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Lt. Governor

State of New Jersey
DEPARTMENT OF EDUCATION
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ANGELICA ALLEN-MCMILLAN, Ed.D.
Acting Commissioner

January 4, 2023

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Re: *State Operated School District of the City of Camden, Camden County v. New Jersey State Interscholastic Athletic Association, Agency Dkt. No. 354-11/22.*

Dear Counsel:

I have reviewed the papers filed in connection with the petition for declaratory ruling and motion for emergent relief filed by the petitioner, the State Operated School District of the City of Camden (Camden), in the above-captioned matter. The New Jersey State Interscholastic Athletic Association (NJSIAA) is investigating alleged recruitment violations by the Camden High School basketball team. Camden is seeking a ruling at this stage of the proceedings as to whether it is required to provide the NJSIAA with certain student records in connection with the NJSIAA's investigation.[1]

[1] There was originally a hearing on the matter scheduled for December 5, 2022, however, the NJSIAA agreed to adjourn the hearing until a decision was issued on the declaratory ruling request. The hearing is currently scheduled for January 9 and 10, 2023.

Pursuant to *N.J.A.C.* 6A:3-7.1(b)1, where a petitioner challenges a rule or determination of the NJSIAA, the Commissioner shall decline to hear the matter on appeal until a hearing before the NJSIAA has been conducted and the NJSIAA has issued a decision. It is undisputed that a hearing in this matter has not yet been conducted and that there has not be any determination made by the NJSIAA. Moreover, the Commissioner's review of NJSIAA matters is appellate in nature; therefore, the Commissioner does not have the authority to dictate to the NJSIAA how it conducts its hearings or what evidence is presented or consider during an investigation as long as the petitioner is afforded due process. *N.J.A.C.* 6A:3-7.5(a).

As such, I have determined to exercise my discretion and decline the request for a declaratory ruling pursuant to *N.J.S.A.* 52:14B-8 and *N.J.A.C.* 6A:3-2.1(a)1. Once the NJSIAA appeal procedures are fully exhausted, if Camden in not in accord with the NJSIAA's final determination a petition may be filed pursuant to *N.J.A.C.* 6A:3-7.1(a). To the extent that Camden maintains that it was not afforded the appropriate due process, that the NJSIAA violated a school law during the evidentiary proceedings or that the NJSIAA Bylaws, Rules or Regulations were violated, those arguments can be made at that juncture.

Accordingly, Camden's request for a declaratory ruling is hereby denied.

Sincerely,

Kathy Ehling

Kathleen Ehling
Assistant Commissioner[2]

VIA E-MAIL ONLY

1-23L

[2] Pursuant to *N.J.S.A.* 18A.4-34, this matter has been delegated to Assistant Commissioner Kathleen Ehling because of the Acting Commissioner's recusal.

6-23
OAL Dkt. No. EDU 03018-18
Agency Dkt. No. 292-12/17

New Jersey Commissioner of Education

Final Decision

Yakik Rumley,

Petitioner,

v.

New Jersey Department of Education,
State Board of Examiners,

Respondent.

The record of this matter, which was transmitted to the Commissioner by the Office of Administrative Law (OAL) pursuant to *N.J.A.C.* 1:1-14.4 and includes an advisement of petitioner's failure to appear at the scheduled OAL hearing on July 22, 2022, has been reviewed. Petitioner did not file an explanation for the failure to appear, notwithstanding the opportunity to do so. Accordingly, this matter is no longer deemed to be a contested case before the Commissioner and is hereby dismissed with prejudice.

IT IS SO ORDERED.[1]

Angelica Allen-McMillan, Ed.D.
ACTING COMMISSIONER OF EDUCATION

Date of Decision: January 12, 2023
Date of Mailing: January 13, 2023

[1] This decision may be appealed to the Appellate Division of the Superior Court pursuant to *N.J.S.A.* 18A:6-9.1. Under *N.J.Ct.R.* 2:4-1(b), a notice of appeal must be filed with the Appellate Division within 45 days from the date of mailing of this decision.

New Jersey Commissioner of Education

Final Decision

Board of Education of the Township of Pennsauken,
Camden County,

Petitioner,

v.

Lovell Pugh-Bassett, Executive County Superintendent,
Camden County Office of Education, Camden County,

Respondent,
And

Board of Education of the Township of Pennsauken,
Camden County,

Petitioner,

v.

Peggy Nicolosi, Interim Executive County Superintendent,
New Jersey Department of Education.

Synopsis

In these consolidated matters, the Board of Education of the Township of Pennsauken (Board) appealed the determinations of the respondents, Lovell Pugh-Bassett, Executive County Superintendent (ECS), and Peggy Nicolosi, Interim ECS, to disapprove certain merit goals submitted by the Board's superintendent, Ronnie Tarchichi, and the payments related thereto, for the 2017-18 and 2018-19 school years.

The ALJ found, *inter alia*, that: two of the disapproved goals for the 2017-18 school year should have been approved, and that the ECS's denial of payment was arbitrary, capricious and unreasonable; for the 2018-19 school year, the proposed merit goals should have been approved; and the ECS was unreasonable in failing to reply to Tarchichi's refusal to further revise his goals. The ALJ ordered that Tarchichi be authorized to provide documentation of completion of 2018-19 goals to the Board for approval of payment and to the ECS for confirmation of payment.

Upon review, the Commissioner rejected the Initial Decision, finding, *inter alia*, that: the ALJ applied the wrong standard of review; the appropriate standard is whether the ECS decisions were consistent with applicable statutes and regulations; based on the appropriate standard of review, the Commissioner disapproved Goals A and E for 2017-18, and Goals A and B for 2018-19; Goals C, D, and E for 2018-19 were approved; Tarchichi may submit documentation of completed goals to the Board for review; and the Board may submit any approved payments to the appropriate ECS for review pursuant to *N.J.A.C.* 6A:23A-3.1(e)(11)(iv).

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

New Jersey Commissioner of Education

Final Decision

Board of Education of the Township of Pennsauken, Camden County,

Petitioner,

v.

Dr. Lovell Pugh-Bassett, Executive County Superintendent, Camden County Office of Education, Camden County,

Respondent,

And

Board of Education of the Township of Pennsauken, Camden County,

Petitioner,

v.

Peggy Nicolosi, Interim Executive County Superintendent, New Jersey Department of Education,

Respondent.

The record of these consolidated matters and the Initial Decision of the Office of Administrative Law (OAL) have been reviewed, as have the exceptions filed by the respondents in accordance with *N.J.A.C.* 1:1-18.4, and the petitioner Pennsauken Board of Education's (Board) reply thereto.

These matters involve the superintendent merit goals for the Board's Superintendent of Schools, Ronnie Tarchichi, for two school years: 2017-18 and 2018-19. In the 2017-18 school year, Tarchichi submitted five proposed merit bonus goals to Lovell Pugh-Bassett, the Executive County Superintendent (ECS) for Camden County, for review and approval. Pugh-Bassett approved four of the proposed goals, but disapproved the fifth proposed goal, Goal E. At the end of the 2017-18 school year, the Board approved payment of a merit bonus to Tarchichi for completion of the four merit goals and sought Pugh-Bassett's approval in order to issue payment. Pugh-Bassett approved payment for three of the four goals, but denied payment for Goal A. The Board paid Tarchichi for the three goals approved by Pugh-Bassett.

Tarchichi then submitted proposed merit goals to Pugh-Bassett for the 2018-19 school year. Pugh-Bassett requested revisions to those goals and communicated back and forth with Tarchichi regarding her request, as well as additional requested revisions. On December 17, 2018, the Board filed a petition of appeal with the Commissioner challenging the disapproval of Goal E and the denial of payment for Goal A in the 2017-18 school year. The following day, the review of Tarchichi's proposed merit goals for the 2018-19 school year was reassigned to Peggy Nicolosi, the Interim ECS for Salem County. Nicolosi requested new revisions and began exchanging emails with Tarchichi regarding her requested changes. Ultimately, Tarchichi informed her that he was unwilling to revise his merit goals any further. The Board then filed a second petition of appeal seeking approval of Tarchichi's five proposed merit goals for the 2018-19 school year.

Following a hearing on the merits, the Administrative Law Judge (ALJ) found that for the 2017-18 school year, payment for Goal A should have been granted and that the denial of

payment by Pugh-Bassett was arbitrary, capricious and unreasonable. The ALJ also concluded that Goal E should have been approved for Tarchichi to complete during the 2017-18 school year and that Pugh-Bassett was unreasonable in failing to approve it. The ALJ found that since the requested relief – *i.e.,* approval of Goal E for the 2017-18 school year – is moot, the Board should be compensated for fees and costs to litigate this matter.[1]

For the 2018-19 school year, the ALJ concluded that the proposed merit goals should have been approved. Specifically, the ALJ found that Nicolosi was unreasonable in failing to reply to Tarchichi's refusal to further revise his proposed goals and failing to "pivot" and address each goal separately as the superintendent suggested rather than tiering the goals as Nicolosi requested. The ALJ ordered that, to the extent Tarchichi worked on the 2018-19 goals, he be authorized to provide documentation of the completion of the goals to the Board for approval of payment and to the ECS for confirmation of payment.

In their exceptions, ECSs Pugh-Bassett and Nicolosi argue that the Initial Decision should be rejected because the ALJ failed to show deference to both ECSs. The ECSs contend that Pugh-Bassett and Nicolosi provided detailed explanations for their positions on each of Tarchichi's goals, which cannot be considered arbitrary, capricious, or unreasonable.

With respect to the 2017-18 school year, the ECSs argue that Pugh-Bassett correctly denied payment for Goal A because Tarchichi did not satisfy the goal as written because he only worked with a subset of half of the eligible students rather than all eligible students as his proposed Goal A had stated. The ECSs indicate that Pugh-Bassett offered to pay half of the goal's monetary amount, but Tarchichi refused. The ECSs contend that Pugh-Bassett

[1] The Commissioner finds that counsel fees are not permitted in this forum, nor are they warranted in this matter.

appropriately disapproved Goal E because it was not meritorious, as the proposed goal was already required by regulation. For the 2018-19 school year, the ECSs argue that Nicolosi was not unreasonable in disapproving the proposed goals because she was not satisfied with the evidence of completion for each goal. The ECSs maintain that the ALJ incorrectly relied on the fact that other ECSs approved similar proposed goals because the needs of each county are different; thus, what occurred between other ECSs and other superintendents regarding proposed merit goals is irrelevant. Accordingly, the ECSs urge the Commissioner to reject the Initial Decision.

In reply, the Board argues that the Initial Decision demonstrates that Tarchichi was treated unfairly compared to how other superintendents are treated. The Board further explains that the ALJ's credibility findings involving Pugh-Bassett – that she testified in a "stilted manner, using jargon and superfluous language," that her communication style was "perceived as passively condescending," and that her testimony was "not particularly persuasive" – demonstrated that she had an "ax to grind." Additionally, the Board points out that there is no standardized method for how ECSs review merit goals, so the actions of the ECSs were arbitrary, capricious, and unreasonable.

At the outset, the Commissioner notes that the ALJ mistakenly applied an incorrect standard of review in this matter. When there is a challenge to a determination made by an office within the Department of Education, the Commissioner is not mandated to give deference to her staff, but instead determines if the finding was legally appropriate. *See*, *Board of Trustees of the Passaic County Elks Cerebral Palsy Center v. New Jersey Dept. of Educ., Office of Fiscal Accountability and Compliance*, Commissioner's Decision No. 334-14, dated

August 14, 2014 (finding that a decision of the Office of Fiscal Accountability and Compliance is not given deference by the Commissioner). Moreover, where the Department of Education has limited the scope of review of a subordinate office or division, it has done so by regulation, *i.e.* appeals filed under *N.J.A.C.* 6A:4 challenging a decision of the State Board of Examiners revoking/suspending a certificate, or a decision of the School Ethics Commission.

In the Initial Decision, the ALJ mistakenly referenced *N.J.A.C.* 6A:4-4.1(a) and stated that an arbitrary, capricious and unreasonable standard of review applied to this case. The petition of appeal in this matter was filed in accordance with *N.J.A.C.* 6A:3, which consists of completely different regulatory provisions than *N.J.A.C.* 6A:4; these two Administrative Code sections should never be conflated. As such, this challenge to the actions of two ECSs is not entitled to the arbitrary, capricious or unreasonable standard of review that is afforded to appeals filed under *N.J.A.C.* 6A:4. Instead, the appropriate standard of review for ECS decisions is whether the decisions are consistent with the applicable statutory and regulatory provisions.

Upon review of the record and applying the appropriate standard of review, the Commissioner finds that the Initial Decision must be rejected. The Commissioner will provide an analysis of the legal sufficiency of each of the proposed merit goals below.

2017-18 Merit Bonus Goals

1. Goal A

Proposed Goal A for the 2017-18 school year was written as follows:

> In order to ensure effective science education for the high school's [English Language Learner] population, the superintendent will create additional writing instruction to assist with the vocabulary and grammar growth with our ELL students in science. The Superintendent will create a Pre-Test and Post-test that will measure student growth on writing strategies embedded

> in student learning. Writing strategies will be created by the superintendent and administered by teachers. This will be supplemental instruction.
>
> All supplemental instruction will be standards-specific and relevant to the pacing guide of the curriculum. 30% of ELL students will show an increase in score from the pre-test exam given initially to the last post-test given in the spring. Focus on 9th and 10th grade students.
>
> [Joint 0009.]

Tarchichi's documentation of completion of the goal demonstrated that he used a sample of 20 ELL students from ninth and tenth grade, and all 20 students improved between the pre-test and post-test.

In denying payment for Goal A, Pugh-Bassett found that by focusing on a sample of 20 ELL students in the ninth and tenth grade – half of the 40 total ELL students in those grades – the superintendent did not satisfy the goal as written, which indicated that he would "focus on 9th and 10th grade students." (Joint 0017). Additionally, Pugh-Bassett found that Tarchichi did not submit documentation that he had created "additional writing instruction to assist with vocabulary and grammar growth with ELL students in science," nor did he demonstrate how multiple choice pre- and post-tests measured student growth in writing strategies. *Ibid.*

Tarchichi testified that he used a sample of 20 students instead of all 40 because "that's just simply not how research works." (1T48:17-18). He explained that "you're supposed to take a sample of a population, not the entire population, and you also have to remember we're dealing with ELL high school students that one, might not be able to participate in the study; two, don't want to be in the health professions; three, simply [have] zero interest in participating in a study." (1T48:18-24). Tarchichi further testified that the tests he created

were multiple choice and short answer, and the results of the test demonstrated the students' growth in "biological content knowledge." (1T51; 1T55:23). Tarchichi indicated in correspondence with Pugh-Bassett that the pre-test was entirely multiple choice to provide a gauge of the students' science content knowledge, and "the writing to learn strategies were the treatment (independent variable), so that was not measured in the original pretest as that would not be the point of the study." (Joint 2480).

The Commissioner finds that Tarchichi was not entitled to payment for Goal A for two reasons. First, the proposed goal states that Tarchichi would focus on 9th and 10th grade ELL students, not a sample of those students. The goal, as written, demonstrates that the 9th and 10th grade students were the intended sample, which is a smaller population than all of the ELL students in the entire school. If Tarchichi intended to work with an even smaller group of students, then he needed to make that clear when he was drafting the goal. Instead, his goal stated that he would work with the 9th and 10th grade ELL students, but he failed to do so. Second, the goal states that the superintendent would "create a Pre-Test and Post-Test that will measure student growth on writing strategies embedded in student learning." The pre-test was strictly multiple choice which does not qualify as a means to measure growth on writing strategies. The Commissioner acknowledges that the post-tests were a combination of multiple choice and short answer but notes that a pre-test that does not include any writing does not enable the ECS to accurately measure improvement in writing. The Commissioner also points out that Tarchichi testified that the test demonstrated the students' growth in "biological content knowledge," but according to the goal, the tests were to demonstrate student growth

on writing strategies. (1T55:23). Accordingly, the Commissioner finds that Goal A for the 2017-18 school year was not completed and the Board may not pay Tarchichi.[2]

2. Goal E

Proposed Goal E was submitted as follows:

> The Superintendent will conduct and implement monthly training academy for new administrative staff about training and supervising staff, setting instructional objectives, developing academic programs, creating instructional resources for use in the classroom, and working to build a rapport with parents at Pennsauken Public Schools. The goal is to give additional support so they transition into more seasoned administrators. The group will meet for a minimum of 10 sessions during the 2017-2018 school year.
>
> [Joint 0011.]

Pugh-Basset found that the goal was not "meritorious" because the existing mandatory requirements set forth in *N.J.A.C.* 6A:9C-3.2 already require support of new school leaders through professional learning. *Ibid.* Pursuant to the regulation, professional development encompasses a "broad range of professional learning," and Pugh-Bassett testified that a goal must go beyond the minimum requirements to be meritorious.

In support of his contention that Pugh-Bassett erred in disapproving Goal E, Tarchichi pointed to two instances wherein he had proposed nearly identical Merit Bonus goals which were approved. Tarchichi testified that in the 2019-20 school year (two years after the school year at issue here), he submitted a proposed goal for a monthly training academy to ECS Judith DeStefano, which was approved. (1T69:4-25)

[2] There was some discussion between the parties about whether Tarchichi could be paid for half of the goal because he worked with half of the students. The Commissioner finds that would not be appropriate here as that was not the sole rationale for determining that Goal A was not completed.

Tarchichi also explained that in the 2015-16 school year, when he was the Superintendent at Woodlynne School District, Pugh-Bassett approved a similar goal for a monthly training academy for new teachers and educational staff. (1T70:23-71:12) According to Tarchichi, given that his nearly identical goals for similar workshops were approved by Pugh-Bassett in 2015-16 and DeStefano in 2019-20, Goal E should have been approved.

The Commissioner finds that *N.J.A.C.* 6A:9C-3.2 already requires training of administrative staff; accordingly, the proposed Goal E cannot be approved. The regulation provides:

> (b) Professional development shall encompass a broad range of professional learning that contributes to improved practice, including, but not limited to:
>
> 1. Participation in the work of established collaborative teams of teachers, school leaders, and other administrative, instructional, and educational services staff members who commit to working together to accomplish common goals and who are engaged in a continuous cycle of professional improvement focused on:
>
> i. Evaluating student learning needs through ongoing review of data on student performance; and
>
> ii. Defining a clear set of educator learning goals based on the rigorous analysis of data on student performance.

[*N.J.A.C.* 6A:9C-3.2(b).]

The professional development of school staff, including the training of administrative staff, is already contemplated by this regulation. The regulation requires districts to provide professional development that includes a broad range of professional learning, including collaboration in teams. Tarchichi may have the flexibility to train his staff in one-on-one sessions or in monthly training academies, but regardless of the format, professional

development is a requirement. Accordingly, a monthly training academy for administrative staff is not a meritorious goal.[3]

2018-19 Merit Bonus Goals[4]

The final revised version of the proposed goals for the 2018-19 school year was submitted as follows:

> **DESCRIPTION OF GOAL: A**
>
> In order to ensure the students of Pennsauken Public Schools continue to receive further course and career choices in secondary education, the superintendent will continue to work to approve more academic courses that are considered dual credit course initiatives. The superintendent will identify articulation agreements and dual credit courses that benefit students at the advanced placement level, honors level, and college prep level.
>
> Superintendent's Role:
> - Continue to work with administration of Camden County College to generate dual credit options for students; currently the district has 20 approved courses from Camden County College.
> - Continue to work with the administration of Rowan College of Burlington County to generate dual credit options for students; currently the district has 10 approved courses from RCBC.
> - Begin to work with the administration of Rowan College of Gloucester County to general dual credit options for students.
> - Superintendent will meet with all eligible students in Pennsauken High School in two assemblies and go over the options of dual credit courses and introduce concepts such as senior year options with students.
> - Separation of specific dual credit courses for AP students, Honors students and College Prep students.

[3] The Commissioner recognizes that Tarchichi was approved for a similar training academy in the 2019-20 school year, but whether that goal should have been approved is not at issue in this matter. The Commissioner also notes that the requirement for a broad range of professional learning went into effect *after* Tarchichi was approved for a similar goal in the 2015-16 school year while working in the Woodlynne school district.

[4] When Tarchichi was reassigned to Nicolosi, he submitted proposed merit goals to her on December 19, 2018 (in a version that was dated December 17, 2018); he then submitted further revised versions of those goals on December 21, 2018 and January 2, 2019. In this decision, the Commissioner will review the January 2, 2019 version, as that is the final version submitted by Tarchichi before he declined to submit any further edits.

Evidence of Completion:

- Sign in sheets and dates for all meetings with College level administrators
- Generated list of all dual credit course offered in every post-secondary institution listed above
- Assembly Presentations offered in a PowerPoint Format for the students of Pennsauken Public Schools
- List of divided courses for AP students, Honors students, and College Prep students
- Creation and submission of all necessary documentation to Cumberland County College for an Articulation Agreements [sic] with dual credit courses for students
- Course descriptions for all current and approved courses
- Approval letters for all approved courses.

DESCRIPTION OF GOAL: B

In order to ensure the students of Pennsauken Public Schools continue to receive further career and technical education (CTE) choices in secondary education, the superintendent will continue to work to approve more CTE that are considered both dual credit course and non-dual credit initiatives. The superintendent will focus on the creation of courses linked to programs that have direct links to employment for students, apprenticeships for students and pathways to college.

Superintendent's Role:

- Continue to work with the administration of Camden County College to generate dual credit options linked to CTE courses at the post-secondary level. Currently the Automotive 1 course is currently [sic] our only dual credit CTE course.
- Meet with professionals in the CTE fields along with stakeholders in education (including teachers, administrators, and parents) in advisory board meetings to further enhance CTE program offerings. Examples include HVAC and Nursing programs.
- Superintendent will meet with all eligible students in Pennsauken High School in two assemblies and go over the options of CTE programs and introduce concepts such as apprenticeships and potential job placements after completion of the CTE program

- Begin to work with the administration of Atlantic County Community College to generate dual credit options for students in Culinary Arts CTE program

Evidence of Completion:

- Sign in sheets and dates for all meetings with College level administrators
- Sign in sheets for CTW advisory board meetings
- Generated list of all dual credit course offered in every post-secondary institution listed above
- Assembly Presentations offered in a PowerPoint Format for the students of Pennsauken Public Schools
- Creation of dual credit courses for Culinary Arts with Atlantic County Community College
- Course descriptions for all current and approved courses
- Approval letters for all approved CTE programs.

DESCRIPTION OF GOAL: C

The Superintendent will further impact college and career readiness though [sic] the offering of SAT prep (5 sessions) to students of Pennsauken High School. Pennsauken High School students, especially student athletes that wish to become collegiate athletes, need to show growth in their SAT scores. This goal will target student athletes and non-student athletes; it will open to all students if they choose to partake.

- Create a statistical analysis of the SAT scores of 11th grade students and differentiate data by subgroups
- Create a statistical analysis of the SAT scores of 12th grade students and differentiate data by subgroups
- Offer students that score red [sic] below a 900 on the SAT, Saturday SAT tutoring sessions taught by the superintendent and other designated instructors
- Hold Town Hall Meetings for Parents and Community Members discussing the importance of preparation of SAT prep for students in addition to SAT importance in NCAA athletic eligibility
- Hold 2 student town hall meetings for the 11th grade class discussing the importance of SAT scores in college scholarship and NCAA athletic eligibility; all student athletes and non-student athletes will be invited to the assembly.

Evidence of Completion

Data analysis of SAT scores of 11th grade students by subgroups

- Sign in sheets of 11th grade students that participate in Saturday SAT tutoring sessions
- Sign in sheets of 12th grade students that participate in Saturday SAT tutoring sessions
- Town Hall sign in sheets for parents and community members
- Presentations of student town hall meetings
- SAT Reading and Math growth goal of a 5-10% increase in student scores
- Board minutes, lesson plans, and a NJ School Performance Report

DESCRIPTION OF GOAL: D

To address the need of more Emergency Medical Technicians (EMTs) needed in the State of New Jersey and the desire of the New Jersey Department of Education for more EMT programs within secondary settings, Pennsauken Public Schools is looking to create an EMT program in our Career and Technical Education (CTE) division of Pennsauken High School.

Superintendent's Role:

- Meet with professionals in the EMT field in Pennsauken Township along with stakeholders in education (including teachers, administrators, and parents) in advisory board meetings to further enhance CTE program offerings.
- Recruit a teacher to facilitate the program with the high [sic] and educate students in the EMT CTE program.
- Superintendent will meet with interested students and discuss the launch of an EMT program in [sic] and introduce concepts such as apprenticeships and potential job placements after completion of the EMT program.

Evidence of Completion:

- Sign in sheets and dates for all EMT advisory board meetings
- Creation and submission of all necessary documentation to the NJDOE for an EMT program for students
- Board Approval of EMT program in Pennsauken High School
- Board Approval of EMT Teacher in Pennsauken High School
- Renovation of High School Facilities layout to include an EMT classroom.
- Course descriptions for the EMT courses provided at Pennsauken High School

- Approval letter for the EMT program for the NJDOE
- Completed EMT classroom by 9-1-2019

DESCRIPTION OF GOAL: E

To address climate and culture issues in Pennsauken High School, the superintendent will conduct and implement a climate club for teachers, parents, stakeholders and students. The goal is to give additional support to the culture of Pennsauken Public Schools regardless of age, race, disability, ethnic origin, sex, and gender in order to promote respect for other people and treat everyone fairly. Additionally, the superintendent will hold 3 book readings to address the importance of global issues. The goal is to enlighten students about national and global issues facing an international civilization. The books that are being used are "The hate you give [sic]," "A Land of Permanent Goodbyes," and a [sic] "The Girl with Seven Names: A North Korean Defector's Story." This is an afterschool club open to all interested students in the high school. There are global current event issues that are continuous topics of conversations in courses with our high school student body [sic].

The three topics that will be discussed in the high school book club's presentations will be:

- Issues of racism and violence
- Middle Eastern Conflict and religious underpinnings
- North Korean Conflict, nuclear weapons and the United States of America

Evidence of Completion:

- Facilitate the discussions and presentations of the topics
- Climate & Culture Club Agendas and Sign in Sheets (8 meetings)
- Facilitate guest speakers for all book club discussions
- Board Minutes to outline the steps needed to improve the climate and culture of Pennsauken Public Schools

[Joint 592-596.][5]

Nicolosi did not approve these superintendent merit goals because she was not satisfied with the evidence of completion outlined therein, which she testified is important because the

[5] The Commissioner notes that Tarchichi submitted a goal involving chronic absenteeism to Pugh-Bassett at the beginning of review process. Such goal will not be considered here because it was replaced with another goal.

evidence of completion is what avoids issues when it comes time for payment to the superintendent based on achievement of the goals. (3T28:24-29:3). Additionally, Nicolosi wanted to combine Goals B (CTE) and D (EMT) into one tiered goal because they were very similar in their relation to career readiness classes. (Joint 580-81). Originally, Nicolosi suggested combining Goal A (college prep) as well, but ultimately agreed that it could stand alone. (Joint 532; 580-81). Tarchichi did not agree that the goals should be tiered as it would be too extensive for one merit goal. (Joint 545; 585).

With respect to those three goals, Nicolosi thought Tarchichi needed to provide meeting minutes to show board approval for the dual credit courses and a video tape of his presentations to demonstrate his involvement. (Joint 581). He refused both, arguing that he was not comfortable with a video tape, and that meeting minutes should not be required for a quantitative goal. (Joint 545). Nicolosi offered to consider alternative evidence to videotaping but Tarchichi did not propose one. (Joint 598).

Additionally, Nicolosi needed a finite measurement as to the number of courses he would be attempting to add or a percentage increase in the number of courses, such as 25%. (Joint 580). Tarchichi argued that a 25% increase was too much to guarantee and that he could not guarantee a percentage increase at all because the community colleges may place limitations on the dual credit courses. (Joint 548). Nicolosi asked for evidence of those limitations or some alternative means to measure the goals, which were not provided. (Joint 598; 599).

With respect to Goal C (SAT prep), Nicolosi proposed that the goal should also include ACT preparation, because according to the New Jersey School Performance Report, students in

the district – predominantly minority students – take the ACT. (Joint 542; 581; 598). Tarchichi refused, and argued that he only wanted to focus on one test and that it is "illogical" to expand the goal given that it was already January, and most students take the SAT. (Joint 585). Nicolosi also suggested that he should demonstrate a 25% increase in test scores. (Joint 542). Tarchichi argued that 25% was too high and proposed a 5-10% increase. (Joint 549). Nicolosi indicated that she was willing to compromise at a 15% increase based on the New Jersey School Performance Report, because a 15% increase would bring students closer to the state average. (Joint 581). Tarchichi refused and kept the proposed goal at a 5-10% increase. (Joint 585; 594). Finally, Nicolosi required that Tarchichi video tape his town hall meetings, but Tarchichi argued that while he would be willing to submit sign in sheets, he would be unwilling to videotape himself due to risks of the tape being placed online. (Joint 545). Nicolosi asked what alternative he could provide to videotaping because sign in sheets were not sufficient evidence of his role in the accomplishment of the goal. (Joint 599).

Finally, with respect to Goal E (culture book club), Nicolosi suggested separating the meetings between students, community members, and teachers, rather than having combined meetings. (Joint 544). Tarchichi argued that he wanted students to interact with stakeholders and therefore, they should attend meetings together. (Joint 586). Nicolosi asked for documentation on how many students, community members and teachers attended the December meeting in order to better assess how to achieve the goal, but the documentation was not provided. (Joint 599). She also suggested moving the location of the meeting into the community and closer to homes. *Ibid.*

The Commissioner finds that proposed Goals A and B were appropriately disapproved because the description of the goals and evidence of completion did not provide a means for measuring these quantitative goals. A quantitative goal needs to be measurable, and the proposed goals indicated that the superintendent would "continue to work to" approve dual credit initiatives in both college prep and vocational classes. As written, it is unclear what would be accomplished in the 2018-19 school year, such as how many courses would be approved. Nicolosi proposed a percentage increase in the number of classes, but when Tarchichi indicated that a percentage would not be possible, Nicolosi asked for an alternative means to measure the goals, which was not provided. While a percentage may not be the only way to measure completion of these quantitative goals, the goals as written do not contain a sufficient finite measurement of completion.

While Nicolosi sought to combine Goal D (EMT) with Goal B (CTE) as a quantitative goal, the Commissioner notes that Goal D (EMT) is currently submitted as a qualitative goal. The Commissioner finds that this goal, as written, may be approved. The creation of an EMT program at Pennsauken High School is substantially different from creating dual credit opportunities with local colleges, so while Nicolosi suggested that the goals be combined, the Commissioner finds that disagreement with such suggestion is not sufficient to disapprove the goal.

With respect to Goal C (SAT prep), the Commissioner finds that the quantitative goal may be approved. While including ACT prep as well – as Nicolosi had suggested – would have enhanced this goal, Goal C can still be considered meritorious without it. Additionally, while Nicolosi's proposed 25% increase was reasonable because it would bring the district's scores up

to the State average, the smaller percentage proposed by Tarchichi would also demonstrate a significant increase in student SAT performance.

Finally, as to Goal E (culture book club), the Commissioner finds that the qualitative goal may be approved. Nicolosi's suggestions regarding separating the meetings and moving the location closer to homes in the community were just that, suggestions to improve the goal during the review process. Disagreement as to the location and whether to combine the meetings did not render the proposed goal non-meritorious.

Accordingly, the Initial Decision of the OAL is rejected. For the 2017-18 school year, Goal A is disapproved for payment, and proposed Goal E is disapproved. For the 2018-19 school year, proposed Goals A and B are disapproved, and proposed Goals C, D, and E are approved. To the extent that Tarchichi completed any of the now-approved goals during the 2018-19 school year, Tarchichi may submit documentation to the Board for review as to payment. Should the Board approve payment for any of the goals, the Board may submit them to the currently-assigned ECS for review in accordance with *N.J.A.C.* 6A:23A-3.1(e)(11)(iv).

IT IS SO ORDERED.[6]

Angelica Allen-McMillan, Ed.D.
ACTING COMMISSIONER OF EDUCATION

Date of Decision: January 12, 2023
Date of Mailing: January 13, 2023

[6] This decision may be appealed to the Appellate Division of the Superior Court pursuant to *N.J.S.A.* 18A:6-9.1. Under *N.J.Ct.R.* 2:4-1(b), a notice of appeal must be filed with the Appellate Division within 45 days from the date of mailing of this decision.

State of New Jersey
OFFICE OF ADMINISTRATIVE LAW

INITIAL DECISION

TOWNSHIP OF PENNSAUKEN
BOARD OF EDUCATION,
Petitioner,
v.
DR. LOVELL PUGH-BASSETT, EXCECUTIVE COUNTY SUPERINTENDENT, CAMDEN COUNTY OFFICE OF EDUCATION, CAMDEN COUNTY,
Respondent,

OAL DKT. NO. EDU 02392-19
AGENCY DKT. NO. 304-12/18

AND

TOWNSHIP OF PENNSAUKEN
BOARD OF EDUCATION,
Petitioner,
v.
PEGGY NICOLOSI, INTERIM EXCECUTIVE COUNTY SUPERINTENDENT, NEW JERSEY DEPARTMENT OF EDUCATION,
Respondent.

OAL DKT. NO. EDU 05255-19
AGENCY DKT. NO. 36-2/19

CONSOLIDATED

William C. Morlok, Esquire, for petitioner (Parker McCay, P.A., attorneys)

Sydney Finkelstein, Deputy Attorney General, for respondents (Matthew J. Platkin, Attorney General of New Jersey, attorney)

Record Closed: April 18, 2022 Decided: October 17, 2022

BEFORE **ELAINE B. FRICK**, ALJ:

STATEMENT OF THE CASE

Petitioner, Township of Pennsauken Board of Education (Pennsauken BOE), seeks approval of a proposed merit goal from the 2017–2018 school year, to be completed by its Superintendent, Ronnie Tarchichi (Tarchichi), which proposed goal was not approved by respondent, Lovell Pugh-Bassett (Pugh-Bassett), Executive County Superintendent (ECS), Camden County Office of Education. The Pennsauken BOE also seeks approval for the payment of a 2017–2018 merit goal which the Pennsauken BOE approved as having been completed by Tarchichi, which was not approved for payment by Pugh-Bassett. The Pennsauken BOE further seeks approval of Tarchichi's proposed merit goals for the 2018–2019 school year, which were not approved either by Pugh-Bassett or by Peggy Nicolosi (Nicolosi), Interim ECS, Salem County Office of Education. Respondents oppose the relief requested.

PROCEDURAL HISTORY

Pennsauken BOE's appeal regarding Pugh-Bassett's disapproval of a proposed merit goal by Tarchichi for the 2017–2018 school year, and Pugh-Bassett's disapproval of payment of a merit goal for Tarchichi for the 2017–2018 school year, was transmitted by the New Jersey Department of Education (DOE) to the Office of Administrative Law (OAL), where it was filed on February 15, 2019, to be heard as a contested case. N.J.S.A. 52:14B-1 to 14B-15 and 14F-1 to 14F-13. The Pennsauken BOE's appeal regarding Nicolosi having not approved Tarchichi's proposed 2018–2019 merit bonus goals was transmitted to the OAL, where it was filed on April 17, 2019, to be heard as a contested

matter. N.J.S.A. 52:14B-1 to 14B-15 and 14F-1 to 14F-13. The matters were consolidated, at the joint request of counsel, by Order of Consolidation entered on May 9, 2019.

Multiple prehearing telephonic conferences were conducted with counsel regarding discovery and scheduling issues. Hearing dates were set and adjourned due to a change in the Deputy Attorney General (DAG) handling the matter; discovery issues; settlement conferences; and the COVID-19 pandemic and executive orders entered, beginning in March 2020, by the Governor of the State of New Jersey, which impacted the normal operations of the OAL, including the suspension of in-person proceedings.

On May 10, 2020, respondents filed a motion to dismiss regarding the Nicolosi appeal, asserting that the matter was not ripe. Disposition of the motion was held in abeyance while the parties engaged in settlement discussions. Oral argument on the motion was heard via Zoom audio/video remote technology on November 4, 2020. An Order denying the motion was entered on November 10, 2020. The order included a conclusion that Nicolosi's request for additional revisions to the proposed merit goals for 2018–2019, and Nicolosi's failure to issue an approval of the goals in response to Tarchichi's communication that he would not do further revisions of the goals, constituted de facto disapproval of the proposed goals.

On October 9, 2020, Pennsauken BOE filed a motion to compel discovery. Oral argument on the motion was heard via Zoom on November 4, 2020. An Order was entered on November 10, 2020, granting the motion, thereby requiring respondents to provide unredacted copies of documentation it produced in discovery.

The hearing was conducted via Zoom, due to the continued suspension of in-person proceedings at the OAL because of the COVID-19 pandemic. The hearing was held on October 20, 2021; October 27, 2021; and October 28, 2021. The record remained open for the submission of written summations. Extensions for the submission of written summations were granted. The record closed on April 18, 2022. Orders granting extensions for the completion of this decision were entered.

FACTUAL DISCUSSION AND FINDINGS

Based upon the testimony and documentary evidence presented during the proceedings, certain facts are undisputed, and I thus **FIND** as **FACTS** the following:

Tarchichi is the Superintendent of Schools for the Pennsauken School District. Tarchichi drafted proposed merit bonus goals for the 2017–2018 school year. He forwarded the proposed goals to ECS Pugh-Bassett for her review and approval. Pugh-Bassett approved four of the proposed goals, and disapproved the fifth requested goal. (J-1 at 0009–0011.)

Tarchichi thereafter worked on the four approved merit goals and submitted a request for approval of completion and payment to be made by the Pennsauken BOE. The Pennsauken BOE approved payment for Tarchichi's four completed merit goals for the 2017–2018 school year. The Pennsauken BOE forwarded to Pugh-Bassett its approval of payment confirmation and Tarchichi's documentation of completion of the goals for her review and approval of payment to be issued. Pugh-Bassett approved payment for three of the completed merit goals and denied payment for goal A. (J-1 at 0015–0018.) The Pennsauken BOE paid Tarchichi for the three approved goals.

Pennsauken BOE submitted a petition to the DOE, dated December 14, 2018, objecting to the determinations made by Pugh-Bassett regarding the 2017–2018 merit bonus goals. (J-1.) The Pennsauken BOE seeks a finding that Pugh-Bassett acted arbitrarily and capriciously, and was otherwise unreasonable in failing to approve one of Tarchichi's proposed merit goals. (J-1.) The Pennsauken BOE further asserts that Pugh-Bassett acted arbitrarily and capriciously in failing to approve payment of goal A, which the Pennsauken BOE approved for payment. The Pennsauken BOE seeks equitable relief, including payment of its counsel fees and costs incurred for the petition.

Tarchichi submitted proposed merit bonus goals for the 2018–2019 school year to Pugh-Bassett for her review and approval. Pugh-Bassett requested revisions of the goals. Tarchichi sent revised proposed merit bonus goals to Pugh-Bassett. Further

revisions were requested by Pugh-Bassett. Tarchichi requested that another ECS review his proposed merit bonus goals. The request was initially denied.

Tarchichi was thereafter directed to submit his 2018–2019 proposed merit bonus goals to Interim ECS Peggy Nicolosi (Nicolosi) of Salem County. Tarchichi provided same to Nicolosi, who asked for revisions. Tarchichi submitted another revised set of merit bonus goals to Nicolosi, who requested further revisions. Tarchichi responded to the request, and Nicolosi asserted she would not change her opinion as to the revisions she sought Tarchichi to make. Tarchichi was unwilling to further revise his merit bonus goals, and requested approval of same. Interim ECS Nicolosi did not respond with approval or disapproval. This was found to be de facto disapproval, by order entered on November 10, 2020.

Pennsauken BOE filed a second petition with the DOE, seeking relief from Nicolosi's failure to provide approval of the merit bonus goals submitted by Tarchichi for the 2018–2019 school year. (J-2.) Pennsauken BOE seeks a finding that Nicolosi's failure to approve Tarchichi's merit goals was arbitrary, capricious, and otherwise unreasonable; and that all five proposed merit bonus goals submitted by the Pennsauken BOE be approved immediately or, in the alternative, directing that the ECS of Burlington County be assigned to review and approve the proposed merit bonus goals for the 2018–2019 school year. The Pennsauken BOE further seeks equitable relief, including reimbursement of counsel fees and costs incurred for the petition. (J-2 at 5–6.)

Testimony

Ronnie Tarchichi testified on behalf of Pennsauken BOE. He holds six master's degrees. He also holds two doctorates, in the areas of Educational Leadership and Special Education.

He began his employment as Superintendent of Pennsauken schools on July 1, 2016. He is the chief administrator of the school district, overseeing a staff of approximately 1,000 individuals and a population of approximately 5,000 students. There are ten schools within the district, two of which are high schools. There are multiple

vocational programs in the district, through the Career Technical Vocational Education (CTVE, also referred to as CTE) program, ten of which he started, in addition to the district serving the collegiate bound students.

He explained that the State of New Jersey capped superintendent salaries in the 2017–2018 and 2018–2019 school years. Superintendents were permitted to seek to earn merit goals, which if achieved, would result in payment to the superintendent of a percentage of their contracted salary. Proposed merit bonus goals may be qualitative or quantitative goals, being a program or activity that a superintendent does above and beyond normal duties, which assists or benefits the district and students. Merit goals must be submitted for review and approval to the Executive County Superintendent (ECS). That is generally done from August through October at the start of the school year. If approved, the superintendent works on the goals during the school year.

The superintendent then must submit proof of completion of the goals to be approved for payment by the BOE. If approved by the BOE, the ECS then reviews the documentation and information submitted by the superintendent, and must determine whether to approve the completion and approval of payment for the goals, so that the BOE can issue payment to the superintendent.

Tarchichi indicated that he never saw any guidelines promulgated by the DOE for a superintendent to follow when formulating merit goals. He was not aware of any information or training from the DOE as to what merit goals should or should not include. He was unaware of any instructions or training provided by DOE to ECSs for their protocols to follow when reviewing merit goal requests or when approving or denying same. (J-3, J-5.) Most communication Tarchichi had when submitting proposed goals to the ECS for review and approval was through email and some phone calls.

2017–2018 Merit Bonus Goals

Tarchichi submitted five proposed merit goals, identified as A through E, for the

2017–2018 school year, for review and approval by Camden County ECS Pugh-Bassett.[1] She did not approve the fifth goal, goal E, and he seeks approval for same through this litigation. (J-1 at 0011.)

Goal E was proposed as:

> The Superintendent will conduct and implement [a] monthly training academy for new administrative staff about training and supervising staff, setting instructional objectives, developing academic programs, creating instructional resources for use in the classroom, and working to build a rapport with parents at Pennsauken Public Schools. The goal is to give additional support so they transition into more seasoned administrators. The group will meet for a minimum of 10 sessions during the 2017–2018 school year. (2.5%\$4,187.50)
>
> (J-1 at 0011.)

Tarchichi explained that the purpose of this goal was to conduct a monthly training academy for new administrative staff to give them something extra as they transitioned from being a teacher to an administrator. There was to be a minimum of ten sessions.

Pugh-Bassett did not approve this as a merit goal, asserting that the goal "*does not* meet the threshold of being '*meritorious*' in relation to existing mandatory requirements for the support of new school leaders through professional learning as outlined at N.J.A.C. 6A:9C-3.2." (J-1 at 0011, italics original.)

Tarchichi asserts the goal should have been approved. He was superintendent in the Woodlynne School District for 2015–2016. He submitted the proposed qualitative goal of implementing a monthly training academy for new teachers and educational staff, aiming to provide additional support as the staff transitioned to more seasoned educators. The goal was approved, and he submitted documentation to support completion of same to get approval for payment by ECS Pugh-Bassett. She approved payment of same,

[1] The 2017–2018 merit goals were identified in the documentation as goals A through E. During testimony, and in some of the documentation, the goals were referred to by number, such as goal number 1 for goal A, goal number 2 for goal B, etc.

finding that the goals Tarchichi had submitted for the 2015–2016 school year had been completed satisfactorily. (P-19 at 2082.)

Tarchichi acknowledged that a superintendent's regular job duties include training their staff. He denied that providing a monthly training academy was part of his regular duties. The goal he proposed in 2017–2018 for the administrative training academy was submitted by him to another Interim ECS, Judy DeStefano, for the 2019–2020 school year. (P-18.) Interim ECS DeStefano approved the goal for Tarchichi for the 2019–2020 school year. (P-18 at 1768.)

Tarchichi contends that since Pugh-Bassett previously approved a similar goal for him in the 2015–2016 school year in a different district, and he was approved by another ECS for the 2019–2020 school year to work towards achieving the very same administrators training academy goal he submitted to Pugh-Bassett for 2017–2018, Pugh-Bassett should have approved goal #5 for him. Had she approved it, Tarchichi contends he could have worked to achieve it in 2017–2018 school year.

The four other proposed merit goals for the 2017–2018 school year were approved by Pugh-Bassett. (J-1 at 0009–0011.) Tarchichi asserts he completed all of those goals. The Pennsauken BOE approved payment for same during its meeting of July 17, 2018. (J-9 at 1094.) The Pennsauken BOE sought approval from Pugh-Bassett to issue payment to Tarchichi. ECS Pugh-Bassett approved payment for three of the four merit goals. (J-1 at 0015–0018.) She did not approve payment for goal #1. (J-1 at 0017–0018.)

The Pennsauken BOE issued payment to Tarchichi for three of the four goals as approved by Pugh-Bassett. Pennsauken BOE seeks to be permitted to issue payment to Tarchichi for the remaining goal #1, which Pugh-Bassett did not approve for payment. Tarchichi was to be paid 3.33% of his contract if he achieved goal #1, which calculated to be $5,577.75. (J-1 at 0010.)

Pugh-Bassett denied approval of payment for goal #1, noting that the submission from Tarchichi to demonstrate achievement of the goal "*did* not satisfy the requirements

for approval and therefore *will not* be approved for payment[.]" (J-1 at 0017, italics original.) Goal #1 was stated as:

> In order to ensure effective science education for the high school's ELL [English Language Learner] population, the superintendent will create additional writing instruction to assist with the vocabulary and grammar growth with our ELL students in science. The Superintendent will create a Pre-Test and Post-Test that will measure student growth on writing strategies embedded in student learning. Writing strategies will be created by the superintendent and administered by teachers. This will be supplemental instruction.
>
> All supplemental instruction will be standards-specific and relevant to the pacing guide of the curriculum. 30% of ELL students will show an increase in score from the pre-test exam given initially to the last post-test given in the spring. Focus on 9th and 10th grade students.
>
> (J-1 at 0017.)

Tarchichi explained that Pennsauken public schools have "a lot" of non-English speaking students. He wanted to take the ninth and tenth grade population of ELL students who had issues with the English language and offer them the possibility of entering the field of science, nursing, or health occupations. Many of those students expressed an interest in entering the healthcare field. Since a large part of the studies in that field require biological language writing, he sought to focus that first goal on assisting the ELL students and giving them a push towards health professions.

Tarchichi asserts that he achieved this goal and the Pennsauken BOE approved payment for same. Pugh-Bassett wrongfully denied payment of $5,577.75 for this goal. Pugh-Bassett denied approval of payment, asserting that Tarchichi had focused on a sampling of the ELL students, that being twenty students, rather than the "focus on 9th and 10th grade students" as stated in the goal. (J-1 at 0017.) Pugh-Bassett indicated that there were forty students in that focus group. Tarchichi testified that as of 2018, there were approximately forty ELL students in the ninth and tenth grade population of Pennsauken high school.

Tarchichi contended that if all forty ELL students were sampled, that is simply not how research works. You are supposed to take a sample of the population, not the entire population. Plus, working with ELL students, some might not be able to participate in the study; some may not be interested in the health field; and others have no interest in participating in the study. He sampled twenty students from the ELL forty student population. Pugh-Bassett did not offer to approve payment for a portion of the goal. He did not interpret her letter indicating additional documentation needed to be provided, to mean that she would approve payment of a portion of the goal. (J-1.)

Pugh-Bassett also noted that Tarchichi did not provide documentation relative to the creation of additional writing instruction to assist with the vocabulary and grammar growth with ELL students in science, as outlined in goal #1. Pugh-Bassett indicated that the documentation provided did not show how the multiple choice pre- and post-testing measured student growth on writing strategies embedded in student learning, as outlined in goal #1. (J-1 at 0017.)

Tarchichi testified that he submitted to ECS Pugh-Bassett a great deal of documentation demonstrating that he completed goal #1. (J-9 at 1095–1138.) He submitted an outline of everything done for merit goal #1. (J-9 at 1137.) He submitted the post-test he created, with questions specific to the goal, to test the students' fundamental understanding of the basics of biological science and included writing to learn strategy, requiring the students to write answers to essay questions. (J-9 at 1096–1100.) He also created a genetics test that was used in the program. (J-9 at 1131.) He included agendas and sign-in sheets in the documentation submitted to Pugh-Bassett. (J-9 at 1102–1128.) Tarchichi explained that the agendas demonstrate writing strategies were discussed with staff members in the professional learning community specific to the ELL students. During a student assembly on February 9, 2018, Tarchichi addressed the high school ELL student sample of twenty students, talking about careers in the health profession, science field, and educational requirements, including the importance of writing in science. (J-9 at 1128.) The twenty students' pre-test and post-test scores were outlined in a table. (J-9 at 1138.) Tarchichi asserted this demonstrates the student growth in biological content knowledge. Every student listed on the chart had progressive increases in their post-testing scores compared to their pre-test score. (J-9 at 1138.)

Tarchichi explained that goal #1 was a quantitative goal. The students' testing scores demonstrated that the students grew quantitatively. He explained to Pugh-Bassett what writing strategies he implemented. (J-9 at 2480.) He believed he was not getting anywhere with Pugh-Bassett to approve payment of the goal. He proposed to Pugh-Bassett consideration of approving payment for half of the goal amount, that being $2,788.87, since she questioned why he did not sample the entire population of forty ELL students in ninth and tenth grades. (R-8.) He noted in his email to her, "I never specified in my goals that I would be using the entire population of ELL." (R-8.) Tarchichi stated that during the course of this OAL proceeding, Pugh-Bassett has not offered to approve payment of goal #1.

2018–2019 Merit Bonus Goals

For the 2018–2019 school year, Tarchichi submitted six merit goals to Pugh-Bassett for her review and approval. She did not approve same. She requested additional information and submissions from him. Tarchichi requested from the DOE that his merit goals be reviewed and approved by another ECS from Burlington County. Eventually, a representative from the DOE directed Tarchichi to submit his 2018–2019 requested merit goals to the Salem County Interim ECS Nicolosi. Upon review, Nicolosi requested additional revisions and additional information from Tarchichi. He advised her he was not going to revise his goals again. She never approved the goals. Pennsauken BOE seeks to have Tarchichi's 2018–2019 merit goals approved.

Tarchichi asserts that during the beginning of the school year of 2018–2019, he was trying to get his proposed merit goals approved by Pugh-Bassett so that he could work to accomplish them. He prepared a timeline outlining the dates and times of his efforts and the status of Pugh-Bassett's responses. (J-17 at 1726–1729.) He initially sent his proposed merit goals via email to Pugh-Bassett on September 14, 2018. (J-17 at 1726 and 1730.) Pugh-Bassett first responded on October 17, 2018, offering feedback, and noted that "none of the goals as proposed are approvable." (J-17 at 1732–1733.) The two engaged in back-and-forth email communications regarding suggested revisions and discussion attempts to set-up a meeting regarding revisions to the merit goals.

Tarchichi submitted revised goals for review and approval to Pugh-Bassett on November 15, 2018. (J-17 at 0431.) He submitted goals identified as goal A through goal E. (J-17 at 0432–0436.)

The revised 2018–2019 merit goals covered several topics. Goal A generally dealt with continuing to approve more academic courses considered dual credit course initiatives, benefiting students at the advanced placement level, honors level, and college prep level, to receive college credits for courses directly aligned to what they wanted to pursue in college. (J-7 at 0432.) Goal B focused on growing the Career Technical Education (CTE) programs, creating courses that would directly link the students to employment, apprenticeships, and pathways to college. (J-7 at 0433.) Goal C dealt with college and career readiness for students, focusing on offering an SAT prep course, particularly to student athletes who wished to become collegiate athletes. (J-7 at 0434.) Goal D was addressing the chronic absenteeism issue, including data analysis and to create town hall meetings and incentives for students to be in school more. (J-7 at 0435.) Goal E was the creation of a climate and culture club to address global issues and read relevant books and hear from speakers on the issues of racism and violence; middle eastern conflict and religious underpinnings; and the North Korean conflict that was a global issue at the time. (J-7 at 0436.) His goal was to make all students more globally conscious, and not just aimed at students of a specific culture or descent.

He received a reply from Pugh-Bassett on November 26, 2018, with multiple questions about the revised proposed merit goals. (J-17 at 1753.) They spoke on the phone, and she provided another list of questions and comments on November 27, 2018, mandating that his final responses had to be sent to her by November 30, 2018, to guarantee he would have time to execute the goals. (J-17 at 1756.) They exchanged further email communications. (J-17 at 1756–1760.) He did consider Pugh-Bassett's comments and implemented those remarks into his "beefed" up revised goals and forwarded them to her on November 30, 2018. (J-7 at 1761; J-17 at 0470–0474.)

Pugh-Bassett responded on December 10, 2018, with more comments and remarks about the revised goals. (J-17 at 1762–1767.) Tarchichi found her comments

to be unprofessional, giving him deadlines, yet she had no deadlines for her response to him to approve or disapprove the proposed goals. She made remarks about portions of the goals she had not addressed previously, one of which made a comment about chronic absenteeism being a statutory requirement and could not be a merit goal effective June 1, 2018. She never mentioned that during the first round of revisions she provided when she should have done so.

Tarchichi again revised the goals and submitted them to Pugh-Bassett on December 16, 2018. (J-7 at 0482–0489.) Goal A still focused on the dual credit courses for college prep and honors students. Goal B still focused on the development of additional programs for CTE students. Goal C still focused on the SAT preparation program. Goal D no longer dealt with chronic absenteeism, and instead focused on the need for more Emergency Medical Technicians (EMTs) in the State and to create an EMT program in the CTE division. (J-7 at 0488.) Goal E still focused on the culture and climate club.

In the meantime, Tarchichi had requested that another ECS review his proposed merit goals for 2018–2019. He had to initiate litigation against Pugh-Bassett regarding the prior year's 2017–2018 merit goals. He spoke to representatives at the DOE. He was advised that Interim ECS Nicolosi would review the 2018–2019 merit goals. He was uncomfortable with that choice since Pugh-Bassett had recommended that Nicolosi should take over the review and approval of his proposed goals. He was not aware of any information disseminating from the DOE to its ECSs as to how they were to apply and follow a consistent review method and provide consistent recommendations for proposed merit goals.

Tarchichi submitted his proposed merit goals for 2018–2019 to Interim ECS Nicolosi on December 19, 2018. (J-7 at 0573.) She responded the following day, having made changes such as combining all goals into three goals with tiers. (J-7 at 0572; 0539–05044.) He responded by email on December 20, 2018, and submitted another revised version of the proposed merit goals on December 21, 2018. (J-7 at 0545; 0571, 0580–0584; and 0575–0579.) Nicolosi responded on December 24, 2018, providing

commentary to each of the points Tarchichi had addressed in his December 20, 2018, email. (J-7 at 0580–0582.)

Tarchichi sent an email on January 2, 2019, to Nicolosi, outlining his responses to Nicolosi's previous comments, and provided his revised merit goals A through E. (J-7 at 0580; 0585–0591; 0592–0597.) He took issue with many of her comments and requests which went beyond what Pugh-Bassett had asked of him. For example, Nicolosi suggested that multiple goals be combined and then layered, or tiered, within the goal. He felt the situation was getting ridiculous and he was not willing to do certain things. She wanted him to combine an ACT prep course into the goal he proposed for SAT preparation. It just posed more hills to climb for him, which he felt he had been doing over the prior five months trying to get the initially proposed goals approved. He engaged in back-and-forth communications with Nicolosi. (J-7 at 0580–0586.)

Nicolosi responded on January 9, 2019, indicating in bold face type that they were both educators, professionals, and both wanted to see students succeed, and she wanted him to succeed in the accomplishment of his goals. (J-7 at 0597.) She noted that having reviewed his revised merit goals, it appeared that they were "at odds in the tiering or combination of goals and documentation" required to demonstrate accomplishment of goals. (J-7 at 0597.) She would not change her position on the combining and tiering of goals. She concluded that she anticipated his reply "will help bring closure to this process [of review and approval of merit goals.]" (J-7 at 0597.) Tarchichi found the response to be unprofessional and he stopped communicating with her. He believed Nicolosi's feedback and Pugh-Bassett's feedback contradicted one another. This demonstrated to him that there was no training given to ECSs as to how to proceed in reviewing and approving proposed merit goals.

Tarchichi asserted that there were other superintendents from other school districts who had proposed similar goals which were approved, while his were not approved by Pugh-Bassett and Nicolosi. (P-19.) As of February 7, 2013, Nicolosi approved goals for the Superintendent of Waterford Elementary School, including a goal to improve attendance, identified as a qualitative goal, when it should have been a quantitative goal. (P-19 at 1791.) He submitted a similar goal to Pugh-Bassett for 2018–

2019, to address chronic absenteeism. (J-7 at 443.) Pugh-Bassett did not approve it, and he eventually abandoned that goal, and replaced it with the goal to create the EMT program for the CTE curriculum. As of September 25, 2018, Nicolosi approved the Collingswood School District Superintendent's quantitative goal for the 2018–2019 school year regarding chronically absent students. (P-19 at 1807–1810.)

Nicolosi also approved a proposed goal by the Collingswood School District's Superintendent to expand the pre-school program for the 2018–2019 school year. (P-19 at 1808–1810.) Tarchichi asserted that the proposed goal was similar to the goals he proposed to expand the dual credit programs, to implement the EMT program, and to expand the HVAC and nursing CTE programs at Pennsauken. (J-7 at 0575–0576.)

Nicolosi approved the proposed goal by the Collingswood School District's Superintendent to ensure there was equity in education so that each child has an equal chance for success, requiring an understanding of the unique challenges and barriers faced by individual students or student populations to overcome barriers. (P-19 at 1809–1810.) Nicolosi approved payment for the completion of the goal. (P-19 at 1811–1814.) Tarchichi contends that he had a proposed goal which was similar, more detailed, and included bringing in community members as stakeholders, yet his goal was deemed not meritorious.

Nicolosi approved payment to be made to the Collingswood Superintendent for 2018–2019 completion of a goal to work with Rowan University to bolster and improve the quality of teaching candidates for the district. (P-19 at 1813–1814.) Tarchichi asserted this was similar to his proposed goal to partner with Rowan University to improve the district, regarding growth of courses for students for dual certification credits.

In 2015–2016, Tarchichi was superintendent in the Woodlynne School District. Pugh-Bassett approved completion and payment to be made to Tarchichi for accomplishment of merit bonus goals. (P-19 at 2080–2082.) One goal related to a three percent increase in proficiency in science. (P-19 at 2081.) In 2018–2019, one of his proposed goals for Pennsauken high school students was to improve the SAT test scores with an SAT preparation program. (J-7 at 577.) The evidence of completion for that goal

was to demonstrate a five to ten percent improvement in reading and mathematics, which was greater than that which he proposed in the 2015–2016 goal to improve science proficiency in his prior school district, which was approved by Pugh-Bassett in 2015.

Pugh-Bassett approved merit goals for the 2017–2018 school year for the Winslow School District Superintendent, including a goal to create a STEM robotics program, which was already part of its curriculum, but would be an additional program for the first-year students at their middle school. (P-19 at 1778.) The second approved goal for that District's superintendent was to create a computer science pilot program for thirty-five students. The other approved goal was to create a pilot computer program for gaming design. (P-19 at 1778–1781.) Tarchichi asserts that the merit goals he submitted for the 2018–2019 school year called for the creation of new programs and the expansion of existing programs, just as those Pugh-Bassett approved for the Winslow Superintendent in 2017–2018. He sought in goals A and B to expand dual credit and academic programs and his revised goal D was to implement a new EMT program.

In 2015, Pugh-Bassett approved proposed merit goals by the Barrington School District Superintendent. The first qualitative goal dealt with presentations in a town meeting to parents and community members to be made aware of current educational trends, changes, and incentives. (P-19 at 1823.) Tarchichi asserts this is similar to his proposed goal E for the 2018–2019 school year regarding the proposed cultural book club and involving community stakeholders, which was not approved by Pugh-Bassett or Nicolosi. The second goal approved by Pugh-Bassett for the Barrington Superintendent dealt with revising job descriptions and updating same, which Tarchichi indicated was merely an administrative task and was not meritorious. He did not find any comparison between that proposed and approved goal to his goals, particularly the goal regarding the creation and implementation of the EMT program. He took issue that Nicolosi asked him to combine proposed goals, which had been revised multiple times for Pugh-Bassett.

In 2016, Pugh-Bassett approved payment for the completion 2015–2016 merit goals for the Barrington School District Superintendent. (P-19 at 1828.) Those goals dealt with conducting research on the district's existing STEAM program, based upon science, technology, engineering, arts, and math, and expansion of same; and

spearheading professional development to increase the district's standardizing math testing benchmarks. The Barrington BOE approved payment of the goals. Pugh-Bassett noted in her letter that one goal was not fully documented, yet she did approve full payment as per the Board's decision. (P-19 at 1829.) Tarchichi compared this to his goal for the 2017–2018 school year regarding ELL students and the development of their language skills and writing for biological sciences careers. The Pennsauken BOE approved full payment for accomplishment of this goal. Pugh-Bassett did not approve payment and never offered that she would accept certain documentation in lieu of something else to affirm the goal was completed. She provided a warning or reminder to the Barrington Superintendent regarding documentation that would confirm completion of a goal, yet never provided that to Tarchichi.

Likewise, Pugh-Bassett never provided any suggestions regarding the EMT goal Tarchichi was trying to get approved for the 2018–2019 school year. Even though the goal was not approved by Pugh-Bassett, Tarchichi did roll out an EMT program that year and completed the goal, as set forth in his proposed goals.

In January 2018, Pugh-Bassett approved payment for the Barrington School District's Superintendent for accomplishment of 2016–2017 school year goals. (P-19 at 1838–1840.) One goal was the development of a multi-cultural club, similar to Tarchichi's proposed goal for a cultural club, except that his was for high school level students. Tarchichi asserted his responsibilities to accomplish the goal were more detailed than the Barrington Superintendent had achieved, and Tarchichi also proposed using three books dealing with current events and race issues. (P-19 at 1840.) Tarchichi asserted that his more detailed goal was not approved, with Pugh-Bassett indicating it was not meritorious.

As of June 2015, an Interim ECS from Camden approved payment for accomplished goals by the Bellmawr School District. One goal was that the superintendent would direct their staff members to design and create a data collection system to be used to track achievement in reading and math. (P-19 at 1857.) Tarchichi did not find this to be a qualitative goal. Another goal approved for the Bellmawr School District's Superintendent was to secure a referendum for funding and beginning an early childhood center. (P-19 at 1857.) Tarchichi has secured multi-million referendums and

has had new buildings created and new facilities renovated for security purposes. These tasks were part of his job as a superintendent and were not done as a merit goal.

As of June 7, 2018, Pugh-Bassett approved payment of merit goals for the Black Horse Pike Regional School District's Superintendent. (P-19 at 1863.) That superintendent's first merit goal was to grow a program in which the school had partnered with a finishing trades institute to train and support the growth of a skilled labor force in the area. The superintendent sought to increase the student participation fifty percent, from twenty-four students by adding twelve more students. (P-19 at 1863–1864.) Tarchichi asserted that his proposed goal to create the EMT program was similar to the Black Horse Pike Regional School District's Superintendent's goal which was approved for payment by Pugh-Bassett.

As of June 30, 2014, another Interim ECS had approved payment to the Collingswood School District's Superintendent for completion of a merit goal to increase the percentage of students taking the PSAT exam. (P-19 at 1919.) Tarchichi contended that the goal he submitted to both Pugh-Bassett and Nicolosi required a great deal more work in preparing the students to take the SAT, and not just increase the number of students taking the test.

As of March 2, 2017, Pugh-Bassett approved the Haddonfield School District's Superintendent's proposed goal to move the district from a STEM-based approach to a STEAM-based approach, and proposed establishing a school district task force comprised of community members and stakeholders to culminate in a report of recommendations the superintendent would then present to the Board of Education for implementation in the 2017–2018 school year. (P-19 at 1990.) Tarchichi contended his proposed goals were similar but much more detailed.

Nicolosi approved the Logan Township School District's Superintendent's proposed goals for 2016–2017, including a goal to strengthen communication with the district's parents and community members regarding the district's mission in the community. This would be measured by using social media venues and the business administrator meeting with township administrators to develop communication with the

governing bodies. (P-19 at 1994–1995.) Tarchichi asserted that communicating with folks in the community, as well as parents and students, was something that he did as part of his job. He did not see how the approved goal for the Logan Township Superintendent was a meritorious goal if it was proposing doing something that is part of the job of being a superintendent.

Another Interim ECS approved Winslow Township Superintendent's goal for the 2014–2015 school year to implement a STEM program at the middle school. (P-19 at 2050.) Pugh-Bassett approved compensation for the Winslow Superintendent for having completed 2015–2016 merit goals, including one goal with the aim to have students become more fully immersed in the new STEM program. (P-19 at 2052.) Another approved completed goal was to create and implement a journalism program in the middle school. (P-19 at 2052–2053.) Tarchichi affirmed that his proposed goals also offered to create and expand new programs at Pennsauken in 2018–2019, such as the EMT program, other CTE programs, and the dual credit programs.

Tarchichi agreed and disagreed that issues presented in one school district may not be the same in another district. He did agree that every school year can bring new and different needs to a district. He acknowledged that he was not present nor a part of any discussions or communications which may have occurred between other superintendents from other school districts during the merit goal process with Pugh-Bassett, Nicolosi, or any other ECS as he outlined. He did not work alongside any other superintendents while they completed their own merit goal processes. He did not have personal knowledge as to how the other superintendents' goals originated, regarding the other letters he pointed to demonstrating others' approvals. He was only aware of the final result as set forth in the letters for the other superintendents.

Tarchichi contends that he was not dealt with fairly in the process of the approval of proposed goals and approval for payment of completed goals for the 2017–2018 school year and for the approval of proposed goals for the 2018–2019 school year. There were many other superintendents who had proposed goals approved which were much less detailed than his proposed goals, or were goals that he did not see as meritorious as they involved tasks which were part of the job of being superintendent. There were other

superintendents who were approved to be paid for the completion of such goals. His goals were rejected. He was never offered a partial payment of goal #1 from the 2017–2018 school year. He was never advised that any of the goals and resubmissions of revised goals for the 2018–2019 school year were ever approved.

Nicholas Perry testified for petitioner. He is the Pennsauken BOE president. He has been a member of the BOE for five years, the last three of which he has served as president. He is a retired educator. He taught for thirty-six years in the Philadelphia public school district, in a blue-ribbon school.

When he became president of the Pennsauken BOE, the board decided there was a much needed change in the direction of their district. He realized a change was needed when 110 students of the graduating class of Pennsauken High School stood up at graduation to signify they were college bound. The other approximate 410 students who were graduating were receiving just a diploma without having other guidance. The Board chose to remove the Superintendent, Human Resources Administrator, and the Business Administrator. The district began with a "clean slate," which included the hiring of Tarchichi as the Superintendent for the Pennsauken School District.

Perry noted that Tarchichi has been responsible for implementing sixteen new programs related to CTE technical educational programming at Pennsauken. Such new programs include carpentry, EMT/Medical technician, Jr. ROTC, and will soon include a diesel technician program and a baking program in conjunction with an international baking company which has a local baking/manufacturing facility.

Perry was engaged in the review of Tarchichi's contract and specifically wanted to include the opportunity for Tarchichi to propose merit goals for the 2017–2018 and 2018–2019 school years. Perry understood the importance of having merit goals, as that would enable Tarchichi to get paid for additional services that he would perform above and beyond his contracted duties. Perry acknowledged that the school district, through its citizens, would be responsible to pay for Tarchichi's contract and his merit goals.

Perry believes that there has been a shift in the culture in the school district. He

asserted that the students are now engaged, with the high school students more involved in their future planning, knowing that they will be learning skills through the CTE programs for future employment. He credits Tarchichi for working above and beyond his superintendent duties, including serving as principal for one of the schools within the district, but he is not getting paid for that. Tarchichi is the only employee in the district with certification in Special Education. That is also a savings to the Pennsauken BOE.

Perry asserted that Tarchichi deserves to get paid for the services he provided under the proposed merit goals. Perry identified himself as being a "union person" and individuals should be paid for things they have done, including services that went over and above their contract. That is why the Pennsauken BOE authorized proceeding with these lawsuits, believing it is imperative that Tarchichi be paid for the merit goals he achieved.

Lovell Pugh-Bassett testified. She is currently employed by Camden County College, which employment began approximately August 2021. Prior to that, she was the ECS for Camden County for approximately six years. She previously was employed by the DOE for approximately twenty years.

Pugh-Bassett explained that a new ECS receives "collegial training" by being partnered with other ECSs for mentoring. She learned the "nuances" of the ECS position by having been employed with the DOE. While at the DOE, she learned how to "navigate" through the DOE system. Outside of that, there is no formal "onboarding training" for an ECS. Much of the collegial mentoring occurred during monthly ECS meetings, where the ECSs would share their "challenges" from their respective counties and would exchange advice and support.

The duties of an ECS are all encompassing, with daily responsibilities varying depending upon the ebb and flow of the school year. An ECS is responsible for overseeing budget reviews, contracts, and providing support to school districts for compliance with best practices. ECSs will monitor school districts via the New Jersey Quality Single Accountability Continuum (NJ QSAC) process and guide districts about regulations, statutes, and code. There are regulations that govern an ECS's duties.

Some regulations provide broad guidance while others go into more detail for very targeted areas of an ECS's job duties.

As ECS for Camden County, Pugh-Bassett was responsible to oversee thirty-eight school districts and approximately nine to ten charter schools. Her specific work in overseeing superintendents of school districts varied. Generally, she would meet with the superintendents who were coming into a new school district to give them support and to share openly and transparently about what was going on in their new school district. She generally would check back in with the superintendent after two or three years to see how things were going. She did a lot of troubleshooting and "a lot of support." She navigated all the "moving parts."

There are monthly roundtable meetings for district superintendents to attend. They get together to discuss concerns they may have. Information is shared which may come "from Trenton" about compliance, regulations, or sharing of initiatives posed by the DOE. They are voluntary meetings.

Review and approval of bonus merit goals were included duties as an ECS. Pugh-Bassett described merit goals as an opportunity for superintendents to identify a specific issue they wished to address within their district that goes above and beyond the requirements of the school district. This gives the superintendent an opportunity to be compensated for addressing issues that go beyond their minimum job duty requirements. A quantitative merit goal is measured by a numerical value. A qualitative merit goal is measured by "soft indicators" like videos and newspaper clips.

Pugh-Bassett acknowledged there was no written guidance, nor protocols or instructions in the entire state to explain how an ECS should review a superintendent's merit goals. When asked what the merit goal process was, she explained that when she was first promoted to ECS for Camden County, she placed an agenda item on one of the monthly roundtable meetings to have a discussion of what her expectations would be with regard to superintendents' merit goals. The way she handles merit goals is to have a conversation with the superintendent to "troubleshoot" their proposed goals with her, prior to the superintendent submitting the goals to their BOE for approval. This is done to avoid

the embarrassment of having the BOE submit the approved proposed merit goals to her with which she did not agree. She saw this as "a bit of cover for the superintendent and opportunity to really have some pre-talks about what they would like to address, I do that process first." (Transcript 2, page 41:13–20.) Then she will "solidify" the goals and come up with consensual language the superintendent will follow, and give her a final draft she will then approve.

Other times, she might have additional meetings, or the superintendent of a district "comes to the table" and says they want to address something "in my equity" and they will figure out based upon her monitoring, performance, and the climate, how to come up with a merit goal very specific to the district. After she approves a merit goal, she sends a letter to the BOE advising them the goal has been approved. She goes through "this painstaking process of trying to make sure that the goal matches a need and that the documentation to be submitted to support the goal is specific enough to be able to demonstrate that they've achieved the goal." (T2 42:5–12.)

She has seen the process evolve over the years, due to document requests from members of the public. Pugh-Bassett developed her procedure to be sure she had the right information available in the event documentation was needed to support that she did go through the process of having merit goals for a superintendent. Also, every now and then, the ECS office gets audited, so she likes to have the documentation "also in kind" to show what she reviewed when "approving or denying or whatever the process was included in the development of the goal." She asserted that the goal should be impactful for the district, although she was not certain if the regulation regarding merit goals expressly stated that the goal must be specific to the needs of the district.

Pugh-Bassett did not know if this was the same process for all county superintendents. She acknowledged that she was not aware how each ECS handled approval of merit goals in their counties. She only had the opportunity to find out what other ECSs did on a daily basis during "collegial conversations" with them. She was not aware whether every ECS even received merit goals for review, asserting that is optional for the district to submit. She was not certain if all other ECSs in the state did review merit goals, but believed that "a good number" or "good portion" of them did have to deal with

merit goals.

Pugh-Bassett asserted that the "skeletal process" of handling merit goals was having an ECS review and approve of proposed goals, and then letting the BOE know that a goal has been approved. An ECS then goes through the process of reviewing submitted documentation and approving payment to be made by a BOE when the superintendent has completed a merit goal.

She described that a superintendent decides "in house" how they want to procedurally have their proposed goals submitted to their BOE for approval. She explained that most superintendents will wait until she and they have "95% approvable" goals before vetting the proposed goals through the superintendent's BOE for formal approval. If she gets such proposed goals from a BOE that is seeking her approval, she will just "respond in kind" with a formal letter.

Other superintendents will go to the BOE first with their proposed goals. She will then respond to the BOE and say whether the goals are approvable or not, and the BOE will respond to her with approvable goals based upon conversations she has had with the superintendent. The BOE may also wait for her to come to a consensus with the superintendent before going through the formal process again of approving proposed merit goals. She was not aware if the DOE issued any specific guidance regarding the writing of merit goals.

The BOE must approve proposed goals since they are the entity that must pay the superintendent for completed goals. The merit goals are activities being carried out on behalf of the school district so the BOE must be aware and approve of the proposed goals. Pugh-Bassett, as ECS, is required to approve the proposed merit goals following the BOE's approval, because the statute says that is her role. The goals cannot be executed and worked upon until she has granted approval.

Pugh-Bassett asserted that the statute pertinent to merit goals does not outline specific deadlines for the process of approval of the proposed goals and approval of payment for the completion of goals. The "natural flow" is that "a lot" of superintendents

submit their goals in August so she has an opportunity to review them before the kick-off of the school year. Her office gets very busy at the start of the school year. She tried to get the merit goals "closed out by September 30th" but noted the process could go beyond that date, depending upon the "back and forth." She acknowledged that she goes back and forth as long as possible so that she gets to a "yes" regarding the language of a goal and does not have to go through the process of denial of a goal. This gives the superintendent time to get the language of a merit goal "in a way that makes it approvable[.]" During the back and forth process, she provides her feedback on the document submitted by the superintendent, which outlines the goals by using the track-changes function in the word processing program, or she will do bulleted lists and emails which are very thorough and responsive to make sure that she can "honor them and give them the respect that they deserve for having taking the time to submit the merit goal so that I can give them good responses." On occasion, she has done research to assist a struggling superintendent to come up with ideas for a merit goal. She will give a suggestion for a replacement idea for a merit goal so that the superintendent does not fall short of the intended number of goals being proposed for the school year.

Pugh-Bassett asserted that she typically meets with the superintendent after the first submission of proposed goals to her through scheduling a remote GoTo Meeting so they can have an extensive conversation. Sometimes she schedules in-person meetings with the superintendent. She then provides written feedback to the superintendent. They are fine-tuning the information for the superintendent so that the superintendent does not get "blindsided" when they come to meet with her about their proposed goals. She was unaware if any of her superintendents provided their BOE with the feedback she gave to the superintendent when helping them to draft their goals.

She believes that merit goals are important for a superintendent who is trying to do additional initiatives in their district. She thus gives the proposed goals "time and attention that they need even if it exhausts past what a soft deadline would be so that we could get to the point where the merit goal could possibly be approved." Pugh-Bassett could not consider approval of proposed merit goals for a prior school year because the goals are developed based upon the need of the district at the time, and those needs shift "so very frequently." She noted that an ECS has no stake in whether a merit goal is

approved or not. It only provided her a point of pride, where she could brag as an ECS of a superintendent who had done amazing initiatives.

2017–2018 Merit Goals

During the 2017–2018 school year, Pugh-Bassett had approximately seven to eight superintendents who each submitted four or five proposed merit goals for her to review. Tarchichi was one of those superintendents. Pugh-Bassett had provided a form to her superintendents to use when submitting goals. A colleague from Bergen County had crafted the form which was used by that colleague in their process of going through merit goals. The colleague shared the form with Pugh-Bassett. Pugh-Bassett found the "informal form" to be a good template for superintendents to better organize their merit goals. On the form, there is an area for "goal type" and it is filled in as quantitative or qualitative goal. The value, or compensation that is sought for the goal, is included under the type of goal by inputting the percentage of the superintendent's salary that is sought to be paid if the goal is accomplished. The actual amount in dollar value may be placed under the percentage. (R-3.) Pugh-Bassett was unsure if the person who served as Camden County ECS prior to her had used that same form.

Tarchichi used the form provided to him by Pugh-Bassett, and submitted to her a draft of five proposed goals, identified as A through E, and that "began the conversation around his merit goals." (R-1.) She responded to Tarchichi's first proposed merit goal submissions, via email, on September 25, 2017, indicating in her first sentence that "these merit goals need work." (R-2.) She proceeded to explain in the email that all of the goals are not approvable because "they are simply replications of requirements of a district (see comments)." (R-2.) She gave a few examples of issues her office knew that the Pennsauken district was facing which he could address in merit goals. She asserted that the superintendent is supposed to be the "star" of the goal, meaning the superintendent has to be the person doing the work to earn the pay. She included her comments in tracking-text boxes on the form he had submitted to her. (R-2.) She also made comments on the areas of the goals that were questionable. This is the format she typically used to provide feedback to all superintendents.

She thereafter had a conversation with Tarchichi about his proposed goals and her feedback. She followed up with him in an email on October 3, 2017, believing it to be their "second round" of her giving additional feedback. The email provided feedback in bullet-point format and additional instructions as to how he should revise his proposed goals for her further review. (R-2 at 2463.)

Tarchichi sent her a revamped version of his merit goals after their initial back and forth. (R-3.) He submitted proposed merit goals A through E, which eventually were all approved by Pugh-Bassett, as per her letter of January 4, 2018, except for goal E. (R-4.) The Pennsauken BOE thereafter approved the proposed goals A through D for the 2017–2018 school year.

Pugh-Bassett did not approve of proposed goal E. (R-3.) That goal dealt with Tarchichi conducting a monthly training academy for new administrative staff to give additional support to the staff as they transitioned into more seasoned administrators. (R-3 at 2471.) Tarchichi proposed that the group would meet for a minimum of ten training sessions during the 2017–2018 school year. (R-3.)

Pugh-Bassett's letter to the Pennsauken BOE of January 4, 2018, described that this goal did not "meet the threshold of being *"meritorious"* in relation to existing mandatory requirements for the support of new school leaders through professional learning as outlined in N.J.A.C. 6A:9C-3.2." (J-1 at 11; R-4 at 2474, internal quotation and italics original.) Pugh-Bassett explained that in early 2017, the professional standards regulations were revised to include a requirement that school districts provide a broad range of professional learning opportunities for teachers and school administrators. To be meritorious, a goal must be something going above and beyond minimum requirements. She wanted Tarchichi's proposed goal to go above and beyond what the regulation indicated was to be provided. She got no response from him about this in their back and forth exchange over proposed goals, so she deemed the goal as not being approvable. She claimed she did not "outright deny" this goal.

She asserted she is not permitted to approve a goal to do something that is already a requirement to be done, since superintendents would then be paid twice for executing

requirements of their job. She acknowledged that the regulation she cited, N.J.A.C. 6A:9C-3.2, requires school administrators, which she described as teachers and administrators, being the "school leaders" to receive training as per the regulation. She avoided confirming that the regulation does not specify that the superintendent is to provide that training, but that professional development and training are required to be done and superintendents are responsible for their school district. The superintendent has the inherent responsibility to make sure the requirements are being implemented.

Pugh-Bassett stated that if a goal was denied for not being meritorious, a superintendent absolutely could not resubmit that goal. The Superintendent may expand or build upon a previously denied goal, but it should not be duplicated and resubmitted. She confirmed that the proposed training academy goal by Tarchichi was later approved by another Interim ECS, Judy DeStefano, from Cape May County, to be worked upon by Tarchichi for the 2019–2020 school year. (P-18 at 1768.) She further acknowledged that the approved goal did not specify the number of sessions required, while the goal she reviewed specified ten sessions would be conducted. She did not agree with Interim ECS DeStefano's approval of the goal for Tarchichi. Pugh-Bassett recognized that each ECS comes from a different background of experience and skills and that none received "on boarding training" or a training process when hired as an ECS. She thus recognized that ECSs could evaluate merit goals differently and might review the exact same proposed merit goal and come to a completely different conclusion, as occurred here.

Pugh-Bassett thereafter had not received, as of July 16, 2018, confirming documentation from Tarchichi that he completed the proposed goals A through D for the 2017–2018 school year. She needed to review such documentation to determine if she would approve payment to be made by the Pennsauken BOE to Tarchichi. She sent a letter to the Pennsauken BOE indicating that the merit goals had been approved for completion by the close of the school year, June 30, and are to be reviewed for completion by the Pennsauken BOE and then submitted to her for approval to be paid. (R-5.) She requested that the Pennsauken BOE advise her if Tarchichi had completed his 2017–2018 merit goals or whether they would no longer be seeking approval for payment. She noted the documentation had to be forwarded to her by August 31, 2018, because there may be a delay in reviewing such documentation since her focus would be shifted to

approval of proposed goals submitted for the 2018–2019 school year. The August 31, 2018 deadline was a date she set to give Tarchichi the opportunity to submit the documentation of completed goals so she could provide a timely response.

A few weeks after Pugh-Bassett sent the "tickler" letter to the Pennsauken BOE, she did receive, in her office, documentation to demonstrate that Tarchichi had completed his goals. She did not know whether the Pennsauken BOE submitted the documentation or if Tarchichi himself submitted it, since she is not "privy" to those internal workings. Typically, documentation would come into her office via courier to her assistant, but she did not know who had submitted it.

She reviewed the documentation and prepared a page of comments regarding all four goals and the documentation she still needed to review to determine if Tarchichi should be approved for payment. Pugh-Bassett's assistant sent an email on August 27, 2018, to Tarchichi, forwarding Pugh-Bassett's comments and advising him the documentation requested had to be provided no later than September 7, 2018. (R-6.) Pugh-Bassett described that she provided comments because she needed some clarity about each goal that was originally submitted as she lined up the documents sent in to demonstrate completion. She needed to "tease out" what she was looking at to gain "clarity" to figure out exactly what documentation was provided to respond to what part of the originally approved goal.

Specifically, as to goal A, also referred to as goal 1, Pugh-Bassett wanted additional documentation. (R-6.) That goal was for ELL students in ninth and tenth grades to improve their science vocabulary. She had confirmed with Tarchichi that there were forty students at Pennsauken who fell into that category of students, but she had only received documentation for twenty students. She requested additional documentation, which she did receive from Tarchichi, but he did not respond to her questions about writing strategies and evidence of completion. Later, they had a conversation and "delved" into "that number 20" due to her comparison of the number of ninth and tenth grade students who were eligible "to receive the treatment of his merit goal." They went through another round of emails in mid-September. (J-1 at 13.) She asserted in an email of September 18, 2018, to Tarchichi, that this was his final

opportunity to provide additional responses to satisfy attainment of his goals, and that she would not be considering his proposed 2018–2019 goals until she received responses from him to allow her to close out his 2017–2018 goals. (J-1 at 13.)

Pugh-Bassett received voluminous documentation, so it was clear to her that some work had been done on the first goal. She wanted to give Tarchichi the opportunity to receive partial approval, and was outlining in dollars and cents in her email what that could be if he provided appropriate documentation. (J-1 at 13.) Since the proposed population of students was forty, she expected to see documentation that forty students were served. There was "no conversation" around serving a sub-population of that group. She asserted that she offered to approve payment of fifty percent of the goal, since twenty students would be fifty percent of the forty students she expected to have been served, as set forth in her email. (J-1 at 13.) She does not always offer that as an option.

Tarchichi did respond to her September 18, 2018, email, by dropping off additional documentation, as of September 28, 2018. He also sent a reply email on that date. (R-7; J-1 at 13.) He asserted he never specified in his original goal that he would be using the entire population of ELL ninth and tenth grade students. He wanted to engage students interested in sciences, especially the field of health care. He used a sample of the entire population. (R-8; J-1 at 13.) She received the documentation he dropped off, but it did not satisfy her inquiries regarding the first goal.

Pugh-Bassett received the Pennsauken BOE's resolution approving payment to Tarchichi for completion of merit goals A–D for the 2017–2018 school year. She authored a letter on October 12, 2018, in response to the Pennsauken BOE. (J-1 at 15.) She approved payment for goals B through D. (J-1 at 17.) She did not approve payment for the first goal, A. She noted in her letter that the submission from Tarchichi did not satisfy the requirements for approval and would not be approved for payment. (J-1 at 17.) She indicated that Tarchichi had focused on a sampling of the ELL students, that being twenty students, rather than focusing on all ninth and tenth grade ELL students, which she was told was comprised of forty students. She claimed, during cross-examination, that her "take away" of the goal was that the focus was on all ninth and tenth grade students. She acknowledged that she had previously approved merit goals that only impacted a small

subset of students.

Pugh-Bassett also criticized that Tarchichi had not provided documentation to demonstrate additional writing instruction to assist with the vocabulary and grammar growth of ELL students, and that the documentation did not demonstrate how the multiple choice tests measured student growth on writing strategies embedded in student learning. (J-1 at 17.) She acknowledged, during cross-examination, that there was nothing in the approved proposed goal requiring submission of writing samples to gain approval for payment of the goal. She dodged confirming that the proposed goal never required submission of the actual tests administered. She was not satisfied with the summary sheet of student scores provided by Tarchichi. She was steadfast that the information provided to her as documentation of fulfillment of the goal was not complete enough for her to make an accurate assessment of the achievement of the goal.

Pugh-Bassett denied telling Tarchichi directly that she refused to discuss payment for goal #1 anymore, and denied that she suggested he could file a lawsuit. She did confirm, in correspondence to the Pennsauken BOE on October 12, 2018, that if Tarchichi wished to appeal to the Commissioner of Education due to her denial of compensation for goal #1, he could submit a request to the Office of Controversies and Disputes. (J-1 at Exhibit C.) She did not want to "litigate this goal denial in my office" and he could file an appeal.

2018–2019 Merit Goals

Tarchichi submitted his proposed 2018–2019 merit goals in October 2018. Pugh-Bassett responded with remarks about re-crafting each of the proposed goals. (J-7 at 419–420.) They exchanged several emails over several days to set up a meeting to review his 2018–2019 proposed goals. (J-7.) As of November 7, 2018, Pugh-Bassett sent an email to Tarchichi outlining some suggestions for his proposed merit goals. (J-7 419–420; R-10.) He submitted his revised proposed goals, identified as A through E, to her on November 15, 2018, on the merit goals submission form. (J-7 at 431–436.) She provided a feedback email to him, with bulleted points for each proposed goal. (J-7 at 445–456.)

He forwarded to her, via email on November 20, 2018, certified minutes from the Pennsauken BOE meeting of November 19, 2018. (J-7 at 437–439.) The minutes confirmed that the Pennsauken BOE approved resubmitting Tarchichi's proposed 2018–2019 merit goals to Pugh-Bassett. (J-7 at 439.) The minutes also confirmed that the Pennsauken BOE approved having the Board's solicitor pursue litigation regarding Tarchichi's merit goals. (J-7 at 438.)

On November 26, 2018, she sent an email to Tarchichi with an outline of feedback for each of his proposed goals A through E. (J-7 at 445.) She was confident they could work through the goals by the end of the day. (J-7 at 445.) Tarchichi responded that he needed to discuss the goals with her. (J-7 at 446.) They exchanged emails, agreeing to talk that evening on the phone. (J-7 at 448–454.) They spoke on the phone, and Pugh-Bassett stated it was a very contentious phone call and she had "to exit the conversation" because she was "becoming offended." During that conversation, Tarchichi requested that another ECS review his merit goals. She told him that she would forward that information to her supervisor and respond to him. She was advised that he could not have another county's ECS review his goals. She communicated that to Tarchichi. (J-7 at 458.) She was willing to continue to work with him to clarify his goals so that they would be approvable. (Id.) Pugh-Bassett gave another detailed bulleted list of comments and questions about each of the five proposed goals. (J-7 at 458–459.) She advised him that he needed to respond by that Friday to guarantee he would "have time to execute the goals in order to maximize its impact on student success." (J-7 at 460.)

Pugh-Bassett testified that Tarchichi again requested to have another ECS review his merit goals and wanted to speak to the DOE supervisor with whom she had spoken. In an email of November 27, 2018, Tarchichi indicated that she was the one who suggested that he have another ECS review his merit goals and he agreed. (J-7 at 458.) As of December 18, 2018, the Acting Director of the Office of Field Services Coordination for the DOE sent an email to Tarchichi advising him that effective immediately, Nicolosi would be responsible for reviewing his proposed 2018–2019 merit goals. (R-13.)

Pugh-Bassett discounted that the Barrington Superintendent's goal from 2016,

which she approved regarding that district's STEAM program, was similar to Tarchichi's 2017–2018 goal regarding ELL students' improvement in science writing and vocabulary. (P-19 at 1828.) She asserted the Barrington goal targeted district-wide students, while Tarchichi's goal only focused on a subset of students in ninth and tenth grades.

Pugh-Bassett authored a letter, as of January 2, 2018, approving payment for merit goals achieved by the Barrington Superintendent from the 2016–2017 school year. (P-19 at 1838–1840.) One goal was for the establishment of a middle school multicultural/diversity club. Pugh-Bassett explained that the Barrington School District had issues that "bubbled up" throughout the previous school year regarding ethnicity and race, and since the goal dealt with preparing middle school students to be successful in high school on issues of multi-culturalism and diversity, she approved it. She acknowledged that Tarchichi's proposed goal for the culture and climate club would be "in a similar bucket" yet asserted that the Barrington's Superintendent's goal was "a little bit more focused on the students based upon existing issues that have been raised or have come up" in that district. (Trans Oct 27, 2021, 144:25-23.)

She did not approve Tarchichi's proposed goal for the 2018–2019 school year for the culture and climate club because she had "some questions of clarity" regarding the benefit of the proposed goal and Pennsauken's student demographic. She defended her position, asserting that she did not insinuate that his goal was not an approvable goal, per se. She wanted to get additional information to determine what would be the impact. She asserted she engaged in significant back and forth with the Barrington Superintendent to approve his proposed goals. Since the letter was from January 2018, which was for the 2016–2017 school year, that reflected a very intense back and forth process.

Pugh-Bassett supported her position that a superintendent is supposed to be the "star" of a merit goal, meaning that the superintendent is performing most of the work to execute a goal. She could not discredit Tarchichi's assertion that a goal approved for another superintendent in another school district in 2015 was a goal in which the superintendent was not the star. (P-19 at 1857.) She was not involved in the back and forth approval process for the goals and did not believe that the template form she utilized

for superintendents to develop and submit their proposed merit goals was being utilized prior to her becoming ECS for Camden County.

She testified that the "process of merit goals evolves every iteration" and that process was the topic of "intense conversations" at monthly ECS meetings after 2015. The process of approval of goals "depends upon the landscape of the county" and that there are "very focused initiatives" in each county, going down to the district level, depending upon the specific needs of the district. If the DOE is embarking upon a specific focus or initiative, the individual superintendents may want to piggyback on those initiatives and create goals "that enhance those initiatives to be consistent and aligned." She emphasized that there are "very, very, very unique" needs of school districts that force very targeted and varying goals. A common theme may be found between districts, but the specificity of merit goals will vary based upon the needs of the district.

Margaret "Peggy" Nicolosi testified. She is the Interim ECS for Salem County, which position she has filled for approximately thirteen years. In the 2018–2019 school year, she was Interim ECS for Salem County and Cumberland County.

She described merit goals as an opportunity for a superintendent to take on initiatives that they may not normally address, being over and above what they normally do. There can be three quantitative goals for the year, paid out at 3.33% of the superintendent's salary; and two qualitative goals for the year, paid out at 2.5% of the superintendent's salary. A qualitative goal is doing something in the district to improve the life or district situation, which is a program or project with not a lot of data involved. A quantitative goal is a program or project with specific data involved, which can be more rigorous than a qualitative goal.

Nicolosi descried the merit goal process. Generally, a school board will establish their district goals for the upcoming school year in July, and then the superintendent will propose merit goals aligned with the district's initiatives for the year, usually in approximately August. She will then go back and forth with the superintendent, similar to any type of negotiation process, to develop the merit goal and agree upon what is going to be the baseline data required to demonstrate completion of the goal.

Her communications with a superintendent are generally via email, but sometimes done in person or over the phone. She usually will insert comments or questions in red directly into the proposed merit goals document she gets from the superintendent. She also provides feedback in more detail in an email she usually sends in response with the red comments. She described that as in any negotiation process, neither party is going to be completely happy with the result, but if the students are the end benefit, the merit goals are settled, and she will send a letter to the school district approving the goals. The superintendent then works on the goals during the school year. In approximately mid-May through the end of June, the superintendent will submit to her the documentation they already agreed upon to demonstrate if the goal was accomplished. If the documentation demonstrates completion, a letter is sent to the BOE authorizing payment of the goal to the superintendent.

Some superintendents will tier their merit goals. Nicolosi explained that it means the superintendent has broken down a goal into parts with steps or levels. If the superintendent is only able to attain part of the goal, they can still be paid a certain amount of money for the part that was accomplished. Tiering a goal is something that may be initiated by the superintendent, or through discussions she has with the superintendent when she is in the process of reviewing the proposed drafted goals. If it is a complicated or multi-step goal, it may be to the advantage of the superintendent to tier the goal.

Nicolosi confirmed that she has never received written guidance from the DOE regarding how she should evaluate merit goals. She agreed that there was no formal on boarding or training for new ECSs. She disagreed with Pugh-Bassett's testimony that the process of reviewing and authorizing merit goals varies from county ECS to county ECS. She recognized that ECSs come into their role from various backgrounds with various experience.

During the 2018–2019 school year, approximately twenty-five percent of the superintendents she oversaw were working on merit goals. She was assigned to review Tarchichi's 2018–2019 merit goals as of December 18, 2018, when she received an email from the DOE representative. (R-13.) She assumed Pugh-Bassett had reviewed the

proposed goals prior to her being assigned to review them. She was not given any other information as to why she was assigned to review his goals. She did not speak to the previous ECS, Pugh-Bassett, when she received the assignment. She was not aware of the back and forth that had occurred between Pugh-Bassett and Tarchichi before she was assigned the review. Nicolosi did not request Pugh-Bassett's suggested changes. Nicolosi did not review any of Tarchichi's prior submissions. She did not request Pennsauken BOE's goals for the year. She assumed what was submitted to her from Tarchichi was aligned with the BOE's goals. She did not speak to any Pennsauken BOE members regarding the proposed goals.

Nicolosi received Tarchichi's proposed goals for 2018–2019 on a merit goal submission form. (R-14.) He emailed the information to her on December 19, 2018. (J-7 at 606.) Goal A dealt with dual credit programs for Camden County College, Rowan College, and Cumberland County College. Goal B dealt with CTE vocational programming, including a culinary program with Atlantic Cape Community College. Goal C dealt with SAT improvement. Goal D was to create an EMT program in the district. Goal E was the culture book club. (J-7 at 485.) After reviewing the proposed goals, she responded to Tarchichi, with red line modifications and comments she made directly on the form. (R-15.) She recalled going back and forth with him several times via email, making headway on some goals and not so much on others.

Nicolosi believed that three of Tarchichi's goals were very similar. She revised goals A, B, and D, into one goal, as goal A. (R-15.) She was attempting to put those goals together into one because the activities were very similar regarding career readiness, contacts with local colleges, and getting dual credits. One suggestion she made was to substitute Rowan College at Gloucester County instead of Cumberland County College, due to the closer proximity of that school to Pennsauken. (R-15.) She acknowledged that the regulation pertaining to review of merit goals did not include requirements for distances for proposed merit goal programming. She wanted to delineate documentation and information to be submitted so she could see finite numbers. She could not approve the three goals, which she modified into one goal, as he had proposed.

She had not seen or heard Pugh-Bassett's comments regarding the three proposed goals from Tarchichi, which Nicolosi combined into one goal. She could not confirm if the colleges in each of Tarchichi's goals had the exact same programming. Nicolosi recognized that she approved two separate goals for the Oldmans Township superintendent in 2014, where both goals addressed the same improvements to be achieved in language arts literacy, except one goal was for grades three through five, while the other goal was for grades six through eight. (P-19 at 1795.) She confirmed she did not require tiering of the goal into one goal, rather than two separate goals. She candidly commented that looking back upon goals she approved in 2016 for the Kingsway superintendent should have been tiered, due to their similarity. (P-19 at 2093.)

Nicolosi revised Tarchichi's proposed goal C, regarding improvement in preparation and scores for the SAT test, into goal B. (R-15.) Nicolosi reviewed the Pennsauken performance report and saw that Pennsauken students also took the ACT, which minority students traditionally perform better on than the SAT. She wanted Tarchichi to expand the goal to include tutoring and preparation for both the SAT and ACT. She tiered the goal. She also needed more information as to the number of students who would demonstrate improvement. She wanted Tarchichi to videotape the proposed programs he intended to present to the students, and he did not agree to videotaping the programs. She acknowledged she did not see any other ECS requiring a superintendent to videotape themselves doing any of the merit goals in the volumes of documents entered into evidence. Nicolosi also requested additional documentation for Tarchichi to provide to demonstrate whether other staff members who apparently were going to be assisting with the preparation programs were going to be paid. She wanted lesson plans for the sessions. He would not agree to provide such information. Nicolosi could not approve the revised goal B she suggested to Tarchichi without the modifications she sought.

She revised his proposed goal E, for the proposed culture and climate club, into goal C. (R-15.) She reviewed the Pennsauken performance report and saw the demographics of school's population of Hispanics, African Americans, and Asians. She was curious as to the proposed books selected by Tarchichi since they were in areas of the world such as North Korea and the Middle East. She was not certain if the topics

from the proposed books were areas of concern for Pennsauken. She checked to see if there were diversity complaints lodged from parents or the public and wanted to know if such matters could be dealt with in a social studies class. Nicolosi recommended taking some of the book club discussions out into the community, rather than all occurring in the school. She had no problem with the spirit of the goal. It was the evidence of completion which was the stumbling block and why she was not able to approve the goal as presented.

They communicated by email over the changes and modifications she was requesting to his proposed goals. (J-7 at 580–605.) She recalled most of the responses from Tarchichi began with "I will not do" whatever it was she had proposed. Their communications broke down, mainly over what she perceived as the documentation and information she was trying to delineate that he would need to provide to demonstrate evidence of completion of the goals. She acknowledged having received a revised set of goals for 2018–2019 from Tarchichi as of January 2, 2019, with his goals A, B, C, D, and E. (J-7 at 592.) She understood this to mean that he refused to turn three of his merit goals into one goal, as she had suggested. (R-15.) She noted, during cross examination, that all five of the goals, as outlined by Tarchichi in his January 2, 2019, submission, could be approvable with more evidence of completion.

When asked if goals from different counties and different years could be compared, Nicolosi responded "Not really." (Tran Oct 28, 2021, 34:12-15.) She confirmed that in 2013, she approved for the Waterford District's Superintendent a merit goal involving attendance. (P-19 at 1791.) She acknowledged she would not be able to approve such a goal now, given that the regulations were modified in 2018 to include attendance improvement as a mandated corrective action plan. She recognized that she approved goals in 2016 for the Upper Township Superintendent, regarding curriculum creation, when she agreed that the creation of curriculum is a requirement for school districts in New Jersey. (P-19 at 1796.)

She further acknowledged that there were goals approved by her in other districts in other years involving those superintendents doing goals, such as website development and contract negotiation, which would require the superintendent to consult with

professionals, such as computer technicians and attorneys, to develop and complete the program or proposed action in the merit goals. She approved a new student attendance committee goal in 2016 for the Kingsway Superintendent, when the superintendent was not identified as being the individual to head up such a committee, nor how many times the committee was supposed to meet, or that the superintendent would even be at the attendance committee meetings. (P-19 at 2092–2093.)

Nicolosi acknowledged that a 2014 goal by the Collingswood Superintendent, regarding PSAT preparation and scoring was approved for payment and was a goal like the SAT goal Tarchichi had proposed for 2018–2019. (P-19 at 1919.) She had questioned Tarchichi's goal based upon the lack of baseline data regarding the number of students who would be anticipated to improve in score and the increase anticipated.

Nicolosi confirmed that an example of a tiered goal appeared in the merit goals from 2016 for the Logan Township Superintendent, for merit goal number one regarding improvement of achievement of three subgroups of students in grades one through eight from standardized test scores. If projected improvement of a percentage of students was not achieved, then only a percentage of the merit goal would be paid. (P-19 at 1994.) Such tiering of a goal would be identified at the beginning of the goal review process. She was familiar with the district, and approved the goal because it set forth a project which was not normally required by a school district. There was extensive data provided as evidence of completion, where she could see from child to child what type of growth had occurred. She was provided not only the subgroup data but data for all of the students from grades one through eight.

Nicolosi believed it was important to treat the proposed goals from Tarchichi as if they were brand new goals. She would not take into account anything that a previous ECS might have thought about the goals. She defended her red line remarks and combination of goals as being suggestions to Tarchichi and that they would be going back and forth ironing out the details of his goals. She reiterated that, for example, the cultural book club goal would have been approvable, but they were having issues with what was going to be the documentation to demonstrate completion of the goal.

Credibility

A fact finder is obligated to weigh the credibility of witnesses. Credibility is best described as that quality of testimony or evidence that makes it worthy of belief. "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 observations of mankind can approve as probable in the circumstances." In re Estate of Perrone, 5 N.J. 514, 522 (1950). To assess credibility, the fact finder should consider the witness' interest in the outcome, their motive or bias. Credibility findings are "often influenced by matters such as observations of character and demeanor of witnesses and common human experience that are not transmitted by the record." State v. Locurto, 157 N.J. 463, 475 (1999). "A trier of fact may reject testimony because it is inherently incredible, or because it is overborne by other testimony." Congleton v. Pura-Tex Stone Corp., 53 N.J. Super. 282, 287 (App. Div. 1958).

Tarchichi presented his testimony in a professional, serious, and confident manner. His expression of concern and interest in improving the educational opportunities for all students in the district was genuine. He outlined, in a matter-of-fact method, his past efforts and accomplishments in the district without appearing boastful or cocky. It was apparent how his confident nature of speaking and direct method of communicating in his emails could be perceived by someone as an intimidating response, such as when he would reply to the ECSs with his disagreement to their suggested revisions or modifications. He supported his positions with examples and thoughtful reasons for his proposed goals and methods. His testimony was persuasive.

Perry testified in a forthright, concerned, and supportive manner. It is recognized that he, as the Pennsauken BOE president, has a vested outcome in this proceeding, to find in the Board's favor. However, his testimony in support of Tarchichi's position was delivered in a sincere manner, supportive of Tarchichi's past efforts and accomplishments in the district, and the Pennsauken BOE's mission to serve the students of the district in the best manner possible with the taxpayers in mind. His testimony was not delivered in a condescending or antagonist position towards the ECSs and the DOE, but rather with a focus on getting a fair conclusion to these matters to enable the district to move forward.

Pugh-Bassett testified in a stilted manner, using jargon and superfluous language which was difficult to follow. It was evident that her style of communication with Tarchichi was perceived as passively condescending, and the tension it created was palpable in their written communications and observed through the Zoom proceeding. Her testimony was not particularly persuasive.

Nicolosi was direct and assertive during her testimony. She was self-assured in describing her style of offering suggestions to the superintendents as to how they should draft their goals, such as by tiering. When confronted with prior goals she approved in the past, which did not include tiering or merging of similar goals, her candid acknowledgement that she should not have approved such goals was appreciated. Likewise, her candid comments indicating that Tarchichi's goals would have been approvable as presented, but with more documentation to support completion of same, were reflective of her honest recognition of the subjectivity of this process.

Based upon a review of the documentary evidence and having heard and observed the testimony of the witnesses, I **FIND** as further **FACTS** the following:

There is no standardized method, procedure, or training provided by the NJ DOE to the ECSs or superintendents addressing how to formulate merit goals; how to review same; and the timing for the submission and approval of such proposed goals; requested revisions; and timing for the approval of payment of same. There are no regulations, manuals, or written guidelines for superintendents to follow regarding merit goals, nor for an ECS to follow when reviewing and providing feedback and approval or disapproval of goals.

Tarchichi sought approval from Pugh-Bassett for him to work on five proposed merit goals for the 2017–2018 school year. She did not approve goal E, the fifth proposed goal for a monthly training academy for new administrators. Tarchichi had previously been approved to complete a similar goal in 2015–2016, by Pugh-Bassett, when Tarchichi was superintendent at another school district. He later proposed this same goal for the 2019–2020 school year, and was approved by another ECS to do so.

Pugh-Bassett approved Tarchichi's first four proposed goals for the 2017–2018 school year. Tarchichi submitted proof of completion of those four goals to the Pennsauken BOE, and the Board approved payment for same. When the Pennsauken BOE sought approval from Pugh-Bassett to pay Tarchichi for those four goals, she approved payment for three of the goals. Tarchichi has received payment for the three goals in 2017–2018.

Pugh-Bassett did not approve payment for the first goal for 2017–2018, regarding ELL students and testing their growth and improvement in the field of science with writing and learning science-field vocabulary. Pugh-Bassett contended that Tarchichi only provided information for twenty of the ninth and tenth grade ELL population, when there were forty students in that specific student population. The approved proposed goal indicated the ninth and tenth grade ELL population was targeted, but did not specify the number of students. Tarchichi contends that the submission of information for twenty students represents a sampling of the student population and demonstrated fulfillment of the goal since all twenty of the sampled students made progress. Pugh-Bassett also contended that the documentation was insufficient to demonstrate the goal was completed because it did not demonstrate that writing and vocabulary were specifically addressed and improved. Tarchichi asserts that the pre- and post-testing, which was multiple choice, did address vocabulary and writing within the test itself, and that essay questions were part of the testing. He asserts that writing and vocabulary were addressed and stressed during a student assembly; the topic was an agenda item in a staff meeting; and all documentation he submitted supported his completion of this goal, as approved for payment by the Pennsauken BOE.

Tarchichi submitted six proposed goals for the 2018–2019 school year to Pugh-Bassett. They were all disapproved. He cut out a proposed goal for improving attendance, when advised by Pugh-Bassett that attendance became a statutory requirement for superintendents in June 2018, so the issue could no longer be presented as a proposed merit goal. Nicolosi had approved, in September 2018, a proposed attendance goal addressing improved attendance for the Superintendent of Collingswood School District.

Tarchichi revised his initial proposed goals for the 2018–2019 school year and submitted them again to Pugh-Bassett. She disapproved them again. Tarchichi's first proposed goal for the 2018–2019 school year addressed the dual credit program improvement for college prep and honors students with Rowan University and other county colleges. The second proposed goal addressed the development and expansion of the CTE programs, in HVAC and nursing. The third proposed merit goal dealt with improving SAT preparation and scores. The fourth proposed goal was to create another CTE program specifically for EMTs. The fifth proposed goal was to create a culture and climate club, focusing on reading books on current trending global topics and bringing in members of the community and community stakeholders to focus on the global culture and climate.

Tarchichi sought to have another ECS review his proposed goals for the 2018–2019 school year. He was directed to submit his proposed goals to Nicolosi as of December 18, 2018. He did so on December 19, 2018. There was back and forth communication between Nicolosi and Tarchichi, with Nicolosi providing her feedback and suggested modifications to Tarchichi's proposed goals, including her request to combine three goals into one merit goal. Tarchichi again submitted his five proposed goals as of January 2, 2019, to Nicolosi. He refused to do any further revisions. Nicolosi's failure to provide approval was deemed to be de facto disapproval of Tarchichi's proposed merit goals for 2018–2019, by order of this tribunal, entered on November 10, 2020. Nicolosi testified that Tarchichi's goals as presented could have been approval, but with additional documentation and information to be specified in the goals as evidence of completion.

Voluminous documentation demonstrated multiple instances of other superintendents being approved to complete proposed merit goals, similar to goals proposed by Tarchichi which were not approved. For example, in 2015–2016, Pugh-Bassett approved Tarchichi to demonstrate a three percent increase in proficiency for test taking, yet his goal proposing an improvement of five to ten percent for the SAT scores was disapproved. In 2014, another Interim ECS approved the Collingswood Superintendent's merit goal to improve PSAT preparation and scoring.

In 2015, Pugh-Bassett approved the Barrington School District's Superintendent's proposed merit goal dealing with educational trends and involving community stakeholders, like Tarchichi's 2018–2019 proposed fifth goal for the culture and climate club. In 2018, the Barrington Superintendent was approved to complete a merit goal addressing the formation of a culture club.

In 2014–2015, the Winslow School District's Superintendent was approved for a merit goal addressing the creation and expansion of the STEM program, which Tarchichi analogized to his proposed second goal in 2018–2019 to expand CTE programs in nursing and HVAC, and his fourth proposed goal in 2018–2019, to create and implement a CTE program for EMTs. In 2017, Pugh-Bassett approved the Winslow School District's Superintendent's merit goal addressing the creation of new programming, which is similar to Tarchichi's proposal for creating the EMT program. In 2018–2019, Nicolosi approved the expansion of the pre-school program as a merit goal for the Collingswood Superintendent, akin to Tarchichi's proposal to expand the CTE programs in 2018–2019, and his merit goal for dual credit program development and expansion for college prep and honors students with Rowan University and county colleges. In 2018, Pugh-Bassett approved the Black Horse Pike Regional Superintendent's proposed merit goal to grow a program for increasing participation in trades, like Tarchichi's proposed goal to create the EMT program.

In 2014, Nicolosi approved a goal by the Collingswood Superintendent, regarding PSAT preparation and scoring, like Tarchichi's proposed goal regarding SAT preparation and scoring improvement.

In 2014, Nicolosi approved two separate goals for the Oldmans Township Superintendent, where both goals addressed the same improvements to be achieved, except one goal was for grades three through five, while the other goal was for grades six through eight, without requiring the goals to be combined into one goal and tiered. Nicolosi confirmed that in 2016, she approved goals for the Kingsway Superintendent which in retrospect, she should have required to be tiered, due to their similarity.

LEGAL ANALYSIS AND CONCLUSIONS

The New Jersey Statutes and New Jersey Administrative Code governing education in the state provide for the appointment of an Executive County Superintendent (ECS). N.J.S.A. 18A:7, et seq; N.J.A.C. 6A:23A, et seq. The statutes and regulations outline the general powers and duties of an ECS. One such duty is that an ECS shall review and approve contracts for superintendents of school districts within their county. N.J.A.C. 6A:23A-3.18(a); N.J.S.A. 18A:7-8j and N.J.S.A. 18A:7-8.1. The ECS's review and approval of a superintendent's contract shall be consistent with several standards, as enumerated in the regulation. N.J.A.C. 6A:23A-3.18(e).

A superintendent of a school district can craft proposed merit bonus goals. A merit goal is a project or program, besides the general duties and responsibilities of the superintendent, which if completed, entitles the superintendent to additional compensation based upon a percentage of their contract. The superintendent's proposed merit goals are to be reviewed and approved by their BOE and ECS. The ECS is also tasked with reviewing and approving for payment merit goals the BOE seeks to compensate the superintendent when the goal has been completed.

There is one regulation in the administrative code pertaining to merit bonus goals. That regulation provides that an ECS's review and approval of the superintendent's contract shall be consistent with standards, including specifically the standard as follows:

> 11. No provision for a merit bonus shall be made except where payment is contingent upon achievement of quantitative merit criterion and/or qualitative merit criterion:
>
> i. A contract may include no more than three quantitative merit criteria and/or two qualitative merit criteria per contract year.
>
> ii. The executive county superintendent shall approve or disapprove the selection of quantitative merit and/or qualitative merit criteria and the data that forms the basis of measuring the achievement of quantitative merit and/or qualitative merit criteria.

iii. A contract may provide for merit bonuses in an amount not exceeding 3.33 percent of annual salary for each quantitative merit criterion achieved and 2.5 percent of annual salary for each qualitative merit criterion achieved. Any such merit bonus shall be considered "extra compensation" for purposes of N.J.A.C. 17:3-4.1 and shall not be cumulative.

iv. The district board of education shall submit to the executive county superintendent a resolution certifying that a quantitative merit criterion or a qualitative merit criterion has been satisfied and shall await confirmation of the satisfaction of that criterion from the executive county superintendent prior to payment of any merit bonus.

N.J.A.C. 6A:23A-3.18(e)11; See, N.J.S.A. 18A:7-8.1(i).

When there is a controversy or dispute arising under school law in New Jersey, a determination shall be rendered by the Commissioner of Education. N.J.A.C. 6A:3-1.14(a). The Commissioner may transmit the controversy to the OAL for a hearing to be conducted, and a written decision to issue by an Administrative Law Judge (ALJ). N.J.A.C. 6A:3-1.11. If the appeal is from a decision of the State Board of Examiners or the School Ethics Commission, it shall be determined whether the decision was supported by "sufficient credible evidence in the record" and the decision shall not be disturbed unless it has been demonstrated that the Board or Ethics Commission "acted in a manner that was arbitrary and capricious or contrary to law." N.J.A.C. 6A:4-4.1(a). Likewise, here a determination shall be made whether the decisions made by Pugh-Bassett and Nicolosi have been supported by sufficient credible evidence in the record, unless it has been demonstrated that they acted in an arbitrary and capricious manner or contrary to the law. "Arbitrary and capricious action of administrative bodies means willful and unreasoning action, without consideration and in disregard of circumstances." Bayshore Sewerage Co. v. Department of Environmental Protection, 122 N.J. Super. 184, 199, citations omitted. If there is "room for two opinions, action is not arbitrary or capricious when exercised honestly and upon due consideration, even though it may be believed that an erroneous conclusion has been reached." Id.

The dispute at issue between Pennsauken BOE and Pugh-Bassett is whether

Pugh-Bassett arbitrarily and capriciously denied payment by the Pennsauken BOE to Tarchichi for merit goal A for the 2017–2018 school year, and whether she arbitrarily and capriciously failed to approve Tarchichi's proposed goal E for the 2017–2018 school year. The Pennsauken BOE further asserts that both Pugh-Bassett and Nicolosi arbitrarily and capriciously denied approval of Tarchichi's proposed 2018–2019 merit goals.

There are no other regulations, statutes, or guidelines promulgated for superintendents or ECSs regarding the procedures to be followed to draft merit goals; the process for approval of proposed goals or approval for payment of completed goals; or any time guidelines for the process. It is thus a subjective process, for which each individual ECS has developed their own style in handling the review and approval of proposed goals, and the review and approval of alleged completed goals to authorize payment to be made by a BOE to its superintendent.

2017–2018 Merit Bonus Goals

1. *Goal A focusing on ELL ninth and tenth grade students interested in science to improve their writing and vocabulary skills, not approved for payment.*

Proposed goal A for the 2017–2018 school year was for Tarchichi to create additional writing instruction to assist with the vocabulary and grammar growth with Pennsauken's ELL ninth and tenth grade students in the field of science. Evidence of completion of the goal would be documentation of pre- and post-tests showing a thirty percent growth in the ninth and tenth grade students' scores, measured from the original pre-test to the final post-test. (R-3 at 2464.)

This goal was one of the four goals approved by Pugh-Bassett. Tarchichi worked on the approved proposed goals during the school year. He sent documentation to the Pennsauken BOE demonstrating his completion of same, which included documentation that all twenty sampled students from the sub-population of ELL ninth and tenth grade students improved their pre- and post-test scores. The Pennsauken BOE approved payment to be made to Tarchichi for completion of all four merit goals for the 2017–2018 school year. Pugh-Bassett approved payment for three of the goals, but denied payment

for goal A. The Pennsauken BOE paid Tarchichi for the three approved goals. The Pennsauken BOE seeks approval to pay Tarchichi for goal A.

Pugh-Bassett crafted her own style of review and approval for payment of goals, based upon her prior employment with the DOE and her insider knowledge she gained for "navigation" through the DOE system, and through collegial conversations and roundtable meetings with other ECSs. She recognizes that her opinion could differ from another county's ECS decision, and their ultimate conclusions could be completely opposite.

Pugh-Bassett denied approval of payment for this goal, noting that the submission from Tarchichi to demonstrate achievement of the goal "*did* not satisfy the requirements for approval and therefore *will not* be approved for payment[.]" (J-1 at 0017, italics original.) She expressed her displeasure that Tarchichi only provided information for twenty students in the ninth and tenth grade ELL population, rather than all approximately forty students in that population. She stated, during cross-examination, that she expected all ninth and tenth grade students to be served under the goal. She was not satisfied with the documentation provided by Tarchichi asserting that just the test scores by students were not enough, and that the actual tests and students' answers should have been submitted.

Pugh-Bassett approved the goal, which did not have language that all forty of the students of the ELL ninth and tenth grade population were to be sampled. The goal specifically targeted that ELL population and never referenced that all ninth and tenth grade students were to be served. The approved goal targeted the subset population at Pennsauken, just as multiple other districts' superintendents had in their approved goals. The asserted documentation Pugh-Bassett deemed as lacking was not specified in the approved goal to be submitted as proof of completion of the goal. The Pennsauken BOE deemed the documentation and information provided by Tarchichi regarding completion of this goal to be satisfactory, and sought approval from Pugh-Bassett for the BOE to pay Tarchichi for completion of this goal.

I **CONCLUDE** the documentation provided by Tarchichi that the goal was

completed was sufficient and in line with the initial approved goal's language. I **CONCLUDE** the evidence preponderates that the documentation appropriately demonstrated that the approved merit goal was completed, and thus payment should have been approved. I **CONCLUDE** that the evidence preponderates, under a totality of the circumstances, that denial of payment by ECS Pugh-Bassett for goal A for the 2017–2018 school year was unreasonable and done in an arbitrary and capricious manner. I **CONCLUDE** that the Pennsauken BOE's request for approval to tender payment to Tarchichi for goal A from the 2017–2018 school year is **GRANTED**.

2. *Proposed goal E never approved by Pugh-Bassett as a proposed goal for Tarchichi to work on for the 2017–2018 school year.*

Goal E was the fifth proposed goal Tarchichi submitted to Pugh-Bassett for her approval for the 2017–2018 school year. (R-3 at 2471.) She did not approve proposed goal E regarding the training academy Tarchichi sought to establish for new administrators. Pugh-Bassett denied approval of the proposed goal, contending it was not an approvable goal because it was a proposal for training, which Tarchichi was already tasked with overseeing, pursuant to N.J.A.C. 6A:9C-3.2. She asserted that the regulation regarding professional development required school leaders, whom she interpreted as being the superintendent, to have professional development and training programs for the teachers and staff.

Tarchichi demonstrated that other superintendents had similar merit goals approved. Tarchichi's goal went beyond standard training, and provided for programming of monthly sessions for the new administrators. Tarchichi subsequently submitted the same goal, without specifying the number of academy sessions, for the 2019–2020 school year, which was approved by ECS DeStefano.

Pugh-Bassett rendered her determination based upon her interpretation of the regulation regarding professional development, and her opinion as to what a merit goal was supposed to be targeting, being something separate and apart from the regular duties and responsibilities of a superintendent. There is no guidance promulgated by the DOE, nor codified anywhere, to support Pugh-Bassett's opinions. The applicable

regulations do not specify that the superintendent cannot propose a merit goal that is deemed within the superintendent's umbrella of responsibility. The superintendent is the overseer of a school district. All proposed goals are going to have some type of connection to such oversight.

I **CONCLUDE** that the evidence preponderates that the academy for new administrators, proposed by Tarchichi, was an approvable goal, and should have been approved for him to attempt to complete during the 2017–2018 school year. I thus **CONCLUDE** that Pugh-Basset's failure to approve this goal was unreasonable, and done in an arbitrary and capricious manner. I thus **CONCLUDE** that the goal should have been approved.

Given that Tarchichi has subsequently proposed a substantially similar goal for 2019–2020, which was approved by another ECS, the issue is rendered moot in terms of granting the requested relief by the Pennsauken BOE. However, having concluded that Pugh-Basset's failure to approve the proposed goal was arbitrary and capricious, the Pennsauken BOE is entitled to relief, such as compensation for their fees and costs to litigate this matter. I thus **CONCLUDE** that, to the extent such relief is permissible by law, the Pennsauken BOE's request to be compensated for their fees and costs incurred by the DOE is **GRANTED**.

2018–2019 Merit Bonus Goals

There is no guidance in the regulations, statutes, or anything promulgated by the DOE as to how merit goals should be drafted or structured, reviewed and approved, or disapproved. The review process is a subjective one, with each ECS left to their method of developing a style for procedural and substantive review, and for approval of proposed merit goals.

Logically, it makes sense that proposed merit goals should be drafted and completed in August or September, at the start of the school year, if the purpose is for the superintendent to be working on goals during the academic school year. That was done by Tarchichi, who submitted his proposed goals to Pugh-Bassett. Unique here was that

he was wrangling with whether a goal from the previous year would be approved for payment by Pugh-Bassett. This set up an adversarial position between them, rather than being the so-called collaborative and cooperative process that was to occur. It was not until December 18, 2018, that the DOE finally confirmed that Nicolosi would be assigned to review Tarchichi's goals.

Nicolosi began the process fresh, not reviewing the prior suggested revisions by Pugh-Bassett. She presented completely overhauled revisions to Tarchichi's goals, combining three proposed goals into one, and drilling down on the remaining two goals as to their purpose, and as to the documentation to demonstrate completion.

Nicolosi cannot be faulted for her approach, given that there are no guidelines in the process for timing and review methods. Yet, Tarchichi had already been engaged in the "back and forth" negotiations for several months with Pugh-Bassett. Tarchichi forwarded his proposed goals to her one day after she was assigned to take over the review from Pugh-Bassett. Nicolosi's initial response was unreasonable, given the time that transpired for Tarchichi already into the 2018–2019 school year, to combine three proposed goals into one in multiple tiers, and creating more issues and responsibilities within the other two goals.

Nicolosi and Tarchichi engaged in back and forth communications, but in January 2019, when Nicolosi received Tarchichi's communication that he was not going to do any further revisions, she considered the process to be at a point that she could not reach an agreement with him. However, she stated during her testimony that his goals as presented could have been approvable goals, but they needed more documentation to demonstrate completion. That position was not communicated to Tarchichi. She never responded to confirm that his proposed five goals could be approved, and just the issue of documentation had to be resolved. She was unwavering on her insistence that Tarchichi videotape himself for one of his goals, rather than negotiating another method of documented proof of completion.

A review of the mountain of documentation regarding other proposed and approved merit goals demonstrates that although school districts have social, cultural,

racial, and economic variants, all of the merit goals focus on similar topics and programs such as improving social, cultural, and racial harmony; improving student and staff performance; creating and improving diverse learning programs; and encouraging neglected or minority subsets of student populations to participate in same. Thus, such information was persuasive and supportive to demonstrate that ECSs have approved similarly proposed goals. I thus **CONCLUDE** that the evidence preponderates that the merit goals for the 2018–2019 school year should have been approved.

Nicolosi was assigned Tarchichi's goals in December 2018, and she acted quickly to review the goals as presented to her. She cannot be faulted for taking her fresh start on the review of his goals, since there is no guidance provided by the DOE or in the regulations or statutes as to the method of review. Where the process broke down was her failure to reply to Tarchichi's refusal to combine his goals as she suggested, and she failed to pivot and address each goal separately as he proposed, with her suggestions. Nicolosi indicated in her testimony that his goals could have been approvable, but would have needed more documentation.

The record supports that although she viewed the goals as being similar, there are instances where each goal could have been approved as a separate goal rather than tiering them into one goal. Likewise, her failure to bend in suggesting other methods of demonstration of goal completion stopped the collaborative process of getting the goals to an approvable manner as she would have liked to see it. I **CONCLUDE** that the evidence preponderates that it was unreasonable, and thus arbitrary and capricious for Nicolosi to not take any further action to have the goals approved, which resulted in de facto disapproval of Tarchichi's 2018–2019 merit goals. I **CONCLUDE** that if Tarchichi worked on the proposed goals for the 2018–2019 school year, he shall be afforded the opportunity to demonstrate completion of same to the Pennsauken BOE for approval of payment, and to have an ECS review the information and determine if payment may be approved.

ORDER

It is **ORDERED** that:

1. The Pennsauken BOE's request for approval to tender payment to Tarchichi for completion of 2017–2018 school year merit goal A is **GRANTED**.

2. The Pennsauken BOE's request for a determination that Pugh-Bassett acted arbitrarily and capriciously in failing to approve the 2017–2018 proposed merit goal E regarding a training academy for new administrators is **GRANTED**.

3. The Pennsauken BOE's request for reimbursement of their fees and costs is **GRANTED**, as permitted by law, to be paid by the DOE.

4. The Pennsauken BOE's request for a determination that Nicolosi acted arbitrarily and capriciously by her de facto disapproval of Tarchichi's proposed 2018–2019 merit goals is **GRANTED**.

5. If Tarchichi worked on the proposed 2018–2019 goals and seeks to be approved for payment of same, he shall provide documentation of completion of the goals to the Pennsauken BOE for approval and, if approved for payment, the Pennsauken BOE shall seek approval from an ECS to review and confirm if payment may be made.

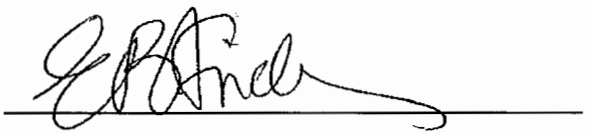
I hereby **FILE** this initial decision with the **COMMISSIONER OF THE DEPARTMENT OF EDUCATION** for consideration.

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

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

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

October 17, 2022
DATE



ELAINE B. FRICK, ALJ

Date Received at Agency: _____

Date Mailed to Parties: _____

EBF/jns

APPENDIX

WITNESSES

For petitioner

Ronnie Tarchichi

Nicholas Perry

For respondent

Lovell Pugh-Bassett

Margaret "Peggy" Nicolosi

EXHIBITS

Joint

J-1 Verified petition of appeal received December 18, 2019, by DOE
Ex A: Letter of January 4, 2018, by Pugh-Bassett to Pennsauken BOE president
Ex B: September 18, 2018, email from Pugh-Bassett to Tarchichi
Ex C: Letter of October 12, 2018, by Pugh-Bassett to Pennsauken BOE president

J-2 February 14, 2019, cover letter by counsel with Verified petition of appeal received by DOE February 15, 2019

J-3 Pre-marked, not utilized

J-4 Request for Production of Documents by petitioner propounded upon respondents

J-5 Email response May 12, 2020, regarding document request #3

J-6 Pre-marked, not utilized

J-7 DOE response to discovery request

J-8 Pre-marked, not utilized

J-9 BOE certification of resolution from BOE meeting July 17, 2018, approving submission of completed merit goals of Tarchichi for the 2017–2018 school year

J-10 through J-16 Pre-marked, not utilized

Petitioner

P-17 Emails regarding 2018/2019 school year merit goals

P-18 January 3, 2020, letter from Interim ECS Judith DeStefano, approving 2019/2020 proposed merit goals by Tarchichi

P-19 Multiple letters from DOE document production regarding merit goals

P-20 Not admitted[2]

P-21 Not admitted

P-22 Pre-marked, not used

P-23 Not admitted

Respondent

R-1 First draft of 2017/2018 merit goals submitted to Dr. Pugh-Bassett

R-2 Email by Pugh-Bassett to Tarchichi, September 25, 2017

R-3 2017/2018 revised merit goals submitted to Dr. Pugh-Bassett

R-4 Pre-marked, not entered, duplicative of J-1 Exhibit A

R-5 Letter by Pugh-Bassett, July 16, 2018

R-6 August 27, 2018, email

R-7 Pre-marked, not entered, duplicative of J-1 Exhibit B

R-8 September 18, 2018, email

R-9 Pre-marked, not entered, duplicative of J-1 Exhibit C

R-10 Email dated November 7, 2018, by Pugh-Bassett

R-11 Pre-marked, not entered, duplicative of J-7 at pages 432–436

R-12 Pre-marked, not entered, duplicative of J-7 at pages 445–446

R-13 Email dated December 18, 2018, by Bloom

R-14 Merit goals 2018-2019 school year from Tarchichi to Nicolosi

R-15 Nicolosi red color edits to proposed merit goals 2018–2019

[2] Judicial notice taken that a complaint was filed on September 2, 2020, captioned as Dr. Ronnie Tarchichi versus Record Custodian Jeannette Larkins, ECS Lovell Pugh-Bassett, and the New Jersey Department of Education, Superior Court of New Jersey, Mercer County, docket number MER-L-001551-20. The matter was resolved by a settlement agreement executed in December 2020.

8-23
OAL Dkt. No. EDU 05509-20
Agency Dkt. No. 34-2/20

New Jersey Commissioner of Education

Final Decision

J.D., on behalf of minor child, I.C.,

Petitioner,

v.

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

Respondent.

The record of this matter, the proposed Settlement Agreement and General Release (Agreement), and the Initial Decision issued by the Office of Administrative Law pursuant to *N.J.A.C.* 1:1-19.1, have been reviewed. Upon such review, the Commissioner approves the settlement and adopts the Initial Decision as the final decision in this matter. In doing so, however, the Commissioner notes, with respect to paragraph 17 of the Agreement, that the Board must comply with the requirements of New Jersey's Open Public Records Act, *N.J.S.A.* 47:1A-1 *et seq.* in regard to information concerning this matter, notwithstanding any agreement the parties may have between themselves to keep the terms of their settlement confidential.

Accordingly, this matter is hereby dismissed, subject to compliance with the terms of the settlement consistent with applicable public records law.

IT IS SO ORDERED.

Angelica Allen-McMillan, Ed.D.

ACTING COMMISSIONER OF EDUCATION

Date of Decision: January 12, 2023
Date of Mailing: January 13, 2023

State of New Jersey

OFFICE OF ADMINISTRATIVE LAW

INITIAL DECISION

SETTLEMENT

OAL DKT. NO. EDU 05509-20

AGENCY DKT. NO. 34-2/20

J.D. ON BEHALF OF
MINOR CHILD I.C.,

Petitioner,

v.

BOARD OF EDUCATION OF THE
BOROUGH OF HIGHLAND PARK,
MIDDLESEX COUNTY,

Respondent.

David R. Giles, Esq. for petitioner (Law Offices of David R. Giles, attorneys)

Caitlin Lundquist, Esq., for respondent (The Busch Law Group, attorneys)

Record Closed: December 14, 2022 Decided: December 15, 2022

BEFORE **JEFFREY N. RABIN**, ALJ:

This matter was transmitted to the Office of Administrative Law (OAL) on May 17, 2021, for determination as a contested case, pursuant to N.J.S.A. 52:14B-1 to -15 and N.J.S.A. 52:14F-1 to -13.

On December 14, 2022, prior to the scheduled hearing date of January 12, 2023, the parties filed a fully executed Settlement Agreement and Board Resolution in this matter. The Agreement and Resolution are attached and fully incorporated herein.

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

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

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

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

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

December 15, 2022
DATE

JEFFREY N. RABIN, ALJ

Date Received at Agency: 12-15-22

Date Sent to Parties: 12-19-22

Attachment

THE BUSCH LAW GROUP LLC
450 Main Street
Metuchen, New Jersey 08840
P: (732) 243-9588; F: (732) 243-9590
Attorneys for Respondent Highland Park
Board of Education

J.D. o/b/o I.C.,

Petitioner,

v.

Highland Park Board of Education,

Respondent.

STATE OF NEW JERSEY
OFFICE OF ADMINISTRATIVE LAW
OAL DOCKET NO.: EDU 05509-2020S /
EDU 04257-2021 S
AGENCY REF. NO.: 34-2/20

SETTLEMENT AGREEMENT AND GENERAL RELEASE

WHEREAS, I.C. is a student residing within the Highland Park School District (hereinafter referred to as "the District"), a public school district operated by the Highland Park Board of Education (hereinafter referred to as "the Board") and J.D. (hereinafter referred to as "Petitioner") and M.C. (hereinafter collectively referred to as "the Parents") are the parents of I.C.; and

WHEREAS, Petitioner filed a Petition of Appeal (hereinafter referred to as "the Petition") with the Commissioner of Education on or about February 3, 2020, for purposes of appealing the Board's determination regarding a harassment, intimidation, and bullying ("HIB") matter involving I.C., and the Petition was assigned Agency Reference Number 34-2/20; and

WHEREAS, the Commissioner of Education transmitted the Petition to the New Jersey Office of Administrative Law ("OAL") for a hearing, and the Petition was assigned OAL Docket Number EDU 04257-2021 S; and

WHEREAS, during the pendency of the Petition following transmittal to the OAL, I.C. was identified as a student with a disability pursuant to the Individuals with Disabilities Education Act ("IDEA"), and received an initial evaluation by the Board's Child Study Team; and

WHEREAS, as result of that initial evaluation by the Board's Child Study Team, I.C. was found eligible for special education and related services and was offered an initial Individual Education Program ("IEP") by the Board, which was not implemented for I.C. due to the absence of written parental consent to the initial IEP; and

WHEREAS, during the pendency of the Petition following transmittal to the OAL, Petitioner unilaterally placed I.C. at a private school and requested that the Board provide reimbursement for the tuition costs associated with that unilateral placement; and

WHEREAS, the Board maintains that it has at all times offered a free, appropriate public education to I.C. and provided appropriate evaluations of I.C., as required by the Individuals with Disabilities Education Act ("IDEA") and its implementing regulations, as applicable, and fully complied with any and all obligations, requirements, and procedural timelines pursuant to the New Jersey Anti-Bullying Bill of Rights Act and its implementing regulations, as applicable; and

WHEREAS, the Board and the Parents are desirous of resolving the issues and have reached an amicable resolution thereby avoiding the time and expense associated with further litigation.

NOW, THEREFORE, in consideration of the mutual promises and covenants set forth herein, the undersigned agree as follows:

1. Subject to the terms of this Agreement, the Board shall reimburse the Parents on a monthly basis for the non-sectarian tuition costs resulting from I.C.'s unilateral placement at Metuchen Christian Academy (hereinafter referred to as "MCA") as follows:

(a) Six Thousand Seven Hundred Thirty-Nine Dollars ($6,739.00) with respect to the remainder of the 2022-2023 school year;

(b) Eight Thousand Four Hundred Twenty-Four Dollars ($8,424.00) with respect to the 2023-2024 school year;

(c) Eight Thousand Four Hundred Twenty-Four Dollars ($8,424.00) with respect to the 2024-2025 school year; and

(d) Eight Thousand Four Hundred Twenty-Four Dollars ($8,424.00) with respect to the 2025-2026 school year.

2. All payments by the Board pursuant to this Agreement are contingent on receipt of the proof of the Parents' payments to or proof of obligation to pay non-sectarian tuition costs to MCA, an invoice reflecting the quarterly payment due, and proof of attendance for the relevant period billed. Such documentation may be submitted on a monthly basis and shall be submitted by e-mail to the attention of the District's Superintendent of Schools. Reimbursement to the parents shall be made within thirty (30) calendar days of the Board's receipt of documentation described above.

3. It is expressly agreed and understood that the Board's financial and legal responsibility to provide or offer educational programming and services to I.C. from the date on which this Agreement is executed by the Parents through August 31, 2026 shall be limited to the reimbursement payments explicitly described in this Agreement, unless the Parents re-register I.C. in the District in writing. The Board shall not be responsible for I.C.'s related services, Child Study or IEP team services, or any other education, transportation, services or expenses except for payments explicitly required pursuant to this Agreement, up to and including August 31, 2026.

4. If at any point during the period of time covered by this Agreement I.C. is not offered placement by MCA, or the Parents choose to remove I.C. from MCA for any reason, the Parents shall immediately notify the District's Director of Special Services in writing of such event and may request from the Board an appropriate program and placement for I.C. Within thirty (30) days' receipt of such written notice, the Board's Child Study Team shall convene an IEP meeting for the purpose of developing an appropriate program and placement for I.C. If there is any dispute between the Parties regarding such placement, the IEP proposed by the Board shall constitute I.C.'s placement for the purposes of the stay-put clause of the IDEA during the pendency of any due process petition or mediation, unless the Parties agree in writing or an administrative law judge orders otherwise.

5. In the event that I.C. ceases to attend MCA for any reason, the Board's obligations to issue payments pursuant to this Agreement shall immediately cease and shall not resume unless I.C.'s attendance resumes at MCA. If the Parents reenroll I.C. in the District at any time before August 31, 2026, the Board's obligations to issue payments pursuant to this Agreement shall permanently end.

6. All responsibilities of the Board pursuant to this Agreement shall immediately cease in the event that the Parents establish domicile outside of the Highland Park Public School District.

7. Each party shall be fully responsible for their own fees, costs and expenses incurred to date in all respects. This includes, but shall not be limited to, attorney's fees, expert fees, evaluation costs, transportation costs, and/or any other costs related to this

matter, whether disclosed or undisclosed to the other party, unless specifically set forth above.

8. The terms of this Agreement represent the compromise of disputed claims between the parties. This Agreement shall not be treated as an admission on the part of the Board that it has not offered I.C. an appropriate program and placement at any time, or failed to provide appropriate evaluations to I.C., or failed to meet its obligations with respect to I.C. pursuant to the New Jersey Anti-Bullying Bill of Rights Act, or that either party has failed to act in accordance with any laws, statutes, regulations and/or codes.

9. This Agreement and Release shall be governed by the laws of the State of New Jersey and may not be altered, amended, modified, superseded, canceled or terminated except by an express written agreement duly executed by all of the parties or their attorneys on their behalf, which makes specific reference to this Agreement.

10. Upon its full execution, this Agreement shall be sent to the Office of Administrative Law to be incorporated into a Final Decision and Order approving same.

11. Each party with respect to the other party hereby waives all past, present and potential claims regarding I.C.'s education, program, placement and services at public expense through August 31, 2026, unless I.C.'s attendance at MCA ceases and her parents reenroll her in the District sooner, at which time this waiver would end. It is expressly understood and further agreed that neither party is considered a "prevailing party" for any purposes. It is further expressly understood that this Agreement and Release does not require either party to waive any claim related to the enforcement of this Agreement, including any attorney's fees that may be incurred as part of such enforcement claim(s) as may be allowable by law.

12. It is expressly agreed and understood that in exchange for this consideration provided in this Agreement, the Parents do forever release, acquit and forever discharge the Board and its officers, trustees, agents, servants, employees, successors, heirs, executors, administrators, insurance carriers and attorneys of and from any and all claims, actions, causes of action, demands, rights, damages, costs, loss of service, expenses and compensation whatsoever, which the Parents now have or which may hereafter accrue on account of or in any way growing out of any and all known and unknown, foreseen and unforeseen bodily and personal injuries and property damage and the consequences thereof resulting or to result from the alleged events which form the basis of and/or could have formed the basis of the Petition against the Board and are/could have been alleged to have occurred during the course of I.C.'s enrollment in the District and are/could have been further alleged to have resulted in severe and permanent injuries and damages on the part of the Board, including but not limited to any and all claims of disability, race, gender, sexual, national origin, discrimination and retaliation, as well as any and all tort claims or contract claims or claims for general damages, and any and all claims arising under, made, regarding, or involving: any federal, state or local laws, including the Individuals with Disabilities Education Act ("IDEA") and/or under the common law; violations of any civil rights laws, statutes, codes, rules, and/or ordinances; claims for personal injury, defamation, hostile educational/school environment, wrongful conduct, any and all laws against discrimination including but not limited to the New Jersey Law Against Discrimination ("NJLAD"); the District's policies, practices, contracts, benefits or understandings; any claims arising out of any relationship between or among the Parents, I.C., and the Board predating the effective date of this Release; any and all grievances, or

demands for mediation or arbitration, or claims or demands under the policies and procedures of the District; and any and all claims asserted, or which could have been asserted, in the above-captioned Petition, including any claims against any current or former agents and/or employees of the District.

13. The Parents further agree that neither he/she/they, nor any person, organization, agency, or other entity on their behalf, will file, charge, claim or sue, or cause to be filed, charged, claimed or sued, any other lawsuit, legal proceeding, administrative complaint, action, or claim of any nature with any court or agency (including any action for damages, attorney's fees, injunction, declaratory, monetary, equitable or other relief) against the Board, its agents, servants, employees, successors, heirs, executors, administrators, attorneys and all other persons, firms, corporations, associations, insurance carrier or partnerships, based on any matter, fact or event occurring prior to the effective date of this Release, whether now known or unknown, or involving any continuing effects of any acts or practices which may have arisen or occurred prior to the effective date of this Release, whether now known or unknown.

14. The Board hereby releases and gives up any and all claims and rights it may now have against the Parents, including those of which it is not aware and those not mentioned in this Agreement.

15. The Parents agree, certify, acknowledge, and represent: (a) that they have been and are hereby advised in writing to consult with an attorney of their choice and at their expense, prior to signing this Release; (b) that they have had adequate time and opportunity to review and discuss, and have reviewed and discussed, all of the terms and sections of this Release thoroughly with their attorney; (c) that their attorney has explained

this entire Release to them; and (d) that they and the Board do not waive any rights or claims that may arise after the effective date of this Agreement and Release. The Parents further warrant, represent, and agree that in signing this Agreement and Release, they do so with full knowledge of any and all rights which they may have with respect to the Board and the Petition.

16. The undersigned understand and agree that they fully understand and consent to the terms set forth herein. Specifically, the Parents and the Board have consulted with their respective attorneys regarding the terms of this Agreement and Release, and are satisfied with the legal services that they have received with respect to same. The undersigned further agree and acknowledge that the drafting and negotiation of this Agreement and Release have been participated in by the undersigned and their respective counsel and, for all purposes; this Agreement and Release shall be deemed to have been drafted jointly by each of the parties. No ambiguity shall be resolved against any party based upon authorship.

17. The terms and conditions of this Agreement shall be held in strictest confidence by all parties and shall not be publicized or disclosed in any manner whatsoever, except that: (a) either party may disclose this Agreement in confidence to their attorneys, accountants, auditors, tax preparers; (b) the Board may disclose this Agreement as necessary or required by law and as required by any other mandated/regulatory reporting or disclosure requirements; and (c) the parties may disclose this Agreement insofar as such disclosure many be necessary to enforce its terms or as otherwise required by law such as to explain or enforce same with a government agency or court of law.

18. The parties agree to cooperate fully and execute any and all supplementary documents and to take all additional actions which may be necessary or appropriate to obtain the full force and effect of the basic terms and interest of this Agreement and Release.

19. The Parents' signatures below represent their agreement to the terms stated herein on behalf of themselves and on behalf of I.C. It is expressly understood by the Parents that the Board's administration will recommend this Agreement and Release be approved by the Board, but that the Agreement and Release is only binding upon the Board as a result of the Board's formal action to approve this Agreement and Release at a public meeting. The Parties further understand that the Board's representative named below has been duly authorized to execute this Agreement on the Board's behalf. This Agreement and Release may be signed by the parties in counterparts on separate copies of the Agreement and Release, and all signature pages shall be incorporated into the Agreement and Release as if all the signatures are affixed on one (1) page.

IN WITNESS WHEREOF, the parties have hereunto set their hands and seals the date and year set forth below.

WITNESS:

DATED: 11/28/22

J.D. o/b/o I.C.:

DATED: Nov 17, 2022

HIGHLAND PARK BOARD OF EDUCATION

DATED: 11/23/22

M.C. o/b/o I.C.:

DATED: Nov 14, 2022

HIGHLAND PARK BOARD OF EDUCATION
435 Mansfield Street
Highland Park NJ 08904

THIS RESOLUTION WAS APPROVED AT THE HYBRID REGULAR PUBLIC MEETING HELD ON MONDAY, NOVEMBER 21, 2022, IN THE HIGHLAND PARK SCHOOL DISTRICT:

APPROVAL OF THE SETTLEMENT AGREEMENT, OAL DOCKET NO.: EDU 04257-2021, AGENCY REF. NO.: 34-2/20 PER THE SCHOOL BOARD ATTORNEY'S RECOMMENDATION

I move that the Board of Education accept the recommendation of the superintendent to approve the Settlement Agreement, OAL Docket No.: EDU 04257-2021, Agency Ref. No.: 34-2/20 per the School Board Attorney's recommendation.

Moved: Mark Krieger Seconded: Allison Casal-Dunn Vote: Yes – 8 No -0
Abstain – 0 Absent – Michelle McFadden-DiNicola

It is hereby certified that the foregoing is a true and correct copy of a resolution adopted by the Highland Park Board of Education at a meeting of the said Board on November 21, 2022, Hybrid Regular Public Meeting.

Linda A. Hoefele
Business Administrator/Board Secretary

11/23/22
Date

9-23
OAL Dkt. No. EDU 09347-20
Agency Dkt. No. 180-8/20

New Jersey Commissioner of Education

Final Decision

S.D., on behalf of minor child, A.D.-W.,

Petitioner,

v.

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

Respondent.

The record of this matter, the proposed Settlement Agreement and General Release (Agreement), and the Initial Decision issued by the Office of Administrative Law pursuant to *N.J.A.C.* 1:1-19.1, have been reviewed. Upon such review, the Commissioner approves the settlement and adopts the Initial Decision as the final decision in this matter. In doing so, however, the Commissioner notes that the Agreement references actions that preceded the consideration of the settlement by the Commissioner of Education. The parties are reminded that a settlement of litigation before the Commissioner is not binding until the Commissioner approves the settlement.

In light of the foregoing, the Commissioner adopts the Initial Decision as the final decision in this matter, provided that the parties have already implemented the settlement terms or have agreed upon mutually satisfactory alternate dates for the effectuation of the terms of the Agreement. Assuming same, the matter is hereby dismissed, subject to compliance with the terms of the settlement.

IT IS SO ORDERED.

ACTING COMMISSIONER OF EDUCATION

Date of Decision: January 12, 2023
Date of Mailing: January 13, 2023

State of New Jersey
OFFICE OF ADMINISTRATIVE LAW

INITIAL DECISION
APPROVING SETTLEMENT
OAL DKT. NO. EDU 09347-20
AGENCY DKT. NO. 180-8/20

S.D. ON BEHALF A.D.-W.,

Petitioner,

v.

BOARD OF EDUCATION OF THE TOWNSHIP OF LUMBERTON, BURLINGTON COUNTY,

Respondent.

S.D., pro se, for petitioner

Emily E. Strawbridge, Esq. for respondent (Parker McCay, attorneys)

Record Closed: November 21, 2022 Decided: November 28, 2022

BEFORE **CATHERINE A. TUOHY**, ALJ:

This matter having been transmitted by the Department of Education, Office of Controversies and Disputes to the Office of Administrative Law (OAL), and filed as a contested case on September 16, 2020, arises from a dispute between petitioner and respondent arising under the school law (N.J.S.A. 18:38-1; N.J.A.C. 6A:3-8.1; and N.J.A.C. 6A:22). The parties have voluntarily agreed to resolve all disputed matters and have entered into a settlement as set forth in the attached settlement agreement.

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

1. The parties have voluntarily agreed to the settlement as evidenced by their signatures or their representatives' signatures on the attached settlement agreement and Board resolution received via email on November 21, 2022.

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

Therefore, I **ORDER** that the parties comply with the settlement terms and that these proceedings be concluded.

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

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

November 28, 2022
DATE

CATHERINE A. TUOHY, ALJ

Date Received at Agency: 12/1/2022

Date Sent to Parties: 12/2/2022

CAT/gd

APPENDIX

LIST OF EXHIBITS

Jointly Submitted

J-1 Settlement agreement signed by S.D., on behalf of A.D.-W., on October 14, 2022, and by the Board representatives on November 18, 2022, and Board resolution approving the settlement agreement at its meeting of November 17, 2022, received by the OAL on November 21, 2022

PARKER McCAY

Parker McCay P.A.
9000 Midlantic Drive, Suite 300
P.O. Box 5054
Mount Laurel, New Jersey 08054-1539

P: 856.596.8900
F: 856.596.9631
www.parkermccay.com

Emily E. Strawbridge, Esquire
P: 856-985-4005
F: 856-810-5852
estrawbridge@parkermccay.com

November 21, 2022

VIA EMAIL (*Grendaly.Dones@oal.nj.gov*)
The Honorable Catharine A. Tuohy, A.L.J.
Office of Administrative Law
1601 Atlantic Ave., Suite 601
Atlantic City, New Jersey 08041

Re: S.D. o.b.o. A.D.-W. v. Twp. Of Lumberton BOE
OAL Docket No.: EDU 09347-2020S/ Agency Ref. No.: 180-8/20

Dear Judge Tuohy:

This office represents the Respondent, Lumberton Township Board of Education, in the above-referenced matter. Attached please find the fully executed settlement agreement and Board Resolution approving same.

It is respectfully requested that the Settlement Agreement be entered as final order in this matter.

Thank you for your attention to this matter.

Respectfully submitted,

/s/ Emily E. Strawbridge
Emily E. Strawbridge

cc: S.D. (*via email & regular mail*)

4888-6276-4607, v. 1

Law Offices
PARKER McCAY P.A.
9000 Midlantic Drive, Suite 300
P.O. Box 5054
Mount Laurel, New Jersey 08054
(856) 596-8900
Attorneys for Respondent-Cross Petitioner, Lumberton Township Board of Education

S.D. o/b/o minor child A.D.-W. **Petitioners,** vs. **LUMBERTON TOWNSHIP BOARD OF EDUCATION** **Respondent-Cross Petitioner.**	**BEFORE THE COMMISSIONER OF EDUCATION** **STATE OF NEW JERSEY** **OAL DOCKET NO.: EDU 09347-2020S** **AGENCY REF. NO.: 180-8/20** **CIVIL ACTION** **SETTLEMENT AGREEMENT**

This Settlement Agreement and General Release (the "Agreement") is entered into on this 14 day of October, 2022 by and between S.D. o/b/o A.D.-W., and the Lumberton Township Board of Education (hereinafter "District"), with its mailing office located at 33 Municipal Drive, Lumberton, NJ , 08048 ("S.D. o/b/o A.D.-W. and District" hereinafter collectively, "the Parties").

WHEREAS, A.D.-W. is a student currently enrolled in the Lumberton Township Public School District;

WHEREAS, A.D.-W. was determined to be residing outside of the Lumberton Township School District;

WHEREAS, a dispute arose as to A.D.-W.'s current domicile and his enrollment as a student in the Lumberton Township Public School District; and

WHEREAS, S.D. filed a Petition of Appeal with the Commissioner of Education challenging the removal of A.D.-W. from the District; and,

WHEREAS, the District filed an Answer and Counterclaim seeking payment of tuition; and,

WHEREAS, the matter was transmitted to the Office of Administrative Law for a Hearing; and,

WHEREAS, the Parties in conducted negotiations and have reached a resolution of the claims contained in the Petition of Appeal and the Answer and Counterclaim filed on behalf of the Parties;

The Parties hereby agree as follows:

1. The District will waive its claims to any entitlement to payment of tuition by S.D. o/b/o A.D.-W. for A.D.-W.'s attendance at the Lumberton Township School District through the date of this agreement.

2. In consideration of the above, S.D. agrees to make payment to the District in the amount of $4,000. S.D. agrees to pay the full amount of $4,000 to the District in accordance with the following payment schedule:

   a. S.D. agrees to begin making payments of $50.00 on December 1, 2022, and continue to make payments of $50.00 on the first of each month until December 1, 2023.

b. S.D. agrees to make payment in the amount of $150.00 on January 1, 2024, and continue to make payments of $150.00 on the first of each month until the total amount of $4,000.00 has been paid in full (approximately January 1, 2026).

c. Payment shall be made in cash, certified check, cashier's check, or money order only.

d. Payment shall be directed to the Lumberton Board of Education, 33 Municipal Dr., Lumberton, NJ 08048.

3. Should S.D. fail to deliver the payment on time, in compliance with all terms set forth in this agreement, the District shall be entitled to enter Judgement against S.D. for the entire amount owed, by the Superior Court of New Jersey.

4. S.D., individually and on behalf of A.D.-W., hereby fully and completely release the District, its members, officers, administrators, agents, servants, employees, or assigns from any and all claims they have or may have accrued against the District, under any law, regulation, or legal theory, and including, without limitation, Section 504 of the Rehabilitation Act of 1973, 29 *U.S.C.*§ 794(a), §705(8), the Family Education Rights and Privacy Act, 20 *U.S.C.* §1232g, *et seq.*, 29 *U.S.C.* §794(a), 42 *U.S.C.* §1983, 42 *U.S.C.* §1988, 29 *U.S.C.* §705(20), the Individuals with Disabilities In Education Act ("IDEA"), 20 *U.S.C.* §1400, *et seq.*, the Americans with Disabilities Act, 42 *U.S.C.* §12132, *et seq.*, the Rehabilitation Act of 1973, 20 U.S.C. §7801, Title II of the Americans with Disabilities Act, 42 *U.S.C.* §12132, *et seq.*, *N.J.A.C.* 6A:14-1.1, *et seq.*, *N.J.A.C.* 6A:14-3.7, Title VII of the Civil Rights Act of 1964, 42 *U.S.C.* §2000, *et seq.*, the Americans with Disabilities Act, 42 *U.S.C.* §621,*et seq.*, all as amended, any statutes of New Jersey including but not limited to the New Jersey Law Against Discrimination, *N.J.S.A.* 10:5-1, *et seq.*, or any other claims which have been or could have been asserted by S.D. or on behalf of A.D.-W., in any forum

arising out of or connected with A.D.-W.'s education by the District, including but not limited to, claims for attorney's and other professional fees and costs, reimbursement related to any unilateral and/or out-of-district placement for A.D.-W., whether known or unknown, or to the extent permitted by applicable law through the date of this agreement.

5. S.D. further agrees to withdraw the current Appeal of the Residency Determination, with prejudice.

6. The Parties have reached this compromise to avoid the expense, inconvenience, and potential acrimony of a residency hearing and litigation. It is understood that the execution of this Agreement does not constitute an admission by the District.

7. This Agreement contains the entire Agreement and understanding between the Parents and Respondents and constitutes a full and final Agreement on any and all issues. This Agreement shall be governed by the laws of the State of New Jersey.

8. S.D. o/b/o A.D.-W. acknowledges that she has read and understands the terms of this Agreement, that she has had the opportunity to have the Agreement reviewed by counsel, that she is satisfied with the advice of her respective counsel, and that she is entering into this Agreement knowingly, freely, voluntarily, without coercion and not under the influence of anything or anyone.

IN WITNESS HEREOF, the Parties have set their hands this 14 day of October, 2022

BY: KEVIN ~~Keven~~ Leahan, President
Lumberton Township
Board of Education

DATED: 10-17-22

BY: _____ DATED: 10/14/2022

S.D. O/B/O A.D.-W.
Petitioner

4888-9611-8830, v. 1

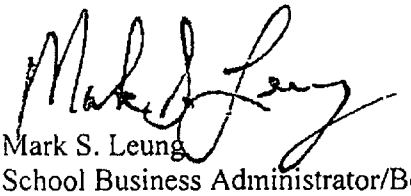
LUMBERTON TOWNSHIP SCHOOL DISTRICT
33 Municipal Drive
Lumberton, NJ 08048

Mark S. Leung
School Business Administrator/Board Secretary

(609) 267-1406, ext. 6615
Fax (609) 267-0002
mleung@lumberton.k12.nj.us

November 18, 2022

I hereby certify that the attached is a true copy of the minutes of the Lumberton Township Board of Education Meeting of November 17, 2022.



Mark S. Leung
School Business Administrator/Board Secretary

MSL/ddh

State of New Jersey
County of Burlington

On this 18th day of November 2022 before the subscriber a Notary Public of the State of New Jersey in and for the County of Burlington duly commissioned and qualified, came Mark S. Leung of the Lumberton Township Board of Education, to me personally known to be the officer described herein, and who executed the preceding instrument and he acknowledged the execution of the same, and being duly sworn, deposed and said Board Seal and his signature as officer were duly affixed and subscribed to the said instrument by the authority and direction of the said Township.

IN WITNESS WHEREOF, I have hereunto set my hand and affixed my official seal at Lumberton, New Jersey this 18th day of November, 2022.

Debbra D. Harper
Notary Public

DEBBRA D. HARPER
NOTARY PUBLIC OF NEW JERSEY
My Commission Expires March 27, 2027

(BOARD SEAL) (SEAL)

FINANCE

A motion was made by Mrs. Clevenger and seconded by Mrs. Faye.

BE IT RESOLVED BY THE LUMBERTON TOWNSHIP BOARD OF EDUCATION to approve the following Finance item:

1. Approve a Residency Settlement Agreement, as per exhibit (Board only).

The motion passed by the following roll call vote:
Ayes – 5
Nos – 0
Abstentions – 0

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

PHILIP D. MURPHY
Governor

SHEILA Y. OLIVER
Lt. Governor

ANGELICA ALLEN-MCMILLAN, Ed.D.
Acting Commissioner

January 12, 2023

VIA EMAIL ONLY

Charles V. Reilly, Esq.
448 North Maple Avenue
Ridgewood, NJ 07450

Laurie Weber
235 South Irving Street
Ridgewood, NJ 07450

Matthew Giacobbe, Esq.
Cleary, Giacobbe, Alfieri & Jacobs, LLC
169 Ramapo Valley Road
Upper Level 105
Oakland, NJ 07436

Re: *Laurie Weber v. Board of Education of the Village of Ridgewood, Bergen County, Agency Dkt. No. 114-7/21, Commissioner Decision No. 233-22*

Dear Parties,

I have reviewed the materials filed in connection with the Infant Toddler Development Center Parent Group's (ITDCPG) Motion for Reconsideration of the Commissioner's September 19, 2022 decision.

Initially, the Commissioner notes that the ITDCPG was granted participant status in this matter by virtue of Commissioner Decision No. 46-22L, dated March 7, 2022. *N.J.A.C.* 1:1-16.6 limits the nature and extent of participation to the right to argue orally, file statements or briefs, and file exceptions to the Initial Decision. Furthermore, *N.J.A.C.* 6A:3-1.15(b) provides that a "party" may make a motion for reconsideration. The ITDCPG is not a "party" to these proceedings, but a participant. Nothing in the applicable rules permits a participant to file a motion for reconsideration.

Furthermore, the motion was not timely filed. Commissioner Decision No. 233-22, which is the subject of the motion for reconsideration, was mailed to the parties on September 19, 2022. Pursuant to *N.J.A.C.* 6A:3-1.14(c), the filing date is three days following the date of mailing; in this matter, the filing date is therefore September 22, 2022. Pursuant to *N.J.A.C.* 6A:3-1.15, a party may make a motion for reconsideration within 10 days of the filing of the Commissioner's decision. Here, that deadline expired

on October 3, 2022, but the ITDCPG's motion was not filed until October 6, 2022. No extension of time was requested or granted.

Nonetheless, the Commissioner has reviewed the motion for reconsideration. Pursuant to *N.J.A.C.* 6A:3-1.15(b)(2), a motion for reconsideration shall be determined based upon the following:

> i. claim(s) of mistake, provided, however, that disagreement with the outcome of a decision, or with the analysis upon which it is based, shall not constitute "mistake" for purposes of this section;
> ii. newly discovered evidence likely to alter the outcome of a matter, where such evidence could not have been previously discovered by due diligence;
> iii. newly ascertained misrepresentation or other misconduct of an adverse party, where such misrepresentation could not have been previously known; or
> iv. reversal of a prior judgment on which the present matter is based.

Upon review and consideration of the submissions, I find that the ITDCPG has failed to satisfy the factors set forth in *N.J.A.C.* 6A:3-1.15(b)(2). The ITDCPG contends that, because children as young as six weeks old are capable of learning, the ITDC is a lawful use of school facilities pursuant to *N.J.S.A.* 18A:30-34(a). However, this argument was previously made by respondent, and rejected. Respondent's submission expresses disagreement with the outcome of the decision, but that is not a sufficient basis for reconsideration.

The Ridgewood Board of Education (Board) filed a brief in support of the ITDCPG's motion for reconsideration. The Board does not address the grounds for reconsideration raised by the ITDCPG, but instead focuses entirely on its arguments related to mootness, which have also previously been considered and rejected.

Accordingly, the Motion for Reconsideration is hereby DENIED.[1]

Sincerely,

Angelica Allen-McMillan, Ed.D.
Acting Commissioner of Education

AAM/JS
c: State Law Library
10-23L

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

11-23
OAL Dkt. No. EDU 10042-21
Agency Dkt. No. 215-11/21

New Jersey Commissioner of Education

Final Decision

Jessica Hidalgo,

Petitioner,

v.

Board of Education of the Morris School District, Morris County,

Respondent.

The record of this matter, the proposed Global Settlement Agreement and Release of Claims (Agreement), and the Initial Decision issued by the Office of Administrative Law pursuant to *N.J.A.C.* 1:1-19.1, have been reviewed. Upon such review, the Commissioner approves the settlement and adopts the Initial Decision as the final decision in this matter. In doing so, however, the Commissioner notes, with respect to paragraph 12 of the Agreement, that the Board must comply with the requirements of New Jersey's Open Public Records Act, *N.J.S.A.* 47:1A-1 *et seq.* in regard to information concerning this matter, notwithstanding any agreement the parties may have between themselves to keep the terms of their settlement confidential.

Accordingly, this matter is hereby dismissed, subject to compliance with the terms of the settlement consistent with applicable public records law.

IT IS SO ORDERED.

Angelica Allen-McMillan, Ed.D.

ACTING COMMISSIONER OF EDUCATION

Date of Decision: January 12, 2023
Date of Mailing: January 13, 2023

State of New Jersey
OFFICE OF ADMINISTRATIVE LAW

INITIAL DECISION
SETTLEMENT
OAL DKT. NO. EDU 10042-21
AGENCY REF. NO. 215-11/21

JESSICA HIDALGO,
Petitioner,

v.

BOARD OF EDUCATION OF THE
MORRIS SCHOOL DISTRICT,
MORRIS COUNTY,
Respondent.

Randi Doner April, Esq., and **Gail Oxfeld Kanef**, Esq. for Petitioner (Oxfeld Cohen, P.C., attorneys)

Frances L. Febres, Esq., for respondent (Cleary, Giacobbe, Alfieri, Jacob, LLC, attorneys)

Record Closed: December 20, 2022 Decided: December 22, 2022

BEFORE **JOHN P. SCOLLO,** ALJ:

NATURE OF PROCEEDINGS

Petitioner seeks reimbursement to the payroll and backpay after she was placed on unpaid leave and her medical coverage was stopped after she was deemed non-compliant with the respondent Board's COVID vaccine/testing requirement due to her religious beliefs.

The Department of Education transmitted the contested case pursuant to N.J.S.A. 52:14B-1 to 15 and N.J.S.A. 52:14f-1 TO 13, to the Office of Administrative Law (OAL), where it was filed on December 9, 2021.

The parties have voluntarily agreed to resolve all disputed matters and have entered into a settlement as set forth in the attached Global Settlement Agreement and Release of Claims and Board Approval.

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

1. The parties have voluntarily agreed to the settlement as evidenced by their signatures and/or the signature of their respective representatives on the attached settlement agreement; and,
2. The settlement fully disposes of all issues in controversy between the parties.

ORDER

It is hereby **ORDERED** that the parties comply with the terms of the settlement agreement; and

It is further **ORDERED** that Petitioner's petition is withdrawn with prejudice.

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

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

John P. Scollo

December 22, 2022
DATE

JOHN P. SCOLLO, ALJ

Date Received at Agency: December 22, 2022

Date Mailed to Parties: December 22, 2022
Db

Batista, Diana [OAL]

From: Frances Febres <ffebres@cgajlaw.com>
Sent: Tuesday, December 20, 2022 4:04 PM
To: Batista, Diana [OAL]; Randi April
Subject: RE: [EXTERNAL] RE: EDU 10042-21 Jessica Hidalgo v. Morris School District BOE
Attachments: 20220615150442469.pdf; FINAL Global Settlement Agreement and Release of Claims.pdf; Certified Board Resolution.pdf

Hi Judge Scollo,

Please see the attached Global Settlement Agreement, signature page with both parties' signature, and the Board's resolution approving same.

Respectfully submitted,

Frances L. Febres, Esq.
Cleary | Giacobbe | Alfieri | Jacobs LLC

Oakland Office
169 Ramapo Valley Rd.
Upper Level - Suite 105
Oakland, NJ 07436
Tel. (973) 845-6700 **Ext. 104**
Fax. (201) 644-7601
Email: ffebres@cgajlaw.com

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From: Batista, Diana [OAL] [mailto:Diana.Batista@oal.nj.gov]
Sent: Tuesday, December 20, 2022 3:42 PM
To: Randi April <RApril@oxfeldcohen.com>; Frances Febres <ffebres@cgajlaw.com>
Subject: [EXTERNAL] RE: EDU 10042-21 Jessica Hidalgo v. Morris School District BOE
Importance: High

In lieu of a more formal letter, the following is from Judge Scollo:

Dear Ms. April and Ms. Febres:

On April 7, 2022, I received Ms. April's email stating that the matter is, in essence, settled. I was also told that the settlement was placed on the record on March 28, 2022 and that the parties were working on nonspecific language.

Frances L. Febres, Esq. (Attorney ID No. 01852012)
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E-mail: ffebres@cgajlaw.com
Attorneys for Morris School District Board of Education

IN THE MATTER OF THE TENURE CHARGES AGAINST JESSICA HIDALGO, TENURED SCHOOL COUNSELOR, EMPLOYED BY THE MORRIS SCHOOL DISTRICT BOARD OF EDUCATION	**GLOBAL SETTLEMENT AGREEMENT & RELEASE OF CLAIMS**

This Agreement is hereby made this ___ day of April, 2022, by and between JESSICA HIDALGO (hereinafter "Ms. Hidalgo") and the MORRIS BOARD OF EDUCATION (hereinafter the "Board") (collectively the "Parties").

WHEREAS, the Board is a body politic and corporate, organized and existing by virtue of the laws of the State of New Jersey, N.J.S.A. 18A:11-1, and is entrusted with maintain and conducting the public schools of the Morris School District;

WHEREAS, Ms. Hidalgo is currently employed by the Board as a tenured school counselor;

WHEREAS, on or about August 23, 2021, Governor Murphy signed Executive Order 253 ("EO 253") that required covered workers of public schools to demonstrate their full-vaccination status or undergo weekly testing for COVID-19; and

WHEREAS, Ms. Hidalgo requested a religious accommodation to EO 253; and

WHEREAS, after having considered whether Ms. Hidalgo's request for exemption to the testing and vaccination requirement could be accommodated, the Board communicated its denial to Ms. Hidalgo; and

WHEREAS, Ms. Hidalgo never met, either in person or via zoom, with any administrator or supervisor from the district with regard to her request; and

WHEREAS, the parties dispute the implementation of Governor Philip Murphy's EO 253 and ability for the Board to exempt Ms. Hidalgo from the weekly testing requirement as a religious accommodation, or provide another accommodation that would enable her to provide school counseling and other school support services to students attending school in-person; and

WHEREAS, the Board certified tenure charges with the Commissioner of Education seeking Ms. Hidalgo's dismissal as a result of not undergoing weekly testing as required by EO 253; and

WHEREAS, Ms. Hidalgo filed a Petition of Appeal before the Commissioner of Education challenging her reduction in compensation in what she thought was a violation of the tenure statute and further challenging the Board's refusal to place Ms. Hidalgo on paid. administrative leave prior to the filing of the tenure charges; and

WHEREAS, to avoid the expense, time and uncertainty of litigation and legal proceedings, the Board and Ms. Hidalgo wish to fully and finally resolve any and all claims, complaints, charges and actions of any kind whatsoever, whether known or unknown, which either party may have against them as provided herein, to their mutual satisfaction.

NOW THEREFORE, Ms. Hidalgo and the Board in consideration of the mutual covenants and promises contained herein, the legal sufficiency of which is hereby acknowledged by the parties, the Parties agree as follows:

1. **RESIGNATION DATE:** Ms. Hidalgo agrees to sign and submit to the Board simultaneously with her execution of the Global Settlement Agreement and Release of Claims ("Agreement"), an irrevocable letter of resignation in lieu of termination ("letter of resignation") from all employment with the Board effective December 31, 2021. The irrevocable letter of resignation shall be in the form attached hereto as Exhibit A. The letter of resignation and this Agreement shall be subject to Ms. Hidalgo's right to rescind pursuant to the Older Workers Benefit Protection Act, 29 U.S.C. 626(F)(1)(G), within seven (7) calendar days of signing the Agreement. If Ms. Hidalgo does not rescind her letter of resignation and this Agreement within seven (7) calendar days of signing them, and provided that this Agreement is approved by the Commissioner of Education, her resignation and this Agreement shall be binding and irrevocable. The Board shall accept Ms. Hidalgo's letter of resignation simultaneously with the acceptance of this Agreement via resolution at a meeting of the Board, subject to Commissioner of Education approval.

a. Should the Commissioner of Education not approve this Agreement, the parties maintain their respective positions and abilities to pursue their claims and charges before the Commissioner of Education. Nothing herein shall constitute an admission or representation for any legal proceeding except as to enforce the terms of this Agreement.

2. **PAYMENT OF SALARY.** In exchange for Ms. Hidalgo's Release of Claims and withdrawal, with prejudice, of her Petition of Appeal with the Commissioner of Education, the Board shall pay Ms. Hidalgo for 39 days of work, between October 25, 2021 and December 31, 2021, in the amount of Fifteen Thousand Two Hundred Seventy-Two Dollars and Seventy-Nine Cents ($15,272.79).

3. **EXCHANGE OF PROPERTY:** Ms. Hidalgo shall return all Board property in her possession but not limited to the Board's laptop computer, district keys and the like, contemporaneously with the signing of the Agreement. Upon her request, Ms. Hidalgo shall be given an appointment to come onto Board property to obtain her personal belongings. Permission must be received from the Interim Superintendent for the appointment.

4. **CONTINGENCY:** This Agreement is contingent upon the approval of the Commissioner of Education and receipt by the Board of an irrevocable letter of resignation from Ms. Hidalgo effective December 31, 2021. The irrevocable letter of resignation shall be provided contemporaneously with the execution of this Agreement by both parties.

5. **CONSIDERATION:** Ms. Hidalgo specifically waives any and all other payments she may ordinarily be due under her employment contract with the District or under Board Policy, except as specifically set forth herein.

6. **RELEASE OF CLAIMS:** Ms. Hidalgo, on behalf of herself and her heirs, successors, and assigns, forever releases the Board, and its past and present Board Members, officers, directors, employees, agents, successors and assigns, hereby releases, waives and forever discharges any and all past, present or future claims that relate to any action that predates this Agreement that she may have against the Board, including but not limited to, the Petition of Appeal currently before the Commissioner of Education, captioned: Jessica Hidalgo v. Board of Education of the Morris School District, Morris County, OAL DKT NO. EDU 10042-21, Agency Ref. No. 215-11/21, along with any and all claims for back pay, benefits, or any other claim related to her employment by the Board, including, but not limited to, any claims arising under the New Jersey Conscientious Employee Protection Act, New Jersey Law Against Discrimination, Title VII of the Civil Rights Act of 1964, the Civil Rights Act of 1866, the Civil Rights Act of 1991, the federal

Age Discrimination in Employment Act of 1967 ("ADEA"), the Older Workers Benefit Protection Act ("OWBPA"), the federal Equal Pay Act, the New Jersey Wage Payment Law, the United States Constitution, the New Jersey State Constitution, the federal Americans With Disabilities Act, the Families First Coronavirus Response Act, the Family and Medical Leave Act, New Jersey Family Leave Act, the Equal Pay Law, the Equal Rights Act, any other federal, state or local law or ordinances, and/or any common law claims under tort, contract (including any collective bargaining agreement she is subject to or part of) or any other theories now or hereafter recognized. The release recited in this paragraph shall include any and all claims which Ms. Hidalgo may have at the time of the execution of this Global Settlement Agreement and Release for any type of damages cognizable under any of the laws referenced herein, including, but not limited to, any and all claims for wages, vacation, sick leave, personal days, compensatory damages, punitive damages, and/or attorneys' fees. Specifically excluded from this general release are Ms. Hidalgo's rights, upon cessation of employment with the Board to obtain continued medical coverage at her own expense as authorized by the Consolidated Omnibus Reconciliation Act of 1986 (COBRA), unless specifically modified herein; any rights she may have arising under the Teachers' Pension and Annuity Fund ("TPAF") and related statutes and regulations; any rights she may have for indemnification by the Board pursuant to N.J.S.A. 18A:16-6 and 6.1; and any rights she may have under the New Jersey Workers' Compensation Law, N.J.S.A. 34:15-1, et seq.

a. This Release does not preclude Ms. Hidalgo from suing for enforcement or for a violation of this Settlement Agreement. The Release does not preclude Ms. Hidalgo from filing for unemployment which the Board will not challenge. With respect to any inquiries from the Department of Labor, however, concerning Ms. Hidalgo's reason for separation, the Board will respond truthfully that her resignation was in settlement of an

employment matter, the details of which shall remain confidential to the greatest extent permitted by law. Upon request from a prospective employer, the Board's Director of Human Resources or designee shall clearly indicate that the employment separation was the result of mutual agreement.

b. Nothing in this Settlement Agreement shall preclude either Party from bringing an action to enforce performance of any term of this Settlement Agreement should there be a default in performance.

c. Ms. Hidalgo understands that nothing in this Agreement shall be construed to prohibit her from filing a charge with, or participating in any investigation or proceeding conducted by, the New Jersey Division on Civil Rights, the U.S. Equal Employment Opportunity Commission (EEOC), or with any other Federal, State or local court or agency. Notwithstanding the foregoing, Ms. Hidalgo hereby waives any and all rights to recover any and all damages, such as, but not limited to, monetary damages and attorney's fees in any charge, complaint or lawsuit filed by her based on events occurring which arose or existed prior to and through the date this Agreement is fully-executed and approved by the Commissioner of Education.

7. **WAIVER & FORFEITURE OF TENURE RIGHTS:** Ms. Hidalgo agrees that, by tendering her resignation, she is waiving and forfeiting her tenure and seniority rights with the Morris Board of Education. Ms. Hidalgo further acknowledges and agrees that, despite forfeiting her tenure and seniority, she maintains the ability to apply for positions that become available as could any qualified individual.

8. Ms. Hidalgo acknowledges that she has had the opportunity to consult with legal counsel and representatives of her choice regarding this Global Settlement Agreement and Release

of Claims, and Waiver that accompanies it prior to executing it; and that she represents that she has read this Agreement and Waiver and fully understands them and agrees to be bound by them. Ms. Hidalgo also acknowledges that she has been given a reasonable period of time within which to consider this settlement and the terms of this Agreement, Release and Waiver prior to executing them.

9. **NON-DISPARAGEMENT:** The parties agree that they will not directly or indirectly disparage the name, reputation, services or competency of one another. The Board shall direct all inquiries regarding Ms. Hidalgo's employment to the Director of Human Resources or designee who shall be limited to responding with the statement provided in Paragraph 11 below. The parties also agree that, to the maximum extent permitted by law and regulation, they will not make statements for publication or public dissemination accusing one another of wrongful, improper, unlawful or unfair actions or conduct.

10. **OLDER WORKER BENEFIT PROTECTION ACT OF 1990:** To comply with the Older Worker Benefit Protection Act of 1990, this Agreement advises Ms. Hidalgo of the legal requirements of the Act, and fully incorporates the legal requirements by reference into this Agreement as follows"

a. Ms. Hidalgo fully understands the terms and conditions of this Agreement;

b. Ms. Hidalgo has been advised to consult with an attorney to review the Agreement;

c. Ms. Hidalgo specifically waives her right to pursue any claims under the Age Discrimination in Employment Act;

d. Ms. Hidalgo does not waive any rights or claims under the Age Discrimination in Employment Act that may arise after the date the waiver is executed;

e. Ms. Hidalgo is receiving consideration above and beyond anything of value to which she already is entitled;

f. Ms. Hidalgo waives her right to at least twenty-one (21) calendar days within which to consider this Agreement as evidenced by Exhibit B, attached hereto; and

g. Ms. Hidalgo has seven (7) calendar days from the date of the execution of this waiver to revoke it.

11. EMPLOYMENT REFERENCES: Responses to any inquiries as to Ms. Hidalgo employment with the Board, including but not limited to, job reference inquiries shall be limited to an acknowledgement of her position, length of employment with the Board, her last annual base salary, and her voluntary resignation. All such inquiries shall be directed only to the Director of Human Resources or designee. Responses to any inquiries to Ms. Hidalgo, shall be responded to with the statement "I resigned and the terms of the resignation are confidential."

12. CONFIDENTIALITY: This Agreement shall remain confidential to the maximum extent permitted by law and neither party shall disclose the terms of this Agreement to third parties. Ms. Hidalgo may disclose the terms of this agreement to her immediate family, tax advisor and attorney who shall be subject to the confidential provision of this agreement, and also maintain the confidentiality of this Agreement.

13. ENTIRE AGREEMENT: This Agreement, Release and Waiver contain the entire Agreement and understanding between the Parties and constitutes a full and final agreement in any and all issues relating to this matter, except that the Parties reserve their right to enforce this Agreement, if necessary;

14. **CHOICE OF LAW:** This Agreement shall be governed by the laws of the State of New Jersey.

15. **SEVERABILITY:** If a specific clause of the Agreement is determined to be illegal or in violation of any Federal or State law, the remainder of the Agreement shall not be affected by such a ruling and shall remain in full force and effect.

16. **BINDING EFFECT:** The parties shall be bound by the terms and conditions of this agreement.

17. **APPROVAL:** The terms and conditions of this Agreement and Ms. Hidalgo's irrevocable letter of resignation are subject to ratification and approval by the Morris Board of Education, along with the approval of the Commissioner of Education.

18. **VOLUNTARY AGREEMENT:** The Parties have entered into this Agreement freely and voluntarily with a full understanding of their rights and the contents of this Agreement.

19. **ADMISSION OF LIABILITY:** The Parties' entry into this Agreement shall not constitute nor shall it be interpreted as an admission of wrongdoing or guilt, or liability in any manner on either of the Parties' part. Any such obligation or liability on either Party's part is expressly denied. The Parties have entered into this Agreement solely to compromise disputed claims.

20. **OPPORTUNITY TO CONSULT WITH COUNSEL:** The Parties acknowledge that each has been given the opportunity to consult with an attorney or a representative of their own choosing with respect to this Agreement and reviewed with their attorney or representative all the terms and conditions of this Agreement prior to executing this Agreement. Each Party signs this Agreement freely and voluntarily and without coercion or duress. The Parties further

acknowledge that they fully understand the duties and obligations enumerated herein and have been informed of their legal rights and obligations.

21. BREACH: If either party breaches this Agreement, the breaching party shall bear the costs of the non-breaching party of any litigation or efforts to have such breach corrected or compensated for, including but not limited to, reasonable attorneys' fees.

22. RATIFICATION: The undersigned representatives of the Board hereby acknowledge that they have been duly authorized by the Board to sign this Agreement and bind the Board to its terms. Upon ratification of this Agreement, the Board authorizes its Board President to execute same on its behalf.

23. GOOD FAITH: The Parties expressly agree that they shall act in good faith to ensure implementation of this Global Settlement Agreement, Release and Waiver.

24. MODIFICATIONS: This Agreement may not be altered, amended or modified except in writing, signed and duly authorized by all Parties.

25. EXECUTION IN COUNTERPARTS AND FACSIMILIE SIGNATURES: This Agreement may be executed in two (or more) counterparts each of which, when executed and delivered shall be deemed to be an original, and of which counterparts, taken together, shall constitute one and the same agreement. An original signature transmitted by facsimile shall be deemed to be an original for the purposes of this Agreement and for the accompanying letter of resignation.

BY SIGNING BELOW, THE PARTIES ACKNOWLEDGE THAT EACH HAS READ THE TERMS OF THIS AGREEMENT, UNDERSTANDS THE TERMS OF THIS AGREEMENT AND INTENDS TO BE LEGALLY BOUND BY THIS AGREEMENT AND ITS PROVISIONS. ADDITIONALLY, THE PARTIES ARE SIGNING BELOW VOLUNTARILY AND WITHOUT THREAT OR COERCION OF ANY KIND.

IN WITNESS WHEREOF, and intending to be legally bound hereby, I, Jessica Hidalgo, have executed the foregoing Agreement this ___ day of April, 2022.

JESSICA HIDALGO

Date:

On Behalf of the Board,
MORRIS BOARD OF EDUCATION

Melissa Spiotta, Board President

Date:

EXHIBIT A

Date: April . 2022

I, Jessica Hidalgo, do hereby submit my irrevocable letter of resignation in lieu of termination effective December 31, 2021.

Jessica Hidalgo

EXHIBIT B

WAIVER

By signing below, the undersigned hereby irrevocably elects to waive the 21-day period referred to in Paragraph 10(f) of this Agreement.

Jessica Hidalgo

Dated: April , 2022

IN WITNESS WHEREOF, and intending to be legally bound hereby, I, Jessica Hidalgo, have executed the foregoing Agreement this 12 day of April, 2022

JESSICA HIDALGO

Date: 5/12/22

On Behalf of the Board,
MORRIS BOARD OF EDUCATION

Melissa Spiotta, Board President

Date: 6/6/22

EXTRACT FROM THE MINUTES OF A MEETING OF THE BOARD OF EDUCATION OF MORRIS SCHOOL DISTRICT, MORRIS COUNTY, NEW JERSEY, AS RECORDED IN THE OFFICIAL MINUTE BOOK.

The Board of Education of Morris School District, in the County of Morris, New Jersey, convened in Regular Session on **Monday, June 6, 2022, at 6:30 p.m.** at Morristown High School Learning Commons, 50 Early Street, Morristown, NJ 07960.

The following members of the Board of Education were present: **Mrs. Katie Cole, Mrs. Meredith Davidson, Ms. Linda K. Murphy, Mrs. Susan Pedalino, Dr. Vivian Rodriguez, Mr. Alan Smith, Mrs. Melissa Spiotta, and Mrs. Beth Wall.**

The following Resolution was offered by **Ms. Murphy,** seconded by **Mr. Smith** and adopted by the Board of Education by the following roll call vote:

Roll Call:

AYES:	Mrs. Cole, Mrs. Davidson, Mrs. Pedalino, Dr. Rodriguez, Mr. Smith, Mrs. Wall, Ms. Murphy, Mrs. Spiotta
NOES:	None
ABSTAIN:	None
ABSENT:	Mrs. Bangiola, Ms. Galdi

BUSINESS MATTERS

Motion #28 that, upon the recommendation of the Interim Superintendent, the Board of Education approve the Settlement Agreement and Mutual Release between the Morris School District Board of Education and Employee #5864.

STATE OF NEW JERSEY)
)ss
COUNTY OF MORRIS)

I, **Anthony Lo Franco, Business Administrator/Board Secretary** of Morris School District, in the County of Morris, State of New Jersey, hereby certify that the foregoing Extract from the Minutes of the Meeting of the Board of Education of said district, duly called and held on **Monday, June 6, 2022** compared by me with the original Minutes as officially recorded in my office in the Minute Book of said Morris School District Board of Education, and is a true complete copy thereof and of the whole of said original Minutes so far as the same relate to the subject matter referred to in said Extract.

In witness, I have hereunto set my hand and affixed the corporate seal of said Board of Education this **16th day of June, 2022.**

(Seal)

Business Administrator/Board Secretary

EXTRACT FROM THE MINUTES OF A MEETING OF THE BOARD OF EDUCATION OF MORRIS SCHOOL DISTRICT, MORRIS COUNTY, NEW JERSEY, AS RECORDED IN THE OFFICIAL MINUTE BOOK.

The Board of Education of Morris School District, in the County of Morris, New Jersey, convened in Regular Session on **Monday, June 6, 2022, at 6:30 p.m.** at Morristown High School Learning Commons, 50 Early Street, Morristown, NJ 07960.

The following members of the Board of Education were present: **Mrs. Katie Cole, Mrs. Meredith Davidson, Ms. Linda K. Murphy, Mrs. Susan Pedalino, Dr. Vivian Rodriguez, Mr. Alan Smith, Mrs. Melissa Spiotta, and Mrs. Beth Wall.**

The following Resolution was offered by **Ms. Murphy,** seconded by **Mr. Smith** and adopted by the Board of Education by the following roll call vote:

Roll Call:

AYES:	Mrs. Cole, Mrs. Davidson, Mrs. Pedalino, Dr. Rodriguez, Mr. Smith, Mrs. Wall, Ms. Murphy, Mrs. Spiotta
NOES:	None
ABSTAIN:	None
ABSENT:	Mrs. Bangiola, Ms. Galdi

BUSINESS MATTERS

Motion #28 that, upon the recommendation of the Interim Superintendent, the Board of Education approve the Settlement Agreement and Mutual Release between the Morris School District Board of Education and Employee #5864.

STATE OF NEW JERSEY)
)ss
COUNTY OF MORRIS)

I, Anthony Lo Franco, Business Administrator/Board Secretary of Morris School District, in the County of Morris, State of New Jersey, hereby certify that the foregoing Extract from the Minutes of the Meeting of the Board of Education of said district, duly called and held on **Monday, June 6, 2022** compared by me with the original Minutes as officially recorded in my office in the Minute Book of said Morris School District Board of Education, and is a true complete copy thereof and of the whole of said original Minutes so far as the same relate to the subject matter referred to in said Extract.

In witness, I have hereunto set my hand and affixed the corporate seal of said Board of Education this **16th day of June, 2022.**

(Seal)

Business Administrator/Board Secretary

12-23
OAL Dkt. No. EDU 00654-22
Agency Dkt. No. 245-12/21

New Jersey Commissioner of Education

Final Decision

K.J., on behalf of minor child, M.Q.,

Petitioner,

v.

Board of Education of the City of Elizabeth, Union County,

Respondent.

The record of this matter, the proposed Settlement Agreement and Release (Agreement) and the Initial Decision issued by the Office of Administrative Law have been reviewed pursuant to *N.J.A.C.* 1:1-19.1. Upon review, the Commissioner approves the terms of the Agreement and adopts the Initial Decision as the final decision in this matter. The case is hereby dismissed, subject to compliance with the terms of the Agreement.

IT IS SO ORDERED.

Angelica Allen-McMillan, Ed.D.
ACTING COMMISSIONER OF EDUCATION

Date of Decision: January 12, 2023
Date of Mailing: January 13, 2023

State of New Jersey
OFFICE OF ADMINISTRATIVE LAW

INITIAL DECISION
SETTLEMENT
OAL DKT. NO. EDU 00654-22
AGENCY DKT. NO. 245-12/21

K.J. ON BEHALF OF MINOR CHILD, M.Q.,
Petitioners,
v.
CITY OF ELIZABETH BOARD OF EDUCATION,
UNION COUNTY,
Respondent.

Richard Friedman, Esq., (Zazzali Fagella Nowak Kleinbaum & Friedman, attorneys) for petitioners

Brian J. Kane, Esq., (LaCorte, Bundy, Varady & Kinsella, attorneys) for respondent

Record Closed: November 17, 2022 Decided: December 6, 2022

BEFORE **ERNEST M. BONGIOVANNI,** ALJ:

On January 21, 2022, the matter was transmitted to the Office of Administrative Law for determination as a contested case.

The parties have agreed to an amicable resolution of the matter and submitted the attached Settlement Agreement via email on November 14, 2022. On November

17, 2022, Brian J. Kane, Esq. sent an e-mail that no formal resolution on this matter was required and that the Board of Education has reviewed and approved of the settlement.

Having reviewed the record and the settlement terms, I **FIND** as follows:

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

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

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

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

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

December 6, 2022

Ernest M. Bongiovanni

DATE

ERNEST M. BONGIOVANNI., ALJ

Date Received at Agency: December 7, 2022

Date Mailed to Parties: December 7, 2022

id

LA CORTE, BUNDY, VARADY & KINSELLA
ATTORNEYS AT LAW

NICHOLAS S. LA CORTE (1911-1978)
GARY A. BUNDY
ROBERT F. VARADY*†
CHRISTOPHER J. KINSELLA*

CHRISTINA M. DIPALO*
BRIAN J. KANE*

OF COUNSEL
JOHN F. MALONE
ANNE K. FRAWLEY

*NY BAR
†CERTIFIED CIVIL TRIAL ATTORNEY

989 BONNEL COURT
UNION, NJ 07083
(908) 810-0500
FAX: (908) 810-0513

97 APPLE STREET • SUITE 7
TINTON FALLS, NJ 07724

PLEASE FORWARD ALL MAIL
TO THE UNION OFFICE

E-Mail: Bkane@LBVKlaw.com

November 14, 2022

Via Email: Ila.Dhabliwala@oal.nj.gov
Honorable Ernest Bongiovani, A.L.J.
State of New Jersey
Office of Administrative Law
33 Washington Street
Newark, NJ 07102

Re: K.J., on behalf of minor child, M.Q. v. Board of Education of the City of Elizabeth, Union County
Agency Dkt. No.: 245-12/21

Dear Judge Bongiovanni:

As you are aware, this firm represents the Elizabeth Board of Education in this matter. Please find enclosed a settlement agreement and stipulation of dismissal signed by the parties in this matter, for Your Honor's consideration and approval. The Elizabeth Board of Education has agreed to resolve this matter and Board Secretary/Business Administrator Harold Kennedy signed off on the agreement. If anything further is required, please contact me at Your Honor's earliest convenience. I thank Your Honor for your time and attention to this matter.

Respectfully submitted,
La Corte, Bundy, Varady & Kinsella

By: */s/Brian J. Kane*
Brian J. Kane, Esq.

cc: Richard Friedman, Esq. (via e-mail)

SETTLEMENT AGREEMENT AND RELEASE

THIS SETTLEMENT AGREEMENT AND RELEASE, (hereinafter referred to as "Agreement"), is made this 8th day of November, 2022, by and between the Kenia Jimenez (hereinafter, also referred to as "Jimenez"), who currently resides at 640 East Third Avenue, Roselle, New Jersey 07203 and the Elizabeth Board of Education (hereinafter, also referred to as the "Board"), with its principal offices located at 500 North Broad Street, Elizabeth, New Jersey 07208.

WHEREAS, Jimenez enrolled her minor child, M.Q., as a student in the Elizabeth Public School District for the 2021-2022 school year; and

WHEREAS, the Board determined that the minor child M.Q. was ineligible to attend the schools of the Elizabeth Public School District due to domicile outside of Elizabeth; and

WHEREAS, Jimenez commenced an action against the Board appealing its residency determination in a matter entitled, K.J. on behalf of minor child, M.Q. v. City of Elizabeth Board of Education, OAL Dkt. No. EDU 00654-2022, Agency Ref. No.: 245-12/21, (hereinafter referred to as the "Petition"); and

WHEREAS, the Board filed a Counterclaim to the Petition against Jimenez for tuition reimbursement for M.Q.'s ineligible attendance in the Elizabeth School District; and

WHEREAS, the Jimenez and the Board (hereinafter, also referred to as the "Parties") having reached a negotiated agreement to fully, and finally, settle all claims among them, including those asserted in the Petition; and

NOW, THEREFORE, in consideration of the mutual promises and undertaking said forth herein, the parties agree as follows:

The foregoing recitals are incorporated herein as if set forth at length.

1. **Consideration.** In settlement of this matter, Ms. Jimenez will pay the Board the amount of $5,000.00, which represents the alleged tuition due and owing for her minor child M.Q.'s alleged ineligible attendance in the Elizabeth School District for the 2021-2022 school year. Ms. Jimenez shall make the payments made payable to the Elizabeth Board of Education. The Petitioner shall pay $1,000.00 within thirty days of the date of the approval of this agreement by the Commissioner of the Department of Education for the State of New Jersey and shall then pay $1,000.00 within every thirty (30) days thereafter until Ms. Jimenez has paid the sum of $5,000.00.

In the event that Petitioner fails to make any of the payments described above, the Petitioner shall be in Default of this agreement, and the parties agree that judgment may be entered on the docket of the Petition in favor of the Respondent for the balance of five thousand dollars ($5,000.00) less any payments made prior to the date of default.

2. **Attendance of M.Q. at Elizabeth Public School District.** The minor child M.Q. shall not be permitted to attend school in the Elizabeth Public Schools free of charge, unless and until the Petitioner submits adequate proofs that the child is domiciled in Elizabeth, pursuant to N.J.S.A. 18A:38-1, et. seq., and so long as Ms. Jimenez follows the proper enrollment procedures.

3. **Waiver and Release of Claims.** In settlement of this matter and in consideration of the payments set forth in Paragraph 1 above, Jimenez hereby releases and forever discharges the Board, in its official and personal capacities, and its related or affiliated entities, and its past, present and future officers, directors, attorneys, employees, owners, insurers, and their respective successors and assigns (collectively "Releasees"), jointly and severally, from any and all actions, complaints, causes of action, lawsuits or claims of any kind (collectively "Claims"), known or unknown, asserted or unasserted, which Jimenez, her heirs, agents, executors, successors or

assigns ever had, now have or hereafter may have against Releasees arising out of any matter, occurrence, omission, or event existing or occurring prior to Jimenez's execution of this Agreement, including, without limitation: any and all causes of action suits, debts, dues, accounts, reckonings, bonds, bills, specialties, covenants, contracts, controversies, agreements, obligations, promises, variances, trespasses, damages, judgments, executions, claims and demands, whether arising in contract or tort, vested or contingent, whether known or unknown, direct or indirect, existing or not existing, by reason of any matter, cause or thing whatsoever, in law or at equity from the beginning of time to the date of the execution of this Agreement.

4. **Stipulation.** Simultaneous with the execution of this Agreement, counsel for all Parties shall execute a Stipulation of Dismissal with Prejudice with regard to the Petition and the Board's Counterclaim in the form attached hereto as Exhibit A.

5. **Counterparts; Entire Agreement; No Oral Modification.** This Agreement may be executed in counterparts, which together shall comprise the entire Agreement. This Agreement constitutes the entire agreement between the parties and supersedes any and all prior agreements, written or oral, expressed or implied. No other promises, agreements or amendments, or any separate agreement relating to the subject matter of this Agreement shall be binding or shall modify this Agreement unless expressed in writing and signed by all parties hereto.

6. **Governing Law.** This Agreement shall be governed and construed in accordance with the laws of the State of New Jersey.

7. **No Admission of Liability.** Nothing in this Agreement shall be construed as an admission or concession of liability or wrongdoing by either party to this agreement. Rather, this Agreement is being offered for the sole purpose of settling cooperatively and amicably any and all possible disputes between the parties.

8. **Severability.** Nothing in this Agreement is intended to violate any law or shall be interpreted to violate any law. If any paragraph or part or subpart of any paragraph in this Agreement or the application thereof is construed to be overbroad and/or unenforceable, then the court making such determination shall have the authority to narrow the paragraph or part or subpart of the paragraph as necessary to make it enforceable and the paragraph or part or subpart of the paragraph shall then be enforceable in its/their narrowed form. Moreover, each paragraph or part or subpart of each paragraph in this Agreement is independent of and severable (separate) from each other. In the event that any paragraph or part or subpart of any paragraph in this Agreement is determined to be legally invalid or unenforceable by a court and is not modified by a court to be enforceable, the affected paragraph or part or subpart of such paragraph shall be stricken from the Agreement, and the remaining paragraphs or parts or subparts of such paragraphs of this Agreement shall remain in full, force and effect.

9. **Headings.** The headings contained in this Agreement are for convenience of reference only and are not intended, and shall not be construed, to modify, define, limit, or expand the intent of the parties as expressed in this Agreement, and they shall not affect the meaning or interpretation of this Agreement.

10. **Interpretation.** This Agreement shall be construed without aid of any canon or rule of law requiring construction or interpretation against the party drafting or causing this Agreement or any provision thereof to be drafted.

11. **Contingency.** It is agreed and understood by all Parties hereto that this Agreement is contingent upon each of the Parties fulfilling all of their respective duties, obligations, and/or promises as stated herein.

12. **Assent to Terms.** Ms. Kenia Jimenez hereby acknowledges that she enters into this agreement with a full understanding of her rights and that she was fully informed of the implications of this Agreement by her attorney, and does so without duress, of her own free will and volition.

Ms. Kenia Jimenez further acknowledges that she was given the opportunity to fully consider this Agreement for a period of up to twenty-one (21) days and was given seven (7) days from the execution of this document to revoke this Agreement, by delivering written notification to Robert F. Varady, Esq., LaCorte, Bundy, Varady & Kinsella, 989 Bonnel Court, Union, New Jersey 07083. It is understood that if this Agreement is revoked, it will not be effective or enforceable and Ms. Jimenez will not be entitled to the consideration described herein. Furthermore, it is understood that if this Agreement is revoked, the underlying proceedings for tuition reimbursement shall be reinstated against Ms. Jimenez.

IN WITNESS WHEREOF, the signatures and/or seals of the parties or their duly authorized representatives have been set forth on the dates indicated below:

Witness:

KENIA JIMENEZ
Dated: 11/08/2022

Luis L. Quevedo
Luis Quevedo
Dated: 11/08/2022

ZAZZALI, FAGELLA, NOWAK, KLEINBAUM & FRIEDMAN
Attorneys for Petitioner K.J. o/b/o M.Q.

Richard Friedman, Esq.
Dated: 11/9/22

For the Elizabeth Board of Education

HAROLD KENNEDY, JR.
Board Secretary/Business Administrator
Dated: 11/14/2022

Brian J. Kane, Esq.
N.J. Attorney I.D. # 333912021
LA CORTE, BUNDY, VARADY & KINSELLA
989 Bonnel Court
Union, NJ 07083
(908) 810-0500
Attorneys for Defendant Board of Education
of the City of Elizabeth, Union County

K.J., on behalf of minor child, M.Q. Petitioner, v. Board of Education of the City of Elizabeth, Union County Respondent.	BEFORE THE COMMISSIONER OF EDUCATION OF THE STATE OF NEW JERSEY AGENCY DOCKET NO.: 245-12/21 OAL DOCKET NO.: EDU-654-2022 N **STIPULATION OF DISMISSAL WITH PREJUDICE**

The matter in difference in the above-entitled action having been amicably adjusted by and between the Petitioner, K.J. on behalf of minor M.Q., and Respondent Board of Education of the City of Elizabeth, Union County, it is hereby stipulated and agreed by the undersigned attorneys that the same be and is hereby dismissed with prejudice, without costs.

All parties to this action further agree that this stipulation may be executed in counterparts and that photocopies and/or facsimile copies of this stipulation shall be deemed original signatures for the purposes of this stipulation.

STIPULATED:

ZAZZALI, FAGELLA, NOWAK, KLEINBAUM & FRIEDMAN
Attorneys for Petitioner K.J. o/b/o M.Q.

Richard Friedman, Esq.
570 Broad Street
Suite 1402
Newark, NJ 07102

Date: 11/08/2022

LA CORTE, BUNDY, VARADY & KINSELLA
Attorneys for Respondent, Elizabeth Board of Education

/s/Robert F. Varady
Robert F. Varady, Esq.
989 Bonnel Court
Union, New Jersey 07083

Date: 11/08/2022

13-23
OAL Dkt. No. EDU 09658-22
Agency Dkt. No. 288-10/22

New Jersey Commissioner of Education

Final Decision

S.M. and D.S., on behalf of minor child, A.S.,

Petitioners,

v.

Board of Education of the Township of Robbinsville, Mercer County,

Respondent.

The record of this matter, the parties' proposed Settlement Agreement and General Release (Agreement), and the Initial Decision issued by the Office of Administrative Law pursuant to *N.J.A.C.* 1:1-19.1, have been reviewed. Upon such review, the Commissioner approves the settlement and adopts the Initial Decision as the final decision in this matter. In so doing, however, the Commissioner notes the Board must comply with the requirements of New Jersey's Open Public Records Act, *N.J.S.A.* 47:1A-1 *et seq.,* with respect to information concerning this matter, notwithstanding any agreement the parties may have between themselves to keep the terms of their settlement confidential. Further, the Commissioner notes that the Agreement references actions that were to take place in a time frame that preceded the consideration of the settlement by the Commissioner of Education. The parties are reminded that a settlement of litigation before the Commissioner is not binding until the Commissioner approves the settlement.

In light of the foregoing, the Commissioner adopts the Initial Decision as the final decision in this matter, provided that the parties have already implemented the settlement terms or have agreed upon mutually satisfactory alternate dates for the effectuation of the terms of the Agreement. Assuming same, the matter is hereby dismissed, subject to compliance with the terms of the settlement.

IT IS SO ORDERED.

ACTING COMMISSIONER OF EDUCATION

Date of Decision: January 12, 2023
Date of Mailing: January 13, 2023

State of New Jersey
OFFICE OF ADMINISTRATIVE LAW

INITIAL DECISION

SETTLEMENT

OAL DKT. NO. EDU 09658-2022

AGENCY REF NO. 288-10/22

S.M. AND D.S. ON BEHALF OF A.S.,

Petitioners,

v.

ROBBINSVILLE BOARD OF EDUCATION,

Respondent.

Bradley R. Flynn, Esq., for petitioners (Montgomery Law, PLLC, attorneys)

Patrick F. Carrigg, Esq., for respondent (Lenox Law Firm, attorneys)

Record Closed: November 29, 2022 Decided: November 29, 2022

BEFORE **ELAINE B. FRICK,** ALJ:

Petitioners initiated a complaint and appeal with the Commissioner of the New Jersey Department of Education (DOE), which was transmitted to the Office of Administrative Law (OAL), where it was docketed on October 26, 2022, to be heard as a contested matter. Petitioners challenged the discipline imposed upon their minor child, a student in the Robbinsville school district.

On November 17, 2022, the parties confirmed, on the record before the Honorable Dean J. Buono, ALJ, the terms of a settlement, resolving all issues in dispute. The parties have confirmed their agreement in writing, with all parties executing the written "Settlement Agreement and General Release," attached hereto as J-1. The parties have confirmed their voluntary agreement of all disputed matters in the written agreement, and wish to have same incorporated into an Initial Decision-Settlement. The Robbinsville Board of Education (BOE) approved the agreement, as per the resolution confirming approval by the BOE at its November 22, 2022, meeting, which is attached as J-2.

I have reviewed the terms of the settlement, and I **FIND** as follows:

1. The parties voluntarily agreed to their settlement of all issues in the pending matter, as confirmed in the "Settlement Agreement and General Release," and executed by petitioners on November 22, 2022, and by the BOE attorney on November 28, 2022. (J-1.) The BOE approved the confidential agreement between the District and student at its meeting of November 22, 2022. (J-2.)

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

I **CONCLUDE** the parties' settlement shall be incorporated into this Initial Decision-Settlement.

Therefore, I **ORDER** that the parties comply with the settlement terms and that these proceedings be concluded.

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

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

November 29, 2022
DATE

ELAINE B. FRICK, ALJ

Date Received at Agency: 12/2/2022

Date Mailed to Parties: 12/5/2022

EBF/jns

APPENDIX

J-1 Settlement Agreement and General Release

J-2 BOE resolution from November 22, 2022, meeting

J-1
mck
11/29/2022
EBF

SETTLEMENT AGREEMENT AND GENERAL RELEASE

This SETTLEMENT AGREEMENT AND GENERAL RELEASE ("**Agreement,**" "**Settlement**" and/or "**Release**") is being entered into among and between S.M. and D.S. on behalf of A.S. ("**Petitioners**" or "**Releasor**") and ROBBINSVILLE BOARD OF EDUCATION ("**Robbinsville**") (collectively "**Releasees**"). S.M. and D.S. on behalf of A.S. and Robbinsville shall be collectively referred to herein as the "**Parties.**"

WHEREAS, S.M. and D.S. on behalf of A.S. initiated litigation against Robbinsville, alleging, amongst other things, an unlawful suspension, in a lawsuit captioned S.M. and D.S. on behalf of A.S. v. Robbinsville Board of Education, OAL Docket No.: EDU 09658-22 (hereinafter referred to as "**The Lawsuit**"); and

WHEREAS, the Parties wishing to resolve The Lawsuit initiated by Petitioners in the interest of the public without the need for further litigation, and all of Petitioners' claims and potential claims against Releasees, hereby stipulate to settle same, subject to the terms and conditions set forth herein: and

WHEREAS, the meaning, effect and terms of this Agreement have been fully explained to Petitioners, who understands that this Agreement settles, bars, and waives any and all claims that they could possibly have against Robbinsville as of the date of this Agreement as set forth herein;

NOW, THEREFORE, in consideration of the mutual promises, covenants, agreements and representations contained herein, the legal sufficiency of which is acknowledged by the Parties, and intending to be legally bound hereby, the Parties agree as follows:

1. Settlement. Petitioners agrees, upon execution of the within Settlement Agreement and General Release by the Parties, that she will voluntarily dismiss The Lawsuit with prejudice.
2. Consideration for Release of Claims. In consideration for dismissal of this claim, the Parties agree:

i. A.S. shall be placed outside of Robbinsville School District for the 2022-23 school year in a public high school within Mercer County.The District shall take steps to place A.S. in an adjacent school District, such as Lawrence, Hamilton, or Princeton. If the District cannot secure a placement in one of these Districts, then the District and Parents agree to work together to secure a placement at a mutually agreeable district. The parties further agree not to place A.S. in the Trenton School District. A.S.'s schedule for the 2022-23 school year will be assigned based upon his academic performance and be adequately rigorous for him based upon the available curriculum and programming. The District

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further agrees, based on the availability of courses offered in the receiving district, to place A.S. in the same, or as close to the same, A.P. classes, subject to A.S.' academic performance. Robbinsville shall be responsible for tuition and transportation costs of the general education placement. The District agrees to secure this placement within thirty days of execution by all parties of this agreement. If a placement cannot be secured at the expiration of thirty days, the parties shall convene a meeting to find discuss additional options. In such case, the District agrees to explore additional placement options for A.S. in other public school districts. The parties agree that A.S. shall be permitted to return to Robbinsville High School at the end of the 2022-2023 school year.

ii. A.S.'s school discipline record shall reflect an infraction for network violation occurring in the 2022-23 school year. No other details of the infraction shall be included in the disciplinary record.

iii. Robbinsville agrees, consistent with its lawful longstanding practice, that A.S.'s disciplinary record will not be sent to colleges and universities to which A.S. applies or might apply.

iv. Robbinsville agrees that it will not seek to file juvenile/criminal charges on behalf of the Board against A.S. arising out of the disciplinary incident that is the subject of The Lawsuit and will maintain that this is a school matter that has been resolved by way of this Agreement.

v. A.S. agrees to cooperate with Robbinsville administration, including Robbinsville High School administration, which shall include, and be exclusively limited to, having an informal conversation with District administration about what, if any, information he may have regarding the alleged network violation. Following the conversation, the investigation shall be deemed to concluded insofar as any questioning or investigating of A.S. shall be concerned unless there is a reasonable need for follow-up. If A.S. provides knowingly false or incomplete information, it may be deemed a separate and independent Code of Conduct violation. The conversation shall not include any written, signed, or sworn statements to be produced by A.S. or his Parents. The parties understand and agree that because this settlement agreement and release contemplates a full release and waiver of any and all legal claims, this agreement shall also release any and all claims regarding any potential criminal and/or juvenile proceedings against A.S.

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vi. A.S.'s grades will be restored in his transcript to those that he earned.

4. No Admissions. The Parties agree that this Settlement, including Robbinsville's approval of the same, does not constitute an admission of liability or wrongdoing by Robbinsville, nor by A.S. and Parents.

5. The Parties' General Release of Claims. In consideration for Releasees' promises and representations made herein, Petitioners, individually and on behalf of his heirs, representatives, immediate family members (including but not limited to her spouse and children), agents, successors and assigns, hereby releases Releasees, its parents, board members, subsidiaries, shareholders, directors, officers, employees, agents, attorneys, insurers, affiliates, predecessors, successors, assigns, heirs, and all persons acting by, through, under or in concert with any of them (collectively, the "**Released Parties**"), from any and all charges, complaints, claims, liabilities, obligations, promises, agreements, controversies, damages, actions, causes of action, suits, rights, demands, costs, losses, debts and expenses, and from any claims arising out of or related to The Lawsuit and the disciplinary incidents giving rise to the Lawsuit. Additionally, the District, their heirs, representatives, agents, successors and assigns, hereby release and forever discharge A.S. and Parents from any and all charges, complaints, claims, liabilities, obligations, promises, agreements, controversies, damages, actions, causes of action, suits, rights, demands, costs, losses, debts and expenses, including, but not limited to, civil, criminal, juvenile, and administrative actions and lawsuits, and reports to law enforcement, arising out of or related to the underlying Lawsuit and disciplinary incidents giving rise to the Lawsuit.

6. No Other Legal Action by the Parties Petitioners confirm that, other than The Lawsuit described on page 1 of this Agreement, they do not have any charge, complaint or action pending in any forum or form against any of the Released Parties as of the date of hereof. Further, Petitioners covenants and agrees not to bring any charge, complaint, action, suit, or administrative proceeding in any forum before any federal, state, or local administrative agency or in any federal, state or local court against any of the Released Parties for any actions that could or did arise or accrue prior to and including the date of this Agreement arising out of or related to The Lawsuit and the disciplinary incidents giving rise to the Lawsuit. This covenant extends to, but is not limited to, proceedings to negate, modify or reform this Agreement, though nothing in this paragraph is intended to limit Petitioners from instituting legal action for the sole purpose of enforcing Releasees' obligations to her under this Agreement. Additionally, the District confirms that other than communications they have had with the Robbinsville Police Department and the State Cyber Crimes Unit, there are no other criminal, juvenile, or law enforcement investigations or criminal or juvenile charges pending or that will be filed. That by

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signing this Agreement, the District agrees that it shall not file or caused to be filed any criminal or juvenile charges for any alleged conduct giving rise to the underlying lawsuit. Further, the District covenants and agrees not to bring any charge, complaint, action, suit, or administrative proceeding in any forum before any federal, state, or local administrative agency or in any federal, state or local court against any of the Released Parties for any actions that could or did arise or accrue prior to and including the date of this Agreement arising out of or related to The Lawsuit and the disciplinary incidents giving rise to the Lawsuit.

6. Confidentiality. The Parties shall keep this Agreement and all of its terms and the facts giving rise hereto completely confidential in accordance with existing Federal and State law governing the confidentiality of student records and shall not hereafter disclose any information concerning this Agreement or its subject matter or terms to any person.

7.Non-Disparagement. The Parties agree not to make, publicly or privately, through any media or medium (including, without limitation, comments on social media networking sites), any disparaging or derogatory remarks or otherwise make statements that could injure the business or reputation of any of the Released Parties. Petitioners and Releasees agree not to defame or disparage the other with respect to any matter arising out of The Lawsuit in the past and in the future.

8. Entire Agreement. This Agreement sets forth the entire agreement between Petitioners and Releasees. Petitioners acknowledges and agrees that Releasees have not made any promises to her other than those set forth in this Agreement. This Agreement may be modified only upon an express written agreement between the Parties. The language of this Agreement shall in all cases be construed as a whole, according to its fair meaning and not strictly for or against any of the Parties.

9. Assent to Terms. The Parties hereby acknowledge that they have entered into this Agreement with a full understanding of their rights and obligations and that they were fully informed of the implications of this Agreement by their respective attorneys, if any, and they do so without duress, of their own free will and volition.

10. Disputes. The validity, performance, construction, and effect of this Agreement shall be governed by the substantive laws of the United States and the State of New Jersey. The Commissioner of Education, through the Office of Controversies and Disputes, shall retain jurisdiction to implement and enforce the Agreement and its terms.

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11. Severability. The invalidity or unenforceability of any provision of this Agreement, whether in whole or in part, shall not in any way affect the validity or enforceability of any other provision contained herein.

12. Counterparts; Exchange by Electronic Means. This Agreement may be executed in counterparts, which shall be taken together as the entire agreement of the Parties hereto. This Agreement may also be exchanged by the Parties via electronic mail for the purposes of securing signatures and will be fully enforceable as an original document.

PETITIONERS ACKNOWLEDGE THAT THEY HAVE READ THIS AGREEMENT, UNDERSTANDS IT AND IS ENTERING INTO IT KNOWINGLY AND VOLUNTARILY AND NOT AS A RESULT OF ANY PRESSURE, COERCION OR DURESS.

PETITIONERS AGREE THAT THEY HAVE HAD A REASONABLE AND SUFFICIENT TIME AND OPPORTUNITY TO CONSULT WITH COUNSEL, AND THAT THEY HAVE FULLY DISCUSSED AND REVIEWED THE TERMS CONTAINED IN THIS AGREEMENT WITH COUNSEL PRIOR TO EXECUTING IT, OR HAS FREELY CHOSEN NOT TO DO SO.

IN WITNESS WHEREOF, and intending to be legally bound, the Parties agree to the terms of this Agreement.

S.M. and D.S. on behalf of A.S.

Dated: 11 / 22 / 2022

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NAME: Deepinder Singh

Dated: 11 / 22 / 2022

ROBBINSVILLE BOARD OF EDUCATION

Patrick F Carrigg

NAME: Patrick F. Carrigg, Esq.

TITLE: Board Attorney

Dated: 11.28.2022

Doc ID 104803a97f993615fdb1cc4613b606b1fd65a6c2

J-2 attn
11/29/2022

Robbinsville
Public Schools

155 Robbinsville Edinburg Road
Robbinsville, New Jersey 08691
(609) 632 – 0910 Ext. 2203

Nick Mackres · School Business Administrator · Mackres.Nick@Robbinsville.k12.nj.us

RESOLUTION

BE IT ADVISED..... that at the Regular Board Meeting of the Robbinsville Board of Education held on November 22, 2022:

Motion was made by Mr. Gulati and seconded by Mr. Veisz to approve the following resolution:

Confidential Agreement

Approve the confidential agreement between the District and student.

The motion was carried upon roll call by Board Members: Mr. Christopher Emigholz, Mrs. Kerriann Fox, Mr. Vito Galluccio, Mr. Jai Gulati, Ms. Tanya Lehmann, Mrs. Lauren Paluzzi, Mr. Scott Veisz and Mr. Richard Young.

I, Nick Mackres, Secretary of the Board of Education of Robbinsville, in the County of Mercer, State of New Jersey, HEREBY CERTIFY that the foregoing annexed extract from the minutes of the Board of Education held on November 22, 2022 has been compared by me with the original minutes as officially recorded in my office in the minute book of said Board of Education and is a try, complete and correct copy thereof and of the whole of said original minutes so far as the same relate to the subject matter referred to in said extract.

IN WITNESS THEREOF, I have hereunto set my hand and affix the Corporate Seal of said Board of Education on this 28th day of November 2022.

Nick Mackres
School Business Administrator / Board Secretary

STATE OF NEW JERSEY
DEPARTMENT OF EDUCATION

In the Matter of the Tenure Hearing of:

JODI BOCCO, SCHOOL DISTRICT OF THE BOROUGH OF WEST LONG BRANCH, MONMOUTH COUNTY

Agency Docket No. 25-2/22

Walt De Treux, Esq., Arbitrator

Hearing Date: 9/30/22
Briefs Received: 12/17/22
Decision Date: 1/17/23

Appearances: For Petitioner School District – Tracy A. Armstrong, Esq.;
Stephanie D. Gironda, Esq., *WILENTZ, GOLDMAN & SPITZER, P.A.*
For Respondent – Jodi Bocco, *Pro se*

Introduction and Statement of Relevant Facts

Jodi Bocco served as a teacher in the West Long Branch School District since September 1987, most recently as a Health & Physical Education Teacher at Frank Antonides Middle School. Bocco previously served as a school counselor and substance awareness coordinator. In December 2012, the District filed tenure charges to dismiss her from that position for allegedly engaging in unbecoming conduct. Specifically, the District charged Bocco with refusing to cooperate with outside agencies, improper conduct toward supervisors, staff members, and outside authorities, insubordination, and inappropriate comments to a student. In a Decision dated July 14, 2012, Arbitrator James Mastriani upheld those charges.

From the 2014-15 school year through the 2020-2021 school year, the District alleged that Respondent engaged in "troubling behavior,' the details of which are not relevant to the

current proceeding. Bocco asserted that the District, through its treatment of her from 2014 through 2021 and its previous filing of tenure charges, was retaliating against her for reporting or attempting to report complaints of child abuse to proper authorities and from reporting or attempting to report violations of the District's Harassment, Intimidation, and Bullying policy.

On June 8, 2021, the School Board, upon recommendation of Superintendent Dr. Christina Egan and based on it concerns with the alleged "troubling behavior," passed a Resolution requiring Bocco to undergo a psychiatric evaluation. The Board offered her the opportunity to challenge its directive in a hearing before the Board and advised that she had the right to appeal any determination by the Board after hearing to the New Jersey Commissioner of Education. Bocco did not respond, and the Board sent her a follow-up letter on July 13, 2021. The Board scheduled an August 10, 2021 appointment for her with Tosk Psychiatric Services.

One day prior to the scheduled appointment, an attorney retained by Bocco notified the Board of Bocco's request for a hearing. Bocco's counsel attended the August 30, 2021 hearing without his client. At hearing, the Board advised that it would select another date for the examination.

In a September 16, 2021 letter between counsel, the District offered several times and dates for an examination. District counsel sent several follow-up reminders to Bocco's counsel. In one such letter on October 25, 2021, District counsel asked if Bocco intended to appeal the Board's directive for a psychiatric evaluation pursuant to N.J.A.C. 6A:3-1.3. Bocco's counsel responded that his client was considering her options. Bocco did not appeal the Board's directive, and she did not attend a psychiatric evaluation.

On January 10, 2022, the District filed the present tenure charges, alleging that Bocco's refusal to attend the psychiatric examination constituted insubordination and conduct unbecoming. It asserted that her actions warrant dismissal from employment.

On March 15, 2022, the New Jersey Department of Education assigned this matter to the undersigned Arbitrator for a hearing. The parties had difficulty in scheduling a hearing, and the Department granted this Arbitrator's request to extend the statutory time limit for the first hearing. At the end of May 2022, Bocco's counsel withdrew from representation. Bocco asked for and was granted several extensions of time in which to hold a hearing so that she could secure representation. When she was unable to do so, this Arbitrator set a hearing date for September 30, 2022.

Prior to the hearing, the District filed an application for a ruling on the scope of the arbitration. Citing Bocco's failure to appeal the School Board's directive to undergo a psychiatric evaluation in a timely manner pursuant to N.J.A.C. 6A:3-1.3, the District asserted that Bocco "waived her right to challenge the Board's reasons for requiring her to undergo a mental health examination." In a September 9, 2022 Interim Order, this Arbitrator accepted the District's argument and ruled that "the validity of the Board's directive is no longer at issue." The Order further stated, "The arbitration proceeding will focus solely on the issues raised by the tenure charges..." The Order identified the issues as, "did the Respondent's refusal to comply with the Board directive constitute insubordination and conduct unbecoming, and if so, does her conduct warrant termination from employment?"

On September 30, 2022, a hearing was held at the offices of the Wilentz law firm, during which time both parties had a full and fair opportunity to present documentary and other

evidence, examine and cross-examine witnesses, and offer argument in support of their respective positions. The parties filed post-hearing briefs and submitted the matter to the Arbitrator for a decision.

Issue

Has the School District of the Borough of West Long Branch established the allegations of insubordination and conduct unbecoming against Respondent Jodi Bocco as set forth in the tenure charges? If so, do those charges warrant dismissal?

Analysis and Decision

Prior to, during, and after the hearing, Respondent has made multiple allegations of retaliation, harassment, and conflicts of interest against the School District. In numerous detailed emails and in her brief, Respondent described reports she made or attempted to make to District officials and outside agencies and her belief that the District has taken adverse action against her for those reports. The allegations, spanning approximately a decade, are too numerous to include in this Decision. I make no finding on the validity of those allegations because they fall beyond the jurisdiction of this proceeding. As stated in the pre-hearing Order, the only issue to be considered in this arbitration is whether Respondent engaged in insubordination and conduct unbecoming by refusing to submit to a psychiatric evaluation. As Respondent did not challenge the validity of the Board's directive in the proper forum through a timely appeal to the Commissioner of Education as was her right, she cannot now challenge the validity of the Board's directive in this forum. Respondent has other forums in which she

can pursue her allegations of harassment, retaliation, and conflicts of interest. This tenure charge arbitration is not the forum to consider or resolve those allegations. The present proceeding only addresses the issues raised in the tenure charges.

Resolution of the issues in this case could not be more straightforward. The School Board directed Respondent to attend a psychiatric evaluation. It gave her multiple opportunities to do so, allowed her to select the medical provider, and reminded her of her right to challenge the Board's directive. Respondent admittedly did not attend the psychiatric evaluation nor appeal the directive. She refused because she did not believe that the directive was valid. She believed it was a form of harassment and retaliation. As noted, the validity of the directive is not before this Arbitrator. The challenge to the validity of the directive should have been filed with the Commissioner of Education, but it was not. With Respondent offering no reason for not complying with the directive other than her opinion as to its validity, I am compelled to find that the charges of insubordination and conduct unbecoming have been substantiated.

The remaining issue is whether Respondent's conduct warrants dismissal from employment. The District cited to several tenure cases in which employees have been terminated for insubordination and the terminations were upheld on appeal. Specific to this case, a penalty less than dismissal would be warranted if a lesser disciplinary sanction would correct Respondent's conduct and ensure that she could return to the classroom without further disruption or consequence. Respondent's repeated refusal to attend the psychiatric evaluation despite several opportunities and her continued insistence that the directive lacks validity demonstrate that a lesser disciplinary penalty would not rehabilitate her conduct or

ensure against further insubordinate behavior. The trust necessary between Respondent and the District has been irreparably broken by her refusal to follow the Board directive. Dismissal from employment is an appropriate penalty.

For these reasons, I find that the School District has established the charges of insubordination and conduct unbecoming and those charges warrant dismissal.

Award

The School District has established the allegations set forth in the tenure charges. Accordingly, the tenure charges are sustained, and dismissal is warranted.

Walt De Treux

WALT De TREUX

STATE OF NEW JERSEY
DEPARTMENT OF EDUCATION

In the Matter of the Tenure Hearing of:

JODI BOCCO, SCHOOL DISTRICT OF THE BOROUGH OF WEST LONG BRANCH, MONMOUTH COUNTY

Agency Docket No. 25-2/22

Affirmation

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

Walt De Treux

WALT De TREUX

18-23
State Board of Examiners Dkt No. 1920-130
Agency Dkt. No. 3-4/22A

New Jersey Commissioner of Education

Final Decision

In the Matter of the Certificates of
Richard N. Leonard, State Board of Examiners,
New Jersey Department of Education.

Order of Suspension by the State Board of Examiners, March 7, 2022

For the Respondent-appellant, David W. Fasset, Esq.

For the Petitioner-Respondent State Board of Examiners, Hasibul Haque, Deputy Attorney General (Matthew J. Platkin, Attorney General of New Jersey)

The Commissioner has reviewed the record and the papers filed in connection with appellant Richard N. Leonard's appeal of the Order of the State Board of Examiners (Board), dated March 7, 2022, revoking his two Teacher of Social Studies Certificates.

Appellant maintained two Teacher of Social Studies Certificates, which were issued in 1972. Between 1973 and 1986, appellant taught Social Studies at West Essex Junior High School in North Caldwell and also served as a substitute teacher in the public schools of Caldwell, Glen Ridge, and Roseland. In addition to employment as a teacher, appellant has also held a real estate broker's license and owned and operated a realty business, Arcadia Realtors, in Roseland, New Jersey. From 1973 to 2019, appellant also served as an elected public official, serving as Councilman and the Mayor of Roseland. It is from appellant's service as an elected public official that the Board of Examiner's revocation proceedings originate.

On February 24, 2015, appellant attended a Roseland Council meeting where the Council considered a motion to recommend a redevelopment plan, which included a parcel of real property located at 165 Eagle Rock Avenue that is adjacent to property owned and operated by appellant and his real estate company, Arcadia Realtors. The proposed plan included the construction of a parking lot which would directly benefit appellant's realty business. The motion was passed with appellant voting against the motion. As appellant admitted, he should have abstained from voting on that motion because the property to be redeveloped was located next to his realty business and the plan would confer a benefit to his realty business.

On or about May 15, 2018, appellant was charged with a single count of violating *N.J.S.A.* 2C:5-2A(1), Conspiracy to Commit a Violation of *N.J.S.A.* 2C:30-2A, Official Misconduct. Pursuant to the Affidavit of Probable Cause, which was executed by an Officer of the Essex County Prosecutor's Office in support of the charge, it was alleged that appellant made a statement in front of the Roseland Council and Borough employees that appellant would continue voting no against ordinances that would benefit 165 Eagle Rock Avenue until the owner of 165 Eagle Rock Avenue agreed to perform snow removal on appellant's business parking lot.

On January 31, 2019, appellant entered a plea of guilty to the charge of conspiracy to commit official misconduct. As part of his plea, appellant admitted that as a councilman for the Township of Roseland, he conspired with his corporation to obtain a benefit for the corporation for an amount under $200.00. On September 26, 2019, appellant was sentenced to a term of probation for one year and was ordered to pay various penalties and assessments. As

conditions of probation, appellant was to remain offense free and to complete thirty hours of community service. Additionally, as part of the plea agreement and sentencing, appellant forfeited his right to public employment and was forever disqualified from holding any office or position of honor, trust or profit under the State of New Jersey or any of its administrative or political subdivisions. The original judgment of conviction incorrectly stated that appellant was sentenced on a second-degree charge, when in fact it was a third-degree charge. As such, on November 8, 2019, the Court entered an amended judgment of conviction without altering the sentencing of appellant.

After the entry of appellant's guilty plea, but prior to his sentencing, on February 8, 2019, the Criminal History Review Unit of the New Jersey Department of Education's Office of Student Protection (OSP) received notice of appellant's guilty plea and transmitted information regarding the same to the Office of Certification & Induction, indicating that appellant was disqualified from employment as a teacher pursuant to *N.J.S.A.* 18:6-7.1 *et seq.* On December 13, 2019, the OSP forwarded the disqualification from employment in public schools to the Board, enclosing a copy of the un-amended judgment of conviction.

Thereafter, on January 27, 2020, the Board issued an Order to Show Cause as to why appellant's certificates should not be revoked. On February 17, 2020, appellant filed an answer to the Order to Show Cause, which also included information – the amended judgment of conviction – which clarified that appellant had been convicted of a third-degree offense, not a second-degree offense. The Order to Show Cause and the answer thereto were put into abeyance by the Board because appellant had indicated that he was appealing the OSP's

determination that he was disqualified from public school employment pursuant to *N.J.S.A.* 18A:6-7.1 *et seq.* As this disqualification formed part of the allegations of the original Order to Show Cause, the Board determined that the resolution of the appeal was appropriate before the Board could move forward on the Order to Show Cause.

On January 6, 2021, appellant, through counsel, withdrew his appeal of the determination of the OSP that he was disqualified from public school employment pursuant to N.J.S.A 18A:6-7.1. On January 27, 2021, the Board advised appellant's counsel that the Order to Show Cause would be moved from abeyance and requested that counsel file an Answer. Appellant, through counsel, advised the Board that there was an error in the original Order to Show Cause relating to the Judgment of Conviction, specifically the grading of the offense to which appellant plead guilty. Accordingly, on June 24, 2021, the Board vacated the original Order to Show cause and issued a new, corrected Order to Show Cause. Appellant filed an Answer on July 30, 2021, wherein he admitted to the charges and that he pleaded guilty to the downgraded third-degree offense and was sentenced to noncustodial probation for one year. Appellant further admitted that the downgraded third-degree conviction automatically disqualifies him from public school employment pursuant to *N.J.S.A.* 2C:51-2(d) but argued that it does not disqualify him under *N.J.S.A.* 18A:6-7.1 or warrant revocation of his teaching certificate.

On September 8, 2021, pursuant to *N.J.A.C.* 6A:9B:4.6(e), the Board sent appellant a hearing notice indicating that there were no material facts in dispute but offering appellant the opportunity to submit written arguments on the issue of whether the conduct addressed in the Order to Show Cause constituted conduct unbecoming a certificate holder, as well as

arguments with regard to the appropriate sanction in the event that the Board found just cause to take action against his certificate. Appellant filed a written response on October 8, 2021, and he appeared before the Board and provided testimony on December 16, 2021. In addition to providing live testimony, appellant was given the opportunity to provide additional documents for the Board to review as part of the hearing.

In its March 8, 2022 Order, the Board concluded that appellant's conduct provided just cause to take action against his certificate pursuant to *N.J.A.C.* 6A:9B-4.4. The Board noted that the purpose of the Criminal History Review Statute was to protect public school pupils from contact with individuals who the Legislature deemed to be a poor example, and individuals convicted of crimes such as conspiracy fall squarely within this category. The Board further found that appellant had abandoned his appeal of the OSP disqualification and indicated that the Board's decision was consistent with the OSP determination. Finally, the Board concluded that an individual whose offense is so serious that he is barred from service in public schools should not be permitted to retain the certificate that authorizes such service. Accordingly, the Board revoked appellant's teaching certificate.

On appeal, appellant argues that *N.J.S.A.* 18A:6-7.1 does not identify conspiracy to commit third-degree official misconduct under *N.J.S.A.* 2C:30-2 as an offense triggering disqualification from public employment. As such, appellant contends that the Board's finding that *N.J.S.A.* 18A:6-7.1 disqualifies him from public employment is clearly erroneous and, by itself, requires reversal. Appellant claims that his withdrawal of his appeal of the OSP's disqualification decision was made without prejudice to challenging the Board's proposed revocation of his teaching certificates. In essence, appellant argues that though he is

disqualified from all public employment, including employment with a public school, pursuant to *N.J.S.A.* 2C:51-2(d), he is not specifically disqualified by *N.J.S.A.* 18A:6-7.1, despite his withdrawal of his appeal of the OSP's determination that he was disqualified.

Appellant further contends that, due to the Board's mistaken belief that his conviction fell within *N.J.S.A.* 18A:6-7.1, the Board failed to independently assess his conduct and the circumstances surrounding it. Appellant also argues that the Board ignored the opinion of the Superior Court and the prosecution that his disqualification from public employment under *N.J.S.A.* 2C:51-2 did not disqualify him from maintaining his teaching certificates.

Lastly, appellant argues that his conduct does not constitute just cause for revocation of his teaching certificate. He argues that nothing in his conduct suggests any inefficiency, incapacity, conduct unbecoming a teacher, or other just cause for revocation pursuant to *N.J.A.C.* 6A:9B-4.4. Specifically, he argues that the evidence establishes that he voted against the redevelopment plan in good faith, and on its merits, because he believed it to be against the public interests. Appellant claims that the criminal complaint against him was politically motivated and that his political opponents retaliated against him by manufacturing a false allegation.

After a comprehensive review, the Commissioner finds that the record adequately supports the Board's determination that appellant engaged in unbecoming conduct and there was just cause to revoke appellant's certificates. In reviewing appeals from decisions of the Board, the Commissioner may not substitute her judgment for that of the Board so long as appellant received due process and the Board's decision is supported by sufficient credible evidence in the record. Further, the Board's decision should not be disturbed unless appellant

demonstrates that it is arbitrary, capricious, or unreasonable. *N.J.A.C.* 6A:4-4.1(a). With regard to reviewing a sanction imposed by the Board, the Appellate Division has defined the standard as determining whether the "punishment is so disproportionate to the offense, in light of all the circumstances, as to be shocking to one's sense of fairness." *In re Certificates of Benjamin Norton*, 2016 *N.J. Super. Unpub. LEXIS* 2291, *6-7 (internal citations and quotations omitted).

Initially, the record reflects that appellant was afforded the necessary due process throughout the proceedings before the Board prior to the suspension of his certificates. Specifically, prior to moving forward with the Order to Show Cause issued on January 27, 2020, appellant was afforded the opportunity to appeal the OSP's determination that his guilty plea and judgment of conviction disqualified him public school employment pursuant to *N.J.S.A.* 18A:6-7.1. The Board granted him the opportunity to pursue the appeal of the OSP's determination and held the Order to Show Cause in abeyance pending said appeal. Additionally, in response to information provided by appellant, the Board corrected the original Order to Show Cause, which listed a second-degree offense, by issuing and allowing appellant the opportunity to respond to an Amended Order to Show Cause which listed a third-degree offense. Lastly, despite the Board determining that there were no material facts in dispute, pursuant to *N.J.A.C.* 6A:9B-4.6(e), appellant was offered the opportunity to submit written submissions as well as appear for in person testimony, which was considered by the Board. As such, it is the Commissioner's determination that appellant received due process in this matter.

As to the record before the Board, the following facts are uncontroverted. First, appellant was a certificate holder, specifically holding two certificates as a Teacher of Social

Studies going back to the early 1970s. Second, on or about May 15, 2018, appellant was charged with a single count of violating *N.J.S.A.* 2C:5-2A(1), Conspiracy to Commit a Violation of *N.J.S.A.* 2C:30-2A, Official Misconduct, a crime of the second degree. Third, on September 26, 2019, appellant entered a guilty plea to a downgraded charge of violating *N.J.S.A.* 2C:5-2A(1), Conspiracy to Commit a Violation of *N.J.S.A.* 2C:30-2A, a crime of the third degree. Fourth, appellant testified and admitted the factual basis of his guilty plea that as a councilman for the Township of Roseland, he conspired with his corporation to obtain a benefit for the corporation in an amount under $200.00. Fifth, as a result of his guilty plea, appellant was sentenced to a year of probation, thirty hours of community service, various monetary penalties and assessments, forfeited his right to public employment and was forever disqualified from holding any office or position of honor, trust, or profit under the State of New Jersey or any of its administrative or political subdivisions, pursuant to *N.J.S.A.* 2C:51-2(d). Sixth, the OSP found that appellant's guilty plea and conviction disqualified him from public school employment pursuant to *N.J.S.A.* 18A:6-7.1, and appellant voluntarily withdrew his appeal of this determination. These facts adequately support the Board's determination that appellant engaged in conduct unbecoming and that a revocation of his teaching certificates is the appropriate penalty.

The majority of appellant's arguments take issue with the Board's reliance upon the OSP's determination that appellant was disqualified from employment in public schools pursuant to *N.J.S.A.* 18A:6-7.1. He argues at length that the crime to which he pled guilty and was sentenced was not enumerated in *N.J.S.A.* 18A:6-7.1 and thus could not be relied upon by the Board. However, the correctness of the OSP's decision to disqualify appellant pursuant to

N.J.S.A. 18A:6-7.1 is not at issue here. Appellant abandoned his appeal of the OSP's determination of disqualification, leaving the Board with the uncontested determination of disqualification pursuant to *N.J.S.A.* 18A:6-7.1, which adequately supports the Board of Examiner's determination and their order of revocation.

The Commissioner disagrees with appellant that the Board relied solely on *N.J.S.A.* 18A:6-7.1 to support its decision. Nevertheless, to address appellant's argument that the Board should have looked at and independently assessed his particular conduct when making a determination as to whether his conduct warranted revocation of his certificates, it is clear that the record before the Board adequately supports a finding of conduct unbecoming and just cause, both of which warrant the revocation of his teaching certificates. Appellant's brief and submissions appear to be an attempt to re-litigate the criminal charges to which appellant freely and voluntarily pleaded guilty, ignoring the fact that appellant, under oath, admitted to conspiring with a corporation to commit the crime of official misconduct.

The Board may revoke or suspend the certificates of a certificate holder for demonstrated inefficiency, incapacity, conduct unbecoming a teacher, or other just cause. *N.J.A.C.* 6A:9B-4.4. "Other just cause shall include, but be not limited to, offenses within the terms of the forfeiture statute, *N.J.S.A.* 2C:51-2, or the disqualification statute, *N.J.S.A.* 18A:6-7.1." *Id.* Here, appellant has admitted, and it is uncontroverted, that he voluntarily pleaded guilty to a crime which is within the terms of the forfeiture statute, *N.J.S.A.* 2C:51-2. As a result, he forfeited his right to public employment and is forever disqualified from holding any office or position of honor, trust or profit under the State of New Jersey or any of its administrative or political subdivisions. Although appellant argues that the prosecutor and the Superior Court

consented to and found that he was not to lose his teaching certificates, he has presented no authority for the proposition that the Board and the Commissioner are bound by the Superior Court and the prosecutor's assessment. The issuance and revocation of certificates falls firmly within the Commissioner's jurisdiction, not that of the Superior Court.

It is clear that the Legislature, when passing the forfeiture statutes, including *N.J.S.A.* 2C:51-2, intended to hold those in positions of public trust to the highest standards of conduct, and breaching that trust would result in forfeiture. As set forth in the Board's order of revocation, teachers must serve as role models for their students. "Teachers... are professional employees to whom the people have entrusted the care and custody of... school children. This heavy duty requires self-restraint and controlled behavior rarely requisite to other types of employment." *Tenure of Sammons*, 1972 S.L.D. 302, 321. Moreover, unfitness to hold a position in a school system may be shown by one incident, if sufficiently flagrant. *Redcay v. State Bd. Of Educ.*, 130 N.J.L. 369, 371 (1943), aff'd 131 N.J.L. 326 (E & A 1944). As noted in the Board's Order, appellant's conviction demonstrates behavior that falls incredibly short of a role model and the high standards to which educators are held. Indeed, his behavior has resulted in him having to resign his position as a Councilman and he is forever barred from any position of employment or public trust with the State of New Jersey. It would be illogical for the Commissioner to conclude that conduct resulting in a bar from all positions of public trust does not also warrant the revocation of his teaching certificates.

Accordingly, the decision of the State Board of Examiners revoking appellant's teaching certificates is affirmed. Appellant's Teacher of Social Studies certificates are hereby revoked.[1]

Angelica Allen-McMillan, Ed.D.
ACTING COMMISSIONER OF EDUCATION

Date of Decision: January 23, 2023
Date of Mailing: January 25, 2023

[1] This decision may be appealed to the Appellate Division of the Superior Court pursuant to *N.J.S.A.* 18A:6-9.1. Under *N.J.Ct.R.* 2:4-1(b), a notice of appeal must be filed with the Appellate Division within 45 days from the date of mailing of this decision.

IN THE MATTER OF	:	NEW JERSEY DEPARTMENT OF EDUCATION
THE CERTIFICATE OF	:	STATE BOARD OF EXAMINERS
RICHARD N. LEONARD	:	ORDER OF REVOCATION
_____	:	DOCKET NO: 1920-130

At its meeting of December 13, 2019, the State Board of Examiners (Board) reviewed information provided by the Essex County Superior Court and the Office of Student Protection (OSP) regarding Richard N. Leonard (Leonard). Leonard was charged with Conspiracy to Engage in Conduct Constituting a Crime – Official Misconduct Unauthorized Use of Official Function (2nd degree), following allegations that he agreed not to take official action as a member of the Roseland Council for a benefit that exceeded $200 in value. Leonard pled guilty to Conspiracy to Engage in Conduct Constituting a Crime – Official Misconduct Unauthorized Use of Official Function (3rd degree) and was sentenced on November 8, 2019 to probation for a period of one year along with other terms and conditions, including forfeiture of public employment. The OSP notified the Board that, as a result of his conviction, Leonard is disqualified from public school employment pursuant to *N.J.S.A.* 18A:6-7.1 *et seq.* Leonard currently holds a Teacher of Social Studies Certificate.

On January 23, 2020, the Board issued an Order to Show Cause to Leonard. On March 9, 2020, the Board placed the matter in abeyance because Leonard indicated he was appealing the OSP's disqualification determination. This disqualification is part of the allegations in the Order to Show Cause, and thus resolution of this appeal was appropriate before the Board could move forward on the Order to Show Cause.

On or about January 6, 2021, Leonard withdrew the pending appeal of OSP's disqualification. Accordingly, the OSP's determination of disqualification pursuant to N.J.S.A.

18A:6-7.1 stands. On January 27, 2021, the Board sent Leonard's counsel a notice that the matter would be moved from abeyance and requested that counsel file an Answer in this matter.

The Board was advised that there was an error in the Order to Show Cause relating to the Judgment of Conviction; it required correction before moving forward in the matter. Accordingly, on June 25, 2021 the Board vacated the original Order to Show Cause and issued a new, corrected, Order to Show Cause.

The Board sent Leonard the corrected Order to Show Cause by regular and certified mail on July 1, 2021. The Order provided that Leonard had 30 days to respond. Leonard filed an Answer on July 30, 2021. In that Answer, Leonard admitted to the charges and indicated that the prosecution downgraded it to a 3rd degree conspiracy to engage in official misconduct. *See* Answer at ¶ 3. He further stated that he pled guilty to the downgraded third-degree charge and was sentenced to noncustodial probation for one year. *Id.* He states that on May 13, 2020, after 7 months of probation, Leonard was discharged from PTI after he performed 70 hours of community service, which was more than double the 30 hours required by his sentence. *Id.*

Leonard admits that his third-degree conviction automatically disqualifies him from holding public school employment under N.J.S.A. 2C:51-2d but does not disqualify him under N.J.S.A. 18A:6-7.1. Further, it does not warrant revocation of his teaching certificate. *Id.* at ¶ 3, 4 and 5.

Leonard states that the allegations of the Order to Show Cause are derived from allegations three (3) years ago when he was a Councilman in Roseland, New Jersey. *Id.* at ¶ 7. Leonard voted against a motion to recommend a proposed Payment in Lieu of Taxes redevelopment plan for property located next to his realty business, allegedly because the owner of the redevelopment property refused to provide snow plowing services to him/his business. Leonard admits that he

should have abstained from voting on the motion but denies that he voted against it because of a desire for snow plowing services or any other benefit to him or his business. *Id.* Further, he states that his opposing vote was not motivated by monetary or other benefit to him or his business. *Id.* at ¶ 9. He also indicates that the council attorney nor any other council member advised him to abstain. *Id.* at ¶ 10.

Thereafter, pursuant to *N.J.A.C.* 6A:9B-4.6(e), on September 8, 2021, the Board sent Leonard a hearing notice by regular and certified mail. The notice explained that there were no material facts in dispute. Thus, Leonard was offered an opportunity to submit written arguments on the issue of whether the conduct addressed in the Order to Show Cause constituted conduct unbecoming a certificate holder, as well as arguments with regard to the appropriate sanction in the event that the Board found just cause to take action against his certificate. It also explained that, upon review of the charges against him and the legal arguments tendered in his defense, the Board would determine if his offense warranted action against his certificate. Thereupon, the Board would also determine the appropriate sanction, if any. Leonard was also offered the opportunity to appear before the Board to provide testimony on the sanction issue. Leonard filed a written response on October 8, 2021 and requested to appear before the Board.

In that response, Leonard argued that although his conviction "automatically disqualified him from holding public employment generally under N.J.S.A. 2C:51-2d, it did not disqualify him from holding public school employment specifically under N.J.S.A. 18A:6-7." *See* Hearing Submission at p. 1. He states that the Court in his criminal matter found that Leonard's public employment disqualification does not disqualify him from maintaining his teacher certificates. *Id.*

He further states that the allegations against him were false and brought over three years after the vote. He says they were "proven to be politically motivated, brought by Mr. Leonard's

political opponents in retaliation for his disclosing antisemitic and racist comments made by those opponents." *Id.* at p. 2. Leonard devoted his entire professional life to public service and support of public education. He is 72 years old and has not taught since 1986 and has no plans to return to teaching. Nevertheless, he wishes to maintain his certificate in recognition of his career. *Id.*

Leonard also submits detailed information on his personal and professional history. *Id.* at p. 3-4. He provides information on the circumstances surrounding the alleged conduct. *Id.* at p. 4-13. Leonard argues that his conduct does not warrant action against his certificate because his conduct was a single act almost 7 years ago; the conduct was unrelated to teaching in the classroom; it was a momentary lapse of judgment and not a pattern of misconduct; he is not disqualified from public school employment pursuant to N.J.S.A. 18A:6-7.1; and the Court in his criminal matter affirmatively found that the disqualification should not disqualify him from maintaining his teacher certificate. *Id.* at p. 18-19. Finally, Leonard states that he believes no sanction against his educator certificate is warranted, but any sanction should be less than revocation. *Id.* at p. 20.

The hearing was scheduled for the Board's December 16, 2021 meeting. Mr. Leonard appeared with his counsel, David W. Fassett, Esquire. Mr. Fassett began the hearing by indicating that he would not reiterate what is in his submissions, but that Leonard wished to speak on his behalf. Prior to the hearing, Counsel for Leonard provided additional documents for the Board to review as part of Leonard's hearing.

Leonard appeared and began by stating that he wanted the Board to know who he was as a person. He wants to give back and is involved in Goodwill and Habitat for Humanity. He spent time discussing his personal ventures and history, his beliefs and the importance of teaching and giving back.

The threshold issue before the Board in this matter is whether Leonard's conduct constitutes conduct unbecoming a certificate holder or other just cause. At its meeting of January 21, 2022, the Board considered the allegations in the Order to Show Cause, the Answer, as well as Leonard's Hearing Response and testimony. The Board determined that no material facts related to Leonard's offense were in dispute since he pled guilty to Conspiracy – Agree/Engage in Conduct Constituting a Crime (3rd degree). Moreover, as a result his conviction, Leonard is disqualified from public school employment pursuant to *N.J.S.A.* 18A:6-7.1 *et seq.* Thus, the Board determined that summary decision was appropriate in this matter. *N.J.A.C.* 6A:9B-4.6(h). After reviewing the allegations, the Board found that Leonard engaged in unbecoming conduct.

The Board must now determine whether Leonard's conduct, as set forth in the Order to Show Cause, provides just cause to act against his certificate pursuant to *N.J.A.C.* 6A:9B-4.4. The Board finds that it does.

In enacting the Criminal History Review statute, *N.J.S.A.* 18A:6-7.1 *et seq.* in 1986, the Legislature sought to protect public school pupils from contact with individuals whom it deemed to be a poor example for them. Individuals convicted of crimes such as Conspiracy fall squarely within this category. The strong legislative policy statement is also in accord with the Commissioner's long-standing belief that teachers must serve as role models for their students. "Teachers... are professional employees to whom the people have entrusted the care and custody of ... school children. This heavy duty requires a degree of self-restraint and controlled behavior rarely requisite to other types of employment." *Tenure of Sammons*, 1972 *S.L.D.* 302, 321. Moreover, unfitness to hold a position in a school system may be shown by one incident, if sufficiently flagrant. *Redcay v. State Bd. of Educ.*, 130 *N.J.L.* 369, 371 (1943), *aff'd*, 131 *N.J.L.* 326 (E & A 1944). In this instance, Leonard's conviction demonstrates behavior that falls short

of a role model. Leonard argues that he is not disqualified under N.J.S.A. 18A:6-7.1; nevertheless, he abandoned the appeal of that determination in January 2021. He cannot now argue the merits of that appeal before this Board and seek a different outcome. Accordingly, the disqualification from OSP stands and the Board takes its action consistent with that determination.

The strong policy statement on the part of the Legislature set forth in *N.J.S.A.* 18A:6-7.1(b) also offers guidance to the Board as to the appropriate sanction in this matter. An individual whose offense is so great that he or she is barred from service in public schools should not be permitted to retain the certificate that authorizes such service. Nor should a person who has been disqualified from teaching in a public school be permitted to continue to hold himself out as a teacher. Thus, because the Legislature and the Commissioner consider Leonard's offense so significant, the Board believes that the only appropriate sanction in this case is the revocation of his certificate.

Accordingly, on January 21, 2022, the Board voted to revoke Richard N. Leonard's Teacher of Social Studies Certificate. On this 4th day of March 2022, the Board voted to adopt its formal written decision and it is therefore ORDERED that Leonard's certificate is hereby revoked, effective immediately. It is further ORDERED that Leonard return his certificate to the Secretary of the State Board of Examiners, Office of Certification and Induction, P.O. Box 500, Trenton, NJ 08625-0500 within 30 days of the mailing date of this decision.

Rani Singh, Secretary
State Board of Examiners

Date of Mailing: March 7, 2022
Via certified and regular mail
Appeals may be made to the Commissioner of Education pursuant to the provisions of *N.J.S.A.* 18A:6-38.4.

19-23
State Board of Examiners Dkt No. 1819-240
OAL Dkt. No. EDE 15392-19
Agency Dkt. No. 5-7/22A

New Jersey Commissioner of Education

Final Decision

In the Matter of the Certificates of
Michael D'Alessio, State Board of Examiners,
New Jersey Department of Education.

Order of Revocation by the State Board of Examiners, June 30, 2022

For the Respondent-Appellant, James J. Uliano, Esq.

For the Petitioner-Respondent State Board of Examiners, Erin Herlihy, Deputy Attorney General (Matthew J. Platkin, Attorney General of New Jersey)

The Commissioner has reviewed the record and the papers filed in connection with appellant Michael D'Alessio's appeal of the Order of the State Board of Examiners (Board), dated June 30, 2022, revoking his Teacher of Handicapped and Teacher of Elementary Grades K-8 Certificate of Eligibility with Advanced Standing. The Board issued an Order to Show Cause on September 19, 2019, and the matter was transmitted to the Office of Administrative Law (OAL). Following a hearing at the OAL, the Administrative Law Judge (ALJ) found that appellant engaged in conduct unbecoming a teacher. Criminal charges had been filed against appellant, stemming from an investigation into the sale of prescription pain medication which revealed that Kevin McNamara (McNamara), an individual associated with appellant, obtained medication from an Acme pharmacy using appellant's credit card, and then sold these medications from

appellant's car in the parking lot of the Acme pharmacy, which is located both within a school zone and within 500 feet of a public housing unit. Additionally, appellant's 14-month-old son was present in the vehicle at the time of the transaction. Such conduct resulted in appellant pleading to an Accusation for Possession of a Controlled Dangerous Substance (CDS), suboxone (3rd degree); he received an Order of Postponement and entered a Pre-Trial Intervention (PTI) program for a period of 12 months. The ALJ recommended that appellant's certificates be revoked. Thereafter, the Board adopted the Initial Decision of the ALJ on May 19, 2022.

On appeal, appellant argues that the Board acted in an arbitrary, capricious, and unreasonable manner because it incorrectly relied upon the ALJ's improper determinations regarding credibility and findings of fact. Specifically, appellant claims that he could not have known of McNamara's substance abuse problems with prescription medications; that when assessing his credibility, the ALJ failed to consider the fact that appellant had his infant son in the car at the time of the incident; and that he could not have known that McNamara's request for a ride to the local pharmacy would result in criminal conduct. Appellant further purports that this singular incident does not rise to the level of unbecoming conduct. Appellant also contends that the ALJ's decision gave inappropriate weight to appellant's participation in the PTI program as an admission of guilt. Finally, appellant argues that the Board failed to consider evidence of mitigation provided by appellant at the OAL, including the fact that he has dedicated his life to helping the special education community, has been back to teaching for two years without incident, and has not had related tenure charges filed against him.

In reviewing appeals from decisions of the Board, the Commissioner may not substitute her judgment for that of the Board so long as the appellant received due process and the Board's

decision is supported by sufficient credible evidence in the record. Further, the Board's decision should not be disturbed unless the appellant demonstrates that it is arbitrary, capricious, or unreasonable. *N.J.A.C.* 6A:4-4.1(a). With regard to reviewing a sanction imposed by the Board, the Appellate Division has defined the standard as determining whether the "punishment is so disproportionate to the offense, in light of all the circumstances, as to be shocking to one's sense of fairness." *In re Certificates of Benjamin Norton*, 2016 N.J. Super. Unpub. LEXIS 2291, *6-7 (internal citations and quotations omitted).

Upon review of the record, the Commissioner concurs with the Board that appellant has engaged in unbecoming conduct. The Commissioner also finds that the Board's decision to revoke appellant's certifications was not arbitrary, capricious, or unreasonable. The Commissioner notes that the Board's decision does not modify any findings of fact or legal conclusions of the Initial Decision. Although appellant contests those findings or conclusions on appeal, the Commissioner accepts the ALJ's findings and conclusions and is satisfied that the record adequately supports the Board's determination that appellant engaged in unbecoming conduct and that revocation of his certificates is the appropriate penalty.

An agency head may not reject or modify any findings of fact as to issues of credibility of lay witnesses unless it is first determined from a review of the record that those findings are arbitrary, capricious or unreasonable or are not supported by sufficient, competent, and credible evidence in the record. *N.J.S.A.* 52:14B-10(c); *N.J.A.C.* 1:1-18.6(c). Despite appellant's argument to the contrary, the ALJ was clearly aware of the fact that appellant's son was in the car at the time of the incident. The ALJ's findings that appellant's testimony was "less than truthful" and his "denial of McNamara's drug addiction less than credible" were made only after he carefully

heard the testimony of all witnesses to the proceeding, which included observing the demeanor of appellant. Accordingly, the Commissioner concludes that the ALJ's credibility findings, on which the Board relied, were supported by sufficient, competent, and credible evidence in the record and were not arbitrary, capricious, or unreasonable.

Regarding appellant's claim that the ALJ placed undue weight on appellant's PTI as an admission of guilt, the ALJ specifically stated, "This tribunal bases no finding upon the criminal charges or acceptance in the PTI program." In addition to this direct negation of appellant's claim, it is also clear from the decision as a whole that the ALJ reached his conclusions based on information about appellant's underlying conduct, not his acceptance in the PTI program.

Furthermore, although appellant argues that this subject incident was a singular event that does not rise to the level of flagrancy required of unbecoming conduct, analysis of a charge of unbecoming conduct focuses on "the morale, efficiency, and public perception of an entity, and how those concerns are harmed by allowing teachers to behave inappropriately while holding public employment." *Bound Brook Bd. of Educ. v. Ciripompa*, 228 *N.J.* 4, 14 (2017). Unfitness to hold a position in a school system may be shown by one incident, if sufficiently flagrant. *Redcay v. State Bd. of Educ.*, 130 N.J.L. 369, 371 (S. Ct. 1943), aff'd, 131 N.J.L. 326 (E. & A. 1944). Teachers "are professional employees to whom the people have entrusted the care and custody of [children.] This heavy duty requires a degree of self-restraint and controlled behavior rarely requisite to other types of employment." *In the Matter of the Tenure Hearing of Jacque L. Sammons, Sch. Dist. of Black Horse Pike Regional, Camden Co.*, 1972 S.L.D. 302, 321. In the instant matter, appellant not only facilitated possession and distribution of a CDS, which

alone is a serious offense, but he did so with the knowledge that his 14-month-old son was in his vehicle.

Finally, appellant's argument that the Board failed to consider the fact that he returned to teaching for two years without incident and did his job well is not persuasive since it is the Board, and not his employer, who is empowered to determine whether he may retain his certification to teach. *N.J.S.A.* 18A:6-38.; *N.J.A.C.* 6A:9B-4.4.

Accordingly, the decision of the Board is affirmed. Appellant's Teacher of the Handicapped and Teacher of Elementary Grades K-8 Certificate of Eligibility with Advanced Standing are hereby revoked.[1]

Angelina Allen McMillan, Jd.D.

ACTING COMMISSIONER OF EDUCATION

Date of Decision: January 23, 2023
Date of Mailing: January 25, 2023

[1] This decision may be appealed to the Appellate Division of the Superior Court pursuant to *N.J.S.A.* 18A:6-9.1. Under *N.J. Ct.R.* 2:4-1(b), a notice of appeal must be filed with the Appellate Division within 45 days from the date of mailing of this decision.

IN THE MATTER OF	:	NEW JERSEY DEPARTMENT OF EDUCATION
THE CERTIFICATES OF	:	STATE BOARD OF EXAMINERS
MICHAEL S. D'ALESSIO	:	ORDER OF REVOCATION
_____	:	DOCKET NO: 1819-240

At its meeting of August 1, 2019, the State Board of Examiners (Board) reviewed information it received regarding Michael S. D'Alessio. The Monmouth County Prosecutor's Office and the Office of Student Protection (OSP) provided information to the State Board of Examiners (Board) regarding D'Alessio.

On June 10, 2019, D'Alessio received an Order of Postponement and entered a Pre-Trial Intervention (PTI) program for a period of 12 months following entry of an Accusation for Possession of a Controlled Dangerous Substance (CDS), suboxone (3rd degree). The Accusation was the result of several other charges in which D'Alessio was alleged to have engaged in conspiracy to distribute CDS within 500 feet of a public housing unit, knowingly distribute, dispense or possess CDS with intent to distribute within 1,000 feet of school property, harm to a child, and possession of oxycodone, amphetamine and alprazolam.

These charges were the result of an investigation into the sale of prescription pain medication. The investigation revealed that individual(s) associated with D'Alessio obtained medication from the Acme pharmacy and then returned to the parking lot outside the pharmacy. The medication was sold in the parking lot out of the vehicle driven by D'Alessio. D'Alessio had his child in the car at the time of the investigation and allegedly when the sale(s) were made; further D'Alessio's credit card was used to purchase the prescription medication.

D'Alessio currently holds a Teacher of Handicapped and Teacher of Elementary Grades K-8 Certificate of Eligibility with Advanced Standing. After reviewing the above information, at

its September 19, 2019 meeting, the Board voted to issue an Order to Show Cause (OSC) to D'Alessio as to why his certificates should not be revoked.

The Board sent D'Alessio the OSC by regular and certified mail on September 23, 2019. The OSC provided that D'Alessio must file an Answer within 30 days. D'Alessio responded on October 21, 2019. In his Answer, D'Alessio admitted that he received pretrial intervention (PTI) but generally denied the allegations that formed the basis for the criminal charges. (Answer, ¶¶ 3-4). D'Alessio indicated that he was "in the wrong place at the wrong time." *Id.* at ₱ 4. He further states that he would not have agreed to enter PTI if he realized it would jeopardize his educator certificates. *Id.* at ₱ 3. He believes that his certificates should not be revoked because he has dedicated his life to helping the special education community. *Id.* at ₱ 6. He has been back to teaching for two years without an incident. *Id.*

Since there were material facts in dispute, on October 31, 2019, the Board transmitted the matter to the Office of Administrative Law (OAL) for hearing as a contested case. On February 15, 2022, Administrative Law Judge (ALJ) Joseph A. Ascione, issued an Initial Decision in the case. *In the Matter of the Certificates of Michael D'Alessio, Jr.*, Dkt. No. EDE 15392-19 (Initial Decision, February 15, 2022).

After reviewing the record, ALJ Ascione found that D'Alessio's actions on October 21, 2015 "clearly demonstrate conduct that is unbecoming, or just cause for a revocation of the certificates." (Initial Decision, slip op. at 10.) Specifically, ALJ Ascione found that D'Alessio's arrest for possession of CDS is a serious offense and that while D'Alessio denies involvement in the possession and distribution of CDS, he facilitated the actions of his co-defendant (McNamara) in the matter. *Id.* at p. 11. Further, ALJ Ascione found that D'Alessio's actions display "a clear lack of judgment." *Id.* In conclusion, ALJ Ascione found that the Board met its burden of proof

and that D'Alessio's conduct constitutes unbecoming conduct and just cause to warrant the revocation of his certificates. *Id.* at p. 12.

D'Alessio filed Exceptions and the Deputy Attorney General (DAG or Deputy) representing the Board filed a reply to the Exceptions.

In his Exceptions, D'Alessio argued that the ALJ's finding that D'Alessio may have unknowingly engaged in the conduct was in conflict with his ultimate findings that D'Alessio knowingly engaged in unbecoming conduct that warrants revocation of his certificates. (Exceptions at p. 2). The crux of the matter is the nature of D'Alessio's involvement in the CDS transaction. D'Alessio argues that the ALJ's determination as to that fact is inconclusive and therefore it confirms that the Board did not meet its burden of proof. *Id.*

D'Alessio further argues that ALJ Ascione's determination that D'Alessio should have known of Mr. McNamara's intent to distribute is belied by the fact that D'Alessio testified that from his perspective he was helping an employee of his family business by taking him to a legitimate pharmacist in a familiar town. *Id.*

Additionally, several witnesses testified that D'Alessio's relationship with McNamara was more of a an employee relationship than a friendship. *Id.* D'Alessio states that the testimony does not indicate that he was in the habit of socializing with McNamara. *Id.* at p. 3. Thus, ALJ's finding that D'Alessio should have known of McNamara's addiction is incorrect.

Moreover, D'Alessio challenges the ALJ's determination as to McNamara's credibility when he testified. Additionally, D'Alessio takes exception to the ALJ's finding that his past and present successful employment with Middletown Board of Education did not mitigate the penalty. *Id.* at p. 5. D'Alessio further takes exception to ALJ Ascione's characterization of D'Alessio's

agitated state during his testimony and then using that to determine that D'Alessio's testimony was less than truthful. *Id.*

The DAG assigned to the matter argued that the initial decision should be affirmed because it was not arbitrary or capricious and is supported by credible evidence in the record. *See* Reply to Exceptions at p. 8. She further states that the ALJ correctly assessed witness credibility. ALJ Ascione correctly noted several contradictions in D'Alessio's testimony and noted his agitated state during his testimony. *Id.* at p. 9.

The DAG further stated that the ALJ's decision cites credible testimony to support the finding that D'Alessio had a lifelong familiarity with McNamara, that D'Alessio's card was used to purchase the CDS, that Suboxone was found in D'Alessio's wallet, and that he did not inquire as to why he was being arrested. *Id.* at p. 11. Accordingly, the record supports the ALJ's finding that D'Alessio knew or should have known of McNamara's addiction and should have known that he was involved in the possession and distribution of CDS. *Id.*

Finally, the DAG argued that D'Alessio incorrectly stated that the ALJ disregarded his past and present employment. Rather, the ALJ credited testimony and noted that D'Alessio was able to perform his teaching duties well. *Id.* at p. 15. The record reflects that the ALJ considered this information but "simply found it uncompelling in light of Respondent's reprehensible conduct." *Id.*

The Board must now determine whether to adopt, modify or reject the Initial Decision in this matter. At its meeting of May 19, 2022, the Board reviewed the Initial Decision, Exceptions and Reply to Exceptions. After full and fair consideration of the Decision and submissions, the Board voted to adopt the Initial Decision.

"Teachers ... are professional employees to whom the people have entrusted the care and custody of ... school children. This heavy duty requires a degree of self-restraint and controlled behavior rarely requisite to other types of employment." *Tenure of Sammons*, 1972 *S.L.D.* 302, 321. There is no doubt that the ALJ is in the best position to render credibility determinations in this matter. Accordingly, the Board will defer to those findings.

As noted above, after assessing the evidence and credibility of the witnesses, ALJ Ascione concluded that D'Alessio's testimony as to the nature/significance of his relationship with McNamara was "less than truthful." *See* Initial Decision at p. 8. ALJ Ascione determined that D'Alessio's denial of McNamara's drug addiction was "less than credible" given McNamara's closeness to D'Alessio's family and business making "the absence of that knowledge implausible." *Id.* He also found that testimony from D'Alessio's coworker was a blanket opinion and based upon this, the Board finds no cause to overturn ALJ Ascione's credibility assessment and therefore his findings of fact.

Moreover, the Board is also unpersuaded by D'Alessio's argument that his current and former employment history should mitigate the penalty here. The ALJ assessed the credibility of the related testimony here and deemed that it does not outweigh the egregiousness of D'Alessio's conduct. *Id.* at p. 11. The Board finds no cause to overturn this finding.

After reviewing the entire record, the Board agrees with the ALJ's assessment regarding D'Alessio's unbecoming conduct and agrees that a revocation of his certificates is appropriate.

Accordingly, on May 19, 2022, the Board voted to adopt the Initial Decision and ordered revocation of D'Alessio's certificates. On this 30th day of June 2022, the Board formally adopted its written decision to adopt the Initial Decision in this matter and it is therefore ORDERED that Michael D'Alessio's Teacher of Handicapped and Teacher of Elementary Grades K-8 Certificate

of Eligibility with Advanced Standing is hereby REVOKED, effective immediately. It is further ordered that D'Alessio return his certificates to the Secretary of the State Board of Examiners, Office of Certification and Induction, P.O. Box 500, Trenton, NJ 08625-0500 within 30 days of the mailing date of this decision.

Rani Singh, Secretary
State Board of Examiners

Date of Mailing: 7/5/22
via certified and regular mail

Appeals may be made to the Commissioner of Education pursuant to the provisions of *N.J.S.A.* 18A:6-38.4.

20-23
Agency Dkt. No. 6-7/22A
SEC Dkt. No. T32-21

New Jersey Commissioner of Education

Final Decision

In the Matter of Willie Hembree,
Board of Education of the City of Plainfield,
Union County.

This matter involves an appeal of the School Ethics Commission's (SEC) June 28, 2022 determination that appellant, Willie Hembree – a member of the Plainfield Board of Education – violated the School Ethics Act (Act) for failure to timely complete board member training in accordance with *N.J.S.A.* 18A:12-33 and *N.J.A.C.* 6A:28-4.1. Appellant ultimately completed the training after the issuance of the SEC's April 26, 2022 Order to Show Cause (OTSC), but prior to its June 28, 2022 decision. The SEC recommended a penalty of censure for the violation. Appellant appealed the SEC's determination, challenging both the finding of a violation and the recommended penalty. Having carefully reviewed the SEC's decision and the record in its entirety, the Commissioner finds that the SEC's decision that appellant violated the Act is supported by sufficient, credible evidence, and that the appellant failed to establish that the decision is arbitrary, capricious, or contrary to law. *N.J.A.C.* 6A:4-4.1(a). However, the Commissioner disagrees with the recommended penalty of censure and instead finds that a penalty of reprimand is appropriate.

In her appeal to the Commissioner, appellant argues that she was scheduled to complete training on February 16, 2022, but experienced technical difficulties. She re-registered for the training but continued to experience difficulties with her logon credentials, throughout which she was in communication with the New Jersey School Boards Association (NJSBA), which

provides the training. According to petitioner, her repeated communication with the NJSBA contradicts the SEC's finding that she made no effort to complete her mandatory training in a timely manner. Furthermore, appellant contends that, due to the technical failures by the NJSBA, the training was simply not available to her in a timely manner.

In opposition, the SEC argues that its decision was not arbitrary, capricious, or unreasonable. The SEC notes that it is undisputed that appellant did not complete the required training by December 31, 2021. Accordingly, the SEC argues that appellant should be censured for violating the Act by failing to complete board member training in a timely manner.

Upon a comprehensive review of the record, the Commissioner finds that the SEC's determination that the appellant is in violation of the Act is supported by sufficient credible evidence, and appellant has not established that the SEC's decision is arbitrary, capricious, or contrary to law. *N.J.A.C.* 6A:4-4.1(a). Pursuant to *N.J.A.C.* 6A:28-4.1, appellant was required to complete the Governance 2 training program by December 31, 2021. While the Commissioner is sympathetic to appellant's technological issues, by appellant's own admission, she did not attempt to complete the training until February 16, 2022, six weeks after the December 31, 2021 deadline. As such, appellant failed to timely complete her board member training in accordance with *N.J.S.A.* 18A:12-33 and *N.J.A.C.* 6A:28-4.1.

With respect to the appropriate penalty, the Commissioner notes that in previous matters, when a respondent completed the requisite training after the issuance of the Order to Show Cause – but prior to the SEC's meeting date – the penalty has been a reprimand. *See, In the Matter of Annette Beasley, Irvington Board of Education, Essex County*, Commissioner Decision No. 223-21SEC, decided October 13, 2021; *In the Matter of Marcos Garciga, Cliffside*

Park Board of Education, Bergen County, Commissioner Decision No. 224-21SEC, decided October 13, 2021; *In the Matter of Gary Yedman, Seaside Park Board of Education, Ocean County*, Commissioner Decision No. 230-21SEC, decided October 13, 2021. As the instant case arises from the same circumstances, the Commissioner finds that a reprimand is the appropriate penalty for the respondent's failure to timely complete the requisite training.[1] Accordingly, the respondent is hereby reprimanded as a school official found to have violated the School Ethics Act.

IT IS SO ORDERED.[2]

Angelina Allen McMillan, Jd.D.
ACTING COMMISSIONER OF EDUCATION

Date of Decision: January 23, 2023
Date of Mailing: January 25, 2023

[1] The SEC has previously recommended a penalty of a censure when a board member completed the training after the issuance of the Order to Show Cause but prior to the SEC's next meeting; however, the Commissioner rejected the penalty recommendation in that case and advised that a reprimand is the appropriate penalty under those circumstances. *In the Matter of Robyn Schneider, The Ethical Community Charter School, Hudson County*, Commissioner Decision No. 140-16SEC, decided April 11, 2016.

[2] This decision may be appealed to the Appellate Division of the Superior Court pursuant to *N.J.S.A.* 18A:6-9.1. Under *N.J.Ct.R.* 2:4-1(b), a notice of appeal must be filed with the Appellate Division within 45 days from the date of mailing of this decision.

Before the School Ethics Commission
Docket No.: T32-21
Amended Decision for Failure to Complete Mandatory Training Requirement in a Timely Manner

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I/M/O Willie Hembree,
Plainfield Board of Education, Union County

I. Procedural History

This matter arises from an Order to Show Cause (OTSC) that was issued by the School Ethics Commission (Commission) at its meeting on April 26, 2022, and also served on April 26, 2022, via electronic mail.[1] The OTSC directed Willie Hembree (Respondent), a "board member" as defined in *N.J.S.A.* 18A:12-23 of the School Ethics Act (Act), *N.J.S.A.* 18A:12-21 *et seq.*, to show cause as to why the Commission should not find her in violation of the Act, for failing to complete training as required by *N.J.S.A.* 18A:12-33 and *N.J.A.C.* 6A:28-4.1.

In the OTSC served on April 26, 2022, the Commission notified Respondent that she had twenty (20) days to respond to the OTSC, and further advised that failure to respond would be deemed an admission of the facts set forth in the OTSC. Respondent was also notified that, upon receipt of the response or upon expiration of the twenty (20) day time period for so filing, the Commission may proceed to a determination of a violation on a summary basis (i.e., without a hearing or further proceedings) in accordance with *N.J.A.C.* 6A:28-1.6(c), which so permits when material facts are not in dispute.

II. Analysis

The Act was enacted by the New Jersey State Legislature to ensure and preserve public confidence in members of local boards of education and local school administrators. *N.J.S.A.* 18A:12-33 and *N.J.A.C.* 6A:28-4.1 require every board member to complete a training program prepared and offered by the New Jersey School Boards Association (NJSBA).

Respondent is a member of the Plainfield Board of Education (Board), located in Union County. As a result of her position on the Board, and in accordance with *N.J.S.A.* 18A:12-33 and *N.J.A.C.* 6A:28-4.1, Respondent is required to complete a mandated training program on an annual basis. For convenience and ease, the training is offered online so any board member may complete it at any time, from anywhere. Respondent was required to complete the Governance 2 training program by December 31, 2021.

On or about April 15, 2022, NJSBA provided the Commission with the names of those board of education members who failed to complete mandated training by December 31, 2021, and

[1] As a result of the ongoing Coronavirus (COVID-19) pandemic, and the implementation of electronic filing, service of process was effectuated by the Commission through electronic transmission only.

the list provided included Respondent. Prior to this time, multiple communications about mandated training were sent to Respondent from NJSBA through a variety of means, including targeted e-mail messages and postings in *School Board Notes*. More specific information detailing the outreach efforts of NJSBA to communicate with Respondent and/or the charter school lead about mandated training is set forth in the attached Certification from NJSBA. Notwithstanding all of these communications, Respondent did not complete mandated training.

In light of Respondent's failure to complete mandated training, an OTSC was issued by the Commission, and served on Respondent, via electronic mail, on April 26, 2022.

At its meeting on May 24, 2022, and because the Commission did not have information from NJSBA or Respondent indicating that Respondent had completed mandated training prior thereto, the Commission adopted a decision recommending that the Commissioner of Education impose a penalty of removal, with such removal to become effective immediately upon issuance of the Commissioner of Education's decision. The Commission's decision further stated that if Respondent completed training before the Commissioner of Education adopted a final decision (which would have been forty-five (45) days after the mailing date of its May 24, 2022, decision), then the Commission recommended that the Commissioner of Education, in lieu of removal, impose a thirty (30) day suspension.

On May 25, 2022, which was after the Commission adopted the aforementioned decision, the Commission received information from NJSBA that Respondent successfully completed mandated training on May 19, 2022.

Notwithstanding Respondent's completion of mandated training on May 19, 2022, there is no dispute that Respondent did not complete her required training by December 31, 2021, and did not complete the training prior to the issuance of the Commission's OTSC.

III. Decision/Penalty Recommendation

N.J.A.C. 6A:28-4.2(d) provides that school board members and charter school trustees who fail to comply with their training mandate shall be considered in violation of *N.J.S.A.* 18A:12-33. Based on the record as set forth above, at its meeting on June 28, 2022, the Commission found that Respondent violated *N.J.S.A.* 18A:12-33 and *N.J.A.C.* 6A:28-4.1. Respondent received repeated notifications of her training requirement, and had ample opportunity to complete the mandated training in a timely fashion; nonetheless, she failed to complete training as required. Where a violation of the Act is found by the Commission, the Commission may recommend to the Commissioner of Education that a penalty be imposed. The recommended penalty can include a reprimand, censure, suspension, or removal of the school official. *N.J.A.C.* 6A:28-10.12.

For the reasons set forth above, and because training is regularly completed annually and can be completed from any computer or device with an internet connection, the Commission recommends that the Commissioner of Education impose a penalty of **censure**.

Pursuant to *N.J.S.A.* 18A:12-29(c), this decision shall be forwarded to the Commissioner of Education for review of the Commission's recommended penalty. Respondent may either: 1) file exceptions to the recommended sanction; 2) file an appeal of the Commission's finding of a

violation; or 3) file both exceptions to the recommended sanction together with an appeal of the finding of a violation.

Parties taking exception to the recommended sanction of the Commission but *not disputing* the Commission's finding of a violation may file, within **thirteen (13) days** from the date the Commission's decision is forwarded to the Commissioner, written exceptions regarding the recommended penalty to the Commissioner. The forwarding date shall be the mailing date to the parties, as indicated below. Such exceptions must be forwarded to: Commissioner of Education, c/o Bureau of Controversies and Disputes, P.O. Box 500, Trenton, New Jersey 08625, marked "Attention: Comments on Ethics Commission Sanction."[2] A copy of any comments filed must be sent to the Commission (school.ethics@doe.nj.gov) and all other parties.

Parties seeking to appeal the Commission's finding of violation *must* file an appeal pursuant to the standards set forth at *N.J.A.C.* 6A:4:1 *et seq.* within **thirty (30) days** of the filing date of the decision from which the appeal is taken. The filing date shall be three (3) days after the date of mailing to the parties, as shown below. In such cases, the Commissioner's review of the Commission's recommended sanction will be deferred and incorporated into the Commissioner's review of the finding of violation on appeal. Where a notice of appeal has been filed on or before the due date for exceptions to the Commission's recommended sanction (thirteen (13) days from the date the decision is mailed by the Commission), exceptions need not be filed by that date, but may be incorporated into the appellant's briefs on appeal.

Robert W. Bender

Robert W. Bender, Chairperson

Mailing Date: June 28, 2022

[2] An electronic submission may also be sent to controversiesdisputesfilings@doe.nj.gov.

Resolution Adopting Amended Decision for Failure to Complete Mandatory Training Requirement in a Timely Manner Docket No.: T32-21

Whereas, Willie Hembree (Respondent) is a "board member" as defined in *N.J.S.A.* 18A:12-23 of the School Ethics Act (Act); and

Whereas, as a board member, Respondent is required to complete a training program prepared and offered by the New Jersey School Boards Association (NJSBA) on an annual basis; and

Whereas, Respondent failed to complete her training program by December 31, 2021; and

Whereas, at its meeting on April 26, 2022, the School Ethics Commission (Commission) issued an Order to Show Cause (OTSC) directing Respondent to show cause as to why she failed to complete her mandatory training by December 31, 2021, as required by *N.J.S.A.* 18A:12-33 and *N.J.A.C.* 6A:28-4.1; and

Whereas, after having been served with the OTSC, Respondent completed her training requirement, but did not respond to the Commission's OTSC as to why she did not complete training by December 31, 2021; and

Whereas, at its meeting on June 28, 2022, the Commission found that Respondent violated *N.J.S.A.* 18A:12-33 and *N.J.A.C.* 6A:28-4.1 by failing to complete the training requirement she was obligated to complete; and

Whereas, at its meeting on June 28, 2022, the Commission recommended that the Commissioner of Education impose a penalty of censure on Respondent; and

Whereas, at its meeting on June 28, 2022, the Commission agreed that the within decision accurately memorializes its findings and recommendations; and

Now Therefore Be It Resolved, that the Commission hereby adopts the within decision and directs its staff to notify all parties to this action of the decision.

Robert W. Bender

Robert W. Bender, Chairperson

I certify that the within Resolution was duly adopted by the School Ethics Commission at its public meeting on June 28, 2022.

Kathryn A Whalen

Kathryn A. Whalen, Esq., Director

For Agency Use Only
Docket Number: _____

In The Matter of Willie Hembree, Plainfield Bd of Ed, Union County	BEFORE THE SCHOOL ETHICS COMMISSION OF NEW JERSEY **CERTIFICATION UNDER OATH** **OF MARCIA LAVIGNE**

Marcia Lavigne, being of full age, does hereby certify as follows:

1. I am an employee of the New Jersey School Boards Association and the Senior Manager of Professional Learning. I am responsible for working with NJSBA staff to assure accuracy of board of education member and charter school trustee mandatory training records.

2. Pursuant to N.J.S.A. 18A:12-33, both elected and appointed school board members and charter school trustees (collectively members) are required to complete educational courses regarding the skills and knowledge necessary to serve as a local school board or charter school member. The training program includes information regarding the school district monitoring system established pursuant to P.L.2005, c.235, the New Jersey Quality Single Accountability Continuum, and the five key components of school district effectiveness on which school districts are evaluated under the monitoring system: instruction and program; personnel; fiscal management; operations; and governance.

3. Pursuant to N.J.A.C. 6A:28-4.1(a), during a member's initial year of service, that member is required complete a training program prepared and offered by the New Jersey School Boards Association which shall include in its content instruction relative to the board member's responsibilities under the Act.

4. Pursuant to N.J.A.C. 6A:28-4.1(b), each member is required to complete a training program to be prepared and offered by the New Jersey School Boards Association on school district governance during the second and third years of service on any board.

5. Pursuant to N.J.A.C. 6A:28-4.1(c), each member is required to complete an advanced training program on relevant changes to New Jersey school law to be prepared and offered by the New Jersey School Boards Association during the first year of any re-elective or re-appointive term.

22-23
OAL Dkt. No. 05501-22
Agency Dkt. No. 145-6/22

New Jersey Commissioner of Education

Final Decision

Eric Fitzke-Grey,

Petitioner,

v.

Board of Education of the West Essex Regional School District, Essex County,

Respondent.

The record of this matter, the December 14, 2022 Order of Administrative Law Judge (ALJ) John P. Scollo, the request for interlocutory review from respondent West Essex Regional School District Board of Education (Board), and petitioner's response thereto, have been reviewed and considered.

This matter arises out of the Board's determination that petitioner, a music teacher employed by the Board, had committed an act of harassment, intimidation, and bullying (HIB) against a student, H.O. In response to certain discovery requests, the Board indicated that it was unable to produce student records and correspondence relating to pupils without parental consent. Petitioner filed a motion seeking to compel discovery. The Board opposed the motion, contending that the motion should be denied because it was filed after the deadline set by the ALJ and petitioner had not complied with his own discovery obligations; the Board also reiterated that federal and State laws barred the production of the documents.

The ALJ concluded that petitioner's answers to the Board's interrogatories were responsive and did not bar petitioner from bringing a motion to compel discovery.[1] The ALJ concluded that none of the documents petitioner sought were student records under *N.J.A.C.* 6A:32-2.1 and ordered the Board to turn over all documents demanded by petitioner.[2]

The Board requested interlocutory review of the ALJ's order. The Board argues that the ALJ incorrectly determined that the documents requested by petitioner are not student records and do not seek any student's private information. According to the Board, correspondence and notes between school staff and H.O.'s parents, H.O's Section 504 Disability Accommodation Plan (504 Plan), doctor's notes, and the identity of the four student witnesses in this matter do indeed constitute education records, and the Family Educational and Privacy Rights Act (FERPA) prohibits their disclosure without the written consent of the students' parents. The Board further contends that the ALJ incorrectly directed the Board to provide an employment verification form to petitioner, when that document was not requested in discovery and is unrelated to the pending case, and when there is no legal requirement that an employer must sign a form attesting that a former employee's service was deemed satisfactory. Finally, the Board reiterates its argument that petitioner should not have been permitted to move to compel discovery in light of his own discovery deficiencies.

In response, petitioner contends that the records at issue are not student records and that he is entitled to the entire investigatory file, including written reports, witness statements,

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[1] The ALJ did not specifically address the Board's argument that the motion to compel was not timely filed. However, since the ALJ allowed the motion to proceed, the Commissioner presumes that the ALJ rejected this argument.

[2] Following the ALJ's Order, the Board produced documents and/or provided assurances that responsive documents have previously been provided regarding demands 8, 9, 14, 15, 16, 25, and 29. The Board also revised its response to demands 19 and 30, indicating that it does not maintain responsive records. Accordingly, those demands do not require further resolution in this forum.

summaries, and email and other communications. Petitioner also argues that he is unable to defend himself against accusations that he violated H.O.'s 504 Plan when he has not been provided with a copy of the plan. Petitioner notes that he was unable to apply for employment in a district in Pennsylvania due to the Board's failure to supply the employment verification form. Finally, petitioner argues that the ALJ correctly found that his discovery responses were adequate and that he was not barred from bringing a motion to compel discovery.

Initially, the Commissioner concludes that the ALJ's decision to allow the motion to compel discovery to proceed is a case management decision within the discretion of the ALJ, and the Commissioner finds no reason to disturb that decision on interlocutory review.

Regarding the employment verification form, the Commissioner can find no evidence that this document was the subject of any discovery request, and therefore it was improper for the ALJ to direct the Board to produce it as part of a motion to compel discovery.

Turning to the issue of student records, the Commissioner concludes that the ALJ erred in finding that the documents in question were not student records. FERPA is clear that an "education record" is a record that contains information directly related to a student and is maintained by an educational agency or institution. 20 *U.S.C.S.* § 1232g(a)(4). The implementing regulations for the corresponding State law, the New Jersey Pupil Records Act (PRA), similarly define a student record as "information related to an individual student gathered within or outside the school district and maintained within the school district." *N.J.A.C.* 6A:32-2.1.

The ALJ concluded that petitioner is not seeking "student records as that term is defined in *N.J.A.C.* 6A:32-2.1," and indicated that "[s]tudent records not subject to disclosure are those which are comprised of information that related directly to the student, such as his name, address, social security number, his grades, and other private information." The ALJ also stated, "Petitioner is not

seeking any student's private information." The ALJ appears to have conflated the definition of an "education record" with the definition of "personally identifiable information," which includes the student's name, address, social security number, and other indirect identifiers such as date or place of birth. 34 *C.F.R.* § 99.3; *N.J.A.C.* 6A:32-2.1. But FERPA and PRA protection extends beyond personally identifiable information: all student records – meaning all records containing information related to a student – are protected.

Reviewing the broad categories of records sought by petitioner, it is clear that the majority of them are, in fact, student records. Complaints, emails, letters, or memos circulated between H.O.'s parents and school officials about the facts of the HIB allegations or other issues pertaining to H.O.'s education certainly contain information related to H.O. Petitioner's request for documents from his Google Drive specifically indicates that he is seeking documents regarding accommodations made by petitioner in reference to H.O. H.O.'s 504 Plan is unquestionably a student record, as are emails or other documentation related to the plan. The identities of the four witnesses and their statements – assuming that those witnesses are students – also contain information about students and are therefore student records.

The Commissioner notes that although the instant matter involves a discovery request and not a request under the Open Public Records Act (OPRA), the regulation governing OPRA requests provides a useful framework for balancing the privacy interests of students with a request for access. Pursuant to *N.J.A.C.* 6A:32-7.5(g), a board of education responding to OPRA requests may release student records without consent as long as all personally identifiable information has been removed from the documents. The board of education is required to make a "reasonable decision that a student's identity cannot be determined whether through single or multiple releases, or when added to other reasonably available information." *Ibid.* However, there are some records that contain so much

student information, or such detailed student information, that redaction can never sufficiently protect the student's identity. This problem is compounded when the party seeking access knows the identity of the student at issue, as there is no possible way to protect the student's identity. Here, petitioner knows the identity of H.O. Accordingly, the Board cannot use redactions to turn over records that contain information relating to H.O. without the consent of H.O.'s parents. Nor can the Board provide the identities of the students who made witness statements without, by definition, disclosing their identities.[3]

However, pursuant to 34 *C.F.R.* § 99.31, prior consent is not required to disclose personally identifiable information when the disclosure is to comply with a judicial order. *See also N.J.A.C.* 6A:32-7.5(e)(15). Under FERPA, the educational agency must make a reasonable effort to notify the parent of the order in advance of compliance, so that the parent may seek protective action. 34 *C.F.R.* § 99.31. Under the PRA, the requirement is more specific: prior to disclosure of student records pursuant to a court order, the board of education must give the parent at least three days' notice of the name of the requesting agency and the specific records requested. *N.J.A.C.* 6A:32-7.6(a)(4).

In *L.R. v. Camden City Public Sch. Dist.*, 238 *N.J.* 547 (2019), the New Jersey Supreme Court identified the factors to be considered for a court order for the production of student records under *N.J.A.C.* 6A:32-7.5(e)(15). The Supreme Court suggested a framework that may include, but is not limited to:

> (1) the type of student record requested; (2) the information that the student record contains; (3) the potential for harm in any subsequent nonconsensual disclosure of

[3] The Board suggests that the ALJ's Order to identify the students who made witness statements is contradicted by his caveat elsewhere in the Order that the names of the students shall be redacted from the witness statements. It appears from this portion of the Order that the ALJ was discussing redacting student names in the context of the hearing, such as for purposes of a transcript, rather than redactions to be completed prior to producing documents in discovery.

> the student record; (4) the injury from disclosure to the relationship between the educational agency and the student and his or her parents or guardians; (5) the extent to which disclosure will impede the educational agency's functions by discouraging candid disclosure of information regarding students; (6) the effect disclosure may have upon persons who have provided such information; (7) the extent to which agency self-evaluation, program improvement, or other determinations will be chilled by disclosure; (8) the adequacy of safeguards to prevent unauthorized disclosure; (9) the degree of need for access to the student records; and (10) whether there is an express statutory or regulatory mandate, articulated public policy, or other recognized public interest militating toward access.
>
> *Id.* at 575.

The Supreme Court noted that not all of the factors will apply in every case, and additional factors may be relevant. *Ibid.*

The Commissioner finds that the most consequential factor in determining whether these records should be released is the degree of need for access to the records. The emails, notes, and other documents regarding the district's investigation of the HIB allegations contain information about the incidents between petitioner and H.O. that are the subject of this matter. Furthermore, as petitioner is alleged to have violated H.O.'s 504 Plan, the contents of that plan are critical to the ultimate determination. Petitioner is entitled to appeal the Board's decision finding that he committed HIB, pursuant to *N.J.S.A.* 18A:37-15(b)(6)(e), and it is unclear to the Commissioner how petitioner would be able to challenge the district's investigation or the Board's decision without access to the records that were part of the investigation and which informed the decision. The Board cannot use the information contained in these documents against petitioner and simultaneously prevent him from reviewing them for possible use in his defense. While the Commissioner acknowledges that FERPA and the PRA tend to militate against access to student records, general principles of due process weigh in favor of access under these circumstances, as do general principles pertaining to discovery. *See, e.g., N.J.A.C.* 1:1-10.1.

The Commissioner acknowledges that the release of student records may be unpalatable to the parents of the students at issue, particularly to H.O.'s parents. As noted herein, the documents in question contain sensitive information about H.O. However, it appears that petitioner has already had access to many of the records and/or the information contained therein during the time that he was employed by the Board. Therefore, while the release will provide petitioner with the written records, it does not appear to the Commissioner that, following release, petitioner will know much or any additional information about H.O. beyond what he already knows. This fact, combined with petitioner's strong due process right to access the records to be used against him, leads the Commissioner to conclude that the records should be released to petitioner as part of discovery.

The Commissioner views student privacy as a matter of paramount concern. Accordingly, the student records shall be released only to counsel for petitioner. The records may not be distributed to any other parties. Petitioner may not use the records for any purpose other than pursuing the petition of appeal in this matter. To the extent that student records may be entered into evidence during the course of the hearing, those portions of the record shall be sealed and shall be available for review only by the ALJ and the Commissioner.[4] To the extent that student witnesses may testify at the hearing, they shall be identified in any transcripts, and in any summary of their testimony in the Initial or Commissioner decisions, only by their initials or a pseudonym.

Accordingly, the Board shall provide all documents and information requested in petitioner's demands 1, 2, 3, 4, 5, 6, 7, 10, 11, 12, 13, 17, 20, 21, 22, 23, 24, 26, and 28. The Board shall notify the parents of the students at issue of the impending disclosure within seven days of the

[4] The Commissioner urges the parties to redact student names from all documents before they are used at hearing or entered into evidence, to limit the potential for further exposure.

date of mailing of this decision.[5] Consistent with *N.J.A.C.* 6A:32-32-7.6(a)(4), the Board shall release the records to petitioner three days after notice is given to the parents. The Order is reversed as to demand 18, as the ALJ found this demand to be unclear and it appears that the Order to produce these records was therefore in error. The Order is reversed as to the employment verification form.

IT IS SO ORDERED.

Angelica Allen-McMillan, Ed.D.
ACTING COMMISSIONER OF EDUCATION

Date of Decision: January 23, 2023
Date of Mailing: January 25, 2023

[5] It does not appear that any of the records demanded by petitioner contain student information regarding students other than H.O. Should the Board determine that other students are identified in these records, it shall redact those students' information prior to disclosure.

23-23
OAL Dkt. No. EDU 00375-22
Agency Dkt. No. 182-7/18

New Jersey Commissioner of Education

Final Decision

B.E., on behalf of minor child, F.E.,

Petitioner,

v.

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

Respondent.

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

Petitioner challenges a suspension imposed by the Board on his minor child. The Administrative Law Judge (ALJ) scheduled a telephone conference regarding petitioner's appeal for October 12, 2022. Petitioner failed to appear and did not respond to an email asking him to explain his failure to appear. A telephone conference was then scheduled for November 14, 2022. Petitioner again failed to appear and did not respond to an email asking him to explain his failure to appear. Therefore, the ALJ dismissed the matter based on petitioner's failure to pursue the appeal.

Upon review, the Commissioner disagrees with the ALJ that the matter should be dismissed based on petitioner's failure to appear. The Initial Decision indicates that the scheduling notices were sent to the parties via email. Pursuant to *N.J.A.C.* 1:1-9.5(c), scheduling

notices must be sent by regular mail unless emergent needs require otherwise. There is no indication in the record that the telephone conferences were emergent; to the contrary, the notices were emailed to the parties a month prior to the scheduled dates. Moreover, while sending scheduling notices via email may be acceptable in many circumstances, such as in cases where all parties or attorneys routinely communicate with the OAL via email, those circumstances are not present here. The record does not contain a single email from petitioner to the OAL. Furthermore, the Initial Decision specifically indicates that there was a concern about the correct spelling of petitioner's email address, and the scheduling notices were therefore sent to four separate email addresses. Given the lack of certainty that petitioner ever received the scheduling notices, the Commissioner finds that dismissal at this juncture is not appropriate.[1]

Accordingly, this matter is remanded to the OAL for further proceedings consistent with this opinion.

IT IS SO ORDERED.

Angelica Allen-McMillan, Ed.D.
ACTING COMMISSIONER OF EDUCATION

Date of Decision: January 26, 2023
Date of Mailing: January 26, 2023

[1] If the scheduling notices were sent to petitioner via regular mail, the ALJ may clarify that fact on remand.

State of New Jersey
OFFICE OF ADMINISTRATIVE LAW

INITIAL DECISION
DISMISSAL
OAL DKT. NO. EDU 00375-22
AGENCY DKT. NO. 182/7/18

B.E. ON BEHALF OF F.E.,
Petitioner,
v.
TOWNSHIP OF PISCATAWAY BOARD OF EDUCATION, MIDDLESEX COUNTY,
Respondent.

B.E., petitioner, pro se

David B. Rubin, Esq., for respondent

Record Closed: November 16, 2022 Decided: December 20, 2022

BEFORE **TRICIA M. CALIGUIRE**, ALJ

On May 1, 2018, the Township of Piscataway, Board of Education (Board) issued a decision suspending then-student F.E. for a portion of the next school year as discipline for conduct occurring on March 14, 2018. On or about July 30, 2018, B.E. on behalf of then-minor child F.E. filed a petition with the Commissioner of the New Jersey Department of Education appealing the suspension. This matter was transmitted to the Office of Administrative Law (OAL), where it was filed on August 16, 2018, as a contested case

pursuant to N.J.S.A. 52:154B-1 et seq. and N.J.S.A. 52:14F-1 et seq. and docketed as EDU 11838-18.

Prior to the 2018–2019 school year, petitioner B.E. withdrew F.E. from Piscataway High School and enrolled him in a private school. On October 15, 2018, the Board filed a motion to dismiss the petition for lack of jurisdiction or alternately, for failure to state a claim on which relief may be granted. Following the filing of responsive briefs, an initial decision was issued on November 20, 2018, granting the motion to dismiss.

On January 4, 2019, the Commissioner issued a final decision reversing the initial decision and remanding the matter for further proceedings at the OAL. On January 11, 2022, in response to an inquiry from Board counsel, the Director of the Office of Controversies and Disputes stated that her office failed to transmit the matter back to the OAL. Petitioner elected to pursue the matter and the matter on remand was transmitted to the OAL, docketed as EDU 00375-22, and assigned to me on January 20, 2022.

The parties appeared for a telephone prehearing conference on February 28, 2022, and stated that they would engage in negotiations toward settlement. On or about June 10, 2022, the parties stated that they had reached agreement on settlement but, on August 30, 2022, counsel for petitioner stated that his client had withdrawn his consent to settle. During a telephone conference on September 9, 2022, which was attended by B.E., counsel stated that he would file a formal request to be relieved as counsel. Neither respondent nor B.E. objected to this request. On September 23, 2022, an order was entered relieving the Law Firm of C.N. Njoku, LLC, as counsel to B.E. on behalf of F.E.

During the September 9, 2022, status conference, B.E. stated his intention to retain new counsel within thirty days and a telephone conference was scheduled for October 12, 2022. Notice of the October 12, 2022, telephone conference was sent to the parties on September 12, 2022. A dial-in number was provided. Due to concern for the correct

spelling of B.E.'s email address, the notice was sent to four separate emails and to his former counsel. The notice stated in bold print:

> **Failure to dial in for the telephone conference will result in the file being returned to the transmitting agency for appropriate action which may include imposition of the proposed penalty or granting the relief requested by the other party.**

B.E. failed to appear for the October 12, 2022, telephone conference. B.E. failed to notify my office in advance or to request an adjournment. On October 14, 2022, an email was sent to B.E. asking him to explain his failure to appear. B.E. did not respond.

On October 14, 2022, notice was sent to the parties of a telephone status conference on November 14, 2022. A dial-in number was provided. B.E. failed to appear for the November 14, 2022, telephone conference. B.E. failed to notify my office in advance or to request an adjournment. On November 15, 2022, an email was sent to B.E. asking him to explain his failure to appear. B.E. did not respond.

Absent exigent circumstances, a petitioner's failure to prosecute a matter should result in its dismissal. Henderson v. Jersey Central Power and Light Company, Dkt. No. PUC 2470-10, Initial Decision (January 5, 2011) http://lawlibrary.rutgers.edu/ new-jersey-administrative-decisions-0 (citations omitted).

Here, neither exigent circumstances nor, for that matter, any explanation whatsoever, has been offered to excuse petitioner's failure to prosecute this matter.

DECISION AND ORDER

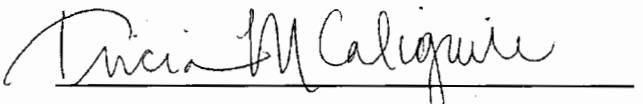
Accordingly, I **CONCLUDE** that petitioner has failed to prosecute its appeal and no longer requests relief in this matter. Therefore, I **ORDER** that this case be and is hereby **DISMISSED WITH PREJUDICE**.

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

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

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

December 20, 2022
DATE



TRICIA M. CALIGUIRE, ALJ

Date Received at Agency: _____

Date Mailed to Parties: _____

TMC/nn

24-23

New Jersey Commissioner of Education
Final Decision

Board of Education of the Township of Springfield,
Union County,

Petitioner,

v.

Board of Education of the City of Newark,
Essex County,

Respondent.

Synopsis

The issue in this case is which of the two school districts – the Board of Education of the Township of Springfield (Springfield) or Board of Education of the City of Newark (Newark) – is responsible for the tuition and transportation costs associated with educating the children of A.I.P. after the family lost their permanent residence and became homeless in approximately June of 2016. The Commissioner issued a previous decision in September 2022, remanding this matter to the OAL to address inconsistent findings in an earlier Initial Decision.

On remand, the ALJ found, *inter alia*, that: the preponderance of credible evidence indicates that A.I.P. and her children resided at an address in Newark for more than one year prior to the start of the 2017-2018 school year; accordingly, they became the responsibility of the Newark school district for the 2017-2018 school year; Springfield expended a total of $79,511.58 in tuition and transportation costs related to the education of A.I.P.'s children; however, A.I.P. relocated to Dover in the summer of 2018 and from that point forward Dover became the school district responsible for the education of the P. children; the amount that Springfield paid in tuition and transportation for the period beginning in the summer of 2018 was $36,031.92. The ALJ concluded that Newark is responsible for educational costs for the children for the 2017-2018 school year, and Dover became the responsible school district in the summer of 2018. Accordingly, the ALJ ordered Newark to reimburse Springfield in the amount of $43,479.66 for educational costs related to the P. children during the 2017-2018 school year.

Upon review, the Commissioner remanded this matter a second time as she is unable to determine from the present record when the P. family's living situation became permanent such that they were no longer homeless. The Commissioner noted that in order to determine which school district is responsible for the cost of the P. children's education at different points in time, a fact-specific homelessness determination is essential. The present record does not provide sufficient and accurate information regarding where the P. family was living and for what length of time so as to allow the Commissioner to determine when they became homeless and at what point their period of homelessness ended. Accordingly, the matter was remanded to the OAL for further proceedings consistent with this decision.

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

24-23
OAL Dkt. No. EDU 08290-22
(EDU 06696-19 on remand)
Agency Dkt. No. 71-4/19

New Jersey Commissioner of Education

Final Decision

Board of Education of the Township of Springfield, Union County,

Petitioner,

v.

Board of Education of the City of Newark, Essex County,

Respondent.

The record of this case and the Initial Decision of the Office of Administrative Law (OAL) have been reviewed, mindful of the Commissioner's September 7, 2022 decision remanding the matter to address inconsistent findings in the Initial Decision. The exceptions filed by respondent Newark Board of Education (Newark) pursuant to *N.J.A.C.* 1:1-18.4, and the reply thereto filed by petitioner Springfield Board of Education (Springfield), have also been considered.

The issue for determination here is which of the two school districts is responsible for the tuition and transportation costs associated with educating the P. children when they became homeless. It is undisputed that A.I.P. and her children resided in Springfield prior to becoming homeless in June of 2016. According to the McKinney-Vento paperwork submitted by A.I.P., the family was residing with A.I.P.'s mother at a Newark address and also at an Irvington address. As the district of residence (the last district that the children attended prior to becoming homeless),

Springfield initially paid for M.P. and Jad.P. to attend school.[1] M.P. attended an out-of-district placement, and Springfield paid the tuition and provided transportation from the Newark address. Springfield also paid the tuition for Jad.P. to attend an out-of-district placement, but she did not require transportation as it was a residential facility. At the end of the 2016-17 school year, Jad.P.'s residential placement came to an end. Springfield offered home instruction pending a new placement, but A.I.P. refused. M.P. also refused to attend the extended school year program.

In June of 2017, Springfield informed Newark that the P. family had lived in Newark for a year, and therefore, Newark should take over responsibility for their placement and tuition for the 2017-18 school year. In September 2017, Newark's homeless management specialist Ana Osoria responded and indicated that she had spoken with A.I.P. and would assist her with registration but needed copies of the children's IEPs. Thereafter, on November 14, 2017, Ms. Osoria informed Springfield that she met with A.I.P. and that she had not lived in Newark consistently for a year because A.I.P. told her she had been staying in "multiple locations and at different districts including hotels/motels in Springfield, a friend's house in Irvington and her family member in Maplewood." (J3). Thereafter, Springfield worked to secure placements for the children because they had not been getting an education. Springfield offered home instruction in the interim, but A.I.P. refused. It appears that Jad.P. and M.P. began attending out-of-district placements in or about April 2018, and Springfield provided transportation for both children from the Newark address. On April 10, 2018, Springfield's Director of Social Services Tiffany Boehm informed Newark

[1] Springfield also paid for and provided transportation for Jas.P. to attend school in Springfield during the 2016-17 school year. Jas.P. graduated in June 2017, and accordingly is not at issue in this matter.

that the placements would begin shortly, but that Springfield intended to bill Newark for the cost because the P. family had lived in Newark for more than a year.[2]

Springfield then initiated a residency investigation. The investigator conducted surveillance on the Newark address and observed M.P. leave the house and get on the bus on four consecutive school days beginning on April 25, 2018. He also observed several vehicles come and go but did not see Jad.P. He also conducted surveillance on a Saturday and did not see any activity. Based on his observations, the investigator concluded that M.P. was residing in Newark. On May 15, 2018, Ms. Osoria updated Springfield that she had spoken with A.I.P. on the phone on April 27, 2018, writing:

> During our conversation, the parent indicated that her mother has asked them to leave several times since we spoke in November 2017 and the family had to split. Her older daughter resided with a friend in Irvington, NJ and [A.I.P.] and her younger daughter stayed temporarily [in Dover] with her friend in a 1 bedroom apartment. [A.I.P.] stated that she needed to provide Springfield with a stable address in order to arrange the bus pick up because of her frequent moves. According to [A.I.P.], because her temporary addresses are not reliable and short term, she drops off the students at her mother's address to be picked up so the bus is not interrupted.
>
> (J7).

Ms. Osoria indicated that she set up an in person meeting with A.I.P. for April 20, 2018 so that she could bring documentation, but A.I.P. did not show up.

In August 2018, A.I.P. informed Springfield by email that she and the children "no longer stay at my mother's house, we currently stay with my fiancé temporarily until I can find a permanent dwelling for us." (P18). Springfield thereafter arranged transportation to pick up M.P. at the fiancé's home in Dover and paid the tuition for her out-of-district placement. It appears that Jad.P. dropped out of school. According to Ms. Boehm's testimony, in December 2018, A.I.P.

[2] The Commissioner notes that with respect to Jad.P., Springfield only appears to seek reimbursement of her transportation costs. The Commissioner is unsure why Jad.P.'s tuition costs do not appear to be at issue.

indicated that she was permanently staying in Dover, and Dover took responsibility for M.P.'s education.

Springfield filed the instant petition against Newark seeking reimbursement of the tuition and transportation costs for M.P. and Jad.P. from June 2017 (one year after it alleged the P. family moved to Newark) through December 2018 (when Dover took over financial responsibility). Following a hearing, the Administrative Law Judge (ALJ) issued an Initial Decision dated June 8, 2022, which found that A.I.P. and her children resided in Newark from June 30, 2016 until the summer of 2018, and therefore became the responsibility of Newark for the 2017-18 school year. The ALJ then ordered Newark to reimburse Springfield for tuition and transportation from June 26, 2017 through December 31, 2018.

The Commissioner issued a decision on September 12, 2022 remanding this matter for inconsistent findings. In one instance, the ALJ appeared to find that A.I.P. was domiciled in Dover as of the summer of 2018, but then went on to order reimbursement of tuition and transportation through December 31, 2018. On remand here, the ALJ found that Dover became the responsible district for the children in the summer of 2018, and revised the tuition and transportation amount due from Newark to no longer include September through December 2018.

Upon review, the Commissioner is constrained to remand this matter a second time as she is unable to determine from the present record when the P. family's living situation became permanent such that they were no longer homeless. In order to determine which school district is responsible for the cost of the minor children's education at different points in time, a homelessness determination is essential. The Commissioner is also not satisfied that the present record provides sufficient and accurate information regarding where the P. family was living and for what length of time while they were homeless.

Under the McKinney-Vento Act, homeless children are defined as "individuals who lack a fixed, regular and adequate nighttime residence," which includes "children sharing housing with other persons due to loss of their own housing, economic hardship, or a similar reason." 42 *U.S.C.A.* § 11434a. Similarly, under state law, homeless children are defined as "child[ren] or youth who lack[] a fixed, regular and adequate residence pursuant to *N.J.S.A.* 18A:7B-12 and *N.J.A.C.* 6A:17-2.2," which includes children living in the "residence of relatives or friends where the homeless child resides out of necessity because his or her family lacks a regular or permanent residence of its own." *N.J.A.C.* 6A:17-1.2 and 2.2. When a child's dwelling becomes fixed, regular and adequate, domicile attaches immediately. *Board of Education of the Township of Egg Harbor v. Board of Education of the Mainland Regional High School District, et al,* Commissioner's Decision No. 555-10, decided December 30, 2010, at 4.

Thus, conducting a homelessness evaluation to determine whether a child's home is considered fixed, regular and adequate requires a fact-specific analysis and "cannot rest upon a simple calculation of the amount of time that children have spent in a particular location or municipality." *M. O'K. v. Board of Education of the Borough of Cresskill, et al*, Commissioner Decision No. 325-14, decided August 12, 2014, at 3, *aff'd*, A-0828-14T4 (App. Div. Sept. 8, 2016). In conducting such a fact-specific inquiry, the Commissioner must consider the totality of the circumstances, such as "[t]he reasons for the children's homelessness, their living conditions, and the resources and intentions of the parents or custodians are relevant." *Ibid.*

Once it is determined whether a child is homeless, the question becomes which district is financially responsible for the child's education. Ordinarily, a student is eligible for a free public education in a school district if he or she is domiciled within the school district. *N.J.S.A.* 18A:38-1(a); *N.J.A.C.* 6A:22-3.1(a). A student's domicile is determined by the domicile of his or her parents.

N.J.A.C. 6A:22-3.1(a)(1). When a child becomes homeless, the school district of residence – *i.e.*, the school district in which the child resided before becoming homeless – remains responsible for the cost of the child's education, including when the child is temporarily living and attending school in another school district. *N.J.A.C.* 6A:17-2.3; *N.J.S.A.* 18A:7B-12. However, when a homeless child lives in a school district for one year or longer – and a new domicile has not been established – the child is "deemed domiciled" in that district for the purposes of determining which district is responsible for the cost of the child's education. *N.J.S.A.* 18A:38-1(d); *N.J.A.C.* 6A:17-2.3(c).

In this matter, while it is undisputed that the family was homeless for at least the 2016-17 school year, it is unclear if or when the P. family lived in Newark for one year such that they would be "deemed domiciled" for purposes of the children's education. Further fact finding is therefore required. In the June 8, 2022 Initial Decision, the ALJ found that the P. family were deemed domiciled in Newark for the 2017-18 school year, reasoning that: "In the instant matter, it is clear that A.I.P. resided in Newark. The address given to Springfield was the Newark address. Springfield's investigator confirmed that A.I.P. resided in Newark. The only reasonable conclusion is the A.I.P. resided in Newark." (Initial Decision, June 8, 2022, at 15). The Initial Decision on remand did not provide any additional factual findings on this issue and simply found that the preponderance of the credible evidence indicated that the P. family resided at the Newark address for more than a year. The Commissioner notes that, despite the ALJ's finding regarding providing Springfield with the Newark address, A.I.P.'s McKinney-Vento paperwork listed both a Newark and an Irvington address.[3] Additionally, the investigator's surveillance on four consecutive school days

[3] The Commissioner acknowledges that the Newark address was used for the purposes of transportation beginning in the 2016-17 school year until the start of the 2018-19 school year, but also notes that according to Ms. Osoria, A.I.P. told her on April 27, 2018 that she would drop the children off at the Newark address when living temporarily elsewhere so that the bus service would not be interrupted.

in April 2018 does not prove that the P. family had lived in Newark for a year after becoming homeless in June 2016, but rather only demonstrates where the family was in April 2018.

While the family appears to have relocated to Newark on June 30, 2016, a determination needs to be made – through testimony from A.I.P. or others with personal knowledge of the family's living arrangement – regarding how long the family lived in the Newark School District. On November 14, 2017, more than a year later, Ms. Osoria spoke with A.I.P. who appeared to tell her that she'd been living in different places, including hotels/motels, with a friend in Irvington and with a family member in Maplewood, but it is unclear whether A.I.P. had lived in Newark for a full year prior to bouncing between these temporary situations.

Additionally, a determination needs to be made regarding when the family's homelessness status changed. It is undisputed that Dover took over responsibility for M.P.'s education sometime in December 2018, so it appears that the Dover address was a permanent residence and the family was no longer homeless. While A.I.P.'s August 2018 email indicated that she was temporarily staying with her fiancé in Dover until she could find a permanent dwelling, it is unclear at what point the Dover residence became fixed, regular and adequate. Such a determination is essential because it will decide which school district is responsible for the cost of M.P.'s education from September 2018 to December 2018. If the family was no longer homeless when they moved to the Dover residence in August 2018, then Dover would be responsible for the cost of education for that period; however, if the Dover residence did not become permanent until December 2018, then either Newark or Springfield (depending on whether the P. family was ever deemed domiciled in Newark) would be the responsible district.

The Commissioner notes that while homelessness determinations are fact-specific, there was never an evaluation of the family's living conditions at any one of the Newark, Irvington, or

Dover addresses. No one looked into what parts of the home the family could use, where the children were sleeping, or what efforts A.I.P. was taking to secure permanent housing. While the Commissioner acknowledges that A.I.P. is not a party in this matter, the fact remains that she is the best source of information about the family's living situation and financial circumstances, and thus her participation through discovery or testimony is critical to a determination in this matter. Therefore, further information is necessary to determine where the P. family was staying when they were homeless and for how long, and the date their home became fixed, regular and adequate such that M.P. and Jad.P. were no longer homeless under state and federal law, in order to resolve the claims for tuition reimbursement.

Accordingly, this matter is hereby remanded to the OAL for further proceedings consistent with this decision,

IT IS SO ORDERED.

Angelica Allen-McMillan, Ed.D.
ACTING COMMISSIONER OF EDUCATION

Date of Decision: January 26, 2023
Date of Mailing: January 26, 2023

State of New Jersey
OFFICE OF ADMINISTRATIVE LAW

INITIAL DECISION
OAL DKT. NO. EDU 08290-22
AGENCY DKT. NO. 71-4/19

ON REMAND
OAL DKT. NO. EDU 06696-19

BOARD OF EDUCATION OF THE TOWNSHIP OF SPRINGFIELD,
Petitioner,
vs.
BOARD OF EDUCATION OF THE CITY OF NEWARK,
Respondent.

Marie-Laurence Fabian, Esq., co-counsel for Petitioner (Porzio, Bromberg & Newman, P.C., attorneys)

Teresa L. Moore, Esq., for Respondent, Newark Board of Education (Riker, Danzig, Scherer, Hyland & Perretti, LLP, attorneys)

Record Closed: October 17, 2022 Decided: November 7, 2022

BEFORE: **THOMAS R. BETANCOURT**, ALJ:

STATEMENT OF THE CASE AND PROCEDURAL HISTORY

Petitioner filed a petition, dated April 10, 2019, with the New Jersey Department of Education, Bureau of Controversies and Disputes, alleging that the Newark Board of Education is responsible for transportation and tuition costs for certain children that have attended school in Petitioner's district.

The matter was transferred to the Office of Administrative Law (OAL), where it was filed on May 15, 2019, as a contested case. N.J.S.A. 52:14B-1 to –15; N.J.S.A. 52:14F-1 to –13, bearing OAL Docket No. EDU 06696-19.

A prehearing conference was held on June 5, 2019. A prehearing order, dated June 7, 2019, was entered by the undersigned.

The hearing was held on December 13, 2021, December 14, 2021 and January 24, 2022.

The record remained open for the parties to submit post hearing briefs, which were due thirty days after receipt of the hearing transcripts. Transcripts were received on March 11, 2022. Petitioner submitted their brief on April 6, 2022. Respondent submitted their brief on April 7, 2022. Whereupon the record closed on April 7, 2022.

An Initial Decision was entered by the undersigned on June 8, 2022, wherein the undersigned found in favor of Petitioner and awarded it tuition reimbursement from Respondent in the amount of $79,511.58.

By Final Decision of the Acting Commissioner of the Department of Education, dated September 7, 2022, the matter was remanded to the undersigned to ascertain who is responsible for the children's education costs between September 2018 and December 2018.

A telephone conference was held with counsel on September 15, 2022.

The parties were directed to submit briefs as to their respective positions as to the Final Decision. Petitioner submitted its brief, together with the Certification of Tiffany Boehm with proposed exhibits P-24, P-25 and P-26, on October 7, 2022. Respondent filed its reply thereto on October 17, 2022.

The record closed on October 17, 2022.

ISSUES

Who is the responsible party for the education of the children from September 2018 through December 2018.

FINDINGS OF FACT[1]

1. A.I.P., and her children, Jas. P., Jad. P. and M.P., resided in the Township of Springfield, N.J. until approximately June of 2016.

2. As residents of Springfield the children were entitled to be educated in the Springfield public school system.

3. All three children, above noted, were students with special needs and had Individualized Education Programs (IEPs). (P-20)

4. A welfare check at the Springfield address of the P family by the Springfield Police revealed that they no longer resided at said address. A different family resided therein. (12/13/21 Tr. 26:12 to 27:24)

5. The Springfield Board of Education discovered that the P family was residing in Newark, NJ, through a worker with Families and Communities Together (FACT), however the worker was unable to provide a current address. (P-19)

6. In September 2016, after being contacted by the school social worker, A.I.P. came to the Florence M. Guadineer Middle School to re-register M.P., and

[1] The Findings of Fact herein are the Findings of Fact from the Initial Decision entered on June 8, 2022.

provided a lease, dated September 1, 2016, for her prior Springfield address. (P-21)

7. The P family was not living at their previous address in Springfield. They were living with the childrens' grandmother in Newark, NJ, at 134 Fabyan Place.

8. The Springfield Police confirmed that the P family was not living at their previous address. A different family was living there. (12/13/21 Tr. 41:6-17)

9. A.I.P. filled out a McKinney Vento Act Student Information form for Jad. P., Jas. P. and M.P. A.I.P. claimed in the forms that the family was homeless since June 30, 2016, and were residing at 134 Fabyan Place, Newark, NJ. She also listed an Irvington address on the forms. (P-3)

10. Springfield BOE set up transportation from the 134 Fabyan Place, Newark, NJ address to Springfield for Jas. P. and M.P. so they could attend school. Transportation was not required for Jad. P. as she was in a residential facility. Transportation for Jas. P. and M.P. continued through the end of the 2016/2017 school year.

11. Transportation was arranged for M.P. to attend the extended school year program but was subsequently cancelled as M.P. refused to attend the program.

12. The transportation company informed Springfield via email that M.P. would not leave the porch of the 134 Fabyan Place, Newark, NJ address. They also advised that A.I.P. had exited the house after being contacted by telephone that M.P. would not get on the bus. (P-9)

13. During the 2016/2017 school year the only address used to pick up the children for transport to school was the 134 Fabyan Place, Newark, NJ address.

14. An email, dated June 27, 2017, was sent to the Newark Board of Education homeless liaison, Ana Osoria, to advise that the P family was living in Newark from May 2016. Said email provided the names of the children and the Newark address. (J-1)

15. Ms. Osoria did not respond to this email until September 12, 2017, after receiving a follow up email from Tiffany Boehm of Springfield, dated September 6, 2017. (J-2)

16. In response to Ms. Osoria's email of September 12, 2017, the IEPs for the three children were forwarded. (P-23)

17. By email dated November 14, 2017, Ms. Osoria advised Springfield that she met with A.I.P. and determined that A.I.P. did not reside in Newark for 365 days. This was based on representations made by A.I.P. Ms. Osoria determined that the children should be the responsibility of Springfield. (J-3)

18. Springfield then assumed responsibility for the children and arranged for placements and transportation from the 134 Fabyan Place, Newark, NJ address. Jad. P. was placed at Washington Academy, and M.P. was placed at Rutgers Day School. P-10 and P-11)

19. By letter dated April 10, 2018, Springfield advised Newark that it still held the position that Springfield was the responsible district for the 2017/2018 school year. (J-4)

20. Ms. Osoria responded, by email dated April 10, 2018, to said letter on behalf of Newark requesting documents to support Springfield's position and restating Newark's position. (J-5)

21. In response thereto, attendance and transportation records were provided by email dated April 23, 2018. (J-6)

22. Ms. Osoria responded, again reiterating Newark's position, which was based upon a conversation she had with A.I.P. Said email was also to update what had transpired. (J-7)

23. Springfield had their residency investigator investigate the residency situation for the P family. The investigator, James Post, set up surveillance at the 134 Fabyan Place, Newark, NJ address and discovered that M.P. was residing therein. He did not observe Jad. P. He prepared a report as to his findings. (P-4)

24. Newark's position regarding the residency of the P family was based entirely on what A.I.P. told Ms. Osoria without any supporting documentation.

25. Ms. Osoria testified that A.I.P. told her she wanted her children to continue to be educated in the Springfield district.

26. Ms. Osoria, after speaking via telephone with A.I.P. on April 27, 2018, arranged a meeting with her for April 30, 2018. A.I.P. did not attend the meeting. (J-7)

27. Springfield discovered during the summer of 2018 that the P family was living in Dover, NJ. M.P. was enrolled in the Dover district. The transportation contract for M.P. was cancelled. It appeared that Jad. P. had dropped out of school.

28. Newark Board of Education was the responsible district for the education of the P family children, Jad. P., Jas. P. and M.P. from the beginning of the 2017/2018 school year until the time the children became the responsibility of the Dover school district.

29. Springfield expended the sum of $15,707.50 in tuition for the Rutgers Day School for M.P. for the period of April to June 2018. (P-12)

30. Springfield expended the sum of $12,942.84 in tuition for the Rutgers Day School for M.P. for the period of September to October 2018. (P-13)

31. Springfield expended the sum of $12,942.84 in tuition for the Rutgers Day School for M.P. for the period of November to December 2018. (P-14)

32. Total tuition costs expended by Springfield for M.P. are $41,593,18.

33. Transportation costs paid by Springfield total $39,918.40 for Jad P. to Washington Academy, and for M.P. to Rutgers Day School, for the period of June 26, 2017 through December 31, 2018. (P-15 and P-15a)

34. Total amount of funds expended by Springfield that the Newark Board of Education is responsible for equal $79,511.58.[2]

ADDITIONAL FINDINGS OF FACT

1. Springfield expended the sum of $36,031.92 during the period A.I.P. had moved to Dover, New Jersey. (P-13, P-14, P-15i and P-15l)

[2] The was the sum determined to be payable from Respondent to Petitioner in the Initial Decision of June 8, 2022. This amount is reduced in the within Initial Decision on Remand.

2. The Dover school district would be the responsible district to educate the children from the time A.I.P. moved to Dover. The move occurred in the summer of 2018.
3. The total amount due Springfield from Newark totals $43,479.66 (79,513.58 less $36,031.92)

LEGAL ANALYSIS AND CONCLUSION

Right to a Free Public Education

N.J.S.A. 18A:38-1(a) and N.J.A.C. 6A:22-3.1(a) sets forth the right of a student to a free public education, which in pertinent parts states:

> Public schools shall be free to the following persons over five and under twenty years of age:
>
> a. Any person who is domiciled within the school district[.]

Consideration in proving residency for purposes of establishing eligibility for school district placement is found at N.J.A.C. 6A:22-3.4(a),

> (a) A district board of education shall accept a combination of any of the following or similar forms of documentation from persons attempting to demonstrate a student's eligibility for enrollment in the school district:
>
> 1. Property tax bills, deeds, contracts of sale, leases, mortgages, signed letters from landlords and other evidence of property ownership, tenancy or residency;
>
> 2. Voter registrations, licenses, permits, financial account information, utility bills, delivery receipts, and other evidence of personal attachment to a particular location;
>
> . . .
>
> 3. Court orders; State agency agreements; and other evidence of court or agency placements or directives;

> 4. Receipts; bills; cancelled checks; insurance claims or payments; and other evidence of expenditures demonstrating personal attachment to a particular location or to support the student;
>
> . . .
>
> 6. Affidavits, certifications and sworn attestations pertaining to statutory criteria for school attendance, from the parent, guardian, person keeping an "affidavit student," adult student, person(s) with whom a family is living, or others as appropriate;
>
> . . .
>
> 8. Any other business record or document issued by a governmental entity.
>
> (b) A district board of education may accept forms of documentation not listed in (a) above, and shall not exclude from consideration any documentation or information presented by a person seeking to enroll a student.
>
> (c) A district board of education shall consider the totality of information and documentation offered by an applicant, and shall not deny enrollment based on failure to provide a particular form of documentation, or a particular subset of documents, without regard to other evidence presented.

N.J.S.A. 18A:7B-12(c) states: The district of residence for children whose parent or guardian temporarily moves from one school district to another as the result of being homeless shall be the district in which the parent or guardian last resided prior to becoming homeless. For the purpose of this amendatory and supplementary act, "homeless" shall mean an individual who temporarily lacks a fixed, regular and adequate residence.

As A.I.P. claimed homelessness for the 2016/2017 school year, Springfield acted appropriately and registered children, notwithstanding their new address in Newark.

N.J.S.A. 18A:38-1(d) states: Any person whose parent or guardian, even though 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.

The preponderance of the credible evidence shows that A.I.P., M.P. and Jad. P. resided at 134 Fabyan Place, Newark, NJ for more than one year. Accordingly, they became the responsibility of the Newark school district for the 2017/2018 school year.

N.J.A.C. 6A:22-6.3 states in pertinent part: a) Tuition assessed pursuant to this section shall be calculated on a per-student basis for the period of a student's ineligible enrollment, up to one year, by applicable grade/program category and consistent with the provisions of N.J.A.C. 6A:23A-17.1. The individual student's record of daily attendance shall not affect the calculation.

Springfield expended the sum of $41,593.18 in tuition costs, and the sum of $39,918.40 in transportation costs from the time that Newark was the responsible district for the education of M.P. and Jad. P. The total sums expended by Springfield were $79,511.58.

However, A.I.P. relocated to Dover, New Jersey in the summer of 2018. Dover would be the responsible district from that point going forward. See Board of Ed. Of Twp. of Egg Harbor v. Board of Ed. Of Mainland Reg'l H.S. Dist., No. 555-10 (Comm'r Ed. Dec. 30, 2010). I agree with the position taken by Respondent that Dover was the responsible district from the period A.I.P. moved. Accordingly, Respondent should not be responsible to reimburse Petitioner for that time frame. The amount Petitioner paid during this period equals $36,031.92. The balance due Petitioner from Respondent equals $43,479.66.

I note that Respondent objected, in its brief, to the additional exhibits produced by Petitioner (P-24, P-25 and P-26). I have determined that the same shall be admitted and be part of the record. The matter is on remand and each party was free to introduce additional relevant information if they chose. I do note that I give no weight to

the assertion by A.I.P. that she remained homeless (P-24) as it is unsupported hearsay with no residuum of relevant competent evidence.

Based upon the foregoing, I further **CONCLUDE** that Jad. P. and M.P., together with their mother, A.I.P., resided at 134 Fabyan Place, Newark, NJ, from June 30, 2016 until the summer of 2018; and, Newark became the responsible school district for the 2017/2018 school year after the family resided therein for more than one year.

I further **CONCLUDE** that A.I.P. moved to Dover, New Jersey in the summer of 2018 and that Dover became the responsible district for the education of the children thereafter.

ORDER

Based upon the foregoing it is **ORDERED** that the Newark Board of Education reimburse the Springfield Board of Education the sum of $43,479.66.

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

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

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

November 7, 2022

DATE

THOMAS R. BETANCOURT, ALJ

Date Received at Agency:

Date Mailed to Parties:

db

APPENDIX

List of Witnesses

For Petitioner:

None

For Respondent:

None

List of Exhibits

For Petitioner:

P-1 letter from Tiffany Boehm to A.I.P. (parent), dated 6/27/16

P-2 Email from Kara King to Tiffany Boehm, dated 9/16/16

P-3 McKinney Vento Act Student Resident Information forms

P-4 Email report from James Post to Jannett Pacheco, Petitioner's Former Director of Human Resources, dated 5/13/18

P-5 Request for Coordinated Special Education Transportation form with regard to Jas.P. for the time period ASAP through June 23, 2016, dated 9/22/16

P-6 Request for Coordinated Special Education Transportation form with regard to M.P. for the time period ASAP through June 23, 2016, dated 9/20/16

P-7 Request for Coordinated Special Education Transportation form with regard to M.P. for the time period ASAP through June 22, 2017, dated 12/2016

P-8 Request for Coordinated Special Education Transportation form with regard to M.P. for the time period July 5, 2017, through August 15, 2017, dated 8/15/17

P-9 Emails from Diana Blajsa from UCESC to Sue Lies, Petitioner's Transportation Coordinator, dated 6/9/17

P-10 Request for Coordinated Special Education Transportation form with regard to Jad.P. for the time period April 2, 2018 through June 21, 2018, dated 3/26/18

P-11 Request for Coordinated Special Education Transportation form with regard to M.P. for the time period April 11, 2018 through June 21, 2018, dated 6/1/17

P-12 Vendor History Printout for April, May and June 2018

P-13 Vendor History Printout for September and October 2018

P-14 Springfield Board of Education Purchase Order 901230

P-15 Springfield Board of Education District Billing Reports

P-17 Power School Documents

P-18 emails between Tiffany Boehm and parent dated 11/28 and 29/2021

P-19 email between Tiffany Boehm and FACT worker

P-20 IEPs

P-21 Lease submitted by parent to Springfield

P-23 email dated 9/17/17 from Tiffany Boehm's secretary, Jessica

For Respondent:

R-1 Residency Investigation

R-2 McKinney Vento training manual

R-3 McKinney Vento questionnaire

Joint Exhibits:

J-1 Email from Ellyn Atherton to Ana Osoria with the subject "Homeless Students Living in Newark" dated 6/27/17

J-2 Emails from Tiffany Boehm to Ana Osoria dated 9/6-12/17

J-3 Emails from Ana Osoria to Tiffany Boehm dated 11/14/17

J-4 letter from Tiffany Boehm to Ana Osoria dated 4/10/18

J-5 Email from Ana Osoria to Tiffany Boehm dated 4/10/18

J-6 Email from Tiffany Boehm to Ana Osoria with attachments dated 4/23/18

J-7 Email from Ana Osoria to Tiffany Boehm dated 5/15/18

Additional Exhibits on Remand:

P-24 email Aug. 8, 2018 to Tiffany Boehm from A.I.P.
P-25 Request for Coordinated Special Education Transportation
P-26 Request for Coordinated Special Education Transportation

Briefs submitted on Remand:

Petitioner:

Letter brief of Marie Laurence Fabian, Esq.
Certification of Tiffany Boehm, with P-24, P-25 and P-26

Respondent:

Letter brief of Teresa L. Moore, Esq.

25-23E
OAL Dkt. No. EDU 11278-22
Agency Dkt. No. 362-12/22

New Jersey Commissioner of Education

Order on Emergent Relief

V.P., on behalf of minor child, M.P,

Petitioner,

v.

Board of Education of the Borough of Midland Park, Bergen County,

Respondent.

The record of this emergent matter, the sound recording of proceedings at the Office of Administrative Law (OAL), and the recommended Order of the Administrative Law Judge (ALJ) have been reviewed. Upon such review, the Commissioner concurs with the ALJ that petitioner has failed to demonstrate entitlement to emergent relief pursuant to the standards enunciated in *Crowe v. DeGioia,* 90 *N.J.* 126 (1982), and codified at *N.J.A.C.* 6A:3-1.6.

Accordingly, the recommended Order of the OAL, to the extent that it denies petitioner's application for emergent relief, is adopted. This matter shall continue at the OAL with such proceedings as the parties and the ALJ deem necessary to bring it to closure.

IT IS SO ORDERED.

Angelica Allen-McMillan, Ed.D.
ACTING COMMISSIONER OF EDUCATION

Date of Decision: January 26, 2023
Date of Mailing: January 26, 2023

State of New Jersey
OFFICE OF ADMINISTRATIVE LAW

ORDER DENYING
EMERGENT RELIEF
OAL DKT. NO. EDU 11278-22
AGENCY DKT. NO. 362-12/22

V.P., ON BEHALF OF MINOR CHILD, M.P.,
Petitioner,
v.
BOARD OF EDUCATION OF THE BOROUGH OF MIDLAND PARK, BERGEN COUNTY,
Respondent.

V.P., petitioner, pro se

Stephen R. Fogarty, Esq., for Respondent (Fogarty & Hara, attorneys)

BEFORE: **JOHN P. SCOLLO,** ALJ:

STATEMENT OF THE CASE

Petitioner, V.P. challenges the Board of Education's alleged failure to give him information about his child's health on December 5, 2022, its alleged failure to provide him with a protocol for addressing access to his son during future emergency situations, and the Board of Education's December 8, 2022 decision to bar V.P. from the campus of Midland Park High School.

PROCEDURAL HISTORY

On or about December 15, 2022, the Petitioner, V.P., filed with the New Jersey Department of Education a Petition of Appeal and a Motion for Emergent Relief. Subsequently, V.P. supplied exhibits. On December 15, 2022, the Office of Controversies and Disputes of the Department of Education (Department) transmitted the case to the Office of Administrative Law (OAL) where it was filed on December 16, 2022 as a contested case.

On December 20, 2022, the law firm of Fogarty and Hara filed a Letter Brief in Opposition to Petitioner's Pro Se Petitioner's Petition of Appeal with Emergent Relief and a number of exhibits. The hearing was held via Zoom on Wednesday, December 21, 2022 before the undersigned.

UNDISPUTED FACTUAL INFORMATION

Per the documents submitted by the parties and the testimony of V.P. I **FIND** that the parties agree on the following facts.

V.P. is the father of M.P., a minor enrolled in Midland Park High School ("MPHS"). A.Z. is the ex-wife of V.P. and is the mother of M.P. Upon the dissolution of their marriage, V.P. and A.Z. entered into a Marriage Settlement Agreement (P-5), referred to herein as the "MSA". The MSA, among other provisions, designates alternating "parenting days" when V.P. or A.Z., respectively, are responsible for M.P.'s care, including the drop-off and the pick-up of M.P. at MPHS. Monday, December 5, 2022 was a parenting day for A.Z. and was not a parenting day for V.P.

Section 4.7 of the MSA provides, "The parties agree to consult with each other and make mutual decisions with respect to ... the child's well-being ... , which shall at all times be the paramount concern of the parties. The parties further agree that routine and day-to-day decisions regarding the child's welfare shall be made by the party who has physical custody of the child at the time."

On Monday, December 5, 2022, M.P. reported to the school nurse, Karen Corcoran, R.N., that he had a headache. M.P. told Corcoran that Mondays were his mother's parenting days. Corcoran telephoned A.Z. about M.P.'s headache and A.Z. decided to wait and see how M.P. felt in an hour. An hour later, M.P. reported to Corcoran that he still had a headache and stated that he wanted to go home. Corcoran again called A.Z. and updated her about M.P.'s condition. A.Z. told Corcoran that her parents (M.P.'s grandparents) would go to the school to pick up M.P. In the meantime, M.P. had texted his father, V.P. telling him that he was not feeling well and wanted him to pick him up from school. V.P. knew that under Section 4.4 of the MSA all Mondays were A.Z.'s parenting days. V.P. also knew that Section 4.12 of the MSA provided, "Absent an emergency, neither party shall come to school ... during the other parent's parenting time." Believing that his son's condition constituted an "emergency", V.P. went to Midland Park High School to pick up M.P. It is noteworthy that Section 4.2 of the MSA provided for the appointment of David Torchin, Esq. as a "parenting coordinator". According to the MSA, "The parenting coordinator's role ... [is to provide] ... intervention between parties on outstanding issues relating to the child. The parties agree to utilize the services of the parenting coordinator to help the parties come to appropriate decisions which are in the best interest of the child." There was no evidence adduced that either V.P. or A.Z. contacted the parenting coordinator on December 5, 2022 regarding the picking-up of M.P. from the school.

There is disagreement between the Petitioner and the Respondent about what took place on December 5, 2022 during the conversations and interactions between and among V.P., Nurse Corcoran, High School Principal Nicholas Capuano; about what various staff members and or students of the school observed during V.P.'s visit to the school; about the conversations or interactions between V.P. and M.P.'s grandparents (the grandfather's being referenced herein as R.Z. and grandparent's referenced herein as the Z.'s); about the emotional state and behavior of V.P.; and, about whether V.P.'s accounts of the events of December 5, 2022 are accurate or whether the reports of five witnesses (R-1) and the Certification of Nicholas Capuano are accurate.

There is agreement on the fact that on December 5, 2022, after V.P., Nurse Corcoran and Principal Capuano had the opportunity to speak with each other in the Principal's Office, that Principal Capuano asked V.P. to leave the school's campus; and that Capuano escorted V.P. to the exit; and that V.P. left the campus.

ANALYSIS OF THE DOCUMENTS AND TESTIMONY

The following is not intended to be a verbatim recitation of the content of documents or of the testimony. Rather it is a summary of the contents of documents and of testimony which I found significant and helpful to my understanding of the matter.

Respondent's Exhibits

The BOE submitted a Letter Brief in Opposition and attached Documents (Exhibits R-1 through R-6), plus the Certification of Nicholas J. Capuano, which was marked by the Tribunal as R-7.

R-1

R-1 consisted of six "Faculty/Staff Incident Reports", written and signed by Carol Weaver, Irene Keller, Karen Corcoran, R.N. (the school nurse), Jason Whelpley, Craig Rush, and Barbara Rasmussen.

Ms. Carol Weaver wrote that she was in the main office when V.P. arrived to pick up his son, M.P. Ms. Weaver reports that when she walked into the Principal's Office, Principal Capuano and Nurse Corcoran were having a telephone conversation with A.Z., the mother of M.P. Ms. Weaver reports that Capuano signaled her that V.P. should not take M.P. with him. Ms. Weaver reports that when the phone call was finished, Capuano asked V.P. to come into his office. Then, without much detail, Ms. Weaver reports that V.P. appeared agitated, and Capuano asked V.P. to leave. Ms. Weaver, who was close enough to hear at least part of the conversation between V.P. and Capuano, quotes V.P. as saying to Capuano, "If anything happens to my son, it's on you." Ms. Weaver further reports that she observed V.P. interact with M.P.'s grandparents in the entrance foyer

and heard V.P. make unspecified "nasty comments" to them which left the grandmother "visibly shaken". Ms. Weaver's testimony is significant because she was an eyewitness who was close enough to both see and hear what transpired on December 5, 2022 at MPHS. Specifically, she described V.P. as "agitated", recalled that Capuano asked V.P. to leave, that as he was leaving V.P. made "nasty comments" to M.P.'s grandparents and observed that as a result of V.P.'s behavior the grandmother was "visibly shaken". Ms. Weaver's observations support the proposition that V.P.'s behavior was not in keeping with good taste and propriety.

Irene Keller wrote that she was in the main office, that V.P. had arrived at the school and was signing his son out of school when he was called into Principal Capuano's office. It is Ms. Keller's recollection that Nurse Corcoran was in Capuano's office at the time. Ms. Keller reports that after a few minutes V.P. left Capuano's office and that V.P. was "very angry". Ms. Keller quoted V.P. as telling Capuano "If anything happens to my son, it's on you." Ms. Keller observed that as V.P. was leaving, M.P.'s grandparents were entering the office. Ms. Keller confirms that words were exchanged between V.P. and the grandparents, but it was unclear to her what was said. She reiterated that after encountering the grandparents, V.P. was "very angry" when he left. Ms. Keller's report is significant because she was an eyewitness to V.P.'s demeanor and behavior. Ms. Keller reported what V.P. said to Principal Corcoran, using the exact same words as Ms. Weaver. It is significant that two witnesses remembered V.P.'s exact warning to Capuano, "If anything happens to my son, it's on you." It is also significant that Ms. Keller, characterized V.P.'s emotional state as "very angry" when he left Capuano's office and then again as "very angry" after encountering the grandparents. Ms. Keller's observations support the proposition that V.P.'s behavior was not in keeping with good taste and propriety.

Karen Corcoran, R.N. wrote that M.P. came twice to her office complaining of a headache. M.P. explained to Corcoran that it was his mother's parenting day. Corcoran spoke to A.Z. both times that M.P. came to her office. During M.P.'s second visit to Corcoran he still had a headache and so A.Z. told Corcoran that she would send M.P.'s grandparents to pick him up. Corcoran wrote that at that point in time, M.P. told her that he had contacted his father and that his father was coming to pick him up. Corcoran

wrote that she had Dr. Prinsel stay with M.P. while she went to tell Principal Capuano about the situation. Corcoran wrote that V.P. arrived while she was speaking with Capuano in his office. Corcoran wrote that Capuano calmly invited V.P. to sit down and informed him that M.P.'s grandparents were on their way to pick up M.P. V.P. insisted that he was already at the school and would take M.P. home. Capuano then told V.P. that they should all wait for A.Z. to come to the school. Corcoran wrote that after Capuano said this, V.P. became angry, raised his voice and raised his finger at her. Capuano calmly asked V.P. to sit down and wait for A.Z. to arrive. Corcoran then wrote that V.P. became "more angry" and described his demeanor as "aggressive" noting that V.P. started screaming and pointing his finger at Principal Capuano and repeating that he was going to take M.P. home. Corcoran wrote that Capuano asked V.P. to leave the school and was escorting V.P. to the school's exit, but that several times during the trip to the exit door V.P. stopped and turned towards Capuano. Corcoran wrote that in the school's lobby V.P. met M.P.'s grandparents and that some words were exchanged, but she was unable to hear what was said. Following that, V.P. was escorted to the exit and left the school.

It is significant that Corcoran, who was present in Capuano's office with both Capuano and V.P. noted that Capuano was calm throughout V.P.'s visit; that she described V.P.'s demeanor throughout his visit to Capuano's office as "angry", "more angry", "aggressive" and "more hostile"; that V.P. raised his voice and pointed his finger at both Corcoran and Capuano; that Capuano's suggestion that they wait for A.Z.'s arrival was not heeded; that there was an exchange of words in the lobby between V.P. and the grandparents; and that V.P. was escorted out of the school. Notably, Corcoran noted that V.P., while walking through the hallway, stopped and turned towards Capuano several times during his exit.

Jason Whelpley wrote that he was in his office finishing a meeting with Craig Rush when he heard Principal Capuano's door open and heard Capuano telling V.P. that he must leave the premises. Whelpley then saw Capuano and V.P. near Capuano's office door when V.P., in a loud voice, told Capuano, "If anything happens to my son, it's on you." Whelpley wrote that V.P. walked out of the office into the vestibule with Capuano following him. Capuano told the secretaries to "clear the office" and to call for security

personnel to come to the scene. Whelpley wrote that he saw V.P. and M.P.'s grandparents in the vestibule. Whelpley concluded by writing that he went back into his office. It is significant that Whelpley confirmed that V.P. spoke in a loud voice to Capuano saying, "If anything happens to my son, it's on you." This is the exact same statement attributed to V.P. by Ms. Weaver and Ms. Keller, both of whom characterized V.P. as speaking these words while "agitated" or "angry". Whelpley's written account also confirms the accounts of others that Capuano asked V.P. to leave the premises and confirms that Capuano found it necessary to call security personnel to the scene.

Craig Rush wrote that after finishing his meeting with Mr. Whelpley he saw and heard Principal Capuano telling V.P., "You need to leave now" and walking behind V.P. escorting him out of the office and into the hallway. He saw V.P. stop and heard him tell Capuano, "I am going to hold you responsible for my son's well-being", or words to that effect. Rush also wrote that he heard V.P. say the words, "Fuck you" and assumed that that V.P. addressed these words to Capuano. Rush wrote that his observations lasted 15 to 20 seconds. He wrote that his observations were that V.P. was "upset and agitated" and that Capuano "remained professional and focused on removing V.P. from the building". It is significant that Rush confirmed that Capuano remained "professional" while V.P. was "upset and agitated". Rush wrote that he clearly heard V.P. use a vulgarity. Rush confirmed that V.P. told Capuano that he was going to hold him responsible for M.P.'s welfare, but not necessarily with the same words used by others.

Barbara Rasmussen wrote what she observed in the main office. She noted that V.P. arrived to pick up his son. Ms. Keller was going to call for M.P. to come to the main office. Nurse Corcoran took a call in the main office from A.Z. Ms. Rasmussen then went to the ladies' room and upon her return therefrom V.P. had already left the building.

It is significant to note that, according to Ms. Rasmussen, Nurse Corcoran took a telephone call from A.Z. in the main office.

R-2

R-2 is the December 5, 2022 handwritten statement of R.Z., the father of A.Z. and the grandfather of M.P. In his statement, R.Z. wrote that V.P. came out of an office and caught sight of him. Mr. Z. wrote that V.P. called him "a piece of shit" and that V.P. passed him, turned to him and then said, "Fuck you" to him. Mr. Z. wrote that V.P. looked "threatening" and appeared to be "getting ready to fight me". Mr. Z. wrote that a "school official" stepped between them to defuse the situation. It is significant that R.Z.'s writing confirmed that V.P. used vulgarities immediately after leaving Capuano' office, which indicates that he was indeed in an angry or agitated or hostile mood. What Mr. Z. wrote comports with Principal Capuano's account of V.P.'s threatening encounter with the grandparents. Mr. Z.'s writing also comports with Ms. Weaver's account of V.P. making "nasty comments" to the grandparents, causing the grandmother to be "visibly shaken".

R-3

R-3 is the Midland Park Police Department Operations Report dated December 7, 2022 (consisting of two pages) taken by Police Officer Jason R. Tillson, who was the School Resource Officer at MPHS on December 5, 2022, plus the Midland Park Police Department Supplementary Investigation Report taken by Lieutenant John Gibbons. Tillson wrote that he was contacted by Ms. Keller and told to respond to a disturbance. His report does not indicate that he had any in-person contact with V.P. and his report does not contain any information obtained from V.P. His report contains information obtained from Principal Nicholas Capuano.

The significant highlights of the Operations Report are: that M.P. complained to Nurse Corcoran that he had a headache, which Corcoran reported to M.P.'s mother, A.Z.; that A.Z. told Corcoran that her parents would go to the school to pick up M.P.; that at approximately 12:02 p.m. V.P. arrived at MPHS to pick up M.P.; that Capuano had a telephone conversation with A.Z. during which she stated that Mondays were her parenting day and that she was sending her parents to pick up M.P.; that the school would not release M.P. to V.P. per the court order referred to by A.Z.; that V.P. then became angry and insisted that he should take M.P. home; that Capuano told V.P. that he must leave the premises; that while leaving the premises V.P. stared at and approached Capuano in an aggressive manner and that V.P. directed vulgar language at the

grandparents upon their arrival at the school and stared at and stepped towards R.Z. in an aggressive manner, with Capuano deciding to step between the two men to de-escalate the situation; and, that V.P. then left the premises. Capuano also reported that Pinsky had a telephone conversation with School Administrator Stacey Garvey.

R-4 and R-5

R-4 is a letter dated December 8, 2022 from Superintendent of Schools Marie C. Cirasella, Ed.D. to V.P. In this letter, Cirasella informed V.P. that as a result of his conduct at MPHS on December 5, 2022, he is now prohibited from visiting any of the Midland Park School District schools for any reason without her express written permission. With the letter, Cirasella enclosed a copy of "Midland Park Board of Education Policy 9150" (Exhibit R-5), which declares that the Superintendent and school Principals have the authority to prohibit the entry of any person into a school building or to expel any person from a school building when there is reason to believe that the presence of said person would be inimical to the good order of the school.

R-6

R-6 is a letter dated December 12, 2022 from Superintendent Cirasella to V.P. in response to his request that the Superintendent confirm the School District's interpretation of multiple court orders and the School District's December 8, 2022 which imposed restraints on his presence on the School District's campuses. In the 12/12/22 letter Cirasella

> (1) assured V.P. that MPHS will respond to him with information about his son, M.P.;
>
> (2) that on days when V.P. has parenting time (under the MSA) he would not be permitted on the school's campus and that he should pick-up and drop-off M.P. at the end of the driveway or by parking behind the school in the municipal parking lot;

(3) that in the event of an emergency occurring on a day when V.P. had parenting time, he is to contact Cirasella, who would determine whether to authorize his presence on campus; and

(4) assured V.P. that the school's personnel would continue to provide him with all notifications, reports, and assessments that are provided to all parents and guardians of students of the District's schools.

R-7

The Tribunal decided to mark the Certification of Nicholas J. Capuano as R-7. In R-7, Capuano wrote:

(1) That he is the Principal of MPHS;

(2) That he is familiar with the matter at hand, i.e. the facts arising out of a December 5, 2022 incident involving student M.P., his father, V.P., school personnel and M.P.'s grandparents.

(3) That on December 5, 2022, M.P. visited the school nurse, Karen Corcoran, R.N. complaining of a headache and that Corcoran telephoned A.Z., M.P.'s mother, about his complaint.

(4) That after lunch, M.P. continued to complain about having a headache and that Corcoran again telephoned A.Z., who responded that she was sending her parents (Mr. and Mrs. Z) to pick-up M.P.

(5) That in the interim, M.P. contacted his father, V.P., about his headache.

(6) That V.P. contacted Nurse Corcoran inquiring about who would pick up M.P. from the school and she told him that A.Z. had made arrangements for the pick-up. Some time later, A.P. appeared at the school to pick-up M.P.

(7) Capuano met V.P. and told him that A.Z. had made arrangements for M.P. to be picked-up.

(8) Capuano stated that V.P. became angry and in a raised voice stated that he would take his son home.

(9) Capuano stated that he asked V.P. to calm down, but V.P. continued to shout and, in Capuano's judgment, became hostile. Capuano warned V.P. that if he did not calm down, he would be asked to leave the building. Capuano stated that V.P. continued his hostile behavior and was told to leave the building.

(10) Capuano stated that as he escorted V.P. out of the building V.P. turned toward him, put his face close to his and stared aggressively at him.

(11) Capuano stated that as he escorted V.P. out of the building, V.P. encountered M.P.'s grandparents, spoke to them in a vulgar manner, and stepped toward the grandfather in a threatening manner with clenched fists.

(12) Capuano stated that he stepped between V.P. and the grandfather to defuse the situation; that V.P. exited the building; and that the encounter between V.P. and the grandparents took place in front of school staff and school children.

(13) Capuano stated that he later spoke with School Business Administrator, Stacey Garvey, who told him that she had spoken to V.P. after he left the building, who told her that "Mr. Capuano better apologize or I'll get him." (This statement was later modified by Mr. Capuano on the last page of the Midland Park Police Department' Operations Report (R-3), where Capuano stated that Garvey's statement was actually that V.P. had stated, "Mr. Capuano better apologize or he will be sorry."

(14) Capuano noted that after the December 5, 2022 incident, he contacted the Midland Park Police Department to make a Police Report.

(15) Capuano stated that he contacted Schools Superintendent Marie Cirasella about the incident of December 5, 2022 because he believed that V.P. had violated Board of Education Policy 9150.

Petitioner's Exhibits

The Petitioner, V.P., submitted his Petition of Appeal and Motion for Emergent Relief and later submitted Exhibits P-1 through P-6.

P-1 is the December 8, 2022 letter sent by Superintendent Cirasella to V.P. It is the same document as R-4.

P-2 is the December 12, 2022 letter sent by Superintendent Cirasella to V.P. It is the same document as R-6.

P-3 is an "extract" taken from the December 7, 2022 Midland Park Police Department Operations Report. It is the same document as the bottom half of page 2 of 2 of the Operations Report, which has been marked as R-3.

P-4 consists of several emails concerning V.P.'s attempts to speak with either School District officials or with the School District's Attorney.

P-5 is a copy of the Marriage Settlement Agreement (MSA) between V.P. and A.Z., which arose out of their divorce proceedings. This document is significant for setting forth the parenting days of A.Z. and the parenting days for V.P. and it is significant for setting forth that routine and day-to-day decisions regarding the child's welfare shall be made by the party who has physical custody of the child at the time.

P-6 is a May 10, 2022 email from school principal Peter Galasso to A.Z. and V.P. regarding certain communications made on that date among V.P., A.Z. and the school regarding the pick-up of M.P. by one or the other of his parents. It is significant only for Galasso's statement that with regard to the picking-up of M.P. by either one of his parents on a given day, the school does not monitor it unless there is a court order.

Testimony of V.P.

When the Tribunal inquired of V.P. what relief he was seeking from the Tribunal, V.P. responded that he is seeking what he has been asking the School District for: a Protocol outlining what he may do or may not do with regard to dropping-off and picking-up his son on his parenting days and, in the event of an emergency, what he may or may not do, regardless of whether it is his parenting day or A.Z.'s parenting day. V.P. stated he also seeks assurance that he will receive any and all information regarding his son

from the School District. In his written Appeal and Motion for Emergent Relief, V.P. wrote that he is seeking the following :

(Note: V.P. listed his demand for relief in seven numbered paragraphs, which are somewhat repetitious and unartfully drafted. The Tribunal has condensed them into a more readable format.)

(1) To find out (i.e., clarify) "if the school can decide and enforce the MSA" insofar as determining which parent (V.P. or A.Z.) can pick-up M.P. on any given day;

(2) To find out (i.e., "clarify") if the school "is allowed to decide and enforce the MSA", (i.e., to deny V.P. the right to pick-up M.P. in an emergency whether the emergency occurs on V.P.'s parenting day or A.Z.'s parenting day) ;

In essence, in #1 and #2, V.P. seeks to find out what the protocol is for routine pick-ups and emergency pick-ups;

(3) V.P. seeks demands that the Tribunal launch an investigation to be conducted by a neutral party.

(4) (6) and (7) To overturn the School Superintendent's December 8, 2022 decision (P-1 a/k/a R-4) barring V.P. from the School District's campuses, particularly MPHS; to restore V.P.'s privilege of dropping-off and picking-up M.P. on the MPHS campus by overturning the restrictions imposed in the School Superintendent's letter dated December 12, 2022, which limits V.P.'s authority to drop-off and pick-up M.P. to the area at the end of the school's driveway or, alternatively, in the municipal parking lot located at the rear of the school;

In support of his position, V.P. testified that on Monday, December 5, 2022 his son, M.P., contacted him to say that he was at school, but was not feeling well and wanted to go home. V.P. stated that he had recently undergone surgery and was in pain, but decided, even though he was only wearing gym clothes, to go to MPHS to pick-up his son

and bring him home. V.P. was aware that according to the MSA, Mondays were not his parenting days. However, he knew that the MSA allowed either parent to pick-up M.P. in the event of an emergency. V.P. claimed that he did not know the nature or severity of his son's illness, but he deemed this occasion to be an "emergency" and so decided that it was his right to go to the school to pick-up M.P. V.P. testified that Nurse Corcoran refused to explain the nature of M.P.'s illness and gave him "one-word answers" to his inquiries. While V.P. testified that he never became angry with anyone at the school, it was clear that he was, at the very least, expressing his displeasure when he recounted his conversation with Corcoran and he admitted that he was "frustrated" and that he was "hyper-alarmed" about his son's complaints of "not feeling well".

V.P. testified that when he arrived at MPHS, he was invited into Principal Capuano's office. Nurse Corcoran was also present with Capuano. Although Capuano invited V.P. to sit down, V.P. refused to sit because his recent surgery made sitting painful. V.P. testified that he told Capuano that he wanted to take his son home. Capuano advised V.P. that M.P.'s grandparents were on their way to the school and that they would pick-up M.P. at A.Z.'s behest. V.P. testified that Nurse Corcoran had refused to give him information about his son and he complained that he was not told when the grandparents were expected to arrive. V.P. testified that he responded by saying that the grandparents were "not on the list" to pick-up M.P. and that since he was already there, he would take M.P. home. V.P. admitted that he was "alarmist" and stated that his concern was to get M.P. home so he could rest.

Upon questioning, V.P. admitted that he knew that Monday, December 5, 2022 was not his parenting day and that it was A.Z.'s parenting day. He admitted that he knew that under the MSA, the routine day-to-day decisions about M.P.'s welfare were to be made by the parent then having physical custody of M.P., which on Mondays would be A.Z. However, V.P. pointed out that the MSA also provided that either parent could pick-up M.P. when there was an emergency and he construed his son's illness to be an emergency. Upon continued questioning, V.P. re-iterated that he told Capuano that he would take his son home and was told that he should wait until A.Z. could arrive and help resolve the situation. When asked if he raised his voice or became angry when he was told that the school could not release M.P. to him, V.P. denied that he ever became angry

or even raised his voice. V.P. was questioned about the statements of the witnesses listed in R-1 and R-7, all of whom stated that V.P. had become loud, angry, and hostile towards Capuano and Corcoran. In response, V.P. was hesitant to say they were all lying. Instead, he stated that they all "misperceived" his emotions and were all mistaken about the volume of his voice. V.P. denied that any of his behavior was "hostile". V.P. never denied that Capuano asked him to leave the premises.

V.P. admitted that he saw his ex-wife's parents in the school's hallway, but he denied that he ever used profanity against them. He specifically denied ever calling his ex-father-in-law, R.Z., a "piece of shit" and denied ever saying "Fuck you" to him.

When confronted with the statements of the R-1 and R-7 witnesses, V.P. claimed that they were either not telling the truth or had been too far away to hear any conversation between himself and R.Z. or that they were not present at all. Indeed, V.P. testified that he did not say anything at all to R.Z. When asked to characterize his relationship with his ex-in-laws, V.P. admitted that it was "contentious". When questioned about Capuano's statement that V.P. walked towards R.Z. with clenched fists, V.P. stated that he always walks with his fists clenched, but that on this occasion his hands were facing downwards, not upwards in a fighting position. When questioned about being escorted out of the building by Capuano and about encountering the ex-in-laws, V.P. denied that Capuano had to step between himself and R.Z. V.P. also testified that Capuano was a big man and that as Capuano escorted him out of the building, Capuano was walking so close behind him that his belly touched the small of his back. V.P. denied ever stopping or turning around to stare at or intimidate Capuano. V.P. also denied that any children were present in the hallway when he encountered his ex-in-laws.

Upon further questioning, V.P., responded to the 13th numbered paragraph of Capuano's Certification wherein Capuano referred to a conversation he had with Stacey Garvey, the school's Business Administrator. Capuano's Certification states that Garvey recounted a telephone conversation she had with V.P. during which V.P. allegedly stated, "Mr. Capuano better apologize, or I'll get him." V.P. admitted that he had a telephone conversation with Garvey shortly after he left the school building which lasted about

twenty minutes. V.P. admitted that Garvey asked if his statement was a threat against Capuano, but he denied that he was making a threat.

On Re-Direct, V.P. clarified that his focus throughout all his dealings with the Midland Park School District has been to understand the protocols regarding drop-offs and pick-ups of his son and to obtain assurance that he would be receiving any and all information about his son from the school district.

Summations

Respondent's Summation

The School District emphasized that its responsibility is to keep the schools safe for students and staff. Respondent's counsel, Mr. Fogarty argued that the weight of the credible evidence, both form the documentary evidence and from V.P. himself confirmed that V.P.'s language and behavior on December 5, 2022 was not in keeping with District Policy 9150 or with the good taste and propriety expected of persons who enter school grounds. He argued that the coherence and agreement of the School District's several witnesses, all of whom had no personal interest at stake in the matter, demonstrated that their accounts of V.P.'s conduct on December 5, 2022 were truthful. On the other hand, V.P.'s claim was that he remained calm throughout this episode, never raised his voice, never pointed his fingers at anyone, never use vulgar language, never stared at anyone, never made any aggressive overtures, and never made any threats is against the weight of all the other evidence in the matter. Mr. Fogarty pointed-out that the District's witnesses all agree that V.P. raised his voice; claimed he was denied information about his son; was accusatory; pointed his fingers at both Capuano and Corcoran; stared at and moved in an aggressive manner toward R.Z.; stopped walking, turned and stared at Capuano; and used vulgarities against his ex-in-laws causing his ex-mother-in-law to be "visible shaken". Most importantly, V.P. never denied that Capuano, after appealing to V.P. to calm down, reached the decision that he had to ask V.P. to leave the premises, to notify security personnel, and to personally escort V.P. out of the building. Although V.P. claimed to have remained calm throughout his time at the school, he never denied that he was ejected from the premises. Attorney Fogarty argued that V.P. had not borne his

burden of proving even one of the four Crowe factors needed to justify emergent relief. Attorney Fogarty asked the Tribunal to agree that School Superintendent Cirasella's action barring V.P. was in keeping with School District Policy 9150; was backed-up with abundant proof of V.P.'s misconduct; and was fully justified. He asked the Tribunal to affirm Cirasella's decision.

Petitioner's Summation

V.P. re-emphasized that he is simply looking for the School District to provide him with the protocols for dropping-off and picking-up his son in non-emergency and in emergency situations. He believed that his son's reported illness constituted an emergency which justified his presence on the campus of MPHS on December 5, 2022. He re-iterated that the school nurse refused to give him information about his son's health when he spoke with her, which made him frustrated, but not angry or hostile. Since he was not told when the grandparents would arrive to pick-up M.P., he could not understand why he could not take M.P. home. He admitted that he is "alarmist" and was indeed alarmed that the delay in getting his son home would be detrimental to him.

Addressing the obvious question of why the statements of the witnesses, all of which attest to V.P.'s inappropriate conduct, should not be believed, V.P. simply stated that they "misperceived" his emotions and did not actually hear the statements of which he is accused of saying.

Finally, V.P. argued that the Superintendent's decision to bar him should be overturned because it would not only be unfair to deny him access to school activities, but it would be dangerous to bar him from the campus in the event of an emergency, such as another health emergency or even in the event of a school shooting. V.P. pointed out the implausibility of getting through to the superintendent in an emergency situation to seek her permission to come to the campus to see to his son's safety.

At the end of his summation, the Tribunal posed a question to V.P. In answer to the Tribunal's question regarding the need for emergent relief, the Tribunal asked V.P. what the imminent threat (post-December 5th) was to M.P. that justified emergent relief.

V.P. could only say that in the event of a possible future emergency (admitting there was no imminent or present emergency) he would need immediate access to the campus.

DISCUSSION AND FINDINGS OF FACT

Having reviewed the documents, testimony, and arguments presented, I make the following findings of **FACT**.

I **FIND** that V.P.'s demand that the School District provide him with information about his son, M.P., has already been completely addressed by the December 12, 2022 letter to V.P. written by Superintendent Marie Cirasella. (R-4) In that letter, Cirasella gives V.P. the School District's assurance that the School District's administrators, teachers and school nurse will respond to his appropriate requests for any information about his son.

I **FIND** that the "protocols" demanded by the Petitioner, V.P., regarding the dropping-off and picking-up of his son, M.P. have been provided in Superintendent Marie Cirasella's letter to him dated December 12, 2022 (R-4).

I **FIND** that V.P.'s demand that he be supplied with information about his son, M.P., has been provided in R-4.

I **FIND** that the response to V.P.'s demand for the "protocols" for dropping-off and picking-up his son, Cirasella's Letter dated December 12, 2022 (R-4) has provided V.P. with a clear statement that he is not to come upon the premises of MPHS and it has provided a clear procedure for where he, on his parenting days, is to drop-off and pick-up his son, M.P.

I **FIND** that the response to V.P.'s demand for "protocols" for emergency visits by him to MPHS has already been addressed in R-4, wherein Superintendent Cirasella sets forth a clear procedure for V.P. to contact her by telephone to seek admission to the MPHS campus, reserving to herself the sole discretion and authority to grant or deny admission to the campus to V.P.

I **FIND** that in response to V.P.'s demand that he be apprised by the School District of all information concerning his son, M.P., Superintendent Cirasella has already stated clearly to V.P. in R-4 that he will continue to receive all notifications, reports, and assessments concerning M.P., which are provided by the school District to all parents and guardians of its students.

I **FIND** that on December 5, 2022 at MPHS, after his arrival at MPHS, V.P. pointed his finger at and accused Nurse Corcoran of not providing him with information about his son, M.P. I **FIND** that V.P.'s accusation against Corcoran is lacking in support. I **FIND** that Corcoran did indeed supply V.P. with adequate information about M.P. and that information was that M.P. was complaining of having a headache, that it being the lad's mother's (A.Z.'s) parenting day she had been informed of M.P.'s complaint and stated that M.P.'s grandparents (the Z.'s) were going to the school to pick-up M.P. I **FIND** that, contrary to V.P.'s testimony, the preponderance of the credible evidence indicates that V.P. was not calm when he was at MPHS; that V.P. raised his voice while speaking with Principal Capuano and Nurse Corcoran and continued to speak in a loud voice even after Capuano asked him to calm down.

I **FIND** that V.P. was not as credible as Principal Capuano and that V.P. was not as credible as the Respondent's other witnesses because Capuano and the Respondent's other witnesses had no personal stake in the outcome of the matter, while V.P. had lost his privilege of entering the MPHS campus and was seeking to gain it back. I have also found V.P. to be less credible than Capuano and Respondent's other witnesses due to the consistency of the Respondent's witnesses combined statements, which agree that V.P. was not calm, that he was angry, that his behavior caused Capuano to decide to eject V.P. from the campus; that as he was being escorted to the exit, V.P. confronted both R.Z. and Principal Capuano; that V.P.'s claims that he remained calm throughout the episode and did not use vulgarities is belied by the sheer number of witnesses who contradicted him; by the fact that V.P. claimed that numerous witnesses all "misperceived" what really happened on December 5, 2022; by the fact that V.P. tacitly admits that he was ejected from the campus; by the fact that V.P. admitted that he was "alarmist", "hyper-alarmed" and "frustrated"; by the fact that V.P. while admitting that his

fists were indeed clenched as he walked by R.Z., he nonetheless claimed that he "always" walks with his hands clenched and that he recalled on this occasion that his hands were facing downwards; and by the overall implausibility of V.P.'s account.

The preponderance of the credible evidence indicates that the following statements should be, and hereby are, found to be true statements of fact.

I **FIND** that even though V.P. knew that Monday, December 5, 2022 was not his parenting day and that his ex-wife, A.Z., had dispatched her parents (the Z.'s) to go to MPHS to pick-up M.P., V.P. insisted that he should bring M.P. home.

I **FIND** that V.P. ignored Principal Capuano's recommendation to wait for A.Z. to arrive to sort out the question of who should pick-up M.P.

I **FIND** that because Principal Capuano found V.P.'s behavior not to be appropriate under the circumstances, Capuano warned him that he would be asked to leave the campus; and then, because V.P. did not calm down, Capuano decided to eject V.P. from the campus due to V.P.'s continuing inappropriate behavior.

I **FIND** that Capuano ordered his staff to summon security personnel to the scene and I **FIND** that in the meantime Capuano personally escorted V.P. to the exit of the school building.

I **FIND** that V.P.'s testimony about Capuano walking so close behind him that his belly touched V.P.'s lower back to be untrue in light of the account given by Capuano that during the walk to the exit, V.P. stopped and turned to face Capuano.

I **FIND** that it would not be likely that Capuano could walk so closely behind V.P. that his belly could touch V.P.'s lower back because their legs would have become entangled if they had been walking in such close proximity, as suggested by V.P.

I **FIND** that V.P. used vulgar language when speaking to M.P.'s grandparents, the Z.'s, in the hallway of MPHS where staff and students were present. Particularly, I **FIND** that V.P. called R.Z. a "piece of shit" and said "Fuck you!" to R.Z.

I **FIND** that V.P. walked towards R.Z. with his fists clenched and in an aggressive manner, causing Principal Capuano to take action to prevent an altercation by placing his own body between the two other men.

I **FIND** that V.P.'s display of vulgar language and aggressive behavior frightened Mrs. Z. I **FIND** that V.P. exited MPHS shortly after directing vulgarities at R.Z.

I **FIND** that shortly after exiting MPHS, V.P. placed a telephone call to School Administrator Stacey Garvey and stated to her either, "Capuano better apologize, or I'll get him" or "Capuano better apologize, or he'll be sorry".

I **FIND** that the statements and actions of V.P. on December 5, 2022 while on the campus of MPHS were grievous enough to violate School Policy 9150.

I **FIND** that V.P. has not set forth proof of any imminent harm or threat to either himself or to M.P. that justifies any sort of emergent relief. I **FIND** that V.P. has not presented sufficient facts or sufficient arguments that would satisfy any of the four Crowe factors.

APPLICABLE LAW

N.J.A.C. 6A:3-1.6(a) provides:

> Where the subject matter of the controversy is a particular course of action by a district board of education ... the petitioner may include with the petition of appeal, a separate motion for emergent relief ... pending the Commissioner's final decision in the contested case."

N.J.A.C. 6A:3-1.6(b) provides:

> A motion for stay or emergent relief shall be accompanied by a letter memorandum or brief which shall address the following standards to be met for granting such relief pursuant to Crowe v. DeGioia , 90 N.J. 126 (1982):
>
> 1. The petitioner will suffer irreparable harm if the requested relief is not granted;
>
> 2. The legal right underlying petitioner's claim is settled;
>
> 3. The petitioner has a likelihood of prevailing on the merits of the underlying claim; and
>
> 4. When the equities and interests of the parties are balanced, the petitioner will suffer greater harm than the respondent will suffer if the requested relief is not granted.

Crowe v. DeGioia, 90 N.J. 126 (1982) arose out of a set of circumstances regarding support and palimony matters. Nonetheless, the case has been the polestar decision in New Jersey for cases wherein injunctive relief is sought. The case stands for the proposition that an injunction cannot be granted unless and until the party seeking relief presents clear and convincing evidence that: (1) the injunction is "necessary to prevent irreparable harm"; (2) that "the legal right underlying the claim is settled"; (3) that the party seeking relief has made "a preliminary showing of a reasonable probability of ultimate success on the merits"; and (4) that "the relative hardship to the parties in granting or denying [injunctive] relief", on a balancing of the equities, weighs in his favor. Crowe, 90 N.J. at 132-34. In order to prevail, the party seeking injunctive relief must demonstrate by clear and convincing evidence that he meets all four Crowe factors. Brown v. City of Paterson, 424 N.J. Super. 176, 183 (App. Div. 2012).

"[A] party who seeks mandatory preliminary injunctive relief must satisfy a 'particularly heavy' burden." Guaman v. Velez, 421 N.J. Super. 239, 247 (App. Div. 2011), Rinaldo v. RLB Inv., LLC, 387 N.J. Super. 387, 396 (App. Div. 2006).

Also, "[w]hen a case presents an issue of 'significant public importance', a court must [also] consider the public interest in addition to the traditional Crowe factors." Garden State Equal. v. Dow, 216 N.J. 314, 321 (2013).

Appellate courts are bound by the trial court's factual findings if they are supported by "substantial, credible evidence" in the record. Triffin v. Automatic Data Processing, Inc., 411 N.J. Super. 292,315 (App. Div. 2010).

Under the first Crowe factor, a party who seeks injunctive relief must establish that injunctive relief is necessary to prevent irreparable harm and to preserve the status quo. Citizens Coach Co. v. Camden Horse R.R. Co. , 29 N.J. Eq. 299, 303 (E.&A. 1878). Irreparable harm is an "injury to be suffered in the absence of injunctive relief [that] is *substantial* and *imminent*." Waste Mgmt. of N.J., Inc. v. Union City Utils. Auth., 399 N.J. Super. 508, 520 (App. Div. 2008).

Under the second Crowe factor, injunctive relief will be withheld when the legal right underlying the claim is unsettled. Citizens Coach, at ps. 304-05.

Under the third Crowe factor, the party seeking relief is obligated to present clear and convincing evidence that he / she has a reasonable probability of ultimate success on the merits. Therefore, injunctive relief will not be granted where there are material facts in controversy. Citizens Coach at ps. 305-06. The party who seeks injunctive relief must be prepared to demonstrate facts which support his case and "must make a preliminary showing of reasonable probability of success on the merits." Crowe, at p. 133.

The second and third Crowe factors involve fact-sensitive analysis that "requires a determination of whether the material facts are in dispute, and whether the applicable law is settled." Waste Mgmt., at p. 528.

Under the fourth Crowe factor, the party who seeks injunctive relief must address the issue of relative hardship to the parties and he must establish that, on balance, the equities favor the grant of temporary relief to maintain the *status quo* pending the outcome of a final hearing." Crowe at p. 134. The party seeking injunctive relief must prove his

case by clear and convincing evidence. Brown at p. 183 and thus his burden is 'particularly heavy'. Guaman at p. 247.

Midland Park Board of Education, District Policy 9150 – School Visitors

The above-captioned Policy is set forth as follows:

> The Board of Education welcomes and encourages visits to schools by parent(s) or legal guardian(s), or other adult resident of the community, and interested educators. In order for the educational program to continue undisturbed when visitors are present and to prevent the intrusion of disruptive persons into the schools, the Board directs the enforcement of rules governing school visits.
>
> The Superintendent and building principal each possess the authority To prohibit the entry of any person into a school of this district or to Expel any person from the school when there is reason to believe the Presence of such person would be inimical to the good order of the school. If such person refuses to leave the school grounds or creates a disturbance, the Principal is authorized to request from the local law enforcement agency whatever assistance is required to remove the individual.
>
> Visitors shall be required to register their presence in the school. No staff Member shall transact business with or permit the continuing presence in the school of a visitor who has not been duly registered. Pupils may not bring visitors to school.
>
> No visitor may confer with a student in school without the approval of the Principal; any such conference may take place only in the presence of a teaching staff member and / or administrator.
>
> The Superintendent shall develop regulations that will protect pupils and employees of the district from disruption to the educational program and the efficient conduct of their assigned tasks.

N.J.S.A. 2C:18-3; N.J.S.A. 18A:17-42; 18A:20-1; 18A:20-34.

ANALYSIS OF THE ARGUMENTS ON THE PENDING MOTION

Petitioner's Argument

Petitioner V.P. did not demonstrate that he met any of the requirements necessary for demonstrating his need for emergent relief pursuant to the four factors governing the granting of injunctive relief set forth in Crowe v. DiGioia, 90 N.J. 126 (1982). His argument was based on speculation that in the event of a future emergency, he would need immediate access to the high school campus in order to safeguard his son's welfare. He completely ignored the reasons set forth in the School Superintendent's letter for barring him from the campus pursuant to Policy 9150 due to his conduct on December 5. 2022. V.P. therefore failed to demonstrate any good reason for overturning the Superintendent's decision to bar him.

Respondent's Argument

The First Crowe Factor:

Regarding the first Crowe factor, the Respondent convincingly argued that the Petitioner did not demonstrate that he would suffer irreparable harm if emergent relief were not granted

The Second Crowe Factor:

Regarding the second Crowe factor, Respondent's Counsel points out that Policy 9150 was enacted in accordance with the laws of New Jersey and that its purpose is the promotion of the safety of school staff and students. The BOE's convincingly argued that the law is settled, and it is settled in favor of the BOE, not V.P.

The Third Crowe Factor:

Regarding the third Crowe factor, Respondent's counsel points out that the weight of the credible evidence favors the respondent. Moreover the failure of V.P. to reconcile his assertion that he did not cause a disturbance on December 5, 2022 with the tacit admission that he was indeed ejected from the MPHS campus without any protest on his part, strongly indicates that V.P. will not be able to prevail on the merits.

The Fourth Crowe Factor:

Regarding the fourth Crowe factor, respondent's counsel points out that V.P. has not demonstrated any harm to his interests that was not self-inflicted. The weight of the evidence is that he caused a disturbance on the campus of MPHS which resulted in his ejection and eventual barring from said campus. The BOE's position is that allowing V.P. onto the campus could, in view of his previous egregious conduct and the likelihood of a repetition of such conduct, pose a continuing danger to the good order of the school. Therefore, the relative harm to the parties falls heavier on the school (the BOE) than it does V.P.

LEGAL ANALYSIS AND CONCLUSIONS

Legal Analysis of the Evidence Concerning School Policy 9150

School Policy 9150 is attached as an exhibit. Its provisions are clearly stated.

Petitioner, V.P.'s position is that he conducted himself with good taste and propriety on December 5, 2022 at MPHS. He stated that he was calm and remained calm. He denies becoming angry or loud, denies that he made accusations; denies that he used vulgar language; denies that he made threats; and denies that he engaged in any hostile actions. He did not deny that he was asked to leave the school building and that he was escorted out of the building. V.P. characterized himself as "alarmist". In regard to the statements of various witnesses who stated that V.P. became angry, loud, accusatory, used vulgar language, that he made threats, and that he acted in a hostile

manner, V.P. responded that the witnesses "misperceived" his words and demeanor and that some of them were too far away to hear what he actually said.

The Respondent's multiple witnesses reported that V.P. was not calm, but rather was visibly agitated and angry and that he raised his voice and was asked to lower his voice. V.P. accused Nurse Corcoran of not giving him information about his son's illness. Multiple witnesses reported that V.P. spoke to his ex-father-in-law using vulgarity and expletives. V.P. did not deny saying to Principal Capuano, "If anything happens to my son, it's on you." This statement and the statement quoted by Capuano (from his conversation with Administrator Stacey Garvey), "If Capuano doesn't apologize, I'll get him", suggest untoward consequences against Capuano. Capuano stated that he surmised the need to place himself between V.P. and R.Z. in order to prevent a physical altercation being initiated by V.P.'s use of vulgar language and his approach towards R.Z. with clenched fists.

I have made findings concerning the above-listed conduct and I **CONCLUDE** that on December 5, 2022 at MPHS V.P. violated School Policy 9150.

Legal Analysis Of The Arguments Concerning The Crowe Factors

Analysis of the First Crowe Factor: The Claim of Irreparable Harm

A party seeking injunctive relief must demonstrate the need for relief by clear and convincing evidence. Brown, *supra*. The party seeking injunctive relief must demonstrate that the claim of irreparable harm is substantial and imminent. Waste Mgmt., *supra*. V.P. has not carried his burden of producing clear and convincing evidence that his being barred from the School District's campuses will cause him or M.P. irreparable harm. There has been no showing that the drop-off and pick-up places to which V.P. is limited imposes any undue hardship to V.P. or to M.P. The Board was not inflicting harm when the Superintendent of Schools barred V.P. from the School Districts campuses. Rather the Superintendent was attempting to promote the safety of the students and staff of the District from a repetition of the type of conduct that V.P. exhibited on December 5, 2022.

I **CONCLUDE** that V.P. has not demonstrated irreparable harm to himself or to his son, M.P., and cannot prevail on the first Crowe factor.

Analysis of the Second Crowe Factor: Whether the Law is Settled or Not

Policy 9150 was enacted in accordance with the laws of New Jersey and its purpose is the promotion of the safety of school staff and students. I **CONCLUDE** that the BOE has demonstrated that the law is settled and that it is settled in its favor.

Analysis of the Third Crowe Factor: That the Movant has Shown a Reasonable Likelihood of Success on the Merits

On the issue of whether V.P. can show a reasonable probability of success on the merits, V.P. has not set forth an argument demonstrating that the merits weigh in his favor. On the other hand, the respondent has marshalled evidence favoring the Respondent's case from witnesses who have no personal interest in the outcome of the matter and whose credibility has not been seriously challenged. I **CONCLUDE** that V.P. has not demonstrated that he has a reasonable probability of success on the merits. Therefore, I **CONCLUDE** that V.P. cannot prevail on the third Crowe factor.

Analysis of the Fourth Crowe Factor : Relative Harm to the Parties

V.P. bears the burden of demonstrating by clear and convincing evidence that the harm he claims to suffer is both substantial and imminent. As noted above, V.P. has not demonstrated that denial of injunctive relief will cause him or his son to suffer any imminent harm or even any foreseeable harm. V.P. has not demonstrated how he or his son, M.P., will be harmed and has not demonstrated that he or his son, M.P., will be harmed to any greater extent than the Board. Therefore, I **CONCLUDE** that V.P. cannot prevail on the fourth Crowe factor.

From my analysis of the facts and the arguments presented pursuant to Crowe, I **CONCLUDE** that V.P. has not demonstrated that he has prevailed on any of the Crowe factors and therefore, he is not entitled to emergent relief.

Having reviewed the documents and testimony presented in this matter, together with the arguments presented, I **CONCLUDE** that the School District does not "enforce" the MSA; rather, it has followed the requirements of the MSA. I also **CONCLUDE** that the definition of an "emergency", as used in the MSA, is not a matter for the OAL to decide. V.P. and A.Z., through their respective counsel have agreed to the terms and content of their MSA. If either of them now or in the future raises a question or conflict about the meaning of the word "emergency" as used in their MSA, then they must seek to resolve it. Ultimately, the definition of "emergency" under the MSA is for the parties themselves to agree upon, or, if they cannot agree upon the definition of "emergency" they must resolve their dispute before the Superior Court of New Jersey, Chancery Division, Family Part.

Having reviewed Exhibit R-4 and Exhibit R-6, I **CONCLUDE** that Superintendent Marie Cirasella has given the School District's assurance to V.P. that the School District's administrators, teachers and school nurse will respond to his appropriate requests for any information about his son. I **CONCLUDE** that Cirasella provided V.P. with a clear statement that he is not to come upon the premises of MPHS and has provided a clear procedure for where he is to pick-up M.P. on his parenting days. I **CONCLUDE** that Cirasella provided V.P. with a clear procedure in which he is to telephone her regarding an emergency that may involve M.P., reserving to herself the authority to grant or deny admittance for V.P. to enter upon the MPHS campus. I **CONCLUDE** that Cirasella has stated clearly to V.P. that he will continue to receive all notifications, reports, and assessments concerning M.P., which are provided by the school District to all parents and guardians of its students. I **CONCLUDE** that Cirasella's December 12, 2022 letter has already provided all of the relief that V.P. is entitled to in this matter, including , but not limited to, his demand for a set of "protocols".

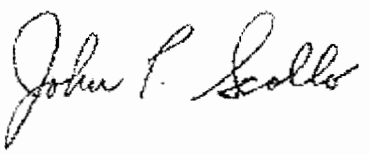
Having made findings of fact concerning V.P.'s conduct on December 5, 2022 at MPHS, and having reviewed School Policy 9150, I **CONCLUDE** that Superintendent Marie Cirasella was authorized to bar V.P. from the premises of the Midland Park School District and I **CONCLUDE** that nothing has come before this Tribunal that indicates that the barring of V.P. should be lifted. I hereby **AFFIRM** Superintendent Cirasella's action

of barring V.P. from the School District's premises, subject to her further consideration of circumstances that may arise, and subject to her sole discretion.

ORDER

It is hereby **ORDERED** that V.P.'s Motion for emergent relief in the form of an Order vacating the December 8, 2022 decision of Superintendent of Schools Marie Cirasella to bar V.P. from the campuses of the Midland Park School District is **DENIED**; and it is further **ORDERED** that V.P.'s demand for a set of protocols (i.e., procedures) for the dropping-off and picking-up of M.P. is **DENIED** because the procedures have already been set forth in R-4, Cirasella's letter dated December 12, 2022; and it is further **ORDERED** that V.P.'s demand for information about his son, M.P., is **DENIED** because the promises and assurances have already been set forth in R-4, Cirasella's letter dated December 12, 2022, and it is further **ORDERED** that a copy of this **ORDER** shall be transmitted by email from the OAL to V.P. and to Attorney Stephen R. Fogarty, and that receipt of same shall be acknowledged immediately by the recipients.

This order on application for emergency relief may be adopted, modified, or rejected by the **COMMISSIONER OF THE DEPARTMENT OF EDUCATION**, who is authorized by law to make the final decision in this case. The final decision shall be issued without delay but no later than forty-five days from the entry of this order. If the **COMMISSIONER OF THE DEPARTMENT OF EDUCATION** does not adopt, modify, or reject this order within those forty-five days, this recommended order shall become the final decision on the issue of emergency relief under N.J.S.A. 52:14B-10.



December 28, 2022
DATE

JOHN P. SCOLLO, ALJ

db

APPENDIX

List of Exhibits

Petitioner's Exhibits

P-1 Superintendent Cirasella's December 8, 2022 Letter

P-2 Superintendent Cirasella's December 12, 2022 Letter

P-3 "Extract" of Police Operations Report

P-4 Several emails from V.P. in which he states his desire to communicate with School District Officials or the District's Attorney

P-5 The Marriage Settlement Agreement between V.P. and A.Z.

P-6 A May 10, 2022 email to A.Z. and V.P. from Peter Galasso, a School Principal

Respondent's Exhibits

R-1 Six Faculty / Staff Incident Reports

R-2 December 5, 2022 Handwritten Statement of R.Z.

R-3 Midland Park Police Operations Report dated December 7, 2022

R-4 December 8, 2022 Letter from Superintendent Cirasella to V.P.

R-5 School Policy 9150

R-6 December 12, 2022 Letter from Superintendent Cirasella to V.P.

R-7 Capuano Certification

26-23
OAL Dkt. No. EDU 11614-22
Agency Dkt. No. 374-12/22

New Jersey Commissioner of Education

Final Decision

D.S., on behalf of minor child, M.S.,

Petitioner,

v.

Board of Education of the Township of Hamilton, Mercer County,

Respondent.

The record of this matter, the Initial Decision of the Office of Administrative Law (OAL), and the exceptions filed by the petitioner[1] pursuant to *N.J.A.C.* 1:1-18.4 have been reviewed and considered.

Petitioner's minor child, M.S., was involved in a fight at Steinert High School (Steinert) in December 2022. Petitioner filed an application for emergent relief, alleging that M.S. was unsafe at Steinert and seeking M.S.'s immediate transfer to Hamilton High School-West (HHS-West). The Administrative Law Judge (ALJ) concluded that petitioner failed to establish irreparable harm, noting that there is no more evidence that A.C. targeted M.S. than evidence that M.S. targeted A.C., and that there is insufficient evidence to conclude that A.C. presents a risk of irreparable harm to M.S. The ALJ further indicated that, to the extent that petitioner alleged that a School Resource Officer (SRO) used excessive force when responding to the fight, petitioner has made clear her

[1] Following the issuance of the Initial Decision, petitioner sent two emails to the Commissioner, which the Commissioner deems to be petitioner's exceptions to the Initial Decision. The Board did not file a reply to petitioner's exceptions.

intent to file a civil lawsuit against the SRO and others, such that redress in the form of monetary damages is available to her and therefore any harm is not irreparable. The ALJ further concluded that petitioner failed to demonstrate a likelihood of success on the merits of her claim regarding the transfer, as a discretionary decision of a board of education will not be overturned unless the board acted in bad faith or in disregard of the circumstances. Here, the ALJ found that the Hamilton Township Board of Education (Board) has a strong basis for its decision to deny petitioner's transfer request based on a history of conflict during M.S.'s previous enrollment at HHS-West. Finally, the ALJ concluded that the balance of the equities does not favor a transfer. Accordingly, the ALJ denied the application for emergent relief.

The ALJ also indicated that petitioner previously filed a separate petition of appeal seeking M.S.'s transfer to HHS-West on the grounds that petitioner had purchased a home within the residency zone for HHS-West. In the Initial Decision, the ALJ indicated that the proceedings in that case, docketed as *D.S., on behalf of minor child, M.S. v. Bd. of Educ. of the Twp. of Hamilton, Mercer Co.*, OAL Dkt. No. EDU 10144-22, will continue.

In her exceptions, petitioner indicates that she disagrees with the decision and believes that she has met the prongs for emergent relief. Petitioner also noted that there has been no civil suit filed against the Steinert administration or the Hamilton Township Police Department.

Upon review, for the reasons detailed in the Initial Decision, the Commissioner concurs with the ALJ that petitioner has failed to demonstrate entitlement to emergent relief pursuant to the standards enunciated in *Crowe v. DeGioia,* 90 *N.J.* 126 (1982), and codified at *N.J.A.C.* 6A:3-1.6. While petitioner's exceptions express her disagreement with the Initial Decision, she offers no legal basis for that disagreement. Furthermore, with regard to petitioner's contention that no civil suit has been filed, the Commissioner notes that the availability of monetary damages is what precludes

a finding of irreparable harm; whether petitioner has filed such a suit at this time is not relevant. Additionally, petitioner is required to meet all four prongs of the emergent relief standard for her application to be granted, and the prong regarding irreparable harm is not the only prong that petitioner failed to meet. The Commissioner concurs with the ALJ that petitioner also failed to demonstrate a likelihood of success on the merits of her claim or that the balance of equities favors a transfer. Accordingly, the Commissioner concludes that the ALJ appropriately denied petitioner's request for emergent relief.

Generally, when a request for emergent relief is denied, the case continues on the merits of the underlying claim. However, here, as the ALJ noted, the underlying issue of M.S.'s transfer is pending in a separate matter. Therefore, there is no need for further proceedings on the merits of the transfer claim in the instant matter.

Accordingly, petitioner's application for emergent relief is denied, and the petition of appeal is hereby dismissed.

IT IS SO ORDERED.[2]

Angelica Allen-McMillan, Ed.D.
ACTING COMMISSIONER OF EDUCATION

Date of Decision: January 26, 2023
Date of Mailing: January 26, 2023

[2] This decision may be appealed to the Appellate Division of the Superior Court pursuant to *N.J.S.A.* 18A:6-9.1. Under *N.J.Ct.R.* 2:4-1(b), a notice of appeal must be filed with the Appellate Division within 45 days from the date of mailing of this decision.

State of New Jersey
OFFICE OF ADMINISTRATIVE LAW

INITIAL DECISION
DENYING EMERGENT RELIEF
OAL DKT. NO. EDU 11614-22
AGENCY DKT. NO. 374-12/22

D.S. ON BEHALF OF M.S.,
Petitioner,
v.
HAMILTON TOWNSHIP BOARD OF EDUCATION, MERCER COUNTY,
Respondent.

D.S., petitioner, pro se

Patrick F. Carrigg, Esq., for respondent (Lenox, Socey, Formidoni, Giordano, Cooley, Lang & Casey, attorneys)

Record Closed: January 4, 2023 Decided: January 5, 2023

BEFORE **TRICIA M. CALIGUIRE**, ALJ:

STATEMENT OF THE CASE

In this emergent matter, petitioner D.S. on behalf of M.S. seeks the immediate transfer of M.S. from Hamilton High School-East, also known as Steinert High School (Steinert), to Hamilton High School-West (HHS-West) on the grounds that M.S. is unsafe

at Steinert due to allegedly being the victim of harassment, intimidation, and bullying (HIB) on or about December 19, 2022, and as a result of allegedly being subjected to excessive force by the school resource officer (SRO) immediately following the December 19, 2022, incident. Respondent Hamilton Township Board of Education, Mercer County (Board), opposes petitioner's request on the grounds that she has not satisfied the requirements to obtain emergent relief.

PROCEDURAL HISTORY

On November 10, 2022, petitioner filed a petition of appeal with the New Jersey Department of Education (DOE), Office of Controversies and Disputes, to challenge the decision of respondent to deny her request to enroll M.S. at HHS-West. The petition was transmitted to the Office of Administrative Law (OAL) on November 15, 2022, for hearing as a contested case pursuant to N.J.S.A. 52:14B-1 to -15, and N.J.S.A. 52:14F-1 to -13 and docketed as EDU 10144-22.

On December 21, 2022, petitioner filed the request for emergent relief with the DOE, which transmitted the emergent petition to the OAL, where it was scheduled for hearing on January 4, 2023. Oral arguments on the emergent petition were made on January 4, 2023, and the record closed.

FACTUAL DISCUSSION AND FINDINGS

Based on the petition for emergent relief, the videos proffered by petitioner, and the documents and videos proffered by respondent, and solely for the purpose of deciding this emergent appeal, I **FIND** the following undisputed **FACTS**:

The Hamilton Township School District (District) operates three high schools and assigns students within the District to a specific high school based on pre-determined residential boundary lines. M.S. is an eighteen-year-old female who receives special education and related services pursuant to an individualized education plan. When M.S. began high school, in September 2019, she lived with her mother, D.S., at an address within the HHS-West zone and attended HHS-West.

During the 2019–2020, and 2020–2021, school years, M.S. was charged by respondent with seven counts of HIB against another HHS-West student. D.S. appealed the Board's decision by emergent and due process petitions. The request for emergent relief, OAL Dkt. No. EDU 09096-20, was denied on October 6, 2020, and affirmed by the Commissioner on November 12, 2020. While the due process petition, OAL Dkt. No. EDU 07830-20, was pending, D.S. on behalf of M.S. brought a lawsuit against certain administrators and staff of HHS-West, including Principal Brian Smith, alleging racial profiling, discrimination, harassment, and bullying of M.S.[1] This matter was resolved prior to trial.

The S. family moved from New Jersey prior to the end of M.S.'s tenth grade year; she began the 2021–2022 school year in eleventh grade at Gateway High School in Florida. On or before November 1, 2021, M.S. moved with her mother, D.S., back to New Jersey and took up residence in Hamilton Township within the geographic zone assigned by the District to Steinert.

On or before October 29, 2021, D.S. applied to the District for an attendance zone waiver by which M.S. would attend high school at HHS-West rather than Steinert. By letter dated October 29, 2021, the District denied petitioner's application. The District stated that its decision was supported by the earlier allegations made by D.S. on behalf of M.S. regarding HHS-West administrators and staff, the case D.S. filed in Superior Court, and D.S.'s conduct during the 2020–2021 school year.[2]

On February 1, 2022, during M.S.'s junior year at Steinert, M.S. was disciplined by respondent for fighting with another student, A.C., and posting video of the fight on social media. After a manifestation determination meeting, respondent concluded that the conduct of M.S. constituted a disciplinary infraction neither related to nor caused by her disability. D.S. sought an expedited ruling overturning that decision and the discipline

[1] Somma on behalf of M.S. v. Smith, et al., MER-L-528-21 (Mercer County Super. Ct. 2016).
[2] D.S.'s conduct was at issue in the emergent petition she filed on March 2, 2021, alleging that she was harassed, intimidated, and bullied by employees of respondent. D.S. v. Bd. of Educ. of the Twp. of Hamilton, OAL Dkt. No. 02205-21, Initial Decision (March 10, 2021) (denying emergent relief).

imposed on M.S. The requested relief was denied, and the discipline upheld. D.S. obo M.S. v. Bd. of Educ. of the Twp. of Hamilton, OAL Dkt. No. EDS 01033-22, Final Decision (March 15, 2022).

On April 4, 2022, petitioner filed with the DOE an appeal of respondent's denial of the attendance zone waiver. The matter was transmitted to the OAL and on July 5, 2022, an initial decision was entered granting summary decision in favor of the District, which was affirmed by the Commissioner of Education. D.S. on behalf of M.S. v. Bd, of Educ. of the Twp. of Hamilton, OAL Dkt. No. EDU 02521-22, Initial Decision (July 5, 2022), Final Decision (August 15, 2022).

Before the decision in EDU 02521-22 was issued, petitioner asked respondent if M.S. could participate in end-of-year activities at HHS-West with the rest of the HHS-West Class of 2023 and, on June 13, 2022, respondent denied that request. Petitioner appealed that decision by petition dated August 23, 2022. That matter is pending at the OAL as EDU 07264-22.

After the 2022–2023 school year began, D.S. informed respondent that she had contracted to purchase (but not yet closed on) a home within the geographic zone assigned to HHS-West and, on October 7, 2022, petitioner filed the above-described residency appeal (EDU 10144-22). On November 9, 2022, respondent stated that it would not permit M.S. to enroll in HHS-West in the event of a permanent change in residency. In making this decision, respondent relied on its November 5, 2021, letter to D.S. from counsel explaining the basis for respondent's denial of petitioner's request for an attendance zone waiver. This letter stated in pertinent part:

> [Y]ou, individually, and on behalf of [M.S.], have accused multiple administrators, including the Principal and the Athletic Director, and multiple certified staff members assigned to [HHS-West] of harassment and discrimination toward [M.S.] and you arising from [bullying], disciplinary incidents, and other circumstances. . . It is confounding that you would insist on having [M.S.] assigned to a school against which you have made such allegations. Nevertheless, while the District denies those allegations and avers that it has engaged in unbiased decisions toward you and [M.S.], those claims and

> past circumstances justify [M.S.'s] assignment to a high school other than [HHS-West] which is in the best educational interest of [M.S.] and the [HHS-West] staff.
>
> [Ltr. of Patrick F. Carrigg, Esq., to D.S. (November 5, 2021), at 2.]

In the current petition for emergent relief, petitioner alleges that on December 19, 2022, M.S. was jumped in the school hallway by A.C.[3] A number of other students filmed the incident using their cell phone cameras. Prior to the hearing, petitioner submitted videos of the incident (presumably taken by these other students) which show that A.C. threw the first punch, M.S. fought back, and the students were separated by several male teachers. As M.S. is being pulled away, she can be seen on the video resisting and continuing to flail her arms.

Prior to issuing discipline to both A.C. and M.S.,[4] the Steinert administration conducted an investigation, which included interviews with both students. Ltr. Br. of Respondent in Opposition to Petitioner's Request for Emergent Relief (January 3, 2023), Ex. F. A.C. claimed that she was provoked by M.S.'s action in posting the video of the February 2022 fight (described above). M.S. claims she only posted the video in the morning of December 19, 2022, because of reports that A.C. made disparaging remarks about her on social media the previous weekend. Ibid.

D.S. made an HIB claim against A.C. regarding this incident on December 19, 2022. The District has until January 10, 2023, to complete its investigation and issue findings. N.J.S.A. 18A:37-15(b)(6)(a).

At petitioner's request, during oral argument, respondent introduced videos of the incident from the Steinert surveillance camera. (Due to confidentiality concerns for the minor students who can be identified in the video, this video will not be transmitted to DOE with this initial decision, nor was a copy provided to petitioner.) On this video, many

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[3] A.C. is the same student with whom M.S. fought in February 2022, and for which she received discipline. See EDU 01033-22, Initial Decision.

[4] There is no evidence that either student appealed the discipline imposed on her; at oral argument, respondent stated that M.S. returned to school on January 3, 2023, after completing the discipline imposed on her.

students are seen walking to class; a student and teacher are standing outside the door to Room 123. M.S. approaches the student and hugs her. A.C. walks up, drops her backpack (or large bag), and takes a swing at M.S.

As the male teachers are pulling the students apart and moving them away from each other, SRO David Leonardi (Leonardi) can be seen moving toward M.S., who is, as described above, resisting and flailing her arms. Leonardi pulls M.S. away and pushes her up against the wall. There is no audio on the school video, but even if M.S. was using the profanity clearly heard on the students' videos, Leonardi does appear to push M.S. with some force. After that, Leonardi is seen pulling M.S. in the opposite direction from where she appears to be moving. In the last video, Leonardi and M.S. are walking toward the principal's office. Leonardi has one hand on M.S.'s shoulder and the other on her arm, but here he appears to be guiding her and, possibly, preventing her from walking away.

Neither party introduced evidence of the guidelines the SRO is required to follow; the number of other incidents, if any, in which Leonardi restrained or even interacted with M.S.; the statements M.S. made to Leonardi or the statements Leonardi made to M.S.; any directions either M.S. or Leonardi were given by the other teachers or administrators who were present; and/or any physical harm M.S. suffered, including reports from her doctor, or urgent medical care she may have received.[5]

Petitioner claims that due to the above-described incidents involving A.C. and Leonardi, M.S. does not feel safe, and it is not feasible for her to remain at Steinert. The only positive adult relationship[6] that M.S. has found is with her guidance counselor, Anthony Belfiore, who maintains an office at HHS-West but has worked with M.S. during the current school year. The District administration is "being spiteful" in retaliation for the civil lawsuit petitioner filed in 2020.

[5] Petitioner made clear that she has filed (or soon will file) an action against the Steinert administrators and Leonardi. Presumably, such evidence would be included with this complaint.
[6] Petitioner also spoke well of HHS-West Principal Smith, despite having brought a civil action against him. "We have moved on," she stated.

LEGAL ANALYSIS AND CONCLUSIONS

The standards for emergent relief are set forth in Crowe v. DeGioia, 90 N.J. 126 (1982), and are codified at N.J.A.C. 6A:3-1.6. The petitioner bears the burden of proving:

> 1. that the party seeking emergent relief will suffer irreparable harm if the requested relief is not granted;
>
> 2. the existence of a settled legal right underlying the petitioner's claim;
>
> 3. that the party seeking emergent relief has a likelihood of prevailing on the merits of the underlying claim; and
>
> 4. when the equities and the interests of the parties are balanced, the party seeking emergent relief will suffer greater harm than the respondent.
>
> [Crowe, 90 N.J. at 132-34.]

On December 21, 2021, petitioner signed and filed a form of petition which included her obligation to demonstrate that the above standards—as set forth on the form—have been met and provided the citations to the regulations and the Crowe case. As summarized above, this is the third emergent petition filed by D.S.; the decisions in the two prior cases included extensive discussions of the Crowe test.

Petitioner did not, in her petition or at oral argument, specifically address any of the Crowe prerequisites for emergent relief. She argued that M.S. is not safe at Steinert; despite the history of fighting between M.S. and A.C., respondent assigned them to three of the same classes in the current school year; and M.S. is afraid of and was harmed by Leonardi. In an attachment to the petition, M.S. made the following five points, in summary:

> 1. After hearing of the incident on December 19, 2022, petitioner met with Principal Bryan Rogers at Steinert and viewed the hallway surveillance video described above, which she claims shows A.C. starting the fight and Leonardi using excessive force. Petitioner requested but was denied a copy of this video.

> 2. In the above meeting, M.S.'s Steinert guidance counselor "lied" to petitioner regarding who escorted M.S. to the Principal's office. This lie, which petitioner recorded and played for M.S., led M.S. to lose "all respect" for the guidance counselor.
>
> 3. There was no need for Leonardi to use force with M.S. as the fight was already broken up.
>
> 4. Petitioner intends to file a civil suit against Steinert administrators, the Hamilton Township Police Department and Leonardi.
>
> 5. Petitioner had warned members of the Steinert administration of trouble between M.S. and A.C. at least three weeks earlier and they failed to respond.
>
> [Petition (December 21, 2021), Attachment.]

Irreparable Harm

To obtain emergent relief, petitioner must demonstrate more than a risk of irreparable harm should M.S. remain at Steinert. Petitioner must make a "clear showing of immediate irreparable injury," or a "presently existing actual threat; (an injunction) may not be used simply to eliminate a possibility of a remote future injury, or a future invasion of rights, be those rights protected by statute or by common law." Cont'l. Group, Inc. v. Amoco Chems. Corp., 614 F. 2d 351, 359 (D.N.J. 1980). In an educational setting, "irreparable harm may be shown when there is a substantial risk of physical injury to the child or others, or when there is a significant interruption or termination of educational services." Ocean Twp. Bd. of Educ. v. J.E. and T.B. obo J.E., OAL Dkt. No. EDS 00592-04, 2004 NJ AGEN LEXIS 115, at *8 (February 23, 2004) (irreparable harm found where an eight-year-old's "physical aggressiveness and disruptive behaviors [posed] a safety concern to himself and others, and the district's behavior modification techniques [were] no longer effective"); Sparta Twp. Bd. of Educ. v. R.M. and V.M. obo C.M., OAL Dkt. No. 01975-20, 2020 NJ AGEN LEXIS, at *14 (February 21, 2020) (inappropriate interactions with other students and breaking a desk deemed "sufficient evidence of the risk of harm to [student], school staff, teachers and students that if [student] remained in school at this

time, other incidents could occur involving the health, safety and welfare of any of these individuals").

Petitioner contends that irreparable harm is established because, essentially, the Steinert administration did not prevent the incident of December 19, 2022; A.C. "jumped" M.S.; and Leonardi used excessive force toward M.S. unnecessarily.

Respondent argues that M.S. is not at risk of harm from A.C., another student whose behavior was arguably provoked by M.S. As described above, the fighting between these two students did not begin—or escalate—in December 2022. There is no more evidence that A.C. targeted M.S. than evidence that M.S. targeted A.C. The above cases in which risk of physical injury was sufficient to present irreparable harm involved students who were placed on home instruction to prevent them from injuring themselves or other students. There are no cases to support removing a student who has been a victim of physical aggression, as petitioner claims happened here. While I agree with petitioner that placing A.C. and M.S. in three of the same classes was unwise, there was no discussion of the reasons for doing so and no evidence that respondent acted in bad faith. If it is necessary to change the students' Steinert schedules to prevent future fights, respondent would be well advised to take such preventative measures. Even so, I **CONCLUDE** that there is insufficient evidence that A.C. presents a risk of irreparable harm to M.S.

With respect to the claim that M.S. is unsafe because Leonardi used excessive force when responding to the December 19, 2022, incident, respondent notes that harm is not irreparable if redress is available by monetary damages. Crowe, 90 N.J. at 132-33. Such is the case here; petitioner has made clear her intention to file a civil lawsuit against Leonardi and his employer, as well as members of the Steinert administration. I **CONCLUDE** that petitioner has not met the burden of establishing that irreparable harm may result unless M.S. is immediately transferred to HHS-West.

The Legal Right is Settled and Likelihood of Prevailing on the Merits

The second consideration is whether the legal right underlying petitioner's claim is settled, N.J.A.C. 6A:3-1.6(b)(2), and then third, petitioner must make a preliminary showing of a reasonable probability of success on the merits. Crowe, 90 N.J. at 133.

While respondent argues that there is no underlying due process claim, I disagree. As described above, the case docketed as EDU 10144-22, is a challenge by petitioner to the decision of respondent to deny her request to enroll M.S. at HHS-West. Even so, petitioner has not yet shown a likelihood of obtaining the relief sought in that case.

Actions within a school board's authority, including the adoption and implementation of policies for the assignment of students, are entitled to a presumption of correctness and will not be upset by the courts unless there is an affirmative showing that a decision is arbitrary, capricious or unreasonable. Thomas v. Bd. of Educ. of Morris Twp., 89 N.J. Super. 327, 332 (App. Div. 1965), affirmed, 46 N.J. 581 (1966). In general, a board of education's actions are entitled to a presumption of lawfulness and good faith. Where board actions are challenged, the challenger bears the burden of proving that such actions were unlawful, arbitrary, capricious or unreasonable. Schuster v. Bd. of Educ. of the Twp. of Montgomery, 96 N.J.A.R.2d (EDU) 670, 676 [citing Schnick v. Westwood Bd. of Educ., 60 N.J. Super. 448 (App. Div. 1960), and Quinlan v. North Bergen Twp. Bd. of Educ., 73 N.J. Super. 40 (App. Div. 1962)].

In matters involving the exercise of a board of education's discretion, 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 conclusions." Kopera v. West Orange Bd. of Educ., 60 N.J. Super. 288, 296 (App. Div. 1960). Our courts have held that "[w]here there is room for two opinions, action is not arbitrary or capricious when exercised honestly and upon due consideration, even though it may be believed that an erroneous conclusion has been reached." Bayshore Sewage Co. v. Dep't of Envtl. Prot., 122 N.J. Super. 184, 199–200 (Ch. Div. 1973), affirmed, 131 N.J. Super. 37 (App Div. 1974). To satisfy the arbitrary and capricious standard, petitioner must prove that respondent acted in either bad faith or in disregard to the circumstances.

As the factual record detailed above makes clear, respondent has a strong basis for its consistent decision to refuse to enroll M.S. at HHS-West. Notwithstanding that M.S. is more mature now, has maintained a productive relationship with her HHS-West guidance counselor, and has reconsidered her prior claims against Principal Smith, it is unlikely that petitioner will be able to show that respondent's decision was arbitrary and/or capricious. For the above reasons, I **CONCLUDE** that petitioner meets the second prong, but not the third prong of the emergent relief standard.

Balance of Equities and Interests

The final prong of the above test is whether the equities and interests of the parties weigh in favor of granting the requested relief to petitioner. Here, again, petitioner claims that greater harm will result to M.S. if she remains at Steinert because she is not safe there. The Board summarized the reasons it disagrees as follows:

> If the Court were to . . . order M.S. back to [HHS-West], it would require revision to M.S.' schedule, for her to meet new teachers in a new setting that she has not attended since March 2021, and place her in a school setting that she has previously claimed was hostile because of the principal, staff, and students. It is a school setting where she previously was found to have harassed multiple students in a violation of the HIB policy and where she claimed to have been the victim of multiple incidents of HIB perpetrated by other students and staff. It is a setting where many struggles arose. In contrast, [Steinert] is a setting where she has done significantly better notwithstanding the recent altercation. Placement of M.S. back at [HHS-West] is not in her best interest.
>
> [P]lacement at [HHS-West] would invite a resurgence of the claims of harassment and conflict between D.S., M.S., and the school officials. It would be a hardship to the district administration and staff members at [HHS-West], previously defendants against allegations of racism that they vehemently dispute, to have to scurry to accommodate M.S. with a program as she moves toward graduation all the while on eggshells that any decision to discipline M.S. or conflict between M.S. and her peers would again result in their

> professional reputations being attacked as they have been numerous times before.
>
> [Ltr. Br. of Respondent, at 7.]

M.S. is just months away from graduation and, as petitioner stated, a fresh start at college. In the meantime, I **CONCLUDE** that petitioner has not shown that the equities favor changing M.S.'s enrollment to HHS-West.

I **CONCLUDE** the petitioner has failed to meet the applicable requirements to obtain emergent relief.

ORDER

For the reasons stated above, I hereby **ORDER** that the application for emergent relief of petitioner D.S. on behalf of M.S. seeking the immediate transfer of M.S. from Steinert to HHS-West is hereby **DENIED**. Proceedings in the underlying due process petition, EDU 10144-22, will continue. The evidentiary hearing will be scheduled by my judicial support specialist at the earliest mutually available date.

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

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

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

January 5, 2023
DATE

TRICIA M. CALIGUIRE, ALJ

Date Received at Agency: _____

Date Mailed to Parties: _____

TMC/nn

27-23
OAL Dkt. No. EDU 04045-23
Agency Dkt. No. 53-3/22

New Jersey Commissioner of Education

Final Decision

In the Matter of the Suspension of the Teaching Certificates of Michelle Soriano, Board of Education of the Township of Belleville, Essex County.

The record of this matter, the proposed Consent Order (Agreement) and the Initial Decision issued by the Office of Administrative Law have been reviewed pursuant to *N.J.A.C.* 1:1-19.1. Upon review, the Commissioner approves the terms of the Agreement and adopts the Initial Decision as the final decision in this matter. The case is hereby dismissed, subject to compliance with the terms of the Agreement.

IT IS SO ORDERED.

Angelica Allen-McMillan, Ed.D.
ACTING COMMISSIONER OF EDUCATION

Date of Decision: January 30, 2023
Date of Mailing: February 2, 2023

State of New Jersey
OFFICE OF ADMINISTRATIVE LAW

INITIAL DECISION
SETTLEMENT
OAL DKT. NO. EDU 04045-22
AGENCY DOCKET NO. 53-3/22

IN THE MATER OF THE TEACHING CERTIFICATES OF MICHELLE SORIANO, BOARD OF EDUCATION OF THE TOWNSHIP OF BELLEVILLE, ESSEX COUNTY,

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Aaron Mandel, Esq. appearing on behalf of petitioner (The Bush Law Group, LLC)

Richard Freidman, Esq., appearing on behalf of respondent (Zazzali, Fagella, Nowak Kleinbaum & Friedman, P.C.)

Record Closed: January 11, 2023 Decided: January 12, 2023

BEFORE **NANCI G. STOKES**, ALJ:

This matter was transmitted to the Office of Administrative Law (OAL) on May 18, 2022, for resolution as a contested case pursuant to N.J.S.A. 52:14B-1 to -15 and N.J.S.A. 52:14F1 to -13. A telephone prehearing was conducted on June 27, 2022. Several conference calls were conducted thereafter, the last one being September 8, 2022.

On November 10, 2022, respondent's counsel submitted a Consent Order, resolving all issues in dispute. The Order was executed by the undersigned on November 15, 2022. The file was returned to the agency as an agency party however, the file was returned to OAL by the Commissioner on December 14, 2022 since I did not issue an Initial Decision as required by N.J.A.C. 1:1-19.1(b).

Having reviewed the contents of the attached Consent Order, I **FIND**:

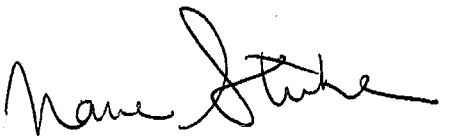
1. The parties have voluntarily agreed to the settlement as evidenced by their signatures and/or the signatures of their representatives.

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

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

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

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



January 12, 2023

DATE

NANCI G. STOKES, ALJ

Date Received at Agency:

Date Mailed to Parties:

ljb

28-23
OAL Dkt. No. EDU 07453-22
Agency Dkt. No. 199-8/22

New Jersey Commissioner of Education

Final Decision

Malcolm Talton,

Petitioner,

v.

Board of Education of Middle Township,
Cape May County,

Respondent.

The record of this matter, the proposed Settlement Agreement (Agreement) and the Initial Decision issued by the Office of Administrative Law have been reviewed pursuant to *N.J.A.C.* 1:1-19.1. Upon review, the Commissioner approves the terms of the Agreement and adopts the Initial Decision as the final decision in this matter. The case is hereby dismissed, subject to compliance with the terms of the Agreement.

IT IS SO ORDERED.

Angelica Allen-McMillan, Ed.D.
ACTING COMMISSIONER OF EDUCATION

Date of Decision: January 30, 2023
Date of Mailing: February 2, 2023

State of New Jersey
OFFICE OF ADMINISTRATIVE LAW

INITIAL DECISION
SETTLEMENT
OAL DKT. NO. EDU 07453-22
AGENCY DKT. NO. 199-8/22

MALCOLM TALTON,
Petitioner,
v.
BOARD OF EDUCATION OF THE TOWNSHIP OF MIDDLE, CAPE MAY COUNTY
Respondent.

Dean R. Wittman, Esq., for petitioner (Zeller & Weliczko, LLP, attorneys)

Rachel M Taylor, Esq., for respondent (Cooper Levenson, PA, attorneys)

Record Closed: December 20, 2022 Decided: December 21, 2022

BEFORE **TAMA B. HUGHES**, ALJ:

This matter was transmitted to the Office of Administrative Law on August 29, 2022, for determination as a contested case, pursuant to N.J.A.C. 1:1-8.2, N.J.S.A. 52:14B-1 to -15 and N.J.S.A. 52:14F-1 to -13.

The parties have agreed to a settlement and have executed a settlement agreement, which is attached hereto.

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

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

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

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

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

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

Tama B Hughes

December 21, 2022
DATE

TAMA B. HUGHES, ALJ

Date Received at Agency: 12/29/2022

Date Mailed to Parties: 12/29/2022

TBH/gd

William S. Donio, Esquire
Rachel M. Taylor, Esquire
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1125 Atlantic Avenue, Third Floor
Atlantic City, NJ 08401
Phone: (609) 572-7376
Fax: (609) 572-7377
Attorneys for Respondent, Middle Township Board of Education

Malcom Talton, Petitioner, vs. Middle Township Board of Education, Cape May County Respondent.	OFFICE OF ADMINISTRATIVE LAW STATE OF NEW JERSEY OAL DOCKET: EDS 07453-2022 S AGENCY NO.: 199/8/22 **SETTLEMENT AGREEMENT**

WHEREAS, Petitioner Malcom Talton ("Petitioner") was an employee of Middle Township School District ("the District"), operated by the Middle Township Board of Education ("the Board"); and

WHEREAS, a dispute between the parties arose with regard to the applicability of N.J.S.A. 18A:16-6.1, indemnification of Petitioner's attorney fees for a quasi-criminal matter within the Middle Township Municipal Court, which was subsequently dismissed by said Court; and

WHEREAS, Petitioner filed a Petition of Appeal ("Petition") and Proof of Service on August 1, 2022 with the Office of Administrative Law related to the dispute; and

WHEREAS, both parties wish to resolve their differences amicable and avoid potential costly litigation without either party admitting to any wrongdoing;

NOW THEREFORE, in consideration of the mutual promises and covenants set forth herein, the parties agree as follows:

1. The Board agrees to provide the full reimbursement amount for Petitioner's attorney's fees, for the dismissed quasi-criminal matter, in the amount of $8,275.00.
2. The Petitioner agrees to dismiss the Petition.
3. The Parties agree that this Agreement shall not be construed in any way as an admission of wrongdoing by either party, nor is the Board agreeing that the Petitioner's actions in relation to the quasi-criminal proceeding were proper. The Parties also agree that this Agreement is not precedent setting, and should not and cannot be used as evidence of a past practice.
4. The Petitioner releases and waives the Board from any and all claims for reimbursement of counsel fees related to the quasi-criminal proceeding up to the date of this Agreement. The Parties understand and agree that neither shall be considered a prevailing party under any statute, common law, or otherwise as a result of this Settlement Agreement and Release. In addition, each party is responsible for their own costs, including any fees, related to this matter., other than those specifically referenced within this Agreement.
5. It is expressly understood and agreed that this Settlement Agreement and Release shall be subject to the laws of the State of New Jersey.

IN WITNESS WHEREOF, the parties have hereunto set their hands and seals the date and year set forth below.

MIDDLE TOWNSHIP BOARD OF EDUCATION

Middle Township Board of Education

DATED: _____

Malcolm Talton

DATED: 11-3-2022

31-23

New Jersey Commissioner of Education

Final Decision

In the Matter of the Suspension of the
Teaching Certificates of Stephanie Sullivan,
Board of Education of the Township of Franklin,
Somerset County.

Synopsis

The petitioning Board sought the suspension of the teaching certificates of respondent – a non-tenured special education teacher – following her resignation without providing the notice required under *N.J.S.A.* 18A:28-8. Respondent submitted a letter on January 10, 2022, informing the Board that she would resign from her position on January 21, 2022 – eleven days from the date of the letter – to accept a non-teaching position.

The ALJ found, *inter alia*, that: although the respondent made efforts to assure a smooth transition before leaving the school, the Board was not able to fill her position for the remainder of the school year; the abrupt nature of respondent's resignation impacted the classroom experience for her students and caused the school district difficulty in providing coverage for her in-class responsibilities as well as her out-of-class administrative duties, including but not limited to the development of IEPs for students eligible for special education services; under *N.J.S.A.* 18A:26-10, any teaching staff member employed by a board of education who ceases to perform his or her duties before the expiration of their term of employment, without the consent of the board, shall be deemed guilty of unprofessional conduct and the Commissioner may thereafter suspend his or her teaching certificate for a period not to exceed one year. Accordingly, the ALJ ordered that respondent's certificates be suspended for a period of one year.

Upon review, the Commissioner concurred with the ALJ's findings and conclusion for the reasons outlined in the Initial Decision. Accordingly, the Commissioner adopted the Initial Decision as the final decision in this matter. Respondent's certificates were suspended for one year from the filing date of this decision, a copy of which has been forwarded to the State Board of Examiners for implementation of the suspension.

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

31-23
OAL Dkt. No. 01767-22
Agency Dkt. No. 33-3/22

New Jersey Commissioner of Education

Final Decision

In the Matter of the Suspension of the Teaching Certificates of Stephanie Sullivan, Board of Education of the Township of Franklin, Somerset County.

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

Upon review, the Commissioner concurs with the Administrative Law Judge that respondent's resignation from employment with only eleven days' notice justifies suspension of respondent's teaching certificates pursuant to *N.J.S.A.* 18A:26-10 and *N.J.S.A.* 18A:28-8.

Accordingly, the Board's motion for summary decision is granted, and respondent's teaching certificates are suspended for a period of one year from the filing date of this decision, a copy of which shall be forwarded to the State Board of Examiners for implementation of the suspension.

IT IS SO ORDERED.[1]

Angelica Allen-McMillan, J.D.S.
ACTING COMMISSIONER OF EDUCATION

Date of Decision: February 2, 2023
Date of Mailing: February 6, 2023

[1] This decision may be appealed to the Appellate Division of the Superior Court pursuant to *N.J.S.A.* 18A:6-9.1. Under *N.J.Ct.R.* 2:4-1(b), a notice of appeal must be filed with the Appellate Division within 45 days from the date of mailing of this decision.

State of New Jersey
OFFICE OF ADMINISTRATIVE LAW

INITIAL DECISION

OAL DKT. NO. EDU 01767-22

AGENCY DKT. NO. 33-3/22

IN THE MATTER OF THE SUSPENSION OF THE TEACHING CERTIFICATES OF STEPHANIE SULLIVAN, FRANKLIN TOWNSHIP BOARD OF EDUCATION, SOMERSET COUNTY

Geoffrey N. Stark, Esq., for petitioner (Capehart Scatchard, P.A., attorneys)

Stephanie Sullivan, respondent, pro se

Record Closed: September 13, 2022 Decided: December 13, 2022

BEFORE **ELIA A. PELIOS**, ALJ:

STATEMENT OF THE CASE

The Franklin Township (Somerset County) Board of Education (Board or petitioner) seeks to suspend the teaching certificates of Stephanie Sullivan (respondent) for resigning her position having provided less than sixty days' notice, pursuant to N.J.S.A. 18A:26-10.

PROCEDURAL HISTORY

The matter was transmitted the matter to the Office of Administrative Law on March 10, 2022. An evidentiary hearing was held on August 11, 2022. The record was held open to permit written closing arguments and closed on September 13, 2022.

FACTUAL DISCUSSION

An evidentiary hearing was held on August 11, 2022. The Board presented testimony from Evelyn Rutledge, the principal of Franklin Middle School, and Jackie Schneider, the District's assistant manager for Human Resources and Personnel Services. Respondent testified on her own behalf. Having considered the testimony presented and the documentary evidence entered into the record (P-1 through P-5), I make the following **FINDINGS** of **FACT**:

Respondent was previously employed by the board as a special education teacher at the Sampson G. Smith School. She worked for the board for approximately three and a half years and was not tenured in the position. She was under an employment contract for the 2021-2022 school year and the District requires the staff to provide sixty days' notice before resigning their position.

Respondent submitted a resignation letter after close of business on January 10, 2022, and her last day was January 21, 2022, eleven days later. At that point she ceased to perform her job duties prior to the expiration of her contract. The Board did not consent to a shorter notice provision and was unable to fill respondent's position for the remainder of the year. The abrupt nature of respondent's resignation impacted the classroom experience for her students and cause the district difficulty in providing coverage for her in-class responsibilities as well as her out-of-class administrative duties, including but not limited to the development of IEPs for students eligible for special education services. Substitutes were frequently required for instruction and other employees had to help manage the administrative details, beyond the scope of their own regular duties.

Respondent left to accept another position outside of the teaching profession. Respondent struggled with what she perceived to be changes in the teaching profession before ultimately determining not to continue. Had she waited, the opportunity she was accepting would not have been available. She was well regarded by colleagues and superiors and was considered to be a good teacher. She worked to lessen the impact of her departure during her brief transition period.

Respondent holds the following teaching certificates:

Teacher of Elementary School, grades Kindergarten (K)-6 Certificate of Eligibility with Advanced Standing, issued in January 2017;

Teacher of Elementary School in grades 5-8, with Mathematics Specialization Certificate of Eligibility with Advanced Standing, issued in January 2017;

Teacher of Students with Disabilities Certificate of Eligibility, issued in January 2017;

Teacher of Elementary School in grades K-6 Certificate, issued in November 2020;

Teacher of Elementary School in grades 5-8, with Mathematics Specialization, Certificate, issued in November 2020; and

Teacher of Students with Disabilities Provisional Certificate, issued in August 2020.

CONCLUSIONS OF LAW

N.J.S.A. 18A:26-10 provides that ("[A]ny teaching staff member **employed by a board of education** . . . who shall, without the consent of the board . . . cease to perform his duties before the expiration of the term of his employment, shall be deemed guilty of unprofessional conduct . . ." In order to sustain the charge of unprofessional conduct pursuant to N.J.S.A. § 18A:26-10, the petitioner must demonstrate that respondent: 1)

was a teaching staff member employed by a board of education who; 2) ceased to perform her duties before the expiration of the term of her employment; 3) without consent of the board. The underlying purpose of N.J.S.A. 18A:26-10 is "to protect pupils from the disruption caused by '[s]taff members who leave before the expiration of their contracts.'" Ibid. (citation omitted.)

In the present matter, the record reflects that none of the required criteria are in dispute and that all are present. The District's contract specifically requires sixty days' notice unless the board consents to a shorter period, which it did not. Accordingly, I **CONCLUDE** that petitioning Board has met its burden by demonstrating by a preponderance of credible evidence that respondent is guilty of unprofessional conduct, and that the charge of such must be **SUSTAINED**.

PENALTY

The charge of unprofessional conduct pursuant to N.J.S.A. 18A:26-10 having been sustained; we now turn to the appropriate penalty to be imposed. N.J.S.A. 18A:26-10 and N.J.A.C. 6A:9B-4.8(b) both provide that the once they receive notice of a teacher leaving their position prior to the term of employment as contemplated by N.J.S.A. 18A:26-10, the commissioner may suspend the certificates held by that teacher for a period not to exceed one year.

While the language clearly indicates that this is a maximum penalty, and that its imposition is permissive rather than mandatory, it is clear from a review of relevant case law that the one-year suspension is issued unless the mitigating circumstances present compel otherwise.

In the present matter, the record reflects that respondent left her position prior to the ending of the employment term. She did not give sixty days' notice, and the Board did not approve a shorter period. In fact, she gave approximately eleven days' notice, less than twenty percent of what is customarily considered sufficient and what is required by the contract. The record also reflects that respondent was well liked by her colleagues and superiors and acquitted herself quite well in the classroom. She also worked during

the time leading up to her departure to try to create as smooth a transition as possible and was frank and candid about her struggles contending with changes in the teaching profession.

While certainly commendable and sincere, these actions do not rise to the significant level of mitigating circumstances that historically have given basis to deviate from the norm of imposing the maximum one-year suspension. Her position went unfilled for the remainder of the school year – nearly five months. Significant substitute assignment was required. Disruption to the educational experience of her students did occur. Accordingly, I am compelled to **CONCLUDE** that the imposition of the one-year suspension is appropriate.

ORDER

The charge of unprofessional conduct against respondent is hereby **SUSTAINED**. Further, it is **ORDERED** that respondent's teaching certificates be **SUSPENDED** for a period of one year.

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

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

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

December 13, 2022
DATE

ELIA A. PELIOS, ALJ

Date Received at Agency: _____

Date Mailed to Parties: _____

EAP/tat

APPENDIX

WITNESSES

For Petitioner:

Evelyn Rutledge, Principal, Franklin Middle School

Jackie Schneider, Assistant Manager for Human Resources and Personnel Services

For Respondent:

Stephanie Sullivan

EXHIBITS

For Petitioner:

P-1 Listing of respondent's teaching certificates

P-2 Respondent's 2018-2019 employment contract

P-3 Respondent's 2021-2022 employment contract

P-4 Respondent's January 10, 2022, letter of resignation

P-5 Email correspondence between respondent and Jackie Schneider and Evelyn Rutledge, dated January 10,2022, through January 11, 2022

For Respondent:

None

32-23

New Jersey Commissioner of Education

Decision

C.S., on behalf of minor child, I.S.,

Petitioner,

v.

Rikki Frischman,

Respondent.

Synopsis

Pro se petitioner sought to hold respondent, Rikki Frischman, accountable for allegedly failing to report an incident of harassment, intimidation, and bullying (HIB) and filed a petition requesting that the respondent "be removed from working with students." Respondent worked in North Brunswick Township schools as a teaching staff member during the 2021-2022 school year; petitioner's child, I.S. was a student in Ms. Frischman's second grade class.

The ALJ found, *inter alia*, that: the issue in this case is whether petitioner may seek to revoke respondent's teaching certificate; respondent filed a motion to dismiss, arguing that petitioner has no standing to seek revocation of respondent's teaching certificate; petitioner's response to the motion to dismiss did not address respondent's legal arguments as to lack of standing or failure to state a claim upon which relief can be granted but opposed the motion, arguing that respondent failed to report an alleged incident of abuse and failed to be honest; accordingly, petitioner sought to "terminate" respondent's teaching certificate; *N.J.A.C.* 6A:3-1.10 provides that prior to transmittal of a case to the OAL, the Commissioner may dismiss the petition on grounds that the petitioner has advanced no cause of action or for lack of jurisdiction, failure to prosecute or other good reason; the New Jersey Administrative Code governs the revocation and suspension of teaching certificates; *N.J.A.C.* 6A:9B-4.5 sets forth circumstances by which revocation or suspension of teaching certificates may be triggered, all of which are initiated by action of the Board of Examiners; there is no provision in regulation for an individual to compel revocation of a teacher's certificates. The ALJ concluded that the petitioner failed to state a claim upon which relief can be granted. Accordingly, the motion to dismiss was granted.

Upon review, the Commissioner concurred with the ALJ that an individual may not compel the revocation of a teacher's certificate, as the authority to revoke or suspend teaching certificates lies solely with the State Board of Examiners, pursuant to *N.J.A.C.* 6A:9B-4.5. Accordingly, the Initial Decision of the OAL was adopted as the final decision in this matter, and the petition was dismissed.

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

32-23
OAL Dkt. No. 05483-22
Agency Dkt. No. 44-3/22

New Jersey Commissioner of Education

Final Decision

C.S., on behalf of minor child, I.S.,

Petitioner,

v.

Rikki Frischman,

Respondent.

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

Upon review, the Commissioner concurs with the Administrative Law Judge that an individual may not compel the revocation of a teacher's certificate, as the authority to revoke or suspend teaching certificates lies solely with the State Board of Examiners, pursuant to *N.J.A.C.* 6A:9B-4.5.

Accordingly, the Board's motion to dismiss is granted, and the petition of appeal is hereby dismissed.

IT IS SO ORDERED.[1]

Angelica Allen-McMillan, J.D.S.
ACTING COMMISSIONER OF EDUCATION

Date of Decision: February 2, 2023
Date of Mailing: February 6, 2023

[1] This decision may be appealed to the Appellate Division of the Superior Court pursuant to *N.J.S.A.* 18A:6-9.1. Under *N.J.Ct.R.* 2:4-1(b), a notice of appeal must be filed with the Appellate Division within 45 days from the date of mailing of this decision.

State of New Jersey
OFFICE OF ADMINISTRATIVE LAW

INITIAL DECISION
ON MOTION TO DISMISS
OAL DKT. NO. EDU 05483-22
AGY. REF. NO. 44-3/22

C.S. ON BEHALF OF MINOR CHILD I.S.,
Petitioner,
v.
RIKKI FRISCHMAN,
Respondent.

C.S., petitioner, pro se

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

Record Closed: November 1, 2022 Decided: December 12, 2022

BEFORE **SUSAN L. OLGIATI**, ALJ:

STATEMENT OF THE CASE AND PROCEDURAL HISTORY

Petitioner, C.S. seeks to hold respondent, Rikki Frischman accountable for allegedly failing to report an incident of harassment, intimidation, and bullying (HIB). On March 14, 2022, petitioner filed a Pro Se Petition of Appeal with the Commissioner of Education, requesting that the respondent "be removed from working with students." On or about June 10, 2022, the Regulatory Officer of the Department of Education,

Office of Controversies and Disputes emailed C.S. seeking clarification of her Petition of Appeal. More specifically, petitioner was asked, "Are you asking the Commissioner to revoke Ms. Frischman's teaching certificates, appealing an HIB decision, both, or something else?" (See, Transmittal packet.) On the morning of June 10, 2022, C.S. responded, "Good morning, I am requesting that Mrs. Frischman [sic] teaching privileges be revoked as she failed to report (violating N.J. Admin. Code 6A:16-5.3) the incident that was reported to her . . . " Id. Later that evening, C.S. further responded, "Good evening, Ms. Simon, I see there is a little misunderstanding of my response and the language used "revoke Mrs. Frischman certification I was referring to termination from duty as a teacher at John Adams not revoke as in reverse her teaching degree." Id.

On or about June 23, 2022, respondent filed a motion to dismiss with the Commissioner. Thereafter, the matter was transferred to the Office of Administrative Law (OAL) as a contested case, where it was filed on July 5, 2022. N.J.S.A. 52:14B-1 to -15; N.J.S.A. 52:14F-1 to -23. The transmittal notice noted that petitioner named only Frischman as respondent and that jurisdiction with regard to Frischman is a threshold issue. The transmittal notice further noted that the issue of whether the Board's HIB decision was arbitrary, capricious, and unreasonable, was not transmitted to the OAL and would follow in a separate transmittal if a petition is filed.

On or about September 20, 2022, respondent refiled the motion to dismiss in the OAL. On October 20, 2022, respondent filed a supplemental letter brief in support of the motion. Petitioner filed her response to the motion on or about October 28, 2022. A telephone case conference was held on November 1, 2022, where the parties confirmed that all responsive papers had been filed and the record closed.

FACTUAL DISCUSSION

Frischman was employed by the North Brunswick Township Board of Education (hereinafter referred to as the Board) as a teaching staff member for the 2021–2022 school year. During that time, I.S.[1] was a student in Frischman's second grade class.

On February 2, 2022, respondent excused I.S. from class to use the restroom. C.S. contends that while I.S. was in the restroom, another student bit him on his buttock. (Petr.'s response to motion to dismiss.) C.S. claims that after leaving the restroom, I.S. met Frischman in the hallway and reported the incident to her. In response, respondent allegedly answered something to the effect of, "Don't worry, I will handle it. If you don't feel comfortable using this bathroom, you can use the 3rd and 4th grade bathroom." Id.

I.S. told C.S. about the incident later that evening. Thereafter, C.S. emailed his teachers and added the principal to the email. Frischman responded to the email that evening and said she had no knowledge of the incident. Frischman arranged to speak with C.S. via telephone the next morning. Petitioner contends that during their conversation, Frischman continued to deny knowledge of the incident but advised that she reported the matter to the instructional dean. Id.

Petitioner asserts that she met with the principal on February 4, 2022, who informed her there was video footage of Frischman having a brief conversation with I.S. in the hallway on the date of the incident and that the other student involved had yet to be interviewed. Id.

Petitioner indicates that an intake report (#21381646) was made to the Institutional Abuse Investigation Unit (IAIU) hotline regarding the incident, but contends that the report was not intended to address the negligence of respondent and that the matter was not escalated into a formal investigation or referred to the Board of Examiners.

[1] I.S. is also referred to the responsive papers/supporting documentation as "Ibn."

Thereafter, on March 14, 2022, petitioner filed her Petition of Appeal seeking termination of Frischman's teaching certificate. Id.[2]

Finally, petitioner states, that by letter dated June 9, 2022, she was advised by Frischman's attorney, that Frischman had since resigned and was no longer employed by the Board.

Respondent denies that I.S. told her about an HIB incident and claims that I.S. only reported that students were playing in the bathroom. (Frischman Cert.) Upon receiving the email from petitioner on the evening of February 2, 2022, Frischman emailed her instructional dean and principal to inform them of C.S.'s claims. Id.

LEGAL ANALYSIS AND CONCLUSIONS OF LAW

The issue is whether petitioner may seek to revoke respondent's teaching certificate.

Respondent filed the motion to dismiss, arguing that petitioner has no standing to seek revocation of respondent's teaching certificate. Respondent argues that revocation proceedings are generated by the findings of a state body or agency such as the Division of Criminal Justice, the employing Board of Education, or the IAIU. Respondent further argues that while an individual may bring a claim or concern to the attention of a Board of Education, it is up to the Board to determine what, if any, action to be taken. Respondent contends that none of the basis for bringing a revocation action have been triggered. Thus, respondent argues there is no legal authority for petitioner's action and the matter should be dismissed.

Petitioner does not address respondent's legal arguments as to lack of standing or failure to state a claim upon which relief can be granted but opposes the motion

[2] Petitioner incorrectly states in her opposition papers that on this date she filed a motion with the OAL. The Petition of Appeal filed by petitioner on that date was filed with the Commissioner of Education.

arguing that respondent failed to report an alleged incident of abuse, and failed to be honest, and therefore seeks to "terminate" her teaching certificate.

I. Standard for Motion to Dismiss

N.J.A.C. 6A:3-1.10 provides:

> At any time prior to transmittal of the pleadings to the OAL, in the Commissioner's discretion or upon motion to dismiss filed in lieu of answer, the Commissioner may dismiss the petition on the grounds that the petitioner has advanced no cause of action even if the petitioner's factual allegations are accepted as true or for lack of jurisdiction, failure to prosecute or other good reason.

The Uniform Administrative Procedure Rules (UAPR), N.J.A.C. 1:1-1.1 to -21.3, provide that they "shall be construed to achieve just results, simplicity in procedure, fairness in administration and the elimination of unjustifiable expense and delay." N.J.A.C. 1:1-1.3(a). They further provide that, "[i]n the absence of a rule, a judge may proceed in accordance with the New Jersey Court Rules, provided the rules are compatible with these purposes."

R.4:6-2, allows for motions for judgment on the pleadings. Under R. 4:6-2, if the basis for a motion to dismiss is that the petition has advanced no cause of action, or failed to state a claim upon which relief may be granted, "the test for determining the adequacy of [the] pleading [is] whether a cause of action is 'suggested' by the facts," such that the "inquiry is limited to examining the legal sufficiency of the facts alleged on the face of the complaint." Printing-Mart Morristown v. Sharp Elecs. Corp., 116 N.J. 739, 746 (1989) (citing R. 4:6-2(e); Velantzas v. Colgate-Palmolive Co., 109 N.J. 189, 192 (1988); Rieder v. Dep't of Transp., 221 N.J. Super. 547, 552 (App.Div.1987)). Thus, R. 4:6-2 is compatible with the purposes of the UAPR, and it is appropriate to assess respondent's motion to dismiss under this standard.

For purposes of the motion, it does not matter whether a petitioner can ultimately "prove the allegation contained in the complaint" because "all facts alleged in the complaint and the legitimate inferences drawn therefrom are deemed admitted." Id.

(citing Somers Constr. Co. v. Bd. of Educ., 198 F.Supp. 732, 734 (D.N.J.1961)); Smith v. City of Newark, 136 N.J. Super. 107, 112 (App.Div.1975) (citing Heavner v. Uniroyal, Inc., 63 N.J. 130, 133 (1973); J.H. Becker, Inc. v. Marlboro Twp., 82 N.J. Super. 519, 524 (App. Div. 1964)). While "[a] complaint should not be dismissed . . . where a cause of action is suggested by the facts," "a dismissal is mandated where the factual allegations are palpably insufficient to support a claim upon which relief can be granted." Rieder, 221 N.J. Super. at 552.

II. Revocation

The New Jersey Administrative Code governs the revocation and suspension of teaching certificates. N.J.A.C 6A:9B-4.5 provides in relevant part that:

> (a) The Board of Examiners may issue an order to show cause to a certificate holder if the Board of Examiners determines the conduct of the holder may warrant the revocation or suspension of the certificate(s) held where:
>
> 1. The Commissioner transmits a contested case to the Board of Examiners that resulted in a teaching staff member's loss of tenure, dismissal, resignation, or retirement;
>
> 2. Pursuant to N.J.A.C. 6A:9B-4.3, the Board of Examiners receives information from a school district that a teaching staff member no longer is employed in the school district;
>
> 3. The Board of Examiners receives information regarding a certificate holder's criminal conviction or pending criminal charges;
>
> 4. The Board of Examiners receives notices that a teaching staff member who is certified in New Jersey and who also holds a teaching certificate in another state has had action taken against his or her certificate by the other state;
>
> 5. Pursuant to N.J.S.A. 9:6-8.10 the Department of Children and Families forwards to the Board of Examiners a copy of a report in which the

> Department of Children and Families has substantiated that a certificate holder has abused or neglected a student or has identified concerns with the conduct of a teaching staff member;
>
> 6. Pursuant to N.J.S.A. 18A:6-7.3, the Commissioner notifies the Board of Examiners that an individual who holds New Jersey certification is disqualified from employment in public schools or has pending charges for an offense that is disqualifying;
>
> 7. A certificate holder fails to maintain any license, certificate, or authorization that is mandated, pursuant to this chapter, for the holder to serve in a position . . .
>
> (b) Nothing in this section shall preclude the Board of Examiners from issuing an order to show cause on its own initiative when the Board of Examiners determines grounds for revocation or suspension of a certificate may exist.
>
> N.J.A.C. 6A:9B-4.5.

The regulation sets forth multiple methods/circumstances by which revocation or suspension of teaching certificates may be triggered. All of which are initiated by action of the Board of Examiners based on findings or information including, but not limited to, a certificate holder's criminal conviction or pending criminal charges, action taken against a teaching staff member's certificate in another state, or report by the Department of Children and Families substantiating abuse or neglect or identifying conduct concerns. The regulation does not presently provide any avenue for an individual to compel revocation of an individual's teaching certificate.

Here, none of the methods by which the Board of Examiners may revoke or suspend a teaching certificate have been triggered. The Board of Examiners has not issued an Order to Show Cause or taken any action concerning respondent's teaching certificate. Accordingly, for purposes of this motion, accepting all of the facts alleged by petitioner as true, they remain "palpably insufficient to support a claim upon which relief can be granted."

To the extent that petitioner believes that respondent engaged in improper conduct or disagrees with the way in which the school's administrators, or the Board of Education handled the HIB, she should consider other avenues which she may have to pursue, if any.

Accordingly, for the reasons set forth herein, I **CONCLUDE** that respondent's motion to dismiss should be **GRANTED**.

ORDER

It is hereby **ORDERED** that the respondent's motion to dismiss is **GRANTED**; and petitioner's Petition of Appeal is **DISMISSED**.

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

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

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

December 12, 2022
DATE

SUSAN L. OLGIATI, ALJ

Date Received at Agency: _____

Date Mailed to Parties: _____

SLO/as

APPENDIX

PAPERS RELIED ON

For petitioner

- Letter in response to the motion

For respondent

- Letter brief in support of motion to dismiss and supporting certification of Frischman
- Supplemental letter brief in support of the motion

33-23E
OAL Dkt. No. EDU 00065-23
Agency Dkt. No. 376-12/22

New Jersey Commissioner of Education

Order on Emergent Relief

W.M. and M.M., on behalf of minor child,

Petitioner,

v.

Board of Education of the Township of Lafayette, Sussex County,

Respondent.

The record of this emergent matter, the sound recording of proceedings at the Office of Administrative Law (OAL), and the recommended Order of the Administrative Law Judge (ALJ) have been reviewed. Upon such review, the Commissioner concurs with the ALJ that petitioner has failed to demonstrate entitlement to emergent relief pursuant to the standards enunciated in *Crowe v. DeGioia,* 90 *N.J.* 126 (1982), and codified at *N.J.A.C.* 6A:3-1.6.

Accordingly, the recommended Order of the OAL denying petitioner's application for emergent relief is adopted for the reasons stated therein. This matter shall continue at the OAL with such proceedings as the parties and the ALJ deem necessary to bring it to closure.

IT IS SO ORDERED.

ACTING COMMISSIONER OF EDUCATION

Date of Decision: February 2, 2023
Date of Mailing: February 6, 2023

State of New Jersey
OFFICE OF ADMINISTRATIVE LAW

ORDER DENYING
EMERGENT RELIEF
OAL DKT. NO. EDU 00065-23
AGENCY DKT. 376-12/22

W.M. and M.M. o/b/o MINOR CHILD,

Petitioner,

v.

BOARD OF EDUCATION OF TOWNSHIP OF LAFAYETTE, SUSSEX COUNTY, AND JENNIFER CENATIEMPO, FORMER SUPERINTENDENT,

Respondents.

M.M. and W.M., pro se, o/b/o their minor child

Eric L. Harrison, Esq., for respondents (Methfessel & Werbel, attorneys)

BEFORE **NANCI G. STOKES**, ALJ:

FACTUAL DISCUSSION AND PROCEDURAL HISTORY

Petitioners, M.M. and W.M., bring this action seeking home instruction for their minor child, compliance with prior Commissioner Decisions regarding videos at their child's school, and a hearing before a new administrative law judge for their challenge to a finding by respondent that no harassment, intimidation, or bullying (HIB) occurred

against their child from January 10, 2020, through January 17, 2020. More pointedly, the Lafayette Township School District's anti-bullying coordinator issued a report on February 20, 2020, concluding that the complaint's alleged conduct did not meet the statutory definition of HIB, but did violate the Student Code of Conduct. Petitioners disagree with this determination. Petitioners also suggest that the investigation leading to the District's HIB denial was inaccurate.

The Anti-Bullying Rights Act (ABRA), N.J.S.A. 18A:37-13 to -37, necessitates Board action concerning HIB complaints and investigations. The Lafayette Township School District's Board of Education (District or Board) accepted the February 20, 2020, report at its March 18, 2021, meeting and issued a written decision on December 27, 2021.[1]

A case is pending before the Hon Ernest Bongiovanni, ALJ, for that same HIB denial by the District under OAL DKT. NO. EDU 00546-22, Agency Dkt, 216-11/21. Petitioners assert that the case before Judge Bongiovanni only addresses their allegations of school misconduct concerning the HIB investigation, not the HIB determination. Yet, on January 19, 2022, the Acting Commissioner of the Department of Education (Commissioner) transmitted that case for adjudication of the District's HIB denial *and* any other violations under ABRA.[2] Like this petition, petitioner M.M. also sought video evidence she asserts the Commissioner ordered. Indeed, petitioners view the January 19, 2022, order transmitting the case to the OAL as ordering copies of the videos petitioners previously sought.[3]

On February 8, 2022, the District provided nearly six hours of footage to the petitioners relevant to its HIB investigation of petitioners' January 17, 2020, complaint. Further, the District offered petitioners an opportunity to review the voluminous additional

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[1] This tribunal is aware that prior litigation involved these procedural steps.

[2] Petitioners maintain the Commissioner's transmittal of multiple issues was inappropriate. However, this action follows the well-established entire controversy doctrine designed to avoid piecemeal litigation of issues raised by a single cause of action. Blanchard Co. v. Beach Concrete Co., Inc., 150 N.J. Super. 277, 294 (App. Div.), certif. denied, 75 N.J. 528 (1977); Cogdell v. Hosp. Ctr. at Orange, 116 N.J. 7, 15 (1989).

[3] However, by Final Decision of November 5, 2020, the Commissioner also upheld another administrative law judge's denial of M.M.'s discovery request for similar videos under OAL DKT. NO. EDU 05225-20, Agency Dkt. No. 94-5/20.

videos at the school, followed by submitting a list of video clips petitioners assert are relevant to the case.

Unable to resolve the District's offer, petitioners filed a motion with Judge Bongiovanni seeking sanctions for non-compliance with the Commissioner's January 19, 2022, order. Significantly, on January 9, 2023, Judge Bongiovanni entered an order regarding the video evidence and converted petitioners' motion for sanctions to one seeking to compel discovery.[4] That order discusses the long history of the video requests and orders the parties to complete discovery regarding those videos within sixty days.[5] Petitioners disagree with this order, and the District maintains that it disposes of the video discovery issues.

Notably, petitioners sought to disqualify Judge Bongiovanni, and the Office of Administrative Law's (OAL) Acting Director denied that request by letter order on November 7, 2022.[6] In other words, the earlier case involving the same HIB complaint continues with Judge Bongiovanni.

Following the alleged events in petitioner's HIB complaint, petitioners removed their minor child from school. The parents maintain that the school is hostile and unsafe because of the school's alleged failures regarding the HIB investigation, allowing bullying to continue, not providing discovery ordered by the Commissioner, obstructing justice, and delaying a hearing. Thus, petitioners assert that the District must provide their minor child with homebound instruction on an emergent basis.

On January 3, 2023, the Department of Education, Office of Controversies and Disputes, transmitted this case to the OAL for hearing as a contested case and resolution of petitioner's motion for emergency relief.

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[4] Under N.J.A.C. 1:1-14.14, an administrative law judge only has authority to issue sanctions for a party's unreasonable failure to comply with any order of that judge or non-compliance with the OAL rules.
[5] On January 12, 2023, the District supplied a copy of that Order.
[6] The OAL Director is the agency head for interlocutory review regarding judge disqualification under N.J.A.C. 1:1-14.10(j).

The Board provided the OAL with multiple documents regarding the videos on January 5, 2023, which the Clerk supplied to me after the case's reassignment.[7] On January 5, 2023, petitioners also supplemented their application.

I requested the Board submit a reply to the emergent application, which I received on January 6, 2023.

On January 9, 2023, petitioner M.M. advised that she and her son had COVID, and requested time to recover. I permitted additional submissions from the parties.

On January 12, 2023, the Board submitted additional materials.

On January 13, 2023, petitioners filed three submissions, including a response to the Board's opposition with attachments, a brief responding to Judge Bongiovanni's order, and exhibit about the request to disqualify Judge Bongiovanni.

The District brought truancy proceedings and disputes that the school is an unsafe or hostile environment or that its HIB denial was inaccurate. The District highlights that petitioners can request home instruction for health or psychological reasons, such as their son's fears, supported by medical documentation but supply none. Further, the District maintains that petitioners do not meet the standards for emergent relief.

I rescheduled oral argument for January 17, 2023, which I conducted by zoom and the record closed.[8]

[7] The OAL's clerk initially assigned the case to Judge Bongiovanni whom the OAL long ago scheduled as an emergent judge for January 9, 2023. After the petitioners requested case reassignment, the Acting Director assigned the emergent relief motion to me, and the OAL scheduled an oral argument for January 11, 2023.

[8] I held a conference to clarify the videos sought before the oral argument on the record given the voluminous submissions. Petitioners were unavailable before January 17, 2023, because of illness.

LEGAL ANALYSIS AND CONCLUSION

The Commissioner's jurisdiction encompasses "controversies and disputes arising under the school laws" under N.J.S.A. 18A:6-9, Dunellen Bd. of Educ. v. Dunellen Ed. Assoc., 64 N.J. 17, 23 (1973), the New Jersey Supreme Court concluded that "the Legislature enacted provisions entrusting school supervision and management to local school boards . . . subject to the supervisory control [of] . . . the State Commissioner of Education."

The regulations governing such disputes before the Commissioner provide that "[w]here the subject matter of the controversy is a particular course of action by a district board of education or any other party subject to the jurisdiction of the Commissioner, the petitioner may include with the petition of appeal, a separate motion for emergent relief or a stay of that action pending the Commissioner's final decision in the contested case." N.J.A.C. 6A:3-1.6(a).

N.J.A.C. 6A:3-1.6(b) sets forth the standards governing motions for emergent relief and instructs that:

> A motion for a stay or emergent relief shall be accompanied by a letter memorandum or brief which shall address the following standards to be met for granting such relief pursuant to Crowe v. DeGioia, 90 N.J. 126 (1982):
>
> > 1. The petitioner will suffer irreparable harm if the requested relief is not granted;
> > 2. The legal right underlying petitioner's claim is settled;
> > 3. The petitioner has a likelihood of prevailing on the merits of the underlying claim; and
> > 4. When the equities and interests of the parties are balanced, the petitioner will suffer greater harm than the respondent will suffer if the requested relief is not granted.
> >
> > [N.J.A.C. 6A:3-1.6(b).]

Indeed, the moving party must demonstrate each element "clearly and convincingly." Waste Management of N.J. v. Union County Utilities Authority, 399 N.J. Super. 508, 520 (App. Div. 2008). Emergent relief is designed "to 'prevent some

threatening, irreparable mischief, which should be averted until opportunity is afforded for a full and deliberate investigation of the case.'" Crowe, 90 N.J. at 132 (citation omitted).

Irreparable harm

Harm is generally considered irreparable if monetary damages cannot adequately redress it. Id. at 132-33. In other words, courts describe irreparable harm as "'substantial injury to a material degree coupled with the inadequacy of money damages.'" Judice's Sunshine Pontiac, Inc. v. General Motors Corp., 418 F. Supp. 1212, 1218 (D.N.J. 1976) (citation omitted). Further, an applicant for emergent relief must demonstrate more than a risk of irreparable harm. Continental Group, Inc. v. Amoco Chemicals Corp., 614 F. 2d 351, 359 (D.N.J. 1980). The requisite for injunctive relief requires a "'clear showing of immediate irreparable injury,'" or a "'presently existing actual threat; [an injunction] may not be used simply to eliminate a possibility of a future remote injury, or a future invasion of rights, be those rights protected by statute or by common law.'" Ibid. (citation omitted). Unsupported allegations of irreversible harm are insufficient to excuse the completion of administrative proceedings. Komninos by Komninos v. Upper Saddle River Bd. of Educ., 13 F.3d 775, 779 (3d Cir. 1994).

Significantly, petitioners argue the same HIB complaint failures here as in the case before Judge Bongiovanni. Should petitioners prevail in demonstrating that a HIB occurred and the District's determination to the contrary was arbitrary, capricious, or unreasonable, consequences might include home instruction to the victim. See N.J.S.A. 18A:37-15(b)(7)(noting that a school has a range of ways it can respond once identifying an incident of HIB); see also. N.J.A.C. 6A:16-10.2 (a court can order home instruction for reasons other than medical). Yet, a plenary hearing has yet to address the disputed facts concerning the HIB complaints and its investigation.

Again, Judge Bongiovanni issued an order concerning the video evidence sought in this action. Should petitioners disagree with that order, they can seek interlocutory review from the Commissioner.

Here, petitioners removed their son from school before adjudicating the District's actions regarding their HIB complaint or investigation issues from January 2020. They allege the school is unsafe for their minor child without specificity other than disagreement with the District's handling of the HIB complaint, currently pending in another case, and vigorous litigation posture in various matters with petitioners. Petitioners' request for home instruction years after the alleged HIB incident detracts from the demand's emergent nature. Further, the loss of educational services was arguably self-inflicted, as the District argues. Petitioners speculate that bullying will continue, asserting their son fears returning to school. Yet, speculative harm is insufficient, and petitioners supply no medical documentation to support a medical need for such instruction.

Thus, I **CONCLUDE** that petitioners have not demonstrated irreparable harm necessary for emergent relief.

Settled Legal Right

Emergent relief "should be withheld when the legal right underlying plaintiff's claim is unsettled." Crowe, 90 N.J. at 133 (citing Citizens Coach Co. v. Camden H. R. Co., 29 N.J.Eq. 299, 304-305 (E & A 1878)).

Notably, an action is moot when it no longer presents a justiciable controversy because the issues raised have become academic. For judicial economy and restraint, it is appropriate to refrain from decision-making when an issue presented is hypothetical, when judgment cannot grant effective relief, or the parties do not have concrete adversity of interest. Anderson v. Sills, 143 N.J. Super 432, 437 (Ch. Div. 1976); Fox v. Twp. of E. Brunswick Bd. of Educ., EDU 10067-98, Initial Decision (March 19, 1999), aff'd, Comm'r (May 3, 1999), https://njlaw.rutgers.edu/collections/oal/; S.J. v. Bd. of Educ. of Mountain Lakes, EDU 07081-03, Initial Decision (October 7, 2003), aff'd, Comm'r (Nov. 17, 2003), aff'd, St. Bd. (Feb. 3, 2004). https://njlaw.rutgers.edu/collections/oal/. Indeed, petitioners acknowledge that they filed this case because Judge Bongiovanni had yet to decide their motion.

Under N.J.A.C. 1:1-14.6, Judge Bongiovanni has wide powers over pre-hearing activities and in developing the record necessary to render an initial decision. Here, Judge Bongiovanni issued an Order addressing the petitioners' video discovery dispute concerning the same HIB complaint petitioners reference here. Petitioners dispute that order and now argue to overturn that order through this application and petition.

Further, the OAL's Acting Director denied petitioners' request to disqualify Judge Bongiovanni despite petitioners' assertions regarding his bias. Duplicative filings seeking to reach different results is inappropriate and the OAL's rules do not give me the authority to overrule another administrative law judge's discovery order. See N.J.A.C. 6A:3-1.4(c).(discussing duplicative filings); N.J.A.C. 1:1-14.10 (providing that the agency head reviews orders through interlocutory review or after the judge issues an initial decision. Given the orders of Judge Bongiovanni and the OAL's Acting Director, I **CONCLUDE** those portions of the petition and emergent application are moot.

To be sure, petitioners have the right to challenge the District's HIB determination. However, a contested hearing on the same HIB complaint has yet to occur in OAL DKT. NO. EDU 00546-22. Further, petitioners cite no authority that requires a District to provide home instruction at its cost under these circumstances. Petitioners supply no medical documentation to support this request and have yet to demonstrate that the District's HIB denial was contrary to the law, arbitrary, capricious, or unreasonable. Therefore, I **CONCLUDE** petitioners have not satisfied this requirement for emergent relief.

Likelihood of Success on the Merits

Under the third emergent relief standard, "a plaintiff must make a preliminary showing of a reasonable probability of ultimate success on the merits." Crowe, supra, 90 N.J. at 133 (citing Ideal Laundry Co. v. Gugliemone, 107 N.J. Eq. 108, 115-16 (E. & A. 1930)). This requirement is often implicitly tied to whether the right to the underlying claim is settled.

Each school district must provide a thorough and efficient education system to all its resident children. N.J. Const. art. VIII, § 4, ¶ 1; N.J.S.A. 18A:33-1. To carry out this

policy, local boards of education have discretionary authority under N.J.S.A. 18A:11-1C. Indeed, a presumption of lawfulness and good faith applies to a board of education's actions. In challenges to board actions, the challenger bears the burden of proving that such acts were unlawful, arbitrary, capricious, or unreasonable. Schuster v. Bd. of Educ. Montgomery Twp., 96 N.J.A.R.2d (EDU) 670, 676 (citing Schnick v. Westwood Ed. of Educ., 60 N.J. Super. 448 (App. Div. 1960), and Quinlan v. Bd. of Educ. of North Bergen Twp., 73 N.J. Super. 40 (App. Div. 1962).

The "arbitrary, capricious and unreasonable" standard of review imposes a heavy burden on challengers of board actions and "means having no rational basis." Piccoli v. Ed. of Educ. of Ramapo Indian Hills Regional School District, OAL DKT. EDU 1839-98 (January 22, 1999) (citing Bayshore Sewage Co. v. Dent. of Envir. Protection, 122 N.J. Super. 184, 199-200 (Ch. Div. 1973), aff'd 131 N.J. Super. 37 (App. Div. 1974).

Again, a plenary hearing must occur to resolve petitioners' disputed claims against the District, which weighs against granting emergent relief. Indeed, I **CONCLUDE** that petitioners have supplied inadequate evidence to support a likelihood of success on the merits to warrant emergent relief.[9]

Balancing of the Equities

Lastly, petitioners fail to meet the fourth emergent relief standard, which involves "the relative hardship to the parties in granting or denying relief." Crowe, 90 N.J. at 134 (citing Isolantite Inc. v. United Elect. Radio & Mach. Workers, 130 N.J.Eq. 506, 515 (Ch.1941), mod. on other grounds, 132 N.J.Eq. 613 (E. & A. 1942)). Petitioners must demonstrate that they will suffer more significant harm than the Board if this tribunal does not grant the requested relief. Moreover, petitioners must show that "the inconvenience or loss to the opposing party will be minimal if the relief is obtained." Zoning Bd. 8 of Adjustment of Sparta Tp. v. Service Elec. Cable Television of New Jersey, Inc., 198 N.J. Super. 370, 379 (App. Div. 1985).

[9] I am mindful that petitioners assert that they need the disputed video evidence to supply that proof. Still, emergent relief requires that petitioners demonstrate a likelihood of success.

The District sought to prevent the release of voluminous security footage that necessarily includes images of staff and many other minor students, potentially compromising the privacy interests of hundreds of individuals. Still, the District provided nearly six hours of footage to the petitioners after the Commissioner transmitted the case before Judge Bongiovanni to the OAL Regardless, Judge Bongiovanni issued an Order regarding the remaining videos, making this issue moot.

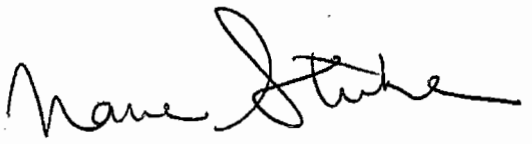
If I deny emergent home instruction, petitioners assert that their minor child may not receive educational services. Yet, this is a parental decision, not one by the District. The parents have yet to demonstrate that the District's denial of HIB against their minor child was arbitrary, capricious, or unreasonable. While I appreciate the petitioners' frustration in the legal process, they chose to remove their child from school. Petitioners cite no legal basis to require a District to bear the cost and inconvenience of home instruction absent a finding concerning the impropriety of its actions or evidence of an unsafe school environment. The petitioners' assertion that their son is afraid to return to school could be supported by evidence supporting a medical need for home instruction but is not. The District's disagreement with petitioners about video evidence or in seeking dismissal of earlier actions on legal grounds has little to do with the safety of a school. Thus, the equities favor the District.

Based on the above discussion, I **CONCLUDE** that petitioners' request for emergent relief does not meet requirements under N.J.A.C. 6A:3-1.6 and must be **DENIED**.

ORDER

Therefore, I **ORDER** that petitioner's request for emergency relief be and is hereby **DENIED.**

This order on application for emergency relief may be adopted, modified, or rejected by the Commissioner of Education, who by law is authorized to make a final decision in this matter. The final decision shall be issued without undue delay, but no later than forty-five (45) days following the entry of this order. If the Commissioner of Education does not adopt, modify, or reject this order within forty-five days, this recommended order shall become a final decision on the issue of emergent relief in accordance with N.J.S.A. 52:14B-10.



January 18, 2023

DATE

NANCI G. STOKES, ALJ

Date Mailed to Parties:

ljb

34-23

New Jersey Commissioner of Education

Final Decision

B.B., on behalf of minor child, A.S.,

Petitioner,

v.

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

Respondent.

Synopsis

In these consolidated matters, petitioner B.B. challenged the determination of the respondent, Board of Education of the Borough of Paulsboro (Board), in regard to a Harassment, Intimidation and Bullying (HIB) complaint made on behalf of her daughter, A.S., against the coach of the girls track team at Paulsboro High School. Petitioner alleged that incidents which occurred during the 2019 spring track season had prompted thoughts of self-harm in A.S. The Board determined that petitioner's allegations did not constitute HIB.

The ALJ found, *inter alia*, that: petitioner was not afforded the due process required by the Anti-Bullying Bill of Rights Act (Act), *N.J.S.A.* 18A:37-13 *et seq.;* specifically, petitioner was not provided an opportunity to appear before the Board, was not provided a summary of the HIB investigation, and did not receive a written decision indicating the Board's rationale for its determination that there had been no HIB; although petitioner was never afforded an opportunity to appear before the Board, the hearing in this matter at the Office of Administration Law (OAL) provided a full evidentiary hearing on the merits; there was no evidence that the coach treated A.S. in a hostile manner; further, HIB must be motivated by an actual or perceived distinguishing characteristic, a critical element that is missing in this case. The ALJ concluded that the allegations contained in the petitions of appeal do not meet the legal standards of the HIB statute; accordingly, the ALJ dismissed the consolidated petitions.

Upon comprehensive review, the Commissioner adopted the Initial Decision of the OAL as the final decision in this matter. In so doing, the Commissioner agreed that the alleged conduct does not constitute HIB as there is no evidence that it was motivated by any actual or perceived characteristic of A.S. The Commissioner also agreed with the ALJ's findings that the Board did not comply with the Act in conducting its HIB investigations, but petitioner ultimately received a full evidentiary hearing through the proceedings at the OAL. Accordingly, the consolidated petitions were dismissed.

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

34-23
OAL Dkt. Nos. EDU 03599-20 and EDU 06458 (Consolidated)
Agency Dkt. Nos. 64-3/20 and 137-6/20

New Jersey Commissioner of Education

Final Decision

B.B., on behalf of minor child, A.S.,

Petitioner,

v.

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

Respondent.

The record of this matter and the Initial Decision of the Office of Administrative Law (OAL) have been reviewed, as have the exceptions filed pursuant to *N.J.A.C.* 1:1-18.4 by the petitioner and the Paulsboro Board of Education's (Board) reply thereto.

These consolidated matters stem from a harassment, intimidation, and bullying (HIB) complaint filed by petitioner on behalf of her daughter, A.S., against the coach of Paulsboro's girls track team. A.S. was a student at the Gloucester County Institute of Technology (GCIT) but was a member of the track team at Paulsboro. Petitioner alleged that her daughter had thoughts of self-harm as a result of incidents that occurred during the 2019 spring track season. Petitioner filed an HIB complaint on or about January 23, 2020,[1] alleging that her daughter was subjected to a hostile environment after she refused to run the 4x100 relay and opted to visit family instead of competing in the West Deptford relays. The Board's anti-bullying specialist

[1] The Superintendent became aware of petitioner's concerns in October 2019, and he conducted an informal "HIB-like" investigation. Upon informing petitioner on or about January 21, 2020 that his investigation did not find any evidence of HIB involving the track coach, petitioner requested a formal HIB investigation.

conducted the HIB investigation, interviewing A.S. and several students, but not the track coach or any other athletic personnel. In her statement, A.S. alleged that: she was pressured to run specific events; the coach would say bad things about her so other students would be mad at her; and the coach would be upset when she was too slow getting dressed or warming up. In a follow up interview, A.S. indicated that she runs track for a scholarship but really wants to play soccer. The HIB investigation was completed on February 21, 2020 and found that there was no HIB violation. The matter was reported to the Board on March 30, 2020, and the Board confirmed the HIB determination at its meeting on April 27, 2020. Thereafter, petitioner was informed that after a complete investigation, there was no evidence of an HIB incident.

Petitioner filed these consolidated petitions challenging the HIB determination.[2] At a hearing on the merits, the Administrative Law Judge (ALJ) heard testimony from the petitioner, the accused track coach, the superintendent, the athletic trainer, three assistant track coaches, the principal, the assistant principal, and the anti-bullying specialist who conducted the HIB investigation. The ALJ found that petitioner was not afforded the due process required by the Anti-Bullying Bill of Rights Act (Act), *N.J.S.A.* 18A:37-13 *et seq.* Specifically, the ALJ found that petitioner was not provided an opportunity to appear before the Board, was not provided a summary of the HIB investigation, and did not receive a written decision indicating the Board's rationale for its determination that there had been no HIB. Additionally, the ALJ noted that the investigation was tainted because there were no interviews with coaching staff and the accused was never advised of the investigation. However, the ALJ found that, "In this case, it makes no sense to return this matter to the Board to correct the procedural errors set forth herein.

[2] The first petition contained a request for emergent relief, which was denied.

Although petitioner was never afforded an opportunity to appear before the Board, she has now been afforded a full evidentiary hearing on the merits." (Initial Decision at 19). Ultimately, the ALJ concluded that there was no evidence that the coach treated A.S. in a hostile manner. Moreover, the ALJ concluded that HIB must be motivated by a distinguishing characteristic and that critical element is missing here, so the allegations do not meet the statutory definition of HIB.

In her exceptions, petitioner alleges that the ALJ failed to include certain factual details or testimony pertaining to the Board's failure to follow HIB policy; further, the ALJ erred in referencing specific dates and in failing to admit some exhibits into evidence. Petitioner also argues that the ALJ erred in finding that the testimony of the assistant coaches did not include any observations of improper behavior, as those coaches did not work closely with A.S. and would not have witnessed any of the incidents in question. According to petitioner, the anti-bullying specialist did not conduct a proper investigation in the way that she gathered information and conducted witness interviews; further, the anti-bullying specialist failed to contact GCIT to determine the full effect of the alleged HIB incidents on A.S.'s education at GCIT. Petitioner contends that the ALJ erred in finding that A.S. and her sisters' statements did not contain specific incidents of mistreatment, abuse or intimidation, and that another student did not detail specific incidents of mistreatment, yelling, or being forced to compete while injured. Furthermore, petitioner points out that the ALJ found that the investigation was tainted with procedural errors; petitioner therefore argues that the hearing in this matter was to determine if the Board's investigation was arbitrary, capricious, or unreasonable, and not for petitioner to conduct the HIB investigation for the Board and give the Board a second

opportunity. As such, the petitioner argues that the ALJ erred in finding that A.S. did not experience HIB.

In reply, the Board argues that petitioner's exceptions mainly consist of *de minimis* issues that are irrelevant to the ultimate determination on the merits. The Board agrees with the ALJ that despite the ALJ's findings regarding procedural errors in the HIB investigation, the petitioner was afforded a full evidentiary hearing in this forum. The Board points out that petitioner called nine witnesses, including herself, and none of the witnesses alleged that A.S. had a distinguishing characteristic as required for an HIB determination. Accordingly, the Board agrees with the ALJ that the petitioner allegations did not meet the legal standard of HIB.

Upon a comprehensive review of the record, the Commissioner agrees with the ALJ that the alleged conduct does not constitute HIB. In order for conduct to meet the statutory definition of HIB, it must be "reasonably perceived as being motivated either by any actual or perceived characteristic, such as race, color, religion, ancestry, national origin, gender, sexual orientation, gender identity and expression, or a mental, physical or sensory disability, or by any other distinguishing characteristic." *N.J.S.A.* 18A:37-14. The Commissioner agrees with the ALJ that the record does not demonstrate that the alleged conduct was motivated by any actual or perceived characteristic of A.S. Accordingly, the alleged conduct cannot be considered HIB.

The Commissioner also agrees with the ALJ that the Board did not comply with the Act in conducting its HIB investigations. *N.J.S.A.* 18A:37-15b(6)(d) provides:

> [P]arents or guardians of the students who are parties to the investigation shall be entitled to receive information about the investigation, in accordance with federal and State law and regulation, including the nature of the investigation, whether the district found evidence of harassment, intimidation, or bullying, or whether discipline was imposed or services provided to address

> the incident of harassment, intimidation, or bullying. This information shall be provided in writing within 5 school days after the results of the investigation are reported to the board. A parent or guardian may request a hearing before the board after receiving the information, and the hearing shall be held within 10 days of the request. The board shall meet in executive session for the hearing to protect the confidentiality of the students. At the hearing the board may hear from the school anti-bullying specialist about the incident, recommendations for discipline or services, and any programs instituted to reduce such incidents[.]

Here, petitioner was not provided with information about the investigation within five school days after the results of the investigation were reported to the Board, nor was she provided with an opportunity for a Board hearing. The Commissioner notes that, although she was not given the opportunity to appear before the Board, petitioner was afforded a full evidentiary hearing in the OAL that included her testimony, as well as testimony from the antibullying specialist, the accused, the superintendent, the principal, the assistant principal, the athletic director, and three assistant track coaches. In this circumstance, the Commissioner agrees with the ALJ that remanding this matter to the Board for a hearing is unnecessary given the full hearing on the merits that petitioner has now been afforded.

The Commissioner is not persuaded by petitioner's exceptions, many of which dispute minor details that do not have any bearing on the outcome of this matter. The Commissioner notes that any disagreement regarding the relevance of the assistant coaches' testimony lacks merit as they were petitioner's witnesses. The Commissioner also finds that exceptions regarding the ALJ's characterization of the testimony of A.S. and other students do not have an impact on this matter as they fail to demonstrate that A.S. had an actual or perceived distinguishing characteristic. Additionally, any exceptions regarding procedural errors in the HIB investigation are of no moment as the ALJ and Commissioner have already acknowledged

those defects. Finally, the Board was not provided with a second opportunity to conduct the HIB investigation because a hearing at the OAL is part of the administrative process.

Accordingly, the Initial Decision is adopted as the final decision in this matter, and the consolidated petitions are hereby dismissed.

IT IS SO ORDERED.[3]

Angelica Allen-McMillan, J.D.S.
ACTING COMMISSIONER OF EDUCATION

Date of Decision: February 6, 2023
Date of Mailing: February 8, 2023

[3] This decision may be appealed to the Appellate Division of the Superior Court pursuant to *N.J.S.A.* 18A:6-9.1. Under *N.J.Ct.R.* 2:4-1(b), a notice of appeal must be filed with the Appellate Division within 45 days from the date of mailing of this decision.

State of New Jersey
OFFICE OF ADMINISTRATIVE LAW

INITIAL DECISION
OAL DKT. NOS. EDU 03599-20
AND EDU 06458-20
AGENCY DKT. NOS. 64-3/20
AND 137-6/20
(CONSOLIDATED)

B.B. ON BEHALF OF A.S.,
Petitioner,
v.
BOARD OF EDUCATION OF THE BOROUGH OF PAULSBORO, GLOUCESTER COUNTY,
Respondent.

B.B., petitioner, pro se

Stephen J. Edelstein, Esq., and **Dustin F. Glass**, Esq., for respondent (Weiner Law Group, L.L.P., attorneys)

BEFORE **KATHLEEN M. CALEMMO**, ALJ:

Record Closed: October 3, 2022 Decided: November 15, 2022

STATEMENT OF THE CASE

Petitioning parent, B.B., challenged the respondent's, Board of Education of the Borough of Paulsboro (Board), response to her Harassment, Intimidation and Bullying (HIB) complaint, made on behalf of her daughter, A.S., against Paulsboro High School (Paulsboro) girl's track coach. The Board determined that her allegations did not constitute HIB.

PROCEDURAL HISTORY

Petitioner filed a request for emergent relief on March 7, 2020, with the New Jersey Department of Education (NJDOE). On March 10, 2020, the NJDOE transmitted the matter to the Office of Administrative Law (OAL) as a contested case, under Docket No. EDU 03599-20. The matter was heard before the Honorable Jeffery R. Wilson, ALJ, on March 17, 2020. Judge Wilson entered an Order denying the request for emergent relief on the same date. On April 24, 2020, the New Jersey Commissioner of Education adopted the Order and directed the matter be returned to the OAL.

On or about April 21, 2020, the respondent filed and served an answer to the petition. On April 25, 2020, the petitioner filed a document described as "my reply to the respondent's answer submitted." On April 27, 2020, the respondent filed a motion to strike the petitioner's April 21, 2020, reply as an impermissible pleading. By Letter Order, dated January 12, 2021, Judge Wilson granted respondent's motion.

On May 1, 2020, the respondent file a motion for summary decision, under Docket No. EDU 03599-20. The petitioner filed her opposition on May 7, 2020, and the respondent filed its reply on May 21, 2020.

On May 28, 2020, while the summary decision motion was pending, the petitioner filed a motion to compel discovery. Two days later, on June 20, 2020, the petitioner filed a request to amend her petition.

On June 29, 2020, the petitioner filed a second, related petition, under Docket No. EDU 06458-20. On January 12, 2021, the respondent filed a motion for summary decision under Docket No. EDU 06458-20. An order was entered on January 14, 2021, consolidating Dockets Nos. EDU 03599-20 and EDU 06458-20.

On January 14, 2021, the petitioner filed a motion to strike the respondent's motion for summary decision under Docket No. 06458-20. On January 18, 2021, the respondent filed its response to the petitioner's motion to strike.

On January 20, 2021, the petitioner filed her opposition to the motion for summary decision, under Docket No. EDU 06458-20. On January 22, 2021, the respondent filed its formal reply to petitioner's opposition. After hearing oral argument on March 15, 2021, by Zoom platform, Judge Wilson entered an order on September 7, 2021, denying respondent's motions for summary decision. Judge Wilson directed that the matter would proceed to a hearing, solely addressing the required elements of the Anti-Bullying Bill of Rights Act.

On September 30, 2021, Judge Wilson entered a Prehearing Order wherein he set a discovery deadline of November 30, 2021. On October 27, 2021, petitioner filed a motion to compel discovery. By Letter Order, dated November 9, 2021, Judge Wilson denied petitioner's motion to compel discovery.

On December 8, 2021, respondent filed a motion to dismiss the consolidated petitions of appeal. On December 10, 2021, petitioner filed an opposition to respondent's motion. Respondent replied on December 13, 2021. Judge Wilson converted the hearing date of January 13, 2022, to oral argument on the motion. Before oral argument was heard, Judge Wilson recused himself after petitioner filed a motion for his recusal which was opposed by respondent. Thereafter, the case was reassigned to me, and I heard oral argument on February 18, 2022. I issued an Order dated March 21, 2022, denying respondent's request for sanctions.

The hearings were held on July 7, 2022, and July 13, 2022. As an accommodation to respondent's witness, the July 7, 2022, hearing was conducted via Zoom platform.

After the last hearing, the parties requested additional time to obtain transcripts and submit written summations. After granting an extension for receipt of closing summation briefs, I closed the record on October 3, 2022.

FACTUAL DISCUSSION AND FINDINGS

The following events, derived from the testimony, the pleadings, and the documents, are not materially controverted. Thus, I **FIND** them as **FACT**:

Petitioner, B.B., is the mother of A.S. A.S. attended Gloucester County Institute of Technology (GCIT) but participated in the Paulsboro track program as a resident of the Paulsboro School District.

On or about October 22, 2019, A.S. gave her parents, B.B. and F.S., a letter, wherein A.S. expressed thoughts about self-harm. B.B. related her daughter's feelings to incidents which occurred during the 2019 spring track season. Because of the letter, F.S. contacted Marvin Hamilton, a Board member, with his concerns. Mr. Hamilton brought F.S.'s concerns about his daughter to the attention of the Superintendent, Dr. Walter Quint.

Dr. Quint conducted what he termed a "HIB-like" investigation. On or about January 21, 2020, Dr. Quint informed B.B. that his "HIB-like" investigation had not found any evidence of a HIB incident involving A.S. and her track coach. Not satisfied with this response, on January 23, 2020, the petitioner submitted a written request for a full HIB investigation.

The HIB investigation was assigned to the Anti-Bullying Specialist, Ms. Jessica Rose Johnson, for the 2019–2020 school year; after investigating, she found no evidence of a HIB violation. Ms. Johnson completed her investigation on February 21, 2020. On March 30, 2020, the HIB case was reported to the Board as "a follow-up to a "HIB-like" investigation with the determination of "Non-HIB" and "No Action Required." (R-2.) The Superintendent's recommendation was confirmed by the Board at its meeting on April 27,

2020. Id. By letter, dated April 28, 2020, Principal Paul Morina informed petitioner that after a complete investigation, there was no evidence of a HIB incident. (R-1.)

In accordance with N.J.S.A. 18A:37-15(b)(6)(d), as the parent, B.B. was entitled to receive information about the investigation and whether Paulsboro found evidence of HIB within five days of Paulsboro submitting the results of its investigation to the Board, which occurred on March 30, 2020. Upon receipt of this information, B.B. had the right to request a hearing before the Board in executive session. B.B. never received the information and was never afforded a hearing before the Board. Her only notification about the HIB investigation was set forth in the letter, dated April 28, 2022, when Principal Morina informed her that "[a]fter a complete investigation, the administration did not find evidence of a HIB incident." This letter was sent after the Board had met and voted to uphold the recommendation.

Testimony

Respondent

Dr. Walter Quint testified on behalf of the respondent. He was the interim superintendent during the 2019–2020 school year when petitioner lodged her HIB complaint. Dr. Quint had previously served as the Superintendent of Paulsboro School District from 1990 to 2001. He returned as the interim superintendent for two years during, the 2013–2014 and 2014–2015 school years and was asked to return for the final time for the 2019–2020 school year. Before his retirement, Dr. Quint had over fifty years of service in the education field.

As Superintendent, Dr. Quint is responsible for ensuring that the school's HIB policy is carried out correctly. He reviews the investigation report and must either confirm or deny its findings. Ultimately, he is responsible for reporting the HIB results to the Board. He has performed his role as superintendent in numerous HIB investigations throughout his career.

The investigation at issue was conducted under his watch. As the Superintendent during the 2019–2020 school year, Dr. Quint was familiar with the HIB policy. This was the same policy that was in effect during the 2018–2019 school year. (R-4.)

In October 2019, the Vice-President of the Board of Education, Mr. Hamilton, gave Dr. Quint a portion of a letter that had been purportedly written by a member of the Paulsboro track team wherein this student, A.S., expressed a desire for self-harm. Because the student did not attend Paulsboro, Dr. Quint notified the principal and the superintendent of GCIT, where the student attended. Paulsboro had not had any contact with the student since track ended in May 2019. As the letter referenced concerns which occurred during the spring 2019 track season, Dr. Quint also notified Paulsboro's athletic director.

The student's mother, B.B., addressed the Board at its meeting on December 16, 2019. Dr. Quint did not remember any specifics regarding B.B.'s comments to the Board but he recalled speaking with her. Because of her concerns, he asked his staff to conduct a "HIB like" investigation. "HIB-like" was Dr. Quint's characterization of the investigation. He believed that GCIT was working with A.S. regarding her emotional well-being so he focused on whether there was a hostile situation within the track and field community at Paulsboro. Dr. Quint added that his sole concern was for A.S.'s well-being.

In an abundance of caution, Dr. Quint contacted the Division of Child Protection and Permanency (DCP&P) and requested an institutional abuse investigation. DCP&P declined to investigate.

Dr. Quint asked the Athletic Director, Mr. Giovannitti, to investigate and interview anyone who would have information or knowledge about the culture within the track program. Due to his long association with the school, Dr. Quint was personally familiar with many of the coaches. Therefore, he did his own investigating and personally spoke to coaches to see if they knew anything that would have contributed to the negativity that A.S. was feeling. Recalling that one of the allegations involved athletes being forced to compete while injured, Dr. Quint asked the trainer if A.S. had ever sought medical help.

The trainer recalled no one talking about mistreatment of any kind. None of the coaches reported seeing or hearing anything that would suggest wrongdoing by the track coach.

Dr. Quint recalled speaking to B.B. about his findings after the "HIB-like" investigation. She expressed her dissatisfaction, so he told her to formally request a HIB investigation. After B.B. requested the investigation, Dr. Quint assigned it to the HIB Coordinator, Mr. Giovannitti, who was also the school's Athletic Director; and the HIB Specialist, Ms. Johnson, to investigate. After reviewing the investigative findings (R-3), Dr. Quint was satisfied that B.B.'s complaint did not meet the definitions or criteria for a HIB claim. He also noted that both investigations revealed the same result.

Referring to the school's policy, there are two options for consideration when a HIB report is made. When Dr. Quint was presented with the portion of A.S.'s letter, he saw nothing in the letter that indicated the matter should be investigated as a HIB. Even though he did not view the matter as a HIB, he still felt that any suggestion of wrongdoing should be investigated. At B.B.'s request, Dr. Quint agreed to perform a thorough investigation that he termed "HIB-like" because the claims did not meet the definition of a HIB. His initial investigation did not show any wrongdoing on the part of the coach. When B.B. did not agree with his assessment, Dr. Quint agreed to perform a HIB investigation.

Dr. Quint did not document his conversations with the coaches and trainer during his "HIB-like" investigation. He recalled finding nothing to indicate that the head coach did anything that rose to the level of a HIB violation. However, he maintained that there was a full HIB investigation conducted separate and apart from his "HIB-like" investigation.

When asked if the Board receives the entire HIB investigation, Dr. Quint responded that the Board only receives the investigation results. In this instance, because the result was "no action required," the Board only received the case number, date of incident, status of investigation, and type of discipline imposed. (R-2.)

When B.B. addressed the Board in December 2019, Dr. Quint stated there were three issues. The first issue was making sure A.S. was receiving proper services due to

her threat of self-harm. The second issue was whether there was any wrongdoing by the head coach. The third issue involved the head coaching position and whether it had been properly advertised. A.S.'s father had also applied for the position. Dr. Quint commented that in 2019, the track team won the State championship and Coach Gunter had been named coach of the year.

Petitioner

Gabrielle Prendergast was the athletic trainer for Paulsboro. She held this position from September 2017 until June 2020. During her time as athletic trainer, Ms. Prendergast did not recall being questioned or interviewed for a "HIB-like" investigation involving A.S.

David Platt was the cross-country coach from 1977 until 2009, and then the assistant distance girl's track coach from 1988 until 2020. He is currently retired from Paulsboro. Mr. Platt was never questioned by school administrators regarding any issues with the girls track team. As a distance coach, Mr. Platt did not coach or work with petitioner's children.

Anita Evans was a teacher in the elementary school in the Paulsboro School District for thirty-four years. During her last eight years, she was a paid coach for the girl's track and field team. Since her retirement, she has served as a volunteer coach for the past seven years. During the 2019 track season, Ms. Evans was a volunteer coach for field events. She did not work with the sprinters or distance runners. No member of administration ever approached her about concerns with the girl's track team during the 2019 track season.

Although she was never interviewed, she never witnessed harassment, intimidation, bullying, or any improper behavior by any coach associated with the girl's track team. She witnessed interactions between coaches and athletes but never witnessed any athlete being mistreated or treated differently.

Paulette Cwik has been an assistant volunteer track coach at Paulsboro High School since 2002. From 1976 until 2001, Coach Cwik was the head coach of the team. After her retirement, she volunteered as an assistant. She was an assistant coach during the 2019 spring track season when the conduct outlined in the HIB complaint allegedly occurred. Although Coach Cwik was also accused, she was never informed or notified about the HIB investigation. She felt that if there were allegations against her, she should have been interviewed.

Coach Cwik never saw anything improper or anything that could be considered harassment, intimidation, or bullying of any of the girls on the team. In her opinion, all the athletes were treated equally.

Coach Cwik stated that the athletes were part of a team and subject to team rules. In response to B.B.'s question, Coach Cwik recalled the situation when A.S. refused to run in the 4 x 100 relay race. On the day of the race, Coach Cwik approached A.S.'s father about why A.S. was not running in the race. She recalled that her conversation about the race was with A.S.'s father and did not recall whether A.S. was present. The coaching staff had not been informed until the day of the relay that A.S. was not going to run. This was the South Jersey Sectional Meet, and A.S. was an integral part of the four-person relay team.

Coach Cwik was also asked about Coach Gunter yelling at B.B.'s daughters for missing the West Deptford relays during the 2019 season. She did not recall anyone yelling. Coach Cwik only recalled that the coaching staff was informed the night before the track meet that the triplets would not be participating. She never witnessed Coach Gunter harass, intimidate, or bully A.S.

Euridee Gunter is a substitute teacher at Paulsboro and the head girl's track and field coach. Her employment with the school began in 1996. Coach Gunter was never notified that she was the subject of a HIB or "HIB-like" investigation for actions involving A.S. during the 2019 track season. No one interviewed her.

On cross-examination, Coach Gunter stated that she never pressured A.S. to run events against her will. She was only aware of allegations that A.S. has considered harming herself because she was present at the December 2019 Board meeting when B.B. addressed the Board.

Paul Morina has been the Principal of Paulsboro High School for the past sixteen years. He is familiar with the school policy regarding reporting and investigating HIB complaints. He sends all incidents to the HIB coordinator for investigation. The HIB coordinator conducts the investigation to determine whether the complaint constitutes a HIB violation. Mr. Morina works closely with the HIB coordinator. They do not predetermine any incident. All allegations are investigated.

Mr. Morina was not aware of any "HIB-like" investigation. As principal, Mr. Morina was required to sign the HIB investigation report. The report did not list Coach Gunter as being interviewed. Coach Gunter was listed as the aggressor, but she was never interviewed as part of the investigation. There was no written report contained in the investigation. The investigation was not completed within ten days. In reviewing the investigation report, Mr. Morina commented that it appeared as if pages were missing.

The Board does not see the investigation report. The Board receives a list of how many HIB complaints were investigated and the disposition of those complaints. Mr. Morina did not know what would happen if any Board member had questions about the investigation. After Board approval, Mr. Morina sends a letter to the parents telling them the results of the investigation. He signed the letter sent to B.B. that was dated April 28, 2022. (R-1.)

Mr. Morina did not recall the specifics of the incident involving A.S. but he stated that every incident is investigated.

John Giovannitti is the Assistant Principal for grades seven and eight and he is the Athletic Director for grades seven through twelve. He also serves as the Affirmative Action Officer and the District HIB Coordinator. He has been employed by Paulsboro for thirty-four years. Generally, when a HIB complaint is made, it is reported to the principal,

who sends it to the Anti-Bullying Specialist. The Anti-Bullying Specialist has ten days to investigate, make an initial determination, and report back to the principal. After reviewing, the principal signs the report, and gives it to the HIB Coordinator for review. The HIB coordinator signs the report, and forwards it to the Superintendent for final review. The Superintendent submits the results to the Board.

Mr. Giovannitti was clear that all complaints are investigated. There is no predetermination about whether a complaint is HIB or not.

Dr. Quint asked him to conduct a HIB-like investigation to determine if there were problems within the girls track program. His recollection was vague, but he recalled conducting some interviews with coaches. He believed he spoke to all the coaches involved with the track program.

Mr. Giovannitti has no contact with the Board. He interacts with the school principals and the superintendent on HIB issues. Acknowledging that the school has lots of policies, he expressed no knowledge of a "HIB-like" policy. He only recalled being asked by Dr. Quint to find out if there were any concerns with the track team.

As Athletic Director, Mr. Giovannitti observes practices and sporting events. He never observed any issues, so he asked some general questions about coaches raising their voices or actions that could be interpreted as mistreating a player. Based on his observations and conversations, he did not find any impropriety.

Mr. Giovannitti stated that the HIB complaint was dated January 23, 2020. He recalled speaking to A.S.'s father on February 7, 2020, at a basketball game to coordinate a time to interview his daughters about the complaint. He could provide no information why he was told to arrange the interviews through F.S. as opposed to B.B.

Mr. Giovannitti stated that it is the policy to send a letter from the superintendent after the matter is submitted to the Board. He did not know what occurred here. He was aware that as the identified aggressor in the complaint, Coach Gunter should have

received a letter, but he did not know whether that occurred. Over the years, Mr. Giovannitti spoke with and observed Coach Gunter.

Jessica Rose Johnson is a school psychologist with the Paulsboro School District, who served as the Anti-Bullying Specialist for the 2019–2020 school year. As part of her responsibilities, she investigated HIB complaints. For the HIB complaint against Coach Gunter, Ms. Johnson only interviewed students involved with the team. She understood that Dr. Quint and Mr. Giovannitti had spoken to the adult personnel involved. In a typical HIB investigation, Ms. Johnson would have conducted the full investigation. She was not privy to any interviews conducted by Dr. Quint and Mr. Giovannitti.

In her experience, when there was a report of a potential HIB, the complaint was always investigated. She received this complaint on January 23, 2020. After receiving a general overview of the complaint, Ms. Johnson recalled not being comfortable interviewing school personnel. She expressed her concerns and understood that Mr. Giovannitti and Dr. Quint would interview the school personnel involved.

Based on the information Ms. Johnson collected, she found no evidence of a HIB incident. She put the "no" on the HIB form solely based on the information that she collected. (R-3.) Her investigation did not contain any statements from personnel or coaches. Ms. Johnson does not make the final decision on whether a HIB occurred. She did not believe her decision was complete because there was no statement from the accused. However, she believed that her investigation gave her the information she needed to decide whether HIB occurred. She determined that it had not.

When conducting her investigation, Ms. Johnson looked for corroboration of the allegations in the complaint and evidence of a HIB. In asking her interview questions, Ms. Johnson tried to keep the identity of the complainant confidential by asking general questions to illicit information.

B.B. testified on her own behalf. She believed that her daughter's expressed desire to harm herself was related to her treatment during the 2019 spring track season.

The two main incidents in the complaint stemmed from A.S.'s decision not to run the 4 x 100 relay, and her decision not to compete in the West Deptford relays so she could visit family. B.B. believed that because of these two decisions, the coaching staff subjected A.S. to a hostile environment. B.B. expressed her concerns directly to the Athletic Director, but nothing was ever done.

B.B. knew something had been bothering A.S. Eventually, A.S. put her feelings in a letter which she gave to her parents in October 2019. Dr. Quint was notified by a Board member of a portion of the letter wherein A.S. related she wanted to harm herself because of mistreatment from her track coach.

After Dr. Quint notified GCIT, A.S.'s case manager contacted B.B. and recommended a psychological evaluation. This resulted in therapy and services for A.S. to help her cope. B.B. believed it affected her education. B.B. recalled receiving an email dated May 16, 2019, from one of A.S.'s teachers notifying her that A.S. was struggling in class. B.B. attributed these struggles to what was occurring at track. Her school struggles continued into the following year.

After not hearing anything from Dr. Quint since the October notification, B.B. attended the December 16, 2019, Board meeting and addressed the Board about the problems her daughter experienced during the 2019 spring track season. Coach Gunter's contract was on the agenda, but the Board decided not to vote on it at that meeting.

On January 21, 2020, B.B. sent an email to Dr. Quint because she had not heard any results of his investigation. When Dr. Quint informed her that no action was going to be taken, B.B. requested a full HIB investigation. The only information B.B. ever received from Paulsboro was the April 28, 2020, letter with one line that stated there was no confirmation of a HIB incident.

B.B. reviewed the school's policy for conducting a HIB investigation and believes that the school did not follow its own policy in conducting the investigation of her complaint against Coach Gunter. She was never notified that the HIB investigation was sent to the Board on March 30, 2020. She follows the Board meeting calendar, so B.B. knew when

the Board met, but she never received anything about her complaint from the Superintendent. The only document she ever received was after the fact on April 28, 2020.

ADDITIONAL FINDINGS OF FACT

It is the obligation of the fact finder to weigh the credibility of the witnesses, and consider the witness's interest in the outcome, motive, or bias. Credibility is the value that a fact finder gives to a witness's testimony. Credibility is best described as that quality of testimony or evidence that makes it worthy of belief. "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 observations of mankind can approve as probable in the circumstances." In re Estate of Perrone, 5 N.J. 514, 522 (1950).

Dr. Quint was the only witness for respondent. Given his years of experience as a superintendent, his familiarity with the staff and faculty at Paulsboro, and his HIB experience, his testimony provided valuable insight. From his testimony, it was clear that when Dr. Quint was informed that a member of the track team had expressed suicidal ideations, his motivation was the welfare of the student/athlete. Although he never viewed this matter as a HIB, his actions in conducting an informal investigation, which he referred to as "HIB-like," may have been well-intentioned but clearly contributed to procedural irregularities with the HIB investigation and the corresponding mistrust expressed by B.B. Although none of petitioner's witnesses recollected being interviewed in a "HIB-like" investigation, it is impossible to confirm, based on the record, who Dr. Quint spoke to regarding his "HIB-like" investigation and what information, if any, they provided. Although Dr. Quint testified that he conducted his own investigation into the culture and atmosphere of the track team, his lack of specificity and documentation discredited his investigation. It was also clear, from the witnesses presented by petitioner, that neither the trainer nor the members of the coaching staff had any recollection of being interviewed.

Coach Cwik was a witness with first-hand knowledge. Her testimony was forthright, without bias or motivation, and sincere. Her long-standing association with the

track team and knowledge of the incidents that gave rise to petitioner's complaint made her a valuable and insightful witness. While Coach Cwik confirmed that she had not been interviewed or even informed about the HIB investigation, her testimony showed that the events involving A.S.'s decision not to compete in certain events did not constitute HIB. I accept Coach Cwik's testimony that she witnessed no yelling, intimidation, or bulling by Coach Gunter as credible.

The testimony from Principal Morina and Athletic Director/HIB Coordinator Giovannitti provided little detail about the investigation. Memories had faded after so many years and neither witness could provide much information. Principal Morina's testimony highlighted the confusion generated by the "HIB-like" investigation and missing pieces within the investigation, including a statement from the accused, Coach Gunter. Mr. Giovannitti's testimony was like Dr. Quint's in that it lacked specificity and corroboration from any of the coaching staff.

The testimony of Jessica Rose Johnson was highly persuasive. She conducted the HIB investigation of the victim, her sisters, and other members of the girls track team. She had read the entire letter written by A.S. and used that letter as the basis for formulating her questions. She investigated whether A.S. was pressured unfairly by her coach, threatened, or disparaged from the viewpoint of the victim. She candidly admitted her investigation was not complete because she did not have a statement from the accused or knowledge of any interviews with coaching staff. Despite that, Ms. Johnson had discretion to determine who to interview and what questions to ask. She testified that the questionnaires she prepared for the student/athletes, the responses she received, and the victim's sisters' written statements all provided her with the information she needed to determine that the incident was not a violation of HIB.

B.B. also offered testimony to highlight procedural irregularities with the HIB investigation and showed instances where Paulsboro deviated from its own policies.

Upon consideration of the above testimony and the documents in evidence, I **FIND**

the following as additional **FACTS**:

On January 23, 2020, the HIB investigation into allegations of harassment by Coach Gunter against A.S. was assigned to Ms. Johnson, the Anti-Bullying Specialist. The investigation was not completed within ten days and there was no statement in the Investigation Report from the accused.

The Investigation Report (R-3) was prepared by Ms. Johnson. Ms. Johnson asked A.S. a series of questions based on the information contained in the letter that B.B. shared with her. There was nothing contained in A.S.'s answers that identified specific incidents of mistreatment, abuse, or intimidation. A.S. and her two sisters submitted written statements. There was nothing in their statements that contained specific incidents identifying mistreatment, abuse, or intimidation; instead, their statements contained expressions of their own feelings and reactions to the events. A HIB Questionnaire was completed by K.R., a member of the track team. Her answers provided no specifics of mistreatment, yelling, or being forced to compete while injured. Questionnaires were also completed by two other members of the track team who recalled no issues with anyone being unkind or any athletes being forced to compete while injured. (R-3.)

Member of the coaching staff never witnessed Coach Gunter yelling, threatening, intimidating, or mistreating A.S. or any other member of the team.

A.S. may have experienced the pressure of being a star athlete on a championship team, but there is no evidence in this record that she experienced bullying, intimidation, or harassment from her head coach.

LEGAL ANALYSIS AND CONCLUSION

This appeal asks that I consider whether the conduct engaged in by Coach Gunter rose to bullying as defined by law, and whether petitioner was afforded adequate due

process during the course of the HIB investigation. N.J.S.A. 18A:37-14 defines HIB to include:

> [A]ny gesture, any written, verbal or physical act . . . whether it be a single incident or a series of incidents, that is reasonably perceived as being motivated either by any actual or perceived characteristic such as race, color, religion, ancestry, national origin, gender, sexual orientation, gender identity and expression, or a mental, physical or sensory disability, or by any other distinguishing characteristic, that takes place on school property, at any school-sponsored function, on a school bus, or off school grounds . . . that substantially disrupts or interferes with the orderly operation of the school or the rights of other students and that:
>
> a. a reasonable person should know, under the circumstances, will have the effect of physically or emotionally harming a student or damaging a student's property, or placing a student in reasonable fear of physical or emotional harm to his person or damage to his property;
>
> b. has the effect of insulting or demeaning any student or group of students; or
>
> c. creates a hostile educational environment for the student by interfering with a student's education or by severely or pervasively causing physical or emotional harm to the student.
>
> [N.J.S.A. 18A:37-14]

Districts are required by law to adopt policies that prohibit HIB; that outline expectations for student behavior; that set forth consequences for inappropriate behavior; and create procedures for reporting HIB related concerns. N.J.S.A. 18A:37-15. A school anti-bullying specialist must be assigned to each school, and the results of HIB investigations must be shared with the Superintendent of Schools and the Board of Education. Moreover, the law specifically requires as follows:

> (c) the results of each investigation shall be reported to the board of education no later than the date of the board of education meeting next following the completion of the investigation, along with information on any services

> provided, training established, discipline imposed, or other action taken or recommended by the superintendent;
>
> (d) parents or guardians of the students who are parties to the investigation shall be entitled to receive information about the investigation, in accordance with federal and State law and regulation, including the nature of the investigation, whether the district found evidence of harassment, intimidation, or bullying, or whether discipline was imposed or services provided to address the incident of harassment, intimidation, or bullying. This information shall be provided in writing within 5 school days after the results of the investigation are reported to the board. A parent or guardian may request a hearing before the board after receiving the information, and the hearing shall be held within 10 days of the request. The board shall meet in executive session for the hearing to protect the confidentiality of the students. At the hearing the board may hear from the school anti-bullying specialist about the incident, recommendations for discipline or services, and any programs instituted to reduce such incidents;
>
> (e) at the next board of education meeting following its receipt of the report, the board shall issue a decision, in writing, to affirm, reject, or modify the superintendent's decision. The board's decision may be appealed to the Commissioner of Education, in accordance with the procedures set forth in law and regulation, no later than 90 days after the issuance of the board's decision . . . .
>
> [N.J.S.A. 18A:37-15 (emphasis supplied).]

Regulations promulgated by the Department of Education further assist local districts in complying with these statutory requirements. N.J.A.C. 6A:16-7.9. The Commissioner has recognized that these requirements have equal applicability when a bullying charge is directed against a staff member. See K.T. on behalf of K.H. and T.D. v. Deerfield Bd. of Educ., EDU 00489-13, Initial Decision (June 19, 2013), rev'd and remanded, Comm'r (July 30, 2013), http://njlaw.rutgers.edu/collections/oal/ (where, in the context of a claim that a teacher bullied a kindergarten student, the Commissioner confirmed that the internal HIB investigation mandated by law is not discretionary).

Petitioner was not afforded the due process that was guaranteed by statute. The law provides that "parents or guardians of the students who are parties to the

investigation" must receive written information about the investigation. Here, petitioner was never afforded an opportunity to appear before the Board; never provided a written summary of the investigation; and never given a written decision from the Board in which it explained its rationale for not finding a HIB violation. How was she to trust in the investigation when she was given no information? More importantly, the failure to document any interviews with the coaching staff or to even advise the accused of the investigation tainted the investigation.

Indeed, this appeal exemplifies the harm that can flow from a failure to follow the statute and Paulsboro's HIB policies. Dr. Quint's "HIB-like" investigation was confusing and may have contributed to a failure to strictly follow policy. Moreover, the school administration clearly knew what its statutory responsibilities entailed; they just failed to follow them. I **CONCLUDE** that the Board failed to comply with the investigatory process contained in the statute and its own policies. I also **CONCLUDE** that the Board violated N.J.S.A. 18A:37-15(b)(6)(d) by not providing B.B. the investigation information, prior to the Board's April 27, 2020, meeting. In failing to comply with this statute, the Board deprived B.B. of her right to a hearing.

In this case, it makes no sense to return this matter to the Board to correct the procedural errors set forth herein. Although petitioner was never afforded an opportunity to appear before the Board, she has now been afforded a full evidentiary hearing on the merits.

The record herein allows me to make a determination whether there was any evidence to support petitioner's claim that her daughter was the target of HIB from her track coach. There is no evidence in the record or testimony from any of the witnesses to substantiate that Coach Gunter treated A.S. in a negative, demeaning, or hostile manner. Although Ms. Johnson's investigation only focused on the victim and other members of the track team, she credibly found no evidence of any conduct that rose to the level of a HIB violation.

Critical to my analysis is the definition of HIB under N.J.S.A. 18A:37-14. The record is completely devoid of any gestures, written, verbal, or physical acts committed

by Coach Gunter that was motivated by any actual or perceived characteristic, such as race, color, religion, ancestry, national origin, gender, sexual orientation, gender identity, disability, of any other distinguishing characteristic of the alleged victim, A.S. HIB must be motivated by a distinguishing characteristic. Here there is none. Accordingly, I **CONCLUDE** that the allegations contained in the Due Process Petitions do not meet the statutory definition of HIB.

Through this hearing, petitioner was given full due process rights and ample opportunity to show that the Board's decision was against the weight of the evidence. She failed to do so. No one testified that Coach Gunter committed an act of harassment, bullying, or intimidation against A.S. Accordingly, I **CONCLUDE** that the allegations contained in the Petitions of Appeal do not meet the legal standards of the HIB statute.

ORDER

Based on the foregoing, I **ORDER** that the consolidated petitions be **DISMISSED**.

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

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

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

November 15, 2022
DATE

Kathleen M. Calemmo
KATHLEEN M. CALEMMO, ALJ

Date Received at Agency: _____

Date Mailed to Parties: _____

KMC/jns

APPENDIX

WITNESSES

For petitioner

Gabrielle Prendergast

David Platt

Anita Evans

Paulette Cwik

Euridee Gunter

Paul Morina

John Giovannitti

Jessica Rose Johnson

B.B.

For respondent

Walter Quint

EXHIBITS

For petitioner

P-1 Letter and envelope, April 28, 2022

P-2 HIB investigation

P-3 Not admitted

P-4 Board report and confirmation

P-5 Not admitted

P-6 Not admitted

P-7 Not admitted

P-8 Not admitted

P-9 Letter to Board, December 16, 2019

P-10 Emails, January 21, 2020, and January 23, 2020

P-11 Board meeting minutes from December 16, 2019, and January 27, 2020

P-12 Not admitted

P-13 Not admitted

P-14 Not admitted

P-15 Not admitted

P-16 Not admitted

P-17 Not admitted

P-18 Not admitted

P-19 Not admitted

P-20 Not admitted

P-21 Not admitted

P-22 Not admitted

P-23 Not admitted

P-24 Not admitted

P-25 Not admitted

P-26 Not admitted

For respondent

R-1 Letter, dated November 4, 2011

R-2 Board actions, dated March 30, 2020, and April 27, 2020

R-3 HIB Finding, dated February 21, 2020

R-4 Board Policy No. 5131.1

35-23

New Jersey Commissioner of Education

Decision

Nicholas Cilento,

Petitioner,

v.

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

Respondent.

Synopsis

Petitioner appealed the decision of the respondent Board of Education (Board) to terminate his employment as a teacher after the State Board of Examiners (Board of Examiners) suspended his teaching certificates. Petitioner sought reinstatement to his tenured teaching position with back pay, benefits and emoluments; alternatively, petitioner requested that this matter be placed on the inactive list at the Office of Administrative Law (OAL) pending the disposition of petitioner's appeal of the Board of Examiners' suspension of his teaching certificates. This matter stems from the filing of tenure charges against petitioner by the respondent Board following two incidents of consuming alcohol on school premises while on duty in May 2019.

The ALJ found, *inter alia*, that: there are no material facts at issue here, and the matter is ripe for summary decision; petitioner, formerly a tenured teacher in the respondent Board's school district, was discovered drinking alcohol while on the job in May 2019; the Board brought tenure charges against petitioner and removed him from employment; after an independent arbitrator recommended against petitioner's dismissal, respondent reinstated him; subsequently – and notwithstanding the decision of the arbitrator – the State Board suspended petitioner's teaching certificates for a period of two years; once petitioner's certification was suspended, the Board terminated him from his tenured teaching position consistent with the requirements of *N.J.S.A.* 18A:26-2 and *N.J.A.C.* 6A:9B-5.1(c); the law is clear that a school board cannot permit a teacher to teach without certification, and as of October 28, 2021, petitioner lost his certification. The ALJ concluded that the Board acted appropriately and in accordance with the law when it removed petitioner from his tenured teaching position, because petitioner did not have a valid teaching certificate at the time of the Board's decision. Accordingly, the ALJ granted the Board's motion for summary decision and dismissed the petition.

Upon review, the Commissioner concurred with the findings and conclusion of the ALJ and adopted the Initial Decision as the final decision in this matter. The petition was dismissed.

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

35-23
OAL Dkt. No. EDU 01414-22
Agency Dkt. No. 249-12/21

New Jersey Commissioner of Education

Decision

Nicholas Cilento,

Petitioner,

v.

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

Respondent.

The record of this matter and the Initial Decision of the Office of Administrative Law (OAL) have been reviewed, as have the exceptions filed pursuant to *N.J.A.C.* 1:1-18.4 by the petitioner. The Woodbridge Board of Education (Board) did not a file a reply.

In this matter, petitioner – a tenured teacher – challenges the Board's decision to terminate him after the New Jersey State Board of Examiners (Board of Examiners) suspended his teaching certificate. By way of background, the Board filed tenure charges against petitioner following two incidents of consuming alcohol on school premises while on duty, on May 20 and May 21, 2019. The arbitrator assigned under *N.J.S.A.* 18A:6-16 to conduct the tenure hearing determined that petitioner engaged in unbecoming conduct and suspended his employment for a period of three months, but determined that petitioner's conduct did not warrant termination. Thereafter, on October 28, 2021, the Board of Examiners found that petitioner's unbecoming conduct warranted a two-year suspension of his teaching certificate.

The Commissioner upheld the suspension, and an appeal of that decision is currently pending in the Appellate Division. On November 9, 2021, the Board terminated petitioner's employment, effective the date that the Board of Examiners suspended his certificate. Petitioner subsequently filed this appeal challenging his termination.

On a motion for summary decision, the Administrative Law Judge (ALJ) concluded that the Board acted in accordance with the law when it terminated petitioner as he did not have a valid teaching certificate at the time he was removed from his position. The ALJ also found that there is no reason to delay this matter while the appeal in the Appellate Division is pending, because: "[t]he question here is not whether the action of the [Board of Examiners] was legal, it is whether the action of [the Board] in November 2021, made in reliance on the decision of the [Board of Examiners], was legal." (Initial Decision at 7).

In his exceptions, petitioner argues that the ALJ ignored the procedural dilemma faced by petitioner when he was forced to initiate this challenge of his termination due to the 90-day filing deadline, while his appeal of the Board of Examiners' suspension of his certificates is still pending in the Appellate Division. Petitioner also contends that the ALJ failed to decide claims alleged in the verified petition, specifically whether the Board of Examiners' Order of Suspension was arbitrary, capricious, unreasonable and contrary to law. According to petitioner, he has a property right in his tenured teaching position, which was taken from him without due process. Petitioner contends that the ALJ erred in finding that petitioner would be able to bring an action against the Board of Examiners for damages to address the violation of petitioner's property and due process rights if the Appellate Division finds that the Board of Examiners' suspension was invalid; in fact, the Commissioner does not have authority to award

monetary damages and the relief that petitioner seeks is reinstatement to his position. Petitioner maintains that this matter should have been placed on the inactive list at the OAL pending the outcome of the appeal in the Appellate Division, since it will affect the outcome of this matter. As such, petitioner urges the Commissioner to reject the Initial Decision.

Upon review, the Commissioner agrees with the ALJ that the Board was not arbitrary, capricious, or unreasonable in terminating petitioner. Pursuant to *N.J.S.A.* 18A:26-2, "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[.]" Accordingly, a school district "shall remove from the position any teaching staff member who fails to maintain" the required certificate. *N.J.A.C.* 6A:9B-5.1(c). In this matter, petitioner failed to maintain a valid certificate as of October 28, 2021, when his teaching certificate was suspended by the Board of Examiners. Therefore, the Board acted in accordance with law when it terminated petitioner from his teaching position for not possessing a valid teaching certificate.

The Commissioner is also in accord with the ALJ that a decision on this matter is not dependent on the outcome of the case at the Appellate Division. Whether the Board's actions in November 2021 were arbitrary, capricious or unreasonable will not change if petitioner is successful in his pending appeal. As such, the ALJ appropriately declined to place this matter on the inactive list.

The Commissioner is not persuaded by petitioner's exceptions. The "procedural dilemma" petitioner discusses does not affect the outcome of this case. Petitioner appropriately initiated the challenge of his termination within the 90-day limitations period, and it is of no moment that his appeal is still pending in the Appellate Division. Additionally, the

Commissioner disagrees with petitioner that the ALJ needed to determine whether the Board of Examiners acted contrary to law in issuing the Order of Suspension. That issue has already been decided by the Commissioner and is pending in the Appellate Division, and it is not relevant to a determination of this matter. Regarding petitioner's alleged property right in his tenured teaching position and violation of due process, the Commissioner finds that petitioner received the process that he was due in the suspension matter, the appeal before the Commissioner, and the matter herein. The Commissioner agrees with petitioner that a separate action against the Board of Examiners in the future would not result in reinstatement to his position, as petitioner seeks, but finds that the viability of a future matter does not affect this case.

Accordingly, the Initial Decision of the OAL is adopted as the final decision in this matter, and the petition is hereby dismissed.

IT IS SO ORDERED. [1]

Angelica Allen-McMillan, Ed.D.
ACTING COMMISSIONER OF EDUCATION

Date of Decision: February 6, 2023
Date of Mailing: February 8, 2023

[1] This decision may be appealed to the Appellate Division of the Superior Court pursuant to *N.J.S.A.* 18A:6-9.1. Under *N.J.Ct.R.* 2:4-1(b), a notice of appeal must be filed with the Appellate Division within 45 days from the date of mailing of this decision.

State of New Jersey
OFFICE OF ADMINISTRATIVE LAW

INITIAL DECISION
SUMMARY DECISION
OAL DKT. NO. EDU 01414-22
AGENCY DKT. NO. 249-12/21

NICHOLAS CILENTO,
Petitioner,
v.
TOWNSHIP OF WOODBRIDGE BOARD OF EDUCATION, MIDDLESEX COUNTY,
Respondent.

Edward A. Cridge, Esq., for petitioner (Mellk Cridge, LLC, attorneys)

Roshan D. Shah, Esq., for respondent (Anderson & Shah, LLC, attorneys)

Record Closed: October 14, 2022 Decided: November 18, 2022

BEFORE **TRICIA M. CALIGUIRE**, ALJ:

STATEMENT OF THE CASE

Petitioner Nicholas Cilento (Cilento) appeals the decision of respondent Township of Woodbridge Board of Education (Woodbridge Board) to terminate his employment as a teacher after the New Jersey Department of Education, State Board of Examiners (State Board), suspended Cilento's teaching certificates. Petitioner seeks reinstatement to his

tenured teaching position with back pay, benefits and associated emoluments or, alternatively, petitioner requests that this matter be placed on the inactive list, pending the disposition of Cilento's appeal of the State Board's suspension of his teaching certificates.

Respondent contends that it had no choice but to terminate petitioner's employment once he lost his teaching certificates because without teaching certificates, petitioner was ineligible to work as a teacher. See N.J.S.A. 18A:26-2; N.J.A.C. 6A:9B-5.1(a).

PROCEDURAL HISTORY

Petitioner's appeal was received at the Department of Education, Office of Controversies and Disputes (DOE), on December 30, 2021. The DOE transmitted this matter as a contested case to the Office of Administrative Law (OAL), where it was filed on February 22, 2022. N.J.S.A. 52:14B-1 to -15; N.J.S.A. 52:14F-1 to -13. The parties appeared for prehearing conferences on April 25, and July 19, 2022, and on September 7, 2022, respondent filed a motion for summary decision in its favor. On September 28, 2022, petitioner filed a brief in opposition to the motion for summary decision and cross-motion for placement on the inactive list. On October 14, 2022, respondent filed a reply in further support of its motion for summary decision and in opposition to petitioner's cross-motion to place this matter on the inactive list. No further papers were filed, and the cross-motions are now ripe for review.[1]

FACTUAL DISCUSSION

Based on the papers filed in this matter, including the certifications of counsel and petitioner, I **FIND** the following **FACTS** undisputed:

1. The Woodbridge Board operates and manages the Woodbridge Township School District.

[1] Although petitioner requested oral argument, I directed that this matter would be decided on the papers. See N.J.A.C. 1:1-12.2(d).

2. Petitioner was a teacher employed by the Woodbridge Board from September 1, 2007, until his termination on November 18, 2021 (effective October 28, 2021).

3. Following two in-school incidents in May 2019, the Woodbridge Board filed five tenure charges against petitioner with the recommended penalty of removal from employment.

4. Charge I was for unbecoming conduct and/or other just cause, including insubordination — consuming alcohol during work in violation of established standards of professional behavior.

5. Charge II was for unbecoming conduct and/or other just cause, including insubordination — consuming alcohol during work in violation of state law.

6. Charge III was for unbecoming conduct and/or other just cause, including insubordination — consuming alcohol during work in violation of municipal law.

7. Charge IV was for insubordination and unbecoming conduct and/or other just cause — violations of district policy.

8. Charge V was for a pattern or course of unbecoming conduct over a protracted period of time.

9. An arbitration hearing on the above charges was held on August 31, and September 1, 2020. The arbitrator sustained tenure charges I through IV but did not find dismissal from employment warranted. The Woodbridge Board reinstated petitioner.

10. On October 28, 2021, the State Board suspended petitioner's teaching certificates for two years, notwithstanding the decision of the arbitrator.

11. Woodbridge Board Superintendent Joseph E. Massimino notified petitioner by letter dated November 9, 2021, that he would recommend petitioner's termination to respondent at its next meeting, effective as of the date of the State Board's decision.

12. On November 18, 2021, respondent approved petitioner's termination from employment, effective October 28, 2021.

13. On December 6, 2021, petitioner appealed the State Board's decision to suspend his teaching certificates.

14. On December 30, 2021, petitioner filed this appeal on the grounds that respondent's decision "was arbitrary, capricious, unreasonable, contrary to and in violation of law, and without legal force or effect."

15. In a final agency decision dated June 23, 2022, Acting Commissioner of Education Angelina Allen-McMillen upheld the decision of the State Board.

16. On July 25, 2022, petitioner filed an appeal of the Acting Commissioner's decision with the Appellate Division of the Superior Court of New Jersey. That appeal is pending.

LEGAL ANALYSIS

Summary decision may be granted when "the papers and discovery which have been filed, together with the affidavits, if any, show that there is no genuine issue as to any material fact challenged and that the moving party is entitled to prevail as a matter of law." N.J.A.C. 1:1-12.5(b). The rule further provides that an adverse party must respond by affidavit setting forth specific facts showing that there is a genuine issue which can only be determined at an evidentiary hearing. Ibid. The OAL rule is modeled on New

Jersey Court Rule 4:46-2. The New Jersey Supreme Court has explained that when deciding a motion for summary judgment under R. 4:46-2,

> . . . a determination whether there exists a "genuine issue" of material fact that precludes summary judgment requires the motion judge to consider whether the competent evidential materials presented, when viewed in the light most favorable to the non-moving party, are sufficient to permit a rational factfinder to resolve the alleged disputed issue in favor of the non-moving party.
>
> [Brill v. Guardian Life Ins. Co. of Am., 142 N.J. 520, 540 (1995).]

I **CONCLUDE** that the parties raise no dispute with respect to material facts and the issues raised by respondent's motion for summary decision and petitioner's cross-motion to have this matter placed on the inactive list can be decided as a matter of law.

The decisions of local governmental bodies, such as school boards of education, carry the presumption of validity and "will remain undisturbed absent a showing of arbitrary, capricious or unreasonable action." Palamar Constr., Inc. v. Pennsauken, 196 N.J. Super. 241, 250 (App. Div. 1983). The burden of proving the action of the governmental agency was arbitrary and capricious lays with the petitioner. J.M. by his guardian D.M. v. Hunterdon Central Regional High School Dist., 96 N.J.A.R. 2d 415, 419 (December 4, 1995), Comm'r. (January 18, 1996).

In terminating petitioner, respondent acted in compliance with the requirements of N.J.S.A. 18A:26-2, which states that "[n]o 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[.]" See also N.J.A.C. 6A:9B-5.1(a) ("any person employed as a teaching staff member by a district board of education shall hold a valid and appropriate certificate"); and N.J.A.C. 6A:9B-5.1(b) (a district "shall remove . . . any teaching staff member who fails to maintain" required certifications). As a local school board, the Woodbridge Board has "the duty to enforce rules promulgated by the State Board." Parsippany-Troy Hills Educ. Assn. v. Bd. of Educ. of Parsippany-Troy Hills, 188 N.J. Super. 161, 166 (App. Div. 1983), citing N.J.S.A. 18A:11-1.

It is undisputed that: petitioner obtained tenure prior to May 2019; in May 2019, petitioner was discovered drinking alcohol while on the job; respondent brought five tenure charges against petitioner and removed him from employment; when an independent arbitrator recommended against dismissal, respondent reinstated petitioner; notwithstanding the decision of the arbitrator, the State Board revoked petitioner's teaching certificates; once petitioner lost his certification, respondent terminated him from his tenured teaching position consistent with the requirements of the above law, regulations, and caselaw.

By his petition, petitioner seeks to reverse the decision of respondent to remove him from his tenured teaching position. He concedes that the present appeal is separate and apart from his challenge to the action of the State Board. At the same time, however, petitioner recognizes that until and unless the decision of the State Board to revoke his teaching certificates is reversed in another forum, he cannot prevail in this one.[2] Petitioner argues that the decision of the Appellate Division (or the Supreme Court of New Jersey, should either party pursue that appeal) will be dispositive. In short, if the decision of the State Board to revoke petitioner's teaching certificates is upheld, so too will be the decision of respondent to terminate him for failure to hold the requisite certification. On the other hand, if the State Board is reversed, and petitioner's certificates are returned to him, then the decision of respondent must also be reversed. Therefore, petitioner argues, fairness and the need to conserve judicial resources compels me to hold off on a decision and simply place this matter on the inactive list until the higher court(s) act.

Respondent, however, contends that even if the action of the State Board is later vacated by the Appellate Division, that will not change the basis by which respondent acted in 2021. "The Appellate Division's future decision, whichever way it goes, cannot retroactively deem the Woodbridge BOE's decision to be arbitrary and capricious." Reply Brief of Respondent in Further Support of Motion for Summary Decision (October 14, 2022), at 4 (emphasis in original). Therefore, there is no need to wait to decide whether respondent's decision to terminate petitioner's employment was arbitrary, capricious and

[2] Petitioner could not wait for the Appellate Division to act on his appeal of the State Board's action, however, because of the ninety-day statute of limitations to appeal the decision of the Woodbridge Board.

unreasonable. It was not; the law is clear that a school board cannot permit a teacher to teach without certification. As of October 28, 2021, petitioner lost his certification. The decision of respondent to terminate him was correct at the time it was made.

Petitioner further argues that he has a "protectible property right in his tenured position," and there must be "a remedy by suit or action at law where that right is invaded." Letter Brief of Petitioner in Opposition to Motion for Summary Decision and in Support of Cross-Motion to Place Case on the Inactive List (September 27, 2022), at 5. Here, petitioner not only challenges the loss of his tenured position, but of "the lawfulness" of the actions of the State Board and Acting Commissioner of the DOE. Ibid. He then contends that a ruling here in respondent's favor must be preceded by a finding that the actions of the State Board and Acting Commissioner were in fact legal. Id. at 7. I disagree.

The question here is not whether the action of the State Board was legal, it is whether the action of respondent in November 2021, made in reliance on the decision of the State Board, was legal. There is no reason to delay a decision on the latter issue to account for circumstances that may change years after the Woodbridge Board acted. I **CONCLUDE** that respondent acted appropriately and in accordance with the law to remove petitioner from his tenured teaching position as petitioner did not have a valid teaching certificate at the time of respondent's decision. As respondent notes, any violation of petitioner's property and/or due process rights may be addressed by an action against the State Board for damages and other appropriate relief if the action of the State Board is found to be invalid.

ORDER

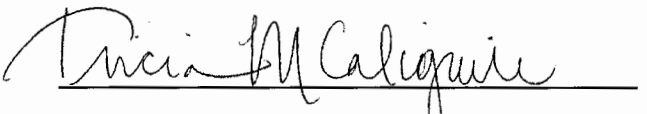
For the reasons cited above, I **ORDER** that the motion of respondent Township of Woodbridge Board of Education for summary decision in its favor is hereby **GRANTED**, the cross-motion of petitioner Nicholas Cilento to place this matter on the inactive list is hereby **DENIED** and the appeal of petitioner is hereby **DISMISSED**.

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

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

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

November 18, 2022
DATE



TRICIA M. CALIGUIRE, ALJ

Date Received at Agency: _____

Date Mailed to Parties: _____

TMC/nn

36-23

BEFORE THE COMMISSIONER OF EDUCATION
OF THE STATE OF NEW JERSEY

In the Matter of the Tenure Hearing of	:	Agency Docket No.
	:	271-10/22
	:	
BOGOTA PUBLIC SCHOOL DISTRICT,	:	Opinion & Award
BERGEN COUNTY,	:	
	:	
Petitioner,	:	
	:	
-and-	:	
	:	
LOUIS J. SEVERINO,	:	
	:	
Respondent.	:	

APPEARANCES:

FOR THE PETITIONER:

NOWELL, P.A.,
William C. Soukas, Esq.

FOR THE RESPONDENT:

RICCI & FAVA
Michael J. DeMarco, Esq.

BEFORE: David J. Reilly, Esq., Arbitrator

PRELIMINARY STATEMENT

This matter comes before me on the tenure charges (the "Charges") that the Board of Education of the Bogota Public School District (the "Board" or "Petitioner") certified against Louis J. Severino ("Respondent") on or about October 10, 2022. The Charges allege Respondent, a tenured teacher, engaged in misconduct relative to an incident that occurred on June 6, 2022 between him and two students at the Bogota High School. In accordance with N.J.S.A. 18A:6-16, on October 21, 2022, I was appointed as the arbitrator to hear and decide this matter.

A hearing was held on December 22, 2023, during which the parties engaged in settlement discussions and ultimately reached an agreement resolving this matter.

On January 12, 2023, the parties submitted an executed a settlement agreement ("Settlement Agreement"), confirming such resolution.[1] In addition, the parties provided a joint submission ("Joint Submission"), requesting approval of the Settlement Agreement and detailing their supporting reasons.

DISCUSSION AND FINDINGS

After careful review and thorough consideration of the Charges, the Settlement Agreement and the Joint Submission, I am satisfied that the terms of the parties' settlement are reasonable and in the best interest of both parties and the public, and thus, warrant approval.

The New Jersey Department of Education's standards governing settlement of tenure charges, as articulated in *In re Cardonick,* 1990 S.L.D. 842, 846, and codified at

[1] The Settlement Agreement includes: (1) a Certification from Petitioner's counsel, William C. Soukas, Esq., affirming that the Board has consented to the settlement; and (2) a Certification from Respondent's counsel, Michael J. DeMarco, Esq., certifying that Severino has consented to the settlement with a full understanding of his rights. *See* Settlement Agreement at 9 – 10.

N.J.A.C. §6A:3-5.6, require that the proposed settlement: (1) document the nature of the charges; (2) include an explanation of the circumstances justifying settlement; (3) reflect the consent of both parties; (4) indicate the charged party entered into the agreement with a full understanding of its terms; (5) demonstrate that the agreement is in the public interest; and (6) specify, where the charged party is a teaching staff member, that he/she has been advised of the Commissioner's duty to refer tenure determinations resulting in a loss of position to the State Board of Examiners for possible suspension or revocation of certificate. *Id.*[2]

Upon examination, it is plain that the documents submitted by the parties, on their face, satisfy requirements (1) – (4) and (6). *See* Joint Submission at 2 - 4; Settlement Agreement at 5 – 10 & Exhibits A – B. The only matter to be resolved then is whether the parties have demonstrated that their settlement of this matter is in the public interest. As stated above, I am persuaded that they have satisfied their burden in this regard.

In reaching this conclusion, as an initial matter, I take note of the parties' representation that the charges stem from a brief, one-time incident, which stands in stark contrast to the otherwise unblemished record Respondent has established over his lengthy career with the Board.[3] Indeed, during his seventeen years of service, the parties report that Respondent has never been the subject of any similar allegations, nor has he received disciplinary action or faced tenure charges. *See* Joint Submission at 3.

Further, the parties aver that the incident at issue here involved matters that were

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[2] As background for these standards, the Commissioner has explained, "once taken up the burden of tenure charges, a board may not lay it down without spreading forth on the record a reasonably specific explanation of why such charges need no longer be pursued or why it is now in the public interest not to pursue them." *In the Matter of the Tenure Hearing of Gilbert Alvarez,* Commissioner's Decision 274-09, at 2 (September 4, 2009).

[3] The duration of the incident is reported to have been approximately one minute. *See* Joint Submission at 3.

personal, unusual and highly unlikely to recur. Also, in reviewing this matter, the Board determined that Respondent's conduct did not involve child abuse or sexual misconduct, and, as such, N.J.S.A 18A:6-7.6 – 7.13(iv) does not require that the incident be reported to public school employers contemplating hiring Respondent. *See* Joint Submission at 3.

These circumstances in no way diminish the gravity of the charges, which involve a physical altercation after school hours between the Respondent and two students, who were then eighteen and nineteen years old. They do, however, provide context for evaluating the appropriateness of the agreed upon settlement.

In addition, and more importantly, on the parties' joint submission, I am satisfied that the Board's decision to settle this matter reflects more than a desire to avoid the cost, burden and uncertainty of proceeding to hearing on the Charges.

Indeed, on the documentation supplied, objective evidence exists that advances Respondent's contention that he was not the aggressor in the June 6, 2022 incident, but instead was engaged in self-defense.[4] For example, reflective of such claim, the photographs produced show that Respondent sustained injuries to his face and body. *See* Joint Submission at 3; Settlement Agreement at 2 & Exhibit C.

Further, as cited, independent third-party determinations lend support for the conclusion that the parties have acted in the public interest by settling this matter. Namely, in response to a report of the June 6, 2022 incident: (1) the Bergen County Prosecutor declined to pursue any criminal charges against Respondent; and (2) the Institutional Abuse Investigative Unit of the New Jersey Child Protection and

[4] The parties report that Respondent has filed complaints of simple assault against each of the two students involved with the June 6, 2022 incident. These charges are currently pending in Lodi Municipal Court, where Hon. Martin Geisler, J.M.C. has found probable cause as to both complaints. In addition, two charges of simple assault filed against Respondent by the Bogota Police Department are also pending in that same Court. *See* Joint Submission at 2.

Permanency Division determined that an investigation of the matter was not warranted. *See* Joint Submission at 3.

In assessing the Settlement Agreement, I also take note that it subjects Respondent to serious adverse consequences. By its terms, he has agreed to resign his employment with the Board and relinquish whatever right he may have had to continued employment with the Bogota School District. In addition, he has acknowledged being notified that it is the duty of the Commissioner of Education to refer tenure charges resulting in the loss of position to the State Board of Examiners for possible action as to his teaching certificate. *See* Joint Submission at 3 – 4; Settlement Agreement at 3 & Exhibit D.

Finally, in determining whether the Settlement Agreement serves the public interest, I recognize that consideration must be given to matters beyond the boundaries of the Bogota School District. In doing so, I am persuaded that the parties' settlement meets this standard. Simply put, as the parties represent, it serves to remove Respondent from the charging district, where his continued presence would be a potential distraction, while allowing him the opportunity to transition to another school district where his established ability to function effectively as a graphic arts teacher could properly fill an otherwise unsatisfied need. *See* Joint Submission at 4.

Accordingly, for all these reasons, I conclude that the parties' Settlement Agreement satisfies the *Cardonick* standards, and, as such, is approved.

AWARD

1. The parties' Settlement Agreement resolving the tenure charges in this matter satisfies the *Cardonick* standards and N.J.A.C §6A:3-5.6, and therefore, is approved.

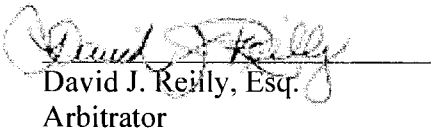
Dated: February 8, 2023

David J. Reilly, Esq.
Arbitrator

STATE OF NEW YORK)
) ss.:
COUNTY OF NEW YORK)

I, David J. Reilly, Esq., affirm that I am the individual described herein and who executed this instrument, which is my Opinion and Award.

Dated: February 8, 2023



David J. Reilly, Esq.
Arbitrator

43-23-E
OAL Dkt. No. EDU 00979-23
Agency Dkt. No. 18-1/23

New Jersey Commissioner of Education

Order on Emergent Relief

J.R., on behalf of minor child, J.R.,

Petitioner,

v.

Board of Education of the Township of West Deptford, Gloucester County,

Respondent.

The record of this emergent matter, the sound recording of proceedings at the Office of Administrative Law (OAL), and the recommended Order of the Administrative Law Judge (ALJ) have been reviewed. Upon such review, the Commissioner concurs with the ALJ that petitioner has failed to demonstrate entitlement to emergent relief pursuant to the standards enunciated in *Crowe v. DeGioia,* 90 *N.J.* 126 (1982), and codified at *N.J.A.C.* 6A:3-1.6.

Accordingly, the recommended Order of the OAL denying petitioner's application for emergent relief is adopted for the reasons stated therein. This matter shall continue at the OAL with such proceedings as the parties and the ALJ deem necessary to bring it to closure.

IT IS SO ORDERED.

Angelica Allen-McMillan, Ed.D.
ACTING COMMISSIONER OF EDUCATION

Date of Decision: February 17, 2023
Date of Mailing: February 17, 2023

48-23

STATE OF NEW JERSEY
DEPARTMENT OF EDUCATION

In the Matter of the Tenure Hearing of	:	Agency Docket No. 101-6/21
	:	
SCHOOL DISTRICT OF THE CITY OF EAST ORANGE, ESSEX COUNTY	:	Opinion & Award
	:	
Petitioner,	:	
	:	
-and-	:	
	:	
ROTIMI OWOH,	:	
	:	
Respondent.	:	

APPEARANCES:

FOR THE PETITIONER:
ANTONELLI KANTOR RIVERA
Ramon E. Rivera, Esq.
Madeline P. Hicks, Esq.

FOR THE RESPONDENT:
THE LAW OFFICE OF ROTIMI OWOH
Rotimi A. Owoh , Esq.

BEFORE: David J. Reilly, Esq., Arbitrator

PRELIMINARY STATEMENT

This matter comes before me on the tenure charges ("Tenure Charges") certified on or about June 24, 2021 by the School District of the City of East Orange, Essex County (the "District" or "Petitioner") against Rotimi Owoh ("Respondent"), a tenured teacher. The Tenure Charges allege that Respondent exhibited excessive absenteeism during the 2018-2019, 2019-2020 and 2020-2021 school years, which, together with other related conduct, amounts to Incapacity, Conduct Unbecoming, Insubordination, Neglect of Duty and Other Just Cause pursuant to N.J.S.A. 18A:6-10, 6-11, 6-16, 6-17.1 and N.J.A.C 6A:3-5.1. (Arbitrator Exhibit 1.)

In accordance with N.J.S.A. 18A:6-16, on July 28, 2021, I was appointed as the arbitrator to hear and decide this matter.[1]

A hearing on the charges against Respondent was conducted on December 13, 2022, by videoconference.[2] Respondent did not appear at the hearing despite having been

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[1] Following a pre-hearing conference, the District filed a motion for summary decision, asserting Respondent's failure to comply with the procedures governing the filing of his answer, N.J.A.C. 6A:3-5.3, compelled a determination that the Tenure Charges had been admitted and, in turn, that Respondent's dismissal was warranted. On November 2, 2021, after considering the parties' respective arguments on the matter, I denied the motion, finding insufficient support for

[2] It was necessary for the hearing to proceed by videoconference, so as to avoid further delay, as I tested positive for COVID-19 just prior to December 13, 2022, thereby precluding my conducting an in-person proceeding. By December 2022, the hearing in this matter had been delayed for more than a year. Hearing dates in December 2021 and January 2022 had to be adjourned due to the unavailability of meeting space and a fire at Respondent's home. At Respondent's request, I subsequently granted multiple adjournments of scheduled hearing days in February, March and April 2022, based upon his representation that Petitioner's failure to respond to his November 4, 2021 written requests for records pursuant to the New Jersey Open Meetings Act ("OPMA") and the New Jersey Open Public Records Act ("OPRA") was adversely effecting his ability to prepare properly for the hearing in this matter. On April 5, 2022, I granted Respondent's motion to stay this proceeding, based upon his having commenced an action in New Jersey Superior Court, Essex County, Docket No. L 001745-22, challenging Petitioner's failure to comply with his OPMA request ("OPMA Action"). On July 25, 2022, Respondent dismissed the OPMA Action and renewed a July 7, 2022 motion to stay this proceeding based upon his having filed an action against Petitioner in New Jersey Superior Court, Essex County, Docket No. L 001930-22, alleging discrimination and retaliation in violation of the New Jersey Law Against Discrimination ("NJLAD") and other statutes. ("LAD Action"). By interim Opinion and Order, dated August 17, 2022, I denied that motion. Thereafter, by notice dated September 23, 2022, I scheduled hearing dates for November 1 and 9, 2022. On October 31, 2022, at Respondent's request, the November 1, 2022 hearing was adjourned, due to health reasons. In granting that adjournment, I notified Respondent that the matter would be marked peremptory as to him going forward, such that no further adjournments would be granted absent extraordinary and compelling circumstances.

given due notice of the scheduled date and time and being previously informed that with the granting of prior adjournments at his request, including most recently for the November 1, 2022 hearing date, this matter would be marked peremptory as to him going forward.[3]

Upon the conclusion of the December 13, 2022 hearing day, the District elected to close by submitting a post-hearing brief.[4] With the receipt of the District's brief on January 20, 2023, I declared the hearing record closed as of that date.

BACKGROUND

Respondent's employment by the District as a teacher dates to September 1, 2001. (Arbitrator Exhibit 1; District Exhibit 1.) Most recently, he was assigned to the Dionne Warwick Institute, an elementary school. He has no record of prior tenure charges.

The following day, November 1, 2022, Respondent gave notice of his unavailability on the next scheduled hearing date, November 9, 2022, due to a court appearance in another matter, as to which he had notice since September 15, 2022. Citing Respondent's delay in raising this issue and concluding that he had not presented extraordinary and compelling circumstances to warrant granting a further adjournment, by notice dated November 1, 2022, I declined to do so and advised that the November 9, 2022 hearing would proceed as scheduled. On that date, Respondent did not appear for the hearing. After recessing for an hour, Petitioner, in view of Respondent's absence, elected to defer presentation of its case until the next scheduled hearing day, December 13, 2022, and Respondent was so notified.

[3] I issued notice of the December 13, 2022 hearing date on November 3, 2022. Respondent had previously confirmed his availability on that day. From Respondent's communications, it appears his failure to attend the December 13, 2022 hearing stems from a motion for summary decision that he filed on November 4, 2022. By that motion, he requested a dismissal of the instant Tenure Charges, based upon an entry of default as to the District in the LAD Action. Although I informed him in writing that the motion would be addressed at the December 13, 2022 hearing, he replied that holding the hearing would defeat the purpose of the default and his attendance at the hearing would constitute implied consent to the District re-litigating the issues otherwise foreclosed by the default. At the December 13 2022 hearing, after giving due consideration to the parties' respective arguments, I ruled that the motion would be taken under advisement and addressed in my ultimate decision in this matter. I directed the parties to advise me of any developments in the LAD Action on which the motion was based. I have since learned that Respondent's motion has been mooted, as the Court in the LAD Action granted the District's motion to vacate the default. For this reason, Respondent's motion for a summary decision dismissing the Tenure Charges is denied.

[4] By correspondence dated December 13, 2022, I informed Respondent of what transpired at the hearing that day, including: (1) Respondent's motion for summary decision was taken under advisement and would be addressed in the ultimate decision in this case; (2) Petitioner commenced and concluded the presentation of its case in chief, which consisted of the testimony of Marissa McKenzie and 30 District Exhibits; (3) the Tenure Charges and Respondent's Answer were received as Arbitrator Exhibits 1 and 2, respectively; and (4) Petitioner had been granted until January 20, 2023 to submit its post-hearing brief, upon receipt of which the record would be closed. Since then, Respondent has not requested an opportunity to submit evidence or file a post-hearing brief.

The Tenure Charges

The charges against Respondent consist of the following:

> **CHARGE ONE: INCAPACITY (EXCESSIVE ABSENTEEISM)**
>
> **CHARGE TWO: CONDUCT UNBECOMING (ABSENCE WITHOUT LEAVE)**
>
> **CHARGE THREE: INSUBORDINATION**
>
> **CHARGE FOUR: NEGLECT OF DUTY**
>
> **CHARGE FIVE: OTHER JUST CAUSE**

(Arbitrator Exhibit 1.)[5]

The essential facts concerning these charges can be stated as follows:

District's Attendance Policy

Marissa McKenzie, the District's Business Administrator, testified that the District maintains an attendance policy (the "Policy") that provides guidance to staff regarding the District's expectations as too time and attendance and the consequences of failing to satisfy them. (District Exhibit 2.)[6]

In particular, the Policy states, in relevant part:

> The East Orange Board of Education recognizes that an effective educational system is one in which all members, whenever possible, report for duty each and every working day. Therefore, to foster and maximize staff attendance at the 95 percent level, an attendance improvement program shall be developed and implemented.
>
> The primary purpose of the attendance program shall be to improve and maintain the quality of education. Improved attendance will increase the level of staff contact time and ensure the continuity of learning by reducing to a minimum the interruption of services provided students by full time staff.

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[5] The Tenure Charges include a detailed statement identifying the allegations supporting each individual charge. (Arbitrator Exhibit 1.)

[6] From June 2016 – April 2022, McKenzie served as the District's Director Labor Relations and Employee Services.

> The regular and prompt attendance of teaching staff members is an essential element in the efficient operation of the school district and the effective conduct of the educational program. Staff member absenteeism disrupts the educational program the Board of Education considers attendance an important component of staff member's job performance.
>
> A teaching staff member who fails to give prompt notice of an absence, misuses sick leave, fails to verify an absence in accordance with Board policy, falsifies the reason for an absence, is absent without authorization, is repeatedly tardy, or accumulates an excessive number of absences may be subject to appropriate consequences, which may include the withholding of salary increments, dismissal and/or certification of tenure charges.

(District Exhibit 2.)

Respondent's Attendance and Leave of Absence Record

McKenzie testified that throughout Respondent's employment with the District, he demonstrated a pattern of excessive absenteeism.

2018-2019 School Year. During the 2018-2019 school year, she said, his attendance deteriorated further. In particular, she noted, he was absent over fifteen days, which involved a combination of personal leave and personal illness leave. (District Exhibit 3.)

On February 28, 2019, Principal Flore-Nadeige Lovett issued Respondent a notice, advising that as of that time, he had been absent a total of 7.5 days and tardy 19 times. She expressed concern as to these statistics and reminded Respondent, "regular attendance is necessary to insure a smooth running educational program." She also scheduled for him to meet with Assistant Principal Kevin Williams to discuss this matter. (District Exhibit 4.)

2019-2020 School Year. During the following school year, 2019-2020, McKenzie related, Respondent, beginning September 16, 2019 and continuing for the balance of the year, was unable to report for work due to health reasons. During the course of the year,

she said, he supplied doctor's statements confirming his medical condition, some of which identified return work dates that were subsequently revised. (District Exhibits 5 -19.)

As of December 6, 2019, she noted, he applied and was subsequently approved for a Family or Medical Leave of Absence ("FMLA"). (District Exhibits 8-11.) The District extended his leave several times during the course of the year, ultimately continuing it through balance of the term (i.e., June 30, 2020). (District Exhibits 11, 13-14, 17-18.)

2020-2021 School Year. She continued that as of June 24, 2020, Respondent had submitted notice of his intent to return to work for the upcoming school year, but had failed to provide medical clearance. On June 24, 2020, a member of her staff, Jennifer Parrish emailed Respondent, advising him to provide his return to work clearance by no later than July 15, 2020 (District Exhibit 20.)

After receiving documentation from Respondent regarding a possible surgery, she noted, Parish emailed him again on June 29, 2020 to request his medical return to work clearance. In doing so, she extended the deadline for submission until August 14, 2020. (District Exhibit 20.)

On August 13, 2020, she said, Owoh advised Parish by email that he would not be able to meet the August 14, 2022 deadline due to an upcoming medical procedure. Parish, in turn, replied by directing Respondent to keep her posted as to his return to work status. (District Exhibit 20.)

On August 27, 2020, she recounted, Parish sent a follow up email to Respondent, requesting that he advise as to his return to work status and provide appropriate medical documentation to support his continued absence if he would not be returning to work.

Respondent answered that same day by informing Parish his surgery had been delayed, pending clearance from his primary care physician. (District Exhibit 20.)

In response, she stated, Parish, on August 27, 2002, advised:

> As you know, we require a medical note that indicates an estimated return to work date for staffing purposes. Due to your signed contract and intent to return we are trying to prepare accordingly but need to know how long you are slated to be out of work since you've been out of work since last September and are no longer protected by FMLA. Please forward the attached medical certification form after your appointment tomorrow.

(District Exhibit 20.)

She reported that on or about August 31, 2020, Parish received correspondence from Ellen Land, APN, advising that she had seen Respondent and was excusing him from work for medical reasons through October 2, 2020. (District Exhibit 21.) By subsequent correspondence, Land extended this period through November 2, 2020. (District Exhibit 22.)

Respondent, she related, emailed Parish on November 2, 2022, stating he would not be able to return to work the next day. As explanation, he cited an upcoming medical review that would determine whether he was cleared for a necessary surgery. (District Exhibit 23.)

Parish, she noted, subsequently received further correspondence from Land, reporting that Respondent was undergoing additional medical follow up, and requesting that he be excused from work through December 2, 2020. Land also stated that if medical clearance is obtained, Respondent intends to have surgery, which would necessitate his being off work through December 23, 2020. (District Exhibit 24.)

By letter dated November 13, 2022, she recounted, Parish informed Respondent that he had exhausted his applicable paid leave accruals as of October 28, 2020, and thus, had

transitioned to unpaid status. Parish advised further that his last paycheck from which his employee share of his group health insurance premiums were deducted was mailed on October 30, 2020. Going forward, Parish explained, he would responsible for making direct payment of the employee portion of the group health insurance premiums until his return to work. (District Exhibit 25.)

On January 8, 2021, she reported, Parish emailed Respondent requesting an update on his status. In doing so, Parish noted that the last medical documentation supplied excused him from work through December 2, 2020. (District Exhibit 26.) Respondent replied by email dated January 15, 2021, stating that due to uncertainty as to his health insurance coverage, he could not undergo surgery, which, in turn, prevented him from providing a medical return to work certification. (District Exhibit 26.)[7]

In response, on January 19, 2021, Parish instructed Respondent to provide a medical note to support his absence from December 3, 2020 to the present. She also provided him with a contact at the District to consult regarding the status of his health insurance. (District 26.) In a separate email, she advised Respondent that if his return to work would be subject to physical limitations, he would need to submit medical note identifying them, so the District could assess if they are feasible. (District 26.)

Replying to Parish's January 19, 2021 email, Respondent referenced his own January 15, 2021 email, which mentioned Land's prior note, but did not contain the information requested.

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[7] Citing Parish's November 13, 2020 letter, he also advised being compelled to seek other employment, as he was now without pay or health insurance coverage from the District. In another email to Parish on January 15, 202, he stated, "I had no choice but to find a job that I can do with my medical condition 'as is.' Hopefully, I will get health insurance to finally get the surgery that I need to recover fully without 'limitations.'" In a subsequent email, Parish reminded Respondent that he remained a District employee on a personal illness leave. However, with his being in unpaid status, she noted, he had no wages from which to deduct his employee share of the group health insurance premium, and therefore, must make direct payment of that sum. (District Exhibit 26.)

McKenzie testified that with Respondent having failed to supply the requested medical documentation, she wrote him on April 26, 2021 to address his situation. In particular, her letter noted: (1) he has been out of work since September 16, 2019; (2) the District had approved him for FMLA leave and subsequent health leave from September 16, 2019 – June 30, 2020; (3) despite submitting an intent to return to work form, identifying a September 1, 2020 return date, he has yet to return or report for clearance; (4) the last medical documentation supplied supported his absence through December 2, 2020; and (5) Parish had emailed him on January 8, 15 and 19, 2021 requesting updated medical information to support his continued absence to no avail. (District Exhibit 27.)

In view of these circumstances, her letter stated:

> This letter will serve as a final request for medical information to support your absence from December 3, 2020 to present. I am enclosing a medical certification form for your convenience. Be advised that the form must be completed in its entirety and must include a projected return to work date.
>
> Please forward the requested information no later than **Friday, May 14, 2021**.
>
> Be advised that failure to respond by the due date may result in a determination that you have abandoned your position. You will be considered absent without leave effective December 3, 2020 and subject to discipline.

(District Exhibit 27 (emphasis in original).)

Having received no reply from Respondent as of May 14, 2021, McKenzie confirmed notifying him by letter, dated May 17, 2021, that due to his failure to provide the requested information, after being afforded extended time to do so, the District had determined that he has abandoned his position. Her letter stated further that the District would pursue tenure charges against him for insubordination, job abandonment and any other applicable charges. (District Exhibit 28.)

McKenzie averred receiving a subsequent letter from Respondent, dated May 20, 2021, stating:

> This is in response to your two letters dated 4-26-2021 and 5-17-2021. See Exhibit 1. In response to the two letters, I have attached herewith the email I sent to Ms. Parish on 1-19-2021. Who abandoned who? Thank you.

(District Exhibit 29.)

In an email response, McKenzie related advising Respondent that his correspondence did not include the information requested per her April 26, 2021 letter, which also set a May 14, 2021 deadline for submission. Respondent, in turn, replied:

> Nothing more will be sent to your school district. The days of "forced" labor is LONG gone. It was called slavery. A contract requires a good faith obligation and performance on both sides.

(District Exhibit 30.)

She stated that at no time has Respondent ever offered any explanation for his failure to provide the requested medical documentation supporting his continued absence since December 3, 2020.

Recommendation of Tenure Charges

In testifying, McKenzie affirmed her conclusion that Respondent's record of absenteeism, his extended period of absence during the 2019-2020 and 2020-2021 school years, excluding his FMLA leave, and his failure to provide medical documentation supporting his absences beyond December 2, 2020 warranted bringing the instant Tenure Charges. She further averred that discharge was the appropriate penalty. In support, she said, his failure to meet the District's attendance expectations undermined the achievement of its mission to operate and maintain an effective and consistent educational

system, and his conduct, in total, constituted incapacity, conduct unbecoming, insubordination and neglect of duty.

DISCUSSION AND FINDINGS

The Issues

The issues to be decided here are:

1. Has the District satisfied its burden of substantiating the Tenure Charges that it has proffered against Respondent?

2. If so, what discipline, if any, is warranted?

Positions of the Parties

District's Position. The District submitted a detailed post-hearing brief. Its position is summarized here.

While acknowledging the restrictions on dismissing a tenured teacher per N.J.S.A. 18A:6-10, the District stresses that excessive absenteeism represents a well-recognized basis for doing so. This principle, it states, holds true even where the absences have been excused or stem from a bona fide illness or injury. *See State-Operated School District of Jersey City v. Pellecchio,* 92 N.J.A.R.2d (EDU) 267, 269-270. In addition, it notes, the teacher's satisfactory performance in the classroom provides no defense, where the absences otherwise support dismissal. *See In re Sheets,* 1979 S.L.D. 790, 798, *adopted, State Board of Education,* 1980 S.LD. 1536.

It argues that the record here demonstrates that the standards for a dismissal due to excessive absences have been satisfied. *Kelsey v. Board of Education of the City of Trenton,* EDU 5773-88 (1989). In particular, it highlights, not only was Respondent absent for more than an entire school year, he failed to communicate as to the status of his medical condition and expected return to work date, as instructed by the District.

Respondent, it stresses, was afforded generous paid leave, and after exhausting such leave, was retained in an unpaid status, subject only to providing required medical documentation regarding his continued need for leave and his anticipated return date. Yet, he failed to satisfy this requirement despite being repeatedly advised of what he needed to submit. Further, when he did communicate, he advised of finding other employment.

In addition, on the evidence presented, it argues, Respondent has been shown to have abandoned his employment with the District.

The circumstances here, it maintains, did not simply involve Respondent exhibiting a lack of responsiveness to its requests for an updated medical status. Nor is there any evidence suggesting his medical condition impeded his ability to respond. Instead, it asserts, his non-compliance represented a conscious choice on his part.

Thus, it submits, when the totality of the circumstances are judged, the only reasonable conclusion is that Respondent abandoned his position. Stated otherwise, it avers, Respondent constructively resigned his employment in January 2021, when he ceased responding to the District's requests and began employment elsewhere. *See In re Stanley, 95 N.J.A.R. 2d (EDU) 497; Westfield Board of Education v. McLear Poffenberger,* EDU 7612-97.

Finally, citing Respondent's failure to appear at the hearing in this matter and present evidence supporting his position, it contends that he has effectively waived all defenses and admitted the Tenure Charges are true and sufficient to warrant his dismissal.

Respondent's Position. As noted, Respondent did not appear at the December 13, 2022 hearing in this case, despite having received due notice and reportedly being

available to attend. Nor at any time since then, has he requested or attempted to present any evidence or argument to advance a defense to the Tenure Charges.

Therefore, the only record document setting forth Respondent's position is his Answer to the Charges. There, in denying the Charges, he states that they are pretexutal and constitute retaliation for his having engaged in protected activities under LAD, federal anti-discrimination and anti-retaliation laws and the New Jersey Conscientious Employee Protection Act. He notes that the District is fully aware of his medical justification in this matter.

His Answer also references his June 18, 2021 letter to the District's Board of Education, in which he denied all of the Charges.

In doing so, he asserted that the charges should be dismissed because: (1) he provided medical documentation to Parish until the District unilaterally terminated his health insurance coverage; (2) he decided against undergoing back surgery because his treating physician and surgeon could not guarantee that the procedure would permanently resolve his medical issues so as to allow him to return work at the District without limitation or restriction; (3) in view of his medical condition, it is medically impracticable for him to "keep up" with "twenty-one energetic and vibrant elementary school children in the classroom" and "climb up and down stairs at the Dionne Warwick Institute," which lacks an elevator; and (4) the real reason for the Tenure Charges is "actually retaliatory" because (a) he helped another teacher to file a discrimination lawsuit against the District; and (b) he also filed a discrimination complaint on his own behalf against the principal(s) at the Dionne Warwick Institute with the District's Central Office.

Finally, he stated in his June 18, 2021 letter that as of that date, he was practicing law. However, he may choose to return to teaching if he becomes medically able to do so without any limitations or restrictions.

Opinion

Certain introductory comments are appropriate here. Per the governing statute, the District is authorized to seek Respondent's dismissal for reasons of "inefficiency, incapacity, unbecoming conduct, or other just cause." N.J.S.A. 18A:6-10. It is recognized that excessive absenteeism may constitute incapacity, unbecoming conduct or just cause sufficient to warrant dismissal. See *In re Castro*, Docket No. A-4875-10 (App. Div. April 25, 2012) (citing *State Operated School District of Jersey City v. Pellechio,* 92 N.J.A.R. 2d 267 (1992)). The existence of legitimate reasons for the absences, such as long-term health issues, may not represent a defense to such a charge or preclude a finding that dismissal is warranted.

In seeking a tenured teacher's dismissal based upon charges of incapacity, unbecoming conduct or other just cause, the school district bears the burden of proof. It must establish the charged allegations by a preponderance of the relevant evidence. In addition, it must demonstrate that the gravity of substantiated offenses warrants the teacher's discharge, as opposed to some lesser disciplinary penalty.

I am not persuaded that the District should be excused of this burden due to Respondent not appearing at the December 13, 2023 hearing or offering any valid explanation for his absence. Stated otherwise, I am not convinced that Respondent's failure in that regard constitutes an admission of the Tenure Charges, so as to warrant a

summary decision of this matter. Instead, I conclude, the District should be held to its proofs.[8]

With these principles in mind, I turn to the charges presented here. After a careful and thorough review of the evidence and arguments presented, I conclude that the District has substantiated Charge Nos. 1 - 3. However, I find that Charge Nos. 4 and 5 have not been sustained and must be dismissed. My reasons for these determinations follow.

Charge No. 1: Incapacity -- Excessive Absenteeism

In seeking the termination of a tenured teacher on grounds of incapacity/excessive absenteeism, the District must show: (1) it considered the number of days and the particular circumstances of the absences; (2) the impact the absences had on the District; and (3) the appropriate warning was given. *In re Castro, supra,* at 13 (citing *In re White,* 92 N.J.A.R. 2d (EDU) 157 (1991)). On the evidence presented, I am satisfied that each prong of this 3-part standard has been satisfied.

First, as McKenzie's testimony and the documentary evidence reflects, the District's assessment of Respondent's protracted absence, which spanned nearly the entirety of two school years, addressed both the number of days and the particular circumstances involved. Indeed, the record substantiates that the Department gave due consideration to Respondent's medical conditions, which precluded him from performing his teaching duties. It did so by reviewing his supporting medical documentation and approving/extending his leave through and including December 2, 2020. Further, it has

[8] As referenced above, Respondent, by his Answer, asserts that the instant Tenure Charges constitute retaliation for his protected activities under LAD and other statutes. I find this claim of pretext represents an affirmative defense for which Respondent carries the burden of proof. While Respondent's Answer has been received as part of the record in this matter (i.e., Arbitrator Exhibit 2), his stated claim of retaliation represents hearsay, and, as such, cannot satisfy his evidentiary obligation. Moreover, even if his Answer could be accepted at face value, it proves inadequate. His claim of retaliation, as stated there, is entirely conclusory, with no supporting factual assertions included. Accordingly, it must be rejected and, as such, has been given no consideration in my decision here.

expressly acknowledged that the period of leave covered by the FMLA has been and should be excluded from the charge of excessive absenteeism/incapacity.

Second, McKenzie's testimony that Respondent's extended absence undermined the District's ability to fulfill its educational mission stands uncontested. In fact, it strikes me as axiomatic that such a prolonged absence by one of the District's teachers would have such effect.

Third, while the District was apparently open to extending Respondent's leave beyond December 2, 2020, it made clear that his continued absence without leave was unacceptable. Simply put, as McKenzie's testimony and the documentary evidence confirms, the District appropriately informed Respondent of both the requirements (i.e., submission of supporting medical documentation for his continued absence) and the consequences of non-compliance (i.e., a determination of job abandonment and discipline). Further, it afforded him ample time to comply, with its initial request being made on January 8, 2021 and its final request being issued on April 26, 2021, which set a May 14, 2021 deadline for compliance.

Accordingly, for all these reasons, I am satisfied that this charge has been substantiated by the weight of the credible evidence presented.

Charge Nos. 2 & 3: Conduct Unbecoming (Absence Without Leave); and Insubordination

I will address these two charges together, as they both rest upon Respondent's failure to comply with the District's instruction to provide supporting medical documentation to substantiate his need for leave beyond December 2, 2020.

In the first of these two charges, the District alleges that by failing to supply the requested medical documentation, Respondent has been absent without leave since

December 3, 2020, and, in turn, has abandoned his position with the District. On review, I am satisfied that the evidence presented substantiates these allegations,

McKenzie's testimony and the exhibits received confirm: (1) the last record that Respondent supplied from his medical practitioner specified he was medically unable to work through December 2, 2020; (2) beginning in January 2021 and continuing through April 2021, the District instructed Respondent to provide medical information supporting his continued absence beyond December 2, 2020; and (3) Respondent never supplied the requested documentation.

On the record here, I am convinced that no basis exists to excuse Respondent's failure in this regard. Simply put, there is no evidence that he was incapable of doing so, nor are there any other mitigating circumstances present.

Quite the contrary, it is plain to me that Respondent made a conscious and willful decision to disregard the District's requests for medical documentation. After allowing the District's May 14, 2021 deadline to expire, Respondent submitted copies of two January 2021 emails to Parish, neither of which included the necessary medical documentation. (District Exhibit 29.) When McKenzie informed him of this deficiency, Respondent confirmed his refusal to comply with the District's request. Indeed, in no uncertain terms, he advised McKenzie, "Nothing more will be sent to your school district." (District Exhibit 30.)

In sum, after weighing the totality of the circumstances, I am persuaded that Respondent was absent without leave, commencing December 3, 2020, and, in turn, abandoned his position with the District by willfully refusing its request to provide medical documentation

supporting his need for additional leave.[9] Accordingly, I am satisfied that on the record here, Charge No. 2 should be sustained.

Turning to Charge No. 3, it accuses Respondent of insubordination based upon these same circumstances.

It is well recognized that insubordination is defined as "the willful and intentional disregard of the lawful and reasonable directives of an employee's duly authorized supervisor." *In the Matter of the Tenure Hearing of Charles Motley,* Commissioner's Decision No. 252-99 at 2-3 (August 4, 1999).

Judged by this standard, Respondent's conduct, no doubt, constitutes insubordination. The District clearly had a right to determine whether Respondent had a bona fide medical reason justifying his inability to return to work on December 2, 2020. Its ability to direct and manage its teaching staff dictates as much. As such, the requests Respondent received from McKenzie and her staff member Parish to supply such documentation represented a lawful and reasonable direction from supervision.

Therefore, I am satisfied, it follows that Respondent's willful and intentional disregard of these requests was insubordinate. In fact, by his May 20, 2021 email to McKenzie, he exhibited utter contempt for her authority, stating dismissively, "Nothing more will be sent to your school district." He then doubled down by mischaracterizing her legitimate information request as an attempt at "forced labor."

Likewise, Respondent's effort to shift blame to the Respondent is unavailing. In his January 2021 emails to Parish, Respondent posits that the District acted improperly by

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[9] Respondent's June 18, 2021 letter to the District's Board of Education further evidences his intent to abandon his position. There, he reported that he was then practicing law and would consider returning to teaching in the future only if he became medically able to do so. He also acknowledged his decision not to have the surgery needed to resolve the medical issues preventing his to return to work at the District. (Arbitrator Exhibit 2.)

discontinuing his salary and requiring him to make direct payment of his employee share of his group health insurance premium. This assertion is unsubstantiated, and in any event, cannot excuse or justify his insubordination.[10] The time honored principle of work now -- grieve later compelled him to comply with Parish and McKenzie's request for supporting medical documentation. His willful and intentional refusal to do so constituted undeniable insubordination.

Therefore, I conclude that this Charge has been sustained.

Charge No. 4: Neglect of Duty

In support of this alleged misconduct, the Charge references Respondent's January 15, 2021 email to Parish stating he had been actively seeking employment elsewhere. On the evidence presented, I am not satisfied that the District has established a neglect of duty by Respondent's actions in this regard.

With Respondent having exhausted his paid leave accrual and apparently unable to afford the required monthly employee contribution to maintain his group health insurance, he had an apparent legitimate need to secure another source of income.[11] Therefore, absent a showing that his efforts to obtain alternate employment undermined or otherwise compromised his recovery from the medical condition preventing his return to work for the District, no basis exists for me to find him guilty of a neglect of duty, as charged.

The District's evidence, I am convinced, falls short in meeting this standard.

---

[10] In fact, this assertion is contradicted by the evidence presented, which shows the District acted appropriately. Its actions in this regard flowed simply from Respondent's exhaustion of his paid leave accruals. With Respondent having no paid leave available, the District properly transferred him to unpaid status, which, in turn, required him to satisfy his employee share of the group health insurance premium by direct payment, as opposed to a payroll deduction.

[11] The legitimacy of such need turns on Respondent's inability to resume his duties with the District on and after December 3, 2020. A determination to that effect is not possible here, as the record does not include any evidence as to Respondent's medical condition after that date. Respondent deprived the District of the opportunity to do so by rejecting its requests for such medical documentation.

Accordingly, I conclude that this Charge has not been sustained and must be dismissed.

Charge No. 5: Other Just Cause

The District has not offered any separate and independent allegations in support of this Charge. Instead, it repeats the allegations on which the first four Charges are based. As such, I am compelled to conclude that this Charge is duplicative, and therefore, should be dismissed.

Penalty

Turning to the issue of penalty, I find Respondent's proven excessive absenteeism weighs heavily in favor of dismissal, notwithstanding his substantiated medical issues through December 2, 2020. Tenure does not entitle Respondent to an indefinite medical leave. Where, as here, the absence has continued over the course of more than a full school year (after excluding FMLA leave), with no projected end date, and undermines the school district's educational mission, it has reached an obvious inflection point.

Simply put, on review, I am persuaded that the balance tips overwhelmingly in favor of Respondent's dismissal, especially when consideration is given to the other sustained charges of absence without leave/abandonment of his position and insubordination. By his willful actions in that regard, he deprived the District of the information essential to verify his medical inability to work and determine whether he should be granted further leave.

Therefore, with their being no mitigating factors present, I find Respondent's dismissal is justified.

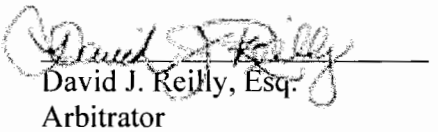
AWARD

1. Respondent is culpable of Charge Nos. 1 – 3.

2. Charge Nos. 4 and 5 have not been sustained, and therefore, are dismissed.

3. The appropriate penalty for the substantiated Charges is dismissal.

Dated: February 21, 2023

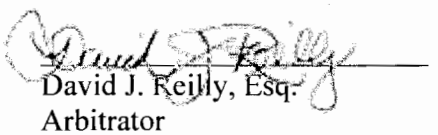


David J. Reilly, Esq.
Arbitrator

STATE OF NEW YORK)
) ss.:
COUNTY OF NEW YORK)

I, David J. Reilly, Esq., affirm that I am the individual described herein and who executed this instrument, which is my Opinion and Award.

Dated: February 21, 2023



David J. Reilly, Esq.
Arbitrator

49-23

In the Matter of the **TENURE** Hearing	)	
	)	
of	)	
	)	**AWARD**
Alim Hasan	)	
"Respondent"	)	
	)	
and	)	AGENCY DOCKET NO. 326-11/22
	)	
SCHOOL DISTRICT OF THE CITY OF EAST ORANGE, ESSEX COUNTY	)	
"Petitioner"	)	
	)	

In accordance with the Teacher Effectiveness and Accountability for Children of New Jersey Act, ("TEACHNJ Act" or "Act") P.L. 2012, Chapter 26 signed into law by Governor Chris Christie on August 6, 2012 the undersigned was appointed as Arbitrator of the dispute described herein.

BEFORE: Mattye M. Gandel, Arbitrator

Before any hearings were held in this matter and while dates were being discussed for the hearing, the School District advised me that Respondent Alim Hasan resigned from the East Orange School District, effective December 30, 2022. Therefore, the charges previously filed against Mr. Hasan are hereby withdrawn based upon his resignation.

Mattye M. Gandel

Mattye M. Gandel

Dated: February 16, 2023

50-23
OAL Dkt. No. EDU 02971-22
Agency Dkt. No. 50-3/22

New Jersey Commissioner of Education

Final Decision

Shawn Collier,

Petitioner,

v.

New Jersey Department of Education,
State Board of Examiners,

Respondent.

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

Upon review, the Commissioner agrees with the Administrative Law Judge's determination that the petition should be dismissed based on petitioner's failure to file any written response to the respondent's motion to dismiss or to have any contact with the OAL. Accordingly, the Initial Decision of the OAL is adopted as the final decision in this matter for the reasons expressed therein, and the petition is hereby dismissed.

IT IS SO ORDERED. [1]

Angelica Allen-McMillan, Ed.D.
ACTING COMMISSIONER OF EDUCATION

Date of Decision: February 27, 2023
Date of Mailing: March 1, 2023

[1] This decision may be appealed to the Appellate Division of the Superior Court pursuant to *N.J.S.A.* 18A:6-9.1. Under *N.J.Ct.R.* 2:4-1(b), a notice of appeal must be filed with the Appellate Division within 45 days from the date of mailing of this decision.

State of New Jersey
OFFICE OF ADMINISTRATIVE LAW

INITIAL DECISION
DISMISSAL
OAL DKT. NO. EDU 02971-22
AGENCY DKT. NO. 50-3/22

SHAWN COLLIER,
Petitioner,
v.
NEW JERSEY DEPARTMENT OF EDUCATION, STATE BOARD OF EXAMINERS,
Respondent.

Shawn Collier, petitioner pro se

Sydney Finklestein, Deputy Attorney General (Matthew J. Platkin, Attorney General of New Jersey, attorney), for respondent

Record Closed: January 31. 2023 Decided: January 31, 2023

BEFORE **ERNEST M. BONGIOVANNI,** ALJ:

STATEMENT OF THE CASE

Petitioner Shawn Collier (Petitioner) appealed a denial, dated December 16, 2021, by the State Board of Examiners, of an application for a teacher of biological science

certificate of eligibility. The application was denied because her cumulative grade point average was below the 3.0 required of those receiving a baccalaureate degree program, higher degree program or a state approved post-baccalaureate certification program.

Collier's appeal was transmitted to the Office of Administrativr Law (OAL) on April 14, 2022. On April 11, 2022, respondent, the New Jersey Department of Education, State Board of Examiners,(Respondent) filed a Motion to Dismiss in lieu of filing an Answer. The motion was supported with Exhibits and a legal brief, and certicviation of mailing to Collier at her address.

Shortly thereafter, petitioner was Noticed, via email to telephonically attend a Prehearing conference. Collier agreed via email of April 26, 2023 to attend the Prehearing conference to be held May 6, 2022 at 9:30 A.M.

At the conference, petitioner was offered an additional thirty days without proceedings going forward, in case she wanted to retain counsel instead of acting pro se. She could also use the additional time to determine if she wished to obtain a high degree program or a State approved post-bacculaureate certificate rather than continuing with the litigation. Hoiwever, she was cautioned that she had thirty days to provide a written reply to respondent's motion to dismiss.

On June 7, 2022, petitioner advised my office that she wished to continue the litigation and without an attorney. She also advised she did not wish to seek another degree in order to have another opportunity to obtain the requested Certificate of Eligibility. However, petitioner made no mention of the written response to the motion to dismiss that was due within thirty days of May 6, 2022.

Having heard nothing further from Collier, for another two months, the court wrote to Collier on August 2, 2022 via email to her that she would have an additional ten days to file her written rresponse to the aforesaid Motion to Dismiss, and referenced N.J.A.C. 1:1-12.2

After another six months had passed, and as of January 31, 2023, Collier has failed to file any written response to the motion to dismiss, nor had any contact with the OAL in any way.

ORDER

Based upon all of the foregoing, I **FIND** that this matter should be and is hereby **DISMISSED WITH PREJUDICE**, for petitioner's willful noncompliance with the requirements of the Rules of the OAL, specifically by failure to provide the required written reply to a motion to dismiss

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

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

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

Ernest M. Bongiovanni

January 31, 2023
DATE

ERNEST M. BONGIOVANNI, ALJ

Date Received at Agency: January 31, 2023

Date Mailed to Parties: January 31, 2023

id

52-23
OAL Dkt. No. EDU 06214-22
Agency Dkt. No. 184-7/22

New Jersey Commissioner of Education

Final Decision

J.B., on behalf of minor children, E.B. and J.B.,

Petitioner,

v.

Board of Education of the Township of Edgewater Park, Burlington County,

Respondent.

The record of this matter, which was transmitted to the Commissioner by the Office of Administrative Law (OAL) pursuant to *N.J.A.C.* 1:1-14.4 and includes an advisement of petitioner's failure to appear at the scheduled OAL hearing on November 18, 2022, has been reviewed. Petitioner did not file an explanation for the failure to appear, notwithstanding the opportunity to do so. Accordingly, this matter is no longer deemed to be a contested case before the Commissioner and is hereby dismissed with prejudice.

IT IS SO ORDERED.[1]

Angelica Allen-McMillan, Ed.D.
ACTING COMMISSIONER OF EDUCATION

Date of Decision: February 27, 2023
Date of Mailing: March 1, 2023

[1] This decision may be appealed to the Appellate Division of the Superior Court pursuant to *N.J.S.A.* 18A:6-9.1. Under *N.J.Ct.R.* 2:4-1(b), a notice of appeal must be filed with the Appellate Division within 45 days from the date of mailing of this decision.

51-23+
OAL Dkt. No. EDU 04075-22
Agency Dkt. No. 94-4/22

New Jersey Commissioner of Education

Final Decision

K.M.,

Petitioner,

v.

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

Respondent.

The record of this matter, which was transmitted to the Commissioner by the Office of Administrative Law (OAL) pursuant to *N.J.A.C.* 1:1-14.4 and includes an advisement of petitioner's failure to appear at the scheduled OAL hearing on January 5, 2023, has been reviewed. On March 1, 2023, the Commissioner emailed the parties a decision dismissing the case based on petitioner's failure to appear or to provide an explanation for that failure. *K.M. v. Bd. of Educ. of the Twp. of Hainesport, Burlington Co.*, Commissioner Decision No. 51-23 (decided February 27, 2023). Also on March 1, 2023, petitioner notified the Office of Controversies and Disputes that she had attempted to appear at the January 5, 2023 hearing, but had technical difficulties accessing the online platform; she also advised that her phone calls to the OAL to attempt to resolve the technical issues went unanswered. Petitioner indicated that she did not receive the OAL's notice regarding her failure to appear, which permitted her 13 days to provide an explanation.

Upon review, the Commissioner finds that petitioner offered a reason why she failed to appear for the hearing, namely that she was prevented from doing so because of technical difficulties.

Accordingly, this matter is remanded to the OAL for further proceedings necessary to reach a determination on the merits.

IT IS SO ORDERED.

Angelica Allen-McMillan, J.d.D.
ACTING COMMISSIONER OF EDUCATION

Date of Decision: March 7, 2023
Date of Mailing: March 9, 2023

53-23

New Jersey Commissioner of Education
Final Decision

Queen City Academy Education Association, on behalf of its members, Gary Corcoran and Eric Koellner,

Petitioner,

v.

Board of Trustees of the Queen City Academy Charter School, Union County,

Respondent.

Synopsis

The petitioner, Queen City Academy Education Association ("petitioner" or "Association") alleged that the respondent Queen City Academy Charter School ("respondent" or "Board") improperly refused to offer an employee health plan that is equivalent to the New Jersey Educators Health Plan ("NJEHP") mandated under *N.J.S.A.* 18A:16-13.2 *et seq.*

The ALJ found, *inter alia*, that: there are no material facts at issue here, and the matter is ripe for summary decision; the only issue for determination in this case is the legal authority of the Board to defer offering a NJEHP-equivalent health insurance plan to Association members because of the prospective adverse financial impact that offering such a plan might have on the Board; in July 2020, the New Jersey Legislature enacted *P.L.* 2020, Chapter 44, which amended the health insurance benefits statutes for school employees, requiring that employees at schools that do not participate in the State Employees' Health Benefits Plan be offered the NJEHP or an equivalent plan; it is undisputed that the Board has not offered or provided such a plan; the Board's argument that the parties must negotiate regarding the increase in cost prior to the Board offering the plan is without merit, as the Board must first offer the required NJEHP equivalent plan and then proceed to negotiations over any increase in net costs; further, the Board's argument that this matter should be stayed pending the adjudication of similar matters currently pending before the New Jersey Council on Local Mandates is also without merit, as those matters involve different parties and there is no reason to believe that any order resulting from those matters would be binding or precedential on the OAL. Accordingly, the ALJ granted petitioner's motion for summary decision and ordered the Board to offer its employees a NJEHP-equivalent plan.

Upon review, the Commissioner, *inter alia*, rejected the Board's arguments on exception and concurred with the ALJ's findings and conclusion herein. The Initial Decision of the OAL was adopted as the final decision in this matter. The Board was ordered to offer and implement a NJEHP-equivalent health insurance plan for its employees, as required under *N.J.S.A.* 18A:16-13.2.

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

State of New Jersey
OFFICE OF ADMINISTRATIVE LAW

INITIAL DECISION
SUMMARY DECISION
OAL DKT. NO. EDU 01028-21
AGENCY DKT. NO. 259-12/20

QUEEN CITY ACADEMY EDUCATION ASSOCIATION, ON BEHALF OF ITS MEMBERS GARY CORCORAN AND ERIC KOELLNER,

Petitioner,

v.

QUEEN CITY ACADEMY CHARTER SCHOOL BOARD OF TRUSTEES, UNION COUNTY,

Respondent.

Richard A. Friedman, Esq., and **Sheila Murugan**, Esq., for petitioner Queen City Academy Education Association (Zazzali, Fagella, Nowak, Kleinbaum and Friedman, attorneys)

Hope R. Blackburn, Esq., for respondent Queen City Academy Charter School Board of Trustees (The Busch Law Group, LLC, attorneys)

Record Closed: December 8, 2022 Decided: January 20, 2023

BEFORE **JUDE-ANTHONY TISCORNIA**, ALJ:

STATEMENT OF THE CASE AND PROCEDURAL HISTORY

Petitioner Queen City Academy Education Association, on behalf of its members Gary Corcoran and Eric Koellner, ("petitioner" or "Association") brought an action against respondent Queen City Academy Charter School Board of Trustees ("respondent" or "the Board") seeking an order compelling the respondent to provide employees with a health plan equivalent to the New Jersey Educators Health Plan (NJEHP) under the Health Benefits Law, N.J.S.A. 18A:16-13.2 et seq., as amended by P.L. 2021, c. 163.

The matter was transmitted by the Department of Education to the Office of Administrative Law (OAL), where it was filed on January 29, 2021, for hearing as a contested case pursuant to N.J.S.A. 52:14B-1 to -15 and N.J.S.A. 52:14F-1 to -13. The matter was assigned to the undersigned on February 22, 2021.

Petitioner was granted leave to file a motion for summary decision. The motion and accompanying brief were received by the undersigned on November 8, 2021. Final submissions were received on December 8, 2022, and the record was closed. The matter is now ripe for decision.

UNDISPUTED FACTS

Queen City Academy (QCA) is a charter school operating under the laws of the State of New Jersey, with its initial charter having been issued in 1999. QCA began receiving students in September 2000, and currently serves students in grades K–9. QCA currently operates under a Charter School Agreement with the New Jersey Department of Education, dated September 11, 2012, which requires it to operate within specific parameters, including, but not limited to, the confines of its authorized grade levels, ages of students, individual class sizes, performance framework, and fiscal constraints. The New Jersey Legislature enacted P.L. 2020, Chapter 44, effective July 1, 2020, which amended the health-insurance-benefits statutes for school employees, requiring that employees at schools that do not participate in the School Employees' Health Benefits Plan (SEHBP) be offered the equivalent of the New Jersey Educators Health Plan (NJEHP) provided via the SEHPB. See N.J.S.A. 18A:16-13.2 ("Chapter 44").

Queen City Academy attempted to procure affordable insurance equivalent to the NJEHP, but its attempts to do so were unsuccessful.

ARGUMENTS OF THE PARTIES

Petitioner argues that the plain language of Chapter 44 requires the Board to offer a health plan equivalent to the NJEHP, regardless of any adverse financial impact. In response to this motion, the Board argues that 1) this tribunal should stay its decision until all final adjudication on similar matters pending before the New Jersey Council on Local Mandates are resolved; 2) the matter is not ripe for summary decision; 3) petitioner has not met the standard for summary decision; and 4) summary decision is inappropriate, as there remain material facts in dispute.

Respondent also argues that offering a plan equivalent to the NJEHP would have an adverse financial impact on the Board so as to threaten the school's viability, and that the Board should not be obliged to offer a plan equivalent to the NJEHP because this requirement as set forth in Chapter 44 is an unfunded mandate, and, thus, unenforceable.

LEGAL DISCUSSION

Point 1 of the Board's response to the motion for summary decision argues that the undersigned should stay any determination regarding the motion pending final adjudication of similar matters currently before the New Jersey Council on Local Mandates, namely, matters involving the boards of education of Franklin Township, Gloucester City, and Lower Township. It should be noted, however, that those matters do not involve any of the same parties as the matter before me. Also, the Board does not suggest, and I have no reason to believe, that any order of the Council on Local Mandates would be binding or in any way precedential to this tribunal. Thus, I **CONCLUDE** that the pending matters before the Council on Local Mandates do not preclude the undersigned from ruling on the petitioner's motion.

Upon review of the facts and legal arguments presented by the parties, it appears that the only issue to be determined on this summary-decision motion is the legal authority of the Board to defer offering an "equivalent" health insurance plan to the Association due to the prospective adverse financial impact offering such a plan would have on the Board. The main issue before this tribunal, thus, is strictly a matter of legal interpretation.

It is well established that if there is no genuine issue as to any material fact, a moving party is entitled to prevail as a matter of law. Brill v. Guardian Life Ins. Co. of Am., 142 N.J. 520, 540 (1995). The purpose of summary decision is to avoid unnecessary hearings and their concomitant burden on public resources. Under the Brill standard, a fact-finding hearing should be avoided "when the evidence is so one-sided that one party must prevail as a matter of law." Brill guides us thusly:

> [A] determination whether there exists a "genuine issue" of material fact that precludes summary judgment requires the motion judge to consider whether the competent evidential materials presented, when viewed in the light most favorable to the non-moving party, are sufficient to permit a rational factfinder to resolve the alleged disputed issue in favor of the non-moving party.
>
> [Ibid.]

In explaining the standard to be applied in summary motion practice, the Brill Court stated:

> The same standard applies to determine whether a prima facie case has been established by the party bearing the burden of proof in a trial. . . .
>
> . . . If a case involves no material factual disputes, the court disposes of it as a matter of law by rendering judgment in favor of the moving or non-moving party.
>
> [Id. at 535–37.]

Based on the foregoing, I **CONCLUDE** that the issue of whether or not the NJEHP or NJEHP-equivalent health-insurance plan must be offered to the QCA employees can be decided as a matter of law.[1]

On July 1, 2020, the New Jersey Legislature enacted P.L. 2020, Chapter 44, which amended the health-insurance-benefits statutes for school employees and provides:

> (1) Notwithstanding the provisions of any other law, rule, or regulation to the contrary, beginning January 1, 2021 and for each plan year thereafter, a board of education as an employer providing health care benefits coverage for its employees, and their dependents if any, in accordance with P.L.1979, c.391 (C.18A:16-12 et seq.) **shall** offer to its employees, and their dependents if any, the **equivalent** of the New Jersey Educators Health Plan in the School Employees' Health Benefits Program as that plan design is described in subsection f. of section 1 of P.L.2020, c.44 (C.52:14-17.46.13).
>
> . . . .
>
> (2) The plans under this section **shall** be offered by the employer regardless of any collective negotiations agreement between the employer and its employees in effect on the effective date [July 1, 2020] of this act, P.L.2020, c.44, that provides for enrollment in other plans offered by the employer.
>
> [N.J.S.A. 18A:16-13.2(a) (emphasis added).]

With regard to employees who commenced employment prior to July 1, 2020, N.J.S.A. 18A:16-13.2(b) provides:

> Prior to January 1, 2021, each employer **shall** provide an enrollment period during which all employees who commenced employment prior to the effective date [July 1, 2020] of this act shall be required to select affirmatively a plan

[1] Two cases with a very similar legal issue have recently been decided at the OAL on summary-decision motion, the first by the Hon. Sarah Crowley, ALJ, Franklin Township Education Association v. Board of Education of Franklin Township, Somerset County, OAL Dkt. No. EDU 01442-21, Initial Decision (November 18, 2022), and the second by the Hon. Gail Cookson, ALJ, Community Charter School of Patterson Education Association v. Community Charter School of Patterson Board of Trustees, OAL Dkt. No. EDU 03968-21, Initial Decision (December 7, 2022).

> provided by the employer. If an employee fails to select affirmatively a plan during this enrollment period, the employer **shall** enroll the employee, and the employee's dependents if any, in the equivalent New Jersey Educators Health Plan offered pursuant to subsection a. of this section for the year January 1, 2021 until December 31, 2021.
>
> [Emphasis added.]

With regard to employees who commence employment on or after July 1, 2020, N.J.S.A. 18A:16-13.2(c)(1) provides:

> Beginning on January 1, 2021, an employee commencing employment on or after the effective date [July 1, 2020] of this act but before January 1, 2028 who does not waive coverage, **shall** be enrolled by the employer in the equivalent New Jersey Educators Health Plan, or the equivalent Garden State Health Plan if selected by the employee, as those plans are offered pursuant to subsection a. of this section. The employee **shall** remain enrolled in either the equivalent New Jersey Educators Health Plan or the equivalent Garden State Health Plan selected by the employee at the annual open enrollment for each plan year until December 31, 2027, provided that the employee during this period may waive coverage as an employee and select and change the type of coverage received under the plan following a qualifying life event, in accordance with the plan regulations. Beginning January 1, 2028, the employee may select, during any open enrollment period or at such other times or under such conditions as the employer may provide, any plan offered by the employer.
>
> [Emphasis added.]

In June 2021 the New Jersey Legislature amended the foregoing law to provide that if the provisions of the foregoing result in an increase in the net cost of healthcare plans, the parties "**shall** commence negotiations immediately, unless mutually agreed upon by the employer and the majority representative to opt to **substantially mitigate the financial impact to the employer** as part of the next collective negotiations agreement . . . ." P.L. 2021, c. 163 (emphasis added). It is undisputed that respondent, the Board, has not offered or provided its members with a plan equivalent to the NJEHP.

While the parties have commenced negotiations over this issue, the Board has not had a financial impact yet and the net impact of employee contributions is not known.

Respondent has not presented any material facts that are in dispute in this matter. The law in question is clear. It mandates the Board to put in place a plan equivalent to the NJEHP, and if there is an increase in net cost, it mandates that the parties negotiate the issue relating to that increase in the net cost of the plan. Respondent argues that the financial impact of offering this plan is substantial and the parties need to negotiate the issue prior to offering it. The Board submits the Certification of Chief Academic Officer Danielle West-Augustin, outlining the potential increase in cost. However, even assuming that I accept these projections as fact, it does not relieve the Board of the obligation to provide such a plan. The Board must provide the plan and then, under the more recent amendments to Chapter 44, proceed to negotiations over such increase in net costs, i.e., deducting for employee contributions.

I therefore **CONCLUDE** that petitioner is entitled to a judgment as a matter of law on the issue involving the obligation of the Board to provide a plan equivalent to the NJEHP for its members. I further **CONCLUDE** that after offering such a plan to its members, if there is a net cost increase, the parties shall negotiate this issue to mitigate the financial impact to the employer.

ORDER

It is **ORDERED** that the motion of petitioner, Queen City Academy Education Association, for summary decision is hereby **GRANTED**. It is further **ORDERED** that respondent, Queen City Academy Charter School Board of Trustees, offer its employees an NJEHP-equivalent plan.

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

This recommended decision may be adopted, modified or rejected by the **COMMISSIONER OF THE DEPARTMENT OF EDUCATION,** who by law is authorized

to make a final decision in this matter. If the Commissioner of the Department of Education does not adopt, modify or reject this decision within forty-five days and unless such time limit is otherwise extended, this recommended decision shall become a final decision in accordance with N.J.S.A. 52:14B-10.

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

January 20, 2023

DATE

JUDE-ANTHONY TISCORNIA, ALJ

Date Received at Agency: 1/20/23

Date Mailed to Parties: 1/20/23

id

53-23
OAL Dkt. No. EDU 01028-21
Agency Dkt. No. 259-12/20

New Jersey Commissioner of Education

Final Decision

Queen City Academy Education Association, on behalf of its members, Gary Corcoran and Eric Koellner,

Petitioner,

v.

Board of Trustees of the Queen City Academy Charter School, Union County,

Respondent.

The record of this matter, the Initial Decision of the Office of Administrative Law (OAL), the exceptions filed by respondent pursuant to *N.J.A.C.* 1:1-18.4, and petitioner's reply thereto, have been reviewed and considered.

The Queen City Education Association (petitioner or Association) is the majority representative for certain employees of the Queen City Academy Charter School Board of Trustees (Board). In its petition of appeal, the Association alleges that the Board violated *N.J.S.A.* 18A:16-13.2 by refusing to offer its employees a health insurance plan that is equivalent to the New Jersey Educators Health Plan (NJEHP).

Following petitioner's motion for summary decision, the Administrative Law Judge (ALJ) found that the Board is obligated to provide a plan equivalent to the NJEHP; further, it was undisputed that the Board has not offered or provided such a plan. The ALJ rejected the Board's argument that the parties must negotiate regarding the increase in cost prior to the Board offering

the plan, finding that the Board must offer the plan and then proceed to negotiations over any increase in net costs. The ALJ also rejected the Board's argument that this matter should be stayed pending the adjudication of similar matters currently pending before the New Jersey Council on Local Mandates, finding that those matters involve different parties and that there is no reason to believe that any order resulting from those matters would be binding or precedential on the OAL. Accordingly, the ALJ granted petitioner's motion for summary decision and ordered the Board to offer its employees a NJEHP-equivalent plan.

In its exceptions, the Board argues that the ALJ failed to consider various questions of fact related to the Board's ability to finance a NJEHP-equivalent plan, including whether implementing the plan prior to negotiating could threaten the school's ability to provide a thorough and efficient education; whether charter schools must implement an unbudgeted plan when they have no independent taxing authority; whether performance was impossible because Small Market Insurers do not offer a NJEHP-equivalent plan; and whether incurring a net negative financial impact could result in over-expanding an appropriation. The Board also contends that there are issues of fact regarding whether implementing the plan would deviate from the state-approved performance framework and charter mission and design, and whether the Association had engaged in good faith negotiations to mitigate any negative financial impact.

In reply, the Association argues that the Initial Decision correctly concluded that the Board must first offer the NJEHP and then the parties shall negotiate over financial impact. According to the Association, the Board's excuses for its non-compliance must fail, as the Legislature is presumed to be aware of existing laws, and nonetheless intentionally required that boards offer a NJEHP-equivalent plan, without any exception for charter schools; the Legislature was also presumably aware that implementation would have financial consequences, as it required negotiations to

mitigate the impact of offering the plan. The Association further indicates that two other cases addressing the issue of a Board's obligation to offer a NJEHP-equivalent plan have recently been decided, with the same outcome as the Initial Decision in this matter.

The Commissioner notes that the Board also provided information regarding a Memorandum of Agreement (MOA) that had been reached between the parties.[1] In doing so, the Board acknowledged *N.J.A.C.* 1:1-18.4 – which provides that evidence not presented at the hearing shall not be submitted as part of an exception, nor incorporated or referred to within exceptions – but indicated that because the fact and status of the parties' ongoing negotiations were a part of the OAL record, it was providing the information regarding the MOA to provide clarity. However, the record demonstrates that no information regarding the MOA was submitted to the ALJ, nor does that information "clarify" anything previously submitted – it is new information, and thus its submission was improper pursuant to *N.J.A.C.* 1:1-18.4. Accordingly, the Commissioner did not consider the portions of the Board's exceptions regarding the MOA, or the portions of the Associations reply thereto, in reaching the decision herein.[2]

Upon review, the Commissioner concurs with the ALJ that *N.J.S.A.* 18A:16-13.2 obligates the Board to first offer a plan equivalent to the NJEHP to Association members, and then to proceed to negotiations over any resulting increase in costs. The plain language of the statute provides that an NJEHP equivalent plan "shall" be offered. *N.J.S.A.* 18A:16-13.2(a)(1). Accordingly, the Board's failure to provide such a plan is in violation of the statute. Furthermore, P.L. 2021, c. 163 provides

[1] A copy of the MOA was not provided.

[2] The Board also argues that the Initial Decision failed to recognize that the Council on Local Mandates did not find that Chapter 44 was not an unfunded mandate, but rather that the matter was not yet ripe for decision. As the Initial Decision does not address the substance of the proceedings before the Council, but rather only found that they did not involve the same parties and would not be binding on the OAL, the Commissioner finds this exception irrelevant.

that any district "with an increase in net cost . . . as a result of" offering the NJEHP-equivalent plan "shall commence negotiations immediately." The Commissioner agrees with the ALJ that, based on this language, the law requires negotiations only after the Board offers a NJEHP-equivalent plan, if there is a net cost increase.

The Commissioner does not find the Board's exceptions, which largely reiterate arguments made and rejected during the summary decision proceedings below, to be persuasive. To the extent that the Board may experience a negative financial impact as a result of offering a NJEHP-equivalent plan, that impact may be negotiated, but there is no exception that would allow the Board to avoid its obligation to offer the plan.

Accordingly, the Initial Decision is adopted as the final decision in this matter. Petitioner's motion for summary decision is granted, and the Board is ordered to offer and implement a NJEHP-equivalent plan.

IT IS SO ORDERED.[3]

Angelica Allen-McMillan, Ed.D.
ACTING COMMISSIONER OF EDUCATION

Date of Decision: February 28, 2023
Date of Mailing: March 1, 2023

[3] This decision may be appealed to the Appellate Division of the Superior Court pursuant to *N.J.S.A.* 18A:6-9.1. Under *N.J.Ct.R.* 2:4-1(b), a notice of appeal must be filed with the Appellate Division within 45 days from the date of mailing of this decision.

53-23
OAL Dkt. No. EDU 01028-21
Agency Dkt. No. 259-12/20

New Jersey Commissioner of Education

Final Decision

Queen City Academy Education Association, on behalf of its members, Gary Corcoran and Eric Koellner,

Petitioner,

v.

Board of Trustees of the Queen City Academy Charter School, Union County,

Respondent.

The record of this matter, the Initial Decision of the Office of Administrative Law (OAL), the exceptions filed by respondent pursuant to *N.J.A.C.* 1:1-18.4, and petitioner's reply thereto, have been reviewed and considered.

The Queen City Education Association (petitioner or Association) is the majority representative for certain employees of the Queen City Academy Charter School Board of Trustees (Board). In its petition of appeal, the Association alleges that the Board violated *N.J.S.A.* 18A:16-13.2 by refusing to offer its employees a health insurance plan that is equivalent to the New Jersey Educators Health Plan (NJEHP).

Following petitioner's motion for summary decision, the Administrative Law Judge (ALJ) found that the Board is obligated to provide a plan equivalent to the NJEHP; further, it was undisputed that the Board has not offered or provided such a plan. The ALJ rejected the Board's argument that the parties must negotiate regarding the increase in cost prior to the Board offering

the plan, finding that the Board must offer the plan and then proceed to negotiations over any increase in net costs. The ALJ also rejected the Board's argument that this matter should be stayed pending the adjudication of similar matters currently pending before the New Jersey Council on Local Mandates, finding that those matters involve different parties and that there is no reason to believe that any order resulting from those matters would be binding or precedential on the OAL. Accordingly, the ALJ granted petitioner's motion for summary decision and ordered the Board to offer its employees a NJEHP-equivalent plan.

In its exceptions, the Board argues that the ALJ failed to consider various questions of fact related to the Board's ability to finance a NJEHP-equivalent plan, including whether implementing the plan prior to negotiating could threaten the school's ability to provide a thorough and efficient education; whether charter schools must implement an unbudgeted plan when they have no independent taxing authority; whether performance was impossible because Small Market Insurers do not offer a NJEHP-equivalent plan; and whether incurring a net negative financial impact could result in over-expanding an appropriation. The Board also contends that there are issues of fact regarding whether implementing the plan would deviate from the state-approved performance framework and charter mission and design, and whether the Association had engaged in good faith negotiations to mitigate any negative financial impact.

In reply, the Association argues that the Initial Decision correctly concluded that the Board must first offer the NJEHP and then the parties shall negotiate over financial impact. According to the Association, the Board's excuses for its non-compliance must fail, as the Legislature is presumed to be aware of existing laws, and nonetheless intentionally required that boards offer a NJEHP-equivalent plan, without any exception for charter schools; the Legislature was also presumably aware that implementation would have financial consequences, as it required negotiations to

mitigate the impact of offering the plan. The Association further indicates that two other cases addressing the issue of a Board's obligation to offer a NJEHP-equivalent plan have recently been decided, with the same outcome as the Initial Decision in this matter.

The Commissioner notes that the Board also provided information regarding a Memorandum of Agreement (MOA) that had been reached between the parties.[1] In doing so, the Board acknowledged *N.J.A.C.* 1:1-18.4 – which provides that evidence not presented at the hearing shall not be submitted as part of an exception, nor incorporated or referred to within exceptions – but indicated that because the fact and status of the parties' ongoing negotiations were a part of the OAL record, it was providing the information regarding the MOA to provide clarity. However, the record demonstrates that no information regarding the MOA was submitted to the ALJ, nor does that information "clarify" anything previously submitted – it is new information, and thus its submission was improper pursuant to *N.J.A.C.* 1:1-18.4. Accordingly, the Commissioner did not consider the portions of the Board's exceptions regarding the MOA, or the portions of the Associations reply thereto, in reaching the decision herein.[2]

Upon review, the Commissioner concurs with the ALJ that *N.J.S.A.* 18A:16-13.2 obligates the Board to first offer a plan equivalent to the NJEHP to Association members, and then to proceed to negotiations over any resulting increase in costs. The plain language of the statute provides that an NJEHP equivalent plan "shall" be offered. *N.J.S.A.* 18A:16-13.2(a)(1). Accordingly, the Board's failure to provide such a plan is in violation of the statute. Furthermore, P.L. 2021, c. 163 provides

[1] A copy of the MOA was not provided.

[2] The Board also argues that the Initial Decision failed to recognize that the Council on Local Mandates did not find that Chapter 44 was not an unfunded mandate, but rather that the matter was not yet ripe for decision. As the Initial Decision does not address the substance of the proceedings before the Council, but rather only found that they did not involve the same parties and would not be binding on the OAL, the Commissioner finds this exception irrelevant.

that any district "with an increase in net cost . . . as a result of" offering the NJEHP-equivalent plan "shall commence negotiations immediately." The Commissioner agrees with the ALJ that, based on this language, the law requires negotiations only after the Board offers a NJEHP-equivalent plan, if there is a net cost increase.

The Commissioner does not find the Board's exceptions, which largely reiterate arguments made and rejected during the summary decision proceedings below, to be persuasive. To the extent that the Board may experience a negative financial impact as a result of offering a NJEHP-equivalent plan, that impact may be negotiated, but there is no exception that would allow the Board to avoid its obligation to offer the plan.

Accordingly, the Initial Decision is adopted as the final decision in this matter. Petitioner's motion for summary decision is granted, and the Board is ordered to offer and implement a NJEHP-equivalent plan.

IT IS SO ORDERED.[3]

Angelica Allen-McMillan, J.d.D.
ACTING COMMISSIONER OF EDUCATION

Date of Decision: February 28, 2023
Date of Mailing: March 1, 2023

[3] This decision may be appealed to the Appellate Division of the Superior Court pursuant to *N.J.S.A.* 18A:6-9.1. Under *N.J.Ct.R.* 2:4-1(b), a notice of appeal must be filed with the Appellate Division within 45 days from the date of mailing of this decision.

54-23

New Jersey Commissioner of Education
Final Decision

Franklin Township Education Association,
Janice Regan, and Sheila Holland,

Petitioners,

v.

Board of Education of Franklin Township,
Somerset County,

Respondent.

Synopsis

The petitioner, Franklin Township Education Association ("petitioner" or "Association") alleged that the respondent Franklin Township Board of Education ("respondent" or "Board") improperly refused to offer an employee health plan that is equivalent to the New Jersey Educators Health Plan ("NJEHP") mandated under *N.J.S.A.* 18A:16-13.2 *et seq.* The Association also filed a related Unfair Practice Charge with the Public Employment Relations Commission (PERC); the Administrative Law Judge (ALJ) found that PERC was the agency with the predominant interest in that case.

The ALJ found, *inter alia*, that: there are no material facts at issue here, and the matter is ripe for summary decision; in July 2020, the New Jersey Legislature enacted *P.L.* 2020, Chapter 44, which amended the health insurance benefits statutes for school employees, requiring that employees at schools that do not participate in the State Employees' Health Benefits Plan be offered the NJEHP or an equivalent plan; it is undisputed that the Board has not offered or provided such a plan; and the Board's argument that the parties must negotiate regarding the increase in cost prior to the Board offering the plan is without merit, as the Board must first offer the required NJEHP equivalent plan and then proceed to negotiations over any increase in net costs. Accordingly, the ALJ granted petitioner's motion for summary decision and ordered the Board to offer its employees a NJEHP-equivalent plan. PERC issued a decision agreeing with the ALJ that the Board is obligated to first offer a NJEHP-equivalent plan and then negotiate regarding any net cost increase.

Upon review, and addressing the issues within the Commissioner's jurisdiction, the Commissioner, *inter alia*, concurred with the ALJ and PERC that the plain language of *N.J.S.A.* 18A:16-13.2 obligates the Board to first offer a plan equivalent to the NJEHP to Association members, before proceeding to negotiations over any resulting increase in costs. Accordingly, the Initial Decision of the OAL was adopted as the final decision in this matter. The Board was ordered to offer and implement a NJEHP-equivalent health insurance plan for its employees, as required under *N.J.S.A.* 18A:16-13.2.

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

54-23
OAL Dkt. Nos. EDU 01442-21 and 01448-21
Agency Dkt. Nos. 1-1/21 and 3-1/21 (consolidated)

New Jersey Commissioner of Education

Final Decision

Franklin Township Education Association, Janice Regan, and Sheila Holland,

Petitioners,

v.

Board of Education of Franklin Township, Somerset County,

Respondent.

The record of this matter, the Initial Decision of the Office of Administrative Law (OAL), the exceptions filed by the parties pursuant to *N.J.A.C.* 1:1-18.4, petitioner's reply to respondent's exceptions, and the decision of the Public Employment Relations Commission (PERC) have been reviewed and considered.[1]

The Franklin Township Education Association (petitioner or Association) is the majority representative for certain employees of the Franklin Township Board of Education (Board). In its petition of appeal, the Association alleges that the Board violated *N.J.S.A.* 18A:16-13.2 by refusing to offer its employees a health insurance plan that is equivalent to the New Jersey Educators Health Plan (NJEHP). Petitioner also filed an Unfair Practice Charge with PERC. The Administrative Law Judge (ALJ) found that PERC was the agency with the predominant interest.

[1] Respondent did not file a reply to petitioner's exceptions.

Following petitioner's motion for summary decision, the ALJ found that the Board is obligated to provide a plan equivalent to the NJEHP and that it was undisputed that the Board has not offered or provided such a plan. The ALJ rejected the Board's argument that the parties must negotiate regarding the increase in cost prior to the Board offering the plan, finding that the Board must offer the plan and then proceed to negotiations over any increase in net costs. Accordingly, the ALJ granted petitioner's motion for summary decision.

In its decision, PERC agreed with the ALJ that the Board is obligated to offer a NJEHP-equivalent plan and then negotiate regarding any net cost increase. PERC amended the Initial Decision to specify that the Board's failure to meet its obligations under *N.J.S.A.* 18A:16-13.2 simultaneously violated the New Jersey Employer-Employee Relations Act.

In its exceptions, petitioner agrees with the merits of the ALJ's decision but requests that the remedy be modified to make employees whole for the financial loss suffered as a result of the Board's refusal to offer the NJEHP plan. Petitioner contends that it sought summary judgment solely on the issue of the Board's liability with respect to its failure to offer the plan and stated in its moving papers that the make-whole remedy would subsequently be proven.

Upon review, addressing the issues within the Commissioner's jurisdiction, the Commissioner concurs with the ALJ and PERC that *N.J.S.A.* 18A:16-13.2 obligates the Board to first offer a plan equivalent to the NJEHP to Association members, and then to proceed to negotiations over any resulting increase in costs. The plain language of the statute provides that an NJEHP equivalent plan "shall" be offered. *N.J.S.A.* 18A:16-13.2(a)(1). Accordingly, the Board's failure to provide such a plan is in violation of the statute. Furthermore, P.L. 2021, c.

163 provides that any district "with an increase in net cost . . . as a result of" offering the NJEHP-equivalent plan "shall commence negotiations immediately." The Commissioner agrees with the ALJ and PERC that, based on this language, the law requires negotiations only after the Board offers a NJEHP-equivalent plan, if there is a net cost increase.

The Commissioner rejects as premature or speculative petitioner's exceptions regarding the issue of remedy. Association members' financial losses, if any, suffered because of the Board's failure to offer the required NJEHP-equivalent plan cannot be ascertained until the Board has offered and implemented that plan. Should such damages become evident in the future, the Association is free to file a new petition of appeal.

Accordingly, the Initial Decision is adopted as the final decision in this matter. Petitioner's motion for summary decision is granted, and the Board is ordered to offer and implement a NJEHP-equivalent plan.

IT IS SO ORDERED.[2]

Angelica Allen-McMillan, J.D.S.
ACTING COMMISSIONER OF EDUCATION

Date of Decision: February 28, 2023
Date of Mailing: March 1, 2023

[2] This decision may be appealed to the Appellate Division of the Superior Court pursuant to *N.J.S.A.* 18A:6-9.1. Under *N.J.Ct.R.* 2:4-1(b), a notice of appeal must be filed with the Appellate Division within 45 days from the date of mailing of this decision.

State of New Jersey
OFFICE OF ADMINISTRATIVE LAW

INITIAL DECISION

OAL DKT. NOS. EDU 01442-2021
AND EDU 01448-2021
AGENCY DKT. NOS. 1-1/21 AND
3-1/21

FRANKLIN TOWNSHIP EDUCATION ASSOCIATION, JANICE REGAN, AND SHELIA HOLLAND,

Petitioners,

v.

BOARD OF EDUCATION OF FRANKLIN TOWNSHIP, SOMERSET COUNTY,

Respondent,

AND

FRANKLIN TOWNSHIP EDUCATION ASSOCIATION,

Petitioner,

v.

BOARD OF EDUCATION OF FRANKLIN TOWNSHIP, SOMERSET COUNTY,

Respondent.

PERC DOCKET NO. CO-2021-139

CONSOLIDATED

Richard A. Friedman, Esq., for petitioner/respondent, Franklin Township Education Association, Janice Regan, and Shelia Holland, (Zazzali, Fagella, Nowak, Kleinbaum & Friedman. P.C., attorneys)

William C. Morlok, Esq., for respondent/petitioner, Board of Education of Franklin Township, Somerset County, (Parker McCay P.A., attorneys)

RECORD CLOSED: October 31, 2022 DATED: November 18, 2022

BEFORE **SARAH G. CROWLEY**, ALJ:

STATEMENT OF FACTS AND PROCEDURAL HISTORY

Petitioner brought an action against the respondent alleging the respondent improperly refused to offer a health plan under N.J.S.A. 18A:13-16.2. The matter was transmitted to the Office of Administrative Law (OAL) as a contested case and assigned to the undersigned. On or about January 8, 2021, the petitioner brought an action against the respondent alleging an Unfair Practice Charge with the Public Employment Relations Commission (PERC) on behalf of the same Franklin Township Education Association. PERC issued a complaint on June 28, 2021. The matters were consolidated by Order, dated September 30, 2022. On September 30, 2022, the petitioner filed a motion for summary decision. Opposition was filed by the respondent, Board of Education on October 10, 2022. Oral argument was conducted via Zoom on October 31, 2022, and the record closed on that date.

STATEMENT OF FACTS

On July 1, 2020, the New Jersey Legislature enacted P.L. 2020, Chapter 44, which amended the health insurance benefits statues for school employees, which provides:

> (1) Notwithstanding the provision of any other law, rule or regulation to the contrary, beginning January 1, 2021 and for each year thereafter, a board of education as an employer providing health care benefits coverage for its employees and their dependent if any, in accordance with P.L. 1979, c. 291 18A:16-12 et seq. shall offer to its employees, and their dependents if any, the equivalent of the New Jersey Educators Plan in the School Employees' Health Benefits Program as that plan design is described in section f. of section 1 of P.L. 2020,c.44, 52:14-17.46.13.
>
> . . . .
>
> (2) the plan under this section shall be offered by the employer regardless of any collective negotiation agreement between the employer and its employees in effect on the effective date [July 1, 2020] of this act, P.L. 2020, c.44, that provides for enrollment in other plans offered by the employer.

With regard to employees who commenced employment prior to July 1, 2020, N.J.S.A. 18A:16-13.2(b) provides that:

> Prior to January 1, 2020, each employer shall provide an enrollment period during which all employees who commenced employment prior to the effective date[July1, 2020] of this act shall be required to select affirmatory a plan provided by the employer. If an employee fails to select affirmatively a plan during this enrollment period, the employer shall enroll the employee, and the employee's dependents if any, in the equivalent New Jersey Educators Health Plan offered pursuant to subsection a. of this section for the year January 1, 2021, until December 31, 2021.

With regard to employees who commence employment on or after July 1, 2020, N.J.S.A. 18A:16-13.2c(1) provides that:

> Beginning on January 1, 2021, an employee commencing employment on or after the effective date [July 1, 2020] of this act but before January 1, 2028, who does not waive coverage, shall be enrolled by the employer in the equivalent New Jersey Educators Health Plan, or equivalent Garden State Health Plan if selected by the employee, as those plans are offered pursuant to subsection a of this section. The employee shall remain enrolled in either the equivalent New Jersey Educators Health Plan or the equivalent Garden State Health Plan selected the employee at the annual open enrollment for each plan year until December 31, 2027, provided that he employee during this period may waive coverage as an employee and select and change the type of coverage received under the plan following a qualifying life event, in accordance with the plan regulations. Beginning January 1, 2028, the employee may select, during open enrollment period or at such other times or under such conditions as the employer may provide, any plan offered by the employer.

In June 2021, the New Jersey legislature amended the forgoing law to provide that if the provisions of the foregoing result in an increase net cost, the parties "shall commence negotiations immediacy, unless mutually agreed upon by the employer and the majority representative to opt to substantially mitigate the finance impact to the employer as part of the next collective negotiators agreement." It is undisputed that the respondent, Franklin Township Board of Education has not offered or provided its

members with a plan equivalent to New Jersey Educator's Health Plan ("NJEHP"). Moreover, the parties have commenced negotiations over this issue.

The foregoing facts are undisputed and are thus **FOUND** as **FACT**.

LEGAL ANALYSIS AND CONCLUSION

The undisputed facts are that petitioners have not been offered a plan equivalent to NJEHP. And although the "net costs" of such a plan have not, nor could they be determined without such an offering, the parties have commenced negotiations regarding this issue. Notwithstanding the speculative nature of cost increase of such a plan, the Board has maintained that it does not have to offer the plan until after the negotiations are completed. However, the law provides that **if** there is an increase in costs that that parties shall negotiate. Moreover, negotiations have been commenced. The law is not discretionary and does provide an option to providing an equivalent plan. The language is clear and unambiguous --- an equivalent plan **shall** be offered; and if an increase in cost occurs, the parties **shall** negotiate it.

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

A determination whether a genuine issue of material fact exists that precludes summary decision requires the judge to consider whether the competent evidential materials presented, when viewed in the light most favorable to the non-moving party, are sufficient to permit a rational fact finder to resolve the allegedly disputed issue in favor of the non-moving party. Our courts have long held that "if the opposing party offers . . . only facts which are immaterial or of an insubstantial nature, a mere scintilla, 'fanciful

frivolous, gauzy or merely suspicious,' he will not be heard to complain if the court grants summary judgment." Brill v. Guardian Life Ins. Co. of Am., 142 N.J. 520 (1995) (citing Judson v. Peoples Bank and Trust Co., 17 N.J. 67, 75 (1954)).

The "judge's function is not himself [or herself] to weigh the evidence and determine the truth of the matter but to determine whether there is a genuine issue for trial." Brill, 142 N.J. at 540 (citing Anderson v. Liberty Lobby, 477 U.S. 242, 249, 106 S. Ct. 2505, 2511, 91 L. Ed. 2d 202, 212 (1986)). When the evidence "is so one-sided that one party must prevail as a matter of law," the trial court should not hesitate to grant summary judgment. Liberty Lobby, 477 U.S. at 252, 106 S. Ct. at 2512, 91 L. Ed. 2d at 214.

The respondent has not presented any material facts that are in dispute in this matter. The law in question is clear. It mandates the District to offer the plan equivalent to the NJEHP, and if there is an increase in cost, it mandates the parties to negotiate the issue relating to increase cost of the plan. Respondent argues that the financial impact of offering this plan is substantial and the parties need to negotiate the issue prior to offering it. They submit documentation outlining the potential increase in cost. However, even assuming that I accept these projections as fact, it does not relieve the District of the obligation to provide such a plan. They must provide the plan and then proceed to negotiations over such increase in costs.

I therefore **CONCLUDE** that the petitioner is entitled to a judgement as a matter of law on the issue involving the obligation of the District to offer provide a plan equivalent to the NJEHP to its members. I further **CONCLUDE** that after offering such a plan to its members, if there is a net cost increase, the parties SHALL negotiate this issue to mitigate the financial impact to the employer.

I hereby **FILE** this initial decision with **PUBLIC EMPLOYMENT RELATIONS COMMISSION** for consideration.

This recommended decision may be adopted, modified or rejected by the **PUBLIC EMPLOYMENT RELATIONS COMMISSION,** who/which by law is authorized to make a final decision on all issues within the scope of its predominant interest. If the **PUBLIC EMPLOYMENT RELATIONS COMMISSION** does not adopt, modify or reject this decision within forty-five days and unless such time limit is otherwise extended, this recommended decision on all of the issues within the scope of predominant interest shall become a final decision in accordance with N.J.S.A. 52:14B-10.

Within thirteen days from the date on which this recommended decision was mailed to the parties, any party may file written exceptions with the **CHAIR OF THE PUBLIC EMPLOYMEN RELATIONS COMMISSION, 495 West State Street, P.O. Box 429, Trenton, New Jersey 08625-0429,** marked "Attention: Exceptions." A copy of any exceptions must be sent to the judge and to the other parties.

Pursuant to N.J.A.C. 1:1-17.8, upon rendering its final decision **PUBLIC EMPLOYMENT RELATIONS COMMISSION** shall forward the record, including this recommended decision and its final decision, to **CIVIL SERVICE COMMISSION**, which may subsequently render a final decision on any remaining issues and consider any specific remedies which may be within its grant of authority.

Upon transmitting the record, **PUBLIC EMPLOYMENT RELATIONS COMMISSION** shall, pursuant to N.J.A.C. 1:1-17.8(c), request an extension to permit the rendering of a final decision by the **CIVIL SERVICE COMMISSION** within forty-five days of the predominant-agency decision. If **CIVIL SERVICE COMMISION** does not render a final decision within the extended time, this recommended decision on the remaining issues and remedies shall become the final decision.

November 18, 2022 _____ Sarah G. Crowley _____

DATE **SARAH G. CROWLEY**, ALJ

Date Mailed to Agency:

PUBLIC EMPLOYMENT RELATIONS COMMISSION: _____

CIVIL SERVICE COMMISSION: _____

Date Mailed to Parties: _____

SGC/tat

55-23

New Jersey Commissioner of Education
Final Decision

Community Charter School of Paterson
Education Association, on behalf of its members,

Petitioner,

v.

Board of Trustees of the Community
Charter School of Paterson, Passaic County,

Respondent.

Synopsis

The petitioner, Community Charter School of Paterson Education Association ("petitioner" or "Association") alleged that respondent Community Charter School of Paterson Board of Trustees ("respondent" or "Board") improperly refused to offer an employee health plan that is equivalent to the New Jersey Educators Health Plan ("NJEHP") mandated under *N.J.S.A.* 18A:16-13.2 *et seq*.

The ALJ found, *inter alia*, that: there are no material facts at issue here, and the matter is ripe for summary decision; the Association and the Board are parties to a collective bargaining agreement which expired on June 30, 2021; negotiations are continuing to reach a successor agreement; in July 2020, the New Jersey Legislature enacted *P.L.* 2020, Chapter 44, which amended the health insurance benefits statutes for school employees, requiring that employees at schools that do not participate in the State Employees' Health Benefits Plan be offered the NJEHP or an equivalent plan; beginning January 1, 2021, the Board offered its employees three Open Access health insurance plans, one of which was identified as substantially equivalent to the NJEHP; that plan was later found to not be equivalent to the NJEHP; the Board claims that it is in negotiations with the Association for a new collective bargaining agreement that will encompass health benefits and costs, but no agreement has yet been reached; the issue to be decided here is the legal authority of the Board to defer offering an equivalent health insurance plan to the Association until negotiations have been completed. The ALJ rejected the Board's argument that the parties must negotiate regarding the increase in cost prior to the Board offering the plan and determined instead that the Board must first offer the required NJEHP equivalent plan and then proceed to negotiations over any increase in net costs. Accordingly, the ALJ granted petitioner's motion for summary decision and ordered the Board to offer its employees a NJEHP-equivalent plan.

Upon review, the Commissioner concurred with the ALJ's findings and conclusion, and adopted the Initial Decision of the OAL as the final decision in this matter. The Board was ordered to offer and implement a NJEHP-equivalent health insurance plan for its employees, as required under *N.J.S.A.* 18A:16-13.2.

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

55-23
OAL Dkt. No. EDU 03968-21
Agency Dkt. No. 27-2/21

New Jersey Commissioner of Education

Final Decision

Community Charter School of Paterson Education Association, on behalf of its members,

Petitioner,

v.

Board of Trustees of the Community Charter School of Paterson, Passaic County,

Respondent.

The record of this matter, the Initial Decision of the Office of Administrative Law (OAL), the exceptions filed by petitioner pursuant to *N.J.A.C.* 1:1-18.4, and respondent's reply thereto, have been reviewed and considered.

The Community Charter School of Paterson Education Association (petitioner or Association) is the majority representative for certain employees of the Community Charter School of Paterson Board of Trustees (Board). In its petition of appeal, the Association alleges that the Board violated *N.J.S.A.* 18A:16-13.2 by refusing to offer its employees a health insurance plan that is equivalent to the New Jersey Educators Health Plan (NJEHP).

Following petitioner's motion for summary decision, the Administrative Law Judge (ALJ) found that the Board is obligated to provide a plan equivalent to the NJEHP and that it was undisputed that the Board has not offered or provided such a plan. The ALJ rejected the

Board's argument that the parties must negotiate regarding the increase in cost prior to the Board offering the plan, finding that the Board must offer the plan and then proceed to negotiations over any increase in net costs. Accordingly, the ALJ granted petitioner's motion for summary decision and ordered the Board to offer its employees a NJEHP-equivalent plan.

In its exceptions, petitioner agrees with the merits of the ALJ's decision but requests that the remedy be modified to make employees whole for the financial loss suffered as a result of the Board's refusal to offer the NJEHP plan. Petitioner contends that it sought summary judgment solely on the issue of the Board's liability with respect to its failure to offer the plan and stated in its moving papers that the make-whole remedy would subsequently be proven.

In reply, the Board argues that petitioner has not supplied any proof of loss by employees. The Board also contends that the statutory scheme provides for collective negotiations to address issues arising from the costs of these plans, rather than a private right of action.[1]

Upon review, the Commissioner concurs with the ALJ that *N.J.S.A.* 18A:16-13.2 obligates the Board to first offer a plan equivalent to the NJEHP to Association members, and then to proceed to negotiations over any resulting increase in costs. The plain language of the statute provides that an NJEHP equivalent plan "shall" be offered. *N.J.S.A.* 18A:16-13.2(a)(1). Accordingly, the Board's failure to provide such a plan is in violation of the statute. Furthermore, P.L. 2021, c. 163 provides that any district "with an increase in net cost . . . as a result of" offering the NJEHP-equivalent plan "shall commence negotiations immediately." The

[1] The Board did not file any exceptions regarding the merits of the Initial Decision.

Commissioner agrees with the ALJ that, based on this language, the law requires negotiations only after the Board offers a NJEHP-equivalent plan, if there is a net cost increase.

The Commissioner rejects as premature or speculative petitioner's exceptions regarding the issue of remedy. Association members' financial losses, if any, suffered as a result of the Board's failure to offer the required NJEHP-equivalent plan cannot be ascertained until the Board has actually offered and implemented that plan. Should such damages become evident in the future, the Association is free to file a new petition of appeal.

Accordingly, the Initial Decision is adopted as the final decision in this matter. Petitioner's motion for summary decision is granted, and the Board is ordered to offer and implement a NJEHP-equivalent employee health insurance plan.

IT IS SO ORDERED.[2]

Angelina Allen McMillan, J.D.S.
ACTING COMMISSIONER OF EDUCATION

Date of Decision: February 28, 2023
Date of Mailing: March 1, 2023

[2] This decision may be appealed to the Appellate Division of the Superior Court pursuant to *N.J.S.A.* 18A:6-9.1. Under *N.J.Ct.R.* 2:4-1(b), a notice of appeal must be filed with the Appellate Division within 45 days from the date of mailing of this decision.

State of New Jersey
OFFICE OF ADMINISTRATIVE LAW

INITIAL DECISION ON MOTION FOR SUMMARY DECISION

OAL DKT. NO. EDU 03968-21

AGENCY DKT. NO. 27-2/21

COMMUNITY CHARTER SCHOOL OF PATERSON EDUCATION ASSOCIATION, ON BEHALF OF ITS MEMBERS,

Petitioner,

v.

COMMUNITY CHARTER SCHOOL OF PATERSON BOARD OF TRUSTEES, PASSAIC COUNTY,

Respondent.

Richard A. Friedman, Esq., and **Sheila Murugan**, Esq., for petitioner Community Charter School of Paterson Education Association (Zazzali, Fagella, Nowak, Kleinbaum & Friedman. P.C., attorneys)

Thomas O. Johnston, Esq., for respondent Community Charter School of Paterson Board of Trustees (Johnston Law Firm, attorneys)

Record Closed: November 21, 2022 Decided: December 7, 2022

BEFORE **GAIL M. COOKSON**, ALJ:

STATEMENT OF THE CASE AND PROCEDURAL HISTORY

Petitioner Community Charter School of Paterson Education Association ("petitioner" or "Association") brought an action against the respondent Community Charter School of Paterson Board of Trustees ("respondent" or "Board") alleging the respondent improperly refused to offer an "equivalent" New Jersey Educators Health Plan ("NJEHP") under the Health Benefits Law, N.J.S.A. 18A:16-13.2 *et seq.*, as amended by P.L. 2021, c. 163.

The matter was transmitted by the Department of Education to the Office of Administrative Law (OAL) where it was filed on April 27, 2021, for hearing as a contested case pursuant to N.J.S.A. 52:14B-1 to -15 and N.J.S.A. 52:14F-1 to -13.[1] The matter was assigned to the the Honorable Acting Director and Chief Administrative Law Judge Ellen S. Bass, who managed the matter until her retirement in May 2022. Following the retirement of Judge Bass, the Honorable Judge Joann Candido, A.L.A.J., conferenced the matter telephonically on June 29, 2022, to familiarize herself with the status of the case and any settlement discussions. Thereafter, the matter was reassigned to me. It was agreed that counsel would consider drafting a joint stipulation of facts and presenting the case through dispositive motion practice. The scheduling of a plenary hearing date was deferred and a briefing schedule established. The matter is now ripe for decision.

STATEMENT OF UNDISPUTED FACTS

1. The Association and the Board are parties to a collective bargaining agreement, but which expired on June 30, 2021. They are continuing negotiations to reach a successor agreement. [Certification of Curtis Palmore ("Palmore Cert.") ¶ 3.]

2. The New Jersey Legislature enacted P.L. 2020, Chapter 44, effective July 1, 2020, which amended the health insurance benefits statutes for school

[1] There is no challenge that the Commissioner of the Department of Education has subject matter jurisdiction to resolve the dispute as coming under "school laws." See Boonton Educ. Ass'n v. Bd. of Educ. of Boonton, No. A-1670-21, 2022 N.J. Super. Unpub. LEXIS 1940, at *2 (App. Div. Oct. 19, 2022), aff'g Final Decision OAL Dkt. No. EDU 4105-21.

employees, requiring, as discussed below, that employees at schools that do not participate in the State Employees' Health Benefits Plan ("SEHBP") be offered the NJEHP or equivalent plan. N.J.S.A. 18A:16-13.2 ("Chapter 44").

3. On July 7, 2021, the Legislature enacted some amendments to various sections of Chapter 44. Specifically, the requirement that the Board must offer an NJEHP or NJEHP-equivalent plan remained the same. [Exhibit A to Certification of Sheila Murugan, Esq. ("Murugan Cert.")]

4. The Board offered the members of the Association healthcare plans known as the Open Access Program (I, II, and III) for the calendar year commencing January 1, 2021.

5. The Board asserts that the OAP III, specifically, is offered as "comparable" to the NJEHP. [Palmore Cert. ¶ 9.]

6. An analysis by the New Jersey Education Association's Assistant Director of Research and Economic Services compared the OAP III plan to the NJEHP and found numerous differences in terms and benefits. [Salerno Cert. ¶ 6; Murugan Cert., Exhibit F.]

7. The Board states that it is negotiations with the Association for a new agreement that will encompass health benefits and costs, but no agreement has been reached yet.

ARGUMENT ON THE MOTIONS

Petitioner argues that the plain letter of the law set forth in Chapter 44 as amended requires the Board to actually offer an equivalent-NJEHP healthcare plan and determine the net cost increases before negotiating with the Association to mitigate those increases.

Respondent argues that it knows the potential cost increases and that the Association must negotiate in good faith a new collective bargaining agreement before

the Board incurs those losses. It also asserts that the OAP III plan offered is substantially consistent with the law's requirements.

LEGAL DISCUSSION

The above-recitation of the factual background, together with a reading of the legal submissions of the parties, makes it clear that the only issue pending determination on this summary disposition motion is the legal authority of the Board to defer offering an "equivalent" health insurance plan to the Association until negotiations have been completed. In other words, the parties argue that the legal issue here is a chicken-egg dilemma as to when negotiations must take place.

It is well-established that if there is no genuine issue as to any material fact, a moving party is entitled to prevail as a matter of law. Brill v. The Guardian Life Insurance Co. of America, 142 N.J. 520, 540 (1995). The purpose of summary decision is to avoid unnecessary hearings and their concomitant burden on public resources. Under the Brill standard, a fact-finding hearing should be avoided "when the evidence is so one-sided that one party must prevail as a matter of law." Brill guides us thusly:

> [A] determination whether there exists a "genuine issue" of material fact that precludes summary judgment requires the motion judge to consider whether the competent evidential materials presented, when viewed in the light most favorable to the non-moving party, are sufficient to permit a rational factfinder to resolve the alleged disputed issue in favor of the non-moving party.
>
> [Id. at 540]

In explaining the standard to be applied in summary motion practice, the Brill Court explained:

> The same standard applies to determine whether a prima facie case has been established by the party bearing the burden of proof in a trial. . . . If a case involves no material factual disputes, the court disposes of it as a matter of law by rendering judgment in favor of the moving or non-moving party.

[Id. at 536-37]

I **CONCLUDE** in this matter that the issue of when the NJEHP or NJEHP-equivalent health insurance plan must be offered to the Community Charter School covered employees can be decided as a matter of law.[2]

On July 1, 2020, the New Jersey Legislature enacted P.L. 2020, Chapter 44, which amended the health insurance benefits statues for school employees, which provides:

> (1) Notwithstanding the provision of any other law, rule or regulation to the contrary, beginning January 1, 2021 and for each year thereafter, a board of education as an employer providing health care benefits coverage for its employees and their dependent if any, in accordance with P.L. 1979, c. 291, 18A:16-12 et seq. **shall** offer to its employees, and their dependents if any, the **equivalent** of the New Jersey Educators Plan in the School Employees' Health Benefits Program as that plan design is described in section f. of section 1 of P.L. 2020, c.44, 52:14-17.46.13.
>
> . . . .
>
> (2) the plan under this section **shall** be offered by the employer regardless of any collective negotiation agreement between the employer and its employees in effect on the effective date [July 1, 2020] of this Act, P.L. 2020, c.44, that provides for enrollment in other plans offered by the employer.
>
> [N.J.S.A. 18A:16-13.2 (emphasis added).]

With regard to employees who commenced employment prior to July 1, 2020, N.J.S.A. 18A:16-13.2(b) provides that:

> Prior to January 1, 2020, each employer **shall** provide an enrollment period during which all employees who

[2] A cased with the same legal issue has been filed at the OAL and was recently decided on summary motion by the Honorable Sarah Crowley, A.L.J.. Franklin Township Education Association, et al. v. Board of Education of Franklin Township, Somerset County, OAL Dkt. EDU 01442-2021 (Nov. 18, 2022). Not only do I concur with her Initial Decision after doing my own legal research, but I am mindful that it makes sense that both cases move in tandem to the Department and then probably to the Superior Court, Appellate Division, for a consistent and determinative legal analysis.

> commenced employment prior to the effective date [July1, 2020] of this act shall be required to select affirmatory a plan provided by the employer. If an employee fails to select affirmatively a plan during this enrollment period, the employer **shall** enroll the employee, and the employee's dependents, if any, in the equivalent New Jersey Educators Health Plan offered pursuant to subsection a. of this section for the year January 1, 2021, until December 31, 2021.
>
> [Id. (emphasis added).]

With regard to employees who commence employment on or after July 1, 2020, N.J.S.A. 18A:16-13.2(c)(1) provides that:

> Beginning on January 1, 2021, an employee commencing employment on or after the effective date [July 1, 2020] of this act but before January 1, 2028, who does not waive coverage, **shall** be enrolled by the employer in the equivalent New Jersey Educators Health Plan, or equivalent Garden State Health Plan if selected by the employee, as those plans are offered pursuant to subsection a of this section. The employee **shall** remain enrolled in either the equivalent New Jersey Educators Health Plan or the equivalent Garden State Health Plan selected the employee at the annual open enrollment for each plan year until December 31, 2027, provided that the employee during this period may waive coverage as an employee and select and change the type of coverage received under the plan following a qualifying life event, in accordance with the plan regulations. Beginning January 1, 2028, the employee may select, during open enrollment period or at such other times or under such conditions as the employer may provide, any plan offered by the employer.
>
> [Id. (emphasis added).]

In June 2021, the New Jersey legislature amended the forgoing law to provide that if the provisions of the foregoing result in an increase in the net cost of healthcare plans, the parties "**shall** commence negotiations immediacy, unless mutually agreed upon by the employer and the majority representative to opt to **substantially mitigate the finance impact to the employer** as part of the next collective negotiators agreement." [P.L. 2021, c. 163 (emphasis added).] It is undisputed that the respondent Board has not offered or provided its members with a plan equivalent to the

NJEHP. While the parties have commenced negotiations over this issue, the Board has not had a financial impact yet and the net impact of employee contributions is not known.

The respondent has not presented any material facts that are in dispute in this matter. The law in question is clear. It mandates the Board to put in place a plan equivalent to the NJEHP, and if there is an increase in net cost, it mandates the parties to negotiate the issue relating to that increase in the net cost of the plan. Respondent argues that the financial impact of offering this plan is substantial and the parties need to negotiate the issue prior to offering it. They submit documentation outlining the potential increase in cost. However, even assuming that I accept these projections as fact, it does not relieve the Board of the obligation to provide such a plan. They must provide the plan and then, under the more recent amendments to Chapter 44, proceed to negotiations over such increase in net costs, i.e., deducting for employee contributions.

I therefore **CONCLUDE** that the petitioner is entitled to a judgment as a matter of law on the issue involving the obligation of the Board to provide a plan equivalent to the NJEHP to its members. I further **CONCLUDE** that after offering such a plan to its members, if there is a net cost increase, the parties shall negotiate this issue to mitigate the financial impact to the employer.

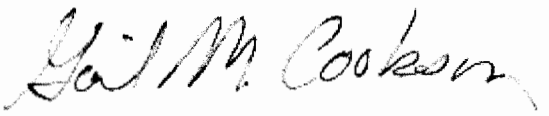
ORDER

It is **ORDERED** that the motion of petitioner Community Charter School of Paterson Education Association for Summary Decision is hereby **GRANTED**. It is further **ORDERED** that the Community Charter School of Paterson Board of Trustees offer its employees a NJEHP-equivalent plan.

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

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

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



December 7, 2022
DATE

GAIL M. COOKSON, ALJ

Date Received at Agency: 12/7/22

Date Mailed to Parties: 12/7/22

id

57-23

STATE OF NEW JERSEY
DEPARTMENT OF EDUCATION

----------X

In the Matter of the TENURE Charges Against

EMMANUEL ETIM,

Agency Dkt. No.
325-11/22

By: SCHOOL DISTRICT OF THE CITY OF EAST ORANGE,
ESSEX COUNTY, NEW JERSEY

----------X

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

ORDER APPROVING SETTLEMENT OF TENURE CHARGES

The School District of the City of East Orange, Essex County (the "Board") certified tenure charges against Emmanuel Etim ("Respondent" or "Etim"), a tenured teacher in the East Orange School District, alleging inefficiency (the "Tenure Charges"); the School Business Administrator/Board Secretary, Marissa McKenzie, filed the Tenure Charges with the Commissioner of Education of the State of New Jersey on or about October 18, 2022. Following submission of the Tenure Charges, Madelaine P. Hicks, Esq. (Antonelli Kantor Rivera) represented the Board in connection with the Tenure Charges. Respondent, by his counsel, Evan Goldman, Esq. (Goldman Davis Krumholz & Dillon, P.C.) filed a Response with the Commissioner on or about November 30, 2022, attaching a September 27, 2022 letter that had been sent to the Board, setting forth Etim's position regarding the Tenure Charges and advising that Respondent would be vigorously defending all the charges. The Commissioner of Education, having reviewed the Tenure Charges and the Response, determined that the charges were sufficient, if true, to warrant dismissal or reduction in compensation and, therefore, referred the matter to arbitration. These charges were referred to the undersigned Arbitrator on December 9, 2022 pursuant to *N.J.S.A.* 18A:6-16, as amended by *P.L.* 2012, c. 26. A timely request for an extension of time was granted.

The parties reached a mutually acceptable settlement of the Tenure Charges prior to the commencement of the hearings scheduled for February 7, 9 and 16, 2023.

The settlement terms were thereafter set forth in a written Settlement Agreement ("Settlement"). On February 8, 2023, the Settlement, signed by the parties, was forwarded to the arbitrator for review and approval. After review of the Settlement and based on representations by the parties' counsel, the standards for settlement or withdrawal of the Tenure Charges have been satisfied in accordance with *N.J.A.C.* 6A:3-5.6 and, therefore, the settlement of the Tenure Charges pursuant to the terms of the Settlement is hereby approved.

1. A copy of the Settlement, as well as the Tenure Charges and the Answer, are annexed to this Order.
2. The settlement of the Tenure Charges is warranted given that Respondent has resigned his employment with the school district effective January 17, 2023. Etim's resignation renders resolution of the charges moot; no further or other relief would result from a continuation of the arbitration proceeding.
3. Both the charged and charging parties have consented to the settlement terms. Both parties were represented by counsel in the negotiation of the settlement terms and the preparation of the Settlement. Etim signed the Settlement indicating his voluntary agreement to its terms on January 10, 2023. The Settlement was also signed by a duly authorized representative of the Board on January 23, 2023, indicating the Board's voluntary agreement to its terms.
4. Respondent confirmed in the Settlement that he fully understands the settlement terms and that he voluntarily entered into the settlement with a full understanding of his rights. Counsel provided advice and counsel to the Respondent throughout the settlement process.
5. The settlement is in the public interest. Respondent has resigned his employment with the district. Proceeding with the Tenure Charges will not provide any further or other relief. Further, by the settlement, the Board avoids the uncertainty of the outcome of the arbitration, the time and

expense associated with litigation and any disruption to the school district resulting from school personnel's participation in the hearing.

6. Based on representations made to me by Etim's counsel, Evan Goldman, Esq., counsel has advised his client of the Commissioner's duty to refer tenure determinations resulting in loss of position to the NJ State Board of Examiners for possible suspension or revocation of his certificate in accordance with N.J.A.C. 6A:3-5.6(a)6.

By reason of the foregoing, the settlement of the tenure charges against the Respondent, Emmanuel Etim, pursuant to the terms set forth in the Settlement, is approved.

Dated: March 1, 2023

Melissa H. Biren, Arbitrator

State of New Jersey)

County of Morris)

On this 1st day of March 2023, before me personally came and appeared MELISSA H. BIREN, to me known to be the individual described in and who executed the foregoing instrument and acknowledged to me that she executed the same.

Notary Public

ROBERT D AGREE
NOTARY PUBLIC
STATE OF NEW JERSEY
ID # 2429835
MY COMMISSION EXPIRES FEB 08, 2028

ANTONELLI KANTOR RIVERA

DANIEL ANTONELLI*
JARRID M. KANTOR*
RAMON E. RIVERA
YULEIKA TAMAYO*
GREGORY D. EMPSON*

JOHN BURKE
MADELAINE P. HICKS*
LAWRENCE M. THEODO
AMY S. BAZARD
MICHAEL A. SABINO*
RICHARD J. BECK*
COURTNEY L. COOKE
GABRIELLA D. CAMPEN

ROBERT D. BLAU
CHARLES E. BEAN
JOR D. REYNOLDS*
PETER J. LOPO

504 Bloomfield Parkway, Suite 1-100
Livingston, NJ 07039
p: 908.623.3676
f: 908.961.0356

2099 Morris Avenue
Union, NJ 07083
Please respond to Livingston office

February 8, 2023

Via Email
Melissa H. Biren, Esq.
Arbitrator & Mediator
52 Whitewood Drive
Morris Plains, NJ 07950

RE: IMO Tenure Hearing of Emmanuel Etim/East Orange School District
Dkt 325-11/22

Dear Ms. Biren:

This firm represents East Orange Board of Education ("Board") in the above-referenced matter. In that connection, please accept this correspondence as the Board's withdrawal of tenure charges against Emmanuel Etim. Pursuant to *In re Cardonick*, State Board decision of April 6, 1983 (1990 School Law Decisions (S.L.D.) 842, 846), enclosed please find a copy of the relevant tenure charges ("Tenure Charges") and settlement agreement ("Settlement Agreement"). As set forth in the Settlement Agreement, the Parties consent to the withdrawal of the Tenure Charges, as Mr. Etim has resigned from his position with the Board. In the interest of public interest, this matter has resolved expeditiously, and Mr. Etim fully understand his rights, as he was advised by counsel.

Thank you for you attention to this matter. We are available for any questions or concerns.

Very truly yours,

s/ Madelaine P. Hicks
Madelaine P Hicks

cc: Evan Goldman, esq. (*via* email)

EMPLOYMENT SEPARATION AGREEMENT AND RELEASE

This Separation Agreement and Release ("Agreement") is entered into on the 10th day of January, 2023, by and between the East Orange Board of Education (the "Board") and Emmanuel Etim, (hereinafter "Mr. Etim" or "Employee").

WHEREAS, Mr. Etim is a tenured employee of the Board; and

WHEREAS, the Board is a body politic and corporate, organized and existing by virtue of the laws of the State of New Jersey, N.J.S.A. 18A:11-1, which is entrusted with maintaining and conducting the public schools of said school district; and

WHEREAS, Mr. Etim was served with tenure charges on or about September 14, 2022;

WHEREAS, Mr. Etim intends to resign from his position effective January, 2022 ("Date of Resignation"); and

WHEREAS, the parties, now wishing to resolve the within matter amicably without the need for litigation or tenure charges, while achieving the goals of both parties, hereby stipulate to settle same, subject to the terms and conditions set forth herein; and

NOW THEREFORE, in consideration of the promises and mutual covenants contained herein, and for other good and valuable consideration, the sufficiency of which is hereby acknowledge, the parties agree to resolve the tenure charges filed with the Commissioner of Education, as follows:

1. **IRREVOCABLE RESIGNATION**

Mr. Etim, by signing this Agreement, hereby tenders his irrevocable resignation effective January 17, 2023, which is annexed hereto as Attachment A. Mr. Etim's resignation shall be effective and irrevocable upon approval of this Agreement by the Board. The Board agrees that it shall accept Mr. Etim's resignation and shall withdraw the instant tenure charges with the

Commissioner of Education. However, in the event that any third-party action shall be initiated against Mr. Etim that implicates the Board, the Board reserves its rights with respect thereto. Mr. Etim agrees that he will not seek any future employment or consultant relationship with the Board in perpetuity and that the Board has no obligation, contractual or otherwise, to re-hire or re-employ him.

2. **COMPENSATION/BENEFITS**

The District agrees to pay Mr. Etim three (3) months salary. Mr. Etim shall not be entitled to any further compensation, emolument of employment or fringe benefit of any kind and specifically waives the right to same. This shall be processed within thirty (30) days of the full execution of the Agreement.

Upon the expiration of Mr. Etim's District-provided coverage, Mr. Etim shall be entitled to any benefits to which he may be lawfully entitled under the Consolidated Omnibus Budget Reconciliation Act ("COBRA"). Mr. Etim shall have the same COBRA rights as any other former employee and shall be solely responsible for any and all costs associated with said COBRA coverage.

In the event Mr. Etim secures health benefits prior to the expiration of his District-provided coverage, he will immediately notify the Board and be removed from the Board's plan.

3. **NO ADMISSIONS**

This Agreement is entered into solely for the purpose of resolving certain issues related to Mr. Etim's employment. Neither the execution, delivery, nor performance of this Agreement, nor Mr. Etim's resignation, shall constitute or be construed at any time or for any purpose to be an admission of liability or wrongdoing by the parties. The parties further agree that neither this

Agreement and Release nor Mr. Etim's resignation shall be used as evidence in any judicial, administrative, or quasi-judicial proceeding, except to enforce the terms of said Agreement.

4. **RELEASE**

Upon execution of this Agreement, and for the consideration herein, Mr. Etim, his heirs and assigns hereby irrevocably waive, release and forever discharge any and all claims and rights, whether known or unknown, which he has or may have against the Board, personally, officially, individually and collectively, including its past and present Board members, all officers and administrators, its attorneys, its agents and employees personally and officially, as well as their successors, and assigns, including, but not limited to any and all claims for attorney's fees, back pay or front pay, any claims for emotional distress or pain and suffering, any and all claims involving tax liability stemming from this Agreement, and any and all claims arising under any federal, state or local ordinance, regulation or law including, but not limited to, the New Jersey and Federal Constitutions; Title VII of the Civil Rights Acts of 1871 and 1991; the Americans with Disabilities Act; the Age Discrimination in Employment Act; the Older Workers Benefit Protection Act of 1990; the Employee Retirement Income Security Act; the Federal Family and Medical Leave Act; the Fair Labor Standards Act; the Equal Pay Act; the Workers' Adjustment and Retraining Notification Act; the New Jersey Law Against Discrimination; the New Jersey Family Leave Act; the New Jersey Conscientious Employee Protection Act; the New Jersey Wage and Hour Law; the Employer-Employee Relations Act; common law claims and any and all other claims that could be initiated in any venue, for harassment, discrimination or retaliation of any kind, breach of promise, misrepresentation, negligence, fraud, estoppel, defamation, violation of public policy, wrongful or constructive discharge, or any other tort, contractual or quasi-contractual claim. Specifically exempted from this release are any claims arising under the

Workers' Compensation Act, N.J.S.A. 34:15-1 et seq., and for health insurance continuation coverage under and pursuant to COBRA. This release does not limit Mr. Etim's right to seek indemnification, in accordance with N.J.S.A. 18A:16-6 and/or N.J.S.A. 18A:16-6.1, with respect to a claim filed against him for any act or omission arising out of and in the course of the performance of his duties as an employee of the Board. The parties represent that they are not currently aware of the existence of any such claims.

It is expressly understood that the arrangement herein is predicated exclusively upon the special circumstances of this matter and shall not be construed to represent any policy, procedure, or past practice of the Board.

The Board will not disclose Mr. Etim's suspension, unless required by law.

5. NON-DISPARAGEMENT

The parties and their agents shall refrain from public negative comments regarding each other, and each other's employees and/or agents. However, nothing in this Agreement shall be construed to limit Mr. Etim or the Board and its agents' obligation to provide accurate information in response to legitimate requests for public information, nor to provide information requested by various State Agencies and/or their agents.

6. SURRENDER OF BOARD PROPERTY

A. Mr. Etim shall surrender all school keys, bank cards and property in his possession to the Superintendent of Schools or his designee.

B. The Superintendent of Schools, or his designee, shall arrange an appointment for Mr. Etim to retrieve her personal property, if necessary.

7. BOARD APPROVAL

This Agreement is subject to approval by the East Orange Board of Education.

8. **ASSENT TO TERMS**

A. The parties each affirm and represent that they had the opportunity to review this Agreement with their own independent legal counsel, that they understand its contents and they are entering into this Agreement without duress, and of their own free will and volition.

B. Mr. Etim further acknowledges that, pursuant to the Age Discrimination in Employment Act, he was given the opportunity to fully consider this Agreement for a period of up to twenty-one (21) days and was given seven (7) days from the execution of this document to revoke this Agreement, by notification to Ramon E. Rivera, Esq., electronic notification to rrivera@akrlaw.com and jscheper@akrlaw.com, simultaneously.

9. **SUCCESSORS AND ASSIGNS**

This Agreement shall be binding upon and shall inure to the benefit of the parties and their respective successors and assigns.

10. **PUBLIC INTEREST**

This Agreement and Release will serve the public interest because, as a result of Mr. Etim having tendered her irrevocable letter of resignation, the Board will not have to engage in litigation related to his employment.

11. **ENTIRE AGREEMENT**

This Agreement constitutes the entire agreement between these parties with respect to the subject matters herein and no other representations, whether verbal or in writing shall be binding upon them. This Agreement may not be altered, amended, modified or revoked except by a new instrument executed in writing by the parties. Each party acknowledges that neither the other party,

nor any agent or attorney of the other party, have made any promise, representation or warranty whatsoever, express or implied, that is not contained in this Agreement to induce it to execute this Agreement.

12. SEVERABLITY

If any non-material portion of this Agreement shall be determined by any court or agency of competent jurisdiction to be contrary to law, then it shall be deemed to be severed from the remainder of this Agreement which shall continue in full force and effect. Should any material provision be stricken by a court of agency of competent jurisdiction, then the entire Agreement shall be null and void, *ab initio*.

13. GOVERNING LAW

The terms of this Agreement and Release shall be governed and interpreted in accordance with the laws of the State of New Jersey.

IN WITNESS WHEREOF, the parties hereto have duly executed this Agreement and Release as of the dates indicated.

FOR THE EAST ORANGE BOARD OF EDUCATION:

Dated: 1/23/23

EMMANUEL ETIM:

Dated: 1/10/23

ATTESTED by Notary Public:

ATTORNEY AT LAW STATE OF NJ

Sworn and subscribed before me this _____ ___ day of _____, 2023

WAIVER

By signing below, the undersigned hereby irrevocably elects to waive the 21-day period referred to in the 8th recital on page 5 of this Agreement.

Emmanuel Etim

DATED: 1/10/23

Attachment A

January 10 __, 2023

East Orange Board of Education
c/o Deliris Lorenzo, Acting Director LRES
199 4th Ave, East Orange, New Jersey 07017

Re: Irrevocable Letter of Resignation

Dear Ms. Lorenzo:

Subject to the terms and conditions of our Separation of Employment Agreement and Release ("Agreement"), and approval of same by the Board of Education, I hereby tender my resignation effective immediately.

Very truly yours,

Emmanuel Etim

EAST ORANGE SCHOOL DISTRICT
DIVISION OF BUSINESS SERVICES
199 Fourth Avenue
East Orange, New Jersey 07017-1026
Phone (862) 233-7300 Fax (973) 678-4987
www.eastorange.k12.nj.us

Board Members
Ms. Terry S. Tucker, President
Ms. Darlene Clovis, Vice President
Mr. Cameron B. Jones, Sr.
Ms. Andrea McPhatter
Mrs. Tashia Owens Muhammad
Mr. Wayne R. Stackhouse, Jr.
Ms. Felecia Williams Ware

RECEIVED BY
STATE OF NJ DOE

Superintendent of Schools
Mr. AbdulSaleem Hasan, Ed.S.
abdulsaleem.hasan@eastorange.k12.nj.us

School Business Administrator/Board Secretary
Ms. Marissa McKenzie
marissa.mckenzie@eastorange.k12.nj.us

Assistant School Business Administrator
Ms. Tia Patterson, MBA, QPA
tia.patterson@eastorange.k12.nj.us

October 18, 2022

Via UPS
Commissioner of Education
Bureau of Controversies and Disputes
Department of Education
100 Riverview Plaza, 4th Floor
PO Box 500
Trenton, NJ 08625-0500

Re: East Orange Board of Education Tenure Charges Against Emmanuel Etim

Dear Commissioner:

Enclosed please find Tenure Charges, Sworn Statement of Evidence, and Certificate of Determination against employee Emmanuel Etim, submitted on behalf of the East Orange Board of Education for your certification.

On September 13, 2022, Mr. Etim was served with the Tenure Charges and accompanying documents and notified of his right to rebut the charges. Mr. Etim has been suspended, without pay, effective October 18, 2022.

Thank you for your courtesy and attention to this matter.

Very truly yours,

Marissa McKenzie
School Business Administrator/Board Secretary

Encl.

C: AbdulSaleem Hasan, Superintendent of Schools (w/o enclosures)
Deliris Lorenzo, Acting Director, LRES (w/o enclosures)
Dawn Nichol-Manning, President, EOEA (copy of Certification of Determination enclosed)
Emmanuel Etim (copy of Certification of Determination enclosed)
Ramon Rivera, Esq., Labor Attorney (w/o enclosures)
Khalifah Shabazz-Charles, Esq., Board Attorney (w/o enclosures)
File

In the Matter of

EMMANUEL ETIM

EAST ORANGE BOARD OF EDUCATION, IN THE COUNTY OF ESSEX

CERTIFICATION OF DETERMINATION

I, AbdulSaleem Hasan, of full age, hereby certify the following:

1. I am the Superintendent of the East Orange Board of Education and I am fully familiar with the facts in this matter.
2. The East Orange Board of Education at its Meeting of October 11, 2022, determined that the attached Tenure Charges and Sworn Statement of Evidence are sufficient, if true in fact, to warrant dismissal of tenured employee Emmanuel Etim.
3. The within determination was made by a majority vote of the whole number of members of the East Orange Board of Education in accordance with applicable Law.

I hereby certify that the foregoing statements made by me are true to the best of my knowledge. I am aware that if any of the foregoing statements made by me are willfully false, I am subject to punishment.

Dated: 10/12/22

AbdulSaleem Hasan
Superintendent of Schools

STATE OF NEW JERSEY: ss
COUNTY OF Union

I CERTIFY that on October 12, 2022 AbdulSaleem Hasan personally came before me and acknowledged under oath, satisfaction that:

(a) He/she is named in and personally signed this document; and
(b) He/she signed, sealed and delivered this document as his/her voluntary act or deed.

My Commission Expires: 11/8/23

MARISSA C. MCKENZIE
NOTARY PUBLIC
STATE OF NEW JERSEY
My Commission Expires 11/8/2023

SCARINCI HOLLENBECK
ATTORNEYS AT LAW
1100 VALLEY BROOK AVENUE
P.O. BOX 790
LYNDHURST, NEW JERSEY 07071-0790
Telephone: (201) 896-4100
Attorneys for East Orange Board of Education

RECEIVED BY
STROVERS ESQ & DISP
[illegible]

In the matter of EMMANUEL ETIM EAST ORANGE BOARD OF EDUCATION, IN THE COUNTY OF ESSEX	NEW JERSEY COMMISSIONER OF EDUCATION AGENCY DOCKET NO. **NOTICE OF TENURE CHARGES**

I, AbdulSaleem Hasan being of full age and duly sworn according to law, depose and say:

1. I am the Superintendent of the East Orange School District (the "District"). As part of my duties, I oversee the administration of all employees throughout the District, including Emmanuel Etim ("Respondent"). During the time period relevant to the Tenure Charges, the Respondent was a tenured employee within the District.

2. I hereby file these Tenure Charges on the basis of Inefficiency pursuant to N.J.S.A. 18A:6-10, N.J.S.A. 18A:6-11, N.J.S.A. 18A:6-17.3, and N.J.A.C. 6A:3-5.1 against the Respondent, a tenured teacher employed by the East Orange Board of Education (the "Board"). The charges stated herein are based upon my personal knowledge, information and belief derived from personnel and other files and records maintained by the Board, and information imparted to me and staff members, specifically as follows:

INFORMATION COMMON TO ALL CHARGES

Respondent, Emmanuel Etim, has been employed by the Board since on or around January 3, 2000. Respondent presently serves in the tenured position of Special Education Teacher at

Sojourner Truth Middle School. During his employment with the District, Respondent has been at all times and, among other things, required to observe and comply with District, State, and Federal Law governing teaching standards. Pursuant to N.J.S.A. 18A:6-17.3(a):

> (1) the superintendent shall promptly file with the secretary of the board of education a charge of inefficiency whenever the employee is rated ineffective or partially effective in an annual summative evaluation and the following year is rated ineffective in the annual summative evaluation;
>
> (2) if the employee is rated partially effective in two consecutive annual summative evaluations or is rated ineffective in an annual summative evaluation and the following year is rated partially effective in the annual summative evaluation, the superintendent shall promptly file with the secretary of the board of education a charge of inefficiency, except that the superintendent upon a written finding of exceptional circumstances may defer the filing of tenure charges until after the next annual summative evaluation. If the employee is not rated effective or highly effective on this annual summative evaluation, the superintendent shall promptly file a charge of inefficiency.

As outlined below, Respondent has demonstrated partially effective performance for two consecutive school years. Accordingly, as described more fully herein and supported by the accompanying Statement of Evidence, Respondent's conduct amounts to Inefficiency sufficient to revoke his tenure protections.

CHARGE ONE: INEFFICIENCY

Respondent has failed to effectively perform the duties of a tenured teacher for two consecutive school years, as follows:

1. Respondent performed his duties in a partially effective manner during the 2020 2021 school year.

2. During the 2020-2021 school year, Respondent was on a Corrective Action Plan. See Statement of Evidence, Exhibit 1.

3. Respondent received an e-mail from Principal Flore-Nadeige B. Lovett, Sojourner Truth Middle School, on November 16, 2020 regarding his failure to submit lesson plans. See Statement of Evidence, Exhibit 2.

4. Respondent received an e-mail from Principal Lovett on November 20, 2020 regarding his failure to appear for his ninth period class or notify administration of connectivity issues, resulting in a lost period of instruction that could have been avoided. See Statement of Evidence, Exhibit 3.

5. Respondent received a Memorandum from Principal Lovett on December 11, 2020 regarding his failure to update and maintain his FOCUS Gradebook on a weekly basis. See Statement of Evidence, Exhibit 4.

6. Respondent received a score of 2.267 in his District observation dated December 15, 2020. See Statement of Evidence, Exhibit 5.

7. Respondent received an e-mail from Principal Lovett on January 4, 2021 scheduling him to observe an effective MCI teacher. See Statement of Evidence, Exhibit 6.

8. Respondent received a Memorandum from Principal Lovett on January 5, 2021 regarding his failure to appear for work and report his absence in Frontline, and to comply with

established procedures when absent and create a substitute folder. See Statement of Evidence, Exhibit 7.

9. Respondent received a Memorandum from Principal Lovett on February 24, 2021 regarding his failure to submit lesson plans for the period of October 9 to December 21 and noting that Respondent had submitted lesson plans late on five occasions. See Statement of Evidence, Exhibit 8.

10. Respondent received a score of 2.533 in his District observation dated March 26, 2021. See Statement of Evidence, Exhibit 9.

11. Respondent received a Memorandum from Principal Lovett on June 14, 2021 regarding his failure to complete his assigned Bulletin Board for the month of June. See Statement of Evidence, Exhibit 10.

12. Respondent was rated partially effective in his 2020-2021 annual summative evaluation dated June 7, 2021. See Statement of Evidence, Exhibit 11.

13. Respondent performed his duties in a partially effective manner during the 2021 – 2022 school year.

14. During the 2021-2022 school year, Respondent was on a Corrective Action Plan. See Statement of Evidence, Exhibit 12.

15. Respondent received a Memorandum from Principal Lovett on September 22, 2021 regarding his failure to submit lesson plans in a timely manner and to adequately maintain and submit his substitute teacher packets. See Statement of Evidence, Exhibit 13.

16. Respondent received an e-mail from Principal Lovett on October 25, 2021 regarding his failure to sign up for three Wednesday workshops. See Statement of Evidence, Exhibit 14.

17. Respondent received a Memorandum from Principal Lovett on November 17, 2021 regarding his failure to complete his assigned Bulletin Board for the month of November. See Statement of Evidence, Exhibit 15.

18. Respondent received a Memorandum from Principal Lovett on November 22, 2021 regarding his failure to complete the Chromebook Return Form. See Statement of Evidence, Exhibit 16.

19. Respondent received an e-mail from Principal Lovett on January 27, 2022 scheduling him to observe an effective MCI teacher. See Statement of Evidence, Exhibit 17.

20. Respondent received a score of 2.313 in his District observation dated January 6, 2022. See Statement of Evidence, Exhibit 18.

21. Respondent received a score of 2.1 in his District observation dated March 15, 2022. See Statement of Evidence, Exhibit 19.

22. Respondent received a score of 2.25 in his District observation dated May 11, 2022. See Statement of Evidence, Exhibit 20.

23. Respondent was rated partially effective in his 2021-2022 annual summative evaluation dated June 10, 2022. See Statement of Evidence, Exhibit 21.

24. Respondent, during the 2020-2021 and 2021-2022 school year, participated in peer observations of MCI teachers and received debriefing regarding appropriate strategies and implementation.

25. Respondent, despite his placement on a Corrective Action Plan and receiving and having access to support from the District, continues to exhibit a pattern of partially effective performance.

26. Respondent has failed to perform his professional responsibilities with respect to weekly planning and submission of lesson plans, regularly checking email, and completing required documents in a timely manner.

27. Respondent has consistently failed to adequately plan lessons designed to meet the needs of his special needs population.

28. Respondent has failed to meet the expected standard of excellence required of a classroom teacher.

WHEREFORE, Respondent has shown that he is unfit to discharge the duties and functions of the position in which he holds tenure in the District, and he should be dismissed.

The above charge is supported by the Statement of Evidence submitted under oath by AbdulSaleem Hasan, dated August 8, 2022

AbdulSaleem Hasan
Superintendent of Schools

Sworn to and subscribed
before me on this 11 day of August, 2022

NOTARY PUBLIC OF
THE STATE OF NEW JERSEY

MARISSA C. MCKENZIE
NOTARY PUBLIC
STATE OF NEW JERSEY
My Commission Expires 11/8/2023

Goldman Davis Krumholz & Dillon, P.C.

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Kelly A. Smith *
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* *(N.J. & N.Y. Bars)*
+ *(Certified by the Supreme Court of New Jersey as a Civil Trial Attorney)*

Jersey City Office
648 Newark Ave
Jersey City, New Jersey 07306
Phone 201-656-5232
Reply to Hackensack Office

November 30, 2022

Angelica Allen-McMillan, Ed.D.
Acting Commissioner
State of New Jersey
Department of Education
PO Box 500
Trenton, NJ 08625-0500

Re: IMO Tenure Hearing of Emmanuel Etim
Agency Docket No. 325-11/22

Dear Acting Commissioner Allen-McMillan:

Please be advised that I am currently representing Emmanuel Etim with regard to the recent Tenure Charges filed against him. Previously, I had forwarded to the East Orange School District a detailed letter (attached) responding to the Tenure Charges filed against him. While that letter was acknowledged by the Business Administrator, I received no other contact from anyone at the District or its attorney.

Mr. Etim is strenuously defending against the filed tenure charges as can be seen on the attached letter. I will continue to defend Mr. Etim at any tenure hearing as he has had a flawless career of 23 and ½ years.

If you require any additional information, please do not hesitate to contact me.

Respectfully submitted,

Evan L. Goldman

cc. Khalifah Shabazz-Charles, Esq.

Goldman Davis Krumholz & Dillon, P.C.

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Reply to Hackensack Office

Writer's Email: egoldman@goldmandavis.com
Writer's Extension 413

September 27, 2022

VIA EMAIL ONLY
Ms. Marissa McKenzie
Interim School Business Administrator/Board Secretary
East Orange School District
Division of Business Services
199 Fourth Avenue
East Orange, NJ 07017

Re: Emmanuel Etim

Dear Ms. McKenzie:

Please accept this letter to note my representation of Mr. Etim regarding the tenure charges that the District has filed and served upon him. I will be representing him in this matter, including but not limited to defending him in any tenure hearing. It is my hope that after this matter is carefully reviewed, there can be some type of resolution which will benefit both the District and Mr. Etim.

Essentially, the tenure charges attempt to portray Mr. Etim as not performing his teaching duties up to the level expected of him by the District. Mr. Etim denies any and all of these allegations and more specifically provides details of this below.

1. Mr. Etim has been teaching for 23 years and 6 months, most of that in the East Orange School District. He currently has Tenure as a Special Education Teacher and has had tenure for many years.

2. Most, if not all, of the allegations pertain to the past two years. As we all know, the past two years were part of the global pandemic and teaching was not easy for any professional. Most teaching was done via zoom.

3. As a Special Education Teacher, Mr. Etim more than the "normal" issues involved in teaching via the zoom platform. At the beginning of the 21-21 school year Mr. Etim had no assistants working with him. His predecessor in that class had three assistants.

4. Even when Mr. Etim was not teaching virtually, he had no one with him. Two parents were consistently drawing Mr. Etim's attention to the fact that their children always had one on one personnel work with their children. One of these students was speech impaired and the other was autistic. The speech impaired student was a female who had to be diapered by the hour. Mr. Etim was left with the student, although regulations required that an adult female change the diaper. As a result, this student would often run out into the hallway. Mr. Etim could not abandon the other students in the classroom, so for the first 5 months of the school year this consistently happened.

5. The classroom that Mr. Etim was assigned had no windows and a door. Students were constantly fanning themselves due to the heat. The toilet barely flushed requiring Mr. Etim to flush the toilet several additional times. The hand wash sink spews hot water.

6. Given the class population with learners with multiple disabilities and functioning capabilities, all of the above compounded normal issues in a special ed. Classroom. Mr. Etim's class consisted of children with autism, downs syndrome and hyperactive disorder, all of which made it difficult for any of them to do any substantial academic work. There was no assistive technology and no aids. There were chrome books, but without the necessary software to enable them to do anything sensible.

7. An assistant who was working there briefly last year was experienced in dealing with these types of students. However, the assistant was replaced with someone much less experienced. Most of these students were MCI (mutiply cognitively impaired).

The situation created by the Pandemic and the lack of support provided to Mr. Etim (not even including the deplorable conditions under which he had to work), would have made it difficult for any teacher to perform adequately. In this case, Mr. Etim is a scapegoat for the lack of support given to him by the East Orange School District. This will be amplified during any tenure hearing and no matter what happens, it is our expectation and hope that this will result in the District giving its teachers adequate support.

The Pandemic made it extremely difficult for teachers who were teaching students without any of these issues to perform adequately. For Mr. Etim, who had a population of students with incredible needs (and where very little assistance was provided), his task was virtually impossible.

As stated above, any and all tenure charges will be defended vigorously.

Thank you for your cooperation.

Very truly yours,

GOLDMAN DAVIS
KRUMHOLZ & DILLON, P.C.
S/ Evan L. Goldman
EVAN L. GOLDMAN

ELG/bap

59-23

New Jersey Commissioner of Education

Decision

W.M., on behalf of minor child, J.M.,

Petitioner,

v.

Board of Education of the Township of Bedminster, Somerset County,

Respondent.

Synopsis

Petitioner disputed the respondent Board's finding that his son, J.M., committed an act of harassment, intimidation or bullying (HIB) against a fellow student pursuant to New Jersey's Anti-Bullying Bill of Rights Act, *N.J.S.A.* 18A:37-13.2 et seq (the Act). After an investigation by the school's anti-bullying specialist, the Board determined that J.M. had committed an act of HIB against classmate C.D. when he made comments regarding C.D.'s weight and attire. The Board asserted that J.M.'s conduct satisfied all of the elements of the statutory definition of HIB under the Act. The petitioner contended that the Board's HIB determination was based on a flawed, incomplete, and biased investigation, and was therefore arbitrary, capricious, and/or unreasonable.

The ALJ found, *inter alia*, that: an action by a board of education is entitled to a presumption of correctness unless it is proven to be arbitrary, capricious or unreasonable; under the Act, "harassment, intimidation, or bullying" is broadly defined as any gesture, any written, verbal, or physical act, or any electronic communication that is reasonably perceived as motivated by any actual or perceived distinguishing characteristic, such as race, color, religion, ancestry, national origin, gender, sexual orientation, gender identity and expression, or a mental, physical, or sensory disability, that takes place on school property and substantially disrupts the orderly operation of the school; in the instant case, the record reflects that J.M. did not deny asking C.D. how much he weighed, nor making unkind comments about the size of C.D.'s shoes, but defended his inappropriate comments as merely "trash talk" among a group of classmates; C.D. was insulted and demeaned by the comments made by J.M. and those comments had the effect of disrupting C.D.'s education by causing him to stop taking his medication in the hope that he would lose weight, and by causing him not to want to go to school for fear of being made fun of by J.M. The ALJ concluded that the petitioners have failed to meet their burden of proof that the Board acted in an arbitrary, capricious, or unreasonable manner in concluding that J.M.'s actions constituted harassment, intimidation or bullying under the Anti-Bullying Bill of Rights Act. Accordingly, the ALJ affirmed the Board's HIB determination and dismissed the petition.

Upon review, the Commissioner concurred with the ALJ that the Board did not act in an arbitrary, capricious, or unreasonable manner in rendering its HIB determination. Accordingly, the Initial Decision of the OAL was adopted as the final decision in this matter, and the petition was dismissed.

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

59-23
OAL Dkt. No. EDU 07337-19
Agency Dkt. No. 73-4/19

New Jersey Commissioner of Education

Final Decision

W.M., on behalf of minor child, J.M.,

Petitioner,

v.

Board of Education of the Township of Bedminster, Somerset County,

Respondent.

The record of this matter and the Initial Decision of the Office of Administrative Law (OAL) have been reviewed, as have the exceptions filed by the petitioner pursuant to *N.J.A.C.* 1:1-18.4, and the Board's reply thereto.

In this matter, petitioner challenges the Board's determination that his son committed an act of harassment, intimidation, and bullying (HIB) based on alleged comments about the victim's weight and attire. Specifically, J.M. admitted to asking C.D. how many pounds he weighs; witnesses reported J.M. calling C.D. fat behind his back and referring to his shoes as being as big as "sailboats"; and C.D. alleged that J.M. used his body to push and intimidate him. As a result of the conduct, C.D. stopped taking his medication because it caused him to gain weight and he did not want to come to school out of concern that he would be teased. The school's anti-bullying specialist conducted an HIB investigation in which she interviewed J.M, C.D., and three student witnesses, and concluded that J.M.'s conduct met the definition of HIB.

Specifically, the HIB investigation report found that the verbal and physical acts were motivated by the distinguishing characteristics of weight, attire, and athletic ability. Moreover, in addition to causing a substantial disruption or interference, the conduct had the effect of insulting or demeaning C.D, and severely or pervasively caused physical or emotional harm to C.D., as he did not want to come to school and ceased taking his prescribed medication. The Board confirmed the HIB determination and petitioner subsequently filed this petition of appeal.

Following a hearing on the merits, the Administrative Law Judge (ALJ) concluded that the Board was not arbitrary, capricious or unreasonable in determining that J.M. committed an HIB violation, as the record demonstrates that J.M made a series of insulting and demeaning comments based on C.D.'s perceived characteristics of weight, shoe size, clothing, and athletic ability. The ALJ further explained that the comments disrupted C.D.'s education as they caused C.D. to stop taking his medicine and fear coming to school. Moreover, the ALJ disagreed with petitioner's arguments and found that the HIB investigation was proper, unbiased, and complete.

In his exceptions, petitioner argues that the HIB determination should be reversed because it was based on a flawed, incomplete, and biased investigation. Petitioner explained that when C.D.'s parent first contacted the guidance counselor about J.M.'s conduct, the counselor told her she was sorry about what the family was going through and that C.D. is a great kid. Petitioner contends that since the guidance counselor is also the anti-bullying specialist who conducted the investigation, the investigator was biased in favor of C.D. based of her initial exchange with C.D.'s parent. Petitioner also contends that the investigation was flawed as no staff were interviewed and, instead, the report relied only on the statements of

fifth-grade students who were named by the victim. As one witness was a good friend of the victim's and was also suspended for punching J.M. in the nose, petitioner alleges he was a biased witness. According to petitioner, the investigator downplayed the assault and never explored the possibility that the HIB complaint was in retaliation for the witness' three-day suspension. Further, the petitioner argues that the investigator did not ask the witnesses about whether C.D. participated in trash-talking; did not consider evidence demonstrating that J.M. was joking and had no history of HIB complaints; and did not place weight on the fact that the victim had no physical injury and that, although he claimed he did not want to come to school, C.D. missed no school days.

Petitioner contends that the ALJ erred in not placing weight on his testimony or the testimony of his son, which, he alleges, demonstrates that the HIB determination was arbitrary, capricious, and unreasonable. According to petitioner, his testimony established that there was a conflict of interest as the Superintendent's children were involved, while his son, J.M., testified that the students would all "trash-talk" each other at lunch, and that after the investigator informed him that C.D. was upset, J.M. apologized. Finally, petitioner takes exception to the ALJ's refusal to accept the testimony of petitioner's expert as reliable. Accordingly, petitioner urges the Commissioner to reject the Initial Decision.

In reply, the Board argues that petitioner does not challenge the ALJ's legal determinations, but rather credibility determinations and assessment of the facts. The Board argues that the ALJ's credibility assessments are supported by the record – as petitioner's testimony was inconsistent and his expert relied on inaccurate information – and therefore the ALJ's determinations were not arbitrary, capricious, or unreasonable. Additionally, the Board

contends that the HIB determination was supported by the record, including J.M.'s own admission that he made a comment about how many pounds C.D. weighed. As such, the Board asks that the Initial Decision be adopted.

Upon review, the Commissioner agrees with the ALJ that, based on the evidence in the record, petitioner did not establish that the Board acted in an arbitrary, capricious, or unreasonable manner in finding that J.M. committed an act of HIB. The Anti-Bullying Bill of Rights Act (the Act) defines HIB as follows:

> [A]ny gesture, any written, verbal or physical act, or any electronic communication, whether it be a single incident or a series of incidents, that is reasonably perceived as being motivated either by any actual or perceived characteristic, such as race, color, religion, ancestry, national origin, gender, sexual orientation, gender identity and expression, or a mental, physical or sensory disability, or by any other distinguishing characteristic, that takes place on school property, at any school-sponsored function, on a school bus, or off school grounds as provided for in section 16 of P.L. 2010, c.122 (C.18A:37-15.3), that substantially disrupts or interferes with the orderly operation of the school or the rights of other students and that:
>
> a. a reasonable person should know, under the circumstances, will have the effect of physically or emotionally harming a student or damaging the student's property, or placing a student in reasonable fear of physical or emotional harm to his person or damage to his property;
>
> b. has the effect of insulting or demeaning any student or group of students; or
>
> c. creates a hostile educational environment for the student by interfering with a student's education or by severely or pervasively causing physical or emotional harm to the student.
>
> *N.J.S.A.* 18A:37-14.

Therefore, a finding of HIB requires three elements. First, the conduct must be reasonably perceived as being motivated by any actual or perceived enumerated characteristic or other distinguishing characteristic and, second, the conduct must substantially disrupt or interfere

with the rights of other students or the orderly operation of the school. The third condition is that one of the three criteria enumerated in the Act regarding the effect of the conduct must also be satisfied. *Wehbeh v. Bd. of Educ. of the Twp. of Verona, Essex County*, Commissioner Decision No. 51-20 (decided February 4, 2020).

Regarding the first element, J.M. admitted to asking the victim how many pounds he weighs, and the comments about weight and shoe size were corroborated by witness statements. It was not arbitrary, capricious, or unreasonable for the Board to conclude that a reasonable person would consider J.M.'s comments to be motivated by the distinguishing characteristic of weight or body type. Regarding the second element, there is ample evidence in the record that the conduct caused a substantial disruption to the rights of C.D, as he reported that he stopped taking his medication in an effort to lose weight and was afraid to come to school. Finally, regarding the third element, there is no doubt here that making fun of someone's weight and shoe size would insult or demean that student. As such, the Board was not arbitrary, capricious or unreasonable in determining that J.M.'s conduct met the definition of HIB.

The Commissioner does not find petitioners' exceptions to be persuasive. The investigation was not biased or flawed. Any initial contact with the victim's family did not impact the investigation and the ultimate determination was made based on the victim's own admission and supported by witness statements. Additionally, the Act does not require interviews with staff members for an investigation to be complete. In this case, evidence to justify the HIB determination was established by interviews with the victim, the accused, and three student witnesses, including one of the accused's friends who indicated that he heard

J.M. call the victim "fat" behind his back. Further, the evidence in the record in no way reflects that the HIB complaint was in retaliation for another incident in which a witness punched the accused. It is irrelevant to the determination in this matter whether C.D. participated in trash-talking or whether J.M. was joking; the HIB definition does not consider the accused's intent. It is also irrelevant that C.D. did not have a physical injury or miss school; the victim's fear of coming to school as well as his refusal to take his medicine constitutes a substantial disruption of his rights. Petitioner's remaining exceptions stem from the ALJ's credibility determinations, which the Commissioner finds no basis to overturn. As such, petitioner failed to meet his burden of demonstrating that the Board's HIB determination was arbitrary, capricious, and unreasonable.

Accordingly, the Initial Decision of the OAL is adopted as the final decision in this matter and the petition of appeal is hereby dismissed.

IT IS SO ORDERED.[1]

ACTING COMMISSIONER OF EDUCATION

Date of Decision: March 7, 2023
Date of Mailing: March 9, 2023

[1] This decision may be appealed to the Appellate Division of the Superior Court pursuant to *N.J.S.A.* 18A:6-9.1. Under *N.J.Ct.R.* 2:4-1(b), a notice of appeal must be filed with the Appellate Division within 45 days from the date of mailing of this decision.

State of New Jersey
OFFICE OF ADMINISTRATIVE LAW

INITIAL DECISION
OAL DKT. NO. EDU 07337-19
AGENCY DKT. NO. 73-4/19

W.M. ON BEHALF OF MINOR
CHILD J.M.,
Petitioner,
v.
TOWNSHIP OF BEDMINSTER BOARD
OF EDUCATION, SOMERSET COUNTY,
Respondent.

Robert M. Biagiotti, Esq., for petitioners

Rita F. Barone, Esq., for respondent (Flanagan, Barone, O'Brien, LLC, attorneys)

Record Closed: September 14, 2022 Decided: December 15, 2022

BEFORE **SUSAN L. OLGIATI**, ALJ:

STATEMENT OF THE CASE

Petitioner, W.M. on behalf of his minor son J.M., challenges the determination of the respondent, Bedminster Township Board of Education (hereinafter referred to as the Board) that J.M. committed an act of harassment, intimidation or bullying (HIB) under the Anti-Bullying Bill of Rights N.J.S.A. 18A:37-13.2 et seq.

PROCEDURAL HISTORY

Petitioner filed a Petition of Appeal with the Commissioner of Education, disputing respondent's determination in HIB case #137. The Department of Education transmitted the matter to the Office of Administrative Law (OAL) for hearing as a contested case, where it was filed on May 30, 2019. N.J.S.A. 52:14B-1 to -15; N.J.S.A. 52:14F-1 to -23. The hearing was delayed due to COVID restrictions on in-person proceedings.[1] The hearing was held on May 24, 2022. During conferencing on the first day of hearing, the parties advised the undersigned that petitioner had just learned that the victims in HIB case #137, the HIB that is the subject of this appeal, and HIB case #138[2] were not the same student. Petitioner acknowledged that the HIB investigation reports, along with the identification numbers of the students involved in the two HIB cases had been provided to them in discovery but contend that W.M. formed his belief as to the identity of the victims based on information provided to him by the Board. Following the testimony of W.M. and J.M., the hearing was continued and petitioners presented the testimony of their expert witness on the second day of hearing held on June 7, 2022. Thereafter, the record remained open for the parties to request a transcript of the proceedings and submit written closing arguments. Upon receipt of the closing arguments, the record closed on September 14, 2022. Thereafter, by Order of Extension, the time for filing this Initial Decision was extended until December 15, 2022.

FACTUAL DISCUSSION AND FINDINGS OF FACT

Having reviewed the evidence in the record, I **FIND** that the following facts have been jointly stipulated or are otherwise undisputed, therefore I **FIND** them as **FACT**:

During the relevant time, J.M. was in the fifth grade in the Bedminster Township Public School District. In December 2018, J.M. was identified as the accused/alleged

[1] The parties jointly requested/agreed upon an in-person hearing rather than proceeding via zoom remote hearing platform.
[2] Another HIB case in which J.M. was named as one of the accused. The allegations of the matter were not substantiated and were not appealed.

offender in HIB case #137 and was identified as one of multiple accused/alleged offenders in HIB case #138.

For HIB case #137, the initial report was received on December 3, 2018. See Stipulation of Facts at No. 1.

The investigation was concluded on December 13, 2018, and the report was signed by the Anti-Bullying Specialist, Anti-Bullying Coordinator, and Principal and then submitted to the Superintendent on that same date. Id. at No. 2.

The Superintendent, Jennifer Giordano, signed off on the report on December 17, 2018, after she clarified a statement on page five of the report. Id. at No. 3.

A reorganization meeting of the Bedminster Board of Education was held on January 4, 2019. Id. at No. 4.

On January 17, 2019, HIB #137 was discussed in executive session of the Board. Id. at No. 5.

By letters dated January 21, 2019, petitioners were advised by the District that HIB case #137 was substantiated against J.M. Id. at No. 6.

By email dated February 5, 2019, petitioner W.M. requested a hearing on HIB case #137 before the Board. Id. at No. 7.

The hearing was scheduled for February 12, 2019, but cancelled due to weather. Id. at No. 8.

Petitioners were advised that the hearing was rescheduled for February 21, 2019, but failed to appear. Id. at No. 9.

On February 21, 2019, HIB case #137 was discussed in executive session of the Board. Id. at No. 10.

By letters dated February 25, 2019, petitioners were advised by the District that HIB case #137 was substantiated against J.M. Id. at No.11.

For HIB case #138, the initial report was received on December 20, 2018. Id. at No. 12.

For HIB case #138, the investigation concluded on January 10, 2019, and the allegations were found to be unsubstantiated. Id. at No. 13.

For HIB case #138, the Principal Todd St. Laurent signed off on the investigation report and notified the victim's parents on January 21, 2019. Id. at No. 14.

Gina Infante was the investigator regarding both HIB case #137 and HIB case #138. Id. at No. 15.

Testimony for petitioner

W.M. testified that he has been a teacher for the past thirty-four years. During the relevant time period, J.M. attended school in the District. He is currently attending school at St. James and is in the seventh grade. On approximately November 27, 2018, W.M. received a telephone call from the Vice Principal (VP) Mr. St. Laurent, advising that J.M. had been punched in the face. At that time, the VP said he could not say who was involved in the incident. W.M. later talked with his son who advised that he was punched in the face by A.C. or S.C., who were twin brothers, and that another student, C.D. was there egging them on to punch J.M. The VP advised that the student who punched J.M. had been suspended for three days. W.M. had a good relationship with the VP. The VP later confirmed which of the students were involved in the incident. He also advised that J.M. would have to sit with him at lunch—meaning he would have detention relating to the punching incident.

Thereafter, he received a call from the Principal, Corby Swan, about a HIB incident in the cafeteria [HIB #137]. Mr. Swan advised that he could not provide any details of the incident.

W.M. then learned about a second HIB concerning J.M. Mr. Swan called him to advise that there was a HIB on the bus. [HIB #138]. W.M. was concerned because J.M. did not take the bus.

Later at the Board meeting, he asked whether the two HIB incidents were the same and he was told, "yes." He also asked if children of the board members were involved in HIB case #138, and was told, "yes." The conversation was with the Board. The Superintendent, Ms. Giordano was also there.

W.M. appeared at the Board meeting with his former attorney who has since passed away. At the meeting, he was advised that the HIB matters were handled together and that the victims were the same. As a teacher, W.M. is very familiar with the HIB process. He advised the Board that proper procedure was not followed. He was told that the Board meeting was not a regular meeting, but rather a reorganization meeting. In speaking with others, he learned that the Board should have taken time at the meeting to hear J.M.'s case. Later in his testimony, W.M. recalled that his conversation regarding improper procedure and whether the two incidents were the same, was with Superintendent Giordano.

W.M. explained that he did not look at the student ID numbers in the HIB reports. He thought the Board would have told him the truth about the students involved.

On cross-examination, W.M. explained that after he was called by the principal about HIB case #137, he contacted the VP to ask whether the same boys who punched J.M. were also involved in HIB #137. He believed he contacted the VP after J.M. spoke with Ms. Infante. J.M. came home hysterically crying, extremely upset and angry. Infante pulled him off the lunch line in the cafeteria and questioned his actions and had him sign an important document. His friends overheard and they called him a bully. His discussion with the VP concerned his disgust regarding Infante's actions and how she could be so

"callous" about J.M.'s well-being. His information regarding Infante's interview of J.M. came from J.M. and the VP. W.M. asked for school video from the cafeteria and was given inaccurate/untrue information about the existence of video footage.

He was confused by the letters he received from the District regarding the two HIB cases. He didn't understand how the same incident could be substantiated in one case and not the other.

He clarified that the Board told him the incidents were the same but did not tell him "it was the same kid."

Upon review of Infante's report, W.M. acknowledged that he was mistaken about her pulling J.M. out of the cafeteria to interview him, and explained that information must have come from J.M. or the VP.

Upon questioning by the undersigned, W.M. testified that Ms. Giordano told him at the Board meeting that the victim in the two HIB incidents were the same, that children of board members were involved, and that the next meeting of the Board was not a reorganization but was a regular Board meeting.

J.M. is currently fourteen years old. He testified that he is doing well at St. James' school and has had no behavioral issues there.

.He described the lunchroom at the Bedminster school as being organized by grade. Students are able to sit where they wanted within the tables assigned to their grade. C.D. is the student whom he was accused of bullying. C.D. was a part of his lunch group, he regularly sat with J.M. and his friends. During lunch, J.M. and his friends would talk about sports and would sometimes "trash talk" with each other. They sometimes referred to him as "giraffe neck" or "twig." C.D. would participate in the trash talk. When they played sports at lunch, he would block and/or "box out" others, but he did not do that with C.D.

He admitted to commenting about C.D.'s shoes size but at the time, didn't think there was any problem with it. He also acknowledged commenting about C.D.'s weight but explained that they all talked trash with each other. They joked around and no one took things too harshly. C.D. continued to sit with them daily.

On November 27, 2018, J.M. was punched in the face by A.C. A.C. said something to him, and he said something back, and A.C. punched him in the nose. A teacher sent them both to the principal's office. A.C. was also a witness in HIB #137.

J.M. did not recall where Infante interviewed him. She asked him yes/no questions and couldn't really explain what happened. Sometime after speaking with Infante, she had him sign a statement in the lunchroom. She called him over to a table near the entrance. He didn't know what he was being asked to sign. If he knew it was going to be on his record, he "would never have signed it." He was embarrassed. His friends asked him what it was about. C.D. was there.

After J.M. spoke with Infante, he said, "sorry" to C.D. He stopped making comments about him. He did not intend to hurt C.D.

On cross-examination, he acknowledged that asking somebody "how many pounds they are" would be offensive but explained that they were all joking around and that C.D. said things to him. He denied saying to C.D. that he was fat but acknowledged that he could have used another word other than "pounds." He also acknowledged that he might have asked C.D. why his shoes were so big.

Raymond Bauer testified to his credentials and work experience in the field of education. He began his career as a teacher and then worked as a vice principal in middle and high school. He was a middle school principal and was the acting superintendent of schools. He is familiar with the HIB statute and has been involved in approximately ten HIB investigations and has reviewed HIB investigation reports. He never served as an anti-bullying coordinator and acknowledged that he attended only one HIB training when the statute was implemented. He was offered and qualified as an expert in the field of HIB investigations over the objection of the Board.

He explained that he was advised by W.M. that the victims in HIB cases #137 and #138 were the same. He has since learned the information was not correct. He acknowledged that the investigation reports he reviewed contained student identification numbers, but he did not review or compare that information in the two HIB reports.

Bauer opined that the investigation in HIB case #137 was not appropriate. As an initial matter, he found a conflict with guidance counselor Gina Infante investigating the HIB, because as a counselor, she is a student advocate, and in the course of a HIB investigation, she is obtaining information that could be used against a student for disciplinary purposes.

He found procedural inconsistencies in HIB #137. Infante made assumptions about the victim's statements. He believed that Infante's response to the victim's mother, in which she expressed that she was sorry for what C.D. and the family was going through, and that her comment that C.D. was a "great kid," were not appropriate. She should have received the information from the mother without comment.

He also had serious questions regarding Infante's handling of J.M.'s interview and the manner in which his statement was presented for his signature. J.M. was not given an opportunity to edit or comment on the statement and he was placed in an embarrassing situation when he was required to sign the statement. Additionally, Infante failed to interview or obtain information from adults who were supervising the students.

Further, the fact that J.M. was punched by witness No. 1 three days earlier was not taken into consideration. Infante seemed not to have considered that there were conflicts with the other children involved in the HIB. She failed to learn about a prior conflict that J.M. had with one of the witnesses outside of school.

As the investigator, Infante had the prerogative to arrange for a peer to help ensure proper behavior at the lunch table. Witness No. 2 offered to speak with J.M., but this was never explored. She also could have arranged for a group counseling session, but there

was no indication that was ever done and saw no counseling for the parents of the children involved.

Bauer opined that Infante made comments she was not qualified to make, about the psychological harm allegedly suffered by C.S. He believes that J.M. was a scapegoat because HIB case #137, which involved alleged psychological harm, was substantiated against J.M. while HIB case #138, which involved allegations of hitting and pushing, was not. He explained that learning that the victims in the two HIB cases were not the same, strengthened his opinion that J.M. was "scapegoated" because in a very short time, the victim in HIB #137 went from being considered a victim to an accused in HIB #138.

On cross-examination, Bauer acknowledged that it would be highly unusual for a superintendent to breach student confidentiality and inform another parent that the students involved in a HIB were children of Board members.

Regarding his opinion that it was a conflict for a guidance counselor to serve as the HIB investigator, Bauer acknowledged that the HIB statute allows the District discretion in appointing the investigator. He further acknowledged that guidance counselors are often appointed as investigators in HIB matters.

Bauer believes the charges against J.M. should not have been substantiated. He also did not agree with the corrective action recommended by Infante.

Gina Infante testified to her work experience. She has been a school counselor for twenty years. She has been an Anti-Bullying Specialist and has received HIB training since 2011. She also presented HIB training to teachers and staff. She investigated HIB case #137. At the time, she had conducted approximately thirty other HIB investigations. HIB #137 was brought to her attention through a November 30, 2018, email from C.D.'s mother, who reported that he was being bullied at school. Infante responded to the mother immediately, because she made concerning statements that C.D. stopped taking his medication, was very depressed, and that they were having problems finding a psychiatrist. Infante told the mother she was sorry they were going through this and that

C.D. was a great kid. The mother reported that the bullying occurred throughout the school year. The father also sent an email about the bullying.

Infante explained that when she conducts an interview, she types up her notes and reads through it with the individual and if they are okay with the statement—they sign it.

She interviewed C.D. and asked if people were making fun of his clothes. She took his statement in her office. He reported that J.M. said he wears the same clothes every day and called his shoes "crap." J.M. also asked about how much he weighed. J.M. put him down and called him stupid. He had heard that J.M. called him fat, but did not say it "to his face." C.D. was talking about his medication and how it made him gain about thirty pounds and J.M. commented that he could not believe he gained thirty pounds from medication. C.D. said he stopped taking the medication because he thought he could lose weight. He didn't want to come to school because he was afraid J.M. would make fun of him. He sits with other students and said that his friendships have improved since he moved from J.M.'s table. He named three witnesses.

Witness No. 1 confirmed that the victim said he did not want to come to school. He saw J.M. being mean to the victim multiple times. The victim did not respond. He just put his head down. Infante found this significant because a lack of response can demonstrate an imbalance of power. She was aware that witness No.1 had previously punched J.M. He told her about the incident during the interview. That incident was handled through the Code of Conduct. J.M.'s comments leading up to the punch were not appropriate and were not tolerant, but they did not justify the punch.

She interviewed witness No. 2 in her office. He was a friend of J.M.'s. He heard J.M. make comments about C.D.'s weight behind his back. He didn't know if J.M. understood that his comments were hurtful, but witness No. 2 noticed that C.D. was upset. J.M. made fun of C.D.'s double chin.

Infante interviewed J.M. in her office on December 5, 2018. She asked him about his comments to C.D. He could not remember his comments but acknowledged that he asked C.D. "how many pounds he weighed." Infante had previously talked to J.M. about

calling others names. J.M. said that after their talks, he learned his lesson and knew not to do that, and apologized. J.M. denied "body checking" or blocking C.D. They also talked about when J.M. got punched by witness No. 1. He gave her his version of what happened. They were using inappropriate terms and J.M. acknowledged that he had taunted witness No. 1 by telling him to push him and hit him. On December 13, Infante reviewed J.M.'s statement with him in her office. She told him to read it to make sure it was accurate. He did not make any changes.

She had J.M. sign his statement for HIB case #138 in the lunchroom. J.M. did not demonstrate any HIB behaviors in that matter. She waived him over to the doorway. She told him to read it, asked him if he was okay with it, and had him sign it. She explained that there were eleven students involved in HIB #138. She was under time constraints to interview everyone, type up the reports, and get the statements signed off. All the behavior in HIB #138 was unsubstantiated.

Infante also interviewed witness No. 3 in connection with HIB case #137. Witness No. 3 is the brother of witness No. 1. He said he had been bulled by J.M. since "pre-K." J.M. recently called him a "loser" and said that "no one liked him." He also heard J.M. call C.D. a "fat loser" and said that he was terrible at recess.

She did not interview any adults because the information she obtained met the HIB criteria.

Infante concluded that J.M.'s comments were motivated by the victim's weight. J.M. admitted asking C.D. how much weight he gained on his medication. Witnesses No. 1 and No. 2 also said they heard J.M. say that C.D. was fat and that his shoes were as big as "sailboats." In addition to weight, she concluded that J.M.'s statement/actions also involved athletic ability. J.M.'s comments also caused a substantial disruption to C.D.'s day. He stopped taking his medication, did not want to wear his clothes because he was afraid of what J.M. would say to him, and did not want to come to school. It didn't matter that C.D. did not actually miss any school days. It was significant that he did not want to come to school. She also determined that there was a series of incidents because it was reported that the HIB occurred throughout the year—no specific dates were given.

Following her investigation, Infante recommended using peer leaders to lead group lessons and talk about different character traits. She also recommended that the teachers incorporate empathy lessons, that they bring in an empathy program, and provide all accused students with a mandatory anti-bullying message. She also recommended pupil counseling and counseling to the parents, if needed. Additionally, she recommended increased supervision or assigned seats, since the lunchroom/recess were "hot spots." In terms of the corrective action taken, she explained there was a Unity Day in February where they had a program called, "The New Kid." The teachers were given follow up questions for use in the classroom. The leaders talked to the students about kindness and tolerance and the DARE officer came in to talk to the students during health class.

She completed the investigation in HIB case #137 on December 13, 2018.

Infante received a verbal report regarding another HIB—case #138 on December 17, 2018. In HIB #138, the only accusation against J.M. was that he and another student taunted the victim and his friends. Infante interviewed J.M. in her office. She found nothing inappropriate with the way he acted in that matter.

On cross-examination, Infante did not agree that most of the allegations in HIB case #137 occurred in the lunchroom and at recess. She contends that the incidents also occurred in the classroom. She acknowledged she did not interview any teachers or staff.

Additionally, she explained that she did not perceive the emails from the victim's parents in which they referenced taking "severe action," to be threatening a lawsuit. Rather, she understood that they wanted the HIB to be addressed.

Witness No. 1 told Infante that C.D. was one of his best friends. Infante agreed that witness No. 3 did not think much of J.M., and that much of his statement discussed things that happened between he and J.M. more than five years ago.

She testified that the information supporting her conclusion that the HIB was also based on "athletic ability" may have come from the victim's mother. She acknowledged that notes of such conversations were not in her report.

Jennifer Giordano is the school superintendent. She explained that once the HIB investigation was completed, it went to the principal, the superintendent, and then to the Board. She signed the report on December 17, 2018. Under the "further action" section of the report, she noted that when she was in the lunchroom on December 4, 2018, she saw the victim and the accused sitting at the same table.

The Board's next regularly scheduled meeting was held on January 17, 2019. She presented both HIB cases during the executive session. On January 4, 2019, the Board had a joint special meeting with the Township, where they swore in new members. The January 17, 2019, meeting date was the first meeting at which the HIBs could have been presented.

The appeal of HIB case #137 was scheduled for February 12, 2019. The Board honored a request to reschedule the appeal due to bad weather. The appeal was rescheduled for February 21, 2019, but J.M.'s parents did not appear. The Board honored another request for a meeting which was held on March 12, 2019. The meeting was attended by the Board, its attorney, the Board secretary, and Giordano. W.M. and his then attorney also attended and spoke at the meeting. They requested that the HIB be looked at again because they felt it should not have been substantiated. Giordano made no statements regarding the HIB. The meeting was run through the Board's attorney. Petitioners did not appeal HIB case #138. Giordano was not aware of HIB case #138 being mentioned. After the meeting, Giordano received correspondence from W.M. requesting a meeting to discuss the well-being and academic achievement of his children. The meeting took place in the beginning of April. She and the VP talked with W.M. She was asked if she would dismiss the charges, but she refused.

Regarding the remedial steps and corrective action taken, Giordano was aware that peer leaders were involved, and of "The New Kid" presentation which addressed bullying, and that the DARE officer conducted a class in February. Additionally, Infante

conducted student counseling with the victim and J.M. until W.M. advised that he did not want Infante to meet with his children. The student lunch seats were also moved but she explained that in middle school, students change their seats.

On cross-examination, Giordano acknowledged that the recommendation of parent counseling was not provided.

During the April 2019 meeting with Giordano and the VP, W.M. said that Giordano had the authority to "make the HIB go away." She could not recall if HIB #138 "came up" at that meeting.

She did not agree that the two HIB cases had "certain similarities."

Credibility

In evaluating evidence, it is necessary for me as the finder of fact to assess the credibility of the witnesses. This requires an overall assessment of the witness's story in light of its rationality or internal consistency and the manner in which it "hangs together" with the other evidence. Carbo v. United States, 314 F. 2d 718, 749 (9th Cir. 1963).

A trier of fact may reject testimony as "inherently incredible" when "it is inconsistent with other testimony or with common experience" or "overborne" by the testimony of other witnesses. Congleton v. Pura-Tex Stone Corp., 53 N.J. Super. 282, 287 (App. Div. 1958). "The interest, motive, bias, or prejudice of a witness may affect his credibility and justify the [trier of fact], whose province it is to pass upon the credibility of an interested witness, in disbelieving his testimony." State v. Salimone, 19 N.J. Super. 600, 608 (App. Div.), certif. denied, 10 N.J. 316 (1952) (citation omitted).

The testimony of W.M. concerning the information he claims he was told about the two HIB cases, including the identity of the victim and the other students involved, and by whom he was told, was confusing—and at times contradictory. Additionally, his testimony that C.D. was involved in the incident in which J.M. was punched and that he was "egging on" the puncher, is unsupported by the evidence in the record. Further, he acknowledged

at hearing that he was mistaken about Ms. Infante pulling J.M. out of the cafeteria to interview him. W.M. was emotional and angry during his testimony and during that of Gina Infante. While he is understandably very concerned about his son and the substantiated HIB determination, his testimony appeared to be unduly influenced and colored by his belief that J.M. was treated unfairly by the District, and that its handling of the HIB investigation was improper. Although W.M.'s beliefs may be sincerely held, he has no first-hand knowledge of the HIB incidents or of Infante's actions in conducting the investigation. Moreover, some of the information upon which he relies has been demonstrated to be incorrect and/or is overborne by the more credible testimony and the documentary evidence in the record. For these reasons, I am unable to accept W.M.'s testimony as reliable or to give it much, if any weight.

J.M.'s testimony that he made comments about C.D.'s weight and shoe size and his acknowledgement that those statements could be considered offensive is consistent with his statements made during the investigation and with the documentary evidence in the record, thus I accept this testimony as credible.

With respect to assessing the testimony and opinions of petitioner's expert witness, it is well settled that "'[t]he weight to which an expert opinion is entitled can rise no higher than the facts and reasoning upon which that opinion is predicated.'" Johnson v. Salem Corp., 97 N.J. 78, 91 (1984) (citation omitted). In this regard, it is within the province of the finder of fact to determine the credibility, weight, and probative value of the expert testimony. State v. Frost, 242 N.J. Super. 601, 615 (App. Div.), certif. denied, 127 N.J. 321 (1990); Rubanick v. Witco Chem. Corp., 242 N.J. Super. 36 (App. Div. 1990), modified on other grounds and remanded, 125 N.J. 421 (1991). Much of the testimony of Raymond Bauer was based on inaccurate information provided by W.M. and/or his unsupported theories of the case. Additionally, Bauer references no statutory or regulatory provision, nor any model policy, or procedure in support of his opinion. Rather, his opinion appears to be based on his personal belief that the investigation could or should have been conducted differently. Finally, his conclusions that investigation was flawed and that J.M. was "scapegoated" because HIB case #137 was substantiated, while case #138 was not and/or because the victim in HIB #137 was also named as an accused in HIB #138, is not reasonable or sensible and appears to ignore that the two cases

involve unrelated and wholly differing facts and circumstances. For these reasons, I do not accept the opinion testimony of Bauer as reasonable or reliable and afford it little to no weight.

As to respondent's witnesses, I accept the testimony of Gina Infante as credible. Her testimony regarding her conduct of the investigation is supported by the documentary evidence in the record. Similarly, her testimony regarding her conclusions was straightforward, reasonable, and supported by the evidence in the record including the written statement and hearing testimony of J.M.

Finally, I also accept the testimony of Jennifer Giordano regarding the Board meetings and her communications with W.M. to be straightforward and reasonable. Thus, to the extent her testimony on these issues differs from that of W.M., I accept her testimony as more reliable and more credible than W.M.'s.

Additional Findings

Having considered the testimony of the witnesses, and having observed their demeanor at hearing, and further having reviewed the documentary evidence, I further **FIND** as **FACT**:

J.M. admitted to making comments to C.D. about how much he weighed and about his shoes being so big. The comments were insulting and demeaning and were not isolated instances.

These comments were reasonably perceived as being motivated by actual or perceived distinguishing characteristics of C.D.

C.D. and witnesses No. 1 and No. 2 confirmed these types of comments by J.M. Witness No. 1 reported that J.M. said C.D.'s shoes were bigger than "sailboats." See J-1, HIB investigation report at pg. 6

C.D. also reported that J.M. made fun of his clothes and called his shoes "crap." These comments were confirmed by witnesses No. 1 and No. 2 who reported that J.M. made fun of C.D.'s shoes and called them fakes. See J-1, HIB investigation report at pgs. 6 and 8.

C.D. also reported that J.M. would extend his arms and push him with his body at recess. See J-1, HIB investigation report at p. 4.

Witness No. 2 also reported J.M. told C.D. that he reminded him of a rooster because of his neck (double chin). See J-1, HIB investigation report at p. 8.

Witness No. 3 reported that J.M. called C.D. fat and a loser and said he was terrible at recess. He also saw J.M. push C.D. See J-1, HIB investigation report at p. 9.

Witness No. 1 considered C.D. to be one of his best friends. He was not friends with J.M. and he was involved in a November 27, 2018, incident in which he punched J.M.

Witness No. 2 was a friend of J.M.

Witness No. 3 was not a friend of J.M. He is the twin brother of witness No. 1.

C.D. was upset by the demeaning and insulting comments made by J.M. He stopped taking his medication for a period of time in hopes that he would lose weight. He did not want to come to school or wear his clothes because he was worried that J.M. would make fun of him. Witnesses No. 1 and No. 2 confirmed that C.D. was upset by J.M.'s comments.

A reasonable person should have known, under the circumstances, that such comments would have the effect of emotionally harming a student.

J.M. acknowledged at hearing that his comments to C.D. could be considered offensive.

J.M. claimed that boys at his lunch table engaged in trash talk. He attributed no specific comments to C.D.

Gina Infante interviewed J.M. about HIB case #137 in her office. She reviewed his statement with him and J.M. signed the statement in her office.

Infante had J.M. review and sign his statement in HIB case #138 by the doorway of the cafeteria. The charges in that matter were not substantiated.

The Board exercised proper procedure in noticing and hearing HIB case #137 at its next regular meeting on January 17, 2019.

Statements made by Infante to C.D.'s mother in response to her HIB complaint in case #137, including that she was sorry the family was experiencing the incidents complained of and that C.D. was a "great kid" did not demonstrate bias in favor of C.D. or against J.M.

J.M. participated in several "talks"/counseling sessions with Infante. These sessions were discontinued after W.M. advised that he did not want his children to meet with Infante.

J.M. received no discipline in connection with HIB case No. 137.

LEGAL ANALYSIS AND CONCLUSIONS

Here, the issue to be decided is whether the Board's determination that J.M. committed a HIB violation was arbitrary, capricious, and unreasonable.

The Anti-Bullying Bill of Rights Act is designed "to strengthen the standards and procedures for preventing, reporting, investigating, and responding to incidents of harassment, intimidation, and bullying of students that occur in school and off school

premises." N.J.S.A. 18A:37-13.1(f). Under the Act, "[h]arassment, intimidation or bullying" is defined as:

> any gesture, any written, verbal or physical act, or any electronic communication, whether it be a single incident or a series of incidents, that is reasonably perceived as being motivated either by any actual or perceived characteristic, such as race, color, religion, ancestry, national origin, gender, sexual orientation, gender identity and expression, or a mental, physical or sensory disability, or by any other distinguishing characteristic, that takes place on school property, at any school-sponsored function, on a school bus, or off school grounds as provided for in section 16 of P.L.2010, c.122 (C.18A:37-15.3), that substantially disrupts or interferes with the orderly operation of the school or the rights of other students and that:
>
> a. a reasonable person should know, under the circumstances, will have the effect of physically or emotionally harming a student or damaging the student's property, or placing a student in reasonable fear of physical or emotional harm to his person or damage to his property;
>
> b. has the effect of insulting or demeaning any student or group of students; or
>
> c. creates a hostile educational environment for the student by interfering with a student's education or by severely or pervasively causing physical or emotional harm to the student.
>
> N.J.S.A. 18A:37-14.

Each school district must adopt a policy that prohibits HIB and provides "a procedure for prompt investigation of reports of violations and complaints." N.J.S.A. 18A:37-15(b)(6). Once an alleged HIB incident is reported to the school principal, the principal must initiate an investigation within one school day of the report. N.J.S.A. 18A:37-15(b)(6)(a). The investigation shall be conducted by a school anti-bullying specialist, but "[t]he principal may appoint additional personnel who are not school anti-bullying specialists to assist in the investigation." Ibid. The investigation shall be completed within ten days of the initial HIB complaint. Ibid.

The results of the investigation shall then be reported to the superintendent of schools, within two days of completion of the investigation, who may "decide to provide intervention services, establish training programs to reduce [HIB] and enhance school climate, impose discipline, order counseling as a result of the findings of the investigation, or take or recommend other appropriate action." N.J.S.A. 18A:37-15(b)(6)(b)

The results shall also be reported to the board of education "no later than the date of the board of education meeting next following the completion of the investigation, along with information on any services provided, training established, discipline imposed, or other action taken or recommended by the superintendent." N.J.S.A. 18A:37-15(b)(6)(c).

The parents of the students involved in any alleged HIB incident "shall be entitled to receive information about the investigation . . . including the nature of the investigation, whether the district found evidence of [HIB], or whether discipline was imposed or services provided to address the incident of [HIB]." N.J.S.A. 18A:37-15(b)(6)(d). The parents may request a hearing before the board, and the hearing must be held within ten days of the request. Ibid. Any hearing shall be held in executive session to protect the identity of any students involved. Ibid. And "[a]t the hearing the board may hear from the school anti-bullying specialist about the incident, recommendations for discipline or services, and any programs instituted to reduce such incidents[.]" Ibid.

A school board must issue a written decision at the first meeting after its receipt of the investigation report. N.J.S.A. 18A:37-15(b)(6)(e). The board may affirm, reject, or modify the superintendent's decision. Ibid. The board's decision may be appealed to the Commissioner of Education. Ibid.

The Commissioner of Education will not overturn the decision of a local board in the absence of a finding that the action below was arbitrary, capricious or unreasonable. T.B.M. v. Moorestown Bd. of Educ., EDU 2780-07, Initial Decision (February 4, 2008) (citing Thomas v. Morris Twp. Bd. of Educ., 89 N.J. Super. 327, 332 (App. Div. 1965), aff'd, 46 N.J. 581(1966)), adopted, Comm'r (April 7, 2008), <http://njlaw.rutgers.edu/collections/oal/>. Further, the Commissioner will not substitute his judgment for that of the board of education, whose exercise of its discretion may not

be disturbed unless shown to be "patently arbitrary, without rational basis or induced by improper motives." Kopera v. W. Orange Bd. of Educ., 60 N.J. Super. 288, 294 (App. Div. 1960). New Jersey courts have held that "[w]here there is room for two opinions, action is not arbitrary or capricious when exercised honestly and upon due consideration, even though it may be believed that an erroneous conclusion has been reached." Bayshore Sewage Co. v. Dep't of Envtl. Prot., 122 N.J. Super. 184, 199 (Ch. Div. 1973), aff'd, 131 N.J. Super. 37 (App. Div. 1974).

Here, petitioners argue that the Board's determination was arbitrary, capricious, and unreasonable because the investigation by Gina Infante was biased, flawed, incomplete, and inconsistent with HIB standards. Despite these arguments, petitioners have presented no credible or competent evidence that the Board acted in an arbitrary, capricious, or unreasonable manner in concluding that J.M. committed a HIB violation under the Anti-Bullying Bill of Rights Act. Rather, the evidence, including the statement and hearing testimony of J.M., as well as the statements of the victim and of the three witnesses, demonstrate that J.M. made a series of insulting and demeaning comments concerning C.D. based on perceived distinguishing characteristics including his weight, shoe size, and clothing. Additionally, the evidence including the statements of the victim and witness No. 3 demonstrates that Infante, and ultimately the Board, reasonably concluded that J.M.'s comments/actions were motivated by athletic ability.

C.D. was insulted and demeaned by the comments made by J.M. and they had the effect of disrupting his education by causing him to stop taking his medication in the hope that he would lose weight and by causing him not to want to go to school for fear of being made fun of by J.M. Further, petitioners' arguments that Infante should have interviewed adult teachers and staff who *may* have witnessed the alleged incidents do not render the investigation as flawed or incomplete. Particularly as the statements of C.D., the three witnesses, and of J.M. demonstrated that the HIB criteria had been established, and further because, no specific dates for the incidents were given—instead the incidents were alleged to have occurred throughout the year. Finally, as previously indicated, petitioners point to no statute, regulation, model policy, or procedure to demonstrate that Infante's investigation of HIB #137 was biased, flawed, incomplete or otherwise improper.

Accordingly, for the reasons set forth herein, I **CONCLUDE** that petitioners have failed to meet their burden of proof that the Board acted in an arbitrary, capricious, or unreasonable manner in concluding that J.M.'s actions constituted harassment, intimidation or bullying under the Anti-Bullying Bill of Rights Act.

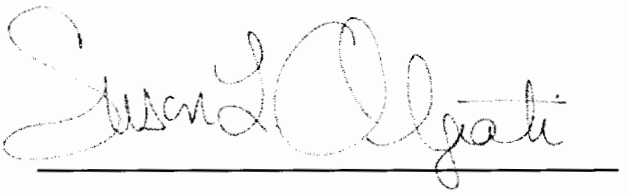
ORDER

Based on the foregoing, I hereby **ORDER** that the decision of the Board is **AFFIRMED** and that the petition is **DISMISSED**.

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

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

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



December 15, 2022
DATE

SUSAN L. OLGIATI, ALJ

Date Received at Agency: _____

Date Mailed to Parties: _____

SLO/as

APPENDIX

WITNESSES

For petitioner

W.M.

J. M.

Raymond Bauer

For respondent

Gina Infante

Jennifer Giordano

EXHIBITS

Joint exhibits

J-1 Initial Harassment Reporting Form - Case #137 — Attached emails, December 2, 2018 (6 pages)

J-2 Case #137 Investigation Report of Gina Infante (15 pages)

J-3 Initial Harassment Reporting Form - Case #138, December 20, 2018 (2 pages)

J-4 Case #138 Investigation Report of Gina Infante (23 pages)

J-5 Bedminster Board of Education Executive Session Minutes — January 17, 2019 (1 page)

J-6 Bedminster Board of Education Executive Session Minutes — February 21, 2019 (1 page)

J-7 Bedminster Township Correspondence to Parents of J.M. advising Case #138 unsubstantiated, January 21, 2019 (1 page)

J-8 Bedminster Township Correspondence to Parents of J.M. advising Case #137 substantiated — February 25, 2019 (1 page)

J-9 HIB Certification of Gina Infante HIB Investigation Cases #137 and No. 138 (9 pages)

J-10 Bedminster School District Report — November 27, 2018 (1 page)

J-11 Not admitted

J-12 Bedminster Twp. School Cafeteria Lunch Duty Schedule — 2018–2019 (1 page)

J-13 Curriculum Vitae of Raymond Bauer (5 pages)

J-14 Expert Report of Raymond Bauer with exhibits (33 pages)

J-15 Resume of Gina Infante (Pecorello) (3 pages)

J-16 Not Admitted

J-17 Bedminster Twp. correspondence to Parents of J.M., dated January 21, 2019, delivering HIB #137 substantiated (2 pages)

J-18 Bedminster Twp. correspondence to Parent of J.M., dated February 25, 2019, advising HIB #137 substantiated (2 pages)

60-23
OAL Dkt. No. EDU 16962-19
Agency Dkt. No. 212-8/19

New Jersey Commissioner of Education

Final Decision

Plainfield Education Association, on behalf of its members,

Petitioner,

v.

Board of Education of the City of Plainfield, Union County,

Respondent.

The record of this matter, the proposed Settlement Agreement (Agreement) and the Initial Decision issued by the Office of Administrative Law have been reviewed pursuant to *N.J.A.C.* 1:1-19.1. Upon review, the Commissioner approves the terms of the Agreement and adopts the Initial Decision as the final decision in this matter. The case is hereby dismissed, subject to compliance with the terms of the Agreement.

IT IS SO ORDERED.

Angelica Allen-McMillan, Ed.D.
ACTING COMMISSIONER OF EDUCATION

Date of Decision: March 7, 2023
Date of Mailing: March 9, 2023

State of New Jersey
OFFICE OF ADMINISTRATIVE LAW

INITIAL DECISION

SETTLEMENT

OAL DKT. NO. EDU 16962-19

AGENCY DKT. NO. 212-8/19

PLAINFIELD EDUCATION ASSOCIATION,
ON BEHALF OF ITS MEMBERS,

Petitioners,

v.

BOARD OF EDUCATION OF THE CITY OF PLAINFIELD, UNION COUNTY,

Respondent.

Randi April., Esq., for petitioners (Oxfeld Cohen, P.C., attorneys)

Hope Blackburn, Esq., for respondent (Busch Law Group, LLC, attorneys)

Record Closed: January 27, 2023 Decided: January 30, 2023

BEFORE **ELISSA MIZZONE TESTA**, ALJ:

This matter was transmitted to the Office of Administrative Law on November 27, 2019 for determination as a contested case, pursuant to N.J.S.A. 52:14B-1 to -15 and N.J.S.A. 52:14F-1 to -13.

A settlement conference was held on February 6, 2020 and during that time, the parties engaged in settlement discussions and agreed to settle the matter. The executed Settlement Agreement indicating the terms of agreement was forwarded to the undersigned on January 30, 2023 and is attached hereto.

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

1. The parties have voluntarily agreed to the settlement as evidenced by their signatures or their representatives' signatures on the attached settlement agreement and the attached Board resolution.

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

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

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

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

January 30, 2023

DATE

ELISSA MIZZONE TESTA, ALJ

Date Received at Agency: January 31, 2023

Mailed to Parties: January 31, 2023
sej

THIS SETTLEMENT AGREEMENT ("Agreement") is made and entered into this day of May, 2022, by and between the **BOARD OF EDUCATION OF THE CITY OF PLAINFIELD, UNION COUNTY,** with administrative offices located at 1200 Myrtle Avenue, Plainfield, NJ 07063 (hereinafter referred to as "the Board"), and **the Plainfield Education Association on Behalf of Frederick Akridge, Sheila Cisson, Patricia Henderson and Lisa Logan Leach** with its primary place of business located at 1449 East 2nd Street, Plainfield, NJ (hereinafter referred to as "Petitioner").

WITNESSETH

WHEREAS, the Board is a body politic and corporate, organized and existing by virtue of the laws of the State of New Jersey, N.J.S.A. 18A:11-1, which is entrusted with maintaining and conducting the public schools of Plainfield; and

WHEREAS, the Plainfield Education Association ("Association") is the exclusive bargaining representative under N.J.S.A.34:13A-1 et seq. for employees of the Board; and

WHEREAS, In 2019, the Association filed the matter captioned Plainfield Education Association on Behalf of Frederick Akridge, Sheila Cisson, Patricia Henderson and Lisa Logan Leach, EDU 16962-19 against the Plainfield Board of Education ("Board") (collectively the "Parties") seeking to compel the Board to hold Donaldson appearances for the following four (4) non-tenured non-certificated staff members pursuant to N.J.S.A. 18A:27-4.1

- Frederick Akridge
- Sheila Cisson
- Patricia Henderson
- Lisa Logan Leach

("Affected Employees"); and

WHEREAS, the relief sought was to have the Affected Employees rehired for the 2019-2020 school year or other relief as the Commissioner deems just and equitable; and

WHEREAS, the Parties wish to amicably resolve all claims related to the captioned matter, hereby stipulate to settle the same, subject to the terms and conditions set forth herein;

NOW, THEREFORE, in consideration of the mutual covenants and promises contained herein, the legal sufficiency of which is hereby acknowledged by the Parties they **BE IT RESOLVED**

1. The afore-going paragraphs are hereby incorporated by reference;
2. The Plainfield Board of Education hereby prospectively agrees to provide the opportunity for Donaldson appearances pursuant to N.J.S.A. 18A:27-4.1(b) for both certificated and non-certificated employess and shall reaffirm its current policy providing for the same.
3. This Agreement represents the entire understanding of the parties and may be modified only in a subsequent written instrument, duly executed by the parties. No other representations of any kind shall be binding upon the parties.
4. The PEA represents that it has the authority to enter into this Settlement on behalf of itself and its respective members, and will indemnify, defend and hold the Board of Education harmless from any liability or challenge thereto.
5. This Agreement and all provisions hereof shall be governed by and construed under the laws of the State of New Jersey.

IN WITNESS WHEREOF, the signatures and/or seals of the parties or their duly authorized representatives have been set forth on the dates indicated below:

PLAINFIELD BOARD OF EDUCATION

BY: _____
Name: Josely Castro
Title: Board Presdent

ATTEST:

BY: _____
Name: Rashon Hasan
Title: School Business Administrator

PLAINFIELD EDUCATION ASSOCIATION

BY: Keith W Coston Jr
Keith W Coston Jr (Jun 3, 2022 16:33 EDT)
Name: Keith Coston
Title: Association President

ATTEST

BY: Melissa Logan
Melissa Logan (Jun 3, 2022 16:34 EDT)
Name: Melissa Logan
Title: Association Secretary

PEA v. PBOE (Donaldson)s) Settlement

Final Audit Report 2022-06-03

Created:	2022-06-02
By:	Maryanne Rodriguez (mrodriguez@njea.org)
Status:	Signed
Transaction ID:	CBJCHBCAABAAyQYkjkh1lm9u2ur2jh34qUNnAvyJdhVx

"PEA v. PBOE (Donaldson)s) Settlement" History

Document created by Maryanne Rodriguez (mrodriguez@njea.org)
2022-06-02 - 6:52:10 PM GMT- IP address: 73.150.106.229

Document emailed to Keith W Coston Jr (keith.costonjr@gmail.com) for signature
2022-06-02 - 6:53:00 PM GMT

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Document e-signed by Keith W Coston Jr (keith.costonjr@gmail.com)
Signature Date: 2022-06-03 - 8:33:34 PM GMT - Time Source: server- IP address: 107.77.225.202

Document emailed to Melissa Logan (mlogan28@gmail.com) for signature
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Document e-signed by Melissa Logan (mlogan28@gmail.com)
Signature Date: 2022-06-03 - 8:34:15 PM GMT - Time Source: server- IP address: 69.74.5.6

Agreement completed.
2022-06-03 - 8:34:15 PM GMT

Adobe Acrobat Sign

61-23

New Jersey Commissioner of Education

Final Decision

P.V. , on behalf of minor child, T.S.,

Petitioner,

v.

Board of Education of the Township of Verona, Essex County,

Respondent.

Synopsis

Petitioner filed the within appeal on June 6, 2022, challenging the discipline imposed by the respondent Board upon her minor son, T.S., for making an inappropriate remark in class on February 19, 2020, during his freshman year at Verona High School. T.S. received a one-day in-school suspension, a one-day Saturday suspension, and the loss of cell phone privileges for multiple days following the incident. The petitioner maintains that the discipline imposed upon T.S. by the Board was based on an incorrect infraction level as detailed in the school's Student Guidebook, and that this discipline later impacted his ability to join the National Honor Society. The Board filed a motion to dismiss, which was converted to a motion for summary decision.

The ALJ found, *inter alia*, that: there is no issue of material fact in this case, and the matter is ripe for summary decision; pursuant to *N.J.A.C.* 6A:3-1.3(i), petitioners must file a petition no later than the 90th day from the date of receipt of the notice of a final order, ruling or other action by the district board of education, individual party, or agency, which is the subject of the requested contested case hearing; here, the petitioner was aware of the discipline imposed and voiced her disagreement with the infraction level and penalty assessed when it occurred, yet the instant petition was not filed until more than two years later; petitioner does not present exceptional circumstances or a compelling reason to warrant relaxation of the ninety-day rule; and her petition was filed well beyond the required time frame. The ALJ concluded that the appeal was clearly filed out of time. Accordingly, the ALJ granted summary decision to the Board and dismissed the petition.

Upon a comprehensive review, the Commissioner concurred with the ALJ that this matter is time-barred by the 90-day limitations period set forth in *N.J.A.C.* 6A:3-1.3(a). Accordingly, the Initial Decision of the OAL was adopted as the final decision in this matter and the petition was dismissed as untimely.

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

61-23
OAL Dkt. No. EDU 05685-22
Agency Dkt. No. 141-6/22

New Jersey Commissioner of Education

Final Decision

P.V., on behalf of minor child, T.S.,

Petitioner,

v.

Board of Education of the Township of Verona, Essex County,

Respondent.

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

Petitioner filed the instant petition on June 6, 2022 challenging the discipline imposed on her son by the Board for making an inappropriate remark in class on February 19, 2020. The Administrative Law Judge (ALJ) found that the petition should be dismissed as it was filed outside the 90-day limitation period set forth in N.J.A.C. 6A:3-1.3(i). The ALJ also found that the circumstances do not warrant relaxation of the filing timeframe.[1]

Upon review, the Commissioner concurs with the ALJ that this matter was filed more than two years after the discipline was imposed and is therefore barred by the 90-day statute of limitations set forth in N.J.A.C. 6A:3-1.3(i). The Commissioner further agrees that relaxation of the limitations period is not warranted.

[1] Petitioner filed a prior emergent matter to compel her son's admission to the National Honor Society as he was precluded from joining based on his disciplinary infraction; the emergent matter was dismissed. The ALJ found that this matter was not barred by the doctrine of collateral estoppel because an analysis on the limitations period was not conducted.

Accordingly, the Initial Decision of the OAL is adopted as the final decision in this matter for the reasons stated therein, and the petition of appeal is hereby dismissed.

IT IS SO ORDERED. [2]

Angelica Allen-McMillan, Ed.D.
ACTING COMMISSIONER OF EDUCATION

Date of Decision: March 7, 2023
Date of Mailing: March 9, 2023

[2] This decision may be appealed to the Appellate Division of the Superior Court pursuant to *N.J.S.A.* 18A:6-9.1. Under *N.J.Ct.R.* 2:4-1(b), a notice of appeal must be filed with the Appellate Division within 45 days from the date of mailing of this decision.

State of New Jersey
OFFICE OF ADMINISTRATIVE LAW

INITIAL DECISION
SUMMARY DECISION
OAL DKT. NO. EDU 05685-22
AGENCY DKT. NO. 141-6/22

P.V. ON BEHALF OF T.S.,
Petitioners,
v.
TOWNSHIP OF VERONA, BOARD OF EDUCATION,
Respondent.

P.V. on behalf of **T.S.,** appearing pro se

Gabrielle Pettineo, Esq., for respondent (Kenney, Gross, Kovats & Parton, attorneys)

Record Closed: January 26, 2023 Decided: January 31, 2023

BEFORE **NANCI G. STOKES**, ALJ:

STATEMENT OF THE CASE

On June 6, 2022, petitioner challenged respondent's discipline imposed on her minor child, T.S., on February 19, 2020, for an incident in school. Is the claim time-

barred? Yes. Under N.J.A.C. 6A:3-1.3(d), absent exceptional circumstances, a petitioner must file an appeal "no later than the 90th day from the date of receipt of the notice of a final order, ruling, or other action by the district board of education, individual party, or agency, that is the subject of the [case]." Ibid.; N.J.A.C. 6A:3-1.1.6

PROCEDURAL HISTORY

On June 6, 2022, petitioner filed a Petition with the Commissioner of the Department of Education (Commissioner) contesting discipline entered by respondent against her minor son while a freshman at Verona High School (Verona). Petitioner maintains that Verona imposed discipline against T.S. for the incorrect infraction level under the high school's Student Guidebook, and this discipline later impacted his ability to join the National Honor Society.

In response to the petition, Verona filed a Motion to Dismiss in place of an Answer on July 6, 2022, asserting that P.V. had another pending case challenging T.S.'s denial of entry into the National Honor Society, resolved by an Order on Emergent relief dated May 23, 2022, denying petitioner's request. Respondent's motion maintained that transfer to the Office of Administrative Law (OAL) was unnecessary because the doctrine of collateral estoppel applied as the proceeding explored the same discipline in the earlier case under OAL DKT. NO. EDU 03920-22. Respondent also asserted that the case is duplicative and precluded by N.J.A.C. 6A:3-1.4(c), requiring petitioner to certify there are no pending related matters.

Still, the Commissioner declined to address respondent's motion to dismiss and transmitted this case to the OAL. On July 11, 2022, the OAL filed the contested case under the Administrative Procedure Act, N.J.S.A. 52:14B-1 to -15, and the act establishing the OAL, N.J.S.A. 52:14F-1 to -13, for a hearing under the Uniform Administrative Procedure Rules, N.J.A.C. 1:1-1.1 to -21.6.

On September 23, 2022, respondent filed a motion to dismiss that I converted to a motion for summary decision to consider facts and evidence outside of the pleadings. Significantly, Verona's motion included a certification with exhibits. I requested a copy of the transcript of the argument on the emergent application under OAL DKT. NO. EDU 03920-22 before the Hon. Julio Morejon, A.L.J., given his discussion of the disputed suspension in his Order. See N.J.A.C. 1:1-14.6(p). On September 24, 2022, petitioner filed her opposition to the motion. On October 24, 2022, respondent objected to converting the motion to a motion for summary decision.

On December 7, 2022, the OAL received the transcript, and I permitted petitioner additional time to respond. However, petitioner resubmitted her same opposition. On December 19, 2022, respondent replied to petitioner's opposition. On January 3, 2023, I requested additional information from Verona, which I received on January 26, 2023, and closed the record.[1]

FINDINGS OF FACT

Based on the documents submitted in support of and in opposition to the motion for summary decision, when viewed in the light most favorable to the non-moving party, I **FIND** the following as **FACT** for purposes of this motion only:

T.S. was a ninth-grade student in attendance at Verona during the 2019-20 school year.

On February 19, 2020, T.S. received a one-day in-school suspension, a one-day Saturday suspension, and the loss of cell phone privileges for multiple days due to his role in an incident in his Spanish class. Before class, T.S.'s Spanish teacher was collecting student cell phones, as was her procedure at the time. T.S. jokingly told his classmates that they should "all say the teacher touched us" so they would not need to

[1] Both parties noted the Student Guidebook in their motion papers, but none provided a certified copy from the 2019-2020 school year. Thus, I requested a certified copy.

turn in their phones. See Transcript, p. 12, 6-8. The teacher heard what T.S. said and sent T.S. to the assistant principal's office.

The assistant principal spoke with T.S. and P.V. on February 19, 2020, discussing the incident and the discipline imposed. That same day, the assistant principal also talked to the Spanish teacher. P.V. voiced her disagreement with the suspension imposed, believing the penalty was excessive under Verona's Student Guidebook. More pointedly, P.V. asserted that the Student Guidebook supported a level two infraction rather than a level three infraction, which warranted lesser consequences. See Transcript, p. 14, 6-10. That same day, the assistant principal sent a letter documenting the conference and explaining the discipline. The letter also advises the parent to contact the guidance counselor or the assistant principal with any questions, concerns, or beliefs about a discrepancy.

The Board of Education policies are readily available on the District's website. Notably, Verona's principal forwards an electronic email to all parents at the start of each school year, including 2019-20, containing links to the Verona Student Handbook (Guidebook), which includes the Student Code of Conduct. The Code of Conduct states that a student or parent has the right to a hearing and can appeal discipline decisions under the Code of Conduct.

T.S. served his suspensions without incident.

On April 22, 2022, P.V. filed a Petition of Appeal with the Commissioner because Verona failed to admit her minor son, T.S., into the National Honor Society (NHS) due to his suspension in February 2020. On April 29, 2022, Verona formally denied T.S.'s NHS admission, noting that T.S.'s "student conduct record is inconsistent with the character requirements of the NHS." The denial instructed T.S. to reapply next year and recommended that he use the time between now and then to amplify his candidacy. Further, the letter advised T.S. that he could request a meeting for clarification of the

denial and advocate for himself. Neither P.V. nor T.S. requested a meeting with NHS's faculty council.

On May 16, 2022, petitioner converted her petition under OAL DKT. NO. EDU 03920-22 to an application for emergent relief under N.J.A.C. 6A-31.6. On May 23, 2022, following oral argument and submissions from both parties, the Hon. Julio Morejon, A.L.J., denied the emergent relief because the proofs failed to establish the necessary elements to grant emergency relief under N.J.A.C. 6A:3-1.6(b), and Crowe v. DeGioia, 90 N.J. 126 (1982).

Judge Morejon also stated that "the issue of suspension of the student is moot as petitioner admits that she did not file a timely appeal with the Department of Education under N.J.A.C. 6a:3-1.3(i)." See Exhibit C, p. 7. On July 8, 2022, the Acting Commissioner of Education upheld the denial of emergent relief and concluded no underlying issues remained, thereby dismissing the case.

During the oral argument on May 20, 2022, before Judge Morejon, petitioner confirmed that Verona informed her of the incident with her son and suspension when it happened. See Transcript, p. 14, lines 2-10. Petitioner spoke with the assistant principal "constantly" about the February 19, 2020, events and suspension, disputing the infraction level and discipline. See Transcript, p. 14, lines 6-10,19 through p. 15, line 9. P.V. also "guessed" that she could have gone to the Board of Education about the suspension. See Transcript, p. 15, lines 22-23 and p. 20, lines 17-23. Yet, P.V. took no further action regarding the suspension until 2022, maintaining that no one told her she could appeal the discipline. Instead, P.V. became aware of the discipline's significance once Verona denied T.S.'s admission to NHS.

DISCUSSION AND CONCLUSIONS OF LAW

Summary-Decision Standard

It is well settled that when facts beyond the initial pleadings are relied on in determining the motion, the motion to dismiss is converted to a motion for summary decision. Jersey City Educ. Ass'n v. City of Jersey City, 316 N.J. Super. 245, 253-54 (App. Div. 1998); see e.g. Price v. Bd. of Educ. of Twp. of Washington, EDU 6121-07, Initial Decision, (December 7, 2007), adopted Comm'r (January 24, 2008) http://njlaw.rutgers.edu/collections/oal/search.html (ALJ converted the motion to dismiss to a motion for summary judgment); see also K.L. & K.L. o/b/o minor children C.L. & M.L. v. Kinnelon Bd. of Educ., EDU 1191-08 and EDU 1192-08 (consolidated), Initial Decision, (April 24, 2008), http://njlaw.rutgers.edu/collections/oal/search.html., adopted Comm'r (July 22, 2008) http://www.state.nj.us/education/legal/index.html (where judge, sua sponte, converted the board's motion to dismiss to a motion for summary decision). Here, respondent attached a certification and several exhibits with its motion papers. Respondent also relies upon materials from the earlier case involving the parties. Thus, I **CONCLUDE** respondent's motion is appropriately considered a motion for summary decision.

A party may move for summary decision upon all or any substantive issues in a contested case. N.J.A.C. 1:1-12.5(a). A party must make the motion a party makes with briefs, with or without affidavits. When the filed papers and discovery, together with any affidavits, show that no genuine issue of material fact exists and that the moving party is entitled to prevail as a matter of law, the judge may grant the motion. N.J.A.C. 1:1-12.5(b). When a party makes such a motion providing that support, an adverse party, to prevail, must submit an affidavit setting forth specific facts showing that a genuine issue of material fact exists that can only be determined in an evidentiary proceeding. Ibid.

Even though a statute calls for a "hearing," where a motion for summary decision is made and supported by documentary evidence and where the objector submits no

evidence to demonstrate that a genuine issue of material fact exists, the motion procedure constitutes the hearing, and no trial-type hearing is necessary. Contini v. Newark Bd. of Educ., 286 N.J. Super. 106, 120–21 (App. Div. 1995), certif. denied, 145 N.J. 372 (1996).

To determine whether a genuine issue of material fact exists that precludes summary judgment, the motion judge must consider whether the competent evidential materials presented, when viewed in the light most favorable to the non-moving party, are sufficient to demonstrate that the moving party is entitled to a judgment as a matter of law. Brill v. Guardian Life Ins., 142 N.J. 520, 540 (1995).

Moreover, even if the non-movant comes forward with some evidence, the court must grant summary judgment if the evidence is "so one-sided that [the movant] must prevail as a matter of law." Ibid. at 536 (citation omitted). If the non-moving party's evidence is "merely colorable or is not significantly probative," the judge should not deny summary judgment. Bowles v. City of Camden, 993 F. Supp. 255, 261 (D.N.J. 1998).

In this case, no genuine issue exists as to the material facts. The only questions are whether the doctrine of collateral estoppel bars petitioner's claim or whether petitioner timely filed her petition disputing T.S.'s discipline under N.J.A.C. 6A:3-1.3(d). More pointedly, no genuine issue exists that petitioner filed a prior case involving the same punishment, now dismissed, and that she did not file the current action within ninety days of the discipline notification. Since these facts are clear and undisputed, I **CONCLUDE** that this case is ripe for summary decision.

Collateral Estoppel

The doctrine of collateral estoppel, or "issue preclusion," is an equitable principle that arises when an issue of fact or law is fully litigated and determined by a final judgement. The earlier determination can preclude future litigation when the party asserting the bar shows that: (1) the issue to be precluded is identical to the issue

decided in the prior proceeding; (2) the issue was actually litigated in the prior proceeding; (3) the court in the prior proceeding issued a final judgment on the merits; (4) the determination of the issue was essential to the prior judgment; and (5) the party against whom the doctrine is asserted was a party to or in privity with a party to the earlier proceeding. Olivieri v. Y.M.F. Carpet, Inc., 186 N.J. 511, 521 (2006) (quoting In re Estate of Dawson, 130 N.J. 1, 20-21 (1994) (quotation marks omitted).

Undeniably, Judge Morejon addressed the discipline issue between the parties, took sworn statements about the events on February 19, 2020, and rendered a decision upheld by the Acting Commissioner. However, exceptions to issue preclusion exist warranting new determinations because of "differences in the quality or extensiveness of the procedures followed in the two courts" or when "the issue is one of law and . . . an intervening change in the applicable legal context or . . . inequitable administration of the laws" requires consideration. Id. at 25. (citing the Restatement (Second) of Judgements § 28 (1982).

Petitioner, appearing pro se, filed the prior action to compel T.S.'s admission to NHS, not to challenge Verona's discipline. The preceding case ended when Judge Morejon concluded that the petitioner did not satisfy emergent relief requirements, a different standard. Further, Judge Morejon highlighted that NHS admission was not a right and subject to review only upon a showing that a school district's admission decision was arbitrary, capricious, or unreasonable. Still, his Order did not analyze whether the circumstances warranted relaxation of the filing timeframe for a petition disputing Verona's discipline. In other words, my review of the record below does not reveal that Judge Morejon fully addressed the timeliness of petitioner's actions under the law. Thus, I **CONCLUDE** that the doctrine of collateral estoppel is not equitably applied to bar this case.

Timeliness

Under N.J.A.C. 6A:3-1.3(d), a party must file an appeal with the Commissioner of Education "no later than the 90th day from the date of receipt of the notice of a final order, ruling, or other action by the district board of education, individual party, or agency, that is the subject of the requested contested case hearing." This rule "provides a measure of repose, an essential element in the proper and efficient administration of the school laws," giving school districts the "security of knowing" that an aggrieved party cannot challenge its actions after ninety days. Kaprow v. Board of Educ. of Berkeley Twp., 131 N.J. 572, 582 (1993).

Courts strictly construe and consistently apply the ninety-day limitation period. Kaprow, 131 N.J. at 588-89; Nissman v. Bd. of Educ., 272 N.J. Super 373, 380-81, (App. Div. 1994); Riely v. Bd. of Educ., 173 N.J. Super. 109, 112-14, (App. Div. 1980). This period begins to run when the petitioner "learn[s] from the Local Board the existence of that state of facts that would enable him to file a timely claim." Kaprow, 131 N.J. at 588-89. Indeed, the "notice of a final order, ruling or other action" is "sufficient to inform an individual of some fact that he or she has a right to know and that the communicating party has a duty to communicate." Id. at 587. Notably, a petitioner need not receive official and formal notification that they may have a valid claim to begin the ninety days. Id. at 588.

However, the Commissioner may exercise her authority under N.J.A.C. 6A:3-1.1.6 to relax the application of the ninety-day rule "where strict adherence thereto may be deemed inappropriate or unnecessary or may result in injustice." Ibid. Yet, exceptions to the ninety-day rule are only appropriate where compelling circumstances exist to justify the enlargement or relaxation of the time limit. See Kaprow, 131 N.J. at 590; DeMaio v. New Providence Bd. of Educ., 96 N.J.A.R.2d (EDU) 449, 453.

Indeed, this extraordinary relief is reserved for situations where the party presents a substantial constitutional issue or a matter of significant public interest

beyond concern only to the parties. Portee v. Bd. of Educ. of Newark, 94 N.J.A.R.2d (EDU) 381, 384; Wise v. Trenton Bd. of Educ., EDU 160-00, Initial Decision (July 25, 2000), adopted, Comm'r Decision (September 11, 2000), aff'd, St. Bd. (January 3, 2001), http://njlaw.rutgers.edu/collections/oal/.

Here, I found that petitioner was aware of the discipline imposed and voiced her disagreement with the infraction level and penalty assessed when it occurred. The ninety-day limitation flows from that notice, not when it became essential to petitioner to challenge because that discipline later impacted T.S.'s NHS admission. Further, petitioner does not dispute that her son made an inappropriate remark on February 19, 2020, or that Verona could discipline her son. Instead, she maintains that she did not know she could appeal the disputed infraction level or discipline imposed. However, the Student Code of Conduct in the Student Guidebook she discussed with the assistant principal regarding the infraction level advises of an ability to appeal. Further, the record discloses no Verona conduct that caused the petitioner to postpone filing her claim for more than two years.

Notably, petitioner's claim has only personal significance, making relaxation of the rule unwarranted. If the Commissioner relaxed the filing timeframe for every harsh result, that action would nullify the rule's salutary public policy of encouraging prompt resolution of disputes. Pacio v. Bd. of Educ. of Lakeland Reg. High Sch. Dist., 1989 S.L.D. 2060 (Comm'r July 29, 1989). Thus, I **CONCLUDE** that petitioner does not present exceptional circumstances or a compelling reason which warrant relaxation of the ninety-day rule and that she filed her petition well beyond the required time frame.

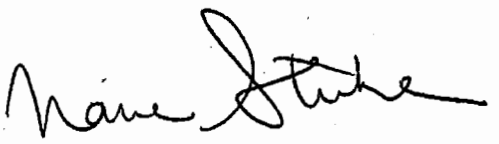
ORDER

Given my findings of fact and conclusions of law, I **ORDER** that the Verona Township Board of Education be **GRANTED** summary decision. I further **ORDER** that petitioner's Petition of Appeal be **DISMISSED**.

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

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

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



January 31, 2023

DATE

NANCI G. STOKES, ALJ

Date Received at Agency: January 31, 2023

Date Mailed to Parties: January 31, 2023

ljb

62-23
OAL Dkt. No. EDU 06954-22
Agency Dkt. No. 175-7/22

New Jersey Commissioner of Education

Final Decision

Shannon Patel,

Petitioner,

v.

Board of Education of the Township of Lakewood, Ocean County,

Respondent.

The record of this matter, the proposed Settlement Agreement and Release (Agreement) and the Initial Decision issued by the Office of Administrative Law have been reviewed pursuant to *N.J.A.C.* 1:1-19.1. Upon review, the Commissioner approves the terms of the Agreement and adopts the Initial Decision as the final decision in this matter. The case is hereby dismissed, subject to compliance with the terms of the Agreement.

IT IS SO ORDERED.

Angelica Allen-McMillan, Ed.D.
ACTING COMMISSIONER OF EDUCATION

Date of Decision: March 7, 2023
Date of Mailing: March 9, 2023

State of New Jersey
OFFICE OF ADMINISTRATIVE LAW

INITIAL DECISION
SETTLEMENT
OAL DKT. NO. EDU 06954-22
AGENCY DKT. NO. 175-7/22

SHANNON PATEL,
Petitioner,
v.
TOWNSHIP OF LAKEWOOD BOARD OF EDUCATION, OCEAN COUNTY,
Respondent.

Sanford Oxfeld, Esq., for petitioner (Oxfeld Cohen, PC, attorneys)

Ashley E. Malandre, Esq., for respondent (Methfessel & Werbel, PC, attorneys)

Record Closed: January 25, 2023 Decided: February 1, 2023

BEFORE **EDWARD J. DELANOY, JR.**, ALJ:

This matter was transmitted to the Office of Administrative Law on August 16, 2022, for determination as a contested case, pursuant to N.J.S.A. 52:14B-1 to -15 and N.J.S.A. 52:14F-1 to -13.

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

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

1. The parties have voluntarily agreed to the settlement as evidenced by their signatures or their representatives' signatures on the attached Consent Order and the attached Board resolution.

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

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

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

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

February 1, 2023 _____

DATE

EDWARD J. DELANOY, JR., ALJ

Date Received at Agency: 2/2/2023

Date Mailed to Parties: _____

EJD/cb

RELEASE

This Release, dated Dec. 27 2022, is given

BY the Releasor, Shannon Patel

referred hereafter to as "I",

TO Releasees, Lakewood Board of Education

referred to as "You".

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

1. **Release**. I release and give up any and all claims and rights which I may have against you. This releases all claims, including those of which I am not aware and those not mentioned in this Release. This Release applies to claims resulting from anything which has happened up to now. I agree to pay from the settlement proceeds an amount sufficient to discharge any and all liens and monetary obligations including, but not limited to medical, wage, worker's compensation, health insurance, Medicare, welfare, child support or other benefits paid by anyone on my behalf, together with such additional sums as may accrue thereon. In recognition of my obligation to satisfy all such liens out of the monies being paid pursuant to this Release, I further agree to indemnify and defend you, your attorneys and your liability insurance carriers from and against any and all claims made or actions filed against you, your attorneys, or your liability insurance carriers for payment of any such liens. I further acknowledge that I have specifically discussed this provision of this Release with my attorneys. I specifically release the following claims: **Any and all claims for damages, injuries, medical bills, liens of any kind, lost wages or losses of any kind (including any and all known and unknown out of pocket medical expenses and Medicare and Medicaid liens) and future expenses associated with the Verified Petition of Appeal filed under docket number: Agency Reference Number 175-7/22.** This Release specifically excludes: (a) claims, if any, arising under the New Jersey Workers' Compensation Act which are unrelated to the Action and which may arise after execution of this Agreement; (b) claims that Petitioner cannot release or waive by law; and (c) claims, if any, arising from the breach of this Agreement. Petitioner certifies that he is unaware of a factual basis for any such claims at this time.

2. **Payment**. I have been paid a total of Five Thousand ~~Four~~ Six Hundred and ~~Seven~~ Forty-five Dollars and ~~Ten~~ two Cents ~~($5,407.10)~~ 5,645.02, in full payment for making this Release. I agree that I will not seek anything further including any other payment from you.

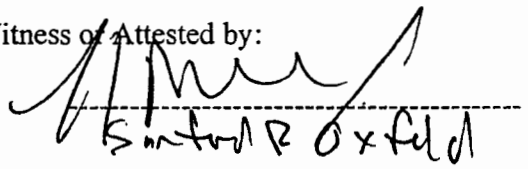
3. **Promise to satisfy all liens out of the Payment**. All claims and/or liens, past, current and/or future arising out of this settlement or asserted against the proceeds of this settlement are to be satisfied by Releasors and/or their Attorneys, including but not limited to any Medicare or Medicaid claims and/or liens, Worker's Compensation claims and/or liens, Social Security claims and/or liens, hospital/healthcare insurer claims and/or liens, physician or attorney claims and/or liens, or any of the statutory, equitable, common law or

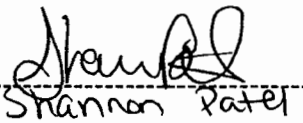
judgment claims and/or liens, including but not limited to claim based on subrogation or any other legal or equitable theory. We therefore agree, upon prompt presentation of any such claims and/or liens, to defend You against any such claims and/or liens, and to indemnify and hold You harmless against any judgment entered against You based on such claims and/or liens, including the payment of any fines, charges and attorneys fees incurred as a result of any such lien. Failure to satisfy any such lien shall be considered a breach of this Agreement and Releasors and their Attorneys agree to pay all costs, interest and attorneys fees relative to any such lien.

4. **Who is Bound**. I am bound by this Release. Anyone who succeeds to my rights and responsibilities, such as my heirs or the executor of my estate, is also bound. This Release is made for your benefit and all who succeed to your rights and responsibilities, such as your heirs or the executor of your estate.

5. **Signatures**. I understand and agree to the terms of this Release. If this Release is made by a corporation its proper corporate officers sign and its corporate seal is affixed.

Witness or Attested by:



----------  ---------- (Seal)

Witness or Attested by:

---------- ---------- (Seal)

STATE OF NEW JERSEY, COUNTY OF Monmouth : SS.:

I CERTIFY that on Dec. 27, 2022, _____

Shannon Patel personally came before me and acknowledged under oath, to my satisfaction, that this person (or if more than one, each person):

(a) is named in and personally signed this document; and
(b) signed, sealed and delivered this document as his or her act and deed.

Prepared by: **(Print signer's name below signature)**

_____ _____

(Print name and title below signature)

Sworn to and subscribed before me
this 27 day of December,
2022

_____

An atty at law of the State of NJ

SETTLEMENT AGREEMENT AND RELEASE
MEDICARE ADDENDUM

In further consideration for the Settlement Agreement and Release (Release) to which this Medicare Addendum is attached and incorporated therein, RELEASEE, its attorneys and insurer(s) rely on the following representations and warranties made by RELEASOR and RELEASOR's Counsel.

I. Representations and Warranties

RELEASOR, RELEASOR's Counsel and RELEASEE agree that all representations and warranties made herein shall survive settlement.

A. Medicare Secondary Payer.

RELEASOR and their counsel acknowledge and agree that the parties hereto have taken reasonable steps from the beginning of this action to comply with the requirements of 42 U.S.C. § 1395y(b) and the rules and regulations promulgated thereunder (hereinafter collectively "MSP").

B. RELEASOR is or was Medicare eligible;

RELEASOR and his/her Counsel represent and warrant that:

1. RELEASOR is or was Medicare eligible;

2. RELEASOR and his/her Counsel are aware of Medicare's interest in this settlement to the extent Medicare has made any conditional payments for medical services or items received by RELEASOR, pursuant to MSP, and related to the accident, injury, or illness giving rise to this settlement, and/or arising from or related to the matters forming the basis of the claims by RELEASOR;

3. RELEASOR and his/her Counsel represent and warrant that they have provided, the requisite information to RELEASEES, its attorneys and insurer(s) necessary to comply with the mandatory reporting obligations of MSP;

C. RELEASOR's Responsibility for Reimbursement of Medicare's Conditional Payments

RELEASOR and his/her counsel represent and warrant that they have notified Medicare and/or its Coordination of Benefits Contractor of the accident, injury, or illness giving rise to this settlement.

RELEASOR and his/her Counsel represent and warrant that within sixty (60) days of the receipt of a final demand letter from Medicare, they shall reimburse Medicare for any conditional payments related to the accident, injury, or illness giving rise to this settlement, and/or arising from or related to the matters forming the basis of the claims asserted by PLAINTIFF/CLAIMANT, as required by MSP.

RELEASOR and his/her Counsel acknowledge and agree that it is their responsibility, not the responsibility of RELEASEE, its attorneys or insurer(s), to reimburse Medicare for any conditional payments made by Medicare on behalf of RELEASOR.

RELEASOR and his/her Counsel specifically warrant and represent that any and all conditional payments, liens, claims and subrogated interests of whatever nature or character asserted or potentially asserted by Medicare and/or persons or entities acting on behalf of Medicare (hereinafter "Medicare Claims") arising from or related to the matters forming the basis of RELEASOR's claim have been, or will be, resolved and satisfied prior to distribution of any of the Settlement Funds to RELEASOR.

RELEASOR's Counsel specifically warrants and represents that he/she shall hold the Settlement Funds in an escrow account or client trust account without distributing to RELEASOR or any other person or entity until the Medicare Claims, if any, arising from or related to the matters forming the basis of RELEASOR's claims has been satisfied or waived and demonstrated by proof of claim or lien satisfaction or waiver and a written release executed by Medicare.

RELEASOR and his/her Counsel specifically warrant and represent that they shall obtain a full waiver or satisfaction and release from Medicare of any and all Medicare Claims arising from or related to the matter forming the basis of RELEASOR's claim.

RELEASOR and RELEASOR's Counsel further specifically warrant and represent that, prior to distributing any of the Settlement Funds to RELEASOR or any other person or entity, RELEASOR's Counsel will provide to RELEASEE, its attorneys and its insurer(s) written documentation from Medicare proving waiver or satisfaction and release of Medicare Claims arising from or related to prior conditional payments, if any, made in connection with the matters forming the basis of RELEASOR's claims.

II. Indemnification

In addition to and without limiting any other language in the Release, RELEASOR agrees to indemnify and hold harmless RELEASEE, its attorneys and insurer(s) from any and all Medicare Claims that have been or may in the future be related to, arise out of or are in connection with MSP.

This indemnification obligation includes all damages and costs incurred by RELEASEE, and/or its attorneys and/or insurer(s), including but not limited to attorney's fees incurred by or on behalf of RELEASEE, and/or its attorneys and/or insurer(s), fines and penalties, multipliers, costs, interest, expenses and judgments.

III. Reliance on Representations and Warranties

In agreeing to the Release, RELEASEE, its attorneys and insurer(s) are relying on the representations and warranties of RELEASOR and his/her Counsel regarding RELEASOR's Medicare status and the actions

RELEASOR and his/her Counsel have represented they have taken and/or will take to satisfy any and all Medicare Claims and interests pertaining to the matters forming the basis of RELEASOR's claims.

If the above representations are not correct or the above actions are not performed, it is acknowledged and agreed that RELEASOR and his/her Counsel are in material breach of this Medicare Addendum, and RELEASEE, its attorneys and/or insurer(s) shall receive complete repayment of the Settlement Funds. In addition, RELEASOR and his/her Counsel shall indemnify RELEASEE, its attorneys and/or insurer(s) for any damages, legal fees and costs or expenses for their failure to adhere to the representations and warranties contained herein.

Executed in Monmouth County, 27th this 2nd day of 2022.

RELEASOR

RELEASOR'S COUNSEL Stanford Oxfeld

STATE OF NJ,

COUNTY OF Monmouth, to wit:

On the 27th day of December, 2022, before me personally appeared RELEASOR, to me known to be the person named in the foregoing Release, and who executed the foregoing Release and acknowledged to me that he/she has read the Release and understands the contents thereof and that he/she voluntarily executed the same.

NOTARY PUBLIC

Stanford C. Oxfeld

~~(PRINT NAME OF NOTARY)~~ Attorney

MY COMMISSION EXPIRES: _____

Lakewood Board of Education
200 Ramsey Avenue, Lakewood, NJ 08701 Main Office: (732) 364-2400 Fax: (732) 905-3687
Laura A. Winters, Ed.D, Superintendent of Schools

RESOLUTION

11. Approve the release agreement between the Lakewood Board of Education and Employee #8371 in the amount of $5,645.02.

MOTION TO APPROVE TO ACCEPT THE ADDITIONS TO THE AGENDA, BUSINESS & SUPERINTENDENT AGENDA AS AMENDED (passed)

Motion: Mr. Stern Second: Mr. Bender
8 Ayes: Mr. Grunhut, Mr. Raitzik, Mr. Nakdimen, Mr. Rodriguez (via zoom), Mr. Bender, Mrs. Gonzalez (via zoom), Mr. Stern, Mr. Zlatkin
O Nays:
O Abstained:
1 Absent: Mr. Greenwald

CERTIFICATION

I, Kevin Campbell, Assistant Business Administrator/ Board Secretary to the Board of Education of the Township of Lakewood, hereby certify the foregoing is a true copy of the Resolution adopted by the Board of Education of the Township of Lakewood, County of Ocean, at the public meeting held on the 4th day of January, 2023.

Kevin Campbell

Kevin Campbell/Assistant Business Administrator/Board Secretary

63-23E
OAL Dkt. No. EDU 00881-23
Agency Dkt. No. 12-1/23

New Jersey Commissioner of Education

Order on Emergent Relief

Margaret Bennett,

Petitioner,

v.

Judith Sullivan, Tom Bogdansky, Doreen Mariani, Marianna Emmolo, and Kim Ansh,

Respondents.

The record of this emergent matter, the sound recording of proceedings at the Office of Administrative Law (OAL), and the recommended Order of the Administrative Law Judge (ALJ) have been reviewed. Upon such review, the Commissioner concurs with the ALJ that petitioner has failed to demonstrate entitlement to emergent relief pursuant to the standards enunciated in *Crowe v. DeGioia,* 90 *N.J.* 126 (1982), and codified at *N.J.A.C.* 6A:3-1.6.

Accordingly, the recommended Order of the OAL denying petitioner's application for emergent relief is adopted for the reasons stated therein. This decision is limited to the issue of the vote cast by respondent Judith Sullivan at the January 5, 2023 Board meeting regarding the non-renewal of Fogarty & Hara's contract to act as Board counsel, which is the only issue for which petitioner ought emergent relief. However, the petition raises other issues included in the January 27, 2023 transmittal to the OAL, and the Commissioner finds that the existing petition is sufficient to allow proceedings regarding those issues to proceed. Accordingly, this

matter shall continue at the OAL with such proceedings as the parties and the ALJ deem necessary to bring it to closure.

IT IS SO ORDERED.

Angelica Allen-McMillan, Ed.D.
ACTING COMMISSIONER OF EDUCATION

Date of Decision: March 7, 2023
Date of Mailing: March 9, 2023

State of New Jersey

OFFICE OF ADMINISTRATIVE LAW

ORDER ON

EMERGENT RELIEF

OAL DKT. NO. EDU 00881-23

AGENCY DKT. NO. 12-1/23

MARGARET BENNETT,

Petitioner,

v.

JUDITH SULLIVAN, TOM BOGDANSKY, DOREEN MARIANI, MARIANNA EMMOLO, AND KIM ANSH,

Respondents.

Margaret Bennet, petitioner pro se

Kerri A. Wright, Esq., (Porzio Bromberg & Newman, Attorneys) for respondents

BEFORE **JUDE-ANTHONY TISCORNIA**, ALJ:

Margaret Benet (petitioner) filed a request for emergent relief challenging the actions of the above captioned five individual Ramapo Indian Hills Regional Board of

Education (Board) members in relieving board counsel, amending board policy and passing a motion.

PROCEDURAL HISTORY

The request for emergent Relief was filed with the New Jersey Department of Education, Office of Controversies and Disputes, on January 27, 2023, and transmitted to the Office of Administrative Law. The matter was set down for a hearing via Zoom before the undersigned on February 6, 2023. The February 6, 2023, hearing was converted to an off the record conference via zoom, and subsequently adjourned until February 7, 2023, by request of counsel for respondents (with consent) so that she may file a response to the forgoing petition.

It should be noted that, as a procedural matter, Bennett has named five individual board members, and not the Board, itself, as a party to the forgoing complaint. Thus, the attorney for the respondents, here, was assigned by the board's insurance carrier to represent the interests of the five named individuals and not the Board as a whole.

At the hearing, the petitioner Bennett amended her emergent petition on the record, focusing the emergent hearing solely on the vote cast by respondent Judith Sullivan at the January 5, 2023, board meeting, a vote which sought to not renew the board counsel Fogarty and O'Hara's contract to act as board counsel. Petitioner seeks emergent injunctive relief removing said "yes" vote and replacing same with a recusal due to an apparent conflict of interest. Bennett noted that the remainder of her complaint, though no emergent, should still be considered heard on a non-emergent by the Commissioner.

FACTS

The following **FACTS** are undisputed.

At the January 5, 2023, board meeting, respondent Judith Sullivan voted in favor of not renewing the contract of the flaw firm Fogarty and Hara to act as the board's attorney. The motion succeeded and the contract was not renewed.

LEGAL ARGUMENTS

Bennett argues that Judith Sullivan has a conflict of interest with Steven Fogarty, and thus, the law firm of Fogarty and Hara, and therefore, she should have recused herself from the vote to renew the contract with that firm at the January 5, 2023, board meeting.

LEGAL ANALYSIS AND CONCLUSIONS

Emergent relief is available pursuant to N.J.A.C. 1:6A-12.1(e), N.J.A.C. 6A:3-1.6(b) and N.J.A.C. 6A:14-2.7(s), if the application meets the following four requirements:

1. The petitioner will suffer irreparable harm if the requested relief is not granted;
2. The legal right underlying the petitioner's claim is settled;
3. The petitioner has a likelihood of prevailing on the merits of the underlying claim; and
4. When the equities and interests of the parties are balanced, the petitioner will suffer greater harm than the respondent will suffer if the requested relief is not granted.

Petitioner argues that, as a citizen and tax payer, she, along with the school district generally, will suffer irreparable harm if Sullivan's vote is not nullified. She argues that the named board members have acted with disregard for applicable regulations and Sullivan has failed to recuse herself of voting on issues from which she should be conflicted out.

While petitioner argues that a conflict exists, there is no testimony before me that speaks to that matter. While she notes on the record that she has documents attached to her petition that tend to prove her position, no foundation was laid to admit any such documents into evidence. Ms. Wright notes in her argument that there is a pending case before the school ethics committee involving the issues disputed here.

Bennet states that, if Sullivan's vote is eliminated, or otherwise, voided, the motion to not renew the attorney contract may not have succeeded. Thus, even I order that Sullivan's vote be voided, it may still result in Fogarty and Hara being non renewed as board council. Either way, I **CONCLUDE** that, even if a conflict did exist, any harm would not be irreparable, as a vote could be re-cast and the law firm may be re-hired at a later date if the board so chooses. Thus, I **CONCLUDE** the petitioner has failed to meet this first prong.

I further **CONCLUDE** that the legal right to seek an order voiding an individual board member's vote is not a well settled right, thus the second prong is not satisfied. To this point, Bennett argued that the underlying right is her right to enjoy a board whose members recuse themselves where a conflict exists. To this point, as I stated prior, while a conflict of interest is a serious cause for concern, the alleged conflict at the center of the petition here has not been established on the record. Thus, I **CONCLUDE** the petitioner has failed to meet this second prong.

I, further, **CONCLUDE** that petitioner's likelihood of prevailing on the merits of the underlying claim is not established, as the alleged conflict of interest has not been established. If the conflict were established, the undersigned may be inclined to issue an order voiding Sullivan's vote, but the effect of that order is undetermined.

I, further, **CONCLUDE** that when the equities and interests of the parties are balanced, the petitioner will **not** suffer greater harm than the respondent will suffer if the requested relief is not granted. This is due to the fact that, as noted above, the non-renewal of a contract can be undone and the firm re-hired if the board so choose.

Based on the foregoing, I **CONCLUDE** that petitioner has failed to meet the four-pronged requirements to succeed on an emergent action as cited above, and is, therefore, not entitled to injunctive relief. The foregoing emergent petition is, therefore, **DENIED.**

ORDER

It is, hereby, **ORDERED** that the Bennett's petition for emergent injunctive relief be **DISMISSED**; it is further **ORDERED** that any remaining issues be referred to the COMMISSIONER for further determination.

This order on application for emergency relief may be adopted, modified, or rejected by the **COMMISSIONER OF THE DEPARTMENT OF EDUCATION**, who is authorized by law to make the final decision in this case. The final decision shall be issued without delay but no later than forty-five days from the entry of this order. If the **COMMISSIONER OF THE DEPARTMENT OF EDUCATION** does not adopt, modify, or reject this order within those forty-five days, this recommended order shall become the final decision on the issue of emergency relief under N.J.S.A. 52:14B-10.

February 8, 2023
DATE

JUDE-ANTHONY TISCORNIA, ALJ

id

64-23E
OAL Dkt. No. EDU 00868-23
Agency Dkt. No. 17-1/23

New Jersey Commissioner of Education

Order on Emergent Relief

S.S., on behalf of minor child, K.S.,

Petitioner,

v.

Board of Education of the Borough of Sayreville, Middlesex County,

Respondent.

The record of this emergent matter, the sound recording of proceedings at the Office of Administrative Law (OAL), and the recommended Order of the Administrative Law Judge (ALJ) have been reviewed. Upon such review, the Commissioner concurs with the ALJ that petitioner has failed to demonstrate entitlement to emergent relief pursuant to the standards enunciated in *Crowe v. DeGioia,* 90 *N.J.* 126 (1982), and codified at *N.J.A.C.* 6A:3-1.6.

Accordingly, the recommended Order of the OAL denying petitioner's application for emergent relief is adopted for the reasons stated therein.[1] This matter shall continue at the OAL with such proceedings as the parties and the ALJ deem necessary to bring it to closure.

IT IS SO ORDERED.

Angelica Allen-McMillan, Ed.D.
ACTING COMMISSIONER OF EDUCATION

Date of Decision: March 7, 2023
Date of Mailing: March 10, 2023

[1] The Board is reminded that in accordance with *N.J.A.C.* 6A:16-7.3 (d)-(e), it must review the status of K.S.'s long term suspension at each board meeting to determine whether the suspension should continue or whether K.S. should return to the general education program.

State of New Jersey
OFFICE OF ADMINISTRATIVE LAW

ORDER DENYING
EMERGENT RELIEF
OAL DKT. NO. EDU 00868-23
AGENCY DKT. NO. 17-1/23

S.S. ON BEHALF OF K.S.,
Petitioner,
v.
BOARD OF EDUCATION, BOROUGH OF SAYREVILLE, MIDDLESEX COUNTY,
Respondent.

George Scott Alevras, Esq., for petitioner (Musto & Alevras, attorneys)

Danielle N. Pantaleo, Esq., for respondent (Busch Law Group, LLC, attorneys)

Record Closed: February 6, 2023 Decided: February 7, 2023

BEFORE **KATHLEEN M. CALEMMO**, ALJ:

STATEMENT OF THE CASE

In this emergent matter, petitioner S.S., on behalf of minor child K.S., seeks the immediate return of K.S. to Sayreville War Memorial High School (Sayreville) on the

grounds that the decision by the Sayreville Borough Board of Education (Board) imposing a long-term suspension with home instruction educational services was arbitrary, unreasonable, and against the weight of the evidence. The Board opposes petitioner's request on the grounds that petitioner has not satisfied the requirements to obtain emergent relief.

PROCEDURAL HISTORY

On January 26, 2023, petitioner filed a petition of appeal with the New Jersey Department of Education (DOE), Office of Controversies and Disputes, challenging the Board's decision to place her son on long-term suspension, provide home instruction educational services, and find an alternative appropriate educational placement. The petition was transmitted to the Office of Administrative Law (OAL) on January 31, 2023, for hearing as a contested case pursuant to N.J.S.A. 52:14B-1 to -15, and N.J.S.A. 52:14F-1 to -13.

The matter was reassigned to me on February 2, 2023, for an emergent hearing on February 6, 2023. After oral argument, the record closed on February 6, 2023.

FACTUAL DISCUSSION AND FINDINGS

Based on the petition for emergent relief, the video proffered by respondent, the legal arguments contained in the briefs in support and opposition of the request for emergent relief, and the arguments of counsel, and solely for the purpose of deciding this emergent appeal, I **FIND** the following undisputed **FACTS**:

K.S. is a classified student with a Specific Learning Disability attending Sayreville as a ninth-grade student. His date of birth is June 14, 2007.

On January 12, 2023, K.S. was involved in an altercation with another student. While the video of the fight showed that the other student threw the first punch, it also showed that the fight immediately became four against one. After K.S.'s three friends

punched and kicked the student, K.S. was then depicted kicking the student several times as he laid on the ground.

After the incident, Sayreville's Child Study Team (CST) held a Manifestation Determination meeting and determined that the incident was not a result of K.S.'s disability. Thereafter, the superintendent for Sayreville requested a Board hearing due to the severity of the incident. The Board held a hearing on January 24, 2023. At the Board hearing, K.S. was represented by counsel. The Board heard testimony from witnesses, reviewed the video of the incident, and reviewed documentary records which included K.S.'s prior disciplinary history and school transcripts. After the hearing, the Board determined that K.S. would be suspended, pending placement in a suitable alternative educational program. In the interim, K.S. is receiving home instruction.

LEGAL ANALYSIS AND CONCLUSIONS

The standards for emergent relief are set forth in Crowe v. DeGioia, 90 N.J. 126 (1982), and are codified at N.J.A.C. 6A:3-1.6. The petitioner bears the burden of proving:

> 1. That the party seeking emergent relief will suffer irreparable harm if the requested relief is not granted;
>
> 2. The existence of a settled legal right underlying the petitioner's claim;
>
> 3. That the party seeking emergent relief has a likelihood of prevailing on the merits of the underlying claim; and
>
> 4. When the equities and the interests of the parties are balanced, the party seeking emergent relief will suffer greater harm than the respondent.
>
> [Crowe, 90 N.J. at 132-34.]

Petitioner has not specifically addressed any of the Crowe prerequisites for emergent relief. Petitioner's argument is that in-home instruction is not a proper substitute for a classroom education. K.S. struggles academically and there is a concern that given the limited home instruction hours, K.S.'s educational progress will suffer further decline.

Petitioner's lead argument was that the discipline was excessive. Reference was made to K.S.'s lack of any prior disciplinary history of violent behavior episodes. Arguing that K.S. was not the aggressor because he was punched in the face, petitioner believes that the discipline was unfairly administered among all the participants involved in the altercation. On balance, petitioner argued that K.S. is suffering greater harm to his education than the school would suffer by his re-admittance.

Irreparable Harm

To obtain emergent relief, petitioner must demonstrate more than a risk of irreparable harm should K.S. not be re-admitted to Sayreville. Petitioner must make a "clear showing of immediate irreparable injury," or a "presently existing actual threat; (an injunction) may not be used simply to eliminate a possibility of a remote future injury, or a future invasion of rights, be those rights protected by statute or by common law." Cont'l. Group, Inc. v. Amoco Chems. Corp., 614 F. 2d 351, 359 (D.N.J. 1980). In an educational setting, "irreparable harm may be shown when there is a substantial risk of physical injury to the child or others, or when there is a significant interruption or termination of educational services." Ocean Twp. Bd. of Educ. v. J.E. and T.B. obo J.E., OAL Dkt. No. EDS 00592-04, 2004 NJ AGEN LEXIS 115, at *8 (February 23, 2004) (irreparable harm found where an eight-year-old's "physical aggressiveness and disruptive behaviors [posed] a safety concern to himself and others, and the district's behavior modification techniques [were] no longer effective"); Sparta Twp. Bd. of Educ. v. R.M. and V.M. obo C.M., OAL Dkt. No. EDS 01975-20, 2020 NJ AGEN LEXIS, at *14 (February 21, 2020) (inappropriate interactions with other students and breaking a desk deemed "sufficient evidence of the risk of harm to [student], school staff, teachers and students that if [student] remained in school at this time, other incidents could occur involving the health, safety and welfare of any of these individuals").

Petitioner contends that irreparable harm is established because home instruction is not adequate. Despite the argument, petitioner has not provided, by affidavit or testimony, information about the home instruction services that K.S. is currently receiving.

Respondent argued that K.S. is receiving home instruction in accordance with N.J.A.C. 6A:14-4.8, since January 20, 2023. Respondent further argued that K.S. is receiving more home instruction than is statutorily required. He is receiving home instruction in all his classes, including World History, Biology, Algebra 1, English 10, and Physical Education. In addition to the home instruction, the CST is meeting and working with K.S.'s parents towards finding an appropriate alternative educational program. As the Board is supplying home instruction services while exploring the appropriateness of alternative placement, I **FIND** that there has been no break in educational services to K.S. Home instruction to a student with a disability must be provided in accordance with N.J.A.C. 6A:14-4.8, and subject to a maximum of sixty calendar day intervals for renewal. I further **FIND** that K.S. was placed on home instruction after he was afforded due process rights under N.J.A.C. 6A:16-7.3. Consequently, I **CONCLUDE** that there is insufficient evidence to show that home instruction educational services present an irreparable harm to K.S.

The Legal Right is Settled and Likelihood of Prevailing on the Merits

The second consideration is whether the legal right underlying petitioner's claim is settled, N.J.A.C. 6A:3-1.6(b)(2), and then third, petitioner must make a preliminary showing of a reasonable probability of success on the merits. Crowe, 90 N.J. at 133.

Petitioner has also filed an underlying due process claim. Petitioner correctly claims that a decision by the Board can be overturned if the decision was arbitrary, capricious, or unreasonable. Whether a Board's decision can be overturned absent a plenary hearing is not well settled. Herein, there is no dispute that the Board has the power to discipline a student and when appropriate subject a student to a long-term suppression.

Actions within a school board's authority, including the adoption and implementation of policies for the assignment of students, are entitled to a presumption of correctness, and will not be upset by the courts unless there is an affirmative showing that a decision is arbitrary, capricious, or unreasonable. Thomas v. Bd. of Educ. of Morris

Twp., 89 N.J. Super. 327, 332 (App. Div. 1965), affirmed, 46 N.J. 581 (1966). In general, a board of education's actions are entitled to a presumption of lawfulness and good faith. Where board actions are challenged, the challenger bears the burden of proving that such actions were unlawful, arbitrary, capricious, or unreasonable. Schuster v. Bd. of Educ. of the Twp. of Montgomery, 96 N.J.A.R.2d (EDU) 670, 676 [citing Schnick v. Westwood Bd. of Educ., 60 N.J. Super. 448 (App. Div. 1960), and Quinlan v. North Bergen Twp. Bd. of Educ., 73 N.J. Super. 40 (App. Div. 1962)].

In matters involving the exercise of a board of education's discretion, 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 conclusions." Kopera v. West Orange Bd. of Educ., 60 N.J. Super. 288, 296 (App. Div. 1960). Our courts have held that "[w]here there is room for two opinions, action is not arbitrary or capricious when exercised honestly and upon due consideration, even though it may be believed that an erroneous conclusion has been reached." Bayshore Sewage Co. v. Dep't of Envtl. Prot., 122 N.J. Super. 184, 199–200 (Ch. Div. 1973), affirmed, 131 N.J. Super. 37 (App Div. 1974). To satisfy the arbitrary and capricious standard, petitioner must prove that respondent acted in either bad faith or in disregard to the circumstances.

The limited record herein included a video of the incident. While K.S. did not initiate the fight, his actions in repeatedly kicking another student who was lying defenseless on the ground was sufficiently serious to warrant a long-term suspension. There was no argument questioning the Board's authority to impose discipline. Petitioner's argument that the Board's decision was arbitrary, capricious, and unreasonable cannot be determined without a full plenary hearing. Herein, petitioner is afforded the protections, established by N.J.A.C. 6A:14-4.8, requiring all home instruction services to be renewed by notice on a sixty-day interval.

I **CONCLUDE** that petitioner does not meet the second and third prong of the emergent relief standard.

Balance of Equities and Interests

The final prong of the above test is whether the equities and interests of the parties weigh in favor of granting the requested relief to petitioner. Petitioner claims that greater harm will result to K.S. because he is suffering an educational loss for every day he remains on home instruction. Petitioner has not presented any proof, let alone clear and convincing proof, of how K.S. is being affected by home instruction. Petitioner has also argued that Sayreville will not suffer any harm because K.S. is not a danger to the school community. K.S. has a minimal disciplinary record, no prior violence, and, in this instance, K.S. reacted after being punched in the face. Petitioner strongly argued that the punishment did not fit the crime.

Respondent's argument is that K.S.'s educational needs are being met through home instruction services. Moreover, K.S. was afforded full due process. He had a Manifestation Determination meeting and a Board hearing. Accordingly, respondent argued that there is no just cause to disturb the Board's decision on an emergent basis. A determination of whether the Board acted arbitrarily or in bad faith can only be decided after a plenary hearing on the merits. In the interim, K.S.'s educational needs are being met by home instruction.

I **CONCLUDE** that petitioner has not shown that the equities favor reversing the Board's decision without a plenary hearing.

For the reasons stated above, I **CONCLUDE** that petitioner has failed to meet the applicable requirements to obtain emergent relief.

ORDER

I hereby **ORDER** that the application for emergent relief of petitioner S.S., on behalf of the minor child K.S., seeking the immediate re-admission to Sayreville War Memorial High School is hereby **DENIED**.

This Order on application for emergency relief may be adopted, modified, or rejected by the **COMMISSIONER OF THE DEPARTMENT OF EDUCATION**, who/which by law is authorized to make a final decision in this matter. The final decision shall be issued without undue delay, but no later than forty-five days following the entry of this order. If the **COMMISSIONER OF THE DEPARTMENT OF EDUCATION** does not adopt, modify, or reject this order within forty-five days, this recommended order shall become a final decision on the issue of emergent relief in accordance with N.J.S.A. 52:14B-10.

February 7, 2023 _____ Kathleen M. Calemmo

DATE **KATHLEEN M. CALEMMO**, ALJ

Date Received at Agency: _____

Date Mailed to Parties: _____

KMC/jns

65-23

New Jersey Commissioner of Education

Final Decision

Board of Education of the Township of Deptford, Gloucester County,

Petitioner,

v.

Board of Education of the Gloucester County Vocational School District, Gloucester County,

Respondent.

Synopsis

Petitioning school district (Deptford) sought an order relieving it of the obligation to pay the tuition and transportation costs for its students to attend the Gloucester County Institute of Technology (GCIT), which is operated by the Gloucester County Vocational-Technical School District (GCV-TSD). Petitioner contended that it offers Career and Technical Education (CTE) programs that are equivalent to those offered at GCIT and is therefore the functional equivalent of an approved vocational school; accordingly, petitioner argued that it is exempt from paying tuition and transportation costs for its resident students to attend GCIT when the same or similar courses are offered in the Deptford School District. The parties filed cross motions for summary decision.

The ALJ found, *inter alia*, that: there are no material facts at issue in this case and the matter is ripe for summary decision; Deptford has created three CTE programs (Academy of Biomedical Science and Nursing/Allied Health; Academy of Engineering and Computer Science; and Spartan School of Carpentry) and received CTE program approval from the NJDOE; the Commissioner previously decided the issue of whether operating approved CTE programs is the same as operating a vocational school (*see, Board of Education of the Delaware Valley Regional High School District, Hunterdon County v. Board of Education of the Hunterdon County Vocational School District, Hunterdon County, et al.,* Commissioner's Decision No. 124-20, decided June 8, 2020, affirmed 2021 *N.J. Super* Unpub. 3090 (App. Div. 2021)) and determined that approved CTE programs are not the equivalent of a vocational school; establishment of a vocational school requires a separate application and approval process; there is no evidence in the record that Deptford has applied for approval to establish a vocational school; accordingly, Deptford is not exempt from paying the tuition and transportation costs for its students who apply and are accepted to attend GCIT under *N.J.S.A.* 18A:54-20.1 and *N.J.A.C.* 6A:19-2.3. The ALJ granted GCV-TSD's motion for summary decision and dismissed Deptford's petition.

Upon review the Commissioner, *inter alia*, concurred with the ALJ's findings and conclusion in this case. Accordingly, the Commissioner adopted the Initial Decision as the final decision in this matter and dismissed the petition.

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

65-23
OAL Dkt. No. EDU 05269-22
Agency Dkt. No. 102-5/22

New Jersey Commissioner of Education

Final Decision

Board of Education of the Township of Deptford, Gloucester County,

Petitioner,

v.

Board of Education of the Gloucester County Vocational-Technical School District, Gloucester County,

Respondent.

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

Petitioner Deptford Township Board of Education (Deptford) seeks an order declaring that it is not required to pay the tuition or transportation costs for its students to attend the Gloucester County Institute of Technology (GCIT), which is operated by the Gloucester County Vocational-Technical School District. Deptford argues that because it offers Career and Technical Education (CTE) programs that are equivalent to those offered at GCIT, it is the functional equivalent of an approved vocational school, and it is therefore exempt from paying tuition and transportation costs.

The Administrative Law Judge (ALJ) found that Deptford's CTE programs are not the equivalent of a vocational school, and Deptford is not exempt from paying the tuition and transportation costs for its students who attend GCIT under *N.J.S.A.* 18A:54-20.1 and *N.J.A.C.* 6A:19-2.3. The ALJ cited to *Board of Education of the Delaware Valley Regional High School District,*

Hunterdon County v. Board of Education of the Hunterdon County Vocational School District, Hunterdon County, et al., Commissioner's Decision No. 124-20, decided June 8, 2020, affirmed 2021 *N.J. Super* Unpub. 3090 (App. Div. 2021), in which the Commissioner decided the same issue and determined that operating approved CTE programs is not the same as operating a vocational school, the establishment of which requires a separate application and approval process. The ALJ found that the record does not reflect any correspondence between Deptford and the Department seeking approval and establishment of a vocational school.

The Commissioner agrees with the ALJ that Deptford is required to pay the tuition and transportation costs for its students to attend GCIT. *N.J.S.A.* 18A:54-20.1 and *N.J.A.C.* 6A:19-2.3 establish that boards of education shall send and pay tuition for its resident students who are accepted to attend a county vocational school district, unless the board of education maintains an approved vocational school. The Commissioner is in accord with the ALJ's determination that Deptford does not have approval to operate a vocational school, nor is its CTE program the same as a vocational school, so it is not exempt from the tuition and transportation requirement.

Accordingly, the Initial Decision of the OAL is adopted as the final decision in this matter, and the petition is hereby dismissed.

IT IS SO ORDERED.[1]

ACTING COMMISSIONER OF EDUCATION

Date of Decision: March 9, 2023
Date of Mailing: March 10, 2023

[1] This decision may be appealed to the Appellate Division of the Superior Court pursuant to *N.J.S.A.* 18A:6-9.1. Under *N.J.Ct.R.* 2:4-1(b), a notice of appeal must be filed with the Appellate Division within 45 days from the date of mailing of this decision.

State of New Jersey
OFFICE OF ADMINISTRATIVE LAW

INITIAL DECISION
GRANTING SUMMARY DECISION
OAL DKT. NO. EDU 05269-22
AGENCY REF. NO. 102/5-22

BOARD OF EDUCATION OF THE TOWNSHIP OF DEPTFORD, GLOUCESTER COUNTY,
Petitioner,
v.
BOARD OF EDUCATION OF THE GLOUCESTER COUNTY VOCATIONAL SCHOOL DISTRICT, GLOUCESTER COUNTY,
Respondent.

Albert K. Marmero, Esq., for petitioner (Long, Marmero & Associates, LLP, attorneys)

Caitlin Pletcher, Esq., for respondent (Florio, Perrucci, Steinhardt, Capelli, Tiption & Taylor, LLC, attorneys)

Record Closed: November 8, 2022 Decision: December 21, 2022

BEFORE **TAMA B. HUGHES**, ALJ:

STATEMENT OF CASE

The Board of Education of the Township of Deptford ("Deptford" or "petitioner") filed a "Petition of Appeal" seeking a declaratory ruling of a February 7, 2022, decision by the Gloucester County Interim Executive County Superintendent (Superintendent) holding petitioner responsible for the tuition and transportation costs of any resident student admitted to the Gloucester County Vocational-Technical School District ("GCVTD" or "respondent"). It is Deptford's contention that they complied with the applicable statutes and regulations when they created and instituted a State recognized "Career and Technical Education" (CTE) program that was assigned the same Classification of Instructional Program (CIP) code as a vocational school. As such, they should be exempt from the tuition and transportation costs of any of their residents/student admitted to GCVTD's program when the same or similar courses are offered in their own district.

PROCEDURAL HISTORY

By letter, dated January 28, 2022, Deptford informed parents and guardians of students in their district that commencing in the 2022/2023 school year, Deptford would no longer pay the tuition and transportation costs for students enrolled in certain programs at the Gloucester County Institute of Technology (GCIT) — GCVTD's vocational school. On February 7, 2022, the superintendent issued a decision rejecting Deptford's plan to stop tuition and transportation reimbursement.

On May 5, 2022, Deptford appealed to the Commissioner of Education seeking a declaratory ruling in its favor. On May 26, 2022, GCVTD filed its answer and a cross-petition for a declaratory ruling. On June 20, 2022, Deptford filed its answer to GCVTD's cross-petition.

On June 23, 2022, the Acting Commissioner of the Department of Education transmitted the matters to the Office of Administrated Law (OAL) to be heard as a contested case. N.J.S.A. 52:14B-1 to -15; N.J.S.A. 52:14F-1 to -13. An initial call was

held on August 24, 2022, at which time the parties were provided dates to file cross motions for summary decision and their respective oppositions. Upon receipt of the parties moving papers, the record closed on November 8, 2022.

FINDING OF FACT

1. GCVTD was established in 1970 as the county vocational school for Gloucester County and pursuant to N.J.S.A. 18A:54-6, the Commissioner of Education ("Commissioner") approved the establishment and operation of GCIT.

2. GCVTD provides multiple CTE programs at GCIT, which include among other things, programs in: Health Sciences/Allied Health/Health Sciences, General; Engineering Technology, General; and Carpentry/carpenter.

3. Deptford operates the Deptford Township School District located in Gloucester County and pays the tuition and transportation costs for its resident students who attend GCIT.

4. Starting in 2018 to 2021, Deptford created and instituted three CTE courses of study: (1) Academy of Biomedical Science and Nursing/Allied Health Sciences, (2) Academy of Engineering and Computer Science, and (3) Spartan School of Carpentry. The CTE courses were approved by the New Jersey Department of Education (NJDOE) pursuant to N.J.A.C. 6A:19-3.1 and 3.2 and assigned the appropriate CIP codes. (Petitioner's brief, Exhibits A–D.)

5. GCVTD offers the same CTE programs at GCIT, all of which are approved by the NJDOE.[1] (Respondent's brief, pages 3–4.)

[1] Some of the courses may be listed under different titles and a different CIP code.

6. By letter, dated January 28, 2022, Deptford informed parents and guardians of students in their District that commencing in the 2022/2023 school year, it would no longer pay the tuition and transportation costs for students enrolled in the following programs at GCIT:

GC Vo-Tech Program	**Deptford High School Equivalent Program**
Health Science	Academy of Biomedical Science and Nursing/Allied Health
Engineering Technology	Academy of Engineering and Computer Science
Carpentry	Spartan School of Carpentry

Deptford also advised parents/guardians that "We are also required by law to cover tuition and transportation costs of any resident student enrolled in a county vocational program, unless we offer the same program within our district. The law defines "the same" as being Department of Education approved, assigned the same Classification of Instructional Program (CIP) code, and meeting or exceeding all applicable program performance standards." (Petitioner's brief, Exhibit F.)

7. By letter, dated February 7, 2022, the superintendent issued a decision rejecting Deptford's plan to stop tuition and transportation reimbursement citing to N.J.A.C. 6A:19-2.3 and N.J.A.C. 18A:54-5 *et seq.* and the fact that Deptford did not maintain a vocational school. (Petitioner's brief, Exhibit F.)

8. Deptford is not an approved vocational school and has not applied for such status with the State Department of Education.

LEGAL ARUGMENT AND CONCLUSION

N.J.A.C. 1:1-12.5 provides that summary decision should be rendered "if the papers and discovery which have been filed, together with the affidavits, if any, show that

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

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

The "judge's function is not himself [or herself] to weigh the evidence and determine the truth of the matter but to determine whether there is a genuine issue for trial." Brill at 540 (citing Anderson v. Liberty Lobby, 477 U.S. 242, 249, 106 S. Ct. 2505, 2511, 91 L. Ed.2d 202, 212 (1986)). When the evidence "is so one-sided that one party must prevail as a matter of law," the trial court should not hesitate to grant summary judgment. Liberty Lobby at 252, 106 S. Ct. at 2512, 91 L. Ed.2d at 214.

Based upon the facts in the present matter as set forth more fully above, I **CONCLUDE** that this matter is ripe for summary decision.

There are no genuine issues of material fact in this matter. The respondent provides a vocational program at GCIT. Petitioner has District students who attend this program and pays their tuition in accordance with N.J.S.A. 18A:54-20.1(a). The petitioner has created three programs (Academy of Biomedical Science and Nursing/Allied Health, Academy of Engineering and Computer Science, Spartan School of Carpentry) and

received CTE program approval from the NJDOE. However, the petitioner does not operate a vocational school and has not applied or received approval to run a vocational school.

Petitioner argues that in each of its course offerings, it has demonstrated that they meet all requirements for a CIP classification under N.J.A.C. 6A:19-2.3, satisfied all program requirements for a CTE program outlined under N.J.A.C. 6A:19-3.1 and therefore its courses are the same as those offered by respondent. Moreover, petitioner avers it has received for the Fiscal Year 2023, an allocation of $27,654,595 in Perkins Grant Funds, for the advancement of its CTE program. Taken collectively, petitioner believes that its good faith efforts to create and obtain NJDOE approval of its CTE courses, is the functional equivalent of an approved vocational school that offers the same courses as the regional vocation school, in this case, GCIT. Therefore, it satisfies the two-part test for exemption of tuition and transportation cost payments under N.J.A.C. 6A:19-2.3(a)(1).

Respondent's argument focuses on the fact that the Commissioner of Education has never declared petitioner a vocational school under N.J.S.A. 18A:54-6. Nowhere in petitioner's motion or supporting documents is there the Commissioner's approval for petitioner to establish and maintain its own vocational school. Likewise, in review of petitioner's papers, is there any evidence that petitioner has considered or voted on a resolution to create a vocational school. While there is evidence that petitioner has created and sought approval for vocational courses which they self-labeled as "Academies" or the like, there are no letters or applications to the Commissioner seeking actual approval as a vocational school pursuant to the statute. As such, summary decision is the appropriate remedy as a matter of law because petitioner does not meet the statutory or regulatory requirements for exemption from paying tuition and transportation costs for their resident students currently enrolled at GCIT.

Respondent is correct.

In this matter, N.J.S.A. 18A:54-20.1 and the corresponding code N.J.A.C. 6A:19-2.3 are controlling.

N.J.S.A. 18A:54-20.1 states in pertinent part:

> a. The board of education of each school district or regional school district in any county in which there is a county vocational school district shall send to any of the schools of the county vocational school district each pupil who resides in the school district or regional school district and who has applied for admission to and has been accepted for attendance at any of the schools of the county vocational school district. The board of education shall pay tuition for each of these pupils to the county vocational school district pursuant to subsection c. of this section. The provisions of this section shall not apply to the board of education of a school district or regional school district maintaining a vocational school or schools pursuant to article 2 of chapter 54 of Title 18A of the New Jersey Statutes. [emphasis added]

N.J.A.C. 6A:19-2.3, which mirrors, N.J.S.A. 18A:54-20.1 states in pertinent part:

> (a) Each resident district board of education shall ensure that resident students may apply to and, if accepted, attend a county vocational school pursuant to N.J.S.A. 18A:54-20.1. The existence of the same career and technical education program at the resident district board of education shall not negate a student's right to apply to and, if accepted, attend a county vocational school, subject to the following limitations:
>
> 1. The resident district board of education shall be responsible for the tuition and transportation costs of any resident student admitted to the county vocational school in which the school district is located, unless the resident district board of education maintains a vocational school pursuant to N.J.S.A. 18A:54-5 et seq., and such school offers the same program as the county vocational school where the student has been admitted. A program shall be deemed the same, for purposes of this section, if it is approved by the Department in accordance with N.J.A.C. 6A:19-3.1 and 3.2, is assigned the same Classification of Instructional

> Programs (CIP) code, and meets or exceeds all applicable program performance standards . . . [emphasis added]

N.J.S.A. 18A:54-5 provides that "the board of education of any school district or regional school district may establish and maintain vocational schools." Id. That authority however is qualified under N.J.S.A. 18A:54-6 which states:

> Before any such school shall be established, the location and rules for the management of the school, the course, or courses of study to be pursued therein, and all changes in such courses shall be approved by the commissioner, subject to the advice and consent of the state board. Id.

Thus, it is critical to determine whether the approval for a CTE program is the equivalent to being an approved vocational school, and if this relieves a board of education from the obligation to pay for resident students who are enrolled at a regional vocational school as set forth in N.J.S.A. 18A:54-20.

This exact issue was recently addressed in Delaware Valley Regional High School District, Board of Education v. Hunterdon County Vocational School, EDU 13276-19, Final Decision (June 8, 2020), affirmed Superior Court of New Jersey Appellate Division, Docket No. A-3927-19, 2021 N.J. Super. Unpub. LEXIS 3090 * | 2021 WL 5872879.

In Delaware Valley, the same issue of law and similar facts were raised. Similar to the petitioner in this matter, Delaware Valley had state approved CTE programs of study which were assigned CIP codes. Delaware Valley sought a determination that because it had state approved CTE programs, it was the equivalent of being a vocational school so that it could qualify for tuition and transportation exemption. The Commission adopted the ALJ's findings and confirmed that "operating a CTE program is not the same as operating a vocational school" and concluded that a Board of Education "does not fall into the exception outlined in N.J.S.A. 18A:54-20.1(a) because it does not operate a vocational school since it never applied or been approved to do so." (Final Decision at page 5.)

In affirming the Commissioner's Final Decision, the Appellate Division determined that:

> [I]t was not arbitrary, capricious, or unreasonable for the Commissioner to conclude Delaware Valley Board does not operate a vocational school. The relevant Department regulations consistently differentiate the terms school, program, and program of study. See, e.g., N.J.A.C. 6A:19-2.1. Thus, approval to administer a CTE program is not the equivalent of approval to operate a vocational school. As the ALJ aptly noted, Delaware Valley Board "does not have an approved 'school[,]' . . . only . . . an approved 'program.'" Delaware Valley Board asserts that contrary to legislative intent, current Department regulations do not provide a mechanism for a regional board of education to obtain approval to operate a vocational school. However, Delaware Valley Board has not sought the Commissioner's approval to operate a vocational school as authorized by statute; it only requested authorization to offer a CTE program, which was approved.
>
> N.J.S.A. 18A:54-5 declares that district and regional school boards "may establish and maintain vocational schools," and N.J.S.A. 18A:54-6 conditions the establishment of district and regional vocational schools on Commissioner approval. Consequently, on this record, we have no basis for concluding Delaware Valley Board operates a vocational school or that the Commissioner denied it the opportunity to establish a vocational school contrary to legislative intent.
>
> Id. at 11-12.

Petitioner argues that it has satisfied the various pieces and parts of the regulatory framework to be a vocational school when it was granted NJDOE approval to offer various CTE courses. Petitioner cites to Delaware Valley, for the proposition that when the controlling statute and implementing regulations as to vocational schools are unclear, a Court should not defer to the agency's interpretation of the statutory language and regulatory scheme because to do so would be "plainly unreasonable." This is a misreading of Delaware Valley.

The Appellate Division in Delaware Valley provided an in-depth analysis of N.J.S.A. 18A:54-20.1(a) and what was necessary to qualify as a vocational school pursuant to the applicable regulations. Citing to N.J.S.A. 18A:54-6, the Court determined

that the Commissioner must approve the location, management rules, and courses of study of all district and regional vocational schools. Citing to N.J.A.C. 6A:19-2.1(c) the Court also noted that boards of education cannot label their schools and programs "career and technical" or "vocational-technical" without NJDOE approval. Id. at 11.

Similar to Delaware Valley, petitioner in this case is not a NJDOE approved vocational school. While it has several NJDOE approved CTE course/programs, that alone does not qualify it to be a vocational school. *See* N.J.S.A. 18A:54-5 *et seq.* There is nothing in the record to reflect any board minutes, letters or other correspondence by the petitioner to the NJDOE consistent with the statutory requirements, seeking approval and establishment of a vocational school.

As succinctly stated in Delaware Valley, approval to administer a CTE program is not the equivalent of approval to operate a vocational school. For all of the foregoing reasons, I **CONCLUDE** that petitioner's CTE courses/program as approved by the NJDOE, is not the equivalent to approval as a vocational school. I further **CONCLUDE** that petitioner is not exempt from paying tuition and transportation costs of its students who apply for and are admitted to the CTE program at GCIT.

ORDER

I hereby **ORDER** that the Board of Education of the Gloucester County Vocational School District's Motion for Summary Decision is hereby **GRANTED** and that the Board of Education of the Township of Deptford's Cross-Motion for Summary Decision is **DENIED**, and their petition is **DISMISSED**.

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

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

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

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

Tama B Hughes

December 21, 2022
DATE

TAMA B. HUGHES, ALJ

Date Received at Agency: _____

Date Mailed to Parties: _____

TBH /gd

APPENDIX

EXHIBITS

For petitioner

- Petitioner's Brief for Motion for Summary Decision
- Opposition to Respondent's Motion for Summary Decision
- Letter brief in support of Petitioner's Motion for Summary Decision and Respondent's Opposition to Petitioners Motion for Summary Decision

For respondent

- Respondent's Brief for Motion for Summary Decision
- Respondent letter brief in Opposition to Petitioner Motion for Summary Decision

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

PHILIP D. MURPHY
Governor

SHEILA Y. OLIVER
Lt. Governor

ANGELICA ALLEN-MCMILLAN, Ed.D.
Acting Commissioner

March 9, 2023

VIA EMAIL ONLY

Askiaa Nash, *pro se*
981 Madison Avenue
Plainfield, NJ 07060

Adam S. Herman, Esq.
Adams, Gutierrez & Lattiboudere, LLC
555 Route 1 South
Suite 240
Iselin, NJ 08830

Re: *Askiaa Nash v. Board of Education of the City of Newark, Essex County, Agency Dkt. No. 315-11/22.*

Dear Parties:

I have reviewed the Petition for Declaratory Ruling in the above-captioned matter, together with the motion to dismiss the petition filed by the respondent, Newark Board of Education (Board).

Upon such review, I have determined to exercise my discretion to decline the declaratory request pursuant to *N.J.S.A.* 52:14B-8 and *N.J.A.C.* 6A:3-2.1(a)1. I have further determined to grant the Board's motion to dismiss this matter.

Petitioner claims that he is entitled to back pay, pension, and benefits because of his "illegal" termination in 2001, in violation of *N.J.S.A.* 18A:6-30. By way of background, petitioner worked for the Board from 1993 to 2001 under an emergency certificate as an Educational Media Specialist, a credential that was issued annually. The Board terminated petitioner in 2001 following a Division of Youth and Family Services investigation into allegations of sexual assault involving students. Petitioner was subsequently convicted on criminal charges stemming from the incident and sentenced to 22 years of incarceration. In 2013, the New Jersey Supreme Court reversed petitioner's criminal conviction and the indictment was dismissed. Petitioner filed a petition against the Board seeking reinstatement in 2013, which was dismissed as untimely and because he had not earned tenure, and that decision was affirmed by the Appellate Division. Petitioner filed a second petition in 2016, again seeking

reinstatement, which was dismissed based on the doctrines of *res judicata* and *collateral estoppel*. Petitioner filed a third petition in 2021, arguing that he was improperly terminated as a non-tenured employee and should therefore be reinstated. The Commissioner found the claims were barred by the doctrines of *res judicata* and *collateral estoppel* as the matter had been fully litigated; further, petitioner's claims were time-barred by the 90-day limitations period.

The Commissioner finds that, as this is the fourth petition challenging petitioner's 2001 termination from the Board, this matter is again barred by the doctrines of *res judicata* and *collateral estoppel*. The Commissioner, and the Appellate Division, have previously determined that petitioner's termination was not improper. Additionally, this matter is also barred by the 90-day statute of limitations set forth in *N.J.A.C.* 6A:3-1.3 as petitioner was terminated more than 20 years ago and his conviction was vacated 10 years ago.

Accordingly, petitioner's petition for a declaratory ruling is DENIED and the Board's motion to dismiss the petition is GRANTED. The petition is hereby dismissed.

Sincerely,

Angelica Allen-McMillan, Ed.D.
Acting Commissioner

AAM/JS
c: State Law Library

66-23L
Date of Mailing: March 10, 2023

67-23SEC

New Jersey Commissioner of Education

Final Decision

Maria Ricupero and Gerlando Termini,

Complainants,

v.

Jeanne Stifelman, Board of Education of the Township of Randolph, Morris County,

Respondent.

Synopsis

Petitioners, citizens of Randolph, alleged that respondent, a member of the Randolph Board of Education, violated multiple sections of the School Ethics Act, *N.J.S.A.* 18A:12-24.1, through actions she took as the chief proponent of a plan to eliminate the Columbus Day holiday from the school district's calendar – a result that generated great community outcry over the lack of public vetting of the plan prior to the Board taking action to eliminate the holiday. The School Ethics Commission (SEC) determined that the respondent violated *N.J.S.A.* 18A:12-24.1(e) of the Code of Ethics for School Board Members and recommended a penalty of reprimand.

The case was forwarded to the Commissioner for final determination of the appropriate penalty in this matter. Upon review, the Commissioner concurred with the penalty recommendation of the SEC for respondent's participation in a meeting with members of the public, which constituted action beyond the scope of her duties as a board member and had the potential to compromise the Board. Accordingly, the respondent was reprimanded as a school official found to have violated the School Ethics Act.

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

67-23SEC
SEC Dkt. No. C25-21
OAL Dkt. No. EEC 10170-21
Agency Dkt. No. 22-1/23

New Jersey Commissioner of Education

Final Decision

Maria Ricupero and Gerlando Termini,

Complainants,

v.

Jeanne Stifelman, Board of Education of the Township of Randolph, Morris County,

Respondent.

The Commissioner has reviewed the record of this matter and the January 31, 2023 decision of the School Ethics Commission (Commission). The Commission found that respondent Jeanne Stifelman, a member of the Randolph Township Board of Education, violated *N.J.S.A.* 18A:12-24(e). The Commission recommended a penalty of reprimand for the violation. The Commission's decision was forwarded to the Commissioner for final determination on the recommended penalty pursuant to *N.J.S.A.* 18A:12-29(c). Respondent neither filed exceptions to the recommended penalty nor instituted an appeal, pursuant to *N.J.A.C.* 6A:4-1 *et seq.*, of the Commission's underlying finding of violation.

Upon review, the Commissioner concurs with the penalty recommended by the Commission for respondent's participation in a May 31, 2021 meeting with members of the

public, which constituted action beyond the scope of her duties as a Board member and had the potential to compromise the Board.

Accordingly, respondent is hereby reprimanded as a school official found to have violated the School Ethics Act.

IT IS SO ORDERED.[1]

Angelica Allen-McMillan, Ed.D.
ACTING COMMISSIONER OF EDUCATION

Date of Decision: March 9, 2023
Date of Mailing: March 10, 2023

[1] This decision may be appealed to the Appellate Division of the Superior Court pursuant to *N.J.S.A.* 18A:6-9.1. Under *N.J.Ct.R.* 2:4-1(b), a notice of appeal must be filed with the Appellate Division within 45 days from the date of mailing of this decision.

Before the School Ethics Commission
OAL Docket No.: EEC-10170-21
SEC Docket No.: C25-21
Final Decision

Maria Ricupero and Gerlando Termini,
Complainants

v.

Jeanne Stifelman,
Randolph Township Board of Education, Morris County,
Respondent

I. Procedural History

The above-captioned matter arises from a Complaint that was filed on July 16, 2021, by Maria Ricupero (Complainant Ricupero) and Gerlando Termini (Complainant Termini) (collectively referred to as Complainants), alleging that Jeanne Stifelman (Respondent), a member of the Randolph Township Board of Education (Board), violated the School Ethics Act (Act), *N.J.S.A* 18A:12-21 *et seq*. More specifically, the Complaint avers that Respondent violated *N.J.S.A* 18A:12-24.1(b), *N.J.S.A* 18A:12-24.1(c), *N.J.S.A* 18A:12-24.1(e), *N.J.S.A* 18A:12-24.1(f), and *N.J.S.A* 18A:12-24(b) in Count 1, violated *N.J.S.A* 18A:12-24.1(b), *N.J.S.A* 18A:12-24.1(c), *N.J.S.A* 18A:12-24.1(e), *N.J.S.A* 18A:12-24.1(g), *N.J.S.A* 18A:12-24(b), and *N.J.S.A* 18A:12-24(c) in Count 2, violated *N.J.S.A* 18A:12-24.1(e), *N.J.S.A* 18A:12-24.1(f), *N.J.S.A* 18A:12-24(b), and *N.J.S.A* 18A:12-24(c) in Count 3, and violated *N.J.S.A* 18A:12-24.1(e), *N.J.S.A* 18A:12-24.1(f), and *N.J.S.A* 18A:12-24(b) in Count 4.

On July 16, 2021, the Complaint was served on Respondent, via electronic mail, notifying her that ethics charges had been filed against her with the School Ethics Commission (Commission), and advising that she had twenty (20) days to file a responsive pleading.[1] On August 4, 2021, Respondent filed a Motion to Dismiss in Lieu of Answer (Motion to Dismiss), and also alleged that the Complaint is frivolous. On August 27, 2021, Complainants filed a response to the Motion to Dismiss and allegation of frivolous filing.

Thereafter, and at its meeting on November 16, 2021, the Commission adopted a decision granting the Motion to Dismiss as to Count 1 (in its entirety); as to *N.J.S.A* 18A:12-24.1(b), *N.J.S.A* 18A:12-24.1(c), *N.J.S.A* 18A:12-24(b), and *N.J.S.A* 18A:12-24(c) in Count 2; as to Count 3 (in its entirety); and as to *N.J.S.A* 18A:12-24.1(f), and *N.J.S.A* 18A:12-24(b) in Count 4,

[1] In order to conduct business during the Coronavirus (COVID-19) pandemic, the Commission implemented an electronic filing system, which remains a permissible method by which the Commission and parties can effectuate service of process. Consequently, service of process was effectuated by the Commission through electronic transmission only

and denying the Motion to Dismiss as to all other allegations. The Commission also adopted a decision finding the Complaint not frivolous, and denying Respondent's request for sanctions; directing Respondent to file an Answer to Complaint (Answer) as to the remaining allegations in the Complaint (*N.J.S.A* 18A:12-24.1(e) and *N.J.S.A* 18A:12-24.1(g) (Count 2) and *N.J.S.A* 18A:12-24.1(e) (Count 4)); and transmitting the above-captioned matter to the Office of Administrative Law (OAL) following receipt of the Answer. On December 8, 2021, Respondent filed an Answer as directed, and the above-captioned matter was transmitted to the OAL.

At the OAL, the contested matter was assigned to the Honorable Andrew M. Baron, Administrative Law Judge (ALJ Baron). *Initial Decision (Granting Summary Decision)* at 1. Following the filing of Respondent's Notice of Motion for Summary Decision, oral argument was held on June 28, 2022, with supplemental argument on October 11, 2022; thereafter, the record closed. *Id.* at 2.

On November 22, 2022, ALJ Baron issued an *Initial Decision (Granting Summary Decision)* detailing his findings of fact and legal conclusions, and the Commission acknowledged receipt of same; therefore, the forty-five (45) day statutory period for the Commission to issue a Final Decision was January 6, 2023. Prior to January 6, 2023, the Commission requested a forty-five (45) day extension of time to issue its final decision so as to provide the Commission, which only meets monthly, with the opportunity to receive and review the full record. Pursuant to *N.J.S.A.* 52:14B-10(c) and *N.J.A.C.* 1:1-18.8, and for good cause shown, the Commission was granted an extension until February 21, 2023.

At its regularly scheduled meeting on December 20, 2022, the Commission considered the full record in this matter. Subsequently, and at a special meeting on January 31, 2023, and for the reasons more fully detailed below, the Commission voted to adopt ALJ Baron's findings of fact; adopt the legal conclusion that Respondent did not violate *N.J.S.A.* 18A:12-24.1(g) as alleged in Count 2; adopt the legal conclusion that Respondent did not violate *N.J.S.A.* 18A:12-24.1(e) as contended in Count 4; but to reject the legal conclusion that Respondent did not violate *N.J.S.A.* 18A:12-24.1(e) as asserted in Count 2. Based on its finding of a violation, the Commission also voted to recommend a penalty of reprimand.

II. Decision on Motion to Dismiss

In its *Decision on Motion to Dismiss*, the Commission stated, in relevant part:

> The Commission, however, finds that if the facts [as] argued are proven true by sufficient credible evidence, they may support a finding that Respondent violated *N.J.S.A.* 18A:12-24.1(e) in Count 2 and Count 4.
>
> Although Respondent maintains that she provided "sufficient disclaimers that she was speaking as an individual" during the meeting on May 31, 2021 with Complainants and in connection with the alleged interview on June 13, 2021, the Commission has advised that despite the use of an otherwise appropriate disclaimer, the content of a message or communication could render any potential disclaimer meaningless. As such, if Complainant can demonstrate that

> Respondent's meeting with Complainants and alleged interview on June 13, 2021, constituted action beyond the scope of her duties as a Board member, and had the potential to compromise the Board (e.g., because she responded to or addressed a complaint or concern before it could be resolved by the administration), a violation may be found. Therefore, the Commission finds that the contended violations of *N.J.S.A.* 18A:12-24.1(e) in Count 2 and Count 4 should *not* be dismissed.
>
> *Decision on Motion to Dismiss* at 17.

In addition, and regarding the stated violation of *N.J.S.A.* 18A:12-24.1(g) in Count 2, the Commission advised:

> After review of the pleadings, the Commission finds that if the facts as asserted are proven true by sufficient credible evidence, they may support a finding that Respondent violated *N.J.S.A.* 18A:12-24.1(g). If Complainants can prove by sufficient credible evidence that Respondent disclosed certain information to Complainants during the May 31, 2021 meeting, namely confidential information from the DISC/DEI committee meetings or any personally identifiable student information, and such information was "not public under any laws, regulations or court orders of this State," or was "otherwise confidential in accordance with [B]oard policies, procedures or practices," a violation of *N.J.S.A.* 18A:12-24.1(g) may be established. Further, if Complainants can demonstrate that Respondent's sharing of data regarding the treatment of Columbus Day in other Morris County schools was indeed not miniscule as suggested by Respondents and establishes that the inaccuracy was other than a reasonable mistake or personal opinion, a violation of *N.J.S.A.* 18A:12-24.1(g) may also be established. Therefore, the Commission finds that the alleged violation of *N.J.S.A.* 18A:12-24.1(g) in Count 2 should not be dismissed.
>
> *Decision on Motion to Dismiss* at 18.

III. *Initial Decision (Granting Summary Decision)*

In the *Initial Decision (Granting Summary Decision)*, ALJ Baron issued ***findings of fact***, and noted that the "parties essentially agree upon" the facts, but "dispute the application and interpretation of the law in relation to the facts." *Initial Decision (Granting Summary Decision)* at 2.

In the "Factual Discussion" section of his *Initial Decision (Granting Summary Decision)*, ALJ Baron initially noted that the genesis of the Complaint is certain actions taken by the Respondent in her capacity as a member of the Randolph Board of Education (Board). *Id.* More specifically, at its regularly scheduled meeting on May 13, 2021, Respondent and another Board member, Susan Devito, introduced a "walk-on" resolution to change the Randolph Township School District's (District) observation of Columbus Day in October to "Indigenous People's Day." *Id.* at 3. For reasons unknown, Respondent brought the resolution on as a last minute

motion from the floor, which is somewhat unusual for a matter that would have such significant importance. As such, the resolution was not part of the original meeting agenda advertised to members of the community, which did not allow for a full-fledged debate and discussion prior to the vote. *Id.*

Ultimately, a majority of the Board voted to remove Columbus Day from the District calendar. *Id.* Upon learning of the change to the District calendar, which was not "vetted" in the normal way such changes are usually introduced, there was a huge public outcry against what Respondent and a majority of the Board had done. *Id.* Thereafter, Complainant Ricupero and Complainant Termini felt compelled to exercise their rights as citizens to file an ethics complaint against Respondent Stifelman who was the leading proponent of the change. *Id.*

However, prior to filing their Complaint with the Commission, Complainant Ricupero and Complainant Termini sought a meeting with Respondent Stifelman to address their concerns and listen to what Respondent had to say about the drastic change to the District calendar. *Id.* The meeting, which occurred on May 31, 2021, lasted almost two hours, and Respondent was not aware it was being recorded. During the meeting, Respondent attempted to justify her actions, but was unsuccessful in addressing Complainants' concerns. *Id.*

Complainants further contend that during the course of the meeting, Respondent also revealed "confidential information" from a local diversity committee on which she served as a member, but it is not disputed that the information she shared did not identify specific individuals or specific cases which were discussed by the committee. *Id.* at 3-4. However, Complainants strongly believe that none of this information should have been discussed even in general terms. *Id.* at 4. It is unclear why this unrelated subject came up during a meeting between the parties the primary purpose of which was to discuss the removal of Columbus Day from the District calendar. *Id.*

In the approximately thirty (30) days that followed the initial vote to remove Columbus Day from the District calendar, there was a tremendous backlash throughout the community, many of whom are proud Italian-Americans, who rely on Columbus Day as a marker for their Italian heritage, not just a day off from work and school as some have suggested. *Id.*

In a hastily arranged community forum sponsored by the Randolph Italian American One Voice Committee, several local, county and State elected officials, and about sixty (60) members of the community appeared to speak out against the removal of Columbus Day from the District calendar. *Id.* Although she was not invited to the forum, Respondent appeared and was seen speaking to members of the press and giving out information. *Id.* However, Ms. Stifelman was not a speaker, and did not use her title as a Board member to defend her actions. *Id.*

Complainants strongly believe that by attending the forum, and being seen speaking to members of the press even though she was not quoted, Respondent had an affirmative obligation to identify herself as a Board member to anyone she was speaking with, and further believe that the anonymous quote which appeared in the newspaper following the forum could only be attributed to her. *Id.* Complainants further believe that, based on the Act, Respondent had an

affirmative obligation to disclaim her position and her role as an attendee, even though she was not part of the formal program. *Id.*

At the Board's next regularly scheduled meeting on June 10, 2021, the removal of Christopher Columbus Day from the District calendar was raised again, this time as part of the Board's formal agenda. *Id.* Nearly all attendees at the Board meeting expressed their outrage at what the Board and Respondent had done, and demanded that Christopher Columbus Day be reinstated. *Id.*

In their Complaint, Complainants contend that Respondent circulated incorrect and incomplete information about what other school districts had done on the Columbus Day issue, and that Respondent was pursuing her own personal agenda in violation of the Act. *Id.* at 5.

At a special Board meeting on June 21, 2021, which was attended by over 400 members of the community, the Board, including Respondent, voted to rescind its prior action and to reinstate Columbus Day on the District calendar. *Id.* Prior to her vote, Respondent stated that a committee should be created to further study the matter, an action which was not taken prior to the earlier "resolution from the floor." *Id.*

Still reeling from what they believe to be a violation of Respondent's ethical obligations, Complainants, who come across as sincere, caring, intelligent and dedicated citizens and taxpayers, sought relief from the Commission for Respondent's role as a leader in creating what they believe to be bad public policy, and for acting outside the scope of her authority as a member of the Board. *Id.*

Based on the foregoing factual findings, ALJ Baron concluded as follows:

- Respondent, who did not use her title outside the scope of public Board meetings, was convinced that her opinion on changing the Christopher Columbus holiday on the District calendar was correct based on her research, and that action by the Board was required despite the potential repercussions. Although Respondent made the ill-advised and perhaps naive decision to try to force the Board to act on a last minute resolution from the floor, which was not part of the monthly meeting agenda, and while Complainants argue that such conduct technically violates the Act, ALJ Baron ***concluded*** that her conduct "does not rise to the level of conduct for which a penalty is warranted." *Id.* at 8.

- By voting with the majority of the Board to rescind the prior Board action after hearing the consensus of the community, even if Respondent had committed any *prima facie* violations of the Act, Respondent corrected her proposed policy change which, at worst, was politically misguided. *Id.*

- Requiring a Board member who attends a community forum(s) to, prior to speaking about their votes, disclaim their speech would have a chilling effect on elected officials at levels of government. *Id.* at 8-9.

- ❖ Other than being a "driving force" in the decision to change the District calendar, Respondent's actions were not self-serving in nature and/or could have resulted in her securing any kind of personal benefit from the change. Instead, Respondent's conduct was "bad public policy" which was later revoked by a majority of the Board (when it rescinded its prior action). The rescission of the previous Board action is a recognition that Respondent and her fellow Board members erred. *Id.* at 9.

- ❖ Respondent's conduct may have been bad policy, but "it does not rise to the level of unethical conduct under the statute." *Id.*

With the above in mind, ALJ Baron **ordered** Respondent should not be penalized for any violation of *N.J.S.A.* 18A:12-24.1(g) and/or *N.J.S.A.* 18A:12-24.1(e), and summary decision is granted in Respondent's favor. *Id.*

IV. Exceptions

Neither Complainants nor Respondent filed Exceptions to the *Initial Decision* within the time period prescribed by *N.J.A.C.* 1:1-18.4(a).

V. Analysis

Upon a careful and independent review of the facts and evidence set forth in the record, the Commission adopts ALJ Baron's findings of fact; adopts the legal conclusion that Respondent did not violate *N.J.S.A.* 18A:12-24.1(g) as alleged in Count 2; adopts the legal conclusion that Respondent did not violate *N.J.S.A.* 18A:12-24.1(e) as contended in Count 4; but rejects the legal conclusion that Respondent did not violate *N.J.S.A.* 18A:12-24.1(e) as asserted in Count 2.

As an initial matter, the Commission agrees with ALJ Baron that Respondent's role as the "driving force" behind the change to the District calendar; the walk-on motion for the resolution to change the District's calendar; and the failure to include the resolution on the Board agenda, thus depriving the community of the opportunity to have advance notice of, to debate, and to discuss the issue are not reasons why she should be found in violation of the Act. In fact, in its *Decision on Motion to Dismiss*, the Commission specifically said that if Complainants could prove that Respondent's meeting with Complainants on May 31, 2021 (Count 2) and alleged interview on June 13, 2021 (Count 4), constituted action beyond the scope of her duties as a Board member, and had the potential to compromise the Board, a violation(s) of *N.J.S.A.* 18A:12-24.1(e) could be found. Moreover, if Complainants could prove that Respondent disclosed confidential or inaccurate information to Complainants during the May 31, 2021, meeting (Count 2), a violation of *N.J.S.A.* 18A:12-24.1(g) could be established. *Decision on Motion to Dismiss* at 17-18. In this way, the Commission dispensed with the argument that any action taken by Respondent at the Board meeting on May 13, 2021, June 10, 2021, and/or June 21, 2021, even if procedurally inappropriate and/or contrary to best practice, was unethical. Instead, the Commission focused on Respondent's conduct and actions outside of scheduled Board meetings.

Based on a thorough review of the record, the Commission also agrees with ALJ Baron that there is insufficient factual evidence that, on May 31, 2021, Respondent disclosed "confidential" or "inaccurate" information to Complainants. Although Complainants may have believed that the information was "confidential" and/or that it was not appropriate for Respondent to have discussed it with them, Complainants needed to identify the specific information that was confidential and the basis for its confidentiality, and/or substantiate the inaccuracy of any information that Respondent may have provided during their meeting on May 31, 2021. The record before ALJ Baron did not reveal such evidence and, therefore, a violation of *N.J.S.A.* 18A:12-24.1(g) is not supportable.

Similarly, the Commission further agrees there is insufficient factual evidence that Respondent violated *N.J.S.A.* 18A:12-24.1(e) when she attended a community forum, regardless of whether she was invited, and did not preface her statements to attendees with a disclaimer. In this regard, and other than Complainants' supposition, there is no evidence that any specific statement was officially attributed to Respondent. Absent evidence that a statement was made by Respondent or attributed to her in some official capacity, there is no way for the Commission to determine whether it required a disclaimer or, even if a disclaimer was used, whether the disclaimer was vitiated by the substance of the statement.

However, the Commission rejects ALJ Baron's conclusion that there is insufficient factual evidence that, on May 31, 2021, Respondent violated *N.J.S.A.* 18A:12-24.1(e) when she met with Complainants to discuss the removal of Columbus Day from the District calendar. In this regard, *N.J.S.A.* 18A:12-24.1(e) states, "I will recognize that authority rests with the board of education and will make no personal promises nor take any private action that may compromise the board." In order to substantiate a violation of *N.J.S.A.* 18A:12-24.1(e), Complainants shall adduce certain factual evidence, namely "factual evidence that Respondent made personal promises or took action beyond the scope of her duties such that, by its nature, had the potential to compromise the board." *N.J.A.C.* 6A:28-6.4(a)(5).

The factual record, limited as it is, is undisputed and confirms that: on May 13, 2021, and without prior notice, Respondent made a walk on motion to approve a resolution to change the District calendar, namely to change Columbus Day to Indigenous People's Day; upon learning of the change, "there was a huge public outcry against what Respondent and a majority of the Board had done"; Complainants sought a meeting with Respondent "to address their concerns and listen to what Respondent had to say about the drastic change on the calendar"; the meeting between Complainants and Respondent occurred on May 31, 2021, and lasted for almost two hours; during the meeting, Respondent attempted to "justify her actions," but was unsuccessful in addressing Complainants' concerns; in the approximately thirty (30) days that followed the Board's vote on May 13, 2021, "there was a tremendous backlash throughout the community"; at the Board's meeting on June 10, 2021, all attendees save three "expressed their outrage at what the [B]oard and [Respondent] had done" on May 13, 2021, and requested that Columbus Day be reinstated to the District calendar; and at a special meeting on June 21, 2021, which was attended by over 400 members of the community, the Board, including Respondent, voted to rescind its prior action and to reinstate Columbus Day. *Id.* at 3-5.

Even if Respondent, when she agreed to meet with Complainants, tried to explain to Complainants that she was speaking as an "individual," the fact is she was the "driving force" of a Board action that resulted in a "huge public outcry," she was asked to attend the meeting because of that action, Complainants wanted to express their concerns to *that* Board member, Complainants wanted to listen to Respondent's rationale for the "drastic change" that *she* initiated to the District calendar. *Id.* In other words, Complainants wanted Respondent, *as a Board member*, to be accountable, and to justify her actions as a Board member, and any attempt to represent or disclaim otherwise was futile.

Respondent knew that there was "a huge public outcry" and "tremendous backlash" from the community about her motion and the Board's action. As a result, and when asked by Complainants, Respondent should have declined the meeting, and referred Complainants to the District's administration, or to the Board. Respondent should never have agreed to meet to discuss, or to comment upon, official Board action, especially when the action was so presently divisive and a palpable point of contention.

By attending the meeting to discuss Board action, Respondent clearly took action beyond the scope of her duties as a Board member. Not only did Respondent's acceptance of, and attendance at, the meeting with Complainants constitute action beyond the scope of her duties as a Board member, it also had the potential to compromise the Board. As a Board member, Respondent is required, pursuant to *N.J.S.A.* 18A:12-24.1(j), to refer all complaints to the District's administration, and is prohibited from resolving, or attempting to resolve, a complaint at a time other than at a public Board meeting, and prior to the failure of an administrative solution. By not referring Complainants' concerns to the administration, which she was aware of prior to attending the meeting, Respondent undermined the administration's authority (and ability) to potentially resolve or address the concerns and this, in turn, imposes an unnecessary strain and hardship on the relationship between the administration and the Board.

Moreover, given the public outcry over Respondent's motion and the Board's action, it was incumbent upon the Board, and not Respondent, to publicly discuss and explain the rationale for its decision-making, and not for Respondent to explain it to Complainants. Although Respondent may have made the motion which caused the Board to take action, Respondent did not, by herself, cause the complained of action (even if she was the driving force). Instead, it was the Board, and the Board alone. Therefore, it was the Board's responsibility, and not Respondent's, to address any concerns, including those from Complainants, about why certain action was taken. Agreeing to meet with certain constituents and to offer her rationale undermined the ability of the Board to explain to the community at large, which included Complainants, why the action was taken. By attempting to explain or rationalize why she made the motion, Respondent compromised the integrity of the Board's decision-making process.

Consequently, and regardless of how Respondent may have attempted to qualify the capacity in which she was speaking and the capacity in which she was attending the meeting, the record supports a finding that Respondent violated *N.J.S.A.* 18A:12-24.1(e) in Count 2.

VI. Decision

For the reasons more fully detailed above, the Commission adopts ALJ Baron's findings of fact; adopts the legal conclusion that Respondent did not violate *N.J.S.A.* 18A:12-24.1(g) as alleged in Count 2; adopts the legal conclusion that Respondent did not violate *N.J.S.A.* 18A:12-24.1(e) as contended in Count 4; but rejects the legal conclusion that Respondent did not violate *N.J.S.A.* 18A:12-24.1(e) as asserted in Count 2.

VII. Penalty

Having found that Respondent violated *N.J.S.A.* 18A:12-24.1(e), and following its review of the record, the Commission recommends a penalty of **reprimand**, the lowest form of sanction/penalty that can be imposed for a violation of the Act. The Commission's recommended penalty of reprimand is predicated on the fact that Respondent's actions, although violative of the Code, did not appear to be willful, wanton, or reckless, and there is no evidence that she has previously been found in violation of the Act. As such, the Commission recommends that Respondent be **reprimanded** for having violated *N.J.S.A.* 18A:12-24.1(e).

Pursuant to *N.J.S.A.* 18A:12-29(c), this decision shall be forwarded to the Commissioner of Education (Commissioner) for review of the Commission's recommended sanction. Parties may either: 1) file exceptions to the recommended sanction; 2) file an appeal of the Commission's findings of violations of the Act; or 3) file both exceptions to the recommended sanction and an appeal of the Commission's findings of violations of the Act.

Parties taking exception to the recommended sanctions of the Commission but *not disputing* the Commission's findings of violations may file, within **thirteen (13) days** from the date the Commission's decision is forwarded to the Commissioner, written exceptions regarding the recommended sanctions to the Commissioner. The forwarding date shall be the mailing date to the parties, as indicated below. Such exceptions must be forwarded to: Commissioner of Education, c/o Bureau of Controversies and Disputes, P.O. Box 500, Trenton, New Jersey 08625, marked "Attention: Comments on Ethics Commission Sanction," as well as to ControversiesDisputesFilings@doe.nj.gov. A copy of any comments filed must be sent to the Commission (school.ethics@doe.nj.gov) and all other parties.

Parties seeking to appeal the Commission's findings of violations *must* file an appeal pursuant to the standards set forth at *N.J.A.C.* 6A:4, *et seq.* within **thirty (30) days** of the filing date of the decision from which the appeal is taken. The filing date shall be three (3) days after the mailing date to the parties, as indicated below. In such cases, the Commissioner's review of the Commission's recommended sanctions will be deferred and incorporated into the Commissioner's review of the findings of violations on appeal. Where a notice of appeal has been filed on or before the due date for exceptions to the Commission's recommended sanction (thirteen (13) days from the date the decision is mailed by the Commission), exceptions need not be filed by that date, but may be incorporated into the appellant's brief on appeal.

Robert W. Bender

Robert W. Bender, Chairperson
School Ethics Commission

Mailing Date: January 31, 2023

Resolution Adopting Decision in Connection with C25-21

Whereas, at its meeting on November 16, 2021, the Commission adopted a decision denying Respondent's Motion to Dismiss in Lieu of Answer (Motion to Dismiss) as to the alleged violations of *N.J.S.A* 18A:12-24.1(e) and *N.J.S.A* 18A:12-24.1(g) in Count 2, and as to the stated violation of *N.J.S.A* 18A:12-24.1(e) in Count 4; finding the Complaint not frivolous, and denying Respondent's request for sanctions; and transmitting the above-captioned matter to the Office of Administrative Law (OAL) following receipt of Respondent's Answer to Complaint (Answer) as to the remaining allegations; and

Whereas, at the OAL, the contested matter was assigned to the Honorable Andrew M. Baron, Administrative Law Judge (ALJ Baron); and

Whereas, on November 22, 2022, ALJ Baron issued an *Initial Decision (Granting Summary Decision)* detailing his findings of fact and legal conclusions; and

Whereas, following the issuance of ALJ Baron's *Initial Decision (Granting Summary Decision)*, neither party filed Exceptions; and

Whereas, at its meeting on December 20, 2022, the Commission reviewed and discussed the full record in the above-captioned matter; and

Whereas, at its meeting on December 20, 2022, the Commission discussed adopting ALJ Baron's findings of fact; adopting the legal conclusion that Respondent did not violate *N.J.S.A.* 18A:12-24.1(g) as alleged in Count 2; adopting the legal conclusion that Respondent did not violate *N.J.S.A.* 18A:12-24.1(e) as contended in Count 4; rejecting the legal conclusion that Respondent did not violate *N.J.S.A.* 18A:12-24.1(e) as asserted in Count 2; and recommending a penalty of reprimand; and

Whereas, at its special meeting on January 31, 2023, the Commission reviewed and voted to approve the within decision as accurately memorializing its actions/findings from its meeting on December 20, 2022; and

Now Therefore Be It Resolved, the Commission hereby adopts the within decision.

Robert W. Bender, Chairperson

I hereby certify that this Resolution was duly adopted by the School Ethics Commission at a special meeting on January 31, 2023.

Kathryn A. Whalen, Esq.
Director, School Ethics Commission

STATE OF NEW JERSEY DEPARTMENT OF EDUCATION

In the Matter of Tenure Charges Against William Mooney:

SCHOOL DISTRICT OF THE TOWNSHIP OF NEPTUNE, MONMOUTH COUNTY

Petitioner,

- and -

WILLIAM MOONEY

Respondent.

Agency Dkt No. 293-10/22

DECISION APPROVING SETTLEMENT AGREEMENT

Before
Felice Busto
Arbitrator

Appearances:

For the Respondent:
Mark Tabakin, Esq.
Margaret A. Miller, Esq.
Weiner Law Group

For the Petitioner:
Stephen B. Hunter, Esq.
Detzky, Hunter & DeFillipo, LLC

On October 27, 2022, the Board of Education of Neptune Township School District [the "Petitioner or the "Board"] certified tenure charges of insubordination, conduct unbecoming and other just cause with the State of New Jersey Department of Education against William Mooney [the "Respondent"] and suspended Mr. Mooney without pay effective October 28, 2022. On November 14, 2022, Respondent filed an answer to the Charges. On November 16, 2022, the tenure charges were referred to me by the Director of the Office of Controversies and Disputes, Department of Education, for a hearing and decision.

On November 22, 29 and December 16, 2022, I held pre-hearing teleconferences during which representatives of the Respondent and the Petitioner met with the arbitrator. During these teleconferences, the parties advised that they had entered into settlement discussions. The arbitrator, via email, continued to request and receive updates from the parties regarding the status of their settlement discussions. Thereafter, Respondent and Petitioner reached a Settlement Agreement ("Agreement") resolving the charges against Mr. Mooney. The terms of the Agreement were approved by the Board on February 23, 2023.

The terms of the Agreement, *in part*, provide that Petitioner agrees to withdraw and rescind the tenure charges against Respondent and further that, pursuant to N.J. S.A. 18A:30-7, Mr. Mooney will be placed on a paid leave of absence effective January 3, 2023 through June 30, 2023.[1] In addition, Mr. Mooney agrees to submit an irrevocable letter of resignation contemporaneous

[1] During Respondent's paid leave of absence he shall forfeit all accrued, but unused time available to him and he shall not accrue any additional time off during the duration of his paid leave.

with the execution of the Settlement Agreement, effective June 30, 2023 and his employment with the Board will automatically cease on June 30, 2023.

During the time period between October 28, 2022 and January 2, 2023, Mr. Mooney will serve an unpaid suspension.

Under N.J.A.C. 6A:3-5.6, the arbitrator is required to issue a brief decision approving the settlement of tenure charges and explaining why the arbitrator is approving the terms of settlement. I have approved these terms for the following reasons:

I am persuaded that the issues that were raised in the Statement of Tenure Charges and Specifications filed by the Petitioner and the Answer to Tenure Charges filed by the Respondent have been fully reviewed and discussed by all parties and that the issues raised therein have been satisfactorily addressed by the terms of settlement. The Settlement acknowledges that Mr. Mooney has entered into the Agreement voluntarily and knowingly and that he was represented by counsel.

Moreover, the terms of the Agreement reflect an appropriate resolution of the tenure charges filed against the Respondent. The Agreement will allow both parties to avoid using valuable educational time as well as the avoid protracted and costly proceedings at the public's expense. The Respondent's agreement to tender his resignation in exchange for the withdrawal of the tenure charges will allow the District to continue to provide efficient educational services to students. I believe that the settlement terms properly balance all of the parties' interests and provide a satisfactory basis for the resolution of any concerns that were raised by

the Statement of, and the Answer to, the Tenure Charges that were set forth in the record of this proceeding. Finally, the arbitrator finds that the Agreement serves the public interest.

For the foregoing reasons, this decision will serve as the arbitrator's approval of the parties' Settlement Agreement.

Dated: March 13, 2023
Ocean Grove, New Jersey

Felice Busto

State of New Jersey }
County of Monmouth } ss:

On this 13th day of March, 2023, before me personally came and appeared Felice Busto to me known and known to me to be the individual described in and who executed the foregoing instrument and she acknowledged to me that she executed same.

Madeline R Boone

Madeline R Boone
NOTARY PUBLIC
State of New Jersey
ID # 50198320
My Commission Expires 6/23/2027

72-23
OAL Dkt. No. EDU 09221-22
Agency Dkt. No. 260-9/22

New Jersey Commissioner of Education

Final Decision

S.K. and R.F., on behalf of minor children,
C.K. and E.K.,

Petitioners,

v.

Board of Education of the Village
of Ridgewood, Bergen County,

Respondent.

The record of this matter, the proposed Stipulation of Settlement and General Release (Agreement), and the Initial Decision issued by the Office of Administrative Law pursuant to *N.J.A.C.* 1:1-19.1, have been reviewed. Upon such review, the Commissioner notes that the Agreement references actions that preceded the consideration of the settlement by the Commissioner of Education. The parties are reminded that a settlement of litigation before the Commissioner is not binding until the Commissioner approves the settlement. Further, with respect to Term 10 of the Agreement, the Board is reminded that it must comply with the requirements of New Jersey's Open Public Records Act, *N.J.S.A.* 47:1A-1 *et seq.*, notwithstanding any agreement the parties may have between themselves to keep the terms of their settlement confidential.

In light of the foregoing, the Commissioner adopts the Initial Decision as the final decision in this matter, provided that the parties have already implemented the settlement terms or have agreed upon mutually satisfactory alternate dates for the effectuation of the

terms of the Agreement. Assuming same, the matter is hereby dismissed, subject to compliance with the terms of the settlement consistent with applicable public records law.

IT IS SO ORDERED.

Angelica Allen-McMillan, Ed.D.
ACTING COMMISSIONER OF EDUCATION

Date of Decision: March 16, 2023
Date of Mailing: March 17, 2023

State of New Jersey
OFFICE OF ADMINISTRATIVE LAW

INITIAL DECISION
SETTLEMENT
OAL DKT. NO. EDU 09221-22
AGENCY DKT. NO. 260-9/22

S.K. AND R.F. ON BEHALF OF MINOR CHILDREN C.K. AND E.K.,
Petitioners,
v.
BOARD OF EDUCATION OF THE VILLAGE OF RIDGEWOOD, BERGEN COUNTY,
Respondent.

Anthony Bianco, Esq., for petitioners (Bianco Law, attorneys)

Danielle A. Panizzi, Esq., for respondent (Cleary, Giacobbe, Alfieri, Jacobs, attorneys)

Record Closed: January 31, 2023 Decided: February 2, 2023

BEFORE **MARGARET M. MONACO**, ALJ:

On or about September 21, 2022, petitioners S.K. and R.F. on behalf of minor children C.K. and E.K. filed a Petition of Appeal with the Commissioner of Education challenging the residency determination by respondent Board of Education of the Village of Ridgewood (the Board). On or about October 10, 2022, the Board filed an Answer to

the Petition, which included a request for tuition. The Department of Education transmitted the matter to the Office of Administrative Law, where it was filed for determination as a contested case. The undersigned held a settlement conference on January 3, 2023. The parties amicably resolved the matter and counsel for the Board submitted the attached Stipulation of Settlement and General Release under letter dated January 31, 2023, along with a Resolution of the Board approving the Settlement Agreement.

Having reviewed the record and the settlement terms, I **FIND**:

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

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

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

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

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

February 2, 2023
DATE

MARGARET M. MONACO, ALJ

Date Received at Agency: 2/3/2023

Date Mailed to Parties:

jb

Bullock, Joycelyn [OAL]

From: Danielle Panizzi <dpanizzi@cgajlaw.com>
Sent: Tuesday, January 31, 2023 6:02 PM
To: Bullock, Joycelyn [OAL]; abianco@biancolawnj.com
Subject: RE: [EXTERNAL] RE: EDU 09221-22 SK & RF obo CK & EK v. Village of Ridgewood
Attachments: 1.31.2023 ltr to J. Monaco encl. settlement.pdf; Settlement Agreement - Fully Executed.pdf; Board Resolution Approving Settlement.pdf

Good Evening Joycelyn,

As a follow up to my e-mail correspondence yesterday, please see the attached in connection with the above-referenced matter.

Thank you,

Danielle Panizzi

Danielle A. Panizzi, Esq., Associate
Cleary Giacobbe Alfieri Jacobs, LLC
955 State Route 34, Suite 200
Matawan, NJ 07747
(732) 583-7474 x166
www.cgajlaw.com | dpanizzi@cgajlaw.com

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From: Danielle Panizzi
Sent: Monday, January 30, 2023 10:33 AM
To: 'Bullock, Joycelyn [OAL]' <Joycelyn.Bullock@oal.nj.gov>; abianco@biancolawnj.com
Subject: RE: [EXTERNAL] RE: EDU 09221-22 SK & RF obo CK & EK v. Village of Ridgewood

Good Morning Joycelyn,

I hope all is well. The Board approved the settlement agreement between the Parties at its last regularly scheduled meeting. I will send over the executed agreement and minutes approving same shortly. My apologies- I was out of the office on Friday.

Thanks and talk soon,

Danielle

CLEARY | GIACOBBE | ALFIERI | JACOBS LLC

DANIELLE PANIZZI, Associate
dpanizzi@cgajlaw.com

Reply to: Matawan Office

January 31, 2023

Via Email Only
Hon. Margaret M. Monaco, ALJ
Office of Administrative Law
33 Washington Street
7th Floor
Newark, NJ 07102

Re: S.F. and R.F. o/b/o minor children C.K. and E.K. v. Village of Ridgewood Board of Education
Agency Reference No.: 260-9/22
OAL Docket No.: EDU 09221-2022N

Dear Judge Monaco:

As you know, the undersigned represents the Ridgewood Board of Education ("Board") in connection with the above-referenced matter. We are pleased to report that the Parties were able to reach an amicable resolution of this matter. In this regard, enclosed herein please find a fully-executed Settlement Agreement to be incorporated in the Court's Final Decision. Additionally enclosed herein are the minutes of the Board's January 23, 2023 meeting evidencing Board approval of the Agreement.

As always, thank you for your assistance regarding this matter.

Very truly yours,

/s/ Danielle Panizzi

Danielle Panizzi
Enclosures

cc: Anthony Bianco, Esq., counsel for Petitioners (w/enclosures via email)

Danielle A. Panizzi, Esq.
CLEARY GIACOBBE ALFIERI JACOBS, LLC
955 Route 34, Suite 200
Matawan, New Jersey 07747
732.583.7474 phone
732.566.7687 fax
Attorneys for Respondent Ridgewood Public Schools Board of Education

S.K. and R.F. o/b/o minor children, C.K. and E.K. Petitioners, v. Village of Ridgewood Board of Education, Respondent.	STATE OF NEW JERSEY DEPARTMENT OF EDUCATION OFFICE OF ADMINISTRATIVE LAW Agency Ref. No.: 260-9/22 OAL Dkt. No: EDU 09221-2022N **STIPULATION OF SETTLEMENT AND GENERAL RELEASE**

This Stipulation of Settlement and General Release ("Agreement") is entered into by and between Samuel Kaushansky and Rebecca Favelyukis ("Parents"), and the Ridgewood Public Schools Board of Education ("Board"), having principal offices at 49 Cottage Place, Ridgewood, New Jersey 07450 (the Board and Parents collectively referred to as the "Parties").

WHEREAS, for the 2021-2022 academic year, C.K. was enrolled in the Ridgewood Public School District ("District") as a kindergarten student at Somerville Elementary School; and;

WHEREAS, it was brought to the District's attention on or about March 17, 2022 that Parents and C.K. were not domiciled in the Village of Ridgewood, New Jersey; and

WHEREAS, for the 2022-2023 academic year, C.K. and E.K. (collectively referred to as the "Students") are enrolled in the District as first (1st) grade and kindergarten students, respectively; and

WHEREAS, on August 1, 2022 the Board issued a Preliminary Notice of Ineligibility to Parents notifying that the District obtained evidence that the Students are not residing in the Village of Ridgewood and notified them of their rights to contest the issue of domicile at a residency hearing before the Board; and

WHEREAS, the Board conducted a residency hearing on August 29, 2022; and

WHEREAS, the Board issued a Final Notice of Ineligibility to Parents on August 29, 2022 finding E.K. and C.K. ineligible for a free appropriate public education in the District N.J.S.A. 18A:38-1(a) and N.J.A.C. 6A:22-3.1(a); and

WHEREAS, the per diem tuition rates for E.K. and C.K.'s education for the 2022-2023 school year are $95.63 for E.K. and $90.01 for C.K., respectively; and

WHEREAS, the assessed tuition for the Students' attendance at Somerville Elementary School for the 2021-2022 and 2022-2023 school years is $15,000 and $13,000 respectively; and

WHEREAS, on September 21, 2022, Parents filed a Petition of Appeal with the Commissioner of Education disputing the Board's residency determination; and

WHEREAS, most recently, on January 3, 2023, Petitioners' counsel and the Board's counsel appeared for a settlement conference before the Honorable Margaret M. Monaco, ALJ; and

WHEREAS, at the settlement conference, Petitioners' counsel and the Board counsel's counsel discussed an amicable resolution to the issues between the Parties as set forth in the Petition; and

WHEREAS, the Parties now wish to memorialize their agreement in writing.

NOW, THEREFORE, in consideration of the mutual promises contained herein and other good and sufficient consideration, the receipt and sufficiency of which is hereby

acknowledged, the Parties now desire to memorialize the terms of their terms and conditions agreement in writing, as follows:

1. Parents agree to pay the Board tuition for C.K. and E.K.'s Period of Ineligible Attendance in the Ridgewood Public School District in the amount of $19,500 ("Settlement Amount") as follows:

a. Parents shall pay the Board an initial payment in the minimum amount of $5,000 by February 1, 2023 following execution of this Agreement;

b. Parents shall pay the Board a minimum amount of $2,500 over the course of four (4) months so that a total of $10,000 shall be paid no later than June 30, 2023. The four (4) monthly installment payments shall be made by the 30th of each month;

c. Parents shall pay the remaining portion of the Settlement Amount in the amount of $4,500 no later than December 31, 2023; and

d. All payments shall be made to the Board by personal or certified check, payable to the Ridgewood Public Schools Board of Education.

2. Should Parents provide a Certificate of Occupancy to the Board for the residence at 143 Kenilworth Rd. Ridgewood, New Jersey 07450 ("Property") on or before February 1, 2023, then the Parties agree that the Settlement Amount shall be reduced to $16,250.00 and the payment schedule set forth in Paragraph 1 above shall remain in effect, with the exception of subsection (c) which will be reduced to $1,250.00.

3. Should Parents fail to re-establish domicile in the Village of Ridgewood by February 28, 2023, C.K. and E.K. are entitled to remain enrolled in the Ridgewood Public Schools, but Parents will be charged monthly tuition rate of $3,250 pursuant to Board Policy

until domicile is re-established in the Village of Ridgewood. Should Parents establish domicile in Ridgewood during the middle of any given month (including February 2023), tuition will be charged on a pro-rated basis. Said monthly payments shall be in addition to the agreed-upon tuition payment structure in Paragraph 1 of this Agreement.

4. Parents must provide a Certificate of Occupancy for the Property to the Board to re-establish residency in the Village of Ridgewood.

5. In consideration of the terms of this Agreement, Parents hereby waive and release the Board, its employees, and agents from all possible claims that have or may have been accrued against the Board arising out of the Petition of Appeal in this matter. Nothing in the release set forth in this Paragraph shall be construed as a release or waiver of any claims between the Parties seeking to enforce any term or provision of this Agreement.

6. In consideration of the terms of this Agreement, and as long as the Parents satisfy their obligations under this Agreement, the Board hereby waives and releases the Parents, their heirs, agents, representatives, and assigns, from any and all claims, demands, debts, liability, and causes of action of any type whatsoever, legal or equitable, arising from or pertaining to any act or circumstance including, but not limited to, anything that has occurred up to the date the Parties execute this Agreement, whether known or unknown, accrued or not accrued, and specifically, any claims for student tuition for failure to be domiciled in the District prior to February 28, 2023.

7. Parents acknowledge that they have had the opportunity to review this Agreement in detail. Parents fully understand its requirements and limitations. Parents hereby state that they are signing this Agreement voluntarily, of their own free will, and not under duress or coercion of any kind.

8. This Agreement shall be construed fairly according to the plain language of its terms and not for or against any party hereto.

9. All parties are bound by this Agreement and each of its provisions. Anyone who succeeds to their rights and responsibilities, such as their successors and assigns are also bound. This Agreement is made for the benefit of all parties hereto and all who succeed to their rights and responsibilities, and expressly includes their officials, representatives, employees, agents, attorneys, successors or assigns.

10. This Agreement is to be kept confidential by both parties to the maximum extent permitted by Law.

11. This Agreement represents the entire Agreement between the Parties, and will not be modified in whole or in part except by a mutual subsequent written and signed agreement.

12. This Agreement is governed by the laws of the State of New Jersey. The Parties agree that the courts of the State or District Court of New Jersey shall be the sole forum in which any legal action concerning or relating to this Agreement shall be brought.

13. In the event that any provision of this Agreement is held to be void or unenforceable by any court or regulatory authority having jurisdiction thereof, such ruling will not affect the validity of this Agreement; the remaining provisions shall continue to be in full force and effect.

14. This Agreement may be executed in one or more original, emailed or telecopied counterparts, all of which together shall be one instrument, and all of which shall be considered duplicate originals.

The parties hereby acknowledge their agreement to the terms set forth above by signing below.

[THE REMAINDER OF THIS PAGE IS INTENTIONALLY LEFT BLANK]

PARENTS:

REBECCA FAVELYUKIS

SAMUEL KAUSHANSKY

Witness for Parent:

Anthony Bianco, Esq.
Attorney at Law, State of NJ

Dated: 1/27, 2023

FOR THE RIDGEWOOD PUBLIC SCHOOLS BOARD OF EDUCATION:

MICHAEL LEMBO
President, Board of Education

SCOTT T. BISIG, M.Ed.
School Business Administrator/
Board Secretary

Dated: 1/23, 2023

EXCERPT FROM THE MINUTES OF THE REGULAR PUBLIC MEETING OF THE BOARD OF EDUCATION OF RIDGEWOOD
BERGEN COUNTY, N.J.

The Board of Education of Ridgewood, in the County of Bergen, New Jersey, convened in public session on Monday, January 23, 2023 at 7:00 p.m. at the Education Center.

The following members of the Ridgewood Board of Education were present: Ms. Sheila Brogan; Mr. Saurabh Dani; Ms. Hyunju Kwak, Mr. Michael Lembo, Mr. Muhammad Mahmoud

The following members were absent: None

VIII. CONSENT ITEMS: REGULAR AND ROUTINE ISSUES

E. FINANCE

ix Approval: Settlement Agreement Residency#1/2022-2023
The Ridgewood Board of Education upon the recommendation of the Interim Superintendent of Schools, approves Settlement Agreement Residency #1/2022-2023 between the parents of students #909976, #910683 and the Ridgewood Board of Education.

Mr. Lembo moved approval of E. Finance.
Ms. Brogan seconded the motion, which was carried by the following roll-call vote:

AYES: Mr. Dani, Ms. Kwak, Mr. Lembo, Mr. Mahmoud, Ms. Brogan
NAYS: none

I certify that this is a true and correct except from the Ridgewood Board of Education Minutes.

Lucy Papamichael
Assistant Board Secretary

73-23
OAL Dkt. No. EDU 09213-22
Agency Dkt. No. 268-10/22

New Jersey Commissioner of Education

Final Decision

R.O., on behalf of minor child, Z.B.,

Petitioner,

v.

Board of Education of the City of Newark, Essex County,

Respondent.

The record of this matter, which was transmitted to the Commissioner by the Office of Administrative Law (OAL) pursuant to *N.J.A.C.* 1:1-14.4 and includes an advisement of petitioner's failure to appear at the scheduled OAL hearing on January 26, 2023, has been reviewed. Petitioner did not file an explanation for the failure to appear, notwithstanding the opportunity to do so. Accordingly, this matter is no longer deemed to be a contested case before the Commissioner and is hereby dismissed with prejudice.

IT IS SO ORDERED.[1]

Angelica Allen-McMillan, J.D.S.
ACTING COMMISSIONER OF EDUCATION

Date of Decision: March 16, 2023
Date of Mailing: March 17, 2023

[1] This decision may be appealed to the Appellate Division of the Superior Court pursuant to *N.J.S.A.* 18A:6-9.1. Under *N.J.Ct.R.* 2:4-1(b), a notice of appeal must be filed with the Appellate Division within 45 days from the date of mailing of this decision.

74-23
OAL Dkt. No. EDU 06563-21
Agency Dkt. No. 241-12/20

New Jersey Commissioner of Education

Final Decision

Rayna Mikulik,

Petitioner,

v.

Board of Education of the City of Elizabeth,
Union County,

Respondent.

The record of this matter, the proposed Settlement Agreement and Release (Agreement), and the Initial Decision issued by the Office of Administrative Law pursuant to *N.J.A.C.* 1:1-19.1, have been reviewed. Upon such review, the Commissioner notes that the Agreement references an action that preceded the consideration of the settlement by the Commissioner of Education. The parties are reminded that a settlement of litigation before the Commissioner is not binding until the Commissioner approves the settlement.

In light of the foregoing, the Commissioner adopts the Initial Decision as the final decision in this matter, provided that the parties have already implemented the settlement terms or have agreed upon mutually satisfactory alternate dates for the effectuation of the terms of the Agreement. Assuming same, the matter is hereby dismissed.

IT IS SO ORDERED.

Angelica Allen-McMillan, Ed.D.
ACTING COMMISSIONER OF EDUCATION

Date of Decision: March 20, 2023
Date of Mailing: March 22, 2023

State of New Jersey
OFFICE OF ADMINISTRATIVE LAW

INITIAL DECISION
SETTLEMENT
OAL DKT. NO. EDU 06563-21
AGENCY DOCKET NO. 241-12/20

RAYNA MIKULIK,
Petitioner,
v.
BOARD OF EDUCATION OF THE CITY OF ELIZABETH, UNION COUNTY,
Respondent.

Gail Oxfeld Kanef, Esq. for petitioner (Oxfeld Cohen, PC, attorneys)

Heather Savage-Ford, Esq. for respondent (Elizabeth Public Schools)

Record Closed: February 14, 2023 Decided: February 14, 2023

BEFORE **ANDREW M. BARON**, ALJ:

This matter was transmitted to the Office of Administrative Law (OAL) on August 5, 2021, for resolution as a contested case pursuant to N.J.S.A. 52:14B-1 to -15 and N.J.S.A. 52:14F1 to -13. A telephone prehearing was conducted on October 13, 2021. Several conference calls were conducted thereafter, the last one being scheduled for January 9, 2023. Prior to the telephone conference, the parties notified the court that they resolved the matter. Parties have agreed to a settlement and have prepared a Settlement

Agreement indicating the terms thereof, which is attached and fully incorporated herein. This Settlement Agreement resolves all disputes.

Having reviewed the contents of the attached Settlement Agreement, I **FIND**:

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

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

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

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

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

February 14, 2023
DATE

ANDREW M. BARON, ALJ

Date Received at Agency: February 15, 2023

Date E-Mailed to Parties: February 15, 2023

lr

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

PHILIP D. MURPHY
Governor

SHEILA Y. OLIVER
Lt. Governor

ANGELICA ALLEN-MCMILLAN, Ed.D.
Acting Commissioner

January 17, 2022

Clerk, Office of Administrative Law
33 Washington Street
Newark, NJ 07102

Re: Rayna Mikulik v. Board of Education of the city of Elizabeth, Union County, Agency Dkt. No. 241-12/20, EDU 06563-21

Dear Clerk:

The above-captioned matter was returned to the Agency as a withdrawal. However, the correspondence contained in the record indicates that the parties have executed a settlement agreement. Pursuant to *N.J.A.C.* 1:1-19.1, the parties must disclose the terms of the settlement and the Judge must issue an Initial Decision incorporating the full terms and approving the settlement. Therefore, I am returning the file to you for further proceedings. If you have any questions, please call this office at (609) 376-9079.

Very truly yours,

Jennifer Simons

Jennifer Simons, Acting Director
Office of Controversies and Disputes

Enclosure

c: Gail Oxfeld Kanef, Esq. (via email only)
Heather Savage-Ford, Esq. (via email only)

SETTLEMENT AGREEMENT & RELEASE

This Settlement Agreement and Release (hereinafter referred to as "Agreement") is made on this 12th day of December, 2022, by and between Rayna Mikulik (hereinafter referred to as "Mikulik") and the Elizabeth Board of Education (hereinafter referred to as "the Board").

WHEREAS, Mikulik filed a Petition of Appeal with the Commissioner of Education challenging the Board to restore her sick days and lost pay as a result of a dispute as to whether Petitioner was ready, willing and able to return to work [OAL Dkt. No. EDU-05653-21; Agency Ref. No. 241-12/20]; and

WHEREAS, the Board filed an Answer to Mikulik's Petition for Relief, disputing her entitlement to the reimbursement of sick days and lost pay; and

WHEREAS, the matter was transferred to the Office of Administrative Law and assigned to the Honorable Andrew M. Baron, A.L.J., for adjudication; and

WHEREAS, the parties are desirous to amicably resolve this matter in lieu of proceeding with litigation; and

NOW, THEREFORE, in consideration of the agreement contained herein, the Parties agree as follows:

1. In exchange for the below consideration, Mikulik agrees to withdraw her Petition currently pending before the Office of Administrative Law against the Board [OAL Dkt. No. EDU-05653-21; Agency Ref. No. 241-12/20].

2. The Board agrees to return twenty-two (22) sick days to Mikulik's sick day bank and reimburse her for six (6) work days in which she did not receive her salary during the 2020-2021 school year.

3. Said reimbursement will be done by the Board within thirty (30) days of the execution of this Agreement.

4. The signatures of the parties below indicate that they have had the opportunity to review this Agreement with their respective parties; that they have read and understood the provisions, terms and conditions of this Agreement; and that they have executed it voluntarily with full knowledge of the significance of all provisions, terms and conditions of this Agreement.

5. This Agreement is executed, and all consideration is given in final settlement of disputed claims and shall not be construed as an admission by either party.

6. This Agreement shall not be modified or amended except by writing duly executed and signed by the parties to this Agreement.

IN WITNESS WHEREOF, the Parties hereto have duly executed this Agreement as of the date first written above.

Rayna Mikulik

Gail Oxfeld Kanef, Esq.
Counsel for Petitioner, Rayna Mikulik

Heather Savage-Ford, Esq.
Counsel for Respondents, Elizabeth Board of Education

75-23
OAL Dkt. No. EDU 3329-22
Agency Dkt. No. 72-4/22

New Jersey Commissioner of Education

Final Decision

In the Matter of the Suspension of the Teaching Certificate of Susan Michaelson, Atlantic Community Charter School, Atlantic County.

The record of this matter, the proposed Settlement Agreement and Release (Agreement), and the Initial Decision issued by the Office of Administrative Law pursuant to *N.J.A.C.* 1:1-19.1, have been reviewed. Upon such review, the Commissioner notes that the Agreement references actions that preceded the consideration of the settlement by the Commissioner of Education. The parties are reminded that a settlement of litigation before the Commissioner is not binding until the Commissioner approves the settlement. Further, with respect to Term 10 of the Agreement, the Board is reminded that it must comply with the requirements of New Jersey's Open Public Records Act, *N.J.S.A.* 47:1A-1 *et seq.*, notwithstanding any agreement the parties may have between themselves to keep the terms of their settlement confidential.

In light of the foregoing, the Commissioner adopts the Initial Decision as the final decision in this matter, provided that the parties have already implemented the settlement terms or have agreed upon mutually satisfactory alternate dates for the effectuation of the terms of the Agreement. Assuming same, the matter is hereby dismissed, subject to compliance with the terms of the settlement consistent with applicable public records law.

IT IS SO ORDERED.

Angelica Allen-McMillan, Ed.D.
ACTING COMMISSIONER OF EDUCATION

Date of Decision: March 20, 2023
Date of Mailing: March 22, 2023

State of New Jersey
OFFICE OF ADMINISTRATIVE LAW

INITIAL DECISION

SETTLEMENT

OAL DKT. NO. EDU 03329-22

AGENCY DKT. NO. 72-4/22

IN THE MATTER OF THE SUSPENSION OF THE TEACHING CERTIFICATE OF SUSAN MICHAELSON, ATLANTIC COMMUNITY CHARTER SCHOOL.

Susan S. Hodges, Esq., for petitioner (Parker McCay, P.A., attorneys)

Robert P. Merenich, Esq., for respondent (Gemmel, Todd & Merenich, attorneys)

Record Closed: January 25, 2023 Decided: February 10, 2023

BEFORE **MARY ANN BOGAN**, ALJ:

This matter was transmitted to the Office of Administrative Law on April 26, 2022, for determination as a contested case, pursuant to N.J.S.A. 52:14B-1 to -15 and N.J.S.A. 52:14F-1 to -13.

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

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

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

2. The settlement fully disposes of all issues in controversy.

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

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

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

February 10, 2023
DATE

Mary Ann Bogan
MARY ANN BOGAN, ALJ

Date Received at Agency: 2/14/2023

Date Mailed to Parties: 2/14/2023

MAB/kl

→ 1 draft IDAS

PARKER McCAY

Parker McCay P.A.
9000 Midlantic Drive, Suite 300
P.O. Box 5054
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Emily E. Strawbridge, Esquire
P: 856-985-4005
F: 856-810-5852
estrawbridge@parkermccay.com

January 25, 2023

Via Email Only (*Leslie.Sklar.oal.nj.gov*).
The Honorable Mary Ann Bogan
Office of Administrative Law
P.O. Box 049
Trenton, NJ 08625-0049

Re: In the Matter of the Suspension of the Teaching Certificate of Susan Michaelson, Atlantic Community Charter School Board of Trustees
OAL Docket No.: EDU 03329-22/Agency Ref. No.: 71-4/22

Dear Judge Bogan:

This office represents the Respondent, Pemberton Township Board of Education ("District") in the above-referenced matter. . Attached please find the fully executed settlement agreement and Board Resolution approving same.

It is respectfully requested that the Settlement Agreement be entered as final order in this matter.

Thank you for your attention to this matter.

Respectfully submitted,

/s/ Emily E. Strawbridge
Emily E. Strawbridge

cc: Robert Merenich, Esq. (bobmerenich@gemmeltoddmerenich.com)

RESOLUTION OF THE
ATLANTIC COMMUNITY CHARTER SCHOOL
BOARD OF TRUSTEES
APPROVAL OF SETTLEMENT AGREEMENT

Whereas, the Atlantic Community Charter School Board of Trustees requires to approve a Settlement Agreement; and

NOW, THEREFORE BE IT RESOLVED that the Atlantic Community Charter School Board of Trustees finds, declares, and certifies as follows:

On a motion made by Douglas B. Groff and seconded by Marlene D. Frayne, the Board of Trustees approved a Settlement Agreement between Atlantic Community Charter School and former Staff Member # 1992 (SM), by Roll Call Vote.

Approved this 19th day of January19, 2023

ROLL CALL VOTE

Ayes: Marlene D. Frayne, Douglas B. Groff, Matthew Heinle, Dr. Kenneth King, Linda A. Brand, Dr. Dominick Potena

Nays: None

This resolution is hereby certified to be a true copy of the Resolution adopted by the Atlantic Community Charter School at the Regular Monthly Meeting of the Board of Trustees held on **January 19, 2023.**

Donella Edwards, Board Secretary
Atlantic Community Charter School

Law Offices of
PARKER McCAY P.A.
9000 Midlantic Drive, Suite 300
P.O. Box 5054
Mount Laurel, New Jersey 08054
Attorneys for Petitioner, Atlantic Community Charter School Board of Trustees

IN THE MATTER OF THE SUSPENSION OF THE TEACHING CERTIFICATE OF SUSAN MICHAELSON, ATLANTIC COMMUNITY CHARTER SCHOOL BOARD OF TRUSTEES	**BEFORE THE COMMISSIONER OF EDUCATION OF THE STATE OF NEW JERSEY** **CIVIL ACTION** **Agency Docket No.: 71-4/22** **OAL Docket No.: EDU 03329-22**

SETTLEMENT AGREEMENT AND RELEASE

This **SETTLEMENT AGREEMENT AND RELEASE** is entered into on this 19th day of January ,2023 by and among Susan Michaelson (hereinafter referred to as "Michaelson") and Petitioner, Atlantic Community Charter School Board of Trustees (hereinafter referred to as "Board of Trustees" and/or "Board"); and

WHEREAS, Michaelson is a former employee of the Atlantic Community Charter Schools who terminated employment her employment on February 7, 2022; and

WHEREAS, the Atlantic Community Charter School Board of Trustees requires 60-days' notice of termination of employment by the terminating employee; and

WHEREAS, a dispute between the Parties arose regarding the amount of notice provided by Michaelson of termination of her employment with the Board; and

WHEREAS, the Parties desire to settle any and all claims and potential in this matter in an amicable way and therefore, after the ability to consult with legal counsel and following negotiations, have agreed to enter into this Settlement Agreement and Release in order to reach a compromise which will fully and finally resolve this matter; and

WHEREAS, the Parties, without alleging and/or admitting any wrongdoing or liability by any party, enter into this Settlement Agreement and Release in order to reach a compromise to fully and finally resolve their dispute in this matter, and agree as follows:

1. The Parties have reached this Agreement to avoid the expense, uncertainty and inconvenience of litigation. It is understood that the execution of this Agreement does not constitute an admission by the Atlantic Community Charter School Board of Trustees of any liability and/or wrongdoing by the Board. This Agreement represents the compromise of disputed claims and shall never be treated as an admission of liability by either party for any purposes whatsoever.

2. The Board agrees to the dismissal of its Petition for the Suspension of the Teaching Certificate of Michaelson.

3. In consideration therefore, Michaelson agrees to fully and completely releases the Charter School, its members, officers, administrators, agents, servants, employees, or assigns from any and all claims they have or may have accrued against the Charter School, under any law, regulation, or legal theory, including but not limited to, claims for attorney's and other professional fees and costs, reimbursement related to this or any other action, whether known or unknown, or to the extent permitted by applicable law through the date of this agreement.

4. In the event that any party materially breaches any of the terms and provisions of this Settlement Agreement and Release, the other party shall be entitled bring or reinstate claims arising under this action.

5. It is expressly understood and agreed that neither party shall be considered a prevailing party under any statute, common law, or otherwise, for any purposes whatsoever, as a result of this Agreement or the compromise of claims as set forth herein. Except as provided in the Paragraphs above, each party shall be responsible for their own attorney's fees, expert

fees, and/or costs incurred in connection with this matter.

6. The Parties acknowledge that they have read and understand the terms of this Agreement, that they had an opportunity to have the Agreement read by their respective counsel, that they are satisfied with the advice of their respective counsel, and that they are entering into this Agreement knowingly, freely, voluntarily, without coercion and not under the influence of anything or anyone.

7. This Settlement Agreement and Release constitutes the entire agreement between the Parties regarding any and all aspects of the final and complete settlement of this matter. This Settlement Agreement and Release supersedes any and all prior agreements and understandings between and among the Parties pertaining to this matter. This Settlement Agreement and Release shall not be amended, modified or amplified without a specific written provision to that effect executed by all the Parties. No oral statements by any person shall, in any manner, amend, modify or amplify the terms and provisions of this Settlement Agreement and Release.

8. The parties are bound by this Agreement and each of its provisions. Anyone who succeeds to their rights and responsibilities, such as their successors and assigns are also bound. This agreement is made for the benefit of all parties hereto and all who succeed to their rights and responsibilities, and expressly includes their officials, representatives, employees, agents, attorneys, successors or assigns.

9. Michaelson understand/s and agree that this Agreement is subject to formal approval by the Atlantic Community Charter School Board of Trustees, following its approval and full execution by Michaelson. In the event the Board thereafter approves the Agreement, it shall be executed forthwith by the Board and shall become effective immediately, and a copy of the formal approval resolution by the Board will be provided to Michaelson. In the event that this Agreement is not approved by the Board, no agreement shall have been formed between the Parties, who shall return to *status quo ante*, and this Agreement shall be deemed null, void, and of no force and effect.

10. This Settlement Agreement shall remain confidential to the maximum extent permitted by law and neither party shall volunteer to disclose its form or contents to any third parties except as may be required by and/or in accordance with operation of law or lawful subpoena or order of court or pursuant to official discovery proceedings.

11. Neither party shall engage in disparaging or negative comments or statements regarding the other party and/or the conduct of the other party. This provision does not bar Michaelson from providing a reasonable explanation of her employment history and separation of employment from the Atlantic Community Charter School to prospective employers.

12. In the event that any provision or clause of this Agreement shall be held invalid or unenforceable by a court or tribunal of competent jurisdiction, the remaining provisions of this Agreement are deemed severable and shall remain in full force and effect to the fullest extent permitted by law, unless the Agreement, as so construed, would substantially frustrate the purposes of the Parties in entering into this Agreement.

13. This Agreement shall be interpreted, enforced, and governed under the laws of the State of New Jersey. The language of all parts of this Agreement shall in all cases be construed as a whole, according to its fair meaning, and not strictly for or against any Party. The Parties agree and acknowledge that this Agreement is the product of mutual draftsmanship and any rule of law requiring that it be construed against the drafter shall not apply.

IN WITNESS HEREOF, the parties have set their hands this____ day of ,2022.

Susan Michaelson

Dated: 12/21/22

Mr. Dominick A. Potena, Ed.D,
Board President
Atlantic Community Charter School Board of Trustees

Dated: 1/19/2023

78-23

New Jersey Commissioner of Education

Decision

A.C.,

Petitioner,

v.

Board of Education of the Bridgewater-Raritan Regional School District, Somerset County,

Respondent.

Synopsis

This case arose from an appeal filed by petitioner's parents on behalf of A.C. in January 2014, seeking to reverse the respondent Board's determination that petitioner committed acts of harassment, intimidation, and bullying (HIB) against fellow students during the 2012-2013 school year, when she was in sixth grade. A.C. was accused, *inter alia*, of making inappropriate comments about the Muslim attire of a fellow student and the weight of another; she was also accused of repeatedly stating that she had a "kill list," wanted a gun permit, wanted to be "Osama Bin Laden #2," and wanted to buy a plane and crash it into the Hoover Dam. A.C. served a five-day suspension for making violent statements and was the focus of a HIB investigation. The petition alleged, *inter alia*, that, by determining A.C. had committed HIB and by suspending her for violent comments and blog posts, the Board violated school laws, including New Jersey's Anti-Bullying Bill of Rights Act, *N.J.S.A.* 18A:37-13.2 et seq (the Act), and A.C.'s constitutional and civil rights. The long procedural history of this case includes a separate action filed in Superior Court and multiple amendments to the petition. During the pendency of this matter, A.C. attained the age of majority and the case caption was changed to reflect A.C. as the sole petitioner.

The ALJ found, *inter alia*, that: the Board's determination that petitioner committed acts of HIB was not arbitrary, capricious, or unreasonable; while the Board did not violate education laws by failing to provide A.C. with support services after her suspension, it did violate procedural requirements of the Act in response to her parents' claims that A.C. was herself the target of HIB; and the Board violated A.C.'s free speech rights by suspending her for violent statements she made about teachers in her off-campus blog. Accordingly, the ALJ ordered that the Board take corrective measures, including training, to ensure that Board members and employees comply with the procedural requirements for HIB investigations. Regarding remedies for the Board's violation of A.C.'s free speech rights by suspending her from school, the Board has already expunged the suspension from A.C.'s school records, and any further redress of the Board's violation of petitioner's constitutional rights would require A.C. to seek relief in a court of appropriate jurisdiction.

The Commissioner adopted the Initial Decision as the final decision in this matter, modified to address the untimeliness of A.C.'s amended pleadings. The Board was ordered to take corrective measures to ensure that procedural violations of the Act do not re-occur. The petition was dismissed.

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

78-23
OAL Dkt. No. 01197-14
Agency Dkt. No. 13-1/14

New Jersey Commissioner of Education

Final Decision

A.C.,

Petitioner,

v.

Board of Education of the Bridgewater-Raritan Regional School District, Somerset County

Respondent.

The record of this matter, the Initial Decision of the Office of Administrative Law (OAL), the exceptions filed by the parties pursuant to *N.J.A.C.* 1:1-18.4, and the replies thereto, have been reviewed and considered.

June 2013 Harassment, Intimidation, and Bullying Complaints Against Petitioner[1]

On June 17, 2013, when petitioner was in sixth grade, she was accused of harassment, intimidation, and bullying (HIB) by three other students. One student, A.Q., alleged that petitioner had repeatedly commented on and questioned A.Q.'s clothing, despite A.Q. explaining to petitioner that her clothing was based on her Muslim religion. All three students reported that petitioner had repeatedly stated that she had a "kill list," wanted a gun permit, wanted to be "Osama Bin Laden #2," and wanted to buy a plane and crash it into the Hoover Dam. During the HIB investigation, it was also reported that petitioner had asked A.S., "Can I eat your flesh because you have too much of it?" or "Can I eat you since you have a lot of flesh?" as a way of making fun of A.S.'s weight. The investigation determined that

[1] Due to the lengthy and complex procedural history of this matter, this decision will address each major incident at issue in the case separately.

petitioner had committed acts of HIB based on her comments on A.Q.'s religion and A.S.'s weight, and petitioner challenged the results at a hearing of the Board of Education of the Bridgewater-Raritan Regional School District (Board) in November 2013. The Board affirmed the determination of the superintendent that petitioner had committed acts of HIB against A.Q. and A.S. Petitioner[2] appealed to the Commissioner in January 2014, seeking to reverse the Board's HIB determination. In November 2016, petitioner filed an amended petition, which included the following counts related to the HIB finding against petitioner:[3]

Count 5: *The Board arbitrarily, capriciously, and unreasonably determined that petitioner committed acts of HIB against A.Q. and A.S.*

Following the Board's motion for summary decision, the Administrative Law Judge (ALJ) concluded that the Board's determination that petitioner committed acts of HIB against A.Q. and A.S. was not arbitrary, capricious, or unreasonable. Reviewing the criteria for a finding of HIB, the ALJ first noted that petitioner's statements to A.Q. were reasonably perceived as being motivated by A.Q.'s religion, and her statements to A.S. were reasonably perceived as being motivated by A.S.'s weight. Next, the conduct took place on school property. Third, petitioner's actions substantially disrupted or interfered with the orderly operation of the school, as the "essential lessons of civil, mature conduct cannot be conveyed in a school that tolerates . . . offensive speech and conduct." Order on Summary Decision, p. 17. Petitioner's conduct also interfered with A.Q. and A.S.'s rights "to be secure and to be let alone," *ibid.*, and other students were so affected by petitioner's behavior that they joined A.Q. in filing a HIB complaint. Finally, the ALJ concluded that a reasonable person should have known that such

[2] The petition was filed by A.C.'s parents on her behalf. As A.C. reached the age of 18 during the pendency of these proceedings, the parties submitted a consent order to the ALJ to modify the case caption to name A.C. as the sole petitioner. Filings referenced herein as those of petitioner may have been submitted by A.C.'s parents but will be identified as petitioner's filings for ease of reference.

[3] The counts of the amended petition are identified as numbered therein. The allegations of each count are summarized, rather than directly quoted.

acts would have the effect of emotionally harming A.Q. and A.S. and the acts did, in fact, have the effect of insulting them. Accordingly, the ALJ granted the Board's motion for summary decision as to Count 5.

In her exceptions, which essentially reiterate arguments made during the briefing on the motion for summary decision, petitioner argues that the ALJ's findings of fact in favor of the Board were made based on incompetent evidence, as there were no certifications, sworn statements, or testimony from individuals possessing personal knowledge of pertinent facts. Petitioner contends that there were disputed issues of material fact, because she denied making the statements to A.Q. and A.S. According to petitioner, the ALJ should have viewed the facts in the light most favorable to petitioner but failed to do so. Petitioner also contends that the ALJ improperly assumed that there was a substantial disruption in the operation of the school when the record lacked any such evidence.

Upon review, the Commissioner concludes that the ALJ appropriately granted the Board's motion for summary decision as to Count 5. When a local board of education acts within its discretionary authority, its decision is entitled to a presumption of correctness and will not be disturbed unless there is an affirmative showing that the decision was "patently arbitrary, without rational basis or induced by improper motives." *Kopera v. W. Orange Bd. of Educ.*, 60 *N.J. Super.* 288, 294 (App. Div. 1960). Furthermore, "where there is room for two opinions, action is not arbitrary or capricious when exercised honestly and upon due consideration[,]" and the Commissioner will not substitute her judgment for that of the board. *Bayshore Sewerage Co. v. Dep't. of Envtl. Prot.*, 122 *N.J. Super.* 184, 199 (Ch. Div. 1973), *aff'd*, 131 *N.J. Super.* 37 (App. Div. 1974). Based on the evidence in the record, the Commissioner finds that petitioner did not meet her burden of demonstrating that the Board's decision was arbitrary, capricious, or unreasonable. The record contains sufficient credible evidence to support the Board's determination that petitioner made comments about A.Q.'s religion and A.S.'s weight and that those comments met the criteria for a finding of HIB.

The Anti-Bullying Bill of Rights Act (Act) defines HIB as follows:

> [A]ny gesture, any written, verbal or physical act, or any electronic communication, whether it be a single incident or a series of incidents, that is reasonably perceived as being motivated either by any actual or perceived characteristic, such as race, color, religion, ancestry, national origin, gender, sexual orientation, gender identity and expression, or a mental, physical or sensory disability, or by any other distinguishing characteristic, that takes place on school property, at any school-sponsored function, on a school bus, or off school grounds as provided for in section 16 of P.L. 2010, c.122 (C.18A:37-15.3), that substantially disrupts or interferes with the orderly operation of the school or the rights of other students and that:
>
> a. a reasonable person should know, under the circumstances, will have the effect of physically or emotionally harming a student or damaging the student's property, or placing a student in reasonable fear of physical or emotional harm to his person or damage to his property;
>
> b. has the effect of insulting or demeaning any student or group of students; or
>
> c. creates a hostile educational environment for the student by interfering with a student's education or by severely or pervasively causing physical or emotional harm to the student.
>
> *N.J.S.A.* 18A:37-14.

Therefore, a finding of HIB requires three elements.[4] First, the conduct must be reasonably perceived as being motivated by any actual or perceived enumerated characteristic or other distinguishing characteristic and, second, the conduct must substantially disrupt or interfere with the rights of other students or the orderly operation of the school. The third condition is that one of the three criteria enumerated in the Act regarding the effect of the conduct must also be satisfied. *Wehbeh v. Bd. of Educ. of the Twp. of Verona, Essex County*, Commissioner Decision No. 51-20 (decided February 4, 2020).

Regarding the first element, in defining HIB as an action "that is *reasonably perceived* as being motivated either by any actual or perceived characteristic . . .", *N.J.S.A.* 18A:37-14 (emphasis added), the statute requires an analysis of how the actor's motivation is perceived and whether that perception is

[4] The statute also requires that the conduct take place on school property, at a school-sponsored function, on a school bus, or off school grounds as provided for in *N.J.S.A.* 18A:37-15.3. The parties do not contest that this requirement has been met with regard to petitioner's comments about A.Q. and A.S.

reasonable. Here, it was not arbitrary, capricious, or unreasonable for the Board to conclude that A.Q. reasonably perceived petitioner's comments as being motivated by the distinguishing characteristic of religion, or that A.S. reasonably perceived petitioner's comments as being motivated by the distinguishing characteristic of her weight.

Regarding the second element, the Commissioner finds that it was not arbitrary, capricious, or unreasonable for the Board to determine that petitioner's comments substantially disrupted or interfered with the rights of other students. Multiple students were so affected by petitioner's comments that they joined A.Q. in filing a HIB complaint. Furthermore, A.Q. and A.S. have the right to attend school in an environment free from offensive comments of this nature. Finally, the Commissioner concurs with the ALJ that petitioner should have known that her comments would have the effect of emotionally harming A.Q. and A.S., and that her comments did have the effect of insulting them.

The Commissioner does not find petitioner's exceptions persuasive. Petitioner contends that the witnesses who gave statements regarding the alleged HIB were not subject to cross-examination, and that the ALJ failed to consider petitioner's denials that she had made any such comments. However, even considering petitioner's denials, at most, they balance the other evidence in the record that petitioner did make the comments about A.Q. and A.S. While the evidence may leave room for two opinions regarding whether petitioner made the statements, it is insufficient to overturn the Board's decision, as it does not demonstrate that the decision was arbitrary, capricious, or unreasonable. To overturn the Board's decision would require the Commissioner to substitute her judgment for that of the Board, which is not permissible.

The Commissioner has previously held that statements similar to those made by petitioner constituted HIB. *See, e.g., R.G.B., on behalf of minor child, E.B. v. Bd. of Educ. of the Village of Ridgewood, Bergen Co.*, Commissioner Decision No. 242-13 (decided June 24, 2013) (statements calling

a student "a horse" and "fat"); *S.S. and W.S., on behalf of minor child, J.S. v. Bd. of Educ. of the Borough of Hasbrouck Heights, Bergen Co.*, Commissioner Decision No. 369-05 (decided October 13, 2005) (statements regarding a student's religious clothing). Accordingly, the Commissioner concludes that the Board's decision that petitioner committed acts of HIB against A.Q. and A.S. was not arbitrary, capricious, or unreasonable and that the ALJ correctly granted the Board's motion for summary decision as to Count 5.

Count 7: The Board violated petitioner's constitutional rights because her comments regarding A.Q. and A.S. were constitutionally protected speech.[5]

Following the Board's motion for summary decision, the ALJ concluded that the Board did not violate petitioner's First Amendment rights by finding that she committed acts of HIB based on her statements to A.Q. and A.S., and granted the Board's motion as to this portion of Count 7. The ALJ noted that First Amendment case law provides that a board of education may impose consequences for speech that substantially disrupts the operations of the school or the rights of other students, which mirrors a requirement of the Act for a finding of HIB. The ALJ found that a substantial disruption did occur, for the same reasons as in Count 5.

In her exceptions, petitioner contends that the ALJ improperly assumed that there was a substantial disruption when the record lacked any such evidence.

Though not specifically raised in the original petition of appeal, Count 7 arises out of the same facts as the original petition – the district's handling of the HIB complaints against petitioner – and it is therefore deemed to relate back to the original date of filing pursuant to *N.J. Ct. R.* 4:9-3.[6] Petitioner's exceptions, which make the same arguments she made during briefing on the motion for summary decision, are not persuasive. The Commissioner concurs with the ALJ that a substantial disruption to

[5] Count 7 also included allegations related to petitioner's May 2013 blog posts and suspension. That portion of Count 7 is discussed separately below.

[6] This rule is applicable to proceedings at the OAL pursuant to *N.J.A.C.* 1:1-1.3.

both the orderly operation of the school and to the rights of other students did occur. Accordingly, the Commissioner finds that the ALJ correctly granted the Board's motion for summary decision on this portion of Count 7.

Count 9. The Board's HIB policy violates the New Jersey Constitution because it prohibits speech and related conduct, and is unconstitutionally vague and overbroad.

Following the Board's motion for summary decision, the ALJ concluded that the Commissioner does not have jurisdiction over facial challenges to the constitutionality of a school board policy. Accordingly, the ALJ granted the Board's motion for summary decision as to Count 9.

The parties did not file exceptions to the ALJ's conclusions regarding Count 9.

Upon review, the Commissioner concurs with the ALJ that the Commissioner has no jurisdiction over facial challenges to the constitutionality of a school board policy. *See, e.g., A.S., supra* (*citing Valent v. N.J. State Bd. of Educ.*, 114 *N.J. Super.* 63, 69 (Ch. Div. 1971). Accordingly, the Commissioner concludes that the ALJ correctly granted the Board's motion for summary decision as to Count 9.

May and June 2013 Harassment, Intimidation, and Bullying Complaints by Petitioner

On May 22, 2013, petitioner's parents alleged that certain teachers had intentionally mispronounced petitioner's first name. On May 28, 2013, they alleged that a student was bullying petitioner on the school bus. The school did not conduct an HIB investigation.

On June 13, 2013, petitioner's parents again alleged that petitioner had been harassed by teachers and students. The school then conducted a HIB investigation regarding petitioner's complaint that teachers were intentionally mispronouncing her name and thereby ridiculing her because of her Asian ancestry. The investigation was conducted by the assistant principal rather than the school's anti-bullying specialist, who was deemed to have a conflict since she was in the same union as the accused teachers. The accused teachers and petitioner's fifth-grade teacher were interviewed, but petitioner

was not interviewed. On June 25, 2013, the principal notified petitioner's parents that the investigation determined that A.C. was not the target of an act of HIB. The superintendent signed the investigation report the following day, and the Board's July 23, 2013 meeting minutes show that the superintendent's report was affirmed, but the Board did not issue a written decision affirming the superintendent' report.

In November 2016, petitioner filed her amended petition, which included the following counts:

Counts 2 and 3. The Board failed to conduct a timely and sufficient investigation of the HIB allegations made by petitioner about teachers intentionally mispronouncing her name and about bullying by a classmate on the bus.

Following the Board's motion for summary decision, the ALJ found that there were genuine issues of material fact with respect to the investigation of the HIB allegations made by petitioner, and therefore denied the motion for summary decision as to those counts. A hearing was held and, in the Initial Decision, the ALJ found that the Board failed to conduct a HIB investigation when petitioner's parents reported that a student was making fun of petitioner on the bus. The Board also failed to timely initiate an investigation regarding the allegations that teachers were intentionally mispronouncing petitioner's name, as the allegations were initially made in May 2013 and an investigation was not initiated until June 2013 when petitioner's parents repeated the allegations. Furthermore, even if staff did not have sufficient information to initiate an investigation until June, the HIB report was not sent to the principal until 13 days after the complaint was made, rather than within 10 days as required by the Act. The ALJ concluded that the investigation should have been conducted by the school's anti-bullying specialist, not the assistant principal, and the fact that the specialist was in the same union as the accused teachers does not, by itself, create a conflict. Finally, the ALJ concluded the Board violated the Act by failing to issue a written decision regarding its HIB determination. The ALJ ordered the Board to take corrective measures, including training, to ensure compliance with the procedural requirements for HIB investigations.

In its exceptions, the Board argues that it appropriately determined that a HIB investigation was not warranted based on petitioner's complaint in May 2013 that a teacher mispronounced her name, because petitioner did not state that she was being bullied or harassed or indicate that the conduct was motivated by a distinguishing characteristic. The Board also contends that petitioner's complaints did not include any accusations against students, and that it therefore did not violate the Act by failing to investigate the conduct of other students. Additionally, while the Board acknowledges that it did not issue a written decision to affirm the June 2013 investigation findings, that violation of the Act is *de minimus* and should be excused because petitioner had the opportunity to contest the findings before the Board.

Upon review, the Commissioner concurs with the ALJ that because the Board failed to provide notice of its HIB determination to petitioner, as required under *N.J.S.A.* 18A:37-15(b)(6)(e), there was no event triggering the start of the 90-day limitations period, and therefore any argument made by the Board as to lack of timeliness of these claims must fail. The Commissioner further agrees with the ALJ that the Board violated the Act by: failing to conduct an investigation when petitioner made the HIB allegations against another student in May 2013; failing to initiate an investigation within one day of petitioner's allegations regarding teachers mispronouncing her name; failing to complete the investigation within 10 days of the allegation; failing to have the school's anti-bullying specialist conduct the investigation; and, as noted above, failing to issue a written decision.[7] The arguments made by the Board in its exceptions were also raised in the Board's post-hearing brief and rejected by the ALJ in the Initial Decision. The Commissioner concurs with the ALJ that these arguments are not persuasive and concludes that the record contains sufficient information to affirm the ALJ's conclusions that the Board violated the procedural requirements of the Act.

[7] As the ALJ noted, petitioner did not allege that the Board's decision that the teacher did not commit an act of HIB against petitioner was arbitrary, capricious, or unreasonable, or seek relief in the form of reversal of that decision. Therefore, the Commissioner does not reach this issue, and this decision is limited to the Board's procedural violations of the Act.

May 2013 Blog Posts and Suspension

On May 17, 2013, petitioner was accused of HIB by another student based on postings she made on her blog, including statements saying that the student was annoying, not funny, and did not have any friends. School staff conducted an investigation and determined that petitioner's statements did not constitute HIB; the determination was affirmed by the Board. However, a review of petitioner's postings demonstrated that she had also made statements on her blog that violated the Board's anti-violence policy, including that she wanted to kill one of her teachers and toss her body in a river, and that she wanted to kick another teacher in the face, break all her bones, and watch her die. Petitioner was suspended for five days based on the violent statements; she was also required to undergo a psychiatric evaluation prior to being allowed to return to school because she threatened to kill herself and others during staff interviews related to the HIB investigation. Petitioner appealed the suspension at a Board hearing in November 2013. The Board voted to expunge the suspension from petitioner's student record.

The amended petition included the following counts:

Count 1. The Board failed to provide petitioner with necessary and appropriate education, remedial, and intervention and referral services with regard to the May 2013 HIB investigation, suspension, and psychiatric clearance.

While the Board's motion for summary decision sought dismissal of the petition in its entirety, the ALJ found that the Board's motion did not address Count 1 and therefore denied the motion as to Count 1. A hearing was held and, in the Initial Decision, the ALJ concluded that the Board did not violate any statutory or regulatory provisions regarding support services for petitioner. The ALJ noted that the Commissioner does not have jurisdiction over any claims regarding special education services, which instead fall under the jurisdiction of the Department of Education's Office of Special Education. Furthermore, petitioner failed to demonstrate that the Board violated *N.J.S.A.* 18A:11-1, which

empowers the Board to do all things necessary "for the lawful and proper conduct, equipment and maintenance" of its schools, or *N.J.S.A.* 18A:40-6, which empowers the Board to provide services that will "aid in the preservation and promotion of the health of the pupils. Finally, petitioner failed to demonstrate that the Board violated *N.J.A.C.* 6A:16-7.1, which requires boards of education to establish a code of student conduct that, among other things, fosters "the health, safety, and social and emotional well-being of students" or *N.J.A.C.* 6A:16-8.1, which requires a system of "planning and delivering intervention and referral services designed to assist students who are experiencing learning, behavior, or health difficulties." Petitioner did not provide evidence to support this claim and, instead, the record reflects that school staff took steps to ensure petitioner's well-being after the blog incident.

The parties did not file exceptions regarding the ALJ's conclusions regarding Count 1.[8]

Upon review, the Commissioner finds it is necessary to address the timing of petitioner's claim and the application of *N.J.A.C.* 6A:3-1.16, which requires that a petition be filed within 90 days of the "date of receipt of the notice of a final order, ruling, or other action by the district board of education" that is the subject of the requested hearing. Pursuant to *N.J.A.C.* 6A:3-1.16, any petition regarding the Board's conduct when petitioner returned from her suspension in May 2013 should have been filed no later than August 2013, yet no petition was filed at that time. Even if the alleged failure to provide services to petitioner could be construed as an ongoing violation, the record reflects that petitioner moved out of the district some time before September 2013. Therefore, at the absolute latest, any petition of appeal alleging a violation of law for failure to provide services should have been filed by the end of November 2013. No such petition was filed. Accordingly, the Commissioner finds that Count 1 of the amended petition was untimely and must be dismissed.

[8] The Board filed exceptions to the Order on Summary Decision, arguing that the ALJ should have granted the Board's motion as to Count 1, but as Count 1 was ultimately dismissed by the Initial Decision and is dismissed herein, it is not necessary to address those exceptions.

Count 7. The Board violated petitioner's constitutional rights by suspending her for the constitutionally protected speech contained in her blog statements.

Following the Board's motion for summary decision, the ALJ found that there was a genuine issue as to whether petitioner's blog postings materially and substantially disrupted the work and discipline of the school, and therefore whether the suspension violated petitioner's First Amendment rights. Accordingly, the ALJ denied the Board's motion for summary decision as to this portion of Count 7. A hearing was held and, in the Initial Decision, the ALJ found that the statements petitioner made on her blog about harming teachers could not be construed as true threats because a reasonable recipient of the statements would not have considered them to be serious expressions of an intent to harm the teachers. The ALJ concluded that petitioner's blog did not materially and substantially interfere with the requirements of appropriate discipline in the operation of the school and could not have reasonably led school authorities to forecast a substantial disruption or material interference with school activities and that, as a result, the Board violated petitioner's First Amendment rights by suspending her. The ALJ noted that the record reflects that the Board has already expunged the suspension from petitioner's school records.[9] The ALJ additionally noted that that any other relief that petitioner might seek regarding the violation of her constitutional rights must be sought in a court of appropriate jurisdiction.

In its exceptions, the Board argues that it correctly determined that petitioner's blog caused a material and substantial disruption within the school, noting that students were aware of and discussed the blog and felt unsafe and upset during school hours. The Board also contends that it reasonably forecasted a substantial disruption based on the violent content of the blog, and – given the frequency and content of the posts – the likelihood that petitioner would have continued to make violent and negative statements about staff and students which would continue to cause those individuals to feel

[9] The ALJ indicated that if the Board had not, in fact, expunged the suspension from petitioner's records, it was ordered to do so.

unsafe. The Board cites to case law concluding that school administrators have substantial discretion to limit or restrict speech that might be constitutionally protected in other environments. Finally, the Board argues that petitioner's claims related to her suspension are moot because the suspension was served and has been expunged from petitioner's record, and therefore no further action can be taken, and no additional remedy is available.

Upon review, the Commissioner finds that, pursuant to *N.J.A.C.* 6A:3-1.16, any petition regarding the Board's conduct or decisions related to the May 2013 suspension should have been filed no later than August 2013, yet no petition was filed at that time. Petitioner did not raise her claim that the Board violated petitioner's First Amendment rights until she filed a Superior Court complaint in May 2016. In his decision dismissing the Superior Court complaint, Judge Thomas C. Miller found that although it was unclear whether petitioner's constitutional claims would be fully adjudicated through the OAL proceedings, nonetheless, the Superior Court's review should be deferred pending completion of the OAL matter. However, the filing of a separate action, in a separate court, three years after the suspension occurred cannot absolve petitioner of the obligation to file any claims against the Board that are within the jurisdiction of the Commissioner within 90 days. The timeliness of a complaint under the Superior Court rules, in and of itself, has no bearing upon the timeliness of a petition under the Department of Education's regulations. *A.S., o/b/o minor child, P.P. v. Bd. of Educ. of the Pinelands Regional Sch. Dist., Ocean Cty.*, Commissioner Decision No. 411-09, decided December 16, 2009. The purpose of the time limitation is, in part, to serve as a measure of repose through which a board of education can be secure that, after the 90 days have elapsed, its decisions will not be challenged before the Commissioner. *See, e.g., Kaprow v. Bd. of Educ. of Berkeley Twp.*, 131 *N.J.* 572, 587 (1993). This requirement cannot be circumvented by the later Superior Court filing.

Nor is the November 2016 amendment of the petition to include counts related to the suspension sufficient to render those claims timely. *N.J. Ct. R.* 4:9-3 provides that when a claim asserted

in an amended pleading arose out of the conduct, transaction, or occurrence set forth or attempted to be set forth in the original pleading, the amendment relates back to the date of the original pleading. Although the original petition does recount the events surrounding petitioner's suspension, that information is included solely in the background section. The petition was filed by an attorney, not a *pro se* petitioner who might be afforded leeway in crafting claims. Indeed, the petition is well-pled, and it is clear from the absence of any reference to the suspension in the portion of the petition that identifies the alleged violations of law and requested relief that petitioner was not attempting to set forth any claim regarding the suspension.

While the Commissioner may relax rules in cases where strict adherence may result in injustice, pursuant to *N.J.A.C.* 6A:3-1.16, the Commissioner does not find relaxation of the 90-day limitations period to be appropriate here. The Commissioner acknowledges the importance of allegations of constitutional violations such as those made by petitioner. However, even if the Commissioner were to find that the Board violated petitioner's First Amendment rights, the Commissioner lacks authority to order any remedy other than the expungement of petitioner's suspension, which has already occurred. Any other remedy is only cognizable in other forums. Should petitioner wish to pursue her First Amendment claim, she is free to do so in the courts that are best positioned to adjudicate and award a remedy for such claims. For all these reasons, the Commissioner concludes that the portion of Count 7 related to the suspension was untimely and must be dismissed.

June 2013 Police Contact

On June 17, 2013, the school's assistant principal contacted the local police department to report petitioner's comments regarding a kill list, wanting to be Osama bin Laden #2, and wanting a gun permit. The school also provided the police with copies of the HIB reports, psychiatric release, and blog postings. The police conducted a search of petitioner's home but found no weapons and closed the case without further action.

The November 2016 amended petition included the following counts:

Count 4. By reporting petitioner's conduct to the police, the Board retaliated against petitioner for filing a HIB complaint.

Following the Board's motion for summary decision, the ALJ concluded that while the Act prohibits retaliation against anyone who reports an alleged HIB incident, the papers did not suggest that school officials retaliated against petitioner when contacting the police, but instead did so based on reports by three of petitioner's classmates that petitioner had said that she had a kill list, wanted to be the next Osama bin Laden, and wanted a gun permit. Accordingly, the ALJ granted the Board's motion for summary decision as to Count 4.

In her exceptions, petitioner contends that there were disputed issues of material fact regarding counts 4 because petitioner denied making the statements regarding a kill list, gun permit, and wanting to be Osama bin Laden #2. According to petitioner, the ALJ should have viewed the facts in the light most favorable to petitioner but failed to do so.

Upon review, the Commissioner finds that, pursuant to *N.J.A.C.* 6A:3-1.16, any petition regarding the district's contact with the police in June 2013 should have been filed by September 2013, but no such claim was filed. Additionally, for the same reasons discussed above, the amendment of the petition in November 2016 is insufficient to render this claim timely. Accordingly, Count 4 of the petition is untimely and must be dismissed.

Count 6. By providing copies of petitioner's student records to a teacher and the police, the Board violated petitioner's privacy rights.

While the Board's motion for summary decision sought dismissal of the petition in its entirety, the ALJ found that the Board's motion did not address Count 6 and therefore denied the motion as to Count 6. The Board then filed a motion for partial summary decision, seeking dismissal of Count 6, which the ALJ granted, concluding that even if the Board had violated the Family Educational Rights and

Privacy Act or New Jersey's Pupil Records Act, there were no enforceable rights or administrative remedies available to petitioner in this forum.

The parties did not file exceptions to the ALJ's conclusions regarding Count 6.

Upon review, the Commissioner finds that, pursuant to *N.J.A.C.* 6A:3-1.16, any petition regarding the district's contact with the police in June 2013 should have been filed by September 2013, but no such claim was filed. Additionally, for the same reasons discussed above, the amendment of the petition in November 2016 is insufficient to render this claim timely. Accordingly, Count 6 of the petition is untimely and must be dismissed.

Count 8. Petitioner's complaints that teachers racially demeaned her were protected under the Law Against Discrimination, and petitioner could not be subject to retaliation for those complaints.

Following the Board's motion for summary decision, the ALJ concluded that there was no causal connection between petitioner's report that teachers had committed acts of HIB against her and the actions of school officials in contacting the police about petitioner's other statements. Accordingly, the ALJ granted the Board's motion for summary decision as to Count 8.

In her exceptions, petitioner argues that the ALJ improperly disregarded her denials and that issues of disputed fact exist regarding when and why school staff called the police.

Upon review, the Commissioner finds that, pursuant to *N.J.A.C.* 6A:3-1.16, any petition regarding the district's contact with the police in June 2013 should have been filed by September 2013, but no such claim was filed. Additionally, for the same reasons discussed above, the amendment of the petition in November 2016 is insufficient to render this claim timely. Accordingly, Count 8 of the petition is untimely and must be dismissed.

Conclusion

The Initial Decision is adopted as the final decision in this matter, as modified herein. The Board shall take corrective measures to ensure that procedural violations of the Act, as identified in Counts 2 and 3, do not re-occur. The Board's motion for summary decision as to the remaining counts is granted, and the petition of appeal is hereby dismissed.

IT IS SO ORDERED. [10]

Angelica Allen-McMillan, J.D.S.
ACTING COMMISSIONER OF EDUCATION

Date of Decision: March 23, 2023
Date of Mailing: March 24, 2023

[10] This decision may be appealed to the Appellate Division of the Superior Court pursuant to *N.J.S.A.* 18A:6-9.1. Under *N.J.Ct.R.* 2:4-1(b), a notice of appeal must be filed with the Appellate Division within 45 days from the date of mailing of this decision.

State of New Jersey
OFFICE OF ADMINISTRATIVE LAW

INITIAL DECISION
OAL DKT. NO. EDU 01197-14
AGENCY DKT. NO. 13-1/14

A.C.

Petitioner,

v.

BRIDGEWATER-RARITAN REGIONAL SCHOOL DISTRICT, SOMERSET COUNTY,

Respondent.

John F. McDonnell, Esq., for petitioner (McDonnell Artigliere, PC, attorneys)

Stephanie C. Schwartz, Esq., for respondent (Hatfield Schwartz Law Group, attorneys)

Record Closed: September 29, 2022 Decided: November 14, 2022

BEFORE **ELIA A. PELIOS,** ALJ:

STATEMENT OF THE CASE

This matter arises from a nine-count petition of appeal originally filed by P.C. and S.C., on behalf of their daughter, A.C., and alleging that respondent Board of Education of the Bridgewater-Raritan Regional School District (Board or District) violated school laws, including the Anti-Bullying Bill of Rights Act, N.J.S.A. 18A:37-13, et seq. (Anti-

Bullying Act), and A.C.'s constitutional and civil rights as a result of the Board's actions in suspending A.C. from school due to violent statements she made in her personal blog about certain teachers, conducting three separate harassment, intimidation, or bullying (HIB) investigations involving A.C., and calling the police to investigate threatening statements A.C. allegedly made while attending the District's Eisenhower Intermediate School during the 2012-2013 school year.[1]

After the Commissioner of Education transferred the matter to the Office of Administrative Law (OAL), the Board filed two motions for summary decision that resulted in the dismissal of several of the counts in the petition of appeal. The issues that survived summary decision, and on which a contested case hearing was held, are as follows:

(1) Did the Board violate the school laws governing programs to support student development by failing to provide A.C. with appropriate services after she returned from her out-of-school suspension?

(2) Did the Board violate the Anti-Bullying Act by failing to timely and sufficiently respond to P.C.'s claims that A.C. had been bullied by a classmate and harassed by teachers?

(3) Did the Board violate A.C.'s free speech rights under the United States Constitution and the New Jersey Constitution by suspending her for the contents of her personal, off-campus blog?

For the reasons that follow, I **CONCLUDE** that while the Board (1) did not violate various education laws by failing to provide A.C. with support services after her suspension, the Board (2) violated certain procedural requirements of the Anti-Bullying Act in response to P.C.'s HIB claims and (3) violated A.C.'s free speech rights by

[1] As reflected in the case caption and explained more fully in the Procedural History section below, A.C., who is no longer a minor child, is now the sole petitioner in this matter.

suspending her for violent, yet constitutionally protected, statements she made about teachers in her off-campus blog.

PROCEDURAL HISTORY

On January 21, 2014, P.C., and S.C., on behalf of A.C., filed with the Commissioner of Education a petition of appeal specifically challenging the Board's November 2013 decision that A.C. committed HIB acts against her classmates. Upon receipt of the Board's answer, the Commissioner transmitted the matter to the OAL as a contested case.

In May 2016, P.C. and S.C. filed an action against the Board and Eisenhower administrators in the Superior Court of New Jersey, Somerset County, Law Division, alleging that the defendants violated A.C.'s constitutional right to free speech by suspending her for her blog postings; violated the Law Against Discrimination (LAD) by retaliating against A.C. because P.C. reported that various teachers had been intentionally mispronouncing A.C.'s first name in a racially demeaning manner; and, that the Board's HIB policy is unconstitutionally overbroad and vague. Board's Motion for Summary Decision, Ex. F.

In August 2016, the OAL matter was placed on the inactive list pending resolution of the Superior Court action. Schwartz Cert., ¶ 11. On October 14, 2016, the Honorable Thomas C. Miller, P.J.Cv., issued an order dismissing the complaint "in order to defer to the OAL action" because "the facts that form the basis of Plaintiff's petition to the OAL are generally the same factual predicate that forms the basis of the Plaintiff's First Amendment claims." Board's Motion, Ex. F.

On November 4, 2016, I granted petitioners' motion to amend their petition. Schwartz Cert., ¶¶ 9-10; Board's Motion, Ex. G., and Ex. H. According to the amended petition, which petitioners filed on September 17, 2017, after the matter was made active again:

- Count One: "With regard to the May 17, 2013 HIB investigation, the subsequent 5-day suspension, and the administration's demand that A.C. receive psychiatric clearance before being permitted to return to Eisenhower School, the Board and its employees violated A.C.'s rights under N.J.S.A. 18A:11-1, et seq., N.J.S.A. 18A:40-6, N.J.A.C. 6A:16-1.1, et seq., N.J.A.C. 6A:16-7.1, et seq. and N.J.A.C. 6A:16-8.1, et seq. by failing to provide her with the necessary and appropriate education, remedial and intervention and referral services."

- Counts Two and Three: "On or about May 18, 2013, P.C. filed a HIB complaint with the Board and its employees maintaining that A.C. was being bullied by certain 6th grade teachers who were continuously mispronouncing her name, and by a classmate on her school bus," but the Board failed to conduct a timely and sufficient HIB investigation, in violation of the Anti-Bullying Act. The Board failed to interview A.C. as part of its investigation and, according to the HIB report, "P.C. and A.C. did not identify a distinguishing characteristic or protected class which, of course, is a completely false statement" because "P.C. and A.C. made it clear that the deliberate and willful mispronunciation of A.C.'s first name was predicated upon her Asian ancestry."

- Count Four: By reporting a "suspicious incident" to the police on June 17, 2013, "the Board and its employees engaged in retaliatory acts against A.C. and her family because they had exercised their rights to file a HIB complaint . . ."

- Count Five: The Board arbitrarily, capriciously, and unreasonably determined that A.C. committed HIB acts based upon one student's religion and another student's physical characteristic.

- Count Six: By providing copies of A.C.'s student records to one of her teachers and members of the Bridgewater Police Department, "the Board and its employees violated A.C.'s privacy rights under . . . "the Family Education Rights and Privacy

Act (FERPA), 20 U.S.C. 1232g, 34 C.F.R. Part 99, N.J.S.A. 18A:36-19 and N.J.A.C. 6A:32-7.4 through 7.6."

- Count Seven: The Board and its employees violated A.C.'s constitutional rights by suspending her and finding that she committed HIB acts because her "speech as set forth in her off-campus blog, and her statements to students A.Q. and A.S. is protected under Article I, paragraph 6 of the New Jersey Constitution," and "[t]he respondents are liable to the petitioner pursuant to the New Jersey Civil Rights Act, N.J.S.A. 10:6-1, et seq. [N.J.C.R.A.] for the violation of petitioner's aforementioned constitutional rights."

- Count Eight: "The petitioner's complaints, through her father, P.C., that various teachers were intentionally mispronouncing A.C.'s first name, in a racially demeaning manner, intentionally causing her humiliation in front of her peers, was protected under the [LAD] and petitioner could not be subjected to retaliation for that complaint pursuant to N.J.S.A. 10:5-12(d)."

- Count Nine: The Board's "HIB Policy violates Article I, paragraph 6 of the New Jersey Constitution as it prohibits speech, and related conduct that cannot be legally prohibited" and "[t]he Policy is unconstitutionally overbroad and vague." [Id. at Ex. H.]

On September 22, 2017, the Board filed an answer denying the allegations set forth in the amended petition. Board's Motion, Ex. I.

On May 4, 2018, the Board filed a motion for summary decision finding that "the Board did not act arbitrarily, capriciously, or unreasonably in reaching the three HIB determinations and the petitioner's rights under the Anti-Bullying Bill of Rights were not violated;" that "petitioner's state law claims must be dismissed . . . because petitioner did not engage in protected speech under the New Jersey State Constitution;" that "petitioner's NJLAD/Retaliation Claims should be dismissed because petitioner's claim

fails as matter of law;" and, that "[t]he petition should be dismissed as moot because all of the students involved in the alleged HIB incidents have graduated or are no longer enrolled in the district." Board's Brief in Support of Motion. On June 26, 2018, P.C. and S.C. filed a brief in opposition to the Board's motion. On July 20, 2018, the Board filed a reply brief in support of its motion. In September 2018, the parties submitted supplemental information that I had requested for purposes of deciding the Board's motion.

On September 20, 2018, I issued an order denying the Board's motion for summary decision as to Counts One, Two, Three and Six, and granting the Board's motion as to Counts Four, Five, Eight and Nine, which were dismissed. The Board's motion was granted in part and denied in part as to Count Seven, which was dismissed in part. An evidentiary hearing was ordered to resolve Count One, Count Two, Count Three, Count Six, and the remaining portion of Count Seven of the petition – whether the Board violated A.C.'s First Amendment right to free speech by suspending her for her off-campus blog. Additionally, as part of this matter, petitioners brought a motion for depositions of seven current or former Board employees and of two police officers, which was denied by order on September 13, 2018. The order granting partial summary decision was submitted under N.J.A.C. 1:1-12.5(e) for immediate review by the Commissioner.

On October 5, 2018, the Commissioner issued a letter indicating his determination to not review the order, pursuant to his discretion under N.J.A.C. 1:1-12.5(e). Also on October 5, 2018, the Board submitted a motion for partial summary decision seeking dismissal of Count Six as a matter of law. That motion was granted and Count Six was dismissed. Thus, as a result of the Board's motions for summary decision, the petition counts that necessitated a hearing were Counts One, Two, Three, and Seven (in part).

A hearing was held on May 6, May 8, May 15, May 16, May 21, and June 4, 2019. At the hearing, A.C., Joseph Diskin, Kimberly Patullo, P.C., and Cathleen Filippello, were called to testify for petitioners, while Alice Piscadlo and Nicole Fitzpatrick testified for the Board.

After the hearing, the parties submitted written summations of their respective positions. The record was reopened on May 20, 2022, when it was determined that petitioner had attained the age of majority while the proceedings had been ongoing. A conference call was held on July 13, 2022, to discuss the matter. A subsequent call was scheduled for August 26, 2022.

Prior to that call, on August 25, 2022, this office received a consent order whereby the parties "consented to the amendment of the caption whereby A.C. shall replace her parents, P.C. and S.C., as A.C. is no longer a minor and has reached the age of majority."[2] The telephone conference scheduled for August 26, 2022, was adjourned. On September 29, 2022, I ordered the caption amended as consented to by the parties because A.C., who was a minor child on whose behalf her parents originally filed this appeal, turned eighteen during the pendency of this matter and she now wishes to pursue the appeal on her own behalf. Therefore, A.C. is now the sole petitioner in this appeal of certain decisions made by the Board. The record re-closed September 29, 2022.

FACTUAL DISCUSSION AND FINDINGS

The following facts are derived from the documentary evidence presented by the parties, and **I FIND**:

A.C. was born in 2000 to Taiwanese immigrants, P.C., and S.C. Second Amended Petition of Appeal, ¶¶ 2-3. She attended the Board's public schools from kindergarten through the sixth grade. Id. at ¶ 4. On May 17, 2013, while A.C. was in sixth grade at the Eisenhower School, one of her classmates, E.K., alleged that A.C. had cyberbullied him on her personal blog. R-1; R-2. In response, Eisenhower administrators conducted a HIB investigation by reviewing the contents of A.C.'s blog. Ibid.

The blog, which was called "GinyPigLuver," included sections entitled "Surveys," "Cute Pics!!!," and "Vids/Music." P-1. However, at the heart of this matter, is another

[2] See statute governing legal capacity of minors eighteen years and older, N.J.S.A. 9:17B-1 to -4 (providing those eighteen years and older with certain rights and obligations, including the right to sue.)

section of the blog entitled "GinyPigLuver - Rants." Ibid. In that section, there were nine separate "rants," including ones called "Annoying Kid," "Anger Issues Escalated Everyone's a Moron," "More on: New Annoying Teacher!," "Amazing News: New Annoying Teacher Found!!!," and "Gigantic Rant on Annoying Teacher That Is Totally Annoying." Ibid. Although A.C. did not refer to the subjects of her "rants" by name, she revealed their identities when asked by school staff during its investigation into the matter.

The entry, "Annoying Kid," included such language as "IT'S A TRUE FACT THIS KID HAS ABSOLUTELY NO FRIENDS OTHER THAN THAT MAN-LADY PERSON" and "THIS KIDS A LOSER." Ibid. A.C. admitted that this entry was about E.K.

In "Anger Issues Escalated Everyone's a Moron," A.C. wrote in reference to an incident between her and her gym teacher during class, "I REALLY, REALLY wanted to kick her in the face and break all her bones and watch her die." Ibid. A.C. admitted that this entry was about her gym teacher, Nicole Fitzpatrick.

The two "rants," "More on: New Annoying Teacher!," "Amazing News: New Annoying Teacher Found!!!," which A.C. admitted were about a teacher named Rachel Merino, included such statements as "I JUST FEEL SO MUCH ANGER AN[D] EMOTIONS IN ME! I JUST WANT TO KILL HER AND TOSS HR BODY IN A RIVER (but I can't, 'cause I'm not old enough to kill people yet – LOL jk I don't kill . . . yet . . :-O", and "I almost SPIT IN HER FACE AND PUNCHED HER DOWN. But I managed to control my unstable self and not do it." Ibid.

Finally, in the entry, "Gigantic Rant on Annoying Teacher That Is Totally Annoying," A.C. wrote how a teacher mispronounced her first name to rhyme with the word "rice," but that the teacher "KNOWS my name is [A.], she's just doing it to insult me." Ibid. A.C. admitted this entry was about her English teacher, Patricia Idell.

The investigation, which was conducted on May 17, 2013, resulted in a finding that the comments A.C. made about E.K. did not constitute a HIB act. (R-1 and R-2.)

However, A.C. was suspended for five days "for making threatening comments about staff members" in her blog. (R-7.) The suspension began on May 20, 2013. Ibid.

On May 17, 2013, school administrators also referred A.C. for a psychiatric evaluation at County of Somerset, Department of Human Services, Psychiatric Emergency Screening Services (PESS) because, as indicated in an incident report filled out by school counselor, Alice Piscadlo, "when [A.C.] was seen by administration [and] counselor she expressed verbally that she wanted to 'go off and die,' kill someone,' and 'kill myself.'" (R-4.)

The same day, A.C. was seen by PESS staff, who concluded that A.C. was not "[a]n imminent danger to self or others secondary to a mental illness." Ibid. A.C. "admitted to feeling a little depressed and rated her depression a 5 on a scale of 0 to 10." (P-5.) The staff diagnosed her with "Depressive Disorder [Not Otherwise Specified] and "Problems with social environment – animosity with certain peers." Ibid. The PESS staff recommended that she seek outpatient counseling services, and P.C. told the staff that he "will follow up with church counselor." Ibid. The evaluation form also states that "[i]f church counseling does not seem to be helpful the family was referred to in-home or outpatient therapy." Ibid.

On May 18, 2013, P.C. emailed the Eisenhower principal, Joseph Diskin, the results of A.C.'s psychiatric screening and requested that A.C.'s suspension be reversed and that she be allowed to return to school on May 20, 2013. (R-9.) P.C. wrote that "[A.C.] is a good student and . . . never intend[ed] to harm any person" and that A.C. "has been bullied at school constantly and led to using blog to convey her frustration and anger." Ibid. P.C. also stated that "[w]e will arrange church [counselor] for [A.C.] to learn how to manage her emotion[.]" Ibid.

On May 20, 2013, Principal Diskin met with P.C. and denied his request to allow A.C. to return to school before the end of her five-day suspension. Petition of Appeal at

¶ 23. P.C. appealed to the Assistant Superintendent, Cheryl Dyer, who also denied P.C.'s request. (R-9.)

On May 22, 2013, P.C. emailed Principal Diskin that "Mrs. Idell is the person intentionally to pronounce [A.C.'s] name incorrectly since beginning of school year until [A.C.] mentioned she felt annoying in her home work on Feb 2nd." (R-21.) He also informed Principal Diskin that "Mrs. Merino . . . called [A.C.] 'pest'." Ibid.

In a June 8, 2013, email, P.C. told Principal Diskin that "I still have not receive the investigation report regarding my complaint," and asked" Can you kindly inform when you will send me the report?" (R-21.)

On June 13, 2013, P.C. met with Principal Diskin and other school staff members, and again alleged that A.C. had been "harassed" by teachers and students. (R-11.) According to the ensuing investigation report, "[s]ince the word harassment was used, an HIB (staff) investigation was started." Ibid. The investigation report indicated that four staff members, Patricia Idell, Rachel Merino, Nicole Fitzpatrick, and Jason Draine, had been accused of bullying A.C., and that as part of the investigation, Assistant Principal Cathleen Filippello interviewed the accused teachers and one of A.C.'s fifth-grade teachers, K.P., who had not been accused of bullying A.C. Ibid.

In her interview, Ms. Idell admitted that she had mispronounced A.C.'s first name, but that she had done so unintentionally. Ibid. She stated that A.C. had corrected her pronunciation, and that she had since made a conscious effort to pronounce A.C.'s name correctly. Ibid. Ms. Fitzpatrick stated that she did not know how to pronounce A.C.'s name and that A.C. had corrected her several times. Ibid.

By letter, dated June 25, 2013, Principal Diskin informed P.C. and S.C. that "[i]t has been determined that your child was not the target of the investigated act of [HIB]." Ibid. The letter also informed P.C. and S.C. that the report would be forwarded to the Superintendent, Michael Shilder, and the Board for further review and that "[y]ou will be

notified if the Board takes action to either modify or reject these findings." Ibid. P.C. and S.C. allege that they "received no further communication regarding this matter" including information regarding any actions taken by the superintendent or the Board and that, as a result, the Board denied them a right to appeal the results of the HIB investigation. Petition of Appeal, ¶¶ 36-37.

On June 26, 2013, Principal Diskin signed the investigation report, which was then signed by the superintendent on July 2, 2013. (R-11.) According to minutes from the Board's July 23, 2013, meeting, the Board approved "the Superintendent's report of alleged HIB incidents and investigations for July 18, 2013, as well as the recommendation of the Board's HIB Committee to affirm the determinations and actions specified." Board's September 6, 2018, Letter to OAL, Ex. B. However, the Board did not issue a written decision affirming the Superintendent's report.

P.C. subsequently appealed A.C.'s five-day-suspension and the results of a different HIB investigation to the Board, which held a hearing on November 12, 2013. (R-23.) On November 13, 2013, the Board Secretary, Peter Starrs, wrote a letter to P.C., informing him that "the Board voted to affirm the determination of the Administration that your daughter did commit an act or acts of HIB, denying your appeal on this issue," but that "[w]ith respect to the suspension for her blog, although she has already served the time and that cannot be undone, the Board voted to expunge her record of the suspension, in effect, granting your appeal on this issue." Ibid.

The foregoing statements are based in large part on documents that speak for themselves and are **FOUND** as **FACT**.

Next is a summary of the testimony presented by the parties at the hearing before me. At that hearing, A.C., Principal Diskin, Kimberly Patullo, P.C., and Assistant Principal Filippello, were called to testify for petitioners, while Alice Piscadlo and Nicole Fitzpatrick testified for the Board.

A.C.

A.C. testified that she made excellent grades throughout her academic career and that, prior and after the incidents at issue in this matter, which occurred during the 2012-2013 school year when she was in the sixth grade, her disciplinary history was otherwise unremarkable. She left the Bridgewater-Raritan school district after sixth grade, and at the time of her testimony in 2019, she was a high school senior who had been accepted to, and planned on attending, The Honors College of Rutgers.

A.C. offered insight into certain problems and feelings she had in the sixth grade. She explained that "I had a lot of issues in sixth grade. I was angry all the time. I was like really sad, too, because [it was] the first year that all my friends got split up from being in the same class, so I had to like make new friends and I didn't really know how to do that." She further stated that she was "insecure" and "super awkward all the time," and that sixth grade "was rough."

A.C., who is Taiwanese American and whose parents emigrated to this country from Taiwan before she was born, also dealt with students and teachers alike who mispronounced her first name to include, and rhyme with, the word "rice." She would correct people who did so "most of the time," and most people would thereafter pronounce her name correctly. When her friends mispronounced her name jokingly, "it wasn't like that big of a deal," but she did not like it when non-friends would repeatedly and intentionally mispronounce her name after she asked them to stop. In sixth grade, A.C. did not think that mispronouncing her name to include the word "rice" was a racial slur; however, in retrospect, she believes that the mispronunciations were racially motivated.

A.C. testified about the blog postings that resulted in her five-day suspension from school in May 2013. She explained that she created her blog "like around late 2012 to early 2013," and that "in the blog I basically wrote about my thoughts . . . How my day went. Things I was upset about . . . I wrote about books that I read. Like, posted pictures

of cute animals, stuff like that. A compilation of things that, like, mattered to me, pretty much."

She only shared her blog with her group of friends, who were four other sixth-grade girls at Eisenhower. In order for her four friends to access her blog, A.C. gave them the web address, which was "ginypigluver.weebly.com." The blog was not password protected, but according to A.C., anyone who wanted to find and access the blog could not merely conduct a web search of A.C.'s name, but instead would have to know and enter the exact web address. She further testified that all of her blog entries were made off-campus, and that she did not use school computers to write on her blog.

Her blog included a section entitled, "GinyPigLuver – Rants." According to A.C., "'Rants' was a side page of my main blog . . . a specific category that I created to compile all my rants into one." She also had sections with "cute pictures, videos, and like music videos that I liked." There was also a section with A.C.'s book recommendations.

As for the "rants" section, A.C. described a "rant" as "it's like when I'm venting about something and I write it down." According to A.C., "I was really angry. So, I write about why I'm angry. And then I like make it funny so that my friends will laugh when they read it."

She made nine separate entries to the "rants" section of her blog during the course of her sixth-grade year. Most relevantly, four of those entries were about teachers at her school, and one was about a classmate.

The first entry, "Gigantic rant on annoying teacher that is totally annoying," was about her English teacher, Ms. Idell. A.C. testified that she wrote that entry "around January [2013]," and that she wrote the entry about Ms. Idell in part because the teacher had repeatedly mispronounced her name to include the word "rice" since the beginning of the 2012-2013 school year. At first, A.C. would correct her, "but it didn't seem to like

make a difference, so I stopped at one point." The fact that Ms. Idell kept mispronouncing her name "annoyed" A.C.

A.C. testified that, "at first I didn't know she was doing it on purpose, I thought she was just like really stupid," and she responded, "I don't think so," when asked by her counsel if she thought Ms. Idell had accidentally mispronounced her name. However, on February 2, 2013, A.C. had a homework assignment for Ms. Idell that apparently brought an end to the teacher's mispronunciation of A.C.'s name. A.C. wrote about how she related to the main character in a story who "had an ethnic name . . . and faced like racism because people pronounced it incorrectly," and according to A.C., "after I handed in that entry she never called my name wrong ever again."

A.C. also wrote two entries about another teacher, Ms. Merino. A.C. recollected that the entries were made in February 2013. Those entries were entitled, "More on New Annoying Teacher" and "Amazing News on New Annoying Teacher Found." A.C. stated that she wrote the posts about Ms. Merino because, even though she wasn't A.C.'s teacher, Ms. Merino said "rude things" to A.C. at school, had allegedly called A.C. a "pest," and "would like scream at students for no reason."

In one of her posts about Ms. Merino, A.C. wrote that "I just feel so much anger and emotion in me, I just want to kill her and toss her body in the river. But I can't, cause I'm not old enough to kill people yet, lol, just kidding, I don't kill. Yet." However, A.C. testified that she did not actually want to kill Ms. Merino and toss her body in a river and stated that "I probably made the same joke to my friends, but . . . if I did it wasn't a serious threat." According to A.C., "it was just a joke."

A.C. testified about writing, in reference to Ms. Merino, "I almost spit in her face and punched her down, but I managed to control my unstable self and not do it." According to A.C., "I was joking, I thought it was funny. My friends thought it was funny like." A.C. explained that "all this stuff that I wrote in here was like yeah, it was to vent, but it was also to make my friends laugh, like they're just jokes."

A.C. also wrote a "rant" about her gym teacher, Ms. Fitzpatrick. While A.C. usually "kept [her posts] anonymous to the point where I didn't tell like what subject the teacher taught, but this one I needed to say that they taught gym, because it was relevant to my story." According to A.C., Ms. Fitzpatrick "just like had a problem with me. She would like single me out for no reason." In reference to Ms. Fitzpatrick, A.C. wrote in her blog, "I wanted to kick her in the face and break all her bones and watch her die." A.C. testified that she did not really want to harm Ms. Fitzpatrick, but instead "just wrote this stuff because I thought it would make my friends laugh."

Finally, a "rant" entitled "Annoying kid," was about a classmate, E.K., who rode the same bus as A.C. According to A.C., she and E.K. did not get along, and the two mutually exchanged unpleasantries. As A.C. explained, "I would like be sitting on the bus minding my own business and he would come up to me and tell me that I'm a loser . . . and then I would respond like, shut up, like nobody likes you." E.K. was the student who brought A.C.'s blog to the school's attention, but A.C. does not know how he gained access to the blog and knew that it was her blog – "I mean my name is only listed in my entire blog one time and you would have to scroll through all the entries to see it . . . so, I don't know if he even knew that I wrote this or if he just had like a suspicion."

A.C. stated that she "was very angry" when she made the "rant" entries but asserted that she never intended to turn her words into actions. According to A.C., "I was too scared to even . . . say like what I felt, you know. So, I wouldn't have, like done anything. I wouldn't even have said, like, what I wrote." A.C. explained that her "rants" were hyperbolic or satirical, not literal. She denied ever directly threatening any of the teachers or the student who were the subjects of her "rants."

In her nine "rant" entries, A.C. did not identify the subjects by name "[t]o protect like their identity" and "create a sense of anonymity." She also did not "sign any of the blogs with my name[.]" According to A.C., "[y]ou would not have known that I had written

any of this, unless you read through all of it and got to the entry where I wrote about people pronouncing my name wrong."

She deleted, and stopped making entries to, the blog on May 17, 2013, the day the school learned about the blog and suspended her from school for the content of the blog. A.C.'s understanding was that the school suspended her "because like the stuff that I wrote made me a threat . . . to like the people I wrote about, I guess." She recalled being called to the principal's office on May 17, and that the principal, assistant principal, and a guidance counselor were there.

While at the principal's office, the assistant principal asked for, and A.C. divulged, the names of the teachers and student about whom she wrote in her blog. However, according to A.C., none of the faculty members who were present asked her for further information about the entries, like why she wrote them or her feelings while writing them. Yet A.C. testified that she told Ms. Filippello on May 17 that "the stuff I said about teachers . . . were jokes."

Although a document entitled "Bridgewater-Raritan Regional School District Life Threatening Behavior Incident Report," dated May 17, 2013, reflected that A.C. stated that she wanted to kill someone and herself, she denied on the witness stand that she told any school staff on May 17 that she intended to kill anyone or herself. However, she allowed that she was very upset about getting in trouble and "probably [said], wow, I wish I could die or something. But like, like teenagers say that stuff all the time," but don't actually mean it.

After A.C.'s psychiatric evaluation on May 17, she did not receive any counseling services either at the school or outside of school.

Principal Joseph Diskin

Diskin began his employment with the Bridgewater-Raritan Regional School District in 2002 and was the principal at Eisenhower during the 2012-2013 school year. E.K. reported the existence of the blog to Ms. Filippello, the assistant principal, "sometime in the afternoon of May 17th." Ms. Filippello then alerted Diskin.

The same afternoon, Diskin accessed the blog on the Internet and read its contents. He also printed a copy of the blog. According to Diskin, "the things that were most problematic were . . . the ones that . . . threatened physical violence, killing" with respect to teachers. Even phrases that included smiley faces or other emoticons did not affect Diskin's interpretation of A.C.'s words; he did not find funny the posts espousing violence.

Diskin did not discuss the posts with A.C.; Ms. Filippello and the school counselor were the staff members who interviewed A.C.

He testified that he did not know, but that it did not make a difference to him, who had access to the blog or when A.C. wrote the entries – whether recent or not – "because of the words about killing, watching someone die . . . what would be violent acts towards staff members." To Diskin, whenever the posts were written, "it's still a threat."

As for access, Diskin said "it was a public blog and that anybody could access it." It did not matter to Diskin whether the blog was easily accessible or whether anyone who wanted to access it had to know and enter the exact phrase "ginypigluver.weebly.com;" whether three people or 3,000 people accessed A.C.'s blog; or whether A.C. wrote the entries at home or at school. According to Diskin, A.C.'s blog "was making a substantial disruption to our school and the – those students had access to it, it was communicated to another student. So where it originated from it did not matter."

The "substantial disruption," in Diskin's opinion, was "the threatening the lives of staff members," Diskin and his staff having to address the situation and hold various meetings about it on May 17 and May 20, "for a sixth grade student like A. and her own well being . . . is also a disruption to our school," and for the student who reported the blog to Ms. Filippello. As Diskin explained, "it's a disruption to our normal operating procedures." However, Diskin conceded that, in response to the blog posts, the police were not called to the school on May 17th, the school was not closed, and no teachers or students (other than A.C.) missed school.

He confirmed that A.C. told Ms. Filippello the identities of the teachers who were the subject of her blog posts and stated that he did not know whether he or other staff members would have been able to identify all of the teachers if A.C. had not told them.

Ms. Filippello called P.C. and asked him to come to the school on May 17. When P.C. arrived, he met with Diskin. Diskin told P.C. about his concerns with some of the contents of A.C.'s blog. He also informed P.C. that A.C. would be suspended for five days. The decision to suspend A.C. was made by Diskin, in consultation with Ms. Filippello and the superintendent.

Diskin and P.C. then went to Ms. Filippello's office and met with her, the school counselor, and A.C.

Diskin did not notify the teachers about whom A.C. wrote in her blog until May 20. May 17 was a Friday, and the superintendent told Diskin to wait to inform them about the contents of the blog after the weekend. The teachers had already left for the weekend, and the superintendent "did not think it was something that was appropriate to talk to them about on the phone over the weekend." Moreover, "A. was in the care of her parents as well as being sent . . . for an evaluation. So we deemed it that she was in a good safe place now and that for that time being our staff was safe." When Diskin talked to the teachers on May 20th, "they were concerned for their safety." However, the only safety

precautions taken at the school were "awareness" and "monitor[ing] the situation" upon A.C.'s return to school.

Diskin confirmed that A.C. was referred for psychiatric screening. The PESS staff that screened her concluded that A.C. was not "[a]n imminent danger to self or others secondary to a mental illness," but recommended that she seek outpatient counseling services. Although A.C. received psychiatric clearance to return to school, Diskin declined P.C.'s May 20 request to allow her back to school because the five-day suspension had not yet ended.

As far as counseling, Diskin stated that P.C. had told him that A.C. would talk with someone at the family's church, and Diskin told P.C. that "we would be checking with our teachers just to see how A. is doing when she returned to school." A.C. was not referred to any in-school counseling services. According to Diskin, "we do not have the role to do that or the personnel to do that type of counseling in our school."

As a result of A.C.'s blog entries, the school counselor, in consultation with Diskin and Ms. Filippello, filled out a "Life Threatening Behavior Incident Report" (R-4.) Diskin explained that the decision to fill out the report was made because, when the school counselor and Ms. Filippello interviewed A.C. about the blog, A.C. "had communicated that she wanted to go off and die, kill someone and kill myself." Diskin and his staff deemed the situation "serious" and did not think that A.C. was joking when she made her oral statements about harming herself or others or when she wrote her blog posts about wanting to harm teachers.

In Diskin's opinion, when he and his staff "hear words like, you know, 'kill', wanting to watch people die, you know, punch them down, we take that very seriously and look at it as something that's way beyond acting out or venting." He also did not think A.C.'s posts were "hyperbole," but conceded that he did not discuss that possibility with his staff. However, he hypothesized that A.C. could have still been subject to some form of discipline had Diskin and his staff determined that A.C. was joking in her posts.

Although Diskin had been employed by the District since 2002, he said that the incident involving A.C. was the first time at Eisenhower that he or his staff had filled out a report involving a life-threatening behavior incident that was deemed "serious."

At his May 20 meeting with P.C., P.C. informed Diskin about teachers mispronouncing A.C.'s name. Diskin told P.C. that he would talk to the teachers about it. Diskin confirmed that in a May 22 email, P.C. again raised this concern, and stated that he believed that Ms. Idell was intentionally mispronouncing A.C.'s name. This was the first time that P.C. used the word "intentional." At some point in May, P.C. also told Diskin that E.K. was bullying A.C. on the school bus. While, in response, the school did not conduct a HIB investigation, Principal Diskin spoke with E.K. and reviewed audible video footage from the school bus that the two students rode together. He determined that there was no bullying, but a mutual conflict in which A.C. and E.K. would call each other names. The principal reassigned their seats on the bus to keep them separated.

The school did conduct a HIB investigation regarding P.C.'s complaint that teachers were intentionally mispronouncing A.C.'s name. However, Diskin did not know when the investigation began other than "sometime after June 13th." The investigation was conducted by Ms. Filippello, and not the school's anti-bullying specialist, Kimberly Patullo, because the superintendent determined that Ms. Patullo had a conflict due to the fact she was in the same union as the accused teachers. This was not only Ms. Filippello's first HIB investigation, but also the school's first HIB investigation of teachers since Diskin started at the school in 2002.

For the investigation, Ms. Filippello interviewed the accused teachers and A.C.'s fifth-grade teacher. However, A.C. was not interviewed as part of the investigation. The teachers at issue were informed by letter dated June 25, 2013, that they had not committed acts of HIB against A.C.

Kimberly Patullo

Kimberly Patullo was employed by the District as a school counselor, and she also served as Eisenhower's anti-bullying specialist, during the 2012-2013 school year. She reviewed E.K.'s May 17, 2012, complaint that A.C. was cyberbullying him. However, because she quickly determined that his allegation did not involve a "distinguishing characteristic" as required by HIB law, she did not conduct a HIB investigation, and instead referred the matter – A.C.'s writings about E.K. on her blog – for a code of conduct investigation.

P.C.

P.C. testified about his interactions with school staff in the aftermath of the blog revelation on May 17, 2013. Ms. Filippello summoned P.C. around 2:30 p.m. on May 17. When he arrived at the school shortly thereafter, he was told by Principal Diskin that A.C. had been suspended for five days because of the blog and that she would have to successfully complete a psychiatric screening prior to her return to school.

When P.C. met with Principal Diskin again on May 20, and although P.C. provided the principal with documentation showing that A.C. had received psychiatric clearance, the principal denied P.C.'s request to reinstate A.C. before the end of her five-day suspension.

P.C. also testified about his email exchanges with Principal Diskin and other school administrators on May 22, 2013, and thereafter. P.C. emailed and spoke with the District's assistant superintendent about appealing A.C.'s suspension and explaining why A.C. wrote what she did about the teachers. He told the assistant superintendent that Ms. Idell mispronounced A.C.'s name and that Ms. Merino called A.C. a "pest." He testified that his interaction with the assistant superintendent on May 22 was the first time he alerted any school officials about his concerns regarding certain teachers' treatment of A.C. P.C. also emailed Principal Diskin with these concerns on May 22. In response,

Principal Diskin called P.C. the next day to tell him that he had spoken with Ms. Idell, who said she had mistakenly mispronounced A.C.'s name, and Ms. Merino, who denied calling A.C. a pest.

When A.C. returned to school from her suspension on May 28, P.C. accompanied her and met with Principal Diskin. At that meeting, P.C. told the principal that E.K. was "making fun of A.C. on the bus," and the principal told him that he would reassign their seats on the bus.

On June 13, P.C. met with school staff, including Principal Diskin, Ms. Filippello, Ms. Piscadlo, and Ms. Patullo. He told the staff that Ms. Merino, Ms. Fitzpatrick, and Ms. Idell were harassing A.C. In response, Ms. Filippello told P.C. that the school would investigate. P.C. testified that, after June 13, neither he nor his daughter were interviewed about the complaints involving E.K. or the teachers.

When confronted on the stand with the psychiatric facility's discharge instructions – which stated in part that "Patient will benefit from outpatient therapy; patient and patient's father are agreeable to this. Patient will follow up with church counselor," P.C. conceded that A.C. never underwent any outpatient therapy or other counseling after her release from the facility.

Cathleen Filippello

Cathleen Filippello began her employment with the District in 2003. She became assistant principal of Eisenhower in 2008 and served in that position during the 2012-2013 school year. Her duties included student discipline. She is the staff member to whom E.K. reported A.C.'s blog after lunchtime on May 17, 2013. She and Principal Diskin reached out to the superintendent "for guidance because we never dealt with a journal that had anything about threatening teachers' lives, wanting to kill people[.]"

Filippello testified that "the Superintendent was in support of the five-day suspension because it was a substantial disruption to the school day." According to Filippello, the "substantial disruption" was "the report of a cyberbully, then that led to calling down A.C. to speak to her about some of the information that was in the blog and then you had two building administrators pulling [the two] school counselors, [and we] were involved with one student at the time where we had close to 800 students." However, she conceded that the word "disruption" was not discussed among administrators on May 13, 2017 – "there's no discussion about a disruption, we just know that we're behind closed doors and cannot address anything else going on in the building." She also could not recall what other duties or meetings she missed due to the blog situation.

She recalled that after A.C. was called to meet with administrators about the blog, A.C. "became very upset and emotional because of some of the things that we had discovered in her blog and that's when she said she wanted to not live anymore, kill herself or hurt others – kill others." She confirmed that A.C. told her the names of the teachers in her blog.

Filippello took the blog seriously because of the threats against staff members. Also, because A.C. "was in my office and she was emotionally upset, rocking back and forth, [saying] 'I don't want to live anymore,' [such that] not only were there staff members who were listed as people who [A.C.] wanted to be hurt . . . I also had a concern for [A.C.'s] well-being." Filippello further testified that A.C. never told her the blog contents about teachers were a joke.

According to Filippello, neither she nor Principal Diskin notified the teachers about the blog on May 17 because it was the end of the school day and "because we were with [A.C.] at that time, concerned about her well-being and getting her [a psychiatric evaluation]." She confirmed that the subject teachers were not notified about the blog until the following Monday, May 20.

Although the school's life-threatening behavior policy included the requirement that local police be contacted, she "followed the direction of the Superintendent" and none of the administrators called the police.

On the topic of the investigation, she conducted regarding P.C.'s HIB allegations against teachers, Filippello stated that it was the school's first investigation involving staff, and that it was the first HIB investigation of any sort that she had led. According to Filippello, she "receive[d] training for HIB for students, and at that time back in 2013, school districts didn't really have an HIB [form] for staff[;] that's why we used the [student] form . . . with staff members because there was nothing in place."

Filippello stated that the superintendent directed her to use the HIB form for students when investigating staff, and that the superintendent told her which people to interview as part of the investigation. She confirmed that she only interviewed teachers, and not A.C., as part of her investigation. When asked why she did not interview A.C., she answered "because [A.C.] was also involved with another case that was going on under investigation in our school." She also confirmed that her HIB report does not include the specific allegations against the teachers but conceded that such information was important.

Based on her investigation, Filippello concluded that "there wasn't enough . . . information to support the allegation." Filippello did not think that the mispronunciation of A.C.'s name to rhyme with "rice" constituted racial harassment.

Alice Piscadlo

Alice Piscadlo began her employment with the district around 2000 and served as a school counselor at Eisenhower during the 2012-2013 school year. She is the school employee who filled out the form that referred A.C. for a psychiatric evaluation on May 17, 2013, "because [A.C.] had expressed . . . verbally that she wanted to go off and die,

kill someone, and kill herself. She repeatedly stated that." According to Piscadlo, A.C. never stated on May 17 that she was joking about the things she said in her blog.

After A.C. returned from her suspension, Piscadlo met with her "two times" and A.C. told Piscadlo that she was "fine." Piscadlo also "checked with [A.C.'s] teachers about how she was doing."

Nicole Fitzpatrick

Nicole Fitzpatrick was A.C.'s gym teacher during the 2012-2013 school year and the subject of one of A.C.'s blog entries. Principal Diskin told Fitzpatrick about the blog on May 20 and Fitzpatrick was "completely shocked by what was written." According to Fitzpatrick, "the one comment that lingers in my mind is that she wanted to break every bone in my body and watch me die." These words made Fitzpatrick "feel threatened."

She spoke with her husband about the blog and testified that "I was concerned for my safety and he was concerned for my safety as well." She also told co-workers that "I was not comfortable having her in my class anymore, but she could not "recall whether I said it to the administration – but I believe I had." She also could not recall whether A.C. was removed from her class after she returned from her suspension.

Fitzpatrick did not call the police after she learned of the contents of A.C.'s blog, and she did not miss any classes as a result of the blog incident other than when Principal Diskin pulled her out of class to tell her about the blog on May 20.

Each one of the witnesses testified in a manner that was forthright, direct, and thorough and as such, I found their testimony to be credible. Based on the testimony presented at the hearing, I further **FIND** as **FACT**:

During the 2012-2013 school year, A.C. did well academically, but admitted that she "had a lot of issues in sixth grade," such that she "was angry," "insecure" and "super awkward."

In the sixth grade, she created a blog in which "I basically wrote about my thoughts" and "things I was upset about." She also "posted pictures of cute animals" and made book recommendations.

Her blog also included a "rants" section in which she posted several rants about Ms. Idell, Ms. Fitzpatrick, and Ms. Merino, who were teachers at Eisenhower.

A.C. "ranted" about Ms. Idell because Ms. Idell had repeatedly mispronounced A.C.'s first name to rhyme with "rice." However, after A.C. wrote for Ms. Idell's class a particular essay about how A.C. related to a story character who "had an ethic name ... and faced like racism because people pronounced it incorrectly," Ms. Idell stopped mispronouncing A.C.'s name.

The rants about Ms. Fitzpatrick and Ms. Merino featured violent statements about inflicting physical harm on those teachers. While A.C. was "really angry" when she made those statements, she was "venting" and did not intend to inflict physical harm on the teachers. The statements were "jokes" that A.C. "thought would make my friends laugh." She did not communicate the statements directly to the teachers.

Although A.C.'s blog was not password-protected, she only shared the blog's web address – ginypigluver.weebly.com – with a small circle of girlfriends who also attended Eisenhower. All of A.C.'s blog entries were made off-campus on a personal computer. A.C. did not use school computers to work on her blog.

On the afternoon of Friday, May 17, 2013, E.K. reported the blog's existence to school staff. As a result, several staff members, including Principal Diskin, Assistant Principal Filippello, Ms. Patullo, and Ms. Piscadlo, spent the afternoon investigating the

matter and meeting with A.C. and P.C. The police were not called to the school and no classes were canceled.

As a result of the blog's contents about certain teachers, Principal Diskin suspended A.C. from school for five days. Eisenhower staff also referred A.C. for a psychiatric evaluation because A.C. made statements about killing herself or others in the presence of Ms. Filippello and Ms. Piscadlo. The evaluation showed that A.C. was not "an imminent danger" to herself or others. The evaluators recommended "outpatient counseling services," but P.C. did not pursue such services for A.C.

At the direction of the superintendent, Principal Diskin did not notify the teachers who the subjects of A.C.'s blog "rants" until Monday, May 20, 2013. He did not notify the teachers on May 17 because they had already gone home for the weekend and because A.C. was in the care of her parents and going for a psychiatric evaluation, school staff "deemed it that [A.C.] was in a good safe place now and that for that time being our staff was safe." The only safety precautions the school took were "awareness" and "monitor[ing]" the situation upon A.C.'s return to school.

When Principal Diskin told Ms. Fitzpatrick about the blog, she felt threatened and concerned for her safety. However, she did not contact police. She did not miss any classes as a result of the blog incident other than when Principal Diskin pulled her out of class on May 20 to discuss the blog with her.

On May 22, 2013, P.C. told Principal Diskin that Ms. Idell had "intentionally" mispronounced A.C.'s first name. On May 28, 2013, P.C. notified Principal Diskin that E.K. was bullying A.C. on the school bus. In response to the latter complaint, Principal Diskin interviewed E.K., but not A.C., reviewed audible video footage from the school bus, and concluded that there was no bullying, but a mutual conflict between the two students. He did not refer the matter to the school's anti-bullying specialist for an investigation.

In response to P.C.'s complaints regarding teachers, Principal Diskin spoke with Ms. Idell, who admitted to "mistakenly" mispronouncing A.C.'s name. However, it was not until June 13, when P.C. met with several school staff members and alleged that certain teachers were "harassing" A.C., that Principal Diskin ordered a HIB investigation.

The investigation was conducted by Ms. Filippello, an administrator, and not the school's anti-bullying specialist, because the superintendent thought there would be a conflict if the anti-bullying specialist investigated teachers who were in the same union as she. This was the school's first investigation into alleged HIB by teachers.

As part of the investigation, Ms. Filippello interviewed the accused teachers but did not interview A.C. Ms. Filippello concluded that the teachers did not commit HIB acts against A.C. She forwarded her report to Principal Diskin on June 26, 2013. Principal Diskin notified P.C. of the results of the investigation. P.C. did not request a hearing before the Board. On July 23, 2013, the Board adopted the findings that the teachers did not commit HIB acts against A.C. The Board did not issue a written decision.

Post-Hearing Submissions[3]

After the close of testimony, the parties submitted written summations. Petitioners argue that the Board violated A.C.'s free speech rights by suspending her for her off-campus blog despite the absence of any substantial disruption of school operations. In this regard, petitioners point out that the police were not contacted, the teachers who were the subjects of A.C.'s "rants" were not notified of the blog's contents until three days after the existence of the blog was reported to school administrators, and no classes were cancelled. Instead, the only evidence of any disruption was that "the investigation of A.C.'s blog . . . caused staff to interview people and conduct meetings." Petitioners also contend that A.C.'s statements about the teachers were not "threats" that would be

[3] At the time of the submissions, the petitioning parties were P.C. and S.C., on behalf of A.C. Even though A.C. is now the sole petitioner, references to "petitioners" will not be changed when discussing submissions made by P.C. and S.C. on behalf of A.C.

unprotected by the First Amendment, because "the blog posts contained conditional, hyperbolic expressions of feelings, about how A.C. felt and what she 'wanted' to do" and "[n]one of the statements were expressions of an intent to communicate a threat of harm to the teachers." These facts, petitioners maintain, are insufficient to punish A.C. for her off-campus blog.

Petitioners' second post-hearing argument is that the Board violated the Anti-Bullying Act by failing to conduct a HIB investigation into P.C.'s allegation that E.K. was bullying A.C. and by failing to timely respond to, and properly investigate, P.C.'s allegations that teachers were harassing A.C. by mispronouncing her name.

Absent from petitioners' post-hearing brief is any argument regarding Count One of their petition of appeal –

> With regard to the May 17, 2013 HIB investigation, the subsequent 5-day suspension, and the administration's demand that A.C. receive psychiatric clearance before being permitted to return to Eisenhower School, the Board and its employees violated A.C.'s rights under N.J.S.A. 18A:11-1, et seq., N.J.S.A. 18A:40-6, N.J.A.C. 6A:16-1.1, et seq., N.J.A.C. 6A:16-7.1, et seq. and N.J.A.C. 6A:16-8.1, et seq. by failing to provide her with the necessary and appropriate education, remedial and intervention and referral services.

In its post-hearing submission, the Board denies that it violated A.C.'s free speech rights by suspending her because "her speech through her blog posts were both perceived as threatening violence and created a material disruption to the operations of the school and therefore were not entitled to constitutional protection." The "material disruption" identified by the Board is that:

> [a]s a result of the blog, Administration immediately diverted their complete attention to A.C. and the blog to (i) address the contents of the blog, (ii) meet amongst themselves to determine subsequent action (iii) hold phone calls with the Superintendent, (iv) meet with P.C., (v) meet with A.C., (vi)

> meet with the teachers who were identified in the blog, and
> (vii) meet with other students regarding the blog.

Thus, the school staff involved in the matter were "unable to attend to any other matters" while they dealt with the blog situation.

The Board also submits that its "decision to suspend A.C. was further premised upon the expectation of a continued disruption" because "the administration's role in addressing the violent posts carried through the weekend into the following week," Ms. Fitzpatrick "felt threatened and wanted A.C. removed from her class after reading the blog," and Eisenhower "is a small school," such that "[i]t was reasonable for administration to forecast that additional disruption would continue to occur in the school if administration did not respond to the incident immediately."

The Board further contends that the blog postings about teachers were perceived as threats by Principal Diskin, Assistant Principal Filippello, and Ms. Fitzpatrick, and thus the Board "was justified in administering discipline in response to the blog postings and did not violate A.C.'s constitutional rights."

Lastly on the constitutional issue, the Board argues that A.C. did not suffer any damages as a result of the Board's alleged First Amendment violation because the suspension was expunged from her record, and she did not offer any evidence that she otherwise suffered any harm as a result of her suspension.

The Board denies any violation of the Anti-Bullying Act in connection with its investigation into P.C.'s complaints regarding E.K. and the teachers. First, the Board argues that, with regard to teachers mispronouncing A.C.'s name, "P.C. did not allege that this conduct was harassing or bullying, nor did P.C. allege that this conduct was predicated on a distinguishing characteristic," as required by the Anti-Bullying Act. As such, in late May 2013, "Mr. Diskin treated the matter as an ordinary complaint and addressed it with the accused teachers," who denied any wrongdoing. Then, in June 2013, when P.C. used the word "harass" in referring to the mispronunciation of A.C.'s

name by certain teachers, the school investigated the matter, "using its discretion to determine whom should be named as an aggressor and how the investigation should be conducted." Ms. Filippello conducted the investigation instead of the anti-bullying specialist "since the alleged aggressors were staff and colleagues of the anti-bullying specialist" and the school "conducted a thorough investigation and reached a fair determination within the time limits set forth under the law."

As for the decision to not conduct a formal HIB investigation into P.C.'s allegations that E.K. was bullying A.C. on the school bus, the Board notes that Principal Diskin spoke with E.K., who told him that both E.K. and A.C. had called each other "losers" and that the principal reviewed audible video footage from the school bus that the two students rode together, and that Principal Diskin concluded that the conflict between the two students did not involve a distinguishing characteristic as required by the Anti-Bullying Act.

The Board, unlike petitioners, addressed Count One in its brief. The Board maintains that it did not violate the school laws, including N.J.S.A. 18A:11-1, et seq., N.J.S.A. 18A:40-6, N.J.A.C. 6A:16-1.1, et seq., N.J.A.C. 6A:16-7.1, et seq. and N.J.A.C. 6A:16-8.1, et seq., "by failing to provide her with the necessary and appropriate education, remedial and intervention and referral services" in response to the blog incident. The Board asserts that it followed proper procedure by referring A.C. for a psychiatric evaluation, and that it took proper precaution upon her return from her suspension, as "A.C.'s counselor monitored A.C. by checking in with A.C. and with her teachers." The Board also notes that the PESS staff recommended "outside counseling" and that "the school does not offer psychological services."

LEGAL DISCUSSION AND CONCLUSIONS OF LAW

There are three main legal issues in this matter. The first issue is whether the Board violated various education laws by failing to provide A.C. with support services after she returned to school from her five-day suspension. The second issue is whether the Board

violated certain procedural requirements under the Anti-Bullying Act in response to P.C.'s HIB complaints against E.K. and Eisenhower teachers. The third issue is whether the Board violated A.C.'s First Amendment rights by suspending her for the contents of her off-campus blog. Each issue shall be addressed in turn.

I. Whether the Board violated various statutory and regulatory provisions by failing to provide A.C. with support services after she returned from her suspension.

Petitioners complain that the Board "violated A.C.'s rights under N.J.S.A. 18A:11-1, et seq., N.J.S.A. 18A:40-6, N.J.A.C. 6A:16-1.1, et seq., N.J.A.C. 6A:16-7.1, et seq. and N.J.A.C. 6A:16-8.1, et seq. by failing to provide her with the necessary and appropriate education, remedial and intervention and referral services." While petitioners did not address this issue in their post-hearing briefs, petitioners alleged in their amended petition that, after A.C. was discharged from PESS on May 17, Eisenhower staff did not refer her for interventional and referral services (I&RS) "to consider her eligibility for a Section 504 Accommodation Plan" or for an evaluation to assess her eligibility for special education, and that A.C. was not "offered school-based counseling services or [I&RS]." Second Amended Petition of Appeal, ¶ 21. Unlike petitioners, the Board addressed this allegation in their post-hearing submission, denying any wrongdoing in terms of the support services petitioners allege that A.C. should have, but did not, receive after her suspension. For the reasons that follow, I **CONCLUDE** that the Board did not violate any regulatory or statutory provisions regarding support services, as alleged by petitioners.

First, to the extent that petitioners allege that Eisenhower staff failed to consider A.C.'s eligibility for Section 504 or special education services, the Commissioner does not have jurisdiction over such claims. Instead, "[f]or students age three through 21, a due process hearing may be requested when there is a disagreement regarding identification, evaluation, reevaluation, classification, educational placement, the provision of a free, appropriate public education, or disciplinary action" under Section 504 or the Individuals with Disabilities Education Act (IDEA), 20 U.S.C. §§ 1400-1485. N.J.A.C. 6A:14-2.7(a)

and (w). Due process hearing requests shall be made to and are under the jurisdiction of the Office of Special Education (OSE or OSEP). N.J.A.C. 6A:14-2.7(c); N.J.A.C. 6A:3-1.3(e).

However,

> [i]f a petition appears to raise, in addition to issues within scope of the Commissioner's authority, issues requiring a determination under State statutes or rules governing special education, the Individuals with Disabilities Education Act (IDEA), or Section 504 of the Rehabilitation Act, and the petition has not been concurrently filed with the OSEP, it will be docketed by the Office of Controversies and Disputes in accordance with this chapter and also forwarded to OSEP for docketing as a special education matter pursuant to N.J.A.C. 6A:14-2.7.
>
> N.J.A.C. 6A:3-1.3(e).

Yet here, other than a vague allegation of a failure to evaluate A.C. under Section 504 or the IDEA, petitioners did not specifically claim that the Board violated those statutes or seek relief thereunder. Thus, the petition of appeal insufficiently identified "issues requiring a determination under" special education law and necessitating concurrent docketing with OSE.

For these reasons, petitioners' bare allegation regarding Section 504 and the IDEA will not be considered as part of this matter.

Second, a review of the provisions cited by petitioners raises questions about what exactly petitioners maintain was the Board's obligation in terms of providing A.C. other support services. N.J.S.A. 18A:11-1 is a general provision regarding a school board's powers and duties and requires, for instance, that a school board "[p]erform all acts and do all things . . . necessary for the lawful and proper conduct, equipment and maintenance of the public schools of the district." Similarly, N.J.S.A. 18A:40-6 generally states that "[t]he board of education of any district may provide such equipment, supplies, and

services as in its judgment will aid in the preservation and promotion of the health of the pupils." However, it is unclear how the Board violated these provisions as far as A.C. is concerned. Even if the provisions apply as alleged, the facts reveal that Eisenhower staff tried to ensure proper conduct in the school by referring A.C. for a psychiatric evaluation and by keeping an eye on her after she returned from her suspension. And as the Board points out, the PESS staff cleared her to return to school and recommended "outpatient counseling services," i.e., counseling outside of the school setting.

Moreover, it is disingenuous of petitioners to blame the Board for failing to provide A.C. with "school-based counseling services" when P.C. told Principal Diskin that P.C. would seek outside counseling through the family's church but testified that A.C. did not, in fact, receive any outside counseling.

N.J.A.C. 6A:16-1.1 to -11.1 govern school district programs to support student development. These provisions include N.J.A.C. 6A:16-7.1, which requires a school district to establish and implement a student code of conduct that, among other things, "[f]oster[s] the health, safety, and social and emotional well-being of students," and N.J.A.C. 6A:16-8.1, which requires school boards to "establish and implement in each school building in which general education students are served a coordinated system for planning and delivering intervention and referral services designed to assist students who are experiencing learning, behavior, or health difficulties[.]" Again, it is not clear in what way petitioners believe the Board violated these provisions because petitioners did not elaborate on this claim in their post-hearing briefs. It is petitioners' burden to show that the Board violated these provisions, and there is an absence of evidence to support such a conclusion.

Instead, the record shows that the Eisenhower staff took steps to ensure A.C.'s well-being after the blog incident, and there is insufficient evidence that A.C. was suffering from mental health issues upon her return from suspension. First, school staff referred A.C. for a psychiatric evaluation to determine whether A.C. might harm herself or others and A.C. was psychiatrically cleared to return to school as a result of the evaluation. And

again, even though the psychiatric staff recommended that A.C. receive "outside counseling," P.C. admitted that he did not pursue any outside counseling for A.C.

Second, the school counselor, Ms. Piscadlo, testified that she met with A.C. twice after A.C. returned to school and that A.C. told her she was fine.

In sum, the record is bereft of evidence indicating that the Board or its employees violated the statutory and regulatory provisions cited by petitioners by failing to offer A.C. "school-based counseling services or [I&RS]."

As a result, I **CONCLUDE** that petitioners have failed to show that the Board "violated A.C.'s rights under N.J.S.A. 18A:11-1, et seq., N.J.S.A. 18A:40-6, N.J.A.C. 6A:16-1.1, et seq., N.J.A.C. 6A:16-7.1, et seq. and N.J.A.C. 6A:16-8.1, et seq. by failing to provide her with the necessary and appropriate education, remedial and intervention and referral services."

II. Whether the Board violated the Anti-Bullying Act by failing to timely or sufficiently respond to P.C.'s claims that A.C. had been bullied by E.K. and harassed by teachers who intentionally mispronounced her first name.

As a threshold matter, I have a jurisdictional concern that petitioners' claim that the Board violated the Anti-Bullying Act offends the "90-day rule" for filing petitions of appeal with the Commissioner of Education. Under that rule, "[t]he petitioner shall file a petition no later than the 90th day from the date of receipt of the notice of a final order, ruling, or other action by the district board of education, individual party, or agency, that is the subject of the requested contested case hearing." N.J.A.C. 6A:3-1.3(i). As the Supreme Court has explained, the "90-day rule" serves the dual purposes of (1) stimulat[ing] litigants to pursue a right of action within a reasonable time so that the opposing party may have a fair opportunity to defend, thus preventing the litigation of stale claims" and (2) "penaliz[ing] dilatoriness and serv[ing] as a measure of repose by giving security and

stability to human affairs."[4] Kaprow v. Bd. of Educ. of Berkeley Twp., 131 N.J. 572, 587 (1993) (citations and quotations omitted). Thus, an untimely claim may be dismissed.

Here, petitioners allege that they were not notified "whether the Superintendent of Schools or the Board of Education, or both, took formal action to adopt, modify or reject the findings of those District employees who undertook the investigation."[5] Second Amended Petition, ¶ 36. Thus, according to petitioners, they "were denied their right to challenge the results of the District's HIB investigation." Id. at ¶37. In response, the Board denied the allegations and set forth as an affirmative defense that "[p]etitioners' claims are barred under N.J.A.C. 6A:3-1.3(i)'s Ninety (90) Day Rule." Answer to Second Amended Petition, ¶ 37; Fourteenth Affirmative Defense.

In my September 20, 2018, order granting in part and denying in part the Board's motion for summary decision, I noted petitioners' allegation that they had been denied an opportunity to challenge the HIB findings regarding the teachers. However, I also noted that Principal Diskin notified petitioners of the HIB investigation results in a letter, dated June 25, 2013. I further found that "the papers do not indicate . . . that the Board issued a written decision with respect to its finding that A.C. was not the victim of HIB," but that the Board merely submitted with its motion the minutes from its July 23, 2018, meeting at which the Board adopted the superintendent's report.

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[4] The ninety-day rule may be relaxed "in any case where a strict adherence thereto may be deemed inappropriate or unnecessary or may result in injustice." N.J.A.C. 6A:3-1.16. However, the rule is relaxed only for compelling reasons, including "cases involving (1) important and novel constitutional questions; (2) informal or *ex parte* determinations of legal questions by administrative officials; and (3) important public rather than private interests which require adjudication or clarification." Brunetti v. Bor. of New Milford, 68 N.J. 576, 586 (1975).

[5] In the original petition, filed with the Commissioner on January 21, 2014, petitioners exclusively sought a reversal of the Board's November 2013 HIB decision that A.C. bullied classmates. However, included in the original petition was an allegation that the Board improperly investigated P.C.'s HIB claims against E.K. and the teachers. On November 4, 2016, I allowed petitioners to amend their petition, and petitioners did so on September 17, 2017, to include several other counts or claims, including a count that the Board violated the Anti-Bullying Act with respect to P.C.'s HIB allegations. Pursuant to R. 4:9-3, "[w]henever the claim or defense asserted in the amended pleading arose out of the conduct, transaction or occurrence set forth or attempted to be set forth in the original pleading, the amendment relates back to the date of the original pleadings." Thus, the claims in the amended petition filed on September 17, 2017, relate back to the time of the filing of the original petition on January 21, 2014.

At the hearing, P.C. offered no testimony regarding the Board's alleged denial of P.C.'s right to challenge the HIB findings regarding the teachers. However, the Board similarly failed to provide any testimony or provide other proof that the Board issued a written decision as required by law, or that petitioners received notice of the Board's July 23, 2013, decision.

Under the Anti-Bullying Act, "[a] parent or guardian may request a hearing before the board after receiving the information [about the investigation results], and the hearing shall be held within 10 days of the request." N.J.S.A. 18A:37-15(b)(6)(d). By letter, dated June 25, 2013, petitioners received from Principal Diskin the results of the HIB investigation into the teachers. However, petitioners did not "request a hearing before the board after receiving the information." Yet, while at its July 23, 2013, meeting, the Board adopted "the Superintendent's report of alleged HIB incidents and investigations for July 18, 2013, as well as the recommendation of the Board's HIB Committee to affirm the determinations and actions specified," the Board did not follow its procedural obligation to "issue a decision, in writing, to affirm, reject, or modify the superintendent's decision." N.J.S.A. 18A:37-15(b)(6)(e). If the Board had issued a written decision, that would have then started the ninety-day period in which petitioners could have appealed the decision under N.J.A.C. 6A:3-1.3(i) and N.J.S.A. 18A:37-15(b)(6)(e), which states that "[t]he board's decision may be appealed to the Commissioner of Education, in accordance with the procedures set forth in law and regulation, no later than 90 days after the issuance of the board's decision."

Because there is no evidence showing that the Board issued a written decision as required by law, I **CONCLUDE** that petitioners did not receive "notice of a final order, ruling, or other action by the district board of education" and thus, by filing a petition of appeal with the Commissioner on January 21, 2014, did not violate the ninety-day rule by then challenging certain aspects of the Board employees' HIB investigation (or lack thereof) into P.C.'s claims against E.K. and certain teachers. Thus, it is appropriate to address the substance of petitioners' claim that the Board violated various requirements

under the Anti-Bullying Act in response to P.C.'s report of possible HIB acts against A.C. by teachers and a classmate.

The Anti-Bullying Act is designed "to strengthen the standards and procedures for preventing, reporting, investigating, and responding to incidents of harassment, intimidation, and bullying of students that occur in school and off school premises."[6] N.J.S.A. 18A:37-13.1(f). Under the act, HIB is defined as:

> [A]ny gesture, any written, verbal or physical act, or any electronic communication, whether it be a single incident or a series of incidents, that is reasonably perceived as being motivated either by any actual or perceived characteristic, such as race, color, religion, ancestry, national origin, gender, sexual orientation, gender identity and expression, or a mental, physical or sensory disability, or by any other distinguishing characteristic, that takes place on school property, at any school-sponsored function, on a school bus, or off school grounds as provided for in section 16 of P.L.2010, c.122 (C.18A:37-15.3), that substantially disrupts or interferes with the orderly operation of the school or the rights of other students and that:
>
> > a. a reasonable person should know, under the circumstances, will have the effect of physically or emotionally harming a student or damaging the student's property, or placing a student in reasonable fear of physical or emotional harm to his person or damage to his property;
> >
> > b. has the effect of insulting or demeaning any student or group of students; or
> >
> > c. creates a hostile educational environment for the student by interfering with a student's education or by severely or pervasively causing physical or emotional harm to the student.
>
> [N.J.S.A. 18A:37-14.]

[6] The act was recently amended to add several other procedural requirements regarding HIB investigations. L. 2021, c. 338. However, the amendments became effective in 2022, and the Board's and Eisenhower staff's actions must be assessed in light of the Anti-Bullying Act's requirements as they existed in 2013.

Each school district must adopt a policy that prohibits HIB and provides for a prompt response to any alleged HIB incident. N.J.S.A. 18A:37-15. Once an alleged HIB incident is reported to the school principal, the principal must initiate an investigation within one school day of the report. N.J.S.A. 18A:37-15(b)(6). The investigation shall be conducted by a school anti-bullying specialist, but "the principal may appoint additional personnel who are not school anti-bullying specialists to assist in the investigation." Ibid. The investigation shall be completed within ten days of the initial HIB complaint. Ibid.

The results of the investigation shall then be quickly reported to the superintendent of schools, who may take certain remedial action. Ibid. The results shall also be reported to the board of education "no later than the date of the board of education meeting next following the completion of the investigation, along with information on any services provided, training established, discipline imposed, or other action taken or recommended by the superintendent." Ibid.

The parents of the students involved in any alleged HIB incident are entitled to receive information about the nature of the investigation and the results of the investigation. Ibid. The parents may request a hearing before the board, and the hearing must be held within ten days of the request. Ibid. Any hearing shall be held in executive session to protect the identity of any students involved. Ibid. The board may hear from the anti-bullying specialist about the incident, recommendations for discipline or services, and any programs instituted to reduce such incidents. Ibid.

And as noted above, a board must issue a written decision at the first meeting after its receipt of the investigation report. Ibid. The board may affirm, reject, or modify the superintendent's decision. Ibid. The board's decision may be appealed to the Commissioner of Education. Ibid.

An action by a board of education "is entitled to a presumption of correctness and will not be upset unless there is an affirmative showing that such decision was arbitrary,

capricious or unreasonable." Thomas v. Morris Twp. Bd. of Educ., 89 N.J. Super. 327, 332 (App.Div.1965.) Thus, to prevail, those challenging a HIB decision made by a board of education "must demonstrate that the Board acted in bad faith, or in utter disregard of the circumstances before it." G.H. & E.H. ex rel. K.H. v. Bd. of Educ. of the Bor. of Franklin Lakes, EDU 13204-13, Initial Decision (February 24, 2014) (citation omitted), adopted, Comm'r (April 10, 2014) http://njlaw.rutgers.edu/collections/oal/. Also, a board's decision may be overturned if its determination violates the legislative policies expressed or implied in the governing act. J.A.H. ex rel. C.H. v. Twp. of Pittsgrove Bd. of Educ., EDU 10826-12, Initial Decision (March 11, 2013) (citing Campbell v. Dep't of Civil Serv., 39 N.J. 556, 562 (1963)), adopted, Comm'r (April 25, 2013) http://njlaw.rutgers.edu/collections/oal/.

Considering these procedural requirements, I **CONCLUDE** that the Board violated the Anti-Bullying Act in several respects after P.C. complained to Principal Diskin about E.K. and Eisenhower teachers. First, regarding petitioners' claim that the Board failed to properly investigate P.C.'s HIB allegation against E.K., the record shows that P.C. told the principal at their May 28, 2013, meeting that E.K. was "making fun of A.C. on the bus." In response, the school did not conduct a HIB investigation, as required by N.J.S.A. 18A:37-15(b)(6)(d). That is, instead of directing the school's anti-bullying specialist to conduct an investigation, Principal Diskin conducted his own investigation in which he spoke with E.K., but not A.C., and reviewed audible video footage from the school bus. Principal Diskin then determined that it was not bullying, but a mutual conflict in which A.C. and E.K. called each other names. By failing to initiate an investigation by the school's anti-bullying specialist within one day of receiving P.C.'s HIB complaint against E.K., Principal Diskin, and therefore the Board, violated the procedural requirements of the Anti-Bullying Act.

Second, the Board violated the Anti-Bullying Act in response to P.C.'s complaint about certain teachers intentionally mispronouncing A.C.'s name. Although on May 22, 2013, P.C. notified Principal Diskin that Ms. Idell was intentionally mispronouncing A.C.'s name, Principal Diskin did not initiate a HIB investigation within one day as required by

law, but instead he spoke with Ms. Idell, who told the principal that she had mistakenly mispronounced A.C.'s name. An allegation that a teacher was "intentionally" mispronouncing a student's name was sufficient to have triggered a formal HIB investigation within one day of the complaint.

However, it was not until June 13, when P.C. met with school staff and again alleged that teachers were "harassing" A.C, that a HIB investigation was then initiated – because, according to the ensuing HIB report, "the word harassment was used[.]" The first problem with the investigation is that it was initiated on June 13, or twenty-two days after P.C. first alleged on May 22 that Ms. Idell was intentionally mispronouncing A.C.'s name. By failing to timely initiate the HIB investigation, Eisenhower staff also failed to timely complete the investigation, in violation of the Anti-Bullying Act, which requires that investigations be completed within ten days of the principal's receipt of a HIB complaint. In this instance, a formal HIB investigation – at least of Ms. Idell – should have been completed by June 1, which was ten days after P.C. notified Principal Diskin that Ms. Idell was intentionally mispronouncing A.C.'s name.

And even assuming Eisenhower staff did not have sufficient information to initiate a HIB investigation until June 13, the record shows that the HIB report was not sent to the principal until June 26, or thirteen days after P.C. met with school staff to again complain about mistreatment of A.C. by teachers.[7] (R-11.) This is also a violation of the ten-day requirement for the completion of HIB investigations.

Another problem with the investigation is that it was conducted by Ms. Filippello, and not the school's anti-bullying specialist, Ms. Patullo, as required by law. Diskin testified that the superintendent determined that Ms. Patullo had a conflict due to the fact she was in the same union as the accused teachers. However, the Anti-Bullying Act provides that "[t]he principal in each school in a school district shall appoint a school anti-

[7] I do note, however, that Principal Diskin notified petitioners of the HIB investigation results in a letter, dated June 25th, indicating that the principal may have received Ms. Filippello's report sooner than June 26th, as stated in the actual HIB report.

bullying specialist;" that "[w]hen a school guidance counselor, school psychologist, or another individual similarly trained is currently employed in the school, the principal shall appoint that individual to be the school anti-bullying specialist;" and that the specialist shall "lead the investigation of incidents of harassment, intimidation, and bullying in the school" and "act as the primary school official responsible for preventing, identifying, and addressing incidents of harassment, intimidation, and bullying in the school." N.J.S.A. 18A:37-20. The requirement that the anti-bullying specialist be the lead investigator is also included in N.J.S.A. 18A:37-15. The law does not distinguish between investigations of students and teachers. The fact that Ms. Filippello, and not Ms. Patullo, the school's anti-bullying specialist, conducted the investigation into alleged teacher HIB misconduct, was a violation of the Anti-Bullying Act.

There have been many cases in which teachers have been accused of committing HIB acts against students. See, e.g., Mosser v. Bd. of Educ. of the City of Union, 2021 N.J. AGEN LEXIS 458 (Dec. 2, 2021); Sohl v. Bd. of Educ. of the Town of Boonton, 2021 N.J. AGEN LEXIS 137 (May 18, 2021); DeFalco v. Bd. of Educ. of the Township of Hamilton, 2019 N.J. AGEN LEXIS 732 (July 26, 2019). Because the anti-bullying specialist is also the school guidance counselor, school psychologist, or other teaching staff member, there would always be a "conflict" if the anti-bullying specialist must investigate an accused colleague who is a member of the same teachers' union. But the law requires the anti-bullying specialist, who is specifically trained in investigating HIB complaints, to conduct HIB investigations, whether the accused is a student or a teacher. N.J.S.A. 18A:37-26 (providing for inservice workshops and training programs for anti-bullying specialists.) Of course, if the anti-bullying specialist was accused of HIB, there would be an actual conflict that would certainly necessitate that an alternate staff member lead the investigation, but the fact that the anti-bullying specialist is in the same union as an accused teacher does not, by itself, excuse a principal from directing the anti-bullying specialist to conduct the investigation. Perhaps the superintendent was being overly cautious by ordering Diskin to have someone not in the teachers' union conduct the investigation since it was the school's first case in which a teacher was accused of HIB.

Nonetheless, it was a violation of the HIB law to have Ms. Filippello, and not Ms. Patullo, conduct the investigation.

Yet another problem with the investigation is that A.C. was not interviewed as part of the investigation. When asked why A.C. was not interviewed, Ms. Filippello answered, "because [A.C.] was also involved with another case that was going on under investigation in our school." Instead, Ms. Filippello only interviewed teachers, and based on her investigation she concluded that "there wasn't enough . . . information to support the allegation." However, by failing to interview A.C., Ms. Filippello heard only one side of the story.

If Ms. Filippello had interviewed A.C., she may have reached a different conclusion, at least with respect to the allegation against Ms. Idell. As A.C. testified at the hearing in this matter, Ms. Idell had repeatedly mispronounced her name to rhyme with "rice" since the beginning of the 2012-2013 school year. At first, A.C. would correct her, "but it didn't seem to like make a difference, so I stopped at one point." The fact that Ms. Idell kept mispronouncing her name "annoyed" A.C. A.C. further testified that, "at first I didn't know she was doing it on purpose, I thought she was just like really stupid," and she responded, "I don't think so," when asked by her counsel if she thought Ms. Idell had accidentally mispronounced her name. Finally, A.C. testified that it was not until she wrote an essay for Ms. Idell's class that Ms. Idell stopped mispronouncing A.C.'s name. In that essay, A.C. wrote about how she related to the main character in a story who "had an ethnic name . . . and faced like racism because people pronounced it incorrectly." While problematic, the failure to interview A.C. as part of the HIB investigation is not a specific violation of the Anti-Bullying Act.

However, the failure to conduct a thorough investigation that includes an interview of the alleged target of HIB could, under certain circumstances, lead to the conclusion that a school board that makes a HIB decision based on such a faulty investigation acted arbitrarily or unreasonably. Here, though, it is important to note that petitioners do not specifically allege that the Board's July 23, 2018, HIB decision was arbitrary, capricious,

or unreasonable, or seek relief in the form of a reversal of that HIB decision. Instead, "petitioners demand judgment granting an Order that the [Board] and its employees, by failing to open and conduct a HIB investigation of certain teachers and a certain student as requested by P.C. in May of 2013, violated A.C.'s rights, as secured by the [Anti-Bullying Act]" and "petitioners demand judgment granting an Order that the [Board] and its employees, by waiting more than 30 days after the receipt of P.C.'s HIB complaint against some of A.C.'s 6th grade teachers and a classmate on A.C.'s bus, to open a formal HIB investigation . . . on or about June 17, 2013, violated A.C.'s rights as secured by the [Anti-Bullying Act]." Second Amended Petition. Thus, I am not asked to, nor will I, assess the validity of the Board's July 23, 2018, HIB decision. However, I **CONCLUDE** that because, as noted above, there is no evidence that the Board issued a written HIB decision regarding the teachers, and because that is the basis for my conclusion that petitioners' HIB claims do not violate the ninety-day rule, the Board violated N.J.S.A. 18A:37-15(b)(6)(e) by neglecting to issue a written HIB decision at or after its July 23, 2013, meeting at which it determined that the teachers did not commit acts of HIB against A.C.

In sum, and based on the foregoing, I **CONCLUDE** that the Board violated the Anti-Bullying Act by failing to conduct a formal HIB investigation into P.C.'s bullying allegation against E.K. and by failing to timely investigate P.C.'s HIB claims against certain teachers; by failing to have the anti-bullying specialist conduct the eventual investigation into P.C.'s HIB claims against teachers; and by failing to issue a written HIB decision.

III. Whether the Board violated A.C.'s First Amendment right to free speech by suspending her for the contents of her off-campus blog.[8]

Prior to a determination whether the Board violated A.C.'s free speech rights by suspending her for violent statements she made in her off-campus blog about certain teachers at her school, it is important to lay out a school's general authority under state law to discipline students for misconduct away from school grounds. This is so because the state regulation that sets forth a school's authority to discipline students for off-campus conduct, N.J.A.C. 6A:16-7.5, clearly recognizes that such authority may be limited by a student's First Amendment rights.

Under N.J.A.C. 6A:16-7.5, "[s]chool authorities have the right to impose a consequence on a student for conduct away from school grounds" if the following conditions are met. N.J.A.C. 6A:16-7.5(a). First, "[t]his authority shall be exercised only when it is reasonably necessary for the student's physical or emotional safety, security, and well-being or for reasons relating to the safety, security and well-being of other students, staff or school grounds[.]" N.J.A.C. 6A:16-7.5(a)(1). Second, "[t]his authority shall be exercised only when the conduct that is the subject of the proposed consequence materially and substantially interferes with the requirements of appropriate discipline in the operation of the school." N.J.A.C. 6A:16-7.5(a)(2).

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[8] Importantly, "the Court has repeatedly acknowledged and approved the administrative handling of educational controversies that arise in the context of constitutional and statutory litigation" because "ultimate constitutional issues are especially fact-sensitive and relate primarily to areas of educational specialization." Abbott v. Burke, 100 N.J. 269, 300 (1985) (citations omitted). As such, this matter, which implicates fact-sensitive constitutional issues in the educational context, is appropriately before the Commissioner of Education, who transmitted the controversy to the OAL for a hearing. The OAL has been tasked with "conduct[ing] a thorough hearing" for the "development of a complete and informed record, which will reflect determinations of administrative issues as well as the resolution of factual matters material to the ultimate constitutional issues." Id. at 303. And "in order to discharge this responsibility in a way that makes sense, the first-instance decision makers, the ALJ and the agency head, must fully address such constitutional issues raised as are necessary to the decision, and resolve them in principled fashion by their best lights, subject, of course, to judicial review." Jones v. Dep't of Cmnty. Affairs, 395 N.J. Super. 632, 636-37 (App.Div.2007) (citing Roadway Express, Inc. v. Kingsley, 37 N.J. 136, 14-42 (1962)).

This second requirement is rooted in the United States Supreme Court's First Amendment jurisprudence regarding students' freedom of speech.[9] Specifically, in Tinker v. Des Moines Indep. Cmty. Sch. Dist., 393 U.S. 503, 506 (1969), the Court famously held that "[i]t can hardly be argued that . . . students . . . shed their constitutional rights to freedom of speech or expression at the schoolhouse gate," and school officials cannot punish them for exercising those rights unless such "conduct would 'materially and substantially interfere with the requirements of appropriate discipline in the operation of the school[.]'" Id. at 509 (quoting Burnside v. Byars, 363 F.2d 744, 749 (5th Cir. 1966)).

In that case, the Court ruled that an Iowa School District improperly suspended several high school students for exercising their right to free speech by wearing black armbands to school in 1965 to protest the Vietnam War. Id. at 504. In reversing the discipline imposed on the children, the Court explained that there was an absence of facts showing that the students' conduct materially and substantially interfered with school operations. The student protesters merely engaged in "a silent, passive expression of opinion" and there was "no evidence whatever of [the students'] interference, actual or nascent, with the schools' work or of collision with the rights of other students to be secure and to be let alone." Id. at 508. While "[o]utside the classrooms, a few students made hostile remarks to the children wearing armbands [,] there were no threats or acts of violence on school premises." Ibid.

According to the Court, "[i]n order for the State in the person of school officials to justify prohibition of a particular expression of opinion, it must be able to show that its action was caused by something more than a mere desire to avoid the discomfort and

[9] The First Amendment to the United States Constitution protects several individual rights, including the freedom of speech. U.S. Const. amend I; see also N.J. Const. art. VI (providing that "[e]very person may freely speak, write and publish his sentiments on all subjects, being responsible for the abuse of that right"). Of course, "[t]he First Amendment restriction on governmental interference with free speech was made applicable to the states by the Fourteenth Amendment to the United States Constitution." Hamilton Amusement Ctr. v. Verniero, 156 N.J. 254, 264-65 (1998). As the New Jersey Supreme Court has explained, "[b]ecause we ordinarily interpret our State Constitution's free speech clause to be no more restrictive than the federal free speech clause, '[w]e rely on federal constitutional principles in interpreting the free speech clause of the New Jersey Constitution.'" Id. at 265 (citing and quoting Shelton Coll. v. State Bd. of Educ., 48 N.J. 501, 518 (1967), Karins v. City of Atlantic City, 152 N.J. 532, 547 (1998); Bell v. Twp. of Stafford, 110 N.J. 384, 393 (1988)).

unpleasantness that always accompany an unpopular viewpoint." Id. at 509. Instead, there must be "facts which might reasonably have led school authorities to forecast substantial disruption of or material interference with school activities[.]" Id. at 514. But because the students in Tinker "neither interrupted school activities nor sought to intrude in the school affairs or the lives of others" and because "[t]hey caused discussion outside of the classrooms, but no interference with work and no disorder," the Court concluded that "our Constitution [did] not permit officials of the State to deny their form of expression." Ibid.

And while Tinker involved on-campus student speech, the Court recently announced in Mahanoy Area Sch. Dist. v. B.L., 141 S. Ct. 2038 (2021), that the Tinker standard that school officials may regulate speech that materially and substantially interferes with school operations applies to off-campus student speech.[10] However, the Court in Mahanoy declined to "set forth a broad, highly general First Amendment rule stating just what counts as 'off campus' speech and whether or how ordinary First Amendment standards must give way off campus to a school's special need to prevent, e.g., substantial disruption of learning-related activities or the protection of those who make up a school community." Id. at 2045.

Nonetheless, the Court noted that "[t]he school's regulatory interests remain significant in some off-campus circumstances" including "serious or severe bullying or harassment targeting particular individuals; threats aimed at teachers or other students; the failure to follow rules concerning lessons, the writing of papers, the use of computers, or participation in other online school activities; and breaches of school security devices, including material maintained within school computers." Ibid.

[10] In so doing, the Court disagreed with the Third Circuit's conclusion below that "*Tinker* does not apply to off-campus speech." B.L. v. Mahanoy Area Sch. Dist., 964 F.3d 170, 186 (3d Cir. 2020). And while the Supreme Court issued its opinion in B.L. after the occurrence of the facts in this matter, the Court's holding is nonetheless instructive in determining the constitutional issue in this case. Moreover, it was assumed in this matter that the Tinker standard applied to A.C.'s off-campus blog, and the parties addressed the issue.

The Court also "mention[ed] three features of off-campus speech that often, even if not always, distinguish schools' efforts to regulate that speech from their efforts to regulate on-campus speech" and stated that "[t]hose features diminish the strength of the unique educational characteristics that might call for special First Amendment leeway." Id. at 2046.

According to the Court, the first feature is that "a school, in relation to off-campus speech, will rarely stand *in loco parentis*, or "in the place of students' parents under circumstances where the children's actual parents cannot protect, guide, and discipline them." Ibid. Thus, "[g]eographically speaking, off-campus speech will normally fall within the zone of parental, rather than school-related, responsibility." Ibid. The second feature is that "from the student speaker's perspective, regulations of off-campus speech, when coupled with regulations of on-campus speech, include all the speech a student utters during the full 24-hour day," such that "courts must be more skeptical of a school's efforts to regulate off-campus speech, for doing so may mean the student cannot engage in that kind of speech at all." Ibid. As such, "[w]hen it comes to political or religious speech that occurs outside school or a school program or activity, the school will have a heavy burden to justify intervention." Ibid. And the third feature is that "the school itself has an interest in protecting a student's unpopular expression, especially when the expression takes place off campus" because "America's public schools are the nurseries of democracy." Ibid.

Due to "the many different kinds of off-campus speech, the different potential school-related and circumstance-specific justifications, and the differing extent to which those justifications may call for First Amendment leeway," the Court "[left] for future cases to decide where, when, and how these features mean the speaker's off-campus location will make the critical difference," and limited its holding to the facts of the case before the Court. Ibid.

Under those facts, B.L., a Pennsylvania high school student who was cut from the varsity cheerleading team and who did not get to play her position of choice on her softball

team, was suspended from the junior varsity cheerleading team for a year due to captioned Snapchat photos she posted while at a local convenient store on a weekend. Id. at 2042. One photo captured B.L. and a friend holding up their middle fingers, with the caption "Fuck school fuck softball fuck cheer fuck everything." Ibid. As the Court explained, "the images spread" among students and school staff and, "[a]fter discussing the matter with the school principal, the coaches decided that because the posts used profanity in connection with a school extracurricular activity, they violated team and school rules" and suspended B.L. from her cheerleading team. Ibid.

In analyzing B.L.'s speech, the Court said that, while her words were "vulgar," they were not "obscene" or "fighting words" that are "outside the First Amendment's ordinary protection." Ibid (citing Chaplinsky v. New Hampshire, 315 U.S. 568 (1942); Cohen v. California, 403 U.S. 15, 19-20 (1971)). The Court also took note of "when, where, and how B.L. spoke:"

> Her posts appeared outside of school hours from a location outside the school. She did not identify the school in her posts or target any member of the school community with vulgar or abusive language. B.L. also transmitted her speech through a personal cellphone, to an audience consisting of her private circle of Snapchat friends. These features of her speech, while risking transmission to the school itself, nonetheless . . . diminish the school's interest in punishing B. L.'s utterance. [Id. at 2047.]

The Court then considered the school's interest in the context of the "three features" of off-campus speech identified by the Court as diminishing a school's regulatory powers. First, while the school had an "interest in teaching good manners and consequently in punishing the use of vulgar language aimed at part of the school community," "[t]he strength of this anti-vulgarity interest is weakened considerably by the fact that B. L. spoke outside the school on her own time;" in other words, "B.L. spoke under circumstances where the school did not stand in loco parentis." Ibid.

Second, though the "school argue[d] that it was trying to prevent disruption, if not within the classroom, then within the bounds of a school-sponsored extracurricular activity," the Court found "no evidence in the record of the sort of 'substantial disruption' of a school activity or a threatened harm to the rights of others that might justify the school's action. "Ibid. The Court noted that "discussion of the matter took, at most, 5 to 10 minutes of an Algebra class 'for just a couple of days'" and that "some members of the cheerleading team were 'upset' about the content of B.L.'s Snapchats," but there was otherwise no forecast of disruption or actual disruption other than "kids kept asking . . . about it." Id. at 2047-48. According to the Court, "[t]he alleged disturbance here does not meet *Tinker*'s demanding standard." Id. at 2048.

Finally, although the school had "a concern for team morale," there was no evidence of "a substantial interference in, or disruption of, the school's efforts to maintain team cohesion." Ibid.

Due to the school's diminished interests in punishing B.L.'s off-campus speech, the Court held that the school violated her First Amendment right to free speech by suspending her from the team for her Snapchat posts.

Over the years, there have been several other off-campus speech cases arising out of Pennsylvania and New Jersey. For example, in J.S. v. Bethlehem Area Sch. Dist., 569 Pa. 638 (Pa. 2002), the Pennsylvania Supreme Court ruled that a school district did not violate a student's First Amendment rights by suspending him "for creating at home, and posting on the Internet, a web site that, *inter alia,* contained derogatory, profane, offensive and threatening statements directed toward one of the student's teachers and his principal." Id. at 643. On the website, the student asked viewers to "give me $20 to help pay for the hitman" to kill his math teacher and posted a drawing of her "with her head cut off and blood dripping from her neck." Id. at 645.

In Bethlehem, the Court found that the website substantially disrupted "the entire school community – teachers, students and parents." Id. at 674. The targeted math

teacher was so distraught over the website that she took a lengthy medical leave of absence and needed three substitute teachers to fill in for her, "[c]ertain students expressed anxiety about the web site and for their safety" and "visited counselors," "there was a feeling of helplessness and low morale" on campus, and "[c]ertain parents understandably voiced concerns for school safety and questioned the delivery of instruction by substitute teachers." Ibid. Thus, the Court was "satisfied that the School District has demonstrated that [the student's] web site created an actual and substantial interference with the work of the school to a magnitude that satisfies the requirements of Tinker."[11] Id. at 675.

In two cases decided on the same day by the Third Circuit Court of Appeals, J.S. v. Blue Mountain Sch. Dist., 650 F.3d 915 (3d Cir. 2011), and Layshock v. Hermitage Sch. Dist., 650 F.3d 205 (3d Cir. 2011), the Court also dealt with First Amendment issues arising from the suspension of Pennsylvania students who created fake profiles of their respective principals on the social media website MySpace while using home computers. In J.S. and Layshock, the school districts themselves conceded that there was no substantial disruption to their operations even though in J.S. the principal called the police, there were "rumblings" in the hallways and classrooms, and staff members were pulled away from their job duties to address the situation, and in Layshock, the principal also contacted the police, "word of the profile 'spread like wildfire' and soon reached most, if not all, of [the] student body," and the school conducted an investigation into the matter, limited students' use of on-campus computers for several days, and cancelled computer programming classes.

In J.S., "[t]he profile contained adult language and sexually explicit content," but "was so outrageous that no one took its content seriously" and the student testified that "she intended the profile to be a joke between herself and her friends." Id. at 920, 921.

[11] While the Court in Bethlehem deemed the student's website "on-campus speech" because he "facilitated the on-campus nature of the speech by accessing the web site on a school computer in a classroom, showing the site to another student, and by informing other students at school of the existence of the web site," the Court's "substantial disruption" analysis is illuminating in this off-campus speech matter. Id. at 668.

At first, "the profile could be viewed in full by anyone who knew the URL (or address) or who otherwise found the profile by searching MySpace for a term it contained;" however, the next day the student made the profile private by limiting access to her MySpace "friends." Id. at 921. The school district did not assert that the profile created a substantial disruption, but that "it was justified in punishing [the student] under *Tinker* because of 'facts which might reasonably have led school authorities to forecast substantial disruption of or material interference with school activities . . . .'" Id. at 928. To support this argument, the district "contend[ed] that the profile was accusatory and aroused suspicions among the school community about [the principal's] character because of the profile's references to his engaging in sexual misconduct." Id. at 930. However, the Court rejected this argument because "[t]he profile was so outrageous that no one could have taken it seriously, and no one did," and "[t]hus, it was clearly not reasonably foreseeable that [the student's] speech would create a substantial disruption or material interference in school[.]" Ibid.

And in a recent, post-Mahanoy case, the Pennsylvania Supreme Court in J.S. v. Manheim Twp. Sch. Dist., 2021 Pa. LEXIS 3998 (Pa. 2021), again addressed the conflict between "student free speech rights under the First Amendment and the duty of public schools to maintain a safe, effective, and efficient educational environment." Id. at *2. Under the facts of that case, a high school student, using his personal smartphone while at home, created two captioned Snapchat memes depicting a classmate as a potential school shooter and shared the memes with one of his schoolfriends. Id. at **3-4. The friend then posted one of the memes to his personal Snapchat account, rendering the meme "available for approximately five minutes and seen by 20 to 40 other students." Id. at **4-5.

The principal soon thereafter learned of the meme and contacted local police, who "concluded there was no threat to school safety" and that the school could remain open. Id. at **5-6. The superintendent "sent an e-mail to all parents and teachers stating that there had been a threat posted on social media, but that, after investigation, the school and campus were deemed safe." Id. at *6. During its investigation, the student who

created the memes told school authorities that "he intended his on-line conversation with [the friend] to be funny and to remain private." Ibid.

The school district expelled the student under its terroristic threats policy, and argued before the Court that the memes resulted in substantial disruption by causing "apprehension," leading to "an investigation by the administration and local police to determine if the threat was real," and because the two students originally involved "lost educational time due to their being interviewed, and . . . the administration was required to spend time investigating the messages, diverting its time and resources." Id. at *59. However, the Court disagreed, finding instead that "[w]hile [the student's] memes no doubt impacted the school environment to some degree, we do not believe that they rose to the level of a substantial disruption required by *Tinker*." Id. at **59-60.

The Court first acknowledged that "the School District responsibly investigated the possibility of a threat by immediately contacting the police," but noted that "[u]pon receipt of law enforcement's investigation and conclusions that [the student] did not present a threat and that it was safe to attend school the next day, . . . it was the School District that created a disruption by sending an email to parents that a threat had been received." Id. at *60. Moreover, "[w]ith respect to the students at school, the interruption was relatively minor, including conversations, concern, and the campus being 'abuzz'" and "[i]mportantly, there is no allegation that school was missed, classes or instruction interrupted, or the operation of the school was compromised." Ibid. The Court "reject[ed] the School District's assertion that its investigation, and even the increased police presence at school the following day, without more, constituted a significant disruption of the school environment" because "[t]aken to its logical conclusion, under the School District's argument, any off-campus speech which was investigated by a school could be punished as a substantial disruption of the school environment regardless of whether it was protected by the First Amendment." Id. at **60-61.

Finally, in Dunkley v. Greater Egg Harbor Bd. of Educ., 216 F. Supp. 3d 485 (D.N.J. 2016), a district court judge in New Jersey held that a high school student's disparaging

comments about certain classmates on out-of-school YouTube and Twitter postings caused a substantial disruption to school operations. In so holding, the judge explained:

> [the postings] contained HIB speech, about which students and parents complained[.] The administrators were required by state law to investigate the complaints about plaintiff's Twitter account, which took them away from other school duties. This disruption was compounded by plaintiff initially lying about his involvement, causing the school administrators to continue their investigation. Complaints from parents and students about the HIB-speech content of the Twitter account, and an investigation into those complaints, which was stymied by plaintiff's intentional decision to lie about his involvement, constitute the 'material and substantial disruption' to the 'work and discipline of the school' requirement necessary to permit the school to discipline plaintiff for his out-of-school speech.
>
> [Id. at 491.]

Thus, the judge concluded, the school district did not violate the student's free speech rights by suspending him for eleven days. The judge distinguished that case from J.S. and Layshock because the student's social media account "contained disparaging comments directed to students' race, gender and other physical and mental characteristics," and therefore "implicated anti-bullying policies and procedures set in place to manage harassment, intimidation and bullying against other students, whether that harassment, intimidation and bullying occurs on-site or off-site." Id. at 493.

Before applying the Tinker standard to the facts of this case, it is necessary to address the Board's argument that A.C.'s statements about teachers in her blog were "threats" that are not protected by the First Amendment. The Board is correct that, in addition to such utterances as obscenities and fighting words, "true threats" are "one of the well-recognized exceptions" to First Amendment protection. B.L., 964 F.3d at 191 (citing Doe v. Pulaski Cnty. Special Sch. Dist., 306 F.3d 616, 619, 621-27 (8th Cir. 2002)); see also Watts v. United States, 394 U.S. 705 (1969) (holding that "[w]hat is a threat must

be distinguished from what is constitutionally protected speech").[12] Thus, if A.C.'s speech constituted "true threats," there would be no need to analyze the effects of her speech under Tinker and her statements would not be protected under the First Amendment.

A "true threat" must be "a statement that a reasonable recipient would have interpreted as a serious expression of an intent to harm or cause injury to another." Doe, 306 F.3d at 624. The speaker must have "intended to communicate the purported threat . . . to the object of the purported threat or to a third party" and "a reasonable recipient" must perceive the statement "as a serious expression of an intent to harm" another person. Id. at 624, 625.

Here, A.C. intended to communicate the purported threat, not to the objects of the purported threat – the teachers – but to third parties, her friends with whom she shared her blog. And the purported threats eventually reached the teachers when they were told about the contents of A.C.'s blog. Thus, A.C.'s statements satisfy one element of the "true threat" analysis. However, were A.C.'s statements "true threats"? That is, would a reasonable recipient have viewed her violent statements about the teachers as serious expressions of A.C.'s intent to harm them?

A.C. testified that she was "joking" or "venting" when she wrote the "rants" about teachers, and that she had no intention to actually harm any of the teachers. She also testified that "[m]y friends thought it was funny." On the other end of the spectrum, Ms. Fitzpatrick, one of the subjects of A.C.'s rants, testified that she "felt threatened and wanted A.C. removed from her class after reading the blog." And Principal Diskin and

[12] In B.L., the Third Circuit held only that "*Tinker* does not apply to off-campus speech" and "reserv[ed] for another day the First Amendment implications of off-campus student speech that threatens violence or harasses others" because the facts in B.L. did not implicate such speech. Id. at 186. Nonetheless, the Court acknowledged that "[a] future case . . . involving speech that is reasonably understood as a threat of violence or harassment targeted at specific students or teachers, would no doubt raise different concerns and require consideration of other lines of First Amendment law. Thus, the Court offered, "[w]hile we disagree with the *Tinker*-based theoretical approach that many of our sister circuits have taken in cases involving students who threaten violence or harass others, our opinion takes no position on schools' bottom-line power to discipline speech in that category" and "[w]e hold only that off-campus speech not implicating that class of interests lies beyond the school's regulatory authority." Id. at 190-91.

Assistant Principal Filippello testified that they understood A.C.'s statements to be threats against the teachers.

However, a review of the actual statements and surrounding circumstances leads to the conclusion that a "reasonable recipient" would not have considered the statements to be "serious expressions" of an intent to harm the teachers. First, the statements themselves. A.C. wrote, "I REALLY, REALLY wanted to kick her in the face and break all her bones and watch her die," in reference to Ms. Fitzpatrick, and in reference to Ms. Merino, she wrote, "I JUST FEEL SO MUCH ANGER AN[D] EMOTIONS IN ME! I JUST WANT TO KILL HER AND TOSS HR BODY IN A RIVER (but I can't, 'cause I'm not old enough to kill people yet – LOL jk I don't kill . . . yet. . :-O", and "I almost SPIT IN HER FACE AND PUNCHED HER DOWN. But I managed to control my unstable self and not do it." These statements, although violent and disturbing, were not true threats, but extremely misguided attempts at humor.

Two of the statements are written in the past tense and describe the emotions she felt at the time of past interactions or incidents with those teachers – A.C. "wanted" to kick Ms. Fitzpatrick after an incident in gym class and she declared that she "almost spit" in Ms. Merino's face and "punched" her as a result of an interaction she had had with that teacher. The other statement about harming Ms. Merino, although written in the present tense, was qualified by a "joking" reference to A.C.'s age as a deterrent to acting out on her statement, and the "jokey" initialism "LOL" and emoticon ":-O." These were deplorable things that A.C. said about the teachers, but a reasonable recipient would not have viewed her violent statements about the teachers as serious expressions of A.C.'s intent to harm them. Intent is "[t]he state of mind accompanying an act, esp. a forbidden act," or "mental resolution or determination to it." Black's Law Dictionary, 825 (8th ed. 2004). A.C.'s statements do not reflect a mental resolution or determination to harm the teachers.

The school staff's reaction to these statements upon learning of A.C.'s blog on May 17 supports the conclusion that a reasonable recipient would not have viewed A.C.'s statements as "true threats." Although Diskin and Filippello testified that they thought

certain statements were "threats" against teachers, neither they, nor the superintendent, ever contacted police, or took any action to notify the teachers at issue until May 20, or three days later. And while Ms. Fitzpatrick testified that she felt "threatened" and "concerned for my safety" when told about A.C.'s statements about her, Ms. Fitzpatrick also did not contact the police and was not sure whether she actually asked Principal Diskin or other administrative staff to remove A.C. from her gym class or whether A.C. was, in fact, removed from her gym class, upon A.C.'s return from suspension. These actions or inactions by school staff belie a reasonable perception that A.C.'s statements were "true threats."

Since A.C.'s blog statements about teachers were not "true threats," the question is whether her statements are protected free speech in light of Tinker and Mahanoy. This question is crucial because the school could not punish A.C. for the statements she made in her off-campus blog unless such speech "materially and substantially interfere[d] with the requirements of appropriate discipline in the operation of the school" or there were "facts which might reasonably have led school authorities to forecast substantial disruption of or material interference with school activities" as a result of A.C.'s blog.

Upon review of the facts in this matter and an application of relevant case law to those facts, I **CONCLUDE** that A.C.'s blog did not materially and substantially interfere with the requirements of appropriate discipline in the operation of the school and could not have reasonably led school authorities to forecast a substantial disruption or material interference with school activities and that, as a result, the Board violated A.C.'s First Amendment rights by suspending her from school because of her off-campus blog.

As an initial matter, it is necessary to note that A.C.'s blog is properly characterized as "off-campus speech." A.C. testified that she created the blog on a home computer and that she did not use school computers to work on her blog. She intended to share her blog only with a circle of four girlfriends who also attended Eisenhower, and provided them with the blog's web address, "ginypigluver.weebly.com." However, the blog was not password protected, and while according to A.C., anyone who sought access to the blog

would have to know and enter the exact web address, E.K. somehow caught wind of the blog, knew the web address, and shared the information with Assistant Principal Filippello. Thus, A.C.s "off-campus speech" found its way "on campus."

Nonetheless, because A.C.'s blog was "off-campus speech," the school could not punish her for the blog's contents absent satisfaction of the Tinker standard. Yet here, like in Tinker, Mahanoy, J.S., Layshock, and Manheim, the school authorities improperly, and in violation of A.C.'s free speech rights, suspended her from school because there was no material and substantial disruption of school operations or facts that would reasonably lead school authorities to forecast substantial disruption.

Certainly, there was disruption of school operations as a result of A.C.'s blog: a classmate of A.C.'s complained about the blog to school staff, who in turn conducted an investigation into the matter. That investigation involved four staff members [Diskin, Filippello, Piscadlo, and Patullo], two students [A.C. and the complaining classmate], and A.C.'s father. By all accounts, the investigation consumed the afternoon of May 17. A.C. was referred for a psychiatric evaluation and missed five days of school while on suspension. The matter trickled into the following Monday when Diskin again met with P.C. and when Diskin informed the relevant teachers about the contents of the blog. However, such disruption was not substantial.

Filippello testified that the "substantial disruption" was "the report of a cyberbully, then that led to calling down A.C. to speak to her about some of the information that was in the blog and then you had two building administrators pulling [the two] school counselors, [and we] were involved with one student at the time where we had close to 800 students." Diskin offered similar testimony, but conceded that, in response to the blog posts, the police were not called to the school on May 17, the school was not closed, and no teachers or students (other than A.C.) missed school. And although the judge in Dunkley found that a school investigation coupled with parent and student complaints regarding off-campus, bullying social media posts constituted a substantial disruption, the Court in Manheim more persuasively concluded – for purposes of this matter – that it

would be illogical if "any off-campus speech which was investigated by the school could be punished as a substantial disruption of the school environment regardless of whether it was protected by the First Amendment."

Here, there was a school investigation, but unlike Manheim, the police were not contacted to address A.C.'s blog, and while Ms. Fitzpatrick testified that she felt threatened, unlike Bethlehem, none of the targeted teachers had to take a leave of absence or missed any time from their classes other than perhaps when they met with Principal Diskin so he could tell them about the blog. The facts of this case undermine a finding of substantial disruption.

Also, like in J.S., there is also an absence of facts that would have forecast a substantial disruption. On Friday, May 17, 2013, A.C. was referred for psychiatric evaluation when, confronted by school staff about her blog, she threatened harm to herself and others. However, the school did not contact police, and instead remanded A.C. to the custody of her father, who took her for the evaluation the same day. The evaluation revealed that A.C. was not a threat to herself or others, and the hospital staff cleared A.C. to return to school. P.C. notified Principal Diskin of the evaluation results the following Monday, but the principal refused to allow A.C. to return to school until she served her five-day suspension.

Diskin testified that he did not immediately notify the targeted teachers on May 17 because they had already left for the weekend, and the superintendent "did not think it was something that was appropriate to talk to them about on the phone over the weekend." Diskin further testified that "A. was in the care of her parents as well as being sent . . . for an evaluation. So we deemed it that she was in a good safe place now and that for that time being our staff was safe." And although the targeted teachers expressed concern for their safety when finally notified about the blog, none of the teachers called the police and the only safety precautions taken at the school were "awareness" and "monitor[ing] the situation" upon A.C.'s return to school. Like in J.S., A.C.'s statements, while disturbing, were meant as "jokes" and she did not intend to harm the teachers.

Thus, the totality of circumstances does not support a finding that there was a forecast of substantial disruption as a result of A.C.'s blog.

As Justice Breyer wrote in Mahanoy, "[i]t might be tempting to dismiss B. L.'s words as unworthy of the robust First Amendment protections discussed herein [b]ut sometimes it is necessary to protect the superfluous in order to preserve the necessary." Mahanoy, 141 S.Ct. at 2048. Certainly, A.C.'s statements about her teachers were vile and distasteful, but they are nonetheless protected by the First Amendment because they were not "true threats" and did not substantially disrupt, or forecast substantial disruption of, the orderly operation of the school. And like in B.L., because A.C. "spoke outside school on her own time," the Board's regulatory powers were diminished because the Board "did not stand in loco parentis" when A.C. posted the statements on her off-campus blog.

In sum, by suspending A.C., the Board not only violated N.J.A.C. 6A:16-7.5, but the Board also violated A.C.'s free speech rights under the United States Constitution and the New Jersey Constitution.[13]

DECISION AND ORDER

Based on a preponderance of the credible evidence, I **CONCLUDE** that while the Board (1) did not violate various education laws by failing to provide A.C. with support services after her suspension, as alleged in Count One, the Board (2) violated certain procedural requirements of the Anti-Bullying Act in response to P.C.'s HIB claims, as alleged in Counts Two and Three, and (3) violated A.C.'s free speech rights under the United States Constitution and the New Jersey Constitution by suspending her for violent statements she made about teachers in her off-campus blog, as alleged in Count Seven.

[13] Because I conclude that A.C.'s blog did not materially interfere with appropriate discipline under N.J.A.C. 6A:16-7.5, I find it unnecessary to reach the other element required for discipline for off-campus conduct – whether the suspension was "reasonably necessary for the student's physical or emotional safety, security and well-being or for reasons relating to the safety, security and well-being of other students, staff or school grounds, pursuant to N.J.S.A. 18A:25-2 and 18A:37-2." N.J.A.C. 6A:16-7.5(a)(1).

As for remedies for the Board's violations of the procedural requirements of the Anti-Bullying Act, I **ORDER** the Board to take corrective measures, including training, to ensure that Board members and Board employees comply with the procedural requirements for HIB investigations.

As for remedies for the Board's violation of A.C.'s free speech rights by suspending her from school, I note the following. First, the record reflects that the Board has already expunged the suspension from A.C.'s school records. If the Board has not, in fact, expunged A.C.'s suspension from her records, I **ORDER** the Board to do so. Second, as petitioners acknowledge in their petition of appeal, I do not have the power to otherwise redress the Board's violation of A.C. constitutional rights, and petitioners must seek any relief that might flow from such violation in a court of appropriate jurisdiction.

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

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

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

November 14, 2022
DATE

ELIA A. PELIOS, ALJ

Date Received at Agency: _____

Date Mailed to Parties: _____

EAP/tat

APPENDIX

WITNESSES

For Petitioners:

A.C.
Joseph Diskin
Kimberly Patullo
P.C.
Cathleen Filippello

For Respondent:

Alice Piscadlo
Nicole Fitzpatrick

EXHIBITS

For Petitioners:

P-1 A.C.'s blog
P-5 Psychiatric Emergency Screening Services (PESS) forms
P-9 June 13, 2013, HIB report
P-10 Summary of correspondence
P-11 June 25, 2013, HIB findings letter
P-18 A.C.'s academic transcript/grades
P-22 July 24, 2013, letter
P-23 Transcript of June 13, 2013, meeting
P-39 A.C.'s academic grades
P-40 A.C.'s academic honors and awards
P-46 Summary of correspondence

P-47 Audio recording of June 13, 2013, meeting

For Respondent:

R-1 May 17, 2013, HIB report

R-2 May 17, 2013, notes

R-4 PESS and referral forms

R-6 Board's Life Threatening Behavior Policy & Regulation

R-7 May 20, 2013, suspension letter

R-10 Board's HIB policy

R-21 May 22, 2013, email

R-22 July 19, 2013, letter

R-23 November 13, 2013, letter

R-25 July 18, 2013, letter

R-26 July 2018 email

79-23
Agency Dkt. No. 9-10/22A
SEC Dkt. No. T02-22

New Jersey Commissioner of Education

Final Decision

In the Matter of James Daley,
Board of Education of the City of Clifton,
Passaic County.

This matter involves an appeal of the School Ethics Commission's (SEC) October 17, 2022 determination that appellant, James Daley – a member of the Clifton Board of Education (Board) – violated the School Ethics Act (Act) for failure to timely complete board member training in accordance with *N.J.S.A.* 18A:12-33 and *N.J.A.C.* 6A:28-4.1. Appellant ultimately completed the training after the issuance of the SEC's August 23, 2022 Order to Show Cause (OTSC), but prior to its October 17, 2022 decision. The SEC recommended a penalty of reprimand for the violation. Appellant appealed the SEC's determination, challenging both the finding of a violation and the recommended penalty. Having carefully reviewed the SEC's decision and the record in its entirety, the Commissioner finds that the SEC's decision that appellant violated the Act is supported by sufficient, credible evidence, and that the appellant failed to establish that the decision is arbitrary, capricious, or contrary to law. *N.J.A.C.* 6A:4-4.1(a). The Commissioner further finds that the recommended penalty of reprimand is appropriate.

In his appeal to the Commissioner, appellant argues that he did not receive the notices of non-compliance sent to his residence in January and March 2022. He indicates that he did receive a June 24, 2022 letter, but it did not identify which course he was required to take, and he was not advised by the Board's business office until September 1, 2022 which course he was required to take. Appellant notes that he took the course promptly thereafter, on September 6, 2022.

In opposition, the SEC argues that its decision was not arbitrary, capricious, or unreasonable. The SEC notes that it is undisputed that appellant did not complete the required training by March 31, 2022. According to the SEC, five notices regard training were sent to appellant, and appellant only disputes receiving two of them. The SEC further contends that the law charges board members with the responsibility for completing training, and that the Board was not responsible for notifying Daley regarding the requirements.

Upon a comprehensive review of the record, the Commissioner finds that the SEC's determination that the appellant is in violation of the Act is supported by sufficient credible evidence, and the appellant has not established that the SEC's decision is arbitrary, capricious, or contrary to law. *N.J.A.C.* 6A:4-4.1(a). Pursuant to *N.J.A.C.* 6A:28-4.1, appellant was required to complete the Governance IV training program by March 31, 2022. It is undisputed that he failed to do so. As such, appellant failed to timely complete board member training in accordance with *N.J.S.A.* 18A:12-33 and *N.J.A.C.* 6A:28-4.1. Appellant offers no explanation for why some notices sent to his address were received, while others were not. Furthermore, appellant admits that he had received a notice by June 24, 2022, nearly two months before the SEC issued the Order to Show Cause, yet appellant appears to have taken no action to complete the training other than inquiring – with the business office, rather than the New Jersey School Boards Association, which offers the training and issued the non-compliance notices – which course he was supposed to take. But appellant's reliance on the Board cannot excuse his violation of the Act, as he is responsible as a board member to be aware of the law and to comply with it.

With respect to the appropriate penalty, the Commissioner notes that in previous matters, when a respondent completed the requisite training after the issuance of the Order to

Show Cause – but prior to the SEC's meeting date – the penalty has been a reprimand. *See, In the Matter of Annette Beasley, Irvington Board of Education, Essex County*, Commissioner Decision No. 223-21SEC, decided October 13, 2021; *In the Matter of Marcos Garciga, Cliffside Park Board of Education, Bergen County*, Commissioner Decision No. 224-21SEC, decided October 13, 2021; *In the Matter of Gary Yedman, Seaside Park Board of Education, Ocean County*, Commissioner Decision No. 230-21SEC, decided October 13, 2021. As the instant case arises from the same circumstances, the Commissioner finds that a reprimand is the appropriate penalty for the respondent's failure to timely complete the requisite training. Accordingly, the respondent is hereby reprimanded as a school official found to have violated the School Ethics Act.

IT IS SO ORDERED.[1]

Angelica Allen-McMillan, J.D.S.
ACTING COMMISSIONER OF EDUCATION

Date of Decision: March 23, 2023
Date of Mailing: March 24, 2023

[1] This decision may be appealed to the Appellate Division of the Superior Court pursuant to *N.J.S.A.* 18A:6-9.1. Under *N.J.Ct.R.* 2:4-1(b), a notice of appeal must be filed with the Appellate Division within 45 days from the date of mailing of this decision.

Before the School Ethics Commission
Docket No.: T02-22
Amended Decision for Failure to Complete Mandatory Training Requirement in a Timely Manner[1]

I/M/O James Daley,
Clifton Board of Education, Passaic County

I. Procedural History

This matter arises from an Order to Show Cause (OTSC) that was issued by the School Ethics Commission (Commission) at its meeting on August 23, 2022, and also served on August 23, 2022, via electronic mail.[2] The OTSC directed James Daley (Respondent), a "board member" as defined in *N.J.S.A.* 18A:12-23 of the School Ethics Act (Act), *N.J.S.A.* 18A:12-21 *et seq.*, to show cause as to why the Commission should not find him in violation of the Act, for failing to complete training as required by *N.J.S.A.* 18A:12-33 and *N.J.A.C.* 6A:28-4.1.

In the OTSC served on August 23, 2022, the Commission notified Respondent that he had twenty (20) days to respond to the OTSC, and further advised that failure to respond would be deemed an admission of the facts set forth in the OTSC. Respondent was also notified that, upon receipt of the response or upon expiration of the twenty (20) day time period for so filing, the Commission may proceed to a determination of a violation on a summary basis (i.e., without a hearing or further proceedings) in accordance with *N.J.A.C.* 6A:28-1.6(c), which so permits when material facts are not in dispute.

II. Analysis

The Act was enacted by the New Jersey State Legislature to ensure and preserve public confidence in members of local boards of education and local school administrators. *N.J.S.A.* 18A:12-33 and *N.J.A.C.* 6A:28-4.1 require every board member to complete a training program prepared and offered by the New Jersey School Boards Association (NJSBA).

Respondent is a member of the Clifton Board of Education (Board), located in Passaic County. As a result of his position on the Board, and in accordance with *N.J.S.A.* 18A:12-33 and *N.J.A.C.* 6A:28-4.1, Respondent is required to complete a mandated training program. For convenience and ease, the training is offered online so any board member may complete it at any

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[1] The School Ethics Commission adopted an Amended Decision at a special meeting October 17, 2022, because its previous decision, adopted on September 14, 2022, failed to acknowledge that Respondent completed training following the issuance of the August 23, 2022, Order to Show Cause.

[2] In order to conduct business during the Coronavirus (COVID-19) pandemic, the Commission implemented an electronic filing system, which remains a permissible method by which the Commission and parties can effectuate service of process. Consequently, service of process was effectuated by the Commission through electronic transmission only.

time, from anywhere. According to NJSBA, Respondent was required to complete the Governance 4 training program by March 31, 2022.[3]

On or about August 22, 2022, NJSBA provided the Commission with the names of those board of education members who failed to complete mandated training by March 31, 2022, and the list provided included Respondent. Prior to this time, multiple communications about mandated training were sent to Respondent from NJSBA through a variety of means, including targeted e-mail messages and postings in *School Board Notes*. More specific information detailing the outreach efforts of NJSBA to communicate with Respondent and/or the charter school lead about mandated training is set forth in the attached Certification from NJSBA. *See* **Exhibit A**. Notwithstanding all of these communications, Respondent did not complete mandated training.

In light of Respondent's failure to complete mandated training, an OTSC was issued by the Commission, and served on Respondent, via electronic mail, on August 23, 2022.

To date, there is no dispute that Respondent did not complete his required training by March 31, 2022, and did not complete the training prior to the issuance of the Commission's OTSC. After having been served with the OTSC, Respondent completed training on September 9, 2022, but did not submit anything, in writing, explaining why a penalty up to and including removal should not be imposed for his failure to complete training by March 31, 2022.

III. Decision/Penalty Recommendation

N.J.A.C. 6A:28-4.2(d) provides that school board members and charter school trustees who fail to comply with their training mandate shall be considered in violation of *N.J.S.A.* 18A:12-33. Based on the record as set forth above, at its special meeting on September 14, 2022, the Commission found that Respondent violated *N.J.S.A.* 18A:12-33 and *N.J.A.C.* 6A:28-4.1. Respondent received repeated notifications of his training requirement, and had ample opportunity to complete the mandated training in a timely fashion; nonetheless, he failed to complete training as required.

Where a violation of the Act is found by the Commission, the Commission may recommend to the Commissioner of Education that a penalty be imposed. The recommended penalty can include a reprimand, censure, suspension or removal of the school official. *N.J.A.C.* 6A:28-10.12. For the reasons set forth above, the Commission recommends that the Commissioner of Education impose a penalty of **reprimand**.

Pursuant to *N.J.S.A.* 18A:12-29(c), this decision shall be forwarded to the Commissioner of Education for review of the Commission's recommended penalty. Respondent may either: 1) file exceptions to the recommended sanction; 2) file an appeal of the Commission's finding of a violation; or 3) file both exceptions to the recommended sanction together with an appeal of the finding of a violation.

Parties taking exception to the recommended sanction of the Commission but *not disputing* the Commission's finding of a violation may file, within **thirteen (13) days** from the date the Commission's decision is forwarded to the Commissioner, written exceptions regarding the

[3] The March 31, 2022, deadline is because on an April school board of education election.

recommended penalty to the Commissioner. The forwarding date shall be the mailing date to the parties, as indicated below. Such exceptions must be forwarded to: Commissioner of Education, c/o Bureau of Controversies and Disputes, P.O. Box 500, Trenton, New Jersey 08625, marked "Attention: Comments on Ethics Commission Sanction."[4] A copy of any comments filed must be sent to the Commission (school.ethics@doe.nj.gov) and all other parties.

Parties seeking to appeal the Commission's finding of violation *must* file an appeal pursuant to the standards set forth at *N.J.A.C.* 6A:4:1 *et seq.* within **thirty (30) days** of the filing date of the decision from which the appeal is taken. The filing date shall be three (3) days after the date of mailing to the parties, as shown below. In such cases, the Commissioner's review of the Commission's recommended sanction will be deferred and incorporated into the Commissioner's review of the finding of violation on appeal. Where a notice of appeal has been filed on or before the due date for exceptions to the Commission's recommended sanction (thirteen (13) days from the date the decision is mailed by the Commission), exceptions need not be filed by that date, but may be incorporated into the appellant's briefs on appeal.

Robert W. Bender, Chairperson

Mailing Date: October 17, 2022

[4] An electronic submission may also be sent to controversiesdisputesfilings@doe.nj.gov.

Resolution Adopting Amended Decision for Failure to Complete Mandatory Training Requirement in a Timely Manner Docket No.: T02-22

Whereas, James Daley (Respondent) is a "board member" as defined in *N.J.S.A.* 18A:12-23 of the School Ethics Act (Act); and

Whereas, as a board member, Respondent is required to complete a training program prepared and offered by the New Jersey School Boards Association (NJSBA) on an annual basis; and

Whereas, Respondent failed to complete his training program by March 31, 2022; and

Whereas, at its meeting on August 23, 2022, the School Ethics Commission (Commission) issued an Order to Show Cause (OTSC) directing Respondent to show cause as to why he failed to complete his mandatory training by March 31, 2022, as required by *N.J.S.A.* 18A:12-33 and *N.J.A.C.* 6A:28-4.1; and

Whereas, after having been served with the OTSC, Respondent completed his training requirement, but did not respond to the Commission's OTSC as to why he did not complete training by March 31, 2022; and

Whereas, at its special meeting on October 17, 2022, the Commission found that Respondent violated *N.J.S.A.* 18A:12-33 and *N.J.A.C.* 6A:28-4.1 by failing to complete mandated training; and

Whereas, at its special meeting on October 17, 2022, the Commission recommended that the Commissioner of Education impose a penalty of reprimand on Respondent; and

Whereas, at its special meeting on October 17, 2022, the Commission agreed that the within decision accurately memorializes its findings and recommendations; and

Now Therefore Be It Resolved, that the Commission hereby adopts the within decision and directs its staff to notify all parties to this action of the decision.

Robert W. Bender, Chairperson

I certify that the within Resolution was duly adopted by the School Ethics Commission at its special meeting on October 17, 2022.

Kathryn A. Whalen, Esq., Director

80-23

New Jersey Commissioner of Education

Final Decision

K.S., on behalf of minor child, K.S.,

Petitioner,

v.

Board of Education of the City of Union City, Hudson County,

Respondent.

Synopsis

Petitioner filed a pro se petition challenging the determination of the respondent Board that his minor child, K.S., was not eligible to receive a free public education in respondent's school district. Petitioner asserted that he and his son were residing with a family friend in Union City while the child's mother, who lives in Jersey City, was having personal issues. K.S. does not have a custody order for his son. The Board contends that K.S. was unable to provide sufficient proof of residency in the District, and filed a counterclaim for tuition for the period from the beginning of the 2022-23 school year through January 31, 2023.

The ALJ found, *inter alia*, that: pursuant to *N.J.S.A.* 18A:38-1, public schools are free to any person over five and under twenty five years of age who is domiciled within the school district; pursuant to *N.J.A.C.* 6A:22-6.2., if a student does not have a right to attend the school district, the Commissioner may assess tuition; in this case, the Board sent Notice of Final Determination of Ineligibility to the minor child's mother on November 1, 2022; the Board received an appeal of this determination on November 21, 2022, filed by K.S., the father of K.S.; petitioner supplied no compelling proof of domicile in Union City despite requests to produce required documentation of residency from the beginning of the school year until January 31, 2023; documents submitted as proof of residency included unsigned lease agreements, a student registration with the child's mother listed at the Union City address but with a Jersey City driver's license, and two utility bills with the exact same information but one with the mother's name and the other with another student's parent's name; no custody order for either parent was presented. The ALJ concluded that K.S. was not domiciled in Union City during the time period at issue; therefore, his son was not eligible to attend school in the District. Accordingly, the ALJ ordered petitioner to pay the Board tuition in the amount of $10, 516.52 for the period of K.S.'s ineligible attendance from September 6, 2022 through January 31, 2023.

Upon review, the Commissioner concurred with the ALJ that petitioner failed to sustain his burden of establishing that he was domiciled in Union City during the time period at issue here. Accordingly, the Initial Decision of the OAL was adopted as the final decision in this matter, with modification with respect to the final tuition calculation. Petitioner was directed to reimburse the Board in the amount of $11,202.38 for tuition costs incurred during the time period in which K.S. was ineligible to attend school in Union City. The petition was dismissed.

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

80-23
OAL Dkt. No. EDU 11086-22
Agency Dkt. No. 321-11/22

New Jersey Commissioner of Education

Final Decision

K.S., on behalf of minor child, K.S.,

Petitioner,

v.

Board of Education of the City of Union City, Hudson County,

Respondent.

The record of this matter and the Initial Decision of the Office of Administrative Law (OAL) have been reviewed, as have the exceptions filed by the Board pursuant to *N.J.A.C.* 1:1-18.4. The petitioner did not file a reply.[1]

In this residency matter, the Administrative Law Judge (ALJ) found that the Board met its burden of demonstrating that petitioner was not domiciled in Union City from the beginning of the 2022-23 school year through January 31, 2023, and the minor child was therefore not entitled to a free education in the District during that time.[2] The ALJ further found that the Board is entitled to tuition reimbursement in the amount of $114.31 per day for 92 school days, from September 6, 2022 through January 31, 2023, totaling $10,516.52.

In its exceptions, the Board requests that the Commissioner include an extra six days of tuition in the final calculation of tuition reimbursement, representing the number of days from January 31, 2023, until the minor child was removed from the district.[3]

[1] The Commissioner was not provided with a transcript of the January 30, 2023 hearing.

[2] The Commissioner notes that, pursuant to *N.J.S.A.* 18A:38-1b and *N.J.A.C.* 6A:22-6.2, the burden of proof falls on the petitioner, not the Board.

[3] The Board also requests two modifications: (1) indicating that petitioner's utility bill was identical to that of another student, rather than to another bill of petitioner's; and (2) finding that the lease provided to the Board

Upon review, the Commissioner concludes that petitioner failed to sustain his burden of establishing that he was a domiciliary of Union City from the beginning of the 2022-23 school year through January 31, 2023. As such, the Commissioner finds that the minor child was not entitled to a free public education in the District's schools during that time.

Pursuant to *N.J.S.A.* 18A:38-1b, the Commissioner shall assess tuition against petitioner for the time period during which the minor child was ineligible to attend school in Union City. Therefore, the Board is entitled to tuition reimbursement in the amount of $11,202.38, representing 92 school days from the beginning of the 2022-23 school year through January 31, 2023, at $114.31 per day, plus an additional 6 days until the child was disenrolled from the District.

Accordingly, the Initial Decision of the OAL is modified with respect to the final tuition calculation. Petitioner is directed to reimburse the Board in the amount of $11,202.38 for tuition costs incurred during the time period in which K.S. was ineligible to attend school in Union City. The petition of appeal is hereby dismissed.

IT IS SO ORDERED.[4]

Angelica Allen-McMillan, J.D.S.
ACTING COMMISSIONER OF EDUCATION

Date of Decision: March 23, 2023
Date of Mailing: March 24, 2023

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was the child's mother's and not his father's. The Commissioner notes that while these requested modifications may be accurate, they are minor details that are not pertinent to the final outcome of this case.

[4] This decision may be appealed to the Appellate Division of the Superior Court pursuant to *N.J.S.A.* 18A:6-9.1. Under *N.J.Ct.R.* 2:4-1(b), a notice of appeal must be filed with the Appellate Division within 45 days from the date of mailing of this decision.

State of New Jersey
OFFICE OF ADMINISTRATIVE LAW

INITIAL DECISION
OAL DKT. NO. EDU 11086-22
AGENCY DKT. NO. 321-11/22

K.S. ON BEHALF OF MINOR CHILD K.S.,

Petitioner,

v.

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

Respondent.

K.S., petitioner appearing pro se

Susanne Lavelle, Esq. appearing on behalf of respondent.

Record Closed: February 1, 2023 Decided: February 8, 2023

BEFORE: **JOANN LASALA CANDIDO**, ALAJ

Petitioner K.S. challenges the residency determination made by the Union City Board of Education ("Board") regarding the minor child K.S. asserting they were not domiciled within the Union City School District. Respondent's demand included a request that the Commissioner dismiss the petition, that the child be removed from the district, and that the petitioner be assessed a tuition charge for ninety-two days of K.S., Jr.'s ineligible attendance in the Board's schools.

The matter was transmitted to the Office of Administrative Law (OAL) on December 12, 2022, for resolution as a contested case pursuant to N.J.S.A. 52:14B-1 to -15 and N.J.S.A. to -13. A hearing was held on January 30, 2023, and the record closed on February 1, 2023, upon receipt of the school calendar.

The issues in this matter are whether K.S. Jr. is eligible to attend respondent's public schools free of charge in accordance with N.J.S.A. 18A: 38-1 and, if not, whether respondent's requests for tuition reimbursement and for disenrollment of K.S., Jr. should be granted.

In support of its claim for tuition, the Board produced evidence in the form of testimony from School Superintendent Silvia Abbato. She testified regarding the results of the investigation supporting the finding that K.S. Jr., is domiciled out-of-district, but continued to attend public schools in the school district for a total of ninety-two days (one holiday). The school year began on September 6, 2022, with nineteen days of attendance for that month, October for twenty days, November for eighteen days and for December seventeen days and for January 2023, students attended school for nineteen days.

Abbato received information in August 2022 anonymously, regarding a residency issue with students on the Union City football team. Abbato directed the Board's counsel to begin an investigation. Counsel reviewed the files of the name of students that transferred into the District that year. When reviewing K.S. Jr. file she found it contained two different addresses, leases were unsigned by the landlord and two utility bills submitted were identical in all respects, but the addresses and owners name were different. K.S. was not aware of the utility bills submitted. Mother of K.S., Jr. presented a driver's license with the student registration that reflects a Jersey City address.

The Board sent the Notice of Initial Determination of Ineligibility to the mother of K.S., Jr on October 18, 2022. The Board did not receive a response. The Board sent the Notice of Final Determination of Ineligibility to the mother of K.S., Jr on November 1,

2022. The Board received an appeal of this determination on November 21, 2022, filed by K.S., the father of K.S., Jr. K.S. filed the appeal with a Jersey City address. (R-8) K.S. wrote on the appeal that a family friend offered to have his son stay with him at the Union City address while his son's mother was having personal issues. On December 21, 2022, family friend Omar Colon provided a document that both K.S. and his son are residing with him since August 15, 2022. The lease provided of Colon's apartment reflects father and son reside in Colon's apartment since May 1, 2022.

K.S. provided an updated utility bill that reflects the Union City address from December 20, 2022 to January 6, 2023. K.S. also changed his driver's license address to the Union City address effective December 20, 2022.

Dr. Anthony Dragona, school business administrator with the Union City school district, provided tuition calculation rate for the 2022-2023 school year by grade level. (R-13) The annual estimated tuition rate for students grade nine through twelve is $20, 576.00. The per diem estimated rate for the same grades is $114.31 per day of attendance.

K.S. does not have a custody Order for K.S., Jr. He is employed part-time with Sam's Club. Prior to residing in his friend Omar Colon's three bedroom apartment in Union City, he resided at his mother's home. K.S. was not able to show proof at the time of his appeal that he resided at the Union City apartment. Both the change of license and the utility bill reflects the Union City address effective in December 2022.

N.J.S.A. 18A:38-1 provides that public schools shall be free to the following persons over five and under 20 years of age:

1. Any person who is domiciled within the school district;

b. (1) Any person who is kept in the home of another person domiciled within the school district and is supported by such other person gratis as if he were such other person's own child, upon filing by such other person with the secretary of the board of education of the district, if so required by the board, a sworn statement that he is domiciled within the district and is

> supporting the child gratis and will assume all personal obligations for the child relative to school requirements and that he intends so to keep and support the child gratuitously for a longer time than merely through the school term, and a copy of his lease if a tenant, or a sworn statement by his landlord acknowledging his tenancy if residing as a tenant without a written lease, and upon filing by the child's parent or guardian with the secretary of the board of education a sworn statement that he is not capable of supporting or providing care for the child due to a family or economic hardship and that the child is not residing with the resident of the district solely for the purpose of receiving a free public education within the district. The statement shall be accompanied by documentation to support the validity of the sworn statements, information from or about which shall be supplied only to the board and only to the extent that it directly pertains to the support or nonsupport of the child. If in the judgment of the board of education the evidence does not support the validity of the claim by the resident, the board may deny admission to the child. The resident may contest the board's decision to the commissioner within 21 days of the date of the decision and shall be entitled to an expedited hearing before the commissioner on the validity of the claim and shall have the burden of proof by a preponderance of the evidence that the child is eligible for a free education under the criteria listed in this subsection. The board of education shall, at the time of its decision, notify the resident in writing of his right to contest the board's decision to the commissioner within 21 days. No child shall be denied admission during the pendency of the proceedings before the commissioner. In the event the child is currently enrolled in the district, the student shall not be removed from school during the 21-day period in which the resident may contest the board's decision nor during the pendency of the proceedings before the commissioner. If in the judgment of the commissioner the evidence does not support the claim of the resident, he shall assess the resident tuition for the student prorated to the time of the student's ineligible attendance in the school district. Tuition shall be computed on the basis of 1/180 of the total annual per pupil cost to the local district multiplied by the number of days of ineligible attendance and shall be collected in the manner in which orders of the commissioner are enforced. Nothing shall preclude a board from collecting tuition from the resident, parent or guardian for a student's period of ineligible attendance in the schools of the district where the issue is not appealed to the commissioner.

In the instant matter, Respondent notified the mother of K.S., Jr. of the residency ineligibility by Final Notice dated November 1, 2022. Neither parent has provided sufficient proof that they have been residing at the Union City address since the start of the 2022-2023 school year. The documents submitted show unsigned lease

agreements, a student registration with the child's mother listed at the Union City address but with a Jersey City driver's license, two attached utility bills with the exact same information but one with the mother's name and the other with another student's parent's name, nor was a custody Order for either parent presented.

Based on the foregoing, I **CONCLUDE** that the respondent has met its burden under N.J.S.A. 18A:38 b (2) that K.S. Jr. was not domiciled in Union City for the dates reflected and therefore is not entitled to a free education in the Union City school district.

N.J.A.C. 6A:22-6.3 states in pertinent part: a) Tuition assessed pursuant to this section shall be calculated on a per-student basis for the period of a student's ineligible enrollment, up to one year, by applicable grade/program category and consistent with the provisions of N.J.A.C. 6A:23A-17.1. The individual student's record of daily attendance shall not affect the calculation.

Pursuant to N.J.S.A. 18A:38-1b, the Commissioner shall assess tuition against petitioner for the time during which the minor child was ineligible to attend school in Union City. Therefore, I further **CONCLUDE** the Board is entitled to tuition reimbursement in the amount of $10, 516.52 ($114.31 per day for 92 days) for the time period from September 6, 2022 through January 31, 2023, during which time petitioner's minor child was ineligible to attend school in respondent's district.

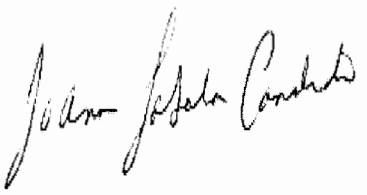
ORDER

Based on the foregoing, it is hereby **ORDERED** that respondent's determination that K.S., Jr. is not a resident and domiciliary in Union City, New Jersey, and was not domiciled within its school district during the period being sought, is hereby **AFFIRMED**. It is further **ORDERED** that respondent is entitled to reimbursement from petitioner for the cost of audited tuition in the amount of $10,516.52.

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

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

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



February 8, 2023

DATE

JOANN LASALA CANDIDO, ALAJ

Date Received at Agency: February 8, 2023

Date Mailed to Parties: February 8, 2023

ljb

EXHIBITS

R-1	Registration form for Khalil Sutton Jr. dated July 25, 2022
R-2.	Standard Form of Apartment Lease between Omar Colon Landlord and Shaquana Forester (unsigned by Landlord).
R-3	New Jersey Driver's License for Shaquana Forester
R-4	PSEG Account in Name of Shaquana Forester for service address 4711 Park Ave. 1R, Union City.
R-5	PSEG Account in Name of Shanika Finely (mother of Student K.R.) for Service address 500 Central Avenue, Apt 810, Union City.
R-6	October 18, 2022 Notice of Initial Ineligibility
R-7	November 1, 2022 Notice of Final Ineligibility
R-8	November 21, 2022 Pro Se Residency Appeal filed by Khalil Sutton Sr. and November 22, 2022 Department of Education Acknowledgement of Receipt of Appeal.
R-9	12/21/2022 Notarized Letter of Omar Colon
R-10	PSEG Bill for Sutton, 4711 Park Avenue, Fl.1R, Union City, Acct. No. 7658866903.
R-11	NJMVC Change of Address Acknowledgment for Khalil Sutton
R-12	Affidavit of Robert Hovan, Roberts & Associates (private investigator) with Exhibits A-B (Deed for 4711 Park Avenue, Union City; Photograph of 882 Pavonia Avenue, Jersey City directory.)
R-13	Excerpts of UCBOE Budget for SY 22/23 (for Per Diem Student Tuition Cost).

81-23E
OAL Dkt. No. EDU 01360-23
Agency Dkt. No. 35-2/23

New Jersey Commissioner of Education

Order on Emergent Relief

Marcella Simadiris,

Petitioner,

v.

Board of Education of the City of Paterson, Passaic County,

Respondent.

The record of this emergent matter, the sound recording of proceedings at the Office of Administrative Law (OAL), and the recommended Order of the Administrative Law Judge (ALJ) have been reviewed. Upon such review, the Commissioner concurs with the ALJ that petitioner has failed to demonstrate entitlement to emergent relief pursuant to the standards enunciated in *Crowe v. DeGioia,* 90 *N.J.* 126 (1982), and codified at *N.J.A.C.* 6A:3-1.6.

Accordingly, the recommended Order of the OAL denying petitioner's application for emergent relief is adopted for the reasons stated therein. This matter shall continue at the OAL with such proceedings as the parties and the ALJ deem necessary to bring it to closure.

IT IS SO ORDERED.

Angelica Allen-McMillan, J.D.S.

ACTING COMMISSIONER OF EDUCATION

Date of Decision: March 23, 2023
Date of Mailing: March 24, 2023

State of New Jersey
OFFICE OF ADMINISTRATIVE LAW

ORDER
EMERGENT RELIEF
OAL DKT. NO. EDU 01360-23
AGENCY DKT. NO. 25-2/23

MARCELLA SIMADIRIS,
Petitioner,
v.
BOARD OF EDUCATION OF THE CITY OF PATERSON, PASSAIC COUNTY,
Respondent.

Alfred F. Maurice, Esq., for petitioner (Springstead & Maurice, attorneys)

Karen A. Murray, Esq., for respondent (The Murray Law Firm, attorneys)

BEFORE **MARGARET M. MONACO**, ALJ:

STATEMENT OF THE CASE AND PROCEDURAL HISTORY

Petitioner Marcella Simadiris challenges the withholding of a portion of her pay by respondent City of Paterson Board of Education (the Board). On February 14, 2023, petitioner filed a Verified Petition of Appeal with the Commissioner of Education,

accompanied by a motion for emergent relief. The Department of Education transmitted the matter to the Office of Administrative Law, where it was filed on February 15, 2023, and scheduled for oral argument on February 24, 2023 regarding petitioner's request for emergent relief. In support of her motion, petitioner filed a brief and certifications by petitioner (Simadiris Cert.) and her attorney (Maurice Cert.). The Board opposes the motion and submitted a brief, along with a certification by counsel (Murray Cert.). Oral argument on the motion was adjourned at the parties' request and rescheduled for March 6, 2023. On March 3, 2023, petitioner filed a supplemental brief in support of her position. Oral argument was entertained on March 6, 2023. On March 7, 2023, the Board filed a supplemental certification of counsel (Murray Supp. Cert.), petitioner submitted an e-mail in response, and the Board responded to that e-mail.

FACTUAL DISCUSSION

For purposes of the within motion, the pertinent facts are undisputed.

Petitioner is a tenured teacher in the Patterson School District (the District). (Verified Petition of Appeal at ¶ 1.) On June 3, 2019, the Board filed its certified tenure charges against petitioner with the Commissioner of Education, along with the Board's May 22, 2019 resolution memorializing the vote certifying the tenure charges against petitioner and certifying that the Board voted to suspend petitioner without pay effective May 23, 2019. (Murray Cert. at ¶ 2 and Exhibit A.) Petitioner filed an Action in Lieu of Prerogative Writ in the Superior Court, Law Division, Passaic County, challenging the Board's resolution on a procedural issue. (Id. at ¶ 3 and Exhibit B.) The Office of Controversies and Disputes held the tenure case in abeyance pending the resolution of the Superior Court proceedings. (Id. at ¶ 4 and Exhibit C.) On August 21, 2019, the Honorable Ernest Caposela, A.J.S.C., issued an Order invalidating the Board's May 22, 2019 resolution certifying the tenure charges and suspending petitioner without pay, which the Board appealed to the Appellate Division. (See Id. at ¶¶ 5 and 11 and Exhibits D and J.) The tenure case was held in abeyance, and petitioner was then suspended

with pay effective September 2, 2019, pending the result of the Board's appeal. (See Id. at ¶¶¶ 6, 7 and 8 and Exhibits E, F and G.)

District employees are paid bi-monthly, on the 15th and 30th of each month. (Murray Cert. at ¶ 9 and Exhibit H.) The Board's payroll records show that petitioner was not paid for the month of June 2019. (Ibid.) In September 2019, the Board refunded petitioner the pay from the two June 2019 pay periods as a result of the trial court's order. (Id. at ¶ 10 and Exhibit I.)

On January 21, 2021, the Appellate Division ruled in favor of the Board and reversed the trial court's order. (Murray Cert. at ¶ 13 and Exhibit L.) On September 9, 2021, the New Jersey Supreme Court denied petitioner's petition for certification. (Id. at ¶ 14 and Exhibit M.) At this point in time, the litigation was concluded and the Board's May 22, 2019 resolution certifying the tenure charges and suspending petitioner without pay became effective.

By letter dated September 21, 2021, the Board's counsel advised the Office of Controversies and Disputes of the results of the above litigation and that the tenure case could now be processed for tenure arbitration. (Murray Cert. at ¶ 15 and Exhibit N.) On September 27, 2021, the Department of Education informed counsel that the tenure charges were referred to Arbitrator James Mastriani. (Id. at ¶ 16 and Exhibit O.) Throughout the above described two years of court litigation, petitioner remained on the Board's payroll, i.e., suspended with pay. (Id. at ¶ 17.)[1]

According to counsel's certification, while preparing exhibits for the tenure hearing, counsel, in conjunction with the District's Human Resources Department and the District's

[1] The Board notes that petitioner submitted applications under the teachers' collective bargaining agreement for an annual stipend of $1,000 for perfect attendance, even though she was suspended with pay; the Board erroneously paid this stipend for three years (2019–2020, 2020–2021, and 2021–2022); and petitioner again submitted a request for this stipend for the Fall 2022 ($500/per semester), despite being advised that she was not entitled to the perfect attendance stipend. (Murray Cert. at ¶¶ 18 and 19.) The parties agree that the Board's recoupment of this $3,000 is a matter subject to the contract's grievance procedure and is not before this forum.

Business Office, discovered that subsequent to the Supreme Court's decision in September 2021, petitioner's suspension without pay, pursuant to the Board's May 22, 2019 resolution, had not been implemented again. (Murray Cert. ¶ at 20.) Counsel's certification explains that, as a result of the two years of litigation and several court decisions, District personnel had overlooked the fact that the suspension monies refunded in September 2019, once again had to be deducted from petitioner's pay, and there was also a significant delay in discovering the oversight as petitioner promptly filed a motion as soon as an arbitrator was assigned, disputing the Board's potential evidence for the hearing. (Ibid.)

The Board has not charged petitioner the full 120 days suspension effective as of the date of the Supreme Court's ruling. (Murray Cert. at ¶ 21.) Rather, the Business Office calculated the suspension without pay consistent with the Board's May 22, 2019 resolution certifying the tenure charges and suspending petitioner without pay effective May 23, 2019. (Ibid.) Specifically, since petitioner is a teacher, the initial suspension would have run through the summer months of July and August, and, thus, no pay was withheld. (Ibid.) Petitioner is only being suspended without pay for forty-one days,[2] and the Board spread out the forty-one days of salary deduction, instead of reducing her pay in full. (Ibid. and Exhibit P.) On December 14, 2022, counsel for the Board e-mailed a letter to petitioner's attorney dated December 12, 2022, advising that petitioner's salary would be reduced by $2,000 gross per paycheck, commencing with her first paycheck in January 2023, to reimburse the District for compensation erroneously paid to her for the period of May 23 to May 31, 2019 and September 1 to September 19, 2019. (Maurice Cert. at Exhibit 1; Simadiris Cert. at Exhibit 1; Murray Supp. Cert. at ¶ 2 and Exhibit A.) The letter further advised that the Business Office would calculate the total salary monies owed. (Murray Supp. Cert. at ¶ 4 and Exhibit A.) Counsel explained in her certification that she drafted the letter based on the 2018–2019 payroll records that showed a suspension without pay for the month of June 2019. (Murray Supp. Cert. at ¶ 3; Murray Cert. at Exhibit H; see Murray Cert. at Exhibit G.) After receiving the information from the

[2] The calculation includes the periods of May 23 to May 31, 2019 (seven days); June 1 to June 30, 2019 (twenty days); and September 1 to September 19, 2019 (fourteen days). See Murray Cert. at Exhibit P.

Business Office, counsel for the Board learned that the June salary deductions had been repaid to petitioner in September 2019. (Murray Supp. Cert. at ¶ 3; see Murray Cert. at Exhibit I.) On January 11, 2023, counsel for the Board sent the Business Office's computation to petitioner's attorney, which included the dates stated in counsel's December 12, 2022 letter and the amount attributable to the period of June 1 to June 30, 2019. (Murray Supp. Cert. at ¶ 5 and Exhibit C; see Murray Cert. at Exhibit P.)

It is against this backdrop that petitioner's application for emergent relief is considered.

LEGAL DISCUSSION AND CONCLUSIONS

Petitioner's emergent application seeks an order enjoining the Board from further payroll deductions until the issue of the amount and method of payment can be determined. (See Simadiris Cert. at ¶ 14.) Alternatively, petitioner urges in her supplemental brief that the period for the payment should be extended and spread over the balance of the school year.

N.J.A.C. 6A:3-1.6(b) sets forth the standards governing motions for emergent relief and instructs:

> A motion for a stay or emergent relief shall be accompanied by a letter memorandum or brief which shall address the following standards to be met for granting such relief pursuant to Crowe v. DeGioia, 90 N.J. 126 (1982):
>
> 1. The petitioner will suffer irreparable harm if the requested relief is not granted;
>
> 2. The legal right underlying petitioner's claim is settled;
>
> 3. The petitioner has a likelihood of prevailing on the merits of the underlying claim; and

> 4. When the equities and interests of the parties are balanced, the petitioner will suffer greater harm than the respondent will suffer if the requested relief is not granted.

"Each of these factors must be clearly and convincingly demonstrated" by the moving party. Waste Mgmt. of N.J. v. Union County. Utils. Auth., 399 N.J. Super. 508, 520 (App. Div. 2008).

Turning to the first criteria, emergent relief should not be granted except "when necessary to prevent irreparable harm." Crowe, 90 N.J. at 132. Harm is generally considered irreparable if it cannot be adequately redressed by monetary damages. Id. at 132-33. It has been described as "'substantial injury to a material degree coupled with the inadequacy of money damages.'" Judice's Sunshine Pontiac, Inc. v. General Motors Corp., 418 F. Supp. 1212, 1218 (D.N.J. 1976) (citation omitted). "In other words, [petitioner] must have no adequate remedy at law." Subcarrier Communications, Inc. v. Day, 299 N.J. Super. 634, 638 (App. Div. 1997). Further, more than a risk of irreparable harm must be demonstrated. Continental Group, Inc. v. Amoco Chemicals Corp., 614 F.2d 351, 359 (D.N.J. 1980). The requisite for injunctive relief requires a "'clear showing of immediate irreparable injury,'" or a "'presently existing actual threat; (an injunction) may not be used simply to eliminate a possibility of a remote future injury, or a future invasion of rights, be those rights protected by statute or by common law.'" Ibid. (Citations omitted.)

Having considered the parties' submissions and arguments, I **CONCLUDE** that petitioner has failed to clearly and convincing demonstrate that she will suffer irreparable harm unless the requested relief is granted.

Petitioner contends in her certification that, "[a]s a result of a $4,000.00 per month reduction in salary, [she] will be unable to pay [her] bills and support [her] family" and "[t]he reduction is causing great hardship and may cause [her] to default on [her] obligations," and petitioner lists various monthly expenses. (Simadiris Cert. at ¶ 8.) Apart

from the lack of documentation to support petitioner's alleged expenses and potential default on her obligations, it is well settled that harm which can be addressed by monetary damages will not suffice to establish irreparable harm and that more than a risk of irreparable injury must be demonstrated. Beyond this, the reduction in petitioner's salary has caused no financial harm that petitioner should not have anticipated. Plainly, petitioner was aware of the Board's May 22, 2019, resolution suspending her without pay, which could not be implemented in light of the trial court's order and until the completion of the litigation surrounding that resolution. Petitioner was also fully aware that she did not serve the imposed suspension and had received a refund of the monies that had been withheld in June 2019. Indeed, the Board, by following the original suspension timetable, rather than the date of the Supreme Court's decision, imposed the suspension for only forty-one days. And the Board also accommodated petitioner by spreading the forty-one day suspension over a period of months so that only a portion of her pay is being withheld every two weeks, rather than withholding petitioner's full salary until the suspension period was completed. In short, petitioner's reduced paycheck for a few months to implement the forty-one day suspension does not constitute irreparable harm.

Petitioner must also make a preliminary showing of a reasonable probability of ultimate success on the merits of her underlying claim, and demonstrate that the legal right underlying her claim is settled, to prevail on an application for an emergent relief. Crowe, 90 N.J. at 133. I **CONCLUDE** that petitioner has failed to shoulder her burden of proving both standards.

Petitioner does not contest the Board's calculation of the forty-one days or the resulting amount of her salary that equates with forty-one days. Rather, the crux of petitioner's argument focuses on the manner or schedule of payment.

N.J.S.A 18A:6-14 provides in pertinent part:

> Upon certification of any charge to the commissioner, the board may suspend the person against whom such charge is made, with or without pay, but, if the determination of the

> charge by the arbitrator is not made within 120 calendar days after certification of the charges, excluding all delays which are granted at the request of such person, then the full salary (except for said 120 days) of such person shall be paid beginning on the one hundred twenty-first day until such determination is made.

In other words, a board of education possesses the statutory right to suspend an employee without pay upon certification of tenure charges, provided that the suspension may not exceed 120 calendar days. In the within matter, the Board acted consistent with the statutory directive. The Board determined to suspend petitioner without pay when it certified the charges against her, and the forty-one day suspension imposed is significantly less than the maximum 120 days. Further, N.J.S.A. 18A:6-14 does not include an exception to the authorized suspension for an alleged hardship or provide that a teacher facing tenure charges has a right to negotiate the duration or amount of his/her suspension. And, as noted, the Board in this case spread the suspension over a period of months, rather than requiring a consecutive forty-one day suspension. The cases and civil service regulation cited in petitioner's brief are markedly distinguishable and do not support a contrary result. Simply put, in contrast to those cases that addressed a salary overpayment, this matter involves the implementation of a statutory authorized suspension. In sum, the viability of petitioner's legal and/or equitable claims cannot be said to be settled in petitioner's favor and petitioner has failed to demonstrate a likelihood of prevailing on the merits of her claims.

In view of the foregoing, it is unnecessary to address whether, when the equities and interests of the parties are balanced, petitioner will suffer greater harm than the Board if the requested relief is not granted.

Based upon the foregoing, I **CONCLUDE** that petitioner has failed to meet the requirements warranting emergent relief.

ORDER

It is **ORDERED** that petitioner's request for emergent relief be and hereby is **DENIED**.

This order on application for emergency relief may be adopted, modified or rejected by the **COMMISSIONER OF THE DEPARTMENT OF EDUCATION**, who by law is authorized to make a final decision in this matter. The final decision shall be issued without undue delay, but no later than forty-five days following the entry of this order. If the **COMMISSIONER OF THE DEPARTMENT OF EDUCATION** does not adopt, modify or reject this order within forty-five days, this recommended order shall become a final decision on the issue of emergent relief in accordance with N.J.S.A. 52:14B-10.

March 8, 2023
DATE

Margaret M Monaco
MARGARET M. MONACO, ALJ

jb

85-23
OAL Dkt. No. EDU 05741-22 (EDU 01694-22 on remand)
Agency Dkt. No. 20-2/22

New Jersey Commissioner of Education

Final Decision

R.C. and B.C., on behalf of minor child, A.C.,

Petitioners,

v.

Board of Education of the Township of Galloway, Atlantic County,

Respondent.

The record of this matter, the proposed Settlement Agreement and Release (Agreement) and the Initial Decision issued by the Office of Administrative Law have been reviewed pursuant to *N.J.A.C.* 1:1-19.1. Upon review, the Commissioner approves the terms of the Agreement and adopts the Initial Decision as the final decision in this matter. The case is hereby dismissed, subject to compliance with the terms of the Agreement.

IT IS SO ORDERED.

Angelica Allen-McMillan, Ed.D.
ACTING COMMISSIONER OF EDUCATION

Date of Decision: March 28, 2023
Date of Mailing: March 29, 2023

State of New Jersey
OFFICE OF ADMINISTRATIVE LAW

INITIAL DECISION
APPROVING SETTLEMENT
OAL DKT. NOS. EDU 05741-22
AGENCY DKT. NOS. 20-2/22

R.C. AND B.C. ON BEHALF OF A.C.,
Petitioner,
v.
TOWNSHIP OF GALLOWAY,
BOARD OF EDUCATION, ATLANTIC COUNTY
Respondent.

R.C. and B.C., petitioners, pro se

Amy Houck Elco Esq., for respondent (Cooper Levenson, Attorneys at Law, attorneys)

Record Closed: February 15, 2023 Decided: March 3, 2023

BEFORE **CARL V. BUCK, III**, ALJ:

This matter having been transmitted by the Department of Education, Office of Controversies and Disputes to the Office of Administrative Law (OAL), and filed as a contested case on July 13, 2022, arises from a dispute between petitioner and respondent arising under the school laws (N.J.A.C. 18A:6-9). The parties have voluntarily agreed to resolve all disputed matters and have entered into a settlement as set forth in the attached settlement agreement.

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

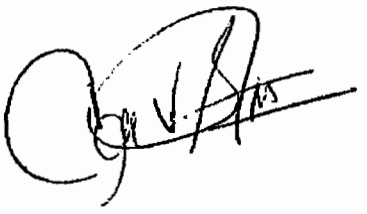
1. The parties have voluntarily agreed to the settlement as evidenced by their signatures or their representatives' signatures on the attached settlement agreement and Board resolution authorizing same at its meeting of January 30, 2023.

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

Therefore, I **ORDER** that the parties comply with the settlement terms and that these proceedings be concluded.

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

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



March 3, 2023
DATE

CARL V. BUCK, III., ALJ

Date Received at Agency: 3/14/2023

Date Sent to Parties: 3/14/2023

/tat

APPENDIX

LIST OF EXHIBITS

Jointly Submitted

J-1 Settlement agreement signed by petitioners on January 27, 2023, and by the Board on January 30, 2023

J-2 Board resolution approving settlement agreement at meeting of January 30, 2023, received by the OAL on February 15, 2023

2/15/23 Rec'd Via AU Hearing

Amy Houck Elco, Esquire
Cooper Levenson, P.A.
1125 Atlantic Avenue, Third Floor
Atlantic City, NJ 08401
Phone: (609) 572-7522
Attorneys for Galloway Township Board of Education

R.C. and B.C. o/b/o A.C., a Minor, Petitioners, vs. Galloway Township Board of Education, Respondent.	OAL Docket No. EDU-06217-2022S Agency Ref No. 160-6/22
R.C. and B.C. o/b/o A.C., a Minor, Petitioners, vs. Galloway Township Board of Education, Respondent,	OAL DOCKET No. EDU-05741-2022S AGENCY REF No. 20-2/22 **SETTLEMENT AGREEMENT**

WHEREAS, a dispute between R.C. and B.C. ("Parents" or "Petitioners") o/b/o A.C., a Minor child and the Galloway Township Board of Education ("Board" or "District"), arose with regard to two HIB matters; (collectively the "Parties"); and

WHEREAS, both parties wish to resolve their differences amicably, allowing each party to move forward, and avoid potential costly litigation without either party admitting to any wrongdoing; and

WHEREAS, the Parties understand that the matters, regardless of whether or not they met the legal definition of HIB violations, greatly impacted the family, not only to A.C., but also to his brother R.C. and the rest of the family.

NOW, THEREFORE, in consideration of the Mutual Promises and Covenants set forth herein, the parties agree as follows:

1. The Parties agree that it is important to discuss and communicate HIB allegations in all steps of the process and will always continue to review and learn from each experience, as part of this Agreement the District has committed to continued training.

   (a) The Board agrees to provide additional annual as well as ongoing training as discussed with Petitioners for all teachers and staff regarding the needs of special needs students. In addition, staff who work specifically with special needs students will received additional training on nonverbal communication, body autonomy in special needs students and the role that it plays in overall safety for these students, within the school and community settings. The continued training will take place no later than the Fall of 2023.

   (b) The Board agrees to provide additional annual as well as ongoing training as discussed with Petitioners for specials teachers and support staff that work with special education students regarding the special needs of the special education students in their classes, focusing on the individual needs of the students to maximize their success and participation in school. The continued training will take place no later than the Fall of 2023.

   (c) The Board agrees to provide additional annual as well as ongoing training as discussed with Petitioners for all staff that work with special needs students in HIB to review the law and individual needs of the students. The continued training will take place no later than the Fall of 2023.

   (d) The Board through its Administration agrees to continue to work on an ongoing basis with the Special Education Parent Advisory Committee and provide training presented by the Administration regarding communicating, rights and HIB to parents and staff. The training will take place no later than the Fall of 2023. Through its Administration, the Board will communicate with parents via the Special Education Advisory Group regarding parental concerns and training needs.

2. The Board through its Administration will continue to review and improve its follow-up communications to check-in with families after an HIB investigation.

3. The Board though its Administration agrees to work with Petitioners and continue to work on ensuring communicating about the student, the student needs and any concerns. Such communication will be two-way so the District will receive

information from the Petitioners and the Petitioners will receive information from the District

4. The Board will continue to follow the law regarding HIB. In addition, the District has placed parent resources on the District website for ease of access and in the student handbooks.

5. The Parties agree to disagree on whether the HIB complaints meet the legal requirements of HIB, as both parties agree to move forward, focusing on A.C. and R.C.'s educational experiences in the District. The Board agrees through the Superintendent to acknowledge that the District could have improved its communication regarding this matter and the items leading up to this matter between the Petitioners and District. Furthermore, on November 29, 2022 the Board's representative, the Superintendent, met with Petitioners to discuss these concerns and work toward improvements moving forward. As part of that discussion, the Superintendent apologized for any communication concerns and the impact this had on the family to Petitioner. After the Agreement is signed the School Solicitor will reach out to the Court to put this Agreement and acknowledge this section and apology on the record.

6. The Board through its Superintendent and Anti-Bullying Coordinator, agree to review and, as needed, revise its HIB Chart discussed with Petitioners to make sure it is in compliance with the law or no longer utilize the chart.

7. On November 29, 2022, the Parties met and reviewed concerns about the investigation and employees involved with the investigation, the Superintendent advised Petitioners that employee matters are confidential, however, anything that needed to be addressed was addressed.

8. The Board through its Administration will create a music plan for R.C. and A.C. to begin music at Reeds Road, if R.C. and A.C. choose to participate. Such plan will be drafted in January of 2023 through collaboration of the District and Petitioners, or as soon as possible after approval of this Agreement.

9. In exchange for the considerations above, the Petitioners on behalf of A.C. agree to dismiss their Complaints OAL Docket No. EDU-06217-2022S and OAL DOCKET No. EDU-05741-2022S and further agree to waive and release all claims against the Board regarding these two specific Docket Numbers listed above.

10. It is expressly understood and agreed that this Settlement Agreement shall be subject to the laws of the State of New Jersey.

IN WITNESS WHEREOF, the parties have hereunto set their hands and seals the date and year set forth below.

FOR THE GALLOWAY TOWNSHIP BOARD OF EDUCATION

Lynette M Carmen

Galloway Township Board of Education

1/30/2023

DATED:

Belinda Chester on behalf of A.C.

Belinda D. Chester

Friday, January 27, 2023

DATED:

Robert Chester on behalf of A.C.

Robert J. Chester

Friday, January 27, 2023

DATED:

Galloway Township Public Schools
101 South Reeds Road | Galloway, NJ 08205
Phone: (609) 748-1250 | Web: www.gtps.k12.nj.us

Stephen P. Santilli
Superintendent of Schools

Joy N. Nixon, CPA
School Business Administrator

GALLOWAY TOWNSHIP BOARD OF EDUCATION RESOLUTION

A motion was made by Mr. Gentile, and seconded by Dr. Beshara-Blauth, and carried by a roll call vote, to accept the Superintendent's recommendation to approve the following:

Two student settlement agreements as discussed in Executive Session on December 19, 2022.

CERTIFICATION

I, Joy Nixon, Business School Business Administrator/Board Secretary of the Board of Education of the Galloway Township School District in the County of Atlantic, New Jersey, DO HEREBY CERTIFY that the resolution entitled **A RESOLUTION OF THE BOARD OF EDUCATION OF THE GALLOWAY TOWNSHIP SCHOOL DISTRICT IN THE COUNTY OF ATLANTIC, NEW JERSEY,** is a copy of the resolution which was duly adopted by the Board at a meeting duly called and held on January 30, 2023, in full compliance with the Open Public Meetings Act, N.J.S.A. 10:4-6, et. seq., at which meeting a quorum was present and acting throughout and which resolution has been compared by me with the original thereof as contained in the minutes as officially recorded in my office in the Minute Book of the Board and is a true, complete and correct copy thereof and the aforesaid resolution has not been repealed, amended or rescinded but remains in full force and effect on and as of the date hereof.

Roll Call:	Mrs. Avery	Aye	Mrs. Coll-Guedes	Abstained
	Dr. Beshara-Blauth	Aye	Mr. Gentile	Aye
	Dr. Bilewu	Aye	Dr. Parmenter	Aye
	Mrs. Chester	Abstained	Mr. Dase	Aye
			Mrs. Carmen	Aye

7 Ayes
2 Abstained
Motion Carried

I, Joy N. Nixon, Business Administrator of Galloway Township Public School District, in the County of Atlantic, State of New Jersey do hereby certify that the foregoing is a true and correct copy of a Resolution adopted by the governing body of the Galloway Township Board of Education, County of Atlantic, State of New Jersey at a regular meeting of said governing body held on January 30, 2023.

(SEAL)

Joy N. Nixon, CPA, MBA
School Business Administrator/Board Secretary

86-23
OAL Dkt. No. EDU 06217-22
Agency Dkt. No. 160-6/22

New Jersey Commissioner of Education

Final Decision

R.C. and B.C., on behalf of minor child, A.C.,

Petitioners,

v.

Board of Education of the Township of Galloway, Atlantic County,

Respondent.

The record of this matter, the proposed Settlement Agreement and Release (Agreement) and the Initial Decision issued by the Office of Administrative Law have been reviewed pursuant to *N.J.A.C.* 1:1-19.1. Upon review, the Commissioner approves the terms of the Agreement and adopts the Initial Decision as the final decision in this matter. The case is hereby dismissed, subject to compliance with the terms of the Agreement.

IT IS SO ORDERED.

Angelica Allen-McMillan, Ed.D.
ACTING COMMISSIONER OF EDUCATION

Date of Decision: March 28, 2023
Date of Mailing: March 29, 2023

State of New Jersey
OFFICE OF ADMINISTRATIVE LAW

INITIAL DECISION
APPROVING SETTLEMENT
OAL DKT. NOS. EDU 06217-22
AGENCY DKT. NOS. 160-6/22

R.C. AND B.C. ON BEHALF OF A.C.,
Petitioner,
v.
BOARD OF EDUCATION OF THE TOWNSHIP OF GALLOWAY, ATLANTIC COUNTY
Respondent.

R.C. and B.C., petitioners, pro se

Amy Houck Elco Esq., for respondent (Cooper Levenson, Attorneys at Law, attorneys)

Record Closed: February 15, 2023 Decided: February 15, 2023

BEFORE **CATHERINE A. TUOHY**, ALJ:

This matter having been transmitted by the Department of Education, Office of Controversies and Disputes to the Office of Administrative Law (OAL), and filed as a contested case on July 19, 2022, arises from a dispute between petitioner and respondent arising under the school laws (N.J.A.C. 18A:6-9). The parties have voluntarily agreed to resolve all disputed matters and have entered into a settlement as set forth in the attached settlement agreement.

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

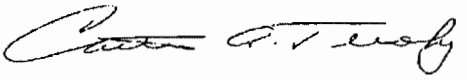
1. The parties have voluntarily agreed to the settlement as evidenced by their signatures or their representatives' signatures on the attached settlement agreement and Board resolution authorizing same at its meeting of January 30, 2023.

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

Therefore, I **ORDER** that the parties comply with the settlement terms and that these proceedings be concluded.

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

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



February 15, 2023
DATE

CATHERINE A. TUOHY, ALJ

Date Received at Agency: 2/17/2023

Date Sent to Parties: 2/17/2023

CAT/gd

APPENDIX

LIST OF EXHIBITS

Jointly Submitted

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J-2 Board resolution approving settlement agreement at meeting of January 30, 2023, received by the OAL on February 15, 2023

Amy Houck Elco, Esquire
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Atlantic City, NJ 08401
Phone: (609) 572-7522
Attorneys for Galloway Township Board of Education

R.C. and B.C. o/b/o A.C., a Minor, Petitioners, vs. Galloway Township Board of Education, Respondent.	OAL Docket No. EDU-06217-2022S Agency Ref No. 160-6/22
R.C. and B.C. o/b/o A.C., a Minor, Petitioners, vs. Galloway Township Board of Education, Respondent,	OAL DOCKET No. EDU-05741-2022S AGENCY REF No. 20-2/22 **SETTLEMENT AGREEMENT**

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WHEREAS, both parties wish to resolve their differences amicably, allowing each party to move forward, and avoid potential costly litigation without either party admitting to any wrongdoing; and

WHEREAS, the Parties understand that the matters, regardless of whether or not they met the legal definition of HIB violations, greatly impacted the family, not only to A.C., but also to his brother R.C. and the rest of the family.

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information from the Petitioners and the Petitioners will receive information from the District

4. The Board will continue to follow the law regarding HIB. In addition, the District has placed parent resources on the District website for ease of access and in the student handbooks.

5. The Parties agree to disagree on whether the HIB complaints meet the legal requirements of HIB, as both parties agree to move forward, focusing on A.C. and R.C.'s educational experiences in the District. The Board agrees through the Superintendent to acknowledge that the District could have improved its communication regarding this matter and the items leading up to this matter between the Petitioners and District. Furthermore, on November 29, 2022 the Board's representative, the Superintendent, met with Petitioners to discuss these concerns and work toward improvements moving forward. As part of that discussion, the Superintendent apologized for any communication concerns and the impact this had on the family to Petitioner. After the Agreement is signed the School Solicitor will reach out to the Court to put this Agreement and acknowledge this section and apology on the record.

6. The Board through its Superintendent and Anti-Bullying Coordinator, agree to review and, as needed, revise its HIB Chart discussed with Petitioners to make sure it is in compliance with the law or no longer utilize the chart.

7. On November 29, 2022, the Parties met and reviewed concerns about the investigation and employees involved with the investigation, the Superintendent advised Petitioners that employee matters are confidential, however, anything that needed to be addressed was addressed.

8. The Board through its Administration will create a music plan for R.C. and A.C. to begin music at Reeds Road, if R.C. and A.C. choose to participate. Such plan will be drafted in January of 2023 through collaboration of the District and Petitioners, or as soon as possible after approval of this Agreement.

9. In exchange for the considerations above, the Petitioners on behalf of A.C. agree to dismiss their Complaints OAL Docket No. EDU-06217-2022S and OAL DOCKET No. EDU-05741-2022S and further agree to waive and release all claims against the Board regarding these two specific Docket Numbers listed above.

10. It is expressly understood and agreed that this Settlement Agreement shall be subject to the laws of the State of New Jersey.

IN WITNESS WHEREOF, the parties have hereunto set their hands and seals the date and year set forth below.

FOR THE GALLOWAY TOWNSHIP BOARD OF EDUCATION

Suzette M Carmen

Galloway Township Board of Education

1/30/2023

DATED:

Belinda Chester on behalf of A.C.

Belinda D. Chester

Friday, January 27, 2023

DATED:

Robert Chester on behalf of A.C.

Robert J. Chester

Friday, January 27, 2023

DATED:

Galloway Township Public Schools
101 South Reeds Road | Galloway, NJ 08205
Phone: (609) 748-1250 | Web: www.gtps.k12.nj.us

Stephen P. Santilli
Superintendent of Schools

Joy N. Nixon, CPA
School Business Administrator

GALLOWAY TOWNSHIP BOARD OF EDUCATION RESOLUTION

A motion was made by Mr. Gentile, and seconded by Dr. Beshara-Blauth, and carried by a roll call vote, to accept the Superintendent's recommendation to approve the following:

Two student settlement agreements as discussed in Executive Session on December 19, 2022.

CERTIFICATION

I, Joy Nixon, Business School Business Administrator/Board Secretary of the Board of Education of the Galloway Township School District in the County of Atlantic, New Jersey, DO HEREBY CERTIFY that the resolution entitled **A RESOLUTION OF THE BOARD OF EDUCATION OF THE GALLOWAY TOWNSHIP SCHOOL DISTRICT IN THE COUNTY OF ATLANTIC, NEW JERSEY,** is a copy of the resolution which was duly adopted by the Board at a meeting duly called and held on January 30, 2023, in full compliance with the Open Public Meetings Act, N.J.S.A. 10:4-6, et. seq., at which meeting a quorum was present and acting throughout and which resolution has been compared by me with the original thereof as contained in the minutes as officially recorded in my office in the Minute Book of the Board and is a true, complete and correct copy thereof and the aforesaid resolution has not been repealed, amended or rescinded but remains in full force and effect on and as of the date hereof.

Roll Call:	Mrs. Avery	Aye	Mrs. Coll-Guedes	Abstained
	Dr. Beshara-Blauth	Aye	Mr. Gentile	Aye
	Dr. Bilewu	Aye	Dr. Parmenter	Aye
	Mrs. Chester	Abstained	Mr. Dase	Aye
			Mrs. Carmen	Aye

7 Ayes
2 Abstained
Motion Carried

I, Joy N. Nixon, Business Administrator of Galloway Township Public School District, in the County of Atlantic, State of New Jersey do hereby certify that the foregoing is a true and correct copy of a Resolution adopted by the governing body of the Galloway Township Board of Education, County of Atlantic, State of New Jersey at a regular meeting of said governing body held on January 30, 2023.

(SEAL)

Joy N. Nixon, CPA, MBA
School Business Administrator/Board Secretary

87-23
OAL Dkt. No. EDU 05914 -22
Agency Dkt. No. 153-6/22

New Jersey Commissioner of Education

Final Decision

In the Matter of the Suspension of the Teaching Certificate of Dachele Hill, Camden's Promise Charter Schools, Camden County.

The record of this matter, the proposed Settlement Agreement and Release (Agreement), and the Initial Decision issued by the Office of Administrative Law pursuant to *N.J.A.C.* 1:1-19.1, have been reviewed. Upon such review, the Commissioner notes that Paragraph 9 the Agreement references actions that preceded the consideration of the settlement by the Commissioner of Education. The parties are reminded that a settlement of litigation before the Commissioner is not binding until the Commissioner approves the settlement. Further, with respect to Paragraph 10 of the Agreement, the Board is reminded that it must comply with the requirements of New Jersey's Open Public Records Act, *N.J.S.A.* 47:1A-1 *et seq.*, notwithstanding any agreement the parties may have between themselves to keep the terms of their settlement confidential.

In light of the foregoing, the Commissioner adopts the Initial Decision as the final decision in this matter, provided that the parties have already implemented the settlement terms or have agreed upon mutually satisfactory alternate dates for the effectuation of the terms of the Agreement. Assuming same, the matter is hereby dismissed, subject to compliance with the terms of the settlement consistent with applicable public records law.

IT IS SO ORDERED.

Angelica Allen-McMillan, Ed.D.
ACTING COMMISSIONER OF EDUCATION

Date of Decision: March 28, 2023
Date of Mailing: March 29, 2023

State of New Jersey
OFFICE OF ADMINISTRATIVE LAW

INITIAL DECISION
SETTLEMENT
OAL DKT. NO. EDU 05914-22
AGENCY NO. 153-6/22

IN THE MATTER OF THE SUSPENSION OF TEACHING CERTIFICATES OF DACHELE HILL, CAMDEN'S PROMISE CHARTER SCHOOLS BOARD OF TRUSTEES, CAMDEN COUNTY.

Emily E. Strawbridge, Esq., for petitioner (Parker McCay, P.A., attorneys)

Dachele Hill, respondent, pro se

Record Closed: February 7, 2023 Decided: March 2, 2023

BEFORE **KIM C. BELIN**, ALJ:

This matter was transmitted to the Office of Administrative Law (OAL) on July 18, 2022, for determination as a contested case, pursuant to N.J.S.A. 52:14B-1 to -15 and N.J.S.A. 52:14F-1 to -13.

The parties have settled this matter and have filed a Settlement Agreement indicating the terms thereof, which is attached and fully incorporated herein.

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

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

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

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

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

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

March 2, 2023
DATE

Kim C. Belin
KIM C. BELIN, ALJ

Date Received at Agency: 3/3/2023

Date Mailed to Parties: 3/3/2023

KCB/am

Camden's Promise Charter School
879 Beideman Ave
Camden, NJ 08105

Joseph Conway
Chief School Administrator
856-365-1000

Richelle H. Baughn
School Board Secretary
856-365-1000

State of New Jersey}
County of Camden}

Richelle H. Baughn, Being first duly sworn on oath, deposes and says:

That the deponent is the Board Secretary of Camden's Promise Charter School, in the County and State aforesaid, and that the annexed extract is a true and exact copy of the minutes of a meeting of Camden's Promise Charter School held on January 5, 2023:

Motioned by Mr. Loyola and seconded by Ms. Hinson that the Board of Trustees approve the Settlement agreement for D.H.
Unanimously Approved

Richelle H. Baughn, School Board Secretary

Law Offices of
PARKER McCAY P.A.
9000 Midlantic Drive, Suite 300
P.O. Box 5054
Mount Laurel, New Jersey 08054
Attorneys for Petitioner, Camden's Promise Charter School Board of Trustees

IN THE MATTER OF THE SUSPENSION OF THE TEACHING CERTIFICATE OF DACHELE HILL, CAMDEN'S PROMISE CHARTER SCHOOLS, CAMDEN COUNTY	**BEFORE THE COMMISSIONER OF EDUCATION OF THE STATE OF NEW JERSEY** **CIVIL ACTION** **OAL Docket No.: EDU 05914-2022 S** **Agency Docket No. 153-6/22**

SETTLEMENT AGREEMENT AND RELEASE

This **SETTLEMENT AGREEMENT AND RELEASE** is entered into on this ____ day of December, 2022 by and among Dachele Hill (hereinafter referred to as "Hill") and Respondent, Camden's Promise Charter School Board of Trustees(hereinafter referred to as "Board of Trustees" and/or "Board"); and

WHEREAS, Hill is a former employee of the Camden's Promise Charter Schools who terminated employment her employment on May 17, 2022; and

WHEREAS, the Camden's Promise Charter School Board of Trustees requires 30-days' notice of termination of employment by the terminating employee; and

WHEREAS, a dispute between the Parties arose regarding the amount of notice provided by Hill of termination of her employment with the Board; and

WHEREAS, the Parties desire to settle any and all claims and potential in this matter in an amicable way and therefore, after the ability to consult with legal counsel and following negotiations, have agreed to enter into this Settlement Agreement and Release in order to reach a compromise which will fully and finally resolve this matter; and

WHEREAS, the Parties, without alleging and/or admitting any wrongdoing or liability by any party, enter into this Settlement Agreement and Release in order to reach a compromise to fully and finally resolve their dispute in this matter, and agree as follows:

1. The Parties have reached this Agreement to avoid the expense, uncertainty and inconvenience of litigation. It is understood that the execution of this Agreement does not constitute an admission by the Camden's Promise Charter School Board of Trustees of any liability and/or wrongdoing by the Board. This Agreement represents the compromise of disputed claims and shall never be treated as an admission of liability by either party for any purposes whatsoever.

2. The Board agrees to withdraw its Petition for the Suspension of the Teaching Certificate of Hill.

3. In consideration therefore, Hill agrees that she will not seek, accept or obtain employment in any teaching position or any other position for which a New Jersey Teaching Certificate credential is required, for any public school district, charter school, or private school within the State of New Jersey for a period of one year from the date of this agreement.

4. In the event that any party materially breaches any of the terms and provisions of this Settlement Agreement and Release, the other party shall be entitled bring or reinstate claims arising under this action.

5. It is expressly understood and agreed that neither party shall be considered a prevailing party under any statute, common law, or otherwise, for any purposes whatsoever, as a result of this Agreement or the compromise of claims as set forth herein. Except as provided in the Paragraphs above, each party shall be responsible for their own attorney's fees, expert fees, and/or costs incurred in connection with this matter.

6. The Parties acknowledge that they have read and understand the terms of this Agreement, that they had an opportunity to have the Agreement read by their respective

counsel, that they are satisfied with the advice of their respective counsel, and that they are entering into this Agreement knowingly, freely, voluntarily, without coercion and not under the influence of anything or anyone.

7. This Settlement Agreement and Release constitutes the entire agreement between the Parties regarding any and all aspects of the final and complete settlement of this matter. This Settlement Agreement and Release supersedes any and all prior agreements and understandings between and among the Parties pertaining to this matter. This Settlement Agreement and Release shall not be amended, modified or amplified without a specific written provision to that effect executed by all the Parties. No oral statements by any person shall, in any manner, amend, modify or amplify the terms and provisions of this Settlement Agreement and Release.

8. The parties are bound by this Agreement and each of its provisions. Anyone who succeeds to their rights and responsibilities, such as their successors and assigns are also bound. This agreement is made for the benefit of all parties hereto and all who succeed to their rights and responsibilities, and expressly includes their officials, representatives, employees, agents, attorneys, successors or assigns.

9. Hill understand/s and agree that this Agreement is subject to formal approval by the Camden's Promise Charter School Board of Trustees, following its approval and full execution by Hill. In the event the Board thereafter approves the Agreement, it shall be executed forthwith by the Board and shall become effective immediately, and a copy of the formal approval resolution by the Board will be provided to Hill. In the event that this Agreement is not approved by the Board, no agreement shall have been formed between the Parties, who shall return to *status quo ante*, and this Agreement shall be deemed null, void, and of no force and effect.

10. This Settlement Agreement shall remain confidential to the maximum extent permitted by law and neither party shall volunteer to disclose its form or contents to any third parties except as may be required by and/or in accordance with operation of law or lawful subpoena or order of court or pursuant to official discovery proceedings. Neither party shall engage in disparaging or negative comments or statements regarding the other party and/or the conduct of the other party.

11. In the event that any provision or clause of this Agreement shall be held invalid

or unenforceable by a court or tribunal of competent jurisdiction, the remaining provisions of this Agreement are deemed severable and shall remain in full force and effect to the fullest extent permitted by law, unless the Agreement, as so construed, would substantially frustrate the purposes of the Parties in entering into this Agreement.

12. This Agreement shall be interpreted, enforced, and governed under the laws of the State of New Jersey. The language of all parts of this Agreement shall in all cases be construed as a whole, according to its fair meaning, and not strictly for or against any Party. The Parties agree and acknowledge that this Agreement is the product of mutual draftsmanship and any rule of law requiring that it be construed against the drafter shall not apply.

13. This Agreement may be executed in one (1) or more counterparts, all of which shall be considered a single and the same, and shall become effective when one (1) or more counterparts have been signed by each party. It is understood that the parties need not sign the same counterpart, and this Agreement shall be fully valid, legally binding, and enforceable whether executed in a single document or in such counterparts.

IN WITNESS HEREOF, the parties have set their hands this____ day of September, 2022.

Dachele Hill

Dated: 12-18-22

Mrs. Zulma Gonzalez-Lombardo,
Board President
Camden's Promise Charter School Board of Trustees

Dated: 11/5/23

LAW OFFICE
Parker McCay P.A.

4872-9081-6067, v. 1

93-23

New Jersey Commissioner of Education

Final Decision

Department of Children and Families,

Petitioner,

v.

R.R.,

Respondent,

and

Robert Rodriguez,

Petitioner,

v.

New Jersey Department of Education,
Criminal History Review Unit,

Respondent.

Synopsis

In this consolidated case, petitioner – a school bus driver – appealed a finding of neglect by the Department of Children and Families (DCF), and a determination by the NJ Department of Education, Criminal History Review Unit (now known as the Office of Student Protection or OSP), imposing a six-month suspension of petitioner's school bus license stemming from a 2017 incident wherein the petitioner parked and locked the school bus without checking to see if any children remained onboard at the end of his shift. Petitioner's negligence resulted in an 8-year-old child being left unsupervised on the bus for nearly two hours.

The ALJ found, *inter alia*, that: there was no dispute, under the totality of the circumstances, that the student never reached his destination on the day of the incident and was found by a third party locked on the bus after 5:00 pm, well after his normal drop off time; accordingly, DCF's determination of established neglect was upheld. Regarding the suspension of petitioner's school bus license, a 6-month suspension was not warranted given that petitioner has not had a valid bus driver "S" endorsement since this matter was initiated more than 4 years ago, and – while technically a 6-month suspension should have been imposed – petitioner has already endured a "de facto" suspension of his bus license for more than 4 years and any further suspension would be fundamentally unfair and penalize him twice for the same violation.

Upon review, the Commissioner adopted the Initial Decision of the OAL as the final decision in this matter, as petitioner has already served the mandatory suspension of his school bus "S" endorsement.

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

93-23
OAL Dkt. Nos. HSV 01772-18 and EDU 06479-18 (consolidated)
DCF Dkt. No. AHU 17-0799
Agency Dkt. No. 73-3/18

New Jersey Commissioner of Education

Final Decision

Department of Children and Families,

Petitioner,

v.

R.R.,

Respondent,

and

Robert Rodriguez,

Petitioner,

v.

New Jersey Department of Education, Criminal History Review Unit, [1]

Respondent.

The record of this matter and the Initial Decision of the Office of Administrative Law (OAL) have been reviewed, as have the exceptions filed by respondent New Jersey Department of Education, Office of Student Protection (OSP) pursuant to *N.J.A.C.* 1:1-18.4, and the petitioner's reply thereto.

[1] The Criminal History Review Unit is now known as the Office of Student Protection. This decision will use Office of Student Protection for consistency.

This consolidated action stems from an incident in which petitioner, a bus driver for the Hoboken School District, left a student on the bus on May 31, 2017. Petitioner parked and locked the school bus at the end of his shift and, approximately two hours later, another district employee found an eight-year-old child on the school bus. The Department of Children and Families (DCF), Institutional Abuse Investigation Unit investigated and established that petitioner's conduct constituted "Neglect/Inadequate Supervision." Additionally, OSP sent a letter dated March 9, 2018, indicating that petitioner's "S" endorsement to operate a school bus would be suspended for 6 months because petitioner had failed to conduct a visual inspection at the end of his transportation route as required by *N.J.S.A.* 18A:39-28 *et seq.* Petitioner challenged the DCF finding of child neglect and filed a petition of appeal with the Department challenging the suspension of his "S" endorsement to operate a school bus. The matters were consolidated at the OAL as they both stemmed from the same incident. DCF was determined to have the predominant interest as to the finding of neglect, and the Commissioner has jurisdiction to decide the remaining education issue involving the suspension of the "S" endorsement.[2]

The Administrative Law Judge (ALJ) upheld DCF's determination of established neglect. With respect to the bus driver "S" endorsement, the ALJ found that a 6-month suspension was not warranted given that petitioner has not had a valid bus driver "S" endorsement since the education matter was initiated more than 4 years ago. The ALJ explained that the pandemic caused extensive, unprecedented delays in this case, and petitioner has certified and testified that he could not utilize his "S" certification throughout the pendency of this matter because he

[2] The education matter was placed on the inactive list while the DCF matter proceeded with testimony. After the completion of the DCF matter, the education matter proceeded by way of summary decision.

was prevented from having his fingerprints taken, which is required to operate a school bus. As such, the ALJ found that while technically a 6-month suspension should be imposed, petitioner has already endured a "de facto" suspension of his "S" endorsement for more than 4 years and any further suspension would be fundamentally unfair and penalize him twice for the same violation.

In its exceptions, OSP argues that the School Bus Safety Act (Act), *N.J.S.A.* 18A:39-26 to -33, requires bus drivers to visually inspect the school bus to ensure that no child has been left on the bus. The Act leaves no discretion and imposes a mandatory 6-month suspension for the first offense of leaving a child on the bus. *N.J.S.A.* 18A:39-29. OSP contends that the statute does not permit further inquiry into a petitioner's personal circumstances. As such, OSP requests that the Initial Decision be rejected.[3]

In reply, petitioner argues that he has already served well more than a 6-month suspension of his "S" endorsement as he has been subject to a "de facto" suspension of not less than 5 years. As such, he urges the Commissioner to adopt the Initial Decision.

Upon review, the Commissioner finds that petitioner failed to inspect the bus at the end of his route as required, which resulted in a student being left on the bus for approximately two hours. The Commissioner further concludes that *N.J.S.A.* 18A:39-29 mandates a six-month suspension of petitioner's school bus endorsement as this was his first offense. However, the Commissioner finds that given the specific circumstances in this matter, in which petitioner has been unable to obtain a valid "S" endorsement for at least the past 4 years while this matter was pending, the petitioner has effectively already served his 6-month suspension. The

[3] OSP also argues that the Department did not violate petitioner's due process rights by blocking him from getting fingerprinted; if petitioner was prevented from having his fingerprints taken, it was not due to any action of the Department. The Commissioner agrees that petitioner's due process rights were not violated.

Commissioner finds that, given the unique circumstances in this case, the suspension petitioner has already served is sufficient to meet the statutory requirement.

Accordingly, the Initial Decision of the OAL is adopted as the final decision in this matter. The petitioner has already served the mandatory suspension of his school bus "S" endorsement.

IT IS SO ORDERED.[4]

Angelica Allen-McMillan, Ed.D.
ACTING COMMISSIONER OF EDUCATION

Date of Decision: March 30, 2023
Date of Mailing: March 31, 2023

[4] This decision may be appealed to the Appellate Division of the Superior Court pursuant to *N.J.S.A.* 18A:6-9.1. Under *N.J.Ct.R.* 2:4-1(b), a notice of appeal must be filed with the Appellate Division within 45 days from the date of mailing of this decision.

State of New Jersey
OFFICE OF ADMINISTRATIVE LAW

INITIAL DECISION

DEPARTMENT OF CHILDREN AND FAMILIES,
Petitioner,
v.
R.R.,
Respondent.

OAL DKT. NO. HSV 01772-18
AGENCY DKT. NO. AHU#17-0799

ROBERT RODRIGUEZ,
Petitioner,
v.
NEW JERSEY DEPARTMENT OF EDUCATON, CRIMINAL REVIEW UNIT,
Respondent.

OAL DKT. NO. EDU 06479-18
AGENCY DKT. NO. 73-3/18

David Kalisky, Deputy Attorney General, for petitioner (Matthew J.Platkin, Attorney General of New Jersey, attorney)

Joann M. Corsetto, Deputy Attorney General, for Petitioner (Matthew J. Platkin, Attorney General of New Jersey, attorney)

Paul Tyshchenko, Esq., for Respondent (Caruso Smith Picini, P.C., attorneys)

Record Closed: December 21, 2022 Decided: January 4, 2023

BEFORE **ANDREW M. BARON**, ALJ:

STATEMENT OF THE CASE

R.R., appeals a finding of neglect by the Department of children and Families, and a determination by the Enforcement Unit of the Department of Education, imposing a six-month suspension of petitioner's school bus driving privileges, arising out of an incident of neglect, where petitioner closed, parked and locked a school bus without checking to see if any children remained on the bus at the end of his shift.

PROCEDURAL HISTORY

This matter was initially the subject of predominant matter, HSV 01772-18, which was decided on April 5, 2022, upholding the DCF determination that neglect was "Established." That decision was recalled, when an issue was raised by the Department of Education that the second part of the case which had been "held in abeyance," was inadvertently not reinstated, and a consolidation order, which has now been filed, was not entered at that time.

R.R. also appeals from a determination by the Department of Education suspending his school bus driver's license "S" endorsement for a period of six months in connection with the finding of "Established Neglect," involving the student who was left on the bus.

Four years after the original incident, the State now seeks via motion for a Summary Disposition a ruling in its favor to impose a six-month period of suspension of petitioner's bus driving privileges, despite having already served a similar suspension imposed by the school district of Bayonne, based on allegations of "Neglect" found by the State Division of Children and Families. (That part of the case had previously been de-activated by consent, was re-activated in April 2022. The ministerial act of filing a consolidation order which was overlooked at the time has now been filed as a prelude to filing the within decision which addresses both matters.

Oral argument on the Department of Education's penalty phase of the case was conducted on September 22, 2022, November 2, 2022, and December 21, 2022, respectively.

Other than the contested fact that R.R. says he checked the bus to make sure no students remained, most of the facts are not disputed.

DISCUSSION AND FINDINGS OF FACTS AS TO DCF v. R.R. HSV-01772-18

Irek Taflinski is a Senior Investigator with the Institutional Abuse and Investigation Unit (IAIU) with the Department of Children and Families (DCF). At the time of the hearing, he had been with the agency for fourteen years. Prior to that, he worked as a supervisor with the agency.

Mr. Taflinski was assigned by the agency to investigate the incident involving R.R., a school bus driver with the Hoboken School District which occurred on May 31, 2017. In addition to speaking with the Hoboken Police Department, and school officials, Mr. Taflinski spoke with the child (J.S.'s) mother and several students who ride the bus with J.S.

Mr. Taflinski prepared an Investigative summary, (P-3) regarding his investigation. Hoboken Public Schools also did a Report of Incident. (P-9). Other evidence considered was the Weather History for 5/31/17 (P-4), Certification of Documents, (P-6), the Hoboken Transportation Employee Manual, (P-7) and the Hoboken Police Investigation Report. (P-10). Also considered was the DCF IAIU Findings Report dated 9/22/17.

According to his testimony, after meeting with the Hoboken Police Department, Mr. Taflinski went to the area where the bus was usually parked at the end of each day and met with the coach and a group of students who play softball on a field adjacent to where the bus is parked.

The coach, whose name was Vincent Johnson, told Mr. Taflinski that there was a foul ball that rolled over near where the bus was parked, and that he and some of the players noticed that there was actually someone still inside the bus. After seeing the individual, Mr. Johnson and his assistant coach immediately opened the door and got the child off the bus. The time was around 5:15 P.M. It is unknown how long the bus was there with J.S. on it before they discovered him. In addition to the people at the field near where the bus was parked, Mr. Taflinski interviewed J.S.

J.S. told him he remembered getting on the bus, he sat in the back, and he remembered falling asleep, he woke up and there was no one else on the bus, including the driver.

The investigator Mr. Taflinski interviewed R.R. R.R. swore that he walked from the front to the rear of the bus, and then back again, checking side-to-side to make sure everyone was off the bus. Mr. Taflinski said he went to see the bus himself, and in his opinion, there was no way a child could hide underneath one of the bus seats, because of the metal bracket that support the seats which are attached to the floor. He further stated during his testimony that it would be virtually impossible to miss a young child still sitting on the bus, particularly if they were the only one remaining.

Mr. Taflinski also interviewed several of the other students, age 8 who rode the bus. At least three of them confirmed that J.S. frequently falls asleep and that R.R. has to wake him up when they reach his destination.

LEGAL ANALYSIS AS TO HSV 01772-18

The Department of Children and Families is entrusted with responsibility for the care, custody, guardianship, maintenance and protection of children. N.J.S.A. 30:4C:-2 (a); G.S. v. Dept. of Human Services, 157 N.J. 176 (1999). In furtherance of that objective, Title 9 of the New Jersey statutes includes comprehensive provisions governing allegations of child abuse and neglect. N.J.S.A. 9:6-8.8 (a). The main goal of Title 9 is to protect children from acts or conditions which threaten their welfare. G.S. 157 N.J. at 176, quoting State v. Demarest, 252 N.J. Super 323, (App. Div. 1991).

Toward the achievement of this goal, any person having reasonable cause to believe that a child has been subjected to child abuse or acts of child abuse is required to report that suspicion to the Division of child Protection and Permanency. (formerly the Division of Youth and Family Services.) N.J.S.A. 9:6-8.11.

Once such an allegation is concluded, the Division will make a finding regarding the allegations.

The Division's standard in abuse and neglect cases is a preponderance of the evidence, which means showing "that a desired inference is more probable than not." N.J. Div. of Youth & Family Servs. v. N.S., 412 N.J. Super. 593, 615 (2010);

N.J.S.A. 9:6-8.46(b)(1). The evidence rules in administrative court state that all relevant evidence is admissible that aid in the ascertainment of the truth. N.J.A.C. 1:1-15.1(b)-(c). Hearsay evidence is allowed. N.J.A.C. 1:1-15.1; N.J.A.C.1:1-15.5. Abuse and neglect evidence rules N.J.S.A. 9:6-8.46(a)(3), N.J.S.A. 9:6-8.46(a)(4), and N.J.S.A. 9:6-8.46(b)(2) also apply.

N.J.S.A. 9:6-8.21 (a) defines parent or guardian as a teacher, employee or volunteer, whether compensated or uncompensated, of an institution who is responsible for the child's welfare and any other staff person of an institution regardless of whether or not the person is responsible for the care or supervision of the child. So, in this case, R.R. in his capacity as a school bus driver, would fall into this category.

N.J.A.C. 10:129-1.3 similarly defines a "parent or guardian" as "any birth parent, adoptive parent, resource parent, stepparent, paramour, or any person, who has assumed responsibility for the care, custody or control of a child or upon whom there is a legal duty for such care" including "a teacher, employee or volunteer, whether compensated or uncompensated, of an institution who is responsible for the child's welfare and any other staff person of an institution regardless of whether or not the person is responsible for the care or supervision of the child" and a "teaching staff

member or other employee, whether compensated or uncompensated, of a day school as defined in N.J.S.A. 9:6-8.21. Clearly R.R. also falls within this definition.

The Division of Child Protection and Permanency (DCP&P's) regulations provide four possible conclusions of an abuse and neglect investigation: (1) substantiated; (2) established; (3) not established; and (4) unfounded. If a finding is either substantiated or established, DCP&P would deem the child abused or neglected in accordance with N.J.S.A. 9:6-8.21. DCP&P has defined their findings as follows:

> Substantiated: a "preponderance of the evidence" suggests the child is "abused or neglected" pursuant to N.J.S.A. 9:6-8.21, and the investigation indicates any of the circumstances set forth in N.J.S.A. 3A:10-7.4 (e.g. subjecting the child to sexual activity, repeated instances of physical abuse) or substantiation is warranted based on factors provided in N.J.A.C. 3A:10-7.5.
> Established: a "preponderance of the evidence" indicates that a child is "abused or neglected" pursuant to N.J.S.A. 9:6-8.21, but the conduct does not warrant a finding of "substantiated."
> Not established: a "preponderance of the evidence indicates the child is "abused or neglected" pursuant to N.J.S.A. 9:6-8.21, but the evidence demonstrates that the child was not harmed or placed at risk of harm.
> Unfounded: there is no "preponderance of the evidence" indicating that the child was abused or neglected pursuant to N.J.S.A. 9:6-8.21, and the evidence indicates that the child was not harmed or placed at risk of harm.

Previous statements made by a child relating to allegations of abuse are admissible in evidence, provided they must be corroborated. N.J.S.A. 9:6-8.46(a)(4). Corroborative evidence may be circumstantial as the Appellate Court has recognized that "it would be a rare case where evidence could be produced that would directly corroborate the specific allegation of abuse" between the victim and perpetrator, especially a parent-perpetrator N.J. Div. of Youth & Family Servs. v. Z.P.R., 351 N.J. Super 427,435-36(App. Div.2002). "The corroborative evidence need not relate directly to the alleged abuser it need only provide support for the out-of-court statements." Id. This means that corroboration can be in any form.

The burden of proof in these matters lies with the Respondent in this matter. N.J.S.A. 9:6-8.46 (a) states: In a fat-finding hearing (1) any determination that the child is an abused or neglected child must be based on a preponderance of the evidence and (2) only competent, material relevant evidence may be admitted. See also: N.J. Div. of Youth and Family Servs. V. P.W.R., 205 N.J. 17,32 (2011).

When an allegation of child abuse or neglect has been substantiated, the name of the individual found to have perpetrated the abuse or neglect and any identifying information are entered into the Registry maintained by the Department. N.J.S.A. 9:6-8.11. The information contained in the Registry is confidential but may be disclosed consistent with relevant statutes.

Though petitioner argues that J.S. was found safe and unharmed, actual harm does not need to occur in order to establish that neglect occurred. See: N.J. Dept. of Children and Families v R.R., 436 N.J. Super. 53,59 (App. Div. 2014). The finding in R.R. affirmed a conclusion of willful and wanton disregard by a school bus driver who failed to inspect the bus personally at the end of a route that day because she relied on a bus aide's statement that no children remained on the bus.

The criteria analogous to the situation in this case was discussed at length in the matter of N.J. Dept. of Children & Families v. E.D.-O, 434 N.J Super 154,157 (App. Div. 2014) wherein a parent let a child in a vehicle for five to ten minutes. The conclusion in ED-O. found that "a parent invites substantial peril when leaving a child of such tender years in a motor vehicle that is out of a parent's sight, no matter how briefly."

When witnesses present conflicting testimonies, it is the duty of the trier of fact to weigh each witnesses' credibility and make a factual finding. In other words, credibility is the value a fact finder assigns to the testimony of a witness, and it incorporates the overall assessment of the witnesses' story in light of its rationality, consistency and how it comports with other evidence. Carbo v. United States, 314 F 2d. 718 (9th Cir. 1963). Credibility findings "are often influenced y matters such as observations of the character and demeanor of witnesses and common human experience that are not transmitted by

the record." State v. Locurto, 157 N.J. 463 (1999). A fact finder is expected to base decisions of credibility on his or her common sense, intuition or experience. Barnes v. United States, 412 N.J Super 837 93 S. Ct. 2357 37 L.Ed. 380 (1973).

Respondent argues that most of the evidence the agency relied on to reach its finding that neglect was Established should be disregarded as Hearsay, and under the residuum rule, there is insufficient evidence to sustain the agency's finding.

Citing Weston v. State, 60 N.J. 36, Respondent contends that the State's case is almost entirely based on hearsay testimony, and as such, its primary witness, Mr. Taflinski, has no firsthand knowledge of any of the facts. He argues that his testimony consists of what other people told him, specifically L.S., the local police, the softball coach, the other students, and the players at the scene. Thus, he argues that the State's case is completely based on hearsay. Nonetheless, even if less weight were given to some of the admissible statements the investigator relied upon, **IT IS UNDISPUTED**, under the totality of the circumstances, that J.S. never reached his destination on the day of the incident, and he was found by third parties on a locked bus sometime after 5:00 o'clock on the day of the incident, well after the normal drop off time for a student of his age.

DEPARTMENT OF EDUCATION CRIMINAL HISTORY REVIEW UNIT ACTION (EDU 06479-18)

I now turn my attention to the second part of the case, wherein the Department of Education seeks a ruling of Summary Disposition to impose a six-month suspension of petitioner's school bus driver's "S" license, as a result of an Established finding of neglect for closing, parking and locking a school bus with a young child still inside.

This part of the case was deactivated by consent, while the first part of the case proceeded with testimony. At the time, a Consolidation Order was inadvertently not entered, which is being filed now as a pro forma matter, since it was always the intention to do so, when the deactivation occurred.

A motion for summary disposition may be granted if there is no genuine issue of material fact and the moving party is entitled to prevail as a matter of law. N.J.A.C. 1:1-12.5. Under that rule, "a party may move for summary decision upon all or any of the substantive issues in a contested case. Further, "the decision sought may be rendered if there is no genuine issue as to any material fact challenged, and the movant is entitled to relief as a matter of law."

By analogy, the State suggests it is the equivalent of R. 4:46-2 regarding summary judgment and avoids unnecessary evidentiary hearings when there are no disputed issues of material fact. Contini v. Bd. of Educ. of Newark, 286 N.J. Super. 106 (App. Div. 1995). See also: Brill v. Guardian Life Insurance Company of America, 142 N.J. 520 (1995), wherein the New Jersey Supreme Court established that the key question is whether the evidence is so one-sided that one party must prevail as a matter of law.

Thus, the State argues here that because of the determination in the first part of the case that neglect was Established, it automatically follows that the six-month bus driving penalty privilege must be assessed, regardless of the suspension already imposed by the Bayonne School District, and the amount of time that elapsed from the offense, the Bayonne suspension and the decision. The State also wants this tribunal to ignore and argues petitioner's inability to fully renew his "S" license throughout this entire time is irrelevant to the mandates of the statute. **I respectfully disagree,** as this, in and of itself, presents a genuine issue of material fact that compels **denial** of the State's motion.

Essentially the State argues that regardless of the time in between and the related suspension by the District, and the fact that throughout this entire time, including a once-in-a-lifetime State emergency health shutdown, and the inability to be fingerprinted, a key component of being able to drive a school bus, strict interpretation of the law does not allow for any flexibility in penalty, and the clock must start fresh regardless of whether or not a penalty has already been served for the same offense. See: Garner v. N.J. Dept. of Educ. Crim Hist. Review Unit, OAL DKT. No. EDU 06655-085, Initial Decision, April 3, 2009) adopted, Comm'r Final Decision, (May 1, 2009).

To reinforce its position that the law is unambiguous on the issue of penalty, with four years having passed, two of which included a once in a lifetime pandemic when the State was either completely shut down, and/or legal proceedings were backed up or delayed, the State also cites: Graham v. New Jersey Dep't of Educ., Criminal History Review Unit, OAL DKT. No. EDU 08439-11 Initial Decision (December 15, 2011), adopted Agency DKT. No. 168-6/11, Final Decision (January 30, 2012) And see: Dacres v. N.J. Dept. of Educ. Crim. Hist. Review Unit, OAL DKT. No. EDU 04414-2010S, Initial Decision Feb. 7, 2011), adopted Comm'r Final Decision (Sept. 8, 2010). Thus, the State argues that a strict application of the statute requires the imposition of a six-month penalty, without any consideration of other factors. **I respectfully disagree,** as these facts warrant a ruling on the issue of penalty in favor of petitioner.

It is unfortunate that while the parties agreed from the outset that the two cases should be consolidated, this tribunal determined and agreed to deactivate the second part of the case involving the enforcement action by the Department of Education. That is no one's fault. No one could have foreseen a pandemic on the horizon, which effectively shut down the State and caused extensive delays in this case and others. But that does not mean the State should be allowed to "sleep on its rights" during this entire time, and then nonetheless demand petitioner still be forced to endure another hardship of another six months of not being able to perform his job duties, and now risk losing his position outright. The principles of equity and fundamental fairness that are inherent in our system of justice dictate otherwise.

Nonetheless, at the time the case was deactivated, no one would have anticipated that a pandemic would ensue, it was not the intention of doing so that the outcome of the first case, if the neglect determination was upheld, would automatically result in a strict construction finding four years after the local school district had already imposed its own suspension of more than six months.

Further, petitioner has certified and testified under oath that despite the State presenting an uncertified copy of his license which no one from the Motor Vehicle Services Commission or the CHRU came forward to explain, petitioner, who I deem

credible based on his certification and testimony explained that regardless of one of the licenses still having the "S" designation on it, he still could not utilize it since the government agency responsible for taking his fingerprints and forwarding them to the CHRU, would not allow this process to go forward.

These actions, (or inactions) appear to be in direct contravention of the statute and petitioner's due process rights. While speculative, even if the Hoboken Board of Education continued to bar petitioner from driving students, other districts may have hired him pending the final disposition of this case. (Judicial notice is taken that once schools fully re-opened, many school district had and still have experienced problems hiring bus drivers to transport their students.) The actual impact of not allowing petitioner to proceed with fingerprinting amounts to a "de facto" suspension of his driving privileges which cannot be ignored and is the equivalent of double jeopardy.

The Double Jeopardy Clause of the Fifth amendment provides that no person shall "be subject for the same offense to be twice put in jeopardy of life or limb." U.S. Const. amend V. The New Jersey Constitution contains a similar provision. "No person shall, after acquittal, be tried for the same offense." N.J Const. Art. I. Sect. 11. The New Jersey Supreme Court has consistently interpreted the State Constitution's double jeopardy protection as coextensive with the guarantee of the Federal Constitution. See: State v. Miles, 229 N.J. 83 (2017), State v. Schubert, 212 N.J. 295 (2012) and State v. Barnes, 84 N.J. 362. (1980). Although the language of the U.S. Constitution and the New Jersey Constitution differ, "they have come to be recognized as substantially coextensive in principle and scope." State v. Ebron, 61 N.J. 207 (1972).

The principle that no person is to be placed in jeopardy "more than once for the same offense" traces the roots to a variety of early sources. United States v. Wilson, 420 U.S. 332, 339-342 (1976). See also: State v. Currie, 41 N.J. 531. The Fifth Amendment of the United States Constitution embodies the principle of common law double jeopardy protections and is binding on the states by virtue of the Fourteenth Amendment. State v. Ebron 61 N.J. 207 (1972), (citing Benton v. Maryland, 395 U.S. 784, (1969)).

Here, we have the Criminal History Review Unit, (CHRU) a Division of the Department of Education, seeking to impose a six-month license suspension against a party who has already been suspended from driving by his employer four years earlier and against whom a Finding of Established Child Neglect has been upheld. Throughout this entire time, petitioner has been unable to perform the job he was hired to do by the Hoboken Board of Education and has been unable to present himself for finger printing pending the outcome of both of these related cases against him. Were it not for the good graces of his employer during this time, who was able to utilize him as an equipment operator and courier which do not require the "S" designation, he would have been terminated. Now, having ironically received a thirty-day notice from the employer, the State seeks to enforce the six-month penalty, even after over forty-eight months where petitioner was prevented from working as a school bus driver. A sense of equity and fundamental fairness seems to compel a different outcome.

No one can be faulted for not having a crystal ball when the State made its request early in the proceedings for seeking to deactivate the second part of the case involving the license suspension, which petitioner and this tribunal agreed to. But it is undisputed that everything changed as of March 15, 2020, when the State, including all of its school and non-essential businesses, and its entire court system were shut down, due to a once-in-a-lifetime public emergency in accordance with Executive Order.

Even after court proceedings slowly opened for virtual hearing, a huge backlog of cases developed over time, which only now the system is starting to recover from. Thus, this case, which had been de-activated by the consent of the parties, remained in that status, and at no time did anyone on behalf of the State move to change the status, until the Initial Decision on the first part of the case was filed. At that time, the State asked for and was granted the opportunity to re-open the case and file this motion. However, the State contends that under the statute regarding suspensions, strict scrutiny must be applied, and there is no discretion or flexibility to look at the totality of the circumstances.

While the Department is technically correct that a six-month penalty of petitioner's "S" privileges should be imposed, petitioner raises a valid concern about

what he refers to as a form of "civil double jeopardy" being penalized twice, consecutively for the same offense. Principles of fundamental fairness, due process and reasonable expectations are the underpinnings of our system which protects against second prosecutions and multiple punishments for the same offense. State v. Yoscowitz, 116 N.J. 679. That is exactly what the State seems to be doing here, regardless of the amount of time petitioner has been unable to work as a bus driver since the incident, and regardless of what appears to be actions taken by other State agencies during this period of time that prevented petitioner from regaining his bus driving privileges while his appeal was pending.

Prior to the first Supplemental Argument on November 2, 2022, petitioner submitted a Certification indicating that he had been rebuffed by the Motor Vehicle Services Commission several times when he tried with the hearing pending, to renew his S rider to his license so he could renew his bus driving duties. Throughout this entire time, the Hoboken Board of Education maintained petitioner's employment, even though he could not drive a school bus, and assigned him to drive other vehicles that did not involve the transportation of students.

Shortly thereafter, the State submitted a certified, but unexplained document which the Deputy Attorney General represented that it showed petitioner had an "S" endorsement throughout the time this matter was pending. It is important to indicate here that while the document the State submitted was certified as a Motor Vehicle Services Commission record, it is undisputed that there was no explanation attached to it by any official at the agency.

When the supplemental argument resumed on December 21, 2022, petitioner offered limited testimony to rebut the State's contentions about the status of his license. Petitioner testified that while he did not dispute that the letter "S" appeared on some of his earlier licenses before 2022, it had no meaning since he was barred by the State from completing the fingerprinting process, which is the final step to remain eligible to be a school bus driver. The only facts before me on this phase of the case are the facts put before me by way of Certification and testimony by the petitioner. No Certification or

testimony was offered by the State, just a partial copy of petitioner's driving abstract, offered as a business record.

With his driving privileges still in limbo, on December 12, 2022, petitioner received formal written notice from his employer that his license with the "S" endorsement had to be reinstated within thirty (30) days in order to fully resume the functions of his job with the Hoboken Board of Education. Though not stated outright, the letter implies that if petitioner is not able to produce a fully approved "S" endorsement, it is likely his employment will end.

In its argument that the mandatory six-month license suspension should still be imposed, the State argues that the decision in the first case sustaining the Established finding of neglect, is irrelevant (emphasis added) to the second proceeding which was initiated by the Department of Education, CHRU unit.

For the reasons set forth herein, **I RESPECTFULLY DISAGREE**. Petitioner was unable to drive a school bus for at least the past four years. It is also undisputed that the employer, the Hoboken Board of Education, has kept petitioner on as an employee, even though he has been unable to do the work he was hired to do.

Also undisputed is that even if an individual is able to secure an "S" endorsement, fingerprints are a prerequisite to activating the "S" endorsement. I accept petitioner's testimony and his representation by way of Certification that despite repeated efforts, he was unable to do so. It is also undisputed that were it not for a once-in-a-lifetime extended State shutdown due to a serious health emergency, this case would have been heard, completed and decided long ago.

Although this is not a criminal case, it is important to understand here that the agency seeking to now impose a six-month license suspension is the Criminal History Review Unit of the Department of Education. As such, by seeking to now invoke an additional penalty against petitioner, after he has already accountable for the underlying incident is akin to a double jeopardy violation.

A property interest in a public sector job arises when the employee has "a legitimate entitlement to continued employment as determined by the laws of the state in which they work. Elmore v. Cleary, 399 F.3rd 279 (3rd Cir. 2005) (citing Bd. of Regents of State v. Roth, 408 U.S. 564 (1972)). Though petitioner may not be a Civil Service employee, he is employed by the Hoboken Board of Education which is a public entity.

I CONCLUDE that petitioner has a property interest in his position as a school bus driver for the Hoboken Board of Education. **I FURTHER CONCLUDE** that the four-year period of time from the inception of the underlying incident and for all of the foregoing reasons set forth herein, including the fact that petitioner was denied the right to be fingerprinted which is a prerequisite for an individual driving children on a bus, constitutes a denial of petitioner's due process rights. **I THEREFORE CONCLUDE**, that taking all of these factors into account, and balancing the equities which are an inherent part of our system of justice, with petitioner now potentially facing permanent termination of his job as evidenced by a letter recently issued by his employer, it would be an undue hardship and unjust for the Department of Education to impose a license suspension of six months, thereby further preventing R.R. from making a living in his chosen occupation.

ORDER

It is hereby **ORDERED** that the earlier determination of **Established Neglect** is **Affirmed,** and with all of the facts having already been presented by both parties and no further hearing being necessary, it is further **ORDERED**, that the State's Motion for Summary Disposition seeking imposition of a six month license suspension is **Denied**, and petitioner having already served the equivalent of a six month penalty for more than four years, any further penalty would constitute a hardship and a violation of petitioner's due process rights. **I THERFORE ORDER**, that on the issue of penalty, on procedural and substantive due process grounds, and as a matter of fundamental fairness and to avoid an undue hardship, no further hearing is warranted and a ruling in favor of petitioner is appropriate that no suspension should be imposed. The matter should now be deemed closed.

I hereby **FILE** my initial decision with the **ASSISTANT COMMISSIONER OF LEGAL REGULATORY AND LEGISLATIVE AFFAIRS, of the DEPARTMENT OF CHILDREN AND FAMILIES and THE DEPARTMENT OF EDUCATION** respectively for consideration.

This recommended decision may be adopted, modified or rejected by either of the **ASSISTANT COMMISSIONERS OF LEGAL REGULATORY AND LEGISLATIVE AFFAIRS**, who by law is authorized to make a final decision in this matter. If the Assistant Commissioner of Legal Regulatory and Legislative Affairs, does not adopt, modify or reject this decision within forty-five days and unless such time limit is otherwise extended, this recommended decision shall become a final decision in accordance with N.J.S.A. 52:14B-10.

Within thirteen days from the date on which this recommended decision was mailed to the parties, any party may file written exceptions with the **ASSISTANT COMMISSIONER OF LEGAL REGULATORY AND LEGISLATIVE AFFAIRS, DEPARTMENT OF CHILDREN AND FAMILIES, 50 East State Street, 5th Floor, PO Box 717, Trenton, New Jersey 08625-0717,** marked "Attention: Exceptions." A copy of any exceptions must be sent to the judge and to the other parties.

Pursuant to N.J.A.C. 1:1-17.8, upon rendering its final decision **ASSISTANT COMMISSIONERS OF LEGAL REGULATORY AND LEGISLATIVE AFFAIRS** respectively shall forward the record, including this recommended decision and its final decision, to the **COMMISSIONER OF THE DEPARTMENT OF EDUCATION**, which may subsequently render a final decision on any remaining issues and consider any specific remedies which may be within its grant of authority.

Also upon transmitting the record, the **ASSISTANT COMMISSIONER OF LEGAL REGULATORY AND LEGISLATIVE AFFAIRS** shall, pursuant to N.J.A.C. 1:1-17.8(c), request an extension to permit the rendering of a final decision by the **COMMISSIONER OF THE DEPARTMENT OF EDUCATION** within forty-five days of the predominant-agency decision. If the **COMMISSIONER OF THE DEPARTMENT OF EDUCATION** does not render a final decision within the extended time, this recommended decision on the remaining issues and remedies shall become the final decision.

January 4, 2023

DATE **ANDREW M. BARON**, ALJ

ASSISTANT COMMISSIONER OF LEGAL REGULATORY AND LEGISLATIVE AFFAIRS:

Date E-Mailed to Agency: January 4, 2023

COMMISSIONER OF THE DEPARTMENT OF EDUCATION:

Date E-Mailed to Agency January 4, 2023

Date E-Mailed to Parties: January 4, 2023

AMB/lr

APPENDIX

For Petitioner:
Irek Taflinski

For Respondent:
None

EXHIBITS IN EVIDENCE (HSV 01772-18)

For Petitioner:

P-1 Initial screening summary 5-31

P-2 Screening summary 6-16

P-3 Investigation summary

P-4 Weather history

P-5 Photographs

P-6 Hoboken Board of Ed. documents

P-7 Student transportation manual

P-8- Bus check

P-9 Security incident report

P-10 Police investigation

P-11 IAIU findings

For Respondent:

R-1 9/30/17 E-mail

R-2 R.R. Morning and afternoon bus routes

EXHIBITS IN EVIDENCE EDU 06479-18)

Petitioner:

P-1 Petitioner Certification

P-2 Employer letter of 12/12/22 with deadline

Respondent:

R-1 Business Record from Motor Vehicle Services Commission

94-23

New Jersey Commissioner of Education

Final Decision

Jamie Sebastian,

Petitioner,

v.

New Jersey Department of Education,
State Board of Examiners,

Respondent.

Synopsis

Pro-se petitioner appealed the determination of the respondent New Jersey State Board of Examiners (SBE) that she had not met the requirements for issuance of a Learning Disabilities Teacher Consultant (LDT-C) endorsement because she lacked twenty-one (21) graduate credits needed to obtain the endorsement. Petitioner argued that her alternative education and experience satisfied a one-to-one-correspondence to the missing credits, in accordance with *N.J.A.C.* 6A:9B-4.12(b). The SBE found that petitioner's experience was geared toward special education instruction and not to the roles and responsibilities of someone serving in the role of a consultant, which is an educational services certificate, rather than an instructional or administrative certificate.

The ALJ found, *inter alia*, that: the issue in this case is whether petitioner satisfied her burden of demonstrating, by a preponderance of the evidence, that the SBE acted in a manner that was arbitrary, capricious, or contrary to law when it determined not to accept petitioner's alternative education to satisfy the remaining requirements that petitioner needed to receive the LDT-C endorsement; *N.J.A.C.* 6A:9B-14.10 sets forth the requirements for issuance of this certificate; the SBE determined that petitioner did not satisfy the requirements for certification because she lacks twenty-one (21) graduate credits and her alternative education and experience was not deemed equivalent to satisfy that deficiency; and petitioner failed to establish that the SBE's decision to deny her application for the LDT-C endorsement was arbitrary, capricious or unreasonable. Accordingly, the ALJ affirmed the SBE's decision and dismissed the petition.

Upon review, the Commissioner found, *inter alia,* that: the petition of appeal in this matter was filed in accordance with *N.J.A.C.* 6A:3, not *N.J.A.C.* 6A:4; the ALJ mistakenly applied the wrong standard of review in the Initial Decision, stating that the SBE's decision will not be overturned unless the petitioner proves that the SBE acted in a manner that was arbitrary, capricious or contrary to law; the appropriate standard of review here is whether the SBE's decision was consistent with the applicable statutory and regulatory provisions of *N.J.A.C.* 6A:3; nonetheless, the record of this matter demonstrates that the petitioner did not complete the required course work and that the SBE's decision to deny her application was consistent with the applicable regulatory provisions. Accordingly, the Initial Decision of the OAL was modified with respect to the appropriate standard of review and the petition was dismissed.

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

94-23
OAL Dkt. No. EDU 01695-22
Agency Dkt. No. 11-1/22

New Jersey Commissioner of Education

Final Decision

Jamie Sebastian,

Petitioner,

v.

New Jersey Department of Education,
State Board of Examiners,

Respondent.

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

In this matter, petitioner challenges the New Jersey State Board of Examiners' (Board) denial of her application for a Learning Disabilities Teacher Consultant (LDT-C) certificate. The Board denied petitioner's application because she was missing twenty-one (21) graduate credits required for the endorsement. Petitioner argued that her alternative education and experience satisfied a one-to-one-correspondence to the missing credits, in accordance with *N.J.A.C.* 6A:9B-4.12(b). The Board found that petitioner's experience was geared toward special education instruction and not to the roles and responsibilities of someone serving in the role of a consultant, which is an educational services certificate, rather than an instructional or administrative certificate. Following a motion to dismiss, the Administrative Law Judge (ALJ) found that petitioner did not meet requirements for an LDT-C Certificate pursuant to *N.J.A.C.* 6A:9B-14.10.

As a threshold matter, a discussion of the applicable standard of review for petitions of appeal that are filed under *N.J.A.C.* 6A:3 is necessary. When there is a challenge to a determination

made by an office within the Department of Education, the Commissioner is not mandated to give deference to her staff, but instead determines if the finding was legally appropriate. *See, Board of Trustees of the Passaic County Elks Cerebral Palsy Center v. New Jersey Dept. of Educ., Office of Fiscal Accountability and Compliance*, Commissioner's Decision No. 334-14, dated August 14, 2014 (finding that a decision of the Office of Fiscal Accountability and Compliance is not given deference by the Commissioner). Moreover, where the Department of Education has limited the scope of review of a subordinate office or division, it has done so by regulation, *i.e.* appeals filed under *N.J.A.C.* 6A:4 challenging a decision of the State Board of Examiners revoking/suspending a certificate, or a decision of the School Ethics Commission.

In the Initial Decision, the ALJ mistakenly referenced *N.J.A.C.* 6A:4-4.1(a), applied deference to the Board, and stated that the Board's decision in this case would not be overturned unless the petitioner proves that the Board acted in a manner that was arbitrary, capricious or contrary to law. It is important to recognize that a decision by the Board denying an application for a certificate is not entitled to the arbitrary, capricious or unreasonable standard of review that is afforded to appeals filed under *N.J.A.C.* 6A:4, challenging a decision of the Board revoking or suspending a certificate. *See, Jessica Walder v. New Jersey Department of Education, State Board of Examiners*, Commissioner's Decision No. 503-14, decided December 29, 2014 (finding that the Commissioner does not give deference to a decision of the State Board of Examiners denying a request for issuance of a certificate). The petition of appeal in this matter was filed in accordance with *N.J.A.C.* 6A:3, which consists of completely different regulatory provisions than *N.J.A.C.* 6A:4; these two Administrative Code Sections should never be conflated. As such, the standard of review that governs appeals filed under *N.J.A.C.* 6A:4 does not apply to this case. Therefore, the appropriate

standard of review of the Boards' decision is whether the decision is consistent with the applicable statutory and regulatory provisions.

Upon review of the record and applying the appropriate standard of review, the Commissioner agrees with the ALJ's ultimate determination that petitioner has not met the requirements for an LDT-C Certificate pursuant to *N.J.A.C.* 6A:9B-14.10. As the ALJ noted, while there are similarities between the job description for the position petitioner performed in Georgia and the requirements for an LDT-C Certificate, the Georgia job description included more teacher-related duties. The limited amount of collaboration required by the Georgia job does not rise to the level of consultant experience that would be sufficient to meet the requirements of *N.J.A.C.* 6A:9B-14.10.

Accordingly, the Initial Decision of the OAL is modified with respect to the appropriate standard of review and the petition is hereby dismissed.

IT IS SO ORDERED.[1]

Angelica Allen-McMillan, J.d.D.
ACTING COMMISSIONER OF EDUCATION

Date of Decision: March 30, 2023
Date of Mailing: March 31, 2023

[1] This decision may be appealed to the Appellate Division of the Superior Court pursuant to *N.J.S.A.* 18A:6-9.1. Under *N.J.Ct.R.* 2:4-1(b), a notice of appeal must be filed with the Appellate Division within 45 days from the date of mailing of this decision.

State of New Jersey
OFFICE OF ADMINISTRATIVE LAW

INITIAL DECISION
OAL DKT. NO. EDU 01695-2022
AGENCY DKT. NO. 11-1/22

JAMIE SEBASTIAN,
Petitioner,
v.
NEW JERSEY DEPARTMENT OF EDUCATION, STATE BOARD OF EXAMINERS,
Respondent.

Jamie Sebastian, petitioner, pro se

Sydney Finkelstein, Deputy Attorney General, for respondent (Matthew J. Platkin, Attorney General of New Jersey, attorney)

Record Closed: January 9, 2023 Decided: February 23, 2023

BEFORE **KIM C. BELIN**, ALJ:

STATEMENT OF THE CASE

Petitioner, Jamie Sebastian appeals the decision to deny her application for a Learning Disabilities Teacher Consultant (LDT-C) endorsement by the State Board of Examiners (Board of Examiners or respondent). The Board of Examiners contends that the petitioner lacked twenty-one graduate credits required for the endorsement.

PROCEDURAL HISTORY

On December 16, 2021, the Board of Examiners denied the petitioner's application for an LDT-C endorsement. Petitioner filed a petition appealing this decision on January 14, 2022. The Department of Education (DOE) transmitted this matter as a contested case to the Office of Administrative Law (OAL) where it was filed on March 4, 2022. N.J.S.A. 52:14B-1 to -15; N.J.S.A. 52:14F-1 to -13.

On February 24, 2022, respondent filed a motion to dismiss in lieu of an answer. N.J.A.C. 6A:3-1.5(g). During a conference call on April 25, 2022, petitioner requested and was granted until June 1, 2022, to seek legal representation. On June 1, 2022, petitioner affirmed her desire to proceed without counsel and this tribunal set a briefing schedule. Petitioner submitted her response on June 27, 2022, in accordance with the briefing schedule and the respondent filed a reply brief on July 13, 2022. The respondent's motion was denied on August 15, 2022.

A hearing was held on October 27, 2022. The record was held open for receipt of transcripts and post-hearing summations. Post-hearing summations were received on January 9, 2023, and the record closed on that date.

FACTUAL DISCUSSION AND FINDINGS

The facts are not in dispute. Accordingly, I **FIND**:

1. Petitioner applied for a Learning Disabilities Teacher-Consultant endorsement on June 4, 2021. (Respondent's Motion to Dismiss[1], at 2.)

2. Petitioner appeared before the Board of Examiners on October 28, 2021, and on December 16, 2021, the Board of Examiners denied her application. (Petitioner's petition.)

[1] Hereinafter RMTD.

3. On May 15, 2022, petitioner completed the Orientation of Psychological Testing class. (Petitioner's response to the RMTD.)

4. Petitioner has an earned a master's degree in special education from Walden University. (RMTD.)

5. Petitioner has earned three semester credits in the following classes:

   a. Teacher as Professional
   b. Design, Curriculum, Instruction & Assessment
   c. Strategic Teaching English as a Second Language
   d. Leadership, Collaboration & Consultation
   e. Special Education: Due Process
   f. Effective Evaluation & Assessment Practice
   g. Adaptive Instructional Evidence Strategies
   h. Creating Effective Behavioral Interventions
   i. Literacy Based Instructional Intervention
   j. Action Research for Educators
   k. Tools for Doctoral Research Demystifying Doctoral Writing
   (Petitioner's Response to the RMTD.)

6. Petitioner has earned five semester hour credits in the following classes:

   a. Leading the Future in Education
   b. Special Education: Theory & Practice
   c. Lead Change in Special Education
   d. Research Theory
   e. Research for Special Education
   f. Designing Specialized Instruction for Diverse Learners
   g. Effective School Intervention
   h. Effective Practices in Special Education
   i. Capstone Project
   j. Quantitative Reasoning
   k. Qualitative Reasoning
   l. Testing and Measurement
   Ibid.

7. Petitioner worked as a special education resource teacher for seven years in Georgia and is currently employed as a special education teacher and

serves a member of the Intervention and Referral Service Team in the Toms River School District.

8. Petitioner was granted an emergency LTD-C certificate which is good for one year and can be extended twice.

Testimony

For petitioner

Kelly Umbach (Umbach) has been a supervisor of special education for six years in the Toms River School District. She has oversight of the child study team (CST) and supervised the petitioner directly. Umbach stated that petitioner was qualified for the LDT-C position based upon her prior experience in Georgia. Petitioner is using the emergency certificate and is performing as a strong LDT-C. Petitioner has written strong Individualized Education Plans (IEP) and has filled all expectations. Umbach hired petitioner.

Dana Weber (Weber) has been a supervisor of special education for four years and was a LDT-C for ten years with the Toms River School District. She has oversight of teachers and programs from kindergarten through grade twelve. Weber observed petitioner this past school year. Petitioner has written IEPs, done case management, re-evaluation meetings and conducted testing. Petitioner has fulfilled the role of LDT-C and has been a valuable resource, and a key person on the CST. Petitioner has given recommendations and strategies including behavioral strategies, supported the administration within the schools and worked well with others. Weber believed petitioner was fully qualified to be a LDT-C.

For respondent

Rani Singh (Singh) has been the Director of Certification since 2019, and also served as secretary to the Board of Examiners during that time. She has a bachelor's degree in biology from Rutgers University. She has oversight over all education certificate applications. As of May 31, 2022, a new application system was installed and implemented in which applicants submitted an application, paid a fee and signed an oath. Once all the documents were received, the case was assigned to an examiner for review. If documents were missing, the examiner contacted the applicant with a notice outlining what was still needed.

Petitioner was missing twenty-one graduate credits. Singh was not the original examiner, however, she reviewed the credential appeal packet and agreed that twenty-one graduate credits were needed. Accordingly, petitioner's application was denied, and she appealed. The Board of Examiners denied her appeal because the Board of Examiners found petitioner's experience was instructional based and not consultant based. Although petitioner completed an additional class since filing her application the additional class was not sufficient to issue a standard certificate, however, the additional class was sufficient to issue an emergency certificate. The emergency certificate was good for one year and could be renewed twice.

Because the LDT-C certificate is unique to New Jersey, there is no reciprocity with any other state. Petitioner can re-apply because applicants are given six months to complete their applications.

Additional Findings

The finder of the facts must determine the credibility of the witnesses before making a decision. Credibility is the value that a fact finder gives to a witness' testimony. Credibility is best described as that quality of testimony or evidence that makes it worthy of belief. "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 observations of mankind can approve as probable in the circumstances." In re Estate of

Perrone, 5 N.J. 514, 522 (1950). To assess credibility, the fact finder should consider the witness' interest in the outcome, motive, or bias; the accuracy of the witness' recollection; the witness' ability to know what s/he is talking about; the reasonableness of the testimony; the witness' demeanor when testifying; the witness' candor or evasion; and the presence of inconsistent or contradictory statements. A trier of fact may reject testimony because it is inherently incredible, or because it is inconsistent with other testimony or with common experience, or because it is overborne by other testimony. Congleton v. Pura-Tex Stone Corp, 53 N.J. Super. 282, 287 (App. Div. 1958).

The fact finder must weigh the testimony of each witness and then determine the weight to give to it. Through this process, the fact finder may accept all of it, a portion of it or none of it. Based upon the testimonial and documentary evidence, I **FIND** the following as additional **FACTS**: Petitioner testified credibly and earnestly about her teaching experience in Georgia which she believed was comparable to the duties of an LDT-C in New Jersey. In addition, she clearly articulated her passion for students with disabilities. I further **FIND** that petitioner has received numerous accolades for her job performance while in Georgia and currently in New Jersey and is a valued asset to her supervisors.

LEGAL ANALYSIS AND CONCLUSION

The New Jersey State Board of Examiners has established a certificate system requiring "any person employed as a teaching staff member by a district board of education shall hold a valid and appropriate certificate." N.J.A.C. 6A:9B-5.1(a). There are three types of certificates — instructional, administrative, and educational services. N.J.A.C. 6A:9B-5.3(a). In addition to certificates, the Board of Examiners has provided for special endorsements that attach to a specific certificate. This qualifies an individual to teach in a particular area based upon the endorsement on the certificate.

A LDT-C is an endorsement under the educational services certificate. The requirements to obtain a LDT-C endorsement are outlined in N.J.A.C. 6A:9B-14.10(c) which mandates:

(b) To be eligible for the standard educational services certificate with a learning disabilities teacher-consultant endorsement, a candidate shall:

1. Hold a master's or higher degree from a regionally accredited college or university;
2. Hold a standard New Jersey or out-of-State instructional certificate; and
3. Have three years of successful teaching experience.

(c) A candidate who satisfies (b) above also shall complete one of the following:

1. A Department-approved graduate program for the preparation of learning disabilities teacher-consultants;
2. A consultant-level master's degree in educational disabilities from a nationally accredited program; or
3. A minimum of 24 semester-hour graduate credits chosen from the areas listed below. The candidate shall complete the requirements in (c)3i through ix below and may take elective credits in any area in (c)3i through x below.

i. Education of students with disabilities, including study in history of the development of educational services for children in each area of exceptionality; study of present services, research, and professional ethics dealing with the characteristics of children who differ from the norm intellectually, physically, socially, and emotionally; evaluation of present practices in the education of students with disabilities; study of the relationship of educational practices and their environmental settings; and cultural and linguistic diversity;

ii. Learning theory, including study in motivation and its effect on learning; leading theories of learning; rewards and incentives; and interests and climate for learning;

iii. Remediation of basic skills, including study in research-based corrective methods and materials as related to specific diagnostic findings, NJSLS requirements, and the school and classroom environment;

iv. Physiological bases for learning, including study of the neurological development and physical readiness of the normal child for learning; abnormal health

conditions that contribute to educational disability; and metabolic and infectious disorders that affect learning;

v. Orientation in psychological testing, including study of an overview of tests applicable to educational psychology; interpretation of psychological reports as applied to tests administered; the appropriate use of tests and the potential misuse of test results; and test construction theory;

vi. Diagnosis of learning problems, including study of the nature and cause of learning problems; formulating an evaluation plan for educational assessments; administering and interpreting technically sound and culturally responsive standardized instruments and functional assessment procedures to determine educational levels, underlying deficits, and learning style; methods of arriving at a diagnosis based on evidence available from each child study team (CST) member; and ways of reporting diagnostic findings;

vii. Accommodations and modifications as a method of providing service to children with learning problems, including utilization of validated methods for adapting instruction for diverse learning needs; technology for students with disabilities; understanding of accommodations and modifications in curriculum, materials, methods, classroom structures, and assessment; utilization of the individualized education plan (IEP) and the NJSLS accommodation and modification; methods to enhance social relationships and positive behavior methods; focus on the inclusive classroom environment; legal issues related to the CST's responsibilities, including the requirements of a free appropriate public education, least restrictive environment, the determination of eligibility, and IEP development;

viii. Collaboration theory and practice, including theory and process of conducting collaborations; establishing collaborative partnerships between general and special educators, with parents and families, and with paraprofessionals; methods of co-teaching, including in-class support and classroom consultation; preparation for participating in a multidisciplinary CST setting with opportunities for modeling and participation in team staffings and parent conferences; opportunities to observe, rehearse, and present results from evaluations in practice sessions;

> ix. A college-supervised, consultant-level practicum in diagnosis and remediation of educational disabilities in school and clinical situations. The definition and nature of this practicum, and the courses in which it will be provided, should be clear in the program description. The practicum shall provide for a minimum of 90 clock hours of college-supervised experience. The practicum shall not be a student-teaching experience; and
>
> x. Elective study chosen from areas such as group dynamics; methods and materials for teaching students with disabilities; curriculum development in the teaching of students with disabilities; teaching of reading; assistive/adaptive technology; interviewing and counseling; educational psychology; and community resources.

Here, it is uncontroverted that petitioner held a master's degree from a regionally accredited college or university, held a New Jersey or out-of-state instructional certificate and had three years of successful teaching experience. However, the Board of Examiners determined that petitioner lacked twenty-one of the twenty-four graduate credits required. In its denial, the Board of Examiners stated that petitioner:

> did not establish a compelling one-to-one correspondence between the LDT-C requirements and her experience and education. The LDT-C [endorsement] is an education service certificate rather than instructional or administrative and it authorizes its holder, specifically, to serve as a consultant rather than a classroom teacher. (R-2 at 2.)

The Board of Examiners acknowledged petitioner's "extensive experience and education" but stated "it was primarily geared towards special education instruction. The Board finds that she would benefit from the coursework geared to the roles and responsibilities of one serving in the role of consultant rather than instructor." Id.

Conversely, the petitioner contends that her work experience consisting of seven years as a special education teacher in Georgia, her current employment with the Toms River School District and academic coursework substantiate that she fulfilled responsibilities as a consultant, as well as a teacher for the past ten years and thus she

is qualified for the LDT-C endorsement. (Petitioner's Appeal Petition.) In addition, since the date of the Board of Examiners denial, she completed a class in psychological testing which supplements her educational achievement list, collaborated with a licensed LDT-C, and worked as an "interventionist to support the staff with the implementation of modifications and accommodations" for the students. (Petitioner's response to the Respondent's Motion to Dismiss.)

Petitioner carries the burden of demonstrating by a preponderance of the credible evidence that she is entitled to the certifications she seeks. Farrar v. State Bd. of Exam'rs, EDU 13763-08, Initial Decision (April 27, 2010), aff'd, Comm'r (July 26, 2010), <http://njlaw.rutgers.edu/collections/oal/>. The Commissioner will "not disturb the decision [of the Examiners] unless the appellant has demonstrated that the Board [of Examiners] or the Commissioner acted in a manner that was arbitrary, capricious or contrary to law." N.J.A.C. 6A:4-4.1; Farrar, supra, EDU 13763-08 (citing Fisher v. State Bd. of Exam'rs, 96 N.J.A.R.2d (EDU) 58). Where there is room for two opinions, action is not considered arbitrary or capricious when exercised honestly and upon due consideration, even though the court may believe that an erroneous conclusion has been reached. Bayshore Sewerage Co. v. Dep't of Envt'l Prot., 122 N.J. Super. 184, 199 (App. Div. 1973). Petitioner has not offered any additional evidence that was not considered by the Board, nor has she alleged any facts establishing that the Board of Examiners clearly erred in denying her application for the LDT-C endorsement after review of those documents. She simply disagrees with the conclusion drawn by the Board of Examiners after exercising its discretion. Hutchinson v. Bd. of Examiners, EDU 16373-12, 2013 N.J. AGEN LEXIS 73, *15.

A review of the Georgia and New Jersey job descriptions show similarities in duties; however, the Georgia job description included more teacher related duties such as "maintain[ing] lesson plans, compil[ing], maintain[ing] and submit[ing] accurate paperwork within designated timelines, demonstrates prompt and regular attendance." (R-1.) Although the Georgia job description required petitioner to collaborate with general education teachers and other staff, the Board of Examiners was not persuaded that petitioner engaged in sufficient consultation duties. I must defer to the expertise of the

Board of Examiners absent a showing that the decision was arbitrary, capricious and unreasonable.

Accordingly, I **CONCLUDE** that petitioner has not met her burden of demonstrating that the Board of Examiners' decision was arbitrary, capricious and unreasonable, and that the petition of appeal must be dismissed. It is regrettable that petitioner was led to believe that her application would be approved with just the submission of her transcripts, however, the Board of Examiners is the entity authorized to issue or refuse to issue certificates.[2] N.J.A.C. 6A:9B-3.2(a).

ORDER

Based upon the foregoing, I hereby **ORDER** that the State Board of Examiners' denial of the petitioner's LDT-C endorsement is **AFFIRMED**.

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

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

[2] It is noted that petitioner is not precluded from re-applying for the LDT-C endorsement or requesting an additional review by the Board of Examiners considering her additional experience working under the emergency certificate.

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

February 23, 2023
DATE

Kim C. Belin
KIM C. BELIN, ALJ

Date Received at Agency: _____

Date Mailed to Parties: _____

KCB/am

APPENDIX

WITNESSES

For petitioner

Kelly C. Umbach

Dana Weber

For respondent

Rani Singh

EXHIBITS

For petitioner

P-1 Letter of reference, dated December 17, 2021

P-2 Unofficial transcripts, from Walden University

P-3 Denial letter, dated August 24, 2021

For respondent

R-1 Credential Review Packet

R-2 State Board of Examiners' Decision, dated December 16, 2021

95-23

New Jersey Commissioner of Education

Final Decision

M.M. and A.M., on behalf of minor children,
E.M. and I.M.,

Petitioners,

v.

Board of Education of the Township of South Brunswick,
Middlesex County,

Respondent.

Synopsis

In this matter on remand, *pro se* petitioners appealed the determination of the respondent Board that their minor children were not entitled to a free public education in the South Brunswick School District during the 2021-2022 school year. The Board contended that, based on the results of residency investigations, petitioners do not live at the address provided on the children's school registration. The Board sought reimbursement for the cost of tuition for the period of E.M. and I.M.'s ineligible attendance. In a decision issued on September 21, 2022, the Commissioner determined that petitioners failed to prove that they were domiciled within the district during the 2021-2022 school year and therefore were not entitled to a free public education in the district's school during that time. However, the Commissioner noted that the record did not provide sufficient information to accurately determine the amount of tuition owed by petitioners for the period of ineligible attendance. Accordingly, the matter was remanded to the OAL for further proceedings to calculate the per diem tuition and number of days of ineligible attendance, as required by *N.J.S.A.* 18A:38-1b.

On remand, the ALJ found that: the petitioners did not sustain their burden of proving that E.M. and I.M. were domiciled in South Brunswick during the period in question; accordingly, the minor children were ineligible to attend school in the district for the entire 2021-22 school year; and the Board submitted a certification setting forth the per diem tuition rate at $72.01. The ALJ concluded that the Board was entitled to tuition reimbursement in the amount of $25,922 ($12,961 for each child) for the 2021-22 school year.

Upon review, the Commissioner adopted the Initial Decision of the OAL as the final decision in this matter, with modification to the total tuition due. Petitioner was directed to reimburse the Board in the amount of $25,923.60 for tuition costs incurred during the period that E.M. and I.M. were ineligible to attend school in South Brunswick. The petition of appeal was dismissed.

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

95-23
OAL Dkt. No. EDU 08821-22
(EDU 04264-22 ON REMAND)
Agency Dkt. No. 47-3/22

New Jersey Commissioner of Education

Decision on Remand

M.M. and A.M, on behalf of minor children, E.M. and I.M.,

Petitioners,

v.

Board of Education of the Township of South Brunswick, Middlesex County,

Respondent.

The record of this matter and the Initial Decision of the Office of Administrative Law (OAL) have been reviewed, mindful of the Commissioner's September 26, 2022, decision remanding this residency matter for calculation of the per diem tuition and the number of days of ineligible attendance. The parties did not file exceptions.

In her September 2022 decision, the Commissioner found that petitioners were not domiciled in South Brunswick during the 2021-22 school year and the minor children were, therefore, not entitled to a free public education in the district during that time. With respect to the assessment of tuition, the Commissioner found that the Board may recover tuition "computed on the basis of 1/180 of the total annual per pupil cost to the local district multiplied by the number of days of ineligible attendance." *N.J.S.A.* 18A:38-1b. As the record did not contain sufficient information to calculate the per diem tuition, nor did it contain evidence as to whether the minor children attended school in South Brunswick for the entire 2021-22 school year, the Commissioner remanded this matter for calculation of tuition consistent with *N.J.S.A.* 18A:38-1b.

On remand, the Administrative Law Judge (ALJ) found that the minor children were ineligible to attend school in the district for the entire 2021-22 school year. The ALJ noted that the Board submitted a certification setting forth the per diem rate at $72.01. Accordingly, the ALJ found that the Board was entitled to tuition reimbursement in the amount of $25,922 ($12,961 for each child) for the 2021-22 school year.

Upon review, the Commissioner agrees with the ALJ that the Board is entitled to tuition reimbursement for the entire 2021-22 school year, during which time the minor children were ineligible to attend school in the district. However, the Commissioner finds that the tuition calculation for that period is $25,923.60 ($72.01 per day for 180 days, totaling $12,961.80 for each child).[1]

Accordingly, the Initial Decision of the OAL is modified as to the tuition calculation. Petitioner is directed to reimburse the Board in the amount of $25,923.60 for tuition costs incurred during the period that E.M. and I.M. were ineligible to attend school in South Brunswick. The petition of appeal is hereby dismissed.

IT IS SO ORDERED.[2]

Angelica Allen-McMillan, Ed.D.
ACTING COMMISSIONER OF EDUCATION

Date of Decision: March 30, 2023
Date of Mailing: March 31, 2023

[1] The ALJ's annual tuition cost appears to have been rounded down to the nearest dollar.

[2] This decision may be appealed to the Appellate Division of the Superior Court pursuant to *N.J.S.A.* 18A:6-9.1. Under *N.J.Ct.R.* 2:4-1(b), a notice of appeal must be filed with the Appellate Division within 45 days from the date of mailing of this decision.

State of New Jersey
OFFICE OF ADMINISTRATIVE LAW

INITIAL DECISION
OAL DKT. NO. EDU 08821-22
AGENCY DKT. NO. 47-3/22
(ON REMAND EDU 04264-22)

M.M. AND A.M. ON BEHALF OF E.M. AND I.M.,

Petitioners,

v.

TOWNSHIP OF SOUTH BRUNSWICK BOARD OF EDUCATION, MIDDLESEX COUNTY,

Respondent.

M.M. and A.M., petitioners, pro se

David L. Disler, Esq., for respondent (Porzio, Bromberg & Newman, P.C., attorneys)

Record Closed: December 8, 2022 Decided: January 10, 2023

BEFORE **TRICIA M. CALIGUIRE**, ALJ:

STATEMENT OF THE CASE

Petitioners M.M. and A.M., on behalf of minor children, E.M. and I.M., appeal the decision of respondent Township of South Brunswick Board of Education, Middlesex County (Board) that E.M. and I.M. were not eligible to attend the South Brunswick Township Public Schools in the 2021–2022 school year. Petitioners also seek a ruling that they are not responsible to pay tuition for E.M. and I.M. for the 2021–2022 school year in the amount of $12,961 for each child.

PROCEDURAL HISTORY

On March 4, 2022, petitioners filed a pro se residency appeal with the Office of Controversies and Disputes of the New Jersey Department of Education. On May 2, 2022, the matter was transmitted to the Office of Administrative Law (OAL) where it was filed as a contested case pursuant to N.J.S.A. 52:14B-1 to -15 and N.J.S.A. 52:14F-1 to -13.

On June 28, 2022, the parties appeared for a prehearing telephone conference, during which the hearing was scheduled for July 20, 2022. A prehearing order was issued on June 30, 2022.

On July 20, 2022, the hearing was conducted using Zoom Communications, Inc., a remote audio/video platform licensed by the OAL for use during the public health emergency in which the Governor of the State of New Jersey issued Emergency Orders mandating stay-at-home protocols for citizens and public employees (COVID-19). Petitioners, who speak Russian and are not fluent in English, were assisted throughout the proceedings, including the hearing, by Natalia Sorokina, a Russian language interpreter. The record closed on July 20, 2022, and on August 15, 2022, an initial decision was issued finding for respondent on all issues.

As set forth in her Decision of September 26, 2022, the Acting Commissioner of Education adopted the findings of fact and conclusions of law of the initial decision and ordered that the matter be remanded to the OAL for the calculation of the total amount of

tuition that petitioners are responsible to pay for their children's attendance in Monmouth Junction Elementary School. On November 30, 2022, respondent submitted the Certification of David Pawlowski to support the tuition assessment. Petitioners responded by letter dated December 7, 2022, received on December 8, 2022, and the record closed.

FACTUAL DISCUSSION AND FINDINGS

The issues in dispute are whether the M. family, mother and two minor children,[1] resided at Bernini Way, Monmouth Junction, New Jersey, within the geographic area served by the South Brunswick Township School District (District), during the 2021–2022 school year and if not, the amount of tuition owed by petitioners to respondent for the 2021–2022 school year.[2]

To properly address the remand order, it is necessary to clarify the dates in which E.M. and I.M. attended Monmouth Junction Elementary School during the 2021–2022 school year, and the costs of their attendance.

At the hearing, respondent presented three witnesses; A.M. testified on behalf of petitioners. In response to the remand order, respondent submitted the Certification of David Pawlowski (Pawlowski), Business Administrator. The following is not a verbatim recitation of the testimony but a summary of the testimonial and documentary evidence that I found relevant to the above issues.

TESTIMONY

Suzanne Luck-Born (Luck-Born), District Director of Student Assessment and Instructional Support, testified on behalf of respondent. She has been employed by the District for twenty-six years in various positions, the last eleven in her current position. Luck-Born is responsible for the Registration Department, including oversight of two

[1] A.M., the father of the two minor children involved in this matter, stated that he lives in Brooklyn, New York, apart from his wife and children.

[2] E.M. has attended school in the District continuously since the 2018–2019 school year and I.M. has attended school in the District continuously since the 2020–2021 school year.

Central Registrars who register new families and coordinate registrations with the Transportation and Buildings Departments.

On September 13, 2021, shortly after the school year began, Luck-Born received an email from the Director of Transportation stating that Mickey Guzman (Guzman), the Community Manager of the Villagio South Brunswick Homeowners Association (Villagio HOA), objected to District buses entering the Villagio community as it is an age-restricted community in which school-aged children are not permitted. (R-1.)[3] According to the District records, the M. children resided in the Villagio community at Bernini Way, but the lease M.M. had provided to the District as proof of residency had expired. Luck-Born or her staff contacted petitioners and requested updated residency documents, which M.M. hand-delivered on September 14, 2021, including a lease for July 1, 2021, through July 1, 2023, for Bernini Way.

On September 21, 2021, Luck-Born retained a private investigator, Patrick O'Brien (O'Brien), to conduct a residency investigation. Luck-Born identified the report generated by O'Brien, in which he concluded that the M. family was not residing at Bernini Way. (R-2.) Using this report, Luck-Born told her supervisor that as a result of the investigation, the District had no basis to conclude that E.M. and I.M. lived at Bernini Way, but the M. family may have been residing at Drinking Brook Road, another location within the township.[4] Luck-Born identified the "system-generated" letter sent to petitioners on December 17, 2021, stating that the District does not "accept students" from the Villagio address, but they could provide proof of residency at the alternate location. (R-3.)

[3] Luck-Born identified this summary of the residency investigation conducted in this matter, which she wrote. She stated that this document was provided to Board of Education members prior to the M. family hearing. Not all communications described in this document were written but all were corroborated by later writings and/or action taken in response.

[4] The District operates seven elementary schools. The two addresses at issue here, Bernini Way and Drinking Brook Road, are within the geographic boundaries for different elementary schools. There was no evidence presented as to why the M. family would prefer one school over another, other than because their children were already attending the first school and because they stated that they do not live within the geographic boundaries of the second school. See, P-6.

On January 10, 2022, Luck-Born sent a letter to petitioners stating that E.M. and I.M. are not eligible to attend the District schools because:

> • Petitioners failed "to provide requested documentation that satisfies the residency requirements as outlined in N.J.S.A. 18A:38-1[.]"
>
> • "Based upon an investigation by [the District's] Residency Officer," the District determined that the M. family "is not residing at Bernini Way[.]"
>
> • "The 55 and Older Community" in which Bernini Way is located "does not use [the District's] schools due to the age restriction of residents."
>
> [R-4.]

On January 26, 2022, petitioners sent a letter to Luck-Born disputing the findings of the investigation, claiming that the District was discriminating against them, and stating that if the District was unwilling to permit the children to complete the year in the District, they would "be forced to go to court and appeal your decision, as well as file a lawsuit for persecution and discrimination." (R-5.) A Board hearing was scheduled and, in the interim, the District hired Prime Source Investigators to obtain a second opinion and more recent information.

On two days in February 2022, the investigator from Prime Source parked outside Bernini Way from 6:00 a.m. to 10:00 a.m., and he reported seeing no activity at the house during those hours. (R-8.) Further, in response to a request from District Superintendent Scott Feder (Feder), Guzman provided excerpts from the Villagio HOA governing documents, which make clear that no children under the age of nineteen are permitted to reside in a home in the community. (R-6.)

On February 10, 2022, respondent held a hearing at which petitioners appeared and gave testimony. On February 14, 2022, Feder sent a final notice of ineligibility to petitioners, which described the basis for the decision of respondent that petitioners' children are not domiciled at Bernini Way and are not eligible to attend school in the

District. (P-3.) Petitioners were again given the opportunity to provide proof of residency at Drinking Brook Road. In this notice, respondent stated that they would be responsible for tuition for each child in the amount of $72 per day, or $12,961 per year.

Petitioners did not provide additional information to respondent. This appeal followed.

David Pawlowski, Business Administrator, certified that the per pupil tuition for a non-resident elementary school student in the District schools during the 2021–2022 school year was $12,961, and the per diem rate was $72.01. Certification of David Pawlowski (November 23, 2022), ¶ 2. Both E.M. and I.M. attended Monmouth Junction Elementary School for the entirety of the 2021–2022 school year. Id., ¶ 3. The combined, per pupil non-resident "elementary school tuition rate for both E.M. and I.M. to attend school at Monmouth Junction Elementary School for the entire 2021–2022 school year was $25,922." Id., ¶ 5.

Patrick J. O'Brien, testified on behalf of respondent. He spent twenty-five years on the South Brunswick Police Department, five as an investigator. From December 2011, through December 2021, O'Brien served as the District Residency Investigator. During this time, he estimates that he handled over one-hundred residency investigations, in cases in which "the Board had reason to believe that non-resident children were attending school" in the District.

O'Brien identified the report he prepared on his investigation of the M. family who were allegedly living at Bernini Way. (R-2.) He began on September 21, 2021, by conducting internet research. He was able to confirm the house at Bernini Way was purchased in 2009 by Charles and Maria Lichtenstein.[5]

O'Brien stated that on September 24, 2021, he arrived at Bernini Way at 7:30 a.m., and stayed one hour, during which he saw no activity, no cars, no lights on inside the house, and no children or adults leaving the house. (R-2.)

[5] Maria Lichtenstein is the landlord on the leases M.M. signed for Bernini Way. (P-6, P-7, P-8.) On each lease, Lichtenstein uses Bernini Way as her address for notices.

On October 15, 2021, O'Brien arrived at Bernini Way at 8:15 a.m. and saw an open second floor window. At 8:23 a.m., a silver SUV with New Jersey license plates pulled into the driveway and when the garage door was opened remotely, drove into the garage. O'Brien described the driver as an adult male in his 60's; he stated that A.M., who was present by Zoom during O'Brien's testimony, was not the man he saw driving the SUV. At 8:26 a.m., O'Brien saw an adult female walking inside the house from the first to the second floor. O'Brien described the adult female as in her 60's; he stated that M.M., who was present by Zoom during O'Brien's testimony, was not the woman he saw in the house.

On November 29, 2021, O'Brien arrived at Bernini Way at 7:32 a.m. and saw the same second floor window open. He saw no cars or other activity. He drove to the elementary school where the M. children were attending. While he was told by staff that M.M. usually drove her children to school and parked in the rear lot, he did not see M.M. or the children that morning.

On November 29, 2021, O'Brien drove past Bernini Way at 7:50 a.m., observed no cars, and proceeded to the elementary school. At 8:45 a.m., a woman driving a white SUV with New Jersey license plates parked in a spot in the rear lot. The car came from the direction opposite of where it would travel if coming from Bernini Way. The woman walked two students, one male and one female into the school, returned to her car, and proceeded to Drinking Brook Road, parking in the driveway.

On November 30, 2021, O'Brien arrived at Drinking Brook Road at 8:25 a.m., and observed the same white SUV parked in the driveway. He saw the lights go on in the car at 8:45 a.m. O'Brien drove to the elementary school, saw the same white SUV drive in from the same route and park in the rear lot at 8:54 a.m. O'Brien left and went to Drinking Brook Road. The same white SUV returned at 9:06 a.m. and parked in the driveway. On Saturday, December 11, 2021, O'Brien saw the same white SUV parked in the driveway at Drinking Brook Road.

O'Brien stated that on each occasion he went to Bernini Way, he never saw children, whether at the home or in the neighborhood, and never saw signs of children

such as toys or bicycles. He concluded that based on his investigation, there are no grounds to believe that the M. family resided at Bernini Way.[6]

Austin Lindsay (Lindsay) testified on behalf of respondent. Since 2018, he has been a field investigator with Prime Source Investigators and in this position, has conducted over one thousand investigations. In a typical residency investigation, he is briefed by the client and given an address to surveil, and reports back with a description of the residence, any vehicles present, and any activity that he observes.

Lindsay identified the report he wrote regarding the investigation he conducted on Bernini Way. (R-8.) On February 3, 2022, Lindsay arrived at Bernini Way at 6:00 a.m. Knowing that school started at 8:55 a.m., and that the children involved were young and likely woke up early, Lindsay wanted an early start. He described Bernini Way as a large home with a two-car garage, located in a cul-de-sac in a nice neighborhood. By the time he left at 10:00 a.m., Lindsay had seen no activity at the house, no lights inside the house going on, no doors opening, no vehicles departing.

On February 4, 2022, Lindsay arrived at Bernini Way at 6:00 a.m., and stayed until 10:00 a.m. Again, he saw no activity, no lights going on, no vehicles. As shown on a video Lindsay took of the residence, one light above the interior staircase was on when he arrived, and it turned off at 8:05 a.m., without any other lights going on. (R-10.) Lindsay concluded that this light was on a timer. Lindsay saw no children at Bernini Way, nor in the neighborhood, and saw no school buses (though both February 3 and 4, 2022 were school days). He concluded that the M. family does not live at Bernini Way.

A.M. testified on behalf of petitioners. He stated that he and M.M. decided to live separately[7] but continue to parent their children together. In 2018, M.M. and the children moved to Monmouth Junction to live with M.M.'s aunt, Maria Lichtenstein (Lichtenstein), and M.M.'s mother.

[6] O'Brien further concluded that the family resided at Drinking Brook Road, but respondent offered no further evidence to support this theory.
[7] A.M. did not say whether he and M.M. are divorced.

Lichtenstein lives at Bernini Way with her husband, M.M. and the children. M.M.'s mother, who was not named, lives at Drinking Brook Road. M.M.'s mother is quite old and sickly and cannot be with the children all the time, but the children do stay with her from time to time. The dates chosen by the investigators to surveil Bernini Way are all days on which the children stayed with their grandmother.

In 2018, petitioners took E.M. to register at Monmouth Junction Elementary School. They were told what documents were required for registration and provided all required documents, including the lease between Lichtenstein and M.M. for Bernini Way.[8] At the same time, petitioners told the registrar that they did not need transportation for E.M. because they lived in the Villagio, and school buses are not allowed in the community.

Each successive year, from 2019 through 2021, petitioners submitted all required documents to the registrar and each year, petitioners told the registrar that they did not need transportation for E.M., and eventually for both children. In 2021, someone in the school system made a mistake and sent the bus to Bernini Way.

A.M. stated that respondent did not prove that M.M. and the children do not live at Bernini Way; just because the HOA rules forbid children does not mean the family does not live there. M.M. pays rent to Lichtenstein, as provided in the lease. When asked to provide proof of payment of rent, A.M. stated that they pay in cash some months and did not have documentary proof of non-cash payments.

DISCUSSION

To the extent that testimony given by petitioner and the other witnesses is in conflict or inconsistent, the credibility of their testimony must be assessed. Credibility is best described as that quality of testimony or evidence which makes it worthy of belief. The Supreme Court of New Jersey considered the issue of credibility in In Re Estate of Perrone, 5 N.J. 514 (1950). The Court pronounced:

[8] Petitioners also introduced copies of M.M.'s federal tax return, her New Jersey driver's license, and her bank account statements, all of which show her address as Bernini Way. (P-6 through P-20.)

> 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.
>
> [Ibid. at 522.]

See also, Spagnuolo v. Bonnet, 16 N.J. 546, (1954), State v. Taylor, 38 N.J. Super. 6 (App. Div.1955).

In order to assess credibility, the witness' interest in the outcome, motive or bias should be considered. Furthermore, a trier-of-fact may reject testimony because it is inherently incredible, or because it is inconsistent with other testimony, or with common experience, or because it is overborne by other testimony. Congleton v. Pura- Tex Stone Corp., 53 N.J. Super. 282, 287 (App. Div. 1958).

Luck-Born, O'Brien and Lindsay were all credible witnesses. They spoke without emotion about routine matters they took on in the course of their employment. While I question the limitations of O'Brien's investigation — he did not have proof that the children he saw with the woman in the white SUV were actually E.M. and I.M. — respondent did not pursue the alternate theory, that the M. family was living at Drinking Brook Road. It was enough that neither investigator saw any children, or even a woman of M.M.'s age, at Bernini Way.

There is no dispute that the Villagio HOA rules forbid children under the age of nineteen, and it should not then be a surprise that by the second week of the 2021–2022 school year, Guzman had had enough of the disruptive school buses and contacted the District to keep them out. A.M. testified that starting in 2018, when E.M. began school, petitioners notified the Transportation Department that they did not need busing, and someone made a mistake in September 2021 and sent a bus to their address. While not all of A.M.'s testimony rang true, this explanation makes sense. Prior to September 2021, Guzman had no reason to complain to the Transportation Department because there were no buses going through the Villagio community. The M. family may have been living at Bernini Way between September 2018 and June 2021, which would explain why M.M.

went to the trouble of opening bank accounts with that address, using that address for her driver's license and her federal tax returns. There was no testimony regarding the apparent willingness of M.M.'s aunt to sign a lease that violates the Villagio's stringent age-restriction rules,[9] but the question here is not whether the M. family and/or their landlord was breaking the rules by setting up house in a fifty-five and over community.[10] The question is whether they lived in the Villagio community during the 2021–2022 school year.

The credible evidence presented by two investigators is that on five occasions, between October 2021, and February 2022, when school was in session and the M. children were in attendance, the children did not spend the previous night at Bernini Way and did not leave from Bernini Way to go to school. Coincidence is not enough to overcome the preponderance of the credible evidence and accordingly, I **FIND** that petitioners did not prove that during the 2021–2022 school year, E.M. and I.M. resided at Bernini Way.

LEGAL ANALYSIS AND CONCLUSION

Petitioners contend that E.M. and I.M. are entitled to a free education in the District under N.J.S.A. 18A:38-1, which provides that public schools shall be free to persons over five and under twenty years of age who are "domiciled within the school district." See, V.R. ex rel A.R. v. Hamburg Bd. of Educ., 2 N.J.A.R. 283, 287 (1980), aff'd, State Bd., 1981 S.L.D. 1533, rev'd on other grounds sub nom., Rabinowitz v. N.J. State Bd. of Educ., 550 F. Supp. 481 (D.N.J. 1982) (New Jersey requires local domicile, as opposed to mere residence, for a student to receive a free education). E.M. is nine years old and I.M. is seven years old and, therefore, I **CONCLUDE** they meet the age requirements to be entitled to a free public education.

[9] There was also no documentary proof that the M. family made lease payments to Lichtenstein.
[10] Given how quickly Guzman reacted when she saw the school buses, it is surprising that she never noticed elementary school-aged children allegedly living in the community for close to four years, a clear violation of HOA rules.

A person who meets age requirements and is domiciled within a school **district** may attend its public schools free of charge. N.J.S.A. 18A:38-1(a). A person may have many **residences** but only one domicile, and a child's domicile is normally that of his or her parents. Somerville Bd. of Educ. v. Manville Bd. of Educ., 332 N.J. Super. 6, 12 (App. Div. 2000), aff'd, 167 N.J. 55 (2001). The domicile of a person is the place where he has his true, fixed, permanent home and principal establishment, and to which whenever he is absent, he has the intention of returning, and from which he has no present intention of moving. In re Unanue, 255 N.J. Super. 362, 374 (Law Div. 1991), aff'd, 311 N.J. Super. 589 (App. Div.), certif. denied, 157 N.J. 541 (1998), cert. denied, 526 U.S. 1051 (1999).

The acts, statements and conduct of the individual, as viewed in the light of all the circumstances, determine a person's true intent. Collins v. Yancey, 55 N.J. Super. 514, 521 (Law Div. 1959). The parents have the burden of proof by a preponderance of the evidence. N.J.S.A. 18A:38-1(b)(2).

Here, the evidence as to E.M. and I.M. being domiciled in the District is mixed. E.M. started school in the District in September 2018, and she and her brother have attended continuously since then. M.M. went to a great deal of trouble to show Bernini Way as her address. Both houses in which M.M.'s relatives reside — Bernini Way and Drinking Brook Road — are in the District, albeit within the geographic boundaries of different elementary schools. Petitioners refused to concede residency at Drinking Brook Drive — either because they did not want their children to change schools in the middle of the school year or because they did not live there and could not prove otherwise.[11]

Accordingly, in light of all of the facts and circumstances, I **CONCLUDE** that E.M. and I.M. are not entitled to a free public education in the District. I **CONCLUDE** petitioners failed to satisfy the burden of proving that E.M. and I.M. are domiciled at Bernini Way and elected not to submit evidence supporting residency at Drinking Brook Road.

N.J.S.A. 18A:38-1(b)(1) provides that when the evidence does not support the claim of the resident, the resident shall be assessed tuition:

[11] In their letter of January 26, 2022, petitioners state that they could enroll their children in private school but prefer for them to complete the current school year at Monmouth Junction Elementary School. (P-2.)

> [F]or the student prorated to the time of the student's ineligible attendance in the school district. Tuition shall be computed on the basis of 1/180 of the total annual per pupil cost to the local district multiplied by the number of days of ineligible attendance and shall be collected in the manner in which orders of the commissioner are enforced.

The record reflects that the actual cost of attendance in-District was $12,961 per year for each student for the 2021–2022 school year and that E.M. and I.M. both attended Monmouth Junction Elementary School for the entire school year.

N.J.A.C. 6A:22-6.3(a) provides that,

> Tuition assessed pursuant to this section shall be calculated on a per-student basis for the period of a student's ineligible enrollment, up to one year, by applicable grade/program category and consistent with the provisions of N.J.A.C. 6A:23A-17.1. The individual student's record of daily attendance shall not affect the calculation.

Therefore, I **CONCLUDE** that petitioners are responsible to pay tuition to respondent for attendance by E.M. and I.M. at Monmouth Junction Elementary School for the entire 2021–2022 school year in the amount of $12,961 for each, for a total of $25,922.

ORDER

I **ORDER** that the decision of respondent South Brunswick Township Board of Education that E.M. and I.M. were not eligible for a free public education in the District during the 2021–2022 school year is **AFFIRMED** and the pro se residency appeal of petitioners M.M. and A.M. on behalf of E.M. and I.M. is **DISMISSED**.

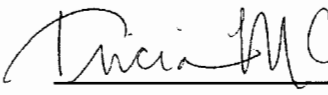
Further, I **ORDER** that petitioners shall pay respondent tuition in the amount of $25,922.

I hereby **FILE** this Initial Decision with the **COMMISSIONER OF THE DEPARTMENT OF EDUCATION** for consideration. This recommended decision may be

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

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

January 10, 2022
DATE



TRICIA M. CALIGUIRE, ALJ

Date Received at Agency: _____

Date Mailed to Parties: _____

TMC/nn

APPENDIX

WITNESSES

For petitioners

A.M.

M.M.

For respondent

Suzanne Luck-Born

Patrick J. O'Brien

Austin Lindsay

EXHIBITS

For petitioners

P-1 Letter from South Brunswick Public Schools to Petitioners regarding ineligibility of children, dated January 10, 2022

P-2 Letter from Petitioners to Suzanne Luck-Born, dated January 26, 2022

P-3 South Brunswick Public Schools Final Notice of Ineligibility, dated February 14, 2022

P-4 Pro Se Residency Appeal, dated March 4, 2022

P-5 Letter of Counsel for Respondent, dated April 29, 2022

P-6 Lease dated June 30, 3018

P-7 Lease dated June 1, 2019

P-8 Lease dated June 1, 2021

P-9 PNC Bank Statement

P-10 PNC Bank Statement

P-11 PNC Bank Statement

P-12 Citibank, N.A. Statement

P-13 Citibank, N.A. Statement

P-14 Citibank, N.A. Statement

P-15 Citi Diamond Preferred Card Statement

P-16 Citi Diamond Preferred Card Statement

P-17 Citi Diamond Preferred Card Statement

P-18 Federal 2019 Income Tax Return, Form 1040

P-19 Federal 2020 Income Tax Return, Form 1040

P-20 New Jersey State Driver's License Issued to M.M.

P-21 New York State Driver's License Issued to A.M.

For respondent

R-1 Summary of Residency Investigation

R-2 Daily Report Log from Residency Investigation

R-3 Letter to Petitioners from Scott Feder, dated December 17, 2021

R-4 Letter to Petitioners from Suzanne Luck-Born regarding Determination of Ineligibility, dated January 10, 2022

R-5 Letter to Suzanne Luck-Born from Petitioners, dated January 26, 2022

R-6 Email from the Villagio South Brunswick to Scott Feder regarding Villagio South Brunswick HOA, dated February 1, 2022

R-7 Respondent's District Policy 5111 – Eligibility of Resident/Non-Resident Pupils

R-8 Email from Nate Reber to David Pawlowski regarding his Investigation Report Summary, dated February 7, 2022

R-9 South Brunswick School District's Statements of Assurance

R-10 Video

R-11 Certification of David Pawlowski, Business Administrator, dated November 23, 2022

96-23

New Jersey Commissioner of Education
Final Decision

Ingrid Fullerton,

Petitioner,

v.

Board of Education of the Borough of East Newark, Hudson County,

Respondent.

Synopsis

Pro-se petitioner was a non-tenured teacher employed by the respondent Board for the 2022-23 school year pursuant to an employment agreement. Petitioner was terminated via a letter dated September 22, 2022 which relieved her of her duties immediately and indicated that she would be on leave with pay for the 60-day period. The following day another letter from the Superintendent informed petitioner that her termination had been reexamined based upon recent conduct and that the immediate termination was for cause and without pay. Petitioner filed an appeal on October 18, 2022, challenging her termination. She claimed, *inter alia*, that the Board's actions: violated the 60-day notice of termination, defamed her character, and wrongfully terminated her under New Jersey's Family and Medical Leave Act. The Board filed a motion for summary decision.

The ALJ found that the petition does not arise out of the New Jersey school laws; therefore, the Commissioner lacks jurisdiction pursuant to *N.J.S.A.* 18A:6-9, and the respondent Board's motion for summary decision could not be addressed. Accordingly, the ALJ took no further action and dismissed the petition.

Upon review, the Commissioner found that the most relevant statute cited by petitioner in her exceptions is *N.J.S.A.* 18A:6-30.1, which provides that "[w]hen the dismissal of any teaching staff member before the expiration of his contract with the board of education shall be decided, upon appeal, to have been without good cause, he shall be entitled to compensation for the full term of the contract . . . ", and that the petitioner appears to argue that the Board improperly terminated her while she was using a sick day and before she had any observations. The Commissioner concurred with the ALJ that the petition did not reference any New Jersey school laws, and the Commissioner therefore lacks jurisdiction over the claims alleged in the petition. However, affording broad latitude to the petitioner as a *pro se* litigant, the Commissioner determined that the matter should be remanded to the OAL for consideration of petitioner's argument under *N.J.S.A.* 18A:6-30.1.

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

96-23
OAL Dkt. No. EDU 09468-22
Agency Dkt. No. 279-10/22

New Jersey Commissioner of Education

Decision

Ingrid Fullerton,

Petitioner,

v.

Board of Education of the Borough of East Newark, Hudson County,

Respondent.

The record of this matter and the Initial Decision of the Office of Administrative Law (OAL) have been reviewed, as have the exceptions filed by the petitioner pursuant to *N.J.A.C.* 1:1-18.4. The Board did not file a reply.

In this matter, petitioner challenges her termination by the East Newark Board of Education (Board). Petitioner was a non-tenured teacher who was employed by the Board for the 2022-23 school year pursuant to an employment agreement. In a letter dated September 22, 2022, the Superintendent provided petitioner with a 60-day notice of termination, relieved her of her duties, and placed her on administrative leave with pay. The following day, the Superintendent informed petitioner that due to inappropriate and harassing text messages, she was instead recommending immediate termination for cause. Petitioner filed the instant petition of appeal, making claims that the Board: violated the 60-day

termination notice in her contract; defamed her character; and wrongfully terminated her under the New Jersey Family and Medical Leave Act (FMLA). Further, petitioner contended that the Board's actions violated the 4th and 5th amendments of the U.S. Constitution.

The Administrative Law Judge (ALJ) found that the petition does not arise out of the New Jersey school laws, and therefore the Commissioner lacks jurisdiction, pursuant to *N.J.S.A.* 18A:6-9. As such, the ALJ dismissed the petition.

In her exceptions, petitioner cites to various education statutes to support her contention that this matter involves New Jersey school law and falls under the Commissioner's jurisdiction. The most relevant statute cited by petitioner is *N.J.S.A.* 18A:6-30.1, which provides that "[w]hen the dismissal of any teaching staff member before the expiration of his contract with the board of education shall be decided, upon appeal, to have been without good cause, he shall be entitled to compensation for the full term of the contract . . . " Petitioner appears to argue that the Board improperly terminated her while she was using a sick day and before she had any observations.[1]

Upon review, the Commissioner agrees with the Administrative Law Judge that the petition did not reference any New Jersey school laws, and the Commissioner therefore lacks jurisdiction over the claims alleged in the petition. Nevertheless, affording latitude to petitioner as a *pro se* litigant, the Commissioner finds this matter should be remanded for consideration of petitioner's argument under *N.J.S.A.* 18A:6-30.1.

[1] Petitioner also argues that *N.J.S.A.* 34:11D-4 prohibits employers from taking retaliatory action when an employee uses sick leave. The Commissioner notes that the statute does not fall under the Commissioner's jurisdiction.

Accordingly, the Initial Decision of the OAL is remanded for further proceedings consistent with this decision.

IT IS SO ORDERED. [2]

Angelica Allen-McMillan, Ed.D.
ACTING COMMISSIONER OF EDUCATION

Date of Decision: March 30, 2023
Date of Mailing: March 31, 2023

[2] This decision may be appealed to the Appellate Division of the Superior Court pursuant to *N.J.S.A.* 18A:6-9.1. Under *N.J.Ct.R.* 2:4-1(b), a notice of appeal must be filed with the Appellate Division within 45 days from the date of mailing of this decision.

State of New Jersey
OFFICE OF ADMINISTRATIVE LAW

INITIAL DECISION
MOTION TO DISMISS
OAL DKT. NO. EDU 09468-22
AGY REF NO. 279-10/22

INGRID FULLERTON,
Petitioner,

v.

BOARD OF EDUCATION OF THE BOROUGH OF EAST NEWARK, HUDSON COUNTY,
Respondent

Ingrid Fullerton, petitioner, pro se

Frances Febres, Esq., for respondent (Cleary, Giacobbe, Alfieri & Jacobs, attorneys)

Record Closed: December 15, 2023 Decided: January 5, 2023

BEFORE **THOMAS R. BETANCOURT**, ALJ:

STATEMENT OF THE CASE AND PROCEDURAL HISTORY

Petitioner, Ingrid Fullerton filed a pro se Petition of Appeal, dated October 18, 2022, challenging her termination of employment with the Respondent District, and seeking Emergent Relief. The Office of Controversies and Disputes in the New Jersey

Department of Education (DOE) transferred the matter to the Office of Administrative Law (OAL), where it was filed on October 19, 2022.

Petitioner is seeking payment of sixty days pay pursuant to her employment contract.

Respondent Board filed its brief in opposition to the request for emergent relief, and the Certification of Rosaura Bagolie, on October 31, 2022.

Oral argument via Zoom was held on October 31, 2022.

The application for emergent relief was denied by Order of the undersigned dated November 1, 2022.

A prehearing conference was held on November 9, 2022, and a Prehearing Order was entered November 14, 2022.

Petitioner filed a motion for summary decision dated November 11, 2022. Respondent filed a motion to dismiss dated November 17, 2022. Petitioner filed her opposition to Respondent's motion to dismiss on December 6, 2022. Respondent filed its opposition to Petitioner's motion for summary decision on December 8, 2022; and, Petitioner filed her response thereto, also on December 8, 2022. Respondent then filed a reply to Petitioner's response on December 15, 2022.

FACTUAL BACKGROUND

Petitioner was employed with the Respondent District pursuant to an Employment Agreement for East Newark Board of Education Employees, dated June 30, 2022. Petitioner was employed as a non-tenured teacher for the 2022-2023 school year, at a salary of $62,348.

Petitioner was terminated from her position via Notice of Determination dated October 7, 2022, with an effective date of termination of September 23, 2022.

Initially, Petitioner was terminated via letter dated October 22, 2022, from Rosaura Bagolie, the Superintendent of the District. Said letter was referenced as a 60-Day Notice of Termination. Said letter relieved Petitioner of her duties immediately, and provided that she be on Administrative Leave with pay for the sixty-day period.

Thereafter, in a letter dated September 23, 2022, Superintendent Bagolie advised Petitioner that her termination was re-examined based upon recent conduct, and the termination of employment be immediate and without pay. This letter stated the termination was for cause. The letter also served as a Rice[i] notice.

Petitioner claimed a violation of the NJ Family and Medical Leave Act (FMLA) in her petition of appeal. Petitioner was not on leave pursuant to FMLA. (See Bagolie Cert., pg. 3, para. 11.)

LEGAL ANALYSIS AND CONCLUSION

N.J.S.A. 18A:6-9 states, in pertinent part:

> The commissioner shall have jurisdiction to hear and determine, without cost to the parties, all controversies and disputes arising under the school laws, excepting those governing higher education, or under the rules of the State board or of the commissioner. For the purposes of this Title, controversies and disputes concerning the conduct of school elections shall not be deemed to arise under the school laws.

Petitioner's petition of appeal sets forth the following claims:

1. Violation of 60 days termination notice;
2. Defamation of character;
3. Wrongful termination during FMLA leave;
4. Violation of NJ FMLA;
5. Violation of 4th Amendment to US Constitution;
6. Violation of 5th Amendment to US Constitution; and,
7. Violation of right of privacy.

Said petition also alleges interference with unemployment benefits.

None of the above noted claims fall under the jurisdiction of the Commissioner of the Department of Education. The only arguable claim that may be before the Commissioner is the contractual claim regarding Petitioner's termination.

See Picogna v. Board of Educ., 249, N.J. Super. 332, 592 A.2d 570, 1991 N.J. Super. LEXIS 229 (App.Div. 1991), Dismissal of terminated teacher's petition was proper, which sought relief from the Commissioner of Education based upon the terminated teacher's allegedly wrongful dismissal by the city board of education, and allowed the terminated teacher to adjudicate a parallel civil suit that he had commenced shortly before he filed his petition with the Commissioner, because even though the Commissioner had jurisdiction to hear and determine without cost to the parties, all controversies and disputes arising under the school laws, N.J.S.A. 18A:6-9, the contract claim of a non-tenured school employee did not arise under the school laws simply because its outcome could have later enabled him to attain tenure under the school laws; whether the terminated teacher's employment was wrongfully terminated under the contract and under the Conscientious Employee Protection Act, N.J.S.A. 34:19-1 et seq. was for the court, not the Commissioner, to decide.

Clearly, this matter is not a controversy or dispute arising under the school laws. The Commissioner lacks jurisdiction. Accordingly, the undersigned lacks jurisdiction.

As the instant matter is not properly before the undersigned, Petitioner's motion for summary decision cannot be addressed.

I make no findings as to the veracity of any claims set forth in the petition of appeal. I only **CONCLUDE** that the instant matter cannot be addressed in this forum due to lack of jurisdiction.

---

[1] Rice v. Union City High School Regional Board of Education, 155 N.J. Super. 64 (1977)

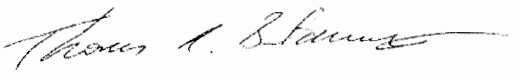
ORDER

It is hereby **ORDERED** that the Respondent's motion to dismiss be **GRANTED**, and that Petitioners' petition of appeal be **DISMISSED**; and,

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

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

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



January 5, 2023 _____

DATE

THOMAS R. BETANCOURT, ALJ

Date Received at Agency: _____

Date Mailed to Parties: _____

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APPENDIX

List of Moving Papers

For Petitioner:

Motion for Summary Decision

Opposition to Motion to Dismiss

Response to Opposition to Motion for Summary Decision

For Respondent:

Motion to Dismiss

Certification of Rosaura Bagolie, Superintendent of Schools with Exhibits A through E

Opposition to Motion for Summary Decision

Reply to Opposition to Motion to Dismiss

97-23SEC

New Jersey Commissioner of Education

Final Decision

Matthew J. McDevitt,

Complainant,

v.

Scott Lavine, Board of Education of the Township of Pennsauken, Camden County,

Respondent.

Synopsis

Complainant alleged that respondent, a member of the Pennsauken Board of Education, violated a section of the School Ethics Act, *N.J.S.A.* 18A:12-21 *et seq*, when he voted to approve a new employment contract for the District's Superintendent of Schools, despite the fact that respondent's wife is employed as a teacher in Pennsauken schools. The School Ethics Commission (SEC) determined that the respondent violated *N.J.S.A.* 18A:12-24(c) of the Code of Ethics for School Board Members for voting to approve the contract, which constituted action in a matter in which respondent had a personal involvement that created a benefit to the respondent. The SEC recommended a penalty of reprimand.

The case was forwarded to the Commissioner for final determination of the appropriate penalty in this matter. Upon review, the Commissioner concurred with the penalty recommendation of the SEC. Accordingly, the respondent shall be reprimanded as a school official found to have violated the School Ethics Act.

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

97-23SEC
SEC Dkt. No. C80-22
Agency Dkt. No. 40-2/23

New Jersey Commissioner of Education

Final Decision

Matthew J. McDevitt,

Complainant,

v.

Scott Lavine, Board of Education of the Township of Pennsauken, Camden County,

Respondent.

The Commissioner has reviewed the record of this matter and the February 21, 2023, decision of the School Ethics Commission (Commission). The Commission found that respondent Scott Lavine, a member of the Pennsauken Board of Education, violated *N.J.S.A.* 18A:12-24(c). The Commission recommended a penalty of reprimand for the violation. The Commission's decision was forwarded to the Commissioner for final determination on the recommended penalty pursuant to *N.J.S.A.* 18A:12-29(c). Respondent neither filed exceptions to the recommended penalty nor instituted an appeal, pursuant to *N.J.A.C.* 6A:4-1 *et seq.*, of the Commission's underlying finding of violation.

Upon review, the Commissioner concurs with the penalty recommended by the Commission for respondent's participation in a vote to approve a new employment contract for the district's superintendent while respondent's wife was employed by the district, which

constituted action in a matter in which respondent had a personal involvement that created a benefit to respondent.

Accordingly, respondent is hereby reprimanded as a school official found to have violated the School Ethics Act.

IT IS SO ORDERED.[1]

Angelica Allen-McMillan, Ed.D.
ACTING COMMISSIONER OF EDUCATION

Date of Decision: March 30, 2023
Date of Mailing: March 31, 2023

[1] This decision may be appealed to the Appellate Division of the Superior Court pursuant to *N.J.S.A.* 18A:6-9.1. Under *N.J.Ct.R.* 2:4-1(b), a notice of appeal must be filed with the Appellate Division within 45 days from the date of mailing of this decision.

Before the School Ethics Commission
Docket No.: C80-22
Final Decision
Summary Disposition

Matthew J. McDevitt,
Complainant

v.

Scott Lavine,
Pennsauken Board of Education, Camden County,
Respondent

I. Procedural History

The above-captioned matter arises from a Complaint that was filed on August 16, 2022, by Matthew J. McDevitt (Complainant), alleging that Scott Lavine (Respondent), a member of the Pennsauken Board of Education (Board), violated the School Ethics Act (Act), *N.J.S.A.* 18A:12-21 *et seq.*[1] More specifically, the Complaint avers that Respondent violated *N.J.S.A.* 18A:12-24(c) of the Act.

On August 26, 2022, the Complaint was served on Respondent via electronic mail, notifying him that ethics charges had been filed against him with the Commission, and advising that he had twenty (20) days to file a responsive pleading.[2] On September 19, 2022, Respondent filed an Answer to Complaint (Answer).

At its meeting on November 22, 2022, and after reviewing the parties' pleadings on October 17, 2022, the Commission adopted a decision finding probable cause for the alleged violation of *N.J.S.A.* 18A:12-24(c), and to decide the above-captioned matter by summary decision pursuant to *N.J.A.C.* 6A:28-10.7(c)(1). The Commission also directed Respondent to file a statement, within twenty (20) days, setting forth the reasons he should not be found in violation of the Act. *N.J.A.C.* 6A:28-10.7(c)(1). Respondent was advised that if he disputes any of the facts determined by the Commission to be both material and undisputed, he should set

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[1] By correspondence dated August 17, 2022, Complainant was notified that the Complaint was deficient, and required amendment before the School Ethics Commission (Commission) could accept his filing. On August 24, 2022, Complainant cured all defects and filed an Amended Complaint (Complaint) that was deemed compliant with the requirements detailed in *N.J.A.C.* 6A:28-6.3.

[2] In order to conduct business during the Coronavirus (COVID-19) pandemic, the Commission implemented an electronic filing system, which remains a permissible method by which the Commission and parties can effectuate service of process. Consequently, service of process was effectuated by the Commission through electronic transmission only.

forth the facts with which he disagrees, and why they are material to the case. Finally, Respondent was advised that following expiration of the time period for submission of his statement, the Commission may make a determination of a violation on a summary basis. Ultimately, and on December 12, 2022, Respondent submitted a Position Statement/Statement of Reasons (Statement of Reasons) as directed.

Consequently, at a special meeting on January 31, 2023, the Commission reviewed the record in this matter and, at its regularly scheduled meeting on February 21, 2023, adopted a decision **finding** that Respondent violated *N.J.S.A.* 18A:12-24(c), and recommending a penalty of **reprimand** for Respondent's violation of the Act.

II. Summary of the Pleadings

In the Complaint, Complainant submits that, based on the substance of Respondent's 2021 and 2022 Personal/Relative and Financial Disclosure Statements, his (Respondent's) spouse is employed in the Pennsauken Public Schools District (District) as a teacher. *Complaint* at 1. Despite his spouse's employment in the District, and at a Board meeting on June 16, 2022, Respondent voted to approve a new contract for the superintendent. *Id.* Because Respondent "voted to award a contract to the person that is his spouse's ultimate superior," Complainant argues that Respondent acted in his official capacity in a matter where he or a member of his immediate family (his spouse) had a personal involvement that created a direct benefit to himself and his spouse in violation of *N.J.S.A.* 18A:12-24(c). *Id.* at 2.

In his Answer, which included a signed Certification, Respondent admitted that he "inadvertently" voted to approve the superintendent's contract during the Board meeting on June 14, 2022, "notwithstanding that his [spouse] is currently a teacher in the [D]istrict." *Answer* at 1. However, Respondent denies that the vote created a direct benefit to himself and/or his spouse. *Id.* According to Respondent, because the vote to approve the contract was unanimous, his "vote had no impact on the ultimate outcome of the approval of the employment contract." *Id.* Respondent noted that he abstained on another agenda item "which included his [spouse] among those [D]istrict employees who were being transferred for the 2022-2023 school year, evidencing that his vote on the superintendent's employment contract (which was otherwise unanimously approved) was unintentional and inadvertent." *Id.* at 1-2. Further, Respondent noted his action was "entirely due to oversight and error," and further admitted that he should have abstained, but "mistakenly failed to do so." *Id.* at 2. Respondent offered, "In an effort to correct any misconception or claim that [Respondent] was purposefully and/or unethically voting on the superintendent's employment contract, the ... Board ... will be once again vot[ing] upon the very same employment contract at its upcoming October 2022 meeting, and [Respondent] will abstain from voting on that agenda item." *Id.* Therefore, Respondent requested that the Commission "impose no penalty, since [Respondent's] vote on the [s]uperintendent's employment contract amounts to a *de minimus* violation of the Act, was unintentional, had no impact on the outcome of the vote, no longer presents a live controversy, and is moot as the Board will vote again on the same contract ... during the October 2022 [B]oard meeting and [Respondent] will abstain from that vote." *Id.*

In his Statement of Reasons, Respondent notes that "Agenda Item No. 3" related to the superintendent's contract and "was one of a block of forty-eight (48) agenda items" that were to be voted upon at the June 14, 2022, Board meeting. *Statement of Reasons* at 1. Respondent further maintains he "deliberately abstained from voting on Agenda Item No. 11," which involved his spouse; however, he "accidentally failed to abstain from voting on Agenda Item No. 3," due to "sheer inadvertence and/or momentary inattention." *Id.* at 2. Respondent contends that although his "inadvertence is no excuse ... it was solely and purely due to his oversight and error that he failed to recuse himself ... ." *Id.* Respondent reasserts that his vote was not the deciding vote, which Respondent notes was unanimous; however, Respondent notes, the superintendent's contract that was voted upon at the June 14, 2022, meeting was "subsequently rescinded because of procedural deficiency" and was resubmitted for a vote at the Board meeting on October 18, 2022, from which Respondent abstained. *Id.*

Respondent requests that the Commission consider that since becoming a Board member in 2018, Respondent "has never before had an ethics complaint filed against him." *Id.* Respondent "deeply regrets" his mistake, and apologizes for his oversight, and reiterates that his conduct "was not intentional in any way nor in an effort to escape his ethical responsibility as a Board member, but rather due to oversight and error." *Id.* at 2-3. Respondent further requests the Commission find that he did not violate the Act, but if a violation is found, Respondent implores "the Commission to consider the lowest level of sanction for his inadvertent failure to abstain." *Id.* at 3.

III. Findings of Fact

Based on its thorough and independent review of the record, the Commission **finds** the following facts to be **undisputed**:

1. Respondent is a member of the Board and has served in this capacity since 2018. *Complaint* at page 1; *Answer* at 1; *Certification of Respondent* at 1; and *Statement of Reasons* at 1-2.

2. Respondent's spouse is employed as a teaching staff member in the District. *Complaint* at page 1; *Answer* at 1; *Certification of Respondent* at 1-2; *Statement of Reasons* at 2.

3. The Board had a meeting on June 16, 2022. *Complaint* at page 1; *Answer* at 1; *Certification of Respondent* at 1; and *Statement of Reasons* at 1.

4. At the Board meeting on June 16, 2022, Respondent voted in the affirmative for Agenda Item No. 3, which included "a block of forty-eight agenda items," including a new employment contract for the superintendent. *Complaint* at page 1; *Answer* at 1; *Certification of Respondent* at 1-2; and *Statement of Reasons* at 1.

5. At the Board meeting on June 16, 2022, Respondent abstained from voting on Agenda Item No. 11, which included a personnel matter related to his spouse, among other District staff. *Answer* at 1-2; *Certification of Respondent* at 1-2; *Statement of Reasons* at 1-2.

6. The superintendent supervises all staff employed in the District. *Complaint* at page 2.

IV. Analysis and Conclusions of Law

The uncontroverted facts in this matter can be briefly summarized as follows: Respondent is a Board member; Respondent's spouse is employed in the District; while Respondent's spouse was employed in the District, he voted to approve a new employment contract for the superintendent, the highest ranking supervisor in the District. By voting on a new employment contract for the superintendent while his spouse was employed in the District, Complainant argues that Respondent violated *N.J.S.A.* 18A:12-24(c).

N.J.S.A. 18A:12-24(c) states, in relevant part:

> No school official shall act in his official capacity in any matter where he ... has a direct or indirect financial involvement that might reasonably be expected to impair his objectivity or independence of judgment. No school official shall act in his official capacity in any matter where he ... has a personal involvement that is or creates some benefit to the school official ... .

Also of relevance to the Commission's analysis is the legislative findings and declarations relative to the adoption of the Act, to wit:

> ...
> a. In our representative form of government it is essential that the conduct of members of local boards of education ... hold the respect and confidence of the people. These board members ... must avoid conduct which is in violation of their public trust or which creates a justifiable impression among the public that such trust is being violated.
> ... .

In *Advisory Opinion* 24-17 (A24-17), the Commission issued clear and unequivocal guidance regarding Board members "who have immediate family members or relatives who are employed in ... the District ... ." More specifically, the Commission stated, "A Board member with a **relative** who is employed **in the District**, **cannot** participate in any aspect of negotiations, including the vote on the collective negotiations agreement following attainment of the memorandum of the agreement. ... ." (emphasis in original). *Id.* The Commission further advised that, "a Board member who has a **relative or immediate family member** employed **in the District** would also be prohibited from participating in any and all issues related to the superintendent, including the search, contract approval, and evaluation of performance" (emphasis in original). *Id.*

With the above in mind, the Commission finds that because Respondent voted, albeit unintentionally and inadvertently, to approve a new employment contract for the superintendent – the individual who has ultimate supervisory authority over Respondent's spouse, and the individual who is charged with making personnel recommendations for his spouse (including

continued employment and possible promotions) – while his spouse was employed in the District, the Commission finds that Respondent acted in his official capacity in a matter where "he ... has a direct or indirect financial involvement that might reasonably be expected to impair his objectivity or independence of judgment," and in his "official capacity in any matter where he ... has a personal involvement that is or creates some benefit to the school official ... ."

The Commission also notes that regardless of whether Respondent's spouse may have actually received a benefit from Respondent's vote is irrelevant, because the "question will always turn on 'whether the circumstances could reasonably be interpreted to show that they had the likely capacity to tempt the official to depart from his sworn public duty,'" and "[a]n actual conflict of interest is not the decisive factor, nor is 'whether the public servant succumbs to temptation,' but rather whether there is a potential for conflict." *I/M/O Deborah Anderson*, High Point Regional Board of Education, Sussex County, Docket No. C45-19, at page 5. In this case, and as conceded by Respondent, there is no question that, due to the employment of his spouse in the District, Respondent had a conflict of interest, actual and/or perceived, and should have abstained from voting on the new employment contract for the superintendent.

Accordingly, and based on a complete and thorough review of the record, the Commission **finds**, based on the undisputed evidence as set forth herein, that Respondent violated *N.J.S.A.* 18A:12-24(c) when he voted to approve a new employment contract for the superintendent while his spouse was employed in the District.

V. Recommended Penalty

Having found that Respondent violated *N.J.S.A.* 18A:12-24(c), the Commission is authorized to recommend to the Commissioner of Education (Commissioner) an appropriate penalty, which may range from reprimand to removal. *N.J.S.A.* 18A:12-29(c).

In its review, the Commission finds that **reprimand** is the most appropriate penalty. In reaching this determination, the Commission finds that, based on the record, Respondent did not act deliberately or intentionally, and that his vote was, based on his abstention in another matter, "sheer inadvertence." The Commission genuinely appreciates Respondent's contrition for his mistake, and his ready acknowledgment of wrongdoing. As the Commission has stated in other decisions, this matter is "a reminder that he, like all other school officials, must be mindful of how their Board action can implicate, and potentially, violate the Act. *No one* is beyond reproach, and *everyone* is entitled to make a mistake." *Mervin Rose v. Ronnie McDowell*, Township of Union Board of Education, Union County, Docket No. C78-20, at 6. The Commission urges Respondent, and all other school officials, to ensure vigilance when reviewing all agenda items to ensure that they are abstaining from all matters as appropriate.

VI. Decision

For the reasons set forth above, the Commission recommends that the Commissioner of Education impose a penalty of **reprimand** for the violation of *N.J.S.A.* 18A:12-24(c).

Pursuant to *N.J.S.A.* 18A:12-29(c), this decision shall be forwarded to the Commissioner of Education for review of the Commission's recommended penalty. The parties may either: 1) file exceptions to the recommended sanction; 2) file an appeal of the Commission's finding of a violation; or 3) file both exceptions to the recommended sanction together with an appeal of the finding of a violation.

Parties taking exception to the recommended sanction of the Commission but ***not disputing*** the Commission's finding of a violation may file, **within thirteen (13) days** from the date the Commission's decision is forwarded to the Commissioner, written exceptions regarding the recommended penalty to the Commissioner. The forwarding date shall be the mailing date to the parties, as indicated below. Such exceptions must be forwarded to: Commissioner of Education, c/o Bureau of Controversies and Disputes, P.O. Box 500, Trenton, New Jersey 08625, marked "Attention: Comments on Ethics Commission Sanction," as well as to (ControversiesDisputesFilings@doe.nj.gov). A copy must also be sent to the Commission (school.ethics@doe.nj.gov) and all other parties.

Parties seeking to appeal the Commission's finding of a violation ***must*** file an appeal pursuant to the standards set forth at *N.J.A.C.* 6A:4:1 *et seq.* **within thirty (30) days** of the filing date of the decision. The filing date shall be three (3) days after the date of mailing to the parties, as shown below. In such cases, the Commissioner's review of the Commission's recommended sanction will be deferred and incorporated into the Commissioner's review of the finding of violation on appeal. Where a notice of appeal has been filed on or before the due date for exceptions to the Commission's recommended sanction (thirteen (13) days from the date the decision is mailed by the Commission), exceptions need not be filed by that date, but may be incorporated in the appellant's briefs on appeal.

Robert W. Bender, Chairperson

Mailing Date: February 21, 2023

Resolution Adopting Decision in Connection with C80-22

Whereas, at its special meeting on January 31, 2023, the School Ethics Commission (Commission) considered the entirety of the record in this matter; and

Whereas, at its special meeting on January 31, 2023, the Commission discussed finding a violation of *N.J.S.A.* 18A:12-24(c); and

Whereas, at its special meeting on January 31, 2023, the Commission discussed recommending a penalty of reprimand for the violation of *N.J.S.A.* 18A:12-24(c); and

Whereas, at its regularly scheduled meeting on February 21, 2023, the Commission reviewed and voted to approve the within decision as accurately memorializing its actions/findings from its special meeting on January 31, 2023; and

Now Therefore Be It Resolved, that the Commission hereby adopts the decision and directs its staff to notify all parties to this action of its decision herein.

Robert W. Bender, Chairperson

I hereby certify that the Resolution was duly adopted by the School Ethics Commission at its meeting on February 21, 2023.

Kathryn A. Whalen, Esq.
Director, School Ethics Commission

98-23
OAL Dkt. No. EDU 08430-22
Agency Dkt. No. 176-7/22

New Jersey Commissioner of Education

Final Decision

Kedra Gamble,

Petitioner,

v.

Board of Education of the Borough of Bound Brook, Somerset County,

Respondent.

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

In this case, the petitioner challenged the respondent Board's evaluation of her performance and subsequent non-renewal. The ALJ's Initial Decision reported that three telephone conferences were scheduled in this case, and petitioner was given proper notice of all three. Petitioner did not participate in a January 17, 2023, telephone conference and did not contact the OAL to explain why she was unable to do so. Another telephone prehearing conference was scheduled for February 22, 2023, and petitioner once again did not participate, nor did she contact the OAL to explain her absence.

The ALJ found that petitioner failed to appear for the scheduled telephone conferences and failed to file any explanation for her failure to appear. Accordingly, the ALJ determined that the petitioner has abandoned her appeal.

Upon review of the record of this matter, the Commissioner concurs with the ALJ that petitioner did not appear for scheduled telephone hearings and filed no explanation for her failure to do so. Accordingly, this matter is no longer deemed to be a contested case before the Commissioner and is hereby dismissed with prejudice.

IT IS SO ORDERED. [1]

Angelica Allen-McMillan, Ed.D.
ACTING COMMISSIONER OF EDUCATION

Date of Decision: April 3, 2023
Date of Mailing: April 5, 2023

[1] This decision may be appealed to the Appellate Division of the Superior Court pursuant to *N.J.S.A.* 18A:6-9.1. Under *N.J.Ct.R.* 2:4-1(b), a notice of appeal must be filed with the Appellate Division within 45 days from the date of mailing of this decision.

State of New Jersey
OFFICE OF ADMINISTRATIVE LAW

INITIAIL DECISION

DISMISSAL

OAL DKT. NO. EDU 08430-22

AGENCY DKT. NO. 176-7/22

KENDRA GAMBLE

Petitioner,

v.

BOROUGH OF BOUND BROOK BOARD OF EDUCATION, SOMERSET COUNTY,

Respondent.

Kendra Gamble petitioner, pro se

Robert J. Merryman, Esq., for respondent (Apruzzeese, McDermott, Mastro & Murphy, P.C., attorneys)

Record Closed: February 23, 2023 Decided: March 3, 2023

BEFORE **JOAN M. BURKE**, ALJ:

STATEMENT OF THE CASE

Petitioners challenge the respondent's, Borough of Bound Brook Board of Education, (Board or respondent) evaluation and non-renewal.

PROCEDURAL HISTORY AND FACTUAL DISCUSSION

This matter was transmitted to the Office of Administrative Law (OAL), where it was filed on March 4, 2022. Petitioner participated in a pre-hearing conference on November 16, 2022. During the pre-hearing conference the parties agreed to have the next scheduled status conference on January 17, 2023. Notice of that telephone conference was emailed to petitioner and respondent on November 22, 2022.

LEGAL DISCUSSION AND CONCLUSIONS OF LAW

Pursuant to N.J.A.C. 1:1-14.4(a),

> If, after appropriate notice, neither a party nor a representative appears at any proceeding scheduled by the Clerk or judge, the judge shall hold the matter for one day before taking any action. If the judge does not receive an explanation for the nonappearance within one day, the judge shall, . . . direct the Clerk to return the matter to the transmitting agency for appropriate disposition pursuant to N.J.A.C. 1:1-3.3(b) and (c).

This matter was scheduled for three telephone conferences. Petitioner was given notice of all telephone conferences. All telephone prehearing notices contain the following language:

> Failure to dial in for the telephone conference, will result in the file being returned to the transmitting agency for appropriate action which may include imposition of the proposed penalty or granting the relief requested by the other party.

Petitioner did not participate in the January 17, 2023, telephone conference and did not contact the OAL to explain why she was unable to do so.

Another telephone prehearing conference was scheduled to be heard on February 22, 2023. Proper notice of that telephone conference was emailed to the petitioner and respondent on January 26, 2023.

The petitioners did not participate in the February 22, 2023, telephone conference and did not contact the OAL to explain why she was unable to do so.

CONCLUSION

To date, the petitioner has not provided a request for an adjournment of the February 22, 2023, telephone conference or an explanation for her nonappearance for the same. Neither has this office received notice of legal representation on behalf of the petitioner. Therefore, I **CONCLUDE** that petitioner has failed to appear and abandoned her appeal.

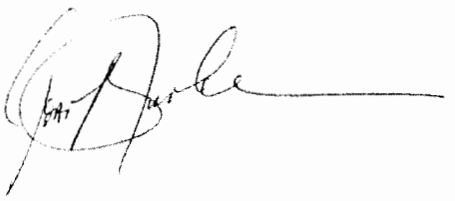
ORDER

It is hereby **ORDERED** that this matter is **DISMISSED**.

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

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

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



March 3, 2023
DATE

JOAN M. BURKE, ALJ

Date Received at Agency: _____

Date Mailed to Parties: _____

/tat

99-23
State Board of Examiners Dkt. No. 1920-110
OAL Dkt. No. EDE-1212-2020
Agency Dkt. No. 10-12/22A

New Jersey Commissioner of Education

Final Decision

In the Matter of the Certificates of
Theresa Guerriere, State Board of Examiners,
New Jersey Department of Education.

Order of Revocation by the State Board of Examiners, December 9, 2022

For the Respondent-Appellant, Oded Weinstock, Esq.

For the Petitioner-Respondent, State Board of Examiners, Sadia Ahsanuddin, Deputy Attorney General (Matthew J. Platkin, Attorney General of New Jersey)

The Commissioner has reviewed the record and the papers filed in connection with appellant Theresa Guerriere's appeal of the Order of the State Board of Examiners (Board), dated December 9, 2022, revoking her Teacher of Health and Physical Education Certificate, Teacher of Handicapped Certificate, and Teacher of Driver Education Certificate.

Appellant and her husband, Harry Guerriere, have been the co-owners of a home located at 201 St. Paul Ave, Apt 1H, Jersey City, New Jersey (hereinafter "the Jersey City property") since 1999. Appellant and her husband are also the owners of a home located at 295 35th Street South, Brigantine, New Jersey (Brigantine property), which they have owned since 2002. On October 29, 2012, Hurricane Sandy (Sandy or "the storm") slammed into the eastern shore of New Jersey, devastating the shore communities, and causing a massive amount of property damage. To assist those affected by the storm, the New Jersey Department of Community Affairs

(DCA) created, among other programs, the Homeowner Resettlement Program (RSP) and the Renovation, Reconstruction, Elevation, and Mitigation (RREM) program. To be eligible for assistance under either program, the property had to: have suffered a specific amount or type of damage; be located in one of the nine communities most affected by Sandy; and be used as the claimant's primary residence. The RREM program also included an income restriction.

On May 27, 2013, appellant filled out an application for RSP assistance. In the application, appellant indicated that the Brigantine property was her and her husband's primary residence when Sandy hit. As part of the application, appellant executed a document titled "Resettlement Program Self-Certification" which states that "any person who knowingly or willingly makes a false or fraudulent statement ... may be subject to termination of assistance and civil and criminal penalties." Attached to the application was a copy of appellant's driver's license, which was issued on December 12, 2012 and lists the Brigantine property as her address. Appellant's RSP application was accepted on July 27, 2013, and thereafter appellant executed a Grant Agreement and Promissory Note. Under the Grant Agreement, appellant made the following affirmative representations: "At the time of Superstorm Sandy, I (We) owned and occupied as my/our primary residence the above-designated IMPACTED RESIDENCE." Additionally, the agreement required that appellant agreed to maintain the Brigantine property as her residence for a minimum of three years after receiving the grant money. On August 20, 2013, appellant received and cashed the grant check in the amount of $10,000.

On June 18, 2013, appellant made an application for assistance through the RREM program. As with the RSP application, appellant certified that the Brigantine property was her and her husband's primary residence. However, while this application was being processed, the

DCA became aware of information that led them to believe that the Brigantine property was not appellant's primary residence. Specifically, the DCA learned that a driver's license issued to appellant on October 24, 2013, listed the Jersey City property as appellant's address. Further, the Motor Vehicle Services address change history showed the Jersey City property as appellant's residential address and mailing address when Sandy hit and that these addresses were changed to the Brigantine address shortly after the storm. Appellants' vehicle registration listed Jersey City as their primary address prior to Sandy. Prior to Sandy, appellant was registered to vote in Jersey City and only changed her voter registration in 2013 after the storm. Additionally, the investigation revealed that tax records for the Brigantine property were mailed to the Jersey City property prior to the storm. As a result, the RREM application was denied and the RSP grant was retroactively denied.

Appellant asserts that after learning of the denial, she entered into a repayment plan for the RSP grant while at the same time filing an appeal of the decision with the DCA (DCA matter). The appeal was treated as contested and was transferred to the Office of Administrative Law (OAL) and heard by the Hon. Todd Miller, Administrative Law Judge (ALJ). In his decision, Judge Miller noted that it was undisputed that the property was located in one of the nine affected communities, that the property sustained sufficient damage to qualify for the grants, and that appellant and her husband's annual adjusted gross income met the income requirement of the RREM program. As a result, Judge Miller found that the only issue before him was appellant's claim that the Brigantine property was her primary residence. *IMO Theresa Guerriere v. Department of Community Affairs,* OAL Docket No. CAF 11204-15.

Judge Miller found that appellant and her husband were employed full time in Jersey City. The Jersey City property was located a few minutes away from their places of work. The Brigantine property was located over 100 miles away from their places of work and represented a two-hour commute each way. Appellant's 2011 taxes, which were filed in 2012, identified the Jersey City property as her address. Appellant's driver's license and motor vehicle registration identified the Jersey City property as her primary address on the date of the storm. In fact, Judge Miller found that all of appellant's vital documents identified Jersey City as her primary address as of the date of the storm. Further, Judge Miller found that these documents were changed after the storm and that the change appeared "too convenient and self-serving" to be credible. Judge Miller concluded that appellant did not meet her burden of establishing that the Brigantine property was her primary address as of the date of the storm.

After the hearing, the DCA made a potential fraud referral to the Atlantic County Prosecutor's Office, whose investigation further revealed that appellant's bank accounts all listed the Jersey City Property as appellant's address during the relevant time period. As a result of the investigation, appellant and her husband were indicted for various alleged crimes, including theft by deception, and making unsworn false statements to authorities. Appellant applied for and was accepted into the Pre-Trial Intervention program (PTI). As part of the conditions for PTI, appellant was required to complete 25 hours of community service, pay restitution in the amount of $7,900.00 (the balance due after appellant's partial repayment), pay mandatory fines and penalties, and complete 12 months of probation. Pursuant to the rules, appellant was not required to admit guilt or make any allocution of the facts as condition of admission into PTI.

After completing her community service and paying the fines and restitution, appellant's request to terminate probation early was granted.

As a result of the foregoing, on December 13, 2019, the Board of Examiners issued an Order to Show Cause why all of appellant's certificates and credentials should not be revoked. Appellant filed her answer on January 17, 2020. Since there appeared to be material facts in dispute, the matter was transmitted to the OAL for hearing as a contested case. The Hon. Tama B. Hughes, ALJ, was assigned to hear the matter. The parties engaged in written discovery and thereafter each side filed motions seeking summary disposition in their favor pursuant to *N.J.A.C.* 1:1-12.5.

Judge Hughes issued her written opinion on January 26, 2022, finding that appellant had engaged in conduct unbecoming a teacher; the decision revoked all of appellant's teaching certificates. Specifically, Judge Hughes incorporated all of Judge Miller's findings and credibility determinations in the DCA matter and held that appellant was collaterally estopped from arguing that the Brigantine property was her primary residence and that her unsworn statements on the RSP and RREM applications constituted material misrepresentations of fact. Judge Hughes rejected appellant's contention that the Board was required to prove that appellant made the material misrepresentation knowingly or purposefully, finding that this was "an attempt to place an enhanced burden of proof on the State." Judge Hughes further found that, in making material misrepresentations, appellant engaged in conduct unbecoming a teacher, and revocation was the only appropriate sanction.

On February 2, 2022, appellant filed exceptions to the Initial Decision. The Deputy Attorney General representing the Board filed their response on March 11, 2022. The Board

considered the arguments and adopted the Initial Decision on December 9, 2022. The Board found that appellant was collaterally estopped from contesting the facts established at the hearing on the DCA matter before Judge Miller. Further, the Board found that appellant's intent was not relevant to the determination that she claimed the Brigantine property as her primary residence and sought and obtained relief funds based upon that claim. The Board also affirmed Judge Hughes' revocation of appellant's teaching certificates. The present appeal to the Commissioner of Education followed.

On appeal, appellant asserts that Judge Hughes and the Board erred in their application of the doctrines of res judicata and collateral estoppel, arguing that the issues before Judge Miller and the DCA were markedly different than the issues before Judge Hughes. Appellant further contends that Judge Hughes erred in finding that appellant was attempting to impose a higher burden of proof on the Board. Appellant argues that Judge Hughes erred in finding that appellant failed to provide any new evidence that was unavailable at the prior proceeding. Additionally, appellant contends that Judge Hughes erred by revoking appellant's certificates without a finding that she committed fraud. Finally, in the alternative, appellant argues that Judge Hugues erred in revoking her teaching certificates summarily without providing an opportunity for appellant to present mitigating evidence.

In reviewing appeals from decisions of the Board, the Commissioner may not substitute her judgment for that of the Board so long as the appellant received due process and the Board's decision is supported by sufficient credible evidence in the record. Further, the Board's decision should not be disturbed unless the appellant demonstrates that it is arbitrary, capricious, or

contrary to law. *N.J.A.C.* 6A:4-4.1(a). The Commissioner may reject or modify conclusions of law but shall clearly state the reasons for so doing. *N.J.A.C.* 1:1-18.6(b).

Upon review, the Commissioner concludes that Judge Hugues and the Board correctly applied the doctrines of res judicata and collateral estoppel with respect to all conclusions of law, findings of fact, and credibility determinations made by Judge Miller in the DCA matter. Res judicata and collateral estoppel (i.e., issue preclusion) are equitable doctrines asserted to prevent parties from re-litigating an issue decided by a prior court. *Winters v. North Hudson Reg. Fire*, 212 *N.J.* 67, 85 (2012). Res judicata and collateral estoppel have been held to apply to administrative agency litigation. *Mansoldo v. State*, 187 *N.J.* 50, 60 (2006). Collateral estoppel applies if:

> (1) the issue to be precluded is identical to the issue decided in the prior proceeding; (2) the issue was actually litigated in the prior proceeding; (3) the court in the prior proceeding issued a final judgment on the merits; (4) the determination of the issue was essential to the prior judgment; and (5) the party against whom the doctrine is asserted was a party to or in privity with a party to the earlier proceeding.
>
> *See Hennessey v. Winslow Twp.*, 183 *N.J.* 593, 599 (2005).

The limited issue of whether or not the Brigantine property constituted appellant's primary residence is central to both the instant matter as well as the previous matter. In the DCA matter, Judge Miller found as a fact that the Brigantine property was not appellant's primary residence. As a result, appellant is precluded from relitigating this issue.

It is well settled that conduct unbecoming a teacher or other public employee includes "'conduct which adversely affects the morale or efficiency'" of the public entity or "which has a tendency to destroy public respect for [public] employees and confidence in the operation of

[public] services." *In re Emmons*, 63 *N.J. Super.* 136, 140 (App. Div. 1960) (internal citation omitted). Contrary to appellant's assertion, the Board is not required to demonstrate that appellant violated any specific statute or engaged in criminal activity; rather, the Board must show that appellant engaged in conduct that violated the implied standard of conduct for teachers.

The Commissioner finds that there is sufficient evidence in the record to conclude that appellant misrepresented her primary residence for the purpose of obtaining relief funds she was not entitled to receive. The Second Restatement of Contracts defines a misrepresentation as "an assertion that is not in accord with the facts." *Restatement (Second) of Contracts* § 159 (1981). The Second Restatement of Contracts also states that "[a] misrepresentation is material if it would be likely to induce a reasonable person to manifest his assent, or if the maker knows that it would be likely to induce the recipient to do so." *Restatement (Second) of Contracts* § 162 (1981). In the DCA matter, Judge Miller found that the RSP and REM programs required, as a condition for receiving relief, that the damaged property be appellant's primary residence. As a result, appellant's assertion on her applications that the Brigantine property was her primary residence was a material misrepresentation.

Appellant's claim that she believed and continues to believe that the Brigantine property was her primary residence prior to the storm is not credible. The facts as found by Judge Miller and supplemented by the documents submitted by the parties in their cross motions for summary decision show that on October 29, 2012, appellant had owned two properties, one located in Jersey City and the other located in Brigantine, for over 10 years. The Jersey City property is located within a few minutes of appellant's work address, while the Brigantine

property is located over 100 miles away. Further, at the time of the storm, all of appellant's vital records identified the Jersey City property as her primary address. After the storm, appellant sought relief funds totaling $20,000.00 through the RSP and RREM program. Each of these programs required that appellant certify that the Brigantine property was her principal residence. Further, the application required that appellant submit some documentation of her primary address, with a driver's license identifying the property as her address being the preferred method of proving primary residence. After the storm, appellant changed the address on her driver's license and submitted the changed driver's license with her applications as proof of primary residence. Appellant also changed her vital records, including her voter registration, vehicle registration and address where she received the property tax information to the Brigantine Address. Finally, after submitting the applications, appellant changed the address on her driver's license back to the Jersey City property. There is simply no legitimate explanation for these document changes. The record clearly and unequivocally demonstrates that appellant was intentionally creating documents after the fact to support a claim for relief that she knew she was not entitled to receive.

This matter is very similar to *I/M/O Certificate of David Toler*, EDE 5946-02, State Bd. of Exam'rs (October 28, 2004). In that case, it was alleged that Toler had provided personal information to a psychologist who used the information to file insurance claims for services that had not been provided. It was also alleged that the Toler received payment from the psychologist. As in this matter, Toler was admitted to PTI and, after his completion of the PTI program, he did not have a criminal record. The Board of Examiners found that participation in a scheme to obtain benefit payments constituted conduct unbecoming a teacher. *See also*

I/M/O Credential of Shauna E. Morgan, Dkt. No. 1314-190, State Bd. of Exam'rs (June 28, 2019) (finding that knowingly providing false information to an employer for the purpose of obtaining improper insurance benefits constituted conduct unbecoming a teacher). Appellant's participation in a scheme to obtain grants from the RSP and RREM programs – relief programs for which she was not eligible – constitutes conduct unbecoming a teacher.

With regard to the penalty determination, the Board's decision to revoke appellant's certificates is consistent with the factors identified in *In re Fulcomer,* 93 *N.J. Super.* 404 (App. Div. 1967). The decision to revoke appellant's certificates is also consistent with revocations in *I/M/O Credential of Shauna E. Morgan*, Dkt. No. 1314-190, State Bd. of Exam'rs (June 28, 2019); *I/M/O Certificate of David Toler*, EDE 5946-02, State Bd. of Exam'rs (October 28, 2004); and *I/M/O the Certificate of Suzanne Amabile*, Agency Dkt. No. 625-04/01-306, State Bd. of Exam'rs (April 3, 2003) (revoking certificate of a former school business administrator for the misappropriation of entrusted property).

Accordingly, the Commissioner finds no basis upon which to disturb the penalty decision of the State Board of Examiners.[1] The Decision of the Board is affirmed.[2]

Angelica Allen-McMillan, Ed.D.
ACTING COMMISSIONER OF EDUCATION

Date of Decision: April 3, 2023
Date of Mailing: April 5, 2023

[1] On March 17, 2023, appellant filed a motion to stay the Board of Examiners' decision pending the outcome of this appeal. Appellant's motion is rendered moot by the decision herein and is therefore denied.

[2] This decision may be appealed to the Appellate Division of the Superior Court pursuant to *N.J.S.A.* 18A:6-9.1. Under *N.J.Ct.R.* 2:4-1(b), a notice of appeal must be filed with the Appellate Division within 45 days from the date of mailing of this decision.

IN THE MATTER OF	:	NEW JERSEY DEPARTMENT OF EDUCATION
THE CERTIFICATES OF	:	STATE BOARD OF EXAMINERS
THERESA GUERRIERE	:	ORDER OF REVOCATION
_____	:	DOCKET NO: 1920-110

At its meeting of November 1, 2019, the State Board of Examiners (Board) reviewed information received from the Office of Student Protection (OSP) and the New Jersey Superior Court – Atlantic County Vicinage regarding Guerriere.

In August 2018, Guerriere was indicted for Theft by Deception – False Impression (3rd degree), Conspiracy – Agree/Engage in Conduct Constituting a Crime (3rd degree), and Unsworn Falsification (4th degree) after she received disaster relief funds by falsely claiming a property as a primary residence.

On July 11, 2019, Guerriere received an Order of Postponement and was entered into PreTrial Intervention Program for a period of 12 months and was required to complete 25 hours of community service and make restitution in the amount of $7,900.

Guerriere holds a Teacher of Health and Physical Education, Teacher of Handicapped, and Teacher of Driver Education certificates. On December 13, 2019, the Board issued Guerriere an Order to Show Cause as to why her certificates should not be revoked.

The Board sent Guerriere the Order to Show Cause by regular and certified mail. The Order provided that Guerriere's Answer was due within 30 days. Guerriere filed her Answer on January 17, 2020.

In that Answer, Guerriere admitted that she was indicted for 3rd degree theft by deception, 3rd degree conspiracy to commit theft by deception, and 4th degree unsworn falsification. *See* Answer at ¶ 3. Guerriere, however, denied that she engaged in any of the alleged conduct or wrongdoing. *Id.* She asserted that she permanently resided in Brigantine, New Jersey at all times

relevant; she paid taxes there and used that address on her driver's license. *Id.* Furthermore, Guerriere admitted that she entered into PTI for 12 months, but she did not enter a guilty plea to any criminal charges. *Id.* at ¶ 4. She further offered 2 separate defenses.

Since there were material facts in dispute, on January 20, 2020, the Board transmitted the matter to the Office of Administrative Law (OAL) for hearing as a contested case. On January 26, 2022, Administrative Law Judge (ALJ) Tama B. Hughes (Judge Hughes) issued an Initial Decision in the case. *In the Matter of the Certificates of Theresa Guerriere*, Dkt. No. EDE 01212-20 (Initial Decision, January 26, 2022).

In the matter at OAL, the Board filed a motion for summary decision, asserting that there were no material facts in dispute as Guerriere's residency was determined at a hearing before the Honorable W. Todd Miller, ALJ (*IMO Theresa Guerriere v. Department of Community Affairs*, OAL Docket No. CAF 11204-15). Guerriere filed a cross motion indicating that the Board has no evidence that Guerriere knowingly submitted a fraudulent application to the State in order to receive Sandy relief funds.

Judge Hughes found that Judge Miller's ruling, as adopted by the Department of Community Affairs, is "controlling upon this tribunal on the issue of respondent's primary residence as of October 29, 2012, and her application for Sandy recovery funds for her Brigantine residence." *Id.* at p. 12-13. ALJ Hughes further found that it did not matter that the Board was not a party to the litigation before Judge Miller, but rather Guerriere had a "full and fair opportunity to litigate the issue and received a final judgment on the merits." *Id.* at p. 13. Accordingly, Judge Hughes determined that Guerriere is collaterally estopped from relitigating the issue of her residency as of October 29, 2012.

Based upon the determination that collateral estoppel applies, the Board argued that summary decision is warranted because Guerriere was found to have "material misrepresentations as to her primary residence to secure Sandy relief funds." *Id.* Judge Hughes therefore found that Guerriere engaged in conduct unbecoming a teacher, such that revocation is appropriate. *Id.* at p. 13-16.

On February 2, 2022, Guerriere filed Exceptions to the Initial Decision. In those Exceptions, Guerriere argues that collateral estoppel and res judicata are not applicable in this matter because the issue before Judge Hughes is different than the issue decided by Judge Miller involving the DCA. *See* Exceptions at p. 19. First, the criminal charges in this matter were issued after Judge Miller's hearing and ruling, so res judicata or collateral estoppel does not apply. *Id.* at p. 23. Further, the alleged criminal conduct involved purposeful or intentional conduct. *Id.* Accordingly, Guerriere states that the Board must prove that she intentionally made a material misrepresentation. *Id.* at p. 24. There is no evidence that her conduct was purposeful or intentional. Rather, based upon discussions and representations, Guerriere "reasonably believed that she qualified for the relief funds." *Id.* Judge Miller's determination is limited to the fact that Guerriere was not legally entitled to the relief funds for which she applied. *Id.* at p. 25.

Guerriere also argues that summary judgment should not be granted where the matter requires a determination of a state of mind or intent. *Id.* at p. 25. The Board's motion should have been denied as a matter of law. *Id.* at p. 26.

Additionally, Guerriere argued that Judge Hughes incorrectly stated that she was arguing the Board had a higher burden of proof in this matter than the matter before Judge Miller. Guerriere asserts that this demonstrates that Judge Hughes did not understand Guerriere's arguments. *Id.* at p. 27. Additionally, Guerriere states that Judge Hughes erroneously found that she presented no

new evidence and failed to permit Guerriere to offer character evidence or evidence in mitigation of the penalty. *Id.* at p. 30-33.

On March 11, 2022, the DAG representing the Board filed a reply to Guerriere's exceptions. The reply states that Judge Hughes properly applied the criteria for determination of collateral estoppel. *See* Reply at p. 9. First, the issue in both the DCA proceeding and in this matter are the same – whether Guerriere's primary residence was in Brigantine, New Jersey at the time of Hurricane Sandy. *Id.* Judge Miller determined that Guerriere received disaster relief by falsely claiming a property as primary residence. *Id.*

Additionally, in determining whether the matter decided by Judge Miller was the same as that before Judge Hughes, courts should look for significant overlap of evidence or argument, among other factors. *Id.* at p. 10. The fact finder in Judge Miller's matter and the instant matter would have considered the exact same testimony, evidence and arguments. *Id.* at p. 10-11. Moreover, Guerriere had a full opportunity to litigate the matter before Judge Miller. *Id.* at p. 12.

The DAG also asserts that the Board does not have to prove Guerriere violated the criminal code or that she had the requisite *mens rea.* *Id.* at p. 14. The Board had to prove by a preponderance of credible evidence that Guerriere misrepresented her primary residence as Brigantine when she applied for Sandy funds. *Id.* at p. 15. Finally, the DAG asserted that there are numerous cases where revocation of certificate is appropriate in instances of fraudulent claims. *Id.* at p. 18-19.

The Board must now determine whether to adopt, modify or reject the Initial Decision in this matter. At its meeting of October 28, 2022[1], the Board reviewed the Initial Decision,

[1] There were delays in the Board's consideration of the Initial Decision in this matter resulting from Board member recusals and lack of quorum, as well as consideration of proposals to resolve this matter short of the initial decision.

Exceptions and Reply Exceptions. After full and fair consideration of the Decision and other submissions, the Board voted to adopt the Initial Decision.

"Teachers ... are professional employees to whom the people have entrusted the care and custody of ... school children. This heavy duty requires a degree of self-restraint and controlled behavior rarely requisite to other types of employment." *Tenure of Sammons*, 1972 *S.L.D.* 302, 321. Unfitness to hold a position in a school system may be shown by one incident, if sufficiently flagrant. *Redcay v. State Bd. of Educ.*, 130 *N.J.L.* 369, 371 (Sup. Ct. 1943), *aff'd*, 131 *N.J.L.* 326 (E & A 1944). In this case, Judge Hughes correctly noted that the facts underlying Guerriere's conduct were established at the DCA hearing before Judge Miller and, pursuant to collateral estoppel, govern the Board's decision-making here. Judge Miller found that Guerriere received Sandy relief funds after she falsely claimed Brigantine was her primary residence. Guerriere's intent behind the filing is not relevant to the determination that she claimed the property as a primary residence and sought and obtained relief funds based upon that claim. Furthermore, the Board agrees with Judge Hughes that Guerriere's behavior constituted unbecoming conduct which warrants a severe penalty, consistent with the Board's precedential case law relating to submission of fraudulent claims. *See IMO Certificates of Eloise Stewart*, 10796-16, State Bd. of Exam'rs (July 27, 2017); *IMO Certificates of Shauna E. Morgan*, Dkt. No. 1314-190, State Bd. of Exam'rs (June 28, 2019); and *IMO Certificate of David Toler*, EDE 5946-02, State Bd. of Exam'rs (October 28, 2004). Consequently, the Board finds that revocation is the appropriate response in this matter and therefore adopts the Initial Decision.

Accordingly, on October 28, 2022, the Board voted to adopt the Initial Decision and ordered to revoke Guerriere's certificates. On this 9th day of December 2022, the Board formally adopted its written decision to adopt the Initial Decision, and it is therefore ORDERED that

Theresa Guerriere's Teacher of Health and Physical Education, Teacher of Handicapped, and Teacher of Driver Education certificates are hereby revoked, effective immediately. It is further ORDERED that Guerriere return her certificates to the Secretary of the State Board of Examiners, Office of Certification and Induction, P.O. Box 500, Trenton, NJ 08625-0500 within 30 days of the mailing date of this decision.

Rani Singh, Secretary
State Board of Examiners

RS/KAG/cf

Date of Mailing:
via certified and regular mail

Appeals may be made to the Commissioner of Education pursuant to *N.J.S.A.* 18A:6-38.4.

100-23

New Jersey Commissioner of Education

Final Decision

Board of Education of the Borough of Oceanport, Monmouth County,

Petitioner,

v.

Borough of Sea Bright, Monmouth County, *et al,*

Respondents

and

Board of Education of Shore Regional High School, Monmouth County,

Petitioner,

v.

Borough of Sea Bright, Monmouth County, *et al,*

Respondents.

Synopsis

Respondents in this consolidated matter are municipalities and boards of education who passed resolutions related to a proposed regionalization plan. Currently, students from the Borough of Sea Bright attend pre-K through eighth grade in Oceanport and high school at Shore Regional High School. Sea Bright – which does not have its own board of education – wishes to leave Oceanport and Shore Regional, and join the boards of education of Highlands, Atlantic Highlands, and Henry Hudson Regional in a new, all-purpose K-12 regional school district. Sea Bright passed a resolution authorizing special counsel to file a petition with the Commissioner seeking approval to place the question before the voters as a referendum. The other respondent municipalities and boards of education passed similar resolutions. The petitioning school districts opposed and contended, *inter alia,* that these resolutions are invalid. The respondents filed motion to dismiss the petition, arguing that the matter is not ripe for review.

Upon review, the Commissioner granted the respondents' motion to dismiss, finding, *inter alia,* that: the passing of a resolution is within the authority of boards of education and governing bodies of municipalities; and the resolutions in question here merely authorize the steps necessary to seek the Commissioner's potential approval of actions related to the proposed regionalization plan. Accordingly, the consolidated petition of appeal was dismissed.

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

100-23
Agency Dkt. Nos. 157-6/22, 190-7/22 (Consolidated)

New Jersey Commissioner of Education

Final Decision

Board of Education of the Borough of Oceanport, Monmouth County,

Petitioner,

v.

Borough of Sea Bright, Monmouth County; Borough of Highlands, Monmouth County; Borough of Atlantic Highlands, Monmouth County; Board of Education of the Borough of Highlands, Monmouth County; Board of Education of the Borough of Atlantic Highlands, Monmouth County; and Board of Education of the Henry Hudson Regional School District, Monmouth County,

Respondents.

and

Board of Education of Shore Regional High School, Monmouth County,

Petitioner,

v.

Borough of Sea Bright, Monmouth County; Borough of Highlands, Monmouth County; Borough of Atlantic Highlands, Monmouth County; Board of Education of the Borough of Highlands, Monmouth County; Board of Education of the Borough of Atlantic Highlands, Monmouth County; and Board of Education of the Henry Hudson Regional School District, Monmouth County,

Respondents.

Respondents in this matter are municipalities and boards of education who passed resolutions related to a proposed regionalization plan. Currently, students from the Borough of Sea Bright attend pre-K through eighth grade in Oceanport and high school at Shore Regional High School. Sea Bright does not have its own board of education. Sea Bright wishes to leave Oceanport and Shore Regional and join the boards of education of Highlands, Atlantic Highlands, and Henry Hudson Regional in a new all-purpose K-12 regional school district. To that end, Sea Bright passed a resolution authorizing special counsel to file a petition with the Commissioner seeking approval to place the question before the voters as a referendum. The other respondent municipalities and boards of education passed similar resolutions.

In their petitions, the boards of education of Oceanport and Shore Regional ask the Commissioner to find that the resolutions are invalid because 1) Sea Bright does not have the authority to withdraw by resolution from Oceanport and Shore Regional or to pursue a referendum on the creation or enlargement of a regional school district, and 2) the November election date referenced in the resolutions is not authorized by statute.[1]

Respondents filed motions to dismiss both petitions. Respondents argue that unless and until the Commissioner authorizes the referenda and the voters approve the actions, Oceanport's and Shore Regional's challenges are not ripe for review. Respondents also contend that the Borough of Sea Bright is a member of the Oceanport consolidated school district and the Shore Regional limited purpose regional school district and therefore is one of the entities

[1] Along with its petition of appeal, Shore Regional filed a motion to consolidate its petition (Agency Dkt. No. 190-7/22) with Oceanport's petition (Agency Dkt. No. 157-6/22). The parties subsequently provided a consent order in which they agreed to the consolidation of the two petitions. The Commissioner concludes that the standards for consolidation set forth in *N.J.A.C.* 1:1-17.3 have been met and, accordingly, orders that the two petitions be consolidated.

authorized by *N.J.S.A.* 18A:13-47.11 to seek the Commissioner's approval regarding a regionalization referendum. Finally, respondents argue that placing the requested referenda on the ballot for the November election is permissible, and further note that their request to the Commissioner for approval seeks permission for that election or as soon thereafter as permitted by law, such that they will be guided by the Commissioner's direction on this issue.

In response, petitioners argue that there are disputed issues of material fact – for example, whether Oceanport is a consolidated school district – that preclude dismissal at this stage of the proceedings and instead warrant transmittal of the matter to the Office of Administrative Law as a contested case. Petitioners assert that they will suffer harm in the event of Sea Bright's withdrawal, such that they have standing to pursue their petitions, and that their petitions are ripe for review. Petitioners reiterate the arguments made in their petitions, contending that Sea Bright does not have the authority to withdraw from Oceanport and Shore Regional and that the requested referendum cannot be placed on the November ballot.

Along with their opposition to the motions to dismiss, petitioners filed a motion to consolidate their petitions with respondents' request to the Commissioner for approval of their referenda. However, the request for the Commissioner's approval of respondents' referenda is not a controversy or dispute over which the Commissioner has jurisdiction pursuant to *N.J.S.A.* 18A:6-9. Procedures related to the formation, enlargement, and dissolution of regional school districts are set forth at *N.J.S.A.* 18A:13-34 *et seq*. Those procedures are entirely different than the procedures related to the adjudication of controversies and disputes set forth in *N.J.A.C.* 6A:3. Accordingly, the Commissioner finds it inappropriate to consolidate the matters

and denies petitioners' motion to consolidate their petitions with respondents' request for approval of their referenda.

Upon review, the Commissioner grants respondents' motion to dismiss. In evaluating a motion to dismiss, "the inquiry is confined to a consideration of the legal sufficiency of the alleged facts apparent on the face of the challenged claim." *Rieder v. State*, 221 *N.J. Super.* 547, 552 (App. Div. 1987) (internal quotation and citation omitted). The Commissioner must assume the facts asserted by the petitioner are true. *Velantzas v. Colgate-Palmolive Co.*, 109 *N.J.* 189, 192 (1988).

The resolutions passed by the respondents state that each entity: 1) finds that good cause exists to pursue a referendum regarding regionalization; 2) seeks to have the referendum placed on the November ballot with approval from the Commissioner; and 3) authorizes special counsel to submit a petition to the Commissioner seeking approval of the referendum. The act of passing a resolution is unquestionably within the authority of boards of education and the governing bodies of municipalities. Moreover, the resolutions are fairly limited in substance. They do not authorize the withdrawal of Sea Bright from Oceanport or Shore Regional, or the placing of any measures on the ballot, or the creation, enlargement, or dissolution of any regional school district. The resolutions only authorize the steps necessary to seek the Commissioner's approval of those actions. Even if petitioners are correct that Sea Bright does not have the authority to withdraw from Oceanport or Shore Regional, or that there are any other reasons for the Commissioner to deny respondents' request for approval of their referenda, that does not make the resolutions invalid. Boards of education and municipalities

may submit any number of requests to the Commissioner; if the ultimate disposition of those requests is a denial, the submission of the request is not rendered improper.

Because the approval or denial of a regionalization referendum is governed by *N.J.S.A.* 18A:34 and is not a controversy or dispute subject to the procedures set forth in *N.J.A.C.* 6A:3, this decision does not reach the substance of any arguments regarding Sea Bright's ability to withdraw from Oceanport or Shore Regional. Those issues will be considered by the Commissioner as part of the *N.J.S.A.* 18A:34 review. Additionally, pursuant to *N.J.S.A.* 18A:6-9, controversies and disputes concerning the conduct of school elections shall not be deemed to arise under the school laws, and therefore any claims regarding the timing of the requested referenda, if approved by the Commissioner, are not justiciable in this forum.

Accordingly, respondents' motion to dismiss is granted, and the petition of appeal is hereby dismissed.

IT IS SO ORDERED.[2]

Angelica Allen-McMillan, J.d.S.
ACTING COMMISSIONER OF EDUCATION

Date of Decision: April 3, 2023
Date of Mailing: April 5, 2023

[2] This decision may be appealed to the Appellate Division of the Superior Court pursuant to *N.J.S.A.* 18A:6-9.1. Under *N.J.Ct.R.* 2:4-1(b), a notice of appeal must be filed with the Appellate Division within 45 days from the date of mailing of this decision.

101-23E
OAL Dkt. No. EDU 02215-23
Agency Dkt. No. 49-2/23

New Jersey Commissioner of Education

Order on Emergent Relief

Lisa Narcise,

Petitioner,

v.

Board of Education of the Township of Mount Olive, Morris County,

Respondent.

The record of this emergent matter, the sound recording of proceedings at the Office of Administrative Law (OAL), and the recommended Order of the Administrative Law Judge (ALJ) have been reviewed. Upon such review, the Commissioner concurs with the ALJ that petitioner has failed to demonstrate entitlement to emergent relief pursuant to the standards enunciated in *Crowe v. DeGioia,* 90 *N.J.* 126 (1982) and codified at *N.J.A.C.* 6A:3-1.6.

Accordingly, the recommended Order of the OAL denying petitioner's application for emergent relief is adopted for the reasons stated therein. This matter shall continue at the OAL with such proceedings as the parties and the ALJ deem necessary to bring it to closure.

IT IS SO ORDERED.

Angelina Allen-McMillan, J.d.S.
ACTING COMMISSIONER OF EDUCATION

Date of Decision: April 3, 2023
Date of Mailing: April 5, 2023

State of New Jersey
OFFICE OF ADMINISTRATIVE LAW

ORDER DENYING MOTION FOR EMERGENT RELIEF

OAL DKT. NO. EDU 02215-23

AGENCY DKT. NO. 49-2/23

LISA NARCISE,

Petitioner,

v.

BOARD OF EDUCATION OF THE TOWNSHIP OF MOUNT OLIVE, MORRIS COUNTY,

Respondent.

Lisa Narcise., petitioner, pro se

Joseph L. Roselle Esq., for respondent (Schneck, Price, Smith & King. LLC, attorneys)

Stephen Edelstein, Esq. for Intervenor Dr. Robert Zywicki (Weiner Law Group, LLC

BEFORE **ERNEST M. BONGIOVANNI,** ALJ:

FACTUAL DISCUSSION

On March 10, 2023 Petitioner, Lisa Narcise (petitioner/Narcise) in the above captioned matter which was filed with the New Jersey Department of Education (DOE) on February 27, 2022, sought to 1) "Expedite the relief requested" in her February 27,

2022 petition of appeal and to "Reinstate Dr. Robert R. Zywicki to his full active status as superintend of schools; 2) Investigate "financial governance and personal improprieties" of "conflicted Board attorney Mark Zitomer, Esq."; 3) "Send a DOE representative to the March 13, 2023 meeting of the Board to ensure Petitioner is not banished from any Board discussions, and that the Doctrine of Necessity is not invoked illegally"; and 4) to ensure at that meeting that a Dr. Gayles does "not participate in personnel matters to certify dubious and retaliatory tenure charges against Dr. Zywicki."

Narcise's February 27, 2020 petition of appeal, while containing ancillary complaints states that "the instructional program and administrative oversight of the district has been completely disputed following the suspension of our Superintendent Dr. Robert Zywicki on October 10, 2022 via private action of a single board member." She also claims the ensuing vote on October 17, 2022 [although failing to mention the vote by the majority of the members was to suspend Superintendent Dr. Zywicki] was made upon on the "false information of our conflicted Board attorney Marc Zitomer, Esq." While the rest of her February 27, 2023 petition speaks of a "recent consensus of non-conflicted members to mediate with Dr. Zywicki", every complaint of petitioner is based on the October 2022, suspension of Superintendent Zywicki and operates on the assumption that he should be reinstated.

On March 10, 2023, using another DOE form Pro Se Petition of Appeal, Narcise filed "another appeal," but which was, correctly viewed by the DOE as a request for emergent relief based on the February 27, 2023 pleading. Here, while petitioner expands somewhat on the alleged facts found in her Feb 27, 2023 pleading, he once again recounts what she perceives a bad decisions made by the BOE by its October 10 and October 17, 2022 sessions by suspending Dr. Zywicki because of information provided by the previously described "conflicted" board attorney.

She then goes on to describe further actions taken by the board in making "false statements" to the public about executive session decisions which resulted in an announcement that there would be another meeting on March 13, 2023 at which time she predicted the Doctrine of Necessity, occasioned when there is an insufficient number of

non-conflicted BOE members available to conduct business would be employed and that at such meeting tenure charges against Zywicki would be preferred.

The respondent BOE filed a brief in Opposition on March 17, 2023 and argues that 1) Petitioner lacks standing to bring the action to challenge a Board's decision to suspend its Superintendent as she "has no direct interest in the case" and the Superintendent is a third party wholly unrelated to petitioner, and therefore cannot assert claims on his behalf; 2) Petitioner failed to submit any support for granting emergent relief, because she failed to submit, as required by N.J.A.C. 6A:3-1.6(b), and as stated in Section V of the Petition of Appeal form provided by the DOE, a "letter memorandum or brief which shall address the standards to be met for granting such relief pursuant to Crowe v. DeGioia, 90 NJ 126 (1982);" 3) Petitioner's claim for Emergent Relief does not meet as required the four elements needed to be proved under Crowe to justify any emergent relief; 5) While related to the Crowe test, respondent argues separately that petitioner's claims regarding the October 10 and October 17, 2022 BOE meetings that resulted in the Superintendent's suspension, have already been litigated by him in his Complaint with Order to Show Cause heard in New Jersey Superior Court, which was denied by Order of the Hon, Louis J. Sceusi, JSC (ret. T/a on recall) and which dismissed the complaint. (Exhibit G, Order and Opinion dated December 2, 2022). Further, as stated in respondent's brief and as uncontested during oral argument (in which Zywicki's attorney appeared for argument acting on behalf of Zywicki as intervenor) Zywicki recently withdrew his Appellate Division Appeal of that matter. Finally, as Narcise did not file her Petition of Appeal until February 27, 2023, her appeal and Emergent application are untimely as she had 90 days to file a claim challenging the October 10 and 17, 2022 suspension actions against Zywicki and her claim was made 133 days after the cause of action arose.

Zywicki also filed a Motion to Intervene in the motion for Emergent relief, While written and oral argument by his counsel was permitted, his counsel candidly conceded that his purpose in intervening was to prevent his client from being barred in filing future actions on Zywicki's behalf by failing to seek to intervene here, owing to the Entire Controversies Rule. Strictly speaking, I doubt that Zywicki had the right to intervene, because he has failed to show a sufficient divergence of interest from petitioner so as "to add measurably and constructively to the scope of the case." Further, I agree with

respondent's point that Narcise makes the same claims as Zywicki, and in this motion Zywicki simply joins in Narcise's arguments. Attorney Edelstein's Certification, paragraph 6. However, as he submitted his written arguments and was heard on the record, I see no reason to deny his motion to intervene, but note for the record that his request to intervene was only on the application for emergent relief not to Intervene in the underlying action. Were that issue before me, I would deny the motion to Intervene as I would regard it as forum shopping given the results in Superior Court.

LEGAL ANALYSIS AND CONCLUSION

To be successful in an application for emergent relief the moving party prove and demonstrate each element clearly and convincingly.. Waste Management of N.J. v. Union. Cnty, Utilities Authority, 399 N.J. Super 508, 520 (App. Div. 2008).

N.J.A.C. 6A:3-1.6(b) sets forth the standards governing motions for emergent relief and instructs that:

> A motion for a stay or emergent relief shall be accompanied by a letter memorandum or brief which shall address the following standards to be met for granting such relief pursuant to Crowe v. DeGioia, 90 N.J. 126 (1982):
>
> 1. The petitioner will suffer irreparable harm if the requested relief is not granted;
>
> 2. The legal right underlying petitioner's claim is settled;
>
> 3. The petitioner has a likelihood of prevailing on the merits of the underlying claim; and
>
> 4. When the equities and interests of the parties are balanced, the petitioner will suffer greater harm than the respondent will suffer if the requested relief is not granted.

[N.J.A.C. 6A:3-1.6(b).] [emphasis supplied]

Irreparable harm

Irreparable harm is a "substantial injury to a material degree coupled with the inadequacy of money damages." Judice's Sunshine Pontiac v. General Motors corp., 418 F. Supp. 1212, 1218 (D.N.J. 1976). An injunctive relief award requires a "clear showing of irreparable injury" or a "presently existing actual threat." Cont'l Grp. v. Amoco Chemicals Corp., 614 F.2d 351, 359 (D.N.J. 1980). More than a risk of irreparable harm must be demonstrated. Id.

Here, petitioner and Intervenor both failed to provide the required written letter memorandum, but also have completely failed to state even a hypothetical case that Narcise will suffer irreparable harm without injunctive relief. She says she has "suffered and the township and their school kids will suffer because of the continued suspension of Zywicki. This is speculative at best. Indeed it would be an almost impossible burden for a citizen or group of citizens to argue irreparable harm if any such official is suspended or eventually even discharged. Aside from her unsworn to arguments about the conflicts and alleged bad motives of Zywicki's adversaries, an emergent application hardly gives the opportunity to prove something that will take months or years to prove (e.g. that the conditions at the schools, because of a change in personnel, have deteriorated, warranting court intervention.)

Right to the underlying claim must be settled and Likelihood of Success on the Merits

A board of education's actions are entitled to a presumption of lawfulness and good faith. In challenges to board actions, the challenger bears the burden of proving that such acts were unlawful, arbitrary, capricious, or unreasonable. Schuster v. Bd. of Educ. Montgomery Twp., 96 N.J.A.R.2d (EDU) 670, 676 (citing Schnick v. Westwood Ed. of Educ., 60 N.J. Super. 448 (App. Div. 1960), and Quinlan v. Bd. of Educ. of North Bergen Twp., 73 N.J. Super. 40 (App. Div. 1962). Narcise makes no competent argument that the BOE's actions were "arbitrary capricious or unreasonable." As for "unlawful" it is entirely speculative that the BOE would not have made the same the decision to suspend Zywicki were it not for the so called "false" statements made to them and the public by the so called conflicted attorney. None of this, not even the nature of the alleged conflict of the attorney has been shown clearly and convincingly, if at all.

Further, disciplinary actions of its employees such as the suspension challenged here and the tenure charges which Zywicki's counsel said will soon be challenged are the province of the local Board of Education which is vested , e.g. with the discretion to accept or reject tenure charges. Galante v. Board of Education of the City of North Arlington, Bergen County, OAL Docket No. 11479-06 (Final Decision August 21, 2008.) The legislature has vested that authority with the local BOE to make and enforce rules governing tenure terms of employment dismissal and discipline of its employees. It is untenable, if not impossible, to accept as a working principal of governing school board business that an aggrieved parent or a single Board member could compel a Board of Education to discipline one of its principles or other employees, or to undo that disciplinary action N.J.S.A. 18A:27-4 et. seq. In the absence of a clear showing of abuse of discretion, the Commissioner of Education will not substitute his or her own judgment for that of the board of education. Massaro v. Bd. of Educ. of the Borough of Bergenfield, 1 965 S.L.D. 84, 85. In Kopera v. Bd. of Educ. of West Orange, 60 N.J. Super. 288, 294 (App. Div. 1960), the Appellate Division stated, "the well-established rule that action of the local board [of education] which lies within the area of its discretionary powers may not be upset unless patently without rational basis or induced by improper motives."

For those reasons and as stated by the respondent and my comments on the record, I find that Narcise has no standing to bring this action. Further the action itself and therefore the emergent appeal is moot as it has already been decided in the Superior Court. Finally, petitioner's appeal is untimely. For all those reasons the rights of the Narcise's underlying claim can hardly be considered settled, and for the same reasons, it cannot be plausibly argued that "clearly and convincingly" there is a likelihood of success on the merits of Narcise's claim.

Balancing of the Equities

As none of the other three elements of Crowe have been proven in favor of the applicant, I need not greatly discuss the final prong of balancing the equities. However, I note that at this stage where only Narcise's concerns for the suspension of Zywicki are at stake, the balance of the equities lie with the BOE as an entity, rather than with just one of its members.

Based on the above discussion, I **CONCLUDE** that petitioner has failed to establish the existence of irreparable harm, that her claims are well settled, that petitioner is likely to prevail on the merits, or that the equites favor petitioner. Accordingly, I **CONCLUDE** the petitioner does not satisfy all the requirements under N.J.A.C. 6A:3-1.6 and must be **DENIED**. I also **CONCLUDE** that petitioner has no standing, her claims are untimely, and already decided by another action in Superior Court and otherwise, such as the relief sought to send representatives of the DOE to the March 13, 2023 BOE meeting, are moot.

ORDER

Therefore, I **ORDER** that petitioner's request for emergent relief be and is hereby **DENIED.**

This order on application for emergency relief may be adopted, modified, or rejected by the **COMMISSIONER OF THE DEPARTMENT OF EDUCATION**, who is authorized by law to make the final decision in this case. The final decision shall be issued without delay but no later than forty-five days from the entry of this order. If the **COMMISSIONER OF THE DEPARTMENT OF EDUCATION** does not adopt, modify, or reject this order within those forty-five days, this recommended order shall become the final decision on the issue of emergency relief under N.J.S.A. 52:14B-10.

March 21, 2023

DATE

Ernest M. Bongiovanni

ERNEST M. BONGIOVANNI, ALJ

Emb/id

108-23
OAL Dkt. No. EDU 00156-23
(EDU 07402-21 ON REMAND)
Agency Dkt. No. 99-6/21

New Jersey Commissioner of Education

Final Decision

Michele Fekete and Ben Kenion,

Petitioners,

v.

Board of Education of the City of Trenton,
Mercer County,

Respondent.

The record of this matter, the proposed Settlement Agreement (Agreement), and the Initial Decision issued by the Office of Administrative Law pursuant to *N.J.A.C.* 1:1-19.1, have been reviewed. Upon such review, the Commissioner notes that Paragraph 2 of the Agreement references an action that preceded the consideration of the settlement by the Commissioner of Education. The parties are reminded that a settlement of litigation before the Commissioner is not binding until the Commissioner approves the settlement.

In light of the foregoing, the Commissioner adopts the Initial Decision as the final decision in this matter, provided that the parties have already implemented the settlement terms or have agreed upon mutually satisfactory alternate dates for the effectuation of the terms of the Agreement. Assuming same, the matter is hereby dismissed.

IT IS SO ORDERED.

Angelica Allen-McMillan, J.D.S.
ACTING COMMISSIONER OF EDUCATION

Date of Decision: April 10, 2023
Date of Mailing: April 12, 2023

State of New Jersey
OFFICE OF ADMINISTRATIVE LAW

INITIAL DECISION

SETTLEMENT

OAL DKT. NO. EDU 00156-23

AGENCY DKT. NO. 99-6/21

(ON REMAND EDU 07402-21[1])

MICHELE FEKETE AND BEN KENION,

Petitioners,

v.

CITY OF TRENTON BOARD OF EDUCATION, MERCER COUNTY,

Respondent.

Stephen B. Hunter, Esq., for petitioners (Detzky, Hunter & DeFillippo, LLC, attorneys)

James Rolle, Jr., Esq., for respondent (Legal Department, Trenton Board of Education, attorneys)

Record Closed: March 2, 2023 Decided: March 21, 2023

[1] This matter was remanded to the OAL pursuant to N.J.A.C. 6A:3-1.13(d), which states when a district board of education is a party to a contested matter, a proposed settlement agreement must either include a copy of a Board resolution approving the settlement or the signature of the Board's attorney, who is the Board's duly authorized representative in litigation. Accordingly, the Board attorney signed and authorized this agreement.

BEFORE **MARY ANN BOGAN**, ALJ:

This matter was transmitted to the Office of Administrative Law on January 5, 2023, for determination as a contested case, pursuant to N.J.S.A. 52:14B-1 to -15 and N.J.S.A. 52:14F-1 to -13.

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

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

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

2. The settlement fully disposes of all issues in controversy.

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

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

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

March 21, 2023
DATE

MARY ANN BOGAN, ALJ

Date Received at Agency: 3/23/2023

Date Mailed to Parties: 3/23/2023

MAB/kl

CERTIFICATION OF COUNSEL

I, James Rolle, Jr., Esq. certify as follows:

1. I am the General Counsel for Respondent, Trenton Board of Education.

2. I am Respondent's attorney of record in the matter of Fekete, Michele and Kenion, Ben v. City of Trenton BOE, Mercer County, OAL Docket No. 07402-2021.

3. On or about June 27, 2022, at its regular monthly meeting, the Board considered the attached settlement, and its terms, in the aforementioned matter.

4. The Board voted to approve the settlement and the within terms.

5. I am duly authorized to sign this Agreement as the legal representative of Respondent.

6. This certification shall be attached to the settlement with my signature affixed to comport with the requirements of *N.J.A.C.* 6A:3-1.13(d).

I hereby certify that the foregoing statements made by me are true. I am aware that if any of the foregoing statements made by me are willfully false, I am subject to punishment.

James Rolle, Jr., Esq.
General Counsel
Trenton Board of Education

Dated: February 28, 2023

RECEIVED
2023 MAR -2 A 9:15
STATE OF NEW JERSEY
OFFICE OF ADMIN.

SETTLEMENT AGREEMENT

This Settlement Agreement ("Agreement") is made on this 27th day of June 2022, by and between Michele Fekete and Benjamin Kenion ("Petitioners") and the Trenton Board of Education ("District and/or "Board") (hereinafter collectively referred to as the "Parties").

RECITALS

WHEREAS, Petitioners served as tenured Occupational Therapists for the Board until a reduction in force in June terminated their employment on June 30, 2016 ("Separation Date"); and

WHEREAS, in the matter of *Michele Fekete and Ben Kenion v. Board of Education of the City of Trenton, Mercer County*, Agency Docket Number 99-6/21, Petitioners sought to enforce their rights to be recalled to employment by the Board; and

WHEREAS, the Board filed a Motion to Dismiss Petitioners' claim; and

WHEREAS, the above-referenced Motion to Dismiss is pending before Judge Bogan in the Office of Administrative Law; and

WHEREAS, now, the Board desires to hire District employees in the role of Occupational Therapist, effective July 1, 2022 ("Recall Date"), and

WHEREAS, Petitioners are the most senior Occupational Therapist with recall rights to the newly opened positions; and

NOW, THEREFORE, in consideration of their respective rights and obligations set forth herein and for other good and sufficient consideration, receipt of which is hereby acknowledged, the Parties agree as follows:

1. Petitioners, upon execution of this agreement, agree to voluntarily dismiss, with prejudice, the above referenced Petition filed against the Board.

2. In consideration of the dismissal, Petitioners shall be recalled to the position of Occupational Therapist effective July 1, 2022. Petitioners will be recalled with full recognition of their tenure and seniority rights.

3. Petitioners will return to the negotiated TEA salary guide at the next step to which they were entitled at the time of separation. Petitioner Fekete was on Step 14 in her last year of service, and thus, she will return on Step 15. Petitioner Kenion was on Step 15 in his last year of service, and thus, he will return on Step 15, as Step 15 is the highest step on the negotiated guide. Petitioners will be given the appropriate degree and credit recognition.

4. Petitioners are not entitled to and will not receive any compensation in recognition of the period between the Separation Date and Recall Date.

5. Petitioners will be recalled with full restoration of their leave time at the time of their separation, less any leave time for which Petitioners were compensated after separation.

6. In further consideration, of the foregoing, Petitioners agree to and hereby release and gives up any and all claims and rights which they may have against the District. This releases all claims, including those of which they are not aware and those not mentioned in this Release. This Release applies to claims resulting from anything which has happened from the beginning of time up to now. Petitioners, specifically releases any and all claims, direct and indirect, and rights for any injury and/or damages which they may have against the District, including but not limited to, contract, torts, negligence discrimination, harassment, hostile environment, retaliation, civil rights violations, wrongful discharge, physical injury, emotional distress, and any and all claims arising under federal, state, or local laws, or ordinance. Petitioners specifically release all claims arising under the Constitution of the United States of America, Title VII of the Civil Rights Act of 1964, the Age Discrimination in Employment Act, the Civil Rights Acts of 1866 and 1991, the

Americans with Disabilities Act, the Employee Retirement Income Security Act, the Equal Pay Act, the Family and Medical Leave Act, the Older Workers Benefit Protection Act, the Occupational Safety and Health Act, the Worker Adjustment and Retraining Notification Act, the Ledbetter Fair Pay Act, the Fair Credit Reporting Act, the Employee Polygraph Protection Act, the Constitution of the State of New Jersey, the New Jersey Law Against Discrimination, the New Jersey Public Employer-Employee Relations Act, the Conscientious Employee Protection Act, the New Jersey Family Leave Act, the New Jersey Wage and Hour Law, the New Jersey Domestic Partnership Act, the New Jersey Equal Pay Act, the New Jersey Occupational Safety and Health Law, and the New Jersey Labor and Workman's Compensation laws.

7. To comply with the Older Workers Benefit Protection Act, this Release advises Petitioners of the legal requirements of the Act and fully incorporates the legal requirements by reference into this Release. Accordingly, by executing this Agreement, Petitioners acknowledge that they: (i) fully understand the terms and conditions of this Release; (ii) have consulted with an attorney to review the Release; (iii) specifically waive their right to pursue any current claims they may have under the Act; (iv) have been given 21 days within which to consider this Release; and (v) have 7 days from the date of the execution of this Release to revoke it. Petitioners understand that they may rescind this Agreement within 7 calendar days of signing it, and such rescission must be in writing and delivered to counsel for the District either by hand or by certified mail within the 7-day period.

8. Petitioners warrant they have not commenced any legal proceedings of any type (including but not limited to charges filed with any governmental agency) against the District. Further, Petitioners agree that they will not commence any legal proceedings against the District arising from or relating to anything that has happened through the date of this Agreement. In the

event of a violation of this paragraph, Petitioners agree that the District shall be entitled to immediate dismissal of the legal proceedings

9. This Agreement sets forth the entire agreement between the Parties with respect to the subject matter hereof and supersedes any and all prior agreements relating thereto. There are no other understandings or agreements between or among the Parties with respect to the subject matter hereof, except as set forth herein, and as set forth in any other documents executed directly or in connection with this Agreement. No condition or provision of this Agreement may be modified, waived or revised in any way except in writing executed by all parties and referring specifically to this Agreement.

10. This Agreement and all rights and duties set forth herein shall be binding upon and inure to the benefit of the Parties hereto, as well as their respective successors and assigns.

11. This Agreement and its interpretation and performance shall be governed by the laws of the State of New Jersey, without giving effect to its conflicts of law rules.

12. This Agreement may be executed simultaneously in counterparts, each of which shall be deemed to be an original, but all of which shall constitute one and the same instrument. The Parties further agree that a facsimile or electronic signature herein shall be deemed to have the same force and effect of an original.

13. This Agreement is not, and may not be construed as, an admission of liability by either Party.

14. The Parties to this Agreement acknowledge and agree that they have entered into this Agreement and have executed it without duress or coercion, and have done so with the opportunity to consult counsel. Each party further acknowledges and agrees that no other party has made representations, warranties, promises or agreements not set forth herein and no party

relies in any way upon any representation, warranty, statement of fact or opinion, understanding, disclosure or non-disclosure not set forth herein in entering into this Agreement and executing it, no party has been induced in any way, except for the consideration, representations, warranties, statements and covenants recited herein, to enter into this Agreement.

15. Petitioners acknowledges their representation, Stephen B. Hunter, Esq., throughout this process and represents that he has fully explained the terms of this Agreement and that Petitioners are satisfied that such representation has been adequate and appropriate. Petitioners further acknowledge that they understand the terms of this agreement and willfully, knowingly, and voluntarily enters into this agreement, free of coercion or duress.

16. The terms of this Agreement are the product of good faith negotiations between the Parties and their respective counsel, and shall be construed without regard to any presumption or other rule requiring construction against the party causing this Agreement to be drafted.

BY SIGNING THIS AGREEMENT, THE PARTIES ACKNOWLEDGE:

A. THEY HAVE READ IT;

B. THEY UNDERSTAND IT AND KNOW THEY ARE GIVING UP IMPORTANT RIGHTS;

C. THEY AGREE WITH EVERYTHING IN IT;

D. THEIR RESPECTIVE ATTORNEYS NEGOTIATED IT WITH THEIR KNOWLEDGE AND CONSENT;

E. THEY HAVE CONSULTED WITH THEIR RESPECTIVE ATTORNEYS ABOUT IT; AND

F. THEY SIGN IT KNOWINGLY AND VOLUNTARILY.

IN WITNESS WHEREOF, and intending to be legally bound, the Parties hereby execute this Agreement.

Michele Fekete — Date

KENION.BENJAMIN.RUSSELL.1246291213 Digitally signed by KENION.BENJAMIN.RUSSELL.1246291213 Date: 2022.06.23 18:32:29 -04'00'

Benjamin Kenion — Date

Trenton School District — Date

IN WITNESS WHEREOF, and intending to be legally bound, the Parties hereby execute this Agreement.

Michele Fekete — 6/23/22

Michele Fekete — Date

Benjamin Kenion — Date

Trenton School District — Date

IN WITNESS WHEREOF, and intending to be legally bound, the Parties hereby execute this Agreement.

Michele Fekete — Date

Benjamin Kenion — Date

Trenton School District — 06-28-2022 Date

109-23
OAL Dkt. No. EDU 10388-22
Agency Dkt. No. 276-10/22

New Jersey Commissioner of Education

Final Decision

Daniella Maniscalco,

Petitioner,

v.

Board of Education of the Borough of Merchantville, Camden County,

Respondent.

The record of this matter and the advisement by the Office of Administrative Law (OAL) – pursuant to *N.J.A.C.* 1:1-14.4 – of petitioner's failure to appear at a hearing on March 13, 2023, have been reviewed.

Petitioner filed an explanation asserting that she missed the hearing because she was involved in a serious car accident.

Based upon the petitioner's timely written explanation for her nonappearance, this matter is being retransmitted to the OAL for further disposition, pursuant to *N.J.A.C.* 1:1-3.3(b).

IT IS SO ORDERED.

Angelica Allen-McMillan, J.d.S.
ACTING COMMISSIONER OF EDUCATION

Date of Decision: April 10, 2023
Date of Mailing: April 12, 2023

110-23

New Jersey Commissioner of Education

Final Decision

Jonathan Wadley,

Petitioner,

v.

New Jersey Department of Education, Office of Student Protection,

Respondent.

Synopsis

Petitioner appealed the decision of the respondent New Jersey Department of Education, Office of Student Protection (OSP), permanently disqualifying him from employment with any educational institution under the supervision of the Department of Education pursuant to *N.J.S.A.* 18A:6-7.1. Petitioner had twice pled guilty, in February 2000 and April 2001, to the second-degree offense of possession of a controlled dangerous substance with intent to distribute on or near a public facility. *N.J.S.A.* 2C:35-7.1(a). Twenty years after his convictions, petitioner applied to be a substitute teacher and submitted to a background check which revealed his criminal record. The OSP filed a motion to dismiss.

The ALJ found that: *N.J.S.A.* 18A:6-7.1 is clear in its requirement that a school cannot employ a staff member if that individual has a disqualifying criminal history record; petitioner's criminal history record check revealed two convictions for drug offenses which are permanently disqualifying for employment in New Jersey schools, even as a substitute teacher; petitioner's arguments that the New Jersey Cannabis Regulatory Enforcement Assistance and Marketplace Modernization Act decriminalizes marijuana possession and therefore his convictions should not bar his ability to work in a public school are without merit, as only certain charges under the Act will be dismissed, vacated, or expunged, and possession of a controlled dangerous substance with intent to distribute on or near a public facility is not one of those enumerated charges. Accordingly, the ALJ granted OSP's motion to dismiss, as petitioner did not make a claim for which relief can be granted.

Upon review, the Commissioner concurred with the ALJ findings and conclusion, and adopted the Initial Decision of the OAL as the final decision in this matter. Accordingly, the petition was dismissed.

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

110-23
OAL Dkt. No. EDU 09223-22
Agency Dkt. No. 211-8/22

New Jersey Commissioner of Education

Final Decision

Jonathan Wadley,

Petitioner,

v.

New Jersey Department of Education, Office of Student Protection,

Respondent.

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

In this matter, petitioner challenges his permanent disqualification from employment with an educational institution under the supervision of the Department of Education (Department). On February 3, 2000, and again on April 6, 2001, petitioner pled guilty to the second-degree offense of possession of a controlled dangerous substance with intent to distribute on or near a public facility. *N.J.S.A.* 2C:35-7.1(a). Approximately 20 years after his convictions, petitioner applied to be a substitute teacher and submitted to a background check which revealed his criminal record. On August 15, 2022, the Office of Student Protection (OSP) notified petitioner that, pursuant to *N.J.S.A.* 18A:6-7.1, he is permanently disqualified from employment or service in public education. Thereafter, petitioner filed the instant petition.

The Administrative Law Judge (ALJ) found that *N.J.A.C.* 18A:7.1(b) dictates petitioner's disqualification to work in a public school, including as a substitute teacher. The ALJ disagreed with petitioner's arguments that the New Jersey Cannabis Regulatory Enforcement Assistance and

Marketplace Modernization Act (Act) decriminalizes marijuana possession and therefore his convictions should not bar his ability to work in a public school. The ALJ noted that only certain charges under the Act will be dismissed, vacated, or expunged, and possession of a controlled dangerous substance with intent to distribute on or near a public facility is not one of those enumerated charges. As such, the ALJ granted OSP's motion to dismiss as petitioner did not make a claim for which relief can be granted.

The Commissioner agrees with the ALJ that petitioner is disqualified from working in a public institution under the supervision of the Department. Pursuant to *N.J.S.A.* 18A:6-7.1, an individual is permanently disqualified if he or she has been convicted of any crime of the first or second degree. Additionally, a person is permanently disqualified for any offense involving the "manufacture, transportation, sale, possession, distribution or habitual use of a 'controlled dangerous substance' . . . " *N.J.S.A.* 18A:6-7.1(b). Petitioner was convicted twice of a second-degree offense, and those convictions involve the possession, sale, or distribution of a controlled dangerous substance. As such, he must be disqualified from employment in public education, in accordance with *N.J.S.A.* 18A:6-7.1.

Accordingly, the Initial Decision of the OAL is adopted as the final decision in this matter, and the petition is hereby dismissed.

IT IS SO ORDERED.[1]

Angelica Allen-McMillan, J.d.S.
ACTING COMMISSIONER OF EDUCATION

Date of Decision: April 11, 2023
Date of Mailing: April 12, 2023

[1] This decision may be appealed to the Appellate Division of the Superior Court pursuant to *N.J.S.A.* 18A:6-9.1. Under *N.J.Ct.R.* 2:4-1(b), a notice of appeal must be filed with the Appellate Division within 45 days from the date of mailing of this decision.

State of New Jersey
OFFICE OF ADMINISTRATIVE LAW

INITIAL DECISION
MOTION TO DISMISS
OAL DKT. NO. EDU 09223-22
AGENCY DKT. NO. 211-8/22

JONATHAN WADLEY,
Petitioner,
v.
NEW JERSEY DEPARTMENT OF EDUCATION,
OFFICE OF STUDENT PROTECTION,
Respondent.

Jonathan Wadley, petitioner, pro se

Sydney Finkelstein, Deputy Attorney General, for respondent (Matthew J. Platkin, Attorney General of New Jersey, attorney)

Record Closed: February 13, 2023 Decided: March 10, 2023

BEFORE **TRICIA M. CALIGUIRE**, ALJ:

STATEMENT OF THE CASE

Petitioner Jonathan Wadley challenges the decision of respondent New Jersey Department of Education, Office of Student Protection (Department), that he is disqualified from employment in a public school, pursuant to N.J.S.A. 18A:6-7.1(b).

PROCEDURAL HISTORY

On August 15, 2022, petitioner filed a petition of appeal with the New Jersey Department of Education, Office of Controversies and Disputes. On October 11, 2022, respondent filed an answer and motion for dismissal. The Commissioner of Education did not rule on the motion but transmitted it with the petition to the Office of Administrative Law (OAL) on October 13, 2022, for hearing as a contested case, pursuant to N.J.S.A. 52:14B-1 to -15, and N.J.S.A. 52:14F-1 to -13.

The matter was scheduled for a telephone prehearing conference on December 8, 2022, but petitioner failed to appear or to contact the OAL to explain his absence. The telephone prehearing conference was rescheduled for January 11, 2023, but petitioner failed to appear. In response to an email from the OAL, petitioner stated that he was unable to get away from work for the prehearing conference and asked that it be rescheduled. The parties appeared for a telephone prehearing conference on January 26, 2023, during which a briefing schedule for respondent's motion to dismiss was issued. On January 31, 2023, petitioner filed a response in opposition to respondent's motion to dismiss. Respondent replied on February 13, 2023, and the motion is now ripe for review.

FACTUAL DISCUSSION AND FINDINGS

The following **FACTS**[1] are not in dispute and accordingly, I **FIND**:

1. Petitioner is an adult male. On or before August 1, 2022, petitioner applied to serve as a substitute teacher in a New Jersey high school. This application was denied, as described below.

2. On February 3, 2000, at the approximate age of nineteen years old, petitioner was charged with, and pled guilty to, the second-degree offense

[1] Most of the documents transmitted by the Department are illegible and therefore, to establish background and non-disputed facts, I relied mainly on statements made by the parties in their moving and responsive papers which were not challenged by the other party.

of possession of a controlled dangerous substance with intent to distribute on or near a public facility, in violation of N.J.S.A. 2C:35-7.1(a).[2]

3. On April 6, 2001, petitioner was charged with, and pled guilty to, the second-degree offense of possession of a controlled dangerous substance with intent to distribute on or near a public facility, in violation of N.J.S.A. 2C:35-7.1(a).

4. On December 9, 2001, petitioner completed a six-month drug program conducted by the Mercer County, New Jersey Drug Court Program.

5. On June 7, 2006, petitioner completed five years of probation. There was no evidence presented of additional criminal charges.

6. By statute, any person applying for employment with, or to volunteer at, a public school in New Jersey must submit to a background check. N.J.S.A. 18A:6-7.1(b). The background check conducted following petitioner's application for employment as a substitute teacher revealed his above-described criminal record.[3]

7. Petitioner stated that he has completed college, has been accepted into the Screen Actors Guild (actors' union), and has found steady employment in the television industry. He is a father of four and grandfather of two and believes he is well qualified to work with children.

8. On August 26, 2022, after enactment of the New Jersey Cannabis Regulatory, Enforcement Assistance and Marketplace Modernization Act, P.L. 2021, c. 19 (the Act), petitioner applied to have his above-described criminal record expunged. His expungement application is pending.

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[2] Petitioner now claims that he was improperly charged; the action of the Trenton Police Department in charging petitioner more than twenty years ago is not at issue in this proceeding.

[3] Again, the documentary record provided by the parties was incomplete or illegible, but this can be presumed based on the requirements of the statute and the content of the notice respondent gave petitioner of his disqualification for employment in a New Jersey public school.

9. On August 15, 2022, respondent notified petitioner in writing that he is "permanently disqualified from serving in any position, paid or unpaid, with any educational institution under the supervision of the Department of Education, or with a contracted service provider under contract with said school or educational facility."

10. This appeal was timely filed by petitioner.

LEGAL ANALYSIS AND CONCLUSIONS

The rules of procedure governing petitions of appeal filed with the Commissioner permit a respondent to submit a motion to dismiss in lieu of (or with) an answer "on the grounds that the petitioner has advanced no cause of action even if the petitioner's factual allegations are accepted as true or for lack of jurisdiction, failure to prosecute or other good reason." N.J.A.C. 6A:3-1.5(g); N.J.A.C. 6A:3-1.10. However, these education rules do not offer any guidance on the standards by which such motions should be assessed.

The Uniform Administrative Procedure Rules (UAPR), N.J.A.C. 1:1-1.1 to -21.3, also do not address the standards for such motions. However, the UAPR, which "shall be construed to achieve just results, simplicity in procedure, fairness in administration and the elimination of unjustifiable expense and delay," state that, "[i]n the absence of a rule, a judge may proceed in accordance with the New Jersey Court Rules, provided the rules are compatible with these purposes." N.J.A.C. 1:1-1.3(a).

Here, the court rule that fills the void is R. 4:6-2 which, like N.J.A.C. 6A:3-1.5(g) and N.J.A.C. 6A:3-1.10, allows for motions for judgment on the pleadings. And since R. 4:6-2 serves the interests of time and expense and may help achieve just results, it is compatible with the UAPR's purposes, and thus it is appropriate to assess respondent's motion to dismiss in lieu of an answer under the standards used by the courts in applying R. 4:6-2.

Under these standards, if the basis for a motion to dismiss is that the petition has advanced no cause of action, or failed to state a claim upon which relief may be granted, "the test for determining the adequacy of [the] pleading [is] whether a cause of action is 'suggested' by the facts," such that the "inquiry is limited to examining the legal sufficiency of the facts alleged on the face of the complaint." Printing-Mart Morristown, 116 N.J. at 746 (citing R. 4:6-2(e)); Velantzas, 109 N.J. at 192; Rieder v. Dep't of Transp., 221 N.J. Super. 547, 552 (App.Div. 1987)).

Importantly, for purposes of the motion, it does not matter whether a petitioner can ultimately "prove the allegation contained in the complaint" because "all facts alleged in the complaint and the legitimate inferences drawn therefrom are deemed admitted." Ibid. (citing Somers Constr. Co. v. Bd. of Educ., 198 F.Supp. 732, 734 (D.N.J.1961)); Smith v. City of Newark, 136 N.J. Super. 107, 112 (App. Div.1975) (citing Heavner v. Uniroyal, Inc., 63 N.J. 130, 133 (1973); J.H. Becker, Inc. v. Marlboro Twp., 82 N.J. Super. 519, 524 (App. Div. 1964)). While "[a] complaint should not be dismissed . . . where a cause of action is suggested by the facts . . . a dismissal is mandated where the factual allegations are palpably insufficient to support a claim upon which relief can be granted." Rieder, 221 N.J. Super. at 552.

Petitioner is working on his own, without the assistance of counsel. For that reason, his pleadings are held to a less stringent standard than that by which pleadings drafted by an attorney are judged. Anchorage Poynte Condo. Ass'n. v. Di Christo, 2017 N.J. Super. Lexis 1112 (August 17, 2017), at *5(citing Haines v. Kerner, 404 U.S. 519 (1972)). Even so, petitioner presents no facts sufficient to negate the application of the following statute:

> An individual . . . shall be permanently disqualified from employment or service under this act if the individual's criminal history record check reveals a record of conviction for any crime of the first or second degree; or [an] offense involving the manufacture, transportation, sale, possession, distribution or habitual use of a "controlled dangerous

> substance" as defined in the "Comprehensive Drug Reform Act of 1987," N.J.S.2C:35-1 et al. or "drug paraphernalia" as defined pursuant to N.J.S.2C:36-1 et seq.
>
> [N.J.S.A. 18A:6-7.1(b).]

In response to the motion to dismiss, Wadley notes that the Act "legaliz[es] and regulat[es] cannabis use and possession for adults 21 years and older and decriminaliz[es] marijuana and hashish possession." Ltr. Br. of Petitioner Opposing Motion to Dismiss (January 31, 2023), at 2. As respondent argues, however, the Act does not expunge the specific crimes as to which petitioner pled guilty, nor does the Act supersede the mandates of N.J.S.A. 18A:6-7.1. Specifically, under the Act, only certain charges are qualified to be dismissed, vacated, and expunged and these enumerated charges do not include possession of a controlled dangerous substance with intent to distribute within 500 feet of a public facility. See Reply Br. of Respondent (February 13, 2023), at 3, citing N.J.S.A. 2C:35-23.1(a).

In his petition and letter brief, petitioner makes policy arguments to support his allegations of unfair and discriminatory treatment by respondent. While it may be that the mistakes petitioner admits making as a young adult would no longer result in criminal charges,[4] and those charges may yet be expunged from his record, until such time as the education laws reflect the recent decriminalization of marijuana possession and use, the above statute dictates petitioner's disqualification to work (or volunteer) in a public school in any capacity, including as a substitute teacher.

For the above reasons, I **CONCLUDE** that petitioner has not made a claim for which relief can be granted.

[4] As stated above, petitioner claims he was mischarged with intent to distribute a controlled substance rather than simple possession. Since he was just nineteen years of age at the time of his first arrest, even under the recent change in the law, he still could have been charged as possession of a controlled substance by a person less than twenty-one years of age is illegal. See N.J.S.A. 24:6I-32(b).

ORDER

For the reasons set forth above, I **ORDER** that the motion of respondent Department of Education to dismiss the petition of Jonathan Wadley for failure to state a claim upon which relief may be granted is hereby **GRANTED** and the petition of Wadley is hereby **DISMISSED**.

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

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

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

March 10, 2023
DATE

TRICIA M. CALIGUIRE, ALJ

Date Received at Agency: _____

Date Mailed to Parties: _____

TMC/nn

111-23

New Jersey Commissioner of Education

Final Decision

Eric Simkin,

Petitioner,

v.

Board of Education of the Township of Voorhees, Camden County,

Respondent.

Synopsis

Pro se petitioner challenged the respondent's filling of a vacancy created by the resignation of Board member Rachel Van Aken (Van Aken) on February 24, 2022. Petitioner maintained that the Board lacked the authority to fill this vacancy and sought to overturn the Board's appointment of Julie Ketover (Ketover) to fill Van Aken's unexpired term; petitioner further sought to nullify any votes cast by Ketover as a Board member. The Board contended that this matter is moot as Ketover was subsequently elected to a full term as a Board member on November 8, 2022. The Board further contended that the petition fails to state a claim upon which relief can be granted and filed a motion to dismiss.

The ALJ found, *inter alia*, that: on February 24, 2022, a vacancy on the Board was created by the resignation of Van Aken; the Board sought to fill the vacant seat for the remainder of Van Aken's term, which expired in November 2022; following two unsuccessful attempts to fill the vacancy in March and April of 2022, the Board rescinded its previous actions regarding the vacancy and voted on June 15, 2022 to appoint Ketover to fill the vacant seat for the remainder of Van Aken's term; and petitioner contended that the Board's actions on June 15, 2022, violated N.J.S.A. 40A:14-201(b)(2) as more than sixty-five days had passed since Van Aken's resignation; however, it is undisputed that Ketover was duly elected to a seat on the Board on November 8, 2022 and petitioner's argument that Ketover's appointment to the seat, three months earlier, could have "dramatically effected the election" is speculative and has no relevance to the within proceeding. The ALJ concluded that the petition is moot because Ketover was duly elected as a member of the Board on November 8, 2022, and there is nothing left to decide in this case. Accordingly, the ALJ granted the Board's motion to dismiss the case for mootness.

Upon review, the Commissioner concurred with the ALJ, for the reasons thoroughly detailed in the Initial Decision, that the petition of appeal is moot. Accordingly, the Board's motion to dismiss was granted, and the petition was dismissed.

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

111-23
OAL Dkt. No. 07409-22
Agency Dkt. No. 216-8/22

New Jersey Commissioner of Education

Final Decision

Eric Simkin,

Petitioner,

v.

Board of Education of the Township of Voorhees, Camden County,

Respondent.

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

Upon review, the Commissioner concurs with the Administrative Law Judge, for the reasons thoroughly detailed in the Initial Decision, that the petition of appeal is moot.

Accordingly, the Board's motion to dismiss is granted, and the petition of appeal is hereby dismissed.

IT IS SO ORDERED.[1]

Angelica Allen-McMillan, J.D.S.
ACTING COMMISSIONER OF EDUCATION

Date of Decision: April 11, 2023
Date of Mailing: April 12, 2023

[1] This decision may be appealed to the Appellate Division of the Superior Court pursuant to *N.J.S.A.* 18A:6-9.1. Under *N.J.Ct.R.* 2:4-1(b), a notice of appeal must be filed with the Appellate Division within 45 days from the date of mailing of this decision.

State of New Jersey
OFFICE OF ADMINISTRATIVE LAW

INITIAL DECISION ON
MOTION TO DISMISS
OAL DKT. NO. EDU 07409-22
AGENCY DKT. NO. 216-8/22

ERIC SIMKIN,
Petitioner,
v.
BOARD OF EDUCATION OF THE TOWNSHIP OF VOORHEES, CAMDEN COUNTY,
Respondent.

Eric Simkin, petitioner, pro se

Jeffrey P. Catalano, Esq., for respondent (Parker McCay, P.A., attorneys)

Record Closed: February 16, 2023 Decided: March 10, 2023

BEFORE **KATHLEEN M. CALEMMO**, ALJ:

STATEMENT OF THE CASE

Petitioner, Eric Simkin, filed this action against respondent, the Board of Education of the Township of Voorhees, Camden County (the Board), as an emergent-relief request and petition. After emergent relief was denied, the Commissioner of Education continued

the petition at the Office of Administrative Law (OAL) for such proceedings as were deemed necessary to bring the matter to closure.

Petitioner challenged how the respondent filled the vacancy caused by the resignation of Board member, Rachel Van Aken, on February 24, 2022. Petitioner maintained that the Board lacked the authority to fill this vacancy. Therefore, he sought to overturn the Board's appointment of Julie Ketover to fill Van Aken's unexpired term and to nullify any votes cast by Ketover as a Board member.

The Board contends that the matter is now moot due to Ketover's election as a Board member on November 8, 2022, for her own term. The Board further contends that the petition fails to state a claim on which relief can be granted, thereby requiring dismissal of the petition.

PROCEDURAL HISTORY

On August 26, 2022, the Department of Education, Office of Controversies and Disputes transmitted petitioner's Motion for Emergent Relief to the OAL to be heard as a contested case. I issued an Order on September 6, 2022, denying the request for emergent relief. On September 14, 2022, the Commissioner issued an Order adopting the September 6, 2022, Order, and continued the matter at the OAL for such proceedings deemed necessary to bring the matter to closure.

Following telephone conferences and the exchange of discovery, the Board filed a Motion to Dismiss. On February 8, 2023, Simkin filed a brief in opposition. On February 15, 2023, the Board filed its reply.

FACTUAL DISCUSSION

On February 24, 2022, a vacancy on the Board was created by the resignation of Rachel Van Aken. The Board sought to fill this seat for the remainder of her term which would end in November 2022. The Board was unsuccessful in two attempts during meetings on March 16, 2022, and on April 11, 2022, to fill the vacancy.

By email, dated April 12, 2022, the Board's Solicitor advised Executive County Superintendent, Daryl Minus-Vincent, that the deadline for the Board to appoint a candidate to fill the vacancy expired on April 30, 2022. (Respondent Exhibit A.) The vacancy created by Ms. Van Aken's resignation was not on the agenda for its May 4, 2022, meeting.

At the June 15, 2022, Board Meeting, Board President Monica Watson added an agenda item to rescind the previous votes to fill the vacancy. The Board then voted to appoint Ms. Ketover to fill the vacant seat for its unexpired term by a vote of five to three. Petitioner contends that under N.J.S.A. 8A:12-15(a), the Board lacked the authority to fill this vacancy because more than sixty-five days had passed since the occurrence of Van Aken's resignation.

After appointing Ms. Ketover to the vacant seat on June 15, 2022, the Board Solicitor sent an email to the new Executive County Superintendent, Carmen Rodriguez, informing him that the Board filled the vacancy. (Respondent Exhibit B.)

Ms. Ketover was sworn in as a Board member at the August 29, 2022, Board meeting and voted during that meeting as a member of the Board. She voted to approve the 2022–2023 curriculum for Social Studies; Science; Math; Language Arts Literacy; Health and Physical Education; Visual and Performing Arts; and World Language. The motion passed with seven members voting yes and one member abstaining. Even if Ms. Ketover's vote was invalidated, this motion would still have passed, and the Curriculum would have taken effect.

On November 8, 2022, Ms. Ketover was duly elected to a seat on the Board.

The above facts are not disputed. Rather, petitioner maintains that the Board's actions on June 15, 2022, violated N.J.S.A. 40A:14-201(b)(2), because sixty-five days had passed since Van Aiken's resignation.

LEGAL ANALYSIS AND CONCLUSION

As the Board properly argued, mootness is a threshold justiciability determination rooted in the notion that judicial power is to be exercised only when a party is immediately threatened with harm. Jackson v. Dep't of Corr., 335 N.J. Super. 227, 231 (App. Div. 2000). "A case is technically moot when the original issue presented has been resolved at least concerning the parties who initiated the litigation." DeVesa v. Dorsey, 134 N.J. 420, 428 (1993). Courts normally will not decide issues when a controversy no longer exists, and the disputed issues have become moot. Id.

An action is moot when it no longer presents a justiciable controversy because the issues raised have become academic. For reasons of judicial economy and restraint, it is appropriate to refrain from decision-making when an issue presented is hypothetical; judgment cannot grant effective relief; or the parties do not have a concrete adversity of interest. Anderson v. Sills, 143 N.J. Super. 432, 437 (Ch. Div. 1976); Fox v. Twp. of E. Brunswick Bd. of Educ., EDU 10067-98, Initial Decision (March 19, 1999), aff'd, Comm'r (May 3, 1999) <http://lawlibrary.rutgers.edu/oal/search.html>; S.J. v. Bd. of Educ. of Mountain Lakes, EDU 07081-03, Initial Decision (October 7, 2003), aff'd, Comm'r (Nov. 17, 2003), aff'd, St. Bd. (Feb. 3, 2004) <http://lawlibrary.rutgers.edu/oal/search.html>.

When a decision being sought in a particular matter has no practical effect on the existing controversy, it is considered moot. "Therefore, when there has been a change in circumstances that raises doubt concerning the immediacy of the controversy, courts will ordinarily dismiss cases as moot, regardless of the state to which litigation has progressed." Anderson, 143 N.J. Super. at 437.

In the instant matter, I **FIND** as it is undisputed that Julie Ketover was duly elected to a seat on the Board on November 8, 2022. Petitioner's argument that Ketover's appointment to the seat, three months earlier, could have "dramatically effected the election" is speculative and has no relevance to this proceeding. Any decision rendered by this tribunal about the Board's action on June 15, 2022, when it voted to approve Ketover's appointment to fill Van Aiken's unexpired term and on August 29, 2022, when it voted to approve Ketover as a member of the Board would have no practical effect due

to Ketover's election on November 8, 2022. As such, I **FIND** that this action no longer presents a justiciable controversy. There is no relief that can be afforded to this petitioner, as there has been no injury shown.

Therefore, I **CONCLUDE** that the petition is moot because Ketover was duly elected on November 8, 2022, as a member of the Board. As such, there is nothing for this tribunal to decide.

ORDER

Based on the foregoing, I hereby **ORDER** that respondent's Motion to Dismiss on behalf of mootness is **GRANTED**.

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

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

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

March 10, 2023
DATE

Kathleen M. Calemmo
KATHLEEN M. CALEMMO, ALJ

Date Received at Agency: _____

Date Sent to Parties: _____

KMC/jns

APPENDIX OF MOTION PROCEEDING

For petitioner

Opposition Brief, with supporting Exhibits, filed February 8, 2023

Exhibit A – Roster of Officials

Exhibit B – Emails

Exhibit C – District Policy

Exhibit D – Interrogatories and Answers to Interrogatories

Exhibit E – Correspondence

For respondent

Motion Brief, with supporting Exhibits, filed January 6, 2023

Exhibit A – Solicitor Cavallo's email to Executive County Superintendent Minus-Vincent, dated April 12, 2022

Exhibit B – Solicitor Cavallo's email to Executive County Superintendent Rodriguez, dated June 21, 2022

Exhibit C – Official Election Results

Reply Brief, filed February 15, 2023

112-23
OAL Dkt. No. EDU 10557-22
Agency Dkt. No. 310-11/22

New Jersey Commissioner of Education

Final Decision

R.G., on behalf of minor child, R.G.,

Petitioner,

v.

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

Respondent.

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

Petitioner filed the instant petition on or after November 5, 2022, challenging the Board's May 11, 2022, denial of his request to expunge his son's records concerning speech and language assessments that petitioner contends were incorrectly administered and scored. The Administrative Law Judge (ALJ) found that the petition should be dismissed as it was filed outside the 90-day limitation period set forth in *N.J.A.C.* 6A:3-1.3(i). The ALJ also found that the circumstances do not warrant relaxation of the filing timeframe.

Upon review, the Commissioner concurs with the ALJ that this matter was filed more than 90 days after the Board denied petitioner's request to expunge his son's student records. As such, the Commissioner agrees with the ALJ that this matter is barred by the 90-day statute

of limitations set forth in *N.J.A.C.* 6A:3-1.3(i). The Commissioner further agrees that relaxation of the limitations period is not warranted.

Accordingly, the Initial Decision of the OAL is adopted as the final decision in this matter, and the petition of appeal is hereby dismissed.

IT IS SO ORDERED. [1]

Angelica Allen-McMillan, Ed.D.
ACTING COMMISSIONER OF EDUCATION

Date of Decision: April 11, 2023
Date of Mailing: April 12, 2023

[1] This decision may be appealed to the Appellate Division of the Superior Court pursuant to *N.J.S.A.* 18A:6-9.1. Under *N.J.Ct.R.* 2:4-1(b), a notice of appeal must be filed with the Appellate Division within 45 days from the date of mailing of this decision.

State of New Jersey

OFFICE OF ADMINISTRATIVE LAW

INITIAL DECISION

MOTION TO DISMISS

OAL DKT. NO. EDU 10557-22

AGENCY DKT. NO. 310-11/22

R.G. ON BEHALF OF MINOR CHILD, R.G.,

Petitioner,

v.

TOWNSHIP OF FLORENCE BOARD OF EDUCATION, BURLINGTON COUNTY,

Respondent.

R.G., petitioner, pro se

Sanmathi Dev, Esq. and **Joseph F. Betley**, Esq., for respondent (Capehart & Scatchard, P.A., attorneys)

Record Closed: January 10, 2023 Decided: March 10, 2023

BEFORE **JUDITH LIEBERMAN**, ALJ:

STATEMENT OF THE CASE

Petitioner R.G. appealed the denial, by respondent Board of Education of the Township of Florence, Burlington County (Board), of his request for the expungement of

records, pursuant to N.J.S.A. 6A:32-7.7(a)1. The Board filed a motion to dismiss based upon the failure of petitioner to file his petition within ninety days, pursuant to N.J.A.C. 6A: 3-3.1(i).

PROCEDURAL HISTORY

On or about November 5, 2022, petitioner filed a petition with the Commissioner of the Department of Education (Commissioner), in which he appeals the Board's denial of his expungement request. On November 18, 2022, respondent filed a motion to dismiss in lieu of an answer. Petitioner filed an opposition brief on November 19, 2022, and respondent filed a reply brief on November 23, 2022. The matter was transmitted to the Office of Administrative Law (OAL) November 22, 2022. During a January 9, 2023, prehearing conference, it was determined that the reply brief was not submitted to the OAL along with the petition, the motion to dismiss and the opposition brief. Respondent submitted its reply brief to the OAL on January 10, 2023. The record for the motion closed that day.

FACTUAL DISCUSSION

The following, taken from the petition and documents appended to the petition, are treated as undisputed for the purpose of this motion.[1] I therefore **FIND** the following as **FACT**:

On or about November 5, 2022, petitioner R.G. filed a petition with the Commissioner, in which he seeks the expungement of records concerning his son. The records concern speech and language assessments that petitioner contends were incorrectly administered and scored. He described the purported errors in his petition. Petition at ¶¶1–5.

[1] Because the matter arises on defendants' motion to dismiss, [the court must] accept as true the facts alleged in the complaint. . . . Plaintiffs are entitled to every reasonable inference in their favor." Craig v. Suburban Cablevision, Inc., 140 N.J. 623, 625-26 (1995) (citations omitted); see also Maeker v. Ross, 219 N.J. 565, 569 (2014).

Petitioner first requested expungement of his son's records on March 30, 2022. Id. at ¶6. School district personnel denied his request, and he appealed the denial to the Board. Ibid. On May 11, 2022, he was advised by the Board that it had reviewed and denied his request. Ibid. The Board further advised that it found that all but one of the assessments at issue were properly conducted. However, having found that one assessment was inaccurately scored, it directed that an addendum concerning that assessment would be included in the student's file. Ibid. The Board further advised that petitioner's communications and the documents that he submitted in support of his expungement request would be made part of the student's educational record. Id. (referring to attached undated letter from Board Secretary Luis Valencia).

On November 18, 2022, respondent filed a motion to dismiss in lieu of an answer. It contends that petitioner's complaint is untimely, as he was required to appeal the denial of his expungement request within ninety days of the Board's denial of his request.

In opposition to the motion, petitioner does not dispute more than ninety days passed since the Board denied his expungement request. He asserts that his failure to file his complaint in a timely manner was an oversight. He noted that he is proceeding pro se; has no legal education or background and is responsible for a child who has special needs. Pet. Reply Brf. at 1. He asserted that the Commissioner should relax the filing deadline pursuant to N.J.A.C. 6A:3-1.16.

LEGAL ANALYSIS AND CONCLUSION

The analysis required when considering a motion to dismiss is "whether a cause of action is suggested by the facts." Velantzas v. Colgate-Palmolive Co., 109 N.J. 189, 192 (1988)(citations omitted). "A reviewing court must search the complaint in depth and with liberality to ascertain whether the fundament of a cause of action may be gleaned even from an obscure statement of claim[.]" Craig v. Suburban Cablevision, Inc., 140 N.J. at 625-26 (1995)(citations omitted). A motion to dismiss should only be granted in the rarest of instances. Printing Mart-Morristown v. Sharp Elecs. Corp., 116 N.J. 739, 772 (1989). In reviewing the complaint, the question is not whether the petitioner can prove the allegations, but whether the facts alleged are sufficient to state a cause of action. Id.

at 746. See also F. G. v. MacDonell, 150 N.J. 550, 556 (1997) ("If a generous reading of the allegations merely suggests a cause of action, the complaint will withstand the motion.").

N.J.A.C. 6A:32-7.7 addresses requests for expungement of student records. It provides:

> (a) Student records are subject to challenge by parents and adult students on grounds of inaccuracy, irrelevancy, impermissible disclosure, inclusion of improper information, or denial of access to organizations, agencies, and persons. The parent or adult student may request:
>
> 1. Expungement of inaccurate, irrelevant, or otherwise improper information from the student record;
>
> 2. Insertion of additional data, as well as reasonable comments regarding the meaning and/or accuracy of the student record;
>
> 3. The immediate stay of disclosure pending final determination of the challenged procedure as described in this subchapter; and/or
>
> 4. Immediate access to student records for organizations, agencies, and persons denied access, pending final determination of the challenged procedure, as described in this subchapter.
>
> (b) To request a change in the student record or to request a stay of disclosure pending final determination of the challenged procedure, a parent or adult student shall notify, in writing, the chief school administrator of the specific issues relating to the student record.
>
> 1. Within 10 school days of notification, the chief school administrator, or the chief school administrator's designee, shall notify the parent or adult student of the school district's decision. If the school district disagrees with the request, the chief school administrator, or the chief school administrator's designee, shall meet with the parent or adult student to resolve the issues set forth in the request.

2. If the matter is not satisfactorily resolved, the parent or adult student has 10 school days to appeal the school district's decision.

2. If an appeal is made to the district board of education, the district board of education shall render a decision within 20 school days.

3. The decision of the district board of education may be appealed to the Commissioner pursuant to N.J.S.A. 18A:6-9[2] and N.J.A.C. 6A:3, Controversies and Disputes. At all stages of the appeal process, the parent or adult student shall be afforded a full and fair opportunity to present evidence relevant to the issue.

4. A record of the appeal proceedings and outcome shall be made a part of the student record with copies made available to the parent or adult student.

(c) Appeals relating to student records of students with disabilities shall be processed in accordance with the requirements of (b) above.

(d) Regardless of the outcome of an appeal, a parent or adult student shall be permitted to place in the student record a statement commenting upon the information in the student record or setting forth any reasons for contesting a portion of the student record, including the decision made in the appeal. The parent's or adult student's statement shall be maintained as part of the student record, as long as the contested portion of the student record is maintained. If the contested portion of the student record is disclosed to any party, the statement commenting upon the information shall also be disclosed to that party.

[Emphasis added.]

[2] The commissioner shall have jurisdiction to hear and determine, without cost to the parties, all controversies and disputes arising under the school laws, excepting those governing higher education, or under the rules of the State board or of the commissioner. For the purposes of this Title, controversies and disputes concerning the conduct of school elections shall not be deemed to arise under the school laws. N.J.S.A. 18A:6-9.

N.J.A.C. 6A:3-1.3(i) requires that appeals from final decisions of district boards of education must be filed with the Commissioner within ninety days:

> The petitioner shall file a petition no later than the 90th day from the date of receipt of the notice of a final order, ruling, or other action by the district board of education, individual party, or agency, that is the subject of the requested contested case hearing. This rule shall not apply in instances where a specific statute, regulation, or court order provides for a period of limitation shorter than 90 days for the filing of a particular type of appeal.

"The ninety-day rule has been strictly followed and applied almost without exception. D.Q. o/b/o S.Q. v. Sch. Dist. of Newark, 2009 N.J. AGEN LEXIS 640 (Jan. 21, 2009). In Dreher v. Jersey City Bd. of Educ., a petition filed only two days after the ninety-day period was dismissed as untimely. 1987 S.L.D. 1706, aff'd, 1988 S.L.[D]. 2439 (State Bd. of Educ. 1988), rev'd on other grounds, A-6120-82 (App. Div. 1989), cert. denied, 117 N.J. 138 (1989)." Hendrickson v. Board of Education of the City of Rahway, Union County and Ray Lopez, Board Member, 2018 N.J. AGEN LEXIS 164, *13-14 (March 5, 2018), adopted, Comm'r, (April 13, 2018), Commissioner of Education Decision (rutgers.edu).[3]

Relaxation of the rule may be permissible if exceptional circumstances have been demonstrated.

> The rules in this chapter shall be considered general rules of practice to govern, expedite and effectuate the procedure before, and the actions of the Commissioner in connection with, the determination of controversies and disputes under the school laws. Where such rules do not reflect a specific statutory requirement or an underlying rule of the OAL, they may be relaxed or dispensed with by the Commissioner, in the Commissioner's discretion, in any case where a strict adherence thereto may be deemed inappropriate or unnecessary or may result in injustice.
>
> [N.J.A.C. 6A:3-1.16.]

[3] This decision and other unpublished and administrative decisions cited here are not binding. They are referenced because they provide relevant guidance.

However, this relief has been rarely granted.

> "Such authority is rarely invoked unless strict adherence to the rule would be inappropriate, unnecessary or where injustice would occur, or where the Commissioner finds the presence of a substantial constitutional issue or other issue of fundamental public interest beyond that of concern only to the parties themselves." [Snow v. Bd. of Educ. of the Twp. of Moorestown, 2007 N.J. AGEN LEXIS 312 (April 20, 2007).] In fact, this extraordinary relief has been reserved only for those situations where a substantial constitutional issue is presented or where a matter of significant public interest is involved, beyond that of concern only to the parties. AAA School LLC v. Passaic Cnty. Educ. Servs. Comm'n, Passaic Cnty, 2014 N.J. AGEN LEXIS 397 (June 18, 2014).
>
> [Hendrickson v. Board of Education of the City of Rahway, Union County and Ray Lopez, Board Member, 2018 N.J. AGEN LEXIS at *13-14.]

Here, there is no dispute that petitioner received the Board's denial of his expungement request on May 11, 2022. He served his petition appealing this decision upon school district personnel on October 31, 2022, and filed his complaint with the Commissioner on or after November 5, 2022. This is well beyond the ninety-day deadline. It is also undisputed that the Board included petitioner's request for expungement, his communications about the request and the documents he submitted in support of his request in his son's student file. The Board thus ensured that there is a clear record of his objection to the documents at issue. In support of his plea for relaxation of the controlling regulation, petitioner cites his pro se status and his obligations to his child. Notwithstanding these circumstances, he properly pursued his application before the school and the Board, as he detailed in his petition. For these reasons, I **CONCLUDE** that petitioner has not presented exceptional circumstances for the Commissioner to relax the ninety-day deadline.

ORDER

For the foregoing reasons, **I ORDER** that respondent's motion to dismiss the petition is **GRANTED**.

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

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

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

March 10, 2023
DATE

JUDITH LIEBERMAN, ALJ

Date Received at Agency: _____

Date Mailed to Parties: _____

JL/jm

116-23
OAL Dkt. No. EDU 06857-22
Agency Dkt. No. 183-7/22

New Jersey Commissioner of Education

Final Decision

I.M. and T.M., on behalf of minor child, S.M.,

Petitioners,

v.

Board of Education of the Borough of New Providence, Union County,

Respondent.

The record of this matter, the proposed Settlement Agreement and Release (Agreement), and the Initial Decision issued by the Office of Administrative Law pursuant to *N.J.A.C.* 1:1-19.1, have been reviewed. Upon such review, the Commissioner notes that Paragraph 3 of the Agreement references actions that preceded the consideration of the settlement by the Commissioner of Education. The parties are reminded that a settlement of litigation before the Commissioner is not binding until the Commissioner approves the settlement. Further, with respect to Paragraphs 1 and 4 of the Agreement, the Board is reminded that it must comply with the requirements of New Jersey's Open Public Records Act, *N.J.S.A.* 47:1A-1 *et seq.*, notwithstanding any agreement the parties may have between themselves to keep the terms of their settlement confidential.

In light of the foregoing, the Commissioner adopts the Initial Decision as the final decision in this matter, provided that the parties have already implemented the settlement terms or have agreed upon mutually satisfactory alternate dates for the effectuation of the

terms of the Agreement. Assuming same, the matter is hereby dismissed, subject to compliance with the terms of the settlement consistent with applicable public records law.

IT IS SO ORDERED.

Angelica Allen-McMillan, Ed.D.
ACTING COMMISSIONER OF EDUCATION

Date of Decision: April 18, 2023
Date of Mailing: April 19, 2023

State of New Jersey
OFFICE OF ADMINISTRATIVE LAW

INITIAL DECISION
SETTLEMENT
OAL DKT. NO. EDU 06857-22
AGENCY DKT. NO. 183-7/22

I.M. AND T.M. ON BEHALF OF S.M.,
Petitioners,
v.
BOARD OF EDUCATION OF THE BOROUGH OF NEW PROVIDENCE, UNION COUNTY,
Respondent.

I.M. and T.M. on behalf of S.M., pro se

Athina Lekas n Cornell, Esq., for respondent (Cornell, Merlino, McKeever & Osborne, LLC, attorneys)

Record Closed: March 15, 2023 Decided: March 22, 2023

BEFORE **WILLIAM COURTNEY**, ALJ:

This matter was transmitted to the Office of Administrative Law on August 8, 2022 for determination as a contested case, pursuant to N.J.S.A. 52:14B-1 to -15 and N.J.S.A. 52:14F-1 to -13.

A hearing was scheduled for March 6 2023 but was adjourned because the parties advised the undersigned that they agreed to settle the matter. The executed Settlement Agreement indicating the terms of agreement was forwarded to the OAL on March 17, 2023 and is attached hereto.

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

1. The parties have voluntarily agreed to the settlement as evidenced by their signatures or their representatives' signatures on the attached settlement agreement and the attached Board resolution.

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

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

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

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

William A Courtney

March 22, 2023

DATE

WILLIAM COURTNEY, ALJ

Date Received at Agency: MARCH 29, 2023

Mailed to Parties: MARCH 29, 2023

sej

CORNELL, MERLINO, MCKEEVER & OSBORNE, LLC
238 St. Paul Street
Westfield, NJ 07090
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Fax: (908) 264-2045
Attorneys For Respondent, New Providence Board of Education

I.M. and T.M. o/b/o S.M.,	:	STATE OF NEW JERSEY
	:	OFFICE OF ADMINISTRATIVE LAW
Petitioner,	:	OAL DOCKET NO.: EDU 6857-22
	:	Agency Ref. No: 183-7/22
v.	:	
	:	
NEW PROVIDENCE BOARD OF EDUCATION,	:	
	:	
Respondent.	:	
	:	

CONFIDENTIAL SETTLEMENT AGREEMENT WITH MUTUAL GENERAL RELEASES

WHEREAS, on or about April 1, 2022, a Complaint alleging actions of harassment, intimidation, and bullying ("HIB") was filed with Allen W. Roberts Elementary School, one of the schools under the governance of the New Providence Board of Education (hereinafter referred to as "Board" or "Respondent"); and

WHEREAS, the New Providence School District (hereinafter referred to as the "District") conducted an investigation of the allegations and determined that harassment, intimidation and bullying was substantiated; and

WHEREAS, the Superintendent of Schools agreed with the investigation's findings; and

WHEREAS, the Board affirmed the recommendation of the Superintendent to substantiate the investigation's findings; and

WHEREAS, the investigation's findings pertain to Petitioner in this matter; and

WHEREAS, there is a dispute between Petitioner and the Board (hereinafter Petitioner and the Board shall be collectively referred to as the "Parties"); and

WHEREAS, on or about May 23, 2022, a hearing was held before the Board with respect to Petitioner; and

WHEREAS, on or about June 28, 2022, a Complaint was filed with the Commissioner of Education on behalf of Petitioner; and

WHEREAS, on or about July 28, 2022, Respondent filed an Answer with the Commissioner in response to the Complaint; and

WHEREAS, on or about December 2, 2022, the Parties participated in a settlement conference with the Honorable William Courtney, A.L.J.; and

NOW THEREFORE, the Parties having a desire to settle the above matter in an amicable way, hereby agree as follows:

1. The District as collectively defined herein shall not release or authorize the release of any document or student record, or any information, written, oral, or electronic/digital, contained therein, relating to the HIB incident involving S.M. unless specifically directed by court order upon application on notice to all named parties and their counsel. All such documents and information shall be deemed privileged and confidential.

2. The Parties further agree that all documents, written, oral, or electronic/digital, relating to the HIB incident and the District's investigation shall not be included in S.M.'s student cumulative record nor shall the alleged HIB incident and the District's investigation be considered a disciplinary action reportable to any third parties without a specifically directed court order upon application on notice to all named parties and their counsel. Further, all documents written, oral or digital/electronic, relating to the HIB incident and the District's investigation, which are currently included in S.M.'s student cumulative records, shall be removed in their entirety from the record and a written confirmation to that effect shall be sent to the Petitioner within five (5) days following the ratification of this Agreement by the Board with written notice to counsel.

3. The Parties hereby stipulate and agree that the Petitioners I.M. and T.M. and Cornell, Merlino, McKeever & Osborne, LLC, Athina Lekas Cornell, Esq., attorney for the New Providence Board of Education of the Borough of New Providence, Union County, New Jersey and the District shall take physical possession of the original and all copies of all of the HIB documents including digital or electronic related to the HIB investigation, findings, code of conduct interventions, this Agreement, and all other aspects of the HIB proceedings involving S.M. No copies of said documents shall be maintained by any other person or anywhere in or by the District except by the Petitioners and Cornell, Merlino, McKeever & Osborne, LLC, as set forth herein. The documents referred to herein shall be transferred to the physical possession of the Petitioners within five (5) days following the ratification of this Agreement by the Board with written notice to counsel.

4. The Parties agree that neither the Petitioners, the Petitioners' legal representatives, Athina Lekas Cornell, Esq. nor the Law Firm of Cornell, Merlino, McKeever & Osborne, LLC, shall release or authorize the release of any document or student record, or any information contained therein, relating to the HIB incident involving S.M. unless specifically directed by court order upon application on notice to all named parties and their counsel.

5. The Parties further agree that if there are further HIB incidents that are substantiated during the 2022-2023 school year, they will be considered additional incidents for purposes of developing an intervention plan as required by statute or any other remedial measures.

6. The Parties have reached this compromise to avoid the expense, inconvenience, and potential acrimony of an administrative law hearing under the school laws. The Parties specifically disclaim any liability to each other. The Parties' entry into this Agreement shall not constitute nor shall it be interpreted as an admission of wrongdoing or guilt, or liability in any manner on either of the Parties' part. Any such obligation or liability on either Party's part is expressly denied. The Parties have all entered into this Agreement solely to compromise disputed claims.

7. In consideration of the settlement of the captioned matter, the Parties forever waive their right to take any action against each other regarding this matter.

8. In consideration of the settlement of the captioned matter, the Parties shall forever release each other from any and all claims, rights and liability, including but not limited to any and all claims for attorney's fees, money damages, civil liability, or any other equitable or legal relief.

9. This Agreement contains the entire Agreement and understanding between all Parties and constitutes a full and final Agreement on any and all issues.

10. Any dispute arising out of the breach of this Agreement shall be governed by the laws of the State of New Jersey.

11. If, during the term of this Agreement, a specific clause of the Agreement is determined to be illegal or in violation of any Federal or State law, the remainder of the Agreement shall not be affected by such a ruling and shall remain in full force and effect.

12. The Parties have entered into this Agreement freely and voluntarily with a full understanding of their rights and the contents of this Agreement. The Parties acknowledge that they had the opportunity to consult with legal counsel or a representative of their choice and that they reviewed the Agreement in detail with their counsel or representative and fully understand its requirements and limitations.

13. This Agreement shall remain confidential to the maximum extent permitted by law and the Parties shall not disclose its form or contents to any third parties.

14. This Agreement shall be construed as if it were drafted by both Parties contemporaneously.

15. This Agreement is subject to ratification by the New Providence Board of Education.

I.M. o/b/o S.M., a minor, Petitioner
Date: **07 Feb 2023**

T.M. o/b/o S.M., a minor, Petitioner
Date: **07 Feb 2023**

ON BEHALF OF THE NEW PROVIDENCE BOARD OF EDUCATION

Mary Misiukiewicz, Board President
Date: 3/17/23

117-23

New Jersey Commissioner of Education
Decision

Board of Education of the Village of
Ridgefield Park, Bergen County,

Petitioner,

v.

Board of Education of the Borough of
Little Ferry, Bergen County, and
Frank R. Scarafile, Superintendent

Respondent.

Synopsis

Petitioner, Ridgefield Park Board of Education (Ridgefield Park), and respondent, Little Ferry Board of Education (Little Ferry), have a longstanding send-receive relationship whereby Little Ferry students attend Ridgefield Park High School on a tuition basis. The two boards are parties to a formal written send-receive agreement which historically has provided for a tuition rate that was lower than the certified tuition rate based on Ridgefield Park's actual cost per pupil. For the 2018-2019 school year, the parties executed a contract that provided an estimated tuition rate and indicated that "there shall be no certified tuition adjustment." Subsequently, in 2022, Ridgefield Park filed the within petition seeking to compel Little Ferry to pay the difference between the estimated tuition cost listed in the contract and the actual State-certified cost. Ridgefield Park filed a motion for summary decision, which Little Ferry opposed; the ALJ considered Little Ferry's opposition as a cross-motion for summary decision.

The ALJ found, *inter alia,* that: although *N.J.A.C.* 6A:23A-17.1(f) requires a receiving district to return an overpayment to a sending district, a receiving district is not required to charge a sending district for an underpayment caused by the difference between the estimated tuition rate in the contract and the State-certified rate; the provision in the parties' contract stipulating that there would be no certified tuition adjustment did not contradict the regulation and was enforceable; although Ridgefield Park could have negotiated contract language stating that it may seek to recoup tuition underpayments, it did not do so in 2018-2019; in this matter, equitable principles favor Little Ferry, which relied upon the contract agreement's negotiated adjustment waiver. Accordingly, the ALJ granted Little Ferry's motion for summary decision and dismissed the petition.

Upon review, the Commissioner concurred with the ALJ that Ridgefield Park is not entitled to recoup any underpayment by Little Ferry for the 2018-2019 school year, finding, *inter alia*, that: there was nothing improper in the ALJ's consideration of Little Ferry's opposition as a cross-motion for summary judgment; and the applicable statutes and regulations clearly permit a receiving district to waive its right to any tuition underpayment from a sending district. Accordingly, the Initial Decision of the OAL was adopted as the final decision in this matter and the petition was dismissed.

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

117-23
OAL Dkt. No. 02068-22
Agency Dkt. No. 27-2/22

New Jersey Commissioner of Education

Final Decision

Board of Education of the Village of Ridgefield Park, Bergen County,

Petitioner,

v.

Board of Education of the Borough of Little Ferry, Bergen County, and Frank R. Scarafile, Superintendent,

Respondents.

The record of this matter, the Initial Decision of the Office of Administrative Law (OAL), the exceptions filed by the petitioner pursuant to *N.J.A.C.* 1:1-18.4, and the respondent's reply thereto, have been reviewed and considered.

This matter involves a sending-receiving relationship whereby students from Little Ferry attend Ridgefield Park High School. Historically, the tuition rate that the Ridgefield Park Board of Education (Ridgefield Park) charged the Little Ferry Board of Education (Little Ferry) was lower than the certified tuition rate calculated by the New Jersey Department of Education (State) based on Ridgefield Park's actual cost per pupil. For the 2018-2019 school year, the parties executed a contract that provided an estimated tuition rate and indicated that "there shall be no certified tuition adjustment." In 2022, Ridgefield Park filed a petition of appeal seeking to compel Little Ferry to pay the difference between the estimated tuition cost listed in the contract and the actual State-certified cost.

Following Ridgefield Park's motion for summary decision, and opposition thereto by Little Ferry – which the Administrative Law Judge (ALJ) considered as a cross-motion for summary decision – the ALJ found that while *N.J.A.C.* 6A:23A-17.1(f) requires a receiving district to return an overpayment to a sending district, a receiving district is not required to charge a sending district for an underpayment caused by the difference between the estimated tuition rate in the contract and the State-certified rate. Accordingly, the ALJ concluded that the provision in the parties' contract stipulating that there would be no certified tuition adjustment did not contradict the regulation and was enforceable. The ALJ found that Ridgefield Park could have negotiated language stating that it may seek to recoup underpayments, but it did not in 2018-2019. Additionally, the ALJ concluded that equitable principles favored Little Ferry, which relied upon the agreement's negotiated adjustment waiver. The ALJ granted Little Ferry's motion for summary decision and dismissed the petition.

In its exceptions, Ridgefield Park argues that the Initial Decision in a prior case between these parties held that the statutory and regulatory scheme governs the right to tuition payments, not the parties' contractual language, and that any contractual language or past practice that is at odds with the regulations is unenforceable. *Bd. of Educ. of the Village of Ridgefield Park, Bergen Co. v. Bd. of Educ. of the Borough of Little Ferry*, OAL Dkt. No. EDU 07868-20 (Initial Decision, March 8, 2021),[1] *adopted*, Commissioner Decision No. 92-21 (decided April 22, 2021).[2] According to Ridgefield Park, the ALJ erred in finding that the 2021 Initial Decision applied only in cases where there was no signed tuition contract, when no such limitation is contained in that decision. Ridgefield Park also contends that there is no basis for the ALJ's conclusion that underpayments and

[1] Hereafter, "2021 Initial Decision."

[2] Hereafter, "2021 Commissioner decision."

overpayments should be treated differently, and that such a result is unfair to receiving districts. Ridgefield Park further argues that while the regulation provides that a receiving district "may" demand an underpayment, this language only means that the receiving district has the discretion to demand or not demand that amount – not that the district can bargain away its right to demand it in a tuition contract. Ridgefield Park notes that Little Ferry did not move for summary decision – and in fact argued that the case should proceed to a hearing – and contends that it was therefore inappropriate for the ALJ to award summary decision to Little Ferry.

In reply, Little Ferry argues that Ridgefield Park agreed to waive any claim for additional tuition costs when it signed the tuition contract providing that "there shall be no certified tuition adjustments for the 2018/2019 school year." According to Little Ferry, the 2021 Commissioner decision allows a receiving district to accept a tuition rate lower than the full certified tuition rate, and that is what Ridgefield Park did in signing the tuition contract. Little Ferry notes that other agreements between the parties either included no language regarding tuition adjustments or expressly confirmed that Little Ferry would pay the adjusted amount, demonstrating that Ridgefield Park was aware of its ability to negotiate the adjustment language. Little Ferry contends that the current matter is factually distinct from the prior matter because of the inclusion of language specifically waiving Ridgefield Park's ability to demand any tuition adjustment. Little Ferry argues that it successfully negotiated for a lower tuition rate, and that Ridgefield Park should be bound by that negotiated term. According to Little Ferry, the ALJ correctly determined that overpayments and underpayments should be treated differently, because while a receiving district can agree to accept less than it is entitled to for the services it provides to the sending district, it should not be unjustly enriched by being permitted to charge the sending district more than the cost the receiving district incurred.

Upon review, the Commissioner concurs with the ALJ that Ridgefield Park is not entitled to recoup any underpayment by Little Ferry for the 2018-2019 school year. Initially, the Commissioner finds unpersuasive Ridgefield Park's argument that it was inappropriate for the ALJ to award summary decision to Little Ferry when Little Ferry had not moved for summary decision. In opposition to Ridgefield Park's motion for summary decision, Little Ferry asserts that its position regarding Ridgefield Park's ability to recoup any underpayments is correct as a matter of law. Little Ferry also argued that there are issues of disputed material facts, but those issues pertain solely to calculation of the tuition rate and the amount Ridgefield Park was seeking to collect. However, in finding that Ridgefield Park is not entitled to recoup the underpayment, those issues of fact become irrelevant, and a plenary hearing to address them would be a waste of judicial resources. The Commissioner finds no basis to disturb the ALJ's decision to view Little Ferry's opposition to Ridgefield Park's motion for summary decision as a cross-motion for summary decision.

Turning to the merits, Ridgefield Park relies heavily on the language in the 2021 Initial Decision that states, "[T]he statutory and regulatory scheme governs the sending-receiving relationship relative to tuition payments, and not the parties' contractual language. .... While the regulatory scheme demands execution of a formal agreement, any contractual language or past practice that is at odds with the regulations is unenforceable." *2021 Initial Decision*, *supra*. Ridgefield Park appears to assume that the portion of the parties' tuition agreement providing for no tuition adjustments is at odds with the regulations, and – pursuant to the 2021 Initial Decision – is therefore unenforceable. However, a board of education choosing to forego its ability to recoup an underpayment is not at odds with the applicable statute or regulation. *N.J.S.A.* 18A:39-19 provides that "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 . . .". That is precisely what occurred between the parties for the 2018-2019 school year. Ridgefield Park determined the estimated tuition rate, and, by virtue of agreeing that it would not recoup any underpayment, also determined the final tuition rate.

Furthermore, as the Commissioner indicated in the 2021 matter, "nothing in the statutes or regulations precludes negotiations between the parties, and the receiving district is free to accept a tuition rate lower than the full certified tuition rate. . .". *2021 Commissioner Decision, supra*.[3] This outcome is also consistent with *Bd. of Educ. of the Borough of Spotswood, Middlesex Co. v. Bd. of Educ. of the Borough of Milltown, Middlesex Co.*, Commissioner Decision No. 179-99 (decided June 7, 1999). In *Spotswood*, the Commissioner noted, "the pertinent regulations permit, but do not require, a receiving district to charge a sending district for either all or part of the money owed when it is determined that the tentative charge established by written contractual agreement was *less* than the actual cost per pupil during the school year." *Ibid.* (citations omitted)[4] (emphasis in original). Spotswood and Milltown had signed a tuition agreement based on a form prepared by the Commissioner in which they agreed that Milltown would pay the full amount of any underpayment, and, accordingly, Milltown was required to pay that amount. However, the Commissioner also noted that "the contract permits the parties the option to check [a box]

[3] To the extent there is any conflict between the Initial Decision and the Commissioner Decision in the prior matter, the Commissioner decision controls. However, the Commissioner does not find there to be any conflict, as the Initial Decision addresses contractual language that is at odds with the regulation, and, as noted herein, a receiving district forgoing its ability to recoup an underpayment is not at odds with the statute or the regulation.

[4] The pertinent regulations were codified in a different section of the Administrative Code at the time of the *Spotswood* decision but are substantially the same in content.

indicating that a sending district *would not* be charged with any tuition differential"[5] and that the applicable regulations permit the receiving district to forego charging the sending district where tentative costs are found to be underestimated. *Ibid.*

Ridgefield Park did not have to forgo its right to recoup an underpayment, as the statute gives the receiving district full discretion to set the rate, so long as it does not exceed the State-certified rate. Ridgefield Park could have included language in its contract allowing it to recoup any underpayment. The parties could have left the agreement silent on this issue, allowing Ridgefield Park to set the rate once it learned of the State-certified rate later in the cycle. If Little Ferry refused to sign either of such versions of the tuition agreement – which is what led to the prior case between these parties – Ridgefield Park could have insisted that they do so. However, none of those events occurred. The statutory and regulatory scheme clearly permits a receiving district to waive its right to any underpayment, and such a waiver is not ineffective simply because it occurred at the time the parties signed their tuition agreement.

Accordingly, the Initial Decision is adopted as the final decision in this matter, and the petition of appeal is dismissed.

IT IS SO ORDERED.[6]

Angelica Allen-McMillan, J.D.S.
ACTING COMMISSIONER OF EDUCATION

Date of Decision: April 20, 2023
Date of Mailing: April 21, 2023

[5] The Commissioner notes that the form currently provided by the Department of Education for tuition contract agreements also includes an option whereby the receiving district can forgo an underpayment or accept partial payment. *See* https://www.nj.gov/education/finance/tuition/tuition1.pdf.

[6] This decision may be appealed to the Appellate Division of the Superior Court pursuant to *N.J.S.A.* 18A:6-9.1. Under *N.J.Ct.R.* 2:4-1(b), a notice of appeal must be filed with the Appellate Division within 45 days from the date of mailing of this decision.

State of New Jersey
OFFICE OF ADMINISTRATIVE LAW

INITIAL DECISION
SUMMARY DECISION
OAL DKT. NO. EDU 02068-22
AGENCY DKT. NO. 27-2/22

BOARD OF EDUCATION OF THE BOROUGH OF RIDGEFIELD PARK, BERGEN COUNTY,
Petitioner,
v.
BOARD OF EDUCATION OF THE BOROUGH OF LITTLE FERRY, BERGEN COUNTY, AND FRANK R. SCARAFILE, SUPERINTENDENT
Respondents.

Kerri Wright, Esq., (Porzio Bromberg & Newman, attorneys)

John Geppert, Esq., (Scarinici Hollenbeck, attorneys)

Record Closed: January 13, 2023 Decided: February 7, 2023

BEFORE **NANCI G. STOKES**, ALJ:

STATEMENT OF THE CASE

For school year 2018-2019, respondent executed a contract with petitioner to educate its high school-aged residents at an estimated tuition rate, agreeing that "there shall be no certified tuition adjustment" for that year. Petitioner now seeks payment at the higher State-certified tuition rate. Is additional reimbursement owed? No. While statutes allow receiving districts to charge tuition up to the State-certified rate, the parties can negotiate a lower rate. N.J.S.A. 18A:38-8; N.J.A.C. 6A:23A-17.1(f)7.

PROCEDURAL HISTORY

On February 24, 2022, the Township of Ridgefield Park Board of Education (Ridgefield Park) filed this action with the Department of Education, Office of Controversies and Disputes (DOE), seeking to compel the Little Ferry Board of Education (Little Ferry) to pay the difference between the estimated tuition cost for educating Little Ferry's high school students and the actual State-certified cost. Specifically, Ridgefield Park maintains that its agreement not to adjust the tuition rate after the State calculated the exact cost and certified the rate is unenforceable under the governing statute.

On March 11, 2022, Little Ferry submitted its answer to the petition.

On March 16, 2022, the DOE transmitted the contested case under the Administrative Procedure Act, N.J.S.A. 52:14B-1 to -15, and the act establishing the OAL, N.J.S.A. 52:14F-1 to -13, for a hearing under the Uniform Administrative Procedure Rules, N.J.A.C. 1:1-1.1 to -21.6.

On November 16, 2022, Ridgefield Park filed a motion for summary decision. On December 7, 2022, Little Ferry filed its opposition to the motion, which I now consider a cross-motion for summary decision. See N.J.A.C. 1:1-14.6(d) (allowing an ALJ to "convert any form of proceeding into another."); see also N.J.A.C. 1:1-14.6(p) (providing

that an ALJ may take action to ensure "the proper, expeditious and fair conduct of the hearing or other proceeding, development of the record and rendering of a decision.") Significantly, each party asserts they are correct under the law and entitled to a decision in their favor. On December 19, 2022, Ridgefield Park submitted its reply. At Little Ferry's request, I scheduled oral argument on the motion for January 13, 2023, and I closed the record.

FINDINGS OF FACT

Based on the documents submitted in support of and in opposition to the motions for summary decision, I **FIND** the following as **FACT** for purposes of these motions only:

The Little Ferry School District has no high school. Little Ferry's high school-aged students attend Ridgefield Park High School on a tuition basis under a send-receive agreement. The State calculates the tuition cost per student under a regulatory formula. However, actual audited expenditures and average daily enrollment numbers are unavailable until after the school year ends. Thus, the State calculates and adjusts the tuition rate over a three-year period.

Under this scheme, Little Ferry estimates the number of students attending Ridgefield Park High School the following year in year one, and Ridgefield Park estimates a per-pupil tuition amount. Little Ferry budgets that estimated amount during year two and pays Ridgefield Park. In year three, the Department of Education reviews Ridgefield Park's audited financials and issues "certified tuition rates," representing the actual cost per student in year two. After the State establishes the certified rate, Little Ferry and Ridgefield Park can address or adjust deficits or credits if the State-certified rate or the number of students differs from the estimated numbers. This three-year cycle repeats continuingly.

Boards must prepare a written sending-receiving contract, including the estimated students and cost per pupil. In 2018-2019, the parties' negotiated sending-

receiving contract included language stating that "there shall be no certified tuition adjustment" for that year.

Little Ferry did not budget beyond the contract tuition cost. Historically, the parties did not include this waiver, and the State-certified rate exceeded the estimated figure. Only recently, Ridgefield Park sought to recoup the difference between the lower estimated contract rate and the State-certified cost. Notably, the parties' sending-receiving agreement from 2016-2017 required Ridgefield Park to remit any overpayment above the State-certified per-pupil cost to Little Ferry and for Little Ferry to pay any underpayment below that rate to Ridgefield Park. Based on the 2018-2019 contract tuition amount and Ridgefield Park's inability to upwardly adjust the rate given the agreed-upon waiver, Little Ferry budgeted tuition funds and paid them per the contract.

Undeniably, Little Ferry received a discounted price from the actual cost per pupil. Specifically, Little Ferry remitted a payment to Ridgefield Park of $4,513,644.44 for tuition for the 2018-2019 school year per the contract. However, the State-certified rate for the 2018-2019 school year was $5,556,369.71, leaving a difference of $1,042,725.27, which Ridgefield Park now seeks.

Notably, in a prior case before the Hon. Ellen Bass, CALJ, for the 2019-2020 and 2020-2021 school years, Ridgefield Park refused to include the 2018-2019 adjustment waiver language, and Little Ferry declined to sign the sending-receiving agreement. In other words, Ridgefield Park wanted the ability to adjust tuition costs up to the State-certified rate and to reserve Ridgefield Park's right to demand that difference. That Decision provides the basis for this litigation.

Before the earlier litigation, the Superintendent advised Little Ferry that it owed Ridgefield Park the balance of the State-certified rate for the 2016-2017 school year, absent any tuition waiver and Ridgefield's stated right to the State-certified rate. Indeed, Little Ferry expressly agreed that it owed Ridgefield Park the balance of the certified tuition cost if the estimated cost was less for the 2016-2017 school year.

Further, the Superintendent told Little Ferry that it must sign the 2019-20 and 2020-21 school years' sending-receiving contracts, allowing tuition adjustments up to the State-certified rate. Little Ferry agreed to pay the State-certified tuition rate for the 2020-2021 school year and paid Ridgefield Park the 2016-2017 balance between the lower estimated cost and the State-certified rate.

Despite the explicit language not to adjust for the certified rate in the 2018-2019 school year contract, on June 28, 2021, Ridgefield Park first demanded the difference between the lower estimated rate and the higher State-certified actual cost per student. Little Ferry refused, maintaining that it only owed what the parties negotiated for, which it anticipated and included in its budget. Indisputably, the Boards negotiated that waiver language in drafting the 2018-2019 sending-receiving contract, and Little Ferry relied upon that adjustment waiver.

In making this demand, Ridgefield Park relies upon language from Judge Bass' Initial Decision, stating that:

> The statutory and regulatory scheme governs the sending-receiving relationship relative to tuition payments, and not the parties' contractual language. See, Mountainside Bd. of Educ. v. Berkeley Heights Bd. of Educ., OAL Dkt. No. EDU 09700-06, Initial Decision (July 20, 2007), adopted, Comm'r (January 17, 2008), http://njlaw.rutgers.edu/collections/oal/ [affirmed 2010 N.J. Super. Unpub. LEXIS 545 (App. Div. 2010).] Indeed, the Commissioner of Education has broad powers to oversee sending-receiving agreements. Merchantville Bd. of Educ. v. Pennsauken and Haddon Bds. of Educ., 204 N.J. Super. 508 (App. Div. 1985). While the regulatory scheme demands execution of a formal agreement (N.J.A.C. 6A:23A-17.1(f)), any contractual language or past practice that is at odds with the regulations is unenforceable.
>
> [Ridgefield Park Bd. of Educ. v. Little Ferry Bd. of Educ., OAL Dkt. No. EDU 07868-20, Initial Decision (March 8, 2021), adopted, Comm'r (April 22, 2021), http://njlaw.rutgers.edu/collections/oal/.]

Further, Judge Bass addressed the tuition rate-setting process, highlighting that "while the parties obviously negotiate the tentative rate, these negotiations do not deprive Ridgefield Park of its clear right, ultimately, to demand the full certified tuition amount." Ibid.

In turn, Little Ferry relies upon the Commissioner's Final Decision in that case, stating that:

> The Commissioner also concurs with the ALJ that Ridgefield Park may charge the full certified tuition rate. N.J.S.A. 18A:28-19 provides that the receiving district "shall determine" the tuition rate. As the ALJ correctly concluded, the plain language of the statute gives the receiving district – Ridgefield Park – the discretion to set the tuition at any amount, with the only limitation being that it cannot exceed the certified tuition rate. While nothing in the statues or regulations precludes negotiations between the parties, and the receiving district is free to accept a tuition rate lower than the full certified tuition rate, the statutory language clearly provides for a specific outcome in the event that the receiving district does not wish to negotiate, or negotiations are unsuccessful. In those circumstances, the receiving district is permitted to set the tuition rate, as long as it is not more than the certified tuition rate.

In 2022, the parties attempted to resolve the disputed tuition for 2018-2019 and submitted the issue to the Interim Executive Bergen County Superintendent of Schools (Superintendent) for mediation under N.J.A.C. 6A:23A-17.1(f)(5). To date, the Superintendent issued no guidance or pronouncement that would facilitate the settlement of this dispute.

Both Boards stress understandable financial hardships.

Little Ferry also argues that the State improperly calculated the certified tuition rate for the 2018-19 school year.

DISCUSSION AND CONCLUSIONS OF LAW

Summary-Decision Standard

A party may move for summary decision upon all or any substantive issues in a contested case. N.J.A.C. 1:1-12.5(a). A party must make the motion a party makes with briefs, with or without affidavits. When the filed papers and discovery, together with any affidavits, show that no genuine issue of material fact exists and that the moving party is entitled to prevail as a matter of law, the judge may grant the motion. N.J.A.C. 1:1-12.5(b). When a party makes such a motion providing that support, an adverse party, to prevail, must submit an affidavit setting forth specific facts showing that a genuine issue of material fact exists that can only be determined in an evidentiary proceeding. Ibid.

Even though a statute calls for a "hearing," where a motion for summary decision is made and supported by documentary evidence and where the objector submits no evidence to demonstrate that a genuine issue of material fact exists, the motion procedure constitutes the hearing, and no trial-type hearing is necessary. Contini v. Newark Bd. of Educ., 286 N.J. Super. 106, 120–21 (App. Div. 1995), certif. denied, 145 N.J. 372 (1996).

To determine whether a genuine issue of material fact exists that precludes summary judgment, the motion judge must consider whether the competent evidential materials presented, when viewed in the light most favorable to the non-moving party, are sufficient to demonstrate that the moving party is entitled to a judgment as a matter of law. Brill v. Guardian Life Ins., 142 N.J. 520, 540 (1995).

Moreover, even if the non-movant comes forward with some evidence, the court must grant summary judgment if the evidence is "so one-sided that [the movant] must prevail as a matter of law." Ibid. at 536 (citation omitted). If the non-moving party's evidence is "merely colorable or is not significantly probative," the judge should not deny summary judgment. Bowles v. City of Camden, 993 F. Supp. 255, 261 (D.N.J. 1998).

In this case, no genuine issue exists as to the material facts. The only question is whether Ridgefield Park has the statutory right to demand the State-certified tuition rate for the 2018-2019 school year despite contractual language waiving the ability to adjust tuition costs based on that rate. More pointedly, no genuine issue exists that the parties negotiated a sending-receiving contract for the 2018-2019 school year setting forth an estimated tuition rate for Ridgefield Park's education of Little Ferry high school students and agreeing that the parties would make no adjustments for the State-certified rate. Yet, the State-certified tuition rate for 2018-2019 exceeded the tentative cost per student. Further, no dispute exists that Little Ferry executed sending-receiving contracts before and after the 2018-2019 school year, which included Ridgefield Park's ability to demand reimbursement up to the State-certified rate and no tuition adjustment waiver. Lastly, there is no dispute that Ridgefield Park first sought the 2018-2019 tuition underpayment from Little Ferry in June 2021. Since these facts are clear and undisputed, I **CONCLUDE** that this case is ripe for summary decision.

Notably, Little Ferry asserts that the actual tuition costs for 2018-2019 are incorrect. Yet, I **CONCLUDE** that the calculation dispute is immaterial to whether Ridgefield Park can demand the full certified rate under the 2018-2019 sending-receiving agreement. Indeed, Little Ferry can file a petition with the Commissioner if it believes there are errors in the tuition calculations.[1]

Timeliness

Under N.J.A.C. 6A:3-1.3(d), a party must file an appeal with the Commissioner of Education "no later than the 90th day from the date of receipt of the notice of a final order, ruling, or other action by the district board of education, individual party, or agency, that is the subject of the requested contested case hearing." This rule "provides a measure of repose, an essential element in the proper and efficient administration of the school laws," giving school districts the "security of knowing" that an aggrieved party

[1] Little Ferry raised the same "factual dispute" before Judge Bass, which she similarly dismissed as immaterial. Notably, the Commissioner calculates the actual cost.

cannot challenge its actions after ninety days. Kaprow v. Board of Educ. of Berkeley Twp., 131 N.J. 572, 582 (1993).

Courts strictly construe and consistently apply the ninety-day limitation period. Kaprow, 131 N.J. at 588-89; Nissman v. Bd. of Educ., 272 N.J. Super 373, 380-81, (App. Div. 1994); Riely v. Bd. of Educ., 173 N.J. Super. 109, 112-14, (App. Div. 1980). This period begins to run when the petitioner "learn[s] from the Local Board the existence of that state of facts that would enable him to file a timely claim." Kaprow, 131 N.J. at 588-89. Indeed, the "notice of a final order, ruling or other action" is "sufficient to inform an individual of some fact that he or she has a right to know and that the communicating party has a duty to communicate." Id. at 587. Notably, petitioners need not receive official and formal notification that they may have a valid claim to begin the ninety days. Id. at 588. However, the regulations encourage the parties to resolve their disputes before litigation, and a petitioner should receive notice of the "firm rejection" of its claims before the statutory period begins. Gloucester Bd. of Educ. v. Lenape Bd. of Educ., OAL Dkt. No. EDU 10120-98, Initial Decision, adopted and modified, Comm'r (December 16, 1999), http://njlaw.rutgers.edu/collections/oal/.

Further, the Commissioner may exercise her authority under N.J.A.C. 6A:3-1.1.6 to relax the application of the ninety-day rule where the Commissioner determines that strict observance might be "inappropriate or unnecessary or may result in injustice." Ibid. Yet, exceptions to the ninety-day rule are only appropriate where compelling circumstances exist to justify the enlargement or relaxation of the time limit. See Kaprow, 131 N.J. at 590; DeMaio v. New Providence Bd. of Educ., 96 N.J.A.R.2d (EDU) 449, 453.

In a similar sending-receiving contract dispute, the Commissioner agreed that the petitioner knew its dispute with the respondent was at an impasse *after* an unsuccessful mediation with the County Superintendent's offices. Mountainside Bd. of Educ. v. Berkeley Heights Bd. of Educ., OAL Dkt. No. EDU 09700-06, Initial Decision (July 20, 2007), adopted, Comm'r (January 17, 2008),

http://njlaw.rutgers.edu/collections/oal/, affirmed 2010 N.J. Super. Unpub. LEXIS 545 (App. Div. 2010) (emphasis added). Even though Mountainside filed its claim more than ninety days later, the Commissioner concluded that the petition was not time-barred. The Commissioner relaxed the time requirement because the parties' tuition disagreement spanned years, and resolving the issue was in the public interest. Id.

Similar public interest considerations exist here. This case is the second one addressing tuition reimbursement under sending-receiving contracts between the parties. Notably, Ridgefield Park did not make its demand until June 2021, after receiving Judge Bass' decision, and learning it may have a claim to the 2018-2019 actual tuition costs. Significantly, the parties attempted mediation as in the other case, including involving the Superintendent in January 2022. When it became clear that the Superintendent would not step in to resolve the issue, Ridgefield Park filed its petition of appeal in February 2022. Thus, I **CONCLUDE** that Ridgefield's claim against Little Ferry is not time-barred.

Sending-Receiving Agreements

Through N.J.S.A. 18A:38–19, New Jersey school districts may enter into sending-receiving agreements whereby the sending district sends its students to the receiving district's schools, N.J.S.A. 18A:38– 8, in return for a tuition payment set by the receiving district that cannot exceed the "actual cost" of the students enrolled. Ibid. Further, regulations govern the Commissioner's calculation of the "actual cost" per pupil. N.J.A.C. 6A:23A–17.1(b).

To allow for appropriate budgeting, the sending and receiving districts must execute a yearly written contract setting the tentative tuition charge, which cannot exceed "the receiving district board of education's 'estimated cost per student' for the ensuing school year . . . multiplied by the estimated average daily enrollment of students expected to be received during the ensuing school year." N.J.A.C. 6A:23A-

17.1(f). Indeed, the receiving district calculates the estimated cost per pupil with an appropriate supporting schedule. N.J.A.C. 6A:23-17.1(f)(1).

Under N.J.A.C. 6A:23A-17.1(f), receiving school districts have differing obligations for overpayment and underpayment of tuition charges compared to the actual certified cost per student. When the Commissioner determines that the tentative tuition charge under the contract exceeds the actual cost per student, the "receiving district board of education *shall* return to the sending district board of education . . . the amount by which the tentative charge exceeded the actual charge." N.J.A.C. 6A:23A-17.1(f)(6) (emphasis added).

However, when the Commissioner determines that the tentative tuition charge under the contract was less than the actual cost per student, the "receiving district board of education *may* charge the sending district board of education *all or part* of the amount owed by the sending district board of education." N.J.A.C. 6A:23A-17.1(f)(7) (emphasis added). In other words, an overpayment by the sending district must be returned to it by the receiving district, but an underpayment request is not mandatory. The parties could not contract otherwise when action is compulsory under a regulation.

Notably, the decision cited by Judge Bass, addressing unenforceable tuition contract provisions, involved *overpayments* by the sending district that the receiving district refused to reimburse. See, Mountainside Bd. of Educ. v. Berkeley Heights Bd. of Educ., OAL Dkt. No. EDU 09700-06, Initial Decision (July 20, 2007), adopted, Comm'r (January 17, 2008), http://njlaw.rutgers.edu/collections/oal/, affirmed 2010 N.J. Super. Unpub. LEXIS 545 (App. Div. 2010). Indeed, the parties sending-receiving agreement set a *maximum* tuition rate without consideration of the Commissioner's actual tuition cost determination and the mandatory overpayment reimbursement requirement. Ibid. (emphasis added). In the last case between these parties, Judge Bass concluded, and the Commissioner agreed, that Ridgefield Park had the right to demand the total certified tuition cost where the parties could not resolve the terms of the sending-receiving agreement.

To be sure, Ridgefield Park has no obligation to accept a lower tuition payment than the State-certified rate in a sending-receiving contract, even if it did so in the past. Instead, the regulation allows Ridgefield Park to demand the State-certified per pupil tuition cost in its contract. Yet, Judge Bass had no agreement like the 2018-2019 contract wherein Ridgefield Park, aware of the ability to demand the actual cost, chose not to. Indeed, her decision addressed Ridgefield Park's authority to insist upon the State-certified rate should it wish to include that provision in the sending-receiving agreement. Significantly, the regulation only allows districts to negotiate a potential underpayment of the difference between the anticipated and actual tuition costs once the Commissioner determines that rate. Thus, I **CONCLUDE** that because this case involves an underpayment, in line with the parties' prior history, the parties' contract provision does not contradict N.J.A.C. 6A:23A-17.1(f)(7), nor is it unenforceable.

Notably, a court has no right "to rewrite the contract merely because one might conclude that it might well have been functionally desirable to draft it differently." Levison v. Weintraub, 215 N.J. Super. 273, 276, (App. Div.), certif. denied, 107 N.J. 650, (1987); Brick Tp. Mun. Util. Auth. v. Diversified R.B. & T., 171 N.J. Super. 397, 402, (App.Div.1979). Nor may the courts remake a better contract for the parties than they have seen fit to enter or to alter it for the benefit of one party and to the detriment of the other. James v. Federal Ins. Co., 5 N.J. 21, 24, (1950).

To determine the intention of the parties to a contract, the court must consider the relations of the parties, the attendant circumstances, and the objects they were trying to attain. Tessmar v. Grosner, 23 N.J. 193, 201, (1957). An agreement must be construed in the context of the circumstances under which it was entered, and it must be accorded a rational meaning in keeping with the express general purpose. Id.

While Ridgefield Park maintains an absolute right to demand the balance, despite its contract precluding adjustments, the Commissioner's Final Decision recognized that the parties could negotiate a lower rate than the actual cost per pupil. The only limit to the sending-receiving contracts relates to overpayments, not

underpayments. Had this been a case of overpayment by Little Ferry, Ridgefield Park would have to return the overpayment as that amount exceeds the statutory maximum. Yet, importantly, the parties did not experience that situation. Instead, the parties' sending-receiving agreements historically resulted in Little Ferry's underpayment of the State-certified actual cost to Ridgefield Park. Thus, the parties' tuition circumstances when entering the 2018-2019 contract were clear. Based on earlier sending-receiving agreements, Ridgefield Park was well aware it could negotiate language stating that it could seek such underpayments, but it did not in 2018-2019.

Here, equitable principles favor Little Ferry. Equitable considerations are appropriate in assessing governmental conduct, Skulski v. Nolan, 68 N.J. 179, 198 (1975), and in trying to prevent manifest injustice, Vogt v. Borough of Belmar, 14 N.J. 195, 205 (1954). The New Jersey Supreme Court has defined equitable estoppel as:

> The effect of the voluntary conduct of a party whereby he is absolutely precluded, both at law and in equity, from asserting rights which might otherwise have existed ..., as against another person, who has in good faith relied upon such conduct, and has been led to change his position for the worse. . . .
>
> [County of Morris v. Fauver, 153 N.J. 80, 104 (1998).]

The doctrine of equitable estopped is invoked when one party changes its position in reliance on the conduct of another party, and the repudiation of that conduct would prejudice the relying party. Amir v. D'Agostino, 328 N.J. Super. 141 (Ch. Div. 1998). The claiming party may rely on conduct, inaction, or representations of the actor. Miller v. Miller, 97 N.J. 154, 163 (1984). Further, the claiming party must show that the other party made the representation intentionally or under such circumstances that it would likely induce action. Ibid. Then, the claiming party must act in a way that is to their detriment. Id. (citing to Fidelity Union Trust Co. v. Essex Cty. Mortgage Co., 130 N.J. Eq. 351, 353 (E. & A.1941)).

Undeniably, Little Ferry did not anticipate or budget for the difference between the tentative cost and the State-certified actual cost for 2018-2019. Instead, Little Ferry relied upon the agreement's negotiated adjustment waiver. Although Ridgefield Park asserts that cost is irrelevant, it goes to Little Ferry's detrimental reliance on the contract's tuition payment provision when creating the budget for such costs. On the contrary, Ridgefield Park had no legitimate expectation of receiving such underpayments when it negotiated and agreed not to seek tuition adjustment payments. Significantly, Ridgefield Park argues it only learned that it might be able to claim such reimbursement after Judge Bass ruled in its favor in the earlier case. Certainly, Ridgefield Park knew its prior experience under these contracts or underpayments and that it had the right to demand the total tuition costs, having included this provision in an earlier agreement. Thus, I **CONCLUDE** that Little Ferry reasonably relied upon the negotiated contract provision for the 2018-2019 tuition, and Ridgefield Park may not now demand the State-certified tuition cost. As such, I **CONCLUDE** that Little Ferry is entitled to summary decision in its favor, and Ridgefield Park is not.

ORDER

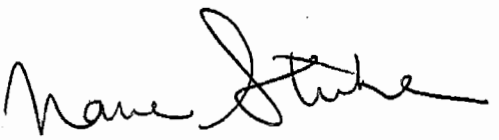
Given my findings of fact and conclusions of law, I **ORDER** that the Little Ferry Board of Education be **GRANTED** summary decision and that the Ridgefield Park Board of Education be **DENIED** summary decision. I further **ORDER** that Ridgefield Park Board of Education's petition be and is hereby **DISMISSED**.

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

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

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

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



February 7, 2023

DATE

NANCI G. STOKES, ALJ

Date Received at Agency: February 7, 2023

Date Mailed to Parties: February 7, 2023

ljb

DOCUMENTS RELIED ON

- Ridgefield Park's motion for summary decision, dated November 16, 2022
- Little Ferry's opposition to the motion, dated December 7, 2022
- Ridgefield Park's reply, dated December 19, 2022

118-23

New Jersey Commissioner of Education
Final Decision

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

Petitioner,

v.

Board of Education of the Borough of Bound Brook,
Somerset County,

Respondent.

Synopsis

The Board of Education of Piscataway (Piscataway) filed a petition contending that the Board of Education of Bound Brook (Bound Brook) is financially responsible for student O.W.'s attendance in Piscataway schools during the 2020–2021 school year. Bound Brook filed a motion for summary decision, asserting that Piscataway's petition was untimely filed. In this matter, O.W. was residing with his parent and attending school in Bound Brook in 2019, when he was removed by the New Jersey Department of Children and Families (DCF) and placed with his aunt, K.W., in Piscataway. O.W. continued to attend school in Bound Brook until the 2020-2021 school year, when his aunt enrolled him in school in Piscataway. During that year, Bound Brook ignored a tuition contract and invoices from Piscataway regarding O.W.'s educational costs. In December 2021 and January 2022, counsel for both boards exchanged a series of emails in which they continued to disagree about which board was responsible for O.W.'s tuition in 2020-2021. Piscataway filed the appeal in April 2022.

The ALJ found, *inter alia,* that: there are no material facts in dispute, and the matter is ripe for summary decision; because Bound Brook ignored Piscataway's tuition contract and invoices during the 2020-2021 school year, Piscataway should have realized that Bound Brook did not intend to pay for O.W.'s costs for that school year, yet the within petition of appeal was not filed until April 18, 2022; the 90-day limitations period in this case began to run at the end of the 2020-2021 school year, so any petition of appeal should have been filed by the end of September 2021; and Piscataway's argument that the matter of financial responsibility was still in dispute in the fall of 2021 and Bound Brook did not take final action until January 2022 is without merit. Accordingly, the ALJ determined that the petition was untimely pursuant to *N.J.A.C.* 6A:3-1.3 and granted Bound Brook's motion for summary decision.

Upon review, the Commissioner disagreed with the ALJ's findings and conclusion, and reversed the Initial Decision. In so doing, the Commissioner found, *inter alia,* that the petition was timely filed as, in other matters, the Commissioner has concluded that the 90-day limitations period begins to run when a petitioner is put on notice of a respondent's "firm position," which in this case did not occur until the exchange of emails in 2022. Further, the record demonstrates that Piscataway established a genuine issue of material fact; therefore, summary decision is inappropriate at this stage. Accordingly, the matter was remanded to the OAL for further proceedings consistent with this decision.

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

118-23
OAL Dkt. No. 03916-22
Agency Dkt. No. 82-4/22

New Jersey Commissioner of Education

Final Decision

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

Petitioner,

v.

Board of Education of the Borough of Bound Brook, Somerset County,

Respondent.

The record of this matter, the Initial Decision of the Office of Administrative Law (OAL), the exceptions filed by the petitioner pursuant to *N.J.A.C.* 1:1-18.4, and the respondent's reply thereto, have been reviewed and considered.

This matter involves the question of whether the Piscataway Board of Education (Piscataway) or the Bound Brook Board of Education (Bound Brook) is responsible for the costs of student O.W.'s attendance in a Piscataway school for the 2020-2021 school year. O.W. was residing with his parent and attending school in Bound Brook in May 2019, when he was removed by the New Jersey Department of Children and Families (DCF) and placed with his aunt, K.W., in Piscataway.[1] O.W. continued to attend school in Bound Brook until the 2020-2021 school year, when his aunt enrolled him in school in Piscataway. During that year,

[1] K.W.'s home was considered a resource family home pursuant to *N.J.S.A.* 30:4C-26.1.

Piscataway sent Bound Brook a tuition contract and periodic invoices, which Bound Brook ignored. In December 2021 and January 2022, counsel for both boards exchanged a series of emails regarding tuition, in which the parties continued to disagree about which board was responsible for O.W.'s costs.

In April 2022, Piscataway filed a petition of appeal, seeking an order that Bound Brook is financially responsible for the costs of O.W.'s attendance in Piscataway during the 2020-2021 school year. Following Bound Brook's motion to dismiss, which was converted to a motion for summary decision pursuant to *N.J.Ct.R.* 4:6-2,[2] the Administrative Law Judge (ALJ) determined that the petition was untimely pursuant to *N.J.A.C.* 6A:3-1.3. The ALJ found that Bound Brook ignored Piscataway's tuition contract and invoices during the 2020-2021 school year, such that Piscataway should have realized that Bound Brook did not intend to pay for O.W.'s costs. The ALJ concluded that, giving all favorable inferences to Piscataway, the 90-day limitations period began to run at the end of the 2020-2021 school year, and therefore any petition of appeal should have been filed by the end of September 2021; Piscataway did not file the petition of appeal until April 18, 2022. The ALJ rejected Piscataway's argument that the matter of financial responsibility was still in dispute in the fall of 2021 and that Bound Brook did not take final action until January 2022, finding that the facts suggest otherwise. Accordingly, the ALJ granted Piscataway's motion for summary decision and dismissed the petition.

In its exceptions, Piscataway argues that, in disputes between school districts arising from an ongoing course of dealing rather than a single discrete action, the Commissioner has framed the triggering event for the 90-day limitations period as when the parties are

[2] The Rules of Court are applicable to OAL proceedings pursuant to *N.J.A.C.* 1:1-1.3.

undeniably at an impasse. According to Piscataway, Bound Brook did not unequivocally refuse to pay for O.W.'s attendance until the exchange of emails between counsel in 2022, and any other events relied upon by the ALJ were insufficient to support a finding that the limitations period began to run earlier. Piscataway contends that it would be unfair to commence the limitations period on the last day of the school year when the regulation does not specify such a start date, and further submits that applying such strict timelines would discourage the informal resolution of these types of matters. Finally, Piscataway argues that, even if the petition was untimely, the limitations period should be relaxed because there was no clear notice to Piscataway that it had commenced running, and there would be no prejudice to Bound Brook.

In reply, Bound Brook argues that the ALJ correctly dismissed the petition as untimely based on the events that occurred during the 2020-2021 school year. According to Bound Brook, the emails between counsel in December 2021 and January 2022 should not reset the clock on the limitations period when Piscataway's counsel acknowledged that Bound Brook had already disagreed that it was responsible for O.W.'s tuition. Bound Brook contends that there is no reason to relax the 90-day limitations period and that doing so would run counter to the principles underlying the limitation.

Upon review, the Commissioner disagrees with the ALJ and finds that the petition of appeal was timely filed. In other matters, the Commissioner has concluded that the 90-day limitations period began to run when a petitioner was on notice of a respondent's "firm position." *Bd. of Educ. of the Twp. of Waterford, Camden Co. v. Bd. of Educ. of the Twp. of Hammonton, Atlantic Co.* and *Bd. Educ. of the Twp. of Folsom, Atlantic Co. v. Bd. of Educ. of the*

Twp. of Hammonton, Atlantic Co., Commissioner Decision No. 132-08 (decided Mar. 24, 2008); *see also Bd. of Educ. of the Borough of Mountainside, Union Co. v. Bd. of Educ. of the Twp. of Berkeley Heights, Union Co.*, Commissioner Decision No. 21-08 (decided January 17, 2008). While the ALJ relied heavily on the fact that Bound Brook ignored the tuition contract and invoices sent by Piscataway, the Commissioner concludes that Bound Brook's failure to respond is not sufficient to have notified Piscataway that Bound Brook was firm in its position that it was not responsible for O.W.'s tuition and costs, nor is the fact that the school year ended without any payment by Bound Brook. Neither of these non-events represents the communication of a firm position by Bound Brook to Piscataway.

Turning to the other potential triggering event asserted by Bound Brook, the enrollment of O.W. in Piscataway schools in September 2020 could not start the running of the limitations period since, at that time, Bound Brook had not stated its position regarding which party was financially responsible for O.W.'s education costs. Additionally, while Piscataway became aware in November 2020 that Bound Brook had not reported O.W. on its Application for State School Aid (ASSA), the certification of Piscataway's business administrator (BA) indicates that Bound Brook had not reported O.W. because Bound Brook believed that O.W.'s aunt had adopted him. Contrary to Bound Book's suggestion that the BA's certification confirms that Bound Brook had disavowed financial responsibility in November 2020, it is clear to the Commissioner that Piscataway was under the impression that Bound Book's disavowal was conditioned on factual misinformation that Piscataway later corrected. It was not unreasonable for Piscataway to believe that, once Bound Brook had received the updated

information showing that O.W.'s aunt had not adopted him and that the kinship legal guardianship had not yet been finalized, Bound Brook would begin making tuition payments.

The parties' briefs on summary decision, as well as their exceptions, also addressed the merits of Piscataway's claim for tuition. However, a review of the record demonstrates that Piscataway has established a genuine issue of material fact regarding DCF's involvement with O.W.'s placement, and therefore summary decision on this issue is inappropriate at this stage.

Accordingly, the Initial Decision is reversed and Bound Brook's motion for summary decision is denied. This matter is remanded to the OAL for further proceedings consistent with this decision.

IT IS SO ORDERED.[3]

Angelica Allen-McMillan, J.D.S.
ACTING COMMISSIONER OF EDUCATION

Date of Decision: April 20, 2023
Date of Mailing: April 21, 2023

[3] This decision may be appealed to the Appellate Division of the Superior Court pursuant to *N.J.S.A.* 18A:6-9.1. Under *N.J.Ct.R.* 2:4-1(b), a notice of appeal must be filed with the Appellate Division within 45 days from the date of mailing of this decision.

State of New Jersey
OFFICE OF ADMINISTRATIVE LAW

INITIAL DECISION
SUMMARY DECISION
OAL DKT. NO. EDU 03916-22
AGENCY DKT. 82-4/22

TOWNSHIP OF PISCATAWAY
BOARD OF EDUCATION,
MIDDLESEX COUNTY,
Petitioner,
_____v.
BOROUGH OF BOUND BROOK
BOARD OF EDUCATION,
SOMERSET COUNTY,
Respondent.

David B. Rubin, Esq., for petitioner

Kyle J. Trent, Esq., for respondent (Apruzzese, McDermott, Mastro & Murphy, attorneys)

Record Closed: December 9, 2022 Decided: January 31, 2023

BEFORE **SUSAN M. SCAROLA**, ALJ (Ret., on recall):

STATEMENT OF THE CASE

The petitioner, Township of Piscataway Board of Education, Middlesex County (Piscataway), contends that the respondent, Borough of Bound Brook Board of Education, Somerset County (Bound Brook), is financially responsible for student O.W.'s attendance at school in Piscataway during the 2020–2021 school year under N.J.S.A. 18A:7B-12(a)(2). That provision states that, for school funding purposes, if a child is placed in a resource family home, "the district of residence shall be the present district of residence of the parent or guardian with whom the child lived prior to the most recent placement in a resource family home."

Piscataway contends that, under N.J.S.A. 18A:7B-12(a)(2), Bound Brook was O.W.'s "district of residence" for the 2020–2021 school year because he lived with a parent in Bound Brook prior to his placement in a resource home in Piscataway in May 2019, and Bound Brook must pay to Piscataway the cost of O.W.'s education for the 2020–2021 school year. In response, Bound Brook has moved to dismiss the petition as untimely.

PROCEDURAL HISTORY

On April 18, 2022, Piscataway filed a petition of appeal with the Commissioner of Education.

In response, on May 6, 2022, Bound Brook filed a motion to dismiss in lieu of an answer pursuant to N.J.A.C. 6A:3-1.5(g). The Commissioner transmitted the matter to the Office of Administrative Law (OAL), where it was filed on May 17, 2022. N.J.S.A. 52:14B-1 to -15; N.J.S.A. 52:14F-1 to -13.

On September 28, 2022, Piscataway filed a brief in opposition to Bound Brook's motion to dismiss, and included with its brief a certification from David Oliveira, Piscataway's school business administrator/board secretary. By letter dated October 28, 2022, the parties were notified that, pursuant to R. 4:6-2, and as urged by Bound Brook, Bound Brook's motion to dismiss would be converted to a motion for summary decision,

because Oliveira's certification in response to Bound Brook's motion included facts outside Piscataway's petition.

On December 9, 2022, Piscataway submitted a brief in opposition to Bound Brook's motion for summary decision and included a supplemental certification from Oliveira and a certification from another Piscataway employee, Stephanie Verbarg.

FACTUAL DISCUSSION

For purposes of Bound Brook's motion, the following facts submitted by Piscataway are not in dispute. O.W. is a student who was residing with a parent and attending school in Bound Brook when, in May 2019, he was removed from his home and placed by the New Jersey Division of Child Protection & Permanency, Department of Children & Families (DCF), with his aunt, K.W., in a resource family home in Piscataway.[1] Petition, ¶¶ 1–2. O.W. continued to attend school in Bound Brook for the remainder of the 2018–2019 school year and for the 2019–2020 school year. Id. at ¶ 3. However, his aunt enrolled him in school in Piscataway for the 2020–2021 school year. Ibid. On or about June 29, 2021, O.W.'s aunt was granted kinship legal guardianship (KLG) over O.W. Id. at ¶ 4.

The Somerset County executive county superintendent has determined that Piscataway was responsible for O.W.'s education from the date of entry of the KLG order, but that determination did not address financial responsibility for O.W.'s enrollment in Piscataway during the 2020–2021 school year.[2] Id. at ¶ 5. On March 23, 2022, Piscataway applied to the Somerset County executive county superintendent for a determination that pursuant to N.J.S.A. 18A:7B-12(a)(2), Bound Brook was financially responsible for O.W.'s enrollment in Piscataway during the 2020–2021 school year; that

[1] Under the laws governing dependent and neglected children, "resource family home" is a "private residence[] wherein any child in the care, custody, or guardianship of the Department of Children and Families may be placed by the department[.]" N.J.S.A. 30:4C-26.1.

[2] It is unclear from the petition when the executive county superintendent made this determination; that is, it is unknown whether this determination was prior to or part of the determination made by the executive county superintendent in response to Piscataway's March 23, 2022, application. The facts concerning determinations made by the Somerset County Executive County Superintendent are recited here in the same order as they were presented by Piscataway in its petition.

application has since been transferred to the Middlesex County executive county superintendent of schools, where it is currently pending resolution. Id. at ¶ 6.

In an April 14, 2022, response to Piscataway's application, Bound Brook asserted that executive county superintendents of school have no jurisdiction to resolve disputes over financial responsibility for the education of students residing in resource family homes, and that such disputes must be resolved, in the first instance, by the Office of School Facilities and Finance on application pursuant to N.J.A.C. 6A:23A-19.2. Id. at ¶ 7. Piscataway disputes Bound Brook's contention regarding jurisdiction and, on April 18, 2022, appealed to the Commissioner's authority over all disputes arising under the school laws for a determination that Bound Brook is responsible for the costs of O.W.'s attendance at school in Piscataway during the 2020–2021 school year. Id. at ¶ 9.

In response, on May 6, 2022, Bound Brook filed a motion to dismiss in lieu of an answer pursuant to N.J.A.C. 6A:3-1.5(g). According to Bound Brook, even assuming that all of the allegations set forth in Piscataway's petition are true, the matter must be dismissed as untimely under N.J.A.C. 6A:3-1.3(i). The 90-day rule, as N.J.A.C. 6A:3-1.3(i) is commonly known, requires a party to "file a petition no later than the 90th day from the date of receipt of the notice of a final order, ruling, or other action by the district board of education, individual party, or agency, that is the subject of the requested contested case hearing." Bound Brook contends that Piscataway should have first filed a complaint with the Office of School Facilities and Finance in accordance with the residency-determination rules at N.J.A.C. 6A:23A-19.1 to -19.3, and that Piscataway filed this petition before the Commissioner on April 18, 2022, in contravention of the 90-day rule because it was filed approximately 594 days after O.W.'s aunt enrolled him in Piscataway.

On September 28, 2022, Piscataway filed a brief in opposition to Bound Brook's motion to dismiss, and included with its brief a certification from David Oliveira, Piscataway's school business administrator/board secretary. Oliveira certified to the following supplemental facts not contained in Piscataway's petition: When, in September 2020, K.W. enrolled O.W. in Piscataway for the 2020–2021 school year, she provided Piscataway with certain paperwork, including a letter from the DCF advising O.W.'s

school principal in Bound Brook that O.W. had been removed from his parental home and placed in a resource family home with K.W. as of May 20, 2019, and that O.W. "will remain in his or her current school—Bound Brook Borough." Oliveira Cert., ¶¶ 2–3. The undated letter bears a fax date stamp of September 11, 2019. Id. at ¶ 3. K.W. also presented a letter from the DCF dated May 21, 2019, authorizing her to register O.W. for school. Id. at ¶ 4.

In October 2020, Piscataway's 2020–2021 electronic Application for State School Aid (ASSA) included O.W. as being the financial responsibility of Bound Brook; however, Piscataway received an error message because Bound Brook's ASSA had not included O.W. as being Bound Brook's responsibility. Id. at ¶ 5. In November or December 2020, Piscataway contacted Bound Brook, which according to Oliveira thought that K.W., a Piscataway resident, had custody of O.W. and that, as such, Piscataway was financially responsible for him for the 2020–2021 school year. Id. at ¶ 6.

Piscataway spoke with K.W., who informed the district that she was seeking KLG status, and that the process was ongoing. Ibid. On December 2, 2020, Piscataway, in turn, informed Bound Brook of the ongoing guardianship process. Ibid. In particular, an accountant for Piscataway sent an email to Bound Brook about the guardianship situation and stated that "[b]ased on this information, as of 10/15/20 [O.W.] is still being sent from Bound Brook, until this process is finalized. Can you adjust your ASSA to reflect Bound Brook sending [O.W.] to Piscataway." Id. at Ex. C. The accountant then advised Bound Brook that "[a]s soon as the court order has finalized the [guardianship] paperwork, we will notify you of the change." Ibid. According to Oliveira, he "alerted the Department [of Education's] Middlesex County Office to the issue in December 2020, in the hope they could straighten it out informally, but that never happened." Id. at ¶ 6.

Oliveira further certified that "[o]ver the course of the 2020–2021 school year, my office sent Bound Brook a tuition contract and periodic invoices for tuition for O.W., which were ignored." Id. at ¶ 7.

However, "[t]he matter remained in limbo between our two districts going into the fall of 2021," when on November 15, 2021, Piscataway contacted the DCF for information

about O.W.'s district of residence. Ibid.; Ex. D. In response, on November 19, 2021, the DCF provided Piscataway with a court order appointing K.W. as O.W.'s KLG on June 29, 2021. Ibid.

Beginning on December 18, 2021, Piscataway's counsel, David Rubin, and Bound Brook's then-counsel, Robert Merryman, exchanged a series of emails about O.W.'s district of residence for the 2020–2021 school year. In the first email, Rubin stated that Bound Brook was responsible and acknowledged that "Bound Brook has indicated it disagrees" and that "my understanding is that this disagreement goes back to last school year." Id. at Ex. E.

On December 22, 2021, Rubin informed Merryman that he reviewed the KLG order and that he accepted Piscataway's responsibility for O.W. after the order was entered, but not for the 2020–2021 school year, and asked Merryman if "Bound Brook is still contesting its financial responsibility for that period of time?" Ibid. Merryman eventually responded on January 27, 2022, advising Rubin that because it was unknown where O.W.'s parent lived when he was removed from the home, "Bound Brook District is not prepared to accept financial responsibility for the child's education in Piscataway for 2020–21." Ibid.

On March 22, 2022, Rubin reached out to the DCF about where O.W.'s parent(s) lived during the 2020–2021 school year, and a DCF representative informed him that O.W.'s mother had lived in Bound Brook throughout the DCF's involvement and was still living in that town when the DCF closed its file on O.W. in July 2021. Id. at Ex. F.

Based on these facts, Piscataway argues in opposition to Bound Brook's motion that the 90-day rule does not bar its petition and that Bound Brook was financially responsible for O.W.'s attendance at school in Piscataway for the 2020–2021 school year pursuant to N.J.S.A. 18A:7B-12(a)(2) since Bound Brook was O.W.'s "district of residence" for the 2020–2021 school year.

As to the timeliness issue, Piscataway maintains that, although Piscataway first approached Bound Brook in December 2020 about financial responsibility for O.W.'s

education, and although "there were further communications between the parties from time to time over the rest of [the 2020–2021] school year, . . . [t]he earliest evidence of a 'final . . . action'" for purposes of N.J.A.C. 6A:3-1.3(i) "was the exchange of emails between the parties' counsel in December 2021 and January 2022, after Piscataway was first made aware in November 2021 that the aunt had secured [KLG] status in June 2021."

According to Piscataway, the limitations period most reasonably started to run after Merryman's January 27, 2022, email in which he stated that Bound Brook "is not prepared to accept financial responsibility for [O.W.'s] education in Piscataway for 2020–2021." And because Piscataway filed its petition on April 18, 2022, such filing was timely, that is, within ninety days of "final action" by Bound Brook regarding financial responsibility for O.W. for the 2020–2021 school year.

Moreover, Piscataway contends that, contrary to Bound Brook's position, it did not have to first appeal to the Office of School Facilities and Finance pursuant to N.J.A.C. 6A:23A-19.2 because that provision does not, on its face, refer to disputes regarding the district of residence of a child living in a resource family home, such as O.W.

Finally, Piscataway argues that, even if its petition was untimely, the 90-day rule should be relaxed for good cause because "[t]here is no evidence that Bound Brook was ever lulled into believing that Piscataway had dropped its pursuit of tuition for the 2020–2021 school year," and "[g]iven the confusion over the aunt's guardianship status during that school year, it's apparent that the material facts bearing on Bound Brook's responsibility were continuing to evolve well after O.W. started attending school in Piscataway in September 2020." In Piscataway's view, "there is no prejudice to Bound Brook by allowing Piscataway its day in court."

On October 11, 2022, Bound Brook submitted a brief, arguing that, because Piscataway, through Oliveira's certification, provided facts outside the petition, Bound Brook's motion to dismiss should be converted to a motion for summary decision and that the additional facts, which Bound Brook does not dispute, not only strengthen Bound Brook's 90-day-rule argument, but also show that Piscataway was financially responsible for O.W. for the 2020–2021 school year.

In regard to the latter argument, Bound Brook relies on N.J.S.A. 30:4C-26b, which authorizes the DCF to determine the school a child should attend while placed in a resource family home. According to Bound Brook, under that statute, only the DCF (or a court) could have changed O.W.'s school placement from Bound Brook to Piscataway, and by accepting O.W. in the absence of the DCF or a court order placing O.W. in Piscataway's schools for the 2020–2021 school year, Piscataway "assume[d] responsibility for the cost of same, and cannot enroll a student in direct contravention to the law and then seek to impose the cost on another school district despite its disregard for the law to the financial detriment of the other school district."

By letter dated October 28, 2022, the parties were advised that, pursuant to R. 4:6-2, and as argued by Bound Brook, Bound Brook's motion to dismiss would be converted to a motion for summary decision, because Oliveira's certification in response to Bound Brook's motion included facts outside Piscataway's petition. Under this rule, if, on a motion to dismiss for failure to state a claim upon which relief may be granted (like Bound Brook's motion to dismiss on timeliness grounds),

> matters outside the pleading are presented to and not excluded by the court, the motion shall be treated as one for summary judgment and disposed of as provided by R. 4:46, and all parties shall be given reasonable notice of the court's intention to treat the motion as one for summary judgment and a reasonable opportunity to present all material pertinent to such a motion.
>
> [R. 4:6-2; see also Roa v. Roa, 200 N.J. 555, 562 (2010) (concluding that because a motion to dismiss a complaint as untimely "was based upon evidence, including certifications, outside of the pleadings," the Court "view[ed] the record in a light most favorable to the non-moving party, which is the standard applicable to summary judgment").]

In accordance with that rule, Piscataway was given an opportunity to oppose Bound Brook's motion for summary decision.

On December 9, 2022, Piscataway submitted a brief in opposition to Bound Brook's motion for summary decision and included a supplemental certification from Oliveira and a certification from another Piscataway employee, Stephanie Verbarg. In its brief, Piscataway again argued against the application of the 90-day rule, reiterating that "Piscataway would not have reasonably considered this matter as having reached an impasse until after the email exchanges between [counsel for each district] clearly framing the issues and our clients' positions concerning them."

As for the substantive issue—which district is financially responsible for O.W.'s schooling during the 2020–2021 school year—Piscataway again contends that N.J.S.A. 18A:7B-12(a)(2) applies, such that Bound Brook is responsible for O.W.'s tuition because Bound Brook was where O.W.'s mother lived when the DCF placed O.W. in a resource family home in Piscataway. And as for Bound Brook's contention that, under N.J.S.A. 30:4C-26b, only the DCF could change O.W.'s placement from Bound Brook to Piscataway, and that in the absence of such action by the DCF Piscataway "assume[d] responsibility for the cost of same, and cannot enroll a student in direct contravention to the law and then seek to impose the cost on another school district despite its disregard for the law to the financial detriment of the other school district," Piscataway counters with Verbarg's certification, in which she attests that O.W.'s aunt informed Verbarg that the DCF did, in fact, direct the aunt to change O.W.'s enrollment from Bound Brook to Piscataway for the 2020–2021 school year. Regardless, according to Piscataway, N.J.S.A. 18A:7B-12(a)(2), which cross-references N.J.S.A. 30:4C-26b, dispositively designates Bound Brook as the district of residence for funding purposes for O.W. during the 2020–2021 school year.

LEGAL ANALYSIS

Standards for summary decision

Under the Uniform Administrative Procedure Rules, N.J.A.C. 1:1-1.1 to -21.6, "[a] party may move for summary decision upon all or any of the substantive issues in a contested case." N.J.A.C. 1:1-12.5(a). Such motion "shall be served with briefs and with or without supporting affidavits" and "[t]he decision sought may be rendered if the papers

and discovery which have been filed, together with the affidavits, if any, show that there is no genuine issue as to any material fact challenged and that the moving party is entitled to prevail as a matter of law." N.J.A.C. 1:1-12.5(b). When the motion "is made and supported, an adverse party in order to prevail must by responding affidavit set forth specific facts showing that there is a genuine issue which can only be determined in an evidentiary proceeding." Ibid.

Bound Brook does not dispute any of the facts presented by Piscataway. As such, the question is whether Bound Brook, as the moving party, is entitled to prevail as a matter of law. This first depends on the threshold issue regarding the timeliness of Piscataway's petition.

The 90-day rule

Under the "rules of procedure for the filing of petitions with the Commissioner of Education to hear and decide controversies and disputes arising under school laws," N.J.A.C. 6A:3-1.1 to -1.17, "[t]he petitioner shall file a petition no later than the 90th day from the date of receipt of the notice of a final order, ruling, or other action by the district board of education, individual party, or agency, that is the subject of the requested contested case hearing." N.J.A.C. 6A:3-1.3(i).

Here, Bound Brook asserts that Piscataway's petition is untimely under the 90-day rule, and, therefore, should be dismissed. As the Supreme Court has explained, the 90-day rule serves the dual purposes of (1) "stimulat[ing] litigants to pursue a right of action within a reasonable time so that the opposing party may have a fair opportunity to defend, thus preventing the litigation of stale claims," and (2) "penaliz[ing] dilatoriness and serv[ing] as a measure of repose by giving security and stability to human affairs." Kaprow v. Bd. of Educ. of Berkeley Twp., 131 N.J. 572, 587 (1993) (citations and quotations omitted). Importantly, for purposes of N.J.A.C. 6A:3-1.3(i), the limitations period begins when a party is "alerted to the existence of facts that may equate in law with . . . a cause of action." Ibid. (citing Burd v. New Jersey Tel. Co., 76 N.J. 284, 291 (1978)).

The 90-day rule may be "relaxed or dispensed with . . . in any case where a strict adherence thereto may be deemed inappropriate or unnecessary or may result in injustice," or if there is "the presence of a substantial constitutional issue or other issue of fundamental public interest beyond that of concern only to the parties themselves." N.J.A.C. 6A:3-1.16; Balwierczak v. Bd. of Educ. of Berkeley Heights, 1999 N.J. AGEN LEXIS 1367 (December 8, 1999).

Timeliness of Piscataway's petition

Piscataway's petition should be dismissed as untimely because the board was alerted to the existence of facts that equated with a cause of action during the 2020–2021 school year yet did not file its petition seeking tuition from Bound Brook for O.W.'s school attendance in Piscataway for the 2020–2021 school year until April 18, 2022. While it is difficult to pinpoint the applicable limitations period in this matter, several instances of inaction by Bound Brook in response to actions by Piscataway throughout the 2020–2021 school year should have indicated to Piscataway that Bound Brook did not intend to pay for O.W. and stimulated Piscataway to file a petition at some point during the 2020–2021 school year, or at some point soon thereafter.

The first indication of Bound Brook's renunciation of responsibility for the costs of O.W.'s education in Piscataway was the fact that Bound Brook did not include O.W. as a student sent to Piscataway in its 2020–2021 ASSA filing. And after Piscataway alerted Bound Brook about K.W.'s ongoing, yet unfinalized, pursuit of guardianship of O.W., stating in the December 2, 2020, email that "[b]ased on this information, as of 10/15/20 [O.W.] is still being sent from Bound Brook, until this process is finalized. Can you adjust your ASSA to reflect Bound Brook sending [O.W.] to Piscataway," it appears that Piscataway's request went unanswered by Bound Brook. This was yet another indication that Bound Brook was disinclined to pay for O.W.'s education in Piscataway.

However, the most obvious indication of Bound Brook's position and what should have served as the impetus for Piscataway to promptly file a petition against Bound Brook was the fact that "[o]ver the course of the 2020–2021 school year, [Piscataway] sent Bound Brook a tuition contract and periodic invoices for tuition for O.W., which were

ignored." At some point during the 2020–2021 school, after Bound Brook's silence or inaction in response to Piscataway's attempts at getting Bound Brook to pay tuition for O.W., Piscataway should have realized that Bound Brook did not intend to pay for O.W. and should have pursued legal action against Bound Brook.

The exact date by which Piscataway should have filed a petition is uncertain, particularly because Oliveira did not certify to or clarify the dates on which Piscataway sent the tuition contract or invoices to Bound Brook. However, even giving all favorable inferences to Piscataway, and setting the start date for the 90-day period at the last day of the 2020–2021 school year, or June 30, 2021, Piscataway would have had to file its petition by the end of September 2021. That did not happen. And although Piscataway advised Bound Brook on December 2, 2020, that "[a]s soon as the court order has finalized the [guardianship] paperwork, we will notify you of the change," Piscataway waited until November 2021 to inquire with the DCF about K.W.'s guardianship status (which was finalized on June 29, 2021), and then revisited with Bound Brook the issue of financial responsibility for the 2020–2021 school year.

Although Piscataway argues that "[t]he matter [of financial responsibility] remained in limbo between the two districts going into the fall of 2021," and that Bound Brook did not take "final action" until January 2022, the facts suggest otherwise. Collectively, Bound Brook's 2020–2021 ASSA filing, Bound Brook's inaction in amending its ASSA filing after Piscataway asked Bound Brook to do so in the December 2, 2020, email, and Bound Brook's inaction when sent a tuition contract and numerous invoices during the 2020–2021 school year alerted Piscataway that Bound Brook was not going to pay O.W.'s tuition for the 2020–2021 school year and should have spurred Piscataway to file a petition against Bound Brook at some point during the 2020–2021 school year, or ninety days thereafter.[3] April 18, 2022—by any measure—was too late.[4]

[3] In this regard, such petition could have been filed at any point with the Commissioner, who has jurisdiction over all matters arising under the school laws. N.J.S.A. 18A:6-9.

[4] That Piscataway first sought redress through an executive county superintendent also does not save Piscataway from the 90-day rule, since Piscataway appealed to that authority only a few weeks before filing a petition with the Commissioner.

Piscataway unconvincingly argues that, in a dispute between school districts, the 90-day period does not begin to run until there is a "firm" disagreement or an "undeniable impasse," citing to Commissioner decisions in Bd. of Educ. of Mountainside v. Bd. of Educ. of Berkeley Heights, 2008 N.J. AGEN LEXIS 270 (January 17, 2008), aff'd, 2010 N.J. Super. Unpub. LEXIS 545 (March 15, 2010), and Bd. of Educ. of Waterford v. Bd. of Educ. of Hammonton, 2008 N.J. AGEN LEXIS 261 (March 24, 2008), and that Piscataway and Bound Brook were not undeniably at an impasse until January 2022. Bound Brook's inaction in the face of Piscataway's persistent attempts to get Bound Brook to accept financial responsibility for O.W. throughout the 2020–2021 school year suggests otherwise. Piscataway was certainly firm in its position by sending a tuition contract and invoices to Bound Brook that it wanted Bound Brook to be responsible for O.W., yet it declined or neglected to pursue legal action within a reasonable time after its communications went unanswered.

Finally, relaxation of the 90-day rule is not appropriate in this case because Piscataway knew it had a cause of action at some point during or shortly after the 2020–2021 school year but sat on its rights, and because there is no "substantial constitutional issue or other issue of fundamental public interest beyond that of concern only to the parties themselves." While not to minimize the importance of a district of residence's orderly payment of tuition for a student's attendance in another school district when required by law, the present dispute is between two school districts over the costs of educating one child for one school year.

Contrary to Piscataway's argument that relaxation is appropriate because "[t]here is no evidence that Bound Brook was ever lulled into believing that Piscataway had dropped its pursuit of tuition for the 2020–2021 school year," Bound Brook could have reasonably concluded that Piscataway would not seek legal recourse when, after ignoring the tuition contract and invoices throughout the 2020–2021 school year, Bound Brook did not hear anything about the tuition issue again until December 2021. Accordingly, Bound Brook's motion to dismiss Piscataway's petition as untimely should be granted.

CONCLUSION

Based on the uncontested facts presented by both districts, Bound Brook's motion to dismiss Piscataway's petition as untimely is granted.

ORDER

I hereby **ORDER** that Bound Brook's motion for summary decision is **GRANTED**. Piscataway's petition shall be **DISMISSED** as untimely filed.

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

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

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

January 31, 2023
DATE

Susan Scarola
SUSAN M. SCAROLA, ALJ (Ret., on recall)

Date Received at Agency: _____

Date Mailed to Parties: _____

SMS/nn

APPENDIX

WITNESSES

For petitioner:

None

For respondent:

None

EXHIBITS

For petitioner:

Briefs

For respondent:

Brief

119-23

New Jersey Commissioner of Education

Final Decision

V.P., on behalf of minor child, M.P.,

Petitioner,

v.

Board of Education of the Borough of Midland Park, Bergen County,

Respondent.

Synopsis

Pro se petitioner challenged the respondent Board's alleged failure to provide information regarding his child's health on December 5, 2022, its alleged failure to provide him with a protocol for addressing access to his son during future emergency situations, and the Board's December 8, 2022, decision to bar V.P. from the campus of Midland Park High School (MPHS). In this case, M.P.'s parents, V.P. and A.Z., entered into a Marriage Settlement Agreement (MSA) upon the dissolution of their marriage; the MSA designates alternate "parenting days" when V.P. or A.Z. are responsible for M.P.'s care, including drop-off and pick-up of M.P. at the high school. The Board asserted that December 5, 2022, was a parenting day for A.Z., and that petitioner's inappropriate and threatening behavior at the school while attempting to pick up his child justified the actions taken by the Board to restrict petitioner's access to the school. The petitioner filed a motion for emergent relief, and a hearing was held via Zoom on December 21, 2022.

The ALJ found, *inter alia*, that: *N.J.A.C.* 6A:3-1.6(b) sets forth the standards governing motions for emergent relief and instructs that parties seeking such relief must meet all of the four standards enunciated in *Crowe v. DeGioia,* 90 *N.J.* 126 (1982); petitioner has failed to meet all four of the required standards for emergent relief; further, the relief sought by petitioner in his appeal has already been addressed through the Board's actions; specifically, petitioner's request for a protocol regarding access to his son during future emergencies, as well as assurances that petitioner will receive information regarding his son, have been addressed through letters from the superintendent; and the superintendent's decision to bar petitioner from the school was consistent with District Policy 9150 regarding school visitors, as the weight of the evidence demonstrated that petitioner behaved inappropriately on December 5, 2022. The ALJ concluded that petitioner's requested relief has been satisfied.

Upon review, the Commissioner concurred with the ALJ's findings and conclusion in this matter. Further, the Commissioner found that the decision to bar petitioner from the district's schools was not arbitrary, capricious, or unreasonable. Accordingly, the Initial Decision of the OAL was adopted as the final decision in this case, and the petition was dismissed.

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

119-23
OAL Dkt. No. 11278-22
Agency Dkt. No. 362-12/22

New Jersey Commissioner of Education

Final Decision

V.P., on behalf of minor child, M.P.,

Petitioner,

v.

Board of Education of the Borough of Midland Park, Bergen County,

Respondent.

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

This matter stems from an incident that occurred on December 5, 2022. Petitioner's child reported a headache to the school nurse and petitioner attempted to pick his child up from school, even though a Marriage Settlement Agreement (MSA) between petitioner and his ex-wife designated December 5th as the mother's parenting day, rather than petitioner's. School staff reported that petitioner behaved inappropriately at the school, using vulgar language and acting aggressively. Thereafter, the district's superintendent informed petitioner that he could not visit any of the district's schools for any reason without her express written permission, pursuant to Midland Park Board of Education (Board) Policy 9150. A subsequent letter from the superintendent clarified that petitioner could seek the superintendent's permission to visit school in case of emergency, and that for routine drop-offs and pick-ups,

petitioner should use the end of the driveway or a nearby municipal parking lot. Petitioner appealed and sought emergent relief, which was denied.

The Administrative Law Judge (ALJ) concluded that petitioner's request for protocols had already been addressed through the superintendent's letters, which also provided the requested assurances that petitioner would receive information regarding his son. The ALJ further concluded that the superintendent's decision to bar petitioner from the district's schools was consistent with district policy, noting that petitioner's testimony was not credible, and that the weight of the evidence demonstrated that petitioner had behaved inappropriately.

Upon review, the Commissioner concurs with the Administrative Law Judge (ALJ) that the Board, through its superintendent, has provided the protocols and assurances sought by petitioner in his petition of appeal.[1] The Commissioner also finds that the decision to bar petitioner from the district was not arbitrary, capricious, or unreasonable.

Accordingly, the Initial Decision is adopted as the final decision in this matter, and the petition of appeal is hereby dismissed.

IT IS SO ORDERED.[2]

Angelica Allen-McMillan, Ed.D.
ACTING COMMISSIONER OF EDUCATION

Date of Decision: April 20, 2023
Date of Mailing: April 21, 2023

[1] The Commissioner also agrees with the ALJ that, to the extent that more specificity regarding the definition of an emergency in the MSA is at issue, that is a matter for petitioner and the child's mother to resolve between themselves or through proceedings in the Superior Court.

[2] This decision may be appealed to the Appellate Division of the Superior Court pursuant to *N.J.S.A.* 18A:6-9.1. Under *N.J.Ct.R.* 2:4-1(b), a notice of appeal must be filed with the Appellate Division within 45 days from the date of mailing of this decision.

State of New Jersey
OFFICE OF ADMINISTRATIVE LAW

INITIAL DECISION
OAL DKT. NO. EDU 11278-22
AGENCY DKT. NO. 362-12/22

V.P., ON BEHALF OF MINOR CHILD, M.P.,
Petitioner,
v.
BOARD OF EDUCATION OF THE BOROUGH OF MIDLAND PARK, BERGEN COUNTY,
Respondent.

V.P., petitioner, pro se

Stephen R. Fogarty, Esq., for Respondent (Fogarty & Hara, attorneys)

Record Closed: January 26, 2023 Decided: February 8, 2023

BEFORE: **JOHN P. SCOLLO,** ALJ:

STATEMENT OF THE CASE

Petitioner, V.P. challenges the Board of Education's alleged failure to give him information about his child's health on December 5, 2022, its alleged failure to provide him with a protocol for addressing access to his son during future emergency situations, and the Board of Education's December 8, 2022 decision to bar V.P. from the campus of Midland Park High School.

PROCEDURAL HISTORY

On or about December 15, 2022, the Petitioner, V.P., filed with the New Jersey Department of Education a Petition of Appeal and a Motion for Emergent Relief. Subsequently, V.P. supplied exhibits. On December 15, 2022, the Office of Controversies and Disputes of the Department of Education (Department) transmitted the case to the Office of Administrative Law (OAL) where it was filed on December 16, 2022 as a contested case.

On December 20, 2022, the law firm of Fogarty and Hara filed a Letter Brief in Opposition to Petitioner's Pro Se Petitioner's Petition of Appeal with Emergent Relief and a number of exhibits. The hearing was held via Zoom on Wednesday, December 21, 2022 before the undersigned.

UNDISPUTED FACTUAL INFORMATION

Per the documents submitted by the parties and the testimony of V.P. I **FIND** that the parties agree on the following facts.

V.P. is the father of M.P., a minor enrolled in Midland Park High School ("MPHS"). A.Z. is the ex-wife of V.P. and is the mother of M.P. Upon the dissolution of their marriage, V.P. and A.Z. entered into a Marriage Settlement Agreement (P-5), referred to herein as the "MSA". The MSA, among other provisions, designates alternating "parenting days" when V.P. or A.Z., respectively, are responsible for M.P.'s care, including the drop-off and the pick-up of M.P. at MPHS. Monday, December 5, 2022 was a parenting day for A.Z. and was not a parenting day for V.P.

Section 4.7 of the MSA provides, "The parties agree to consult with each other and make mutual decisions with respect to ... the child's well-being ... , which shall at all times be the paramount concern of the parties. The parties further agree that routine and day-to-day decisions regarding the child's welfare shall be made by the party who has physical custody of the child at the time."

On Monday, December 5, 2022, M.P. reported to the school nurse, Karen Corcoran, R.N., that he had a headache. M.P. told Corcoran that Mondays were his mother's parenting days. Corcoran telephoned A.Z. about M.P.'s headache and A.Z. decided to wait and see how M.P. felt in an hour. An hour later, M.P. reported to Corcoran that he still had a headache and stated that he wanted to go home. Corcoran again called A.Z. and updated her about M.P.'s condition. A.Z. told Corcoran that her parents (M.P.'s grandparents) would go to the school to pick up M.P. In the meantime, M.P. had texted his father, V.P. telling him that he was not feeling well and wanted him to pick him up from school. V.P. knew that under Section 4.4 of the MSA all Mondays were A.Z.'s parenting days. V.P. also knew that Section 4.12 of the MSA provided, "Absent an emergency, neither party shall come to school ... during the other parent's parenting time." Believing that his son's condition constituted an "emergency", V.P. went to Midland Park High School to pick up M.P. It is noteworthy that Section 4.2 of the MSA provided for the appointment of David Torchin, Esq. as a "parenting coordinator". According to the MSA, "The parenting coordinator's role ... [is to provide] ... intervention between parties on outstanding issues relating to the child. The parties agree to utilize the services of the parenting coordinator to help the parties come to appropriate decisions which are in the best interest of the child." There was no evidence adduced that either V.P. or A.Z. contacted the parenting coordinator on December 5, 2022 regarding the picking-up of M.P. from the school.

There is disagreement between the Petitioner and the Respondent about what took place on December 5, 2022 during the conversations and interactions between and among V.P., Nurse Corcoran, High School Principal Nicholas Capuano; about what various staff members and or students of the school observed during V.P.'s visit to the school; about the conversations or interactions between V.P. and M.P.'s grandparents (the grandfather's being referenced herein as R.Z. and grandparent's referenced herein as the Z.'s); about the emotional state and behavior of V.P.; and, about whether V.P.'s accounts of the events of December 5, 2022 are accurate or whether the reports of five witnesses (R-1) and the Certification of Nicholas Capuano are accurate.

There is agreement on the fact that on December 5, 2022, after V.P., Nurse Corcoran and Principal Capuano had the opportunity to speak with each other in the Principal's Office, that Principal Capuano asked V.P. to leave the school's campus; and that Capuano escorted V.P. to the exit; and that V.P. left the campus.

ANALYSIS OF THE DOCUMENTS AND TESTIMONY

The following is not intended to be a verbatim recitation of the content of documents or of the testimony. Rather it is a summary of the contents of documents and of testimony which I found significant and helpful to my understanding of the matter.

Respondent's Exhibits

The BOE submitted a Letter Brief in Opposition and attached Documents (Exhibits R-1 through R-6), plus the Certification of Nicholas J. Capuano, which was marked by the Tribunal as R-7.

R-1

R-1 consisted of six "Faculty/Staff Incident Reports", written and signed by Carol Weaver, Irene Keller, Karen Corcoran, R.N. (the school nurse), Jason Whelpley, Craig Rush, and Barbara Rasmussen.

Ms. Carol Weaver wrote that she was in the main office when V.P. arrived to pick up his son, M.P. Ms. Weaver reports that when she walked into the Principal's Office, Principal Capuano and Nurse Corcoran were having a telephone conversation with A.Z., the mother of M.P. Ms. Weaver reports that Capuano signaled her that V.P. should not take M.P. with him. Ms. Weaver reports that when the phone call was finished, Capuano asked V.P. to come into his office. Then, without much detail, Ms. Weaver reports that V.P. appeared agitated, and Capuano asked V.P. to leave. Ms. Weaver, who was close enough to hear at least part of the conversation between V.P. and Capuano, quotes V.P. as saying to Capuano, "If anything happens to my son, it's on you." Ms. Weaver further reports that she observed V.P. interact with M.P.'s grandparents in the entrance foyer

and heard V.P. make unspecified "nasty comments" to them which left the grandmother "visibly shaken". Ms. Weaver's testimony is significant because she was an eyewitness who was close enough to both see and hear what transpired on December 5, 2022 at MPHS. Specifically, she described V.P. as "agitated", recalled that Capuano asked V.P. to leave, that as he was leaving V.P. made "nasty comments" to M.P.'s grandparents and observed that as a result of V.P.'s behavior the grandmother was "visibly shaken". Ms. Weaver's observations support the proposition that V.P.'s behavior was not in keeping with good taste and propriety.

Irene Keller wrote that she was in the main office, that V.P. had arrived at the school and was signing his son out of school when he was called into Principal Capuano's office. It is Ms. Keller's recollection that Nurse Corcoran was in Capuano's office at the time. Ms. Keller reports that after a few minutes V.P. left Capuano's office and that V.P. was "very angry". Ms. Keller quoted V.P. as telling Capuano "If anything happens to my son, it's on you." Ms. Keller observed that as V.P. was leaving, M.P.'s grandparents were entering the office. Ms. Keller confirms that words were exchanged between V.P. and the grandparents, but it was unclear to her what was said. She reiterated that after encountering the grandparents, V.P. was "very angry" when he left. Ms. Keller's report is significant because she was an eyewitness to V.P.'s demeanor and behavior. Ms. Keller reported what V.P. said to Principal Corcoran, using the exact same words as Ms. Weaver. It is significant that two witnesses remembered V.P.'s exact warning to Capuano, "If anything happens to my son, it's on you." It is also significant that Ms. Keller, characterized V.P.'s emotional state as "very angry" when he left Capuano's office and then again as "very angry" after encountering the grandparents. Ms. Keller's observations support the proposition that V.P.'s behavior was not in keeping with good taste and propriety.

Karen Corcoran, R.N. wrote that M.P. came twice to her office complaining of a headache. M.P. explained to Corcoran that it was his mother's parenting day. Corcoran spoke to A.Z. both times that M.P. came to her office. During M.P.'s second visit to Corcoran he still had a headache and so A.Z. told Corcoran that she would send M.P.'s grandparents to pick him up. Corcoran wrote that at that point in time, M.P. told her that he had contacted his father and that his father was coming to pick him up. Corcoran

wrote that she had Dr. Prinsel stay with M.P. while she went to tell Principal Capuano about the situation. Corcoran wrote that V.P. arrived while she was speaking with Capuano in his office. Corcoran wrote that Capuano calmly invited V.P. to sit down and informed him that M.P.'s grandparents were on their way to pick up M.P. V.P. insisted that he was already at the school and would take M.P. home. Capuano then told V.P. that they should all wait for A.Z. to come to the school. Corcoran wrote that after Capuano said this, V.P. became angry, raised his voice and raised his finger at her. Capuano calmly asked V.P. to sit down and wait for A.Z. to arrive. Corcoran then wrote that V.P. became "more angry" and described his demeanor as "aggressive" noting that V.P. started screaming and pointing his finger at Principal Capuano and repeating that he was going to take M.P. home. Corcoran wrote that Capuano asked V.P. to leave the school and was escorting V.P. to the school's exit, but that several times during the trip to the exit door V.P. stopped and turned towards Capuano. Corcoran wrote that in the school's lobby V.P. met M.P.'s grandparents and that some words were exchanged, but she was unable to hear what was said. Following that, V.P. was escorted to the exit and left the school.

It is significant that Corcoran, who was present in Capuano's office with both Capuano and V.P. noted that Capuano was calm throughout V.P.'s visit; that she described V.P.'s demeanor throughout his visit to Capuano's office as "angry", "more angry", "aggressive" and "more hostile"; that V.P. raised his voice and pointed his finger at both Corcoran and Capuano; that Capuano's suggestion that they wait for A.Z.'s arrival was not heeded; that there was an exchange of words in the lobby between V.P. and the grandparents; and that V.P. was escorted out of the school. Notably, Corcoran noted that V.P., while walking through the hallway, stopped and turned towards Capuano several times during his exit.

Jason Whelpley wrote that he was in his office finishing a meeting with Craig Rush when he heard Principal Capuano's door open and heard Capuano telling V.P. that he must leave the premises. Whelpley then saw Capuano and V.P. near Capuano's office door when V.P., in a loud voice, told Capuano, "If anything happens to my son, it's on you." Whelpley wrote that V.P. walked out of the office into the vestibule with Capuano following him. Capuano told the secretaries to "clear the office" and to call for security

personnel to come to the scene. Whelpley wrote that he saw V.P. and M.P.'s grandparents in the vestibule. Whelpley concluded by writing that he went back into his office. It is significant that Whelpley confirmed that V.P. spoke in a loud voice to Capuano saying, "If anything happens to my son, it's on you." This is the exact same statement attributed to V.P. by Ms. Weaver and Ms. Keller, both of whom characterized V.P. as speaking these words while "agitated" or "angry". Whelpley's written account also confirms the accounts of others that Capuano asked V.P. to leave the premises and confirms that Capuano found it necessary to call security personnel to the scene.

Craig Rush wrote that after finishing his meeting with Mr. Whelpley he saw and heard Principal Capuano telling V.P., "You need to leave now" and walking behind V.P. escorting him out of the office and into the hallway. He saw V.P. stop and heard him tell Capuano, "I am going to hold you responsible for my son's well-being", or words to that effect. Rush also wrote that he heard V.P. say the words, "Fuck you" and assumed that that V.P. addressed these words to Capuano. Rush wrote that his observations lasted 15 to 20 seconds. He wrote that his observations were that V.P. was "upset and agitated" and that Capuano "remained professional and focused on removing V.P. from the building". It is significant that Rush confirmed that Capuano remained "professional" while V.P. was "upset and agitated". Rush wrote that he clearly heard V.P. use a vulgarity. Rush confirmed that V.P. told Capuano that he was going to hold him responsible for M.P.'s welfare, but not necessarily with the same words used by others.

Barbara Rasmussen wrote what she observed in the main office. She noted that V.P. arrived to pick up his son. Ms. Keller was going to call for M.P. to come to the main office. Nurse Corcoran took a call in the main office from A.Z. Ms. Rasmussen then went to the ladies' room and upon her return therefrom V.P. had already left the building.

It is significant to note that, according to Ms. Rasmussen, Nurse Corcoran took a telephone call from A.Z. in the main office.

R-2

R-2 is the December 5, 2022 handwritten statement of R.Z., the father of A.Z. and the grandfather of M.P. In his statement, R.Z. wrote that V.P. came out of an office and caught sight of him. Mr. Z. wrote that V.P. called him "a piece of shit" and that V.P. passed him, turned to him and then said, "Fuck you" to him. Mr. Z. wrote that V.P. looked "threatening" and appeared to be "getting ready to fight me". Mr. Z. wrote that a "school official" stepped between them to defuse the situation. It is significant that R.Z.'s writing confirmed that V.P. used vulgarities immediately after leaving Capuano' office, which indicates that he was indeed in an angry or agitated or hostile mood. What Mr. Z. wrote comports with Principal Capuano's account of V.P.'s threatening encounter with the grandparents. Mr. Z.'s writing also comports with Ms. Weaver's account of V.P. making "nasty comments" to the grandparents, causing the grandmother to be "visibly shaken".

R-3

R-3 is the Midland Park Police Department Operations Report dated December 7, 2022 (consisting of two pages) taken by Police Officer Jason R. Tillson, who was the School Resource Officer at MPHS on December 5, 2022, plus the Midland Park Police Department Supplementary Investigation Report taken by Lieutenant John Gibbons. Tillson wrote that he was contacted by Ms. Keller and told to respond to a disturbance. His report does not indicate that he had any in-person contact with V.P. and his report does not contain any information obtained from V.P. His report contains information obtained from Principal Nicholas Capuano.

The significant highlights of the Operations Report are: that M.P. complained to Nurse Corcoran that he had a headache, which Corcoran reported to M.P.'s mother, A.Z.; that A.Z. told Corcoran that her parents would go to the school to pick up M.P.; that at approximately 12:02 p.m. V.P. arrived at MPHS to pick up M.P.; that Capuano had a telephone conversation with A.Z. during which she stated that Mondays were her parenting day and that she was sending her parents to pick up M.P.; that the school would not release M.P. to V.P. per the court order referred to by A.Z.; that V.P. then became angry and insisted that he should take M.P. home; that Capuano told V.P. that he must leave the premises; that while leaving the premises V.P. stared at and approached Capuano in an aggressive manner and that V.P. directed vulgar language at the

grandparents upon their arrival at the school and stared at and stepped towards R.Z. in an aggressive manner, with Capuano deciding to step between the two men to de-escalate the situation; and, that V.P. then left the premises. Capuano also reported that Pinsky had a telephone conversation with School Administrator Stacey Garvey.

R-4 and R-5

R-4 is a letter dated December 8, 2022 from Superintendent of Schools Marie C. Cirasella, Ed.D. to V.P. In this letter, Cirasella informed V.P. that as a result of his conduct at MPHS on December 5, 2022, he is now prohibited from visiting any of the Midland Park School District schools for any reason without her express written permission. With the letter, Cirasella enclosed a copy of "Midland Park Board of Education Policy 9150" (Exhibit R-5), which declares that the Superintendent and school Principals have the authority to prohibit the entry of any person into a school building or to expel any person from a school building when there is reason to believe that the presence of said person would be inimical to the good order of the school.

R-6

R-6 is a letter dated December 12, 2022 from Superintendent Cirasella to V.P. in response to his request that the Superintendent confirm the School District's interpretation of multiple court orders and the School District's December 8, 2022 which imposed restraints on his presence on the School District's campuses. In the 12/12/22 letter Cirasella

> (1) assured V.P. that MPHS will respond to him with information about his son, M.P.;
>
> (2) that on days when V.P. has parenting time (under the MSA) he would not be permitted on the school's campus and that he should pick-up and drop-off M.P. at the end of the driveway or by parking behind the school in the municipal parking lot;

(3) that in the event of an emergency occurring on a day when V.P. had parenting time, he is to contact Cirasella, who would determine whether to authorize his presence on campus; and

(4) assured V.P. that the school's personnel would continue to provide him with all notifications, reports, and assessments that are provided to all parents and guardians of students of the District's schools.

R-7

The Tribunal decided to mark the Certification of Nicholas J. Capuano as R-7. In R-7, Capuano wrote:

(1) That he is the Principal of MPHS;

(2) That he is familiar with the matter at hand, i.e. the facts arising out of a December 5, 2022 incident involving student M.P., his father, V.P., school personnel and M.P.'s grandparents.

(3) That on December 5, 2022, M.P. visited the school nurse, Karen Corcoran, R.N. complaining of a headache and that Corcoran telephoned A.Z., M.P.'s mother, about his complaint.

(4) That after lunch, M.P. continued to complain about having a headache and that Corcoran again telephoned A.Z., who responded that she was sending her parents (Mr. and Mrs. Z) to pick-up M.P.

(5) That in the interim, M.P. contacted his father, V.P., about his headache.

(6) That V.P. contacted Nurse Corcoran inquiring about who would pick up M.P. from the school and she told him that A.Z. had made arrangements for the pick-up. Some time later, A.P. appeared at the school to pick-up M.P.

(7) Capuano met V.P. and told him that A.Z. had made arrangements for M.P. to be picked-up.

(8) Capuano stated that V.P. became angry and in a raised voice stated that he would take his son home.

(9) Capuano stated that he asked V.P. to calm down, but V.P. continued to shout and, in Capuano's judgment, became hostile. Capuano warned V.P. that if he did not calm down, he would be asked to leave the building. Capuano stated that V.P. continued his hostile behavior and was told to leave the building.

(10) Capuano stated that as he escorted V.P. out of the building V.P. turned toward him, put his face close to his and stared aggressively at him.

(11) Capuano stated that as he escorted V.P. out of the building, V.P. encountered M.P.'s grandparents, spoke to them in a vulgar manner, and stepped toward the grandfather in a threatening manner with clenched fists.

(12) Capuano stated that he stepped between V.P. and the grandfather to defuse the situation; that V.P. exited the building; and that the encounter between V.P. and the grandparents took place in front of school staff and school children.

(13) Capuano stated that he later spoke with School Business Administrator, Stacey Garvey, who told him that she had spoken to V.P. after he left the building, who told her that "Mr. Capuano better apologize or I'll get him." (This statement was later modified by Mr. Capuano on the last page of the Midland Park Police Department' Operations Report (R-3), where Capuano stated that Garvey's statement was actually that V.P. had stated, "Mr. Capuano better apologize or he will be sorry."

(14) Capuano noted that after the December 5, 2022 incident, he contacted the Midland Park Police Department to make a Police Report.

(15) Capuano stated that he contacted Schools Superintendent Marie Cirasella about the incident of December 5, 2022 because he believed that V.P. had violated Board of Education Policy 9150.

Petitioner's Exhibits

The Petitioner, V.P., submitted his Petition of Appeal and Motion for Emergent Relief and later submitted Exhibits P-1 through P-6.

P-1 is the December 8, 2022 letter sent by Superintendent Cirasella to V.P. It is the same document as R-4.

P-2 is the December 12, 2022 letter sent by Superintendent Cirasella to V.P. It is the same document as R-6.

P-3 is an "extract" taken from the December 7, 2022 Midland Park Police Department Operations Report. It is the same document as the bottom half of page 2 of 2 of the Operations Report, which has been marked as R-3.

P-4 consists of several emails concerning V.P.'s attempts to speak with either School District officials or with the School District's Attorney.

P-5 is a copy of the Marriage Settlement Agreement (MSA) between V.P. and A.Z., which arose out of their divorce proceedings. This document is significant for setting forth the parenting days of A.Z. and the parenting days for V.P. and it is significant for setting forth that routine and day-to-day decisions regarding the child's welfare shall be made by the party who has physical custody of the child at the time.

P-6 is a May 10, 2022 email from school principal Peter Galasso to A.Z. and V.P. regarding certain communications made on that date among V.P., A.Z. and the school regarding the pick-up of M.P. by one or the other of his parents. It is significant only for Galasso's statement that with regard to the picking-up of M.P. by either one of his parents on a given day, the school does not monitor it unless there is a court order.

Testimony of V.P.

When the Tribunal inquired of V.P. what relief he was seeking from the Tribunal, V.P. responded that he is seeking what he has been asking the School District for: a Protocol outlining what he may do or may not do with regard to dropping-off and picking-up his son on his parenting days and, in the event of an emergency, what he may or may not do, regardless of whether it is his parenting day or A.Z.'s parenting day. V.P. stated he also seeks assurance that he will receive any and all information regarding his son

from the School District. In his written Appeal and Motion for Emergent Relief, V.P. wrote that he is seeking the following :

(Note: V.P. listed his demand for relief in seven numbered paragraphs, which are somewhat repetitious and unartfully drafted. The Tribunal has condensed them into a more readable format.)

(1) To find out (i.e., clarify) "if the school can decide and enforce the MSA" insofar as determining which parent (V.P. or A.Z.) can pick-up M.P. on any given day;

(2) To find out (i.e., "clarify") if the school "is allowed to decide and enforce the MSA", (i.e., to deny V.P. the right to pick-up M.P. in an emergency whether the emergency occurs on V.P.'s parenting day or A.Z.'s parenting day) ;

In essence, in #1 and #2, V.P. seeks to find out what the protocol is for routine pick-ups and emergency pick-ups;

(3) V.P. seeks demands that the Tribunal launch an investigation to be conducted by a neutral party.

(4) (6) and (7) To overturn the School Superintendent's December 8, 2022 decision (P-1 a/k/a R-4) barring V.P. from the School District's campuses, particularly MPHS; to restore V.P.'s privilege of dropping-off and picking-up M.P. on the MPHS campus by overturning the restrictions imposed in the School Superintendent's letter dated December 12, 2022, which limits V.P.'s authority to drop-off and pick-up M.P. to the area at the end of the school's driveway or, alternatively, in the municipal parking lot located at the rear of the school;

In support of his position, V.P. testified that on Monday, December 5, 2022 his son, M.P., contacted him to say that he was at school, but was not feeling well and wanted to go home. V.P. stated that he had recently undergone surgery and was in pain, but decided, even though he was only wearing gym clothes, to go to MPHS to pick-up his son

and bring him home. V.P. was aware that according to the MSA, Mondays were not his parenting days. However, he knew that the MSA allowed either parent to pick-up M.P. in the event of an emergency. V.P. claimed that he did not know the nature or severity of his son's illness, but he deemed this occasion to be an "emergency" and so decided that it was his right to go to the school to pick-up M.P. V.P. testified that Nurse Corcoran refused to explain the nature of M.P.'s illness and gave him "one-word answers" to his inquiries. While V.P. testified that he never became angry with anyone at the school, it was clear that he was, at the very least, expressing his displeasure when he recounted his conversation with Corcoran and he admitted that he was "frustrated" and that he was "hyper-alarmed" about his son's complaints of "not feeling well".

V.P. testified that when he arrived at MPHS, he was invited into Principal Capuano's office. Nurse Corcoran was also present with Capuano. Although Capuano invited V.P. to sit down, V.P. refused to sit because his recent surgery made sitting painful. V.P. testified that he told Capuano that he wanted to take his son home. Capuano advised V.P. that M.P.'s grandparents were on their way to the school and that they would pick-up M.P. at A.Z.'s behest. V.P. testified that Nurse Corcoran had refused to give him information about his son and he complained that he was not told when the grandparents were expected to arrive. V.P. testified that he responded by saying that the grandparents were "not on the list" to pick-up M.P. and that since he was already there, he would take M.P. home. V.P. admitted that he was "alarmist" and stated that his concern was to get M.P. home so he could rest.

Upon questioning, V.P. admitted that he knew that Monday, December 5, 2022 was not his parenting day and that it was A.Z.'s parenting day. He admitted that he knew that under the MSA, the routine day-to-day decisions about M.P.'s welfare were to be made by the parent then having physical custody of M.P., which on Mondays would be A.Z. However, V.P. pointed out that the MSA also provided that either parent could pick-up M.P. when there was an emergency and he construed his son's illness to be an emergency. Upon continued questioning, V.P. re-iterated that he told Capuano that he would take his son home and was told that he should wait until A.Z. could arrive and help resolve the situation. When asked if he raised his voice or became angry when he was told that the school could not release M.P. to him, V.P. denied that he ever became angry

or even raised his voice. V.P. was questioned about the statements of the witnesses listed in R-1 and R-7, all of whom stated that V.P. had become loud, angry, and hostile towards Capuano and Corcoran. In response, V.P. was hesitant to say they were all lying. Instead, he stated that they all "misperceived" his emotions and were all mistaken about the volume of his voice. V.P. denied that any of his behavior was "hostile". V.P. never denied that Capuano asked him to leave the premises.

V.P. admitted that he saw his ex-wife's parents in the school's hallway, but he denied that he ever used profanity against them. He specifically denied ever calling his ex-father-in-law, R.Z., a "piece of shit" and denied ever saying "Fuck you" to him.

When confronted with the statements of the R-1 and R-7 witnesses, V.P. claimed that they were either not telling the truth or had been too far away to hear any conversation between himself and R.Z. or that they were not present at all. Indeed, V.P. testified that he did not say anything at all to R.Z. When asked to characterize his relationship with his ex-in-laws, V.P. admitted that it was "contentious". When questioned about Capuano's statement that V.P. walked towards R.Z. with clenched fists, V.P. stated that he always walks with his fists clenched, but that on this occasion his hands were facing downwards, not upwards in a fighting position. When questioned about being escorted out of the building by Capuano and about encountering the ex-in-laws, V.P. denied that Capuano had to step between himself and R.Z. V.P. also testified that Capuano was a big man and that as Capuano escorted him out of the building, Capuano was walking so close behind him that his belly touched the small of his back. V.P. denied ever stopping or turning around to stare at or intimidate Capuano. V.P. also denied that any children were present in the hallway when he encountered his ex-in-laws.

Upon further questioning, V.P., responded to the 13th numbered paragraph of Capuano's Certification wherein Capuano referred to a conversation he had with Stacey Garvey, the school's Business Administrator. Capuano's Certification states that Garvey recounted a telephone conversation she had with V.P. during which V.P. allegedly stated, "Mr. Capuano better apologize, or I'll get him." V.P. admitted that he had a telephone conversation with Garvey shortly after he left the school building which lasted about

twenty minutes. V.P. admitted that Garvey asked if his statement was a threat against Capuano, but he denied that he was making a threat.

On Re-Direct, V.P. clarified that his focus throughout all his dealings with the Midland Park School District has been to understand the protocols regarding drop-offs and pick-ups of his son and to obtain assurance that he would be receiving any and all information about his son from the school district.

Summations

Respondent's Summation

The School District emphasized that its responsibility is to keep the schools safe for students and staff. Respondent's counsel, Mr. Fogarty argued that the weight of the credible evidence, both form the documentary evidence and from V.P. himself confirmed that V.P.'s language and behavior on December 5, 2022 was not in keeping with District Policy 9150 or with the good taste and propriety expected of persons who enter school grounds. He argued that the coherence and agreement of the School District's several witnesses, all of whom had no personal interest at stake in the matter, demonstrated that their accounts of V.P.'s conduct on December 5, 2022 were truthful. On the other hand, V.P.'s claim was that he remained calm throughout this episode, never raised his voice, never pointed his fingers at anyone, never use vulgar language, never stared at anyone, never made any aggressive overtures, and never made any threats is against the weight of all the other evidence in the matter. Mr. Fogarty pointed-out that the District's witnesses all agree that V.P. raised his voice; claimed he was denied information about his son; was accusatory; pointed his fingers at both Capuano and Corcoran; stared at and moved in an aggressive manner toward R.Z.; stopped walking, turned and stared at Capuano; and used vulgarities against his ex-in-laws causing his ex-mother-in-law to be "visible shaken". Most importantly, V.P. never denied that Capuano, after appealing to V.P. to calm down, reached the decision that he had to ask V.P. to leave the premises, to notify security personnel, and to personally escort V.P. out of the building. Although V.P. claimed to have remained calm throughout his time at the school, he never denied that he was ejected from the premises. Attorney Fogarty argued that V.P. had not borne his

burden of proving even one of the four Crowe factors needed to justify emergent relief. Attorney Fogarty asked the Tribunal to agree that School Superintendent Cirasella's action barring V.P. was in keeping with School District Policy 9150; was backed-up with abundant proof of V.P.'s misconduct; and was fully justified. He asked the Tribunal to affirm Cirasella's decision.

Petitioner's Summation

V.P. re-emphasized that he is simply looking for the School District to provide him with the protocols for dropping-off and picking-up his son in non-emergency and in emergency situations. He believed that his son's reported illness constituted an emergency which justified his presence on the campus of MPHS on December 5, 2022. He re-iterated that the school nurse refused to give him information about his son's health when he spoke with her, which made him frustrated, but not angry or hostile. Since he was not told when the grandparents would arrive to pick-up M.P., he could not understand why he could not take M.P. home. He admitted that he is "alarmist" and was indeed alarmed that the delay in getting his son home would be detrimental to him.

Addressing the obvious question of why the statements of the witnesses, all of which attest to V.P.'s inappropriate conduct, should not be believed, V.P. simply stated that they "misperceived" his emotions and did not actually hear the statements of which he is accused of saying.

Finally, V.P. argued that the Superintendent's decision to bar him should be overturned because it would not only be unfair to deny him access to school activities, but it would be dangerous to bar him from the campus in the event of an emergency, such as another health emergency or even in the event of a school shooting. V.P. pointed out the implausibility of getting through to the superintendent in an emergency situation to seek her permission to come to the campus to see to his son's safety.

At the end of his summation, the Tribunal posed a question to V.P. In answer to the Tribunal's question regarding the need for emergent relief, the Tribunal asked V.P. what the imminent threat (post-December 5th) was to M.P. that justified emergent relief.

V.P. could only say that in the event of a possible future emergency (admitting there was no imminent or present emergency) he would need immediate access to the campus.

DISCUSSION AND FINDINGS OF FACT

Having reviewed the documents, testimony, and arguments presented, I make the following findings of **FACT**.

I **FIND** that V.P.'s demand that the School District provide him with information about his son, M.P., has already been completely addressed by the December 12, 2022 letter to V.P. written by Superintendent Marie Cirasella. (R-4) In that letter, Cirasella gives V.P. the School District's assurance that the School District's administrators, teachers and school nurse will respond to his appropriate requests for any information about his son.

I **FIND** that the "protocols" demanded by the Petitioner, V.P., regarding the dropping-off and picking-up of his son, M.P. have been provided in Superintendent Marie Cirasella's letter to him dated December 12, 2022 (R-4).

I **FIND** that V.P.'s demand that he be supplied with information about his son, M.P., has been provided in R-4.

I **FIND** that the response to V.P.'s demand for the "protocols" for dropping-off and picking-up his son, Cirasella's Letter dated December 12, 2022 (R-4) has provided V.P. with a clear statement that he is not to come upon the premises of MPHS and it has provided a clear procedure for where he, on his parenting days, is to drop-off and pick-up his son, M.P.

I **FIND** that the response to V.P.'s demand for "protocols" for emergency visits by him to MPHS has already been addressed in R-4, wherein Superintendent Cirasella sets forth a clear procedure for V.P. to contact her by telephone to seek admission to the MPHS campus, reserving to herself the sole discretion and authority to grant or deny admission to the campus to V.P.

I **FIND** that in response to V.P.'s demand that he be apprised by the School District of all information concerning his son, M.P., Superintendent Cirasella has already stated clearly to V.P. in R-4 that he will continue to receive all notifications, reports, and assessments concerning M.P., which are provided by the school District to all parents and guardians of its students.

I **FIND** that on December 5, 2022 at MPHS, after his arrival at MPHS, V.P. pointed his finger at and accused Nurse Corcoran of not providing him with information about his son, M.P. I **FIND** that V.P.'s accusation against Corcoran is lacking in support. I **FIND** that Corcoran did indeed supply V.P. with adequate information about M.P. and that information was that M.P. was complaining of having a headache, that it being the lad's mother's (A.Z.'s) parenting day she had been informed of M.P.'s complaint and stated that M.P.'s grandparents (the Z.'s) were going to the school to pick-up M.P. I **FIND** that, contrary to V.P.'s testimony, the preponderance of the credible evidence indicates that V.P. was not calm when he was at MPHS; that V.P. raised his voice while speaking with Principal Capuano and Nurse Corcoran and continued to speak in a loud voice even after Capuano asked him to calm down.

I **FIND** that V.P. was not as credible as Principal Capuano and that V.P. was not as credible as the Respondent's other witnesses because Capuano and the Respondent's other witnesses had no personal stake in the outcome of the matter, while V.P. had lost his privilege of entering the MPHS campus and was seeking to gain it back. I have also found V.P. to be less credible than Capuano and Respondent's other witnesses due to the consistency of the Respondent's witnesses combined statements, which agree that V.P. was not calm, that he was angry, that his behavior caused Capuano to decide to eject V.P. from the campus; that as he was being escorted to the exit, V.P. confronted both R.Z. and Principal Capuano; that V.P.'s claims that he remained calm throughout the episode and did not use vulgarities is belied by the sheer number of witnesses who contradicted him; by the fact that V.P. claimed that numerous witnesses all "misperceived" what really happened on December 5, 2022; by the fact that V.P. tacitly admits that he was ejected from the campus; by the fact that V.P. admitted that he was "alarmist", "hyper-alarmed" and "frustrated"; by the fact that V.P. while admitting that his

fists were indeed clenched as he walked by R.Z., he nonetheless claimed that he "always" walks with his hands clenched and that he recalled on this occasion that his hands were facing downwards; and by the overall implausibility of V.P.'s account.

The preponderance of the credible evidence indicates that the following statements should be, and hereby are, found to be true statements of fact.

I **FIND** that even though V.P. knew that Monday, December 5, 2022 was not his parenting day and that his ex-wife, A.Z., had dispatched her parents (the Z.'s) to go to MPHS to pick-up M.P., V.P. insisted that he should bring M.P. home.

I **FIND** that V.P. ignored Principal Capuano's recommendation to wait for A.Z. to arrive to sort out the question of who should pick-up M.P.

I **FIND** that because Principal Capuano found V.P.'s behavior not to be appropriate under the circumstances, Capuano warned him that he would be asked to leave the campus; and then, because V.P. did not calm down, Capuano decided to eject V.P. from the campus due to V.P.'s continuing inappropriate behavior.

I **FIND** that Capuano ordered his staff to summon security personnel to the scene and I **FIND** that in the meantime Capuano personally escorted V.P. to the exit of the school building.

I **FIND** that V.P.'s testimony about Capuano walking so close behind him that his belly touched V.P.'s lower back to be untrue in light of the account given by Capuano that during the walk to the exit, V.P. stopped and turned to face Capuano.

I **FIND** that it would not be likely that Capuano could walk so closely behind V.P. that his belly could touch V.P.'s lower back because their legs would have become entangled if they had been walking in such close proximity, as suggested by V.P.

I **FIND** that V.P. used vulgar language when speaking to M.P.'s grandparents, the Z.'s, in the hallway of MPHS where staff and students were present. Particularly, I **FIND** that V.P. called R.Z. a "piece of shit" and said "Fuck you!" to R.Z.

I **FIND** that V.P. walked towards R.Z. with his fists clenched and in an aggressive manner, causing Principal Capuano to take action to prevent an altercation by placing his own body between the two other men.

I **FIND** that V.P.'s display of vulgar language and aggressive behavior frightened Mrs. Z. I **FIND** that V.P. exited MPHS shortly after directing vulgarities at R.Z.

I **FIND** that shortly after exiting MPHS, V.P. placed a telephone call to School Administrator Stacey Garvey and stated to her either, "Capuano better apologize, or I'll get him" or "Capuano better apologize, or he'll be sorry".

I **FIND** that the statements and actions of V.P. on December 5, 2022 while on the campus of MPHS were grievous enough to violate School Policy 9150.

I **FIND** that V.P. has not set forth proof of any imminent harm or threat to either himself or to M.P. that justifies any sort of emergent relief. I **FIND** that V.P. has not presented sufficient facts or sufficient arguments that would satisfy any of the four Crowe factors.

APPLICABLE LAW

N.J.A.C. 6A:3-1.6(a) provides:

> Where the subject matter of the controversy is a particular course of action by a district board of education ... the petitioner may include with the petition of appeal, a separate motion for emergent relief ... pending the Commissioner's final decision in the contested case."

N.J.A.C. 6A:3-1.6(b) provides:

> A motion for stay or emergent relief shall be accompanied by a letter memorandum or brief which shall address the following standards to be met for granting such relief pursuant to Crowe v. DeGioia , 90 N.J. 126 (1982):
>
> 1. The petitioner will suffer irreparable harm if the requested relief is not granted;
>
> 2. The legal right underlying petitioner's claim is settled;
>
> 3. The petitioner has a likelihood of prevailing on the merits of the underlying claim; and
>
> 4. When the equities and interests of the parties are balanced, the petitioner will suffer greater harm than the respondent will suffer if the requested relief is not granted.

Crowe v. DeGioia, 90 N.J. 126 (1982) arose out of a set of circumstances regarding support and palimony matters. Nonetheless, the case has been the polestar decision in New Jersey for cases wherein injunctive relief is sought. The case stands for the proposition that an injunction cannot be granted unless and until the party seeking relief presents clear and convincing evidence that: (1) the injunction is "necessary to prevent irreparable harm"; (2) that "the legal right underlying the claim is settled"; (3) that the party seeking relief has made "a preliminary showing of a reasonable probability of ultimate success on the merits"; and (4) that "the relative hardship to the parties in granting or denying [injunctive] relief", on a balancing of the equities, weighs in his favor. Crowe, 90 N.J. at 132-34. In order to prevail, the party seeking injunctive relief must demonstrate by clear and convincing evidence that he meets all four Crowe factors. Brown v. City of Paterson, 424 N.J. Super. 176, 183 (App. Div. 2012).

"[A] party who seeks mandatory preliminary injunctive relief must satisfy a 'particularly heavy' burden." Guaman v. Velez, 421 N.J. Super. 239, 247 (App. Div. 2011), Rinaldo v. RLB Inv., LLC, 387 N.J. Super. 387, 396 (App. Div. 2006).

Also, "[w]hen a case presents an issue of 'significant public importance', a court must [also] consider the public interest in addition to the traditional Crowe factors." Garden State Equal. v. Dow, 216 N.J. 314, 321 (2013).

Appellate courts are bound by the trial court's factual findings if they are supported by "substantial, credible evidence" in the record. Triffin v. Automatic Data Processing, Inc., 411 N.J. Super. 292,315 (App. Div. 2010).

Under the first Crowe factor, a party who seeks injunctive relief must establish that injunctive relief is necessary to prevent irreparable harm and to preserve the status quo. Citizens Coach Co. v. Camden Horse R.R. Co. , 29 N.J. Eq. 299, 303 (E.&A. 1878). Irreparable harm is an "injury to be suffered in the absence of injunctive relief [that] is *substantial* and *imminent*." Waste Mgmt. of N.J., Inc. v. Union City Utils. Auth., 399 N.J. Super. 508, 520 (App. Div. 2008).

Under the second Crowe factor, injunctive relief will be withheld when the legal right underlying the claim is unsettled. Citizens Coach, at ps. 304-05.

Under the third Crowe factor, the party seeking relief is obligated to present clear and convincing evidence that he / she has a reasonable probability of ultimate success on the merits. Therefore, injunctive relief will not be granted where there are material facts in controversy. Citizens Coach at ps. 305-06. The party who seeks injunctive relief must be prepared to demonstrate facts which support his case and "must make a preliminary showing of reasonable probability of success on the merits." Crowe, at p. 133.

The second and third Crowe factors involve fact-sensitive analysis that "requires a determination of whether the material facts are in dispute, and whether the applicable law is settled." Waste Mgmt., at p. 528.

Under the fourth Crowe factor, the party who seeks injunctive relief must address the issue of relative hardship to the parties and he must establish that, on balance, the equities favor the grant of temporary relief to maintain the *status quo* pending the outcome of a final hearing." Crowe at p. 134. The party seeking injunctive relief must prove his

case by clear and convincing evidence. Brown at p. 183 and thus his burden is 'particularly heavy'. Guaman at p. 247.

Midland Park Board of Education, District Policy 9150 – School Visitors

The above-captioned Policy is set forth as follows:

> The Board of Education welcomes and encourages visits to schools by parent(s) or legal guardian(s), or other adult resident of the community, and interested educators. In order for the educational program to continue undisturbed when visitors are present and to prevent the intrusion of disruptive persons into the schools, the Board directs the enforcement of rules governing school visits.
>
> The Superintendent and building principal each possess the authority To prohibit the entry of any person into a school of this district or to Expel any person from the school when there is reason to believe the Presence of such person would be inimical to the good order of the school. If such person refuses to leave the school grounds or creates a disturbance, the Principal is authorized to request from the local law enforcement agency whatever assistance is required to remove the individual.
>
> Visitors shall be required to register their presence in the school. No staff Member shall transact business with or permit the continuing presence in the school of a visitor who has not been duly registered. Pupils may not bring visitors to school.
>
> No visitor may confer with a student in school without the approval of the Principal; any such conference may take place only in the presence of a teaching staff member and / or administrator.
>
> The Superintendent shall develop regulations that will protect pupils and employees of the district from disruption to the educational program and the efficient conduct of their assigned tasks.

N.J.S.A. 2C:18-3; N.J.S.A. 18A:17-42; 18A:20-1; 18A:20-34.

ANALYSIS OF THE ARGUMENTS ON THE PENDING MOTION

Petitioner's Argument

Petitioner V.P. did not demonstrate that he met any of the requirements necessary for demonstrating his need for emergent relief pursuant to the four factors governing the granting of injunctive relief set forth in Crowe v. DiGioia, 90 N.J. 126 (1982). His argument was based on speculation that in the event of a future emergency, he would need immediate access to the high school campus in order to safeguard his son's welfare. He completely ignored the reasons set forth in the School Superintendent's letter for barring him from the campus pursuant to Policy 9150 due to his conduct on December 5. 2022. V.P. therefore failed to demonstrate any good reason for overturning the Superintendent's decision to bar him.

Respondent's Argument

The First Crowe Factor:

Regarding the first Crowe factor, the Respondent convincingly argued that the Petitioner did not demonstrate that he would suffer irreparable harm if emergent relief were not granted

The Second Crowe Factor:

Regarding the second Crowe factor, Respondent's Counsel points out that Policy 9150 was enacted in accordance with the laws of New Jersey and that its purpose is the promotion of the safety of school staff and students. The BOE's convincingly argued that the law is settled, and it is settled in favor of the BOE, not V.P.

The Third Crowe Factor:

Regarding the third Crowe factor, Respondent's counsel points out that the weight of the credible evidence favors the respondent. Moreover the failure of V.P. to reconcile his assertion that he did not cause a disturbance on December 5, 2022 with the tacit admission that he was indeed ejected from the MPHS campus without any protest on his part, strongly indicates that V.P. will not be able to prevail on the merits.

The Fourth Crowe Factor:

Regarding the fourth Crowe factor, respondent's counsel points out that V.P. has not demonstrated any harm to his interests that was not self-inflicted. The weight of the evidence is that he caused a disturbance on the campus of MPHS which resulted in his ejection and eventual barring from said campus. The BOE's position is that allowing V.P. onto the campus could, in view of his previous egregious conduct and the likelihood of a repetition of such conduct, pose a continuing danger to the good order of the school. Therefore, the relative harm to the parties falls heavier on the school (the BOE) than it does V.P.

LEGAL ANALYSIS AND CONCLUSIONS

Legal Analysis of the Evidence Concerning School Policy 9150

School Policy 9150 is attached as an exhibit. Its provisions are clearly stated.

Petitioner, V.P.'s position is that he conducted himself with good taste and propriety on December 5, 2022 at MPHS. He stated that he was calm and remained calm. He denies becoming angry or loud, denies that he made accusations; denies that he used vulgar language; denies that he made threats; and denies that he engaged in any hostile actions. He did not deny that he was asked to leave the school building and that he was escorted out of the building. V.P. characterized himself as "alarmist". In regard to the statements of various witnesses who stated that V.P. became angry, loud, accusatory, used vulgar language, that he made threats, and that he acted in a hostile

manner, V.P. responded that the witnesses "misperceived" his words and demeanor and that some of them were too far away to hear what he actually said.

The Respondent's multiple witnesses reported that V.P. was not calm, but rather was visibly agitated and angry and that he raised his voice and was asked to lower his voice. V.P. accused Nurse Corcoran of not giving him information about his son's illness. Multiple witnesses reported that V.P. spoke to his ex-father-in-law using vulgarity and expletives. V.P. did not deny saying to Principal Capuano, "If anything happens to my son, it's on you." This statement and the statement quoted by Capuano (from his conversation with Administrator Stacey Garvey), "If Capuano doesn't apologize, I'll get him", suggest untoward consequences against Capuano. Capuano stated that he surmised the need to place himself between V.P. and R.Z. in order to prevent a physical altercation being initiated by V.P.'s use of vulgar language and his approach towards R.Z. with clenched fists.

I have made findings concerning the above-listed conduct and I **CONCLUDE** that on December 5, 2022 at MPHS V.P. violated School Policy 9150.

Legal Analysis Of The Arguments Concerning The Crowe Factors

Analysis of the First Crowe Factor: The Claim of Irreparable Harm

A party seeking injunctive relief must demonstrate the need for relief by clear and convincing evidence. Brown, *supra*. The party seeking injunctive relief must demonstrate that the claim of irreparable harm is substantial and imminent. Waste Mgmt., *supra*. V.P. has not carried his burden of producing clear and convincing evidence that his being barred from the School District's campuses will cause him or M.P. irreparable harm. There has been no showing that the drop-off and pick-up places to which V.P. is limited imposes any undue hardship to V.P. or to M.P. The Board was not inflicting harm when the Superintendent of Schools barred V.P. from the School Districts campuses. Rather the Superintendent was attempting to promote the safety of the students and staff of the District from a repetition of the type of conduct that V.P. exhibited on December 5, 2022.

I **CONCLUDE** that V.P. has not demonstrated irreparable harm to himself or to his son, M.P., and cannot prevail on the first Crowe factor.

Analysis of the Second Crowe Factor: Whether the Law is Settled or Not

Policy 9150 was enacted in accordance with the laws of New Jersey and its purpose is the promotion of the safety of school staff and students. I **CONCLUDE** that the BOE has demonstrated that the law is settled and that it is settled in its favor.

Analysis of the Third Crowe Factor: That the Movant has Shown a Reasonable Likelihood of Success on the Merits

On the issue of whether V.P. can show a reasonable probability of success on the merits, V.P. has not set forth an argument demonstrating that the merits weigh in his favor. On the other hand, the respondent has marshalled evidence favoring the Respondent's case from witnesses who have no personal interest in the outcome of the matter and whose credibility has not been seriously challenged. I **CONCLUDE** that V.P. has not demonstrated that he has a reasonable probability of success on the merits. Therefore, I **CONCLUDE** that V.P. cannot prevail on the third Crowe factor.

Analysis of the Fourth Crowe Factor : Relative Harm to the Parties

V.P. bears the burden of demonstrating by clear and convincing evidence that the harm he claims to suffer is both substantial and imminent. As noted above, V.P. has not demonstrated that denial of injunctive relief will cause him or his son to suffer any imminent harm or even any foreseeable harm. V.P. has not demonstrated how he or his son, M.P., will be harmed and has not demonstrated that he or his son, M.P., will be harmed to any greater extent than the Board. Therefore, I **CONCLUDE** that V.P. cannot prevail on the fourth Crowe factor.

From my analysis of the facts and the arguments presented pursuant to Crowe, I **CONCLUDE** that V.P. has not demonstrated that he has prevailed on any of the Crowe factors and therefore, he is not entitled to emergent relief.

Having reviewed the documents and testimony presented in this matter, together with the arguments presented, I **CONCLUDE** that the School District does not "enforce" the MSA; rather, it has followed the requirements of the MSA. I also **CONCLUDE** that the definition of an "emergency", as used in the MSA, is not a matter for the OAL to decide. V.P. and A.Z., through their respective counsel have agreed to the terms and content of their MSA. If either of them now or in the future raises a question or conflict about the meaning of the word "emergency" as used in their MSA, then they must seek to resolve it. Ultimately, the definition of "emergency" under the MSA is for the parties themselves to agree upon, or, if they cannot agree upon the definition of "emergency" they must resolve their dispute before the Superior Court of New Jersey, Chancery Division, Family Part.

Having reviewed Exhibit R-4 and Exhibit R-6, I **CONCLUDE** that Superintendent Marie Cirasella has given the School District's assurance to V.P. that the School District's administrators, teachers and school nurse will respond to his appropriate requests for any information about his son. I **CONCLUDE** that Cirasella provided V.P. with a clear statement that he is not to come upon the premises of MPHS and has provided a clear procedure for where he is to pick-up M.P. on his parenting days. I **CONCLUDE** that Cirasella provided V.P. with a clear procedure in which he is to telephone her regarding an emergency that may involve M.P., reserving to herself the authority to grant or deny admittance for V.P. to enter upon the MPHS campus. I **CONCLUDE** that Cirasella has stated clearly to V.P. that he will continue to receive all notifications, reports, and assessments concerning M.P., which are provided by the school District to all parents and guardians of its students. I **CONCLUDE** that Cirasella's December 12, 2022 letter has already provided all of the relief that V.P. is entitled to in this matter, including , but not limited to, his demand for a set of "protocols".

Having made findings of fact concerning V.P.'s conduct on December 5, 2022 at MPHS, and having reviewed School Policy 9150, I **CONCLUDE** that Superintendent Marie Cirasella was authorized to bar V.P. from the premises of the Midland Park School District and I **CONCLUDE** that nothing has come before this Tribunal that indicates that the barring of V.P. should be lifted. I hereby **AFFIRM** Superintendent Cirasella's action

of barring V.P. from the School District's premises, subject to her further consideration of circumstances that may arise, and subject to her sole discretion.

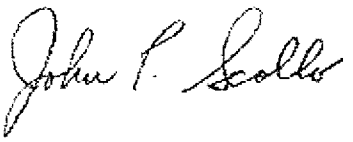
ORDER

It is hereby **ORDERED** that V.P.'s Motion for emergent relief in the form of an Order vacating the December 8, 2022 decision of Superintendent of Schools Marie Cirasella to bar V.P. from the campuses of the Midland Park School District is **DENIED**; and it is further **ORDERED** that V.P.'s demand for a set of protocols (i.e., procedures) for the dropping-off and picking-up of M.P. is **DENIED** because the procedures have already been set forth in R-4, Cirasella's letter dated December 12, 2022; and it is further **ORDERED** that V.P.'s demand for information about his son, M.P., is **DENIED** because the promises and assurances have already been set forth in R-4, Cirasella's letter dated December 12, 2022, and it is further **ORDERED** that a copy of this **ORDER** shall be transmitted by email from the OAL to V.P. and to Attorney Stephen R. Fogarty, and that receipt of same shall be acknowledged immediately by the recipients.

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

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

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



February 8, 2023
DATE

JOHN P. SCOLLO, ALJ

Date Received at Agency:

Date Mailed to Parties:

db

APPENDIX

List of Exhibits

Petitioner's Exhibits

P-1 Superintendent Cirasella's December 8, 2022 Letter

P-2 Superintendent Cirasella's December 12, 2022 Letter

P-3 "Extract" of Police Operations Report

P-4 Several emails from V.P. in which he states his desire to communicate with School District Officials or the District's Attorney

P-5 The Marriage Settlement Agreement between V.P. and A.Z.

P-6 A May 10, 2022 email to A.Z. and V.P. from Peter Galasso, a School Principal

Respondent's Exhibits

R-1 Six Faculty / Staff Incident Reports

R-2 December 5, 2022 Handwritten Statement of R.Z.

R-3 Midland Park Police Operations Report dated December 7, 2022

R-4 December 8, 2022 Letter from Superintendent Cirasella to V.P.

R-5 School Policy 9150

R-6 December 12, 2022 Letter from Superintendent Cirasella to V.P.

R-7 Capuano Certification

120-23

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

PHILIP D. MURPHY
Governor

SHEILA Y. OLIVER
Lt. Governor

ANGELICA ALLEN-MCMILLAN, Ed.D.
Acting Commissioner

April 20, 2023

VIA EMAIL ONLY

Edwin and Shirley Cajamarca
224 2nd Street
Elizabeth, NJ 07203

Brian Kane, Esq.
LaCorte, Bundy, Varady & Kinsella
989 Bonnel Court
Union, NJ 07083

Re: ***E.C. and S.C., on behalf of minor children, C.C. and K.C. v. Board of Education of the City of Elizabeth, Union County, Agency Dkt. No. 100-4/23***

Dear Parties,

This matter arises from the determination of the Elizabeth Board of Education (Board) that petitioners do not meet the residency requirements of *N.J.S.A.* 18A:38-1. The petition of appeal in this matter was received by the Office of Controversies and Disputes, which processes petitions filed before the Commissioner pursuant to *N.J.A.C.* 6A:3-1.3(a), via email on April 17, 2023. Accordingly, an acknowledgment was sent to the parties that identified April 17, 2023 as the filing date. Thereafter, the Board determined that, because the petition was filed more than 21 days after the Board issued the notice of ineligibility, it would not allow petitioners' minor children to continue to attend school in Elizabeth during the pendency of the proceedings.

Petitioners filed a motion for emergent relief, pursuant to *N.J.A.C.* 6A:3-8.1(f), which the Board did not oppose. As part of their motion, petitioners included a shipping receipt that demonstrated that they had mailed the petition of appeal via United States Postal Service (USPS) Priority Mail, using a third-party shipping service called "Prime Postal Center." The tracking information demonstrates that the package was shipped on March 24, accepted by the USPS on March 25, and delivered to the Department of Education (DOE) on March 27, 2023. However, the tracking information listed the DOE's Office of Certification and Induction as the recipient, rather than the Office of Controversies and Disputes. Accordingly, the package containing the mailed version of the petition was searched for and located in the Office of Certification and Induction. The petition was enclosed in a plain white mailing envelope, which was correctly addressed by petitioners to the Office of Controversies and Disputes. However, Prime Postal Center placed the entire package in a USPS-supplied Priority Mail envelope and prepared an electronic shipping label which listed the recipient as the Office of Certification and

Induction. Whether this happened due to an autofill error or for some other reason, it is clear that the fault for the incorrect address lies with Prime Postal Center, not petitioners.

Upon review of petitioners' submission, I conclude that the filing date for the petition of appeal must be amended to March 27, 2023, the date that the petition was delivered to the Department of Education. Based upon this filing date, the petition was filed within 21 days of the Board's notice of ineligibility. Therefore, pursuant to *N.J.S.A.* 18A:38-1, petitioners' minor children may not be denied admission during the pendency of the proceedings.[1]

The petition will be transmitted to the Office of Administrative Law for further proceedings regarding the merits of the underlying residency dispute. Minor children C.C. and K.C. are permitted to attend school in Elizabeth during the pendency of the proceedings.

Sincerely,

Angelica Allen-McMillan, Ed.D.
Acting Commissioner of Education

120-23L

[1] Because the Commissioner concludes that the petition was filed within 21 days of the notice of ineligibility, there is no need to reach a decision on petitioners' motion for emergent relief or to address the factors of *Crowe v. DeGioia*, 90 *N.J.* 126 (1982).

121-23
OAL Dkt. No. EDU 00727-21
Agency Dkt. No. 127-6/20

New Jersey Commissioner of Education

Final Decision

New Jersey Education Association,

Petitioner,

v.

Board of Education of the Hudson County Schools of Technology, Hudson County,

Respondent.

The record of this matter, the Initial Decision of the Office of Administrative Law (OAL), the exceptions filed by respondent Hudson County Schools of Technology Board of Education (HCST) pursuant to *N.J.A.C.* 1:1-18.4, and the reply thereto filed by petitioner New Jersey Education Association (NJEA), have been reviewed and considered.[1]

In this matter, the NJEA is seeking payment from HCST for the legal fees and costs that it incurred in defending a criminal matter involving an HCST secretary, Graciela Rubet. Rubet was accused of taking a gift bag belonging to another employee from a locker on June 22, 2018. Following an investigation into the incident, the Board attorney directed the district to have charges filed against Rubet. Thereafter, on or about August 9, 2018, the superintendent reported the incident to the police, provided them with a copy of video surveillance, and informed them that she wanted to pursue a criminal complaint against Rubet. On August 29, 2018, the North Bergen Municipal Court issued a criminal complaint against Rubet, charging her

[1] HCST's reply to the NJEA's reply was not considered, as such a filing is not contemplated by *N.J.A.C.* 1:1-18.4. Despite HCST's assertions, the Commissioner notes that the NJEA's reply exceptions were timely filed in accordance with the extension that it received from the Commissioner with HCST's consent.

with the fourth-degree crime of theft by unlawfully taking or exercising control over movable property. On February 24, 2020, the charges against Rubet were dismissed. Rubet was defended in the criminal matter by the Law Firm of Caruso Smith Picini, P.C. (Law Firm). On April 24, 2020 and again on August 25, 2020, the Law Firm sent demand letters to the Board, requesting reimbursement in the amount of $155,367.27 to defray Rubet's legal costs in defending the criminal charges against her. The NJEA then filed the instant petition of appeal.

Following cross-motions for summary decision, the Administrative Law Judge (ALJ) found that the NJEA is entitled to reimbursement for the legal fees and costs associated with defending Rubet in the criminal matter, pursuant to *N.J.S.A.* 18A:16-6.1. Specifically, the ALJ concluded that the criminal charge arose out of and in the course of the performance of Rubet's position as a secretary at HCST. The ALJ noted that *N.J.S.A.* 18A:16-6.1 provides an exception to indemnification when a criminal complaint is filed by or on behalf of the Board. In this case, the ALJ found that the complaint was filed by a police officer and on behalf of Edward Sellmeyer, the employee who owned the gift bag, and not by or on behalf of HCST, such that the exception does not apply. Finally, the ALJ found that the NJEA is entitled to indemnification even though the funds will be paid to the Law Firm rather than to Rubet herself, and that a settlement agreement and release between Rubet and HCST does not affect the NJEA's right to seek indemnification.[2]

In its exceptions, HCST argues that the NJEA is not entitled to indemnification for several reasons. First, according to HCST, Rubet's actions in going into a coworker's locker and taking a

[2] The settlement stemmed from Rubet's suspension from employment during the pendency of the criminal matter. In the agreement, HCST agreed to pay Rubet $115,000 to compensate for her pain and suffering during the suspension period in exchange for a general release for any claims arising out of the suspension during the suspension period.

gift bag does not arise out of and in the course of the performance of her duties as a secretary as it is unrelated to her job responsibilities. Second, HCST argues that the ALJ erred in finding that this matter was not filed by or on behalf of the Board as it ignores that the school contacted police and made the request to file a criminal complaint. Third, HCST contends that Rubet does not have a right to reimbursement for her legal fees because she waived her rights to bring any action against the Board in a settlement agreement with HCST. Finally, HCST maintains that the NJEA does not have an independent right or standing to bring this action as the NJEA is not an employee of HCST.

In reply, the NJEA argues that the ALJ correctly concluded that the complaint was not filed by or on behalf of HCST. The NJEA explains that police officers issue complaints, and therefore the complaint in this case was issued by the officer who signed the summons. The NJEA also points out that the complaint was filed on behalf of Sellmeyer, who was the actual victim because he owned the property, and not the Board. As such, the NJEA maintains that it is entitled to reimbursement of Rubet's legal fees. Additionally, the NJEA contends that the settlement agreement between Rubet and HCST did not release any rights of the NJEA because it was not a party to the settlement. Accordingly, the NJEA's position is that it funded Rubet's legal fees, and it is therefore entitled to reimbursement under *N.J.S.A.* 18A:16-6.1.

Upon review, the Commissioner finds that the NJEA is not entitled to payment for the legal fees and costs incurred in the defense of Graciela Rubet because the criminal matter was initiated by HCST. The statute provides:

> Should any criminal or quasi-criminal action be instituted against any such person for any such act or omission and should such proceeding be dismissed or result in a final disposition in favor of such person, the board of education shall reimburse him for the

> cost of defending such proceeding, including reasonable counsel fees and expenses of the original hearing or trial and all appeals. No employee shall be entitled to be held harmless or have his defense costs defrayed as a result of a criminal or quasi-criminal complaint filed against the employee by or on behalf of the board of education.
>
> [*N.J.S.A.* 18A:16-6.1 (Emphasis added).]

When interpreting a statute, the goal is to discern the legislative intent, which can be gleaned from the plain meaning of the language. *Board of Education of the City of Sea Isle City v. Kennedy*, 196 *N.J.* 1, 12 (2008). In doing so, courts intend to give meaning to all statutory provisions, without rendering any language "inoperative, superfluous, void[,] or insignificant." *In re DiGuglielmo*, 252 *N.J.* 350, 360-61 (2022) (alteration in original) (quoting *Sanchez v. Fitness Factory Edgewater, LLC*, 242 *N.J.* 252, 261 (2020)). The language of *N.J.S.A.* 18A:16-6.1 indicates that an employee will not have her legal costs indemnified if the criminal complaint is filed against the employee "by or on behalf of the board of education." In order to effectuate meaning to each provision of the statute without rendering any words superfluous, the Commissioner notes that there must be a different meaning when a complaint is filed "by" a board versus when a complaint is filed "on behalf of" a board, as the provisions are separated by "or," indicating that there are two separate scenarios when the legal costs will not be defrayed.

Considering the plain meaning of the statute in this circumstance, the complaint was filed *on behalf of* Sellmeyer, the victim who owned the property that was allegedly stolen. Conversely, the complaint was filed *by* HCST. The Board attorney directed the district to have charges filed. Thereafter, the superintendent reported the incident to police, and the police incident report specifically indicates that "Mrs. Lin-Rodriguez informed me that at this time, she

would like to pursue criminal complaints against Rubet." HCST initiated the criminal action by reporting it to police and pressing charges. The Commissioner is not persuaded by the NJEA's argument that the complaint was filed by the police officer who signed the summons. While the officer physically signed the complaint, that is an officer's job. However, it was HCST that reported the incident and pursued the charges with the police, such that the police followed through and issued the summons. The legislature could only intend that that a complaint is filed by the party that presses charges.[3] As the complaint was filed by HCST, Rubet shall not be held harmless and have her legal costs defrayed under *N.J.S.A.* 18A:16-6.1. Therefore, the NJEA is not entitled to reimbursement of the costs it spent for Rubet's legal defense.[4]

Accordingly, the Initial Decision of the OAL is rejected. HCST's motion for summary decision is granted, and the NJEA's motion for summary decision is denied. The petition of appeal is hereby dismissed.

IT IS SO ORDERED.[5]

Angelica Allen-McMillan, Ed.D.
ACTING COMMISSIONER OF EDUCATION

Date of Decision: April 24, 2023
Date of Mailing: April 26, 2023

[3] While it appears to be undisputed that the gift bag at issue in this matter belonged to Sellmeyer, the criminal summons indicates that the gift bag belonged to HSCT. If such were true, the complaint would have been filed on behalf of HCST in addition to being filed by HCST.

[4] As this issue is dispositive, the Commissioner need not determine any of the remaining issues in this matter.

[5] This decision may be appealed to the Appellate Division of the Superior Court pursuant to *N.J.S.A.* 18A:6-9.1. Under *N.J.Ct.R.* 2:4-1(b), a notice of appeal must be filed with the Appellate Division within 45 days from the date of mailing of this decision.

State of New Jersey

OFFICE OF ADMINISTRATIVE LAW

INITIAL DECISION

SUMMARY DECISION

OAL DKT. NO. EDU 00727-21

AGENCY DKT. NO. 127-6/20

NEW JERSEY EDUCATION ASSOCIATION,

Petitioner,

v.

BOARD OF EDUCATION OF THE HUDSON COUNTY SCHOOLS OF TECHNOLOGY, HUDSON COUNTY,

Respondent.

Joshua Forsman, Esq., for petitioner (Caruso, Smith, Picini, P.C., attorneys)

Michelle Schott, Esq., for respondent (Purcell, Mulcahy & Flanagan, LLC, attorneys)

Record Closed: July 28, 2022 Decided: February 3, 2023

BEFORE **ELISSA MIZZONE TESTA**, ALJ

PROCEDURAL HISTORY AND STATEMENT OF CASE

Petitioner, New Jersey Education Association ("NJEA"), seeks payment by the respondent, the Board of Education of the Hudson County Schools of Technology

("Respondent", "Board" or "HCST") for legal fees and costs associated with defending a criminal matter. On January 21, 2021, this matter was transferred to the Office of Administrative Law ("OAL") from the New Jersey Department of Education.

Respondent filed a Motion to Dismiss in Lieu of an Answer in accordance with N.J.A.C. 6A:3-1.10 and N.J.A.C. 6A:3-1.5(g). On April 8, 2021, pursuant to a telephone conference held with the undersigned and counsel for the parties, it was agreed that there are no disputed facts with respect to this matter, and respondent's Motion to Dismiss in Lieu of an Answer was converted to a Motion for Summary Decision. Subsequently, petitioner filed a Cross-Motion for Summary Decision and each party then submitted opposition and replies to each Summary Decision Motion. On January 5, 2022, Oral Argument was held on the Summary Decision Motions. On July 28, 2022, a telephone conference was held to clarify whether the reasonableness of the attorneys' fees in question was an issue to be decided before the undersigned; it was agreed and determined that the only issue to be decided by way of this Initial Decision is whether respondent is required to reimburse petitioner for the cost of the legal fees associated with Rubet's criminal defense pursuant to N.J.S.A. 18A:16-6.1. The record was then closed.

FACTUAL DISCUSSION

The following facts are undisputed, and I therefore **FIND** them to be the **FACTS** of the case:

1. On June 22, 2018, Graciela Rubet was employed as a secretary by the Hudson County Schools of Technology.
2. On June 22, 2018, it was alleged that Rubet unlawfully took property while on school grounds during the course of her employment.
3. On August 29, 2018, a Criminal Complaint against Rubet, alleging theft by unlawfully taking or exercising control over property, was issued by the

North Bergen Municipal Court, (Exhibit A. Criminal Complaint). The Complaint was signed by Officer Eric Weyand (Exhibit A). [1]

4. John R. Dineen, Esq., Board Counsel for HCST, directed HCST to have criminal charges filed against Rubet and those charges were filed on the district's behalf. (Exhibit R. Certification of John R. Dineen, Esq., Board Counsel for HCST).

5. The North Bergen Police Department Incident Report attached to the Criminal Complaint also indicate that then Acting Superintendent Amy Lin-Rodriguez of the District requested that criminal charges be filed against Rubet. (Exhibit A., Criminal Complaint, Police Incident Report).

6. The Police Incident Report indicates that Lin-Rodriguez viewed Rubet on a surveillance camera taking a gift bag from an employee's locker. (Exhibit A., Criminal Complaint, Police Incident Report).

7. It is undisputed that there is no evidence to suggest that Rubet's job responsibilities as a secretary included going into the lockers of other employees.

8. Rubet was represented in her criminal defense matter by the Law Firm of Caruso Smith Picini, P.C. (Exhibit C, April 24, 2020 Demand Letter for Rubet's Legal Fees, with Invoices).

9. The Criminal Complaint against Rubet was ultimately dismissed by the North Bergen Municipal Court on or about February 24, 2020. (Exhibit D. New Jersey Automated Criminal Complaint System Charged, Disposition Inquiry Report).

10. As per the billing records of Rubet's attorneys, a few days prior to the Criminal Complaint being dismissed against her, her attorneys began negotiating with respondent's Board Counsel regarding a Settlement Agreement between Rubet and respondent. (Exhibit C., April 24, 2020 Demand to respondent for Rubet's Legal Fees, with Invoices; See Counsel Entries on February 20, 2020.)

[1] The referenced Exhibits are attached to the Motion and Cross-Motion for Summary Decision.

11. On April 24, 2020, a Demand Letter from Nicolas Poberezhsky of the Caruso Smith Picini Law Firm "to defray Ms. Rubet's legal costs" was forwarded to respondent. (Exhibit C. April 24, 2020 Demand Letter to Respondent for Rubet's Legal Fees with Invoices).

12. In the Demand Letter, Mr. Poberezhsky demands $155,367.27 be forwarded to his law firm "to defray Rubet's legal costs." (Exhibit C. April 24, 2020 Demand Letter to Respondent for Rubet's Legal Fees, with Invoices).

13. Rubet and respondent agreed to settle their differences related to the matter involved in the Municipal Court Criminal Complaint and their Settlement Agreement was fully executed on or about July 17, 2020. (Exhibit E., Settlement Agreement).

14. Under the terms of the Agreement, Rubet was paid $115,000. (Exhibit E. Settlement Agreement, ¶8).

15. The General Release in the Settlement Agreement reads, in part, as follows:

> General Release – As an inducement for the Employer to enter into this Agreement, the Employee does hereby remise, release and forever discharge the Employer and its officials, officers, directors, employees, agents, successors and assigns from any and all debts, obligations, suites, actions, causes of action, claims or demands, in law or in equity, which the Employee ever had now has or hereafter can, shall or may have, for upon or by reason of any matter, cause or thing whatsoever arising

16. The General Release further reads, in part, as follows:

> . . . In the event that any action or proceeding has been filed or instituted, the Employee agrees to cause its immediate dismissal with prejudice. Employee further agrees not to participate as a plaintiff either individually or as part of a class, as if so named, she shall withdraw with prejudice from the matter. (Exhibit E., Settlement Agreement, ¶10) (Emphasis added).

17. The Settlement Agreement further provides as follows:

> **KNOWING AND VOLUNTARY WAIVER** – The Employee acknowledges that in the execution of this Agreement, she is affecting a knowing and voluntary waiver of any claims, liabilities or causes of action against Employer, its officials, and employees . . .. The Employee has consulted with an attorney and has read this Agreement and fully understands all of its terms.

(Exhibit E. Settlement Agreement. ¶12) (Emphasis added).

18. The Petition in this matter was filed on or about October 20, 2020 with the New Jersey Education Association as the petitioner and the Hudson County Schools of Technology as respondent. (Exhibit F., Petition without Exhibits). The petitioner seeks to have the Hudson County Schools of Technology pay to the New Jersey Education Association $155,367.27 "to defray Ms. Rubet's legal costs" that appear to have been incurred by the Caruso Smith Picini Law Firm in representing Ms. Rubet in the Municipal Court action referenced in the proceeding paragraphs. (Exhibit F., Petition; Exhibit C, April 24, 2020 Demand Letter to Respondent for Graciela Rubet's Legal Fees, with Invoices. See list paragraph on first page).

20. Petitioner submits documentation of hours spent by her attorneys in representing Rubet in her criminal matter. (Exhibit C, April 24, 2020 Demand Letter to Respondent for Rubet's Legal Fees, with Invoices).

21. No documentation is provided as to what entity is obligated to pay Rubet's legal fees and under what conditions, pursuant to contract or other legal vehicle, although it is undisputed that she has no outstanding legal fees.

22. There is no representation in the Petition, or documentation provided by petitioner, New Jersey Education Association indicating that Rubet is responsible for the payment of the $155,367.27 for legal fees that are sought.

LEGAL ANALYSIS AND CONCLUSION

A party may move for summary decision under N.J.A.C. 1:1-12.5(b), which "may be rendered if the papers and discovery, which have been filed, together with the affidavits, if any, show that there is no genuine issue as to any material fact challenged and that the moving party is entitled to prevail as a matter of law." This Motion shares similarities with the summary judgment rule established in New Jersey Court Rules, R. 4:46-2. See, Judson v. People's Bank and Trust Co. of Westfield, 17 N.J. 67, 74 (1954). Pursuant to this standard, all inferences of doubt are drawn against the movant and in favor of the party against whom the motion is directed. Id. at 75. Here, both the

respondent and the petitioner are moving parties. Summary Judgment is precluded when it is determined that "there exists a genuine issue of material fact." Brill v. Guardian Life Insurance Co., 142 N.J. 520 (1995).

Petitioner and respondent agree that no genuine issues of material fact exist in this case. Therefore, the primary legal question to be determined is whether respondent is required to reimburse petitioner for the cost of the legal fees associated with Rubet's criminal defense pursuant to N.J.S.A. 18A:16-6.1.

The indemnity of board of education employees in certain criminal and quasi-criminal actions is governed by N.J.S.A. 18A:16-6.1, which provides in pertinent part:

> Should any criminal or quasi-criminal action be instituted against any such person for any such act or omission and should such proceeding be dismissed or result in a final disposition in favor of such person, the board of education shall reimburse him for the cost of defending such proceeding, including reasonable counsel fees and expenses of the original hearing or trial and all appeals. No employee shall be entitled to be held harmless or have his defense costs defrayed as a result of a criminal or quasi-criminal complaint filed against the employee by or on behalf of the board of education.

In Bower v. East Orange Bd. of Educ. (Bower I) 149 N.J. 416 (1997), the New Jersey Supreme Court interpreted N.J.S.A. 18A:16-6.1 to be read in conjunction with N.J.S.A. 18A:16-6[2] and adopted a two-part standard to determine whether board of education employees are entitled to indemnification of counsel fees and expenses incurred in the defense of criminal charges under the statute. To prevail, the employee must demonstrate by a preponderance of the evidence that 1) any act or omission on which

[2] N.J.S.A. 18A:16-6 provides: "Whenever any civil or administrative action or other legal proceeding has been or shall be brought against any person holding any office, position or employment under the jurisdiction of any board of education, including any student teacher or person assigned to other professional pre-teaching field experience, for any act or omission arising out of and in the course of the performance of the duties of such office, position, employment or student teaching or other assignment to professional field experience, the board shall defray all costs of defending such action, including reasonable counsel fees and expenses, together with costs of appeal, if any, and shall save harmless and protect such person from any financial loss resulting therefrom; provided that

> (a) no employee shall be entitled to be held harmless or have his defense costs defrayed in a disciplinary proceeding instituted against him by the board or when the employee is appealing an action taken by the board..."

the criminal charges are based, arose "out of and in the course of the performance of his duties", and 2) the charges were either dismissed or resulted in a final disposition favorable to the employee. Id. at 423.

Rubet has satisfied the second prong under Bower – all criminal charges against her were ultimately dismissed. The next inquiry then focuses on whether the act on which the criminal charges are based arose out of and in the course of the performance of her duties as a secretary. Respondent contends that N.J.S.A. 18A:16-6.1 does not apply here because the act upon which the criminal charge was based did not arise out of Rubet's performance of her duties as a secretary. Rather, respondent argues, when Rubet allegedly stole a gift bag from another employee's locker, she was acting outside of the scope of her employment duties.

The facts underlying the criminal charge are to be "analyzed strictly rather than liberally, so that reimbursement of legal fees and expenses should only ensue when the circumstances are such as to fit clearly within the legislative limitations." Powers v. Union City Bd. of Ed., 124 N.J. Super. 589 (Law Div.1973) aff'd, 127 N.J. Super 294 (App. Div.), certif. denied, 65 N.J. 575, (1974) (analyzing a prior version of the indemnification provision). This is so because a public employee should not be "encouraged to engage in acts which may constitute crimes by the assurance that an acquittal on the charge will permit him to saddle defense costs upon the taxpayers of the community." Ibid.

In Bower, after setting forth the two-part test for indemnification under N.J.S.A. 18A:16-6.1, the Supreme Court elaborated on the scope of the term "arose out of and in the course of the performance of [the employee's] duties." Bower, a kindergarten teacher, was criminally charged with sexually abusing his students during the school day and on school premises. The charges were ultimately dismissed. Bower requested indemnification from the Board for the legal fees associated with the defense of his criminal action pursuant to N.J.S.A. 18A:16-6.1, which the board denied. Bower appealed to the State Board of Education.

The State Board of Education remanded the matter to the OAL in light of the dismissal of Bower's indictment with prejudice. The State Board instructed, on remand,

that Bower had the burden of establishing both a nexus between the alleged conduct and the performance of his duties and a favorable disposition of the criminal charges. The ALJ recommended the denial of Bower's request for indemnification because he was unable to establish that the conduct alleged in the criminal matter arose out of the performance of his duties as a teacher. The Commission adopted the ALJ's recommendation, noting that the record was devoid of proof that Bower's alleged actions were linked to his teaching responsibilities. The State Board affirmed the Commissioner's ruling, emphasizing that Bower had failed to meet his "affirmative burden" of establishing a relationship between the conduct alleged and the performance of his duties as a teacher.

Bower's attorneys separately filed suit on behalf of Bower and themselves in the Law Division, seeking a judgment for attorney fees and disbursements, representing the work done in defending Bower against both indictments. The Law Division judge concluded that the criminal charges indeed had arisen out of the performance of Bower's duties because his involvement with the children was produced by his contact with them as a teacher. The judge awarded both the attorney fees and disbursements.

The Appellate Division reversed the judgment of the State Board and affirmed the judgment of the Law Division. The Appellate Division found that to arise "out of" the employment responsibilities, the criminal charges "must be of such nature the risk of which might have been contemplated by a reasonable person when entering the employment, as incidental to it." Bower v. East Orange Bd. of Educ., 287 N.J. Super. 15, 32 (App. Div. 1996). Such a risk "is incidental to the employment when it belongs to or relates to what a teacher has to do in fulfilling his contract of service." Ibid. The Supreme Court affirmed. See, Bower v. East Orange Bd. of Educ., 149 N.J. 416 (1997).

The Court found it "undisputed" that the alleged events "took place in the school, during school hours, and while Bower was required to be engaged in performing his duties as a teacher." Id. at 432. However, the Court denied the Board's assertion of a supplementary requirement that the employee present *specific* testimony that rebuts the charges or explains their specific relationship to the employee's performance of their assigned duties, as the requirement was absent from the statute, nor had it been imposed

by administrative regulation. Id. at 433. All that is required of employees under the statute, the Court concluded, is proof by a preponderance of the evidence that the acts upon which the criminal charges were predicated arose out of and in the course of performance of the duties of employment, which Bower plainly satisfied. Id. at 434.

In McHarris v. North Brunswick Bd. of Educ., EDU 4968-01, Initial Decision (Dec. 8, 2005), McHarris, an In-School Suspension (ISS) supervisor was arrested and charged with criminal sexual contact based on allegations of inappropriate conduct with two students in the ISS classroom. During the time period of the allegations, the two students were not assigned to ISS. McHarris was subsequently acquitted of all criminal charges after a jury returned a verdict of not guilty and he sought indemnification from the board of education.

McHarris had testified that, while the students in question were not assigned to the ISS classroom, he allowed non-ISS assigned students to have their lunch break in the room and that other teachers and staff frequently visited the classroom. The Assistant Principal also confirmed that neither of the two students were assigned to the classroom. She testified that non-ISS students were not permitted to enter that room, however, there was no written policy in this regard and that it was difficult to keep other students out of the room. The ALJ also found that there was no proof of any verbal instruction to McHarris that non-ISS students were not permitted in the room, and that the school administration was on notice that McHarris allowed non-assigned students in the classroom during a free period. As such, the ALJ concluded that the alleged acts arose out of and in the course of McHarris' duties and that he was entitled to reimbursement under N.J.S.A. 18A:16-6.1.

In contrast, in Crews v. Hackensack Bd. of Educ., EDU 07629-06, Initial Decision (May 2, 2007), adopted, Comm'r (May 31, 2007), Crews, a teacher for the Hackensack School District, challenged the board's denial of reimbursement of legal fees incurred in connection with her defense against a criminal complaint for disorderly conduct. While school was in session, Crews was observed to be under the influence of a controlled substance or alcohol. Pursuant to the District's substance abuse policy, Crews was required to immediately undergo a medical examination. While another employee

attempted to accompany her to a doctor, Crews exited the school grounds. Police were summoned and the officers detected the smell of alcohol on her. They summoned an ambulance. When it arrived, Crews became more agitated and louder was flailing her arms, was cursing and said that she did not want to go with the ambulance. She yelled to get the f--- off her and to keep his f---ing hands off her. The officer told her she would be arrested if she did not calm down. The officers arrested her for disorderly conduct when she persisted and tried to push away from the officers. After a bench trial, Crews was acquitted, and the charges were dismissed.

The ALJ concluded that Crew's disorderly conduct charge neither arose out of nor arose in the course of the performance of her duties as a teacher. In so finding, the ALJ noted that the arrest occurred off school property on a public street when she was not in the process of educating children or attempting to fulfill her obligation to undergo a medical test under the substance abuse program. As such, the ALJ found that Crews was not entitled to reimbursement under N.J.S.A. 18A:16-6.1.

Here, as was the case in Bower and McHarris, but in contrast to Crews, Rubet was charged with a crime that allegedly occurred on school premises. She was charged with the theft of a gift bag that was in the locker of a fellow employee, Mr. Sellmeyer. The risk of a secretary being charged with the theft of an item in the school is "of such nature that the risk of which might have been contemplated by a reasonable person when entering the employment, as incidental to it." Bower, 287 N.J. Super. at 32. Rubet's presence on school grounds demonstrates that this risk was at least incidental to Rubet's position as a school secretary. Thus, the criminal charge against Rubet arose out of her employment in the district and the first requirement of the two-part test is satisfied.

I therefore **CONCLUDE** that the criminal charge against Rubet arose out of and occurred in the course of the performance of her position as a secretary for HCST.

Respondent next contends that the exception carved out in N.J.S.A. 18A:16-6.1, which denies indemnity for an employee when the criminal or quasi criminal matter was filed "by or on behalf of the board of education" applies here. Respondent asserts that because Board Counsel and the Acting Superintendent requested that the District and

the Police Department file criminal charges against Rubet, the Criminal Complaint was filed on behalf of the district.

A person is guilty of theft if they "unlawfully take, or exercise unlawful control over, movable property of another with the purpose to deprive him thereof." N.J.S.A. 2C:20-3A. "Victim" is defined as "a person who suffers a personal, physical or psychological injury or death or incurs loss or injury to personal or real property as a result of a crime committed against that person . . ." N.J.S.A. 2C:43-3(e). An individual convicted of theft may be ordered to pay restitution to the victim. N.J.S.A. 2C:43-3.

Here, Edward Sellmeyer, meets the statutory definition of "victim," because he alone allegedly suffered a loss of property in the form of a gift bag worth approximately $200. Additionally, the criminal complaint was signed by Officer Eric Weyand, who charged Rubet with the violation of N.J.S.A. 2C:20-3A, the offense of Theft by Unlawful Taking in the Fourth Degree. While respondent may have wanted and advocated for criminal charges to be filed against Rubet, the charges were not filed "on behalf of" respondent. Criminal charges such as the one at issue here are filed by or on behalf of the victim, and here, Mr. Sellmeyer fits that definition. No action was or could have been taken by respondent to officially press charges against Rubet – its only connection to the incident was that it took place on school property.

I therefore **CONCLUDE** that the Complaint was filed by Officer Weyand on behalf of Mr. Sellmeyer, not on the behalf of respondent. Accordingly, the exception carved out in N.J.S.A. 18A:16-6.1 is not applicable here.

Respondent next argues that the indemnification statute refers only to an employee, not to other entities that may pay the employee's legal fees.

A board's obligation to pay for the indemnification of third parties under N.J.S.A. 18A:16-6.1 is not relieved even if the employees themselves did not shoulder any of the costs. In Salaam v. Irvington Bd. of Educ., EDU 13483-10, Initial Decision (May 17, 2012), adopted, Comm'r (June 25, 2012), a criminal complaint was filed against Salaam, a teacher employed by the Irvington Board of Education, for allegedly assaulting a fifteen-

year-old student. The criminal complaint was eventually dismissed. Salaam was a member of the NJEA and had obtained his legal services through a law firm that participated in the program. Salaam requested reimbursement for his attorney fees under N.J.S.A. 18A:16-6.1. The Board of Education ignored his request and Salaam appealed.

The ALJ concluded that the Board was required to reimburse the NJEA for Salaam's fees even though Salaam himself did not pay the fees. The ALJ rejected the Board's argument that Salaam had no standing to bring the case because NJEA financed his defense, and that Salaam had no fees to be reimbursed. The ALJ explained that:

> the fact that a third party finances the defense is irrelevant as the obligation to pay for the cost remains with the board of education. In other words, the fact that a third party finances the defense does not relieve a board of education of its obligation under the statute to pay for it.

The ALJ further found that NJEA was entitled to indemnification, as the fact that Salaam "chose to protect himself from potentially ruinous defense costs" should not "inure to the benefit of the Board of Education." The Commissioner adopted the ALJ's decision in full. On appeal, the Appellate Division affirmed these rulings. See, Salaam v. Bd. of Educ. of Irvington, Essex County, 2014 N.J. Super. Unpub. Lexis 268 (App. Div. February 4, 2014).

Similarly, a qualifying employee who is defended by an insurance company is entitled to indemnification pursuant to N.J.S.A. 18A:16-6 and 6.1, even when the reimbursement monies will ultimately be paid to the defending insurer rather than the employee. In Waters & Horace Mann Co. v. Tom's River Bd. of Educ, EDU 2611-10, Initial Decision (April 4, 2011), adopted, Comm'r (May 11, 2011), Waters, an Art Teacher, was alleged to have made inappropriate sexual comments to a student. Waters was named as a defendant, among others, in a lawsuit brought by the student. The claims included negligent supervision as well as violation of the Anti-Bullying Bill of Rights Act. Waters sought coverage through the NJEA, and the Horace Mann Insurance Company provided his defense. This policy contained a Subrogation Clause, which stated that:

> In the event of any payment under this contract, the Company shall be subrogated to all the **Insured's** rights of recovery therefore against any person or organization and the **Insured** shall execute and deliver instruments and papers and do whatever else is necessary to secure such rights. The **Insured** shall do nothing after loss of prejudice to such rights.

The lawsuit was dismissed against Waters without any finding of liability. Waters & the Horace Mann Co. brought an N.J.S.A. 18A:16-6 claim (involving civil actions) seeking reimbursement in the amount of $59,023.82, representing the settlement as well as attorney's fees and costs incurred in defending Waters. The board refused, arguing that Waters had not actually incurred any expense in his defense, only Horace Mann had, and that Horace Mann is not an "employee" and therefore did not have standing to bring a claim.

The ALJ noted that Waters was faced with four choices following the Board's refusal to provide him with a defense: "raise the money himself; persuade a defense counsel to take the case and cover the upfront costs in hopes of indemnification; forgo hiring counsel to provide a defense; or draw upon the insurance policy." The ALJ concluded that the intent of N.J.S.A. 18A:16-6 was to defray the employee's expenses; the subrogation clause in the insurance policy clearly stated that the Company shall be subrogated to all the Insured's rights of recovery against any person or organization; the petitioners' contention that the statute does not require an employee to personally go out of pocket to claim indemnification, and that it is sufficient that Waters petitioned for reimbursement, as in line with the Appellate Division's holdings in Sekuler v. Montgomery Township Board of Education, A-000091- 96T1 (App. Div. May 8, 1997) certif. denied, 151 N.J. 464 (1997); and the interpretation urged by the Board was overly mechanistic and not within the statute or existing case law. Accordingly, the ALJ granted the petitioners' request for relief and ordered the board to reimburse petitioners for all costs and fees expended on behalf of Waters in connection with the defense and settlement of the Superior Court lawsuit. The Commissioner adopted the decision in full.

The Appellate Division affirmed, holding that the subrogation clause was valid, and that nothing in the legislative history supports the Board's position that Horace Mann cannot seek reimbursement under the statute because it is not a board employee. See,

Waters v. Bd. of Educ. of Toms River, 2011 N.J. Super. Unpub. LEXIS 3083 (App. Div. Dec. 22, 2011). The Court determined that the purposes and policies of the statute are advanced by allowing for reimbursement of costs in situations in which, in the face of board refusal to defend a case, a school employee relies on his union's insurance policy to fund legal representation. To conclude otherwise, the court held, that it "would create a loophole for school boards that would undermine the statutory purpose of defraying the costs of a school employee's defense of a suit." Id. at *19. Thus, a qualifying employee who is defended by an insurance company is entitled to indemnification pursuant to N.J.S.A. 18A:16-6 and 6.1, "even when the reimbursement monies will ultimately be paid to the defending insurer rather than the employee." Ibid.

The Court also questioned the decision of Meisenbacher v. Newark Bd. of Educ., 1 N.J.A.R. 162, 165 (Dep't of Educ. 1980), certif. granted, remanded, 91 N.J. 251 (1982), which the board had relied upon in its arguments. In that case, the ALJ held that an attorney who represented a school employee in a civil matter did not have standing to seek reimbursement from the Newark Board of Education. The court concluded that the reasoning in Meisenbacher was "questionable" because the ALJ relied on broad language in Hartmann v. Maplewood Sch. Transp. Co., 106 N.J. Super. 187, 192 (Law Div. 1969), aff'd 109 N.J. Super. 497 (App. Div. 1970) without acknowledging the factual differences between Hartmann, which involved a school bus company's driver and the issue of whether the driver was a "school employee" for the purposes of N.J.S.A. 18A:16-6, and the facts of the case before him, namely, the defense of a teacher in the district. Id. at *15-16 n.1

Here, because Rubet is entitled to reimbursement of legal fees for the cost of her criminal defense, the NJEA, who provided the funding for these fees, is entitled to same. As stated in Salaam and Waters, the Board is not relieved of its obligation under the statute to pay simply because the NJEA is not an "employee" of the Board. It does not make a difference which party filed the petition under N.J.S.A. 18A:16-16.1, and the Board has not cited any authority to the contrary.

I therefore **CONCLUDE** that the NJEA, who defended Rubet, a qualifying employee, is entitled to indemnification pursuant to N.J.S.A. 18A:16-6.1 even when the

reimbursement monies will ultimately be paid to the defending attorneys rather than Rubet herself. Accordingly, the NJEA is entitled to restitution for legal fees under N.J.S.A. 18A:16-6.1.

Finally, respondent contends that, even if Rubet is found to be entitled to reimbursement under N.J.S.A. 18A:16-6.1, she waived such entitlement pursuant to her prior Settlement Agreement with respondent.

The New Jersey Supreme Court has enunciated the standard to determine whether a party has waived its legal rights. As a threshold matter, "[w]aiver is the voluntary and intentional relinquishment of a known right." Knorr v. Smeal, 178 N.J. 169, 177 (2003). The party must "have full knowledge of [its] legal rights and intent to surrender those rights." Ibid. A party need not expressly state its intent to waive a right; rather, waiver can occur implicitly if "the circumstances clearly show that the party knew of the right and then abandoned it, either by design or indifference." Ibid. Such a waiver must be done "clearly, unequivocally, and decisively." Ibid. Determining whether a party waived a right is a fact-sensitive analysis. See, Ibid.

In the Settlement Agreement, Rubet waived any future claims that she personally may be entitled to against the respondent. However, Rubet did not claim to waive any rights on behalf of NJEA. Significantly, she did not and does not have the authority to waive any rights on behalf of the NJEA. The NJEA itself did not sign any form of release as part of agreement between Rubet and the respondent, nor was it a party to any of the previous actions involving Rubet. It never demonstrated a voluntary and intentional relinquishment of its right to seek reimbursement under N.J.S.A. 18A:16.6.1, as is required under New Jersey law. Accordingly, the District cannot use Rubet's Settlement Agreement as a shield to avoid its financial obligations under N.J.S.A. 18A:16.6.1.

I therefore **CONCLUDE** that Rubet's Settlement Agreement did not affect NJEA's legal rights under N.J.S.A. 18A:16-6.1 because the NJEA was not a party to the agreement and because Rubet did not have authority to waive NJEA's legal rights.

CONCLUSION

I **CONCLUDE** that the NJEA is entitled to reimbursement for legal fees and costs associated with defending Rubert in the criminal matter. Rubet was charged with a Criminal Complaint connected with on-duty conduct and the charges were subsequently dismissed. As a result, Rubet would be entitled to reimbursement of reasonable legal fees under N.J.S.A. 18A:16.6.1. Since Rubet would be entitled to reimbursement of legal fees, the NJEA, who funded those legal fees, is accordingly entitled to reimbursement.

Therefore, having reviewed both parties' submissions, I **CONCLUDE** that no issues of material fact exist. I further **CONCLUDE** that respondent is in violation of N.J.S.A. 18A:16.6.1 and that petitioner is entitled to reimbursement for Rubet's legal fees and costs.

ORDER

It is therefore **ORDERED** that the petitioner's Motion for Summary Decision be and hereby is **GRANTED**. It is further **ORDERED** that the respondent's Motion for Summary Decision be and hereby is **DENIED.**

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

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

Within thirteen days from the date on which this recommended decision was mailed to the parties, any party may file written exceptions with the **COMMISSIONER OF**

THE DEPARTMENT OF EDUCATION, ATTN: BUREAU OF CONTROVERSIES AND DISPUTES, 100 Riverview Plaza, 4th Floor, PO Box 500, Trenton, New Jersey 08625-0500, marked "Attention: Exceptions." A copy of any exceptions must be sent to the judge and to the other parties.

February 3, 2023

DATE

ELISSA MIZZONE TESTA, ALJ

Date Received at Agency: February 3, 2023

Date Mailed to Parties: February 3, 2023

EMT/sej

BRIEFS RELIED ON

For Petitioner

Cross-Motion for Summary Decision with Supporting Brief

Opposition to Respondent's Motion

For Respondent

Motion for Summary Decision with Supporting Brief

Opposition to Petitioner's Cross-Motion

122-23
OAL Dkt. No. EDU 02066-22
Agency Dkt. No. 15-2/22

New Jersey Commissioner of Education

Final Decision

J.S. and S.S., on behalf of minor child, A.S.,

Petitioner,

v.

Board of Education of the West Morris Regional High School District, Morris County,

Respondent.

The record of this matter and the Initial Decision of the Office of Administrative Law (OAL) have been reviewed, along with petitioners' exceptions filed in accordance with *N.J.A.C.* 1:1-18.4. The Board did not file a reply.[1]

In this matter, petitioners claim that the Board discriminated against A.S. by failing to provide door-to-door transportation to and from her out-of-district placement. A.S. is a high school student who attends Sage Alliance (Sage) due to her special education needs. At the time her placement began at the start of the 2021-22 school year, the Board secured Cassidy Transportation (Cassidy) to transport A.S. to and from Sage. As petitioners live on a hazardous,

[1] The Commissioner was not provided with a transcript of the October 7, 2022 hearing, which included the limited testimony of one witness. The parties agreed that the testimony and record in a related special education matter – *J.S. and S.S., on behalf of A.S. v. West Morris Regional Board of Education*, EDS 08829-21, Final Decision dated December 7, 2022 – was duplicative of the record in this matter, and therefore the testimony of all witnesses and the corresponding exhibits from that matter were incorporated by reference in this matter. The Commissioner was not provided with a transcript of the hearing or the exhibits from the special education matter.

steep mountain road, Cassidy determined that it would be unsafe to stop directly in front of petitioners' home because it is utilizing a smaller bus rather than a full-sized bus which would have the ability to safely stop traffic.[2] As such, Cassidy picks A.S. up and drops her off at the municipal building located one-third of a mile from petitioners' home. Petitioners filed the instant petition claiming that the Board is discriminating against A.S. based on her disability and seeking an order requiring the Board to provide door-to-door transportation.

The Administrative Law Judge (ALJ) found that petitioners' claims under the New Jersey Law Against Discrimination (LAD) and the Americans with Disabilities Act (ADA) do not arise under the New Jersey School Laws and are therefore outside the Commissioner's jurisdiction pursuant to *N.J.S.A.* 18A:6-9.[3] The ALJ found, however, that petitioners' claim under New Jersey's Equality and Equity in Education Law, *N.J.S.A.* 18A:36-20 – which prohibits discrimination "in admission to, or in obtaining any advantages, privileges or courses of study of the school by reason of race, color, creed, sex or national origin" – is properly before the Commissioner. Considering the merits of petitioners' argument that A.S.'s disability is the reason that the Board has denied the curb-to-curb transportation service that other general education students on her road enjoy, the ALJ found that A.S.'s disability is not the proximate cause of why she is not being picked up in front of her house. Instead, the ALJ found that it is the hazardous road where petitioners live that prevents the shorter bus from stopping in front

[2] The type of vehicle being used to transport A.S. to and from school is unclear. The director of transportation for Washington Township School District referred to the vehicle as a van but clarified that it was a smaller yellow school bus, while the transportation supervisor at West Morris Regional High School District testified in the related special education matter that a seven-passenger minivan is utilized to transport A.S.

[3] The ALJ found the Board's argument that petitioners had failed to exhaust their remedies under the Individuals with Disabilities Education Act (IDEA) was moot, because a final decision has been issued in petitioners' due process petition.

of the home; thus, utilizing the municipal building for pick up and drop off is an "unintended consequence" of A.S.'s placement at Sage.[4]

In their exceptions, petitioners argue that the ALJ should have addressed their claims under Section 504 of the Rehabilitation Act (504), the ADA, and the LAD because, according to petitioners, the Commissioner has concurrent jurisdiction with the Division on Civil Rights over LAD matters when it involves schools, and the OAL has jurisdiction to hear cases involving Section 504 and the ADA. Petitioners also argue that the ALJ failed to address the fact that the Board does not allow child study teams to offer curb-to-curb transportation for people with mental health or psychiatric disabilities, regardless of their needs, and only offers it if there is a physical impairment requiring door to door transportation. Petitioners contend that because there is disparate treatment between children with physical disabilities and children with mental health or psychiatric disabilities, disability-based discrimination is apparent. Additionally, petitioners argue that A.S. was treated differently than general education students who are picked up at their homes on the same hazardous road as A.S.'s house. In support of their contention, petitioners point out that the Board did not have to use Cassidy to transport their daughter, as it could have considered other options or transported A.S. on its own using a larger bus rather than requiring her to walk along a hazardous route or rely on her parents to drive her to the municipal building.

[4] In a related special education matter, petitioners filed a due process petition similarly challenging the Board's failure to provide door-to-door transportation for A.S. to Sage and arguing that the lack of door-to-door transportation violates A.S.'s right to a free and appropriate public education (FAPE). *J.S. and S.S., on behalf of A.S. v. West Morris Regional Board of Education*, EDS 08829-21, Final Decision dated December 7, 2022. In a Final Decision, the ALJ found that there was no medical evidence in the record that A.S. required drop-off and pick-up immediately outside of her house. As such, the ALJ found that while a bus stop at her home may be preferable, transportation to and from the municipal building does not rise to the level of a denial of FAPE or a deprivation of educational benefits.

Upon review, the Commissioner finds that the Board is not meeting its responsibility to provide A.S. with appropriate transportation to and from school. Notably, the Board has not provided persuasive evidence that it is incapable of safely stopping in front of A.S.'s house but yet it is requiring her to walk along a hazardous road without sidewalks or a shoulder to the location of her assigned bus stop.

Pursuant to *N.J.A.C.* 6A:27-1.3(a):

> District boards of education shall provide transportation to public school students who reside remote from their assigned school of attendance, nonpublic school students who reside remote from their school of attendance and meet the eligibility criteria of N.J.A.C. 6A:27-2.2, and students with disabilities who reside remote from their assigned school or who require transportation services in accordance with their individualized education program (IEP).

In this matter, A.S. is a student with a disability who resides remote from her assigned out-of-district placement, and as such, she is entitled to transportation to and from school. In order for A.S. to utilize the provided transportation, she must travel one-third of a mile down a steep, hazardous road to a municipal parking lot because, according to Cassidy, it is unsafe to stop along such a dangerous route. The Commissioner cannot reconcile why the Board would accept Cassidy's representation that the road is so unsafe that a vehicle cannot safely pick up a student (especially when other buses have previously stopped in front of her house), but at the same time find it acceptable for a student to walk down the same hazardous road, without a shoulder or sidewalks, to reach her assigned bus stop. The Commissioner understands that petitioners have been driving A.S. to the municipal building; while petitioners have been taking extra efforts to ensure that their child reaches the bus safely, they should not be required to do so. It is the Board's responsibility to provide A.S. with transportation under *N.J.A.C.* 6A:27-

1.3(a), and her parents should not be burdened with the additional responsibility of driving her back and forth because the Board has chosen a location that is indisputably unsafe for her to traverse on her own.

The Commissioner is uncertain why Cassidy transportation cannot effectuate a safe stop at or near petitioners' home. It is clear that full-sized school buses routinely stop along petitioners' road, and even at their house, while utilizing flashing lights to safely stop. If Cassidy is providing a shorter yellow school bus as one witness testified, then it is unclear why such a school bus would not be equipped with flashing lights and a stop sign in order to stop traffic. If, on the other hand, Cassidy is utilizing a seven-passenger minivan as another witness testified, then it is unclear why a van cannot pull into petitioners' driveway, or a safe pull-off location away from traffic. Notably, the record is devoid of testimony from a representative of Cassidy to explain its rationale in detail.

Considering the specific circumstances in this matter – including the treacherous route A.S. would be required to walk to her assigned bus stop and the fact that transportation vehicles have safely stopped at A.S.'s home in the past – the Commissioner finds that the Board should provide curb-to-curb transportation to and from A.S.'s out-of-district placement at Sage beginning in the 2023-24 school year. The Commissioner notes that if the Board is unable to meet its responsibility while utilizing a short yellow bus or a seven-passenger minivan, it is free to utilize a large school bus, which has already been determined to be able to safely stop along petitioners' road. Given that petitioners' requested relief of curb-to-curb transportation is being granted, it is unnecessary for the Commissioner to reach the remaining discrimination arguments in this case.

Accordingly, the Initial Decision of the OAL is rejected. The Board is required to provide A.S. with curb-to-curb transportation to and from Sage beginning in the 2023-24 school year.

IT IS SO ORDERED.[5]

Angelica Allen-McMillan, Ed.D.
ACTING COMMISSIONER OF EDUCATION

Date of Decision: April 24, 2023
Date of Mailing: April 26, 2023

[5] This decision may be appealed to the Appellate Division of the Superior Court pursuant to *N.J.S.A.* 18A:6-9.1. Under *N.J.Ct.R.* 2:4-1(b), a notice of appeal must be filed with the Appellate Division within 45 days from the date of mailing of this decision.

State of New Jersey
OFFICE OF ADMINISTRATIVE LAW

INITIAL DECISION
OAL DKT. NO. EDU 02066-22
AGENCY DKT. NO. 15-2/22

J.S. AND S.S. ON BEHALF OF A.S.,
Petitioner,
v.
WEST MORRIS REGIONAL HIGH SCHOOL BOARD OF EDUCATION,
Respondent.

David R. Giles, Esq., for petitioner

Jodi S. Howlett, Esq., for respondent (Cleary, Giacobbe, Alfieri, and Jacobs, attorneys)

Record Closed: December 15, 2022 Decided: January 30, 2023

BEFORE **JUDE-ANTHONY TISCORNIA**, ALJ:

STATEMENT OF THE CASE

J.S. and S.S. on behalf of A.S. (petitioners) filed a petition claiming, among other related items, that the West Morris Regional High School District (District) discriminated against A.S. due to its failure to provide door-to-door transportation to and from A.S.'s out-of-district placement.

PROCEDURAL HISTORY

On February 1, 2022, J.S. and S.S. on behalf of A.S. filed a petition seeking the following:

A.) a declaration that the District has discriminated against A.S. by not providing her with door-to-door transportation;

B.) an order directing the District to provide door-to-door transportation;

C.) an order directing the District to reimburse A.S.'s parents for out-of-pocket expenses and for their time;

D.) attorney's fees; and

E.) other relief as appropriate.

The matter was transmitted to the Office of Administrative Law on March 16, 2022, as a contested case. A hearing was conducted by the undersigned on October 7, 2022. Final submissions were received by the parties on December 15, 2022, at which point the record was closed.

FINDINGS OF FACTS

I **FIND** the following to be the facts of the case:

Petitioners reside on Schooley's Mountain Road, Long Valley, New Jersey 07853, and, as such, the West Morris Regional High School District is the local education agency responsible for providing A.S. with a free, appropriate public education (FAPE). The parties agree that Schooley's Mountain Road is dangerous and hazardous.

A.S. is currently fifteen years old and in the tenth grade. At the time of the filing of the due-process petition, A.S. was fourteen years old and attending Sage Alliance (Sage)

as a ninth-grade student. A.S. has been deemed eligible for special education and related services under the classification of "other health impaired."

Prior to becoming a student in the West Morris Regional High School District, A.S. was a special-education student in the Washington Township School District (Washington Township). While students of Washington Township, both A.S. and her brother were picked up and dropped off by a Washington Township school bus in front of their house on Schooley's Mountain Road.

On June 10, 2020, Washington Township proposed an IEP ("6/10/20 IEP") placing A.S. at the Newmark School in Scotch Plains, New Jersey. Transportation was added as a related service to her IEP.

On January 14, 2021, Washington Township issued an IEP ("1/14/2021 IEP") placing A.S. at Barnstable Academy in Oakland, New Jersey, for the remainder of her eighth-grade year. The Washington Township School District provided A.S. with "curb-to-curb" transportation as a related service in her IEP through June 10, 2021.

On April 23, 2021, Washington Township convened an Annual Review IEP meeting ("4/23/21 IEP"). At that meeting, it was contemplated that A.S. was in need of a more therapeutic placement than Barnstable Academy for her ninth-grade year. Accordingly, the 4/23/21 IEP provides for A.S. to remain at Barnstable Academy for the remainder of the 2020–2021 school year. Washington Township sent records to potential out-of-district placements with a therapeutic component in preparation for A.S.'s freshman year of high school.

On July 1, 2021, following the completion of A.S.'s eighth-grade year, A.S. became a student of the West Morris Regional High School District. On July 14, 2021, at the request of petitioners, the West Morris Regional High School District convened an IEP meeting. At that time, petitioners advised the District that they wished to discuss Barnstable Academy's decision to discontinue A.S.'s placement in the program. The IEP team determined that, in reviewing the recommendations from Long Valley Middle School and Barnstable Academy, a more therapeutic out-of-district placement would most

appropriately meet A.S.'s social-emotional needs. Petitioners and A.S. attended the July 14, 2021, IEP meeting virtually.

The IEP drafted as a result of the July 14, 2021, meeting ("7/14/21 IEP") placed A.S. on home instruction pending her acceptance to an appropriate out-of-district placement. Because A.S. would be receiving home instruction, transportation was not provided as a "related service" in the 7/14/21 IEP. The 7/14/21 IEP was implemented after expiration of the fifteen-day notice period pursuant to N.J.A.C. 6A:14-2.3(h).

Subsequent to the 7/14/21 IEP meeting, the West Morris Regional High School District secured A.S.'s placement at Sage Day High School in Boonton, New Jersey, for the 2021–2022 school year. A.S. started her ninth-grade year at Sage on September 10, 2021. Upon A.S.'s placement at Sage, the West Morris Regional High School District worked to secure A.S.'s transportation to the out-of-district placement.

On September 10, and September 15, 2021, the District put the transportation route out for public bid to various vendors pursuant to N.J.S.A. 18A:18A-1 et seq. The District did not receive any bids for transportation from any vendors on A.S.'s route for Sage. On September 20, 2021, the District's director of special education, Michael Reinknecht, informed petitioners of the difficulties in securing a vendor to provide transportation to Sage. On October 1, 2021, the District put the transportation route out to public bid for a third time to transportation vendors pursuant to N.J.S.A. 18A:18A-1 et seq.

In October 2021 the District secured a sole vendor, Cassidy Transportation, to transport A.S. to and from Sage. Cassidy was then employed by the District to transport A.S. (via school bus) to Sage, beginning on October 10, 2021. Between the time A.S. started at Sage on September 10, 2021, and Cassidy being contracted to transport A.S. on October 10, 2021, her father, S.S., drove A.S. to and from Sage every school day for approximately twenty days.

As A.S. is the only student utilizing the bus route to Sage, Cassidy utilizes a smaller "short bus" to transport her to and from Sage. Due to the hazardous conditions of

Schooley's Mountain Road, Cassidy Transportation determined that it may prove unsafe to effectuate a stop immediately in front of A.S.'s house utilizing this sort of equipment. Cassidy Transportation, instead, picks up and drops off A.S. at the Washington Township Municipal Building, one-third mile from A.S.'s home.

On October 5, 2021, petitioners filed a request for a due-process hearing to challenge the District's refusal to provide "curb-to-curb" transportation pursuant to the 4/23/21 IEP created by A.S.'s previous district.

On October 12, 2021, West Morris Regional High School District convened a Thirty-Day Review IEP meeting ("10/12/21 IEP"). At that meeting, it was reported by A.S.'s teachers at Sage that she was transitioning well, and the input reflected strong clinical and academic feedback. The 10/12/21 IEP provides transportation to Sage as a related service with pickup and drop-off locations at the Washington Township Municipal Building. Cassidy Transportation has been safely transporting A.S. to and from Sage daily since October 11, 2021, and throughout the pendency of these proceedings.

SUMMARY OF RELEVANT TESTIMONY

As noted above, this matter was set down for a hearing on October 7, 2022. Prior to the hearing, it was decided among the parties that the bulk of the testimony to be presented was duplicative of the testimony already placed on the record in the related case, J.S. and S.S. on behalf of S.S. v. West Morris Regional Board of Education, OAL docket number EDS 08829-21. Thus, the testimony of all the witnesses taken in EDS 08829-21, along with the corresponding exhibits and transcripts, was incorporated by reference on the record on October 7, 2022. Only the limited testimony of Dr. Michael Reinknecht was taken at the October 7, 2022, hearing.

Michael Reinknecht

Michael Reinknecht is the District's director of special education. He testified that West Morris Regional High School District's own director of transportation is responsible for transporting their special-education students. He further testified that West Morris has

a contract with the Washington Township School District to transport general-education students. Reinknecht stated that he had no knowledge of the fact that all general-education high-school students who live on Schooley's Mountain Road are transported to and from school and picked up in front of their homes.

LEGAL DISCUSSION

In response to the petition, respondent argues that petitioners' discrimination claims are barred by the Individuals with Disabilities Education Act's (IDEA's) exhaustion requirement. In its brief, the District argues that the IDEA affords parents of a disabled child the opportunity to present a complaint "with respect to *any* matter *relating* to the identification, evaluation, or educational placement of the child, or the provision of a free appropriate public education to such child . . . ." 20 U.S.C. § 1415(b)(6)(A) (emphasis added). The District argues that exhaustion of the IDEA's administrative process is required in non-IDEA actions where the petitioner seeks relief that can otherwise be obtained under the IDEA, noting that Congress provided an express "[r]ule of construction" in 20 U.S.C. § 1415(l), which provides:

> Nothing in this title [20 U.S.C.S. §§ 1400 et seq.] shall be construed to restrict or limit the rights, procedures, and remedies available under the Constitution, the Americans with Disabilities Act of 1990, title V of the Rehabilitation Act of 1973 [29 U.S.C.S. §§ 790 et seq.], or other Federal laws protecting the rights of children with disabilities, except that before the filing of a civil action under such laws seeking relief that is also available under this part [20 U.S.C.S. §§ 1411 et seq.], the [IDEA administrative process] shall be exhausted to the same extent as would be required had the action been brought under this part [20 U.S.C.S. §§ 1411 et seq.].

Thus, the District argues that it is only following the outcome of the due-process hearing that an aggrieved party shall have a right to bring the action filed with the commissioner. As noted above, petitioners had filed a due-process petition (EDS 08829-21) and a hearing was held. Although no decision was rendered in that matter when the instant matter was filed, a decision has since been made, with petitioners being largely

unsuccessful on their claims, thus, I **CONCLUDE** that respondent's exhaustion argument is, therefore, mute.

Respondent next argues that the commissioner of the Department of Education does not have jurisdiction over claims brought pursuant to the New Jersey Law Against Discrimination or the Americans With Disabilities Act, asserting that the extent of the jurisdiction of the commissioner is set forth in N.J.S.A. 18A:6-9, which provides the following:

> The commissioner shall have jurisdiction to hear and determine, without cost to the parties, all controversies and disputes arising under the school laws, excepting those governing higher education, or under the rules of the State board or of the commissioner.

Thus, respondent argues, the statute clearly implies that where the controversy does not arise under the school laws, it is outside the commissioner's jurisdiction.

As petitioners rightfully point out in their brief, however, New Jersey's Equality and Equity in Education law provides that "[n]o pupil in a public school in this State shall be discriminated against in admission to, or in obtaining any advantages, privileges or courses of study of the school by reason of race, color, creed, sex or national origin." N.J.S.A. 18A:36-20; see also N.J.A.C. 6A:7-1.1, which states:

> The purpose of this chapter is to ensure all students, regardless of race, creed, color, national origin, ancestry, age, marital status, affectional or sexual orientation, gender, gender identity or expression, religion, disability, or socioeconomic status, are provided equal access to educational programs and services by district boards of education.

Based on the foregoing, I **CONCLUDE** that petitioners' current petition is properly before the commissioner of the New Jersey Department of Education as per the plain language of the above-referenced statutes and regulations.

With these jurisdictional and procedural issues now resolved, I turn to address petitioners' case-in-chief: the assertion that the Board discriminated against A.S. by denying her curb-to-curb transportation, a service, they claim, provided to all other students living on Schooley's Mountain Road, because A.S. has a disability.

As discussed in the factual findings above, and as discussed at length in the related special-education case, the District put A.S.'s transportation route out for public bid to various vendors, with Cassidy Transportation ultimately winning the bid and securing the contract to transport A.S. to and from Sage. This transportation route was put out to bid because A.S. is entitled to, and receives, special-education instruction at her out-of-district placement, Sage Academy. This placement was chosen by A.S.'s parents after evaluating other facilities and determining Sage to be the best placement for their child. As transportation is a related service to A.S.'s special-education programing, the District is obliged to put the transportation route out to bid so that A.S. may properly access her special-education programing, as she has been doing on a regular basis thus far.

After Cassidy won the bid and traveled to A.S.'s home, Cassidy determined that, due to the hazardous conditions of Schooley's Mountain Road, Cassidy could not safely pick up A.S. directly in front of her home with the equipment (short school bus) it utilizes to transport A.S. Thus, Cassidy resolved to pick A.S. up at the municipal building approximately one-third mile down the road from A.S.'s home, which Cassidy determined to be the closest location to A.S.'s house at which the bus may safely execute a stop.

Petitioners argue that if A.S. were a general-education student, she would be picked up by a larger bus, one that would, presumably, be able to stop in front of her home safely. Thus, they reason that, but for A.S.'s learning disability, which, in turn, brought forth an IEP calling for an out-of-district placement and transportation as a related service, A.S. would be picked up in front of her home by a larger bus on a daily basis. Petitioners argue that A.S.'s disability is the cause in fact, or the "but for" cause of A.S. not being picked up directly in front of her home. While this scenario may be *a* cause in fact, it is not the *only* cause in fact. One may argue, for instance, that "but for" the location of the petitioners' house being on a hazardous stretch of road, A.S. would be picked up

in front of her home. If, for example, she lived in a residential neighborhood with wide, straight, level lanes of traffic, effectuating a stop directly in front of her home with any motor vehicle—short bus, long bus, etc.—could be achieved with ease. Thus, while A.S.'s disability may be a cause in fact of why A.S. is not picked up immediately in front of her home, it is not the proximate cause, and, therefore, not the direct cause of why she is not picked up in front of her house. Rather, I **CONCLUDE** that A.S. being picked up at the municipal building is an unintended consequence of the Board's implementation of A.S.'s IEP, so that she may access a free and appropriate education as required by law.

ORDER

Based upon the foregoing, it is **ORDERED** that the petition of appeal be, and hereby is, **DISMISSED**.

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

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

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

January 30, 2023
DATE

JUDE-ANTHONY TISCORNIA, ALJ

Date Received at Agency: 1/30/23

Date Mailed to Parties: 1/30/23

id

APPENDIX

LIST OF WITNESSES

Respondent's Witnesses:

None presented at hearing (See notes on page 5,above)

Petitioners' Witnesses:

Michael Reinknecht

EXHIBIT LIST

The respondent and petitioner's exhibit list and all accompanying exhibits in the related matter of J.S. and S.S. on behalf of S.S. v. West Morris Regional Board of Education, OAL docket number EDS 08829-21, is incorporated into this matter by reference. (See notes on page 5, above)

123-23
OAL Dkt. No. 08281-22
Agency Dkt. No. 217-8/22

New Jersey Commissioner of Education

Final Decision

Yesenia Camilo,

Petitioner,

v.

Board of Education of the Town of West New York, Hudson County,

Respondent.

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

This matter arises from tenure charges filed by the West New York Board of Education (Board) against petitioner. The arbitrator assigned to hear the case ordered that petitioner be reinstated to her position if she successfully completed a fitness for duty examination. Petitioner proposed that the exam be completed by Dr. Daniel Gollin, but the Board rejected her proposal and scheduled the exam with its choice of physician, Dr. Mark White. Petitioner attended the exam but also filed a petition of appeal on the same day.

Following cross-motions for summary decision, the Administrative Law Judge (ALJ) found that petitioner did not waive her claim by submitting to the exam with Dr. White. The ALJ also found that both *N.J.S.A.* 18A:16-3 and Board Policy 2161 allow an employee to propose a physician of her choice for a fitness for duty exam and concluded that the Board was required to act in a reasonable manner in reviewing petitioner's proposal. The Board offered no reason whatsoever for its rejection of petitioner's choice of Dr. Gollin and, therefore, the ALJ concluded that the Board's

actions were arbitrary, capricious and unreasonable. The ALJ rejected the Board's argument that, because the arbitrator ordered the Board to schedule the exam, it had unfettered discretion in choosing a doctor, noting that the arbitrator specifically indicated that the exam should be performed pursuant to *N.J.S.A.* 18A:16-3. Accordingly, the ALJ granted petitioner's motion for summary decision.

Upon review, the Commissioner concurs with the ALJ, for the reasons thoroughly detailed in the Initial Decision, that: the Board was required to comply with *N.J.S.A.* 18A:16-3 and should have considered petitioner's choice of doctor in scheduling the exam; the Board's rejection of petitioner's choice of doctor without any explanation was arbitrary, capricious, and unreasonable; and petitioner did not waive her right to make such a claim by attending the exam with Dr. White.

Accordingly, petitioner's motion for summary decision is granted. All reports and exams of Dr. White are null and void. Dr. White and practitioners affiliated with him shall not be used for any future exams of petitioner or to provide testimony in any tenure proceedings against petitioner. Petitioner shall have the opportunity, if she has not already done so, to propose a doctor for a fitness for duty exam. The Board shall not unreasonably withhold its approval of petitioner's choice. If petitioner does not propose a doctor within ten calendar days of the date of mailing of this decision, the exam shall be scheduled with a doctor designated by the Board.

IT IS SO ORDERED.[1]

Angelica Allen-McMillan, Ed.D.
ACTING COMMISSIONER OF EDUCATION

Date of Decision: April 24, 2023
Date of Mailing: April 26, 2023

[1] This decision may be appealed to the Appellate Division of the Superior Court pursuant to *N.J.S.A.* 18A:6-9.1. Under *N.J.Ct.R.* 2:4-1(b), a notice of appeal must be filed with the Appellate Division within 45 days from the date of mailing of this decision.

State of New Jersey
OFFICE OF ADMINISTRATIVE LAW

INITIAL DECISION
GRANTING PETITIONER'S MOTION FOR SUMMARY DECISION AND DENYING RESPONDENT'S CROSS-MOTION FOR SUMMARY DECISION
OAL DKT. NO. EDU 08281-22
AGENCY DKT. NO. 217-8/22

YESENIA CAMILO,
Petitioner,
v.
WEST NEW YORK BOARD OF EDUCATION, HUDSON COUNTY,
Respondent.

Albert J. Leonardo, Esq, for petitioner (Zazzali, Fagella, Nowak, Kleinbaum & Friedman, P.C., attorneys)

David J. Kass, Esq., for respondent (Florio, Perrucci, Steinhardt, Cappelli, Tipton & Taylor, LLC, attorneys)

Record Closed: March 17, 2023 Decided: March 20, 2023

BEFORE: **MATTHEW G. MILLER, ALJ**

STATEMENT OF THE CASE

Petitioner, Yesenia Camilo, is employed as a teacher in the West New York, New Jersey school district. On September 20, 2020, respondent filed tenure charges against Ms. Camilo, alleging that she engaged in conduct unbecoming a teacher and that there was other just cause for her termination.

On June 3, 2021, an arbitrator assigned by the New Jersey Commissioner of Education sustained the charges in part, dismissed the charges in part and ordered her reinstatement on the condition that she successfully undergo a fitness-for-duty examination. That exam was not completed.

On November 1, 2021, respondent filed revised tenure charges, once again alleging conduct unbecoming and other just cause for termination. In the interim, Ms. Camilo completed a fitness for duty exam on February 1, 2022. Then, by decision dated July 5, 2022, a Commissioner assigned arbitrator sustained the charges in part, but ordered that Ms. Camilo be reinstated if she successfully completed another fitness for duty examination. That exam was to be scheduled within five business days and completed within fourteen business days of the decision.

By letter dated July 8, 2022, Ms. Camilo proposed that the exam be conducted by Daniel B. Gollin, M.D., but that proposal was not approved. Then, by letter dated August 4, 2022, the arbitrator issued a supplemental decision finding that respondent had failed to comply with the terms of his July 5, 2022 decision and ordering reinstatement of petitioner's salary pending the completion of the exam.

On August 8, 2022, respondent scheduled the exam with Mark White, Ph.D. to occur on August 29, 2022. By letter dated August 12, 2022, petitioner objected to Dr. White's selection and once again proposed that the exam be performed by Dr. Gollin. Respondent refused and after an interchange of messages, the examination finally commenced on September 23, 2022, continued briefly on November 17, 2022 and eventually concluded on December 22, 2022.

In a January 9, 2023 report, Dr. White found that Ms. Camilo was fit for duty, but opined that when she was assigned to the middle school, that "it may be necessary…to provide sick leave…to permit her to avail herself of therapy to address adjustment issues." On January 11, respondent sought "clarification" of Dr. White's opinion and the following day, Dr. White authored a report that she was not fit for duty.

Then, on January 21, 2023, the Board again filed tenure charges against Ms. Camilo and same were served on January 26.

PROCEDURAL HISTORY

On August 26, 2022, Ms. Camilo filed a petition seeking relief from the selection of Dr. White as her fitness for duty examiner. Respondent filed an Answer to the Petition on September 12, 2022 and the matter was transmitted to Office of Administrative Law ("OAL") on September 20, 2022 for hearing as a contested case. N.J.S.A. 52:14B-1 to -15 and N.J.S.A. 52:14F-1 to -13.

An initial conference was held on November 28, 2022 with additional conferences taking place on December 22, 2022 and February 3, 2023. Petitioner then filed this Motion for Summary Decision on February 6, 2023 and following the filing of a Cross-Motion for Summary Decision and an opposition brief by petitioner and a reply brief by petitioner, the record closed on March 17, 2023.

FINDINGS OF UNDISPUTED FACT

The following **FACTS** of the case are not in dispute:

1. Most of the facts detailed in the Statement of the Case are undisputed and a full timeline of events will be provided below.

2. At all times relevant to this matter, petitioner, Yesenia Camilo, was a tenured teacher employed by the West New York, New Jersey school district.

3. On September 20, 2020, respondent filed tenure charges against petitioner alleging that she engaged in conduct unbecoming a teacher and that there was other just cause for her termination. (Exhibit R-A).

4. On June 3, 2021, an arbitrator assigned by the New Jersey Commissioner of Education sustained the charges in part, denied the charges in part and ordered her reinstatement on the condition that she successfully undergo a fitness-for-duty examination. (Exhibit R-B). That exam, however, was never completed.

5. On November 1, 2021, respondent filed revised tenure charges, once again alleging conduct unbecoming and other just cause for termination, but this time adding a charge of abandonment of position. (Exhibit R-D).

6. In the interim, Ms. Camilo completed a fitness for duty exam on February 1, 2022.

7. Then, by decision dated July 5, 2022, a different Commissioner assigned arbitrator sustained the charges in part, but ordered that Ms. Camilo be reinstated if she successfully completed another fitness-for-duty examination. That exam was to be scheduled within five business days and completed within fourteen business days of the decision. (Exhibit R-C).

8. By letter dated July 8, 2022, Ms. Camilo proposed that the exam be conducted by Daniel B. Gollin, M.D., but that proposal was not approved. (Exhibit P-B).

9. Then, by letter dated August 4, 2022, the arbitrator issued a supplemental decision finding that respondent had failed to comply with the terms of his July 5, 2022 decision and ordering reinstatement of petitioner's salary pending the completion of the exam. (Exhibit R-E).

10. On August 8, 2022, respondent scheduled the exam with Mark White, Ph.D. to occur on August 29, 2022. (Exhibit P-D). By letter dated August 12, 2022,

petitioner objected to Dr. White's selection and once again proposed that the exam be performed by Dr. Gollin. (Exhibit P-E).

11. Respondent refused and after an interchange of messages, on August 26, 2022, through counsel, Ms. Camilo agreed to undergo the examination with Dr. White. However, in doing so, she "reserve(d) all rights to seek relief from the Commissioner of Education in this matter". (Exhibit P-J).

12. That same day, petitioner filed this fair hearing appeal. The examination with Dr. White finally commenced on September 23, 2022, continued briefly on November 17, 2022, and ultimately concluded on December 22, 2022.

13. In a January 9, 2023 report, Dr. White found that Ms. Camilo was fit for duty, but opined that when she was assigned to the middle school, that "it may be necessary...to provide sick leave...to permit her to avail herself of therapy to address adjustment issues." (Exhibit P-L). On January 11, respondent sought "clarification" of Dr. White's opinion and on January 12, Dr. White authored a report in which he opined that she was not fit for duty. (Exhibits P-M and P-N).

14. Then, on January 21, 2023, the Board again filed tenure charges against Ms. Camilo and same were served on January 26. (Exhibit P-O).

15. The parties have agreed that the issue in the case before the OAL does not involve the validity of the tenure charges that have been filed against Ms. Camilo, nor whether she is "fit-for-duty."

16. Rather, the issue is limited to whether respondent's actions in scheduling the examination with Dr. White and refusing to consider petitioner's choice of doctors was lawful and, if not, what, if any, remedy would be appropriate.

MOTION

Petitioner filed a Motion for Summary Decision, arguing that;

> The Board's directive that Camilo submit to a fitness for duty examination with its chosen doctor and only its chosen doctor violates that law and is invalid.

More specifically, petitioner argues that the law "clearly provides" her the right to reject the Board's chosen doctor and propose her own to perform the exam and that the decision to ignore her choice was improper. N.J.S.A. 18A:16-3.

It is argued that the only reason for the Board insisting on Dr. White as the examining doctor was as a pretext to filing yet another set of tenure charges against petitioner in an effort to terminate her employment. It's decision to outright reject Ms. Camilo's proposed examiner was therefore arbitrary and capricious.

Respondent opposes the Motion and has filed a Cross-Motion for Summary Decision, first arguing that the original Motion was moot, since Ms. Camilo, whether reserving her rights or not, voluntarily underwent the examination. It was also argued that the results of the exam are irrelevant to the sole issue before the court; whether the manner in which the exam was scheduled was legal.

Respondent argued that it followed both the letter and intent of the statute, but that regardless of whether it is found to have violated the statute, the OAL is powerless to assess any penalty for said violation.

LEGAL POSITIONS

PETITIONER:

Petitioner argues that despite Ms. Camilo having undergone the examination with Dr. White, respondent's decision to insist upon an examination with this provider violates N.J.S.A. 18A:16-3, which affords her the option of being examined by a physician of her choosing, as long as that choice is approved by the Board.

It is further argued that the Board's rejection of Dr. Gollin was arbitrary and capricious and not only violated the statute, but also Board policy.

> What occurred here is simple: he Board coerced Camilo to submit for an examination with its chosen doctor, arbitrarily and unreasonably refused to consider and approve Camilo's proposed doctor.
>
> Petitioner brief at 15.

It is claimed that this refusal was part and parcel of a plan by the Board to file a third set of tenure charges against petitioner "in an effort to terminate her employment."

In support of her position, Ms. Camilo cites to Board of Ed. of City of Pleasantville, Atlantic County v. Chambers, 96 N.J.A.R. 2d (EDU) 447 Final Decision (February 7, 1996).

Petitioner is requesting that Dr. White's report be deemed "invalid" and that it be "rescinded and expunged" and that respondent be compelled "to accept my chosen doctor to perform the fitness for duty examination".

Petitioner also denies waiving any rights by agreeing to appear for the examination with Dr. White, since she only accepted same "under the threat of termination by the Board".

RESPONDENT:

Respondent argues that it did nothing wrong, but instead simply followed the language of the July 5, 2022 arbitration award which required that it and not petitioner, schedule the fitness-for-duty examination.

By following the letter of the arbitration award, it *per se* acted in a reasonable manner, which was compliant with the standard enunciated in Chambers.

It was further argued that by attending and ultimately completing the exam with Dr. White after the filing of the fair hearing appeal, petitioner waived any claim that the Board acted improperly. West Jersey Title & Guaranty Co. v. Industrial Trust Co., 27 N.J. 144,

152 (1958). See also, George F. Malcolm, Inc. v. Burlington City Loan & Trust Co., 115 N.J. Eq. 227 (Ch. 1934).

Respondent further argues that petitioner's proposed remedy of "striking" Dr. White's evaluation is unauthorized by law and even if petitioner's Motion is granted, there is no appropriate remedy, making the Motion moot.

CERTIFICATION OF YESENIA CAMILO:

In support of the Motion for Summary Decision, Ms. Camilo provided a Certification which largely mimics counsel's arguments and timeline. In addition to requesting legal remedies, she provided background information and a history of her employment related issues with respondent.

She certified that she has been employed by respondent as a teacher for twenty-two years and carries certificates as Teacher of English as a Second Language, Teacher of the Handicapped, Teacher of the Deaf and Hard of Hearing and Teacher of Elementary Education.

She then briefly traced the course of her employment difficulties, beginning with the Board's filing of tenure charges in September, 2020 and continuing through the arbitrator's July 5, 2022 decision that she be reinstated if she successfully completed a fitness for duty examination.

She then certified to the course of events that occurred subsequent to the ruling, including the offering of Dr. Gollin, with whom she had never treated nor had contact with, as a potential examiner. She continued to trace the course of the post-arbitration dispute, including her objection to the Board's selection of Dr. White and her interpretation of Board Policy 3161 as permitting her to select her examiner and that the Board could not unreasonably reject her choice.

Ultimately, under threat of legal action, Ms. Camilo, through counsel, agreed to appear for the exam with Dr. White, but argued that her appearance "was not an

agreement that the Board's directive complies with the governing law" and that she "did so without waiver or prejudice" and "in good faith, and in response to the Board's threat to take action against my employment if I did not attend."

Ms. Camilo then reviewed the contents of Dr. White's initial report and the later "clarification" and the subsequent filing of yet another set of tenure charges on January 26, 2023.

LAW AND POLICY

The law involved in the performance of so called "fit-for-duty" examinations is rather clear and reads in pertinent part:

> **18A:16-2. - Physical examinations; drug testing; requirements**
>
> (a.) Every board of education may require its employees and shall require any candidate for employment who has received a conditional offer of employment to undergo a physical examination. The board may require individual psychiatric or physical examinations of any employee, whenever, in the judgment of the board, an employee shows evidence of deviation from normal, physical or mental health.
>
> **18A:16-3. - Character of examinations**
>
> Any such examination may be made by a physician or institution designated by the board, in which case the cost thereof...shall be borne by the board or, at the option of the employee, they may be made by a physician or institution of his own choosing, approved by the board, in which case said examination shall be made at the employee's expense.

Respondent has also propounded a district policy on this issue which reads, in pertinent part:

> **District Policy 3161 – Examination for Cause**
>
> The Board of Education may, in accordance with law, require the psychiatric or physical examination of any teaching staff

> member who shows evidence of deviation from normal physical or mental health...
>
> This examination shall be at the expense of the school district and the results shall be confidential and only provided to the Director of Human Resources and/or designee...
>
> The teaching staff member may, at his/her option, submit names of physicians or institutions to the Board for consideration to complete the appropriate examination(s). The Board is not required to designate a physician or institution submitted for consideration by the teaching staff member, but the Board will not act unreasonably in withholding its approval of a physician or institution submitted by a teaching staff member. The cost of the examination will be borne by the Board if the Board designates a physician or institution from the names submitted from the teaching staff member.
>
> If the teaching staff member's request is denied, or if the teaching staff member does not request the Board to consider a physician or institution, the staff member may elect to submit to an appropriate examination conducted by a physician or institution of the teaching staff member's own choosing and at his/her expense, provided the physician or institution so chosen is approved by the Board, pursuant to N.J.S.A. 18A:16-3, and is authorized and directed by the member to report the result of the examination to the Board.

Ms. Camilo is not challenging respondent's right to demand the examination but argues that a reasonableness standard should be read into N.J.S.A. 18A:16-3 and that the Board never proffered a reason why her choice of doctor was unacceptable.

Respondent argues that because the exam was ordered by the arbitrator and not by it, N.J.S.A. 18A:16-3 does not apply and that its denial of Ms. Camilo's chosen doctor was appropriate.

WAIVER

Respondent claims that by voluntarily submitting to the examination with Dr. White on September 23, 2022 after having both objected to it and filing this Petition on August 26, 2022, Ms. Camilo legally waived her right to object to both its performance and the utilization of the ensuing report by respondent.

In her Certification, Ms. Camilo, while agreeing to attend the exam, noted that this agreement, per her attorney's email "is not an agreement that the Board's directive complies with the Arbitrator's Award and the school laws governing fitness for duty examinations." She also "reserves all rights to seek relief from the Commissioner of Education in this matter" and further claimed that the only reason she agreed to undergo the examination was "under the threat of termination by the Board".

This issue is effectively independent of the underlying issue of whether the examination in a broad sense was properly scheduled.

The doctrine of waiver was discussed in detail in Sroczynski v. Milek, 197 N.J. 36 (2008):

> It hardly needs repeating that "[w]aiver is the voluntary and intentional relinquishment of a known right." Knorr v. Smeal, 178 N.J. 169, 177 (2003) (citing W. Jersey Title & Guar. Co. v. Indus. Trust Co., 27 N.J. 144, 152 (1958)). *See also* Shotmeyer v. N.J. Realty Title Ins. Co., 195 N.J. 72, 89 (2008). It is beyond question that "[a]n effective waiver requires a party to have full knowledge of his legal rights and inten[d] to surrender those rights." Knorr, supra, 178 N.J. at 177 (citing W. Jersey Title & Guar. Co., supra, 27 N.J. at 153). A waiver cannot be divined but, instead, must be the product of objective proofs: "The intent to waive need not be stated expressly, provided the circumstances clearly show that the party knew of the right and then abandoned it, either by design or indifference." *Ibid.* (citing Merchs. Indem. Corp. of N.Y. v. Eggleston, 68 N.J. Super. 235, 254 (App. Div. 1961), aff'd, 37 N.J. 114 (1962)). That benchmark standard leaves little room for doubt, as "[t]he party waiving a known right must do so clearly, unequivocally, and decisively." Ibid. (citing County Chevrolet, Inc. v. Twp. of N. Brunswick Planning Bd., 190 N.J. Super. 376, 380 (App. Div. 1983)). *See also* Shotmeyer, supra, 195 N.J. at 89 (quoting Knorr, supra). Specifically, "waiver 'presupposes a full knowledge of the right and an intentional surrender; waiver cannot be predicated on consent given under a mistake of fact.'" County of Morris v. Fauver, 153 N.J. 80, 104-05 (1998) (quoting W. Jersey Title & Guar. Co., supra, 27 N.J. at 153).
>
> Id. at 63-64.

The cases cited by petitioner is her brief are not entirely on point but do provide some basic guidance. For example, in Rieder v. Caldwell-West Caldwell Bd. of Ed., 1999 N.J. AGEN LEXIS 60, EDU 7609-97, Initial Decision, (Jan. 22, 1999), adopted, Comm'r. (March 10, 1999), aff'd, St. Bd. (July 7, 1999), while the Board did adopt the basic "waiver law" cited above, the factual circumstances are much different. There, a teacher on the preferred eligible list remained silent, despite learning that another individual had been appointed ahead of her. The court found that this alone was insufficient to "warrant the inference that (she) intended to waive her right to remain on the...list." Id. at 8.

Tribbett v. Board of Ed. Twp. of Willingboro, 2012 N.J. Agen. LEXIS 343, Agency Dkt. No. 231-8/11, (May 10, 2012), adopted, Comm'r (August 1, 2011) is a tenure case, where like in multiple other cases, "a waiver of tenure rights requires a clear and unequivocal rejection of an offer of employment". Id. at 21.

Evaul v. Bd. of Ed. of City of Camden, 35 N.J. 244 (1961) may be the most illustrative case. While this is another tenure case where an employee resigned, the Court held that the resignation had been proffered under "emotionally charged" circumstances and had been "an impetuous act prompted by her understandably distraught condition." While she was reinstated to her position, the Court held that based on equitable principles, she was not entitled to back pay. Id. at 249-50.

Petitioner argues that she was essentially forced to agree to undergo the exam with Dr. White, certifying:

> Notwithstanding my objection to the Board's chosen doctor and my Petition, I, in good faith, and in response to the Board's threat to take action against my employment if I did not attend, attended and completed the fitness for duty examination with Dr. White.
>
> Camilo certification at ¶24.

Ms. Camilo cites to respondent counsel's August 15, 2022 letter to her attorney to support her allegation that her job was being threatened by her refusal to accept the

Board's unilateral selection of Dr. White. The letter was essentially a legal discussion/disagreement until the final paragraph, which read as follows;

> We urge Ms. Camilo to reconsider her refusal to attend the fitness for duty examination with Dr. White on August 29, 2022 at 9:00 A.M. Pursuant to Arbitrator Pecklers' award, 'the failure of Ms. Camilo to attend the Fitness For Duty shall result in an adverse inference being drawn that she is unfit for duty.' In such event, the Board reserves its right to pursue any and all legal remedies available.
>
> (Exhibit P-G).

There is surprisingly little case law concerning the issue of waiver and most of what there is concerns insurance companies providing coverage under a reservation of rights.

However, there was a statement by the Court In the Matter of State of New Jersey, Department of Human Services, Division of Public Welfare and Union County Welfare Board, Respondents - and - Communications Workers of America, AFL-CIO, Charging Party, 1980 NJ Perc. LEXIS 235 (April 18, 1980) that is notable:

> It should be apparent that the State's defense of waiver on the part of the Union has been rejected. The CWA's consistent oral reservation of rights in the face of County intention to seek State approval, particularly the Union's stated reservations of right to litigate the justification for inclusion of the subject to State approval clause in the agreement has preserved the Union's objections. Its practical approach to making its agreement with the County effective is in no sense the equivalent of a waiver of rights. The clear and convincing proof of a relinquishment of rights necessary to support the State's position is thus lacking.
>
> Id. at n.35.

While respondent claims that the reservation of rights statement contained in Ms. Camilo's attorney's email (Exhibit P-J) "is no more legally operative than a boilerplate attorney salutation", he notably fails to produce any case law that is really on point. The citation to Cole v. Jersey City Medical Center, 215 N.J. 265 (2013), which concerned a contractual arbitration clause (another common fact pattern in waiver cases), is correct in that there need not necessarily be an expressed statement of waiver, but it also states

that if "the circumstances clearly show that the party knew of the right and then abandoned it, either by design or indifference", then as long as those actions/inactions demonstrated waiver "clearly, unequivocally, and decisively", then waiver could be found. Id. at 277, cit. Knorr, 178 N.J. at 177.

I **FIND** that Ms. Camilo did not waive her rights to contest respondent's unilateral scheduling of the exam with Dr. White. It was very clear from the onset of the issues concerning scheduling and its timing, that petitioner was challenging the manner in which the examination was going to be performed.

After the back-and-forth interaction between counsel, as was noted by respondent's counsel, they "clearly disagree(d)" as to the application of the statute and the Board policy. (Exhibit P-I). After it was obvious that the Board would not accept Dr. Gollin as the examining doctor, petitioner agreed to be examined by Dr. White, but very clearly stated that the agreement to do so was not a concession that the Board was acting properly and she explicitly reserved the right to contest respondent's decision, as it ultimately did. In fact, the day that she agreed to the exam, the petition which led to the referral to the OAL was filed. (Exhibit P-K)

There is nothing in this fact pattern that demonstrated that Ms. Camilo intended to relinquish any rights, let alone that she gave them up "clearly, unequivocally, and decisively". Deeming the verbiage to be "boilerplate" does not make it so and given the history of conflict over the specific issue that was the subject of said language, it simply cannot be dismissed as meaningless legalese. This is particularly true given the filing of the Petition of Appeal on August 26, 2022.

While I appreciate that the exam was performed during the pendency of this litigation, I **FIND** that the doctrine of waiver does not apply in this case and that this matter should be decided on the merits.

LAW AND ANALYSIS

Summary decision may be granted "if the papers and discovery which have been filed, together with the affidavits, if any, show that there is no genuine issue as to any material fact challenged and that the moving party is entitled to prevail as a matter of law." N.J.A.C. 1:1-12.5(b). The OAL summary decision rule is essentially the same as the summary judgment rule under the New Jersey Court Rules, which states:

> The judgment or order sought shall be rendered forthwith if the pleadings, depositions, answers to interrogatories and admissions on file, together with the affidavits, if any, show that there is no genuine issue as to any material fact challenged and that the moving party is entitled to a judgment or order as a matter of law. An issue of fact is genuine only if, considering the burden of persuasion at trial, the evidence submitted by the parties on the motion, together with all legitimate inferences therefrom favoring the non-moving party, would require submission of the issue to the trier of fact.
>
> [R. 4:46-2(c).]

The New Jersey Supreme Court has modified and clarified the analysis required when considering a motion for summary decision/judgment. In Brill v. Guardian Life Insurance Co. of America, 142 N.J. 520, 540 (1995), the Court adopted the summary judgment standard utilized by federal courts:

> Under this new standard, a determination whether there exists a "genuine issue" of material fact that precludes summary judgment requires the motion judge to consider whether the competent evidential materials presented, when viewed in the light most favorable to the non-moving party, are sufficient to permit a rational factfinder to resolve the alleged disputed issue in favor of the non-moving party. The "judge's function is not himself [or herself] to weigh the evidence and determine the truth of the matter but to determine whether there is a genuine issue for trial." [Anderson v. Liberty Lobby, 477 U.S. 242, 249, 106 S. Ct. 2505, 2511, 91 L. Ed. 2d 202, 212 (1986).] . . . If there exists a single, unavoidable resolution of the alleged disputed issue of fact, that issue should be considered insufficient to constitute a "genuine" issue of material fact for purposes of Rule 4:46-2. Liberty Lobby,

> supra, 477 U.S. at 250, 106 S. Ct. at 2511, 91 L. Ed. 2d at 213. The import of our holding is that when the evidence "is so one-sided that one party must prevail as a matter of law," Liberty Lobby, supra, 477 U.S. at 252, 106 S. Ct. at 2512, 91 L. Ed. 2d at 214, the trial court should not hesitate to grant summary judgment.
>
> [Id. at 540.]

The burden is on the moving party to exclude all reasonable doubt as to the existence of any genuine issue of material fact, and all inferences of doubt are drawn against the moving party and in favor of the non-moving party. Saldana v. DiMedio, 275 N.J. Super. 488, 494 (App. Div. 1994). The critical question therefore is "whether the evidence presents a sufficient disagreement to require [a hearing] or whether it is so one-sided that one party must prevail as a matter of law." Brill, 142 N.J. at 533 (citation omitted). If the non-moving party's evidence is merely colorable, or is not significantly probative, summary judgment should not be denied. See, Bowles v. City of Camden, 993 F. Supp. 255, 261 (D.N.J. 1998).

While respondent's issues (the details of which are irrelevant for the purposes of this Motion) with Ms. Camilo apparently began in September, 2019, the procedural events that led to this specific dispute began with an October 16, 2019 memo to Ms. Camilo from the district placing her on administrative leave and ordering that she undergo a fitness-for-duty examination. (Exhibit R-A13). The Board resolution ordering same specifically cited N.J.S.A. 18A:16-2 as the basis for the exam. (Exhibit R-A14). That exam was scheduled by respondent to take place on October 28, 2019, but was thereafter rescheduled to take place on January 23, 2020. (Exhibits R-A15 and R-A16).

Despite having yet to appear for the scheduled fitness-for-duty examinations, the tenure charges were forwarded to an arbitrator by the Department of Education's Bureau of Controversies and Disputes on September 24, 2020 and hearings were held on March 19 and March 25, 2021. The arbitrator then issued her decision on June 3, 2021, with Ms. Camilo still not having appeared for the exam. The arbitrator sustained the tenure charges in part, dismissed them in part and ordered Ms. Camilo's reinstatement on the condition that she successfully undergo a fitness-for-duty examination. (Exhibit R-B).

Following petitioner's failure to appear for the examination, on November 29, 2021 the Board filed a "revised" set of tenure charges against Ms. Camilo (Exhibit R-D). After motion practice, a hearing was held on May 12, 2022 during which the arbitrator reviewed the litany of reasons/excuses why petitioner had failed to attend various scheduled exams before enrolling in an Employee Assistance Program for psychological treatment.

The arbitrator also noted that Ms. Camilo had undergone a "successful" fitness-for-duty examination on February 1, 2022 with the Board's "in-house doctor", Vincent C. Ruiz, M.D. However, the arbitrator did not find the exam to be "dispositive", since the language utilized by the doctor in this "fitness-for-duty" exam, did not specifically address Ms. Camilo's fitness for duty. Ultimately, in a July 5, 2022 award, the arbitrator sustained the charges in part and dismissed them in part and ordered, in pertinent part:

> Within five (5) business days of the receipt of this AWARD, the Board shall schedule a psychiatric Fitness For Duty examination for Ms. Camilo pursuant to N.J.S.A. 18A:16-3, which shall be held within fourteen (14) business days. The doctor administering the Fitness For Duty exam shall definitely state in the report that Ms. Camilo "is" or "is not" fit to return to her teaching duties. This timeline may be amended by mutual agreement of counsel in the event of scheduling difficulties. The failure of Ms. Camilo to attend the Fitness For Duty shall result in an adverse inference being drawn that she is unfit for duty. An absence may be excused only for an emergent and documented circumstances.
>
> (Exhibit R-C)

In an Award Clarification letter dated August 4, 2022, the arbitrator addressed another scheduling issue. On July 8, 2022, petitioner's counsel, as he did here, had sent a letter to the Board proposing that the exam be performed by Dr. Gollin[1] and complained to the arbitrator that respondent had failed to respond to the request and had further failed to suggest any other doctor. Despite promises to schedule the exam, respondent failed to do so. The arbitrator then authored his clarification and ordered Ms. Camilo to be "immediately paid her salary, pending the results of the Fitness For Duty examination." (Exhibit R-E).

[1] (Exhibit P-B)

Following the Clarification Award, the back-and-forth which led to Ms. Camilo's exam with Dr. White ensued. First, there was an August 8, 2022 email from respondent's counsel to petitioner's counsel scheduling the exam for August 29, 2022 with Dr. White. (Exhibit P-D). Petitioner's counsel replied in an August 12, 2022 letter in which she declined to be examined by Dr. White and again proposed Dr. Gollin. (Exhibit P-E).

The back-and-forth continued with a letter from respondent's counsel which seems to ignore petitioner's suggestion of Dr. Gollin and infers that once the Board makes a selection, the option for the employee to counter that suggestion disappears. (Exhibit P-G). In reply, petitioner's counsel sent an August 15, 2022 letter in which he noted that the arbitrator had cited specifically to N.J.S.A. 18A:16-3 and that both the language of the statute and District Policy 3161 permit the employee to propose a doctor to conduct the exam. Counsel further argues that the Board cannot unreasonably or arbitrarily withhold approval of that doctor. He also noted that Ms. Camilo "reserves all rights to file a petition with the New Jersey Commissioner of Education to enforce her rights in this matter." (Exhibit P-H).

Respondent's counsel replied by letter dated August 16, 2022, noting that "the Board maintains that unless same is either vacated or modified on appeal, the Board remains responsible for scheduling Ms. Camilo's Psychiatric Fitness for Duty examination, which necessarily includes selecting the examining physician." (Exhibit P-I).

There was then an August 26, 2022 email exchange between counsel in which, ultimately, Ms. Camilo agreed to attend the exam with Dr. White, but also that she "reserves all rights to seek relief from the Commissioner of Education". (Exhibit P-J).

That was immediately followed by the filing of a Petition of Appeal arguing that the Board's actions violated N.J.S.A. 18A:16-3. (Exhibit P-K).

In analyzing this case, perhaps the best way to summarize respondent's position is that it insists on all parties following the portions of the law and policies it likes and then ignoring those that it doesn't.

Despite the somewhat tortured procedural history, the underlying facts are rather basic. This entire case started with what appears, for what it's worth, to be an entirely justified request that Ms. Camilo undergo a fitness-for-duty examination per N.J.S.A. 18A:16-2.

Ultimately, an arbitrator, despite Ms. Camilo actually having already undergone a fitness-for-duty exam by the Board's chosen doctor, ordered another fitness-for-duty examination to be performed "pursuant to N.J.S.A. 18A:16-3".

As argued by respondent, the language of N.J.S.A. 18A:16-3 is unambiguous. The Board can designate the physician to perform the exam "or, at the option of the employee, they may be made by a physician or institution of his own choosing, approved by the board".

There simply is not a lot of room for interpretation in this language. The Board can designate the physician and the employee can accept that choice, or the employee can propose their own doctor to perform the exam (at their own expense). That choice must then be approved by the Board.

Respondent argues that there is no requirement for it to accept the employee's choice and infers that it has unfettered discretion in making its decision. That is incorrect. Not only does District Policy 3161 mandate that the Board act in a reasonable manner, but case law supports that standard as well.

While respondent attempts to distinguish this examination from, for instance, the exam which it initially attempted to schedule back in 2019, that is a distinction without a difference. In essence, respondent argues that since the arbitrator ordered the exam, it can ignore the statute and do whatever it wants. Whether it was ordered to take place by the arbitrator or not, this is an exam that is being required by the Board for petitioner to

return to work and that has been true from the first requested examination until today and that exam was to be performed per the dictates of N.J.S.A. 18A:16-3.

Both parties argue that Chambers v. Pleasantville Board of Education, 1998 N.J. Agen. LEXIS 263 (May 1, 1998) supports their respective positions. In Chambers, the petitioner was a teacher who was having difficulties on the job and the Board requested that he undergo a psychiatric examination. Chambers refused to be examined by the Board selected doctor, but in the underlying action before State Board of Education, he was ordered to "propose a psychiatrist for his examination and ordered that the BOE not unreasonably withhold its approval of such psychiatrist." Id. at 11, citing Pleasantville City Board of Education v. Chambers, 96 N.J.A.R. 2d (EDU) 447, 448.

While the Board ultimately agreed to petitioner's selection of doctor and the controversy here was avoided, petitioner points out that a reasonableness factor must be built into the decision-making process or else that process is meaningless.

This issue is discussed in G.H. and E.H. on behalf of K.H. v. Board of Education of Franklin Lakes, 2014 N.J. Agen. LEXIS 19 (February 24, 2014). While this was a bullying case, the manner in which a Board must act is discussed, with the court noting that the Commissioner "will not overturn a local board in the absence of a finding that its actions were arbitrary, capricious, or unreasonable." Id. at 19, cit. Thomas v. Board of Education, 89 N.J. Super. 327 (App. Div. 1965).

The court continued, citing to Kopera v. W. Orange Bd. of Educ., 60 N.J. Super. 288 (App. Div. 1960), that;

> The Commissioner will not substitute his judgment for that of the board of education, whose exercise of its discretion may not be disturbed unless shown to be "patently arbitrary, without rational basis or induced by improper motives."
>
> K.H., 2014 N.J. Agen. LEXIS at 19, quot. Kopera, 60 N.J. Super. at 294.

This sentiment was also expressed in J.A.H. on behalf of minor child, C.H. v. Township of Pittsgrove Board of Education, 2013 N.J. Agen. LEXIS 58 (March 11, 2013), aff'd. 2013 N.J. Agen. LEXIS 436 (April 25, 2018), another bullying case.

> The standard before me one that is comparable to appellate review -- arbitrary and capricious, since the matter under review is a final decision of a school board. When an administrative body such as a school board acts within its authority, its decision is entitled to a presumption of correctness and will not be upset unless there is an affirmative showing that such decision was arbitrary, capricious or unreasonable. Kopera v. W. Orange Bd. of Educ., 60 N.J. Super. 288, 294 (App. Div. 1960) Thomas v. Bd. of Ed. Of Morris Tp., 89 N.J. Super. 327, 332 (App. Div. 1965)Thus, the Commissioner, and consequently the ALJ, cannot overturn a local board's decision absent the required affirmative showing of arbitrariness.
>
> Id. at 11. See also, Klapach v. Board of Education of Fort Lee, 2021 N.J. Agen. LEXIS 89 (April 6, 2021).

There is no question that there is a reasonableness standard that governs a Board's actions and interpretations of law, policy and procedure. And there is no material fact in dispute that would lead me to conclude that the Board acted in a reasonable manner in declining to approve petitioner's proposed examiner. The Board has never expressed any reason why Dr. Gollin was unacceptable, but only insisted upon Ms. Camilo appearing before Dr. White.

District Policy 3161 actually contains a reasonableness clause ("the Board will not act unreasonably in withholding its approval of a physician or institution submitted by a teaching staff member"), which respondent never gave any indication of intending to follow.

When combined with case law which clearly indicates that the Board must act in a reasonable manner when applying the dictates of N.J.S.A. 18A:16-3, I **CONCLUDE** that petitioner has proven by a preponderance of the credible evidence that respondent, in rejecting Ms. Camilo's choice of Dr. Gollin without positing any reason for that rejection, acted in a manner that was arbitrary, capricious and unreasonable.

Now that it has been determined that the Board acted improperly, the question that remains is what, if anything, the remedy for its improper actions should be. Unsurprisingly and ultimately unsuccessfully, respondent argues that since the statute does not contain a penalty provision, there should be no adverse action taken and that rescinding Dr. White's reports would be "an extraordinary, unjustifiable remedy".

Petitioner emphatically disagrees, pointing to multiple cases which demonstrate that both ALJs and Commissioners have broad discretion in formulating remedies for similar violations.

In Board of Education v. Levitt, 197 N.J. Super. 239 (App. Div. 1984), a case involving the improper denial of tenure to substitute teachers, the court held that;

> It is a well-settled principle of administrative law that the statutory powers accorded an agency "should be liberally construed to permit the agency to achieve the task assigned to it, and that such administrative agency has such implied incidental powers as may reasonably be adapted to that end." In re Suspension of Heller, 73 N.J. 292, 303 (1977), quoting In re Com'r of Bank. v. Parkwood Co., 98 N.J. Super. 263, 271-272 (App.Div.1967). These incidental powers have been extended to the fashioning of remedies, including the award of specific items of compensatory damages not expressly enumerated by statute. (Citations omitted)
>
> Id. at 245.

The theory underlying Levitt was followed by the Court in Klapach, another bullying case in which the court, after a finding reversing an HIB[2] violation, ordered the Board to "remove any references to the...investigation and findings from petitioner's personnel file." Id. at 4.

The Court in Graziano v. Grant, 326 N.J. Super. 342 (App. Div. 1999) expressed this proposition well. In this matter involving a contract dispute concerning the ownership of a medical practice, the court wrote that;

[2] Harassment, Intimidation and Bullying

> Applying principles of fairness and justice, a judge sitting in a court of equity has a broad range of discretion to fashion the appropriate remedy in order to vindicate a wrong consistent with principles of fairness, justice, and the law.
>
> Id. at 343.

The court continued;

> The imposition, under these circumstances, of a reasonable covenant against competition is consistent with the broad equitable powers entrusted to him. We therefore conclude that the judge did not mistakenly exercise his discretion in deciding to impose a restrictive covenant against Grant.
>
> Ibid. See also, Crane v. Bielski, 15 N.J. 342 (1954).

Given this discretion, I **FIND** that the Court has the power to formulate a remedy to compensate petitioner for the Board's violation of N.J.S.A. 18A:16-3 and District Policy 3161. That remedy will be fashioned below.

FINDINGS & CONCLUSIONS

The nature of this dispute is limited and this decision is not a referendum on Ms. Camilo's fitness for duty. Rather, what this decision does is emphasize that if someone's career and livelihood is under threat and procedures are in place that dictate how the matter should proceed, those procedures must be followed. That protects both the rights of the employee and the integrity of the disciplinary decision made by the Board.

With that being said, I **CONCLUDE** that there are no issues of material fact in dispute that would preclude the disposing of this case via Motion for Summary Decision.

Given the totality of the evidence and argument, I **FIND** the following:

1. That respondent acted in an arbitrary, capricious and unreasonable manner in violation of both N.J.S.A. 18A:16-3 and District Policy 3161 by failing to approve Ms. Camilo's selection of Dr. Gollin as her examining physician and by further failing to provide a reasonable (or any) explanation for its failure to do so.

2. That Ms. Camilo did not waive her right to contest the Board's decision.

3. That this Court has the authority to formulate a remedy to compensate petitioner for the Board's improper actions.

I therefore **CONCLUDE** that summary decision shall be granted in favor of petitioner and denied on behalf of respondent.

Given the nature of the both the dispute and the violation and the manner in which this case has proceeded since 2019, I **FIND** that the following remedies are appropriate, and it is hereby **ORDERED**:

1. That the examination performed by Dr. White on September 23, 2022, November 17, 2022 and December 22, 2022 shall be considered null and void.

2. That the reports authored by Dr. White on January 9, 2023 and January 12, 2023 shall be considered null and void and should not be considered by any party for any reason.

3. That Dr. White shall be barred from acting as the fitness-for-duty examiner in any and all matters involving petitioner and shall further be barred from testifying or providing any evidence in any proceedings involving Ms. Camilo's current or any potential future tenure charges.

4. That the parties shall comply with the dictates of N.J.S.A. 18A:16-3 concerning the selection of the examining doctor.

5. That if petitioner proposes a doctor to conduct the fitness-for-duty examination per N.J.S.A. 18A:16-3, respondent must approve that physician or, if that physician is unacceptable, advise petitioner of the basis for that rejection and explain why that rejection is not arbitrary, capricious and/or unreasonable.

6. That petitioner shall have ten calendar days from the issuance of this Initial Decision to propose a doctor to conduct the fitness-for-duty examination to the Board. If no such proposal is forthcoming from petitioner in that timeframe, the examination shall be scheduled with a physician designated by the Board, except that the Board shall not schedule the examination to take place with Dr. White or practitioners affiliated with him (including, but not limited to Kyle Barr, Psy.D. and Julie Wikman, M.A., L.A.C.) (Exhibit P-N).

ORDER

Based on the foregoing, it is hereby **ORDERED** that petitioner's Motion for Summary Decision be and is hereby **GRANTED** and it is further;

ORDERED that respondent's Cross-Motion for Summary Decision be and is hereby **DENIED**, and it is further;

ORDERED that the remedies enumerated above shall be enacted by the parties.

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

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

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

March 20, 2023
DATE

MATTHEW G. MILLER, ALJ

Date Received at Agency: March 21, 2023

Date Mailed to Parties: March 21, 2023

MGM/sej

APPENDIX

EXHIBITS

FOR PETITIONER:

P-A July 5, 2022 Arbitration Award

P-B July 8, 2022 letter from petitioner's counsel to respondent's counsel proposing that Dr. Gollin perform the Fitness for Duty exam

P-C August 4, 2022 Clarification of Award

P-C1 July 18, 2022 status letter from petitioner's counsel to respondent's counsel

P-C2 Same as P-B

P-C3 August 2, 2022 status letter from petitioner's counsel to respondent's counsel

PC-4 July 29, 2022 status email from petitioner's counsel to respondent's counsel

P-D August 8, 2022 email from respondent's counsel to petitioner's counsel scheduling the Fitness for Duty exam with Dr. White for August 29, 2022.

P-E August 12, 2022 letter from petitioner's counsel to respondent's counsel declining to be examined by Dr. White.

P-F District Policy 3161 – Examination for Cause

P-G August 15, 2022 letter from respondent's counsel to petitioner's counsel, Fitness for Duty examination.

P-H August 15, 2022 letter from petitioner's counsel to respondent's counsel; reply to P-G.

P-I August 16, 2022 letter from respondent's counsel to petitioner's counsel; reply to P-G.

P-J August 26, 2022 email exchange between respondent's counsel and petitioner's counsel; September 23, 2022 Fitness for Duty exam with Dr. White.

P-K August 26, 2022 Petition of Appeal

P-L January 9, 2023 report of Mark White, Ph.D.

P-M January 11, 2023 letter from respondent's attorney to Dr. White.

P-N January 12, 2023 report of Mark White, Ph.D.

P-O January 21, 2023 Tenure Charges

P-Q February 3, 2023 Certification of Yesenia Camilo

FOR RESPONDENT:

R-A August 11, 2020 Tenure Charges

R-A1 June 18, 2003 Employment Contract

R-A2 Petitioner teaching certificates

R-A3 West New York District Policy 3150 - Discipline

R-A4 West New York District Policy 3161 – Examination for Cause

R-A5 West New York District Policy 3270 – Professional Responsibilities

R-A6 West New York District Policy 3280 – Liability for Pupil Welfare

R-A7 West New York District Policy 3161 – Inappropriate Staff Conduct

R-A8 October 7, 2019 e-mail from Frank Gagliardi to Petitioner

R-A9 September 18, 2019 instructional counseling notice

R-A10 September 18, 2019 letter from Yoleisy Yanez to Christian Cardenas

R-A11 October 7, 2019 letter from Yoleisy Yanez

R-A12 October 8, 2019 reprimand

R-A13 October 16, 2019 memo to petitioner from Allan C. Roth re: Fitness-for-Duty examination

R-A14 Fitness-for-Duty resolution

R-A15 October 22, 2019 letter from Allan C. Roth scheduling petitioner's Fitness-for-Duty examination for October 28, 2019

R-A16 January 14, 2020 letter from Allan C. Roth scheduling petitioner's Fitness-for-Duty examination for January 23, 2020

R-A17 October 18, 2019 e-mail from Patrick Gagliardi, re: "I owe you" incident

R-B June 3, 2021 Arbitration Award of Joyce M. Klein

R-C July 5, 2022 Arbitration Award of Michael J. Picklers

R-D November 1, 2021 revised Tenure Charges

R-E August 4, 2022 Arbitration Award Clarification of Michael J. Picklers

R-F January 9, 2023 report of Mark White, Ph.D.

R-G January 11, 2023 letter from respondent's attorney to Dr. White.

R-H January 12, 2023 report of Mark White, Ph.D.

R-I January 21, 2023 tenure charges and February 9, 2023 Certificate of Determination, suspending petitioner without pay

R-J August 15, 2022 letter from petitioner's counsel to respondent's counsel

R-K August 16, 2022 letter from respondent's counsel to petitioner's counsel

124-23
OAL Dkt. No. EDU 00212-23
Agency Dkt. No. 371-12/22

New Jersey Commissioner of Education

Final Decision

T.C., on behalf of minor child, D.R.H., Jr.,

Petitioner,

v.

Board of Education of the City of Rahway, Union County,

Respondent.

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

Upon review, the Commissioner concurs with the Administrative Law Judge's (ALJ) finding that petitioner failed to sustain her burden of establishing that she or any person having custody of her minor child was a domiciliary of Rahway during the 2022-2023 school year. The Commissioner further concurs with the ALJ's conclusion that D.R.H., Jr. was, therefore, not entitled to a free public education in Rahway's schools during that time.

Pursuant to *N.J.S.A.* 18A:38-1b, the Commissioner shall assess tuition against petitioner for the time period during which the minor child was ineligible to attend school in Rahway. Therefore, the Rahway Board of Education (Board) is entitled to tuition reimbursement in the

amount of $9,803.13[1] for the period from the beginning of the 2022-2023 school year through March 24, 2023, during which time petitioner's minor child was ineligible to attend school in Rahway.

Accordingly, the Initial Decision of the OAL is adopted as the final decision in this matter. Petitioner is directed to reimburse the Board in the amount of 9,803.13 for the period from the beginning of the 2022-2023 school year through March 24, 2023, for tuition costs incurred during the time period in which the minor child was ineligible to attend school in Rahway. The petition of appeal is hereby dismissed.

IT IS SO ORDERED.[2]

Angelica Allen-McMillan, Ed.D.
ACTING COMMISSIONER OF EDUCATION

Date of Decision: April 24, 2023
Date of Mailing: April 26, 2023

[1] This calculation is based on 127 school days of ineligible attendance at a tuition rate of $77.19 per day. The Commissioner notes that these figures were derived from testimony presented to the ALJ during the hearing. However, a transcript of the testimony was not provided to the Commissioner, nor did the record contain any certification verifying the tuition rate or number of days of ineligible attendance. Therefore, the Commissioner relies on the ALJ's findings of fact.

[2] This decision may be appealed to the Appellate Division of the Superior Court pursuant to *N.J.S.A.* 18A:6-9.1. Under *N.J.Ct.R.* 2:4-1(b), a notice of appeal must be filed with the Appellate Division within 45 days from the date of mailing of this decision.

State of New Jersey
OFFICE OF ADMINISTRATIVE LAW

INITIAL DECISION
OAL DKT. NO. EDU 00212-23
AGENCY DKT. NO. 371-12/22

T.C. O/B/O MINOR CHILD D.R.H.,JR.

Petitioner,

v.

BOARD OF EDUCATION OF THE CITY OF RAHWAY UNION COUNTY,

Respondent.

T.C., pro se petitioner

Margaret Miller, Esq., for respondent (Weiner Law Group)

Record Closed: March 20, 2023 Decided: March 24, 2023

BEFORE **JOANN LASALA CANDIDO**, ALAJ:

Petitioner, T.C, the mother of minor child D.R.H., appeals the determination of the Board of Education of the City of Rahway School District (the "Board") that D.R.H. did not reside within the Rahway school district in the 2022–2023 school year and that tuition reimbursement is required. The Board alleges that the minor child D.R.H. was not residing at the address provided by the petitioner and seeks repayment of tuition.

On December 2, 2022, the Board notified T.C. that her child was ineligible to continue to attend school within the district. It's Initial Determination of Ineligibility was provided to T.C. on October 12, 2022. The petitioner filed a notice of appeal on or about December 14, 2022, and the Board filed an answer on December 29, 2022. On or about January 5, 2023, the matter was transmitted to the Office of Administrative Law (OAL) for determination as a contested case. N.J.S.A. 52:14b-1 to N.J.S.A. 52:14F-1 to 13. The hearing was held via Zoom on March 20, 2023, on which date the record closed.

At issue is whether D.R.H. was entitled to be enrolled in the district for purposes of receiving a thorough and efficient public education free of charge for the 2022–2023 school year, pursuant to N.J.S.A. 18A:38-1.

Based upon the papers submitted as of the hearing date and the supplemental submission by respondent as to tuition calculations, as well as the testimony of T.C. and Rahway Board of Education attendance officer William White and Board Secretary Stephen Fried, I **FIND** the following **FACTS**.

D.R.H. has been a student at Grover Cleveland since Kindergarten and is currently in the sixth grade. T.C. resides in the State of Delaware since November 27, 2021. Her mother had applied for temporary guardianship of D.R.H. On September 13, 2022, Attendance Officer White went to the home of T.C.'s Aunt Joselyn Ortiz to confirm that D.R.H. resides at her address with his grandmother Mrs. Fitzgerald. White was advised that there was not room in her residence for the two of them and that the grandmother resides in Roselle. T.C. submitted a Temporary Guardianship Affidavit filed with the Superior Court on September 15, 2022, with no attached signed Court Order. It requested Guardianship to commence on July 1, 2023.

To date, Mrs. Fitzgerald has not submitted documents of proof of residence in Rahway. Neither she nor Ms. Ortiz testified.

The respondent is seeking tuition for the child for the 2022-2023 school year at a daily rate of $77.19 for 127 days (through today, March 24, 2023), for a total cost of $9803.13.

N.J.S.A. 18A:38-1(a) provides that every person in New Jersey between the ages of five and twenty is entitled to a free education if they are "domiciled within the school district." "Domicile" means a permanent home from which a person does not intend to move. Lipman v. Rutgers-State Univ. of N.J., 329 N.J. 16 A-5475-18 Super. 433, 444 (App. Div. 2000). A child's domicile is normally that of his parents. Roxbury Twp. Bd. of Educ. v. West Milford Bd. of Educ., 283 N.J. Super. 505, 521-22 (App. Div. 1995).

However, "[i]f the superintendent or administrative principal of a school district finds that the parent or guardian of a child who is attending the schools of the district is not domiciled within the district . . . , the superintendent or administrative principal may apply to the board of education for the removal of the child." N.J.S.A. 18A:38-1(b)(2). The parents may contest a local school board's decision regarding the student's right to attend school in the district to the Commissioner of Education and "shall have the burden of proof by a preponderance of the evidence" to prove domicile in the school district. N.J.S.A. 18A:38-1(b)(2). The State Board of Education has promulgated various rules implementing N.J.S.A. 18A:38-1 and governing student domicile and eligibility to attend school. N.J.A.C. 6A:22-1.1 to -6.3.

The record is clear that petitioner's child was not domiciled in Rahway with his grandmother. The aunt, Ms. Ortiz advised the District that there was no room in her home and the grandmother, Ms. Fitzgerald did not present any documents proving she resided at that Rahway address. I therefore **CONCLUDE** that petitioner has failed in her burden to prove by a preponderance of the evidence that her child was domiciled in Rahway. Tuition is sought by the Board for the period of ineligible attendance.

A school district may seek a child's disenrollment from its schools and seek tuition reimbursement if a child is attending but domiciled in another district. N.J.S.A.

18A:38-1(b)(2). The parents or legal guardian of the child are entitled to a hearing where they have the burden of proving domicile by a preponderance of the evidence, which occurred today.

Based on the foregoing, I **CONCLUDE** that the respondent is entitled to tuition in the amount of $77.19 per day for a total of $9803.13.

ORDER

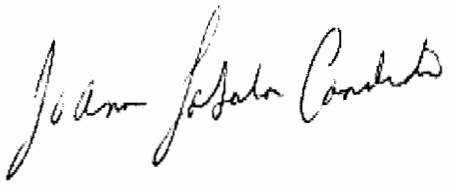
I **ORDER** that the decision of respondent City of Rahway Board of Education that D.R.H. was not eligible for a free public education in the District during the 2022-2023 school year is **AFFIRMED** and the pro se residency appeal of petitioner T.C. on behalf of D.R.H. is **DISMISSED.**

Further, I **ORDER** that petitioner shall pay respondent tuition in the amount of $9803.13.

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

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

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



March 24, 2023

DATE

JOANN LASALA CANDIDO, ALAJ

Date Received at Agency: March 24, 2023

Date Mailed to Parties: March 24, 2023

ljb

EXHIBITS

For petitioner:

None

For respondent:

R-1 Follow-Up Residency Investigation Summary dated November 8, 2022

R-2 Temporary Guardianship Form and Affidavit

R-3 E-Mail Correspondence

R-4 Two-part Affidavit Student

R-5 First page completed of Affidavit Student

R-6 Letter to T.C. from William White dated October 12, 2022

R-7 Notice of Initial Determination of Ineligibility dated October 12, 2022

R-8 E-Mail Correspondence

R-9 Tuition sought from District

125-23
OAL Dkt. No. 00880-23
Agency Dkt. No. 16-1/23

New Jersey Commissioner of Education

Final Decision

Amanda Gomez,

Petitioner,

v.

New Jersey Department of Education,
Office of Student Protection,

Respondent.

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

Upon review, the Commissioner concurs with the Administrative Law Judge, for the reasons detailed in the Initial Decision, that petitioner is permanently disqualified from employment in any school under the supervision of the Department of Education, pursuant to *N.J.S.A.* 18A:6-7.1.

Accordingly, the respondent's motion to dismiss is granted, and the petition of appeal is hereby dismissed.

IT IS SO ORDERED.[1]

ACTING COMMISSIONER OF EDUCATION

Date of Decision: April 24, 2023
Date of Mailing: April 26, 2023

[1] This decision may be appealed to the Appellate Division of the Superior Court pursuant to *N.J.S.A.* 18A:6-9.1. Under *N.J.Ct.R.* 2:4-1(b), a notice of appeal must be filed with the Appellate Division within 45 days from the date of mailing of this decision.

State of New Jersey
OFFICE OF ADMINISTRATIVE LAW

INITIAL DECISION
DISMISSING THE PETITION
OAL DKT. NO. EDU 00880-23
AGENCY DKT. 16-1/23

AMANDA GOMEZ,
Petitioner,
v.
NEW JERSEY DEPARTMENT OF EDUCATION, OFFICE OF STUDENT PROTECTION,
Respondent.

Amanda Gomez, petitioner, pro se

Sadia Ahsanuddin, Deputy Attorney General, for respondent (Matthew J. Platkin, Attorney General of New Jersey, attorney)

Record Closed: March 17, 2023 Decided: March 20, 2023

BEFORE **SUSANA E. GUERRERO**, ALJ:

STATEMENT OF THE CASE

Petitioner, Amanda Gomez (Gomez or petitioner), filed an application for emergent relief seeking a determination by respondent, New Jersey Department of Education,

Office of Student Protection (respondent), challenging her disqualification from employment.

PROCEDURAL HISTORY

On January 27, 2023, the matter was filed with the Office of Administrative Law (OAL). The petitioner initially sought emergent relief. Oral argument on the emergent application was scheduled for February 1, 2023, but during a conference prior to the hearing, the petitioner withdrew her emergent application. The underlying Due Process matter remained with the undersigned. A pre-hearing conference was scheduled for February 16, 2023, however, petitioner failed to appear. The conference was then rescheduled for February 21, 2023, and the petitioner again failed to appear.

On February 16, 2023, respondent filed a Motion to Dismiss in lieu of an Answer. By letter dated February 22, 2023, petitioner was advised to file any written opposition to respondent's motion by March 8, 2023. No opposition or response was received. Another telephone conference was scheduled for March 13, 2023. Again, the petitioner failed to appear. To date, petitioner has not filed any opposition to the motion to dismiss, nor has she contacted this tribunal to explain why she did not appear to any of the prehearing conferences or file an opposition.

FACTS AND CONCLUSIONS OF LAW

Petitioner was employed by Pomptonian Food Services and worked at Clifton High School serving food in the cafeteria. A fingerprint search of Gomez was conducted in December 2022 which revealed that she had been arrested on July 23, 2007 and had been convicted of theft by deception in the third degree, N.J.S.A. 2C:20-4 on August 28, 2007. The New Jersey Department of Education's Office of Student Protection (OSP) informed Gomez that she was permanently disqualified from serving in any position with any educational institution.

Gomez subsequently filed the motion for emergent relief, in which she did not deny the conviction. She wrote, "This is because of a mistake I made 15 years ago. At the

time of the incident I was young and hanging out with the wrong crowd and was not thinking about my future and how it could affect me. The incedent [sic] that is on my record had nothing to do with children or put anyone in danger."

The respondent asserts that the petition should be dismissed because even accepting Gomez's allegations as true, she has failed to establish a cause of action upon which relief can be granted, pursuant to N.J.A.C. 6A:3-1.10. Gomez did not oppose the motion to dismiss.

N.J.S.A. 18A:6-7.1 requires the permanent disqualification from employment or service of a school cafeteria worker if that individual's "criminal history record check reveals a record of conviction for any crime of the first or second degree; or . . . a crime as set forth in Chapter 39 of Title 2C of the New Jersey Statutes, **a third degree crime as set forth in Chapter 20 of Title 2C of the New Jersey Statutes**, or a crime as listed below . . . ." N.J.S.A. 18A:6-7.1(c)(2). (emphasis added)

I **FIND** that the record shows that Gomez was convicted for the crime of theft by deception, N.J.S.A. 2C:20-4, which is a crime of the third degree as set forth in Chapter 20 of Title 2C. Pursuant to N.J.S.A. 18A:6-7.1(c)(2), this conviction permanently disqualifies her from serving as a cafeteria worker at the Clifton public school. Gomez has not challenged the accuracy of the disqualifying criminal history record, and only asserts in her petition that it occurred when she was young and hanging out with "the wrong crowd," and that she needs to provide for her two children. Even if the statements made in the petition are true, it does not constitute sufficient grounds to reverse the disqualification. Permanent disqualification is not discretionary, as the statute reads that the individual "shall be permanently disqualified" upon one of the convictions listed in N.J.S.A. 18A:6-7.1. Therefore, I **CONCLUDE** that Gomez is permanently disqualified from serving as a cafeteria worker with the school, and that her petition must be dismissed.

If, however, Gomez's record becomes expunged, she may request that the Department of Education reconsider the disqualification.

ORDER

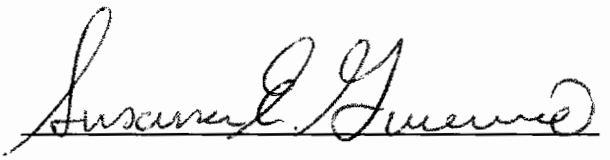
It is hereby **ORDERED** that the motion to dismiss filed by the New Jersey Department of Education, Office of Student Protection is **GRANTED**. It is further **ORDERED** that the petition be and hereby is **DISMISSED** without prejudice.

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

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

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

March 20, 2023
DATE



SUSANA E. GUERRERO, ALJ

Date Received at Agency: _____

Date Mailed to Parties: _____

jb

STATE OF NEW JERSEY
COMMISSIONER OF EDUCATION
WALLKILL VALLEY REGIONAL HIGH SCHOOL BOARD OF EDUCATION

IN THE MATTER OF TENURE HEARING	)	
	)	
between	)	
	)	
WALLKILL VALLEY REGIONAL HIGH SCHOOL BOARD OF EDUCATION SUSSEX COUNTY, NEW JERSEY	)	
	)	
Petitioner	)	**OPINION AND**
and	)	**AWARD**
	)	
JAMES MARION	)	
Respondent	)	
	)	
DOCKET NO. 249-9/22	)	

Before: Lisa C. Charles
Arbitrator

APPEARANCES

FOR THE PETITIONER

Paul E. Griggs, Esq. and Dennis McKeever, Esq.
Cornell, Merlino, McKeever & Osborne, LLC

FOR THE RESPONDENT

Sandford R. Oxfeld, Esq.
Oxfeld Cohen, PC

BACKGROUND

James Marion (Respondent) is a tenured teacher at the Wallkill Valley Regional School District, Sussex County, New Jersey (Petitioner or District). Respondent has been employed by the District as a science teacher since January 2002. In March 2022, three female students reported to James Hamil, the school psychologist, that Respondent made them feel uncomfortable with sexually provocative comments and daily hugging and touching their shoulders. Mr. Hamil reported the matter to Adam Vazquez, Assistant Principal, who reported it to David Carr, Superintendent of School/Principal. Principal Carr authorized Taryn Geuther, Director of Curriculum, to conduct a school investigation and she interviewed five students on March 21-22, 2022. The District placed Respondent on a paid suspension during the school investigation. Also on March 21, 2022, the matter was reported to the New Jersey Department of Children and Families Institutional Abuse Investigation Unit (IAIU), which investigated the matter as a child sexual abuse/risk of sexual abuse concern. On May 17, 2022, the IAIU's report determined that the Respondent's behavior did not rise to the level of sexual abuse, that the students were not harmed or placed at risk of harm by the Respondent, and that the child sex abuse/risk of sexual abuse concern was "unfounded."

On August 4, 2022, based on the complaints of the same three students and two other students interviewed during the school investigation, the Petitioner instituted five tenure charges against Respondent for Unbecoming Conduct, Inappropriate Behavior, Violation of Regulations 3280 and 3281, and Other Just

Cause. On September 7, 2022, the District placed Respondent on an unpaid suspension for 120 days, and on September 15, 2022, Paul Griggs, Counsel for the Petitioner, submitted the following documents to the Commissioner of Education:

(1) a Statement of Tenure Charges
(2) a Statement of Evidence
(3) Certified Copy of Certificate of Determination and CM (certified mail) receipts

On September 22, 2022, the Respondent denied all the charges and filed an answer opposing the charges. The Commissioner of Education, having reviewed the charges and Respondent's answer, determined that the charges were sufficient, if true, to warrant dismissal or reduction in compensation and referred the charges for arbitration on October 12, 2022.

On February 3, 2023, Sandford Oxfeld, Counsel for the Respondent, filed a Motion in Limine to dismiss the tenure charges with prejudice asserting that the Petitioner violated *N.J.S.A. 18A:6-17.1(b((3).* That statute states in relevant part:

> **Upon referral of the case for arbitration, the employing board of education shall provide all evidence including, but not limited to, documents, electronic evidence, statement of witnesses, and a list of witnesses with a complete summary of their testimony to the employee or the employee's representative. The employing board of education shall be precluded from presenting any additional evidence at the hearing, except for purposes of impeachment of witnesses.**

The Respondent notes that it did not receive the student witnesses' names until December 2022, that it did not receive the IAIU report until February 2023, and that to date, it has not received the summary of the witnesses' testimony and other required pretrial disclosures. The Respondent's motion seeks to exclude

the testimony of any witnesses and any other evidence the Petitioner may offer at the arbitration hearing that was not provided to the Respondent upon referral of the case for arbitration. The Petitioner submitted its brief regarding the motion on March 7, 2023, and the Respondent submitted its response brief on March 22, 2023. The Petitioner submitted a sur-reply on April 4, 2023, and on that same day, the Respondent objected to its consideration.

Respondent Position

The Respondent argues: (a) that the Petitioner cannot present its case in chief since it is barred by statute from providing any evidence at the hearing which it had not disclosed upon referral of the case for arbitration; (b) that the IAIU report was available when the charges were referred for arbitration but the Petitioner failed to secure it or provide it to the Respondent; (c) that the Petitioner did not provide the students' names, a list of witnesses, a summary of their testimony, and other mandated disclosures specified in *N.J.S.A. 18A:6-17.1(b)(3)* when the case was referred for arbitration; (d) that the instant case is governed by the procedures established in the Opinion and Award written by Arbitrator Gerard G. Restaino in Atlantic City Board of Education v. John Toland DOE Dkt 167-8/20 dated October 13, 2021, which the Superior Court of New Jersey upheld; and (e) that the Motion in Limine was filed prior to setting the trial date to avoid having the students recount the events if the motion prevailed. The Respondent requests that the tenure charges against Mr. Marion be dismissed with prejudice.

Petitioner Position

The Petitioner argues: (a) that the IAIU report was not disclosed to the Respondent upon referral of the case for arbitration because it was not available; (b) that the students' names were not initially provided to Respondent because the parties had not agreed upon a Protective Order; (c) that the Statement of Tenure Charges included an Appendix of Exhibits containing a witness list and a summary of their testimony, and that along with the Statement of Evidence, and Certified True Copy of Determination and CM receipts provided to Respondent satisfied the statutory requirements; and (d) that the Motion in Limine was filed prematurely since according to New Jersey Court Rule 4:25-7 the parties are to exchange pretrial information seven days prior to the initial hearing or trial date but the trial date has not yet been set. The Petitioner requests that the Motion in Limine be dismissed.

DISCUSSION

The Respondent's argument that the Petitioner cannot present its case in chief since it is barred by statute from providing any evidence at the arbitration hearing which it had not disclosed upon referral of the case for arbitration is persuasive. Although the witness list and a summary of their testimony was in the Appendix of Exhibits attached to the Statement of Evidence, the District acknowledges that it did not provide the Respondent the students' names and the IAIU report upon referral of the case for arbitration in October 2022. In addition, the District's argument that the IAIU report was not provided because it

was not available was not supported by the facts. The evidence reveals that the IAIU report was prepared in May 2022, and although the District requested it in July, November, and December 2022, it did not take the necessary steps to obtain the IAIU report. The evidence shows that the IAIU report was obtained only after the Respondent subpoenaed for its release in January 2023. The District provided no explanation why it did not subpoena the report prior to the referral of the case for arbitration.

In addition, the District's argument that it did not supply the students' names because there was no Protective Order agreed upon by the parties is unpersuasive. The evidence shows that the parties signed a Protective Order in December 2022. Again, the District provided no explanation why it did not seek a Protective Order prior to that date so that the students' names could have been provided to the Respondent when the case was referred for arbitration. Thus, the evidence reveals that the District did not comply with the provisions of *N.J.S.A. 18A:6-17.1(b)(3)*, which requires that all specified disclosures be provided to the Respondent upon referral of the case for arbitration.

Moreover, the Respondent's argument that the instant case is governed by the procedures established in the Atlantic City Board of Education v. John Toland DOE Dkt 167-8/20 Opinion and Award written by Arbitrator Gerard G. Restaino, dated October 13, 2021, and confirmed by the Superior Court of New Jersey is persuasive. In the Toland case, the Petitioner failed to provide the Respondent with a witness list and a summary of their testimony. The procedures established in the Toland case and upheld by the Superior Court on

January 20, 2022, established that the District is statutorily prohibited from calling undisclosed witnesses and/or presenting evidence in its case in chief when it fails to adhere to the mandates of *N.J.S.A. 18A:6-17.1(b)(3).* Arbitrator Restaino held that the consequence of non-compliance with the statute is mandatory. Thus, he granted the Motion In Limine to bar the testimony of undisclosed witnesses since the District did not adhere to the statute. In his Award, Arbitrator Restaino stated that:

> **"The specifics of the Legislative intent do not grant me leave to ignore the requirements of the statute. The language in question is specific not general and must be given full force and weight."**

The facts in the instant case are similar to those in the Toland case as both Petitioners failed to comply with the statute's requirement to provide the Respondent with all specified disclosures mandated by the statute. In the instant case, the Petitioner failed to provide documents, specifically, the IAIU report and a list of the students' names. In confirming Arbitrator Restaino's Award, the Superior Court ruled that since the Award was based upon the District's failure to comply with the statute, the tenure charges filed against the Respondent should be dismissed. The Court concluded that:

> **"...plaintiff is entitled to appropriate notice as to the evidence which will be presented against him in support of the charges....Plaintiff is a tenured employee and is defending his job and career. Therefore, an individual in Plaintiff's position should be entitled to strict compliance with statutory rules due to the extremely important rights involved in tenure employment termination matters.**

Furthermore, the District's argument that the Statement of Tenure Charges, Statement of Evidence, and Certified True Copy of Determination and

CM receipts satisfied the statutory requirements is not supported by the facts. The language of the statute specifically requires the District to "provide all evidence including, but not limited to, documents, electronic evidence, statement of witnesses, and a list of witnesses with a complete summary of their testimony...." As noted above, the evidence reveals, and the District acknowledges, that it did not provide all the specified disclosures to the Respondent upon referral of the case for arbitration since it did not include the IAIU report or the students' names. Thus, the District provided insufficient evidence to support its claim that the above noted items it provided to the Commissioner of Education satisfy all the specific statutory requirements.

Finally, Respondent's argument that the Motion in Limine was filed prior to setting the trial date to avoid having the students recount the events if the motion will prevail is persuasive. In its brief, the Petitioner cited the New Jersey Court Rule 4:25-7 requirement that parties exchange pretrial information seven days before the trial date. However, the Petitioner also acknowledged that "...there is no specific guidance regarding the procedures for the filing and handling of a *motion in limine* in relation to an administrative action." Since the arbitration process is an administrative action outside of the Court, I find that the cited Court Rule is not applicable, and thus, the Respondent's motion is not premature. In the instant case, there is no need to further involve the students if the case could be dismissed on procedural grounds.

Therefore, I grant the Respondent's Motion in Limine to dismiss the tenure charges against James Marion, DKT NO. 249-9/22, with prejudice since the District failed to adhere to the requirements of *N.J.S.A. 18A:6-17.1(b)(3)*.

It is so ordered.

Lisa C. Charles
Arbitrator

4/24/23
Date

State of New Jersey}
County of Mercer}
Sworn to and affirmed before me on April 24, 2023

N. Marfatia
Notary Public

NIYATI A. MARFATIA
NOTARY PUBLIC
STATE OF NEW JERSEY
MY COMMISSION EXPIRES 07/25/2024

NEW JERSEY DEPARTMENT OF EDUCATION

IN THE MATTER OF
TENURE CHARGES BY

KINGSWAY REGIONAL SCHOOL
DISTRICT, GLOUCESTER COUNTY,
Petitioner

and

Agency Dkt #265-9/22

JOSEPH KUPPLER,
Respondent

Appearances:

For Petitioner: Stephen Edelstein, Esq.
Weiner Law Group, LLP

For Respondent: Daniel Dowdy, Esq.
Keith Waldman, Esq.
Selikoff & Cohen, P.A.

Before: Barbara C. Deinhardt
Arbitrator

ORDER APPROVING SETTLEMENT OF TENURE CHARGES

On August 25, 2022, the Kingsway Regional School District, Gloucester County, by its Superintendent Dr. James Lavender, filed with the Commissioner of Education of the State of New Jersey, Tenure Charges against Respondent Joseph Kuppler, a tenured teacher in the

Kingsway Regional School District, alleging unbecoming conduct. The Commissioner of Education, having reviewed the Tenure Charges and Respondent's October 11, 2022 Answer thereto, determined that the charges were sufficient, if true, to warrant dismissal or reduction in salary and, therefore, referred the matter to arbitration. The charges were referred to the undersigned on October 14, 2022, pursuant to N.J.S.A. 18A:6-16.

Following the completion of discovery and the adjudication of several pre-hearing motions, the parties reached a mutually acceptable settlement of the Tenure Charges prior to the commencement of the hearings scheduled for March 15, 16, 17, 27 and 28. A hearing was held on March 16, 2023, in which the District laid out the basis for the settlement, to wit, that:

1. Following the District's full investigation of the matter, including evidence disclosed during discovery in this proceeding, and the finding by the Institutional Abuse Investigation Unit of Unfounded with regard to the same allegations contained in the Tenure Charges against Mr. Kuppler, the District was voluntarily dismissing all Tenure Charges currently pending against Joseph Kuppler. The District agrees that allegations of sexual abuse were unfounded and that no students were harmed or placed at risk of harm with regard to any conduct as alleged in the Tenure Charges. As such, the District has determined that any and all allegations of sexual misconduct and sexual harassment have been found to be unsupported and unsubstantiated within the meaning of N.J.S.A. 18A:6-7.6.

2. Mr. Kuppler will provide an irrevocable letter of resignation effective June 30, 2023. He will be paid his full salary, benefits and emoluments of employment through June 30, 2023, but will not be paid any back pay for the 120 days he was out of work without pay. The District will not contest any application by Mr. Kuppler that he may make for unemployment insurance benefits and will provide a neutral employment reference with regard to Mr. Kuppler if requested.
3. Mr. Kuppler testified that he understood the terms of the settlement and that he was entering into the agreement knowlingly and voluntarily. According to Mr. Kuppler, he does not wish to work at the District because he's not wanted there. Further, he testified that he understood that under the Administrative Code, and particularly N.J.A.C. 6A:3-5.6(a)6, the Commissioner has a duty to refer tenure determinations resulting in the loss of position to the State Board of Examiners for possible suspension or revocation of certificate.

The settlement terms were thereafter set forth in a written Settlement Agreement ("Settlement"). On April 28, 2023, the Settlement, signed by the parties, was forwarded to the Arbitrator for review and approval. After review of the Settlement and based on the representations by the parties in the hearing, I find that the standards for settlement or withdrawal of the Tenure Charges have been satisfied in accordance with N.J.A.C. 6A:3-5.6 and therefore the settlement of the Tenure Charges pursuant to the terms of the Settlement is hereby approved.

1. A copy of the Settlement, as well as the Tenure Charges and the Answer, are annexed to this Order;
2. The withdrawal of the Tenure Charges is warranted given that further investigations demonstrated that the charges were not substantiated and Respondent has decided to resign his position;
3. The Settlement is signed by both the charged and charging parties, both of whom were represented by competent counsel;
4. Respondent was informed of the terms of the Settlement and testified that he was entering into the agreement with a full understanding of his rights, having been represented by competent counsel;
5. The Settlement is in the public interest, given that further investigation showed the charges not to be substantiated and, Respondent having resigned his employment, proceeding with the Tenure Charges will not provide any further relief; and
6. Respondent was advised of the Commissioner's duty to refer tenure determinations resulting in loss of position to the State Board of Examiners for possible suspension or revocation of certificate.

By reason of the forgoing, I am satisfied that the terms of the parties' settlement are reasonable and in the best interests of both parties and of the public and therefore the settlement and withdrawal of the Tenure Charges against Respondent Joseph Kuppler, pursuant to the terms set forth in the Settlement, is approved.

SO ORDERED.

Barbara C. Deinhardt
Neutral Arbitrator

Dated: April 28, 2023

STATE OF NEW YORK)
: ss
COUNTY OF KINGS)

On this the 28th day of April, 2023, I, Barbara C. Deinhardt, affirm, pursuant to Section 7507 of the Civil Practice Law and Rules of the State of New York, that I have executed and issued the forgoing as my Interim Opinion and Order in the above matter.

Barbara C. Deinhardt

STATE OF NEW JERSEY DEPARTMENT OF EDUCATION
Agency Docket No.: 218-8/22

In the Matter of the TENURE Hearing between

The UNION TOWNSHIP BOARD OF EDUCATION, UNION COUNTY NEW JERSEY,

PETITIONER

and

COREY LOWERY,

RESPONDENT

BEFORE: **Ira Cure, Esq.**
Arbitrator

APPEARANCES

For the Petitioner School Petitioner:
Florio Perrucci, et. al.
By: Christopher J. Buggy, Esq.

For the Respondent:
The Lopez Firm
By: Omar A. Lopez, Esq.

OPINION and AWARD

Pursuant to *N.J.S.A., 18A:6-10, et seq,* as amended by *P.L. 2012, c. 26 and P.L. 2015, c. 109* ("TEACHNJ"), the tenure charges brought by the Petitioner Township Board of Education, Union County ("Board" or "Petitioner") against Corey Lowery ("Lowery" or "Respondent") were referred to me for a hearing and decision. The charges were filed with the New Jersey Department of Education ("DOE") on or about August 26, 2022. On September 20, 2022, in lieu of an answer, the Respondent moved to dismiss the charges.

On September 21, 2022, Jennifer Killough-Herrera, the DOE's Director of the Office of Controversies and Disputes, appointed me to hear this dispute. The Petitioner is represented by Christopher Buggy, Esq. of the firm of Florio, Perrucci, Steinhardt, Capelli, Tipton and Taylor, LLC and the Respondent is represented by Omar A. Lopez, Esq. of the Lopez Firm.

On September 22, 2022, I conducted a telephone conference with the parties to discuss the case. During the conference, the parties agreed to a briefing schedule. On January 6, 2023, I denied 1) the Respondent's motion to dismiss; 2) the Respondent's request that his suspension without pay for 120 days be lifted; and 3) the Petitioner's cross-motion for summary decision.

Hearings were held at the Petitioner's law firm, Florio, Perrucci, Steinhardt, Cappelli, Tipton and Taylor, LLC, ("Florio firm") 450 Mountain Avenue, New Providence, New Jersey, on February 2, and February 15, 2023.

Both parties were afforded a full opportunity to examine and cross-examine witnesses, submit evidence, and present arguments in support of their respective positions. The parties submitted briefs and the record was closed as of April 14, 2023. The evidence adduced and the positions and arguments set forth by the parties have been fully considered in the preparation and issuance of this Opinion and Award.

A related case is pending before Arbitrator Ralph H. Colflesh ("Colefish"). Although related, the two proceedings were not consolidated.[1]

[1] The Respondent objected to the Petitioner's request to amend the charge pending before Arbitrator Colflesh. At the time of this writing, I am unaware if arbitrator Colflesh has issued an Award in the proceeding before him.

THE ISSUE:

The issue for arbitral determination is:

Has the Petitioner established that the Respondent abandoned his position as set forth in the Tenure charges brought against the Respondent? If so, what shall be the penalty?

STATEMENT OF CHARGES

I, Dr. Scott Taylor, of full age and capacity, having been duly sworn by the undersigned authority, depose and say as follows:

I am employed by the Township of Union Board of Education ("Board") as its Superintendent of Schools. The Board maintains its administrative offices at 2369 Morris Ave, Union, New Jersey 07083. I am charged with the general oversight of the school district and all employees serving therein. During all times relevant herein, Corey Lowery ("Mr. Lowery" or "Respondent") has been employed by the Board as a high school Principal. Lowery is currently tenured pursuant to N.J.S.A. 18A:28-5.

I am fully familiar with all the facts and circumstances regarding the charges against Mr. Lowery, based upon my personal knowledge and upon information and belief. I have personally reviewed the accompanying Sworn Statement of Evidence. I hereby charge Mr. Lowery with abandonment of position, violation of New Jersey statutes, violation of Board policies and/or other just cause warranting dismissal or reduction in salary, pursuant to N.J.S.A. 18A:6-10, et seq., as more particularly set forth below.

BACKGROUND COMMON TO ALL CHARGES

Respondent was hired by the Board on or about September 1, 2007, as the Principal of Franklin Elementary School, where he remained through July 31, 2015. Respondent became the Principal of Union High School on August 1, 2015, a position he still holds today.

At all relevant times herein, Respondent was subject to the terms and conditions of the Collective Bargaining Agreements between the Board and The Township of Union Association of School Administrators for September 1, 2014 through August 31, 2018, thereafter by the Agreement of the same parties for September 1, 2018 through August 31, 2021, and thereafter by the Agreement of the same parties for September 1, 2021 through June 30, 2024. Further, Respondent was obligated to perform the duties of his position in accordance with any and all Board policies and any and all applicable laws, rules, and regulations, as an employee of the Board.

On July 21, 2017, Linda Ionta ("Ms. Ionta"), the Board's Athletic Director, submitted

an Affirmative Action Complaint against Respondent. In sum, Ms. Ionta claimed that Respondent created a hostile and/or unhealthy workplace environment because of his actions toward her and the Union Township High School coaches that she oversees. Specifically, Ms. Ionta pointed to twelve (12) incidents, or actions, that contributed to Respondent's creation of a hostile work environment.

As a result, the Board engaged Peter B. Fallon, Esq. ("Mr. Fallon"), to complete an investigation into the allegations. Following an in-depth investigation, Mr. Fallon concluded that Respondent violated the Board's Workplace Harassment Policy for the following reasons:

1. Writing up Ms. Ionta on a District "Comments Related" form typically used to discipline a staff member when he was not her supervisor was inappropriate behavior that was intimidating, offensive and harassing.
2. Respondent's continued insistence that Ms. Ionta obtain his approval or consent before recommending coaches for appointment or reappointment was contrary to my direction and established practices and policies of the Board.
3. Respondent continued his behavior after former Superintendent Gregory Tatum directed him to refrain from doing so.
4. Respondent's continued insistence that Ms. Ionta obtain his permission prior to recommending the appointment of coaches was an attempt to intimidate and harass her into following his instructions.

Relevant to the investigation completed by Mr. Fallon, Former Board Policy 4119.3/4219.3 stated "[d]isciplinary action may be taken if the severity of the workplace harassment or bullying makes that intervention appropriate."

As a result of Ms. Ionta's complaint and Mr. Fallon's findings, Respondent was placed on paid administrative leave on or about September 13, 2018. On or about May 5, 2020, Lincoln University announced that it hired Respondent as its head men's basketball coach. Lincoln University is located in Lincoln University, Pennsylvania, approximately one hundred and thirty-five (135) miles from Union Township High School. Despite his acceptance of a full-time position which conflicted with his duties of employment with the Board, Respondent refused to resign from his Board position, as detailed in a letter from his attorney, dated May 19, 2020. In response to numerous requests, on September 22, 2020, Respondent's attorney confirmed that Respondent sold his New Jersey residence and relocated to Pennsylvania.

Throughout this timeframe, there were multiple civil lawsuits filed in connection with the aforementioned circumstances. First, on about November 13, 2018, Respondent filed a civil lawsuit captioned Lowery v. Nufrio et al., UNN-L-3887-18. Additionally, the Board instituted an action pursuant to the New Jersey First Act captioned Union Township Board of Education v. Corey Lowery, Docket No. UNN-L-3466-20, due to Respondent's failure to reside in the State of New Jersey, after having moved to Pennsylvania, as referenced above.

Throughout the course of the Lowery litigation, Respondent has consistently demanded to be reinstated as Principal of Union High School. Respondent demanded reinstatement in December 2019. At mediation in March 2021, Respondent again demanded reinstatement. As recently as May 3, 2022, Respondent continued to demand reinstatement, as well as payment of significant monies by the Board, to resolve his action against the Board.

After receiving Respondent's May 3, 2022 settlement demand, the parties requested the Court hold a settlement conference in an effort to resolve the litigation. The Court scheduled a settlement conference for June 8, 2022. Prior to attending the conference, on May 10, 2022, Respondent and I, as well as our respective counsel, conducted a meeting via Zoom regarding Respondent's return as Principal at Union High School on July 1, 2022. During this May 10, 2022 Zoom meeting, Respondent and I were able to become acquainted and I was able to communicate my expectations for the Principal role at Union High School. We also reviewed a three-page memo I prepared regarding same. At the end of the May 10, 2022 Zoom conference, the parties scheduled another Zoom conference for May 26, 2022 for further discussion of the logistics of Respondent's return to the Principal position at Union High School. This meeting was cancelled by Respondent on May 25, 2022 due to a last minute scheduling conflict.

At the June 8, 2022, the parties and their counsel attended a settlement conference before Hon. Mark P. Ciarrocca, P.J. Civ., at the Union County Courthouse in Elizabeth, New Jersey. At the settlement conference the Board was prepared to discuss settlement proposals, with the parties' understanding that Respondent would be returning as Principal at Union High School on July 1, 2022 and the monetary component of any settlement would need to be negotiated. Specifically, the Board offered Respondent full reinstatement to his position as Principal of Union High School effective July 1, 2022, along with financial considerations and other accommodations. After discussing this proposal with his counsel, Respondent advised the Court and the Board for the first time that he was not interested in returning to his position as Principal at Union High School.

After the June 8, 2022 settlement conference, the Board and Respondent exchanged various settlement proposals. On or about June 22, 2022, the Board learned through media outlets that not only was Respondent no longer interested in returning to his position as Principal at Union High School, but that he had accepted a full-time position as Assistant Coach of the Seton Hall University Men's Basketball team. Additionally, on or about June 27, 2022, Respondent's attorney not only confirmed Respondent's acceptance of the full-time position at Seton Hall University, he also advised that Respondent had moved back to New Jersey in June of 2022.

Current Board Policies 3214 and 4214 provide that no staff member of the Board of Education "shall have any interest, financial or otherwise, direct or indirect, or engage in any business or transaction or professional activity which is in conflict with the proper discharge of the staff member's duties." Likewise, former Board Policy 4119.21/4219.21, which states "[a]n employee of the Township of Union Board of Education shall not have any interest, financial or otherwise, direct or indirect, or engage in any business or

transaction or professional activity which is in conflict with the proper discharge of his/her duties." Similarly, former Board Policy 4119.22/4219.22, states that "[n]o member of the staff shall engage in outside employment which conflicts with proper performance of his/her duties, or which would tend to harm the teaching/learning relationship."

Current Board Policies 3230 and 4230, provide that employees "shall not devote time during their work day to an outside private enterprise, business, or business organization." Under these Policies, the "Board reserves the right to determine if activities outside the [employee's] job responsibilities interfere with their performance and the discharge of the [employee's] responsibilities to this district." In that same vein, former Board Policy 4138/4238 states in pertinent part, "[s]chool employees shall not use school time or school facilities in connection with any personal activity for financial profit. Any violations of this provision may bring disciplinary action." This Policy further states, "[n]o outside work by a staff member shall prevent him/her from properly performing assigned functions during duty hours or be prejudicial to his/her work effectiveness."

Additionally, N.J.S.A. 18A:28-8 states, "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."

Finally, N.J.S.A. 18A:12-24 states "[n]o school official or member of his immediate family shall have an interest in a business organization or engage in any business transaction, or professional activity, which is in substantial conflict with the proper discharge of his duties in the public interest," and [n]o school official shall undertake any employment service, whether compensated or not, which might reasonably be expected to prejudice his independence of judgment in the exercise of his official duties."

SPECIFICATION OF CHARGES
CHARGE I
ABANDONMENT OF POSITION

The foregoing background information, and the facts alleged therein are incorporated by reference as if fully set forth herein. Respondent is guilty of abandonment of his position. In June 2022, Respondent moved back to the State of New Jersey. On June 8, 2022, after years of demanding reinstatement, and after plans had been made to reinstate Respondent effective July 1, 2022, for the first time, Respondent abruptly and unexpectedly advised the Board that he would not be returning to his position as Principal at Union High School. Further, on or about June 22, 2022, Respondent accepted a full-time position as Assistant Coach of the Seton Hall University Men's Basketball Team, resulting in his inability to perform the functions of his full-time role as an administrator. Respondent is unwilling, incapable and unable to perform his duties as Principal while simultaneously working as an assistant coach of a Division I men's basketball program. Respondent's employment as an assistant coach with Seton Hall University clearly

conflicts with the proper performance of Respondent's duties as an administrator with the Board, and illustrate Respondent no longer is willing to perform those duties. The above-referenced facts demonstrate abandonment of position and warrant Respondent's immediate dismissal from the position of Principal with the Board.

Count 1

On June 8, 2022, Respondent informed the Board that he was no longer interested in returning as Principal of Union High School, despite consistently demanding reinstatement in that position. This abrupt change in position was also contrary to the parties' understanding and plans made for Respondent's reinstatement effective July 1, 2022. Under N.J.S.A. 18A:28-8, a tenured teaching staff member must give at least sixty (60) days written notice of his intention to relinquish his position.

Count 2

On or about June 22, 2022, Respondent accepted a position as an assistant men's basketball coach at Seton Hall University, a position which he continues to hold. This is a full-time, paid position which conflicts and interferes with the proper performance and discharge of his duties as an administrator with the Board. Current Board Policies 3214 and 4214 provide that no staff member of the Board of Education "shall have any interest, financial or otherwise, direct or indirect, or engage in any business or transaction or professional activity which is in conflict with the proper discharge of the staff member's duties." Further, under N.J.S.A. 18A:12-24, no school official shall have an interest in a business organization or engage in any business transaction, or professional activity, which is in substantial conflict with the proper discharge of his duties in the public interest.

The foregoing acts and omissions by Respondent, as set forth in the above Counts, individually and cumulatively, constitute abandonment of his position, warranting dismissal.

FACTS

Prior to being employed by the Petitioner, the Respondent began his career in education as a teacher in the Hillside School District. From 1998-2000 Mr. Lowery taught fifth grade at George Washington Elementary School. From 2000-2002, Mr. Lowery taught at the Calvin Coolidge Demonstration School. Commencing in 2002, Mr. Lowery began his career as an administrator. In addition to being a reading teacher at the Walter O. Krumbiegel Middle School, from 2002-2003, Mr. Lowery became an Administrative Intern, and assisted Principal Gregory Tatum ("Tatum"). (Respondent Ex. 10).

From 2003-2007, Mr. Lowery was the Vice Principal of the Walter O. Krumbiegel Middle School. After Mr. Tatum left the Hillside School District, he was employed by the Petitioner in this proceeding as an Assistant Superintendent. Mr. Tatum then helped recruit Mr. Lowery to become the Principal of Franklin Elementary School in Union Township.

Franklin Elementary School had been designated as a School in Need of Improvement ("SINI") because it had failed to meet state benchmarks. Mr. Tatum testified that under Mr. Lowery's tenure, Franklin Elementary School emerged from the SINI designation, and was considered to be one of the better elementary schools in the State of New Jersey.

From 1998-2005, while working in Hillside, Mr. Lowery also coached the Union High School basketball team. According to Mr. Tatum, Mr. Lowery's rapport with high school students led him in 2015 to recruit Mr. Lowery to be the Principal of Union High School.

As a Principal in Union Township, Mr. Lowery's employment was in part governed

by the collective negotiations' agreement ("CNA") between the Board and the Township of Union Association of School Administrators. ("UTASA").

Throughout Mr. Lowery's employment by the Petitioner, he worked with some success as the head men's basketball coach at two junior colleges in New Jersey. From 2006-2010, Mr. Lowery was the head coach at Middlesex College in Edison, New Jersey, and from 2011 to 2017, Mr. Lowery was the head coach at Essex County College in Newark, New Jersey.

There is no evidence that Mr. Lowery's coaching duties interfered with his work as a Principal at Union High School. Mr. Tatum testified that Mr. Lowery's coaching duties did not interfere with Mr. Lowery's duties as a Principal.

On July 21, 2017, Linda Ionta ("Ionta"), the Petitioner's Athletic Director filed an Affirmative Action Complaint against Mr. Lowery. Ms. Ionta alleged that Mr. Lowery "created a hostile and/or unhealthy workplace environment towards her and the Union Township High School coaches" that Ms. Ionta supervised.[2]

The Board commenced an investigation, and by letter on September 14, 2018, now Superintendent Tatum placed Mr. Lowery on administrative leave. The letter states in pertinent part:

> This letter is written to confirm the fact that you have been placed on an administrative leave of absence with pay effective September 13, 2018. The reason you have been placed on an administrative leave of absence with pay is due to the conclusion of the affirmative action investigator's report and pending litigation.
>
> While you are on this leave, you are not permitted on the school grounds of any Township of Union Public School without my prior approval. In addition, you should not have

[2] The allegations contained in Ms. Ionta's complaint are not before me.

any contact with faculty, staff, or students of any Township of Union Public Schools.

Until Ms. Ionta's complaint was filed, there is no evidence that Mr. Lowery had been disciplined by the Board, and in fact he had received uniformly good evaluations. As a result of being placed on leave, Mr. Lowery commenced a lawsuit against the Board entitled *Lowery v. Nufrio et. al.*, UNN-L-3887-18[3].

On or about May 5, 2020, while on leave Mr. Lowery accepted the position of the head men's basketball coach at Lincoln University in Pennsylvania. When the Petitioner learned of Mr. Lowery's employment by Lincoln University, the Board commenced an action against Mr. Lowery under the New Jersey First Act, which, with certain exceptions, requires New Jersey public employees to reside in New Jersey.[4]

The present Superintendent of Schools is Dr. Scott Taylor ("Taylor"). Dr. Taylor succeeded Mr. Tatum as Superintendent. In his testimony before me, and in the above stated charges and specifications, Dr. Taylor stated that he believed Mr. Lowery wanted to return to his position as Principal of Union High School. At the time that Dr. Taylor became Superintendent, Mr. Lowery was on administrative leave. As such, Dr. Taylor never supervised or observed Mr. Lowery in his role as Principal of Union High School.

Dr Taylor described settlement discussions between himself and Mr. Lowery, and the possible return of Mr. Lowery to his position as Principal. These discussions occurred in May 2022. Although Mr. Lowery and Dr. Taylor discussed the possibility that Mr. Lowery would return to work on July 1, 2022, no firm commitment to return Mr. Lowery to service was made.

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[3] The allegations contained in this complaint are not before me.

[4] The allegations contained in the complaint filed pursuant to the New Jersey First Act are not before me. However, as I understand it, they may have some bearing on the proceeding before Arbitrator Coleflesh.

On June 8, 2022, Mr. Lowery and his counsel, and counsel for the Board, appeared in Court for a settlement conference. During these ongoing discussions, the media reported that Mr. Lowery had accepted a position as the assistant men's basketball coach at Seton Hall University, a Division I program. Respondent's counsel confirmed these reports. Without discussing Mr. Lowery's decision to take the position at Seton Hall, the Petitioner concluded that Mr. Lowery was no longer interested in returning to his position as Principal of Union High School. However, there is no evidence that Mr. Lowery ever communicated an intention not to return to Union High School.

Discussions between counsel for Mr. Lowery and the Petitioner continued, and on June 15, 2022, counsel for Mr. Lowery sent a letter to counsel for the Petitioner in which he stated that Mr. Lowery would remain on administrative leave and resign as Principal of Union High School on September 30, 2023. (Respondent's Ex. 19). Counsel for the Petitioner appeared to accept the terms offered by counsel for Mr. Lowery. (Respondent's Ex. 20). Counsel for the Petitioner sent an email to Mr. Lowery's attorney which stated: "Please accept this email as my further acknowledgement that we have a deal subject to final Board approval, to resolve this matter along the terms outlined in your letter of June 15, 2022." (Respondent's Ex. 20). On June 24, 2022, counsel for the Petitioner forwarded a draft settlement agreement to counsel to the Respondent. (Respondent's Ex. 21). However, the Board did not approve the settlement terms, and on July 19, 2022, the Board appointed an Interim Principal for Union High School. (Respondent's Ex. 27).

Dr. Taylor testified that he was unaware of the settlement discussions held between counsel for the Board and Mr. Lowery's counsel. Dr. Taylor also testified that he never discussed Mr. Lowery's duties as an assistant head coach at Seton Hall University

with Mr. Lowery.

On July 14, 2022, Dr. Taylor sent Mr. Lowery a "Rice notice" informing him that the status of his employment would be discussed at the Board's meeting set for July 19, 2022.[5] On August 4, 2022, Dr. Taylor filed sworn tenure charges against Mr. Lowery. On August 23, 2022, the Board determined that there was probable cause to credit the evidence in support of the tenure charges, and that the tenure charges were sufficient to warrant dismissal in accordance with *N.J.S.A.* 18A:6-14.

POSITIONS OF THE PARTIES

A. The Board's Position

The Board recognizes that tenure is designed to protect statutorily designated school employees from dismissal for "unfounded, flimsy, or political reasons." However, the Board notes that a tenured Principal may be dismissed for "inefficiency, incapacity, unbecoming conduct, or other just cause." *N.J.S.A.* 18A:6-10.

In support of its position that Mr. Lowery abandoned his position as Principal of Union High School, the Board cites to the Board's Conflict of Interest Policy No. 3214 which provides in pertinent part:

> No staff member of the Board of Education shall have any interest, financial or otherwise, direct or indirect, or engage in any business transaction or professional activity which is in conflict with the proper discharge of the staff member's duties.

Although the Board concedes that Mr. Lowery is an administrator and not a teacher, the Board contends that Mr. Lowery is bound by policies that further restrict

[5] Under New Jersey law, a Rice notice is sent to an employee whose employment status will be discussed at a closed-door meeting. The term is derived from the case of *Rice v. Union C'nty High School Bd. Of Ed,* 155 N.J. Super. 64 (App. Div. 1977).

outside activities by staff members. The Board cites Outside Activities Policy No. 3230 which provides in pertinent part: "Teaching staff members shall not devote time during their workday to outside private enterprise, business or business organization." In addition, the Board notes that it "reserves the right to determine if activities outside of the teaching staff members job responsibilities interfere with their professional performance and the discharge of the member's responsibilities to the students of this district."

The Board also maintains that Mr. Lowery violated *N.J.S.A.* 18A:28-8 which requires all teaching staff to provide sixty days written notice of their intent to relinquish their position.

The Board takes the position that by accepting the position as an assistant basketball coach at Seton Hall University, Mr. Lowery created for himself an undeniable conflict of interest, and violated the statute because he never gave notice to the Board that he was relinquishing his job. In further support of its argument that Mr. Lowery could not be both the Principal of Union High School and an assistant basketball coach at a Division I school, the Board cites to the CNA between the Board and the UTASA.

The Board notes that under the CNA, administrators are required to work no less than eight hours per day including lunch. In addition, the CNA provides that:

> an administrator shall be required to extend his or her daily working hours to perform his/her professional responsibilities in accordance with existing practices for the profession. This includes various workshops, professional development meetings and presentations pertaining to district initiatives, building department or academic information sessions.

(Petitioner's Ex. 19, Art. 6.01).

In addition to the professional requirements for administrators, the Board notes that the CNA also limits the amount of time off that an administrator can take during the

school year. The Board points out that while administrators are entitled to twenty-five vacation days during the school year, an administrator may not take vacation days when students are in attendance without the prior approval of the Superintendent. Dr. Taylor testified that he would not authorize Mr. Lowery's use of vacation days in order to perform his duties as an assistant basketball coach. Similarly, administrators are also entitled to six personal days per year, but no more than two personal days may be taken consecutively without the permission of the Superintendent.

The Board reasons that the position of Principal is a full-time, demanding position, and that it would be impossible for Mr. Lowery to fulfill his duties as a Principal and as a basketball coach for a Division I school. The Board cites Mr. Lowery's testimony in this proceeding, and notes that Mr. Lowery himself established that the demands of an assistant basketball coach precluded him from taking on both roles. The Board notes that as an assistant basketball coach, he was required to attend both home and away games, some of which were outside of the State of New Jersey and would require Mr. Lowery to miss school. In addition, as an assistant basketball coach, Mr. Lowery would have to attend practices, watch films resulting in a commitment of approximately forty hours per week.

While conceding that Mr. Lowery had previously coached at the Junior College level with the approval of Mr. Tatum, the Board argues that the demands of Division I basketball program far outweigh Mr. Lowery's previous coaching responsibilities.

The Board also contends that because of the settlement discussions with Mr. Lowery, it was unclear if Mr. Lowery truly intended to return to his position as Principal of Union High School, and therefore the Board concluded that it was justified in finding a

replacement for Mr. Lowery to assume the duties of Principal.

The Board also notes that tenure rights may be relinquished on a voluntary basis. The Board points to *N.J.S.A.* 18A:28-8 which 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 of written notice of his intention, unless the board shall approve of 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.

The Board contends that when a tenured employee refuses to accept a full-time position offered to them, that employee has surrendered his right to tenure. (Board's brief at 17, citing, *O'Toole v. Forestal,* 211 N.J. Super. (App. Div. 1986).

The Board maintains that during settlement discussions Mr. Lowery refused to accept the full-time position offered to him, and thereby relinquished his tenure rights. The Board asserts that Mr. Lowery put the Board in an untenable position because Mr. Lowery knew that the Board had to have a Principal in place for the 2022-2023 school year. The Board asserts that Mr. Lowery never intended to return to Union High School as evidenced by his employment as assistant basketball coach at Seton Hall University. The Board reasons that by his actions, Mr. Lowery demonstrated that he intended to abandon his position at Union High School. The Board contends that Mr. Lowery ignored his obligations to the students at Union High School.

The Board also analyzes Mr. Lowery's role as an Assistant Coach at Seton Hall University and contends that his position as coach presents a substantial conflict with his duties as a Principal at Union High School. The Board contends that by assuming his duties at Seton Hall University, Mr. Lowery will be running afoul of Board policies and

N.J.S.A. 18A:12-24 which prohibit school employees from having a business interest that conflicts with their obligations to their school. The Board maintains that, as an assistant basketball coach, Mr. Lowery would have to sacrifice some of his obligations to Union High School if he were to continue in both jobs. The Board stated that Mr. Lowery made a choice, and he must live with the consequences.

The Board contends that Mr. Lowery abandoned his job, and that dismissal is the appropriate penalty.

B. Respondent's Position

The Respondent begins his brief by noting that the burden of proof in tenure cases is on the Petitioner, which must prove the truth of the allegations against Mr. Lowery by a preponderance of the evidence. The Respondent also notes that the tenure laws are designed to "protect competent and qualified teachers in the security of their positions during good behavior, and to protect them . . . against removal for unfounded, flimsy or political reasons." (Respondent's Brief at 13 citing, *Zimmerman v. Board of Education of Newark,* 38 N.J. 65, 71 (1962)). The Respondent maintains that the Tenure Act must be liberally construed." (Respondent's Brief at 1 citing, *Spiewak v. Bd. of Education of Rutherford,* 90 N.J. 63, 74-75 (1982)).

In discussing the first count in which Mr. Lowery purportedly indicated that he did not desire to return to Union High School, the Respondent denies that he ever communicated a desire not to return to Union High School as Principal. The Respondent also notes that in order to relinquish his tenure rights he had to make a knowing choice to surrender those rights. The Respondent relies upon the case of *Knorr v. Smeal,* 178 N.J. 169 (2003). In *Knorr* the Court stated that:

> Waiver is a voluntary and intentional relinquishment of a known, right. An effective waiver requires a party to have full knowledge of his legal rights and intent to surrender those rights. The intent to waive need not be stated expressly, provided the circumstances clearly show that the party knew of the right and then abandoned it, either by design or indifference. The party waiving a known right must do so clearly, unequivocally and decisively.

(Respondent's Brief at 15).

The Respondent also cites other cases where the Courts and the Commissioner of Education concluded that employment held before a suspension, or without notice of the consequences of accepting another position did not constitute a knowing and voluntary waiver of tenure rights. (Respondent's Brief at 15 citing, *School District of Willingboro v. Gilbert,* 3 N.J.A.R. 206, aff'd 3 N.J.A.R. 209 (1981); *Parsells v. Bd. of Ed. of Sommerville,* Docket No. A-3084-19 (App. Div. June 6, 2022) (slip op.)).

The Respondent contends that he never resigned or intended to resign by exploring settlement options at a court-sanctioned settlement conference. The Respondent asserts that he was deciding whether he should purchase the "offeror's peace" with the Petitioner and put the litigation behind him. Thus, the Petitioner maintains that he never intended to waive his right to tenure and Charge 1 must be dismissed.

Regarding the second count, the Respondent rejects the Board's position that his work as an assistant head basketball coach at Seton Hall University would interfere with his ability to perform his duties as Principal at Union High School. The Respondent asserts that many of the policies relied upon by the Board refer to teachers and not administrators such as Mr. Lowery.

The Respondent also contends that under the provisions of the CNA he would be able to arrange his personal and vacation days in order to fulfill his obligations to both

Seton Hall University and to Union High School.

The Respondent notes that as Principal he is charged with creating a master schedule. While the Respondent recognizes that he would frequently have to attend after school events, he states that he had previously worked with other administrators to divide those responsibilities so that there is coverage at various school events, and minimal disruption to school activities.

The Respondent points to Mr. Tatum's testimony in which Mr. Tatum stated that Mr. Lowery's coaching responsibilities did not interfere with his duties as Principal. Mr. Tatum characterized Mr. Lowery as "highly professional" and in constant communication. The Respondent also notes that, since September 13, 2018, when he was placed on administrative leave, the Respondent has had no duties to perform as an employee of the Petitioner.

The Respondent rejects the idea that his employment at Seton Hall University would "prejudice his independence of judgment in the exercise of his official duties." The Respondent asserts that he has always acted in a professional manner as a Principal with sincerity and dedication.

The Respondent contends that the Petitioner is speculating when it asserts that the Respondent is unable to perform the tasks of an assistant basketball coach and Union High School Principal. The Respondent notes that Dr. Taylor never supervised Mr. Lowery. The Respondent further contends that the Petitioner has no factual basis for insisting that the Respondent relinquish his tenure rights based upon the fact that he is a coach at Seton Hall University.

The Respondent maintains that the Petitioner has not proven Count 2. The

Respondent asks me to dismiss the charges against the Petitioner, that his suspension be reversed, and that his pay be reinstated with all backpay benefits and emoluments due to him. In addition, the Respondent demands all back pension contributions in order to restore Respondent's pension credit to the Teacher's Pension and Annuity Fund.

DISCUSSION

A. The Legal Standard

The Education Tenure Act governing teacher tenure provides in pertinent part:

> No person shall be dismissed or reduced in compensation,
>
> (a) if he is or shall be under tenure of office, position or employment during good behavior and efficiency in the public school system of the state . . .
>
> except for inefficiency, incapacity, unbecoming conduct, or other just cause, and then only after a hearing held pursuant to this sub article, by the commissioner, or a person appointed by him to act in his behalf, after a written charge or charges, of the cause or causes of complaint, shall have been preferred against such person, signed by the person or persons making the same, who may or may not be a member or members of a board of education, and filed and proceeded upon as in this subarticle provided.

N.J.S.A. 18a:6-10.

Tenure is a "statutory right that may not be forfeited or waived." *Spiewak v. Rutherford Bd. of Educ.*, 90 N.J. 63, 77 (1982). Tenure is designed to protect employees from dismissal "for unfounded, flimsy or political reasons." *Wright v. Bd. of Educ. Of E. Orange*, 99 N.J. 112, 118 quoting *Zimmerman v. Newark Bd. of Educ.*, 38 N.J. 65, 72 (1962).

In order to find that an employee engaged in conduct which merits removal, that employee is "entitled to an evaluation of the conduct in terms of its relationship to the

nature of the office itself, and in that context, an appraisal of the actual or potential impairment of the public interest which may be expected to result from the conduct in question." *Sch. Dist. Of Parsippany-Troy Hills v. Hess,* 97 N.J.A.R. 2D (EDU) 34, 45 (citations omitted).

The Board has asserted two Charges against Mr. Lowery each of which it contends merits Mr. Lowery's termination. The Board has the burden of proof in this proceeding. The two Counts though related will be discussed separately.

A. Count 1

> On June 8, 2022, Respondent informed the Board that he was no longer interested in returning as Principal of Union High School, despite consistently demanding reinstatement in that position. This abrupt change in position was also contrary to the parties' understanding and plans made for Respondent's reinstatement effective July 1, 2022. Under N.J.S.A. 18A:28-8, a tenured teaching staff member must give at least sixty (60) days written notice of his intention to relinquish his position.

Count 1 arises from the conversations that Mr. Lowery had with Dr. Taylor, and settlement discussions held in Court to resolve pending litigation. In order to prove this charge, the burden is on the Petitioner to establish that Mr. Lowery knowingly relinquished his position and waived his tenure rights.

There is no evidence that establishes that Mr. Lowery ever agreed to relinquish his position and waive his tenure rights. The evidence shows that throughout May of 2022, Mr. Lowery was in contact with Dr. Taylor and the two were discussing Mr. Lowery's reinstatement to his position as Principal as of July 1, 2022. The evidence also establishes, that on a separate track, counsel for the Board and counsel for Mr. Lowery were in Court discussing a resolution of pending litigation. The proposed settlement would have kept Mr. Lowery on Administrative leave through September 30, 2023. That is under the terms of the settlement agreement, Mr. Lowery would not have to perform any duties

as a Principal and would have been permitted to retire in September of 2023.

After the announcement that Mr. Lowery had taken the position at Seton Hall University, the Board decided not to finalize the settlement that had been under discussion.

Dr. Taylor was unaware of the settlement discussions between the Board and Mr. Lowery. The settlement discussions and the possibility of Mr. Lowery's reinstatement to full-time duty at Union High School were independent of each other.

At no point did Mr. Lowery specifically relinquish or waive his tenure rights. Even if I were to credit the position of the Board, that by engaging in settlement discussions, Mr. Lowery had communicated that he was no longer interested in being Principal of Union High School, that settlement required the Board to provide significant consideration to Mr. Lowery. The only conclusion that could be drawn from the fact that settlement discussions occurred, is that Mr. Lowery was willing to consider the offeror's peace, but without that consideration contained in the settlement proposal he was still interested in maintaining his position as Principal of Union High School.

Accordingly, I find that the Petitioner has not proven Count 1.

B. Count 2

> On or about June 22, 2022, Respondent accepted a position as an assistant men's basketball coach at Seton Hall University, a position which he continues to hold. This is a full-time, paid position which conflicts and interferes with the proper performance and discharge of his duties as an administrator with the Board. Current Board Policies 3214 and 4214 provide that no staff member of the Board of Education "shall have any interest, financial or otherwise, direct or indirect, or engage in any business or transaction or professional activity which is in conflict with the proper discharge of the staff member's duties." Further, under N.J.S.A. 18A:12-24, no school official shall have an interest in a business organization or engage in any business transaction, or professional activity, which is in substantial conflict with the proper discharge of his duties in the public interest.

Count 2 concerns Mr. Lowery's decision to accept the position of assistant head basketball coach at Seton Hall University. The Petitioner contends that by accepting this position, the Respondent has violated Current Board Policies 3214 and 4214 and N.J.S.A. 18A:12-24, which preclude school officials from engaging in activities that have a substantial conflict with their duties. Having reviewed the record evidence, I conclude that the Petitioner has partially proven the allegations contained in Count 2. I find that Mr. Lowery, by taking the position of assistant head coach at Seton Hall University, engaged in a professional activity which was in substantial conflict with his position as Principal of Union High School. Nonetheless, under the unique circumstances of this case, I also conclude that Mr. Lowery's termination is not warranted.

Although Mr. Lowery has established to my satisfaction that he had successfully served as a Principal and as head basketball coach on the Junior College level, I am unable to conclude that Mr. Lowery would be able to adequately fulfill his duties as Principal if he were to be reinstated and continue his employment at Seton Hall University.

Mr. Lowery's own testimony establishes that coaching a Division I basketball team is more rigorous than coaching a New Jersey Junior College. Although many games are on weekends, there are also occasional games during the week that entail extensive travel, and occasionally overnight travel. In addition, if a Division I team is successful it might engage in significant post-season tournament play. I also conclude that the rigors of the schedule, the travel, and practices on non-game days would conflict with Mr. Lowery's ability to perform the duties of Principal at Union High School.

While I conclude that there is an innate conflict between the position of assistant coach and Principal, I do not believe that a significant penalty should be imposed upon

the Respondent. I make this finding because at the time Mr. Lowery accepted the position at Seton Hall University, the Board had placed Mr. Lowery on administrative leave and he was "not permitted on the school grounds of any Township of Union Public School without. . .prior approval. In addition, [he was barred from having] any contact with faculty, staff, or students of any Township of Union Public Schools."

As such, Mr. Lowery had no responsibility to the Petitioner until the Petitioner ended the administrative leave. Mr. Lowery was, therefore, free to partake in any activity he chose until the Petitioner directed Mr. Lowery to return to work.

Under these circumstances, the issue becomes what is the appropriate penalty. While I conclude that Mr. Lowery placed himself in an inherent conflict, at this juncture, I do not believe he should suffer a monetary penalty, and this award shall be deemed a warning that he no longer engages in activities that place him in a conflict with his duties as Principal of Union High School.

I direct that Mr. Lowery be reinstated to his position as Principal of Union High School with all backpay, benefits and emoluments due to him, including any pension contributions.

However, Mr. Lowery's reinstatement is contingent upon his deciding whether he prefers to be an assistant basketball coach at Seton Hall University or the Principal of Union High School. As such, within thirty days of the date of this Award, Mr. Lowery must choose if wishes to remain at Seton Hall University or to return to the position of Principal Union High School. Mr. Lowery cannot have both full-time positions. Should Mr. Lowery choose to remain at Seton Hall University at the end of the thirty days, his employment by the Petitioner will be deemed terminated.

Absent an appeal to the Commissioner, I will retain jurisdiction to resolve any dispute concerning the remedy herein.

AWARD

The undersigned Arbitrator having been designated pursuant to *N.J.S.A., 18A:6-16,* as amended by *P.L. 2012, c. 26 and P.L. 2015, c. 109* ("TEACHNJ") hereby issues and AWARDS as follows:

1. The allegations contained in Count 1 of the Charge have not been proven, and are dismissed;
2. The allegations contained in Count 2 of the Charge has been partially proven;
3. This Award shall be deemed a warning to Petitioner Corey Lowery, Petitioner Corey Lowery shall not engage in any professional activity that will be in substantial conflict with his position as Principal of Union High School;
4. Petitioner Corey Lowery shall be reinstated to his position as Principal of Union High School with all backpay, benefits and emoluments due to him, including any pension contributions;
5. Petitioner Corey Lowery's reinstatement is contingent upon his resignation from Seton Hall University within thirty days of the execution of this Award;
6. In the event Petitioner Corey Lowery fails to resign from his position as an assistant basketball coach at Seton Hall University within thirty days of the date of this award, his employment by the Petitioner shall be deemed terminated;

7. The undersigned shall retain jurisdiction for the limited purpose of resolving any disputes concerning the remedy herein.

Dated: April 29, 2023

Ira Cure

State Of New York)
)
County of Kings)

On this 29th day of April, 2023 before me personally came and appeared Ira Cure, to me known and known to me to be the individual described herein and who executed the foregoing instrument and he acknowledged that he executed the same.

Notary Public

ELIZABETH ORFAN
Notary Public, State of New York
No. 02OR4976601
Qualified in Kings County
Commission Expires April 23, 2023

STATE OF NEW JERSEY
DEPARTMENT OF EDUCATION
BUREAU OF CONTROVERSIES AND DISPUTES

In the Matter of the Tenure Hearing
of Sheldon Harris

City of East Orange School District (Essex County),

"Petitioner,"

-and-

Sheldon Harris,

"Respondent."

DECISION ON RESPONDENT'S MOTION IN LIMINE

Agency Docket No. 301-11/22

Appearances:

For the Petitioner:
Madelaine P. Hicks, Esq.
Antonelli Kantor Rivera

For the Respondent
Sanford R. Oxfeld, Esq.
Oxfeld Cohen

On August 8, 2022, the School District of the City of East Orange ["District" or "Petitioner"], certified tenure charges with the Commissioner of Education against tenure teacher Sheldon Harris ["Respondent"] for inefficiency. The District seeks to remove the Respondent from his tenured teaching position based upon the charges that were sworn to by Superintendent of Schools AbdulSaleem Hasan:

CHARGE ONE: INEFFICIENCY

Respondent has failed to effectively perform the duties of a tenured teacher for two consecutive school years, as follows:

1. Respondent performed his duties in a partially effective manner during the 2020-2021 school year.
2. Respondent was observed on December 18, 2020. See Statement of Evidence, Exhibit 1.
3. Respondent received a Memorandum from Mr. John P. English, Principal of the Cicely L. Tyson School, on January 22, 2021 based upon his failure to submit his Round 1 Observation Portfolio by the December 18, 2020 deadline. See Statement of Evidence, Exhibit 2.
4. Respondent was observed on May 11, 2021. See Statement of Evidence, Exhibit 3.
5. Respondent was rated partially effective in his 2020-2021 annual summative evaluation dated June 14, 2021. See Statement of Evidence, Exhibit 4.
6. Respondent performed his duties in a partially effective manner during the 2021-2022 school year.
7. During the 2021-2022 school year, Respondent was on a Corrective Action Plan. See Statement of Evidence, Exhibit 5.
8. Respondent received a Memorandum from Principal English October 20, 2021 based upon his failure to submit a copy of his SGO's and PDP's by the October 15, 2021 deadline. See Statement of Evidence, Exhibit 6.

9. Respondent received a Memorandum from Principal English on October 25, 2021 based upon his failure to submit lesson plans in a timely manner. See Statement of Evidence, Exhibit 7.

10. Respondent was observed on October 28, 2021. See Statement of Evidence, Exhibit 8.

11. Respondent received a Memorandum from Principal English on December 1, 2021 based upon his failure to submit lesson plans in a timely manner. See Statement of Evidence, Exhibit 9.

12. Respondent was observed on February 24, 2022. See Statement of Evidence, Exhibit 10.

13. Respondent was observed on April 25, 2022. See Statement of Evidence, Exhibit 11.

14. Respondent was rated partially effective in his 2021-2022 annual summative evaluation dated June 27, 2022. See Statement of Evidence, Exhibit 12.

15. Respondent has faied to meet the expected standard of excellence required of a classroom teacher.

WHEREFORE, Respondent has shown that he is unfit to discharge the duties and functions of the position in which he holds tenure in the District, and he should be dismissed.

Attached to the tenure charges were the statement of evidence exhibits 1-12 referenced above.

On November 14, 2022, the State of New Jersey Department of Education acknowledged receipt of the certified tenure charges and the statement of evidence exhibits as of November 9, 2022.[1]

[1] On November 18, 2022, Counsel for the Respondent filed a motion to dismiss because "the district has not filed the appropriate procedures under N.J.S.A. 18A:6-11 in the bringing of these tenure charges." Included in the Respondent's motion was a certification from the Respondent. The Respondent also

By letter dated December 9, 2022, I received notice from Jennifer Killough-Herrera, the Executive Director of the Division of Legal and External Service, New Jersey Department of Education, that this matter was referred to me pursuant to *N.J.S.A.* 18A:6-16. A copy of the certified tenure charges and the statement of evidence exhibits were included with the notice. The charges were not accompanied by statements of witnesses or a list of witnesses with a complete summary of their testimony.

Informal settlement discussions initially took place in lieu of proceeding to an evidentiary hearing. On February 8, 2023, the District requested that the matter proceed to a hearing in lieu of continuing settlement discussions. On March 3, 2023, after several conference calls and email exchanges between February 8th and March 3rd, the parties agreed to a pre-trial schedule that included the exchange of discovery and an an opportunity to file and respond to motions.

On March 30, 2023, the Respondent submitted a letter memorandum in support of a motion in limine and motion to dismiss the charges against him. More specifically, with respect to the motion in limine, the Respondent contends that the District failed to comply with N.J.S.A. 18:6-17.1 because the District's

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provided an answer to the District's charges. On November 28, 2022, the District filed a letter brief in opposition to the Respondent's motion.

charges were not accompanied by statements of witnesses or a list of witnesses with a complete summary of their testimony:

> N.J.S.A. 18A:6-17.1. **Panel of arbitrators**
>
> * * *
>
> b. (3) Upon referral of the case for arbitration, the employing board of education shall provide all evidence including, but not limited to, documents, electronic evidence, statements of witnesses, and a list of witnesses with a complete summary of their testimony, to the employee or the employee's representative. The employing board of education shall be precluded from presenting any additional evidence at the hearing, except for purposes of impeachment of witnesses. At least 10 days prior to the hearing, the employee shall provide all evidence upon which he will rely including, but not limited to, documents, electronic evidence, statements of witnesses, and a list of witnesses with a complete summary of their testimony, to the employing board of education or its representative. The employee shall be precluded from presenting any additional evidence at the hearing except for purposes of impeachment of witnesses.

In support of this position, the Respondent refers to *In the Matter of the Tenure Hearing of John Toland, Atlantic City School District Board of Education, DOE Agency Docket No. 167-8/20*, an Award issued by Arbitrator Gerard Restaino on October 13, 2021, confirmed by the Superior Court of New Jersey, Counties of Atlantic and Cape May, Docket No. ATL-L-3656-21, on January 30, 2022. The Respondent also relies upon an Award issued by Arbitrator Lisa Charles most recently on April 24, 2023. *See In the Matter of the Tenure Hearing of James Marion, Wallkill Valley Regional High School Board of Education, DOE Agency*

Docket No. 249-9/22. In each of these cases, the arbitrator granted the respondent's motion to dismiss because the petitioner did not strictly adhere to the statute. The Respondent requests that the tenure charges be dismissed with prejudice and the awarding of attorneys' fees given the blatant violation of the statute.

On April 21, 2023, the District submitted a letter brief in opposition to the Respondent's motions. With respect to the Respondent's motion in limine, the District contends that the Respondent's position lacks merit. The District relies *Allen v. E. Orange BE,* an unpublished Appellate Division Decision issued on February 4, 2022, and *Petrella v. Hackensack BE,* another unpublished Appellate Division Decision issued on March 5, 2021. In *Allen,* the arbitrator denied the Respondent's motion to dismiss the tenure charges based upon N.J.S.A. 18:6-17.1(b)3 and permitted the matter to move forward and be heard on its merits. The Court concluded that strict statutory construction was not required and, therefore, the arbitrator did not exceed his authority by providing the parties with a full and fair opportunity to prepare for the arbitration prior to the hearing. In *Petrella,* the Court "discern[ed] no undue means tainting the arbitrator's decision" where the arbitrator considered additional exhibits that were submitted during the arbitration hearing.

I have thoroughly reviewed and considered the decisions the parties submitted in support of their respective positions. I have also considered other arbitration decisions referenced in *Petrella*: *In re Tenure Hearing of Ebert*, No. 267-9/14 (N.J. Dep't of Educ. Jan. 30, 2015) (Denenberg, Arb.); *In re Tenure Hearing of Gordon*, No. 24-1/18 (N.J. Dep't of Educ. Aug. 13, 2018) (Licata, Arb.); *In re Tenure Hearing of Fetty*, No. 173-7/19 (N.J. Dep't of Educ. Sep. 3, 2019) (Zudick, Arb.). The Court in *Petrella* distinguished these cases in part because "the decisions all involved pre-hearing procedural violations distinguishable from the issue on this appeal: the submission of additional exhibits during the arbitration." As for *Allen*, the Court's decision does not include any excerpts from the arbitrator's decision that includes any substantive analysis of his decision to deny the Respondent's motion. Nor could I find the arbitrator's decision on the motion on the State's website that includes electronic copies of the Arbitrator TEACHNJ decisions. Putting this aside, I conclude that *Toland*, *Marion* and *Ebert* are directly on point in the instant matter. To reiterate, N.J.S.A. 18A:6-17.1.b(3) provides, in relevant part:

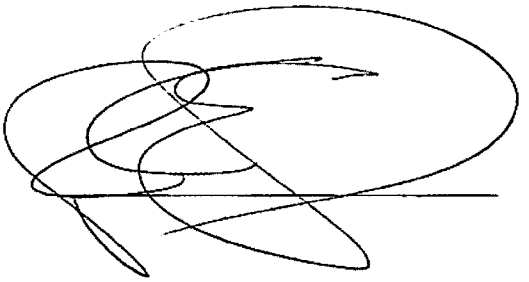
> Upon referral of the case for arbitration, the employing board of education shall provide all evidence including, but not limited to, documents, electronic evidence, statements of witnesses, and a list of witnesses with a complete summary of their testimony, to the employee or the employee's representative. The employing board of education shall be precluded from presenting any additional evidence at the hearing, except for purposes of impeachment of witnesses.

In this case, the District at the time that this matter was referred to me on December 9, 2022, provided the exhibits it relied upon to file tenure charges against the Respondent. However, the District failed to submit statements of witnesses and failed to provide a list of witnesses with a complete summary of their testimony by that date. Based on these undisputed facts, and given the strict compliance that has been required of the statutory rules in the arbitration decisions cited above (i.e. *Toland, Marion* and *Ebert)*, I conclude that the District failed to comply with N.J.S.A. 18A:6-17.1.b(3).

Accordingly, based upon the foregoing and the parties submissions addressing the Respondent's motion in limine, the Respondent's motion is granted. The tenure charges against the Respondent are dismissed without prejudice. I decline the Respondent's request to dismiss the charges with prejudice or to award attorneys' fees. As awarded in *Toland*, the Respondent "shall be returned to work with full back pay, health benefits, seniority and any other emoluments he lost while serving a 120 day suspension."

AWARD

The Respondent's motion in limine is granted due to the District's failure to follow the statutory requirements of N.J.S.A. 18A:6-17.1.b.(3). The tenure charges against the Respondent are dismissed without prejudice. The Respondent "shall be returned to work with full back pay, health benefits, seniority and any other emoluments he lost while serving a 120 day suspension."



Dated: May 2, 2023
Sea Girt, New Jersey

State of New Jersey }
County of Monmouth }ss:

On this 2nd day of May, 2023, before me personally came and appeared Robert C. Gifford to me known and known to me to be the individual described in and who executed the foregoing instrument and he acknowledged to me that he executed same.

Linda L Gifford
Notary Public
Expires 1-10-26

IN THE MATTER OF THE TENURE ARBITRATION
BETWEEN

SCHOOL DISTRICT OF THE BOROUGH OF
LAKEHURST, OCEAN COUNTY,

PETITIONER,

AND

REBECCA SCHROEDER,

RESPONDENT.

DOCKET NO. 177 7/22

BEFORE JACQUELIN F. DRUCKER, ESQ.
ARBITRATOR

AWARD

APPEARANCES BY COUNSEL:

FOR THE PETITIONER: MICHAEL A. PATTANITE, JR., ESQ. [1]
LENOX, SOCEY, FORMIDONI, GIORDANO, LANG,
CARRIGG & CASEY, LLC

FOR THE RESPONDENT: MICHAEL DAMM, ESQ.
SELIKOFF & COHEN, P.A.

I. PROCEDURAL BACKGROUND

The Board of Education of Lakehurst, New Jersey (Ocean County) ("Board") certified to the Commissioner of Education four tenure charges ("Charges") seeking the revocation of tenure and termination of employment of Rebecca Schroeder ("Respondent" or "Ms. Schroeder"), a tenured Teacher employed by the School District of the Borough of Lakehurst, Ocean County ("District," "Employer," or "Management"). Each charge alleged "unbecoming conduct" and pertained to events alleged to have occurred on April 7, 2022. In lieu of an Answer, Respondent

[1] Mr. Pattanite and his law firm joined as substitute counsel effective January 14, 2023.

timely submitted a detailed Motion to Dismiss ("Motion") seeking dismissal of all charges. Thereafter, by letter dated July 22, 2022, the Commissioner of Education, through the Office of Controversies and Disputes, referred the charges to this Arbitrator pursuant to N.J.S.A. 18A:6-16. In a conference with the Arbitrator, the parties agreed that full briefing and consideration of the Motion would proceed before further scheduling was undertaken. In accordance with the schedule agreed to by the parties, the parties provided detailed submissions regarding the Motion. After having given full, fair, and careful consideration to all arguments presented by the parties, the charges and all supporting documents provided by the District, and all authorities and citations offered by the parties, the Arbitrator issued an Order Regarding Motion to Dismiss ("Order"), granting the Motion as to Charge Four and holding the hearing would proceed as to Charges One, Two, and Three. That Order, issued on September 7, 2022, is attached hereto and incorporated herein by reference. Respondent thereafter submitted her full Answer in response to the remaining charges.

By agreement of the parties, the hearing of the remaining three charges was commenced on January 19, 2023, at the Lakehurst Community Center, 207 Center Street, Lakehurst, New Jersey. At hearing, each party was given a full and fair opportunity to present evidence through documents and testimony of witnesses. All witnesses, except Ms. Schroeder and District Superintendent Loren Fuhring, the Board's party representative, were sequestered. All testimony was provided under oath and was subject to direct, cross, redirect, and re-cross examination. At the commencement of the hearing, it was agreed that a court reporter would prepare a transcript, which, after the hearing, was provided to both parties and the Arbitrator.[2] At the conclusion of the District's case in chief, the Respondent moved for dismissal of all charges, arguing that the District had not met its burden of proof. The Arbitrator took the motion under advisement and now concludes that, based upon the findings herein, it need not be addressed. When the presentation of evidence was concluded, the parties agreed to a schedule for post-hearing briefs

[2] Neither party prepared an errata sheet regarding same, nor did the Arbitrator. The Arbitrator notes, however, that, on page 8 of the transcript, the District's opening statement is attributed to "The Arbitrator." This is incorrect. It of course was presented by counsel to the District. In addition, the transcript states that each witness was sworn "by the Certified Court Reporter." That is incorrect; each witness was placed under oath by the Arbitrator, who administered the oath herself, asking each witness to swear or affirm regarding the truth of the witness's forthcoming testimony.

and arguments. Following agreed extensions of time, same were timely submitted to the Arbitrator, and exchange copies were forwarded by the Arbitrator's Office Administrator, whereupon the hearing was closed on March 23, 2023. In light of the Motion process and various scheduling issues, the Arbitrator, with the agreement of the parties, secured approval from the Office of Controversies and Disputes for extensions of the statutory deadlines for this proceeding.

II. THE CHARGES

In seeking termination of Respondent's employment and revocation of her tenure, the District asserted four Charges, each of which alleges that Respondent engaged in unbecoming conduct. Charges One, Two, and Three relate to the alleged events of April 7, 2022. Charge Four related to a discussion that Superintendent of the Lakehurst School District, Loren Fuhring, held with Respondent the following day, April 8, 2022. That Charge alleged that Grievant had "knowingly, intentionally, and willfully made a false statement" to the District Superintendent. For the reasons stated in the Order, attached hereto and incorporated herein by reference, Respondent's Motion to Dismiss was granted with regard to Charge Four, as the charge itself was based not on a denial but solely upon Respondent's statement that she lacked recollection. The Arbitrator notes that, while Charge Four was dismissed, the full evidence adduced at hearing, through testimony presented under oath, confirmed further that there was no falsehood conveyed by Respondent during the investigation.

Charges One, Two, and Three allege that on or about April 7, 2022, Respondent, a tenured Pre-School Teacher, "knowingly, intentionally, and willfully" and during school hours and "in the presence of staff members and students": "lay on the ground in her classroom and went to sleep, at approximately 9:35 a.m."(Charge One); "did sleep in the closet of her classroom during lunch period" (Charge Two); and "did delegate instructional responsibilities to [LM], a paraprofessional in her classroom, without any supervision, by asking [LM] to perform morning meeting, or 'circle time' by herself while Ms. Schroeder did . . .sleep in her classroom by laying on the floor . . . ." (Charge Three).

III. FINDINGS OF FACT

Multiple elements of the relevant facts are not in dispute. Ms. Schroeder is employed by the District as a tenured Pre-School Teacher and has served in that capacity for many years. At all relevant times, she was assigned to a class of approximately 12 students, aged three to five. During the 2021-22 school year, also assigned to Ms. Schroeder's class was LM, a Paraprofessional who then was in her first year of employment with the District.

The Charges relate to events that occurred on April 7, 2022. The preceding week, Ms. Schroder had spent eight hours at a local Emergency Department being treated for severe gastroenteritis, which resulted in her being off duty on the Thursday and Friday of that week. Ms. Schroeder followed the proper administrative steps to report off duty because of illness on those two days, letting the attendance officer know that she was ill and that she was seeking emergency treatment. There is no issue in the instant charges regarding the propriety of her absences on those days nor is there any valid challenge to the credibility of her testimony recounting her illness and medical care.

Ms. Schroder routinely arrives for class well before the required time of 7:55 a.m. Thursday, April 7, was no different, and she reported between 7:15 and 7:20 a.m. and prepared for the class. She was not, she testified, feeling unwell at that time. On Thursdays, the children's mornings began with a physical activity class in the gymnasium. Ms. Schroeder and LM thus walked together to the gym/cafeteria area to be there to pick up the students when their session in the gymnasium concluded. As they were walking, Ms. Schroeder began to feel nauseated. She and LM concur that she told LM that her stomach hurt and that she was feeling sick, as she had felt the prior week when she had gone to the hospital. Ms. Schroeder visited the bathroom but continued to feel ill. When LM suggested that perhaps she needed to go home, Ms. Schroeder said "Let's see, I am just not feeling right." Ms. Schroeder usually engages with the children during their physical activity class but, on this day, she and LM instead sat in the bleachers and

observed the class from there. While there, Ms. Schroeder told LM that she was not feeling better and felt that she needed to go home. She indicated that she would call the nurse when they returned to the classroom.

In the classroom, Ms. Schroeder had the children sit on the carpet for their usual "circle time," to take attendance, read stories, and get ready for the day. "Circle time" is conducted with the full class together, before breaking into "centers," in various parts of the room, when the students focus on different activities such as technology, blocks, dramatic play, etc. After having the children assemble on the floor, Ms. Schroeder asked LM to lead the circle time while she called the nurse, but Ms. Schroeder remained present, at her desk, right beside the students in the circle. LM took a seat in a rocking chair as Ms. Schroeder sat at the desk just a few feet from LM and the children. Ms. Schroeder telephoned the RN. The RN recalls that, in their brief conversation, Ms. Schroeder reported that she was nauseated and had diarrhea. They agreed that she should go home, and Ms. Schroeder asked the RN to call the office to let them know. The RN relayed this information to Cecilia Ward, the Coordinator of Substitutes, telling Ms. Ward that Ms. Schroeder "has to go home." Ms. Ward told the RN that she did not know what she was going to do, as she did not think that she had a substitute teacher available.

After speaking with the RN, Ms. Schroder remained at her desk, observing the circle time, waiting to hear back from administration as to whether she could be relieved. LM told Management and initially testified that, as to this particular point in time, she had to do circle time "alone" and had never done so before, yet the record establishes and LM at no time disputed that, while she was reading stories to the class, she, the class, and the activities were under the observation of Ms. Schroeder, who was seated at the desk, mere feet away. Circle time is considered instructional activity, and, on this day, it was conducted pursuant to the plans and readings developed by Ms. Schroeder and under Ms. Schroeder's direct and immediate supervision and observation.

During circle time, Coordinator Ward entered the classroom. She had been unable to locate a substitute teacher and, of the Paraprofessionals who could step in, one was out on leave and the

other was already covering an assignment. Ms. Ward testified that she apologized to Ms. Schroeder and told her that there were no teachers or paraprofessionals available to cover the class for her for the rest of the day. Ms. Ward, who has known Ms. Schroeder for many years, confirmed that Ms. Schroeder appeared to be "a little under the weather" and noted that she had been resting her head on her hand while seated at the desk by the circle session. Ms. Ward asked her if she was going to make it, and Ms. Schroeder responded that she would "get through the day." All agree that it was essential for this Pre-School class to have both a Teacher or appropriate substitute plus a Paraprofessional present, given the number of students, their age levels, and pedagogical and safety requirements. Ms. Schroeder was aware of this requirement and also aware of the difficulty the District often had finding appropriate substitutes. She thus decided, she testified, that she could "tough it out."

In total, circle time lasted approximately 20 minutes. Ms. Schroeder was at her desk, observing and monitoring the circle time, with the exception of one moment, which Ms. Schroeder described as when she felt the worst of the day, when she briefly went into the bathroom in the classroom and then returned to her desk. When Ms. Schroeder noted that LM was completing a story, Ms. Schroeder began to set up for the center activities, fetching the small decorative pillows that the children use during center time and for naps. It is undisputed that, as COVID and various viruses, including a gastrointestinal bug then prevalent within the school population, remained of concern, the classroom hygiene routine was for Ms. Schroeder or LM to spray the pillows each morning with disinfectant before placing them on the furniture for use by the children. LM in testimony initially suggested that Ms. Schroeder did this as part of a plan to prepare a place on the floor to sleep, but LM acknowledged on cross-examination that preparation of the pillows was a daily hygiene routine in the classroom.

After Ms. Schroeder placed the pillows, she returned to her desk, and circle time was completed. Ms. Schroeder and LM then directed the children into their groups for center activities. During center time, Ms. Schroeder and LM typically would move throughout the classroom or position themselves so that they could observe the various groups. LM took a seat at a table near one group, and Ms. Schroeder sat on the floor, which is common for Pre-School Teachers, by the

sofa, in the center of the room, near another group. Although she still felt unwell, Ms. Schroeder while seated was observing the children in one group who were working with puzzles, and her undisputed testimony establishes that she was interacting with them verbally. As Ms. Schroeder was in the center of the room, she also could observe the children in another group, on the other side of her, while LM, seated at a table, was in a position to monitor the groups closest to her. LM reported to the District and initially testified that, during this time, she observed Ms. Schroeder "laying [sic] on the floor," but LM modified that account as her sworn testimony progressed, ultimately agreeing that Ms. Schroeder was, as Ms. Schroeder has consistently maintained, seated upright and not lying on the floor. As addressed below, LM's account was the only testimony (as contrasted with a witness's written account, which the witness contradicted in testimony) supporting the aspect of Charges One and Three alleging that Ms. Schroeder willfully "lay on the ground," in the classroom, and LM's account cannot be and is not credited. [3] Having followed, carefully observed, and studied all testimony and considered all evidence, the Arbitrator credits Ms. Schroeder's account of events that morning, including that Ms. Schroeder was seated on the floor, observing the children in their center activities.

Another Paraprofessional testified that, during center activities, at approximately 9:45 a.m., she "popped [her] head into" Ms. Schroeder's classroom for less than a minute. This

[3] LM's testimony in this and other regards lacks credibility for a number of reasons. Her accounts, on the whole, were conclusory and lacking in the supporting detail that would be expected of an eyewitness and participant in events. When she did attempt to offer details, these points, as well as central assertions and sequences of events, were inconsistent, not only when contrasted with her written accounts but also within her sworn testimony. Further, LM's written statements had been "updated" pursuant to directives from the District and contain the content of a conversation to which, under oath, LM acknowledged she was not privy. LM's testimony on cross-examination tended to be evasive and argumentative, and matters that she at points had described as certainties were acknowledged in testimony to be assumptions and overstatements. In that regard, the record shows substantial exaggeration regarding her role that morning and inconsistencies in her stated motivations for and timing of her actions in conveying information to Management. Moreover, LM has an interest in the outcome of these proceedings, as her personal friend now is holding the teaching position to which Ms. Schroeder would return if the charges herein are not sustained. Accordingly, and having carefully assessed all aspects of the testimony of all witnesses, having observed same attentively throughout their sworn testimony on direct, cross, redirect, and follow-up questioning, and having thoroughly considered all other evidence of record, the Arbitrator finds that there are significant impediments to according weight and credibility to the specifics of LM's accounts.

Paraprofessional, who holds a substitute teaching certificate and has been assigned to teach Ms. Schroeder's class pending the outcome of this proceeding, was working in another class that day. She testified that, during the minute in which she popped her head into the classroom, center activities were underway, and she saw Ms. Schroeder on the floor in the library area, across the classroom, with children in the center area "right next to her." This is consistent with Ms. Schroeder's account of the activities that were underway in her area. While this Paraprofessional testified initially (and wrote in a statement) that she saw Ms. Schroeder lying on the floor "sound asleep," in her testimony the Paraprofessional acknowledged that she could see only Ms. Schroeder's legs, "from her knee down," and could not see Ms. Schroeder's head, face, upper torso, or abdominal area, as there was a bookcase blocking her view. She also could not recall the position of Ms. Schroeder's feet or what type of shoes she was wearing. The Paraprofessional also observed, she testified, that Ms. Schroeder "was moving." The Paraprofessional asked LM if she could help out, and LM reportedly said that she could handle things. In her testimony, the Paraprofessional explained that she had reported and written that Ms. Schroeder had been "sound asleep" only because LM had told her that Ms. Schroeder was sleeping.

Also during the center time activities, while Ms. Schroeder was seated on the floor and LM was seated at a table, Carmen Quaglia, Pre-School Supervisor, entered the classroom, Ms. Schroeder greeted her verbally, and Ms. Quaglia noted that Ms. Schroeder looked tired and disheveled. She asked Ms. Schroeder if she was okay, and Ms. Schroeder responded that she was not feeling well. When Ms. Quaglia said that she should go home, Ms. Schroeder explained that she had spoken to the RN and to Ms. Wade and that there was no one who could cover the class. Ms. Quaglia recalls that Ms. Schroeder told her that she thought she would be okay and could make it through the day. Ms. Schroeder got up from the floor and, as even LM testified, "continued" her teaching activities until it became time to prepare the students for lunch. Ms. Schroeder then

oversaw the students as they washed their hands, retrieved their lunch boxes, and sat and ate their lunches. LM testified that, during this time, Ms. Schroeder appeared to be feeling better and that ". . . she seemed great. She seemed fine."

The District has alleged that during some portion of the morning, from the time that Ms. Schroeder contacted the RN until some point at or prior to the students' lunch, LM was required for approximately 45 minutes to teach the class and manage the entire class alone "without teacher support" from Ms. Schroeder. As indicated above, however, the evidence of record does not establish that this was the case. In fact, during this time, both the Coordinator and the Pre-School Supervisor were in the classroom and, while both agreed that Ms. Schroeder stated that she was not well but that she could get through the day, neither observed anything to suggest or to raise concern that LM was being left alone to teach with no guidance or supervision from Ms. Schroeder. Other than conclusory testimony by LM, with no details as to any particular actions or any absence of direction, nothing in the record indicates that LM was left on her own to handle any tasks with the students. Ms. Schroeder was present throughout the morning and, while she was grappling with feeling unwell but feeling better toward the end of center activities, there is no credible evidence that she at any time failed to oversee the classroom and the work of LM or that she shirked her duties as a Teacher or delegated instructional responsibilities to LM without providing proper supervision.

After the students had lunch, which Ms. Schroeder supervised, it was time for Ms. Schroeder's scheduled lunch break at 11:30 a.m. Ms. Schroeder told LM that she was going to take a nap in the "closet," which all agree is a storage room, housing toys and other items that are not in daily use. It is located at the back of the classroom, behind the kitchen area, and has sufficient space to accommodate a desk and to store a number of extra cots. Rooms of this type are used from time to time by staff when a quiet, closed space is needed. The parties agree that, during lunch breaks, Teachers are free to engage in personal activities of their choice. They may leave the school, as long as they return by the end of the break, may tend to personal business, and are free to nap, although the District has suggested that napping in the storage room was prohibited. Nothing in any policy, however, indicates that such a prohibition is in place or should be known.

Testimony in this regard veered off into why it is wrong for personnel to sleep in the "classroom" and did not address the storage room, behind the kitchen, with the doors closed, away from the children, during a private lunch period. The District has suggested that Ms. Schroeder could have asked the RN to sleep in her office. The RN indicated that this could be possible and that it occurs roughly once per year, but Ms. Schroeder noted that, while there are two beds in the RN's office, the space is bright and has frequent access by students and staff. Similarly, when asked about the teachers' lounge, Ms. Schroeder noted that it is not quiet or private and there was no sofa at that time. Finally, the District suggested that Ms. Schroeder could have taken a nap in her car, which Ms. Schroeder acknowledged that she could have. In the end, however, there has been no showing that use of the storage room in this way during her lunch break was prohibited, posed an impropriety, or placed the welfare of the children in jeopardy.[4]

Ms. Schroeder entered the storage room and set her telephone alarm so she would wake up before the end of her lunch period. She napped on one of the cots, and, when she awoke, Ms. Schroeder returned to the classroom at approximately 12:00 or 12:05 p.m. LM, however, told Ms. Schroeder that she was worried about her and was going to the office to tell them that she should be permitted to leave. Ms. Schroeder responded that it was not necessary, that she was going to be fine, and that she did not want to bother them because she knew that there were no substitutes available. LM nonetheless went to the office, which is odd, as Ms. Schroeder had said she was better and, from the end of center time at least one hour before, LM had observed that Ms. Schroeder was, as LM said, "fine" and "great." LM reported first to Coordinator Ward that Ms. Schroeder was not well and took a nap in storage room. LM then spoke with the District Superintendent, who recalls that LM told her that Ms. Schroeder had taken a nap "in the middle of the classroom," which is different from what LM told Ms. Ward.

[4] The District also has argued that, during her lunch break, Ms. Schroeder could have summoned medical assistance, dialed 911, or contacted her personal physician. This is a notable over-dramatization of the circumstances with which Ms. Schroeder was dealing. By this point, she had committed to and was working through the day, was already feeling better, had been observed by LM as being "fine," and had expected that a brief nap during her lunch break would be helpful. The situation was not and has never been described by Ms. Schroeder as a medical emergency, as suggested by the District.

While Ms. Schroeder was monitoring the students during their nap time, Supervisor Quaglia returned to the classroom. She went when she knew that LM would be on her lunch break and that the children would still be in nap time. She and Ms. Schroeder spoke, and Ms. Schroeder told her about having been ill the week before but that she had concluded that her condition that morning ultimately had not been related. Ms. Schroeder and Ms. Quaglia discussed the fact that she was feeling better and that, with the absence of any available coverage for the class, would be able to stay for the little time that remained in the day. The RN also stopped in during this time to check on Ms. Schroeder, and Ms. Schroeder reported to the RN that she was feeling better and was able to complete the day. Ms. Schroeder did so, and, after the students had left for the day, she stayed for a 2:00 p.m. teachers' meeting with Ms. Quaglia. Ms. Quaglia recalls that Ms. Schroeder did then seem to be feeling better, that she contributed to the meeting, and that she had the paperwork that Ms. Quaglia had asked the Teachers to prepare for the meeting.

The following day, based on what LM had reported, the District Superintendent oversaw the initiation of an investigation. Ms. Schroeder reported to work that day, and she was summoned to meet with the District Superintendent, who told Ms. Schroeder repeatedly that she had been seen sleeping. Ms. Schroeder testified that she began to doubt herself, wondering if she might have had a medical episode that did not recall. She noted that she has a heart condition, of which LM is aware, and Ms. Schroeder thus wondered why, if LM thought she had passed out, LM did not summon help using the emergency button or other communication options available in the classroom. Written accounts were requested from those noted above, although LM later revised her written account at the request of the District. Ms. Schroeder was notified that she was being sent for a fitness-for-duty examination. She complied and was found fully fit for duty.

IV. ANALYSIS

Respondent is a tenured Teacher, and the District seeks, under N.J.S.A. §18A:6-10 and N.J.A.C. §6A:3-5.1, to revoke her tenure and dismiss her from employment on the basis of charges alleging that, on April 7, 2022, she engaged in unbecoming conduct. To this end, the District bears the burden of establishing, by a preponderance of the credible evidence, that Respondent engaged in the acts alleged in the charges and, if so, that said actions constituted unbecoming conduct under New Jersey law. If that is established by the credible evidence of record, the question then is whether dismissal is the appropriate level of discipline. *In re Fulcomer,* 93 N.J. Super. 404 (App. Div. 1967). Having carefully reviewed and considered all evidence of record and all arguments and authority presented, the Arbitrator determines that resolution of Charges One and Three turns solely on the first inquiry, which is whether the District has met its burden of establishing that Respondent engaged in the conduct alleged in those Charges. The proofs, consisting of extensive testimony and documents and leading to the factual findings noted above, fall far short of establishing that events occurred as alleged in Charges One and Three. As to Charge Two, the Arbitrator finds that the proofs fall far short of establishing that Respondent's actions as alleged therein, in view of the detailed facts of record, constituted unbecoming conduct.

The allegations set forth in Charges One and Three are the result of initial accounts and reports that have been shown to lack credibility but to have flourished through repetition. Managerial concerns would have been warranted if the allegations were true, yet the evidence of record establishes that they are not. Simply stated and what the overwhelming weight of the credible evidence shows is that Respondent was physically unwell but not unable to function in her capacity as a Teacher and that, in order to properly attend to the children, she enlisted Paraprofessional LM's assistance with the class but at no time left LM alone or had LM interact with the children without Respondent's supervision, observation, and guidance as the Teacher in charge of the class. The record further shows that, during a portion of center activity time, Respondent was seated on the floor, interacting with and observing student groups, while LM was seated at a table with her attention directed to different groups of students, as is the structure

of center time. The uncorroborated allegation by LM that Respondent lay on the floor cannot be credited, nor is credit given to LM's allegation that Respondent fell asleep at any point while seated on the floor.

The District has portrayed the circumstances as being dramatic in nature, describing Respondent as having been so ill that she could not hold her head up, could not keep her eyes open, and could not stay awake and arguing that she nonetheless offered no medical evidence to support such a condition of emergent illness. Yet nothing in the record establishes that these circumstances existed. Respondent has consistently, from the morning of April 7 to present, described a situation involving nausea and diarrhea that made her feel unwell but that did not render her unable to function, given that no substitute was available, and that had largely subsided by late morning. All who testified regarding interactions with Respondent, even LM, offered descriptions that were consistent with those facts.

The District also suggests that there is a set procedure for how Teachers are to deal with instances in which they become unwell after having reported to work or while teaching a class, but no such policy or directive has been shown to exist. The RN logically is to be consulted, which was the case here, but beyond that, there is no specified course of conduct. Indeed, the absence of such a policy is indicative of the broad range of circumstances that may exist when a teacher begins to feel ill in the course of the workday. Try as the District might to heighten the drama, this was not a case of a dire emergency or a medical collapse, and Respondent at no time portrayed it as such. This was a case in which a Teacher, knowing that Management had no ready way to cover her needed presence in the classroom, remained on duty, pushing through and hoping that the symptoms she was experiencing would pass. She continued to function, albeit not in top form, providing the required supervision of the classroom, students, and the Paraprofessional. As Respondent told others that day and testified at hearing, she gradually felt better over the course of two hours and anticipated that, if she could take a nap during her lunch break, she would be back in full form. And, in fact, the evidence establishes that this is what happened.

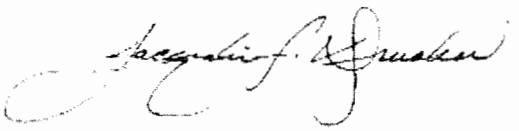
As is clear from these findings, Charge Two, regarding the nap that Respondent acknowledges she took during her lunch break, in the storage room, behind the kitchen area, away from the students, with the door closed, and with her alarm set so that she would return to the classroom on time, has not been shown to constitute any form of misconduct or unbecoming conduct. The District is free to prohibit the use of such storage spaces for purposes such as lunch-break naps or class preparation, but no such prohibition was in place at the relevant time. Moreover, the District has not shown that Respondent's action in this regard constituted unbecoming conduct: there has been no showing that Respondent's action during her lunch break created any risk of harm, raised any concern for the welfare of students or personnel, constituted inappropriate conduct by a teaching professional, compromised morale or efficiency, or formed any basis upon which the respect of the public or the interests of the District were impaired. *Karins v. City of Atlantic City*, 157 N.J. 532 (1988); *Bound Brook Board of Education v. Ciripompa*, 228 N.J. 4 (2017); *In re Emmons,* 63 N.J. Super. 136 (App. Div. 160). Accordingly, Charge Two fails as the action at issue has not been shown to constitute unbecoming conduct.

Charge One fails for a lack of proof. It asserts that Respondent "willfully lay on the ground in her classroom and went to sleep," which, for the reasons stated above, has not been shown by a preponderance or any measure of the credible evidence. Similarly, Charge Three fails for lack of proof. It alleges that Respondent delegated instructional responsibilities to the Paraprofessional "without any supervision" by asking the Paraprofessional to conduct circle time by herself while Respondent allegedly slept. Again, the evidence as to the allegation of sleeping is fundamentally flawed and without credibility, and that element of the Charge thus has not been established. Moreover, while Respondent did ask the Paraprofessional to lead circle time while Respondent was feeling unwell and attempted to arrange to leave, circle time was conducted in accordance with the plans Respondent had developed, with Respondent mere feet away, under Respondent's observation and supervision, and with Respondent's full awareness, per her specific and credible testimony, of what task was being performed by the Paraprofessional at what time. For the reasons addressed above, the record does not support, by any measure of proof, a finding that, as

alleged in Charge Three, Respondent was asleep at any time or that Respondent at any time told the Paraprofessional to conduct or had the Paraprofessional conduct circle time "by herself," without Respondent's presence and supervision.

In the absence proof, by a preponderance of the credible evidence or by even lesser standards, that the alleged actions and conduct occurred, all Charges against the Respondent are hereby dismissed. The District is ordered to restore Respondent to her position as Pre-School Teacher and to make her whole for any compensation, benefits, and seniority lost as a result of her suspension pending resolution of these Charges.

Dated: May 1, 2023



Jacquelin F. Drucker, Esq.

Appendix A – Order regarding Motion to Dismiss

IN THE MATTER OF THE TENURE ARBITRATION
BETWEEN

SCHOOL DISTRICT OF THE BOROUGH OF
LAKEHURST, OCEAN COUNTY,

DOCKET NO. 177 7/22

PETITIONER,

AND

BEFORE JACQUELIN F. DRUCKER, ESQ.
ARBITRATOR

REBECCA SCHROEDER,

RESPONDENT.

ORDER RE: MOTION TO DISMISS

APPEARANCES BY COUNSEL:

FOR THE RESPONDENT/
MOVING PARTY: MICHAEL DAMM, ESQ.
SELIKOFF & COHEN, P.A.

FOR THE DISTRICT: BARRY A. STEIBER, ESQ.
CITTA, HOLZAPFEL & ZABARSKY

I. PROCEDURAL BACKGROUND

The Board of Education of Lakehurst, New Jersey (Ocean County) ("Board") certified to the Commissioner of Education four tenure charges ("Tenure Charges") seeking the termination of employment of Rebecca Schroeder ("Respondent" or "Ms. Schroeder" or "Movant"), a tenured Teacher employed by the School District of the Borough of Lakehurst, Ocean County ("District," "Employer," "Lakehurst"). Each charge alleged Unbecoming Conduct and related to events having occurred on April 7, 2022. In lieu of an Answer, Respondent on July 15, 2022, timely submitted a detailed Motion to Dismiss ("Motion") seeking dismissal of all charges. Thereafter, by letter dated July 22, 2022, the Commissioner of Education, through the Office of Controversies and Disputes, referred the charges to this Arbitrator pursuant to N.J.S.A. 18A:6-

16. The Arbitrator conducted a conference call with counsel on August 9, 2022, at which time the parties agreed that full briefing and consideration of the Motion would proceed before further scheduling was undertaken. In light of this process and with the agreement of the parties, the Arbitrator secured approval from the Office of Controversies and Disputes for an extension of the statutory deadline for completion of this proceeding.

In accordance with the schedule agreed to by the parties, the District on August 19, 2022, submitted its detailed response to the Motion. Respondent submitted her reply brief on August 24, 2022. In reaching the conclusions and decisions herein regarding the Motion, the Arbitrator has given full, fair, and careful consideration to all arguments presented by the parties, the charges and all supporting documents provided by the District, and all authorities and citations offered by the parties.

II. THE CHARGES

At issue in this case are four Charges, each of which alleges that Respondent engaged in Unbecoming Conduct. Charges One, Two, and Three relate to the alleged events of April 7, 2022. Charge Four relates to the discussion the District Superintendent conducted with Respondent the following day, April 8. Specifically, Charge Four alleges as follows:

> UNBECOMING CONDUCT: That on or about April 8, 2022, Rebecca Schroeder, a tenured Pre-School teacher with the Lakehurst School District, did knowingly, intentionally, and willfully make a false statement to Loren Fuhring, Superintendent of the Lakehurst School District, when questioned about the incident involving Lisa Monahan occurring on or about April 7, 2022, by denying that she fell asleep in her classroom.

III. RULING ON THE MOTION TO DISMISS

In considering the Respondent's Motion to Dismiss, all facts alleged in the Charges are accepted as true. In addition, accompanying the Charges is the Superintendent's affidavit regarding the Charges. That affidavit includes the Superintendent's account of the communication cited in Charge Four, as does an affidavit supplied by the District with its opposition to the Motion. These documents and additional evidence included with the Charges and the opposition to the Motion have been cited by the District in support of the single assertion set forth in Charge Four, which is that Respondent "knowingly, intentionally, and willfully make a false statement" to the Superintendent "by denying that she fell asleep in her classroom."

Although all facts as alleged in Charge Four are accepted as true as are all references in the evidence supplied by the District in support of the Charges and the Opposition to the Motion, taken together, they establish only that Respondent said, which she does not deny, that she did not remember or recall having fallen asleep. Specifically, in the Superintendent's affidavit dated May 10, 2022, which accompanies the Charges, the Superintendent stated as follows:

> 5. The next day, Friday April 8, 2022, I conducted an interview of Ms. Schroeder in my office. Present for the interview was the Lakehurst Teachers Association President, Cherie Menchini. When questioned, Ms. Schroeder denied falling asleep in her classroom during circle time. She told me that "I don't remember that". Ms. Schroeder did admit that she slept in the closet of her classroom during her regular 42-minute lunch period. Following the initial interview, Ms. Schroeder continued to teach her class.

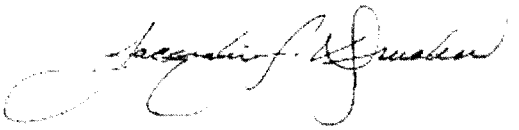
In another affidavit of the Superintendent, dated August 18, 2022, and apparently prepared specifically for use in the District's opposition to the instant Motion, the Superintendent reiterated the same assertion as quoted above.

Further, as noted above, the other evidence submitted by the District in support of the Charges refers only to statements by Respondent in which she cites a lack of recollection. No evidence reflects or attributes to Respondent a denial.

The statement "I don't remember that" is well established in law and logic as neither an affirmation nor a denial as to the substance of the question posed. Whether the lack of recall itself is credible is a different factual issue, but the statement attributed to Respondent in Charge Four does not, under any interpretation, constitute a denial. Thus, accepting as true all of the allegations set forth in Charge Four, in the supporting affidavit, in the affidavit supplied with the District's Opposition to the Motion, and in all other evidence presented by the District in support of the Charges, no cause of action can be shown for Unbecoming Conduct based on the allegation that Respondent made a false statement by "denying that she fell asleep in her classroom." Accordingly, the Motion is granted as to Charge Four, which hereby is dismissed.

With regard to the remaining Charges, the Motion is denied in that the Charges are not dismissed. This does not, however, preclude Respondent from advancing at hearing the fact-based and/or procedural arguments posed in this Motion as to the remaining Charges. As required by statute, a hearing will be held to determine if the remaining three Charges are supported by the preponderance of the evidence. The Office of Controversies and Disputes has granted an extension until December 6, 2022, for the hearing of this matter. The Arbitrator's office will contact counsel to arrange for a prehearing conference at which time scheduling of the hearing and any remaining pre-hearing steps will be addressed.

Dated: September 7, 2022



Jacquelin F. Drucker, Esq.

137-23

New Jersey Commissioner of Education

Final Decision

D.S., on behalf of minor child, M.S.,

Petitioner,

v.

Board of Education of the Township of Hamilton, Mercer County,

Respondent.

Synopsis

Petitioner challenged the decision of the respondent Board to deny her request that her daughter, M.S., be permitted to participate in activities with the Class of 2023 at Hamilton High School-West (HHS-West), specifically to attend the HHS-West senior prom and to receive her high school diploma in the HHS-West graduation ceremony – even though M.S. currently attends Steinert High School, another of the three high schools operated by the Board. The instant case is the latest in a series of challenges brought by the petitioner against the Board since 2021 involving demands that M.S. be allowed to finish her high school education at HHS-West despite the fact that M.S. was subject to discipline and removed from school at HHS-West on nine occasions for fighting and acts of harassment, intimidation and bullying against fellow students.

The ALJ found, *inter alia*, that: in order to prevail, the petitioner must show that the decision of the Board to deny her request to permit M.S.'s participation in the HHS-West 2023 prom and graduation ceremony was arbitrary, capricious, unreasonable, and/or in violation of Board policy; petitioner failed to present any such evidence; actions within a school board's authority, including the adoption and implementation of policies for assignment of students, are entitled to a presumption of correctness and will not be upset without an affirmative showing that a decision is arbitrary, capricious or unreasonable; based on the factual record in this case, the Board had a strong basis for its decision to refuse to permit M.S. to participate in 2023 prom and graduation activities at HHS-West. Accordingly, the ALJ denied petitioner's request for M.S. to attend the HHS-West senior prom and to walk in the HHS-West graduation ceremony and dismissed the petition.

Upon a comprehensive review, the Commissioner concurred with the findings and conclusions of the ALJ and adopted the Initial Decision of the OAL as the final decision in this matter. The petition was dismissed.

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

137-23
OAL Dkt. No. 07264-22
Agency Dkt. No. 194-7/22

New Jersey Commissioner of Education

Final Decision

D.S., on behalf of minor child, M.S.,

Petitioner,

v.

Board of Education of the Township of Hamilton, Mercer County,

Respondent.

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

Upon review, the Commissioner concurs with the Administrative Law Judge, for the reasons detailed in the Initial Decision, that the Hamilton Township Board of Education's decision to deny petitioner's request for her minor child to participate in the senior prom and graduation ceremony of a different high school within the school district was not arbitrary, capricious, or unreasonable.

Accordingly, the Initial Decision is adopted as the final decision in this matter, and the petition of appeal is hereby dismissed.

IT IS SO ORDERED.[1]

Angelica Allen-McMillan, Ed.D.
ACTING COMMISSIONER OF EDUCATION

Date of Decision: May 9, 2023
Date of Mailing: May 10, 2023

[1] This decision may be appealed to the Appellate Division of the Superior Court pursuant to *N.J.S.A.* 18A:6-9.1. Under *N.J.Ct.R.* 2:4-1(b), a notice of appeal must be filed with the Appellate Division within 45 days from the date of mailing of this decision.

State of New Jersey
OFFICE OF ADMINISTRATIVE LAW

INITIAL DECISION
OAL DKT. NO. EDU 07264-22
AGENCY DKT. NO. 194-7/22

D.S. ON BEHALF OF M.S.,
Petitioner,
v.
HAMILTON TOWNSHIP BOARD OF EDUCATION, MERCER COUNTY,
Respondent.

D.S. petitioner, pro se

Rita F. Barone, Esq., for respondent (Flanagan Barone O'Brien, LLC, attorneys)

Record Closed: March 13, 2023 Decided: March 30, 2023

BEFORE **TRICIA M. CALIGUIRE**, ALJ:

STATEMENT OF THE CASE

Petitioner D.S. on behalf of M.S. challenges the decision of respondent Hamilton Township Board of Education, Mercer County (Board) to deny her request that M.S. be permitted to participate in activities with the Class of 2023 at Hamilton High School-West (HHS-West), specifically to attend the HHS-West senior prom and to receive her high school diploma in the HHS-West graduation ceremony.

PROCEDURAL HISTORY

On July 18, 2022, D.S. on behalf of M.S. filed a petition of appeal with the New Jersey Department of Education, Office of Controversies and Disputes (DOE). On August 16, 2022, respondent Board filed an answer and motion for dismissal. The Commissioner of Education did not rule on the motion but transmitted it with the petition to the Office of Administrative Law (OAL) on August 22, 2022, for hearing as a contested case, pursuant to N.J.S.A. 52:14B-1 to -15, and N.J.S.A. 52:14F-1 to -13.

The matter was scheduled for a telephone prehearing conference on October 17, 2022. Prior to the telephone conference, respondent sent notice of a change in counsel, but respondent failed to appear. The telephone prehearing conference was rescheduled for November 2, 2022, during which a briefing schedule for respondent's motion to dismiss was issued. On December 16, 2022, the motion to dismiss was denied and the due process hearing was scheduled to coincide with the hearing in a related case between these parties, EDU 10144-22.[1]

As described in the summary of undisputed facts, below, since early 2021, I have presided over six matters involving these parties and prior to this hearing, had issued decisions in four of the matters. Based on the documents filed in both this matter and in EDU 10144-22, and the testimony and arguments made by both parties in prior matters over which I presided, I understood that the basis for petitioner's current requests for relief, and the grounds by which respondent denied both requests, were similar. In the interest of judicial economy and in an attempt to provide petitioner with resolution prior to the end of the current school year,[2] the hearings in both matters were conducted on March 6, 2023, at the OAL.[3] Following the hearing, petitioner submitted a handwritten letter accusing opposing counsel of specific improper conduct, which was vehemently denied by return letter of counsel. This correspondence was forwarded to Candice Hendricks,

[1] See also D.S obo M.S. v. Hamilton Twp. Bd. of Educ., OAL Dkt. No. 10144-22, Initial Decision (March 30, 2023).
[2] M.S. is on track to graduate in June 2023.
[3] All other hearings involving these parties over which I presided were conducted by Zoom due to the restrictions on public gatherings initiated during the COVID-19 emergency.

OAL Assistant Director of Judicial Standards. The record remained open for simultaneous post-hearing submissions and on March 13, 2023, the record closed.[4]

FACTUAL DISCUSSION AND FINDINGS

The following background **FACTS** are not in dispute and accordingly, I **FIND**:

The Hamilton Township School District (District) operates three high schools and assigns students residing within the District to a specific high school based on pre-determined residential boundary lines. When M.S. began high school, in September 2019, she lived with her mother, D.S., at an address within the HHS-West zone and attended HHS-West.

During the 2019–2020 school year, M.S. was subject to discipline and removed from school on nine occasions.[5] She was charged with seven acts of harassment, intimidation and bullying (HIB) toward another HHS-West student. On July 27, 2020, D.S. filed a due process petition to challenge the Board's decision finding M.S. guilty of seven counts of HIB. After transmittal to the OAL, this matter was docketed as EDU 07830-20, and was assigned to the Honorable Jeffrey N. Rabin, ALJ.

On September 25, 2020, D.S. filed an emergent petition to challenge one of the seven findings of HIB and to also charge HHS-West Principal Brian Smith with harassment. The harassment charge triggered a separate internal investigation by the Board and therefore, the DOE transmitted only the HIB challenge, docketed at the OAL

[4] In all the proceedings before me, D.S. showed a complete lack of propriety and disregard for civility, insulted and denigrated witnesses, opposing counsel, my judicial support specialist, and myself, in correspondence, telephone conferences, and during hearings. One final example follows. After receiving respondent's post-hearing submission, D.S., apparently having forgotten my instructions from the bench, sent the following email to my chambers: "With all due respect; what is this? More testimony in cases that were already heard on 3/6/2023. If Judge Claigure [sic] permits this after me being verbally threatened by Rita Barons [sic] after Judge Caligula [sic] left the bench, I will be filing a reply[.] It saddens me that the HTSD is continuing to waste taxpayers money purposely continuing fighting for something that will cause absolutely NOONE any harm instead increases the moral and positive influence in My child's life and education. Isn't that what we should be focusing on and not continually try and break [M.S.] down even more[.] You disgust me[.]"

[5] See D.S. obo M.S. v. Hamilton Twp. Bd. of Educ., OAL Dkt. No. 07830-20, Transmittal Documents (August 14, 2020).

as EDU 09096-20, and assigned to Judge Rabin. Before the emergent hearing, D.S. filed a motion for Judge Rabin's recusal, which was denied. On October 6, 2020, Judge Rabin issued a ruling denying emergent relief.

On October 21, 2020, D.S. filed a second motion for Judge Rabin to recuse himself in EDU 07830-20, which motion was also denied.

On March 2, 2021, while EDU 07380-20 was pending, D.S. filed a related emergent petition charging Principal Smith with continuing harassment of both D.S. and M.S. and appealing the decision of respondent to bar D.S. from HHS-West property due to her allegedly inappropriate behavior. The emergent matter, EDU 02205-21, was assigned to Judge Rabin, who conducted the emergent hearing and on March 10, 2021, issued a ruling denying emergent relief.[6] In his order on emergent relief, Judge Rabin found as fact that:

> [D.S.] had spoken derogatory and accusatory language against Principal Smith during the public portion of public school board meetings and in correspondence to various parties, included publicly accusing Principal Smith of being a racist. Because of these issues, and because of the litigation between the parties, Dr. James Altobello (the Board's Director of Secondary Education), in conjunction with the Board superintendent, created interventions to ensure that D.S. and Smith did not have direct interaction.
>
> [D.S. on behalf of M.S. v. Hamilton Twp. Bd. of Educ., OAL Dkt. No. EDU 02205-21, Order (March 11, 2021), at 3, aff'd., Final Decision (April 20, 2021).]

On March 10, 2021, D.S. on behalf of M.S. brought a lawsuit in Mercer County, New Jersey Superior Court against certain administrators and staff of HHS-West, alleging racial profiling, discrimination, harassment, and bullying.[7] This matter was resolved prior to trial.

[6] To date, the Board's decision to bar D.S. from the HHS-West facilities stands.
[7] Somma on behalf of M.S. v. Smith, et al., MERL-L-528-21 (Mercer County Super. Ct. 2021).

On March 30, 2021, D.S. filed a third motion for Judge Rabin to recuse himself in EDU 07830-20, which motion was also denied.

M.S. withdrew from HHS-West in March 2021, and began the 2021–2022 school year (in eleventh grade) at Gateway High School in Florida. On or before November 1, 2021, M.S. moved with her mother, D.S., back to New Jersey and took up residence in Hamilton Township within the geographic zone assigned by the District to Hamilton High School-East (also known as Steinert).

On October 28, 2021, D.S. applied to the District for an attendance zone waiver by which M.S. would attend high school at HHS-West rather than Steinert. By letter dated October 29, 2021, the District denied petitioner's application. The District stated that its decision was supported by the earlier allegations made by D.S. on behalf of M.S. regarding HHS-West administrators and staff, the litigation that ensued, and D.S.'s conduct during the 2020–2021 school year (as described more fully in the order issued by Judge Rabin in EDU 02205-21).

On or about February 1, 2022, M.S. was suspended by the Steinert administration for fighting with another student and posting video of the fight on social media. M.S. is eligible for special education and related services but, after a manifestation determination meeting, respondent concluded that the conduct of M.S. constituted a disciplinary infraction neither related to nor caused by her disability. D.S. sought an expedited ruling overturning that decision and the discipline imposed on M.S. The expedited matter, EDS 01033-22, was assigned to me. Before the expedited hearing, D.S. filed an emergent petition directly with the OAL; on February 23, 2022, following a hearing, I issued an order denying emergent relief. The expedited hearing was held on March 4, 2022, and on March 15, 2022, I issued a final decision in favor of the respondent and D.S.'s petition was dismissed. D.S. obo M.S. v. Bd. of Educ. of the Twp. of Hamilton, OAL Dkt. No. EDS 01033-22, Final Decision (March 15, 2022).

On March 8, 2022, petitioner filed an appeal with the DOE of the first zone waiver denial. The matter was transmitted to the OAL, assigned to me, and on July 5, 2022, I issued an initial decision granting summary decision in favor of the District, which was

affirmed by the Commissioner of Education. D.S. on behalf of M.S. v. Hamilton Township Board of Education, OAL Dkt. No. EDU 02521-22, Initial Decision (July 5, 2022), aff'd., Final Decision (August 15, 2022).

Before the decision on the first zone waiver appeal was issued, petitioner asked respondent if M.S. could participate in end-of-year activities at HHS-West with the rest of the HHS-West Class of 2023 and, on June 13, 2022, respondent denied that request. This appeal followed.

After this matter was filed, D.S. informed respondent that she had contracted to purchase (but not yet closed on) a home within the geographic zone assigned to HHS-West. Had the District permitted M.S. to enroll at HHS-West after moving to the new home, this matter (EDU 07264-22) would have been moot but on November 9, 2022, respondent stated that it would not permit M.S. to enroll at HHS-West in the event of a permanent change in residency. In making this decision, respondent relied on its November 5, 2021, letter to D.S. from counsel explaining the basis for respondent's denial of petitioner's first request for a zone waiver. This letter stated in pertinent part:

> [Y]ou, individually, and on behalf of [M.S.], have accused multiple administrators, including the Principal and the Athletic Director, and multiple certified staff members assigned to [HHS-West] of harassment and discrimination toward [M.S.] and you arising from [bullying], disciplinary incidents, and other circumstances. . . It is confounding that you would insist on having [M.S.] assigned to a school against which you have made such allegations. Nevertheless, while the District denies those allegations and avers that it has engaged in unbiased decisions toward you and [M.S.], those claims and past circumstances justify [M.S.'s] assignment to a high school other than [HHS-West] which is in the best educational interest of [M.S.] and the [HHS-West] staff.
>
> [(R-8) (Ltr. of Patrick F. Carrigg, Esq., to D.S. (November 5, 2021), at 2.)]

On November 10, 2022, petitioner filed an appeal of her second zone waiver request. That matter was transmitted to the OAL by the DOE on November 10, 2022; the OAL docketed it as EDU 10144-22, and assigned it to me.

On December 21, 2022, petitioner filed a request for emergent relief, seeking the immediate transfer of M.S. from Steinert to HHS-West on the grounds that M.S. is unsafe at Steinert due to allegedly being the victim of HIB on or about December 19, 2022, and as a result of allegedly being subjected to excessive force by the school resource officer immediately following the December 19, 2022, incident. This emergent matter was docketed as EDU 11614-22, and assigned to me. The emergent hearing was held on January 4, 2023, and on January 5, 2023, I issued an initial decision denying emergent relief. D.S. on behalf of M.S. v. Hamilton Twp. Bd. of Educ., OAL Dkt. No. 11614-22, Initial Decision (January 5, 2023), aff'd., Final Decision (February 24, 2023).

Disputed Issue

To prevail in this matter, petitioner must show that the decision of respondent to deny her request to permit M.S. to participate in the HHS-West senior prom and graduation ceremony with the same rights and privileges as the other members of the HHS-West Class of 2023, was arbitrary, capricious, unreasonable, and/or in violation of Board policy.

Testimony

Petitioner testified and presented the testimony of her daughter, M.S. Respondent called one witness for the limited purpose of identifying pre-marked exhibits for introduction. The following is not a verbatim recitation of the testimony but a summary of the documentary and testimonial evidence I found relevant to the above-described dispute.

M.S. is an eighteen-year-old female in her senior year of high school. She started her testimony with a general description of the mental health issues she experienced while a middle school student in the District. Based on her testimony, it appears that incidents occurring outside of school contributed to M.S.'s condition.

M.S. described two incidents during the 2019–2020 school year, when she was a freshman, which resulted in her being disciplined by the HHS-West administration. The first occurred at a football game at which she participated as a cheerleader. M.S. stated that she was "jumped" from behind by another female student and she fought back. The next day, M.S. was told that she was removed from the cheer team for fighting while wearing her cheer uniform.

In the second incident, M.S. stated that she was trying to "de-escalate" a fight between other students when a security guard attempted to grab her by the wrists. She was sent to the nurse's office.

While at HHS-West, M.S. stated that she had problems with the cheerleading director, the athletic director, and the football coach. Further, she described her relationship with Principal Smith as "rocky," noting that he suspended her "a couple times," and that she did not want him involved in any disciplinary matters affecting her. M.S. stated that she was very upset about how she was treated at HHS-West by administrators and teachers. At the time, she told her mother, who took her complaints to the Board. M.S. also knows that her mother filed a lawsuit against Principal Smith and others in the administration, accusing them of racial discrimination.

M.S. recalled moving with her mother to Florida, where she completed tenth grade and started eleventh grade. She could not recall the reason her family moved to Florida and gave an incomplete explanation as to why they returned to New Jersey.

M.S. enrolled at Steinert in November 2021, and has since attended Steinert. She stated that she has no friends there and no relationship with her guidance counselor or other staff. On cross-examination, M.S. admitted that she has made a positive connection with her Steinert art teacher, Mr. Cooper, who she described as a sort of "older sibling." She also has a positive relationship with Ms. Leon, her support counselor. She stated that she continues to meet (by Zoom and in-person) with her HHS-West counselor, Edward Belfiore (Belfiore), who she has known since she was a young child. She described Belfiore as a mentor and the most significant adult presence in her life.

Shortly after M.S. enrolled at Steinert, she started the Black Students' Union (BSU) because no such extracurricular organization existed at Steinert. M.S. wanted to learn more about her culture. In the BSU, she has "cordial relationships," but no friends.

M.S. recalled being suspended for fighting in school on February 1, 2022. She stated that then-Steinert Principal Bridget O'Neil was not doing her job, evidence of which is the excessive suspension M.S. was given for fighting. M.S. stated that she was suspended for forty-five days and claimed that other male students were also suspended (for an unrelated fight), but for a much shorter period. This, she said, was proof of racial discrimination at Steinert, as the male students are white.

M.S. acknowledged that her actions in ninth and tenth grade, while at HHS-West, were the result of her own poor decision-making and were "not worth it." She stated that she has come a long way, has made the Honor Roll for the first time this past semester, and has applied to four colleges (for August 2023 admission). M.S. said that for the first time, she is proud of herself. She understands that respondent will not permit her to return to HHS-West because of her actions there, but it is important for her to walk the stage with the HHS-West graduating class because her older brother (who died prior to graduating high school) did not get that opportunity.

D.S. testified briefly on her own behalf.[8] She spoke of ongoing issues with the District and more than once, accused Superintendent Scott Rocco of denying her current requests for personal reasons. She and M.S. are tired, emotionally drained, and want to move on from the past.

D.S. stated that after respondent denied her request for M.S. to participate in end-of-year activities with the HHS-West Class of 2023, she attended the June 2022 regular meeting of the Board. While there, D.S. stated that she spoke with three Board members

[8] Petitioner was not initially sworn in as she stated that she would be presenting arguments in favor of her position, but when she began to describe incidents involving her daughter, she was asked to take the oath. Her testimony was still relatively brief as I recognized that M.S., who was present, would have first-hand knowledge of the incidents being described.

regarding the decision to deny her request and that these Board members were not aware of the request, which is evidence of Superintendent Rocco's bad faith.

Dr. James Altobello, Director of Administration, testified on behalf of respondent. Among his other duties for the District, Dr. Altobello is responsible for administering requests such as to participate in events at other than the school of enrollment, and for students to change schools within the District, such as the zone waiver requests made by petitioner (and described above). He has communicated with petitioner regarding the request involved in this matter (and the zone waiver appeal involved in EDU 10144-22).

Dr. Altobello identified District Policy 5120, which provides in pertinent part:

> The Board of Education directs the assignment of pupils to the schools, programs, and classes of this district consistent with the best interests of pupils and the best uses of the resources of this district.
>
> Pupils shall generally attend the school located in the attendance area of their residence. The Superintendent may assign a pupil to a school other than that designated by the attendance areas when such an exception is justified by circumstances and/or is in the best interests of the pupil. (Every effort will be made to exercise sensitivity and reasonable judgment regarding student placement.)
>
> [R-15.]

Dr. Altobello stated that Board Regulation 5120 describes how Board Policy 5120 will be administered. He identified Board Regulation 5120, which provides in pertinent part:

> The Superintendent or Designee will review all requests for an "attendance zone waiver." Approval of all zone waivers is based upon the following criteria:
>
> 1. Legal mandates (court order, parental custody);
>
> 2. Child Study recommendations;

3. Homelessness, Department of Child Protection and Permanency interventions and

4. Students in good standing having attend Hamilton Township Schools for two consecutive years and entering 5th, 8th, or 11th grade who move within the Hamilton Township borders, may petition for a zone waiver to remain in their current school through graduation or promotion.

[R-16.]

On October 25, 2021, and June 13, 2022, D.S. submitted zone waiver requests. (R5; R-12.) Dr. Altobello stated that both were denied as none of the specific criteria (shown above) were met. (R-6; R-14.)

Dr. Altobello stated that Policy 5120 does not specifically prohibit a student attending one of the District high schools from participating in graduation activities held at another of the three high schools. He stated his understanding that the right to participate in graduation activities is based on attendance, pursuant to N.J.A.C. 6A:8-5.2.[9].

Finally, Dr. Altobello stated that Principal Smith will personally hand diplomas to the members of the HHS-West Class of 2023 as they cross the stage. He could, but has yet to, compel a principal at any of the District high schools to give a diploma to a student who does not attend that specific high school. Further, given the accusations that petitioner has leveled at Principal Smith, both personal and professional, in public and in the course of litigation, Dr. Altobello is not comfortable directing Principal Smith to award a diploma to M.S. He stated that such an order would not be appropriate.

Credibility Analysis and Additional Findings

For testimony to be believed, it must not only come from the mouth of a credible witness, but it also has to be credible in itself. It must elicit evidence that is from such common experience and observation that it can be approved as proper under the

[9] At the hearing, Dr. Altobello could not recall the regulatory cite; it was provided by counsel post-hearing.

circumstances. See, Spagnuolo v. Bonnet, 16 N.J. 546 (1954); Gallo v. Gallo, 66 N.J. Super. 1 (App. Div. 1961). A credibility determination requires an overall assessment of the witness's story in light of its rationality, internal consistency, and the manner in which it "hangs together" with the other evidence. Carbo v. United States, 314 F.2d 718, 749 (9th Cir. 1963). Also, "'[t]he interest, motive, bias, or prejudice of a witness may affect his credibility and justify the [trier of fact], whose province it is to pass upon the credibility of an interested witness, in disbelieving his testimony.'" State v. Salimone, 19 N.J. Super. 600, 608 (App. Div.), certif. denied, 10 N.J. 316 (1952) (citation omitted).

The most important witness, M.S., is no longer a minor child, having turned eighteen prior to the hearing. In the past, M.S. had shown herself to me to be less than credible, but at this hearing, I found her to present an honest, if somewhat biased, account of her high school experience in the Hamilton Township school system. She is very soft spoken and appears shy.[10]

Most of M.S.'s testimony was coached by her mother, despite numerous attempts to direct D.S. to avoid leading questions and/or not to use questions to present her own testimony. Much of what M.S. stated on direct examination she willingly contradicted on cross. For example, she complained of no positive adult relationships at Steinert, making her relationship with Belfiore all the more important. She then spoke highly of Steinert teachers Cooper and Leon and how much they have helped her. She admitted to poor academic performance while at HHS-West and improved academic performance at Steinert, and I so **FIND**. Further, M.S. stated that had she stayed on the path she was on at HHS-West, she doubts she would be where she is today—on the Honor Roll, headed to college in the fall.

Significantly, M.S. understands that the decision made by respondent to keep her at Steinert rather than permitting her enrollment at HHS-West (the subject of EDU 10144-22), is the result of the actions she took while a student at HHS-West, and I so **FIND**. While M.S. admits that such actions were not worth it, she did not acknowledge as untrue

[10] While on the witness stand, M.S. was repeatedly asked to speak up.

the claims of racial discrimination, bigotry, bullying, and harassment brought on her behalf against teachers and administrators of HHS-West.

Between them, D.S. and M.S. only presented evidence of one incident in which a decision of respondent could be classified as unfair, that being M.S.'s testimony that in February 2022, she received greater discipline for the same violations of school policy than was given to other male, white students. But there was no evidence introduced to corroborate her hearsay statement, no certification, no eyewitnesses, not even cross-examination of respondent's witness. Further, a review of the record in EDS 01033-22, shows that M.S. was suspended in February 2022, for twenty-two days, not forty-five days (as she now recalls).

Similarly, on multiple occasions, D.S. stated that Superintendent Rocco acted out of personal spite when he denied the request to permit M.S. to participate in senior year activities at HHS-West but presented no evidence to support those speculative statements.[11] Though petitioner pointed out that the Board policy and regulation on which respondent based the decision in this matter does not specifically prohibit a student enrolled at one high school from walking in the graduation ceremony at another, she failed to present evidence that the Board has permitted other students to do so.[12]

Dr. Altobello appeared credible, and I believe that he is truly uncomfortable asking Principal Smith to hand a diploma to a student who has made very serious allegations of improper conduct against him, allegations that resulted in a Board investigation, civil litigation, and multiple administrative proceedings. As petitioner notes, the regulation Dr. Altobello cited to support his decision does not prohibit the award of diplomas based on residency and attendance at a particular high school. The regulation, N.J.A.C. 6A:8-5.2, addressed academic requirements for graduation that must be followed by district boards of education. Board Policy 5410, however, states in pertinent part:

[11] Petitioner did not name the Board members who allegedly support her request, and did not secure their testimony or introduce affidavits in which they confirmed their alleged statements.
[12] Petitioner's argument that both she and M.S. were welcomed to the stage at HHS-West in 2005 to receive the diploma of her deceased son is touching but is not evidence that respondent routinely makes exceptions to the stated policy.

> School attendance shall be a factor in the determination of a pupil's promotion or retention. In high school, only extenuating circumstances should permit the promotion of a pupil who has been in attendance fewer than ninety percent of the days during the school year.

That Dr. Altobello failed to identify the above policy while on the witness stand is not evidence that he violated it. His explanation for his decisions regarding where M.S. completes high school and receives her diploma are within the discretion afforded him by Board Policy 5120 and Board Regulation 5120. I **FIND** as **FACT** that petitioner presented no evidence to prove that the decision of respondent to deny her request for M.S. to participate in the prom and graduation ceremony at HHS-West was arbitrary, capricious, unreasonable, and/or in violation of Board policy.

LEGAL ANALYSIS AND CONCLUSIONS

Actions within a school board's authority, including the adoption and implementation of policies for the assignment of students, are entitled to a presumption of correctness and will not be upset by the courts unless there is an affirmative showing that a decision is arbitrary, capricious or unreasonable. Thomas v. Bd. of Educ. of Morris Twp., 89 N.J. Super. 327, 332 (App. Div. 1965), aff'd., 46 N.J. 581 (1966). In general, a board of education's actions are entitled to a presumption of lawfulness and good faith.

D.S. argues that the Board did not meet its burden of proving that its decision was not arbitrary and capricious,[13] but where board actions are challenged, the challenger—D.S., not the Board—bears the burden of proving that such actions were unlawful, arbitrary, capricious or unreasonable. Schuster v. Bd. of Educ. of the Twp. of Montgomery, 96 N.J.A.R.2d (EDU) 670, 676 [citing Schnick v. Westwood Bd. of Educ., 60 N.J. Super. 448 (App. Div. 1960), and Quinlan v. North Bergen Twp. Bd. of Educ., 73 N.J. Super. 40 (App. Div. 1962)].[14]

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[13] See Ltr. Br. of Petitioner (March 13, 2023), at 1.

[14] D.S. is critical of respondent for relying on cases which were decided as much as sixty years ago, calling such "insanity." See Br. of Petitioner at 3. Though dated, all cases cited here were determined to still be good law.

In matters involving the exercise of a board of education's discretion, 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 conclusions." Kopera v. West Orange Bd. of Educ., 60 N.J. Super. 288, 296 (App. Div. 1960). Our courts have held that "[w]here there is room for two opinions, action is not arbitrary or capricious when exercised honestly and upon due consideration, even though it may be believed that an erroneous conclusion has been reached." Bayshore Sewage Co. v. Dep't of Envtl. Prot., 122 N.J. Super. 184, 199–200 (Ch. Div. 1973), aff'd., 131 N.J. Super. 37 (App Div. 1974). To satisfy the arbitrary and capricious standard, petitioner must prove that respondent acted in either bad faith or in disregard to the circumstances and I **CONCLUDE** that she has done neither.

As the factual record detailed above makes clear, respondent has a strong basis for its decision to refuse to permit M.S. to participate in graduation activities at HHS-West. Those privileges are reserved for students who attend school at HHS-West and respondent will not permit M.S. to finish her senior year at HHS-West.[15]

Notwithstanding that M.S. claims to be more mature now, has maintained a productive relationship with her HHS-West guidance counselor, and has reconsidered her prior claims against Principal Smith,[16] respondent has decided that it is in the best interest of M.S. and the staff and administration of HHS-West for M.S. to finish her senior year at Steinert. It is not lost here that petitioner made seven separate claims against staff and administrators of HHS-West, alleging that those staff members bullied, harassed, and discriminated against, M.S. Even at the hearing in this matter, M.S. repeated her claims of racial discrimination by HHS-West administrators (and added a claim against the former Steinert principal), an unintentional reminder of the hardship to its employees that respondent seeks to prevent:

[15] The decision of the Board in EDU 10144-22 has been upheld by initial decision issued March 30, 2023, pending a final decision by the DOE.

[16] Petitioner attempts in her closing to reframe her history of litigation as actions against the District, Dr. Altobello and Superintendent Rocco, and not the HHS-West administration. Br. of Petitioner at 3. As set forth above, however, not counting the three recusal motions, of the ten claims filed by D.S., seven were against HHS-West staff and administrators.

> Placement [of M.S.] at West would invite a resurgence of the claims of harassment and conflict between D.S., M.S., and the school officials. It would be a hardship to the district administration and staff members at West, previously defendants against allegations of racism that they vehemently dispute, to have to scurry to accommodate M.S. with a program as she moves toward graduation all the while on eggshells that any decision to discipline M.S. or conflict between M.S. and her peers would again result in their professional reputations being attacked as they have been numerous times before.
>
> [Ltr. Br. of Respondent (March 13, 2023), at 6.]

Though petitioner may disagree with the decision made by Dr. Altobello, disagreement alone is not sufficient to prove that his decision was arbitrary, capricious and/or in violation of Board policy.

ORDER

For the reasons set forth above, I **ORDER** that the appeal of petitioner D.S on behalf of M.S. of the decision of respondent Hamilton Township Board of Education to deny her request for M.S. to attend the HHS-West senior prom and to walk in the HHS-West graduation ceremony is hereby **DENIED** and the petition is hereby **DISMISSED**.

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

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

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

March 30, 2023
DATE

Tricia M Caliguire
TRICIA M. CALIGUIRE, ALJ

Date Received at Agency: _____

Date Mailed to Parties: _____

TMC/nn

APPENDIX

WITNESSES

For petitioner

M.S.

D.S.

For respondent

Dr. James Altobello

EXHIBITS

For petitioner

P-1 Email from M.H. (now M.S.) to Dr. James Altobello, dated September 21, 2022

For respondent

R-1 Petition of Appeal, dated July 18, 2022

R-2 Answer of Board, dated August 15, 2022

R-3 Not introduced

R-4 Not introduced

R-5 Zone Waiver Request Email, dated October 20, 2021

R-6 Zone Waiver Denial, dated October 29, 2021

R-7 Emails, dated October 29, 2021, through November 3, 2021

R-8 Letter from Board Counsel to Petitioner, dated November 5, 2021

R-9 Email from E. Gonzalez to Petitioner, dated October 29, 2021

R-10 Emails from Petitioner, dated May 3 through May 5, 2022

R-11 Email from Dr. Altobello, dated May 3, 2022

R-12 Zone Waiver Request, dated June 13, 2022

R-13 Not introduced

R-14 Email from Board Counsel to Petitioner, dated June 21, 2021

R-15 District Policy 5120

R-16 District Regulation 5120

R-17 Not introduced

138-23

New Jersey Commissioner of Education

Final Decision

D.S., on behalf of minor child, M.S.,

Petitioner,

v.

Board of Education of the Township of Hamilton, Mercer County,

Respondent.

Synopsis

Petitioner challenged the decision of the respondent Board to deny her request to transfer her daughter, M.S., from Steinert High School (Steinert) to Hamilton High School West (HHS-W) for the remainder of the 2022-2023 school year. The instant case is the latest in a series of challenges brought by the petitioner against the Board since 2021 involving demands that M.S. be allowed to finish her high school education at HHS-West despite the fact that M.S. was subject to discipline and removed from school at HHS-West on nine occasions for fighting and acts of harassment, intimidation and bullying against fellow students.

The ALJ found, *inter alia*, that: to prevail in this matter, petitioner was required to prove that the Board's decision to deny her request to enroll M.S. at HHS-West for the remainder of the 2022–2023 school year was arbitrary, capricious, unreasonable and/or in violation of Board policy; petitioner failed to present any such evidence; the school administration must by law and Board policy act in the best interest of the student and there is no evidence that it is in M.S.'s best interest to return to HHS-West rather than complete her senior year at Steinert; M.S. admitted in testimony that she had poor academic performance while a student at HHS-West and had improved her performance at Steinert; further, M.S. testified that had she stayed on the path she was on at HHS-West, she would not be on the Honor Roll and headed to college in the fall; actions taken by a school board that fall within its authority, including the adoption and implementation of policies for assignment of students, are entitled to a presumption of correctness and will not be upset without an affirmative showing that a decision is arbitrary, capricious or unreasonable; and, based on the factual record in this case, the Board had a strong basis for its consistent decision to refuse to enroll M.S. at HHS-West. The ALJ concluded that the petitioner did not carry her burden of proof in this matter. Accordingly, the ALJ dismissed the petition.

Upon a comprehensive review, the Commissioner concurred with the findings and conclusions of the ALJ and adopted the Initial Decision of the OAL as the final decision in this matter. The petition was dismissed.

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

138-23
OAL Dkt. No. 10144-22
Agency Dkt. No. 269-10/22

New Jersey Commissioner of Education

Final Decision

D.S., on behalf of minor child, M.S.,

Petitioner,

v.

Board of Education of the Township of Hamilton, Mercer County,

Respondent.

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

Upon review, the Commissioner concurs with the Administrative Law Judge, for the reasons detailed in the Initial Decision, that the Hamilton Township Board of Education's decision to deny petitioner's request for a transfer of her minor child to a different high school within the school district was not arbitrary, capricious, or unreasonable.

Accordingly, the Initial Decision is adopted as the final decision in this matter, and the petition of appeal is hereby dismissed.

IT IS SO ORDERED.[1]

Angelina Allen-McMillan, J.d.D.
ACTING COMMISSIONER OF EDUCATION

Date of Decision: May 9, 2023
Date of Mailing: May 10, 2023

[1] This decision may be appealed to the Appellate Division of the Superior Court pursuant to *N.J.S.A.* 18A:6-9.1. Under *N.J.Ct.R.* 2:4-1(b), a notice of appeal must be filed with the Appellate Division within 45 days from the date of mailing of this decision.

State of New Jersey
OFFICE OF ADMINISTRATIVE LAW

INITIAL DECISION
OAL DKT. NO. EDU 10144-22
AGENCY DKT. NO. 269-10/22

D.S. ON BEHALF OF M.S.,
Petitioner,
v.
HAMILTON TOWNSHIP BOARD OF EDUCATION, MERCER COUNTY,
Respondent.

D.S., petitioner, pro se

Patrick F. Carrigg, Esq., for respondent (Lenox, Socey, Formidoni, Giordano, Cooley, Lang & Casey, attorneys)

Record Closed: March 13, 2023 Decided: March 30, 2023

BEFORE **TRICIA M. CALIGUIRE**, ALJ:

STATEMENT OF THE CASE

Petitioner D.S. on behalf of M.S. challenges the decision of respondent Hamilton Township Board of Education, Mercer County (Board) to deny her request to transfer M.S. from Hamilton High School East (Steinert) to Hamilton High School-West (HHS-West), for the remainder of the 2022–2023 school year.

PROCEDURAL HISTORY

On October 7, 2022, D.S. filed a petition of appeal with the New Jersey Department of Education, Office of Controversies and Disputes (DOE), to challenge the decision of respondent Board to deny her request to enroll M.S. at HHS-West. On November 9, 2022, respondent filed a motion for summary decision in lieu of an answer on the grounds that petitioner did not live within the geographic boundaries of HHS-West. The Commissioner of Education did not rule on the motion but transmitted it with the petition to the Office of Administrative Law (OAL) on November 10, 2022, for hearing as a contested case pursuant to N.J.S.A. 52:14B-1 to -15, and N.J.S.A. 52:14F-1 to -13.

On December 16, 2022, based on changed circumstances since the date of the petition, I directed petitioner to amend her petition with proof of her change of residence and permitted respondent to file an amended answer or amended motion for summary decision. On January 3, 2023, petitioner filed an amended petition. On January 13, 2023, respondent filed a second motion for summary decision. This motion was denied on the record on March 6, 2023, prior to the due process hearing, which was scheduled to coincide with the hearing in a related case between these parties, EDU 07264-22.[1]

As described in the summary of undisputed facts, below, since early 2021, I have presided over six matters involving these parties and prior to this hearing, had issued decisions in four of the matters. Generally, based on the documents filed in both this matter and in EDU 07264-22, and the testimony and arguments made by both parties in prior matters over which I presided, I understood that the basis for petitioner's current requests for relief, and the grounds by which respondent denied both requests, were similar. In the interest of judicial economy and in an attempt to provide petitioner with resolution prior to the end of the current school year,[2] the hearings in both matters were conducted on March 6, 2023, at the OAL.[3] Following the hearing, petitioner submitted a

[1] See also D.S obo M.S. v. Hamilton Twp. Bd. of Educ., OAL Dkt. No. 07264-22, Initial Decision (March 30, 2023).
[2] M.S. is on track to graduate in June 2023.
[3] All other hearings involving these parties over which I presided were conducted by Zoom due to the restrictions on public gatherings initiated during the COVID-19 emergency.

handwritten letter accusing opposing counsel of specific improper conduct, which was vehemently denied by return letter of counsel. This correspondence was forwarded to Candice Hendricks, OAL Assistant Director of Judicial Standards. The record remained open for simultaneous post-hearing submissions and on March 13, 2023, the record closed.[4]

FACTUAL DISCUSSION AND FINDINGS

The following background **FACTS** are not in dispute and accordingly, I **FIND**:

The Hamilton Township School District (District) operates three high schools and assigns students residing within the District to a specific high school based on pre-determined residential boundary lines. When M.S. began high school, in September 2019, she lived with her mother, D.S., at an address within the HHS-West zone and attended HHS-West.

During the 2019–2020 school year, M.S. was subject to discipline and removed from school on nine occasions.[5] She was charged with seven acts of harassment, intimidation and bullying (HIB) toward another HHS-West student. On July 27, 2020, D.S. filed a due process petition to challenge the Board's decision finding M.S. guilty of seven counts of HIB. After transmittal to the OAL, this matter was docketed as EDU 07830-20, and assigned to the Honorable Jeffrey N. Rabin, ALJ.

[4] In all the proceedings before me, D.S. showed a complete lack of propriety and disregard for civility, insulted and denigrated witnesses, opposing counsel, my judicial support specialist, and myself, in correspondence, telephone conferences, and during hearings. One final example follows. After receiving respondent's post-hearing submission, D.S., apparently having forgotten my instructions from the bench, sent the following email to my chambers: "With all due respect; what is this? More testimony in cases that were already heard on 3/6/2023. If Judge Claigure [sic] permits this after me being verbally threatened by Rita Barons [sic] after Judge Caligula [sic] left the bench, I will be filing a reply[.] It saddens me that the HTSD is continuing to waste taxpayers money purposely continuing fighting for something that will cause absolutely NOONE any harm instead increases the moral and positive influence in My child's life and education. Isn't that what we should be focusing on and not continually try and break [M.S.] down even more[.] You disgust me[.]"

[5] See D.S. obo M.S. v. Hamilton Twp. Bd. of Educ., OAL Dkt. No. 07830-20, Transmittal Documents (August 14, 2020).

On September 25, 2020, D.S. filed an emergent petition to challenge one of the seven findings of HIB and to also charge HHS-West Principal Brian Smith with harassment. The harassment charge triggered a separate internal investigation by the Board and therefore, the DOE transmitted only the HIB challenge, docketed at the OAL as EDU 09096-20, and assigned to Judge Rabin. Before the emergent hearing, D.S. filed a motion for Judge Rabin's recusal, which was denied. On October 6, 2020, Judge Rabin issued a ruling denying emergent relief.

On October 21, 2020, D.S. filed a second motion for Judge Rabin to recuse himself in EDU 07830-20, which motion was also denied.

On March 2, 2021, while EDU 07380-20 was pending, D.S. filed a related emergent petition charging Principal Smith with continued harassment of both D.S. and M.S. and appealing the decision of respondent to bar D.S. from HHS-West property due to her allegedly inappropriate behavior. The emergent matter, EDU 02205-21, was assigned to Judge Rabin, who conducted the emergent hearing and on March 10, 2021, issued a ruling denying emergent relief.[6] In his order on emergent relief, Judge Rabin found as fact that:

> [D.S.] had spoken derogatory and accusatory language against Principal Smith during the public portion of public school board meetings and in correspondence to various parties, included publicly accusing Principal Smith of being a racist. Because of these issues, and because of the litigation between the parties, Dr. James Altobello (the Board's Director of Secondary Education), in conjunction with the Board superintendent, created interventions to ensure that D.S. and Smith did not have direct interaction.
>
> [D.S. on behalf of M.S. v. Hamilton Twp. Bd. of Educ., OAL Dkt. No. EDU 02205-21, Order (March 11, 2021), at 3, aff'd., Final Decision (April 20, 2021).]

On March 10, 2021, D.S. on behalf of M.S. brought a lawsuit in Mercer County, New Jersey Superior Court against certain administrators and staff of HHS-West, alleging

[6] To date, the Board's decision to bar D.S. from HHS-West buildings and grounds stands.

racial profiling, discrimination, harassment, and bullying.[7] This matter was resolved prior to trial.

On March 30, 2021, D.S. filed a third motion for Judge Rabin to recuse himself in EDU 07830-20, which motion was also denied.

M.S. withdrew from HHS-West in March 2021, and began the 2021–2022 school year (in eleventh grade) at Gateway High School in Florida. On or before November 1, 2021, M.S. moved with her mother, D.S., back to New Jersey and took up residence in Hamilton Township within the geographic zone assigned by the District to Hamilton High School-East (also known as Steinert).

On October 28, 2021, D.S. applied to the District for an attendance zone waiver by which M.S. would attend high school at HHS-West rather than Steinert. By letter dated October 29, 2021, the District denied petitioner's application. The District stated that its decision was supported by the earlier allegations made by D.S. regarding HHS-West administrators and staff, the litigation that ensued, and D.S.'s conduct during the 2020–2021 school year (as described more fully in the order issued by Judge Rabin in EDU 02205-21).

On or about February 1, 2022, M.S. was suspended by the Steinert administration for fighting with another student and posting video of the fight on social media. M.S. is eligible for special education and related services but, after a manifestation determination meeting, respondent concluded that the conduct of M.S. constituted a disciplinary infraction neither related to nor caused by her disability. D.S. sought an expedited ruling overturning that decision and the discipline imposed on M.S. The expedited matter, EDS 01033-22, was assigned to me. Before the expedited hearing, D.S. filed an emergent petition directly with the OAL; on February 23, 2022, following a hearing, I issued an order denying emergent relief. The expedited hearing was held on March 4, 2022, and on March 15, 2022, I issued a final decision in favor of respondent and D.S.'s petition was

[7] Somma on behalf of M.S. v. Smith, et al., MERL-L-528-21 (Mercer County Super. Ct. 2021).

dismissed. D.S. obo M.S. v. Bd. of Educ. of the Twp. of Hamilton, OAL Dkt. No. EDS 01033-22, Final Decision (March 15, 2022).

On March 8, 2022, petitioner filed an appeal of the first zone waiver denial with the DOE. The matter was transmitted to the OAL, assigned to me, and on July 5, 2022, I issued an initial decision granting summary decision in favor of the District, which was affirmed by the Commissioner of Education. D.S. on behalf of M.S. v. Hamilton Township Board of Education, OAL Dkt. No. EDU 02521-22, Initial Decision (July 5, 2022), aff'd., Final Decision (August 15, 2022).

Before the decision on the first zone waiver appeal was issued, petitioner asked respondent if M.S. could participate in end-of-year activities at HHS-West with the rest of the HHS-West Class of 2023 and, on June 13, 2022, respondent denied that request. On July 18, 2022, petitioner appealed respondent's decision. That petition was transmitted by the DOE to the OAL, docketed as EDU 07264-22, and assigned to me. After that matter was filed, D.S. informed respondent that she had contracted to purchase (but not yet closed on) a home within the geographic zone assigned to HHS-West and, therefore, asked that M.S.'s enrollment be changed from Steinert to HHS-West. Had the District permitted M.S. to enroll at HHS-West after moving to the new home, EDU 07264-22 would have been moot but on November 9, 2022, respondent stated that it would not permit M.S. to enroll at HHS-West in the event of a permanent change in residency. In making this decision, respondent relied on its November 5, 2021, letter to D.S. from counsel explaining the basis for respondent's denial of petitioner's first request for a zone waiver. This letter stated in pertinent part:

> [Y]ou, individually, and on behalf of [M.S.], have accused multiple administrators, including the Principal and the Athletic Director, and multiple certified staff members assigned to [HHS-West] of harassment and discrimination toward [M.S.] and you arising from [bullying], disciplinary incidents, and other circumstances. . . It is confounding that you would insist on having [M.S.] assigned to a school against which you have made such allegations. Nevertheless, while the District denies those allegations and avers that it has engaged in unbiased decisions toward you and [M.S.], those claims and past circumstances justify [M.S.'s] assignment to a high

> school other than [HHS-West] which is in the best educational interest of [M.S.] and the [HHS-West] staff.
>
> [(R-8) (Ltr. of Patrick F. Carrigg, Esq., to D.S. (November 5, 2021), at 2.)]

On November 10, 2022, petitioner filed the present matter, an appeal of her second zone waiver request. The DOE transmitted this matter to the OAL on November 15, 2022; the OAL docketed it as EDU 10144-22, and assigned it to me.

On December 21, 2022, petitioner filed a request for emergent relief, seeking the immediate transfer of M.S. from Steinert to HHS-West on the grounds that M.S. is unsafe at Steinert due to allegedly being the victim of HIB on or about December 19, 2022, and as a result of allegedly being subjected to excessive force by the school resource officer immediately following the December 19, 2022, incident. This emergent matter was docketed as EDU 11614-22 and assigned to me. The emergent hearing was held on January 4, 2023, and on January 5, 2023, I issued an initial decision denying emergent relief. D.S. on behalf of M.S. v. Hamilton Twp. Bd. of Educ., OAL Dkt. No. 11614-22, Initial Decision (January 5, 2023), aff'd., Final Decision (February 24, 2023).

Disputed Issue

To prevail in this matter, petitioner must show that the decision of respondent to deny her request to enroll M.S. at HHS-West for the remainder of the 2022–2023 school year was arbitrary, capricious, unreasonable, and/or in violation of Board policy.

Testimony

Petitioner testified and presented the testimony of her daughter, M.S. Respondent called one witness for the limited purpose of identifying pre-marked exhibits for introduction. The following is not a verbatim recitation of the testimony but a summary of the documentary and testimonial evidence I found relevant to the above-described dispute.

M.S. is an eighteen-year-old female in her senior year of high school. She started her testimony with a general description of the mental health issues she experienced while a middle school student in the District. Based on her testimony, it appears that incidents occurring outside of school contributed to M.S.'s condition.

M.S. described two incidents during the 2019–2020 school year, when she was a freshman, which resulted in her being disciplined by the HHS-West administration. The first occurred at a football game at which she participated as a cheerleader. M.S. stated that she was "jumped" from behind by another female student and she fought back. The next day, M.S. was told that she was removed from the cheer team for fighting while wearing her cheer uniform.

In the second incident, M.S. stated that she was trying to "de-escalate" a fight between other students when a security guard attempted to grab her by the wrists. She was sent to the nurse's office.

While at HHS-West, M.S. stated that she had problems with the cheerleading director, the athletic director, and the football coach. Further, she described her relationship with Principal Smith as "rocky," noting that he suspended her "a couple times," and that she did not want him involved in any disciplinary matters affecting her. M.S. stated that she was very upset about how she was treated at HHS-West by administrators and teachers. At the time, she told her mother, who took her complaints to the Board. M.S. also knows that her mother filed a lawsuit against Principal Smith and others in the administration, accusing them of racial discrimination.

M.S. recalled moving with her mother to Florida, where she completed tenth grade and started eleventh grade. She could not recall the reason her family moved to Florida and gave an incomplete explanation as to why they returned to New Jersey.

M.S. enrolled at Steinert in November 2021, and has since attended Steinert. She stated that she has no friends there and no relationship with her guidance counselor or other staff. On cross-examination, M.S. admitted that she has made a positive connection with her Steinert art teacher, Mr. Cooper, who she described as a sort of "older sibling."

She also has a positive relationship with Ms. Leon, her support counselor. She stated that she continues to meet (by Zoom and in-person) with her HHS-West counselor, Edward Belfiore (Belfiore), who she has known since she was a young child. She described Belfiore as a mentor and the most significant adult presence in her life.

Shortly after M.S. enrolled at Steinert, she started the Black Students' Union (BSU) because no such extracurricular organization existed at Steinert. M.S. wanted to learn more about her culture. In the BSU, she has "cordial relationships," but no friends.

M.S. recalled being suspended for fighting in school on February 1, 2022. She stated that then-Steinert Principal Bridget O'Neil was not doing her job, evidence of which is the excessive suspension Principal O'Neill gave M.S. for fighting. M.S. stated that she was suspended for forty-five days and claimed that other male students were also suspended (for an unrelated fight), but for a much shorter period. This, she said, was proof of racial discrimination at Steinert, as the male students are white.

M.S. acknowledged that her actions in ninth and tenth grade, while at HHS-West, were the result of her own poor decision-making and were "not worth it." She stated that she has come a long way, has made the Honor Roll for the first time this past semester, and has applied to four colleges (for August 2023 admission). M.S. said that for the first time, she is proud of herself. She understands that respondent will not permit her to return to HHS-West because of her actions while a student at HHS-West, but it is important for her to walk the stage with the HHS-West graduating class because her older brother (who died prior to graduating high school) did not get that opportunity.

D.S. testified briefly on her own behalf.[8] She spoke of ongoing issues with the District and more than once, accused Superintendent Scott Rocco of denying her current requests for personal reasons. She and M.S. are tired, emotionally drained, and want to move on from the past.

[8] Petitioner was not initially sworn in as she stated that she would be presenting arguments in favor of her position, but when she began to describe incidents involving her daughter, she was asked to take the oath. Her testimony was still relatively brief as I recognized that M.S., who was present, had first-hand knowledge of the incidents being described.

D.S. stated that after respondent denied her request for M.S. to participate in end-of-year activities with the HHS-West Class of 2023 (which is the subject of EDU 07264-22), she attended the June 2022 regular meeting of the Board. While there, D.S. stated that she spoke with three Board members regarding the decision to deny her request and that these Board members were not aware of the request, which is evidence of Superintendent Rocco's bad faith.

Dr. James Altobello, Director of Administration, testified on behalf of respondent. Among his other duties for the District, Dr. Altobello is responsible for administering requests for students to change schools within the District, such as the zone waiver requests made by petitioner (and described above). He has communicated with petitioner regarding the request involved in this matter (and the request involved in EDU 07264-22).

Dr. Altobello identified District Policy 5120, which provides in pertinent part:

> The Board of Education directs the assignment of pupils to the schools, programs, and classes of this district consistent with the best interests of pupils and the best uses of the resources of this district.
>
> Pupils shall generally attend the school located in the attendance area of their residence. The Superintendent may assign a pupil to a school other than that designated by the attendance areas when such an exception is justified by circumstances and/or is in the best interests of the pupil. (Every effort will be made to exercise sensitivity and reasonable judgment regarding student placement.)
>
> [R-15.]

Dr. Altobello stated that Board Regulation 5120 describes how Policy 5120 will be administered. He identified Board Regulation 5120, which provides in pertinent part:

> The Superintendent or Designee will review all requests for an "attendance zone waiver." Approval of all zone waivers is based upon the following criteria:
>
> 1. Legal mandates (court order, parental custody);

2. Child Study recommendations;

3. Homelessness, Department of Child Protection and Permanency interventions and

4. Students in good standing having attend Hamilton Township Schools for two consecutive years and entering 5th, 8th, or 11th grade who move within the Hamilton Township borders, may petition for a zone waiver to remain in their current school through graduation or promotion.

[R-16.]

On October 25, 2021, and June 13, 2022, D.S. submitted zone waiver requests. (R5; R-12.) Dr. Altobello stated that both were denied as the requisite criteria (shown above) were not met. (R-6; R-14.)

Credibility Analysis and Additional Findings

For testimony to be believed, it must not only come from the mouth of a credible witness, but it also has to be credible in itself. It must elicit evidence that is from such common experience and observation that it can be approved as proper under the circumstances. See, Spagnuolo v. Bonnet, 16 N.J. 546 (1954); Gallo v. Gallo, 66 N.J. Super. 1 (App. Div. 1961). A credibility determination requires an overall assessment of the witness's story in light of its rationality, internal consistency, and the manner in which it "hangs together" with the other evidence. Carbo v. United States, 314 F.2d 718, 749 (9th Cir. 1963). Also, "'[t]he interest, motive, bias, or prejudice of a witness may affect his credibility and justify the [trier of fact], whose province it is to pass upon the credibility of an interested witness, in disbelieving his testimony.'" State v. Salimone, 19 N.J. Super. 600, 608 (App. Div.), certif. denied, 10 N.J. 316 (1952) (citation omitted).

The most important witness, M.S., is no longer a minor child, having turned eighteen prior to the hearing. In the past, M.S. had shown herself to me to be less than credible, but at this hearing, I found her to present an honest, if somewhat biased, account

of her high school experience in the Hamilton Township school system. She is very soft spoken and appears shy.[9]

Most of M.S.'s testimony was coached by her mother, despite numerous attempts to direct D.S. to avoid leading questions and/or not to use questions to present her own testimony. Much of what M.S. stated on direct examination she willingly contradicted on cross. For example, she complained of no positive adult relationships at Steinert, making her relationship with Belfiore all the more important. She then spoke highly of Steinert teachers Cooper and Leon and how much they have helped her. She admitted to poor academic performance while at HHS-West and improved academic performance at Steinert, and I so **FIND**. Further, M.S. stated that had she stayed on the path she was on at HHS-West, she doubts she would be where she is today—on the Honor Roll, headed to college in the fall.

Significantly, M.S. understands that the decision made by respondent to keep her at Steinert rather than permitting her enrollment at HHS-West is the result of the actions she took while a student at HHS-West, and I so **FIND**. While M.S. admits that such actions were not worth it, she did not acknowledge as untrue the claims of racial discrimination, bigotry, bullying, and harassment brought on her behalf against teachers and administrators of HHS-West.

Between them, D.S. and M.S. only presented evidence of one incident in which a decision of respondent could be classified as unfair, that being M.S.'s testimony that in February 2022, she received greater discipline for the same violations of school policy than was given to other male, white students. But there was no evidence introduced to corroborate her hearsay statement, no certification, no eyewitnesses, not even cross-examination of respondent's witness. Further, a review of the record in EDS 01033-22, shows that M.S. was suspended in February 2022, for twenty-two days, not forty-five days (as she now recalls).

[9] While on the witness stand, M.S. was repeatedly asked to speak up.

Similarly, on multiple occasions, D.S. stated that Superintendent Rocco acted out of personal spite when he denied the request to enroll M.S. at HHS-West but presented no evidence to support those speculative statements. Though the specific Board policy and regulation on which respondent based the decision in this matter is known to petitioner, she presented no evidence (or argument) to support the claim that the Board is acting in violation of that policy.

I **FIND** as **FACT** that petitioner presented no evidence to prove that the decision of respondent to deny her request to enroll M.S. at HHS-West for the remainder of the 2022–2023 school year was unlawful, arbitrary, capricious, unreasonable, and/or in violation of Board policy.

LEGAL ANALYSIS AND CONCLUSIONS

Actions within a school board's authority, including the adoption and implementation of policies for the assignment of students, are entitled to a presumption of correctness and will not be upset by the courts unless there is an affirmative showing that a decision is arbitrary, capricious or unreasonable. Thomas v. Bd. of Educ. of Morris Twp., 89 N.J. Super. 327, 332 (App. Div. 1965), affirmed, 46 N.J. 581 (1966). In general, a board of education's actions are entitled to a presumption of lawfulness and good faith.

D.S. argues that the Board did not meet its burden of proving that its decision was not arbitrary and capricious,[10] but where board actions are challenged, the challenger—D.S., not the Board—bears the burden of proving that such actions were unlawful, arbitrary, capricious or unreasonable. Schuster v. Bd. of Educ. of the Twp. of Montgomery, 96 N.J.A.R.2d (EDU) 670, 676 [citing Schnick v. Westwood Bd. of Educ., 60 N.J. Super. 448 (App. Div. 1960), and Quinlan v. North Bergen Twp. Bd. of Educ., 73 N.J. Super. 40 (App. Div. 1962)].[11]

[10] See Ltr. Br. of Petitioner (March 13, 2023), at 1.
[11] D.S. is critical of respondent for relying on cases which were decided as much as sixty years ago, calling such "insanity." See Br. of Petitioner at 3. Though dated, all cases cited here were determined to still be good law.

In matters involving the exercise of a board of education's discretion, 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 conclusions." Kopera v. West Orange Bd. of Educ., 60 N.J. Super. 288, 296 (App. Div. 1960). Our courts have held that "[w]here there is room for two opinions, action is not arbitrary or capricious when exercised honestly and upon due consideration, even though it may be believed that an erroneous conclusion has been reached." Bayshore Sewage Co. v. Dep't of Envtl. Prot., 122 N.J. Super. 184, 199–200 (Ch. Div. 1973), aff'd., 131 N.J. Super. 37 (App Div. 1974). To satisfy the arbitrary and capricious standard, petitioner must prove that respondent acted in either bad faith or in disregard to the circumstances.

As the factual record detailed above makes clear, respondent has a strong basis for its consistent decision to refuse to enroll M.S. at HHS-West. Notwithstanding that M.S. claims to have matured and admits that her behavior as a freshman and sophomore at HHS-West was inappropriate, she was disciplined for fighting in school just three months ago. Any evidence that M.S. is without friends and more prone to being disciplined at Steinert is overwhelmed by her disciplinary record while at HHS-West.

The argument D.S. makes regarding the adult support M.S. will experience if she transfers to HHS-West is compelling as M.S. has maintained a productive relationship with her HHS-West guidance counselor and has reconsidered her prior claims against Principal Smith. But the preponderance of the evidence is that M.S. has performed better academically at Steinert than she did at HHS-West and has established at least two positive relationships with Steinert staff members. Other than speculating that Superintendent Rocco is acting out of personal animus, petitioner introduced no evidence to support her claim that respondent's decision was arbitrary and/or capricious.

Both D.S. and M.S. expressed the need to put the past behind them and move on, but rather than accept the predictable consequences of their actions while M.S. was enrolled at HHS-West,[12] they continue to use the DOE process to try and reverse the reasonable decisions of respondent to keep M.S. and her mother away from the staff and

[12] As described above, both mother and daughter were cited by the HHS-West administration for inappropriate conduct on school grounds.

administrators who they claim treated both of them in a bigoted, discriminatory, harassing and bullying manner. Notwithstanding that all HHS-West personnel were cleared of wrongdoing; M.S. cannot dispute that she felt strongly enough in 2021 about her alleged mistreatment that her mother took legal action to protect her. In the words of Board counsel, "it is confounding that [D.S.] would insist on having [M.S.] assigned to" HHS-West.

The administration must by law and Board policy act in the best interest of the student, and there is no evidence that it is in M.S.'s best interest to return to HHS-West rather than complete her senior year at Steinert. Further, the administration must also act in the best interest of its employees, who are responsible for the education of hundreds of other students, not just M.S. Petitioner made seven separate claims against staff and administrators of HHS-West, alleging that those staff members bullied, harassed, and discriminated against, M.S. Even at the hearing in this matter, M.S. repeated her claims of racial discrimination by HHS-West administrators (and added a claim against the former Steinert principal), an unintentional reminder of the hardship to its employees that respondent seeks to prevent:

> Placement [of M.S.] at West would invite a resurgence of the claims of harassment and conflict between D.S., M.S., and the school officials. It would be a hardship to the district administration and staff members at West, previously defendants against allegations of racism that they vehemently dispute, to have to scurry to accommodate M.S. with a program as she moves toward graduation all the while on eggshells that any decision to discipline M.S. or conflict between M.S. and her peers would again result in their professional reputations being attacked as they have been numerous times before.
>
> [Ltr. Br. of Respondent (March 13, 2023), at 6.]

Though petitioner may disagree with the decision made by Dr. Altobello, disagreement alone is not sufficient to prove that his decision was arbitrary, capricious and/or in violation of Board policy. I **CONCLUDE** that petitioner has not carried the burden of proving that the action of respondent in denying the request to enroll M.S. at

HHS-West for the remainder of the 2022–2023 school year was arbitrary, capricious and/or in violation of Board policy.

ORDER

For the reasons set forth above, I **ORDER** that the appeal of D.S. on behalf of M.S. of the decision of respondent Hamilton Township Board of Education to deny an attendance zone waiver and/or to refuse to enroll M.S. at Hamilton High School West for the remainder of the 2022–2023 school year is hereby **DENIED** and the petition is **DISMISSED**.

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

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

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

March 30, 2023
DATE

TRICIA M. CALIGUIRE, ALJ

Date Received at Agency: _____

Date Mailed to Parties: _____

TMC/nn

APPENDIX

WITNESSES

For petitioner

M.S.

D.S.

For respondent

Dr. James Altobello

EXHIBITS

For petitioner

P-1 Email from M.H. (now M.S.) to Dr. James Altobello, dated September 21, 2022

For respondent

R-1 Petition of Appeal, dated July 18, 2022

R-2 Answer of Board, dated August 15, 2022

R-3 Not introduced

R-4 Not introduced

R-5 Zone Waiver Request Email, dated October 20, 2021

R-6 Zone Waiver Denial, dated October 29, 2021

R-7 Emails, dated October 29, 2021, through November 3, 2021

R-8 Letter from Board Counsel to Petitioner, dated November 5, 2021

R-9 Email from E. Gonzalez to Petitioner, dated October 29, 2021

R-10 Emails from Petitioner, dated May 3 through May 5, 2022

R-11 Email from Dr. Altobello, dated May 3, 2022

R-12 Zone Waiver Request, dated June 13, 2022

R-13 Not introduced

R-14 Email from Board Counsel to Petitioner, dated June 21, 2021

R-15 District Policy 5120

R-16 District Regulation 5120

R-17 Not introduced

139-23
Agency Dkt. No. 45-2/23

New Jersey Commissioner of Education

Final Decision

In the Matter of the Tenure Hearing of Anselmo Girimonte, School District of the Town of Kearny, Hudson County.

For the Petitioner, Kenneth J. Lindenfelser, Esq.

No appearance by or on behalf of Respondent, Anselmo Girimonte

This matter was opened before the Commissioner of Education on February 23, 2023, through tenure charges of unbecoming conduct certified by Flora Encarnacao, Superintendent and Chief Administrator of the Kearny School District ("District"), together with supporting evidence against respondent, Anselmo Girimonte, a tenured teaching staff member in the District's employ. On February 23, 2023, the District provided respondent with the Sworn Tenure Charges and the Sworn Statement of Evidence with exhibits through a mailing to the respondent's current address, via certified mail and Federal Express overnight delivery.

This communication clearly provided notice to respondent that, pursuant to *N.J.A.C.* 6A:3-5.3 and 6A:3-5.4, an individual against whom tenure charges are certified *"shall have 15 days from the day such charges are filed with the Commissioner to file a written response to the charges with the Commissioner,"* and that failure to answer within the prescribed period would – absent granting of an extension for good cause shown – result in the charges being deemed admitted. No reply to the tenure charges was received from or on behalf of the respondent.

The certified tenure charges and statement of supporting evidence filed by the District in this matter indicate that the respondent was employed by the District as a tenured teacher. The Certified Tenure Charges outline various violations of board policy by the respondent, including respondent's failure to report his March 4, 2022, arrest for the distribution of child pornography to the District. A federal grand jury indicted respondent on January 13, 2023, for two counts relating to the possession and distribution of child pornography.

Deeming the allegations to be admitted and noting that the respondent has failed to respond to the charges certified against him at the District level, the Commissioner finds that the District's charge of unbecoming conduct has been proven and overwhelmingly warrants the respondent's dismissal. Accordingly, summary decision is hereby granted to the District, and the respondent is dismissed from his tenured position with the Kearny School District. This matter will be transmitted to the State Board of Examiners for action against respondent's certificate(s) as that body deems appropriate.

IT IS SO ORDERED.[1]

Angelica Allen-McMillan, J.d.D.
ACTING COMMISSIONER OF EDUCATION

Date of Decision: May 9, 2023
Date of Mailing: May 10, 2023

[1] This decision may be appealed to the Appellate Division of the Superior Court pursuant to *N.J.S.A.* 18A:6-9.1. Under *N.J.Ct.R.* 2:4-1(b), a notice of appeal must be filed with the Appellate Division within 45 days from the date of mailing of this decision.

142-23
OAL Dkt. No. 11069-14
Agency Dkt. No. 156-6/14

New Jersey Commissioner of Education

Order on Emergent Relief

Leonor Alcantara, individually and as Guardian ad Litem for E.A.; Leslie Johnson, individually and as Guardian ad Litem for D.J.; Juana Perez, individually and as Guardian ad Litem for Y.P.; Tatiana Escobar; Henry Moro and Ira Schulman, individually and as Guardian ad Litem for A.S.,

Petitioners,

v.

Angelica Allen Mc-Millan, Acting Commissioner of the New Jersey Department of Education; New Jersey State Board of Education; and New Jersey Department of Education,

Respondents.

The motion for emergent relief filed by petitioners and the opposition thereto filed by respondents have been reviewed and considered.

In a 2014 petition[1] filed against the New Jersey Commissioner of Education, the New Jersey Department of Education (Department), and the New Jersey State Board of Education (collectively, "respondents"), petitioners alleged that the Lakewood Township Board of Education (Lakewood) is unable to provide its public school students with a thorough and efficient education (T&E) because it does not receive sufficient funding under the School

[1] Petitioners amended their petition on September 4, 2018.

Funding Reform Act, *N.J.S.A.* 18A:7F-43 to -70 (SFRA). Following proceedings at the Office of Administrative Law (OAL), the Commissioner issued a decision concluding that petitioners failed to meet the threshold inquiry of establishing Lakewood's failure to provide T&E; accordingly, the Commissioner did not reach the issue of the constitutionality of the SFRA. *Alcantara v. Hespe*, Commissioner Decision No. 149-21 (July 16, 2021). Petitioners appealed, and the Appellate Division reversed and remanded the matter with instructions for the Commissioner to consider petitioners' substantive arguments pertaining to the SFRA. *Alcantara v. Allen-McMillan*, 475 *N.J. Super.* 58 (App. Div. Mar. 6, 2023). On May 1, 2023, petitioners filed a motion for emergent relief, seeking an Order that the Commissioner would issue a final decision on the remand from the Appellate Division no later than May 15, 2023.

On May 12, 2023, the Commissioner issued a letter directing the Department to expedite the comprehensive review of the Lakewood school district referenced in *Alcantara v. Hespe*, *supra*. The Commissioner indicated that the information that comprised the record before the OAL, the Commissioner, and the Appellate Division is now outdated and found that an updated record is required in order to make an appropriately informed decision about the SFRA and its application to Lakewood. The comprehensive review, as well as an opportunity for petitioners and Lakewood to respond to the resulting report and recommendations, will occur prior to the issuance of a final agency decision on the as-applied constitutionality of the SFRA.

Upon review of petitioner's motion for emergent relief, and in light of the May 12, 2023 letter, the Commissioner concludes that the motion must be denied, as it is now moot. "A case is technically moot when the original issue presented has been resolved . . .". *DeVesa v. Dorsey*, 134 *N.J.* 420, 428 (1993). With the Commissioner's determination of a schedule for the

proceedings in this matter, as outlined in the May 12, 2023, letter, there is no longer any question pertaining to the timing of her decision that requires resolution.

Accordingly, petitioners' motion for emergent relief is denied.

IT IS SO ORDERED.

Angelica Allen-McMillan, Ed.D.
ACTING COMMISSIONER OF EDUCATION

Date of Decision: May 12, 2023
Date of Mailing: May 12, 2023

143-23

New Jersey Commissioner of Education

Final Decision

Francis Gavin,

Petitioner,

v.

Board of Education of the Township of Allamuchy, Warren County, and Lisa Strutin,

Respondents.

Synopsis

In January 2021, *pro se* petitioner filed an appeal challenging the respondent Board's decision to appoint Lisa Strutin (Strutin) to a vacant seat on the Allamuchy Board of Education. The vacancy was created by the resignation of William Cramer on September 9, 2020, prior to the end of his term. The Board thereafter advertised the vacancy and petitioner submitted a statement of interest and resume on September 28, 2020. The Board interviewed petitioner at a meeting on October 26, 2020 but did not fill the vacancy and instead requested an extension of time from the Executive County Superintendent (ECS) to appoint a replacement member. Subsequently, at a Board meeting on November 23, 2020, Lisa Strutin (Strutin), who had recently lost her bid for reelection to the Board, was appointed to fill Cramer's unexpired term and was elected back to her former position as Board President. Petitioner contended that the Board violated *N.J.S.A.* 18A:12-15 when it appointed Strutin to fill the vacancy more than 65 days after the seat was vacated by the resignation of Cramer. The Board contended that this matter is moot as Strutin was subsequently reelected to a full term on the Board in 2021 and the vacancy created by the resignation of Cramer no longer exists.

The ALJ found, *inter alia*, that: there are no material facts at issue here and the matter is ripe for summary decision; the Board failed to appoint a replacement member within the statutory timeframe required by *N.J.S.A.* 18A:12-15 and therefore lost its authority to fill the vacancy; *N.J.S.A.* 18A:12-15 does not permit an ECS to grant a Board an extension of the 65-day window to fill a vacancy, so the extension in this case (which was later rescinded) was invalid; accordingly, Strutin's appointment was null and void as it was not authorized under *N.J.S.A.* 18A:12-15. The ALJ granted petitioner's motion for summary decision, denied the Board's cross motion, and ordered the ECS to appoint a Board member to the Allamuchy Board of Education.

Upon review, the Commissioner concurred with the ALJ that the Board did not have statutory authority to appoint Strutin to fill the Board vacancy created by Cramer's resignation. However, the Commissioner further agreed with the parties that petitioner's requested relief is now moot as the term created by that vacancy expired on December 31, 2021. Accordingly, the Initial Decision of the OAL was modified with respect to the remedy; petitioner's motion for summary decision was granted, but the requested remedy was dismissed as moot.

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

143-23
OAL Dkt. No. EDU 00307-21
Agency Dkt. No. 4-1/21

New Jersey Commissioner of Education

Final Decision

Francis Gavin,

Petitioner,

v.

Board of Education of the Township of Allamuchy, Warren County, and Lisa Strutin,

Respondents.

The record of this matter and the Initial Decision of the Office of Administrative Law (OAL) have been reviewed and considered, as have the exceptions filed by the respondents, Allamuchy Township Board of Education (Board) and Board member Lisa Strutin, pursuant to *N.J.A.C.* 1:1-18.4, and the reply thereto submitted by the petitioner, Francis Gavin.

Petitioner filed this matter seeking to vacate the Board's appointment of Lisa Strutin to a vacant seat on the Board. On September 9, 2020, William Cramer resigned as a member of the Board, thereby creating a vacancy. The Board advertised the vacancy and petitioner submitted his written expression of interest and a resume on September 28, 2020. The Board interviewed petitioner at its regular Board meeting on October 26, 2020, but after a closed session, announced that it would not be filling the vacancy at that time.

Pursuant to *N.J.S.A.* 18A:12-15(f), a Board is authorized to fill a vacancy on a board of education. However, in accordance with *N.J.S.A.* 18A:12-15(a), if the Board has not filled a vacancy within 65 days of its occurrence, the Executive County Superintendent (ECS) shall fill the vacancy.

On September 25, 2020, Strutin, who was president of the Board, contacted the ECS, Rosalie Lamonte, by email to discuss the possibility of taking longer than 65 days to appoint a Board member due to the upcoming school board election. On November 10, 2020 – three days before the 65-day deadline – the vice president of the Board wrote an email to the ECS, inquiring about an extension of the 65 days, and the ECS advised that the deadline would be extended to the November 23 Board meeting. Thereafter, on November 17, 2020, the Board attorney requested an extension to the December 21 Board meeting because the election results would not be certified until the November 23 meeting; the ECS granted this request. After the ECS informed petitioner that the deadline had been extended, petitioner inquired about the process. In response, on November 20, 2020, the ECS rescinded the extension in an email copied to the Board secretary, which stated:

> I am definitely aware of the statute to which you refer. The county office obviously prefers that the board makes the decision to fill a vacancy rather than the county superintendent. Nevertheless, since this appears to be generating some controversy, I have decided to ask the Allamuchy board to forward resumes of interested parties to me so that I can, consistent with my statutory authority as the county superintendent, fill the vacancy. The board may certainly advertise or otherwise post information about the vacant seat to generate interest in the position.
>
> After receipt and review of resumes, I will inform the board of my decision.

Notwithstanding the ECS's email, at a Board meeting held on November 23, 2020, Strutin – who had recently lost her bid for reelection – resigned from the Board and expressed interest in the vacant position created by Cramer's resignation. At the same meeting, the Board voted to appoint Strutin to the open seat and then elected her back to her former position as Board president. The ECS sent a letter to the Board on December 3, 2020, directing the Board to rescind Strutin's

appointment to the vacant seat. The Board did not comply. As such, petitioner filed the instant petition challenging Strutin's appointment.

Following cross-motions for summary decision, the Administrative Law Judge (ALJ) found that the Board failed to appoint a member within the statutory timeframe and therefore lost its authority to fill the vacancy. The ALJ found that *N.J.S.A.* 18A:12-15 does not permit an ECS to grant a Board an extension of the 65-day window to fill a vacancy, so the extension in this case (which was later rescinded) was invalid. As such, the ALJ declared Strutin's appointment null and void as it was not authorized by *N.J.S.A.* 18A:12-15, and further ordered the ECS to appoint a Board member to the Allamuchy Board of Education.

In their exceptions, the Board and Strutin argue that this petition is now moot as there have been multiple elections for the Board since the petition was filed. The Board explains that Strutin was reelected to the Board in 2021 and the vacancy created by Cramer's resignation in 2020 no longer exists. The Board contends that while a decision on the novel issues in this matter would be beneficial to help guide other Boards and ECSs through similar circumstances, the relief proposed by the ALJ should be rejected as any harm it would remedy concluded more than two years ago.

In reply, petitioner makes clear that the term for the vacancy created when Cramer resigned from the Board on September 9, 2020, ended on December 31, 2021. As such, petitioner agrees with the Board that the specific relief sought is now moot. However, petitioner clarifies that he alerted the ALJ prior to the expiration of the term but requested that a decision on the underlying issue be adjudicated, and the Board agreed. Petitioner argues that as this matter is of public importance and capable of repetition while evading judicial review, a decision should be rendered. Petitioner further contends that since appointed members typically only fill the position until the

next election, judicial intervention will often become moot due to the short timeframe. As such, petitioner requests that the Initial Decision be adopted in all aspects except the requested relief.

Upon review, the Commissioner agrees with the ALJ that the Board did not have statutory authority to appoint Strutin to fill the Board member vacancy created by Cramer's resignation. *N.J.S.A.* 18A:12-15 provides:

> Vacancies in the membership of the board shall be filled as follows:
>
> a. By the county superintendent, if the vacancy is caused by the absence of candidates for election to the school board or by the removal of a member because of lack of qualifications or is not filled within 65 days following its occurrence.
>
> . . .
>
> f. By a majority vote of the remaining members of the board after the vacancy occurs in all other cases.

When interpreting a statute, the goal is to discern the legislative intent, which can be gleaned from the plain language contained therein. *Board of Education of the City of Sea Isle City v. Kennedy*, 196 *N.J.* 1, 12 (2008). The word "shall" in the first line of the statute indicates that the statutory scheme is mandatory. The statute makes clear that a Board has the legal authority to fill a vacancy by majority vote, but if the vacancy is not filled within 65 days, then that authority shifts to the ECS. The legislature clearly delineated who has the authority to appoint a Board member to a vacant seat and the statute leaves no room for interpretation. There is no ambiguity that prior to the expiration of 65 days, a Board may fill a vacancy by majority vote; but after 65 days, the Board no longer has that authority. Notably, the legislature did not provide any mechanism by which an ECS can extend the statutory timeframe beyond 65 days to fill a Board vacancy. Accordingly, here, the Board was not authorized to appoint Strutin to fill the vacancy as more than 65 days had passed

since the resignation of former Board member Cramer. Any extension by the ECS was not permitted under *N.J.S.A.* 18A:12-15.

The Commissioner agrees with the parties, however, that petitioner's requested relief to nullify Strutin's appointment to the Board and to mandate that the ECS fill the vacancy is no longer viable as the term created by that vacancy expired on December 31, 2021. Nevertheless, considering that the issues in this case are capable of repetition, that such cases may often be rendered moot due to a short timeframe before an unexpired term ends, and considering the extensive delays in this matter, through no fault of the parties,[1] the Commissioner has addressed the underlying merits of this matter despite the lack of a remedy available at this late juncture.

Accordingly, the Initial Decision of the OAL is modified with respect to the remedy. Petitioner's motion for summary decision is granted, but the requested remedy is dismissed as moot.

IT IS SO ORDERED.[2]

Angelica Allen-McMillan, Ed.D.
ACTING COMMISSIONER OF EDUCATION

Date of Decision: May 16, 2023
Date of Mailing: May 17, 2023

[1] The Commissioner notes that the parties' cross-motions for summary decision were filed and argued by March 30, 2021, while the Board member position at issue was still active. The Initial Decision was issued nearly two years after the cross-motions for summary decision were filed.

[2] This decision may be appealed to the Appellate Division of the Superior Court pursuant to *N.J.S.A.* 18A:6-9.1. Under *N.J.Ct.R.* 2:4-1(b), a notice of appeal must be filed with the Appellate Division within 45 days from the date of mailing of this decision.

State of New Jersey
OFFICE OF ADMINISTRATIVE LAW

INIITAL DECISION
SUMMARY DECISION
OAL DKT. NO. EDU 00307-21
AGENCY DKT. NO. 4-1/21

FRANCIS GAVIN,
Petitioner,
v.
BOARD OF EDUCATION OF THE TOWNSHIP OF ALLAMUCHY, WARREN COUNTY AND LISA STRUTIN,
Respondents.

Francis Gavin, petitioner, pro se

Eric L. Harrison, Esq., for respondents (Methfessel & Werbel, attorneys)

Record Closed: February 1, 2023 Decided: February 21, 2023

BEFORE **JULIO C. MOREJON**, ALJ:

STATEMENT OF THE CASE

Petitioner, Francis Gavin (Gavin) seeks to vacate Respondent, Board of Education of the Township of Allamuchy's (the Board), decision to appoint Respondent, Lisa Strutin (Strutin), to a vacant seat on the Board.

PROCEDURAL HISTORY

On January 13, 2021, Gavin filed a petition with the Commissioner of Education of the State of New Jersey (Commissioner), challenging the decision of the Board appointing Strutin to a vacant board position as ultra-vires. Along with the petition, Gavin simultaneously filed with the Commissioner an application for emergent relief pursuant to N.J.A.C. 6A-3-1.6. The matter was transferred to the Office of Administrative Law (OAL) and received at the OAL on January 13, 2021, as an emergent and contested matter.

On January 19, 2021, the parties appeared remotely before the undersigned for oral argument concerning Gavin's application for emergent relied and on January 22, 2021, an Order was entered denying Gavin's application for emergent relief.

Thereafter, on February 24, 2021, the Board filed a motion for summary decision. On March 5, 2021, Gavin filed a cross motion for summary decision. On March 10, 2021, the Board filed its opposition to Gavin's cross motion. On March 30, 2021, the parties appeared remotely for oral argument. In accordance with Executive Order No. 127, as extended by N.J.S.A.26:13-32, all Agency Initial Decisions and Final Decisions were extended until January 1, 2022. I closed the record on February 1, 2023.

FINDINGS

The following facts are not in dispute and **FIND** the same as **FACT** herein.

The Board is a type II board of education pursuant to N.J.S.A. 18A:10-1 with nine members and governs the Allamuchy Township School District in Allamuchy Township, County of Warren and State of New Jersey. (Gavin's Brief in opposition to the Board's motion for summary decision, Statement of Facts; and the Board's Brief in support of its motion, Statement of Undisputed Facts and in opposition to Gavin's motion, Response to Petitioner's Statement of Facts). On September 9, 2020, William Cramer (Cramer) resigned as a member of the Board and a vacancy on the Board was created. Id.

The Board then advertised on their district website the existence of the vacancy. The Board required anyone interested in being appointed to the vacant seat to file a written expression of interest and a resume by October 16, 2020. Id. Gavin submitted to the Board Secretary a written expression of interest and resume on September 28, 2020. Id.

On October 26, 2020, in a public session of a regular board meeting, the Board interviewed Gavin. After conducting the interview, the Board moved into a closed session. Id. When the Board returned to public session, Strutin, the Board president, announced that the Board would not be filling the vacancy at that time. Id. The Board did not identify any other individuals who had expressed an interest in filling the vacant seat nor did the Board interview any other candidates for the seat. Id.

Pursuant to N.J.S.A. 18A:12-15f, the Board by a majority vote of the remaining members of the board after a vacancy, is authorized to fill said vacancy. Pursuant to N.J.S.A. 18A:12- 15a, the authority to fill a board vacancy shifts to the Dr. Rosalie Dr. Lamonte, Interim Executive County Superintendent of Schools for Warren County, (Dr. Lamonte) if the vacancy has not been filled by the local board within sixty-five (65) days following the occurrence of the vacancy. Id. The Board failed to fill the vacancy by November 13, 2020, a period of 65 days since the occurrence of the vacancy, and therefore, the county superintendent is authorized by N.J.S.A. 18A:12- 15a to appoint a board member. Id.

On September 25, 2020, Strutin contacted Dr. Lamonte to discuss the possibility of the Board needing more than 65 days to appoint someone to fill Cramer's vacant seat pending the results of the upcoming election in November. (Certification of James Schlessinger at ¶ 2, Exhibit A, attached to respondents' motion; Certification of Lisa Strutin at ¶¶ 4-5, attached to respondents' motion).

On November 10, 2020, Board Vice President Giovanni Cusmano (Cusmano) sent an email to Dr. Lamonte inquiring as to the deadline for the Board to fill the vacant seat. (Certification of Lisa Strutin at ¶ 6, attached to respondents' motion; Certification of James

Schlessinger at ¶ 4, Exhibit B, attached to respondents' motion). In response, Dr. Lamonte informed Cusmano that the Board could have additional time beyond the 65 day period to fill the vacant seat. (Certification of Lisa Strutin at ¶ 6, attached to respondents' motion; Certification of James Schlessinger at ¶ 4, Exhibit B, attached to respondents' motion).

On November 17, 2020, Board Attorney Ari Schneider, Esq. sent an email to Dr. Lamonte seeking a further extension of time for the Board to fill the seat. (Certification of Lisa Strutin at ¶ 8, attached to respondents' motion; Certification of James Schlessinger at ¶ 5, Exhibit C attached to respondents' motion). Dr. Lamonte reiterated her approval of additional time for the Board to appoint a new member itself. Dr. Lamonte informed Gavin of her extension. (Certification of Lisa Strutin at ¶ 8, attached to respondents' motion; Certification of James Schlessinger at ¶ 5, Exhibit C, attached to respondents' motion)

In response to an email from Gavin on November 14, 2020, advising her that the 65-day time period within which the Board was authorized to fill the vacancy had elapsed and that he continued to be interested in the vacant seat, on November 17, 2020, Dr. Lamonte responded to Gavin in an email informing him that she had "... extended the timeline for the board to interview interested candidates and appoint someone until their December 21, 2020 meeting." (Gavin's Brief in opposition to the Board's motion for summary decision, Statement of Facts; and the Board's Brief in support of its motion, Statement of Undisputed Facts and in opposition to Gavin's motion, Response to Petitioner's Statement of Facts).

On November 18, 2020,Gavin sent an email to Dr. Lamonte inquiring about the circumstances that gave rise to an extension of time to fill the board vacancy and further outlining the statutory framework of relative authority between Dr. Lamonte and the Board. (Certified Petition, Exhibit D).

On November 20, 2020, in response to another inquiry from Gavin, Dr. Lamonte reversed her prior decision granting the Board until at least the December 21, 2020, Board

meeting to fill the vacant Board position and informed Gavin that she would ask the Board to forward to her the resumes of individuals who had expressed an interest in the vacant board position. Dr. Lamont's email to Gavin stated:

> I am definitely aware of the statute to which you refer. The county office obviously prefers that the board makes the decision to fill a vacancy rather than the county superintendent. Nevertheless, since this appears to be generating some controversy, I have decided to ask the Allamuchy board to forward resumes of interested parties to me so that I can, consistent with my statutory authority as the county superintendent, fill the vacancy. The board may certainly advertise or otherwise post information about the vacant seat to generate interest in the position.
>
> After receipt and review of resumes, I will inform the board of my decision. [1]
>
> [Certified Petition at ¶ 23]

It was not until Dr. Lamonte learned of Strutin's intention to seek appointment to the vacant seat that she attempted to rescind the extension she had previously granted. Dr. Lamonte claimed that the Board's anticipated appointment of Ms. Strutin "was a means to circumvent the results of the election, resulting in a lack of transparency and violation of the public's trust." (Certification of James Schlessinger, Exhibit F)

On November 23, 2020, the Board convened remotely for a regularly scheduled board meeting. At this meeting Strutin resigned from her position as a member of the Board and President and expressed interest in the vacant position created by Cramer's resignation. Strutin was a candidate for reelection at the November 2020 election but did not win reelection, and her term would conclude at the end of 2020. (Gavin's Brief in opposition to the Board's motion for summary decision, Statement of Facts; and the Board's Brief in support of its motion, Statement of Undisputed Facts and in opposition to Gavin's motion, Response to Petitioner's Statement of Facts).

[1] Dr. Lamont's email was copied to James Schlesinger (Schlesinger) , the Secretary of the Board regarding her decision of November 20, 2020.

The remaining Board members then went into executive session. When the Board returned to the public session the Board voted to appoint Strutin to fill Cramer's vacant board seat. Strutin was then sworn in as the replacement for Cramer and then the Board elected her as President of the Board. The Board's action in appointing Cramer was taken without public notice, as the agenda did not provide that the Board would consider Strutin to fill Cramer's vacant seat position, and before public comment was allowed regarding the same. Id.

Following the Board's decision, on December 3, 2020, Dr. Lamonte, directed the Board to rescind the appointment of Strutin to the Board not later than the Board's next regularly scheduled board meeting. On December 10, 2020, the Board convened for a special meeting with an agenda of executive session to discuss potential litigation with the Department of Education and a personnel matter. The only action taken by the Board on December 10, 2020 was to appoint an acting superintendent. The regularly scheduled meeting noticed for December 21, 2020 was cancelled due to the Board inability to have a quorum of members. Id.

The Board gave no reason for declining to fill the vacancy at the December 3, 2020, meeting. The Board did not identify any other individuals who had expressed an interest in filling the vacant seat nor did the Board interview any other candidates for the seat. At no time after Cramer's resignation, did the Board publicly discuss seeking an extension of time of the December 21, 2020 extension granted by Dr. Lamonte to fill the vacant seat on the Board after, or adopt a resolution to seek an extension of time of the December 21, 2020, extension provided by Dr. Lamonte. Id.

ARGUMENTS

The Board argues that its appointment of Strutin to fill the vacancy on November 23, 2020 was within its authority under N.J.S.A. 18A:12-15(a) upon Dr. Lamonte granting the Board an extension of the 65-day timeframe under the statute Id. The Board argues further that its decision is presumed valid as Dr. Lamonte's rescission of the granted extension could only be effective if said decision could be shown to be arbitrary,

capricious, or unreasonable. The Board cites to following authority for this argument: Cell v. Zoning Board of Adjustment, 172 N.J. 75, 81 (2002). Furthermore, a "trial court . . . may not substitute its judgment for that of the governmental body being challenged." Miller v. Passaic Valley Water Commission, 259 N.J. Super. 1, 15 (App. Div.), certif. denied, 130 N.J. 601 (1992). The Board posits that since Gavin has failed to show the Board acted in an arbitrary, capricious, or unreasonable manner, the Board's decision is valid.

The Board's main argument is contained in its brief in opposition to Gavin's cross-motion for summary decision as follows:

> This tribunal's decision on the parties' cross-motions ultimately comes down to one question: were the actions of the Board in appointing Lisa Strutin arbitrary, capricious, or unreasonable? Cell v. Zoning Board of Adjustment, 172 N.J. 75, 81 (2002)?.
>
> [Board, opposition brief, at page 8]

Gavin's main argument is that Dr. Lamonte did not have the statutory authority to grant an extension of the 65-dasy to the Board. Gavin argues that N.J.S.A. 18A:12-15(a) confers a mandatory duty on Dr. Lamonte through the word "shall" in N.J.S.A.18A:12-15(a), and that Dr. Lamonte had no authority to delegate this duty pursuant to N.J.S.A.18A:7-8.

Gavin argues further that while Dr. Lamont had the authority and discretion to grant an extension of 65-days to the Board it would be correct that Dr. Lamont also had the discretion to rescind such an extension in the present circumstances. Gavin cites to In re Election Inquiry, 92 N.J.A.R. at 222, for this authority, where the Superintendent only became aware of the potential conflict of interest after the deadline had passed and after she had granted the extension. After having the concern brought to her attention, the Superintendent rescinded the extension, thereby fully transferring the authority back to herself. Gavin thus argues that Dr. Lamont, like the Superintendent in In Re Election

Inquiry, had the authority to invoke the mandatory duty, as prescribed by the word "shall" in N.J.S.A.18A:12-15(a), to rescind the extension.

Gavin argues that the Board's appointment of Strutin was ultra vires. In making this argument, Gavin points out that Schlessinger, the Board's Business Administrator, received Dr. Lamont's rescission at 5:33 pm on Friday, November 20, and there was ample opportunity to communicate this rescission to the Board before its meeting began at 7:30 pm on Monday, November 23. The Board's appointment of Strutin after Dr. Strutin rescinded the extension, Gavin argues, was therefore, ultra vires.

Gavin also argues that the arbitrary, capricious, or unreasonable standard is not reached because Dr. Lamonte did not have authority to grant the extension, and therefore the Board's decision is not presumed to be valid, because the Board had no legal authority to make a decision after the expiration of the 65-day period. Gavin argues for the following relief herein:

1. Declaring the action taken by the Allamuchy Township Board of Education on November 23, 2020 to fill the vacant board seat to be ultra vires and null and void;

2. Vacating the purported appointment of Lisa Strutin on November 23, 2020 as a member of the Allamuchy Township Board of Education; and

3. Mandating the Executive County Superintendent to make an appointment from the citizens of Allamuchy Township to fill the vacancy on the Allamuchy Township Board of Education within a time certain.

DISCUSSION AND CONCLUSIONS

Pursuant to N.J.A.C. 1:1-12.5(b), summary decision "may be rendered if the papers and discovery which have been filed, together with the affidavits, if any, show that there is no genuine issue as to any material fact challenged and that the moving party is entitled to prevail as a matter of law." This rule is substantially similar to the summary-

judgment rule embodied in the New Jersey Court Rules. See Judson v. Peoples Bank & Trust Co. of Westfield, 17 N.J. 67, 74 (1954). In Brill v. Guardian Life Insurance Co., 142 N.J. 520, 540 (1995), the New Jersey Supreme Court addressed the appropriate test to be employed in deciding the motion:

> [A] determination whether there exists a "genuine issue" of material fact that precludes summary judgment requires the motion judge to consider whether the competent evidential materials presented, when viewed in the light most favorable to the non-moving party, are sufficient to permit a rational factfinder to resolve the alleged disputed issue in favor of the non-moving party. The "judge's function is not . . . to weigh the evidence and determine the truth of the matter but to determine whether there is a genuine issue for trial." . . . . If there exists a single, unavoidable resolution of the alleged disputed issue of fact, that issue should be considered insufficient to constitute a "genuine" issue of material fact for purposes of Rule 4:46-2.
>
> [Citations omitted.]

In evaluating the merits of the motion, all inferences of doubt are drawn against the movant and in favor of the party against whom the motion is directed. Judson, 17 N.J. at 75. However, "[w]hen a motion for summary decision is made and supported, an adverse party in order to prevail must by responding affidavit set forth specific facts showing that there is a genuine issue which can only be determined in an evidentiary proceeding." N.J.A.C. 1:1-12.5(b). The New Jersey Supreme Court has cautioned that, "if the opposing party offers no affidavits or matter in opposition, or only facts which are immaterial or of an insubstantial nature, a mere scintilla, . . . '[f]anciful, frivolous, gauzy or merely suspicious' . . ., he will not be heard to complain if the court grants summary judgment, taking as true the statement of uncontradicted facts in the papers relied upon by the moving party, such papers themselves not otherwise showing the existence of an issue of material fact." Judson, 17 N.J. at 75 (citation omitted). Stated differently, "[b]are conclusions . . . without factual support in tendered affidavits, will not defeat a meritorious application for summary judgment." U.S. Pipe & Foundry Co. v. Am. Arbitration Ass'n, 67 N.J. Super. 384, 399-400 (App.Div.1961). Likewise, unsupported and self-serving statements, standing alone, are insufficient to create a genuine issue of material fact.

Heyert v. Taddese, 431 N.J. Super. 388, 413-414 (App. Div. 2013). And the "non-moving party cannot defeat a motion for summary judgment merely by pointing to any fact in dispute." Brill, 142 N.J. at 529. Disputed issues of fact that are immaterial or of an insubstantial nature will not suffice. Ibid.; Worthy v. Kennedy Health System, 446 N.J. Super. 71, 85-86 (App. Div. 2016), certif. denied, 228 N.J. 24 (2016). Rather, "[c]ompetent opposition requires 'competent evidential material' beyond mere 'speculation' and 'fanciful arguments,'" Cortez v. Gindhart, 435 N.J. Super. 589, 605 (App. Div. 2014), certif. denied, 220 N.J. 269 (2015) (citation omitted), and the party opposing the motion "'must do more than simply show that there is some metaphysical doubt as to the material facts.'" Alfano v. Schaud, 429 N.J. Super. 469, 474 (App. Div. 2013), certif. denied, 214 N.J. 119 (2013) (citation omitted).

Judged against these standards, I **CONCLUDE** that there is no genuine issue as to any material fact and that the matter is ripe for summary decision in favor of Gavin.

Pursuant to N.J.S.A. 18A:12-15, on the occasion of a vacancy occurring on a local board of education, the statute vests the local board of education with authority to appoint a citizen of that municipality to fill such a vacancy. However, that authority exists for a period of 65 days from the creation of the vacancy. After the expiration of 65 days, on the failure of the local board of education to appoint, the authority shifts to the Executive County Superintendent. The statute states in relevant part:

> Vacancies in the membership of the board shall be filled as follows:
>
> a. By the county superintendent, if the vacancy is caused by the absence of candidates for election to the school board or by the removal of a member because of lack of qualifications, or is not filled within 65 days following its occurrence;
>
> * * *
>
> f. By a majority vote of the remaining members of the board after the vacancy occurs in all other cases.

[N.J.S.A.18A:12-15]

The Board raise the following arguments in an effort to justify the action that they took in contravention of N.J.S.A. 18A:12-15. 1) Dr. Lamonte, the Executive County Superintendent granted an extension of the legislatively established time frame to appoint; and 2) the action of a local agency is not subject to review unless arbitrary, capricious or unreasonable on its merits. Each of these arguments is without merit, as Dr. Lamont did not have the authority to make said extension.

The Board argues that they sought from Dr. Lamonte an extension of the statutory time frame and that the request was granted. However, as discussed herein, the Legislature has established a clearly delineated grant of authority to appoint to fill a vacancy on a local board of education. N.J.S.A. 18A:12-15 grants no authority or provisions for extension or modification of that statutory scheme by anyone. The statute provides that the Executive County Superintendent has no authority to modify the unequivocal provisions of the statute. Id. The only authority granted by the statute to the Executive County Superintendent in the circumstance of a vacancy is to fill that vacancy after the passage of 65 days, the time frame in which the local board of education is authorized to fill the vacancy. Id. [emphasis supplied] There is no grant of authority to the Executive County Superintendent to extend or otherwise disregard the statutory directive.

In addition to the authority to appoint to fill a vacancy on a local board of education, the Legislature, in creating the statutory position of Executive County Superintendent, has defined both the jurisdiction and the general scope of the powers and duties of the position of the Executive County Superintendent. The jurisdiction of the Executive County Superintendent is defined in N.J.S.A. 18A:7-5 as follows:

> Each executive county superintendent shall devote his entire time to the duties of his office, and he shall have general supervision of all of the public schools of the districts of the county except those city school districts in which there shall have been appointed superintendents of schools.

Among the 24 specifically mandated powers and duties that the Legislature has vested in the Executive County Superintendent pursuant to N.J.S.A. 18A:7-8, none grant the Executive County Superintendent the authority to extend statutory timeframes or to delegate her authority to a local board of education. Without some legislative grant of authority to modify the statutory scheme, Dr. Lamont, as the Executive County Superintendent had no power to grant an extension of time to appoint to the Board.

In this matter, the Board failed to appoint within the statutory time frame, and thus I **CONCLUDE** the Board lost its authority to appoint after the passage of the 65-days, under N.J.S.A.18A:12-15, and only Dr. Lamonte, the Executive County Superintendent can then appoint to fill the vacancy. The statute provides for no other relevant considerations, interpretations or exceptions. No further inquiry need be made. The fact that Dr. Lamonte granted the Board an extension after the 65-days, and then "rescinded" the same was done so in error, as it is not allowed by N.J.S.A.18A:12-15.

Therefore, I **CONCLUDE** that the appointment of Strutin by the Board on November 23, 2020 was not authorized by N.J.S.A. 18A:12-15 and must be declared to be a nullity and I **CONCLUDE** that the Executive County Superintendent must be ordered to fulfill her statutory duty to appoint a board member.

I **CONCLUDE** that summary decision for Gavin under N.J.A.C. 1:1-12.5, is appropriate herein because there are no genuine issues in dispute and the relief requested in his motion for summary decision, is **GRANTED**.

I **CONCLUDE** that the Board's motion for summary decision is **DENIED**.

ORDER

It is hereby **ORDERED** that summary decision for Gavin under N.J.A.C. 1:1-12.5, is appropriate herein because there are no genuine issues to dispute the relief requested in his motion for summary decision, and therefore his motion for summary decision is

GRANTED; and it is further **ORDERED** that the relief requested therein by Gavin in his motion for summary decision, is **GRANTED.**

It is hereby **ORDERED** that the Board's motion for summary decision is **DENIED**.

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

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

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

February 21, 2023 — Julio Morejon

DATE — **JULIO C. MOREJON**, ALJ

Date Received at Agency — February 21, 2023

Date E-Mailed to Parties: — February 21, 2023

lr

APPENDIX

EXHIBITS

For petitioner:

Cross Motion for Summary Decision with an accompanying Brief.

For respondent:

Motion for summary decision, legal brief, certifications of Lisa Strutin and certification of James Schlessinger, attorney certification, and exhibits.

The Board's opposition brief to Gavin's cross motion for summary decision

144-23
OAL Dkt. No. EDU 10889-22
Agency Dkt. No. 309-11/22

New Jersey Commissioner of Education

Final Decision

P.F., on behalf of minor child, D.F.,

Petitioner,

v.

Board of Education of the High Point Regional High School District, Sussex County,

Respondent.

The record of this matter and the Initial Decision of the Office of Administrative Law (OAL) have been reviewed and considered.[1] The parties did not file exceptions.

In this matter, petitioner challenges the Board's determination that her daughter was not the victim of harassment, intimidation, and bullying (HIB) when another student allegedly grabbed her by the arm and would not let go. Petitioner also alleged that the student had stolen D.F.'s Chromebook twice before turning it in, claiming that she had found it. Following an investigation in accordance with the Anti-Bullying Bill of Rights Act, *N.J.S.A.* 18A:37-13 *et seq.*, the Board found the incident was the result of a conflict between students that was not motivated by a distinguishing characteristic of D.F., and therefore concluded that the incident did not meet the definition of HIB. Nevertheless, to address the conflict, the Board had the students sign a no-contact order and adjusted class schedules as necessary.

[1] The Commissioner was not provided with a transcript of the February 10, 2023 hearing in this matter.

Following a hearing on the merits, the Administrative Law Judge (ALJ) concluded that the petitioner had not met her burden of demonstrating that the Board's determination regarding the HIB allegations was arbitrary, capricious, or unreasonable.

Upon review, the Commissioner agrees with the ALJ that the Board did not act in an arbitrary, capricious, or unreasonable manner in rendering its HIB determination, as the alleged actions were not motivated by a distinguishing characteristic of D.F. Accordingly, the Initial Decision of the OAL is adopted as the final decision in this matter, and the petition is hereby dismissed.

IT IS SO ORDERED.[2]

Angelica Allen-McMillan, J.D.S.
ACTING COMMISSIONER OF EDUCATION

Date of Decision: May 16, 2023
Date of Mailing: May 17, 2023

[2] This decision may be appealed to the Appellate Division of the Superior Court pursuant to *N.J.S.A.* 18A:6-9.1. Under *N.J.Ct.R.* 2:4-1(b), a notice of appeal must be filed with the Appellate Division within 45 days from the date of mailing of this decision.

State of New Jersey
OFFICE OF ADMINISTRATIVE LAW

INITIAL DECISION
OAL DKT. NO. EDU 10889-22
AGENCY DKT. NO. 309-11/22

P.F. ON BEHALF OF MINOR CHILD, D.F.,
Petitioner,
v.
HIGH POINT REGIONAL HIGH SCHOOL DISTRICT BOARD OF EDUCATION, SUSSEX COUNTY,
Respondent.

P.F., petitioner, pro se

Eric L. Harrison, Esq., for respondent (Methfessel & Werbel, attorneys)

Record Closed: February 21, 2023 Decided: April 4, 2023

BEFORE **KELLY J. KIRK**, ALJ:

STATEMENT OF THE CASE

Petitioner, P.F., challenges the decision of the High Point Regional High School District Board of Education (Board) that the incident complained of did not constitute harassment, intimidation, and bullying (HIB).

PROCEDURAL HISTORY

By letter dated October 27, 2022, the Board notified petitioner that "the incident in question was properly determined to not have been a HIB." On November 15, 2022, petitioner filed with the New Jersey Department of Education (Department) a Pro Se Petition of Appeal (Petition) alleging that her "daughter [D.F.] was being bullied during the 2020/21 school year which has now carried over into the 2022/23 school year" and that the superintendent, administrators and board of education were not following policy, and requesting the following relief: "Superintendent and BOE to admit that this is indeed HIB"; "Have my daughter complete art work and a functional resume from the 2022/23 school year";[1] "Enforce HIB laws, policies, and safety for all students"; and "Stop the HIB incidences that are flowing over into the 2022/23 school year." On December 1, 2022, respondent filed its answer to the Petition.

The Department transmitted the case to the Office of Administrative Law (OAL) under the Administrative Procedure Act, N.J.S.A. 52:14B-1 to -15, and the act establishing the office, N.J.S.A. 52:14F-1 to -23, for a hearing under the Uniform Administrative Procedure Rules, N.J.A.C. 1:1-1.1 to -21.6, and the rules of procedure established by the Department of Education to hear and decide controversies and disputes arising under school laws, N.J.A.C. 6A:3-1.1 to -1.17. The case was filed at the Office of Administrative Law (OAL) on December 6, 2022. The hearing was held on February 10, 2023. The record closed on February 21, 2023, after receipt of the parties post-hearing submissions.

FACTUAL DISCUSSION

Preliminary Facts

P.F. testified on behalf of petitioner. School anti-bullying specialist (ABS) James Rice testified on behalf of respondent. Having had an opportunity to consider the

[1] The matter transmitted to the OAL was a challenge to the Board's HIB investigation and therefore this relief falls outside the scope of the subject matter and is not addressed herein.

evidence and to observe the witnesses and make credibility determinations based on the witnesses' testimony, I **FIND** the following preliminary **FACTS**:

High Point Regional High School (HPRHS) Harassment—Intimidation—Bullying Report 33-21-22, initial referral date May 10, 2022 (May 2022 HIB Report), reflects that there was an investigation into an incident between D.F. and another student, P.D., that occurred in a school hallway on May 4, 2022.

James Rice, who previously worked as an active police officer for twenty-five years, is employed at HPRHS as the director of safety and security and as the school anti-bullying specialist (ABS). Rice was on vacation on May 4, 2022, so the incident was initially handled by the school assistant principal. Upon his return from vacation, Rice was directed by the school principal to conduct a HIB investigation. Rice prepared the May 2022 HIB Report and summarized his factual findings as follows:

> On 5/4/2022, it was reported to AP Schleer that an incident involving [redacted] and [redacted] had occurred in the 400 wing hallway near Room 409 at the top of the ramp. AP Schleer had conducted an investigation and reviewed video tape of the incident which involved the two students conversing, then [redacted] ["]grabbing" [redacted] left wrist and pulling [redacted] toward [redacted]. AP Schleer concluded that the arm pulling was an attempt by [redacted] to pull [redacted] towards her. [Redacted] did not come to school on 5/5/22, 5/6/22, or 5/9/22. The administration contacted [P.F.] about the absences, at which time [P.F.] said that she felt [redacted] was being bullied and that she was not allowing [redacted] to return to school until "something is done."
>
> On 5/10/2022, I was directed by Principal Tallamy to conduct an HIB investigation in reference to the conflict between the two students that had occurred on 5/4/2022 and what may have been going on prior to that incident.
>
> Myself, AP Schleer, and Mrs. Delaney (acting as Case Manager) now spoke to a witness to the incident, [redacted] who is [redacted] boyfriend.[2] [Redacted] told us that [redacted] and [redacted] are friends, but that there was an

[2] The boyfriend referred to herein is the boyfriend of D.F.

issue previous to 5/4 where [redacted] took [redacted] Chromebook. [Redacted] said that [redacted] brought the Chromebook to the office and said she "found it." [Redacted] said that [redacted] was not talking to [redacted] because of the Chromebook issue and planned to avoid her for 2 days. [Redacted] said that on 5/4, [redacted] came up to talk to [redacted] and that [redacted] wanted to hug [redacted] and that [redacted] grabbed [redacted] arm to give her the hug. [Redacted] said that he stepped between them and [redacted] let go. [Redacted] provided a written statement about what we talked about (see statement).

Myself, AP Schleer, and Mrs. Delaney (acting as Case Manager) now spoke to [redacted] about the incident. [Redacted] said that she took the Chromebook because [redacted] left it in the lunchroom and that she turned it into the Main Office so they could give it back to her. [Redacted] said that [redacted] is her friend and that she wanted a hug. [Redacted] said that [redacted] wouldn't give her a hug so she grabbed her arm to pull her towards her to get a hug. [Redacted] said that [redacted] stepped in and she let go of [redacted] arm. They all went to class after that.

At approximately 2:45 p.m., Myself and Mrs. Imhoff, (acting as Case Manager per Mrs. Delaney) spoke to [P.F.] and [redacted] via telephone in order to gather information from [redacted] about this incident. [Redacted] told me that Last week (Week of 5/2/22 through 5/6/22) that [redacted] "started acting different (explained different as weird). [Redacted] continued by saying that on Monday, [redacted] took her Chromebook and that it wasn't the first time. Then on Wednesday, [redacted] came up to her and [redacted] while they were walking in the hallway near Room 409. [Redacted] said that they met, and [redacted] grabbed her left arm and pulled her towards her. I asked [redacted] said anything, [redacted] said yes, but she forgets exactly what it was. [P.F.] added that someone should have talked to [redacted] sooner. I asked [redacted] why she did not come to school since that incident took place and [redacted] said that she was afraid that [redacted] would do that again. I then asked [redacted] if that incident made her feel uncomfortable, to which she replied yes. [P.F.] added that [redacted] wasn't uncomfortable, that she was afraid. I asked [P.F.] to have [redacted] email me a statement about the incident, to which she told me that [redacted] would. No email was ever sent.

On 5/11/2022, a meeting took place with [P.F.], [redacted], and School Administration. A No Contact Order was put in

> place and signed by [redacted], [P.F.] and AP Schleer. I was not present at this meeting.
>
> On 5/13/2022, [redacted] came to school and she provided me with a written statement about the incident at that time. (see statement). Later this day, Myself, AP Schleer and Mrs. Delaney (acting as Case Manager) met with [redacted] signed the No Contact Order and Mrs. Delaney went over everything with her. [Redacted] said she understood.
>
> Based on the information gathered as part of this investigation, I have concluded that this incident is the result of a conflict between the two students and that no distinguishing characteristic is present at this time. This incident is classified as unfounded as a HIB. Report submitted by ABS Rice.
>
> [R-1.]

The May 2022 HIB Report reflects that Rice's investigation found no substantial disruption of or interference with operations of the school or rights of students, no actual or perceived distinguishing characteristic, no physical or emotional harm or fear of harm to a student or his or her property, no effect of insulting or demeaning a student or group of students, and no creation of "hostile educational environment" interfering with a student's education. The handwritten questions on the last page of the May 2022 HIB Report were from Superintendent Ripley and were answered by Rice and the assistant principal and resulted in no changes to the May 2022 HIB Report.

By email dated May 10, 2022, P.F. advised that before she would allow D.F. to return to school she required the following: P.D. to be removed from D.F.'s gym class; P.D. to be removed from the adjoining art room; P.D. to sit in a different area/room during lunch; D.F. to be allowed to use her cell phone or a school phone privately to immediately inform her of issues with P.D.; and a member of HPRHS administration to immediately advise her of any issue with P.D. (P-1.)

An HPRHS No-Contact Order, dated May 11, 2022, reflects that "[o]n the basis of information obtained in statements, interviews and incident report at this time it is found that there is reasonable cause to believe that the . . . students have been involved in a

dispute that requires action by the [HPRHS] District" and ordering, inter alia, that the students: "shall have no contact of any nature, to include in person, by telephone, in writing, through e-mails, instant messages or [otherwise]," "shall not personally or through third parties (friends), threaten assault, stalk, attack, harass, bully, intimidate, or otherwise abuse in any nature each other," "shall be expected to keep a reasonable distance from each other while attending school," "shall avoid each other is [sic] the hallways, cafeteria, and classrooms," and "shall maintain distance from each other that will avoid any type of physical confrontation." (R-2.) The No-Contact Order reflects that it was effective immediately and would remain in effect unless modified or terminated "by the Main Office," that "a party that violates this order faces immediate disciplinary action," and that "[v]iolation may occur even if the parties consent to contact" because only HPRHS administration could release the parties from the No-Contact Order. (R-2.) P.F. and D.F. signed the No-Contact Order on May 11, 2022, and D.P. signed the No-Contact Order on May 13, 2022.

By email dated May 11, 2022, principal Jonathan Tallamy confirmed that P.D. had been "changed to a different PE period." (P-1.) By email dated May 15, 2022, P.F. advised that D.F. had seen P.D. in gym class. (P-1.) By emails dated May 16, 2022, and May 17, 2022, Principal Tallamy advised that the PE schedule is sometimes tricky with activities and locations, and that it was an issue due to weather, but there was no interaction between D.F. and P.D. and it would not be a problem in the future, regardless of weather. (P-1.) By email dated May 22, 2022, P.F. alleged that D.F. had been the victim of three HIB incidents and advised that if she did not receive written confirmation that P.D. was removed from D.F.'s gym class she would keep D.F. out of school. By email dated May 23, 2022, Superintendent Ripley advised that he was reviewing the May 2022 HIB Report and that he would contact her to discuss the process and management of the issue. (P-1.)

By email dated June 2, 2022, P.F. advised that there was an incident in school on June 1, 2022, wherein P.F. and her boyfriend were being made fun of and harassed in the auditorium and another student, D.M., said to them they were "special education kids," and that contrary to her agreement with the District, she was not notified. P.F. further advised that she was concerned about several enumerated changes in her daughter's

demeanor. (P-1.) Superintendent Ripley replied, stating, inter alia, that he personally communicates with the director, D.F.'s case manager, and other administrators several times a week to monitor D.F.'s social, emotional, and academic health, and that a HIB investigation would be initiated. (P-1.) Rice investigated the June 1, 2022, incident and determined that it met the HIB criteria.

By letter dated July 1, 2022, Principal Tallamy notified petitioner that the District did not find evidence that D.F. was involved in an act of HIB or any other Code of Conduct violation with regard to the May 4, 2022,[3] incident, that a follow-up session had been conducted with D.F. and a school counselor, and that no administrative action was necessary at that time. (R-3.) The July 1, 2022, letter further reflects that the following services were offered for D.F.: "Met with ABS, Assistant Principal [and] Case Manager"; "No contact order in place"; "Guidance Counselor follow up as needed"; and "Reminder of student support resources." (R-3.) The July 1, 2022, letter advised petitioner that she could request a hearing before the Board. (R-3.) On July 13, 2022, petitioner emailed Principal Tallamy in response to the July 1, 2022, letter stating that she "would like to meet with the Board of Education regarding the incident" and that "[w]e can do it in executive session; however, the public does need to know about situations like this being swept under the carpet." (R-4.) On July 13, 2022, superintendent Scott Ripley emailed petitioner advising that she could present her concerns to the Board during public comments at the next meeting on July 26, 2022. (R-4.) Shortly thereafter, Superintendent Ripley again emailed petitioner, advising, "If however you are seeking an official appeal to a HIB determination, please provide the request and the context regarding the case in question." (R-4.) Petitioner replied that "this is an official appeal request" of a "harassment/assault incident" and subsequent emails confirmed that it was for the May 4, 2022, incident. (R-4.) The HIB appeal was scheduled for the Board's July 21, 2022, at 6:00 p.m. virtual meeting. (R-4.) Rice did not attend the Board meeting.

[3] The letter incorrectly states, "the incident of 5/10/22" (the date on which Rice's investigation was commenced).

A memorandum dated July 21, 2022, from anti-bullying coordinator Seamus Campbell to Superintendent Ripley summarizes events related to two situations that were investigated as possible HIB, to wit: 33-21-22 and 38-21-22.

> **33-21-22**
>
> On **5/4/22**, [redacted] notified Assistant Principal Mr. Michael Schleer of an incident involving herself and another student. [Redacted] communicated an allegation to Mr. Schleer that earlier that day, a student had physically assaulted her. Mr. Schleer began to investigate [redacted] allegations immediately. Mr. Schleer contacted High Point's Security Office in an attempt to obtain surveillance footage of the alleged incident. Mr. Schleer attempted to make contact with the student's parent, [P.F.], by phone on 5/4/22, but was unable to establish contact.
>
> On **5/5/22**, Mr. Schleer viewed the video footage in question, and called and spoke with [P.F.] over the phone.
>
> On **5/6/22**, Mr. Schleer attempted to meet with [redacted], but she was absent from school. Mr. Schleer spoke with Mr. Tallamy and it was decided that [P.F.] should be invited to attend a meeting at her earliest convenience with the High Point Administration as well as Special Education Case Manager, Ms. Tess Roman. **Mr. Tallamy directed Mr. Rice to conduct a H.I.B. investigation**. Mr. Tallamy made several attempts to schedule a meeting with [redacted] and her mother, [P.F.] finally agreed to come in for a meeting on 5/9/22 at 3:30 p.m.
>
> On **5/9/22**, an in person meeting was held at High Point. Attendees included [redacted], [P.F.], Mr. Tallamy, Mr. Schleer, Ms. Roman and Mrs. Delaney (Supervisor of Pupil Personnel Services).
>
> On **5/13/22**, Mr. Rice procured a written statement from [redacted].
>
> **Additional Information and Context**:
>
> [Redacted] was absent from school on 5/6, 5/9, 5/10, 5/11. An essential component of a H.I.B. investigation is obtaining a written statement from the alleged victim. [Redacted] persistent absences prolonged the time it took to complete this investigation.

NJ regulations stipulate that a "distinguishing characteristic" must be a component of a conflict in order for it to be considered a H.I.B. Mr. Rice's investigation concluded that no distinguishing characteristic existed, and thus the incident and related incidents amounted to a "conflict" among students and not a H.I.B.

As is always the case, High Point provides structured support and proactive measures to remediate such conflicts. For this conflict, a "no contact order" was developed and signed by students and parents which facilitated preventing further conflict. [Redacted] case manager, Ms. Roman, and other HP staff, consulted with her regarding ways in which to avoid future conflict. Other students involved in this conflict were provided with similar support. Also, one or more student schedules were changed in order to reduce contact between students having a conflict and several teachers were notified of the need to supervise specific students at specific times in order to prevent subsequent conflicts.

On **5/15/22**, [P.F.] lodged a complaint to Mr. Tallamy claiming that [redacted] and another student might have been in the same gym class despite schedule changes. Mr. Tallamy responded to [P.F.] through email and explained that inclement weather sometimes causes Phys. Ed. classes to share facilities.

On **5/20/22**, Mr. Tallamy signed Mr. Rice's H.I.B. report and forwarded it to Dr. Ripley.

On **5/23/22**, Dr. Ripley signed the H.I.B. report affirming Mr. Rice's investigation.

This investigation was not completed in time to be submitted for Board review at the June meeting.

On **6/28/22**, the HPBOE affirmed the HIB report 33-21-22.

38-21-22

On **6/2/22**, Mr. Rice was directed by Mr. Tallamy to initiate a HIB investigation into an incident that was reported to have occurred in the Auditorium on 6/1/2022. The report involved [P.F.], [redacted] mother, who alleged via email that [redacted] and her boyfriend, [redacted], were "being made fun of" "aka harassed" by another student who called them "special education kids."

> The ensuing investigation involved numerous interviews and meetings involving [redacted], several other students, Ms. Schleer and Ms. Roman. Based on the evidence reviewed as part of this investigation, Mr. Rice concluded that [redacted] was a victim of a HIB.
>
> On **6/215/22** [sic], Mr. Tallamy signed Mr. Rice's H.I.B. report and forwarded it to Dr. Ripley.
>
> On **6/20/22**, Dr. Ripley signed the H.I.B. report affirming Mr. Rice's investigation.
>
> On **6/28/22**, the HPBOE affirmed the HIB report 38-21-22.
>
> [R-6.]

The HPRHS July 21, 2022, virtual-meeting minutes reflect, in pertinent part, the following:

> HIB Appeal
>
> The Committee discussed an HIB incident and the parties involved. The committee is scheduled to meet (virtually) with the parent at 6:00 this evening. At 6:07, the committee heard the appeal of the parent. At 6:55, the parent left the meeting.
>
> [R-5.]

On July 25, 2022, petitioner emailed, among others, Superintendent Ripley and various Board members. In the email, which was several pages long, petitioner apologized for abruptly ending the July 21, 2022, meeting, noted her frustrations with the meeting, and raised multiple concerns and complaints. (R-7.) Petitioner's email also stated that her daughter "is suffering emotionally, socially, and academically from this incident." (R-7.)

A letter dated October 27, 2022, from Superintendent Ripley to petitioner states as follows:

> Please accept this letter as an official notification and resolution of the HIB Appeal about which you met with the

> Board of Education on Thursday July 21, 2022 at 6:05 p.m. During that meeting you presented your belief that your daughter had been "HIBed" by another student. It was your stated belief, as communicated to the Board of Education, that the district's determination that it was not a HIB was in error. During that meeting, you became frustrated that the Board communicated their belief that the matter did not meet the parameters of a HIB. Prior to resolving the matter your agitation resulted in your stating that you were withdrawing the HIB Appeal and then you promptly disconnected from the meeting. Therefore, this letter shall serve as official notice of the HIB Appeal meeting summary and Board determination supporting the district's determination that the incident in question was properly determined to not have been a HIB. Please let me know If you have any further questions.
>
> [R-8.]

Testimony

P.F.

D.F. was definitely singled out. Her Chromebook was stolen twice and when she asked the main office who found the Chromebook, she was told P.D. had found it both times. P.D. and her friends are continually harassing D.F. and HPRHS does not provide her with the required documentation. P.D. admitted that she also grabbed D.F.'s arm because she was mad. D.F.'s boyfriend's statement was that P.D. was told to stop five times before he stepped between them. She kept D.F. home after the May 4, 2022, incident because D.F. said she was afraid, not just uncomfortable. D.F. was smiling in the video, but because of her communication and multiple handicaps, D.F. smiles when she is in a stressful or uncomfortable situation.

Trooper Popeck, the school resource officer, told her in two separate conversations that he was upset that D.F. was being harassed and bullied. Nothing is being done to stop the HIB incidents. Since April 2022 there have been four HIB incidents, not including several other incidents that P.F. has let slide. On the last day of school there was an incident between D.F. and P.D. P.F. received a call from two administrators who advised that P.D. had violated the No-Contact Order and approached

D.F., and that if it had not been the last day of school D.F. would have been given detention because she answered P.D.'s question. So, somewhere along the line, we eliminated the No-Contact Order because, due to her communication and multiple handicaps, D.F. does not understand the No-Contact and had always been taught that if someone talks to her, to talk back.

She is trying to protect D.F. D.F. is still on home instruction because she has considered suicide and needs a safety plan, but no safety plan is being created. D.F. has been involved in four HIB incidents with P.D. D.F. is aware that she has other rights, but she is a single parent and has no money, so it is difficult for her.

James Rice

Rice determined that the May 4, 2022, incident was a student conflict as a result of the Chromebook situation and not a HIB incident because it did not meet the HIB criteria. P.F. had chosen to keep D.F. home, asserting that it was not a safe situation for her, but he was not able to determine if D.F. was actually in fear or if that was a parent choice. A no-contact order is entered for non-HIB situations for students involved in conflicts to separate them, allow time to cool off, and to avoid interaction that would further the incident. Students may choose to reenact a friendship, but, if not, it sets a clear boundary or line not to cross so the students may coexist without creating further conflict.

LEGAL ANALYSIS AND CONCLUSION

It was the intent of the Legislature in enacting the "Anti-Bullying Bill of Rights Act" (ABR) to strengthen the standards and procedures for preventing, reporting, investigating, and responding to incidents of harassment, intimidation, and bullying of students that occur in school and off school premises. N.J.S.A. 18A:37-13.1; N.J.S.A. 18A:37-13.2. Notwithstanding any provision of N.J.S.A. 52:14B-1 et seq. or any other law to the contrary, the commissioner may adopt such rules and regulations as the commissioner deems necessary to implement the provisions of the ABR.

"Harassment, intimidation or bullying" means any gesture, any written, verbal or physical act, or any electronic communication, whether it be a single incident or a series of incidents, that is reasonably perceived as being motivated either by any actual or perceived characteristic, such as race, color, religion, ancestry, national origin, gender, sexual orientation, gender identity and expression, or a mental, physical or sensory disability, or by any other distinguishing characteristic, that takes place on school property, at any school-sponsored function, on a school bus, or off school grounds as provided for in N.J.S.A. 18A:37-15.3, that substantially disrupts or interferes with the orderly operation of the school or the rights of other students **and that**:

> a. a reasonable person should know, under the circumstances, will have the effect of physically or emotionally harming a student or damaging the student's property, or placing a student in reasonable fear of physical or emotional harm to his person or damage to his property;
>
> b. has the effect of insulting or demeaning any student or group of students; or
>
> c. creates a hostile educational environment for the student by interfering with a student's education or by severely or pervasively causing physical or emotional harm to the student.
>
> [N.J.S.A. 18A:37-14.]

Each school district shall adopt a policy prohibiting harassment, intimidation or bullying on school property, at a school-sponsored function or on a school bus. N.J.S.A. 18A:37-15(a); N.J.A.C. 6A:16-7.7(a). School districts have local control over the content of the policy, except that the policy must contain, at a minimum, the twelve components enumerated at N.J.S.A. 18A:37-15(b). See also N.J.A.C. 6A:16-7.7(a)(2). A school district is not prohibited from adopting a policy that includes components that are more stringent than the aforesaid components. N.J.S.A. 18A:37-15(f); N.J.A.C. 6A:16-7.7(b). The superintendent of schools shall appoint a district anti-bullying coordinator, and the principal in each school in a school district shall appoint a school anti-bullying specialist. N.J.S.A. 18A:37-20(a)–(b). The school anti-bullying specialist shall (1) chair the school safety team; (2) lead the investigation of incidents of harassment, intimidation, and

bullying in the school; and (3) act as the primary school official responsible for preventing, identifying, and addressing incidents of harassment, intimidation, and bullying in the school. Ibid.

All acts of harassment, intimidation, or bullying must be reported to the school principal verbally the same day and in writing within two days of when the school employee or contracted service provider witnessed or received reliable information regarding any such incident. N.J.S.A. 18A:37-15(b)(5). The written report must be on a numbered form developed by the Department of Education and must be submitted promptly by the principal to the superintendent of schools. Ibid. The school district must provide a means for a parent or guardian to complete an online numbered form to confidentially report an incident of harassment, intimidation, or bullying. Ibid. The principal must inform the parents or guardians of all students involved in the alleged incident, and keep a written record of the date, time, and manner of notification to the parents or guardians. Ibid. A redacted copy of the form that removes all student identification information shall be confidentially shared with the board of education after the conclusion of the investigation, if a hearing is requested by a parent or guardian pursuant to N.J.S.A. 18A:37-15(b)(6)(d). Ibid.

An investigation shall be initiated by the principal or the principal's designee within one school day of the report of the incident and shall be conducted by a school anti-bullying specialist. N.J.S.A. 18A:37-15(b)(6)(a). The investigation shall be completed as soon as possible, but not later than 10 school days from the date of the written report of the incident of harassment, intimidation, or bullying. Ibid. The results of the investigation must be reported to the superintendent of schools within two school days of the completion of the investigation, and in accordance with regulations promulgated by the State Board of Education pursuant to the "Administrative Procedure Act," P.L.1968, c.410 (C.52:14B-1 et seq.), the superintendent may decide to provide intervention services, establish training programs to reduce harassment, intimidation, or bullying and enhance school climate, impose discipline, order counseling as a result of the findings of the investigation, or take or recommend other appropriate action. N.J.S.A. 18A:37-15(b)(6)(b). The results of each investigation shall be reported to the board of education no later than the date of the board of education meeting next following the completion of

the investigation, along with information on any services provided, training established, discipline imposed, or other action taken or recommended by the superintendent. N.J.S.A. 18A:37-15(b)(6)(c).

Parents or guardians of the students who are parties to the investigation are entitled to receive information about the investigation, in accordance with federal and State law and regulation, including the nature of the investigation, whether the district found evidence of harassment, intimidation, or bullying, or whether discipline was imposed or services provided to address the incident of harassment, intimidation, or bullying. N.J.S.A. 18A:37-15(b)(6)(d). This information must be provided in writing within 5 school days after the results of the investigation are reported to the board. Ibid. A parent or guardian may request a hearing before the board after receiving the information, and the hearing shall be held within 10 days of the request. Ibid.; N.J.A.C. 6A:16-7.7(a)(2)(xi)(2). The board shall meet in executive session for the hearing to protect the confidentiality of the students. N.J.S.A. 18A:37-15(b)(6)(d). At the hearing the board may hear from the school anti-bullying specialist about the incident, recommendations for discipline or services, and any programs instituted to reduce such incidents. Ibid. At the next board of education meeting following its receipt of the report, the board shall issue a decision, in writing, to affirm, reject, or modify the superintendent's decision. N.J.S.A. 18A:37-15(b)(6)(e). The board's decision may be appealed to the Commissioner of Education, in accordance with the procedures set forth in law and regulation, no later than 90 days after the issuance of the board's decision. Ibid.

> The statutory definition of "bullying" does not include all violent or aggressive conduct against a student. The definition, both before and after adoption of the 2010 Anti-Bullying Act, refers to conduct that is "reasonably perceived as being motivated" by a "distinguishing characteristic" of the victim, such as, "race, color, religion, ancestry, national origin, gender, sexual orientation, gender identity and expression, or a mental, physical or sensory [disability]." N.J.S.A. 18A:37-14. The statute has not limited "distinguishing characteristic" to those specifically enumerated, but it has consistently required such a perceived motivation.
>
> Thus, harmful or demeaning conduct motivated only by another reason, for example, a dispute about relationships or

> personal belongings, or aggressive conduct without identifiable motivation, does not come within the statutory definition of bullying.
>
> [K.L. v. Evesham Tp. Bd. of Educ., 423 N.J. Super. 337, 350–51 (App. Div. 2011) (footnote omitted).]

Thus, an incident may even be physically, psychologically, or socially harmful, but still not meet the HIB criteria.

Petitioner argues that this is a HIB violation because of the language in the New Jersey Guidance for Parents on the Anti-Bullying Bill of Rights Act (Guidance), which reflects, "to set . . . apart from others . . . to single out," and P.D. has singled out P.F. two times prior—stole her Chromebook twice—and this third time grabbed her arm and did not let go. Specifically, the Guidance petitioner refers to states:

> The ABR does not explain the meaning of a "distinguishing characteristic." However, the dictionary (Webster's Ninth Collegiate Dictionary) defines the word "distinguish" as ". . . to perceive a difference in . . . to mark as separate or different . . . to separate into kinds, classes or categories . . . to set above or apart from others . . . to single out. . ." The same dictionary defines the word "characteristic" as ". . . something that identifies a person or thing or class. . ."

After an investigation by the ABS, the Board determined that this incident was ordinary student conduct—not HIB—as a result of a history of sporadic conflict between the two students. It found no substantial disruption of or interference with operations of the school or rights of students, no actual or perceived distinguishing characteristic, no physical or emotional harm or fear of harm to a student or his or her property, no effect of insulting or demeaning a student or group of students, and no creation of "hostile educational environment" interfering with a student's education. The Board thereafter took action reasonably calculated to remediate and end the conduct—the students signed a no-contact order, staff was alerted to the potential for conflict, and some schedule/class changes were made.

The decision of a board acting within the scope of its authority is entitled to a presumption of correctness and will not be upset unless there is an affirmative showing

that such decision was arbitrary, capricious, or unreasonable. Thomas v. Bd. of Educ., 89 N.J. Super. 327, 332 (App. Div. 1965). Similarly, the action of a board which lies within the area of its discretionary powers may not be upset unless patently arbitrary, without rational basis or induced by improper motives. Kopera v. Bd. of Educ., 60 N.J. Super. 288, 294 (App. Div. 1960). Although petitioner contends that her daughter is being set apart or singled out, the ABR nevertheless requires that it be the result of a distinguishing characteristic—such as race, color, religion, ancestry, national original, sexual orientation, gender identity and expression, mental disability, physical disability, sensory disability—or other difference, and no such distinguishing characteristic or difference has been identified for the May 4, 2022, incident.

In view of the foregoing, I **CONCLUDE** that the Board's determination that the incident complained of did not constitute harassment, intimidation, and bullying was not arbitrary, capricious, or unreasonable and further **CONCLUDE** that the Petition should be dismissed.

Additionally, it is noted that petitioner referenced social, emotional, and academic issues, and submitted numerous additional emails (P-1) relative to, inter alia, D.F.'s individualized education plan (IEP) and IEP meetings, an alleged November 2022 HIB incident, an alleged "hit list," home instruction, and a safety plan that post-date the May 4, 2022, incident. Petitioner also submitted text messages and social-media printouts (P-2; P-3) which post-date the May 4, 2022, incident. This matter involves only an appeal of the Board's HIB determination as to the May 4, 2022, incident and therefore those emails, text messages, and social-media printouts fall outside the scope of this hearing and are not otherwise referenced herein.

ORDER

It is hereby **ORDERED** that petitioner's Petition is **DISMISSED**.

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

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

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

Kelly J Kirk

April 4, 2023

DATE

KELLY J. KIRK, ALJ

Date Received at Agency:

Date Mailed to Parties:

db

APPENDIX

LIST OF WITNESSES

For Petitioner:

P.F.

For Respondent:

James Rice

LIST OF EXHIBITS

For Petitioner:

P-1 Emails
P-2 Personal notes and printouts
P-3 Message

For Respondent:

R-1 HPRHS HIB Report, dated May 10, 2022
R-2 HPRHS No-Contact Order, dated May 11, 2022
R-3 HPRHS letter to petitioner, dated July 1, 2022
R-4 Emails, dated July 2022
R-5 Virtual-meeting minutes, dated July 21, 2022
R-6 Memo, dated July 21, 2022
R-7 Email from petitioner, dated July 25, 2022
R-8 HPRHS letter to petitioner, dated October 27, 2022

145-23
OAL Dkt. No. EDU 00702-23
Agency Dkt. No. 378-12/22

New Jersey Commissioner of Education

Decision

Stephen Eget,

Petitioner,

v.

Board of Education of the Borough of Mountain Lakes, Morris County,

Respondent.

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

Petitioner seeks the release of his estranged daughter's student records from the high school that she attended. Petitioner's daughter is 18 years old and no longer a student in the Mountain Lakes School District (District), but petitioner sought the records because his ex-wife would not disclose if or where their daughter was attending college. According to petitioner, a 2018 court order from his divorce proceedings granted him "equal and unfettered access" to his child's health and education records. The Board denied petitioner's request, informing him that a parent does not have access to a graduate's student records once they have reached the age of majority. Petitioner filed the instant appeal challenging the denial of access to his daughter's records.

Following the Board's motion for summary decision,[1] the Administrative Law Judge (ALJ) found that petitioner is not authorized to obtain his daughter's school records. *N.J.A.C.* 6A:32-7.5(e) provides, in relevant part:

[1] Petitioner did not file opposition to the motion.

> Organizations, agencies, and persons authorized to access student records shall include only the following: . . .
>
> 3. An adult student and/or a parent who has the written permission of an adult student, except that the parent shall have access without the adult student's consent, as long as the adult student is financially dependent on the parent and enrolled in the public school system, or if the adult student has been declared legally incompetent by a court of appropriate jurisdiction. The parent of a financially dependent adult student may not disclose information contained in the adult student's record to a second or third party without the adult student's consent;
> . . .

The ALJ found that since petitioner's daughter is an adult who has graduated from the District, has not been declared legally incompetent, and has not provided written permission for the release of her student records, petitioner does not have the authority to access those records.

The Commissioner agrees with the ALJ, for the reasons stated in the Initial Decision, that petitioner is not entitled to access his adult child's student records. Accordingly, the Initial Decision of the OAL is adopted as the final decision in this matter and the petition is hereby dismissed.

IT IS SO ORDERED. [2]

Angelica Allen-McMillan, Ed.D.
ACTING COMMISSIONER OF EDUCATION

Date of Decision: May 16, 2023
Date of Mailing: May 17, 2023

[2] This decision may be appealed to the Appellate Division of the Superior Court pursuant to *N.J.S.A.* 18A:6-9.1. Under *N.J.Ct.R.* 2:4-1(b), a notice of appeal must be filed with the Appellate Division within 45 days from the date of mailing of this decision.

State of New Jersey
OFFICE OF ADMINISTRATIVE LAW

INITIAL DECISION
SUMMARY DECISION
OAL DKT. NO. EDU 00702-2023
AGENCY DKT. NO. 378-12/22

STEPHEN EGET,
Petitioner,
v.
BOARD OF EDUCATION OF MOUNTAIN LAKES, MORRIS COUNTY,
Respondent.

Steven Eget, petitioner, pro se

Robert D. Lorfink, Esq., for respondent (Fogarty and Hara, attorneys)

Record Closed: March 24, 2023 Decided: April 4, 2023

BEFORE **SUSANA E. GUERRERO**, ALJ:

STATEMENT OF THE CASE

Petitioner Steven Eget (Eget or petitioner) seeks the release of his eighteen-year-old daughter's school records. The Board of Education of the Borough of Mountain Lakes (the Board or respondent) has denied Eget's request for records.

PROCEDURAL HISTORY

Petitioner filed a Petition of Appeal with the Commissioner of Education on or around December 27, 2022, and the Commissioner transmitted the matter to the Office of Administrative Law, where it was filed as a contested case on January 23, 2023. N.J.S.A. 52:14B-1 to -15; N.J.S.A. 52:14F-1 to -13.

A prehearing conference was held on February 10, 2023, during which a hearing was scheduled for March 27, 2023. During the prehearing conference, counsel for the Board indicated that he intended to file a motion for summary decision. In the prehearing order filed on February 13, 2023, the pro se petitioner was informed that he had twenty calendar days to file a written opposition to the motion.

The Board filed a motion for summary decision on or around February 23, 2022. When the petitioner failed to file a timely response to the motion, the undersigned sent the parties a letter on March 20, 2023 adjourning the March 27, 2023 hearing date and informing the parties that the deadline to file an opposition to the motion would be extended to March 24, 2023. The petitioner never filed an opposition to the motion.

FINDINGS OF FACT

Based on the submissions presented, and the uncontroverted background facts, I **FIND** the following:

Petitioner's daughter, L.E., attended the Mountain Lakes School District. He is estranged from his daughter. L.E. is over eighteen years old.

On December 16, 2022, petitioner contacted the Director of School Counseling for the Mountain Lakes School District, to request disclosure of L.E.'s school records. Petitioner informed the Director that he was in a long and drawn out divorce matter with his former spouse who was refusing to disclose where L.E. was attending college, or even confirm that she was, in fact, attending college. Petitioner's request to access L.E.'s

records was denied. The Director informed the petitioner: "When a graduate has reached the age of majority, her parents no longer have rights to her records; only she can request records and/or release those records."

The petitioner then cited to a provision of a 2018 court order stemming from his divorce proceeding that was issued by the Superior Court, Chancery Division of the County of Morris, that granted him "equal and unfettered access to both the children's health and education records." That court order was entered before L.E. even began high school. When petitioner made this request, L.E. was no longer attending the Mountain Lakes school district, and had reached the age of eighteen.

The Director again responded to petitioner's request, stating:

> Under state law, N.J.A.C. 6A:32-7.5, access to an adult student's records can only be granted to the parent if the parent has a written permission of the adult student, except that the parent shall have access without the adult student's consent, as long as the adult student is financially dependent on the parent and enrolled in the public school system, or if the adult student has been declared legally incompetent by a court of appropriate jurisdiction. Since your daughter is no longer enrolled in the Mountain Lakes School District, and you have not presented me with your daughter's written permission, you are not permitted access to her records.

The petitioner never provided the Board with L.E.'s written consent for her school records.

In his Petition of Appeal, Eget appears to rely on the aforementioned court order from 2018. He also references N.J.S.A. 9:2-4.2, and states that, to the best of his knowledge, the court has not emancipated L.E.

LEGAL ANALYSIS AND CONCLUSION

In its motion, the Board asserts that there are no genuine issues of material fact in the matter, and that its motion for summary decision must be granted as a matter of law.

Pursuant to N.J.A.C. 1:1-12.5(b), summary decision "may be rendered if the papers and discovery which have been filed, together with the affidavits, if any, show that there is no genuine issue as to any material fact challenged and that the moving party is entitled to prevail as a matter of law." This rule is substantially similar to the summary judgment rule embodied in the N.J. Court Rules, R. 4:46-2. See Judson v. Peoples bank & Trust Co. of Westfield, 17 N.J. 67, 74 (1954). In connection therewith, all inferences of doubt are drawn against the movant and in favor of the party against whom the motion is directed. Id. at 75. In Brill v. Guardian Life Insurance Co., 142 N.J. 520, 540 (1995), the New Jersey Supreme Court addressed the appropriate test to be employed in determining the motion:

> [A] determination whether there exists a "genuine issue" of material fact that precludes summary judgment requires the motion judge to consider whether the competent evidential materials presented, when viewed in the light most favorable to the non-moving party, are sufficient to permit a rational fact finder to resolve the alleged disputed issue in favor of the non-moving party. The "judge's function is not . . . to weigh the evidence and determine the truth of the matter but to determine whether there is a genuine issue for trial."
>
> [Citation omitted.]

Having reviewed the Board's motion and supporting documents, I **CONCLUDE** that this matter is ripe for summary decision as there are no genuine issues of material fact. The facts presented by the Board are straightforward and undisputed.

The New Jersey State Legislature has conferred upon the Commissioner of Education "jurisdiction to hear and determine . . . all controversies and disputes arising under the school laws . . . or under the rules of the State board or of the commissioner." N.J.S.A. 18A:6-9. Here, to the extent that Eget seeks relief pursuant to an order that was issued five years ago by a Superior Court Judge in connection with a matrimonial matter, that clearly falls outside the scope of the Commissioner's jurisdiction as it does not involve a dispute arising under the school laws. The Commissioner lacks jurisdiction to enforce or interpret a Family Part court order.

Eget's Petition also references N.J.S.A. 9:2-4.2,[1] which addresses parental access to children's records. It appears that Eget maintains that he is entitled to L.E.'s school records because she has not been emancipated by any Court. Again, counsel for the Board is correct to note that the Commissioner lacks jurisdiction to enforce this statutory provision, as it does not arise under the school laws.

N.J.A.C. 6A:32-7.5, which addresses access to student records, applies here. It provides, in relevant part:

> (a) Only authorized organizations, agencies, or persons, as defined in this section, shall have access to student records, including student health records.
>
> . . .
>
> (c) Each district board of education shall control access to, disclosure of, and communication regarding information contained in student health records to assure access only to people permitted by Federal and State statute and regulations or as stated at (e) below.
>
> . . .
>
> (e) Organizations, agencies, and persons authorized to access student records shall include only the following:
>
> 1. The student who has the written permission of a parent and the parent of a student under the age of 18, regardless of whether the child resides with the parent, except pursuant to N.J.S.A. 9:2-4;. . .
>
> 2. . . .
>
> 3. An adult student and/or a parent who has the written permission of an adult student, except that the parent shall have access without the adult student's consent as long as the adult student is financially dependent on the parent and enrolled in the public school system, or if the adult student has been declared legally incompetent by a court of appropriate jurisdiction. The parent of a financially dependent adult student may not disclose information contained in the adult

[1] N.J.S.A. 9:2-4.2 provides in relevant part: "Every parent, except as prohibited by federal and State law, shall have access to records and information pertaining to his or her unemancipated child, including, but not limited to, medical, dental, insurance, child care and educational records, whether or not the child resides with the parent, unless that access is found by the court to be not in the best interest of the child or the access is found by the court to be sought for the purpose of causing detriment to the other parent."

> student's record to a second or third party without the adult student's consent;
>
> . . .
>
> 14. Organizations, agencies, and persons from outside the school if they have the written consent of the parent or adult student. Organizations, agencies, and persons shall not transfer student record information to a third party without the written consent of the parent or adult student;
>
> 15. Organizations, agencies and individuals outside the school, other than those specified in this section, upon the presentation of a court order; . . .

Of the approximately sixteen categories of authorized agencies, organizations or persons who may gain access to student records, there is no evidence that petitioner would satisfy any of these categories. Since Eget's daughter is an adult who no longer attends school in the district; there is no indication that she has ever been declared legally incompetent by any court; and as she never provided written permission for the release of her school records, Eget is not authorized to obtain her records pursuant to N.J.A.C. 6A:32-7.5(e). Given the uncontroverted facts in this matter, and drawing all inferences of doubt in favor of the petitioner, and against the Board, as the moving party, I **CONCLUDE** that the Board must prevail as a matter of law.

ORDER

It is hereby **ORDERED** that the motion for summary decision filed by the Board is **GRANTED**, and that the petition be dismissed.

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

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

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

April 4, 2023
DATE

SUSANA E. GUERRERO, ALJ

Date Received at Agency: _____

Date Mailed to Parties: _____

jb

148-23
OAL Dkt. No. EDU 9400-22
Agency Dkt. No. 254-9/22

New Jersey Commissioner of Education

Final Decision

In the Matter of the Suspension of the Teaching Certificate of Lisa Thielman, Board of Education of the Township of Wayne, Passaic County.

The record of this matter, the proposed Settlement Agreement and Mutual Release (Agreement) and the Initial Decision issued by the Office of Administrative Law have been reviewed pursuant to *N.J.A.C.* 1:1-19.1. Upon review, the Commissioner approves the terms of the Agreement and adopts the Initial Decision as the final decision in this matter. The case is hereby dismissed, subject to compliance with the terms of the Agreement.

IT IS SO ORDERED.

Angelica Allen-McMillan, Ed.D.
ACTING COMMISSIONER OF EDUCATION

Date of Decision: May 22, 2023
Date of Mailing: May 23, 2023

State of New Jersey
OFFICE OF ADMINISTRATIVE LAW

INITIAL DECISION
SETTLEMENT
OAL DKT. NO. EDU 09400-22
AGENCY DKT. NO. 254-9/22

IN THE MATTER OF THE SUSPENSION OF THE TEACHING CERTIFICATE OF LISA THIELMAN, BOARD OF EDUCATION OF THE TOWNSHIP OF WAYNE, PASSAIC COUNTY.

John G. Geppert, Jr., Esq., for petitioner Board of Education of the Township of Wayne (Scarinci & Hollenbeck, attorneys)

Michael S. Weinstein, Esq., for respondent Lisa Thielman (Cole Schotz, attorneys)

Record Closed: April 18, 2023 Decided: April 18, 2023

BEFORE **MARGARET M. MONACO**, ALJ:

In this matter, the Board of Education of the Township of Wayne (the Board) seeks the suspension of the teaching certificate of respondent Lisa Thielman (respondent) based upon her alleged failure to provide adequate notice of her resignation from her teaching position. The Department of Education transmitted the matter to the Office of Administrative Law, where it was filed for determination as a contested case. The hearing

was scheduled for March 22 and 23, 2023. Prior to the commencement of the hearing, the parties amicably resolved the matter, and counsel for the Board submitted, via e-mail dated April 18, 2023, the attached Settlement Agreement and Mutual Release, indicating the terms of agreement, and the attached extract from the minutes of the Board meeting on April 13, 2023 approving the Settlement Agreement and Mutual Release.

Having reviewed the record and the settlement terms, I **FIND**:

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

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

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

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

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

April 18, 2023
DATE

MARGARET M. MONACO, ALJ

Date Received at Agency: April 20, 2023

Date Mailed to Parties: April 20, 2023

jb

SCARINCI & HOLLENBECK, LLC
150 Clove Road
Little Falls, New Jersey 07424
Telephone: (201) 896-7097
Attorneys for Wayne Township Board of Education

I/M/O SUSPENSION OF THE TEACHING CERTIFICATE OF LISA THIELMAN, SCHOOL DISTRICT OF WAYNE TOWNSHIP, PASSAIC COUNTY	STATE OF NEW JERSEY DEPARTMENT OF EDUCATION OAL DKT. NO.: EDU 09400-22 AGENCY REF. NO. 254-9/22

SETTLEMENT AGREEMENT AND MUTUAL RELEASE

This Settlement Agreement and Mutual Release ("Agreement") is entered into on the __ day of April, 2023, by and between Lisa Thielman, (hereinafter "Thielman") and the Wayne Township Board of Education (hereinafter the "Board") (collectively the "Parties").

WHEREAS, the Board is a body politic and corporate, organized and existing by virtue of the laws of the State of New Jersey, N.J.S.A. 18A:11-1, which is entrusted with maintaining and conducting the public schools of the Wayne Township Public School District; and

WHEREAS, the Board has its administrative offices located at 50 Nellis Drive, Wayne, New Jersey, 07470.

WHEREAS, Thielman was employed by the Board as a Teacher of the Deaf beginning March, 2022 for the 2021/2022 academic year; and

WHEREAS, Thielman provided notice of her intent to withdraw from her 2022/2023 academic year employment contract, effective immediately, on August 15, 2022; and

WHEREAS, a dispute arose between the parties; and

WHEREAS, on September 9, 2022, the Board notified the Commissioner of Education of Ms. Thielman's resignation; and

WHEREAS, the Parties wish to amicably resolve any and all disputes between them without admitting any deficiencies or wrongdoing by either party in order to reach a compromise and avoid incurring the expense and inconvenience of further legal action; and

WHEREAS, the Board and Thielman have engaged in good faith discussions concerning the dispute and have reached an agreement, which they wish to memorialize herein.

NOW THEREFORE, the Board and Thielman, in consideration of the mutual covenants and promises contained herein, the legal sufficiency of which is hereby acknowledged by the Parties, agree as follows:

1. SUSPENSION OF CERTIFICATES: Ms. Thielman's teaching certificates, Teacher of the Handicapped (2470) and Teacher of the Deaf (2420), shall be suspended for a period of twelve (12) weeks commencing on May 22, 2023. The Board does not object to Ms. Thielman being permitted to use her certificates after the suspension period is completed.

2. HEALTH BENEFITS: Ms. Thielman shall provide reimbursement to the Board in the amount of one thousand nine hundred eighty-three dollars and ninety-three cents ($1983.93) for the cost of health benefits for the months of July, 2022 and August, 2022. Reimbursement in a check made payable to the Wayne Board of Education shall be made in two payments, to be submitted to the District Benefits Manager, Kathy Bruseo, 50 Nellis Drive, Wayne, New Jersey, 07470. The first payment shall be made within 30 days of the date of the Commissioner's Decision. The second payment shall be made 30 days later.

3. WITHDRAWAL OF LITIGATION: Upon execution of this Agreement, the Board agrees to immediately withdraw the following matters: Order to Show Cause filed on September 9, 2022 (OAL DKT. NO.: EDU 09400-22)(AGEN. REF. NO. 254-9/22) and take all necessary, expedient steps to administratively seek approval of the Settlement.

4. MUTUAL RELEASE AND WAIVER: In exchange for the above consideration, Ms. Thielman, her heirs and assigns hereby irrevocably waive, release and forever discharge any and all claims and rights, whether known or unknown, which she has or may have against the Board, personally, officially, individually and collectively, including its past and present Board members, all officers and administrators, its attorneys, its agents and employees personally and officially, as well as their successors, and assigns, including, but not limited to any and all claims for attorney's fees, back pay or front pay, any claims for emotional distress or pain and suffering, any and all claims involving tax liability stemming from this Agreement, and any and all claims arising under any federal, state or local ordinance, regulation or law including, but not limited to, the New Jersey and Federal Constitutions; Title VII of the Civil Rights Acts of 1871, 1964 and 1991; the Americans with Disabilities Act; the Age Discrimination in Employment Act; the Older Workers Benefit Protection Act of 1990; the Employee Retirement Income Security Act; the Federal Family and Medical Leave Act; the Families First Coronavirus Response Act; the Fair Labor Standards Act; the Equal Pay Act; the Workers' Adjustment and Retraining Notification Act; the New Jersey Law Against Discrimination; the New Jersey Family Leave Act; the New Jersey Conscientious Employee Protection Act; the New Jersey Wage and Hour Law; the New Jersey Equal Pay Law; the New Jersey Paid Sick Leave Act; the Employer-Employee Relations Act; the New Jersey Public Employees' Occupational Safety and Health Act; common law claims and any and all other claims

that could be initiated in any venue, for harassment, discrimination or retaliation of any kind, breach of promise, misrepresentation, negligence, fraud, estoppel, defamation, violation of public policy, wrongful or constructive discharge, or any other tort, contractual or quasi-contractual claim. Specifically exempted from this release are any claims arising under the Workers' Compensation Act, N.J.S.A. 34:15-1 et seq., and for health insurance continuation coverage under and pursuant to COBRA. Ms. Thielman also does not waive her right to seek or claim indemnity under N.J.S.A. 18A:16-6 regarding any potential third-party claims made for acts or omissions arising from the performance of her duties for the Board.

Except as prohibited by law, and except as otherwise set forth in this Settlement Agreement, the Board, its successors and assigns, and its present and former Board members, employees and officers hereby agree to release and forever discharges Thielman from any and all known past and present claims, suits, tenure charges, actions at law or in equity of any kind, in any forum that it may have against her as of the date of this Agreement. Subject to the fulfillment of the terms of this Agreement, the Board will take no further action with respect to the separation from employment. The release recited in this paragraph shall include any and all known possible claims which the Board may have for any type of damages cognizable under any of the laws referenced herein, including, but not limited to any and all claims for compensatory damages, punitive damages, and/or attorneys' fees as of the effective date of this Agreement. However, in the event that any third-party action shall be initiated against Ms. Thielman that implicates the Board, the Board reserves its right with respect thereto.

5 RE-EMPLOYMENT: Ms. Thielman agrees that she will not seek any future employment, volunteer or consultant relationship with the Board in perpetuity and that the Board has no obligation, contractual or otherwise, to re-hire or re-employ her.

6. INQUIRIES: The Board agrees to limit its response to any future inquiry regarding Ms. Thielman's Board employment to confirming the dates of her employment within the school district, the amount of her salary in her last year of employment-2021/2022, the position that Ms. Thielman held within the District. However, nothing herein shall be deemed to limit the Board's actions in compliance with the Open Public Records Act, or its obligation to respond fully and accurately to any and all inquiries from public entities, while maintaining the limits set forth in this Section. Timely, written notice to Thielman shall be made if OPRA inquiries are received by the Board related to her employment and disclosures are contemplated.

7. OLDER WORKER BENEFIT PROTECTION ACT OF 1990: To comply with the Older Workers Benefit Protection Act of 1990, if applicable, this Agreement advises Thielman of the legal requirements of the Act, and fully incorporates the legal requirements by reference into this Agreement. Accordingly, by executing this Agreement, Thielman acknowledges that she: (i) fully understands the terms and conditions of this Agreement; (ii) has consulted with an attorney to review the Agreement; (iii) specifically waives her right to pursue any current claims she may have under the Age Discrimination in Employment Act; (iv) has been given sufficient

time within which to consider this Agreement, and (v) has seven (7) days from the date of the execution of this Agreement to revoke it. Thielman understands that she may rescind this Agreement within seven (7) calendar days of signing it, and such rescission must be in writing and delivered to counsel for the Board either by hand or by certified mail within the seven-day period. Thielman agrees that she has been given a reasonable period of time of at least 21 days within which to review and consider this Settlement prior to executing this Agreement, but Thielman may waive this 21-day period by signing the space provided at the end of this Settlement.

8. CONFIDENTIALITY: The parties agree that this settlement agreement shall be deemed confidential, except to the extent provided by law, and that neither party shall discuss, communicate, publish, publicize, disseminate, confirm or otherwise disclose or cause to be disclosed, communicated, published, publicized, disseminated, confirmed or discussed the terms of this settlement with any third party, organization, or entity, provided that this provision shall not preclude Ms. Thielman from disclosing the terms of this settlement agreement to her attorneys, accountants, tax advisors, employers, family members, or to the Administrative Law Judge, the Commissioner of Education, or any other tribunal as may be required to obtain approval of this settlement agreement.

9. ENTIRE AGREEMENT: This Agreement and Release contain the entire Agreement and understanding between the Parties and constitutes a full and final agreement in any and all issues relating to this matter, except that the Parties reserve their right to enforce this Agreement, if necessary.

10. CHOICE OF LAW: This Agreement shall be governed by the laws of the State of New Jersey.

11. SEVERABILITY: If, during the term of this Agreement, a specific clause of the Agreement is determined to be illegal or in violation of any Federal or State law, the remainder of the Agreement shall not be affected by such a ruling and shall remain in full force and effect.

12. BINDING EFFECT: The Parties shall be bound by the terms and conditions of this Agreement.

13. APPROVAL: The terms and conditions of this Agreement are subject to ratification and approval by the Board, Administrative Law Judge and the Commissioner of Education.

14. VOLUNTARY AGREEMENT: The Parties have entered into this Agreement freely and voluntarily with a full understanding of their rights and the contents of this Agreement.

15. ADMISSION OF LIABILITY: The Parties' entry into this Agreement shall not constitute nor shall it be interpreted as an admission of wrongdoing or guilt, or liability

in any manner on either of the Parties' part. Any such obligation or liability on either Party's part is expressly denied. The Parties have entered into this Agreement solely to compromise disputed claims.

16. OPPORTUNITY TO CONSULT WITH COUNSEL: The Parties acknowledge that each has been given the opportunity to consult with an attorney or a representative of their own choosing with respect to this Agreement and reviewed with their attorney or representative all the terms and conditions of this Agreement prior to executing this Agreement. Each Party signs this Agreement freely and voluntarily and without coercion or duress. The Parties further acknowledge that they fully understand the duties and obligations enumerated herein and have been informed of their legal rights and obligations. All fees and cost associated with this settlement, OTSC and underlying action are borne by the parties exclusively. Each parties agrees to be responsible for its own fee's and cost.

17. BREACH: If either party breaches this Agreement, the breaching party may be liable for damages caused by the breach including those recognized under law.

18. RATIFICATION: The undersigned representatives of the Board hereby acknowledge that they have been duly authorized by the Board to sign this Agreement and bind the Board to its terms providing the Agreement is approved by the Administrative Law Judge and Commissioner of Education. Upon ratification of this Agreement, the Board authorizes its Board President to execute same on its behalf.

19. GOOD FAITH AND NONDISPARAGEMENT: The Parties expressly agree that they shall act in good faith to ensure implementation of this Agreement and Release. The Parties mutually agree to refrain from making any derogatory comments, written or oral; retaliation or disparagement, in any matter, against the other party or their families, family members, agents, officials, administrators, representatives and employees, regarding any matters relating to the within disputes.

20. MODIFICATIONS: This Agreement may not be altered, amended or modified except in writing, signed and duly authorized by all Parties.

21. EXECUTION OF COUNTERPARTS AND FACSIMILE SIGNATURES: This Agreement may be executed in two (or more) counterparts each of which, when executed and delivered shall be deemed to be an original, and of which counterparts, taken together, shall constitute one and the same agreement. An original signature transmitted by facsimile shall be deemed to be an original for purposes of this Agreement.

IN WITNESS WHEREOF, the Parties hereunder set their hands and seals to this Agreement

effective on this ___ day of April, 2023.

Dated: 04/07/2023

Lisa Thielman
LISA THIELMAN

Dated: 04/13/2023

DONALD PAVLAK
BOARD PRESIDENT
WAYNE BOARD OF EDUCATION

WAIVER

By signing below, the undersigned hereby irrevocably elects to waive the 21 days period referred to in the 7th recital on page 3 of this Agreement.

Lisa Thielman
LISA THIELMAN

DATED: 04/07/2023

Wayne
Township Public Schools
50 Nellis Drive, Wayne, New Jersey 07470

William P. Moffitt,
Business Administrator/Board Secretary

Phone: (973) 633-3006
Fax: (973) 628-8837

EXTRACT FROM THE MINUTES OF A MEETING OF THE BOARD OF EDUCATION OF THE TOWNSHIP OF WAYNE, PASSAIC COUNTY, NEW JERSEY, AS RECORDED IN THE OFFICIAL MINUTE BOOK.

The Board of Education of the Township of Wayne in the County of Passaic, New Jersey, convened in a Public Work Session on April 13, 2023 in the Anthony Wayne Middle School Media Center, 201 Garside Avenue, Wayne New Jersey 07470 This meeting was scheduled to begin at 7:30 p.m. pursuant to the terms of the Sunshine Law

The following members of the Wayne Board of Education were present: Ryan Battershill, Michael Fattal, Matthew Giordano, Catherine Kazan, Donald Pavlak, Jr., Barbara Rigoglioso and Iveta Wentink.

Absent: Sean Duffy, Haralampos Prassakos

X. Emergent School Resource Legal

1. Approval of Settlement Agreement and Mutual Release

Recommended Action:

RESOLVED, that the Board of Education, upon the recommendation of the Superintendent, hereby approves the Settlement Agreement and General Release, dated April 7 2023, OAL DKT NO EDU 09400-22, AGENCY REF. NO 254-9/22, as attached by reference, and further authorizes the Board President and Secretary to execute same on behalf of the Board. The Business Administrator and Superintendent are authorized to take all further steps required by the terms of the Settlement to further implement same.

MOTION: M. FATTAL
SECOND: M. GIORDANO
VOTE: 7 Yeas, 0 Nays, 0 Abstentions

STATE OF NEW JERSEY)
COUNTY OF PASSAIC) ss:

I, William P. Moffitt, Business Admin strator/Board Secretary, Wayne Board of Education of the Township of Wayne, in the County of Passaic, State of New Jersey, hereby verify that the foregoing extract from the minutes of the meeting of the Wayne Board of Education, duly called and held on April 13, 2023, has been compared by me with the original minutes as officially recorded in my office in the minute book of said Wayne Board of Education and is a true, complete copy thereof and of the whole of said original minutes so far as the same relate to the subject matter referred to in said extract. In witness, I have hereunto set my hand and affixed the corporate seal of the Wayne Board of Education this 14th day of April 2023.

SEAL

William P. Moffitt
Business Administrator/Board Secretary

149-23

PECKLERS ADR, L.L.C.

8900 Boulevard East
Suite 6E North
North Bergen, New Jersey 07047

VIA FIRST CLASS MAIL

201- 869-2371
E-Mail: mjpecklers@aol com

Michael J. Pecklers, Esq., President

May 11, 2023

Jennifer Simons, Director
Office of Controversies and Disputes
State of New Jersey
Department of Education
PO Box 500
Trenton, New Jersey 08625-0500

RE: IMO THE TENURE HEARING OF ROBERT ZYWICKI
SCHOOL DISTRICT OF THE TOWNSHIP OF MOUNT OLIVE
AGENCY DOCKET NO. 70-3/23

Dear Ms. Simons:

By virtue of the attached resignation letter from Dr. Zywicki, and as acknowledged by counsel in the within email string, this case has now become moot by operation of law, per N.J.A.C. 6A:3-5.6(d). I have also independently confirmed that the Board of Education ratified the acceptance of the same by the acting superintendent.

Thank you for your attention to this matter. My invoice has been included. By copy of this correspondence to counsel, they are being notified that I have closed my file and are thanked for their professional courtesies throughout the case.

Very truly yours,

MICHAEL J. PECKLERS, ESQ.,
ARBITRATOR

c: Vittorio S. LaPira, Esq. (via email)
Stephen Edelstein, Esq. "

150-23
OAL Dkt. No. EDU 06156-22
Agency Dkt. No. 133-5/22

New Jersey Commissioner of Education

Final Decision

Board of Education of the Northern Highlands Regional High School District, Bergen County,

Petitioner,

v.

Board of Education of the Borough of Saddle River, Bergen County,

Respondent.

The record of this matter, the proposed Stipulation of Settlement (Agreement) and the Initial Decision issued by the Office of Administrative Law have been reviewed pursuant to *N.J.A.C.* 1:1-19.1. Upon review, the Commissioner approves the terms of the Agreement and adopts the Initial Decision as the final decision in this matter. The case is hereby dismissed, subject to compliance with the terms of the Agreement.

IT IS SO ORDERED.

Angelica Allen-McMillan, Ed.D.
ACTING COMMISSIONER OF EDUCATION

Date of Decision: May 23, 2023
Date of Mailing: May 24, 2023

State of New Jersey
OFFICE OF ADMINISTRATIVE LAW

INITIAL DECISION
SETTLEMENT
OAL DKT. NO. EDU 06156-22
AGENCY DKT. NO. 133-5/22

NORTHERN HIGHLANDS REGIONAL HIGH SCHOOL DISTRICT BOE, BERGEN COUNTYY,

Petitioner,

v.

BOROUGH OF SADDLE RIVER BOE, BERGEN COUNTY,

Respondent.

James L. Plosia Jr., Esq., for Petitioner (Plosia Cohen LLC, attorneys)

Matthew J. Giacobbe, Esq., for Respondent (Cleary, Giacobbe, Alfieri, Jacobs, LLC, attorneys)

Record Closed: April 25, 2023 Decided: April 26, 2023

BEFORE **DANIELLE PASQUALE**, ALJ:

This matter was transmitted to the Office of Administrative Law on July 25, 2022, for determination as a contested case, pursuant to N.J.S.A. 52:14B-1 to -15 and N.J.S.A. 52:14F-1 to -13.

The parties have agreed to a settlement and have prepared a Stipulation of Settlement indicating the terms thereof, which is attached and fully incorporated herein. This Settlement Agreement resolves all disputes.

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

1. The parties have voluntarily agreed to the settlement as evidenced by their signatures or their representatives' signatures on the attached settlement agreement and the attached Board resolution.

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

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

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

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

April 26, 2023
DATE

DANIELLE PASQUALE, ALJ

Date Received at Agency: April 26, 2023

Date E-Mailed to Parties: April 26, 2023

lr

Attachment

PLOSIA COHEN, LLC
385 Route 24, Suite 3G
Chester, New Jersey 07930
(908) 888-2547
Attorneys for Respondent Northern Highlands
Regional High School Board of Education

NORTHERN HIGHLANDS REGIONAL HIGH SCHOOL BOARD OF EDUCATION Petitioners v. SADDLE RIVER BOARD OF EDUCATION, Respondent	STATE OF NEW JERSEY DEPARTMENT OF EDUCATION Agency Dkt. No.: 133-5/22 OAL Dkt No.: EDU 06156-2022 N **STIPULATION OF SETTLMENT**

The parties in the above-captioned matter hereby agree to resolve this dispute pursuant to the following terms:

1. Within thirty (30) days of the date on which the Administrative Law Judge accepts this Stipulation of Settlement and issues it as a Final Decision, the Saddle River Board of Education ("Saddle River") shall pay the sum of $14,055.00 to the Northern Highlands Regional High School Board of Education ("Northern Highlands").

2. Northern Highlands shall, pursuant to the terms of this Stipulation and payment of the sum set forth in paragraph 1 above, dismiss its pending Petition of Appeal with prejudice.

3. Northern Highlands shall provide Saddle River with a monthly tuition bill setting forth the specific Saddle River students and the related tuition charged for each of the students. The monthly tuition bill shall not be increased or decreased retroactively and shall only be amended prospectively on the specific dates set forth in the parties' current Send-Receive Agreement; namely, October 15th, November 30th, February 28th and June 30th.

NORTHERN HIGHLANDS REGIONAL HIGH SCHOOL BOARD OF EDUCATION	SADDLE RIVER BOARD OF EDUCATION
BY: Christine P Terracina	BY:
DATED:	DATED: 4/13/23

EXTRACT OF MINUTES - CERTIFIED COPY
AS RECORDED IN THE OFFICIAL MINUTE BOOK

The Board of Education of the Northern Highlands Regional High School, Borough of Allendale, in the County of Bergen, New Jersey, convened on April 24, 2023, at 7:30 p.m. in the Northern Highlands Regional High School, 298 Hillside Avenue, Allendale, New Jersey.

The following member(s) of the Board of Education were present: Mrs. Ferrarie, Mrs. Halperin, Mr. Hernandez, Mrs. Liljegren, Mrs. Milston, Mr. Mulvey and Dr. Prince

Mr. Kearl, Mrs. Trumbetti and Dr. Yallowitz were absent.

The following motion was offered by Mr. Hernandez, seconded by Mr. Mulvey and adopted by the Board of Education by Roll Call Vote: 7-0-0.

B-8. Approval of the settlement agreement with Saddle River Board of Education, per attachment.

I, Sue Anne Mather, Secretary of the Board of Education of the Northern Highlands Regional High School, Borough of Allendale, in the County of Bergen, State of New Jersey, hereby certify that the foregoing extract from the minutes of the meeting of the Board of Education of said district duly called and held on April 24, 2023, has been compared by me with the original minutes as officially recorded in the Board Office in the minute book of said the Northern Highlands Regional High School Board of Education and is a true, complete copy thereof and of the whole of said original minutes so far as the same relate to the subject matter referred to in said extract. In witness I have hereunto set my hand and affixed the corporate seal of said Board of Education this 25th day of April, 2023.

Sue Anne Mather

Sue Anne Mather
Business Administrator / Board Secretary

Reyes, Elisa [OAL]

From:	Microsoft Outlook
To:	Matthew Giacobbe; James Plosia; Scot Beckerman; Mary Athenas; Conor Plosia
Sent:	Wednesday, April 26, 2023 10:54 AM
Subject:	Relayed: RE: Judge Pasquale's Initial Decision Settlement on EDU 06156-22 Northern Highlands Reg High School Dist BOE, Bergen Co. v Borough of Saddle River BOE, Bergen Co.

Delivery to these recipients or groups is complete, but no delivery notification was sent by the destination server:

Matthew Giacobbe (mgiacobbe@cgajlaw.com)

James Plosia (jplosia@pclawnj.com)

Scot Beckerman (beckermans@northernhighlands.org)

Mary Athenas (mathenas@cgajlaw.com)

Conor Plosia (conor@pclawnj.com)

Subject: RE: Judge Pasquale's Initial Decision Settlement on EDU 06156-22 Northern Highlands Reg High School Dist BOE, Bergen Co. v Borough of Saddle River BOE, Bergen Co.

151-23
OAL Dkt. No. EDU 11105-22
Agency Dkt. No. 323-11/22

New Jersey Commissioner of Education

Final Decision

K.M., on behalf of minor child, B.M.,

Petitioner,

v.

Board of Education of the Township of Wayne, Passaic County,

Respondent.

The record of this matter, the proposed Settlement Agreement and General Release (Agreement) and the Initial Decision issued by the Office of Administrative Law have been reviewed pursuant to *N.J.A.C.* 1:1-19.1. Upon review, the Commissioner approves the terms of the Agreement and adopts the Initial Decision as the final decision in this matter. The case is hereby dismissed, subject to compliance with the terms of the Agreement.

IT IS SO ORDERED.

Angelica Allen-McMillan, Ed.D.
ACTING COMMISSIONER OF EDUCATION

Date of Decision: May 23, 2023
Date of Mailing: May 24, 2023

State of New Jersey
OFFICE OF ADMINISTRATIVE LAW

INITIAL DECISION
SETTLEMENT
OAL DKT. NO. EDU 11105-22
AGENCY DKT. NO. 323-11/22

K.M. ON BEHALF OF MINOR CHILD, B.M.,

Petitioners,

v.

WAYNE TOWNSHIP BOARD OF EDUCATION,

Respondent.

George M. Holland, Esq., for petitioners

Margaret A. Miller, Esq., for respondent (Weiner Law Group, LLP, attorneys)

Record Closed: April 18, 2023 Decided: April 19, 2023

BEFORE **JULIO C. MOREJON**, ALJ:

This matter was transmitted to the Office of Administrative Law on December 13, 2022 for determination as a contested case, pursuant to N.J.S.A. 52:14B-1 to -15 and N.J.S.A. 52:14F-1 to -13.

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

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

1. The parties have voluntarily agreed to the settlement as evidenced by their signatures or their representatives' signatures on the attached settlement agreement and board resolution.

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

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

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

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

April 19, 2023 — Julio Morejon

DATE — **JULIO C. MOREJON**, ALJ

Date Received at Agency: April 19, 2023

E-Mailed to Parties: April 20, 2023

lr

Reyes, Elisa [OAL]

From:	Microsoft Outlook
To:	George Holland; Alex DJamoos; Laurie Bramley
Sent:	Wednesday, April 19, 2023 9:44 AM
Subject:	Relayed: RE: Judge Morejon's Initial Decision Settlement for EDU 11105-22 K.M. o/b/o B.M. v. Wayne Township Board of Education

Delivery to these recipients or groups is complete, but no delivery notification was sent by the destination server:

George Holland (georgehollandlaw@gmail.com)

Alex DJamoos (ADJamoos@fbolawfirm.com)

Laurie Bramley (LBramley@fbolawfirm.com)

Subject: RE: Judge Morejon's Initial Decision Settlement for EDU 11105-22 K.M. o/b/o B.M. v. Wayne Township Board of Education

Alexander L. D'Jamoos, Esq.
Attorney ID #003582006
FLANAGAN, BARONE & O'BRIEN, LLC
4 Essex Ave. Suite 200
P.O. Box 259
Bernardsville, NJ 07924
(908) 658-3800
Attorneys for Respondents, Wayne Township BOE
Our File No. (304) 28347 RFB

K.M. o/b/o B.M.,

Petitioners,

v.

WAYNE TOWNSHIP BOARD OF EDUCATION, JANE AND JOHN DOES 1-10, AND ABC CORPORATIONS 1-10,

Respondents.

BUREAU OF CONTROVERSIES & DISPUTES
DEPARTMENT OF EDUCATION
STATE OF NEW JERSEY
OAL DOCKET NO. EDU 11105-22
AGENCY REFERENCE NO: 323-11/22

STIPULATION OF DISMISSAL WITH PREJUDICE

Pursuant to a settlement agreement reached by the parties in a companion case, captioned as K.M. and M.M., on behalf of B.M., vs. the Wayne Township Board of Education, OAL Docket. No.: EDS 11510-2022 N; Agency Ref. No.: 2023-35132, it is hereby stipulated and agreed by and between the parties that the above-captioned matter is dismissed with prejudice and without costs against any party.

GEORGE M. HOLLAND, ESQ.
Attorney for Petitioners

By: s/George M. Holland
GEORGE M. HOLLAND

Dated: April 14, 2023

FLANAGAN, BARONE & O'BRIEN, LLC
Attorneys for Respondent

By: s/Alexander D'Jamoos
ALEXANDER L. D'JAMOOS, ESQ.

Dated: April 14, 2023

SETTLEMENT AGREEMENT AND GENERAL RELEASE

This **SETTLEMENT AND RELEASE AGREEMENT** (this "Agreement") is made and entered into by and between K.M. and M.M., individually and on behalf of their minor child, B.M. (collectively referred to as the "Parents"), and the Board of Education of the Township of Wayne (the "Board" and/or the "District")).

W I T N E S E T H

WHEREAS, the Board is the local educational agency responsible for providing B.M. with a free and appropriate public education; and

WHEREAS, B.M. is classified as eligible for special education and related services under the category of "Other Health Impaired" in accordance with the Individuals with Disabilities Education Act, 20 U.S.C.A. §1401, et seq., and the Federal Regulations pertaining to same, 34 C.F.R. §300.1, et seq., as well as the New Jersey Regulations pertaining to same, N.J.A.C. 6A:14-1.1, et seq. (collectively referred to as the "IDEA"); and

WHEREAS, a dispute arose regarding the appropriate placement for B.M. for the 2022/2023 school year; and

WHEREAS, the Parents filed a Petition for Due Process with the New Jersey Department of Education, Office of Special Education, seeking an out-of-district placement for B.M. for the 2022/2023 school year, which matter was docketed before the Department of Education as Agency Reference No.: 2023-35132, and the Office of Administrative Law as Docket No.: EDS-11510-22; and

WHEREAS, the Parents also filed a Petition with the New Jersey Department of Education, Office of Controversies and Disputes, appealing the findings of an investigation conducted in accordance with the Anti-Bullying Bill of Rights Act, which matter was docketed before the Department of Education as Agency Reference No. 323-11/22, and the Office of Administrative Law as EDU-11105-22; and

WHEREAS, the Board and the Parents (the "Parties") desire to settle any and all outstanding claims, controversies, demands, actions or causes of action as set forth in the matter docketed before the Department of Education as Agency Reference No.: 2023-35132, and the Office of Administrative Law as Docket No.: EDS-11510-22; and the matter docketed before the Department of Education as Agency Reference No. 323-11/22, and the Office of Administrative Law as EDU-11105-22; and

WHEREAS, the Parties deem it in their best interests to set forth in a formal written agreement their respective rights, duties and obligations;

NOW, THEREFORE, in consideration of the mutual promises, covenants and other good and valuable consideration set forth herein, it is hereby agreed by and between the Parties hereto as follows:

1. **PROVISION OF EDUCATIONAL SERVICES:**

   A. The Board agrees to place B.M. at Winston Preparatory School ("Winston"), located in Whippany, New Jersey, and pay for all regular and customary tuition and special education and related service costs associated with B.M.'s placement at Winston, as set forth in her most recent IEP, dated September 14, 2022, including, but not limited to door-to-door transportation to and from the Parents' home and Winston, provided that B.M. is accepted into the program, with her placement at Winston to commence as soon as Winston can accommodate her following the approval of this Agreement by the Board in accordance with paragraph 12 of this Agreement.

   B. The Parents shall remain financially responsible for any and all other additional costs associated with B.M.'s placement at Winston or any other fees incurred by the Parents in providing B.M. with additional educational services beyond those costs and fees that will be covered by the regular and customary tuition being paid by the Board for B.M. to attend Winston, as set forth in her IEP, including but not limited to, miscellaneous charges, recreation fees, activity fees, and all other costs not specifically provided for under her IEP or covered by the regular and customary tuition being paid by the Board for her to attend Winston.

   C. B.M.'s IEP, dated September 14, 2022, shall be amended by the District, without a meeting, within 7 days following the approval of this Agreement by the Board to incorporate the terms of this agreement and change in placement to Winston, and the execution of this Agreement by the Parents shall be considered written consent for the District to do so. All other provisions of the previous IEP shall remain in full force and effect. However, a "30-day review" IEP meeting will be conducted following B.M.'s placement at Winston. If a term or condition of this amended IEP conflicts with a term or condition of this Agreement, the term(s) and condition(s) of this Agreement shall control.

   D. Commencing retroactively from April 7, 2023 until such time as her placement at Winston can be effectuated, B.M. shall remain on home instruction with the understanding that B.M. shall be placed at Winston as soon as Winston can accommodate her following the approval of this Agreement by the Board in accordance with paragraph 12 this Agreement.

   E. Should B.M. not be accepted at Winston, or should she be accepted at Winston following the approval of this Agreement by the Board in accordance with paragraph 12 this Agreement B.M. shall be placed on home instruction pending her placement in an alternate out of district placement. If, instead, she is disenrolled or discharged from Winston in the future, the process and procedure outlined in paragraph 4 of this

Agreement shall apply. However, should a dispute arise in the future between the Parties and B.M. can and does remain placed at Winston, meaning she has not been disenrolled or discharged, her placement at Winston shall be her Stay-Put placement in accordance with the IDEA subject to the terms and conditions of this Agreement.

F. The parties understand and agree that B.M. shall not be entitled to Extended School Year ("ESY") services for the Summer 2023.

2. In further consideration of the promises and covenants set forth herein, the Parties further agree as follows:

A. The Parents shall withdraw with prejudice the matter docketed before the Department of Education as Agency Reference No.: 2023-35132, and docketed before the Office of Administrative Law as Docket No.: EDS-11510-22.

B. A. The Parents shall withdraw with prejudice the matter docketed before the Department of Education as Agency Reference No. 323-11/22, and docketed before the Office of Administrative Law as Docket No.: EDU-11105-22. The Parents shall execute the Stipulation of Dismissal in the form that is attached hereto as Exhibit "A".

C. The Parents shall withdraw their request for an appeal before the Wayne Township Board of Education contesting the three (3) day suspension imposed against B.M. through the date of the Parents' execution of this Agreement, and the Parents further agree that they will take no further action to contest this disciplinary action.

D. The District shall complete all open harassment, intimidation or bullying ("HIB") complaints through the date of the Parents' execution of this Agreement. To the extent that any open HIB investigation is concluded with a finding that B.M. committed an act of HIB, no consequences will be imposed against B.M. For all open HIB investigations in which B.M. is either the target or the aggressor, the Parents agree that they will not initiate any action to appeal such findings to the Wayne Township Board of Education and/or the Commissioner of Education.

3. This Agreement is made without any admission of liability or responsibility by the Board and shall not be construed as an admission by the Board that it did not, at all times relevant herein, properly perform its duties and obligations regarding evaluation, programming and placement for B.M. in accordance with law, including the IDEA, through the date of the Parents' execution of this Agreement.

4. The Board's prospective obligations under this Agreement shall cease if and when Parents fail to reside within the Board's geographic boundaries, pro-rated to the date of their departure; or (2) if any time B.M. is disenrolled or discharged from Winston, pro-rated to the date of B.M.'s disenrollment. In the event that B.M. is disenrolled or discharged from Winston, the Board shall immediately hold an IEP meeting to discuss B.M.'s program and placement, and B.M. shall be placed on home instruction until such time as an appropriate

placement is mutually agreed upon by the parties or a placement is ordered by a court of law of appropriate jurisdiction.

5. **MUTUAL RELEASE.**

   A. The Parents, individually and on behalf of B.M. hereby release, acquit and forever discharge the Board, its current and former members, officers, directors, agents, servants, employees, successors, attorneys, assigns and affiliates, of and from any and all known claims, liabilities, demands, causes of action, damages, indemnities and obligations of every kind and nature, in law or equity, which have accrued regarding B.M.'s education from the date of her enrollment in the Wayne Township Public School District through date of the Parents' execution of this Agreement, including but not limited to, any and all claims and demands directly or indirectly arising from or in any way connected with the Board's obligation to provide B.M. with a free and appropriate education; any statutory or common law claims based upon the facts and circumstances upon which this Agreement is based, including but not limited to the IDEA, 42 *U.S.C.* §1983, Section 504 of the Rehabilitation Act of 1973, the New Jersey Law Against Discrimination, the American with Disabilities Act, Anti-Bullying Bill of Rights Act, or any other federal or state law.

   B. The Parties acknowledge and agree that this Agreement is in full and complete settlement of any and all claims that had been asserted, can be asserted, may be asserted or could be asserted by either party against the other up to the date of the Parents' execution of this Agreement, individually or on behalf of their minor child for compensatory damages, pain, suffering, emotional distress, stress, humiliation, embarrassment, mental anguish, medical expenses, punitive damages, interests, attorneys fees, costs of suit, loss of benefits, consequential damage, reputation damage, violation of civil rights, privileges and immunities secured by the Civil Rights Act of 1871, 42 *U.S.C.* §§1981, 1983, 1985, 1986, and 1988, the New Jersey Tort Claims Act *N.J.S.A.* Title 59, the Fourth and Fourteenth Amendments to the United States Constitution, the Individuals with Disabilities Education Act, 20 *U.S.C.* § 1400, *et seq.; N.J.S.A.* 18A:46-1, *et seq.*; and *N.J.A.C.* 6A:14-1.1, *et seq.*, the Anti-Bullying Bill of Rights Act, and any and all other federal, state and local constitutional, statutory, regulatory or administrative laws, ordinances or common law duties, whether enumerated herein specifically or not.

7. **INDEMNIFICATION.** the Parents agree to indemnify and hold harmless the Board, their current and former members, officers, directors, agents, servants, employees, successors, attorneys, assigns and affiliates, of and from any and all claims, liabilities, demands, causes of action, costs, expenses, attorneys' fees, damages, indemnities and obligations of every kind and nature, in law, equity, or otherwise, known and unknown, suspected and unsuspected, disclosed and undisclosed, initiated by B.M. upon reaching the age of majority arising out of or in any way related to agreements, events, acts, omissions or conduct which relate in anyway the claims raised in the matter docketed before the Department of Education as Agency Reference No.: 2023-35132, and the Office of Administrative Law as Docket No.: EDS-11510-22; and the matter docketed before the

Department of Education as Agency Reference No. 323-11/22, and the Office of Administrative Law as EDU-11105-22 up to the date of Parents' execution of this Agreement.

8. **COVENANT NOT TO SUE OR USE ALLEGATIONS.** The parties covenant not to sue, initiate, or continue any legal or administrative proceedings or appeals with regard to any or all claims released herein, provided, however, that this shall not preclude any claims pertaining to a breach or alleged of this Agreement or with respect to any future claims that could be made by the Parents vis-à-vis B.M.'s rights under the IDEA or any other State of Federal law.

9. **CONFIDENTIALITY.** The terms of this Agreement and the Agreement itself shall be held in strictest confidence by all parties and shall not be publicized or disclosed in any manner whatsoever, except that: (a) either party may disclose this Agreement in confidence to their attorneys, accountants, auditors, tax preparers, individuals at Winston and financial advisors; (b) the Board may disclose this Agreement as may be necessary to fulfill its obligation under the Open Public Records Act (the "OPRA"), N.J.S.A. §47:1A 1, et seq., as well as all other standard or legally required reporting or disclosure requirements; and (c) the parties may disclose this Agreement insofar as such disclosure may be necessary to explain or enforce its terms with a court of law or government entity or in any other way as otherwise required by law.

10. **COSTS AND FEES.** The parties shall each bear their own costs, expenses, attorney's fees, and any other costs pursuant to the IDEA or any other Federal or State statute. It is further agreed that neither party shall be considered a "prevailing party" for any purpose under the IDEA as a direct result of the entering into of this Agreement.

11. **ENTIRE AGREEMENT.** This Agreement constitutes the complete, final and exclusive embodiment of the entire agreement between the parties with regard to the subject matter hereof. This Agreement is entered into freely, willingly and voluntarily, without duress or coercion and with the opportunity for each party to consult with counsel of their choosing.

12. **WARRANTIES/BOARD APPROVAL.** The Parents warrant that they are fully entitled and duly authorized to give this complete and final general release and discharge on behalf of themselves and on behalf of their minor child B.M. This Agreement shall be subject to approval by the Board during its next regularly scheduled meeting following its execution by the Parents and the Director of Special Services for the District shall recommend its approval. Upon the Board's counsel's receipt of the fully executed form of this Agreement, and the requisite Board resolution or other proof of board approval, the fully-executed form of this Agreement and proof of board approval shall be submitted to the Administrative Law Judge assigned to this case and request the issuance of a Final Decision approving this Agreement. In the event that board approval is not obtained and/or the Administrative Law Judge assigned to this case fails to approve this Agreement, the Parties shall return to their legal positions without prejudice.

13. **CONSTRUCTION.** For purposes of construction, this Agreement shall not be deemed to be drafted by any party, and any ambiguity shall not be construed against any party.

14. **APPLICABLE LAW.** This Agreement shall be deemed to have been entered into and shall be construed and enforced in accordance with the laws of the State of New Jersey as applied to contracts made and to be performed entirely within New Jersey.

15. **SEVERABILITY.** If a court of competent jurisdiction determines that any term or provision of this Agreement is invalid or unenforceable, in whole or in part, the remaining terms and provisions hereof shall be unimpaired. Such court will have the authority to modify or replace the invalid or unenforceable term or provision with a valid and enforceable term or provision that most accurately represents the parties' intention with respect to the invalid or unenforceable term or provision.

16. **FURTHER ACTS.** The parties agree to cooperate fully and execute any and all supplementary documents and to take all additional actions which may be necessary or appropriate to get full force and effect of the basic terms and interest of this Settlement Agreement and General Release.

17. **COUNTERPARTS.** This Agreement may be signed in counterpart but shall not be effective as against any party unless and until that party executes the Agreement.

18. **PARAGRAPH HEADINGS.** The paragraph headings contained in this Agreement are for reference purposes only and shall not affect in any way the meaning or interpretation of this Agreement.

19. **EXECUTION.** The parties agree that they were not under duress or forced to enter into this Agreement.

THE REMAINDER OF THIS PAGE IS INTENTIONALLY LEFT BLANK

IN WITNESS WHEREOF, the parties have duly authorized and caused this Agreement to be executed as follows:

Board of Education
of the Township of Wayne

By: _____
Donald Pavlak, Jr., Board President

Dated: 4/13/23

ATTEST:

By: _____
William Moffit, Board Secretary

K.M., individually and on behalf
of her minor child, B.M.

By: _____
K.M.

Dated: 4/10/2023

M.M., individually and on behalf of
his minor child, B.M.

By: _____
M.M.

Dated: 4/10/2023

Wayne
Township Public Schools
50 Nellis Drive, Wayne, New Jersey 07470

William P. Moffitt,
Business Administrator/Board Secretary

Phone (973) 633-3006
Fax: (973) 628-8837

EXTRACT FROM THE MINUTES OF A MEETING OF THE BOARD OF EDUCATION OF THE TOWNSHIP OF WAYNE, PASSAIC COUNTY, NEW JERSEY, AS RECORDED IN THE OFFICIAL MINUTE BOOK.

The Board of Education of the Township of Wayne in the County of Passaic, New Jersey convened in a Public Work Session on April 13, 2023 in the Anthony Wayne Middle School Media Center, 201 Garside Avenue, Wayne New Jersey 07470 This meeting was scheduled to begin at 7:30 p.m. pursuant to the terms of the Sunshine Law

The following members of the Wayne Board of Education were present: Ryan Battershill, Michael Fatta , Matthew Giordano Catherine Kazan, Donald Pavlak, Jr., Barbara Rigoglioso and Iveta Wentink

Absent: Sean Duffy Haralampos Prassakos

X. Emergent School Resource Legal

4. Approval of Settlement Agreement and General Release

Recommended Action:

RESOLVED, that the Board of Education, upon the recommendation of the Superintendent, hereby approves the Settlement Agreement and General Release, in the matter of Student ID# 6373554692 OAL DKT. NO.. EDS 11510-2022, AGENCY REF. NO 2023-35132, as attached by reference, and further authorizes the Board President and Secretary to execute same on behalf of the Board The Business Administrator and Superintendent are authorized to take all further steps required by the terms of the Settlement to further implement same.

MOTION: M. FATTAL
SECOND: M. GIORDANO
VOTE: 7 Yeas, 0 Nays, 0 Abstentions

STATE OF NEW JERSEY)
COUNTY OF PASSAIC) ss

I, William P. Moffitt, Business Administrator/Board Secretary, Wayne Board of Education of the Township of Wayne, in the County of Passaic, State of New Jersey, hereby verify that the foregoing extract from the minutes of the meeting of the Wayne Board of Education, duly called and held on April 13, 2023, has been compared by me with the original minutes as officially recorded in my office in the minute book of said Wayne Board of Education and is a true, complete copy thereof and of the whole of said original minutes so far as the same relate to the subject matter referred to in said extract. In witness, I have hereunto set my hand and affixed the corporate seal of the Wayne Board of Education this 14th day of April 2023

SEAL

William P. Moffitt
Business Administrator/Board Secretary

152-23
OAL Dkt. No. EDU 00347-23
Agency Dkt. No. 366-12/22

New Jersey Commissioner of Education

Final Decision

Y.W.,

Petitioner,

v.

Board of Education of the Township of Pequannock, Morris County,

Respondent.

The record of this matter, the proposed Settlement Agreement (Agreement), and the Initial Decision issued by the Office of Administrative Law pursuant to *N.J.A.C.* 1:1-19.1, have been reviewed. Upon such review, the Commissioner notes that paragraph 4 of the Agreement references an action that preceded the consideration of the settlement by the Commissioner of Education. The parties are reminded that a settlement of litigation before the Commissioner is not binding until the Commissioner approves the settlement.

In light of the foregoing, the Commissioner adopts the Initial Decision as the final decision in this matter, provided that the parties have already implemented the settlement terms or have agreed upon mutually satisfactory alternate dates for the effectuation of the terms of the Agreement. Assuming same, the matter is hereby dismissed.

IT IS SO ORDERED.

Angelica Allen-McMillan, Ed.D.
ACTING COMMISSIONER OF EDUCATION

Date of Decision: May 23, 2023
Date of Mailing: May 24, 2023

State of New Jersey
OFFICE OF ADMINISTRATIVE LAW

INITIAL DECISION
SETTLEMENT
OAL DKT. NO. EDU 00347-23
AGENCY DKT. NO. 366-12/22

Y.W. ON BEHALF OF MINOR CHILD S.H.L.,
Petitioner,
v.
BOARD OF EDUCATION OF THE TOWNSHIP OF PEQUANNOCK, MORRIS COUNTY,
Respondent.

Y.W., petitioner, pro se

Jaclyn M. Morgese, Esq., for respondent (Cornell, Merlino, McKeever & Osborne, attorneys)

Record Closed: April 18, 2023 Decided: April 24, 2023

BEFORE **MARGARET M. MONACO**, ALJ:

On or about December 15, 2022, petitioner Y.W. on behalf of minor child S.H.L. filed a Petition of Appeal with the Commissioner of Education challenging the residency determination by respondent Board of Education of the Township of Pequannock (the Board). On or about January 6, 2023, the Board filed an Answer to Petition of Appeal,

which included a request for tuition. The Department of Education transmitted the matter to the Office of Administrative Law, where it was filed for determination as a contested case. Following telephone conferences with the parties, the parties amicably resolved the matter and counsel for the Board submitted the attached Settlement Agreement under letter dated April 18, 2023, along with a Resolution of the Board approving the Settlement Agreement.

Having reviewed the record and the settlement terms, I **FIND**:

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

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

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

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

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

April 24, 2023
DATE

MARGARET M. MONACO, ALJ

Date Received at Agency: April 25, 2023

Date Mailed to Parties: April 25, 2023

jb

SETTLEMENT AGREEMENT

This Agreement is made on April 3, 2023, by and between the Pequannock Township Board of Education ("Board/District"), with offices at 538 Newark Pompton Turnpike, Pompton Plains, New Jersey 07444, and Y.W., residing at 72 McEwen Street, Warwick, New York 10990.

WHEREAS, Y.W. is the parent of S.H.L., a First Grade student enrolled in the District; and

WHEREAS, following a Residency Investigation, S.H.L. was determined not to be domiciled within the District; and

WHEREAS, on November 8, 2022, the Board sent Y.W. a Notice of Ineligibility; and

WHEREAS, on December 19, 2022, Y.W. filed a Residency Appeal with the Department of Education, which the Board Answered on January 10, 2023; and

WHEREAS, this matter was transmitted to the Office of Administrative Law; and

WHEREAS, in lieu of a hearing, the parties seek to resolve this matter amicably; and

NOW THEREFORE, the parties hereby agree as follows

1. S.H.L. shall remain enrolled in the District in order to complete the 2022-2023 School Year. The 2022-2023 School Year is expected to conclude on June 21, 2023.
2. Effective upon the conclusion of the 2022-2023 School Year, S.H.L. shall be disenrolled from the District.
3. Y.W. shall enroll S.H.L., and any other children, in the appropriate home district where Y.W. and her children are domiciled for the 2023-2024 school year and beyond.

4. Y.W. shall pay to the District the total Tuition amount of $19,656.00.
    a. Payment shall be made in nine (9) monthly installments of two thousand one hundred eighty four ($2,184.00) dollars per month.
    b. The first Payment shall be made on the 1st of the Month immediately following full approval of this Agreement by the Board. All subsequent payments shall be made on or before the First of the Month.
    c. Payment shall be by check made payable to the "Pequannock Township School District" and may be mailed to the attention of Gordon Gibbs, School Business Administrator, 538 Newark Pompton Turnpike, Pompton Plains, New Jersey 07444.
5. The Tuition amount agreed to by the parties represents a reduced sum. In the event that Y.W. fails to pay in strict accordance with the terms set forth above, the terms of this Agreement shall be deemed null and void, and the Board shall be permitted to pursue the full cost of Tuition ($32,760.00) for the 2022-2023 school year, as well as reasonable counsel fees and costs.
6. The parties have entered into this Settlement Agreement to avoid the expense and inconvenience of a hearing or any other proceeding regarding residency.
7. In consideration of the settlement of this matter, Y.W. shall release the District from any and all claims, rights and liability, including but not limited to any and all claims for attorneys' fees, compensatory education, money damages, civil liability, or any other equitable or legal relief through the date of the execution of this Settlement Agreement.

8. This Agreement contains the entire Agreement and understanding between the parties and constitutes a full and final Agreement on any and all issues.
9. This Agreement shall be governed by the laws of the State of New Jersey.
10. If, during the term of this Agreement, a specific clause of the Agreement is determined to be illegal or in violation of any Federal or State law, the remainder of the Agreement shall not be affected by such a ruling and shall remain in full force and effect.
11. The parties have entered into this Agreement freely and voluntarily with a full understanding of their rights and the contents of this Agreement The parties acknowledge that they had the opportunity to consult with legal counsel or a representative of their choice and that they reviewed the Agreement in detail with their counsel or representative and fully understand its requirements and limitations.
12. This Agreement may not be altered, amended or modified except by writing, signed and duly authorized by all parties.
13. This Agreement is subject to ratification by the Pequannock Township Board of Education.

ON BEHALF OF S.H.L.:

_____ Date: _____

Yan Wang, Parent

ON BEHALF OF THE PEQUANNOCK TOWNSHIP BOARD OF EDUCATION

Brian ~~Senyk,~~ Board President Date: 4/3/23

8. This Agreement contains the entire Agreement and understanding between the parties and constitutes a full and final Agreement on any and all issues.
9. This Agreement shall be governed by the laws of the State of New Jersey.
10. If, during the term of this Agreement, a specific clause of the Agreement is determined to be illegal or in violation of any Federal or State law, the remainder of the Agreement shall not be affected by such a ruling and shall remain in full force and effect.
11. The parties have entered into this Agreement freely and voluntarily with a full understanding of their rights and the contents of this Agreement. The parties acknowledge that they had the opportunity to consult with legal counsel or a representative of their choice and that they reviewed the Agreement in detail with their counsel or representative and fully understand its requirements and limitations.
12. This Agreement may not be altered, amended or modified except by writing, signed and duly authorized by all parties.
13. This Agreement is subject to ratification by the Pequannock Township Board of Education.

ON BEHALF OF S.H.L.:

Yan Wang, Parent

Date: 7/1/23

ON BEHALF OF THE PEQUANNOCK TOWNSHIP BOARD OF EDUCATION:

Date:

Brian Senyk, Board President

FINANCE, FACILITIES, AND ATHLETICS
Mr. Joseph Blumert, Chair

FFA-134-23 Approval of Settlement Agreement

RESOLUTION NO. FFA-134-23
APPROVAL OF SETTLEMENT AGREEMENT FOR STUDENT #100233

RESOLVED, that the Board of Education, upon recommendation of the Superintendent, hereby approves and accepts the Settlement Agreement for student #100233.

Motion by: Blumert	Second by: MacSweeney	Roll Call Vote: 8-0-0

153-23

New Jersey Commissioner of Education

Final Decision

Michael Cantatore,

Petitioner,

v.

Board of Education of the Carlstadt-East Rutherford Regional High School District, Bergen County,

Respondent.

Synopsis

Pro se petitioner, a teacher employed by the Carlstadt-East Rutherford Board of Education (Board), challenged the Board's adoption of the district's Grading Policy #2624, which has been in place – uninterrupted and unchanged – since it was established in April 2004. Petitioner alleged, *inter alia*, that Policy #2624 was modified on the Carlstadt-East Rutherford District website in February 2021, such that the policy's stated adoption date of April 2004 was falsified. The Board contended that no change has been made to the Board's Grading Policy since 2004, on the district's website or elsewhere.

The ALJ found, *inter alia*, that: there are no material facts at issue in this matter, and the case is ripe for summary decision; in order to bring a complaint to hear a controversy or dispute arising under the school laws, a person must be an interested party; *N.J.A.C.* 6A:3-1.2 defines interested person to mean a person who will be substantially, specifically, and directly affected by the outcome of a controversy before the Commissioner; the Commissioner has consistently declined to hear cases brought by petitioners who would not be affected by the outcome in a direct and meaningful way; here, the petitioner lacks standing to bring the within complaint before the Commissioner as it is students within the school district who would be impacted by the policy in question, not the petitioner; further, the petition was untimely filed under *N.J.A.C.* 6A:3-1.3(i). The ALJ concluded that the petition must be dismissed for lack of standing and untimeliness. Accordingly, the Board's motion for summary decision was granted. The petition was dismissed.

Upon review, the Commissioner concurs with the Administrative Law Judge that petitioner lacks standing and that the petition of appeal was untimely pursuant to *N.J.A.C.* 6A:3-1.3. Accordingly, the Initial Decision of the OAL was adopted as the final decision in this matter, and the petition was dismissed.

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

153-23
OAL Dkt. No. 05498-22
Agency Dkt. No. 112-5/22

New Jersey Commissioner of Education

Final Decision

Michael Cantatore,

Petitioner,

v.

Board of Education of the Carlstadt-East Rutherford Regional High School District, Bergen County,

Respondent.

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

Upon review, the Commissioner concurs with the Administrative Law Judge that petitioner lacks standing and that the petition of appeal was untimely pursuant to *N.J.A.C.* 6A:3-1.3.

Accordingly, the Board's motion for summary decision is granted, and the petition of appeal is hereby dismissed.

IT IS SO ORDERED.[1]

Angelica Allen-McMillan, Ed.D.
ACTING COMMISSIONER OF EDUCATION

Date of Decision: May 25, 2023
Date of Mailing: May 25, 2023

[1] This decision may be appealed to the Appellate Division of the Superior Court pursuant to *N.J.S.A.* 18A:6-9.1. Under *N.J.Ct.R.* 2:4-1(b), a notice of appeal must be filed with the Appellate Division within 45 days from the date of mailing of this decision.

State of New Jersey

OFFICE OF ADMINISTRATIVE LAW

INITIAL DECISION

SUMMARY DECISION

OAL DKT. NO. EDU 05498-22

AGENCY DKT. NO. 112-5/22

MICHAEL CANTATORE,

Petitioner,

v.

BOARD OF EDUCATION OF THE CARLSTADT-EAST RUTHERFORD REGIONAL HIGH SCHOOL DISTRICT,BERGEN COUNTY,

Respondent.

Michael Cantatore, petitioner, pro se

Kerri A. Wright, Esq., for respondent (Porzio, Bromberg & Newman, P.C., attorneys)

Record Closed: January 5, 2023 Decided: April 26, 2023

BEFORE **ELISSA MIZZONE TESTA**, ALJ

PROCEDURAL HISTORY AND STATEMENT OF CASE

Petitioner, Michael Cantatore, challenges respondent, the Board of Education of the Carlstadt-East Rutherford Regional High School District, Bergen County ("the

Board") adoption of the District's Grading Policy. Petitioner is an employee/teacher of the respondent. On July 5, 2022, this matter was transmitted to the Office of Administrative Law ("OAL") from the New Jersey Department of Education.

On July 25, 2022, pursuant to a telephone conference held with the undersigned and the parties, respondent was given leave to file a Motion for Summary Decision. On September 1, 2022, respondent filed same. On September 28, 2022, petitioner filed Opposition to the Motion for Summary Judgement. On October 11, 2022, respondent filed a Reply Brief and on October 31, 2022, petitioner filed a Reply Brief. On January 5, 2023, the final responsive papers were submitted, and the record closed.

FACTUAL DISCUSSION

The facts as set forth by respondent by way of Certification of Dario Sforza, Ed.D and attached to respondent's Brief in Support of Summary Decision as Exhibit A, are as follows:

Petitioner is a teacher and an employee of the Carlstadt-East Rutherford Regional School District Board of Education.

The Board has adopted Policy Number 2624, "Grading System" (the "Grading Policy"), which was created in April 2004. The Board's Grading Policy specifically provides that:

> The Superintendent shall develop and continually review in consultation with teaching staff members, parent(s) or legal guardians(s), and pupils, a grading program appropriate to the course of study and maturity of pupils. The final decision on any contested grade will be the responsibility of the Superintendent. A pupil classified as disabled will be graded in accordance with his/her Individualized Educational Program (IEP) or the Section 504 Plan.

The Board states that the Grading Policy has been in place, uninterrupted, since its creation in April 2004 and was the Grading Policy that was in place at the time relevant to

petitioner's claims. No changes have been made to the Grading Policy at any point in time since its creation in April 2004.

As the District's Superintendent, Dr. Sforza implements the Board's Grading Policy throughout the District. The implementation of the Board's Grading Policy is subject to flexibility and District practice. This includes the "no grade lower" practice by which there is a minimum threshold posted grade which might vary from a teacher's gradebook grade. Under this practice, a *gradebook grade* (which is reflective of the teacher's personal calculation of a student's average marking period performance in class) would warrant an automatic *posted grade* consistent with the "no grade lower" threshold number.

The "no grade lower" practice ranking has been the district's practice for over thirty years. Over the past two years, and in response to the ongoing COVID-19 pandemic, Dr. Sforza implemented the Board's grading policy in such a way that the threshold grade for the district's "no grade lower" practice was set at fifty-five (55). Under practice, the posted grades of fifty-five are automatically inputted as the lowest grade a teacher was permitted to give a student during the period covering January 1, 2021 through June 30, 2021.

Dr. Sforza made the decision to implement the Grading Policy in this manner consistent with his authority as Superintendent and in harmony with the Board's Grading Policy, which provides that "[t]he Superintendent shall develop and continually review in consultation with teaching staff members, parent(s) or legal guardian(s), and pupils, a grading program appropriate to the course of study and maturity of pupils." Difficulties facing District students as a result of the global pandemic, such as learning loss, led to the decision to implement the Grading Policy and its "no grade lower" District practice in this manner, as Dr. Sforza determined this course of action to best serve the district's students and their specific learning needs. This is not the only implementation practice enacted throughout the district in response to the COVID-19 pandemic. In fact, other practices enacted include the Road Back to Becton 1648 Restart Recover Plan 2020-2021, the Road Forward District Plan and Policy 1648, and the Safe Return to In Person

Instruction and Continuity of Service pursuant to the Federal American Rescue Plan Act, Section 2001(i)Z – 2022-2023. However, petitioner took issue only with the implementation of the Grading Policy.

A teacher was permitted to request a lower grade than the required threshold in the past few years so long as they met the requirements on a "Request for Grade Lower than fifty-five" form and appropriately justified their reasons in a short narrative and checked off the interventions implemented to assist each child to succeed. Discretion for approval/denial of a teacher's request is made by the department supervisor and supervisor of guidance. Respondent alleges that the Petitioner attempted to utilize this practice to request lower grades but did not meet the minimum requirements stated above and altered the form to suit his needs, including after he was warned not to do so.

Moreover, Dr. Sforza's wide statutory authority to implement Board policies by virtue of his position as Superintendent is also reinvigorated in myriad in other Board policies. Specifically:

- Board Policy 1230, "Superintendent's Duties", states that:
    - ". . . Function: The Superintendent shall serve as Chief Executive and Administrative Officer of the district by implementing policies established by the Board of Education and by discharging the duties imposed on his/her office by law. . . ."
    - Board Policy 2200, "Curriculum Content", created in July 2016, provides: "The Superintendent is responsible for implementing the curriculum approved by the Board."
    - Board Policy 2210, "Curriculum Development", created in April 2004, provides: " . . As educational leader of the district, the Superintendent shall be responsible to the Board for the development of curriculum and shall establish procedures for curriculum development that ensure the effective participation of teaching staff

members, pupils, the community, and members of the Board. . . ."

- Board Policy 2220, "Adoption of Courses", created April 2004, provides: "The Superintendent is responsible for the continuous evaluation of the courses of study against the educational goals of the Board and shall recommend to the Board such new or altered courses of study as are deemed to be in the best interests of the pupils of this district."

- Board Policy 2610, Educational Program Evaluation", created April 2004, provides: "The Board of Education directs the Superintendent to develop and implement a systematic plan for the continuous evaluation of the educational program against the educational goals established by this Board."

The Superintendent's intimate and extensive involvement in implementing the Board's policies, especially those which touch upon the academic performance of District students is well-documented throughout the Board's many policies.

However, Petitioner did not agree with the manner in which Dr. Sforza implemented the Board's Grading Policy in response to the ongoing COVID-19 pandemic, and thus filed a complaint with OFAC which resulted in Case #INV-010-21. OFAC's decision denied petitioner's complaint and noted that: "N.J.S.A. 18A:12-24.1(c) provides that boards of education have the authority to set policies for school districts. N.J.S.A. 18A:17-20 provides that Superintendents have the authority to implement those policies. Accordingly, the Superintendent has the authority to implement the Board's policy for its Grading System, Policy #2624."

Petitioner appealed to the Commissioner of Education the OFAC's decision because he alleges "the Board of Education never discussed and approved [an] updated" Grading Policy, and because Dr. Sforza "adopt[ed] a different policy, updat[ed] this policy on the district's website and implement[ed] it without approval of" the Board. According to Respondent, the Board's Grading Policy has not been updated. Dr. Sforza did not adopt a new policy nor update the district's website, and that implementing policies are

expressly within the realm of the Superintendent's powers pursuant to statute, regardless.

Petitioner also raised instances of "grade falsification." However, these allegations are not before the Commissioner as, per petitioner's own admission, his complaint to OFAC was "solely based on the [assertion] that Board Policy #2624 (the Grading Policy], which was adopted on April 14, 2004, was changed on the district's website . . .".[1]

In February 2022, the District had a Policy Audit conducted by Strauss Esmay. According to the cover letter sent by Strauss Esmay to the District upon completion of the audit, the audit reviewed "**existing** bylaws, **policies**, and/or regulations. . . " Emphasis added. The Strauss Esmay Policy Audit Summary page generated as a result of the audit shows that the Board's Grading Policy reviewed during the audit was Grading System Policy 2624, adopted in April 2004 -- not some new policy from February 2021 as petitioner alleges. Moreover, the Strauss Esmay audit labeled the existing Grading System Policy #2624 from 2004 as "Good" with "Update Not Needed" for being in "compliance and does not need to be revised."

It is the Board's position that no change has been made to the Board's Grading Policy since 2004, on the district's website, or anywhere else.

Cantatore argues that in February 2021, he accessed both Policy #2624 and Regulation #2624 several times and they were the same document. The next time he accessed Policy #2624, he noticed that the detailed policy was replaced by a three-paragraph policy. See Ex. 6, attached to petitioner's Opposition to Motion for Summary Decision. Cantatore alleges that policy #2624 was modified on the Carlstadt-East Rutherford District website in February 2021, while possessing a falsified adoption date of April 2004. In addition, the three-paragraph policy replaced the original detailed Grading Policy and was never approved at a Board meeting.

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[1] The issue of grade falsification was not made part of the Petition that was transmitted to the OAL.

LEGAL ANALYSIS AND CONCLUSION

A party may move for summary decision under N.J.A.C. 1:1-12.5(b), which "may be rendered if the papers and discovery, which have been filed, together with the affidavits, if any, show that there is no genuine issue as to any material fact challenged and that the moving party is entitled to prevail as a matter of law." This Motion shares similarities with the summary judgment rule established in New Jersey Court Rules, R. 4:46-2. See Judson v. People's Bank and Trust Co. of Westfield, 17 N.J. 67, 74 (1954). Pursuant to this standard, all inferences of doubt are drawn against the movant and in favor of the party against whom the Motion is directed. Id. at 75. Here, both the respondent and the petitioner are moving parties. Summary Judgment is precluded when it is determined that "there exists a genuine issue of material fact." Brill v. Guardian Life Insurance Co., 142 N.J. 520 (1995).

Respondent argues that the Motion for Summary Decision should be granted because petitioner lacks standing. Standing is a threshold justiciability determination about whether a litigant is entitled to bring an action before a court or other tribunal. Herron v. Montclair Bd. of Educ., EDU 14067-13, Comm'r decision, (Jun. 2, 2014) (citing, Stubaus v. Whitman, 339 N.J. Super. 38, 47 (App. Div. 2001)). Restrictions on standing apply to those who initiate administrative proceedings before the Commissioner. The Commissioner has clarified through regulation as well as case law that only an "interested person," i.e., one who has standing, may initiate such proceedings. Bedminster Educ. Ass'n v. Bedminster Twp. Bd. of Educ., EDU 6720-05, Comm'r decision (June 16, 2006). "[I]n order to bring a complaint to hear a controversy or dispute arising under the school laws, a person must be an interested party." S.J. v. Mountain Lakes Bd. of Educ., EDU 7081-03, Initial Decision, (Oct. 7, 2003).

N.J.A.C. 6A:3-1.2 defines "interested person(s)" to mean "a person(s) who will be substantially, specifically, and directly affected by the outcome of a controversy before the Commissioner." Consequently, petitioners must show that they will "be affected by the outcome in a direct and meaningful way" before they may proceed in a contested case. U.K. & G.K. ex rel D.K. v. Clifton Bd. of Educ., 93 N.J.A.R.2d (EDU) 71; Kenwood

v. Montclair Bd. of Educ., EDU 8858-81, Initial Decision, (Apr. 23, 1982), adopted, Comm'r (June 14, 1982)). Thus, to have standing, a complaining party must demonstrate "some measurable amount of detrimental impact on the complaining party's personal rights." S.J. v. Mountain Lakes Bd. of Educ., EDU 7081-03, Initial Decision, (Oct. 7, 2003) (citing, Salorio v. Glaser, 82 N.J. 482, 491 (1998)).

A deficiency in standing is fatal to a petition such as the one at issue here. "The dismissal of cases brought by litigants who will not be effected by the outcome in a direct and meaningful way is required by this regulation." S.J. v. Mountain Lakes Bd. of Educ., EDU 7081-03, Initial Decision, (Oct. 7, 2003) (citing, S.R. and E.D.R. o/b/o E.D.R., Jr. v. Montague Bd. of Educ., EDU 5300-03, 201 AGEN LEXIS 583 (Oct. 3, 2001)). Thus, the Commissioner has consistently declined to hear cases brought by petitioners who would not be affected by the outcome in a direct and meaningful way. See, e.g., U.K. & G.K. o/b/o D.K. v. Clifton Bd. of Educ., 93 N.J.A.R.2d (EDU) 73 (Nov. 20, 1992) (parents objecting to discipline of someone else's child); Kenwood v. Montclair Bd. of Educ., EDU 8858-81, Initial Decision, (April 23, 1982), adopted, Comm'r (June 14, 1982), aff'd, St. Bd. (Sept. 8, 1982) (concerned citizen seeking to rewrite school attendance policy); Lobis v. Maple Shade Bd. of Educ., EDU 3630-79, Initial Decision, (June 11, 1980), adopted, Comm'r (Aug. 11, 1980), aff'd, St. Bd. (Nov. 5, 1980) (parent whose child no longer attended school complaining about quality of education received by remaining students); Delaney v. Woodbridge Bd. of Educ., EDU 382-78, Initial Decision, (Dec. 12, 1979), adopted, Comm'r (June 11, 1980) (taxpayer questioning propriety of filling job vacancies); Ricardelli v. Newark Bd. of Educ., EDU 1894-79, Initial Decision, (Sept. 26, 1979), adopted, Comm'r (Nov. 16, 1979) (taxpayer challenging legality of school board's decision to transfer personnel); G.G. v. New Providence Bd. of Educ., 1975 S.L.D. 502 (parent of high school graduate challenging attendance policy).

Petitioner here cannot make the requisite showing of standing. To illustrate, even if the Board's Grading Policy, or a modification of it, did violate some provision of the school laws or the administrative code, it is not petitioner who would be harmed -- if anyone, it would be the district students who are negatively impacted by the violative policy. As such, petitioner lacks standing just as in Herron, where the Commissioner

determined that a teacher advocating for District students who experienced academic problems, while "commendable", did "not add up to the concrete, personal stake in respondent's current actions which standing contemplates." The Commissioner further highlighted that no district student or parent had joined the petitioner in prosecuting the matter. Id. Thus, the Commissioner concluded, "there are no parties in this case with concrete interests adverse to the actions which respondent has proposed, and to which petitioner objects." Id.

I agree with the Respondent that the similarities between the circumstances at issue in Herron and the instant matter are eerily striking. Petitioner apparently has taken it upon himself to advocate on behalf of the students because he personally disagrees with the manner in which the Superintendent implemented the Board's Grading Policy. However, the result is, just as it was in Herron, then, that petitioner lacks standing. This deficiency is inexorably fatal to the instant Petition such that respondent's Motion for Summary Decision should be granted on this basis alone.

Cantatore argues that he does not lack standing because this matter involves a clear violation of N.J.S.A. 18A:12-24.1c, which provides that boards of education have the authority to set policies for school districts. However, he argues that the Board failed to adopt the three-paragraph Grading Policy #2624 that currently appears on the website. Unfortunately, Cantatore cannot and does not dispute that any District student or parent has joined him in prosecuting this matter. Nor that he has had any concrete, personal stake in respondent's alleged actions which standing contemplates. N.J.A.C. 6A:3-1.2 defines "interested person(s)" to mean "a person(s) who will be substantially, specifically, and directly affected by the outcome of a controversy before the Commissioner." Consequently, petitioners must show that they will "be affected by the outcome in a direct and meaningful way" before they may proceed in a contested matter.

Petitioner cannot make the requisite showing of standing because it is not the petitioner who would be harmed even if the Board's Grading Policy, or modification of it, did violate some provision of the school laws or the administrative code. Rather it would be the district's students who would be negatively impacted by the violative policy. I

CONCLUDE that petitioner lacks standing. Even though it has been concluded that the matter should be dismissed, and Summary Decision be granted in favor of the respondent because petitioner lacks standing, the issue of untimeliness will be addressed.

Respondent also argues that the Motion for Summary Decision should be granted because the petition is untimely. Even if petitioner had standing, the instant petition should be dismissed as untimely. N.J.A.C. 6A:3-1.3(i) provides that a "petitioner shall file a petition no later than the 90th day from the date of receipt of the notice of a final order, ruling, or other action by the district board of education, individual party, or agency, which is the subject of the requested contested case hearing. . ." The purpose of this 90-day rule is to "provide a measure of repose and stability" and ensure "the proper and efficient administration of the school laws" because it "gives school districts the security of knowing that administrative decisions regarding the operation of the school cannot be challenged after ninety -days." Howell Tp., Mayor of Howell and Council of Tp. of Howell v. Freehold Regional School District, EDU 2427-06, Initial Decision (Oct. 5, 2006) (citing, Kaprow v. Bd. of Educ. of Berkeley Tp., 131 N.J. 572, 582 (1993)). Accordingly, the 90-day rule serves an important and "salutary purpose of discouraging dilatoriness and providing a measure of repose in the conduct of school affairs." C.G. and R.G. v. Brick Tp. Bd. of Educ., EDU 110-06, Comm'r decision, (Mar. 24, 2006) (citing, Farrell v. Votator Division of Chemtron Corp., 62 N.J. 111, 115 (1973); Ochs v. Federal Ins. Co., 90 N.J. 108, 112 (1982); Kaprow v. Berkeley Tp. Bd. of Educ., 131 N.J. 572, 588 (1993)). For example, in Howell, the petitioners' challenge to a board policy adopted on May 10, 2004 which was filed on February 17, 2006, was dismissed as untimely. Id.

The sole basis of Petitioner's complaint to OFAC was the alleged change to the Board's Grading Policy on the District's website. According to petitioner, this change took place in February 2021. Respondent argues that even if this change did occur, which respondent denies, February 2021 is far beyond 90-days prior to the filing of the instant petition on May 25, 2022. And, even if petitioner's complaint to OFAC could be considered the date by which to measure timeliness here, the letter requesting an OFAC investigation was sent on October 12, 2021 -- six months after the alleged

February 2021 alteration. See, Certification of Weston J. Kulick, Esq., (Exhibit "A"), attached to Respondent's Brief in Support of Motion for Summary Decision. Whichever the measure respondent argues that the instant petition is untimely.

Cantatore argues that the response from the OFAC regarding OFAC Case #INV-010-21 was mailed on April 28th, 2022. See, Exh. #15 to petitioner's Opposition. The *pro se* petition for the appeal of OFAC Case #INV-101-21 was mailed out on May 25, 2022. See, Exh. #16 petitioner's Opposition. Thus, according to Cantatore, only twenty-seven (27) days elapsed from the day the OFAC response was received until the *pro se* petition was mailed out. I find Respondent's argument to be persuasive and factually correct as to the timing of the filing of Cantatore's Petition. Therefore, I **CONCLUDE** that the instant petition should be dismissed as untimely pursuant to N.J.A.C. 6A:3-1.3(i).

As the facts set forth above pertain to the arguments of lack of standing and untimeliness of filing, I **CONCLUDE** that there are no issues of material fact and Summary Decision should be granted in favor of respondent. There is no need to further address the argument raised by respondent pertaining to the joinder of indispensable parties.

Therefore, having reviewed both parties' submissions, I **CONCLUDE** that Summary Decision should be granted in favor of the respondent dismissing Cantatore's petition because he lacks standing and further because the petition was untimely pursuant to N.J.S.A. 6A:3-1.3(i).

ORDER

It is therefore **ORDERED** that the respondent's Motion for Summary Decision be and hereby is **GRANTED**.

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

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

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

April 26, 2023
DATE

ELISSA MIZZONE TESTA, ALJ

Date Received at Agency: April 26, 2023

Date Mailed to Parties: April 26, 2023

EMT/sej

BRIEFS RELIED ON

For Petitioner:

Petitioner's Opposition to Motion for Summary Decision

Petitioner's Opposition to respondent's Reply.

For Respondent:

Respondent's Motion for Summery Decision with Memorandum of Law and Certification of Weston J. Kulick, Esq. and attached Exhibit A and Certification of Dario Sforza, Ed.D. and attached Exhibits A-E.

Respondent's Reply to petitioner's Opposition to Motion for Summary Decision.

154-23

New Jersey Commissioner of Education

Final Decision

In the Matter of the Suspension of the Teaching Certificate of Jorge Castro, Board of Education of the Borough of East Newark, Hudson County.

Synopsis

This matter was opened before the Commissioner of Education on December 6, 2022, by way of an Order to Show Cause served by the petitioner, the East Newark Board of Education (Board), upon the respondent, Jorge Castro, a Teacher of Social Studies, requiring respondent to show cause why an order should not be entered suspending his teaching certificate for unprofessional conduct pursuant to *N.J.S.A.* 18A:26-10 after he resigned his position without giving the sixty-day (60) notice required by his contract with the petitioner. Respondent was duly advised that – pursuant to *N.J.A.C.* 6A:3-1.5(e) – failure to respond would cause each allegation raised by the Board to be deemed admitted and might result in summary decision by the Commissioner. The respondent failed to answer the order.

Upon review, the Commissioner found that, although respondent resigned without providing 60-days' notice, the circumstances in this matter do not warrant suspension of his teaching certificate. Respondent was hired to teach middle school social studies. A short time after he signed a contract with the Board as a Teacher of Social Studies, petitioner informed respondent that he was expected to become certified in science through a pilot program, and to teach science as well as social studies. Subsequently, several weeks prior to the start of the school year, respondent resigned because he did not want to teach science. The Commissioner noted that respondent was hired with the understanding that he would teach social studies, was later informed that he would be expected to teach science (a subject he was not certified to teach) and thereafter resigned prior to the start of the school year. As such, the Commissioner found that a suspension of respondent's teaching certificate is unjustified. Accordingly, the Commissioner declined to exercise her discretion to suspend respondent's certificate and granted summary decision in his favor. The petition was dismissed.

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

154-23
Agency Dkt. No. 303-11/22

New Jersey Commissioner of Education

Decision

In the Matter of the Suspension of the Teaching Certificates of Jorge Castro, Board of Education of the Borough of East Newark, Hudson County.

For petitioner, Frances L. Febres, Esq.

No appearance by or on behalf of respondent

This matter was opened before the Commissioner of Education on December 6, 2022, by way of an Order to Show Cause served by petitioner (East Newark Board of Education) upon respondent (Jorge Castro), requiring respondent to show cause why an order should not be entered suspending his teaching certificate pursuant to *N.J.S.A.* 18A:26-10 for resigning without giving the notice required by his teaching contract. By notice dated December 9, 2022, the Office of Controversies and Disputes (Office) acknowledged proof that the Order to Show Cause had been served upon respondent and directed respondent to answer within 20 days.

No answer having yet been received, on January 18, 2023, the Office sent respondent a second and final notice – via certified, regular, and electronic mail – directing that he file an answer within ten days. The notice advised that, pursuant to *N.J.A.C.* 6A:3-1.5(e), failure to answer would cause each allegation in petitioner's papers to be deemed admitted and might result in summary decision by the Commissioner. The certified mail tracking indicates that the

notice was left with an individual on January 21, 2023. No answer to the Order to Show Cause has been filed as of this date.

The following facts are demonstrated by the petition and supporting exhibits submitted by petitioner in this matter. Respondent is a certified social studies teacher who entered into a contract to teach at the East Newark Middle School for the 2022-23 school year. On July 10, 2022, the superintendent informed respondent that social studies teachers at East Newark Middle School are traditionally certified in both social studies and science. The superintendent then offered to have respondent certified to teach middle school science as part of a state pilot program if he agreed to take the Praxis, which he indicated that he would. On August 10, 2022, respondent submitted a letter to the Board resigning from the social studies teacher position, effective that day. The letter indicated, in part: "This was a difficult decision to make, but I believe it is what is best for the students and myself. I am passionate about teaching social studies. I cannot say that I am passionate about teaching science, and this position was going to require me to teach science, a subject that I am not strong in." Thereafter, the superintendent informed respondent that he was contractually obligated to provide 60-days' notice of his resignation, or else a petition for suspension of his certificates would be filed. On September 2, 2022, respondent did not show up for the start of the school year. Respondent received a text that day indicating that he was expected at school and he replied reiterating that he had resigned, effective August 10, 2022. Respondent has not submitted a response to these allegations; therefore, the Commissioner deems such allegations to be admitted pursuant to *N.J.A.C.* 6A:3-1.5(e).

Upon review, the Commissioner finds that, while respondent resigned without providing 60-days' notice, the circumstances in this matter do not warrant suspension of his teaching certificates. *N.J.S.A.* 18A:26-10 provides:

> Any teaching staff member employed by a board of education or an approved private school for the disabled, who shall, without the consent of the board . . . cease to perform his duties before the expiration of the term of his employment, shall be deemed guilty of unprofessional conduct, and the commissioner may, upon receiving notice thereof, suspend his certificate for a period not exceeding one year.

According to the statute, the Commissioner has the discretion to suspend a teacher's certificates for a year when a teaching staff member resigns without providing the notice required under his teaching contract. In this matter, it is clear that respondent was hired to teach middle school social studies, as evidenced by his certification in social studies. Only a short time after he signed the contract – not before – did petitioner inform respondent that he was expected to become certified in science through a pilot program and teach science.[1] Thereafter, several weeks prior to the start of the school year, respondent resigned because he did not want to teach science. The Commissioner notes that, given that respondent was hired with the understanding that he would teach social studies, was later informed that he would be expected to teach science (a subject he was not even certified to teach at that time), and resigned prior to the start of the school year, the Commissioner finds that a suspension of his teaching certificates is unjustified. As such, the Commissioner declines to exercise her discretion to suspend respondent's teaching certificates.

[1] It does not appear that that respondent ever took the Praxis and obtained his certification in science.

Accordingly, summary decision is entered in favor of respondent. The petition is hereby dismissed.

IT IS SO ORDERED. [2]

Angelica Allen-McMillan, Ed.D.
ACTING COMMISSIONER OF EDUCATION

Date of Decision: May 25, 2023
Date of Mailing: May 25, 2023

[2] This decision may be appealed to the Appellate Division of the Superior Court pursuant to *N.J.S.A.* 18A:6-9.1. Under *N.J.Ct.R.* 2:4-1(b), a notice of appeal must be filed with the Appellate Division within 45 days from the date of mailing of this decision.

155-23
OAL Dkt. No. EDU 02655-23
Agency Dkt. No. 77-3/23

New Jersey Commissioner of Education

Order on Emergent Relief

Robert Zywicki,

Petitioner,

v.

Board of Education of the Township of Mount Olive, Morris County,

Respondent.

The record of this emergent matter, the sound recording of proceedings at the Office of Administrative Law (OAL), and the recommended Order of the Administrative Law Judge (ALJ) have been reviewed.

This matter arises from tenure charges certified by the Mount Olive Board of Education (Board) against petitioner, who is the district's superintendent. Petitioner alleged that the Board improperly invoked the Doctrine of Necessity to certify the tenure charges, such that the Board's vote should be vacated. Following oral argument on petitioner's motion for emergent relief, the Administrative Law Judge (ALJ) issued an Order dismissing the petition because jurisdiction over petitioner's claims lies with the School Ethics Commission, not the Commissioner.

Upon review, the Commissioner concludes that it was improper for the ALJ to dismiss the petition in an Order. Pursuant to *N.J.A.C.* 1:1-12.7, the disposition of a motion which

completely concludes a case shall be by initial decision. This requirement is critical because, when an initial decision is issued, the parties can file exceptions pursuant to *N.J.A.C.* 1:1-18.4.[1] While the ALJ could have issued an initial decision dismissing the case for lack of jurisdiction, he did not do so. Dismissing the case in its entirety through an Order, without affording the parties the opportunity to file exceptions, deprived them of an important protection built into the applicable regulatory scheme. Accordingly, the Commissioner rejects the ALJ's Order.

However, the Commissioner finds that the record contains sufficient information to rule on petitioner's motion for emergent relief. Pursuant to *Crowe v. DeGioia*, 90 *N.J.* 126, 132-134 (1983), and *N.J.A.C.* 6A:3-1.6, there are four prongs the Commissioner must consider when emergent relief is sought: 1) whether the petitioner will suffer irreparable harm if the requested relief is not granted; 2) whether the legal right underlying petitioner's claim is settled; 3) whether the petitioner has a likelihood of prevailing on the merits of the underlying claim; and 4) whether, when the equities and interests of the parties are balanced, the petitioner will suffer greater harm than the respondent will suffer if the requested relief is not granted.

The Commissioner concludes that petitioner has failed to demonstrate that he will suffer irreparable harm if the requested relief is not granted. Irreparable harm is defined as harm "that cannot be redressed adequately by monetary damages." *Crowe*, *supra*, 90 *N.J.* at 132-33. Petitioner claims that he will suffer based on the loss of his salary and health benefits, but those are precisely the types of harm that can be redressed by monetary damages. To the extent that petitioner alleges damage to his reputation, the Commissioner concludes that

[1] There is no regulation permitting the parties to file exceptions to an Order Denying Emergent Relief.

petitioner has presented only conclusory and speculative arguments and has failed to demonstrate that his reputation will be damaged irreparably if he is not immediately reinstated.

As all four *Crowe* factors must be met for emergent relief to be granted, it is not necessary to address the remaining factors. The Commissioner also does not reach the issue of whether jurisdiction over this matter lies with the School Ethics Commission. The Commissioner, however, concurs with the ALJ that her referral of this case to the OAL does not constitute a decision that jurisdiction over the matter lies with the Commissioner, for the reasons detailed in the Order.

Accordingly, the Order dismissing the petition is rejected. Petitioner's motion for emergent relief is denied. This matter shall continue at the OAL with such proceedings as the parties and the ALJ deem necessary to bring it to closure.

IT IS SO ORDERED.

Angelica Allen-McMillan, Ed.D.
ACTING COMMISSIONER OF EDUCATION

Date of Decision: May 25, 2023
Date of Mailing: May 25, 2023

State of New Jersey
OFFICE OF ADMINISTRATIVE LAW

ORDER DENYING
EMERGENT RELIEF
OAL DKT. NO. EDU 02655-23
AGENCY DKT. NO. 77-3/23

ROBERT ZYWICKI,
Petitioner,
v.
BOARD OF EDUCATION OF THE TOWNSHIP OF MOUNT OLIVE, MORRIS COUNTY,
Respondent.

Stephen J. Edelstein, Esq. for petitioner (Weiner Law Group, LLP, attorneys)

Joseph L. Roselle, Esq. for respondent (Schenck, Price, Smith & King, LPP, attorneys)

BEFORE: JOHN P. SCOLLO, ALJ:

STATEMENT OF THE CASE

Petitioner, Robert Zywicki filed a Verified Petition of Appeal and a Motion for Emergent Relief with the Commissioner of Education's Office challenging and seeking to overturn two actions (i.e., votes) of the Mt. Olive Board of Education (hereinafter MOBOE), which took place during the MOBOE's March 13, 2023 meeting. In the first action, the MOBOE voted to invoke the Doctrine of Necessity, and subsequently, in the

second action, the MOBOE voted to certify tenure charges against Robert Zywicki, the Superintendent of Schools.

PROCEDURAL HISTORY

On or about March 22, 2023, the Petitioner, Robert Zywicki (hereinafter "Zywicki" or the "Superintendent"), through his attorney, Stephen J. Edelstein, filed a Petition of Appeal with an accompanying Motion for Emergent Relief. On March 23, 2023, Attorney Edelstein filed his supporting Brief. On March 23, 2023, the Office of Controversies and Disputes in the Department of Education (hereinafter the "DOE" or the "Commissioner") transmitted the case to the Office of Administrative Law (OAL) where it was filed on March 24, 2023 as a contested case. The matter was then assigned to John P. Scollo, ALJ, who ordered the parties to submit Opposition papers, Reply papers, Briefs and supporting materials by March 30, 2023. Oral argument via Zoom was conducted on April 3, 2023 with concerned citizens and a member of the press[1] in attendance.

After the hearing, the judge ordered the attorneys to submit their written summation Briefs by April 5, 2023 with clarifications of their arguments and additional materials.

BACKGROUND INFORMATION ASCERTAINED FROM THE PARTIES' SUBMISSIONS

In support of Petitioner Zywicki's position, Attorney Edelstein first explained what the Doctrine of Necessity is. He noted at the outset that of the nine people who constituted the MOBOE on March 13, 2023, four of them were conflicted on the issue of voting on tenure charges against Zywicki due to their involvement in pending litigation with Zywicki (who initiated the litigation is not entirely clear to this Tribunal). The four BOE members claimed to be conflicted by Edelstein are: Mr. Antoine Gayles, Mr.

[1] The Tribunal welcomes the participation of the press in this matter. While this Judge does not know the parties, their histories, their affiliations, their personal biases or prejudices, or their feelings towards each other, it is evident that these parties have engaged in multiple actions and lawsuits against each other over matters which directly or indirectly affect the schools. The taxpayers will likely bear the costs of these legal matters. The newspaper's thorough and objective investigation, probing into the origins and causes of these multiple actions, would render a great service to the people of Mt. Olive.

Anthony Strillacci, Ms. Elizabeth Ouimet, and Dr. Anthony Giordano. Attorney Edelstein also noted that the Doctrine of Necessity could only be invoked if there were at least five BOE members who were genuinely conflicted. Edelstein claims that enemies of Zywicki (including the above four people and Christopher Zeier and the MOBOE's attorney, Marc Zitomer), improperly and in bad faith manipulated the issue of conflicts in order to bring the number of purportedly "conflicted" BOE members to at least five so that all MOBOE members, including the four previously listed above, would be able to vote on the tenure charges thus making it virtually certain that said charges would be certified. Edelstein argued that if the machinations of Zywicki's "enemies" in manipulating the number of "conflicted" people had not been successful, then there would have still been a quorum (five people) available to vote on the tenure charges and that the effort to certify the tenure charges against Zywicki would have failed. Attorney Roselle argued to the contrary.

ANALYSIS OF THE ARGUMENTS

The following is not a verbatim account of the arguments and documents presented, but rather it encompasses points that the Tribunal found to be most important.

Petitioner's and Respondent's Arguments Regarding Emergent Relief

Attorney Edelstein argued that the MOBOE's improper invocation of the Doctrine of Necessity and its improper certification of tenure charges against Zywicki, and its concomitant suspension of Zywicki's salary and benefits calls for emergent relief. He argued that Zywicki meets the standards (i.e., the four prongs) set forth in Crowe v. DeGioia, 90 N.J. 126 (1982) and thus qualifies for emergent relief. Attorney Roselle argued to the contrary claiming that emergent relief would not be justified and that Zywicki meets none of the criteria for emergent relief as set forth in Crowe v. DeGioia, 90 N.J. 126 (1982). This will be addressed further below.

The Parties' Arguments Regarding Jurisdiction

Both sides agree that the threshold issue before me is the question of whether the OAL has jurisdiction over this matter.

The Parties' jurisdictional arguments with respect to the Commissioner's decision to refer the matter to the OAL

Zywicki's Petition of Appeal and Motion for Emergent Relief were filed with the Commissioner of Education, who immediately referred the matter to the Office of Administrative Law.

Attorney Edelstein notes that the Commissioner of Education could have dismissed the Petition of Appeal and the Motion if she believed that she lacked jurisdiction. Therefore, he argues that the very fact that the Commissioner referred the matter to the OAL demonstrates that the Commissioner believes he has jurisdiction.

Attorney Roselle, the Respondent's counsel, notes that jurisdiction properly lies with the School Ethics Commission and that the Commissioner of Education's acceptance of Zywicki's papers does not automatically mean that she acknowledged that jurisdiction was proper and was no longer an issue. Attorney Roselle argues that issues dealing with Board member conflicts of interest or the proper invocation of the Doctrine of Necessity belong before the School Ethics Commission. The Respondent relies on previous OAL rulings in Gilliam Gardner v. Board of Education of the City of Hackensack, Bergen County and James Montesano, Patricia Aquino-Lozano and Celso King, Intervenors, OAL Docket No.: EDU 09421-12 (2013) and Castriotta v. Board of Education of the Township of Roxbury, Morris County, OAL Docket No. : EDU 09217-10 (2011), *reversed* on other grounds, 427 N.J. Super. 592 (App. Div. 2012)

The Parties' jurisdictional arguments with respect to whether this matter arises under the School Laws or under the School Ethics Act (N.J.S.A.18A:12-21, et seq.)

Attorney Edelstein argues that this case contains a valid and important issue which arises under the school laws and therefore jurisdiction belongs to the Commissioner of Education and thus to the OAL. For support, he points to the wide scope of N.J.S.A. 18A:6-9, where is says:

> The commissioner shall have jurisdiction to hear and determine, without cost to the parties, all controversies and disputes arising under the school laws....

That being so, Edelstein argues, the case clearly belongs under the jurisdiction of the Commissioner of Education.

The issue Edelstein refers to is whether or not the MOBOE failed to follow Board Policy 0163, a bylaw, when on March 13, 2023 it allegedly failed to post notice of its intent to invoke the Doctrine of Necessity. Attorney Edelstein maintains that this is a school law issue and therefore it brings this matter into the jurisdiction of the Commissioner of Education. He concludes that the Board's invocation of the Doctrine of Necessity fails because the Board did not announce (by posting, as required by the bylaw) its intention to invoke the Doctrine of Necessity.

Attorney Edelstein's other argument is that when the Board ignored one of its own bylaws, it was acting beyond the scope of its bylaws when it went ahead with the vote to invoke the Doctrine of Necessity and when it went ahead with the vote on the tenure charges. The bylaw (Board Policy number 0163) covers the invocation of the Doctrine of Necessity and says:

> "When the Board announces the Doctrine of Necessity is being invoked, the details, parameters and / or other pertinent facts of the matter to be voted should be revealed on an agenda for the public meeting in which the matter is to be voted upon."

Edelstein argues that the ignoring of a bylaw raises a school law issue because boards of education must follow procedures set forth in N.J.S.A. 18A:11-1(for making, amending, or repealing bylaws) if they intend to act outside the bounds of their present bylaws. Attorney Edelstein argues that the Board was only empowered to make, amend or repeal its bylaws by following N.J.S.A. 18A:11-1 and that any such changes must appear in the Board's minutes. Edelstein says, "That did not occur" on March 1, 2023.

The Respondent does not concede that the Board acted beyond the scope of its bylaws because it simply did not ignore or set aside the bylaw. Instead, the MOBOE acted within the scope of its bylaws. It concedes that advance posting of its intent to invoke the Doctrine of Necessity did not take place before the March 13, 2023 Board meeting. However, the Respondent argues that no advance posting could possibly be made of its decision to invoke the Doctrine of Necessity because the MOBOE only received advice regarding the invocation of the Doctrine of Necessity from its attorney during the actual Board meeting of March 13, 2023. Moreover, the Board did announce that it was invoking the Doctrine of Necessity during the Board Meeting. The Respondent argues that its action was fully in keeping with the wording of Board Policy 0163 for the following reasons

because it did announce its decision to invoke the Doctrine of Necessity at its earliest opportunity to do so at the Board meeting to those in attendance;

because the announcement itself constituted the required posting of an agenda;

because there is no requirement in the bylaw for any minimum amount of posting time that must pass before the Board may vote on a matter under the Doctrine of Necessity; and

because the very wording of the bylaw allows a posting to be simultaneous with the vote, as demonstrated by the words "for the public meeting in which the matter is to be voted upon.

APPLICABLE LAW

Jurisdiction of the Commissioner of Education

N.J.S.A. 18A:6-9 provides

> The commissioner shall have jurisdiction to hear and determine, without costs to the parties, all controversies and disputes arising under the school laws ....

The New Jersey School Ethics Act

The New Jersey School Ethics Act is found at N.J.S.A. 18A:12-21 through N.J.S.A. 18A:12-34. N.J.S.A. 18A:12-24 sets forth prohibited conduct pertaining to all school officials. The Code of Ethics for School Board Members is found therein at N.J.S.A. 18A:12-24.1. In addition to the requirements of the School Ethics Act, it imposes additional rules governing the conduct of School Board Members. The establishment of the School Ethics Commission is set forth in N.J.S.A. 18A:12-27. The School Ethics Commission's (or "S.E.C.'s") powers and duties are set forth in N.J.S.A. 18A:12-28 and -29. The jurisdiction of the School Ethics Commission is set forth in N.J.S.A. 18A:12-29 where the statute says that the S.E.C. accepts complaints alleging a violation of the School Ethics Act or of the Code of Ethics for School Board Members. The S.E.C. then determines whether or not probable cause exists to credit the allegations of the complaint. If the S.E.C. determines that probable cause does not exist, then it shall dismiss the complaint. If the S.E.C. determines that probable cause exists, then it shall refer the matter to the Office of Administrative Law (OAL). Once the OAL hears the matter, the S.E.C. determines by majority vote whether the conduct complained of constitutes a violation of the School Ethics Act (i.e., it decides whether to accept or reject the ALJ's Initial Decision). If the S.E.C. finds that a violation has occurred, it shall, by majority vote, recommend a sanction (reprimand, censure, suspension, or removal) to the Commissioner of Education, who then shall act on the S.E.C.'s recommendation regarding the sanction.

LEGAL ANALYSIS AND CONCLUSIONS

Decision on whether the Commissioner of Education's decision to refer the matter to the OAL manifests a decision on his part that jurisdiction lies with the Commissioner rather than with the School Ethics Commission

While that is true that the Commissioner could have dismissed the Petition of Appeal and the Motion for Emergent Relief if she believed she lacked jurisdiction, the Commissioner was not under any obligation to do so. Her decision to refer the matter to the OAL was proper and, in most cases, the usual course; but her referral does not necessarily decide the question of jurisdiction. To believe otherwise would mean that the issue of determining jurisdiction can never be decided by the OAL. Obviously, that is not true. The parties, in their arguments, have not taken such a position and they have vigorously argued the pros and cons of jurisdiction.

I **CONCLUDE** that the Commissioner of Education's referral of the matter to the OAL does not manifest a decision on her part that jurisdiction lies with the Commissioner of Education's Office.

Decision as to whether the bylaw's (Board Policy 0163's) requirement for a posting is or is not a school law issue

I have evaluated the arguments of both counsel. Attorney Edelstein's argument is that the Board's alleged ignoring of its own bylaw raises a school law issue because boards of education must follow procedures set forth in N.J.S.A. 18A:11-1 (for making, amending, or repealing bylaws) if they wish to act outside the bounds of their present bylaws. This, he argues, is a matter of school law. His purpose is to characterize this matter as a school law case. The Respondent's position is that the thrust of Attorney Edelstein's allegations, indeed his entire case, is that the Board "improperly and in bad faith" invoked the Doctrine of Necessity in order to certify tenure charges against Mr. Zywicki. The Respondent argues that Zywicki's allegations are all School Ethics issues, which belong under the jurisdiction of the School Ethics Commission.

The applicable law was stated by Margaret Monaco, ALJ in Clarissa Gilliam Gardner v. Board of Education of the City of Hackensack, Bergen County and James Montesano, Patricia Aquino-Lozano and Celso King, Agency Docket No. 146-5/12 (2013)

> "The Commissioner's jurisdiction is defined by statute and is limited to controversies and disputes arising under the school laws." N.J.S.A. 18A:6-9. Our courts have held that, "[w]here the controversy does not arise under the school laws, it is outside the Commissioner's jurisdiction even though it may pertain to school personnel." Bd. of Educ. Of E. Brunswick v.Twp. Council of E. Brunswick , 48 N.J. 94, 102 (1966). It is recognized that "the sweep of the Department's interest and the Commissioner's jurisdiction does not extend to all matters involving boards of education." Archway Programs, Inc. v.Pemberton Twsp. Bd. of Educ., 352 N.J. Super. 420, 424-425 (App. Div. 2002).

In my analysis, Attorney Edelstein's words tell it all. By his use of the words, "improperly and in bad faith", Attorney Edelstein makes it clear that he is arguing that the members of the MOBOE engaged in unethical conduct. The issue of whether the MOBOE ignored the bylaw is only part and parcel of the larger ethical claims. Therefore, I **CONCLUDE** that the allegation that the MOBOE ignored its bylaw does not transform the matter into a school law case.

Decision Regarding Jurisdiction

The Petitioner, Robert Zywicki, submitted his Petition of Appeal and Motion for Emergent Relief and later submitted his supporting Brief and Exhibits to the Office of Controversies and Disputes in the New Jersey Department of Education. Zywicki did not file his papers with the School Ethics Commission (the "S.E.C.").

While the Commissioner of Education has jurisdiction over "all controversies and disputes arising under the school laws", it is also clear that jurisdiction over School Ethics matters belongs with the School Ethics Commission (i.e., that ethics matters are to be initiated by a complaint filed with the S.E.C., not with the Commissioner, and then the S.E.C. decides the threshold issue of probable cause). Zywicki's allegations are that the

MOBOE "improperly and in bad faith" invoked the Doctrine of Necessity in order to "manipulate" the vote on the certification of the tenure charges against him. The essence of Zywicki's allegations (bad faith manipulation of who was or was not "conflicted" in order to invoke the Doctrine of Necessity, and bad faith manipulation of the vote certifying tenure charges) is that certain members of the MOBOE acted unethically and conspired to strip him of his position, his compensation and his family's health benefits. Therefore, by his own words, Zywicki states that the matter presents ethical issues rather than school law issues.

Since it is clear that Zywicki himself has characterized this matter as an ethics matter, it follows that pursuant to N.J.S.A. 18A:12-28 and 29, jurisdiction lies with the S.E.C. rather that the Commissioner of Education. See Castriotta v. Bd. of Educ. Of Roxbury, EDU-09217-10, Final Decision (May 18, 2011), http://www.nj.gov/education/legal/, rev'd on other grounds, 427 N.J. Super. 592 (App. Div. 2012), where the Commissioner of Education re-affirmed that the "review and adjudication of allegations of Code of Ethics For School Board Members violations is solely within the purview of the School Ethics Commission."

In his filed papers, Zywicki does not raise a valid school law issue; the issues he raises are ethical issues. If this were a matter arising under the school laws, then the Commissioner (and subsequently, at his discretion, the OAL) would have jurisdiction. However, the nature of the allegations, set forth in Zywicki's own words, demonstrates that they are ethical matters and not matters arising under the school laws. As stated above, N.J.S.A. 18A:12-28 and -29 provide that complaints regarding ethical matters fall within the jurisdiction of the S.E.C. rather than the jurisdiction of the Commissioner of Education. I **CONCLUDE** that jurisdiction belongs with the S.E.C. and Zywicki should have brought his grievance by way of a Complaint filed with the S.E.C. It follows, and I **CONCLUDE** that this OAL matter, having been transmitted to the OAL by the Commissioner of Education, who lacked jurisdiction, cannot be maintained, and must be **DISMISSED** for lack of jurisdiction.

Legal Analysis Of The Arguments Concerning The Crowe Factors

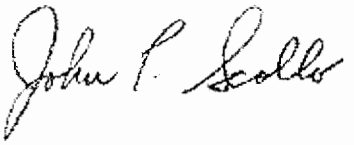
Since the matter has been decided on jurisdictional grounds, there is no need for this Tribunal to make an analysis of the Crowe factors.

ORDER

It is hereby **ORDERED** that Zywicki's Petition of Appeal is **DISMISSED** and his Motion for Emergent Relief seeking an Order immediately vacating the MOBOE's vote to invoke the Doctrine of Necessity and immediately vacating the MOBOE's certification of the tenure charges brought against Zywicki must be, and hereby is, **DENIED**; and it is further

ORDERED that a copy of this **ORDER** shall be transmitted by email from the OAL to both attorneys, Stephen J. Edelstein and Joseph L. Roselle, and that receipt of same shall be acknowledged immediately by the attorneys.

This order on application for emergency relief may be adopted, modified, or rejected by the **COMMISSIONER OF THE DEPARTMENT OF EDUCATION**, who is authorized by law to make the final decision in this case. The final decision shall be issued without delay but no later than forty-five days from the entry of this order. If the **COMMISSIONER OF THE DEPARTMENT OF EDUCATION** does not adopt, modify, or reject this order within those forty-five days, this recommended order shall become the final decision on the issue of emergency relief under N.J.S.A. 52:14B-10.



April 14, 2023

DATE

JOHN P. SCOLLO, ALJ

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APPENDIX

List of Exhibits

For Petitioner

P-1 Petitioner Zywicki's (per Attorney Edelstein) March 31, 2023 submission containing Brief (supplementing his March 23, 2023 Letter Brief to the Commissioner of Education, attached as "#1"); and also attaching as "#2", Board Policy 0131; and also attaching as "#3", the Minutes of the MOBOE meeting of 3/13/23.

P-2 Petitioner Zywicki's April 5, 2023 supplement / summation of the April 3, 2023 oral argument, with an attached Exhibit "A" (a copy of the OAL Transmittal Sheet)

P-3 Copies of Statutes, Regulations, Rules and Cases relied upon by the Petitioner

For Respondent's

R-1 Respondent MOBOE's March 30, 2023 submission containing Brief; Outline of Factual Background; Certification of Christopher Zeier, attaching Exhibits "A" through "L"; and an Index of Cases with cases.

R-2 Respondent's April 5, 2023 supplement / summation of the April 3, 2023 oral argument with an attached "Exhibit "A" (a copy of the 3/13/23 Resolution to Invoke the Doctrine of Necessity); Exhibit "B" (a copy of Zywicki's Answer to the Tenure Charges, Agency Docket Number 70-3/23, dated March 31, 2023); Exhibit "C" (a copy of a 3/31/23 letter from Jennifer Killough-Herrera of the Department of Education to Attorney LaPira and Attorney Edelstein; and, an Index of Cases with cases).

R-3 Copies of Statutes, Regulations, Rules and Cases relied upon by the Respondent.

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

Suzanne Chew,

46-3/21

By: LOPATCONG TOWNSHIP BOARD OF EDUCATION, NEW JERSEY
----------X
Before **Deborah M. Gaines, Esq.**, Impartial Arbitrator

Decision

THE Lopatcong Township Board of Education (the "Board") certified tenure charges against Suzanne Chew ("Respondent" or "Chew"), a tenured teacher in the Lopatcong Township school district. Tenure Charges alleging various claims incapacity to perform her duties were filed with the Commissioner of Education of the State of New Jersey; the Commissioner received the charges on February 19, 2021. Respondent, by her counsel, Sandford Oxfeld, Esq. filed an Answer with the Commissioner, denying the allegations and asserting various defenses. The Commissioner of Education, having reviewed the Tenure Charges and the Respondent's Answer, determined that the charges were sufficient, if true, to warrant dismissal or reduction in compensation and, therefore, referred the matter to arbitration. These charges were referred to the undersigned Arbitrator on April 13, 2021, pursuant to *N.J.S.A.* 18A:6-16, as amended by *P.L.* 2012, c. 26. A timely request for an extension of time was granted.

The hearing was originally scheduled for August 11, 2021, and at the request of the parties adjourned pending Respondent's attending a fitness for duty examination.

The parties entered settlement discussions and have advised the undersigned there is no longer a controversy at issue as the Respondent.

Dated: May 17, 2023

Deborah Gaines

Deborah M. Gaines, Esq., Arbitrator

Affirmation

State of New York }

County of New York } ss:

I, DEBORAH GAINES, do hereby affirm upon my oath as Arbitrator that I am the individual described in and who executed this instrument, which is my award.

Date: May 17, 2023

Deborah Gaines

PHILIP D. MURPHY
Governor

SHEILA Y. OLIVER
Lt. Governor

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

ANGELICA ALLEN-MCMILLAN, Ed.D.
Acting Commissioner

June 1, 2023

Louis R. Lessig, Esq.
Brown & Connery, LLP
360 Haddon Avenue
Westmont, NJ 08108

Edward A. Cridge, Esq.
Mellk Cridge LLC
211 Blackwell Road
Pennington, NJ 08534

Re: ***Jennifer Rome and Mellk Cridge LLC v. State-Operated School District of the City of Camden, Camden County, OAL Dkt. No. EDU 01642-23, Agency Dkt. No. 23-1/23***

Dear Counsel:

I have considered the papers submitted by the parties in connection with respondent's request for interlocutory review of ALJ Judith Lieberman's denial of its motion to dismiss the petition for indemnification filed in the above-captioned matter.

Upon full consideration of the submitted materials, I have determined not to grant interlocutory review, pursuant to my discretion under *N.J.A.C.* 1:1-14.10.

Accordingly, the request for interlocutory review is hereby denied.

Sincerely,

Angelica Allen-McMillan, Ed.D.

Angelica Allen-McMillan, Ed.D.
Acting Commissioner

AAM/JS
c: Honorable Judith Lieberman, A.L.J.
Clerk, Office of Administrative Law

161-23

162-23
OAL Dkt. No. EDU 10880-23
Agency Dkt. No. 297-11/22

New Jersey Commissioner of Education

Final Decision

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

Petitioner,

v.

Board of Education of the Borough of Island Heights, Ocean County,

Respondent.

The record of this matter, the proposed Settlement Agreement and General Release (Agreement) and the Initial Decision issued by the Office of Administrative Law have been reviewed pursuant to *N.J.A.C.* 1:1-19.1. Upon review, the Commissioner approves the terms of the Agreement and adopts the Initial Decision as the final decision in this matter. The case is hereby dismissed, subject to compliance with the terms of the Agreement.

IT IS SO ORDERED.

Angelina Allen McMillan, Ed.D.
ACTING COMMISSIONER OF EDUCATION

Date of Decision: June 5, 2023
Date of Mailing: June 7, 2023

State of New Jersey
OFFICE OF ADMINISTRATIVE LAW

INITIAL DECISION
SETTLEMENT
OAL DKT. NO. EDU 10880-22
AGENCY DKT. NO. 297-11/22

E.E.C ON BEHALF OF MINOR CHILD E.C.,
Petitioner,
v.
BOROUGH OF ISLAND HEIGHTS BOARD OF EDUCATION, OCEAN COUNTY,
Respondent.

Francesco Taddeo, Esq., for petitioner (Francesco Taddeo, LLC, attorneys)

Danielle A. Panizzi, Esq., for respondent (Cleary, Giacobbe, Alfieri, Jacobs, LLC, attorneys)

Record Closed: May 1, 2023 Decided: May 2, 2023

BEFORE **SARAH G. CROWLEY**, ALJ:

This appeal was filed on December 6, 2022. On December 7, 2022, the Department of Education Office of Controversies and Disputes transmitted the matter along with the petition of appeal to the Office of Administrative Law.

The parties have agreed to a settlement and entered into a Settlement Agreement and General Release, indicating the terms thereof, and submitted the Settlement Agreement and General Release and the excerpt from the Borough of Island Heights Board of Education's (Board) regular meeting on April 5, 2023, both of which are attached and fully incorporated herein.

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

1. The parties have voluntarily agreed to the settlement as evidenced by their signatures on the Settlement Agreement and General Release.

2. The settlement fully disposes of all issues in controversy.

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

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

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

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

May 2, 2023
DATE

Sarah G. Crowley
SARAH G. CROWLEY, ALJ

Date Received at Agency: 5/2/2023

Date Mailed to Parties: 5/2/2023

SGC/nn

RECEIVED

2023 MAY -1 P 1:43

STATE OF NEW JERSEY
OFFICE OF ADMIN. LAW

SETTLEMENT AGREEMENT AND GENERAL RELEASE

This Settlement Agreement and General Release (hereinafter the "Settlement Agreement" or "Agreement") is hereby entered into between Erin Edwards-Cruz (referred to as "Cruz"), and The Island Heights Board of Education ("Island Heights"), hereinafter referred to collectively as the "Parties". This General Release is considered the complete Settlement Agreement. For purposes of this Agreement, the terms "Cruz" and Island Heights Board of Education shall also mean and include Erin Edwards-Cruz, Timothy Rem, all and all the parties' heirs, executors, administrators, successors, assigns, agents, attorneys, representatives, accountants, predecessors, successors, insurance carriers, and all persons acting by, through or in concert with them.

This involves a matter arising out of a residency appeal involving a minor, E.C.

NOW THEREFORE, in consideration for foregoing the cost of litigation and for the mutual covenants and other good and valuable considerations contained herein, the Parties hereby agree as follows:

1. Island Heights will receive payment of $500.00, which includes any and all tuition, costs, reimbursement payments, and other good and valuable consideration the receipt and sufficiency of which is hereby acknowledged, in full and final payment for making this Release regarding the purchase the above matter. The parties agree that this Release is mutual, and that the neither will not seek anything further, including any other payment, from the other. The parties release, give up and forever discharge any and all claims and rights which the other may have as of the date of this Release. It is hereby understood and agreed that the parties, for and in consideration of the payment of monies and/or other consideration set forth herein, do hereby irrevocably and unconditionally release and forever discharge each other from all manner of action(s), cause(s) of action, and suit(s), which I ever had, now have or assert, shall or may have or may assert, for, upon or by reason of any matter, cause or thing whatsoever to the date hereof, including attorneys fees, up to the date of this Release, including all New Jersey and/or other state or federal statutory, constitutional, administrative or common law claims against each other.

2. It is understood that each party is solely responsible for, and will satisfy, all legal fees, costs, etc. relating to this matter. The exchange of the above items is the full consideration under this agreement and is in full and complete satisfaction of any and all claims by the parties raised during this action up to the date of execution of this General Release.

3. The parties and their respective legal counsel take no position with respect to and make no representations nor render any opinions on the tax ramifications, if any, of the consideration set forth above.

4. **No Admission of Liability.** This Agreement is executed and all consideration is given in final settlement of disputed claims and shall not be construed as an admission of any allegation of liability or wrongdoing by any of the Parties.

5. **Representation**. In connection with this Settlement Agreement and General Release, the Parties have each been represented by an attorney, or been advised and had the opportunity to consult an attorney, and fully understand the terms of this Settlement Agreement and

General Release and their respective obligations hereunder. In addition, the Parties understand that they are under no obligation to sign this Settlement Agreement and General Release, and they have entered into same freely and voluntarily.

6. **Non Construction**. This Settlement Agreement and General Release shall not be construed against the Party preparing it, but shall be construed as if the Parties jointly prepared it and any uncertainty or ambiguity shall not be interpreted against any Party.

7. **Authorization**. Each Party respectively represents and warrants that it is fully authorized to enter into the terms and conditions of, and to execute and be bound by, this Settlement Agreement and General Release. The Parties agree to use their best efforts promptly to execute and to effectuate the terms provided for herein. In addition, each person whose signature appears thereon warrants and guarantees that he/she has been duly authorized and has full authority to execute this Settlement Agreement and General Release on behalf of the person, persons or entity on whose behalf this Settlement Agreement and General Release is executed.

8. **Choice of Law**. All matters respecting this Settlement Agreement and General Release shall be governed, controlled by and construed in accordance with any applicable federal law and the laws of the State of New Jersey, without giving effect thereof to principles of conflicts of law.

9. This Settlement Agreement is binding upon and inures to the benefit of the Parties hereto and their respective owners, employees, officers, predecessors, successors, heirs, executors, administrators, successors, successor employers and assigns.

10. **Complete Agreement**. The Settlement Agreement and General Release contains the entire agreement between the Parties with respect to the subject litigation between the parties. No party has agreed to do anything other than as is expressly stated in this Agreement.

11. Each of the Parties represent and warrant that they have carefully read each and every provision of this Agreement and that they fully understand all of the terms and conditions contained in each provision of this Agreement. Each of the Parties represents and warrants that they enter into this Agreement voluntarily, of their own free will, without any pressure or coercion from any person or entity whatsoever.

IN WITNESS HEREOF, and intending to be legally bound hereby, the parties have executed the foregoing General Release on the dates set forth and attested below:

WITNESS:_____ _____ Dated: _____

ERIN EDWARDS-CRUZ

ISLAND HEIGHTS BOARD OF EDUCATION

WITNESS: _____

Maureen DeSanto Dated: 4/26/23

BY: Board President

RECEIVED
2023 MAY -1 P 1:43
STATE OF NEW JERSEY
OFFICE OF ADMIN. LAW

ISLAND HEIGHTS SCHOOL DISTRICT
115 Summit Avenue, P.O. Box 329
Island Heights, NJ 08732
Tel. (732) 929-1222
Fax (732) 929-9563
www.islandheights.k12.nj.us

TIMOTHY J. REHM
Superintendent

FRANK FRAZEE
Business Administrator

Sea Devils

LIL BRENDEL
Board Secretary

April 6, 2023

Upon motion of Mr. King seconded by Dr. Smith the following resolution was approved:

ACCEPT SETTLEMENT AGREEMENT AND GENERAL RELEASE FOR RESIDENCY CASE

RESOLVED, That the Board of Education accept the settlement agreement and general release for residency case.

ROLL CALL:
AYES: Mrs. Bornebusch, Mrs. DeSanto, Mr. King, Mr. MacNeal, Mr. Sabey, Dr. Smith and Mrs. Weber

I hereby certify the foregoing to be excerpt from the Board of Education of the Island Heights School in the County of Ocean held on April 5, 2023.

Lil Brendel
Board Secretary

RECEIVED

2023 MAY -1 P 1:43

STATE OF NEW JERSEY
OFFICE OF ADMIN. LAW

CLEARY | GIACOBBE | ALFIERI | JACOBS LLC

DANIELLE PANIZZI, Associate
dpanizzi@cgajlaw.com

Reply to: Matawan Office

May 1, 2023

Via Email Nicole.Newman@oal.nj.gov
Honorable Sarah G. Crowley, ALJ
Attn: Nicole Newman, Judicial Assistant
Office of Administrative Law
3444 Quakerbridge Road
Quakerbridge Plaza- Bldg. 9
Mercerville, New Jersey 08619

Re: E.E.C., o/b/o minor child, E.C. v. Borough of Island Heights Board of Education, Ocean County
Agency Reference No.: 297-11/22
OAL Docket No.: EDU 10880-2022S
SETTLEMENT AGREEMENT WITH BOARD APPROVAL

Dear Judge Crowley:

Please be reminded that the undersigned represents the Borough of Island Heights Board of Education in connection with the above-referenced matter. Petitioners are represented by Francesco Taddeo, Esq. We are pleased to report that the parties were able to reach an amicable resolution of this matter. In this regard, enclosed herewith is a fully executed Settlement Agreement and Board Resolution to be incorporated in the Court's Decision.

As always, we appreciate the Court's assistance regarding this matter.

Respectfully,

/s/ Danielle A. Panizzi

Danielle Panizzi
Enclosures
cc: Francesco Taddeo, Esq. (*via email at* ft@taddeolaw.com)

163-23
OAL Dkt. No. EDU 01136-23
Agency Dkt. No. 26-2/23

New Jersey Commissioner of Education

Final Decision

Board of Trustees of People's Prep Charter School,

Petitioner,

v.

Board of Education of the City of Newark, Essex County,

Respondent.

The record of this matter, the proposed Settlement Agreement (Agreement), and the Initial Decision issued by the Office of Administrative Law pursuant to *N.J.A.C.* 1:1-19.1, have been reviewed. Upon such review, the Commissioner notes that Paragraph 1 of the Agreement references an immediate effective date for the terms of the settlement; such action, however, preceded the consideration of the settlement by the Commissioner of Education. The parties are reminded that a settlement of litigation before the Commissioner is not binding until the Commissioner approves the settlement.

In light of the foregoing, the Commissioner adopts the Initial Decision as the final decision in this matter, provided that the parties have already implemented the settlement terms or have agreed upon mutually satisfactory alternate dates for the effectuation of the terms of the Agreement. Assuming same, the matter is hereby dismissed.

IT IS SO ORDERED.

Angelica Allen-McMillan, Ed.D.
ACTING COMMISSIONER OF EDUCATION

Date of Decision: June 5, 2023
Date of Mailing: June 7, 2023

State of New Jersey
OFFICE OF ADMINISTRATIVE LAW

INITIAL DECISION
SETTLEMENT
OAL DKT. NO. EDU 01136-23
AGENCY DOCKET NO. 26-2/23

BOARD OF TRUSTEES OF PEOPLE'S PREPARATORY CHARTER SCHOOL, ESSEX COUNTY,
Petitioner,
v.
BOARD OF EDUCATION OF THE CITY OF NEWARK, ESSEX COUNTY,
Respondent.

Thomas O. Johnston, Esq. for petitioner

Brenda Liss, Esq. for respondent (General Counsel, Newark Board of Education)

Record Closed: May 1, 2023 Decided: May 3, 2023

BEFORE **ANDREW M. BARON**, ALJ:

This matter was transmitted to the Office of Administrative Law (OAL) on February 6, 2023, for resolution as a contested case pursuant to N.J.S.A. 52:14B-1 to -15 and N.J.S.A. 52:14F1 to -13. During the pendency of the case, parties have agreed to a settlement and have prepared a Settlement Agreement indicating the terms thereof,

which is attached and fully incorporated herein. This Settlement Agreement resolves all disputes.

Having reviewed the contents of the attached Settlement Agreement, I **FIND**:

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

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

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

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

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

May 3, 2023 _____

DATE

ANDREW M. BARON, ALJ

Date Received at Agency: MAY 4, 2023

Date E-Mailed to Parties: May 5, 2023

lr

SETTLEMENT AGREEMENT
PEOPLE'S PREP CHARTER SCHOOL v. NEWARK BOARD OF EDUCATION AND C.S. o/b/o S.S.
AGENCY REF. NO. 26-3/23
EDU 001136-23
February 22, 2023

The parties agree to resolve their differences in the above referenced matter as follows:

1. Effective immediately, student S.S.'s placement will be at the Essex Valley School, conditioned on Essex Valley School re-confirming acceptance and sending an acceptance letter to the Newark Board of Education. Respondent Newark Board of Education ("NBOE") will assume fiscal and transportation responsibility for the placement per *N.J.S.A.* 18A:36A-11 and not challenge this initial placement at Essex Valley School.

2. People's Prep Charter School ("PPCS") shall remain S.S.'s local education agency with respect to providing S.S. case management services.

3. A 30-day IEP review of the S.S.'s current program will take place.

4. Continuation of this program will be determined at the annual review.

5. Upon full execution of this Agreement, PPCS will withdraw its petition for due process and request for emergent relief.

6. Al parties will pay for their own attorney's fees and costs.

Keith Rolen
People's Prep Charter School, Inc.

Marilyn Mitchell
Newark Board of Education

Candice S Sims (May 1, 2023 14:47 EDT)
C.S. on behalf of S.S.

164-23
OAL Dkt. No. EDU 16589-17
Agency Dkt. No. 241-10/17

New Jersey Commissioner of Education

Decision

S.H. and C.H., on behalf of minor children, C.H., S.H., and S.H.,

Petitioners,

v.

Board of Education of the Township of Alloway, Salem County,

Respondent.

On March 26, 2019, a final agency decision was rendered in this matter, wherein the Commissioner found petitioners S.H. and C.H. liable for tuition in the amount of $36,333.60 for a period during the 2017-2018 and 2018-2019 school years in which petitioners' minor children were ineligible to attend school in the Alloway Township school district. The Alloway Township Board of Education (Board) subsequently requested that the Commissioner seek entry of the assessment on the judgment docket of the Superior Court pursuant to *N.J.S.A.* 2A:58-10.

Petitioners opposed the request, arguing that because the Board has received funds for the children's attendance through State Aid and property taxes, the Board has already collected tuition in full and the assessment should not be entered on the judgment docket. However, *N.J.S.A.* 18A:38-1b provides for the assessment of tuition against a parent or guardian without

regard to any other source of funds received by the district. The Commissioner's decision assessing tuition has been upheld by the Appellate Division and the New Jersey Supreme Court, such that there is no question that petitioners owe tuition to the Board. *S.H. and C.H., o/b/o C.H., S.H., and S.H. v. Bd. of Educ. of the Twp. of Alloway, Salem Co.*, 2022 *N.J. Super. Unpub.* LEXIS 857 (App. Div. May 20, 2022), *cert. denied* May 2, 2023. Furthermore, petitioners do not contend that they have personally paid the Board any portion of the amount assessed against them.

Accordingly, pursuant to *N.J.S.A.* 2A:58-10, Stephen Horwell and Christy Horwell are now subject to entry of a judgment by the court in the amount of $36,333.60, which represents the payment ordered by the Commissioner, with interest to accrue as provided by law.

IT IS SO ORDERED.

Angelica Allen-McMillan, J.D.S.
ACTING COMMISSIONER OF EDUCATION

Date of Decision: June 5, 2023
Date of Mailing: June 6, 2023

165-23

New Jersey Commissioner of Education

Final Decision

In the Matter of the Suspension of the
Teaching Certificate of Jessica Ryan,
Board of Education of the Township of Piscataway,
Middlesex County.

Synopsis

The petitioning Board sought the suspension of the teaching certificate of respondent – a non-tenured English teacher – following her resignation without providing the notice required under *N.J.S.A.* 18A:28-8. Respondent sent a letter to the Board on July 14, 2022, indicating that she was resigning and was providing her 60 days' notice but was also requesting an early release from her contract for the 2022-2023 school year. Respondent was advised by district staff that if a replacement could be found within 60 days, she would be provided early release, but otherwise she should expect to be held to her contractual obligations. When the district was unable to hire a replacement before the start of the school year, the respondent refused to report to work on September 1, 2022. Respondent did not deny these allegations but attempted to explain her early resignation by citing to alleged harassment and other difficulties with her work environment.

Respondent failed to appear at an OAL hearing in this matter scheduled for April 11, 2023, and the case was returned to the DOE without the issuance of a decision. As the party that failed to appear in this case was the respondent – not the petitioner – the Board is entitled to a decision on the merits. The Commissioner therefore deems the allegations contained in the order to show cause to be admitted and further deems them sufficient to justify suspension of respondent's teaching certificates pursuant to *N.J.S.A.* 18A:26-10 and *N.J.S.A.* 18A:28-8.

Accordingly, the Commissioner granted summary decision to the petitioner, and respondent's teaching certificates were suspended for a period of one year from the filing date of the decision, a copy of which has been forwarded to the State Board of Examiners for implementation of the suspension.

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

165-23
OAL Dkt. No. EDU 10878-22
Agency Dkt. No. 261-9/22

New Jersey Commissioner of Education

Final Decision

In the Matter of the Suspension of the Teaching Certificate of Jessica Ryan, Board of Education of the Township of Piscataway, Middlesex County.

This matter was opened before the Commissioner of Education on September 22, 2022, by way of an Order to Show Cause served by petitioner Piscataway Township Board of Education (Board) upon respondent Jessica Ryan, requiring respondent to show cause why an order should not be entered suspending her teaching certificates pursuant to *N.J.S.A.* 18A:26-10 and *N.J.S.A.* 18A:28-8 for resigning without giving the notice required by law. On November 29, 2022, the Department of Education (DOE) received respondent's answer. The case was transmitted to the Office of Administrative Law on December 6, 2022.

By notice dated April 19, 2022, and received by the DOE on April 24, 2022, the Administrative Law Judge (ALJ) advised of respondent's failure to appear at a scheduled hearing in the OAL on April 11, 2023, and indicated that the case was being returned to the DOE. The party that failed to appear in this case, however, was the respondent – not the petitioner. Accordingly, the petitioner remains entitled to a decision on the merits.

The petition and supporting exhibits submitted by petitioner in this matter indicate that: respondent entered into a contract to work as a teacher for the 2022-23 school year; the contract provides that it can be terminated by either party upon sixty days' written notice; on

July 14, 2022, respondent sent correspondence indicating that she was resigning and was providing her 60 days' notice but was requesting an early release from her contract; district staff indicated that if a replacement could be found within 60 days, respondent would be provided early release, but otherwise she should expect to be held to her contractual obligation; the district was unable to hire a replacement before the start of the school year; and on August 31, 2022, respondent refused to report to work on September 1, 2022. In her answer, the respondent does not deny these allegations, but only attempts to explain her early resignation by citing to alleged harassment and other difficulties with her work environment. Therefore, the Commissioner deems such allegations to be admitted and further deems them sufficient to justify suspension of respondent's teaching certificates pursuant to *N.J.S.A.* 18A:26-10 and *N.J.S.A.* 18A:28-8.

Accordingly, summary decision is hereby granted to petitioner, and respondent's teaching certificates are suspended for a period of one year from the filing date of this decision, a copy of which shall be forwarded to the State Board of Examiners for implementation of the suspension.

IT IS SO ORDERED.[1]

Angelica Allen-McMillan, J.D.S.
ACTING COMMISSIONER OF EDUCATION

Date of Decision: June 5, 2023
Date of Mailing: June 7, 2023

[1] This decision may be appealed to the Appellate Division of the Superior Court pursuant to *N.J.S.A.* 18A:6-9.1. Under *N.J.Ct.R.* 2:4-1(b), a notice of appeal must be filed with the Appellate Division within 45 days from the date of mailing of this decision.

166-23E
OAL Dkt. No. EDU 03234-23
Agency Dkt. No. 99-4/23

New Jersey Commissioner of Education

Order on Emergent Relief

T.H., on behalf of minor child, A.E.,

Petitioner,

v.

Board of Education of the City of Jersey City, Hudson County,

Respondent.

The record of this emergent matter, the sound recording of proceedings at the Office of Administrative Law (OAL), and the recommended Order of the Administrative Law Judge (ALJ) have been reviewed. Upon such review, the Commissioner concurs with the ALJ that petitioner has failed to demonstrate entitlement to emergent relief pursuant to the standards enunciated in *Crowe v. DeGioia,* 90 *N.J.* 126 (1982), and codified at *N.J.A.C.* 6A:3-1.6. Accordingly, the recommended Order of the OAL denying petitioner's application for emergent relief is adopted for the reasons stated therein.

However, the ALJ mistakenly indicated in the Order that the New Jersey Department of Education (NJDOE) only transmitted the appeal for emergent relief and that there is no underlying merits application pending. While the NJDOE's transmittal indicated that the petitioner sought emergent relief, it did not indicate that emergent relief was the only issue being transmitted. Nonetheless, to the extent clarification is necessary, the Commissioner

deems the petition of appeal to be both a request for emergent relief and a merits petition regarding the issue of A.E.'s transfer.[1] Accordingly, this matter shall continue at the OAL with such proceedings as the parties and the ALJ deem necessary to bring it to closure.

IT IS SO ORDERED.

ACTING COMMISSIONER OF EDUCATION

Date of Decision: June 5, 2023
Date of Mailing: June 7, 2023

[1] Petitioner's request for a "federal audit in order to physically examine [her] child's records" was not transmitted to the OAL, as the NJDOE is not a federal agency and is therefore without authority to transmit or adjudicate that issue. The Commissioner further notes that a document entitled "OCR Electronic Appeals Form" was attached to the petition of appeal. The ALJ referred to this document as a complaint filed with the "DOE Office of Civil Rights." However, the NJDOE does not have an "Office of Civil Rights" and the only "complaint" filed with the NJDOE was the petition of appeal seeking a federal audit and the transfer of A.E. The NJDOE cannot confirm whether the OCR Electronic Appeals Form was filed with the United States Department of Education, where petitioner was directed to file her complaint based on correspondence from the United States Department of Health and Human Services Office for Civil Rights that was also attached to the petition of appeal, nor would the NJDOE have any authority to transmit a complaint filed with a federal agency to the OAL.

State of New Jersey
OFFICE OF ADMINISTRATIVE LAW

ORDER ON EMERGENT RELIEF
OAL DKT. NO. EDU 03234-23
AGENCY DKT. NO. 99-4/23

T.H. ON BEHALF OF A.E.,
Petitioner,
v.
BOARD OF EDUCATION OF THE CITY OF JERSEY CITY, HUDSON COUNTY,
Respondent.

T.H., on behalf of **A.E.** petitioner pro se

Cherie L. Adams, Esq., for respondent Board of Education of the City of Jersey City (Adams, Gutierrez and Lattiboudere, attorneys)

BEFORE **GAIL M. COOKSON**, ALJ:

Petitioner T.H. filed a Petition of Appeal with the Department of Education on or about April 14, 2023, seeking emergent relief against the Board of Education of the City of Jersey City (Jersey City or District) in the form of a (1) "federal audit" of her fourteen-year-old daughter A.E.'s records to verify proper academic placement; and, (2) an out-of-district placement for her at Bayonne High School with tuition paid for by Jersey City for alleged failure to implement and execute A.E.'s Section 504 Plan, 34 C.F.R. §104.36.

The State Department of Education, Office of Controversies and Disputes (DOE), transmitted the Application for Emergent Relief to the Office of Administrative Law (OAL) on or about April 17, 2023. The matter was assigned to the undersigned for oral argument and was scheduled for April 24, 2023. On that date, discussions were held off-the-record, and the matter was continued until April 28, 2023, in order to allow counsel for the District the opportunity to consult with her client because the prior week had been spring break. Oral argument was held on April 28, 2023, and thereafter, I took the emergency petition under advisement.

UNDISPUTED FACTS ON EMERGENT PETITION

1. Petitioner has one daughter, A.E., who is fourteen and is presently in ninth (freshman) grade at James J. Ferris (Ferris) High School. In September, A.E. was accepted into a special Finance Student Learning Center program at Ferris but was not placed in the advanced math class her mother expected her to be.

2. Previously, A.E. attended P.S. 5 and graduated from its eighth grade with a strong academic record.

3. As reported by petitioner, A.E. suffers from severe asthma, migraines, chronic gastro-reflux with a risk of aspiration, a congenital orthopedic disease that makes ambulation and physical activity difficult, and several other medical conditions.

4. At P.S. 5, there was no formal 504 Plan in place or supporting medical documentation for A.E., but petitioner indicated that the nurse and administrators knew how to handle any medical issues that came up. As a result, however, there was no 504 Plan in place to transfer to the high school at the start of the school year.

5. The Ferris 504 team, led by Ethan Norlander, initiated formal 504 Plan considerations and, as medical documentation was submitted, a plan was put in place and then revised twice: November 2022, February 17, and March 15, 2023. Petitioner agreed to each of these 504 Plans.

6. Over the course of those revisions, A.E. was granted an exemption from physical education and sports, an allowance to leave class early, an elevator pass, additional time for tests and assignments, printed copies of lectures or PowerPoint presentations, the right to turn away from computer screens, access to the bathroom without restriction, and referral to the nurse if she had headaches, vomiting, or airway restriction.

7. On April 4, 2023, petitioner filed a separate complaint with the DOE Office of Civil Rights (OCR) alleging a long history of issues with accessing A.E.'s school records, as well as allegations of bullying, racism, "premeditated terrorism," homophobia and other discrimination being directed at her daughter by teachers and administrators. This complaint was not transmitted by DOE and is not before the OAL, but I have deemed it incorporated herein.

8. During oral argument, petitioner reiterated her complaints about a lack of proper grading and/or accountability of A.E.'s work; refusal by administrators and teachers to communicate with her; and asserted some undefined HIPAA violations.

9. Petitioner was concerned that the school nurse did not call her directly on March 31, 2023, when A.E. reported to that office feeling dizzy and nauseous. Instead, A.E. was told to call her mom, who was then put on speaker phone and instructed the nurse to administer the medication as directed by the child's neurologist.

10. This was the only recent[1] incident involving the nurse and A.E. set forth in the OCR complaint which alleged a health safety issue. There is no documentation before me as to any hospitalizations needed by A.E. during this school year, either at the direction of and from the school, or privately from their home during off-school hours.

11. In addition to the communication, schedule, placement, and record issues described above, petitioner's allegations concern her health, her HIPAA rights (only with respect to advising about a conflict with medical and school appointments), her civil rights

[1] Petitioner also set forth that an incident occurred on September 14, 2022, when the school nurse failed to properly execute A.E.'s Asthma Rescue Plan, which plan was apparently not produced by P.S. 5 to Ferris, for which petitioner believed the nurse had a medical obligation to call for an ambulance.

to be free of terroristic and discriminatory threats, and the disrespect shown her by staff, security, and administrators.

LEGAL DISCUSSION AND CONCLUSIONS OF LAW

For the reasons set forth below after due consideration of the written submissions and oral argument received, I **CONCLUDE** that petitioner's request for emergent relief must be **DENIED**.

Petitioner's petition for emergent relief may only be granted if she satisfies the well-known factors set for in Crowe v. DeGoia, 90 N.J. 126 (1986), and I determine that the balance of equities favors granting said relief, to wit:

> 1. The petitioner will suffer irreparable harm if the requested relief is not granted;
>
> 2. The legal right underlying the petitioner's claim is settled;
>
> 3. The petitioner has a likelihood of prevailing on the merits of the underlying claim; and
>
> 4. When the equities and interests of the parties are balanced, the petitioner will suffer greater harm than the respondent will suffer if the requested relief is not granted.

The touchstone of emergent relief is whether irreparable harm will befall the petitioning party prior to the ability of a forum or agency to hear the underlying merits. In the within matter, DOE only transmitted the appeal for emergent relief and there is no underlying merits application pending.

Respondent argues that petitioner cannot be granted in the form of a mandatory, unilateral out-of-district placement to another public high school because the relief sought cannot be supported, there is no send-receive relationship between Jersey City and Bayonne, and the requested relief is not justified.

I start with the factor of irreparable harm and **CONCLUDE** that the removal of A.E. from Ferris High School with less than eight weeks remaining in the school year will be very disrupting to her education and do more harm than good. Certainly, the emergent appeal to have her transferred to Bayonne High School where her mother works, even if Jersey City could be ordered to provide for and pay for such relief, is also unusual and would be disrupting. The assertions by petitioner are replete with incidents that have made her stressed and angry at the school staff and administrators about her child's placement and grades, but the only genuine 504 Plan health safety issue was resolved without hospitalization or apparently any medical follow-up.

Moreover, the Crowe factor of irreparable harm blends with the likelihood of success on the merits in this matter. Other than the allegations that the District has not communicated or cooperated with petitioner throughout the school year, petitioner's main concern on this emergency petition is that her daughter is not safe at the high school because she might stop or have difficulty breathing, and the nurse might not respond with medication and/or actions appropriately and quickly enough. It is clear that A.E. was not denied admission into the special finance program due to her medical disabilities because, in fact, she was admitted. Similarly, there is simply no support in this record that a math placement back in September was determined on the basis of discriminatory considerations. Moreover, a school action taken eight months ago is not an appropriate basis for emergent relief.

The factor of likelihood of success on the merits also favors the District on the issue of the requested relief of an alternative public high school placement. As stated, on April 4, 2023, petitioner filed a separate complaint with the DOE Office of Civil Rights alleging a long history of issues with accessing A.E.'s school records, as well as allegations of bullying, racism, "premeditated terrorism," homophobia and other discrimination being directed at her daughter by teachers and administrators. This complaint was not transmitted by DOE and is not before the OAL, but I have deemed it incorporated herein. Nor does it appear that there are allegations that the District denied A.E. a fair and appropriate public education (FAPE). The same should be said of the present matter. There is no support for petitioner's assertions that A.E.'s schoolwork or grades have been impacted by violation of her 504

Plan. Moreover, if I found that respondent had violated Section 504, the administrative action would be to refer the matter to the OCR for a remedy. 34 C.F.R. § 104.6 (a). Accordingly, on this central concept, petitioner does not have a strong likelihood of success on the merits.

The other Crowe factors require the balance of equities and public interest. These must include the parent's interest in the safety of her child's medical condition and of her daughter's interest in her continued freshman education. At this time and on this record, there is simply too little a basis to mandate a transfer to an out-of-district high school, especially this late in the school year. The single medical incident in March is not evidence of an ongoing emergency or a pattern and practice of failing to abide by A.E.'s 504 Plan.

Accordingly, I **CONCLUDE** that petitioner's application for emergent relief seeking a federal audit, over which I have no jurisdiction, and a paid transfer to an out-of-district public high school must be denied on this emergent appeal because petitioner has failed to satisfy the Crowe factors. Nevertheless, I take this opportunity to also make the following observations and suggestions. First, petitioner is always free to relocate into another public school district, or to locate and timely apply for access to a charter school or choice school district. Second, it was apparent during the oral argument that emotions have run high and tempers have flared between the parties during the school year.

I can only recommend that the District procure the services of an independent community dispute resolution professional to convene a mediation session(s) where the parent, child, and appropriate school personnel can be encouraged to communicate valid concerns in a safe and productive space. The District could also diffuse some of petitioner's concerns by assuring that all tests, assignments, grades, and reports are accessible to her, if not already, and that A.E. is receiving all lesson materials in accessible formats. I would also remind petitioner that discourse is better heard when

conveyed politely, and action is more likely at the local school level than to involve every person in the district and county-wide education bureaucracy.[2]

ORDER

ACCORDINGLY, it is **ORDERED** that petitioner's application for emergent relief is and the same is hereby **DENIED**.

This order on application for emergency relief may be adopted, modified or rejected by the **COMMISSIONER OF THE DEPARTMENT OF EDUCATION**, who/which by law is authorized to make a final decision in this matter. The final decision shall be issued without undue delay, but no later than forty-five days following the entry of this order. If the **COMMISSIONER OF THE DEPARTMENT OF EDUCATION** does not adopt, modify or reject this order within forty-five days, this recommended order shall become a final decision on the issue of emergent relief in accordance with N.J.S.A. 52:14B-10.

Gail M. Cookson

May 1, 2023
DATE

GAIL M. COOKSON, ALJ

id

[2] If petitioner believes there has been bullying of A.E. on the basis of her race, ethnicity, sexual orientation, or medical disabilities, there are proper investigative procedures in place under the HIB statute and regulations that must be followed as an initial matter, with separate appeal opportunities or review if the District fails to investigate. See, e.g., N.J.S.A. 18A:37-25.

167-23
Agency Dkt. No. 102-4/23

New Jersey Commissioner of Education

Final Decision

In the Matter of the Tenure Hearing of
Tracie Sims, School District of the
City of East Orange, Essex County.

For the Petitioner, Ramon E. Rivera, Esq.

No appearance by or on behalf of Respondent, Tracie Sims

This matter was opened before the Commissioner of Education on April 19, 2023, through tenure charges of unbecoming conduct and other just cause certified by AbdulSaleem Hasan, Superintendent of the East Orange School District ("District"), together with supporting evidence against respondent, Tracie Sims, a tenured teacher in the District's employ. The District provided respondent with written notice of such certification at the respondent's current known address, via UPS Next Day Air. The District also provided a copy of the certification to respondent's attorney, via email.

On April 21, 2023, the Commissioner issued a notice to respondent's attorney via email, directing respondent to file an answer to the charges. This communication provided notice to respondent that, pursuant to *N.J.A.C.* 6A:3-5.3 and 6A:3-5.4, an individual against whom tenure charges are certified *"shall have 15 days from the day such charges are filed with the Commissioner to file a written response to the charges with the Commissioner,"* and that failure to answer within the prescribed period would – absent granting of an extension for good cause shown – result in the charges being deemed admitted. On May 15, 2023, the Commissioner

sent a second email to respondent's attorney. No reply to the tenure charges has been received from or on behalf of the respondent.

The certified tenure charges and statement of supporting evidence filed by the District in this matter indicate that the respondent was employed by the District as a tenured teacher. The tenure charges indicate that during a conversation with a student, respondent grabbed the student and shoved her against a group of lockers; after respondent released the student and the student began to walk away, respondent struck the student in the back of her head. The District's filing includes video surveillance footage showing the incident.

Deeming the allegations to be admitted and noting that the respondent has failed to respond to the charges certified against her before the Commissioner, the Commissioner finds that the District's charge of unbecoming conduct has been proven and overwhelmingly warrants the respondent's dismissal. Accordingly, summary decision is hereby granted to the District, and the respondent is dismissed from her tenured position with the East Orange School District.

IT IS SO ORDERED.[1]

Angelica Allen-McMillan, Ed.D.
ACTING COMMISSIONER OF EDUCATION

Date of Decision: June 5, 2023
Date of Mailing: June 7, 2023

[1] This decision may be appealed to the Appellate Division of the Superior Court pursuant to *N.J.S.A.* 18A:6-9.1. Under *N.J.Ct.R.* 2:4-1(b), a notice of appeal must be filed with the Appellate Division within 45 days from the date of mailing of this decision.

Pursuant to Referral by the Commissioner of Education
State of New Jersey
Before Timothy J. Brown, Esquire

In the matter of:

The Tenure Hearing of Celeste Thatcher	:	
	:	**Agency Docket No. 67-3/23**
New Jersey Department of Corrections, Edna Mahan Correctional Facility	:	

Decision (Approval of Settlement)

Appearances:

On behalf of the New Jersey Department of Corrections Edna Mahan Correctional Facility:
Gina Labrecque, Esquire
Deputy Attorney General
Richard J Hughes Justice Complex
25 Market Street, P.O. Box 112
Trenton, NJ 08626-0112

On behalf of Celeste Thatcher:
Rosemarie Cipparulo, Esquire
Weissman & Mintz LLC
One Executive Drive, Suite 200
Somerset, NJ 08837

Introduction

This matter arises from tenure charges against **Respondent Celeste Thatcher** of incompetency, inefficiency, conduct unbecoming and other sufficient cause by the **New Jersey Department of Corrections Edna Mahan Correctional Facility** (the

Department) and a March 31, 2023 referral of the tenure charges to the undersigned by the New Jersey Department of Education, Bureau of Controversies and Disputes pursuant to *P.L. 2112, c. 26.*

The Tenure Charges

In its nine Tenure Charges against Respondent the Department asserted that Respondent engaged in: (1) Incompetency, inefficiency, failure to perform duties; (2) Conduct unbecoming a public employee; (3) Neglect of duty; (4) Other sufficient cause; (5) Neglect of duty, loafing, idleness or willful failure to devote attention to tasks which would not result in danger to persons or property; (6) Failure or excessive delay carrying out an order which would not result in danger to persons or property; (7) Incompetence or inefficiency; (8) Falsification: Intentional misstatement of material fact in connection with work, employment application, attendance, or in any record, report, investigation or other proceeding; and (9) Conduct unbecoming a public employee.[1] The Department asserted that due to the severity of the conduct alleged the Department sought removal of Respondent.

Respondent Thatcher filed a timely answer to charges denying the Department's Tenure Charges.

[1] Charges 1 - 4 reference N.J.A.C. 4A:2-2.3(a), and charges 5 - 9 reference H.R.B. 84-17 as amended.

Settlement

The hearing in this matter began on June 9, 2023 via Zoom, at which time the parties notified the undersigned of their proposed settlement of the Charges, the terms of which settlement were stated on the record. The parties provided the undersigned a copy of their fully executed Settlement Agreement for my review and approval.

At the June 9, 2023 hearing the Respondent, Celeste Thatcher, testified under oath that she read and reviewed the terms of the Settlement Agreement with counsel, and that she understood the terms of, and freely entered into, the Settlement Agreement. The Settlement Agreement (attached) settles all of the outstanding charges filed against Respondent by the Department, the Settlement Agreement – executed by all parties - reflects that Respondent entered into the Agreement with a full understanding of her rights; and that each party consented to the Settlement.[2] Additionally, the Settlement Agreement reflects the approval of the Agreement by the Department as indicated by the signature of Department of Corrections Legal Specialist Kathleen Krieger, Esquire, on behalf of the NJ Department of Corrections (the Department).

Approval of the Settlement is in the public interest as the parties have voluntarily entered into the Settlement and its approval avoids the expenditure of limited public resources.

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[2] At the June 9, 2023 hearing, Counsel for the Department represented that Respondent's obligation under paragraph B of the Settlement "...to retire within thirty (30) days..." has already been satisfied by Respondent, as: (a) the Settlement contemplates only that Respondent will apply for retirement within the referenced 30-day time period and (b) Respondent, as of the date of the hearing, had already applied for retirement.

Based upon such considerations. I find that the Settlement meets the standards established by the State Board of Education in the matter of *In re Cardonick*. State Board Decision of April 6, 1983 *(1990 School Law Decisions (S.L.D.)* 842, 846).

Conclusion

The Settlement of the instant Tenure Charges is **Approved**.

Dated: June 12, 2023

Timothy J Brown, Esquire
Arbitrator

I, Timothy J Brown, affirm that I have executed this document as my Decision in Agency Docket Case No. 67-3/23 relating to tenure charges against Celeste Thatcher on the 12th day of June, 2023.

Timothy J Brown

IN THE MATTER OF TENURE HEARING OF: CELESTE THATCHER and NEW JERSEY DEPARTMENT OF CORRECTIONS	AGENCY DOCKET NO. 67-3/23 Arbitrator Timothy J. Brown **SETTLEMENT AGREEMENT**

The parties hereto have voluntarily resolved all disputed matters and enter into the following Settlement Agreement, which fully disposes of all issues in controversy between them:

A. The **Tenure charges** filed on March 15, 2023, attached hereto as Attachment 1, contained the following charges and proposed discipline:

Charge	Discipline	Dates Effective
1. N.J.A.C. 4A:2-2.3(a)(1) - Incompetency, inefficiency, failure to perform duties	Removal	N/A
2. 2. N.J.A.C. 4A:2-2.3(a)(6) - Conduct unbecoming a public employee.	Same as above	N/A
3. N.J.A.C. 4A:2-2.3(a)(7) - Neglect of duty	Same as above	N/A
4. N.J.A.C. 4A:2-2.3(a) (12) - Other sufficient cause	Same as above	N/A
5. H.R.B. 84-17, as amended: B1 - Neglect of duty, loafing, idleness or willful failure to devote attention to tasks which would not result in danger to persons or property	Same as above	N/A
6. H.R.B. 84-17, as amended: B5 - Failure or excessive delay carrying out an order which would not	Same as above	N/A

result in danger to persons or property		
7. H.R.B. 84-17, as amended: B9 - Incompetence or inefficiency	Same as above	N/A
8. H.R.B. 84-17, as amended: C8 - Falsification: Intentional misstatement of material fact in connection with work, employment application, attendance, or in any record, report, Investigation or other proceeding.	Same as above	N/A
9. H.R.B. 84-17, as amended: C11 - Conduct unbecoming a public employee.	Same as above	N/A

B. Thatcher agrees to Retire within thirty (30) days from the date of signing of this Settlement Agreement, as a resolution to the tenure charges and each charge listed in Paragraph A. Upon the retirement of Thatcher, the Department of Corrections agrees to withdraw all of the charges listed in Paragraph A. The parties further agree that if Thatcher's retirement application is not approved, or if Thatcher's retirement application is approved but Thatcher fails to retire within thirty (30) days, The Department of Corrections shall separate Thatcher and record the separation as a General Resignation pursuant to N.J.A.C. 4A:2-6.3, as a resolution to each charge listed in Paragraph A. As of this date, Respondent is no longer under consideration for any additional disciplinary action.

i. The parties acknowledge that under N.J.A.C. 17:1-2.18, no pension, seniority or benefit time will be credited for periods for which the employee is not paid by the employer.

ii. Thatcher agrees not to seek or accept future employment with the New Jersey Department of Corrections.

iii. Thatcher has been advised that, as a teaching staff member, the Commissioner of the New Jersey Department of Education has the duty to refer all tenure determinations resulting in loss of position to the State Board of Examiners.

iv. The parties acknowledge and agree that settlement is justified in this matter and is in the public interest as Thatcher wishes to seek employment outside of the Appointing Authority and that such settlement will provide the benefit of avoiding the costs and expenses of litigation.

C. The parties have further agreed to the following:

i. The appointing authority will not impose any work days of suspension without pay upon Thatcher.

ii. The Appointing Authority will pay no back pay, counsel fees or other monetary relief to Thatcher.

D. The parties recognize that the Division of Pensions and Benefits is independent of the Department of Corrections, and this Settlement Agreement does not make any representations regarding any actions or inactions by the Division of Pensions and Benefits.

E. The Appointing Authority shall amend Respondent's personnel records to reflect the terms of this Agreement. All internal records of the Department of Corrections will be kept intact. Nothing herein shall preclude the Department from releasing information on this matter to anyone who has a release executed by Respondent or as consistent with state or federal law. Any

information regarding the underlying charges will be provided to the New Jersey Division of Pensions and Benefits.

F. Respondent waives all other claims against the Department of Corrections with regard to this matter, including any award of back pay, counsel fees or other monetary relief, except as may otherwise be provided herein. This Agreement resolves any and all disciplinary actions pending against Respondent.

G. Nothing in this Agreement shall constitute an admission or stipulation of facts regarding the charges listed in Paragraph A. By entering into this Agreement, neither party admits or denies a violation of any state or federal law, any agency or departmental policy, or the parties' collective negotiations agreement. This Agreement shall not constitute precedent in matters involving other employees.

H. Respondent waives all claims, suits or actions, whether known, unknown, vested or contingent, civil, criminal or administrative, in law or equity against the State of New Jersey, the New Jersey Department of Corrections, their employees, agents, or assigns, including but not limited to those which have been or could have been made or prosecuted on account of any conduct of any party occurring at any time with respect to the events, information or disputes giving rise to this action up to the date of this Agreement, including, but not limited to, all claims under Title VII of the Civil Rights Act of 1964, the Civil Rights Act of 1991, the Americans with Disabilities Act, the Family Leave Act, the Family and Medical Leave Act, the New Jersey Law Against Discrimination, the Equal Pay Act, the Conscientious Employee Protection Act, the Age Discrimination in Employment Act, Title 11A - the Civil Service Act, the Older Workers Benefits Protection Act, the Occupational Safety and Health Act, the Public Employee Occupational Safety and Health Act, the New Jersey Smoking Act, New Jersey wages and

hours law, public works statutes, unemployment compensation laws, disability benefits laws, the United States Constitution, the New Jersey Constitution, any workers compensation or common law claims and any contract express or implied. This waiver includes all claims involving any continuing effects of actions or practices which arose prior to the date of this Settlement Agreement and bars the use in any way of any past action or practice in any subsequent claims, except pending workers compensation claims.

I. The parties agree that if any portion of this Settlement Agreement is deemed unenforceable, the remainder of this Settlement Agreement shall be fully enforceable.

J. This Settlement Agreement is binding on the parties and may not be supplemented, amended, changed or modified in any manner, orally or otherwise, except in writing signed by a duly authorized representative of each party.

K. By signing this Settlement Agreement, the signatories represent that they have read this Agreement and fully understand its terms.

APPROVAL OF THE SETTLEMENT AGREEMENT

In witness of this Agreement, having read and understood the terms and having agreed to be bound by each of the terms of this Agreement, the parties affix their signatures below.

6/8/2023
DATE

Respondent
Celeste Thatcher

AGENCY DOCKET NO. 67-1/23

6/8/23
DATE

On Behalf of Respondent
Rosemarie Ciparullo

6/1/23
DATE

On Behalf of NJ Dept. of Corrections
Kathleen Kreuger

CERTIFICATION

I, Celeste Thatcher, being the Petitioner in this matter, hereby certify that I have reviewed this Settlement Agreement and fully understand its meaning and terms. I acknowledge my understanding and verify my acceptance of the terms of this Settlement Agreement. I acknowledge that my representative questioned my understanding, verified my acceptance of the terms of this Settlement Agreement, and answered all of my questions regarding this Settlement to my satisfaction. I am satisfied with my representation and I enter into this Settlement Agreement voluntarily.

It is also my understanding that this Settlement Agreement will terminate all claims and further appeal against the State of New Jersey and the New Jersey Department of Corrections.

I certify that the foregoing statement made by me are true. I am aware that if any of the foregoing statements made by me are willfully false, I am subject to punishment.

6/8/2023
Dated:

Celeste Thatcher

178-23

New Jersey Commissioner of Education
Decision

T.Y. and A.Y., on behalf of minor child, S.Y.,

Petitioner,

v.

Board of Education of the Gateway Regional High School District, Gloucester County,

Respondent.

Synopsis

Petitioners disputed the respondent Board's finding that their daughter, S.Y., committed an act of harassment, intimidation or bullying (HIB) against a fellow student pursuant to New Jersey's Anti-Bullying Bill of Rights Act, *N.J.S.A.* 18A:37-13.2 et seq (the Act). After an investigation by the school's anti-bullying specialist, the Board determined that S.Y. had committed an act of HIB against B.B. when she made racial comments that were reasonably perceived to be motivated by B.B.'s African American ancestry. The petitioners sought to reverse the Board's HIB determination, contending that the determination was arbitrary, unreasonable, and in disregard of the circumstances surrounding the alleged HIB incidents. The Board asserted that S.Y.'s conduct satisfied all of the elements of the statutory definition of HIB under the Act and must therefore be upheld, as its actions were not arbitrary, capricious or unreasonable.

The ALJ found, *inter alia*, that: an action by a board of education is entitled to a presumption of correctness unless it is proven to be arbitrary, capricious or unreasonable; under the Act, "harassment, intimidation, or bullying" is broadly defined as any gesture, any written, verbal, or physical act, or any electronic communication that is reasonably perceived as motivated by any actual or perceived distinguishing characteristic, such as race, color, religion, ancestry, national origin, gender, sexual orientation, gender identity and expression, or a mental, physical, or sensory disability, that takes place on school property and substantially disrupts the orderly operation of the school; in the instant case, S.Y.'s actions constituted HIB as the term is defined by law; her racial comment at the lunch table and her injection of race into an encounter with B.B. in a crowded hallway were reasonably perceived by B.B. to be motivated by the distinguishing characteristic of race; the incidents occurred on school property during the regular school day and substantially interfered with the rights of another student; B.B. left the lunchroom upset and her reaction to S.Y.'s comments disrupted her next class to the extent that she had to be removed from class by her teacher. The ALJ concluded that the petitioners failed to meet their burden to prove that the Board's actions in determining that S.Y. committed acts of HIB against B.B. were arbitrary, capricious, or unreasonable; accordingly, the Board's HIB determination was affirmed, and the petition was dismissed.

Upon review, the Commissioner concurred with the ALJ that the Board did not act in an arbitrary, capricious, or unreasonable manner in rendering its HIB determination. Accordingly, the Initial Decision of the OAL was adopted as the final decision in this matter, and the petition was dismissed.

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

178-23
OAL Dkt. No. 03784-22
Agency Dkt. No. 75-4/22

New Jersey Commissioner of Education

Final Decision

T.Y. and A.Y., on behalf of minor child, S.Y.,

Petitioner,

v.

Board of Education of the Gateway Regional High School District, Gloucester County,

Respondent.

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

Upon review, and for the reasons thoroughly detailed in the Initial Decision, the Commissioner concurs with the Administrative Law Judge that the Board's decision that S.Y. committed an act of harassment, intimidation, and bullying was not arbitrary, capricious, or unreasonable.

Accordingly, the petition of appeal is hereby dismissed.

IT IS SO ORDERED.[1]

Angelica Allen-McMillan, J.d.D.
ACTING COMMISSIONER OF EDUCATION

Date of Decision: June 15, 2023
Date of Mailing: June 19, 2023

[1] This decision may be appealed to the Appellate Division of the Superior Court pursuant to *N.J.S.A.* 18A:6-9.1. Under *N.J.Ct.R.* 2:4-1(b), a notice of appeal must be filed with the Appellate Division within 45 days from the date of mailing of this decision.

State of New Jersey
OFFICE OF ADMINISTRATIVE LAW

INITIAL DECISION

OAL DKT. NO. EDU 03784-22

AGENCY DKT. NO. 75-4/22

T.Y. AND A.Y. ON BEHALF OF S.Y.,

Petitioners,

v.

BOARD OF EDUCATION OF THE GATEWAY REGIONAL HIGH SCHOOL DISTRICT, GLOUCESTER COUNTY,

Respondent.

Jeremiah J. Atkins, Esq., for petitioners (Hoffman and DiMuzio, attorneys)

Kelli A. Prinz, Esq., for respondent (D'Arcy Johnson Day, P.C., attorneys)

Record Closed: April 3, 2023 Decided: May 4, 2023

BEFORE **KATHLEEN M. CALEMMO**, ALJ:

STATEMENT OF THE CASE

Petitioners, T.Y. and A.Y., challenged the determination of respondent, the Gateway Regional High School District Board of Education, (the Board) that their daughter, S.Y. engaged in behavior statutorily defined as harassment, intimidation, and bullying (HIB). Petitioners maintained that the respondent failed to consider the behavior of the alleged victim and compared the situation to a conflict between students rather than an act of HIB. Petitioners maintained that the Board's determination was arbitrary, unreasonable, and in utter disregard of the circumstances before it and must be reversed.

The Board replied that its actions complied with all the procedural mandates of the statute and its regulations. The Board further maintained that because its actions were not arbitrary, capricious, or unreasonable, its determination must be upheld.

PROCEDURAL HISTORY

Petitioner filed a petition of appeal with the Commissioner of Education (the Commissioner) on April 5, 2022. After respondent filed its answer, the matter was transmitted to the Office of Administrative Law (OAL) on May 10, 2022.

A plenary hearing was conducted via Zoom platform on December 20, 2022. After receipt of the closing summations on April 3, 2023, the record closed.

FACTUAL DISCUSSION AND FINDINGS

TESTIMONY

Petitioners

S.Y. is currently a tenth-grade student at Gateway. At the beginning of nineth grade, S.Y.'s friend O. asked if B.B. could sit at their lunch table and everyone agreed. B.B. was new, but she was friends with O.

S.Y. stated that when things did not go B.B.'s way, B.B. would say it was racially motivated. B.B. called the other girls racists. S.Y. described everyone else at the table getting ice cream and B.B. commented after not getting any that it was because she is black. After calling the other girls racist, she usually laughed. S.Y. did not take it seriously, and B.B. never appeared upset. B.B. would also call her "cracker." She would just say "cracker" over and over for no reason, but always seemed to be joking because she would be laughing. S.Y. laughed along and claimed it did not bother her at first, but it started to when it turned serious.

The first incident occurred when they were leaving history class and walking to physics class. S.Y. was annoyed because middle school students were blocking the

hallway. B.B. asked her if she was mad. When S.Y. said she was, B.B. asked her if it was because "I'm black" and S.Y. answered "yes" jokingly because that was the nature of their relationship. S.Y. described that comment as B.B.'s usual response to everything. S.Y.'s yes answer was sarcastic. She said it to appease B.B. and make her stop asking. During her interview, S.Y. told this to Ms. Little and Mr. Raba.

S.Y. also recalled the lunchtime finger incident. S.Y.'s friend, C., sent a picture of her bruised finger to S.Y. via Snap Chat application on her cell phone. S.Y. showed the picture of the bruised finger to the girls at the lunch table. When S.Y. said that C.'s finger was black and blue, B.B. chimed in with "like me." S.Y. sarcastically answered "yes, like you." She never said it's black like B.B. S.Y. claimed it was B.B. who brought race into the conversation. According to S.Y., the mood at the table was happy, B.B. was laughing when she made her comment. After B.B. made the comment and S.Y. sarcastically responded, B.B. left the table but she came back laughing.

After these incidents, S.Y. and B.B. only saw each other in class, everyone from the lunch table moved to different tables.

All the girls at the table had been friends before B.B. started sitting at their lunch table. They never used the term "cracker" until B.B. joined the group. S.Y. claimed that B.B. used the term first, but then they all used it. Prior to her statement during this investigation, S.Y. never reported that the term "cracker" was being said at her lunch table.

T.Y. testified that after conversations with his daughter, he felt the HIB determination was wrong. He requested a meeting with Dr. Pierro, Mr. Raba, and Ms. Little. During the meeting, he took contemporaneous notes. (P-3.) He was surprised by Mr. Raba's statement that even though S.Y. had no malicious intent, her statements were offensive to another student. T.Y. was also confused by the administrations' lack of reaction when they were informed of the racial comments being made at the lunch table. After months of engaging in this behavior, how were the girls to know when the joking stopped, and the comments became HIB?

Respondents

S.J. is B.B.'s mother. B.B. had just started school at Gateway at the beginning of the year. The family had moved from Camden; this was B.B.'s first year in a new school district.

S.J. had never heard B.B. mention S.Y.'s name until the incident. S.J. knew that the girls sat in the same group at lunch because B.B. said she did not want her lunch moved because of this incident. B.B. sat at this table because it is where her friend O. sat. B.B. had told her mother about two incidents where S.Y. had made comments to her about the color of her skin, which upset her. B.B. told her that S.Y. referred to another girl's black and blue finger as the color of B.B. and made a comment referring to being angry and being black.

Although B.B. was hurt by these comments, she did not have any difficulty going to school and her grades did not suffer. It can be a struggle for B.B. being a minority student, but S.J. attempted to reassure her daughter that she is beautiful. Her daughter does not like to talk about the incident.

S.J. had no knowledge of any racially related comments made by her daughter. Had she known, S.J. would not have condoned it. The school district kept her informed of the investigation but never mentioned anything about B.B. making racial comments.

Aimee Little is the Anti-Bullying Specialist (ABS) at Gateway Regional High School. She has served in that capacity since 2011. As the ABS, Ms. Little must be familiar with the Anti-Bullying Act, its regulations, and the Board's HIB Policy 5512. She also served as the primary investigator for HIB complaints.

The first time that Ms. Little met B.B. was during her investigation. She only knew of S.Y. because of a previous investigation that she conducted.

Ms. Little was made aware of the incident after school hours on a Friday by the vice principal, Mr. Raba, who received an email that B.B.'s teacher removed her from English class because she was upset.

The first step in any investigation is to secure the principal's approval. After the principal's approval, Ms. Little and Mr. Raba, working as a team, conduct the investigation. Mr. Raba asks the questions and Ms. Little types the answers on her computer. Ms. Little also observes the body language of the student being interviewed. The school instituted an online anonymous reporting system called "Stop It."

B.B. filed a "Stop It" report which was reviewed prior to her interview. She reported two primary incidents. The first one occurred on a Wednesday during a change of class when the hallway was crowded with students. B.B. was walking near S.Y., who was agitated by the crowds. B.B. asked her why she was so mad. According to B.B., S.Y. responded, "Shut up. That's why you're Black." Then on Friday during lunch, while a group of four students were looking at a picture of another girl's very black and blue finger, B.B. reported that S.Y. stated, "Look, it's black and blue like you, B.B."

According to Ms. Little, B.B. was not comfortable retelling this story. She was sitting on the edge of her seat and gripping her chair. Ms. Little described B.B. as being upset.

Part of the process is to identify the parties who witnessed the event. For the hallway incident, the parties were just S.Y. and B.B. Although the hallway was crowded with students, B.B. did not think anyone heard S.Y.'s comment. In the lunchroom there were four students sitting at the table when the comment was made. All four girls were interviewed.

After B.B., O. was the first witness interviewed. O.'s recollection matched B.B.'s. O. said that S.Y. referenced the bruised finger as being the same color as B.B.'s skin. This comment upset O., and she got up and left the table. She stated that she was shocked by the comment and did not know how to respond.

The questions posed to O. were generic. She was only told that there was a report on "Stop It" about an incident that occurred on Friday at the lunch table. O. easily recalled the bruised finger and volunteered S.Y.'s comment. In response to the question of how it made O. feel, she said upset and shocked and stated that B.B. was also upset.

J. was the other witness at the table, but she had little recollection. She recalled that people at the table looked upset. However, she also recalled laughter. After hearing B.B. calling S.Y. a racist, J. said that both girls were laughing. J. described B.B. as agitated and talking loudly. In response to a question of whether the laughter stemmed from joking and being funny or nervous laughter, J. thought B.B.'s laughter sounded more like nervous laughter.

S.Y. was the last girl interviewed. Her recollection of the comments about the picture differed from O. and B.B. S.Y. attributed the racial comment about the finger to being made by B.B.'s who asked, "black like me" and S.Y. responded "yes." Ms. Little did not judge whether S.Y.'s comment was sarcastic or mean spirited.

S.Y. also recalled the hallway incident. She was annoyed by students blocking access as she walked to her next classroom. B.B. asked her if she was mad because B.B. is black and she responded yes, because you are black. The perception of this incident between the two girls was different.

S.Y. also volunteered that B.B. calls her a "cracker" but it did not bother her.

After S.Y.'s interview, Ms. Little and Mr. Raba had a second interview with B.B. They specifically asked B.B. about the "cracker" reference. B.B. admitted to using that term and to all the girls saying it at the lunch table. B.B. denied ever discussing her race with S.Y. B.B. admitted that all the girls joke about race at the lunch table. She also recalled the incident where she said that everyone got ice cream except the black girl. B.B. was upset about the ice cream but she did not want to make a big deal about it. She acknowledged saying "that's because I'm black" but only to her friend O.

These four interviews comprised the totality of the investigation. The next step in the investigation was to review the statements in the context of the HIB criteria. In this instance, race was a motivating factor, the incidents occurred at school and disrupted B.B.'s school day by her removal from class. The incident met all the HIB criteria. After determining that the HIB criteria were satisfied, the findings were presented to the principal, Dr. Pierro, for his review and assessment.

As the ABS, Ms. Little wrote the HIB report. Her report was reviewed by the principal, Dr. Pierro and the superintendent, Dr. Whalen. After their approval, the report went to the Board for final approval.

Part of the interviews was to learn about the relationship among the girls, who sat together at the lunch table. B.B. stated that she was only close friends with O. With regards to the other girls, including S.Y., B.B. stated that they follow each other on social media, but do not see each other outside of school.

Ms. Little clarified that B.B. did not want to change her lunch table because she wanted to be with O. She was fearful that she would be moved from the lunch table and lose her only friend at the school. Ms. Little believed that because of this fear, B.B. downplayed the incident and how it made her feel.

Ms. Little receives annual training in conflicts versus bullying.

Louis C. Raba has been in public education for almost thirty years. He started his career as a teacher and for the last twenty years, he has been a school administrator. He has served as the assistant principal of Gateway Regional High School for the past seven years. He also serves as the Anti-Bullying Coordinator (ABC) for the district. Mr. Raba is a certified anti-bullying coordinator through New Jersey Public Schools Administrators (NJPSA). He attends yearly workshops on HIB investigations.

Before the incident in December 2021, Mr. Raba had no previous interaction with B.B. S.Y. had been a student at Gateway since seventh grade. Mr. Raba had never met her personally but knew she had a prior HIB violation during eighth grade.

Mr. Raba was alerted about the incident by another assistant principal, who sent him an email saying that B.B. was very upset about a racial comment made by S.Y., during the school day. B.B. was sent to his office and Mr. Raba briefly met with her that afternoon. When B.B. came into the office, she was crying. Because the timing was so close to dismissal, Mr. Raba asked her to go onto the "Stop It" platform and report what happened. Later that same day, B.B.'s mother called him to make sure he knew that her daughter was upset and asked what was going to be done.

On Monday, December 13, 2021, the guidance counselor helped B.B. complete the "Stop It" report. The "Stop It" report generates notification to the administration to begin the investigation process. Mr. Raba explained how he works as a team with the ABA, Ms. Little. At the conclusion of the interview, the student is asked to read their statement to make sure that it was transcribed correctly and accurately reflected their words. The students are encouraged to cross out words or make changes to the statement, if needed.

Mr. Raba recalled that B.B. did not consider S.Y. a close friend. They do not see each other outside of school. They do not text one another. B.B. stated that on multiple occasions S.Y. has said hurtful things to her. One of the incidents involved a situation when the girls were leaving class and walking in the hall. Mr. Raba and Ms. Little could not find any witnesses to the hallway exchange and relied on B.B.'s and S.Y.'s statements. The other issue occurred at the lunch table. The girls were looking at a picture of another girl's bruised finger and S.Y. allegedly commented that the finger was black like B.B. There were two other girls present during the incident involving the finger.

B.B. appeared distressed and uncomfortable during her interview. They gave B.B. the option of changing her lunch table but B.B. refused. She wanted to continue to have lunch with O., who was her only friend in the school.

S.Y. was also interviewed. The best way that Mr. Raba could explain S.Y.'s comments was that the context was completely different from the way B.B. described it. The topic was the same, but the verbiage used by the girls was very different.

S.Y. alleged that B.B. called her a "cracker." The use of the term was discussed but no HIB investigation was initiated. It was described that there were multiple girls at the table, including B.B., using the term to describe each other. Mr. Raba gave S.Y.'s parents the opportunity to request a HIB investigation over the use of the word "cracker" but they declined. S.Y. reported that the term was used at the table but that it did not bother her. The first mention of the girls at this lunch table using the term "cracker" was made by S.Y. during this HIB investigation.

Before determining that the matter between B.B. and S.Y. constituted a HIB, Mr. Raba and Ms. Little analyzed all three key components of the Anti-Bullying Act. The first component requires a distinguishing characteristic. This was met because the comments involved B.B.'s race. The second component, a disruption to the student's school day, was met. B.B. was so upset she had to be removed from class and sent to the assistant principal's office. Any time that a student is crying in a classroom and the teacher acknowledges it, there is a disruption to the learning environment. The third component involved whether the alleged behavior occurred. The determination was that certain things were said to B.B. involving her race that offended her and caused her distress.

The investigation consisted of four student interviews. The determination that the conduct constituted HIB was a collaborative decision involving Mr. Raba, Ms. Little, and the school principal, Mr. Pierro. The superintendent makes the final approval before it is sent to the Board.

The use of inappropriate language is a code of conduct violation. None of the girls were disciplined for a code of conduct violation for their talk at the lunch table. S.Y. was disciplined for a violation of HIB.

Jeffrey Pierro is in his eighth year as the principal of Gateway Regional High School. Dr. Pierro is familiar with the Board's HIB policy and the district's code of conduct policy. Although Dr. Pierro is familiar with HIB investigations, his role is to review the investigation report, discuss its findings with Mr. Raba and Ms. Little, and make the determination.

Dr. Pierro was present at a meeting with S.Y.'s father. He recalled that Mr. Y. disagreed with the results because he thought the situation was more of a back and forth among the girls. Dr. Pierro disagreed.

There was a discussion among Dr. Pierro, Mr. Raba, and Ms. Little about the use of the term "cracker" by the girls at the lunch table. Although such language was inappropriate, none of the girls reported it as offensive. All the students at the table could have been disciplined for a code of conduct violation but under the circumstances herein, no discipline was instituted against any of the girls for the use of the word "cracker."

Shannon Whalen is the superintendent of Gateway Regional, Westfield School District, and Notional Park School District. Dr. Whalen is familiar with the Board's 5512 HIB Policy and the District's code of conduct.

Generally, Dr. Whalen reviews HIB reports to make sure the required information is provided, and the procedures have been followed. However, after learning of the concerns of S.Y.'s father, Dr. Whalen discussed the matter with Dr. Pierro, Mr. Raba, and Ms. Little. She supported their findings and recommendations.

Dr. Whalen informed S.Y.'s family that they were welcome to attend the Board meeting in executive session and present any information they wanted the Board to consider. At the conclusion of the meeting, the Board held the matter so they could hear from the alleged victim's family. The Board's personnel committee held a zoom meeting with B.B.'s mother and thereafter rendered their decision to uphold the HIB determination at the January meeting.

Although Dr. Whalen played no role in the investigation, she did review the student summaries. When asked about B.B.'s alleged racial comments, Dr. Whalen said she recalled that statements were made by all the girls at the lunch table that were inappropriate. However, she had no concern about how the investigation was conducted.

Having heard the testimony presented at the hearing, and having reviewed the documentary evidence, I **FIND**:

On December 10, 2021, B.B. was removed from class by her teacher because she was upset. B.B.'s teacher, Jill Reichman reported to Assistant Principal, Dana DeGeorge that B.B. was upset because another student, S.Y., made racial comments to her. Ms. DeGeorge alerted Mr. Raba by email of the incident and sent B.B. to his office. (J-1.)

When B.B. appeared in Mr. Raba's office, she was crying. As it was near dismissal, Mr. Raba advised B.B. to make her report on "Stop It." B.B. was still upset when she got home, prompting her mother to call Mr. Raba.

On December 13, 2021, B.B., with the help of a guidance counselor, reported the incidents on "Stop It." All HIB incidents are referred to Ms. Little, the school's ABS and Mr. Rapa, the ABC, for investigation.

B.B. reported two incidents. The first incident occurred on December 8, 2021, as the students were walking in a crowded hallway between class periods. B.B. asked an agitated S.Y. why she was so angry. According to B.B., S.Y. told her to "shut up" and made a comment about her race. According to S.Y., B.B. asked her if she was angry because B.B. is black. No other student witnessed this exchange.

The second incident occurred on Friday, December 10, 2021, in the cafeteria, at the lunch table. S.Y. displayed a picture of a friend's finger that was badly bruised. There were two witnesses present at the lunch table. O. corroborated B.B.'s statement that S.Y. said the finger was turning black like B.B. Neither of the two witnesses corroborated S.Y.'s version. J. did not recall the finger conversation but corroborated that B.B. called S.Y. a racist.

The incident at the lunch table caused B.B. to be so upset that her teacher removed her from class and contacted an assistant principal. The assistant principal sent B.B. to the ABC's office. When B.B. returned home, her mother witnessed how affected she was by the incident and her mother contacted Mr. Raba, the ABC.

After the interviews of the four students, Ms. Little prepared the Investigative Findings Report Form. (J-3.) The incident was verbally reported to Mr. Raba on December 10, 2021, and reported on "Stop It" on December 13, 2021, which was the date the investigation began. The alleged victim B.B. is an African American female in ninth grade. The alleged offender S.Y. is a Caucasian female in ninth grade. The two incidents occurred during the school day and on school property. "Race" was deemed the motivational factor for the two HIB incidents.

The school principal, Jeffrey Pierro, reviewed the report and approved the HIB determination on December 17, 2021, and sent the report to the superintendent. A meeting occurred on December 20, 2021, with S.Y.'s father, Dr. Pierro, Mr. Raba, and Ms. Little in attendance. On December 21, 2021, Superintendent of Schools, Shannon M. Whalen, sent a letter to the parents of S.Y., informing them that the district investigation had concluded that S.Y. had engaged in conduct that fell under the definition of HIB, based on the perceived characteristic of race with the consequence of a one day in-school suspension. They were informed of their right to appeal the administration's determination to the Board. (J-5.)

On December 22, 2021, the petitioners requested a hearing before the Board to appeal the HIB determination. On January 5, 2022, in executive session, the Board heard the petitioner's appeal. At the conclusion of the hearing, the Board adjourned the meeting so it could hear testimony from the alleged victim's mother. The Board reconvened in executive session at its next regularly scheduled meeting. After hearing from and questioning the alleged victim's mother via Zoom platform, the Board voted to affirm the district's finding that S.Y.'s conduct constituted an act of HIB.

CONCLUSIONS OF LAW

In accordance with the Anti-Bullying Law, N.J.S.A. 18A:37-14, HIB is defined as:

> [A]ny gesture, any written, verbal or physical act . . . whether it be a single incident or a series of incidents, that is reasonably perceived as being motivated either by any actual or perceived characteristic such as race, color . . . or by any

> other distinguishing characteristic . . . that takes place on school property . . . substantially disrupts or interferes with the orderly operation of the school or the rights of other students and that:
>
> a. a reasonable person should know, under the circumstances, will have the effect of physically or emotionally harming a student or damaging a student's property, or placing a student in reasonable fear of physical or emotional harm to his person or damage to his property;
>
> b. has the effect of insulting or demeaning any student or group of students; or
>
> c. creates a hostile educational environment for the student by interfering with a student's education or be severely or pervasively causing physical or emotional harm to the student.

In accordance with N.J.A.C. 6A:16-7.7, Gateway developed, adopted, and implemented HIB Policy 5512 that mirrors the above statute. (J-4 at 014-105.)

I **CONCLUDE** that S.Y.'s actions constituted HIB as that term is defined by law. Her racial comment at the lunch table and injecting race into her encounter with B.B. in the crowded hallway were "reasonably perceived" by B.B. as being motivated by race, a "distinguishing characteristic." The incidents occurred on school property during the regular school day. S.Y.'s racial comments substantially interfered with the rights of another student. B.B. left the lunchroom upset and her physical reaction to S.Y.'s comments disrupted her next class to the extent that she had to be removed from class by her teacher. The racial statements could reasonably be perceived as offensive, insulting, and demeaning.

The regulations that accompany and amplify the requirements of the Anti-Bully Law state that consequences for students found to have violated the HIB policy should be "varied and graded according to the nature of the behavior . . . and the student's history of problem behaviors and performance." N.J.A.C. 6A:16-7.7(a)(2)(vi)(1). I **CONCLUDE** that the actions of school personnel relative to this incident were consistent with the letter and spirit of N.J.S.A. 18A:37-14 and N.J.A.C. 6A:16-7.7. S.Y. was not a chronic

troublemaker, and no one contends otherwise. But her comments were offensive, insulting, and unkind, and the school district's response was designed to redirect her behavior in a measured manner while recognizing this was a second offense.

Petitioners disagree, urging that the actions of the Board were unfair and one-sided. The Commissioner will not overturn the decision of a local board in the absence of a finding that the action below was arbitrary, capricious, or unreasonable. T.B.M. v. Moorestown Bd. of Educ., EDU 2780-07, Initial Decision (February 6, 2008), <http://njlaw.rutgers.edu/collections/oal/> (citing Thomas v. Morris Twp. Bd. of Educ., 89 N.J. Super. 327, 332 (App. Div. 1965), aff'd, 46 N.J. 581(1966)). The Commissioner will not substitute his judgment for that of the board of education, whose exercise of its discretion may not be disturbed unless shown to be "patently arbitrary, without rational basis or induced by improper motives." Kopera v. W. Orange Bd. of Educ., 60 N.J. Super. 288, 294 (App. Div. 1960). Our courts have held that "[w]here there is room for two opinions, action is not arbitrary or capricious when exercised honestly and upon due consideration, even though it may be believed that an erroneous conclusion has been reached." Bayshore Sewage Co. v. Dep't of Envtl. Prot., 122 N.J. Super. 184, 199-200 (Ch. Div. 1973), aff'd, 131 N.J. Super. 37 (App. Div. 1974). Thus, to prevail, the petitioner must demonstrate that the Board acted in bad faith, or in utter disregard of the circumstances before it. T.B.M., EDU 2780-07. It is a weighty burden; one which I **CONCLUDE** these petitioners have not met. This record has presented me with no evidence that would suggest that the actions of this Board, or its personnel, were taken in bad faith or in utter disregard of the circumstances presented.

Nor has the petitioner convinced me that the Board, through its administration, was biased or unfair to S.Y. in its investigation. The investigation was procedurally compliant with the requirements of N.J.A.C. 6A:16-7.7. Districts are required by law to adopt comprehensive policies prohibiting HIB and outlining expectations for student behavior; setting forth consequences for inappropriate behavior; and creating procedures for reporting HIB related concerns. Id. A school anti-bullying specialist must be assigned to each school, and the results of the HIB investigation shared with the Superintendent of Schools. The results of each investigation must likewise be shared with the Board of Education. Parents are entitled to receive information about the investigation, in writing,

within five school days after the results of the investigation have been reported to the board. The parent may request a hearing before the board, to be conducted within ten days of the request. N.J.S.A. 18A:37-15(b)(6). Comprehensive regulations promulgated by the Department of Education further guide districts in complying with these statutory requirements. N.J.A.C. 6A:16-7.7.

School personnel promptly responded to B.B.'s HIB complaint; began their investigation within one day; and completed it within ten school days, as required by law. N.J.S.A. 18A:37-15(b)(6)(a). T.Y. urged that the initial investigation of the complaint against his daughter failed to take into consideration the racial comments made by B.B. However, S.Y. freely admitted that she was not offended by B.B. calling her a "cracker" or any of the racial comments allegedly made by the students at the lunch table. B.B. was not only the new student, but she was also the only African American student at this lunch table. She sat at this table because she was clinging to her one and only friend at her new school. O., who was also friends with S.Y., corroborated B.B.'s interview statement and S.Y.'s racial comment. O. also told the investigators how the statement made her feel, lending credence to B.B.'s distress. O. stated she was so uncomfortable she got up and walked away. Even J. acknowledged to the investigators that B.B.'s laughter could have been nervous laughter. S.Y.'s interview and testimony appeared to deflect from her own conduct to portray B.B. as the instigator of her own distress. B.B.'s conduct away from the lunch table, apart from S.Y., and in her next class, demonstrated the harmful continuing affect that the comment caused her. B.B.'s distress caused her teacher to remove her from class and send her to the ABC to report a racial incident.

Petitioners argued that the decision in W.D. & J. v. Bd. of Educ. of Jefferson, 2020 N.J. Super. Unpub. LEXIS 1787, was like the situation between S.Y., B.B., and the other girls at the lunch table. I disagree. The girls in W.D. were all playing the same game, while texting in iMessage "group chat" outside of school. It appeared that this group of friends were of diverse ethnic backgrounds. The "pretend fight" they were engaging in was vulgar, crude, and inappropriate. After one of the participants used the "N-word" the game ended, leaving one of the participants, G.D., in tears. The ensuing HIB investigation did not find any disruption or interference with the school day or the rights of other students. The incident was deemed a conflict because the girls had been mutually

engaged and fully involved in using inappropriate, abhorrent, and egregious language as a game. The use of the "N-word" stemmed from this deplorable game where everyone had been an equal and willing participant. In addition, after the episode, G.D. appeared unaffected. The friendship among the group and the mutuality of the conduct sets the case, herein, apart from the scenario in W.D.

ORDER

Based on the foregoing, I **ORDER** that the appeal be **DISMISSED**.

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

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

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

Kathleen M. Calemmo

May 3, 2023
DATE

KATHLEEN M. CALEMMO, ALJ

Date Received at Agency: _____

Date Mailed to Parties: _____

KMC/tat

APPENDIX

WITNESSES

For Petitioner:

S.Y.

T.Y.

For Respondent:

Aimee Little, ABS

Louis Raba, ABD

Principal Jeffrey Pierro

Superintendent Shannon Whalen

EXHIBITS

Joint:

J-1 Email notification to Mr. Rabe, dated December 10, 2021

J-2 Notification letter to S.Y.'s parents, dated December 14, 2021

J-3 Investigation report with witness statements

J-4 Policy 5512 – HIB

J-5 Determination letter, dated December 21, 2021

For Petitioner:

P-1 Gateway Regional School District Code of Conduct

P-2 New Jersey Department of Education's Guidance for Parents on the Anti-Bullying Bill of Rights Act

P-3 Handwritten notes, dated December 20, 2021

For Respondent:

None

179-23
Agency Dkt. No. 48-2/23

New Jersey Commissioner of Education

Final Decision

In the Matter of the Suspension of the Teaching Certificates of Julia Hinlicky, Board of Trustees of the Camden's Promise Charter School, Camden County.

This matter was opened before the Commissioner of Education on February 22, 2023, by way of an Order to Show Cause served by petitioner (Camden's Promise Charter School) upon respondent (Julia Hinlicky), requiring respondent to show cause why an order should not be entered suspending her teaching certificates pursuant to *N.J.S.A.* 18A:26-10 and *N.J.S.A.* 18A:28-8 for resigning without giving the notice required by law. By notice dated March 7, 2023, the Office of Controversies and Disputes (Office) acknowledged proof that the Order to Show Cause had been served upon respondent and directed respondent to answer within 20 days.

No answer having yet been received, on May 9, 2023, the Office sent respondent a second and final notice – via certified and regular mail, and email – directing that she must file an answer within ten days. The notice advised that, pursuant to *N.J.A.C.* 6A:3-1.5(e), failure to answer would cause each allegation in petitioner's papers to be deemed admitted and might result in summary decision by the Commissioner. On May 19, 2023, the Office received a letter from respondent, stating that she does not feel the need to defend her decision to leave her teaching position as it was the right decision for her and her family.

The petition and supporting exhibits submitted by petitioner in this matter indicate that: respondent entered into a contract to work as a teacher for the 2022-23 school year; the contract provides that it can be terminated by either party upon sixty days' written notice; and on

January 24, 2023, respondent sent correspondence indicating that she was resigning, effective February 10, 2023, thereby providing less than the required 60 days' notice. The respondent has not denied these allegations; therefore, the Commissioner deems such allegations to be admitted pursuant to *N.J.A.C.* 6A:3-1.5(e) and further deems them sufficient to justify suspension of respondent's teaching certificates pursuant to *N.J.S.A.* 18A:26-10 and *N.J.S.A.* 18A:28-8.

Accordingly, summary decision is hereby granted to petitioner, and respondent's teaching certificates are suspended for a period of one year from the filing date of this decision, a copy of which shall be forwarded to the State Board of Examiners for implementation of the suspension.

IT IS SO ORDERED.[1]

Angelica Allen-McMillan, J.D.S.
ACTING COMMISSIONER OF EDUCATION

Date of Decision: June 15, 2023
Date of Mailing: June 19, 2023

[1] This decision may be appealed to the Appellate Division of the Superior Court pursuant to *N.J.S.A.* 18A:6-9.1. Under *N.J.Ct.R.* 2:4-1(b), a notice of appeal must be filed with the Appellate Division within 45 days from the date of mailing of this decision.

180-23E
OAL Dkt. No. EDU 03528-23
Agency Dkt. No. 108-4/23

New Jersey Commissioner of Education

Order on Emergent Relief

A.I., on behalf of N.I.,

Petitioner,

v.

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

Respondent.

The record of this emergent matter, the sound recording of proceedings at the Office of Administrative Law (OAL), and the recommended Order of the Administrative Law Judge (ALJ) have been reviewed. Upon such review, the Commissioner concurs with the ALJ that petitioner has failed to demonstrate entitlement to emergent relief pursuant to the standards enunciated in *Crowe v. DeGioia,* 90 *N.J.* 126 (1982), and codified at *N.J.A.C.* 6A:3-1.6.

Accordingly, the recommended Order of the OAL denying petitioner's application for emergent relief is adopted for the reasons stated therein. This matter shall continue at the OAL with such proceedings as the parties and the ALJ deem necessary to bring it to closure.

IT IS SO ORDERED.

Angelica Allen-McMillan, J.D.S.
ACTING COMMISSIONER OF EDUCATION

Date of Decision: June 15, 2023
Date of Mailing: June 19, 2023

State of New Jersey
OFFICE OF ADMINISTRATIVE LAW

AMENDED ORDER DENYING EMERGENT RELIEF
OAL DKT. NO. EDU 03528-23
AGENCY DKT. NO. 108-4/23

A.I. ON BEHALF OF N.I.,
Petitioner,
v.
OCEAN TOWNSHIP BOARD OF EDUCATION
Respondent.

A.I., petitioner, pro se

Michael J. Gross, Esq., for respondent (Kenney, Gross, Kovacs & Parton, attorneys)

BEFORE: **WILLIAM T. COOPER III**, ALJ:

STATEMENT OF THE CASE

A.I. (petitioner) brings an action for emergent relief against the Board of Education of the Township of Ocean (respondent) challenging the imposition of a long-term suspension from school from March 9, 2023, to June 20, 2023, against her minor child, N.I. and seeking his immediate reinstatement. The suspension imposed by respondent

was because of N.I.'s involvement in incidents that occurred on March 2 and 3, 2023, against other students.

PROCEDURAL HISTORY

On April 18, 2023, a formal hearing was conducted by respondent pursuant to N.J.A.C. 6A:16-7.3(a)(10). On April 19, 2023, respondent provided a written determination of discipline imposed against N.I. On April 25, 2023, the petitioner filed a request for emergent relief at the Department of Education Office of Controversies and Disputes (OCD) challenging the discipline imposed and seeking the immediate reinstatement of N.I. On April 27, 2023, the matter was transmitted to the Office of Administrative Law (OAL) as a contested case seeking emergent relief for petitioner. N.J.S.A. 52:14B-1 to -15; N.J.S.A. 52:14F-1 to -13.

Oral argument regarding the application for emergent relief was conducted on May 12, 2023.

FACTUAL DISCUSSION

The following facts are not in dispute therefore, I find the following as **FACT**:

Petitioner

N.I. is a seventeen-year-old eleventh-grade student attending Ocean Township High School (OTHS).

On March 2, 2023, a female student reported that she was in her vehicle waiting to exit the student parking lot when the occupants of a black colored Jetta vehicle, shot gel balls at her vehicle. The student identified N.I. as the driver of the Jetta and observed another student in the Jetta stick a "gun" out the rear window. She was unsure of what was being shot at her vehicle but believed it to be an Orbeez toy gun that shoots "gel balls".

On March 3, 2023, two female students reported that as they were leaving school grounds walking on the sidewalk along West Park Avenue, a black colored Jetta slowed down, they heard shouting and then observed a rear seat passenger aim a gun and then shoot at them. They realized it was a toy gun when they saw the residue on their legs and backpacks.

When questioned, N.I. readily admitted his involvement and confirmed he was the driver of the Jetta involved in both incidents. N.I. also admitted that he owned the Orbeez toy guns used in both incidents and brought them to school in his vehicle. The other occupants, who were also OTHS students, readily admitted that they used the toy guns to shoot at cars and the two female students.

On March 8, 2023, N.I. was issued an initial out-of-school suspension. The notice of the suspension advised that the investigation into these incidents was on-going and that a longer suspension may be warranted.

On March 10, 2023, OTHS principal Dawn C. Kaszba issued a ten-day suspension to N.I. effective March 9, 2023. The notice of suspension noted that "at the conclusion of the investigation a recommendation could be made to the superintendent and to the BOE for an additional long-term suspension."

On March 16, 2023, Dr. James Stefankiewicz, Ed.D., (Stefankiewicz) the school superintendent confirmed the ten-day suspension, and noted that the "actions of this nature jeopardize the safety, security, and well-being of the school and its students." The confirmation notice referenced OTHS Student Handbook and Policies Section 8467-Weapons. Finally, the confirmation notice advised that in addition to the ten-day suspension the matter was being referred to the BOE for a long-term suspension.

On March 21, 2023, Stefankiewicz issued a formal notice of a disciplinary hearing to be held by the BOE on April 11, 2023. Pursuant to N.J.A.C. 6A:16-7.3 the notice advised the basis for the proposed long-term suspension, the officials to be called at the hearing and the documents that would be relied upon. The notice also properly advised

petitioner as to the right to be represented by legal counsel and the ability to enter a defense on N.I.'s behalf.

Petitioner retained Michael Weiss, Esq., who contacted BOE attorney Michael Gross, Esq. and attempted to negotiate a disciplinary penalty, resulting in the hearing scheduled for April 11, 2023, being adjourned to April 18, 2023.

On April 18, 2023, the BOE heard the matter and rendered its decision, to continue N.I.'s suspension through June 20, 2023.

Petitioner

Petitioner argues that respondent has violated N.I.'s due process rights in that the disciplinary hearing did not occur within thirty days of the initial suspension issued on March 9, 2023. Further, the petitioner argues that N.I. has not been provided with adequate educational support or home instruction, and that what has been provided is limited. The lack of educational support has had a negative impact on N.I.'s grade point average. Regarding the two incidents, she blamed the passenger of the vehicle because he shot the toy gun, claiming he is not an individual with whom N.I. normally "socializes" with. She maintains that no damage was done to any vehicle, and no one was injured by the gel balls. Overall, she feels that N.I. is a bright child who made a "big mistake," but that the penalty being imposed is excessive because N.I. does not have a prior disciplinary history that would support such a harsh penalty. Finally, she is very concerned that N.I. is depressed due to the lack of socialization with his friends and classmates.

Petitioner has provided documents that support N.I.'s good character. In addition to those documents Assistant Football Coach James Simonelli testified at the hearing that N.I. is a good person who maintains his temper and composure in tough situations. He further offered that N.I. is a kind individual, loyal teammate, and a good student who always shows up for practice. He also believes that the penalty is excessive under the circumstances.

Petitioner requests the immediate reinstatement of N.I. to OTHS.

Respondent

Respondent maintains that N.I.'s due process rights were not violated as the parents and student were properly apprised in writing as to the specific charges, as well as the facts that were relied upon by the BOE in rendering its decision. Any delay in conducting the disciplinary hearing was the direct result of legal counsel employed by the petitioner, attempting to negotiate a lesser penalty. Regarding the penalty imposed the respondent believes that the severity of the two incidents justifies a long-term suspension.

Respondent maintains that the incidents occurred over a two-day period and more than likely would have continued had the individuals not been caught. Further, it was noted that the female students who were shot at while walking home suffered injury from being struck by the gel balls. Further, the incident understandably caused emotional distress to the students who were struck. Respondent offers that the penalty imposed is consistent with school policies, is justified by the very nature of the offenses and a lesser penalty could result in similar conduct in the future.

LEGAL ANALYSIS AND CONCLUSION

N.J.A.C. 1:6A-12.1(a) provides that the affected parent(s), guardian, district, or public agency may apply in writing for emergent relief. An emergent relief application is required to set forth the specific relief sought and the specific circumstances that the applicant contends justify the relief sought. Each application is required to be supported by an affidavit prepared by an affiant with personal knowledge of the facts contained therein and, if an expert's opinion is included, the affidavit will specify the expert's qualifications.

Emergent relief shall only be requested for the following issues pursuant to N.J.A.C. 6A:14-2.7(r):

i. Issues involving a break in the delivery of services;

ii. Issues involving disciplinary action, including manifestation determinations and determinations of interim alternate educational settings;

iii. Issues concerning placement pending the outcome of due process proceedings; and

iv. Issues involving graduation or participation in graduation ceremonies.

Here, the issue involves disciplinary action, thus, emergent relief can be considered.

The standards for emergent relief are set forth in Crowe v. DeGioia, 90 N.J. 126 (1982), and codified at N.J.A.C. 6A:3-1.6(b):

1. The petitioner will suffer irreparable harm if the requested relief is not granted;

2. The legal right underlying petitioner's claim is settled;

3. The petitioner has a likelihood of prevailing on the merits of the underlying claim; and

4. When the equities and interests of the parties are balanced, the petitioner will suffer greater harm than the respondent will suffer if the requested relief is not granted.

The petitioner bears the burden of satisfying all four prongs of this test. Crowe v. DeGioia, 90 N.J. at 132-134.

The **first consideration** is whether petitioner will suffer irreparable harm if the requested relief is not granted. "Irreparable harm is shown when money damages cannot adequately compensate plaintiff's injuries." Hornstine v. Twp. of Moorestown, 263 F. Supp. 2d 887, 911 (D.N.J. 2003) (citing Sampson v. Murray, 415 U.S. 61, 90 (1974)). "More than a risk of irreparable harm must be demonstrated." Cont'l Grp., Inc. v. Amoco Chemicals Corp., 614 F.2d 351, 359 (3d Cir. 1980). "The requisite for injunctive relief has been characterized as a clear showing of immediate irreparable injury . . . or a presently existing actual threat; [an injunction] may not be used simply to eliminate a possibility of

a remote future injury, or a future invasion of rights protected by statute or by common law." Id. This was further explained by the New Jersey District Court:

> "A party seeking a preliminary injunction must make a clear showing of immediate irreparable injury . . . Establishing a risk of irreparable harm is not enough. A plaintiff has the burden of proving a clear showing of immediate irreparable injury. Mere speculation as to an injury that will result, in the absence of any facts supporting such a claim, is insufficient to demonstrate irreparable harm." See Spacemax Int'l LLC v. Core Health & Fitness, LLC, No. CIV.A. 2:13-4015-CCC, 2013 WL 5817168, at 2 (D.N.J. Oct. 28, 2013) (internal citations and quotations omitted).

Here, irreparable harm has not been established by petitioner. The petitioner believes that her son is currently suffering from depression, and that his grades have been negatively impacted due to the long-term suspension. However, these assertions alone are insufficient to support a claim of irreparable harm. A long-term suspension may have a negative impact upon N.I., however, that fact alone does not support the conclusion that he has or will suffer irreparable harm.

I **CONCLUDE** that the petitioner has not met its burden of establishing irreparable harm.

The **second consideration** is whether the petitioner has shown her claim to be well settled. Petitioner challenges the discipline rendered by respondent because of N.I.'s involvement in two incidents involving the use of a toy gun to shoot gel balls. The first incident involved shooting the toy gun at a vehicle in the student parking lot. The second incident involved shooting the toy gun at two female students who were walking home.

Local boards of education are responsible for protecting the health, safety and welfare of its students and ensuring the orderly conduct of the academic process. Gross v. Lopez, 419 U.S. 656 (1976). To accomplish this, such boards are empowered to establish rules of conduct and impose discipline to enforce such rules. It is established law that the actions of a board of education which lie within the area of discretionary powers, especially as it relates to matters of student discipline, cannot be upset unless

there is a showing that the discipline imposed was arbitrary, capricious, without a rational basis, or was induced by improper motives. J.M. v. Hunterdon Central Reg. H.S., 96 N.J.A.R. 2d (EDU) 415, 419 (citing Kopera v. West Orange Bd. Of Educ., 60 N.J. Super 288 (App. Div. 1960).

Here, the petitioner argues that the discipline imposed is excessive while respondent counters that it is consistent with school policy.

Based upon the limited record at this stage of the proceedings I cannot conclude that the discipline imposed was arbitrary, capricious, without a rational basis, or was induced by improper motives.

I **CONCLUDE** that the petitioner has not shown that the discipline imposed was arbitrary, capricious, without a rational basis, or was induced by improper motives.

The **third consideration** is whether petitioner has a likelihood of prevailing on the merits. It is well settled that the decisions of local boards of education are to stand undisturbed unless shown to be patently "arbitrary, without rational basis or induced by improper motives. J.M. By His Guardian, D.M. v. Hunterdon Central Regional High School District, Hunterdon County, 96 N.J. (EDU) 415, 419; R.A.M. and C.A.M. v. Board of Education of the Township of Tabernacle, 94 N.J.A.R. (EDU) 573, 576 (citing Kopera v. West Orange Bd. Of Educ., 60 N.J. Super 288 (App. Div.1960).

Here, the petitioner argues that the discipline imposed is excessive. Respondent argues that the incidents N.I. was involved in, together with the need to deter such incidents in the future, justifies the significant discipline rendered here. Petitioner has failed to show that respondents actions were arbitrary, capricious, without rational basis or induced by improper motives.

I **CONCLUDE** that petitioner has not shown a likelihood of prevailing on the merits at this point in the proceedings.

The **fourth requirement** for emergent relief entails a balancing of the interests between the parties. Petitioner argues that the discipline issued by respondent is excessive and will have a detrimental impact upon N.I. However, the respondent has an obligation to all the students, and the petitioners' arguments fail to recognize that N.I.'s actions had a harmful impact upon other students. Further, petitioner fails to recognize respondent's need to deter similar behavior in the future.

Therefore, I **CONCLUDE** that the equities weigh in favor of respondent.

Having considered the parties' arguments and submissions, I **CONCLUDE** that the petitioner has not met all four prongs of the standard for the entitlement to emergency relief. For the foregoing reasons, I **CONCLUDE** that the request for emergent relief is denied.

It is **ORDERED** that petitioner's motion for emergent relief is **DENIED**. The parties have advised me that no other issues remain once the emergent relief matter is resolved.

This order on application for emergency relief may be adopted, modified or rejected by **COMMISSIONER OF THE DEPARTMENT OF EDUCATION**, who/which by law is authorized to make a final decision in this matter. The final decision shall be issued without undue delay, but no later than forty-five days following the entry of this order. If Commissioner of the Department of Education does not adopt, modify or reject this order within forty-five days, this recommended order shall become a final decision on the issue of emergent relief in accordance with N.J.S.A. 52:14B-10.

May 15, 2023
DATE

WILLIAM T. COOPER III, ALJ

Date Received at Agency

Date Mailed to Parties:

WTC/

APPENDIX

WITNESSES

For petitioner

James Simonelli

For respondent

None

EXHIBITS

For petitioner

Petition for Emergent Relief and Expedited Relief and supporting documents

For respondent

Response to Emergent Relief Request, legal memorandum, investigation reports and OTHS Student Handbook

181-23
OAL Dkt. No. EDU 13521-17
Agency Dkt. No. 166-7/17

New Jersey Commissioner of Education

Final Decision

David Searfoorce,

Petitioner,

v.

State-Operated School District of the City of Camden, Camden County,

Respondent.

The record of this matter, the proposed Settlement Agreement (Agreement), and the Initial Decision issued by the Office of Administrative Law pursuant to *N.J.A.C.* 1:1-19.1, have been reviewed. Upon such review, the Commissioner notes that Paragraph 2 of the Agreement references an action that preceded the consideration of the settlement by the Commissioner of Education. The parties are reminded that a settlement of litigation before the Commissioner is not binding until the Commissioner approves the settlement.

In light of the foregoing, the Commissioner adopts the Initial Decision as the final decision in this matter, provided that the parties have already implemented the settlement terms or have agreed upon mutually satisfactory alternate dates for the effectuation of the terms of the Agreement. Assuming same, the matter is hereby dismissed.

IT IS SO ORDERED.

Angelica Allen-McMillan, Ed.D.
ACTING COMMISSIONER OF EDUCATION

Date of Decision: June 20, 2023
Date of Mailing: June 21, 2023

182-23
OAL Dkt. No. EDU 01995-22
Agency Dkt. No. 48-3/22

New Jersey Commissioner of Education

Final Decision

J.G. and S.G., on behalf of minor child, A.G.,

Petitioners,

v.

Board of Education of the Freehold Regional School District, Monmouth County,

Respondent.

The record of this matter, the proposed Settlement Agreement and Limited General Release (Agreement), and the Initial Decision issued by the Office of Administrative Law pursuant to *N.J.A.C.* 1:1-19.1, have been reviewed. Upon such review, the Commissioner notes that, with respect to Paragraph 8 of the Agreement, the Board is reminded that it must comply with the requirements of New Jersey's Open Public Records Act, *N.J.S.A.* 47:1A-1 *et seq.*, notwithstanding any agreement the parties may have between themselves to keep the terms of their settlement confidential.

In light of the foregoing, the Commissioner adopts the Initial Decision as the final decision in this matter, which is hereby dismissed subject to compliance with the terms of the settlement consistent with applicable public records law.

IT IS SO ORDERED.

Angelica Allen-McMillan, Ed.D.

ACTING COMMISSIONER OF EDUCATION

Date of Decision: June 20, 2023
Date of Mailing: June 21, 2023

State of New Jersey
OFFICE OF ADMINISTRATIVE LAW

INITIAL DECISION

SETTLEMENT

OAL DKT. NO. EDU 1995-22
AGENCY DKT. NO. 48-3/22

J.G. AND S.G. ON BEHALF OF MINOR CHILD, A.G.,

Petitioners,

v.

BOARD OF EDUCATION OF THE FREEHOLD REGIONAL SCHOOL DISTRICT, MONMOUTH COUNTY.

Respondent.

Andrew Parsinitz, Esq., for petitioners (Davis & Mendelson, LLC, attorneys)

Andrew W. Li, Esq., for respondent (Comegno Law Group, P.C., attorneys)

Record Closed: May 10, 2023 Decided: May 11, 2023

BEFORE **ELIA A. PELIOS**, ALJ:

This matter was transmitted to the Office of Administrative Law (OAL) on March 16, 2022, for determination as a contested case, pursuant to N.J.S.A. 52:14B-1 to -15 and N.J.S.A. 52:14F-1 to -13.

On May 1, 2023, the parties filed a fully executed Settlement Agreement and Board Resolution approving the settlement. The Agreement and Resolution are attached and

fully incorporated herein. On May 10, 2023, a conference call was held to confirm that all procedural matters were finalized.

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

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

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

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

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

May 11, 2023
DATE

ELIA A. PELIOS, ALJ

Date Received at Agency: 5-15-23

Date Mailed to Parties: 5-15-23

EAP/caa

J.G. and S.G. o/b/o A.G. **Petitioners,** **v.** **FREEHOLD REGIONAL HIGH SCHOOL DISTRICT BOARD OF EDUCATION,** **Respondent.**	**STATE OF NEW JERSEY** **OFFICE OF ADMINISTRATIVE LAW** **OAL Docket No.: EDU 01955-2022** **Agency Ref. No.: 48-3/22** **SETTLEMENT AGREEMENT AND LIMITED GENERAL RELEASE**

THIS SETTLEMENT AGREEMENT AND LIMITED GENERAL RELEASE (hereinafter referred to as the "Agreement") is entered into by and between J.G., S.G., and A.G..[1], individually and jointly (hereinafter collectively referred to as "Petitioners"), and the Freehold Regional High School District Board of Education (hereinafter referred to as the "Board") to resolve and settle certain outstanding claims and disputed issues as follows:

RECITALS

WHEREAS, a disagreement arose between Petitioners and the Board (hereinafter collectively referred to as the "Parties"); and

WHEREAS, Petitioners filed a Petition (hereinafter referred to as the "Petition") captioned as J.G. and S.G. on behalf of A.G. v. Freehold Regional High School Board of Education, which is presently pending in the Office of Administrative Law under OAL Docket Number EDU 01955-2022 and Agency Reference Number 48-3/22; and

WHEREAS, the Board has denied the allegations contained in the Petition and/or raised affirmative defenses thereto; and

WHEREAS, the Parties, after the opportunity for consultation with and between their respective legal counsel and following negotiations, desire to resolve certain aspects of the dispute raised in the Petition efficiently and amicably by entering into this Agreement so as to avoid the uncertainty, expenditure of time and resources, and the incurring of costs and expenses associated with further proceedings and/or litigation; and

WHEREAS, neither of the Parties admits or acknowledges, either explicitly or implicitly, any misconduct, wrongdoing, and/or liability, but through and by this Agreement are

[1] A.G. having reached the age of majority during the pendency of this matter.

taking this action solely as a matter of a business judgment and at the recommendation of their respective legal counsel; and

THUS, the Parties, in view of the aforementioned premise and in consideration of the mutual promises and covenants contained herein, and other good and valuable consideration, the receipt and sufficiency of which is hereby acknowledged by the Parties, enter into this Agreement to outline their agreement, release certain claims, and express the full and complete terms of same; **NOW, THEREFORE, THE PARTIES HEREBY AGREE:**

1. **Education Services:** The Parties agree and understand that a one-time payment in the amount of eight thousand two hundred dollars ($8,200.00) will be made on behalf of the Board for A.G.'s educational services. The payment will be made in the form of a check made payable to Davis & Mendelson LLC, as legal counsel for Petitioners in this matter, to be mailed within thirty (30) days following approval of this Agreement by the Court. The Parties understand and agree that Petitioners, within five calendar (5) days following approval of this Agreement by the Court, shall provide the Board with a written revocation of consent for A.G.'s eligibility as a student with a disability eligible for special education and/or related services. The Parties further understand and agree that the Board shall in no way be responsible, and shall have no obligation, to evaluate or assess A.G., nor shall the Board be responsible, and shall have no obligation, to prepare, administer, case manage, monitor, meet regarding and/or implement an Individualized Education Plan (IEP) and/or a program of special education and/or related services for A.G.

2. **Further Board Responsibilities:** Consistent with their stated desires, Petitioners agree and understand that A.G. will not participate in and/or be present at school-related events (such as the prom and graduation ceremonies), and the Parties shall have as little interaction with one another as is practicable; however, the Parties understand and agree that the Board, as part of the settlement of this matter, shall:

    a. **FRHSD diploma:** Upon completion of A.G.'s Health, English, and Physical Education courses, A.G.'s FRHSD graduation requirements will be deemed to be satisfied and completed and A.G. will receive a diploma from the Freehold Regional High School District.

    b. **FRHSD transcript:** A.G.'s transcript will be from the Freehold Regional High School District. The transcript will reflect the LPS courses taken by A.G., as well as A.G.'s home instruction courses during the 2021-22 and 2022-23 school years (including the Health course), however, the transcript will not reflect that A.G. attended courses through home instruction. If so requested by Petitioners, the transcript will include A.G.'s decile rank.

    c. **College Recommendations:** A.G. will receive the standard recommendation from the FRHSD guidance department as provided to other FRHSD students. A.G. will

also be able to request recommendations from FRSHD teachers through the same online portal available to other FRHSD students; however, Petitioners understand and agree that the Board cannot and will not compel or require any FRHSD teacher to provide such recommendations.

d. **District Employee Liaison:** A district employee shall be designated for the purpose of serving as a liaison between the Parties (hereinafter "Liaison"). The Liaison will address and attempt to resolve any school-related issues between the Parties for the remainder of the 2022-2023 academic year. Issues to be addressed by the Liaison will include, but not be limited to, issues such as issues related to grades, report card errors, transcript requests, and diploma concerns. The Parties recognize that the purpose of the appointment of the Liaison is to reduce counsel fees to the parties by addressing, and hopefully, resolving minor issues amongst themselves. Petitioners understand that they shall direct any such issues to the Liaison and the Board shall be afforded a reasonable opportunity to address and resolve any such issues prior to involving counsel to address any such issues.

3. **Counsel Fees:** The Parties agree and understand that a one-time payment in the amount of $15,000.00 (fifteen thousand dollars) will be made on behalf of the Board to Davis & Mendelson LLC, as legal counsel for Petitioners in this matter, to be mailed within thirty (30) days following approval of this Agreement by the Court.

4. **Payment Documents:** Petitioners will efficiently and without delay provide, through their counsel, all documents (such as a W-9 form and/or purchase order) which may be needed by the Board for processing of the above-referenced settlement payments. These payments are made as part of the settlement of this matter and neither Party shall be deemed or considered, either explicitly or implicitly, to be a prevailing party and/or entitled to any counsel and/or expert fees or costs and/or other expenses related to litigating the issues raised in the Petition, other than as specified in this Agreement. The Board makes no representations or warranties regarding the taxability of any portion of the settlement payments referenced above. Petitioners and their attorneys understand and acknowledge that the Board is not paying or withholding taxes on the settlement payments set forth above. Petitioners agree to assume full liability for any applicable state, federal, and/or local taxes that may be required by law to be paid with respect to any portion of this Settlement Agreement. Given the Board is not withholding any taxes from the settlement payments, in the event the Internal Revenue Service, the New Jersey Division of Revenue, and/or any taxing authority may assess the Board with any taxes or penalties for failure to withhold any taxes from the settlement payments, Petitioners agree to indemnify, hold harmless, and be fully responsible for any such taxes or penalties arising from the failure to withhold taxes from the settlement payments.

5. **Withdrawal of Petition:** As and in consideration for this Agreement, Petitioners understand and agree that the pending Petition shall be voluntarily withdrawn by way of a written request

to the Court, to be submitted by counsel for Petitioners within five (5) business days of receipt of the fully executed Agreement.

6. **Waiver and Limited General Release:** Other than those claims specifically reserved and/or preserved herein, by entering into this Agreement, Petitioners release the Board from claims regarding A.G.'s educational program and placement arising from the facts and/or events as described within the Petition, including, but not limited to, any counsel fees for services performed by Davis & Mendelson, L.L.C. or other claims that were asserted in the Petition. Petitioners hereby forever and fully waive and release the Board from any claims seeking the specific relief sought in the Petition. However, the Parties understand and agree that nothing herein shall prevent Petitioners (either individually and/or jointly) from (a) seeking enforcement of the terms of this Settlement Agreement before a tribunal of competent jurisdiction and/or (b) asserting claims (other than those released by this Agreement) against the Board, its members, employees, agents and/or representatives for negligence and/or the negligent handling of any incidents taking and/or having taken place on school grounds; and/or (c) from asserting claims (other than those released by this Agreement) against the Board, its members, employees, agents and/or representatives for any alleged violations of the New Jersey Civil Rights Act and/or the New Jersey Law Against Discrimination for any acts and/or omissions taking place and/or having taken place, in a separate action in Superior Court. Nothing set forth in this provision shall be construed as a release or waiver of any other and/or additional claims between the Parties not otherwise specifically reserved and/or preserved that may arise after the date of this Agreement. Nothing set forth in this provision shall be construed as a release or waiver of any claims between the Parties seeking to enforce any term or provision of this Agreement or as a release or waiver of any claims specifically reserved and/or preserved in this Agreement.

7. **Prevailing Parties and Attorney's Fees:** Neither Party will be considered to be a "prevailing party" for any purpose and, other than as specified in this Agreement, each Party shall be responsible for their own attorney's fees, expert costs, and any other costs and/or expenses incurred in connection with this matter and/or with the development of this Agreement.

8. **Confidentiality and Non-Disparagement:** Each of the Petitioners, individually and jointly, including A.G., as well as the Board and all of its members understands and agrees that this Agreement, including its terms, must remain confidential to the full extent allowed by law as a material term of this Agreement. As such, the Parties further understand and agree that the terms and existence of this Agreement are and shall remain confidential to the extent permitted by law and shall not be disclosed by any of the Petitioners, individually and/or jointly, or the Board to any other individual or entity, other than counsel, financial professionals and/or services providers, without the written consent of the other Party, unless enforcement of this Agreement is sought by the non-breaching Party in a court of law. No Party shall engage in disparaging and/or negative comments or statements regarding any other Party and/or their conduct, with regard to the claims covered by this Agreement, this Agreement and/or the terms

thereof, and/or the settlement process for this Agreement, in any forum or media, including, but not limited to, any and all social media statements or posts of any kind on any platform, website or application such as, but not limited to, Facebook, Instagram, YouTube, Twitter, or any other platform(s), website(s) or application(s). The above notwithstanding, however, the Parties specifically agree that no interpretation of the word "disparagement" shall pertain to any evidence or testimony which may be offered or adduced by the Parties in any court proceeding or administrative agency proceeding which arises from either (a) a need to enforce any provision of this agreement, or (b) any further administrative proceeding or legal proceeding commenced by, or participated in by the Parties.

9. **Review of Agreement:** The Parties acknowledge that they have read and understand the terms of this Agreement, have had an opportunity to have had the Agreement reviewed by legal counsel (if they so choose), are satisfied with the advice of such counsel, and that they are entering into this Agreement knowingly, freely, voluntarily, without coercion, and not under the influence of anything or anyone.

10. **Board Approval:** Petitioners understand and agree that this Agreement is subject to approval by the Board at its next regularly scheduled meeting following the execution of this Agreement by Petitioners. If so approved, a fully executed copy of this Agreement and accompanying Board resolution shall be provided to Petitioners within ten (10) calendar days of such approval.

11. **Binding Agreement:** Petitioners, individually and jointly, represent, verify, and affirm to the Board that they have understood and agree that this Agreement is binding on Petitioners, individually and/or jointly.

12. **Interpretation of Agreement:** This Agreement shall be interpreted, enforced, and governed under the laws of the State of New Jersey, without regard to that jurisdiction's choice-of-law doctrines. The language of all parts of this Agreement shall in all cases be construed as a whole, according to its fair meaning, and not strictly for or against any of the Parties. The Parties understand and agree that that this Agreement is the product of mutual draftsmanship and any rule or law requiring that it be construed against the drafter shall not apply.

13. **Entire Agreement:** This Agreement constitutes the entire agreement of the Parties with respect to the subject matter hereof and supersedes all prior written or oral and all contemporaneous oral agreements, understandings, and negotiations. This Agreement may only be amended in writing by way of a document signed by all Parties.

14. **Counterparts:** This Agreement may be executed in one (1) or more counterparts, all of which shall be considered a single and the same and shall become effective when one (1) or more counterparts have been signed by each Party. It is understood and agreed that the Parties need not sign the same counterpart, and this Agreement shall be fully valid, legally binding, and enforceable whether executed in a single document or in such counterparts.

INTENDING TO BE legally bound hereby and **IN WITNESS WHEREOF,** the Parties hereto

hereby execute this Settlement Agreement and Limited General Release as witnessed by their signatures below.

PETITIONERS

J.G.
Date: 4/20/23

S.G.
Date: 4/20/23

A.G.
Date: 4/20/23

FREEHOLD REGIONAL HIGH SCHOOL DISTRICT BOARD OF EDUCATION

Board President
Date:

RECEIVED
2023 MAY -1 P 4:06
STATE OF NEW JERSEY
OFFICE OF ADMIN. LAW

183-23
OAL Dkt. No. EDU 06833-22
Agency Dkt. No. 188-7/22

New Jersey Commissioner of Education

Final Decision

R.L. and Y.L., on behalf of minor children, M.L. and T.L.,

Petitioners,

v.

Board of Trustees of the Central New Jersey College Preparatory Charter School, Somerset County,

Respondent.

The record of this matter, the proposed Settlement Agreement (Agreement) and the Initial Decision issued by the Office of Administrative Law have been reviewed pursuant to *N.J.A.C.* 1:1-19.1. Upon review, the Commissioner approves the terms of the Agreement and adopts the Initial Decision as the final decision in this matter. The case is hereby dismissed, subject to compliance with the terms of the Agreement.

IT IS SO ORDERED.

Angelica Allen-McMillan, Ed.D.
ACTING COMMISSIONER OF EDUCATION

Date of Decision: June 20, 2023
Date of Mailing: June 21, 2023

State of New Jersey
OFFICE OF ADMINISTRATIVE LAW

INITIAL DECISION
SETTLEMENT
OAL DKT. NO. EDU 06833-22
AGENCY DKT. NO. 188-7/22

R.L. AND Y.L., ON BEHALF OF MINOR CHILDREN, M.L. AND T.L,
Petitioner,
v.
CENTRAL NEW JERSEY COLLEGE PREPARATORY CHARTER SCHOOL BOARD OF TRUSTEES, SOMERSET COUNTY,
Respondent.

Jessica Weinberg, Esq., for petitioner (Manes & Weinberg Special Needs Lawyers, LLC, attorneys)

Thomas O. Johnston, Esq., for respondent (The Johnston Law Firm, LLC, attorneys)

Record Closed: May 5, 2023 Decided: May 8, 2023

BEFORE **SARAH G. CROWLEY**, ALJ:

This appeal was filed on July 18, 2022. On August 8, 2022, the Department of Education Office of Controversies and Disputes transmitted the matter along with the petition of appeal to the Office of Administrative Law (OAL).

The parties have agreed to a settlement and entered into a Settlement Agreement, indicating the terms thereof, and submitted the Settlement Agreement and the Resolution of the Central Jersey College Prep Charter School Board of Education's (Board) regular meeting on April 25, 2023, both of which are attached and fully incorporated herein.

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

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

2. The settlement fully disposes of all issues in controversy.

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

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

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

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

May 8, 2023
DATE

Sarah G. Crowley
SARAH G. CROWLEY, ALJ

Date Received at Agency: 5/12/2023

Date Mailed to Parties:

SGC/nn

CENTRAL JERSEY COLLEGE PREP CHARTER SCHOOL

2016 National Blue-Ribbon School

RECEIVED
2023 MAY -5 P 3:34
STATE OF NEW JERSEY
OFFICE OF ADMIN. LAW

Board of Trustees Resolution

Date of Board Meeting: 04.25.2023

Central Jersey College Prep Charter School
101 Mettlers Rd.
Somerset, NJ 08873

Subject of Resolution: Student Settlement

BE IT RESOLVED that The Board approves the settlement in student matter bearing docket OAL EDU 06833-22 in accordance with the terms therein.

Motion made by Dr. Uzun **Seconded by** Dr. Tunigar

Names:	**Tally of Votes:**
Ozcan Uzun	YES
Ferhan Tunagur	YES
Jackie Lewis	YES
Eric Van Bladel	ABSENT

I, Victoria Mosier (Board Secretary) certify that the above resolution was passed by majority of a quorum of this Board of Trustees, as indicated above.

Signature: _____ Date: 05/05/2023

RECEIVED
2023 FEB 28 P 2:13
STATE OF NEW JERSEY
OFFICE OF ADMIN. LAW

R.L. and YL obo ML and TL) v. Board of Trustees of Central Jersey College Preparatory Charter School< Inc.
OAL Docket No.: EDU 06833-22
January 27, 2023

Whereas, *R.L. and YL obo ML and T.L. ("Petitioners") and the Board of Trustees of Central Jersey College Preparatory Charter School, Inc. ("School")* have agreed to settle their differences in the above matter as follows in accordance with this settlement agreement ("Agreement"), as follows:

1. M.L. shall be re-admitted to the School (Somerset Campus-101 Mettlers Road, Somerset, NJ) for the 2nd grade and T.L. shall be readmitted to the School (Somerset Campus-101 Mettlers Road, Somerset, NJ) for the 7th grade, unless the Parents request the New Brunswick campus, at the commencement of the 2023-2024 school year, provided that, Petitioners have not received written notice from their then current school district that the student will be retained in grade for the 2023-2024 school year.
2. The School shall send all necessary registration and transfer paperwork to the Parents no later than April 30, 2023, and provide all school-wide notices related to the 2023-2024 school year to the Parents, even If such notices are disseminated during the 2022-2023 school year. By May 31, 2023, Petitioners must complete all the paperwork for registration prescribed by the School. By virtue of this Agreement and its approval by the Hon. Sarah G. Crowley, A.L.J., the School is authorized to re-admit M.L. and T.L., irrespective of the School's lottery admission procedures, which shall otherwise remain in full force and effect for other prospective students and future years.
3. Contemporaneous with the effective date of this Agreement, Petitioners will withdraw in writing the FERPA complaint filed with the United States Department of

Education in or about October 2022.

4. Petitioners knowingly and irrevocably and unconditionally release and forever waive for themselves, and M.L. and T.L., any and all known or could have been known claims related to M.L. and T.L.'s education, against the School, its officers, administrators, board members, employees, agents, counsel insurers, co-insurers, re-insurers and insurance carriers, which may arise through the date of the Petitioners' execution of this agreement, under any and all federal and state laws, including, but not limited to, the Individuals with Disabilities Education Act, Section 504, Americans with Disabilities Act, *N.J.A.C.* 6A:14-1 et seq, Rehabilitation Act of 1973, N.J. Law Against Discrimination, 34 CFR 100.7, 42 USC § 1983, 20 USC 141(d), 34 CFE 300.320, Family Educational Rights and Privacy Act (FERPA) and any corresponding federal or state regulation promulgated therewith for compensatory education, transportation, tuition reimbursement, or damages of any kind or any other relief, compensatory, injunctive or otherwise.
5. Petitioners expressly waive any rights to attorney's fees and costs related to this matter.
6. Subject to the foregoing, this petition bearing docket number EDU 06833-22 shall be dismissed by Hon. Sarah G. Crowley, A.L.J., in accordance with this Agreement.
7. The parties acknowledge they are satisfied with their legal representation.
8. It is understood and agreed that execution of this Agreement is by mutual agreement to avoid the additional costs and expenses of litigation, potential appeals and applications for attorney's fees and that the settlement of this matter does not constitute an admission by any party of any wrongdoing or liability. No party shall claim to be the prevailing party in this matter or any threatened litigation.

9. The parties represent and acknowledge that they have had a reasonable amount of time to consider this Agreement, and that in executing this Agreement rely entirely upon their own judgment, beliefs and interests and the advice of their counsel, and they do not rely and have not relied upon any representation or statement made by any party, or by any agents, representatives or attorneys of any party, with regard to the subject matter, basis or effect of this Agreement or otherwise, other than as specifically stated in this Agreement. The parties specifically acknowledge that all releases contained herein are knowing and voluntary.

10. This Agreement is made under the laws of the State of New Jersey and shall be governed by and construed in accordance with such laws.

11. The terms and conditions contained herein constitute the entire understanding and agreement between the parties with respect to the settlement of the above-referenced matter. Petitioners acknowledge that in executing this document, they have not relied upon any statement, promise or representation, oral or written, not set forth herein. No change or modification of this Agreement shall be valid unless the same is in writing and signed by the Petitioners and the School.

12. This Agreement may be executed via electronic signatures and in counterparts.

For Petitioners

Dated: 2/8/2023

For Central Jersey College Preparatory Charter School, Inc.

February 24, 2023

Dated:

New Jersey Commissioner of Education

Decision

Gene Queval,

Petitioner,

v.

Board of Education of the City of Trenton, Mercer County,

Respondent.

Synopsis

Petitioner – formerly employed by the respondent Board's school district – claimed that the Board violated his tenure rights under *N.J.S.A.* 18A:17-2 when it terminated him from his position as an Account Payables Specialist (APS) without filing tenure charges. The Board contends that petitioner was not a tenured employee when he was terminated, as he had voluntarily relinquished any tenure rights he had acquired under *N.J.S.A.* 18A:17-2 when he accepted a promotion in 2009 to APS – a position that is neither a secretarial nor a clerical position – and, therefore, the filing of tenure charges was not necessary.

The ALJ found, *inter alia*, that: the issue here is whether the duties of petitioner's position as an APS could be characterized as secretarial or clerical in nature, such that petitioner would have obtained tenure in that position under *N.J.S.A.* 18A:17-2, and therefore would have held tenure at the time of his termination; petitioner voluntarily accepted a promotion to the position of APS from his previous position as APC in 2009; the work performed by the petitioner as an APC required only general office work; when he accepted the APS position, petitioner was required to audit, analyze, examine, and reconcile documents and prepare contracted purchase orders and invoices for payment on behalf of the Board; petitioner was also assigned a new function of tracking utilities; the APS position involved independent problem solving and exercising discretionary authority when performing his duties; further, while serving as APS, the petitioner was disciplined for failing to perform all of his duties. The ALJ concluded as a matter of law that petitioner relinquished the tenure rights he had acquired as an APC by voluntarily accepting the APS position and attendant salary increase. Accordingly, the ALJ affirmed the Board's action to terminate petitioner's employment and dismissed the petition.

Upon review, the Commissioner concurred with the ALJ's well-reasoned findings of fact and conclusions of law and adopted the Initial Decision as the final decision in this matter. In so doing, the Commissioner found, *inter alia*, that tenure rights are statutory, not contractual; tenure can only be secured when the precise conditions articulated in the applicable statute are met; and the burden of proving entitlement to tenure protections falls on the employee. *DiNapoli v. Bd. of Educ. of Twp. of Verona*, 434 *N.J. Super.* 233, 237 (App. Div. 2014). Accordingly, the petition was dismissed.

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

184-23
OAL Dkt. No. 14298-18
Agency Dkt. No. 208-8/18

New Jersey Commissioner of Education

Final Decision

Gene Queval,

Petitioner,

v.

Board of Education of the City of Trenton, Mercer County,

Respondent.

The record of this matter, the Initial Decision of the Office of Administrative Law (OAL), the exceptions filed by petitioner pursuant to *N.J.A.C.* 1:1-18.4, and the Board's reply thereto, have been reviewed and considered.

This matter concerns petitioner's claim that the Board violated the tenure rights he acquired under *N.J.S.A.* 18A:17-2 when it terminated him from his position as Accounts Payable Specialist (APS). The Board contends that while petitioner acquired tenure under *N.J.S.A.* 18A:17-2 in his previous position as Accounts Payable Clerk (APC), he voluntarily relinquished those tenure rights when he accepted a promotion to APS in 2009 – a title is which is neither a secretarial nor a clerical position – and thus was not a tenured employee when he was terminated. Petitioner also alleges that the Board violated the New Jersey Open Public Meetings Act (OPMA), *N.J.S.A.* 10:4-6 to -21, when it terminated him on June 26, 2018, without discussing his employment during the public session.

The Administrative Law Judge (ALJ) concluded that because the APS position was neither secretarial nor clerical in nature, petitioner did not acquire tenure as an APS under *N.J.S.A.* 18A:17-2. In her analysis, the ALJ carefully compared petitioner's job duties as an APC with his job duties as an APS. The ALJ found that the APS position required petitioner to perform tasks beyond routine clerical work including auditing, analysis, independent problem solving and the exercise of discretionary authority when determining whether invoices should be paid. The ALJ further concluded as a matter of law that petitioner relinquished the tenure rights he acquired as an APC by voluntarily accepting the APS position and attendant salary increase. Finally, the ALJ found that petitioner did not offer any evidence to support his OPMA claim and no longer wished to pursue it.

In his exceptions, petitioner argues that the ALJ ignored witness testimony which established that the APS position was "a tenure-eligible clerical position" in which he acquired tenure because he continued to perform clerical duties that involved little to no independent judgment or discretionary authority. He also argues that the ALJ erred as a matter of law by concluding that he surrendered his tenure rights by accepting the APS position because he never knowingly or voluntarily waived those rights. He further argues that the ALJ's dismissal of his OPMA claim on the basis that he failed to pursue it is contradicted by the record.

In reply, the Board asserts that the ALJ correctly assessed the record, including the witness testimony, when she concluded that the APS position was not clerical in nature and thus not tenure-eligible under *N.J.S.A.* 18A:17-2. It also asserts that the ALJ appropriately rejected petitioner's argument that he still held tenure rights to the APC position despite having

voluntarily accepted the promotion to the APS position. It further asserts that because petitioner has offered no evidence to support his OPMA claim, the ALJ properly dismissed it.

Upon review, the Commissioner concurs with the ALJ's well-reasoned findings of fact and conclusions of law. "Tenure rights are statutory and not contractual." *DiNapoli v. Bd. of Educ. of Twp. of Verona*, 434 *N.J. Super.* 233, 237 (App. Div. 2014). "To acquire the security of tenure, the precise conditions enunciated in the applicable statute must be met." *Id.* at 237-38. "The employee shoulders the burden of establishing entitlement to tenure protection, which ordinarily must be clearly proven." *Id.* at 238. "A mere overlap in duties . . . does not mean that two positions are equivalent for tenure purposes." *Dennery v. Bd. of Educ. of Passaic Cnty. Reg'l High Sch. Dist. #1*, 131 *N.J.* 626, 640 (1993). "If a newly-created position is similar to a tenure holder's abolished position but also requires additional duties or different responsibilities, then the newly-created position is not considered to be substantially similar to the former position." *Ibid.*

Petitioner's claim that the APS position is a tenure-eligible clerical position, substantially similar to the APC position, is not supported by the facts in evidence. It is uncontested that petitioner acquired tenure in the APC position pursuant to *N.J.S.A.* 18A:17-2(b)(1), which provides that "[a]ny person holding any secretarial or clerical position or employment under a board of education of any school district" acquires tenure following three years of employment. However, effective July 1, 2008, the Board reclassified petitioner's position from an APC to an APS, and abolished the APC position. Although petitioner's former supervisor testified that he approached her twice about reclassifying his position, he denied doing so. She further testified that she initially declined to request a reclassification but did so once petitioner agreed to take

on additional responsibilities, including conducting audits, authorizing vendor payments, and tracking school utilities. In any event, petitioner never objected to the reclassification. On the contrary, he signed an employment contract on May 14, 2009, agreeing to employment as an APS for the 2009-2010 school year and signed similar contracts annually through May 2018. There is nothing in the record to indicate that he was informed that his tenure rights would be impacted by the reclassification.

The documentary and testimonial evidence in the record support the ALJ's finding that the APS position was neither secretarial nor clerical in nature. In particular, the APC job description states that the employee is responsible for, among other duties, "assist[ing] in the payment of purchase orders" and "assist[ing] in the auditing, and reconciling receipts and invoices to purchase orders." The APS job description, by comparison, states that the "job goal" is "performing audit and preparation of contracted purchase orders and invoices for payment on behalf of the [Board]." More specifically, the employee is "[r]esponsible for auditing, reconciling invoices to Purchase Orders (POs), shipping documentation and preparing all purchase orders for payment" as well as "reconciling vendor statements quarterly." The job descriptions establish that while the APC had a supportive, secondary role in these tasks, the APS is responsible for completing them independently.[1]

The testimony from three of petitioner's former supervisors bolsters this conclusion. They each testified that petitioner's duties as APS were not primarily clerical in nature. Instead, petitioner was expected to review, analyze, and audit documents including purchase orders,

[1] Additionally, per the job descriptions, APC candidates were required to have a high school diploma or GED, plus at least five years of experience in data entry or a two-year technical/college degree, while APS candidates need a high school diploma plus five years of experience in accounts payable, among other experience.

invoices, and vouchers for accuracy to determine whether a vendor should be paid. If petitioner discovered a discrepancy, he was expected to resolve it. Based upon the status of the documentation, petitioner was tasked with independently determining whether to approve or refuse payment to vendors. He was also expected to apply discounts or other price adjustments when appropriate. This differed substantially from his role as an APC, in which he did not analyze or audit purchase orders or related documentation and lacked authority to determine whether a vendor should be paid.

Although much of petitioner's testimony consisted of self-serving, blanket denials of any change in his duties following the reclassification, he admitted that: (1) he analyzed open purchase orders as an APS; (2) how he handled purchase orders as an APS became more complicated and involved investigation; and (3) he had authority to pay vendors. Contrary to his assertions, the fact that he continued to perform incidental clerical tasks such as filing and data entry as an APS, along with the new analytical, auditing, and discretionary functions, does not support the conclusion that the APS position is predominantly clerical in nature or substantially similar to the APC position.

Next, petitioner's claim that he did not knowingly and voluntarily waive his secretarial tenure rights by accepting the APS position is contradicted by both the plain language of *N.J.S.A.* 18A:17-2 and controlling appellate case law. *N.J.S.A.* 18A:17-2(b)(1) states that "[a]ny person holding any secretarial or clerical position or employment under a board of education of any school district . . . shall not be dismissed or suspended or reduced in compensation, except for neglect, misbehavior or other offense and only in the manner prescribed by . . ." applicable tenure laws.

In *DiNapoli*, 434 *N.J. Super.* at 239-40, citing the statute's plain language, the Appellate Division concluded that "*N.J.S.A.* 18A:17-2 authorizes tenure to be maintained only while the employee serves in a secretarial position, office or employment." Consequently, it held that a Board employee who voluntarily transferred from a secretarial position to a distinct, non-secretarial position "abandoned" her secretarial tenure rights and "relinquished her right to 'bump back' into a secretarial position." *Id.* at 240-241, 246. It rejected the petitioner's arguments that something more "than [her] acceptance of a non-tenurable position" was required "to demonstrate an intention to relinquish her clerical tenure rights." *Id.* at 246-49. Here, petitioner's attempt to distinguish *DiNapoli* on its facts by claiming that it did not involve an employee who changed positions but continued to perform the same duties is unavailing. As discussed herein, petitioner did not continue to perform the same duties once he became an APS.

Petitioner asserts that *Quinlan v. Board of Education of the Township of North Bergen*, 73 *N.J. Super.* 40 (App. Div. 1962), is analogous to the present matter because the employee there changed positions but continued to perform the same duties and therefore retained her secretarial tenure rights. However, *Quinlan* is distinguishable on its facts. There, the Board appointed the employee, who initially worked solely as a tenured clerk, to a "hybrid position of clerk-attendance officer" in which she then worked "as both a clerk and an attendance officer." *Id.* at 45-46. The court reasoned that under this arrangement, the Board "chose to preserve [the employee's] status as a clerk, and to give her the additional post of attendance officer." *Id.* at 46. By contrast, in this case, the Board in no way preserved petitioner's status as an APC; it abolished that position as part of the reclassification. Furthermore, nothing in the record

establishes that the APS position encompassed all of petitioner's APC duties and responsibilities. As demonstrated by the job descriptions, the APS position was an entirely distinct position with different duties and qualifications. Additionally, petitioner's employment contracts make clear that he ceased holding the position of APC once he signed an employment contract in May 2009, agreeing to work as an APS for the 2009-2010 school year; he went on to sign similar contracts thereafter.

Petitioner's reliance upon *Keaney v. Board of Education of the Township of Bloomfield, Essex County*, EDU 5881-03, Agency Dkt. No. 128-4/03, Initial Decision at 6-7 (July 28, 2005), adopted by Comm'r (Aug. 31, 2005) is unpersuasive. There, the Commissioner agreed with the ALJ that a tenured janitorial employee who voluntarily accepted a promotion to maintenance supervisor did not "knowingly and intelligently waive[] his tenure as a janitorial employee when he assumed the title of supervisor" because "[h]is duties remained in the field of maintenance and skilled trades." *Id.* at 11-12. At the outset, *Keaney* is distinguishable because it concerns the janitorial employee tenure statute, *N.J.S.A.* 18A:17-3, which is inapplicable here. Moreover, the ALJ in that case found that, as a result of the promotion, the employee "assume[d] greater responsibility in his area of tenure." *Id.* at 19. Here, however, the record establishes that petitioner took on additional responsibilities outside his area of tenure. The auditing, problem-solving, and discretionary functions he assumed were neither secretarial nor clerical in nature.

In addition, petitioner's reliance on the Appellate Division's opinion in *Parsells v. Board of Education of Borough of Somerville*, 472 *N.J. Super.* 369, 378-80 (App. Div.), *aff'd as modified*, ____ *N.J.* ____, ____ (2023), slip op. at 2-21, is misplaced. There, the Appellate Division held that school boards had a duty to notify tenured full-time teachers who consider switching to a part-

time teaching position about the impact such a decision would have on their tenure status. *Parsells,* 472 *N.J. Super.* at 378-79. However, on June 12, 2023, the Supreme Court disagreed and "reject[ed] the imposition of a duty on school boards to 'notify, in advance, full-time teachers who consider voluntarily transferring to part-time teaching positions that they may not have a right to return to their full-time position.'" *Parsells*, slip op. at 21. The Court held that neither its opinion in *Bridgewater-Raritan Education Association v. Board of Education of Bridgewater-Raritan School District*, 221 *N.J.* 349 (2015), nor "the mere existence of the Tenure Act" provided a basis for such a duty. *Parsells*, slip op. at 2. Thus, *Parsells* does not support petitioner's assertion that he did not knowingly and voluntarily waive his secretarial tenure rights when he accepted the APS position because he was never directly notified by the Board about a change to his tenure status. The Board had no legal duty to provide such notification, and *DiNapoli* controls.

While the Supreme Court in *Parsells* nonetheless agreed with the Commissioner that the petitioner in that case had not knowingly waived her tenure rights to a full-time teaching position by voluntarily accepting a part-time teaching position, the facts in this matter are distinguishable for several reasons. In *Parsells*, slip op. at 14-15, the Court cited the fact that the petitioner never provided notice of her intention to relinquish her tenured position as is required by *N.J.S.A.* 18A:28-8; *N.J.S.A.* 18A:28-8 applies only to teaching staff members and is not applicable here. Furthermore, the Court recognized that the evidence in *Parsells* clearly showed that the petitioner intended to return to full-time teaching once it was in the best interest of her family, which bolstered its conclusion that she had not knowingly waived or abandoned her tenure rights. *Parsells*, slip op. at 18. By contrast, here, the record is devoid of evidence that petitioner

viewed the promotion to APS as a temporary opportunity and intended, at some future time, to forego the promotion and return to a tenured secretarial position. Indeed, petitioner was aware that the APC position was abolished as a result of the reclassification, and he consistently held the APS position for approximately nine years prior to his termination. In sum, *Parsells*, which does not concern secretarial tenure rights, fails to support petitioner's assertion that he did not knowingly and voluntarily waive his secretarial tenure rights when he accepted the APS position.

As for petitioner's OPMA claim, the Commissioner has "incidental jurisdiction to determine issues arising under the Open Public Meetings Act as they relate to controversies under the school laws." *Sukin v. Northfield Bd. of Educ.*, 171 *N.J. Super.* 184, 187 (App. Div. 1979). *N.J.S.A.* 10:4-12(b)(8) permits boards of education to "exclude the public from that portion of a meeting at which the public body discusses any matter involving" a board employee's "termination of employment" unless the employee "request[s] in writing that the matter . . . be discussed at a public meeting." This exception "provides employees with the right to move a private discussion into the sunshine of a public discussion." *Kean Fed'n of Teachers v. Morell*, 233 *N.J.* 566, 586 (2018).

Although petitioner claims in his exceptions that the "uncontested facts" demonstrate that he requested in writing that his employment be discussed at the Board's June 26, 2018, meeting, the record is devoid of documentation to establish that fact. Indeed, petitioner never testified that he made this request in writing. He testified only that he asked to have his employment discussed in open session. Moreover, he failed to establish that the Board violated OPMA by discussing his employment in Executive Session. The Board minutes state that Board counsel announced at the meeting that "no discussion" was anticipated regarding petitioner's

employment during Executive Session and that if the need for discussion arose, the Board would return to open session to conduct it. Therefore, the record supports the ALJ's finding that petitioner failed to provide sufficient evidence to support his OPMA claim.

Accordingly, the Initial Decision of the OAL is adopted as the final decision in this matter, and the petition of appeal is hereby dismissed.

IT IS SO ORDERED.[2]

Angelica Allen-McMillan, Ed.D.
ACTING COMMISSIONER OF EDUCATION

Date of Decision: June 20, 2023
Date of Mailing: June 21, 2023

[2] This decision may be appealed to the Appellate Division of the Superior Court pursuant to *N.J.S.A.* 18A:6-9.1. Under *N.J.Ct.R.* 2:4-1(b), a notice of appeal must be filed with the Appellate Division within 45 days from the date of mailing of this decision.

State of New Jersey
OFFICE OF ADMINISTRATIVE LAW

INITIAL DECISION
OAL DKT. NO. EDU 14298-18
AGENCY DKT. NO. 208-8/18

GENE QUEVAL,
Petitioner,
v.
BOARD OF EDUCATION, CITY OF TRENTON, MERCER COUNTY,
Respondent.

Hop T. Wechsler, Esq., **and Steven R. Cohen**, Esq., for petitioner (Selikoff & Cohen, P.A. attorneys)

Sandra N. Varano, Esq., for respondent (Nirenberg & Varano, LLP, attorneys)

Record closed: March 20, 2023 Decided: May 4, 2023

BEFORE **MARY ANN BOGAN**, ALJ:

STATEMENT OF THE CASE

Petitioner, Gene Queval, alleges that the termination of his employment as a result of his job performance as an Accounts Payable Specialist (APS), a position he maintains is clerical with tenure rights, was a violation of tenure rights. Petitioner contends that the Board was obligated to bring tenure charges before a Teacher

Effectiveness and Accountability for the Children of New Jersey (TEACHNJ) Act arbitrator. Respondent, the Trenton Board of Education (Board), contends that petitioner was terminated from a non-tenured position and the filing of tenure charges before a TEACHNJ arbitrator was not necessary.

PROCEDURAL HISTORY

On August 27, 2018, petitioner filed a verified petition with the Commissioner of the New Jersey Department of Education for the non-renewal of his employment that violated his tenure rights under N.J.S.A. 18A:17-2. Petitioner seeks his reinstatement to the position of APS, as well as full back pay with interest and benefits, including pension credit retroactive to August 1, 2018, the effective date of the purported non-renewal by the Board. The petitioner also alleges that the Board violated the Open Public Meetings Act (OPMA). Respondent filed its response on September 26, 2018. The Board denied that petitioner remained tenured after the position was reclassified from Accounts Payable Clerk (APC) to APS. The Board also denied that it violated the OPMA. Subsequently, on October 1, 2018, the petition was transmitted to the Office of Administrative Law (OAL) for hearing as a contested case pursuant to N.J.S.A. 52:14B-1 to -15 and N.J.S.A. 52:14F-1 to -13. At the time the case was ready for hearing, the Office of Administrative Law (OAL) was closed to in-person hearings due to the COVID-19 pandemic. The parties jointly requested a delay of the hearing until after normal operations resumed. The hearing took place on September 13, 2022, and January 11, 2023. Following receipt of the parties' post-hearing briefs and the transcripts, the record closed on March 20, 2023.

FACTUAL DISCUSSION AND FINDINGS

The parties submitted a joint stipulation of facts (J-1). Accordingly, I adopt the following undisputed **FACTS**:

1. Gene Queval (Queval) was employed by the Trenton Board of Education (Board) as an Accounts Payable Clerk from August 1, 1994, to June 30, 2008.

2. Queval's annual base salary in the Accounts Payable Clerk position as stated on his employment contracts was as follows:

   - 1996–1997: $21,198 (salary to be adjusted after the completion of negotiations)
   - 1997–1998: $22,017 (salary to be adjusted after the completion of negotiations)
   - 1998–1999: $24,050
   - 1999–2000: $25,000 (salary to be adjusted after the completion of negotiations)
   - 2002–2003: $36,962
   - 2003–2004: $41,321
   - 2005–2006: $48,263
   - 2006–2007: $48,263 (salary to be adjusted upon ratification of the new collective bargaining agreement)
   - 2007–2008: $48,263 (salary to be adjusted upon ratification of the new collective bargaining agreement)
   - 2008–2009: $48,263 (to be adjusted upon ratification of contract)

Attached as Exhibit A are true and correct copies of Queval's annual employment contracts stating his salary for the Accounts Payable Clerk position.

3. Queval acquired tenure in the Accounts Payable Clerk position pursuant to N.J.S.A. 18A:17-2.

4. Effective July 1, 2008, the Board reclassified Queval from Accounts Payable Clerk to Accounts Payable Specialist.

5. Attached as Exhibit B is a true and correct copy of the Board's job description for the Accounts Payable Specialist position.

6. Queval's annual base salary in the Accounts Payable Specialist position as stated on his annual employment contracts was as follows:

   - 2009–2010: $54,931 (salary to be adjusted upon ratification of new collective bargaining agreement)
   - 2010–2011: $54,931 (salary to be adjusted upon ratification of contract)
   - 2011–2012: $57,995
   - 2012–2013: $57,995
   - 2013–2014: $57,995 (salary to be adjusted upon ratification of contract)
   - 2014–2015: $61,316

   Attached as Exhibit C are true and correct copies of Queval's annual employment contracts stating his salary for the Accounts Payable Specialist position.

7. On May 8, 2018, the Board voted to renew Queval's 2018–2019 employment contract.

8. On or about May 15, 2018, Queval received an employment contract from the Board for the 2018–2019 school year. Queval's 2018–2019 annual base salary as stated on the contract was $61,316 (salary to be adjusted upon ratification of new contacts [sic]. Attached as Exhibit D is a true and correct copy of Queval's 2018–2019 employment contract.

9. At its monthly meeting on June 26, 2018, the Board minutes reflect that Queval's employment was terminated effective July 30, 2018. Attached as Exhibit E are true and correct copies of two June 26, 2018, Board minutes pages and the personnel transactions page from the June 26, 2018, meeting agenda that concerns Queval's employment. Page 28 of the minutes and the personnel transactions page both identify Queval by his employee ID number (100544) only.

Testimony

Petitioner

Gene Queval (Queval) testified that when he began working for the Board, the Accounts Payable Department consisted of the comptroller, the business services coordinator, the APC position that Queval held, and two secretarial positions. He was initially supervised by the comptroller and later by the business services coordinator. Queval stated that he remained in a tenured position and performed similar job functions after what he referred to as a job-title change to APS. As an APC, Queval performed clerical duties like typing, filing, answering phones, entering data, and pulling document requests. Queval also cleared purchase orders and paid vendors. In the year 2000 he began using EduMet, a computer program that allowed him to pull up purchase-order numbers, clear purchase orders, and pay vendors. (P-7.) Everyone in the department used EduMet. The major responsibilities set forth on Queval's APC annual employee evaluations include: remediates, expediates, and routes information regarding accounts payable; has contact with vendors regarding invoices, deliveries, corrections, and discrepancies; works with the warehouse and schools regarding shipments and problems; reconciles vendor statements; maintains filing system for non-cleared purchase orders; assists with reconciling and expediting payments of buildings-and-grounds billings and data entry for transportation-aid reimbursement. (P-2 to P-12; R-1 to R-8.) Queval's responsibilities did not include customizing computer programs, creating forms, or entering data in different categories. He had no direct reports and could not assign work to any other staff members.

The job posting for the APC included three main qualifications: high-school graduate or GED equivalent; at least five years' job experience in data entry, or a two-year technical/college degree may be substituted; possess excellent communication skills. (P-1.)

After the job title changed from APC to APS, Queval sat at the same desk and worked with the same people. In his view, the annual performance evaluation for the APS position did not include job duties that were significantly different from the job

duties he performed in the clerk position. (P-19.) Queval acknowledged that the evaluation indicates that he took on more responsibilities, in particular as it relates to auditing and reconciling invoices to purchase orders. He pointed out that the only new job responsibility was tracking utility payments, although the volume of work increased. Queval was never told that his job duties in the retitled position no longer included clerical duties, no administrator indicated to him that he would be required to waive his tenure rights, nor was a change to his tenure eligibility ever mentioned. As far as he was concerned, he was still tenured when the job title changed.

Queval testified that in 2008, Shawn Mitchell, who served as the business services coordinator and supervised Queval, informed him that due to a reorganization in the accounting department, his job title would change to APS. This title change did not require an application or an interview, and Queval was not asked to resign from his position as an APC in order to be rehired as an APS. Queval did not take part in the reclassification process, although he did recall that as part of the reorganization, Mitchell's position as business services coordinator was abolished, as was one of the two secretarial positions. Mitchell then became the interim payroll supervisor, and Queval continued to be supervised by Mitchell until 2013. Queval believed that employees whose job duties include clerical duties like answering the phones and typing letters were clerical employees. Queval acknowledged that he knew he was getting more duties and responsibilities. He stated, "there was changing of the way that work was being done," and "they were pushing back the tasks of the business services coordinator back into the department."

Ultimately, it was the Board's general counsel, James Rolle, Jr., who told Queval that his employment was being terminated. Queval responded that he had a contract and was tenured. Thereafter, Queval was notified via a Rice notice issued by the respondent that his employment would be discussed during the Board meeting open session. Queval attended that meeting and spoke on his own behalf. He recalled that the Board did not engage in a discussion at that time. Subsequently, the Board voted not to renew his employment contract.

Queval is currently employed by the Hamilton Township Board of Education as a secretary in the Accounts Payable Department.

Respondent

Shawn Mitchell (Mitchell) is currently employed by the Board as the assistant business administrator/comptroller. She worked as the business services coordinator from 2005 to 2008, when she became the payroll supervisor. In 2010 she became the comptroller, and then assistant business administrator/comptroller. Mitchell is a certified public accountant.

Mitchell supervised Queval in his roles as an APC and APS in the Accounts Payable Department. At the time she became the business services coordinator, Queval was employed in the department as an APC. In the position of business services coordinator, she was the head of the Accounts Payable Department and supervised all employees. She was primarily responsible for ensuring the payment of all District invoices, which included tuition, utility bills, and charter-school aid. While performing her duties she reviewed purchase orders, analyzed and examined them for accuracy, and ensured that any required adjustments were made. Even though her position was not a clerical position, and she was not eligible for tenure, she did perform "clerk-type" duties such as filing and answering phones.

Mitchell became familiar with Queval's APC duties through the outgoing business services coordinator, and during a one-on-one meeting with each staff member. She understood that his APC duties were accurately set forth in his performance evaluations, and that Queval would maintain the purchase orders that were sent from the Purchasing Department, file them in chronological order, and stamp each purchase order as cleared when he was told the item had been received. (P-11; R-7.) As the APC he did not conduct an analysis or perform an audit. Moreover, he did not have authority to determine if an invoice should not be paid and he did not perform any duties other than office-type work.

Mitchell denied notifying Queval that his job title would change. Rather, she was approached by Queval about reclassifying his position. At that time, Mitchell was not yet familiar with the procedure for reclassification. Queval provided her with some information on the process. After reviewing the information, Mitchell told Queval that she was unable to do a reclassification since he continued to perform the same job duties. When Mitchell began working as the interim payroll supervisor, Queval approached her again and agreed that he would learn additional responsibilities, including reviewing and examining documentation for the purchase orders, conducting audits of financial records, ensuring that purchase orders and invoices were reconciled, and authorizing payments. These were duties that Mitchell performed as the business services coordinator and not duties that Queval performed in his role as APC. In addition to the APS position, Queval would track utilities, a new responsibility that involved setting up a spreadsheet to keep track of the utilities at each school.

Eventually Mitchell spoke with the business administrator, created an APS job description, and completed the Job Reclassification Form, consistent with Board Policy 4113-4114. (P-13; P-14; R-24.) The Board policy permits reclassification when the job duties and the job title change. The reclassification form states, in part:

> Gene has taken on increased responsibility as it relates to auditing and reconciling invoices to purchase orders. In his current position, it requires only that he assist, however, in the past year he has been given more responsibility for the processing of payment of purchase orders. In addition, he has begun working with Purchasing in attempts to resolve issues relating to outstanding purchase order differences.

Additional responsibilities added to this position that Queval began handling included preparing purchase orders for payment, reviewing or assisting with the review of the bill list and dissemination of bills, tracking aid-in-lieu-of-transportation invoices, and processing special-services tuition invoices. He is now responsible for working with external auditors for the timely retrieval of documents requested.

Mitchell also proposed the abolishment of the business services coordinator position, the absorption of those duties by members within the department, and the creation of a senior accountant position. (P-13.)

In conjunction with the Board policy regarding reclassification, Mitchell submitted a new job description for a new position of account specialist; the job qualifications and job duties—including the level of responsibility, the complexity of the work, and the knowledge and skills required to perform those duties—differed significantly from those of the APC. As a result of the reclassification, Queval received a new job title, a new job description, and a pay raise. Mitchell acknowledged that the Job Reclassification Form did not mention tenure and she did not discuss with Queval that by taking the APS position he would be surrendering his tenure rights. (See P-13; R-24.) Mitchell agreed that Queval was never asked to resign from his APC position, apply for a new position, or interview for the APS position.

Mitchell testified that Queval refused to perform many of the higher-level functions of the APS position, and as a result he received a number of written memos; reprimands, including an increment withholding; and a thirty-day suspension without pay. Ultimately, he was terminated. (R-27; R-28; R-29; R-30; R-31.)

Nisha Goyal (Goyal), accounting manager, is a certified public accountant. She began working for the Board in 2015. In 2016 she assumed the manager's position and began supervising the employees in the Accounts Payable Department, including Queval, who worked as an APS. (R-19.) Goyal did not supervise Queval when he served in the APC position. She became aware of his job duties by reviewing the job description for his position. She stated that as an APS, Queval was expected to financially examine the purchase orders, process the purchase orders, audit financial documents, and compare the semi-monthly bill list with the checks to be generated in order to ensure accuracy. Queval was also expected to reconcile all accounts payable and pay any credits and excesses involved while determining whether there was a discrepancy on a vendor bill. This meant Queval had the authority to decide whether or not an invoice should remain unpaid. She further explained that auditing meant a

financial examination of the documents. Although Queval performed some clerical duties, the APS position did not primarily involve clerical duties. (R-19; P-14.)

Goyal also indicated that Queval was responsible for utility expenditures. Queval was in the chain of payment authorization; this meant he had the authority to approve or disapprove a vendor payment.

For much of the time that Goyal worked with Queval, she had difficulty in ensuring that Queval performed his job duties. Multiple times she reiterated the APS job duties in writing. Goyal increased her level of supervision over Queval's performance due to his refusal to perform all of the duties. She explained that instruction and guidance to an employee on how to perform job duties does not mean the job is clerical, especially here, where he was expected to exercise independent judgment.

As a result of his ongoing performance issues, Goyal issued a corrective action plan for Queval. (P-23; R-35.) This plan set forth that "an APS works with all facets of the accounting system, principally the validation, processing and filing of invoices." She then submitted a request to withhold his increment, and ultimately recommended that his contract not be renewed. (R-28 to R-30; R-35; R-36; R-37; R-38; R-39.)

After Queval was terminated, some of his duties were added to the senior accountant position. (R-19.)

Todd Schechter (Schechter) was employed by the Board as the assistant comptroller since 2011. He began supervising the Accounts Payable Department in 2012 to 2013. In 2013, Goyal was hired as the accounting manager and Schechter was promoted to the comptroller position. Schechter supervised all employees in the department and completed their performance reviews. At that time, Queval worked as the APS. (R-19; P-14.) Schechter testified that as part of the specialist position, Queval made decisions regarding purchase orders. His decision making consisted of conducting an analysis of the data he decided to enter and the authority he had to "clear" a purchase order. After interpreting the data, Queval had decision-making

authority to determine whether a bill would be paid or held back. Only a small portion of his responsibilities included clerical-type work. Schechter pointed out that he also performed some clerical functions like answering the phone, typing, and email, but his position was not clerical.

Additional Findings of Fact

In addition to the stipulated facts, I **FIND** that petitioner voluntarily accepted the position of APS from his previously held position of APC. The APS position was partly created to take over some of the business services coordinator duties. With regard to the work performed by the petitioner as an APC, it did not require analysis or auditing and he did not perform duties beyond general office work. When petitioner accepted the APS position he was responsible to audit, analyze, examine, and reconcile documents and prepare contracted purchase orders and invoices for payment on behalf of the Trenton Board of Education. The petitioner was also assigned a new function of tracking utilities. The position involved independent problem solving and exercising discretionary authority when performing his duties. While serving as an APS, the petitioner was disciplined for failing to perform all of his duties.

LEGAL ANALYSIS AND CONCLUSION

The issue presented is whether the duties of petitioner's reclassified position of accounts payable specialist could be characterized as secretarial or clerical in nature, such that petitioner would have obtained tenure in that position under N.J.S.A. 18A:17-2, and therefore would have tenure for all relevant purposes. Moreover, was petitioner protected from summary termination under the tenure laws such that he would have the right to be returned to his position with back pay from July 30, 2018?

N.J.S.A. 18A:17-2, "Tenure of secretaries, assistant secretaries, school business administrators, business managers and secretarial and clerical employees," provides as follows:

> a. Any secretary, assistant secretary, school business administrator or business manager of a board of education of any school district who has or shall have devoted his full time to the duties of his office and has or shall have served therein for three consecutive calendar years, and
>
> b. Any person holding any secretarial or clerical position or employment under a board of education of any school district or under any officer thereof, after
>
> > 1. The expiration of a period of employment of three consecutive calendar years in the district or such shorter period as may be fixed by the board or officer employing him, or
> >
> > 2. Employment for three consecutive academic years, together with employment at the beginning of the next succeeding academic year, an academic year being the period between the time when school opens in the district after the general summer vacation and the beginning of the next succeeding summer vacation, and
>
> c. Any person, who has acquired, or shall hereafter acquire, tenure in any secretarial or clerical office, position or employment under the board of education of a school district and has been appointed district clerk or secretary, or shall hereafter be appointed secretary of said district, as such secretary, shall hold his office, position or employment under tenure during good behavior and efficiency and shall not be dismissed or suspended or reduced in compensation, except for neglect, misbehavior or other offense and only in the manner prescribed by subarticle B of article 2 of chapter 6 of this title.

The petitioner argues that he was tenured even after he became the APS. A claim of tenure in situations such as this one imposes upon the petitioner the burden of presenting sufficient competent and credible evidence of facts essential to his claim. Here, the petitioner must prove by a preponderance of the competent and credible evidence that the respondent employed him in a clerical position in order for his claim for tenure to succeed. Wright v. E. Orange Bd. of Educ., 99 N.J. 112, 118–19 (1985); see also DiNapoli v. Bd. of Educ. of Verona, 434 N.J. Super. 233, 238 (App. Div. 2014).

The court in Barnes v. Board of Education of Jersey City, 85 N.J. Super. 42, 45 (App. Div. 1964), noted that the tenure statute was to be construed liberally, and that it was the nature of the duties performed by an employee that determined whether tenure rights were acquired, and not the title of the position. In Beaute v. Board of Education of North Arlington, OAL Dkt. No. EDU 295-80, Initial Decision (July 28, 1981), adopted, Comm'r (September 14, 1981), aff'd, State Bd. (February 3, 1982), the ALJ noted that "[a] mere change in title or creation of a paper job description, without any substantial change in specific duties is an evasion that should not be permitted to erode an employee's rights in the continuing accrual of tenure. The duties performed, rather than the title of the position, should be controlling, and we should look to the substance rather than the form."

The petitioner claims that the duties he performed in the position of APS were predominantly those that are commonly performed by individuals in today's secretarial and/or clerical workforce, like he performed as an APC. Respondent contends that although some of the functions performed by the petitioner in his position as APS could be characterized as those traditionally done by one denominated as a secretary or clerk (such as answering the phone, filing, etc.), most of his duties of the position went well beyond routine office functions, and required verification, analysis, self-direction, and independent problem solving with some authority, duties that Queval refused to perform after receiving a new job with a new title and job duties, and increased pay. Thus, this matter turns on the nature of petitioner's duties as an APS. If the facts show that the work was more like that of a secretarial position, then he would have gained tenure in that employment. If not, then he would not be tenured.

In Kopko v. Board of Education of Middletown, 2011 N.J. AGEN LEXIS 391 (July 25, 2011), adopted, 2011 N.J. AGEN LEXIS 878 (September 7, 2011), the issue was whether Kopko's duties as an assistant traffic coordinator were clerical within the meaning of N.J.S.A. 18A:17-2. The ALJ reasoned:

> The independent problem-solving tasks designated to petitioner and the authority she held to handle crises on a day-to-day basis belie her argument that she could be classified as a secretarial or clerical employee. Although

> she did perform some routine office tasks, the additional responsibilities conferred upon her removed her position from one of a secretarial classification to one of authority.
>
> [N.J. AGEN LEXIS 391 at *23.]

Similarly, in Fink v. Board of Education of Hunterdon County Polytech, 2009 N.J. AGEN LEXIS 691 (September 28, 2009), aff'd, 2009 N.J. AGEN LEXIS 1194 (November 2, 2009), the ALJ and the Commissioner rejected Fink's claims that her time working as coordinator of adult education counted toward her tenure right as a secretary or clerk. The ALJ found that the position involved day-to-day responsibilities that far exceeded the clerical and supportive responsibilities of a secretarial position. The ALJ concluded:

> Because the duties of an adult education coordinator involve analysis, self-direction and similar higher-level responsibilities, they cannot in any way be considered equivalent to those of a secretarial position which, by its nature, involves assisting a person in authority in performing such higher-level duties and responsibilities.
>
> [2009 N.J. AGEN LEXIS 691 at *19.]

Also "[t]he fact that an employee has a supervisor and is assigned work does not make him a clerical employee within the meaning of the [tenure] statute." Effenberger v. Toms River Reg'l Schs. Bd. of Educ., 95 N.J.A.R.2d (EDU) 66.

The petitioner also asserts that he was not advised of a change in tenure potential when the APC position was reclassified to a non-tenurable APS position. In essence, the petitioner asserts that a local school board may not sidestep tenure rights by simply renaming the position or tacking on additional meaningless requirements. The local board must extend the staff member's tenure rights to the newly created position. See Marbut v. Bd. of Educ. of S. Brunswick, 97 N.J.A.R.2d (EDU) 99 (determination of tenure eligibility depended upon whether the employee's duties were "predominantly clerical in nature" and whether any additional non-clerical duties were therefore "minimal and incidental to the predominantly and primarily clerical duties"); Viemeister v. Bd. of Educ. of Prospect Park, 5 N.J. Super. 215, 218 (App. Div. 1949) (wherein it was held that a tenured principal should be reinstated because his position

had not in fact been abolished when the local school board created the position of "teaching" principal); Vogel v. Bd. of Educ., SB #95-83, State Bd. of Educ. (June 5, 1985), slip op. at 5–6 (explaining that a "[b]oard's decision to abolish a position is not sacrosanct and will be disturbed if it is found upon examination that the duties of the abolished position essentially have been transferred to another position so as to defeat the rights of a tenured employee to the abolished position"); Luppino v. Bayonne Bd. of Educ., 1980 S.L.D. 1028, 1035–36 (ruling that the duties of an administrator of home instruction and a principal of home instruction "were substantially the same" and a change of title "did not involve the meaningful addition of extra duties").

However, mere overlap in duties does not mean that two positions are equivalent for tenure purposes. If a newly created position is similar to a tenure holder's abolished position but also requires additional duties or different responsibilities, then the newly created position is not considered to be substantially similar to the former position. Santarsiero v. Bd. of Educ. of Parsippany-Troy Hills, 1984 S.L.D. 854, 879; see also Sandri v. Bd. of Educ. of Bergen Cnty. Vocational Sch. Dist., 1986 S.L.D. 1501 (ruling that duties of abolished position of supervisor of guidance/shop were similar but of greater nature and scope than newly created position of director of special needs and student services); Rufalo v. Bd. of Educ. of Livingston, 1986 S.L.D. 1699 (ruling that despite overlap of duties between post of vice principal and newly created supervisor position, positions were "substantially different").

Finally, in the case at hand, the parties do not dispute that Queval acquired tenure pursuant to N.J.S.A. 18A:17-2 while working as an accounts payable clerk. However, the petitioner claims that he cannot be "de-tenured" by the Board without a knowing and voluntary waiver of his tenure rights. Bridgewater-Raritan Educ. Ass'n v. Bd. of Educ. of Bridgewater-Raritan Sch. Dist., Somerset Cnty., 221 N.J. 349, 361 (2015). Citing Bridgewater, the court in Parsells v. Board of Education of Somerville, 472 N.J. Super. 369, 379 (App. Div. 2022), noted that "[t]he Board is best positioned to have accurate information about the consequences of a decision by . . . a tenured full-time teacher" transitioning to a different job.

Respondent asserts that Queval extinguished his tenure protections after he accepted the position of accounts payable specialist. Consequently, respondent argues that Queval was not tenured when the Board voted to terminate him effective July 20, 2018.

Under these facts, upon the voluntary acceptance of a non-tenurable position, a school-district employee typically relinquishes any protections associated with the previously tenured title. See, e.g., Colon-Serrano v. Plainfield Bd. of Educ., 2008 N.J. AGEN LEXIS 252 (January 28, 2008) (finding that an employee who had earned tenure as an attendance aide lost the protections associated with the position when she accepted the non-tenurable position of classroom aide); see also DiNapoli, 434 N.J. Super. at 240 (holding that a secretary relinquished her tenure rights when she voluntarily transferred to the position of assistant school business administrator, thus giving up her right to "bump" a non-tenured secretarial employee when the administrator position was eliminated).

Here, petitioner relinquished his tenure protections when he voluntarily accepted a promotion to APS. As a result, when the Board voted to terminate him, he was not entitled to tenure rights.

Finally, petitioner included in his verified petition of appeal a claim under the New Jersey Open Public Meetings Act, N.J.S.A. 10:4-15, regarding the Board's alleged conduct at the meeting on June 26, 2018, when petitioner was terminated. The petitioner did not offer testimony or evidence in support of this claim. Moreover, the record reflects that the petitioner no longer wished to pursue this claim.

I **CONCLUDE** that given the facts stipulated and proven by a preponderance of the evidence, petitioner had more duties and responsibilities as an APS than a secretarial or clerical employee, and he cannot be considered as having been employed as a secretary or clerk. As a result, petitioner did not acquire tenure in his position as an APS and has no claim to employment based upon an alleged violation of his tenure rights.

ORDER

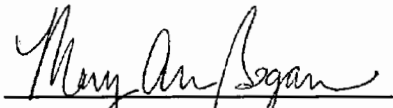
I hereby **ORDER** that the petitioner's appeal be **DISMISSED**.

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

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

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

May 4, 2023
DATE



MARY ANN BOGAN, ALJ

Date Received at Agency: _____

Date Mailed to Parties: _____

MAB/kl

APPENDIX

WITNESSES

For petitioner

Gene Queval

For respondent

Shawn Mitchell

Nisha Goyal

Todd Schechter

Joint exhibits

J-1 Joint stipulation of facts

For petitioner

P-1 Accounts Payable Clerk job description

P-2 Gene Queval 1995 evaluation

P-3 Gene Queval 1996 evaluation

P-4 Gene Queval 1998 evaluation

P-5 Gene Queval 1999 evaluation

P-6 Gene Queval 2002 evaluation

P-7 Gene Queval 2003 evaluation

P-8 Gene Queval 2004 evaluation

P-9 Gene Queval 2005 evaluation

P-10 Gene Queval 2006 evaluation

P-11 Gene Queval 2007 evaluation

P-12 Gene Queval 2008 evaluation

P-13 Job Reclassification Form

P-14 Accounts Payable Specialist job description

P-15 Trenton Board of Education meeting minutes from June 23, 2008 (Creations and Re-classification of Position(s) pages only)

P-16 Gene Queval 2010 evaluation

P-17 Gene Queval 2013 evaluation

P-18 Gene Queval 2014 evaluation

P-19 Gene Queval 2015 evaluation

P-20 Gene Queval 2016 evaluation

P-21 Gene Queval 2017 evaluation

P-22 Gene Queval 2018 evaluation

P-23 Memorandum from Nisha Goyal to Gene Queval, dated October 18, 2017, with attached Corrective Action Plan

P-24 Purchase Orders over 90 Days reports generated by Nisha Goyal, dated February 12, 2018

P-25 Trenton Board of Education meeting minutes from June 26, 2018 (Public Participation and Board Discussion & Action on Consent Agenda pages only) with attached Personnel Transactions agenda (Termination page only)

For respondent

R-1 Petitioner's Evaluation Form, dated June 7, 1999 (Bates stamped P43)

R-2 Petitioner's Evaluation Form, dated April 17, 2002 (Bates stamped P50)

R-3 Petitioner's Evaluation Form, dated April 11, 2003 (Bates stamped P57)

R-4 Petitioner's Evaluation Form, dated April 10, 2004 (Bates stamped P64)

R-5 Petitioner's Evaluation Form, dated April 4, 2005 (Bates stamped P71)

R-6 Petitioner's Evaluation Form, dated April 27, 2006 (Bates stamped TRENTONBOE-OAL-00466)

R-7 Petitioner's Evaluation Form, dated April 27, 2007 (Bates stamped P78)

R-8 Petitioner's Evaluation Form, dated April 29, 2008 (Bates stamped P84)

R-9 Petitioner's Evaluation Form, dated April 21, 2010 (Bates stamped TRENTONBOE-OAL00473)

R-10 Petitioner's Evaluation Form, dated April 26, 2013 (Bates stamped PI 2)

R-11 Petitioner's Evaluation Form, dated April 29, 2014 (Bates stamped PI6)

R-12 Petitioner's Evaluation Form, dated April 22, 2015 (Bates stamped TRENTONBOE-OAL00477)

R-13 Petitioner's Evaluation Form, dated April 14, 2016 (Bates stamped P20)

R-14 Petitioner's Evaluation Form, dated April 26, 2017 (Bates stamped P24)

R-15 Petitioner's Evaluation Form, dated April 17, 2018 (Bates stamped TRENTONBOE00373)

R-16 Petitioner's Application for Employment (TRENTONBOE00J 96)

R-17 Petitioner's Answers to Interrogatories

R-18 Trenton BOE Post—Accounts Payable Clerk (TENTONBOE-OAL00495)

R-19 Trenton BOE Job Description, Accounts Payable Specialist (TRENTONBOE00023)

R-20 Trenton BOE Job Description, Senior Accountant (TRENTONBOE-OAL00483)

R-21 Trenton BOE Job Description, Senior Accountant (TRENTONBOE-OAL00496)

R-22 Trenton BOE Job Description, Secretary (TRENTONBOE-OAL00400)

R-23 Trenton BOE Job Description, Accounting Manager (TRENTONBOE-OAL00402)

R-24 Trenton BOE Reclassification Forms (TRENTONBOE-OAL00485–495)

R-25 Petitioners Employment Contract, Accounts Payable Clerk, July 1, 2008, to June 30, 2009 (TRENTONBOE00083)

R-26 Petitioner's Employment Contract, Accounts Payable Specialist, July 1, 2009, to June 30, 2010 (TRENTONBOE00084)

R-27 Memorandum, dated October 27, 2016, with attachments (TRENTONBOE00377–384)

R-28 Memorandum, dated November 14, 2016 (TRENTONBOE00385)

R-29 Meeting Notes, dated November 18, 2016 (TRENTONBOE-OAL00502)

R-30 Trenton BOE Employment Status Form dated April 26, 2017 (TRENTONBOE-OAL00454-456)

R-31 Emails, dated June 12, 2017 (TRENTONBOE-OAL00457)

R-32 Email, dated July 12, 2017 (TRENTONBOE-OAL00459)

R-33 Correspondence, dated August 14, 2017 (TRENTONBOE-OAL00460)

R-34 Grievance Form, dated September 25, 2017 (TRENTONBOE-OAL00498–501)

R-35 Memorandum, dated October 18, 2017 (TRENTONBOE00393)

R-36 Memorandum, dated December 15, 2017 (TRENTONBOE00391)

R-37 Emails re: POs Over 90 Days (TRENTONBOE00386–388)

R-38 Memorandum, dated February 28, 2018 (TRENTONBOE00389)

R-39 Employment Status Form, dated April 17, 2018 (TRENTONBOE00397–399)

R-40 Petitioner's Interrogatory Amendment, dated February 20, 2020

R-41 Petitioner's Interrogatory Amendment, dated March 3, 2022

R-42 Letter to petitioner from Hamilton Township BOE, April 29, 2021 (P107)

185-23E
OAL Dkt. No. EDU 05047-23
Agency Dkt. No. 157-6/23

New Jersey Commissioner of Education

g **Order on Emergent Relief**

H.G, on behalf of minor child, E.G.,

Petitioner,

v.

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

Respondent.

The record of this emergent matter and the recommended Order of the Administrative Law Judge (ALJ) have been reviewed. Upon such review, the Commissioner concurs with the ALJ that petitioner has failed to demonstrate entitlement to emergent relief pursuant to the standards enunciated in *Crowe v. DeGioia,* 90 *N.J.* 126 (1982), and codified at *N.J.A.C.* 6A:3-1.6.

Accordingly, the recommended Order denying petitioner's application for emergent relief is adopted for the reasons stated therein. This matter shall continue at the Office of Administrative Law with such proceedings as the parties and the ALJ deem necessary to bring it to closure.

IT IS SO ORDERED.

Angelica Allen-McMillan, Ed.D.
ACTING COMMISSIONER OF EDUCATION

Date of Decision: June 20, 2023
Date of Mailing: June 20, 2023

State of New Jersey
OFFICE OF ADMINISTRATIVE LAW

ORDER
ON EMERGENT RELIEF
OAL DKT. NO. EDU 05047-23
AGENCY DKT.NO. 156-6/23

H.G. ON BEHALF OF E.G.,
Petitioner,
v.
BOROUGH OF TENAFLY BOARD OF EDUCATION,
Respondent.

H.G., petitioner appearing pro se

Stephen Fogerty, Esq. for respondent (Fogarty and Hara, attorneys)

BEFORE **KIMBERLY A. MOSS**, ALJ:

Petitioner, H.G. on behalf of minor child E.G., brings this action seeking E.G., be allowed to walk at the graduation ceremony although she does not have enough credits to receive a diploma.

On June 6, 2023, the Office of Special Education Programs transmitted the matter to the Office of Administrative Law (OAL) for emergent relief. A telephone conference was held on June 14, 2023. Oral arguments were held on June 19, 2023.

FACTUAL DISCUSSION

After carefully considering the documentary evidence presented, and having had the opportunity to hear oral arguments, I **FIND** the following **FACTS**:

E.G. and her family moved to Tenafly in mid-February 2020 from Israel. E.G. has a twin brother. When E.G. entered the district twenty-nine of her school credits from Israel were transferred. E.G. began having mental health difficulties. In May 2020 it was determined that E.G was eligible for special education services. From March 2020 through June 2020 the District provided remote learning. E.G. had difficulty with remote learning. E.G. did not receive any credits toward graduation from the District from March 2020 to June 2020. E.G. did not receive any credits toward graduation for the 2020-2021 school year. Petitioner decided to home school E.G, who was disenrolled during the 2021-2022 school year. Petitioner in homeschooling E.G. concentrated on her mental health difficulties more than academics. E.G. received no credits toward graduation for the 2021-2022 school year. E.G. returned to the District in January 2022. From January 2022 to the present E.G. has audited classes rather than taking classes for credit. E.G. has received no credits toward graduation from January 2022 to the present.

E.G. would be scheduled to graduate in June 2023 if she had the requisite credits. As of now, E.G. still only has twenty-nine credits. One hundred and twenty credits are required for a student to graduate from high school. She is classified by the District as a sophomore. The District allowed E.G. to attend the prom and other senior activities.

Petitioners want E.G. to take part in the graduation ceremony. The District allows students to take part in the graduation ceremony when the student has no more than two classes to complete and will have the required amount of credits by completing summer school the summer of the graduation. E.R. is not going to summer school. In July 2023 she is returning to Israel for a gap year after which she will continue her

education in Israel. E.G. had forty unexcused absences while she was auditing classes in the 2022-2023 school year.

LEGAL ANALYSIS AND CONCLUSION

The standards for the granting of emergent relief are set forth in N.J.A.C. 6A:3-1.6(b). Emergent relief may be granted if the judge determines from the proofs that:

1. The petitioner will suffer irreparable harm if the requested relief is not granted;
2. The legal right underlying the petitioner's claim is settled;
3. The petitioner has a likelihood of prevailing on the merits of the underlying claim; and
4. When the equities and interests of the parties are balanced, the petitioner will suffer greater harm than the respondent will suffer if the requested relief is not granted.

In this matter, the petitioner has not shown that E.G. will suffer irreparable harm if she is not allowed to participate in the graduation ceremony. Petitioner has provided no documentation of E.R.'s medical condition.

Petitioners have not shown that they have a likelihood of prevailing on the merits or that the petitioners' underlying claim is settled. N.J.S.A. provides:

> The board of education of a school district and the board of trustees of a charter school shall permit a student who has been classified as eligible for special education programs and services pursuant to chapter 46 of Title 18A of the New Jersey Statutes and whose individualized education program prescribes continued special education programs beyond the fourth year of high school to participate in commencement ceremonies with his graduating class and to receive a certificate of attendance, provided that the student has attended four years of high school.

E.G did not attend four years of high school. She was home schooled for one year and audited classes without credit from January 2022 through June 2023. E.G does not intend to come back to the District. E.G. will leave for Israel in July 2023, have a gap year, and then complete her high school education in Israel.

After hearing the arguments of petitioner and respondent and considering the documentation submitted, I **CONCLUDE** that petitioner has not met the requirements of N.J.A.C. 6A:3-1.5(b).

ORDER

Accordingly, it is **ORDERED** that the petition for emergent relief is hereby **DENIED**.

This order on application for emergency relief may be adopted, modified or rejected by the **COMMISSIONER OF THE DEPARTMENT OF EDUCATION**, who/which by law is authorized to make a final decision in this matter. The final decision shall be issued without undue delay, but no later than forty-five days following the entry of this order. If (title of agency head) does not adopt, modify or reject this order within forty-five days, this recommended order shall become a final decision on the issue of emergent relief in accordance with N.J.S.A. 52:14B-10.

June 20, 2023

DATE

KIMBERLY A. MOSS, ALJ

186-23E
OAL Dkt. No. EDU 05399-23
Agency Dkt. No. 165-6/23

New Jersey Commissioner of Education

Order on Emergent Relief

E.C.-G., on behalf of A.J.G.,

Petitioner,

v.

Board of Education of the City of Jersey City, Hudson County,

Respondent.

The record of this emergent matter and the recommended Order of the Administrative Law Judge (ALJ) have been reviewed. Upon such review, the Commissioner concurs with the ALJ that petitioner has failed to demonstrate entitlement to emergent relief pursuant to the standards enunciated in *Crowe v. DeGioia,* 90 *N.J.* 126 (1982), and codified at *N.J.A.C.* 6A:3-1.6.

Accordingly, the recommended Order of the OAL denying petitioner's application for emergent relief is adopted for the reasons stated therein. This matter shall continue at the OAL with such proceedings as the parties and the ALJ deem necessary to bring it to closure.

IT IS SO ORDERED.

Angelica Allen-McMillan, Ed.D.
ACTING COMMISSIONER OF EDUCATION

Date of Decision: June 23, 2023
Date of Mailing: June 23, 2023

State of New Jersey
OFFICE OF ADMINISTRATIVE LAW

ORDER ON EMERGENT RELIEF

OAL DKT. NO. EDU 05399-23

AGENCY DKT. NO. 165-6/23

E.C.-G. ON BEHALF OF A.J.G.,

Petitioner,

v.

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

Respondent.

E.C.-G., petitioner pro se

Cherie L. Adams, Esq., for respondent Board of Education of the City of Jersey City (Adams, Gutierrez & Lattiboudere, attorneys)

BEFORE **GAIL M. COOKSON**, ALJ:

Petitioner E.C.-G. filed a Petition of Appeal electronically with the Department of Education on Sunday, June 18, 2023, and perfected it on June 20, 2023, seeking emergent relief against the Board of Education of the City of Jersey City (Jersey City or District) in the form of an Order requiring the District to allow her son A.J.G. to graduate with a diploma and at the commencement ceremony scheduled for tomorrow, Friday, June 23, 2023.

The Department of Education, Office of Controversies and Disputes (DOE), transmitted the Application for Emergent Relief to the Office of Administrative Law (OAL) on June 20, 2023. The matter was assigned to the undersigned for oral argument and was scheduled for June 22, 2023. On that date, I entered an oral decision on the record in order to facilitate expedited review by the Commissioner. This decision now memorializes that ruling.

UNDISPUTED FACTS ON EMERGENT PETITION

1. Petitioner has a son, A.J.G., who is now eighteen and was a senior at Henry Snyder High School. The 2022-2023 school year has now been concluded and graduation for eligible seniors in scheduled for tomorrow, Friday, June 23, 2023.

2. During his senior year, A.J.G. took a full-year, five-credit class in Sculpture. That class was the first period of the day. Eligibility for graduation requires completion of 120 credits. A.J.G. needed these five credits to fulfill that requirement.

3. The District has a Student Code of Conduct that contains its attendance policies. It states that a student cannot miss more than 10% of the school days on unexcused absences, or 18 days out of the school calendar. The policies also define that lateness to class counts as a "tardy" unless the student arrives after the half-way point of the class, in which case it counts as an "unexcused absence." Teachers mark it accordingly on a daily, real-time, basis. [See Certification of Acting Principal Iguana Leftwich.]

4. Over the course of the year, A.J.G. was marked tardy a total of twenty-four times to Sculpture class, and marked absent as a very late tardy approximately thirty-one times. In April 2023, he was given the opportunity to remove up to ten of those days by participating in what the District refers to as "seat time recovery." A.J.G. availed himself of most of that opportunity, earning back eight of the days. Yet, his tardiness continued unabated into June. He ended the school year with twenty-three unexcused absences, twelve excused absences, and twenty-four tardies in Sculpture.

5. Petitioner and her husband had been advised about their son's poor attendance and tardiness on numerous occasions during the school year, including in November, January, March, April, May and June. In fact, by June 2, 2023, both the student and his parents were advised that he had missed his chance to make himself eligible for graduation. They were advised that he would be required to make-up the missing five credits during the summer and that he would not be allowed to walk at the commencement ceremony.

6. On oral argument, petitioner reiterated her complaints about a lack of proper notice and/or warnings concerning A.J.G.'s poor attendance record, the consequences of same, and the lack of any plan to help him complete his graduation requirements.

7. A.J.G. apparently constructed enough pottery in the time he was in the Sculpture classroom to have a passing grade, but for the number of unexcused absences.

8. This emergent relief petition was not filed until two weeks after the student and the parents were advised that he would be ineligible for graduation or commencement, thus exacerbating the time crunch of hearing this case before tomorrow's ceremony.

LEGAL DISCUSSION AND CONCLUSIONS OF LAW

For the reasons set forth below after due consideration of the written submissions and oral argument received, I **CONCLUDE** that petitioner's request for emergent relief must be **DENIED**.

Petitioner's petition for emergent relief may only be granted if she satisfies the well-known factors set for in Crowe v. DeGoia, 90 N.J. 126 (1986), and I determine that the balance of equities favors granting said relief, to wit:

> 1. The petitioner will suffer irreparable harm if the requested relief is not granted;

2. The legal right underlying the petitioner's claim is settled;

3. The petitioner has a likelihood of prevailing on the merits of the underlying claim; and

4. When the equities and interests of the parties are balanced, the petitioner will suffer greater harm than the respondent will suffer if the requested relief is not granted.

The touchstone of emergent relief is whether irreparable harm will befall the petitioning party prior to the ability of a forum or agency to hear the underlying merits. In the within matter, I **CONCLUDE** that A.J.G. will not be irreparably harmed by the denial of a diploma and participation in tomorrow's graduation ceremony. The District has the rare practice of scheduling a full cap-and-gown graduation ceremony with speakers, the principal, parents, guests, and other students who also earn their diploma over the summer. Moreover, his acceptance to college is not in jeopardy although I recognize that the summer course might overlap with the start of college football practice. I address this potential concern below but I also note that the college he will be attending is in Reading, Pennsylvania, which is not an excessive distance from New Jersey.

There also does not seem to be any likelihood of success on the merits of petitioner's emergent request. The Student Code of Conduct is a clearly stated policy and is consistent with the District's obligations to have an attendance policy. Therein, it is set forth that a student cannot be so late to class that they miss more than half of the class period. Such tardiness counts as an absence and is marked contemporaneously as such by the teacher each day on the attendance sheet. As demonstrated by the undisputed facts, A.J.G. was tardy to his first period Sculpture class over fifty times, with over thirty of those being marked as unexcused absences, inclusive of the eight days he did makeup with "seat time recovery." Even if he had earned the maximum ten days back, he still would have exceeded the number of allowed absences. Accordingly, on this central concept, petitioner does not have a strong likelihood of success on the merits. He violated the attendance policy to an excessive degree; he and his parents

were warned several times[1]; and, I **CONCLUDE** that he must accept the consequences of that behavior.

The other Crowe factors require the balance of equities and the individual and public interests. Again, and as I stated on the record, to excuse A.J.G. from the attendance policy, notwithstanding all these days late to class, so he can graduate with his friends and attend football camp in August without having to make up the five credits over the summer is to allow him to skirt an important life lesson: showing up is part of his responsibility as a student, and it will be at college and at any future employment. It is of no moment to my consideration that he could complete some pottery in half the time.

For the same reason, excusing A.J.G. from the consequences of his tardiness will send the wrong message to other students and parents, and would be inherently unfair. Therefore, the public interest weighs against granting the relief sought as well.

Accordingly, I **CONCLUDE** that petitioner's application for emergent relief seeking an Order allowing A.J.G. to graduate with a diploma and attend the main commencement ceremony with his classmates must be denied.

I recommend that the District work with the parents and the student to schedule a summer course during which he can make up the five credits for graduation that will also not interfere, to the greatest extent possible, with college football practices.

ORDER

ACCORDINGLY, it is **ORDERED** that petitioner's application for emergent relief is and the same is hereby **DENIED**.

[1]There is no obligation that the District must contact the parents each time a high school student shows up late to class but attends the remainder of the class and school day.

This order on application for emergency relief may be adopted, modified or rejected by the **COMMISSIONER OF THE DEPARTMENT OF EDUCATION**, who/which by law is authorized to make a final decision in this matter. The final decision shall be issued without undue delay, but no later than forty-five days following the entry of this order. If the **COMMISSIONER OF THE DEPARTMENT OF EDUCATION** does not adopt, modify or reject this order within forty-five days, this recommended order shall become a final decision on the issue of emergent relief in accordance with N.J.S.A. 52:14B-10.

Gail M. Cookson

June 22, 2023
DATE

GAIL M. COOKSON, ALJ

id

187-23
OAL Dkt. No. EDU 16977-15
Agency Dkt. No. 192-7/15

New Jersey Commissioner of Education

Final Decision

Ramadan Bayyan,

Petitioner,

v.

State-Operated School District of the City of Camden, Camden County,

Respondent.

The record of this matter, the proposed Settlement Agreement and General Release (Agreement) and the Initial Decision issued by the Office of Administrative Law have been reviewed pursuant to *N.J.A.C.* 1:1-19.1. Upon review, the Commissioner approves the terms of the Agreement and adopts the Initial Decision as the final decision in this matter. The case is hereby dismissed, subject to compliance with the terms of the Agreement.

IT IS SO ORDERED.

Angelica Allen-McMillan, Ed.D.
ACTING COMMISSIONER OF EDUCATION

Date of Decision: June 27, 2023
Date of Mailing: June 28, 2023

State of New Jersey
OFFICE OF ADMINISTRATIVE LAW

INITIAL DECISION

SETTLEMENT

OAL DKT. NO. EDU 16977-15

AGENCY DKT. NO. 192-7/15

RAMADAN BAYYAN,

Petitioner,

v.

CITY OF CAMDEN STATE-OPERATED SCHOOL DISTRICT, CAMDEN COUNTY,

Respondent.

Hop T. Wechsler, Esq. for petitioner (Selikoff & Cohen, P.A., attorneys)

Louis R. Lessig, Esq., for respondent (Brown & Connery, LLP, attorneys)

Record Closed: May 23, 2023 Decided: May 23, 2023

BEFORE **JUDITH LIEBERMAN**, ALJ:

This matter was transmitted to the Office of Administrative Law on October 23, 2015, for determination as a contested case, pursuant to N.J.S.A. 52:14B-1 to N.J.S.A. 52:14B-15 and N.J.S.A. 52:14F-1 to N.J.S.A. 52:14F-13.

The parties have agreed to a settlement and have prepared a Joint Motion and Stipulation for Approval of Settlement Agreement, Settlement Agreement and General Release indicating the terms thereof and Board resolution adopting the Settlement

Agreement and General Release. A copy of the Settlement Agreement and General Release and Board resolution are attached and fully incorporated herein.

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

1. The parties have voluntarily agreed to the settlement as evidenced by their signatures or their representatives' signatures on the attached settlement agreement and the attached Board resolution.

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

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

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

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

May 23, 2023 — Judith Lieberman
DATE — **JUDITH LIEBERMAN**, ALJ

Date Received at Agency: 5-25-23

Mailed to Parties: 5-25-23

JL/jm

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RAMADAN BAYYAN,

Petitioner,

v.

CITY OF CAMDEN STATE-OPERATED SCHOOL DISTRICT, CAMDEN COUNTY,

Respondent.

STATE OF NEW JERSEY
OFFICE OF ADMINISTRATIVE LAW

OAL Dkt. No. EDU 16977-15
Agency Dkt. No. 192-7/15

JOINT MOTION AND STIPULATION FOR APPROVAL OF SETTLEMENT AGREEMENT PURSUANT TO N.J.A.C. 1:1-19.1

PLEASE TAKE NOTICE that Petitioner Ramadan Bayyan, by and through his attorneys, Keith Waldman, Esq. and Hop T. Wechsler, Esq. of Selikoff & Cohen, P.A., and Respondent State-Operated School District of the City of Camden, Camden County, by and through its attorney, Louis R. Lessig, Esq. of Brown & Connery, LLP, jointly hereby move for an Initial Decision and Order approving settlement of the above-captioned matter pursuant to N.J.A.C. 1:1-19.1.

The basis for this Joint Motion and Stipulation is that the parties have reached and fully executed a Settlement Agreement to fully and finally resolve Petitioner's Petition of Appeal (OAL Docket No. EDU 16977-15, Agency Docket No. 192-7/15), which has been pending before the Office of Administrative Law (OAL) since October 2015. A true and correct copy of the fully-executed Settlement Agreement is attached hereto.

The parties respectfully request that the Office of Administrative Law approve the attached Settlement Agreement because it fully and finally resolves Petitioner's Petition of Appeal to the mutual benefit of the parties and promotes the public interest by avoiding the cost of protracted litigation. In order to expedite approval of the settlement, the parties further agree to waive all exceptions pursuant to N.J.A.C. 1:1-18.4(e).

By and through their respective counsel, the parties stipulate that they have knowingly, freely, and voluntarily consented to the attached Settlement Agreement; that the Settlement Agreement fully disposes of all issues in controversy and is consistent with the law; and that the Settlement Agreement fulfills all of the requirements of N.J.A.C. 1:1-19.1 accordingly.

WHEREFORE, the parties request that the Office of Administrative Law issue an Initial Decision and Order (Settlement):

(a) Finding that the parties have voluntarily agreed to the settlement, as evidenced by the attached Settlement Agreement, and that the parties' settlement fully disposes of all issues in controversy and is consistent with the law;

(b) Approving the settlement pursuant to N.J.A.C. 1:1-19.1; and

(c) Ordering that the parties comply with the settlement terms and that these proceedings be concluded.

A proposed form of Order is attached.

SELIKOFF & COHEN, P.A.	BROWN & CONNERY, LLP
By: H Weiss	By:
Dated: 5/22/23	Dated: 5/22/23

SETTLEMENT AGREEMENT AND GENERAL RELEASE

This Settlement Agreement and General Release (hereinafter Agreement) is entered into between the State-Operated School District of the City of Camden (hereinafter the District), with an address of 1033 Cambridge Street, Camden, NJ 08105 and Ramadan M. Bayyan (Bayyan) with an address of P.O. Box 13095, Philadelphia, PA 19101 (the District and Bayyan are sometimes collectively referred to as the Parties or individually as a Party).

WHEREAS Bayyan was employed as a tenured Industrial Arts teacher by the District;

WHEREAS the District terminated Bayyan's employment as the result of a reduction in force (RIF);

WHEREAS Bayyan filed a Petition of Appeal (Petition) with the New Jersey Commissioner of Education (Commissioner) challenging the termination of his tenured employment;

WHEREAS the Petition is pending before the New Jersey Office of Administrative Law (OAL) under the caption *Ramadan Bayyan v. State-Operated School District of the City of Camden, Camden County*, Agency Docket No. 192-7/15, OAL Docket No. EDU 16977-15;

WHEREAS the Parties mutually desire to consensually resolve the matter;

NOW, THEREFORE, in consideration of the mutual covenants and promises contained herein, the legal sufficiency of which is hereby acknowledged by the Parties, the District and Bayyan hereby agree as follows:

1. Effective Date. This Agreement shall be deemed ratified by the State District Superintendent as authorized representative of the District in accordance with N.J.S.A. 18A:7A-35. The District agrees to fully execute this Agreement within seven (7) to ten (10) days from the date of Bayyan's partial execution thereof. The Agreement will then be submitted to the New Jersey Division of Pensions and Benefits (Division of Pensions) and/or the Teachers' Pension and Annuity Fund Board of Trustees (TPAF Board) for approval. Following approval by the Division of Pensions and/or TPAF Board, this Agreement shall take effect on the date it is approved by the Commissioner.

2. Payment by the District. In full and final settlement of this matter, the District will pay a total of $392,086.93 to Bayyan, representing full back pay for the period from July 1, 2015 through and including February 29, 2020, less $12,286.79 earnings in mitigation. Payment will be subject to the standard payroll deductions, including but not limited to any employee pension contributions. Payment will be due within thirty (30) days following approval of this Agreement by the Commissioner. The District will issue an IRS form W-2 to Bayyan. The Parties mutually understand that the State will pay the pension amount required by the Division of Pensions and/or TPAF for the employer. Should the Parties' mutual understanding be incorrect and the employer contribution must be made by the District, the Parties agree in advance to adjust any pension calculations to reflect the required employer pension contribution. Following payment of all required contributions, Bayyan will then have the opportunity to apply to the Division of

RMB 2/27/23

Pensions for pension credit and/or the reopening of his pension account and/or modification of his pension amount. In the event that the Division of Pensions and/or TPAF determines that the District is responsible for paying the employer pension contribution, the Parties mutually agree to make any modifications necessary to this Agreement; however, the Parties understand that the total amount paid by the District to Bayyan (or, if necessary, to the Division of Pensions on Bayyan's behalf) is fixed at $392,086.93.

3. Agency Approval. This Agreement is subject to review and approval by the Commissioner and the Division of Pensions and/or the TPAF Board. Should the Commissioner and/or the Division of Pensions and/or the TPAF Board fail to approve the Agreement for any reason, the Parties agree in advance to reform the Agreement to the extent necessary to meet any objections and secure approval. Neither the District, legal counsel for either Party, nor anyone else has made any representation or guarantee that the Division of Pensions will approve Bayyan's application for pension credit and/or the reopening of his pension account and/or modification of his pension amount. The Parties understand and acknowledge that only the Division of Pensions can approve such credit, reopening, or modification. In the event that any application is not successful and the Division of Pensions returns the employee pension contribution for Bayyan to the District, the District will promptly return the contribution to Bayyan.

4. General Release. The Parties agree that this Agreement shall act as a release of any and all claims that each may have against each other, their respective dependents, heirs, shareholders, directors, officers, members, employees, agents, attorneys, affiliates, parents, subsidiaries, predecessors, successors, assigns, and all persons acting by, through, under, or in concert with any of them, from the beginning of time up to and including the effective date of this Agreement, such claims including but not limited to all known and unknown charges, complaints, claims, grievances, liabilities, obligations, promises, agreements, controversies, damages, actions, causes of action, suits, rights, demands, costs, losses, debts, penalties, fees, and expenses (including attorneys' fees and costs actually incurred) of any nature whatsoever that Bayyan has, ever had, or may have had, against the District, whether or not apparent, yet to be discovered, or which may hereafter develop, for any acts or omissions relating to or arising from anything that has happened up to the effective date of this Agreement. This release specifically includes, but is not limited to, any claims that Bayyan asserted, or may have asserted, under the National Labor Relations Act; the Civil Rights Act of 1964; Sections 1981 through 1988 of Title 42 of the United States Code; the Employment Retirement Income Security Act; the Immigration Reform Control Act; the Americans with Disabilities Act; the Age Discrimination & Employment Act; the Fair Labor Standards Act; the Occupational Safety & Health Act; the Family & Medical Leave Act; the Equal Pay Act; the New Jersey Law Against Discrimination; the New Jersey Wage Payment Law; the New Jersey Minimum Wage Act; the New Jersey Family Leave Act; the New Jersey Conscientious Employee Protection Act; the Education Laws (Title 18A); and the Education Regulations (Title 6A), with the exception of the claims mentioned in Paragraph 6 below; any present and/or future constitution, statute, regulation, ordinance, executive order, public policy, or common law; any written, verbal or implied contract, policy, plan, and/or procedure; and any other authority or basis for seeking damages or relief of any kind. Bayyan acknowledges that this is a full, complete and general release of any and all claims against the District, and that this release applies to the District, all departments and subdivisions of the District, and all of the District's

RMB 2/27/23

officers, agents, and employees. This release is intended to be broadly construed and applies to any and all claims and potential claims whatsoever, including those of which either or both Parties are not aware, resulting from anything that has happened up to the effective date of this Agreement.

5. Covenant Not to Sue. Other than the Petition, Bayyan warrants that he has not commenced any legal proceedings of any type (including but not limited to charges filed with any governmental agency) against the District. Bayyan further agrees that he will not commence any legal proceedings against the District arising from or relating to anything that has happened up to the effective date of this Agreement. Should any such legal proceedings be commenced on Bayyan's behalf, Bayyan agrees that he will not seek or accept any relief or recovery therefrom. In the event of a violation of this paragraph, Bayyan agrees that the District shall be entitled to immediate dismissal of the legal proceedings. Should any entity, agency, commission, or person file a charge, action, complaint, or lawsuit against the District based on any of claims released under Paragraph 3 above, Bayyan agrees not to seek or accept any resulting relief whatsoever in accordance with this paragraph.

6. Claims Not Released. Notwithstanding Paragraphs 3 and 4 of this Agreement, Bayyan does not waive or release claims that were filed or could be filed under the Workers' Compensation Law, N.J.S.A. 34:15-1 *et seq.*; the Teachers' Pension and Annuity Fund Act, N.J.S.A. 18A:66-1 *et seq.*; the indemnity provisions of NJ.S.A. 18A:16-6 and 6.1 with regard to civil and criminal actions; claims by third parties, claims arising from any breach of this Agreement; claims that arise after the date of this Agreement; challenges to the validity of this Agreement under the Older Workers Benefits Protection Act; and any claims that may not lawfully be released, discharged, or waived. The District reserves its right to assert any and all defenses to the claims listed in this paragraph. Bayyan is not aware, as of the date of the execution of this Agreement, of any bases for any of the above claims not released.

7. Older Workers Benefit Protection Act. The general releases in Paragraph 4 above include a waiver and release of all claims under the Age Discrimination in Employment Act (ADEA) and Older Workers Benefit Protection Act (OWBPA). Under the requirements of the ADEA and OWBPA, Bayyan specifically acknowledges that:

(a) He has been advised to consult with an attorney of his choosing concerning the legal significance of the Agreement and has done so;

(b) The Agreement is written in a manner that he understands;

(c) The consideration set forth in the Agreement consists of benefits to which he is not otherwise entitled and is adequate and sufficient to support his promises, covenants, and releases as set forth herein;

(d) He has been afforded twenty-one (21) days to consider the Agreement before executing it and advised that any changes thereto subsequently agreed upon by the parties, whether material or immaterial, do not restart this consideration period, and that by signing and returning the Agreement before the end of the 21-day period, he

AMB 2/27/23

will have knowingly and voluntarily waived the right to consider the Agreement for the full consideration period; and

(c) He has been advised that during the seven (7) day period following his execution of the Agreement, he may revoke his acceptance of the Agreement by delivering written notice to the District c/o its counsel:

Louis R. Lessig, Esq.
Brown & Connery, LLP
360 Haddon Avenue
Westmont, NJ 08108
llessig@brownconnery.com

with a copy provided to Bayyan's counsel:

Keith Waldman, Esq.
Selikoff & Cohen, P.A.
700 East Gate Drive, Suite 502
Mt. Laurel, NJ 08054
kwaldman@selikoffcohen.com

and that the Agreement shall not become effective or enforceable until after the revocation period has expired.

8. No Rehire. Bayyan acknowledges and agrees that his employment with the District will be irrevocably severed under this Agreement and that he will be ineligible for rehire as an employee of the District. Bayyan agrees not to apply for reemployment with the District. If for some reason the District receives an application for employment from Bayyan, the District shall have no obligation to consider or review the application.

9. No Admission. This Agreement is not, and may not be construed as, an admission of liability by either Party.

10. Entire Agreement. This Agreement constitutes and contains the entire agreement and understanding between the District and Bayyan concerning the subject matters addressed herein and supersedes and replaces all prior negotiations and all agreements, proposed or otherwise, whether written or oral, concerning the subject matter hereof. No other promises or agreements shall be binding unless in writing, signed by the Parties, and expressly stated to represent an amendment or supersession to this Agreement.

11. Severability and Construction. Should any provision of this Agreement be declared or determined by any court or agency of competent jurisdiction to be illegal, invalid, or unenforceable, the Parties will make reasonable efforts to reform that provision. Should the provision remain illegal, invalid, or unenforceable, the remainder of the Agreement will be fully enforceable. This Agreement was negotiated at arms-length and shall not be construed against its drafter as each party participated equally in its drafting.

RMB 2/27/23

12. Governing Law and Forum Selection. This Agreement, and all matters arising out of or relating to it, shall be governed by and construed under the laws of the State of New Jersey, without regard to conflict of law principles. Any disputes relating to this Agreement shall be resolved exclusively in the Superior Court of New Jersey, Camden County. The Parties hereby irrevocably submit to the exclusive jurisdiction of such court and waive the defense of inconvenient forum to the maintenance of any action or proceeding in such venue.

13. Warranty of Capacity to Execute Agreement. By signing this Agreement, each signatory represents that they are a Party or have been duly authorized by a Party to sign on that Party's behalf and that this Agreement is duly authorized, approved, and consented to by that Party as to its terms.

14. Successors-in-Interest. This Agreement shall be binding upon and inure to the benefit of the executors, administrators, personal or legal representatives, heirs, successors, and assigns of each Party.

15. Notices. Any notice given or demand made pursuant to this Agreement shall be made by certified mail, return receipt requested, and addressed to the respective Party at the address stated herein or to such changed address as that Party may have provided by like notice.

16. Execution in Counterparts. This Agreement may be executed in counterparts, each of which, taken together, shall constitute one and the same agreement. An original signature transmitted by facsimile or digital scan shall be deemed to be an original for purposes of this Agreement.

THE PARTIES ACKNOWLEDGE THAT EACH HAS READ THIS AGREEMENT IN ITS ENTIRETY, HAD AN OPPORTUNITY TO CONSULT WITH THEIR OWN COUNSEL, UNDERSTAND ALL OF THE TERMS AND FREELY, VOLUNTARILY AND KNOWINGLY, WITHOUT DURESS OR COERCION, CONSENT TO ALL THE TERMS AND CONDITIONS CONTAINED THEREIN.

IN WITNESS WHEREOF, the Parties have executed this Agreement to be signed by their duly authorized representatives as of the effective date(s) below.

Ramadan M. Bayyan

Ramadan M. Bayyan

Date: 2/27/23

Katrina T. McCombs
State District Superintendent
Camden City School District

Date: 5-1-23

Authorization of the Policy Committee to recommend an update to the public comment policy to comply with current procedures. Specifically, the Committee is recommending a revision to Policy 1120 to include a 90-minute time frame for public comment, along with including a time limitation of three minutes per comment. The Committee is also recommending a repeal of Regulation 1120, and adoption of new policy 1121, Public Participation at Board of Education Meetings, to set forth the current procedures in place for public comment and the requirements for public comment during remote meetings.

File Attachments
1120 Board of Education Meetings.doc (77 KB)
1120 Board of Education Meetings Public Participation Regulation.doc (60 KB)
1121 Public Participation at Board of Education Meeting.doc (66 KB)

Subject **2nd Reading - Policy Adoption Policy 9112-Student Representative to the Board**

Meeting Apr 25, 2023 - Regular Monthly Board Meeting Report

Category Legal, Board & Governmental Relations

Type Action (Consent)

Authorization to accept the Policy Committee's recommendation of the adoptation of Policy 9112 regarding the appointment of a student representative to the board in compliance with a new law.

File Attachments
9112 Student Representative to the Board.docx (24 KB)

RESOLUTIONS

Subject **Settlement - Legal (R2223-41 - RMB v. CCSD**

Meeting Apr 25, 2023 - Regular Monthly Board Meeting Report

Category RESOLUTIONS

Type Action, Action (Consent)

RESOLUTION # R2223-41 SY 22-23

AUTHORIZATION OF THE CAMDEN CITY SCHOOL DISTRICT TO APPROVE THE SETTLEMENT AGREEMENT AND GENERAL RELEASE IN THE MATTER OF RAMADAN M. BAYYAN V. STATE OPERATED SCHOOL DISTRICT OF THE CITY OF CAMDEN.

WHEREAS, the parties settled all controversies between them, including Plaintiff's claims at the Office of Administrative Law (OAL), Agency Docket 192-7/15, OAL Docket No. EDU 16977-15, and any and all related claims which could have been asserted, whether they are presently known or unknown; and

WHEREAS, the Plaintiff and the Camden City School District have agreed to the terms of a Settlement Agreement and General Release; and

NOW, THEREFORE BE IT RESOLVED, by the Camden City School District, as follows:

1. The Camden City School District hereby accepts and ratifies the terms and conditions of the Settlement Agreement and General Release; and
2. The State District Superintendent authorizes the execution of the Settlement Agreement and General Release; and
3. This resolution shall take effect immediately.

Submitted by: Samantha Price, General Counsel

188-23
OAL Dkt. No. EDU 02651-22
Agency Dkt. No. 34-3/22

New Jersey Commissioner of Education

Final Decision

L.N., on behalf of minor child, J.M.,

Petitioner,

v.

Board of Education of the Township of Bedminster, Somerset County,

Respondent.

The record of this matter, the proposed Settlement Agreement and Release (Agreement), and the Initial Decision issued by the Office of Administrative Law pursuant to *N.J.A.C.* 1:1-19.1, have been reviewed. Upon such review, the Commissioner notes that paragraph 2 of the Agreement references actions that preceded the consideration of the settlement by the Commissioner of Education. The parties are reminded that a settlement of litigation before the Commissioner is not binding until the Commissioner approves the settlement.

In light of the foregoing, the Commissioner adopts the Initial Decision as the final decision in this matter, provided that the parties have already implemented the settlement terms or have agreed upon mutually satisfactory alternate dates for the effectuation of the terms of the Agreement. Assuming same, the matter is hereby dismissed.

IT IS SO ORDERED.

Angelica Allen-McMillan, Ed.D.
ACTING COMMISSIONER OF EDUCATION

Date of Decision: June 27, 2023
Date of Mailing: June 28, 2023

State of New Jersey
OFFICE OF ADMINISTRATIVE LAW

INITIAL DECISION
SETTLEMENT
OAL DKT. NO. EDU 02651-22
AGENCY DKT. NO. 34-3/22

L.N. ON BEHALF OF J.M.,
Petitioner,
v.
BOARD OF EDUCATION
TOWNSHIP BEDMINSTER,
SOMERSET COUNTY
Respondent.

Francis J, Masciocchi, Esq., for petitioner (attorney)

Rita F. Barone, Esq., for respondent (Flanagan Barone O'Brien, attorneys)

Record Closed: May 8, 2023 Decided: May 25, 2023

BEFORE **KIM C. BELIN**, ALJ:

This matter was transmitted to the Office of Administrative Law on April 6,2023 for determination as a contested case, pursuant to N.J.S.A. 52:14B-1 to -15 and N.J.S.A. 52:14F-1 to -13.

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

I have reviewed the record and the terms of the Settlement Agreement and I **FIND**:

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

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

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

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

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

Kim C. Belin

May 25, 2023
DATE

KIM C. BELIN, ALJ

Date Received at Agency: 5-30-23

Date Mailed to Parties: 5-30-23

KCB/am

Rita F. Barone, Esq.
Attorney ID No. 038211995
FLANAGAN, BARONE & O'BRIEN
4 Essex Avenue – Suite 200
P.O. Box 259
Bernardsville, New Jersey 07924
Attorneys for Respondents, Bedminster Township School District BOE
Our File: (304) 27892 -RFB

Lisa Nicolau, Parent, obo J.M. Petitioner(s),	BEFORE THE COMMISSIONER OF EDUCATION OF NEW JERSEY
v.	Agency # 34-3/22 EDU # 02651-2022S
Bedminster Township School District Board of Education Respondent(s).	

SETTLEMENT AGREEMENT AND RELEASE

This Settlement Agreement and General Release, ("Agreement"), is entered into this day of March 2023 by and between the Petitioner, Lisa Nicolau obo J.M. and Respondent, Bedminster Township Board of Education, et al. (hereinafter "Petitioner", "Respondent" and collectively "Parties"); and

WHEREAS, the Petitioner challenged a residency decision made by the Respondent; and

WHEREAS, the Parties have agreed to settle all of the claims in this matter in an amicable way, and therefore, after consultation between legal counsel and following negotiations, have agreed to enter into this Settlement Agreement and Release in order to formalize their compromise, which will fully and finally resolve this matter; and

WHEREAS, the Respondent does not admit liability or any wrongdoing of any kind, but is entering into this Settlement Agreement and Release solely as a matter of business judgment; and

WHEREAS, having negotiated in good faith, the Parties enter into this Settlement Agreement and Release in order to reach a compromise to fully and finally resolve their dispute in this matter, and hereby agree as follows;

1. Release from All Claims:

The execution of this Agreement will constitute the full release by Parties of all claims known and unknown that they ever had or may have against one another arising up to and including the date of the execution of this Agreement, including all claims that were alleged in the Petition of Appeal bearing Docket No. EDU 02651-2022S, any and all claims that could have been alleged in the Petition of Appeal concerning J.M.'s enrollment as a student within the Bedminster Township Board of Education School District as well as any and all claims for money damages in any form as well as any claim for attorneys' fees.

2. Consideration:

In consideration for this Settlement Agreement and Release, the Petitioner will pay the Respondent $11,033.50 representing tuition for J.M.'s attendance at the Bedminster Township Board of Education schools for the 2021-22 school year. This payment shall be made as follows: $2000.00 within thirty (30) days of Board Approval of this Agreement. $200.00 per month thereafter until such time as full payment of the total sum noted herein has been paid to the Respondent. Payment shall be made to the Bedminster Township Board of Education's business office by the 5th day of each month after the initial $2000.00 payment is made within thirty (30)

days of Board Approval of this Agreement. In the event that any payment is late, the Respondent's business office will send a letter within 20 days to Petitioner Lisa Nicolau via regular and certified mail to cure the default. If the default is not cured within 10 days thereafter, the Respondent shall immediately move to enforce the Settlement Agreement and seek Judgement as set forth in paragraph 14 below.

3. Full and Final Settlement:

This Settlement Agreement and Release represents a full and final settlement of the dispute between the Parties. The Parties expressly acknowledge and agree that the settlement payment is for all of the claimed damages, including, but not limited to, compensatory damages, attorneys' fees, litigation costs and/or expenses incurred by and/or on behalf of Respondent with respect to J.M.'s attendance at the Bedminster Township Board of Education School District, this litigation, and any and all other claims, cross-claims and/or counterclaims which Petitioner or Respondent, asserted and/or could have asserted including those which are not specifically mentioned in this Settlement Agreement and Release, except for any such claims as may be necessary to seek enforcement of the terms of this Settlement Agreement and Release. This means that Petitioner and Respondent release any and all claims they asserted and/or could have asserted against each other in this or any other forum arising out of the facts and circumstances set forth in the Petition of Appeal by executing this Settlement Agreement and Release.

4. General Release:

(a) Release of Claims by Petitioner Against Respondent:

In consideration for the making of this Agreement and for J.M.'s enrollment and attendance at the Bedminster Township Board of Education Schools, and for other benefits

realized by the Parties under this Agreement, Petitioner Lisa Nicolau, for herself, and on behalf of J.M., their heirs, administrators, beneficiaries, assigns, executors, and attorneys, knowingly, voluntarily and unconditionally releases and forever discharges the Respondent, its agents, officers, directors, board members, employees, representatives, parents, subsidiaries, subcontractors and contractors and assigns, both jointly and individually, in both their personal and official capacities of and from all manner of action(s), cause(s) of action, and suit(s), including but not limited to, any claims, debts, sums of money, accounts, reckonings, bonds, bills, claims for counsel fees, interest, expenses and costs, specialties, covenants, contracts, controversies, agreements, benefits, promises, variances, trespasses, damages, judgments, executions, claims and demands of any nature whatsoever, in law or in equity, civil or criminal, vested or contingent, which she has ever had, now has or assert, or which she or her relatives, heirs, executors, representatives, assigns or administrators hereafter can, shall or may have or may assert, for, upon or by reason of any matter, cause or thing whatsoever to the date hereof, it being the intention herein of Petitioner to release Respondent from any and all claims of any and every nature, including attorneys' fees, up to the date of the Agreement, unrestricted in any way by the nature of the claim, including, though not by way of limitation, all matters which were asserted or could have been asserted in all actions or claims identified above or any matter arising out of J.M.'s enrollment in the Bedminster Township Board of Education Schools, and any other state or federal statutory, constitutional, or common law claims. This release includes, but is not limited to, any and all rights, causes of actions, claims or demands of any kind through the date of this release and further includes any alleged injuries or damages suffered at any time

after the date of this release by reason of the continued effects of any such acts which occurred on or before the date of this release including any claims to attorneys' fees.

(b) Release of Claims by the Respondent Against Petitioner

It is hereby understood and agreed that the Respondent, for and in consideration of the payment of tuition by Petitioner, and the release of all claims, and/or other consideration set forth herein, do hereby irrevocably and unconditionally release Petitioner of and from all manner of action(s), cause(s) of action, and suit(s) which were or could have been brought in the present litigation or as a result of this litigation.

5. Voluntary Withdrawal of Petition of Appeal:

The Parties shall execute and file the Voluntary Dismissal with Prejudice annexed to the Settlement Agreement and Release as Exhibit A after full execution of this Settlement Agreement and Release by all parties.

6. Non-Assignment:

By executing this Settlement Agreement and Release, the Parties expressly certify, acknowledge, and represent that they have not assigned to any third party any right or claim that any party has, may have or believes that the party has or may have against each other. The Parties further certify that they have no other charges, claims and/or complaints of any kind pending against each other, and further covenant and certify that they will not file or cause to be filed any charge, claim or complaint of any kind against each other seeking civil and/or criminal sanctions, personal recovery and/or injunctive relief based upon any facts leading up to the date of the signing of this Settlement Agreement and Release. The Parties certify that they have not assigned any claims and will not file any claims based upon any facts leading up to the date of

the signing of this Settlement Agreement and Release.

7. No Admission of Liability:

(a) Respondent expressly denies liability for any and all of the Petitioners' claims, whether known or unknown, alleged in the Petition of Appeal. It is understood and agreed between the Petitioners and Respondent that this Agreement will not be construed at any time or for any purpose as an admission by the Respondent of any act or omission alleged by Petitioners, or any acts or omissions that could have been alleged by Petitioners, or any liability or responsibility for any wrongdoing of any kind;

(b) The Parties expressly agree that neither of them shall be considered to be a "prevailing party" as a result of this Agreement; and

(c) The Parties further agree that this Agreement shall not be offered, used or considered as evidence in any proceeding of any type, except to the extent necessary to enforce the terms of this Agreement. The Parties further agree and understand that they shall not provide a copy of this Agreement to any person, other than their attorneys, except if compelled to do so by legal process.

8. Attorneys' Fees:

The Parties, and their counsel, expressly waive and release each other from any and all claims for attorneys' fees and costs, including, but not limited to, claims for attorneys' fees and costs allowed under any Federal, State and/or local law, statute, regulation and/or ordinance.

9. Binding Agreement:

This Settlement Agreement and Release shall be binding on the Petitioners and any and all of her respective heirs, representatives, successors and assigns, and to Respondent, their

present or former departments, elected and appointed officials, officers, directors, agents, administrators, board members, attorneys, representatives, past and present employees, and any and all of its respective heirs, representatives, successors and assigns.

10. Covenant Not to Sue:

The Parties covenant that no other claim shall at any time hereinafter be filed against any party relating to any event or matter that was or could have been raised in the Petition of Appeal or a related lawsuit.

11. Confidentiality of Agreement:

The Parties agrees that, going forward, the amounts and fact of the payments described herein, any and all consideration provided herein, any and all discussions, communications and correspondence leading to this Agreement, which could give rise to an inference as to the Parties involved shall be kept confidential, to the extent permitted by law. It is the Parties' understanding, agreement and expectation that this confidentiality provision shall apply to the fullest extent permissible by law, and shall preclude the Petitioner, their agents or representatives, from voluntarily or otherwise testifying at or participating in any proceeding, hearing, trial or preparation for hearing or trial, concerning the matters covered by this confidentiality provision, unless compelled to do so by law or by court order. The sole consideration for this confidentiality provision is the mutuality of the obligations of the Parties with respect thereto.

The Petitioner also acknowledges that this settlement is being made with a public entity and is subject to disclosure, notwithstanding this confidentiality clause, in accordance with the Open Public Meetings Act, N.J.S.A. 10:4-6, et. seq.; Open Public Records Act, N.J.S.A. 47:1A-1, et. seq.; any and all Federal or New Jersey statutes or regulations governing public entity meetings and disclosures including all case law interpreting same.

12. Language:

The language of this Settlement Agreement and Release has been negotiated and is a product of the draftsmanship of all of the Parties, and shall, in all cases, be construed as a whole according to its objective and fair meaning and shall not be interpreted in favor of or against any party. Not by way of limiting the foregoing, the interpretation of any provision (in part or in

whole) of this Settlement Agreement and Release shall not, in any manner, be interpreted against the drafter.

13. Entire Agreement:

This Agreement constitutes the entire agreement between the Petitioner and the Respondent with respect to the Petition of Appeal and supersedes all prior written or oral agreements, statements, offers or understandings between the Parties. The Parties acknowledge that they are not relying on any other representations, warranties, agreements or undertakings other than those expressly contained herein. This Agreement shall not be amended, modified or revised except by a written instrument duly signed by all of the Parties hereto, or their respective successors or assigns. No oral statement of any person shall in any manner or degree, modify the terms and provisions of this Agreement.

14. Controlling Law and Venue and In the Event of Default of Payment:

This Agreement shall be construed in accordance with and governed by the laws of the State of New Jersey. To the extent that Petitioner defaults on any payment required by this Agreement to be made by Respondent, the Parties agree that the remaining moneys owed shall be converted to a Consent Judgement and that Respondent may seek to enforce the provisions of this Agreement, and/or seek Collection of the Consent Judgement amount within the Superior Court of New Jersey, Somerset County Vicinage, which Court shall retain jurisdiction to enforce the terms of this Agreement and/or over any proceedings pertaining to collection of Consent Judgement amount by Respondent from Petitioners.

15. Severability:

If any provision of this Agreement is declared invalid or unenforceable by any court of competent jurisdiction, and if such provision cannot be modified to be enforceable to any extent

or in any application, the remaining provisions of this Agreement shall nevertheless survive and continue in full force and effect.

16. Counterparts:

This Agreement may be executed in several counterparts, each of which will be deemed an original, but all of which will constitute one and the same.

17. Authority to Sign:

Respondent hereby represents and warrants that the individual signing this Agreement on its behalf has the full power and authority to enter into this Agreement on the respective Respondent' behalf. Respondent further warrant that they approved this Agreement in a manner permitted by law for approval of such documents.

BY SIGNING THIS SETTLEMENT AGREEMENT AND RELEASE THE PARTIES SPECIFICALLY ACKNOWLEDGE THAT:

A. THEY HAVE READ IT;

B. THEY UNDERSTAND IT AND KNOW THAT THEY ARE GIVING UP IMPORTANT LEGAL RIGHTS;

C. THEY AGREE WITH EVERYTHING IN IT AND TO ABIDE BY THE TERMS OF THIS AGREEMENT;

D. THEIR ATTORNEYS NEGOTIATED THIS AGREEMENT WITH THEIR ASSISTANCE, KNOWLEDGE, AND CONSENT;

E. THEY HAVE CONSULTED WITH AN ATTORNEY CONCERNING THIS AGREEMENT PRIOR TO EXECUTING THIS AGREEMENT;

F. THEY HAVE SIGNED THIS AGREEMENT KNOWINGLY AND VOLUNTARILY.

DATED: _____

Lisa Nicolau

DATED: 4-11-2023

Jennifer Giordano, Superintendent

DATED: 4-11-23

Suzie Stevinson, Board President

or in any application, the remaining provisions of this Agreement shall nevertheless survive and continue in full force and effect.\

16. Counterparts:

This Agreement may be executed in several counterparts, each of which will be deemed an original, but all of which will constitute one and the same.

17. Authority to Sign:

Respondent hereby represents and warrants that the individual signing this Agreement on its behalf has the full power and authority to enter into this Agreement on the respective Respondent' behalf. Respondent further warrant that they approved this Agreement in a manner permitted by law for approval of such documents.

BY SIGNING THIS SETTLEMENT AGREEMENT AND RELEASE THE PARTIES SPECIFICALLY ACKNOWLEDGE THAT:

A. THEY HAVE READ IT;

B. THEY UNDERSTAND IT AND KNOW THAT THEY ARE GIVING UP IMPORTANT LEGAL RIGHTS;

C. THEY AGREE WITH EVERYTHING IN IT AND TO ABIDE BY THE TERMS OF THIS AGREEMENT;

D. THEIR ATTORNEYS NEGOTIATED THIS AGREEMENT WITH THEIR ASSISTANCE, KNOWLEDGE, AND CONSENT;

E. THEY HAVE CONSULTED WITH AN ATTORNEY CONCERNING THIS AGREEMENT PRIOR TO EXECUTING THIS AGREEMENT;

F. THEY HAVE SIGNED THIS AGREEMENT KNOWINGLY AND VOLUNTARILY.

DATED: 4/24/23

Lisa ~~Nicolau~~
Nicolaou

189-23

New Jersey Commissioner of Education

Final Decision

Jennifer Rome,

Petitioner,

v.

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

Respondent.

Synopsis

Petitioner alleged that the respondent Board violated her tenure rights by terminating her employment at the end of her contract term in June 2022. Petitioner asserted that she obtained tenure as the result of her four years of non-consecutive employment within a five-year period with the Board, pursuant to *N.J.S.A.* 18A:28-5. The Board contended that petitioner did not obtain tenure because her initial short-term employment was to fill an absence, which is an exception to the tenure accrual statute and not entitled to credit towards tenure. The Board filed a motion for summary decision, which was opposed by the petitioner.

The ALJ found, *inter alia*, that: there are no material facts at issue here, and the matter is ripe for summary decision; petitioner was hired as a computer teacher on August 30, 2017, to fill a long-term absence; the contract for this temporary position provided that it could be terminated by either party upon thirty days' notice; petitioner served in the position as computer teacher until January 2018; in a subsequent application for employment with the school district, petitioner indicated that her prior position with the Board had been as a "long-term sub"; petitioner was retained as an elementary school teacher on October 15, 2018; and her employment continued under annual contracts for the 2019-2020, 2020-2021, and 2021-2022 school years; petitioner was advised on April 22, 2022 that the District would not renew her contract for the following school year; and *N.J.S.A.* 18A:16-1 specifically addresses the tenure acquisition rights of employees filling long-term substitute positions, providing in relevant part that "no person so acting shall acquire tenure in the office or employment in which he acts pursuant to this section when so acting." The ALJ concluded that the petitioner did not obtain tenure rights in the District through benefit of the long-term substitute contract in the 2017-2018 school year, and therefore did not have sufficient time to acquire tenure in the district.

Upon review, the Commissioner concurred with the ALJ that petitioner did not acquire tenure because her position during the 2017-2018 school year as a long-term substitute cannot be included in the calculation of her years of service pursuant to *N.J.S.A.* 18A:16-1.1. Accordingly, the Board's motion for summary decision was granted, and the petition of appeal was dismissed.

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

189-23
OAL Dkt. No. 07452-22
Agency Dkt. No. 174-7/22

New Jersey Commissioner of Education

Final Decision

Jennifer Rome,

Petitioner,

v.

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

Respondent.

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

Upon review, the Commissioner concurs with the Administrative Law Judge (ALJ) that petitioner did not acquire tenure because her position during the 2017-2018 school year was a long-term substitute position that is not included in the calculation of her years of service pursuant to *N.J.S.A.* 18A:16-1.1.

Accordingly, the Board's motion for summary decision is granted, and the petition of appeal is hereby dismissed.

IT IS SO ORDERED.[1]

Angelica Allen-McMillan, J.d.D.

ACTING COMMISSIONER OF EDUCATION

Date of Decision: June 27, 2023
Date of Mailing: June 28, 2023

[1] This decision may be appealed to the Appellate Division of the Superior Court pursuant to *N.J.S.A.* 18A:6-9.1. Under *N.J.Ct.R.* 2:4-1(b), a notice of appeal must be filed with the Appellate Division within 45 days from the date of mailing of this decision.

State of New Jersey
OFFICE OF ADMINISTRATIVE LAW

INITIAL DECISION
SUMMARY DECISION
OAL DKT. NO. EDU 07452-22
AGENCY DKT. NO. 174-7/22

JENNIFER ROME,
Petitioner,
v.
WILLINGBORO TOWNSHIP BOARD OF EDUCATION, BURLINGTON COUNTY,
Respondent.

Jennifer Rome, petitioner, pro se

Mark W. Starsle, Esq., for respondent (Madden & Madden, PA, attorneys)

Record Closed: April 12, 2023 Decided: May 17, 2023

BEFORE **SARAH G. CROWLEY**, ALJ:

STATEMENT OF THE CASE

Petitioner, Jennifer Rome alleges the respondent, Willingboro Township Board of Education (Board or District) violated her tenure rights by terminating her at the end of her contract term in June 2022. Petitioner alleges that she obtained tenure due to her four years of non-consecutive employment within a five-year period with the Board

pursuant to N.J.S.A. 18A: 28-5. The Board counters that the petitioner did not obtain tenure due to her initial short-term contract to fill an absence, which is an exception to the tenure accrual statute, and not entitled to credit towards tenure. The petitioner filed a due process complaint and the matter was transmitted to the Office of Administrative Law (OAL), where it was filed for hearing as a contested case on August 29, 2023, pursuant to N.J.S.A. 52:14B-1 to -15 and N.J.S.A. 52:14F-1 to 3. The Board filed a motion for summary decision on March 21, 2023. Opposition was filed by the petitioner and oral argument was heard via Zoom on April 12, 2023, and the record closed.

FACTUAL DISCUSSION AND FINDINGS

Based on the documents and certifications filed in this matter, I **FIND** the following as **FACTS**:

1. Petitioner was retained by the District on August 30, 2017, to fill a long-term absence as a computer teacher.

2. The contract provides that it may be terminated by either party upon thirty-days' notice.

3. The petitioner served in this position from August 30, 2017, until January 2018.

4. In a subsequent application for employment with the District, petitioner indicated that her prior position was a "long-term sub."

5. Thereafter, on October 15, 2018, petitioner was retained as an elementary school teacher. Subsequent elementary school teacher contracts were executed for the 2019–2020, 2020–2021, and 2021–2022 school years.

6. Petitioner worked for less than four years in a tenure eligible position for the District.

7. On April 22, 2022, the District advised the petitioner of its intention not to renew petitioner's contract for the following school year.

LEGAL ANALYSIS AND CONCLUSIONS

It is well-established that if there is no genuine issue as to any material fact, a moving party is entitled to prevail as a matter of law. Brill v. The Guardian Life Insurance Co. of America, 142 N.J. 520, 540 (1995). The purpose of summary decision is to avoid unnecessary hearings and their concomitant burden on public resources. Under the Brill standard, a fact-finding hearing should be avoided "when the evidence is so one-sided that one party must prevail as a matter of law." Brill guides us thusly:

> [A] determination whether there exists a "genuine issue" of material fact that precludes summary judgment requires the motion judge to consider whether the competent evidential materials presented, when viewed in the light most favorable to the non-moving party, are sufficient to permit a rational factfinder to resolve the alleged disputed issue in favor of the non-moving party.
>
> [Id. at 540.]

In this case, the petitioner argues that she obtained tenure under N.J.S.A. 18A:28-5. The petitioner argues that the time in which she was retained for the short-term contract for a long-term substitute constitutes time toward her tenure. The District argues that her time as a long-term substitute does not court towards the accrual of tenure under the language of N.J.S.A. 18A:16-1.1.

The petitioner has argued that she obtained her tenure under N.J.S.A. 18A:28-5, and that her long-term substitute position should count toward her accumulation of time for tenure. She argues, without any support, that this was a full-time position which should count toward tenure. However, she was terminated at the end of the contract period in December 2018, and acknowledged in her application for a new position with the District that she was "a long-term substitute" during the 2017–2018 school year. N.J.S.A.18A:16-1 specifically addresses the tenure acquisition rights of employees filling long-term substitute positions. The statute provides in relevant part that "no

person so acting shall acquire tenure in the office or employment in which he acts pursuant to this section when so acting. Spiewak v. Bd. of Education of Rutherford, 90 N.J. 63 (1982).

Accordingly, I **CONCLUDE** that the petitioner did not obtain tenure rights in the District due to the long-term substitute contract in the 2017–2018 school year, and accordingly insufficient time to acquire tenure.

ORDER

For the foregoing reasons, I **ORDER** that the motion of respondent Willingboro Township Board of Education is **GRANTED**, and the petition is **DISMISSED**.

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

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

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

May 17, 2023
DATE

Sarah G. Crowley
SARAH G. CROWLEY, ALJ

Date Received at Agency: _____

Date Mailed to Parties: _____

SGC/nn

New Jersey Commissioner of Education

Final Decision

B.A. and R.R., on behalf of minor child, E.A.,

Petitioners,

v.

Board of Education of the West Essex Regional School District, Essex County,

Respondent.

Synopsis

Petitioners appealed the decision of the respondent Board to suspend their child, E.A., for five days after a substitute teacher observed E.A. in the student restroom with a vaping device in her mouth, and a subsequent urine drug screen collected the following day yielded a "negative dilute" result. The Board assumed that the dilute test result indicated tampering with the sample and interpreted the test as a "presumptive positive" result. Based on this, the Board determined that E.A.'s alleged use of a vaping device warranted a suspension under the Board's Substance Abuse Policy (R 5530). Petitioners alleged that the Board repeatedly violated school policy in its disciplinary actions relating to their daughter and sought, *inter alia*, to have the suspension expunged from E.A.'s student record.

The ALJ found, *inter alia*, that: E.A.'s testimony lacked credibility, while the testimony of the Board's witnesses was straightforward and direct; school board policies are entitled to a presumption of correctness and will not be upset by the courts unless there is an affirmative showing that such decision is arbitrary, capricious or unreasonable; the Board admitted that it did not immediately send E.A. for a urine drug screen as its policy requires, however petitioners' assertion that this error rendered the suspension arbitrary, capricious, or unreasonable is without merit; likewise, petitioners' contention that the interpretation of the dilute negative urine test as a presumptive positive result was arbitrary, capricious, and unreasonable, was unconvincing given the Board's ample demonstration that it had followed this practice for many years; petitioners bears the burden of showing that the respondent's actions were arbitrary, capricious or unreasonable and failed to do so. The ALJ concluded that the five-day suspension was not arbitrary, capricious, or unreasonable; accordingly, E.A.'s suspension was affirmed, and the petition was dismissed with prejudice.

Upon review, the Commissioner concurred with the ALJ's findings of fact and credibility determinations but did not concur with all the ALJ's conclusions of law, determining, *inter alia*, that the Board's decision to suspend E.A. for five days based solely upon a negative dilute urine screen was unreasonable and unsupported by the Board's Substance Abuse Policy (R 5530) or the 2021-2022 Student Handbook. Accordingly, the Commissioner directed the Board to remove from E.A.'s student records all information pertaining to the unreasonable disciplinary action taken against her in May 2022.

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

190-23
OAL Dkt. No. EDU 06247-22
Agency Dkt. No. 196-7/22

New Jersey Commissioner of Education

Final Decision

B.A. and R.R., on behalf of minor child, E.A.,

Petitioners,

v.

Board of Education of the West Essex Regional School District, Essex County,

Respondent.

The record of this matter, the Initial Decision of the Office of Administrative Law (OAL), the exceptions filed by the petitioners pursuant to *N.J.A.C.* 1:1-18.4, and the Board's reply thereto, have been reviewed and considered.

This matter involves the Board's decision to suspend E.A. for five days. A substitute teacher familiar with E.A. observed her in the student restroom with a blue vaping device in her mouth, and a urine drug screen she took the following day yielded a "negative dilute" result. Assuming tampering had occurred, the Board interpreted the dilute result as a "presumptive positive" result and determined that it warranted a suspension under the Board's Substance Abuse Policy (R 5530). The Administrative Law Judge (ALJ) concluded that the five-day suspension was not arbitrary, capricious, or unreasonable.

Although the Board admitted that it did not immediately send E.A. for a urine drug screen as its policy requires, the ALJ rejected petitioners' contentions that the Board's misstep

rendered the suspension arbitrary, capricious, or unreasonable, and declined to find that the Board acted in bad faith. The ALJ also rejected petitioners' assertion that the Board's decision to interpret the dilute result as a presumptive positive result was arbitrary, capricious, or unreasonable, finding that the Board "amply demonstrated this practice going back to at least 2007." Finally, the ALJ rejected petitioners' claim that a subsequent urine drug screen from E.A., which yielded a positive result for marijuana metabolite, should be disregarded because the threshold used to interpret the result did not conform to United States Department of Transportation (DOT) guidelines utilized by the district.

In their exceptions, petitioners again argue that: (1) the Board's actions to suspend E.A. were arbitrary and committed in bad faith; (2) the Board failed to follow its own policy in that it did not send E.A. for a drug screen until the day after she was allegedly observed vaping; and (3) the Board arbitrarily interpreted the negative dilute result as a presumptive positive result. In addition, petitioners contend that it was unreasonable for the Board to require E.A. to produce a clean urine drug screen before returning to school after she had served the five-day suspension because marijuana is known to stay in the body for up to thirty days.

In reply, the Board argues that its actions were reasonable given the circumstances and were not undertaken in bad faith. While it acknowledges that Board policies did not state that a negative dilute result would be considered a presumptive positive result warranting a suspension, it maintains that its actions were reasonable given the objective nature of the testing and its past practice of interpreting dilute results in this fashion for approximately fifteen years. Moreover, the Board asserts that petitioners' reliance on DOT guidelines is misplaced as the Commissioner does not require districts to follow them. Finally, the Board

contends that because petitioners did not raise the school "re-entry" claim before the ALJ, their argument on that issue should be disregarded.

Upon review, the Commissioner concurs with the ALJ's findings of fact and credibility determinations while partially concurring with the ALJ's conclusions of law. Initially, the Commissioner agrees with the ALJ that it was reasonable for the Board to refer E.A. for a urine drug screen the day after she was observed with the vape pen. However, the Commissioner disagrees with the ALJ's conclusion that the Board's decision to suspend E.A. for five days because her drug screen yielded a negative dilute result was reasonable.

The Legislature granted local boards of education sweeping authority to enact rules regarding operation of their public schools. *N.J.S.A.* 18A:11-1(c), (d); *Bd. of Educ. of City of Plainfield v. Cooperman*, 105 N.J. 587, 596 (1987). Board action conducted within the ambit of its broad discretionary authority "may not be upset unless patently arbitrary, without rational basis or induced by improper motives." *Kopera v. W. Orange Bd. of Educ.*, 60 N.J. Super. 288, 294 (App. Div. 1960). Board determinations are "entitled to a presumption of correctness." *Thomas v. Bd. of Educ. of Twp. of Morris*, 89 N.J. Super. 327, 332 (App. Div. 1965), *aff'd*, 46 N.J. 581 (1966). The Commissioner may not substitute her judgment for that of the Board. *Schinck v. Bd. of Educ. of Westwood Consol. Sch. Dist.*, 60 N.J. Super. 448, 476 (App. Div. 1960).

Boards may suspend a student from school if the student's conduct constitutes "good cause" for suspension. *N.J.S.A.* 18A:37-2. While the statute lists several examples of conduct that satisfy the good cause standard, boards may suspend a student for other reasons so long as the good cause standard is met. State education regulations require boards to implement a code of student conduct, aimed at "foster[ing] the health, safety, and social and emotional

well-being of students," which must establish parameters for discipline and include a description of conduct that will result in suspension. *N.J.A.C.* 6A:16-7.1(a), *N.J.A.C.* 6A:16-7.1(b), *N.J.A.C.* 6A:16-7.1(c).

Additionally, in the interest of student health and safety, boards are required to implement "a comprehensive substance abuse intervention, prevention and treatment referral program" in their elementary and secondary schools to "identify pupils who are substance abusers, assess the extent of these pupils' involvement with these substances and, where appropriate, refer pupils and their families to . . . professional treatment." *N.J.S.A.* 18A:40A-10. The statute defines "substances" to include "[a]ny chemical or compound that releases vapor," and the policies apply to "students who consume or are suspected of being under the influence of or who possess" substances on school grounds. *N.J.S.A.* 18A:40A-9; *N.J.A.C.* 6A:16-4.1(a).

To satisfy this legislative mandate, boards must "adopt and implement . . . policies and procedures for the evaluation, referral for treatment and discipline of pupils involved in incidents of possession or abuse of substances . . . on school property." *N.J.S.A.* 18A:40A-11; *N.J.A.C.* 6A:16-4.1(a). The Board's Substance Abuse Policy (R 5530) provides that students found in possession of or using a "vape product" on school grounds "will be assessed to determine if the student is under the influence of drugs or other substance." Additionally, it states that "[s]tudents who violate the substance abuse rules will be disciplined as per the Code of Conduct outlined in the Student Handbook."

The Board's 2021-2022 Student Handbook states that conduct involving "Tobacco Products Electronic cigarettes/Vaping products (paraphernalia) (and) Smokeless Tobacco Items containing Nicotine" violates the student code of conduct and will result in a two-day

suspension for a student's first offense. The Student Handbook distinguishes this conduct from conduct involving "possession of drug or drug paraphernalia or use of an illegal substance." If a student is found to be in "possession of an illegal substance or paraphernalia while in school," a suspension "not less than ten days" is imposed. If a student is found to be "under the influence" of an illegal substance while at school, a suspension "not less than five days" is imposed for a first offense.

In this case, a substitute teacher deemed credible by the ALJ testified that she saw E.A. in the student restroom with a blue vape pen in her mouth on May 12, 2022. E.A., found to be "not credible" by the ALJ, denied vaping in the restroom but claimed that she used marijuana the night before and generally consumes a lot of water. The substitute teacher did not report the incident until the end of the school day.[1] Consequently, E.A. was not interviewed by the assistant principal or drug screened until the following day, May 13, 2022. At that point, E.A. was not in possession of the vape pen. However, the assistant principal – deemed credible by the ALJ – testified that she explained to E.A. that "a staff member . . . saw her in the bathroom the previous day vaping" and that E.A. "acknowledged that it had happened." The assistant principal further testified that a decision was made to send E.A. for a urine drug screen the following day because it was not known what substance the vape pen contained.

At the outset, the ALJ's credibility findings are entitled to deference. *In re Young*, 202 *N.J.* 50, 71 (2010). The Commissioner agrees with the ALJ that there is nothing in the record to establish that the Board acted in bad faith by sending E.A. for a drug screen the day after the incident in the restroom. Given the circumstances, it would have been unreasonable and

[1] *N.J.S.A.* 18A:40A-12(a) requires that such incidents be reported to the school nurse or student assistance counselor (SAC) and the principal or designee "as soon as possible."

contrary to the Board's Substance Abuse Policy to decline to refer E.A. for a urine drug screen solely because the substitute teacher did not immediately report the incident. As noted, the purpose of the referral program is to identify pupils who may need substance abuse treatment. *N.J.S.A.* 18A:40A-10; *N.J.S.A.* 18A:40A-11. The Board's actions reasonably comport with that important goal.

However, the Commissioner finds that the Board's decision to suspend E.A. for five days based upon a negative dilute urine screen result was arbitrary and lacked a rational basis. Credible testimony from both the assistant principal and the Student Assistance Counselor (SAC) confirmed that the Board chose not to suspend E.A. for possession of a vape pen. Rather, the Board suspended E.A. following its receipt of the negative dilute urine screen result on May 19, 2022. On that same date, petitioners were informed in writing that "a DILUTE result is considered positive according to [Board] policy" and thus warranted a five-day suspension for E.A. But neither the Board's Substance Abuse Policy (R 5530) nor the 2021-2022 Student Handbook indicate that students will receive a five-day suspension if their urine drug screen yields a negative dilute result, or that such a result will be treated as a presumptive positive.[2]

On the contrary, the Board's Substance Abuse Policy (R 5530) states that once a student is referred for a screening to determine whether she is under the influence, "the student shall be allowed to return to school until such time as a positive determination of alcohol or other drug use is received from the examining physician, unless the student was also removed for violating the Code of Student Conduct." It also states that "[i]f the written report of the

[2] Effective August 17, 2022, the Board amended its Substance Abuse Policy (R 5530) to state that students found in possession of vape products will be sent immediately for a urine screening and must provide "a non-dilute, non-adulterated sample." It now states that "[a] dilute screen is a presumptive positive test result" and that "[a]ppropriate disciplinary action shall be taken for a positive test result." The propriety of its actions in that regard is beyond the scope of this petition of appeal.

medical examination verifies that alcohol or other drugs do not interfere with the student's physical and mental ability to perform in school, the student will be immediately returned to school." The Substance Abuse Policy (R 5530) makes no mention of either the significance or ramifications of a dilute result.

The record indicates that E.A. was medically cleared to return to school by a physician on May 13, 2022—the same day she completed the initial urine drug screen. And yet, the Board imposed the five-day suspension beginning on May 20, 2022, upon its receipt of the negative dilute urine screen result absent any evidence that she deliberately tampered with the sample. While the Student Handbook contemplates a suspension of not less than five days for a first offense if a student is found to be "under the influence" of an illegal substance while at school, the negative dilute urine screen result—collected the day after E.A. was observed with a vape pen in the student restroom—failed to establish that E.A. was under the influence of drugs or other substances on school grounds on May 12, 2022.

It is not known from the record whether the vape pen contained an illegal substance. The fact that a subsequent urine sample collected during E.A.'s suspension on May 24, 2022 yielded a positive result for marijuana metabolite fails to support the conclusion that E.A. was under the influence of marijuana at school on May 12, 2022, when she was observed with the vape pen in her mouth.[3] The Board's SAC, qualified as an expert by the ALJ, conceded that "it's impossible to tell exactly when someone inhaled marijuana, how you, how many metabolites

[3] Any urine screens taken by E.A. after May 20, 2022, the date her suspension took effect, could not have factored into the Board's decision to suspend her, and therefore do not assist the Commissioner in determining whether the five-day suspension was arbitrary, capricious, or unreasonable. Thus, the Commissioner need not address petitioners' contention that the May 24, 2022, test result deemed positive for marijuana metabolite (21 ng/mL) by High Focus Treatment Center should be deemed negative under the Board's screening threshold of equal to or greater than 50 ng/mL. In any event, while they may be informative, DOT standards are not controlling in this matter.

were in their system, but marijuana can stay in your system, obviously, for some period of time."

In addition, credible testimony from the assistant principal and the Board's SAC undermines the Board's position that it was reasonable to interpret the negative dilute urine screen result as a presumptive positive. The assistant principal credibly testified that she informed E.A. that if the drug screen "comes back positive, yes you're going to be suspended. If it comes back negative, then no." Moreover, the SAC testified that he informed E.A. and her stepfather before they departed school grounds to attend the drug screening that she "should not drink copious amounts of water because it could render the [drug screen] results inconclusive." While it would have been reasonable for the Board to view the negative dilute urine screen result as inconclusive and to request that E.A. provide another urine sample, it was unreasonable for the Board to treat it as a presumptive positive result warranting a five-day suspension absent any basis for same other than apparent past practice in the district dating back to 2007.

As for petitioners' contention that it was unreasonable for the Board to require E.A. to produce a clean urine drug screen before returning to school because marijuana is known to stay in the body for up to thirty days, the Commissioner finds that petitioners failed to offer any competent evidence to support their position.

In sum, the Commissioner holds that the Board's decision to suspend E.A. for five days based solely upon a negative dilute urine screen was unreasonable and unsupported by the Board's Substance Abuse Policy (R 5530) or its 2021-2022 Student Handbook. The Board is

hereby directed to remove all information pertaining to the unreasonable disciplinary action taken against E.A. from her student record.

IT IS SO ORDERED.[4]

Angelica Allen-McMillan, Ed.D.
ACTING COMMISSIONER OF EDUCATION

Date of Decision: June 27, 2023
Date of Mailing: June 28, 2023

[4] This decision may be appealed to the Appellate Division of the Superior Court pursuant to *N.J.S.A.* 18A:6-9.1. Under *N.J.Ct.R.* 2:4-1(b), a notice of appeal must be filed with the Appellate Division within 45 days from the date of mailing of this decision.

State of New Jersey
OFFICE OF ADMINISTRATIVE LAW

INITIAL DECISION
OAL DKT. NO. EDU 06247-22
AGY REF NO. 196-7/22

B.A. AND R.R., ON BEHALF OF E.A,
Petitioners,

v.

WEST ESSEX REGIONAL SCHOOL DISTRICT BOARD OF EDUCATION, ESSEX COUNTY,
Respondent.

B.A. and **R.R.** parents on behalf of E.A., petitioner, pro se

Leslie A. Koch, Esq., for respondent (Methfessel & Werbel, attorneys)

Record closed: February 10, 2023 Decided: April 6, 2023

BEFORE **THOMAS R. BETANCOURT**, ALJ:

STATEMENT OF THE CASE AND PROCEDURAL HISTORY

Petitioners filed a pro se Petition of Appeal seeking Emergent Relief with the Office of Controversies and Disputes in the New Jersey Department of Education (DOE) on July 27, 2022.

Said emergent motion sought an order removing a disciplinary suspension imposed upon E.A.; compensatory education; a review of School Policies, procedures and staff training; and such other relief deemed appropriate by the Commissioner.

Respondent Board filed its Answer to the Petition, a brief in opposition to the request for emergent relief, and the Certification of Anthony V. Emering, with Exhibits 1 through 8.

Oral argument via Zoom was held on August 2, 2022. The emergent application was denied orally from the bench and memorialized in an Order.

A telephone conference was held on September 16, 2022, to discuss scheduling of oral argument on a motion for summary decision filed by Respondent, scheduling of the hearing should the motion be unsuccessful, and to address the student's status pending a decision on the instant matter. An Order was entered the same date directing Respondent to stay E.A.'s status as "not in good standing" until the entry of an Initial Decision in the within matter.

Respondent filed a motion for summary decision on September 9, 2022. Petitioner filed his response thereto, and a counter motion for summary decision, and a motion to compel discovery on September 21, 2022. Respondent filed its brief in opposition to the counter motion for summary decision on October 10, 2022. Petitioner filed his reply thereto on October 23, 2022. Oral argument on the motions was held on November 17, 2022. An Order was entered on November 18, 2022 denying the motion for summary decision and the cross motion for summary decision.

The undersigned reserved on the motion to compel discovery and directed the parties from the bench, at the conclusion of oral argument on the cross motions, to work out the discovery issues, as set forth in said order.

The hearing was held on December 20, 2022. The parties were granted time to obtain transcripts of the proceedings and to submit written summations. Each party submitted their written summations on February 10, 2023, whereupon the record was closed.

SUMMARY OF RELEVANT TESTIMONY

E.A. testified as follows:

Direct Examination

She was in the bathroom on May 12, 2022, between classes. Suddenly all the kids in the bathroom scrambled. She was unsure of how many kids were in the bathroom. A substitute teacher, Ms. Caria, walked into the bathroom. E.A. was unsure at what time that occurred.

The next day she was taken to the office by Mr. Emering. In the office were Westervelt and Hoebee. They were asking her questions. She was told she was in the office because she was vaping. She responded "oh".

Her mother was then called, who was at work. She was not sure if her father, B.A., was called. Her stepfather, J.R., was called. He picked her up from school and took her home.

When in the office she was told she would be drug tested. She admitted to using marijuana the night before, terming it "one tiny hit".

She further explained that she drinks a lot of water, and did so the morning of Friday, May 13, 2022.

Cross Examination

She has applied to several colleges, nine in total. She has been accepted at the University of Arizona, the University of Delaware, Penn State, Ohio State and Indiana. She has not heard from the other schools, as yet.

While she was suspended she had access to Google Classroom.

She reviewed her grades and report card. She did well, except for Latin. She received a D- on the final. She received a D+ on the Latin mid-term exam.

Her cumulative GPA is 4.2024.

Violet Capria testified as follows:

DIRECT EXAMINATION

She is employed by West Essex Regional High School as a permanent substitute teacher. She knows E.A. who was in her proctoring for make up assignments. She spent a whole week with E.A. This was during E.A.'s junior year (2021/2022 school year).

On May 12, 2022 she entered the bathroom and went into a stall. When she left the stall she saw there were a group of students there. She saw E.A. and saw a blue vape in her mouth. The students "jaws dropped" when they saw her. She then washed her hands and left. E.A. was the only one she observed vaping. She estimated six other girls in the bathroom.

Ms. Capria knew she had to tell someone what she saw. However, she had a classroom full of students and went there. She advised the office of what she saw at

the end of the day. She told Ms. Kim Westervelt, who is her supervisor. This occurred about 2:35 p.m.

CROSS EXAMINATION

When she told Ms. Westervelt what occurred, she was advised that next time she is to report it right away.

She did not make a written report.

BY THE ALJ

Ms. Capria had no doubt that it was E.A. she observed with a vape pen in her mouth.

B.A., Petitioner, testified as follows:

The school did not follow their own policies. The policy does not state that a negative dilute is presumed a positive test. There is no school nurse to examine the student. There was no official report.

The first drug screen was "negative dilute". The second was "interference". The next test was "negative (less than a 5ngl level). The last test was negative in his view as it was below school mandated levels.

CROSS EXAMINATION

B.A. has no experience or training in interpreting drug screen results. He has no experience in writing or interpreting school policies.

Kimberly Westervelt testified as follows:

She is the Assistant Principal at West Essex Regional High School. She is familiar with the school substance abuse policy and regulations. She has implemented this protocol probably twenty to thirty times in the past two years.

She had no reason to doubt Ms. Capria when she advised she saw E.A. using a vape pen. Ms. Westervelt knows Ms. Capria had proctored mid-term exams for E.A.

Ms. Westervelt put the time Ms. Capria advised her of what she saw at around 3:30 p.m., not the 2:35 p.m. Ms. Capria had stated.

After she spoke with Ms. Capria she wrote down what was told to her. She then called the Principal, who was no longer in the office. The other assistant principal had left for the day. Ms. Westervelt then made a decision to speak with them the next day in the morning.

The next day she spoke with the Principal and the other assistant principal. They decided to enact the protocol and send E.A. for drug screening. Vaping requires drug screening as it is unknown what may be in the vape pen.

E.A. was brought into Ms. Hoebee's office. She was told her bag was to be searched. Nothing was found. E.A. was then told she would be sent for a drug screening, and that her parents would be called. At this point E.A. became visibly upset. E.A. stated that she had smoked marijuana the night before. She was told if the drug screen comes back positive she would be suspended; if negative, she would not be. E.A.'s mother was called and it was arranged that her stepfather would pick her up. In the room at this time were Ms. Westervelt, Ms. Hoebee, Mr. Emering and E.A.

When E.A. left with her stepfather Ms. Westervelt was under the impression that they would proceed to a Doctor's Care Facility for the drug screening.

About one hour later B.A. called the school and was advised that E.A. had to go for drug screening or would be immediately suspended. E.A. did later on that day receive a drug screening.

CROSS EXAMINATION

Moving forward, Ms. Westervelt stated that the protocol would be enacted at the end of the school day. She was not aware that E.A. was in the school until 4:00 p.m. on May 12, 2022.

She tried to call Mr. Diliberto on May 12, 2022, but was unable to speak with him.

The protocol for E.A. began at 10:45 a.m. on May 13, 2022.

If a student is out of compliance with the substance abuse policy they cannot be in school unless they are in treatment.

E.A. was not suspended immediately. The drug screening results were received about a week later. That is when the suspension began.

E.A. did not get suspended for vaping as she was not in possession of a vape pen when in the office the next day. This was a unique case.

Ms. Westervelt recalled speaking with B.A. later in the day on May 13, 2022.

E.A. was suspended for five days and medically excused for four days. The reason for being medically excused was that she had not been medically cleared to return to school. Medically excused is not in the school policy. It is a consistent practice of the school.

B.A. was combative when he called. He was advised that E.A. was not suspended. The drug screening results were needed first.

BY THE AJL

Ms. Westervelt stated that a "negative dilute" has been viewed as a positive test for purposes of suspension. That has been the school policy during her tenure of three plus years as vice principal. E.A.'s parents were not informed that a negative dilute would result in a suspension.

Ms. Westervelt was not aware that school policy had been changed, after the incident with E.A., to interpret a negative dilute result as a positive result.

Antony Emering testified as a student assistance counselor, as follows:

He is employed by West Essex Regional High School as the student assistance counselor, and, secondarily, as the coordinator of Section 504 accommodations.

Part of his duties is to read and interpret drug screening results.

He is always consulted when a student may be sent for drug testing so he can coordinate preparation of forms, and also alert the testing facility that a student may be coming.

He was with Ms. Westervelt and Ms. Hoebee the morning of May 13, 2022, when they were discussing whether or not to have E.A. go through the substance abuse protocol. He was on board with the decision to do so.

He knows E.A. and explained to her the process. He also spoke with her stepfather, and informed him of what needed to be done. He advised that E.A. should not drink copious amounts of water as it could render the results inconclusive.

Two validity markers come into play with a urine sample: creatine and specific gravity. Specific gravity has to be above 1.000. This is the cutoff threshold. Both are looked at by a medical review facility. There is the collection facility. The sample is sent to a lab. A doctor independent of the testing facility reviews the results and sends a report to the school. He determines whether the results are positive, negative, dilute or any other potential issues. E.A.'s sample was negative dilute. Her sample had a specific gravity of 1.0011. Anything under 1.0030 is a potential issue. The creatine was 10.7 milligrams per deciliter. Anything under 20 milligrams per deciliter is considered a potential dilution.

Mr. Emering then described marijuana testing. A June 2, 2022 drug screen done by High Focus showed a positive test for marijuana (21 nanograms per milliliter). A prior test result from High Focus (5/28/22) shows a result of "interference". Mr. Emering had never before seen a test with this result. This means the sample was untestable. E.A.'s mother was correct to have her retested immediately after the "interference" result was obtained. The second test showed the 21 nanograms per milliliter result.

The first test of E.A. (Friday, May 13, 2022) was delayed for about four hours. The district did not enforce its two hour rule for testing. A clean, non-dilute, non adulterated urine screen is needed. The first test didn't qualify. The blood test she took, the fourth test, was acceptable for her to return to school. High Focus, where the test was done, recommended a treatment program for E.A. They recommended an intensive out patient program in their letter dated June 7, 2022.

E.A. was allowed to return to school without being enrolled in the program. She was re-evaluated by Charlie Health. They indicated E.A. should continue with her out patient provider.

Mr. Emering emailed the Petitioner with the return to school policy. He also had some telephone conversations with the Petitioner.

Mr. Emering was surprised that E.A. did not go directly to be tested after leaving school with her stepfather on May 12, 2022. He termed it "disconcerting". Not going is considered a presumptive positive.

CROSS EXAMINATION

He is aware of the school policies regarding substance abuse. They are based on model policies in the State of New Jersey.

He is aware of the requirements under N.J.S.A. 18A:48-12 to test students suspected of being under the influence.

Mr. Emering stated that once you are reposed with information you have an obligation to send the student for testing. He further stated that it would be most ideal to test sooner, agreeing that testing on Thursday, May 12, 2022 would be the most ideal.

He did not receive a telephone call from Ms. Westervelt or Ms. Capria on May 12, 2022.

E.A. did not get suspended for vaping because the administration was trying to be even handed.

School policy was not followed. E.A. was not immediately sent for testing.

The Department of Transportation (DOT) guidelines are followed with their testing. The DOT would consider a negative dilute as a negative, or require a retest.

The DOT cutoff is 50, which is what the school uses. The High Focus result was 21, which is below 50. It is still a positive test. High Focus uses 20 as a cutoff level. The school can't dictate to High Focus what their cutoffs should be.

The first test was collected on May 13, 2022 at 3:58 p.m. The results came back on May 19, 2022. He called E.A.'s mother at 6:50 p.m. as that is when he received the results.

The third test was administered on June 1, 2022.

Mr. Emering would prefer a urine test to a blood test, as urine is more accurate in terms of substance abuse. The benefit of a blood test is that it is more difficult to doctor a blood test. The problem with a blood test is that it does not have validity markers.

The school policy was amended in August 2022 regarding a negative dilute result. Mr. Emering stated that he always considered a negative dilute unacceptable as a clean test. This since he began employment with the district in 2007. It is considered a positive test.

RE-DIRECT EXAMINATION

It is the past practice of the school to treat negative dilute test results as positive, and has been since he began his employment.

The school is not required to follow DOT guidelines. DOT guidelines relate to employees who are usually drivers.

CREDIBILITY

When witnesses present conflicting testimonies, it is the duty of the trier of fact to weigh each witness's credibility and make a factual finding. In other words, credibility is the value a fact finder assigns to the testimony of a witness, and it incorporates the overall assessment of the witness's story in light of its rationality, consistency, and how it comports with other evidence. Carbo v. United States, 314 F.2d 718 (9th Cir. 1963); see Polk, supra, 90 N.J. 550. Credibility findings "are often influenced by matters

such as observations of the character and demeanor of witnesses and common human experience that are not transmitted by the record." State v. Locurto, 157 N.J. 463 (1999). A fact finder is expected to base decisions of credibility on his or her common sense, intuition or experience. Barnes v. United States, 412 U.S. 837, 93 S. Ct. 2357, 37 L. Ed. 2d 380 (1973).

The finder of fact is not bound to believe the testimony of any witness, and credibility does not automatically rest astride the party with more witnesses. In re Perrone, 5 N.J. 514 (1950). Testimony may be disbelieved, but may not be disregarded at an administrative proceeding. Middletown Twp. v. Murdoch, 73 N.J. Super. 511 (App. Div. 1962). Credible testimony must not only proceed from the mouth of credible witnesses but must be credible in itself. Spagnuolo v. Bonnet, 16 N.J. 546 (1954).

When facts are contested, the trier of fact must assess and weigh the credibility of the witnesses for purposes of making factual findings. Credibility is the value that a finder of fact gives to a witness's testimony. It requires an overall assessment of the witness's story in light of its rationality, its internal consistency, and the manner in which it "hangs together" with the other evidence. Carbo v. United States, 314 F.2d 718, 749 (8th Cir. 1963).

The testimony of E.A. appeared to be rehearsed. Her flat denial of vaping did not ring true. It was a self serving statement that was in direct opposition to the credible testimony of Ms. Capria. Further, I found her description of how much water she drinks to be merely an attempt to explain away the results of the first test, which came back as negative dilute. She had admitted that she smoked marijuana the night before the drug screen was administered. I otherwise found her to be a pleasant, articulate, and bright young woman. However, I cannot deem her testimony as to the crucial issue in this matter as credible.

B.A. was credible. However, he did not witness what transpired in the bathroom. He mostly argued that the school did not follow its own policy. He further argued that the test results should have been interpreted as negative.

Violet Capria was straightforward and direct in her testimony. She knows E.A. and was positive that it was E.A. she saw in the bathroom vaping. She had no doubt as to her observation. I deem her credible.

Kimberly Westervelt also was straightforward and direct in her testimony. She credibly stated the reasons for not strictly following school policy on May 12, 2022. I deem her credible.

Anthony Emering I found to be credible. His knowledge of substance abuse and testing was informative and helpful. He readily admitted that the best practice would have been to have E.A. tested on May 12, 2022, the day of the incident, as opposed to the next day. His explanation that it was still the better practice of testing the next day, as opposed to not all, was well stated.

FINDINGS OF FACT

1. E.A. is a student in the West Essex Regional School District. On May 12, 2022 she was a high school junior.

2. Petitioners, B.A. and R.R. are her parents.

3. On May 12, 2022, full time substitute teacher Violet Capria, was using the student bathroom. Upon exiting her stall she saw E.A. using a vaping device.

4. Ms. Capria did not report this incident to the school administration until the end of her school day, contrary to school policy which requires it be reported immediately. When she did report the incident, she did so to Kimberly Westervelt, assistant principal.

5. Kimberly Westervelt, upon receiving the information of E.A. vaping from Ms. Capria, attempted to contact the Principal and was unable. The other vice principal had left for the day. At this point, Ms. Westervelt made a decision to speak with them the next day. This is also contrary to school policy.

6. On May 13, 2022, Ms. Westervelt spoke with the principal and other assistant principal. It was decided to initiate the school protocol and send E.A. for drug screening. E.A. was brought to the office and met with Ms. Westervelt, Ms. Hoebee and Mr. Emering.

7. When told she would need to have a drug screen E.A. admitted to having smoked marijuana the night before and feared the test would be positive.

8. The school determined not to suspend E.A. for vaping, which carries a two-day suspension, as no vape pen was found in her possession on May 13, 2022.

9. The initial drug screen was delayed several hours as petitioner, B.A., did not immediately agree to have E.A. tested. Eventually, E.A. was tested on May 13, 2022 at The Doctor's Office of West Caldwell. The result was Negative Dilute. (P-6 and R-16)

10. The past practice of the district has always considered a Negative Dilute result as a positive result, at least as far back as 2007.

11. The initial drug screen results were received on May 19, 2022. (P-6 and R-16)

12. E.A. was suspended for five days after receipt of the initial drug screen. E.A. was also medically excused from school for an additional four days, pending receipt of a negative drug screen.

13. E.A. had four drug screens in total, as follows:

a. The initial drug screen with a Negative Dilute result, sample taken May 13, 2022.

b. High Focus – sample taken May 24, 2022 – with a result of Interference.

c. High Focus – second sample taken on May 24, 3033 – with a positive result for THC

d. June 6, 2022 – private blood test by E.A. physician – with a negative result

(R-24, Certification of Anthony Emering, Exhibits 4, 5, 6 and 8)

14. The student handbook provides for a two-day suspension for the use of vaping products. (R-3)

15. Student Discipline/Code of Conduct (R 5600) sets forth that suspension may be imposed for use of controlled dangerous substances. (R-5)

16. Substance Abuse is addressed in 5530 Substance Abuse, which sets forth that discipline can be imposed, and the procedures to be followed. (R-6)

17. School policy, as set forth in R-6, is for the student to be immediately referred to the principal, or other designated school official.

18. E.A. was not immediately referred to the principal. That was not done until the next day.

19. Regulation 5610 sets forth suspension procedures. (R-9)

20. Policy 5530 and Regulation 5530 (R-6 and R-7) in effect on May 12, 2022, do not mention a dilute screen test result.

21. Policy 5530 was amended in September 2022 to include a "dilute screen is a presumptive positive test result."

22. E.A.'s grades did not suffer due to the suspension. She maintained good grades, with the exception of Latin, which she showed difficulty with prior to the suspension. (R-30 and R-31)

CONCLUSIONS OF LAW

School Board policies are entitled to a presumption of correctness and will not be upset by the courts unless there is an affirmative showing that such decision is arbitrary,

capricious or unreasonable. Thomas v. Bd. of Educ. of Morris Twp., 89 N.J. Super. 327, 332 (App. Div. 1965), affirmed, 46 N.J. 581 (1966). In general, a board of education's actions are entitled to a presumption of lawfulness and good faith.

Where board actions are challenged, the challenger bears the burden of proving that such actions were unlawful, arbitrary, capricious or unreasonable. Schuster v. Ed. of Educ. Montgomery Twp., 96 N.J.A.R.2d (EDU) 670, 676 (citing Schnick v. Westwood Ed. of Educ., 60 N.J. Super. 448 (App. Div. 1960), and Quinlan v. Bd. of Educ. of North Bergen Twp., 73 N.J. Super. 40 (App. Div. 1962)). In matters involving the exercise of a local board of education's discretion, 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 conclusions." Kopera v. West Orange Bd. of Educ., 60 N.J. Super. 288, 296 (App. Div. 1960). Therefore, petitioner must demonstrate much more than simply a difference of opinion over the action taken by respondent. In order to satisfy the arbitrary and capricious standard, petitioner must prove that respondent acted in either bad faith or in disregard to the circumstances.

N.J.S.A. 18A:37-2 states that, "Conduct which shall constitute good cause for suspension or expulsion of a pupil guilty of such conduct, shall include but not be limited, to any of the following: . .(j)Knowing possession or knowing consumption without legal authority of alcoholic beverages or controlled dangerous substances on school premises or being under the influence of intoxicating liquor or controlled dangerous substances while on school premises.

Petitioner contends that the Respondent's failure to follow its policy should result in the suspension being vacated. Respondent's witnesses all admit the failure to follow policy. Ms. Capria did not report the vaping incident immediately but waited until her school day had ended. Ms. Westervelt did not contact the principal or other vice principal (each had left for the day); did not bring E.A. into the office assuming she had left school by the time she was informed of the vaping incident; did not contact E.A.'s parents; and, did not have E.A. immediately tested. The school did not do any of the

above until the following day. However, this delay does not make the school's actions arbitrary, unreasonable, or capricious. E.A. violated school policy by vaping. The school could not simply ignore this because it failed to follow its protocol.

The Respondent did not act in bad faith or in disregard to the circumstances. See P.S. o/b/o T.S. v. Bd. of Educ. Township of East Brunswick, et al., 10-1, 2019 WL 4928823, at *6 (N.J. Adm. Aug. 28, 2019). Respondent, via Ms. Westervelt, made a decision to address the incident the next day as she was unable to locate the principal and other vice principal. Nothing in this action is arbitrary, capricious or unreasonable. It was not ideal pursuant to their policy, but was certainly understandable given the lateness in the day when Ms. Westervelt received the information, coupled with her inability to reach the principal and other vice principal.

West Essex Regional School District Policy 5610 Suspension sets forth that "conduct which shall constitute for suspension ... shall include.. the conduct defined in N.J.S.A. 18A:37-2 and the school district's Student Discipline Code of Conduct Policy and Regulation in accordance with N.J.A.C. 6A:16-7.1."

The Respondent decided, given the circumstances of the instant matter, not to suspend E.A. for vaping. However, the Respondent determined that it should follow its protocol and send E.A. for a drug screen. That result was Negative Dilute, which the Respondent had interpreted as a positive result from at least 2007. This resulted in the suspension of E.A. for five days. E.A. continued out of school as being medically excused pending the receipt of a negative drug screen. Nothing about these actions, while not ideal, render them arbitrary, capricious or unreasonable.

Petitioner asserts that the Respondent's amendment to its Policy 5530 Substance Abuse to include a dilute result as unacceptable should render their past practice of interpreting such a result as a positive void. The Respondent has amply demonstrated this practice going back to at least 2007. That the Policy was amended

to now include this past practice does not render it arbitrary, capricious or unreasonable.

Petitioner also asserts that the Respondent's interpretation of the drug screens were inappropriate. As to the drug screen that was positive for THC Petitioner claims that it does not conform to DOT guidelines. DOT guidelines have the cutoff for marijuana at 50. The positive THC test has it at 20. As Mr. Emering stated in his testimony it was a positive test and the school is not bound by the DOT guidelines. Interpreting a positive test as just that cannot be deemed arbitrary, capricious or unreasonable.

Petitioner bears the burden of showing that the Respondent's actions were arbitrary, capricious or unreasonable. See Schuster v. Ed. of Educ. Montgomery Twp., 96 N.J.A.R.2d (EDU) 670, 676 (citing Schnick v. Westwood Ed. of Educ., 60 N.J. Super. 448 (App. Div. 1960), and Quinlan v. Bd. of Educ. of North Bergen Twp., 73 N.J. Super. 40 (App. Div. 1962)).

Petitioners have failed to carry their burden.

Based upon the above, I **CONCLUDE** that the facts support the Respondent's imposition of a five-day suspension of E.A., and that the same is not arbitrary, capricious or unreasonable.

ORDER

It is **ORDERED** that Respondent's suspension of E.A. is **AFFIRMED**; and, it is further **ORDERED** that Petitioner's petition is dismissed with prejudice.

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

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

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

April 6, 2023

DATE

THOMAS R. BETANCOURT, ALJ

Date Received at Agency:

Date Mailed to Parties:

db

APPENDIX

List of Witnesses

For Petitioner:

E.A.
B.A.

For Respondent:

Violet Capria
Kimberly Westervelt
Anthony Emering

List of Exhibits

For Petitioner:

P-1 Certification of B.A.
Certification of E.A.
P-2 Policy and Regulation #5530 – Substance Abuse (in place on May 12, 2022)
P-3 Drug Screening Information
P-4 Email correspondence
P-5 letters from Petitioner's counsel
P-6 Drug Screen Results
P-7 Policy and Regulation #5540 – Substance Abuse (effective August 17, 2022)
P-8 Discovery correspondence with counsel
P-9 DOT Drug Test Rule

For Respondent:

R-1 pro se Petition of Appeal, dated 7/26/2022
R-2 Respondent's Answer
R-3 Student Handbook
R-4 Policy 5600 Student Discipline/Code of Conduct

R-5 Policy 5600 Student Discipline/Code of Conduct
R-6 Policy 5530 Substance Abuse
R-7 Regulation 5530 Substance Abuse
R-8 Policy 5610 Suspension
R-9 Regulation 5610 Suspension Procedures
R-10 Student Drug Testing Flow Chart
R-11 Local State Certified Treatment Facilities
R-12 West Essex Senior High School Student Assistance Program
R-13 Student Reasonable Suspicion Report
R-14 Parent Acknowledgement, dated 5/13/2022
R-15 Physician's Statement, dated 5/13/2022
R-16 The Doctor's Office of West Caldwell: Medical Review Officer Report, dated 5/19/2022
R-17 Email from Principal Caesar Diliberto, dated 5/19/2022
R-18 Out-of-School Suspension notice, dated May 20, 2022
R-19 Parsippany HFC Lab Results, dated June 2, 2022
R-20 Letter from High Focus Centers to Anthony Emering, West Essex High School, Dated June 7, 2022
R-21 Email from R.R., dated 5/31/2022
R-22 Email from B.A. with blood test results, dated 6/6/2022
R-23 Certification of E.A., dated 9/20/22
R-24 Certification of Anthony Emering
R-25 Anthony Emering Resume
R-26 Job Description Substance Awareness Coordinator
R-27 Certification of Kimberly Westervelt
R-28 Resume of Kimberly Westervelt
R-29 Resume of Violet Capria
R-30 E.A. grades, produced by B.A.
R-31 E.A. transcript
R-32 Petitioners' response to discovery requests
R-33 Policy 8330 Student Records
R-34 Regulation 8330 Student Records
R-35 E.A. report card 2021-2022

191-23E
OAL Dkt. No. EDU 03426-23
Agency Dkt. No. 110-4/23

New Jersey Commissioner of Education

Order on Emergent Relief

D.P., on behalf of minor child, D.V.P.,

Petitioner,

v.

Board of Education of the Borough of North Arlington, Bergen County,

Respondent.

The record of this emergent matter, the sound recording of proceedings at the Office of Administrative Law (OAL), and the recommended Order of the Administrative Law Judge (ALJ) have been reviewed. Upon such review, the Commissioner concurs with the ALJ that petitioner has failed to demonstrate entitlement to emergent relief pursuant to the standards enunciated in *Crowe v. DeGioia,* 90 *N.J.* 126 (1982), and codified at *N.J.A.C.* 6A:3-1.6.

Accordingly, the recommended Order of the OAL denying petitioner's application for emergent relief is adopted for the reasons stated therein. This matter shall continue at the OAL with such proceedings as the parties and the ALJ deem necessary to bring it to closure.

IT IS SO ORDERED.

ACTING COMMISSIONER OF EDUCATION

Date of Decision: June 27, 2023
Date of Mailing: June 28, 2023

State of New Jersey
OFFICE OF ADMINISTRATIVE LAW

ORDER DENYING
EMERGENT RELIEF
OAL DKT. NO. EDU 03426-23
AGENCY DKT. NO. 110-4/23

D.P. ON BEHALF OF MINOR CHILD, D.V.P.,
Petitioner,
v.
BOARD OF EDUCATION OF THE BOROUGH OF NORTH ARLINGTON, BERGEN COUNTY
Respondent.

Stephen J. Edelstein, Esq., for petitioner (Weiner Law Group, LLP, attorneys)

Eric Harrison, Esq., for respondent (Methfessel & Werbel, PC, attorneys)

Record Closed: May 8, 2023 Decided: May 23, 2023

BEFORE **WILLIAM J. COURTNEY, ALJ:**

STATEMENT OF THE CASE

Petitioner, D.P., seeks emergent temporary relief on behalf of her son D.V.P. compelling respondent to take all steps necessary to protect D.V.P. from harassment, intimidation, and bullying ("HIB") including removing four of his classmates from all

classes that D.V.P. attends for the remainder of the school year. Petitioner alleges that respondent violated The Anti-Bullying Bill of Rights Act, N.J.S.A. 18A:37-1 et seq., and Board Policy #5512 titled, "Harassment, Intimidation and Bullying" by failing to open an HIB investigation or taking any other actions to protect D.V.P. from ongoing harassment, intimidation, and bullying. Petitioner claims that there is a reasonable likelihood that D.V.P. will suffer immediate and irreparable harm if the requested Emergent Relief is not granted.

PROCEDURAL HISTORY

Petitioner filed a Verified Petition of Appeal on April 25, 2023 seeking Emergent Relief to protect her minor child, who is an eight-grade student within the North Arlington School District ("District") from ongoing harassment, intimidation, and bullying. On April 28, 2023, respondent filed a Verified Answer along with opposition to the Motion for Emergent Relief and a Cross-Motion to Dismiss petitioner's appeal, without prejudice. The request for Emergent Relief and Motion to Dismiss was transmitted to the Office of Administrative Law by the New Jersey Department of Education for consideration. The parties' written submissions were considered followed by oral argument of counsel beginning on May 1, 2023 and continuing, at the request of counsel, on May 8, 2023. The record was closed on May 8, 2023 after the oral arguments were presented.

LEGAL ANALYISIS

A: RESPONDENT'S CROSS-MOTION TO DISMISS

Respondent's Cross-Motion can be broken into two distinct arguments. The first argument is that this tribunal lacks jurisdiction to hear this matter because petitioner failed to exhaust her administrative remedies prior to filing a petition of appeal with the Commissioner of Education . The second argument is that petitioner's claims against four school employees (Yurchak, Russo, Kenny and Keim) and four of D.V.P.'s fellow classmates (L.M., J.R., V.H. and E.Z.) must be dismissed with prejudice because the Anti-

Bullying Bill of Rights Act, N.J.S.A. 18A:37-1 et. seq., does not permit a direct action against a school employee or other students.

THE JURISDICTION ISSUE:

In its opposition to the petitioner's Verified Petition of Appeal and Motion for Emergent Relief, respondent asserts that this tribunal lacks jurisdiction to hear the Appeal to the Commissioner of Education. In support of its position, respondent interprets N.J.A.C. 6A:16-7.7 (a)(2)(ix)(1)(A) as requiring an aggrieved student or parent to first exhaust administrative remedies by seeking a hearing before the board of education before appealing to the Commissioner of education. What the regulation actually states however is that an aggrieved party "may" appeal to the district board of education and not that such party "must" appeal to the district board of education prior to appealing to the Commissioner.

As petitioner points out in her Reply Brief, this issue was addressed by Acting Commissioner McMillan in her June 23, 2022 Final Decision in R.C and B.C. on behalf of A.C. v. Bd. of Ed. of the Twp. of Galloway. In that decision, the Commissioner notes:

> ... a party challenging a board's HIB decision is not required to request and participate in a hearing before the board of education prior to filing a petition of appeal with the Commissioner. N.J.S.A.18A:37-15(6)(d) provides that a parent *may* request a hearing, but nothing in the Anti-Bullying Bill of Rights Act requires a board hearing. Accordingly, the ALJ's conclusion that the petitioners failed to exhaust administrative remedies is incorrect.

The Commissioner, however, citing N.J.S.A. 18A:37-15(b)(6)(e) goes on to emphasize that "the Board of Education must have issued a decision affirming, rejecting, or modifying the Superintendent's decision for the matter to be ripe for review by the Commissioner, as it is the Board's decision - not the Superintendent's decision - that is appealable to the Commissioner" Id. at footnote 1.

It is unclear from the papers submitted or from oral arguments of counsel whether respondent, North Arlington Board of Education issued a decision in this matter. However, based upon respondent's admission of this tribunal's jurisdiction in paragraph 1 of its Verified Answer, Opposition to the Motion for Emergent Relief and Cross-Motion to Dismiss, I **FIND** that this Court has jurisdiction to hear and decide petitioner's Motion for Emergent Relief and **DENY** respondent's Cross-Motion to Dismiss. I **CONCLUDE**, however, that my denial of respondent's Cross Motion to Dismiss on jurisdictional grounds is without prejudice to respondent's right to renew said Motion if there is evidence that the North Arlington Board of Education did not issue a decision affirming, rejecting or modifying a decision of the Superintendent regarding the results of the investigation of petitioner's claims, services provided, training established, discipline imposed or other action taken or recommended. See, N.J.S.A. 18A:37-15(b)(6)(c)-(e).

CROSS MOTION TO DISMISS CLAIMS AGAINST SCHOOL EMPLOYEES AND STUDENTS

While there may indeed be some merit to respondent's Cross Motion concerning the applicability of N.J.S.A. 18A:37-1 et seq. to individuals such as school employees and students, this Motion is inappropriate at this time. Petitioner's application for Emergent Relief is being heard on an expedited basis because it is alleged that irreparable harm will result if this matter is not resolved. The same cannot be said for respondent's Cross Motion. This tribunal is without sufficient information at this time to decide these aspects of respondent's Cross Motion and will decide these Motions if and when they are sufficiently briefed, and appropriate factual determinations can be made. Accordingly, these aspects of respondent's Cross Motion are **DENIED**, without prejudice.

B. PETITIONER'S APPLICATION FOR EMERGENT RELIEF

1. Standard for Emergent Relief

A litigant seeking emergent relief must comply with the requirement of N.J.A.C. 6A:3-1.6 which provides, in relevant part:

> (B) a motion for a stay or emergent relief shall be accompanied by a letter memorandum or brief which shall address the following standards to be met for granting such relief pursuant to Crowe v. DeGioia, 90 N.J. 126 (1982):
>
> 1. The petitioner will suffer irreparable harm if the requested relief is not granted;
> 2. The legal right underlying petitioner's claim is settled;
> 3. The petitioner has a likelihood of prevailing on the merits the underlying claim;
> 4. When the equities and interests of the parties are balanced, the petitioner will suffer greater harm than the respondent will suffer if the requested relief is not granted.

I agree with respondent's argument that it is the petitioner's burden to demonstrate a clear right to Emergent Relief by addressing these components of Emergent Relief (See, e.g., Hamilton Twp. Bd. of Educ. V. L.E. and A.E. o/b/o J.E., OAL Dkt. No. EDS 14744-18 (N.J. Adm. Oct. 2022, 2-18), and I also agree with respondent's contention that petitioner has failed to do so. I **FIND** that petitioner has failed to satisfy all four of the required standards necessary for Emergent Relief to be granted.

The petitioner maintains that the district has done "absolutely nothing" to stop ongoing harassment, intimidation and bullying of her son by other students. She claims that four students that she has identified in her Verified Petition of Appeal have, over the past two years, sexually harassed D.V.P., called him names and physically assaulted him

by slapping him in the chest, legs, and buttocks all because of a distinguishing characteristic, his size and weight. Most recently, D.V.P. was shot by one of the four identified students with a rubber band from a rubber band gun causing injury to his eye. Petitioner claims that when the child who shot the rubber band was disciplined, the three other students subjected D.V.P. to more harassment in the form of retaliation.

The primary support of petitioner's claim that Emergent Relief is necessary is laid out in an April 5, 2023 letter from petitioner's attorney (Mark A. Tabakin, Esq.) to Stephen Yurchak, Superintendent of the North Arlington Board of Education. The letter details a history of complaints by petitioner to the district concerning the treatment of her son along with sweeping allegations that no action was taken or being taken to ensure D.V.P.'s safety.

Respondent denies not taking action in response to concerns raised by petitioner about how D.V.P. was being treated by his classmates in the past and/or present. In support of its denial, respondent offers an April 6, 2022 letter from Principal Nicole Cambell Russo ("Russo Letter") to petitioner. The Russo letter is in response to a voicemail message left by petitioner on the school's attendance line, the day after her lawyer wrote to Superintendent Yurchak.[1] The Russo Letter documents that actions were taken in response to petitioner's concerns and that the district was willing to meet with petitioner and/or her attorney as soon as the following day to discuss her concerns regarding her son's safety. While petitioner relies heavily upon Superintendent Yurchak's failure to respond to an email as evidence of the lack of concern for D.V.P.'s safety, she provides no reason why she did not respond to Ms. Russo's offer to meet with her and her attorney to discuss her concerns the day after her attorney sent his letter complaint regarding the same alleged safety concerns. The Russo Letter stated:

[1] The letter written by petitioner 's attorney on April 5, 2023 was sent via email only to Superintendent Yurchak. The email was not responded to by the Superintendent or anyone else because it was directed to the Superintendent's spam folder. Accordingly, no one was aware that a letter had been sent until the Verified Petition of Appeal was filed accusing the Superintendent of ignoring the letter.

> While we are always willing to meet with parents to discuss concerns regarding their children's education, we do not believe that an unsafe situation exists at [the school for D.V.P.] or any other student. The Administration has addressed every concern that has been raised related to [D.V.P.], and we see no reason why he cannot attend school. [D.V.P.'s] teachers have been instructed to be alert for any issues with [D.V.P.], and we have implemented measures to eliminate unstructured interactions between [D.V.P.] and the students who have been identified in previous complaints. Steps will prevent any issues from occurring and allow [D.V.P.] to attend school in a safe and secure learning environment.

The letter went on to specifically offer petitioner and her attorney an immediate opportunity to meet to discuss her concerns.

> Should you be in the area tomorrow, we can arrange a time to meet in my office to discuss your concerns. However, if you insist on meeting with your attorney present, please provide some dates and times that you and your attorney are available so I can ensure that the district's attorney is also available to be present at the meeting.

There is no indication in the record that petitioner took any action to respond to Ms. Russo's offer to meet with her and/or her attorney and discuss her concerns.

Respondent denies petitioner's allegation that D.V.P. has been the victim of a sustained pattern of harassment, intimidation, and bullying ("HIB") throughout much of the past two years. In its Verified Answer, the district indicated that,

> [O]n a grand total of approximately four occasions over the past two years, D.V.P.'s mother has complained that he has been mistreated by fellow students. All of these complaints were addressed appropriately, though not all were treated as instances of alleged harassment, intimidation and bullying due to the absence of a complaint or evidence that the offending students was motivated by a real or perceived characteristic of D.V.P.

[Verified Answer (R-1) at ¶ 11]

On one of those four occasions, D.V.P.'s mother called to report that D.V.P.'s brother was struck by another student at a recreational football game after school. D.V.P.'s mother expressed concern that D.V.P. might be harassed by the fellow students who had punched his brother and/or one of that student's friends. The classroom teacher and counselor monitored the situation and D.V.P. reported that he was not harassed by these students. (R-1 at ¶ 11).

Most recently, in March of 2023, when D.V.P. was struck by a rubber band, the student who shot the rubber band was, according to respondent, appropriately suspended for two days for a Code of Conduct violation. The incident was not investigated as an HIB event because there was no evidence (or complaint by D.V.P.) at the time that the misconduct was motivated by a real or perceived characteristic[2]. Petitioner did not object to the absence of an HIB investigation, or to how the incident was resolved. Id.

When petitioner reported the alleged retaliation against D.V.P. after the student was disciplined for shooting the rubber band, the school investigated the retaliation claims and disciplined the offending students. Additionally, Principal Russo worked with the guidance counselor to arrange different travel routes between classes to guard against further contact between D.V.P. and the students at issue. The district also asserts in the Verified Answer that when Principal Russo met with D.V.P. and his mother and the school nurse after the rubber band incident (and presumably after D.V.P. returned to school after the spring break), she asked D.V.P. whether any of these students continued to bother him and he responded" no". Id. at ¶13. The district also points out that D.V.P. returned to school after spring break (on or about April 17th) without incident. Id. at ¶ 17.

[2] Respondent did advise the tribunal during a telephone conference that after receiving the Verified Petition of Appeal and learning of the allegations that the rubber band incident is now claimed to have motivated by a real or perceived characteristic of D.V.P., a HIB investigation has been initiated.

Finally, the district provided copies of handwritten notes from the school nurse (Addison Keim) who was speaking with petitioner and D.V.P. at or around the time of the alleged retaliation. The note from April 4, 2023 documents a conversation with petitioner concerning the rubber band incident. Ms. Keim reports that the petitioner indicated that she was surprised that there was no HIB investigation because the incident involved a student who called D.V.P. names. Ms. Keim informed petitioner that the matter was handled as a Code of Conduct violation and that it had never been reported that the other students called D.V.P. names. When petitioner was asked specifically what was said to her son, she responded "I would have to ask [D.V.P.]". R-1 at p.18. After speaking with petitioner, Ms. Keim spoke with D.V.P. and informed him that she had reached out to all teachers to keep an eye on the situation and asked him to let her know if anything else happened. There was nothing contained in Ms. Keim's notes that would indicate that anyone called D.V.P. names at the time of the rubber band incident, and she specifically noted that "D.V.P. did not report feeling unsafe at school". R-1, p.19.

(A) IRREPARABLE HARM

Based upon the facts presented I cannot **FIND** that D.V.P. will suffer irreparable harm in the event Emergent Relief is not granted. While petitioner alleges that she unilaterally removed her son from school for safety reasons two days before spring break, she also returned him back to school after the break and he has been attending classes for more than a month without incident. Shortly after the rubber band incident, D.V.P. spoke with the school counselor and did not report that he was feeling unsafe.

The school Principal, Ms. Russo also indicated in a letter to petitioner dated April 6, 2023 that the district had implemented measures to ensure D.V.P.'s safety, such as instructing his teachers to be alert of any issues concerning D.V.P. and limiting his interactions with students identified in petitioner's complaints. This tribunal has also been informed that the district has now opened an HIB investigation, after the filing of this

Motion for Emergent Relief, concerning petitioner's claim in the Verified Complaint that comments concerning her son's weight were made while the alleged HIB was taking place.

Given that the district has taken actions to protect D.V.P. and those actions appear to be working, I **CONCLUDE** that it is unlikely that immediate irreputable harm is likely to occur if relief is not granted.

(B) THE LEGAL RIGHT UNDERLYING PETITIONER'S CLAIM

It is undisputed that D.V.P. has a legal right to a HIB-free school environment. I **FIND,** however, that actions being taken by the district during the pendency of this litigation to protect that right are sufficient.

(C) THE LIKELIHOOD THAT PETITIONER WILL PREVAIL ON THE MERITS OF THE CLAIM

While I believe that there is some evidence that petitioner may have suffered harassment, Intimidation and or bullying, I cannot **FIND**, at this stage of the litigation, that there is a likelihood that petitioner will prevail on the merits of such a claim. Given the facts presented in support and opposition to this Motion for Emergent Relief, it is evident that more discovery needs to be conducted in order to make any type of prediction as to who might ultimately prevail on the merits of the claims being made.

(D) BALANCING OF THE EQUITIES

After considering all of the facts presented, I do not **FIND** that the petitioner will suffer greater harm than respondent if the requested relief is not granted. Petitioner is asking this Court to remove students from D.V.P.'s classrooms, which will undoubtedly have a substantial impact on the students being removed. The facts presented to this tribunal indicate that since the school implemented measures to address petitioner's

concerns, there have been no further HIB incidents. Accordingly, there does not appear to be any indication that petitioner will suffer greater harm than respondent if the other children are not removed from D.V.P.'s classes.

Regarding the remaining relief sought by petitioner, a balancing of the equites does not weigh in petitioner's favor. Petitioner asks this tribunal to direct the school district to take all steps necessary to protect D.V.P. from ongoing HIB and to prevent the situation from getting worse. The district is already required pursuant to N.J.S.A. 18A:37-1 et seq. and District Policy 5512 to protect D.V.P. from HIB. Moreover, I **FIND** that the district has taken actions to protect D.V.P. from ongoing HIB and that those actions appear to be working.

CONCLUSION

Based on the forgoing, I **CONCLUDE** that petitioner has not sustained her burden to demonstrate a clear right to the Emergent Relief requested and therefore,

It is on this 23rd day of May, **ORDERED**:

1. That petitioner's application for emergent relief be and hereby is **DENIED**;
2. That respondent's Motion to Dismiss petitioner's claims for failing to exhaust administrative remedies be and hereby is **DENIED,** without prejudice; and
3. That respondent's Motion to Dismiss petitioner's claims against school employees and students is **DENIED**, without prejudice.

The parties have advised me that no other issues remain that need to be addressed once the emergent relief issue is resolved.

This Order on application for emergency relief may be adopted, modified or rejected by the **COMMISSIONER OF THE DEPARTMENT OF EDUCATION**, who/which by law is authorized to make a final decision in this matter. The final decision shall be

issued without undue delay but no later than forty-five days following the entry of this order. If the **COMMISSIONER OF THE DEPARTMENT OF EDUCATION** does not adopt, modify or reject this order within forty-five days, this recommended order shall become a final decision on the issue of emergent relief in accordance with N.J.S.A. 52:14B-10.

May 24, 2023

DATE

WILLIAM COURTNEY, ALJ

Date Received at Agency May 24, 2023

Date Mailed to Parties: May 24, 2023

sej

APPENDIX

EXHIBITS:

For Petitioners:

P-1 Verified Petition of Appeal

For Respondent:

R-1 Verified Answer, Opposition to Motion for Emergent Relief and Cross-Motion to Dismiss

STATE OF NEW JERSEY DEPARTMENT OF EDUCATION

----------X

In the Matter of Tenure Hearing
of Jeffrey Silberman, School District of
the Borough of Ridgefield,
Bergen County.

Agency Docket No. 234-9/22

OPINION AND AWARD

Issued: July 5, 2023

----------X

Arbitrator
Joseph Licata, Esq.

For The Petitioner
Frances L. Febres, Esq.
Cleary, Giacobbe, Alfieri, Jacobs, LLC

For The Respondent
Ronald J. Ricci, Esq.
Ricci and Fava, L.L.C.

INTRODUCTION

On September 8, 2022, Petitioner, Ridgefield Board of Education filed with the New Jersey Commissioner of Education a Statement of Tenure Charges and Statement of Evidence Under Oath, with supporting documents and Certification Supporting the Charges. Petitioner's filing included Respondent, Jeffrey Silberman's response to the Charges and a summary of anticipated witnesses and their testimony. The Sworn Tenure Charges, which define the permissible scope of this proceeding, state verbatim as follows:

Facts Common To All Charges

1. Jeffrey Silberman, has been employed by the Board as a Technology Teacher since September 1, 2003. As a member of the teaching staff, teachers at all times are expected to conduct themselves in a professional manner, in accordance with the law, District policies, regulations and provisions; and to exhibit high standards of behavior, integrity, and sound judgment, as well as to refrain from inappropriate behavior with students. In turn, Mr. Silberman is to maintain a high degree of self-restraint, composure, and controlled behavior in the classroom and especially serving students.

2. Board Policy 3281, Inappropriate Staff Conduct, states in relevant part:

> The Board recognizes there exists a professional responsibility for all school staff to protect a student's health, safety, and welfare. The Board strongly believes that school staff members have the public's trust and confidence to protect the well-being of all pupils attending the school district.
>
> In support of the Board's strong commitment to the public's trust and confidence of school staff, the Board of Education holds all school staff to the highest level of professional responsibility in their conduct with all pupils. Inappropriate conduct and conduct unbecoming a school staff member will not be tolerated in this school district.
>
> The Board recognizes and appreciates the staff-pupil professional relationship that exists in a school district's educational environment. This Policy has been developed and adopted by this Board to provide guidance and direction to avoid actual and/or the appearance of inappropriate staff conduct and conduct unbecoming a school staff member toward pupils.
>
> School staff's conduct in completing their professional responsibilities shall be appropriate at all times. School staff shall not make inappropriate comments to pupils or about pupils and shall not engage in inappropriate language or expression in the presence of pupils. School staff shall not engage in inappropriate conduct toward or with pupils.
>
> A school staff member is always expected to maintain a professional relationship with pupils and to protect the health, safety, and welfare of school pupils. A staff member's conduct will be held to the professional standards established by the New Jersey State Board of Education and the New Jersey Commissioner of Education. Inappropriate conduct or conduct unbecoming a staff member may also include conduct not specifically listed in this Policy, but conduct determined by the New Jersey State Board of Education, the New Jersey Commissioner of Education, an arbitration process, and/or appropriate courts to be inappropriate or conduct unbecoming a school staff member.

3. Mr. Silberman's Employment Contract dated August 27, 2003 states that he "accepts the employment aforesaid and agrees faithfully to do and perform duties under the employment aforesaid and to observe and enforce the rules prescribed for the government of the school by the Board of Education." See Dr. Pantoliano's Statement of Evidence, **Exhibit B** (J. Silberman Employment Contract, September 2003).

4. Mr. Silberman's Employment Contract dated July 12, 2021, for the 2021-2022 school year, similarly states that he "accepts the employment aforesaid and agrees faithfully to do

and perform duties under the employment aforesaid and to observe and enforce the rules prescribed for the government of the school by the Board of Education." See Dr. Pantoliano's Statement of Evidence, **Exhibit C** (J. Silberman Employment Contract, July 2021).

5. Jeffrey Silberman is a tenured teacher with the District with over 19 years of employment with Ridgefield Public Schools.

6. He currently holds certifications as an Elementary School Teacher, Teacher of Business Administration/Office Systems Technology, Teacher of Business: Finance/Economics/Law, Teacher of Business: Keyboarding and Data Entry.

7. Despite his acknowledged duty to comply with Board Policy and faithfully perform the duties of his position, that require him to support, engage, motivate and protect the students in his care, on at least three occasions, Mr. Silberman displayed anger and frustration towards students, which manifested in inappropriate physical contact with students.

8. He has received reprimands for his conduct towards students in the past, however, his conduct persists despite interventions and reminders of the expectations for his position. The care and protection of students is one of the Board's most important responsibilities, and as such, Mr. Silberman's uncorrected pattern of conduct cannot be tolerated. The Board must be proactive in ensuring its students' protection and well-being; the Commissioner of Education should similarly place the care and well-being of students ahead of an adult, especially where Mr. Silberman has had several opportunities to correct his behavior but has shown an inability and failure to do so.

9. On November 14, 2007, Mr. Silberman received a ranking of "needs improvement" in the Learning Environment and Teacher/Student Interaction domains for the following categories: 1) creating and environment of respect and rapport; 2) treating students in a fair and consistent manner, 3) establishing an atmosphere of cooperation, mutual respect and concern, and 4) creating a learning environment in which others feel free to express themselves respectfully." See Dr. Pantoliano's Statement of Evidence, **Exhibit D** (November 14, 2007 Observation Report).

10. On May 1, 2015, then-Vice-Principal Gerard Angelo Bellizzi notified the principal of an incident that occurred during his second period Digital Photography class. The details of the events were summarized in a correspondence dated May 4, 2015. See Dr. Pantoliano's Statement of Evidence, **Exhibit E** (Correspondence dated May 4, 2015 from Principal John W. Coviello to Jeffrey Silberman).

11. In that correspondence, then-Principal John W. Coviello wrote to Mr. Silberman about an incident where a student made a claim that Mr. Silberman became angry and kicked his chair in order to have him comply with the teacher's directive to speak to him outside of the classroom. It was reported that the student became visibly upset and described that Mr. Silberman kicked the student's chair. See Dr. Pantoliano's Statement of Evidence, **Exhibit E** (Correspondence dated May 4, 2015 from Principal John W. Coviello to Jeffrey Silberman).

12. Similarly, and most recently, Mr. Silberman has displayed anger yet again towards two students in his technology class, which resulted in physical harm inflicted upon one of the students.

13. The most recent events giving rise to these tenure charges all relate to Mr. Silberman's conduct on or about April 27, 2022, during a lockdown drill that occurred in class. I memorialized my understanding of the events to Mr. Silberman in correspondence dated June 16,

2022. In that correspondence, I indicated that two students from the same class reported that, during or around the time of the lockdown drill, Mr. Silberman made inappropriate physical contact with them. One student reported that he was forcibly pulled out of his chair, with such force that a bruise was left on the student's arm. The other student reported that Mr. Silberman slapped his hand and pulled his hand off the computer mouse. See Dr. Pantoliano's Statement of Evidence, **Exhibit F** (Correspondence dated June 16, 2022 from Dr. Letizia Pantoliano to Mr. Silberman).

14. On April 28, 2022, Principal Timothy Yang had a parent meeting with the parents of two students from Mr. Silberman's technology class.

15. One student's parents lodged a formal complaint against Mr. Silberman on behalf of their son, a fifth grader.

16. The student was called into Mr. Yang's office and asked to describe the incident that took place on April 27, 2022. According to the student, during a lockdown drill on April 27, 2022, every student was told to be quiet. The student moved his chair back which made a loud squeaking noise. The student reported that Mr. Silberman came behind him and grabbed him by his upper left arm and ushered him forcibly up and moved his chair. Mr. Silberman made the student stand during the duration of the drill. See Dr. Pantoliano's Statement of Evidence, Exhibit G, (Slocum Skewes School Investigation Summary Report).

17. At the meeting, there was no bruise or laceration visible on the student's arm. However, the next day, on Friday, April 29, 2022, the student's parents returned to meet with Mr. Yang and showed there was a visible bruise consistent with Mr. Silberman's grabbing of the student's arm on April 27, 2022. See **Exhibit G**.

18. Thereafter, the student was sent to the nurse's office who confirmed that the student had an oval-shaped bruise consistent with the incident. See **Exhibit G**, photos of student's visible bruise on arm, attached to exhibit.

19. After meeting with the first student's parents, another student's father had a meeting with Mr. Yang and former Assistant Principal Lauretta Allen.

20. The second student's father also lodged a formal complaint against Mr. Silberman.

21. The second student was called into Mr. Yang's office and described that during the lockdown drill, as he was using his mouse, Mr. Silberman slapped the student's hand and pulled his hand off the mouse. Mr. Silberman said to the student, "Why are you clicking so loudly? I'll see you in detention." See **Exhibit G**.

22. The second student told Mr. Yang that Mr. Silberman has a short fuse and is not a nice man. See **Exhibit G**.

23. Other students were interviewed as part of the administrative investigation.

24. Eight students observed and made statements that Mr. Silberman touched/hit/slapped the student's hand and moved it from the placement of the mouse. See **Exhibit G**.

25. Four students observed and made statements that Mr. Silberman "threw" another student's hooded sweatshirt onto another table. See **Exhibit G**.

26. Fourteen students observed and made statements that Mr. Silberman grabbed/touched the student's arm and lifted him from the chair. See **Exhibit G**.

27. Fourteen students observed and made statements that Mr. Silberman moved the student's chair. See **Exhibit G**.

28. During the investigation, Mr. Silberman claimed that he pulled the one student out of his chair because he had lifted two feet off the ground, however, fourteen students contradicted Mr. Silberman's account. See **Exhibit F**.

29. Mr. Silberman alleged that he was concerned for the student's safety and grabbed the back of the chair and the student, holding him up so he wouldn't fall. All students who observed the incident with Mr. Silberman and the student were asked if the student moved his chair or was leaning back on his chair. All students report that the student moved his chair. See **Exhibit G**.

30. The Department of Children and Families Institutional Abuse Investigation Unit ("IAIU") conducted an investigation after the incident and the findings were consistent with the administrative investigation. See Dr. Pantoliano' s Statement of Evidence, (Redacted IAIU Findings dated June 27, 2022) **Exhibit H**.

31. Pursuant to N.J.S.A. 9:6-8.11, the Department of Children and Families, IAIU generally conducts investigations into the allegations of abuse and neglect occurring in various out-of-home settings.

32. On or about April 29, 2022, the school nurse examined a student who alleged he was injured as a result of Mr. Silberman's actions. See **Exhibit G**, photos of student's visible bruise on arm, attached to exhibit.

33. On June 27, 2022, the IAIU submitted a findings report where they concluded: "IAIU has determined, in accordance with N.J.S.A. 9:6-8.21 that the child was not abused by Teacher Jeffrey M. Silberman. However, some information indicates that the child was harmed or placed at risk of harm." See Dr. Pantoliano's Statement of Evidence, **Exhibit H**, (Redacted IAIU Findings dated June 27, 2022).

34. This evidence that the child was harmed or placed at risk of harm is sufficient for a recommendation that the Board consider tenure charges for dismissal against Mr. Silberman, especially considering that Mr. Silberman has created a practice of inappropriate and reckless conduct with students that cannot be tolerated.

35. It is clear that Mr. Silberman disregarded the professional obligations imposed on him as a member of the professional teaching staff and has engaged in a pattern of conduct that demonstrates that he is not fit to perform the duties as a public school educator and an employee of the District.

36. Mr. Silberman cannot return to the classroom with the chance that he will continue to conduct himself in the manner described and harm another student.

37. Each child who comes to the school should feel a level of comfort where they feel safe from harm, especially in the supervision of teaching staff. The safety of every student is the school's priority and a teacher who digresses from this priority should be immediately removed from the classroom setting. School boards cannot take chances with students' safety, nor should

the Commissioner of Education risk students' safety by allowing Mr. Silberman's return to the classroom.

CHARGE ONE

NEGLECT OF DUTY: VIOLATION OF BOARD POLICIES

38. The facts set forth above are hereby repeated and incorporated herein by reference.

39. Mr. Silberman, on at least three occasions, was reminded of his obligation to adhere to District policy and protocols.

40. On at least one occasion during the 2007 school year, Mr. Silberman was advised of the Board's concerns with his conduct and rapport with the students.

41. In 2015 and again in 2022, Mr. Silberman violated District Policy 3217 by his use of force or fear in the treatment of pupils in his classroom.

42. District Policy 3217 – Use of Corporal Punishment provides that "[t]he Board of Education cannot condone an employee's resort to force or fear in the treatment of pupils, even those pupils whose conduct appears to be open defiance of authority. Each pupil is protected by law from bodily harm and from offensive bodily touching. See Dr. Pantoliano's Statement of Evidence, **Exhibit I** (District Policy 3217).

43. District Policy 3217 also provides:

> Teaching staff members shall not use physical force or the threat of physical force to maintain discipline or compel obedience except as permitted by law, but may remove pupils from the classroom or school by the lawful procedures established for the suspension and expulsion of pupils.

44. A teaching staff member who 2) touches a pupil in an offensive way even though no physical harm is intended and . . . 4) punishes pupils by means that are cruel or unusual will be subject to discipline by this Board and may be dismissed. See Dr. Pantoliano's Statement of Evidence, **Exhibit I**.

45. Back in May 2015, the Board addressed concerns when Mr. Silberman first kicked a student's chair as a response to a student's defiance and insubordination. Mr. Silberman's response by kicking the student's chair is a violation of District Policy 3217. See **Exhibit E**.

46. Silberman was interviewed by then-Vice Principal Angelo Bellizzi and REA Representative Lauren Lavelle. When asked about your conduct in 2015, you stated that the student was not completing his assigned work. You also noted that the physical contact with the chair was meant "to get [the student's] attention" and move the chair out the way because you were in a hurry to speak with him in order to remove the situation from your classroom. See **Exhibit E**.

47. Eight students were also interviewed as part of the May 2015 investigation. They noted that they witnessed Mr. Silberman kick the student's chair and the students all expressed concern when they observed Mr. Silberman's physical contact with the student's chair.

48. Kicking the student's chair, as a response to the student's defiance, is a direct violation of District Policy 3217.

49. Mr. Silberman's conduct in April 2022 led to physical harm to a student. This conduct is unacceptable and as stated in District Policy 3217 will lead to discipline and dismissal from the Board.

50. Mr. Silberman also failed to adhere to District Policy 3281. Mr. Silberman's actions run afoul of the Board's strong commitment to the public's trust and confidence of school staff and the protection of all pupils attending the school district.

51. Mr. Silberman's displays of anger and physical aggression towards students in his classroom does not provide for a healthy, safe educational environment for students.

52. Although the of the April 27, 2022 IAIU investigation related to Mr. Silberman's interaction with one student, the IAIU's findings revealed that Mr. Silberman placed students in harm.

53. During the District's investigation of the incident of April 27, 2022, two students also reported that Mr. Silberman made inappropriate physical contact with them. See Dr. Pantoliano's Statement of Evidence, **Exhibit F**.

54. When interviewed as part of the investigation, Mr. Silberman denied that he inappropriately touched students. Instead, he claimed that he was demonstrating the proper position of a hand on the computer mouse. Yet eight other students contradicted his account of the events in his classroom. See **Exhibit F**.

55. Accordingly, Mr. Silberman's conduct is not simply a result of an isolated incident or circumstance involving a de-escalation event requiring Mr. Silberman to make physical contact with students. Rather, Mr. Silberman has a pattern of displaying anger and frustration towards his students in an aggressive manner.

56. As explained herein, District Policy 3281 was violated on numerous occasions. See **Exhibit A**.

57. District Policy 3281 provides that [t]he Board recognizes there exists a professional responsibility for all school staff to protect a student's health, safety, and welfare. The Board strongly believes that school staff members have the public's trust and confidence to protect the well-being of all pupils attending the school district. See **Exhibit A**.

58. In support of the Board's strong commitment to the public's trust and confidence of school staff, the Board of Education holds all school staff to the highest level of professional responsibility in their conduct with all pupils. Inappropriate conduct and conduct unbecoming a school staff member will not be tolerated in this school district. See **Exhibit A**.

59. Mr. Silberman has created a classroom environment where students do not feel safe or supported by him.

60. As a result, the next necessary step is to dismiss Mr. Silberman from employment with the Board.

CHARGE TWO

CONDUCT UNBECOMING: CREATING A RISK OF HARM TO STUDENTS

61. The facts set forth above are hereby repeated and incorporates herein by reference.

62. Mr. Silberman's physical contact with students in the manner reported by students and observed by other teaching staff demonstrates that he creates has created a risk of harm to students.

63. Mr. Silberman creates a risk of harm to students both physically and emotionally.

64. During the 2015 incident, students had expressed "genuine concern" when they observed Mr. Silberman kick a student's chair. See **Exhibit E**.

65. Additionally, both the students involved and the witnesses to the 2015 incident were reported to be "disturbed to varying degrees." See **Exhibit E**.

66. Mr. Silberman's behavior has been a concern to the Board and other administrative staff over the course of his time at the District.

67. Principal John W. Coviello warned Mr. Silberman that any subsequent actions involving physical contact with students may result in further discipline. See **Exhibit E**.

68. As noted in the June 16, 2022 correspondence to Mr. Silberman, this was not the first time that his anger and inappropriate physical conduct, creating a risk of harm to students, had been addressed. See **Exhibit F**.

69. It is well-established that the New Jersey Commissioner of Education recognizes that a pattern of conduct may constitute unbecoming conduct.

70. The course of misconduct set forth herein constitutes a pattern of conduct unbecoming a teaching staff member.

CHARGE THREE

OTHER JUST CAUSE: ABUSE OF POWER

71. The facts set forth above are hereby repeated and incorporated herein by reference.

72. The aforementioned misconduct of Mr. Silberman has occurred over multiple occasions over an extended period of time. As noted by reference to his actions in 2007, 2015, and 2022, this most recent event was not an isolated incident of poor judgment or a mistake, rather, it was yet another example of Mr. Silberman's abuse of power and inability to exercise self-control or restraint, to the danger of the students in his care.

73. Mr. Silberman engaged in unprofessional conduct and failed to properly discharge his responsibility for the supervision of pupils with the highest level of care and prudent conduct which resulted in a neglect of his duties and a violation of District policies as well as the standards of professional conduct.

74. For all the reasons set forth herein, Mr. Silberman's actions demonstrate that he is no longer able to perform the duties as a school teacher and dismissal is warranted.

On September 9, 2022, Respondent filed an Answer with the Commissioner.

On September 12, 2022, the Director, Office of Dispute and Controversies deemed the Tenure Charges, if true to be sufficient to warrant dismissal or other lower-level penalties and assigned Arbitrator Jay Goldstein to hear and decide the dispute pursuant to N.J.S.A. 18A:6-16.

On September 22, 2022, Respondent, through Counsel, filed a "Motion to Bar" certain documents and testimony from being admitted into the arbitration record. Petitioner filed an opposition brief on September 30, 2022. Respondent filed a reply brief on October 3, 2022.

However, after Arbitrator Goldstein informed Counsel that he would defer ruling on Respondent's motion until Petitioner attempted to introduce the evidence at arbitration and Respondent raised an objection, he returned the file to the Office of Bureau and Controversies and removed himself from the matter. Thereafter, on December 28, 2022, the Director assigned the undersigned Arbitrator to hear and decide the dispute pursuant to N.J.S.A. 18A:6-16.

In advance of the first day of hearing, I decided Respondent's motion on January 30, 2023, and filed the decision with the Director of the Bureau of Controversies and Disputes, Office of the Commissioner, New Jersey Department of Education. The January 30, 2023 motion decision is incorporated herein by reference. Subsequently, hearings were held on February 23, 27 and March 6, 2023. The proceedings were transcribed before a certified court reporter and both sides and the undersigned received the transcripts for use in this proceeding.

On February 23, 2023, Petitioner called as a witness, Ali Huda, a police officer employed by the Borough of Ridgefield, and father of M.H.. Huda testified that his son informed both him and his wife that Respondent grabbed M.H. by his arm out of a chair from a seated position and then made him stand for the remainder of a lockdown drill on April 27, 2022. It is alleged that Respondent believed that M.H. intentionally screeched his chair by moving backward on the floor during the lockdown drill. On the same day, Petitioner called as a witness, Timothy Yang,

Principal of Slocum Skewes School, who testified about his conversations with students M.H. and M.V., their parents and Respondent. On the same day, Petitioner called John Coviello. Coviello is the former Principal of Slocum Skewes School who testified about a letter of reprimand he issued to Respondent on May 4, 2015 for kicking the chair of a student.

On February 27, 2023, Petitioner called Hiyoung Kim, who is the school nurse at Slocum Skewes School. Ms. Kim examined M.H. on April 28, 2022, and then again on April 29, after being advised by M.H.'s parents that on the eve of April 28 they noticed a bruise on the inside of M.H.'s upper arm. Petitioner also called Domenico Vaccaro, the father of student M.V. Mr. Vaccaro testified that Respondent slapped M.V.'s hand, roughly pulled his hand off the computer mouse, and yelled at him for allegedly smacking the mouse down on the desk during the lockdown drill.

Petitioner next called Lauretta Allen, Vice Principal of Slocum Skewes School who testified that she overheard students talking about Respondent's actions during the lockdown drill and that she sat in and took notes of Principal Yang's interviews of the parents of M.H. and M.V. and M.V. Lastly, Petitioner called Dr. Letizia Pantoliano, Superintendent of Schools, who testified about her review of all the reports and notes gathered about Respondents' behaviors during the lockdown drill and the factors she took into consideration in recommending the filing of tenure charges to the Board of Education.

After the testimony of Dr. Pantoliano, Petitioner rested its case, at which time Respondent made a Motion for Directed Verdict (or judgement) due to the failure of Petitioner to introduce the testimony of any witness having firsthand knowledge of the events of April 27, 2022, and the alleged deprivation of Respondent's right to confrontation under the Sixth Amendment to the United States Constitution (to be discussed in more detail).

On March 6, 2023, Respondent called Darla Ferdinand, President of the Ridgefield Teacher's Association. Ms. Ferdinand testified that she began teaching the same year as Respondent, and has known him for the entirety of his career as a teacher as Slocum School. Ms. Ferdinand also testified that she accompanied Mr. Silberman to the investigatory meeting conducted by Principal Yang and Vice Principal Allen on April 28, 2022.

Lastly, Respondent testified on his own behalf.

The following exhibits were entered in the record:

Petitioner's Tenure Hearing Exhibits

P3 Police Report (A)

P3A Photograph 3289 (A)

P3B Photograph 3289(2) (A)

P4 E-mail dated May 3rd. (A)

P5 Students' Statements (A)

P6 Certification of T. Yang prepared by the district's attorney (A)

P7 John Coviello's Report (A)

P8 Instructions for Drill, Incident Procedure Sheet (A)

P9 Resume of Dr. L. Pantoliano (A)

P10 Agenda – Opening Day (A)

P11 Faculty Meeting Schedule (A)

P12 Letter of Reprimand (A)

P13 Inappropriate Staff Conduct Board Policy (A)

P14 Use of Corporal Punishment Board Policy (A)

P15 IAIU Findings (A)

P16 Tenure Charges (A)

P17 Statement of Evidence(A)

P18 Crisis Management Training Powerpoint (M)

Respondent's Tenure Hearing Exhibits

R2 Certification of Ali Huda (M)

R3 Photo of Technology Classroom

R4 Certification of T. Yang prepared by the district's attorney (M)

R5 Notes of L. Allen

R6 Evaluations

The parties filed post-hearing briefs whereupon the record was closed.

Finally, the undersigned's Opinion and Award is issued in accordance with N.J.S.A. 18A:6-17.1 and the American Arbitration Association Labor Arbitration Rules.

THE ISSUE

Did Petitioner have just cause to support the tenure charges for dismissal of Respondent, Jeffrey Silberman or, in the alternative only, to suspend him for six months without pay based upon his conduct during an April 27, 2022 active shooter lockdown drill?

FINDINGS

Respondent, Jeffrey Silberman is a tenured teacher with the District with over 19 years of employment with Ridgefield Public Schools. He currently holds certifications as an Elementary School Teacher, Teacher of Business Administration/Office Systems Technology, Teacher of Business: Finance/Economics/Law, Teacher of Business: Keyboarding and Data Entry. The only discipline on his record, albeit potentially significant in relation to this proceeding is the letter of reprimand issued on May 4, 2015 by former school principal John Coviello.[1]

[1] In the undersigned's January 30, 2023 decision on Respondent's Motion to Bar evidence, I held that the letter of reprimand may be relied on by either party to establish whether and to what extent the letter of reprimand placed Respondent on notice as to what conduct he must improve, and whether or not the notice provided is sufficient to have encompassed the alleged misconduct for which Respondent has been currently charged. Due to a lack of closure on the duration of the letter (related to Mr. Coviello's apparent failure to close it out before leaving the District), the weight to be accorded the letter is the same as one issued with an intent to remove it in two years. It cannot be deemed expunged, however, because the letter still remained in Respondent's file and any dispute over that fact should have been processed through the contractual grievance procedures.

Dr. Letizia Pantoliano, who has attained her doctorate in Educational Leadership from Columbia University in 2005, has been serving as the Interim Superintendent of Schools for the Ridgefield School District since 2020.

Dr. Pantoliano recommended to the Ridgefield Board of Education the filing of tenure charges against Respondent based on incidents transpiring on April 27, 2022 inside Respondent's computer and technology class/lab during an approximate five-minute, annual active shooter lockdown drill. Given the importance of the drill in this day and age, both staff and students are expected to take it seriously, i.e., as if it was the real thing. The Ridgefield Police Department had previously visited the school and provided a list of instructions for a Lock Down, dated November 21, 2018:

Lock Down

1. Announcement will be made over the public address system

   "Lock Down, Lock Down, Lock Down"

2. Quickly evaluate hallway are outside room door
3. Shelter any occupants in hallway near doorway inside room
4. Remove "Sorry-Pin" from door jam, confirm door is locked and close door
5. Place the door shade to the **DOWN** position
6. Quietly move items to block the interior doorway
7. Turn all room lights **OFF** and all computer monitors **OFF**
8. Move all occupants inside room to the **Hard Corner**
9. Turn all cell phones to **Silent** or **Vibrate**
10. Check attendance
11. Keep all occupants as quiet as possible

12. Prepare the "Shelter-In-Place" Bucket to be used

13. Wait for further instructions over public address system

14. Be prepared for Law Enforcement to enter the room utilizing the door key

If in a **LOCK DOWN** condition and the **FIRE ALARM** is activated, **Remain** in the **LOCK DOWN** until advised by Administration (Ex. P8).

Principal Timothy Yang testified that there is no specific policy in the Ridgefield School District regarding the technology lab procedure. Rather, the principal confirmed that Mr. Silberman was supposed to make his own lockdown drill because his classroom is different than other classrooms. Unlike other classrooms, Respondent's classroom is much larger and does not have a "hard corner" for students to take cover. Exhibit R3 is a color photograph of Respondent's classroom, which shows a line of desks to one side facing computer monitors and backed by a wall. Across the classroom are other student desks, observed not in a linear row but, rather, adjacent to one another on a 45-degree angle. At the bottom center of the photograph are monitors on top of Respondent's desk were he can see the entire classroom and monitor the work of students accordingly.

Although the tenure charges did not include criticism of Respondent's method of conducting an active shooter drill, Respondent testified that he has his students work quietly through the drill and some even wearing headphones. Regarding whether or not the students know they are supposed to be quiet, Principal Yang said he assumes they do. He indicated that lockdown drills are short, about five, ten minutes, so all of the facts related to this investigation would have occurred in that short period of a few minutes. Principal Yang testified, and common sense dictates, that students are to remain quiet during the active shooter lockdown drill. Since the events in question took place within the confines of the active shooter lockdown drill on April 27, 2022, it was a relatively short duration in which Respondent's alleged misconduct occurred.

Moving past the end of Respondent's class on April 27, 2022, at approximately 2:45 p.m., Vice Principal Lauretta Allen stood at the 5th grade door during dismissal and students approached her asking if she heard what happened. Principal Yang received an e-mail the night of the incident around 8:00 p.m. from Inase Mansour, mother of M.H. On April 28, 2022, parents of M.H. arrived to make a complaint against Respondent. The parents complained about Respondent's treatment of their son during the active shooter lockdown drill. During the April 28, 2022 meeting with the Huda family, Vice Principal Allen took notes. Mr. Huda testified that on April 27, 2022, M.H. came home from school and asked his dad, "If a teacher touches you inappropriately, can you sue?" Mr. Huda responded, "Well, depending on how he touched you. Please further elaborate what had happened... That's when he told me that his teacher grabbed him out of the chair without any due cause" (Tr. 1, p. 17).

During the meeting, Principal Yang and Vice Principal Allen called M.H. to join the meeting with the parents. M.H. explained that during the lockdown drill, M.H. moved his chair. Respondent became annoyed, grabbed M.H. by his arm, lifted him up, moved the chair, and placed him up against the wall to stand during the rest of the drill. Vice Principal Allen had M.H. demonstrate the incident on her, and show her from his point of view what happened. During the meeting with M.H. and his parents, Principal Yang asked Mr. Huda to inspect M.H. for any bruises or signs of injury. Mr. Huda, a police officer, checked his son for any signs in the presence of Principal Yang. There were no physical marks seen on M.H.

In Principal Yang's May 3, 2022 disposition of the investigation, based on Vice Principal Allen's notes primarily, Yang recorded the following statements from M.H.:

- During the lockdown drill about 2 pm on April 27, 2022, every student was told to be quiet.
- Mohamad moved his chair back which made a loud squeaking noise.

- According to Mohamad, Mr. Silberman came behind him and grabbed him by his upper left arm-ushered him "forcibly" up and moved his chair, and had him stand during the duration of the drill.
- According to Mohmad, Mr. Silberman didn't say a word or gave a warning.
- During the meeting, Ms. Allen and Mohamad re-enacted the incident in front of Mr. Yang and Mr. and Mrs. Huda.
- Mohamad demonstrated how he was grabbed on his arm ushered to stand and removed from the chair.
- During this meeting, Mohamad was checked by Mr. Huda to see if there were any bruises or lacerations to his arm. There were no visible marks during this meeting.

*****

In addition, Domenico Vaccaro, father of M.V., recalls going to the school on or about April 28, 2022 and speaking with Principal Yang about what happened to M.V. Mr. Vaccaro testified that he initially learned that there was a situation with M.V. and his teacher from his wife. He then went to meet with the Principal and he learned that there was a lockdown and the children were continuing their work and Mr. Silberman struck M.V. in his hand. Mr. Vaccaro testified that he reported the incident because "he struck my son."

However, Mr. Vaccaro conceded that he had never seen M.V.'s statement prior to his testimony. A part of M.V.'s statement was read to Mr. Vaccaro which stated that "[Mr. Silberman] randomly smacked my hand and roughly pulled my hand up," "then he yelled at me for smacking the mouse." Mr. Vaccaro did not recall M.V. saying that Mr. Silberman yelled at him when he first reported the incident to his parents. Rather, Mr. Vaccaro testified that M.V. said that M.V. told him Mr. Silberman approached him and said not to click his mouse.

Principal Yang called M.V. down to the office to provide his description of the incident. Principal Yang testified that M.V. said he was using his computer mouse loudly, then Mr.

Silberman slapped his arm and removed M.V.'s hand from the mouse, demonstrating on his father that Mr. Silberman placed his hand over M.V.'s hand. Yang brought his mouse over and M.V. demonstrated what happened using his father as himself in the demonstration. During the demonstration, it was noted that Respondent made contact with his hand that made a "pop". M.V. also demonstrated the forcefulness he experienced by using his father's hand.

In Principal Yang's May 3, 2022 disposition report, he more contemporaneously memorialized (as contrasted with his testimony) as to what M.V. and his father reported during the meeting with both himself and Vice Principal Allen.

On April 28, 2022, at 10:30 am, Mr. Vacarro had a meeting with Mr. Yang and Vice Principal Allen lodging a formal complaint against Mr. Silberman (Technology Teacher) on behalf of his son Mario Vaccaro (5th grade). Mr. Vacarro had several questions regarding Mr. Silberman.

- Mr. Vacarro stated there was an incident with his son Mario (5th grade) in the same class as Mohamad.
- Curious was this a recurring incident?
- Mr. Yang and Vice Principal Allen at this time stated we were not aware of any prior incidents.

Mario was called into Mr. Yang's office and was asked to describe the incident that took place on April 27. Mr. Vaccaro was present during the interview as per his request. According to Mario:

- During the lockdown drill, Mr. Silberman told the students to continue working. He walked around the room locking the door and pulling the window shades.
- Mario said he was using his mouse and Mr. Silberman said he was clicking it loudly and Mr. Silberman slapped his hand and pulled his hand off the mouse.
- Mr. Silberman said, "Why are you clicking so loudly? I'll see you in detention."
- Mr. Silberman never assigned a date or time for detention and Mario stated he would not attend either way.
- Mario was hit on the right hand however, there were no markings or bruising.

- Mr. Yang, asked, "Do you have a different mouse than everyone else?"
- Mario responded, "No, Mr. Silberman said I was slapping the mouse not clicking the mouse."
- Mario demonstrated to Mr. Vacarro how Mr. Silberman slapped and grabbed his hand.
- Mario stated Mr. Silberman has a short fuse, not a nice man. Mr. Vacarro stated he has heard other students say the same thing.
- Mario was shocked about what happened he didn't expect a teacher to do that nowadays.
- Mario stated the last 20 min. of class, the students were chatting during the period as normal.
- Mario stated that students were holding in their laughter they thought it was funny that he got hit and Moe was standing.
- It is also noted that "Erickson's" hooded sweatshirt was thrown across the room by Mr. Silberman .
- It was asked, "Before the drill was Mr. Silberman upset?" Mario responded, "No, he was normal."
- Mario stated after the drill, Mr. Silberman tried to explain to him the importance of the drill.
- Mr. Silberman told Mario to be quiet and do what was practiced. It was asked what does that look like? Mario stated he doesn't remember because they only practiced it once at the beginning of the school year.
- Mr. Vacarro asked Mario, "Have you ever seen him strike another student?"
- Mario responded, "No, never."

Principal Yang and Vice Principal Allen next called Respondent to be questioned.

Respondent's statements made during the investigation

On April 28, 2022, Principal Yang and Vice Principal Allen next asked Respondent to report to the main office for an interview. Respondent, together with Union Representative Darla Ferdinand, arrived to the main office at approximately 11:30 a.m. Vice Principal Allen testified that Respondent described that M.H. was leaning back in his chair with two of the four legs of the

chair being off the ground. Respondent claimed to have feared for M.H.'s safety, so he went behind M.H., grabbed the back of the chair and M.H.'s arm, and "lifted" M.H. out of the chair, holding him up so that M.H. would not fall. Principal Yang echoed Vice Principal Allen's testimony with respect to what Respondent told him during the interview.

During the interview, Respondent insisted that he did not hit M.V.'s hand. Instead, as M.V was "swatting" the mouse, Respondent covered his hand in order for him to stop and then reposition it to show him how to properly use the computer mouse.[2]

Taken from Principal Yang's May 3, 2022 disposition report, which was informed, in large part, by Vice Principal Allen's notes, Respondent provided the following input:

April 28, 2022, at 11:25 am Mr. Silberman, Mrs. Ferdinand(Union Rep), Mrs. Gryotoo(Union Rep), Mr. Yang and Vice Principal Allen met.

- It was stated two parents the Huda's and Vaccaro's were lodging a complaint concerning an incident that took place in Technology class on April 27, 2022, during the drill.
- Mr. Yang summarized M. Huda's version.
- Mr. Yang summarized M. Vaccaro's version.

Mr. Silberman 's account of events:

- When the drill was announced students have 15 seconds to get chairs in place and for him to pull the pin from the door.
- Mr. Silberman stated Mario was swatting the mouse-demonstrated how hard and loud Mario was swatting the mouse.
- Mr. Silberman stated he repositioned Mario's hand.
- Mr. Silberman stated, Mario looked confused-he was swatting the mouse. Mr. Silberman repositioned Mario's hand to stop.
- Mr. Silberman asked, "Do you know what you're doing?" Mario, stopped, and responded, "No what am I doing?"

[2] Vice Principal Allen testified that unless the students have special needs or other type of handicap, it is not appropriate for a teacher to physically model anything, especially in a lockdown drill when everyone is supposed to be quiet. No work should be occurring but rather, students should be quietly waiting for the next announcement.

- This is where Mr. Silberman took his wrist and showed Mario how to place his hand on the mouse.

- Mr. Silberman stated, "Moe" was kicking off the wall in the chair, leaning back on the chair, the two front legs of the chair were in the air. (Demonstrated).

- Concerned for his safety-grabbed the back of the chair and Moe, holding him up so he doesn't fall.

- To support Moe, Mr. Silberman grabbed his arm and the back of the chair. He lifted Moe out of the chair and told him to stand until the end of the lockdown drill. According to Mr. Silberman Mohamad was standing no more than a minute.

- It was asked did you contact the parents?: "Mr. Silberman said didn't think I needed to call parents."

- This is the 1st incident for both students and he felt since he addressed the behaviors with the students it didn't have to go further.

- Mr. Silberman stated he didn't notice anything, did not notice students laughing, making fun of, etc.

- Mr. Silberman was told to go home until further notice. He will get a call to return once the investigation is completed.

Principal Yang and Vice Principal Allen then had the students come to the main office individually to be questioned and to provide a written statement as to what transpired during the April 27, 2022 active shooter lockdown drill. Set forth in the header to Principal Yang's May 3, 2022 disposition report is the following:

Student interviews began on Thursday, April 28, 2022, and concluded on Friday, April 29, 2022. Every student in Ms. Mendoza's homeroom was interviewed except for Julius Colo who was absent on the day of the incident and Elliot Pyo was as absent on the day of the interview.

All students were asked if they observed any interaction between Mr. Silberman and Mario, and Mr. Silberman and Mohammad on April 27, during the lockdown drill. Students filed out a statement if they observed an interaction between Mr. Silberman and Mario, and/or Mr. Silberman Mohammad.

A verbatim summary of the student statements provided to Vice Principal Allen are set forth below, with the exception that initials have been substituted by the undersigned for actual student names in order to protect their privacy.

MH 4/28/2022

So, the lockdown started, and before that the class was loud and everybody was laughing. Mr. S. was in a bad mood because everone was fooling around. During the drill Mr. S was roaming the classroom, making sure everone was doing work, And he said, "guys make sure your quiet." Then about 20 seconds later I adjust my chair and then it squeaked. I heard loud foot steps running toward me the he grabbed me by my arm and takes me out of my seat and, drags my chair to the door and, says "since you don't know how to act on a chair your standing for the rest of the drill." I was confused because he did not even say anything he just grabbed me out of my chair. Then after the drill I sat back down.

FJ 4/28/2022

Taped, or tuched mee for him to ect up and took his chair, then threw erics hudey by the door then talked to mario.

RK 4/28/2022

I was doing my work then mr Silberman grabbed moes shoulder and made him stand up and he takes his chair and he stood till the end of the dril

LC 4/28/2022

I didn't hear anything but after the drill I heard Mr. silberman telling mario not to slap the mouze while clicking it.

MBK 4-28

Mario was doning his work, then out of no where mr. silberman comes and takes marios hand off his mouse and hit is hand about 2 times. A few minutes later moe was to tight in his chair so he moved back but on acident it made noise then mr. Silberman comes really angry and pick moe up with 1 arm the moe was confused so he just got up then Mr. Sm said "stand for the rest of the class"

AMF

mr. Silberman grabed mario by the hand and hit him 1 or 2 and then took moehamad by the arm and pushed his chair and told him to stand for the rest of the Lockdown.

ZMT 4-28-22

Mario: Mr. Silverman grabed Mario's hand and started hitting his hand for tapping his mouse.
Moe: Mr. Sliberman picked up Moe from his arms and made him stand for the rest of the lockdown for moving his chair a bit.

EO 4/28/2022

I saw Mr. Silverman pick up Moe his arm and pull back his chair. I heard him (Mr. Silberman) scream at him for making noise. I also saw Mr. Silberman grab Mario by his hand or arm. It seemed a bit aggressive to me.

TC 4/29/2022

What I saw was mr. Silberman pulling mohhamed chair backwards while [illegible] standing Then Mohumad had to stand for the rest of the lockdown.

JPP 4/29/2022

When my class were in technology class, there was a lockdown. When Mario Vaccaro was on the computer he was smacking the mouse or something like that. And then mario went under his desk. Mr. Silberman was kind of mad but he just told him to go back to his seat. After that happened, Moe accidentally squeaked his chair and mr. silberman got mad so he lifted moe up with one hand.

ER 4/29/22

I saw Mr. Silberman throwing my sweater across the room. Next, I saw Mr. Silberman slapping Mario's hand and putting his hand away from the mouse because mario was playing with the mouse. Lastly, I saw Mr. Silberman grabbing Moe's arm and liftin him up, and putting his chair to another table.

ZMZR 4/29/22

So there was a lockdown and mario hid under the desk mr s got a little mad and told him to sit back to his desk then moehammad scoted his chair and MR S grabed him and pick him up by the hand and put his chair to the side then mario was clicking his mouse agresively and MR S came and I heard a slapping sound also he threw erickson's hoodie.

SRM 4/29

I saw Mr Silberman grab Mario's hand and started hitting him. Mr Silberman ___ lifted Mohammad up and took his chair away.

AS 4-29-22

I saw Mario click his mouse so mr. silverman smaked marios hand and throw erickson's hoodie across the room and moehumed moved his chair back and mr. silvieman picked moe up and took his chair.

MV 4/29/

The announcement for the drill had gone off and Mr. S said to continue with our work. He went off to lock the doors and we were doing brainpop. Then a little later, he got up and randomly smacked my hand and roughly pulled my hand up. He then yelled at me for "smacking the mouse and interupting the class." He then said "see you in detention." After that he blabbled some other stuff that I didn't really puck up and went back to his seat.

A little later, Mr. S got up and picked up Moe by the arm out of His seat for "making noise during the drill." The rest of that class it was only just whispers and other little noises.

KV 4-29-2022

So when there was a lock down and my friend mario was sitting next to me and he was clicking his mouse and mr. Silberman grab his hand really hard and lift it up. The lockdown was almost done moe tryed fixing his seat mr. Silberman came from behind and grabe his arm and lift moe and took hes chair.

TWSM 4/29/22

All I saw was mr s slid the chair back from Mohamed

DY 4/29/22

When the lockdown started Mr. Silberman walked out of the room and closed the door. Then mario went under the table and stayed there. Then mr silberman told him to get up, and he went up and sat back down. Then later on moe accidentally squeaked his chair and mr silberman went to moe and picked him up and took his chair so moe had to stand up and do his work.

JY 4/29/22

When I was doing brainpop with my friend next to me, the speaker announced that there was a lockdown. Mr. Silberman started unrolling the thing on the door for so people cannot see in. After we continued to do the brainpop, when Mr. Silberman started walking around. When Moe, my friend, moved his chair making a squeak, Mr. Silberman grabbed Moe by the shoulders a little forcefully he moved the chair. After around 4 minutes, he got back his chair to Moe. After Mario started to click his mouse, which made Mr. Silberman very mad. After the lockdown he said to log out of the computer, then the bell rang (Ex. P-5).

On April 29, 2022 meeting, the Huda family returned to the school to report that M.H. had a bruise in the general area as to where he claimed Respondent grabbed him. Mr. Huda testified that on the preceding evening, they filed a report with the Ridgefield Police Department after discovering the bruise. Mr. Huda is employed as a police officer by the Borough. As it turns out, members of the Police Department came to Huda's home and took the report from M.H. (Ex. P3). In the report, M.H. told the investigating police officers that he was unsure as to whether the bruise was caused by Respondent. The bruise in the photo introduced in this proceeding reflected a yellowing, as opposed to dark blue, appearance.

School Nurse Hiyoung Kim testified that on the morning of April 29, 2022, that the parent of M.H. reported there was a marking on his son's arm and they asked the nurse for it to be documented. Ms. Kim examined M.H. Principal Yang requested that Ms. Kim document

everything and photograph the bruise, which she did (Ex. P3A and B). Ms. Kim testified that her notes contain information as to the details MH provided pertaining to the bruise. Namely, that M.H. told Ms. Kim that the teacher grabbed his left upper arm that Wednesday. Ms. Kim testified the bruise was yellow and thus appeared to be healing at the time of her examination.

During the hearing, Respondent's counsel questioned Principal Yang and Vice Principal Allen with respect to potential limitations on the accuracy of students' statements. Principal Yang was aware that Respondent had students working at their computers during the drill. However, Principal Yang was not aware whether or not students were working with headphones or using a software program, known as "BrainPOP" during the incident. In addition, viewing the aforementioned photograph of Respondent's classroom, Principal Yang noted that the students face the wall at their computers and he was unaware as to where in the classroom each of the students interviewed actually sat. In other words, he did not verify the vantage point that each student had, including potential obstructions, to make the observations they reported.

During her testimony, Superintendent Pantoliano testified that, in her experience, middle school students are aware of everything that is going on around them, especially the teacher and that students could have seen behind them through reflections on their computer monitors.[3]

Although the undersigned has previously set forth sections of Principal Yang's May 3, 2022 disposition report, Yang's analysis of the interviews and written statements is as follows:

After interviewing the students the following statements were consistent:

- **Two students** observed and made statements that Mario was hitting, banging, using the mouse improperly
- **Two students** observed and made statements Mario went under the desk/table when the lockdown drill was announced

[3] It is not clear from Dr. Pantoliano's testimony as to whether a reflection would be present when a software program or document is up on the screen in comparison to a monitor that has been turned off.

- **Eight students** observed and made statements Mr. Silberman touched/hit/slapped Mario's hand and moved it from the placement of the mouse.

- **Four students** observed and made statements Mr. Silberman "threw" Erickson's hooded sweatshirt onto another table.

- **Fourteen students** observed and made statements Mr. Silberman grabbed/touched Moe's arm and lifted him from the chair.

- **Fourteen students** observed and made statements Mr. Silberman moved Moe's chair.

All students who observed the incident with Mr. Silberman and Mohammad were asked if Mohammad moved his chair (making noise) or was leaning back on his chair (with the two front feet off the ground). All students reported that Mohmmad moved his chair.

Pictures of the bruising (M.H.), the nurse's report, and student statements (including Mohammad and Mario), are attached to this report.

Timothy Yang **5/3/2022**

Signature of Principal **Date**[4]

On or about April 29, 2022, Petitioner reported the incident, as is required to do so, to the Department of Children and Families, Institutional Abuse Investigation Unit ("IAIU").

It is noted that the above May 3, 2022 disposition report by Principal Yang was forwarded to Dr. Pantoliano. It was not provided to Respondent. On June 3, 2022, Dr. Pantoliano met with Respondent and Union representative, Darla Ferdinand. Dr. Pantoliano testified that Respondent and Ferdinand attended the meeting of June 3, 2022 and "Kara Doviak" attended as a representative of the Superintendent/Board of Education.

Dr. Pantoliano testified as to Respondent's explanation as to what occurred on April 27, 2022. Regarding M.H., Respondent explained to Dr. Pantoliano that M.H. was falling back in his

[4] Importantly, the statistical synopsis provided by Principal Yang, as set forth above, was relied upon by the administration, Superintendent Pantoliano and the Board for the purpose of according significant weight to the hearsay statements made against Respondent's interest.

chair, that he grabbed the chair and the student to prevent him from falling. At Dr. Pantoliano's request, Respondent demonstrated what happened using Ms. Ferdinand as M.H. Respondent, standing behind Ms. Ferdinand grabbed her upper body to prevent her from falling in the chair. Conversely, Dr. Pantoliano insisted that Respondent did not demonstrate lifting Ms. Ferdinand out of the chair.[5] Equally more puzzling to Dr. Pantoliano is why Respondent would not have opted for simply grabbing the back of the chair and moving the student forward so that all four legs of the chair were touching the floor.

In addition, Dr. Pantoliano testified as to Respondent's explanation concerning his interaction with M.V. Respondent explained that the student was improperly clicking the mouse and he wanted to demonstrate the proper use of the mouse. Dr. Pantoliano opined that she did not understand how covering the student's hand would demonstrate the proper use of the mouse. Dr. Pantoliano questioned Respondent as to other ways he could have helped M.V. to properly use the mouse without touching him, i.e., by demonstrating himself how to use a mouse in M.V.'s presence. In other words, to Dr. Pantoliano there was no need to have the child's hand in between my hand and the mouse.

Dr. Pantoliano opined that instructing students how to use a mouse during and active shooter lockdown drill was not an appropriate exercise. At page 135 of the transcript of February 27, 2023 proceeding, Dr. Pantoliano elaborated upon her concern:

> "The students were supposed to be as quiet as possible. The lights are supposed to be off. The computer monitors are supposed to be off, and whole goal behind that because if there was an active shooter or intruder in the building, you want them to believe that no one is in that classroom, so doing any kind of active, direct instruction with one student, would one, distract all of the other students from what they're supposed to be doing, which is being quiet during a lockdown drill because this is 5th grade, every student is going turning around, looking at why the teacher is near one particular student with their hand on them... And that's where their

[5] Dr. Pantoliano opined that she did not believe that it was possible to pull the student out of the chair and up into a standing position while standing behind the chair.

attention and focus is going to be when it should be on the lockdown drill and practicinge." (Tr. 2, p. 135).

Dr. Pantoliano, in the same vein, commented on Respondent's alleged explanation concerning M.H. in the context of an active shooter lockdown drill:

> "I believe there was a discussion on how long that he left him standing so he believed that he made him stand, was in a matter of seconds in time. How long was a part of the conversation. You know, he was only standing a minute, less than a minute. My feeling as a former teacher and the Superintendent of Schools, if there were an active shooter and it was a dangerous situation, as soon as he made that one child stand, he made that one child a target. If there was a shooter going to come to the door, the first person that was going to be shot was the child standing because again, everyone else is sitting down, that child is standing up so that student becomes a target so at no time do I believe that child should have been made to stand..." (Id., p. 136).

Ms. Ferdinand testified that she also accompanied Respondent to the meeting with Dr. Pantoliano on June 3, 2022. She confirmed that at no time prior to the meeting was Respondent provided with the investigation report and that the report was not provided to him by Dr. Pantoliano until the end of the meeting. Ms. Ferdinand testified that Respondent, just as he was during the April 28, 2022 meeting with Principal Yang and Vice Principal Allen, was shocked and sincerely believed that he was trying to keep the room safe.

On June 16, 2022, Dr. Pantoliano issued a letter to Respondent entitled, "Notice of Discipline & Increment Withholding" (Ex. P. 12). The version of events attested to by the students and Respondent's responses were briefly discussed in the letter by Dr. Pantoliano. In pertinent part, implicitly discrediting Respondent's version, Dr. Pantoliano noted with respect to M.H., "One student reported that he was forcibly pulled out of his chair, with such force that a bruise was left on his arm... Though you claimed that you pulled the one student out of his chair because he had lifted two feet off the ground, that was contradicted by fourteen students... The other student reported that you slapped his hand and pulled his hand off the computer mouse... Though you

claim you were demonstrating the proper position of a hand on a computer mouse to the other student, that too was contradicted by eight other students." (Id.). Lastly, Dr. Pantoliano refers in her June 16, 2022 letter to the 2015 letter of reprimand issued by former Principal John Coviello (Ex. P. 7) and the 2007 observation report where in it was stated that Respondent received a ranking of "needs improvement" and "creating an environment of respect and rapport"; "treating students in a fair and consistent manner"; "establishing an atmosphere of cooperation, mutual respect and concern"; and "creating a learning environment in which others feel free to express themselves respectfully."

Dr. Pantoliano's letter notified Respondent of her rationale underlying her intent to recommend withholding salary adjustments and increments and tenure charges seeking his dismissal:

> "Your conduct demonstrates that you're unable to correct your behavior and implement appropriate, alternative strategies for classroom management and student behavior. Your actions endanger students physically and emotionally, which is in direct contravention to your role as Teacher. Teachers are expected to model appropriate behavior and provide safe learning spaces for students. Students should not fear their teachers or going to class. Classrooms should be welcoming environments that promote learning; not hinder learning or student engagement." (Id.).

In a report dated June 27, 2022 (after Dr. Pantoliano referred the matter to the Board to consider Tenure Charges against Respondent), IAIU entered the following findings:

- The allegation of physical abuse/physical impairment – cut, bruise, welt, abrasion, oral injury is not established in accordance with N.J.SA. 9:6-8.21.
- However, some information in the case of the child was harmed or placed at risk of harm (Ex. P3).[6]
- Notably, findings of "not established" are not disclosed in a Child Abuse Record Information check, but they are maintained in agency records.

[6] The IAIU report does not specify what information indicated that the "child" was harmed or placed at risk of harm.

RELEVANT BOARD POLICIES

Board Policy 3281, Inappropriate Staff Conduct

The Board recognizes there exists a professional responsibility for all school staff to protect a student's health, safety, and welfare. The Board strongly believes that school staff members have the public's trust and confidence to protect the well-being of all pupils attending the school district.

In support of the Board's strong commitment to the public's trust and confidence of school staff, the Board of Education holds all school staff to the highest level of professional responsibility in their conduct with all pupils. Inappropriate conduct and conduct unbecoming a school staff member will not be tolerated in this school district.

The Board recognizes and appreciates the staff-pupil professional relationship that exists in a school district's educational environment. This Policy has been developed and adopted by this Board to provide guidance and direction to avoid actual and/or the appearance of inappropriate staff conduct and conduct unbecoming a school staff member toward pupils.

School staff's conduct in completing their professional responsibilities shall be appropriate at all times. School staff shall not make inappropriate comments to pupils or about pupils and shall not engage in inappropriate language or expression in the presence of pupils. School staff shall not engage in inappropriate conduct toward or with pupils.

A school staff member is always expected to maintain a professional relationship with pupils and to protect the health, safety, and welfare of school pupils. A staff member's conduct will be held to the professional standards established by the New Jersey State Board of Education and the New Jersey Commissioner of Education. Inappropriate conduct or conduct unbecoming a staff member may also include conduct not specifically listed in this Policy, but conduct determined by the New Jersey State Board of Education, the New Jersey Commissioner of Education, an arbitration process, and/or appropriate courts to be inappropriate or conduct unbecoming a school staff member.

Board Policy 3217, Use of Corporal Punishment

The Board of Education cannot condone an employee's resort to force or fear in the treatment of pupils, even those pupils whose conduct appears to be open defiance of authority. Each pupil is protected by law from bodily harm and from offensive bodily touching.

Teaching staff members shall not use physical force or the threat of physical force to maintain discipline or compel obedience except as permitted by law, but may remove pupils from the classroom or school by the lawful procedures established for the suspension and expulsion of pupils.

This policy derives from State law that prohibits corporal punishment with limited exceptions of when force can be used on a student. That statute provides: No person employed or engaged in a school or educational institution, whether public or private, shall inflict or cause to be inflicted corporal punishment upon a pupil attending such school or institution; but any such person may, within the scope of his employment, use and apply such amounts of force as is reasonable and necessary:

(1) to quell a disturbance, threatening physical injury to others;

(2) to obtain possession of weapons or other dangerous objects upon the person or within the control of a pupil;

(3) for the purpose of self-defense; and

(4) for the protection of persons or property; and such acts, or any of them, shall not be construed to constitute corporal punishment within the meaning and intendment of this section. Every resolution, bylaw, rule, ordinance, or other act or authority permitting or authorizing corporal punishment to be inflicted upon a pupil attending a school or educational institution shall be void.

RELEVANT STATUTE

N.J.S.A. 18A:6-10.

No person shall be dismissed or reduced in compensation,

(a) if he is or shall be under tenure of office, position or employment during good behavior and efficiency in the public school system of the state, or

(b) if he is or shall be under tenure of office, position or employment during good behavior and efficiency as a supervisor, teacher or in any other teaching capacity in the Marie H. Katzenbach school for the deaf, or in any other educational institution conducted under the supervision of the commissioner;

except for inefficiency, incapacity, unbecoming conduct, or other just cause, . . .

DISCUSSION

In the State of New Jersey, a tenured teacher shall not be dismissed from his position or reduced in compensation "except for inefficiency, incapacity, unbecoming conduct, or other just cause." N.J.S.A. 18A:6-10. The TEACH NJ legislation, enacted in 2012, led to the replacement of the Office of Administrative Law and the Commissioner of Education with labor arbitrators required to be members of the National Academy of Arbitrators. It must be presumed that the legislature was aware of how arbitrators address and analyze just cause disciplinary cases, especially in the context of removal or dismissal. Consistent with the legislative enactment, it may be expected that the traditional arbitral factors relied on to evaluate the propriety of the removal or dismissal of a public employee will be brought to the table in addition to the precedent developed over the years by the Commissioner of Education prior to 2012. In fact, the only evidence of the legislature issuing substantive directives to the arbitration panel occurred in 2019, whereby arbitrator training was required on conduct unbecoming an employee, including, but not limited to, issues related to allegations of sexual assault and child abuse. N.J.S.A. 18A:6-17.1(a):

> (1) A review of tenure charge cases concerning conduct unbecoming by a school employee, including cases decided both before and after the enactment of P.L.2012, c. 26 (C.18A:6-117 et al.); and
>
> (2) A review of the factors to be considered by arbitrators in deciding tenure charge cases concerning conduct unbecoming by a school employee including, but not limited to, the nature of the alleged offense and the impact, or potential impact, of the employee's conduct on the health and safety of students within the context of the school environment.[7]

In considering both arbitral and education law precedent, I note first that Petitioner must prove, by a preponderance of the credible evidence, that Respondent is guilty of some or all of the

[7] The undersigned filed a certification with the Commissioner on September 17, 2020 acknowledging the completion of such training. Subsequently, supplemental training was required for cultural diversity and bias. The undersigned completed such training on October 4, 2022.

disciplinary allegations contained in the charges. See, West New York v. Bock, 38 N.J. 500 (1962); Cumberland Farms, Inc. v. Moffett, 218 N.J. Super. 331, 341 (App. Div. 1987); Atkinson v. Parsekian, 37 N.J. 143 (1962); *Elkouri and Elkouri*, How Arbitration Works, 5th Edition, pages 930, et. seq. Importantly, the statutorily permitted scope of the instant tenure proceeding is limited to the Charges and specifications actually expressed in the Sworn Tenure Charges. Pursuant to N.J.SA. 18A:6-17.1(3)(b), Petitioner is also obligated to provide full disclosure of its evidence upon filing the Charges with the Commissioner of Education and may not present any additional evidence, save for rebuttal, or impeachment, at the hearing.

N.J.A.C. 6A:3-5.1(b) (1), in pertinent part, specifically states:

> **Charges shall be stated with specificity as to the action or behavior underlying the charges** and shall be filed in writing with the secretary of the district board of education or with the State district superintendent, accompanied by a supporting statement of evidence, both of which shall be executed under oath by the person(s) instituting such charges. Complete copies of all documents referenced in the statement of evidence shall be attached as part of the statement [emphasis supplied].[8]

The requirement imposed on the employing board of education is not so onerous when it is realized that the board can take as much time as it desires to ensure it has "all its ducks lined up in a row." Conversely, a tenured school teacher had comparatively less time to file a response to the charges,

[8] Similarly, in the analogous context of civil service cases, where the ALJ/Commissioner dichotomy is the same as it was in the education context prior to 2012, an employee cannot be legally tried or found guilty on charges of which s/he has not been given plain notice by the Appointing Authority. Indeed, the *de novo* hearing following an administrative appeal is limited to the charges and specifications contained in of the Final Notice of Disciplinary Action. West New York v. Bock, 38 N.J. 500, 522 (1962), Dept. of Law and Public Safety, Division of Motor Vehicles v. Miller, 115 N.J. Super. 122 (1971); Borough of HohoKus v. Menduno, 91 N.J. Super. 482, 487-488, 221 A.2d 228 (App.Div.1966)(noting that a public employer can only find an employee guilty of offenses specifically mentioned in the charges); Hammond v. Monmouth County Sheriff's Dep't, 317 N.J. Super. 199, 206 (App. Div. 1999)(noting that an Appointing Authority's broadening of local-level charges on subsequent appeal would "surcharge the right to appeal with a cost which violates any decent sense of due process or fair play"); Grasso v. Borough of Glassboro, 205 N.J. Super. 18 (October 16, 1985) (the original charges may not be amended at a trial de novo so as to include new charges); Accord, Fabian vs. Town of North Bergen, (CSV 3198-97, Initial Decision (August 24, 1998), adopted, Merit System Board, (December 2, 1998). Finally, arbitrators follow similar tenets of due process when addressing just cause in a disciplinary dispute. See, *Elkouri & Elkouri*, How Arbitration Works, 5th Edition, page 918; *Koven & Smith*, Just Cause -- The Seven Tests, 2d Edition, page 397.

specifically, 15 days under N.J.S.A. 18A:6-16. Therefore, once a board of education files with the Commissioner tenure charges, it is bound by the specifications it articulated.

In light of the foregoing, I first find that the scope of this proceeding is inextricably tied to, and limited by, Petitioner's wording of the Tenure Charges and supporting specifications. Notably, in this case, as it turned out, there were two potential alternative set of findings which could have been made **if the Sworn Tenure Charges permitted**: (1) Petitioner sufficiently demonstrated that Respondent abused his power as a teacher, acted with physical aggression as form of discipline or compelling obedience in his classroom (similar to the 2015 allegations), and/or physically and/or emotionally harmed M.H., and/or M.V. in the presence of other students; or (2) Respondent interacted with M.V. and M.H. by touching them physically, thereby showing poor judgment, even if his intent was pedagogy and student safety, respectively. Having said this, however, any fair reading of the factual specifications contained in the Sworn Tenure Charges unambiguously shows that Petitioner rested its Charges on the former, while expressly discrediting the latter.

In fact, Respondent's version of events, (2), above, sans the legal conclusion, were presented to Principal Yang and Vice Principal Allen as early as their April 28, 2022 interview of Respondent. And, whereas Petitioner had every opportunity to file its pleadings in the alternative, it instead sought Respondent's removal based on the version(s) of events set forth by M.H., M.V., the other student witnesses, and the finding of the IAIU that students may have been harmed. To illustrate, specifications from the Sworn Tenure Charges demonstrate Petitioner's rejection of what could have formed the basis of pleadings in the alternative while instead favoring only a singular line of accusations:

> During the investigation, Mr. Silberman claimed that he pulled the one student out of his chair because he had lifted two feet off the ground, ***however, fourteen***

students contradicted Mr. Silberman's account [See par. 28,**Exhibit F**].

Mr. Silberman alleged that he was concerned for the student's safety and grabbed the back of the chair and the student, holding him up so he wouldn't fall. ***All students who observed the incident with Mr. Silberman and the student were asked if the student moved his chair or was leaning back on his chair. All students report that the student moved his chair*** [See par. 29,**Exhibit G**].

In 2015, and again in 2022, Mr. Silberman violated District Policy 3217 ***by his use of force or fear in the treatment of pupils in his classroom*** [See par. 41].

Mr. Silberman's conduct in April 2022 led to physical harm to a student. This conduct is unacceptable and as stated in District Policy 3217 will lead to discipline and dismissal from the Board [See par. 49].

During the District's investigation of the incident of April 27, 2022, two students also reported that Mr. Silberman made inappropriate physical contact with them [See par. 53, **Exhibit F**].[9]

When interviewed as part of the investigation, Mr. Silberman denied that he inappropriately touched students. Instead, he claimed that he was demonstrating the proper position of a hand on the computer mouse. ***Yet eight other students contradicted his account of the events in his classroom*** [See par. 54, **Exhibit F**].

Mr. Silberman has created a classroom environment where students do not feel safe or supported by him [See par. 59].

As a result, the next necessary step is to dismiss Mr. Silberman from employment with the Board [See par. 60].

Mr. Silberman's physical contact with students in the manner reported by students and observed by other teaching staff demonstrates that he has created a risk of harm to students [See par. 62].

As noted in the June 16, 2022 correspondence to Mr. Silberman, ***this was not the first time that his anger and inappropriate physical conduct, creating a risk of harm to students, had been addressed*** [See par. 68, **Exhibit F**].

The aforementioned misconduct of Mr. Silberman has occurred over multiple occasions over an extended period of time. As noted by reference to his actions in 2007, 2015, and 2022, ***this most recent event was not an isolated incident of poor judgment or a mistake, rather, it was yet another example of Mr. Silberman's***

[9] Referring to Dr. Pantoliano's June 16, 2022 Notice of Discipline and Increment Withholding correspondence to Respondent which, in turn, is referencing the verbal and written statements of M.H. and M.V. and Principal Yang's and Vice Principal Allen's Summary of Investigation Report, dated May 2, 2022.

> ***abuse of power and inability to exercise self-control or restraint, to the danger of the students in his care*** [See par. 72].
>
> For all these reasons set forth herein, Mr. Silberman's actions demonstrate that he is no longer able to perform the duties as a school teacher and dismissal is warranted [par. 74].

Plainly, Petitioner elected in the Sworn Tenure Charges to squarely discredit Respondent's admitted actions of laying hands on M.H. to prevent him from falling and on M.V. to show him how to properly use a computer mouse. Thus, while Respondent's version of events may be the subject of a credibility dispute, once discredited by Petitioner within the Charges itself, it cannot be fairly resurrected as "Plan B" as the hearing moved along.

Consistent with the above finding, therefore, I cannot consider as within the permissible scope of this proceeding – other than for potential credibility resolutions – the following testimony adduced from Dr. Letizia Pantoliano on February 27, 2023 (months after the filing of charges):

> "[e]ven with the best of intentions," teachers should not be laying their hands on students because we are dealing with intent versus perception and again, this is the perception of the student." (Tr. 2, pp. 153-154);
>
> "Even if I took everything he said in the most favorable, positive light to him, I don't know why you would touch anyone if they were falling because they are in a chair with a solid back so why don't' you just grab the back of the chair and upright them. It didn't make sense having to touch the student at all." (Id., p. 130).
>
> "[L]ooking in the most favorable light for Mr. Silberman, his decisions didn't make any sense when you're looking at the health, safety and welfare of the children in his class." (Id., p. 137).
>
> Whether physical harm was not intended is of no regard, it still violates the policy (Id., pp. 163-164).
>
> Mr. Silberman exhibited poor judgment in grabbing M.H. instead of up righting the chair, and also by making M.H. stand up. Mr. Silberman also exhibited poor judgment when he put his hand on M.V.'s to demonstrate how to use a mouse, especially during a lockdown drill, which he claimed he wanted to take seriously. This poor judgment led to the inappropriate touching of students and conduct unbecoming (Id., p. 180).

> The bruise was immaterial to her decision to file tenure charges, though it supported her decision later on, as she could not confirm whether Mr. Silberman caused it or his intent, but she could confirm that his conduct was inappropriate for the situation (Id., p. 212).

In sum, Petitioner must be held to the Charges/specifications it actually filed, and may not now resurrect those it expressly rejected.

Also, consistent with the undersigned's January 30, 2023 ruling, the Tenure Charges must be dismissed to the extent they seek to bundle the 2007 non-disciplinary Observation and 2015 Letter of Reprimand as evidence in support of Tenure Charges filed in 2022. Rather, as disposed of in the undersigned's January 30, 2023 ruling, the 2015 Letter of Reprimand and the 2007 Observation are relevant to the issue of prior discipline (2015 letter of reprimand) with an intent to remove the discipline upon two years of good behavior and notice imparted to Respondent by both documents that physical aggression or inappropriate physical contact is prohibited and could lead to discipline, or further discipline. The past incidents cannot, however, be resurrected and weighed differently in this 2022 Tenure proceeding, i.e., Respondent cannot be disciplined twice for the same offense. See, e.g., IMO Randolph Board of Education and Jill S. Buglovsky, Agency Docket No. 265-9/12 (Licata), confirmed, Buglovsky v. The Randolph Township Board of Education, Morris County, Docket No.: C13-13 (P.J. Ch. Stephan C. Hansbury); and In the Matter of Arbitration of John Carlomango, School District of the Township of Hillside, Agency Dkt. No. 450-13 (Melissa Biren).

Lastly, to the extent that there are similarities between the facts underlying the 2015 Letter of Reprimand and the 2022 allegations, this does not mean that the 2015 misconduct, in and of itself, can be used to prove that Respondent committed the charged 2022 alleged misconduct. See, N.J.R.E. 404(b) and Rule 404(b) of the Federal Rules of Evidence:

> "(b) Other Crimes, Wrongs, or Acts -- Evidence of other crimes, wrongs, or acts is not admissible to prove the disposition of a person in order to show that he acted in conformity therewith. Such evidence may be admitted for other purposes, such as proof of motive, opportunity, intent, preparation, plan, knowledge, identity or absence of mistake or accident when such matters are relevant to a material issue in dispute." [see, e.g., State v. Redick, 181 N.J. 553(2004); State v. Abdullah, 372 N.J. Super 252 (2004).[10]

Next, having defined the permissible scope of this proceeding, I will address Respondent's motion for a "Directed Verdict". Respondent has the burden to prove that it was entitled to judgment at the conclusion of Petitioner's case, i.e., on February 27, 2023. Petitioner has the burden to prove the Sworn Tenure Charges by a preponderance of the credible evidence. Claiming that it did not, Respondent moved on February 27, 2022 (at the conclusion of Petitioner's case) to dismiss, or seek judgment in its favor regarding the Charges. Respondent asserted that he was entitled as a matter of due process to have the motion decided before having to put on his case. Armed with a stack of caselaw, while Respondent was ready to go on February 27, 2023, neither counsel for the Petitioner nor the undersigned had sufficient notice of the motion to address it at that time.

Instead, it was agreed, primarily off the record, (1) to finish the case in its entirety instead of holding the hearing in abeyance pending a decision on the motion; and (2) to bifurcate the record and decision to allow the parties a full opportunity to address the motion based on the record which concluded February 27, 2023. In practical terms, the parties agreed to address the motion as the first point of their post-hearing briefs. The parties also agreed, if the matter was not disposed of

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[10] See also, Gredone, Department of Corrections, 1999 WL 118100 (Administrative Law Judge Kathleen Duncan refused to admit evidence of an employee's prior disciplinary record in 1993 for falsifying an attendance record as proof that the employee intentionally falsified reports in the case then before her); and Hart v. County of Camden, 2001 WL 875795 (Administrative Law Judge Martone rejected evidence of a correction's officer's demeanor toward inmates as corroborating proof of a specific incident of the correction's officer's intimidating and antagonizing inmates).

by motion, to address the merits of their respective arguments thereafter based on the entire record, including the evidence adduced at the March 6, 2023 hearing. Thus, in the end, the procedure put in place preserved Respondent's right to move for dismissal at the conclusion of Petitioner's case while giving counsel for the Petitioner and the undersigned a full opportunity to get caught up to speed with Respondent.

As to the merits of the motion, Respondent specifically contends that Petitioner failed to present the testimony of any witness having firsthand knowledge of the events which transpired inside Respondent's Computer and Technology classroom on April 27, 2022. The legal grounds for Respondent's motion is that Petitioner disregarded Respondent's alleged constitutional right to confront witnesses and/or disregarded the hearsay rules of evidence by bringing Tenure Charges to a hearing based purely on hearsay evidence; more specifically, by failing to present the testimony of M.H., M.V. or any other witness who had firsthand knowledge of what actually transpired inside Respondent's classroom on April 27, 2022 during the active shooter lockdown drill.

Initially, I do not find that Petitioner deprived Respondent of a constitutional right to confront witnesses under the Sixth Amendment to the United States Constitution or the New Jersey State Constitution analogue. This is so because the constitutional guarantees apply to criminal as opposed to civil proceedings, with the exception of the Fifth Amendment right against self-incrimination. See, Dolan v. City of Orange, 287 N.J. Super. 136, 144 (App. Div. 1996) (explaining that, in disciplinary hearings, "the right of confrontation and cross examination is not part of the panoply of procedural safeguards required by federal or state constitutions"); Borough of Franklin v. Smith, 466 N.J. Super. 487 (App. Div. 2021) (Borough subpoena requiring police officer to testify for the Borough in his disciplinary appeal did not deny him due process; Fifth Amendment

concerns do not constitute categorical justification not to comply with subpoena; rather, Fifth Amendment must be invoked, if at all, on a question-by-question basis); See, also, IMO Randolph Board of Education and Jill S. Buglovsky, Agency Docket No. 265-9/12 (Licata, 2013), confirmed, Buglovsky v. The Randolph Township Board of Education, Morris County, Docket No.: C13-13 (P.J. Ch. Stephan C. Hansbury) (recognizing that while the constitutional prohibition against double jeopardy does not apply to a tenure case, the principles underlying the constitutional principle may extend by analogy under just cause). Thus, I initially find that Petitioner did not deprive Respondent of a constitutional guarantee by failing to call, in its case-in-chief, any witness who was inside Respondent's classroom on April 27, 2022 when the alleged incidents took place.

Instead, Respondent's motion is more properly characterized as a hearsay challenge to the evidence presented by Petitioner. Petitioner maintains that there is sufficient competent evidence which, in conjunction with the reliable hearsay evidence, supports the Charges as well as Respondent's dismissal from employment, including, but not limited to, (1) the relatively consistent, but independent statements of 14 students, none of whom filed a complaint against Respondent in the past; (2) the honesty of their parents; (3) the reporting of the incident to police officers, administrators, the school nurse; (4) participation in the DCF/IAIU investigation, etc.; (5) The IAIU's finding that a student may have been harmed; (6) the bruise which surfaced on M.H.'s arm; and (7) the alleged fanciful explanation by Grievant as to what occurred, i.e., that he went off script during an active shooter drill to prevent M.H. from falling and to model the proper use of a mouse to M.V. Respondent replies that Petitioner's proofs fall far short of satisfying the residuum rule. For the reasons which follow, I am satisfied that with one exception pertaining to compelling M.H. to stand in front of the class, Petitioner has failed to presented sufficient

competent evidence to support the Charges. An appropriate disciplinary penalty will be discussed, *infra.*

In addressing the record before me, an understanding of the hearsay and residuum rules of evidence is necessary. Hearsay evidence is generally admissible in arbitration proceedings and in administrative proceedings in New Jersey. It is subject to whatever weight accorded to it by the decision-maker. See, *Elkouri and Elkouri*, How Arbitration Works, Eight Edition, Ch. 8.4 C. (8-33), citing, Kagel, Practice and Procedure, in the Common Law of the Workplace: The Views of Arbitrators 37 (St. Antoine ed., BNA Books, 2d ed. 2005). Indeed, arbitrators generally admit hearsay evidence, but qualify its reception by informing the parties that it is admitted only "for what it is worth". In most cases, very little weight is given to hearsay evidence and it is exceedingly unlikely that an arbitrator will render a decision by hearsay evidence alone. *Elkouri & Elkouri, supra,* at 449-451. Perhaps the most comprehensive review of the arbitral treatment of hearsay evidence is set forth by Arbitrator Stanley Kravit in Barton Center, Senior Health Management, LLP and UFCW Local 1425 (Kravits 2005), FMCS Case No. 040715/56271-3, 2005 WL 7084765.

In the matter before Arbitrator Kravit, the grievance challenged the discharge of two certified nurse's aides for verbally abusing and failing to reposition the pillow of an elderly resident. Similar to the student-teacher paradigm, the facts involved a common occurrence in the industry whereby the employer and the family of the resident did not wish to present the testimony of the resident against her caretakers. Arbitrator Kravits provided the following historical recitation of the hearsay rule, as addressed by arbitrators (footnote annotations appear in full in Barton Center, Senior Health Management, LLP but are omitted here for brevity):

> Hearsay is defined, simply, as a statement made outside the hearing by a person other than the testifying witness, offered in evidence to prove the truth of the matter asserted. The probative value of such evidence depends on the credibility of someone who cannot be cross-examined.

The issue of whether such evidence should be admitted at all, assuming it does not fall within the many categories of admissibility, must be separated from the weight to be given. The absence of cross-examination denies the grievants of the right to test whether the actual declarant is lying, remembering inaccurately, or simply wrong. Possible motivation of a declarant is a critical element where there is evidence of conflict, e.g., between accuser and grievant, or between the accuser and other accused in the same setting.

Since arbitrators are not bound by the strict rules of evidence applicable in court, there originally developed a practice of admitting hearsay "for what it is worth". As various texts and many arbitrators have stated, "Rarely do the parties know what it is worth, at least not at the hearing." I would add, nor in the preparation of their briefs.

As far back as 1967 a prominent group of arbitrators concluded:

"Unless corroborated by truth-tending circumstances in the environment in which it was uttered, it (hearsay) is unreliable evidence and should be received with mounting skepticism of its probative value as it becomes more remote and filtered."

This statement strengthened the underpinnings of the practice of receiving hearsay, but limiting its probative value. It is reflected, e.g., in the following comment on the "for what it is worth", if anything, concept:

"In accepting it, however, the arbitrator is expected to have the expertise and experience to properly evaluate the evidence and to accord it the appropriate weight dependent upon the corroborating support for the evidence and the circumstances surrounding it." Wisconsin Dept. of Health & Social Services, 84 LA 219, 222 (Imes, 1985)

There have been many cases in which hearsay has been offered in lieu of testimony of bus passenger complaints against drivers; undercover agent or security guard allegations against employees; and nursing home patients' allegations of abuse against CNAs. In the great majority of these cases, of which this Arbitrator has made an extensive review, arbitrators have refused to sustain discharges based **solely** upon hearsay evidence. This caution is well stated by the following holding:

"I am very conscious of the fact, which the Union stresses in its brief, that it has been deprived of the opportunity to cross-examine the [security officer] and thereby perhaps to impeach his very serious accusations against the grievant. All that a fair and conscientious arbitrator can do under these circumstances is to scrutinize the hearsay evidence very closely, and to give it little or no weight if there is any indication that the evidence is untruthful, misleading or biased." Baker-Marine Corp., 77 LA 721, 723 (Marlatt, 1981)

Perhaps the definitive statement on the issue of admissibility versus weight was made by Arbitrator Glushein in Bambergers, 59 LA 879 (1972). In that case an undercover detective reported to a Company official that he had purchased marijuana from an employee. He produced the purchase and later gave a statement to the police. At the hearing the Company did not produce the agent, but relied upon the hearsay testimony of its security manager. The union objected to the testimony and asked that it be stricken. In his award overturning the discharge, the Arbitrator held:

> "Whether or not I now strike his testimony from the record, the result is the same. As will appear in a few moments, I find the hearsay recital to be an entirely inadequate basis on which to destroy a man's career, job rights and essential livelihood, not to mention the stain upon his reputation and the resulting difficulty of finding another job."

"The general rule in arbitration, and one to which the arbitrator subscribes, is that hearsay testimony may be admitted in some circumstances where the customary rules of evidence in court proceedings would exclude it. Such hearsay may lend a degree of support to facts otherwise established by first-hand, competent, reliable and probative evidence. But to rely absolutely and exclusively on pure hearsay is a proposition far beyond what the arbitrator is prepared to accept, and one which is wholly unsupported in the arbitration literature."

"Some kinds of hearsay no doubt are more compelling than others and carry a certain degree of probability. But in all or substantially all cases which the arbitrator can envisage, there must be apart from the hearsay a core of competent, reliable and credible evidence which the hearsay corroborates."

"Especially is this standard mandatory where the contested issue is such a serious one as here, on which turn a man's livelihood and reputation." (Id. at 881-882)

These citations reflect my reasons for admitting the hearsay complaints against the grievants, as well as my view of the appro-weight these exhibits may be given.

In a case similar to Bambergers, Arbitrator Gallagher overturned a discharge for drug use on company premises where the sole evidence was the report of an undercover agent who did not testify. Stating that:

> "Consistent with prior arbitral decisions related to discharge for alleged alcohol or drug usage, the Arbitrator holds the opinion that the burden of proof placed upon the Company in cases of this type must meet the standard of 'clear and convincing' evidence to support the 'just cause' basis for the discharge" (citations omitted). The Arbitrator held that, in the absence of the testimony of the agent, "the Company's case is lacking a central and crucial element."

Tarmac Virginia, 95 LA 813, 818 (1990)

Because patient abuse is so serious an offense, and because complaining patients or patient-witnesses are unavailable to testify for medical reasons, nursing home cases are the most difficult in which to apply the standard of just cause against allegations based on hearsay.

In Ambassador Convalescent Center, Inc., 83 LA 44 (Lipson, 1984) the Arbitrator upheld the discharge of an orderly accused by a helpless but mentally alert patient who died before the hearing. The patient repeated the accusation on the day it allegedly occurred to a visitor and several staff and had a discoloration on his left eye. The orderly was accused by the patient of striking him.

The patient also accused the grievant in front of an investigating nurse. The grievant testified and denied the allegations. Another employee disputed a portion of the patient's account of events. The employer's case was based solely on the hearsay testimony of those who had heard the patient's complaints.

The Arbitrator first acknowledged the reasons for admission of the hearsay and the necessary caution in receiving it.

> "Frequently, hearsay is the only evidence available in the work place setting, and the automatic exclusion of same could result in an incomplete record and a failure to accomplish a just result. On the other hand, an arbitrator must carefully bear in mind the inherent weaknesses in hearsay evidence, particularly in the context of a discipline case where the employer has the burden of proving just cause." (Id. at 46)

The Arbitrator admitted the hearsay on the basis of the following sections of the Federal Rules of Evidence:

"Rule 803. Hearsay Exceptions; Availability of Declarant Immaterial ...

(1) Present sense impression.--A statement describing or explaining an event or condition made while the declarant was perceiving the event or condition, or immediately thereafter.

Excited utterance.--A statement relating to a startling event or condition made while the declarant was under the stress of excitement caused by the event or condition ..."

"Rule 804. Hearsay Exceptions; Declarant Unavailable ....

(b) Hearsay exceptions.--The following are not excluded by the hearsay rule if the declarant is unavailable as a witness:

(5) Other exceptions.--A statement not specifically covered by any of the foregoing exceptions, but having equivalent circumstantial guarantees of trustworthiness, if the court determines that (A) the statement is offered as evidence of a material fact; (B) the statement is more probative on the point for which it is offered than any other evidence which the proponent can procure through reasonable efforts; and (C) the general purposes of these rules and the interests of justice will best be served by admission of the statement into evidence."

In addition to finding that the circumstances before him met the criteria of these sections, the Arbitrator found the hearsay far more credible than the testimony of either the grievant or co-worker, stating:

> "While great weight must be given to the sworn testimony of the Grievant and the co-worker Long, in which misconduct was denied, it must be recognized that said testimony cannot be deemed impartial. The Grievant certainly has an interest in a decision that would result in his reinstatement and back pay, and it is understandable that a friend or co-worker would tend to support his assertions." (Id. at 47)

Since there was no apparent motive for the patient to have falsely accused the grievant, the Arbitrator found "that the Employer has made a clear and convincing case that [grievant] struck patient "D"." (Id.)

Arbitrator Lipson was strongly motivated by the fact that "patient abuse cannot be tolerated in a health care facility" and his finding that the patient had suffered an eye injury. The question is whether the Arbitrator's analysis represents a sound arbitral response to nursing home situations or merely indicates that, once admitted, hearsay gains in credibility to an inappropriate degree by the simple fact of admission.

The challenge for arbitrators lies in the admonition to "carefully bear in mind the inherent weaknesses of hearsay evidence," especially when the hearsay is contradicted by the grievant's testimony; and considering that a grievant in an unwitnessed situation has little hope of proving himself "not guilty" and that such a requirement runs counter to due process.

In Ambassador the Arbitrator accepted the hearsay accusation as both a present sense impression and an excited utterance while stating that

> "There can be no debate that the 'interests of justice will best be served by admission of the statement into evidence,' since otherwise there can be no inquiry into an accusation of patient abuse, a serious matter in the nursing home context."

However, the accusation should and does trigger investigation, as is required by Florida law. The need to investigate and prevent abuse must be viewed separately from the issue of the weight to be given to hearsay evidence.

In Wisconsin Dept. of Health & Social Services, *supra*, Arbitrator Imes confronted a situation very similar to that in Ambassador, including a discharge based solely on hearsay accusation by a non-testifying witness/patient. This also included admission of the accusation "for its probative value since without admission of the statements into evidence, there would be no inquiry into the accusation of patient abuse." (Id. at 222)

Acknowledging that patient abuse is intolerable "because patient care, custody and protection is the very core of the institution's reasons for being," she cautioned employers against the risk of not having patients testify in the absence of medical verification of their inability to do so. (Citing the requirements that would apply in court, at 222) The Arbitrator concluded:

> "... it is incumbent upon the arbitrator to carefully weigh the evidence submitted and reach a reasonable decision based upon the reliability and credibility of the evidence. In so doing, it is concluded the employer failed to establish clear and convincing proof that the grievant had physically abused one of the Center's residents." (Id. at 223).

This case is noteworthy for several other conclusions expressed in the opinion. First, that hearsay cannot be corroborated by hearsay in the form of additional statements taken from other witnesses who do not testify. Second, the Arbitrator rejected both the excited utterance and startling event exceptions based on the facts. There, as in the case before me, the patient's accusation was not spontaneous with the event alleged. Neither of these concepts are any guaranty of weight being accorded to testimony. And, underlying facts must be carefully scrutinized as to a resident's mental state, particularly where the sole evidence is hearsay.

In City of Pontiac, 92 LA 780 (1989) Arbitrator Roumell commented at length on the awards cited above, there an employee was discharged for failing to comply with a last chance agreement by not regularly attending aftercare therapy for alcohol dependency. The evidentiary issue was the admission of and the weight to be given to two letters from the therapist, offered in the absence of his testimony, stating the grievant's failure to attend.

The admission of the letters and the denial of the grievance were clearly predicated on the testimony of the City's Human Resource coordinator that, in three meetings with her, the grievant admitted that he had not attended all of the required sessions with the therapist. Such admissions against interest are exceptions to the rule against hearsay.

> Each of these cases is a well-researched and thoughtful analysis of the distinction between admissibility and weight to be given to hearsay evidence. Each stresses the reasons why arbitrators may be expected to admit hearsay, but cautions against relying solely upon hearsay in discharge cases. The caution for arbitrators is that, once admitted, hearsay may take on a degree of credibility in nursing home cases where there is no other apparent way of preventing patient abuse.

In sum, hearsay evidence must be evaluated as to its "truth lending" circumstances. The bias or lack thereof of those making the out of court declarant must be measured. Hearsay evidence is a common occurrence where there is an understandable reluctance on the part of the declarant to testify, such as, patient-provider, bus passenger-driver, employee-security guard and, I add to the list, student-teacher. However, the existence of the dependent relationship alone does not excuse the employer from backing the hearsay statements of the dependent witnesses with competent evidence. Indeed, in serving on several hospital arbitration panels, I point out that the balance is often contractually struck so as to preclude an arbitrator from drawing "an adverse inference" against the patient who does not participate in the arbitration hearing. Additionally, hearsay cannot be deemed competent evidence to support other hearsay. Rather, hearsay may be credited to support competent evidence, and *vice versa.* Admissions against interest constitute competent evidence, as does a lack of credibility on the part of the alleged offender when competent evidence allows the hearsay evidence to be equally weighted.

Finally, the arbitrator must review whether or not an exception(s) to the hearsay rule exists which, in that circumstance, may be deemed competent evidence in and of itself.

Next, I observe, New Jersey administrative law also follows the same principles relied upon in the arbitration context. Pursuant to N.J.A.C. 1:1-15.5, "Hearsay evidence; residuum rule", the following hearsay principles are codified.

> (a) Subject to the judge's discretion to exclude evidence under N.J.A.C. 1:1-15.1(c) or a valid claim of privilege, hearsay evidence shall be admissible in the trial of contested cases. Hearsay evidence which is admitted shall be accorded whatever

weight the judge deems appropriate taking into account the nature, character and scope of the evidence, the circumstances of its creation and production, and, generally, its reliability.

(b) Notwithstanding the admissibility of hearsay evidence, some legally competent evidence must exist to support each ultimate finding of fact to an extent sufficient to provide assurances of reliability and to avoid the fact or appearance of arbitrariness. [emphasis supplied].

Consistent therewith, the New Jersey Supreme Court stated:

> [A] fact finding or a legal determination cannot be based upon hearsay alone. Hearsay may be employed to corroborate competent proof, or competent proof may be supported or given added probative force by hearsay testimony. But in the final analysis for a court to sustain an administrative decision, which affects the substantial rights of a party, there must be a residuum of legal and competent evidence in the record to support it. [Weston v. State of New Jersey, 60 N.J. 36, 51 (1972).]; see, also, David v. Strelecki, 97 N.J. Super. 360, rev'd 51 N.J. 563, cert. den., 390 U.S. 933; Matter of Tenure Hearing of Cowan, 224 N.J. Super. 737 (App. Div.1988).

The residuum rule does not require that each fact be based on a residuum of legally competent evidence but rather focuses on the ultimate finding or findings of material fact. See, Rurorede v. Borough of Hasbrouck Heights, 214 N.J. 338, 359 (2013), citing, Mayflower Sec. Co., Inc. v. Bureau of Sec., 64 *N.J.* 85, 92–93 (1973). The underlying rationale of the rule is that an administrative determination should "not rest upon evidence which the unsuccessful party was incapable of impeaching or rebutting." Application of Howard Savings Bank, 143 N.J. Super. 1, 9 (App. Div. 1976).

Consistent with the foregoing, Respondent presents the following persuasive case law. In Dolan v. City of East Orange, *supra*, the city sought removal of a public employee based on charges of conduct unbecoming arising out of a physical altercation between Dolan and a subordinate employee, Caldwell. The hearing officer recommended removal based solely on a letter produced by Caldwell, who did not testify. On review, the Court held that "traditional

notions of fairness require that Dolan have opportunity to confront and cross-examine Caldwell." Id. at 145-146. The Law Division's finding that a new hearing was required since no substantive evidence existed to support the removal was upheld by the Appellate Division (reasoning that the charges were not sustainable in the absence of affording Dolan an opportunity to confront his accuser) [Resp. Brief, page 30].

Respondent also correctly notes the rejection by administrative law tribunals of discipline based solely on hearsay. Hearsay may be employed to corroborate competent proof, or competent proof may be supported or given added probative force by hearsay testimony; however, in order to support an administrative decision, "which affects the substantial rights of a party, there must be a residuum of legal and competent evidence in the record to support it." [Resp. Brief, p. 30].

Respondent also aptly observes that arbitrators on the TEACH NJ Panel similarly adhere to the above principles. In the Matter of the State Operated School District of the City of Paterson v. Richard Vincenti, 255-14 (Edelman, June 11, 2014) involved tenure charges brought against Vincenti citing unbecoming conduct, incapacity and other just cause for a variety of alleged offenses, including egregious allegations of verbal abuse of his students. The district relied on the testimony of the principal, letters received by teachers, the school secretary's testimony, written statements by students, and testimony of the assistant principal. Vincenti asserted the district had not met its burden and argued that hearsay evidence and allegations not founded on the charges must be accorded no weight.

Arbitrator Edelman noted that hearsay evidence is admissible, however, standing alone it is not sufficient to prove the charge. He reasoned that Vincenti had a fundamental due process right to face his accusers and to cross-examine in order to discredit the accusations. Arbitrator Edelman held that to the extent that anonymous letters for the sole basis of a charge, they have no

probative value and that unsigned letters or second or third hand reports regarding misconduct are insufficient to demonstrate he committed the infractions charges. Particularly instructive to this matter, Arbitrator Edelman held that hearsay statements from other students are not sufficient to demonstrate that Respondent made the remarks attributed to him.

In the Matter of the Tenure Hearing of Michelle Gates, Case No. 144-5/16 (Gerber, September 8, 2016) involved charges all stemming from allegations that Respondent gave answers to and assisted students during state testing. An investigation was undertaken by the State, two investigators testified, the recordings and transcripts of statements made by twenty-seven students were admitted into evidence at the hearing. The students were not under oath at the time of their statements, nor was Respondent or a representative present during the interviews. Thus, Respondent had no opportunity to cross-examine. Upon reviewing the reports of the investigation, tenure charges were brought. The District rested its case without ever calling any of the twenty-seven students that were interviewed.

Respondent moved to dismiss contending all of the evidence presented constituted hearsay evidence and that evidence was not supported by a residuum of competent admissible non-hearsay evidence. Arbitrator Gerber reserved ruling, and asked the parties to file written summations on the motions. Thereafter, citing Dolan v. East Orange, supra., Arbitrator Gerber found that Respondent was denied the opportunity to cross-examine the witnesses – and that no evidence was even presented that the students were unavailable. Indeed, all of the cases cited by the Petitioner acknowledged that a case cannot turn on hearsay alone; that there must be a residuum of competent, credible evidence before sustaining a tenure charge. As such, Arbitrator Gerber held that the evidence presented by the district constituted hearsay evidence and there was not one piece of direct, non-hearsay evidence to support the allegations as the only witnesses had no direct

knowledge of the alleged conduct. Accordingly, Arbitrator Gerber entered judgment in favor of Respondent and dismissed the charges against her with prejudice [Resp. Brief, pp. 32-33].[11]

In the Matter of the Tenure Hearing of Thomas Strassle, Agency Dkt. No.: 131-5/16 (Biren, October 5, 2016), multiple charges were brought against Strassle, one involving allegations of sexual contact with a student, N.C. At the hearing, N.C. did not testify. Rather, other witnesses testified, without any first-hand knowledge, based on the allegations set forth in N.C.'s statements. Because there was no competent reliable evidence proffered, Respondent moved to dismiss at the close of the district's case in chief.

Arbitrator Biren held that while admissible, hearsay evidence alone is insufficient to prove an allegation, finding this is especially true, where, as here, a tenured teacher is subjected to termination. Citing Vincenti, Arbitrator Biren noted that "Respondent has a fundamental due process right to face his accusers at trial." Id. Though N.C.'s statement was sworn to police, N.C. was not subject to cross-examination when providing her statement, thus the Arbitrator found that Respondent was unable to question her veracity, about inconsistencies, about possible bias, improper motivation, and any other facts that might indicate the allegations were fabricated. Significantly, Arbitrator Biren reasoned that she was without the opportunity to assess N.C.'s credibility.

In addition, Arbitrator Biren determined that there was no competent evidence in the record because no witness had direct knowledge of the claims. Arbitrator Bien also observed that while the police and the IAIU investigated the allegations, no criminal or other charges were filed against Strassle resulting from N.C.'s statements. Ultimately, Arbitrator Biren found that due process required the school district to prove these serious charges by a preponderance of the evidence

[11] Cf. I/M/O Woodbridge Township Board of Education v. John Radzik, Dkt. No. 368-12/12 (Licata, 2013) (hearsay written statements and OFAC report supported by the testimony of two eyewitnesses).

before the 12-year tenured teacher with no evidence of prior discipline is dismissed. It was held that "[t]o uphold these charges in the total absence of competent and reliable evidence to support them would result in the type of miscarriage of justice that these tenure proceedings are intended to prevent." Id. The charges were therefore dismissed at the conclusion of the district's case in chief.

In the instant case, Respondent observes, Petitioner presented hearsay statements made by the alleged student victims, M.H. and M.V., as well as from the students claimed to have witnessed the interactions between Respondent and M.H. and Respondent and M.V. Thus, like Vincenti, Respondent reasons, Petitioner offered solely hearsay evidence, and has failed to proffer any competent credible evidence to corroborate the hearsay statements. Like Gates, Petitioner presented witnesses with no direct knowledge of the alleged conduct and relied solely on investigation reports, testimony of investigators, and out of court statements of student witnesses. Like Strassle, Respondent points out, the IAIU investigation in this matter resulted in no established findings. Moreover, in addition to Respondent being without the opportunity to cross-examine, in the same vein of Strassle, Respondent submits that the undersigned is deprived of the opportunity to assess the credibility of the only witnesses with direct knowledge of the allegations.

In sum, Respondent submits there was no evidence that the students were not available to be called as witnesses. Because the student witnesses were not called, Respondent asserts that he was denied the opportunity to cross-examine. Additionally, the statements made by the students admitted into evidence in this case were not sworn statements nor made under oath. Like Gates, Respondent submits, the only evidence produced in this case is uncorroborated hearsay evidence. To uphold the charges in this case, in the total absence of competent and reliable evidence and remove a twenty-year veteran teacher would result in a miscarriage of justice. Thus, Respondent

asks the undersigned to grant its motion, to dismiss the Sworn Tenure Charges and to make Respondent whole for any and all losses.

As for Petitioner's reply, Petitioner believes that the hearsay evidence is entirely reliable based upon the circumstances which inform its origins. For example, Petitioner suggests that in support of the student statements, the undersigned should consider the "firsthand accounts of the initial investigators in this case" – referring to the parents of the students and Principal Yang and Vice Principal Allen (Pet. Brief, pp. 38-39). However, in terms of the hearsay rule, I note, Petitioner incorrectly refers to secondhand accounts as firsthand accounts. In the end, it seeks to support hearsay with hearsay. Petitioner asks the undersigned to credit the consistency of all 14 statements, the willingness of M.H. and M.V. to participate in investigations, a lack of bias on their parts, and Respondent's past behaviors.

While I agree that the hearsay here does have significant elements of reliability, it must be remembered that Respondent would have had the right to cross examination had Petitioner put forth the student/eyewitnesses to testify. Just as any attorney's case would look unbeatable if only direct examination was permitted (but not cross), so too, I find, any attorney's case would look insurmountable if only required to introduce the investigatory file to prove its case. In the end, Respondent, through skilled counsel, may have poked numerous holes in the observational capabilities of each student, whether those interviewed on April 28 spoke to those before their April 29 interview, among other possibilities. For these very reasons, and as the overwhelming majority of arbitration and administrative law cases support, I cannot accept hearsay alone as a basis to severely penalize Respondent. Indeed, Petitioner itself notes that hearsay may be employed to corroborate competent proof, or competent proof may be supported or given added probative force by hearsay testimony." Weston v. State, 60 N.J. 36, 51 (1972). Implicitly,

therefore, Petitioner understands (or should understand) that hearsay evidence cannot fairly constitute "competent evidence" to corroborate other hearsay evidence under the residuum rule.

Having said this, however, Petitioner's reliance on Ruroede v. Borough v. Hasbrouck Heights, 214 N.J. 338, 359-60 (2013) does aid Petitioner's charges with respect to Respondent's act of forcing M.H. to stand for the remainder of the active shooter lockdown drill in front of the class. Ruroede involved a police officer who was placed on temporary sick leave and suspended without pay due to charges stemming from an off-duty verbal and physical altercation at a bar; there was no live testimony of the complaining witness or other eyewitnesses; and there was an internal investigation conducted by the Police Department and preparation of a report presenting the summaries of the police rules and regulations violated as well as the summary of witness statements.

In my opinion, however, the most critical part of the Supreme Court's rationale in Ruroede is that competent evidence, in the form of Rurorede's admissions was not hearsay. Rather, there was sufficient probative, non-hearsay evidence to meet the residuum rule test and support the disciplinary charges as filed by the Police Chief.

As to the Charges:

> Following the internal investigation, the Police Department issued to Ruroede a Notice of Immediate Suspension and Disciplinary Charges (Notice). The Notice alleged that Ruroede violated eleven Police Department Rules and Regulations, including: 3:1.1 (Standard of Conduct), 3:1.11 (Conduct toward Superiors and Subordinate Officers and Associates), 3:1.12 (Obedience to Laws and Regulations), 3:1.29 (Withholding Information), 3:9–1 (Handling of Firearms), 3:9.3 (Off Duty or Secondary Firearm), 3:10.1 (Conduct Towards Public), 3:12.4 (Departmental Investigations–Testifying), and 4:8.4 (Unauthorized Absence). It charged Ruroede with conduct unbecoming a police officer, conduct unbecoming a public employee, disorderly conduct, willful violation of rules and regulations, dishonesty and untruthfulness, and withholding information. The Notice concluded that Ruroede had "violated the implicit standard of good behavior which devolves upon one who

stands in the public eye as an upholder of that which is morally and legally correct," and recommended that Ruroede be suspended immediately without pay pending his termination. . .

As to the sufficiency of evidence, the Court relied upon Ruroede's admissions and his proven guilt to the charge of dishonesty:

> He was at Blarney Station while he was supposed to be on sick leave; he was at the scene of the altercation with Egbert; due to whatever verbal exchange ensued, he conceded that he became involved in a public altercation with Egbert; and he conceded that he displayed his official police badge and that he was carrying a weapon. Although he admits to carrying a knife rather than a firearm, he nonetheless admitted to carrying a weapon under his shirt and to lifting his shirt in a display toward Egbert during the dispute. And, he conceded making threatening comments to Egbert, "br[eaking] his hold," "grabb [ing] his jacket," and "push[ing] him away." That evidence was competent, and it was sufficient to support the ultimate facts necessary to sustain the Borough's charges that Ruroede engaged in inappropriate conduct unbecoming a police officer. The evidence supported that Ruroede violated departmental rules and regulations governing the behavior of police officers. *See* Police Department Rules and Regulations 3:1.1 (Standard of Conduct), 3:1.12 (Obedience to Laws and Regulations), 3:10.1 (Conduct Towards Public); Conduct Unbecoming a Police Officer; Disorderly Conduct; Willful Violation of Rules and Regulations; Dishonesty and Untruthfulness.
>
> It is not material whether we accept Egbert's or Ruroede version of how the altercation began. The differences between the two pale in comparison to the bigger picture: the proofs in this record establish that Ruroede acted inappropriately for a person holding the public trust as a police officer and public employee. Ruroede had more than twenty-three years of experience with the Police Department. He had been a superior officer. We can reasonably infer that he had enough experience working under relevant police rules and regulations to avoid physically grabbing anyone, displaying his police credentials during such a dispute, or carrying a weapon, all while on sick leave. Additionally, Ruroede knew, or should have known, not to make inconsistent statements during the course of the internal affairs investigation, calling into question his honesty, integrity, and truthfulness, essential traits for a law enforcement officer. His dishonesty—providing conflicting statements to investigators about the altercation is significant. In sum, the Borough's proofs were sufficient to prove the charges by a preponderance of the evidence, and the charges support the termination of his employment as a police officer (Id., at pp. 362-363).

In sum, with the exceptions that Ruroede claimed not to be the aggressor, and that he was carrying a knife, and not a gun, he admitted to most of the charged misconduct and his inconsistent statements made to investigators spoke for themselves.

In this matter, regarding M.H., Petitioner expressly averred, under paragraph 16 of the Sworn Tenure Charges:

> The student was called into Mr. Yang's office and asked to describe the incident that took place on April 27, 2022. According to the student, during a lockdown drill on April 27, 2022, every student was told to be quiet. The student moved his chair back which made a loud squeaking noise. The student reported that Mr. Silberman came behind him and grabbed him by his upper left arm and ushered him forcibly up and moved his chair. ***Mr. Silberman made the student stand during the duration of the drill.*** See Dr. Pantoliano's Statement of Evidence, Exhibit G, (Slocum Skewes School Investigation Summary Report).

Consistent with Rurorede, I find, Respondent admitted, in pertinent part, to making M.H. stand for the remainder of the lockdown drill.

In my experience, making a student stand in front of the class (or in a corner) for even a minute or less was a time-honored form of discipline *via* humiliation in the olden days, one not countenanced as an acceptable form of discipline in these days of enlightenment. However, the act itself does not, in my view, meet the statutory definition of "corporal punishment" or Board Policy 3217, as Dr. Pantoliano submits (Tr. 2, p. 136). It does, however, invoke a violation of Board Policy 3281, "Inappropriate Staff Conduct", which states, in relevant part:

> The Board recognizes there exists a professional responsibility for all school staff to protect a student's health, safety, and welfare. The Board strongly believes that school staff members have the public's trust and confidence to protect the well-being of all pupils attending the school district.
>
> In support of the Board's strong commitment to the public's trust and confidence of school staff, ***the Board of Education holds all school staff to the highest level of professional responsibility in their conduct with all pupils.***

Inappropriate conduct and conduct unbecoming a school staff member will not be tolerated in this school district.

The Board recognizes and appreciates the staff-pupil professional relationship that exists in a school district's educational environment. ***This Policy has been developed and adopted by this Board to provide guidance and direction to avoid actual and/or the appearance of inappropriate staff conduct and conduct unbecoming a school staff member toward pupils.***

School staff shall not engage in inappropriate conduct toward or with pupils.

A school staff member is always expected to maintain a professional relationship with pupils and to protect the health, safety, and welfare of school pupils. A staff member's conduct will be held to the professional standards established by the New Jersey State Board of Education and the New Jersey Commissioner of Education. ***Inappropriate conduct or conduct unbecoming a staff member may also include conduct not specifically listed in this Policy, but conduct determined by the New Jersey State Board of Education, the New Jersey Commissioner of Education, an arbitration process, and/or appropriate courts to be inappropriate or conduct unbecoming a school staff member.***

In finding that Petitioner sufficiently met its burden as to the above charge, paragraph 16, based on competent evidence, i.e., Respondent's admission, I deem incredible Respondent's assertion that this act may have been a safety precaution. On the contrary, Respondent, by clear implication, conceded in his April 28, 2022 commentary to Principal Yang and Vice Principal Allen that he viewed M.H.s conduct as misbehaving, but not warranting parental notification. In other words, in real time, because Respondent judged M.H.'s act of allegedly pushing off his desk and "popping a wheely" as misbehaving, he ended up making M.H. stand in front of the class, and did not believe that parental notification was necessary.

Lastly, Respondent took this action in the context of an active shooter lockdown drill which he, himself, acknowledged was supposed to replicate the real thing. As Dr. Pantoliano aptly observed, in an active shooter situation, Respondent made the standing student a target who would be the first person being shot. (Tr. 2, p. 136). In other words, unless I am to conclude that

Respondent was clueless about the danger of making a student stand during an active shooter occurrence, which the drill is designed to replicate, I must reject his explanation that the act of making M.H. stand was non-disciplinary. Thus, for these reasons, I credit Petitioner's allegation, as expressed in the Sworn Tenure Charges, that Respondent improperly made M.H. stand for the remainder of the lockdown drill as a form of discipline, and thereby objectively humiliated him in front of the rest of the class.

Having said this, however, the remainder of Petitoner's case against Respondent is undoubtedly without competent evidence (or sufficient competent evidence). Respondent chose to provide the following explanation to Principal Yang and Vice Principal Allen on April 28, 2022.

- Mr. Silberman stated, "Moe" was kicking off the wall in the chair, leaning back on the chair, the two front legs of the chair were in the air. (Demonstrated).
- Concerned for his safety-grabbed the back of the chair and Moe, holding him up so he doesn't fall.
- To support Moe, Mr. Silberman grabbed his arm and the back of the chair. He lifted Moe out of the chair and told him to stand until the end of the lockdown drill. According to Mr. Silberman Mohamad was standing no more than a minute.

Here, I note, there was no competent evidence to support crediting a different version than what Respondent admitted to. Next, with respect to the balance of the M.H. incident and the M.V. incident in its entirety, this record does not contain the requisite competent evidence to support according outcome-determinative weight to the hearsay statements. There is no exception to the hearsay rule, e.g., present sense impression, excited utterance, other exception where the hearsay is the best or only evidence which could be proffered, and no admission against interest, as was the case with respect to Respondent forcing M.H. To stand in front of the class for allegedly "popping a wheely." Also, with respect to M.V., Respondent's explanation was also relatively consistent during both his April 28, 2022 interview and his June 3, 2022 meeting with Dr.

Pantoliano:

Mr. Silberman 's account of events: (April 28, 2022):

- Mr. Silberman stated Mario was swatting the mouse-demonstrated how hard and loud Mario was swatting the mouse.
- Mr. Silberman stated he repositioned Mario's hand.
- Mr. Silberman stated, Mario looked confused-he was swatting the mouse. Mr. Silberman repositioned Mario's hand to stop.
- Mr. Silberman asked, "Do you know what you're doing?" Mario, stopped, and responded, "No what am I doing?"
- This is where Mr. Silberman took his wrist and showed Mario how to place his hand on the mouse.

Therefore, I find that, with a limited exception involving M.H., there is a lack of admission by Respondent that he engaged in the charged acts of misconduct, and thus, hearsay does not corroborate any competent evidence and competent evidence, i.e., Respondent's statement does not corroborate Petitioner's hearsay evidence. Weston v. State, 60 N.J. 36, 51 (1972).

Moreover, the limited findings concerning M.H. do not amount to competent evidence concerning M.V., especially when M.V.'s actions preceded M.H.'s. And, although it may be improper for a teacher to demonstrate use of a mouse by touching, I do not find that Petitioner charged Respondent with such an offense, in fact, it rejected Respondent's explanation in the Charges itself. Nor do I deem the admitted act to be discipline, however unwise it may have been.

Also, unlike Rurorede, Petitioner did not charge Respondent with dishonesty. On the contrary, Petitioner simply does not believe Respondent's explanations, indeed, it stated so in the Charges. However, Petitioner's disbelief of Respondent's version(s), standing alone, or in combination with a dispute over what the physical reenactments looked like do not amount to competent evidence which would enable giving hearsay determinative weight. In fact, in just

about every discipline case, the employer does not believe the employee's alternative version of events. Certainly, this cannot be accepted as an excuse to allow the employer to support its case with hearsay evidence alone or else the rule would be meaningless.

Additionally, I am not persuaded by Petitioner's reliance on In the Matter of the Tenure Hearing of M. William Cowan, School District of the Borough of Bernardsville, 224 N.J. Super 737 (App. Div. 1988). In that matter, the Appellate Division affirmed the dismissal of a tenured teacher who was accused of various acts of misconduct. Evidence of an incident of an alleged assault consisted of testimony of the high school principal and his memorandum of the incident which included facts the principal had learned from alleged eyewitnesses. The principal was not a witness to the event. The student who was the victim of the alleged assault did not testify at the hearing, nor was there any other direct or eyewitnesses of the assault. The Court held that there "need not be a residuum of competent evidence to prove each act considered by the Commissioner so long as the combined probative force of the relevant hearsay and relevant competent evidence" sustains the Commission's finding of unbecoming conduct. Id. at 751.

However, what Petitioner critically omits is the fact that the one charge premised on hearsay alone stemmed from a 1974 incident, whereas the Court found competent evidence to sustain charges involving conduct occurring in 1975, 1980, 1982 and 1984 which, in the end, were sufficient to justify the Tenure Charges. This matter bears no such similarity. The events properly charged involve two incidents on April 27, 2022. Importantly, I cannot find that the competent proof regarding the limited, proven misconduct of Respondent toward M.H. constitutes competent proof regarding the balance of the charges involving M.H. and all of the charges involving M.V. Stated differently, I do not concur that Cowan stands for the proposition that proof of a relatively

isolated act through competent evidence means proof of the remaining 80-90% of Petitioner's case against Respondent without more.

Also, I reject Petitioner's argument that Respondent cannot now challenge on hearsay grounds Petitioner's failure to produce competent evidence since it had the ability to subpoena M.H. and M.V. (or any other student/eyewitness). As a general proposition, I agree with Petitioner that it did not have a constitutionally mandated duty or otherwise to present the testimony of any student/eyewitness. Indeed, this was put to rest previously. I further agree that Respondent could have subpoenaed the students. However, while Petitioner may have had no duty to call the students to testify, Petitioner bears the burden of proof and, hence, is ultimately accountable for what its case against Respondent looks like in the absence of calling the students to testify; and, in this matter, regarding the balance of the allegations involving M.H., and all of the allegations against M.V., it does not look very good.

In light of the foregoing, I find that Petitioner's case was not made via competent evidence against Respondent in the absence of the student/eyewitness(s), save for Respondent's act of forcing M.H. to stand. Notably, all student/eyewitness were "available", in the legal sense of the term, to testify at arbitration. There was no assertion that any student lacked competency to testify. See, State v. Busco, 255 N.J. 193 (2016) and ensuing, "Assessing the Competency of Child Witnesses Report and Recommendations to the Supreme Court" (December 23, 2020). In fact, all students were implicitly viewed as competent to speak to Principal Yang and Vice Principal Allen and to write out a witness statements. Rather, the dilemma Petitioner ostensibly found itself in appears to be attributable to the reluctancy of the parents of the students to allow their children to testify.

However, I observe, Respondent, as of April 28, 2022, and certainly by the filing of the Statement of Evidence in September, 2022, knew that the statements of M.H. and M.V., in combination with the input of their parents, served as the factual basis for this matter to proceed to a District investigation, an official police report, an IAIU investigation, and eventually the issuance of Tenure Charges. Thus, in my opinion, as to the concern that Respondent would know the identities of the derivative complainants, that "horse had already left the barn." I further observe that there certainly could have been buffers put in place to ameliorate any anticipatory anxiety which any student (and/or their parents) may have been experiencing about the students testifying. Such arrangements could have included allowing the parents to be in the hearing room and/or taking the testimony of M.H. and M.V. or any other student/eyewitness via Zoom. Neither of these accommodations, in my opinion, would have deprived Respondent of due process and could have potentially bolstered or perhaps greatly bolstered Petitioner's case against Respondent involving M.V. Nonetheless, the matter was heard to a conclusion without any firsthand witness testimony presented by Petitioner.[12]

Based on the foregoing, I find and conclude that Respondent's motion for judgement based on Petitioner's failure to sufficiently support the Charges, through competent evidence, must be granted with respect to M.H., save for the finding that Respondent improperly forced M.H. to stand for the remainder of the drill in violation of Board Policy 3281 and with respect to M.V. in its entirety.

[12] I note that M.H.'s father is a police officer who must have known the pitfalls of trying to prove a case through hearsay evidence. Presumably, he knows that convictions secured through his testimony would not have been secured based on his police reports alone. Lastly, with the police department on his side, I am not sure why he believed Respondent would not be deterred by that fact when dealing with M.H. or his siblings in the future.

The Appropriate Penalty

In addressing the appropriateness of the penalty in cases involving tenure charges, relevant factors "include the nature and circumstances of the incidents or charges, any evidence as to provocation, the teacher's prior record and present attitude, the effect of such conduct in the maintenance of discipline among the students and staff, and the likelihood of such behavior recurring." In the Matter of the Tenure Hearing of Erroll Goodwater, School District of the City of Camden, Agency Docket Nos. 185-7/11 and 187-7/11 (April 27, 2012), quoting, In re Tenure Hearing of Fulcomer, 93 N.J. Super. 404 (App. Div. 1967). In In re Tenure Hearing of Fulcomer, 93 N.J. Super. 404 (App. Div. 1967), the Court established a number of factors that should be considered when deciding whether a teacher should be dismissed for unbecoming conduct. Those factors include: 1) the nature and gravity of the offenses under all the circumstances involved; 2) the teacher's attitude – i.e. whether the acts were premeditated, cruel, or done with intent to punish; 3) any evidence as to provocation, extenuation or aggravation. Mitigation factors that the Fulcomer Court include: 1) the educator's ability, record and length of service, 2) the educator's disciplinary record; and 3) the "impact of the penalty on the [educator]'s career, including the difficulty which would confront her as an [educator] dismissed for unbecoming conduct, in obtaining a position in the State.

Initially, I find that Respondent's act of forcing M.H. to stand for even one minute due to his immediately preceding behavior does constitute conduct unbecoming and/or a violation of Board Policy 3281, as discussed previously. However, in my opinion, the act is not in the same category in terms of severity of the offense as compared with numerous prior cases decided by arbitrators and the Commissioner prior to 2012.[13] In other words, it does not amount to an

[13] See, e.g., Bd. of Educ. of City of New Brunswick v. Murphy, 92 N.J.A.R.2d (EDU) 527 (N.J. Adm. Aug. 27, 1992) (copy attached); and In the Matter of Tenure Charges against Leonard Yarborough, Agency Dkt. No. 259-

egregious or sufficiently flagrant violation to justify removal as a single-incident offense. Nonetheless, while I do not find that the act meets the definitions of "cruel" or "premeditated", I do find that it was done with the intent of punishing M.H. for, as Respondent admits, popping a wheelie with his chair during the drill. Nonetheless, Respondent obviously caused emotional harm and humiliation to M.H. or created the potential for that harm, and he created at least the potential of harm to other students.[14]

In addition, as ruled upon in the undersigned's January 30, 2023 decision, I do find that the 2015 letter authored by former Principal Coviello constitutes prior discipline with an intent to remove the letter from Respondent's personnel file for two years of good behavior, which Respondent met. More importantly, however, the letter of reprimand imparted notice to Respondent regarding improper forms of discipline and the impact on students.

> General findings indicate that during a verbal altercation with Brandon Quintero, you approached Brandon's seat, stopped in front of his seat, and told him to "get up." When Brandon did not comply with your directive, you made physical contact with his chair while he was seated in it by hitting the leg of the chair with your foot. The difference between "kicked" and "tapped" in this case is not nearly as significant as the fact that you made

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9/15-12/14, Comm'r Dkt No. 198-16 (May 24, 2016). See In re Doyle, 201 N.J. Super. 347 (App. Div. 1985); IMO Tenure Hearing of Claire Miller OAL Dkt No. EDU 5812-01, Agency Dkt. No. 240-7/01/99 (Decided December 7, 2001); School District of the Borough of Red Bank v. Portia Williams 2 NJAR 237 (Decided July 10, 1981); In re Tiefenbacher 1983 SLD 1648, In Re Harrell, 1979 SLD 479; Tenure Hearing of Adam Mierzwa, EDU 8220-07 (May 6, 2008), modified in part Comm'r (June 23, 2008); Tenure Hearing of Barbara Emri, EDU 4579-00 (Aug. 30, 2002) modified Comm'r (October 21, 2002), modified State Bd. Of Exmainers (December 3, 2003).

[14] That Vice Principal Allen testified that M.H. and M.V. laughed off the incidents (Tr. 2, pp. 47-48) cannot be disregarded; neither, however, can the potential for harm caused by Respondent. See, I/M/O Tenure Hearing of Blanca Godinez, School District of the City of Paterson, Passaic County, Agency Docket No. 239-9/19 (Licata, 2020) (teacher improperly physically restraining student in gym class caused actual harm to student being restrained and potential harm to other student onlookers), see, also, In re Converters Paperboard Company, Division of Midwest Folding Carton, Inc. [Rockford, Ill.] and United Paperworkers International Union, Local 1050, 99 LA 430 (Borland 1992)(just cause existed to discharge cutter man who placed smoke bomb outside foreman's office, even though no damage resulted where he knew that lighting any incendiary device in highly combustible environment created serious potential for fire. "The grievant's plan to light smoke bomb reveals total lack of concern for safety, even though there was no proof that he intended to start fire.").

> physical contact with his seat during the altercation to elicit his compliance with your directive. What you presented as "tapping" the chair was perceived and described by all ten students as "kicking."
>
> Brandon Quintero was understandably upset by this altercation. At no time should you have made physical contact with this student, directly or indirectly through his chair, especially during an altercation. Aside form that reality, perception of children and adolescents are not to be taken lightly in situations like these. All who witnessed the even were disturbed to varying degrees. Please know that any subsequent actions involving physical contact with students may result in further disciplinary action (Ex. P7).

In my opinion, Respondent was placed on notice that his improper actions toward one student, at the very least, carries the potential for upsetting other students in the classroom. Therefore, consideration of Respondent's April 27, 2022 act of improper discipline which was objectively humiliating toward M.H. and carried the potential of emotionally harming other students must be deemed a similar offense to the one in 2015. By the same token, however, I acknowledge that the relatively mild form of discipline meted out by Principal Coviello likely did not send a forceful enough message to Respondent. As such, there is only so much mileage that can be achieved in reliance on the 2015 discipline with respect to affixing a penalty in this case.

Lastly, I deem relevant Respondent's twenty years of employment. It cannot be overlooked or disregarded as Superintendent Pantoliano apparently did. Respondent was well liked by his colleagues, very helpful in the IT context and received satisfactory evaluations. More importantly, it must be inferred that for most of his career, Respondent did not pose a threat of harm to any student or otherwise improperly discipline students (save for 2015). It also is recognized that seven years elapsed between the 2015 and 2022 incidents.

Based on a balancing of factors, I believe that a fair and appropriate penalty must be one which recognizes the seriousness of the offense, albeit not sufficiently egregious as a single incident to warrant dismissal, including the harm to M.H. and the potential harm to other students, the fact that Respondent did not heed the general message imparted by the 2015 letter, the countervailing fact that the 2015 letter did not meet the seriousness of the offense, and Respondent's length of employment. In my opinion, the loss of adjustment and salary increments for the 2022-2023 school year and a suspension without pay from the beginning of the 2023-2024 school year to winter break (so as to minimize disruption to the class) is an appropriate penalty. Plainly, there is no room left for Respondent to again venture outside the parameters of proper student engagement and discipline. The Charges are adjusted in accordance with this Opinion, and the instant appeal is decided accordingly.

Respectfully submitted,

Joseph Licata, Arbitrator

Dated: July 5, 2023

State of New Jersey)
) :SS
County of Bergen)

On the 5th day of July, 2023, before me personally came and appeared Joseph Licata, to me known and known to me to be the person described herein who executed the foregoing instrument and he acknowledged to me that he executed the same.

Notary Public

JACQUELINE M. LICATA
Commission # 50026026
Notary Public, State of New Jersey
My Commission Expires
November 09, 2025

198-23
OAL Dkt. No. EDU 04901-20
Agency Dkt. No. 59-3/20

New Jersey Commissioner of Education

Final Decision

K.B., on behalf of minor child, T.W.,

Petitioner,

v.

Board of Education of the Township of Mahwah, Bergen County,

Respondent.

The record of this matter, the proposed Settlement Agreement and Release (Agreement), and the Initial Decision issued by the Office of Administrative Law pursuant to *N.J.A.C.* 1:1-19.1, have been reviewed. Upon such review, the Commissioner notes that, with respect to Paragraph 6 of the Agreement, the Board is reminded that it must comply with the requirements of New Jersey's Open Public Records Act, *N.J.S.A.* 47:1A-1 *et seq.*, notwithstanding any agreement the parties may have between themselves to keep the terms of their settlement confidential.

In light of the foregoing, the Commissioner adopts the Initial Decision as the final decision in this matter, which is hereby dismissed subject to compliance with the terms of the settlement consistent with applicable public records law.

IT IS SO ORDERED.

Angelica Allen-McMillan, Ed.D.
ACTING COMMISSIONER OF EDUCATION

Date of Decision: July 6, 2023
Date of Mailing: July 6, 2023

State of New Jersey
OFFICE OF ADMINISTRATIVE LAW

INITIAL DECISION
SETTLEMENT
OAL DKT. NO. EDU 04901-20
AGENCY DKT. NO. 59-3/20

K.B. ON BEHALF OF MINOR CHILD, T.W.,
Petitioner,
v.
BOARD OF EDUCATION OF THE TOWNSHIP OF MAHWAH, BERGEN COUNTY,
Respondent.

K.B., petitioner, pro se

Nathanya G. Simon, Esq., for respondent (Scarinci & Hollenbeck, LLC, attorneys)

Record Closed: May 31, 2023 Decided: June 1, 2023

BEFORE **BARRY E. MOSCOWITZ,** ALJ:

On April 27, 2020, the Commissioner of the Department of Education transmitted this case to the Office of Administrative Law (OAL) under the Administrative Procedure Act, N.J.S.A. 52:14B-1 to -15, and the act establishing the OAL, N.J.S.A. 52:14F-1 to -23, for a hearing under the Uniform Administrative Procedure Rules, N.J.A.C. 1:1-1.1 to -21.6.

A copy of their settlement agreement is attached to this decision. Having reviewed the terms of the settlement agreement, I **FIND** that the parties have entered into their settlement voluntarily, as evidenced by their signatures, the signatures of their representatives, or both.

Moreover, I **CONCLUDE** that the settlement agreement is consistent with the law, is fully dispositive of all issues in controversy between the parties, and is otherwise consistent with the requirements of N.J.A.C. 1:1-19.1.

Therefore, given my findings of fact and conclusions of law, I **ORDER** that the parties comply with the terms of their settlement and that these proceedings are now closed.

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

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

June 1, 2023
DATE

BARRY E. MOSCOWITZ, ALJ

Date Received at Agency: June 1, 2023

Date Mailed to Parties: June 13, 2023
dr

Nathanya G. Simon, Esq.
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Our File No.: 13969.1006
Attorneys for Respondent, Mahwah Board of Education

K.B. o b o T.W. Petitioner, Vs. Mahwah Board of Education, Respondent.	STATE OF NEW JERSEY DEPARTMENT OF EDUCATION OFFICE OF ADMINISTRATIVE LAW **SETTLEMENT AGREEMENT AND RELEASE** **OAL DKT. NO.: EDU 04901-20** **AGENCY REF. NO.: 59-3/20**

WHEREAS, Respondent, the Mahwah Board of Education (hereinafter "Board") is a body politic and corporate, organized and existing by virtue of the law of the State of New Jersey, pursuant to N.J.S.A. 18A:11-1, and which is invested with the authority for maintaining and operating the Mahwah School District ("District"); and

WHEREAS, K.B. (hereinafter the "Parent"), is the parent of minor T.W. (Date of Birth: August 2, 2005) ("T.W."), who is currently in his junior year in High School; and

WHEREAS, a dispute arose between the Board and Parent regarding an investigation and finding relating to a Harassment, Intimidation and Bullying (HIB) matter that occurred when T.W. was a middle school student; and

WHEREAS, the parties in good faith have discussed the issues involved in this matter and after conferencing with Administrative Law Judge Barry Moscowitz, have a desire to settle this matter in an amicable way, without admitting any wrongdoings or deficiencies, but in order to

reach a compromise of this dispute in the best interest of the student and to avoid additional protracted litigation proceedings, the parties are interested in resolving all issues between them.

NOW, THEREFORE, the Parties enter into this Settlement Agreement and Release of Claims ("Agreement") and agree as follows:

1. The District agrees and acknowledges that T.W. has been a student in good standing in Mahwah High School from date of entry as a 9th grade student, to date.

2. The District will ensure that any and all inquiries regarding records of T.W. shall be referred to the Office of Special Services for response. No middle school records shall be released unless there is a Court Order to do so or the Parent has the opportunity to review the records and provide written consent to do so.

3. As a material part of this Settlement, Parent releases any and all claims, rights and liability relating in any way to this matter. Notwithstanding these provisions, either party to this Agreement may bring an action to enforce any term of this Agreement.

4. This Agreement does not require Board approval and the Administrator signing this Agreement represents that he/she has the authority to sign on behalf of the District.

5. This Agreement is made without any admissions or findings of liability or responsibility by either party.

6. This Agreement and all its terms are and will remain confidential to the maximum extent permitted by law.

7. This Agreement shall be governed by the laws of the State of New Jersey.

8. This Agreement represents the entire agreement between the parties and shall not be modified in whole or in part but can be executed in one or more original or emailed counterparts.

9. This Agreement shall be filed with the Administrative Law Judge assigned to this matter and shall be approved and incorporated into an Initial Decision with a recommendation for approval by the Commissioner of Education.

10. The foregoing constitutes full and complete settlement regarding all issues and claims raised in this matter.

11. This Agreement has been entered into voluntarily, freely, willingly and without duress or coercion, and with the opportunity to consult with counsel of each party's choosing. Parent has acted pro se. The Board has been represented by Nathanya G. Simon of the Firm Scarinci Hollenbeck, LLC, and is satisfied with her competent representation. Both parties acknowledge that they have reviewed this Agreement in its entirety, that they fully understand its provisions, and fully understand all its contents and limitations. All parties are bound by this Agreement and each of its provisions and anyone who succeeds to the rights and responsibilities of the parties are also so bound.

IN WITNESS WHEREOF

199-23
OAL Dkt. No. EDU 00056-23
Agency Dkt. No. 193-10/21

New Jersey Commissioner of Education

Final Decision

Eric Nathaniel Gordon,

Petitioner,

v.

Board of Education of the Township of Sparta, Sussex County,

Respondent.

The record of this matter, the proposed Settlement Agreement and Release (Agreement), and the Initial Decision issued by the Office of Administrative Law pursuant to *N.J.A.C.* 1:1-19.1, have been reviewed. Upon such review, the Commissioner notes that paragraph 1 of the Agreement references actions that preceded the consideration of the settlement by the Commissioner of Education. The parties are reminded that a settlement of litigation before the Commissioner is not binding until the Commissioner approves the settlement.

In light of the foregoing, the Commissioner adopts the Initial Decision as the final decision in this matter, provided that the parties have already implemented the settlement terms or have agreed upon mutually satisfactory alternate dates for the effectuation of the terms of the Agreement. Assuming same, the matter is hereby dismissed.

IT IS SO ORDERED.

Angelica Allen-McMillan, Ed.D.
ACTING COMMISSIONER OF EDUCATION

Date of Decision: July 6, 2023
Date of Mailing: July 6, 2023

State of New Jersey
OFFICE OF ADMINISTRATIVE LAW

INITIAL DECISION
SETTLEMENT
OAL DKT. NO. EDU 00056-23
AGENCY DKT. NO. 193-10/21
ON REMAND
OAL DKT. NO. EDU 09328-21

ERIC NATHANIEL GORDON,

Petitioner,

v.

BOARD OF EDUCATION OF THE TOWNSHIP OF SPARTA, SUSSEX COUNTY,

Respondent.

Eric Nathaniel Gordon, petitioner, pro se

Mark H. Zitomer, Esq. (Schenck, Price, Smith and King, attorneys), for respondent

Record Closed: May 17, 2023 Decided: May 31, 2023

BEFORE **IRENE JONES**, ALJ Ret. on recall

On December 21, 2022, The Department of Education remanded this matter to the Office of Administrative Law (OAL) for determination as a contested case. A status conference call was held on March 13, 2023, before the undersigned. Subsequently, a

substitution of counsel was filed by the petitioner's attorney on March 20, 2023. The petitioner advised that he would be appearing pro se. After a prehearing conference was held on March 22, 2023, the parties exchanged discovery and thereafter reached an amicable resolution of this matter. On May 17, 2023, the parties filed a Stipulation of Settlement and the requisite Board Resolution with the undersigned.

I have reviewed the record and the terms of the Stipulation of Settlement and, I **FIND**:

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

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

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

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

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

Irene Jones

May 31, 2023
DATE

IRENE JONES, ALJ Ret. on recall

Date Received at Agency: June 1, 2023

Date Mailed to Parties: June 1, 2023

id

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May 17, 2023

Via Electronic Mail
Honorable Irene Jones, ALJ
c/o Ila Dhabliwala, Judicial Assistant
Office of Administrative Law
33 Washington Street
Newark, New Jersey 07102

Re: Eric Gordon v. Sparta Township Board of Education
OAL Docket No.: EDU 00056-23

Dear Judge Jones:

This firm represents the Respondent, Sparta Township Board of Education ("Board"), in the above-referenced matter. As Your Honor is aware, the parties reached a settlement in this matter, which was approved by the Board at its April 27, 2023 meeting. Attached please find the fully-executed settlement agreement and Board resolution for Your Honor's review and approval.

Thank you for Your Honor's attention to this matter. Should Your Honor have any questions at this time, please do not hesitate to contact me.

Respectfully submitted,
SCHENCK, PRICE, SMITH & KING, LLP

MARC H. ZITOMER

cc: Dr. Matthew Beck, Superintendent
Joanne Black, Business Administrator/Board Secretary
Eric Gordon, *Pro Se*

SETTLEMENT AGREEMENT & RELEASE

This Agreement and Release ("the Agreement") is entered into and effective this 27th day of April, 2023 ("the Effective Date"), by and between Eric Nathaniel Gordon ("Mr. Gordon") and the Sparta Township Board of Education ("Board")

WHEREAS, the Board is a body public and corporate, organized and existing by virtue of the laws of the State of New Jersey, N.J.S.A. 18A:11-1; and

WHEREAS, Mr. Gordon has filed a petition of appeal with the New Jersey Commissioner of Education against the Board which has been docketed as OAL Docket No. EDU 00056-23; and

WHEREAS, the parties desire to resolve and settle all employment issues between them which fall within the jurisdiction of the New Jersey Commissioner of Education and/or the New Jersey Office of Administrative Law pursuant to the terms and conditions set forth in this Agreement;

NOW, THEREFORE, in consideration of the mutual covenants and conditions set forth in this Agreement, the Parties agree as follows:

1. **Consideration.**

   a. Mr. Gordon agrees to withdraw with prejudice his pending petition of appeal docketed as OAL Docket No. EDU 00056-23.

   b. Mr. Gordon agrees not to pursue any action against the Board which falls within the jurisdiction of the New Jersey Commissioner of Education and/or the New Jersey Office of Administrative Law.

   c. The Board will transmit to Mr. Gordon a check payable to "Eric Nathaniel Gordon" for one-thousand dollars ($1,000.00) within thirty (30) days of the full execution of this Agreement. He shall be responsible for all taxes and withholdings.

   d. Mr. Gordon acknowledges that the aforesaid constitutes good and valuable consideration

2. **Release.** In exchange for the above consideration, Mr. Gordon, and his heirs and assigns, hereby irrevocably and unconditionally waive, release, and forever discharge any claims, rights, demands, judgments, suits, causes of action or liabilities (hereinafter "claims"), whether known or unknown, which they have or may have against the Board, personally and officially, individually and collectively, its past and present Board members, officers, administrators, its Superintendent of Schools, agents, employees, attorneys, and their successors, heirs and assigns, including, but not limited to any claims for attorneys' fees, back pay or front pay, any claims involving tax liability stemming from this settlement, which fall within the jurisdiction of the New Jersey Commissioner of Education and/or the New Jersey Office of Administrative Law, which arise directly or indirectly or in any way out of Mr. Gordon's

E.G. E.G.

K.M. KM

employment relationship with the Board. Mr. Gordon reserves the right to pursue any purported claims under the New Jersey Law Against Discrimination in the New Jersey Superior Court or other applicable venue other than with the New Jersey Commissioner of Education or in the New Jersey Office of Administrative Law.

3. **No Admissions.** This Agreement is entered into solely for the purpose of resolving disputed claims, and neither the execution, delivery, nor performance of this Agreement shall constitute or be construed at any time or for any purpose to be an admission of fact or liability by either party to this agreement, and the parties further agree that this Agreement and Release shall not be used as evidence in any judicial, administrative, or quasi-judicial proceeding, except to enforce the terms of the Agreement.

4. **Confidentiality.** This Settlement Agreement and the circumstances leading to its execution shall remain confidential to the maximum extent permitted by law and neither party shall discuss it publicly. However, this confidentiality provision shall not apply to any State reporting obligation that the Board may have pursuant to statute or code. Moreover, nothing shall preclude Mr. Gordon from sharing this agreement with his legal, tax, or other financial advisors so long as they maintain the confidentiality of the agreement.

5. **Authority.** This Agreement is subject to Board approval. If approved, the Board President is fully authorized to execute this Agreement on behalf of the Board.

6. **Successors and Assigns.** This Agreement shall be binding upon and shall inure to the benefit of the parties and their respective successors and assigns

7. **Amendment; Severability; No Waiver.** This Agreement shall not be amended, changed, or modified except in a writing signed by all parties. The provisions of this Agreement are severable. If any term or portion thereof of this Agreement shall be held to be invalid or unenforceable to any extent, the remainder of this Agreement shall not be affected thereby, and each remaining term or portion thereof shall be valid and enforced to the fullest extent permitted by law. Any failure to enforce any provision of this Agreement shall not operate as a waiver of such provision or of any other provision.

8. **Entire Agreement.** This Agreement constitutes the entire agreement between the parties with respect to the subject matters herein, and supersedes and integrates any and all prior representations, negotiations, discussions, understandings, and agreements, whether oral or written. Each party acknowledges that neither the other party, nor any agent or attorney of the other party, has made any promise, representation, or warranty whatsoever, express or implied, not contained in this Agreement to induce it to execute this Agreement.

9. **Construction.** The terms of this Agreement are not to be construed against any one party, but are to be construed as if all parties prepared it equally.

10. **Law Governing.** This Agreement is governed by the laws of New Jersey.

11. **Assent to Terms.** Mr. Gordon hereby acknowledges that he signed this Settlement & Release with a full understanding of his rights.

E.G. _____

K.M _____

IN WITNESS WHEREOF, the parties have executed this agreement consisting of three (3) pages as of the effective date.

Witness:

By: _____
Eric Nathaniel Gordon

Dated: 4/27/23

Witness: _____

Dated. _____

SPARTA TOWNSHIP
BOARD OF EDUCATION

By: _____
Kurt Morris, Board President

Dated: 4/27/23

Witness: _____

Dated: 4/27/23

Sparta Township Public Schools

18 Mohawk Avenue
Sparta, New Jersey 07871
973-729-2155
Fax: 973-729-0576

Joanne Black
Business Administrator/
Board Secretary
973-729-3655
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Dr. Matthew Beck
Superintendent
973-729-7886
Email:
matthew beck@sparta.org

Tara Rossi
Assistant Superintendent
973-729-7174
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EXTRACT FROM THE MINUTES OF A REGULAR MEETING OF THE SPARTA BOARD OF EDUCATION OF THE TOWNSHIP OF SPARTA SUSSEX COUNTY, NJ AS RECORDED IN THE OFFICIAL SET OF MINUTES

The Board of Education of the Township of Sparta in the County of Sussex, NJ convened in a **Regular Meeting** on **April 27, 2023** at **6:00 pm at the Mohawk Avenue School Auditorium.**

The following members of the Board of Education were present

Lauren Collier, Christina Keiling, Walter Knapp, Leigh McMichael, Kurt Morris, Craig Palleschi, Wendy Selander
Absent: LeeAnne Pitzer – arrived during Executive Session
Vanessa Serrano – arrived during Executive Session

The following resolution was offered by Kurt Morris, seconded by LeeAnne Pitzer and adopted by the Board of Education by the following roll call vote

RESOLVED that the Board approves the settlement in the matter captioned Eric Nathaniel Gordon v. Board of Education of the Township of Sparta, Sussex County, OAL Docket No EDU 00056-23, in accordance with the terms and conditions therein; and

BE IT FURTHER RESOLVED, that the Business Administrator and/or Board President is authorized to sign the agreement on behalf of the Board.

Roll Call	
Ayes:	**NINE**
Nays:	**NONE**
Absent.	**NONE**
Abstention.	**NONE**

State of New Jersey)
County of Sussex) SS

I, Joanne Black, Business Administrator of the Board of Education of the Township of Sparta, in the County of Sussex, State of New Jersey, hereby certify that the foregoing extract from the minutes of the meeting of the Board of Education of said district duly called and held on **April 27, 2023** has been compared by me with the original minutes as officially recorded in my office in the minute book of said Sparta Township Board of Education, and is a true, complete copy thereof and of the whole of said original minutes so far as the same relate to the subject matter referred to in said extract in witness I have hereunto set my hand and affixed the corporate seal of said Board of Education this **16th day of May, 2023**.

Joanne Black
Joanne Black
Business Administrator/Board Secretary

Dhabliwala, Ila [OAL]

From: Anne F. Miller <afm@spsk.com>
Sent: Wednesday, May 17, 2023 3:38 PM
To: Dhabliwala, Ila [OAL]; egordon21@hotmail.com
Cc: Marc H. Zitomer
Subject: [EXTERNAL] Eric Gordon v. Sparta Township Board of Education Docket No.: EDU 00056-23
Attachments: Letter to Judge Jones.pdf; Fully-Executed Settlement Agreement.PDF; Resolution.PDF

Good afternoon
Please see the attached from Marc Zitomer. Thank you.

Schenck Price
SCHENCK PRICE SMITH & KING, LLP
Serving Our Clients and Community for Over 100 Years

Anne F. Miller
Legal Assistant/Paralegal
Schenck, Price, Smith & King, LLP
220 Park Avenue | PO Box 991 | Florham Park, NJ 07932
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Email | Website

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200-23
OAL Dkt. No. EDU 10180-22
Agency Dkt. No. 273-10/22

New Jersey Commissioner of Education

Final Decision

J.H., on behalf of minor child, A.T.B.,

Petitioner,

v.

Board of Education of the Township of Bloomfield, Essex County,

Respondent.

The record of this matter, which was transmitted to the Commissioner by the Office of Administrative Law (OAL) pursuant to *N.J.A.C.* 1:1-14.4 and includes an advisement of petitioner's failure to appear at the scheduled OAL hearing on June 1, 2023, has been reviewed. Petitioner did not file an explanation for the failure to appear, notwithstanding the opportunity to do so. Accordingly, this matter is no longer deemed to be a contested case before the Commissioner and is hereby dismissed with prejudice.

IT IS SO ORDERED.[1]

Angelica Allen-McMillan, Ed.D.
ACTING COMMISSIONER OF EDUCATION

Date of Decision: July 6, 2023
Date of Mailing: July 6, 2023

[1] This decision may be appealed to the Appellate Division of the Superior Court pursuant to *N.J.S.A.* 18A:6-9.1. Under *N.J.Ct.R.* 2:4-1(b), a notice of appeal must be filed with the Appellate Division within 45 days from the date of mailing of this decision.

201-23

New Jersey Commissioner of Education

Decision

J.M., on behalf of minor child, B.M.,

Petitioner,

v.

Board of Education of the School District of the Chathams, Morris County,

Respondent.

Synopsis

Petitioner disputed the respondent Board's finding that his son, B.M., committed an act of harassment, intimidation or bullying (HIB) against a fellow student pursuant to New Jersey's Anti-Bullying Bill of Rights Act, *N.J.S.A.* 18A:37-13.2 et seq (the Act). After an investigation by the school's anti-bullying specialist, the Board determined that B.M. violated the Act when he offered a cashew nut to A.K. – a classmate with a known and documented allergy to nuts – causing A.K. to recoil; B.M. then touched A.K.'s water bottle and lunch bag without first washing his hands. B.M. received a penalty of five days of lunch detention and a follow-up meeting with a guidance counselor. The Board asserted that B.M.'s conduct satisfied all of the elements of the statutory definition of HIB under the Act. The petitioner contended, *inter alia*, that the Board's affirmative determination of HIB was arbitrary, capricious, and unreasonable. The parties consented to resolve the case by summary decision.

The ALJ found, *inter alia*, that: the incident in question was not part of a pattern of conduct; A.K.'s mother did not seek to have B.M. receive a severe penalty for his actions in this matter; a review of the Board's HIB Report Form indicates that school officials acted defensively and overreacted to the incident between B.M. and A.K.; and the inclusion of an affirmative HIB determination in B.M.'s school record could be detrimental to him in the future. The ALJ concluded that the record did not support a finding that B.M. committed an act of HIB and that the Board's HIB determination was unjustified and excessive. Accordingly, the ALJ reversed the Board's finding of HIB and ordered that B.M.'s student record be adjusted to remove any reference to that finding.

Upon review, the Commissioner rejected the ALJ's conclusion that the Board's HIB determination was unjustified and excessive, concluding instead that the petitioner failed to establish that the Board's actions in this matter were arbitrary, capricious, unreasonable, or induced by improper motives. In so doing, the Commissioner found, *inter alia*, that B.M.'s conduct satisfied the statutory definition of HIB and interfered with A.K.'s right to a safe and civil environment at school; further, the HIB investigation was sufficiently thorough in scope. Accordingly, the Commissioner upheld the Board's HIB determination, and the petition of appeal was dismissed.

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

201-23
OAL Dkt. No. EDU 04092-19
Agency Dkt. No. 37-2/19

New Jersey Commissioner of Education

Final Decision

J.M., on behalf of minor child, B.M.,

Petitioner,

v.

Board of Education of the School District of the Chathams, Morris County,

Respondent.

The record of this matter, the Initial Decision of the Office of Administrative Law (OAL), the exceptions filed by the Board pursuant to *N.J.A.C.* 1:1-18.4, and petitioner's reply thereto, have been reviewed and considered.

Petitioner challenges the Board's determination that his son, B.M., committed an act of harassment, intimidation, and bullying (HIB) against a classmate, A.K., who has a nut allergy. During the school lunch period, B.M. offered A.K. a cashew, which caused A.K. to recoil. B.M. subsequently touched A.K.'s lunch bag[1] and water bottle with the same hand that had offered the cashew, even after A.K. warned him to stop due to his nut allergy.

When the school's anti-bullying specialist investigated the incident, B.M. admitted that he knew A.K. was allergic to "peanuts" but stated that he temporarily forgot about it. B.M. admitted touching A.K.'s water bottle and volunteered that he had not washed his hands

[1] In the Initial Decision, the ALJ appears to use "lunch bag" and "lunchbox" interchangeably. For consistency, the Commissioner will use "lunch bag" here.

before doing so. Security camera footage confirmed that B.M. had also touched A.K.'s lunch bag. B.M. acknowledged that A.K. got "annoyed" with him "due to his allergy." The HIB Report Form completed by the anti-bullying specialist states that the single incident at issue "[t]argeted pupil's allergy to nuts" and describes the HIB behavior as "jeopardizing the safety of others."

At the conclusion of a thorough investigation during which B.M., A.K., and a student eyewitness were interviewed, the anti-bullying specialist determined that B.M. committed an act of HIB. The Board agreed, finding that B.M.'s actions were motivated by A.K.'s nut allergy, that the conduct occurred on school grounds during the school day, and that it had the effect of upsetting A.K. and compromising his safety. Thereafter, petitioner filed the instant appeal. Once the matter was transmitted to the OAL, the parties consented to its resolution by summary decision without the need for a hearing.

The Administrative Law Judge (ALJ) concluded that the record did not support a finding that B.M. committed an act of HIB and that the Board's HIB determination was unjustified and excessive. The ALJ cited the fact that the incident was not part of a pattern of conduct, and that A.K.'s mother had not sought for B.M. to receive a severe penalty. The ALJ further found that the HIB Report Form indicated that school officials acted defensively and overreacted. In addition, the ALJ considered the negative impact that the HIB determination might have on B.M. in the future.

In its exceptions, the Board argues that the ALJ erroneously focused upon whether, in his opinion, B.M.'s actions were severe enough to warrant an affirmative finding of HIB instead of whether the Board's HIB determination was arbitrary, capricious, or unreasonable. It also

argues that the ALJ inappropriately considered whether B.M. intended to harm A.K. through his actions.

In reply, petitioner contends that the ALJ correctly applied the arbitrary, capricious, or unreasonable standard of review when determining that the finding of HIB against B.M. was unjustified and excessive. Petitioner also asserts that: (1) the record lacks proof that B.M.'s conduct was motivated by A.K.'s allergy to peanuts or that B.M. rubbed his hands on A.K.'s lunch bag; (2) B.M. did not realize that offering A.K. a cashew could cause A.K. to have an allergic reaction; and (3) the HIB investigation was too limited as it ignored B.M.'s diagnosis of ADHD and Auditory Processing Disorder, did not include statements from other students at the lunch table, and failed to give due consideration to all available evidence.

Upon review, the Commissioner rejects the ALJ's conclusion that the Board's HIB determination was unjustified and excessive.[2] Board action conducted within the ambit of its broad discretionary authority "may not be upset unless patently arbitrary, without rational basis or induced by improper motives." *Kopera v. W. Orange Bd. of Educ.*, 60 *N.J. Super.* 288, 294 (App. Div. 1960). The Commissioner may not substitute their judgment for that of the Board. *Schinck v. Bd. of Educ. of Westwood Consol. Sch. Dist.*, 60 *N.J. Super.* 448, 476 (App. Div. 1960).

The Anti-Bullying Bill of Rights Act (the Act), *N.J.S.A.* 18A:37-13 *et seq.*, requires local boards of education to adopt policies prohibiting HIB which address, among other things,

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[2] The Commissioner also rejects as unsupported by the record the ALJ's factual finding #18, which states: "In reaching his determination that an HIB violation occurred, [the anti-bullying specialist] confirmed that he based his entire decision on the nature of A.K.'s allergy, parent input, and the medical information the school has on file." It appears that, in rendering this finding, the ALJ misconstrued an email which states that the anti-bullying specialist based his decision regarding A.K.'s allergies "on both parent input and the medical information that we have on file for him."

procedures for promptly investigating HIB allegations as well as remedial action for HIB violations. *L.W. ex rel. L.G. v. Toms River Reg'l Schs. Bd. of Educ.*, 381 *N.J. Super.* 465, 498 (App. Div. 2005), *modified by, aff'd by, remanded*, 189 *N.J.* 381 (2007) (citing *N.J.S.A.* 18A:37-15); *Dunkley v. Bd. of Educ. of Greater Egg Harbor Reg'l High Sch. Dist.*, 216 *F. Supp. 3d* 485, 489 (D.N.J. 2016) (quoting *N.J.S.A.* 18A:37-15). The Act defines HIB as:

> [A]ny gesture, any written, verbal or physical act, or any electronic communication, whether it be a single incident or a series of incidents, that is reasonably perceived as being motivated either by any actual or perceived characteristic, such as race, color, religion, ancestry, national origin, gender, sexual orientation, gender identity and expression, or a mental, physical or sensory disability, or by any other distinguishing characteristic, that takes place on school property, at any school-sponsored function, on a school bus, or off school grounds as provided for in section 16 of P.L. 2010, c.122 (C.18A:37-15.3), that substantially disrupts or interferes with the orderly operation of the school or the rights of other students and that:
>
> a. a reasonable person should know, under the circumstances, will have the effect of physically or emotionally harming a student or damaging the student's property, or placing a student in reasonable fear of physical or emotional harm to his person or damage to his property;
>
> b. has the effect of insulting or demeaning any student or group of students; or
>
> c. creates a hostile educational environment for the student by interfering with a student's education or by severely or pervasively causing physical or emotional harm to the student.
>
> [*N.J.S.A.* 18A:37-14.]

In summary, a finding of HIB requires three elements under the Act. First, the conduct must be reasonably perceived as being motivated by any actual or perceived characteristic expressly identified in the statute, or by any other distinguishing characteristic.[3] Second, the conduct must substantially disrupt or interfere with the rights of other students or the orderly

[3] The parties do not dispute that the conduct at issue took place on school property.

operation of the school. Third, one of the three conditions set forth in subsections (a), (b), and (c) must be satisfied. *Wehbeh v. Bd. of Educ. of the Twp. of Verona, Essex Cnty.*, Comm'r Decision No. 510-20 (decided Feb. 4, 2020).

B.M.'s conduct satisfies the statutory definition of HIB. Regarding the first element, the record establishes that, on school property during the lunch period, B.M. held a cashew in his hand, extended his arm toward A.K., offered the cashew to him, and later touched A.K.'s lunch bag and water bottle. A.K. reacted by recoiling and warning B.M. to stop his behavior due to his nut allergy. A.K. reasonably perceived that B.M.'s conduct toward him was motivated by his nut allergy, which qualifies as a distinguishing characteristic. B.M.'s actual intent is not relevant under the Act.

As for the second element, B.M.'s conduct interfered with A.K.'s right to a safe and civil environment at school. *See N.J.S.A.* 18A:37-13 (explaining the purpose of the Act and finding that "a safe and civil environment in school is necessary for students to learn and achieve high academic standards"). Concerning the third element, a reasonable person should know that presenting a cashew to a student with a nut allergy will place that student in reasonable fear of physical harm. While B.M. claimed that he only knew A.K. was allergic to "peanuts," A.K. reacted negatively to the cashew and immediately reminded B.M. of his "nut" allergy. B.M. proceeded to touch A.K.'s lunch bag and water bottle with the same hand that held the cashew. Whether or not B.M. intended to harm A.K. is immaterial under the Act.

The Commissioner agrees with the Board that the ALJ erroneously focused upon whether, from his own perspective, B.M.'s actions were severe enough to warrant a finding of HIB instead of whether the Board's determination was arbitrary, capricious, or unreasonable

under the Act. Rather than analyzing B.M.'s conduct under the statutory definition of HIB and evaluating the reasonableness of the Board's HIB determination, the ALJ inappropriately substituted his own judgment for that of the Board. It was not for the ALJ to decide that B.M. could or should have received a lesser code of conduct violation as opposed to a HIB violation. Whether A.K.'s mother had sought a finding of HIB against B.M. is irrelevant under the Act, as is the potential negative impact of a HIB determination on B.M.'s school record. And yet, the ALJ considered these immaterial factors. Furthermore, the ALJ's finding that the content of the HIB Report Form was indicative of a defensive overreaction by school officials is unfounded.

Petitioner's reply exceptions are unavailing. The record need not contain proof that B.M.'s conduct was actually motivated by A.K.'s nut allergy. Rather, as explained herein, the pertinent inquiry under the Act is whether A.K. reasonably perceived that B.M.'s conduct toward him was motivated by his nut allergy. Additionally, petitioner's insistence that A.K. is only allergic to peanuts is contradicted by the record. Moreover, the ALJ never found that B.M. "rubbed" his hands on the lunch bag or the water bottle. Rather, security video confirmed, and the ALJ found, that B.M. touched A.K.'s lunch bag with his hands. And whether B.M. realized in the moment that offering A.K. a cashew could trigger A.K. to experience an allergic reaction is not relevant under the reasonable person standard stated at *N.J.S.A.* 18A:37-14(a).

Finally, the Commissioner finds that the HIB investigation was sufficiently thorough in scope. Contrary to petitioner's claim, the record reflects that another student seated at the same lunch table as B.M. and A.K. on the date of the incident was interviewed during the investigation. That student confirmed that B.M. had offered A.K. a nut and stated that, in response, A.K. had asked B.M.: "Are you trying to kill me?" Additionally, the anti-bullying

specialist was fully aware of B.M.'s 504 plan. The fact that the 504 plan was not mentioned on the HIB Report Form does not establish that it was not considered. In any event, petitioner has not cited any legal authority to support the conclusion that B.M.'s 504 plan should have absolved him of a HIB determination against him.

Accordingly, the ALJ's conclusion that the Board's HIB determination was unjustified and excessive is rejected. Instead, the Commissioner finds that petitioner has not established that the Board's HIB determination was arbitrary, capricious, unreasonable, or induced by improper motives. Accordingly, the Commissioner upholds the Board's HIB determination, and the petition of appeal is hereby dismissed.

IT IS SO ORDERED.[4]

Angelina Allen McMillan, Ed.D.
ACTING COMMISSIONER OF EDUCATION

Date of Decision: July 6, 2023
Date of Mailing: July 7, 2023

[4] This decision may be appealed to the Appellate Division of the Superior Court pursuant to *N.J.S.A.* 18A:6-9.1. Under *N.J.Ct.R.* 2:4-1(b), a notice of appeal must be filed with the Appellate Division within 45 days from the date of mailing of this decision.

State of New Jersey
OFFICE OF ADMINISTRATIVE LAW

INITIAL DECISION
OAL DKT. NO. EDU 04092-19
AGENCY DKT. NO. 37-2/19

J.M. ON BEHALF OF MINOR CHILD, B.M.,
Petitioners,
v.
THE CHATHAMS SCHOOL DISTRICT
BOARD OF EDUCATION, MORRIS COUNTY,
Respondent.

Richard Kaplow, Esq. for petitioner

Frances L. Febres, Esq. for respondent (Cleary Giacobbe Alfieri Jacobs, LLC, attorneys)

Record Closed: March 17, 2023 Decided: April 13, 2023

BEFORE ANDREW M. BARON, ALJ:

STATEMENT OF THE CASE

Petitioner challenges an HIB (Harassment, Intimidation and Bullying, "HIB") finding against their minor child by the Chatham School District involving an incident with another student.

BACKGROUND AND PROCEDURAL HISTORY

On October 24, 2018, the District ABS officer determined that petitioner had engaged in an HIB violation, because his actions could have harmed another student. Two days later, the school principal affirmed the finding, which was followed by a penalty of five days detention and a follow up meeting with the guidance counselor.

On or about October 31, 2018, the matter was then sent to the Superintendent, who informed petitioner's parents that the matter was being formally reported to the Chatham Board of Education as a bullying incident. Even though the determination had already been made, the ABS officer continued his investigation and questioning of the alleged victim.

The matter was then taken up by the Board of Education on November 19, 2018. Following a hearing, the board affirmed the HIB determination, specifically finding that the student's actions were motivated by knowledge of the victim's nut allergy, which occurred on school grounds, during the school day and had the effect of upsetting the victim and compromising his safety.

This appeal was filed and transmitted to the Office of Administrative Law on March 22, 2019. Numerous conferences and efforts to resolve the matter pre and post pandemic ensued, which were unsuccessful.

Thereafter, by consent, the parties determined that the matter could be decided by Summary Disposition without testimony.

FACTUAL DISCUSSION AND FINDINGS OF FACT

Based on the facts as submitted by both sides, I make the following **FINDINGS OF FACT**, which are essentially undisputed, and which are subject to the interpretation and application of the New Jersey Anti-Bullying Law.

1. A.K. and B.M. were both seventh grade students attending The Chatham Middle School on October 17, 2018.
2. Sometime during the lunch/recess period that day, the school was notified by A.K.'s mother that B.M. had waived cashews in A.K.'s face and was touching his lunch bag and water bottle.
3. A.K.has a nut allergy, and apparently shared this incident with his mother when he returned home from school.
4. In an email communication from A.K.'s mother dated October 17, 2018, in a calm tone, his mother simply requested: "Can you please let Benjamin know that this is a serious health issue and, for some individuals can be potentially life threatening? It is unclear how and why this incident was then escalated into an HIB investigation, as opposed to a code of conduct violation, or simply detention with counseling.
5. B.M. has auditory processing, ADHD and other forms of related and other documented social and learning challenges. He also has accommodations under a Federal 504 plan. None of this is referenced in the HIB report.
6. Thereafter, a HIB investigation was initiated and conducted by the school's anti-bullying specialist, Anthony Giaconia.
7. Mr. Giaconia filed a nine-page report, and while it appears A.K.'s mother only asked for the District to speak with B.M. about the potential health ramifications, at no time was she demanding severe punishment of B.M. that was consistent with the actions of the District.
8. In fact, by the time it got to the school principal, it then escalated once it went to the District Superintendent who also directed school officials to contact the local police.
9. Although a one-day suspension was recommended, school officials themselves decided to reduce that to five days of lunch detention, which is a common penalty for other student infractions.
10. The HIB form which Chatham utilizes contains sixteen possible actions in connection with the statute. However only one box was checked: "Jeopardizing the safety of others."
11. The report also allows for the opportunity to reference up to six interviews with witnesses to the incident. No one was listed.

12. At a meeting between B.M. and the school counselor which Mr. Giaconia attended in his capacity as the A.B.S. investigator, Mr. Giaconia told B.M. that "no one thinks B.M. tried to intentionally hurt, A.K."
13. Other options on the HIB report which would support a finding under the Act are not checked, including but not limited to: "threatening comments, gestures or physical acts, intimidating conduct towards another pupil.
14. For example, it is undisputed that leading up to the incident which the District determined was an HIB violation, there was no physical aggression or contact by B.M. against the pupil, there was no teasing or name calling, there were no insulting or demeaning comments, there were no threatening comments, gestures or physical acts, there was no indication of intimidating conduct, there was no spreading harmful rumors or gossip about the pupil, there was no getting another person to harm a pupil, there was no indication of harassment intimidation or bullying through electronic communications, no stalking, no destruction of property, no public humiliation, stealing or theft, no defacing of property, excluding or rejection, and finally, no extorting or exploiting a pupil.
15. In fact, it was not disputed that leading up to the incident which gave rise to the HIB complaint, both boys were friends, even playing together at each other's homes.
16. During the interview, A.K. indicated that B.M. waved a cashew in this face, and when he asked B.M. to stop, B.M. also touched his lunchbox and his water bottle.
17. During his interview with B.M., he acknowledged that he knew A.K. was allergic to nuts, but that he "temporarily forgot." He further indicated that he hadn't "washed his hands yet. The ABS official interpreted that to mean that B.M. knew the residue from the nuts he was holding could transfer to A.K.'s water bottle and lunch bag.
18. In reaching his determination that an HIB violation occurred, Mr. Giaconia confirmed that he based his entire decision on the nature of A.K.'s allergy, parent input, and the medical information the school has on file.
19. When communicating with B.M.'s parents, Mr. Giaconia indicated that even if the incident did not constitute a provable act of bullying, "it would still be classified as a violation of the Code of Conduct and the disciplinary consequences would be the same."

20. Although there was some question about the status of the friendship between the boys on the day of the incident, A.K. who usually sits at another lunch table, chose to sit with B.M. on the day of the incident, and prior thereto, they had been frequent guests at each other's homes.
21. **I FIND**, that whatever occurred between B.M. and A.K. on October 17, 2018, a preponderance of the facts and evidence **DO NOT** support a finding that a HIB violation was committed by B.M. **I FIND** that while school officials were justified in conducting an investigation, the end result, which was to charge and sustain a finding of a HB violation by B.M. was not justified and was excessive.
22. **I FURTHER FIND**, that in viewing the extensive nine-page report, together with the initial email submitted to school officials by A.K.'s mother, there is nothing to suggest she was seeking to have such a severe penalty imposed, nor does the report itself suggest a pattern of conduct by B.M. against A.K. that is more in line with what the Anti-Bullying statute requires. **I FIND** that the lack of entries in all sixteen boxes which outline what an HIB violation is, speaks volumes to the fact that out of defensiveness, school officials may have overreacted, including but not limited to involving the superintendent of schools, and also by contacting the local police.
23. As school officials indicated to B.M.'s parents, he could have been charged with a code of conduct violation, which seems more consistent with the underlying events, and the ultimate penalty of a five-day lunch detention, which is a common form of discipline in schools. Even though B.M. was a seventh grader at the time, **I FIND** that having a bullying incident as part of his school record may be detrimental to him at some time in the future.
24. For all of the foregoing reasons outlined above, **I CANNOT FIND** that the events of October 17, 2018 constitute an act of bullying.

LEGAL ANALYSIS AND CONCLUSION OF LAW

The New Jersey Anti-Bullying Bill of Rights, sets forth four elements under N.J.S.A. 18A:37-13 that must be established in order to constitute an incident of bullying in a school setting. (HIB).

The first element requires conduct that must be "reasonably perceived as being motivated either by any actual or perceived characteristic, such as race, color, religion, ancestry, national origin, gender, sexual orientation gender identity and expression, or a mental, physical or sensory disability, or by any other distinguishing characteristic."

The next requirement is the conduct must take place "on school property, at any school-sponsored function, on a school bus, or off school grounds.

Third, the conduct must substantially disrupt or interfere with the orderly operation of the school or the rights of other students.

The fourth and final element necessary to establish an HIB incident is that the conduct must be such that:

a) A reasonable person should know, under the circumstances, will have the effect of physically or emotionally harming a student or damaging the student's property, or placing a student in reasonable fear of physical or emotional harm to his person or damage to his property.
b) Has the effect of insulting or demeaning any student or group of students or
c) Creates a hostile educational environment for the student or group of students by interfering with a student's education or by severely or pervasively causing physical or emotional harm to the student.

In addition to the aforementioned criteria, the statute also references that an HIB investigation must be thorough and timely and be completed within ten days of the reported incident. See: L.P. and H.P. o/b/o L.P. v. Bd. of Educ. of the West Morris Reg. High School Dist. OAL Dkt. No. EDU 04462-16, 2016 WL 3361005 (2016).

Other cases have defined bullying on a case-by-case basis as within the discretion of the district. In C.K. & M.K. o/b/o M.K. v. Voorhees Bd. of Ed. OAL Dkt. No. EDU 20510-10 2017 WL 10399002, Final Decision (N.J. Adm. March 2017), an accused student who was developmentally disabled reached under a bathroom stall and grabbed a girl's leg asking for a high-five. Though the accused student was not interviewed during the investigation, which went beyond the ten-day timeline, the ALJ found that it would not be in the best interests of the students to be re-interviewed, as the information received would be inconsequential.

In another matter involving the timing and manner in which an investigation was conducted, an HIB inquiry consisted of student interviews, written statements and review of surveillance footage. See: W.H. o/b/o Z.A. v. Beverly Bd. of Educ. OAL Dkt. No. EDU 08075-19, Initial Decision 2021 WL 7629602 adopted Comm'r Final Decision (N.J. Adm. October 21, 2021). In upholding the ABS determination that there was no evidence to support any element of the HIB statute, the ALJ determined that the District had conducted a prompt and thorough" investigation.

And, in a case which upheld a District's fining of an HIB violation, which ultimately reversed an ALJ's finding that the HIB investigation was not thorough, the Commissioner of Education rejected an ALJ's determination finding that the investigation was insufficient. See: L.K. and T.K. o/b/o A.K. v. Mansfield Twp.Bd. of Educ. OAL Dkt. No. EDU 7067-16, 2019 WL 1259466, Initial Decision rejected, Comm'r Final Decision (N.J. Adm. April 22, 2019). The conduct of the student in that case was motivated by gender, and notably however and left undisturbed was the ALJ's finding was that the ABR focuses on the impact of the conduct of an accused student, which the victim reasonable perceived as being the motivation for the conduct itself.

CONCLUSION

The parties by Consent filed a Motion and Cross Motion for Summary Disposition, suggesting there I no need for a hearing, and the case can be decided as a matter of law based on facts which are for the most part undisputed.

I agree, and therefore **CONCLUDE** there are insufficient facts to establish by a preponderance of the evidence that an HIB violation occurred. While food allergies in children must be taken seriously at all times, **I CONCLUDE** for purposes of this situation that District officials overreached, and the matter would have been more appropriately dealt with at the time through internal alternate means. That is not to suggest that no discipline was warranted, but **I CONCLUDE** that the events did not give rise to a determination that B.M. was bullying A.K. The counseling the District required, together with a lunch detention was sufficient, without escalating the matter to an HIB violation.

ORDER

With the **Finding and Conclusion** that there are insufficient facts to establish by a preponderance of the evidence that B.M. committed an HIB violation, it is hereby **ORDERED** that the finding against him arising out of an incident on October 17, 2018 is hereby **REVERSED,** and a copy of this decision shall be placed in B.M.'s student file. The District' internal records concerning B.M. should be adjusted accordingly.

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

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

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

April 13, 2023
DATE

ANDREW M. BARON, ALJ

Date Received at Agency: April 13, 2023

Date E-Mailed to Parties: April 13, 2023

lr

APPENDIX

LIST OF WITNESSES

For Petitioner:

None

For Respondent:

None

LIST OF EXHIBITS IN EVIDENCE

(Confidential and subject to privacy laws due to nature of proceeding, minor children involved, exempt from OPRA and other public disclosure not to be released unless court ordered)

For Petitioner

Incorporates by reference Exhibits R-1 through R-5

P-1 Thumb drive- (Unable to view after first sixty seconds)

For Respondent

R-1 E-mail notification from A.K.'s mother

R-2 HIB Investigation report

R-3 Principal affirmance of HIB finding

R-4 E-mail clarification to ABS investigator

R-5 Board Affirmance

202-23

New Jersey Commissioner of Education
Final Decision

Board of Education of the Bordentown Regional School District, Burlington County,

Petitioner,

v.

Raymond Marini, Interim Executive County Superintendent, New Jersey Department of Education, Board of Education of the Northern Burlington County Regional School District, Burlington County, and Z.L. and T.L., on behalf of minor children, J.L. and B.L.,

Respondents.

Synopsis

In this matter on remand, the Board of Education of the Bordentown Regional School District (Bordentown) appealed the determination of respondent Raymond Marini, Interim Executive County Superintendent (ECS), that Z.L. and T.L. and their minor children are homeless. Bordentown contended that Z.L. and T.L. are domiciled in Bordentown, as they have resided in the Bordentown home of T.L.'s mother since they lost their housing within the Northern Burlington County Regional School District (Northern Burlington) due to financial hardship, and further argued that Bordentown is therefore not financially responsible for tuition costs related to J.L. and B.L.'s attendance in Northern Burlington schools for the 2020-2021 school year and beyond. Following issuance of an Initial Decision on July 22, 2022, in which the ALJ found that the L family was no longer homeless, the Commissioner remanded the matter to the OAL for further development of the record to determine whether the family's housing was regular, fixed and adequate, as well as a factual determination as to the date when the family were no longer homeless.

On remand, the ALJ found, *inter alia*, that: Z.L. and T.L. have lived in Bordentown with T.L.'s mother for five years and have no plans to relocate; the family has full access to the Bordentown home's kitchen and second bathroom; while the space is tight, all family members have a bed; and the Bordentown home is a fixed, regular, and adequate place to live; accordingly, the children can no longer be considered homeless. The ALJ concluded that the family have become residents of Bordentown; the ECS's determination of homelessness should be reversed; and Bordentown has no financial responsibility for the children's attendance in Northern Burlington schools; further, Northern Burlington has no basis for tuition reimbursement for the school years prior to 2020-2021.

Upon review, the Commissioner, *inter alia,* agreed with the ALJ that the L family is no longer homeless and adopted the Initial Decision with modification, finding that Bordentown is responsible for the cost of educating the L children during the 2020-2021, 2021-2022 and 2022-2023 school years and may seek reimbursement from Z.L. and T.L. for certain costs that exceed the cost Bordentown would have incurred to educate them in its own schools.

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

202-23
OAL Dkt. No. EDU 09659-22
(EDU 01639-22 On Remand)
Agency Dkt. No. 7-1/22

New Jersey Commissioner of Education

Final Decision

Board of Education of the Bordentown Regional School District, Burlington County,

Petitioner,

v.

Raymond Marini, Executive County Superintendent, New Jersey Department of Education, Board of Education of the Northern Burlington County Regional School District, and Z.L. and T.L., on behalf of minor children, J.L. and B.L.,

Respondents.

The record of this matter and the Initial Decision of the Office of Administrative Law (OAL) have been reviewed, as have the exceptions filed pursuant to *N.J.A.C.* 1:1-18.4 by respondents Northern Burlington County Regional Board of Education (Northern Burlington) and Z.L. and T.L., and the reply thereto filed by petitioner Bordentown Board of Education (Bordentown).

The L. family resided in Chesterfield, which is part of the Northern Burlington school district, until they lost their housing due to financial hardship. They moved in with T.L.'s mother in Bordentown. The children continued to attend school in Northern Burlington, and Bordentown assumed responsibility for the cost of their tuition and transportation for the 2018-2019 and 2019-

2020 school years. On October 14, 2021, after Bordentown challenged the family's homelessness status, Executive County Superintendent (ECS) Raymond Marini issued a determination that the family was still homeless. Bordentown filed an appeal challenging this ECS decision and seeking a determination that Bordentown had become the family's permanent residence, and that Bordentown is not responsible for the cost of educating the children for the 2020-2021 school year and future years. J.L. continued to attend school in Northern Burlington through the 2021-2022 school year, then transferred to an online private school for the 2022-2023 school year; the record indicates that he is scheduled to graduate in 2023. B.L. continues to attend school in Northern Burlington through the present; Z.L. testified that B.L. is on track to graduate in June 2024 although, as a special education student, he may be able to continue his education beyond the standard four years of high school.

On July 22, 2022, the Administrative Law Judge (ALJ) issued an Initial Decision finding that the family was no longer homeless. On October 19, 2022, the Commissioner remanded the matter to the OAL for further development of the record. Following a hearing, the ALJ found that the Bordentown home is a fixed, regular, and adequate place to live and that the children can no longer be considered homeless. The ALJ noted that the family has lived in Bordentown for five years and has made no effort to find other housing. Accordingly, the ALJ concluded that the children have become residents of Bordentown and that Bordentown has no financial responsibility for their attendance in Northern Burlington for the 2020-2021 or 2021-2022 school years. The ALJ also concluded that Northern Burlington has no basis for tuition reimbursement for the school years prior to 2020-2021.

In their exceptions, Z.L. and T.L. argue that they were uprooted when Z.L. got sick and was unable to keep his job, leading to the loss of the family's house. They note that B.L. has special

needs and that it is in his best interests to remain in Northern Burlington schools for his senior year, as requiring him to switch schools will result in him becoming violent and inconsolable to the point that he would simply be unable to attend school and therefore would not graduate in June 2024 as anticipated.

In its exceptions, Northern Burlington argues that Bordentown failed to prove by a preponderance of the evidence that the L. family is no longer homeless. According to Northern Burlington, Bordentown did not seek any discovery from the L. family and improperly placed the burden on the L. family to show that they were homeless. Northern Burlington also contends that the family's living arrangements are not fixed, regular, or adequate, with two children sharing a bed, an adult child sharing a room with a parent, and the other parent sleeping on an air mattress in a common area, with the rooms so small that their dressers line the hallways. Northern Burlington notes that Z.L. testified that he sent in seven apartment applications but was denied based on his credit score, demonstrating that the family does not have the ability to find alternate housing.

Furthermore, Northern Burlington argues that Bordentown is fiscally responsible for the children's education regardless of whether the family was homeless. Northern Burlington contends that if the family remained homeless, Bordentown would be responsible for their costs once they had resided in Bordentown for one year, pursuant to *N.J.S.A.* 18A:38-1(d). If the family was not homeless, Bordentown would still be responsible for their costs, pursuant to *J.G., o/b/o T.G. and C.G. v. Bd. of Educ. of the Twp. of Edison, Middlesex Co., and Bd. of Educ. of the Borough of Milltown, Middlesex Co.*, Commissioner Decision No. 125-20 (June 15, 2020), which held that the district where the G. family lived when they became homeless was not responsible for the costs of the children's tuition after they became domiciled in a new district.

In its reply, Bordentown argues that there is ample evidence in the record to support the ALJ's conclusion that the Bordentown home is fixed, regular, and adequate, and that the L. family is no longer homeless. Bordentown notes that Z.L. testified that he had only applied for housing seven times in the more than five years since the family moved to Bordentown – with the most recent application occurring in the summer of 2022 – and that the family has refused to look in any districts other than Northern Burlington. According to Bordentown, the parents' preference to have their children remain in Northern Burlington schools is insufficient to support a finding of homelessness. Bordentown argues that the family's income, in combination with their lack of housing expenses or bills since 2017 should allow them to obtain another residence and that there is no necessity to their remaining in Bordentown.

Bordentown also argues that Northern Burlington incorrectly relies on *J.G.*, *supra*, to support its contention that Bordentown is responsible for the children's costs even if they are no longer homeless. Bordentown distinguishes this matter from *J.G.*, noting that *J.G.* was initiated as a residency case, which entitled the parents to keep their children enrolled in their school during the pendency of the appeal. The student's original district had attempted to disenroll the children and thereby put a stop to its accrual of tuition and transportation costs – something that Northern Burlington never attempted to do here. Additionally, the district where the G. family moved never notified them that it was disputing their continued homeless status – something that Bordentown did do here. Bordentown also argues that it would not have incurred any costs if the L. children attended school in Bordentown, as it owns and operates its own fleet of buses and is currently experiencing declining enrollment that would have allowed adequate space for the L. children.

Upon review, the Commissioner agrees with the ALJ that the L. family is no longer homeless. Under the McKinney-Vento Act, homeless children are defined as "individuals who lack a fixed,

regular and adequate nighttime residence," which includes "children sharing housing with other persons due to loss of their own housing, economic hardship, or a similar reason." 42 *U.S.C.A.* § 11434a. Similarly, under state law, homeless children are defined as "child[ren] or youth who lack[] a fixed, regular, and adequate residence pursuant to *N.J.S.A.* 18A:7B-12 and *N.J.A.C.* 6A:17-2.2," which includes children living in the "residence of relatives or friends where the homeless child resides out of necessity because his or her family lacks a regular or permanent residence of its own." *N.J.A.C.* 6A:17-1.2 and 2.2.

Thus, conducting a homelessness evaluation to determine whether a child's home is considered fixed, regular, and adequate requires a fact-specific analysis and "cannot rest upon a simple calculation of the amount of time that children have spent in a particular location or municipality." *M. O'K. v. Board of Education of the Borough of Cresskill, et al*, Commissioner Decision No. 325-14, decided August 12, 2014, at 3, *aff'd*, A-0828-14T4 (App. Div. September 8, 2016). In conducting such a fact-specific inquiry, the Commissioner must consider the totality of the circumstances, as "[t]he reasons for the children's homelessness, their living conditions, and the resources and intentions of the parents or custodians are relevant." *Ibid.*

The Commissioner has previously addressed the fact-specific nature of a homelessness inquiry. In *M. O'K., supra,* following the foreclosure of their home in Cresskill, the O'K family occupied the bottom floor of their relatives' house in Little Ferry, which consisted of one small bedroom and a common area, without a bathroom or kitchen. The parents and two of the children shared the bedroom, while their third child slept in the common area. At the time of the litigation, neither parent was employed, and the family's sole income consisted of Social Security Disability benefits. During the pendency of the litigation, the O'K family represented that they were actively searching for a house in Cresskill. The Commissioner found, and the Appellate Division affirmed,

that the O'K family became homeless due to the foreclosure of their home in Cresskill, and although they had been deemed domiciled in Little Ferry as a result of their residence in the district for over one year, they continued to remain homeless due to their shared living conditions and the parents' economic hardship.

In contrast, in *State-Operated School District of the City of Camden, Camden County v. C. Ann Volk, Executive County Superintendent, New Jersey Department of Education, and E.H., on behalf of minor child, K.M.*, Commissioner Decision No. 172-17R, decided June 20, 2017, the family relocated from Voorhees to Camden due to economic hardship that prevented them from continuing their lease. In the Camden residence, the family was able to use the entire residence and was not relegated to a portion of the home that would otherwise be considered inadequate. E.H., the children's mother, argued that the residence was inadequate because the siblings had to share a room, which the Commissioner found was not uncommon. Furthermore, given E.H.'s ongoing employment at an annual salary of $65,000, the Commissioner was not persuaded that she was unable to find suitable housing in Voorhees, particularly in light of her testimony that she had stopped looking for apartments. The Commissioner found that the family was not residing in the Camden residence of out necessity and that it qualified as a "fixed, regular, and adequate" nighttime residence, such that the family was not homeless. *Ibid.*

Similar to *Camden*, in *J.G., on behalf of minor children, T.G. and C.G. v. Board of Education of the Township of Edison, et al,* Commissioner Decision No. 125-20, decided June 15, 2020, the G. family moved in with J.G.'s mother in Edison after being evicted from their home in Milltown. The family was able to use three of the four bedrooms, the kitchen, bathrooms, all common areas, and utilities in the Edison home. J.G. and his wife were both employed, with an income of $71,000 a year, but they did not pay rent or contribute to housing costs, other than food and a storage facility.

While they stated that their intent was to move back to Milltown, there was no documentation of their search for a new home, and J.G. admitted that he had not submitted a rental application in at least six months. The Commissioner found that, while J.G.'s intention may be to eventually move back to Milltown, the totality of the facts and circumstances demonstrate that the family is no longer homeless.

Here, the L. family's circumstances demonstrate that while their living situation may not be ideal due to tight quarters, it is fixed, regular, and adequate. The Commissioner does not find Northern Burlington's exceptions to be persuasive.[1] The testimony demonstrates that the family has full access to two bedrooms, the kitchen and a full bathroom, with T.L.'s mother also having her own full bathroom. Petitioners have an income of approximately $62,000 per year but do not pay rent or any other expenses for the Bordentown home except for the television bill. Z.L. testified that he had applied for rental apartments in Northern Burlington but was denied due to his credit score. However, he also testified that he had applied for rental apartments only seven times over more than five years, had not applied for any rentals since the summer of 2022, and had not applied for housing in any other school districts because he and T.L. wanted the children to remain in Northern Burlington's schools. These facts are comparable to those in *Camden*, *supra*, in which the parents had poor credit and debts, including default judgments, and had been rejected for rentals. Additionally, the siblings shared a room, as B.L. and J.L. do here, and one parent slept in the living room, as Z.L. does here. However, they had full access to the home where they were residing; had an income of $65,000 per year; and had stopped looking for other housing. The family in *Camden* was found not to be homeless. *See also J.G.*, *supra*.

[1] Z.L. and T.L.'s exceptions do not specifically argue that the ALJ incorrectly concluded that they were no longer homeless, but rather address what they believe to be in the best interests of the children. However, that analysis is only applicable when the children have been determined to be homeless. *N.J.S.A.* 18A:7B-12.1.

The L. family has resided in the Bordentown home for more than five years. "[W]hen a homeless family moves into a relative's home that is adequate – and the adults in the family are sufficiently employed with the financial means to find alternative housing, and the family continues to live in the home for an extended period of time without any imminent or foreseeable risk of losing their place in that home, and they share the space as a cohesive unit – a finding of homelessness would be improper." *Camden, supra.* While the L. family may eventually intend to leave the Bordentown home, that intent alone is insufficient to support a finding of homelessness; the totality of the facts in this case demonstrate that the family is no longer homeless and has not been homeless since at least the beginning of the 2020-2021 school year.[2]

As J.L. and B.L. were neither homeless nor residents of Northern Burlington, they were not entitled to a free public education in Northern Burlington's schools during the 2020-2021, 2021-2022, or 2022-2023 school years. However, as the children did attend Northern Burlington schools, the Commissioner must determine who bears the financial responsibility for their attendance. Northern Burlington is not the responsible party, as its obligation to provide the children with a free public education ceased when the family became domiciled in Bordentown in 2018, after one year of living with T.L.'s mother, in accordance with *N.J.S.A.* 18A:38-1(d) and *N.J.A.C.* 6A:17-2.3. On the other hand, the purpose of the McKinney-Vento Act and the related state law is to ensure that a homeless child is not denied a free public education; it is not meant to enable a child to receive an education in a school district of preference by circumventing residency requirements. *Camden, supra.*

[2] Because Bordentown has already paid Northern Regional for the children's tuition for the 2018-2019 and 2019-2020 school years, and is not contesting payment for those years, it is not necessary for the Commissioner to determine whether the family's residence in Bordentown became fixed prior to the 2020-2021 school year.

In *Camden, supra,* once the Commissioner determined that the children resided in Camden and were not homeless, Camden was held responsible for paying tuition to Voorhees, where the children attended school. However, Camden was permitted to recover from the parent the difference between the per pupil cost of education and transportation in Camden and the costs paid to Voorhees for the children. *Ibid.* Similarly, in *J.G., supra,* once the Commissioner determined that the children resided in Edison and were not homeless, Edison was held responsible for paying tuition to Milltown, where the children attended school. Edison was permitted to recover the difference in costs. *Ibid.*

This case presents a similar scenario. Bordentown is the district where the children were domiciled for the 2020-2021, 2021-2022, and 2022-2023 school years and is therefore the district responsible for their education. Accordingly, Bordentown must reimburse Northern Burlington for the cost of educating the children in Northern Burlington.

Bordentown may seek reimbursement from Z.L. and T.L. for certain costs that exceed the cost Bordentown would have incurred to educate the children in its own schools. This amount shall be calculated as the total of 1) the difference between the cost of the children's transportation to Northern Burlington and any cost of transportation Bordentown may have incurred had the children attended school in Bordentown, and 2) the difference between Northern Burlington's annual per pupil cost for the 2020-2021, 2021-2022, and 2022-2023 school years and Bordentown's per pupil cost for each of those years.

The Commissioner acknowledges that the amount Bordentown will be required to pay to Northern Burlington includes special education tuition and related costs for B.L., making those payments significantly higher than the per pupil cost that a district incurs to educate a general education student. However, the Commissioner has previously concluded in student residency

matters that a board of education's ability to recover tuition costs from a parent is limited. *N.J.S.A.* 18A:38-1(b) provides that if a parent loses a residency appeal, the Commissioner shall assess tuition "computed on the basis of 1/180 of the total annual per pupil cost to the local district multiplied by the number of days of ineligible attendance." The statute does not specify that the assessed tuition be equal to the actual costs incurred by the district for educating the student at issue. Instead, it uses the measure of annual per pupil cost, which is based on the district's overall costs and enrollment and is not specific to any individual student. *See N.J.-B., on behalf of minor child, I.T. v. Board of Education of the Township of Union, Union County*, Commissioner's Decision No. 112-20, decided April 24, 2020 (finding that tuition reimbursement is limited to 1/180 of the per pupil cost and does not include the assessment of special education and related costs). While this matter was not opened as a residency matter, because this decision assesses tuition costs against respondents Z.L. and T.L. for the cost of their children's ineligible attendance in Northern Burlington, the Commissioner concludes that it is appropriate to apply the statute and case law related to residency assessments to this matter.

Bordentown argues that it should not be responsible for any costs for the 2020-2021, 2021-2022, or 2022-2023 school years and attempts to distinguish *J.G* because that case was initiated as a residency matter and because the district where the *G.* family moved never notified them that it was disputing their homelessness status. However, Bordentown fails to acknowledge that the Commissioner ordered a similar reimbursement structure in *Camden*, which was initiated as an appeal of a homelessness determination by an ECS, just as this case was. Accordingly, the Commissioner does not find Bordentown's exceptions persuasive. The Commissioner also rejects Bordentown's argument that since it was under its targeted enrollment, the district would incur no additional cost for educating J.L. and B.L. This argument mischaracterizes the costs of education as

being solely those arising from hiring a teacher to provide instruction to students. However, school funding and student tuition payments are based on many categories of expense that are averaged across all students. *See, e.g., N.J.A.C.* 6A:23A-17.1 (establishing the means of determining the "actual cost per student" for determining tuition rates and including the cost of textbooks, instructional equipment, teaching supplies, land and building rentals, school-sponsored activities, administration services, technology, training, and numerous other types of expenses in addition to teacher salaries). Furthermore, as noted above, because B.L. is a special education student, his educational costs exceed those of a general education student, and such costs would have been incurred by Bordentown if B.L. had attended school in its school district, as Bordentown wished, for those school years.[3]

Regarding Northern Burlington's cross-petition for tuition for the 2015-2016, 2016-2017, and 2017-2018 school years, the claim rests on a handwritten note from T.L.'s mother indicting that the family had been living with her, which is dated October 13, 2014. However, during the hearing, counsel for Northern Burlington agreed that the family became homeless in 2017, not in 2014. Additionally, Z.L. testified that the family moved to Bordentown in April 2017. Therefore, the Commissioner finds that Northern Burlington has no basis for tuition reimbursement and the cross-petition is dismissed.

Accordingly, the Initial Decision is adopted as modified herein. Bordentown is ordered to reimburse Northern Burlington for the costs of J.L. and B.L.'s attendance at Northern Burlington County Regional High School for the 2020-2021, 2021-2022, and 2022-2023 school years.

[3] Bordentown has presented no argument that the additional services provided for B.L. were inappropriate or excessive, and, indeed, Bordentown paid those costs to Northern Burlington for the 2018-2019 and 2019-2020 school years.

Bordentown may seek reimbursement from Z.L. and T.L. as outlined herein. B.L. shall be enrolled in Bordentown for the 2023-2024 school year.

IT IS SO ORDERED. [4]

Angelica Allen-McMillan, J.D.S.
ACTING COMMISSIONER OF EDUCATION

Date of Decision: July 6, 2023
Date of Mailing: July 7, 2023

[4] This decision may be appealed to the Appellate Division of the Superior Court pursuant to *N.J.S.A.* 18A:6-9.1. Under *N.J.Ct.R.* 2:4-1(b), a notice of appeal must be filed with the Appellate Division within 45 days from the date of mailing of this decision.

State of New Jersey
OFFICE OF ADMINISTRATIVE LAW

INITIAL DECISION
OAL DKT. NO. EDU 09659-22
AGENCY DKT. NO. 7-1/22
(ON REMAND EDU 01639-22)

BOARD OF EDUCATION OF THE BORDENTOWN REGIONAL SCHOOL DISTRICT, BURLINGTON COUNTY,

Petitioner,

v.

RAYMOND MARINI, INTERIM EXECUTIVE COUNTY SUPERINTENDENT, NEW JERSEY STATE DEPARTMENT OF EDUCATION, BOARD OF EDUCATION OF THE NORTHERN REGIONAL COUNTY SCHOOL DISTRICT, BURLINGTON COUNTY; AND Z.L. AND T.L ON BEHALF OF MINOR CHILDREN, J.L. AND B.L.,

Respondents.

Cameron R. Morgan, Esq., for petitioner, Bordentown Regional Board of Education (Cleary, Giacobbe, Alfieri and Jacobs, LLC, attorneys)

William C. Morlok, Esq., for respondent, Northern Regional County School District Board of Education (Parker McCay, P.A., attorneys)

Colin G. Klika, Deputy Attorney General, for respondent, Raymond Marini, Interim Executive County Superintendent (Matthew J. Platkin, Attorney General of New Jersey, attorneys)

Z.L. and **T.L.**, respondents, pro se

Record Closed: March 22, 2023 Decided: April 21, 2023

BEFORE **SARAH G. CROWLEY**, ALJ:

STATEMENT OF THE CASE

Petitioner, Board of Education of the Bordentown Regional School District (Bordentown), challenges the homelessness determination by the Northern Burlington County Regional Board of Education (Burlington) and the Interim Executive County Superintendent (ECS). Petitioner contends that J.L. and B.L., are not homeless, but are domiciled in the Bordentown School District, having lived with Z.L.'s mother-in-law in Bordentown for the last five years. At issue is whether the children and their parents are "homeless," under the applicable law. Burlington determined that the family was still homeless and thus, Bordentown had an obligation to pay tuition and bus the children to Burlington, where they resided prior to becoming homeless in 2017. The ECS affirmed the homelessness determination.

PROCEDURAL HISTORY

This matter arose with the filing of a petition of appeal by Bordentown on January 10, 2022, challenging the homelessness determination by the ECS. The matter was transmitted to the Office of Administrative Law (OAL) as a contested matter on March 4, 2022. N.J.S.A. 52:14B-1 to -15; N.J.S.A. 52:14F-1 to -13. The matter was remanded after summary decision in favor of Bordentown had been granted. The remand requests a factual inquiry into the nature of the housing, i.e. is it "regular, fixed and adequate," and a factual determination as to when the family was no longer homeless. The matter was

heard via Zoom on January 30, 2023, and the record closed after written submissions by the parties.

TESTIMONY AND FACTUAL FINDINGS

For Bordentown

Tina Zach (Zach) is the homelessness liaison for the Bordentown school district. She has had training and has held this position for approximately ten years. She was familiar with the L. family who had moved in with family in Bordentown after losing their home in 2017. The family initially advised that they were staying with family in Bordentown but wanted to remain in the Burlington school district, and they did not need transportation. They advised that the housing was temporary and that they were living with the children's grandmother. There were originally three children in school, but the daughter (M.L.) graduated last year and B.L. is a senior this year and is finishing high school online through a private school. P.L. is a junior at Northern Burlington High School.

After the first year in which they lived in Bordentown and continued to go to Burlington, Bordentown assumed the cost. Bordentown paid for all three children to attend school in Northern Burlington during the 2018–2019, and 2019–2020 school years. Bordentown continued to receive updated information, but the family maintained that they were in transitional housing and were homeless. The district has a residency questionnaire that needs to be filled out annually. At the end of 2020, another questionnaire was sent to the family and they advised that they were still living with family in Bordentown. They provided no information about trying to secure other housing, or indicating that the housing was inadequate, and thus, the district determined that they no longer met the definition of homeless.

Ms. Zach attempted to speak to Z.L. about the situation and he was pretty agitated by the conversation. He indicated that the housing was not comfortable, but they had no plans to move, and he was still not employed full time. Zach testified that based upon the information that Bordentown had received, they determined that the family no longer meet the definition of homeless was made. They were living in a three-bedroom house, they

all had beds, access to a full bathroom and kitchen and had no plans to move. Zach does not know about the annual application for state aide but would assume that if Bordentown was paying for the L. family to go to school in Northern Burlington, it would be reflected in the state aide application, and when this changed, the state aid would change accordingly. Zach testified that the determination was not just based on the duration of their stay at the grandmother's home, but the fact that they had no plans to move. Moreover, they were in fixed and adequate housing.

Vanessa Bekarciak, is the Director of Special Services for Bordentown. She also oversees homelessness and residency issues for the district. She was familiar with the L. family. She understood that initially the L. family's housing in Bordentown was temporary, but they began to question this due to the duration of the stay and the admission that they were not seeking alternate housing. In addition, they had not moved around at all, since they left their home in Burlington, they had been in one house. She believed that where they were living was adequate and had become a fixed and permanent situation for them. She testified that just because Z.L. wanted to reside somewhere else did not mean they remained homeless. She testified that it was very fact sensitive, and it is not just duration that determines homelessness. They looked at the adequacy of the housing situation and if it was stable. The L. family was not in jeopardy of being removed from this housing and were not making any plans to move back into the Burlington District.

For Burlington

Z.L. testified on behalf of himself and the minor children. He advised that he lost his job and the home in Chesterfield, Burlington County, was foreclosed on in 2016. Thereafter, they moved in with his mother-in-law in Bordentown Township. The children continued to attend school in Burlington, and he filled out the paperwork necessary for this to continue. He and his wife have three children. Their oldest, M.L. graduated last year. She is in college at Rowan/Burlington Community College and takes classes online. The older son is now a senior and he attends high school online. They pay for him to attend private high school online, as they were concerned that he would not be able to complete his senior year at Burlington. Their youngest is at Burlington. He is a junior

and has an IEP due to some learning differences. They have every reason to believe that he will graduate next year. They do not know if he will go on to college or need additional services due to his disabilities.

Z.L. was terminated from his job in 2015 and was unable to keep the family home when it was foreclosed on. He indicated that he had some health issues, including a stroke which may have led to his unemployment. He testified that he had looked at some housing in Northern Burlington but was declined due to his bad credit with the foreclosure. His wife works and makes approximately $40,000 a year. They do not pay rent or any other expenses at his mother-in-law's house except for the cable TV bill.

He testified that he is currently working as a consultant has but only makes about $20,000 a year. No documentation of employment, unemployment or inability to work was provided. He testified that they have not looked in any other districts because he wants his son to remain at Northern Burlington, but he really could not afford any housing there.

His mother-in-law's home has three bedrooms. His wife currently shares a bedroom with their daughter, who is in college now. The boys share a bedroom and Z.L. has a blow-up mattress in the den. His mother-in-law has the master bedroom and her own bathroom. The L. Family shares the other full bathroom and has full access to the kitchen. There are dressers in the hallway due to limited room in the bedrooms and the situation. They have no plans to move out and do not want to leave the district before their son graduates from high school.

Richard Kaz is the business administrator at the Northern Burlington Regional School District. He has been employed there for twenty-two years. He testified that based upon their calculations, Bordentown owes them $234,113.60 for the years of 2021, 2022 and 2023, for the education of the L children who have been residing in Bordentown due to homelessness but continued to attend school in Northern Burlington. He testified that they had submitted the appropriate documentation to Bordentown but had not been paid.

Based upon the documentary evidence and testimony, I **FIND** the following as **FACT**:

1. The children were attending school in the Northern Burlington Regional School District at that time they became homeless due job loss and foreclosure on their home in 2016.

2. The family moved in with R.B., the children's maternal grandmother, along with their mother and father at the Deerfield Court home in Bordentown, New Jersey.

3. Northern Burlington was advised of the relocation by the grandmother in October 2017, at which point Burlington put Bordentown on notice of their potential responsibility under the McKinney-Vento Homeless Assistance Act.

4. They attended school in Northern Burlington and arranged for their own transportation for the 2017–2018 school year.

5. Thereafter, Bordentown assumed responsibility and provided tuition and transportation to Northern Burlington pursuant to N.J.S.A. 18A:38-1(d).

6. Bordentown paid the tuition and transportation for the children in the 2018–2019 and 2019–2020 school years.

7. When Northern Burlington sent the invoice to Bordentown for the 2020–2021 school year, Bordentown filed a Notice of Dispute with the Executive Superintendent challenging the homelessness status of the family.

8. On October 14, 2021, the County Superintendent concluded that the family, who had been residing with the grandmother in Bordentown since 2017, was still "homeless."

9. The family is living in a three bedroom home with their grandmother. They have access to a full bathroom and have full access to the kitchen. The two boys share a bedroom as does the mother and daughter. The father Z.L. has a blow-up mattress in the den. Their family has dressers in the hallway due to limited space in the bedrooms.

10. The mother works and earns approximately $40,000 a year, and Z.L. is working as a consultant earning $20,000 a year. They pay no rent or expenses to live in the home with the exception of the cable bill.

11. They have made no efforts to find other housing.

12. The family has a fixed, regular and adequate dwelling, where they have resided for over five years.

13. The family is not homeless and was not homeless in the 2020–2021, 2021–2022 or 2022–2023 school years.

I **FIND** the foregoing as **FACT**.

LEGAL ANALYSIS AND CONCLUSION

It is well settled in this jurisdiction that parents may not simply choose the school district that they wish their children to attend: the general rule is that school districts are responsible for providing a free education to children "domiciled" within the school district. N.J.S.A. 18A:38-1(a) states that public schools shall be free to any person over five and under twenty years of age who is domiciled within the school district. "A student is domiciled in the school district when he or she is the child of a parent or guardian whose domicile is located within the school district." N.J.A.C. 6A:22-3.1(a)(1).

Under the McKinney-Vento Homeless Education Assistance Improvement Act of 2001, 42 U.S.C. § 11431 et seq., state educational agencies must ensure that each homeless child and youth has equal access to the same public education as every other

child and youth. The protections offered to homeless students and their parents under the federal McKinney-Vento Act and New Jersey's corresponding state law represent an exception to otherwise applicable residency rules. In contrast to the basic premise that students must change schools when they leave a school district, the laws protecting homeless students generally allow parents the choice to keep their children enrolled in their original school district if the parents relocate to another school district as the result of being homeless. N.J.S.A. 18A:38-1(f); N.J.A.C. 6A:22-3.2(d). The district of residence for children whose parents temporarily move from one school district to another as the result of being homeless shall be the district in which the parent or guardian last resided prior to becoming homeless. N.J.S.A. 18A:7B-12(c).

Under the federal McKinney-Vento Act and New Jersey's corresponding law, the term "homeless" refers to individuals who lack a fixed, regular, and adequate residence. Federal law refers to the lack of an adequate "nighttime" residence. 42 U.S.C. § 11434a (referring to 42 U.S.C. Sec.11302(a)(1)); N.J.S.A. 18A:7B-12(c); N.J.A.C. 6A17-1.2.

N.J.A.C. 6A:17-2.2 states that:

> (a) A district board of education shall determine that a child is homeless for purposes of this subchapter when he or she resides in any of the following:
>
> 1. A publicly or privately operated shelter designed to provide temporary living accommodations, including:
>
> i. Hotels or motels;
> ii. Congregate shelters, including domestic violence and runaway shelters;
> iii. Transitional housing; and
> iv. Homes for adolescent mothers;
>
> 2. A public or private place not designated for or ordinarily used as a regular sleeping accommodation, including:
>
> i. Cars or other vehicles including mobile homes;
> ii. Tents or other temporary shelters;
> iii. Parks;
> iv. Abandoned buildings;
> v. Bus or train stations; or

vi. Temporary shelters provided to migrant workers and their children on farm sites;

3. The residence of relatives or friends where the homeless child resides out of necessity because his or her family lacks a regular or permanent residence of its own;

4. Substandard housing; or

5. Any temporary location wherein children and youth are awaiting foster care placement.

[N.J.A.C. 6A:17-2.2.]

This subchapter and subsection, however, must be read, in conjunction with 42 U.S.C. § 11302(a)(1), which defines "homeless" for the McKinney-Vento Act, and N.J.S.A. 18A:7B-12(c), which defines "homeless" for school-funding purposes. Under the former, "homeless" means lacking "a fixed, regular, and adequate nighttime residence." Under the latter, "homeless" means temporarily lacking "a fixed, regular and adequate residence." Thus, both definitions have at their core the concept of a fixed, regular, and adequate place to live with regular sleeping accommodations. This shared concept is not a coincidence, as the New Jersey regulatory scheme, looks to the federal regulatory scheme for its definition of terms. See N.J.A.C. 6A:17-2.1 ("Nothing in this subchapter shall limit the educational rights of homeless children and youth or school district responsibilities under Subtitle VII-B of the Stewart B. McKinney-Vento Homeless Assistance Act (42 U.S.C. 11431 et seq.)".)

Financial responsibility of the district of residence terminates when the family is deemed "domiciled" in another district, which occurs when the family has lived in another district for a full year or longer. At this time, financial responsibility shifts to the school district in which the student now resides. N.J.S.A. 18A:38-1(d) states:

> Any person whose parent or guardian, even though 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 domiciled within the district for the purposes of this section.

Northern Burlington, as the original district of residence, was responsible for the children's tuition when they first became homeless, and they continued to go to school there throughout the 2017–2018 school year. However, after residing in Bordentown for more than one year, they were deemed domiciled in Bordentown pursuant to N.J.S.A. 18A:38-1(d) and financial responsibility shifted to Bordentown. Bordentown provided tuition and transportation for an additional two years. When they received the tuition bill for the two remaining children in the Northern Burlington Regional School District in 2021, they requested a review by the County Superintendent claiming that the Bordentown residence had become "regular, fixed and adequate" home and they could no longer be deemed "homeless," having resided in this regular fixed and adequate housing for more than four years (and now five years), and by their own admission had no plans, nor have they made any effort to secure affordable housing in Northern Burlington or elsewhere. The petitioner is still essentially unemployed, has bad credit, very little income.

Respondents argue that the family remains homeless, and they are entitled to continue school in Northern Burlington at Bordentown's expense because they are in a "doubled-up living arrangement" and continue to "experience financial hardship." The testimony from Z.L. which is not disputed is that they moved in with his mother-in-law five years ago, and they have no current plans to leave. He does not have a full-time job, has bad credit and they do not want to pull their son out of the district. They live in a three-bedroom home with their mother-in-law. The children are all in a bedroom and have their own beds. The father sleeps in the den. They have full access to the kitchen and a full bath. The mother-in-law has her own full bathroom. They have dressers in the hallway and the living conditions are tight and not ideal. However, it is "fixed, adequate, and permanent" and they have no immediate plans to relocate.

The determination of whether a student is considered "homeless," triggering the protections for homeless students available under the law, is fact sensitive. In M. O'K. and S. O'K., A. O'K. and C. O'K. v. Bd. of Educ. of the Borough of Cresskill and Bd. of Educ. of the Borough of Little Ferry, OAL No. EDU 14830-13, Agency No. 214-9/13 (N.J. Comm'r of Educ. Aug. 12, 2014); aff'd, 2016 WL, 4699166 (N.J. Sup. Ct. App. Div. Sept. 8, 2016, the school district argued that the students who lived with their parents in the

grandparents' home were no longer "homeless" as they had lived there for over a year. The family prevailed in their argument that they were still "homeless" in part because five people occupied the bottom floor of the house which had no shower, sink or kitchen. This was found to be less than a regular and adequate nighttime residence. This case is clearly distinguishable from the facts in the present case as the family has a shower, sink and kitchen as well as bedrooms for the children, and the father sleeps in the den.

More recently, an administrative law judge (ALJ) wrote that "homelessness is best viewed in a continuum." State-Operated Sch. Dist. of Camden v. Volk, EDU 4521-16, Initial Decision (March 22, 2017), modified, Comm'r (June 20, 2017), at *11, http://njlaw.rutgers.edu/collections/oal/. In that case, the ALJ thoroughly examined whether a family in a borderline situation was homeless and considered the totality of the circumstances. Among the factors the ALJ considered were intent, fixed location, regular use, and adequacy. The ALJ determined that the family intended to stay in their current living situation because they stopped looking for another place to live; that the location was fixed and that the use was regular because the family had lived in the same place for several years; and that their living situation was adequate because the children had a designated sleeping area and access to a kitchen and bathroom facilities, despite the sharing of rooms and limited space. To the extent that homeless status is identified as one without a "fixed, regular and adequate" living place, given the very lengthy period of residence, the adequacy of the living place and the regularity of occupation, the ALJ found that the child did live in a "fixed, regular, and adequate residence" and concluded that she was not homeless. See also L.C. on behalf of her Minor Child B.C. v. Bd of Educ. of the Twp. of Branchburg, Somerset County, 96 N.J.A.R. 2d (EDU)1003 (Commissioner found that "while her living arrangements with her brother [in his apartment] may not be permanent in the sense that she may wish to eventually return to Branchburg, the evidence shows them to have become sufficiently fixed, regular, and adequate so as to preclude a finding of homelessness.")

Similar to Volk, in J.G., on behalf of minor children, T.G. and C.G. v. Board of education of the Township of Edison, et al, Commissioner's Decision No. 125-20, decided June 15, 2020, the G. family was evicted from their home in Milltown and moved in with J.G.'s mother in Edison. The family had the use of three of the four bedrooms, the kitchen,

bathrooms, all common areas and utilities in the Edison home. Although both J.G. and his wife were employed, with an income of $71,000 a year, they did not pay rent or contribute to the housing costs, other than food and a storage facility. While they stated that their intent was to move back to Milltown, there was no documentation of their search for a new home. The Commissioner found that while J.G.'s intentions may be to eventually move back to Milltown, the totality of the facts and circumstances demonstrated that the family was no longer homeless.

The County Superintendent's determination that respondents are McKinney-Vento eligible, and that Bordentown is fiscally responsible for the students was based on the fact that the family lost their home due to financial hardship and that the family is residing with friends/relatives out of necessity. He found that they were doubled up and hoped to move out eventually, with no current plans to relocate. There was no other analysis undertaken with regards to homelessness. There was no analysis of whether the housing was fixed, adequate or permanent. It does not appear that any consideration was given to the fact that the family had been living there for five years and is making no efforts to find other housing. Moreover, they are in a fixed and adequate home. The totality of the facts and circumstances demonstrate that the L. family was not homeless in the 2020–2021, 2021–2022 school years and are no longer homeless and have become permanent residents in Bordentown and are entitled to enroll and attend school in that district.

For the reasons stated, I **CONCLUDE** that the family has "fixed, permanent and adequate" housing and is no longer homeless. I further **CONCLUDE** that Bordentown is their District of Residence. I further **CONCLUDE** that Bordentown has no financial responsibility for the respondents' attendance at Northern Burlington Regional High School, and respondents should be placed in the Bordentown Public School District. I further **CONCLUDE** that Northern Burlington has no basis for tuition reimbursement for the school years prior to 2020–2021. I further **CONCLUDE** that the ECS's determination of homelessness should be **REVERSED**, and judgment entered in favor of the petitioner, Bordentown Township Board of Education.

ORDER

Based on the foregoing, it is hereby **ORDERED** that the relief requested in the petition is **GRANTED**, and the homelessness decision of the Interim Executive County Superintendent is **REVERSED**.

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

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

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

April 21, 2023
DATE

Sarah G. Crowley
SARAH G. CROWLEY, ALJ

Date Received at Agency: April 21, 2023

Date Mailed to Parties: April 21, 2023

SCG/nn/am

APPENDIX

WITNESSES

For petitioner

Tina Zach

Vanessa Bekarciak

For respondent

Z.L.

EXHIBITS

For petitioner

P-1 Letter from R.S. regarding the Z. family

P-2 Email from Kaitlin Mallory (NBRSD), dated October 16, 2017

P-3 Norther Burlington homelessness forms

P-4 Email from Tina Zach, dated August 9, 2014

P-5 Northern Burlington correspondence and tuition contracts

P-6 Letter from Bordentown, dated October 18, 2018

P-7 Purchase Orders 2018-2019

P-8 Purchase Order 2019-2020

P-9 Letter from Northern Burlington to Parent, dated December 7, 2018

P-10 McKinney-Vento Permission Form, dated December 18, 2018

P-11 Residency Questionnaire for 2018-2019 school year

P-12 Residency Questionnaire for 2019-2020 school year

P-13 Email from Caitlin Mallory, dated September 2, 2020

P-14 Student Residence Questionnaire, dated September 2, 2020

P-15 Email between Bordentown and Northern Burlington, dated September 14, 2020

P-16 Email between Bordentown and Northern Burlington, dated August 11,

2021

P-17 Notice of Dispute and Request for Redetermination, dated September 14, 2021

P-18 County Superintendent decision, dated October 14, 2021

P-21 NJ Property Tax records

P-22 Residency Certification

P-23 Contact Logs from Tina Zach

P-24 Supplemental Residence Information Forms, dated September 2, 2021

P-25 Memorandum from Tina Zach to Vanessa Bekarciak, dated September 24, 2021

P-28 CV of Venessa Bekarciak

For respondent

R-1 Emails to Samantha Crean, Homeless liaison for Northern Burlington, dated September 23, 2021 (Exhibit A and B)

R-2 invoices for tuition (Exhibit C)

R-3 invoices for tuition (Exhibit D)

R-4 invoices for tuition (Exhibit E)

R-5 invoices for tuition (Exhibit F)

203-23

New Jersey Commissioner of Education

Final Decision

In the Matter of the Suspension of the
Teaching Certificate of Nicholas Spiniello,
Board of Trustees of Central Jersey College Prep
Charter School, Somerset County.

Synopsis

This matter was opened before the Commissioner of Education on October 13, 2022, by way of an Order to Show Cause served by the petitioner, the Board of Trustees of the Central Jersey College Prep Charter School (Board), upon the respondent, Nicholas Spiniello, a Teacher Physical Education/Health, requiring respondent to show cause why an order should not be entered suspending his teaching certificate for unprofessional conduct pursuant to *N.J.S.A.* 18A:26-10 after he resigned his position without giving the sixty-day (60) notice required by his contract with the petitioner. Respondent filed an answer to the Order to Show Cause stating that he was unable to fulfill his contractual obligations because of a family emergency that required him to be out of state. The respondent failed to provide documentation or details regarding his family emergency despite several requests for him to do so, and subsequently failed to appear for two scheduled pre-hearing conferences. Accordingly, the ALJ concluded that respondent's teaching certificate should be suspended for a period of one year.

Upon review, the Commissioner concluded that the respondent did not deny the allegations that he resigned without giving the notice required in his contract, but only attempted to explain his early resignation by stating that he experienced a family emergency. No documentation or detail regarding the nature of the emergency was provided despite several requests. Therefore, the Commissioner deemed the allegations to be admitted and further deemed them sufficient to justify suspension of respondent's teaching certificates pursuant to *N.J.S.A.* 18A:26-10 and *N.J.S.A.* 18A:28-8. Accordingly, respondent's certificates were suspended for a period of one year from the date of the filing of this decision – a copy of which was forwarded to the State Board of Examiners for the purpose of effectuating this order.

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

203-23
OAL Dkt. No. EDU 10387-22
Agency Dkt. No. 283-10/22

New Jersey Commissioner of Education

Final Decision

In the Matter of the Suspension of the Teaching Certificate of Nicholas Spiniello, Board of Trustees of Central Jersey College Prep Charter School, Somerset County.

This matter was opened before the Commissioner of Education on October 13, 2022, by way of an Order to Show Cause served by petitioner, Board of Trustees of the Central Jersey Prep Charter School (Board), upon respondent, Nicholas Spiniello, requiring respondent to show cause why an order should not be entered suspending his teaching certificates pursuant to *N.J.S.A.* 18A:26-10 and *N.J.S.A.* 18A:28-8 for resigning without giving the notice required by law. On November 9, 2022, the Department of Education (DOE) received respondent's answer, and the case was transmitted to the Office of Administrative Law.

The Administrative Law Judge (ALJ) issued an Initial Decision indicating that respondent failed to appear for two scheduled pre-hearing conferences. Accordingly, the ALJ concluded that respondent's teaching certificate should be suspended for one year.

The petition and supporting exhibits submitted by petitioner in this matter indicate that: respondent entered into a contract to work as a teacher for the 2022-23 school year; the contract provides that it can be terminated by either party upon sixty days' written notice; and respondent resigned on September 2, 2022, effective immediately. In his answer, the respondent does not deny these allegations, but only attempts to explain his early resignation

by stating that he experienced a family emergency; however, no documentation or detail regarding the nature of the emergency was provided. Therefore, the Commissioner deems such allegations to be admitted and further deems them sufficient to justify suspension of respondent's teaching certificates pursuant to *N.J.S.A.* 18A:26-10 and *N.J.S.A.* 18A:28-8.

Accordingly, summary decision is hereby granted to petitioner, and respondent's teaching certificates are suspended for a period of one year from the filing date of this decision, a copy of which shall be forwarded to the State Board of Examiners for implementation of the suspension.

IT IS SO ORDERED.[1]

Angelica Allen-McMillan, Ed.D.
ACTING COMMISSIONER OF EDUCATION

Date of Decision: July 6, 2023
Date of Mailing: July 7, 2023

[1] This decision may be appealed to the Appellate Division of the Superior Court pursuant to *N.J.S.A.* 18A:6-9.1. Under *N.J.Ct.R.* 2:4-1(b), a notice of appeal must be filed with the Appellate Division within 45 days from the date of mailing of this decision.

State of New Jersey
OFFICE OF ADMINISTRATIVE LAW

INITIAL DECISION
FAILURE TO APPEAR
OAL DKT. NO. EDU 10387-22
AGENCY DKT. NO. 282-10/22

IN THE MATTER OF THE SUSPENSION OF THE TEACHING CERTIFICATE OF NICHOLAS SPINIELLO, BOARD OF TRUSTEES OF CENTRAL JERSEY COLLEGE PREP CHARTER SCHOOL, SOMERSET COUNTY.

Thomas O. Johnston, Esq., for petitioner (The Johnston Law Firm, LLC, attorneys)

Nicholas Spiniello, respondent, pro se

Record Closed: May 19, 2023 Decided: May 24, 2023

BEFORE **EDWARD J. DELANOY, JR.**, Deputy Director and ALAJ:

STATEMENT OF THE CASE

Petitioner, Board of Trustees of Central Jersey College Prep Charter School, seeks the suspension of Nicholas Spiniello's (respondent) teaching certificate.

PROCEDURAL HISTORY AND FACTUAL DISCUSSION

This matter was transmitted to the Office of Administrative Law (OAL), where it was filed on November 17, 2022. The parties participated in a pre-hearing conference on January 11, 2023. During the pre-hearing conference the parties agreed to have the next scheduled status conference on March 8, 2023. Notice of that telephone conference was emailed to petitioner and respondent on January 12, 2023. The respondent failed to participate in the scheduled conference. The matter was scheduled for another status conference on May 1, 2023. Notice of that telephone conference was emailed to petitioner and respondent on March 9, 2023. Again, the respondent failed to participate in the scheduled conference.

LEGAL DISCUSSION AND CONCLUSIONS OF LAW

Pursuant to N.J.A.C. 1:1-14.4(a),

> If, after appropriate notice, neither a party nor a representative appears at any proceeding scheduled by the Clerk or judge, the judge shall hold the matter for one day before taking any action. If the judge does not receive an explanation for the nonappearance within one day, the judge shall, . . . direct the Clerk to return the matter to the transmitting agency for appropriate disposition pursuant to N.J.A.C. 1:1-3.3(b) and (c).

This matter was scheduled for two telephone conferences. Respondent was given notice of all telephone conferences. All telephone status conference notices contain the following language:

> Failure to dial in for the telephone conference, will result in the file being returned to the transmitting agency for appropriate action which may include imposition of the proposed penalty or granting the relief requested by the other party.

Respondent did not participate in the March 8, 2023, telephone status conference and did not contact the OAL to explain why he was unable to do so.

Another telephone status conference was scheduled to be heard on May 1, 2023. Proper notice of that telephone conference was emailed to the petitioner and respondent on March 9, 2023.

The respondent did not participate in the May 1, 2023, telephone conference and did not contact the OAL to explain why he was unable to do so.

CONCLUSION

To date, the respondent has not provided a request for an adjournment of the May 1, 2023, telephone conference or an explanation for his nonappearance for the same. Neither has this office received notice of legal representation on behalf of the respondent. Therefore, I **CONCLUDE** that respondent has failed to appear and abandoned his appeal.

ORDER

It is hereby **ORDERED** that respondent's teaching certification is suspended for one year.

It is hereby **ORDERED** that petitioner's relief is **GRANTED**.

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

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

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

May 24, 2023
DATE

Edward J Delanoy Jr

EDWARD J. DELANOY, JR.,
Deputy Director and ALAJ

Date Received at Agency: _____

Date Mailed to Parties: _____

/cb

205-23

New Jersey Commissioner of Education

Final Decision

Justin S. Ginion,

Petitioner,

v.

New Jersey Department of Education, Office of Student Protection,

Respondent.

Synopsis

Petitioner appealed the decision of the respondent New Jersey Department of Education, Office of Student Protection (OSP), permanently disqualifying him – pursuant to *N.J.S.A.* 18A:6-7.1 – from performing roofing work at public school facilities after a background check revealed that he was convicted of multiple disqualifying drug-related offenses. Petitioner contended that *N.J.S.A.* 18A:6-7.1 is inapplicable to him because his roofing work does not involve regular contact with pupils; therefore, his criminal history does not permanently disqualify him from work at public school facilities. The OSP filed a motion to dismiss, which was denied, and a hearing was held on December 1, 2022.

The ALJ found that: petitioner is employed by a roofing company that contracts with school districts throughout the State of New Jersey; between 2008 and 2021, petitioner worked on many school roofing projects in New Jersey; in 2021, petitioner sought employment on a contract with the Sayreville School District and a fingerprint search on petitioner was conducted which revealed petitioner's criminal convictions in the Commonwealth of Pennsylvania; petitioner did not challenge the accuracy of his criminal history record and admits that his criminal convictions would disqualify him under *N.J.S.A.* 18A:6-7.1, which requires that any person with a history of disqualifying criminal convictions cannot be employed by a New Jersey school in a position involving regular contact with pupils; in this case, based on testimony from petitioner and his employer, petitioner did not and would not have regular contact with pupils while performing roofing work on school grounds. Accordingly, the ALJ concluded that petitioner is not barred from employment on school roofing projects and should not be permanently disqualified from working for his employer on such projects.

Upon review, the Commissioner adopted the ALJ's well-reasoned Initial Decision as the final decision in this matter. In so doing, the Commissioner noted that determining whether a third-party contractor such as petitioner has regular contact with pupils while working on school grounds is a fact-sensitive inquiry that must be evaluated carefully on a case-by-case basis. Accordingly, the Commissioner's holding in this matter is limited to the unique facts presented herein. The respondent's determination permanently disqualifying petitioner from performing roofing work at school facilities was reversed.

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

205-23
OAL Dkt. No. 07977-21
Agency Dkt. No. 118-8/21

New Jersey Commissioner of Education

Final Decision

Justin S. Ginion,

Petitioner,

v.

New Jersey Department of Education, Office of Student Protection,

Respondent.

The record of this matter, the Initial Decision of the Office of Administrative Law (OAL), the exceptions filed by respondent pursuant to *N.J.A.C.* 1:1-18.4, and petitioner's reply thereto, have been reviewed and considered.

This dispute concerns whether *N.J.S.A.* 18A:6-7.1 permanently disqualifies petitioner from performing roofing work at public school facilities after a background check revealed that he was convicted of multiple disqualifying drug-related offenses.[1] The crux of the matter is whether petitioner's roofing work "involves regular contact with pupils" as contemplated by *N.J.S.A.* 18A:6-7.1. The statue provides, in relevant part:

> A facility, center, school, or school system under the supervision of the Department of Education and board of education which cares for, or is involved in the education of children under the age

[1] Although the Administrative Law Judge (ALJ) found—and respondent maintains—that petitioner was also convicted of conspiracy to commit criminal mischief (charged in December 1999) and resisting arrest (charged in November 2011), the record lacks final disposition information regarding those charges. However, petitioner has not disputed the ALJ's findings in this regard.

> of 18 shall not employ for pay or contract for the paid services of any teaching staff member or substitute teacher, teacher aide, child study team member, school physician, school nurse, custodian, school maintenance worker, cafeteria worker, school law enforcement officer, school secretary or clerical worker or any other person serving in a position which involves regular contact with pupils unless the employer has first determined consistent with the requirements and standards of this act, that no criminal history record information exists . . . which would disqualify that individual from being employed or utilized in such capacity or position.
>
> [*N.J.S.A.* 18A:6-7.1.]

N.J.S.A. 18A:6-7.1 mandates that covered individuals convicted of certain enumerated offenses "shall be permanently disqualified from employment or service under this act." *Ibid.* Those enumerated offenses include drug-related offenses. *N.J.S.A.* 18A:6-7.1(b), (c), (d).

Respondent determined that petitioner's convictions, all of which occurred in Pennsylvania, permanently disqualified him from working at public school facilities pursuant to *N.J.S.A.* 18A:6-7.1. Petitioner has never disputed the accuracy of his criminal record; he concedes that if *N.J.S.A.* 18A:6-7.1 is applicable to him, then he would be permanently disqualified from work at public school facilities based upon his criminal history. However, petitioner contends that *N.J.S.A.* 18A:6-7.1 is inapplicable to him because his roofing work does not involve regular contact with pupils and, as such, his criminal history does not permanently disqualify him from work at public school facilities.

Following a contested hearing, the ALJ issued an Initial Decision in petitioner's favor and recommended reversal of respondent's determination permanently disqualifying petitioner from employment at public school facilities. The ALJ agreed with petitioner that he does not have regular contact with pupils while performing roofing work on school grounds. In support

thereof, the ALJ cited: (1) credible testimony from petitioner that he has never had contact with pupils during his prior school roofing work between 2008 and 2021;[2] (2) credible testimony from petitioner's employer who asserted that school roofing projects are typically completed during the summer months and that work areas are "off limits" to pupils for safety reasons; and (3) the ordinary meaning of "regular contact" as utilized in the statute. The ALJ rejected respondent's position that petitioner's "mere presence" on school grounds would create "an opportunity for contact" with pupils tantamount to the "regular contact" with pupils discussed in *N.J.S.A.* 18A:6-7.1.

In their exceptions, respondent argues that the Commissioner should reject the Initial Decision because the ALJ erred when concluding that *N.J.S.A.* 18A:6-7.1 does not apply to petitioner. Respondent maintains that petitioner necessarily has regular contact with pupils while working on school grounds when pupils are also present.[3] In reply, petitioner argues that the ALJ's well-reasoned Initial Decision should be upheld because it is amply supported by the testimony in the record and that respondent's interpretation of *N.J.S.A.* 18A:6-7.1 is overbroad and discriminatory.

Upon review, the Commissioner adopts the ALJ's comprehensive, well-reasoned Initial Decision as the final decision in this matter. The sufficient, credible evidence in the record—in

---

[2] Petitioner was not permanently disqualified until 2021 despite his criminal history because of a glitch in respondent's computerized tracking system which did not properly identify construction workers (Initial Decision at 5-6).

[3] Alternatively, respondent contends that the ALJ should have granted its motion to dismiss the matter as moot because the school roofing project that petitioner was working on in Sayreville prior to his permanent disqualification was completed during the OAL proceedings. The Commissioner agrees with the ALJ that the matter is not moot. Respondent's determination permanently disqualifies petitioner from future employment at all public school facilities—not just from the prior roofing project. Moreover, the legal issue raised herein implicates the public's interest in school safety and is likely to recur. *See State v. Cassidy*, 235 N.J. 482, 491 (2018) (holding that courts will entertain cases that have become moot "when the issue is of significant public importance and is likely to recur").

particular, the credible testimony from petitioner and his employer—amply supports the ALJ's legal conclusion that *N.J.S.A.* 18A:6-7.1 is inapplicable to petitioner because he does not have regular contact with pupils during his roofing work at school facilities. That said, the Commissioner notes that determining whether a third-party contractor such as petitioner has "regular contact" with pupils while working on school grounds is a fact-sensitive inquiry that must be evaluated carefully on a case-by-case basis. The Commissioner's holding in this matter is limited to the unique facts presented herein.

Accordingly, respondent's determination permanently disqualifying petitioner from performing roofing work at school facilities is reversed.

IT IS SO ORDERED.[4]

Angelina Allen McMillan, Jd.D.

ACTING COMMISSIONER OF EDUCATION

Date of Decision: July 12, 2023
Date of Mailing: July 13, 2023

[4] This decision may be appealed to the Appellate Division of the Superior Court pursuant to *N.J.S.A.* 18A:6-9.1. Under *N.J.Ct.R.* 2:4-1(b), a notice of appeal must be filed with the Appellate Division within 45 days from the date of mailing of this decision.

State of New Jersey
OFFICE OF ADMINISTRATIVE LAW

INITIAL DECISION
OAL DKT. NO. EDU 07977-21
AGENCY DKT. NO. 118-8/21

JUSTIN S. GINION,

Petitioner,

v.

NEW JERSEY DEPARTMENT OF EDUCATION, OFFICE OF STUDENT PROTECTION,

Respondent.

Robert L. Grundlock, Jr., Esq., for petitioner (Rubin, Ehrlich, Buckley & Przekop, P.C., attorneys)

Sydney Finkelstein, Deputy Attorney General, for respondent (Matthew J. Platkin, Attorney General of New Jersey, attorney)

BEFORE **WILLIAM T. COOPER, III**, ALJ:

Record Closed: March 1, 2023 Decided: May 30, 2023

STATEMENT OF THE CASE

Petitioner, Justin S. Ginion, an employee of Strober-Wright Roofing, Inc. (Strober Roofing) who sought to work on a public school roofing project for the Sayreville School

District (Sayreville) appeals the determination of the New Jersey Department of Education, Office of Student Protection, Criminal History Unit, (OSP) issued on June 7, 2021, to permanently disqualify him from serving in any position, which is under the supervision of the Department of Education.

PROCEDURAL HISTORY

On June 7, 2021, the OSP issued a notice disqualifying petitioner from working at any educational institution under the supervision of the Department of Education (DOE). A timely appeal was filed, and the matter was transmitted to the Office of Administrative Law (OAL) where it was filed as a contested case on September 23, 2021. N.J.S.A. 52:14 B-1 to-15; N.J.S.A. 52:14 F-1 to-13.

On February 17, 2022, the petitioner moved for summary decision. On March 11, 2022, the respondent cross-moved for summary decision, and on March 22, 2022, the petitioner filed a reply brief. The motions for summary decision were denied by this tribunal on May 2, 2022.

On July 6, 2022, the respondent moved to dismiss the petition claiming it was moot because the Sayreville school project was completed. A status conference was conducted on July 14, 2022. After respondent was given an opportunity to respond to the motion, oral argument was conducted on August 5, 2022. The motion to dismiss was denied on August 23, 2022.

A hearing was conducted on December 1, 2022. The record remained open until March 1, 2023, for the parties to provide written summations and on that date the record closed.[1]

[1] An order of extension for filing an initial decision was issued on April 17, 2023, extending the filing of the initial decision to May 30, 2023.

FACTUAL DISCUSSION AND FINDINGS

TESTIMONY

For petitioner

Michael Strober (Strober) is a commercial roofing contractor and the owner of Strober Roofing. He testified that forty to fifty percent of the work performed by Strober Roofing is on public school buildings. According to Strober, Strober Roofing tries to complete school projects over the summer months when school buildings are empty, and no pupils are attending. Strober testified that work on public school projects are more lucrative for his employees as they are entitled to "prevailing" rate on such projects. He has approximately forty or more employees working at any given time.

Strober testified that the petitioner had been employed by Strober Roofing for ten plus years. During that time the petitioner has worked his way up the ranks from an apprentice to a supervisor. Strober characterized the petitioner as a model employee. Strober noted that petitioner's disqualification from school projects has had a negative effect on the petitioner's income and he is currently working on jobs that are below his skill level.

Strober testified that Strober Roofing employees are not in contact with pupils on school projects. He explained that there are several reasons for this: safety standards require that the areas where they are working are off limits to pupils, the projects are done in the summer months while pupils are on vacation, regulations require the installation of a "portable latrine" so the employees are not entering the school building to use the facilities, the location of the work site is on the roof and not inside the building, and a supervisor directs the employees so they know where they are permitted to go. Strober Roofing has never received a complaint of an employee having contact with a pupil.

Justin Ginion (Ginion) testified he is forty-two years of age and lives in Bensalem, Pennsylvania with his fiancé and two daughters. He has been employed at Strober Roofing for fourteen years. General work on school buildings moves quickly because

they have a limited time to complete the projects. Typically, the work area is taped off, then ladders go up, the old roof is removed, and the crew installs the new roof.

According to Ginion, the workers never have contact with pupils during construction. Petitioner offered several reasons for this: first, the roofing materials used by Strober Roofing includes chemicals that non-employees are prevented from coming into contact and precautions are taken to ensure this; second, the removal of older roofs often involves asbestoses and there are strict guidelines on handling such materials which include securing the area from entry by non-employees; the materials used in the construction of new roofs generally require the air conditioning to be turned off so that dirt, fumes and unknown particles are not introduced into the school building. According to Ginion he has never had contact with a pupil while working on school projects.

Strober was awarded a contract to perform roofing work on a public-school building located in the Sayreville School District (Sayreville). Petitioner sought to work on the Sayreville School District project, and he submitted to a fingerprint search pursuant to N.J.S.A. 18A:6-7.2.

The fingerprint search revealed that Ginion had the following criminal convictions in the Commonwealth of Pennsylvania: (a) Conspiracy (Criminal Mischief) in December 1999; (b) a violation of the Controlled Substance Abuse Act and resisting arrest in November 2001; (c) a violation of the Controlled Dangerous Substance Act (two counts) in January 2004; (d) a violation of the Controlled Dangerous Substance Act (two counts) in March 2005; (e) a violation of the Controlled Dangerous Substance Act in July 2006; and (f) a violation of the Controlled Substance Act (two counts) in December 2007. Ginion does not challenge the accuracy of his criminal history record or that his criminal convictions would disqualify him under N.J.S.A. 18A:6-7.1.

Ginion indicated that he was in his twenties when he faced criminal charges and blamed his past behavior on a difficult and troubled childhood. He admitted to being in prison, however, he viewed it in a positive manner indicating that he learned how to read and write while incarcerated. Further, he became involved in Alcoholic Anonymous and Narcotics Anonymous, organizations which he is still involved with. Ginion noted that the

greatest positive change in his life occurred when he became a father. Ginion testified he has had no further criminal convictions since 2007.

Ginion advised that he has worked on numerous school projects for Strober without any issues from 2008 to 2021. Since June 7, 2021, after he was advised he could not work on school projects, and his income was cut by fifty percent. Based upon the permanent ban he is still unable to work on school projects.

For respondent

James Scaringelli (Scaringelli) has been employed with the New Jersey Department of Education, Office of Student Protection, as an investigator for fourteen years. Scaringelli testified to his responsibilities and his day-to-day work at OSP. He explained that OSP oversees the criminal history background check process for new applicants that are coming to seek employment either in school facilities or with contractors who provide services to school districts throughout the state.

Scaringelli advised that an applicant's criminal history is reviewed to determine if they have any convictions for the disqualifying crimes enumerated in N.J.S.A. 18A:6-7.1. If an applicant has a conviction for a disqualifying crime, then that individual is ineligible for employment. Scaringelli further testified that disqualification notifications are sent to the applicant as well as the prospective employer and to The Motor Vehicle Commission so that those agencies can take whatever action they deem appropriate.

According to Scaringelli, Ginion was deemed to be permanently disqualified from his desired employment on a school roofing project due to his prior criminal history. Ginion was notified of this permanent disqualification as were the "two perspective employers," Jackson Township and Sayreville School Districts.

Scaringelli advised that OSP started to track individuals who identified themselves as construction workers within the last eighteen months. The OSP found that construction workers, such as roofers or employees of third-party service contractors were not being identified properly in the OSP system. School districts did not have a specific code entry

for construction workers, and often would use a "custodial position" or "other" code when identifying them. School districts would assume that construction workers were employees of third-party contractors and were not direct school district employees, so that disqualification notices did not apply. To correct this issue a new position code, "construction workers" was added to the OSP system. Since this change was implemented, approximately 2,000 people have been identified as construction workers in the OSP system.

Scaringelli admitted that he had no knowledge if Ginion would have contact with pupils while preforming his job but insisted that Ginion's "mere presence" on school grounds would establish contact with pupils if the school "was open and pupils were present." It was his opinion that the intent of the legislation was to keep individuals with criminal records from working on or in public schools.

Dr. Jamar Purnsely (Purnsely) is employed by the Department of Education as the Director of Fiscal Accountability and Compliance. He testified to his responsibilities and how N.J.S.A. 18A:6-7.1 is enforced. He testified that the unit looks at the backgrounds of individuals seeking employment if there were any criminal convictions at which point, they were reviewed to determine if the offense was one of the enumerated offenses under the statute. If the conviction includes one of the enumerated offenses, then the individual is disqualified, and the parties were notified.

FINDINGS

For testimony to be believed, it must not only come from the mouth of a credible witness, but it also must be credible. It must elicit evidence that is from such common experience and observation that it can be approved as proper under the circumstances. See Spagnuolo v. Bonnet, 16 N.J. 546 (1954); Gallo v. Gallo, 66 N.J. Super. 1 (App. Div. 1961). A credibility determination requires an overall assessment of the witnesses' story in light of its rationality or internal consistency and the manner in which it "hangs together" with other evidence. Carbo v. United States, 314 F.2d 718, 749 (9th Cir. 1963). Also, "the interest, motive, bias, or prejudice of a witness may affect his credibility and justify the [trier of fact], whose province it is to pass upon the credibility of an interested witness, in

disbelieving his testimony." State v. Salimone, 19 N.J. Super. 600, 608 (App. Div.), certif. denied, 10 N.J. 316 (1952) (citation omitted).

A trier of fact may reject testimony because it is inherently incredible, or because it is inconsistent with other testimony or with common experience, or because it is overborne by other testimony. Congleton v. Pura-Tex Stone Corp.,53 N.J. Super 282, 287 (App. Div. 1958).

There was no indication that any of the witnesses in this matter had any interest, motive or bias that would affect their testimony. As such I accept all four of the witnesses as credible.

Based upon the testimony heard and documents entered in evidence, I **FIND** the following as **FACT**:

1. Ginion is employed by Strober Roofing, as a roofer/supervisor. Strober Roofing contracts with numerous schools and Board of Educations throughout the State of New Jersey. From 2008 to 2021 Ginion worked on many such school projects.

2. Strober Roofing was awarded a contract to perform roofing work on a public-school building located in the Sayreville School District (Sayreville). Petitioner sought to work on the Sayreville School District project, and he submitted to a fingerprint search pursuant to N.J.S.A. 18A:6-7.

3. The fingerprint search revealed that Ginion had the following criminal convictions out the Commonwealth of Pennsylvania: (a) Conspiracy (Criminal Mischief) in December 1999; (b) a violation of the Controlled Substance Abuse Act and resisting arrest in November 2001; (c) a violation of the Controlled Dangerous Substance Act (two counts) in January 2004; (d) a violation of the Controlled Dangerous Substance Act (two counts) in March 2005; (e) a violation of the Controlled Dangerous Substance Act in

July 2006; and (f) a violation of the Controlled Substance Act (two counts) in December 2007.

4. Ginion does not challenge the accuracy of his criminal history record or that his criminal convictions would disqualify him under N.J.S.A. 18A:6-7.1.

5. Based upon his criminal history Ginion was notified that he was "permanently disqualified" from serving in any position, paid or unpaid, with any educational institution under the supervision of the Department of Education, or any contracted service provider under contract with any "school or educational facility." (R-1.)

6. In an email dated June 7, 2021, Scaringelli notified Sayreville that Ginion has been disqualified from "school employment," and directed to ensure that Strober Roofing did not assign Ginion to work at any school facility. (R-2.)

7. Strober has never received a complaint of an employee having contact with a pupil because several factors preclude pupil contact: Safety standards require that the areas where they are working be off limits to pupils; the projects are done in the summer months while pupils are not in school; regulations require the installation of a "portable latrine" so the employees were not entering the school building; the location of the work site is on the roof and not the interior; and a supervisor directs the employees where and where not to be.

8. From 2008 to 2021 Ginion never had interactions with pupils while working on school projects for Strober Roofing.

9. Ginion has had no further criminal involvement since 2007.

LEGAL ANALYSIS

The issue here is the applicability of N.J.S.A. 18A:6-7.1 to an employee of a third-party contractor, and whether such an employee is in a position that involves regular contact with students.

N.J.S.A. 18A:6-7.1, provides in part as follows:

> A facility, center, school, or school system under the supervision of the Department of Education and board of education which cares for, or is involved in the education of children under the age of 18 **shall not employ for pay or contract for the paid services of any teaching staff member or substitute teacher, teacher aide, child study team member, school physician, school nurse, custodian, school maintenance worker, cafeteria worker, school law enforcement officer, school secretary or clerical worker or any other person serving in a position which involves regular contact with pupils unless the employer has first determined** consistent with the requirements and standards of this act, **that no criminal history record information exists** on file in the Federal Bureau of Investigation, Identification Division, or the State Bureau of Identification **which would disqualify that individual from being employed or utilized in such capacity or position. (Emphasis added).**

Petitioner's argument

Petitioner argues that the OSP misapplied N.J.S.A. 18A:6-7.1 to his position as a roofer for a third-party employer. The statute expressly limits job place discrimination based upon criminal history to employees of the school system "for pay or contract for paid services of any teaching staff member, substitute teacher, teacher aide, child study team member, school physician, school nurse, custodian, school maintenance worker, cafeteria worker, school law enforcement officer, school secretary or clerical worker or any other person serving in a position which involves regular contact with pupils." The petitioner claims that the OSP improperly adds "construction worker" to the list of employees identified. Further, even if the statute were applicable to him petitioner claims

that there is no evidence that a roofer would have "regular contact" with pupils on the Sayreville project, or any other roofing job.

Additionally, the petitioner contends that the statutory list of employees does not include employees of a third-party entity such as Strober. The category of employees and workers identified are those who would necessarily encounter pupils as part of their job, or regularly work inside of schools and thereby encounter pupils as part of their job. According to the petitioner he does not fit into any of these categories.

Finally, petitioner submits that the actions by the OSP are contrary to the provisions and intent of N.J.S.A. 34:6B-11 "Opportunity to Compete Act" and N.J.S.A.10:5−12 "New Jersey Law Against Discrimination."

Respondent's argument

Respondent argues that N.J.S.A. 18A:6-7.1 applies to employees of a third-party contractor since it includes the following phrase, "any other person serving in a position which involves regular contact with pupils." Respondent offers that petitioner's mere presence on school grounds creates the potential that petitioner would have access to pupils.

Respondent further argues that petitioner has not presented any evidence that there would be "barriers or obstacles" that would prevent him from "getting in contact with pupils" and that he has numerous criminal convictions that require his permanent disqualification. Respondent notes that the stated intent of the statute was to protect pupils from individuals who were convicted of specific criminal offenses and, therefore, no leniency can be afforded to him.

Finally, respondent argues that N.J.S.A. 34:6B-11 "Opportunity to Compete Act" and N.J.S.A.10:5-12 "New Jersey Law Against Discrimination" are inapplicable in light of the plain language and intent of N.J.S.A. 18A:6-7.1.

> The statute clearly directs local school districts to **"not employ for pay or contract for the paid services of any teaching staff member or substitute teacher, teacher aide, child study team member, school physician, school nurse, custodian, school maintenance worker, cafeteria worker, school law enforcement officer, school secretary or clerical worker or any other person serving in a position which involves regular contact with pupils."**

Here, petitioner is not employed by a local school district in any of the positions enumerated in the statute, therefore, the focus is whether he is "a person serving in a position which involves regular contact with pupils." Respondent's argument is that petitioner's mere presence on school grounds provides an opportunity for contact and thus he should be permanently disqualified from such projects. This position is rejected as it overlooks the plain language of the statute which requires regular contact with pupils.

Merriam-Webster defines "regular" as: (a) a recurring, or functioning at fixed, uniform, or normal intervals; regular income, a regular churchgoer; (b) Orderly, Methodical; regular habits. Vocabulary.com defines "regular" as 1. conforming to a standard or pattern; 2. in accordance with fixed order or procedure or principle; 3. in accordance with regular practice or procedure; 4. not deviating from what is normal; 5. relating to a person who does something regularly; 6. officially full-time; 7. a regular patron; 8. a dependable follower; 9. Occurring at fixed intervals. From the foregoing it is clear that the definition of regular contact would not include "mere presence," or "an opportunity for contact."

The statutory list of employees does not include employees of a third-party entity such as Strober Roofing. The category of employees and workers identified in the statute are those who would necessarily encounter pupils as part of their jobs, or those who regularly work inside of schools and thereby encounter pupils as part of their jobs. Ginion does not fit into any of these categories.

Roofing projects are typically completed during the summer months while students are not in attendance. The work sites are off limits to all but the roofers. Scaringelli testified that he has never received a complaint from an employee having contact with a pupil. The petitioner testified that in his fourteen years working on such projects he has never had contact with a pupil. Applying the law to the facts, I **CONCLUDE** that the petitioner, as an employee of a roofing contractor, is not in a position to have regular contact with pupils.

Petitioner also argues that respondent's actions in this matter run counter to the Opportunity to Compete Act, N.J.S.A. 34:6B-11. That act prohibits an employer from requiring an employee to complete an application that inquiries about criminal records and prohibits the employer from seeking such information from a third party during the initial application process. However, N.J.S.A. 34:6B-16 provides exceptions to the prohibited actions by employers. N.J.S.A. 34:6B-16(b) provides the following:

> The employment sought or being considered is for a position where a criminal history record background check is required by law, rule or regulation, or where an arrest or conviction by the person for one or more crimes or offenses would or may preclude the person from holding such employment as required by any law, rule or regulation, or where any law, rule, or regulation restricts an employer's ability to engage in specified business activities based on the criminal records of its employees.

Petitioner's argument is unpersuasive as a criminal background check is required by law for certain individuals working in or for school districts. Accordingly, I **CONCLUDE** that the Opportunity to Compete Act does not apply here. I further **CONCLUDE** that as the petitioner has no regular contact with pupils or the opportunity to have regular contact with pupils when working as a roofing contractor at public school facilities while pupils are not present, he is not barred from such employment. Therefore, he should not be permanently disqualified from working for Strober Roofing on school projects.

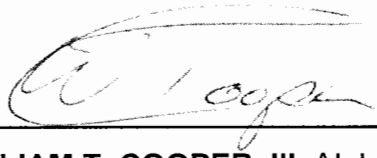
ORDER

It is hereby **ORDERED** that the determination by the New Jersey Department of Education, Office of Student Protection issued on June 7, 2021, to permanently disqualify Justin Ginion from working for Strober-Wright, Inc. on school roofing projects is **REVERSED**.

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

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

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



May 30, 2023
DATE

WILLIAM T. COOPER, III, ALJ

Date Received at Agency: _____

Date E-Mailed to Parties: _____

WTC/am

APPENDIX

WITNESSES

For petitioner

Michael Strober

Justin Ginion

For respondent

James Scaringelli

Jamar Purnsley

EXHIBITS

For petitioner

P-1 written summation

For respondent

R-1 June 7, 2021, letter to Justin Ginion

R-2 June 7, 2021, email to Sayreville School District

R-3 N.J.S.A. 18A:6-7.1

R-4 Bucks County Court Summary

R-5 Proposed statement of undisputed facts

R-6 Petitioner's responses to Interrogatories

206-23

New Jersey Commissioner of Education

Final Decision

D.E. and J.E., on behalf of minor children, A.E., E.E., and C.E.,

Petitioners,

v.

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

Respondent.

Synopsis

Petitioners filed a pro se petition challenging the determination of the respondent Board that their minor children were not eligible to receive a free public education in respondent's school district. The Board sought reimbursement of tuition from petitioners, asserting that the children were not domiciled within the school district during the 2022-2023 school year. Petitioners did not appear at the May 15, 2023 hearing in this matter, and the record closed at the conclusion of the ex parte hearing.

The ALJ found, *inter alia*, that: pursuant to *N.J.S.A.* 18A:38-1, public schools are free to any persons over five and under twenty five years of age who are domiciled within the school district; pursuant to *N.J.A.C.* 6A:22-6.2., if a student does not have a right to attend the school district, the Commissioner may assess tuition; in this case, petitioners did reside in Oakland in the past, but left in September 2021 due to a foreclosure; petitioners subsequently moved in with relatives in Hawthorne and the Board recognized the children as homeless during the 2021-2022 school year; they were permitted to remain enrolled in the school district for the entire school year pursuant to the McKinney-Vento Homeless Assistance Act; there is no evidence that petitioners and their children were ever domiciled in Oakland during the 2022-2023 school year, and the Board contends that they continue to reside in Hawthorne; the Bergen County Executive County Superintendent issued a determination in October 2022 that the children were not homeless and that they were domiciled in Hawthorne and entitled to a free education in Hawthorne schools for the remainder of the school year; petitioners failed to appear at a hearing in this matter on May 15, 2023 and provided no explanation for their failure to appear. The ALJ concluded that petitioners have abandoned their appeal. Accordingly, the ALJ ordered the petition dismissed and granted the Board's counterclaim for tuition in the total amount of $53,808.82.

Upon review, the Commissioner concurred with the ALJ findings and conclusions and adopted the Initial Decision of the OAL as the final decision in this matter. Petitioners were directed to reimburse the Board in the revised amount of $53,808.06 for the period from November 1, 2022 through the end of the 2022-2023 school year, for tuition costs incurred during the time period in which A.E., C.E., and E.E. were ineligible to attend school in Oakland. The petition of appeal is hereby dismissed.

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

206-23
OAL Dkt. No. EDU 11519-22
Agency Dkt. No. 322-11/22

New Jersey Commissioner of Education

Final Decision

D.E. and J.E., on behalf of minor children, A.E., E.E., and C.E.,

Petitioners,

v.

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

Respondent.

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

Upon review, the Commissioner concurs with the Administrative Law Judge's (ALJ) finding that petitioners abandoned their appeal and failed to sustain their burden of establishing that they were domiciled in Oakland during the 2022-2023 school year. The Commissioner further concurs with the ALJ's conclusion that the minor children were, therefore, not entitled to a free public education in Oakland's schools during that time.

Pursuant to *N.J.S.A.* 18A:38-1b, the Commissioner shall assess tuition against petitioners for the time period during which the minor children were ineligible to attend school in Oakland. Therefore, the Board is entitled to tuition reimbursement in the amount of $53,808.06[1] for the

[1] This amount is based on the testimony of the district's School Business Administrator, as summarized in the Initial Decision. The Commissioner was not provided with a transcript of the testimony. The total includes $19,052.14

period from November 1, 2022 through the end of the 2022-2023 school year, during which time petitioner's minor children were ineligible to attend school in Oakland.

Accordingly, the Initial Decision of the OAL is adopted as the final decision in this matter. Petitioners are directed to reimburse the Board in the amount of $53,808.06 for the period from November 1, 2022 through the end of the 2022-2023 school year, for tuition costs incurred during the time period in which A.E., C.E., and E.E. were ineligible to attend school in Oakland. The petition of appeal is hereby dismissed.

IT IS SO ORDERED.[2]

Angelica Allen-McMillan, Ed.D.
ACTING COMMISSIONER OF EDUCATION

Date of Decision: July 12, 2023
Date of Mailing: July 13, 2023

($134.17 per day x 142 days) for tuition for A.E. and $17,377.96 ($122.38 per day x 142 days) each for C.E. and E.E. The Initial Decision awarded $17,378.34 each for C.E. and E.E. However, there appears to be a mathematical error in that calculation, and it has been revised by the Commissioner.

[2] This decision may be appealed to the Appellate Division of the Superior Court pursuant to *N.J.S.A.* 18A:6-9.1. Under *N.J.Ct.R.* 2:4-1(b), a notice of appeal must be filed with the Appellate Division within 45 days from the date of mailing of this decision.

State of New Jersey
OFFICE OF ADMINISTRATIVE LAW

INITIAL DECISION
OAL DKT. NO. EDU 11519-22
AGENCY DKT. NO. 322-11/22

D.E. AND J.E. ON BEHALF OF MINOR CHILDREN A.E., E.E., AND C.E.,

Petitioners,

v.

BOARD OF EDUCATION OF THE BOROUGH OF OAKLAND, BERGEN COUNTY,

Respondent.

No appearance by D.E. and **J.E.**, petitioners, pro se

Stephen R. Fogarty, Esq., for respondent (Fogarty & Hara, attorneys)

Record Closed: May 15, 2023 Decided: June 13, 2023

BEFORE **SUSANA E. GUERRERO,** ALJ:

STATEMENT OF THE CASE AND PROCEDURAL HISTORY

Petitioners, parents of minor children A.E., E.E., and C.E., challenged the respondent Board of Education's residency determination. In its counterclaim, the respondent Board of Education of the Borough of Oakland (Respondent, District or

Oakland) seeks reimbursement of tuition from petitioners, asserting that the children were not domiciled within the school District during the 2022–2023 school year.

The matter was transmitted to the Office of Administrative Law (OAL), where it was filed on December 21, 2022. At the initial prehearing telephone conference, the parties requested that the matter be bifurcated because it involved two separate school districts. By order dated March 1, 2023, I entered an order granting Oakland's motion to bifurcate the matter originally captioned D.E. on behalf of minor children, A.E., E.E., C.E., and R.E. v. Board of Education of the Borough of Oakland, Bergen County and Board of Education of the Ramapo Indian Hills Regional High School District, Bergen County, and ordering that the matter proceed against Oakland under the caption D.E. and J.E. on behalf of minor children, A.E., EE., and C.E. v Board of Education of the Borough of Oakland, Bergen County, using the same OAL docket number; and against Ramapo Indian Hills Regional High School District under caption D.E. and J.E. on behalf of minor child R.E. v. Board of Education of the Ramapo Indian Hills Regional High School District, Bergen County, under a separate docket number. A Prehearing Order was entered on March 15, 2023.

A hearing was initially scheduled for April 3, 2023, but adjourned. A subsequent telephone conference was scheduled for April 25, 2023, and the petitioners did not participate. By email dated May 1, 2023, the parties were informed that a peremptory hearing was being scheduled for either May 15, 2023 or June 27, 2023, and they were asked to advise by May 5, 2023 of any conflict with either date. Petitioners did not advise as to their unavailability on either day. Therefore, on May 5, 2023, the OAL sent the parties a Notice of Hearing, for an in-person hearing at the OAL in Newark on May 15, 2023. Petitioners did not appear for the hearing, and the record closed at the conclusion of the ex parte hearing.

FINDINGS OF FACT

Having reviewed and considered the uncontested testimony presented by Annette M. Wells (Wells), District's School Business Administrator and Board Secretary, at the

hearing, the documentary evidence presented at the hearing, and the petition and counterclaim filed by the parties, I **FIND** the following **FACTS** in this matter:

The petitioners did not appear for the hearing, and there is no indication that they did not receive notice of the hearing. The petitioners never called or wrote to the OAL explaining their failure to appear for the prehearing conferences or the hearing. I, therefore, **FIND** that that the petitioners have abandoned their appeal.

The petitioners and their children once resided in Oakland, however, they left Oakland in or around September 1, 2021, apparently due to a foreclosure. During the 2021–2022 school year, they resided with relatives in Hawthorne. During that school year, the Board recognized the children as homeless, and they were permitted to remain enrolled in the District schools for the entire school year pursuant to the McKinney-Vento Homeless Assistance Act. There is no evidence that the petitioners and their children were ever domiciled in Oakland during the 2022–2023 school year, and it is the District's understanding that they continue to reside in Hawthorne.

When the petitioners represented to the District at the start of the 2022–2023 school year that they were still not residing in Oakland, the District's Superintendent of Schools requested a homeless determination for the students from the Executive County Superintendent. In early October 2022, about a month following the request, the Executive County Superintendent determined that the students were not homeless and that they were domiciled in Hawthorne and entitled to a tuition-free education in the Hawthorne school district for the remainder of the school year.

At an October 27, 2022 Board meeting, the Oakland Board of Education held a hearing, which the parents did not attend, and voted to disenroll the students from the District based on their non-resident status.

Petitioners filed the subject petition challenging the Board's decision on November 21, 2022. In that petition, D.E. acknowledged that the family resides in Hawthorne with relatives.

During the 2022–2023 school year A.E., C.E. and E.E. attended school in Oakland, which is a kindergarten through eighth grade district. During this school year, A.E. attended Valley Middle School, while C.E. and E.E. attended Manito Elementary School in the District.

Wells testified that the daily tuition rate for A.E. at Valley Middle School is $134.17 (as the per pupil yearly rate is $24,151). Wells calculated that from November 1, 2022 to May 15, 2023, the day of the hearing, the per pupil tuition amounted to $24,151.[1] She testified that, given the daily tuition rate, the cost to continue to attend Valley Middle School from May 16, 2023 to June 22, 2023, the last day of school for the 2022–2023 school year, totals $3,488.42. Therefore, she testified that the tuition due for A.E. from November 1, 2022 through the end of the 2022–2023 school year totals $19,052.14.

Wells testified that the daily tuition rate to attend Manito Elementary is $122.38 (as the annual tuition rate is $22,029). This amounts to tuition totaling $14,196.46 for the period between November 1, 2022 and May 15, 2023, and $3,181.88 between May 16, 2023 and June 22, 2023, which amounts to $17,378.34 per pupil from November 1, 2022 through the end of the school year.

Therefore, the respondent asserts that tuition for A.E., C.E., and E.E. from November 1, 2022 through the end of the school year totals $53,808.82.

LEGAL ANALYSIS AND CONCLUSIONS

Any child between the ages of five and twenty years old is entitled to a free public education in the district in which he is a resident. N.J.S.A. 18A:38-1(a); N.J.A.C. 6A:22-3.1(a). A student is a resident of a school district if his parent or guardian has a permanent home in the district such that "the parent or guardian intends to return to it when absent and has no present intent of moving from it, notwithstanding the existence of homes or residences elsewhere." N.J.A.C. 6A:22-3.1(a)(1). A student may attend school in a

[1] While the respondent's counterclaim seeks tuition reimbursement retroactive to October 13, 2022, at the hearing Wells testified that the respondent only seeks reimbursement retroactive to November 1, 2022 given that the Board took action to disenroll the students at the end of October 2022.

district in which he is a non-resident, with or without payment of tuition, at the discretion of the school district. N.J.S.A. 18A:38-3(a); N.J.A.C. 6A:22-2.2.

Domicile has been defined as the place where a person has his true, fixed, permanent home and principal establishment, and to which whenever he is absent he has the intention of returning. State v. Benny, 20 N.J. 238, 250 (1955). The domicile of an unemancipated child is that of his or her parent, custodian or guardian. P.B.K. o/b/o minor child E.Y. v. Board of Ed. Of Tenafly, 343 N.J. Super 419, 427 (App. Div. 2001). Where the local board determines that a child is not properly domiciled in its district, N.J.S.A. 18A:38-1(b)(2) provides a right of appeal to the parents.

Here, the respondent produced Oakland's School Business Administrator and Board Secretary, Wells, who testified clearly and credibly concerning the per pupil cost to attend the middle school and elementary school in the District, that the residency investigation determined that A.E., E.E. and C.E. were not domiciled in Oakland, and the cost of tuition that applies to these children. I accept her testimony as fact.

N.J.A.C. 6A:22-6.2(a) authorizes the Commissioner of Education to assess tuition for non-resident students. It states:

> If in the judgement of the Commissioner the evidence does not support the claim of the resident, he shall assess the resident tuition for the student prorated to the time of the student's ineligible attendance in the school district. Tuition shall be computed on the basis of 1/180 of the total annual per pupil cost to the local district multiplied by the number of days of ineligible attendance and shall be collected in the manner in which orders of the Commissioner are enforced.

N.J.S.A. 18A:38-1(b) also requires that tuition be calculated on the basis of 1/180 of the total annual per pupil cost to the district multiplied by the number of days of ineligible attendance.

Here, the petitioners have failed to appear for the scheduled hearing, without explanation, and there is no testimony or other evidence challenging the District's

residency determination or tuition costs. I **CONCLUDE** that since the petitioners have abandoned their appeal, their Petition should be dismissed.

Based upon the facts adduced at the hearing, I **CONCLUDE** that the petitioners' children A.E., E.E. and C.E. were not domiciled in the Borough of Oakland during the 2022–2023 school year, and not entitled to a free public education there during this period. I also **CONCLUDE** that the Board of Education of the Borough of Oakland is entitled to reimbursement, retroactive to November 1, 2022, for the costs of tuition for the three students consistent with the per diem rates presented by the respondent. Specifically, the petitioners must reimburse the respondent at a per diem rate of $134.17 for A.E. to attend the middle school, and the per diem rate of $122.38 for E.E. and C.E. Should the three students remain enrolled in the District through the end of the 2022–2023 school year, the parents are responsible for reimbursing the respondent in the amount of $53,808.82 for A.E., E.E., and C.E.

ORDER

It is hereby **ORDERED** that the petitioners' residency appeal is **DISMISSED** as a consequence of their failure to appear at the hearing without providing any explanation for the non-appearance. It is further **ORDERED** that respondent's counterclaim seeking tuition reimbursement in **GRANTED**. It is further **ORDERED** that the petitioners reimburse the respondent for the period beginning November 1, 2022 to the date the students are disenrolled from the District, as follows: at a daily tuition rates of $134.17 for A.E.; a daily tuition rate of $122.38 for C.E.; and a daily rate of $122.38 for E.E.

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

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

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

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

June 13, 2023
DATE

SUSANA E. GUERRERO, ALJ

Date Received at Agency: _____

Date Mailed to Parties: _____

jb

APPENDIX

Witnesses

For Petitioners:

None

For Respondent:

Annette M. Wells

Exhibits

For Petitioners:

None

For Respondent:

R-1 to R-5	Not in Evidence
R-6	Request to Executive County Superintendent for Homelessness Determination dated September 7, 2022
R-7	Not in Evidence
R-8	Homeless Determination dated October 13, 2022
R-9	Not in Evidence
R-10	Not in Evidence
R-11	Resolution Approving Disenrollments dated October 27, 2022

207-23

New Jersey Commissioner of Education

Final Decision

D.E. and J.E., on behalf of minor child, R.E.,

Petitioners,

v.

Board of Education of Ramapo Indian Hills Regional School District, Bergen County,

Respondent.

Synopsis

Petitioners filed a pro se petition challenging the determination of the respondent Board that their minor child was not eligible to receive a free public education in the Ramapo Indian Hills Regional School District. The Board sought reimbursement of tuition from petitioners, asserting that R.E. was not domiciled within any of the municipalities in the Ramapo Indian Hills Regional School District (District) between October 13, 2022 and the end of the 2022-2023 school year. Petitioners did not appear at the May 22, 2023 hearing in this matter and offered no explanation for their failure to appear. The record closed on June 2, 2023 after the filing of the Board's post-hearing brief.

The ALJ found, *inter alia*, that: pursuant to *N.J.S.A.* 18A:38-1, public schools are free to any persons over five and under twenty five years of age who are domiciled within the school district; pursuant to *N.J.A.C.* 6A:22-6.2., if a student does not have a right to attend the school district, the Commissioner may assess tuition; in this case, R.E. had been attending Indian Hills High School while petitioners resided in Oakland, one of the municipalities served by the respondent district, prior to the 2022-2023 school year; however, the family left Oakland in September 2021 due to a foreclosure and petitioners subsequently moved in with relatives in Hawthorne; the Board recognized R.E. as homeless during the 2021-2022 school year and permitted R.E. to remain enrolled at Indian Hills High School pursuant to the McKinney-Vento Homeless Assistance Act; the Board contends that petitioners continue to reside in Hawthorne; in October 2022 the Bergen County Executive County Superintendent determined that the petitioners and R.E. had become domiciled in Hawthorne and were entitled to a free education in Hawthorne schools for the remainder of the school year; nonetheless, R.E. continued to attend Indian Hills High School; petitioners failed to appear at a hearing in this matter on May 22, 2023 and offered no explanation for their failure to appear. The ALJ concluded that petitioners had abandoned their appeal. Accordingly, the ALJ dismissed the petition, granted the Board's counterclaim for tuition, and ordered petitioners to reimburse the Board for tuition at a rate of $107.92 per day for the period beginning October 13, 2022 to the date R.E. was disenrolled from the District.

Upon review, the Commissioner concurred with the ALJ findings and conclusions and adopted the Initial Decision of the OAL as the final decision in this matter. The Commissioner determined that there were 155 school days between October 13, 2022 and the end of the 2022-2023 school year and ordered petitioners to reimburse the Board in the amount of $16,727.60 for the period of R.E.'s ineligible attendance in the Ramapo Indian Hills Regional School District.

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

207-23
OAL Dkt. No. EDU 01738-23
Agency Dkt. No. 322-11/22

New Jersey Commissioner of Education

Final Decision

D.E. and J.E., on behalf of minor child, R.E.,

Petitioners,

v.

Board of Education of Ramapo Indian Hills Regional School District, Bergen County,

Respondent.

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

Upon review, the Commissioner concurs with the Administrative Law Judge's (ALJ) finding that petitioners abandoned their appeal and failed to sustain their burden of establishing that they were domiciled within any of the municipalities in the Ramapo Indian Hills Regional School District (District) between October 13, 2022 and the end of the 2022-2023 school year. The Commissioner further concurs with the ALJ's conclusion that R.E. was, therefore, not entitled to a free public education in the District during that time.

Pursuant to *N.J.S.A.* 18A:38-1b, the Commissioner shall assess tuition against petitioners for the time period during which R.E. was ineligible to attend school in the District. The statute specifically provides that the Commissioner may order tuition "computed on the basis of 1/180 of the total annual per pupil cost to the local district *multiplied by the number of days of ineligible attendance*." *N.J.S.A.* 18A:38-1b (emphasis added). A certification submitted by the District's

Business Administrator indicates that the per diem tuition rate is $107.92. However, that certification does not provide the number of days of ineligible attendance, nor did the ALJ make any findings of fact on that issue. Although that information should have been provided during the OAL proceedings, because the Business Administrator's certification included a copy of the District's calendar for the 2022-2023 school year, the Commissioner is able to make a finding regarding the number of days of ineligible attendance without the need for a remand to the OAL. The Commissioner finds that there were 155 school days between October 13, 2022 and the end of the 2022-2023 school year. Therefore, the Board is entitled to tuition reimbursement in the amount of $16,727.60 for the period from October 13, 2022 through the end of the 2022-2023 school year, during which time R.E. was ineligible to attend school in the District.

Accordingly, the Initial Decision of the OAL is adopted as the final decision in this matter. Petitioner is directed to reimburse the Board in the amount of $16,727.60 for the time period from October 13, 2022 through the end of the 2022-2023 school year, for tuition costs incurred during the period in which R.E. was ineligible to attend school in the District. The petition of appeal is hereby dismissed.

IT IS SO ORDERED.[1]

Angelica Allen-McMillan, Ed.D.
ACTING COMMISSIONER OF EDUCATION

Date of Decision: July 12, 2023
Date of Mailing: July 13, 2023

[1] This decision may be appealed to the Appellate Division of the Superior Court pursuant to *N.J.S.A.* 18A:6-9.1. Under *N.J.Ct.R.* 2:4-1(b), a notice of appeal must be filed with the Appellate Division within 45 days from the date of mailing of this decision.

State of New Jersey
OFFICE OF ADMINISTRATIVE LAW

INITIAL DECISION
OAL DKT. NO. EDU 01738-23
AGENCY DKT. NO. 322-11/2

D.E. AND J.E. ON BEHALF OF R.E.,
Petitioners,
v.
RAMAPO INDIAN HILLS REGIONAL BOARD OF EDUCATION, BERGEN COUNTY,
Respondent.

No appearance by D.E. and **J.E.**, petitioners, pro se

Caitlin W. Lundquist, Esq., for respondent (Busch Law Group, attorneys)

Record Closed: June 2, 2023 Decided: June 22, 2023

BEFORE **SUSANA E. GUERRERO,** ALJ:

STATEMENT OF THE CASE AND PROCEDURAL HISTORY

Petitioners, parents of minor child R.E., challenged the respondent Board of Education's residency determination. In its counterclaim, the respondent Board of Education of the Ramapo Indian Hills Regional High School District (Respondent,

Ramapo Indian Hills) seeks reimbursement of tuition from petitioners, asserting that R.E. was not domiciled within the school District during the 2022–2023 school year.

This matter was transmitted to the Office of Administrative Law (OAL), under caption D.E. on behalf of minor children, A.E., E.E., C.E., and R.E. v. Board of Education of the Borough of Oakland, Bergen County and Board of Education of the Ramapo Indian Hills Regional High School District, Bergen County, under OAL docket number EDU 11519-22, where it was filed on December 21, 2022. At the initial prehearing telephone conferences, the parties requested that the matter be bifurcated since the petitioners' four children attended two different school districts. By order dated March 1, 2023, I bifurcated the matter and ordered that the matter against the Ramapo Indian Hills Regional High School District proceed under D.E. and J.E. on behalf of minor child R.E. v. Board of Education of the Ramapo Indian Hills Regional High School District, Bergen County, with OAL docket number EDU 01738-23, and that D.E. and J.E. on behalf of minor children, A.E., EE., and C.E. v Board of Education of the Borough of Oakland, Bergen County proceed under OAL docket number EDU 11519-22.

The petitioners failed to participate in scheduled telephone conferences. A hearing was initially scheduled for April 28, 2023, but adjourned. On or around April 28, 2023, the parties were notified that a peremptory hearing date was scheduled for May 22, 2023. As the petitioners did not appear for the hearing, an ex parte hearing took place at the OAL in Newark, New Jersey on that date, and the record remained open to allow the respondent an opportunity to submit a post-hearing brief. The record closed on June 2, 2023, when the post-hearing brief was filed.

FINDINGS OF FACT

Having reviewed and considered the uncontested testimony of Thomas Lambe, School Business Administrator and Board Secretary for Ramapo Indian Hills Regional High School District, at the hearing, the documentary evidence presented at the hearing, the petition, counterclaim, and post-hearing briefs submitted, I **FIND** the following **FACTS** in this matter:

The petitioners did not appear for the hearing, and there is no indication that they did not receive notice of the hearing. The petitioner never called or wrote to the OAL explaining their failure to appear for the prehearing conferences or the hearing. I therefore **FIND** that the petitioners have abandoned their appeal.

Ramapo Indian Hills is a regional public school district consisting of two high schools serving students from Oakland and two other towns in Bergen County. Prior to the 2022–2023 school year, the petitioners and their children, including R.E., resided in Oakland and attended the Oakland school district schools and Ramapo Indian Hills. Specifically, R.E. has been attending Indian Hills High School, one of the two high schools in the Ramapo Indian Hills Regional School District. The petitioners, and R.E., left Oakland in or around September 1, 2021, apparently due to a foreclosure, and moved in with relatives in Hawthorne, a town outside the Ramapo Indian Hills School District. During the 2021–2022 school year, Ramapo Indian Hills considered R.E. homeless and allowed R.E. to remain enrolled at the high school for the entire school year. The District asserts that R.E. continues to reside in Hawthorne. There is no evidence that the petitioners or R.E. were ever domiciled in Oakland, or in any of the other towns within the regional school district, during the 2022–2023 school year.

When the petitioners represented at the start of the 2022–2023 school year that they were still not residing in Oakland, in or around September 16, 2022, the Executive County Superintendent was asked to make a homeless determination for R.E. By letter dated October 13, 2022, the Executive County Superintendent determined that R.E. and R.E.'s siblings were not homeless and that they were domiciled in Hawthorne and entitled to a tuition-free education in the Hawthorne School District for the remainder of the school year. R.E., however, continued to attend Indian Hills High School throughout the 2022–2023 school year.

Lambe sent the petitioner a letter dated October 28, 2022 informing them that, given the Executive County Superintendent's decision, R.E. should register as a student in the Hawthorne School District and that R.E. cannot continue to attend school at Indian Hills High School. Lambe informed the petitioners that they may request a hearing before the Board to challenge this determination. He also informed them that they may be

responsible for a tuition assessment at the rate of $148.49 per day for each day of ineligible enrollment. Lambe described this tuition rate as that applying to students, including R.E., who are receiving special education services.

The parents requested a hearing before the Board but failed to appear. On November 14, 2022, the Board voted to disenroll the students from the District based on their non-resident status. On November 15, 2022, the Board sent the petitioners a letter advising that R.E. is not entitled to a tuition-free education in the District and that since they did not appear for the Board hearing, R.E. was to be disenrolled effective twenty-one days from the date of this notice. The petitioners were also informed that they would be assessed tuition at the rate of approximately $107.92 for each day during the period of ineligibility and prorated from the date of enrollment. According to Lambe, this rate reflects the "regular tuition rate," that applies to students who are not classified.

Petitioners filed the subject petition challenging the Board's decision on or about November 20, 2022. In that petition, D.E. acknowledged that the family does not reside in Oakland.

During the 2022–2023 school year, R.E. attended school at Indian Hills High School. The respondent seeks tuition reimbursement retroactive to October 13, 2022, the date that the Executive County Superintendent determined that R.E. was not eligible for a tuition-free education at Ramapo Indian Hills.

At the conclusion of the hearing, the respondent was asked to submit a Certification prepared by Lambe with the per-diem tuition rate applicable to a general education student attending school in the District. In that Certification, Lambe confirmed that the per pupil tuition rate was $107.92 per day for the 2022–2023 school year, which is the same rate reflected in the November 15, 2022 letter.

LEGAL ANALYSIS AND CONCLUSIONS

Any child between the ages of five and twenty years old is entitled to a free public education in the district in which he is a resident. N.J.S.A. 18A:38-1(a); N.J.A.C. 6A:22-3.1(a). A student is a resident of a school district if his parent or guardian has a permanent home in the district such that "the parent or guardian intends to return to it when absent and has no present intent of moving from it, notwithstanding the existence of homes or residences elsewhere." N.J.A.C. 6A:22-3.1(a)(1). A student may attend school in a district in which he is a non-resident, with or without payment of tuition, at the discretion of the school district. N.J.S.A. 18A:38-3(a); N.J.A.C. 6A:22-2.2.

Domicile has been defined as the place where a person has his true, fixed, permanent home and principal establishment, and to which whenever he is absent he has the intention of returning. State v. Benny, 20 N.J. 238, 250 (1955). The domicile of an unemancipated child is that of his or her parent, custodian or guardian. P.B.K. o/b/o minor child E.Y. v. Board of Ed. of Tenafly, 343 N.J. Super 419, 427 (App. Div. 2001). Where the local board determines that a child is not properly domiciled in its district, N.J.S.A. 18A:38-1(b)(2) provides a right of appeal to the parents.

Here, the respondent produced the District's School Business Administrator and Board Secretary, Lambe, who testified and provided a signed certification concerning R.E.'s residency status and results of the residency determination, her attendance at Indian Hills High School, and the per pupil cost to attend in the 2022–23 school year. I accept his testimony as fact.

N.J.A.C. 6A:22-6.2(a) authorizes the Commissioner of Education to assess tuition for non-resident students. It states:

> If in the judgement of the Commissioner the evidence does not support the claim of the resident, he shall assess the resident tuition for the student prorated to the time of the student's ineligible attendance in the school district. Tuition shall be computed on the basis of 1/180 of the total annual per pupil cost to the local district multiplied by the number of

> days of ineligible attendance and shall be collected in the manner in which orders of the Commissioner are enforced.

Here, the petitioners have failed to appear for the scheduled hearing, without explanation, and there is no testimony or other evidence challenging the District's residency determination or tuition cost. I **CONCLUDE** that since the petitioners have abandoned their appeal, their Petition should be dismissed.

Based upon the facts adduced at the hearing and Lambe's Certification, I **CONCLUDE** that the petitioners and R.E. were not domiciled within the Ramapo Indian Hills Regional School District during the 2022–2023 school year, and that R.E. is not entitled to a free public education there. I also **CONCLUDE** that the Board is entitled to reimbursement, retroactive to October 13, 2022, for tuition calculated at the rate of $107.92 per day. October 13, 2022 is the day when the Executive County Superintendent determined that R.E. was not a homeless student, that she was domiciled in Hawthorne, and that she was not eligible for a tuition-free education in the District. The $107.92 daily rate is the rate applicable to a general education student attending school in the District, and it is the rate used to calculate the total annual per pupil cost to the District. Despite the fact that R.E. may receive special education services, for purposes of seeking tuition reimbursement from a non-resident student, the District is only entitled to reimbursement based on the per pupil cost, not any additional special education costs that are not included in that figure.

ORDER

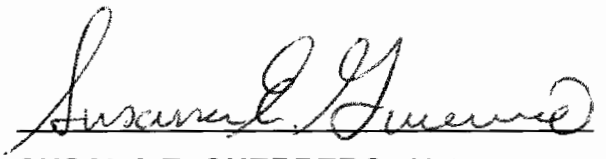
It is hereby **ORDERED** that the petitioners' residency appeal is **DISMISSED** as a consequence of their failure to appear at the hearing without providing any explanation for the non-appearance, and that R.E. be disenrolled from the District. It is further **ORDERED** that respondent's counterclaim seeking tuition reimbursement is **GRANTED**. It is further **ORDERED** that the petitioners reimburse the respondent, at a daily tuition rate of $107.92, for the period beginning October 13, 2022 to the date R.E. is disenrolled from the District.

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

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

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

June 22, 2023
DATE



SUSANA E. GUERRERO, ALJ

Date Received at Agency: _____

Date Mailed to Parties: _____

jb

APPENDIX

Witnesses

For Petitioners:

None

For Respondent:

Thomas Lambe

Exhibits

For Petitioner:

None

For Respondent:

R-1 Letter from Executive County Super intendent to Board's Superintendent, October 13, 2022

R-2 Notice of initial Determination of Eligibility, October 28, 2022

R-3 Email correspondence with petitioner regarding Board hearing, November 2022

R-4 Board Resolution approving R.E.'s disenrollment, November 14, 2022

R-5 Notice of Final Ineligibility Determination, November 15, 2022, with enclosures

208-23

New Jersey Commissioner of Education

Final Decision

Pablo Olivera,

Petitioner,

v.

Board of Education of the City of Newark,
Essex County,
Respondent.

Synopsis

Petitioner – a tenured teacher – challenged the respondent Board's withholding of his salary increment for the 2022-2023 school year. Petitioner had received a summative performance evaluation with a rating of "ineffective" in June 2022. The Board subsequently notified petitioner, by letter dated June 22, 2022, that his salary increment would be withheld for the following school year due to "inefficiency". On September 22, 2022, the Newark Teachers Union filed a grievance on behalf of petitioner, which the Board denied on December 7, 2022. Petitioner filed the within appeal with the Commissioner on March 3, 2023. The Board filed a motion to dismiss in lieu of an answer.

The ALJ found, *inter alia*, that: petitioner's appeal was not filed within 90 days of the Board's decision as required by *N.J.A.C.* 6A:3-1.3(i); the Board's letter notifying petitioner of his increment withholding, dated June 22, 2022, provided adequate notice of petitioner's right to file a petition with the Commissioner as it informed him that the Board had taken action, described that action, and clearly stated that the petitioner's inefficiency was the reason for the action; petitioner's argument that the denial of his grievance in December 2022 should trigger the 90-day rule is without merit as case law indicates that the filing of a grievance does not toll the limitations period under *N.J.A.C.* 6A:3-1.3(i); and the circumstances of this case do not warrant relaxation of the 90-day rule. Accordingly, the ALJ granted the Board's motion to dismiss the petition.

Upon review, the Commissioner, *inter alia*, concurred with the ALJ's findings and conclusions and adopted the Initial Decision as the final decision in this matter. In so doing, the Commissioner found unavailing the petitioner's argument that he was not aware that his work performance was the sole reason his increment was withheld, as he had received an evaluation of "ineffective" shortly before receiving notice from the Board that he would not receive a salary increment for 2022-2023. The petition of appeal was dismissed.

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

208-23
OAL Dkt. No. 02749-23
Agency Dkt. No. 56-3/23

New Jersey Commissioner of Education

Final Decision

Pablo Olivera,

Petitioner,

v.

Board of Education of the City of Newark, Essex County,

Respondent.

The record of this matter, the Initial Decision of the Office of Administrative Law (OAL), and the exceptions filed by petitioner pursuant to *N.J.A.C.* 1:1-18.4 have been reviewed and considered.[1]

On June 22, 2022, the Newark Board of Education (Board) notified petitioner that his salary increment would be withheld for the 2022-2023 school year. On September 22, 2022, the Newark Teachers Union filed a grievance on behalf of petitioner, which the Board denied on December 7, 2022. Petitioner filed a petition of appeal with the Commissioner on March 3, 2023. The Administrative Law Judge (ALJ) granted the Board's motion to dismiss, concluding that the petition was not filed within 90 days of the Board's decision as required by *N.J.A.C.* 6A:3-1.3(i). The ALJ found that the June 22, 2022 letter provided adequate notice of petitioner's right to file a petition with the Commissioner because it informed petitioner that the Board took action, described the action, and clearly stated the reason for the action as petitioner's inefficiency. The

[1] Respondent's reply to petitioner's exceptions was not timely filed and was therefore not considered.

ALJ rejected petitioner's argument that the denial of his grievance should trigger the 90-day rule, citing to case law indicating that the filing of a grievance does not toll the limitations period. Finally, the ALJ found that the circumstances did not warrant relaxation of the 90-day rule.

In his exceptions, petitioner argues that the June 22, 2022 letter failed to provide him with adequate notice of his rights under the law. Petitioner takes issue with the fact that the letter did not inform him of his right to appeal to the Commissioner or that such an appeal was his sole recourse to challenge the withholding of his increment. Petitioner contends that he reasonably believed that the Board considered disciplinary factors beyond the quality of his work performance and that the June 22 letter was not sufficiently informative to dispel this notion. According to petitioner, it was not until he received the December 7, 2022 letter that he was notified by the Board that his increment was withheld for ineffective work performance pursuant to *N.J.S.A.* 18A:29-14. Petitioner argues that the ALJ improperly concluded that the June 22 letter in no way suggested that there might have been another reason for the increment withholding, because "inefficiency" is a vague term subject to multiple interpretations.

Upon review, the Commissioner concurs with the ALJ that the June 22 letter provided adequate notice to petitioner and triggered the start of the 90-day limitations period. While petitioner argues that he was unaware that his work performance was the sole cause of his increment being withheld, he was or should have been well aware that his work performance was an issue for the Board, because he had received an evaluation of "ineffective" shortly before receiving the June 22 letter regarding his increment.[2] If petitioner believed that discipline may have

[2] The Commissioner notes that petitioner has not provided any certification or testimony regarding what facts he was aware of or what he believed at the time he received the June 22 letter. The petition of appeal, which includes a verification signed by petitioner that the facts contained therein are true to the best of his knowledge, does not include any representations related to this issue. And, while petitioner's lack of awareness was an argument made in his opposition to the Board's motion to dismiss, that filing contains no certification from

been the true reason for his increment being withheld, he could have pursued that claim before the Public Employee Relations Commission (PERC). Notably, *N.J.A.C.* 6A:3-1.3(i) specifically provides that when an increment withholding dispute has been submitted to PERC for a determination of whether the withholding was predominantly disciplinary in nature and PERC determines that it was predominantly for reasons of teaching performance, the teacher must file a petition of appeal with the Commissioner within 90 days of PERC's decision. This rule acknowledges that proceedings before PERC and the Commissioner may be related and provides a reasonable and appropriate timeline for petitioners to navigate the two avenues for seeking relief. If petitioner had pursued a claim with PERC, he could have 1) obtained a decision that the withholding was predominantly disciplinary, as he allegedly believed, and therefore been in the right forum to pursue his challenge or 2) obtained a decision that the withholding was predominantly for reasons of teaching performance, in which case he would have had 90 days from the date of that decision to appeal to the Commissioner. But petitioner failed to pursue a PERC claim, and he cannot now avoid the consequences of his strategy by circumventing the 90-day rule.

Petitioner's reliance on *T.W., on behalf of M.W. v. Bd. of Educ. of the Freehold Regional High School District*, EDU 11522-18, Initial Decision (Feb. 14, 2019), *adopted*, Commissioner Decision No. 81-19 (Mar. 27, 2019) is misplaced. In *T.W.*, petitioner contacted the Interim Executive County Superintendent (ECS) when her child's guidance counselors indicated that he could not attend a program at Mercer County Technical Schools (MCTS). The ECS responded and indicated that

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petitioner. The certification by petitioner's attorney – which itself verges on argument rather than being a straightforward recitation of facts – is insufficient to determine petitioner's awareness or understanding. However, even accepting for purposes of this decision that petitioner believed the withholding was disciplinary in nature, the Commissioner's conclusion does not change.

Freehold Regional would not be required to pay tuition for M.W.'s attendance at MCTS.[3] Freehold Regional's Director of Guidance and Operations later issued a letter that "serve[d] as formal notice" that the district would not pay tuition. The ALJ concluded that the letter from the ECS was not the triggering event for the start of the 90-day timeline. Perhaps based on his misunderstanding that the earlier letter was sent by the district's superintendent rather than the ECS, petitioner contends that his situation is analogous to that of *T.W.*, and that the more formal December 7 letter, not the June 22 letter, is the triggering event for the limitations period. However, these cases are not analogous. In *T.W.*, the letter from the ECS was not a decision by the board of education that could trigger the start of the limitations period. Here, the June 22 letter was a decision by the Board.

Petitioner's reliance on *Salaam v. Bd. of Educ. of the City of Irvington*, EDU 13483-10, Initial Decision (May 16, 2012), *adopted*, Commissioner Decision No. 264-12 (June 25, 2012) is similarly misplaced. In *Salaam*, the petitioner sent the board of education a request for reimbursement of legal fees. Receiving no response from the board, petitioner filed a petition of appeal, which the board moved to dismiss because it was filed five months after the criminal charges for which reimbursement was sought had been dismissed. The ALJ concluded that there was no violation of the 90-day rule, because the board had failed to respond to the demand letter. Here, petitioner attempts to analogize the *Salaam* demand letter to a letter sent by petitioner's attorney to the Board on August 11, 2022, inviting the Board to negotiate a settlement and indicating that an Unfair Labor Practice claim would otherwise be filed. However, these cases are not analogous. The board of education's failure to respond to the demand letter in *Salaam* meant that there was no decision by the board that triggered the commencement of the 90-day timeline. Without that triggering

[3] Petitioner's exceptions refer to this letter as being from "the superintendent," apparently meaning the superintendent of the school district. However, an ECS is an employee of the Department of Education, not any local school district.

event, the petition of appeal was not untimely. Here, the Board had made its decision to withhold petitioner's increment and communicated that decision to petitioner. Therefore, the event triggering the running of the limitations period had occurred.

As the ALJ noted, neither petitioner's attempt to negotiate with the Board nor his filing of a grievance[4] toll the 90-day limitations period. *Giannetta v. Bd. of Educ. of Egg Harbor*, Commissioner Decision 147-05 (April 25, 2005); *Kenny v. Bd. of Educ. of the Borough of Moonachie*, EDU 9284-17, Initial Decision (Aug. 17, 2017), *adopted*, Commissioner Decision No. 286-17 (Sept. 27, 2017). The Commissioner also agrees with the ALJ that there are no circumstances present that warrant the relaxation of the 90-day rule.

Accordingly, the Initial Decision is adopted as the final decision in this matter. The petition of appeal is hereby dismissed.

IT IS SO ORDERED.[5]

Angelica Allen-McMillan, J.D.S.
ACTING COMMISSIONER OF EDUCATION

Date of Decision: July 12, 2023
Date of Mailing: July 13, 2023

[4] The Commissioner notes that September 22, 2022, is 92 days after June 22, 2022, such that even the grievance was untimely.

[5] This decision may be appealed to the Appellate Division of the Superior Court pursuant to *N.J.S.A.* 18A:6-9.1. Under *N.J.Ct.R.* 2:4-1(b), a notice of appeal must be filed with the Appellate Division within 45 days from the date of mailing of this decision.

State of New Jersey
OFFICE OF ADMINISTRATIVE LAW

INITIAL DECISION
DISMISSING THE PETITION
OAL DKT. NO. EDU 02749-2023
AGENCY DKT. NO. 56-3/23

PABLO OLIVERA,
Petitioner,
v.
BOARD OF EDUCATION OF THE CITY OF NEWARK, ESSEX COUNTY,
Respondent.

Nicholas Poberezhsky, Esq., for petitioner (Caruso Smith Picini, attorneys)

John J.D. Burke, Esq., for respondent (Antonelli, Kantor, Rivera, attorneys)

Record Closed: April 19, 2023 Decided: June 2, 2023

BEFORE **SUSANA E. GUERRERO**, ALJ:

STATEMENT OF THE CASE

Petitioner Pablo Olivera (Olivera or petitioner), teacher employed by the Board of Education of the City of Newark (the Board or respondent), challenges the withholding of his salary increment for the 2022–2023 school year. Respondent filed a motion to dismiss in lieu of an Answer.

PROCEDURAL HISTORY

Petitioner filed a Petition of Appeal with the Commissioner of Education on or around March 3, 2023, and the Commissioner transmitted the matter to the Office of Administrative Law, where it was filed as a contested case on March 24, 2023. N.J.S.A. 52:14B-1 to -15; N.J.S.A. 52:14F-1 to -13.

A prehearing conference was held on April 12, 2023, approximately two days after the petitioner filed an opposition to the respondent's motion to dismiss. Respondent filed a reply to the opposition on April 19, 2023.

FINDINGS OF FACT

Based on the submissions presented, and the uncontroverted background facts, I **FIND** the following **FACTS**:

Olivera is a tenured teacher who has been employed by the Board for approximately twenty-five years. In or around June 2022, Olivera received an "ineffective" summative evaluation rating. On or around June 22, 2022, the Board notified Olivera that his salary increment would be withheld for the 2022–23 school year due to "inefficiency."

On or about August 11, 2022, Olivera's attorney submitted a letter of representation to the Board's Senior Associate Counsel informing that he had been retained to file an Unfair Labor Practice (ULP) claim with the Public Employment Relations Commission (PERC) against the Board to appeal the withholding of the salary increment. In the letter, counsel asserts that Olivera was in fact effective, that the Board lacked just cause to impose this discipline, that the Board failed to provide the necessary support, that he was "set up to fail," and that Olivera was retaliated against by being involuntarily transferred. Counsel for Olivera indicated: "If you believe that there is a reasonable possibility of settling this matter via a reduction of the discipline imposed against Mr. Olivera, please call my cell . . . at your earliest convenience. Otherwise, please confirm

that you will agree to accept service of the ULP on behalf of [the Board]." The Board did not respond to the August 11, 2022 letter.

On or about September 22, 2022, the Newark Teachers Union filed a grievance on behalf of Olivera, challenging the withholding of the salary increment for the 2022–2023 school year. By letter dated December 7, 2022, the Board informed petitioner's counsel that it had received the Level 3 Grievance and that the Grievance was denied pursuant to Article III of the Agreement between the Board and the Newark Teachers Union "because, without limitation, the increment withholding was based on inefficiency; and is therefore not arbitrable." Citing to N.J.S.A. 18A:29-14, the Board concludes that it is "well-established that an increment withheld for inefficiency must be appealed to the Commissioner of Education and cannot be subject to arbitration."

Petitioner asserts in his Petition, dated March 3, 2023, that the Board's withholding of the salary increment was "an overtly severe penalty for which it lacked just cause to impose; that the 'ineffective' summative evaluation rating was not properly procured; and that the imposition of such discipline constituted an arbitrary and capricious act."

The Board subsequently filed a Notice of Motion to Dismiss in lieu of an Answer to the Petition, on or around March 23, 2023, asserting that the Petition should be dismissed because it was filed out of time.

LEGAL ANALYSIS AND CONCLUSION

In its motion, the Board asserts that the Petition should be dismissed because it was filed more than ninety days from the date petitioner received notice of the Board's decision freezing his salary increment for the 2022–2023 school year. The petitioner argues that the motion to dismiss should be denied because, he asserts, it was not the June 22, 2022 letter that triggered the ninety-day period, but the December 7, 2022 notice denying Olivera's grievance, and petitioner, therefore, filed this appeal in compliance with the ninety-day rule. He also asserts that the June 22, 2022 letter did not give Olivera adequate notice of his right to file a petition with the Commissioner because it does not make clear that inefficiency was the sole reason for the withholding of his increment. The

petitioner also argues that even if it is determined that the June 22, 2022 letter constitutes sufficient notice of a final action by the Board, the Petition should still be accepted as timely due to exceptional circumstances and/or good cause. According to the petitioner, these circumstances include the Board's failure to respond to or even acknowledge receipt of the August 11, 2022 letter, and the fact that the grievance was filed with the Board on September 22, 2022, which was within ninety days of issuing said notice.

N.J.A.C. 6A:3-1.3(i) provides that, regarding the filing and service of a petition of appeal with the Commissioner of Education:

> The petitioner shall file a petition ***no later than the 90th day from the date of receipt of the notice of a final order, ruling, or other action by the district board of education***, individual party, or agency, that is the subject of the requested contested case hearing. This rule shall not apply in instances where a specific statute, regulation, or court order provides for a period of limitation shorter than 90 days for the filing of a particular type of appeal.
>
> . . .
>
> 2. Pursuant to N.J.S.A. 18:29-14[1] and 34:13A-27.d,[2] where an increment withholding dispute has been submitted to the Public Employment Relations Commission for determination of whether the withholding was predominately disciplinary and the Commission determines that the withholding was predominantly for reasons of teaching performance, the teaching staff member's petition shall be filed within 90 days of notice of the Commission's decision, or of the final judicial decision in any appeal from the decision of the Commission, whichever is later.
>
> . . .
>
> [emphasis added.]

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1 N.J.S.A. 18A:29-14 provides, in part: "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 therefore, 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 . . . .

2 N.J.S.A. 34:13A-27 provides, in part: "If there is a dispute as to whether a . . . withholding of an increment of a teaching staff member is disciplinary, the commission shall determine whether the basis for the . . . withholding is predominately disciplinary . . . . If the commission determines that the basis for a transfer is predominately disciplinary, the commission shall have the authority to take reasonable action to effectuate the purpose of this act."

Here, the Petition was filed on March 3, 2023. Although the petitioner asserts that it was the December 7, 2022 notice denying Olivera's grievance that should trigger the ninety-day rule, and not the June 22, 2022 letter, I do not agree. I also disagree with the petitioner that the June 22 letter failed to provide Olivera adequate notice of his right to file a petition with the Commissioner because it does not make clear that inefficiency was the sole reason for the withholding of his increment. The June 22, 2022 letter, sent to the petitioner on Board letterhead, clearly informs him that the Board took official action at its meeting on June 1 to withhold his salary increment for the 2022–2023 school year, and it expressly states that the reason for the Board's action to withhold the salary increment "was inefficiency." In no way does the letter suggest that there may be another reason for the increment withholding. On its face, the June 22, 2022 letter informed the petitioner that the Board took action, it describes the action taken by the Board, and it clearly states the reason for the Board's action. I, therefore, **CONCLUDE** that the June 22, 2022 letter constitutes adequate notice of a final action by the Board, and that it triggered the running of the ninety-day period.

In extraordinary cases, the ninety-day limitation may be relaxed to allow for an appeal filed outside the ninety-day window. See Nancy T. Snow v. Board of Education, EDU 6404-06, final decision, (April 20, 2007), https://njlaw.rutgers.edu/collections/oal/final/edu6404-06.pdf (Commissioner may "relax [the] rule under exceptional circumstances or if there is a compelling reason to do so . . . . Such authority, however, is rarely invoked unless strict adherence to the rule would be inappropriate, unnecessary or where injustice would occur . . . or where the Commissioner finds the presence of a substantial constitutional issue or other issue of fundamental public interest beyond that or concern only to the parties themselves").

Petitioner's appeal was filed about 254 days after he received notice of the Board's action, which is well beyond the ninety-day filing period set forth in N.J.A.C. 6A:3-1.3(i). Olivera argues that the ninety-day rule should be relaxed due to exceptional circumstances, including the Board's failure to timely respond to the August 11, 2022 letter, and because the Board did not confirm the "apparent exclusivity" of Olivera's alleged ineffectiveness as a basis for the increment withholding until the denial of his

grievance in December 2022. The petitioner also cites to the doctrine of unclean hands to justify a relaxation of the ninety-day rule here.

I am not persuaded by the petitioner's argument that exceptional circumstances, or even good cause, exists to relax the ninety-day rule here. First, the petitioner's August 11, 2022 letter to the Board, advising of the filing of an unfair labor practice claim and seeking a reduction of the discipline imposed, in no way tolls the ninety-day period, and I am not persuaded that the Board's failure to respond to this letter warrants a relaxation of the ninety-day rule. See, e.g., Thomas Lygate v. Board of Education, EDU 2660-07, final decision, (March 17, 2008), https://njlaw.rutgers.edu/collections/oal/final/edu2660-07.pdf. Despite the petitioner's argument, the Board did not act in such a deleterious manner that would excuse the petitioner from its obligation to file its appeal within the required ninety days. The petitioner's filing of the grievance on September 22, 2022 also does not toll the limitations period. See Kenny v. Bd. of Educ. Borough of Moonachie, EDU 9284-17, adopted, Comm'r (Sept. 27, 2017) (rejecting the notion that the ninety-day rule was tolled by filing of the grievance and noting that "the Commissioner has held that attempts to resolve a dispute in other forums do not serve to toll the statute of limitations.") Only an appeal filed with the Commissioner stops the ninety-day countdown. I **CONCLUDE** that the petitioner has failed to demonstrate exceptional circumstances that would warrant a relaxation of the ninety-day rule here.

Having reviewed the Board's motion and supporting documents, and the petitioner's opposition to the motion, and having considered the applicable law, I **CONCLUDE** that the Petition must be dismissed as it was filed well beyond the ninety-day limitation imposed by N.J.A.C. 6A:3-1.3(i), and because no extraordinary circumstances exist to warrant a relaxation of this limitation.

ORDER

It is hereby **ORDERED** that the motion to dismiss the Petition filed by the Board is **GRANTED**, and that the Petition be dismissed.

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

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

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

June 2, 2023
DATE

SUSANA E. GUERRERO, ALJ

Date Received at Agency: _____

Date Mailed to Parties: _____

jb

209-23

New Jersey Commissioner of Education

Final Decision

V.B., on behalf of minor children, J.B., J.B., K.B, and K.B.,

Petitioner,

v.

Board of Education of the City of Elizabeth,
Union County,

Respondent.

Synopsis

Pro se petitioner appealed the determination of the respondent Board that her minor children were not entitled to a free public education in Elizabeth schools during the period from March 13 to April 25, 2023. The Board contended that V.B.'s children had transferred in and out of the District five times since 2017, and a residency investigation concluded that the family was not domiciled in Elizabeth during the period in question. The Board sought tuition reimbursement in the total amount of $9,570.00 for the children's ineligible attendance during the 2022-2023 school year.

The ALJ found, *inter alia*, that: petitioner testified credibly that the address on her paperwork with the District included an incorrect apartment number, and she had lived on the third floor rather than the second floor, which is where the residency investigator visited to gather evidence that she did not live at the address provided; the Roselle address that the investigator contended is petitioner's actual address is the home of the children's paternal grandmother, where the children spent time but never slept overnight; petitioner submitted a current lease effective March 1, 2023, as well as a utility bill and driver's license with the same current address in Elizabeth as proof of her residency within the school district during the time in question; the District's investigator did not surveille petitioner's current address; and the Board failed to prove that the children were living at the grandmother's Roselle home. The ALJ concluded that petitioner met her burden of proof that the family is currently domiciled in Elizabeth and the children are eligible for a free education in Elizabeth schools. Accordingly, the ALJ determined that no tuition reimbursement is due to the District and ordered the reversal of the Board's residency determination.

Upon review, the Commissioner concurred with the ALJ's findings and conclusion and adopted the Initial Decision of the OAL as the final decision in this matter. Accordingly, the petition of appeal was granted, and no tuition reimbursement is owed to the Board.

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

209-23
OAL Dkt. No. 03209-23
Agency Dkt. No. 93-4/23

New Jersey Commissioner of Education

Final Decision

V.B., on behalf of minor children, J.R., J.R., K.B. and K.B.,

Petitioner,

v.

Board of Education of the City of Elizabeth, Union County,

Respondent.

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

Upon review, the Commissioner concurs with the Administrative Law Judge that V.B. and her four minor children were residents of the City of Elizabeth – and domiciled within the Board's school district – during the period of March 13, 2023, to April 25, 2023. Thus, the Board is not entitled to reimbursement from petitioner for tuition costs.

Accordingly, the petition of appeal is hereby granted.

IT IS SO ORDERED.[1]

Angelina Allen McMillan, Ed.D.
ACTING COMMISSIONER OF EDUCATION

Date of Decision: July 12, 2023
Date of Mailing: July 13, 2023

[1] This decision may be appealed to the Appellate Division of the Superior Court pursuant to *N.J.S.A.* 18A:6-9.1. Under *N.J.Ct.R.* 2:4-1(b), a notice of appeal must be filed with the Appellate Division within 45 days from the date of mailing of this decision.

State of New Jersey
OFFICE OF ADMINISTRATIVE LAW

INITIAL DECISION
OAL DKT. NO. EDU 03209-23
AGENCY DKT. NO. 93-4/23

V.B. ON BEHALF OF MINOR CHILDREN J.R., J.R., K.B. & K.B.,

Petitioner,

v.

CITY OF ELIZABETH BOARD OF EDUCATION, UNION COUNTY,

Respondent.

V.B., petitioner, appearing pro se

Brian Kane, Esq. for respondent (LaCorte, Bundy, Varady & Kinsella)

Record Closed: June 1, 2023 Decided: June 9, 2023

BEFORE: **JOANN LASALA CANDIDO**, ALAJ

STATEMENT OF THE CASE

Petitioner, V.B., challenges the residency determination made by the Elizabeth Board of Education ("Board") about her minor children J.R., J.R., K.B. and K.B. On or about April 11, 2023, respondent submitted an Answer, which was filed with the

Commissioner of Education on April 12, 2023. Respondent's demand included a request that the Commissioner dismiss the petition of appeal, that the children be removed from the district, and that the petitioner be assessed a tuition charge for each day of the four children's' ineligible attendance in the Board's schools for the 2022-2023 school year for a total of twenty-four days.

The matter was transmitted to the Office of Administrative Law (OAL) on April 12, 2023, for resolution as a contested case pursuant to N.J.S.A. 52:14B-1 to -15 and N.J.S.A.52:14F-1 to -13. A hearing was held on June 1, 2023, and the record closed on that date.

The issues in this matter are whether the children are eligible to attend respondent's public schools free of charge in accordance with N.J.S.A. 18A:38-1 and, if not, whether respondent's requests for tuition reimbursement and for disenrollment of the children should be granted.

TESTIMONY

William Buteau

Elizabeth Board of Education residency investigator William Buteau testified on behalf of the Board. Buteau investigates following up on tips and prepares reports. Buteau investigated the children in this matter because the children transferred in and out of the District five times since 2017. On May 18, 2023, Buteau drafted a Summary Report in the above-named matter. R-1 The Report outlines the number of times the children were in and out of the District and what triggered his investigation. The Transfer Information confirms each time the children were transferred. R-2 On September 20, 2022, a chain of emails from school officials shows an address for petitioner on Spring Street in Union. R-3 Petitioner forwarded an email to school officials attaching a confirmation from Capitol One on November 23, 2022, reflecting a change of address from Newark to Elizabeth. R-4

Buteau stated that based upon a background check of petitioner, her most current address lists that of an address in Newark. It also shows an address in Roselle that the Board states she resides in. R-5 On or about March 2, 2023, the Board filed two Notice of Initial Determination of Ineligibility letters for two of the students on each. The petitioner did not request a hearing on these documents. R-6 Buteau went to the addresses listed on a location report and he could not locate petitioner. He was told the petitioner did not live there by the neighbors. He would go to these addresses on weekdays. He did not go to the current address listed on the lease and utility bill. On or about March 13, 2023, the Board filed four Notices of Final Ineligibility, one for each student. The tuition for K.B. is $99.75 per day for attending school while not a resident; the tuition for J.R. is $99.63 per day; the tuition for K.F.B. is $99.75 per day and the tuition for J.F.R. is $99.63 per day while attending during ineligibility. These rates are applied depending on the grade level. R-7 Lastly, when the students turn on a school owned laptop computer, it reveals the location of the student. Prior to March 1, 2023, the computers reveal a Roselle address at times. Buteau was not available in the office to accept paperwork from the petitioner. The students were disenrolled on April 25, 2023. That was based upon twenty-four school days between March 13, 2023, to April 25, 2023. The total tuition the Board seeks is $9,570.00 for the twenty-four days.

V.B.

V.B. credibly testified on her behalf. She states that the address on the Board paperwork for her Park Street address in Elizabeth reflects apartment #2 when in fact she lived on the third floor. The address in Roselle is the paternal grandmother's home and the children never sleep there. V.B. submitted the current lease, utility bill and driver's license for her apartment in Elizabeth. The children have not been permitted in school since the Easter break. V.B. attempted to drop off paperwork that the District did not accept to file a timely appeal. When she asked the investigator if he was in his office when she attempted ,to drop off paperwork he responded he was not.

The parties have stipulated the following **FACTS**.

1. On March 2, 2023, the Respondent Elizabeth Board of Education made its initial determination that the minor students J.R., J.R., K.B., and K.B. were not domiciled within the District and sent letters to that effect to the petitioner.

2. In the initial determination letters, the respondent notified the petitioner regarding the procedure for requesting a hearing before the Elizabeth Board of Education.

3. On March 13, 2023, the respondent Elizabeth Board of Education made its final determination that the minor students J.R., J.R., K.B., and K.B. were not domiciled within the District and sent letters.

4. In the final determination letters, the respondent informed the petitioner that if the petitioner did not file the appeal within twenty-one (21) days, the Petitioner's children would be removed from Respondent's schools.

5. In the final determination letters, the respondent informed the petitioner that petitioner may be assessed for tuition of the minor students at a per diem rate of $99.75 per student for ineligible attendance.

6. On April 10, 2023, petitioner's residency appeal was filed with the Department of Education.

In addition to the stipulated **FACTS**, I heard testimony from petitioner whom I **FIND** was credible and forthcoming as well as from Investigator William Buteau and **FIND** additional **FACTS**:

1. Petitioner provided a residency Appeal dated March 21, 2023 and another on May 1, 2023. P-1
2. Petitioner, at the time the Board is assessing tuition for twenty-four days, provided proof by submitting a Lease agreement effective March 1, 2023 at an Elizabeth address as well as a utility bill and driver's license all reflecting the Elizabeth address. She resided on the third floor of her prior Elizabeth address and not the 2nd floor where Investigator Buteau checked.

3. Investigator Buteau did not investigate the current Elizabeth address.
4. The Roselle address is the paternal grandmother's address. The Board did not provide proof that the four children were viewed living at this address.
5. The respondent is seeking tuition for the four children for twenty-four school days for K.B. at $99.75 per day; the tuition for J.R. at $99.63 per day; the tuition for K.F.B. at $99.75 per day and the tuition for J.F.R. at $99.63 per day for a total of $9570.00.

LEGAL ANALYSIS AND CONCLUSIONS

Under N.J.S.A. 18A:38-1(a), "[a]ny person who is domiciled within the school district" is entitled to a free education from that district. However, "[i]f the superintendent or administrative principal of a school district finds that the parent or guardian of a child who is attending the schools of the district is not domiciled within the district . . . , the superintendent or administrative principal may apply to the board of education for the removal of the child." N.J.S.A. 18A:38-1(b)(2). The parents may contest a local school board's decision regarding the student's right to attend school in the district to the Commissioner of Education and "shall have the burden of proof by a preponderance of the evidence" to prove domicile in the school district. N.J.S.A. 18A:38-1(b)(2). The State Board of Education has promulgated various rules implementing N.J.S.A. 18A:38-1 and governing student domicile and eligibility to attend school. N.J.A.C. 6A:22-1.1 to -6.3.

Generally, appeals of a local school board's "determinations with respect to entitlement to attend school pursuant to N.J.S.A. 18A:38-1 and N.J.A.C. 6A:22[-1.1 to 6.3]" proceed under the general provisions governing controversies and disputes before the Commissioner of Education, N.J.A.C. 6A:3-1.1 to -1.17, but certain exceptions exist. N.J.A.C. 6A:3-8.1(a). For example, pro se petitioners may file a petition in letter form if they use a specific form provided by the Department of Education. N.J.A.C. 6A:3-8.1(a)(1). When utilizing the Pro Se Residency Appeal form provided by the Department of Education to file their petition, the parents or guardians must "[i]nclude a signed attestation" that "[t]hey understand that they may be assessed tuition for the period of the child(ren)'s ineligible attendance . . . if the Commissioner

determines that the appeal has been abandoned or withdrawn and/or that the child(ren) are ineligible for a free education in the district." N.J.A.C. 6A:3-8.1(a)(1)(iv)(2).

According to N.J.A.C. 6A:22-6.3(a), "[t]uition assessed pursuant to the provisions of this section shall be calculated on a per student basis for the period of a student's ineligible enrollment, by applicable grade/program category and consistent with the provisions of N.J.A.C. 6A:23-3.1. The individual student's record of daily attendance shall not impact on such calculation." However, "[n]othing in this chapter shall preclude an equitable determination, by the district board of education or the Commissioner, that, when the circumstances of a matter so warrant, tuition shall not be assessed for all or part of any period of a student's ineligible attendance in the school district." N.J.A.C.6A:22-6.3(b).

Per N.J.S.A. 18A:38-1(b)(2), the resident "shall have the burden of proof by a preponderance of the evidence that the child is eligible for a free education". See, generally, D.L. v. Board of Educ. of Princeton Regional School Dist., 366 N.J. Super. 269 (App. Div. 2004).

Based upon the foregoing, I **CONCLUDE** that the petitioner has met her burden under N.J.S.A.18A:38-1(b) (2) that J.R., J.R.., K.B. and K.B. are and have been domiciled in Elizabeth from March 13, 2023 to April 25, 2023, and therefore are entitled to a free education in the Elizabeth school district. V.B. provided the Lease agreement effective March 1, 2023, her driver's license, and her utility bill that all reflect the same address in Elizabeth where she was domiciled during the time the District is assessing tuition.

ORDER

Accordingly, it is hereby **ORDERED** that respondent's determination that V.B. and her four children, J.R., J.R., K.B. and K.B., are not residents and domiciliary in Elizabeth, New Jersey, and were not domiciled within its school district during the period of March 13, 2023 to April 25, 2023, is hereby **REVERSED**. It is further **ORDERED** that

respondent is not entitled to reimbursement from petitioner for the cost of audited tuition in the amount of $9,570.00.

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

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

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

June 9, 2023

DATE

JOANN LASALA CANDIDO, ALAJ

Date Received at Agency: June 9, 2023

Date Mailed to Parties: June 9, 2023

EXHIBITS

For Petitioner

P-1 Residency Appeals dated March 21, 2023 and May 1, 2023

P-2 New Jersey Driver's License

P-3 PSE&G Bill

P-4 Lease Agreement effective March 1, 2023

For Respondent

R-1 Elizabeth Board of Education Report dated May 18, 2023

R-2 Transfer Records of J.R., J.R., K.B. and K.B.

R-3 Correspondence from V.B. dated September 14, 2022

R-4 V.B.'s letter Capitol One statement dated November 23, 2022

R-5 Accurint Report for V.B.

R-6 Notice of Initial Determination of Ineligibility for J.R., J.R., K.B. and K.B.

R-7 Notices of Final Determination for J.R., J.R., K.B. and K.B.

R-8 Laptop Surveillance for K.B. and K.B.

R-9 Elizabeth Board of Education 2022-2023 school calendar

215-23
OAL Dkt. No. EDU 03127-22
Agency Dkt. No. 43-3/22

New Jersey Commissioner of Education

Final Decision

Board of Education of the Township of Frankford, Sussex County,

Petitioner,

v.

Board of Education of the Kittatinny Regional High School District, Sussex County, Joni Torpey and Lance Torpey,

Respondents.

The record of this matter, the proposed Stipulation of Settlement, Release and Dismissal with Prejudice (Agreement), and the Initial Decision issued by the Office of Administrative Law pursuant to *N.J.A.C.* 1:1-19.1, have been reviewed. Upon such review, the Commissioner notes that Paragraphs 1 and 2 of the Agreement reference actions that have preceded the consideration of the settlement by the Commissioner of Education. The parties are reminded that a settlement of litigation before the Commissioner is not binding until the Commissioner has approved the settlement.

In light of the foregoing, the Commissioner adopts the Initial Decision as the final decision in this matter, provided that the parties have already implemented the settlement terms or have agreed upon mutually satisfactory alternate dates for the effectuation of the terms of the Agreement. Assuming same, the matter is hereby dismissed.

IT IS SO ORDERED.

Kathleen Ehling

ASSISTANT COMMISSIONER[1]

Date of Decision: July 17, 2023
Date of Mailing: July 19, 2023

[1] Pursuant to N.J.S.A. 18A:4-34, this matter has been delegated to Assistant Commissioner Kathleen Ehling.

State of New Jersey
OFFICE OF ADMINISTRATIVE LAW

INITIAL DECISION
SETTLEMENT
OAL DKT. NO. EDU 03127-22
AGENCY DKT NO. 43-2/22

BOARD OF EDUCATION OF THE TOWNSHIP OF FRANKFORD, SUSSEX COUNTY,

Petitioner,

v.

BOARD OF EDUCATION OF THE KITTATINNY REGIONAL HIGH SCHOOL DISTRICT, SUSSEX COUNTY; JONI TORPEY AND LANCE TORPEY,

Respondents.

Nicholas R. Carlson, Esq. appearing on behalf of Frankford Township Board of Education (Anderson & Shah, LLC, attorneys

Gary Kraemer, Esq. on behalf of Kittatinny Regional High School District Board of Education

Joni and Lance Torpey, appearing pro se

Record Closed: June 15, 2023 Decided: June 21, 2023

BEFORE **NANCI G. STOKES**, ALJ:

This case was transmitted to the Office of Administrative Law (OAL) on April 20, 2022, for resolution as a contested case under N.J.S.A. 52:14B-1 to -15 and N.J.S.A. 52:14F1 to -13. On May 4, 2022, I conducted a telephone prehearing wherein petitioner's counsel advised that new counsel would be substituting into the case. On May 23, 2022, the OAL received the substitution of counsel.

At later conferences, the parties discussed various procedural issues. On September 28, 2022, the petitioner dismissed its claims against the Board of Education, Township of Stillwater, Sussex County, because Stillwater was not seeking tuition reimbursement from Frankford. Following a motion, I ordered that the petitioner amend the petition to include the Torpeys as respondents on November 3, 2022. While discovery was ongoing, the parties reached a settlement that the Board approved at its meeting on June 12, 2023. That agreement permits the parties to affix separate signatures to the last page, and all parties signed the agreement. Respondent submitted the fully executed settlement agreement and Board Resolution on June 15, 2023.

Having reviewed the contents of the attached Settlement Agreement and General Release, I **FIND**:

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

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

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

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

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

June 21, 2023

DATE

NANCI G. STOKES, ALJ

Date Received at Agency: June 21, 2023

Date Mailed to Parties: June 21, 2023

ljb

New Jersey Commissioner of Education
Final Decision

S.W. and N.W., on behalf of minor child, M.W.,

Petitioners,

v.

Board of Education of the Township of Maurice River, Cumberland County,

Respondent.

Synopsis

Petitioners challenged the decision of the respondent Board to relocate M.W.'s bus stop from their driveway to a consolidated school bus stop located approximately one-tenth of one mile away from petitioners' home. Petitioners contended that there is no safe walking path between their home and the new bus stop. A hearing in this matter was held on April 27, 2023.

The ALJ found, *inter alia*, that: the Commissioner will not overturn the decision of a local board of education in the absence of a finding that its were arbitrary, capricious, or unreasonable; in this case, the Board determined a need to consolidate bus stops prior to the start of the 2022-2023 school year; M.W.'s bus stop was changed from in front of her home to a consolidated stop approximately three hundred feet away; petitioners argued that the new bus stop location is unsafe because it is on a heavily traveled road that lacks a sufficient shoulder and proper maintenance, and has a posted speed limit of fifty mph; however, the proposed consolidation of bus stops was needed for safety reasons to reduce the number of home stops and to help alleviate a bus driver shortage; members of the Board listened to parental concerns about the new bus stops, investigated the new consolidated bus routes and determined that the plan was safe and efficient. The ALJ concluded that petitioners have not met their burden to demonstrate that the decision of the Board in adopting the consolidated bus stop proposal was arbitrary, capricious, or unreasonable. Accordingly, the ALJ ordered the petition dismissed.

Upon review, the Commissioner concurred with the ALJ's detailed findings and conclusions, and adopted the Initial Decision of the OAL as the final decision in this case. The petition was dismissed.

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

216-23
OAL Dkt. No. EDU 11099-22
Agency Dkt. No. 318-11/22

New Jersey Commissioner of Education

Final Decision

S.W. and N.W., on behalf of minor child, M.W.,

Petitioners,

v.

Board of Education of the Township of Maurice River, Cumberland County,

Respondent.

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

Upon review, and for the reasons thoroughly detailed in the Initial Decision, the Commissioner concurs with the Administrative Law Judge that petitioners failed to demonstrate that the Board's decision to relocate M.W.'s school bus stop from the petitioners' driveway to a consolidated school bus stop located approximately one-tenth of one mile away from petitioners' home was arbitrary, capricious, or unreasonable.

Accordingly, the petition of appeal is hereby dismissed.

IT IS SO ORDERED.[1]

Kathleen Ehling

ASSISTANT COMMISSIONER[2]

Date of Decision: July 17, 2023
Date of Mailing: July 19, 2023

[1] This decision may be appealed to the Appellate Division of the Superior Court pursuant to *N.J.S.A.* 18A:6-9.1. Under *N.J.Ct.R.* 2:4-1(b), a notice of appeal must be filed with the Appellate Division within 45 days from the date of mailing of this decision.

[2] Pursuant to *N.J.S.A.* 18A:4-34, this matter has been delegated to Assistant Commissioner Kathleen Ehling.

State of New Jersey
OFFICE OF ADMINISTRATIVE LAW

INITIAL DECISION

OAL DKT. NO. EDU 11099-22

AGENCY DKT. NO. 318-11/22

S.W. AND N.W. ON BEHALF OF M.W.,

Petitioners,

v.

BOARD OF EDUCATION OF THE TOWNSHIP OF MAURICE RIVER, CUMBERLAND COUNTY,

Respondent.

S.W. and N.W., petitioners pro se

Erin R. Thompson, Esq., for respondent (Birchmeier & Powell, LLC, attorneys)

Record Closed: May 22, 2023 Decided: June 20, 2023

BEFORE **KATHLEEN M. CALEMMO**, ALJ:

STATEMENT OF THE CASE

Petitioners, S.W. and N.W. on behalf of their daughter, M.W. challenged the decision by the respondent, Board of Education of the Township of Maurice River (Board) changing their daughter's bus stop from their residence to Park Drive and Hesstown Road because they allege there is no safe walking route from their home to the new bus stop.

PROCEDURAL HISTORY

Petitioner filed a petition of appeal with the Commissioner of Education Controversies and Disputes (the Commissioner) on November 18, 2022. The respondent filed its answer on December 8, 2022. On December 12, 2022, the matter was transmitted to the Office of Administrative Law (OAL), where it was filed on December 13, 2022, as a contested case. N.J.S.A. 52:14B-1 to B-15 and N.J.S.A. 52:14F-1 to F-13. 2019.

The hearing was held on April 27, 2023. After receipt of the closing summations on May 22, 2023, the record closed.

FACTUAL DISCUSSION AND FINDINGS

I **FIND** the following to be the undisputed **FACTS** of the case:

Prior to the commencement of the 2022-2023 school year, the Board determined the need to consolidate bus stops. M.W.'s stop was changed from in front of her home to a consolidated stop approximately three hundred feet away.

In August 2022, before M.W. was scheduled to start eighth grade, petitioners received bus information, notifying them of the new bus stop. Once notified of the new bus stop, petitioners brought their safety concerns to the Board. Petitioners maintained that there was no safe walking route from their home to the bus stop because the road lacked a sufficient shoulder and the posted speed limit was fifty miles per hour. Petitioners further maintained that the road is highly traveled and not well maintained. The white shoulder line is washed out in spots or covered with debris. They also expressed issues with flooding even after a normal rainstorm.

Maurice River is a rural community of approximately ninety-two miles. There are three State Highways, State Highway 47, State Highway 49, and Millville/Mays Landing Road. Only the state highways have paved shoulders. Most of the roads in Maurice

River have dirt or gravel shoulders. Some of the roads are unpaved. There are very limited sidewalks.

During the 2022-2023 school year, the Board was responsible for busing approximately three hundred and fifty elementary students and two hundred high school students. The buses traveled on all the roads through out Maurice River.

The new consolidated bus stop at Hesstown and Park Drive accommodated five or six students. The bus was able to pull into the stop off the road to an area that was large enough to accommodate parked cars. The stop was considered centrally located for all students to access being approximately one tenth of a mile from the impacted students' homes.

TESTIMONY

Petitioners

S.W. believed that the Board did not exercise due diligence in investigating her safety concerns. On September 8, 2022, S.W. and N.W. sent an email to Susan Walkup, Transportation Coordinator, and to Dr. Cohen, Superintendent, to express their concerns. (P-1.) The ability of their daughter to safely walk from their home to the new bus stop was their main concern. They did not believe that Hesstown Road was safe for walking for anyone, especially children. After attending the Board meeting on September 20, 2022, and learning that the bus stops were going to remain in place, S.W. sent another email and included Patricia Powell, (Powell), Business Administrator, because she felt her safety concerns had not been addressed. (P-2.) S.W. outlined her safety concerns to include no sufficient shoulder, uneven ground, speed limit of fifty miles per hour, and flooding concerns.

Although Dr. Cohen responded by email, dated October 5, 2022, S.W. felt his answer was vague and non-responsive. (P-3.)

S.W. wanted to attend the Transportation Committee meeting, but her request was denied. She sent an email dated October 27, 2022, so the committee would have her main safety concerns, including a video of flooding after a normal rainfall, along with her daughter's comment about fearing heavy traffic coming in both directions with nowhere for her go. (P-4.) By email, dated November 7, 2022, Dr. Cohen advised S.W. that the Transportation Committee reviewed all her concerns but voted to keep the bus stop in place. (P-5.) S.W. was not satisfied. She wanted information which adequately addressed her safety concerns.

S.W. walked the route and took pictures. (P-6.) The pictures showed that the ground on the sides of the road is uneven and overgrown. Although the bus stop is on the same side of the street as their home, M.W. crosses the street to the east side to walk home so she can see the traffic coming towards her. The east side is covered with debris and trash.

S.W. has lived in her home for fifteen years. She acknowledged that Maurice River, not the school district, is responsible for snow, shrubbery, and debris removal along Hesstown Road. She did not contact Maurice River about the condition of the shoulder, only the Board.

N.W. testified that after fifteen years of living on Hesstown Road, they are very familiar with how unsafe it is. It is not safe for anyone to walk. He understood the need to consolidate bus stops but questioned the desire for efficiency over safety.

Respondents

Susan Walkup (Walkup) is the transportation coordinator. She was hired by the Board two years ago. She received her transportation supervisor certification eight years ago. She has fifteen years of experience in driving a school bus. During her first year as the transportation coordinator, Walkup studied the bus routes but made no changes. As a result of driving and studying the routes, she proposed consolidating fifty bus stops beginning in the 2022-2023 school year.

She understood that parents prefer front door stops, but central location community bus stops are safer for bus drivers and children. She drove the new and old routes with the business administrator, Powell.

To provide Dr. Cohen and the Board members with visualization of the new routes, Walkup drove them in a school bus to visit eleven of the new bus stops where parents had expressed concerns. The tour included the Hesstown Road and Park Drive new bus stop. There were no expressed concerns about the safety of this sight. Walkup did not view any impediments to M.W. walking to and from her home on the grassy shoulder area alongside the road.

Walkup is very familiar with Hesstown Road. It is not a major road and there are no sidewalks, which is typical for Maurice River Township. This stop was selected because it was centrally located for all impacted students, being approximately one tenth of a mile from all their homes. The location was off the road and large enough to accommodate parked cars for parents. While waiting for the bus, the children are off the road. She deemed the location safe for the students and safe for the bus driver.

Due to S.W.'s and N.W.'s concerns about flooding. Walkup drove the road with Powell on January 31, 2023, after it had been raining for about six hours. There were puddles but no safety concerns. Powell took pictures of the road. (R-6.)

In her professional opinion, the new bus stop did not present any safety concerns.

Patricia Powell has been the school's business administrator for the past twenty-one years. Powell hired Walkup to be the transportation coordinator. Facing a bus driver shortage, part of Walkup's duties was to study the routes for efficiency and safety. After Walkup revised the routes, Powell went with her on a school bus to experience the changes. There had been too many home bus stops that needed to be consolidated. When buses make multiple short stops on the same road, there is more cause for concern from aggressive drivers. Powell deemed Walkup's proposals to be safe and needed.

After Powell reviewed the proposal for the new routes, she sent the information to the Board's Transportation Committee for their review. At the August 22, 2022, meeting the Board approved the proposal to consolidate bus stops. After the new bus passes were sent to the families, complaints about the changes were received. To address these complaints, Walkup took Powell, Dr. Cohen, the Board president, and two members of the Transportation Committee on a bus trip to experience the old and new routes. There were complaints about eleven consolidated stops. At each new stop, the Board members would vote yes or no on whether to keep the change. The stop at issue got a unanimous yes vote from the Transportation Committee members. Powell believed the consolidated routes were more efficient.

The new stop on Hesstown and Park Road was situated at an entrance to a trailer park. It was wide enough to accommodate parked cars and all impacted students had an equal walking distance of about one tenth of a mile. There were no expressed concerns about the walkability of the grassy dirt shoulder running along the roadway. In Powell's opinion, the distance between petitioners' house and the bus stop was walkable with sufficient room to walk on the grassy/dirt area off the limited shoulder.

After a rainstorm, Powell returned to the area with Walkup. She took pictures of the road and did not notice any flooding concerns. (R-6.)

Robert A. Chard (Chard) is the chairman of the Transportation Committee. Chard has been a Board member for nineteen years. He has been on the Transportation Committee for sixteen years. Chard grew up on Hesstown Road, near where petitioners currently live. He is very familiar with all the roads in the Township because he spent twenty-five years as a Maurice River police officer.

In July 2022, after receiving the information on the proposed consolidation of bus stops, he personally drove the new route. He thought the plan to cut down the number of stops was good for the children and the bus drivers. He had no issues with the proposal.

He described Hesstown Road as having one lane in each direction with a dirt shoulder. He noted that the speed limit was forty-five miles per hour. He was advised on cross-examination by S.W. that the speed limit is fifty miles per hour.

Chard participated on the bus trip to review the new sites. At the Hesstown and Park stop, he got off the bus and walked a short distance. From what he viewed, he believed petitioners' daughter could easily walk to her home. When the members got back on the bus, they unanimously voted to keep the consolidated stop. Chard also viewed the video of the road during a rainstorm, but it had no effect on his decision. At the Board meeting, Chard voted to approve the consolidated stop.

Having heard the testimony presented at the hearing, and having reviewed the documentary evidence, I **FIND** the following additional **FACTS**:

The proposed consolidation of bus stops was needed for safety to reduce the number of home stops and to help alleviate the shortage of bus drivers. After voting to approve the consolidation plan, the Board listened to the concern of the parents. Walkup took members of the Board on a school bus tour to directly experience the proposed changes. They were able to experience first-hand from the seat of a bus, these new routes and stops.

The petitioner's concern is not with the site, but rather with their daughter's inability to safely walk to and from their home to the bus stop. Without access to sidewalks, the only way to walk from the house to the bus stop is on the shoulder and grassy area of a road where cars can drive at speeds of fifty miles per hour. The pictures showed a grass, gravel, and dirt area off the sides of the road. (R-6 and P-6.) Testimony from Walkup, Powell, and Chard about the walkability of the shoulder area differed from S.W. and N.W. While I do not doubt the sincerity of the petitioners and their obvious motive to keep their daughter as safe as possible, I was more persuaded by the pictures from both parties and the testimony from respondent's witnesses that there was sufficient room to walk. The terrain was uneven, and overgrown, but there was room to safely walk the short distance from petitioners' home to the bus stop. All the students to the new site were required to navigate one tenth of a mile to this new communal bus stop.

Petitioners' flooding concern was also investigated by the Board. The Transportation Committee reviewed the video she submitted. Moreover, Walkup and Powell drove the road after a six-hour rainstorm and found no concerns.

CONCLUSIONS OF LAW

The Commissioner will not overturn the decision of a local board in the absence of a finding that the action below was arbitrary, capricious, or unreasonable. T.B.M. v. Moorestown Bd. of Educ., EDU 2780-07, Initial Decision (February 6, 2008), <http://njlaw.rutgers.edu/collections/oal/> (citing Thomas v. Morris Twp. Bd. of Educ., 89 N.J. Super. 327, 332 (App. Div. 1965), aff'd, 46 N.J. 581(1966)). The Commissioner will not substitute his judgment for that of the board of education, whose exercise of its discretion may not be disturbed unless shown to be "patently arbitrary, without rational basis or induced by improper motives." Kopera v. W. Orange Bd. of Educ., 60 N.J. Super. 288, 294 (App. Div. 1960). Our courts have held that "[w]here there is room for two opinions, action is not arbitrary or capricious when exercised honestly and upon due consideration, even though it may be believed that an erroneous conclusion has been reached." Bayshore Sewage Co. v. Dep't of Envtl. Prot., 122 N.J. Super. 184, 199-200 (Ch. Div. 1973), aff'd, 131 N.J. Super. 37 (App. Div. 1974). Thus, to prevail, the petitioner must demonstrate that the Board acted in bad faith, or in utter disregard of the circumstances before it. T.B.M., EDU 2780-07. It is a weighty burden; one which I **CONCLUDE** these petitioners have not met. This record has presented me with no evidence that would suggest that the actions of this Board, or its personnel, were taken in bad faith or in utter disregard of the circumstances presented.

N.J.S.A. 18A:39-1 provides that for "elementary school pupils who live more than two miles from their public school of attendance or secondary school pupils who live more than two and one-half miles from their public school of attendance, the district shall provide transportation to and from school . . ." However, local school boards are given broad discretion to "make reasonable classifications for furnishing transportation, taking into account differences in the degree of traffic and other conditions existing in the various sections of the district." Buonocore v. Hillsdale Bd. of Educ., 92 N.J.A.R.2d (EDU) 655,

658 (internal citations and quotation marks omitted). "It is well-settled that a local school board's action lying within their discretion will not be overturned unless it is arbitrary, without rational basis, or induced by improper motives." Lemma v. Bd. of Educ. of Twp. of Branchburg, EDU 8953-97, Initial Decision (July 22, 1998).

Further, "responsibility for the removal of traffic safety hazards belongs to the municipal governing authority rather than to the school boards." Mr. & Mrs. T.F.S. ex rel. J.R.S. v. S. Brunswick Twp. Bd. of Educ., EDU 10118-05, Initial Decision (June 29, 2006) (citing Schrenk v. Ridgewood Bd. of Educ., 1961 S.L.D. 185, 187)), adopted, Comm'r (August 4, 2006), < https://njlaw.rutgers.edu/collections/oal/ >.

Here, petitioners' daughter has been asked to walk approximately one tenth of a mile along a rural road to her assigned bus stop. Petitioners assert that the shoulder is not safe for walking, made even worse by rain. However, based on a review of the images admitted into evidence, the road contains no obvious safety concerns and there is a sufficiently wide grassy dirt area for walking. I agree that the terrain does not look even and there are areas in need of maintenance, but it remains, nonetheless, walkable. There is a concern about the fifty miles per hour speed limit and aggressive driving in this area. However, these concerns and the maintenance of the shoulder to the roadway are the responsibility of the governing authority and not the school Board.

The Board's investigation was thorough and involved physical inspections of the route and ultimately a determination that the bus stop was safe and accessible by all impacted students. Petitioners have not shown that the Board ignored obvious dangers in making their determination.

Local boards of education have wide discretion to determine appropriate bus routes and stops for school children. The decisions of local boards will only be overturned if arbitrary, capricious, or otherwise unreasonable.

The Board herein thoroughly investigated the new consolidated bus routes and determined that the plan was safe and efficient. Petitioners have not shown that the roadway was unreasonably dangerous or that the Board had otherwise acted in an

arbitrary or discriminatory fashion in denying their request to reject the bus stop proposal and allow their daughter to be picked up and returned to their home.

I **CONCLUDE** petitioners have not met their burden to demonstrate that the decision of the Board, in adopting the consolidated bus stop proposal was arbitrary, capricious, or unreasonable.

ORDER

Based on the foregoing, I **ORDER** that the appeal be **DISMISSED**.

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

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

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

Kathleen M. Calemmo

June 20, 2023
DATE

KATHLEEN M. CALEMMO, ALJ

Date Received at Agency: _____

Date Mailed to Parties: _____

KMC/tat

APPENDIX

WITNESSES

For Petitioner:

S.W.

N.W.

For Respondent:

Susan Walkup

Patricia Powell

Robert Chard

EXHIBITS

For Petitioner:

P-1 Email, dated September 8, 2022, regarding safety concerns

P-2 Email, dated September 21, 2022, regarding lack of response

P-3 Follow-up email, dated October 5, 2022 and video of flooding

P-4 Email, dated October 27, 2022 with concerns for Transportation Committee

P-5 Email, dated November 6, 2022

P-6 Pictures of walking route

For Respondent:

R-1 Email exchange

R-2 Board minutes, dated September 20, 2022

R-3 Board minutes, dated October 18, 2022

R-4 Board minutes, dated November 21, 2022

R-5 Google map of area

R-6 Photographs of new bus stop after rain on January 31, 2023

R-7 Photographs of other bus stops after rain on January 31, 2023

217-23
OAL Dkt. No. EDU 02247-23
Agency Dkt. No. 50-3/23

New Jersey Commissioner of Education

Final Decision

R.J., on behalf of minor child, J.C.,

Petitioner,

v.

Board of Education of the Township of Union, Union County,

Respondent.

The record of this matter and the Initial Decision of the Office of Administrative Law (OAL) have been reviewed and considered.

Petitioner challenges a residency determination made by the Township of Union Board of Education (Board). The Administrative Law Judge (ALJ) scheduled a telephone conference regarding petitioner's appeal for June 21, 2023. Petitioner failed to appear, and the ALJ returned the file to the agency.

Upon review, the Commissioner disagrees with the ALJ that the matter should be dismissed based on petitioner's failure to appear. The record indicates that the scheduling notices were sent to the parties via email. Pursuant to *N.J.A.C.* 1:1-9.5(c), scheduling notices must be sent by regular mail unless emergent needs require otherwise. There is no indication in the record that the telephone conferences were emergent. Moreover, while sending scheduling notices via email may be acceptable in many circumstances – such as in cases where

all parties or attorneys routinely communicate with the OAL via email – the record here demonstrates that the incorrect email address was used to send notices to petitioner.[1] The record further demonstrates that the petitioner advised the OAL that the incorrect email address had been used on June 23, 2023, and requested that the telephone conference be rescheduled, but the ALJ nonetheless decided to mark the case as a failure to appear.

Because the record demonstrates that petitioner did not receive the scheduling notices, the Commissioner finds that dismissal at this juncture is not appropriate.

Accordingly, this matter is remanded to the OAL for further proceedings consistent with this opinion.

Kathleen Ehling

ASSISTANT COMMISSIONER[2]

Date of Decision: July 17, 2023
Date of Mailing: July 19, 2023

[1] The Commissioner acknowledges that the ALJ used the email address listed for petitioner on the transmittal form and apologizes for the inconvenience caused by the typographical error on that form. Petitioner's correct email address is reflected elsewhere in the file.

[2] Pursuant to N.J.S.A. 18A:4-34, this matter has been delegated to Assistant Commissioner Kathleen Ehling.

218-23E
OAL Dkt. No. EDU 05251-23
Agency Dkt. No. 162-6/23

New Jersey Commissioner of Education

Order on Emergent Relief

Acelero Learning Monmouth/Middlesex County, Inc.,

Petitioner,

v.

Board of Education of the Borough of Red Bank, Monmouth County, and New Jersey Department of Education,

Respondents.

The record of this emergent matter, the sound recording of proceedings at the Office of Administrative Law (OAL), and the recommended Order of the Administrative Law Judge (ALJ) have been reviewed. Upon such review, the Commissioner concurs with the ALJ that petitioner has failed to demonstrate entitlement to emergent relief pursuant to the standards enunciated in *Crowe v. DeGioia,* 90 *N.J.* 126 (1982), and codified at *N.J.A.C.* 6A:3-1.6.

Accordingly, the recommended Order of the OAL denying petitioner's application for emergent relief is adopted for the reasons stated therein. This matter shall continue at the OAL with such proceedings as the parties and the ALJ deem necessary to bring it to closure.

IT IS SO ORDERED.

Kathleen Ehling
ASSISTANT COMMISSIONER[1]

Date of Decision: July 17, 2023
Date of Mailing: July 19, 2023

[1] Pursuant to *N.J.S.A.* 18A:4-34, this matter has been delegated to Assistant Commissioner Kathleen Ehling.

State of New Jersey
OFFICE OF ADMINISTRATIVE LAW

ORDER DENYING
EMERGENT RELIEF
OAL DKT. NO. EDU 05251-23
AGENCY DKT. NO. 162-6/23

ACELERO LEARNING CENTER
MONMOUTH/MIDDLESEX COUNTY, INC.,
Petitioner,
v.
BOARD OF EDUCATION OF THE
BOROUGH OF RED BANK, MONMOUTH
COUNTY AND NEW JERSEY
DEPARTMENT OF EDUCATION,
Respondents.

Teresa L. Moore, Esq., for petitioner (Riker, Danzig, Scherer, Hyland & Perretti, LLP, attorneys)

Danielle N. Pantaleo, Esq., for respondent, Board of Education of the Borough of Red Bank (Busch Law Group, LLC, attorneys)

Sadia Ahsanuddin, Deputy Attorney General, for respondent, New Jersey Department of Education (Matthew J. Platkin, Attorney General of New Jersey, attorney)

BEFORE **SARAH G. CROWLEY**, ALJ:

STATEMENT OF THE CASE AND PROCEDURAL HISTORY

Petitioner filed a petition and motion for emergent relief with the New Jersey Department of Education (DOE) on June 13, 2023. The contested matter was transferred to the Office of Administrative Law (OAL), pursuant to N.J.A.C. 1:6A-12.1, where it was filed on June 14, 2023. The motion for emergent relief seeks an order that would stay the termination of the 2022–2023 contract and the non-renewal of the 2023–2024 contract between the petitioner and the respondent, Red Bank Board of Education. Opposition was filed by the respondents, and the matter was heard before the undersigned via Zoom on June 23, 2023. The record closed at that time.

FACTUAL BACKGROUND

Petitioner, Acelero Learning Center Monmouth/Middlesex County, Inc. (petitioner), is a private head start program provider, licensed, and approved by the State of New Jersey. Respondent, Red Bank Board of Education (Board) is a public school district in Red Bank, New Jersey. The Board entered into a contract with petitioner to provide a pre-school head start program in Red Bank for an initial term ending June 30, 2023. Pursuant to the terms of the contract, petitioner began providing services to the Board. In September 2022, one of the petitioner's teachers left and a substitute was provided as a replacement. Thereafter, in January 2023, petitioner lost another teacher and again hired a substitute teacher on a temporary basis. Both teachers met the requirements for a substitute teacher and the petitioner was in the process of recruiting full-time replacements which met the requirement of the contract.

On January 20, 2023, the petitioner notified the respondent that they would not be renewing the contract for the period of 2023–2024. The respondent notified petitioner on February 14, 2023, that they had concerns about some deficiencies in the contract, including the staffing issues. DOE was notified of the deficiencies but did not respond and takes no position in this proceeding. On March 17, 2023, the Board notified petitioner that it was holding them in breach of contract and terminating the current contract and would not be renewing the 2023–2024 contract. The petitioner has argued that after notifying respondent of its intent not to renew the contract, they

thereafter rescinded this notice. Moreover, there is no legal basis to challenge the non-renewal asserted as renewal was not mandated, nor was DOE approval of a non-renewal required.

The above facts are undisputed and are **FOUND** as **FACT**.

ISSUE PRESENTED

Has the petitioner demonstrated grounds for emergent relief under New Jersey Law?

LEGAL ANALYSIS AND CONCLUSION

The New Jersey Supreme Court has set forth a four-prong test for determining whether an applicant is entitled to emergent relief. Crowe v. DeGioia, 90 N.J. 126, 132-34 (1982) (enumerating the factors later codified at N.J.A.C. 6A:14.2-7(s)1).

The four factors (the Factors), include:

1. The petitioner will suffer irreparable harm if the requested relief is not granted;

2. The legal right underlying petitioner's claim is settled;

3. The petitioner has a likelihood of prevailing on the merits of the underlying claim; and

4. When the equities and interests of the parties are balanced, the petitioner will suffer greater harm than the respondent will suffer if the requested relief is not granted.

The moving party bears the burden of proving each of the Crowe elements "clearly and convincingly." Waste Mgmt. of N.J. v. Union County Util. Auth., 399 N.J. Super. 508, 520 (App. Div. 2008).

A review of the four factors is in order.

Factor One. The petitioner will suffer irreparable harm if the requested relief is not granted. The contract at issue is due to expire on June 30, 2023, one week from today. The remedy for a breach of contract, if such a breach exists, is a monetary one. It is well settled that monetary damages fail to satisfy the requirement of irreparable harm. The petitioner appeared to be asserting irreparable harm to the children who receive such services under the contract. However, petitioner conceded during oral argument that they are not representing the rights of any such children. The irreparable harm is that petitioner will not be able to provide services in the respondents' district. This fails to meet the requirement of irreparable harm.

Factor Two. The legal right underlying petitioner's claim is settled. Petitioner is alleging a breach of contract because the Board did not obtain the consent of the DOE to terminate the contract. The petitioner further alleges that the staffing issues were not a basis for termination of the contract. These issues are factual issues which have not been demonstrated, and thus, the legal right underlying the petitioner's claim is not settled.

Factor Three. Petitioner has a likelihood of prevailing on the merits of the underlying claim. Petitioner must prove that respondent did not have the right to terminate the contract, after they lost two staff members. The credentials and the ability of the petitioner to satisfy the terms of the contract are unclear, and thus, the petitioner has not demonstrated a likelihood of prevailing on the merits of the underlying claims. There is no likelihood of prevailing on the merits of a claim to renew the contract for another year, as they terminated it initially, and there is no legal right to the renewal of the contract.

Factor Four. When the equities and interests of the parties are balanced, the petitioner will suffer greater harm than the respondents will suffer if the requested relief will not be granted. Here, the only harm suffered by the petitioner is monetary, when balanced against the respondents' need to provide reliable services to the preschool children of Red Bank. The balance of equites does not favor the petitioner.

Based upon the foregoing, I **CONCLUDE** that petitioner's request for emergent relief be **DENIED**.

ORDER

It is hereby **ORDERED** that petitioner's request for emergent relief is **DENIED** and the petition should be **DISMISSED**.

This order on application for emergency relief may be adopted, modified or rejected by **COMMISSIONER OF THE DEPARTMENT OF EDUCATION**, who/which by law is authorized to make a final decision in this matter. The final decision shall be issued without undue delay, but no later than forty-five days following the entry of this order. If Commissioner of the Department of Education does no adopt, modify or reject this order within forty-five days, this recommended order shall become a final decision on the issue of emergent relief in accordance with N.J.S.A. 52:14B-10.

June 26, 2023
Date

Sarah G. Crowley
SARAH G. CROWLEY, ALJ

Date Received at Agency _____

Date Mailed to Parties: _____

SGC/kl

APPENDIX

EXHIBITS

For petitioner

- Petition
- Brief in Support of Application for Emergent Relief
- Certification of Amanda Worth-Colon
- Exhibits A through H

For respondent, Board of Education of the Borough of Red Bank

- Brief in Opposition to the motion filed by Red Bank Board of Education

For respondent, New Jersey Department of Education

- Statement of Interest filed by the New Jersey Department of Education

219-23E
OAL Dkt. No. EDU 05504-23
Agency Dkt. No. 166-6/23

New Jersey Commissioner of Education

Order on Emergent Relief

Kiddie Korner Learning Center,

Petitioner,

v.

Board of Education of the City of Newark, Essex County,

Respondent.

The record of this emergent matter, the sound recording of proceedings at the Office of Administrative Law (OAL), and the recommended Order of the Administrative Law Judge (ALJ) have been reviewed. Upon such review, the Commissioner concurs with the ALJ that petitioner has failed to demonstrate entitlement to emergent relief pursuant to the standards enunciated in *Crowe v. DeGioia,* 90 *N.J.* 126 (1982), and codified at *N.J.A.C.* 6A:3-1.6.

Accordingly, the recommended Order denying petitioner's application for emergent relief is adopted for the reasons stated therein. However, to the extent that the ALJ suggested petitioner must file a separate petition of appeal in order to resolve the merits of this dispute, the Commissioner wishes to clarify that a separate petition is unnecessary. The underlying petition of appeal endures despite denial of the application for emergent relief. Because that petition regarding the merits of the non-renewal of petitioner's contract was previously

transmitted to the OAL and is still pending, this matter shall continue at the OAL with such proceedings as the parties and the ALJ deem necessary to bring it to closure.

IT IS SO ORDERED.

Kathleen Ehling

ASSISTANT COMMISSIONER[1]

Date of Decision: July 17, 2023
Date of Mailing: July 19, 2023

[1] Pursuant to *N.J.S.A.* 18A:4-34, this matter has been delegated to Assistant Commissioner Kathleen Ehling.

State of New Jersey
OFFICE OF ADMINISTRATIVE LAW

ORDER DENYING
EMERGENT RELIEF
OAL DKT. NO. EDU 05504-23
AGENCY DKT. NO. 166-6/23

KIDDIE KORNER LEARNING CENTER,
Petitioner,
v.
BOARD OF EDUCATION OF THE CITY OF NEWARK, ESSEX COUNTY,
Respondent.

Bradley Flynn, Esq., for petitioner (Montgomery Law, PLLC, attorneys)

Brenda Liss, Esq., for respondent (Newark Board of Education, Office of General Counsel, attorneys)

Record Closed: June 29, 2023 Decided: June 30, 2023

BEFORE **ANDREW M. BARON**, ALJ:

STATEMENT OF THE CASE

Petitioner Kiddie Corner Learning Center, an early childhood school located in Newark, New Jersey, brings this application for emergent relief seeking a stay from a determination by respondent Newark Board of Education concerning the non-renewal of

a contract between the parties as of June 30, 2023. In bringing this application, petitioner further contends that this was an arbitrary and capricious determination by the Board, and amounts to a termination of an existing contract, as opposed to a non-renewal. As such, petitioner seeks immediate relief to maintain the status quo until a full plenary hearing can be conducted.

PROCEDURAL HISTORY

Petitioner filed this motion for Emergent Relief following a determination by the Department of Education, Office of Early Childhood which affirmed a March 30, 2023 notice of non-renewal of its contract with the Newark Board of Education to provide early childhood education to Newark residents.

There is an indication of an earlier legal dispute between the parties in the prior year, as well as a due process petition which was withdrawn. (A similar application for emergent relief filed earlier this month was also withdrawn on June 13, 2023 without prejudice, pending the outcome of the appeal before the State Office of Early Childhood Learning). Counsel for the District correctly points out that on a procedural basis, that Office was application was not made a party to this application, following its affirmance of the Board's non-renewal action nonetheless, over objection, the application was allowed to proceed, so as not to further delay the time sensitive nature of the application Should this matter proceed under a separate regular petition and action, that office can be added at a later time, since the actions being challenged here are primarily those of the Board.

Following argument and limited testimony from LaRhonda Lewis, who serves as Executive Director of Kiddie Corner, and Yolanda Severe who serves as Executive Director of the Newark Board of Education, Office of Early Childhood Education, each of whom previously supplied respective certifications, the record remained open through the end of the day on June 29th for supplemental submissions.

DISCUSSION AND LIMITED UNDISPUTED FACTS

Petitioner Kiddie Corner Learning Center is a non-profit corporation with its principal place of business located at 319-321 Verona Avenue Newark, New Jersey. It

started providing services as a preschool in 1991 and has provided pre-school services for the Newark Board of Education since 1998. The contract between the parties is subject to renewal on an annual basis, though Kiddie Corner has provided such services to Newark school children on an uninterrupted basis for over twenty-five (25) years.

Respondent Newark Board of Education, with offices at 765 Broad Street, Newark New Jersey is a local education agency responsible for the education of several thousand students residing within the geographic area of Newark. As the largest urban school district in the State of New Jersey, the District is also responsible for adhering to the principles of the "Abbott" case, and the funding requirements associated therewith.

On July 2021, there was a dispute between the parties over funding. Petitioner says that lack of funding, which was a violation of the contract in existence at the time, led to its inability to retain appropriate staffing levels and maintain the required curriculum. That dispute became the subject of a separate appeal petitioner brought before the Department of Education, which was transmitted to the Office of Administrative Law.

Among other things, petitioner argued then and now that certain restrictions imposed on it by the District, led to certain enrollment problems, as the District stayed remote for a longer period of time than other Districts, and certain parents were not interested in having their children participate in remote only at such a young age.

Thus, new registration for the next school year was delayed, by which time some parents had enrolled their children elsewhere.

With the contract for the 22-23 school year, a classroom was taken away, and certain conditions the District imposed remained, including the imposition of a Corrective Action Plan (CAP), parts of which had been in existence since at least 2020.

Among other things, it is several aspects of the Corrective Action Plan which are disputed by both sides, which cannot be decided here, including but not limited to financial issues, enrollment requirements, and teacher training the District was required to provide.

Petitioner says the District effectively made it impossible for it to comply with the plan, which is a requirement of the contract between the parties.

After a significant amount of back-and-forth discussions and negotiations, on March 30, 2023, the District, as it is required to do, provided written notice to Kiddie Corner that the contract would not be renewed for the 23-24 school year. A revised notice of non-renewal was requested by petitioner and provided by the Board.

Within a week of issuing that notice, and before the school could file a formal appeal with the Department of Education, the District sent a representative to the school, without notice to Kiddie Corner, to hand out a written letter to the parents advising them that Kiddie Corner would no longer be a Board sponsored school for the next school year. The district contends it was simply following protocol as required by law since registration for the next school year had already been underway for some time, and parents whose children attended Kiddie Corner needed to be notified immediately to afford them sufficient time to select a different school for the next school year. (For reasons unknown, petitioner says the District official who came to the site refused to share a copy of the letter with Ms. Lewis, the Executive Director who was not informed of this development, leaving her in the embarrassing position of asking parents to show her the letter, thus leaving Kiddie Corner suspicious of the District's motives.)

Most of the remaining facts, including but not limited to whether or not Kiddie Corner was able to comply with the Corrective Action Plan, and the level of support it received from the District are disputed, and no determination on those issues can be made at this time, though to some extent, it seems clear the relationship significantly changed following the first appeal Kiddie Corner filed.

LEGAL ANALYSIS AND CONCLUSIONS

The threshold question in this matter is whether or not the District violated its statutory, regulatory and contractual obligations to petitioner pursuant to N.J.A.C. 6A:13A-9.3 (a)(1)(a) et. seq. by failing to renew a long existing year-to-year contract between the parties that spanned over twenty-five years. The parties do not even agree on what that

action constitutes, with the District arguing it has the absolute right to not renew the contract, and petitioner arguing that the Board's decision is more tantamount of a termination, which carries its own set of consequences.

I will first address the Board's arguments that the application should fail on procedural grounds, since the request for relief was not brought within ninety (90) days of when petitioner received notice of the term of the 2022-23 contract, and second that the Department of Education was not added as a party once it issued its affirmance of the action to non-renew.

The first argument regarding the timing of the filing seems at best, disingenuous. While petitioner may have a dispute about the terms of the contract in existence which the Board says led to the non-renewal, the triggering event was the letter of March 30, 2023 advising petitioner of the non-renewal, which was followed almost immediately by the Board's actions on April 5th, (which it attempted to hide from petitioner) advising the remaining students that they would have to enroll for the coming year elsewhere.

With this filing being brought within ninety (90) days of the triggering events as required under N.J.A.C. 6A;3-1.3(i), **I FIND** that petitioner's request for emergent relief is timely.

Next, Respondent argues that the application should be barred on procedural grounds since the Department of Education, Office of Preschool Education Division of Early Childhood Services was not added as a party.

While this legal argument may be technically correct, petitioner by consent previously withdrew without prejudice its earlier request for emergent relief, based in part on an objection by the Board that the Division of Early Childhood Learning had not yet ruled.

On June 15, 2023, in a short ruling of two paragraphs that does not go into great detail the State Division of Early Childhood Learning affirmed the District's non-renewal of the contract between the parties based on the evidence provided by Newark. At no

time during the discussions about the first emergent application being withdrawn without prejudice did the Board raise the argument that the State Office of Early Childhood Learning must be added as a party, and since this application is primarily targeted to the actions of the District, it would have been prejudicial to further delay the proceeding past June 30th when the existing contract ends to require an amendment to the pleadings, which can be done at a later time should a full petitioner be filed. Thus, that argument must fail as well, and the emergent hearing went forward.

Third, the Board argues there is no authority to impose a stay. If petitioner can meet the requirements set forth below, N.J.A.C. 6A:3-1.6 (a) and (b) says otherwise memorializing that a stay is an appropriate form of emergent relief.[1]

However ,with so many remaining facts in dispute, that are perhaps appropriate for a different proceeding or forum, my limited focus on this Emergent Relief application, is whether petitioner can meet the requirements of Crowe v. DeGioa, 90 N.J. 126, 132,34 (1982), factors of which are also enumerated at N.J.A.C. 1:1-12.6, N.J.A.C. 6A:3-1.6(b) and N.J.A.C. 6A:14.2-7 as follows: See also: Ispahani v. Allied Domecq Retailing United States, 320 N.J. Super. (App. Div. 1999).

i. The petitioner will suffer irreparable harm if the requested relief is not granted.

ii. The legal right underlying petitioner's claim is settled.

iii. The petitioner has a likelihood of prevailing on the underlying merits.

iv. When the equities and interests of the parties are balanced, the petitioner will suffer greater harm than the respondent will if the relief is not granted.

The burden for demonstrating success on these prongs is on the moving party. Waste Management of NJ v. Union County Utilities Authority, 399 NJ Super 508 (App. Div. 2008).

[1] The District also argues that this matter of damages is not sufficient to meet the immediate and irreparable harm requirement to justify a stay of the non-renewal, and there is no legal authority on a non-renewal claim to issue a stay.

Certainly, petitioner has demonstrated, at least to some extent it will suffer immediate and irreparable harm., as the non-renewal, which petitioner argues should be considered a breach of contract, may result in the closure of the school together with the loss of jobs and income for its employees, as well as the good will and sense of community afforded the parents and families whose children attend the school. However, a key question here is will the loss of income alone, (in essence monetary damages) sufficient to satisfy this prong of Crowe or is it more appropriate to bring this claim in another forum, since the Office of Administrative Law does not have jurisdiction to award money damages.

As to prong (ii), petitioner argues that the law on the underlying claim is settled, thus they are entitled to a stay. With so many facts disputed, including the underlying action itself (non-renewal vs. termination) as well as whether or not petitioner fulfilled the obligations of a Corrective Action Plan, (as well as whether a Corrective Action Plan should have been instituted in the first place) a separate dispute as to enrollment, and financial concerns, these issues can only be decided once a full hearing is conducted, should a separate due process petition be filed.

As to the likelihood of success on the merits, again here, the outcome is unclear. While petitioner has put forth what appear to be valid concerns and complaints about the treatment it received from the District, especially during the last three years, I cannot determine at this stage of the proceedings whether or not they will ultimately prevail. While the Board admitted during the course of argument that Kiddie Corner was the only one of its twenty- four vendors on a Corrective Action Plan, that fact, in and of itself, is not sufficient to meet the requirements of Crowe.

Finally, as to prong (iv) balancing the equities, while it would be extremely unfortunate if this long established and reliable vendor associated with the Newark Public Schools had to close its doors, with so many remaining facts in dispute, it is not clear at this time that the equities weigh in favor of petitioner, at least for purposes of this application. It is not disputed that thirty of the forty-five children in the program at the time of the non-renewal notice will "age out" of pre-school and start kindergarten at another

school in Newark. The District says the remaining fifteen children have been placed, and it is unclear as to how many new children would have started at Kiddie Corner had the contract been renewed. Although there may be merit to the equitable argument that after twenty-five years of loyal service to the District, petitioner was "singled out," for retribution, I am unable to make a determination in favor of petitioner at this time on prong (iv), without the benefit of significant additional statistics, facts and documents and testimony beyond the certifications and documents submitted.

Therefore, for the reasons set forth herein, since I am limited to all four parameters as outlined in Crowe, **I CANNOT CONCLUDE** petitioner is entitled to an emergent stay at this time. Any such claims shall be preserved for a different proceeding on the merits should one be brought.

ORDER

For the reasons set forth above and herein, I **THEREFORE ORDER** that petitioner's motion for Emergent Decision be and hereby is **DENIED**.

I FURTHER ORDER, that this ruling Order only applies to the request for a stay of the non-renewal of the contract between the parties but is not dispositive of what appears to be several other outstanding factual and legal disputes between the parties that may be more appropriate for another forum/jurisdiction to decide, and/or a separate full petition within this forum.

This Order on application for emergency relief may be adopted, modified or rejected by the **COMMISSIONER OF THE DEPARTMENT OF EDUCATION**, who/which by law is authorized to make a final decision in this matter. The final decision shall be issued without undue delay but no later than forty-five days following the entry of this order. If the **COMMISSIONER OF THE DEPARTMENT OF EDUCATION** does not adopt, modify or reject this order within -five days, this recommended order shall become a final decision on the issue of forty emergent relief in accordance with N.J.S.A. 52:14B-10.

June 30, 2023
DATE

ANDREW M. BARON, ALJ

Date Received at Agency June 30, 2023

Date E-Mailed to Parties: June 30, 2023

lr

223-23
OAL Dkt. No. 00065-23
Agency Dkt. No. 376-12/22

New Jersey Commissioner of Education

Final Decision

W.M. and M.M., on behalf of minor child,

Petitioners,

v.

Board of Education of the Township of Lafayette, Sussex County,

Respondent.

The record of this matter, the Initial Decision of the Office of Administrative Law (OAL), and the exceptions filed by petitioners pursuant to *N.J.A.C.* 1:1-18.4 have been reviewed and considered.[1]

By way of background, petitioners[2] alleged that their minor child was the victim of harassment, intimidation, and bullying (HIB). On or about December 27, 2021, the Lafayette Board of Education (Board) issued a decision that petitioners' child was not the victim of HIB. On January 19, 2022, the Commissioner transmitted a case captioned *M.M., on behalf of minor child v. Board of Education of the Township of Lafayette, Sussex County, and*

[1] The Board did not file a reply to petitioners' exceptions.

[2] Throughout the course of the events related to this case, some actions have been undertaken by petitioners jointly, while others were done by M.M. individually. For ease of reference, all actions taken by W.M. and/or M.M. on behalf of their child, whether jointly or individually, will be referred to as actions taken by "petitioners."

Jennifer Cenatiempo, former Superintendent, Agency Dkt. No. 216-11/21,[3] to the OAL for a hearing regarding the merits of the Board's HIB decision and alleged violations of the Anti-Bullying Bill of Rights Act.

On December 30, 2022, petitioners filed the petition of appeal and motion for emergent relief in the instant matter (the "2022 case"). The 2022 case was transmitted to the OAL on January 3, 2023. The relief requested included home instruction for petitioners' child, an order requiring the Board to comply with a previous Commissioner decision regarding copies of video evidence, and the scheduling of a HIB appeal with a "new and impartial" judge. Petitioners' motion for emergent relief was denied. *W.M. and M.M., on behalf of minor child v. Board of Education of the Township of Lafayette, Sussex County*, Commissioner Decision No. 33-23E (February 3, 2023).

Thereafter, the Board filed a motion for summary decision. The Hon. Nanci G. Stokes, ALJ, found that petitioners had previously filed a motion to disqualify Judge Bongiovanni from the 2021 case; the motion was denied by the Acting Director of the OAL, and Judge Stokes concluded that she had no authority to disturb that Order. Judge Stokes further concluded that the issue of the video evidence was moot because Judge Bongiovanni had addressed it in a discovery order, which Judge Stokes determined she had no authority to disturb.

Regarding petitioners' request for home instruction, Judge Stokes determined that the 2022 case essentially replicates the issues raised in the 2021 case. Judge Stokes noted that, if petitioners prevailed on their 2021 case and demonstrated that HIB occurred and the Board's

[3] This case will be referred to as the "2021 case." It bears OAL Docket Number EDU 00546-22 and was assigned to the Hon. Ernest Bongiovanni, ALJ. There is a typographical error on page 6 of the Initial Decision that identifies the OAL Docket Number for the 2021 case as EDU 00456-22. All other references to the 2021 case in the Initial Decision identify the correct OAL Docket Number of EDU 00546-22.

decision to the contrary was arbitrary, capricious, or unreasonable, the relief ordered by Judge Bongiovanni might include home instruction. Judge Stokes rejected petitioners' argument that they had not requested home instruction as part of the 2021 case, citing to the entire controversy doctrine and to the OAL rules that provide for liberal amendments to pleadings.

In their exceptions, petitioners argue that the 2022 case is not duplicative of the 2021 case, because they did not request home instruction in the 2021 case. Petitioners also contend that they are not re-arguing discovery issues, but rather are seeking enforcement of the Commissioner's decision ordering the Board to produce video evidence. Finally, petitioners contend that Judge Bongiovanni is biased and therefore should not be permitted to handle the 2021 case.[4]

Upon review, the Commissioner concurs with Judge Stokes' decision granting the Board's motion for summary decision. As Judge Stokes noted, pursuant to *N.J.A.C.* 1:1-14.10(j), the Director of the OAL is the agency head for purposes of motions to disqualify. Therefore, neither Judge Stokes nor the Commissioner have the authority to overturn the Director's decision regarding petitioners' motion to disqualify Judge Bongiovanni. Furthermore, as the

[4] Petitioners also contend that Judge Bongiovanni denied them the discovery they requested and refused to allow them to appear virtually for the proceedings regarding the above-noted 2021 case. Those allegations are not addressed herein, as this decision is limited to a review of Judge Stokes' Initial Decision regarding the 2022 case. Petitioners may present any and all arguments regarding Judge Bongiovanni's orders, or the way in which he handled proceedings, for the Commissioner's review when she considers and decides the 2021 case. Petitioner also makes allegations regarding a petition filed in 2020, which are not addressed herein, as the Commissioner has already issued a decision in that matter. *M.M., on behalf of minor child v. Board of Education of the Township of Lafayette*, Agency Dkt. 94-5/20, EDU 05225-20, Commissioner Decision No. 43-22 (March 4, 2022). There is a typographical error on page 6 of the Initial Decision that identifies the OAL Docket Number for the 2020 matter as EDU 07225-20. All other references to the 2020 matter in the Initial Decision identify the correct OAL Docket Number of 05225-20.

Commissioner's decision regarding the video evidence was issued in the 2021 case, any issues related to that evidence must be addressed in those proceedings to avoid piecemeal litigation.

Finally, regarding the request for home instruction, the Commissioner finds that petitioners are not precluded from seeking that relief in the proceedings related to the 2021 case. As the request for home instruction is based entirely on petitioners' allegations that their child is unsafe at school because he has been the victim of HIB, it is in the interests of judicial economy to determine whether home instruction is an appropriate remedy in the 2021 case, which was transmitted to address petitioners' HIB claims.

Accordingly, the Initial Decision is adopted as the final decision in this matter, and the petition of appeal is hereby dismissed.

IT IS SO ORDERED.[5]

Angelica Allen-McMillan, Ed.D.
ACTING COMMISSIONER OF EDUCATION

Date of Decision: August 1, 2023
Date of Mailing: August 1, 2023

[5] This decision may be appealed to the Appellate Division of the Superior Court pursuant to *N.J.S.A.* 18A:6-9.1. Under *N.J.Ct.R.* 2:4-1(b), a notice of appeal must be filed with the Appellate Division within 45 days from the date of mailing of this decision.

State of New Jersey
OFFICE OF ADMINISTRATIVE LAW

INITIAL DECISION
SUMMARY DECISION
OAL DKT. NO. EDU 00065-23
AGENCY DKT. 376-12/22

W.M. & M.M. ON BEHALF OF MINOR CHILD,
Petitioner,
v.
BOARD OF EDUCATION OF TOWNSHIP OF LAFAYETTE, SUSSEX COUNTY,
Respondents.

M.M. and W.M., pro se, o/b/o their minor child

Eric L. Harrison, Esq., for respondents (Methfessel & Werbel, attorneys)

Record Closed: June 09, 2023 Decided: June 19, 2023

BEFORE **NANCI G. STOKES**, ALJ:

STATEMENT OF THE CASE

Through another case, petitioners are challenging the respondent's 2020 finding that no harassment, intimidation, or bullying (HIB) occurred against their child, in which the Judge ordered discovery and scheduled a hearing. Are petitioners entitled to home instruction, a new judge, or relief from the order through a new petition? No. Consideration

of moot issues and duplicative cases is improper and impairs judicial economy. Cogdell v. Hosp. Ctr. at Orange, 116 N.J. 7, 15 (1989).

PROCEDURAL HISTORY

Following the alleged events in the petitioners' HIB complaint between January 10 and 17, 2020, the petitioners removed their minor child from school. In this case, petitioners seek home instruction for their minor child, an order requiring compliance with the Commissioner of Education's (Commissioner) orders regarding video evidence they sought in earlier cases for the same HIB dispute, and a hearing before another judge on the HIB denial appeal.

On January 3, 2023, the Department of Education, Office of Controversies and Disputes, transmitted this case to the Office of Administrative Law (OAL) for hearing as a contested case and resolution of petitioners' motion for emergency relief.

The Lafayette Township School District's Board of Education (Lafayette or Board) provided the OAL with multiple documents regarding the videos on January 5, 2023, which the Clerk supplied to me after the case's reassignment.[1] On January 5, 2023, petitioners also supplemented their application.

I requested the Board submit a reply to the emergent application, which I received on January 6, 2023.

On January 9, 2023, petitioner M.M. advised that she and her son had COVID and requested time to recover. I adjourned the argument on petitioners' emergent relief and permitted additional submissions from the parties.

On January 12, 2023, the Board submitted additional materials.

[1] The OAL's clerk initially assigned the case to Judge Bongiovanni whom the OAL long ago scheduled as an emergent judge for January 9, 2023. After the petitioners requested case reassignment, the Acting Director assigned the emergent relief motion to me, and the OAL scheduled an oral argument for January 11, 2023.

On January 13, 2023, petitioners filed three submissions, including a response to Lafayette's opposition with attachments, a brief regarding Judge Bongiovanni's order, and exhibits about the request to disqualify Judge Bongiovanni. On January 17, 2023, I heard oral argument on the emergent application via Zoom.

On January 18, 2023, I issued an order denying petitioners' request for emergent relief, concluding that petitioners did not meet the requirements under N.J.A.C. 6A:3-1.6. The Commissioner upheld my determination.

On March 27, 2023, petitioners advised the OAL that the audio of the emergent argument was impaired, and portions appeared missing. The OAL's IT department determined that the connectivity was skipped briefly during Zoom, leaving short audio gaps. I directed petitioners to identify the missing recording segments and offer statements they believe were not recorded to supplement the record. On April 20, 2023, petitioners submitted corrections to the transcript and record. On April 21, 2023, respondent's counsel advised that he had no objection to petitioners' proposed modifications to the record, and I ordered supplementation of the record with petitioners' corrections enumerated one to twenty-four.[2]

On May 2, 2023, I scheduled a telephone conference for June 12, 2023, to which petitioners objected and requested I render an Initial Decision instead. This tribunal advised that a dispositive motion or a hearing precedes an Initial Decision.

On May 18, 2023, Lafayette filed a motion for summary decision. I rescheduled the telephone conference for August 10, 2023, and set a motion response schedule.

Petitioners filed their objection to Lafayette's motion on June 8, 2023, and Lafayette replied on June 9, 2023. I permitted an additional reply by petitioners, which I received on June 9, 2023. Lafayette waived any further reply that day, and I closed the record.

[2] The petitioners sought interlocutory review of the emergent relief denial from the Appellate Division, but did not complete that application. Although I ordered supplementation of the record per petitioners' request, they opted not to proceed with that review.

FINDINGS OF FACTS

Based on the documents submitted in support of and in opposition to the motions for summary decision, when viewed in the light most favorable to the non-moving party, I **FIND** the following as **FACT** for purposes of this motion:

On February 20, 2020, the Lafayette's anti-bullying coordinator issued a report, concluding that the complaint's alleged conduct did not meet the statutory definition of HIB, but did violate the Student Code of Conduct. Further, Lafayette would take remedial measures to ensure that M.M.'s son felt comfortable in school, including seat changes in physical education and classrooms, and monitoring by teachers and the school's social worker. Petitioners challenge that Lafayette initiated these remedial steps.

Petitioners filed several petitions regarding respondent's actions, disagreeing with its HIB determination and asserting that the HIB investigation leading to Lafayette's HIB denial was inaccurate.

Video Discovery and the Scope of OAL DOCKET NO. EDU 00546-22

Specifically, M.M. filed an appeal with the Commissioner to which the OAL assigned a docket number, EDU 05225-20. On August 7, 2020, Administrative Law Judge (ALJ) Jude Tiscornia granted summary decision in favor of Lafayette under EDU 05225-20, finding that petitioners did not request a hearing before the Board making their claim procedurally deficient and denying copies of security camera video recordings of M.M. minor child's gym class in January 2020. Previously, M.M. reviewed videos of the gym class at the school while accompanied by a school employee.

On November 5, 2020, the Commissioner adopted the decision, agreeing that the claim was not ripe, and that Lafayette need not produce the videos. The Commissioner also noted that it only had jurisdiction over New Jersey's school laws, not federal ones. M.M. asserted, in part, that she should receive copies of the videos under the Family

Educational Rights and Privacy Act (FERPA), 20 U.S.C. § 1232g, outside the Commissioner's jurisdiction. N.J.S.A. 18A:6-9. Yet, addressing the New Jersey's Pupil Records Act, N.J.S.A 18A:36-19, the Commissioner highlighted that the Act only required Lafayette to provide M.M. access to her child's records, not copies. N.J.A.C. 6A:37-2.5. Lafayette previously agreed to let petitioner come to school and watch the videos. In other words, Lafayette granted petitioner "access." Notably, on September 18, 2020, the United States Department of Education also denied petitioner's request for the videos under FERPA.

M.M. appealed from the Commissioner's Final Decision and the Appellate Division remanded the case to the Commissioner. On December 20, 2021, the Commissioner denied the Board's summary decision request on remand and ordered the Board to issue a written HIB determination regarding HIB Coordinator's February 20, 2020, report. Indeed, the Anti-Bullying Rights Act (ABRA), N.J.S.A. 18A:37-13 to -37, necessitates Board action concerning HIB complaints and investigations. Although the Board accepted the decision at its March 18, 2020, meeting, the Board had yet to issue a written decision upholding the determination; it did so on December 27, 2021. The December 20, 2021, order also required the Board to provide the videos petitioner requested.

The Board filed a motion to reconsider the December 20, 2021, Final Decision, which the Commissioner denied on January 19, 2022. Because the Board issued its decision on the HIB February 20, 2020, determination, the Commissioner concluded that petitioner M.M.'s challenge to that decision was now ripe, permitting transmittal to the OAL for adjudication of that determination and "any other violations of the [ABRA]." Further, as with any transmitted case, the Commissioner highlighted that petitioner is "entitled to discovery, including the video evidence." That case is pending before the Hon. Ernest Bongiovanni, ALJ, under OAL DKT. NO. EDU 00546-22, Agency Dkt, 216-11/21. Judge Bongiovanni scheduled the case for a hearing on June 30, 2023, and Lafayette maintains it is ready to proceed in that case.

Like the petition here, M.M. also sought video evidence she asserts the Commissioner ordered from Judge Bongiovanni. Indeed, petitioners view the January 19, 2022, order transmitting the case to the OAL as ordering copies of the videos

petitioners previously sought. Yet, Lafayette opposed that discovery, believing that the Commissioner's Orders conflicted; one denied the request, and the other granted the request. Further, petitioners were unsuccessful under FERPA.

On January 21, 2022, M.M. forwarded the same discovery demands in EDU 00456-22 that she sought in EDU 07225-20, more than her first request and her earlier review of videos at the school after the 2020 HIB allegations.

Lafayette sought to prevent the release of considerable security footage that necessarily includes images of staff and many other minor students, potentially compromising the privacy interests of hundreds of individuals. Still, on February 8, 2022, Lafayette provided nearly six hours of footage to M.M. relevant to its HIB investigation of the January 17, 2020, complaint. Further, Lafayette offered M.M. an opportunity to review the other videos she requested at the school, followed by submitting a list of video clips she thought relevant to the case. M.M. did not accept that proposal.

Unable to resolve Lafayette's offer, M.M. filed a motion with Judge Bongiovanni seeking sanctions for non-compliance with the Commissioner's January 19, 2022, order. Significantly, on January 9, 2023, Judge Bongiovanni entered an order regarding the video evidence and converted petitioners' motion for sanctions to one seeking to compel discovery. See N.J.A.C. 1:1-14.6(d) (permitting the ALJ to convert any form of proceeding into another); and N.J.A.C. 1:1-14.6(n) (allowing an ALJ to compel the production of materials to allow a "full and true disclosure of the facts".) Judge Bongiovanni's order discussed the long history of the video requests and ordered the parties to complete discovery regarding those videos within sixty days. Petitioners disagree with this order but did not seek interlocutory review of that determination. Still, Lafayette maintains that it disposes of the video discovery issues in that case and here.

Disqualification

Petitioners sought to disqualify Judge Bongiovanni. Generally, M.M. asserts that Judge Bongiovanni is biased and favors Lafayette, having disagreed with M.M. during oral argument on her discovery motion for the videos. However, the Office of

Administrative Law's (OAL) Acting Director denied M.M.'s disqualification request by letter order on November 7, 2022. To be sure, the earlier case involving the same HIB complaint continues with Judge Bongiovanni, and the Acting Director did not reassign the case.

Home Instruction

When all students received home instruction because of the COVID emergency, so did petitioners' minor child. However, petitioners did not permit their child to return once students returned to Lafayette's schools for in-person instruction.

The petitioners believe that the school is hostile and unsafe for their child because of the school's alleged failures regarding the HIB investigation, allowing bullying to continue, not providing discovery ordered by the Commissioner, obstructing justice, and in delaying a hearing. They maintain that their child fears returning to the school's hostile, unsafe environment, and that Lafayette's actions "caused extensive damage to their child's trust in adults." Thus, petitioners assert that Lafayette must provide their child with homebound instruction. Undeniably, no judge ordered this form of education for petitioners' minor child, and petitioners did not identify this relief before. Still, petitioners have yet to demonstrate that Lafayette's denial of HIB against their child was arbitrary, capricious, or unreasonable, that Lafayette's investigation was inaccurate, or that the school environment is unsafe.

Lafayette brought truancy proceedings and disputes that the school is an unsafe or hostile environment or that its HIB denial was inaccurate. Notwithstanding, Lafayette asserts the case before Judge Bongiovanni can address all petitioners' issues related to the HIB and that the filing of this case was duplicative. Indeed, petitioners argue the same HIB complaint failures and discovery disputes here as in the case before Judge Bongiovanni.

Notably, Lafayette also highlights that petitioners can request home instruction for health or psychological reasons, such as the fears petitioners claim their child has about attending school or other medical issues necessitating home instruction. Petitioners can

support such a request with medical documentation recommending homebound instruction, but they supplied none.

DISCUSSION AND CONCLUSIONS OF LAW

Summary-Decision Standard

A party may move for summary decision upon all or any substantive issues in a contested case. N.J.A.C. 1:1-12.5(a). The motion must include briefs, with or without affidavits. When the filed papers and discovery and any affidavits show that no genuine issue of material fact exists and that the moving party is entitled to prevail as a matter of law, the judge may grant the motion. N.J.A.C. 1:1-12.5(b). When such a motion is made and supported, an adverse party, to prevail, must submit an affidavit setting forth specific facts showing that a genuine issue of material fact exists that can only be determined in an evidentiary proceeding. Ibid.

Even though a statute calls for a "hearing," where a motion for summary decision is made and supported by documentary evidence and where the objector submits no evidence to demonstrate that a genuine issue of material fact exists, the motion procedure constitutes the hearing, and no trial-type hearing is necessary. Contini v. Newark Bd. of Educ., 286 N.J. Super. 106, 120–21 (App. Div. 1995), certif. denied, 145 N.J. 372 (1996).

To determine whether a genuine issue of material fact exists that precludes summary judgment, the motion judge must consider whether the competent evidential materials presented, when viewed in the light most favorable to the non-moving party, are sufficient to demonstrate that the moving party is entitled to a judgment as a matter of law. Brill v. Guardian Life Ins., 142 N.J. 520, 540 (1995).

Moreover, even if the non-movant comes forward with some evidence, the court must grant summary judgment if the evidence is "so one-sided that [the movant] must prevail as a matter of law." Ibid. at 536 (citation omitted). If the non-moving party's evidence is "merely colorable or is not significantly probative," the judge should not deny summary judgment. Bowles v. City of Camden, 993 F. Supp. 255, 261 (D.N.J. 1998).

Petitioners' motion response predominantly highlights their disputes regarding the HIB report, the investigation, the videos, and the school's actions regarding the HIB. Further, petitioners express frustration in Lafayette's litigation posture taken in earlier cases. Yet, those disputes do not require resolution here or prevent summary decision on the legal grounds Lafayette presents to support its motion. Indeed, those disputes are before Judge Bongiovanni, and Lafayette does not seek summary decision on whether the petitioners' child was the victim of a HIB or whether its investigation or actions were proper.

Instead, the question is whether petitioners can seek home instruction, a new judge, or discovery related to a HIB determination and alleged failures regarding the HIB investigation when those disputed issues remain pending before another judge. Indisputably, petitioners presented no medical evidence to support home instruction for their minor child. Further, Judge Bongiovanni issued a discovery order addressing the same videos the petitioners seek here. Additionally, the OAL's Acting Director denied Judge Bongiovanni's disqualification. Since these facts are clear and undisputed, I **CONCLUDE** that this case is ripe for summary decision.

Orders

Petitioners seek a review of Judge Bongiovanni's discovery order and enforcement of the Commissioner's orders regarding the videos through this petition. Additionally, they seek a judge other than Judge Bongiovanni to decide their HIB disputes despite the OAL's Acting Director's order denying his disqualification.

As Lafayette points out, petitioners can still seek further review from the Commissioner or the Appellate Division for this case or in Judge Bongiovanni's case once the proceedings end. See N.J.A.C. 1:1-14.10 (providing that the agency head reviews orders through interlocutory review); N.J.A.C. 1:1-18.6 (noting agency review after the ALJ issues an initial decision); N.J.A.C. 6A:4-1.3 (stating that the Commissioner's Final Decisions are appealable to the Appellate Division.)

Although administrative law judges have independence in executing "certain important responsibilities . . . to conduct hearings, make factual findings, and recommend decisions in contested cases for the various State agencies," final decision authority rests with the agency subject to judicial review by the Appellate Division. In re Appeal of Certain Sections of Unif. Admin. Procedure Rules, 90 N.J. 85, 94 (1982); N.J.S.A. 52:14B-10(c). Significantly, the OAL Director is the agency head for interlocutory review regarding judge disqualification under N.J.A.C. 1:1-14.10(j). M.M. did not seek interlocutory review of Judge Bongiovanni's discovery order. Further, under N.J.A.C. 1:1-14.14, an administrative law judge only has the authority to issue sanctions for a party's unreasonable failure to comply with any order of that judge or non-compliance with the OAL rules. (Emphasis added.) Thus, I **CONCLUDE** that I have no authority to disturb Judge Bongiovanni's discovery order, or those orders or determinations issued by an agency head.

Notably, an action is moot when it no longer presents a justiciable controversy because the issues raised have become academic. For judicial economy and restraint, it is appropriate to refrain from decision-making when an issue presented is hypothetical, judgment cannot grant effective relief, or the parties do not have concrete adversity of interest. Anderson v. Sills, 143 N.J. Super 432, 437 (Ch. Div. 1976); Greenfield v. New Jersey Dep't of Corrections, 382 N.J. Super. 254, 257-58 (App. Div. 2006); S.J. v. Bd. of Educ. of Mountain Lakes, EDU 07081-03, Initial Decision (October 7, 2003), aff'd, Comm'r (Nov. 17, 2003), aff'd, St. Bd. (Feb. 3, 2004). https://njlaw.rutgers.edu/collections/oal/. Indeed, petitioners acknowledge that they filed this case because Judge Bongiovanni had yet to decide their motion regarding the videos. However, because Judge Bongiovanni addressed the discovery issue, I **CONCLUDE** that the issue is moot here.

Entire Controversy

Petitioners maintain the Commissioner's January 19, 2022, transmittal of multiple issues to Judge Bongiovanni was inappropriate. Further, they maintain that the request for home instruction remains in this case because they did not include that relief in their earlier petitions. Therefore, petitioners argue that I should not grant summary decision.

However, the Commissioner's transmittal determination in the earlier case is not before me. Regardless, the Commissioner followed the well-established entire controversy doctrine designed to avoid piecemeal litigation of issues raised by a single cause of action. Cogdell v. Hosp. Ctr. at Orange, 116 N.J. 7, 15 (1989). Duplicative filings are discouraged. See N.J.A.C. 6A:3-1.4(c) (discussing duplicative filings).

The objectives behind the entire controversy doctrine are threefold:

> 1) To encourage the comprehensive and conclusive determination of a legal controversy.
> 2) To achieve party fairness, including both parties before the court as well as prospective parties.
> 3) To promote judicial economy and efficiency by avoiding fragmented, multiple, and duplicative litigation.
>
> [DiTrolio v Antiles, 142 N.J. 253, 267 (1995); Cogdell, 116 N.J. at 22-24.]

Further, the "determinative consideration is whether distinct claims are aspects of a single larger controversy because they arise from interrelated facts," even where different causes of action could provide other relief. DiTrolio, 142 N.J. at 271.

Undeniably, the request for home instruction relates to the HIB incident in the case before Judge Bongiovanni. Should petitioners prevail in demonstrating that a HIB occurred and that Lafayette's determination or investigation to the contrary was arbitrary, capricious, or unreasonable, relief might include home instruction to a victim. See N.J.S.A. 18A:37-15(b)(7) (noting that a school has a range of ways it can respond once identifying an incident of HIB). Notably, under N.J.A.C. 1:1-6.2, the OAL rules provide for liberal amendments to pleadings. Further, petitioners can still provide medical documentation to support a medical basis for home instruction without the need for litigation or order. Regardless, I **CONCLUDE** that this petition essentially duplicates the issues in the earlier petition and that the entire controversy doctrine requires petitioners to raise all relief in the pending interrelated case.

In sum, I **CONCLUDE** that summary judgment should be **GRANTED** in favor of Lafayette as a matter of law.

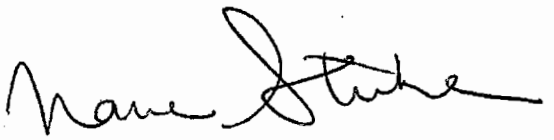
ORDER

Given my findings of fact and conclusions of law, I **ORDER** that Lafayette be **GRANTED** summary decision, and I further **ORDER** that the petition be **DISMISSED WITH PREJUDICE**.

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

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

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



June 19, 2023

DATE

NANCI G. STOKES, ALJ

Date Received at Agency: June 19, 2023

Date Mailed to Parties: June 19, 2023

ljb

DOCUMENTS SUBMITTED

For petitioners:

P-1 Commissioner's Decision dated January 19, 2022

P-2 Appendix Motion for Leave to Appeal Interlocutory Review

P-3 Department of Education's OAL transmittal docketed under EDU 00065-23

P-4 Department of Education's response to M.M.'s appeal and order granting dismissal.

P-5 Undated Board Minutes and incident report

P-6 Email exchanges

P-7 Additional email exchanges regarding videos

P-8 Materials submitted to Judge Tiscornia

P-9 Recent HIB complaint

P-10 Truancy materials

For respondent:

R-1 Respondent's June 2022 submission to Judge Bongiovanni, with all exhibits in EDU 00546-22, Agency Dkt, 216-11/21

R-2 Order denying emergent relief

R-3 Commissioner's Decision affirming denial of the motion for emergent relief.

R-4 Judge Bongiovanni's Order denying petitioners' motion for sanctions in EDU 00546-22, Agency Dkt, 216-11/21

224-23
OAL Dkt. No. EDU 03426-23
Agency Dkt. No. 110-4/23

New Jersey Commissioner of Education

Order on Emergent Relief

D.P., on behalf of minor child, D.V.P.,

Petitioner,

v.

Board of Education of the Borough of North Arlington, Bergen County,

Respondent.

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

Upon review, the Commissioner concurs with the Administrative Law Judge that this matter should be dismissed because the parties have agreed that no issues remain to be addressed following the resolution of petitioner's motion for emergent relief.

Accordingly, the Initial Decision is adopted as the final decision in this matter, and the petition of appeal is hereby dismissed.

IT IS SO ORDERED.[1]

Angelica Allen-McMillan, Ed.D.
ACTING COMMISSIONER OF EDUCATION

Date of Decision: August 1, 2023
Date of Mailing: August 1, 2023

[1] This decision may be appealed to the Appellate Division of the Superior Court pursuant to *N.J.S.A.* 18A:6-9.1. Under *N.J.Ct.R.* 2:4-1(b), a notice of appeal must be filed with the Appellate Division within 45 days from the date of mailing of this decision.

State of New Jersey
OFFICE OF ADMINISTRATIVE LAW

INITIAL DECISION
OAL DKT. NO. EDU 03426-23
AGENCY DKT. NO. 110-4/23

D.P. ON BEHALF OF MINOR CHILD, D.V.P.,
Petitioner,
v.
BOARD OF EDUCATION OF THE BOROUGH OF NORTH ARLINGTON, BERGEN COUNTY
Respondent.

Stephen J. Edelstein, Esq., for petitioner (Weiner Law Group, LLP, attorneys)

Eric Harrison, Esq., for respondent (Methfessel & Werbel, PC, attorneys)

Record Closed: June 30, 2023 Decided: July 5, 2023

BEFORE **WILLIAM J. COURTNEY, ALJ:**

STATEMENT OF THE CASE

Petitioner, D.P., sought emergent temporary relief on behalf of her son D.V.P. compelling respondent to take all steps necessary to protect D.V.P. from harassment, intimidation, and bullying ("HIB") including removing four of his classmates from all

classes that D.V.P. attends for the remainder of the school year. Petitioner alleges that respondent violated The Anti-Bullying Bill of Rights Act, N.J.S.A. 18A:37-1 et seq., and Board Policy #5512 titled, "Harassment, Intimidation and Bullying" by failing to open an HIB Investigation or taking any other actions to protect D.V.P. from ongoing harassment, intimidation, and bullying. Petitioner claimed that there is a reasonable likelihood that D.V.P. would suffer immediate and irreparable harm if the requested Emergent Relief was not granted.

PROCEDURAL HISTORY

Petitioner filed a Verified Petition of Appeal on April 25, 2023 seeking Emergent Relief to protect her minor child, who is an eight-grade student within the North Arlington School District ("District") from ongoing harassment, intimidation, and bullying. On April 28, 2023, respondent filed a Verified Answer along with opposition to the Motion for Emergent Relief and a Cross-Motion to Dismiss petitioner's appeal, without prejudice. The request for Emergent Relief and Motion to Dismiss was transmitted to the Office of Administrative Law by the New Jersey Department of Education for consideration. The parties' written submissions were considered followed by oral argument of counsel beginning on May 1, 2023 and continuing, at the request of counsel, on May 8, 2023. The record was closed on May 8, 2023 after the oral arguments were presented. On May 23, 2023 an Order was entered denying petitioner's claim for Emergent Relief and the parties have agreed that no other issues remain now that petitioner's request for emergent relief has been resolved.

LEGAL ANALYISIS

The only issues before this tribunal in this matter were petitioner's Motion for Emergent Relief and respondent's Cross Motions relating to it. I **FIND**, and the parties agree, that the May 23, 2023 Order Denying Petitioner's Motion and respondents Cross-Motions (See Exhibit A) resolve all issues and I **CONCLUDE** that this matter should be dismissed.

ORDER

IT IS on this **5th** day of July, 2023 **ORDERED** that this matter be **DISMISSED**.

July 5, 2023

DATE

WILLIAM COURTNEY, ALJ

Date Received at Agency July 5, 2023

Date Mailed to Parties: July 5, 2023

sej

APPENDIX

EXHIBITS:

For Petitioners:

P-1 Verified Petition of Appeal

For Respondent:

R-1 Verified Answer, Opposition to Motion for Emergent Relief and Cross-Motion to Dismiss

225-23
OAL Dkt. No. 05047-23
Agency Dkt. No. 156-6/23

New Jersey Commissioner of Education

Final Decision

H.G., on behalf of E.G.,

Petitioner,

v.

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

Respondent.

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

Upon review, the Commissioner concurs with the Administrative Law Judge that, following the resolution of petitioner's motion for emergent relief, this matter is moot.

Accordingly, the Initial Decision is adopted as the final decision in this matter, and the petition of appeal is hereby dismissed.

IT IS SO ORDERED.[1]

Angelica Allen-McMillan, J.D.S.
ACTING COMMISSIONER OF EDUCATION

Date of Decision: August 1, 2023
Date of Mailing: August 1, 2023

[1] This decision may be appealed to the Appellate Division of the Superior Court pursuant to *N.J.S.A.* 18A:6-9.1. Under *N.J.Ct.R.* 2:4-1(b), a notice of appeal must be filed with the Appellate Division within 45 days from the date of mailing of this decision.

State of New Jersey
OFFICE OF ADMINISTRATIVE LAW

INITIAL DECISION
DISMISSAL
OAL DKT. NO. EDU 05047-23
AGENCY DKT.NO. 156-6/23

H.G. ON BEHALF OF E.G.,
Petitioner,
v.
BOROUGH OF TENAFLY BOARD OF EDUCATION,
Respondent.

H.G., petitioner appearing pro se

Stephen Fogerty, Esq. for respondent (Fogarty and Hara, attorneys)

Record Closed: June 23, 2023 Decided: June 27, 2023

BEFORE **KIMBERLY A. MOSS**, ALJ:

Petitioner, H.G. on behalf of minor child E.G., brings this action seeking E.G., be allowed to walk at the graduation ceremony although she does not have enough credits to receive a diploma.

On June 6, 2023, the Office of Special Education Programs transmitted the matter to the Office of Administrative Law (OAL) for emergent relief. A telephone conference was held on June 14, 2023. Oral arguments were held on June 19, 2023. On June 20, 2023 I issued an Order denying the emergent relief, which was upheld by the Commissioner on the same date.

The graduation that E.G. requested to participate in has now passed. In July 2023 petitioners will be returning to Israel. I **CONCLUDE** that this matter is moot and no longer a contested case before the OAL. Accordingly, this matter is hereby **DISMISSED**.

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

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

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

June 27, 2023

DATE

KIMBERLY A. MOSS, ALJ

Date Received at Agency: June 27, 2023

Date Mailed to Parties: June 27, 2023

226-23

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

PHILIP D. MURPHY
Governor

SHEILA Y. OLIVER
Lt. Governor

ANGELICA ALLEN-MCMILLAN, Ed.D.
Acting Commissioner

August 1, 2023

VIA EMAIL ONLY
Richard P. Coe, Jr., Esq.
Weir Greenblatt Pierce LLP
35 Kings Highway East
Haddonfield, NJ 08033

Stephen J. Edelstein, Esq.
Weiner Law Group LLP
629 Parsippany Road
P.O. Box 0438
Parsippany, NJ 07054

Re: *In the Matter of the Tenure Hearing of Susan Ficke, School District of the Township of Monroe, Gloucester County, Agency Dkt. No. 186-7/23*

Dear Counsel:

I have reviewed the petition filed by the Monroe Township School District (District), as well as the correspondence submitted by respondent Susan Ficke objecting to the filing of any tenure charges against her. Respondent contends that tenure charges may not be filed as a standard petition of appeal, pursuant to *N.J.A.C.* 6A:3-5.1(a). Respondent further argues that the charges were not filed with the Secretary of the District's Board of Education (Board), as required by *N.J.A.C.* 6A:3-5.1(b)(1). Additionally, the charges were not forwarded to respondent, as required by *N.J.A.C.* 6A:3-5.1(b)(2), nor did respondent have an opportunity to submit a statement of position and evidence to the Board, as required by *N.J.A.C.* 6A:3-5.1(b)(3), or to have that statement considered by the Board at the same time it considered the charges, as required by *N.J.A.C.* 6A:3-5.1(b)(4). Therefore, respondent requests that the tenure charges filed against her be dismissed for failure to comply with the regulatory requirements.

In response, the District maintains that the charges and statement of evidence against respondent have been filed with the Board Secretary and certified under oath by the Board President. The District requests that, if it is determined that petitioner should respond locally first, she be required to do so within fifteen days of the date the charges were filed with the Commissioner.

Upon review and consideration of the submissions, I find that the tenure charges filed in this matter do not comply with *N.J.A.C.* 6A:3-5.1. Even accepting the District's argument that the charges and statement of evidence have been filed with the Board Secretary, the District failed to transmit them to respondent within three days of that filing, failed to provide respondent with an opportunity to submit a statement of position and evidence, and failed to consider respondent's statement before filing the tenure charges with the Commissioner. These requirements are clearly outlined in the applicable regulatory provisions, and tenure charges may not proceed when the requirements have not been followed. Additionally, the Commissioner declines to order respondent to file her statement of position and evidence with the Board at this time. If the District wishes to commence tenure proceedings against respondent, it must do so by following the correct procedures, and only once it has done so will respondent have an obligation to respond.

Accordingly, the tenure charges against Susan Ficke are hereby dismissed without prejudice.[1]

Sincerely,

Angelica Allen-McMillan, Ed.D.
Acting Commissioner

AAM/JS
c: County Superintendent

226-23

[1] This decision may be appealed to the Appellate Division of the Superior Court pursuant to *N.J.S.A.* 18A:6-9.1. Under *N.J.Ct.R.* 2:4-1(b), a notice of appeal must be filed with the Appellate Division within 45 days from the date of mailing of this decision.

231-23
OAL Dkt. No. EDU 9224-22
Agency Dkt. No. 237-9/22

New Jersey Commissioner of Education

Final Decision

A.C., on behalf of minor child,

Petitioner,

v.

Board of Education of the Township of Toms River, Ocean County,

Respondent.

The record of this matter, which was transmitted to the Commissioner by the Office of Administrative Law (OAL) pursuant to *N.J.A.C.* 1:1-14.4 and includes an advisement of petitioner's failure to appear at the scheduled OAL hearing on June 21, 2023, has been reviewed. Petitioner did not file an explanation for her failure to appear, notwithstanding the opportunity to do so. Accordingly, this matter is no longer deemed to be a contested case before the Commissioner and is hereby dismissed with prejudice.

IT IS SO ORDERED.[1]

Angelica Allen-McMillan, J.D.S.

ACTING COMMISSIONER OF EDUCATION

Date of Decision: August 3, 2023
Date of Mailing: August 4, 2023

[1] This decision may be appealed to the Appellate Division of the Superior Court pursuant to *N.J.S.A.* 18A:6-9.1. Under *N.J.Ct.R.* 2:4-1(b), a notice of appeal must be filed with the Appellate Division within 45 days from the date of mailing of this decision.

232-23
OAL Dkt. No. EDU 04192-23
Agency Dkt. No. 130-5/23

New Jersey Commissioner of Education

Final Decision

J.M.-W. on behalf of minor children, L.W. and M.W.,

Petitioner,

v.

Board of Education of the City of Elizabeth, Union County,

Respondent.

The record of this matter, the proposed Settlement Agreement and Release (Agreement) and the Initial Decision issued by the Office of Administrative Law have been reviewed pursuant to *N.J.A.C.* 1:1-19.1. Upon review, the Commissioner approves the terms of the Agreement and adopts the Initial Decision as the final decision in this matter. The case is hereby dismissed, subject to compliance with the terms of the Agreement.

IT IS SO ORDERED.

Angelica Allen-McMillan, Ed.D.
ACTING COMMISSIONER OF EDUCATION

Date of Decision: August 3, 2023
Date of Mailing: August 4, 2023

State of New Jersey
OFFICE OF ADMINISTRATIVE LAW

INITIAL DECISION
SETTLEMENT
OAL DKT. NO. EDU 04192-23
AGENCY DKT. NO. 130-5/23

J.M.-W. ON BEHALF OF MINOR CHILDREN L.W. AND M.W.,
Petitioner,
v.
BOARD OF EDUCATION OF THE CITY OF ELIZABETH, UNION COUNTY,
Respondent.

J.M.-W., petitioner, pro se

Brian Kane, Esq., for respondent (LaCorte, Bundy, Varady & Kinsella, attorneys)

Record Closed: July 19, 2023 Decided: July 25, 2023

BEFORE **MARGARET M. MONACO**, ALJ:

On or about May 9, 2023, petitioner J.M.-W. on behalf of minor children L.W. and M.W. filed a Petition of Appeal with the Commissioner of Education challenging the residency determination by respondent Board of Education of the City of Elizabeth (the Board). On May 11, 2023, the Board filed an Answer to Residency Appeal and

Counterclaim. The Department of Education transmitted the matter to the Office of Administrative Law, where it was filed for determination as a contested case. Following telephone conferences with the parties, the parties amicably resolved the matter and counsel for the Board submitted the attached Settlement Agreement and Release under e-mail dated July 19, 2023, along with a certification of the School Business Administrator, Harold Kennedy, Jr., and Stipulation of Dismissal with Prejudice.

Having reviewed the record and the settlement terms, I **FIND**:

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

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

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

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

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

July 25, 2023
DATE

Margaret M. Monaco
MARGARET M. MONACO, ALJ

Date Received at Agency: July 26, 2023

Date Mailed to Parties: July 26, 2023

jb

SETTLEMENT AGREEMENT AND RELEASE

THIS SETTLEMENT AGREEMENT AND RELEASE, (hereinafter referred to as "Agreement"), is made this 18 day of July, 2023, by and between the Jessica Mateo-Wood (hereinafter, also referred to as "Petitioner"), who currently resides at 403 Spring Street, Hillside, New Jersey 07205 and the Elizabeth Board of Education (hereinafter, also referred to as the "Board"), with its principal offices located at 500 North Broad Street, Elizabeth, New Jersey 07208.

WHEREAS, Petitioner enrolled her minor child L.W., as a student in the Elizabeth Public School District for the 2022-2023 school year; and

WHEREAS, the Board determined that the minor child L.W. was ineligible to attend the schools of the Elizabeth Public School District due to domicile outside of Elizabeth; and

WHEREAS, Petitioner commenced an action against the Board appealing its residency determination in a matter entitled, J.M.W. on behalf of minor child, L.W. v. City of Elizabeth Board of Education, OAL Dkt. No. EDU 04192-2023 N, Agency Ref. No.: 2130-5/23, (hereinafter referred to as the "Petition"); and

WHEREAS, the Board filed a Counterclaim to the Petition against Petitioner for tuition reimbursement for L.W.'s ineligible attendance in the Elizabeth School District; and

WHEREAS, the Petitioner and the Board (hereinafter, also referred to as the "Parties") having reached a negotiated agreement to fully, and finally, settle all claims among them, including those asserted in the Petition; and

NOW, THEREFORE, in consideration of the mutual promises and undertaking said forth herein, the parties agree as follows:

The foregoing recitals are incorporated herein as if set forth at length.

1. **Consideration**. In settlement of this matter, Petitioner will pay the Board the amount of six thousand dollars $6,000.00, which represents the alleged tuition due and owing for her minor child L.W.'s alleged ineligible attendance in the Elizabeth School District for the 2022-2023 school year. Petitioner shall send the payments made payable to the Elizabeth Board of Education. The Petitioner shall pay three thousand dollars ($3,000.00) within thirty days of the date of the approval of this agreement by the Commissioner of the Department of Education for the State of New Jersey and shall then pay five hundred dollars ($500.00) within every thirty (30) days thereafter until Petitioner has paid the sum of $6,000.00.

In the event that Petitioner fails to make any of the payments described above, the Petitioner shall be in Default of this agreement. Petitioner shall have ten (10) days to cure this default. If the Petitioner fails to cure this default, the parties agree that judgment may be entered on the docket of the Petition in favor of the Respondent for the balance of six thousand dollars ($6,000.00) less any payments made prior to the date of default.

2. **Attendance of L.W. at Elizabeth Public School District**. The minor child L.W. shall not be permitted to attend school in the Elizabeth Public Schools free of charge, unless and until the Petitioner submits adequate proofs that the child is domiciled in Elizabeth, pursuant to N.J.S.A. 18A:38-1, et. seq., and so long as Petitioner follows the proper enrollment procedures.

3. **Waiver and Release of Claims**. In settlement of this matter and in consideration of the payments set forth in Paragraph 1 above, Petitioner hereby releases and forever discharges the Board, in its official and personal capacities, and its related or affiliated entities, and its past, present and future officers, directors, attorneys, employees, owners, insurers, and their respective successors and assigns (collectively "Releasees"), jointly and severally, from any and all actions, complaints, causes of action, lawsuits or claims of any kind (collectively "Claims"), known or

unknown, asserted or unasserted, which Petitioner, her heirs, agents, executors, successors or assigns ever had, now have or hereafter may have against Releasees arising out of any matter, occurrence, omission, or event existing or occurring prior to Petitioner's execution of this Agreement, including, without limitation: any and all causes of action suits, debts, dues, accounts, reckonings, bonds, bills, specialties, covenants, contracts, controversies, agreements, obligations, promises, variances, trespasses, damages, judgments, executions, claims and demands, whether arising in contract or tort, vested or contingent, whether known or unknown, direct or indirect, existing or not existing, by reason of any matter, cause or thing whatsoever, in law or at equity from the beginning of time to the date of the execution of this Agreement.

4. **Stipulation**. Simultaneous with the execution of this Agreement, Petitioner and counsel for the Board shall execute a Stipulation of Dismissal with Prejudice with regard to the Petition and the Board's Counterclaim in the form attached hereto as Exhibit A.

5. **Counterparts; Entire Agreement; No Oral Modification**. This Agreement may be executed in counterparts, which together shall comprise the entire Agreement. This Agreement constitutes the entire agreement between the parties and supersedes any and all prior agreements, written or oral, expressed or implied. No other promises, agreements or amendments, or any separate agreement relating to the subject matter of this Agreement shall be binding or shall modify this Agreement unless expressed in writing and signed by all parties hereto.

6. **Governing Law**. This Agreement shall be governed and construed in accordance with the laws of the State of New Jersey.

7. **No Admission of Liability**. Nothing in this Agreement shall be construed as an admission or concession of liability or wrongdoing by either party to this agreement. Rather, this

Agreement is being offered for the sole purpose of settling cooperatively and amicably any and all possible disputes between the parties.

8. **Severability**. Nothing in this Agreement is intended to violate any law or shall be interpreted to violate any law. If any paragraph or part or subpart of any paragraph in this Agreement or the application thereof is construed to be overbroad and/or unenforceable, then the court making such determination shall have the authority to narrow the paragraph or part or subpart of the paragraph as necessary to make it enforceable and the paragraph or part or subpart of the paragraph shall then be enforceable in its/their narrowed form. Moreover, each paragraph or part or subpart of each paragraph in this Agreement is independent of and severable (separate) from each other. In the event that any paragraph or part or subpart of any paragraph in this Agreement is determined to be legally invalid or unenforceable by a court and is not modified by a court to be enforceable, the affected paragraph or part or subpart of such paragraph shall be stricken from the Agreement, and the remaining paragraphs or parts or subparts of such paragraphs of this Agreement shall remain in full, force and effect.

9. **Headings**. The headings contained in this Agreement are for convenience of reference only and are not intended, and shall not be construed, to modify, define, limit, or expand the intent of the parties as expressed in this Agreement, and they shall not affect the meaning or interpretation of this Agreement.

10. **Interpretation**. This Agreement shall be construed without aid of any canon or rule of law requiring construction or interpretation against the party drafting or causing this Agreement or any provision thereof to be drafted.

11. **Contingency**. It is agreed and understood by all Parties hereto that this Agreement is contingent upon each of the Parties fulfilling all of their respective duties, obligations, and/or promises as stated herein.

12. **Assent to Terms.** Petitioner Jessica Mateo-Wood hereby acknowledges that she enters into this agreement with a full understanding of her rights, and does so without duress, of her own free will and volition.

Ms. Jessica Mateo-Wood further acknowledges that she was given the opportunity to fully consider this Agreement and is given seven (7) days from the execution of this document to revoke this Agreement, by delivering written notification to Brian J. Kane, Esq., LaCorte, Bundy, Varady & Kinsella, 989 Bonnel Court, Union, New Jersey 07083. It is understood that if this Agreement is revoked, it will not be effective or enforceable and Petitioner will not be entitled to the consideration described herein. Furthermore, it is understood that if this Agreement is revoked, the underlying proceedings for tuition reimbursement shall be reinstated against Petitioner.

IN WITNESS WHEREOF, the signatures and/or seals of the parties or their duly authorized representatives have been set forth on the dates indicated below:

JESSICA MATEO-WOOD
Dated: 7/5/2023

For the Elizabeth Board of Education

HAROLD KENNEDY, JR.
Board Secretary/Business Administrator
Dated: 7/19/2023

Brian J. Kane, Esq.
N.J. Attorney I.D. # 333912021
LA CORTE, BUNDY, VARADY & KINSELLA
989 Bonnel Court
Union, NJ 07083
(908) 810-0500
Attorneys for Defendant Board of Education
of the City of Elizabeth, Union County

J.M.W. on behalf of minor children, L.L.W., Petitioner, v. Board of Education of the City of Elizabeth, Union County Respondent.	BEFORE THE COMMISSIONER OF EDUCATION OF THE STATE OF NEW JERSEY OAL DOCKET NO.: EDU 04192-2023 N AGENCY DOCKET NO.: 130-5/23 **CERTIFICATION OF HAROLD KENNEDY, JR.**

I, Harold Kennedy, Jr., of full age, do hereby certify the following:

1. I am employed as the School Business Administrator and Board Secretary for the Elizabeth Board of Education.
2. I make this Certification in support of the Elizabeth Board of Education's settlement agreement in the above referenced matter.
3. I am familiar with the facts and circumstances surrounding the above residency appeal.
4. I am authorized to sign the enclosed settlement agreement on behalf of the Respondent Elizabeth Board of Education.

I hereby certify that the foregoing statements made by me are true. I am aware that if any of the aforesaid statements are willfully false, I am subject to punishment pursuant to the Rules of this Court.

Dated: 07/19/2023

Harold Kennedy, Jr.
School Business Administrator/Board Secretary
for the Elizabeth Board of Education

Brian J Kane, Esq
[illegible]
LAVORETE BUNDY VARADY & KINSELLA
989 Bonnel Court
Union, NJ 07083
(908) 810-0500
Attorneys for Defendant Board of Education
of the City of Elizabeth, Union County

J M W on behalf of minor children E L W,	BEFORE THE COMMISSIONER OF EDUCATION OF THE STATE OF NEW JERSEY
Petitioner,	OAL DOCKET NO. EDU 04[illegible] AGENCY DOCKET NO. [illegible]
v.	**STIPULATION OF DISMISSAL WITH PREJUDICE**
Board of Education of the City of Elizabeth, Union County	
Respondent	

The matter in difference in the above-entitled action having been amicably settled between the Petitioner, J M W on behalf of minor E W, and Respondent Board of Education of the City of Elizabeth, Union County, it is hereby stipulated and agreed by the undersigned that the petition be and is hereby dismissed with prejudice, without costs.

All parties to this action further agree that this stipulation may be executed in counterparts and that photocopies and or facsimile copies of this stipulation shall be deemed originals for the purposes of this stipulation

STIPULATED:

Jessica Mateo-Wood
403 Spring Street,
Hillside, New Jersey 07205
Dated

LAVORETE, BUNDY, VARADY & KINSELLA
Attorneys for Respondent, Elizabeth Board of Education

s/ Brian Kane
Brian J. Kane, Esq
989 Bonnel Court
Union, New Jersey 07083
Dated: 07/10/2023

PHILIP D. MURPHY
Governor

SHEILA Y. OLIVER
Lt. Governor

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

ANGELICA ALLEN-MCMILLAN, Ed.D.
Acting Commissioner

August 3, 2023

VIA EMAIL ONLY
Jamal Barnes, Esq.
Barnes Law Firm
76 South Orange Avenue, Suite 203A
South Orange, NJ 07079

Madelaine P. Hicks, Esq.
Antonelli Kantor Rivera
354 Eisenhower Parkway, Suite 1000
Livingston, NJ 07039

Re: *In the Matter of the Tenure Hearing of Tracie Sims, School District of the City of East Orange, Essex County, Agency Dkt. No. 102-4/23, Commissioner Decision No. 167-23.*

Dear Counsel:

I have reviewed respondent Tracie Sims' motion to vacate the June 5, 2023 decision in the above-captioned matter. The motion was not opposed by the East Orange Board of Education (Board).

Upon review, the motion to vacate the June 5, 2023 decision is granted. Respondent shall file an answer to the tenure charges within 15 days of the date of this decision. Respondent may submit the same information provided to the Board during the Board-level proceedings, but a submission to the Commissioner is required by *N.J.A.C.* 6A:3-5.3. Alternatively, should the Board wish to withdraw the tenure charges, the Board shall notify the Office of Controversies and Disputes within 15 days. The parties are reminded that a proposed withdrawal must address the standards established by *In re Cardonick*, codified at *N.J.A.C.* 6A:3-5.6.

Sincerely,

Angelica Allen-McMillan, Ed.D.

Angelica Allen-McMillan, Ed.D.
Acting Commissioner

AAM/JS
c: County Superintendent

233-23L

234-23
OAL Dkt. No. 11069-14
Agency Dkt. No. 156-6/14

New Jersey Commissioner of Education

Order on Motion for Clarification

Leonor Alcantara, individually and as Guardian ad Litem for E.A.; Leslie Johnson, individually and as Guardian ad Litem for D.J.; Juana Perez, individually and as Guardian ad Litem for Y.P.; Tatiana Escobar; Henry Moro and Ira Schulman, individually and as Guardian ad Litem for A.S.,

Petitioners,

v.

Angelica Allen Mc-Millan, Acting Commissioner of the New Jersey Department of Education; New Jersey State Board of Education; and New Jersey Department of Education,

Respondents.

The motion for clarification filed by petitioners has been reviewed and considered.

In a 2014 petition[1] filed against the New Jersey Commissioner of Education, the New Jersey Department of Education (Department), and the New Jersey State Board of Education (collectively, "respondents"), petitioners alleged that the Lakewood Township Board of Education (Lakewood) is unable to provide its public school students with a thorough and efficient education (T&E) because it does not receive sufficient funding under the School Funding Reform Act, *N.J.S.A.* 18A:7F-43 to -70 (SFRA). Following proceedings at the Office of

[1] Petitioners amended their petition on September 4, 2018.

Administrative Law (OAL), the Commissioner issued a decision concluding that petitioners failed to meet the threshold inquiry of establishing Lakewood's failure to provide T&E; accordingly, the Commissioner did not reach the issue of the constitutionality of the SFRA. *Alcantara v. Hespe*, Commissioner Decision No. 149-21 (July 16, 2021). Petitioners appealed, and the Appellate Division reversed and remanded the matter with instructions for the Commissioner to consider petitioners' substantive arguments pertaining to the SFRA. *Alcantara v. Allen-McMillan*, 475 *N.J. Super.* 58 (App. Div. Mar. 6, 2023). On May 1, 2023, petitioners filed a motion for emergent relief, seeking an Order that the Commissioner would issue a final decision on the remand from the Appellate Division no later than May 15, 2023.

On May 12, 2023, the Commissioner issued a letter directing the Department to expedite the comprehensive review of the Lakewood school district referenced in *Alcantara v. Hespe, supra*. The Commissioner indicated that the information that comprised the record before the OAL, the Commissioner, and the Appellate Division is now outdated and found that an updated record is required in order to make an appropriately informed decision about the SFRA and its application to Lakewood. The comprehensive review, as well as an opportunity for petitioners and Lakewood to respond to the resulting report and recommendations, will occur prior to the issuance of a final agency decision on the as-applied constitutionality of the SFRA.

Also on May 12, 2023, the Commissioner denied petitioner's motion for emergent relief, finding that it was moot in light of the May 12, 2023 letter. *Alcantara v. Allen-McMillan*, Commissioner Decision No. 142-23 (May 12, 2023). Petitioners sought leave to appeal the Commissioner's May 12, 2023 decision; the motion was denied by the Appellate Division by Order dated June 9, 2023.

On July 7, 2023, petitioners filed a motion for clarification of the Commissioner's May 12, 2023 decision denying their motion for emergent relief.

Upon review, the Commissioner concludes that petitioners' motion for clarification must be denied, as it is untimely. Pursuant to *N.J.A.C.* 6A:3-1.15, a motion for clarification must be made within ten days of the filing of the Commissioner's decision. As the decision denying the motion for emergent relief was issued on May 12, 2023, that deadline expired on May 22, 2023. Petitioners' motion for clarification was not filed until July 7, 2023, fifty-five days after the Commissioner's decision was issued and forty-five days past the deadline. While petitioners argue that the deadline should be relaxed because they have effectively been attempting to pursue clarification of the May 12, 2023 decision through other means, including through a motion for leave to file an interlocutory appeal with the Appellate Division and various correspondence, the Commissioner does not find that the circumstances warrant relaxation of the deadline. Petitioners chose their course of action following the May 12, 2023 decision, and the fact that they were not satisfied with the result of those efforts does not excuse the significantly late filing of their motion for clarification.

Accordingly, petitioners' motion for clarification is denied.

IT IS SO ORDERED.

ACTING COMMISSIONER OF EDUCATION

Date of Decision: August 4, 2023
Date of Mailing: August 4, 2023

236-23
SEC Dkt. No. C81-20
OAL Dkt. No. EEC 04844-21
Agency Dkt. No. 2-4/23A

New Jersey Commissioner of Education

Final Decision

In the Matter of Brigite Goncalves, East Newark Board of Education, Hudson County.

This matter involves an appeal of a School Ethics Commission (Commission) decision issued April 25, 2023, determining that appellant, a former member of the East Newark Board of Education (Board), violated *N.J.S.A.* 18A:12-24(c) of the School Ethics Act by voting to approve a shared services agreement between the Board and the Borough of East Newark (Borough) while she was employed part-time as the Borough's Chief Financial Officer. Having carefully reviewed the Commission's decision and the record in its entirety, the Commissioner finds that the Commission's decision is supported by sufficient credible evidence, and that appellant failed to establish that the decision is arbitrary, capricious, or contrary to law. *N.J.A.C.* 6A:4-4.1(a). The Commissioner further finds that the penalty of a reprimand was appropriate.

The relevant facts are uncontested. The Borough of East Newark is a Type I school district in which all Board members are appointed by the Mayor of the Borough. The former Mayor appointed appellant to the Board in March 2019, and she became the Board president in May 2020. While serving as a Board member, appellant was employed by the Borough in various positions. On July 20, 2020, appellant voted to approve a shared services agreement between the Board and the Borough, requiring the Board to pay the Borough for lawn care, snow removal, transportation, and fuel services. At the time of her vote, appellant was employed by the Borough part-time as its Chief Financial Officer and a new Mayor had taken office.

On December 8, 2020, a Board member filed a complaint with the Commission alleging, among other things, that appellant violated *N.J.S.A.* 18A:12-24(c) when she voted to approve the shared services agreement.[1] The Commission found probable cause to credit the allegation and transmitted the matter to the Office of Administrative Law (OAL) for a contested hearing. At the conclusion of the hearing, the Administrative Law Judge (ALJ) concluded that appellant had not violated *N.J.S.A.* 18A:12-24(c) or any other provision of the School Ethics Act and dismissed the complaint.

In its April 25, 2023, decision, the Commission adopted the ALJ's credibility determinations, findings of fact, and the majority of the ALJ's conclusions of law and recommendation to dismiss numerous other alleged violations of the School Ethics Act not at issue on appeal. However, the Commission rejected the ALJ's conclusion that appellant did not violate *N.J.S.A.* 18A:12-24(c) when she voted to approve the shared services agreement. Instead, the Commission found that appellant's "affirmative vote, in and of itself, constituted action in her official capacity in a matter where she . . . had a direct or indirect financial involvement that might reasonably be expected to impair her objectivity." *In the Matter of Brigite Goncalves*, SEC Docket No. C81-20, SEC Decision (April 25, 2023), at 6-7. As for the appropriate penalty, the Commission recommended a reprimand.

On appeal, appellant contends that she did not violate *N.J.S.A.* 18A:12-24(c) by voting to approve the shared services agreement because her part-time Borough salary did not constitute a financial involvement that might reasonably be expected to impair her objectivity. She asserts that as Chief Financial Officer, she performed day-to-day bookkeeping and accounting functions that did not present a conflict of interest with her role on the Board. In addition, she argues that no

[1] Because they are not challenged on appeal, the other allegations in the complaint that were dismissed are not discussed herein.

reasonable observer in the Borough could have perceived that her employment impaired her objectivity because they would have known about friction between appellant and the new Mayor's administration and her lack of influence over them. She further contends that even if the Commissioner concludes that she violated *N.J.S.A.* 18A:12-24(c), no penalty should be imposed because the violation was *de minimis* and she is no longer a Board member.

In reply, the Commission contends that its decision was reasonable and adequately supported by the record. Citing *In the Matter of Carvalho, Neron and Nina, Elizabeth Board of Education, Union County*, and *In the Matter of Nina, Carvalho, Neron and Rodriguez, Elizabeth Board of Education, Union County*, (Consolidated), Commissioner Decision No. 168-18A (June 1, 2018), it asserts that a reasonable member of the public could conclude that appellant's objectivity would be impaired when casting a vote which would benefit her employer. The Commission further asserts that an actual conflict of interest need not exist for a violation to occur and that the recommended penalty of reprimand is consistent with past precedent.

In adjudicating appeals from decisions of the Commission, the Commissioner must "ascertain whether the decision is supported by sufficient credible evidence in the record and shall not disturb the decision unless the appellant has demonstrated that [the Commission] acted in a manner that was arbitrary, capricious, or contrary to law." *N.J.A.C.* 6A:4-4.1(a). Upon a comprehensive review of the record, the Commissioner finds that the Commission's decision is supported by sufficient credible evidence, and that appellant has not established that the Commission acted in a manner that was arbitrary, capricious, or contrary to law.

When enacting the School Ethics Act, the Legislature declared that "it is essential that the conduct of members of local boards of education . . . hold the respect and confidence of the people. These board members . . . must avoid conduct which is in violation of their public trust or which

creates a justifiable impression among the public that such trust is being violated." *N.J.S.A.* 18A:12-22(a). In furtherance of that important goal, *N.J.S.A.* 18A:12-24(c) states, in relevant part: "No school official shall act in his official capacity in any matter where he . . . has a direct or indirect financial involvement that might reasonably be expected to impair his objectivity or independence of judgment."

Initially, appellant's contention that her part-time employment with the Borough does not establish a financial involvement that can reasonably be expected to impair her objectivity under *N.J.S.A.* 18A:12-24(c) is undermined by past precedent. The fact that she worked part-time is not dispositive. "A small financial interest – or no financial interest at all – can nevertheless constitute direct or indirect financial involvement that might reasonably be expected to impair a Board member's objectivity or independence of judgment." *In the Matter of Monteiro, Jr., Elizabeth Board of Education, Union County*, Commissioner Decision No. 94-15SEC (March 16, 2015), at 3. Thus, although she did not earn a full-time salary, her employment with the Borough nonetheless constituted a financial involvement that could reasonably be expected to impair her objectivity. *See also SEC Public Advisory Opinion A01-19* (March 27, 2019) (advising that Board members employed by the City would violate *N.J.S.A.* 18A:12-24(c) by voting on a potential land transfer proposed by the City as it would "appear that they were acting in a matter in which they had a direct or indirect financial involvement that might reasonably be expected to impair their objectivity or independence of judgment").

Appellant's attempt to distinguish *Carvalho*, relied upon by the Commission, is unpersuasive. In *Carvalho* at 5-6, the Commissioner held that respondent Board members violated *N.J.S.A.* 18A:12-24(c) when they simultaneously worked for the City of Elizabeth and voted to appoint a City Councilman to the position of Assistant Superintendent. The Commissioner reasoned that the

respondents' employment with the City "could reasonably be expected to impair their objectivity or independence of judgment because they were voting for their employer" and "their vote . . . created the perception that they may not be objective." *Ibid.* The fact that the nature of the vote in *Carvalho* differed as it involved appointment of an Assistant Superintendent as opposed to the approval of a shared services agreement does not render it inapplicable to the matter at hand. In both cases, the Board members' votes were cast in their employers' favor. Here, under the agreement's terms, the Borough was slated to receive payments from the Board. Consequently, appellant's vote in favor of the agreement while simultaneously employed by the Borough created the perception that she might not be acting objectively or independently.

Appellant further contends that her vote did not violate *N.J.S.A.* 18A:12-24(c) because: (1) her duties as Chief Financial Officer involved ministerial functions such as bookkeeping and accounting; (2) she did not advise or hold influence over the new Mayor or Borough Council regarding policy decisions or any matters related to the school district; and (3) the Borough never adopted the shared services agreement for the school year in question although similar agreements had been adopted in prior years. Each of these contentions is unavailing. As explained in *Carvalho*, the pertinent inquiry is whether appellant's vote in favor of the shared services agreement with the Borough could create the perception among members of the public that the employer-employee relationship might impair her objectivity or independent judgment. The Commissioner finds that a reasonable member of the public could perceive that appellant, due to her employment with the Borough, might be more inclined to vote in favor of the shared services agreement with the Borough even if its adoption was not in the Board's best interest. Appellant's actual duties, her actual influence over the new Mayor or Borough Council, and whether the Borough ultimately adopted the shared services agreement are irrelevant to this inquiry. *See, generally, Friends Retirement Concepts*

v. Bd. of Educ. of Borough of Somerville, 356 *N.J. Super*. 203, 215 (Law Div. 2002) (discussing a violation of the School Ethics Act and explaining that "[a]n actual conflict of interest is not the decisive factor . . . but rather whether there is a potential for conflict").

Citing *Mayer v. Berrios*, SEC Docket No. C03-23, SEC Decision on Motion to Dismiss (April 25, 2023), appellant also contends that because the Borough is a very small community, reasonable community members were surely aware that she lacked influence over the new Mayor and Borough Council due to an ongoing rift between them. Therefore, they could not have perceived that the acrimonious employer-employee relationship could have resulted in the impairment of appellant's objectivity or judgment when voting on the shared services agreement. The Commissioner finds that *Mayer*, which is both factually and legally distinguishable from the present matter and does not involve a violation of *N.J.S.A.* 18A:12-24(c), fails to support appellant's position. Moreover, there is no factual or legal basis to support appellant's assertion that a reasonable Borough resident would have likely been aware of an alleged political rift between appellant and Borough officials merely because the Borough is a very small community of several thousand residents. On the contrary, a reasonable resident of the Borough—regardless of its size—could justifiably believe that appellant's objectivity was impaired due to her employment status when she voted to approve the shared services agreement and that the public trust had been violated. This conclusion is consistent with the express legislative intent of the School Ethics Act. See *N.J.S.A.* 18A:12-22(a) ("[B]oard members . . . must avoid conduct which is in violation of their public trust or which creates a justifiable impression among the public that such trust is being violated.").

Finally, the Commissioner concurs with the Commission that the least severe penalty, a reprimand, is appropriate. Appellant's vote in favor of the shared services agreement—given her employment status with the Borough—resembles that of the respondents in *Carvalho*, who were also

reprimanded for casting votes in favor of their employer. In addition, as was true in *Carvalho*, the record lacks evidence of "political cronyism or any other aggravating factor." *In the Matter of Brigite Goncalves*, SEC Docket No. C81-20, SEC Decision (April 25, 2023), at 8-9 (citing *Carvalho* at 5-6). Contrary to appellant's assertion, her violation of *N.J.S.A.* 18A:12-24(c) was not *de minimis* and the fact that she is no longer a Board member does not negate her past actions or otherwise exonerate her from receiving a penalty.

Accordingly, appellant is hereby reprimanded as a school board member found to have violated the School Ethics Act.

IT IS SO ORDERED.[2]

Angelica Allen-McMillan, J.D.S.
ACTING COMMISSIONER OF EDUCATION

Date of Decision: August 7, 2023
Date of Mailing: August 9, 2023

[2] This decision may be appealed to the Appellate Division of the Superior Court pursuant to *N.J.S.A.* 18A:6-9.1. Under *N.J.Ct.R.* 2:4-1(b), a notice of appeal must be filed with the Appellate Division within 45 days from the date of mailing of this decision.

Before the School Ethics Commission
OAL Docket No.: EEC-04844-21
SEC Docket No.: C81-20
Final Decision

I/M/O Brigite Goncalves,
East Newark Board of Education, Hudson County

I. Procedural History

The above-captioned matter arises from a Complaint that was filed on December 8, 2020, by Carla Fernandes (Complainant), alleging that Brigite Goncalves (Respondent), a member of the East Newark Board of Education (Board), violated the School Ethics Act (Act), *N.J.S.A.* 18A:12-21 *et seq*. More specifically, the Complaint averred that Respondent violated *N.J.S.A.* 18A:12-24(a), *N.J.S.A.* 18A:12-24(b), *N.J.S.A.* 18A:12-24(c), *N.J.S.A.* 18A:12-24(d), as well as *N.J.S.A.* 18A:12-24.1(f) of the Code of Ethics for School Board Members (Code) in Counts 1-4.

At its meeting on March 23, 2021, the Commission adopted a decision finding that the alleged violations of the Act that occurred prior to June 11, 2020, were untimely filed[1]; granting the Motion to Dismiss as to Count 1, and as to the alleged violations of *N.J.S.A.* 18A:12-24(a) and *N.J.S.A.* 18A:12-24(d) in Count 3 and Count 4; denying the Motion to Dismiss as to the alleged violations of *N.J.S.A.* 18A:12-24(b), *N.J.S.A.* 18A:12-24(c), and *N.J.S.A.* 18A:12-24.1(f) in Count 3 (but only for the actions that occurred on June 15, 2020, and June 30, 2020); and denying the Motion to Dismiss as to the alleged violations of *N.J.S.A.* 18A:12-24(b), *N.J.S.A.* 18A:12-24(c), and *N.J.S.A.* 18A:12-24.1(f) in Count 4 (but only for the conduct that occurred on July 20, 2020). The Commission also directed Respondent to file an Answer to Complaint (Answer) for the remaining allegations, which she did on April 1, 2021.

Thereafter, and at its meeting on May 25, 2021, the Commission adopted a decision finding probable cause for all of the remaining allegations in the Complaint. Based on its finding of probable cause, the Commission voted to transmit the within matter to the Office of Administrative Law (OAL) for a hearing and, pursuant to *N.J.A.C.* 6A:28-10.7(b), the attorney for the Commission (Petitioner) was charged with prosecuting the allegations in the Complaint which the Commission found probable cause to credit.

At the OAL, the contested matter was assigned to the Honorable Jude-Anthony Tiscornia, Administrative Law Judge (ALJ Tiscornia). *Initial Decision* at 1. On September 29, 2021, Respondent filed a motion for summary decision, and Petitioner filed a cross-motion on October 19, 2021. *Id.* at 2. On January 31, 2022, ALJ Tiscornia granted Respondent's motion for summary decision in part, and ordered "that any charge or allegation set forth in the [C]omplaint that pertains to any event or any of [R]espondent's actions that transpired prior to June 11, 2020, be dismissed, as any such event would have occurred more than 180 days prior to the filing of

[1] The Commission's determination resulted in the dismissal of Count 2 (in its entirety), and in the dismissal of certain claims in Count 3 and Count 4.

the [C]omplaint on December 8, 2020." *Id.* With the denial of the balance of Respondent's motion for summary decisions, as well as Petitioner's cross-motion, the matter was heard on October 13, 2022, via Zoom. *Id.* On January 3, 2023, the parties' final submissions were received by ALJ Tiscornia and, thereafter, the record closed. *Id.*

On February 15, 2023, ALJ Tiscornia issued an *Initial Decision* detailing his findings of fact and legal conclusions, and the Commission acknowledged receipt of same; therefore, the forty-five (45) day statutory period for the Commission to issue a Final Decision was April 3, 2023.[2] Prior to April 3, 2023, the Commission requested a forty-five (45) day extension of time to issue its final decision so as to provide the Commission, which only meets monthly, with the opportunity to receive and review the full record. Pursuant to *N.J.S.A.* 52:14B-10(c) and *N.J.A.C.* 1:1-18.8, and for good cause shown, the Commission was granted an extension until May 18, 2023.

At its regularly scheduled meeting on March 21, 2023, the Commission considered the full record in this matter. Subsequently, and at its regularly scheduled meeting on April 25, 2023, and for the reasons more fully detailed below, the Commission voted to ***adopt*** ALJ Tiscornia's credibility determinations; ***adopt*** ALJ Tiscornia's findings of fact; ***adopt*** the legal conclusion that Respondent did not violate *N.J.S.A.* 18A:12-24(b), *N.J.S.A.* 18A:12-24(c), and/or *N.J.S.A.* 18A:12-24.1(f) on June 15, 2020 (Count 3); ***adopt*** the legal conclusion that Respondent did not violate *N.J.S.A.* 18A:12-24(b), *N.J.S.A.* 18A:12-24(c), and/or *N.J.S.A.* 18A:12-24.1(f) on June 30, 2020 (Count 3); ***adopt*** the legal conclusion that Respondent did not violate *N.J.S.A.* 18A:12-24(b) and/or *N.J.S.A.* 18A:12-24.1(f) on July 20, 2020[3] (Count 4); but to ***reject*** the legal conclusion that Respondent did not violate *N.J.S.A.* 18A:12-24(c) on July 20, 2020 (Count 4). Based on its determination that Respondent violated *N.J.S.A.* 18A:12-24(c) when she voted to approve a shared services agreement with her employer, the Commission also voted to recommend a penalty of ***reprimand***.

II. Remaining Allegations in the Complaint

By way of background, Complainant states that the Board is a Type I school district, and its members are appointed by the Mayor of the Borough of East Newark (Borough). Respondent was appointed to the Board on or about March 11, 2019, and has served as its Board President since May 18, 2020. In addition, from approximately November 10, 2005, until July 31, 2020, Respondent was employed by the Borough in some capacity. While employed by the Borough, Respondent most recently served as the Chief Financial Officer (CFO), and previously served as Treasurer, Administrative Assistant, and Qualified Purchasing Agent. As the CFO, Complainant submits that Respondent "had a fiduciary responsibility towards the Borough."

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[2] Forty-five (45) days after February 15, 2023, was, technically, Saturday, April 1, 2023; by rule, and because April 1, 2023, was a Saturday, the deadline was extended until the next business day, which was Monday, April 3, 2023.

[3] In the *Initial Decision*, ALJ Tiscornia erroneously cites the date of violation as June 20, 2020, but the date cited in the Complaint is July 20, 2020.

With the above in mind, and in Count 3, Complainant states that, on or about March 2, 2020, Respondent "voted in favor of a resolution, declaring it necessary to issue school bonds in the amount of $2,041,350 for certain capital improvement projects and requiring the resolution to be delivered to the Board of School Estimate [(BSE)] and the Borough." Complainant asserts that, despite being in charge of the Borough's finances (as the Borough CFO), Respondent did not recuse herself from the vote. In addition, on or about June 15, 2020, Respondent appointed herself and another Board member (Joanna Lopez) to the BSE, despite the fact that she (Respondent) is the Borough CFO. Complainant further contends that, on or about June 30, 2020, Respondent "participated in the [BSE] meeting as the sole [Board] representative (Ms. Lopez was absent), and voted with the other [BSE] members present, in favor of a resolution determining that the Borough should issue school bonds and school promissory notes in the amount of $2,041,350 to finance the [Board's] capital improvement projects." Based on these facts, Complainant contends Respondent has violated *N.J.S.A.* 18A:12-24(b), *N.J.S.A.* 18A:12-24(c), and *N.J.S.A.* 18A:12-24.1(f) "continuously ... including on or about ... June 15, 2020, and June 30, 2020[,] in that she cannot properly carry out the public duties of her [Board] office without being prejudiced by or having her independent judgment impaired by her private interests and fiduciary duties as a Borough employee and her duties and responsibilities as a member of the [BSE]."

In Count 4, Complainant states that on or about July 20, 2020, Respondent voted to approve a "Shared Services Agreement between the [Board] and the Borough, which requires the [Board] to make payments to the Borough for lawn care/snow removal, transportation, and fuel." Complainant further states, "[d]espite being the Borough CFO, in charge of the Borough's finances including billing/invoices," Respondent did not recuse herself from these votes. Based on these facts, Complainant asserts Respondent has violated *N.J.S.A.* 18A:12-24(b), *N.J.S.A.* 18A:12-24(c), and *N.J.S.A.* 18A:12-24.1(f) "continuously ... including on or about July 20, 2020 in that she cannot properly carry out the public duties of her [Board] office without being prejudiced by or having her independent judgment impaired by her private interests and fiduciary duties as a Borough employee."

III. *Initial Decision*

In the *Initial Decision*, ALJ Tiscornia summarized the remaining issue in dispute as whether "there is a conflict between [R]espondent acting in her capacity as a [Board] member and simultaneously being employed as chief financial officer (CFO) for the Borough of East Newark." *Id.* at 2.

ALJ Tiscornia next summarized the testimony offered by Complainant, the Board President; Kevin Harris (Harris), the Borough clerk; and Respondent. *Id.* at 3-8. Although ALJ Tiscornia found the testimony of Harris and Respondent to be credible, he found "the whole" of Complainant's testimony to be not credible. *Id.* More specifically, despite knowing Respondent "for over fifteen years," during which Respondent had almost always served as the CFO of East Newark, Complainant testified "she only came to know of [Respondent's] employment with the Borough through a chance encounter with her at Borough Hall." *Id.* at 5. Per ALJ Tiscornia, "I find this testimony to be not credible." *Id.* In addition, Complainant testified that Respondent "publicly disclosed her employment with the Borough via her annual personal financial-disclosure statement," but also testified she "failed to publicly disclose her employment with the Borough." *Id.* As to this testimony, ALJ Tiscornia stated, "I find this testimony to be

contradictory and, therefore, not credible. *Id.* Finally, ALJ Tiscornia found that Complainant "failed to articulate exactly how" Respondent's actions violated the cited provisions of the Act, but instead "continued to assert that she 'felt' as though [Respondent] was in violation and filed the ethics complaint based on this sentiment." *Id.* at 5-6. Although she "testified that her conviction was supported by advice given her by an attorney," Complainant "refused to provide the name of the attorney." *Id.* at 6. As such, ALJ Tiscornia also found "this testimony to be not credible." *Id.* In summary, ALJ Tiscornia stated, "[t]he sum of [Complainant's] non-credible testimony and the clandestine attorney consultation wherein [she] was advised to pursue the ethics complaint renders the whole of [Complainant's] testimony not credible. *Id.*

In his review, and with the dismissal of all other untimely claims, ALJ Tiscornia noted that the following three events remain: (1) on June 15, 2022, Respondent, as Board President, appointed herself to the BSE; (2) on July 20, 2020,[4] Respondent voted as a Board member to approve a shared services agreement with the Borough; and (3) on June 30, 2020, she voted as a member of the BSE to authorize the issuance of bonds and notes to finance District "capital improvement projects" (that she had also voted to support in her capacity as a Board member). *Id.* at 8.

As to these remaining events, ALJ Tiscornia issued the following ***findings of fact***: Respondent was appointed to the Board in 2019, and began serving as President in May 2020. *Id.* at 9. As a Type I school district, all Board members are appointed by the mayor of the Borough of East Newark. *Id.* During her tenure as a Board member, Respondent was also employed part-time by the Borough as its CFO. *Id.*

If/when the Board determines that school bonds should be sold to raise money for a capital project, the Board must pass a resolution determining that it is necessary to sell those bonds, and then deliver a statement of the amount of money necessary for the capital project. *Id.* This statement is then reviewed by the Borough's BSE. *Id.* The BSE consists of five members: the mayor, two members of Borough Council, and two members of the Board who are appointed by the Board President. *Id.*

On June 15, 2020, while serving as Board President, Respondent appointed herself and one other member of the Board to the Borough's BSE. *Id.* At the June 30, 2020, BSE meeting, Goncalves voted in favor of a resolution "fixing and determining the amount of school bonds to be issued by the Borough of East Newark to finance various improvements to the East Newark Public School." *Id.*

Based on the findings of fact detailed above, ALJ Tiscornia ***concludes*** that *N.J.S.A.* 18A:12-24(a) does not preclude an individual employed by a municipality from serving on the Board, and Complainant did not offer any evidence to support such an assertion. *Id.* at 9-10.

Regarding the alleged violation of *N.J.S.A.* 18A:12-24(b), Complainant "offered no evidence or testimony that [Respondent], through her status as a Board member, derived any unwarranted privileges, advantages or employment for herself or anyone else"; Complainant did not offer any evidence or testimony to show that Respondent received any compensation in

[4] In the *Initial Decision*, ALJ Tiscornia erroneously cites the date of violation as June 20, 2020, but the date cited in the Complaint is July 20, 2020.

appointing herself to the BSE, and Respondent testified it was "customary" for the Board President to appoint themselves to the BSE; Respondent's "self-appointment appears to be derived from mundane necessity more than illicit self-enrichment"; there is no "allegation that [Respondent] could possibly inure a personal benefit from voting in favor of issuing bonds to fund maintenance of existing school structures; and the "only conceivable benefit derived from the proper maintenance of the buildings is one inured to the general public ... for having their school facilities well maintained." *Id.* at 10. For these reasons, ALJ Tiscornia ***concludes*** that Complainant failed to show how Respondent violated *N.J.S.A.* 18A:12-24(b). *Id.*

As for the stated violation of *N.J.S.A.* 18A:12-24(c), ALJ Tiscornia found that Complainant failed "to articulate how [Respondent's] objectivity and/or independence of judgment was impaired." *Id.* at 11. Although, through her testimony, Complainant inferred that "the interests of the Borough are contrary to those of the Board," "no sound evidence of such a conflict has been presented to support [Complainant's] own opinion and conjecture. *Id.* As a result, ALJ Tiscornia ***concludes*** that Complainant failed to show how Respondent violated *N.J.S.A.* 18A:12-24(c). *Id.*

Regarding the purported violation of *N.J.S.A.* 18A:12-24(d), ALJ Tiscornia found that Complainant failed to articulate how Respondent's independence of judgment as a Board member was impaired due to her simultaneous employment as the CFO of East Newark. *Id.* Again, although her testimony inferred that the interests of the Borough are contrary to those of the Board, "no sound evidence of such a conflict has been presented to support [Complainant's] own opinion and conjecture." *Id.* Consequently, ALJ Tiscornia ***concludes*** that Complainant failed to show how Respondent violated *N.J.S.A.* 18A:12-24(d). *Id.* at 12.

Finally, and as for the alleged violation of *N.J.S.A.* 18A:12-24.1(f), Complainant has failed to articulate how Respondent "surrendered her independent judgment to special-interest or partisan political groups" and, in fact, "the whole of the testimony presented by [Complainant] did not even mention special-interest groups or partisan politics, whatsoever." *Id.* Therefore, ALJ Tiscornia ***concludes*** that Complainant failed to show how Respondent violated *N.J.S.A.* 18A:12-24.1(f). *Id.*

Based on his findings of fact and legal conclusions, ALJ Tiscornia ***orders*** that the Complaint be ***dismissed***. *Id.*

IV. Exceptions

The *Initial Decision* was sent to the parties on February 15, 2023, and stated, in relevant part, "Within thirteen days from the date on which this recommended decision was mailed to the parties, any party may file written exceptions with the" Commission. *N.J.A.C.* 1:1-18.4(a). As of February 28, 2023,[5] which was thirteen (13) days after the *Initial Decision* was mailed to the parties, neither Petitioner nor Respondent filed exceptions and/or requested an extension to do so.

[5] Thirteen days after February 6, 2023, was, technically, Sunday, February 19, 2023; by rule, and because February 19, 2023, was a Sunday, and February 20, 2023, was a holiday, the deadline was extended until the next business day, which was Tuesday, February 21, 2023.

V. Analysis

Following receipt of an initial decision, the Commission "may enter an order or a final decision adopting, rejecting, or modifying" it. *N.J.A.C.* 1:1-18.6(a). The Commission is also authorized to "reject or modify conclusions of law, interpretations of agency policy, or findings of fact not relating to issues of credibility of lay witness testimony," but "may not reject or modify any finding of fact as to issues of credibility of lay witness testimony unless it first determines from a review of a record that the findings are arbitrary, capricious or unreasonable, or are not supported by sufficient, competent, and credible evidence in the record." *N.J.A.C.* 1:1-18.6(b); *N.J.A.C.* 1:1-18.6 (c).

As an initial matter, and given the limited circumstances in which it may reject or modify a finding(s) of fact as to issues of credibility, the Commission finds an insufficient basis upon which to reject or modify the credibility determinations set forth in the *Initial Decision*, particularly those relating to Complainant's credibility. Moreover, and following a careful and independent review of the facts and evidence set forth in the record, the Commission adopts ALJ Tiscornia's findings of fact; adopts the legal conclusion that Respondent did not violate *N.J.S.A.* 18A:12-24(b), *N.J.S.A.* 18A:12-24(c), and/or *N.J.S.A.* 18A:12-24.1(f) on June 15, 2020 (Count 3), when she appointed herself to serve on the Board of School Estimate (BSE); adopts the legal conclusion that Respondent did not violate *N.J.S.A.* 18A:12-24(b), *N.J.S.A.* 18A:12-24(c), and/or *N.J.S.A.* 18A:12-24.1(f) on June 30, 2020 (Count 3), when, in her capacity as a member of the BSE, she voted to authorize the issuance of bonds; adopts the legal conclusion that Respondent did not violate *N.J.S.A.* 18A:12-24(b) and/or *N.J.S.A.* 18A:12-24.1(f) on July 20, 2020 (Count 4), when she voted to approve a shared services agreement between the Board and her employer; but rejects the legal conclusion that Respondent did not violate *N.J.S.A.* 18A:12-24(c) on July 20, 2020, when she voted to approve a shared services agreement between the Board and her employer.

With regard to Respondent's self-appointment to the BSE on June 15, 2020 (Count 3), and her vote (on the BSE) to authorize the issuance of bonds on June 30, 2020 (Count 3), the Commission agrees with ALJ Tiscornia that, based on the record, there is insufficient factual evidence that either action constituted use or attempted use of her official position to secure an unwarranted privilege, advantage, or employment for herself, a member of her immediate family, or an "other" (*N.J.S.A.* 18A:12-24(b)); either constituted action in her official capacity in a matter where she, or a member of her immediate family, had a direct or indirect financial involvement that might reasonably be expected to impair her objectivity, or in a matter in which she had a personal involvement that created some benefit to her or to a member of her immediate family (*N.J.S.A.* 18A:12-24(c)); and/or either constituted action on behalf of, or at the request of, a special interest group or persons organized and voluntarily united in opinion and who adhere to a particular political party or cause, or use of the schools in order to acquire some benefit for herself, a member of her immediate family, or a friend (*N.J.S.A.* 18A:12-24.1(f)).

Although the Commission agrees that the record is equally devoid of sufficient factual evidence that Respondent violated *N.J.S.A.* 18A:12-24(b) and/or *N.J.S.A.* 18A:12-24.1(f) when, in her capacity as a member of the Board, she voted to approve a shared services agreement between the Board and her employer (the Borough), the Commission finds that her affirmative vote, in and of itself, constituted action in her official capacity in a matter where she, or a member of her immediate family, had a direct or indirect financial involvement that might

reasonably be expected to impair her objectivity (*N.J.S.A.* 18A:12-24(c)). Of importance, Respondent does not dispute the fact that, while she was employed by the Borough, she voted (in her official capacity as a Board member) in favor of the shared services agreement between the Board and the Borough. *See* Answer to Complaint, ¶ 12.

The Commission's determination in this regard is guided by its past precedent.[6] More specifically, in *I/M/O Carvalho, Neron, and Nina*, Elizabeth Board of Education, Union County (Docket No. C10-16) and *I/M/O Nina, Carvalho, Neron, and Rodriguez*, Elizabeth Board of Education, Union County (Docket No. C11-16) (*Consolidated*), Respondents Carvalho, Nina, and Neron, all of whom were employed by the City of Elizabeth, were, among other things, alleged to have violated *N.J.S.A.* 18A:12-24(b) and *N.J.S.A.* 18A:12-24(c) when, in their capacity as members of the Board, they voted to approve the appointment of an individual, who also served as a sitting Councilman on the governing body of their employer (the City of Elizabeth), to serve as an administrator in the Elizabeth Public Schools District.

In finding a violation of *N.J.S.A.* 18A:12-24(c), the Commission stated, in relevant part:

> Based on the findings of fact [issued by the Administrative Law Judge], the Commission adopts the legal conclusion that by voting to appoint ... a sitting Councilman for the City (their employer), to the position of Assistant Superintendent *while* they were employed by the City, Carvalho, Nina, and Neron had a direct or indirect financial involvement in the vote, i.e., their employment, that might reasonably be expected to impair their objectivity or independence of judgment in violation of *N.J.S.A.* 18A:12-24(c). Because the vote to appoint [the Councilman] was tantamount to a vote for their employer, a reasonable member of the public could conclude that this employee-employer relationship impaired their objectivity and independence of judgment.
>
> *Id.* at 3.

In affirming the Commission's decision finding a violation of *N.J.S.A.* 18A:12-24(c), the Commissioner of Education found:

> Upon a comprehensive review of the record, the Commissioner finds that the decision of the Commission as to a determination of a violation of *N.J.S.A.* 18A:12-24(c) is supported by sufficient credible evidence, and that the respondents have not established that the Commission's decision is arbitrary, capricious or contrary to law. *N.J.A.C.* 6A:4-4.1(a). Pursuant to *N.J.S.A. 18A:12-24(c)*, a school official may not act in a matter in which he or she "has a direct or indirect financial involvement that might reasonably be expected to impair his [or her] objectivity or independence of judgment." Given that respondents worked for the City of Elizabeth and Cuesta was a sitting City councilman, respondents had

[6] Although there are several public advisory opinions which discuss whether a school official would violate the Act if they were involved in matters related to their employer (including discussions and/or votes), namely *Advisory Opinion A01-19*, *Advisory Opinion A12-21*, *Advisory Opinion A13-21*, they were either issued and/or made public after the above-captioned matter was filed with the Commission on December 8, 2020.

> direct or indirect involvement that could reasonably be expected to impair their objectivity or independence of judgment because they were voting for their employer. As such, for the reasons expressed in the Commission's comprehensive decision, the respondents' conduct violated *N.J.S.A.* 18A:12-24(c).

See I/M/O Carvalho, Neron, and Nina, Elizabeth Board of Education, Union County (Docket No. C10-16) and *I/M/O Nina, Carvalho, Neron, and Rodriguez*, Elizabeth Board of Education, Union County (Agency Docket No. 5-9/17A) (*Consolidated*) at 5-6.

Based on its precedent in this area, and because Respondent voted to approve a shared services agreement between the Board and the Borough (her employer), at a time when she was serving as both a member of the Board and as an active employee of the Borough, the Commission finds that the record supports a finding that Respondent violated *N.J.S.A.* 18A:12-24(c).

VI. Decision

For the aforementioned reasons, the Commission ***adopts*** ALJ Tiscornia's credibility determinations; ***adopts*** ALJ Tiscornia's findings of fact; ***adopts*** the legal conclusion that Respondent did not violate *N.J.S.A.* 18A:12-24(b), *N.J.S.A.* 18A:12-24(c), and/or *N.J.S.A.* 18A:12-24.1(f) on June 15, 2020 (Count 3); ***adopts*** the legal conclusion that Respondent did not violate *N.J.S.A.* 18A:12-24(b), *N.J.S.A.* 18A:12-24(c), and/or *N.J.S.A.* 18A:12-24.1(f) on June 30, 2020 (Count 3); ***adopts*** the legal conclusion that Respondent did not violate *N.J.S.A.* 18A:12-24(b) and/or *N.J.S.A.* 18A:12-24.1(f) on July 20, 2020 (Count 4); but ***rejects*** the legal conclusion that Respondent did not violate *N.J.S.A.* 18A:12-24(c) on July 20, 2020 (Count 4).

VII. Penalty

Having found that Respondent violated *N.J.S.A.* 18A:12-24(c), and following its review of the record, the Commission recommends a penalty of **reprimand**, the lowest form of sanction/penalty that can be imposed for a violation of the Act. Although, following its finding of a violation in *I/M/O Carvalho, Neron, and Nina*, Elizabeth Board of Education, Union County (Docket No. C10-16) and *I/M/O Nina, Carvalho, Neron, and Rodriguez*, Elizabeth Board of Education, Union County (Docket No. C11-16) (*Consolidated*), the Commission recommended a penalty of censure, the Commissioner of Education modified the recommended penalty to reprimand. In modifying the penalty, the Commissioner of Education stated, in pertinent part:

> ... Although the conflict of interest respondents had in voting for [the Councilman] despite their employment with the City was enough to warrant a violation of *N.J.S.A.* 18A:12-24(c), it does not rise to the same level of political cronyism that the Commission was concerned with in [other matters], which resulted in the increased sanction from reprimand to censure. Therefore, the Commissioner finds that a reprimand is the appropriate penalty for [R]espondents in this matter.

See I/M/O Carvalho, Neron, and Nina, Elizabeth Board of Education, Union County (Docket No. C10-16) and *I/M/O Nina, Carvalho, Neron, and Rodriguez*, Elizabeth Board of Education, Union County (Agency Docket No. 5-9/17A) (*Consolidated*) at 7. Accordingly, and

without any evidence of political cronyism or any other aggravating factor, the Commission recommends that Respondent be **reprimanded** for having violated *N.J.S.A.* 18A:12-24(c).

Pursuant to *N.J.S.A.* 18A:12-29(c), this decision shall be forwarded to the Commissioner of Education (Commissioner) for review of the Commission's recommended sanction. Parties may either: 1) file exceptions to the recommended sanction; 2) file an appeal of the Commission's findings of violations of the Act; or 3) file both exceptions to the recommended sanction and an appeal of the Commission's findings of violations of the Act.

Parties taking exception to the recommended sanctions of the Commission but *not disputing* the Commission's findings of violations may file, within **thirteen (13) days** from the date the Commission's decision is forwarded to the Commissioner, written exceptions regarding the recommended sanctions to the Commissioner. The forwarding date shall be the mailing date to the parties, as indicated below. Such exceptions must be forwarded to: Commissioner of Education, c/o Bureau of Controversies and Disputes, P.O. Box 500, Trenton, New Jersey 08625, marked "Attention: Comments on Ethics Commission Sanction," as well as to ControversiesDisputesFilings@doe.nj.gov. A copy of any comments filed must be sent to the Commission (school.ethics@doe.nj.gov) and all other parties.

Parties seeking to appeal the Commission's findings of violations *must* file an appeal pursuant to the standards set forth at *N.J.A.C.* 6A:4, *et seq.* within **thirty (30) days** of the filing date of the decision from which the appeal is taken. The filing date shall be three (3) days after the mailing date to the parties, as indicated below. In such cases, the Commissioner's review of the Commission's recommended sanctions will be deferred and incorporated into the Commissioner's review of the findings of violations on appeal. Where a notice of appeal has been filed on or before the due date for exceptions to the Commission's recommended sanction (thirteen (13) days from the date the decision is mailed by the Commission), exceptions need not be filed by that date, but may be incorporated into the appellant's brief on appeal.

Robert W. Bender, Chairperson
School Ethics Commission

Mailing Date: April 25, 2023

Resolution Adopting Decision in Connection with C81-20

Whereas, at its meeting on May 25, 2021, the School Ethics Commission (Commission) voted to transmit the above-captioned matter to the Office of Administrative Law (OAL) for a hearing; and

Whereas, at the OAL, the contested matter was assigned to the Honorable Jude-Anthony Tiscornia, Administrative Law Judge (ALJ Tiscornia); and

Whereas, on February 15, 2023, ALJ Tiscornia issued an *Initial Decision* detailing his findings of fact and legal conclusions; and

Whereas, neither party filed Exceptions to ALJ Tiscornia's *Initial Decision*; and

Whereas, at its meeting on March 21, 2023, the Commission reviewed and discussed the full record in the above-captioned matter; and

Whereas, at its meeting on March 21, 2023, the Commission discussed adopting ALJ Tiscornia's credibility determinations; adopting ALJ Tiscornia's findings of fact; adopting the legal conclusion that Respondent did not violate *N.J.S.A.* 18A:12-24(b), *N.J.S.A.* 18A:12-24(c), and/or *N.J.S.A.* 18A:12-24.1(f) on June 15, 2020 (Count 3); adopting the legal conclusion that Respondent did not violate *N.J.S.A.* 18A:12-24(b), *N.J.S.A.* 18A:12-24(c), and/or *N.J.S.A.* 18A:12-24.1(f) on June 30, 2020 (Count 3); adopting the legal conclusion that Respondent did not violate *N.J.S.A.* 18A:12-24(b) and/or *N.J.S.A.* 18A:12-24.1(f) on July 20, 2020 (Count 4); rejecting the legal conclusion that Respondent did not violate *N.J.S.A.* 18A:12-24(c) on July 20, 2020 (Count 4); and recommending a penalty of reprimand; and

Whereas, at its meeting on April 25, 2023, the Commission reviewed and voted to approve the within decision as accurately memorializing its actions/findings from its meeting on March 21, 2023; and

Now Therefore Be It Resolved, the Commission hereby adopts the within decision.

Robert W. Bender, Chairperson

I hereby certify that this Resolution was duly adopted by the School Ethics Commission at its regularly scheduled meeting on April 25, 2023.

Kathryn A. Whalen, Esq.
Director, School Ethics Commission

PHILIP D. MURPHY
Governor

SHEILA Y. OLIVER
Lt. Governor

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

ANGELICA ALLEN-MCMILLAN, Ed.D.
Acting Commissioner

August 7, 2023

VIA EMAIL ONLY
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Springstead & Maurice, Esqs.
Court Plaza South, East Wing
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Hackensack, New Jersey 07601

Erin Herlihy, DAG
Division of Law
R.J. Hughes Justice Complex
25 Market Street, P.O. Box 112
Trenton, New Jersey 08625

Re: *In the Matter of the Certificates of James McMullan*, State Board of Examiners Dkt. No. 1920-119, Commissioner Appeal Dkt. No. 4-5/23A

Dear Parties:

I have reviewed the materials filed in connection with appellant James McMullan's Motion to Stay the decision of the State Board of Examiners (Board) issued April 17, 2023 suspending his teaching certificates for two years.

Pursuant to *N.J.A.C.* 6A:4-3.3(a), a motion to stay a Board determination pending resolution of an appeal filed with the Commissioner must first be made to the Board. Here, appellant sought a stay from the Board that was denied on June 8, 2023. Thereafter, appellant was entitled to seek a stay from the Commissioner in accordance with *N.J.A.C.* 6A:4-3.1. However, his motion for stay, filed with the Commissioner on July 6, 2023, is procedurally defective.

Motions made to the Commissioner must be accompanied by a brief detailing the nature of the action, the relief sought, and why the movant is entitled to such relief. *N.J.A.C.* 6A:4-3.1(a). Additionally, they must be accompanied by an affidavit setting forth the underlying factual basis for the motion. *N.J.A.C.* 6A:4-3.1(c). Appellant's submission, improperly fashioned as a notice to

appeal the Board's denial of the stay request, lacks the requisite brief and affidavit. Accordingly, the motion to stay is denied as procedurally defective.

Furthermore, even assuming the motion was not procedurally defective, it must nevertheless be denied on the merits. Pursuant to *N.J.A.C.* 6A:4-4.1(b), a motion for stay is considered an extraordinary remedy that may only be issued upon a finding that appellant has met each prong of the four-pronged standard for the granting of interim relief set forth in *Crowe v. DeGioia*, 90 *N.J.* 126 (1982). Thus, a stay may be granted where necessary to prevent irreparable harm, where the legal right underlying the movant's claim is settled, where there is a likelihood of success on the merits and where the relative hardship to the moving party favors granting such relief. *Id.* at 132-34.

Upon review of the parties' submissions, I find that appellant has failed to satisfy this standard. Appellant did not submit a brief addressing the *Crowe* standard and has failed to demonstrate that the legal right underlying his claim is settled. In particular, this prong warrants an evaluation of his underlying claim—that he did not engage in unbecoming conduct warranting a suspension of his teaching certificates. Such an inquiry is intensely fact sensitive, depends on credibility determinations regarding the testimony of the witnesses in each case, and must be viewed in light of various precedents related to the conduct of teachers. For this reason, the Commissioner cannot conclude that appellant has demonstrated that the legal right underlying his claim is settled.

Because all four prongs of the *Crowe* standard must be met for a stay to be granted, it is not necessary to analyze the remaining prongs. Accordingly, appellant's request for a stay of the State Board of Examiner's Order of Suspension issued April 17, 2023 is hereby DENIED.

Sincerely,

Angelica Allen-McMillan, Ed.D.

Angelica Allen-McMillan, Ed.D.
Acting Commissioner

AAM/JS
c: County Superintendent

237-23L

238-23

New Jersey Commissioner of Education

Final Decision

K.S., on behalf of minor child, L.W.,

Petitioner,

v.

Board of Education of the Borough of Mount Ephraim, Camden County,

Respondent.

Synopsis

Pro se petitioner appealed the determination of the respondent Board that her minor child was not entitled to a free public education in Mount Ephraim schools during the period from October 1, 2022 through the end of the 2022-2023 school year. The Board contended that L.W. was not residing at the Mount Ephraim address provided by petitioner and sought tuition reimbursement for the period of ineligible attendance.

The ALJ found, *inter alia*, that: at the start of the 2022-2023 school year, K.S. had two children attending school in Mount Ephraim; after an investigation determined that K.S. and her children were not living at the address provided during registration, petitioner withdrew her older child and enrolled him in the school district where the family resides; petitioner subsequently filed a residency petition asserting that her younger child, L.W., was eligible to attend preschool in Mount Ephraim based on an agreement she had reached with L.W.'s paternal grandfather to keep L.W. in his home in Mount Ephraim during the week through the end of the school year; pursuant to *N.J.S.A.* 18A:38-1(b)(1), in order for L.W. to be eligible to attend school from his grandfather's Mount Ephraim address free of charge, a formal agreement must be in place to show that the grandfather is supporting L.W. gratis, has assumed all personal obligations for L.W. relative to school requirements, and intends to keep and support the child gratuitously for a period of time exceeding the school term. As petitioner failed to show evidence of any such agreement, the ALJ determined that she did not sustain her burden of establishing that she was a domiciliary of Mount Ephraim from October 1, 2022, through the end of the 2022-2023 school year. Accordingly, the ALJ concluded that the Board is entitled to reimbursement for the cost of educating L.W., in the sum of $17,227, for the 161 days L.W. attended school during the 2022-2023, school year.

Upon review, the Commissioner concurred with the ALJ's findings and conclusion and adopted the Initial Decision of the OAL as the final decision in this matter. Petitioner was directed to reimburse the Board in the amount of $17,227 for tuition costs incurred during the time period that L.W. was ineligible to attend school in Mount Ephraim. The petition of appeal was dismissed.

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

238-23
OAL Dkt. No. EDU 02724-23
Agency Dkt. No. 59-3/23

New Jersey Commissioner of Education

Final Decision

K.S., on behalf of minor child, L.W.,

Petitioner,

v.

Board of Education of the Borough of Mount Ephraim, Camden County,

Respondent.

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

Upon review, the Commissioner concurs with the finding of the Administrative Law Judge (ALJ) that petitioner failed to sustain her burden of establishing that she was a domiciliary of Mount Ephraim from October 1, 2022, through the end of the 2022-2023 school year. The Commissioner further concurs with the ALJ's findings that L.W.'s paternal grandfather, a resident of Mount Ephraim, was not supporting L.W. gratis as if L.W. was his own child and that L.W. was only temporarily residing with his paternal grandfather for the sole purpose of attending school in Mount Ephraim. L.W. was, therefore, not entitled to a free public education in Mount Ephraim during this time.

Pursuant to *N.J.S.A.* 18A:38-1(b), the Commissioner shall assess tuition against petitioner for the time period during which the minor child was ineligible to attend school in

Mount Ephraim. Therefore, respondent is entitled to tuition reimbursement in the amount of $17,227 (161 school days x $107 per pupil tuition rate per day) for the time period from October 1, 2022 through June 15, 2023.

Accordingly, the Initial Decision of the OAL is adopted as the final decision in this matter. Petitioner is directed to reimburse respondent in the amount of $17,227 for tuition costs incurred during the time period that L.W. was ineligible to attend school in Mount Ephraim. The petition of appeal is hereby dismissed.

IT IS SO ORDERED.[1]

Angelica Allen-McMillan, J.D.S.
ACTING COMMISSIONER OF EDUCATION

Date of Decision: August 7, 2023
Date of Mailing: August 9, 2023

[1] This decision may be appealed to the Appellate Division of the Superior Court pursuant to *N.J.S.A.* 18A:6-9.1. Under *N.J.Ct.R.* 2:4-1(b), a notice of appeal must be filed with the Appellate Division within 45 days from the date of mailing of this decision.

State of New Jersey
OFFICE OF ADMINISTRATIVE LAW

INITIAL DECISION

OAL DKT. NO. EDU 02724-23

AGENCY DKT. NO. 59-3/23

K.S. ON BEHALF OF MINOR CHILD,

L.W.,

Petitioner,

v.

BOARD OF EDUCATION OF THE BOROUGH OF MOUNT EPHRAIM, CAMDEN COUNTY,

Respondent.

K.S., on behalf of minor child, L.W, petitioner, pro se

Patrick F. Carrigg, Esq., for respondent (Lenox, Socey, Formidoni, Giordano, Lang, Carrigg & Casey, LLC, attorneys)

Record Closed: June 30, 2023 Decided: July 6, 2023

BEFORE **KATHLEEN M. CALEMMO**, ALJ:

STATEMENT OF THE CASE

Petitioner K.S., the mother of minor child L.W., appeals the determination by the respondent Board of Education (Board) of the Borough of Mount Ephraim, Camden County (Mt. Ephraim) that L.W., a preschool student, could not attend preschool within the Mount Ephraim Public School District (District) because he did not reside in Mount Ephraim. The Board alleged that the minor child L.W. was not residing at the address provided by the petitioner and seeks repayment of tuition from October 1, 2022, until the

last day of the 2022-2023 school year. At issue is whether L.W. was entitled to be enrolled in the district for purposes of receiving a thorough and efficient public education free of charge for the 2022-2023 school year, pursuant to N.J.S.A. 18A:38-1.

PROCEDURAL HISTORY

On February 13, 2023, after a hearing, the Board voted and determined that L.W. was ineligible to attend preschool in the District. On March 7, 2023, K.S. filed a pro se residency appeal. On March 24, 2023, the Board filed an answer and counter petition for an order assessing tuition. The Department of Education Office of Controversies and Disputes transmitted this matter to the Office of Administrative Law (OAL) where it was filed on March 28, 2023, as a contested case. N.J.S.A. 52:14B-1 to -15; N.J.S.A. 52:14F-1 to -13.

The hearing was conducted via ZOOM platform on May 26, 2023. The record closed on June 30, 2023, after receipt of closing summations.

FACTUAL DISCUSSION AND FINDINGS

The issues in dispute are whether L.W. lived with his parents and brother outside of the geographic area served by District, during the 2022-2023 school year and if so, the amount of tuition owed by petitioner to respondent for the 2022-2023 school year.

It is undisputed and I so **FIND** that as the start of the 2022-2023, K.S. had two children attending school in District. After an investigation, the District learned that K.S. and her children were not living at the Baird Avenue address in Mount Ephraim. In January 2023, the District informed K.S. of its preliminary determination of ineligibility affecting her children. K.S. requested a hearing before the Board. Prior to the Board meeting on February 13, 2023, K.S. withdrew her older son, C.D., and transferred him to the school district where the family resides.

The Board met on February 13, 2023. K.S. presented her appeal in executive session. Her justification for keeping L.W. in District was because her new school district

did not offer a preschool program. After the hearing in executive session, the Board voted that L.W. as a non-resident was not eligible to attend preschool in the District.

K.S. appealed the Board's determination on the grounds that she reached an agreement with L.W.'s paternal grandfather, who resides at the Baird Avenue address in Mount Ephraim, to keep L.W. during the week, until the end of the school year. (R-2.)

At the hearing, respondent presented testimony from Superintendent, Michael Hunter; K.S. testified on behalf of petitioners. The following is not a verbatim recitation of the testimony but a summary of the testimonial and documentary evidence that I found relevant to the above issues.

TESTIMONY

Michael Hunter is the Superintendent and the Principal of the Middle School. At the beginning of the 2022-2023 school year, the District performed a residency audit for all students enrolled in kindergarten, third grade, and sixth grade. As K.S.'s older son, C.D., was enrolled in sixth grade in the Middle School, he was part of the audit. Although K.S. provided documentation as to an address in Mount Ephraim, there were other indications that C.D. was not residing at the address provided.

As a result, Mr. Hunter retained Reese Investigations to determine if C.D. was residing within the District. (R-3.) As a result of the investigation, Mr. Hunter learned that K.S. signed a lease on September 22, 2022, for an apartment in Oaklyn[1], where she resided with her children. The investigator photographed K.S. and her two sons leaving the Collingswood apartment at 7:36 a.m. and entering her vehicle. The two boys were wearing backpacks. (R-3.)

In 2019, Mount Ephraim was awarded a preschool expansion grant to institute a full day program. Due to the popularity of the program, admission is by lottery based on

[1] Respondent believed that petitioner was residing in Oaklyn, which shares a border with Collingswood. At the hearing, petitioner confirmed that her apartment is in Collingswood.

registration requirements. The preschool program is only open to Mount Ephraim residents; it is not available by tuition or through a school choice voucher. K.S.'s younger son, L.W., attended the preschool program.

K.S. voluntarily withdrew C.D. from the District. The District completed the transfer card for C.D.'s new school which showed that C.D. was no longer a resident of Mount Ephraim. As to her younger son, L.W., K.S. advised Mr. Hunter that she was not withdrawing him because she reached an agreement with Rich, L.W.'s paternal grandfather, who agreed to keep L.W. during the week so he could attend school. (R-2.)

There was no dispute that K.S. was living outside of Mount Ephraim. The original address used at the start of the school year was the address for Rich, L.W.'s paternal grandfather.

K.S. testified on her own behalf. K.S.'s resides with L.W.'s father, but they are not married. Her older son C.D. must live with her pursuant to a custody agreement.

Rich resides in Mount Ephraim. After the Board's decision, Rich agreed to keep L.W. so he could finish out the school year in his preschool program. K.S. acknowledged that despite the living arrangement, L.W. visits his parents and brother, and sleeps overnight. The arrangement with Rich is only temporary until the end of the school year.

After consideration of the testimony and the documents in evidence, I **FIND** the following as additional **FACTS**:

After moving outside the District, K.S. wanted L.W. to continue in the preschool program in Mount Ephraim because there was no preschool option in her new school district. After learning that non-residents were not eligible to attend the preschool program, K.S. entered into an agreement with Rich, L.W.'s grandfather. Because Rich was a Mount Ephraim resident, K.S. believed L.W. could live with Rich during the week until the end of the school year to retain his eligibility.

L.W.'s parents remained financially responsible for their son's health and welfare.

LEGAL ANALYSIS AND CONCLUSION

N.J.S.A. 18A:38-1, provides that public schools shall be free to persons over five and under twenty years of age who are "domiciled within the school district." See, V.R. ex rel A.R. v. Hamburg Bd. of Educ., 2 N.J.A.R. 283, 287 (1980), aff'd, State Bd., 1981 S.L.D. 1533, rev'd on other grounds sub nom., Rabinowitz v. N.J. State Bd. of Educ., 550 F. Supp. 481 (D.N.J. 1982) (New Jersey requires local domicile, as opposed to mere residence, for a student to receive a free education). Although L.W. was not of school age, he was receiving a free education at a public-school preschool program only open to registered children domiciled within the school district.

A person who is domiciled within a school district may attend its public schools free of charge. N.J.S.A. 18A:38-1(a). A person may have many residences but only one domicile, and a child's domicile is normally that of his or her parents. Somerville Bd. of Educ. v. Manville Bd. of Educ., 332 N.J. Super. 6, 12 (App. Div. 2000), aff'd, 167 N.J. 55 (2001). The domicile of a person is the place where he has his true, fixed, permanent home and principal establishment, and to which whenever he is absent, he has the intention of returning, and from which he has no present intention of moving. In re Unanue, 255 N.J. Super. 362, 374 (Law Div. 1991), aff'd, 311 N.J. Super. 589 (App. Div.), certif. denied, 157 N.J. 541 (1998), cert. denied, 526 U.S. 1051 (1999).

The acts, statements and conduct of the individual, as viewed in the light of all the circumstances, determine a person's true intent. Collins v. Yancey, 55 N.J. Super. 514, 521 (Law Div. 1959). Petitioner, K.S., has the burden of proof by a preponderance of the evidence that she meets the residency eligibility requirements. N.J.S.A. 18A:38-1(b)(2).

The domicile of an unemancipated child is the domicile of the parent, custodian, or guardian. P.B.K. ex rel. minor child E.Y. v. Bd. of Educ. of Tenafly, 343 N.J. Super. 419, 427 (App. Div. 2001). Thus, a child would routinely attend school in the district where his or her parents live. There is no dispute that L.W.'s parents live outside the geographic boundaries of the District.

To avoid the issue of L.W.'s domicile, K.S. testified that Rich, L.W.'s paternal grandfather, agreed to keep him at his house so L.W. could finish preschool in Mount Ephraim. K.S.'s testified that she made an agreement with Rich to keep L.W. in preschool in Mount Ephraim. She offered no other terms of the agreement. For such an agreement to be valid, K.S. must meet the requirements set forth in N.J.S.A. 18A:38-1(b)(1):

> Any person who is kept in the home of another person domiciled within the school district and is supported by such other person gratis as if he were such other person's own child, upon filing by such other person with the secretary of the board of education of the district, is so required by the board, a sworn statement that he is domicile within the district and is supporting the child gratis and will assume all personal obligations for the child relative to school requirements and that he intends so to keep and support the child gratuitously for a longer time that merely through the school term. . . . and upon filing by the child's parent . . . with the secretary of the board of education a sworn statement that he is not capable of supporting or providing care for the child due to a family or economic hardship and that the child is not residing with the resident of the district solely for the purpose of receiving a free public education within the district.

The above statute provides affirmative obligations for both Rich and K.S. Rich did not testify. K.S. offered no testimony as to her financial arrangement with Rich. She provided no documentary evidence as to the terms of their agreement. Accordingly, I cannot **CONCLUDE** on the record before me that Rich is supporting L.W. gratis as if L.W. was his own child. I further **CONCLUDE** that there was no record of any contact by either K.S. or Rich to the Board regarding the financial terms of this agreement or Rich's assumption of all personal obligations for L.W. K.S. testified that she attends parent/teacher conferences and receives emails from the District. As to L.W.'s parents' obligations, there is nothing in the record to show that they lack the financial means to provide for the support of their son. Based on the record herein, I **CONCLUDE** that L.W. is only residing with Rich to receive a free public preschool program in Mount Ephraim, in violation of N.J.S.A. 18A:38-1(b)(1).

Accordingly, in light of all of the facts and circumstances, I **CONCLUDE** that L.W. is not entitled to attend the free public preschool program in the District. I **CONCLUDE** petitioner failed to satisfy the burden of proving that L.W. is domiciled at Baird Avenue. I further **CONCLUDE** that K.S.'s agreement with Rich must fail because it is a temporary situation to avoid the residency requirement and allow L.W. to attend preschool in the District until the end of the school year.

N.J.S.A. 18A:38-1(b)(1) provides that when the evidence does not support the claim of the resident, the resident shall be assessed tuition:

> [F]or the student prorated to the time of the student's ineligible attendance in the school district. Tuition shall be computed on the basis of 1/180 of the total annual per pupil cost to the local district multiplied by the number of days of ineligible attendance and shall be collected in the manner in which orders of the commissioner are enforced.

N.J.A.C. 6A:22-6.3(a) provides that,

> Tuition assessed pursuant to this section shall be calculated on a per-student basis for the period of a student's ineligible enrollment, up to one year, by applicable grade/program category and consistent with the provisions of N.J.A.C. 6A:23A-17.1. The individual student's record of daily attendance shall not affect the calculation.

As set forth above, a school board is entitled to recover tuition from a parent or guardian of a child found ineligible to attend a school in its district. L.W. was not entitled to a free public education in the Mount Ephraim School District because he did not meet eligibility requirements. Annual tuition cost is $19,325, with a per diem cost of $107. Since October 1, 2022, L.W. attended 161 days as a Mt Ephraim student while not being domiciled in Mt. Ephraim. Therefore, petitioners owe tuition to respondent in the amount of $17,227 (161 school days x $107 per pupil tuition rate per day). Therefore, I further **CONCLUDE** that respondent is entitled to reimbursement from the parents of L.W. for the cost of providing an education to their son, L.W., in the sum of $17,227, for the 161 days L.W. attended school during the 2022-2023, school year.

ORDER

I **ORDER** that the decision of respondent Board of Education of the Borough of Mount Ephraim determining L.W. ineligible for the free public preschool program in the Mount Ephraim School District during the 2022-2023 school year is **AFFIRMED** and the pro se residency appeal of petitioners K.S. on behalf of L.W. is **DISMISSED.**

Further, I **ORDER** that L.W.'s parents shall be responsible for tuition reimbursement to respondent in the amount of $17,227.

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

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

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

Kathleen M. Calemmo

July 6, 2023 _____

DATE

KATHLEEN M. CALEMMO, ALJ

Date Received at Agency: _____

Date Mailed to Parties: _____

KMC/tat

APPENDIX

WITNESSES

For Petitioners:

K.S.

For Respondent:

Michael Hunter

EXHIBITS

For Petitioner:

None

For Respondent:

R-1 Final Ineligibility Notice
R-2 Email Chain of March 11, 2023
R-3 Investigator's Report and Photos

239-23SEC

New Jersey Commissioner of Education

Final Decision

Kelly Ellis-Foster,

Complainant,

v.

Salvatore Giordano, Board of Education of the Township of Old Bridge,Middlesex County,

Respondent.

Synopsis

Complainant alleged, *inter alia*, that respondent, a member of the Old Bridge Board of Education, violated a section of the School Ethics Act, *N.J.S.A.* 18A:12-21 *et seq* when he sent correspondence from his Board email address to members of the State Legislature and a member of the public that expressed his personal views, an action that had the potential to compromise the Board. The School Ethics Commission (SEC) determined that the respondent's actions violated *N.J.S.A.* 18A:12-24.1(e) of the Code of Ethics for School Board Members, and recommended a penalty of reprimand.

The case was forwarded to the Commissioner for final determination of the appropriate penalty in this matter. Upon review, the Commissioner concurred with the penalty recommendation of the SEC. Accordingly, the respondent shall be reprimanded as a school official found to have violated the School Ethics Act.

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

239-23SEC
SEC Dkt. No. C88-21
OAL Dkt. No. EEC01269-22
Agency Dkt. No. 176-6/23

New Jersey Commissioner of Education

Final Decision

Kelly Ellis-Foster,

Complainant,

v.

Salvatore Giordano, Board of Education of the Township of Old Bridge, Middlesex County,

Respondent.

The Commissioner has reviewed the record of this matter and the June 27, 2023 decision of the School Ethics Commission (Commission). The Commission found that respondent Salvatore Giordano, a member of the Old Bridge Board of Education (Board), violated *N.J.S.A.* 18A:12-24.1(e) of the Code of Ethics for School Board Members. The Commission recommended a penalty of reprimand for the violation. The Commission's decision was forwarded to the Commissioner for final determination on the recommended penalty pursuant to *N.J.S.A.* 18A:12-29(c). Respondent neither filed exceptions to the recommended penalty nor instituted an appeal, pursuant to *N.J.A.C.* 6A:4-1 *et seq.*, of the Commission's underlying finding of violation.

Upon review, the Commissioner concurs with the penalty recommended by the Commission for respondent's use of his Board email address to send correspondence to

members of the State Legislature and a member of the public that expressed his personal views, which had the potential to compromise the Board.

Accordingly, respondent is hereby reprimanded as a school official found to have violated the School Ethics Act.

IT IS SO ORDERED.[1]

Angelica Allen-McMillan, Ed.D.
ACTING COMMISSIONER OF EDUCATION

Date of Decision: August 7, 2023
Date of Mailing: August 9, 2023

[1] This decision may be appealed to the Appellate Division of the Superior Court pursuant to *N.J.S.A.* 18A:6-9.1. Under *N.J.Ct.R.* 2:4-1(b), a notice of appeal must be filed with the Appellate Division within 45 days from the date of mailing of this decision.

Before the School Ethics Commission
OAL Docket No.: EEC-01269-22
SEC Docket No.: C88-21
Final Decision

Kelly Ellis-Foster,
Complainant

v.

Salvatore Giordano,
Old Bridge Board of Education, Middlesex County
Respondent

I. Procedural History

The above-captioned matter arises from a Complaint that was filed with the School Ethics Commission (Commission) on November 29, 2021, by Kelly Ellis-Foster (Complainant), alleging that Salvatore Giordano (Respondent), a member of the Old Bridge Board of Education (Board), violated the School Ethics Act (Act), *N.J.S.A.* 18A:12-21 *et seq.*[1] More specifically, in Count 1, Complaint asserted that Respondent violated *N.J.S.A.* 18A:12-24.1(a) of the Code of Ethics for School Board Members (Code) when he consistently wore his mask improperly and removed his mask when making comments at Board meetings in violation of mask mandates in New Jersey schools. Complaint at 1-2. In Count 2, Complainant averred that Respondent violated *N.J.S.A.* 18A:12-24.1(c), *N.J.S.A.* 18A:12-24.1(d), and *N.J.S.A.* 18A:12-24.1(e) of the Code when he, on multiple occasions, sent emails to all Board members expressing his "personal and ideological views"; sent emails to school administrators "making demands and requests to take specific action without direction or consensus of the Board"; and sent an email from his school email account to a parent and members of the State Legislature urging them to take action. *Id.* at 2-4.

On May 4, 2022, Respondent filed an Answer to the Complaint and also alleged that Complaint is frivolous. On January 11, 2022, Complainant filed a response to the allegation that the Complaint is frivolous.

At a special meeting on February 4, 2022, the Commission adopted a letter decision transmitting the matter to the Office of Administrative Law (OAL). In addition, the Commission voted to reserve its determination on Respondent's allegation that the Complaint is frivolous until after the ruling at the OAL.

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[1] On November 29, 2021, Complainant filed a deficient Complaint; however, on December 1, 2021, Complainant cured all defects and filed an Amended Complaint that was deemed compliant with the requirements detailed in *N.J.A.C.* 6A:28-6.3.

At the OAL, Complainant filed a Second Amended Complaint on June 13, 2022, alleging two additional violations of *N.J.S.A.* 18A:12-24.1(c) based on emails Respondent sent to two school employees inquiring as to why they were resigning, and an additional violation of *N.J.S.A.* 18A:12-24.1(a) for Respondent's refusal to wear a mask and failure to uphold mask requirements.

Following cross-motions for summary decision with a joint statement of facts and joint exhibits, the Administrative Law Judge (ALJ) issued an Initial Decision on April 3, 2023.

At its meeting on May 23, 2023, the Commission considered the full record in this matter. Thereafter, at its meeting on June 27, 2023, the Commission voted to adopt the Initial Decision's findings of fact, legal conclusion that Respondent violated *N.J.S.A.* 18A:12-24.1(e), and the recommended penalty of reprimand.

II. Initial Decision

A. Count 1

By way of background, Complainant has been a member of the Board from January 2015 through January 2018 and from January 2019 through January 2022, holding roles including Board Vice President and Board President. *Initial Decision* at 5. Respondent has served on the Board from January 2020 to the present. *Ibid.*

Following the start of the COVID-19 pandemic, the Board adopted a plan entitled "The Path Forward" (Plan) on July 30, 2020, to outline protocols for the 2020-21 school year, and included the requirement that staff, and students wear masks when in a school facility or on a bus. *Ibid.* The Board then adopted the "Plan for Safe Return to In-Person Instruction and Continuity of Services" on June 29, 2021, which also included a mask mandate. *Id.* at 6. Following the enactment of Executive Order 251 (EO 251) on August 6, 2021, that included a mask requirement in New Jersey schools, the Board approved the "Road Forward Plan" on August 24, 2021, which referenced the mask requirement in EO 251. *Ibid.*

It is undisputed that at nine Board meetings between May 11, 2021, and November 23, 2021, Complainant wore his mask below his nose and below his mouth when speaking. *Id.* at 7-10, 20. At the Board meeting on November 23, 2021, Complainant observed Respondent remove his mask before executive session and twice requested that he wear his mask. *Id.*at 10-11, 20. When Respondent refused to put on a face covering, Complainant left the meeting. *Id. at 11* Additionally, at the January 11, 2022, Board meeting, Respondent refused to wear a mask. *Id.* at 11, 20. When he was told that he would need to wear the mask or leave the meeting, Respondent chose to leave the meeting. *Id. at 11.*

Complainant alleged that Respondent violated *N.J.S.A.* 18A:12-24.1(a) by failing to comply with the mask mandates as required by District policies and EO 251. The ALJ concluded that Complainant failed to meet her burden that Respondent violated *N.J.S.A.* 18A:12-24.1(a). *Initial Decision* at 21. The ALJ reasoned that it would be an "expansive interpretation" of the mask mandate to find that wearing a mask below the nose or below the mouth when speaking is

a violation. *Ibid.* Additionally, the ALJ found that the record is devoid of evidence as to what happened after Complainant left the November 23, 2021, meeting, so the record does not establish that Respondent refused to wear a mask in violation of the mask mandate. *Ibid.* Finally, there is no compelling reason why Respondent's decision to leave the January 11, 2022, meeting would be a violation of the Act. *Ibid.* Accordingly, the ALJ dismissed Count 1 of the Complaint.[2] *Ibid.*

B. Count 2

Complainant alleged that Respondent violated *N.J.S.A.* 18A:12-24.1(d) when he sent an email on November 19, 2020, to the Superintendent urging that the decision to return the students to remote learning "needs to be reversed." *J-1.* The ALJ found that Respondent was "advocating for his preferred policy option which does not rise to the level of a violation of the Act." *Initial Decision* at 22.

On December 7, 2020, Respondent sent an email to the entire Board with the subject "Lockdown Hypocrisy," stating "[t]his is what tyranny looks like," quoting the First Amendment, and including a link to Governor Murphy's twitter page regarding the shutdown of clubs in Paterson. *J-2.* Complainant alleged that this email constituted a violation of *N.J.S.A.* 18A:12-24.1(c) as he was acting in furtherance of a politically partisan group. *Initial Decision* at 23. The ALJ found the email is Respondent's personal opinion and does not advocate for a politically partisan group and is therefore not a violation of the Act. *Ibid.*

Complainant alleged that Respondent violated *N.J.S.A.* 18A:12-24.1(a)[3] and *N.J.S.A.* 18A:12-24.1(d) when he responded to the Assistant Superintendent on February 13, 2021, regarding plans for reentry to the building, indicating that masks and distancing are unnecessary and should be phased out. *J-3.* The ALJ found that the email expressed Respondent's personal views and did not direct that the Assistant Superintendent take any action. *Initial Decision* at 23-24. As such, Complainant failed to demonstrate that this email constituted a violation of the Act. *Id. at 24.*

On August 9, 2021, in response to an email by a parent regarding masking in schools, Respondent sent an email from his school email address to a State Senator and two State Assemblymen, stating:

> In the totalitarian Executive Order 251 it says under 1.a that mandatory use of masks are not required "when doing so would inhibit the individual's health, such as when the individual is exposed to extreme heat indoors." If parents and school districts can prove, which we can, that masks are dangerous to the health of children then we should be able to fight this, and I expect lawsuits to come

[2] To the extent that the ALJ concluded that EO 251 has the force of law, the Commission does not need to reach that issue, nor does it have jurisdiction over the validity of executive orders.

[3] Complainant did not allege a violation of *N.J.S.A.* 18A:12-24.1(a) with respect to Count 2 in her Complaint; however, as the allegation was raised in her cross-motion for summary decision, the ALJ nevertheless addressed the argument.

> because of this reason. School districts and elected officials need to be more vocal about this especially since executive orders are not even approved by the General Assembly and State Senate which I would personally argue is not a "law." Please feel free to forward this to others as you see necessary. . . (J-5).

Complainant alleged that Respondent violated *N.J.S.A.* 18A:12-24.1(d) and *N.J.S.A.* 18A:12-24.1(e) when he sent the August 9, 2021, email. *Initial Decision* at 27. The ALJ found that the email does not only include Respondent's personal views, but "ends with clear language that plainly encourages action," specifically when Respondent writes "we should be able to fight this" and "[s]chool districts and elected officials need to be more vocal about this." *Ibid.* The ALJ also noted Respondent encouraged that the email be forwarded to others. *Ibid.* As such, the ALJ concluded that Complainant demonstrated that this email, from Respondent's school email address, can be interpreted as "an endorsement by the Board both of his personal position, support for lawsuits and a further call to action." *Ibid.* Accordingly, the ALJ concluded that the August 9, 2021, email had the potential to compromise the Board and is therefore a violation of *N.J.S.A.* 18A:12-24.1(e).[4] *Id.* at 27-28.

On September 10, 2021, Respondent sent an email to the full board that supported the passing of another Board member's resolution, but included political rhetoric. *J-8.* Complainant asserted that Respondent violated *N.J.S.A.* 18A:12-24.1(c) due to its political views that were not related to the district or its operation. *Initial Decision* at 24. The ALJ found that Respondent's advocating of his position on a pending Board resolution was not a violation of the Act. *Ibid.*

On September 19, 2021, Respondent sent an email to the Board and the Superintendent indicating that if mask mandates do not apply to the Governor, they should not apply to the students and staff, and he included a link to the Governor's twitter page. *J-10.* Complainant alleged that this action violated *N.J.S.A.* 18A:12-24.1(c) because the email did not relate to a specific action of the Board. *Initial Decision* at 25. The ALJ found that Respondent's email expressed his opinion and was not partisan, and therefore, did not violate the Act. *Ibid.*

Finally, on November 22, 2021, Respondent sent two emails to district employees inquiring as to why they were resigning and offering to speak with them by telephone or email. *J-15; J-16.* Complainant alleged that the emails were a violation of *N.J.S.A.* 18A:12-24.1(d) because Board members do not oversee personnel matters and his communications were not in the scope of his role as a Board member. *Initial Decision* at 25-26. The ALJ found that there is no evidence that Respondent was managing a personnel issue nor that the email was a means of intimidation. *Id. at 26.* As such, the ALJ found that the charge was not supported by the record. *Ibid.*

With respect to the penalty for the sustained violation of *N.J.S.A.* 18A:12-24.1(e), the ALJ noted that this was Respondent's first violation of the Act, and the communication was a one-time incident, but that it expressed his personal opinion and advocated action from his Board

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[4] The ALJ did not indicate whether the August 9, 2021, email was a violation of *N.J.S.A.* 18A:12-24.1(d). Upon review, the Commission has determined that Complainant failed to meet her burden of demonstrating that Respondent violated *N.J.S.A.* 18A:12-24.1(d).

email address. *Id.* at 28-29. Accordingly, the ALJ concluded that a penalty of reprimand was appropriate. *Id. at 29.*

III. Analysis

Upon a careful, thorough, and independent review of the record,[5] the Commission agrees with the ALJ that Respondent violated *N.J.S.A.* 18A:12-24.1(e) in Count 2 when he sent the August 9, 2021, email. The Commission is also in accord with the ALJ's determination that Respondent did not violate *N.J.S.A.* 18A:12-24.1(a), *N.J.S.A.* 18A:12-24.1(c), and *N.J.S.A.* 18A:12-24.1(d).

Pursuant to *N.J.S.A.* 18A:12-24.1(e), Board members must "recognize that authority rests with the board of education," and therefore, must "make no personal promises nor take any private action that may compromise the board." The ALJ appropriately found that Respondent's actions in sending correspondence from his Board email address to members of the State Legislature and a member of the public that expressed his personal views had the potential to compromise the Board. When Respondent expressed his disagreement with mask mandates by stating "[i]f parents and school districts can prove, which we can, that masks are dangerous to the health of children then we should be able to fight this, and I expect lawsuits to come because of this reason," his personal views could reasonably be interpreted as being endorsed by the Board as a whole. Additionally, when Respondent urged "[s]chool districts and elected officials need to be more vocal about this," and "[p]lease feel free to forward this to others as you see necessary," his statements had the potential to compromise the Board as the legislators and public may view his statements as the Board supporting a call to action against the masking mandate in schools. Accordingly, the Commission agrees with the ALJ that Complainant met her burden of demonstrating that Respondent violated *N.J.S.A.* 18A:12-24.1(e) when he sent the August 9, 2021, email to members of the State Legislature and the public.

The Commission further agrees with the ALJ that a **reprimand** is the appropriate penalty for such a violation. As noted by the ALJ, the issue of penalty is fact sensitive. *Initial Decision,* at 28. The masking mandate was a major issue across the State. *Ibid.* Per the ALJ, Respondent sent an email from his Board email address to members of the public conveying his personal views of the mask mandate and encouraging action. *Ibid.* However, it appears that this is Respondent's first violation and the violation of the Code resulted from one email sent by Respondent. *Id.* at 28-29. Accordingly, the Commission adopts the ALJ's recommended penalty in this matter.

IV. Decision

For all of the aforementioned reasons, the Commission adopts the Initial Decision of the OAL as the final decision in this matter. The Commission finds that Respondent violated *N.J.S.A.* 18A:12-24.1(e) and adopts the recommended penalty of **reprimand** for the violation.

[5] The parties did not file exceptions to the Initial Decision.

Additionally, at its meeting on May 23, 2023, and because it previously reserved its determination, the Commission considered Respondent's request that the Commission find the Complaint frivolous. As the Commission found a violation of the Act in this matter, it clearly could not determine that the Complaint was filed in bad faith or solely for the purpose of harassment, delay, or malicious injury, or that it lacked a reasonable basis in law or equity. *N.J.A.C.* 6A:28-1.2. Therefore, the Commission voted to find that the Complaint was not frivolous.

Pursuant to *N.J.S.A.* 18A:12-29(c), this decision shall be forwarded to the Commissioner of Education for review of the Commission's recommended penalty. The parties may either: 1) file exceptions to the recommended sanction; 2) file an appeal of the Commission's finding of a violation; or 3) file both exceptions to the recommended sanction together with an appeal of the finding of a violation.

Parties taking exception to the recommended sanction of the Commission but *not disputing* the Commission's finding of a violation may file, **within thirteen (13) days** from the date the Commission's decision is forwarded to the Commissioner, written exceptions regarding the recommended penalty to the Commissioner. The forwarding date shall be the mailing date to the parties, as indicated below. Such exceptions must be forwarded to: Commissioner of Education, c/o Bureau of Controversies and Disputes, P.O. Box 500, Trenton, New Jersey 08625, marked "Attention: Comments on Ethics Commission Sanction," as well as to (ControversiesDisputesFilings@doe.nj.gov). A copy must also be sent to the Commission (school.ethics@doe.nj.gov) and all other parties.

Parties seeking to appeal the Commission's finding of violation *must* file an appeal pursuant to the standards set forth at *N.J.A.C.* 6A:4:1 *et seq.* **within thirty (30) days** of the filing date of the decision from which the appeal is taken. The filing date shall be three (3) days after the date of mailing to the parties, as shown below. In such cases, the Commissioner's review of the Commission's recommended sanction will be deferred and incorporated into the Commissioner's review of the finding of violation on appeal. Where a notice of appeal has been filed on or before the due date for exceptions to the Commission's recommended sanction (thirteen (13) days from the date the decision is mailed by the Commission), exceptions need not be filed by that date, but may be incorporated into the appellant's briefs on appeal.

Robert W. Bender

Robert W. Bender, Chairperson

Mailing Date: June 27, 2023

Resolution Adopting Decision in Connection with C88-21

Whereas, at its meeting on February 4, 2022, the School Ethics Commission (Commission) voted to transmit the above-captioned matter to the Office of Administrative Law (OAL) for a plenary hearing as a contested case; and

Whereas, the Administrative Law Judge (ALJ), issued an Initial Decision dated April 3, 2023; and

Whereas, the ALJ found that Respondent violated *N.J.S.A.* 18A:12-24.1(e), but did not violate *N.J.S.A.* 18A:12-24.1(a), *N.J.S.A.* 18A:12-24.1(c), or *N.J.S.A.* 18A:12-24.1(d), and recommended that Respondent be reprimanded; and

Whereas, the parties did not file exceptions to the Initial Decision; and

Whereas, at its meeting on May 23, 2023, the Commission reviewed the record in this matter, discussed adopting the ALJ's conclusion that Respondent violated *N.J.S.A.* 18A:12-24.1(e) and discussed adopting the recommended penalty of reprimand; and

Whereas, at its meeting on May 23, 2023, and because it was not determined previously, the Commission discussed finding the Complaint not frivolous; and

Whereas, at its meeting on June 27, 2023, the Commission reviewed and voted to approve the within decision as accurately memorializing its actions/findings from its meeting on May 23, 2023; and

Now Therefore Be It Resolved, the Commission hereby adopts the within decision.

Robert W. Bender

Robert W. Bender, Chairperson

I hereby certify that this Resolution was duly adopted by the School Ethics Commission at its regularly scheduled meeting on June 27, 2023.

Brigid C. Martens

Brigid C. Martens, Acting Director
School Ethics Commission

248-23
OAL Dkt. No. 00546-22
Agency Dkt. No. 216-11/21

New Jersey Commissioner of Education

Final Decision

M.M., on behalf of minor child,

Petitioner,

v.

Board of Education of the Township of Lafayette, Sussex County, and Jennifer Cenatiempo, former Superintendent,

Respondents.

The record of this matter, the Initial Decision of the Office of Administrative Law (OAL), and the exceptions filed by petitioner pursuant to *N.J.A.C.* 1:1-18.4 have been reviewed and considered.[1]

Petitioners[2] allege that their minor child was the victim of harassment, intimidation, and bullying (HIB). On or about December 27, 2021, the Lafayette Board of Education (Board) issued a decision that petitioners' child was not the victim of HIB. The case was transmitted to the OAL for a hearing regarding the merits of the Board's HIB decision and alleged violations of the Anti-Bullying Bill of Rights Act.

[1] Respondents did not file a reply to petitioner's exceptions.

[2] The petition of appeal was filed by M.M., who is the minor child's mother. W.M., the child's father, later moved to intervene, and the motion was granted. Accordingly, although the case caption names only M.M., this decision will refer to "petitioners," to include both M.M. and W.M. Additionally, throughout the course of the events related to this case, some actions have been undertaken by petitioners jointly, while others were taken by M.M. individually. For ease of reference, all actions taken by W.M. and/or M.M. on behalf of their child, whether jointly or individually, will be referred to as actions taken by "petitioners."

The Administrative Law Judge (ALJ) scheduled a hearing for June 30, 2023. Petitioners requested that the hearing be held virtually rather than in person. The ALJ denied petitioners' request to appear virtually. When petitioners failed to appear for the scheduled hearing on June 30, 2023, the ALJ dismissed the case pursuant to *N.J.A.C.* 1:1-14.4.

In their exceptions, petitioners argue that the Board failed to comply with a previous Commissioner decision ordering them to provide video evidence to petitioners, which allegedly impaired their ability to present their case. Petitioners also contend that they should have been allowed to participate in the hearing virtually because they do not have childcare, W.M. would have to miss a day of work, and M.M. does not have a reliable car.

Upon review, the Commissioner concurs with the ALJ that the petition must be dismissed. *N.J.A.C.* 1:1-14.6 gives the ALJ broad authority to determine the nature of the proceedings. The ALJ determined that the hearing in this matter should be conducted in person, and the Commissioner finds no reason to disturb that determination. Furthermore, the Commissioner concludes that petitioners have not demonstrated good cause for their failure to appear. Their disagreement with the ALJ's discovery order does not provide an excuse for failing to participate in the proceedings. Nor do petitioners' alleged difficulties regarding childcare, time off work, or transportation, which petitioners do not contend were limited to preventing them from appearing on June 30, 2023, but rather prevent them from ever appearing in person. While petitioners may find a virtual hearing more convenient, the authority to determine the appropriate format of a hearing lies with the ALJ, not with petitioners.

Additionally, in accordance with *N.J.A.C.* 1:1-14.9, the Commissioner has reviewed the ALJ's January 9, 2023 Order Denying Motion for Discovery Sanctions. Prior to transmitting this matter to the OAL, the Commissioner ordered the Board to produce video evidence sought by petitioner.

M.M., on behalf of minor child v. Board of Education of the Township of Lafayette, Commissioner Decision No. 333-21L+ (Dec. 20, 2021). Petitioners moved for sanctions based on the Board's alleged failure to comply with the Commissioner's order. However, the record reflects that the Board provided all video evidence that was at issue at the time of Commissioner Decision No. 331-21L+ – that is, all video evidence which the Board had previously allowed petitioners to view, but not copy. Therefore, the Board has complied with Commissioner Decision No. 331-21L+, and no sanctions are warranted. Furthermore, with regard to discovery requests made by petitioners after Commissioner Decision No. 331-21L+ was issued, the Commissioner concurs with the ALJ's January 9, 2023 Order denying those requests,[3] for the reasons detailed therein.

Accordingly, the Initial Decision is adopted as the final decision in this matter. The petition of appeal is hereby dismissed.

IT IS SO ORDERED.[4]

Angelica Allen-McMillan, Ed.D.
ACTING COMMISSIONER OF EDUCATION

Date of Decision: August 21, 2023
Date of Mailing: August 21, 2023

[3] The ALJ did order the Board to produce copies of video clips specified in the HIB report and any video clips the Board intended to use at hearing. The Commissioner also concurs with this portion of the ALJ's Order.

[4] This decision may be appealed to the Appellate Division of the Superior Court pursuant to *N.J.S.A.* 18A:6-9.1. Under *N.J.Ct.R.* 2:4-1(b), a notice of appeal must be filed with the Appellate Division within 45 days from the date of mailing of this decision.

State of New Jersey
OFFICE OF ADMINISTRATIVE LAW

INITIAL DECISION
DISMISSAL WITH PREJUDICE
OAL DKT. NO. EDU 00546-22
AGENCY DKT. NO. 216-11/21

M.M. o/b/o MINOR CHILD,

Petitioner,

v.

BOARD OF EDUCATION OF THE TOWNSHIP OF LAFAYETTE, SUSSEX COUNTY, AND JENNIFER CENATIEMPO, FORMER SUPERINTENDENT,

Respondents.

M.M. o/b/o her minor child, pro se.

ERIC L. HARRISON, Esq., for respondents (Methfessel and Werbel, attorneys)

Record Closed: June 30, 2023 Decided: July 5, 2023

BEFORE **ERNEST M. BONGIOVANNI**, ALJ:

On June 21, 2022 this matter was transmitted to the Office of Administrative Law (OAL) for hearing as a contested case pursuant to N.J.S.A. 52:14B-1 to -15 and N.J.S.A. 52:14f 1 to-13. The parents allege HIB violations and that the respondent violated their child's rights for failing to determine there were any HIB violations and by not fairly investigating allegations which stem from their understanding of what their child told them.

After several attempts by phone or virtual appearances to hold a prehearing conferences, a hearing was scheduled for June 30, 2023, notice of which was sent to the petitioners by the Office of Administrative Law on May 17, 2023.

On June 21, 2023 petitioners[1] sent an email request to change the in-person hearing scheduled for June 30, 2023, to a virtual hearing. The undersigned denied the request and petitioner was advised of same in writing. On June 23, 2023, petitioner made a request to reconsider the denial, this request directed to the assignment judge. The undesigned advised petitioner there would be no reconsideration. Petitioners asked that in lieu of an in-person hearing, certain documents of theirs should simply be entered as exhibits "for the record." W.M. argued that he and M.M. should not be required to come to attend court for the hearing, because they "will not be able to present evidence," as the respondent Board of education had not been made to comply with Court Ordered Discovery.

However, on January 9, 2023, in a written decision, the undersigned denied a motion by petitioners for "Sanctions" against respondent for their alleged noncompliance with a 2022 Order for Discovery signed by the Commissioner before the matter had been transmitted to the undersigned for a hearing. As the denial of sanctions decision made very clear, I disagreed that since the transmittal there was any noncompliance by the respondent, Board of Education, that all required Discovery was provided and that petitioners repeated demands for many hours of additional videotapes of children at the school had no foundation, were unreasonable and amounted to possible harassment and stalling tactics. Further I clarified the then current status of Discovery and gave petitioners additional time to make more specific demands, e.g. naming dates times and places of specific videos and description of what the videos would show and the basis for believing they show HIB taking place.

Between the January 9, 2023 denial of the motion for sanctions and the June 30, 2023 hearing, petitioners never argued formally or informally that respondents had not complied with the conditions and Discovery elements of the Order denying sanctions. No

[1] M.M., the child's mother was the sole petitioner; however, on March 8, 2023, W.M., the child's father and husband of M.M. was allowed to enter his appearance after his motion to intervene was granted.

motion whatsoever was filed to enforce my decision. Petitioners did on March 10, 2023 provide a 24-page email which simply disagreed with the aforesaid January 9, 2023 decision; thus there is no argument of any noncompliance by respondent with the Court's Order.

Further, even had there been an argument, cogent or otherwise, made regarding the Sanctions Denial Order, petitioners failed to articulate any relationship between the Discovery issues raised and the "reason" for the recent and somewhat sudden request that the hearing be virtual. In fact, there was and is no relationship between the alleged longstanding but already decided Discovery complaints and the arbitrary demand the hearing be virtual. On June 21, and June 23, 2023, in two emails to the court, petitioners made it clear that W.M. and M.M. refused to appear because they had been , in their minds, and despite a Court decision to the contrary, denied Discovery. They adamantly refused to participate in the hearing in any meaningful way. In their own words: "Since we are not acting as witnesses in this matter and have been denied video evidence to show what happened outside our witness, but reported accurately by our child, we can only provide simple statements about what our child told us. ...There is no need for an in-court appearance." Further in another email June 21, 2023, petitioners stated: "We cannot attend an in-person hearing...", as they "have no childcare for our son."

However, petitioners made it clear they were not asking for an adjournment to arrange childcare on some other date or time for their son. Rather, petitioners were adamant they would not attend any in court hearing at any other time. As they continue to explain, their reason for refusing to appear is they have been denied their rights and denied Discovery. In their words: "There is no reason to lose work. My wife and I can give statements we would like to give on behalf our child which can easily be done virtually...Lastly I will not allow my wife to go alone [2] far away to sit in front of a hostile judge and the school attorney after the history this matter...and what has occurred when

[2] At a previous conference before W.M. made a motion to intervene, when M.M. had raised the subject of childcare, it was suggested W.M. could provide childcare. Soon thereafter W.M. made a motion to intervene. In any event no one suggested M.M. had to appear alone, quite the contrary as the Court had even granted a motion by W.M. to intervene. Moreover, the parents failed to articulate any extraordinary reason regarding childcare or for that matter how they could provide childcare for the minor child, approximately age 8 while appearing virtually but could not provide it for the same childcare during an in-person hearing.

my wife has been alone with previous judges and the school attorney, she should not have to be intimidated... We have already been expressly denied what the Commissioner says we need to prove merits, so we can't prove merits . There is no need to suffer more loss of work and we still don't have childcare so we both won't be able to attend."

Again both parents made it clear they did not seek an adjournment to get childcare and I find this "reason" to be specious. Further, even if the petitioners believed what they say it is apparent they have no idea, or perhaps rather no concern, despite the court's many indulgences, regarding how hearings are supposed to work; that they are not just "allowed to give statements" about what their child said, and that respondents have rights as litigants just as much as petitioners do, one which includes confronting witnesses, and another which is objecting to alleged evidence. Finally, it was abundantly clear from their own words they petitioners have no intention, and possibly never had the intention, of appearing in court and participating in a hearing in a meaningful way, and instead want the court to make up a complete set of rules to apply to them alone.

On June 23, 2023, petitioner again e-mailed to request a reconsideration of the denial to allow them to participate/appear virtually. This reconsideration was not granted.

After receiving the aforesaid communications from petitioners, they were advised by the Court in writing that if they failed to appear in person for the hearing on June 30, 2023 at 9:30 as scheduled weeks earlier, their case would be dismissed. Further, petitioners were advised no exhibits sent by them would be entered into evidence as there would be no evidentiary hearing without their appearance.

On the day of hearing, petitioners did not appear. Respondent, their single witness and attorney were on time and present and said they were "ready" to proceed. The petitioners' failure to appear was deliberate and calculated, regardless of its "reason." Accordingly, the petition must be **DISMISSED WITH PREJUDICE.**

For the above reasons, I **CONCLUDE** that petitioners have abandoned their request for a hearing in this matter and has forfeited their right to further contest the

actions complained of. Accordingly, this matter should be dismissed with prejudice for lack of prosecution and failure to appear.

ORDER

It is **ORDERED** that the petitioners' appeal be **DISMISSED WITH PREJUDICE** pursuant to N.J.A.C. 1:1-14.4, and I **DIRECT** the Clerk to return the matter to the agency for appropriate disposition.

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

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

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

July 5, 2023

DATE

ERNEST M. BONGIOVANNI, ALJ

Date Received at Agency: 7/5/23

Date Mailed to Parties: 7/5/23

id

249-23

New Jersey Commissioner of Education
Final Decision

Board of Education of the City of Vineland
Cumberland County,

Petitioner,

v.

Cumberland County Board of Vocational Education,
Cumberland County,

Respondent.

Synopsis

The petitioner, Board of Education of the City of Vineland (Vineland), sought reimbursement from the respondent, Cumberland County Board of Vocational Education (CCTEC), for alleged overpayment of tuition for the 2020-2021 school year. Vineland contends that CCTEC's proposed 50% adjustment to the overpayment amount of $1,185,655.00 would result in Vineland being charged more than the school district's actual cost per pupil, in violation of *N.J.S.A.* 18A:54-20.1(c). Vineland filed a motion for summary decision, which was opposed by CCTEC.

The ALJ found, *inter alia*, that: there are no material facts at issue, and the matter is ripe for summary decision; the issue for determination in this case was whether the respondent can charge the petitioner more than the certified tuition rate for the 2020-2021 school year; Vineland filed a motion based on there being no factual dispute that, pursuant to *N.J.S.A.* 18A:54-20.1(c), CCTEC cannot charge petitioner more than the State certified tuition rate for the education of Vineland students at CCTEC; respondent's opposition to the petitioner's motion for summary decision on the grounds that the parties had a ten-year history of abiding by a 50% reciprocal provision which allowed CCTEC to pay or give a credit of half the total amount owed to Vineland is without merit, as this 50% provision contravenes *N.J.S.A.* 18A:54-20.1(c) and is unenforceable as it has resulted in Vineland being forced to pay CCTEC more than the actual cost per pupil cost. The ALJ concluded that the 50% adjustment applied to the 2020-2021 tuition agreement is unenforceable as a matter of law and because no agreement existed between the parties. Accordingly, the ALJ granted Vineland's motion for summary decision.

Upon review, the Commissioner concurred with the ALJ's findings and conclusion, and adopted the Initial Decision of the OAL as the final decision in this matter. Accordingly, the Commissioner granted petitioner's motion for summary decision. Petitioner is entitled to reimbursement or a credit from respondent in the amount of the full tuition overpayment of $1,185,665.00 for the 2020-2021 school year.

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

249-23
OAL Dkt. No. 02861-22
Agency Dkt. No. 56-3/22

New Jersey Commissioner of Education

Final Decision

Board of Education of the City of Vineland,
Cumberland County,

Petitioner,

v.

Cumberland County Board of Vocational
Education, Cumberland County,

Respondent.

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

Upon review, the Commissioner concurs with the Administrative Law Judge that *N.J.S.A.* 18A:54-20.1(c) precludes a county vocational school from charging a sending district more than the actual State certified per pupil rate. Petitioner is therefore entitled to reimbursement or a credit from respondent in the amount of the full tuition overpayment of $1,185,665.00 for the 2020-2021 school year.

Accordingly, petitioner's motion for summary decision is granted.

IT IS SO ORDERED.[1]

Angelica Allen-McMillan, J.D.S.
ACTING COMMISSIONER OF EDUCATION

Date of Decision: August 21, 2023
Date of Mailing: August 23, 2023

[1] This decision may be appealed to the Appellate Division of the Superior Court pursuant to *N.J.S.A.* 18A:6-9.1. Under *N.J.Ct.R.* 2:4-1(b), a notice of appeal must be filed with the Appellate Division within 45 days from the date of mailing of this decision.

State of New Jersey
OFFICE OF ADMINISTRATIVE LAW

INITIAL DECISION
GRANTING SUMMARY DECISION
OAL DKT. NO. EDU 02861-22
AGENCY DKT. NO. 56-3/22

CITY OF VINELAND BOARD OF EDUCATION, CUMBERLAND COUNTY,
Petitioner,
v.
CUMBERLAND COUNTY VOCATIONAL BOARD OF EDUCATION, CUMBERLAND COUNTY,
Respondent.

Robert A. De Santo, Esq., for petitioner (Gruccio, Pepper, De Santo & Ruth, P.A., attorneys)

Kerri A. Wright, Esq., for respondent (Porzio, Bromberg & Newman, P.C., attorneys)

Record Closed: April 11, 2023 Decided: July 10, 2023[1]

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[1] Due to a voluminous caseload, the Initial Decision was delayed.

BEFORE **KIM C. BELIN**, ALJ:

STATEMENT OF THE CASE

The Board of Education of the City of Vineland School District, Cumberland County (Petitioner/VBE) seeks reimbursement from Cumberland County Board of Vocational Education (Respondent/CCTEC) for alleged overpayment of tuition for the 2020-21 school year.

PROCEDURAL HISTORY

Petitioner filed a petition, dated March 21, 2022, seeking reimbursement of alleged tuition overcharges paid to the respondent for the 2020 through 2021 school year.[2] The respondent filed its answer, dated April 11, 2022. The matter was transmitted as a contested case to the Office of Administrative Law (OAL) where it was filed on April 12, 2022. N.J.S.A. 52:14B-1 to -15; N.J.S.A. 52:14F-1 to -13.

Petitioner filed a motion for summary decision, dated January 9, 2023. On January 19, 2023, the respondent requested a two-week extension which was granted. However, instead of filing a response to the petitioner's motion for summary decision, the respondent submitted a motion to consolidate dated February 13, 2023. This motion was denied by the undersigned on April 10, 2023. On March 29, 2023, the respondent was directed to clarify whether it intended to respond to the petitioner's motion for summary decision by April 10, 2023. On April 10, 2023, the respondent filed its opposition to the petitioner's motion for summary decision. Petitioner filed its reply on April 11, 2023. The record closed on that date.

FACTUAL DISCUSSION AND FINDINGS

The following FACTS are undisputed and I, therefore **FIND**:

[2] Petitioner filed two other petitions seeking tuition reimbursement of tuition overcharges for school years 2012 through 2019. These petitions were consolidated on December 10, 2021 and are pending adjudication.

1. Petitioner oversees the operation of the City of Vineland School District Type II School District. (Petitioner's Br. in Supp. of Motion for Summary Decision (MSD) at 3.)

2. Respondent oversees the operation of the Cumberland County Vocational School District and its vocational school known as CCTEC. (Ibid.)

3. Petitioner pays tuition for student residents of the City of Vineland who attend CCTEC. (Ibid.)

4. From 2011 through 2020, petitioner and CCTEC entered into successive one-year contracts using a template and pre-printed text promulgated by the New Jersey Department of Education providing for tuition rates and adjustments. (Exhibit A, Respondent's Opposition to Petitioner's MSD, CCTEC00010 through CCTEC000020.)

5. The tuition contract for the 2020-21 school year is only signed by the respondent's representatives. (Exhibit 1, Petitioner's Certification of Counsel.)

6. In a letter dated February 7, 2022, the respondent's business administrator notified the petitioner's business administrator of a tuition adjustment for the 2020-2021 school year. Specifically, the letter stated that a tuition overpayment of $1,185,665.00 would be reduced by 50% on the petitioner's September 2022 tuition invoice. (Exhibit A, Petitioner's Br. In Supp. of MSD.)

7. In an email dated November 9, 2020, petitioner's counsel notified respondent's counsel questioning the adjustment and requesting revisions to the contract language. (Exhibit 2, Petitioner's Certification of Counsel.)

8. Counsel for petitioner and respondent exchanged emails from November 9, 2020 through November 23, 2020, discussing revising the 2020-21 contracts. (Exhibit 3, Petitioner's Certification of Counsel.)

9. In emails dated January 11, 2021 and January 20, 2021, petitioner's counsel requested revisions to four tuition contracts but at a minimum three contracts, which included a regular education contract, Strive and Strive ESY contracts for the 2020-21 school year. (Ibid.)

10. On January 26, 2021, petitioner's counsel emailed respondent's counsel seeking a response. Respondent's counsel promised to follow up with his client. (Ibid.)

11. In emails dated February 8, 2021 and February 23, 2021, petitioner's counsel sought a response from the respondent. (Ibid.)

12. On June 7, 2021, petitioner's counsel proposed that the tuition contracts be revised to change the reimbursement to 100% instead of 50% for any overpayment or underpayment. Respondent's counsel stated that he would check with his client on the same date, however, as of June 24, 2021, there was no answer to the proposal. (Ibid.)

LEGAL ANALYSIS AND CONCLUSIONS

A motion for summary decision (Motion) may be granted if the papers and discovery presented, as well as any affidavits which may have been filed with the application, show that there is no genuine issue of material facts, and the moving party is entitled to prevail as a matter of law. N.J.A.C. 1:1-12.5(b). If the motion is sufficiently supported, the non-moving party must demonstrate by affidavit that there is a genuine issue of fact which can only be determined in an evidentiary proceeding, to prevail in such an application. (Ibid.) These provisions mirror the summary judgment language of R. 4:46-2(c) of the New Jersey Court Rules.

The motion judge must "consider whether competent evidential materials presented, when viewed in the light most favorable to the non-moving party . . . are sufficient to permit a rational fact finder to resolve the alleged disputed issue in favor of the non-moving party." Brill v. Guardian Life Insurance Company of American, 142 N.J. 520, 523 (1995). And even if the non-moving party comes forward with some evidence, this forum must grant summary decision if the evidence is "so one-sided that [the moving party] must prevail as a matter of law." Id. at 536.

The issue presented is whether the respondent can charge more than the certified tuition rate to the petitioner for the 2020-21 school year. Based upon the evidence presented, this case is ripe for summary decision.

The petitioner herein filed a Motion on the basis that there is no factual dispute that the respondent cannot charge more than the State certified tuition rate. Petitioner relies upon N.J.S.A. 18A:54-20.1(c) which provides in relevant part:

> The board of education of a county vocational school district shall receive such funds as may be appropriated by the county pursuant to N.J.S.A. 18A:54-29.2 and shall be entitled to collect and receive from the sending districts in which each pupil attending the vocational school resides, for the tuition of that pupil, . . . a sum not to exceed the actual cost per pupil as determined for each vocational program classification, according to rules prescribed by the commissioner and approved by the State board.
> (Emphasis added.)

The "actual cost per student" is defined at N.J.A.C. 6A:23A-17.1(b) as "the local cost per student in average daily enrollment, based upon audited expenditures for that year for the purpose for which the tuition rate is being determined and consistent with the grade/program categories in N.J.S.A. 18A:7F-50 and 18A:7F-55 . . ." This cost is determined by the Commissioner of Education (Commissioner) and is based upon the:

> a. Revenues, expenditures, and fund balances reflected in the [county vocational school district] CVSD's annual independent audit; and

> b. Average daily enrollment data by category submitted by the CVSD on a form prescribed by the Commissioner.
>
> [N.J.A.C. 6A:23A-17.4(b).]

Once the Department of Education determines the actual cost per student, the receiving district is **required** to return the excess to the sending district or at the option of the sending district to credit the sending district the excess amount in accordance with N.J.A.C. 6A:23-17.1(f)(6) which provides:

> If the Commissioner later determines that the tentative tuition charge established by written contractual agreement, except for a contractual agreement for a student enrolled in a special education class, was greater than the actual cost per student during the school year multiplied by the actual ADE [average daily enrollment] received, the receiving district board of education shall return to the sending district board of education in the second 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. The receiving district board of education shall make such adjustment for a contractual agreement for a student enrolled in a special education class no later than the end of the second school year following the contract year.

The receiving district **may** charge for a shortfall after the tuition calculation has been made pursuant to N.J.A.C. 6A:23-17.1(f)(7) which provides:

> If the Commissioner later determines that the tentative charge established by written contractual agreement, except for a contractual agreement for a student enrolled in a special education class, was less than the actual cost per student during the school year multiplied by the actual average daily enrollment received, the receiving district board of education may charge the sending district board of education <u>all or part of the amount owed by the sending district board of education</u>, to be paid during the second school year following the school year for which the tentative charge was paid. Such adjustment for a contractual agreement for a student enrolled in a special education class shall be made no later than the end of the second school year following the contract year.

(Emphasis added.)

The tuition contract between the parties for the 2020–2021 school year is a pre-printed template agreement provided by the New Jersey Department of Education. Paragraph 4a of regular education tuition agreement provided that if the VBE overpaid tuition, the CCTEC had the option of paying the excess or providing a credit to the VBE in accordance with a schedule to which the parties agreed. The parties set the reconciliation date as June 30 of the third year following the base year and added "50%." It is uncontested that this means CCTEC would only reimburse or give a credit of half of the total amount owed by or to the VBE.

Petitioner contends that this 50% adjustment results in the VBE being charged more than the actual cost per pupil in violation of the law. Moreover, petitioner asserts that the parties never finalized the tuition agreement for the 2020-21 school year and thus, the respondent's action in reducing the amount owed to the petitioner is unenforceable.

The respondent opposes the petitioner's MSD on grounds that the parties had a ten-year history of abiding by the 50% reciprocal provision which allowed CCTEC to pay or give a credit of half of total amount owed to the VBE. Moreover, the CCTEC contends that the parties' failure to fully execute the 2020-21 agreement was irrelevant and did not negate the ten-year precedent. I am not so persuaded.

If the VBE is owed a reimbursement because it paid more than the actual per pupil cost, then receiving only half of that reimbursement results in the VBE paying more than the actual per pupil cost and that contravenes N.J.S.A. 18A:54-20.1(c). In an Order dated January 5, 2023, involving the same parties, the undersigned determined that the 50% reciprocal provision was unenforceable in fully executed contracts dating from 2012 through 2020 because the 50% reciprocal provision resulted in forcing the VBE to pay more than the actual per pupil cost which contravened N.J.S.A. 18A:54-20.1(c).

"The most important aspect of a contract is the intent of the parties." Bd. of Ed. of Twp. of Waterford v. Bd. of Ed. of Twp. of Hammonton, 2008 N.J. AGEN LEXIS 69. Here,

the partially signed agreement as well as the numerous emails spanning from November 2020 to June 2021, evinces that there was no agreement between the parties for the 2020-21 school year. Petitioner's counsel expressly opposed the 50% provision and attempted to revise the contact language and respondent's counsel never received approval from his client. Thus, there was no agreement for the CCTEC to adjustment the amount owed to the VBE and the VBE was entitled to the full reimbursement in accordance with the statute and regulations cited herein. Accordingly, I **CONCLUDE** that the 50% adjustment as applied to the 2020-21 tuition agreement is unenforceable as a matter of law and because there was no agreement between the parties.

Having carefully reviewed the record, I **FIND** there are no material facts in dispute and the petitioner is entitled to prevail as a matter of law. The record reflects that N.J.S.A. 18A:54-20.1(c) precludes a county vocational school from charging more than the actual State certified per pupil rate. For the 2020-21 school year there was a tuition overpayment of $1,185,655 owed to the VBE. The CCTEC did not reimburse the full amount but chose to provide a 50% credit to the VBE despite the lack of a fully executed agreement. This resulted in the VBE paying more than the State certified actual cost per student which violates N.J.A.C. 18A:54-20.1(c). Viewing these facts as I must, in the light most favorable to the non-moving party, I **CONCLUDE** there is no factual dispute sufficient to justify an evidentiary hearing and summary decision in favor of the petitioner is appropriate.

ORDER

Based upon the reasons stated above, petitioner's Motion for Summary Decision is hereby **GRANTED**.

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

This recommended decision may be adopted, modified or rejected by the **COMMISSIONER OF THE DEPARTMENT OF EDUCATION,** who by law is authorized to make a final decision in this matter. If the Commissioner of the Department of

Education does not adopt, modify or reject this decision within forty-five days and unless such time limit is otherwise extended, this recommended decision shall become a final decision in accordance with N.J.S.A. 52:14B-10.

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

July 10, 2023 Kim C. Belin

DATE **KIM C. BELIN**, ALJ

Date Received at Agency: _____

Date Mailed to Parties: _____

KCB/am/lam

APPENDIX

EXHIBITS

For petitioner

- Motion for Summary Decision with certification and exhibits, dated January 9, 2023
- Petitioner's Reply Letter to Respondent's Opposition, dated April 11, 2023

For respondent

- Letter Brief in Opposition to Petitioner's Motion for Summary Decision, dated April 12, 2023

250-23

New Jersey Commissioner of Education

Final Decision

M.D., on behalf of minor child, D.G.,

Petitioner,

v.

Board of Education of the City of Elizabeth,
Union County,

Respondent.

Synopsis

Pro se petitioner appealed the determination of the respondent Board that her minor child was not entitled to a free public education in Elizabeth schools during the 2022-2023 school year. Based on device export records linked to D.G.'s school-issued computer and a subsequent residency investigation, the Board contended that D.G. and her family were not living in Elizabeth but rather at an address in Union, New Jersey. The Board sought tuition reimbursement for the period of D.G.'s alleged ineligible attendance in Elizabeth schools.

The ALJ found, *inter alia*, that: petitioner M.D. testified credibly that prior to August 2022, she and her family lived in Elizabeth at a home they purchased in 1999; in March 2022, the family purchased a home on Park Place in Union, NJ, as an investment property with the intention of renting the house to tenants; because the house was in need of significant remodeling, the family moved to the Union house temporarily in August 2022 to oversee the ongoing construction; M.D.'s documentation all reflects her address as the Elizabeth house and the family was able to immediately return to living there once they realized that their occupancy at the Union house was endangering their residency status in Elizabeth; the family lived in the Union house from August 2022 until March 6, 2023, which was not long enough to trigger *N.J.A.C.* 6A:22-3.1(a)(4). Accordingly, the ALJ concluded that petitioner satisfied her burden to prove by a preponderance of evidence that she was domiciled in Elizabeth during the 2022-2023 school year; D.G. was therefore eligible for a free education in Elizabeth during the same time period.

Upon review, the Commissioner concurred with the ALJ's findings and conclusion and adopted the Initial Decision of the OAL as the final decision in this matter. Accordingly, the petition of appeal was granted, and no tuition reimbursement is due to the Board.

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

250-23
OAL Dkt. No. 03077-23
Agency Dkt. No. 87-3/23

New Jersey Commissioner of Education

Final Decision

M.D., on behalf of minor child, D.G.,

Petitioner,

v.

Board of Education of the City of Elizabeth, Union County,

Respondent.

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

Upon review, the Commissioner concurs with the Administrative Law Judge that M.D. and her minor child D.G. were domiciled in Elizabeth during the period from August 2022 to March 6, 2023 and that D.G. was therefore entitled to a free education in Elizabeth's schools during that period. Thus, the Board is not entitled to reimbursement from petitioner for tuition costs.

Accordingly, the petition of appeal is hereby granted.

IT IS SO ORDERED.[1]

Angelica Allen-McMillan, Ed.D.
ACTING COMMISSIONER OF EDUCATION

Date of Decision: August 21, 2023
Date of Mailing: August 23, 2023

[1] This decision may be appealed to the Appellate Division of the Superior Court pursuant to *N.J.S.A.* 18A:6-9.1. Under *N.J.Ct.R.* 2:4-1(b), a notice of appeal must be filed with the Appellate Division within 45 days from the date of mailing of this decision.

State of New Jersey
OFFICE OF ADMINISTRATIVE LAW

INITIAL DECISION
OAL DKT. NO. EDU 03077-23
AGENCY DKT. NO. 87-3/23

M.D. ON BEHALF OF MINOR CHILD, D.G.,
Petitioner,
v.
BOARD OF EDUCATION OF THE CITY OF ELIZABETH, UNION COUNTY,
Respondent.

M.D. and **S.G.**,[1] petitioners, pro se

Brian Kane, Esq., for respondent (LaCorte, Bundy, Varady & Kinsella, attorneys)

Record Closed: June 15, 2023 Decided: July 14, 2023

BEFORE **KELLY J. KIRK**, ALJ:

STATEMENT OF THE CASE AND PROCEDURAL HISTORY

Petitioner M.D. challenges the action of the Board of Education of the City of Elizabeth (Board) removing her daughter, D.G., from the Elizabeth Public Schools.

[1] Although not reflected on the petition, S.G., the student's father, also appeared.

By letter dated March 6, 2023, Elizabeth Public Schools notified M.D. that its review of D.G.'s domicile/residency status indicated that she was not entitled to a public education in Elizabeth and that an investigation revealed that D.G. did not reside in Elizabeth. (R-8.) By letter dated March 13, 2023, Elizabeth Public Schools notified M.D. that D.G. was ineligible to attend Elizabeth Public Schools and would be removed. (R-11.) On March 29, 2023, petitioner filed a Pro Se Petition of Appeal with the Department of Education. The Board filed its answer on March 31, 2023. On April 10, 2023, the Department transmitted the case to the Office of Administrative Law under the Administrative Procedure Act, N.J.S.A. 52:14B-1 to -15, and the act establishing the office, N.J.S.A. 52:14F-1 to -23, for a hearing under the Uniform Administrative Procedure Rules, N.J.A.C. 1:1-1.1 to -21.6, and the rules of procedure established by the Department of Education to hear and decide controversies and disputes arising under school laws, N.J.A.C. 6A:3-1.1 to -1.17. Jurisdiction is conferred under N.J.S.A. 18A:6-9.

The hearing was held on May 23, 2023. The Board submitted its post-hearing brief on June 14, 2023, and petitioner submitted her post-hearing letter on June 15, 2023, on which date the record closed.

FACTUAL DISCUSSION AND FINDINGS

M.D. testified on behalf of petitioner. Timothy Kirk testified on behalf of the Board.

Preliminary Facts

After due consideration of the testimonial and documentary evidence presented at the hearing, and having had the opportunity to observe the demeanor of the witnesses and assess their credibility, I **FIND** the following preliminary facts:

M.D. is married to S.G. Their daughter, D.G., was enrolled in grade 11 at Elizabeth High School for the 2022–2023 school year. (R-1.) Prior to August 2022,

M.D., S.G., and their children (the family) were living at 500 Main Street, Elizabeth, New Jersey[2] (the Elizabeth house), which M.D. and S.G. purchased on April 5, 1999. (R-6.)

On March 30, 2022, M.D. and S.G. purchased 200 Park Place, Union, New Jersey[3] (the Union house). (R-5.) The family began living at the Union house in August 2022.

Device export data records reflect that from December 1, 2022, to March 1, 2023, D.G.'s school-issued laptop was pinging from school and from the Union house, but not from the Elizabeth house. (R-2.)

Timothy Kirk has been employed by the Board as an investigator for approximately twenty months, and prior thereto he was an Elizabeth police officer for thirty-four years. On March 1, 2023, he commenced an investigation of the residency of D.G. after the legal department was advised by the technology department that D.G.'s laptop was pinging from Union and not from Elizabeth. On March 3, 2023, at 7:10 a.m., Kirk observed M.D. and D.G. exit the Union house and enter a 2009 Toyota registered to S.G. (R-3; R-7; R-14.) On March 6, 2023, at 7:12 a.m., Kirk observed M.D. and D.G. exit the Union house. (R-7.) Kirk prepared a Residency Investigation Report, dated March 31, 2023. (R-13.)

By Notice of Initial Determination of Ineligibility, dated March 6, 2023, Elizabeth Public Schools notified M.D. that its review of D.G.'s domicile/residency status indicated that she was not entitled to a free education in the district because of "Domicile/Residency not in the district" and that its investigation revealed that D.G. did not reside at the Elizabeth house. (R-8.) The notice further notified M.D. that she should contact Kirk on or before March 13, 2023, or email her proofs to indicate whether D.G. would be removed from the school and educated elsewhere, or if she would be requesting a hearing before the Board to demonstrate that D.G. was entitled to attend school in the district. (R-8.)

[2] A fictitious address is used for privacy.
[3] A fictitious address is used for privacy.

On March 8, 2023, M.D. completed the district's Residency Verification Form and submitted the form, along with the required verifications. (R-9.) The verifications submitted included a "current property tax bill," "government issued identification," "current gas bill," "current water bill," and "pay stub from employer." (R-9; R-10.) The 2023 1st & 2nd Quarter Tax Bill for the Elizabeth house reflects the mailing address as the Elizabeth house. (R-10.) M.D.'s Auto Driver License, issued in November 2020 and expiring in January 2024, reflects the Elizabeth house as her address. (R-10.) The January 20, 2023, Elizabethtown Gas bill for the Elizabeth house reflects M.D.'s name, reflects the Elizabeth house as the mailing address, and reflects current charges of $287.72. (R-10.) The January 27, 2023, Liberty Water Company bill reflects M.D.'s name, reflects the Elizabeth house as the mailing address, and reflects current charges of $85.71. (R-10.) A paycheck stub for M.D., dated February 24, 2023, reflects the Elizabeth house as her mailing address. (R-10.) Petitioner did not request a hearing before the Board.

By Notice of Final Ineligibility, dated March 13, 2023, Elizabeth Public Schools notified M.D. that after review of the information she submitted it determined that D.G. was ineligible to attend school in Elizabeth, because:

> YOUR DOMICILE/RESIDENCY IS NOT IN THE DISTRICT. OUR INVESTIGATION REVEALS THAT YOU LIVE OUTSIDE OF ELIZABETH.
>
> [R-11.]

The notice further notified M.D. of her right to appeal, and of the daily tuition rate of $99.63. (R-11.)

On March 29, 2023, petitioner filed a Pro Se Petition of Appeal (Petition) with the Department of Education. (R-12.) The Petition states, in pertinent part:

> The Elizabeth School District has determined that my daughter . . . is no longer eligible to attend the . . . High School. This came to us as a surprise as our intentions

were not to move to the other house permanently. We have realized this was a mistake on our part.

In April 2022, we decided to purchase another house as an investment for the purpose of renting out the house. This house is located in Union and needs a lot of remodeling and fixing, therefore, we contracted staff to make those changes. In the meantime, we also remained at our home in Elizabeth. Initially, we thought it would be a smoother and quicker process, but unfortunately, we had a few hiccups along the way. This prompted the need to supervise and monitor the work being done in the new purchase. In order to do so, we had to make changes to our living arrangements for the months to come. We understand this took longer than we initially planned. In reality, it was more of a commodity for me as I work from home, and it was more comfortable for me to work and supervise the work being done in the Union house at the same time.

We truly did not know that by staying temporarily in the Union house while fixing it for rent, we were violating any rules. We still own and are living in our home in Elizabeth. Since receiving the letter, we realized that our actions may have led the Elizabeth School District to believe this was our permanent home and therefore, we have since left the Union house.

We really were not conscious of what effect staying in the Union house would have on our daughter's education. Her mental health is the most important thing for us and since receiving the news we have seen a great amount of stress added into her life. She is a junior in high school and has made many friends which gives her great happiness. We feel responsible for causing this confusion and making her feel unsure of what will happen due to our actions.

Please see attached for the supporting documents where it shows that nothing has been changed from our residency in Elizabeth. Feel free to request any other information needed.

. . . .

I would like to please request that [D.G.] is reinstated at . . . High School. This is a learning experience for me and my family and we hope she does not get punished for a mistake we made to occupy two places at the same time. I confirm that we have been staying in Elizabeth since the notice we

> received. I hope you find it in your heart to understand that this was not intentional and will not be repeated.
>
> [R-12.]

The February 15, 2023, Elizabethtown Gas bill for the Elizabeth house reflects M.D.'s name, reflects the Elizabeth house as her mailing address, and reflects current charges of $191.81. (R-12.)

An Individual Report Plus Associates (IRPA) printout reflects the Union house as a possible address associated with M.D. and reflects an absentee owner. (R-3.) The registration for S.G.'s 2009 Toyota reflects the Elizabeth house. (R-3.) The Union house Property Detail record reflects the Elizabeth house as the mailing address for the owner. (R-4.) The Elizabeth house Property Detail record also reflects the Elizabeth house as the mailing address for the owner. (R-4.)

Device export data records reflect that from December 1, 2023, through March 6, 2023, D.G.'s school-issued laptop was pinging at the Union house. (R-2; R-15.) Device export data records further reflect that from March 7, 2023, to May 1, 2023, D.G.'s school-issued laptop pinged from school and the Elizabeth house, and never pinged from the Union house, or from outside of Elizabeth. (R-15.)

Testimony

Timothy Kirk

The August 16, 2022, date reflected on the IRPA printout coincides with the dates the student's laptop started pinging from the Union house. The residency verifications submitted by M.D. were not sufficient to establish residency in Elizabeth because his investigation revealed that despite owning the Elizabeth house the family was staying at the Union house. He concluded that D.G. resided at the Union house. He still believes that the family's primary domicile was the Union house.

He drove by the Union house approximately three or four times in April and May before school but never saw the parents' cars at the Union house. He does not know if a vehicle was in the one-car garage. He never saw anyone inside the Union house. He has not seen anyone at the Union house since March 6, 2023, when petitioner received the notice, and there were no more laptop pings from Union. Since March 6, 2023, a few of the laptop pings are from the Elizabeth house and the others are from school. The laptop cannot be pinged if it is turned off.

Once the family received the March 6, 2023, notice, they may have returned to the Elizabeth house. He does not know for sure if the petitioner is back in Elizabeth, but the Board has not changed its position regarding residency. His determination was that from August 2022 to March 6, 2023, the family resided in Union. He visited the Elizabeth house once in April, between 11:00 a.m. and 1:00 p.m., but he did not observe the family vehicles there. He does not have any evidence that would refute petitioner's assertion in the Petition that since receipt of the notice the family is no longer living in the Union house. The laptop pings from Elizabeth, though not as frequently as it had pinged from Union. In Union, it pinged every day, but in Elizabeth, there are no pings sometimes for several days.

M.D.

They had initially intended for a contractor to manage the renovations, but the renovations commenced in June 2022, and it became too expensive, and they instead had to find various contactors for each project. She is employed full time, 9:00 a.m. to 5:30 p.m., but she has been working from home since the pandemic. The family began temporarily living in Union so she could manage the renovations work. She does not deny that her family started living in Union in August, but it was only temporary to manage the work being done, which she had expected to be completed in October. She apologizes to the Board because she did not know they were not allowed to do that. Work was being done on the first floor and basement, but not on the second floor. The basement was just finished, and she expects all the work to be completed in another month. She intends to rent the Union house after the renovations are complete.

Since her receipt of the notice, they returned to living only at the Elizabeth house and D.G. has been driven back and forth between the Elizabeth house and school daily. There have been no rental agreements on either house. D.G.'s laptop may be pinging less frequently than before because of this situation, as the uncertainty of possibly being removed from her school has negatively affected D.G., including her academic performance. D.G. was crying this morning about what might happen. She feels sad for her daughter because it was her decision to temporarily live in Union that has caused D.G. to be in this situation.

LEGAL ANALYSIS AND CONCLUSION

Public schools are free to persons over five and under twenty years of age who are domiciled within the school district or are kept in the home of another person domiciled within the school district and supported by such other person gratis as if he were such other person's own child. N.J.S.A. 18A:38-1(a) and (b)(1). If the school district finds that the parent or guardian of a child who is attending the schools of the district is not domiciled within the district and the child is not kept in the home of another person domiciled within the school district and supported by such person gratis as if the child were the person's own child, the superintendent or administrative principal may apply to the board of education for the removal of the child. N.J.S.A. 18A:38-1(b)(2). The parent or guardian is entitled to a hearing before the board and, if in the judgment of the board, the parent or guardian is not domiciled within the district or the child is not kept in the home of another person domiciled within the school district and supported gratis, the board may order the transfer or removal of the child from school. Ibid. The parent or guardian may contest the board's decision before the Commissioner of Education within twenty-one days of the date of the decision and is entitled to an expedited hearing. Ibid. The parent or guardian has the burden of proof by a preponderance of the evidence that the child is eligible for a free education under the criteria listed in the statute. Ibid. Where the evidence does not support the claims of the parent, the Commissioner is authorized to assess tuition prorated to the time of the student's ineligible attendance in the schools of the district, and tuition is computed on the basis of 1/180 of the total annual per-pupil cost to the local district multiplied by the number of days of ineligible attendance. Ibid.

Pursuant to N.J.A.C. 6A:22-3.1(a)(1), a student is eligible to attend a school district if he or she is domiciled within the school district, and a student is domiciled in the school district when he or she is the child of a parent or guardian whose domicile is located within the school district. A student is domiciled in the school district when his or her parent or guardian resides within the school district on an all-year-round basis for one year or more, notwithstanding the existence of a domicile elsewhere. N.J.A.C. 6A:22-3.1(a)(4).

> "Domicile" is defined as "the place where [a person] has his [or her] true, fixed, permanent home and principal establishment, and to which whenever he is absent, he has an intention of returning." T.B.W. ex rel. A.W. v. Bd. of Ed. of the Township of Belleville, Essex County, 1998 N.J. AGEN LEXIS 122, Agency Dkt. No. 159-5/96, 1998 WL 668678 (N.J. Adm. June 18, 1998). As the court noted in Collins v. Yancey, 55 N.J. Super. 514, 520–21, 151 A.2d 68 (Law Div. 1959), a person may have several residences or places of abode, but only one domicile at a time. Id.
>
> [D.L. v. Bd. of Educ. of Princeton Reg'l Sch. Dist., 366 N.J. Super. 269, 273–74 (App. Div. 2004).]

Petitioner credibly testified that she and her husband purchased an investment home in Union and were in the process of renovating it, and to facilitate that process the family temporarily moved into the Union house. M.D.'s documentation all still reflects her address as the Elizabeth house and her testimony that she intended to return to the Elizabeth house when the renovations were complete on the Union house is corroborated by the family's ability to immediately return to living in the Elizabeth house, which had not been rented out. There is no evidence that the family continued to live at the Union house after receiving the notice, as they have not been observed at the Union house and D.G.'s laptop never again pinged from the Union house but has pinged from the Elizabeth house. Moreover, as corroborated by the IRPA printout, the family was in the Union house from August 2022 until March 6, 2023, which was not long enough to trigger N.J.A.C. 6A:22-3.1(a)(4). Accordingly, I **CONCLUDE** that petitioner has satisfied her burden to prove by a preponderance of the evidence that she was domiciled in

Elizabeth and D.G. was therefore eligible for a free education in Elizabeth for the 2022–2023 school year.

ORDER

It is **ORDERED** that petitioner's Pro Se Petition of Appeal be and hereby is **GRANTED**, and further **ORDERED** that D.G. is eligible to attend school in Elizabeth.

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

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

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

Kelly J Kirk

June 14, 2023 _____

DATE

KELLY J. KIRK, ALJ

Date Received at Agency: _____

Date Mailed to Parties: _____

db

APPENDIX

Witnesses

For Petitioner:

M.D.

For Respondent:

Timothy Kirk

Exhibits

For Petitioner:

None

For Respondent:

R-1 Demographics

R-2 March 1, 2023, email and device export data (December 1, 2023, through March 1, 2023)

R-3 Individual Report Plus Associates

R-4 Property Detail

R-5 Deed (Union house)

R-6 Deed (Elizabeth house)

R-7 Investigator notes

R-8 Notice of Initial Determination of Ineligibility, dated March 6, 2023

R-9 Blank Residency Verification Form

R-10 Completed Residency Verification Form and verifications

R-11 Notice of Final Ineligibility, dated March 13, 2023

R-12 Pro Se Petition of Appeal

R-13 Residency Investigation Report

R-14 Photographs

R-15 Device export data (March 1, 2023, through May 1, 2023)

251-23
Agency Dkt. No. 174-6/23

New Jersey Commissioner of Education

Final Decision

In the Matter of the Suspension of the
Teaching Certificates of Amanda Ramppen,
Team Academy Charter School, Inc.,
Essex County.

This matter was opened before the Commissioner of Education on June 27, 2023, by way of an Order to Show Cause served by petitioner (Team Academy Charter School, Inc.) upon respondent (Amanda Ramppen), requiring respondent to show cause why an order should not be entered suspending her teaching certificates pursuant to *N.J.S.A.* 18A:26-10 and *N.J.S.A.* 18A:28-8 for resigning without giving the notice required by law.

While awaiting proof of service from petitioner, the Office of Controversies and Disputes received a letter from respondent on July 25, 2023, stating that after careful consideration, she stood by her decision to resign due to health issues and would accept any resulting consequences, including the suspension of her teaching certificates. The letter also stated that she would not be retaining legal representation to contest the suspension.

The petition and supporting exhibits submitted by petitioner in this matter indicate that: respondent entered into a contract to work as a teacher for the 2022-23 school year; the contract provides that it can be terminated by the employee upon sixty days' written notice; and that on April 17, 2023, respondent sent correspondence to petitioner indicating that she was resigning, effective May 1, 2023, thereby providing less than the required sixty days' notice. The respondent has not denied these allegations; therefore, the Commissioner deems such allegations to be

admitted pursuant to *N.J.A.C.* 6A:3-1.5(a) and further deems them sufficient to justify suspension of respondent's teaching certificates pursuant to *N.J.S.A.* 18A:26-10 and *N.J.S.A.* 18A:28-8.

Accordingly, summary decision is hereby granted to petitioner, and respondent's teaching certificates are suspended for a period of one year from the filing date of this decision, a copy of which shall be forwarded to the State Board of Examiners for implementation of the suspension.

IT IS SO ORDERED.[1]

Angelica Allen-McMillan, J.D.S.
ACTING COMMISSIONER OF EDUCATION

Date of Decision: August 21, 2023
Date of Mailing: August 30, 2023

[1] This decision may be appealed to the Appellate Division of the Superior Court pursuant to *N.J.S.A.* 18A:6-9.1. Under *N.J.Ct.R.* 2:4-1(b), a notice of appeal must be filed with the Appellate Division within 45 days from the date of mailing of this decision.

IN THE MATTER OF TENURE HEARING OF: TYSHEMA LANE and NEW JERSEY DEPARTMENT OF CHILDREN AND FAMILIES	AGENCY DOCKET NO. 142 Arbitrator Walt De Treux **SETTLEMENT AGREEMENT**

The parties hereto have voluntarily resolved all disputed matters and enter into the following Settlement Agreement, which fully disposes of all issues in controversy between them:

A. The **Tenure charges** filed on May 23, 2023, attached hereto as Attachment 1, contained the following charges and proposed discipline:

Charge	Discipline
1. N.J.A.C. 4A:2-2.3(a)(1) - Incompetency, Inefficiency, or Failure to Perform Duties	Removal
2. N.J.A.C. 4A:2-2.3(a)(6) - Conduct Unbecoming a Public Employee	Removal
3. N.J.A.C. 4A:2-2.3(a)(7) Neglect of Duty	Removal
4. N.J.A.C. 4A:2-2.3(a)(12) Other Sufficient Cause	Removal

B. Respondent Tyshema Lane ("Respondent") withdraws her appeal and request for a hearing and the Petitioner Appointing Authority the New Jersey Department of Children and Families ("Petitioner" or the "Appointing Authority") agrees that the following result will occur with regard to each charge:

Charge	Disposition
1. N.J.A.C. 4A:2-2.3(a)(1) - Incompetency, Inefficiency, or Failure to Perform Duties	Voluntary Resignation (See Paragraph C - resolving all charges)
2. N.J.A.C. 4A:2-2.3(a)(6) - Conduct Unbecoming a Public Employee	Same
3. N.J.A.C. 4A:2-2.3(a)(7) Neglect of Duty	Same
4. N.J.A.C. 4A:2-2.3(a)(12) Other Sufficient Cause	Same

C. The parties have agreed to the following:

Petitioner agrees to accept a Voluntary Resignation from Respondent, which shall be effective August 14, 2023, as a resolution to the tenure charges appeal and each charge listed in Paragraph A. The parties acknowledge and agree that settlement is justified in this matter and is in the public interest, as Respondent wishes to seek employment outside of the Appointing Authority and that such settlement will provide the benefit of avoiding the costs and expenses of litigation. As of this date, Respondent is no longer under consideration for any disciplinary action, under the following conditions:

i. Under N.J.A.C. 17:1-2.18, no pension, seniority or benefit time will be credited for periods for which the employee is not paid by the employer;

ii. Respondent agrees not to seek or accept future employment with the New Jersey Department of Children and Families;

iii. Respondent acknowledges that, as a teaching staff member, the Commissioner of the New Jersey Department of Education has the duty to refer all tenure

determinations resulting in loss of position to the State Board of Examiners;

iv. The Appointing Authority agrees to preserve the following documents, in the ordinary course of business, and will only release them as required by state or federal law:

a. Respondent's Responses to Charges, received on April 21, 2023

b. Respondent's Exhibits, received on June 21, 2023

D. The Appointing Authority shall amend Respondent's personnel records to reflect the terms of this Agreement. All internal records of the Appointing Authority will be kept intact. Nothing herein shall preclude the Appointing Authority from releasing information on this matter to anyone who has a release executed by Respondent or as consistent with state or federal law. With exception to these circumstances the Appointing Authority will not release information on this matter. Any information regarding the underlying charges will be provided to the Public Employees Retirement System pursuant to N.J.S.A. 43:1-3.3, as amended, or as otherwise provided by law.

E. Respondent waives all other claims against the Appointing Authority with regard to this matter, including any award of back pay, counsel fees or other monetary relief, except as may otherwise be provided herein. This Agreement resolves any and all disciplinary actions pending against Respondent.

F. Nothing in this Agreement shall constitute an admission or stipulation of facts regarding the charges listed in Paragraph A. By entering into this Agreement, neither party admits or denies a violation of any state or federal law, any agency or departmental policy, or the parties' collective negotiations agreement. This Agreement shall not constitute precedent in matters involving

other employees. The Appointing Authority makes no representations as to any matter not made part of this agreement, including but not limited to, pension eligibility.

G. Respondent waives all claims, suits or actions, whether known, unknown, vested or contingent, civil, criminal or administrative, in law or equity against the State of New Jersey, the Appointing Authority, their employees, agents, or assigns, including but not limited to those which have been or could have been made or prosecuted on account of any conduct of any party occurring at any time with respect to the events, information or disputes giving rise to this action up to the date of this Agreement, including, but not limited to, all claims under Title VII of the Civil Rights Act of 1964, the Civil Rights Act of 1991, the Americans with Disabilities Act, the Family Leave Act, the Family and Medical Leave Act, the New Jersey Law Against Discrimination, the Equal Pay Act, the Conscientious Employee Protection Act, the Age Discrimination in Employment Act, Title 11A - the Civil Service Act, the Older Workers Benefits Protection Act, the Occupational Safety and Health Act, the Public Employee Occupational Safety and Health Act, the New Jersey Smoking Act, New Jersey wages and hours law, public works statutes, unemployment compensation laws, disability benefits laws, the United States Constitution, the New Jersey Constitution, any workers compensation or common law claims and any contract express or implied. This waiver includes all claims involving any continuing effects of actions or practices which arose prior to the date of this Settlement Agreement and bars the use in any way of any past action or practice in any subsequent claims, except pending workers compensation claims.

H. The parties agree that if any portion of this Settlement Agreement is deemed unenforceable, the remainder of this Settlement Agreement shall be fully enforceable.

I. This Settlement Agreement is binding on the parties and may not be supplemented, amended, changed or modified in any manner, orally or otherwise, except in writing signed by a duly authorized representative of each party.

J. By signing this Settlement Agreement, the signatories represent that they have read this Agreement and fully understand its terms.

CERTIFICATION

I, Tyshema Lane, being the Respondent in this matter, hereby certify that I have reviewed this Settlement Agreement and fully understand its meaning and terms. I acknowledge my understanding and verify my acceptance of the terms of this Settlement Agreement. I acknowledge that my representative questioned my understanding, verified my acceptance of the terms of this Settlement Agreement, and answered all of my questions regarding this Settlement to my satisfaction. I am satisfied with my representation and I enter into this Settlement Agreement voluntarily.

It is also my understanding that this Settlement Agreement will terminate all claims and further appeal against the State of New Jersey and the New Jersey Department of Children and Families.

I certify that the foregoing statement made by me are true. I am aware that if any of the foregoing statements made by me are willfully false, I am subject to punishment.

8/14/2023
Dated:

Tyshema Lane
Tyshema Lane

I. This Settlement Agreement is binding on the parties and may not be supplemented, amended, changed or modified in any manner, orally or otherwise, except in writing signed by a duly authorized representative of each party.

J. By signing this Settlement Agreement, the signatories represent that they have read this Agreement and fully understand its terms.

APPROVAL OF THE SETTLEMENT AGREEMENT

In witness of this Agreement, having read and understood the terms and having agreed to be bound by each of the terms of this Agreement, the parties affix their signatures below.

8/14/2023
DATE

Tyshema Lane
Respondent
Tyshema Lane

8/15/23
DATE

On Behalf of Dept. of Children and Families

253-23

New Jersey Commissioner of Education
Final Decision

Board of Education of the Township of North Bergen, Bergen County,

Petitioner,

v.

New Jersey Department of Education and
Angelica Allen-McMillan, Acting Commissioner,

Respondents.

Synopsis

The petitioner, the Board of Education of the Township of North Bergen (Board), challenged the respondent's determination that the Board is responsible for J.P.'s educational costs for the 2019-2020 school year pursuant to *N.J.S.A.* 18A:7B-12(b). In 2017, J.P. was placed at Bancroft Neurohealth (Bancroft) by the Department of Children and Families (DCF). Prior to this placement, J.P. resided with his mother, M.P., in North Bergen, and the Board assumed the cost of J.P.'s education at Bancroft as required under *N.J.S.A.* 18A:7B-12(b). When M.P.'s address could not be determined as of October 15, 2018, the State of New Jersey assumed financial responsibility for J.P.'s educational costs for the 2028-2019 school year under *N.J.S.A.* 18A:7B-12(d). The issue for determination here is which entity is responsible for the cost of J.P.'s education during the 2019-2020 school year, since M.P.'s address was unknown as of October 15, 2019. The parties filed cross motions for summary decision.

The ALJ found, *inter alia,* that: there are no material facts at issue, and the matter is ripe for summary decision; the Board's argument that a student's present district of residence must be determined by the Department of Education (DOE) by October 16 of each school year is without merit as the regulations do not state any such deadline; rather, the regulations state that the district of residence is determined by the residence of the parents on October 16; in this matter, it was stipulated that J.P.'s mother lived within the North Bergen School District on October 16, 2019; it is not disputed that DOE informed North Bergen that it was the district of residence for J.P. in March 2021; there is no provision in the regulation that states that the DOE must inform a school district that it is the district of residence for a student by October 16th; and the Board's argument that the doctrine of laches should be invoked in this matter is also without merit. The ALJ concluded that since M.P. resided in North Bergen beginning in May 2019, the Board's school district is the district of residence for J.P. for the 2019-2020 school year. Accordingly, the ALJ granted respondent's motion for summary decision and denied the petitioner's cross motion.

Upon a comprehensive review of the record, the Commissioner adopted the Initial Decision of the OAL as the final decision is this matter. The substantial, credible evidence in the record supports the conclusion that North Bergen was J.P.'s district of residence for the 2019-2020 school year. Accordingly, summary decision was granted in favor of the respondent and the petition was dismissed.

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

253-23
OAL Dkt. No. EDU 00807-22
Agency Dkt. No. 226-12/21

New Jersey Commissioner of Education

Final Decision

Board of Education of the Township of North Bergen, Hudson County,

Petitioner,

v.

New Jersey Department of Education and Angelica Allen-McMillan, Acting Commissioner,

Respondents.

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

Petitioner initiated this action to challenge respondent's determination that the North Bergen Board of Education (the Board or North Bergen) is responsible for minor child J.P.'s educational costs for the 2019-2020 school year pursuant to *N.J.S.A.* 18A:7B-12(b). That statute provides, in relevant part:

> The district of residence for children who are in residential State facilities, or who have been placed by State agencies in group homes, skill development homes, [or] private schools . . . shall be the present district of residence of the parent or guardian with whom the child lived prior to his most recent admission to a State facility or most recent placement by a State agency.
>
> [*N.J.S.A.* 18A:7B-12(b).]

Consistent with the statute, the corresponding regulations at *N.J.A.C.* 6A:23A-19.2(a)(2) explain that "[t]he 'present district of residence' of a child placed by a State agency in a group

home, skill development home, [or] approved private school for students with disabilities . . . means the New Jersey district of residence of the child's parent(s) or guardian(s) as of the date of the child's most recent placement by the State agency." Additionally, the regulations provide that "[i]n subsequent school years spent in the educational placement made by a State agency, the child's 'present district of residence'" is "the New Jersey district of residence of the child's parent(s) or guardian(s) as of the last school day prior to October 16." *N.J.A.C.* 6A:23A-19.2(a)(1), (a)(2).

The Commissioner of Education, or her designee, is responsible for determining the child's present district of residence "based upon by the address submitted by the Department of Corrections, the Department of Children and Families, or the Juvenile Justice Commission on forms prepared by the Department of Education." *N.J.A.C.* 6A:23A-19.3(b). The Department of Education (DOE) must notify the responsible district of its determination. *N.J.A.C.* 6A:23A-19.3(c). "In order to prevent a lapse in the child's education and/or child study services, the district board of education shall be bound by such determination unless and until it is reversed on redetermination or appeal . . . ." *Ibid.*

The DOE's district of residence determination "is entitled to a presumption of correctness." *Board of Education of the Township of Piscataway v. New Jersey Department of Education, Office of School Funding*, OAL Dkt. No. EDU 05063-10, Initial Decision at 10 (Oct. 4, 2010), *aff'd*, Commissioner Decision No. 465-10 (Nov. 8, 2010). "[W]hen a local school board contests a district-of-residence determination made by the Department, the local board bears the burden of proving that the determination was in error." *Ibid.*

The material facts are undisputed. The Department of Children and Families (DCF) placed J.P. at Bancroft Neurohealth on May 18, 2017. Prior to placement, J.P. resided with his mother, M.P., in North Bergen. Pursuant to *N.J.S.A.* 18A:7B-12(d), the State of New Jersey assumed fiscal

responsibility for J.P.'s educational costs for the 2018-2019 school year after the DOE determined that M.P.'s address was unknown as of October 15, 2018.

On March 3, 2021, DCF requested a district of residence determination for J.P. and informed the DOE that M.P. had resided at a permanent address in North Bergen since May 2019. The record contains a copy of a residential lease for an apartment in North Bergen listing M.P. as the occupant effective May 15, 2019, until May 31, 2021.[1] Via letter dated March 29, 2021, the DOE informed petitioner that because M.P. resided at a permanent address in North Bergen "on October 15, 2020 [sic] and October 15, 2020," petitioner was responsible for J.P.'s educational costs for the 2019-2020 and 2020-2021 school years.[2]

On November 23, 2021, the DOE sent petitioner a second letter to correct the typographical error that appeared in the March 29, 2021, letter. The second letter informed petitioner that because M.P. resided at a permanent address in North Bergen "on October 15, 2019 and October 15, 2020," petitioner was responsible for J.P.'s educational costs for the 2019-2020 and 2020-2021 school years.

On or about December 2, 2021, the Board filed an appeal of respondent's district of residence determination with the Office of Controversies and Disputes. The matter was transmitted to the OAL and the parties moved for summary decision. The Administrative Law Judge (ALJ) granted respondent's motion for summary decision upon concluding that North Bergen was J.P's district of residence for the 2019-2020 school year and that it was therefore responsible for J.P.'s educational costs for that year.

---

[1] J.P.'s father resides elsewhere in North Bergen Township.

[2] Petitioner does not contest the DOE's determination for the 2020-2021 school year. Its petition states that "[a]fter conducting its own investigation," it agreed "that M.P. was in fact a resident of North Bergen at least as of April 29, 2021."

In so doing, the ALJ rejected the Board's contention that it should be absolved of payment of J.P.'s educational costs for the 2019-2020 school year under the doctrine of laches because the DOE did not provide notice to petitioner that it was J.P.'s district of residence until March 2021. The ALJ correctly noted that the relevant regulations do not provide a deadline for the DOE to give notice to the district of residence. Moreover, the ALJ recognized that the DOE was not notified by DCF until March 2021 that M.P. had a permanent address in North Bergen as of May 2019. Once the DOE received this information from DCF, it sent a letter to petitioner that same month notifying it of its financial obligation for J.P.'s educational costs.

Upon a comprehensive review of the record in this matter, the Commissioner adopts the ALJ's findings and conclusions as set forth in the Initial Decision. The substantial, credible evidence in the record supports the conclusion that North Bergen was J.P.'s district of residence for the 2019-2020 school year. Petitioner provided no evidence to the contrary. Therefore, petitioner is responsible for J.P.'s educational costs for the 2019-2020 school year.

Accordingly, respondent's motion for summary decision is granted, petitioner's cross-motion for summary decision is denied, and the petition of appeal is hereby dismissed.

IT IS SO ORDERED.[3]

Angelica Allen-McMillan, J.d.D.

ACTING COMMISSIONER OF EDUCATION

Date of Decision: August 22, 2023
Date of Mailing: August 23, 2023

[3] This decision may be appealed to the Appellate Division of the Superior Court pursuant to *N.J.S.A.* 18A:6-9.1. Under *N.J.Ct.R.* 2:4-1(b), a notice of appeal must be filed with the Appellate Division within 45 days from the date of mailing of this decision.

State of New Jersey
OFFICE OF ADMINISTRATIVE LAW

INITIAL DECISION
OAL DKT.NO. EDU 00807-22
AGENCY DKT. NO. 226-12/21

BOARD OF EDUCATION OF THE TOWNSHIP OF NORTH BERGEN, HUDSON COUNTY,

Petitioner,

v.

NEW JERSEY DEPARTMENT OF EDUCATION & ANGELICA ALLEN MCMILLIAN, ACTING COMMISSIONER,

Respondent.

Jason Ryglicki, Esq. for petitioner (Ryglicki & Gillman, P.C. attorneys)

Sadia Ahsanuddin, Esq., for respondent (Matthew J. Platkin, Acting Attorney General)

Record Closed: July 9, 2023 Decided: July 21, 2023

BEFORE: KIMBERLY A. MOSS, ALJ:

The Department of Education (DOE) determined that the Board of Education for the Township of North Bergen (North Bergen) is responsible for the tuition of J.P. for the 2019-2020 school year. North Bergen appealed the DOE's determination. DOE filed a motion to dismiss the petition in lieu of answer on or about January 27, 2022. North

Bergen filed opposition to the motion on March 1, 2022. DEP filed a reply to the opposition on June 7, 2022. I denied the motion on July 11, 2022.

On March 23, 2023, DOE filed a motion for Summary Decision. North Bergen filed a cross motion for summary decision on April 10, 2023. The DOE filed a reply to the opposition on May 15, 2023. North Bergen filed a sur reply on July 9, 2023, on which date the record closed.

.

FACTUAL DISCUSSION

I **FIND** the following stipulated **FACTS**:

1. This case is a district of residence appeal involving student J.P.
2. J.P.'s date of birth is March 13, 2005.
3. On May 18, 2017, J.P. was placed by the Department of Children and Families ("DCF") at Bancroft Neurohealth.
4. Prior to placement at Neurohealth, J.P. resided with his mother M.P. in the township of North Bergen.
5. In a letter dated May 17, 2019, the Department of Education made a determination that the address of M.P. was unknown on October 15, 2018, and therefore, that the State would be responsible for the educational costs of J.P. for the 2018-2019 school year. Attached hereto as "Exhibit A" is a true and accurate copy of the May 17, 2019, letter from the Department of Education.
6. On April 26, 2019, M.P. signed a lease for occupancy at 39 74th Street, Apt. B4, North Bergen, NJ 07047, to start on May 15, 2019. Attached hereto as "Exhibit B" is a true and accurate copy of the lease that M.P. signed on April 26, 2019.
7. In May 2019, M.P. secured a permanent address at 39-74th Street, Apt. B4, North Bergen, NJ 07047.
8. The lease for 39-74th Street, Apt. B4, North Bergen, NJ 07047 lists M.P. as the tenant from May 15, 2019, to May 31, 2021.
9. The address 39-74th Street, Apt. B4, North Bergen, NJ 07047 falls within the North Bergen Public School District.
10. On October 15, 2019, M.P. was listed on a lease for 39-74th Street, Apt. B4, North Bergen, NJ 07047.
11. M.P. was a resident of North Bergen in May 2019.

12. On March 1, 2021, the Division of Children and Families completed form CP&P 25-65 for J.P. This form stated that: "The mother, [M.P.] has resided in a permanent address in North Bergen since 5/2019." The form also stated, "J. resided with his mother prior to the initial Dept P [sic] placement." Attached hereto as "Exhibit C" is March 1, 2021 Form.
13. On March 29, 2021 the Department of Education sent a letter to North Bergen, stating that "North Bergen School District is responsible for the educational costs of the child for the 2019-2020 and 2020-2021 school years." This letter further provided that the Department of Education made this determination because J.P.'s mother, M.P., was a resident of North Bergen on "October 15, 2020 and October 15, 2020 [sic]." Attached hereto as "Exhibit D" is a true and accurate copy of the March 29, 2021 letter from the Department of Education.
14. On May 3, 2021, M.P. signed a month-to-month lease for occupancy at 39-74th Street, Apt. B4, North Bergen, NJ.
15. On November 23, 2021, DOE sent a revised letter to North Bergen which stated that "On October 15, 2019 and October 15, 2020, [J.P.'s] mother [M.P.], resided at 39 74th Street, Apt. B4, North Bergen, NJ 07047-6920." Attached hereto as "Exhibit E" is a true and accurate copy of the November 23, 2021 letter from the Department of Education.
16. C.P. is J.P.'s father.
17. C.P. currently resides at 7508 Park Avenue, Apt. 205 North Bergen, New Jersey 07047.

LEGAL ARGUMENT AND CONCLUSION

The rules governing motions for summary decision in an OAL matter are embodied N.J.A.C. 1:1-12.5. These provisions mirror the language of Rule 4:46-2 and the New Jersey Supreme Court's decision in Judson v. Peoples Bank and Trust Company of Westfield, 17 N.J. 67 (1954). Under N.J.A.C. 1:1-12.5(b), the determination to grant summary judgment should be based on the papers presented as well as any affidavits which may have been filed with the application. In order for the adverse, i.e., the non-moving party to prevail in such an application, responding affidavits must be submitted showing that there is indeed a genuine issue of fact, which can only be determined in an evidentiary proceeding. The Court in Brill v. Guardian Life

Insurance Company of America, 142 N.J. 520, 523 (1995), set the standard to be applied when deciding a motion for summary judgment. Therein the Court stated:

> The determination whether there exists a genuine issue with respect to a material fact challenged requires the Motion Judge to consider whether the competent evidential materials presented, when viewed in the light most favorable to the non-moving party . . . are sufficient to permit a rational fact finder to resolve the alleged disputed issue in favor of the non-moving party.
>
> There is no material issue of fact in this matter.

N.J.A.C. 6A:19.2 provides:

> (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:7F-45 and referred to in the first paragraph of N.J.S.A. 18A:7B-12.b, means the New Jersey district of residence of the child's parent(s) or guardian(s) as of the last school day prior to October 16.
> 2. The "present district of residence" of a child placed by a State agency in a group home, skill development home, approved private school for students with disabilities or out-of-State facility, also referred to in N.J.S.A. 18A:7B-12.b means the New Jersey district of residence of the child's parent(s) or guardian(s) as of the date of the child's most recent 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 (a)1 above.
> 3. If the State becomes the child's legal guardian after the date of the child's initial placement by a State agency, the State will assume financial responsibility for the child's educational costs in subsequent school years.
> (b) The "present district of residence" or "district of residence" referred to in N.J.S.A. 18A:7B-12.b shall be determined by the Commissioner or his or her designee based upon the address submitted by the Department of Corrections, the Department of Children and Families, or the Juvenile Justice Commission on forms prepared by the Department of Education.
> (c) The district board of education shall be notified by the Department of the determination of the district of residence. In order to prevent a lapse in the child's education and/or child study services, the district board of education shall be bound by such determination unless and until it is reversed on redetermination or appeal pursuant to the provisions of (e) and (f) below.
> (d) A district board of education contesting the Department's determination of district of residence shall submit a written notification of a dispute to the Office of School Facilities and 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 Department;
2. Written rationale for rejecting the determination of the Department; and
3. Any additional information the district board of education has obtained that might enable redetermination of the district of residence.
(e) The Office of School Facilities and Finance shall attempt to resolve the dispute administratively and shall notify the district board of education whether a redetermination of district of residence will be made within 90 days of the receipt of 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 Office of School Facilities and 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. 6A:3, Controversies and Disputes.
(g) As prescribed by N.J.S.A. 18A:7B-12, the "district of residence" for a homeless child whose parent(s) or guardian(s) temporarily moves from one school district to another is the district in which the parent(s) or guardian(s) last resided prior to becoming homeless. This district shall be designated as the district of residence for as long as the parent(s) or guardian(s) remains homeless.

N.J.S.A. 18A: 7B-2 provides:

a. For each State-placed child who is resident in a district and in a State facility on the last school day prior to October 16 of the prebudget year, and for each district-placed child who is resident in a district and in a State facility on the last school day prior to October 16 of the budget year, the Commissioner of Education shall deduct from the State aid payable to that district an amount equal to the approved per pupil cost established pursuant to the provisions of section 24 of P.L.1996, c.138 (C.18A:7F-24); except that for a child in a county juvenile detention center, no deduction shall be made until Fiscal Year 1999, in which year and thereafter 50% of the per pupil cost shall be deducted.
b. If, for any district, the amount to be deducted pursuant to subsection a. of this section is greater than State aid payable to the district, the district shall pay to the Department of Education the difference between the amount to be deducted and the State aid payable to the district.
c. The amount deducted pursuant to subsection a. of this section and the amount paid to the Department of Education pursuant to subsection b. of this section shall be forwarded to the Department of Human Services or the Department of Children and Families, as applicable, if the facility is operated by or under contract with that department, or to the Department of Corrections if the facility is operated by or under contract with that department, or to the Juvenile Justice Commission established pursuant to section 2 of P.L.1995, c.284 (C.52:17B-170) if the facility is operated by or under contract with that commission, and shall serve as payment by the district of tuition for the child. In the case of county juvenile detention centers, the tuition shall be deemed to supplement funds currently

> provided by the county for this purpose under chapter 10 and chapter 11 of Title 9 of the Revised Statutes. In Fiscal Year 1998, a county shall not decrease its level of contribution as a result of the payment of tuition pursuant to this section. In Fiscal Year 1999 and thereafter, a county shall be required to pay 50% of the approved per pupil costs established pursuant to the provisions of section 24 of P.L.1996, c.138 (C.18A:7F-24) for the purpose of implementing chapters 10 and 11 of Title 9 of the Revised Statutes. Amounts so deducted shall be used solely for the support of educational programs and shall be maintained in a separate account for that purpose. No district shall be responsible for the tuition of any child admitted by the State to a State facility after the last school day prior to October 16 of the prebudget year.

When the State makes a determination as to who is responsible for the child's education and/or a determination about the "district of residency," it is entitled to a presumption of correctness. Bd. of Educ. of S. River v. Dep't of Educ., EDU 10117-98, Initial Decision (November 1, 2000) http://lawlibrary.rutgers.edu/oal/search.html. It is well established that when a local school board contests a DOR determination, the local board bears the burden of proving that the determination was in error. Bd. of Educ. of Bradley Beach v. Dep't of Educ., EDU 4975-99, Comm'r (July 3, 2000). http://lawlibrary.rutgers.edu/oal/search.html

In this matter, North Bergen argues that the student's present district of residence must be determined by the DOE by October 16 of that school year. The regulations do not state this. The regulations state that the district of residence is determined by the residence of the parents on October 16. In this matter it is stipulated that J.P.'s mother lived in the District on October 16, 2019. It is not disputed that DOE informed North Bergen that it was the district of residence for J.P. in March 2021. There is no provision in the regulation that states the DOE must inform a District that it is the district of residence for a student by October 16th of that year. North Bergen argued that the doctrine of laches should be invoked since the DOE did not inform North Bergen that it was J.P.'s. present district of residence in 2019-2020 until March 2021.

The court in Secaucus Town v. Jersey City, 19 N.J. Tax 10, 27`stated:

> In Lavin v. Board of Education of Hackensack, 90 N.J. 145, (1982), the Supreme Court defined laches as "'such neglect or omission to assert a right as, taken in conjunction with the lapse of time, more or less great, and other circumstances causing prejudice to an adverse party, operates as a bar in a court of equity.'" Id. at 151, 447 A.2d 516 (quoting from 2

> Pomeroy Equity Jurisprudence § 419 at 171-72 (5th ed.1941)). The Court then articulated the following factors as relevant to a claim of laches:

The length of delay, reasons for delay, and changing conditions of either or both parties during the delay are the most important factors that a court considers and weighs. The length of the delay alone or in conjunction with the other elements may result in laches. It is because the central issue is whether it is inequitable to permit the claim to be enforced that generally the change in conditions or relations of the parties coupled with the passage of time becomes the primary determinant. . . . Inequity, more often than not, will turn on whether a party has been misled to his harm by the delay. Id. at 152-53 The court stated: equitable estoppel will be applied in the appropriate circumstances [against a governmental entity] unless the application would 'prejudice essential governmental functions.'" Middletown Tp. Policemen's Benevolent Ass'n., Local No. 124 v. Middletown Tp., supra, 162 N.J. at 367, 744 A.2d 649. The same principle applies to laches. East Orange v. Livingston Tp., 102 N.J. Super. 512, 522, 246 A.2d 178 (Law Div.1968), aff'd, 54 N.J. 96, 253 A.2d 546 (1969) ID at 20-21

Secaucus Town v. Jersey City, 19 N.J. Tax 10, 27`

The Court has stated of the doctrine of laches:

> That doctrine is invoked to deny a party enforcement of a known right when the party engages in an inexcusable and unexplained delay in exercising that right to the prejudice of the other party. In re Kietur, 332 N.J. Super. 18, 28, 752 A.2d 799, 805 (App.Div.2000) (citing County of Morris v. Fauver, 153 N.J. 80, 105, 707 A.2d 958, 970 (1998)). Laches may only be enforced when the delaying party had sufficient opportunity to assert the right in the proper forum and the prejudiced party acted in good faith believing that the right had been abandoned. Dorchester Manor v. Borough of New Milford, 287 N.J. Super. 163, 172, 670 A.2d 600, 604 (Law Div.1994), aff'd, 287 N.J. Super. 114, 670 A.2d 576 (App.Div.1996). The time constraints for the application of laches "are not fixed but are characteristically flexible." Lavin v. Bd. of Educ., 90 N.J. 145, 151, 447 A.2d 516, 519 (1982). The key factors to be considered in deciding whether to apply the doctrine are the length of the delay, the reasons for the delay, and the "changing conditions of either or both parties during the delay." Id. at 152, 447 A.2d at 520. The core equitable concern in applying laches is whether a party has been harmed by the delay. Id. at 152-53, 447 A.2d at 519-20.
> Knorr v. Smeal, 178 N.J. 169, 180-181

In this matter the regulation does not state the date when the DOE must inform the district that it is the district of residence for a student by a specific time. The DOE did

not know that M.P lived in North Bergen beginning in May 2019 until it was informed by the Division of Children and Families on or about March 1, 2021. DOE informed North Bergen that it was responsible for J.P.'s educational costs for 2019-2020 school year on March 29, 2021. There was a gap of over a year before DOE became aware that J.P.'s district of residence for the 2019-2020 school year.

I **CONCLUDE** Since M.P. resided in North Bergin beginning in May 2019, that North Bergin was the District of residence for J.P. for the 2019-2020 school year.

ORDER

It is therefore **ORDERED** that the respondent's motion for summary decision be and is hereby **GRANTED**.

It is further **ORDERED** that petitioner's cross-motion for summary decision is **DENIED.**

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

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

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

July 21, 2023

DATE

KIMBERLY A. MOSS, ALJ

Date Received at Agency: July 21, 2023

Date Mailed to Parties: July 21, 2023

ljb

EXHIBITS
from stipulated Facts

Joint

J-A Letter from the Department of Education to North Bergen Dated May 17, 2019

J-B Lease Signed by M.P. for Occupancy in North Bergen signed on April 26, 2019

J-C Division of Children and Families CP&P 25-65 From for J.P. Dated March 1, 2021

J-D Letter from the Department of Education to North Bergen Dated March 29, 2021

J-E Letter from Department of Education to North Bergen Dated November 23, 2021

254-23

New Jersey Commissioner of Education

Final Decision

John Cash, Jr.,

Petitioner,

v.

New Jersey Department of Education,
State Board of Examiners,

Respondent.

Synopsis

Pro-se petitioner appealed the determination of the respondent New Jersey State Board of Examiners (SBE) denying his request for a second extension of time to satisfy the requirements of New Jersey's Alternate Route teacher certification program. Specifically, petitioner sought an additional two-year extension of his provisional certificate for a Computer Science endorsement after discovering that he had been incorrectly advised that the employing district would waive the remaining academic requirements associated with obtaining certification through the Alternate Route program. Petitioner's extension request was denied when the SBE determined that a second renewal exceeded the four-year program limit allowed by law; further, the SBE emphasized that the responsibility for, and awareness of, the requirements for program completion lie with the applicant, including the obligation to verify information provided by the employing school district. The respondent filed a motion for summary decision, seeking dismissal of the petition.

The ALJ found, *inter alia*, that: there are no issues of material fact in this case and the matter is ripe for summary decision; the regulation governing provisional certificate renewals, *N.J.A.C.* 6A:9B-8.5, provides that a school principal may recommend renewal of a provisional teacher's two-year provisional certificate for an additional two years if the candidate has not completed the requirements for standard certification within the first two years of employment; pursuant to *N.J.A.C.* 6A:9B-8.5(c) there are limited and specific circumstances under which a renewal can be extended beyond the maximum of four years for program completion; however, none of those limited circumstances apply in the instant case; petitioner admitted that though he completed the majority of the requirements, he has not completed all of the academic coursework associated with the Alternate Route program because he relied upon incorrect information from a representative of the school district who counseled him that the district would waive the remaining academic requirements. The ALJ concluded that, unfortunately, the governing regulations do not permit discretionary consideration of the specific circumstances of this matter to allow a waiver beyond the four-year program limit. Accordingly, the ALJ granted the SBE's motion for summary decision and dismissed the petition.

Upon review, the Commissioner concurred with the findings and conclusions of the ALJ and adopted the Initial Decision as the final decision in this matter. The petition was dismissed.

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

254-23
OAL Dkt. No. EDU 01325-23
Agency Dkt. No. 363-12/22

New Jersey Commissioner of Education

Final Decision

John Cash, Jr.,

Petitioner,

v.

New Jersey Department of Education,
State Board of Examiners,

Respondent.

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

Upon review, and for the reasons thoroughly expressed in the Initial Decision, the Commissioner adopts the findings and conclusions of the Administrative Law Judge (ALJ). The Commissioner concurs with the ALJ that petitioner is ineligible for a second renewal of his Teacher of Computer Science Technology provisional certificate under *N.J.A.C.* 6A:9B-8.5(c) because he has failed to satisfy the regulatory requirements for same.

Accordingly, respondent's motion for summary decision is granted and the petition of appeal is hereby dismissed.

IT IS SO ORDERED.[1]

Angelica Allen-McMillan, Ed.D.
ACTING COMMISSIONER OF EDUCATION

Date of Decision: August 22, 2023
Date of Mailing: August 23, 2023

[1] This decision may be appealed to the Appellate Division of the Superior Court pursuant to *N.J.S.A.* 18A:6-9.1. Under *N.J.Ct.R.* 2:4-1(b), a notice of appeal must be filed with the Appellate Division within 45 days from the date of mailing of this decision.

State of New Jersey
OFFICE OF ADMINISTRATIVE LAW

INITIAL DECISION
OAL DKT. NO. EDU 01325-23
AGENCY DKT. NO. 363-12/22

JOHN CASH, JR.,
Petitioner,
v.
NEW JERSEY DEPARTMENT OF EDUCATON, STATE BOARD OF EXAMINERS,
Respondent.

John Cash, Jr., pro se petitioner

David Kalisky, Deputy Attorney General, for respondent (Matthew J. Platkin, Attorney General of New Jersey, attorney)

Record Closed: June 30, 2023 Decided: July 18, 2023

BEFORE **ANDREW M. BARON**, ALJ:

STATEMENT OF THE CASE

John Cash, Jr. ("Cash or petitioner"), appeals a determination by the Board of Examiners, Recruitment Unit of the Department of Education, denying his request for an additional extension to meet the requirements of the alternate teaching program.

PROCEDURAL HISTORY

John Cash appeals from a determination by the Department of Education denying his request for an additional extension of time to satisfy the requirements of the alternate route teaching provisional certificate program.

UNDISPUTED FACTS AN DISCUSSION

Faced with a growing shortage of public-school teachers, several years ago the New Jersey Department of Education created an Alternate Route Program for individuals with business and other experience who were seeking a career in teaching.

With the onset of the pandemic in March 2020, even more teachers decided to retire which increased the shortage of available teachers for districts to draw upon.

In response to the continued thinning ranks of experienced teachers. The Legislature and Governor Murphy enacted the New Teacher Certification Pilot Program, which allows certain school districts the flexibility to award teaching certificates to newly trained teachers, in lieu of the traditional Praxis and other traditional requirements prior to receiving a teacher's license.

Pursuant to this process, the Department of Education informed Cash that before receiving a provisional certification, CE candidates must be hired by a school in the same area required for the teaching position.

Among other things, such individuals seeking an alternate certification are required to complete a minimum 50 hours of pre-professional experience in an authorized educator preparation program, as well as 400 hours of continuing education, in order to be eligible for a standard certificate in the same endorsement area.

Prior to receiving a certificate, such candidates must also pass a commissioner approved basic skills assessment test, enroll in their school's mentoring program for a

minimum of thirty weeks, and obtain at least two evaluations with ratings of effective or highly effective.

In August 2018, the Englewood School District, which to some extent is an urban district, enrolled petitioner in the Alternate CTE program for a Computer Science endorsement, with classes at Brookdale Community College starting in September 2018. (In 1992, Mr. Cash previously obtained an alternate certificate to teach social studies through the State of Maryland).

Having completed several but not all of the requirements, in 2020 Cash applied for a renewal of his provisional CTE which was originally issued in August 2018. The District granted his request, having received an overall rating as effective.

For reasons unknown, and what ultimately became the genesis of this appeal, Cash says the District told him with all of his prior experience, he would not have to complete all of the academic requirements and classes associated with the program at Brookdale, essentially waiving that requirement.

Knowing that his first extension would expire in August 2022, Cash applied for a second renewal, which was ultimately disapproved by the Board on September 16, 2022, due to the Board's determination that a second renewal exceeded the limits allowed by law. Moreover, despite Cash's explanation that he relied on a District representative who told him he did not have to complete the classes at Brookdale, the Board and the Department of Education correctly emphasize that the responsibility and awareness of completing all the requirement is on the applicant, regardless of what one individual incorrectly tells them, and he could have verified the information he allegedly received with the Department itself, who would have given him the correct information.

Cash argues he essentially completed most of the program requirements in good faith, and that the "misunderstanding" about his prior academic experience in Maryland should not serve as a barrier to his continued employment in Englewood under the New Teacher Pilot Certification Program, which was a policy directive aimed at filling several open teaching positions which escalated due to retirements of experienced teachers.

He further indicates that as an African American teacher in a highly diverse district, he is the very model the State and certain districts were looking for when this program came into being. During his four years in Englewood, there is no dispute Mr. Cash was rated as an "effective" teacher, and he completed the thirty plus hours of mentoring, as well as the fifty hours of pre-professional experience. He did some of the class requirements at Brookdale but did not do the rest as a result of improper advice he received from a district official. With the second renewal denied, Cash indicates it would be a hardship for him to essentially start over in a new district, in a new subject area, since he would be barred from continuing with the same subject in the same district under State regulations.

Under these circumstances, Cash argues that he is entitled to a waiver as he has substantially complied with the rest of the requirements.

LEGAL ARGUMENT

The State filed a Motion to Dismiss the Appeal, couched in terms of a Motion for Summary Disposition, essentially arguing there are no disputed material facts, since petitioner admitted he did not complete the classroom portion of the alternate teaching program in the required amount of time. A motion for summary disposition may be granted if there is no genuine issue of material fact and the moving party is entitled to prevail as a matter of law. N.J.A.C. 1:1-12.5. Under that rule, "a party may move for summary decision upon all or any of the substantive issues in a contested case. Further, "the decision sought may be rendered if there is no genuine issue as to any material fact challenged, and the movant is entitled to relief as a matter of law."

By analogy, the State suggests it is the equivalent of R. 4:46-2 regarding summary judgment and avoids unnecessary evidentiary hearings when there are no disputed issues of material fact. Contini v. Bd. of Educ. of Newark, 286 N.J. Super. 106 (App. Div. 1995). See also: Brill v. Guardian Life Insurance Company of America, 142 N.J. 520 (1995), wherein the New Jersey Supreme Court established that the key question is whether the evidence is so one-sided that one party must prevail as a matter of law.

The regulation governing provisional certificate renewals, N.J.A.C.6A:9B-8.5 provides:

The principal may recommend a provisional teacher for renewal of his or her two-year provisional certificate if the candidate has not yet completed the requirements for the standard certificate within the first two years of employment pursuant to N.J.A.C. 6A; 9B:-8.4.

See also: N.J.A.C. 6A:9B-8.5 (b)(4) which speaks to limited circumstances that a renewal can be extended beyond the maximum four years in limited circumstances:

The two-year provisional certificate may only be renewed once for a maximum provisional period of four years, or may be renewed twice for a maximum provisional period of six years, if the candidate fulfills one or more of the following in addition to the regular requirements:

1. The candidate holds a CE as a teacher of students with disabilities endorsement, or a CE with Bilingual/bicultural endorsement, or a CE with an English as a second language endorsement.
2. The candidate was issued the provisional certificate after February 1 of the first school year when the candidate was employed; or
3. The candidate does not receive the annual cumulative rating as required for standard certification by July 31st of the candidate's fourth year.

Unfortunately, **I CONCLUDE** that none of these limited exceptions to the maximum four-year period apply to Cash, who completed several other aspects of the program in good faith and was dedicated to the students in Englewood during his time there. Other than the three circumstances outlined above which do not apply to Cash, neither I nor the Commissioner have the discretion to consider the totality of the circumstances to extend/ renew his status.

(Judicial notice is taken of the growing need for otherwise qualified teaching applicants who come from other fields to offset the growing shortage of teachers in this State). Nonetheless, in order to insure that the very best of these individuals who do not go through the regular four year teaching programs are qualified, the State has created a strict series of requirements that all such candidates must complete.

Having completed the majority of the requirements, with the exception of the classroom hours at Brookdale, petitioner cannot be faulted for seeking a waiver from the remaining requirements. Unfortunately, **I FURTHER CONCLUDE** that despite seemingly stellar qualifications, no such waiver exists that would enable the District and the Department to bypass the one key component he failed to complete within the four years. I **THEREFORE CONCLUDE** that the State's Motion to Dismiss the Appeal, presented in the form of a Motion for Summary Disposition must be **GRANTED**.

ORDER

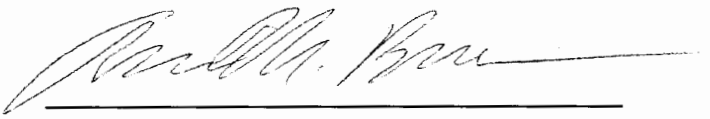
It is hereby **ORDERED** that the determination that petitioner is not eligible for a second renewal of is **Affirmed,** and with all of the facts having already been presented by both parties and no further hearing being necessary, it is further **ORDERED**, that the State's Motion to Dismiss, presented in the form of a Motion for Summary Disposition is **Granted**.. With no material facts in dispute, and petitioner having essentially admitted he did not complete all the requirements, despite having four years to do so **I THERFORE ORDER**, that the matter is hereby decided in its entirety on the merits in favor of Respondent.

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

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

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

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



July 18, 2023
DATE

ANDREW M. BARON, ALJ

Date Received at Agency: July 18, 2023

Date E-Mailed to Parties: July 18, 2023

lr

255-23

New Jersey Commissioner of Education

Final Decision

S.M., on behalf of J.C.,

Petitioner,

v.

Board of Education of the City of Elizabeth,
Union County,

Respondent.

Synopsis

Pro se petitioner appealed the determination of the respondent Board that her daughter – who has now reached the age of majority and graduated – was not entitled to a free public education in Elizabeth schools during the period from February 2023 through the end of June 2023. The Board contended that J.C. lived in Roselle during this period. Petitioner asserted that she and her daughter were domiciled in Elizabeth during the period in question; however, J.C. spends time before and after school at her grandmother's home in Roselle because there is no internet service in the Elizabeth apartment. The Board sought tuition reimbursement for the period of J.C.'s alleged ineligible attendance in Elizabeth schools.

The ALJ found, *inter alia*, that: petitioner S.M. and her daughter, J.C., testified credibly that they moved back to New Jersey from Virginia prior to the start of J.C.'s junior year in high school; S.M. arranged to rent an apartment in Elizabeth, but the unit flooded prior to her occupancy and mother and daughter were then offered housing with J.C.'s aunt in her Elizabeth apartment; the apartment, however, had no internet service so J.C. used her laptop for schoolwork at her grandmother's house in Roselle in the early mornings and after school; there is sufficient credible evidence that J.C. resided in Elizabeth even though she and her mother spent time with J.C.'s grandmother in Roselle for family meals and gatherings, for internet access, and for mutual care and support; working single parents often must call on family members to help out, but this does not constitute a factual predicate for concluding that J.C. resides in Roselle; further, J.C. was of majority age and could be domiciled in a residence separate from her parent; the Board's case here relies solely on computer pings from J.C's computer at the Roselle house and infrequent surveillance of the two addresses, and was not adequate to prove that J.C. did not live in Elizabeth. The ALJ concluded that petitioner met her burden of proof to show residency in Elizabeth and reversed the Board's decision that J.C. was not entitled to a free public education in Elizabeth schools.

Upon review, the Commissioner remanded this case to the OAL pursuant to *N.J.A.C.* 1:1-18.7(a) for the purpose of allowing the ALJ to make factual findings regarding two of the Board's exhibits which were not addressed in the Initial Decision and which the Board contends prove that J.C. was living in Roselle and not Elizabeth during the period in question.

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

255-23
OAL Dkt. No. EDU 02774-23
Agency Dkt. No. 80-3/23

New Jersey Commissioner of Education

Final Decision

S.M., on behalf of J.C.,

Petitioner,

v.

Board of Education of the City of Elizabeth, Union County,

Respondent.

The record of this matter, the Initial Decision of the Office of Administrative Law (OAL), and the exceptions filed by respondent pursuant to *N.J.A.C.* 1:1-18.4, have been reviewed and considered. Petitioner did not file a reply.

This matter concerns the Board's determination that J.C., who has reached the age of majority, was not domiciled in Elizabeth from February 2023 through the end of June 2023 and the Board's subsequent demand for payment of tuition in the amount of $4,084.43. Petitioner appealed the Board's determination, claiming that she and her daughter resided in Elizabeth during the time period at issue, and the matter was transmitted to the OAL for a contested hearing. S.M., J.C., and the Board's investigator testified at the hearing held on July 6, 2023.

The Administrative Law Judge (ALJ) concluded that the very credible testimony of S.M. and J.C., coupled with documents in evidence presented by both parties, constituted sufficient credible evidence to establish that J.C. resided in Elizabeth during the time period in question even though she also spent time at a relative's home in Roselle before and after school. Consequently, the ALJ granted petitioner's appeal and denied the Board's counterclaim for tuition.

In their exceptions, the Board contends, among other things, that prior to the hearing, "J.C. provided her drivers [*sic*] license and bank statement which indicated her address was [in] Roselle." Respondent's Exceptions, at 3. The Board further contends that neither S.M. nor J.C. addressed these documents, marked in evidence as R-11 and R-12, during their hearing testimony.

Upon careful review of the record, the Commissioner finds that a remand of this matter is necessary pursuant to *N.J.A.C.* 1:1-18.7(a) because it is unclear from the Initial Decision whether the ALJ considered respondent's exhibits R-11 and R-12. R-11 is a photograph of J.C.'s New Jersey Probationary Auto License, issued July 11, 2022, and lists her address as a relative's home in Roselle. R-12 is a copy of J.C.'s monthly bank statement for April 2023 which also lists the same Roselle address. Because the record does not contain transcripts, the Commissioner is unable to determine whether these exhibits and their significance were addressed during the hearing. Moreover, neither R-11 nor R-12 are discussed in the ALJ's Initial Decision.

For these reasons, the Commissioner remands the matter to the OAL for the purpose of allowing the ALJ to render factual findings pertaining to R-11 and R-12, to explain the weight she assigned to those exhibits, and to discuss the effect, if any, those exhibits had on her ultimate conclusions of law.

IT IS SO ORDERED.[1]

Angelica Allen-McMillan, Ed.D.
ACTING COMMISSIONER OF EDUCATION

Date of Decision: August 22, 2023
Date of Mailing: August 23, 2023

[1] This decision may be appealed to the Appellate Division of the Superior Court pursuant to *N.J.S.A.* 18A:6-9.1. Under *N.J.Ct.R.* 2:4-1(b), a notice of appeal must be filed with the Appellate Division within 45 days from the date of mailing of this decision.

State of New Jersey
OFFICE OF ADMINISTRATIVE LAW

INITIAL DECISION
OAL DKT. NO. EDU 02774-23
AGENCY DKT. NO. 80-3/23

S.M. ON BEHALF OF MINOR CHILD J.C.,
Petitioner,
v.
BOARD OF EDUCATION OF THE CITY OF ELIZABETH, UNION COUNTY,
Respondent.

S.M. and **J.C.**, pro se

Brian Kane, Esq., for respondent Elizabeth Board of Education (LaCorte, Bundy, Varady & Kinsella, attorneys)

Record Closed: July 6, 2023 Decided: July 19, 2023

BEFORE **GAIL M. COOKSON,** ALJ:

STATEMENT OF THE CASE

This matter involves an appeal by S.M. from the non-residency determination made by the Board of Education of the City of Elizabeth (Board) with respect to her daughter J.C., who has now reached the age of majority and graduated. Petitioner challenges the finding of the Board that they were not domiciled in the district and that J.C. was not entitled, therefore, to a free education.

PROCEDURAL HISTORY

By notice dated March 8, 2023, petitioner was notified that the Board's Legal Department had determined that J.C. be disenrolled from the high school on the basis that she did not live in Elizabeth but rather in Roselle. Petitioner filed a pro se Residency Appeal pursuant to N.J.S.A. 18A:38-1 and N.J.A.C. 6A:3-8.1 and 6A:22 with the Commissioner of Education (Commissioner) in a timely manner on March 21, 2023. On March 27, 2023, the respondent Board filed an Answer to the appeal with a Counterclaim for reimbursement from petitioner for the costs of tuition incurred by the attendance of her daughter in the Board's school district.

The appeal and counterclaim were transmitted by the Commissioner to the Office of Administrative Law on March 28, 2023, as contested matters in accordance with N.J.S.A. 52:14B-1 to -15. The case was assigned to me on April 3, 2023. I convened a case management telephone conference on May 8, 2023. The hearing was held on July 6, 2023, on which date the record closed.

FACTUAL DISCUSSION

As an initial matter, the following facts, while not the subject of a joint stipulation, were undisputed:

1. J.C. has a date of birth of November 6, 2004, and thus reached the age of majority prior to the undertaking of the residency investigation by the Board.

2. J.C. began attending Elizabeth High School in September 2021 for her junior and then senior years.

3. J.C. graduated on June 23, 2023, and will be attending Spelman College in the fall.

4. The residence at 607 E. Second Ave. (607 2nd), Roselle, is owned by J.C.'s grandmother P.S.

5. The residence at 1422 Lower Road (1422 Lower), Elizabeth, is an apartment rented by J.C.'s aunt (by marriage).

6. There is no residence at 1433 Lower Road; rather, that property is a cemetery and its association to this student was a clerical error of unknown origin.[1]

Based upon due consideration of the testimonial and documentary evidence presented at the hearing, and having had the opportunity to observe the demeanor of the witnesses and assess their credibility, I **FIND** the following **FACTS**:

The Board disputes that J.C. is domiciled at her aunt's home at 1422 Lower and presented the testimony and investigative report of William Buteau in support of its disenrollment decision. Buteau has been employed by the Board as an investigator with the Legal Department for approximately six years. He received no training in this position except for the use of the CLEAR and ACCURINT software programs. Buteau has a high school education and worked for thirty years in the Elizabeth Police Department, achieving the rank of Detective.

Buteau was assigned the investigation of J.C. in February 2023 because the Board's Legal Department noticed that her school-issued laptop was often connected to the internet at a consistent location in Roselle. He reviewed her enrollment demographics and the documentation submitted from her enrollment at the beginning of the 2021-2022 school year.

Buteau testified that he conducted a visual surveillance of the two subject properties and persons related to the residency at those locations on February 17, March 23, 24, 27, 28, and then June 29, 2023. I note that the last date just listed is after the school year had ended and graduation had taken place. At that time, Buteau observed that the Volkswagen was parked in the Roselle driveway and there were graduation celebration balloons prominently displayed. On the earliest surveillance occasion, Buteau was able to identify, as an initial matter with some database searches and assistance, the three vehicles owned by petitioner and her mother. On March 23, he passed by at 4:04

[1] Actually, it is clear on S.N.'s Affidavit (R-2) that her address was 1422 Lower Road, so it probably was an inadvertent error during input by Board staff.

p.m. and saw the Honda Accord used by S.M. in the driveway. On March 24, he passed by again and saw the Volkswagen used by J.C. in the driveway at 7:33 a.m. On March 27, between 2:54 and 3:01 p.m., Buteau was at 607 2nd and observed J.C. leave that residence and drive to 1422 Lower. He requested to speak with her when they both arrived there, but J.C. felt that he should talk to her mother even though she was over the age of 18 at that point. On March 28, at 7:25 a.m., Buteau passed by 607 2nd again and saw the vehicles usually driven by mother and daughter there.

On the counterclaim for tuition asserted by the Board, Buteau testified that the per diem tuition cost for a high school child is $99.63 and should be applied to the period from March 8, 2023, through the end of the school year. I **FIND** that this per diem rate is uncontested. Nevertheless, petitioner rightly points out that J.C. was disenrolled from Monday, March 13 through Friday, March 31, which was during the permitted twenty-one-day appeal period, contrary to the regulations. If I determine that I need to reach the counterclaim, I shall deduct these days from consideration.

J.C. and her mother S.M. both testified in support of the propriety of her enrollment in Elizabeth for her junior and senior years of high school. S.M. testified that she and her daughter returned to New Jersey from Virginia for the start of her junior year due to both the pandemic and a recent marital separation. S.M. had arranged to rent an apartment in Elizabeth and had registered her daughter in the District, but a flood had made that apartment unavailable. At that time, S.M.'s sister-in-law (J.C.'s aunt) offered to let them stay with her at the 607 2nd apartment. S.M. remained there until her grandmother (J.C.'s great grandmother) became ill. This elder family member came from Barbados to live with her daughter P.S., J.C.'s grandmother. At that time, S.M. moved from Elizabeth to the Roselle home in order to assist with her care. J.C. remained with her aunt in Elizabeth. Both S.M. and P.S. are employed in healthcare fields, but S.M. also moonlights as an Uber and Lyft driver.

J.C. testified that she lives with her aunt but also makes time to visit her grandmother's house to see her and her mother. She typically has breakfast over there but eats dinner more often with her aunt. J.C. has done well in high school, achieving a 4.3 GPA, and has been accepted into Spelman College in Atlanta, Georgia for the fall.

During high school, she was President of the National Honor Society and Secretary of both Student Government and Student Council. In addition, she worked weekends at the mall during the school year and held two jobs (i.e., seven days per week) during the summers, including full-time for the Elizabeth Recreation Department.

J.C. also explained that her aunt had no wi-fi connection in her apartment, so she often went to her grandmother's house not only to see her and her mom, but to use the internet there to complete her schoolwork. There were a few times when she connected to the internet while at 1422 Lower but that only occurred because she used her cell phone as a hotspot. J.C. used her 1422 Lower address on her job applications and for her payroll and tax information.

I **FIND** the testimony of S.M. and J.C. to have been very credible. For example, J.C. was almost of majority age by the start of her senior year and had use of her mother's Volkswagen to travel to her grandmother's and aunt's houses and to school, but there was insufficient or unsafe parking at the aunt's residence. Because the car was a lease, S.M. explained that she had required J.C. to park it most often at 607 2nd to save on the "dings" etcetera that could cause a problem at the lease termination.

I am not rejecting Buteau's investigation, but it only went so far. He never interviewed J.C.'s aunt, mother, or grandmother, or asked to inspect the bedrooms and closets for signs of residency. Buteau also never tested the wi-fi reception at that location. Further, he failed to account for summers, holidays or weekends on the internet access data. That data report clearly shows that J.C. is not at her grandmother's house every night but rather on average, only once or twice a week. I **FIND** that this is not indicative of living there throughout the school year. In fact, his own observations are confirmative of the fact that J.C. eats breakfast at 607 2nd but returns to 1422 Lower near the end of the afternoon.

I am also impressed by the fact that J.C. was obviously a very conscientious high school student and has been accepted to Spelman College in Atlanta, Georgia, the top ranked HBCU and one that is also highly ranked overall nationally. The Board should be proud of what J.C. has achieved and what she will undoubtedly contribute to society.

ANALYSIS AND CONCLUSIONS OF LAW

Persons over five and under twenty years of age who are domiciled within a school district may attend its public schools free of charge. N.J.S.A. 18A:38-1(a). For purposes of this subsection, the domicile of an unemancipated child is the domicile of the parent, custodian, or guardian. P.B.K. v. Tenafly Bd., 343 N.J. Super. 419 (App. Div. 2001). If the parent or guardian of a child attending school in the district is not domiciled within the district, the superintendent or administrative principal may apply to the board of education for the child's removal. N.J.S.A. 18A:38-1b.(2). No child shall be removed from school during the twenty-one-day period during which the parent or guardian may contest the board's decision or during the pendency of the proceedings before the Commissioner. Ibid. In a residency appeal, the parent has the burden of proof by a preponderance of the evidence. N.J.S.A. 18A:38-1(b)(2). The legal standard to be applied is set forth in the regulation:

> A student is domiciled in the district when he or she is living with a parent or legal guardian whose permanent home is located within the district. A home is permanent when the parent or guardian intends to return to it when absent and has no present intent of moving from it, notwithstanding the existence of homes or residences elsewhere.
>
> [N.J.A.C. 6A:28-2.4(a)(1)(i)]

It has long been held that a person may have many residences but only one domicile. Somerville Bd. v. Manville Bd., 332 N.J. Super. 6, 12 (App. Div. 2000), aff'd, 167 N.J. 55 (2001). As incorporated in the regulation, the domicile of a person is the place where she has her true, fixed, permanent home and principal establishment, and to which whenever she is absent, she has the intention of returning, and from which she has no present intention of moving. Matter of Unanue, 255 N.J. Super. 362, 374 (Law Div. 1991), aff'd, 311 N.J. Super. 589 (App. Div. 1998), certif. denied, 157 N.J. 541 (1998), cert. denied, 526 U.S. 1051, 119 S.Ct. 1357, 143 L. Ed.2d 518 (1999). The acts, statements and conduct of the individual, as viewed in light of all circumstances, determine a person's true intent. Collins v. Yancey, 55 N.J. Super. 514, 521 (Law Div. 1959).

Where a person has more than one residence, the following factors are useful in determining his or her domicile: the physical characteristics of each place, the time spent and the things done in each place, the other persons found there, the person's mental attitude towards each place, and whether there is or is not an intention, when absent, to return. Mercadante v. City of Paterson, 111 N.J. Super. 35, 39-40 (Ch. Div. 1970), aff'd, 58 N.J. 112 (1971). A choice of domicile by a person, irrespective of his motive, will be honored by the court, provided there are sufficient objective indicia, by way of proofs, supporting the actual existence of that domicile." In re Unanue, 255 N.J. Super. 362, 374 (Law Div. 1991).

Based upon the testimony and documents presented by each party, I **CONCLUDE** that there is sufficient credible evidence that J.C. resided at 1422 Lower Road even if she spent time at 607 2nd, as did her mother until an elderly family member took ill. The petitioners plainly spend time with J.C.'s grandmother both for common family meals and gatherings, e.g., graduation celebration after school ended, but also for internet access, and mutual care and support. This extended family assisted one another with responsibilities for supporting and nurturing J.C. To argue that children cannot be enrolled in a school district unless they are cared for before and after school and on weekends within that same school district would disenroll a substantial portion of our population. Working parents, especially single parents, often must call upon the volunteer services of grandmothers, cousins, or aunts to help. But the fact that J.C.'s family members help out with these types of responsibilities does not form the factual predicate for concluding that permanent residence exists in Roselle. Further, J.C. was of majority age and therefore, could be domiciled in a residence separate from her parent.

In sum, I **CONCLUDE** that the above-referenced testimonial descriptions by petitioner and her daughter of their daily routines were credible, made sense, and hung together. Accordingly, I **CONCLUDE** that petitioner has met the burden of proof on her appeal of the Board's non-residency and de-enrollment determinations. Therefore, I also **CONCLUDE** that the Board is not entitled to an award in its favor on the counterclaim for the full amount of the partial school year tuition cost.

ORDER

Based on the foregoing findings of fact and conclusions of law, it is **ORDERED** that the relief requested by S.M. on behalf of J.C. be and the same is **GRANTED** and her residency appeal is **UPHELD**. The decision of the Board with respect to J.C.'s right to a free public education in Elizabeth is **REVERSED**. Accordingly, it is further **ORDERED** that respondent City of Elizabeth Board of Education's counterclaim for tuition reimbursement be and the same is **DENIED**.

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

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

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

Gail M. Cookson

July 19, 2023
DATE

GAIL M. COOKSON, ALJ

Date Received at Agency: 7/19/23

Date Mailed to Parties: 7/19/23

id

APPENDIX

LIST OF WITNESSES

For Petitioners:

S.M.

J.C.

For Respondent:

William Buteau

LIST OF EXHIBITS IN EVIDENCE

For Petitioner:

P-1 J.C. Paystub

P-2 J.C. W-2

P-3 Elizabeth Department of Recreation Application, Summer 2022

For Respondent:

R-1 Petitioner J.C.'s Demographics

R-2 Residency Affidavit C – Temporary Housing, dated September 9, 2021

R-3 S.N. CLEAR Background Check

R-4 Electronic data of J.C.'s school laptop locations

R-5 Notice of Initial Determination of Ineligibility, dated February 23, 2023

R-6 Documents submitted by S.M. on behalf of J.C.

R-7 Notices of Final Ineligibility for J.C., dated March 8, 2023

R-8 Summary of Residency File Report, dated March 28, 2023

R-9 Petitioner J.C.'s CLEAR Background Check

R-10 Petitioner J.C.'s CLEAR Background Check for Elizabeth, NJ

R-11 Petitioner J.C.'s Driver's License

R-12 Petitioner J.C.'s Bank Statement S.M. on behalf of minor children, J.C.

R-13 Photograph Surveillance, dated June 7, 2023

256-23

New Jersey Commissioner of Education

Final Decision

Michael Bazerman,

Petitioner,

v.

New Jersey Department of Education, Office of Student Protection,

Respondent.

Synopsis

Petitioner appealed the determination of the respondent New Jersey Department of Education, Office of Student Protection (OSP), permanently disqualifying him – pursuant to *N.J.S.A.* 18A:6-7.1 – from performing electrical work in New Jersey school facilities after a background check revealed a conviction in New York State for official misconduct. The issue in this case is whether petitioner's New York official misconduct offense, a Class A misdemeanor crime codified at *N.Y.P.L.* 195.00, is substantially equivalent to New Jersey's official misconduct offense, a second-degree crime codified at *N.J.S.A.* 2C:30-2. The parties filed cross motions for summary decision.

The ALJ found, *inter alia*, that: there are no material facts at issue and the matter is ripe for summary decision; petitioner works as a low voltage electrician; he was required to submit to a criminal background check when his employer applied for an installation job at a New Jersey (NJ) public school; the background check revealed a 2013 conviction under N.Y.P.L. 195.00 for official misconduct in New York (NY); the conviction stemmed from an audit wherein petitioner was unable to account for $5,811 that the New York Police Department (NYPD) reimbursed him for surveillance and wiretap equipment he purchased while employed as a detective for the NYPD; although both N.Y.P.L. 195.00 and *N.J.S.A.* 2C:30-2 use the same language, the offenses were not substantially equivalent because they subject the offender to different penalties. The ALJ concluded that because the NY and NJ statutes are not substantially equivalent, the petitioner should not be permanently barred from employment on NJ school projects; accordingly, petitioner's motion for summary decision was granted.

Upon review, the Commissioner rejected the Initial Decision, finding the appeal to be untimely. The Commissioner noted that, even assuming the petition was timely filed, petitioner's position – adopted by the ALJ – that *N.Y.P.L.* 195.00 and *N.J.S.A.* 2C:30-2 are not substantially equivalent because the penalties imposed for each offense differ, is unavailing. Instead, the Commissioner found, *inter alia*, that *N.Y.P.L.* 195.00 and *N.J.S.A.* 2C:30-2 are substantially equivalent crimes, and a plain language reading of *N.J.S.A.* 18A:6-7.1(d) makes clear that the appropriate inquiry is whether the crimes or offenses are substantially equivalent, not whether the penalties associated with them are substantially equivalent. Accordingly, OSP's motion for summary decision was granted and the petition was dismissed.

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

256-23
OAL Dkt. No. EDU 05310-22
Agency Dkt. No. 92-4/22

New Jersey Commissioner of Education

Final Decision

Michael Bazerman,

Petitioner,

v.

New Jersey Department of Education, Office of Student Protection,

Respondent.

The record of this matter, the Initial Decision of the Office of Administrative Law (OAL), the exceptions filed by respondent pursuant to *N.J.A.C.* 1:1-18.4, and petitioner's reply thereto have been reviewed and considered.

This matter concerns whether *N.J.S.A.* 18A:6-7.1 permanently disqualifies petitioner from performing electrical work at public school facilities after a background check revealed that he was convicted of official misconduct in New York. At issue is whether New York's official misconduct offense, a Class A misdemeanor crime codified at *N.Y.P.L.* 195.00, is substantially equivalent to New Jersey's official misconduct offense, a second-degree crime codified at *N.J.S.A.* 2C:30-2.

N.J.S.A. 18A:6-7.1 provides, in relevant part:

> A facility, center, school, or school system under the supervision of the Department of Education and board of education which cares for, or is involved in the education of children under the age of 18 shall not employ for pay or contract for the paid services of any teaching staff member . . . or any other person serving in a position which involves regular contact with pupils unless the employer has first determined consistent with the requirements and

> standards of this act, that no criminal history record information exists . . . which would disqualify that individual from being employed or utilized in such capacity or position. . . .

The statute mandates that, absent limited exceptions not applicable here, individuals convicted of "any crime of the first or second degree" are "permanently disqualified from employment or service." *Ibid.* Moreover, "[f]or the purposes of this section, a conviction exists if the individual has at any time been convicted under the laws of this State or under any similar statutes of the United States or any other state for a substantially equivalent crime or other offense." *N.J.S.A.* 18A:6-7.1(d). Under New York law, misdemeanors are considered crimes. *See N.Y.P.L. §* 10.00(6).

The relevant facts are undisputed. In 2013, petitioner was convicted of official misconduct pursuant to *N.Y.P.L.* 195.00 while employed by the New York City Police Department (NYPD) as a detective. According to petitioner, he was authorized to purchase equipment related to surveillance and wiretap activities with his own money and would receive reimbursement for same upon submission of receipts. During an audit, he was unable to account for equipment for which he had received reimbursement and was subsequently charged with official misconduct. He pled guilty, served no jail time, received a conditional discharge after one-year, paid restitution in the amount of $5,811, and was barred from future employment as a public official.[1]

In 2021, petitioner, now employed as an electrician and data technician in New Jersey with NetQ Multimedia Company, was assigned to work on a project at a public school building in Toms River and underwent a criminal background check. Upon learning of petitioner's official misconduct

[1] In 2015, the State of New York issued petitioner a "certificate of relief from disabilities" which relieves him "of all disabilities and bars to employment, excluding the right to be eligible for public office" based upon his conviction. However, the certificate states that it "shall NOT prevent any judicial, administrative, licensing, or other body, board, or authority from relying upon the conviction specified . . . as the basis for the exercise of its discretionary power to suspend, revoke, refuse to issue or renew any license, permit or other authority or privilege." *See also In re Winston*, 438 *N.J. Super.* 1, 8 (App. Div. 2014) ("A New York certificate of relief from disabilities does not alter or affect the criminal conviction to which it relates.").

conviction, respondent barred petitioner from employment at public school facilities pursuant to *N.J.S.A.* 18A:6-7.1. Respondent reasoned that New York's official misconduct offense was substantially equivalent to New Jersey's official misconduct offense, a second-degree crime. Consequently, since *N.J.S.A.* 18A:6-7.1 provides that all convictions for first- and second-degree crimes are disqualifying offenses, respondent determined that petitioner was therefore permanently disqualified.

Petitioner appealed, and the matter was transmitted to the Office of Administrative Law (OAL). Respondent initially moved to dismiss the petition as untimely, but later withdrew the motion. Because none of the material facts were disputed, the parties moved for summary decision. The Administrative Law Judge (ALJ) granted petitioner's cross-motion for summary decision upon concluding that *N.Y.P.L.* 195.00 and *N.J.S.A.* 2C:30-2 were not substantially equivalent offenses. Although the ALJ found that "[b]oth statutes use the same language," he reasoned that the offenses were not substantially equivalent because they subject the offender to different penalties. Initial Decision at 5. Specifically, the ALJ determined that the maximum term of imprisonment for a Class A misdemeanor in New York is 364 days, while the maximum term of imprisonment for a second-degree offense in New Jersey is ten years. *Ibid.*

In its exceptions, respondent argues that the ALJ erroneously focused his analysis on the penalties that courts may impose at sentencing for each offense instead of the nearly identical statutory language defining the elements of each offense. Respondent maintains that because *N.Y.P.L.* 195.00 and *N.J.S.A.* 2C:30-2 are substantially equivalent crimes, petitioner is permanently disqualified from working at public school facilities pursuant to *N.J.S.A.* 18A:6-7.1. Respondent also contends that the ALJ went beyond the four corners of *N.J.S.A.* 18A:6-7.1 when he found that

petitioner's conviction did not reflect the level of dishonesty "required for disqualification under *N.J.S.A.* 18A:6-7.1 suggested by the enumerated crimes." Initial Decision at 5.

In his reply, petitioner requests that the Commissioner adopt the ALJ's Initial Decision. He maintains that a comparative analysis of the two crimes reveals that they are not substantially equivalent and that the ALJ had the discretion to consider, as part of his analysis, that the sentences imposed for each crime differ. Furthermore, petitioner disagrees with respondent that the ALJ went beyond the four corners of *N.J.S.A.* 18A:6-7.1 when he found that "the record of deceit in petitioner's conviction is lacking" and that petitioner simply "failed to account" for money. Initial Decision at 5. Finally, although this issue was neither addressed by the ALJ nor discussed in respondent's exceptions, petitioner contends that his misdemeanor conviction "cannot be considered a prior conviction for comparative analysis and disqualification purposes" because *N.J.S.A.* 2C:44-4(c), a statute governing the sentencing of criminal offenders, states that "[a] conviction in another jurisdiction shall constitute a prior conviction of a crime if a sentence of imprisonment in excess of one year was authorized under the law of the other jurisdiction."[2]

Upon review, the Commissioner rejects the Initial Decision of the OAL. First, although this issue was not addressed by the ALJ, the Commissioner finds and concludes that petitioner's appeal was untimely. *N.J.A.C.* 6A:3-1.3(i) provides that petitions must be filed "no later than the 90th day from the date of receipt of the notice of a final order, ruling, or other action" by an agency. "The "ninety-day limitation period" is a "reasonable procedural requirement" that "provides finality in education matters" while affording litigants a "meaningful opportunity to file [a] petition." *Kaprow v. Bd. of Educ. of Berkeley Twp.*, 131 *N.J.* 572, 583 (1993).

[2] *N.J.A.C.* 1:1-18.4(d) provides that replies "may address the issues raised in the exceptions filed by the other party."

Respondent issued its determination on September 13, 2021. As such, petitioner should have filed his petition on or before December 13, 2021. However, his petition was not received by the Office of Controversies and Disputes (Office) until April 26, 2022. Even if the Office had received petitioner's purported email submissions of January 19 and February 25, 2022, they would have been untimely as well. While the record reflects that an employee of respondent mistakenly told petitioner via email on September 22, 2022, that there was no timeline for the filing of an appeal, the limitation period is established by regulation and applies regardless of any statement to the contrary by an employee. Moreover, the employee also provided petitioner with the Office's email address. The onus was on petitioner to inquire with the Office, which is responsible for the processing of petitions, if he had questions. For these reasons, petitioner's appeal should be dismissed as untimely.

But even assuming his petition was timely filed, petitioner's position—adopted by the ALJ—that *N.Y.P.L.* 195.00 and *N.J.S.A.* 2C:30-2 are not substantially equivalent because the penalties imposed for each offense differ, is unavailing. Instead, the Commissioner finds and concludes that *N.Y.P.L.* 195.00 and *N.J.S.A.* 2C:30-2 are substantially equivalent crimes and that, consequently, petitioner is permanently disqualified from employment on public school projects pursuant to *N.J.S.A.* 18A:6-7.1.

At the outset, the Appellate Division has determined that "*N.J.S.A.* 2C:30-2 is based upon New York Penal Law § 195.00." *State v. Brady*, 452 *N.J. Super.* 143, 162 (App. Div. 2017). That finding is bolstered by a comparative review of the statutes' plain language. As illustrated below, the elements of each offense are nearly identical.

N.Y.P.L. 195.00, Official Misconduct, states:

> A public servant is guilty of official misconduct when, with intent to obtain a benefit or deprive another person of a benefit:

1. He commits an act relating to his office but constituting an unauthorized exercise of his official functions, knowing that such act is unauthorized; or

2. He knowingly refrains from performing a duty which is imposed upon him by law or is clearly inherent in the nature of his office.

Official misconduct is a class A misdemeanor.

By comparison, *N.J.S.A.* 2C:30-2 states:

> A public servant is guilty of official misconduct when, with purpose to obtain a benefit for himself or another or to injure or to deprive another of a benefit:
>
> a. He commits an act relating to his office but constituting an unauthorized exercise of his official functions, knowing that such act is unauthorized or he is committing such act in an unauthorized manner; or
>
> b. He knowingly refrains from performing a duty which is imposed upon him by law or is clearly inherent in the nature of his office.
>
> Official misconduct is a crime of the second degree. If the benefit obtained or sought to be obtained, or of which another is deprived or sought to be deprived, is of a value of $200.00 or less, the offense of official misconduct is a crime of the third degree.

The Commissioner rejects the ALJ's attempt to distinguish the two offenses by relying on the penalties associated with them. When construing a statute, the best indicator of legislative intent is a statute's plain language. *In re Ridgefield Pk. Bd. of Educ.*, 244 *N.J.* 1, 18 (2020). A plain language reading of *N.J.S.A.* 18A:6-7.1(d) makes clear that the appropriate inquiry is whether the crimes or offenses are substantially equivalent, not whether the penalties associated with them are substantially equivalent. *See N.J.S.A.* 18A:6-7.1(d) ("[A] conviction exists if the individual has at any time been convicted under the laws of this State or under any similar statutes of the United States or any other state for a substantially equivalent crime or other offense.") (emphasis added). The

penalties associated with each crime are neither dispositive nor relevant when determining whether the two crimes are substantially equivalent to one another under *N.J.S.A.* 18A:6-7.1(d).

Furthermore, the ALJ's approach in this matter runs contrary to precedent. *See Kelly v. New Jersey State Department of Education, Criminal History Review Unit*, Commissioner Decision No. 396-18R (December 18, 2018) (holding that because the petitioner's conviction under Pennsylvania law Pa.C.S.A. § 907 for the first-degree misdemeanor of possessing instruments of a crime was substantially equivalent to *N.J.S.A.* 2C:39-4(a), a second-degree crime, he was permanently disqualified from employment pursuant to *N.J.S.A.* 18A:6-7.1). In *Kelly*, the ALJ's analysis, adopted by the Commissioner, centered around the statutory elements of each crime and not their degree or the penalties associated with them. *Kelly v. New Jersey State Department of Education, Criminal History Review Unit*, OAL Dkt. No. EDU 12761-16 (EDU 5753-12 on remand), Initial Decision (November 16, 2018), at 7-13, *aff'd*, Commissioner Decision No. 396-18R (December 18, 2018). In the end, the different penalties imposed in Pennsylvania and New Jersey had no bearing upon the comparative analysis of the statutory elements of each crime for purposes of determining whether they were substantially equivalent to one another.

In addition, the ALJ's finding that petitioner's conviction did not reflect the level of dishonesty "required for disqualification under *N.J.S.A.* 18A:6-7.1 suggested by the enumerated crimes," Initial Decision at 5, is misplaced. Respondent did not permanently disqualify petitioner based upon a conviction of one of the enumerated crimes at *N.J.S.A.* 18A:6-7.1(a), (b), or (c). On the contrary, respondent's determination was based upon the plain language of *N.J.S.A.* 18A:6-7.1, which mandates that individuals convicted of <u>any</u> first- or second-degree crime "shall be permanently disqualified from employment or service." As written, the statute does not allow for consideration of the level of dishonesty involved in the commission of the offense. Neither the ALJ nor the

Commissioner is permitted to "rewrite a statute or add language that the Legislature omitted." *State v. Munafo*, 222 *N.J.* 480, 488 (2015).

Finally, petitioner's reliance on *N.J.S.A.* 2C:44-4(c) is unavailing because that statute governs the sentencing of criminal offenders and is inapplicable to the present civil matter. As noted, *N.J.S.A.* 18A:6-7.1(d) expressly provides that "[f]or the purposes of this section, a conviction exists if the individual has at any time been convicted under the laws of this State or under any other similar statutes of the United States or any other state for a substantially equivalent crime or other offense." By its plain language, subsection (d) clearly establishes the definition of conviction to be utilized for purposes of *N.J.S.A.* 18A:6-7.1. To instead apply the definition of conviction found at *N.J.S.A.* 2C:44-4(c), which specifically pertains to criminal sentencing, would ignore the plain language of subsection (d) and undermine the Legislature's intent. *See generally Aronberg v. Tolbert*, 207 N.J. 587, 605 (2011) (holding that one "cannot ignore the relevant statutory language to reach a more sympathetic result for [petitioner]").

Accordingly, respondent's motion for summary decision is granted, petitioner's cross-motion for summary decision is denied, and the petition of appeal is hereby dismissed.

IT IS SO ORDERED.[3]

Kathleen Ehling

ACTING COMMISSIONER OF EDUCATION[4]

Date of Decision: August 29, 2023
Date of Mailing: August 30, 2023

[3] This decision may be appealed to the Appellate Division of the Superior Court pursuant to *N.J.S.A.* 18A:6-9.1. Under *N.Y.C.* 2:4-1(b), a notice of appeal must be filed with the Appellate Division within 45 days from the date of mailing of this decision.

[4] Pursuant to N.J.S.A. 18A:4-34, this matter has been delegated to Kathleen Ehling.

State of New Jersey
OFFICE OF ADMINISTRATIVE LAW

INITIAL DECISION
GRANTING SUMMARY
DECISION
OAL DKT. NO. EDU 05310-22
AGENCY DKT. NO. 92-4/22

MICHAEL BAZERMAN,

Petitioner,

v.

NEW JERSEY DEPARTMENT OF EDUCATION,
OFFICE OF STUDENT PROTECTION,

Respondent.

Michael Bazerman, petitioner, pro se

David L. Kalisky, Deputy Attorney General, for respondent (Matthew J. Platkin, Attorney General of New Jersey, attorney)

Record Closed: June 2, 2023 Decided: July 17, 2023

BEFORE: **EDWARD J. DELANOY, JR.**, Deputy Director and ALAJ:

STATEMENT OF THE CASE

Petitioner Michael Bazerman (Bazerman) appeals the New Jersey Department of Education ("respondent" or "DOE") determination that petitioner's New York conviction is

"substantially equivalent" to a first- or second-degree crime in New Jersey, thereby barring petitioner from employment in New Jersey schools.

Petitioner and respondent have filed cross motions for summary decision. The respondent argues that petitioner's conviction for official misconduct in New York disqualifies him from working in New Jersey schools pursuant to N.J.S.A. 18A:6-7.1. In response, petitioner argues that his New York conviction is not "substantially equivalent" to those crimes that bar employment under 18A:6-7.1.

STATEMENT OF FACTS AND PROCEDURAL HISTORY

Petitioner is a low voltage electrician and data technician. Resp. Brief p. 2. On August 18, 2021, petitioner applied for an installation job in one of the Toms River School District's school buildings, requiring him to submit fingerprints for a criminal background check. Ibid.

On September 13, 2021, petitioner was notified that under N.J.S.A. 18A:6-7.1, individuals convicted of first- or second-degree crimes in New Jersey or "substantially equivalent" crimes in other jurisdictions are permanently barred from employment, and, due to his violation of N.Y.P.L 195.00 in 2013, petitioner would be barred from employment. Id. at 3.

Petitioner was convicted of "Official Misconduct: Public Servant Performing Illegal Function," N.Y.P.L. 195.00, because he could not account for $5,811 that the New York Police Department reimbursed him for buying equipment while working for the Department in 2013. Id. at 4. Respondent found that N.Y.P.L. 195 is "substantially equivalent" to N.J.S.A. 2C:30-2, "Official Misconduct." Both statutes use the same language. N.Y.P.L. 195.00 provides:

> A public servant is guilty of official misconduct when, with intent to obtain a benefit or deprive another person of a benefit:

> 1. He commits an act relating to his office but constituting an unauthorized exercise of his official functions, knowing that such act is unathorized; or
>
> 2. He knowingly refrains from performing a duty which is imposed upon him by law or is clearly inherent in the nature of his office.

Official misconduct is a class A misdemeanor.

N.J.S.A. 2D:30-2 provides:

> A public servant is guilty of official misconduct when, with purpose to obtain a benefit for himself or another or to injure or to deprive another of a benefit:
>
> > a. He commits an act relating to his office but constituting an unauthorized exercise of his official functions, knowing that such act is unauthorized or he is committing such act in an unauthorized manner; or
> >
> > b. He knowingly refrains from performing a duty which is imposed upon him by law or is clearly inherent in the nature of his office.

Official misconduct is a crime of the second degree. If the benefit obtained or sought to be obtained, or of which another is deprived or sought to be deprived, is of a value of $200 or less, the offense of official misconduct is a crime of the third degree.

On April 8, 2022, petitioner filed a petition appealing respondent's decision to bar him from employment. Resp. Brief p. 3.

On March 21, 2023, respondent filed a Motion for Summary Decision, and on April 11, 2023, petitioner filed a Cross Motion for Summary Decision. The last pleading was received on June 2, 2023, and the record closed on that day.

The issue is whether N.Y.P.L. 195 is "substantially equivalent" to N.J.S.A. 2C:30-2.

LEGAL ANALYSIS AND CONCLUSION

I. Standard for Summary Decision

Under the Uniform Administrative Procedure Rules, N.J.A.C. 1:1-1.1 to -21.6, "[a] party may move for summary decision upon all or any of the substantive issues in a contested case." N.J.A.C. 1:1-12.5(a). Such motion "shall be served with briefs and with or without supporting affidavits" and "[t]he decision sought may be rendered if the papers and discovery which have been filed, together with the affidavits, if any, show that there is no genuine issue as to any material fact challenged and that the moving party is entitled to prevail as a matter of law." N.J.A.C. 1:1-12.5(b). When the motion "is made and supported, an adverse party in order to prevail must by responding affidavit set forth specific facts showing that there is a genuine issue which can only be determined in an evidentiary proceeding." Ibid.

N.J.S.A. 18A:6-7.1 creates a bar to employment for individuals whose "criminal history record check reveals a record of conviction for any crime of the first or second degree" or for specific enumerated crimes. See Id. N.J.S.A. 18A:6-7.1 elaborates that "[f]or the purposes of [the] section, a conviction exists if the individual has at any time been convicted under the law of this State or under any similar statutes of the United States or any other state for a substantially equivalent crime or other offense." Id.

Most of the enumerated crimes involve actions that place others in physical danger or the threat of harm. See N.J.S.A. 18A:6-7.1(c) (listing "recklessly endangering another person," "burglary," and "threat and other improper influence" among the disqualifying crimes). Indeed, the majority of cases where convictions in other states were deemed "substantially equivalent" fall into this category. See e.g., David Kelly v. New Jersey State Board of Education, EDU 12761-16, initial decision, (Nov. 16, 2018), adopted, (Dec. 18, 2018), https://njlaw.rutgers.edu/collections/oal/html/initial/edu12761-16_1.html (man who recklessly endangered children in PA barred from employment).

In John Caucino v. Department of Education, EDU 6213-04, initial decision, (Feb. 10, 2005), adopted, (March 11, 2005),

https://njlaw.rutgers.edu/collections/oal/html/initial/edu06213-04_1.html., a schoolteacher was found to have defrauded a bank of more than $150,000. Id. N.J.S.A. 18A:6-7.1 also lists perjury among the enumerated crimes, a crime of dishonesty, but also a rather severe one.

Here, petitioner was not convicted of a violent crime. Nor does the level of dishonesty rise to the level required for disqualification under N.J.S.A. 18A:6-7.1 suggested by the enumerated crimes. The benefit petitioner received, approximately $5,000, does not approach that of the more than $150,000 gained in Caucino. Moreover, the record of deceit in petitioner's conviction is lacking. It is simply stated that he "failed to account" for the money, not that he defrauded the NYPD, or perjured himself under oath.

Notably, respondent does not seek petitioner's disqualification based on one of the enumerated crimes, but rather the more general bar of individuals who have been convicted for "any crime of the first or second degree." Resp. Brief p. 13. The more relevant inquiry, therefore, is not whether the elements of the New York crime are comparable to one of the enumerated offenses, but rather whether the class of crime for which petitioner was convicted is "substantially equivalent" to that of the class of first or second-degree crimes in New Jersey.

Petitioner was convicted of a Class A misdemeanor in New York, a classification that carries with it imprisonment that "shall not exceed three hundred sixty-four days." N.Y.P.L. 70.15.1. In contrast, a second-degree crime in New Jersey carries with it a prison term "between five years and ten years." A New York Class A misdemeanor, therefore, is clearly not "substantially equivalent" to a second-degree crime in New Jersey.

To create the substantial equivalence, respondent is essentially arguing that, due to the similarity of the language between N.Y.P.L. 195.00 and N.J.S.A. 2C:30-2, it can be inferred that petitioner would have been convicted under N.J.S.A. 2C:30-2 had he been tried for the same actions in New Jersey. Such an argument, however, ignores the actualities of sentencing in different jurisdictions. Similar language may lead to two very

different legal standards in application. Moreover, petitioner plead guilty to the charge of official misconduct based on the penalty the charge holds. Resp. Brief Ex. F. Had petitioner been facing five to ten years under N.J.S.A. 2C:30-2, the result may have been very different.

The only reliable comparison that can be drawn, therefore, is based on the classification of the crimes. N.Y.P.L. 195.00 is not a crime that involves "the use of force or the threat of force" like those enumerated under N.J.S.A. 18A:6-7.1, and respondent does not argue that N.Y.P.L. 195.00 is equivalent to one of these enumerated crimes. Instead, respondent argues petitioner's crime is "substantially equivalent" to the general category of first-and second-degree crimes in New Jersey. These categories are defined not by the elements of crimes, but by the sentences they carry. Thus, the proper comparison is not the elements of the crimes but the sentence classifications. Here, we have a Class A Misdemeanor in New York which, based upon classification, is a much less serious crime than a first- or second-degree crime in New Jersey.

CONCLUSION

I **CONCLUDE** that based on the undisputed facts and the documents presented by the parties, N.Y.P.L. 195.00 is not "substantially equivalent" to N.J.S.A. 2C:30-2, and petitioner's Cross Motion for Summary Decision should be granted.

ORDER

I hereby **ORDER** that the petitioner's motion for summary decision is **GRANTED**, and respondent's motion for summary decision is **DISMISSED**.

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

This recommended decision may be adopted, modified, or rejected by the **COMMISSIONER OF THE DEPARTMENT OF EDUCATION,** who by law is authorized to make a final decision in this matter. If the Commissioner of the Department of

Education does not adopt, modify, or reject this decision within forty-five days and unless such time limit is otherwise extended, this recommended decision shall become a final decision in accordance with N.J.S.A. 52:14B-10.

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

July 17, 2023
DATE

Edward J Delanoy Jr
EDWARD J. DELANOY, JR.,
Deputy Director and ALAJ

Date Received at Agency: _____

Date Mailed to Parties: _____

EJD/cb

APPENDIX

EXHIBITS

For petitioner

- Response to Motion for Summary Decision, dated April 9, 2023
- Response to May 30, 2023, Reply, dated May 15, 2023

For respondent

- Letter Brief and Certification in Support of Motion for Summary Decision, dated March 20, 2023
- Reply Brief in Support of Motion for Summary Decision, dated May 8, 2023

257-23
State Board of Examiners Dkt No. 1920-110
Agency Dkt. No. 3-4/23A

New Jersey Commissioner of Education

Final Decision

In the Matter of the Certificates of
Tarley Cooper, State Board of Examiners,
New Jersey Department of Education.

Order of Revocation by the State Board of Examiners, April 13, 2023

Appellant, *pro se*

For the Respondent State Board of Examiners, Sadia Ahsanuddin, Deputy Attorney General (Matthew J. Platkin, Attorney General of New Jersey)

The Commissioner has reviewed the record and the papers filed in connection with appellant Tarley Cooper's appeal of the Order of the State Board of Examiners (Board), dated April 13, 2023, revoking his Teacher of Elementary School in Grades K-6 and Teacher of Students with Disabilities certificates. In February 2019, appellant pled guilty to criminal charges of Aggravated Assault and Recklessly Endangering Another Person in Pennsylvania. Based on the conviction, the Pennsylvania Professional Standards and Practices Commission revoked appellant's educator certificate in January 2020, and the Delaware Department of Education revoked his educator licenses in August 2021.

In April 2021, the Board found that the level and nature of appellant's conduct provided just cause for the consideration for the revocation of his New Jersey certificates and issued an Order to Show Cause (OTSC). In his Answer, Cooper acknowledged his conviction but noted that he had sent a letter to the Federal Bureau of Investigation (FBI) requesting that the

conviction be withdrawn because the police complaint was fabricated. The Board concluded that appellant had engaged in unbecoming conduct and that the appropriate penalty was revocation of his certificates.

On appeal, appellant argues that the incident that led to his conviction was fabricated by the police and that he is the target of a conspiracy by an unnamed hate group. Appellant contends that he has always disputed the charges against him, and that he has contacted the FBI, the Governor of Pennsylvania, and the Pennsylvania Board of Pardons (BOP) to have his convictions overturned.

In reviewing appeals from decisions of the Board, the Commissioner may not substitute her judgment for that of the Board so long as the appellant received due process and the Board's decision is supported by sufficient credible evidence in the record. Further, the Board's decision should not be disturbed unless the appellant demonstrates that it is arbitrary, capricious, or unreasonable. *N.J.A.C.* 6A:4-4.1(a). With regard to reviewing a sanction imposed by the Board, the Appellate Division has defined the standard as determining whether the "punishment is so disproportionate to the offense, in light of all the circumstances, as to be shocking to one's sense of fairness." *In re Certificates of Benjamin Norton*, 2016 N.J. Super. Unpub. LEXIS 2291, *6-7 (internal citations and quotations omitted).

Upon review of the record, the Commissioner concurs with the Board that appellant has engaged in unbecoming conduct. The Commissioner also finds that the Board's decision to revoke appellant's certifications was not arbitrary, capricious, or unreasonable. While

petitioner provided copies of letters requesting an investigation by the FBI[1] and a pardon from the Governor of Pennsylvania and the BOP,[2] he does not appear to have appealed his conviction through the courts, nor has he provided any information demonstrating that the FBI, Governor, or BOP have acted on his requests. In the absence of any such information, appellant's convictions stand, and the Commissioner is satisfied that the record adequately supports the Board's determination that appellant engaged in unbecoming conduct and that revocation of his certificates is the appropriate penalty.

Accordingly, the decision of the Board is affirmed. Appellant's Teacher of Elementary School in Grades K-6 and Teacher of Students with Disabilities certificates are hereby revoked.[3]

Kathleen Ehling

ACTING COMMISSIONER OF EDUCATION[4]

Date of Decision: August 29, 2023
Date of Mailing: August 30, 2023

[1] Appellant's letter to the FBI is dated March 16, 2021, and it references an earlier request dated October 21, 2019. Accordingly, the FBI had ample time to act upon the request prior to the issuance of the Board's decision if it intended to do so.

[2] The Commissioner notes that both appellant's letter to the Governor and his application to the BOP are dated after the Board's decision revoking his certificates. The Commissioner cannot conclude that the Board's decision was arbitrary, capricious, or unreasonable based on documents that did not exist at the time that decision was made.

[3] This decision may be appealed to the Appellate Division of the Superior Court pursuant to *N.J.S.A.* 18A:6-9.1. Under N.J. Ct.R. 2:4-1(b), a notice of appeal must be filed with the Appellate Division within 45 days from the date of mailing of this decision.

[4] Pursuant to N.J.S.A. 18A:4-34, this matter has been delegated to Kathleen Ehling.

IN THE MATTER OF	:	NEW JERSEY DEPARTMENT OF EDUCATION
THE CERTIFICATES OF	:	STATE BOARD OF EXAMINERS
TARLEY COOPER	:	ORDER OF REVOCATION
_____	:	DOCKET NO: 2021-138

At its meeting of February 26, 2021, the State Board of Examiners (Board) reviewed information received from the National Association of State Directors of Teacher Education and Certification and the Commonwealth of Pennsylvania Professional Standards and Practices Commission (Pennsylvania Commission) regarding Tarley Cooper. On February 12, 2019, Cooper pled guilty to criminal charges of Aggravated Assault and Recklessly Endangering Another Person in the Delaware County Court of Common Pleas in Pennsylvania. On January 31, 2020, the Pennsylvania Commission revoked his educator certificate based on the undisputed conviction for Aggravated Assault and Recklessly Endangering Another Person.

Cooper currently holds a Teacher of Elementary School in Grades K-6 Certificate and a Teacher of Students with Disabilities Certificate. Upon review of the above information, the Board voted at its meeting of April 1, 2021 to issue Cooper an Order to Show Cause as to why his certificates should not be revoked.

On August 2, 2021, the Board received notice that the Delaware Department of Education revoked Cooper's Delaware educator license(s) as a result of the Aggravated Assault and Recklessly Endangering convictions in Pennsylvania.

The Board sent Cooper the Order to Show Cause by regular and certified mail on April 6, 2021. The Order provided that Cooper must file an Answer within 30 days. The certified return receipt was returned as received and the regular mail was not returned. The Board then sent Cooper a Second Notice on May 25, 2021. Again, the certified return receipt was returned as received and the regular mail was not returned.

The Board then received information that Cooper's address may have changed. Accordingly, the Board resent the Order on August 26, 2021. Cooper filed an Answer on September 3, 2021.

In his Answer, Cooper acknowledged his conviction but noted that he sent a letter to the FBI in response to the Order to Show Cause; the letter requested that his conviction be withdrawn because the entire police criminal complaint was fabricated. Cooper indicated in his Answer that he was falsely accused, abused, and kidnapped. *See* Answer at ¶1-4.

Thereafter, pursuant to *N.J.A.C.* 6A:9B-4.6(e), on November 10, 2021, the Board sent Cooper a hearing notice by regular and certified mail. The notice explained that it appeared that no material facts were in dispute as Cooper was convicted of the crime(s). Cooper was offered an opportunity to submit written arguments on the issue of whether the conduct addressed in the Order to Show Cause constituted conduct unbecoming a certificate holder, as well as arguments with regard to the appropriate sanction in the event that the Board found just cause to take action against his certificates. Cooper was also offered the opportunity to appear before the Board to provide testimony on the sanction issue.

Cooper responded that he could only refer the Board to the letter he sent to the FBI. He was unsure how long it would take to receive a response from the FBI regarding his letter and asked that the Board request that information from the FBI if it required same. After advising Cooper that the Board is not required to request information from the FBI for his defense, the Board requested Cooper provide information on whether he has a pending appeal of his conviction or other information to show that the conviction is pending a review or appeal. Cooper did not produce such information and the Board advised this matter would be placed on an agenda for a hearing.

In additional communications Cooper indicated that he wished to appear before the Board virtually as he would be unable to appear in person. The Board scheduled the matter for a hearing at its January 26, 2023 meeting and sent Cooper the meeting access information, along with meeting procedures.

Prior to that scheduled meeting, Cooper submitted a letter dated January 19, 2023 wherein he indicated that he would not be able to attend the hearing due to a statement in the Board's invitation to the virtual meeting. The Board's coordinator offered several times for Cooper to attend, advising that the hearing procedures provided guidance on the fact that the hearing was limited to evidence in mitigation of the penalty and was not a factual hearing. Cooper interpreted this information as limiting and elected not to appear for his scheduled hearing. The Board was, however, provided with his January 19, 2023 correspondence. Cooper did not attend the scheduled hearing.

The threshold issue before the Board in this matter is whether Cooper's conduct constitutes conduct unbecoming a certificate holder. At its meeting of March 3, 2023, the Board considered the allegations in the Order to Show Cause as well as Cooper's Answer. The Board determined that no material facts related to Cooper's offense were in dispute since he acknowledge that he was criminally convicted of Aggravated Assault and Recklessly Endangering Another Person.

Although Cooper indicated he was requesting an investigation with the FBI regarding his conviction, he did not produce paperwork demonstrating he filed a formal appeal of the convictions, or that the FBI had initiated an investigation into his allegations such that his conviction could potentially be overturned. The Board is not obligated to pursue such information and Cooper did not provide same to the Board. Cooper did not provide any information or documentation indicating that his conviction was overturned or on appeal.

Given that the conviction remains and there is no information on the status of any appeal or investigation into the convictions, the Board determined that summary decision was appropriate in this matter. *N.J.A.C.* 6A:9B-4.6(h).

The Board must now determine whether Cooper's conduct, as set forth in the Order to Show Cause, represents just cause to act against his certificates pursuant to *N.J.A.C.* 6A:9B-4.4. The Board finds that it does.

The Board may revoke or suspend the certification of any certificate holder on the basis of demonstrated inefficiency, incapacity, conduct unbecoming a teacher or other just cause. *N.J.A.C.* 6A:9B-4.4. "Teachers... are professional employees to whom the people have entrusted the care and custody of ... school children. This heavy duty requires a degree of self-restraint and controlled behavior rarely requisite to other types of employment." *Tenure of Sammons*, 1972 *S.L.D.* 302, 321.

Furthermore, unfitness to hold a position in a school system may be shown by one incident, if sufficiently flagrant. *Redcay v. State Bd. of Educ.*, 130 *N.J.L.* 369, 371 (1943), *aff'd*, 131 N.J.L. 326 (E & A 1944). In this instance, Cooper's actions in being convicted of Aggravated Assault and Reckless Endangerment, along with having his Pennsylvania and Delaware educator certificates revoked demonstrate behavior that falls far short of the role model status expected of teachers. The Board therefore concludes that the appropriate response to Cooper's breach is the revocation of his certificates.

Accordingly, on March 3, 2023, the Board voted to revoke Tarley Cooper's Teacher of Elementary School in Grades K-6 Certificate and Teacher of Students with Disabilities Certificate. On this 13th day of April 2023, the Board voted to adopt its formal written decision and it is therefore ORDERED that the revocation of Tarley Cooper's certificates be effective immediately.

It is further ORDERED that Cooper return his certificates to the Secretary of the State Board of Examiners, Office of Certification and Induction, P.O. Box 500, Trenton, NJ 08625-0500 within 30 days of the mailing date of this decision.

Rani Singh, Secretary
State Board of Examiners

RS/KAG/cf

Date of Mailing:

Appeals may be made to the Commissioner of Education pursuant to the provisions of *N.J.S.A.* 18A:6-38.4.

258-23SEC+

New Jersey Commissioner of Education

Final Decision

Joseph Argenziano,

Complainant,

v.

Kathleen Fable, Board of Education of the Northern Valley Regional School District, Bergen County,

Respondent.

Synopsis

Complainant alleged, *inter alia*, that respondent, a member of the Northern Valley Regional School District Board of Education, violated two sections of the School Ethics Act, *N.J.S.A.* 18A:12-21 *et seq,* when she conducted a personal investigation into the cost of computer equipment by contacting vendors and other school districts without authorization from the Board, actions that had the potential to compromise the Board. The School Ethics Commission (SEC) determined that the respondent's actions violated *N.J.S.A.* 18A:12-24.1(c) and *N.J.S.A.* 18A:12-24.1(e) of the Code of Ethics for School Board Members and recommended a penalty of censure.

The case was forwarded to the Commissioner for final determination of the appropriate penalty in this matter. Upon review, the Commissioner concurred with the penalty recommendation of the SEC. Accordingly, the respondent shall be censured as a school official found to have violated the School Ethics Act.

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

258-23SEC+
SEC Dkt. No. C20-20
OAL Dkt. No. EEC 10182-20
Agency Dkt. No. 204-7/23

New Jersey Commissioner of Education

Final Decision

Joseph Argenziano,

Complainant,

v.

Kathleen Fable, Board of Education of the Northern Valley Regional School District, Bergen County,

Respondent.

The Commissioner has reviewed the record of this matter and the July 25, 2023 decision of the School Ethics Commission (Commission). The Commission found that respondent Kathleen Fable, a member of the Northern Valley Regional Board of Education (Board), violated *N.J.S.A.* 18A:12-24.1(c) and *N.J.S.A.* 18A:12-24.1(e) of the Code of Ethics for School Board Members. The Commission recommended a penalty of censure for the violation. The Commission's decision was forwarded to the Commissioner for final determination on the recommended penalty pursuant to *N.J.S.A.* 18A:12-29(c). Respondent neither filed exceptions to the recommended penalty nor instituted an appeal, pursuant to *N.J.A.C.* 6A:4-1 *et seq.*, of the Commission's underlying finding of violation.

Upon review, the Commissioner concurs with the penalty recommended by the Commission for respondent's actions in conducting a personal investigation into the cost of

equipment by contacting vendors and other school districts without authorization from the Board.

Accordingly, respondent is hereby censured as a school official found to have violated the School Ethics Act.

IT IS SO ORDERED.[1]

Kathleen Ehling

ACTING COMMISSIONER OF EDUCATION[2]

Date of Decision: August 29, 2023
Date of Mailing: August 30, 2023

[1] This decision may be appealed to the Appellate Division of the Superior Court pursuant to *N.J.S.A.* 18A:6-9.1. Under *N.J.Ct.R.* 2:4-1(b), a notice of appeal must be filed with the Appellate Division within 45 days from the date of mailing of this decision.

[2] Pursuant to N.J.S.A. 18A:4-34, this matter has been delegated to Kathleen Ehling.

Before the School Ethics Commission
OAL Docket No.: EEC-10182-20
SEC Docket No.: C20-20
Final Decision

Joseph Argenziano,
Complainant

v.

Kathleen Fable,
Northern Valley Regional Board of Education, Bergen County
Respondent

I. Procedural History

The above-captioned matter arises from a Complaint that was filed with the School Ethics Commission (Commission) on May 15, 2020,[1] by Joseph Argenziano (Complainant), a member of the Northern Valley Regional Board of Education (Board), alleging that Kathleen Fable (Respondent), also a member of the Board, violated the School Ethics Act (Act), *N.J.S.A.* 18A:12-21 *et seq*. More specifically, the Complaint alleges that Respondent violated *N.J.S.A.* 18A:12-24.1(c) and *N.J.S.A.* 18A:12-24.1(e) of the Code of Ethics for School Board Members (Code) when she conducted a personal investigation into the cost of Chromebooks by contacting vendors and other school districts without authorization from the Board.

At its meeting on September 29, 2020, and after reviewing Respondent's Motion to Dismiss in Lieu of Answer (Motion to Dismiss) and Complainant's response thereto, the Commission voted to deny the Motion to Dismiss in its entirety. Based on its determination, the Commission also voted to direct Respondent to file an Answer to Complaint (Answer), and to transmit the matter to the Office of Administrative Law (OAL) following receipt of the Answer.

On October 19, 2020, Respondent filed an Answer as directed. The Commission subsequently transmitted the matter to the OAL for a plenary hearing where Complainant would carry the burden to prove the alleged violations of the Code as set forth in the Complaint.

At the OAL, a hearing was held on November 22 and 23, 2022. Thereafter, the Administrative Law Judge (ALJ) issued an Initial Decision on May 15, 2023. Respondent filed exceptions to the Initial Decision, in accordance with *N.J.A.C.* 1:1-18.4, and Complainant filed a reply thereto.

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[1] On May 15, 2020, Complainant filed a deficient Complaint; however, on May 19, 2020, Complainant cured all defects and filed an Amended Complaint that was deemed compliant with the requirements detailed in *N.J.A.C.* 6A:28-6.3.

At its meeting on June 27, 2023, the Commission considered the full record in this matter. Thereafter, at its meeting on July 25, 2023, the Commission voted to adopt the Initial Decision's findings of fact, the legal conclusions that Respondent violated *N.J.S.A.* 18A:12-24.1(c) and *N.J.S.A.* 18A:12-24.1(e), and the recommended penalty of censure.

II. Initial Decision

During the 2019-2020 school year, the Board was considering replacing the Apple devices in the one-to-one program where each student receives a device. *Initial Decision* at 21. On March 31, 2020, the Board heard a presentation on a feasibility study in which a recommendation was made to replace the 2,100 student devices with the MacBook Air 13. *Ibid.* While a vote was not taken at the Board meeting to approve the MacBooks, Respondent "set forth her skepticism" regarding the cost of the devices. *Id.* at 21-22. According to Respondent, she and another Board member were "frustrated with what they thought was the lack of information from the administration regarding their selection of new Apple devices to replace the old Apple Devices." *Id.* at 21.

On April 1, 2020, Respondent emailed the business administrators for the Tenafly, Emerson, Paramus and Ridgewood Boards of Education indicating that she was a member of the Board and requesting information on their experiences with Chromebooks as she was "looking to do an analysis of Apple devices versus Chromebooks." *Id.* at 22. Thereafter, Respondent's employee at her private business, Breana Sylvester (Sylvester), sent several emails to a district vendor, CDW-G. *Ibid.* Sylvester indicated that she was emailing "on behalf of a board member of the Northern Valley Regional High School district [(District)] in Demarest, NJ" and requested a quote for Chromebooks with detailed specifications, as "[t]he school is looking to move students over to Chromebooks, as part of a 1:1 program." *J-5; Initial Decision* at 22. The vendor alerted the Superintendent to the request, and the Superintendent advised the vendor that Sylvester was "illegally soliciting information" on the District's behalf. *Initial Decision* at 22. On April 14, 2020, CDW-G responded to Sylvester indicating that it could not provide quotes to an "unauthorized person." Respondent replied and indicated that she was seeking information regarding her "PERSONAL RESEARCH as a board member," but that as CDW-G was not responsive, she would contact another approved vendor. *J-8; Initial Decision* at 22. Consequently, Respondent sought price quotes for Chromebooks from Ocean Computers and Dell EMC. *Initial Decision* at 23.

Respondent did not apprise the Board of her plans, nor did she have approval from the Board, the Finance Committee, the Superintendent, the Board President, or the Board attorney to contact vendors or other school districts. *Ibid.* On April 27, 2020, the Board authorized the purchase of MacBooks for the one-to-one program, and on May 11, 2020, passed a resolution authorizing Complainant to file the within ethics complaint. *Ibid.*

The ALJ found that it is undisputed that Respondent contacted vendors, both directly and through her employee, as well as other school districts ostensibly on behalf of the Board. *Id.* at 25. The ALJ further found that Respondent and her employee identified Respondent as a Board member and represented that the Board was contemplating switching from MacBooks to Chromebooks, despite the fact that the Board was considering no such switch. *Ibid.* According to

the ALJ, Respondent's "rationale" was her belief that she had not been given accurate and detailed information related to the MacBooks and wanted to do her own research. *Ibid.* However, the ALJ contends in doing so, Respondent violated [D]istrict policy and the Code because she put the Board in "potentially compromised positions" when she took private action to conduct a personal investigation into the cost of Chromebooks without authorization." *Ibid.*

In concluding Respondent violated *N.J.S.A.* 18A:12-24.1(c) and *N.J.S.A* 18A: 12-24.1(e) and recommending an appropriate penalty, the ALJ compared the within matter to *Lowell v. Smallwood, Asbury Park Board of Education, Monmouth County*, 2017 *N.J. Super. Unpub. LEXIS* 1267 (App. Div. 2017). In *Lowell*, the respondents violated *N.J.S.A.* 18A:12-24.1(c) and *N.J.S.A* 18A: 12-24.1(e) when they conducted a site visit to assess a candidate for interim Superintendent without board authority and without approval of the State monitor. The Commission recommended a penalty of censure for the violations, which was accepted by the Commissioner, and affirmed by the Appellate Division. The ALJ found this present matter to be similar to *Lowell* as Respondent "made repeated contact with vendors and school administrators without [B]oard approval." *Initial Decision* at 26. As such, the ALJ recommended a penalty of censure. *Ibid.*

III. Exceptions

Respondent's Exceptions

In her exceptions, Respondent initially argues that she had requested information regarding the costs of the technology refresh multiple times, but it was not provided, and that seeking data from outside entities when District administration fails to provide it is in accordance with the "best practices" for Board members according to the *Lighthouse Inquiry*, a publication by the Iowa Association of School Boards in 2001.

Respondent argues she did not violate *N.J.S.A.* 18A:12-24.1(c) because Complainant did not provide any evidence to support that Respondent "acted beyond the scope of her capacity as a board member." On the contrary, Respondent maintains, the evidence demonstrates that she "conducted her own research, not on behalf of the Board, but with knowledge of all members of the Finance Committee," which is common practice. Respondent further argues the Initial Decision disregarded Daniel Eller's testimony which indicated that conducting outside research was part of the Finance Committee discussion and was discussed in the presence of Complainant and the Superintendent. Additionally, Respondent contends that the ALJ failed to consider Sylvester's testimony that Respondent did not review the email she sent to the vendor, but rather another supervisor did.

Respondent argues she did not violate *N.J.S.A.* 18A:12-24.1(e) because there is no evidence that she made any personal promises to the individuals she contacted. Respondent maintains that contacting other school districts to learn about their experiences with Chromebooks is not something that would compromise a school board. Additionally, Respondent asserts that there is no evidence she "leveraged her standing as a [B]oard member to get information from outside sources," such as other school districts or vendors, as she was conducting "personal research." Respondent maintains she did not direct her assistant to use her

Board member status when drafting the emails in question, nor did she tell her assistant what companies to contact or the specifications for the Chromebooks. Furthermore, Respondent contends her inquiries did not compromise the Board.

As to the penalty, Respondent notes despite that she has not been a Board member since 2021, Complainant read the Initial Decision and the recommended penalty of censure to the public at the May 22, 2023, Board meeting, without waiting for the Commissioner of Education to make a final pronouncement of the penalty. Respondent argues a penalty of reprimand should be issued, rather than censure, due to the mitigating factors of Complainant's use of the process for his own political gain and the administration's failure to provide Respondent and the Finance Committee with "necessary information."

Complainant's Reply to Respondent's Exceptions

In his reply, Complainant argues there is no basis to reject the ALJ's findings that Sylvester and Respondent were not credible witnesses. Complainant contends the Commission should adopt the ALJ's findings, namely that Respondent violated *N.J.S.A.* 18A:12-24.1(c), and *N.J.S.A.* 18A:12-24.1(e). More specifically, Complainant notes contrary to Respondent's assertion that she was conducting "personal research," it is undisputed that Respondent held herself out as representing the Board when she and her assistant solicited pricing information from vendors and information from other school districts. Complainant asserts Respondent contacted a District vendor and a potential vendor without the authorization of the full Board, while representing that she was seeking information as a Board member, and directed her assistant, who has no connection to the Board, to seek information on the Board's behalf, in violation of *N.J.S.A.* 18A:12-24.1(c).

Regarding a violation of *N.J.S.A.* 18A:12-24.1(e), Complainant argues Respondent engaged in private action that compromised (or at a minimum had the potential to compromise) the Board when she "directly solicited information concerning school technology from a District vendor and a potential vendor, as well as several neighboring school districts' Business Administrators without first obtaining authority from the Board." Complainant reiterates Respondent and her assistant, on Respondent's behalf, "'gave the impression' that she was acting on behalf of the Board, although she did not have permission to do so."

Complainant urges the Commission to find a censure as the appropriate penalty as Respondent was "a seasoned Board member and serving in her second term at the time of the events at issue." Therefore, Respondent should have been "well-aware" that her actions were unethical.

IV. Analysis

Upon a careful, thorough, and independent review of the record, the Commission agrees with the ALJ that Respondent violated *N.J.S.A.* 18A:12-24.1(c) and *N.J.S.A.* 18A:12-24.1(e).

At the outset, the Commission notes that an agency head may not reject or modify any findings of fact as to issues of credibility of lay witnesses unless it is first determined from a

review of the record that those findings are arbitrary, capricious or unreasonable or are not supported by sufficient, competent, and credible evidence in the record. *N.J.S.A.* 52:14B-10(c); *N.J.A.C.* 1:1-18.6(c). Despite Respondent's arguments, the Commission finds no basis to disturb the credibility findings of the ALJ regarding Respondent's or Sylvester's testimony. The ALJ had the opportunity to observe and assess the witnesses during their testimony, and the credibility findings are supported by sufficient, competent, and credible evidence in the record.

Pursuant to *N.J.S.A.* 18A:12-24.1(c), board members must confine board action to "policy making, planning, and appraisal" and "frame policies and plans only after the board has consulted those who will be affected by them." Respondent took official action to effectuate policies and plans without consulting those affected by the policies and plans when she contacted vendors and other school districts, both indirectly and through her private employee who did not have a connection to the Board; identified herself as a member of the Board; and indicated that the Board was contemplating switching from MacBooks to Chromebooks, when the Board had not considered a change. In using misrepresentations (either directly or indirectly) and her position on the Board to find a quote for Chromebooks in the hope of securing a contract for Chromebooks, Respondent took action to effectuate plans without consulting with the Board. While Respondent alleges that some members of the Finance Committee were aware that she may conduct research, Respondent did not have Board approval to take such actions. Moreover, Respondent's actions far exceeded preliminary internet searches or "research"; she conducted a detailed inquiry in which she contacted school vendors and gave the impression that she was doing so on behalf of the Board. As such, the Commission agrees with the ALJ that Respondent's actions constitute a violation of *N.J.S.A.* 18A:12-24.1(c).

In accordance with *N.J.S.A.* 18A:12-24.1(e), Board members must "recognize that authority rests with the board of education," and therefore, must "make no personal promises nor take any private action that may compromise the board." Respondent took personal action when she contacted vendors and school districts without authorization from the Board, seeking price quotes for Chromebooks. Such actions had the potential to compromise the Board as Respondent falsely implied to vendors, including a District vendor, that the Board was considering purchasing Chromebooks. The Commission disagrees with Respondent that it is the "best practice" to seek data from outside entities when information is not provided by the administration. Respondent was within her right to express disagreement at the Board meeting, but it was inappropriate of Respondent to conduct her own private investigation and place the Board at risk. Further, the administration did not fail to provide information; a feasibility study was provided but Respondent sought additional information. Accordingly, the Commission agrees with the ALJ that Respondent violated *N.J.S.A.* 18A:12-24.1(e).

The Commission further agrees with the ALJ that a **censure** is the appropriate penalty for such a violation. *Lowell, supra,* presents an analogous case in which violations of *N.J.S.A.* 18A:12-24.1(c) and *N.J.S.A.* 18A:12-24.1(e) resulted in a censure after the respondents conducted a site visit without authority to assess a candidate for interim Superintendent. The Commission notes that while Respondent no longer serves on the Board, she was an experienced Board member in her second term at the time of the violations and made repeated contacts with other school districts and vendors without Board approval. Furthermore, Respondent not only committed such flagrant violations on her own, but also recruited her private employee without

any connection to the Board to conduct an investigation on her behalf. Accordingly, the Commission adopts the ALJ's recommended penalty in this matter.

IV. Decision

For all of the aforementioned reasons, the Commission adopts the Initial Decision of the OAL as the final decision in this matter. The Commission finds that Respondent violated *N.J.S.A.* 18A:12-24.1(c) and *N.J.S.A.* 18A:12-24.1(e) and adopts the recommended penalty of **censure** for the violation.

Pursuant to *N.J.S.A.* 18A:12-29(c), this decision shall be forwarded to the Commissioner of Education for review of the Commission's recommended penalty. The parties may either: 1) file exceptions to the recommended sanction; 2) file an appeal of the Commission's finding of a violation; or 3) file both exceptions to the recommended sanction together with an appeal of the finding of a violation.

Parties taking exception to the recommended sanction of the Commission but *not disputing* the Commission's finding of a violation may file, **within thirteen (13) days** from the date the Commission's decision is forwarded to the Commissioner, written exceptions regarding the recommended penalty to the Commissioner. The forwarding date shall be the mailing date to the parties, as indicated below. Such exceptions must be forwarded to: Commissioner of Education, c/o Bureau of Controversies and Disputes, P.O. Box 500, Trenton, New Jersey 08625, marked "Attention: Comments on Ethics Commission Sanction," as well as to (ControversiesDisputesFilings@doe.nj.gov). A copy must also be sent to the Commission (school.ethics@doe.nj.gov) and all other parties.

Parties seeking to appeal the Commission's finding of violation *must* file an appeal pursuant to the standards set forth at *N.J.A.C.* 6A:4:1 *et seq.* **within thirty (30) days** of the filing date of the decision from which the appeal is taken. The filing date shall be three (3) days after the date of mailing to the parties, as shown below. In such cases, the Commissioner's review of the Commission's recommended sanction will be deferred and incorporated into the Commissioner's review of the finding of violation on appeal. Where a notice of appeal has been filed on or before the due date for exceptions to the Commission's recommended sanction (thirteen (13) days from the date the decision is mailed by the Commission), exceptions need not be filed by that date, but may be incorporated into the appellant's briefs on appeal.

Robert W. Bender

Robert W. Bender, Chairperson

Mailing Date: July 25, 2023

Resolution Adopting Decision in Connection with C20-20

Whereas, at its meeting on September 29, 2020, the School Ethics Commission (Commission) voted to transmit the above-captioned matter to the Office of Administrative Law (OAL) for a plenary hearing; and

Whereas, the Administrative Law Judge (ALJ), issued an Initial Decision dated May 15, 2023; and

Whereas, the ALJ found that Respondent violated *N.J.S.A.* 18A:12-24.1(c) and *N.J.S.A.* 18A:12-24.1(e), and recommended that Respondent be censured; and

Whereas, Respondent filed exceptions to the Initial Decision and Complainant filed a reply to Respondent's exceptions; and

Whereas, at its meeting on June 27, 2023, the Commission reviewed the record in this matter, discussed adopting the ALJ's conclusion that Respondent violated *N.J.S.A.* 18A:12-24.1(c) and *N.J.S.A.* 18A:12-24.1(e), and discussed adopting the recommended penalty of censure; and

Whereas, at its meeting on July 25, 2023, the Commission reviewed and voted to approve the within decision as accurately memorializing its actions/findings from its meeting on June 27, 2023; and

Now Therefore Be It Resolved, the Commission hereby adopts the within decision.

Robert W. Bender

Robert W. Bender, Chairperson

I hereby certify that this Resolution was duly adopted by the School Ethics Commission at its regularly scheduled meeting on July 25, 2023.

Brigid C. Martens

Brigid C. Martens, Acting Director
School Ethics Commission

268-23
State Board of Examiners Dkt. No. 2021-144
Agency Dkt. No. 8-10/22A

New Jersey Commissioner of Education

Final Decision

In the Matter of the Certificates of
Scott Levy, State Board of Examiners,
New Jersey Department of Education.

Order of Suspension by the State Board of Examiners, September 20, 2022

For the Appellant, Nicholas Poberezhsky, Esq.

For the Respondent, State Board of Examiners, Amna Toor, Deputy Attorney General (Matthew J. Platkin, Attorney General of New Jersey)

The Commissioner has reviewed the record and the papers filed in connection with appellant Scott Levy's appeal of the Order of the State Board of Examiners (Board), dated September 20, 2022, suspending his Teacher of English Certificate of Eligibility, Teacher of Elementary School Grades K-8 Certificate of Eligibility, Teacher of English Certificate, and Teacher of Elementary Grades K-8 Certificate for one year.

On May 20, 2020, the Wyckoff Board of Education filed tenure charges against appellant. These charges stemmed from a series of allegations that appellant engaged in conduct unbecoming a teacher by: 1) physically assaulting a seventh-grade student identified as M.K.; 2) harassing and inappropriately touching a student identified as K.T.; and 3) harassing and inappropriately touching a student identified as A.P. The charges further alleged that: 4) appellant had a substantial record of misconduct, which included prior accusations of inappropriate contact for which remedial measures had been taken and failed, and this pattern of conduct justified his removal from employment.

Following an arbitration, the Arbitrator determined that the district had substantiated all four tenure charges.

Specifically, the Arbitrator found that on January 3, 2020, appellant assaulted M.K. by knocking the books from M.K.'s hands when she approached him for assistance and then intentionally contacting M.K.'s face twice with the back of his hand as she continued to request his assistance with the assignment. In making this determination, the Arbitrator assessed the credibility of the witnesses and found that the student's testimony was clear, consistent, and unembellished. Conversely, the Arbitrator found that appellant's testimony had changed over time, and it appeared to the Arbitrator that appellant was "attempting to minimize his culpability for [the] incident, while avoiding an affirmative admission." The Arbitrator found that "[i]n sum ... [appellant's] testimony simply lacks the ring of truth."

The Arbitrator further found that appellant engaged in the harassment and inappropriate touching of K.T. during the 2019-2020 school year. This conduct included frequent and intentional placing of appellant's hands on K.T.'s shoulders and back, as well as placing his hand over K.T.'s hands while looking at her computer. The Arbitrator also found that on one occasion appellant had placed his hand on K.T.'s thigh while looking at her computer. The Arbitrator found K.T.'s testimony to be clear, consistent, and credible, while appellant's testimony was less persuasive and a "post hoc effort to recast his undeniable misconduct."

The Arbitrator also found that appellant engaged in the harassment and inappropriate touching of A.P. during the 2019-2020 school year. This conduct included appellant frequently and intentionally placing his hands on A.P.'s shoulders and back, as well as putting his hand over A.P.'s hands while looking at her computer. The Arbitrator also found that on one occasion appellant had

placed his hand on A.P.'s thigh while looking at her computer. Arbitrator found A.P.'s testimony to be clear, consistent, and credible, while appellant's testimony was less persuasive.

Finally, the Arbitrator found that, during the 2015-2016 and 2016-2017 school years, appellant had engaged in a course of conduct that "caused his students to feel uncomfortable and undermined the learning environment" and that, taken together with the present allegations, "represented a sufficient linkage between them to sustain [a] charge that [appellant] has engaged in a pattern of inappropriate conduct towards his students." The evidence supporting this tenure charge included a letter from a prior superintendent, which appellant acknowledged receiving, detailing prior allegations of inappropriate touching of students. The Arbitrator expressly found as unpersuasive the appellant's denial that the prior disciplinary action related to his in-classroom behavior, as his denial was directly contradicted by the evidence.

In assessing the penalty, the Arbitrator concluded that appellant's pattern of failing to maintain proper boundaries with students "call[s] for a level of discipline that is sufficient to impress upon [appellant] the serious error of his ways." However, the Arbitrator determined that because he could not find appellant's inappropriate touching to be of a sexual nature, dismissal was not warranted. The Arbitrator imposed a six-month suspension without pay and a requirement that appellant participate in eight hours of professional development classes regarding appropriate teacher-student interactions and classroom management.

Thereafter, the Board issued an Order to Show Cause as to why appellant's certificates should not be suspended or revoked. Appellant filed an answer on August 12, 2021, raising several defenses. On May 19, 2022, the Board sent a hearing notice to appellant, advising him that there appeared to be no material facts in dispute. Appellant provided a written response to the Board on June 16, 2022, indicating that while he "vehemently disputes several of the factual determinations' found by the

Arbitrator ... [appellant] does not request that this matter be transferred to the Office of Administrative Law." The Board found that it was constrained by the doctrine of collateral estoppel; therefore, there were no material facts in dispute, and the Board proceeded on a summary basis pursuant to *N.J.A.C.* 6A:9B-4.6(h). [1]

In an Order of Suspension dated September 20, 2022, the Board, after adopting the facts as found by the Arbitrator, held that Appellant engaged in conduct unbecoming a teacher and that his conduct provided just cause to act against his certificates pursuant to *N.J.A.C.* 6A:9B-4.5. Further, after considering the mitigating factors, including appellant's lengthy and otherwise successful career and the fact that the touching was not of a sexual nature, the Board found that a one-year suspension of appellant's certificates was the appropriate sanction. The within appeal followed.

On appeal, appellant argues that the Board failed to give sufficient consideration to appellant's state of mind. Appellant contends that a showing of specific intent to commit conduct unbecoming a teacher is necessary to act against an individual's certificates. Appellant claims that the Arbitrator did not find that he intended to make inappropriate contact with the students and instead found that the contact was incidental or accidental. Appellant also argues that the penalty imposed is excessive and that the Board should have given deference to the Arbitrator's penalty assessment, as the arbitrator was in a better position to assess the nature of the misconduct. Appellant further asserts that the factors identified in *In re Tenure Hearing Fulcomer,* 93 *N.J. Super.* 404 (App. Div. 1967) weigh against suspension or revocation.

[1] Appellant, in his reply brief, argues for the first time that this matter should have been sent to the Office of Administrative Law (OAL) to determine his specific intent and should not have proceeded summarily. A review of the proceedings and decision before the Arbitrator makes clear that the record was sufficiently developed to permit the Board to proceed summarily, pursuant to *N.J.A.C.* 6A:9B-4.6(h). Further, based on the June 16, 2022, letter, appellant appears to have understood the nature of the proceedings and raised no objection to proceeding on a summary basis in this matter.

In reviewing appeals from decisions of the Board, the Commissioner may not substitute her judgment for that of the Board as long as the appellant received due process and the Board's decision is supported by sufficient credible evidence in the record. Further, the Board's decision should not be disturbed unless the appellant demonstrates that it is arbitrary, capricious, or unreasonable. *N.J.A.C.* 6A:4-4.1(a). Upon a comprehensive review, the Commissioner finds that the record adequately supports the Board's determination that appellant engaged in unbecoming conduct and that a one-year suspension of his certificates was the appropriate penalty.

Appellant's insistence that his physical contact with students was merely incidental or accidental is contrary to the record, the substantiated charges, and the factual and credibility findings made by the Arbitrator. For each of the substantiated charges, the Arbitrator found that appellant engaged in repeated intentional physical contact with students, causing them distress. The Arbitrator also found that the amount of force utilized by appellant does not change the essential nature of his conduct. Furthermore, the Arbitrator found appellant's innocent explanations for the contact to be unpersuasive.

Appellant's assertion that the Board must find that appellant specifically intended to engage in conduct unbecoming a teacher is contrary to law. Unbecoming conduct has been defined as conduct that "has a tendency to destroy public respect for [government] employees and confidence in the operation of public services." *Bound Brook Bd. Of Educ. v. Ciripompa*, 13 228 *N.J.* 4, 13 (2017) (internal citations omitted). Taking appellant at his word that he did not intend to engage in conduct unbecoming a teacher, appellant's subjective intentions do not cure the shock and upset felt by the students who were subject to his repeated unwanted contact, nor do they restore the public's respect and confidence in the provision of public services.

Finally, with regard to appellant's argument that the Board should defer to the Arbitrator's penalty determination, the Commissioner notes that the Board – whose statutory authority is derived separately from that of the panel of arbitrators – can act against a teacher's certificates regardless of the penalty imposed by an arbitrator in a tenure proceeding without affording the arbitrator's penalty determination any special deference. *See In the Matter of the Certificates of Nicholas Cilento,* Commissioner Decision No. 131-22, dated June 23, 2022[2] (issuing a two-year suspension of the appellant's certificates after an arbitrator issued a three-month suspension in a tenure proceeding).

There is nothing in the record to suggest that the Board's decision to suspend appellant's certificates for one year was arbitrary, capricious, or unreasonable.[3] Accordingly, the decision of the State Board of Examiners is affirmed for the reasons expressed therein.[4]

Angelica Allen-McMillan, Ed.D.
ACTING COMMISSIONER OF EDUCATION

Date of Decision: September 7, 2023
Date of Mailing: September 8, 2023

[2] This decision is currently pending review in the Appellate Division. Appellant requested that the within matter be held in abeyance until the *Cilento* appeal has been concluded, arguing that the decision may be dispositive in this matter. Appellant's request is denied.

[3] Appellant argues that the suspension is inconsistent with the factors to be considered pursuant to *Fulcomer, supra.* The Commissioner notes that *Fulcomer* pertains to penalties imposed in tenure proceedings, and not proceedings before the Board. Nonetheless, the Commissioner finds that the Board's penalty determination is consistent with the *Fulcomer* factors.

[4] This decision may be appealed to the Appellate Division of the Superior Court pursuant to *N.J.S.A.* 18A:6-9.1. Under *N.J.Ct.R.* 2:4-1(b), a notice of appeal must be filed with the Appellate Division within 45 days from the date of mailing of this decision.

IN THE MATTER OF	:	NEW JERSEY DEPARTMENT OF EDUCATION
THE CERTIFICATES OF	:	STATE BOARD OF EXAMINERS
SCOTT LEVY	:	ORDER OF SUSPENSION
_____	:	DOCKET NO: 2021-144

At its meeting of April 1, 2021, the State Board of Examiners (Board) reviewed a tenure decision regarding Scott Levy (Levy), a tenured teacher in the Wyckoff School District (Wyckoff). Wyckoff certified tenure charges against Levy for unbecoming conduct alleging that he physically assaulted a seventh-grade student, inappropriately touched two other students and had a substantial record of misconduct.

On January 28, 2021, the Arbitrator appointed to the case pursuant to *N.J.S.A.* 18A:6-16 found that Wyckoff demonstrated the truth of the charges and suspended Levy from his tenured employment. *In the Matter of the Tenure Hearing of Scott Levy,* Dkt. No. 104-5/20 (Arbitrator's Decision, January 28, 2021). The matter was referred to the Board for review.

In the Arbitration Decision (which is incorporated herein by reference), the Arbitrator found that on January 3, 2020, Levy knocked books from a seventh grader's hands when she approached him for assistance on an assignment, and twice touched her face with the back of his hand by swinging his arms, as she resumed her petition for his help. *See* Arbitration Decision at p. 33.

Additionally, the Arbitrator found that during the 2019-2020 school year, Levy inappropriately touched another seventh-grade student on the shoulder, hand, and leg, causing her to feel uncomfortable. *See* Arbitration Decision at p. 39.

The Arbitrator also found that during the 2019-2020 school year, Levy touched another seventh-grade student inappropriately on the hand and leg, causing her to feel uncomfortable. *See* Arbitration Decision at page 43.

The Arbitrator also found that in years preceding the 2019-2020 school year, Levy engaged in pattern of inappropriate conduct towards his students, causing his students to feel uncomfortable and undermining the learning environment. *See* Arbitration Decision at page 47.

Levy is the holder of Teacher of English Certificate of Eligibility, Teacher of Elementary School Grades K-8 Certificate of Eligibility, Teacher of English Certificate, and a Teacher of Elementary Grades K-8 Certificate.

On May 13, 2021, the Board voted to issue Levy an Order to Show Cause for revocation due to the findings in the Arbitration decision. The Board sent Levy the Order to Show Cause by regular and certified mail. The Order provided that Levy's Answer was due within 30 days. Levy filed his Answer on August 12, 2021.

In that Answer, Levy admitted that Wyckoff brought tenure charges against him but denied that the Arbitrator found truth in all of the charges. (Answer, ¶¶ 2, 3). Levy stated that the Arbitrator rejected Wyckoff's claims that he committed sexual harassment and that he assaulted a student. *Id.* at ¶ 3. He further answered that the Arbitration decision speaks for itself. *Id.* at ¶¶ 4-7. He also submitted 8 additional defenses.

Levy also submitted a letter from counsel wherein he argues two additional matters. The first is that Levy was "already severely and sufficiently punished" by the Arbitrator in this matter. He further points out that Levy's actions were not found to be sexual in nature and he had no malicious intent. Levy argued that since the Arbitrator did not find a lengthier suspension or loss of tenure to be appropriate, it follows that his certificates should not be suspended because that would extend his discipline.

Thereafter, pursuant to *N.J.A.C.* 6A:9B-4.6(e), on May 19, 2022, the Board sent Levy a hearing notice by regular and certified mail. The notice explained that there appeared to be no material facts in dispute. Thus, Levy was offered an opportunity to submit written arguments on the issue of whether the conduct addressed in the Order to Show Cause provided just cause to take action against his certificates as

well as arguments with regard to the appropriate sanction in the event that the Board determined to take action against his certificates. It also explained that upon review of the charges against him and the legal arguments tendered in his defense, the Board would determine if Levy's offense warranted action against his certificates. Thereupon, the Board would also determine the appropriate sanction, if any. Levy was also offered the opportunity to appear before the Board to provide testimony on the sanction issue. Levy filed a written response on June 16, 2022. Levy did not wish to appear before the Board.

In his Hearing Response, Levy indicated that he "vehemently disputes several of the factual determinations" found by the Arbitrator in this matter. *See* Hearing Submission at p. 1. Levy argues there are several problems with the Arbitrator's findings, but he does not request that this matter be transferred to the Office of Administrative Law for a hearing because doing so could delay the processing of his retirement. *Id.* at p. 2.

Levy requests that the arbitration decision be considered in totality; specifically, the findings that Levy's physical contact with students was incidental in nature and part of his classroom management style. *Id.* He further states that if the Board accepts the Arbitrator's findings of fact, it must also accept that Levy did not commit sexual harassment and that he lacked malicious intent. *Id.*

Finally, Levy argues that the Board should consider that he was a popular director of the theater program and drama club; he organized many fundraising drives, one that raised well over $10,000 during the 8 years he chaired the event; he founded a student run newspaper; he had a long and decorated career as an educator. *Id.* at p. 4-5. Levy states that he was already punished by virtue of his penalties from the tenure arbitration award and requested that no further discipline is warranted.

The threshold issue before the Board in this matter, therefore, is whether Levy's conduct constitutes unbecoming conduct of a certificate holder. At its meeting of August 5, 2022, the Board considered the allegations in the Order to Show Cause as well as Levy's Answer and Hearing Submission. The Board determined that it was constrained by collateral estoppel to accept the facts as found in the tenure hearing

and therefore no material facts related to Levy's offense were in dispute. *See In the Matter of the Certificates of Richard Barnes-Bey*, Dkt. No. 1314-194 (Bd. Of Examiners September 17, 2015) (Collateral estoppel applies to facts established in a prior tenure hearing for Board revocation proceedings). Thus, the Board determined that summary decision was appropriate in this matter. *N.J.A.C.* 6A:9B-4.6(h).

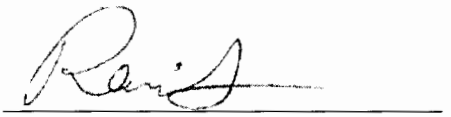
The Board must now determine whether Levy's conduct, as set forth in the Order to Show Cause and proven in the tenure hearing, represents just cause to act against his certificates pursuant to *N.J.A.C.* 6A:9B-4.5. The Board finds that it does.

It is important to note that the Board is not bound to the penalty assessed by an Arbitrator as it relates to a challenge on an educator's tenure. Levy's argument that he cannot or should not be "punished" beyond the Arbitration Award penalty would essentially hamstring the Board from exercising its responsibility and statutory authority on revocation/suspension of educator certificates, usurping the Board's expertise and authority on these matters. The Board is a separate body and applies its own, independent decision as to whether the specific conduct established in the tenure proceedings warrants action on an educator's teaching certificates. The "responsibility of the [Board] under N.J.S.A. 18:6-38 is not the same as the Commissioner's obligation to determine the appropriate penalty once tenure charges brought against a teaching staff member have been sustained." *IMO Theresa Lucarelli*, Dkt. No. 2-99 (State Board of Education Decision, May 5, 1999), citing *IMO John Ahern, slip opinion* (State Board of Education Decision, August 5, 1987).

Accordingly, the Board may revoke or suspend the certification of any certificate holder on the basis of demonstrated inefficiency, incapacity, conduct unbecoming a teacher or other just cause. *N.J.A.C.* 6A:9B-4.4. In this case, the record established that Levy knocked a book from a student's hands, inappropriately touched two students, causing them to feel uncomfortable. The Board recognizes Levy's arguments that the touching was not found to be of a sexual nature and finds this fact mitigates the penalty in this matter. In light of Levy's lengthy otherwise successful career and the fact that the conduct was not

sexual in nature, the Board finds that the appropriate response in this matter is a one-year suspension of Levy's certificates.

Accordingly, on August 5, 2022, the Board voted to suspend Scott Levy's educator certificates for one (1) year. On this 16th day of September 2022, the Board voted to adopt its formal written decision and it is therefore ORDERED that Levy's certificates are hereby suspended for one year, effective immediately. It is further ORDERED that Levy return his certificates to the Secretary of the State Board of Examiners, Office of Certification and Induction, P.O. Box 500, Trenton, NJ 08625-0500 within 30 days of the mailing date of this decision.



Rani Singh, Secretary
State Board of Examiners

Date of Mailing:
Via certified and regular mail

Appeals may be made to the Commissioner of Education pursuant to *N.J.S.A.* 18A:6-38.4.

269-23
OAL Dkt. No. 09257-22
Agency Dkt. No. 266-9/22

New Jersey Commissioner of Education

Final Decision

C.W.N. and W.N., on behalf of minor child, R.N.,

Petitioners,

v.

Board of Education of the City of Bayonne, Hudson County,

Respondent.

The record of this matter, the Initial Decision of the Office of Administrative Law (OAL), and the Stipulation of Dismissal signed by the parties have been reviewed and considered.

Upon review, the Commissioner concurs with the Administrative Law Judge that this matter is no longer a contested case, and that dismissal is appropriate.

Accordingly, the petition of appeal is hereby dismissed.

IT IS SO ORDERED.[1]

Angelica Allen-McMillan, Ed.D.
ACTING COMMISSIONER OF EDUCATION

Date of Decision: September 7, 2023
Date of Mailing: September 8, 2023

[1] This decision may be appealed to the Appellate Division of the Superior Court pursuant to *N.J.S.A.* 18A:6-9.1. Under *N.J.Ct.R.* 2:4-1(b), a notice of appeal must be filed with the Appellate Division within 45 days from the date of mailing of this decision.

State of New Jersey
OFFICE OF ADMINISTRATIVE LAW

INITIAL DECISION
DISMISSAL
OAL DKT. NO. EDU 09257-22
AGENCY DKT. NO. 266-9/22

C.W.N. AND W.N. ON BEHALF OF R.N.,
Petitioners,
v.
CITY OF BAYONNE, BOARD OF EDUCATION,
Respondent.

Eldridge Hawkins, Esq., for petitioners

Alexander L. D'Jamoos, Esq., for respondent (Flanagan, Barone, & O'Brien, LLC, attorneys)

Record Closed: July 24, 2023 Decided: July 31, 2023

BEFORE **WILLIAM COURTNEY**, ALJ:

On, October 18, 2022, this matter was transmitted to the Office of Administrative Law (OAL) for hearing as a contested cases pursuant to N.J.S.A. 52:14B-1 to -15 and N.J.S.A. 52:14F1 to -13. The matter was scheduled for a telephone conference on July 24, 2023, but was adjourned because the parties advised the undersigned that they agreed to resolve the matter. A Stipulation of Dismissal of Petition and Mutual Release of Claims with Prejudice was signed by the parties and is attached hereto.

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

Based on the foregoing, it is hereby **ORDERED** that this matter be and is hereby **DISMISSED**.

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

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

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

William J. Courtney

July 31, 2023

DATE

WILLIAM COURTNEY, ALJ

Date Received at Agency: July 31, 2023

Date Mailed to Parties: July 31, 2023

sej

270-23

New Jersey Commissioner of Education

Final Decision

Do-Yeon Shim,

Petitioner,

v.

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

Respondent.

Synopsis

In this matter, petitioner – a tenured teacher employed by the respondent, Board of Education of the Borough of Ridgefield (Board) – challenged the determination of the Board that she had committed an act of harassment, intimidation and bullying (HIB) against a second-grade student. The Board alleged that petitioner committed HIB when she took a photograph of the student's braided hairstyle as he bent down to tie his shoelace, then showed the photograph to the student, and told him that "they could play tic-tac-toe on his head because his hair looked like a tic-tac-toe board." Petitioner asserted that she had taken the picture because she thought the student's hairstyle "was cool" and she wanted to create a bonding moment with him. The school district's HIB investigation determined that petitioner's actions were "reasonably perceived to be motivated on the basis of appearance, race or ethnic origin" and that she had committed an act in violation of the HIB statute, *N.J.S.A.* 18A:37-14. The parties filed cross motions for summary decision.

The ALJ found, *inter alia*, that: there are no material facts at issue in this matter and the case is ripe for summary decision; the statutory elements of a HIB violation are set forth in the Anti-Bullying Bill of Rights Act, at *N.J.S.A.* 18A:37-14, and require a finding that the petitioner's conduct substantially disrupted or interfered with the orderly operation of the school or the rights of other students; here, the record is devoid of evidence to establish this requirement; no student witnesses, nor the alleged HIB victim himself, reported or reacted in any negative way to the incident in question; the incident was reported by one of two staff members who observed petitioner's interaction with the student. The ALJ determined that petitioner's conduct, while wholly inappropriate and racially insensitive, did not constitute a HIB violation under New Jersey law. Accordingly, the ALJ granted petitioner's motion for summary decision, concluding that the Board's HIB determination in this case was arbitrary, capricious, and unreasonable.

Upon review, the Commissioner adopted the Initial Decision of the OAL as the final decision in this matter. In so doing, the Commissioner did not condone the petitioner's conduct and poor judgment but agreed with the ALJ's well-reasoned conclusion that the incident did not meet the statutory requirements of an HIB violation. Summary decision was granted to the petitioner.

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

270-23
OAL Dkt. No. EDU 02751-23
Agency Dkt. No. 69-3/23

New Jersey Commissioner of Education

Final Decision

Do Yeon Shim,

Petitioner,

v.

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

Respondent.

The record of this matter, the Initial Decision of the Office of Administrative Law (OAL), the exceptions filed by respondent Board of Education of the Borough of Ridgefield (Board) pursuant to *N.J.A.C.* 1:1-18.4, and petitioner's reply thereto, have been reviewed and considered.

This matter involves the Board's determination that petitioner, a teacher, committed an act of harassment, intimidation, or bullying (HIB) when she took a photograph of a second-grade student's braided hairstyle as he bent down to tie his shoelace, showed the photograph to the student, and told him that "they could play tic-tac-toe on his head because his hair looked like a tic-tac-toe board." Initial Decision, at 3. During the HIB investigation, one staff member witness reported that the student seemed "unfazed" by petitioner's conduct. *Ibid.* While another staff member witness said that the student seemed "confused" by petitioner's conduct, she confirmed that "there was no apparent impact on [him] the rest of the day." *Id.* at 4. The student told

administrators that petitioner took the photograph because "she liked [his] hair" and reported that "he liked the picture because his hair looked good." *Id.* at 3.

Petitioner appealed the Board's determination, and the matter was transmitted to the OAL. The parties cross-moved for summary decision. Upon finding that the material facts were not in dispute, the Administrative Law Judge (ALJ) granted petitioner's motion for summary decision and concluded that the Board's HIB determination was arbitrary, capricious, and unreasonable. The ALJ analyzed the statutory elements of a HIB violation as set forth in the Anti-Bullying Bill of Rights Act (the Act) at *N.J.S.A.* 18A:37-14, along with relevant case law, and determined that the record was devoid of evidence to establish that petitioner's conduct substantially disrupted or interfered with the orderly operation of the school or the rights of other students. Consequently, petitioner's conduct—although wholly inappropriate and racially insensitive—did not constitute a HIB violation under New Jersey law.

In their exceptions, the Board argues that petitioner's conduct "substantially interfered with the student's right to be let alone and feel comfortable among his peers." Respondent's Exceptions, at 3. The exceptions focus upon the nature of petitioner's conduct, which was unquestionably offensive, insensitive, and demeaning. *Id.* at 4-5. While the Board concedes that "no students reported the matter" to administrators, it emphasizes that a staff member did. *Id.* at 3-4. In reply, petitioner asks the Commissioner to adopt the ALJ's Initial Decision because the Board had no basis upon which to conclude that a substantial disruption resulted from the interaction between petitioner and the student.

Upon review, the Commissioner adopts the ALJ's thoughtful and well-reasoned Initial Decision as the Final Decision in this matter. While the Commissioner absolutely does not

condone petitioner's conduct and poor judgment, the ALJ correctly determined that it did not meet the statutory requirements of a HIB violation based upon the evidentiary record. The Act defines HIB as:

> [A]ny gesture, any written, verbal or physical act, or any electronic communication, whether it be a single incident or a series of incidents, that is reasonably perceived as being motivated either by any actual or perceived characteristic, such as race, color, religion, ancestry, national origin, gender, sexual orientation, gender identity and expression, or a mental, physical or sensory disability, or by any other distinguishing characteristic, that takes place on school property, at any school-sponsored function, on a school bus, or off school grounds as provided for in section 16 of P.L. 2010, c.122 (C.18A:37-15.3), that substantially disrupts or interferes with the orderly operation of the school or the rights of other students and that:
>
> a. a reasonable person should know, under the circumstances, will have the effect of physically or emotionally harming a student or damaging the student's property, or placing a student in reasonable fear of physical or emotional harm to his person or damage to his property;
>
> b. has the effect of insulting or demeaning any student or group of students; or
>
> c. creates a hostile educational environment for the student by interfering with a student's education or by severely or pervasively causing physical or emotional harm to the student.
>
> [*N.J.S.A.* 18A:37-14.]

In sum, a finding of HIB requires three elements under the Act. First, the conduct must be reasonably perceived as being motivated by any actual or perceived characteristic expressly identified in the statute, or by any other distinguishing characteristic.[1] Second, the conduct must substantially disrupt or interfere with the rights of other students or the orderly operation of the school. Third, one of the three conditions set forth in subsections (a), (b), and (c) must be

[1] The parties do not dispute that the conduct at issue took place on school property.

satisfied. *Wehbeh v. Bd. of Educ. of the Twp. of Verona, Essex Cnty.*, Commissioner Decision No. 510-20 (Feb. 4, 2020).

Here, it is undisputed that the Board's written HIB determination referenced only the first element of the statute vis-à-vis petitioner's conduct, *i.e.*, that it can be reasonably perceived as being motivated by "appearance, race and ethnic origin." Initial Decision, at 9. The Board made no findings regarding the other requisite statutory elements. Because the ALJ correctly concluded that the record fails to establish that petitioner's conduct substantially disrupted or interfered with the orderly operation of the school or the rights of other students, the Commissioner concurs with the ALJ that petitioner's conduct did not constitute a HIB violation under the Act. Consequently, it is unnecessary to analyze whether one of the three conditions set forth in subsections (a), (b), and (c) of *N.J.S.A.* 18A:37-14 was satisfied.

The Board's reliance in its exceptions upon *T.R. and T.R., on behalf of minor child, E.R. v. Board of Education of the Bridgewater-Raritan Regional School District, Somerset County*, OAL Dkt. No. EDU 10208-13, Initial Decision (Sept. 25, 2014), Commissioner Decision No. 450-14 (Nov. 10, 2014), and *R.H. and M.H., on behalf of minor child, A.H. v. Board of Education of the Borough of Sayreville, Middlesex County*, OAL Dkt. Nos. EDU 09435-17 and EDU 14833-17, Initial Decision (June 24, 2021), Commissioner Decision No. 198-21 (Sept. 23, 2021), is unavailing. The Board cited those matters to illustrate that students have a right to be let alone, and that substantial disruptions have been found to occur under the Act when other students are so affected by the HIB incident that they report it to administrators. Respondent's Exceptions, at 2-3. Here, however, there is no indication that students present in the hallway during the incident noticed what had occurred or were affected in any way by petitioner's conduct. Initial Decision,

at 19. In addition, the Board concedes that no students reported the incident to administrators. Respondent's Exceptions, at 3.

Accordingly, the Commissioner hereby adopts the Initial Decision as the Final Decision in this matter, grants petitioner's motion for summary decision, and denies respondent's cross-motion for summary decision.

IT IS SO ORDERED.[2]

Angelina Allen McMillan, Ed.D.
ACTING COMMISSIONER OF EDUCATION

Date of Decision: September 7, 2023
Date of Mailing: September 8, 2023

[2] This decision may be appealed to the Appellate Division of the Superior Court pursuant to *N.J.S.A.* 18A:6-9.1. Under *N.J.Ct.R.* 2:4-1(b), a notice of appeal must be filed with the Appellate Division within 45 days from the date of mailing of this decision

State of New Jersey

OFFICE OF ADMINISTRATIVE LAW

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

OAL DKT. NO. EDU 02751-23

AGENCY DKT. NO. 69-3/23

DO YEON SHIM,

Petitioner,

v.

RIDGEFIELD PUBLIC SCHOOLS BOARD OF EDUCATION, BERGEN COUNTY,

Respondent.

Michael J. DeMarco, Esq, for petitioner (Ricci & Fava, P.C., attorneys)

Frances L. Febres, Esq., for respondent (Cleary, Giacobbe, Alfieri, Jacobs, L.L.C, attorneys)

Record Closed: July 24, 2023 Decided: July 26, 2023

BEFORE: **MATTHEW G. MILLER, ALJ**

STATEMENT OF THE CASE

This is a Harassment, Intimidation, and Bullying ("HIB") case arising out of an alleged violation of the New Jersey Anti-Bullying Bill of Rights, N.J.S.A. 18A:37-13, et seq.

Petitioner, Do Yeon Shim, is employed as a teacher in the Ridgefield, New Jersey School District. Following an incident involving a student that occurred on December 15, 2022, the District's HIB Coordinator determined that Ms. Shim had violated the HIB statute in a December 23, 2022 report. The District Superintendent signed off on the report on January 3, 2023 and a determination letter dated January 9, 2023 was sent to petitioner.

Ms. Shim, through counsel, appealed this determination by letter dated January 11, 2023, but the decision was affirmed by the Ridgefield Board of Education ("RBOE"), with the result being forwarded to Ms. Shim by letter dated January 20, 2023

PROCEDURAL HISTORY

On March 13, 2023, Ms. Shim filed a Verified Petition of Appeal. Respondent filed an Answer to the Petition on or about March 21, 2023 and the matter was transmitted to Office of Administrative Law ("OAL") on March 24, 2023 for hearing as a contested case. N.J.S.A. 52:14B-1 to -15 and N.J.S.A. 52:14F-1 to -13.

An initial conference was held on April 14, 2023. Petitioner then filed this Motion for Summary Decision on May 31, 2023. Respondent followed with opposition to the Motion and a Cross-motion for Summary Decision and following the filing of Opposition/Reply Briefs by both parties, the record closed on July 24, 2023.

FINDINGS OF UNDISPUTED FACT

The following **FACTS** of the case are not in dispute:

1. At all times relevant to this matter, petitioner, Do Yeon Shim, was a tenured teacher employed by the Ridgefield, New Jersey School District.

2. On December 15, 2022, while working at the Bergen Boulevard School[1], Ms. Shim was involved in an incident with a student that was witnessed by two other staff members ("SM1" and "SM2"). (Exhibit P-A).

3. More specifically, SM1 was walking the student back from a bathroom break to his classroom. When the student bent over to tie his shoe, Ms. Shim told him to hold that position and then used her phone to take a picture of his hair. (Exhibit R-A).

4. After doing so, Ms. Shim showed the photo to the student and stated that they could play tic-tac-toe on his head because his hair looked like a tic-tac-toe board.

5. SM1 intervened and complimented the student's hairstyle, and they left the area. SM1 further stated that the student seemed "unfazed" by the interaction and was excited to receive stickers on his testing chart.

6. SM1 reported the incident and an investigation commenced on December 16, 2022 that was performed by the District's Anti-Bullying Coordinator, Kara Doviak and signed off on by Dr. Letizia Pantoliano, the District Superintendent.

7. In conjunction with that investigation, the student was interviewed by Ms. Doviak and Dr. Tamika DePass, the District's Affirmative Action Officer. During the interview, the student confirmed the incident and felt that Ms. Shim had taken the picture because "she liked (his) hair". He also expressed that he liked the picture because his hair looked good.

8. SM2 was also interviewed and confirmed the incident, noting that Ms. Shim told the student to stay down because she wanted to take a picture of his head.

[1] This school is attended by 1st and 2nd grade students.

She felt that the student seemed "confused" but admitted that she "could not read him well". She noted that other students in the hallway were "quiet" and that she was "uncomfortable" with the interaction, although there was no apparent impact on the student the rest of the day.

9. Ms. Shim was also interviewed as part of the investigation and confirmed the basics of the incident, claiming that she took the picture because she thought the student's hairstyle was cool and she wanted to create a bonding moment with him.

10. The investigation concluded that Ms. Shim's actions were "reasonably perceived to be motivated on the basis of appearance, race or ethnic origin" and that she had committed an act in violation of the HIB statute.

11. Ms. Shim was advised of the result of the investigation on January 9, 2023 and offered an opportunity to contest the result before the RBOE. (Exhibit P-B).

12. On January 10, 2023, Ms. Shim was further advised that her actions violated RBOE Policy 3280 (Liability for Pupil Welfare) and 3281 (Inappropriate Staff Conduct). (Exhibit R-B).

13. On January 11, 2023, petitioner requested a hearing before the RBOE and on January 19, 2023, the RBOE affirmed the district's determination that she had committed an act of HIB. (Exhibit P-C and Exhibit R-C).

14. Petitioner was advised of the outcome via a January 20, 2023 letter. (Exhibit P-D).

15. The sole issue in dispute is whether respondent's affirmation of the district's determination that petitioner violated N.J.S.A. 18A:37-13, et seq. was arbitrary, capricious and unreasonable.

MOTION

Petitioner filed a Motion for Summary Decision, arguing that;

> Clearly, the determination in this case only addresses the distinguishing characteristic element of the statute and fails to address any other element required.

Petitioner emphasizes that none of the evidence supplied by respondent addresses the other three elements of the statute; that the conduct substantially disrupted the orderly operation of the school, that a reasonable person should have known that the conduct would physically or emotionally harm a student and that it either insulted or demeaned the student or created a hostile educational environment for him. N.J.S.A. 18A:37-14.

Citing to Wehbeh v. Bd. of Educ. of the Twp. of Verona, 2020 N.J. Agen. LEXIS 50 (Comm'r of Ed. February 4, 2020) and N.U. on behalf of minor child, M.U. v. Bd. of Educ. of the Town of Mansfield, Burlington County, 2020 N.J. Agen. LEXIS 244 (Comm'r of Ed. August 2, 2020), petitioner argues that respondent's finding of an HIB violation was arbitrary, capricious and unreasonable and therefore must be reversed.

Respondent opposed the Motion and filed a Cross-Motion for Summary Decision, arguing that with the presumption of correctness and what it considers to be a lack of affirmative showing that its decision was arbitrary, capricious and unreasonable, its decision was clearly correct. Thomas v. Morris Twp. Bd. of Educ., 89 N.J. Super. 327, 332 (App. Div. 1965).

It was also argued that petitioner's actions met all four prongs of the HIB statute in any event and that respondent's decision was well-supported by the facts of the case;

> The District correctly concluded that Petitioner's actions constituted HIB because they were motivated by appearance, race and/or ethnic origin, the conduct occurred in school, substantially interfered with the student's right to be left alone and to feel secure and comfortable in school and was the type of conduct that a reasonable person would find would cause emotional harm, and which was offensive and demeaning. Those findings were ultimately affirmed by the Board, and which decision was not arbitrary, capricious or unreasonable, as required for its decision to be overturned.

Respondent's brief at 4.

LEGAL POSITIONS

PETITIONER:

Petitioner argues that by the very findings of the HIB investigation, the Board's affirmation of Ms. Shim's guilt of the offense was arbitrary, capricious and unreasonable. Referencing the HIB statute, it was argued that respondent cited to only a single prong of what is a multi-part test to determine whether a violation had occurred and while she disagreed with that finding, in the absence of even a mention of the other prongs made the finding *de jure* unsustainable. Pointing to N.U. o/b/o M.U, petitioner notes;

> In addition to the fact that no specific findings were made addressing all elements of the statute, the allegations themselves likewise do not meet the standard to constitute acts of HIB. Therefore, the determination that petitioner engaged in (an) act of HIB is substantively deficient as well as procedurally deficient and this, is arbitrary, capricious and unreasonable and must be reversed.
>
> Petitioner brief at 7.

Petitioner then goes on to analyze the incident against the specific prongs of the statute and argues that there is nothing about same that violates same in any way. In so doing, counsel points to Wehbeh, Melnyk v. Teaneck Bd. of Educ., 2016 U.S. Dist. LEXIS 161524 (D.N.J. Nov. 22, 2016) and D.D.K. o/b/o D.K. v. Bd. of Educ. of the Tp. of Readington, 2016 N.J. Agen. LEXIS 835, (Initial Decision, October 6, 2016), adopted as modified, 2016 N.J. Agen. LEXIS 1348 (Comm'r of Ed., November 11, 2016).

RESPONDENT:

Respondent argues that Ms. Shim's actions unquestionably constituted a violation of the HIB Act and that its conclusions were not only not arbitrary, capricious or unreasonable, but were clearly correct.

More specifically, it argued that its investigation confirmed that petitioner's actions met all four prongs of the HIB statute and that while petitioner may disagree with the Board's determination, as long as its discretion was "exercised honestly and upon due consideration", it should be upheld. J.B. o/b/o minor child J.B. v. Northern Valley Reg. High Sch. District, 2021 N.J. Agen. LEXIS 571 (March 8, 2021).

It should be noted that respondent's Brief included a section concerning the manner in which the investigation was conducted and how potential administrative errors in same should be overlooked. However, petitioner did not question the technicalities of either the investigation or the manner in which it was affirmed by the Board of Education. Petitioner's only complaint is the finding (and subsequent affirmation) itself.

HIB REPORT:

The HIB report reads in full as follows;

> On December 15, 2022, staff member #1 at BB school reported an incident that took place in the hall way (sic) outside of the bathroom while the class was taking an allotted bathroom break. Staff member #1 stated that she was walking victim back to his classroom teacher and he asked to show his teacher his work. Present were Offender, staff member #2, staff member #3 and victim's classmates. Staff member #1 reports the following: "Victim bent down to tie his shoe. Offender took her phone out and told victim to stand still as offender took a picture. At first I thought offender was taking a picture of victim tying his shoe. Offender then showed victim the picture and stated that they could play tic tac toe on victim's head. Victim looked puzzled, maybe in shock, not sure what offender meant. Offender then further explained that they could play tic tac toe together on his head because his hair looked like a "tic tac toe board." Immediately after staff member #1 told him how much she liked his braids and who helps him with his hair. Then they went back to finish their work in the testing office. Nothing else was said of the incident and victim appeared unfazed as he was excited to receive stickers on his testing chart.

On December 16, 2022, victim was interviewed by myself and Dr. DePass. Though questioning victim confirmed that his teacher took a picture of his head and said it looked like a tic tac toe board. He was asked why he thought she did this and he said, "She liked my hair" Did you like that she took a picture of your hair? Yes. Did you tell your mom? Yes. How did she take the picture? I was tying my shoelaces. Did she show you the picture? Yes. She said I didn't know what the top looks like and said she wanted to play tic tac toe. Did you like the picture? Yes. Why did you like it? Because my hair looks good.

On December 16, 2022, staff member #3 was interviewed as a possible witness. She stated she was not present at the time the picture was taken. She said she was walking down the hall and staff member #1 took victim out for a break. They talked about how proud she was about victim's sentence structure work.

Staff member #2 reports she was in the hallway when victim came to show her his sentences. She confirms that victim bent over to tie his shoes and offender told him to stay down because she wanted to take a picture of his head. She reports victim looking confused. She then said offender took a picture, showed victim the picture and told him that is (sic) looks like a tic tac toe board and that they can play. When asked about victim's reactions she said she couldn't read him well but he looked confused. When asked about victim's reactions she said she couldn't read him well but he looked confused. When asked the reaction of the other students she said they were quiet. When asked how she felt about the incident staff member #2 reported feeling uncomfortable. She was asked if offender did anything further and she said no. When asked how victim was for the rest of the day she said he seemed normal and didn't seem out of sorts.

Interview with Offender on December 19, 2022 with Dr. DePass and Kara Doviak. Dr. DePass verified with offender that she took the photo and asked her why she took it. Offender responded that she thought the pattern was cool and wanted to share it with victim. Offender said she wanted to find bonding moments and thought victim's hair was cool. Victim showed me his writing booklet and I told him I wanted to see the same things from him in class as well and that he can do it. Victim couldn't see the top of his head so I wanted to show him. When asked if she asked for victims' permission before taking the photo she said she did not but let him know she was taking the picture. It was just the top of his head. When you took the pic were there other student reactions?

> No, everyone was occupied while waiting for the bathroom, there was no reactions. It was just myself, staff member #3 and staff member #2.
>
> Summary
>
> Staff member #1 reported that offender told a student to stay in a bent down position so she could take a picture of his head. When showing the victim the picture, offender said they should play tic tac toe on his head. The staff member (offender) and two other staff members substantiated the incident. The student also substantiated that this happened. The finding of this case substantiated a case of HIB based on the fact that the findings can be reasonable perceived as being motivated by either any actual or perceived characteristic such as race, religion, gender, mental...physical or sensory disability or by any other distinguishing characteristic. In this case it has been determined that the staff member's (offender) actions were motivated by appearance, race and ethnic origin. Although the offender reports she did not realize the potential negative impact this incident may have had, it is still a case of HIB based on the Anti-bullying law in New Jersey.
>
> (Exhibit P-A)

LAW AND ANALYSIS

Summary decision may be granted "if the papers and discovery which have been filed, together with the affidavits, if any, show that there is no genuine issue as to any material fact challenged and that the moving party is entitled to prevail as a matter of law." N.J.A.C. 1:1-12.5(b). The OAL summary decision rule is essentially the same as the summary judgment rule under the New Jersey Court Rules, which states:

> The judgment or order sought shall be rendered forthwith if the pleadings, depositions, answers to interrogatories and admissions on file, together with the affidavits, if any, show that there is no genuine issue as to any material fact challenged and that the moving party is entitled to a judgment or order as a matter of law. An issue of fact is genuine only if, considering the burden of persuasion at trial, the evidence submitted by the parties on the motion, together with all

> legitimate inferences therefrom favoring the non-moving party, would require submission of the issue to the trier of fact.
>
> [R. 4:46-2(c).]

The New Jersey Supreme Court has modified and clarified the analysis required when considering a motion for summary decision/judgment. In Brill v. Guardian Life Insurance Co. of America, 142 N.J. 520, 540 (1995), the Court adopted the summary judgment standard utilized by federal courts:

> Under this new standard, a determination whether there exists a "genuine issue" of material fact that precludes summary judgment requires the motion judge to consider whether the competent evidential materials presented, when viewed in the light most favorable to the non-moving party, are sufficient to permit a rational factfinder to resolve the alleged disputed issue in favor of the non-moving party. The "judge's function is not himself [or herself] to weigh the evidence and determine the truth of the matter but to determine whether there is a genuine issue for trial." [Anderson v. Liberty Lobby, 477 U.S. 242, 249, 106 S. Ct. 2505, 2511, 91 L. Ed. 2d 202, 212 (1986).] . . . If there exists a single, unavoidable resolution of the alleged disputed issue of fact, that issue should be considered insufficient to constitute a "genuine" issue of material fact for purposes of R. 4:46-2. Liberty Lobby, supra, 477 U.S. at 250, 106 S. Ct. at 2511, 91 L. Ed. 2d at 213. The import of our holding is that when the evidence "is so one-sided that one party must prevail as a matter of law," Liberty Lobby, supra, 477 U.S. at 252, 106 S. Ct. at 2512, 91 L. Ed. 2d at 214, the trial court should not hesitate to grant summary judgment.
>
> [Id. at 540.]

The burden is on the moving party to exclude all reasonable doubt as to the existence of any genuine issue of material fact, and all inferences of doubt are drawn against the moving party and in favor of the non-moving party. Saldana v. DiMedio, 275 N.J. Super. 488, 494 (App. Div. 1994). The critical question therefore is "whether the evidence presents a sufficient disagreement to require [a hearing] or whether it is so one-sided that one party must prevail as a matter of law." Brill, 142 N.J. at 533 (citation omitted). If the non-moving party's evidence is merely colorable, or is not significantly

probative, summary judgment should not be denied. See, Bowles v. City of Camden, 993 F. Supp. 255, 261 (D.N.J. 1998).

An action by a local board of education "is entitled to a presumption of correctness and will not be upset unless there is an affirmative showing that such decision was arbitrary, capricious or unreasonable." Thomas v. Morris Twp. Bd. of Educ., 89 N.J. Super. 327, 332 (App. Div. 1965). Our courts have held that "[w]here there is room for two opinions, action is not arbitrary or capricious when exercised honestly and upon due consideration, even though it may be believed that an erroneous conclusion has been reached." Bayshore Sewage Co. v. Dep't of Envtl. Prot., 122 N.J. Super. 184, 199-200 (Ch. Div. 1973),aff'd, 131 N.J. Super. 37 (App. Div. 1974). Thus, in order to prevail, those challenging a decision made by a board of education "must demonstrate that the Board acted in bad faith, or in utter disregard of the circumstances before it." G.H. & E.H. ex rel. K.H. v. Bd. of Educ. of Franklin Lakes, 2014 N.J. AGEN. LEXIS 19 (February 24, 2014) (citation omitted), adopted, 2014 N.J. AGEN. LEXIS 1137 (April 10, 2014). Also, a board's decision may be overturned if its determination violates the legislative policies expressed or implied in the governing act. J.A.H. ex rel. C.H. v. Twp. of Pittsgrove Bd. of Educ., 2013 N.J. AGEN. LEXIS 58 (March 11, 2013) (citing Campbell v. Dep't of Civil Serv., 39 N.J. 556, 562 (1963)), adopted, 2013 N.J. AGEN. LEXIS 436 (April 25, 2013).

The Anti-Bullying Act is designed "to strengthen the standards and procedures for preventing, reporting, investigating, and responding to incidents of harassment, intimidation, and bullying of students that occur in school and off school premises." N.J.S.A. 18A:37-13.1(f). Under the Act, "[h]arassment, intimidation or bullying" is defined as;

> any gesture, any written, verbal or physical act, or any electronic communication, whether it be a single incident or a series of incidents, that is reasonably perceived as being motivated either by any actual or perceived characteristic, such as race, color, religion, ancestry, national origin, gender, sexual orientation, gender identity and expression, or a mental, physical or sensory disability, or by any other distinguishing characteristic, that takes place on school property, at any school-sponsored function, on a school bus, or off school grounds as provided for in section 16 of P.L.

> 2010, c.122 (C.18A:37-15.3), that substantially disrupts or interferes with the orderly operation of the school or the rights of other students and that:
>
> > a. a reasonable person should know, under the circumstances, will have the effect of physically or emotionally harming a student or damaging the student's property, or placing a student in reasonable fear of physical or emotional harm to his person or damage to his property;
> >
> > b. has the effect of insulting or demeaning any student or group of students; or
> >
> > c. creates a hostile educational environment for the student by interfering with a student's education or by severely or pervasively causing physical or emotional harm to the student.
>
> [N.J.S.A. 18A:37-14.]

At this point, it is important to note that the interplay of sections (a), (b) and (c) was addressed by the Commissioner in Wehbeh, 2020 N.J. Agen. LEXIS 50;

> ...a finding of HIB requires three elements. First, the conduct must be reasonably perceived as motivated by any actual or perceived enumerated characteristic or other distinguishing characteristic and, second, the conduct must substantially disrupt or interfere with the rights of other students or the orderly operation of the school. (Footnote omitted). The third condition is that one of the three criteria enumerated in the Act regarding the effect of the conduct must also be satisfied.
>
> Id. at 3.

The Commissioner explained that "as a matter of standard statutory construction, the term "or" between subsections (b) and (c) also applies to subsection (a), such that a demonstration of any of these three criteria can support a finding of HIB." Id. at n2.

Each school district must adopt a policy that prohibits HIB and provides "a procedure for prompt investigation of reports of violations and complaints." N.J.S.A. 18A:37-15(b)(6). Once an alleged HIB incident is reported to the school principal, the

principal must initiate an investigation within one school day of the report. N.J.S.A. 18A:37-15(b)(6)(a). The investigation shall be conducted by a school anti-bullying specialist, but "[t]he principal may appoint additional personnel who are not school anti-bullying specialists to assist in the investigation." Ibid. The investigation shall be completed within ten-days of the initial HIB complaint. Ibid.

The results of the investigation shall then be quickly reported to the superintendent of schools, who may take certain remedial action. N.J.S.A. 18A:37-15(b)(6)(b). In particular, "the superintendent may decide to provide intervention services, establish training programs to reduce [HIB] and enhance school climate, impose discipline, order counseling as a result of the findings of the investigation, or take or recommend other appropriate action." Ibid.

The results shall also be reported to the board of education "no later than the date of the board of education meeting next following the completion of the investigation, along with information on any services provided, training established, discipline imposed, or other action taken or recommended by the superintendent." N.J.S.A. 18A:37-15(b)(6)(c).

The parents of the students involved in any alleged HIB incident "shall be entitled to receive information about the investigation, . . . including the nature of the investigation, whether the district found evidence of [HIB], or whether discipline was imposed, or services provided to address the incident of [HIB]." N.J.S.A. 18A:37-15(b)(6)(d). The parents may request a hearing before the board, and the hearing must be held within ten-days of the request. Ibid. Any hearing shall be held in executive session to protect the identity of any students involved. Ibid. And "[a]t the hearing, the board may hear from the school's anti-bullying specialist about the incident, recommendations for discipline or services, and any programs instituted to reduce such incidents[.]" Ibid.

A school board must issue a written decision at the first meeting after its receipt of the investigation report. N.J.S.A. 18A:37-15(b)(6)(e). The board may affirm, reject, or modify the superintendent's decision. Ibid. The board's decision may be appealed to the Commissioner of Education. Ibid.

Before determining the outcome of the case, we must analyze the facts for what they are. This is not a case about inferring what impact Ms. Shim's action could potentially have had and it is certainly not a referendum on whether her decision-making was appropriate or whether she should face discipline or not. This case is specifically about whether petitioner's actions that day amounted to an HIB violation.

I **CONCLUDE** that it did not and that respondent's determination that it did was arbitrary, capricious and unreasonable.

Per the HIB statute and its interpretation by the courts, for there to be a valid finding of an HIB violation (in this specific case), these things had to have happened;

1. A reasonable person would perceive that the conduct was based upon a distinguishing characteristic.

AND

2. The conduct took place on school property.[2]

AND

3. The conduct must substantially disrupt or interfere with the orderly operation of the school or the rights of other students.

AND

3a. A reasonable person should know that the conduct would have the effect of...emotionally harming a student.

OR

3b. The conduct has the effect of insulting or demeaning the student.

OR

3c. The conduct created a hostile educational environment for the student by interfering with the

[2] There is no dispute that the conduct took place on school property and while this prong is more inclusive, there is no need, given this location, to delve further into this aspect of the statutory requirements.

> student's education or by severely or pervasively causing emotional harm to the student.

In other words, as will be explored in some detail below, in order for there to be a cognizable finding of a HIB violation, respondent must demonstrate that it met prongs 1, 2 and 3 and then any of 3a, 3b or 3c. Any break in the chain causes the charge to fail.

Here, respondent's reasoning in support of its HIB findings was;

> The finding of this case substantiates a case of HIB based on the fact that the findings can be reasonable perceived as being motivated by either any actual or perceived characteristic such as race, religion, gender, mental...physical or sensory disability or by any other distinguishing characteristic. In this case it has been determined that the staff member's (offender) actions were motivated by appearance, race and ethnic origin. Although the offender reports she did not realize the potential negative impact this incident may have had, it is still a case of HIB based on the Anti-bullying law in New Jersey.

As emphasized by petitioner, respondent did not make any other findings or determinations as to how Ms. Shim's conduct violated the HIB statute.

While why the incident occurred is obviously an important part of any HIB case, in order for there to be a sustainable finding of a statutory violation, a much more detailed analysis must take place, one that was not undertaken by respondent here.

STATUTORY ANALYSIS

PRONG 1 - THE CONDUCT WAS REASONABLY PERCEIVED TO BE BASED UPON A DISTINGUISHING CHARACTERISTIC

Putting aside the obvious "What was she thinking?" aspect of the incident, the first aspect of the statute that must be addressed is the one area where respondent documented its conclusion, that Ms. Shim's conduct could be reasonably perceived as being motived by race or another distinguishing characteristic.

However, it first must be determined whose perception controls. It is the alleged perpetrator, the alleged victim or a "reasonable person"?

One of the first cases to discuss this issue was Melnyk;

> On its face, the HIB Policy requires that several factors must be met before an expression can be found to be harassment. First, the communication must be "reasonably perceived as motivated" by an actual or perceived characteristic. That is to say, the comment must be objectively perceived to a reasonable person as motivated by a characteristic.
>
> Id. at 17-18.

Melynk was cited with approval in R.H. ex rel. A.H. v. Borough of Sayreville Bd. of Educ., 2023 U.S. Dist. LEXIS 83587 (D.N.J. May 12, 2023);

> First, the communication must be "reasonably perceived as being motivated either by any actual or perceived characteristic, such as race . . ." among other things. N.J.S.A. § 18A:37-14. "The 'reasonably perceived' test is an objective one that has withstood constitutional scrutiny," and does not present a vagueness issue. See, Melynk v. Teaneck Bd. of Educ., No. 16-0188, 2016 U.S. Dist. LEXIS 161524, 2016 WL 6892077, at *8 (D.N.J. Nov. 22, 2016)
>
> Id. at 13.

This result is also alluded to in S.A. v. Bd. of Educ. of Moorestown, 2019 N.J. Super. Unpub. LEXIS 2114 (App. Div. October 15, 2019). There, in a case involving a teacher who requested a student's (poor) test papers as part of his job duties, the court concluded that a HIB violation had not occurred, since;

> we do not discern sufficient facts to support a conclusion that any actions by R.L. were motivated by G.A.'s ADHD or other personal characteristics.
>
> Id. at 7.

It further noted that;

> even if we presume R.L. was insensitive or even unkind, there is no evidence R.L. was prompted by any actual or perceived characteristic, such as race, color, religion, ancestry, national origin, gender, sexual orientation, gender identity and expression, or a mental, physical or sensory disability, or by any other distinguishing characteristic.
>
> Ibid.

This prong was again discussed in L.K. and T.K. ex rel. A.K. v. Mansfield Bd. of Educ., 2019 N.J. Agen. LEXIS 62 (January 22, 2019), Final Decision, 2019 N.J. Agen. LEXIS 345 (Comm'r of Ed. April 22, 2019), reversed and remanded, L.K. and T.K. ex rel. A.K. v. Bd. of Educ. of Mansfield, 2020 N.J. Super. Unpub. LEXIS 2082 (App. Div. November 2, 2020).

In L.K., the ALJ found that "the statute focuses on the impact of (the) conduct on (the alleged victim) and what (the alleged victim) reasonably perceived." However, in that case involving young children and a gender transitioning student, the Court further found;

> There is no requirement that the Board find that A.K.'s conduct was actually motivated by the perceived characteristic, because, as petitioners argue, A.K. most likely does not even know what "gender identity" means. However, even under the actual wording of the statute, the only corroborated finding from the investigation was that A.K. asked questions about why N3 dressed like a girl even though N3 asked her to stop. Therefore, the age of A.K. was relevant to whether A.K.'s conduct was motivated by the perceived characteristic or because a seven-year-old would be curious about why a student she knew as a boy was dressing like a girl. The investigators had the time to find and interview someone in the cafeteria who may have heard A.K. continue the "harassment," but they did not.
>
> L.K. and T.K. ex rel. A.K. v. Mansfield Bd. of Educ., 2019 N.J. Agen. LEXIS 62 at pg. 17-18.

Given the lack of clarity in the statute, there will of course be some confusion. However, that lack of clarity was addressed in Wehbeh v. Bd. of Educ. of the Tp. of Verona, 2020 N.J. Agen. LEXIS 50 (Comm'r of Ed. February 4, 2020), where the

Commissioner found that a "standard reasonableness determination common in many types of adjudications" should be utilized. It was noted that to require an actor to have intentionally committed to offense, the burden concerning motivation would be improperly placed on the alleged victim. Id. at n3.

Ultimately, I **CONCLUDE** that in order to find that the first prong of the statute had been satisfied, an investigating body must view the evidence in its entirety and determine whether a reasonable person could perceive that the conduct could be "motivated by an actual or perceived characteristic". That determination should take into account the totality of the circumstances, including the traits/characteristics of the alleged victim, the age, knowledge and experience of the actor as well as the time, place and location of the act, etc.

Then, if the investigator makes a determination that a reasonable person would conclude that the act was motivated by an actual or perceived characteristic, the investigation will proceed to the next element of the HIB offense. In essence, the consideration of this prong does not focus purely on either the perception of the alleged victim or the expressed intent of the alleged actor, but instead provides an objective standard based on the totality of the circumstances.

In doing so, I **FIND** that a reasonable person could conclude that petitioner's motivation in performing the act was based upon the student's hairstyle, which, per September 2019 Guidance on Race Discrimination Based on Hairstyle published by the New Jersey Division on Civil Rights, is "closely associated with Black people". Id. at 1. (Exhibit R-D)

PRONG 2 – LOCATION OF THE CONDUCT

That the second prong of the HIB statute, concerns the location of the incident, has been met is unchallenged, since the conduct occurred in the school building.

PRONG 3 – THE CONDUCT SUBSTANTIALLY DISRUPTED OR INTERFERED WITH THE ORDERLY OPERATION OF THE SCHOOL OR THE RIGHTS OF OTHER STUDENTS.

Very simply, I **CONCLUDE** that there is no credible evidence that this entire interaction "substantially disrupt(ed) or interfere(d) with the orderly operation of the school or the rights of other students". As much as respondent's counsel tries to massage the finding of the HIB report to meet the verbiage of this prong, he simply cannot. Even the most optimistic and favorable reading of the report demonstrates that the student in question "looked puzzled, maybe in shock" momentarily. However, in the next minute, SM1 stated that the student "appeared unfazed as he was excited to receive stickers on his testing chart".

He also appeared "confused" to SM2, but then she admitted that "she couldn't read him well", although she noted that the student "seemed normal and didn't seem out of sorts" for the rest of the day. Further, while SM2 stated that other children in the area (who were not mentioned by SM1) were "quiet", the report fails to mention if there was even an indication that they had seen the interaction and none of these other students were ever (apparently) identified or interviewed.

Finally, the victim himself literally did not express any discomfort or disruption due to the event. He expressed that he thought Ms. Shim took his picture because she liked his hair and that he liked the picture because his hair looked good.

The case law concerning this prong is clear that the negligible impact that this interaction had on the student and the utter lack of evidence that it had any impact on other students does not satisfy this prong of the HIB statute. As noted by the Commissioner in D.D.K. o/b/o D.K, 2016 N.J. Agen. LEXIS 1348;

> However, the report determined that the incident did not amount to HIB because the comments did not substantially disrupt or interfere with the orderly operation of the school or the rights of other students. In support of this finding, the report noted that D.K. stated in his interview that "fortunately,

> this was not problematic for my learning experience, but it ticked me off at the time." (Exhibit J-l). The student witness observed the alleged aggressor make an "embarrassed laugh" to himself when he realized what he had said had come out wrong, but did not hear anyone else laugh and did not think D.K. was upset as a result of the comment. Ibid. The teachers did not hear any of the alleged comments.
>
> Previously, conduct has been determined to substantially disrupt the orderly operation of the school when students are so upset or embarrassed that they are "not fully available for learning." G.H. and E.H. on behalf of K.H. v. Board of Education of the Borough of Franklin Lakes, Bergen County, OAL Dkt. No. EDU 13204-13, decided February 24, 2014, adopted Commissioner Decision No. 157-14, April 10, 2014. Additionally, when other students are "so affected" by behavior that they report it, the orderly operation of the school may be substantially disrupted. T.R. and T.R. on behalf of E.R. v. Bridgewater-Raritan Regional Board of Education, OAL Dkt. No. EDU 10208-13, decided September 25, 2014, adopted Commissioner Decision No. 450-14, November 10, 2014. Given that D.K. indicated that the comments were not problematic for his learning experience and other students did not appear to be affected by them -- combined with a lack of any other evidence to the contrary -- the Commissioner is constrained to agree that petitioner failed to meet his burden of demonstrating that the comments substantially disrupted or interfered with the orderly operation of the school or the rights of other students.
>
> D.D.K. o/b/o D.K., 2016 N.J. Agen. LEXIS 1348 at 2-3.

The case cited by respondent in support of its position is unhelpful. In R.P. o/b/o A.P. v. Bd. of Educ. of Tp. of Hamilton, 2018 N.J. Agen. LEXIS 83 (Initial Decision, January 2, 2018), adopted, 2018 N.J. Agen. LEXIS 346 (Comm'r of Ed., March 29, 2018). That matter involved a ten-year-old student who was exposed to repeated sexual innuendo and gestures by another student. She wrote a letter to the school "urgently seeking help...due to A.P.'s ongoing inappropriate behavior. Through this letter and confirmed during her interview with (a school official), (the victim) expressed her extreme discomfort and distress over A.P.'s ongoing conduct." A.P., 2018 N.J. Agen. LEXIS 83 at 15. Given the severity of the harassment, the Court found that the student's "extreme discomfort and distress" was sufficient to satisfy the "disruption prong". Ibid.

In the case at bar, there is no evidence that there was anything more than, at best, a negligible, literally momentary disruption to the student's educational process. Further, there is no evidence at all that any other students were even aware of the incident, let alone impacted by it.

With no evidence demonstrating that Prong 3 of the statutory requirements was either met or considered, I **CONCLUDE** that any finding of an HIB violation by Ms. Shim was arbitrary, capricious and unreasonable. This is not a case where reasonable minds can differ as to the conclusion that was reached; rather this is a case where it was literally impossible, by definition, to reach that conclusion.

Given the breaking of the chain with respondent's failure to meet Prong 3, there is no need to analyze the case against the balance of the statutory requirements.

FINDINGS AND CONCLUSIONS

Having reviewed the undisputed facts in this matter and even given the presumption of correctness of respondent's findings, I **CONCLUDE** that petitioner has clearly and convincingly demonstrated that respondent's determination that her actions were violative of the HIB statute was arbitrary, capricious and unreasonable. Thomas, 89 N.J. Super. at 332.

Both the decision of the HIB coordinator/Superintendent and the Board's affirmation of same are quite remarkable. The standards that must be met before a finding of an HIB violation can be made are well-known and the failure of the report to mention anything other than the perceived motivation of the act is highly problematic. In fact, the report even infers that the student was not impacted by Ms. Shim's actions ("the potential negative impact this incident may have had"), but nonetheless concludes that it was "still a case of HIB based on the Anti-bullying law in New Jersey."

No, it is not and when the Board had the opportunity to correct what was an obviously incomplete and erroneous conclusion by the HIB coordinator and Superintendent, it instead ratified it.

As noted above, this case is not about whether Ms. Shim made a poor decision or violated other district policies. Rather, she was accused of violating a specific statute that has specific elements that must be met before a finding of guilt can be made and sustained. Even giving respondent every benefit of the doubt, I **FIND** there is no way that a reasonable respondent could have concluded, based upon this factual scenario, that Ms. Shim's actions violated N.J.S.A. 18A:37-13.2, et seq.

Based on the foregoing, I **CONCLUDE** the Board's decision that petitioner's conduct meets the statutory definition of HIB and that she committed an act of HIB against a student, was arbitrary, capricious and unreasonable.

Accordingly, I **CONCLUDE** that petitioner's Motion for Summary Decision should be **GRANTED,** and I further **CONCLUDE** that respondent's Motion for Summary Decision should be **DENIED**.

ORDER

Based on the foregoing, it is hereby **ORDERED** that petitioner's Motion for Summary Decision be and is hereby **GRANTED** and it is further;

ORDERED that respondent's Cross-Motion for Summary Decision be and is hereby **DENIED**.

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

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

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

July 26, 2023
DATE

MATTHEW G. MILLER, ALJ

Date Received at Agency: July 26, 2023

Date Mailed to Parties: July 26, 2023

MGM/sej

APPENDIX

EXHIBITS

FOR PETITIONER:

P-A HIB Summary Report

P-B January 9, 2023 HIB Determination Letter

P-C January 11, 2023 Appeal Letter

P-D January 20, 2023 Post-Appeal HIB Determination Letter

FOR RESPONDENT:

R-A Picture of student taken by petitioner

R-B January 10, 2023 disciplinary letter

R-C January 19, 2023 Ridgefield Board of Education Meeting Minutes

R-D September 2019 Guidance on Race Discrimination Based on Hairstyle published by the New Jersey Division on Civil Rights

R-E Ridgefield District Policy 3280 – Liability for Pupil Welfare

R-F Ridgefield District Policy 3281 – Inappropriate Staff Conduct

271-23

New Jersey Commissioner of Education

Decision

Board of Education of the Clearview Regional School District, Gloucester County,

Petitioners,

v.

New Jersey Department of Education and Dr. Angelica Allen-McMillan, Acting Commissioner,

Respondents.

Synopsis

The Clearview Regional Board of Education challenged a March 2023 State Aid determination by the respondent, New Jersey Department of Education (Department), projecting that petitioner's aid for the 2023-2024 school year would be reduced by $1,044,568. Petitioner contended that, pursuant to *N.J.S.A.* 18A:7F-68(c)(3), the District qualifies for a statutory exemption from state school aid reductions such that the Department's projected 2023-2024 aid determination is incorrect; further, petitioner sought to restore the District's state aid to the 2020-2021 school year level. The Department contended that the plain language of 18A:7F-68(c)(3) does not apply to regional school districts like Clearview, which serves students from the municipalities of Harrison and Mantua. The parties filed cross motions for summary decision.

The ALJ found, *inter alia*, that: there are no material facts at issue here, and the matter is ripe for summary decision; there is no dispute that Clearview is a regional district comprised of two constituent municipalities; while the District is arguably "located" in a municipality because all of its buildings are situated in Harrison, the statutory funding scheme for regional school districts must take into account the equalized valuation of each constituent municipality; applying the statutory provisions as interpreted by petitioner would only take into account the equalized total tax rate of Harrison, which is inconsistent with the statutory funding scheme for regional school districts; therefore, petitioner's argument that it can qualify for an exemption from a state aid reduction due to having all its buildings located in Harrison is without merit. The ALJ concluded that a plain reading of *N.J.S.A.* 18A:7F-68(c)(3) does not support petitioner's position that the statutory exemption applies to regional school districts. Accordingly, the ALJ granted the Department's motion for summary decision, and denied Clearview's cross-motion.

Upon review, the Commissioner adopted the ALJ's thorough and well-reasoned Initial Decision as the final decision in this matter. Summary decision was granted in favor of the Department and the petition was dismissed.

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

271-23
OAL Dkt. No. EDU 02403-23
Agency Dkt. No. 73-3/23

New Jersey Commissioner of Education

Final Decision

Board of Education of the Clearview Regional School District, Gloucester County,

Petitioner,

v.

New Jersey Department of Education and Dr. Angelica Allen-McMillan, Acting Commissioner,

Respondents.

The record of this matter, the Initial Decision of the Office of Administrative Law (OAL), the exceptions filed by petitioner pursuant to *N.J.A.C.* 1:1-18.4, and respondents' reply thereto, have been reviewed and considered.

At issue is petitioner's challenge to respondents' 2023-2024 projected state school aid determination for petitioner's regional school district, which is comprised of students from the municipalities of Harrison and Mantua. On March 2, 2023, the Department of Education's Division of Finance and Business Services, Office of School Funding, projected that petitioner's state school aid would be reduced by $1,044,568 for the 2023-2024 school year. Petitioner contends that it qualifies for a statutory exemption from state school aid reductions, codified at

N.J.S.A. 18A:7F-68(c)(3), and that, consequently, respondents' projected state school aid determination is erroneous.[1]

N.J.S.A. 18A:7F-68(c)(3) states:

> A school district, other than an SDA district, that is located in a municipality in which the equalized total tax rate is at least 10 percent greater than the Statewide average equalized total tax rate for the most recent available calendar year and is spending at least 10 percent below adequacy as calculated pursuant to section 1 of P.L. 2018, c.67 (C.18A:7F-70) shall not be subject to a reduction in State aid pursuant to subsection b. of this section.

Petitioner asserts that the statutory exemption applies to it because: (1) it is not an SDA district; (2) its buildings are "located in" the municipality of Harrison; (3) Harrison Township's equalized total tax rate is at least 10 percent greater than the Statewide average equalized total tax rate for the most recent available calendar year (122.316%); and (4) the district's spending is at least 10 percent below adequacy (85.072%). Respondents contend that *N.J.S.A.* 18A:7F-68(c)(3) is not applicable to regional school districts and that petitioner's district is therefore ineligible for the statutory exemption. Specifically, respondents point out that the plain language of *N.J.S.A.* 18A:7F-68(c)(3) only provides a method of calculation for single municipality school districts that is predicated on the existence of a single equalized total tax rate.

Petitioner initially moved for emergent relief but later withdrew its emergent application without prejudice. Once the matter was transmitted to the OAL, the parties jointly requested

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[1] Petitioner further contends that it was eligible for the statutory exemption for the 2021-2022 and 2022-2023 school years, during which respondents also reduced its state school aid. Therefore, petitioner seeks a retroactive restoration of state school aid for those years. However, petitioner's challenge of respondents' state school aid determinations for the 2021-2022 and 2022-2023 school years is untimely. *See N.J.A.C.* 6A:3-1.3(i) (explaining that petitions of appeal must be filed "no later than the 90th day from the date of receipt of the notice of a final order, ruling or other action by the . . . agency").

that petitioner's filing be converted to a motion for summary decision, and respondents cross-moved for summary decision. Overall, the Administrative Law Judge (ALJ) agreed with respondents that a plain reading of *N.J.S.A.* 18A:7F-68(c)(3) does not support petitioner's position that the statutory exemption applies to regional school districts.

Upon review of relevant related school funding statutes and case law, the ALJ reasoned that "[e]ven though it is arguably located in a [single] municipality, the statutory funding scheme for regional school districts must take into account the equalized [tax] valuation of each constituent municipality." Initial Decision, at 10-12. To interpret and apply the statutory exemption as urged by petitioner "would only take into account the equalized total tax rate of Harrison, which is inconsistent with the . . . statutory funding scheme for regional school districts." *Ibid.*

Accordingly, the ALJ held that "a regional school district cannot take into account only one constituent municipality to quality for an exemption from State aid reductions" pursuant to *N.J.S.A.* 18A:7F-68(c)(3). *Id.* at 12. The ALJ agreed with respondents that because "the focus of the provision is on a municipality's equalized tax rate and a regional school district is comprised of multiple municipalities," the statutory exemption is not applicable to regional school districts. *Id.* at 13-14. The ALJ further concluded that respondents' interpretation of the statute was reasonable and should be accorded substantial deference. *Id.* at 14-15.

In their exceptions, petitioner argues that the ALJ's interpretation of the statutory exemption is erroneous because a plain reading of *N.J.S.A.* 18A:7F-68(c)(3) only requires consideration of where the district is "located," and not where it "pulls students from." Petitioner's exceptions, at 3-5. Thus, because the municipality of Harrison meets the statutory

criteria, the fact that petitioner's district also educates students from the municipality of Mantua—and receives property tax dollars from Mantua—is irrelevant. *Ibid.*

In any event, petitioner asserts that the municipality of Mantua also has an equalized total tax rate that is at least 10 percent greater than the Statewide average equalized total tax rate for the most recent available calendar year (120.386%). *Id.* at 6-7. It also contends that because newly formed regional school districts are exempt from state school aid reductions pursuant to *N.J.S.A.* 18A:7F-68(c)(5), it would defy common sense to exclude existing regional school districts from the statutory exemption codified at *N.J.S.A.* 18A:7F-68(c)(3*). Ibid.*

In reply, respondents maintain that, by its plain language, the statutory exemption is not applicable to regional districts like petitioner because *N.J.S.A.* 18A:7F-68(c)(3) "only provides a method of calculation for single municipality school districts, and the exemption is predicated on the existence of a single equalized total tax rate." Respondent's Exceptions, at 8-10. They explain that "regional school districts . . . are comprised of multiple municipalities with each municipality having [its] own equalized total tax rate." *Id.* at 10. They contend that "[i]f an average of municipal tax rates within a region – or some other formulation suggested by petitioner – were a possible consideration, the singular forms of 'the' and 'rate' would not have been used" by the Legislature in *N.J.S.A.* 18A:7F-68(c)(3). *Id.* at 11. They also point to subsection (c)(5) as evidence that had the Legislature intended for (c)(3) to apply to regional school districts, it would have "provided a method of calculation applicable to regional school districts" as it did in subsection (c)(5).

Upon careful review, the Commissioner adopts the ALJ's thorough, well-reasoned Initial Decision as the Final Decision in this matter. The Commissioner concurs with the ALJ that,

by its plain language, the statutory exemption is not applicable to regional districts because it presupposes the existence of a single equalized total tax rate. As written, the statutory exemption simply does not allow for consideration of both the municipality of Harrison's equalized total tax rate and the municipality of Mantua's equalized total tax rate. However, both equalized total tax rates are relevant when considering school funding issues pertaining to regional school districts. *See generally Borough of Sea Bright v. State, Dep't of Educ.*, 242 N.J. Super. 225, 231-32 (App. Div. 1990) (explaining that the costs of a regional school district are apportioned "among the constituent municipalities according to their property values") (emphasis added).

Additionally, the Commissioner concurs with the ALJ that petitioner's interpretation of the statutory exemption is inconsistent with the statutory school funding scheme for regional school districts because it only accounts for Harrison Township's equalized total tax rate while ignoring Mantua Township's equalized total tax rate. Contrary to petitioner's assertion, the Commissioner does not find the fact that the district's buildings are located solely in Harrison to be dispositive or persuasive. Moreover, *N.J.S.A.* 18A:7F-68(c)(5) illustrates that had the Legislature wished to craft an exemption for existing regional school districts, it would have done so explicitly. *See also N.J.S.A.* 18A:7F-32(b) (setting forth a specific methodology to calculate supplemental State aid for certain regional school districts).

The Commissioner is not empowered to "rewrite a plainly-written enactment of the Legislature or presume that the Legislature intended something other than that expressed by way of the plain language." *DiProspero v. Penn*, 183 N.J. 477, 492 (2005) (quoting *O'Connell v.*

State, 171 N.J. 484, 488 (2002)). In sum, legislative action is necessary to extend the exemption codified at *N.J.S.A.* 18A:7F-68(c)(3) to existing regional school districts.[2]

Accordingly, respondents' motion for summary decision is granted, and the petition of appeal is hereby dismissed.

IT IS SO ORDERED.[3]

Angelica Allen-McMillan, Ed.D.
ACTING COMMISSIONER OF EDUCATION

Date of Decision: September 7, 2023
Date of Mailing: September 8, 2023

[2] *P.L.* 2023, *c.* 140, enacted August 16, 2023, amends *N.J.S.A.* 18A:7F-68 to add "an exemption from State school aid reductions for a school district that: is a regional school district comprised of five or more constituent districts; has mitigated the costs of regionalization as determined by the Commissioner of Education; spends 15 percent less in administrative costs per pupil than the Statewide average for regional school districts; and has increased the district's general fund tax levy by the maximum amount permitted by statute in each of the last five years." *Sponsor's Statement to S. 3950* (*P.L* 2023, *c.* 140).

[3] This decision may be appealed to the Appellate Division of the Superior Court pursuant to *N.J.S.A.* 18A:6-9.1. Under *N.J.Ct.R.* 2:4-1(b), a notice of appeal must be filed with the Appellate Division within 45 days from the date of mailing of this decision.

State of New Jersey
OFFICE OF ADMINISTRATIVE LAW

INITIAL DECISION
CROSS-MOTIONS FOR
SUMMARY DECISION

OAL DKT. NO. EDU 02403-23
AGENCY DKT. NO. 73-3/23

CLEARVIEW REGIONAL SCHOOL DISTRICT,
BOARD OF EDUCATION,
Petitioner,

v.

NEW JERSEY DEPARTMENT OF EDUCATION
AND DR. ANGELICA ALLEN-MCMILLIAN,
ACTING COMMISSIONER,
Respondents.

William C. Morlock, Esq., for petitioner (Parker McCay, P.A., attorneys)

Colin G. Klika, Esq., for respondents (Matthew J. Platkin, Attorney General of New Jersey, attorney)

BEFORE **JACOB S. GERTSMAN**, ALJ t/a:

Record Closed: May 10, 2023 Decided: July 31, 2023

STATEMENT OF THE CASE

Petitioner Clearview Regional Board of Education (Clearview or District) challenges the State Aid determination of respondent New Jersey Department of Education (Department or NJDOE) and seeks a finding that the District qualifies, and has qualified, for the exemption set forth in N.J.S.A. 18A:7F-68(c)(3). Clearview additionally seeks a finding that the NJDOE restore the District's State Aid to be identical to the 2020-2021 school year. Respondents contend that the plain language of 18A:7F-68(c)(3) excludes regional school districts.

PROCEDURAL HISTORY

A petition for emergent relief was filed by petitioner on March 17, 2023, and the matter was transmitted to the Office of Administrative Law (OAL), where it was filed on March 17, 2023, as a contested case and assigned to the undersigned. N.J.S.A. 52:14B-1 to N.J.S.A. 52:14B-15; N.J.S.A. 52:14F-1 to N.J.S.A. 52:14F-13. Oral argument was scheduled for March 30, 2023.

A telephone status conference was held on March 24, 2023, where the petitioner withdrew the emergent petition without prejudice, and the parties jointly requested that the petitioner's filing be converted a motion for summary decision.[1] Respondents filed their cross-motion for summary decision on April 2, 2023, and Clearview filed a response on April 6, 2023. Oral argument on the cross-motions was held on May 11, 2023, and the record was then closed. An order of extension was entered in this matter to allow an extension of time in which to file the Initial Decision.

[1] Clearview's emergent petition additionally sought relief from respondents for the deprivation of a thorough and efficient education (T& E). However, in its response to respondents' cross-motion, petitioner stated that "Clearview asserts that their T&E arguments are no longer necessary or relevant to the Court's review as this review is purely one of statutory interpretation." (Petitioner response brief at 1) Accordingly, that issue is no longer germane to this matter and will not be considered.

FACTUAL DISCUSSION AND FINDINGS

Based on the briefs submitted for purposes of the cross-motions, the following facts are not in dispute, and I **SO FIND**:

1. Petitioner is a regional school district located in Gloucester County, New Jersey, comprised of more than one municipality. The District, and all of its buildings, are located in the Municipality of Harrison (Harrison)[2] and additionally pulls students from the Municipality of Mantua (Mantua). (petitioner cross-motion at ¶¶1, 2, 3, 28 and 29.)

2. The NJDOE projects that that the municipality tax rate as a percentage of state average for Harrison is 122.316% and for Mantua is 120.386%. Additionally, the NJDOE projects that the District's spending as percentage of adequacy is 85.072%. (petitioner cross-motion: Exhibits A, B and D; petitioner response brief at 3.)

3. Petitioner received the following reductions in state aid:

   2018 - 2019: -$93,165
   2019 - 2020: -$315,939
   2020 - 2021: -$566,240
   2021 - 2022: -$125,400
   2022 - 2023: -$538,602
   (petitioner cross-motion at ¶ 5)

4. Petitioner concedes it suffered appropriate reductions under S2 for years 2020-2021 and before where it did not meet the exemption criteria. However, it contends it did meet the exemption criteria beginning in the 2021-2022 year. (Id. at ¶ 8)

[2] The district's buildings are located in Mullica Hill, an unincorporated community in the Township of Harrison

5. On September 29, 2022, the NJDOE responded to the inquiry of Senator Edward Durr and Assemblywoman Bethanne McCarthy Patrick regarding the implementation of P.L. 2018, c. 67 (S2), and their request for an explanation as to why Clearview "was not included in the hold harmless provision for districts that spend below their adequacy budgets and are located in a municipality in which the total equalized tax rate exceeds the state average." (Id., Exhibit C.)

Assistant Commissioner Kevin Dehmer (Dehmer) response to the inquiry stated:

> As you know P.L.2018, c. 67 amended the School Funding Reform Act of 2008 (SFRA) in order to ensure school districts receive an amount of State aid consistent with current characteristics, with the funding being adjusted over the course of several years. The changes require the Department to reduce funding for overfunded districts according to a prescribed schedule. However, the law includes the following language in *N.J.S.A.* 18A:7F-68.c, which exempts certain districts from the scheduled reductions during the phase-in.
>
> A school district, other than an SDA district, that is located in a municipality in which the equalized total tax rate is at least 10 percent greater than the Statewide average equalized total tax rate for the most recent available calendar year and is spending at least 10 percent below adequacy as calculated pursuant to section 1 of P.L.2018, c.67 (C.18A:7F-70) shall not be subject to a reduction in State aid pursuant to subsection b. of this section.
>
> After reading this section of law, one notes that it does not provide any criteria that would apply to school districts that are comprised of more than one municipality. The language specifically applies to "[a] school district ... that is located in a municipality in which the equalized tax rate is at least 10 percent greater than the Statewide average equalized tax rate ..." Because the plain language of the statute delineates districts within a municipality exclusively, applying this section of law to regional school districts would extend the statutory language. Such policymaking decisions exceeds the authority delineated in statutory language, thereby requiring that regional school districts be omitted.
>
> [Ibid.]

6. On March 2, 2023, the Department issued its State aid notice to petitioner for the upcoming 2023-2024 year, which again required a reduction in state aid due to their state aid differential being positive. (Petitioner cross-motion at ¶ 5.)

LEGAL ANALYSIS AND CONCLUSION

Summary decision may be granted "if the papers and discovery which have been filed, together with the affidavits, if any, show that there is no genuine issue as to any material fact challenged and that the moving party is entitled to prevail as a matter of law." N.J.A.C. 1:1-12.5(b).

The standard for granting summary judgment (decision) is found in Brill v. Guardian Life Insurance Company of America, 142 N.J. 520 (1995):

> a determination whether there exists a genuine "issue" of material fact that precludes summary judgment requires the motion judge to consider whether the competent evidential materials presented, when viewed in the light most favorable to the non-moving party, are sufficient to permit a rational fact-finder to resolve the alleged disputed issue in favor of the non-moving party. The "judge's function is not himself [or herself] to weigh the evidence and determine the truth of the matter but to determine whether there is a genuine issue for trial."
>
> [Brill, 142 N.J. at 540 (quoting Anderson v. Liberty Lobby, 477 U.S. 242 (1986).]

In addressing whether the Brill standard has been met in this case, further guidance is found in R. 4:46-2(c):

> An issue of fact is genuine only if, considering the burden of persuasion at trial, the evidence submitted by the parties on the motion, together with all legitimate inferences therefrom favoring the non-moving party, would require submission of the issue to the trier of fact.

Accordingly, the undisputed facts and the arguments of both parties will be evaluated utilizing the Brill standard.

Public school funding in New Jersey is governed by the School Funding Reform Act of 2008 (SFRA), N.J.S.A. 18A:7F-43 to -71. Enacted in 2008, following decades of litigation over school funding, SFRA was designed to meet the State Constitution's mandate that the Legislature provide for the maintenance and support of a thorough and efficient system of free public schools for children between the ages of five and eighteen years. Abbott v. Burke, 199 N.J. 140, 141-48 (2009) (Abbott XX). The "act represents the culmination of five years of diligent efforts by both the Executive and Legislative branches of State government to develop an equitable and predictable way to distribute State aid that addresses the deficiencies found in past formulas as identified by the Supreme Court." N.J.S.A. 18A:7F-44(h). SFRA established a school funding formula through which school districts fund their budgets using a combination of local property taxes and State aid.[3] Bd. of Educ. v. Repollet, No. A-1568-19 (App. Div. September 1, 2021).

At the core of the formula is the "adequacy budget" — an estimate of what it costs each district to provide the "thorough and efficient" (T & E) education to every student in the district according to the district's enrollment and student characteristics. After determining the necessary funding level to provide a T & E education to every pupil in the district, the State then calculates the "local fair share" — the amount that each district is able to contribute to its adequacy budget based on its ability to raise local revenue. This local portion is calculated by indexing the district's property wealth and aggregate income.

After determining the district's adequacy budget and local fair share, the State then determines the allocation of "equalization aid" — the difference between a district's adequacy budget and its local fair share for each district. This is done by subtracting the district's local fair share from its adequacy budget. If the district's local fair share is lower than its adequacy budget, the State provides the difference in its equalization aid. If the

[3] SFRA provides for several categories of State aid. See, for example, N.J.S.A. 18A:7F-52, -54 to -58 (providing equalization, preschool, special education, security, transportation, and adjustment aid). "State aid" is a term that encompasses each of these categories.

district's local fair share is over its adequacy budget, the district does not qualify for equalization aid.

In 2018, the Legislature addressed "growing imbalances" in the State created by districts that were levying local property taxes well below their respective local fair share. Repollet, at 5. It enacted P.L. 2018, c. 67 (S2), which amended SFRA's formula to calculate the required local share. The amendments introduced a "State aid differential" variable, a measure of the extent to which a district is overfunded and underfunded to recalculate the distribution of aid more equitably. N.J.S.A. 18A:7F-67.

The "State aid differential"[4] calculates gains and losses in State aid for the district. Repollet at 7. It is calculated by subtracting the district's budget-year state aid, not including any adjustment aid, educational adequacy aid, or other "non-SFRA aid", from the prior year's total state aid, a sum that includes adjustment and non-SFRA aid. Ibid.

When the State aid differential is negative, N.J.S.A. 18A:7F-68(a) mandates that the school district

> shall receive State school aid in an amount equal to the sum of the district's State aid in the prior school year plus the district's proportionate share of the sum of any increase in State aid included in the annual appropriations act for that fiscal year and the total State aid reduction pursuant to subsection b. of this section based on the district's State aid differential as a percent of the Statewide total State aid differential among all school districts and county vocational school districts for which the State aid differential is negative.
>
> [N.J.S.A. 18A:7F-68(a).]

When the State aid differential is positive, N.J.S.A. 18A:7F-68(b) mandates that the school district

[4] "State aid differential" means the difference between the sum of a school district's or county vocational school district's allocations of equalization aid, special education categorical aid, security categorical aid, transportation aid, adjustment aid, and non-SFRA aids in the prebudget year, and the sum of equalization aid, special education categorical aid, security categorical aid, and transportation aid as calculated for the budget year in each category in accordance with the provisions of sections 11, 13, 14, and 15 of P.L.2007, c.260 (C.18A:7F-53, C.18A:7F-55, C.18A:7F-56, and C.18A:7F-57), respectively. N.J.S.A. 18A:7F-67.

> shall receive State school aid in an amount equal to the district's State aid in the prior school year minus a percent of the State aid differential according to the following schedule:
>
> **(1)** 13 percent in the 2019-2020 school year;
> **(2)** 23 percent in the 2020-2021 school year;
> **(3)** 37 percent in the 2021-2022 school year;
> **(4)** 55 percent in the 2022-2023 school year;
> **(5)** 76 percent in the 2023-2024 school year; and
> **(6)** 100 percent in the 2024-2025 school year.
>
> [N.J.S.A. 18A:7F-68(b).]

The Legislature, however, provided exemptions from the subsection (b) State aid reductions in section 68, subsection (c). In pertinent part the Legislature exempted

> A school district, other than an SDA district, that is located in a municipality in which the equalized total tax rate is at least 10 percent greater than the Statewide average equalized total tax rate for the most recent available calendar year and is spending at least 10 percent below adequacy as calculated pursuant to section 1 of P.L.2018, c.67 (C. 18A:7F-70) shall not be subject to a reduction in State aid pursuant to subsection b. of this section.
>
> [N.J.S.A. 18A:7F-68(c)(3).]

As noted above, the district, in its response brief stated that "their T&E arguments are no longer necessary or relevant to the Court's review as this review is purely one of statutory interpretation." (Petitioner response brief at 1.) Accordingly, the sole issue in this matter is whether the district is entitled to the exemption set forth in N.J.S.A. 18A:7F-68(c)(3).

Petitioner contends it qualifies for the exemption under a plain reading of the statute because (1) it is "a school district," (2) that is "other than an SDA [Abbott] district," (3) "that is located in a municipality," (4) "in which the equalized total tax rate is at least 10 percent greater than the Statewide average equalized total tax rate for the most recent available calendar year," and (5) "is spending at least 10 percent below adequacy as calculated pursuant to section 1 of P.L.2018, c.67 (C.18A:7F-70)." (Cross-Motion at 6-7;

Reply Brief at 3.) This argument is premised on the district's interpretation that "located in" means "to be in a particular place." Petitioner asserts that the district, although it is a regional school district serving students from Harrison Township and Mantua Township, is located in the Municipality of Harrison because that is where all of the district's buildings are located. (Reply Brief at 3.)

Petitioner further argues that N.J.S.A. 18A:7F-68(c)(3) says "school district" and does not include the terms "local school districts" or "regional school districts." Citing, P.L. 2018, c. 90 (2018), N.J.S.A. 18A:7G-3 and N.J.S.A. 18A:18A-60, Clearview maintains that the Legislature has defined "school district" to mean "a local school district, regional school district, or county special services school district or county vocational school." The Legislature, by listing "local school district" and "regional school district", demonstrates its ability to differentiate the two without relying on such phrases as "located in a municipality" (and not "comprised of") which in plain language, encompasses any school district located in a municipality whether it draws students from one or more municipalities. (Petitioner Cross-Motion at 7-8; Reply Brief at 4-5.)

Accordingly, petitioner claims that it qualifies for the exemption from a reduction in State aid since it is located entirely in Harrison Township and the Department of Education's projections are that Harrison Township has a Municipality Tax Rate as a percentage of State Average at 122.316% and the District's Spending as a percentage of Adequacy at 85.072%. (Petitioner Cross-Motion at 6-7; Reply Brief at 3-5.)

"[T]he goal of statutory interpretation is to ascertain and effectuate the Legislature's intent." Cashin v. Bello, 223 N.J. 328, 335 (2015). "[T]he best indicator of that intent is the statutory language." DiProspero v. Penn, 183 N.J. 477, 492 (2005). "Accordingly, '[t]he starting point of all statutory interpretation must be the language used in the enactment.'" Spade v. Select Comfort Corp., 232 N.J. 504, 515 (2018) (quoting New Jersey Div. of Child Protection and Permanency v. Y.N., 220 N.J. 165, 178 (2014)).

In McCarter v. Board of Education., 73 N.J.L. 301 (1906), the court determined that "a legally-constituted school district is the territory erected into a school district by operation of law. The board of education [does] not constitute the district. That is merely

the method provided for its government — the machinery for managing the schools in the district." Id. at 303. (Emphasis added) Accordingly, the location of a district should not be based on the Board of Education office location. However, in Falcone v. Board of Education., 17 N.J. Misc. 75, 78 (C.P. 1939), the court ruled that "[t]he words "school district" constitute but a generic term, conveniently used to designate the territory within which school lands and buildings are grouped," citing to McCarter.

According to Falcone, since the district's school buildings are all located in Mullica Hill, an argument could be made that the district is located in a municipality (Harrison).

However, pursuant to N.J.S.A. 1:1-1, statutory phrases "must be read and construed with their context and shall, unless inconsistent with the manifest intent of the Legislature or unless another or different meaning is expressly indicated, be given their generally accepted meaning, according to the approved usage of the language." New Jersey Ass'n of School Business Officials v. Davy, 409 N.J. Super 467, 484 (App. Div. 2009). When interpreting a statute, a court first reviews "the statute's plain language, which is the best indicator of legislative intent. . . . If the language of the statute clearly reflects the Legislature's intent, then the court applies the law as written, affording the terms their plain meaning. If the language is ambiguous, the court may resort to extrinsic interpretative aids, including legislative history, to determine the statute's meaning." State v. Scudieri, 469 N.J. Super. 507, 513 (App. Div. 2021).

Here, it is not in dispute that petitioner is a regional district comprised of two constituent municipalities. Even though it is arguably located in a municipality, the statutory funding scheme for regional school districts must take into account the equalized valuation of each constituent municipality.

"Equalized valuation" is defined in N.J.S.A. 18A:7F-45:

> "Equalized valuation" means the equalized valuation of the taxing district or taxing districts, as certified by the Director of the Division of Taxation on October 1, or subsequently revised by the tax court by January 15, of the prebudget year. With respect to regional districts and their constituent districts.

> however, the equalized valuations as described above shall be allocated among the regional and constituent districts in proportion to the number of pupils resident in each of them. In the event that the equalized table certified by the director shall be revised by the tax court after January 15 of the prebudget year, the revised valuations shall be used in the recomputation of aid for an individual school district filing an appeal, but shall have no effect upon the calculation of the property value rate, Statewide average equalized school tax rate, or Statewide equalized total tax rate.
>
> [N.J.S.A. 18A:7F-45.]

In other words, although the property value rate, the Statewide average equalized school tax rate and the Statewide equalized total tax rate would remain unchanged, there are other factors to take into account when calculating the equalized valuation of a regional school district and those factors are related to such districts' constituent districts, specifically to the proportion of pupils' resident in each of them.

Other provisions of New Jersey school law refer to different calculations for districts comprised of more than one municipality. For example, N.J.S.A. 18A:24-1 states, in regard to loans and bonds and other obligations:

> "Average equalized valuation of taxable property" in a district comprising one municipality means the amount stated in the supplemental debt statement required to be filed prior to the authorization of the bonds of the district, as the average of the last three preceding equalized valuations of the taxable real estate (together with improvements) of the municipality, as stated in the annual debt statement of the municipality or revision thereof last filed, and in a district comprising more than one municipality means the sum of all such amounts so stated in the supplemental debt statements so required to be filed.
>
> [N.J.S.A. 18A:24-1.]

N.J.S.A. 18A:38-7.9 states:

> a. In the event the designated district is composed of more than one municipality, when allocating equalized

> valuations or district incomes, pursuant to the provisions of section 3 of P.L.2007, c.260 (C.18A:7F-45), for the purpose of calculating State aid, persons attending schools in the designated district pursuant to section 2 [C.18A:38-7.8] of this act shall be assigned to each municipality comprising the designated district in direct proportion to the number of persons ordinarily attending school from each municipality in the designated district without considering the persons attending pursuant to this act.
>
> b. In the event the designated district is a constituent district of a limited purpose regional district, when allocating equalized valuations or district incomes, pursuant to the provisions of section 3 of P.L.2007, c.260 (C.18A:7F-45), for the purpose of apportioning the amounts to be raised by taxes for the limited purpose regional district of which the designated district is a constituent district, persons attending schools in the designated district pursuant to section 2 [C.18A:38-7.8] of this act shall not be counted.
>
> [N.J.S.A. 18A:38-7.9.]

These provisions support the proposition that the statutory funding scheme for regional school districts must take into account the equalized valuation of each constituent municipality. Applying the statute provision as interpreted by petitioner would only take into account the equalized total tax rate of Harrison, which is inconsistent with the above statutory funding scheme for regional school districts. Based on the foregoing, petitioner's argument that it can qualify for an exemption from a State aid reduction due to having all its buildings located in Harrison fails. Accordingly, I **CONCLUDE** that a regional district cannot take into account only one constituent municipality to qualify for an exemption from State aid reductions.

Alternatively, Clearview argues that if it is determined that the statute's language requires some textual analysis, it is a fundamental canon of statutory construction that the words of a statute must be read in their context and with a view to their place in the overall statutory scheme. They maintain that any inventive reading of the exemption should look to both municipalities that send students to Clearview and contend that each municipality has an equalized total tax rate that is at least ten percent greater than the Statewide average equalized total tax rate for the most recent available calendar year. In

addition, the NJDOE and the Legislature's intent is to financially incentivize and reward regionalization. Petitioner finds it "perplexing" that under the respondents' interpretation of the statute newly formed regional school districts are completely exempt from state aid reductions, pursuant to N.J.S.A. 18A:7F-68(c)(5), and non-regional school districts are eligible for the exemption; but existing regional school districts would be singled out and denied the exemption. It argues that if the Legislature wanted to arbitrarily discriminate against regional school districts, it would have done so explicitly. (Petitioner Reply Brief at 5-8.)

Respondents argue that the plain language of N.J.S.A. 18A:7F-68(c)(3) necessarily excludes regional school districts because the statute's language only relates to single-municipality districts. This argument is premised on their interpretation that the statute's language only relates to single-municipality districts. They contend that there is no criteria or calculation mechanism that applies to districts that are comprised of more than one municipality, that is, regional school districts. Respondents maintain that the statute only provides a method of calculation for single municipality school districts, and the exemption is predicated on the existence of a single equalized total tax rate. They further argue that a regional school district inherently lacks those characteristics, as by definition a regional school district does not exist in a single municipality, and thus cannot fall within that statutory exemption. "In fact, by definition a regional school district does not exist in a single municipality, and thus cannot fall within that statutory exemption." (Respondents Cross-Motion at 10.)

Respondents assert that it is evident that the language relates only to single-municipality districts even when reading the statutory provision in isolation. They argue that the provision's use of the singular definite article "the" inherently denotes that only one single "equalized total tax rate" can be considered for the purposes of the exemption. Further, if an average of municipal tax rates within a region, or some other formulation was a possible consideration, the singular form of "the" and "rate" would not have been used. (Id. at 11.)

Respondents also note that the phrase "located in a municipality" in subsection (c)(3) is a unique identifier throughout N.J.S.A. 18A:7F-68. They contend the Legislature

clearly distinguishes between single municipality and regional school districts in other statutes, such as N.J.S.A. 18A:7F-45, defining both "district income" and "equalized valuations" for regional school districts in contrast with single municipality school districts. (Id. at 12.)

When interpreting a statute, a court "must enforce the legislative will expressed by the clear language in the statute, and not presume that the Legislature intended something not expressly stated." Gonzalez v. Sch. Dist., City of Union, 325 N.J. Super. 244, 253 (App. Div. 1999).

In the present matter, a plain reading of N.J.S.A. 18A:7F-68(c)(3) indicates that the school district seeking an exemption must be located in a municipality in which the equalized total tax rate is at least ten percent greater than the Statewide average equalized total tax rate for the most recent available calendar year. Additionally, the legislature's use of the terms "municipality" and "the equalized total tax rate" is significant. Since, the focus of the provision is on a municipality's equalized tax rate and a regional school district is comprised of multiple municipalities, the formula cannot apply to such districts. Accordingly, I **CONCLUDE** that a plain reading of the statute does not support that the provision applies to school districts composed of multiple municipalities.

Finally, an agency generally is given substantial deference in interpreting a statute it is charged with enforcing. See Klumb v. Bd. of Educ. of Manalapan-Englishtown Reg'l High Sch. Dist., 199 N.J. 14, 19 (2009) ("interpretations of [a] statute and cognate enactments by agencies empowered to enforce them are given substantial deference in the context of statutory interpretation. Even when the language of the statute is ambiguous and the Legislature has not addressed the precise question of statutory meaning, [a court] may not simply impose [its] own construction on the statute, as would be necessary in the absence of an administrative interpretation."); In re Pontoriero, 439 N.J. Super. 24, 35-36, (App. Div. 2015) "where a statute is ambiguous, [a court gives] substantial deference to the interpretation of the agency empowered to enforce it. In those circumstances, the court need not conclude that the agency construction was the only one it permissibly could have adopted, or even the reading the court would have

reached if the question initially had arisen in a judicial proceeding but only whether the interpretation is plainly unreasonable.")

Respondents persuasively argue that "the language employed by the Legislature demonstrates a clear intent that the exemption [applies] for a specific purpose – that the enumerated equation for the equalized tax rate must be calculated from a single municipality," and any other interpretation would "exceed the statutory language." (Respondents Cross-Motion at 13-14.) Therefore, I **CONCLUDE** that the Department's interpretation of the statute is reasonable, and its interpretation should be given substantial deference since it is the agency that has been empowered to enforce it.

ORDER

Based on the foregoing, it is hereby **ORDERED** that:

1. Respondents' motion for summary decision be and hereby is **GRANTED**.

2. Petitioner's motion for summary decision be and hereby is **DENIED**.

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

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

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

July 31, 2023
DATE

JACOB S. GERTSMAN, ALJ t/a

Date Received at Agency: July 31, 2023

Date Mailed to Parties: July 31, 2023

JSG

272-23
OAL Dkt. No. EDU 03970-23
Agency Dkt. No. 120-5/23

New Jersey Commissioner of Education

Final Decision

R.Y.M., on behalf of minor child, G.C.,

Petitioner,

v.

Board of Education of the City of Elizabeth, Union County,

Respondent.

The record of this matter, the proposed Settlement Agreement and Release (Agreement) and the Initial Decision issued by the Office of Administrative Law have been reviewed pursuant to *N.J.A.C.* 1:1-19.1. Upon review, the Commissioner approves the terms of the Agreement and adopts the Initial Decision as the final decision in this matter. The case is hereby dismissed, subject to compliance with the terms of the Agreement.

IT IS SO ORDERED.

Angelica Allen-McMillan, Ed.D.
ACTING COMMISSIONER OF EDUCATION

Date of Decision: September 7, 2023
Date of Mailing: September 8, 2023

State of New Jersey
OFFICE OF ADMINISTRATIVE LAW

INITIAL DECISION
SETTLEMENT
OAL DKT. NO. EDU 03970-23
AGENCY DOCKET NO. 120-5/23

R.Y.M. ON BEHALF OF MINOR CHILD, G.C.,
Petitioner,
v.
BOARD OF EDUCATION OF THE CITY OF ELIZABETH, UNION COUNTY,
Respondent.

Roxanna Yanez-Montesdeoca, petitioner, pro se

Brian Kane, Esq., for respondent (LaCorte, Bundy, Varady & Kinsella, attorneys)

Record Closed: July 31, 2023 Decided: August 7, 2023

BEFORE **R. TALI EPSTEIN**, ALJ:

This matter was transmitted to the Office of Administrative Law (OAL) on May 8, 2023, for resolution as a contested case pursuant to N.J.S.A. 52:14B-1 to -15 and N.J.S.A. 52:14F1 to -13.

A hearing was scheduled for August 2, 2023. Prior to that date, respondent's counsel advised that the matter was resolved and, thereafter, forwarded a fully

executed Settlement Agreement and Release to the undersigned, a copy of which is attached and fully incorporated herein.

Having reviewed the contents of the attached Settlement Agreement and Release, I **FIND**:

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

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

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

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

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

August 7, 2023
DATE

R. TALI EPSTEIN, ALJ

Date Received at Agency: August 7, 2023

Date Mailed to Parties: August 7, 2023

lsr

SETTLEMENT AGREEMENT AND RELEASE

THIS SETTLEMENT AGREEMENT AND RELEASE, (hereinafter referred to as "Agreement"), is made this 25 day of July, 2023, by and between the Roxanna Yanez-Montesdeoca (hereinafter, also referred to as "Petitioner"), who currently resides at 145 Hillside Ave., Newark, New Jersey 07108 and the Elizabeth Board of Education (hereinafter, also referred to as the "Board"), with its principal offices located at 500 North Broad Street, Elizabeth, New Jersey 07208.

WHEREAS, Petitioner enrolled her minor child G.C. as a student in the Elizabeth Public School District for the 2022-2023 school year; and

WHEREAS, the Board determined that the minor child G.C.was ineligible to attend the schools of the Elizabeth Public School District due to domicile outside of Elizabeth; and

WHEREAS, Petitioner commenced an action against the Board appealing its residency determination in a matter entitled, R.Y.M. on behalf of minor child, G.C. v. City of Elizabeth Board of Education, OAL Dkt. No. EDU 3970-23, Agency Ref. No.: 2120-5/23, (hereinafter referred to as the "Petition"); and

WHEREAS, the Board filed a Counterclaim to the Petition against Petitioner for tuition reimbursement for G.C.'s ineligible attendance in the Elizabeth School District; and

WHEREAS, the Petitioner and the Board (hereinafter, also referred to as the "Parties") having reached a negotiated agreement to fully, and finally, settle all claims among them, including those asserted in the Petition; and

NOW, THEREFORE, in consideration of the mutual promises and undertaking said forth herein, the parties agree as follows:

The foregoing recitals are incorporated herein as if set forth at length.

1. **Consideration.** In settlement of this matter, Petitioner will pay the Board the amount of four thousand, five hundred, eighty two dollars and ninety eight cents ($4,582.98), which represents the alleged tuition due and owing for her minor child G.C.'s alleged ineligible attendance in the Elizabeth School District for the 2022-2023 school year. Petitioner shall send the payments made payable to the Elizabeth Board of Education. The Petitioner shall pay two thousand two hundred, ninety one dollars and forty nine cents ($2,291.49) within thirty days of the date of the approval of this agreement by the Commissioner of the Department of Education for the State of New Jersey and shall then pay five hundred dollars ($500.00) within every thirty (30) days thereafter until Petitioner has paid the sum of $4,582.98.

In the event that Petitioner fails to make any of the payments described above, the Petitioner shall be in Default of this agreement. Petitioner shall have ten (10) days to cure this default. If the Petitioner fails to cure this default, the parties agree that judgment may be entered on the docket of the Petition in favor of the Respondent for the balance of four thousand, five hundred, eighty two dollars and ninety eight cents ($4,582.98), less any payments made prior to the date of default.

2. **Attendance of G.C. at Elizabeth Public School District.** The minor child G.C. shall not be permitted to attend school in the Elizabeth Public Schools free of charge, unless and until the Petitioner submits adequate proofs that the child is domiciled in Elizabeth, pursuant to N.J.S.A. 18A:38-1, et. seq., and so long as Petitioner follows the proper enrollment procedures.

3. **Waiver and Release of Claims.** In settlement of this matter and in consideration of the payments set forth in Paragraph 1 above, Petitioner hereby releases and forever discharges the Board, in its official and personal capacities, and its related or affiliated entities, and its past, present and future officers, directors, attorneys, employees, owners, insurers, and their respective successors and assigns (collectively "Releasees"), jointly and severally, from any and all actions,

complaints, causes of action, lawsuits or claims of any kind (collectively "Claims"), known or unknown, asserted or unasserted, which Petitioner, her heirs, agents, executors, successors or assigns ever had, now have or hereafter may have against Releasees arising out of any matter, occurrence, omission, or event existing or occurring prior to Petitioner's execution of this Agreement, including, without limitation: any and all causes of action suits, debts, dues, accounts, reckonings, bonds, bills, specialties, covenants, contracts, controversies, agreements, obligations, promises, variances, trespasses, damages, judgments, executions, claims and demands, whether arising in contract or tort, vested or contingent, whether known or unknown, direct or indirect, existing or not existing, by reason of any matter, cause or thing whatsoever, in law or at equity from the beginning of time to the date of the execution of this Agreement.

4. **Stipulation.** Simultaneous with the execution of this Agreement, Petitioner and counsel for the Board shall execute a Stipulation of Dismissal with Prejudice with regard to the Petition and the Board's Counterclaim in the form attached hereto as Exhibit A.

5. **Counterparts; Entire Agreement; No Oral Modification.** This Agreement may be executed in counterparts, which together shall comprise the entire Agreement. This Agreement constitutes the entire agreement between the parties and supersedes any and all prior agreements, written or oral, expressed or implied. No other promises, agreements or amendments, or any separate agreement relating to the subject matter of this Agreement shall be binding or shall modify this Agreement unless expressed in writing and signed by all parties hereto.

6. **Governing Law.** This Agreement shall be governed and construed in accordance with the laws of the State of New Jersey.

7. **No Admission of Liability.** Nothing in this Agreement shall be construed as an admission or concession of liability or wrongdoing by either party to this agreement. Rather, this

Agreement is being offered for the sole purpose of settling cooperatively and amicably any and all possible disputes between the parties.

8. **Severability.** Nothing in this Agreement is intended to violate any law or shall be interpreted to violate any law. If any paragraph or part or subpart of any paragraph in this Agreement or the application thereof is construed to be overbroad and/or unenforceable, then the court making such determination shall have the authority to narrow the paragraph or part or subpart of the paragraph as necessary to make it enforceable and the paragraph or part or subpart of the paragraph shall then be enforceable in its/their narrowed form. Moreover, each paragraph or part or subpart of each paragraph in this Agreement is independent of and severable (separate) from each other. In the event that any paragraph or part or subpart of any paragraph in this Agreement is determined to be legally invalid or unenforceable by a court and is not modified by a court to be enforceable, the affected paragraph or part or subpart of such paragraph shall be stricken from the Agreement, and the remaining paragraphs or parts or subparts of such paragraphs of this Agreement shall remain in full, force and effect.

9. **Headings.** The headings contained in this Agreement are for convenience of reference only and are not intended, and shall not be construed, to modify, define, limit, or expand the intent of the parties as expressed in this Agreement, and they shall not affect the meaning or interpretation of this Agreement.

10. **Interpretation.** This Agreement shall be construed without aid of any canon or rule of law requiring construction or interpretation against the party drafting or causing this Agreement or any provision thereof to be drafted.

11. **Contingency.** It is agreed and understood by all Parties hereto that this Agreement is contingent upon each of the Parties fulfilling all of their respective duties, obligations, and/or promises as stated herein.

12. **Assent to Terms.** Petitioner Roxanna Yanez-Montesdeoca hereby acknowledges that she enters into this agreement with a full understanding of her rights, and does so without duress, of her own free will and volition.

Roxanna Yanez-Montesdeoca further acknowledges that she was given the opportunity to fully consider this Agreement and is given seven (7) days from the execution of this document to revoke this Agreement, by delivering written notification to Brian J. Kane, Esq., LaCorte, Bundy, Varady & Kinsella, 989 Bonnel Court, Union, New Jersey 07083. It is understood that if this Agreement is revoked, it will not be effective or enforceable and Petitioner will not be entitled to the consideration described herein. Furthermore, it is understood that if this Agreement is revoked, the underlying proceedings for tuition reimbursement shall be reinstated against Petitioner.

IN WITNESS WHEREOF, the signatures and/or seals of the parties or their duly authorized representatives have been set forth on the dates indicated below:

ROXANNA YANEZ-MONTESDEOCA
Dated: 07/20/2023

For the Elizabeth Board of Education

HAROLD KENNEDY, JR.
Board Secretary/Business Administrator
Dated: 7/25/2023

276-23

New Jersey Commissioner of Education

Final Decision

In the Matter of the Suspension of the Teaching Certificates of Jesenia Chester, Board of Education of the Township of South Brunswick, Middlesex County.

Synopsis

The petitioning Board alleged that the respondent – a non-tenured kindergarten teacher – resigned her position without providing the notice required under *N.J.S.A.* 18A:26-10 and sought the suspension of respondent's teaching certificate for a period of one year. Respondent taught kindergarten in a South Brunswick school during the 2021-2022 school year and the Board asserted that her contract was renewed at a Board meeting on May 12, 2022. However, on August 4, 2022, respondent sent the District an email resigning her position effective September 1, 2022 and did not return to her position for the start of the new school year. The parties filed cross motions for summary decision.

The ALJ found, *inter alia*, that: there are no material facts at issue in this case and the matter is ripe for summary decision; there is no dispute that there was a contract in place between the parties, or at least that there was an implied contract; petitioner did not present any reasons justifying her resignation other than personal motives; under *N.J.S.A.* 18A:26-10, any teaching staff member employed by a board of education who ceases to perform his or her duties before the expiration of their term of employment, without the consent of the board, shall be deemed guilty of unprofessional conduct and the Commissioner may thereafter suspend his or her teaching certificate for a period not to exceed one year. The ALJ concluded that respondent engaged in unprofessional conduct by failing to give the required 60-day notice. Accordingly, the ALJ granted the Board's motion for summary decision and ordered that respondent's teaching certificate be suspended for one year.

Upon review, the Commissioner, *inter alia*, remanded the matter to the OAL for further fact-finding as the present record is devoid of information necessary to reach a final determination in this case. Specifically, it is necessary to review the contract under which respondent was employed in the 2021-2022 school year and whether it contained a 60-day notice provision or some other length of time, as well as respondent's written acceptance of the Board's offer of continued employment following the May 12, 2022 Board meeting. Accordingly, the matter was remanded to the OAL for further findings as noted herein.

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

276-23
OAL Dkt. No. EDU 10542-22
Agency Dkt. No. 284-10/22

New Jersey Commissioner of Education

Final Decision

In the Matter of the Suspension of the Teaching Certificates of Jesenia Chester, Board of Education of the Township of South Brunswick, Middlesex County.

The record of this matter and the Initial Decision of the Office of Administrative Law (OAL) have been reviewed and considered.

Respondent Jesenia Chester, a teacher employed by the South Brunswick Board of Education (Board), notified the Board on August 4, 2022, that she would be resigning effective September 1, 2022. The Board filed an Order to Show Cause seeking the suspension of respondent's teaching certificates for resigning from her teaching position without providing the required 60-day notice. Following the Board's motion for summary decision, the Administrative Law Judge (ALJ) concluded that respondent engaged in unprofessional conduct by failing to give the required notice. The ALJ found that there is no dispute that there was a contract in place between the parties, or that there was at least an implied contract. The ALJ also concluded that petitioner did not present any reasons justifying her actions other than personal motives. Accordingly, the ALJ granted the Board's motion for summary decision and ordered that respondent's teaching certificates be suspended for one year.

Respondent filed exceptions to the Initial Decision; however, they were not considered because they were not timely filed. *N.J.A.C.* 1:1-18.4 requires exceptions be filed within 13 days from the date the judge's initial decision was mailed to the parties. The Initial Decision was mailed on August 2, 2023, making the due date for any exceptions August 15, 2023. The tracking information for respondent's exceptions shows a mailing date of August 21, 2023, with delivery to the Department of Education on August 23, 2023. Respondent did not request an extension of time to file her exceptions.[1]

Upon review, the Commissioner concludes that this matter must be remanded to the OAL. Initially, the Commissioner notes that *N.J.S.A.* 18A:28-8, which requires tenured teachers to give 60 days' notice before resigning, does not apply to respondent, who was not tenured. Instead, respondent's notice obligations are established by the terms of her employment contract. *IMO the Suspension of the Teaching Certificate of Melissa Van Pelt, Gray Charter School, Newark, Essex. Co.*, Commissioner Decision No. 170-09 (May 29, 2009), *aff'd*, 414 N.J. Super. 440 (App Div. 2010). If respondent's resignation was not in accordance with the terms of her contract, then she is guilty of unprofessional conduct and the Commissioner may suspend her certificates for up to one year. *N.J.S.A.* 18A:26-10.

The ALJ determined that there was a contract or an implied contract between the parties at the time of respondent's resignation. However, the Commissioner finds that the record does not contain sufficient evidence to reach that conclusion. *N.J.S.A.* 18A:27-10 requires a board of education to provide nontenured teaching staff members with a written

[1] Because respondent's exceptions were not considered, the Board's reply thereto was also not considered. Furthermore, a September 23, 2023 email sent from respondent to counsel for the Board, in reply to the Board's exceptions, was not considered, as sur-replies are not permitted under the applicable regulations.

offer of a contract for employment, or a written notice that employment will not be offered, on or before May 15 of each year.[2] *N.J.S.A.* 18A:27-12 requires the employee to accept the offer in writing on or before June 1. If the employee does so, employment continues, on at least the same terms and conditions as the previous school year, with such salary increases as may be required by law or board policy. *N.J.S.A.* 18A:27-12; *N.J.S.A.* 18A:27-10. If the employee does not accept the offer in writing, her employment is not renewed. *N.J.S.A.* 18A:27-12. The principles pertaining to implied contracts do not apply when the applicable statute specifically requires acceptances to be in writing.

There is no evidence in the record to demonstrate whether respondent accepted her employment in writing. Respondent did indicate that she remembered "saying thank you for the opportunity." Response to Order to Show Cause, ¶23. If that statement was made in writing, it may be sufficient to constitute written acceptance. Alternatively, respondent may have accepted the offer in writing in another manner. However, if she did not accept her offer of employment in writing, then she was not under contract at the time of her resignation and had no notice obligations regarding her resignation.

Additionally, if respondent did accept the Board's offer, her employment continued under the same terms and conditions established by her contract for the 2021-2022 school year, including any provisions regarding her notice obligations. However, the record does not

[2] It is not clear to the Commissioner that the Board complied with its obligation to make a written offer of employment. While respondent's summative evaluation indicated that she was being recommended for a contract for the 2022-2023 school year, that evaluation was neither from the Board nor an offer of employment. Nonetheless, *N.J.S.A.* 18A:27-11 provides that when a board of education fails to give an employee either an offer of employment or notice of non-employment, the board is deemed to have offered the employee continued employment for the next school year. Accordingly, the Board is deemed to have offered respondent employment for the 2022-2023 school year.

contain a copy of respondent's 2021-2022 contract. Therefore, the Commissioner is unable to determine whether the contract contained a 60-day notice provision or some other length of time.

Accordingly, this matter is remanded to the OAL for further findings regarding respondent's acceptance of the Board's offer of employment and, if such acceptance was given, the terms of the 2021-2022 contract.

IT IS SO ORDERED.[3]

Angelica Allen-McMillan, Ed.D.
ACTING COMMISSIONER OF EDUCATION

Date of Decision: September 14, 2023
Date of Mailing: September 18, 2023

[3] This decision may be appealed to the Appellate Division of the Superior Court pursuant to *N.J.S.A.* 18A:6-9.1. Under *N.J.Ct.R.* 2:4-1(b), a notice of appeal must be filed with the Appellate Division within 45 days from the date of mailing of this decision.

State of New Jersey
OFFICE OF ADMINISTRATIVE LAW

INITIAL DECISION GRANTING MOTION FOR SUMMARY DECISION

OAL DKT. NO. EDU 10542-2022
AGENCY DKT. NO. 284-10/22

IN RE SUSPENSION OF THE TEACHING CERTIFICATES OF JESENIA CHESTER, BOARD OF EDUCATION OF THE TOWNSHIP OF SOUTH BRUNSICK, MIDDLESEX COUNTY.

Marie-Laurence Fabian, Esq., for petitioner (Porzio Bromberg & Newman, attorneys)

Jesenia Chester, respondent, pro se

Record Closed: June 26, 2023 Decided: August 2, 2023

BEFORE **JOAN M. BURKE**, ALJ:

STATEMENT OF THE CASE

The South Brunswick Board of Education ("Board" or "petitioner") seeks an order suspending the teaching certificate of respondent Jesenia Chester ("respondent") for

failing to provide adequate notice of resignation, in violation of her employment contract and N.J.S.A. 18A:26-10.

PROCEDURAL HISTORY

At the request of the Board, the Commissioner of Education issued an Order to Show Cause on October 7, 2022, ordering respondent to show cause why her teaching certificate should not be suspended for unprofessional conduct pursuant to N.J.S.A. 18A:26-10. Respondent filed an answer on November 14, 2022, and the matter was transferred to the Office of Administrative Law on November 28, 2023, for determination as a contested case. A status conference was scheduled for February 9, 2023, but the respondent? requested an adjournment based on her work schedule. A status conference was held on March 29, 2023. At that time, the parties informed this tribunal that they would prefer the matter to be determined based on the papers that were submitted. On March 30, 2023, this tribunal received a letter wherein both parties requested that the matter be decided in a "summary fashion" without a hearing based on the papers that were submitted to date. The Board requested the motion based on upon the affidavit, with attachments, of Kimberly Maloy-White dated October 12, 2022. The respondent requested the motion based on her Reply to the Order to Show Cause, with attachments dated November 14, 2022. On May 9, 2022, I requested from the parties letter briefs or memorandum of law addressing the appropriateness of summary decision and why each side is entitled to summary decision. The briefs with supporting documents were received and the record closed on June 26, 2023.

BACKGROUND FACTS

The following facts are found to be undisputed based on the record. On June 10, 2021, the Board hired respondent to serve as a Kindergarten teacher for the 2021-2022 school year. Certification of Maloy-White at ¶ 3. Respondent was assigned to Constable Elementary School District (the "District"). Ibid. Respondent began working in her position on or about September 1, 2021, where she continued until the end of the school year. Certification of Maloy-White at ¶ 5. On April 23, 2022 the respondent was notified through her summative evaluation that she was being recommended for a contract for the

2022-2023 school year. Certification of Maloy-White at ¶ 6. The respondent's contract was renewed by the Board of Education at its meeting on May 12, 2022. Certification of Maloy-White at ¶ 7.

On August 4, 2022, the respondent sent an email to the District informing them that she had decided to pursue her career as a teacher elsewhere, thereby submitted a resignation effective September 1, 2022. (Petitioner's Exhibit F.) Respondent was advised by Maloy-White that by law she was required to provide the District with sixty days' notice prior to resigning in order to give the District sufficient time to secure a replacement. Certification of Maloy-White at ¶ 10. Respondent was further notified that the failure to give the required sixty-day notice would jeopardize her teaching certificate. Ibid. Nevertheless, respondent did not return to her position when the school year began on September 1, 2022. Certification of Maloy-White at ¶ 12. Thus the respondent resigned without providing the requisite notice to the Board. (Petitioner's Brief dated June 8, 2023.) The District filled the position quickly with a teacher slated for another position, however the District was not fully staffed. See Supplemental Affidavit of Kimberly Maloy-White at 3. The district had to juggle positions and use substitutes in other classes. Ibid.

RESPONDENT'S POSITION

Respondent argues that her contract states that the effective date to start the 2022-2023 school year was "9/30/2022 and terminates on 6/30/2023." See Respondent's Letter Brief at ¶ 2. Respondent further argues that she was not in receipt of a contract and since her resignation was placed on 10/4/22[1](sic), she was not under tenure of service. Ibid. The respondent did not dispute the sixty days but instead emphasizes that without knowledge of salary, benefits and classroom designation, she was well within her right to explore options for her benefit. In addition to her economic situation, the salary at South Brunswick was not enough "to stabilize her life between student loans, numerous undisclosed medical emergencies, general cost of living expenses, without any guarantee, I . . . gave as short notice as possible." See Respondent's Letter Brief at ¶

[1] Respondent submit her resignation on August 4, 2022. This was determined to be a typo.

2. Moreover, her fiancée accepted a job in Pittsburg, Pennsylvania and as such she needed to plan accordingly. Id. at ¶ 3.

Respondent states that she is not certified to teach students with registered IEP and 504 Plans. However during the 2021-2022 school year, she was assigned an inclusion class where the teacher of record resigned midway through the school year. Id. at ¶ 4. In this position she states that she was forced to work as a teacher of record as well as a general education teacher. Ibid. She states that she takes her students' needs above anything else and felt that the "administration did not do their part to prove they cared for the children's (sic) needs as much" as she did. Ibid. Respondent also points to several reasons why she did not return for the 2022-2023 school year. These reasons include mental anxiety for which she sought help, depression, feelings of abandonment by the administration and by fellow Kindergarten teachers. Id. at ¶ 6,and ¶ 14. Respondent argues that stripping her of her certificate would devastate and disable her from doing what she loves and is passionate about. Id. at ¶ 16. She points to her summative evaluation where it states:

> An example of Ms. Chester's work this year is her commitment to strong home/school partnerships to support student learning, as evidenced by her weekly newsletters and social media posts on Twitter. These proactive communications afford her the opportunity to tell the story of her classroom herself, and to invite families and others in to celebrate students' efforts and success. This serves as a point of pride in this practice Standard. Ms. Chester is commended for this contribution.
>
> [Respondent's Brief at ¶ 18.]

Respondent states that by stripping her of her certification "with the fact that legislative statute instigates a lack of professionalism, that is an attack on my personal character and is a blemish that will never go away, and I will be stigmatized regardless of all my efforts to do everything for my students." Id. at ¶ 21.

Respondent stated that she was happy on May 12, when her contract was renewed, however she was never given a formal copy of the renewed contract. Id. at ¶ 2.

Respondent further stated that she was not aware of the sixty-day window of resignation. Id. at ¶ 23. Since she was not given a physical contract, she did not recall saying "I will be teaching here next school year". Ibid. All she recalled saying is "thank you for the opportunity". Ibid. She argues that this was not a contractual agreement, because, if it was, she would have "asked for additional documentation cementing the fact of my renewal for the 2022-2023 school year." Ibid.

Respondent admits that she did give her resignation twenty-nine days prior to the contract effective date of September 1, 2023. Id. at ¶ 24. She states that if she had given sixty days from August 4, 2022, it would involve twenty-three days into the school year, and this would be far "too much time for a teacher to be involved and not affect the students if the teacher did in fact leave after that point. Id. In the best interest of the students she felt a teacher should be in the classroom for the entire school year. Id.

Respondent requested a copy of her contract on August 23, 2022. (Petitioner's Exhibit H.) Maloy-White replied " As I stated in my original conversation with you. You were re-appointed to a 2nd year contract at the May 12, 2022, board meeting. Salaries for the 2022-2023 school year are being approved at the August 25, 2022 board meeting. Contracts will be distributed after the board meeting. Your resignation is also being approved on August 25, 2022. You will not receive a contract since you are not returning to work on September 1, 2022". Ibid.

According to the respondent she was informed by Maloy-White that she did not have tenure but she "was in a tenure tract position." See Respondent's Exhibit H. Respondent argues that N.J.S.A. 18A:28-8 does not apply to her because she is not "under tenure of service.". Id. at ¶ 27. Furthermore, to reach tenure status a teacher must teach in the same school district for four full years. Ibid. The respondent says she has only taught in the South Brunswick School District for one full year. Ibid.

"[F]rom my proof regarding professionalism in the classroom and outside the classroom," respondent concludes, "being told by way of written communication my resignation is being approved by the board at the August 25, 2022 board meeting, as well as the effective and terminating dates of both the 2021-2022 and 2022-2023 approval

meeting documents not being within the date I sent my resignation in, I hereby object to the action that my teaching certificate be revoked for one year pursuant to N.J.S.A. 18A:26"." Id. at ¶ 31.

BOARD'S POSITION

The Board stated that the respondent was hired by the South Brunswick School District (District) on or about September 1, 2021. On April 23, 2022, she was notified that she was being recommended for a contract for the 2022-2023 school year. (Petitioner's Brief, dated June 8, 2023.) On May 12, 2022, Ms. Chester's contract was renewed for the 2022-2023 school year. Ibid. On August 4, 2023, Ms. Chester informed the District that she decided to pursue her career as a teacher elsewhere effective September 1, 2022. Ibid. Ms. Maloy-White informed the respondent on April 10, 2022, that she was required to give the District sixty-day notice and that her teacher's certificate would be jeopardized. Id. at 2. The Board argues that N.J.S.A. 18A:26-10 requires the suspension of Ms. Chester's certificate. The Board further argues that:

> it is well recognized that [t]he obvious purpose of this statute and N.J.S.A. 18A:28-8, a companion statute referring to tenured staff members, is to provide notice to the school so that a replacement can be hired without adversely impacting students." IMO Suspension of Teaching Certificate of Maximillan Capshaw, OAL Docket No. EDU 12318-06, Commissioner Decision June 12, 2007.
>
> [Petitioner's Brief, dated June 8, 2023]

The Board argues that this matter is similar to IMO Capshaw. There, the petitioner submitted his resignation in August prior to the start of a new school year". Ibid.

I **FIND** as **FACT** that there are no genuine issues of material fact requiring a hearing. This matter is therefore ripe for summary decision.

LEGAL DISCUSSION

Under the Uniform Administrative Procedure Rules, N.J.A.C. 1:1-1.1 to -21.6, "[a] party may move for summary decision upon all or any of the substantive issues in a contested case." N.J.A.C. 1:1-12.5(a). Such motion "shall be served with briefs and with or without supporting affidavits" and "[t]he decision sought may be rendered if the papers and discovery which have been filed, together with the affidavits, if any, show that there is no genuine issue as to any material fact challenged and that the moving party is entitled to prevail as a matter of law." N.J.A.C. 1:1-12.5(b). When the motion "is made and supported, an adverse party in order to prevail must by responding affidavit set forth specific facts showing that there is a genuine issue which can only be determined in an evidentiary proceeding." Ibid.

This standard is substantially the same as that which governs motions for summary judgment in civil litigation. Contini v. Bd of Educ. of Newark, 286 N.J. Super. 106, 121 (App. Div. 1995). In other words, a court must ascertain "whether the competent evidential materials presented, when viewed in the light most favorable to the non-moving party in consideration of the applicable evidentiary standard, are sufficient to permit a rational factfinder to resolve the alleged disputed issue in favor of the non-moving party." L.A. v. Bd. of Educ. of Trenton, 221 N.J. 192, 204 (2015) (internal quotes and citations omitted).

N.J.S.A. 18A:26-10, applicable to non-tenured certificated staff, provides that:

> Any teaching staff member employed by a board of education . . . , who shall, without the consent of the board . . . cease to perform his duties before the expiration of the term of his employment, shall be deemed guilty of unprofessional conduct, and the commissioner may, upon receiving notice thereof, suspend his certificate for a period not exceeding one year.
>
> [N.J.S.A. 18A:26-10.]

"The obvious purpose of N.J.S.A. 18A:26-10 is to provide notice to the school so that a suitable replacement can be hired without adversely impacting students." Penns Grove-

Carneys Point Bd. of Educ. v. Leinen, 94 N.J.A.R. 2d (EDU) 405, 407 (citing reference omitted).

The sufficiency of notice is dictated by the terms of the parties' employment contract. In re Suspension of the Teaching Certificate of Schvamberg, EDU 09828-13, Initial Decision (January 21, 2014), adopted, Comm'r (March 5, 2014) https://njlaw.rutgers.edu/collections/oal/html/initial/edu09828-13_1.html. In most cases, the Commissioner has imposed the maximum one-year suspension of a teaching certificate for leaving without adequate notice. See, e.g., Green v. School Dist. of Mount Holly, EDU 0733-02, Initial Decision (Sept. 5, 2002), adopted, Comm'r (Oct. 25, 2002) https://njlaw.rutgers.edu/collections/oal/html/initial/edu00733-02_1.html; In re Suspension of the Teaching Certificate of Montalbano, EDU 3588-00, Initial Decision (April 24, 2001), adopted, Comm'r (June 11, 2001) https://njlaw.rutgers.edu/collections/oal/html/initial/edu3588-00_1.html; Penns Grove-Carneys Point v. Leinen, 94 N.J.A.R.2d (EDU) 405. "In rare circumstances in which the Commissioner has seen fit to lessen the suspension period, it was for compelling reasons." Bd. of Educ. of Borough of Alpine v. Yuz, EDU 1116-06, Initial Decision (July 17, 2008), adopted, Comm'r (September 23, 2008) https://njlaw.rutgers.edu/collections/oal/html/initial/edu01116-06_1.html (citing In re Rogers, 1989 S.L.D. 1962 (May 16, 1989), adopted, Comm'r (June 21, 1989)).

"Compelling reasons" have been found, for example, where matters of significant public interest were involved and where constitutional issues were implicated. See Bey v. Bd. of Educ. of Newark, 93 N.J.A.R.2d (EDU) 288. The Commission also declined to suspend a teacher who went above and beyond to ensure a smooth transition by developing a program through the end of the year and meeting with her successor to put the program in place. Bd. of Educ. of Black Horse Pike Regional School Dist. v. Mooney, 1984 S.L.D. 810, adopted, 1984 S.L.D. 821. A suspension of less than a year was imposed on a teacher of handicapped children who switched jobs for "noble" reasons—to work with more severely handicapped children at a state facility. In re Rogers, 1989 S.L.D. 1962 (May 16, 1989), adopted, Comm'r (June 21, 1989).

N.J.S.A. 18A:26-10 provides that ("[A]ny teaching staff member employed by a board of education . . . who shall, without the consent of the board . . . cease to perform his duties before the expiration of the term of his employment, shall be deemed guilty of unprofessional conduct . . " In order to sustain the charge of unprofessional conduct pursuant to N.J.S.A. § 18A:26-10, the petitioner must demonstrate that respondent: 1) was a teaching staff member employed by a board of education who; 2) ceased to perform her duties before the expiration of the term of her employment; 3) without consent of the board. The underlying purpose of N.J.S.A. 18A:26-10 is "to protect pupils from the disruption caused by '[s]taff members who leave before the expiration of their contracts.'" Ibid.

In the present matter, the record reflects that none of the required criteria are in dispute. Here, it is not disputed that respondent left the District before the expiration of her sixty-day notice period. Respondent was notified on April 23, 2022, through her summative evaluation that she was being recommended for a contract for the 2022-2023 school year. Certification of Maloy-White at ¶ 6. On May 12, 2022, respondent's contract was renewed for the 2022-2023 school year. Certification of Maloy-White at ¶ 7, Exhibit D. On August 4, 2023, respondent notified the District that she would not return to teach in the 2022-2023 school year which was scheduled to begin on September 1, 2023. Respondent argues that she did not enter into a contract with the District and since she did not receive a contract, nor did she sign a contract for the 2022-2023 program year and as such.(Respondent's Brief, dated June 15, 2023, Response to Order to Show Cause, dated November 14, 2022) I find no merit in this argument in that there is no dispute that there was a contract or at the very least there was an implied contract here. As stated in Snyder v. Freeman, 300 N.C. 204

:

> A 'contract implied in fact,'. . . arises where the intention of the parties is not expressed, but an agreement in fact, creating an obligation is implied or presumed from their acts, or, as it has been otherwise stated, where there are circumstances which, according to the ordinary course of dealing and the common understanding of men, show a mutual intent to contract. 17 C.J.S., Contracts § 4(b) (1963). An implied contract is valid and enforceable as if it were express or written. [Id. at 217]

Moreover, the respondent admitted that there was a contract. She stated that, "[I]was delighted to hear that my contract was renewed." Respondent's Brief at ¶ 22. By submitting her resignation on August 4, 2022, the Board was given only twenty-eight days' notice which does not comply with the sixty-days' notice requirement and as such "shall be deemed guilty of unprofessional conduct" pursuant to N.J.S.A. 18A:26-10.

Far from offering compelling reasons or extenuating circumstances to explain her premature departure, respondent pleads that without knowledge of salary, benefits and classroom designation, she was well within her right to explore options for her benefit. In addition she argues that the salary at South Brunswick was not enough "to stabilize her life between student loans, numerous undisclosed medical emergencies, general cost of living expenses, without any guarantee. . . . " Respondent's Brief at ¶ 2. Her departure disrupted the school environment in precisely the manner the law was designed to prevent.

Respondent's implicit argument that had she given notice at sixty days it would involve twenty-three days into the school year, and this would be far "too much time for a teacher to be involved and not affect the students if the teacher did in fact leave after that point" (Respondent's Brief at ¶ 24.), implies that she knew that sixty days was required, but decided to forego the requirement anyway. Furthermore, respondent was informed by Maloy-White on August 10, 2022, of the sixty days' notice requirement. Accordingly, I **CONCLUDE** that the Board has met its burden by demonstrating by a preponderance of credible evidence that respondent is guilty of unprofessional conduct, and that the charge of such must be **SUSTAINED**.

PENALTY

Having sustained the charge of unprofessional conduct pursuant to N.J.S.A. 18A:26-10, the appropriate penalty to be imposed must be determined. N.J.S.A. 18A:26-10 and N.J.A.C. 6A:9B-4.8(b) both provide that once they receive notice of a teacher leaving their position prior to the term of employment as contemplated by N.J.S.A.

18A:26-10, the commissioner may suspend the certificates held by that teacher for a period not to exceed one year.

> The decision to suspend a teaching certificate pursuant to N.J.S.A. 18A:28-8 is discretionary and the Commissioner has historically evaluated all attendant circumstances on a case-by-case basis. As a general rule, however, given the underlying purpose of the statute, teachers who have been found guilty of unprofessional conduct for failing to provide the requisite [sixty]-day notice receive a one-year certificate suspension. The one year suspension is routinely issued where the facts demonstrate that individuals have violated the [sixty]-day notice requirement for strictly personal reasons, putting their own self-interest above the interests of students and their professional obligation to provide adequate notice to the board.
>
> [In re Certificates of Chae Hyuk Im, 2018 N.J. Super. Unpub. LEXIS 1748 at 8-9.]

Although the Board did find a suitable replacement for the respondent, it was still at a cost to the Board. As the Board stated, "it was robbing Peter to Pay Paul." (Petitioner's Brief dated June 8, at 3.) In IM, the court found "[u]nlike these cases— which have justified an exception to the customary one-year suspension—the facts in this matter are neither exceptional nor do they warrant the exercise of the Commissioner's discretion. Rather, in the instant matter, [Im's] desire for the early release from his professional obligations was based solely on personal motives and his own convenience. Id. at 9.

Similarly, here, the respondent's reason for resignation was to explore other teaching opportunities; solely for "personal motives." Viewing all evidence in the light most favorable to respondent, no rational factfinder could find in her favor. Therefore, the Board's motion for summary decision should be granted.

CONCLUSION

Based on the above, the Board's motion for summary decision is **GRANTED**. The respondent's motion for summary decision is **DENIED**. The charge of unprofessional

conduct against respondent is hereby **SUSTAINED**. Further, it is **ORDERED** that respondent's teaching certificate be **SUSPENDED** for a period of one year.

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

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

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

August 2, 2023
DATE

JOAN M. BURKE, ALJ

Date Received at Agency: August 2, 2023

Date Mailed to Parties: August 2, 2023

JMB/jm/mph

APPENDIX

Exhibits

For petitioner

Order to Show Cause with attachments
Letter Brief, dated June 8, 2023
Letter Brief, dated June 26, 2023

For respondent

Response to Order to Show Cause with attachments
Letter Brief, dated June 15, 2023
Letter Brief, dated June 26, 2023

277-23
State Board of Examiners Dkt. No. 2021-184
OAL Dkt. No. EDE 08835-2021
Agency Dkt. No. 5-5/23A

New Jersey Commissioner of Education

Final Decision

In the Matter of the Certificates of
Howard Zlotkin, State Board of Examiners,
New Jersey Department of Education.

Order of Suspension by the State Board of Examiners, May 18, 2023

Respondent-Appellant, *pro se*

For the Petitioner-Respondent State Board of Examiners, Colin G. Klika, Deputy Attorney General (Matthew J. Platkin, Attorney General of New Jersey)

The Commissioner has reviewed the record and the papers filed in connection with appellant Howard Zlotkin's appeal of the Order of the State Board of Examiners (Board), dated May 18, 2023, suspending his Teacher of Elementary Grades K-8 Certificate of Eligibility, Teacher of Biological Science Certificate of Eligibility, Teacher of Biological Science Standard Certificate, and Teacher of Earth Science Standard Certificate for a period of two years.

Appellant, an experienced science teacher who worked in Jersey City, resigned after a flagrant incident of unbecoming conduct in which he angrily cursed at his students and made an offensive gesture while engaging in a profanity-laced diatribe captured on video during a class conducted via Zoom. On September 22, 2021, the Board issued an Order to Show Cause (OSC) for the revocation of appellant's certificates and subsequently transmitted the matter to the

Office of Administrative Law (OAL) for a contested hearing. The Board moved for summary decision.

Having determined that no genuine issues of material fact existed, the Administrative Law Judge (ALJ) granted the Board's motion for summary decision. The ALJ concluded that appellant's actions constituted conduct unbecoming a teacher. Regarding the appropriate penalty, the ALJ cited several mitigating factors, including appellant's appreciation of the seriousness of his actions and the fact that he had taught for more than twenty years without incident. Consequently, the ALJ found that a two-year suspension of appellant's certificates—and not a revocation—was warranted. Upon considering the Board's exceptions regarding the penalty and appellant's reply thereto, the Board adopted the ALJ's Initial Decision and suspended appellant's certificates for two years effective May 18, 2023.

On appeal, while appellant did not object to the determination that a two-year suspension of his certificates was warranted for his proven unbecoming conduct, he contended that the suspension should take effect retroactively, beginning on April 28, 2021 (the date the school district suspended him for his actions), because he should be credited for "time served." In response, the Board argued that the law only provides for prospective suspensions of certificates and that retroactive suspensions would make the entire regulatory process a meaningless exercise. In his reply brief, while appellant expressed his strong disappointment with the Board's objection to imposition of a retroactive suspension, he ultimately decided to "accept [the] two-year suspension without the inclusion of time served." Appellant's reply brief, at 2. Although it appears that appellant has abandoned his sole contention on appeal, he did not formally withdraw his appeal pursuant to *N.J.A.C.* 6A:4-4.2(a).

In reviewing appeals from decisions of the State Board of Examiners, the Commissioner may not substitute her judgment for that of the Board so long as the appellant received due process and the Board's decision is supported by sufficient, credible evidence in the record. *N.J.A.C.* 6A:4-4.1(a). Further, the Board's decision should not be disturbed unless the appellant demonstrates that it is arbitrary, capricious, or unreasonable. *Ibid.* Here, the sufficient, credible evidence, in the record—including video footage of the incident at issue—overwhelmingly supports the Board's determination that appellant engaged in unbecoming conduct and that a two-year suspension of his certificates is the appropriate penalty. There is nothing in the record to suggest that appellant did not receive due process or that the Board's decision was arbitrary, capricious, or unreasonable. Moreover, despite his ongoing frustration and disappointment, appellant has indicated that he now accepts the prospective two-year suspension of his certificates.

Accordingly, the decision of the State Board of Examiners suspending appellant's certificates for two years, effective May 18, 2023, is affirmed.[1]

ACTING COMMISSIONER OF EDUCATION

Date of Decision: September 14, 2023
Date of Mailing: September 18, 2023

[1] This decision may be appealed to the Appellate Division of the Superior Court pursuant to *N.J.S.A.* 18A:6-9.1. Under *N.J.Ct.R.* 2:4-1(b), a notice of appeal must be filed with the Appellate Division within 45 days from the date of mailing of this decision.

IN THE MATTER OF	:	NEW JERSEY DEPARTMENT OF EDUCATION
THE CERTIFICATES OF	:	STATE BOARD OF EXAMINERS
HOWARD ZLOTKIN	:	DOCKET NO. 2021-184
		REVOCATION PROCEEDING
		ORDER TO SHOW CAUSE

1. Howard Zlotkin is the holder of a Teacher of Elementary Grades K-8 Certificate of Eligibility, Teacher of Biological Science Certificate of Eligibility, Teacher of Biological Science standard certificate, and Teacher of Earth Science standard certificate.

2. The Jersey City Public School District (Jersey City) provided information to the State Board of Examiners (Board) regarding Zlotkin.

3. Zlotkin was a science teacher in the district who resigned after angrily cursing at his students and engaging in a profanity laced diatribe in front of his students, at one point giving his student (s) his middle finger and telling one student "Fuck you.". The recorded incident is incorporated herein by reference.

4. Pursuant to the recording, Zlotkin said the following to his students:

   a. "....Because I've been working for twenty years and I don't really care who you are or what color you are. I don't care where you came from. I worked three jobs every fucking day of my life and you know what I have one kid, not seven because I can't afford seven."

   b. "I lost a house because I was out of work, I worked two careers. I reinvented myself. I never gave up and I don't give up but I hear people whining and crying about Black Lives Matter, but George Floyd was a fucking criminal and he got arrested and he got killed because he wouldn't comply and the bottom line is we make him a fucking hero."

   c. "He's not a hero, he's like a criminal just like fucking Tawana Brawley and you know what, Tawana Brawley lied and ruined peoples lives and you guys emulate people like um uh people that just are fucking wrong, that are criminals, and you're making them right because they're black or because they got a bad story. Everybody's got a bad story. Half the planet's starving to death and they're not whining."

d. "But the ladies that run Black Lives Matter own five houses and are multimillionaires and they don't give a shit – they're making money off people and we're fighting each other. We're gonna fall apart and I'll tell you something right now, that's not equity. Equity is everybody matters – not just one person, not just the other."

e. "And I'll tell you something, I ain't fucking privileged, I come to work. I haven't gotten paid by my black vice principal who thinks I'm fucking privileged too. And I come to school...."

f. When a student stated that Zlotkin was privileged, he responded with "You know what S., fuck you I'm privileged, Fuck you...."

5. The Board finds that the level and nature of Zlotkin's conduct provides just cause for consideration of the revocation of his certificates.

6. Pursuant to the Board's vote, it is therefore on this 17th day of September 2021 ORDERED that Howard Zlotkin show cause why all certificates and credentials he holds as of the final adjudication of this matter should not be revoked.

_____

Rani Singh, Secretary
New Jersey State Board of Examiners

Date of Mailing: _____

278-23E
OAL Dkt. No. EDU 07604-23
Agency Dkt. No. 222-8/23

New Jersey Commissioner of Education

Order on Emergent Relief

U.C. and E.C., on behalf of minor child, N.C.,

Petitioner,

v.

Board of Trustees of the Thomas Edison EnergySmart Charter School, Somerset County, and Jessica Graf,

Respondent.

The record of this emergent matter, the sound recording of proceedings at the Office of Administrative Law (OAL), and the recommended Order of the Administrative Law Judge (ALJ) have been reviewed. Upon such review, the Commissioner concurs with the ALJ that petitioner has failed to demonstrate entitlement to emergent relief pursuant to the standards enunciated in *Crowe v. DeGioia,* 90 *N.J.* 126 (1982), and codified at *N.J.A.C.* 6A:3-1.6. Accordingly, the recommended Order denying petitioner's application for emergent relief is adopted for the reasons stated therein.

IT IS SO ORDERED.

Angelica Allen-McMillan, J.d.D.
ACTING COMMISSIONER OF EDUCATION

Date of Decision: September 14, 2023
Date of Mailing: September 18, 2023

State of New Jersey
OFFICE OF ADMINISTRATIVE LAW

ORDER DENYING
EMERGENT RELIEF
OAL DKT. NO. EDU 07604-23
AGENCY REF. NO. 222-8/23

U.C. AND E.C. ON BEHALF OF
MINOR CHILD N.C.,
Petitioners,
v.
BOARD OF TRUSTEES OF THE THOMAS EDISON ENERGYSMART CHARTER SCHOOL, SOMERSET COUNTY, AND JESSICA GRAF,
Respondents.

U.C., Esq., petitioner and attorney

David L. Disler, Esq., for respondents (Porzio, Bromberg & Newman, attorneys)

BEFORE **JEFFREY N. RABIN**, ALJ:

STATEMENT OF THE CASE AND PROCEDURAL HISTORY

Petitioners, U.C. and E.C. on behalf of minor student, N.C., appeal the results of the respondents' Lottery System for selecting students for the school years 2021–2023 at Thomas Edison EnergySmart Charter School, Somerset County (respondents or

TEECS), and seek emergent relief in the form of a declaratory judgment that the actions, conduct, practices of respondents Graf and TEECS violated the charter school laws of the State of New Jersey, and that minor child N.C. be admitted to TEECS for the upcoming 2023–2024 school year;

The within motion for emergent relief was filed by petitioners on August 14, 2023, with the New Jersey Department of Education (DOE), Office of Controversies and Disputes (OCD). The motion for emergent relief was transmitted to the Office of Administrative Law (OAL), where it was filed on August 15, 2023. N.J.S.A. 52:14B-1 to -15; N.J.S.A. 52:14F-1 to -13. An emergent hearing in this matter took place via Zoom on August 21, 2023, and the record closed at that time.

FINDINGS OF FACT

Based on petitioners' Petition for emergent relief and responsive brief, respondents' brief, and the evidence and testimony offered by the parties and their representatives, and solely for the purpose of deciding this emergent appeal, I **FIND** the following to be the undisputed facts:

1. TEECS a charter school for grades K-12 in Franklin, New Jersey, accepted students from three area school districts: Franklin, North Brunswick and South Brunswick Townships. The New Jersey DOE limited TEECS' enrollment per grade to an average of fifty students per grade. Each year more students applied than there was room for, and TEECS implemented an admissions policy using a lottery. Preference was given to students who resided in either Franklin, North Brunswick or South Brunswick Townships, and TEECS entered the names of economically disadvantaged students four times in the lottery to provide a weighted advantage. (Yildiz Cert., ¶4.)

2. Petitioners have been residents of Franklin Township, Somerset County, New Jersey since 2022. They were the parents of minor child N.C., an eight-year-old. Petitioners identify racially as "Black African and American." From 2021 through 2023, petitioners applied for and were denied admission

for N.C. to attend TEECS. By letter dated February 6, 2023, petitioners were notified that N.C. had not been chosen in the lottery for enrollment in TEECs for 2023–2024, that he would be waitlisted, and that no further correspondence would be forthcoming unless N.C. was later chosen from the waitlist. As enrollment was full, a child could only be admitted from the waitlist if a student at TEECS disenrolled.

TESTIMONY

For petitioners

U.C. presented her case as both petitioner-counsel and parent of minor child N.C.

Schools were required to provide an equal chance to all students and each town served by TEECS had to have an equal proportion of students in TEECS. N.J.A.C. 6A:11-2.1(b)(4) provides that a charter school shall ". . . ii. Describe its plan to ensure the enrollment of a cross section of the school-age population of the region of residence, including racial and academic factors. This plan shall include apportionment of available space from each of the district boards of education that comprise the region of residence." Franklin Township is 36% Black.

The Commissioner of the DOE must do a comprehensive review of a charter school's recruitment plan in order to ensure its school is diversified. Respondents' counsel indicated that the DOE had certified that TEECS met its access and equity policy. (Respondents Exhibit C.)

Petitioners' filing was not untimely, despite not complying with the ninety-day appeal period from notice of rejection, and despite receiving a letter dated February 6, 2023, indicating that N.C. was not being admitted and was being waitlisted, because there was still the possibility that N.C. could be admitted from the waitlist. Petitioners waited to see if that was happening, despite the February 6, 2023, letter stating that no further correspondence would be sent unless the student was being admitted from the waitlist. (Respondents Exhibit A.)

TEECS was not transparent in its process, despite respondents pointing out that all its compliance data was publicly available. All its admissions statistics were available on the DOE website.

N.C. would suffer irreparable harm if not granted emergent relief and immediately admitted to TEECS because he is very emotional and would suffer if he had to switch schools in mid-semester. If not admitted to TEECS, N.C. would continue at McAfee Elementary School.

For respondents

David L. Disler, Esq., presented for respondents.

Charter schools were approved for a set number of students. Respondents were at its limit, therefore for a student to be admitted off the waitlist, another student would have to have disenrolled. Therefore, the key lottery was when a student was about to enter kindergarten, because if they won the lottery, the child would be able to remain at TEECS through twelfth grade. The within petitioners did not live in Franklin Township when N.C. was kindergarten age.

The ninety-day appeal period ran from the date of respondents' February 6, 2023, letter, and therefore petitioners' filing of August 14, 2023, was beyond the filing period. Crowe v. DeGioia, 90 N.J. 126 (1982) required a showing of irreparable harm, but caselaw set forth that an applicant for emergent relief could not have caused their own harm. Here, petitioners should have filed their appeal immediately after receiving notice that N.C. did not win a spot via the lottery, instead of waiting until six months later and a mere two weeks before the next school year began. It was also not uncommon for students to move to different schools mid-semester; parents often move and their children begin at new schools in the middle of a marking period. Without any other proof of irreparable harm, petitioners have failed to meet that test.

Petitioners were wrong to conclude that New Jersey law required "equal" apportionment. Such requirement was not in the statute. N.J.A.C. 6A:11-2.1(b)(4) was not applicable to the within scenario, because that statute dealt with a charter school's initial admission plan and did not pertain to respondents' admissions lottery. Further, even if that statute applied herein, nowhere did it require "equal" apportionment. Respondents advertised its admissions lottery to all three of the sending townships, Franklin, North Brunswick and South Brunswick Townships. Further, based on publicly available statistics, Franklin Township was actually over-represented at TEECS, with 65% of TEECS students coming from petitioners' home township of Franklin.

The three townships had a total of 21,112 students. 4,328 of those students were African-American, equaling 20%. Of the 599 students enrolled at TEECS, 114 were African-American, equaling 19%. Therefore, the percentage of African-Americans closely reflected the percentage of African-Americans in the three sending townships. Despite this, petitioners seem to want to have race be a factor in having N.C. admitted, but that would go against the recent Supreme Court case prohibiting the use of race in admissions and would be violative of New Jersey law. Current law would not support petitioners' position.

A balancing of equities would not favor petitioners. TEECS has a capped admissions limit, and every spot has been taken. But regardless of the outcome of the within emergent appeal, N.C. would still receive an education in Franklin Township. But for this court to order respondents to admit N.C. to TEECS, another student would have to be disenrolled, a student who received a notice of admissions six months ago and might or might not have any other educational options. Further, for this court to invalidate respondents' admissions lottery program on an emergent appeal would allow every parent whose child was not initially selected in the lottery to file an emergent appeal in order to force their child to be immediately admitted to a school that was already at full capacity.

LEGAL ANALYSIS

The issue is whether petitioners had proven by a preponderance of the evidence that they had met the standard for emergent relief, and that they were entitled to relief.

N.J.S.A. 18A:6-9 authorizes the Commissioner of Education to consider controversies between a parent and a school board. The OAL is the appropriate venue for hearing an appeal of a school board's findings and the DOE properly forwarded this matter to the OAL for this emergent appeal to be heard.

N.J.A.C. 6A:14-2.7(r) allows a party to apply in writing for a temporary order of emergent relief as part of a request for a due process hearing or an expedited hearing for disciplinary action. The request needed to be supported by an affidavit or notarized statement specifying the basis for the request for emergency relief. N.J.A.C. 6A:14-2.7(r)(1) lists the cases emergent relief is available for, which includes issues involving (i) a break in the delivery of services, (ii) disciplinary action, including manifestation determinations and determinations of interim alternate educational settings, (iii) placement pending the outcome of due process proceedings, and (iv) issues involving graduation or participation in graduation ceremonies.

Petitioners' Appeal documents failed to address whether they met any of the four situations which would allow for emergent relief. The closest would arguably be (iii) placement pending the outcome of due process proceedings; however, petitioners did not specify this clause, did not address due process proceedings in their appeal or at the hearing, and petitioners admitted that minor student N.C. already had school placement for the coming school year.

Despite petitioners' not properly addressing these prerequisites to relief, I **CONCLUDE** that the within matter concerns itself with issues regarding placement pending the outcome of a due process appeal and, therefore, petitioners' Petition met one of the threshold issues required to be eligible for emergent relief.

Next, as set out in the Petition executed by petitioners, and pursuant to N.J.A.C. 6A: 3-1.6 and the case of Crowe v. DeGioia, 90 N.J. 126 (1982), a petitioner must show by a preponderance of the evidence that the four prongs/prerequisites set forth therein had been met in petitioners' favor in order to be granted emergent relief.

A petitioner bears the burden of proving the four prongs for emergent relief. B.W. ex rel. D.W. v. Lenape Reg'l High Sch. Dist., OAL Dkt. No. EDS 06933-05, Agency Ref. No. 2006-10522E, at 8 (N.J. Adm); see also J.G. ex rel. Q.B. v. Bd. of Educ. of Lakewood, OAL Dkt. No. EDU 10073-03, Agency Ref. No. 466-12/03, at 6 (N.J. Adm); R.D. ex rel. C.D. v. Willingboro Bd. of Educ., 95 N.J.A.R.2d 190, at 2.

Per N.J.A.C. 6A: 3-1.6 and Crowe, emergent relief may be granted if the judge determines from the proofs that the following four prongs have been met:

i. The petitioner will suffer irreparable harm if the requested relief is not granted;

ii. The legal right underlying the petitioner's claim is settled;

iii. The petitioner has a likelihood of prevailing on the merits of the underlying claim; and

iv. When the equities and interests of the parties are balanced, the petitioner will suffer greater harm than the respondent will suffer if the requested relief is not granted.

However, despite having acknowledged the Crowe test by executing the Petition, petitioners failed to address the standards set forth in Crowe, as required by N.J.A.C. 6A:3-1.6(b), and failed to provide testimony addressing these standards. It must also be noted that petitioners failed to offer any documentary or oral evidence that in any way tied respondent Jessica Graf to any of the actions or violations allegedly conducted by TEECS.

Respondents argued that petitioners did not meet all four prongs of the Crowe test.

1. The petitioners will suffer irreparable harm if the requested relief is not granted.

In its Petition and at the hearing, petitioners argued that N.C. was of such a tender age (eight) that a sudden and abrupt change to a new school after the school year had started would psychologically affect his emotional wellbeing. This was an opinion from his mother, not an expert in psychology or psychiatry; no documentation was provided to show that N.C. was a particularly sensitive child or had suffered emotional wellbeing previously or had issues regarding changes to his routine. No evidence was offered to show that even if N.C. started TEECS in the middle of a semester that any emotional issues would be irreparable, lifelong emotional issues. It was clear that petitioners would have gladly admitted N.C. to TEECS if a spot was offered from the waitlist over the last three years, whether that happened in the summer or the middle of a semester. Additionally, petitioners recently moved into Franklin Township in 2022, and did not offer any evidence from that move as to how N.C. emotionally handled that change in residence and change in schools.

It must be noted that the "irreparable harm" standard contemplated that the harm be both substantial and immediate. Subcarrier Communications, Inc. v. Day, 299 N.J. Super. 634, 638 (App. Div. 1997). Irreparable harm included that the occurrence of harm was imminent, A. Hollander & Sons, Inc. v. Imperial Fur Blending Corp., 2 N.J. 235, 249 (1949), but not where a mere inconvenience may occur. B&S Ltd. v. Elephant & Castle Intern, Inc., 388 N.J. Super. 160 (Ch. Div. 2006). Here, any harm raised by petitioners was speculative, not based on evidence, not shown to potentially be substantial, and certainly not imminent, as it would only arise if N.C. was later admitted from the waitlist in the middle of a semester.

Further, petitioners were in receipt of a letter dated February 6, 2023, which clearly indicated that N.C. had not won a spot in TEECS from the admissions lottery conducted on February 4, 2023, that he would be added to the waitlist as number thirty on that list, and that they would only receive any further notice from the school if a spot later opened up so that a student would be selected from the waitlist. Petitioners should have taken

immediate action at that time to challenge the lottery system. Respondents properly argued that a petition of appeal before the Commissioner must be brought within ninety-days of receipt of "notice of a final order, ruling or other action by the district board of education, individual party, or agency, which is the subject of the contested case hearing." N.J.A.C. 6A:3-1.3(i). The Commissioner has concluded that the phrase, "receipt of the notice of a final order, ruling or other action," is interpreted in caselaw to mean even an informal awareness of an action by a board of education or other party. Mazzeo v. Bd. of Ed. of Tp. of Barnegat, OAL Dkt. No. EDU 4561-05, Agency Dkt. No. 151-6/05 (August 18, 2005), aff'd (Comm. Ed. September 29, 2005).

Accordingly, any harm that might be caused by N.C. switching to TEECS mid-semester was due to petitioners' delay in challenging respondents' decision of February 6, 2023. See McKenzie v. Corzine, 396 N.J. Super. 405, 414–15 (App. Div. 2007) (holding that injunctive relief is not appropriate where the "imminent" irreparable injury alleged by a plaintiff was caused by the plaintiff).

As no specific motion to dismiss for violation of the ninety-day rule was filed by respondents, I will not reach a decision on whether such violation would preclude the filing of a due process petition or require an immediate dismissal. However, I **FIND** that petitioners' delay in appealing the results of respondents' admissions lottery was the cause of any harm that might befall N.C. I **CONCLUDE** that petitioners failed to prove that there would be any irreparable harm to N.C. and that petitioners failed to show that the first prong of the Crowe test for emergent relief had been met in favor of the petitioners.

2. The legal right underlying the petitioners' claim is settled.

Petitioners concluded in their Petition that the legal right underlying petitioners' claim was well-settled under N.J.A.C. 6A:3 Controversies and Disputes, and in accordance with N.J.S.A. 18A:6-9. However, they did not cite to specific sections of these statutes and regulations, and did not offer any argument as to how or why those sections were definitive. More importantly, petitioners provided no caselaw that supported their position.

Respondents correctly argued that petitioners were wrong to conclude that New Jersey law required "equal" apportionment. Such requirement was not in the statute, and the statute cited by petitioners, N.J.A.C. 6A:11-2.1(b)(4), was not applicable to the within scenario. Petitioners were unconvincing when they offered caselaw to try to glean legislative intent in an attempt at reinterpreting the plain language of these sections.

The charter school lottery regulation is N.J.A.C. 6A:11-4.5, which states that if there are more enrollment applications than spaces available, the charter school shall use a random selection process. The regulation therefore approves of a lottery to facilitate the selection of students for enrollment, and a waitlist if the number of applicants exceed the available number of spots, with the rank on the waitlist to be determined by lottery. The lottery regulation does not reference apportionment by district, nor does it provide for a separate waitlist for each constituent district, and therefore petitioners' argument that a separate admissions lottery was legally required for each of the three constituent sending townships would most likely be unsuccessful.

Respondents advertised its admissions lottery to all three of its sending townships, Franklin, North Brunswick and South Brunswick. Interestingly enough, based on publicly available statistics, Franklin Township was over-represented at TEECS, with 65% of TEECS students coming from petitioners' hometown of Franklin.

It therefore appeared that respondents, not petitioners, would have a greater likelihood of success at a full due process hearing. Accordingly, I **CONCLUDE** that petitioners failed to show that the second prong of the Crowe test for emergent relief had been met in favor of the petitioners.

3. The petitioners have a likelihood of prevailing on the merits of the underlying claim.

Petitioners stated in their Petition that "based on the verified responses and statements admitted by Respondent Graf, the petitioners have a likelihood of prevailing on the merits of the underlying claim." That statement in no way exhibited why petitioners

believed they had a likelihood of prevailing. Respondent Graf was not called to testify at the emergent hearing, and petitioners made no reference to specific statements made by her, nor how any such statements would ensure success on the merits of the case. Rather, it appears both the statutes, regulations, and the facts of this case make it a greater likelihood that respondents would prevail on the merits of the case.

The laws cited by petitioners did not apply to the within matter. Petitioners attempted to insinuate specific language into the plain language of the statutes and regulations cited, but nowhere was "equal" apportionment required. Further, petitioners submitted no caselaw that supported their claims. While it is possible that petitioners could succeed in a full due process hearing on the issues in this case, petitioners have not met their burden of proving that they would succeed on the merits as of the time of this emergent hearing.

From a factual standpoint, petitioners' argument as to apportionment related to the admissions lottery would necessarily fail because Franklin Township was actually over-represented at TEECS, with 65% of TEECS students coming from petitioners' home township of Franklin. Regarding African-American attendance, 20% of students in the three-township district were African-American, and TEECS had a 19% African-American student body. Thus, it appeared that respondents had a student body reflective of the entirety of the available student body and was well-apportioned. While petitioners challenged these statistics, it was respondents who certified this information before proffering it to this court; petitioners had the burden of proving that these numbers were not accurate or were being misinterpreted, but they offered no proof of same.

It is also worth noting that in its 2020 Renewal Summary for TEECS, DOE gave a score of "Meets Standard" for "Access and Equity," noting that the TEECS "demonstrates a commitment to serving and meeting the needs of all students," while providing examples of TEECS's exhaustive outreach efforts to the community. Respondents were right to argue that this certification from DOE negated any argument that TEECS did not have any plan or engage in any efforts to recruit students of diverse backgrounds throughout its constituent sending districts.

I **CONCLUDE** that petitioners failed to show that the third prong of the Crowe test for emergent relief had been met in favor of the petitioners.

4. When the equities and interests of the parties are balanced, the petitioners will suffer greater harm than the respondents will suffer if the requested relief is not granted.

Again, petitioners in their moving papers simply concluded that the balancing of equities would favor their position, without explaining why. Petitioners merely offered their (unsupported) argument that N.C. would suffer irreparable harm. They failed to compare that speculative harm to any harm that might be caused to the respondents or the TEECS student body if emergent relief was not granted.

Having already concluded that petitioners failed to prove irreparable harm, we may now examine any harm to the school. If the entire admission lottery was to be invalidated, TEECS would be in the unenviable position of having to recreate a system for admissions. That could invalidate any waiting lists, and have a ripple effect on admissions for several years. In the short term, respondents would be forced to create and seek approval for a new admission protocol a mere week before the start of a new school year.

More detrimentally, if the within court were to grant petitioners' request and force respondents to immediately admit N.C. to TEECS, another student would have to be disenrolled. Assuming respondents would only disenroll a student who had not yet begun school at TEECS, that would mean a student and his family who won admission through the lottery on February 4, 2023, and have spent the last six months preparing as if he or she would be starting at TEECS at the beginning of the 2023–2024 school year, would at the last minute have to scramble to either enroll the student into public school in their township or to have to find a new charter school within the next week. Conversely, N.C. already has an educational program at McAfee Elementary School, and if petitioners are unsuccessful in the within emergent matter, there would be no break in educational services for N.C.; he would simply remain in his current educational program.

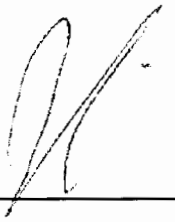
I **CONCLUDE** that petitioners failed to show that the fourth prong of the Crowe test for emergent relief had been met in favor of the petitioners.

Therefore, I **CONCLUDE** that petitioners failed to show by a preponderance of the evidence that they met any of the four prongs of the Crowe test for emergent relief. I **CONCLUDE** that petitioners failed to prove that they were entitled to emergent relief in this matter.

ORDER

Accordingly, **I ORDER** that the petitioners' application for emergent relief be and hereby is **DENIED**.

This order on application for emergency relief may be adopted, modified or rejected by **COMMISSIONER OF THE DEPARTMENT OF EDUCATION**, who/which by law is authorized to make a final decision in this matter. The final decision shall be issued without undue delay, but no later than forty-five days following the entry of this order. If Commissioner of the Department of Education does not adopt, modify or reject this order within forty-five days, this recommended order shall become a final decision on the issue of emergent relief in accordance with N.J.S.A. 52:14B-10.



August 22, 2023
DATE

JEFFREY N. RABIN, ALJ

Date Received at Agency: August 22, 2023

Date Mailed to Parties: August 22, 2023

JNR/cb

APPENDIX

WITNESSES

For petitioners

U.C., parent and attorney

For respondents

David L. Disler, Esq.

BRIEFS/EXHIBITS

For petitioners

- Petition, dated August 14, 2023
- Brief in Response to Opposition Brief, dated August 21, 2023

For respondents

- Brief in Response to Petition for Emergent Relief, dated August 20, 2023

279-23E
OAL Dkt. No. EDU 07863-23
Agency Dkt. No. 224-8/23

New Jersey Commissioner of Education

Order on Emergent Relief

Erskine Barrino,

Petitioner,

v.

New Jersey Department of Education,
Office of Student Protection,

Respondent.

The record of this emergent matter, the sound recording of proceedings at the Office of Administrative Law (OAL), and the recommended Order of the Administrative Law Judge (ALJ) have been reviewed. Upon such review, the Commissioner concurs with the ALJ that petitioner has failed to demonstrate entitlement to emergent relief pursuant to the standards enunciated in *Crowe v. DeGioia,* 90 *N.J.* 126 (1982), and codified at *N.J.A.C.* 6A:3-1.6. Accordingly, the recommended Order denying petitioner's application for emergent relief is adopted for the reasons stated therein.

However, the Order incorrectly states that the only question transmitted to the OAL was whether petitioner is entitled to emergent relief. The transmittal of this matter included both a petition and a motion for emergent relief, and the underlying petition of appeal endures despite denial of the application for emergent relief. Accordingly, this matter shall continue at the OAL with such proceedings as the parties and the ALJ deem necessary to bring it to closure.

IT IS SO ORDERED.

Angelica Allen-McMillan, Ed.D.
ACTING COMMISSIONER OF EDUCATION

Date of Decision: September 14, 2023
Date of Mailing: September 18, 2023

State of New Jersey
OFFICE OF ADMINISTRATIVE LAW

ORDER DENYING
EMERGENT RELIEF
OAL DKT. NO. EDU 07863-23
AGENCY DKT. NO. 224-8/23

ERSKINE BARRINO,
Petitioner,
v.

NEW JERSEY DEPARTMENT OF EDUCATION,
OFFICE OF STUDENT PROTECTION,
Respondent.

Erskine Barrino, petitioner, pro se

Sadia Ahsanuddin, Deputy Attorney General, for respondent (Matthew J. Platkin, Attorney General of New Jersey, attorney)

BEFORE: JOHN P. SCOLLO, ALJ:

STATEMENT OF THE CASE

Erskine Barrino seeks emergent relief from the Department of Education, Office of Student Protection's determination dated August 8, 2023 that he is disqualified from serving as a Security Officer for the West Orange (Essex County) Board of Education.

This Tribunal will only decide the question transmitted to it by the Agency i.e., whether Barrino is entitled to emergent relief."

PROCEDURAL HISTORY

Petitioner, Erskine Barrino, filed a Pro Se Petition of Appeal on August 17, 2023 seeking Emergent Relief from the Commissioner of Education. He challenges the Office of Student Protection's (hereinafter OSP) August 8, 2023 determination, as expressed in its Notice of Disqualification sent to him on August 8, 2023, that he is permanently disqualified from serving in any position with an educational institutional which is under the supervision of the New Jersey Department of Education due to a November 14, 1990 guilty plea (Judgment of Conviction) to the charge of Possession of a Weapon (N.J.S.A. 2C:39-5B). On August 23, 2023, the OSP, represented by the New Jersey Attorney General's Office, filed papers (Brief) in Opposition to the Petition for Emergent Relief and a Motion to Dismiss said Petition.

This is the Order on the Petition.

FACTUAL DISCUSSION

Based on the submissions and the testimony elicited at the hearing on August 24, 2023, the Tribunal **FINDS** that the parties are not in disagreement about any of the following facts.

By way of background, on May 1, 1989, Petitioner Erskine Barrino was arrested in Bergen County on a charge of Possession (N.J.S.A. 2C:39-5B) of a Weapon.

On November 14, 1990, Barrino entered a plea of guilty to said charge.

He was sentenced to two years' probation, which he completed. He did not file a Petition for Expungement of said conviction until August 22, 2023. There will be a hearing

on the Expungement Petition on October 23, 2023 in the Superior Court of New Jersey, Criminal Part, Bergen County.

Erskine Barrino applied for the position of Security Officer with the Board of Education of West Orange, Essex Couty, New Jersey. On July 26, 2023, the Superintendent of School for West Orange sent a letter notifying Barrino that his appointment as a Security Officer was approved at the West Orange Board of Education's meeting of July 25, 2023 for the period from September 1, 2023 through June 30, 2024. However, on August 8, 2023, the State Department of Education, Office of Student Protection (OSP) sent a letter to Barrino notifying him of its determination that he is permanently disqualified from serving in any position with an educational institutional which is under the supervision of the New Jersey Department of Education. The OSP explained that Barrino's criminal history shows that on November 14, 1990 he entered a plea of guilty (a Judgment of Conviction) to the charge of Possession of a Weapon (N.J.S.A. 2C:39-5B). Since the record of the conviction has never been expunged, said criminal record still exists and he is therefore disqualified from holding said position.

ANALYSIS OF THE RESPECTIVE POSITIONS OF THE PARTIES

Arguments Presented by the Petitioner

Erskine Barrino's August 17, 2023 Pro Se Petition of Appeal admits that on November 14, 1990 he entered a guilty plea to the charge of Possession of a Weapon N.J.S.A. 2C:39-5B; that he was sentenced to two years of probation; and that he successfully completed probation. In his testimony, he admitted that he did not apply for an expungement until August 23, 2023. His Petition of Appeal seeks emergent relief pursuant to Crowe v. DeGioia, 90 N.J. 126 (1982). The argument upon which he seeks emergent relief is that he needs to work to support his family, which includes a child who has medical issues. He was appointed to the Security Officer position by the WOBOE, admittedly subject to the results of a background check. If he does not get the job with the WOBOE he will be jobless and unable to support himself and his family. He stated that he left his last employment during the week before the hearing because he had to give two weeks' notice to his employer, Mancon, Inc., where he worked for wages as a

Parts Specialist and from whom he received health insurance coverage for himself and his family members. During the hearing, he stated that there was a possibility that he could regain his job with Mancon, Inc, unless it has been filled in the interim. He argued that since his guilty plea in 1990, he has not been involved in any criminal activity and that he learned from his mistake. He is a family man and wants to serve the interests of his own children and those of other schoolchildren and their parents.

The Tribunal explained the requirements of the four prongs of Crowe. The Tribunal emphasized that it is the burden of the person seeking emergent relief to persuade the Tribunal that he meets the requirements of each of the four prongs of Crowe. Barrino acknowledged that he understood this and addressed each of the four prongs.

When asked to explain how he met the requirements of demonstrating that he would suffer irreparable harm (the first Crowe factor) if the requested relief were not granted, he explained that he needed both the wages and the health insurance coverage that was part of the prospective job, especially since he has a child who has medical issues. He admitted that the health insurance coverage, like wages, was an economic benefit. Of course, Crowe held that a harm is not irreparable if it can be redressed by money. Barrino had no response to this. When asked to present whether he had any other arguments that demonstrated irreparable harm that were not based on economic harm, Barrino basically had no response.

Given that opportunity to address the second, third and fourth Crowe factors, Barrino was not able to demonstrate that the law supported his claim for relief. In regard to the second Crowe factor, he could not overcome the OSP's argument that the law imposed a mandatory disqualification to people convicted of the type of offense that he had on his record. In regard to the third Crowe factor, he was unable to demonstrate why, that under the circumstances of the matter, he would have a likelihood of success on the merits. Finally, on the fourth Crowe factor, he could not demonstrate how, when the equities of the matter were compared, that he would suffer greater harm than the Respondent, if the relief he sought was not granted. Moreover, he was not able to refute the Respondent's argument that the interest of the students required that there be no

exceptions to the disqualification of applicants who have a record of offenses proscribed by the applicable statutes.

Arguments Presented by the Respondent

DAG Ahsahuddin stated that she would rely on the arguments presented in her Opposition papers (Brief) to demonstrate that Barrino could not demonstrate that he would suffer irreparable harm (the first Crowe factor). As such, he could not meet all four of the Crowe factors and his Petition must fail. Moreover, since Barrino could not demonstrate that he was entitled to relief under any of the other three Crowe factors, it was clear that he was not entitled to the emergent relief he sought.

DISCUSSION AND FINDINGS OF FACT

Having reviewed the documents, testimony, and arguments presented, I make the following findings of **FACT**.

I **FIND** that Barrino's arguments on the issue of irreparable harm were based only on the economic effects of the Respondent's determination that he was disqualified from the position he seeks. Moreover, Barrino did not demonstrate that he was not capable of finding alternate employment. He even stated that he might be able to become re-employed with Mancon, Inc., a job where he received both wages and health insurance coverage.

I **FIND** that Barrino did present a sympathetic argument concerning the need for him to maintain health insurance coverage, but I further **FIND** that this is an argument based on the economic effects of the Respondent's determination.

I **FIND** that Barrino did not present cogent arguments that would meet the requirements of the second, third, and fourth prongs of Crowe.

I **FIND** that Barrino has not presented sufficient facts or sufficient arguments that would satisfy any of the four Crowe factors.

APPLICABLE LAW

Jurisdiction of the Commissioner of Education

N.J.S.A. 18A:6-9 provides

> The commissioner shall have jurisdiction to hear and determine, without costs to the parties, all controversies and disputes arising under the school laws ....

Law Governing the Granting of Injunctions Seeking Emergent Relief

N.J.A.C. 6A:3-1.6(a) provides:

> Where the subject matter of the controversy is a particular course of action by a district board of education ... the petitioner may include with the petition of appeal, a separate motion for emergent relief ... pending the Commissioner's final decision in the contested case."

N.J.A.C. 6A:3-1.6(b) provides:

> A motion for stay or emergent relief shall be accompanied by a letter memorandum or brief which shall address the following standards to be met for granting such relief pursuant to Crowe v. DeGioia , 90 N.J. 126 (1982):
>
> 1. The petitioner will suffer irreparable harm if the requested relief is not granted;
>
> 2. The legal right underlying petitioner's claim is settled;
>
> 3. The petitioner has a likelihood of prevailing on the merits of the underlying claim; and
>
> 4. When the equities and interests of the parties are balanced, the petitioner will suffer greater harm than the respondent will suffer if the requested relief is not granted.

The Crowe Factors

Crowe v. DeGioia, 90 N.J. 126 (1982) arose out of a set of circumstances regarding support and palimony matters. Nonetheless, the case has been the polestar decision in New Jersey for cases wherein injunctive relief is sought. The case stands for the proposition that an injunction cannot be granted unless and until the party seeking relief presents clear and convincing evidence that: (1) the injunction is "necessary to prevent irreparable harm"; (2) that "the legal right underlying the claim is settled"; (3) that the party seeking relief has made "a preliminary showing of a reasonable probability of ultimate success on the merits"; and (4) that "the relative hardship to the parties in granting or denying [injunctive] relief", on a balancing of the equities, weighs in his favor. Crowe, 90 N.J. at 132-34. In order to prevail, the party seeking injunctive relief must demonstrate by clear and convincing evidence that he meets all four Crowe factors. Brown v. City of Paterson, 424 N.J. Super. 176, 183 (App. Div. 2012).

"[A] party who seeks mandatory preliminary injunctive relief must satisfy a 'particularly heavy' burden." Guaman v. Velez, 421 N.J. Super. 239, 247 (App. Div. 2011), Rinaldo v. RLB Inv., LLC, 387 N.J. Super. 387, 396 (App. Div. 2006).

Also, "[w]hen a case presents an issue of 'significant public importance', a court must [also] consider the public interest in addition to the traditional Crowe factors." Garden State Equal. v. Dow, 216 N.J. 314, 321 (2013).

Appellate courts are bound by the trial court's factual findings if they are supported by "substantial, credible evidence" in the record. Triffin v. Automatic Data Processing, Inc., 411 N.J. Super. 292,315 (App. Div. 2010).

Under the first Crowe factor, a party who seeks injunctive relief must establish that injunctive relief is necessary to prevent irreparable harm and to preserve the status quo. Citizens Coach Co. v. Camden Horse R.R. Co. , 29 N.J. Eq. 299, 303 (E.&A. 1878). Irreparable harm is an "injury to be suffered in the absence of injunctive relief [that] is *substantial* and *imminent*." Waste Mgmt. of N.J., Inc. v. Union City Utils. Auth., 399 N.J. Super. 508, 520 (App. Div. 2008).

Under the second Crowe factor, injunctive relief will be withheld when the legal right underlying the claim is unsettled. Citizens Coach, at ps. 304-05.

Under the third Crowe factor, the party seeking relief is obligated to present clear and convincing evidence that he / she has a reasonable probability of ultimate success on the merits. Therefore, injunctive relief will not be granted where there are material facts in controversy. Citizens Coach at ps. 305-06. The party who seeks injunctive relief must be prepared to demonstrate facts which support his case and "must make a preliminary showing of reasonable probability of success on the merits." Crowe, at p. 133.

The second and third Crowe factors involve fact-sensitive analysis that "requires a determination of whether the material facts are in dispute, and whether the applicable law is settled." Waste Mgmt., at p. 528.

Under the fourth Crowe factor, the party who seeks injunctive relief must address the issue of relative hardship to the parties and he must establish that, on balance, the equities favor the grant of temporary relief to maintain the *status quo* pending the outcome of a final hearing." Crowe at p. 134. The party seeking injunctive relief must prove his case by clear and convincing evidence. Brown at p. 183 and thus his burden is 'particularly heavy'. Guaman at p. 247.

I **CONCLUDE** that Barrino has not met his burden regarding any of the Crowe factors.

LEGAL ANALYSIS AND CONCLUSIONS

The First Crowe Factor

Regarding the first Crowe factor, the Respondent convincingly argued that the Petitioner did not demonstrate that he would suffer irreparable harm if emergent relief were not granted. The Respondent convincingly argued that the Petitioner's failure to prevail on the first Crowe factor means that he cannot meet his burden of proving that he

satisfied all of the Crowe factors, and it therefore follows that the Petition must be dismissed.

The Second Crowe Factor

Regarding the second Crowe factor, the Petitioner did not meet his burden of demonstrating that the law is settled in his favor.

The Third Crowe Factor

Regarding the third Crowe factor, the Petitioner did not meet his burden of demonstrating that under the circumstances of this matter he would be likely to prevail on the merits at trial.

The Fourth Crowe Factor

Regarding the fourth Crowe factor, the Petitioner did not demonstrate that on balance, the equities favor the grant of the temporary relief which the Petitioner seeks.

I **CONCLUDE** that Barrino has not met his burden regarding any of the Crowe factors."

ORDER

It is hereby **ORDERED** that Barrino's Petition seeking Emergent Relief in the form of an Order overturning the OSP's determination dated August 8, 2023 must be and hereby is **DENIED**; and it is further

ORDERED that a copy of this **ORDER** shall be transmitted by email from the OAL to the Pro Se Petitioner, Erskine Barrino and to the Respondent's counsel, Sadia Ahsahuddin, DAG.

This order on application for emergency relief may be adopted, modified or rejected by the **COMMISSIONER OF THE DEPARTMENT OF EDUCATION,** who by law is authorized to make a final decision in this matter. The final decision on the issue of emergent relief shall be issued without undue delay, but no later than forty-five days following the entry of this order. If the **COMMISSIONER OF THE DEPARTMENT OF EDUCATION** does not adopt, modify or reject this order within forty-five days, this recommended order shall become a final decision on the issue of emergent relief in accordance with N.J.S.A. 52:14B-10.

August 25, 2023

DATE

JOHN P. SCOLLO, ALJ

db

STATE OF NEW JERSEY DEPARTMENT OF EDUCATION

In the Matter of Tenure Charges Against Elisha Jones

IRVINGTON BOARD OF EDUCATION

Petitioner,

- and -

ELISHA JONES

Respondent.

Agency Dkt No. 182-7/23

DECISION APPROVING SETTLEMENT AGREEMENT

Before
Joyce M. Klein
Arbitrator

Appearances:

For the Petitioner:
Ronald Hunt, Esq.
Hunt, Hamlin & Ridley

For the Respondent:
Ronald J. Ricci, Esq.
Ricci & Fava, LLC

On June 29, 2023, the Irvington Board of Education [the "Petitioner"] filed tenure charges of conduct unbecoming with the State of New Jersey Department of Education against Elisha Jones [the "Respondent"], a teacher employed by the Petitioner. On July 10, 2023, Respondent filed an answer to the charges. On July 31, 2023, the charges were referred to me by the Director of the Bureau of Controversies and Disputes, Department of Education, for a hearing and decision.

On August 7, 2023, Respondent filed a Motion to Dismiss. On August 14, 2023, Petitioner filed a response to that Motion. On September 5, 2023, I denied Respondent's Motion.

On September 6, 2023, in lieu of commencing the scheduled hearing, I met with representatives of the Irvington Board of Education and Ms. Jones. At that time, the parties entered into settlement discussions and thereafter reached a Settlement Agreement resolving the charges brought against Ms. Jones. The terms of settlement were approved by both Respondent and Petitioner by September 14, 2023.

The terms of settlement of the tenure charges provide that Petitioner agrees reinstate Respondent and her termination is converted to a sixty (60) day suspension without pay from June 29 to August 28, 2023. Petitioner agreed that it will not try to deprive Respondent from collecting Unemployment Benefits during the period of her suspension. Upon her return to work, Respondent will be transferred to the Irvington High School and shall resume her pay status with no loss of seniority or contractual benefits as a result of her suspension. Respondent will attend "Handle With Care" training and comply with all training protocols.

Under N.J.A.C. 6A:3-5.6, the arbitrator is required to issue a brief decision approving the settlement of tenure charges and explaining why the arbitrator is approving the terms of settlement. I have approved these terms for the following reasons.

I am persuaded that the issues that were raised in the Statement of Tenure Charges and Specifications filed by the Petitioner and the Answer to Tenure Charges filed by the Respondent have been fully reviewed and discussed by all parties and that the issues raised therein have been satisfactorily addressed by the terms of settlement. The terms of settlement reflect an appropriate resolution of the charges leveled against the Respondent. The settlement will allow both parties to move forward without using valuable educational time as well as the avoidance of protracted and costly proceedings at the public's expense. The Respondent's determination to accept a sixty (60) day suspension and the District's determination to employ her at the Irvington High School will allow Respondent to complete her career with the District and will allow the District to ensure that she continues to be a productive employee while working with high school students. I believe that the settlement terms properly balance all of the parties' interests and provide a satisfactory basis for the resolution of any concerns that were raised by the Statement of, and the Answer to, the Tenure Charges that were set forth in the record of this proceeding.

Accordingly, and based upon all of the above, this will serve as the arbitrator's approval of the parties' settlement agreement.

Dated: September 15, 2023
Ocean Grove, New Jersey

Joyce M. Klein

State of New Jersey }
County of Monmouth }ss:

On this 15th day of September, before me, using communication technology, came and appeared Joyce M. Klein to me known and known to me to be the individual described in and who executed the foregoing instrument and she acknowledged to me that she executed same.

Madeline R Boone

Madeline R Boone
NOTARY PUBLIC
State of New Jersey
ID # 50198320
My Commission Expires 6/23/2027

284-23
or
283-23

IN THE MATTER OF TENURE BETWEEN

Jennifer Ferrara

-And-

Board of Education of the City of Newark
Essex County, New Jersey

Agency Docket No.: 221-8/22

Arbitrator: Kinard Lang

Hearing Dates: January 23, 31; February 21, 22, 23, 24; March 22, 23, 24; May 18 and 19, 2023

Hearing Locations: New Jersey Board of Mediation, Newark, N.J.; Offices of Zazzali, Fagella, Nowak, Kleinbaum & Friedman, Newark, N.J.

Issue:

Has the School District of Newark borne the burden of proving Teacher, Jennifer Ferrara, must be dismissed, consistent with the provisions of the TeachNJ Act, due to Inefficiency; if not, what shall the Remedy be?

APPEARANCES:

Adam Herman S., Esq. - Petitioner Colin M. Lynch, Esq. - Respondent

Post Hearing Briefs Filed: July 31, 2023

BACKGROUND

This matter comes to us as the result of the District's decision to pursue revocation of Respondent Jennifer Ferrara's Tenure. Respondent began her employment at Rafael Hernandez School in November 2014. Her performance for the 2014-15 school year was evaluated as *Partially Effective*. However, from the 2015-16 school year, until the 2020-21 school year; where much instruction was performed virtually due to the Covid Pandemic, Respondent's teaching performance was observed and evaluated as *Effective*.

We will review Respondent's observations and evaluations for the 2020-21 and 2021-22 School years; the latter taught while on a Corrective Action Plan, due to the former. The following is a summary of those Observations and Evaluations, and their circumstantial context:

A) Due to the Covid pandemic Respondent did not receive an annual Summative Evaluation for the 2019-20 school year; that school year she received two *Effective* Observations, and was selected to be the school's *"model"* English Language Arts teacher, before the pandemic curtailed in-classroom instruction.

B) In November, 2020 with Ferrara's support, S. Montague became the Newark Teachers' Union representative at RHS.

C) The preceding only occurred after Pared refused to accept NTU membership's acclimation of Montague as their representative, and required an election.

1) ***Effective* rating** of Ferrara's performance; Vice Principal Hill's December 15, 2020 Observation.

D) January 21, 2021; during a meeting Montague advises Principal Pared that Respondent and other teachers fear "repercussions" from Administration if they "speak out" at Union meetings, regarding complaints against RHS Administration.

2) ***Partially Effective* rating** of Ferrara's performance; Vice Principal Bird's March 2, 2021 Observation.

E) On April 27, 2021 Principal Pared issued a written reprimand to Respondent for her April 26th violation of the RHS Covid mask protocol.

F) April 28, 2021 WebEx faculty meeting: The record establishes at this meeting Pared questioned the necessity of the Union as a communications *"intermediary"* between she and its members, she also publicly rebuked Respondent for the cited Covid protocol violation.

3) ***Partially Effective Annual Evaluation*** of Ferrara's 2020-21 performance; Vice Principal Hill, May 13, 2021, resulting in Respondent's CAP status for the 2021-22 school year.

G) Early in June 2021 Pared changed Ferrara's teaching cohort and assignment for the 2021-22 school year: From 6th and 7th Grade ELA to 8th Grade ELA; the record contains the unsuccessfully rebutted testimony of then ELA Coach Carnemolla, that she asked Pared not to make those changes while Respondent was teaching on a CAP.

H) Sometime in June 2021 Respondent made a written complaint to the School District Office of Labor and Employee Relations regarding the Pared Administration's treatment of teachers. That complaint was in conjunction with a June 17, 2021 WebEx meeting between District Labor Relations Director, J. Watson, Respondent, Montague and other teachers: They complained about asserted *"Extremely Toxic and hostile work environment, Targeting, Falsifying information, Slander, Intimidation, Bullying".*

I) On or about October 25, 2021 Respondent's scheduled coaching from ELA Coach Carnemolla was aborted; on October 31st Principal Pared notifies Respondent "..."*At this time we have to cancel the additional coaching prep...*"

4) ***Effective* rating** of Ferrara's performance; Vice Principal Hill's December 3, 2021 teaching Observation.

J) On January 5, 2022 Principal Pared called an Emergency faculty meeting.

Because of Pared's agenda, this becomes known as the *"climate and culture meeting";* Respondent spoke at the meeting about her sensed *"lack of trust with staff toward administration"*. On January 6th Vice Principal Vargas replaced Vice Principal Hill as Respondent's immediate supervisor and observer.

K) On January 13, 2022 Pared began preparing for Ferrara's removal; she sought evidence from H. Daughtry, School District HRS Office, to support her revocation of Respondent's tenure.

L) Respondent is on approved Bereavement and FMLA leaves from January 10 to February 7, 2022.

5) ***Partially Effective*** **rating** of Ferrara's performance; Vice Principal Vargas' February 17, 2022 teaching Observation.

6) ***Partially Effective*** **Mid-Year Evaluation**; Vice Principal Vargas, February 23, 2022.

M) On March 16, 2022 Respondent received treatment for a "work related injury" at N.J. Concentra Medical Center; she experienced Elevated blood pressure and anxiety as the result of Vice Principal Vargas' unscheduled visit of her classroom. There in front of students, Vargas demanded data regarding lesson plans. Weeks following these events, Respondent was approved for FMLA leave from April 25th to the June 23rd end of the 2021-22 school year.

7) ***Partially Effective* rating** of Ferrara's performance Principal Pared, March 29, 2022 teaching Observation.

Based upon the preceding Observations and Evaluations, on May 10, 2022 Principal Pared recommended Respondent's loss of Tenure to the N.J. Commissioner of Education; that resulted in this Arbitration.

POSITIONS OF THE PARTIES

Petitioner

Respondent earned Partially Effective ratings for the 2020-21 and 2021-22 school years, thus, the TeachNJ Act requires revocation of her Tenure. We are told that in our review of the proper application of the Act to Respondent, we may **only** consider whether:

> *"a. ...(1) The employee's evaluation failed to adhere substantially to the evaluation process, including, but not limited to providing a corrective action plan;*
>
> *(2) There is a mistake of fact in the evaluation;*
>
> *(3) The charges would not have been brought but for considerations of political affiliation, nepotism, union activity, discrimination as prohibited by state or federal law, or other activity prohibited by state or federal law;*
>
> *(4) The district's actions were arbitrary and capricious.*

b. In the event the employee is able to demonstrate that any of the provisions of paragraphs (1) through (4) of subsection a. of this section are applicable, the arbitrator shall determine if that fact materially affected the outcome of the evaluation. If the arbitrator determines that it did not materially affect the outcome of the evaluation, the arbitrator shall render a decision in favor of the board and the employee shall be dismissed."

c. The evaluator's determination as to the quality of an employee's classroom performance shall not be subject to an arbitrator's review."

The District tells us it has produced a preponderance of relevant evidence, documented in the records of RHS administrators' Observations and Evaluations during the 2020-21 and 2021-22 school years, showing Ferrara's professional Inefficiency. She must be Dismissed.

Respondent

Of course, Respondent tells us those Observations were made through eyes jaundiced with anti-Union animus; that the evaluations were, at best, procedurally defective. In that connection there are unexplained *discrepancies* in RHS administrators' Observation ratings.

We are told the testimony of several teachers, including Montague and Ferrara, provides evidence of Principal Pared's anti-Union statements.

According to their testimony, she made those statements at faculty meetings, as well as claims that she *"knows what goes on at your little meetings"*; during the Pandemic NTU meetings were held on WebEx, to which Pared had access.

For all these reasons the District's charges against the Respondent must be dismissed.

Discussion and Analysis

We will begin at the end of the preceding chronology listing the events leading to this arbitration. According to the Respondent, Pared's March 29, 2022 Observation was unannounced, with no pre-Observation conference; that it was not a *normal* class but rather a Test Preparation lesson, with a lesson plan Respondent had no role in developing. In that connection, we have Principal Pared's Cross-Examination Testimony:

*" ...**Q.** All right. So when you did the final observation of Ms. Ferrara, you were conscious that this was a test prep because she had the test prep package; correct?*

***A.** She had a test prep document. Yes.*

***Q.** Okay. And then you made that choice to utilize that test prep **and not a lesson** to give her her last final observation; correct?*

***A.** Yes.* (Emphasis added)

It is clear from Pared's testimony that she chose to personally conduct what her testimony shows she knew was a *"make it or break it"* Observation of Ferrara. Nothing in the *Newark Board of Education Teacher Evaluation Guide* **requires** the Principal to conduct an Observation under those circumstances.

I) I find Pared's actions here Arbitrary.

Preceding Pared's March 29th Observation Ferrara was treated for a "work related injury" at Concentra Medical Center on March 16th; that medical attention occurred approximately three weeks after Vice Principal Vargas' February 17, 2022 Observation, where Respondent was *ultimately* rated Partially Effective.

However, for reasons not adequately explained by the District, following the February 17th Observation Vargas recorded Respondent's performance as Effective; only at the conclusion of their post-Observation conference did Vargas tell Respondent her Observation was rated Partially Effective.

Respondent argues that *late change* effectively denied her *due process*; her right, as acknowledged in the testimony of Vargas and Pared, to come into the post-Observation conference armed with evidence to persuade Vargas her *changed* rating of Respondent was *unjustified.*

II) I find Vargas' behavior here Capricious

Vargas' February 23, 2022 Mid- year evaluation of Respondent's teaching performance as Partially Effective relied, at least in part, on the cited February 17th Observation; we are told that evaluation *"...was infected with the flaws of Vargas' observation of Ferrara undertaken immediately prior"*, and therefore has little validity.

On May 6, 2022 Vice Principal Vargas completed the District's Annual Summative Evaluation of Respondent, she rated her Partially Effective. The testimony of Vargas, Pared and Assistant Superintendent Jose Fuentes, establishes that a post-Evaluation conference is required. Their testimony is consistent with Article V, Section 12, C. of the parties' Collective Bargaining Agreement:

> *" C. OBSERVATION/EVALUATION CONFERENCES*
>
> *Observation/evaluation conferences shall be held within (10) calendar days of the classroom visit. The (10) days may be extended by the number of days that either party is absent."*

The District's "Teacher Evaluation Guide" says, following this *"summative performance review"*, the teacher and administrator should meet for a conference, where *"...The Administrator will then revise (if necessary) or complete the Annual Evaluation,* ***based on this conference.***" (Emphasis added)

Clearly, the District knew, or should have known, Respondent was on an approved FMLA leave of absence on the day it chose to do her Annual Evaluation, and that her absence would deny her the post-Evaluation conference opportunity to which she was entitled; her last best chance to produce evidence supporting her assertion of professional Effectiveness.

III) I find the Respondent's Annual Evaluation failed to adhere substantially to the TeachNJ Evaluation process.

Conclusions

With respect to Tenured teachers with a Corrective Action Plan, the Newark Board of Education Teacher Evaluation Guide says: *"Work with HRS Office to pursue tenure charges if applicable"*, **in June.** The evidence shows that on January 13, 2022 Principal Pared contacted H. Daughtry in the HRS office seeking data to support her *opined* pursuit of Tenure charges against Ms. Farrara.

The record tells us about the Observations and Evaluations following Pared's data request from Daughtry. However, when that request for Tenure revocation evidence was made, Respondent had only one Observation for the 2021-22 CAP school year; that Observation rated her performance Effective.

I find Pared's action here tantamount to a self-fulfilling prophecy.

Pared's intrusion into Union meetings, antipathy for Montague and interference in RHS Union leadership selection, convince me Ms. Ferrara's participation in NTU complaints tainted Administration's ratings of her teaching performance.

Based on the entire record in this matter I find the District's Ratings of Respondent violated the Provisions of TeachNJ; that they were influenced by Farrara's Union activity, were arbitrary and capricious, and failed to adhere to prescribed evaluation processes. I find all of that materially affected Ms. Farrara's Observations and Evaluations.

AWARD

The Grievance is sustained. The charge of Partial Inefficiency is Dismissed

Kinard Lang, Arbitrator/Mediator_____September 18, 2023

285-23
OAL Dkt. No. 00239-23
Agency Dkt. No. 358-12/22

New Jersey Commissioner of Education

Final Decision

Y.L., on behalf of minor child, J.W.,

Petitioner,

v.

Board of Education of the Town of Secaucus, Hudson County,

Respondent.

The record of this matter, the Initial Decision of the Office of Administrative Law (OAL), and the Stipulation of Dismissal signed by the parties have been reviewed and considered.

Upon review, the Commissioner concurs with the Administrative Law Judge that this matter is no longer a contested case, and that dismissal is appropriate.

Accordingly, the petition of appeal is hereby dismissed.

IT IS SO ORDERED.[1]

Angelica Allen-McMillan, Ed.D.
ACTING COMMISSIONER OF EDUCATION

Date of Decision: September 19, 2023
Date of Mailing: September 20, 2023

[1] This decision may be appealed to the Appellate Division of the Superior Court pursuant to *N.J.S.A.* 18A:6-9.1. Under *N.J.Ct.R.* 2:4-1(b), a notice of appeal must be filed with the Appellate Division within 45 days from the date of mailing of this decision.

State of New Jersey
OFFICE OF ADMINISTRATIVE LAW

INITIAL DECISION
DISMISSAL
OAL DKT. NO. EDU 00239-23
AGENCY DKT. NO. 358-12/22

Y.L. ON BEHALF OF MINOR CHILD J.W.,
Petitioner,
v.
BOARD OF EDUCATION OF THE TOWN OF SECAUCUS, HUDSON COUNTY,
Respondent.

Thomas J. Koehl, Esq. for petitioner

Stephen R. Fogarty, Esq. for respondent (Fogarty & Hara, attorneys)

Record Closed: August 29, 2023 Decided: August 30, 2023

BEFORE **NANCI G. STOKES**, ALJ:

STATEMENT OF THE CASE

Petitioner, Y.L., filed a residency appeal on behalf of her child, J.W. Shortly thereafter the Town of Secaucus Board of Education (Respondent) filed an Answer with the State Department of Education. The matter was transmitted to the Office of

Administrative Law (OAL) on January 9, 2023, for determination as a contested case pursuant to N.J.S.A. 52:14F-1 to -13. A telephone prehearing was conducted on February 27, 2023. Several conferences were scheduled thereafter, the last one being August 29, 2023. On August 29, 2023, Petitioner's counsel submitted a Stipulation of Dismissal, which is attached hereto for reference.

Based on the foregoing, I **CONCLUDE** that this matter is no longer a contested case before the Office of Administrative Law. It is therefore **ORDERED** that this matter be and is hereby **DISMISSED**.

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

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

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

August 30, 2023

DATE

NANCI G. STOKES, ALJ

Date Received at Agency: August 30, 2023

Date Mailed to Parties: August 30, 2023

ljb

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Secaucus Board of Education,

Y.L. o/b/o minor child, J.W.,	:	STATE OF NEW JERSEY OFFICE OF ADMINISTRATIVE LAW
Petitioner,	:	OAL Docket No.:EDU00239-2023N Agency Ref. No.: 358-12/22
v.	:	
Town of Secaucus Board of Education, Hudson County,	:	**STIPULATION OF DISMISSAL**
Respondent.	:	

It is hereby stipulated and agreed by the undersigned that the above-captioned action be and is hereby dismissed with prejudice and without costs to either of the parties.

By: _____
Thomas J. Koehl, Esq.
Attorney for Petitioner

Dated: August 29, 2023

By: /s/ Stephen R. Fogarty
Stephen R. Fogarty, Esq.
Attorney for Respondent

Dated: August 29, 2023

286-23
OAL Dkt. No. EDU 02236-23
Agency Dkt. No. 29-2/23

New Jersey Commissioner of Education

Final Decision

D.M., on behalf of minor children, D.M. and M.M.,

Petitioner,

v.

Board of Education of the Township of Waterford, Camden County,

Respondent.

The record of this matter and the Initial Decision issued by the Office of Administrative Law have been reviewed pursuant to *N.J.A.C.* 1:1-19.1. As the Initial Decision includes the complete terms of a settlement agreement (Agreement) between the parties, the Commissioner approves the terms of the Agreement and adopts the Initial Decision as the final decision in this matter. The case is hereby dismissed, subject to compliance with the terms of the Agreement.

IT IS SO ORDERED.

ACTING COMMISSIONER OF EDUCATION

Date of Decision: September 19, 2023
Date of Mailing: September 20, 2023

291-23
State Board of Examiners Dkt. No. 1920-119
OAL Dkt. No. EDE 01394-20
Agency Dkt. No. 4-5/23A

New Jersey Commissioner of Education

Final Decision

In the Matter of the Certificates of James McMullan, State Board of Examiners, New Jersey Department of Education.

Order of Suspension by the State Board of Examiners, April 17, 2023

For the Respondent-Appellant, Lauren McGovern, Esq.

For the Petitioner-Respondent State Board of Examiners, Erin I. Herlihy, Deputy Attorney General (Matthew J. Platkin, Attorney General of New Jersey)

The Commissioner has reviewed the record, hearing transcripts, and papers filed in connection with James McMullan's appeal of the Order of the State Board of Examiners (Board), dated April 17, 2023, suspending his Teacher of Elementary Grades K-8 Certificate of Eligibility with Advanced Standing, Teacher of Elementary Grades K-8 Certificate, Supervisor Certificate, and Principal Certificate of Eligibility for a period of two years.

Appellant resigned from his employment as a tenured teacher with the Oakland School District effective June 30, 2019, following allegations of unbecoming conduct. On December 17, 2019, the Board issued an Order to Show Cause (OSC) for the suspension of appellant's certificates and ultimately transmitted the matter to the Office of Administrative Law

(OAL) for a contested hearing. The Board called eight witnesses to testify. Appellant called four witnesses, and also testified on his own behalf. The record closed on November 16, 2022.

The Administrative Law Judge (ALJ) concluded that appellant's actions and multiple instances of poor judgment when dealing with three different students constituted conduct unbecoming a teacher so egregious that it shocked the conscience. *In the Matter of the Certificates of James McMullan*, OAL Dkt. No. EDE 01394-20, Agency Dkt. No. 1920-119, Initial Decision (December 20, 2022) at 12-16. In particular, the ALJ found that appellant: (1) yelled at, mocked, and embarrassed a student who had a learning disability in front of the entire classroom; (2) removed another student from his classroom and left him unsupervised in a hallway, out of appellant's line of sight, with the classroom door locked; (3) falsified facts regarding the hallway incident when asked about it by the principal; and (4) told a third student with special needs that he would have to go to a "special school", then ripped books out of the student's hands in front of other students in the hallway. *Id.* at 14.

When assessing the witness testimony, the ALJ determined that the Board's witnesses were credible and persuasive. *Id.* at 13. Of note, the Board presented direct testimony from the students involved in the first and second incidents. By contrast, the ALJ determined that appellant's own testimony was neither "credible in terms of his factual recitation nor in the manner in which it was given." *Ibid.* In particular, the ALJ found that appellant's "recitation and demonstration of the contact with the students was exaggerated and not credible nor true." *Ibid.* The ALJ described appellant's testimony as "evasive" and found that he "attempted to spin the facts in his favor." *Ibid.* Additionally, the ALJ noted that appellant's testimony regarding his interaction with the student he yelled at and mocked was directly contradicted by that of his own

witness. *Ibid.* Furthermore, the ALJ rejected the defense proffered for appellant's conduct, *i.e.,* "his diabetes and merely a difference in teaching style," as "preposterous." *Id.* at 15-16. The ALJ ultimately recommended that appellant's certificates be "suspended indefinitely." *Id.* at 16.

Upon considering appellant's exceptions and the Board's reply thereto, the Board adopted the ALJ's Initial Decision with a modification as to the penalty. The Board concluded that a suspension with a finite term of two years was appropriate under the circumstances. The Board emphasized the fact that although appellant received prior warnings, reprimands, and guidance from his employer, he nonetheless committed multiple instances of unbecoming conduct, to the detriment of his students. The Board also considered prior decisions in which it imposed two-year suspensions of certificates for analogous instances of unbecoming conduct.

Appellant maintains that no action should be taken against his certificates. He asserts that the Board erred by not considering mitigating factors when determining the penalty to be imposed. Specifically, appellant claims that the Board failed to consider: (1) his lengthy teaching career and his positive impact on students; (2) the impact of his medical condition during the 2018-2019 school year; (3) the hardship a suspension will create for him and students at the Paterson School District, where he has taught for the last four years and has received positive evaluations; and (4) that he is sincerely remorseful and is unlikely to commit unbecoming conduct in the future. Appellant also argues that his 2011 increment withholding, which was restored after he completed a corrective action plan, should not be considered a prior instance of discipline.

In reviewing appeals from decisions of the State Board of Examiners, the Commissioner may not substitute her judgment for that of the Board so long as the appellant received due process and the Board's decision is supported by sufficient credible evidence in the record. The Commissioner's role in reviewing appeals is constrained by *N.J.A.C.* 6A:4-4.1(a), which specifies that "the Commissioner shall ascertain whether the decision is supported by sufficient credible evidence in the record and shall not disturb the decision unless the appellant has demonstrated that the State Board of Examiners . . . acted in a manner that was arbitrary, capricious, or contrary to law."

Initially, the record reflects that appellant received due process throughout the proceedings, and he does not contend otherwise. Next, the Commissioner finds that the sufficient credible evidence in the record—including voluminous documentary evidence and credible witness testimony—supports the Board's determination that a two-year suspension of appellant's certificates is warranted given the nature and extent of his proven unbecoming conduct. Appellant committed multiple instances of unbecoming conduct which directly involved three different students. Neither the ALJ nor the Board based its decision on the withholding of appellant's increment in 2011. The Board appropriately deferred to the ALJ's credibility findings, as the ALJ had the opportunity to carefully observe and evaluate the demeanor of the witnesses who testified.

Regarding appellant's claims about mitigating circumstances, neither the length of his teaching career nor his positive influence on some students mitigates the need for disciplinary action in this matter. Contrary to his assertions, the record does not support a finding that he has expressed sincere remorse or that he is unlikely to commit similar unbecoming conduct in

the future. Apart from the fact that his testimony before the ALJ lacked credibility, appellant steadfastly continues to cite his ongoing medical condition as an excuse for his unbecoming conduct despite the ALJ's sound rejection of that defense. His claim that the Paterson School District and its students will suffer a hardship if his certificates are suspended is grounded in speculation. Upon considering the totality of the circumstances, the Board reasonably modified the recommended penalty from an indefinite suspension to a two-year suspension of appellant's certificates.

As for the cases cited by appellant in his briefs, they are readily distinguishable from the present matter. None of them support the conclusion that any aspect of the Board's decision was arbitrary, capricious, or contrary to law. The fact that other individuals received shorter suspensions of their certificates under entirely different circumstances is neither persuasive nor dispositive. Because the Board's decision is supported by sufficient, credible evidence, and appellant has failed to establish that it was arbitrary, capricious, or contrary to law, the Commissioner has no grounds to disturb it. *N.J.A.C.* 6A:4-4.1(a).

Accordingly, the decision of the State Board of Examiners suspending appellant's certificates for two years, effective April 17, 2023, is affirmed.[1]

Angelica Allen-McMillan, J.d.S.
ACTING COMMISSIONER OF EDUCATION

Date of Decision: September 29, 2023
Date of Mailing: October 2, 2023

[1] This decision may be appealed to the Appellate Division of the Superior Court pursuant to *N.J.S.A.* 18A:6-9.1. Under *N.J.Ct.R.* 2:4-1(b), a notice of appeal must be filed with the Appellate Division within 45 days from the date of mailing of this decision.

292-23

New Jersey Commissioner of Education

Final Decision

J.B., on behalf of minor children, C.B. and C.B.,

Petitioner,

v.

Board of Education of the City of Elizabeth,
Union County,

Respondent.

Synopsis

Pro se petitioner appealed the determination of the respondent Board that she and her family are not domiciled in Elizabeth and that her children are therefore not entitled to a free public education in Elizabeth schools. Petitioner admitted that she and her husband and children had been staying temporarily at a relative's home in Hillside due to a family emergency but had been forthcoming with the District as to the situation that necessitated their short-term relocation. Petitioner asserted that the family remains permanently domiciled in Elizabeth and are therefore entitled to attend school in the District. The Board filed a counterclaim demanding tuition repayment for the period since March 21, 2023.

The ALJ found, *inter alia*, that: the Board's residency investigator made only one visit to the petitioner's Elizabeth address and found no one at home in the late morning of February 1, 2023; the investigator further admitted that he had not interviewed any member of petitioner's family in reaching his determination that the family was no longer domiciled in Elizabeth; it is undisputed that petitioner and her family established their domicile in Elizabeth many years ago; petitioner and her husband both gave credible and compelling testimony as to the circumstances of their temporary relocation to Hillside because of a family emergency and their intent to keep Elizabeth as their permanent residence. The ALJ concluded that petitioner has proven by the preponderance of credible evidence that their residence remains in Elizabeth and their intention was always to return there as soon as the temporary family emergency was resolved. Accordingly, the minor children were entitled to a free public education in Elizabeth schools, and the Board's residency determination was reversed.

Upon review of the record, the Commissioner found that a remand of this matter is necessary pursuant to *N.J.A.C.* 1:1-18.7(a) because it is unclear from the Initial Decision whether the ALJ considered respondent's exhibit R-6, which appears to call into question petitioner's domicile in Elizabeth. Exhibit R-6 is not referenced in the Initial Decision and, because the record does not contain transcripts, the Commissioner is unable to determine whether this exhibit and its significance was addressed during the hearing. Accordingly, the Commissioner remanded this case to the OAL for the purpose of allowing the ALJ to render factual findings pertaining to the Board's exhibit R-6.

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

292-23
OAL Dkt. No. 02537-23
Agency Dkt. No. 63-3/23

New Jersey Commissioner of Education

Final Decision

J.B., on behalf of minor children, C.B. and C.B.,

Petitioner,

v.

Board of Education of the City of Elizabeth, Union County,

Respondent.

The record of this matter, the Initial Decision of the Office of Administrative Law (OAL), and the exceptions filed by the Elizabeth Board of Education (Board) pursuant to *N.J.A.C.* 1:1-18.4, have been reviewed and considered. Petitioner did not file a reply to the Board's exceptions.

Petitioner appealed the Board's determination that she and her minor children do not reside in Elizabeth. Following a hearing, the Administrative Law Judge (ALJ) concluded that the family had temporarily relocated away from their home in Elizabeth due to a family emergency, but that their residence remained in Elizabeth and that the minor children were, therefore, entitled to a free education in Elizabeth's schools.

In its exceptions, the Board argues that the ALJ did not properly consider proof of petitioner's residence in Hillside and gave too much weight to petitioner's testimony. The Board notes that petitioner attempted to register her children for school in Hillside and

provided multiple documents in support, including a sworn and notarized affidavit and change of address documents for a bank account, Verizon bill, and the Motor Vehicle Commission (Exhibit R-6). The Board further contends that a 14-month stay in in Hillside, encompassing the entirety of the 2022-2023 school year, should not be considered temporary for the purposes of establishing domicile. According to the Board, petitioner chose to move out of Elizabeth to Hillside, and there is no evidence that they were forced to relocate there.

Upon careful review of the record, the Commissioner finds that a remand of this matter is necessary pursuant to *N.J.A.C.* 1:1-18.7(a) because it is unclear from the Initial Decision whether the ALJ considered respondent's exhibit R-6, which demonstrates that petitioner changed her address with multiple entities and swore to the Hillside school district that she and her children resided there. Exhibit R-6 is not referenced in the Initial Decision and, because the record does not contain transcripts, the Commissioner is unable to determine whether these exhibits and their significance were addressed during the hearing.

For these reasons, the Commissioner remands the matter to the OAL for the purpose of allowing the ALJ to render factual findings pertaining to Exhibit R-6, to explain the weight she assigned to those exhibits, and to discuss the effect, if any, those exhibits had on her ultimate conclusions of law.

IT IS SO ORDERED.

Angelina Allen McMillan, Ed.D.
ACTING COMMISSIONER OF EDUCATION

Date of Decision: September 29, 2023
Date of Mailing: October 2, 2023

State of New Jersey
OFFICE OF ADMINISTRATIVE LAW

INITIAL DECISION
OAL DKT. NO. EDU 02537-23
AGENCY DKT. NO. 63-3/23

J.B. ON BEHALF OF C.B. AND C.B.,
Petitioner,
v.
CITY OF ELIZABETH BOARD OF EDUCATION,
UNION COUNTY,
Respondent.

J.B., on behalf of **C.B**. and **C.B**. petitioner pro se

Brian J. Kane, Esq., for respondent City of Elizabeth Board of Education (LaCorte, Bundy, Varady & Kinsella, attorneys)

Record Closed: August 9, 2023 Decided: August 18, 2023

BEFORE **GAIL M. COOKSON**, ALJ:

STATEMENT OF THE CASE

Petitioner J.B. (petitioner or J.B.) filed and perfected a Petition of Appeal with the New Jersey Department of Education on or about March 7, 2023, from the final determination of the City of Elizabeth Board of Education ("District" or "Board") dated

February 24, 2023, that she and her family are not domiciled in the Elizabeth and that her children could not continue to attend its schools for free as residents of the District. The Board answered the petition and filed a counterclaim demanding tuition repayment for the period since March 21, 2023.

PROCEDURAL HISTORY

The Department of Education Office of Controversies and Disputes transmitted the Petition to the Office of Administrative Law (OAL) on or about March 22, 2023. After being assigned to this matter, I convened several telephonic conference calls to discuss preparation for the hearing and dates for same. An adjournment of one date was granted subject to the potential continued accrual of tuition reimbursement. The plenary hearing was held on August 9, 2023, on which date the record closed.

FACTUAL DISCUSSION

Based upon the testimony of the witnesses and the documentary evidence presented, and with the opportunity to assess the credibility of the witnesses, I **FIND** the following:

William Buteau testified for the Board.[1] He has been an Investigator with the District's Legal Department for approximately six years. Prior thereto, Buteau had been with the Elizabeth Police Department for thirty-one years, leaving at the rank of Detective. In January of this year, he was assigned to investigate the petitioner's daughters who attended sixth and ninth grades in the District. The investigation arose as a result of the recent usage by school administrators of the Absolute software; that is, electronic reports of where school-issued laptops are being utilized by students. In this case, those electronic details or "pings" indicated that petitioner's children were using their computers consistently from a location in Hillside. Buteau also reviewed the registration information for these students and undertook some online research of persons, vehicles, and addresses associated with them and their

[1] For clarity of presentation only and because petitioner is pro se, I had the District proceed first but the burden of proof remains on her.

family. Petitioner is registered with the school as living at 744 Trumbull Street, Elizabeth, New Jersey. On February 1, 2023, Buteau made his only visit to that location at approximately 10:00 or 11:00 a.m. No one was home and he made no contact with anyone at that time or since.

Buteau's research revealed that the house was owned by a woman whom he believed to be the grandmother of the students. He also traced the parents' vehicle registrations to an address in Mountainside. Buteau determined that the residence where the pings emanated most often, other than District facilities, was located at 1287 White Street in Hillside. The laptop usage appeared there on or about June 22, 2022. On February 7, 2023, the Legal Department issued Initial Notices of Ineligibility to petitioner alleging that her daughters lived outside the District and should be disenrolled. Final Notices were issued on February 24, 2023. Buteau did not write up his investigative report until May 31, 2023, after review of some documents submitted by petitioner in early April. Lastly, Buteau explained briefly how the tuition calculations were made based on the per diem rate and the number of days in the school year (75) since the issuance of the Final Notices.

On cross-examination and questioning from myself, Buteau acknowledged that he had interviewed no member of petitioner's family. He also clarified that the Elizabeth home was owned by petitioner's seventy-nine-year-old grandmother (the students' great-grandmother) and that petitioner's mother (the students' grandmother) also resided there.

Petitioner J.B. (Ms. B) and her husband J.B. (Mr. B) both testified at this hearing. Ms. B explained that they had always been forthcoming with the District as to a change in their family circumstances that necessitated that they stay at the Hillside residence on a temporary and emergency basis only. Mr. B's older brother – V.B. – resided there with his daughter. Their mother had also resided there until her death in October 2018, and it is her Estate that still owns the house. V.B. suffers from Huntington's disease, which is a neurodegenerative, progressive, and incurable condition. Only some years after their mother's death, Mr. and Ms. B became aware that V.B. was in arrears on the mortgage and that violations of odor ordinances had been issued to him. V.B. had been laid off in July 2022 due to his worsening condition and inability to do the work. He was collecting some

temporary disability income. They then realized that not only had his condition worsened but his living conditions had deteriorated to a shocking degree. The house was observed to be at an almost hoarder's level of clutter, mess, and disarray, and was unsanitary. Mr. B demanded that V.B.'s adult daughter vacate the premises; thereafter, he and petitioner began the long process of cleaning up the house, as evidenced by their before and after photos. There was some delay in this effort due to Ms. B being in a car accident last summer.

Mr. B described his brother as in denial and very uncooperative. While their sister, who suffered with the same genetic disease, had allowed her husband to become her power of attorney, V.B. refused to do similarly and has thus been unhelpful in pursuing Social Security or Medicaid benefits. Their plan is to relocate their brother to an assisted living facility. Although they have also considered relocating all of them back into 744 Trumbull, there is simply not enough room. They have listed the house for sale, which proceeds will be distributed pursuant to the Estate's instructions; however, Mr. B might forgo his portion if it is needed to help with V.B.'s care. They have also been looking for a larger temporary residence in Elizabeth until his brother can be placed in a care facility.

Mr. B also testified that because they were a tight-knit family, their daughters wanted to remain with their parents at the Hillside residence once it was liveable, and while he needed to be there to provide some care and stability for V.B. Both petitioner and her husband clearly stated their intent to remain residents of Elizabeth; that such has been their community for many years; and both daughters had proceeded through many school years in the District. They play in soccer leagues in the city, participate in parades, and have all their friends there.

On cross-examination, Mr. B explained that their personal vehicles are registered and insured at his business address but are not owned by the company. Although they had not had a formal lease for many years with petitioner's grandmother, petitioner and her husband had always contributed to the expenses at 744 Trumbull, providing $400-500 cash to her grandmother every month.

I must make credibility determinations with regard to these potentially material facts. A credibility determination requires an overall assessment of the witness' story in light of its rationality, internal consistency and the manner in which it "hangs together" with the other evidence. Daiichi Pharm. Co. v. Apotex, Inc., 441 F. Supp. 2d 672 (D.N.J. 2006). After carefully considering the testimonial and documentary evidence presented and having had the opportunity to listen to the testimony and observe the demeanor of the witnesses, I am convinced that petitioner's testimony and that of her husband were very credible. Petitioners' testimony was sincere and forthright. As they stated, they were always upfront with the District as to what was happening and tried to fulfill all information requests. Accordingly, I **FIND** that petitioner and Mr. B have every intent to keep Elizabeth as their permanent residence.

LEGAL DISCUSSION AND CONCLUSIONS OF LAW

The District claims that petitioner can no longer establish domicile in Elizabeth because they have relocated to Hillside to the home of V.B. Petitioner claims that this is just the result of a confluence of unfortunate medical and legal concerns they have with V.B., whom they now have a moral obligation to assist in spite of his lack of cooperation and worsening condition, because there is no one else who can handle it all.

It is undisputed that petitioner and her family established their domicile in Elizabeth many years ago. The right to a thorough and free education in the district of one's New Jersey domicile is well settled. A.M.S. ex rel. A.D.S. v. Bd. of Educ. of City of Margate, 409 N.J. Super. 149, 160-61 (App. Div. 2009). Therein, the court stated:

> N.J.A.C. 6A:22-2.1(b) requires school districts to adopt written policies and procedures related to student residency and to incorporate Department of Education (DOE) regulations pertaining to student residency into each district's policies and procedures. Moreover, in doing so, "a district board of education shall construe the provisions" of DOE regulations governing student residency "liberally so as to effectuate the right of students to a free public education."

The Legislature has provided that local boards of education are responsible for the education of school-age children who reside within their respective district. N.J.S.A. 18A:38-1. Narrow exceptions to the domicile rule are also provided when, among other things, the parent or guardian is a temporary resident of a district, N.J.S.A. 18A-38-1(d), or a parent moves between districts as a result of homelessness. N.J.S.A. 18A-38-1(f). In any event, a child's district of residence is generally determined based upon the district of residence of the child's parent or guardian. See, e.g., N.J.S.A. 18A:7B-12; N.J.S.A. 18A-38-1.

Generally, eligibility under the education laws and regulations is framed as, in relevant part:

> A student is eligible to attend a school district if he or she is domiciled within the school district. . . A student is domiciled in the school district when his or her parent or guardian resides within the school district on an all-year-round basis for one year or more, notwithstanding the existence of a domicile elsewhere.
>
> [N.J.A.C. 6A:22-3.1(a)(4) (as amended 2013).]

It should be noted that the regulations had provided at the time of earlier decisions, e.g., K.L. v. Bd. of Educ., No. A-5671-07T1, 2010 N.J. Super. Unpub. LEXIS 11, at *9 (Super. Ct. App. Div. Jan. 4, 2010):

> A student is domiciled in the school district when he or she is living with a parent . . . whose permanent home is located within the school district. A home is permanent when the parent or guardian intends to return to it when absent and has no present intent of moving from it, notwithstanding the existence of homes or residences elsewhere.
>
> [N.J.A.C. 6A:22-3.1(a)(1).]

Petitioner has asserted that she and her family intend to return to the 744 Trumbull home and had no intent to move from it but did so out of necessity temporarily both as executors of the Estate and as informal guardians of V.B. Yet, as we see, this regulation as

amended no longer encompasses the concept of "intent." 45 N.J.R. 1209(a) (May 20, 2013).

It is clear that the determination of "necessity" here is fact sensitive, on which issue petitioner has the burden of proof. Hawthorne BOE v. Prospect Park BOE and Dept. of Educ., OAL DKT. NO. EDU 16270-13, Final Agency Decision (May 12, 2014) http://njlaw.rutgers.edu/collections/oal/>. In Hawthorne, there was no evidence that petitioner's family was a victim of an abrupt change of circumstances. In clear contrast, the family's circumstances here are clearly distinguishable because they did temporarily become transient due to several emergencies (hoarder household; uncooperative ill brother; need for assisted living). See also S.J. o/b/o V.J. v. Bd. of Educ. of S. Orange-Maplewood, EDU 5656-07, Initial Decision (January 22, 2008), adopted, Comm'r (March 3, 2008), http://njlaw.rutgers.edu/collections/oal/> (family evicted from apartment and then drifted around while living in a beauty salon, with a friend, and with child's grandmother in an attic); A.B. v. W. Orange Bd. of Educ., EDU13330-09, Initial Decision (January 25, 2010), adopted, Comm'r (April 13, 2010), http://njlaw.rutgers.edu/collections/oal/> (single mother evicted after losing full-time job and thereafter alternated between apartments of several friends).

This is the case of temporary relocation away from one's abode due to fire, storms or other natural disasters, or exigent family emergency. On the basis of the above-referenced facts and legal authority, I **CONCLUDE** that petitioner has proven by the preponderance of the credible evidence that their residence remains in Elizabeth and that they have an intent to return there as soon as this temporary family emergency is resolved. These students should be permitted to receive a free public education in the City of Elizabeth.

ORDER

Accordingly, it is **ORDERED** that petitioner's appeal from the City of Elizabeth Board of Education residency determination is and the same is hereby **UPHELD** and the determination of the City of Elizabeth Board of Education on residency is **REVERSED**.

It is further **ORDERED** that the counterclaim of the City of Elizabeth Board of Education for tuition reimbursement is **DENIED**.

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

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

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

Gail M. Cookson

August 18, 2023
DATE

GAIL M. COOKSON, ALJ

Date Received at Agency 8/18/23

Date Mailed to Parties: 8/18/23

id

APPENDIX

LIST OF WITNESSES

For Petitioner:

J.B. (Mother)

J.B. (Father)

For Respondent:

William Buteau

LIST OF EXHIBITS IN EVIDENCE

For Petitioner

P-1 GSMLS Listing

P-2 Medical Prescription of Disability of V.B.

P-3 Before and After Photographs

P-4 Email Correspondence re Listing

P-5 Family Texts re Habitability Issues, etc.

P-6 744 Trumbull Payments in Lieu of Rent

P-7 Correspondence with District, with Affidavits

P-8 Worker Compensation and Accident documentation

For Respondent

R-1 Elizabeth BOE Demographics Information on C.B. and C.B.

R-2 Investigation Report of William Buteau, dated May 23, 2023

R-3 Notices of Initial Determinations of Ineligibility, dated February 7, 2023

R-4 Notices of Initial Determinations of Ineligibility, dated February 24, 2023

R-5 Laptop Surveillance

R-6 Petitioner's Proof of Residency

R-7 2022-2023 Elizabeth BOE School Calendar

293-23

New Jersey Commissioner of Education

Final Decision

A.W.,

Petitioner,

v.

New Jersey State Interscholastic Athletic Association,

Respondent.

Synopsis

Petitioner sought reversal of the final decision of the New Jersey State Interscholastic Athletic Association (NJSIAA) denying his request for a waiver of the Eight Semester Rule – which limits a student's eligibility for high school athletics to eight consecutive semesters following his or her entrance into the 9th grade – to allow A.W. to play basketball during his senior year at Ramapo High School (Ramapo). A.W. attended Bergen Catholic High School (Bergen Catholic) as a freshman. Due to the COVID-19 pandemic, he attended Bergen Catholic virtually for his sophomore year. A.W. earned passing grades but, because of concerns about his grasp of the subject matter, a decision was made to have him repeat his sophomore year at St. Peter's Prep, where he played on the junior varsity basketball team. A.W. began his junior year at St. Peter's Prep but transferred to Ramapo in October 2022, where he played as a junior on the varsity basketball team. A.W. filed an Eligibility Waiver Request with the NJSIAA prior to the start of his senior year at Ramapo in September 2023, requesting a waiver from the strict application of the Eight Semester Rule so that he could participate in high school athletics during his senior year. The NJSIAA Eligibility Committee denied the waiver request, finding that A.W. did not meet the standards for granting a waiver of the Eight Semester Rule. An appeal to the NJSIAA Eligibility Committee followed thereafter.

The Eligibility Appeals Committee (EAC) determined not to grant a waiver of the Eight Semester Rule because, *inter alia:* the family's decision to have petitioner repeat his sophomore year was voluntary and not compelled by circumstances beyond their control; granting of a waiver would give A.W. a fifth year of eligibility to play sports, contradicting the intent of the Eight Semester Rule as well as the intent behind waivers of eligibility requirements; petitioner's voluntary reclassification when he transferred to St. Peter's Prep was effectively an academic redshirt; A.W.'s participation as a fifth year senior would provide Ramapo an athletic advantage, and would displace another student who only had four years to play high school basketball. The waiver was denied.

The Commissioner upheld the NJSIAA's decision and dismissed the petition, finding that petitioner did not meet his burden to entitle him to prevail on appeal. In so deciding, the Commissioner – who may not substitute her judgment for that of the NJSIAA on appeal – noted that the NJSIAA's decision to deny the request for waiver was not arbitrary, capricious, or unreasonable.

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

293-23
Agency Dkt. No. 202-7/23

New Jersey Commissioner of Education

Final Decision

A.W.,

Petitioner,

v.

New Jersey State Interscholastic Athletic Association,

Respondent.

For Petitioner, Roshan D. Shah, Esq. (Anderson & Shah, LLC)

For Respondent, Steven P. Goodell, Esq. (Parker McCay)

This case involves an appeal of a decision of the New Jersey State Interscholastic Athletic Association (NJSIAA) denying petitioner A.W.'s request for a waiver of the Eight Semester Rule to allow him to participate in sports during his senior year at Ramapo High School (Ramapo).

Athletic competition in New Jersey's public schools is overseen by respondent, NJSIAA, a voluntary, non-profit organization which promulgates the rules and regulations governing high school athletics. *See, B.C. v. Cumberland Reg. Sch. Dist.*, 220 *N.J. Super.* 214, 234 (App. Div. 1987). Article V, Section J of NJSIAA's Bylaws, Rules and Regulations restricts a student's eligibility to play sports to four years. Specifically, the provision known as the Eight Semester Rule provides that, "[n]o student shall be eligible for high school athletics after the expiration of eight consecutive semesters following his or her entrance into the 9th grade. A student

becomes ineligible for high school athletics when the class in which he/she was originally enrolled has graduated." The NJSIAA Guidelines set forth the reasons for the Eight Semester Rule in the NJSIAA Handbook:

> This rule is intended to prohibit "red shirting," and is also aimed at preventing athletically gifted pupils who are not meeting academic standards from replacing other students who are maintaining their academic standards but who might not have the same athletic prowess. The rule is also aimed at maintaining a uniform progression among all member schools within a four-year cycle and equalizing competition within these schools.

In appropriate cases, the NJSIAA may grant a waiver of the eligibility rules if the overall objectives of the association and its member schools will not be undermined. The Eight Semester Rule can be waived when a student proves that he or she cannot comply with the rule due to circumstances beyond his or her control.

The material facts in this case do not appear to be in dispute. A.W. attended Bergen Catholic High School (Bergen Catholic) as a freshman. Due to the COVID-19 pandemic, he attended Bergen Catholic virtually for his sophomore year. A.W. earned passing grades but, because of concerns about his grasp of the subject matter, A.W.'s mother sought to have him repeat his sophomore year. When Bergen Catholic did not permit A.W. to reclassify as a sophomore, he transferred to St. Peter's Prep, where he repeated his sophomore year and played on the junior varsity basketball team. He began his junior year at St. Peter's Prep but transferred to Ramapo in October 2022. As a junior at Ramapo, A.W. played on the varsity basketball team. A.W. began his senior year at Ramapo in September 2023.

Because A.W. has already had four years of athletic eligibility, on April 24, 2023, an Eligibility Waiver Request was filed by the petitioner with the NJSIAA requesting a waiver from

the strict application of the Eight Semester Rule so that A.W. can participate in high school athletics during his senior year. On May 2, 2023, the NJSIAA Eligibility Committee voted 7-0 to deny the waiver request, finding that A.W. did not meet the standards for granting a waiver of the Eight Semester Rule.

Thereafter, the petitioner appealed the decision of the Eligibility Committee to the Eligibility Appeals Committee (EAC). Following a hearing on May 31, 2023, at which sworn testimony was taken from Ramapo's athletic director, A.W., and A.W.'s mother, the EAC denied the request for a waiver of the Eight Semester Rule. The EAC found that A.W. did well during his sophomore year at Bergen Catholic, passing all his courses with good grades and earning enough credits to advance to his junior year. The EAC determined that the family's choice to have A.W. repeat sophomore year was voluntary and not compelled by circumstances beyond their control. Although A.W. argued that COVID-19 and the need for virtual learning were circumstances beyond their control, the EAC found that remote instruction was common in 2020-2021 and does not distinguish A.W. from other students across the State who learned remotely during the pandemic. The EAC concluded that A.W.'s voluntary reclassification as a sophomore when he transferred to St. Peter's Prep was "effectively an academic redshirt" and granting him a waiver would give him an opportunity – a fifth year of eligibility – that other students do not get. (Eligibility Appeal Committee decision letter dated June 26, 2023). The EAC found that A.W.'s participation as a fifth-year senior would provide Ramapo an athletic advantage because he would be a player with "great potential" playing for a State Championship-winning team. *Ibid.* Finally, the EAC concluded that allowing A.W. a fifth year of eligibility would be unfair to other students because there are a limited number of positions

available on the varsity basketball team and if A.W. made the team, he would displace another student who only had four years of eligibility.

On July 26, 2023, the petitioner filed an appeal with the Commissioner of Education challenging the decision of the NJSIAA. On April 23, 2012, the NJSIAA filed its answer to the petition. On May 2, 2012, the petitioner filed his brief in support of the requested relief and on May 15, 2012, the NJSIAA filed its reply brief.

In his brief, the petitioner argues that the NJSIAA should have granted the waiver request because the impact of the COVID-19 pandemic and his need to address his academics constitute circumstances beyond his control. According to the petitioner, the NJSIAA improperly counted the year he attended Bergen Catholic virtually against him because he was "forced" to forego in-person attendance and his opportunity to participate in athletics during that year.

The petitioner also contends that the NJSIAA made factual misstatements in its decision. Regarding the NJSIAA's finding that A.W. would take the place of another student on the team, he points out that the team only cuts players if there are at least three players more than necessary. Regarding the NJSIAA's finding that Ramapo would receive an athletic advance from A.W.'s participation, he argues that he is a reserve player who Ramapo can replace "without much effort."

In reply, the NJSIAA asserts that it provided the petitioner with rigorous due process, noting that this case was heard by two NJSIAA committees, both of which unanimously denied the request for a waiver of the Eight Semester Rule. The NJSIAA stresses that the Eight Semester Rule is designed to ensure that all students have an equal opportunity to play high

school sports and limits that opportunity to four years. The NJSIAA points to case law holding that the Eight Semester Rule applies to semesters of attendance, rather than semesters of competition. The NJSIAA contends that it was, therefore, appropriate to count the year that A.W. attended Bergen Catholic virtually, because he had the opportunity to participate in basketball during that year, even if he did not do so. The NJSIAA also emphasizes that the family's decision to have A.W. repeat this sophomore year was entirely voluntary: he had passed his courses and would have been enrolled as a junior at Bergen Catholic in the following year had his family not decided to have him repeat his sophomore year for their own purposes. Accordingly, the NJSIAA maintains that the petitioner's ineligibility is not due to circumstances beyond his control, but instead constitutes "academic red shirting" and that any waiver would contradict the express intent of the Eight Semester Rule.

Additionally, the NJSIAA argues that the record supports its conclusion that Ramapo would receive an advantage if A.W. were granted a waiver. The NJSIAA notes that Ramapo's athletic director testified that A.W. would "be counted on to defend, rebound, don't turn the ball over and play hard." Additionally, the waiver request states that A.W. "is a slightly above average varsity level high school basketball player with great potential" who played on a State Championship-winning team. According to the NJSIAA, the record also supports its conclusion that A.W.'s participation would displace another student who only had four years of eligibility for basketball, as the team does make cuts; at the very least, A.W. would take playing time away from another student.

Upon careful review and consideration, the Commissioner determines to uphold the decision of the NJSIAA and dismiss the petitioner's appeal. As explained above, the NJSIAA is a voluntary association of public and nonpublic schools, organized – pursuant to *N.J.S.A.* 18A:11-3 – to oversee athletics for its member schools in accordance with a constitution, bylaws, rules, and regulations approved by the Commissioner of Education and adopted annually by member schools, for which they become school policy enforceable by the NJSIAA. Ramapo is a member of the NJSIAA.

It is well-established that the Commissioner's scope of review in matters involving NJSIAA decisions, including determinations made by the Eligibility Appeals Committee, is appellate in nature. *N.J.S.A.* 18A:11-3; *Board of Education of the City of Camden v. NJSIAA*, 92 *N.J.A.R.* 2d (EDU) 182, 188. That is, the Commissioner may not overturn an action by the NJSIAA in applying its rules, absent a demonstration by the petitioner that it applied such rules in a patently arbitrary, capricious, or unreasonable manner. *N.J.A.C.* 6A:3-7.5(a)(2); *B.C. v. Cumberland Regional School District*, 220 *N.J. Super.* 214, 231-232 (App. Div. 1987); *Kopera v. West Orange Board of Education*, 60 *N.J. Super.* 288, 297 (App. Div. 1960). Nor may the Commissioner substitute her own judgment for that of the NJSIAA, where due process has been provided and where there is sufficient credible evidence in the record as a whole to serve as a basis for the decision reached by the NJSIAA. *N.J.A.C.* 6A:3-7.5(a)(1); *Dam Jin Koh and Hong Jun Kim v. NJSIAA*, 1987 *S.L.D.* 259.

Additionally, the New Jersey courts have spoken as to the narrow scope of "arbitrary, capricious, or unreasonable" in the context of challenges such as petitioners:

> In the law, "arbitrary" and "capricious" means having no rational basis. *** Arbitrary and capricious action of administrative bodies means willful and

> unreasoning action, without consideration and in disregard of circumstances. Where there is room for two opinions, action is not arbitrary or capricious when exercised honestly and upon due consideration, even though it may be believed that an erroneous conclusion has been reached.*** (citations omitted) *Bayshore Sew. Co. v. Dep't of Envt. Protection*, 122 *N.J. Super.* 184, 199-200 (Ch. Div. 1973), *aff'd* 131 *N.J. Super.* 37 (App. Div. 1974).

Petitioners seeking to overturn decisions of the NJSIAA therefore bear a heavy burden, and – considering the record of this matter in light of the prescribed standard of review – the Commissioner cannot find that petitioner herein has met his burden so as to entitle him to prevail on appeal.

More specifically, considering its duty to ensure fairness and integrity in athletic competition statewide, the Commissioner cannot find that the NJSIAA applied its rules in a patently arbitrary or unreasonable manner. A.W. has already had the opportunity to participate in four years of high school athletics – including the year when he attended Bergen Catholic virtually – as envisioned by the eligibility rules. Moreover, the Commissioner is in accord with the NJSIAA's finding that the family's decision to have A.W. repeat tenth grade was voluntary and does not amount to circumstances beyond their control. The record demonstrates that, despite the COVID-19 pandemic, A.W. earned good grades as well as sufficient credit during his sophomore year at Bergen Catholic to enroll as a junior the following year, but his family chose to have him repeat the year for their own reasons. The Commissioner finds that the record supports the NJSIAA's conclusions that A.W.'s participation would affect the ability of another student to play and would give Ramapo an athletic advantage. Finally, the NJSIAA's conclusion that the circumstances in this case are effectively "red shirting" is not arbitrary, capricious, or unreasonable.

Accordingly, the Commissioner – having found that the petitioner was afforded the due process to which he was entitled and that the NJSIAA's decision denying the request for waiver was neither arbitrary nor unreasonable – upholds the NJSIAA's decision and dismisses the petition of appeal.

IT IS SO ORDERED.[1]

Angelina Allen McMillan, J.D.S.
ACTING COMMISSIONER OF EDUCATION

Date of Decision: September 29, 2023
Date of Mailing: October 2, 2023

[1] This decision may be appealed to the Appellate Division of the Superior Court pursuant to *N.J.S.A.* 18A:6-9.1. Under N.J. Ct.R. 2:4-1(b), a notice of appeal must be filed with the Appellate Division within 45 days from the date of mailing of this decision.

294-23

New Jersey Commissioner of Education

Final Decision

T.H., on behalf of minor child, A.E.,

Petitioner,

v.

Board of Education of the City of Jersey City, Hudson County,

Respondent.

Synopsis

Pro se petitioner sought emergent relief against respondent, the Jersey City Board of Education (Board or Jersey City), demanding a "federal audit" of her daughter's school records to verify the appropriateness of A.E.'s academic placement, as well as an out of district placement for her at Bayonne High School at the Board's expense. Petitioner alleged that Jersey City failed to implement and execute A.E.'s "Section 504 Plan" (Section 504 of the Rehabilitation Act of 1973 as amended, codified at 29 U.S.C. § 794, a federal law that protects qualified individuals from discrimination based upon their disability). Emergent relief was denied, and thereafter the Board filed a motion to dismiss for failure to state a claim upon which relief may be granted.

The ALJ found, *inter alia*, that: there is no dispute that petitioner and her daughter are domiciled in Jersey City; pursuant to *N.J.S.A.* 18A:38-1, A.E. is entitled to a free public education in Jersey City schools; there is no factual basis to show that petitioner is a resident of Bayonne or falls within any exception, such as a choice school district, that would allow A.E. to attend Bayonne High School at Jersey City's expense; the Bayonne Board of Education is not party to this case and there is nothing to indicate that Bayonne has agreed to allow A.E. to attend as a non-resident student pursuant to *N.J.A.C.* 6A:22-2.2. The ALJ concluded that there is simply no legal support for petitioner's demand that A.E. be allowed to attend school in Bayonne at Jersey City's expense because of the Board's alleged failures regarding her 504 Plan. Accordingly, the ALJ granted the Board's motion and dismissed petitioner's appeal with prejudice.

Upon review, the Commissioner adopted the Initial Decision of the OAL as the final decision in this matter. In so doing, the Commissioner concurred with the ALJ that there is no legal basis under state school laws to compel the Board to pay for A.E. to attend school in Bayonne. The petition was dismissed.

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

294-23
OAL Dkt. No. EDU 03234-23
Agency Dkt. No. 99-4/23

New Jersey Commissioner of Education

Final Decision

T.H., on behalf of minor child, A.E.,

Petitioner,

v.

Board of Education of the City of Jersey City, Hudson County,

Respondent.

The record of this matter, the Initial Decision of the Office of Administrative Law (OAL), and the exceptions filed by petitioner pursuant to *N.J.A.C.* 1:1-18.4, have been reviewed and considered. The Jersey City Board of Education (Board) did not file a reply.

This matter involves petitioner's request for her daughter, A.E., to be transferred to the Bayonne school district at the Board's expense because the Board allegedly failed to comply with A.E.'s 504 Plan.[1] Petitioner initially sought relief on an emergent basis, which was denied by the Commissioner in May 2023. Subsequently, the Board filed a motion to dismiss the underlying petition for failure to state a claim upon which relief may be granted.

After reviewing the parties' submissions, the Administrative Law Judge (ALJ) granted the Board's motion upon concluding that petitioner's request lacked legal support. Citing

[1] "504 Plan" refers to Section 504 of the Rehabilitation Act of 1973 as amended, codified at 29 U.S.C. § 794, a federal law that protects qualified individuals from discrimination based upon their disability.

N.J.S.A. 18A:38-1(a), which entitles persons between ages five and twenty to attend public school free of charge in the school district where they are domiciled, the ALJ found that it was undisputed that petitioner and A.E. are domiciled in Jersey City. Therefore, the ALJ concluded that A.E. is entitled to attend public school free of charge in Jersey City, not in Bayonne. In addition, the ALJ concluded that there is no legal basis to compel the Board to pay for A.E. to attend school in Bayonne.

In her exceptions, petitioner argues—as she did before the ALJ—that the Board should pay for A.E. to attend school in Bayonne because it has failed to comply with A.E.'s 504 Plan. However, her claims regarding the Board's violation of the 504 Plan are unsubstantiated.[2] Furthermore, she does not dispute the fact that she and A.E. are domiciled in Jersey City.

Upon review, the Commissioner adopts the ALJ's Initial Decision as the final decision in this matter. The Commissioner concurs with the ALJ that there is no legal basis under State school laws to compel the Board to pay for A.E. to attend school in Bayonne.[3]

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[2] In connection with the May 1, 2023, order denying petitioner's application for emergent relief, adopted by the Commissioner, the ALJ found as undisputed fact that petitioner agreed to an initial 504 Plan for A.E. on November 2022, and agreed to revisions on February 17, 2023, and March 15, 2023. *T.H., on behalf of minor child, A.E. v. Board of Education of the City of Jersey City, Hudson County*, OAL Dkt. No. EDU 03234-23, Agency Dkt. No. 99-4/23, Order on Emergent Relief (May 1, 2023), at 2. In addition, the ALJ found as undisputed fact that the only recent incident alleging a health and safety issue involved A.E. visiting the nurse on March 31, 2023, due to dizziness and nausea. *Id.* at 3. Petitioner expressed concern that the nurse did not call her directly on that date, but instead told A.E. to call her. *Ibid.* In any event, while on speaker phone with A.E., petitioner directed the nurse to administer A.E.'s medication. *Ibid.* The ALJ concluded that "[t]he only genuine 504 Plan health safety issue was resolved without hospitalization or apparently any medical follow-up." *Id.* at 5. Finally, the ALJ held that "[t]here is no support for petitioner's assertions that A.E.'s schoolwork or grades have been impacted by violation of her 504 Plan." *Id.* at 5-6. The ALJ incorporated these factual findings into the Initial Decision presently before the Commissioner. *T.H., on behalf of minor child, A.E. v. Board of Education of the City of Jersey City, Hudson County*, OAL Dkt. No. EDU 03234-23, Agency Dkt. No. 99-4/23, Initial Decision (August 18, 2023), at 2.

[3] As petitioner continues to rely upon various federal laws to support her position, she is reminded that the Commissioner's jurisdiction is limited to the hearing and deciding of controversies and disputes arising under State school laws in accordance with *N.J.S.A.* 18A:6-9.

Accordingly, the Board's motion is granted, and the petition of appeal is hereby dismissed.

IT IS SO ORDERED.[4]

Angelica Allen-McMillan, Ed.D.
ACTING COMMISSIONER OF EDUCATION

Date of Decision: September 29, 2023
Date of Mailing: October 2, 2023

[4] This decision may be appealed to the Appellate Division of the Superior Court pursuant to *N.J.S.A.* 18A:6-9.1. Under *N.J.Ct.R.* 2:4-1(b), a notice of appeal must be filed with the Appellate Division within 45 days from the date of mailing of this decision.

State of New Jersey
OFFICE OF ADMINISTRATIVE LAW

INITIAL DECISION ON
MOTION TO DISMISS
OAL DKT. NO. EDU 03234-23
AGENCY DKT. NO. 99-4/23

T.H. ON BEHALF OF A.E.,

Petitioner,

v.

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

Respondent.

T.H., on behalf of **A.E.** petitioner pro se

Cherie L. Adams, Esq., for respondent Board of Education of the City of Jersey City (Adams, Gutierrez and Lattiboudere, attorneys)

Record Closed: August 7, 2023 Decided: August 18, 2023

BEFORE **GAIL M. COOKSON**, ALJ:

Petitioner T.H. (petitioner or T.H.) filed a Petition of Appeal with the Department of Education on or about April 14, 2023, seeking emergent relief against the Board of Education of the City of Jersey City (Jersey City or District) in the form of a (1) "federal audit" of her fourteen-year-old daughter A.E.'s records to verify proper academic placement; and, (2) an out-of-district placement for her at Bayonne High School with tuition paid for by Jersey

City for alleged failure to implement and execute A.E.'s Section 504 Plan, 34 C.F.R. §104.36.

The New Jersey Department of Education, Office of Controversies and Disputes, transmitted only the Application for Emergent Relief to the Office of Administrative Law (OAL) on or about April 17, 2023. The matter was assigned to the undersigned for oral argument and was scheduled for April 24, 2023. On that date, discussions were held off-the-record, and the matter was continued until April 28, 2023, in order to allow counsel for the District the opportunity to consult with her client because the prior week had been spring break. Oral argument was held on April 28, 2023, and thereafter, I issued an Order denying the requested emergent relief on May 1, 2023. The Commissioner affirmed that denial and returned the case to the OAL for a hearing on the underlying merits petition.

Thereafter, the District filed a Motion to Dismiss for the failure of petitioner to state a claim upon which relief may be granted. Briefs and other submissions have been presented and the motion is now ripe for adjudication. I adopt and incorporate my earlier findings as if set forth at length herein. While petitioner is not represented and did not present legal arguments opposing the motion, I have carefully reviewed the applicable law.

LEGAL DISCUSSION AND CONCLUSIONS OF LAW

For the reasons set forth below after due consideration of the written submissions, I **CONCLUDE** that petitioner's request for her daughter to be transferred to a different public school at District expense must be **DENIED**.

On a motion to dismiss for failure to set forth a claim upon which relief may be granted, I must accept all the allegations as true and decide whether they are sufficient as a matter of law. I must grant such a motion where the petition fails to properly assert a cause of action upon which the Commissioner may grant relief. N.J.A.C. 6A:3-1.10(a). See Bank Leumi USA v. Kloss, 243 N.J. 218, 229 (2020); R. 4:6-2. These same principles are applicable at the OAL. City of Hackensack v. Winner, 82 N.J. 1, 29 (1980). A motion

to dismiss or for summary decision constitutes a hearing on the papers; i.e., stands in place of an evidentiary hearing.

Petitioner asserts that the District's alleged failures as to her daughter's 504 Plan entitles A.E. to attend school in Bayonne at the expense of the Jersey City Board of Education. I **CONCLUDE** that there is no legal support for this demand.

N.J.S.A. 18A:38-1 states in relevant part:

> 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; . . .

There is no dispute that the petitioner and A.E. reside at 271 4th Street, Jersey City, New Jersey. There is also no dispute that Jersey City is petitioner's domicile. Accordingly, there are simply no facts presented that show the petitioner is a resident of Bayonne or falls within any exception that would allow A.E. to attend Bayonne at Jersey City's expense (such as a choice school district). While a local board of education has the discretion to admit non-resident students with or without payment of tuition with the consent of the board of education of that district, N.J.A.C. 6A:22-2.2, there is no indication that the Bayonne Board of Education has agreed to allow A.E. to attend as a non-resident student either with or without tuition. This regulation also establishes that acceptance of non-resident students is voluntary on the part of the other district. Further, Bayonne Board of Education is not a party hereto.

Petitioner may seek to obtain tuition-free enrollment from Bayonne; she may pay for out-of-district tuition for her daughter in Bayonne; or, she is free to move into that District. But she is not free and has no legal basis to force this District to provide a free public education in a separate and distinct public school district.

ORDER

For the reasons set forth above, it is **ORDERED** that petitioner's petition is and the same is hereby **DENIED** and the matter is **DISMISSED** with prejudice.

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

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

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

August 18, 2023
DATE

GAIL M. COOKSON, ALJ

Date Received at Agency: 8/18/23

Date Mailed to Parties: 8/18/23
id

295-23

New Jersey Commissioner of Education
Decision

R.Z. and L.D., on behalf of minor child, L.Z.,

Petitioners,

v.

Board of Education of the Northern Valley Regional High School District, Bergen County,

Respondent.

Synopsis

Petitioners sought to appeal the findings of a harassment, intimidation, and bullying (HIB) investigation conducted by the anti-bullying specialist (ABS) at their child's school. The petition was filed prior to the Board's issuance of its decision in the HIB matter. The Board filed a motion to dismiss the petition as premature.

The ALJ found, *inter alia*, that: pursuant to *N.J.S.A.* 18A:37-15(b)(6)(e), only the Board's final decision may be appealed to the Commissioner; accordingly, the ALJ granted the Board's motion upon concluding that the petition was filed prematurely. Citing *N.J.S.A.* 18A:37-15(b)(6

n action by a board of education is entitled to a presumption of correctness unless it is proven to be arbitrary, capricious or unreasonable; under the Act, "harassment, intimidation, or bullying" is broadly defined as any gesture, any written, verbal, or physical act, or any electronic communication that is reasonably perceived as motivated by any actual or perceived distinguishing characteristic, such as race, color, religion, ancestry, national origin, gender, sexual orientation, gender identity and expression, or a mental, physical, or sensory disability, that takes place on school property and substantially disrupts the orderly operation of the school; in the instant case, S.Y.'s actions constituted HIB as the term is defined by law; her racial comment at the lunch table and her injection of race into an encounter with B.B. in a crowded hallway were reasonably perceived by B.B. to be motivated by the distinguishing characteristic of race; the incidents occurred on school property during the regular school day and substantially interfered with the rights of another student; B.B. left the lunchroom upset and her reaction to S.Y.'s comments disrupted her next class to the extent that she had to be removed from class by her teacher. The ALJ concluded that the petitioners failed to meet their burden to prove that the Board's actions in determining that S.Y. committed acts of HIB against B.B. were arbitrary, capricious, or unreasonable; accordingly, the Board's HIB determination was affirmed, and the petition was dismissed.

Upon review, the Commissioner concurred with the ALJ that the Board did not act in an arbitrary, capricious, or unreasonable manner in rendering its HIB determination. Accordingly, the Initial Decision of the OAL was adopted as the final decision in this matter, and the petition was dismissed.

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

295-23
OAL Dkt. No. EDU 05870-23
Agency Dkt. No. 143-5/23

New Jersey Commissioner of Education

Final Decision

R.Z. and L.D., on behalf of minor child, L.Z.,

Petitioners,

v.

Board of Education of the Northern Valley Regional High School District, Bergen County,

Respondent.

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

Petitioners sought to appeal the findings of a harassment, intimidation, and bullying (HIB) investigation conducted by the anti-bullying specialist (ABS) at their child's school. At the time of filing of petitioners' appeal to the Commissioner, the findings at issue had been reported to the superintendent but had not yet been affirmed, rejected, or modified by the Board. It is uncontested that the Board did not render its final decision until after petitioners filed their appeal with the Commissioner. For these reasons, the Board moved to dismiss the petition as premature.

Citing *N.J.S.A.* 18A:37-15(b)(6), the Administrative Law Judge (ALJ) granted the Board's motion upon concluding that the petition was filed prematurely. The ALJ found that, per *N.J.S.A.* 18A:37-15(b)(6)(e), only the Board's final decision may be appealed to the Commissioner.

Thus, the matter was not yet ripe for review by the Commissioner when petitioners initiated this action by filing their petition of appeal.

Upon review, the Commissioner adopts the ALJ's Initial Decision as the final decision in this matter. The Commissioner concurs with the ALJ that petitioners' premature attempt to appeal to the Commissioner before the Board had an opportunity to render its decision was inconsistent with the statutory scheme. *See M.M., on behalf of minor child v. Board of Education of the Township of Lafayette, Sussex County*, Commissioner Decision No. 253-20 (Nov. 5, 2020), at 5 ("Only after the final decision by the board of education did the Legislature create a right of appeal to the Commissioner, and for good reason – it is not in the interest of judicial economy to adjudicate HIB matters in a piecemeal fashion.").

Accordingly, the Board's motion to dismiss is granted, and the petition of appeal is hereby dismissed.

IT IS SO ORDERED.[1]

Angelica Allen-McMillan, J.D.S.
ACTING COMMISSIONER OF EDUCATION

Date of Decision: September 29, 2023
Date of Mailing: October 2, 2023

[1] This decision may be appealed to the Appellate Division of the Superior Court pursuant to *N.J.S.A.* 18A:6-9.1. Under *N.J.Ct.R.* 2:4-1(b), a notice of appeal must be filed with the Appellate Division within 45 days from the date of mailing of this decision.

State of New Jersey
OFFICE OF ADMINISTRATIVE LAW

INITIAL DECISION
SUMMARY DECISION
OAL DKT. NO. EDU 05870-23
AGENCY DKT. 143-5/23

R.Z. & L.D. ON BEHALF OF MINOR CHILD L.Z.,

Petitioner,

v.

BOARD OF EDUCATION OF THE NORTHERN VALLEY REGIONAL HIGH SCHOOL DISTRICT,

Respondent.

Avram E. Frisch, Esq., for petitioner (Law Offices of Avram E. Frisch, LLC attorneys)

Christine Martinez, Esq., for respondent, (Machado Law Group, attorney)

BEFORE: **KIMBERLY A. MOSS**, ALJ

Record Closed: July 27, 2023 Decided: August 22, 2023

Petitioners filed an appeal of a Harassment, Intimidation and Bullying (HIB) matter. The petition was filed at the Office of Administrative Law on July 3, 2023. Included in the filing was a motion to dismiss from respondent dated June 26, 2023. Petitioner filed opposition to the motion on July 24, 2023. Respondent filed a reply to the opposition on July 27, 2023. Petitioner filed a reply via email on July 31, 2023, on which date the record closed.

FACTUAL DISCUSSION

I **FIND** the following **FACTS**:

On or about January 13, 2023, petitioners informed the Board of an alleged HIB. The HIB investigation was done within ten school days on January 30, 2023. The findings were reported to the Board on February 13, 2023. On April 13, 2023, petitioner requested a hearing before the Board. On April 17, 2023, petitioner requested that the meeting be scheduled on a Monday. The Board initially offered May 22, 2023. It then offered May 8, 2023, for the hearing before the Board. The meeting was scheduled for May 8, 2023. On May 5, 2023, the Superintendent, after reviewing the investigation, determined that further investigation was necessary. The results of the additional investigation were reported to the Board on May 22, 2023.

On May 23, 2023, petitioners filed a petition of appeal stating that they disagreed with the HIB findings and that they were denied the opportunity to have their appeal heard within ten days. On June 2, 2023, petitioners were offered a hearing before the Board on June 26, 2023, which petitioners rejected. The petition of appeal was served on the Board on June 6, 2023. On June 8, 2023, the Board scheduled a special meeting on June 12, 2023, where petitioners were provided with a hearing before the Board.

LEGAL ANALYSIS AND DISCUSSION

R.4:6-2 provides:

> Every defense, legal or equitable, in law or fact, to a claim for relief in any complaint, counterclaim, cross-claim, or third-party complaint shall be asserted in the answer thereto, except that the following defenses, unless otherwise provided by R. 4:6-3, may at the option of the pleader be made by motion, with briefs: (a) lack of jurisdiction over the subject matter, (b) lack of jurisdiction over the person, (c) insufficiency of process, (d) insufficiency of service of process, (e) failure to state a claim upon which relief can be granted, (f) failure to join a party without whom the action cannot proceed, as provided by R. 4:28-1. If a motion is made raising any of these defenses, it shall be made before pleading if a further pleading is to be made. No defense or objection is waived by being joined with one or more other defenses in an answer or motion. Special appearances are superseded. A motion to dismiss based on defense (e), and any opposition thereto, shall be filed and served in accordance with the time frames set forth in R. 4:46-1. If, on a motion to dismiss based on defense

(e), matters outside the pleading are presented to and not excluded by the court, the motion shall be treated as one for summary judgment and disposed of as provided by R. 4:46, and all parties shall be given reasonable notice of the court's intention to treat the motion as one for summary judgment and a reasonable opportunity to present all material pertinent to such a motion.

N.J.A.C. 6A: 3-1.5 (g) provides:

Nothing in this section precludes the filing of a motion to dismiss in lieu of an answer to a petition, provided that such motion is filed within the time allotted for the filing of an answer. Briefing on such motions shall be in the manner and within the time fixed by the Commissioner, or by the ALJ if the motion is to be briefed following transmittal to the OAL.

N.J.A.C. 6A: 3-1.10 provides:

At any time prior to transmittal of the pleadings to the OAL, in the Commissioner's discretion or upon motion to dismiss filed in lieu of answer, the Commissioner may dismiss the petition on the grounds that the petitioner has advanced no cause of action even if the petitioner's factual allegations are accepted as true or for lack of jurisdiction, failure to prosecute or other good reason.
Board of Education v Repollet 2021 N.J. Super. Unpub. LEXIS 1955 provides:
The standards governing the grant or denial of a motion to dismiss for failure to state a claim in the administrative context are identical to those governing a similar motion in the Superior Court. Compare N.J.A.C. 6A:3-1.10 with Rule 4:6-2(e); see also Sloan ex rel. Sloan v. Klagholtz, 342 N.J. Super. 385, 393-94, 776 A.2d 894 (App. Div. 2001). When reviewing a motion to dismiss pursuant to Rule 4:6-2(e), the inquiry is "limited to examining the legal sufficiency of the facts alleged on the face of the complaint." Printing Mart-Morristown v. Sharp Elec. Corp., 116 N.J. 739, 746, 563 A.2d 31 (1989)

N.J.S.A. 18A:37-15(b)(6) provides:

(a)Each school district shall adopt a policy prohibiting harassment, intimidation or bullying on school property, at a school-sponsored function or on a school bus. The school district shall adopt the policy through a process that includes representation of parents or guardians, school employees, volunteers, students, administrators, and community representatives.
(b) A school district shall have local control over the content of the policy, except that the policy shall contain, at a minimum, the following components:
(6) a procedure for prompt investigation of reports of violations and complaints, which procedure shall at a minimum provide that:
(a) the investigation shall be initiated by the principal or the principal's designee within one school day of the report of the incident and shall be

conducted by a school anti-bullying specialist. The principal may appoint additional personnel who are not school anti-bullying specialists to assist in the investigation. The investigation shall be completed as soon as possible, but not later than 10 school days from the date of the written report of the incident of harassment, intimidation, or bullying or from the date of the written notification from the superintendent to the principal to initiate an investigation pursuant to paragraph (5) of this subsection. In the event that there is information relative to the investigation that is anticipated but not yet received by the end of the 10-day period, the school anti-bullying specialist may amend the original report of the results of the investigation to reflect the information;

(b) the results of the investigation shall be reported to the superintendent of schools within two school days of the completion of the investigation, and in accordance with regulations promulgated by the State Board of Education pursuant to the "Administrative Procedure Act," P.L.1968, c.410 (C.52:14B-1 et seq.), the superintendent may decide to provide intervention services, establish training programs to reduce harassment, intimidation, or bullying and enhance school climate, impose discipline, order counseling as a result of the findings of the investigation, or take or recommend other appropriate action including seeking further information;

(c) the results of each investigation shall be reported to the board of education no later than the date of the board of education meeting next following the completion of the investigation, along with information on any services provided, training established, discipline imposed, or other action taken or recommended by the superintendent;

(d) parents or guardians of the students who are parties to the investigation shall be entitled to receive information about the investigation, in accordance with federal and State law and regulation, including the nature of the investigation, whether the district found evidence of harassment, intimidation, or bullying, or whether discipline was imposed or services provided to address the incident of harassment, intimidation, or bullying. This information shall be provided in writing within 5 school days after the results of the investigation are reported to the board. A parent or guardian may request a hearing before the board after receiving the information, and the hearing shall be held within 10 days of the request. The board shall meet in executive session for the hearing to protect the confidentiality of the students. At the hearing the board may hear from the school anti-bullying specialist about the incident, recommendations for discipline or services, and any programs instituted to reduce such incidents;

(e) at the next board of education meeting following its receipt of the report pursuant to subparagraph (c) of paragraph (6) of this subsection, the board shall issue a decision, in writing, to affirm, reject, or modify the superintendent's decision. The board's decision may be appealed to the Commissioner of Education, in accordance with the procedures set forth in law and regulation, no later than 90 days after the issuance of the board's decision; and

(f) a parent, student, guardian, or organization may file a complaint with the Division on Civil Rights within 180 days of the occurrence of any incident of harassment, intimidation, or bullying based on membership in a

protected group as enumerated in the "Law Against Discrimination," P.L.1945, c.169 (C.10:5-1 et seq.);

In M.M. obo minor child v. Board of Education of the Township of Layfette 2020 N.J. AGEN LEXIS 374, 6,7 the Commissioner stated:

> There is no dispute that the Board has not issued a decision regarding petitioner's HIB claim; in fact, petitioner admits as much in the petition of appeal. 7 The district's ABC has made findings, and the superintendent has reported those findings to the Board, but the Act requires those findings to be affirmed, rejected, or modified by the Board, and it is the Board's decision that is appealable to the Commissioner. N.J.S.A. 18A:37-15(b)(6)(e). The Legislature explicitly created a multi-step process for the investigation and determination of HIB allegations. Only after the final decision by the board of education did the Legislature create a right of appeal to the Commissioner, and for good reason - it is not in the interest of judicial economy to adjudicate HIB matters in a piecemeal fashion. To allow an appeal following the ABC's written report, as petitioner sought to do here, would result in the expenditure of time and money to dispute findings that could have been rejected by the Board if the matter had proceeded to a vote. Moreover, the standard of review applicable to the Commissioner's decision in HIB matters necessitates that the process be concluded prior to coming before the Commissioner.

In this matter, the Board did not render a decision on the HIB hearing until after petitioner filed the appeal with the Commissioner. The Superintendent determined that further investigation was needed. The Board did not issue a decision prior to petitioners filing the appeal to the Commissioner. The petitioner's right to appeal does not accrue until after the Board makes a final determination. Petitioners appeal to the Commissioner in this matter was premature.

The petitioners were given a hearing before the Board on June 8, 2023, after they filed the current petition. The petitioner states that its petition is the Board's failure to follow statutory process. However, petitioner's right to appeal does not accrue until after the Board has decided. Petitioners filed the petition prior to the Board deciding on the HIB matter.

I **CONCLUDE** that the petition was filed prematurely since it was filed prior to the Board's decision on the HIB since petitioners' right to appeal begins after the Board has

made a decision on the HIB case. In addition, petitioners have had a hearing on the merits by the Board subsequent to filing the petition.

ORDER

Accordingly, It is **ORDERED** that respondents motions for to dismiss the petition be and is hereby **GRANTED**.

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

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

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

August 22, 2023

DATE

KIMBERLY A. MOSS, ALJ

Date Received at Agency: August 22, 2023

Date Mailed to Parties: August 22, 2023

ljb

APPENDIX

- Petitioner and Respondent's, motions, briefs and exhibits.

296-23
OAL Dkt. No. EDU 01254-22
Agency Dkt. No. 228-12/21

New Jersey Commissioner of Education

Final Decision

Board of Education of the Ocean County Vocational Technical School District,
Ocean County,

Petitioner,

v.

New Jersey Department of Education,
Office of Accountability and Compliance,

Respondent.

The record of this matter, the proposed Consent Order and the Initial Decision issued by the Office of Administrative Law have been reviewed pursuant to *N.J.A.C.* 1:1-19.1. Upon review, the Commissioner approves the terms of the Consent Order and adopts the Initial Decision as the final decision in this matter. The case is hereby dismissed, subject to compliance with the terms of the Consent Order.

IT IS SO ORDERED.

Angelica Allen-McMillan, Ed.D.
ACTING COMMISSIONER OF EDUCATION

Date of Decision: October 2, 2023
Date of Mailing: October 4, 2023

State of New Jersey
OFFICE OF ADMINISTRATIVE LAW

INITIAL DECISION

SETTLEMENT

OAL DKT. NO. EDU 01254-22

AGENCY DKT. NO. 228-12/21

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

Petitioner,

v.

NEW JERSEY DEPARTMENT OF EDUCATION, OFFICE OF FISCAL ACCOUNTABILITY AND COMPLIANCE,

Respondent.

Robert C. Shea, Esq., for petitioner (R.C. Shea & Associates, attorneys)

Michael Czarnecki, Deputy Attorney General, for respondent (Matthew J. Platkin, Attorney General of New Jersey, attorneys)

Record Closed: September 6, 2023 Decided: September 6, 2023

BEFORE **TAMA B. HUGHES**, ALJ:

This matter was transmitted to the Office of Administrative Law on February 15, 2022, for determination as a contested case, pursuant to N.J.A.C. 1:1-8.2, N.J.S.A. 52:14B-1 to -15 and N.J.S.A. 52:14F-1 to -13

The parties have agreed to a settlement and have executed a Consent Order, which is attached hereto.

I have reviewed the record and the terms of Consent Order and I **FIND**:

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

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

3. In accordance with N.J.A.C. 6A:3-1.13(d), the proposed settlement has been consented to and authorized by respondent.

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

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

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

September 6, 2023
DATE

TAMA B. HUGHES, ALJ

Date Received at Agency: 9/8/2023

Date Mailed to Parties: 9/8/2023

TBH/gd

Attachment: Consent Order

R.C. SHEA & ASSOCIATES
Attorneys for Complainant,
Ocean County Vocational Technical School
244 Main Street, P.O. Box 2627
Toms River, New Jersey 08754

MATTHEW J. PLATKIN
ATTORNEY GENERAL OF NEW JERSEY
Attorney for Respondents,
New Jersey Department of Education,
Office of Fiscal Accountability and Compliance
R.J. Hughes Justice Complex
25 Market Street, P.O. Box 112
Trenton, New Jersey 08625-0112

OCEAN COUNTY VOCATIONAL TECHNICAL SCHOOL DISTRCT, Petitioner, v. DEPARTMENT OF EDUCATION, OFFICE OF FISCAL ACCOUNTABILITY AND COMPLIANCE Respondent.	STATE OF NEW JERSEY OFFICE OF ADMINISTRATIVE LAW OAL DOCKET No.: EDU 01254-2022S AGENCY DOCKET No.: 228-12/21 CONSENT ORDER

WHEREAS, Petitioner, Ocean County Vocational Technical School District ("OCVTS") and Respondent, Department of Education, Office of Fiscal Accountability and Compliance ("OFAC"), have mutually agreed to settle the above-captioned matter, with Robert C. Shea, Esq. appearing on behalf of OCVTS, and Matthew J. Platkin, Attorney General of New Jersey, by Michal Czarnecki, Deputy Attorney General, appearing on behalf of OFAC; and

WHEREAS, this matter arose from OFAC's September 8, 2021 finding of a failure to follow N.J.A.C. 6A:23A-6.2(a)(2)(ii) wherein a Board member's relative was hired for a full-time

teaching position under subject "Nepotism OFAC Case #INV-05-21"; and

WHEREAS, on January 4, 2022, OCVTS sought the reversal of this finding by instituting a petition of appeal; and

WHEREAS, the settlement of this matter shall not constitute precedent in other pending or future litigation.

NOW, THEREFORE, the parties hereto agree to settle the above-captioned matter upon the following terms:

1. Petitioner will withdraw its petition against Respondent within 10 business days of the execution of this agreement.

2. Respondent hereby finds that OCVTS has been in compliance with the requirements of the September 8, 2021 matter sent to the district under subject "Nepotism OFAC Case #INV-05-21".

3. Respondent hereby will find that the matter under subject "Nepotism OFAC Case #INV-05-21" is considered closed and concluded.

4. While Respondent does not concede that the allegations in this matter were not justified, nor does Petitioner admit or concede the truth of the allegations in the petition filed in this matter, both parties have entered into this agreement for the purposes of settlement only.

5. The parties agree that this Consent Order fully resolves all issues between them arising from the Petitioner's January 4, 2022 petition of appeal.

Date: 8/30/2023

Robert C. Shea Esq.
Attorney for Ocean County Vocational Technical School

Date: 8/30/2023

chal Czarnecki, DAG
Attorney for OFAC

Dated: July 28, 2023

Tama B. Hughes, Judge
Office of Administrative Law

New Jersey Commissioner of Education

Final Decision

Linda Amerman, Art Amerman, Elliott Banen, Byron Chapin, Erin Chapin, Susan Graglia, Lou Graglia, Doug Gold, Elena Gold, Carol Eng, Jodi Goffredo, Kris Pawelko, Alla Safir-Krause, Cynthia Phillips, and Kerri Sirinides,

Petitioners,

v.

Board of Education of the Ramapo Indian Hills Regional High School District, Bergen County,

Respondent.

Synopsis

Petitioners challenged the vote to appoint Brian DeLaite (DeLaite) to a vacant seat on the Board of Education of the Ramapo Indian Hills Regional High School District, contending that the vote was invalid because – per *Robert's Rules of Order* – five affirmative votes were required, comprising a "majority of the entire membership," to make this appointment. The Board asserted that, pursuant to *N.J.S.A.* 18A:12-15(f) and Board policy, only "a majority of the remaining members" after recusals, or four affirmative votes, were required to appoint DeLaite. The Board at the time of the vote to fill the vacancy consisted of 8 members, two of whom recused themselves, leaving a quorum of six members. Four members voted to appoint DeLaite, while two opposed the appointment. The parties submitted cross motions for summary judgment.

The ALJ found, *inter alia*, that: there are no issues of material fact in this matter and the case is ripe for summary decision; *N.J.S.A.* 18A:12-15(f) mandates that the vacancy in question be filled "[b]y a majority vote of the remaining members of the board after the vacancy occurs"; Board Policy #0143 was consistent with, and incorporated language from, the controlling statute; and the language upon which the petitioners relied from *Robert's Rules of Order* cannot supersede *N.J.S.A.* 18A:12-15 and Board Policy #0143. The ALJ concluded that because there were four affirmative votes for DeLaite, which constituted a majority of the remaining members following the recusals, the Board's vote was valid and in accord with *N.J.S.A.* 18A:12-15. Accordingly, the ALJ granted the Board's motion for summary decision.

Upon review, the Commissioner adopted the Initial Decision of the OAL as the final decision in this matter, finding that petitioners' reliance on language from *Robert's Rules of Order* is misplaced as *N.J.S.A.* 18A:12-15, which controls how board vacancies are filled in type II districts with elected boards of education, applies in this case. Accordingly, the Board's motion for summary decision was granted, and the petition was dismissed.

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

301-23
OAL Dkt. No. EDU 00610-23
Agency Dkt. No. 365-12/22

New Jersey Commissioner of Education

Final Decision

Linda Amerman, Art Amerman, Elliott Banen, Byron Chapin, Erin Chapin, Susan Graglia, Lou Graglia, Doug Gold, Elena Gold, Carol Eng, Jodi Goffredo, Kris Pawelko, Alla Safir-Krause, Cynthia Phillips, and Kerri Sirinides,

Petitioners,

v.

Board of Education of the Ramapo Indian Hills Regional High School District, Bergen County,

Respondent.

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

Respondent Board is a regional board of education. Petitioners challenged the Board's November 14, 2022, vote to appoint Brian DeLaite to a vacant seat. The material facts are uncontested. Due to the vacancy, the Board had eight members instead of its full membership of nine members. Two members recused themselves from voting because of prior interactions with DeLaite. A quorum existed even after the recusals. Ultimately, four members voted to appoint DeLaite, and two voted not to appoint him. Petitioners insisted that the vote was invalid because, per *Robert's Rules of Order*, five affirmative votes were needed for a "majority of the entire membership" to appoint DeLaite. Joint Exhibit J-5, at 6. In response, the Board asserted that,

pursuant to *N.J.S.A.* 18A:12-15(f) and Board policy, only "a majority of the remaining members" following the recusals, or four affirmative votes, was required to appoint DeLaite.

Once the matter was transmitted to the Office of Administrative Law (OAL), the parties cross-moved for summary decision and submitted a joint stipulation of facts and joint exhibits. Upon review of the parties' submissions, the Administrative Law Judge (ALJ) granted the Board's motion for summary decision. The ALJ found that *N.J.S.A.* 18A:12-15(f) mandated that the vacancy at issue here be filled "[b]y a majority vote of the remaining members of the board after the vacancy occurs."[1] The ALJ further found that Board Policy #0143 was consistent with, and incorporated language from, the controlling statute. Additionally, the ALJ found that the language upon which petitioners relied from *Robert's Rules of Order*, which the Board abides by, cannot supersede *N.J.S.A.* 18A:12-15 and Board Policy #0143. The ALJ concluded that because the four affirmative votes for DeLaite constituted a majority of the remaining members following the recusals, the Board's vote was valid and in accord with *N.J.S.A.* 18A:12-15.

Upon review, the Commissioner adopts the ALJ's thorough and well-reasoned decision as the final decision in this matter. Petitioners' reliance on language from *Robert's Rules of Order* §44:9(b), which discusses alternative circumstances in which "a majority of the entire membership" may be required for a valid vote, is misplaced. Joint Exhibit J-5, at 6. As the ALJ thoughtfully explained in the Initial Decision, the Legislature decided not to require a majority vote of the entire membership for purposes of appointing a new board member to fill a vacancy under *N.J.S.A.* 18A:12-15(f), as demonstrated by the statute's plain language. *See DiPropsero v. Penn*, 183

[1] *N.J.S.A.* 18A:13-11 requires that vacancies in membership of regional boards of education be filled in the same manner as vacancies in membership of boards of education of type II districts having elected boards of education. Consequently, *N.J.S.A.* 18A:12-15, which controls how board vacancies are filled in type II districts having elected boards of education, applies here.

N.J. 477, 492 (2005) ("The Legislature's intent is the paramount goal when interpreting a statute and, generally, the best indicator of that intent is the statutory language.").

As written, *N.J.S.A.* 18A:12-15(f) requires only "a majority vote of the remaining members of the board after the vacancy occurs," and not a majority of the entire membership. The ALJ correctly found that had the Legislature wished to include such a provision in *N.J.S.A.* 18A:12-15(f), it would have done so expressly as it has in other sections of Title 18. *See, e.g., N.J.S.A.* 18A:6-11 ("by majority vote of its full membership"); *N.J.S.A.* 18A:15-2 ("by a majority vote of all of the members of the board"); *N.J.S.A.* 18A:16-8 ("by a recorded roll call majority vote of its full membership"). It is uncontested that more than half of the votes cast by the remaining members entitled to vote—excluding those members who recused themselves—were in favor of DeLaite's appointment to the Board. That is precisely what was required under *N.J.S.A.* 18A:12-15(f) for a valid appointment. *See Robert's Rules of Order* § 44:1 (defining "majority vote" as "more than half of the votes cast by persons entitled to vote, excluding blanks or abstentions"). Joint Exhibit J-5, at 1.

Accordingly, the Board's motion for summary decision is granted, petitioners' motion for summary decision is denied, and the petition of appeal is hereby dismissed.

IT IS SO ORDERED.[2]

Kathleen Elliz

ACTING COMMISSIONER OF EDUCATION

Date of Decision: October 6, 2023
Date of Mailing: October 11, 2023

[2] This decision may be appealed to the Appellate Division of the Superior Court pursuant to *N.J.S.A.* 18A:6-9.1. Under *N.J.Ct.R.* 2:4-1(b), a notice of appeal must be filed with the Appellate Division within 45 days from the date of mailing of this decision.

State of New Jersey
OFFICE OF ADMINISTRATIVE LAW

INITIAL DECISION
OAL DKT. NO. EDU 00610-23
AGY. DKT. NO. 365-12/22

LINDA AMERMAN, ET AL.,
Petitioners,
v.
BOARD OF EDUCATION OF THE RAMAPO INDIAN HILLS REGIONAL HIGH SCHOOL DISTRICT, BERGEN COUNTY,
Respondent.

Carol Eng, Lead Petitioner, pro se

Matthew J. Giacobbe, Esq., for Respondent (Cleary Giacobbe Alfieri Jacobs, attorneys)

Record Closed: August 2, 2023 Decided: August 28, 2023

BEFORE **THOMAS R. BETANCOURT**, ALJ:

STATEMENT OF THE CASE AND PROCEDURAL HISTORY

Petitioners challenge the Board's vote regarding a vacancy.

The matter was transferred to the Office of Administrative Law (OAL), where it was filed on January 19, 2023, as a contested case. N.J.S.A. 52:14B-1 to -15; N.J.S.A. 52:14F-1 to -13.

A prehearing conference was held on March 23, 2023, and a prehearing order was issued on the same date.

The parties filed cross motions for summary decision. Petitioners filed their brief in support of their motion on April 28, 2023. Respondent filed brief in support of their motion on May 15, 2023.

The parties, together with their respective cross motions for summary decision, submitted a Stipulation of Undisputed Facts and Joint Exhibits J-1 through J-6.

Petitioners filed their responsive brief on July 7, 2023. Respondent indicated that it would not file a responsive brief on August 2, 2023, whereupon the record closed.

STIPULATION OF UNDISPUTED FACTS

The parties submitted the following stipulation of facts, and I so **FIND** the following:

1. On or about September 29, 2022, former Board member James Setteducato, a representative from Wyckoff, resigned from the Board creating a vacant seat. At full membership, the Board consists of nine members. Following Mr. Setteducato's resignation, the Board consisted of eight members.

2. The Board held a regular public meeting on November 14, 2022. This meeting was simultaneously livestreamed and archived on the Board website. (J-1 in hyperlink format.)

3. On November 14, 2022, the Board interviewed two potential candidates — Brian

DeLaite and Michael Homaychak — for the vacant Board seat in open, public session at their regularly-scheduled Board meeting. All eight Board members were present at the meeting. (J-2.)

4. Two Board members — Robert Fortunato and John Carolan, both elected representatives from Wyckoff — recused themselves from interview process, discussions, and subsequent vote to fill the vacant seat. Member Fortunato publicly stated that he recused himself from the process as a result of "serving on another board with one of the applicants." Member Carolan publicly stated that he recused himself from the process due to having "past interactions with one of the candidates." See "J-2"; see also "J-1," at 0:16:20.

5. Prior to the vote in public session at the November 14 meeting, then-Board Counsel Rodney Hara advised the Board that a vote to fill the seat would require a majority of the Board. Mr. Hara advised the Board that with two (2) recusals, four (4) "yes" votes would constitute a majority of the Board on a vote to fill the vacant seat. Board Member Judith Sullivan stated a point of order and formal objection to then-Board Counsel Rodney Hara's definition of "majority vote of the remaining board members." See "J-2".

6. Board Policy #0143 states that, when voting to fill a vacant seat:

> A vacancy in the membership of a regional Board of Education shall be filled in accordance with N.J.S.A. 18A:13-11. A vacancy shall be filled from the constituent districts represented by the former incumbents in the same manner as vacancies in the membership of Boards of Education of Type II districts having elected Boards of Education are filled.
>
> A vacancy in the membership of a Board of Education shall be filled as follows:
>
> 1. By the Executive County Superintendent, if the vacancy is caused by:
>
> a. The absence of candidates for election to the school Board; or

b. The removal of a member because of lack of qualifications;
c. The failure of the Board to appoint a person to a vacancy within sixty-five days following its occurrence; or

2. By the Executive County Superintendent, to a number sufficient to make up a quorum of the Board if, by reason of vacancies, a quorum is lacking;

3. By special election within sixty days of the annual school election, if:

a. Two or more candidates qualified by law for membership on the school Board receive an equal number of votes in the annual school election. In the event that both candidates receive an equal number of votes in the special election, the vacancy shall be filled by the Executive County Superintendent; or
b. The annual election is disqualified due to improper election procedures.

4. By the Commissioner of Education if there is a failure to elect a member at the annual school election due to improper campaign practices; or

5. By a majority vote of the remaining members of the Board of Education after the vacancy occurs in all other cases.

The Board Secretary shall promptly notify the President of a vacancy to be filled by the Board. The President shall inform all other Board members. The Board will give public notice of the vacancy and invite any qualified person to submit a written request for consideration of his/her candidacy for the vacancy. The Board may also require candidates submit a resume with their written request.

In considering candidates who have expressed an interest in a vacancy, the Board of Education may interview candidates in public or executive session. The Board must vote to appoint a candidate to a vacancy in public session and there shall be no decisions made in executive session. In the event interviews are conducted in executive session, Board members, in the public session nomination and voting process, shall express their opinion in support of their vote so the public can witness any deliberations, policy formulation, and the decision making process of the Board.

A roll call vote will be conducted on candidates in the order the candidates were nominated with a second. If there are two or more vacancies, each

> vacancy will be filled by a separate election process. The first candidate who receives the votes of a majority of the remaining Board members will be elected to the vacancy. In the event no candidate receives a majority vote of the remaining Board members, another election process shall be conducted between the two candidates receiving the highest number of votes.
>
> (Board Policy #0143 J-3.)

7. The Board operates under Robert's Rules of Order. (J-4.)

8. Robert's Rules of Order §44:9(b) (Twelfth Edition) states that "a majority of the entire membership is a majority of the total number of those who are members of the voting body at the time of the vote." (J-5.)

9. At the November 14 meeting, in public session, the Board voted 4-2, with two (2) recusals, to appoint Brian DeLaite to the vacant seat, effective immediately, and set to expire upon the Board's organization meeting following the 2023 Annual School Election. See "J-2."

10. Mr. DeLaite was an unsuccessful candidate for the Board in the November 2022 election. (J-6.)

11. Petitioners filed a Pro Se Petition of Appeal on December 15, 2022 challenging the Board's appointment of Mr. DeLaite to the vacant seat.

LEGAL ANALYSIS AND CONCLUSION

Standard for Summary Decision

A motion for summary decision may be granted if the papers and discovery presented, as well as any affidavits which may have been filed with the application, show that there is no genuine issue of material fact and the moving party is entitled to prevail as a matter of law. N.J.A.C. 1:1-12.5(b). If the motion is sufficiently supported, the non-moving party must demonstrate by affidavit that there is a genuine issue of fact which can only be determined in an evidentiary proceeding, in order to prevail in such an application. Ibid. These provisions mirror the summary judgment language of R. 4:46-2(c) of the New Jersey Court Rules.

The motion judge must "consider whether the competent evidential materials presented, when viewed in the light most favorable to the non-moving party . . . , are sufficient to permit a rational fact finder to resolve the alleged disputed issue in favor of the non-moving party." Brill v. Guardian Life Ins. Co. of Am., 142 N.J. 520, 523 (1995). And even if the non-moving party comes forward with some evidence, this forum must grant summary decision if the evidence is "so one-sided that [the moving party] must prevail as a matter of law." Id. at 536 (citation omitted).

In the instant matter the parties agree that there are no material disputed facts, and have submitted a Stipulation of Undisputed Facts. Accordingly, the matter is ripe for summary decision.

School Board Vacancies

N.J.S.A. 18A:12-15 states:

Vacancies in the membership of the board shall be filled as follows:

a. By the county superintendent, if the vacancy is caused by the absence of candidates for election to the school board or by the removal of a member

because of lack of qualifications, or is not filled within 65 days following its occurrence;

b. By the county superintendent, to a number sufficient to make up a quorum of the board if, by reason of vacancies, a quorum is lacking;

c. By special election, if in the annual school election two or more candidates qualified by law for membership on the school board receive an equal number of votes. Such special election shall be held only upon recount and certification by the county board of elections of such election result, shall be restricted to such candidates, shall be held within 60 days of the annual school election, and shall be conducted in accordance with procedures for annual and special school elections set forth in Title 19 of the Revised Statutes. The vacancy shall be filled by the county superintendent if in such special election two or more candidates qualified by law for membership on the school board receive an equal number of votes;

d. By special election if there is a failure to elect a member at the annual school election due to improper election procedures. Such special election shall be restricted to those persons who were candidates at such annual school election, shall be held within 60 days of such annual school election, and shall be conducted in accordance with the procedures for annual and special school elections set forth in Title 19 of the Revised Statutes;

e. By the commissioner if there is a failure to elect a member at the annual school election due to improper campaign practices; or

f. By a majority vote of the remaining members of the board after the vacancy occurs in all other cases.

Each member so appointed shall serve until the organizational meeting following the next annual election unless the member is appointed to fill a vacancy occurring within the 60 days immediately preceding such election if the annual election is held in April, or occurring after the third Monday in July if the election is held in November, to fill a term extending beyond such election, in which case the member shall serve until the organizational meeting following the second annual election next succeeding the

> occurrence of the vacancy, and any vacancy for the remainder of the term shall be filled at the annual election or the second annual election next succeeding the occurrence of the vacancy, as the case may be.

In the matter at hand, the applicable section would be subsection f., which states: By a majority vote of the remaining members of the board after the vacancy occurs in all other cases.

Board Policy #0143 requires the Board to follow N.J.S.A. 18A:12-15 when filling a vacancy on the Board.

Roberts Rules of Order, in Rule 44:9(b) states "A majority of the entire membership is a majority of the total of those who are members of the voting body at the time of the vote."

The question herein arises as to what controls the action of the Board regarding its vote to replace the member who resigned.

What controls the manner in which a vacant Board seat is filled are N.J.S.A. 18A:12-15 and Board Policy #0143. Roberts Rules of Order do not, and cannot, supersede N.J.S.A. 18A:12-15 and Board Policy #0143.

N.J.S.A. 18A:12-15 does not require a majority vote of the full membership. Many other statutes pertaining to boards of education do require a majority vote of the full membership. See N.J.S.A. 18A:6-11 ("by majority vote of its full membership"); N.J.S.A. 18A:15-2 ("by majority vote of all of the members of the board"); N.J.S.A. 18A:16-8 ("majority vote of its full membership"); N.J.S.A. 18A:17-5 ("majority vote of its full membership of the board"); N.J.S.A. 18A:17-14.1 ("by a majority vote of all members of the board"); N.J.S.A. 18A:17-15 ("majority vote of the full membership of the board"); N.J.S.A. 18A:20-5 ("majority vote of its full membership of the board"); N.J.S.A. 18A:20-37 ("by a majority vote of all its members") N.J.S.A. 18A:25-1 ("majority vote of the full membership of the board"); N.J.S.A. 18A:27-1 ("majority vote of the full membership of the board"); N.J.S.A. 18A:29-14 ("majority vote of the full membership of the board");

N.J.S.A. 18A:33-1 ("majority vote of the full membership of the board"); N.J.S.A. 18A:34-1 ("majority vote of the full membership of the board"); N.J.S.A. 18A:38-6 ("by a majority vote of all the members of the board of education"); N.J.S.A. 18A:51-1 ("by a majority vote of all of the members of each such board"); and N.J.S.A. 18A:51-11 ("majority vote of its full membership"). Yet the Legislature chose not to use the term of art "majority vote of its full membership" when enacting N.J.S.A. 18A:12-15(f).

The legislative history of N.J.S.A. 18A:12-15(f) shows that it was amended in December 1996 to add the words "by a majority vote of the remaining members of" the board.

The Senate Education Committee Statement to the bill states: "This bill specifies that when a member of a school board in a Type 23 II district resigns, the vacancy will be filled by a majority vote of the remaining members of the board. Under an interpretation of the present statute, it is possible for the member who resigns to vote on the appointment of a successor."

The Assembly Education Committee statement to the bill states: "As amended by committee, this bill specifies that when a member of a school board in a Type II district resigns, the vacancy will be filled by a majority vote of the remaining members of the board after the vacancy has occurred. Under an interpretation of the present statute, it is possible for the member who resigns to vote on the appointment of a successor. The committee amended the bill to add language clarifying that the vote of the remaining members of the board will occur after the vacancy has occurred. This bill was pre-filed for introduction in the 1996 session pending technical review. As reported, the bill includes the changes required by technical review which has been performed." Had the Legislature intended N.J.S.A. 18A:12-15(f) to require a majority vote of the full membership they would have included the same in the statute. They did not.

In the instant matter, the remaining members of the board totaled eight. At the meeting where Mr. DeLaite was selected to replace Mr. Setteducato all eight remaining members were present. Two of those members recused themselves and stated their reasons for recusal on the record, notwithstanding Petitioners' assertion that they did

not. There remained a quorum of six voting members. Of those six members four members voted in the affirmative. These four affirmative votes constituted a majority of the remaining members, and their vote was in accordance with N.J.S.A. 18A:12-15(f).

Petitioners in their brief define the issues as follows:

1. Did the former majority members of the 2022 Ramapo Indian Hills Board of Education uphold, preserve and ensure the public confidence, trust and respect of the people who elected them?

2. Did the former majority members of the 2022 Ramapo Indian Board of Education dutifully abide by the policies and regulations, and use integrity and ethical procedures to select the best qualified candidate to serve on the open Wyckoff seat on the Board?

Neither of the two above noted issues were set forth in the due process petition and are not considered herein. The issue is the legality of the vote to place Mr. DeLaite on the Board.

Also in their brief, Petitioners seek to introduce unrelated, and unsupported facts, none of which have any bearing on the legality of the vote to place Mr. DeLaite on the Board. They are, therefore, not considered herein.

Respondent, in its brief, cites two cases regarding plurality votes in filling a vacant board seat that predate the 1996 amendment to N.J.S.A. 18A: 12-15(f): Polonsky, et al. v. Red Bank Board of Education, 1967 S.L.D. 93 (Comm'r of Educ. Apr. 25, 1967); and Corda v. Willingboro Board of Education, 1987 S.L.D. 337 (Dec. 26, 1986), aff'd 1987 S.L.D. 349 (Comm'r of Educ. Feb. 5, 1987). Respondent makes a compelling argument as to the validity of the vote in question intertwining the two above cases with the amendment to the statute. However, the undersigned determines that the analysis above as to the legislative history, and the lack of the words "full membership" in the statute is sufficient to determine that the vote to fill the vacancy at issue herein was valid.

Based upon the above I **CONCLUDE** there are no genuine issues of material facts as they relate to the due process petition, and Respondent is entitled to prevail as a matter of law.

ORDER

It is hereby **ORDERED** that Respondent's motion for summary decision is **GRANTED**; and

It is further **ORDERED** that Petitioners' motion for summary decision is **DENIED**; and

It is further **ORDERED** that Petitioners' due process petition is **DISMISSED** with prejudice.

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

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

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

August 28, 2023
DATE

THOMAS R. BETANCOURT, ALJ

Date Received at Agency: _____

Date Mailed to Parties: _____

jb

APPENDIX

List of Moving Papers

For Petitioners:

Brief in support of motion for summary decision

Reply brief in opposition to respondent's motion for summary decision

For Respondent:

Motion for summary decision

Brief in support of motion for summary decision

Joint Filings:

Stipulation of Undisputed Facts

Joint Exhibits:

J-1 November 14, 2022 meeting hyperlink

J-2 Minutes of November 14, 2022 meeting

J-3 Board Policy #0143

J-4 Robert's Rules of Order

J-5 Robert's Rules of Order, Chapter XIII, §44

J-6 November 2022 election results from Bergen County Clerk's Office

J-7 Pro Se Petition of Appeal filed December 15, 2022

Other Pleadings and Filings:

Answer to Petition of Appeal and Separate Defenses

302-23

New Jersey Commissioner of Education

Decision

Corey Gallagher,

Petitioner,

v.

Board of Education of the Township of Byram, Sussex County,

Respondent.

Synopsis

Petitioner, a tenured teacher in the respondent Board's school district, challenged the Board's withholding of his pay for certain dates that the Board contends were unexcused absences and not compensable. Petitioner, who also serves as an assistant basketball coach in the Lenape Valley School District (Lenape Valley), was approved for a medical leave of absence from his teaching position in Byram to undergo back surgery in September 2022; he returned to work in Byram on January 5, 2023. During the time he was on approved medical leave, petitioner continued to attend Lenape Valley's basketball practices. The days on which petitioner attended practices at Lenape Valley while on medical leave from Byram are at issue in this case. Petitioner alleged that Byram's actions violated his tenure rights because his salary was reduced without just cause and without the benefit of a hearing. The parties filed cross motions for summary decision.

The ALJ found, *inter alia*, that: petitioner's argument that his tenure rights were violated is without merit as the withholding of his wages was a recoupment, rather than an arbitrary change to petitioner's pay and there was no evidence that his rate of pay changed; despite his claims that he was only a spectator at the Lenape Valley basketball practices, petitioner's attendance at Lenape Valley basketball practices constituted "other gainful employment" under Board Policy 3432, which provides that no day will be considered a sick leave day on which an employee has engaged in or prepared for other gainful employment; therefore, the dates at issue must be considered as unexcused absences rather than sick days. Accordingly, the ALJ granted the Board's motion for summary decision, denied petitioner's motion for summary decision, and dismissed the petition.

Upon review, the Commissioner, *inter alia*, concurred with the ALJ that the Board's action in withholding petitioner's pay for unexcused absences was not in violation of the tenure laws and that petitioner's attendance at Lenape Valley basketball practices constitutes other gainful employment while on sick leave, which is prohibited under Board Policy 3432. However, the Commissioner finds that this matter must be remanded for factual findings regarding the specific dates on which petitioner attended Lenape Valley practices. Accordingly, the matter was remanded to the OAL for further proceedings consistent with the Commissioner's decision.

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

302-23
OAL Dkt. No. 00264-23
Agency Dkt. No. 373-12/22

New Jersey Commissioner of Education

Final Decision

Corey Gallagher,

Petitioner,

v.

Board of Education of the Township of Byram, Sussex County,

Respondent.

The record of this matter, the Initial Decision of the Office of Administrative Law (OAL), the exceptions filed by petitioner pursuant to *N.J.A.C.* 1:1-18.4, and the reply thereto by the Byram Board of Education (Byram or Board), have been reviewed and considered.

Petitioner is a tenured teacher in Byram. He is additionally employed as an assistant basketball coach in the Lenape Valley School District (Lenape Valley). On September 21, 2022, petitioner requested a medical leave of absence from his duties in Byram because he needed to undergo back surgery. Petitioner's leave was approved, and he ultimately returned to work on January 5, 2023. However, it came to Byram's attention that petitioner continued to attend Lenape Valley Basketball practices while he was on leave. On December 5, 2022, Byram's Superintendent informed petitioner that Byram therefore expected him to return to work. On December 6, 2022, petitioner did not return to work, and Byram's Superintendent advised petitioner that he would not

be paid for the days that he was employed as a coach by Lenape Valley but failed to report to work in Byram – November 21, 22, 23, 28, 29, and 30, and December 1, 2, 5, and 6, 2022.[1]

Petitioner appealed, alleging that Byram's actions violated his tenure rights because his salary was reduced without just cause and without the benefit of a hearing. Following cross motions for summary decision, the Administrative Law Judge (ALJ) rejected petitioner's argument, concluding that the tenure laws prohibit arbitrary changes to an employee's pay, not the withholding of wages as a recoupment, and there was no evidence that petitioner's rate of pay had been changed. Despite petitioner's claims that he was only a spectator at the Lenape Valley basketball practices, the ALJ also concluded that petitioner's attendance at Lenape Valley basketball practices constituted "other gainful employment" under Board Policy 3432, which provides that no day will be considered a sick leave day on which an employee has engaged in or prepared for other gainful employment. Accordingly, the ALJ found that the dates at issue must be considered as unexcused absences rather than sick days. The ALJ granted the Board's motion for summary decision, denied petitioner's motion for summary decision, and dismissed the petition.

In his exceptions, petitioner argues that summary decision for the Board was not appropriate because, although the ALJ indicated that petitioner did not dispute that he appeared at Lenape Valley basketball practices on the dates at issue, petitioner does dispute those dates. According to petitioner, the Board provided no support as to the dates of Lenape Valley practices that it believes petitioner attended or what petitioner did at those practices. Petitioner contends that it does not make sense to prohibit him from "using his eyes at a time when he would not have been teaching in any case as it was after school." Finally, petitioner argues that withholding his pay is in contravention of tenure law.

[1] It appears from the record that petitioner stopped attending Lenape Valley practices after receiving the December 6, 2022 notice.

In reply, the Board argues that the dates at issue were listed in exhibits that were jointly agreed to by the parties, and therefore there is no factual dispute. Distinguishing the cases cited by petitioner, the Board contends that docking a teacher's pay for an unexcused absence is consistent with the sick leave laws and does not violate the tenure laws or require the Board to bring tenure charges to effectuate the recoupment. Accordingly, the Board urges the Commissioner to adopt the Initial Decision.

Upon review, the Commissioner concurs with the ALJ that the Board's action in withholding petitioner's pay for unexcused absences was not in violation of the tenure laws. The Commissioner has previously concluded that a board of education is not required to initiate tenure charges to withhold an employee's pay for an unexcused absence. *Charles Weisberg v. Bd. of Educ. of the Twp. of Riverside, Burlington Co.*, Commissioner Decision No. 126-07 (decided March 18, 2004). Petitioner's arguments to the contrary, which were already made as part of his motion for summary decision and rejected by the ALJ, are not persuasive.

The Commissioner concludes that Board Policy 3432, which prohibits the use of sick leave on a day when an employee has engaged in or prepared for other gainful employment, is not arbitrary, capricious, or unreasonable. The Commissioner concurs with the ALJ that petitioner's attendance at Lenape Valley basketball practices constitutes other gainful employment. Petitioner was contracted to perform the duties of an assistant basketball coach for Lenape Valley – duties which surely include attendance at practices. By appearing at those practices, petitioner was fulfilling the obligations of his employment contract, and therefore engaging in other gainful employment.

However, the Commissioner finds that this matter must be remanded for factual findings regarding the dates on which petitioner attended Lenape Valley practices. Throughout the case,

petitioner has repeatedly admitted that he attended practices in Lenape Valley while on medical leave from Byram, but nothing in the record specifies which dates are included in that admission.[2] Petitioner's exceptions indicate that he has proof that he did not attend practice on December 5, 2022, because he had an appointment with his therapist on that date.[3] Also included in the record is a February 1, 2023 letter from petitioner to the ALJ that alleges that the district withheld petitioner's salary for two days that he did not attend practice; it is not clear what the second disputed date was. While the Board may withhold petitioner's pay for any days on which he engaged in other gainful employment by attending a Lenape Valley practice, it may not do so for days on which he did not appear at practice.

Accordingly, this matter is remanded for further proceedings consistent with this decision.

IT IS SO ORDERED.

Kathleen Ellis

ACTING COMMISSIONER OF EDUCATION

Date of Decision: October 6, 2023
Date of Mailing: October 11, 2023

[2] The Commissioner finds that petitioner's stipulation to exhibit J-11, which recites the dates at issue, is not tantamount to his agreement that he attended Lenape Valley practices on those dates.

[3] In its reply to petitioner's exceptions, the Board disagrees that the therapist's note proves that petitioner did not attend practice, because the time of the appointment is allegedly different than the time of practice. The Commissioner does not make any factual findings regarding whether petitioner attended practice on December 5, 2022, and leaves that issue for the ALJ to determine on remand.

State of New Jersey
OFFICE OF ADMINISTRATIVE LAW

INITIAL DECISION
SUMMARY DECISION
OAL DKT. NO. EDU 00264-23
AGENCY REF. NO.: 373-12/22

COREY GALLAGHER,

Petitioner,

vs.

TOWNSHIP OF BYRAM BOARD OF EDUCATION, SUSSEX COUNTY,

Respondent.

Randi Doner April, Esq., for petitioner (Oxfeld, Cohen, P.C., attorneys)

Paul E. Griggs, Esq., for respondent (Cornell, Merlino, McKeever & Osborne, LLC, attorneys)

Record Closed: June 13, 2023 Decided: July 11, 2023

BEFORE: **JOHN P. SCOLLO**, ALJ:

STATEMENT OF THE CASE

On December 5, 2022 the BOE (i.e., Superintendent of Schools, John Fritzky) advised Petitioner Gallagher (hereinafter "Gallagher") by email that the Byram Board of Education (hereinafter the "BOE") learned that Gallagher was working as an assistant basketball coach for Lenape Valley High School while on medical leave from his teaching position with Byram BOE. Fritzky advised Gallagher to report to work on December 6. When Gallagher did not report to work in Byram on December 6, Fritzky

advised Gallagher by email that his pay would be docked for the dates of November 21, 22, 23, 28, 29, 30, December 1, 2, 5, and 6, 2023. Byram BOE withheld ten days of Gallagher's pay.

Petitioner, Corey Gallagher challenges Respondent, Byram BOE's withholding ("docking") of his pay for the subject dates. The BOE contends that Gallagher's failure to report to work on the dates in question were unexcused absences and therefore not compensable. Gallagher contends that, per his physician's notes and the BOE's approval of the medical leave of absence based on the physician's notes, he was excused from work on the dates in question and should therefore be paid sick time benefits for those dates.

Gallagher, noting that he is a tenured employee, contends, pursuant to N.J.S.A. 18A:28-1 et seq. (particularly N.J.S.A. 18A:28-5) and N.J.S.A. 18A:6-10, that his salary was reduced without just cause and without the required benefit of a hearing.

The BOE contends that this is not a salary reduction case and that N.J.S.A. 18A:28-1, et seq. are inapplicable. The BOE also contends that this case is a sick leave (a/k/a "medical leave") case and that the applicable law governing this case is found in the parties' Collective Bargaining Agreement, the BOE's Policy Number 3432 (governing the granting of sick leave), and N.J.S.A. 18A: 30-1, et seq. (governing the requirements for sick leave and the docking of the employee's annual salary for days taken in excess of the limits of sick leave).

PROCEDURAL HISTORY

After Byram BOE withheld Gallagher's pay, Gallagher's counsel filed a Petition of Appeal with the Commissioner of the New Jersey Department of Education dated December 20, 2022. Upon receipt of the matter by the Department of Education's Office of Controversies and Disputes on January 6, 2023, the matter was transmitted on January 9, 2023 to the Office of Administrative Law, where it was filed on January 10, 2023 as a contested case pursuant to N.J.S.A. 52:14B-1 to -15 and N.J.S.A. 52:14F-1 to 13. On January 18, 2023, the matter was assigned to Administrative Law Judge,

John P. Scollo. Judge Scollo held an Initial Telephone Conference with both counsel on January 24, 2023 and issued a Pre-Hearing Order on January 26, 2023, which set forth discovery obligations and set due dates and conference dates.

After discovery was completed, counsel for Petitioner-Gallagher filed a Motion for Summary Decision, which was followed by Respondent-BOE filing its Cross-Motion for Summary Decision. This writing is the Tribunal's Initial Decision on the Motion and Cross-Motion.

UNDISPUTED FACTS

From their submissions, the Parties are in agreement regarding the following statements of fact.

(1) Gallagher has been a staff member (teacher) with the Township of Byram (the District or BOE) since 2002.

(2) Gallagher is a tenured employee.

(3) Gallagher's annual salary in Byram for the 2022-2023 school is $82,912.

(4) Starting in 2013 and continuing to the present time, Gallagher has signed multiple contracts with the Lenape Valley School District to serve as an assistant basketball coach in that school district. For the 2022-2023 school year (July 1, 2022 through June 30, 2023), Gallagher was compensated with a one-time stipend on February 28, 2023 of $5,973 for his service as an assistant basketball coach.

(5) On September 21, 2022, Gallagher requested a medical leave of absence from his teaching job with Byram because he needed to undergo back surgery. He presented a letter from his physician, Jay Chun, M.D. dated September 21, 2022 stating that Gallagher would undergo back surgery on October 12, 2022 and would not be able to return to work for four to eight weeks after the date of the surgery.

(6) On October 26, 2022, The Byram BOE approved Gallagher's medical leave of absence based on Dr. Chun's September 21, 2022 letter.

(7) In a letter dated November 17, 2022, Dr. Chun reported that Gallagher was still under his care and he requested that Gallagher be excused from work until the completion of physical therapy in six weeks.

(8) On December 5, 2022, Byram's Superintendent of Schools John Fritzky (hereinafter "Fritzky") sent an email to Gallagher stating that his absences were permitted based on Dr. Chun's request; he (Fritzky) learned that during the time of Gallagher's leave he continued to be employed as a coach with Lenape Valley School District; and he quoted BOE Policy 3432, which provides, in applicable part, "no day will be considered a sick leave day on which the employee is engaged in or prepared for other gainful employment ... or has engaged in any activity that would raise doubts regarding the validity of the sick leave request." Fritzky's email ended with his statement that he expected Gallagher to be present on December 6, 2022 to carry out his teaching responsibilities. Fritzky also warned Gallagher saying, "If you do not appear for work, you will not be paid for days absent because they are unexcused and not sick days."

(9) On December 6, 2022, Gallagher did not appear for work in Byram. On December 6, 2022, Fritzky sent an email to Gallagher again quoting Board Policy 3432 and advised Gallagher that he would not be paid for the days he was employed as a basketball coach at the Lenape Valley Regional School District but failed to report to work in the Byram School District. He set forth the dates as: November 21, 22, 23, 28, 29, and 30 and December 1, 2, 5, and 6, 2022.

(10) Gallagher does not dispute that he appeared at basketball practices at Lenape Valley on November 21, 22, 23, 28, 29 and 30 and on December 1, 2, 5, and 6, 2022. However, Gallagher maintains that although he appeared at Lenape Valley on the above dates, he was a mere spectator and was not working.

(11) Gallagher returned to his work duties in Byram on January 5, 2023.

DISCUSSION

Gallagher's Position

Gallagher maintains that N.J.S.A. 18A:6-10 and N.J.S.A. 18A:28-5 constitute the applicable law governing this matter. These statutes have been cited in the APPLICABLE LAW section of this Initial Decision. Gallagher argues that he is a tenured employee and thus comes under the protections afforded by these statutes. He argues that no tenure charges have been brought against him and he was not afforded any type of hearing before the Byram BOE unilaterally withheld ten days' of his wages.

Gallagher argues that the Byram BOE, without good cause, and despite the opinions expressed in his physician's letters, arbitrarily concluded that he was not eligible for sick leave. Gallagher argues that although Board Policy 3432 provides that employees who engage in or prepare for other gainful employment are not eligible for sick pay, he remained eligible for sick pay on the subject dates because he was not engaged in or preparing for gainful employment when he merely appeared at Lenape Valley basketball practices as an observer and not as an active participant in coaching activities.

Byram BOE's Position

Byram BOE maintains that this is not a matter about a reduction (diminution) of someone's rate of pay. Therefore N.J.S.A. 18A:6-10 and N.J.S.A. 18A:28-5 are inapplicable. Byram BOE maintains that this is a sick (medical) leave policy matter. Byram BOE maintains that the applicable principles of law governing this case are found in N.J.S.A. 18A:30-1, et seq. This statute is cited in the APPLICABLE LAW section of this Initial Decision. Byram BOE maintains that the BOE's policies, specifically Board Policy 3432 controls this matter. Byram BOE also maintains that the Collective Bargaining Agreement dated June 10, 2022 controls this matter. Both Board Policy 3432 and the applicable sections of the Collective Bargaining Agreement are cited in the APPLICABLE LAW section of this Initial Decision.

Byram BOE relies upon the definition of "sick leave" set forth in N.J.S.A. 18A:30-1. There it states that "sick leave" means "the absence from his or her post of duty, of any person because of personal disability due to illness or injury, or because he or she has been excluded from school by the school district's medical authorities on account of a contagious disease ...."

In the matter at bar, there is no doubt that Gallagher underwent a surgical procedure to his back and thereafter underwent a course of physical therapy. There is no doubt that his physician supplied notes to the Byram BOE explaining the need for a period of sick leave for Gallagher to recover from his procedure. By way of background, in addition to his employment as a schoolteacher in the Byram School District, Gallagher is also employed as an Assistant Basketball Coach in the Lenape Valley School District. This is a paid position. The problem presented in this matter arises out of the fact that, while on sick leave from Byram, Gallagher appeared at high school basketball practice sessions (and perhaps games) at Lenape Valley. Byram BOE argues that Gallagher's appearance at Lenape Valley was in furtherance of his employment obligations with Lenape Valley and thus constituted engagement in or preparation for "other gainful employment" while on sick leave, thus, in the BOE's judgment, making him ineligible to collect sick leave pay.

Byram BOE argues that it has never sought to reduce, nor has it reduced Gallagher's rate of pay. Byram argues that by withholding ten days' of Gallagher's pay it was merely recouping money paid to Gallagher as sick pay for time when he was ineligible to collect sick pay (i.e., on the aforesaid subject dates).

APPLICABLE LAW

The statutes under discussion in this matter are N.J.S.A. 18A:6-10 (Dismissal and Reduction in Compensation of Persons Under Tenure in the Public School System); N.J.S.A. 18A:28-5 (Requirements for Tenure); and N.J.S.A. 18A:30-1,et seq. (Sick Leave).

N.J.S.A. 18A:6-10 reads as follows:

No person shall be dismissed or reduced in compensation,

(a) If he shall be under tenure of office, position or employment during good behavior and efficiency in the public school system of the state, or If he is or shall be under tenure of office, position or employment during good behavior and efficiency as a supervisor, teacher or in any other teaching capacity in the Marie H. Katzenbach school for the deaf, or in any other educational institution conducted under the supervision of the commissioner;

except for inefficiency, incapacity, unbecoming conduct, or other just cause, and then only after a hearing held pursuant to this subarticle, by the commissioner, or a person appointed by him to act in his behalf, after a written charge or charges, of the cause or causes of complaint, shall have been preferred against such person, signed by the person or persons making the same, who may or may not be a member or members of a board of education, and filed and proceeded upon as in this subarticle provided.

Nothing in this section shall prevent the reduction of the number of any such persons holding such offices, positions or employments under the conditions and with the effect provided by law.

N.J.S.A. 18A:28-5 (in applicable part) reads as follows:

(a) The services of all teaching staff members employed prior to the effective date of P.L. 2012, c.26 (C.18A:6-117 et al.) in the positions of teacher, principal, other than administrative principal, assistant principal, vice-principal assistant superintendent, and all school nurses ... , shall be under tenure during good behavior and efficiency and they shall not be dismissed or reduced in compensation except for inefficiency, incapacity, or conduct unbecoming such a teaching staff member or other just cause and then only in the manner prescribed by subarticle B of article 2 of chapter 6 of this Title. after employment in such district or by such board for ... (specified time periods).

The services of all teaching staff members employed on or after the effective date of P.L. 2012, c.26 (C. 18A:6-117 et al.) in the position of teacher, principal, other than administrative principal, assistant principal, vice-principal, assistant superintendent, and all school nurses ..., shall be under tenure during good behavior and efficiency and they

> shall not be dismissed or reduced in compensation except for inefficiency, incapacity, or conduct unbecoming such a teaching staff member or other just cause and then only in the manner prescribed by subarticle B of article 2 of chapter 6 of this Title, after employment in such district or by such board for... (specified time periods). (Section (b) continues with criteria which a teacher must meet in order to gain tenure, including the successful completion of a mentorship program. (Section (c) provides that tenure in an administrative or supervisory position shall accrue only by employment in that administrative or supervisory position.

N.J.S.A. 18A:30-1 through 13 governs all aspects of sick leave policy. For the matter at bar the applicable sections are: 18A:30-1(Definition of Sick Leave); 18A:30-2 (Sick Leave Allowable); 18A:30-3 (Accumulated Sick Leave); 18A:30-4 (Physician's Certificate Required for Sick Leave); and 18A:30-6 (Prolonged Absence Beyond Sick Leave Period). The text of each of the aforementioned sections follow.

> N.J.S.A. 18A:30-1 reads as follows:
>
> Sick leave is hereby defined to mean the absence from his or her post of duty, of any person because of personal disability due to illness or injury, or because he or she has been excluded from school by the school district's medical authorities on account of a contagious disease or being quarantined for such a disease in his or her immediate household.
>
> N.J.S.A. 18A:30-2 reads as follows:
>
> All persons holding any office, position, or employment in all Local school districts or county vocational schools of the state who are steadily employed by the board of education or who are protected by tenure in their office, position, or employment under the provisions of this or any other law, except persons in the classified service of the civil service under Title 11, Civil Service, of the Revised Statutes, shall be allowed sick leave with full pay for a minimum of 10 school days in any school year.
>
> N.J.S.A. 18A:30-3 reads as follows:
>
> If any such person requires in any school year less than the specified number of days of sick leave with pay allowed, all days of such minimum sick leave not utilized that year shall

> be accumulative to be used for additional sick leave as needed in subsequent years.
>
> N.J.S.A. 18A:30-4 reads as follows:
>
> In case of sick leave claimed, a board of education may require a physician's certificate to be fled with the secretary of the board of education in order to obtain sick leave.
>
> N.J.S.A. 18A:30-6 reads as follows:
>
> When absence, under the circumstances described in section 18A:30-1 of this article, exceeds the annual sick leave and the accumulated sick leave, the board of education may pay any such person each day's salary less the pay of a substitute, if a substitute is employed or the estimate cost of the employment of a substitute if none is employed, for such length of time as may be determined by the board of education in each individual case. A day's salary is defined as 1/200 of the annual salary.

Article 13 of the Collective Bargaining Agreement dated June 10, 2022 between the Byram Township Board of Education and the Byram Education Association, tracks the provisions of N.J.S.A. 18A:30-1, et seq. Section 'A' provides that teachers are entitled to ten sick leave days per school year and that unused sick leave time shall be accumulated from year to year with no maximum limit. Section 'C' allows the BOE to require a physician's certificate in order to obtain credit for sick leave. Under Section 'D', the BOE may, in its sole discretion, grant extended paid leave of absence to a teacher who has exhausted his or her accumulated sick leave due to a lengthy illness, in accordance with N.J.A.C. 18A:30-6.

The Byram BOE's Sick Leave Policy is set forth in District Policy number 3432. In applicable part, District Policy 3432 provides as follows:

> The Board of Education shall grant sick leave, in accordance with law, to teaching staff members absent from work because of personal disability or quarantine. Each steadily employed employee eligible for sick leave will be entitled annually to the number of paid sick leave days negotiated with the employee's majority representative or provided in this policy or in an individual contract with the Board.

> The Board reserves the right to require of any employee who claims sick leave, sufficient proof, including a physician's certification, of the employee's illness or disability. As a minimum, no day will be considered to be a sick leave day on which the employee has engaged in or prepared for other gainful employment, has participated in a work stoppage, or has engaged in any activity that would raise doubts regarding the validity of the sick leave request.

ISSUES

(1) Did Byram BOE reduce Gallagher's salary?

(2) Was Gallagher working when he attended Lenape Valley basketball practices or games?

(3) Was there sufficient justification for Byram to withhold ten days' pay from Gallagher?

LEGAL ANALYSIS AND CONCLUSIONS

Analysis of Issue Number One

It has been stipulated that Gallagher's rate of pay in Byram Township for the school year 2022-2023 was $82,912. Gallagher's argument is that Byram's withholding of his pay is not a recoupment of wages improvidently paid as sick leave, but is a reduction of his salary without just cause and without a hearing. The statutes upon which Gallagher bases his reduction claim, N.J.S.A. 18A:6-10 and N.J.S.A. 18A:28-5, prohibit arbitrary changes to an employee's *rate* of pay without just cause and without a hearing. They do not contemplate whether an employer's withholding of wages in order to recoup wages improvidently or mistakenly paid to an employee as sick leave is a reduction of that employee's rate of pay. There is no evidence in this matter that demonstrates that Gallagher's rate of pay has been changed. There is abundant evidence that what occurred in this matter was that Byram BOE paid sick leave benefits to Gallagher, but later came to learn that Gallagher was not eligible to receive sick leave pay for the subject dates. There has been no disagreement about the amounts paid /

received. The only dispute is whether this is a matter of recoupment or of reduction of Gallagher's rate of pay. Moreover, there is no dispute that if Gallagher or any other employee were absent without being excused, the Byram BOE would not be obliged to pay for unexcused absences. I **CONCLUDE** that there has been no evidence adduced in this matter, which proves that the Byram BOE reduced Gallagher's rate of pay.

Analysis of Issue Number Two

Policy 3432 says "...no day will be considered to be a sick leave day on which an employee has *engaged in* or *prepared for* other gainful employment" If Gallagher, while at Lenape Valley stepped onto the basketball court, picked up a note pad, drew diagrams, picked up a clip board, made notes, spoke with a player or other coaches about the subject of basketball, or simply picked up a basketball, a towel, or other equipment, then it would be clear that he "engaged in" coaching, which is a "gainful employment". Board Policy 3432 also says "... no day will be considered a sick leave day on which the employee 'prepared for' other gainful employment." Gallagher claims that he did not engage in basketball coaching activities on the days that he appeared at Lenape Valley. He claims that he was only a spectator at the team's practice. If he were not under contract with Lenape Valley and were to observe the team during its practice session, he would be like any other spectator. He could not be construed to be 'preparing for' other gainful employment. However, Gallagher was under contract with Lenape Valley as an assistant basketball coach on the subject dates when he appeared at Lenape Valley to watch his team. It is beyond dispute that he would remember his observations of his team when he returned to work. Those observations could, and likely would, serve as insights into the performance of individual players and into the performance of the team as a whole unit. The observations that Gallagher made of his team during practice sessions on the subject dates could, and likely would, aid him when he returned to active coaching. It follows that these observations can and should be deemed to be "preparations for" his job at Lenape Valley, which, of course, is "other gainful employment". Therefore, I **CONCLUDE** that Gallagher's attendance at Lenape Valley basketball practices constitutes "other gainful employment" under Board Policy 3432.

Analysis of Issue Number Three

Under Board Policy 3432, days on which the employee either engages in or prepares for other gainful employment cannot be considered as sick leave days. If an employee fails to report to work without being excused from his work duties by his employer, he has no right to demand payment and the employer has the right to withhold wages for any unexcused absences. Having concluded that Gallagher was engaged in or preparing for "other gainful employment" while attending Lenape Valley basketball practice, I **CONCLUDE** that Byram BOE was correct when it decided that the subject dates should not be considered as sick leave days.

Since Gallagher was absent and did not perform his work duties for Byram BOE on the subject days, I **CONCLUDE** that the subject dates must be considered as unexcused absences.

Since Byram BOE had already paid sick leave pay to Gallagher for the subject dates, and since it was later realized that Gallagher was neither entitled to receive sick leave pay nor any pay for unexcused absences, I **CONCLUDE** that Byram BOE was justified in withholding ten days of Gallagher's wages in order to recoup the monies which Gallagher had already received from Byram BOE.

ORDER

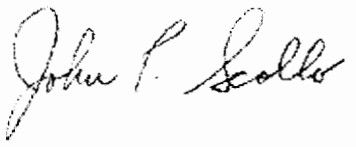
It is hereby **ORDERED** that the Byram BOE's motion for **SUMMARY DECISION** is **GRANTED**, and it is further **ORDERED** that Gallagher's motion for **SUMMARY DECISION** is **DENIED** and his Petition is **DISMISSED** in its entirety.

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

This recommended decision may be adopted, modified, or rejected by the **COMMISSIONER OF THE DEPARTMENT OF EDUCATION,** who by law is authorized to make a final decision in this matter. If the Commissioner of the Department of

Education does not adopt, modify, or reject this decision within forty-five days and unless such time limit is otherwise extended, this recommended decision shall become a final decision in accordance with N.J.S.A. 52:14B-10.

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



July 11, 2023
DATE

JOHN P. SCOLLO, ALJ

Date Received at Agency:

Date Mailed to Parties:
db

303-23E
OAL Dkt. No. EDU 08997-23
Agency Dkt. No. 231-8/23

New Jersey Commissioner of Education

Order on Emergent Relief

J.R., on behalf of minor child, P.R.,

Petitioner,

v.

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

Respondent.

The record of this emergent matter, the sound recording of proceedings at the Office of Administrative Law (OAL), and the recommended Order of the Administrative Law Judge (ALJ) have been reviewed. Upon such review, the Commissioner concurs with the ALJ that petitioner has failed to demonstrate entitlement to emergent relief pursuant to the standards enunciated in *Crowe v. DeGioia,* 90 *N.J.* 126 (1982), and codified at *N.J.A.C.* 6A:3-1.6.

Accordingly, the recommended Order of the OAL denying petitioner's application for emergent relief is adopted for the reasons stated therein. This matter shall continue at the OAL with such proceedings as the parties and the ALJ deem necessary to bring it to closure.

IT IS SO ORDERED.

Kathleen Ellis
ACTING COMMISSIONER OF EDUCATION

Date of Decision: October 6, 2023
Date of Mailing: October 11, 2023

State of New Jersey
OFFICE OF ADMINISTRATIVE LAW

ORDER ON EMERGENT RELIEF

J.R. ON BEHALF OF
MINOR CHILD P.R.,
Petitioner,
v.
BOARD OF EDUCATION OF THE
TOWNSHIP OF WESTAMPTON,
BURLINGTON COUNTY,
Respondent.

OAL DKT. NO. EDU 08997-23
AGENCY DKT. NO. 231-8/23

J.R., on behalf of P.R., petitioner, pro se

Alicia D'Anella, Esq., and **William Morlok,** Esq., for respondent (Parker McCay, P.A., attorneys)

BEFORE **TRICIA M. CALIGUIRE,** ALJ:

STATEMENT OF THE CASE

Petitioner J.R. on behalf of minor child P.R., challenges two decisions of respondent Board of Education of the Township of Westampton, Burlington County (Board), that harassment, intimidation and bullying (HIB) of P.R. did not occur. In the current proceeding, petitioner seeks an order for emergent relief in the form of an immediate transfer of P.R. to the Northern Burlington School District at the Board's expense.

PROCEDURAL HISTORY

On August 26, 2023, petitioner filed a pro se petition of appeal with the Office of Controversies and Disputes of the New Jersey Department of Education (Department). On September 11, 2023, petitioner filed a motion for emergent relief with the Department. The Commissioner did not act upon the motion and pursuant to N.J.A.C. 6A:3-1.6(c)(3), on September 12, 2023, the emergent matter and the petition of appeal were transmitted to the Office of Administrative Law (OAL). The emergent relief request was scheduled for oral argument, which was held on September 18, 2023. The motion for emergent relief is now ripe for consideration.

FACTUAL DISCUSSION

Most of the pertinent facts in this case are not in dispute. Accordingly, I **FIND** as **FACTS**:

P.R. is an eleven-year-old girl in the sixth grade at Westampton Middle School (WMS), the only middle school in the Westampton School District (District).

During the 2019-2020 school year, while in second grade in the District, P.R. was physically assaulted on the playground during school hours by a same-age male classmate. J.R. is of the understanding that other students were similarly assaulted, and the male classmate was enrolled in another, out-of-district school. Three years later, at the beginning of the 2022-2023 school year, the male classmate returned to the District, at Westampton Intermediate School (WIS), without notice to J.R.[1] P.R. was also enrolled at WIS in the 2022-2023 school year.

While J.R. documents conversations she initiated with WIS staff and administration, then-Superintendent Anthony Petruzzelli, and Superintendent James DiDonato after he

[1]Here, District Superintendent James DiDonato certified that J.R. received notice before the commencement of the 2022-2023 school year. Certification of James DiDonato (September 15, 2023), ¶ 8. At the hearing, petitioner testified that she received no such notice. Further, in her petition, J.R. stated that DiDonato was not the superintendent in August-September 2022.

assumed office in October 2022, to express her concerns regarding her daughter's safety and regarding P.R.'s anxiety and/or fear of the male classmate, there is no evidence of any direct interactions between P.R. and the male classmate prior to December 19, 2022.

Respondent takes the position that neither P.R. nor the male classmate had any recollection of the 2019 playground incident. While P.R.'s documented action in the fall of 2022 confirms that she had a strong recollection of the incident and was frightened as a result, the male classmate's first documented statement, on December 19, 2022, is evidence that his recollection was, at the least, refreshed by information provided to him by third persons: "Oh so you're P., you're the one saying I hurt you, now I know who you are, now I see you."

Based on information provided by P.R., J.R. documented additional statements allegedly made to P.R. by the male classmate that P.R. perceived as threatening on April 17, April 18, April 24, and April 25, 2023. J.R. brought an HIB claim against the male classmate, which was denied by notice dated May 5, 2023, on the grounds that the male classmate's actions and/or statements in these the incidents were not motivated by a distinguishing characteristic of P.R.

Most of the above incidents took place in the WIS lunchroom. WIS administrators worked with P.R. to develop an "exit plan," whereby P.R. would be seated at lunch close to the door. WIS staff were notified of the exit plan. On June 2, 2023, the male classmate approached P.R. in the lunchroom; when she began to cry, a lunch aide implemented the exit plan and took P.R. to her homeroom classroom. The male classmate followed, screaming "she's gonna get it." P.R.'s teacher, Mrs. Kish, locked the door. P.R. was taken from this room to the main office until the male classmate was removed from the school. J.R. filed a police report and a second HIB claim. The second HIB was denied on the grounds that the male classmate's actions and/or statements in the incident were not motivated by a distinguishing characteristic of P.R.[2]

[2] DiDonato stated that the male classmate was disciplined for this incident consistent with the Student Code of Conduct and that his actions are a manifestation of his disability. DiDonato Cert., ¶ ¶ 17, 18.

Superintendent DiDonato stated that the June 2, 2023, incident "while upsetting for everyone involved and undoubtedly scary for P.R., was the culmination of [the male classmate] being the topic of gossip of 5th graders all year." DiDonato Cert, ¶ 18.

On August 14, 2023, the Board upheld the District decision that both HIB claims were unfounded.

P.R. began the 2023-2024 school year at WMS wearing a personal safety alarm. On the first day, the male classmate made comments to her in the hall that she perceived as threatening. Between September 6 and 14, 2023, the male classmate made comments to P.R. that she perceived as threatening on four separate occasions. P.R. has not returned to school since September 14, 2023.

DiDonato stated that in school in September 2023, P.R. has been overheard "whispering" to another classmate insults regarding the male classmate and that the male classmate is aware of such behavior by P.R. DiDonato Cert., ¶ 19. Further, he states P.R.'s allegations regarding two of the four incidents in September 2023 cannot be corroborated by staff. Id. at ¶ 21.

On September 15, 2023, P.R.'s pediatrician, Dr. Melissa D. Labrou, diagnosed her with anxiety due to traumatic events at school and prescribed home instruction pending a Section 504[3] classification meeting and placement at an out-of-district public school.

LEGAL ANALYSIS

When the subject matter of a controversy is action by a board of education, the petitioner may file "a separate motion for emergent relief . . . pending the Commissioner's final decision in the contested case." N.J.A.C. 6A:3-1.6(a). Here, J.R. has initiated due process proceedings to challenge the denial of HIB claims and has requested emergent

[3] Dr. Labrou refers to Section 504 of the Rehabilitation Act, 29 U.S.C. § 794.

relief pending a decision on the HIB appeal. As respondent has noted, even if J.R.'s challenge to the HIB rulings were overturned here, and affirmed by the Department, the relief she requests—both on an emergent and permanent basis—may not be available under the HIB statute, as discussed further below.

Complicating this analysis, and potentially making it moot, is that P.R.'s personal physician has diagnosed her with anxiety as a result of the incidents of the past year and Board counsel stated that the District will move forward, pursuant to its obligations under N.J.A.C. 6A:16-10.1:

> (a) The district board of education shall provide instructional services to an enrolled student, whether a general education student in kindergarten through grade 12 or special education student age three to 21, when the student is confined to the home or another out-of-school setting due to a temporary or chronic health condition or a need for treatment that precludes participation in their usual education setting, whether general education or special education.
>
> 1. To request home instruction due to a temporary or chronic health condition, the parent shall submit to the school district a request that includes a written determination from the student's physician documenting the projected need for confinement at the student's residence or other treatment setting for more than 10 consecutive school days or 20 cumulative school days during the school year.
>
>   i. The school district shall forward the written determination to the school physician, who shall verify the need for home instruction. The school physician may contact the student's physician to secure additional information concerning the student's diagnosis or need for treatment, and shall either verify the need for home instruction or shall provide to the district board of education reasons for denial.
>
> 2. The school district shall notify the parent concerning the school physician's verification or reasons for denial within five school days after receipt of the written determination by the student's physician.

3. The school district shall provide instructional services within five school days after receipt of the school physician's verification or, if verification is made prior to the student's confinement, during the first week of the student's confinement to the home or out-of-school setting.

Notwithstanding the above, the motion for emergent relief was transmitted by the Department for immediate hearing at the OAL and J.R. chose not to withdraw her request for emergent relief pending a decision on P.R.'s eligibility for a 504 plan. The standards for granting emergent relief are set forth in Crowe v. DeGioia, 90 N.J. 126 (1982), and are codified at N.J.A.C. 6A:3-1.6(b). The petitioner bears the burden of proving:

1. Petitioner will suffer irreparable harm if the requested relief is not granted;

2. The legal right underlying the petitioner's claim is settled;

3. Petitioner has a likelihood of prevailing on the merits of the underlying claim; and

4. When the equities and the interests of the parties are balanced, the petitioner will suffer greater harm than the respondent will suffer if the requested relief is not granted.

[N.J.A.C. 6A:3-1.6(b).]

Irreparable Harm

To obtain emergent relief, J.R. must demonstrate more than a risk of irreparable harm should P.R. remain at WMS. She must make a "clear showing of immediate irreparable injury," or a "presently existing actual threat; (an injunction) may not be used simply to eliminate a possibility of a remote future injury, or a future invasion of rights, be those rights protected by statute or by common law." Cont'l. Group, Inc. v. Amoco Chems. Corp., 614 F. 2d 351, 359 (D.N.J. 1980). In an educational setting, "irreparable harm may be shown when there is a substantial risk of physical injury to the child or others, or when there is a significant interruption or termination of educational services." Ocean Twp. Bd.

of Educ. v. J.E. and T.B. obo J.E., OAL Dkt. No. EDS 00592-04, 2004 NJ AGEN LEXIS 115, at *8 (February 23, 2004) (irreparable harm found where an eight-year-old's "physical aggressiveness and disruptive behaviors [posed] a safety concern to himself and others, and the district's behavior modification techniques [were] no longer effective"); Sparta Twp. Bd. of Educ. v. R.M. and V.M. obo C.M., OAL Dkt. No. 01975-20, 2020 NJ AGEN LEXIS, at *14 (February 21, 2020) (inappropriate interactions with other students and breaking a desk deemed "sufficient evidence of the risk of harm to [student], school staff, teachers and students that if [student] remained in school at this time, other incidents could occur involving the health, safety and welfare of any of these individuals").

While everyone agrees that P.R. has not been physically harmed (since 2019), even the Board concedes that emotional injury can be irreparable harm. There may be disagreement over the genesis of the conduct that P.R. perceives as threatening, but it is of little consequence whether the male classmate remembered P.R. on his own or was convinced by third-party gossip that she was worthy of his attention.[4] During the 2022-2023 school year and at the beginning of the current school year, P.R. has been subject to frightening and unpredictable threats from another student. There is no need to speculate whether harm will result; P.R.'s doctor has diagnosed her with anxiety as a result of trauma experienced in school. She has lost educational time and, until home instruction is implemented (and that is not a given as the process required by the regulation quoted above has just begun), will continue to go without instruction.

I **CONCLUDE** that J.R. has met the burden of establishing that irreparable harm has resulted and may be aggravated if P.R.'s current placement is not changed.

[4] The Board argues that "self-created harms cannot be considered irreparable harms" sufficient for emergent relief. Br. of Respondent Opposing Emergent Relief (September 15, 2023), at 3 (citations omitted). It is not clear if the Board is accusing P.R. of making this up or accusing her mother of encouraging her daughter's anxiety.

The Legal Right is Settled and Likelihood of Prevailing on the Merits

The second consideration is whether the legal right underlying J.R.'s claim is settled, N.J.A.C. 6A:3-1.6(b)(2), and then third, J.R. must make a preliminary showing of a reasonable probability of success on the merits. Crowe, 90 N.J. at 133.

In her petition for due process, J.R. appeals the finding of the Board that on two occasions, the male classmate did not commit an HIB as defined in the New Jersey Anti-Bullying Law, as follows in pertinent part:

> "Harassment, intimidation or bullying" means any gesture, any written, verbal or physical act . . . whether it be a single incident or a series of incidents, that is reasonably perceived as being motivated either by any actual or perceived characteristic, . . . or by any other distinguishing characteristic, that takes place on school property . . . that substantially disrupts or interferes with the orderly operation of the school or the rights of other students and that:
>
> a. a reasonable person should know, under the circumstances, will have the effect of physically or emotionally harming a student or damaging the student's property, or placing a student in reasonable fear of physical or emotional harm to his person or damage to his property;
>
> b. has the effect of insulting or demeaning any student or group of students; or
>
> c. creates a hostile educational environment for the student by interfering with a student's education or by severely or pervasively causing physical or emotional harm to the student.
>
> [N.J.S.A. 18A:37-14.]

The District denied both J.R.'s HIB claims on the grounds that the male classmate was not motivated by any distinguishing characteristic of P.R.[5] J.R. argues, and I agree, that the male classmate, by his own words, has been motivated by his perception that P.R. is the reason he was removed from the District. Though the Board argues that the memories of second graders cannot last three years, that argument cannot survive the undisputed facts. It may well be that the male classmate would never have focused on P.R. had he not been reminded of who she is (and that is only speculation), but he was so reminded and has made known his understanding of P.R.'s role in his educational experience.

Where J.R.'s emergent claim fails is that she has not shown a likelihood of obtaining the relief she seeks, an out-of-district placement for P.R. The HIB statute requires the District to adopt a policy that includes "consequences and appropriate remedial action for a person who commits an act of [HIB.]" N.J.S.A. 18A:37-15(b)(4). Further,

> [T]he range of ways in which a school will respond once an incident of harassment, intimidation or bullying is identified, which shall be defined by the principal in conjunction with the school anti-bullying specialist, but shall include an appropriate combination of services that are available within the district such as counseling, support services, intervention services, and other programs, as defined by the commissioner. In the event that the necessary programs and services are not available within the district, the district may apply to the Department of Education for a grant from the "Bullying Prevention Fund" established pursuant to section 25 of P.L.2010, c.122 (C.18A:37-28) to support the provision of out-of-district programs and services[.]
>
> [N.J.S.A. 18A:37-15(b)(7).]

To date, our research has not revealed circumstances in which the Commissioner

[5] While discussion of the male classmate was limited, the Board appeared to argue that he could not be guilty of an HIB violation because his actions were a manifestation of his disability. That argument, however, was not briefed.

has defined "support services, intervention services and other programs" to include out-of-district placement for the victims of HIB. The discretion to so interpret the statutory guidelines is within the authority of the Commissioner, not the OAL.

For the above reasons, I **CONCLUDE** that J.R. meets the third prong, but not the second prong, of the emergent relief standard.

Balance of Equities and Interests

The final prong of the above test is whether the equities and interests of the parties weigh in favor of granting the requested relief. The Board argues that the balance is between the potential anxiety that P.R. may suffer and the cost to the Board of an out-of-district placement (estimated by counsel at the hearing to range between $15,000 and $20,000/year).[6]

The Board comes just short of arguing that P.R. has succumbed to fears based in discrimination against the disabled. Br. of Resp't. at 7-8. In doing so, the Board ignores that it failed to act in a proactive manner, to ensure that the re-introduction of a student who was removed for physically aggressive behavior against his peers be accomplished without raising concerns of parents or of those peers. J.R.'s petition recounts numerous failed opportunities of the District to address potential concerns, starting with advance notice to J.R. and informing all staff of the need to take precautions with both students.

On balance, I **CONCLUDE** that the greater harm is the potential emotional injury that P.R. may experience, and which has now been diagnosed.

I **CONCLUDE** the petitioner's request for emergent relief does not satisfy the applicable requirements.

[6] In its brief, the Board assumes that J.R. is asking for the male classmate to be removed from the District, but that is not the relief requested. See Br. of Resp't., at 6. J.R. asks to have P.R. transferred to another school, outside the District.

ORDER

For the reasons stated above, I hereby **ORDER** that the application for emergent relief of petitioner J.R. on behalf of P.R. is hereby **DENIED**.

This order on application for emergency relief may be adopted, modified or rejected by **COMMISSIONER OF THE DEPARTMENT OF EDUCATION** who/which by law is authorized to make a final decision in this matter. The final decision shall be issued without undue delay, but no later than forty-five days following the entry of this order. If **COMMISSIONER OF THE DEPARTMENT OF EDUCATION** does not adopt, modify or reject this order within forty-five days, this recommended order shall become a final decision on the issue of emergent relief in accordance with N.J.S.A. 52:14B-10.

Following receipt of the Commissioner's decision, or after the forty-five-day period has expired, further proceedings in this matter will be scheduled, if necessary.

September 19, 2023
DATE

TRICIA M. CALIGUIRE, ALJ

Date Received at Agency:

Date Mailed to Parties:

TMC/mph

304-23

New Jersey Commissioner of Education

Final Decision

Alvin Herron,

Petitioner,

v.

New Jersey Department of Education, State Board of Examiners,

Respondent.

Synopsis

Pro-se petitioner appealed the determination of the respondent New Jersey State Board of Examiners (SBE) that he had not met the requirements for issuance of a standard administrative certificate with a supervisor endorsement pursuant to *N.J.A.C.* 6A:9B-12.6(a)(3). Petitioner holds a standard certificate with a military science endorsement issued pursuant to *N.J.A.C.* 6A:9B-11.8. On March 4, 2022, the Board denied petitioner's application for a standard supervisor certificate. Petitioner filed this appeal on June 28, 2022, after which the SBE filed a motion for summary decision in lieu of an answer.

The ALJ found, *inter alia*, that: there are no material facts at issue in this matter, and the case is ripe for summary decision; the SBE rejected petitioner's application for a standard supervisor certificate after denying his request to substitute his military science endorsement and teaching experience completed under that endorsement for his licensure deficiencies under *N.J.A.C.* 6A:9B-12.6(a)(3); in so doing, the SBE cited *N.J.A.C.* 6A:9B-11.8(c), which states that holders of a military science endorsement may not to use it as the basis for obtaining additional endorsements. The ALJ concluded that the petitioner failed to establish, by a preponderance of evidence, that he currently satisfies the requirements for issuance of a standard administrative certificate with a supervisor endorsement, set forth at *N.J.A.C.* 6A:9B-12.6(a)(3). Accordingly, the ALJ granted summary decision to the respondent and dismissed petitioner's appeal.

Upon review, the Commissioner concurred with the ALJ that petitioner failed to establish that he currently satisfies the requirements for issuance of the standard administrative certificate with a supervisor endorsement. Accordingly, the Initial Decision of the OAL was adopted as the final decision in this matter and the petition was dismissed.

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

304-23
OAL Dkt. No. EDU 05966-22
Agency Dkt. No. 162-6/22

New Jersey Commissioner of Education

Final Decision

Alvin Herron,

Petitioner,

v.

New Jersey Department of Education, State Board of Examiners,

Respondent.

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

Upon review, the Commissioner adopts the Initial Decision as the Final Decision in this matter. The Commissioner concurs with the Administrative Law Judge (ALJ) that petitioner has failed to establish, by a preponderance of evidence, that he currently satisfies the requirements for issuance of a standard administrative certificate with a supervisor endorsement, set forth at *N.J.A.C.* 6A:9B-12.6(a)(3).

Petitioner holds a standard certificate with a military science endorsement issued pursuant to *N.J.A.C.* 6A:9B-11.8. In connection with his application for a standard administrative certificate with a supervisor endorsement, he sought to rely upon teaching experience completed under his military science endorsement. However, *N.J.A.C.* 6A:9B-11.8(c) states that holders of the military science endorsement "shall not use it as the basis for obtaining additional endorsements" and must instead "obtain additional endorsements by meeting applicable requirements outlined in [Chapter 9B]." Citing *N.J.A.C.* 6A:9B-11.8(c), respondent denied petitioner's application for issuance of a standard

administrative certificate with a supervisor endorsement. *In the Matter of the Application of Alvin Herron*, State Board of Examiners Decision, at 1 (March 4, 2022).

The Commissioner has previously held that respondent is not at liberty to waive applicable regulatory requirements when deciding whether to issue certificates and endorsements. *Hutchinson v. New Jersey State Board of Examiners*, OAL Dkt. No EDU 16373-12, Initial Decision (April 5, 2013), *adopted*, Commissioner Decision No. 177-13 (May 15, 2013). Because petitioner has not satisfied the regulatory requirements for issuance of a standard administrative certificate with a supervisor endorsement, set forth at *N.J.A.C.* 6A:9B-12.6(a)(3), the Commissioner holds that respondent's denial of petitioner's application was reasonable and appropriate.

Accordingly, respondent's motion for summary decision is granted, and the petition of appeal is hereby dismissed.[1]

IT IS SO ORDERED.[2]

Kathleen Elliz

ACTING COMMISSIONER OF EDUCATION

Date of Decision: October 13, 2023
Date of Mailing: October 18, 2023

[1] Moreover, the Commissioner finds that the instant petition was untimely filed and is subject to dismissal on that basis alone. Pursuant to *N.J.A.C.* 6A:3-1.3(i), petitions must be filed "no later than the 90th day from the date of receipt of the notice of a final order, ruling, or other action." The State Board of Examiners' decision from which petitioner sought relief was emailed to him on March 4, 2022. He filed his petition on June 28, 2022—116 days after he was served with the decision at issue. The record does not contain any basis upon which to conclude that a failure to relax the ninety-day deadline would be inappropriate or result in an injustice.

[2] This decision may be appealed to the Appellate Division of the Superior Court pursuant to *N.J.S.A.* 18A:6-9.1. Under *N.J.Ct.R.* 2:4-1(b), a notice of appeal must be filed with the Appellate Division within 45 days from the date of mailing of this decision

State of New Jersey
OFFICE OF ADMINISTRATIVE LAW

INITIAL DECISION
GRANTING MOTION FOR
SUMMARY DECISION
OAL DKT. NO. EDU 05966-22
AGENCY DKT. NO. 162-6/22

ALVIN HERRON,
Petitioner,
v.
NEW JERSEY DEPARTMENT OF EDUCATION, BOARD OF EXAMINERS,
Respondent.

Alvin R. Herron, petitioner, pro se

David L. Kalisky, Deputy Attorney General, for respondent (Matthew J. Platkin, Attorney General of New Jersey, attorney)

Record Closed: December 28, 2022 Decided: September 8, 2023

BEFORE **JEFFREY N. RABIN**, ALJ:

STATEMENT OF THE CASE

Petitioner, Alvin Herron, appealed the denial of his application for a Standard Supervisor Certificate ("SSC"), by respondent, the New Jersey Department of Education,

Board of Examiners (respondent or Board). Respondent's Answer to petitioner's appeal contained a motion to dismiss, which is treated herein as a motion for summary decision.

PROCEDURAL HISTORY

On March 4, 2022, the Board issued its decision denying petitioner's application for an SSC. Petitioner filed an appeal on June 28, 2022, which was transmitted to the Office of Administrative Law (OAL) and filed on July 20, 2022, as a contested case. N.J.S.A. 52:14B-1 to N.J.S.A. 52:14B-15; N.J.S.A. 52:14F-1 to N.J.S.A. 52:14F-13.

In lieu of an Answer, respondent filed the within motion for summary decision with accompanying brief, on or about July 18, 2022. Petitioner filed a brief on December 13, 2022, and respondent submitted a reply brief on December 28, 2022.

FACTUAL DISCUSSION AND FINDINGS OF FACT

Based upon the parties' moving papers and briefs, and for the purpose of deciding this motion for summary decision, I **FIND** the following:

1. Petitioner teaches in New Jersey under an instructional certificate with a military science endorsement, and does not hold a standard New Jersey instructional or educational services certificate, or its out-of-state equivalent. His teaching experiences at the Department of Corrections and the Juvenile Justice Commission were completed under petitioner's military science endorsement. He sought an SSC in order to become a supervisor of Correctional Educational Services.

LEGAL ANALYSIS AND CONCLUSION OF LAW

The issue is whether the Board is entitled to a summary decision in the within matter, or whether a full hearing should be held.

Summary decision may be granted when the papers and discovery that have been filed show that there is no genuine issue as to any material fact challenged and the moving party is entitled to prevail as a matter of law. N.J.A.C. 1:1-12.5(b). No evidentiary hearing needs to be held if there are no disputed issues of material fact. Frank v. Ivy Club, 120 N.J. 73, 98, cert. denied, 498 U.S. 1073 (1991). "When the evidence is so one-sided that one party must prevail as a matter of law, the [tribunal] should not hesitate to grant summary [decision]." Della Vella v. Bureau of Homeowner Protection, OAL Dkt. No. CAF 17020-13, 2014 WL 1383908 (N.J. Adm. 2014) (quoting Brill v. Guardian Life Ins. Co. of Am., 142 N.J. 520, 529 (1995)).

Further, the non-moving party has the burden "to make an affirmative demonstration . . . that the facts are not as the movant alleges." Spiotta v. William H. Wilson, Inc., 72 N.J. Super. 572, 581 (App.Div. 1962). This requirement, however, does not relieve the moving party from having to initially establish in its moving papers that there was no genuine issue of fact and that they were entitled to prevail as a matter of law. It is the "movant's burden to exclude any reasonable doubt as to the existence of any genuine issue of fact." Conti v. Board of Education, 286 N.J. Super. 106 (App. Div. 1995) (quoting Judson v. Peoples Bank and Trust Co. of Westfield, 17 N.J. 67, 74 (1954)).

For an adverse party to a motion for summary decision to prevail they must, by responding affidavit, set forth specific facts showing that there was a genuine issue which could only be addressed in an evidentiary proceeding. N.J.A.C. 1:1-12.5(b).

On March 4, 2022, the Board denied petitioner's application for an SSC, by denying petitioner's request to substitute his licensure deficiencies under N.J.A.C. 6A:9B-12.6(a)(3), with his military science endorsement and teaching experience that was completed under that endorsement, based on N.J.A.C. 6A:9B-11.8(c), which stated that holders of a military science endorsement were not to use it as the basis for obtaining additional endorsements.

In support of his appeal, petitioner requested that the Board accept his standard instructional certificate with a military science endorsement, as well as his teaching

experiences at the Department of Corrections and the Juvenile Justice Commission, which were completed under his military science endorsement, as experience equivalent to the requirements in N.J.A.C. 6A:9B-12.6(a)(3). In denying petitioner's application for an SSC, respondent advised petitioner that candidates for the SSC needed to "hold a standard New Jersey instructional or educational services certificate, or its out-of-state equivalent." N.J.A.C. 6A:9B-12.6(a)(3), and that petitioner did not meet that requirement. Additionally, respondent found that petitioner also failed to meet the requirement under N.J.A.C. 6A:9B-12.6(a)(3) that candidates "complete three years of successful, full-time teaching and/or educational services experience," because petitioner's teaching experience was not completed under an appropriate New Jersey certificate.

In his brief responding to respondent's motion, petitioner failed to argue that there were genuine issues of fact in dispute that required a full due process hearing, and failed to argue that respondent was not entitled to a summary decision in this matter. Petitioner provided no affidavit setting forth specific facts showing that there was a genuine issue which could only be addressed in an evidentiary proceeding, as required by N.J.A.C. 1:1-12.5(b).

There appears to be no factual questions in this case. Petitioner disagreed with respondent's interpretation of the law, which would make this case ripe for a summary decision motion.

In respondent's motion and briefs, they correctly argued that it was reasonable for the Board to deny petitioner's application for an SSC because he failed to meet those aforementioned regulatory requirements under N.J.A.C. 6A:9B-12.6(a)(3). It is true, however, that an applicant who is deficient in the certification requirements may provide the Board with evidence of "alternative education and/or experience that the applicant believes is equivalent to the areas of deficiency." N.J.A.C. 6A:9B-4.12(b). Respondent submitted that while the Board did not waive requirements for certification, under N.J.A.C. 6A:9B-4.12(b) the Board is given the discretionary authority to accept alternate education and/or experience if it is equivalent to the requirement.

Yet respondent is also correct in asserting that the burden would be on the applicant to present, by a preponderance of the evidence, such information necessary to establish the "one-to-one correspondence" of alternate education or experience to the regulatory requirements that were deemed deficient. See Hutchinson v. N.J. Dept. of Educ., State Bd. Of Exam'rs, EDU 16373-12, Initial Decision (Apr. 5, 2013), adopted, (May 15, 2013); McQuilken v. N.J. St. Bd. of Exam'rs, OAL Dkt. No. EDU 8375-11, Initial Decision (Dec. 13, 2011), http://njlaw.rutgers.edu/collections/oal, adopted Comm'r (January 27, 2012) (citing Farrar v. St. Bd. of Exam'rs, OAL Dkt. No. EDU 13768-08, Initial Decision (Sept. 9, 2009), adopted, Comm'r (July 26, 2010), http://njlaw.rutgers.edu/collections/oal/).

Petitioner failed to meet his burden of proving that he had sufficient alternate education or experience to substitute for the necessary certification. Petitioner asked the respondent to consider his military science endorsement and his professional teaching experience, namely his teaching experiences at the Department of Corrections and the Juvenile Justice Commission, as substitutes for the requirements of N.J.A.C. 6A:9B-12.6(a)(3). But the Board found that petitioner's teaching experiences at the Department of Corrections and the Juvenile Justice Commission were completed under his military science endorsement and concluded that N.J.A.C. 6A:9B-11.8(c) prohibited holders of the military science endorsement from "us[ing] it as the basis for obtaining additional endorsements." As a result, the Board held that it was "constrained from accepting [petitioner's] military science endorsement in order to meet the requirements for certification as a supervisor" set out in N.J.A.C. 6A:9B-12.6(a)(3).

N.J.A.C. 6A:9B-12.6(a)(3) requires that all applicants for the SSC must "[h]old a standard New Jersey instructional or educational services certificate, or its out-of-State equivalent, and complete three years of successful, full-time teaching and/or educational services experience." N.J.A.C. 6A:9B-12.6(a)(3) also requires that any applicant who has completed three years of full-time teaching experience in New Jersey must also be able to demonstrate that their experience was completed "under an appropriate New Jersey certificate." Petitioner failed to prove that he met the "appropriate New Jersey certificate" requirement; his teaching experience took place pursuant to a military science endorsement, and N.J.A.C. 6A:9B-11.8(c) prohibited holders of the military science

endorsement from using that endorsement as the basis for obtaining further endorsements. The Board argued that it had no discretion or authority to waive the requirements of N.J.A.C. 6A:9B-12.6(a)(3), and petitioner failed to argue or prove that respondent had such authority.

Petitioner offered no additional information or facts in dispute which might be considered by respondent, and failed to argue that there were any genuine issues in dispute for which a full due process hearing was warranted. Petitioner, as the non-moving party, had the burden to make an affirmative demonstration that the facts were not as the movant alleges, per Spiotta, 72 N.J. Super. at 581, but petitioner failed to do so.

I **CONCLUDE** that petitioner did not comply with the requirements of N.J.A.C. 6A:9B-12.6(a)(3) that all applicants for the SSC must hold a standard New Jersey instructional or educational services certificate, or its out-of-State equivalent, and complete three years of successful, full-time teaching and/or educational services experience under an appropriate New Jersey certificate.

Rather than argue the merits of respondent's motion for summary decision, petitioner's argument was that respondent's reliance on N.J.A.C. 6A:9B-II.8(c) violated the Uniformed Services Employment and Reemployment Rights Act, 38 U.S.C. § 4301 et seq. ("USERRA"). 38 U.S.C. § 43II(a) states:

> [a] person who is a member of, applies to be a member of, performs, has performed, applies to perform, or has an obligation to perform service in a uniformed service shall not be denied initial employment, reemployment, retention in employment, promotion, or any benefit of employment by an employer on the basis of that membership, application for membership, performance of service, application for service, or obligation.

However, petitioner was not denied a promotion because he was in the military. He was denied a certificate which would have allowed a promotion because he chose to teach pursuant to a military endorsement. Petitioner's military background in no way

precluded him from complying with the standards set forth for obtaining an SSC. Petitioner could have taken steps to obtain a standard New Jersey instructional or educational services certificate, or its out-of-state equivalent, but instead hoped to use his military endorsement as the means for circumventing the regulatory requirements for procuring an SSC.

I **FIND** that respondent did not deny petitioner's application for an SSC due to his military service, and further **FIND** that petitioner failed to prove that USERRA was violated in the within matter. In that USERRA had not been violated by respondent, petitioner's argument that USERRA superseded New Jersey law was moot.

Similarly, because respondent did not deny petitioner's application for an SSC due to his military service, petitioner's arguments that respondent violated the New Jersey Law Against Discrimination (LAD) and N.J.S.A. 10:5-12(a) were moot. Regardless, whether a New Jersey regulation or statute is violative of another New Jersey regulation or statute, or violative of a Federal regulation or statute, is not a matter properly before this court; a challenge to New Jersey law must be filed in the Appellate Division.

Accordingly, I **FIND** that there are no genuine issues of fact which would require a full due process evidentiary hearing and **CONCLUDE** that this matter is ripe for a summary decision. I **CONCLUDE** that the respondent's motion for summary decision is **GRANTED**.

ORDER

I hereby **ORDER** that the respondent's motion for summary decision is **GRANTED** and the within appeal is **DISMISSED**.

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

This recommended decision may be adopted, modified, or rejected by the **COMMISSIONER OF THE DEPARTMENT OF EDUCATION,** who by law is authorized to make a final decision in this matter. If the Commissioner of the Department of

Education does not adopt, modify, or reject this decision within forty-five days and unless such time limit is otherwise extended, this recommended decision shall become a final decision in accordance with N.J.S.A. 52:14B-10.

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

September 8, 2023
DATE

JEFFREY N. RABIN, ALJ

Date Received at Agency: _____

Date Mailed to Parties: _____

JNR/jm

APPENDIX

BRIEFS

For petitioner

Brief, dated December 13, 2022

For respondent

Motion For Summary Decision with accompanying brief, dated July 18, 2022

Reply brief, dated December 28, 2022

305-23

New Jersey Commissioner of Education

Final Decision

N.M., on behalf of minor child, E.M.,

Petitioner,

v.

Board of Education of the Township of Voorhees, Camden County,

Respondent.

Synopsis

Pro se petitioner appealed the finding of the respondent Board that her son – a student at Voorhees Middle School – was not the victim of harassment, intimidation, and bullying (HIB) pursuant to the Anti-Bullying Bill of Rights Act (Act), *N.J.S.A.* 18A:37-13 *et seq.* Petitioner alleged that E.M. was the victim of HIB when a student acted aggressively toward him during a kickball practice. Specifically, when E.M. told the second student, T.B., that he was in the wrong kickball line, T.B. pushed E.M. in the face and called him a "racist." Petitioner subsequently notified the school about the incident, which triggered an HIB investigation. Petitioner alleged that three days after the kickball confrontation T.B. made a comment about E.M.'s size, calling him "small" for not playing tackle football, which N.M. claimed is a distinguishing characteristic under the HIB statute. The HIB investigation concluded that the incident was not motivated by a distinguishing characteristic and therefore did not constitute HIB. The school took remedial action against T.B. by separating him from E.M. and treating T.B.'s behavior as a code of conduct violation. The Board filed a motion for summary decision, which was opposed by petitioner.

The ALJ found, *inter alia*, that: there are no material facts at issue in this case, and the matter is ripe for summary decision; petitioner did not proffer any evidence about E.M.'s size relative to the other student involved, or any of his peers; petitioner failed to prove that T.B.'s conduct in the kickball line was motivated by E.M.'s size or any other distinguishing characteristic; therefore, the conduct did not satisfy the statutory definition of HIB. The ALJ concluded that the Board's decision was not arbitrary, capricious, or unreasonable. Accordingly, the ALJ granted the Board's motion for summary decision and dismissed the petition

Upon a comprehensive review, the Commissioner, *inter alia,* concurred with the ALJ that the Board did not act in an arbitrary, capricious, or unreasonable manner in rendering its HIB determination as the alleged action was not motivated by a distinguishing characteristic of E.M. Accordingly, the Initial Decision of the OAL was adopted as the final decision in this matter, and the petition was dismissed.

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

305-23
OAL Dkt. No. EDU 10879-22
Agency Dkt. No. 295-11/22

New Jersey Commissioner of Education

Final Decision

N.M., on behalf of minor child, E.M.,

Petitioner,

v.

Board of Education of the Township of Voorhees, Camden County,

Respondent.

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

Petitioner challenges respondent Board's determination that an incident during which another student acted aggressively toward E.M. did not constitute harassment, intimidation, or bullying (HIB). When the other student joined E.M.'s class's kickball line, E.M. asked him why he was in line where he did not belong. Initial Decision, at 2. In response, the other student "pushed" E.M. in the face and called him a "racist." *Ibid.* At the conclusion of the investigation, during which both students were interviewed, the anti-bullying coordinator determined that the incident did not qualify as HIB because the other student's conduct was not motivated by a distinguishing characteristic. The Board agreed.

After this matter was transmitted to the OAL, the Board filed a motion for summary decision. Petitioner opposed the motion but failed to submit a responding affidavit as is required

by *N.J.A.C.* 1:1-12.5(b). She asserted that, based upon comments the other student allegedly made to E.M. several days after the incident occurred, the other student's conduct toward E.M. in the kickball line was motivated by a distinguishing characteristic—E.M.'s small size—and therefore qualified as HIB.

Ultimately, the Administrative Law Judge (ALJ) determined that the material facts were not in dispute and granted the Board's motion for summary decision. The ALJ concluded that petitioner did not proffer any evidence about E.M.'s size relative to the other student involved, or any of his peers. Consequently, the ALJ held that petitioner failed to prove that the other student's conduct in the kickball line was motivated by E.M.'s size or any other distinguishing characteristic and that, therefore, the conduct did not satisfy the statutory definition of HIB. Thus, the ALJ concluded that the Board's decision was not arbitrary, capricious, or unreasonable.

Upon review, the Commissioner adopts the ALJ's Initial Decision as the Final Decision in this matter. Board action conducted within the ambit of its broad discretionary authority "may not be upset unless patently arbitrary, without rational basis or induced by improper motives." *Kopera v. W. Orange Bd. of Educ.*, 60 *N.J. Super.* 288, 294 (App. Div. 1960). The Commissioner may not substitute their judgment for that of the Board. *Schinck v. Bd. of Educ. of Westwood Consol. Sch. Dist.*, 60 *N.J. Super.* 448, 476 (App. Div. 1960).

As discussed in the ALJ's Initial Decision, the Anti-Bullying Bill of Rights Act (the Act), at *N.J.S.A.* 18A:37-14, defines HIB as:

> [A]ny gesture, any written, verbal or physical act, or any electronic communication, whether it be a single incident or a series of incidents, that is reasonably perceived as being motivated either by any actual or perceived characteristic, such as race, color, religion, ancestry, national origin, gender, sexual orientation, gender identity and expression, or a mental, physical or sensory

> disability, or by any other distinguishing characteristic, that takes place on school property, at any school-sponsored function, on a school bus, or off school grounds as provided for in section 16 of P.L. 2010, c.122 (C.18A:37-15.3), that substantially disrupts or interferes with the orderly operation of the school or the rights of other students and that:
>
> a. a reasonable person should know, under the circumstances, will have the effect of physically or emotionally harming a student or damaging the student's property, or placing a student in reasonable fear of physical or emotional harm to his person or damage to his property;
>
> b. has the effect of insulting or demeaning any student or group of students; or
>
> c. creates a hostile educational environment for the student by interfering with a student's education or by severely or pervasively causing physical or emotional harm to the student.

In summary, a finding of HIB requires three elements under the Act. First, the conduct must be reasonably perceived as being motivated by any actual or perceived characteristic expressly identified in the statute, or by any other distinguishing characteristic.[1] Second, the conduct must substantially disrupt or interfere with the rights of other students or the orderly operation of the school. Third, one of the three conditions set forth in subsections (a), (b), and (c) must be satisfied. *Wehbeh v. Bd. of Educ. of the Twp. of Verona, Essex Cnty.*, Commissioner Decision No. 510-20 (Feb. 4, 2020).

The Commissioner concurs with the ALJ that the record is devoid of any evidence to satisfy the first statutory element, i.e., that the other student's conduct toward E.M. could be reasonably perceived as being motivated by any distinguishing characteristic, specifically E.M.'s size. Furthermore, the evidence fails to establish that the comments allegedly made to E.M. by the other student three days later regarding his small size were in any way related to the incident in

[1] The parties do not dispute that the conduct at issue took place on school property.

the kickball line. Moreover, the anti-bullying coordinator made findings during the investigation that E.M. "does not stand out as big or small" or "weak or isolated" among his peers. Initial Decision, at 3. Petitioner has failed to refute these findings. While certainly inappropriate, the other student's conduct toward E.M. in the kickball line does not constitute HIB under the Act.[2] *See K.L. v. Evesham Twp. Bd. of Educ.*, 423 *N.J. Super.* 337, 351 ("[A]ggressive conduct without identifiable motivation[] does not come within the statutory definition of bullying."). Thus, the Commissioner concurs with the ALJ that the Board's determination declining to find that a HIB incident occurred was not arbitrary, capricious, or unreasonable.

Accordingly, the Board's motion for summary decision is granted, and the petition of appeal is hereby dismissed.

IT IS SO ORDERED.[3]

Kathleen Elliry
ACTING COMMISSIONER OF EDUCATION

Date of Decision: October 13, 2023
Date of Mailing: October 18, 2023

[2] As noted in the Initial Decision, the Board disciplined the other student for his conduct as it constituted a Code of Conduct violation and ensured that the children were separated.

[3] This decision may be appealed to the Appellate Division of the Superior Court pursuant to *N.J.S.A.* 18A:6-9.1. Under *N.J.Ct.R.* 2:4-1(b), a notice of appeal must be filed with the Appellate Division within 45 days from the date of mailing of this decision.

State of New Jersey
OFFICE OF ADMINISTRATIVE LAW

INITIAL DECISION
SUMMARY DECISION
OAL DKT. NO. EDU 10879-22
AGENCY DKT. NO. 295-11/22

N.M., ON BEHALF OF MINOR CHILD, E.M.,
Petitioner,
v.
BOARD OF EDUCATION OF THE TOWNSHIP OF VOORHEES, CAMDEN COUNTY,
Respondent.

N.M., on behalf of E.M., petitioner, pro se

Alicia D'Anella, Esq., for respondent (Parker McCay, P.A., attorneys)

Record Closed: September 1, 2023 Decided: September 7, 2023

BEFORE **SARAH H. SURGENT**, ALJ:

STATEMENT OF THE CASE

Petitioner N.M., on behalf of her minor child, E.M., contends that the Board of Education of the Township of Voorhees, Camden County (Board) erred in finding that

E.M. was not a victim of harassment, intimidation, or bullying (HIB) by a fellow classmate. N.M. maintains that the Board's decision was arbitrary, capricious, and unreasonable, which the Board denies.

PROCEDURAL HISTORY

N.M.'s petition of appeal was filed with the Commissioner of Education on November 23, 2022. It was transmitted to the Office of Administrative Law (OAL) on December 6, 2022, to be heard as a contested case. On March 1, 2023, the Board filed a motion for summary decision, pursuant to N.J.A.C. 1:1-12.5. On April 18, 2023, N.M. filed her opposition to the motion with exhibits, but with no responding affidavits, contrary to N.J.A.C. 1:1-12.5(b). The Board filed its reply on June 30, 2023. After receiving missing supplemental exhibits, (C-1; C-2), the record closed on September 1, 2023.

FACTUAL DISCUSSION AND FINDINGS

Having reviewed the parties' documents, these salient points are undisputed. I therefore **FIND** the following as **FACT**:

On May 20, 2022, E.M. was a student at Voorhees Middle School (School). E.M. and his classmates were playing kickball outside and were lined up in two lines. T.B., the alleged perpetrator, joined E.M.'s line, where he did not belong. E.M. told T.B., in essence, that he was in the wrong line, and T.B. got upset and pushed, slapped, or "smacked" E.M. in the face and called E.M. a "racist." E.M. reported the incident to his mother, N.M., who then sent the School an email replete with hearsay upon hearsay, (R-A), which launched an HIB investigation into the incident.

On May 23, 2022, the School received N.M.'s complaint, and the School's Anti-Bullying Specialist (ABS), Steve Boianelli (Boianelli), was directed to conduct an investigation. (Boianelli Certif.). Boianelli interviewed both students on May 23, 2022, and they each confirmed that the incident had occurred. (Boianelli Certif.; R-B). It is clear from their statements that there is a history of animosity between the two students. Ibid. During his interview, E.M. also complained that on May 23, 2022, three days after

the playground incident, T.B. called E.M. "small" for not playing tackle football, which N.M. claims is a distinguishing characteristic covered under the HIB statute. However, Boianelli noted that size was not mentioned during the May 20, 2022, incident, and that E.M. "does not stand out as big or small, and is generally well-liked, well socialized, and does not stand out as weak or isolated." Ibid. No evidence was adduced about the relative sizes of T.B. and E.M. Ibid. Boianelli concluded that E.M. was not singled out during the May 20, 2022, incident and that it was not motivated by a distinguishing characteristic, and was therefore not a HIB incident. (Boianelli Certif.). The School took remedial action against T.B. by separating him from E.M. and treating T.B.'s behavior as a code of conduct violation. (R-1; Donnelly Certif.).

N.M. appealed from Boianelli's decision to the Board and was heard on July 7, 2022. (C-2). The Board also heard from Boianelli. On August 29, 2022, the Board affirmed the outcome of the investigation that the May 20, 2022, occurrence was not a HIB incident. Ibid.

LEGAL ANALYSIS AND CONCLUSIONS

A summary decision "may be rendered if the papers and discovery which have been filed, together with the affidavits, if any, show that there is no genuine issue as to any material fact challenged and that the moving party is entitled to prevail as a matter of law." N.J.A.C. 1:1-12.5(b). That rule is substantially similar to the summary judgment rule embodied in the New Jersey Court Rules. See R. 4:46-2; Judson v. Peoples Bank & Trust Co. of Westfield, 17 N.J. 67, 74 (1954).

In Brill v. Guardian Life Ins. Co., 142 N.J. 520 (1995), the New Jersey Supreme Court addressed the appropriate test to be employed in determining the motion:

> [A] determination whether there exists a "genuine issue" of material fact that precludes summary judgment requires the motion judge to consider whether the competent evidential materials presented, when viewed in the light most favorable to the non-moving party, are sufficient to permit a rational fact finder to resolve the alleged disputed issue in favor of the non-moving party. The "judge's function is not . . . to weigh the

> evidence and determine the truth of the matter but to determine whether there is a genuine issue for trial."
>
> [Id. at 540 (quoting Anderson v. Liberty Lobby, Inc., 477 U.S. 242, 250 (1986)).]

In evaluating the merits of the motion, "[a]ll inferences of doubt are drawn against the movant and in favor of the opponent of the motion." Judson, 17 N.J. at 75. However, "[w]hen a motion for summary decision is made and supported, an adverse party in order to prevail must by responding affidavit set forth specific facts showing that there is a genuine issue which can only be determined in an evidentiary proceeding." N.J.A.C. 1:1-12.5(b) (emphasis added). N.M. did not submit any responding affidavit.

Having reviewed the parties' submissions, I **CONCLUDE** that no genuine issues of material fact exist which require a plenary hearing regarding the issue of whether a HIB incident occurred on May 20, 2022. This matter is therefore ripe for summary decision.

The Anti-Bullying Bill of Rights Act (ABRA), N.J.S.A. 18A:37-13.2 et seq., was enacted "to strengthen the standards and procedures for preventing, reporting, investigating, and responding to incidents of harassment, intimidation and bullying of students that occur in school and off school premises." N.J.S.A. 18A:37-13.1f. N.J.S.A. 18A:37-15 requires that each New Jersey school district "adopt a policy prohibiting harassment, intimidation or bullying on school property, at a school-sponsored function or on a school bus," which, at a minimum shall contain itemized components including procedures for reporting and investigating alleged HIB incidents. A school's HIB policy must also "include provisions for appropriate responses to [HIB] . . . that occurs off school grounds, in cases in which a school employee is made aware of such actions," and those responses "shall be consistent with the board of education's code of student conduct and other provisions of the board's policy on [HIB]." N.J.S.A. 18A:37-15.3.

> "Harassment, intimidation or bullying" means any gesture, any written, verbal or physical act, or any electronic communication, whether it be a single incident or a series of incidents, that is reasonably perceived as being motivated either by any actual or perceived characteristic, such as race, color, religion, ancestry, national origin, gender, sexual

> orientation, gender identity and expression, or a mental, physical or sensory disability, or by any other distinguishing characteristic, that takes place on school property, at any school-sponsored function, on a school bus, or off school grounds as provided for in section 16 of P.L.2010, c.122 (C.18A:37-15.3), that substantially disrupts or interferes with the orderly operation of the school or the rights of other students . . .
>
> [N.J.S.A. 18A:37-14 (emphasis added).]

In her kitchen-sink brief, through hearsay upon hearsay, N.M. raises a litany of issues not germane to this appeal, and not supported by any competent credible evidence and responding affidavits. She did not adduce any evidence about E.M.'s size relative to any of his classmates, including T.B. In sum, she did not prove that E.M.'s size, which she characterizes as a "distinguishing characteristic," in any way motivated T.B.'s conduct on May 20, 2022. I therefore **CONCLUDE** that T.B's conduct did not meet the definition of a HIB incident, and that the Board's decision was not arbitrary, capricious, or unreasonable.

ORDER

It is therefore **ORDERED** that the Board's motion for summary decision is hereby **GRANTED**, and it is further

ORDERED that N.M.'s petition of appeal is hereby **DISMISSED**.

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

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

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

September 7, 2023 — Sarah H. Surgent

DATE — **SARAH H. SURGENT**, ALJ

Date Received at Agency: _____

Date Mailed to Parties: _____

SHS/nn/mph

APPENDIX

EXHIBITS

For the Judge

C-1 HIBster Report, dated July 5, 2022

C-2 Letter from Dr. Neely Hackett, Superintendent of Voorhees Schools, to E.M.'s parents, with Board's final decision

For Petitioner

P-A Email from N.M. to School, dated May 21, 2022

P-B Statements of E.M. and T.B. to Boianelli, dated May 23, 2022

P-C Email from N.M. to School, dated May 23, 2022

P-D School District Policy 3280

P-E Certification of Boianelli, dated March 31, 2023; Certification of Susan Donnelly, dated March 31, 2023

For Respondent

R-1 Certification of Boianelli, dated March 31, 2023; Certification of Susan Donnelly, dated March 31, 2023

R-A Email from N.M. to School, dated May 21, 2022

R-B Statements of E.M. and T.B. to Boianelli, dated May 23, 2022

R-C Email from N.M. to School, dated May 23, 2022

R-D Certification of Susan Donnelly, dated June 29, 2023

R-DA School's HIB Audit Trail

306-23

New Jersey Commissioner of Education

Final Decision

L.R., on behalf of minor child, M.R.,

Petitioner,

v.

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

Respondent.

Synopsis

Pro se petitioner appealed the finding of the respondent Board that her daughter committed an act of harassment, intimidation, and bullying (HIB) pursuant to the Anti-Bullying Bill of Rights Act (Act), *N.J.S.A.* 18A:37-13 *et seq.* On November 4, 2022, the victim, one of M.R.'s classmates, received a text message with a picture of the character Stewie Griffin from Family Guy and a picture of the victim stating "Hey Stewie, what do you call someone with a big head?" M.R. admitted to posting the TikTok video but denied that it referred to the victim and stated that the message was simply an inside joke between her and another student. The petitioner argued, *inter alia,* that the HIB statute is unreasonable but failed to allege that the Board's determination regarding M.R. was arbitrary, capricious, or unreasonable. The Board filed a motion for summary decision, to which petitioner responded that she believes the HIB statute is too broad.

The ALJ found, *inter alia*, that: there are no material facts at issue in this case, and the matter is ripe for summary decision; M.R. admitted posting the TikTok image of Stewie Griffin which the HIB investigation found referred to the victim in a derogatory manner; petitioner did not allege that the Board's decision was arbitrary, capricious, or unreasonable; the investigation revealed that M.R. and two other girls used "Stewie Griffin" as a code name for the victim due to the size of her forehead; and the hurtful social media messages caused the victim to miss several days of school and necessitated her transfer to other classes to avoid being in the same classroom with M.R. The ALJ concluded that the Board's decision was not arbitrary, capricious, or unreasonable. Accordingly, the ALJ granted the Board's motion for summary decision and dismissed the petition.

Upon review, the Commissioner, *inter alia,* concurred with the ALJ that the Board did not act in an arbitrary, capricious, or unreasonable manner in rendering its HIB determination in this case. Accordingly, the Initial Decision of the OAL was adopted as the final decision in this matter, and the petition was dismissed.

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

306-23
OAL Dkt. No. EDU 04391-23
Agency Dkt. No. 109-4/23

New Jersey Commissioner of Education

Final Decision

L.R., on behalf of minor child, M.R.,

Petitioner,

v.

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

Respondent.

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

Upon review, and for the reasons stated therein, the Commissioner hereby adopts the Initial Decision as the Final Decision in this matter. The Commissioner concurs with the Administrative Law Judge (ALJ) that petitioner failed to demonstrate, pursuant to *N.J.A.C.* 1:1-12.5(b), that there existed any genuine issue of material fact warranting an evidentiary hearing. Therefore, it was appropriate for the ALJ to decide the matter summarily. In addition, the Commissioner concurs with the ALJ that the Board's decision that M.R. committed an act of harassment, intimidation, and bullying was not arbitrary, capricious, or unreasonable.

Accordingly, the Board's motion for summary decision is granted, and the petition of appeal is hereby dismissed.

IT IS SO ORDERED.[1]

Kathleen Elliott
ACTING COMMISSIONER OF EDUCATION

Date of Decision: October 13, 2023
Date of Mailing: October 18, 2023

[1] This decision may be appealed to the Appellate Division of the Superior Court pursuant to *N.J.S.A.* 18A:6-9.1. Under *N.J.Ct.R.* 2:4-1(b), a notice of appeal must be filed with the Appellate Division within 45 days from the date of mailing of this decision.

State of New Jersey
OFFICE OF ADMINISTRATIVE LAW

INITIAL DECISION
OAL DKT. NO. EDU 04391-23
AGENCY DKT. NO. 109-4/23

L.R. ON BEHALF OF MINOR CHILD M.R.,
Petitioner,
v.
BOARD OF EDUCATION OF THE BOROUGH OF PARAMUS,
Respondent.

L.R., petitioner, pro se,

Sean Fogarty, Esq., appearing on behalf of respondent (Fogarty & O'Hara, attorneys)

Record Closed: August 30, 2023 Decided: September 7, 2023

BEFORE **KIMBERLY A. MOSS**, ALJ:

PROCEDURAL HISTORY

Petitioner, L.R., challenges the respondent's finding that her child M.R. committed acts of harassment, intimidation, or bullying (HIB). On May 18, 2023, the matter was transmitted to the Office of Administrative Law (OAL) for a hearing as a contested case. The matter was assigned to the undersigned and a telephone

prehearing was conducted on June 7, 2023, wherein the parties agreed on a hearing date of August 24, 2023. A status conference was also conducted on July 20, 2023. During the pendency of the conference, the parties agreed that the August hearing date would be adjourned, and a new hearing date was scheduled for September 22, 2023. A discover deadline was given as well as a motion schedule.

Respondent filed a motion for summary decision on August 18, 2023. Petitioner filed a letter dated August 17, 2023, stating among other things that she did believe that the HIB law was too broad. On August 29, 2023, petitioner was asked if she would be responding to respondent's motion. She declined to further respond to the motion.

FACTUAL DISCUSSION

Having reviewed the submissions from the parties, I **FIND** the following **FACTS:**

On or about November 4, 2022, the District received a report of a HIB incident alleging that the victim was subjected to HIB over a series of messaging and social media incidents. On November 4, 2022, the victim received a text message with a picture of the character Stewie Griffin from Family Guy and a picture of the victim stating "Hey Stewie, what do you call someone with a big head?"

M.R. and other students confirmed the existence of a TikTok account. M.R. admitted posting the image of Stewie Griffen with the caption" If you know, you know." The victim, because of these incidents did not want to come to school. An investigation ensued. On November 4, 2022, Andrew J. Bianco, the principal of East Brook Middle school called the parents of the students to advise that there was an HIB allegation. The District's investigation began on November 7, 2022. M.R., the victim and another student were interviewed and gave statements. M.R. admitted posting the TikTok video but denied it referred to the victim. She stated that it was an inside joke between her and another student.

One of the other students involved in the incident was "Aggressor one." The victim asked Aggressor one what the Stewie thing was about. Aggressor one gave her hints based on body type and hair. Aggressor one also told the victim it was someone she hangs out with a lot.

In the investigation, Aggressor one stated that she called the victim Stewie Griffin, and it became a joke between Aggressor one, Aggressor three and M.R. Another witness stated that Stewie Griffin was a code name M.R. and Aggressor's one and three called the victim. Aggressor one stated that the victim had a big forehead and was nosy. Other students knew that Stewie Griffin was a reference to the victim. As a result of this, the victim was hurt, sad, crying a lot and did not want to come to school.

After the investigation was completed on November 22, 2022, it was determined that M.R. committed an act of HIB. The victim 's class schedule was changed but no discipline was opposed. The Superintendent, Sean Adams, affirmed the findings of HIB because the HIB behavior was motivated by a distinguishing characteristic of the victim. The results of the investigation were reported to the Board on December 12, 2022.

The results of the HIB were sent to petitioner on December 13, 2022. Petitioner requested a hearing before the Board which was held on January 23, 2023. Petitioner requested that the determination of HIB be reversed, and that the timeline of the investigation was improperly conducted at the Board meeting. The Board affirmed Superintendent Adams decision.

Petitioner argues that the HIB definition includes anything a child does and believes that the HIB law is unreasonable. Petitioner argues that the investigation did not fairly interview three children, the investigation exceeded the ten-day requirement, there was no documentation of a post from M.R. and case notes were distributed by the Board's attorneys.

LEGAL ANALYSIS AND DISCUSSION

The rules governing motions for summary decision in an OAL matter are embodied N.J.A.C. 1:1-12.5. These provisions mirror the language of Rule 4:46-2 and the New Jersey Supreme Court's decision in Judson v. Peoples Bank and Trust Company of Westfield, 17 N.J. 67 (1954). Under N.J.A.C. 1:1-12.5(b), the determination to grant summary judgment should be based on the papers presented as well as any affidavits which may have been filed with the application. In order for the adverse, i.e., the non-moving party to prevail in such an application, responding affidavits must be submitted showing that there is indeed a genuine issue of fact, which can only be determined in an evidentiary proceeding. The Court in Brill v. Guardian Life Insurance Company of America, 142 N.J. 520, 523 (1995), set the standard to be applied when deciding a motion for summary judgment. Therein the Court stated:

> The determination whether there exists a genuine issue with respect to a material fact challenged requires the Motion Judge to consider whether the competent evidential materials presented, when viewed in the light most favorable to the non-moving party . . . are sufficient to permit a rational fact finder to resolve the alleged disputed issue in favor of the non-moving party.

There is no material issue of fact in this matter.

N.J.S.A. 18A:37-14

> "Harassment, intimidation or bullying" means any gesture, any written, verbal or physical act, or any electronic communication, whether it be a single incident or a series of incidents, that is reasonably perceived as being motivated either by any actual or perceived characteristic, such as race, color, religion, ancestry, national origin, gender, sexual orientation, gender identity and expression, or a mental, physical or sensory disability, or by any other distinguishing characteristic, that takes place on school property, at any school-sponsored function, on a school bus, or off school grounds as provided for in section 16 of P.L.2010, c.122 (C.18A:37-15.3), that substantially disrupts or interferes with the orderly operation of the school or the rights of other students and that:
> a. a reasonable person should know, under the circumstances, will have the effect of physically or emotionally harming a student or damaging the

student's property, or placing a student in reasonable fear of physical or emotional harm to his person or damage to his property;
b. has the effect of insulting or demeaning any student or group of students; or
c. creates a hostile educational environment for the student by interfering with a student's education or by severely or pervasively causing physical or emotional harm to the student.

N.J.S.A. 18A: 37-15(b) (5) provides:

A school district shall have local control over the content of the policy, except that the policy shall contain, at a minimum, the following components:
5. a procedure for reporting an act of harassment, intimidation or bullying, including a provision that permits a person to report an act of harassment, intimidation or bullying anonymously; however, this shall not be construed to permit formal disciplinary action solely on the basis of an anonymous report.
All acts of harassment, intimidation, or bullying shall be reported verbally to the school principal on the same day when the school employee or contracted service provider witnessed or received reliable information regarding any such incident. The principal shall inform the parents or guardians of all students involved in the alleged incident, and may discuss, as appropriate, the availability of counseling and other intervention services. The principal shall keep a written record of the date, time, and manner of notification to the parents or guardians. All acts of harassment, intimidation, or bullying shall be reported in writing to the school principal within two school days of when the school employee or contracted service provider witnessed or received reliable information that a student had been subject to haraP.L.2002, c.83 (C.18A:37-14) Harassment, intimidation, or bullying. The written report shall be on a numbered form developed by the Department of Education. A copy of the form shall be submitted promptly by the principal to the superintendent of schools. The form shall be completed even if a preliminary determination is made under the school district's policy that the reported incident or complaint is a report outside the scope of the definition of harassment, intimidation, or bullying pursuant to section 2 of , and shall be kept on file at the school but shall not be included in any student record, unless the incident results in disciplinary action or is otherwise required to be contained in a student's record under State or federal law. A redacted copy of the form that removes all student identification information shall be confidentially shared with the board of education after the conclusion of the investigation if a hearing is requested by a parent or guardian pursuant to subparagraph (d) of paragraph (6) of this subsection.
The school district shall provide a means for a parent or guardian to complete an online numbered form developed by the Department of

Education to confidentially report an incident of harassment, intimidation, or bullying.
The principal shall report to the superintendent if a preliminary determination is made under the school district's policy that the reported incident or complaint is a report outside the scope of the definition of harassment, intimidation, or bullying, and the superintendent may require the principal to conduct an investigation of the incident, if the superintendent determines that an investigation is necessary because the incident is within the scope of the definition of harassment, intimidation, or bullying. The superintendent shall notify the principal of this determination in writing;

N.J.S.A. 18A:37-15(b)(6) provides:

(a)Each school district shall adopt a policy prohibiting harassment, intimidation or bullying on school property, at a school-sponsored function or on a school bus. The school district shall adopt the policy through a process that includes representation of parents or guardians, school employees, volunteers, students, administrators, and community representatives.
(b) A school district shall have local control over the content of the policy, except that the policy shall contain, at a minimum, the following components:
(6) a procedure for prompt investigation of reports of violations and complaints, which procedure shall at a minimum provide that:
(a) the investigation shall be initiated by the principal or the principal's designee within one school day of the report of the incident and shall be conducted by a school anti-bullying specialist. The principal may appoint additional personnel who are not school anti-bullying specialists to assist in the investigation. The investigation shall be completed as soon as possible, but not later than 10 school days from the date of the written report of the incident of harassment, intimidation, or bullying or from the date of the written notification from the superintendent to the principal to initiate an investigation pursuant to paragraph (5) of this subsection. In the event that there is information relative to the investigation that is anticipated but not yet received by the end of the 10-day period, the school anti-bullying specialist may amend the original report of the results of the investigation to reflect the information;
(b) the results of the investigation shall be reported to the superintendent of schools within two school days of the completion of the investigation, and in accordance with regulations promulgated by the State Board of Education pursuant to the "Administrative Procedure Act," P.L.1968, c.410 (C.52:14B-1 et seq.), the superintendent may decide to provide intervention services, establish training programs to reduce harassment, intimidation, or bullying and enhance school climate, impose discipline,

order counseling as a result of the findings of the investigation, or take or recommend other appropriate action including seeking further information;
(c) the results of each investigation shall be reported to the board of education no later than the date of the board of education meeting next following the completion of the investigation, along with information on any services provided, training established, discipline imposed, or other action taken or recommended by the superintendent.
(d) parents or guardians of the students who are parties to the investigation shall be entitled to receive information about the investigation, in accordance with federal and State law and regulation, including the nature of the investigation, whether the district found evidence of harassment, intimidation, or bullying, or whether discipline was imposed, or services provided to address the incident of harassment, intimidation, or bullying. This information shall be provided in writing within 5 school days after the results of the investigation are reported to the board. A parent or guardian may request a hearing before the board after receiving the information, and the hearing shall be held within 10 days of the request. The board shall meet in executive session for the hearing to protect the confidentiality of the students. At the hearing the board may hear from the school anti-bullying specialist about the incident, recommendations for discipline or services, and any programs instituted to reduce such incidents;
(e) at the next board of education meeting following its receipt of the report pursuant to subparagraph (c) of paragraph (6) of this subsection, the board shall issue a decision, in writing, to affirm, reject, or modify the superintendent's decision. The board's decision may be appealed to the Commissioner of Education, in accordance with the procedures set forth in law and regulation, no later than 90 days after the issuance of the board's decision; and
(f) a parent, student, guardian, or organization may file a complaint with the Division on Civil Rights within 180 days of the occurrence of any incident of harassment, intimidation, or bullying based on membership in a protected group as enumerated in the "Law Against Discrimination," P.L.1945, c.169 (C.10:5-1 et seq.);

In this matter M.R. admitted posting the TikTok image of Stewie Griffin which the investigation found referred to the victim in a derogatory manner. Petitioner did not allege that the Board's decision was arbitrary, capricious, or unreasonable. The investigation revealed that Aggressor one, Aggressor three and M.R. used Stewie Grifin as a code name for the victim due to the size of her forehead. As a result of this the victim became upset and refused to return to school, missed several days of school and did not want to be in the same class as M.R.

I **CONCLUDE** that the board ruling that M.R. committed an act of HIB was **NOT** arbitrary, capricious, or unreasonable.

ORDER

Based on the foregoing, it is **ORDERED** that respondents motion for summary decision be and is hereby **GRANTED**.

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

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

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

September 7, 2023

DATE

KIMBERLY A. MOSS, ALJ

Date Received at Agency: September 7, 2023

Date Mailed to Parties: September 7, 2023

ljb

New Jersey Commissioner of Education

Final Decision

Salvatore Piarulli,

Petitioner,

v.

Board of Education of the Borough of Garwood, Union County, Board of Education of the Township of Clark, Tracey Roland, *et al*,

Respondents.

Synopsis

Petitioner – a member of the Garwood Board of Education (Garwood or Garwood BOE) – challenged the respondent Board's action replacing him as the Garwood BOE's sending district representative (SDR) to the Clark Board of Education (Clark or Clark BOE), claiming, *inter alia*, that his removal as SDR was *ultra vires* and void. Petitioner had been appointed in January 2022 to serve as Garwood's SDR on the Clark BOE, pursuant to *N.J.S.A.* 18A:38-8.2. Garwood voted on October 18, 2022 to remove petitioner as its SDR. Petitioner subsequently served the Garwood BOE with a Notice of Claim seeking $10 million dollars in damages based on an allegation that he was slandered and libeled as the result of his removal as SDR. The instant petition was filed on January 24, 2023. The Garwood BOE filed a motion to dismiss, contending that the petition is time-barred pursuant to *N.J.A.C.* 6A:3-1.3, and that the Board has the authority under *N.J.S.A.* 18A:11-1(d) to appoint or remove any board member to / from the SDR position.

The ALJ found, *inter alia*, that: Garwood had the legal authority to remove petitioner as SDR and did not act *ultra vires* when it voted to do so; when petitioner filed his Notice of Claim, he was not protecting any of the public's rights but rather was asserting a monetary claim for his own benefit; and the petition was filed beyond the allowable time limit. Accordingly, the ALJ granted the Board's motion to dismiss the case as untimely under *N.J.A.C.* 6A:3-1.3(i).

Upon review, the Commissioner concurred with the ALJ that the petition of appeal was untimely under *N.J.A.C.* 6A:3-1.3(i) and adopted the Initial Decision of the OAL with modification to acknowledge that petitioner's claims regarding Garwood's filing of a Superior Court lawsuit were timely, as they were included in the petition of appeal and filed four days after the lawsuit was filed. However, all issues regarding petitioner's alleged conflict of interest and removal from the Garwood BOE were resolved prior to the Commissioner's consideration of the case herein and are therefore moot. Accordingly, the petition was dismissed.

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

309-23
OAL Dkt. No. 01274-23
Agency Dkt. No. 11-1/23

New Jersey Commissioner of Education

Final Decision

Salvatore Piarulli,

Petitioner,

v.

Board of Education of the Borough of Garwood, Union County, Board of Education of the Township of Clark, Union County, Tracey Roland, Timothy Ryan, Al DelConte, Christine Gurriero, Vincent Basciano, Adrienne Barnes, Jennifer Uva, April Farrell, Tina Simitz, Linda Koenig, and Maureen Crawford,

Respondents.

The record of this matter, the Initial Decision of the Office of Administrative Law (OAL), the exceptions filed by petitioner pursuant to *N.J.A.C.* 1:1-18.4, and the reply thereto by the Garwood Board of Education (Garwood or Garwood BOE), have been reviewed and considered.

Petitioner is a member of the Garwood BOE. Garwood sends its students to Clark Township for high school. Pursuant to, Garwood is entitled to one representative on the Clark Board of Education (Clark or Clark BOE). Petitioner was appointed as Garwood's sending district representative (SDR) on the Clark BOE in January 2022. On October 18, 2022, Garwood voted to remove petitioner as its SDR.

On January 10, 2023, petitioner served Garwood with a Notice of Claim seeking $10 million dollars in damages based on an allegation that "[o]n October 18, 2022, Mr. Piarulli was slandered and libeled". On January 20, 2023, Garwood filed a complaint in Superior Court seeking to remove petitioner from the Garwood BOE because the Notice of Claim created a conflict of interest in violation of *N.J.S.A.* 18A:12-2. The Superior Court complaint was dismissed to allow review by the Commissioner; Garwood then filed a petition of appeal seeking petitioner's removal from the Garwood BOE. That petition was transmitted to the OAL as *Bd. of Educ. of the Borough of Garwood, Union Co. v. Salvatore Piarulli*, Agency Dkt. No. 27-2/23, EDU 01176-23. On February 13, 2023, petitioner agreed to withdraw his Notice of Claim, and Garwood agreed to withdraw its petition.

In the meantime, petitioner filed the instant petition of appeal on January 24, 2023. The petition sought relief relating to two issues. First, petitioner sought a determination that Garwood's removal of petitioner as SDR was *ultra vires* and void, and that, consequently, any actions of the Clark BOE after October 18, 2022 were also null and void. Second, petitioner sought a declaration that his Notice of Claim was primarily filed in the public interest, that Garwood's filing of the Superior Court lawsuit was *ultra vires*, and that petitioner may continue to serve on the Garwood BOE provided that he recuses himself from any discussion regarding his claim that occurs.

Following a motion to dismiss, the Administrative Law Judge (ALJ) concluded that Garwood had the authority to remove petitioner as SDR and did not act *ultra vires* when it voted to do so. The ALJ found that when petitioner filed his Notice of Claim, he was not protecting any of the public's rights but was asserting a monetary claim for his own benefit.

Finally, the ALJ concluded that the petition was filed beyond the 90-day time limit allowed by *N.J.A.C.* 6A:3-1.3(i) and must be dismissed.

In his exceptions, petitioner argues that he was removed as SDR based on defamatory allegations that he had violated the School Ethics Act, and that there is a factual dispute regarding the issue of defamation which precludes summary decision. According to petitioner, Garwood did not have the legal authority to remove him as SDR without filing a petition of appeal, because only the Commissioner has jurisdiction over matters concerning the school laws. Petitioner contends that the portion of his petition related to Garwood's filing of the Superior Court complaint was not untimely, because the petition was filed within 90 days of the date the Board filed the Superior Court complaint. Petitioner also argues that his petition was not untimely as to the rest of his claims, because Garwood engaged in a continuing tort and was on notice of his claims prior to the expiration of the 90-day limitations period, based on his January 10, 2023 Notice of Claim. Finally, petitioner argues that even if the 90-day limitations period did expire, it should be tolled on equitable grounds.

In reply, Garwood argues that the ALJ correctly concluded that Garwood had the authority to remove petitioner as SDR and that the petition of appeal was untimely. Accordingly, Garwood urges the Commissioner to adopt the Initial Decision.

Upon review, the Commissioner concurs with the ALJ that petitioner's claims regarding his removal as SDR are untimely. Pursuant to *N.J.A.C.* 6A:3-1.3(d), the 90-day period for the filing of an appeal to the Commissioner begins when the affected individuals have received adequate notice. For the notice to be adequate, the individuals must have been alerted to the existence of facts which gave rise to a cause of action. *Kaprow v. Bd. of Educ. of Berkeley Twp.*,

131 *N.J.* 572, 586-587 (1993). Petitioner was clearly on notice as of October 18, 2022, that he had been removed as SDR. Accordingly, any petition related to that action should have been filed on or before January 16, 2023, but the petition of appeal in this matter was not filed until January 24, 2023.

The Commissioner rejects petitioner's argument that Garwood was on notice that petitioner intended to challenge his removal as SDR based on the January 10, 2023 Notice of Claim. The Commissioner has previously held that the timeliness of a complaint in another forum, in and of itself, has no bearing upon the timeliness of a petition under the Department of Education's regulations. *A.S., o/b/o minor child, P.P. v. Bd. of Educ. of the Pinelands Regional Sch. Dist., Ocean Cty.*, Commissioner Decision No. 411-09 (December 16, 2009). The purpose of the time limitation is, in part, to serve as a measure of repose through which a board of education can be secure, after the 90 days have elapsed, that its decisions will not be challenged before the Commissioner. *See, e.g., Kaprow, supra.* This requirement cannot be circumvented by serving a Notice of Claim, which is governed by rules that are completely distinct from those governing controversies and disputes arising under the school laws over which the Commissioner has jurisdiction.

The Commissioner also rejects petitioner's argument that Garwood engaged in a pattern of tortious conduct and therefore the 90-day limitations period runs from the latest action. Initially, the action that petitioner claims continued the pattern was Garwood's filing of the Superior Court complaint. That filing occurred on January 20, 2023, after the time limit for petitioner to challenge the October 18, 2022 vote that removed him as SDR had expired. Moreover, the Commissioner finds that Garwood's action in seeking petitioner's removal from

the Board is separate and apart from its actions in removing him as SDR. Each action triggers the start of its own 90-day limitations period, and any claims regarding the Superior Court complaint cannot be used to excuse the late filing of petitioner's claims regarding his removal as SDR. Finally, the Commissioner concludes that there are no circumstances present that warrant the relaxation of the 90-day rule. Accordingly, the Commissioner concludes that petitioner's claims regarding his removal as SDR are untimely and must be dismissed.[1]

However, the Commissioner finds that petitioner's claims regarding Garwood's filing of the Superior Court lawsuit are timely, as they were included in the petition of appeal which was filed only four days after the lawsuit was filed. Nonetheless, the Commissioner concludes that these claims must be dismissed as moot. "Mootness is a threshold justiciability determination rooted in the notion that judicial power is to be exercised only when a party is immediately threatened with harm. A case is technically moot when the original issue presented has been resolved, at least concerning the parties who initiated the litigation. To restate, an issue is moot when the decision sought in a matter, when rendered, can have no practical effect on the existing controversy." *Betancourt v. Trinitas Hosp.*, 415 *N.J. Super.* 301, 311 (App. Div. 2010) (internal quotations and citations omitted).

The record reflects that the Superior Court complaint seeking petitioner's removal from the Garwood BOE has been dismissed, petitioner has withdrawn his Notice of Claim against Garwood, and Garwood has withdrawn the petition of appeal seeking petitioner's removal from the Garwood BOE. Therefore, all issues regarding petitioner's alleged conflict of interest and

[1] Because the Commissioner has dismissed the claims related to petitioner's removal as SDR based on *N.J.A.C.* 6A:1-1.3(i), she does not reach the issue of whether Garwood's actions in removing petitioner were proper.

removal from the Garwood BOE have been resolved. Any opinion from the Commissioner regarding the propriety of the parties' actions would be merely advisory, with no practical effect. These issues are, therefore, moot.

Accordingly, the Initial Decision is adopted as the final decision in this matter, as modified herein. The petition of appeal is hereby dismissed.

IT IS SO ORDERED.[2]

Angelica Allen-McMillan, Ed.D.
ACTING COMMISSIONER OF EDUCATION

Date of Decision: October 18, 2023
Date of Mailing: October 19, 2023

[2] This decision may be appealed to the Appellate Division of the Superior Court pursuant to *N.J.S.A.* 18A:6-9.1. Under *N.J.Ct.R.* 2:4-1(b), a notice of appeal must be filed with the Appellate Division within 45 days from the date of mailing of this decision.

State of New Jersey
OFFICE OF ADMINISTRATIVE LAW

INITIAL DECISION
OAL DKT. NO. EDU 01274-23
AGENCY REF. NO.:11-1/23

SALVATORE PIARULLI,

Petitioner,

vs.

BOARD OF EDUCATION OF THE BOROUGH OF GARWOOD, UNION COUNTY, BOARD OF EDUCATION OF THE BOROUGH OF CLARK, UNION COUNTY, TRACEY ROLAND, ET ALS.,

Respondent.

Ronald A. Berutti, Esq. for Petitioner ((Murray-Nolan, Berutti, LLC, attorneys)

Robert E. Levy, Esq. for Respondent (Scarinci & Hollenbeck, LLC, attorneys)

BEFORE: **JOHN P. SCOLLO**, ALJ

Record Closed: April 21, 2023 Decided: July 27, 2023

STATEMENT OF THE CASE

In EDU 01274-23, Petitioner, Salvatore Piarulli (hereinafter "Piarulli"), challenges Respondent, Garwood Board of Education's (hereinafter the "Garwood BOE") action

replacing him as Garwood BOE's (a sending school district) Sending District Representative (hereinafter, "SDR") to the Clark Board of Education (hereinafter "Clark BOE", which is a receiving school district). Piarulli's January 21, 2023, Petition to the New Jersey Commissioner of Education is in two Counts and seeks the following relief: (1) a determination that a resolution passed on October 18, 2022 by Board-I (a term Piarulli uses to designate the Garwood BOE as constituted as of January, 2022) removing him as Garwood's SDR was *ultra vires* and void *ab initio*; (2) a determination that after his 10/18/22 removal from the position of SDR, all actions of the Clark BOE were null and void; (3) a declaration that Piarulli's filing and service of a Notice of Tort Claim on January 11, 2023 was primarily in the public interest; (4) a determination that the lawsuit filed by Board-II (a term Piarulli uses to designate the Garwood BOE as constituted after the November, 2022 Board of Education election) for the purpose of removing him from membership on the Garwood BOE is *ultra vires*; (5) an award of legal fees and costs; and (6) other further and reasonable relief.

PROCEDURAL HISTORY

On February 2, 2023, Mark Chiarocca, J.S.C., the Presiding Judge of the Chancery Division, Union County, issued an Order dismissing without prejudice Garwood BOE's Verified Complaint (which had been filed on January 20, 2023) so as to allow the Commissioner of Education to review the matter.

The Department of Education's Office of Controversies and Disputes, on February 7, 2023 transmitted a matter filed by Garwood BOE to the Office of Administrative Law, where it was filed on February 7, 2023 as a contested case pursuant to N.J.S.A. 52:14B-1 to -15 and N.J.S.A. 52:14F-1 to 13. It was captioned Board of Education of the Borough of Garwood, Union County v. Salvatore Piarulli and assigned OAL Docket Number EDU 01176-23. Later, by the agreement of the parties, whereby Piarulli agreed to withdraw his Tort Claim Notice and the BOE agreed to withdraw its petition in EDU 01176-23, that matter was withdrawn during a teleconference on Monday, February 13, 2023.

On February 8, 2023, the Department of Education transmitted another matter, this one filed by Piarulli, to the Office of Administrative Law, where it was filed on February 8, 2023. This matter was assigned OAL Docket Number EDU 01274-23 and captioned Salvatore Piarulli v. Borough of Garwood, Board of Education of the Borough of Clark, Tracey Roland, Timothy Ryan, Al DelConte, Christine Gurriero, Vincent Basciano, Adrienne Barnes, Jennifer Uva, April Farrell, Tina Simitz,Linda Koenig, and Maureen Crawford.

On February 9, 2023 EDU 01176-23 and EDU 01274-23 were assigned to John P. Scollo, ALJ. As noted above, during the February 13, 2023 telephone Conference, EDU 01176-23 was withdrawn.

The matter now under consideration is a Motion, which Garwood BOE filed on February 10, 2023. Garwood BOE seeks to dismiss Piarulli's Petition filed under OAL Docket Number 01274-23 (Agency Number 11-1/23). Garwood BOE bases it's Motion to Dismiss on two points. First, it contends that the Petition which Piarulli filed with the Commissioner of Education on January 24, 2023 was filed beyond the 90-day time limit allowed by N.J.A.C. 6A:3-1.3 and therefore is time-barred. Second, Garwood BOE also contends that it has the authority to appoint or to remove any board member to / from the position of Sending District Representative to the Clark BOE. Its vote on a resolution to replace Piarulli as SDR took place on October 18, 2022 and was done within its authority under N.J.S.A. 18A:11-1(d). Garwood BOE notes that not only was the BOE's October 18, 2022 action legal, but Piarulli does not cite any statutory or regulatory basis on which to challenge the BOE's action.

FACTUAL DISCUSSION

In Piarulli's Sur-Reply he provided a useful Timeline, which the Tribunal will utilize, along with other chronological references in the parties' submissions, to illustrate the matter at hand. The chronology set forth below is not a verbatim account, but it sets forth events, which the Tribunal deems particularly significant. The Tribunal will intersperse pertinent facts and also the parties' contentions / positions / interpretations of laws and regulations throughout the following discussion.

Timeline

November, 2021 and January, 2022

Piarulli was elected to the Garwood BOE in the November, 2021 election, he was sworn-in in January, 2022. At the BOE's reorganization meeting, the BOE appointed him as Garwood's Sending District Representative to the BOE of Clark pursuant to N.J.S.A. 18A:38-8.1 and 8.2. Clark is where Garwood sends its high school students. Throughout the course of this Initial Decision Garwood will be referred to as a "sending district" and Clark will be referred to as a "receiving district".

October 18, 2022

On October 18, 2022, Garwood BOE voted in favor of a resolution to replace Piarulli as its SDR to the Clark BOE with another board member. Piarulli contends that this was the result of defamatory statements and retaliation by the BOE's president, whom he claims is a "political rival".

Piarulli states that sometime after the vote that replaced him as SDR he had a conversation with Garwood BOE's attorney (John G. Geppert). During that conversation, he inquired about the legal basis for the BOE's action. Piarulli states that during that conversation Geppert responded by citing N.J.S.A. 18A: 38-8.1 and also "Robert's Rules of Order". Piarulli believes that these authorities were insufficient bases for replacing him and he concluded that the vote to replace him was therefore illegal.

N.J.A.C.. 6A:3-1.3 (i) sets forth a 90-day time limit for the filing of a Petition with the Office of the Commissioner of Education, wherein a Petitioner seeks relief from an action taken by a board of education. Thus, if Piarulli wanted to contest the BOE's October 18, 2022 action that removed him as the position of SDR, the 90-day limit for filing a Petition, as measured from October 18, 2022, would expire on January 16, 2023.

January 11, 2023

On January 11, 2023, Piarulli filed a Notice of Claim in which he seeks monetary and non-monetary relief from the Garwood BOE. Piarulli maintains that his $10,000,000 monetary claim was a "placeholder" on the Notice of Claim form, but he admits that the Notice of Claim does indeed seek monetary compensation for the tort of defamation. However, he claims that his primary reason for filing the Notice of Claim was the public interest. He claims that the public interest was violated on October 18, 2022 when the BOE removed the people's duly-elected Board member from the position of SDR to the Clark BOE.

January 16, 2023, January 20, 2023 and January 24, 2023

January 16, 2023 marked ninety days from the date (October 18, 2022) that the Garwood BOE voted to replace Piarulli as the SDR to the Clark BOE.

On January 20, 2023, the Garwood BOE filed a Verified Complaint and Order to Show Cause in the Superior Court seeking to prevent Piarulli from serving on the Garwood BOE in any capacity, i.e., to remove Piarulli from membership on the Garwood BOE. The BOE's reason for filing these papers was that Piarulli's filing of the Notice of Claim on January 11, 2023 put him into a conflict of interest with his BOE obligations and thus mandated either his resignation from the BOE or his removal from the BOE pursuant to N.J.S.A. 18A:12-2. N.J.S.A. 18A:12-2 is entitled "Inconsistent Interests or Office Prohibited". It encompasses situations where a board member may have a conflict of interest. On January 20, 2023, Judge Thomas Walsh granted the BOE's application for relief, issuing a Temporary Restraining Order against Piarulli, with the proviso that Piarulli could move to vacate the restraints on two days' notice.

On January 24, 2023, Piarulli filed his Petition with the Commissioner in which he sought to overturn the resolution of October 18, 2022. January 24th was eight days beyond January 16th. Based on this fact, the BOE contends that Piarulli was late in filing his Petition and therefore his Petition is time-barred and, as such, should be dismissed. However, Piarulli contends that his Petition complains not only about the

BOE's action dated October 18, 2022, but also complains about the BOE's continuing tortious and illegal actions taken against him up to and including January 20, 2023 when Garwood BOE filed a Verified Complaint and Order to Cause in Superior Court seeking to oust Piarulli from membership on the Garwood BOE. Thus, Piarulli's response to Garwood BOE's time-limit argument is that the ninety-day time limit actually started to run from January 20, 2023 (with a consequent ninety-day time limit ending on April 20, 2023). Piarulli notes that the January 24, 2023 filing of his Petition with the Commissioner would be well within the time limit.

Piarulli, citing New Jersey's acceptance of the Continuing Tort Doctrine, contends that Garwood BOE has engaged in continuing tortious conduct against him, which culminated on January 20, 2023 when it filed the Verified Complaint and Order To Show Cause to have him removed from his membership on the BOE. The Garwood BOE points out that Piarulli filed a Notice of Claim on January 11, 2023 in which he sought $10,000,000 from the BOE as compensatory damages for alleged defamation. The BOE contends that it filed the Order to Show Cause and Verified Complaint on January 20, 2023 because, if Piarulli were to remain on the Garwood BOE while the question of his conflict of interest remained an open question, his presence would interfere with the BOE's ability to function. Thus Garwood BOE contends that it was required by N.J.S.A. 18A:12-2 to take immediate action. Both sides agree that the text of N.J.S.A. 18A:12-2 states that no member of a Board of Education may serve or continue to serve on a BOE if he has a direct or indirect interest in a claim against the BOE. Thus, Garwood BOE contends that Piarulli refused to resign and that its filing of the January 20, 2023 Verified Complaint and Order to Show Cause was a necessity required by the law and was not a tortious act.

Piarulli admits that he filed the Notice of Claim on January 11, 2023 in which he seeks non-monetary relief and a claim for money damages from the BOE. While Piarulli admits that his $10,000,000 claim does indeed say that he seeks compensation for the tort of defamation, the $10,000,000 figure was a mere placeholder on a form and that his primary reason for filing the Notice of Claim was to protect the public's interest in having its duly-elected BOE member continue to serve in a capacity to which he was appointed by the BOE (i.e., serving as the BOE's SDR).

January 24, 2023

On January 24, 2023 Piarulli, responding to Garwood BOE's Verified Complaint and Order to Show Cause, filed his own Verified Complaint and Order to Show Cause in Superior Court, Union County, Chancery Division alleging that the BOE's actions were illegal and seeking to vacate the January 20, 2023 Temporary Restraining Order issued by Judge Walsh and to dismiss Garwood's Verified Complaint.

February 2, 2023

On February 2, 2023, Mark P. Ciarrocca,, P.J. Cv., Union County Superior Court, observing that neither N.J.S.A. 18A: 6-9 nor N.J.S.A. 18A:12-2 state that the Commissioner of Education has the exclusive jurisdiction [to decide the controversy], an administrative remedy was nevertheless available. Judge Ciarrocca therefore dissolved the temporary restraints set forth in Judge Walsh's January 20, 2023 Order and dismissed Garwood BOE's Verified Complaint so as to allow review by the Commissioner of Education, pursuant to N.J.S.A. 18A:6-9.

The above-stated timeline of events and the recitation of the facts as set forth above is consistent with the parties' submissions. The Tribunal, having read all the submissions thoroughly, believes it has set forth all the facts of consequence and considers additional nuances and interpretations of facts as inconsequential.

EXPOSITION OF THE ISSUES, ANALYSIS OF THE PARTIES' ARGUMENTS, and FINDINGS OF FACT

The analysis of the parties' positions in this matter must begin with an exposition (in the form of questions) of the issues presented.

The questions presented in this matter are as follows:

(1) Under all relevant legal authorities, did the Garwood BOE have the authority to appoint, remove, or replace one of its members as its Sending District Representative?

(2) Was the Garwood BOE's removal of Piarulli as Sending District Representative and its replacement of Piarulli with another BOE member legal?

(3) Was Piarulli's filing of his Petition to the Commissioner of Education on January 11, 2023 timely?

Question Number 1: Under all relevant legal authorities, did the Garwood BOE have the authority to appoint, remove, or replace one of its members as its Sending District Representative?

Piarulli's Position

It is Piarulli's position that Garwood BOE lacked the authority to remove him from the position of Sending District Representative and did not have the authority to replace him as the SDR. Piarulli contends that he could only be removed from the position of SDR by the Commissioner and then only after he is afforded a hearing. Piarulli contends that the BOE's action on October 18, 2022 was politically motivated and /or done for unethical reasons.

Piarulli also contends that his filing of the Notice of Claim was done primarily to protect the public interest. His argument is that this is the type of situation that calls for the type of "close factual analysis" mentioned in Board of Education of Sea Isle City v. Kennedy, 196 N.J. 1 (2008) and which should not require his removal from office.

Comment by the Tribunal

The Statute that gives a BOE the authority to appoint one of its members to the position of SDR is N.J.S.A. 18A:38.1 and 38.2. (See APPLICABLE LAW section for text.) The statutes state that the local BOE has the authority to appoint one of its members to the

position of SDR, that it should do so at its organizational meeting, and that the appointment is limited to one year. N.J.S.A. 18A:38.1 and 38.2 are silent about the subject of removing or replacing the SDR. Nothing in the statute states or implies that the local BOE is unable to remove or replace the person it has appointed as SDR.

The BOE's Position

The Garwood BOE recognizes that the Commissioner, per N.J.S.A. 18A:6-9, has jurisdiction over all controversies and disputes arising under the school laws. The Garwood BOE's position is that N.J.S.A. 18A:11-1 gives local BOE's certain powers and authority regarding self-governance. In particular, Garwood cites 18A:11-1 (d) as granting a local BOE the authority to "Perform all acts and do all things consistent with law and the rules of the state board, necessary for the lawful and proper conduct ... of the public schools of the district." Thus, a BOE may remove a member whom it previously appointed as SDR from the position of SDR in its discretion.

Comment by the Tribunal

Garwood's point would be that just as the local board has the authority to enact, amend, or repeal its own by-laws, or to hire, replace or discharge providers of goods or professional services, etcetera, it has the right to appoint, in its own discretion, which member shall represent the BOE in the position of SDR. Although N.J.S.A. 18A:38-8.2 states that the SDR's term is limited to one year, companion statutes demonstrate circumstances where the SDR serves less than a full year. An instance of such a situation is set forth in N.J.S.A. 18A: 38-8.2(c) which provides for the "rotation" of people in the position of SDR.

ANALYSIS AND FINDINGS OF FACT AS TO QUESTION ONE

I agree with Judge Ciarrocca's observation, as stated in his February 2, 2023 Order, that neither N.J.S.A. 18A: 6-9 nor N.J.S.A. 18A:12-2 confer exclusive jurisdiction on the Commissioner of Education over the present controversy.

I **FIND** that the Statutes that give a BOE the authority to appoint one of its members to the position of SDR are N.J.S.A. 18A:38-8.1 and 8.2. (See APPLICABLE LAW section for text.) I **FIND** that these statutes state that the local BOE has the authority to appoint one of its members to the position of SDR, that it should do so at its organizational meeting, and that the appointment is limited to one year. I **FIND** that N.J.S.A. 18A:38-8.1 and 38.2 are silent about the subject of removing or replacing an SDR. Nothing in the statutes state or imply that a local BOE is unable to remove or replace a person it has appointed as an SDR. I **FIND** that this silence means that the power to appoint implies a correlative power to remove or replace.

This Tribunal recognizes that local BOEs are creatures of the State and may exercise only those powers granted to it by the Legislature either expressly, by necessity, or by fair implication. Atlantic City Educational Ass'n v. Board of Educ. of the City of Atlantic City, 299 N.J. Super. 649, 691 (App. Div. 1997), certification denied, 152 N.J. 192. I **FIND** that the principle of self-governance set forth in N.J.S.A. 18A:11-1 is obviously a grant of authority from the Legislature.

I **FIND** that there is no disagreement between the parties that BOE members are elected by the voters of the school district. In regard to the provisions contained in N.J.S.A. 18A:38-8.1 and 8.2, I **FIND** that committee assignments, chairmanships, and other designations are made by the BOE members themselves, not by the voters.

I **FIND** that the elected position of Board Member differs from the appointed position of SDR. I **FIND** that the appointment of a BOE member to the position of SDR is not something that the voters decide; it is one that the BOE members themselves decide collectively as a board in the exercise of their own discretion.

Piarulli's argument appears to be that his filing of the Notice of Claim protected the public's right to have him complete his one-year term as SDR, and as such should be afforded a fact-sensitive analysis under Kennedy. I **FIND** that there is no such right because N.J.S.A. 18A:38-8.1 and 8.2 clearly demonstrate that the BOE, not the voters, appoint the SDRs.

The Tribunal is aware of Piarulli's claim that the BOE's action on October 18, 2022 was politically motivated and / or was done for unethical reasons. I **FIND** that these are allegations of unethical conduct by BOE members. As such, I **FIND** that they are not matters arising under the school laws.

Question Number 2: Was the Garwood BOE's removal of Piarulli as Sending District Representative and its replacement of Piarulli with another BOE member legal?

(See Analysis and Findings set forth for Question One.)

Question Number 3: Was Piarulli's filing of his Petition to the Commissioner of Education on January 11, 2023 timely?

Piarulli's Position

The vote to remove Piarulli as SDR was taken on October 18, 2023. Ninety days later would be January 16, 2023. Piarulli filed his Petition on January 24, 2023. January 24, 2023 was eight (8) days beyond the allowable time limit as measured from the October 18, 2023 vote. However, Piarulli contends that Garwood BOE's filing of the Verified Complaint and Order to Show Cause on January 20, 2023 was a tortious act. Piarulli's argument is based on the Continuing Tort Doctrine. The Continuing Tort Doctrine is recognized in New Jersey. As stated in Wilson v. Wal-Mart Stores, 158 N.J. 263, 272 (1999),

> When an individual is subject to a continual, cumulative pattern of tortious conduct, the statute of limitations does not begin to run until the wrongful action ceases.

Thus, the Continuing Tort Doctrine is a principle of law that recognizes that when tortious behavior continues or repeats over a prolonged period of time, that course of conduct should be treated as a whole such that the statute of limitations will not begin to run until the course of conduct ends.

Piarulli contends that Garwood BOE's tortious act on January 20, 2023 (the filing date of the Verified Complaint and Order to Show Cause) was part and parcel of the BOE's earlier unethical and tortious conduct on October 18, 2022. Therefore, Piarulli argues, under the Continuing Tort Doctrine the "clock", the ninety-day limit of N.J.A.C.6A:1-1.3(i), must be re-set from October 18, 2022 to April 20, 2023. Since the clock was re-set by Garwood's continuing tortious action, his filing of his Petition on January 24, 2023 was well within the ninety-day time limit and therefore cannot be adjudicated to have been filed late.

Piarulli contends that Garwood BOE's filing of a Verified Complaint and Order to Show Cause on January 24, 2023 to remove him from the BOE was part of a continuing series of tortious actions instigated by people with unethical and political motives.

Garwood BOE's Position

In its argument, Garwood BOE looks to N.J.S.A. 18A:12-2, which provides that no BOE member shall be interested, directly or indirectly, in a claim against the BOE. Garwood BOE maintains that the meaning of this statute is that when a BOE member has a conflict of interest with the BOE, he cannot continue to serve on the BOE. He must choose between discontinuing the claim or resigning from the BOE. The statute also means that if he does not discontinue the claim, and will not resign from the BOE, then the BOE must remove him.

Garwood BOE contends that when Piarulli filed his Notice of Claim against the BOE on January 11, 2023, his own monetary interest (his assertion of a claim for money damages against Garwood BOE) instantly conflicted with his duty to uphold the interests of Garwood BOE. Garwood BOE stated that Piarulli refused to resign from the BOE, thus forcing it to take action to remove him from the BOE. So, Garwood argues that when it filed its Verified Petition and Order to Show Cause to remove Piarulli from Garwood BOE, it was actually fulfilling its duty to protect the interests of the BOE and was not engaging in any unethical, tortious, or illegal activity. That is to say, its filing of the Verified Complaint and Order to Show Cause was not even a tortious act.

So, logically, there can be no *continuing* tortious activity. Therefore, argues Garwood, the Continuing Tort Doctrine is not applicable to the matter at bar.

ANALYSIS AND FINDINGS OF FACTS AS TO QUESTION THREE

On the issue of timeliness, I **FIND** that N.J.S.A. 18A:12-2 requires that when a BOE member is in a conflict situation, he must either abandon the claim that has placed him into a conflict with his BOE duties or he must either resign or face removal. I **FIND** that Garwood BOE filed the Verified Complaint and Order To Show Cause on January 20, 2023 because Piarulli refused to resign and because it was indeed duty-bound under the statute to take immediate action to remove him from the BOE due to the conflict of interest created by his filing of the Notice of Claim on January 11, 2023.

As noted above, Piarulli alleges that Garwood BOE's filing of the Verified Complaint and Order to Show Cause on January 20, 2023 was a tortious act. I **FIND** that Garwood BOE's filing of the Verified Complaint and Order to Show Cause on January 20, 2023 was not a tortious act. The only other tortious acts Piarulli alleges are (1) defamation (which allegedly occurred on or before October 18, 2022, for which Piarulli has presented no evidence beyond his mere allegation, and which is an issue beyond the jurisdiction of the OAL) and (2) Garwood BOE's vote to remove Piarulli as the SDR on October 18, 2022. I **FIND** that there was no other tortious act that would support the application of the Continuing Tort Doctrine. Since the October 18, 2022 vote was the only other act on which Piarulli could base his Petition, then the N.J.A.C. 6A:3-1.3(i)'s ninety-day time limit applies. The vote to remove Piarulli as SDR was taken on October 18, 2022. Ninety days later would be January 16, 2023. Piarulli filed his Petition on January 24, 2023. January 24, 2023 was eight (8) days beyond the allowable time limit. I therefore **FIND** that Piarulli's Petition was filed beyond the allowable time limit.

APPLICABLE LAW

For the matter at bar the applicable Statutes and Regulations are:

(1) N.J.S.A. 18A:6-9;

(2) N.J.S.A. 18A:38-8.1 and 8.2;

(3) N.J.S.A. 18A:11-1(d);

(4) N.J.S.A. 18A:12-2;

(5) N.J.S.A. 18A:12-3; and

(6) N.J.A.C. 6A:3-1.3 (i).

N.J.S.A. 18A:6-9 states, in applicable part,

> The commissioner shall have jurisdiction to hear and determine, without cost to the parties, all controversies and disputes arising under the school laws, excepting those governing higher education, or under the rules of the state board or of the commissioner. For the purposes of this Title, controversies and disputes concerning the conduct of school elections shall not be deemed to arise under the school laws.

N.J.S.A. 18A:38-8.1 states, in applicable part,

> In addition to the members of the board of education of a Type I and Type II school district provided by law, in a school district which is receiving pupils from another district or districts pursuant to N.J.S.A. 18A:38-8, there shall be an additional member as provided pursuant to section 2 of this act, to represent the board of education of each sending district. Any additional member shall be a member of the board of education of a sending district designated annually by the board of that district and shall be eligible to vote on the following matters before the receiving district board of education:
>
> (The four types of matters set forth as "a" through "d", have been omitted as irrelevant to the matter before this Tribunal.)

N.J.S.A. 18A:38-8.2 states, in applicable part,

> A school district which is sending pupils to another school district pursuant to N.J.S.A. 18A:38-8 shall have representation on the board of education of the receiving school district as follows:
>
> (a) [omitted by the Tribunal];

(b;c) [omitted by the Tribunal, except to note that these sections provide for the rotation of SDRs]

(d) A representative of a sending board of education shall be designated at the meeting of the board which is closest in time to the annual organizational meeting of the receiving district board of education and shall serve a one-year term beginning with the organizational meeting of the receiving district board. The representative shall be subject to the rules and procedures of the receiving district board of education.

(e) [omitted by the Tribunal].

N.J.S.A. 18A:11-1(d) states:

The board shall –

a. Adopt an official seal;

b. Enforce the rules of the state board;

c. Make, amend and repeal rules, not inconsistent with his title or with the rules of the state board, for its own government and the transaction of its business and for the government and management of the public schools and public school property of the district and for the employment, regulation of conduct and discharge of its employees, subject, where applicable, to the provisions of Title 11, Civil Service, of the Revised Statutes; and

d. Perform all acts and do all things, consistent with law and the rules of the state board, necessary for the lawful and proper conduct, equipment and maintenance of the public schools of the district.

N.J.S.A. 18a:12-2 states:

No member of a board of education shall be interested directly or indirectly in any contract with or any claim against the board, nor, in the case of local and regional school districts, shall he hold office as mayor or as a member of the governing body of a municipality, nor in the case of county special services school districts and county vocational school districts, shall he hold office as a member of the governing body of a county.

N.J.S.A. 18a:12-3 states, in applicable part:

> Whenever a member of a local or regional board of education shall cease to be a bona fide resident of the district, or of any constituent district of a consolidated or regional district which he represents, or shall become mayor or a member of the governing body of a municipality, his membership in the board shall immediately cease; and, any member who fails to attend three consecutive meetings of the board without good cause may be removed by it.

N.J.A.C.6A:3-1.3 (i) states, in applicable part,

> The petitioner shall file a petition no later than the 90th day from the date of receipt of the notice of a final order, ruling, or other action by the district board of education, individual party, or agency, that is the subject of the requested contested case hearing. This rule shall not apply in instances where a specific statute, regulation, or court order provides for a period of limitation shorter than ninety days for the filing of a particular type of appeal.

In Board of Educ. of Sea Isle City v. Kennedy, 196 N.J. 1 (2008) a Board of Education member (the President of the BOE) and his wife had an autistic child for whom they sought an IEP. Litigation ensued between the Kennedys and the school district. Kennedy voluntarily resigned from the BOE. The parties reached a settlement. The following year, Kennedy was again elected to the BOE. Claiming that the school district had violated the settlement agreement, Mrs. Kennedy filed applications requesting a due process hearing and an emergent hearing seeking various relief, including payment for services which Mrs. Kennedy provided for her son, attorney's fees, expert's fees, costs, and expenses. The school district sought a declaratory ruling from the Commissioner that the applications created a conflict of interest, which was incompatible with Mr. Kennedy's continued BOE membership. The matter was referred to the Office of Administrative Law, where an ALJ issued a decision finding that Mr. Kennedy's conduct was permissible under the School Ethics Act (N.J.S.A. 18A: 12-21 to -34 because Kennedy's due process request was designed to protect the educational rights of his child and was permitted by N.J.S.A. 18A:12-24(j), which allows a school official to represent himself or his immediate family member concerning his / their own

interests. Nonetheless, the Commissioner rejected the ALJ's recommendation, determined that Kennedy's actions created a disqualifying conflict of interest under N.J.S.A. 18A:12-2 and ordered Kennedy's removal from the BOE. The State Board of Education affirmed the removal. The Appellate Division also affirmed the removal.

The Supreme Court undertook the task of harmonizing the N.J.S.A. 18A:12-2 and N.J.S.A. 18A: 12-24j. In Kennedy, the Supreme Court held that not all controversies and disputes between parents and school districts should require a sitting board member's removal from office. The Court emphasized that what was needed was a fact-sensitive analysis in each individual case to determine whether the BOE member's interest constitutes a substantial conflict requiring his removal from office as the sole remedy. The Court noted that not all claims result in a substantial conflict. Because of this, the Court considers all factors such as whether the BOE member is pursuing a claim in the public interest or whether he is pursuing a claim for his own aggrandizement or financial gain. The Court expressed its concern that BOE members who have handicapped children should not have to fear the loss of their elected office in the event that they question or challenge the appropriateness of their own children's education. The Supreme Court concluded that a BOE member should not be removed from office merely because he has advanced any claim "in a proceeding" against a school district involving the member's or an immediate family member's interests. However, in the Kennedy case, because the due process claim included a request for monetary relief, the Supreme Court affirmed the decision of the Appellate Division, as modified therein.

The upshot of Kennedy case is that the Supreme Court held that removal should not be automatic, but rather should be appraised on a close factual analysis on a case-by-case basis. The Court would consider whether there is a substantial, disqualifying conflict of interest identified by the type of claim (one motivated by the desire to advance the benefit of the public at large versus one motivated, even in part, for personal aggrandizement or for financial reasons) or by the type of proceeding, i.e., whether it was brought under N.J.S.A. 18A:12-2 or under the School Ethics Act, N.J.S.A. 18A:12-21 to -34. The Court made it clear in Kennedy, that when the Board

member has a financial interest in the claim, then he has a conflict of interest. Therefore, he cannot continue to remain on the BOE and he can be removed.

LEGAL ANALYSIS AND CONCLUSIONS

CONCLUSIONS REGARDING QUESTION ONE

Having found that N.J.S.A. 18A:38-8.1 and 8.2 authorize a local BOE to appoint, remove and replace SDRs, I **CONCLUDE** that Garwood BOE had the authority to remove someone it had previously appointed from the position of SDR.

Having found that N.J.S.A. 18A:11-1(d) grants self-governance to local BOEs, it follows, and I **CONCLUDE** , pursuant to the provisions of N.J.S.A. 18A:38-8.1 and 8.2 and of N.J.S.A. 18A:11-1(d) and of N.J.S.A. 18A:12-3, that Garwood BOE had the authority, in its discretion, to appoint, remove, and replace any member serving as an SDR. I **CONCLUDE** that Garwood BOE did not act *ultra vires* when it voted to remove Piarulli from the position of SDR. I **CONCLUDE** that Garwood BOE's removal of Piarulli from the position of SDR was legal. Having been legally removed from the position of SDR, I **CONCLUDE** that Piarulli has no further right to serve as SDR.

Having found that inasmuch as the position of SDR is a position that the BOE makes in its own discretion, I **CONCLUDE** that a BOE does not need "cause" to remove the SDR from that position. I further **CONCLUDE** that Piarulli did not have a right, in the name of the public interest, to continue to serve the entire full year of his appointment as SDR, but only served as SDR at the discretion of the Garwood BOE.

I **CONCLUDE** that when Piarulli filed his Notice of Claim he was not protecting any of the public's rights. I **CONCLUDE** that when Piarulli filed his Notice of Claim he asserted a monetary claim for his own benefit.

Having found that Piarulli's allegations that Garwood BOE's vote on October 18, 2022 was the result of political chicanery (i.e., unethical conduct), I **CONCLUDE** that

primary jurisdiction over such matters would not lie with the Commissioner of Education, but with the School Ethics Commission.

CONCLUSIONS REGARDING QUESTION TWO

Having **CONCLUDED** that Garwood has the authority to appoint, remove, and replace members to and from the position of SDR, it follows, and I **CONCLUDE** that Garwood's removal of Piarulli from the position of SDR was legal and I **CONCLUDE** that its appointment of another of its members to the position of SDR was legal.

CONCLUSION REGARDING QUESTION THREE

Having found that Piarulli's Petition was filed beyond the allowable time limit, I **CONCLUDE** that his Petition must be dismissed pursuant to the time limit set forth in N.J.A.C. 6A:3-1.3(i).

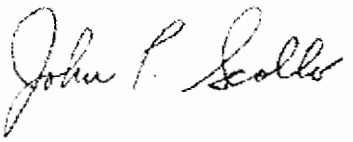
ORDERS

Pursuant to the foregoing conclusions, it is hereby **ORDERED** that the Petition filed by Piarulli on January 24, 2023 is time-barred and must be **DISMISSED** with prejudice; and it is further **ORDERED** that this **ORDER** shall be served upon the parties via email and said parties shall acknowledge receipt of same within seven (7) days.

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

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

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



July 27, 2023
DATE

JOHN P. SCOLLO, ALJ

Date Received at Agency:

Date Mailed to Parties:
db

310-23

New Jersey Commissioner of Education

Final Decision

Tierra Gourdine,

Petitioner,

v.

New Jersey Department of Education,
Office of Student Protection,

Respondent.

Synopsis

Petitioner – formerly employed as a teacher in Hillsborough – challenged the determination of the New Jersey Department of Education, Office of Student Protection, to disqualify her from employment in a public school pursuant to *N.J.S.A.* 18A:6-7.1 after a criminal history background check revealed that in January 2023, petitioner was charged with, and pled guilty to, the third-degree offense of assault by automobile, in violation of *N.J.S.A.* 2C:12-1(c), and the third-degree offense of endangering another person, in violation of *N.J.S.A.* 2C:24-7.1(a)(3). The Department filed a motion to dismiss petitioner's appeal.

The ALJ found, *inter alia*, that: *N.J.S.A.* 18A-6.7-7.1 (e) provides an opportunity for a teacher to challenge their disqualification from employment when the conviction was disclosed by a criminal background check performed pursuant to the act by challenging the accuracy of the disqualifying criminal record; in this case, petitioner did not challenge the accuracy of her criminal history record but conceded that she pled guilty to a lesser charge as it was the only choice available to her; without challenging the accuracy of the conviction, the above statute dictates petitioner's disqualification to work (or volunteer) in a public school in any capacity, including as a substitute teacher. The ALJ concluded that petitioner has not made a claim upon which relief can be granted. Accordingly, the ALJ granted the Department's motion to dismiss.

Upon review, the Commissioner concurred with the ALJ that petitioner's criminal history disqualifies her from working in a public school. Accordingly, the Initial Decision was adopted was the final decision in this matter, and the petition of appeal was dismissed.

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

310-23
OAL Dkt. No. 04217-23
Agency Dkt. No. 28-2/23

New Jersey Commissioner of Education

Final Decision

Tierra Gourdine,

Petitioner,

v.

New Jersey Department of Education,
Office of Student Protection,

Respondent.

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

Upon review, the Commissioner concurs with the Administrative Law Judge that petitioner's criminal history disqualifies her from working in a public school.

Accordingly, the Initial Decision is adopted as the final decision in this matter, and the petition of appeal is hereby dismissed.

IT IS SO ORDERED.[1]

Angelina Allen McMillan, J.d.S.
ACTING COMMISSIONER OF EDUCATION

Date of Decision: October 18, 2023
Date of Mailing: October 19, 2023

[1] This decision may be appealed to the Appellate Division of the Superior Court pursuant to *N.J.S.A.* 18A:6-9.1. Under *N.J.Ct.R.* 2:4-1(b), a notice of appeal must be filed with the Appellate Division within 45 days from the date of mailing of this decision.

State of New Jersey
OFFICE OF ADMINISTRATIVE LAW

INITIAL DECISION
MOTION TO DISMISS
OAL DKT. NO. EDU 04217-23
AGENCY DKT. NO. 28-2/23

TIERRA GOURDINE,
Petitioner,
v.
NEW JERSEY DEPARTMENT OF EDUCATION,
OFFICE OF STUDENT PROTECTION,
Respondent.

Tierra Gourdine, petitioner, pro se

David L. Kalisky, Deputy Attorney General, for respondent (Matthew J. Platkin, Attorney General of New Jersey, attorney)

Record Closed: September 5, 2023 Decided: September 12, 2023

BEFORE **NICOLE T. MINUTOLI**, ALJ:

STATEMENT OF THE CASE

Petitioner Tierra Gourdine (Gourdine) challenges the decision of respondent New Jersey Department of Education, Office of Student Protection (Department), that she is disqualified from employment in a public school, pursuant to N.J.S.A. 18A:6-7.1(b).

PROCEDURAL HISTORY

On January 27, 2023, respondent notified petitioner that she was permanently disqualified from serving in any position, paid or unpaid, with any educational institution under the supervision of the Department of Education.

On February 2, 2023, petitioner filed a petition of appeal with the New Jersey Department of Education, Office of Controversies and Disputes. On March 14, 2023, respondent filed an answer and motion for dismissal. The Commissioner of Education did not rule on the motion but transmitted it with the petition to the Office of Administrative Law (OAL) on May 17, 2023, for hearing as a contested case, pursuant to N.J.S.A. 52:14B-1 to -15, and N.J.S.A. 52:14F-1 to -13.

The parties appeared for a telephone prehearing conference on July 6, 2023, during which a briefing schedule for respondent's motion to dismiss was issued. On August 21, 2023, petitioner filed a response in opposition to respondent's motion to dismiss. Respondent did not file a reply and the motion is now ripe for review.

FACTUAL DISCUSSION AND FINDINGS

I accept the following **FACTS** as true and accordingly, I **FIND**:

1. Petitioner is an adult female. Petitioner began her teaching career approximately seventeen and a half years ago at Hillsborough High School.

2. On March 18, 2022, petitioner resigned from her position at Hillsborough High School due to mental health issues but continued coaching in the Franklin Township School District.

3. On January 23, 2023, petitioner was charged with, and pled guilty to, the third-degree offense of assault by automobile, in violation of N.J.S.A. 2C:12-

1(c), and the third-degree offense of endangering another person, in violation of N.J.S.A. 2C:24-7.1(a)(3).

4. By statute, any person applying for employment with, or to volunteer at a public school in New Jersey must submit to a background check. N.J.S.A. 18A:6-7.1(b).

5. On January 26, 2023, petitioner emailed respondent's Criminal History Review Unit (CHRU) to inquire whether her January 23, 2023, guilty plea would disqualify her as a teacher. Later the same day, petitioner emailed CHRU once more to explain the circumstances surrounding her criminal conviction contending that after the Coronavirus pandemic, returning to the building for work was difficult and required her to seek therapy. She tried to resolve her psychiatric issues but was unable to do so. Petitioner stated that she then tried to take her life by driving off the road.

6. By email notice dated January 27, 2023, respondent notified petitioner, based on the records revealed by a criminal history background check, that she was "permanently disqualified from serving in any position, paid or unpaid, with any educational institution under the supervision of the Department of Education. . . [and that she had] 14 days from the date of this written notice of disqualification to challenge the accuracy of [her] criminal record."

7. On February 1, 2023, Department investigator James Scarangelli responded to petitioner's January 26, 2023, emails, informing her that the "Office of Student Protection is guided by the requirements of N.J.S.A. 18A:6-7.1" and . . . "[b]ased upon your conviction for Assault by Automobile (3rd degree) on January 23, 2023, the Office of Student Protection had to adhere to the requirements of the aforementioned statute and disqualify you from school employment." The investigator's email also stated that "[t]he Office of Student Protection is not charged with the ability to consider the information contained in your letter, however, you may file a formal appeal

with the New Jersey Department of Education Office of Controversies and Disputes."

8. This appeal was timely filed by petitioner.

LEGAL ANALYSIS AND CONCLUSIONS

The rules of procedure governing petitions of appeal filed with the Commissioner permit a respondent to submit a motion to dismiss in lieu of (or with) an answer "on the grounds that the petitioner has advanced no cause of action even if the petitioner's factual allegations are accepted as true or for lack of jurisdiction, failure to prosecute or other good reason." N.J.A.C. 6A:3-1.5(g); N.J.A.C. 6A:3-1.10. However, these education rules do not offer any guidance on the standards by which such motions should be assessed.

The Uniform Administrative Procedure Rules (UAPR), N.J.A.C. 1:1-1.1 to -21.3, also do not address the standards for such motions. However, the UAPR, which "shall be construed to achieve just results, simplicity in procedure, fairness in administration and the elimination of unjustifiable expense and delay," state that, "[i]n the absence of a rule, a judge may proceed in accordance with the New Jersey Court Rules, provided the rules are compatible with these purposes." N.J.A.C. 1:1-1.3(a).

Here, the court rule that fills the void is R. 4:6-2 which, like N.J.A.C. 6A:3-1.5(g) and N.J.A.C. 6A:3-1.10, allows for motions for judgment on the pleadings. And since R. 4:6-2 serves the interests of time and expense and may help achieve just results, it is compatible with the UAPR's purposes, and thus it is appropriate to assess respondent's motion to dismiss in lieu of an answer under the standards used by the courts in applying R. 4:6-2.

Under these standards, if the basis for a motion to dismiss is that the petition has advanced no cause of action, or failed to state a claim upon which relief may be granted, "the test for determining the adequacy of [the] pleading [is] whether a cause of action is 'suggested' by the facts," such that the "inquiry is limited to examining the legal sufficiency of the facts alleged on the face of the complaint." Printing-Mart Morristown v. Sharp

Electronics Corp., 116 N.J. 739, 746 (1989) (citing R. 4:6-2(e)); Velantzas, 109 N.J. 189, 192 (1988); Rieder v. Dep't of Transp., 221 N.J. Super. 547, 552 (App. Div. 1987).

Importantly, for purposes of the motion, it does not matter whether a petitioner can ultimately "prove the allegation contained in the complaint" because "all facts alleged in the complaint and the legitimate inferences drawn therefrom are deemed admitted." Ibid. (citing Somers Constr. Co. v. Bd. of Educ., 198 F.Supp. 732, 734 (D.N.J.1961)); Smith v. City of Newark, 136 N.J. Super. 107, 112 (App. Div.1975) (citing Heavner v. Uniroyal, Inc., 63 N.J. 130, 133 (1973); J.H. Becker, Inc. v. Marlboro Twp., 82 N.J. Super. 519, 524 (App. Div. 1964)). While "[a] complaint should not be dismissed . . . where a cause of action is suggested by the facts . . . a dismissal is mandated where the factual allegations are palpably insufficient to support a claim upon which relief can be granted." Rieder, 221 N.J. Super. at 552.

Petitioner is working on her own, without the assistance of counsel. For that reason, her pleadings are held to a less stringent standard than that by which pleadings drafted by an attorney are judged. Anchorage Poynte Condo. Ass'n. v. Di Christo, 2017 N.J. Super. Lexis 1112 (August 17, 2017), at *5 (citing Haines v. Kerner, 404 U.S. 519 (1972)). Even so, petitioner presents no facts sufficient to negate the application of the following statute:

> An individual . . . shall be permanently disqualified from employment or service under this act if the individual's criminal history record check reveals a record of conviction for any crime of the first or second degree; or [an] offense involving the manufacture, transportation, sale, possession, distribution or habitual use of a "controlled dangerous substance" as defined in the "Comprehensive Drug Reform Act of 1987," N.J.S.2C:35-1 et al. or "drug paraphernalia" as defined pursuant to N.J.S.2C:36-1 et seq.
>
> [N.J.S.A. 18A:6-7.1(b).]

N.J.S.A. 18A-6.7-7.1 (e), provides an opportunity to challenge their disqualification from employment when the conviction was disclosed by a criminal background check performed pursuant to this act by challenging the accuracy of the disqualifying criminal

record. Here, petitioner does not challenge the accuracy of her criminal history record but concedes that she pled guilty to a lesser charge as it was the only choice available. Therefore, without challenging the accuracy of the conviction, the above statute dictates petitioner's disqualification to work (or volunteer) in a public school in any capacity, including as a substitute teacher.

For the above reasons, I **CONCLUDE** that petitioner has not made a claim for which relief can be granted.

ORDER

For the reasons set forth above, I **ORDER** that the motion of respondent Department of Education to dismiss the petition of Tierra Gourdine for failure to state a claim upon which relief may be granted is hereby **GRANTED** and the petition of Gourdine is hereby **DISMISSED**.

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

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

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

September 12, 2023
DATE

NICOLE T. MINUTOLI, ALJ

Date Received at Agency: September 12, 2023

Date Mailed to Parties: September 12, 2023

NTM/dw

311-23
SEC Dkt. No. C71-20
OAL Dkt. No. EEC-04006-21
Agency Dkt. No. 8-7/23A

New Jersey Commissioner of Education

Final Decision

In the Matter of Sheila Brogan, Ridgewood Board of Education, Bergen County.

This matter involves an appeal of a School Ethics Commission (Commission) decision issued February 25, 2022, determining that appellant – a member of the Ridgewood Board of Education (Board) – violated *N.J.S.A.* 18A:12-24(c) of the School Ethics Act by failing to recuse herself from executive session on May 7, 2020, despite her personal interest in a lawsuit slated to be discussed. The Commission recommended that appellant be censured for the violation. For the reasons explained herein, the Commissioner holds that the appeal should be dismissed as untimely.

It is well-established that "any appeal of a determination of the School Ethics Commission shall be to the Commissioner of Education whose determination shall be a final agency action ....and appeal of that action shall be directly to the Appellate Division of the Superior Court." *N.J.S.A.* 18A:12-29.1. Consistent with this statutory requirement, page 8 of the Commission's February 25, 2022, decision states that "[p]arties seeking to appeal the Commission's findings of violations *must* file an appeal pursuant to the standards set forth at *N.J.A.C.* 6A:4, et seq., within thirty (30) days of the filing date of the decision from which the appeal is taken." Indeed, *N.J.A.C.* 6A:4-1.3(c) provides that "[a]ppeals of School Ethics Commission decisions finding that a school official has violated the School Ethics Act (Act), including the Code of Ethics for School Board Members, shall be made to the

Commissioner in accordance with this chapter." Such appeals "shall be filed within 30 days of the filing date of the decision being appealed." *N.J.A.C.* 6A:4-2.2(b).

Instead of appealing the Commission's decision to the Commissioner, appellant filed an appeal with the Superior Court of New Jersey, Appellate Division, on March 9, 2022. *In the Matter of Sheila Brogan, Ridgewood Board of Education, Bergen County*, Dkt. No. A-1959-21 (June 21, 2023) (slip op. at 4). Meanwhile, as the Commissioner had not received an appeal of the underlying violation from appellant, the Commissioner reviewed the Commission's recommended penalty of censure as required pursuant to *N.J.S.A.* 18A:12-29(c). On April 14, 2022, the Commissioner issued a final decision concurring with the recommended penalty and censuring appellant for violating the Act. *In the Matter of Sheila Brogan, Ridgewood Board of Education, Bergen County*, Commissioner Decision No. 79-22SEC (April 14, 2022). Over a year later, on June 21, 2023, the Appellate Division dismissed appellant's appeal for lack of jurisdiction. *In re Brogan*, slip op. at 4-5.[1] Subsequently, appellant filed the instant appeal to the Commissioner on July 10, 2023, challenging the underlying violation.

Appellant contends that although her appeal to the Commissioner is untimely, it should be considered "[i]n light of the directions on the Final Decision dated April 14, 2022." Appellant's brief, at 5. That decision—a final agency decision of the Commissioner adopting the penalty recommended by the Commission—states in a footnote that it may be appealed to the Appellate Division of the Superior Court pursuant to *N.J.S.A.* 18A:6-9.1. Although it is uncontested that appellant filed her appeal of the Commission's decision with the Appellate Division on March 9, 2022, she now attempts to convince the Commissioner that she only did so because of the instruction in the footnote of the

[1] *See N.J. Ct. R.* 2:2-3(a)(2) (permitting appeals to the Appellate Division as of right from "final decisions or actions of any state administrative agency or officer").

Commissioner's April 14, 2022 final agency decision regarding the penalty. Given the undisputed fact that her appeal to the Appellate Division was filed more than one month *before* the Commissioner's final agency decision was issued, this explanation is clearly disingenuous.

Furthermore, appellant has not established any unusual or compelling circumstances that would warrant relaxation of the thirty-day filing deadline for appeals in the interest of justice. *See N.J.A.C.* 6A:4-4.4(a) (explaining that Chapter 4 rules "shall be construed to secure a just determination, simplicity of procedure, fairness in administration, and elimination of unnecessary delay" and are subject to relaxation by the Commissioner when not mandated by statute "in his or her discretion, if strict adherence to the rule is deemed inappropriate or unnecessary or would result in injustice").

Accordingly, appellant's appeal of the Commission's February 25, 2022, decision is dismissed as untimely. The Commissioner's April 14, 2022, final decision concurring with the penalty recommended by the Commission and censuring appellant for violating the Act remains in full force and effect.

IT IS SO ORDERED.[2]

Angelica Allen-McMillan, J.D.S.
ACTING COMMISSIONER OF EDUCATION

Date of Decision: October 18, 2023
Date of Mailing: October 19, 2023

[2] This decision may be appealed to the Appellate Division of the Superior Court pursuant to *N.J.S.A.* 18A:6-9.1. Under *N.J.Ct.R.* 2:4-1(b), a notice of appeal must be filed with the Appellate Division within 45 days from the date of mailing of this decision.

317-23
OAL Dkt. No. EDU 06867-23
Agency Dkt. No. 146-5/23

New Jersey Commissioner of Education

Final Decision

C.H., on behalf of minor children, A.H. and A.H.,

Petitioner,

v.

Board of Education of the Village of Ridgefield Park, Bergen County,

Respondent.

The record of this matter and the Initial Decision issued by the Office of Administrative Law have been reviewed pursuant to *N.J.A.C.* 1:1-19.1. As the Initial Decision includes the complete terms of a settlement agreement (Agreement) between the parties, the Commissioner approves the terms of the Agreement and adopts the Initial Decision as the final decision in this matter. The case is hereby dismissed, subject to compliance with the terms of the Agreement.

IT IS SO ORDERED.

Angelica Allen-McMillan, Ed.D.
ACTING COMMISSIONER OF EDUCATION

Date of Decision: October 23, 2023
Date of Mailing: October 25, 2023

State of New Jersey
OFFICE OF ADMINISTRATIVE LAW

INITIAL DECISION
SETTLEMENT
OAL DKT. NO. EDU 06867-23
AGENCY DKT. NO. 46-5/23

C.H., ON BEHALF OF MINOR CHILDREN,
A.H AND A.H.,
Petitioner,
v.
BOARD OF EDUCATION OF THE VILLAGE
OF RIDGEFIELD PARK, BERGEN COUNTY,
Respondent.

C.H., petitioner, pro se

David L. Disler, Esq., for respondent (Porzio, Bromberg, Newman, P.C., attorneys)

Record Closed: September 21, 2023 Decided: September 22, 2023

BEFORE **DANIEL J. BROWN**, ALJ:

On August 1, 2023, the Commissioner of the Department of Education transmitted this case to the Office of Administrative Law (OAL) under the Administrative Procedure Act, N.J.S.A. 52:14B-1 to -15, and the act establishing the OAL, N.J.S.A. 52:14F-1 to -23, for a hearing under the Uniform Administrative Procedure Rules, N.J.A.C. 1:1-1.1 to -21.6.

A copy of their settlement agreement is attached to this decision. Having reviewed the terms of the settlement agreement, I **FIND** that the parties have entered into their settlement voluntarily, as evidenced by their signatures, the signatures of their representatives, or both.

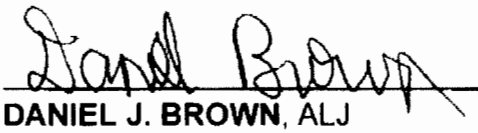
Moreover, I **CONCLUDE** that the settlement agreement is consistent with the law, is fully dispositive of all issues in controversy between the parties, and is otherwise consistent with the requirements of N.J.A.C. 1:1-19.1.

Therefore, given my findings of fact and conclusions of law, I **ORDER** that the parties comply with the terms of their settlement and that these proceedings are now closed.

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

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

September 22, 2023
DATE



DANIEL J. BROWN, ALJ

Date Received at Agency: September 25, 2023

Date Mailed to Parties: September 25, 2023

dr

SETTLEMENT AGREEMENT

This Settlement Agreement and Release ("Agreement") is made and entered into by and between the RIDGEFIELD PARK BOARD OF EDUCATION, and C.H., o/b/o A.H. and A.H. (collectively "C.H."), (collectively the "Parties" and each individually a "Party"), for full settlement of certain civil and administrative claims that were alleged and/or could have been alleged by C.H., including the residency dispute between the Board and C.H, docketed as C.H o/b/o A.H. and A.H. v. Ridgefield Park Board of Education, Agency Docket No. 146-5/23, OAL Docket No.: EDU 06867-2023.

WHEREAS, the Board is a public body corporate and politic legally existing under the laws of the State of New Jersey that operates the Ridgefield Park School District ("District").

WHEREAS, C.H. is a New Jersey resident and the parent of two minors, A.H. and A.H..

WHEREAS, the Board determined that C.H. did not reside in Ridgefield Park during the 2022-2023 school year, and as a result her children, A.H. and A.H., would not be entitled to attend school in the District tuition free.

WHEREAS, on May 31, 2023, C.H. filed a Petition of Appeal of the Board's residency determination, docketed as C.H. o/b/o A.H. and A.H. v. Ridgefield Park Board of Education, Agency Docket No. 146-5/23, OAL Docket No.: EDU 06867-2023 ("Residency Appeal").

WHEREAS, during a meeting with District administration, C.H. acknowledged that she did not reside in Ridgefield Park for parts of the 2022-2023 school year, but that it was her intention to return to her residence in Ridgefield Park and remain domiciled in that home during the 2023-2024 school year; and

WHEREAS, the Parties desire to fully settle the dispute between them and avoid the uncertainty and expense of litigation arising out of the Residency Appeal.

NOW, THEREFORE, it is hereby stipulated and agreed by and between the Parties upon the following premises and in consideration of the promises, mutual covenants, and agreements set forth herein, and for other good and valuable consideration, the sufficiency of which is hereby acknowledged, as follows:

1. **Enrollment**: The Board agrees to enroll A.H. and A.H., the children of C.H., in the District for the 2023-2024 school year.

2. **Reserved Right to Disenroll**: The Board reserves the right to disenroll A.H. and A.H. if evidence is presented that C.H. no longer is domiciled in Ridgefield Park.

3. **Duty to Notify the Board**: C.H. agrees to immediately notify the Board should she no longer reside in Ridgefield Park. Such notification shall be immediate and shall permit the Board to disenroll A.H. and A.H. from the District. Should it be discovered that C.H. no longer is domiciled in Ridgefield Park, but her children continue to attend school in the District, the Board further reserves the right to disenroll the students and charge C.H. the certified tuition rate for the time period when the students were enrolled, but not domiciled in the District.

4. **Withdrawal and Stipulation of Dismissal**: In exchange for the consideration set forth herein, C.H. shall dismiss, with prejudice, all allegations, claims, charges, actions, complaints, lawsuits, and/or appeals, instituted by C.H. against the Board, including, but not limited, to the Residency Appeal.

5. **No Admission of Liability**: This Agreement shall not be construed as an admission by the Board of any of any acts, omissions, or wrongdoing alleged or those that could have been alleged by C.H. against the Board. The Board specifically denies any liability whatsoever for any damages, injuries or other claims by C.H. that were alleged or could be claimed by C.H. C.H. acknowledges and agrees that they are not prevailing parties in connection with this matter.

6. **Release**: In exchange for the consideration set forth herein, C.H. releases and give up any and all claims and rights they may have against the Board for any damages or injuries to C.H. in connection with A.H.'s and/or A.H.'s education in the District, arising out of alleged acts or omissions, whether known or unknown, that have taken place through the date of this Agreement. As used in this Agreement, the term "Board" means the Ridgefield Park Board of Education, its current or former elected or appointed officials, administrators, employees, attorneys, agents, servants, representatives, predecessors and successors, insurance carriers, and all other persons or entities for whom any of the above have been or may be legally responsible. C.H. specifically releases any and all claims that could have been brought in a petition before the Commissioner of Education and any other civil or administrative claims that C.H. could assert now, or in the future, resulting from any action or failure to act occurring prior to the time C.H. sign this Agreement, under any provision of any law, common or statutory, of the United States, New Jersey or any other state, city, county, or locality, including but not limited to the Individuals with Disabilities Education Act, 20 U.S.C. § 1400 *et seq* and *N.J.A.C.* 6A:14-1 *et seq.*; the Americans with Disabilities Act (ADA), and the New Jersey Law Against Discrimination (NJLAD); and any and all available claims for monetary or equitable relief, including but not limited to attorneys' fees, costs and disbursements, punitive damages, and penalties.

7. **Agreement Not to Sue.** C.H. agrees not to file any lawsuit or claim against the Board, based on any events, whether known or unknown, occurring prior to the date of the execution of this Agreement, in any court or tribunal of the United States, New Jersey or any other state, city, county, or locality, for any claims released in this Agreement.

8. **Indemnification and Hold Harmless.** C.H. agree to defend, indemnify and hold harmless the District and its representatives, insurers, third party administrators and attorneys from any claim that may be brought by A.H. or A.H. or on behalf of A.H. or A.H., during and at any time subsequent to the term of this Agreement, alleging any claims released in this Agreement.

9. **Good and Valuable Consideration**: The Parties agree that the resolution of the Residency Appeal and the terms set forth herein are good and valuable consideration for making this Agreement.

10. **Consultation with Counsel**: The Parties acknowledge that each has consulted, or had the opportunity to consult, with legal counsel of their own selection regarding this Agreement. The Parties understand how this Agreement will affect their legal rights and voluntarily enter into this Agreement with such knowledge and understanding. Each Party acknowledges that that the

terms of this Agreement are fully understood and voluntarily accepted by them, and that, other than the consideration set forth herein, no promises or representations of any kind have been made to them by the other Party. The Parties represent and acknowledge that in executing this Agreement they did not rely, and have not relied, upon any representation or statement, whether oral or written, made by the other Party or by that other Party's agents, representatives, or attorneys with regard to the subject matter, basis, or effect of this Agreement or otherwise.

11. **Knowing and Voluntary Acknowledgment**: The Parties have read this Agreement in its entirety and understand all of its terms. The Parties warrant that they have executed this Agreement of their own free will and without duress. The Parties knowingly, freely, and voluntarily assent to all its terms and conditions, including without limitation, the waiver, release and covenants contained herein.

12. **Entire Agreement**: The recitals set forth at the beginning of this Agreement are incorporated by reference and made a part of this Agreement. This Agreement constitutes the entire agreement of the Parties relating to the subject matter herein. There are no written or oral terms made by any Party other than those contained here. This Agreement supersedes all prior and contemporaneous understandings, discussions, agreements, representations, and warranties, both written and oral, regarding the subject matter contained herein. Any previous agreements between the Parties hereto, whether written or oral, are merged into this Agreement, and other such terms, if any, are no longer in effect. No change in, addition to, or waiver of the terms and provisions hereof shall be binding on any Party unless agreed to in writing by its authorized representative, with express reference to this Agreement.

13. **Governing Law**: The Parties intend for this Agreement to be legally binding. This Agreement shall be governed and construed in accordance with the laws of the State of New Jersey.

14. **Drafting of Agreement**: It is acknowledged that the Parties jointly drafted this Agreement and the Release, and that neither Party shall be deemed the sole author hereof for purposes of interpretation. Therefore, the language of this Agreement shall not be presumptively construed in favor of or against any of the Parties. Any rule of construction to the effect that ambiguities are to be resolved against the drafting Party shall not apply in interpreting this Agreement. Rather, the language in this Agreement shall be interpreted as to its fair meaning and not strictly for or against any Party.

15. **Counterparts**: This Agreement may be executed in counterparts, each of which shall be deemed an original, but all of which together shall be deemed to be one and the same. A signed copy of this Agreement delivered by facsimile, e-mail or other means of electronic transmission shall be deemed to have the same legal effect as delivery of an original signed copy of this Agreement.

16. **Severability**: If any of the provisions of this Agreement shall be held by any court of competent jurisdiction to be invalid or unenforceable, such invalidity or unenforceability shall not invalidate or render unenforceable the entire Agreement, but rather the entire Agreement shall be construed as if not containing the particular provision or provisions held to be invalid or unenforceable, and the rights and obligations of the Parties pursuant to this Agreement shall be construed and enforced accordingly.

17. **Headings**: Captions and headings of this Agreement are for reference purposes only and shall not in any way affect the meaning or interpretation of this Agreement.

18. **Authority to Execute**: All signatories hereto warrant and represent that they have the authority and are fully authorized to execute this Agreement and do thereby bind the Party which they purport to represent.

19. **Board Approval**. This Agreement is subject to Board approval before taking effect.

20. **Signatures.** BY SIGNING THIS AGREEMENT THE PARTIES STATE THAT

a. THEY HAVE READ IT;

b. THEY AGREE WITH EVERYTHING IN IT;

c. THEY HAVE BEEN ADVISED TO CONSULT WITH AN ATTORNEY PRIOR TO EXECUTING THIS AGREEMENT AND HAVE HAD AN OPPORTUNITY TO DO SO; AND

d. THEY HAVE SIGNED THIS AGREEMENT KNOWINGLY AND VOLUNTARILY.

IN WITNESS WHEREOF, and intending to be legally bound, each of the Parties hereto has caused this Agreement to be executed as of the date(s) set forth below.

C.H. o/b/o A.H. and A.H.

C.H.

Dated: 8/25/2023

RIDGEFIELD PARK BOARD OF EDUCATION

Dr. Ricardo Martinez
Board President

Dated: 9/20/2023

Scott T. Bisig
Interim Business Administrator/Board Secretary

Dated: 9/19/23

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319-23

New Jersey Commissioner of Education

Final Decision

F.E.,

Petitioner,

v.

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

Respondent.

Synopsis

Petitioner appealed the April 2018 decision of respondent, Township of Piscataway Board of Education (Board), to impose a one-year suspension on him for posting threatening messages on Instagram. On August 10, 2023, the Board unconditionally expunged the disputed suspension from F.E.'s permanent record. Subsequently, on August 22, 2023, the Board filed a motion to dismiss F.E.'s claim for mootness, which was opposed by the petitioner.

The ALJ found, *inter alia*, that: F.E. opposed the motion to dismiss on the grounds that the relief he requests is not an expungement but "a dismissal of the charges with unconditional apology"; F.E.'s student records in the Piscataway School District no longer include any reference to the incident for which he received discipline in March 2018; any claims petitioner might have had against the Piscataway School District are now moot as the suspension of F.E. was expunged by the Board, and a plenary hearing in this matter would have no practical effect on the outcome of the case. The ALJ concluded that the matter is now moot, and petitioner's appeal must be dismissed.

Upon review, the Commissioner concurred with the findings and conclusions of the ALJ. Accordingly, the Initial Decision of the OAL was adopted as the final decision in this matter, and the petition was dismissed.

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

319-23
OAL Dkt. No. 01496-23
(EDU 00375-22 on Remand)
Agency Dkt. No. 182-7/18

New Jersey Commissioner of Education

Final Decision

F.E.,

Petitioner,

v.

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

Respondent.

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

Upon review, the Commissioner concurs with the Administrative Law Judge that the petition must be dismissed.

Accordingly, the Initial Decision is adopted as the final decision in this matter, and the petition of appeal is hereby dismissed.

IT IS SO ORDERED.[1]

Angelica Allen-McMillan, J.D.S.
ACTING COMMISSIONER OF EDUCATION

Date of Decision: October 27, 2023
Date of Mailing: November 1, 2023

[1] This decision may be appealed to the Appellate Division of the Superior Court pursuant to *N.J.S.A.* 18A:6-9.1. Under *N.J.Ct.R.* 2:4-1(b), a notice of appeal must be filed with the Appellate Division within 45 days from the date of mailing of this decision.

State of New Jersey
OFFICE OF ADMINISTRATIVE LAW

INITIAL DECISION
DISMISSAL
OAL DKT. NO. EDU 00375-22
AGENCY DKT. NO. 182/7/18

B.E. ON BEHALF OF F.E.,
Petitioner,
v.
TOWNSHIP OF PISCATAWAY BOARD OF EDUCATION, MIDDLESEX COUNTY,
Respondent.

B.E., petitioner, pro se

David B. Rubin, Esq., for respondent

Record Closed: November 16, 2022 Decided: December 20, 2022

BEFORE **TRICIA M. CALIGUIRE**, ALJ

On May 1, 2018, the Township of Piscataway, Board of Education (Board) issued a decision suspending then-student F.E. for a portion of the next school year as discipline for conduct occurring on March 14, 2018. On or about July 30, 2018, B.E. on behalf of then-minor child F.E. filed a petition with the Commissioner of the New Jersey Department of Education appealing the suspension. This matter was transmitted to the Office of Administrative Law (OAL), where it was filed on August 16, 2018, as a contested case

pursuant to N.J.S.A. 52:154B-1 et seq. and N.J.S.A. 52:14F-1 et seq. and docketed as EDU 11838-18.

Prior to the 2018–2019 school year, petitioner B.E. withdrew F.E. from Piscataway High School and enrolled him in a private school. On October 15, 2018, the Board filed a motion to dismiss the petition for lack of jurisdiction or alternately, for failure to state a claim on which relief may be granted. Following the filing of responsive briefs, an initial decision was issued on November 20, 2018, granting the motion to dismiss.

On January 4, 2019, the Commissioner issued a final decision reversing the initial decision and remanding the matter for further proceedings at the OAL. On January 11, 2022, in response to an inquiry from Board counsel, the Director of the Office of Controversies and Disputes stated that her office failed to transmit the matter back to the OAL. Petitioner elected to pursue the matter and the matter on remand was transmitted to the OAL, docketed as EDU 00375-22, and assigned to me on January 20, 2022.

The parties appeared for a telephone prehearing conference on February 28, 2022, and stated that they would engage in negotiations toward settlement. On or about June 10, 2022, the parties stated that they had reached agreement on settlement but, on August 30, 2022, counsel for petitioner stated that his client had withdrawn his consent to settle. During a telephone conference on September 9, 2022, which was attended by B.E., counsel stated that he would file a formal request to be relieved as counsel. Neither respondent nor B.E. objected to this request. On September 23, 2022, an order was entered relieving the Law Firm of C.N. Njoku, LLC, as counsel to B.E. on behalf of F.E.

During the September 9, 2022, status conference, B.E. stated his intention to retain new counsel within thirty days and a telephone conference was scheduled for October 12, 2022. Notice of the October 12, 2022, telephone conference was sent to the parties on September 12, 2022. A dial-in number was provided. Due to concern for the correct

spelling of B.E.'s email address, the notice was sent to four separate emails and to his former counsel. The notice stated in bold print:

> **Failure to dial in for the telephone conference will result in the file being returned to the transmitting agency for appropriate action which may include imposition of the proposed penalty or granting the relief requested by the other party.**

B.E. failed to appear for the October 12, 2022, telephone conference. B.E. failed to notify my office in advance or to request an adjournment. On October 14, 2022, an email was sent to B.E. asking him to explain his failure to appear. B.E. did not respond.

On October 14, 2022, notice was sent to the parties of a telephone status conference on November 14, 2022. A dial-in number was provided. B.E. failed to appear for the November 14, 2022, telephone conference. B.E. failed to notify my office in advance or to request an adjournment. On November 15, 2022, an email was sent to B.E. asking him to explain his failure to appear. B.E. did not respond.

Absent exigent circumstances, a petitioner's failure to prosecute a matter should result in its dismissal. Henderson v. Jersey Central Power and Light Company, Dkt. No. PUC 2470-10, Initial Decision (January 5, 2011) http://lawlibrary.rutgers.edu/ new-jersey-administrative-decisions-0 (citations omitted).

Here, neither exigent circumstances nor, for that matter, any explanation whatsoever, has been offered to excuse petitioner's failure to prosecute this matter.

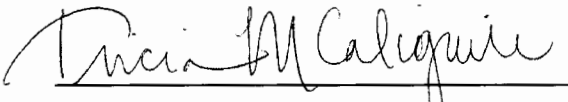
DECISION AND ORDER

Accordingly, I **CONCLUDE** that petitioner has failed to prosecute its appeal and no longer requests relief in this matter. Therefore, I **ORDER** that this case be and is hereby **DISMISSED WITH PREJUDICE**.

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

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

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

December 20, 2022 

DATE **TRICIA M. CALIGUIRE**, ALJ

Date Received at Agency: _____

Date Mailed to Parties: _____

TMC/nn

320-23

New Jersey Commissioner of Education

Final Decision

A.D., on behalf of minor child, A.D.,

Petitioner,

v.

Board of Education of the Township of River Edge, Bergen County,

Respondent.

Synopsis

Pro se petitioner appealed the finding of the respondent Board that her daughter, a third-grade student at one of the respondent Board's schools, committed an act of harassment, intimidation, and bullying (HIB), pursuant to the Anti-Bullying Bill of Rights Act (Act), *N.J.S.A.* 18A:37-13 *et seq,* against an African-American classmate. The HIB complaint resulted from a comment made by A.D. to another student, saying that A.D. "hates black people." The student witness then reported the comment to the complainant, who perceived A.D.'s statement as insulting and demeaning. The petitioner argued, *inter alia,* that the Board failed to follow the investigative procedures outlined in its HIB policy, and that her daughter's statement was misconstrued as she was not referring to the complainant when she said she "hates black people;" rather, A.D. used the phrase to describe her feelings toward African-American employees of the aftercare program she attended who "yell at her." Petitioner sought to have A.D.'s HIB violation modified to a violation of the school's Code of Conduct. The Board contended that it had properly applied Board Policy 5131.1, Harassment, Intimidation and Bullying, in this matter.

The ALJ found, *inter alia*, that: there is no question that A.D. made the statement in question, which included a racial description; A.D.'s intent, however, was not to insult her classmate but rather to express her dislike for the African American personnel working in the school aftercare program; nonetheless, the complainant was upset by the remark and reported that she did not want to attend school, felt unsafe at recess and lunch, and felt fear from knowing that a classmate disliked her because of the color of her skin; and the incident caused a disruption to the school. Accordingly, the ALJ concluded that the Board's HIB determination was not arbitrary, capricious, or unreasonable, and dismissed the petition.

Upon review, the Commissioner, *inter alia,* concurred with the ALJ that the Board did not act in an arbitrary, capricious, or unreasonable manner in rendering its HIB determination in this case. Accordingly, the Initial Decision of the OAL was adopted as the final decision in this matter, and the petition was dismissed.

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

320-23
OAL Dkt. No. 04748-23
Agency Dkt. No. 126-5/23

New Jersey Commissioner of Education

Final Decision

A.D., on behalf of minor child, A.D.,

Petitioner,

v.

Board of Education of the Township of River Edge, Bergen County,

Respondent.

The record of this matter, the Initial Decision of the Office of Administrative Law (OAL), the exceptions filed by the petitioner pursuant to *N.J.A.C.* 1:1-18.4, and the Board's reply thereto, have been reviewed and considered.

Petitioner appeals the determination of the River Edge Board of Education (Board) that her child, A.D., committed an act of harassment, intimidation, and bullying (HIB). A.D. told another student (the witness) that A.D. "hates black people." The witness reported this comment to a third student (the complainant), who is black, and the witness and the complainant together reported A.D.'s statement to a teacher. During the course of the investigation, in the presence of the complainant, A.D. stated that she "doesn't like black people" because the African-American staff who work in the after-school program yell at her.

Following a hearing, the Administrative Law Judge (ALJ) found that there was no question that A.D. made the statement, which included a racial description. The ALJ further

found that the complainant was upset by the remark and reported that she did not want to attend school, felt unsafe at recess and lunch, and felt fear from knowing that a classmate disliked her because of the color of her skin. Finally, the ALJ found that the incident caused a disruption to the school. Accordingly, the ALJ concluded that the Board's decision was not arbitrary, capricious, or unreasonable.

In her exceptions, petitioner argues that the statement was made when A.D. and the witness were alone, and that A.D. specifically referred to the black people at aftercare who yell at A.D. Petitioner contends that the statement initially caused no disruption; it wasn't until later, when A.D. and the witness began to have some conflicts between them, that the witness reported A.D.'s statement to the complainant. The petitioner suggests that the witness reported the statement in an attempt to get A.D. in trouble and that the witness repeated an incorrect version of the statement. Petitioner alleges that there are discrepancies among the interview notes, HIB report, and information presented at the hearing. According to petitioner, there was no history of mean behavior between the three students. Finally, petitioner argues that the Board did not provide any records or proof of a disruption.[1]

In reply, the Board argues that petitioner agreed in the Joint Stipulation of Facts that A.D. admitted saying that she "doesn't like black people." According to the Board, the information contained in the Joint Stipulation of Facts regarding the complainant's reaction to the statement, as well as the testimony presented at the hearing, demonstrates that A.D.'s statement substantially disrupted and interfered with the complainant's rights. The Board

[1] Petitioner also argues that A.D. was subject to retaliatory behavior by the other students following the incident. If petitioner believed that A.D. was the target of HIB, she was free to file a complaint. However, the acts of other students after the incident at issue have no bearing on whether the Board's decision was arbitrary, capricious, or unreasonable.

contends that the Anti-Bullying Bill of Rights Act (Act) requires only an analysis of how A.D.'s motivation was perceived and whether that perception was reasonable, not an analysis of A.D.'s actual motivation or intent in making the statement. Accordingly, the Board urges the Commissioner to adopt the Initial Decision.

Upon review, the Commissioner concurs with the ALJ that that Board's determination that A.D. committed an act of HIB was not arbitrary, capricious, or unreasonable. When a local board of education acts within its discretionary authority, its decision is entitled to a presumption of correctness and will not be disturbed unless there is an affirmative showing that the decision was "patently arbitrary, without rational basis or induced by improper motives." *Kopera v. W. Orange Bd. of Educ.*, 60 *N.J. Super.* 288, 294 (App. Div. 1960). Furthermore, "where there is room for two opinions, action is not arbitrary or capricious when exercised honestly and upon due consideration[,]" and the Commissioner will not substitute his judgment for that of the board. *Bayshore Sewerage Co. v. Dep't. of Envtl. Prot.*, 122 *N.J. Super.* 184, 199 (Ch. Div. 1973), *aff'd*, 131 *N.J. Super.* 37 (App. Div. 1974).

The Act defines HIB as follows:

> [A]ny gesture, any written, verbal or physical act, or any electronic communication, whether it be a single incident or a series of incidents, that is reasonably perceived as being motivated either by any actual or perceived characteristic, such as race, color, religion, ancestry, national origin, gender, sexual orientation, gender identity and expression, or a mental, physical or sensory disability, or by any other distinguishing characteristic, that takes place on school property, at any school-sponsored function, on a school bus, or off school grounds as provided for in section 16 of P.L. 2010, c.122 (C.18A:37-15.3), that substantially disrupts or interferes with the orderly operation of the school or the rights of other students and that:
>
> a. a reasonable person should know, under the circumstances, will have the effect of physically or emotionally harming a student

> or damaging the student's property, or placing a student in reasonable fear of physical or emotional harm to his person or damage to his property;
>
> b. has the effect of insulting or demeaning any student or group of students; or
>
> c. creates a hostile educational environment for the student by interfering with a student's education or by severely or pervasively causing physical or emotional harm to the student.
>
> *N.J.S.A.* 18A:37-14.

Therefore, a finding of HIB requires three elements. First, the conduct must be reasonably perceived as being motivated by any actual or perceived enumerated characteristic or other distinguishing characteristic and, second, the conduct must substantially disrupt or interfere with the rights of other students or the orderly operation of the school.[2] The third condition is that one of the three criteria enumerated in the Act regarding the effect of the conduct must also be satisfied. *Wehbeh v. Bd. of Educ. of the Twp. of Verona, Essex County*, Commissioner Decision No. 51-20 (decided February 4, 2020).

Regarding the first element, in defining HIB as an action "that is *reasonably perceived* as being motivated either by any actual or perceived characteristic . . .", *N.J.S.A.* 18A:37-14 (emphasis added), the statute requires an analysis of how the actor's motivation is perceived and whether that perception is reasonable. It does not require an analysis of the actual motivation of the actor. *Wehbeh, supra.* Certainly, evidence that the actor was motivated by a distinguishing characteristic would meet the standard of this section of the Act, but evidence that the actor was not so motivated does not end the analysis. Here, it was not arbitrary, capricious, or unreasonable for the Board to conclude that the complainant reasonably

[2] The conduct must also take place on school property, at a school-sponsored function, on a school bus, or off school grounds as provided for in *N.J.S.A.* 18A:37-15.3. This requirement does not appear to be at issue in this case.

perceived A.D.'s statement that she does not like black people as being motivated by the distinguishing characteristic of race.

Regarding the second element, the investigation demonstrated that the complainant was upset by the remark and reported that she did not want to attend school, felt unsafe at recess and lunch, and felt fear from knowing that a classmate disliked her because of the color of her skin. Based on this evidence, the Commissioner finds that it was not arbitrary, capricious, or unreasonable for the Board to conclude that A.D.'s statement substantially interfered with the complainant's rights.

Regarding the third element, an act of HIB is one that "a reasonable person *should* know, under the circumstances, will have the effect of physically or emotionally harming a student," "*has the effect* of insulting or demeaning a student," or "*creates* a hostile educational environment . . .". *N.J.S.A.* 18A:37-14(a) (emphasis added). None of these criteria require the actor to have actual knowledge of the effect that her actions will have, or to specifically intend to bring about that effect. The first requires only that a reasonable person should know there would be a harmful effect, not that the actor knows there would be such an effect. The second two criteria address only the actual effect of the act, without any reference to what either the actor or a reasonable person does or should know. *Wehbeh*, *supra*. As such, a board of education can find that an individual committed an act of HIB even if the individual did not intend to cause harm. For this reason, the Commissioner finds that petitioner's exceptions regarding her child's intent, and the alleged context behind her statement, are unpersuasive. The Board found that A.D.'s statement that she did not like black people was insulting or

demeaning, satisfying the requirements of the Act. It was not arbitrary, capricious, or unreasonable for the Board to reach that conclusion.

Accordingly, the Initial Decision is adopted as the final decision in this matter, and the petition of appeal is hereby dismissed.

IT IS SO ORDERED.[3]

Angelina Allen McMillan, Jd.D.
ACTING COMMISSIONER OF EDUCATION

Date of Decision: October 27, 2023
Date of Mailing: November 1, 2023

[3] This decision may be appealed to the Appellate Division of the Superior Court pursuant to *N.J.S.A.* 18A:6-9.1. Under *N.J.Ct.R.* 2:4-1(b), a notice of appeal must be filed with the Appellate Division within 45 days from the date of mailing of this decision.

State of New Jersey
OFFICE OF ADMINISTRATIVE LAW

INITIAL DECISION
OAL DKT. NO. EDU 04748-23
AGENCY REF. NO.126-5/23

A.D ON BEHALF OF MINOR CHILD A.D.,
Petitioner,
v.
BOARD OF EDUCATION OF THE TOWNSHIP OF RIVER EDGE, BERGEN COUNTY,
Respondent.

A.D., petitioner, pro se

Stephen R. Fogarty, Esq., for respondent (Fogarty & Hara, attorneys)

Record Closed: September 18, 2023 Decided: September 19, 2023

BEFORE **THOMAS R. BETANCOURT**, ALJ:

STATEMENT OF THE CASE AND PROCEDURAL HISTORY

Petitioner filed a pro se Petition of Appeal with the New Jersey Department of Education, Office of Controversies and Disputes, dated May 1, 2023, challenging the Board's harassment, intimidation and bullying (HIB) determination.

The Office of Controversies and Disputes transmitted the contested case to the Office of Administrative Law (OAL) as a contested matter, where it was filed on June 1, 2023.

A prehearing conference was held on June 20, 2023, and a Prehearing Order was entered on June 21, 2023.

Respondent filed a motion to exclude certain documents that were requested in the discovery demand of Petitioner. Petitioner declined to submit a response.

After an in camera review of the contested documents the undersigned granted Respondent's motion by Order dated September 12, 2023.

A hearing on the matter was held on September 18, 2023, whereupon the record closed.

ISSUE

Did Respondent err in determining that the minor child A.D. committed an act of HIB within the meaning of the Anti-Bullying Bill of Rights Act, N.J.S.A. 18A:37-13.2 et seq.

STIPULATED FACTS

1. The River Edge Board of Education (the "Board") operates a kindergarten through sixth grade public school district (the "District") for the Borough of River Edge in Bergen County, New Jersey and operates two schools.

2. Petitioner, A.D. is the mother of A.D., a student enrolled in the District, who is alleged to have committed an act of Harassment, Intimidation, and Bullying ("HIB"). On or about May 8, 2023 Petitioner, on behalf of her daughter (hereinafter, "A.D."), filed a Pro Se Petition of Appeal with the Office of Controversies and Disputes, which was

transmitted as a contested case to the Office of Administrative Law on May 31, 2023. The relief sought by Petitioner is the reversal of the Board's HIB Determination and a modification of that determination to a code of conduct violation. A true and accurate copy of the May 31, 2023 Transmittal Notice is attached hereto as Exhibit J-1.

3. During the 2022-2023 School Year, A.D. was a third-grade student attending Cherry Hill Elementary School. The alleged Victim, (hereinafter referred to as "Victim), was also a student enrolled in Cherry Hill Elementary School during the 2022-2023 School Year.

4. On or about January 26, 2023 a Cherry Hill School third-grade classroom teacher, Ms. Kristen Karavitis, received a report from the Victim and a Student witness that A.D. said that she "hates black people", which her report noted occurred on school grounds. The report noted that the Victim reported this to her school counselor, who is also the Cherry Hill School's Anti-Bullying Specialist, Mrs. Janel Blake. A true and accurate copy of Mrs. Karavitis' Incident Report Form is attached hereto as Exhibit J-2, pg. 2.

5. Mrs. Blake reported the HIB Complaint to the Cherry Hill Principal, Mrs. Denise Heitman. Upon receiving this complaint Mrs. Heitman spoke with the three students involved outside of their classroom in the presence of Mrs. Karavitis. During this discussion the Victim stated that the Witness told her that A.D. said she "hates black people." The incident date noted in the report was January 24, 2023. During this discussion with Mrs. Heitman A.D. stated "she doesn't like black people" because they yell a lot in the after school program, in the presence of the Victim. A true and accurate copy of Mrs. Heitman's 338 Form is attached hereto as Exhibit J-3, pg. 2-3.

6. An investigation into the alleged incident ensued. On January 26, 2023, Mrs. Heitman called the parents of the students involved to inform them a HIB complaint was reported and that the allegations would be investigated. The District's investigation began on Thursday, January 26, 2023. A true and accurate copy of the District's redacted HIB Report is attached hereto as Exhibit J-4, p. 1, 3.

7. Mrs. Blake conducted the HIB Investigation. As part of her investigation Mrs. Blake interviewed A.D., the Victim, and the Student Witness. Mrs. Blake's HIB investigation report also noted that the Victim and Student Witness reported to their classroom teacher Mrs. Karavitis that A.D. said to the Student Witness that she "hates black people." Mrs. Blake's report also indicated that while the Victim did not hear this statement directly from A.D., the Student Witness who heard the statement repeated it to the Victim, who is African-American, in school on January 26, 2023. This HIB investigation report also noted that A.D. subsequently stated that she "doesn't' like black people" because they yell at her in her aftercare program, during her discussion with Mrs. Heitman in front of the Victim, the Student Witness, and the classroom teacher on January 26, 2023. See Exhibit J-4, p. 2.

8. Mrs. Blake noted in her report that A.D. had a pattern of mean behavior and excluding the Victim, which Mrs. Blake determined culminated in A.D.'s statement that she "does not like" or "hates black people." See Exhibit J-4, p. 3.

9. The HIB report noted that the Victim perceived the comment as insulting and demeaning. As a result of these incidents the Victim reported to Mrs. Blake she was uncomfortable, did not want to attend school, felt unsafe at recess and lunch, and reported she had a fear that came with knowing a classmate disliked her because of the color of her skin. See Exhibit J-4 at p. 3.

10. Mrs. Blake completed the HIB Investigation on Monday February 6, 2023. Upon completion of the investigation, Mrs. Blake determined that A.D. committed an act of HIB and violated the Anti-Bullying Bill of Rights Act. See Exhibit J-4, p. 2, 4.

11. Following the incident, A.D. met twice with Mrs. Blake during school hours and had two restorative learning days after school with Mrs. Heitman. The report recommended that A.D. would continue her school counseling with Mrs. Blake, write an apology letter to the Victim, and would enroll in Social and Emotional Learning. Mrs. Karavitis assigned lunch seating for the students involved. See Exhibit J-4, p. 3-4.

12. The results of the HIB Investigation were reported to the Superintendent, Cathy Danahy. After reviewing the report, the Superintendent affirmed the findings of the HIB investigation. The results of the investigation were reported to the Board on March 1, 2023. A true and accurate copy of the March 1, 2023 Board Minutes are attached hereto as Exhibit J-5.

13. The results of the Board's HIB Investigation were sent to Petitioner the following day, March 2, 2023. A true and accurate copy of the March 2, 2023 correspondence to Petitioner is attached hereto as Exhibit J-6.

14. Petitioner notified the Superintendent she would be appealing the Board's decision on March 7, 2023 via e-mail. In response, the Superintendent confirmed Petitioner's request for a Board hearing scheduled for March 14, 2023 and provided Petitioner a copy of the redacted HIB report. A true and correct copy of the March 7, 2023 e-mail exchange is attached hereto as Exhibit J-7.

15. Due to a scheduling conflict Petitioner requested the Board hearing be moved from March 14 to April 19, 2023. A true and correct copy of Petitioner's March 10, 2023 e-mail is attached hereto as Exhibit J-8.

16. At the hearing where Petitioner was represented by counsel, Petitioner implored the Board to reverse the Superintendent's determination to modify the finding to a code of conduct violation. A true and correct copy of the Board's revised decision dated April 24, 2023 is attached hereto as Exhibit J-9.

17. The Board rejected Petitioner's arguments and acted to affirm the Superintendent's decision. The Board's April 24, 2023 decision letter stated that any appeals of the Board's decision must be made to the Commissioner of Education no later than ninety (90) days after the issuance of the decision. See Exhibit J-9.

18. A true and correct copy of Board Policy 5131.1, Harassment, Intimidation and Bullying is attached hereto as Exhibit J-10.

19. A true and correct copy of A.D.'s apology note is attached hereto as Exhibit J-11.

FINDINGS OF FACT

The statement of A.D., the minor child, was not intended to be a racial epithet. Rather, A.D., the minor child, intended to express her dislike for the African-American personnel working in the school after care program, as they were not nice to her. Had A.D. merely stated that she did not like the aftercare personnel as they were not nice to her, without referring to any racial description, there would not have been a HIB investigation, as stated by Janel Blake, HIB specialist, in her testimony.

LEGAL ANALYSIS AND CONCLUSION

The Anti-Bullying Bill of Rights Act ("Act"), N.J.S.A. 18A:37-13 et seq., is designed "to strengthen the standards and procedures for preventing, reporting, investigating, and responding to incidents of harassment, intimidation, and bullying of students that occur in school and off school premises." N.J.S.A. 18A:37-13.1.(f). Under the Act, "harassment, intimidation or bullying" (HIB) is defined as:

> [A]ny gesture, any written, verbal or physical act, or any electronic communication, whether it be a single incident or a series of incidents, that is reasonably perceived as being motivated either by any actual or perceived characteristic, such as race, color, religion, ancestry, national origin, gender, sexual orientation, gender identity and expression, or a mental, physical or sensory disability, or by any other distinguishing characteristic, that takes place on school property, at any school-sponsored function, on a school bus, or off school grounds as provided for in section 16 ofP.L.2010, c.122 (C.18A:37-15.3), that substantially disrupts or interferes with the orderly operation of the school or the rights of other students and that:
>
> a. a reasonable person should know, under the circumstances, will have the effect of physically or emotionally harming a student or damaging the student's

> property, or placing a student in reasonable fear of physical or emotional harm to his person or damage to his property;
>
> b. has the effect of insulting or demeaning any student or group of students; or
>
> c. creates a hostile educational environment for the student by interfering with a student's education or by severely or pervasively causing physical or emotional harm to the student.
>
> [N.J.S.A. 18A:37-14.]

Each school district must adopt a policy that prohibits HIB and provides for a prompt response to any alleged HIB incident. N.J.S.A 18A:37-15. Once an alleged HIB incident is reported to the school principal, the principal must initiate an investigation within one school day of the report. N.J.S.A 18A:37-15(b)(6). The investigation shall be conducted by a school anti-bullying specialist, and shall take no longer than ten school days to be completed. The results of the investigation shall then be quickly reported to the superintendent of schools, who may take certain remedial action. The results shall also be reported to the board of education "no later than the date of the board of education meeting next following the completion of the investigation, along with information on any services provided, training established, discipline imposed, or other action taken or recommended by the superintendent." Ibid.

Pursuant to the Act, the parents of the students involved in any alleged HIB incident are entitled to receive information about the nature of the investigation and the result of the investigation. The parents may request a hearing before the board, and the hearing must be held within ten days of the request. Any hearing shall be held in executive session to protect the identity of any students involved. The board may hear from the anti-bullying specialist about the incident, recommendations for discipline or services, and any programs instituted to reduce such incidents. The board must issue a decision at the first meeting after its receipt of the investigation report. The board may affirm, reject, or modify the superintendent's decision. The board's decision may be appealed to the Commissioner of Education.

An action by a board of education "is entitled to a presumption of correctness and will not be upset unless there is an affirmative showing that such decision was arbitrary, capricious or unreasonable." Thomas v. Morris Twp. Bd. of Educ., 89 N.J. Super. 327, 332 (App. Div. 1965). Thus, in order to prevail, those challenging an HIB decision made by a board of education "must demonstrate that the Board acted in bad faith, or in utter disregard of the circumstances before it." G.H. & E.H. ex rel. K.H. v. Bd. of Educ. of the Bor. of Franklin Lakes, EDU 13204-13, Initial Decision (February 24, 2014) (citation omitted) <http://njlaw.rutgers.edu/collections/oal/>, adopted, Comm'r (April 10, 2014). Also, a board's decision may be overturned if its determination violates the legislative policies expressed or implied in the governing act. J.A.H. ex rel. C.H. v. Twp. of Pittsgrove Bd. of Educ., EDU 10826-12, Initial Decision (March 11, 2013) (citing Campbell v. Dep't of Civil Serv., 39 N.J. 556 (1963), 562 (1963)), adopted, Comm'r (April 25, 2013) <http://njlaw.rutgers.edu/collections/oal/>.

There are reported cases in which HIB determinations by boards of education have been both affirmed and overturned. In R.G.B. v. Vill. of Ridgewood Bd. of Educ., EDU 14213-12, Initial Decision (May 15, 2013) <http://njlaw.rutgers.edu/collections/oal/>, adopted, Comm'r (June 24, 2013), the ALJ found that the Board did not act in an arbitrary, capricious, or unreasonable manner in determining that a student engaged in HIB when he repeatedly called a female student "fat," "fat ass," and "horse." According to the ALJ, such verbal statements satisfied all of the necessary elements under N.J.S.A. 18A:37-14. And, in G.H., supra, the ALJ also upheld a Board's finding that a white student who repeatedly called a black student "Kool-Aid" engaged in HIB. The ALJ found that the "use of the word 'kool-aid' was directed at [the other student] because of his race; insulted and demeaned [the other student]; and . . . interfered with [the other student's] education" because "[u]pset and embarrassed children are not fully available for learning." However, in J.A.H., supra, the Board's finding that an incident in which one student stuffed a crumbled piece of paper down the shirt of another student constituted an act of bullying was overturned as arbitrary, capricious, and unreasonable because the incident was merely a prank that was part of an ongoing, mutual conflict between the two boys and did not "contain the

more serious and aggravating elements either 'expressed or implied' under [N.J.S.A. 18A:37-14.]" The ALJ found that the incident was not improperly motivated by a distinguishing characteristic and that the facts "only support[ed] a finding of ordinary student conflicts rather than the more serious behavior of bullying."

In the instant matter, there is no question that A.D. said she didn't like "black people". She was referring to the African American workers in the after care program that she perceived to be mean. There is also no question that this reference of not liking black people was relayed to an African American student in A.D.'s class by a third student in that class. The African American student was upset by the remark and related the same to Ms. Blake. A.D. then penned an apology letter to the African American student. This incident caused a disruption in that A.D., and the other two students involved, were counseled on the matter. A.D. underwent restorative measures with Ms. Blake and Ms. Heitman.

Given the totality of the facts in the instant matter, I cannot conclude that the Board acted in an arbitrary, capricious, or unreasonable manner in determining that an HIB incident did occur. See In Thomas v. Morris Twp. Bd. of Educ., 89 N.J. Super. 327, 332 (App. Div. 1965); R.G.B. v. Vill. of Ridgewood Bd. of Educ., EDU 14213-12, Initial Decision (May 15, 2013) <http://njlaw.rutgers.edu/collections/oal/>, adopted, Comm'r (June 24, 2013); and, J.A.H. ex rel. C.H. v. Twp. of Pittsgrove Bd. of Educ., EDU 10826-12, Initial Decision (March 11, 2013) (citing Campbell v. Dep't of Civil Serv., 39 N.J. 556 (1963), 562 (1963)), adopted, Comm'r (April 25, 2013) <http://njlaw.rutgers.edu/collections/oal/>.

While the undersigned may have come to a different conclusion than a finding of HIB, based on the intent of A.D. in making the statement, that does not mean that the Board acted in an arbitrary, capricious or unreasonable manner.

Accordingly, I **CONCLUDE** that Petitioner has failed to sustain the burden of establishing that the Board acted arbitrarily, capriciously, or unreasonably in finding that HIB did occur.

Based upon the foregoing, I **CONCLUDE** that the Petition must be **DISMISSED**.

ORDER

It is hereby **ORDERED** that Petitioner's Amended Petition be **DISMISSED** with prejudice.

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

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

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

September 19, 2023
DATE

THOMAS R. BETANCOURT, ALJ

Date Received at Agency:

Date Mailed to Parties:
db

APPENDIX

List of Witnesses

For Petitioner:

A.D., minor child

A.D., Petitioner

For Respondent:

Janel Blake, HIB Specialist

Denise Heitman, Principal

Catherine Danahy, Superintendent

List of Exhibits

Joint Exhibits:

J-1 May 31, 2023 OAL transmittal

J-2 January 26, 2023 Incident Report Form

J-3 HIB 338 Form

J-4 HIB Investigative Report

J-5 March 1, 2023 Board Meeting Minutes

J-6 March 2, 2023 HIB Finding Letter

J-7 March 7, 2023 E-Mail

J-8 March 10, 2023 E-Mail

J-9 April 24, 2023 Board Decision Letter

J-10 5131.1 Board's HIB Policy

J-11 Apology Note

321-23

New Jersey Commissioner of Education

Final Decision

Erskine Barrino,

Petitioner,

v.

New Jersey Department of Education,
Office of Student Protection,

Respondent.

Synopsis

Petitioner challenged the determination of the New Jersey Department of Education, Office of Student Protection, to permanently disqualify him from employment in a public school pursuant to *N.J.S.A.* 18A:6-7.1 after a criminal history background check revealed that in November of 1990, petitioner entered a plea of guilty to a charge of unlawful possession of a weapon. Petitioner had been conditionally approved to serve as a security guard at a New Jersey public school. The Department filed a motion to dismiss petitioner's appeal.

The ALJ found, *inter alia*, that: in 1990, petitioner was sentenced to two years' probation, which he completed; petitioner did not file a Petition for Expungement of his conviction until August 22, 2023; a hearing on the expungement is scheduled for October 23, 2023 in Superior Court; since the record of the conviction has not been expunged to date, the criminal record still exists and petitioner is therefore disqualified from holding any position in a New Jersey public school.

Upon review, the Commissioner concurred with the ALJ that petitioner's criminal history disqualifies him from working in a public school. Accordingly, the Initial Decision was adopted as the final decision in this matter, and the petition of appeal was dismissed.

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

321-21
OAL Dkt. No. EDU 07863-23
Agency Dkt. No. 224-8/23

New Jersey Commissioner of Education

Final Decision

Erskine Barrino,

Petitioner,

v.

New Jersey Department of Education,
Office of Student Protection,

Respondent.

The record of this matter and the decision[1] of the Office of Administrative Law (OAL) have been reviewed and considered. The parties did not file exceptions.

Upon review, the Commissioner concurs with the Administrative Law Judge that petitioner is disqualified from employment in public schools.

Accordingly, the OAL decision is adopted as the final decision in this matter, and the petition of appeal is hereby dismissed.

IT IS SO ORDERED.[2]

Angelica Allen-McMillan, Ed.D.
ACTING COMMISSIONER OF EDUCATION

Date of Decision: October 27, 2023
Date of Mailing: November 1, 2023

[1] The decision is captioned as "Supplemental Order Denying Emergent Relief and Denying the Substantive Petition for Relief." However, pursuant to *N.J.A.C.* 1:1-18.1(b), decisions that are fully dispositive of all issues in the case are initial decisions. Accordingly, the Commissioner deems the "Supplemental Order" to be an initial decision. The parties were notified of this determination and given the opportunity to file exceptions in accordance with *N.J.A.C.* 1:1-18.4.

[2] This decision may be appealed to the Appellate Division of the Superior Court pursuant to *N.J.S.A.* 18A:6-9.1. Under *N.J.Ct.R.* 2:4-1(b), a notice of appeal must be filed with the Appellate Division within 45 days from the date of mailing of this decision.

State of New Jersey
OFFICE OF ADMINISTRATIVE LAW

SUPPLEMENTAL ORDER DENYING EMERGENT RELIEF AND DENYING THE SUBSTANTIVE PETITION FOR RELIEF
OAL DKT. NO. EDU 07863-23
AGENCY DKT. NO. 224-8/23

ERSKIN BARRINO,

Petitioner,

v.

NEW JERSEY DEPARTMENT OF EDUCATION, OFFICE OF STUDENT PROTECTION,

Respondent.

Erskine Barrino, petitioner, pro se

Sadia Ahsanuddin, Deputy Attorney General, for respondent (Matthew J. Platkin, Attorney General of New Jersey, attorney)

BEFORE: JOHN P. SCOLLO, ALJ:

STATEMENT OF THE CASE

Erskin Barrino seeks emergent relief from the Department of Education, Office of Student Protection's determination dated August 8, 2023 that he is disqualified from serving as a Security Officer for the West Orange (Essex County) Board of Education.

PROCEDURAL HISTORY

Petitioner, Erskin Barrino, filed a Pro Se Petition of Appeal on August 17, 2023 seeking Emergent Relief from the Commissioner of Education. He challenges the OSP's August 8, 2023 determination, as expressed in its Notice of Disqualification sent to him on August 8, 2023, that he is permanently disqualified from serving in any position with an educational institutional which is under the supervision of the N.J. Department of Education due to a November 14, 1990 guilty plea (Judgment of Conviction) to the charge of Possession of a Weapon (N.J.S.A. 2C:39-5B). On August 23, 2023, the OSP, represented by the New Jersey Attorney General's Office, filed papers (Brief) in Opposition to the Petition for Emergent Relief and a Motion to Dismiss said Petition.

On August 25, 2023, this judge issued his Order. On September 14, 2023, the Acting Commissioner of Education issued her Order concurring with this judge's denial of emergent relief; but directing this Tribunal to continue to the substantive issues presented, (i.e., a decision on the merits of the appeal). Since the parties were afforded the opportunity to address all issues, including both the issue of whether there was a basis

for emergent relief as well as the opportunity to address the merits of their positions, this judge is satisfied that there is no need for further submissions or arguments.

This writing is the Tribunal's Supplemental Order addressing the mandate of the Commissioner's September 14, 2023 Order.

FACTUAL DISCUSSION

Based on the submissions and the testimony elicited at the hearing on August 24, 2023, the Tribunal **FINDS** that the parties are not in disagreement about any of the following facts.

By way of background, on May 1, 1989, Petitioner Erskin Barrino was arrested in Bergen County on a charge of Possession (N.J.S.A. 2C:39-5B) of a Weapon.

On November 14, 1990, Barrino entered a plea of guilty to said charge. He was sentenced to two years' probation, which he completed. He did not file a Petition for Expungement of said conviction until August 22, 2023. There will be a hearing on the Expungement Petition on October 23, 2023 in the Superior Court of New Jersey, Criminal Part, Bergen County.

Erskine Barrino applied for the position of Security Officer with the Board of Education of West Orange, Essex Couty, New Jersey. On July 26, 2023, the Superintendent of School for West Orange sent a letter notifying Barrino that his appointment as a Security Officer was approved at the West Orange Board of Education's meeting of July 25, 2023 for the period from September 1, 2023 through June 30, 2024. However, on August 8, 2023, the State Department of Education, Office of Student Protection (OSP) sent a letter to Barrino notifying him of its determination that he is permanently disqualified from serving in any position with an educational institutional which is under the supervision of the N.J Department of Education. The OSP explained that Barrino's criminal history shows that on November 14, 1990 he entered a plea of guilty (a Judgment of Conviction) to the charge of Possession of a Weapon (N.J.S.A.

2C:39-5B). Since the record of the conviction has never been expunged, said criminal record still exists and he is therefore disqualified from holding said position.

ANALYSIS OF THE RESPECTIVE POSITIONS OF THE PARTIES

Arguments Presented by the Petitioner

Erskin Barrino's August 17, 2023 Pro Se Petition of Appeal admits that on November 14, 1990 he entered a guilty plea to the charge of Possession of a Weapon N.J.S.A. 2C:39-5B; that he was sentenced to two years of probation; and that he successfully completed probation. In his testimony, he admitted that he did not apply for an expungement until August 23, 2023. His Petition of Appeal seeks emergent relief pursuant to Crowe v. DeGioia, 90 N.J. 126 (1982). The argument upon which he seeks emergent relief is that he needs to work to support his family, which includes a child who has medical issues. He was appointed to the Security Officer position by the WOBOE, admittedly subject to the results of a background check. If he does not get the job with the WOBOE he will be jobless and unable to support himself and his family. He stated that he left his last employment during the week before the hearing because he had to give two weeks' notice to his employer, Mancon, Inc., where he worked for wages as a Parts Specialist and from whom he received health insurance coverage for himself and his family members. During the hearing, he stated that there was a possibility that he could regain his job with Mancon, Inc, unless it has been filled in the interim. He argued that since his guilty plea in 1990, he has not been involved in any criminal activity and that he learned from his mistake. He is a family man and wants to serve the interests of his own children and those of other schoolchildren and their parents.

The Tribunal explained the requirements of the four prongs of Crowe. The Tribunal emphasized that it is the burden of the person seeking emergent relief to persuade the Tribunal that he meets the requirements of each of the four prongs of Crowe. Barrino acknowledged that he understood this and addressed each of the four prongs.

When asked to explain how he met the requirements of demonstrating that he would suffer irreparable harm (the first Crowe factor) if the requested relief were not

granted, he explained that needed both the wages and the health insurance coverage that was part of the prospective job, especially since he has a child who has medical issues. He admitted that the health insurance coverage, like wages, was an economic benefit. Of course, Crowe held that a harm is not irreparable if it can be redressed by money. Barrino had no response to this. When asked to present whether he had any other arguments that demonstrated irreparable harm that were not based on economic harm, Barrino basically had no response.

Given that opportunity to address the second, third and fourth Crowe factors, Barrino was not able to demonstrate that the law supported his claim for relief. In regard to the second Crowe factor, he could not overcome the OSP's argument that the law imposed a mandatory disqualification to people convicted of the type of offense that he had on his record. In regard to the third Crowe factor, he was unable to demonstrate why, that under the circumstances of the matter, he would have a likelihood of success on the merits. Finally, on the fourth Crowe factor, he could not demonstrate how, when the equities of the matter were compared, that he would suffer greater harm than the Respondent, if the relief he sought was not granted. Moreover, he was not able to refute the Respondent's argument that the interest of the students required that there be no exceptions to the disqualification of applicants who have a record of offenses proscribed by the applicable statutes.

Arguments Presented by the Respondent

DAG Ahsahuddin stated that she would rely on the arguments presented in her Opposition papers (Brief) to demonstrate that Barrino could not demonstrate that he would suffer irreparable harm (the first Crowe factor). As such, he could not meet all four of the Crowe factors and his Petition must fail. Moreover, since Barrino could not

demonstrate that he was entitled to relief under any of the other three Crowe factors, it was clear that he was not entitled to the emergent relief he sought.

Since Barrino could not demonstrate entitlement to emergent relief, the motion to dismiss Barrino's Petition must be granted.

DISCUSSION AND FINDINGS OF FACT

Having reviewed the documents, testimony, and arguments presented, I make the following findings of **FACT**.

I **FIND** that Barrino's arguments on the issue of irreparable harm were based only on the economic effects of the Respondent's determination that he was disqualified from the position he seeks. Moreover, Barrino did not demonstrate that he was not capable of finding alternate employment. He even stated that he might be able to become re-employed with Mancon, Inc., a job where he received both wages and health insurance coverage.

I **FIND** that Barrino did present a sympathetic argument concerning the need for him to maintain health insurance coverage, but I further **FIND** that this is an argument based on the economic effects of the Respondent's determination.

I **FIND** that Barrino did not present cogent arguments that would meet the requirements of the second, third, and fourth prongs of Crowe.

I **FIND** that Barrino did not present sufficient facts or sufficient arguments that would satisfy any of the four Crowe factors.

I **FIND** that the disqualification is set forth in N.J.S.A. 18A:6-7.1(c) (2) where it states:

> "[a]n individual ... shall be permanently disqualified from employment or service under this act if the individual's criminal history check reveals a record of conviction for any

> crime of the first or second degree; or [a] crime as set forth in chapter 39 of Title 2C of the New Jersey Statutes."

I **FIND** that the use of the word "shall" in N.J.S.A. 18A:7.1 (c) (2) means that the disqualification is permanent and non-discretionary. I **FIND** that Barrino was not able to refute the Respondent's argument that the interest of the students required that there be no exceptions to the disqualification of applicants who have a record of offenses proscribed by the applicable statutes.

APPLICABLE LAW

Jurisdiction of the Commissioner of Education

N.J.S.A. 18A:6-9 provides

> The commissioner shall have jurisdiction to hear and determine, without costs to the parties, all controversies and disputes arising under the school laws ....

Law Governing the Granting of Injunctions Seeking Emergent Relief

N.J.A.C. 6A:3-1.6(a) provides:

> Where the subject matter of the controversy is a particular course of action by a district board of education ... the petitioner may include with the petition of appeal, a separate motion for emergent relief ... pending the Commissioner's final decision in the contested case."

N.J.A.C. 6A:3-1.6(b) provides:

> A motion for stay or emergent relief shall be accompanied by a letter memorandum or brief which shall address the following standards to be met for granting such relief pursuant to Crowe v. DeGioia , 90 N.J. 126 (1982):
>
> 1. The petitioner will suffer irreparable harm if the requested relief is not granted;
>
> 2. The legal right underlying petitioner's claim is settled;
>
> 3. The petitioner has a likelihood of prevailing on the merits of the underlying claim; and

> 4. When the equities and interests of the parties are balanced, the petitioner will suffer greater harm than the respondent will suffer if the requested relief is not granted.

The Crowe Factors

Crowe v. DeGioia, 90 N.J. 126 (1982) arose out of a set of circumstances regarding support and palimony matters. Nonetheless, the case has been the polestar decision in New Jersey for cases wherein injunctive relief is sought. The case stands for the proposition that an injunction cannot be granted unless and until the party seeking relief presents clear and convincing evidence that: (1) the injunction is "necessary to prevent irreparable harm"; (2) that "the legal right underlying the claim is settled"; (3) that the party seeking relief has made "a preliminary showing of a reasonable probability of ultimate success on the merits"; and (4) that "the relative hardship to the parties in granting or denying [injunctive] relief", on a balancing of the equities, weighs in his favor. Crowe, 90 N.J. at 132-34. In order to prevail, the party seeking injunctive relief must demonstrate by clear and convincing evidence that he meets all four Crowe factors. Brown v. City of Paterson, 424 N.J. Super. 176, 183 (App. Div. 2012).

"[A] party who seeks mandatory preliminary injunctive relief must satisfy a 'particularly heavy' burden." Guaman v. Velez, 421 N.J. Super. 239, 247 (App. Div. 2011), Rinaldo v. RLB Inv., LLC, 387 N.J. Super. 387, 396 (App. Div. 2006).

Also, "[w]hen a case presents an issue of 'significant public importance', a court must [also] consider the public interest in addition to the traditional Crowe factors." Garden State Equal. v. Dow, 216 N.J. 314, 321 (2013).

Appellate courts are bound by the trial court's factual findings if they are supported by "substantial, credible evidence" in the record. Triffin v. Automatic Data Processing, Inc., 411 N.J. Super. 292,315 (App. Div. 2010).

Under the first Crowe factor, a party who seeks injunctive relief must establish that injunctive relief is necessary to prevent irreparable harm and to preserve the status quo.

Citizens Coach Co. v. Camden Horse R.R. Co. , 29 N.J. Eq. 299, 303 (E.&A. 1878). Irreparable harm is an "injury to be suffered in the absence of injunctive relief [that] is *substantial* and *imminent*." Waste Mgmt. of N.J., Inc. v. Union City Utils. Auth., 399 N.J. Super. 508, 520 (App. Div. 2008).

Under the second Crowe factor, injunctive relief will be withheld when the legal right underlying the claim is unsettled. Citizens Coach, at ps. 304-05.

Under the third Crowe factor, the party seeking relief is obligated to present clear and convincing evidence that he / she has a reasonable probability of ultimate success on the merits. Therefore, injunctive relief will not be granted where there are material facts in controversy. Citizens Coach at ps. 305-06. The party who seeks injunctive relief must be prepared to demonstrate facts which support his case and "must make a preliminary showing of reasonable probability of success on the merits." Crowe, at p. 133.

The second and third Crowe factors involve fact-sensitive analysis that "requires a determination of whether the material facts are in dispute, and whether the applicable law is settled." Waste Mgmt., at p. 528.

Under the fourth Crowe factor, the party who seeks injunctive relief must address the issue of relative hardship to the parties and he must establish that, on balance, the equities favor the grant of temporary relief to maintain the *status quo* pending the outcome of a final hearing." Crowe at p. 134. The party seeking injunctive relief must prove his case by clear and convincing evidence. Brown at p. 183 and thus his burden is 'particularly heavy'. Guaman at p. 247.

LEGAL ANALYSIS AND CONCLUSIONS

The First Crowe Factor

Regarding the first Crowe factor, the Respondent convincingly argued that the Petitioner did not demonstrate that he would suffer irreparable harm if emergent relief were not granted. The Respondent convincingly argued that the Petitioner's failure to

prevail on the first Crowe factor means that he cannot meet his burden of proving that he satisfied all of the Crowe factors, and it therefore follows that the Petition must be dismissed.

The Second Crowe Factor

Regarding the second Crowe factor, the Petitioner did not meet his burden of demonstrating that the law is settled in his favor.

The Third Crowe Factor

Regarding the third Crowe factor, the Petitioner did not meet his burden of demonstrating that under the circumstances of this matter he would be likely to prevail on the merits at trial.

The Fourth Crowe Factor

Regarding the fourth Crowe factor, the Petitioner did not demonstrate that on balance, the equities favor the grant of the temporary relief which the Petitioner seeks.

I **CONCLUDE** that the Petitioner failed to meet the requirements of any of the Crowe factors.

The Substantive Issues

I have found that N.J.S.A. 18A:6-7.1(c) (2) imposes a mandatory, permanent disqualification for anyone who has a criminal record of an offense listed under N.J.S.A. 18A:6-7.1 (here, a conviction for illegal possession of a weapon). I have found that Barrino was not able to refute the Respondent's argument that the interest of the students required that there be no exceptions to the disqualification of applicants who have a record of an offense enumerated under N.J.S.A. 18A: 6-7.1. I note that the language of N.J.S.A. 18A: 6-7.1 (c) (2) allows no discretion regarding the imposition of the disqualification. I therefore **CONCLUDE** that since Barrino has a criminal record that

includes a conviction for an offense listed under N.J.S.A. 18A:6-7.1 (illegal possession of a weapon), he is disqualified from serving as a school security guard.

ORDER

It is hereby **ORDERED** that Barrino's Petition seeking Emergent Relief in the form of an Order overturning the OSP's determination dated August 8, 2023 must be and hereby is **DENIED**; and

it is further **ORDERED** that Petitioner's Petition, having not met the requirements of Crowe, must be and hereby is **DISMISSED**; and

it is further **ORDERED** that Petitioner, having failed to demonstrate that he is not disqualified from applying for the position of school security guard or from serving as a school security guard, his petition must be dismissed; and

it is further **ORDERED** that a copy of this **ORDER** shall be transmitted by email from the OAL to the Pro Se Petitioner, Erskin Barrino and to the Respondent's counsel, Sadia Ahsahuddin, DAG.

This order on application for emergency relief may be adopted, modified, or rejected by the **COMMISSIONER OF THE DEPARTMENT OF EDUCATION**, who is authorized by law to make the final decision in this case. The final decision shall be issued without delay but no later than forty-five days from the entry of this order. If the **COMMISSIONER OF THE DEPARTMENT OF EDUCATION** does not adopt, modify, or reject this order within those forty-five days, this recommended order shall become the final decision on the issue of emergency relief under N.J.S.A. 52:14B-10.

John P. Scollo

September 20, 2023

DATE

JOHN P. SCOLLO, ALJ

db

322-23
OAL Dkt. No. EDU 09457-23
Agency Dkt. No. 253-9/23

New Jersey Commissioner of Education

Order on Emergent Relief

T.D., on behalf of minor child, S.D.,

Petitioner,

v.

Board of Education of the Morris County Vocational School District, Morris County,

Respondent.

The record of this emergent matter, the sound recording of proceedings at the Office of Administrative Law (OAL), and the recommended Order of the Administrative Law Judge (ALJ) have been reviewed. Upon such review, the Commissioner concurs with the ALJ that petitioner has failed to demonstrate entitlement to emergent relief pursuant to the standards enunciated in *Crowe v. DeGioia,* 90 *N.J.* 126 (1982), and codified at *N.J.A.C.* 6A:3-1.6.

Accordingly, the recommended Order of the OAL denying petitioner's application for emergent relief is adopted for the reasons stated therein. This matter shall continue at the OAL with such proceedings as the parties and the ALJ deem necessary to bring it to closure.

IT IS SO ORDERED.

Angelina Allen McMillan, Ed.D.
ACTING COMMISSIONER OF EDUCATION

Date of Decision: October 27, 2023
Date of Mailing: November 1, 2023

State of New Jersey
OFFICE OF ADMINISTRATIVE LAW

ORDER
DENYING EMERGENT RELIEF
OAL DKT. NO. EDU 09457-23
AGENCY DKT. 253-9/23

T.D. ON BEHALF OF MINOR CHILD S.D.,
Petitioner,
v.
BOARD OF EDUCATION OF MORRIS COUNTY VOCATIONAL SCHOOL DISTRICT, MORRIS COUNTY,
Respondent.

T.D., petitioner, appearing pro se

Carolyn R. Chaudry, Esq. appearing on behalf of respondent (Chaudry Law, attorneys)

Record Closed: September 28, 2023 Decided: September 29, 2023

BEFORE **NANCI G. STOKES**, ALJ:

STATEMENT OF THE CASE

Petitioner T.D. brings this action challenging the decision of the Board of Education (Board) of the Morris County Vocational School District's (District) to transfer and withdraw his minor son S.D. from the Morris County School of Technology (MCST),

where he attended the ninth grade during the 2022-23 school year, to his local high school.

PROCEDURAL HISTORY

On September 18, 2023, T.D, filed this emergent application seeking S.D.'s immediate return to MCST. The OAL scheduled this case for oral argument on September 26, 2023, but reassigned the case to me and rescheduled the oral argument for September 28, 2023.

On September 25, 2023, the Board filed its opposition to the motion. On September 27, 2023, petitioner responded. On September 27, 2023, I conducted a conference with the parties to clarify the issues and discuss a possible resolution with their consent. I received additional documentation from the District on September 27 and 28, 2023. Petitioner submitted a reply on September 28, 2023.

On September 28, 2023, I heard oral argument. I permitted petitioner time to further comment on exhibits from the District, which I received that day and closed the record.

FACTUAL DISCUSSION

Many of the facts are not in dispute. MCST is a vocational public high school in Denville Township, Morris County, operating as part of the District. The District provides choice schools that are admissions-based, and no student has a right to attend a choice school. Students accepted into the District must maintain an adequate level of academic performance, adhere to the student code of conduct, and consistently attend their program to remain in any career-technical program in the District.

S.D., a fourteen-year-old, now attends the Jefferson Township High School (Jefferson) within his domicile. That school district provides college preparation classes, including Advanced Principles in Computer Sciences. Computer science

principles are part of the tenth-grade curriculum at MCST. S.D. was accepted into Jefferson's honors program, STEM Academy, focusing on science, technology, engineering, and mathematics.

To support his emergent application, T.D. highlights that S.D. was taking Computer Information Systems (CIS) courses that he asserts are unavailable at the same level at his home public high school. Without a return to MCST, T.D. maintains that S.D.'s CIS instruction will suffer irreparable harm and will impact his ability to obtain a good college education or career. Petitioner supplies U.S. News' high school rankings to show that MCST's program is rated higher than that of Jefferson based on its students' performance on state-required tests, graduation, and college preparation.

T.D. asserts that the District did not follow its procedures in addressing S.D.'s behavioral issues, which could have prevented future events and kept him at MCST. Specifically, T.D. suggests that the District's HIB policy requires remedial measures to correct and avoid problem behavior. T.D. also notes that the District did not provide S.D. with the required educational instruction within five days of the suspension.

T.D. questions the completeness of the District's investigation of events involving S.D., citing a recent diagnosis of Oppositional Defiant Disorder (ODD) and incitement by others as the root cause of S.D.'s misconduct. Yet, S.D.'s parents only provided a psychiatrist evaluation diagnosing S.D. with ODD after the District's determination to return S.D. to his local public school. Further, T.D. did not challenge the results of the District's HIB investigations against S.D. Still further, both S.D. and his parents acknowledge S.D.'s inappropriate actions.

T.D. also argues that the District did not investigate other HIB incidents directed toward S.D., which T.D. reported on June 15, 2023, after the District's concerning S.D.'s return to his local high school. T.D. maintains that S.D. is suffering from social shaming by his peers due to speculation about his return to Jefferson. T.D. highlights that S.D. is doing better this year and has taken steps to improve his behavior, including counseling

and successfully completing his Sunday school studies. S.D. apologized for his behavior.

In opposition to the petitioner's emergent relief request, the District supplies the Certifications of Scott Moffit, Superintendent; Mark Menadier, Principal; and Athena Borzeka, Director of Student Services and Special Education, with multiple exhibits.

By February 1, 2023, the District placed S.D. on a behavioral contract due to his accumulation of code of conduct violations, including substantiated harassment, intimidation, and bullying (HIB) charges. S.D. served a two-day suspension, and the District required that S.D. undergo counseling and complete restorative justice protocol. The contract explains that S.D.'s behavior did not comply with the MCST Student Handbook standards. To improve his standing at MCST, the District expected S.D. to demonstrate respect for all MCST community members and refrain from disparaging behaviors. Further, the District expected S.D. to contribute to a positive educational environment and adhere to the Internet usage agreement. The contract explains that further violating the code of conduct could result in additional disciplinary action.

Yet, after the contract began, S.D. engaged in subsequent events of academic dishonesty, demeaning and disruptive classroom conduct, loitering in a hall rather than going to class. MCST's principal met with S.D. following these incidents and advised T.D. of the misconduct. On May 31, 2023, the District substantiated another HIB charge against S.D. In other words, S.D. did not remedy his behavior while attending MCST. S.D.'s behavior was alarming.

On June 5, 2023, the District suspended him for the last ten days of school and advised T.D. it was returning S.D. to his local public school district. That day, the District notified T.D. of his rights concerning the 504 Plan.

For the 2022-2023 school year S.D. had a 504 Plan for ADHD and misophonia, commencing April 2023. As part of the HIB investigations, the Director of Special Services, who investigated the HIB charges against S.D., considered his disabilities,

including the possible ODD diagnosis, even without a physician's diagnosis. The Director also serves as the District's 504 Plan Coordinator and Anti-Bullying Coordinator. Specifically, she reviewed S.D.'s 504 plan and concluded that S.D.'s disabilities were not the primary cause of his making racist comments, inappropriate sexual gestures, and severe lack of academic integrity. Instead, the District determined that S.D. understood right from wrong and received counseling on the seriousness of inappropriate racial comments. However, the District did not conduct a manifestation meeting or evaluation before S.D.'s suspension and return to Jefferson.

Under District Policy 5114.1, the District will return students with behavioral contracts whose behavior does not adequately improve to their resident school district. S.D.'s parents appealed the administration's decision to the Superintendent, who met with them to discuss the circumstances leading up to the decision to return S.D. to his resident school district. On June 21, 2023, the Superintendent upheld the determination.

S.D.'s parents appealed to the Board, which upheld the determination to return S.D. to his home school following the Board hearing on August 8, 2023. T.D. suggests the Board's closed session with MCST's Principal and Superintendent was inappropriate.

At the hearing, the Board also advised S.D. and his parents that it has a Share Time Cyber Security and Information Protection Academy, a two-year program in collaboration with the County College of Morris. Cyber security courses are part of the eleventh grade MCST curriculum. If S.D. can demonstrate his improved behaviors, the Board will give him priority admission into the Share Time program for his junior and senior years. Notably, when S.D. returned to his local high school, the District marked S.D. as a transfer and withdrawal from its rolls, not an expulsion.

LEGAL DISCUSSION AND CONCLUSIONS

The regulations governing disputes before the Commissioner of Education allow petitioners to file a separate motion for emergent relief or a stay of that action pending the Commissioner's final decision in the contested case. N.J.A.C. 6A:3-1.6(a).

N.J.A.C. 6A:3-1.6(b) sets forth the standards governing motions for emergent relief and instructs that:

> A motion for a stay or emergent relief shall be accompanied by a letter memorandum or brief which shall address the following standards to be met for granting such relief pursuant to Crowe v. DeGioia, 90 N.J. 126 (1982):
>
> > 1. The petitioner will suffer irreparable harm if the requested relief is not granted;
> > 2. The legal right underlying petitioner's claim is settled;
> > 3. The petitioner has a likelihood of prevailing on the merits of the underlying claim; and
> > 4. When the equities and interests of the parties are balanced, the petitioner will suffer greater harm than the respondent will suffer if the requested relief is not granted.

[N.J.A.C. 6A:3-1.6(b).]

Indeed, the moving party must demonstrate each element "clearly and convincingly." Waste Management of N.J. v. Union County Utilities Authority, 399 N.J. Super. 508, 520 (App. Div. 2008). Emergent relief is designed "to 'prevent some threatening, irreparable mischief, which should be averted until opportunity is afforded for a full and deliberate investigation of the case.' Crowe, 90 N.J. at 132 (citation omitted).

Irreparable harm

Harm is considered irreparable if monetary damages cannot adequately redress it. Id. at 132-33. In other words, irreparable harm is described as "'substantial injury to a material degree coupled with the inadequacy of money damages.'" Judice's Sunshine Pontiac, Inc. v. General Motors Corp., 418 F. Supp. 1212, 1218 (D.N.J. 1976) (citation omitted). Further, a claimant must demonstrate more than the risk of irreparable harm.

Continental Group, Inc. v. Amoco Chemicals Corp., 614 F. 2d 351, 359 (D.N.J. 1980). Indeed, petitioner must show a clear threat of immediate irreparable injury because emergent relief is not appropriate to "simply eliminate a possibility of a remote future injury, or a future invasion of rights." Ibid. (citation omitted).

Here, T.D. suggests only possible future harm to S.D.'s college education and career without evidence to support that claim. T.D. speculates that the unavailability of MCST's CIS courses decides S.D.'s future. Further, whether MCST has a higher rating than Jefferson does not alone suggest irreparable harm to S.D. should he not return to MCST. Undeniably, colleges look at multiple factors in determining student admissions, not just where a student attended high school. S.D. is attending Jefferson without cost and will not lose credit for any semester. Instead, S.D. can complete his education at the public high school and receive a diploma from that school, even with college credits. College preparatory and computer courses are available to S.D. at Jefferson, including those offered at MCST. Should S.D. correct his behavior this year, he can also attend another computer-focused program associated with the county college to earn college credit and his high school diploma. Even if S.D. prevails on the underlying action, remedies, like missed CIS courses, could be at the District's cost. In other words, monetary damages could correct any transcript deficiencies.

While T.D. suggests that S.D. faces social shame surrounding his return to Jefferson, that harm, if any, has already occurred. To what effect a continuing suspension would have is unclear and speculative.

Thus, I **CONCLUDE** that petitioner has failed to shoulder the burden of proving that S.D. will suffer irreparable harm. Even though T.D.'s claim for emergent relief fails by not meeting this requirement, T.D. does not satisfy the remaining criteria for emergent relief.

Settled Legal Right

Emergent relief "should be withheld when the legal right underlying plaintiff's claim is unsettled." Crowe, 90 N.J. at 133 (citing Citizens Coach Co. v. Camden H. R. Co., 29 N.J.Eq. 299, 304-305 (E & A 1878)).

Local boards of education adopt rules for the management of the district's public schools and act to ensure the lawful and proper conduct of the district's public schools. The local school district of Jefferson Township is responsible for student tuition and transportation to a vocational school district like the District here. Under N.J.S.A. 18A:54-7, vocational school districts can receive pupils who applied for admission to and accepted for attendance at any county vocational school district school. The board of education of a county vocational school district then has control over admitted students, including the power to suspend and expel pupils from school. N.J.S.A. 18A:54-20(g).

The right to education is not without certain restrictions. Pupils must submit to the authority of their teachers; they must pursue their prescribed courses of study and comply with the rules established to govern the schools. N.J.S.A. 18A:37-1. Under N.J.S.A. 18A:37-2, a school district may expel or suspend a student for good cause. Good cause includes, in relevant part, continued and willful disobedience, open defiance of authority, taking the personal property of another, or harassment, intimidation, or bullying. School districts must develop a student code of conduct, establishing standards, policies, and procedures for positive student development and behavioral expectations. N.J.A.C. 6A:16-7.5.

Expulsion" means the discontinuance of educational services or the discontinuance of payment of educational services for a student." N.J.A.C. 6A:16-1.3. S.D. was not expelled. Still, a long-term suspension means the "removal of a student for more than [ten] consecutive school days from the general education program, . . . but not the cessation of the student's educational services." Id. Notably, S.D.'s suspension and return to Jefferson was not S.D.'s first disciplinary suspension.

Significantly, vocational school districts have an alternative process for unsuccessful students called the "Return to Resident School District." This process is distinguishable from expulsion because students do not experience a discontinuance of educational services. Instead, the vocational school district transfers them back to their local school for re-enrollment, which again becomes responsible for providing the student with educational services like all other students in its local school district. Here, the District's Policy 5114.1 explains that the determination to return a student to their local district focuses on the safety of its students and staff population, the security and integrity of the district equipment and software, and the reasonable likelihood of the student to profit academically from the school program. The policy also includes a conference with the Superintendent, which occurred here.

Notably, under Policy 5114.1, the superintendent can issue a behavioral contract to a student to guide their continued enrollment. The policy further states that a "breech [sp.] of this contract will result in the student's return to the resident school district." Further, "in many cases, such dismissal will be timed to coincide with the end of a marking period." S.D. was under a behavioral contract in February 2023 to support and guide S.D. about his expected conduct. Yet, after the contract was in place, the District substantiated another HIB charge against S.D., among other code of conduct violations. The principal informed S.D.'s parents of S.D.'s continuing misconduct as it occurred. District Policy 5131.2 covers Harassment, Intimidation, and Bullying. This policy notes that responses to HIB incidents should align with the code of conduct, and consequences can run from admonishment to expulsion.

Students in public educational institutions facing severe disciplinary measures such as suspension or expulsion have the right to due process of law. R.R. v. Bd. of Ed., Shore Reg. H.S., 109 N.J. Super. 337, 346-47 (Ch. Div. 1970). The fundamental requirements of due process of law are notice and hearing. Id. at 349, (quoting from Dixon v. Alabama State Board of Education, 294 F.2d 150 (5th Cir. 1961), cert. denied, 368 U.S. 930, (1961)).

Policy 5114.1 explains the due process provided to parents and students when facing a student's return to their resident school district. Undeniably, S.D. and his parents received notice and attended several meetings before requesting and appearing at a Board hearing to address their appeal. See N.J.A.C. 6A:16-7.3(c).

Here, S.D. has no right to return to a choice school without demonstrating that the District improperly returned S.D. to Jefferson. T.D. suggests the District did not follow its disciplinary or return to local school procedures but fails to adequately specify how. Even if the District did not supply education within five days of the suspension, that failure has little to do with the District's actions leading to S.D.'s suspension or his return to his local public school. Similarly, disputes regarding the District's failure to investigate other HIB incidents reported after S.D.'s suspension are not germane to the District's actions in suspending or returning S.D. to his resident school for his admitted misconduct. Petitioner suggests the Board's closed session to vote on S.D.'s discipline should not have included school administrators. However, when the Board votes on a student's suspension, it must review the case in consultation with school administrators. NJ.A.C. 6A:16-7.3. Still, that a school district may expel or suspend a student for good cause is settled in the Board's favor.

Thus, I **CONCLUDE** that the petitioner has not demonstrated that he has a legal right settled in his favor.

However, given S.D.'s 504 Plan, the District should have convened a manifestation meeting and evaluation under 34 CFR §104.35 to determine whether S.D.'s behavior was related to his disability before his suspension and return to the local public school. See Office of Special Education Programs Memorandum 95-16, U.S. Department of Education, 22 IDELR 531 (April 26, 1995.); See also "Frequently Asked Questions About Section 504 and the Education of Children with Disabilities," Office for Civil Rights (OCR), U.S. Department of Education. Even if S.D.'s right to an evaluation and manifestation meeting is settled under 34 CFR §104.35, this does not change the result of this emergent application because T.D. does not meet the required elements

for that relief. Still, I urge MCST to do so now, even though I cannot order that relief through T.D.'s petition.

Likelihood of Success on the Merits

Under the third emergent relief standard, "a plaintiff must make a preliminary showing of a reasonable probability of ultimate success on the merits." Crowe, supra, 90 N.J. at 133 (citing Ideal Laundry Co. v. Gugliemone, 107 N.J. Eq. 108, 115-16 (E. & A. 1930)). This requirement if often implicitly tied to whether the right to the underlying claim is settled.

When a local board of education acts within its discretionary authority, its decision is entitled to a presumption of correctness that will not be disturbed unless there is an affirmative showing that the decision was "patently arbitrary, without rational basis or induced by improper motives." Kopera v. W. Orange Bd. of Educ., 60 N.J. Super. 288, 294 (App. Div. 1960). To overcome that presumption, the petitioner must prove that the board "acted in either bad faith or in disregard to the circumstances." T.B.M. v. Moorestown Bd. of Educ., OAL Dkt. No. EDU 2780-07 (February 6, 2008), aff'd, Comm'r (April 25, 2013) (citing Thomas v. Morris Twp. Bd. of Educ., 89 N.J. Super. 327, 332 (App. Div. 1965), aff'd, 46 N.J. 581 (1966)). Furthermore, "where there is room for two opinions, action is not arbitrary or capricious when exercised honestly and upon due consideration[,]" and the Commissioner will not substitute his judgment for that of the board. Bayshore Sewerage Co. v. Dep't. of Envtl. Prot., 122 N.J. Super. 184, 199 (Ch. Div. 1973), aff'd, 131 N.J. Super. 37 (App. Div. 1974). In other words, the burden is a heavy one.

Still, the Board's factual determinations require such deference only when supported by substantial credible evidence, e.g., having a rational basis. Quinlan v. Board of Ed. of North Bergen Tp., 73 N.J. Super. 40 (App. Div. 1962); Schinck v. Board of Ed. of Westwood Consol. School Dist., 60 N.J. Super. 448 (App. Div. 1960). Additionally, the reviewing tribunal may reject the findings of fact if the evidentiary

record does not support them. In re Suspension of License of Silberman, 169 N.J. Super. 243, 255-56 (App. Div. 1979), aff'd, 84 N.J. 303 (1980).

Here, the District supplies its rationale for suspending and returning S.D. to Jefferson. S.D. did not deny his actions and his parents were aware of his continuing misconduct. Instead, T.D. maintains that others urged S.D.'s misconduct or that the District should have done more to correct his behaviors. Yet, the District addressed S.D.'s inappropriate behavior by placing him on a behavioral plan, providing counseling, completing restorative justice protocol, to no avail. While petitioner may be dissatisfied with the result, he presents little to show that it was improper, arbitrary, or unreasonable.

Therefore, I **CONCLUDE** that petitioner has not demonstrated that he has a likelihood of success on the underlying claim.

Balancing of the Equities

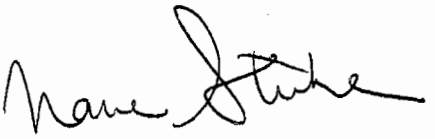
Lastly, T.D. fails to meet the fourth emergent relief standard, which involves "the relative hardship to the parties in granting or denying relief." Crowe, 90 N.J. at 134 (citing Isolantite Inc. v. United Elect. Radio & Mach. Workers, 130 N.J.Eq. 506, 515 (Ch.1941), mod. on other grounds, 132 N.J.Eq. 613 (E. & A. 1942)). T.D. must demonstrate that S.D. will suffer more significant harm than the Board if this tribunal does not grant the requested relief. If I deny emergent relief, S.D. will continue his public education at Jefferson. S.D. also has an opportunity to attend college-level computer courses if he can demonstrate that he appreciates the errors of his ways and acts appropriately this year. Further, his student record does not reflect expulsion.

On the other hand, S.D.'s improper actions were many and alarming. The District has substantiated two HIB claims against S.D. and counseled S.D. on significant instances of academic dishonesty along with demeaning, lewd, and disruptive classroom conduct. The District has a substantial interest in deterring student and staff member harassment and maintaining its programs' academic integrity and safety, free

from misconduct like that of S.D. Thus, I **CONCLUDE** that balancing the equities weighs far more in favor of the District.

Based on the foregoing, I **CONCLUDE** that petitioner has failed to meet the requirements under N.J.A.C. 6A:3-1.6(b) warranting emergent relief. Accordingly, I **ORDER** that petitioner's application for such relief be and hereby is **DENIED**.

This order on application for emergency relief may be adopted, modified, or rejected by the **COMMISSIONER OF EDUCATION**, who by law is authorized to make a final decision in this matter. The final decision shall be issued without undue delay, but no later than forty-five days following the entry of this order. If the Commissioner of Education does not adopt, modify, or reject this order within forty-five days, this recommended order shall become a final decision on the issue of emergent relief in accordance with N.J.S.A. 52:14B-10.



September 29, 2023

DATE

NANCI G. STOKES, ALJ

ljb

323-23

New Jersey Commissioner of Education

Final Decision

Daniella Maniscalco,

Petitioner,

v.

Board of Education of the Borough of Merchantville, Camden County,

Respondent.

Synopsis

Pro se petitioner filed a petition in October 2022 in which she challenged the respondent Board's actions relating to the handling of her resignation from employment with the school district. The matter was dismissed on March 13, 2023 after the petitioner failed to appear for a scheduled hearing. Petitioner filed exceptions/explanations with the Commissioner as to why she failed to appear as scheduled; the matter was then reinstated and remanded to the Office of Administrative Law (OAL) in a Final Decision dated April 10, 2023. The matter was subsequently scheduled for an in-person hearing at the OAL on September 26, 2023.

The ALJ found, *inter alia*, that: prior to the hearing date, petitioner objected to respondent's exhibit and witness list, questioning why, among other things, two specific individuals were not being called by the Board to testify; petitioner did not provide any exhibits or supply a witness list as requested; at the September 26th hearing – which was converted to a Zoom format – petitioner refused to move forward because the Board did not produce the two witnesses that she believed were necessary to develop a full record; petitioner expressed significant displeasure with the overall handling of the matter, and steadfastly refused to proceed; when asked if she was thereby withdrawing her complaint, the respondent repeatedly answered "no", but subsequently removed herself from the Zoom hearing without comment. The ALJ found that the petitioner's conduct at the hearing was obstructive and intentional, and concluded that petitioner had abandoned her request for a hearing and forfeited her right to further contest the actions of the Board that she had complained about. Accordingly, the ALJ dismissed the petitioner's appeal with prejudice.

Upon review, the Commissioner concurred with the ALJ's findings and conclusion, and adopted the Initial Decision of the OAL as the final decision in this matter. The petition was dismissed.

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

323-23
OAL Dkt. No. 03369-23
(EDU 10388-22 on Remand)
Agency Dkt. No. 276-10/22

New Jersey Commissioner of Education

Final Decision

Daniella Maniscalco,

Petitioner,

v.

Board of Education of the Borough of Merchantville, Camden County,

Respondent.

The record of this matter and the Initial Decision of the Office of Administrative Law (OAL) have been reviewed and considered. The parties did not file exceptions.[1]

Upon review, the Commissioner concurs with the Administrative Law Judge that the petition must be dismissed due to petitioner's refusal to move forward with the scheduled hearing.

Accordingly, the Initial Decision is adopted as the final decision in this matter, and the petition of appeal is hereby dismissed.

IT IS SO ORDERED.[2]

Angelica Allen-McMillan, J.D.S.
ACTING COMMISSIONER OF EDUCATION

Date of Decision: October 30, 2023
Date of Mailing: November 1, 2023

[1] Petitioner emailed the Office of Controversies and Disputes on October 19, 2023, alleging that the Administrative Law Judge improperly handled her case. As this email was received after the deadline for exceptions, it was not considered.

[2] This decision may be appealed to the Appellate Division of the Superior Court pursuant to *N.J.S.A.* 18A:6-9.1. Under *N.J.Ct.R.* 2:4-1(b), a notice of appeal must be filed with the Appellate Division within 45 days from the date of mailing of this decision.

State of New Jersey
OFFICE OF ADMINISTRATIVE LAW

INITIAL DECISION
DISMISSAL WITH PREJUDICE
OAL DKT. NO. EDU 03369-23
(ON REMAND EDU 10388-22)
AGENCY DKT. NO. 276-10/22

DANIELLA MANISCALCO,
Petitioner,
v.
BOARD OF EDUCATION OF
BOROUGH OF MERCHANTVILLE,
Respondent.

Daniella Maniscalco, petitioner, pro se

Daniel Long, Esq., for respondent (Wade, Long, Wood & Long, LLC, attorneys)

Record Closed: September 26, 2023 Decided: October 2, 2023

BEFORE **TAMA B. HUGHES**, ALJ:

This matter originated under Docket No. EDU 10388-22 and transmitted to the Office of Administrative Law (OAL) on November 17, 2022, for a hearing as a contested case pursuant to N.J.S.A. 52:14B-1 to -15 and N.J.S.A. 52:14f 1 to-13. Through this complaint, the petitioner challenged the Board's actions related to the handling of her resignation. The matter was dismissed on March 13, 2023, for failure to appear.

Petitioner filed exceptions/explanations with the Commissioner of the Department of Education as to why she failed to appear on the scheduled status calls. In a Final Decision, dated April 10, 2023, the matter was reinstated and remanded to the Office of Administrative Law, under OAL Docket No. EDU 03369-23, for a hearing. See April 10, 2023, Final Decision.

On June 27, 2023, a prehearing conference call was held at which time the in-person hearing date of September 26, 2023, was set.[1] See July 6, 2023, Prehearing Order. Subsequent to the issuance of the Prehearing Order, petitioner sent over a series of emails objecting to among other things: how the matter was being handled; the options available to her to resolve the matter; the location of the hearing; and the fact that she wanted another hearing judge. By letter, dated July 25, 2023, petitioner's concerns and questions were addressed. See July 25, 2023, letter.

On September 21, 2023, respondent's exhibits and witness list were provided to the petitioner and this Tribunal. By email that same date, petitioner objected to respondent's exhibit and witness list, questioning why, among other things, two other individuals, were not being called by the respondent to testify at the hearing. Petitioner did not provide any exhibits or supply a witness list.

On the hearing date, the petitioner refused to go forward with the hearing because the respondent did not produce the two witnesses that she believed were necessary to develop a full record. A lengthy colloquy took place both off the record and then on the record, wherein petitioner expressed her significant displeasure over the handling of the matter, the fact that no one told her that she herself could have subpoenaed and/or called the witnesses, how the undersigned was treating her, and the denial of her request for an adjournment. Throughout all of this, respondent's counsel stood by ready to proceed with his witnesses.

[1] The hearing date was subsequently converted to a remote hearing, via Zoom. At the time of notice, both parties were informed that all of the exhibits that they intended to rely upon, needed to be provided one week in advance of the hearing with a copy to this Tribunal, along with the proposed witness list.

Petitioner was repeatedly asked if she was ready to proceed with the hearing to which she would respond that she would only proceed if the two witnesses that she believed were necessary were brought in by the respondent to testify. When asked if she was going to withdraw the complaint given the fact that she refused to proceed with the hearing, she repeatedly stated "no." After this colloquy went on for some time - during which petitioner became increasingly argumentative, petitioner intentionally removed herself from the zoom hearing. The record remained open for several more minutes; however, the petitioner did not re-enter the remote hearing.

I **FIND** that the petitioner's conduct, her refusal to move forward, and leaving the virtual hearing, to be intentional and obstructive.

For the above reasons, I **CONCLUDE** that the petitioner has abandoned her request for a hearing in this matter and has forfeited her right to further contest the actions complained about. Accordingly, this matter should be dismissed with prejudice for lack of prosecution and failure to appear.

ORDER

It is **ORDERED** that the petitioner's appeal be **DISMISSED WITH PREJUDICE** pursuant to N.J.A.C. 1:1-14.4, and I **DIRECT** the Clerk to return the matter to the agency for appropriate disposition.

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

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

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

October 2, 2023
DATE

TAMA B. HUGHES, ALJ

Date Received at Agency: _____

Date Mailed to Parties: _____

TBH/gd/lam

324-23
OAL Dkt. No. EDU 05126-23
Agency Dkt. No. 132-5/23

New Jersey Commissioner of Education

Final Decision

B.A., on behalf of minor children, A.A. and N.A.,

Petitioner,

v.

Board of Education of the Township of Stafford, Ocean County,

Respondent.

The record of this matter, the proposed Settlement Agreement and General Release (Agreement), and the Initial Decision issued by the Office of Administrative Law pursuant to *N.J.A.C.* 1:1-19.1, have been reviewed. Upon such review, the Commissioner notes that, with respect to Paragraph 10 of the Agreement, the Board is reminded that it must comply with the requirements of New Jersey's Open Public Records Act, *N.J.S.A.* 47:1A-1 *et seq.*, notwithstanding any agreement the parties may have between themselves to keep the terms of their settlement confidential.

In light of the foregoing, the Commissioner adopts the Initial Decision as the final decision in this matter, which is hereby dismissed subject to compliance with the terms of the settlement consistent with applicable public records law.

IT IS SO ORDERED.

Angelica Allen-McMillan, J.D.S.
ACTING COMMISSIONER OF EDUCATION

Date of Decision: October 30, 2023
Date of Mailing: November 1, 2023

State of New Jersey
OFFICE OF ADMINISTRATIVE LAW

INITIAL DECISION
SETTLEMENT
OAL DKT. NO. EDU 05126-23
AGENCY DKT. NO. 132-5/23

B.A. ON BEHALF OF A.A. AND N.A.,
Petitioner,
v.
BOARD
OF EDUCATION OF THE TOWNSHIP OF
STAFFORD, OCEAN COUNTY,
Respondent.

B.A., petitioner, pro se

Jacob K. Mintun, Esq., for respondent (Comegno Law Group, P.C., attorneys)

Record Closed: October 7, 2023 Decided: October 10, 2023

BEFORE **TRICIA M. CALIGUIRE,** ALJ:

This appeal was filed on May 15, 2023. An answer and counter-petition for tuition was filed on June 5, 2023. On June 12, 2023, the Department of Education, Office of Controversies and Disputes, transmitted the matter along with the petition of appeal to the Office of Administrative Law for hearing as a contested case.

The parties have agreed to a settlement and entered into a Settlement Agreement and General Release, indicating the terms of settlement, including the withdrawal with prejudice of the petition and counter-petition. The parties submitted the Settlement Agreement and General Release, and a certified extract of the minutes of the Board of Education of the Township of Stafford (Board) showing that at its business meeting on May 8, 2023, the Board adopted a resolution approving the settlement, both of which are attached and fully incorporated herein. (J-1.)

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

1. The parties have voluntarily agreed to the settlement as evidenced by their signatures on the Settlement Agreement and General Release.

2. The settlement fully disposes of all issues in controversy.

I **CONCLUDE** that this agreement meets the requirements of N.J.A.C. 1:1-19.1 and that the settlement should be approved. I approve the settlement and therefore **ORDER** that the parties shall comply with the settlement terms and **DISMISS** the petition and counter-petition **WITH PREJUDICE**.

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

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

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

October 10, 2023
DATE

Tricia M Caliguire
TRICIA M. CALIGUIRE, ALJ

Date Received at Agency: 10/11/2023

Date Mailed to Parties: 10/11/2023

TMC/kl

APPENDIX

EXHIBITS

Jointly submitted:

J-1 Settlement Agreement and General Release and certified extract of Board Minutes of May 8, 2023

COMEGNO LAW GROUP, P.C.
521 Pleasant Valley Avenue
Moorestown, New Jersey 08057
856.234.4114
856.234-4262 Fax
Attorneys for Respondent

BY: JEFFREY R. CACCESE, ESQUIRE
JACOB K. MINTUN, ESQUIRE

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STATE OF NEW JERSEY
OFFICE OF THE LAW

B.A. o/b/o A.A. and N.A., Petitioners, v. STAFFORD TOWNSHIP SCHOOL DISTRICT BOARD OF EDUCATION, Respondent.	STATE OF NEW JERSEY DEPARTMENT OF EDUCATION DOCKET NO: EDU-05126-2023-S AGENCY REF: 132-5/23 **SETTLEMENT AGREEMENT AND GENERAL RELEASE**

This Settlement Agreement (the "***Agreement***") is made and entered into by and between B.A. o/b/o A.A. and N.A. ("***Petitioners***"), and the Stafford Township School District Board of Education ("***Board***" or "***District***") (hereinafter collectively, the "***Parties***"), this 11th day of September, 2023, to resolve and settle all outstanding claims and disputes as follows:

RECITALS

WHEREAS, A.A. and N.A. attended school within the District during the 2022-2023 school year; and

WHEREAS, during the 2022-2023 school year, the Board received information that Petitioners were no longer living within the Stafford Township School District; and

WHEREAS, an investigator for the District relayed that Petitioners were witnessed travelling to/from their designated bus stop within the District, to a residence located in Barnegat Township; and

WHEREAS, the Barnegat Township residence is outside the Stafford Township School District's boundaries; and

WHEREAS, the Board asserts that Petitioners are no longer eligible to attend Stafford Township Schools under N.J.A.C. § 6A:22-3.1; and

WHEREAS, on January 2, 2023, a "Notice of Initial Determination of Ineligibility" was issued to Petitioners; and

WHEREAS, on January 30, 2023, a second "Notice of Initial Determination of Ineligibility" was issued to Petitioners; and

WHEREAS, on April 21, 2023, a Notice of Final Ineligibility was issued to Petitioners; and

WHEREAS, on May 8, 2023, the Board passed a motion to disenroll N.A. and A.A. from the school; and

WHEREAS, on May 15, 2023, Petitioners filed a residency appeal in response to the Board's decision; and

WHEREAS, on June 5, 2023, the Board filed an Answer along with a Counter-Petition for Tuition for the 2022-2023 school year; and

WHEREAS, Petitioners acknowledge that they fully and completely understand the terms contained within this Agreement; and

WHEREAS, neither of the Parties admits or acknowledges, either explicitly or implicitly, any misconduct, wrongdoing, and/or liability, but through and by this Agreement are taking this action solely as a matter of a business judgement and at the recommendation of their respective legal counsel; and

WHEREAS, the Parties, after the opportunity for consultation with and between their respective legal counsel and following said discussion and negotiations, desire to fully, efficiently, and amicably resolve all aspects of their dispute and to memorialize the further relation between the Parties by entering into this Agreement so as to avoid the uncertainty, expenditure of time and resources, and the incurring of costs and expenses associated with further proceedings and/or litigation; and

NOW, THEREFORE, in consideration of the mutual promises and representations herein contained, and intending to be legally bound, the Parties understand and **AGREE AS FOLLOWS:**

1. Petitioners will withdraw their residency appeal in its entirety and with prejudice.

2. The Board will withdraw its Counter-Petition for Tuition in its entirety and with prejudice.

3. Petitioners acknowledge that A.A. and N.A. will be enrolled (or seek enrollment) in the Barnegat Township Public School system for the 2023-2024 school year, **and that this is the proper school district based on Petitioners' current residence**.

4. Petitioners acknowledge that A.A. and N.A. will be disenrolled in the Stafford Township School District, if not already done so at the time of signing this Agreement.

5. Should Petitioners be denied enrollment within the Barnegat Township Public School system, Petitioners understand that it is their responsibility to enroll A.A. and N.A. in the proper District based on their current residency.

6. If at any future time Petitioners become residents within the Stafford Township School District, Petitioners may apply for enrollment through the District's enrollment process. Nothing in this Agreement is meant to bar Petitioners from attending Stafford Township School District if they are residents of the same.

7. The Parties understand and agree that neither party is entitled to any benefit outside of this Agreement. The Parties further acknowledge that neither of the Parties are a "prevailing party" and that, in exchange for the consideration provided for by this Agreement, each Party waives any further claims against the other Party for any attorneys' fees and/or costs relating to this matter.

8. In consideration of the obligations noted above in this Agreement, and for other good and valuable consideration, all Parties to this agreement, RELEASE, WAIVE, AND FOREVER DISCHARGE each other (their former, present and future board members, officers, employees, agents, and servants) from any and all claims and causes of action, in law or in equity, whether known or unknown, whether asserted or unasserted, contingent or otherwise, arising from or relating directly or indirectly to Petitioners' involvement with the Board.

9. This Release and Waiver does not bar an action to enforce the terms of this Agreement.

10. The Parties shall keep the terms of this Agreement strictly confidential to the fullest extent permitted by law, and shall not share or communicate the terms of same with any other individual, other than with Petitioners and the Parties' respective counsel and/or accountants, unless enforcement of this Agreement is sought by any Party in a court of law.

11. The Parties agree and understand that this agreement is non-precedential, and, therefore, cannot be used in any subsequent proceeding.

12. This Agreement is subject to Board approval.

13. This Agreement, and all matters arising out of or relating to this Agreement, shall be interpreted under the laws of the State of New Jersey. Any action to enforce this Agreement, or matters arising out of or relating to this Agreement, shall be brought in the federal or state courts of the State of New Jersey. The Parties irrevocably consent to the personal jurisdiction of such courts.

14. The invalidity or unenforceability of any provision of this Agreement, whether in whole or in part, shall not in any way affect the validity or enforceability of any other provision contained herein.

15. This Agreement may be executed in counterparts, which shall be taken together as the entire agreement of the Parties hereto. This Agreement may also be exchanged

by the Parties via electronic mail for the purposes of securing signatures and will be fully enforceable as an original document.

16. This Agreement constitutes the entire agreement of the Parties with respect to the subject matter hereof and supersedes all prior written or oral and all contemporaneous oral agreements, understandings, and negotiations. This Agreement may only be amended in writing by way of a document signed by all Parties.

17. The Parties acknowledge that they have read and understand the terms of this Agreement, that they have had the opportunity to have the Agreement reviewed by counsel, and that they are entering into this Agreement knowingly, freely, voluntarily, without coercion and not under the influence of anything or anyone.

18. Petitioners represent that they have the sole authority to enter into this Agreement.

INTENDING TO BE legally bound hereby and **IN WITNESS WHEREOF,** the Parties hereto hereby execute this Agreement and General Release as witnessed by their signatures below.

FOR PETITIONERS:

BY: _____ DATED: 8/30/23

FOR THE STAFFORD TOWNSHIP SCHOOL DISTRICT BOARD OF EDUCATION:

BY: _____ DATED: 9/11/23

BY: _____ DATED: 9/6/23

STAFFORD TOWNSHIP SCHOOL DISTRICT

Administrative Offices
250 North Main Street
Manahawkin, NJ 08050

www.staffordschools.org

George J Chidiac
Superintendent

Lourdes LaGuard a
School Business Adm nistrator
Voice: 609 978 5700 x1032
Fax: 609 597 4377

"BUILDING A BETTER WORLD ONE STUDENT AT A TIME"

October 6, 2023

CERTIFICATION

I certify that these are the true and exact minutes of the Stafford Township Board of Education Business Meeting held May 8, 2023:

RESOLUTION

It was moved by Ms. Formica and seconded by Dr. Regulski to approve to un-enroll students #23695 and #24322 as these students are no longer district residents.

Roll call vote: six (6) members present voted yes; motion passed.

Lourdes LaGuardia
School Business Administrator/Board Secretary

LL/km/10-6-2023

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2023 OCT -7 A 2:55
STATE OF NEW JERSEY
OFFICE OF ADMINISTRATIVE LAW

325-23
OAL Dkt. No. EDU 07567-23
Agency Dkt. No. 199-7/23

New Jersey Commissioner of Education

Final Decision

G.C., on behalf of minor children, L.C., J.C. and B.C.,

Petitioner,

v.

Board of Education of the Borough of Saddle River, Bergen County,

Respondent.

The record of this matter, the proposed Settlement Agreement and Stipulated Consent Judgment (Agreement), and the Initial Decision issued by the Office of Administrative Law pursuant to *N.J.A.C.* 1:1-19.1, have been reviewed. Upon such review, the Commissioner notes that paragraph 1 of the Agreement references an action that preceded the consideration of the settlement by the Commissioner of Education. The parties are reminded that a settlement of litigation before the Commissioner is not binding until the Commissioner approves the settlement. Further, the Commissioner notes that, with respect to Paragraph 8 of the Agreement, the Board is reminded that it must comply with the requirements of New Jersey's Open Public Records Act, *N.J.S.A.* 47:1A-1 *et seq.*, notwithstanding any agreement the parties may have between themselves to keep the terms of their settlement confidential.

In light of the foregoing, the Commissioner adopts the Initial Decision as the final decision in this matter, provided that the parties have already implemented the settlement terms or have agreed upon mutually satisfactory alternate dates for the effectuation of the

terms of the Agreement. Assuming same, the matter is hereby dismissed, subject to compliance with the terms of the settlement consistent with applicable public records law.

IT IS SO ORDERED.

Angelica Allen-McMillan, Ed.D.
ACTING COMMISSIONER OF EDUCATION

Date of Decision: October 30, 2023
Date of Mailing: November 1, 2023

State of New Jersey
OFFICE OF ADMINISTRATIVE LAW

INITIAL DECISION
SETTLEMENT
OAL DKT. NO. EDU 07567-23
AGENCY DKT. NO. 199-7/23

G.C., ON BEHALF OF MINOR CHILDREN, L.C., J.C. AND B.C.,
Petitioner,
v.
BOROUGH OF SADDLE RIVER BOARD OF EDUCATION, BERGEN COUNTY,
Respondent.

William Borowinski, Esq., for petitioner (The Haddad Law Firm, attorneys)

Frances L. Febres, Esq., for respondent (Cleary Giacobbe Alfieri Jacobs, LLC, attorneys)

Record Closed: October 12, 2023 Decided: October 12, 2023

BEFORE **DANIEL J. BROWN,** ALJ:

On August 16, 2023, the Commissioner of the Department of Education transmitted this case to the Office of Administrative Law (OAL) under the Administrative Procedure Act, N.J.S.A. 52:14B-1 to -15, and the act establishing the OAL, N.J.S.A. 52:14F-1 to -23, for a hearing under the Uniform Administrative Procedure Rules, N.J.A.C. 1:1-1.1 to -21.6.

A copy of their settlement agreement and board resolution are attached to this decision. Having reviewed the terms of the settlement agreement, I **FIND** that the parties have entered into their settlement voluntarily, as evidenced by their signatures, the signatures of their representatives, or both.

Moreover, I **CONCLUDE** that the settlement agreement is consistent with the law, is fully dispositive of all issues in controversy between the parties, and is otherwise consistent with the requirements of N.J.A.C. 1:1-19.1.

Therefore, given my findings of fact and conclusions of law, I **ORDER** that the parties comply with the terms of their settlement and that these proceedings are now closed.

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

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

10/12/23
DATE

Daniel Brown
DANIEL J. BROWN, ALJ

Date Received at Agency: OCTOBER 13, 2023

Date Mailed to Parties: OCTOBER 13, 2023

dr

Ramos, Damaris [OAL]

From:	Frances Febres <ffebres@cgajlaw.com>
Sent:	Thursday, October 12, 2023 12:21 PM
To:	Ramos, Damaris [OAL]
Cc:	William Borowinski (wborowinski@sphlaw.com); Gina Cinotti; Kaitlyn Lawler
Subject:	[EXTERNAL] EDU 7567-23 (GC obo minor children LC, JC & BC v BOE of the Borough of Saddle River, Bergen County)
Attachments:	Casey Fully-Executed Settlement Agrm w executed consent judgment.pdf; Casey Resolution.pdf

Good Afternoon,

I am pleased to present a fully-executed settlement agreement and Board resolution extract for Judge Brown's review.

Please advise if there is anything further that may be required.

Regards,
Frances

Frances L. Febres, Esq.
Cleary | Giacobbe | Alfieri | Jacobs LLC

Oakland Office
169 Ramapo Valley Rd.
Upper Level - Suite 105
Oakland, NJ 07436
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CLEARY GIACOBBE ALFIERI & JACOBS, LLC
169 Ramapo Valley Road
Upper Level, Suite 105
Oakland, New Jersey 07436
Telephone: 973-845-6700
Facsimile: 201-644-7601
Attorneys for Respondent

G.C. o/b/o minor children, L.C., J.C. and B.C. Petitioner, v. Saddle River Board of Education, Bergen County., Respondent.	STATE OF NEW JERSEY OFFICE OF CONTROVERSIES & DISPUTES Agency Dkt. No. 199-7/23 OAL Dkt. No: EDU 07567-2023N **SETTLEMENT AGREEMENT AND STIPULATED CONSENT JUDGMENT**

This Settlement Agreement and Stipulated Consent Judgment ("Agreement") is entered into by and between Gia Casey o/b/o minor children L.C., J.C. and B.C. ("Petitioner") and the Saddle River Board of Education ("Board"), having principal offices at 97 E Allendale Rd, Saddle River, New Jersey 07458 (the Board and Petitioner are collectively referred to as the "Parties").

WHEREAS, for the 2022-2023 academic year, the minor children L.C., J.C. and B.C. (hereinafter referred to as the "Children") were enrolled in the Saddle River School District ("District"); and

WHEREAS, during the 2022-2023 the school district learned that neither Petitioner nor the Children were domiciled in Saddle River, New Jersey, but were domiciled in Kinnelon, New Jersey; and

WHEREAS, following notices to Petitioner and a residency hearing conducted by the Board of Education on June 28, 2023, during which Petitioner appeared and participated, the

Saddle River Board of Education found that the Children were not domiciled in Saddle River and voted to remove them from its school; and

WHEREAS, Petitioner filed the instant Petition of Appeal to dispute the Children's removal from the school, which Petition was later amended; and

WHEREAS, the Board of Education filed an Answer and Counterclaim to the Petition of Appeal, and thereafter Amended Counterclaim, seeking tuition for each of L.C., J.C. and B.C.'s attendance, in addition to reimbursement for extended school year services, special education related services and transportation; and

WHEREAS, the Parties have conferred and reached an amicable resolution to the issues between the Parties pertaining to the above-captioned matter, and as stated in the Parties' amended pleadings; and

WHEREAS, the Parties have each determined that this resolution is their respective best interest, without the need to spend further time and resources in proceeding to an administrative hearing.

NOW, THEREFORE, in consideration of the mutual promises contained herein and other good and sufficient consideration, the receipt and sufficiency of which is hereby acknowledged, the Parties now desire to memorialize the terms of their terms and conditions agreement in writing, as follows:

1. Petitioner agrees to pay the Board tuition for the Children's Period of Ineligible Attendance in the Saddle River School District during the 2022-2023 school year, which tuition and related expenses calculate to Ninety-Six Thousand Eight Hundred Sixteen Dollars ($96,816.00) but which the Board will agree to reduce to Eighty-Seven Eight Hundred Sixteen

Thousand Dollars ($87,816.00), which shall be referred to as the "Settlement Amount" as follows:

a. Petitioner shall pay the Settlement Amount in two (2) installments: the first payment in the amount of $43,908.00 must be received by the Board's business office by October 13, 2023, and the second payment in the amount of $43,908.00 must be received by the Board's business office by January 15, 2024.

b. Petitioner agrees that the Settlement Amount, which incorporates a reduction in the overall tuition owed, is contingent on the timely payment of the first installment.

c. Should the Board not receive the first installment, in full, by October 13, 2023, the second tuition payment will be $48,908.00, and must be paid by January 15, 2024.

d. All payments shall be made to the Board by personal or certified check, payable to the Saddle River Board of Education.

2. In the event Petitioner fails to pay in accordance with the terms set forth in this Stipulation:

a. Petitioner shall be given ninety (90) days from Notice of Default to cure same;

b. Thereafter, the Board may submit an ex parte certification to the Superior Court of New Jersey with notice to Petitioner, setting forth her failure to pay in accordance with the terms set forth herein with a consent judgment in Respondent's favor, in the form annexed hereto as Exhibit "A," for entry by the court (the "Consent Judgment"), and which Consent Judgment the parties authorize their attorneys to execute

on their behalf. The Consent Judgment shall be for the full tuition amount owed for the 2022-2023 school year: $96,816.00, less any payments made by Petitioner to the Board pursuant to Paragraph 1 (above);

i. The original, fully-executed Consent Judgement shall be maintained with the Board's Attorney and shall not be filed with the Superior Court until/unless required to effectuate the payment of the tuition, and only after Petitioner was provided with notice of her default and provided with time to cure any such default, as specified herein.

ii. This Consent Judgment may be signed and dated in any number of counterparts, each of which shall be an original, and such counterparts shall together be one and the same Consent Judgment.

c. Petitioner waives all rights to contest entry of the Consent Judgment, an unexecuted copy of which is attached as Exhibit "A" to this Agreement. The Consent Judgment may be docketed with the Clerk of the Superior Court of New Jersey;

d. Petitioner shall pay all of the Board's reasonable attorney's fees and legal costs associated with enforcing the Board's rights under this Stipulation; and

e. No delay or omission on the part of the Board in exercising any right under this Stipulation will operate as a waiver of that right or of any other right under this Stipulation.

3. In consideration of the terms of this Agreement, Petitioner hereby waives, releases and indemnifies the Board, its employees, and agents from all possible claims, including claims that may be raised by 3rd parties with standing, that have or may have been accrued against the Board arising out of the Petition of Appeal and Amended Petition of Appeal in this

matter. Nothing in this Release or Indemnification set forth in this Paragraph shall be construed as a release or waiver of any claims between the Parties seeking to enforce any term or provision of this Agreement.

4. In consideration of the terms of this Agreement, and as long as the Parents satisfy their obligations under this Agreement, the Board hereby waives and releases the Petitioner, her heirs, agents, representatives, and assigns, from any and all claims, demands, debts, liability, and causes of action of any type whatsoever, legal or equitable, arising from or pertaining to any act or circumstance including, but not limited to, anything that has occurred up to the date the Parties execute this Agreement, whether known or unknown, accrued or not accrued, as it concerns the claims that could have been raised in the above-captioned matter for the 2022-2023 school year.

5. Petitioner acknowledges that she has had the opportunity to review this Agreement in detail with her Attorney. Petitioner fully understand its requirements and limitations. Petitioner hereby states that she is signing this Agreement voluntarily, of her own free will, and not under duress or coercion of any kind.

6. This Agreement shall be construed fairly according to the plain language of its terms and not for or against any party hereto.

7. All parties are bound by this Agreement and each of its provisions. Anyone who succeeds their rights and responsibilities, such as their successors and assigns are also bound. This Agreement is made for the benefit of all parties hereto and all who succeed to their rights and responsibilities, and expressly includes their officials, representatives, employees, agents, attorneys, successors or assigns.

8. This Agreement is to be kept confidential by both parties to the maximum extent permitted by Law.

9. This Agreement represents the entire Agreement between the Parties and will not be modified in whole or in part except by a mutual subsequent written and signed agreement.

10. This Agreement is governed by the laws of the State of New Jersey. The Parties agree that the courts of the State or District Court of New Jersey shall be the sole forum in which any legal action concerning or relating to this Agreement shall be brought.

11. In the event that any provision of this Agreement is held to be void or unenforceable by any court or regulatory authority having jurisdiction thereof, such ruling will not affect the validity of this Agreement; the remaining provisions shall continue to be in full force and effect.

12. This Agreement may be executed in one or more original, emailed or telecopied counterparts, all of which together shall be one instrument, and all of which shall be considered duplicate originals.

13. **This Agreement is conditioned upon and subject to the review and approval of an Administrative Law Judge, and the Saddle River Board of Education.**

The parties hereby acknowledge their agreement to the terms set forth above by signing below.

PETITIONER:

Gia Casey

GIA CASEY

Date: 9/28/2023

FOR THE SADDLE RIVER BOARD OF EDUCATION:

Board of Education

Date: 10/11/2023

Witness for Petitioner:

WILLIAM J. BOROWINSKI
Attorney at Law, State of NJ

Dated: Sept 28, 2023

KAITLYN LAWLER
Board Secretary

Date: 10/11/2023

Frances L. Febres, Esq. (ID No. 018542012)
CLEARY GIACOBBE ALFIERI & JACOBS, LLC
169 Ramapo Valley Road
Upper Level, Suite 105
Oakland, New Jersey 07436
Telephone: 973-845-6700
Facsimile: 201-644-7601
Attorneys for Plaintiff, Saddle River Board of Education

Saddle River Board of Education, Plaintiff, vs. Gia Casey Defendant.	SUPERIOR COURT OF NEW JERSEY LAW DIVISION: ESSEX COUNTY **CONSENT JUDGMENT**

THIS MATTER having been opened to the Court by Cleary Giacobbe Alfieri Jacobs LLC, attorneys for the Plaintiff, Saddle River Board of Education ("Plaintiff"), with the consent of the Defendant, Gia Casey ("Defendant"), and it appearing that the parties entered into a Settlement Agreement on _____, 2023, which had been approved by an Administrative Law Judge, to resolve a dispute before the New Jersey Office of Administrative Law and, as part of the Settlement Agreement, the Plaintiff and the Defendant willingly executed this Consent Judgment, the entry of which is governed by the terms and conditions of the Settlement Agreement, and good cause appearing:

IT IS on this ___ day of _____, 20____, ORDERED AND ADJUDGED:

Judgment is entered in favor of Plaintiff and against Defendant, Gia Casey, in the amount of Ninety-Six Thousand Eight Hundred Sixteen Dollars ($96,816.00), in addition to interest, attorneys' fees, and legal costs, as of _____, 20____, as follows:

a. Within ___ days of the execution of this Judgment, Gia Casey shall pay the Saddle River Board of Education $96,816.00 less any monies already paid to the Plaintiff under the Settlement Agreement; and

b. Gia Casey shall pay Plaintiff's attorneys fees and legal costs incurred in enforcing this Consent Judgment.

J.S.C.

We hereby consent to the form and entry of this Consent Judgment:

WILLIAM BOROWINSKI, ESQ.
Haddad Law Firm
Attorneys for Defendant, Gia Casey

Date: 9/26/2023

FRANCES L. FEBRES, ESQ.
Cleary Giacobbe Alfieri Jacobs LLC
Attorneys for the Plaintiff,
Saddle River Board of Education

Date: 10/12/23

Saddle River School District - Wandell School
97 East Allendale Road, Saddle River, NJ 07458
201.327.0727 *www.wandellschool.org* *Fax: 201.236.8166*

The following is a copy of the Saddle River Board of Education resolution at its meeting on October 11, 2023

E-23241003: Residency Settlement Agreement 2023-24

Be it resolved that upon recommendation of the Superintendent, the Saddle River Board of Education accepts the settlement agreement for students #10748, #10749, & #10750 for the back tuition on a residency matter, in the total amount of $87,816, to be paid in two installments of equal amounts each ($43,908 & $43,908) , where payment is due on October 13, 2023 and January 15, 2024, as per the Board Attorney and the attorney for the family, as indicated in the mutually agreed upon settlement agreement.

Motion:	*YE*	*Second:*		*ES*		*Discussion:*	*N/A*		
Roll Call Vote:		*EK:*	*Y*	*YE:*	*Y*	*EN:*	*Y*	*ES:*	*Y*	*JP: Absent*

All Motions Passed 4-0

I hereby certify that this is a true/ accurate copy of the minutes of the Regular Session of the Saddle River Board of Education held on October 11, 2023.

Kaitlyn Lawler

Kaitlyn Lawler, Board Secretary

October 12, 2023
Date

328-23

New Jersey Commissioner of Education

Decision

I.R., on behalf of minor child, J.R.,

Petitioner,

v.

Board of Education of the Township of East Brunswick, Middlesex County,

Respondent.

Synopsis

Petitioner appealed two harassment, intimidation or bullying (HIB) determinations by the respondent Board involving her daughter, J.R., who was an eighth grader in the Board's school district at the time of the incidents. Specifically, the Board had determined: (1) that J.R. committed an act of HIB pursuant to New Jersey's Anti-Bullying Bill of Rights Act, *N.J.S.A.* 18A:37-13.2 et seq, when she created and disseminated a meme regarding the weight and appearance of another student, N.C.; and (2) that J.R. was not the victim of HIB by N.C. when N.C. started a fight with J.R. in retaliation. Petitioner contended that the HIB investigations into these matters were flawed, and sought, *inter alia*, to reverse both of the Board's HIB determinations involving her daughter.

The ALJ found, *inter alia*, that: regarding the first Board determination above, the record demonstrated that J.R. had made comments to N.C. about her weight, but the Board's decision was based solely on the incident regarding the meme; the Board's written decision contained misstatements, including that J.R. created the meme, while the investigation demonstrated that another student had created it; and the Board's decision indicated J.R. had admitted to showing the meme to other students in the school when there is no such admission in the record; regarding the second Board determination above, N.C. did not commit an act of HIB when she physically attacked J.R. because N.C.'s actions were not "reasonably perceived as being motivated either by any actual or perceived characteristic," as required under *N.J.S.A.* 18A:37-14. Accordingly, the ALJ affirmed the Board's determination that J.R. was not the victim of HIB but reversed the Board's decision that J.R. had committed an act of HIB.

Upon review, the Commissioner found that the record contains sufficient evidence to support the Board's finding of HIB, and concluded that it was not arbitrary, capricious, or unreasonable for the Board to have determined that J.R. committed HIB against N.C. Accordingly, the Initial Decision of the OAL was reversed in part and the Board's finding that J.R. committed an act of HIB was affirmed, while the Initial Decision was affirmed in part and the Board's finding that J.R. was not the victim of HIB was affirmed. The petition was dismissed.

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

328-23
OAL Dkt. No. 17359-18
Agency Dkt. No. 265-10/18

New Jersey Commissioner of Education

Final Decision

I.R., on behalf of minor child, J.R.,

Petitioner,

v.

Board of Education of the Township of East Brunswick, Middlesex County,

Respondent.

The record of this matter, the Initial Decision of the Office of Administrative Law (OAL), and the exceptions filed by the East Brunswick Board of Education (Board) pursuant to *N.J.A.C.* 1:1-18.4 have been reviewed and considered. Petitioner did not file a reply to the Board's exceptions.

This matter involves two harassment, intimidation, and bullying (HIB) determinations made by the Board. First, the Board determined that J.R. committed an act of HIB when she created and disseminated a meme regarding the weight and appearance of another student, N.C. Second, the Board determined that J.R. was not the victim of HIB by N.C. when N.C. started a fight with J.R. in retaliation. Following a hearing, the Administrative Law Judge (ALJ) affirmed the Board's decision that J.R. was not the victim of HIB, finding that N.C.'s actions were not based on a distinguishing characteristic of J.R. The ALJ reversed the Board's decision that J.R. committed an act of HIB. The ALJ noted that although the record demonstrated that J.R.

had made comments to N.C. about her weight, the Board's decision was based solely on the incident regarding the meme. The ALJ found that the Board's written decision contained misstatements, including that J.R. created the meme, while the investigation demonstrated that another student had created it. Moreover, the Board's decision indicated J.R. had admitted to showing the meme to other students in the school when there is no such admission in the record. Because these factual inaccuracies did not support the Board's conclusion, the ALJ found that the decision was not entitled to a presumption of correctness and reversed the decision.

In its exceptions, the Board argues that even though the Board's decision erroneously states that J.R. created the meme, disseminating the meme is sufficient on its own for a finding of HIB against J.R. The Board also contends that the conduct reported by N.C. was not exclusive to the meme and extended to J.R.'s other comments about N.C.'s weight and appearance.

Upon review, the Commissioner finds that the record contains sufficient evidence to support the Board's finding of HIB. When a local board of education acts within its discretionary authority, its decision is entitled to a presumption of correctness and will not be disturbed unless there is an affirmative showing that the decision was "patently arbitrary, without rational basis or induced by improper motives." *Kopera v. W. Orange Bd. of Educ.*, 60 *N.J. Super.* 288, 294 (App. Div. 1960). Even if J.R. did not admit to disseminating the meme, N.C. did report during the investigation that she saw J.R. showing the meme to other students. The Commissioner concludes that it was not arbitrary, capricious, or unreasonable for the Board to find N.C.'s report credible, or for the Board to find that J.R.'s conduct in disseminating the meme met the statutory criteria for an act of HIB.

Additionally, the record is replete with J.R.'s admissions that she called N.C. "fat" on numerous occasions. These allegations were contained in the HIB complaint filed by N.C.'s parents, and they were addressed in the investigation report on which the Board's decision was based. J.R.'s insulting comments toward N.C. also meet the statutory criteria for an act of HIB.

Accordingly, the Initial Decision is reversed in part, and the Board's finding that J.R. committed an act of HIB is hereby affirmed. The Initial Decision is affirmed in part, and the Board's finding that J.R. was not the victim of an act of HIB is affirmed. The petition of appeal is hereby dismissed.

IT IS SO ORDERED.[1]

Angelica Allen-McMillan, Ed.D.
ACTING COMMISSIONER OF EDUCATION

Date of Decision: November 2, 2023
Date of Mailing: November 3, 2023

[1] This decision may be appealed to the Appellate Division of the Superior Court pursuant to *N.J.S.A.* 18A:6-9.1. Under *N.J.Ct.R.* 2:4-1(b), a notice of appeal must be filed with the Appellate Division within 45 days from the date of mailing of this decision.

State of New Jersey
OFFICE OF ADMINISTRATIVE LAW

INITIAL DECISION
OAL DKT. NO. EDU 17359-18
AGENCY DKT. NO. 265-10/18

I.R. ON BEHALF OF MINOR CHILD, J.R.,

Petitioner,

v.

TOWNSHIP OF EAST BRUNSWICK BOARD OF EDUCATION, MIDDLESEX COUNTY,

Respondent.

I.R., petitioner on behalf of minor child J.R., pro se

Frances L. Febres, Esq., for respondent (Cleary, Giacobbe, Alfieri, Jacobs, LLC, attorneys)

Record Closed: July 11, 2022 Decided: August 18, 2023

BEFORE **CARL V. BUCK III,** ALJ:

STATEMENT OF THE CASE

Petitioner I.R. appeals the determinations by respondent Township of East Brunswick Board of Education (Board) that (1) I.R.'s daughter, J.R., violated the Board's harassment, intimidation, or bullying (HIB) policy when "she created and disseminated a meme regarding [N.C.'s] weight and appearance" and that (2) J.R.'s classmate, N.C., did not violate the Board's HIB policy when she fought J.R. For the reasons that follow, I conclude that the

Board's determination that N.C. did not commit a HIB act against J.R. should be affirmed, while the Board's determination that J.R. committed an act of HIB against N.C. should be reversed.

PROCEDURAL HISTORY

On August 3, 2018, the Board determined that J.R. committed an act of HIB against her classmate, N.C., on the basis of N.C.'s weight or appearance, but that N.C. did not commit a HIB act by starting a fight with J.R. in retaliation. Petitioner filed a timely petition of appeal with the Commissioner of Education, and upon receipt of an answer from the Board, the Commissioner, on December 5, 2018, transmitted the matter to the Office of Administrative Law (OAL) as a contested case, pursuant to N.J.S.A. 52:14B-1 to -15 and N.J.S.A. 52:14F-1 to -13. The matter was heard on January 31, 2020, and February 19, 2020. The record was closed after post-hearing submissions by the parties on July 11, 2022. Orders of extension of the deadline to file the initial decision were signed on August 16, 2022; October 6, 2022; November 23, 2022; January 9, 2023; April 10, 2023; May 15, 2023; and July 7, 2023. By these orders of extension, the deadline for filing the initial decision was extended to August 21, 2023.

FACTUAL DISCUSSION AND FINDINGS

The following facts are derived from the documentary evidence submitted by the parties to this matter, and **I FIND**:

This matter arises from separate HIB incident reports filed on May 21, 2018, by the fathers of two eighth-grade students at Churchill Junior High School in East Brunswick. In the first report, the father of N.C. alleged that his daughter "has been subject to name-calling and derogatory social media posts related to her weight and physical appearance." (R-2.) The alleged offender was N.C.'s classmate, J.R. Ibid. In the second report, J.R.'s father, I.R., who is the petitioner in this matter, alleged that his daughter had been the target of a

physical attack by N.C. on May 16, 2018, and that J.R. "has been 'the victim of physical attacks by the members of the same group" while at school. (R-3.)

As a result of the HIB allegations, an Anti-Bullying Specialist, Tiffany Papp, conducted an investigation and issued two separate written reports of her findings on May 31, 2018. (R-2; R-3.) As part of her investigation into the incidents, Ms. Papp interviewed several students, including J.R. and N.C. Ibid.

According to N.C., a group of students, including J.R., had been picking on her throughout the school year. (R-3.) One day, a member of that group, identified as "O2" in one of the HIB reports, posted "a picture of a fat sheep on Instagram. I was tagged in it. The caption said 'Look' with my name tagged to it. It was [O2's Instagram] account." Ibid. N.C. told Ms. Papp that, "It made me feel upset. I don't know why they need to make me feel bad. [J.R.] had the picture before first period. She was holding it up and laughing in front of people in the hallway. I wanted to cry, but I didn't. The bell rang, so I went to class. I usually see [J.R.] after period 2. That's when I pushed her and she swung at me." Ibid. In a statement about the incident, N.C. wrote, "They were bullying me and posting mean things about me and calling me fat and I had enough, so I hit [J.R.]" (R-2.)

In her written statement, J.R. wrote, "Walking to class and got thrown into a window by [N.C.] She threw punches and I hit her back in self-defense." (R-3.) J.R. reported that she had had issues with N.C. and N.C.'s group of friends throughout the school year. Ibid. In her interview with Ms. Papp, J.R. explained that "Someone else posted something not nice [about [N.C.]] online. I'm friends with him . . . so she associated me with it [the online posting]. In school, her and her friends followed me to my class . . . [N.C.] hit me." (R-2.) J.R. stated that she and N.C. "see each other in the halls all the time" and that when she saw N.C., "I would say fuck you and call her fat." Ibid.

In his interview, O2 admitted that he posted the sheep meme and stated that, in doing so, "I guess I was calling her fat." Ibid. He further stated that "[J.R.] had nothing to with it and then [N.C.] went up to her and hit her." Ibid.

Another student who was interviewed and identified as "W1" stated that N.C. "told me that she got tagged in an Instagram post. It was a fat ram meaning that she was fat and it was O2 that posted it." Ibid. According to W1, "[N.C.] told us before the fight in period 2 that she had enough and that she was going to fight [J.R.]" Ibid.

Another student who was interviewed, "W3," "Before period 1, [J.R.] said something to [N.C.] [J.R.] also said something to [N.C.] right before she fought her and [N.C.] just got fed up and went for it. In the morning before the fight, [N.C.] said she didn't know how to make it stop. She went to Guidance, she tried to approach [O2 and J.R.] That didn't work. I also told O2 to stop. It just didn't stop, so [N.C.] fought." Ibid.

"W4," another student witness who was interviewed, stated that "There's been a lot of back and forth between [J.R.], O2, and [N.C.] . . . [N.C.] saw a picture online that was meant to be a fat blob. O2 posted it. It was meant to call [N.C.] fat. That over-did it . . . They would call her fat and all to her face. Then, when they put the 'fat' picture up she had enough." Ibid. According to W4, "[J.R.] just doesn't stop running her mouth about [N.C.] saying that she's fat and a bitch. [N.C.] says it back to her. [N.C.] does get herself into drama, but [J.R.] really started this one with them going at each other."

Finally, "W5" recounted that "[J.R.] takes O2's side and whatever O2 does, [J.R.] does. So, [N.C.] went up to [J.R.] and said, 'Why did you post that about me with O2?' [J.R.] tried to hit her. [N.C.] tried to block her and then they fought." Ibid.

After interviewing the students who were involved in or witnessed the incidents, Ms. Papp concluded that J.R. and the student who posted the picture of a sheep on his Instagram account committed HIB against N.C. (R-2.) Ms. Papp determined that that the incident involving the picture met the definition of HIB because the distinguishing characteristic motivating the incident was N.C.'s "weight/physical appearance;" "offender knew the action would physically or emotionally cause harm to the victim[;]" and the incident "insulted or

demeaned a student" and "created a hostile educational environment by severely or pervasively causing physical or emotional harm to the student." (R-2.)

However, Ms. Papp concluded in a separate written report that N.C.'s physical attack on J.R. did not meet the definition of HIB because, although J.R. "was in fear of physical or emotional harm," there was an absence of a distinguishing characteristic motivating the incident." (R-3.) Instead, the incident was addressed under the school's code of conduct. (R-4.)

Thereafter, J.R.'s parents met with school administrators about the HIB reports. (R-5.) J.R.'s parents wanted to know why school officials had determined that their daughter was not the victim of HIB and explained that the physical altercation with N.C. had a negative emotional and educational impact on J.R. Ibid. The school officials offered to provide J.R. with certain supports. Ibid.

By letter, dated June 18, 2018, an assistant superintendent, Louis Figueroa, notified J.R.'s parents that J.R. was found to have committed an act of HIB and the reasons therefor. R-8. Specifically, Dr. Figueroa summarized the HIB investigation findings as follows: J.R. "insulted or demeaned another student" and "offender upset the victim by her actions." Ibid. And he listed the evidence as "offender electronically bullied the victim;" "actions caused emotional harm and interfered with the victim's education;" and "offender bullied the victim by these actions." Ibid.

However, in the letter, Dr. Figueroa mistakenly wrote that "This report is sent to you as a result of a comprehensive HIB investigation in which your child, Joseph was identified as an offender." Ibid. J.R.'s first name is not Joseph.[1] Dr. Figueroa notified the parents of their right to a hearing before the Board. Ibid.

In response, J.R.'s parents requested a hearing before the Board, and on July 26, 2018, appeared before the Board to contest the findings that J.R. committed an act of HIB

[1] However, J.R.'s actual first name is written correctly in another section of the letter. Ibid.

against N.C. and that J.R. was not the victim of HIB as a result of the physical altercation with N.C. (R-10.)

By letter, dated August 3, 2018, the Board informed J.R.'s parents that "the Board determined to uphold the Superintendent's findings." Ibid. With respect to the fight, "the Board agreed with [Ms. Papp's] determination that the other student's conduct was not motivated by a perceived or actual characteristic; rather, the other student's conduct was a code of conduct violation and was in response to your daughter's dissemination of an inappropriate meme about the student. During [Ms. Papp's] investigation, your daughter admitted to showing the meme to other students in school." Ibid. As for the other incident, "the Board found that your daughter's conduct did meet the HIB criteria as she created and disseminated a meme regarding the other student's weight and appearance." Ibid.

The Board informed J.R.'s parents of their right of appeal to the Commissioner of Education. Ibid.

On October 30, 2018, I.R. did, in fact, file an appeal with the Commissioner and after the Board filed an answer, the Commissioner sent the matter to the OAL as a contested case.

A hearing was held on January 31, 2020, and February 19, 2020. At the hearing, Mark Sutor and Louis Figueroa testified for the Board, while I.R. testified on his own behalf. Ms. Papp, who was on maternity leave and unable to testify in person, provided written testimony on behalf of the Board.

Mark Sutor (Mr. Sutor), Principal of Churchill Junior High School, testified on behalf of the Board. Mr. Sutor testified that he reviews the report of the Anti-Bullying Specialist to determine if the findings meet the legal definition of HIB. These incidents first came to his attention when there was a fight in the school. N.C. hit or pushed J.R. and J.R. pushed back before the fight was broken up. He learned the fight was caused by a meme of a large sheep. The fight was originally handled as a code of conduct issue for which both students were disciplined, and then I.R. requested an HIB investigation into the matter. Mr. Sutor testified

that when N.C.'s parents were notified of the HIB investigation, they requested an HIB investigation into J.R.'s conduct. As part of his request, I.R. claimed that four girls in the school had a history of bullying J.R.

Mr. Sutor testified that Ms. Papp, the Student Assistance Counselor at a different school in the district, was assigned to complete the HIB investigation because I.R. asked for an independent HIB specialist. Ms. Papp conducted both investigations at issue here. She found that J.R. had made negative and demeaning comments toward N.C. over a period of several months that referred to her weight and appearance. Mr. Sutor testified that J.R. had done this along with other students, both in the hallways at school and online, and it was extremely upsetting to N.C. Ultimately, Ms. Papp found that J.R. had bullied N.C. Regarding N.C.'s misconduct, Mr. Sutor testified that Ms. Papp found that an altercation had occurred, but that N.C. did not commit an act of HIB against J.R. because no distinguishing characteristic was identified as the motivation for the altercation. Instead, Ms. Papp found that J.R.'s sharing of the meme was the reason for N.C.'s actions.

Mr. Sutor also testified that he met with I.R. on June 13, 2018, to discuss the findings. After this meeting, I.R. appealed the findings of the District to the Board, which held a hearing on July 26, 2018. At this meeting, the Board upheld the findings of the District regarding both HIB investigations. The Board agreed that there was no lasting impact on J.R.

When asked about J.R.'s grades declining at the end of the 2017-2018 school year and during the following school year, Mr. Sutor testified that it is normal for grades to change for students transitioning from middle school to high school. Mr. Sutor explained that transitioning from the elementary school model (2017-2018 school year) to the high school model (2018-2019 school year), as J.R. did, can result in a change in a student's grades, so that is not necessarily a result of a HIB incident.

Dr. Louis Figueroa, (Dr. Figueroa), Assistant Superintendent, District Anti-Bullying Coordinator, and County Anti-Bullying Bill of Rights Chairman, also testified on behalf of the Board. Dr. Figueroa testified that he reviews the HIB investigations from the Supervisor of

Student Services, who is Danielle Blalock. He then reviews them with the superintendent before they go to the Board. Dr. Figueroa explained that the anti-bullying specialist conducts the HIB investigations themselves and they undergo training to be able to do so. Dr. Figueroa testified that he also provides monthly updates to the supervisor of student services and the anti-bullying specialists in the District.

Dr. Figueroa testified that he reviewed both of the reports that are on appeal here and that he agreed with the findings in both cases. He makes sure that the findings are consistent with the law and that there are facts to back up the determinations that are made. He found that both of the findings in this matter were supported by sufficient evidence. Dr. Figueroa spoke to I.R. about the findings around the end of May or beginning of June, though he could not recall the exact date. He testified that they spoke about I.R.'s concerns regarding the accuracy and the questions that were asked by the anti-bullying specialist. He testified about a meeting with I.R. and his wife on June 13, 2018, which also included Danielle Blalock and Mr. Sutor. Dr. Figueroa testified that he always meets with parents when they ask to discuss HIB findings. Dr. Figueroa also explained that he sent a follow up letter after the meeting, which was followed by I.R.'s request to be heard by the Board, received around June 25, 2018.

Dr. Figueroa testified that the Board heard this matter on July 26, 2018, a date requested by I.R. During this hearing, I.R. was able to speak to the Board and the Board questioned Dr. Figueroa, Mr. Sutor, and Ms. Blalock. He testified that the Board voted to accept the recommendations of the District on both HIB investigations. The Board agreed with the findings against J.R. because there was an actual or perceived characteristic (weight or appearance) that motivated J.R. and the evidence showed that J.R. knew her actions would physically or emotionally harm N.C., that it insulted or demeaned N.C., and that it created a hostile educational environment.

Tiffany Papp (Ms. Papp)Student Assistance Specialist and Anti-Bullying Specialist, was unavailable to testify for the Board due to being on leave, so written testimony was provided. Direct and cross-examinations with written answers were both admitted into

evidence. At the time of the investigation in May 2018, Ms. Papp was employed at the Hammarskjold Middle School but was asked to conduct the HIB investigations at issue here as an independent party. She is trained to complete HIB investigations.

The first reported incident which Ms. Papp investigated, as stated in the Anti-Bullying Specialist Reporting Form was "the parent of the alleged target [N.C.], reports that [N.C] has been subject to name-calling and derogatory social media posts related to her weight and physical appearance." Ms. Papp's investigation included reviewing written statements from the students involved and interviewing witnesses. At the conclusion of this investigation, Ms. Papp found J.R.'s conduct met the definition of HIB due to an actual or perceived characteristic that motivated the incident and because of the effects of the behavior on N.C. Therefore, a finding of HIB was made against J.R.

The second reported incident which Ms. Papp investigated, as stated in the Anti-Bullying Specialist Reporting Form, "the parent of the alleged target, [I.R.], requested an HIB investigation following a physical incident on May 16, 2018. [I.R.] states that his daughter, [J.R.], has been "the victim of physical attacks by members of the same group while in the Churchill Junior High School building." Ms. Papp's investigation included reviewing written statements from the students involved and interviewing witnesses. Ms. Papp also reviewed video footage of the incident. At the conclusion of the investigation, Ms. Papp found this to be an unconfirmed incident of HIB because there was no actual or perceived characteristic that motivated the incident.

Ms. Papp noted that although J.R. informed her of past issues with N.C., the other students interviewed did not. Ms. Papp also noted that all four of the students requested by I.R. were investigated as part of the second incident with J.R. as the alleged victim. Additionally, since the two incidents were related, most students were only interviewed once for both investigations. While J.R. was not found to have created the meme of N.C., she was found to have disseminated it in school. J.R. was also found to be involved in making verbal comments regarding N.C.'s weight and appearance.

I.R. testified for himself and his daughter. According to I.R, J.R.'s grades declined after the fight with N.C. I.R. testified that J.R. lost trust in school authorities and actively avoided interactions with the school administration. J.R. also attended therapy for months after the incident. I.R. noted that the letter from Dr. Figueroa named a different student as the offender, rather than J.R., and that the Board incorrectly wrote in its decision that J.R. admitted to sharing the meme and that she "created and disseminated" the meme. I.R. felt that this was a reason to reverse the findings in the investigation against J.R. I.R. also testified that there were no independent witnesses interviewed during the investigation because all of them were either members of J.R.'s friend group, or N.C.'s friend group.

I.R. testified that since the letter containing the findings from Dr. Figueroa contained errors (the wrong name) and directly contradicts the findings of the District's own investigation by Ms. Papp, who did not interview any independent witnesses, the finding against J.R. should be reversed. Regarding the investigation against N.C., I.R. testified that the distinguishing characteristic is that J.R. left the friend group, or "exclusion." Additionally, I.R. testified that his initial HIB investigation request included other students and not just N.C.

Each one of the witnesses testified in a manner that was forthright, direct, and thorough; as such, I found their testimony to be credible.

In April 2020, the parties submitted post-hearing briefs on their respective positions. I.R. maintains that the Board's determinations must be reversed due to certain procedural deficiencies of the HIB investigations and because the evidence does not support the Board's determinations. I.R. contends that he and his daughter were denied due process because the school misidentified J.R. as "Joseph" when informing I.R. and his wife that J.R. had committed an act of HIB, the Board incorrectly concluded that J.R. not only disseminated the meme but also "created" it, there was no proof that J.R. actually shared the meme, no proof of emotional harm to N.C., and Ms. Papp did not interview "independent" witnesses. I.R. also argues that his daughter was the victim of bullying because the distinguishing characteristic motivating N.C.'s instigation of the fight with J.R. was that "J.R. was singled out by the group

of students and cast as an outsider and a pariah after she stop[ped] being a friend with that group[.]" I.R. also states that J.R. suffered emotionally and academically after the incident.

The Board maintains that its determinations should be affirmed because (1) "[t]he Board acted reasonably in determining that J.R. violated the HIB policy by repeatedly calling [N.C.] 'fat,' a 'fat pig,' and a 'fat toddler' multiple times a day for several months;" (2) "the Board acted reasonably in determining that J.R. was not a HIB victim because actions taken against J.R. were not motivated by a distinguishing characteristic;" and (3) "the Board's determinations must be upheld because the record clearly supported the Board's HIB determinations and there were no material procedural errors."

First, with respect to the HIB finding against J.R., the Board notes that J.R. and N.C. had an ongoing feud, that "J.R. specifically admitted to previously calling N.C. a 'fat toddler' and further admitted to calling N.C. 'fat'", and that "N.C. would often run to the bathroom and cry." The Board also notes that:

> J.R. did not specifically deny she disseminated the meme portraying N.C. as a 'fat sheep'; she only denied creating the same. However, N.C. stated that J.R. was showing the meme prior to first period and N.C.'s friends supported her account by stating that J.R. somehow instigated N.C. the morning of the fight. Given this, it was reasonable for the ABS and the Board to find that J.R. disseminated the meme portraying N.C. as a 'fat sheep.'

Second, the Board argues that N.C. did not bully J.R. by fighting her because the fight was not motivated by a distinguishing characteristic. Instead, the fight "arose from a dispute between two feuding parties." Moreover, even if the fight had been the result of J.R.'s exclusion from a former group of friends, the Board maintains that "a dispute between students purely arising from an underlying conflict 'such as a relationship falling apart between former friends' is not HIB." And to the extent that I.R. alleges that N.C. attacked J.R. because J.R. is "small," there is no evidence to support this allegation.

Finally, the Board posits the following:

> [I.R.] also argues that the Board's decision to affirm [the finding the J.R. bullied N.C.] should be reversed because its written decision included the following two incorrect statements: (1) J.R. created the 'fat sheep' meme and (2) J.R. admitted to showing around the 'fat sheep' meme. However, these errors were . . . de minimis because the Board fulfilled its procedural mandate to release a written decision affirming, rejecting, or otherwise modifying the factfinder's decision. Although the basis provided by the Board may certainly guide the Commissioner's analysis, reversal of a Board decision is inappropriate 'where the record is sufficient for a fact finder to determine whether an act of HIB occurred.'

LEGAL ANALYSIS AND CONCLUSIONS

The Anti-Bullying Act is designed "to strengthen the standards and procedures for preventing, reporting, investigating, and responding to incidents of harassment, intimidation, and bullying of students that occur in school and off school premises."[2] N.J.S.A. 18A:37-13.1(f). Under the act, HIB is defined as:

> [A]ny gesture, any written, verbal or physical act, or any electronic communication, whether it be a single incident or a series of incidents, that is reasonably perceived as being motivated either by any actual or perceived characteristic, such as race, color, religion, ancestry, national origin, gender, sexual orientation, gender identity and expression, or a mental, physical or sensory disability, or by any other distinguishing characteristic, that takes place on school property, at any school-sponsored function, on a school bus, or off school grounds as provided for in section 16 of P.L.2010, c.122 (C.18A:37-15.3), that substantially disrupts or interferes with the orderly operation of the school or the rights of other students and that:
>
> a. a reasonable person should know, under the circumstances, will have the effect of physically or emotionally harming a student or damaging the student's property, or

[2] The act was recently amended to add several other procedural requirements regarding HIB investigations. L. 2021, c. 338. However, the amendments became effective in 2022, and the Board's and school staff's actions must be assessed in light of the Anti-Bullying Act's requirements as they existed in 2018.

> placing a student in reasonable fear of physical or emotional harm to his person or damage to his property;
>
> b. has the effect of insulting or demeaning any student or group of students; or
>
> c. creates a hostile educational environment for the student by interfering with a student's education or by severely or pervasively causing physical or emotional harm to the student.
>
> [N.J.S.A. 18A:37-14.]

As the Commissioner has explained, under this provision, N.J.S.A. 18A:37-14, "a finding of HIB requires three elements":

> First, the conduct must be reasonably perceived as motivated by any actual or perceived enumerated characteristic or other distinguishing characteristic and, second, the conduct must substantially disrupt or interfere with the rights of other students or the orderly operation of the school. The third condition is that one of the three criteria enumerated in the Act regarding the effect of the conduct must also be satisfied.
>
> [Wehbeh v. Bd. of Educ. of the Twp. of Verona, 2020 N.J. AGEN LEXIS 50, **7-8.]

Each school district must adopt a policy that prohibits HIB and provides for a prompt response to any alleged HIB incident. N.J.S.A. 18A:37-15. Once an alleged HIB incident is reported to the school principal, the principal must initiate an investigation within one school day of the report. N.J.S.A. 18A:37-15(b)(6). The investigation shall be conducted by a school anti-bullying specialist, but "the principal may appoint additional personnel who are not school anti-bullying specialists to assist in the investigation." Ibid. The investigation shall be completed within ten days of the initial HIB complaint. Ibid.

The results of the investigation shall then be quickly reported to the superintendent of schools, who may take certain remedial action. Ibid. The results shall also be reported to the board of education "no later than the date of the board of education meeting next following the completion of the investigation, along with information on any services

provided, training established, discipline imposed, or other action taken or recommended by the superintendent." Ibid.

The parents of the students involved in any alleged HIB incident are entitled to receive information about the nature of the investigation and the results of the investigation. Ibid. The parents may request a hearing before the board, and the hearing must be held within ten days of the request. Ibid. Any hearing shall be held in executive session to protect the identity of any students involved. Ibid. The board may hear from the anti-bullying specialist about the incident, recommendations for discipline or services, and any programs instituted to reduce such incidents. Ibid.

A school board must issue a written decision at the first meeting after its receipt of the investigation report. Ibid. The board may affirm, reject, or modify the superintendent's decision. Ibid. The board's decision may be appealed to the Commissioner of Education. Ibid.

An action by a board of education "is entitled to a presumption of correctness and will not be upset unless there is an affirmative showing that such decision was arbitrary, capricious or unreasonable." Thomas v. Morris Twp. Bd. of Educ., 89 N.J. Super. 327, 332 (App. Div. 1965). In other words, "action of the local board which lies within the area of its discretionary powers may not be upset unless patently arbitrary, without rational basis or induced by improper motives." Kopera v. Bd. of Educ. of the Town of W. Orange, 60 N.J. Super. 288, 294 (App. Div. 1960). Indeed, "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 conclusions." Id. at 298. Thus, in order to prevail, those challenging a HIB decision made by a board of education "must demonstrate that the Board acted in bad faith, or in utter disregard of the circumstances before it." G.H. & E.H. ex rel. K.H. v. Bd. of Educ. of the Bor. of Franklin Lakes, EDU 13204-13, Initial Decision (February 24, 2014) (citation omitted), adopted, Comm'r (April 10, 2014) <http://njlaw.rutgers.edu/collections/oal/>.

I. The Board's determination that J.R. committed an act of HIB as detailed in its written decision is without a rational basis and must be reversed.

First, I am constrained to **CONCLUDE** that the Board's written decision that J.R. committed HIB against N.C. lacks a reasonable basis and cannot stand.

As prologue, it is clear from the exhibits that J.R. and N.C. had a contentious relationship prior to their physical fight on May 16, 2018. It is equally clear that, while the conflict was mutual, J.R. crossed the line on several occasions, including her admission that in the midst of their ongoing feud, she and N.C. would "see each other in the halls all the time" and that when she saw N.C., "I would say fuck you and call her fat." Calling N.C. "fat" – an actual or perceived distinguishing characteristic – understandably upset N.C. and interfered with her right to be "left alone" at school and these circumstances would meet the statutory definition of HIB. However, this misconduct by J.R. was not the stated basis for the Board's determination that J.R. committed HIB against N.C.

The Anti-Bullying Act provides that "the board shall issue a decision, in writing, to affirm, reject, or modify the superintendent's decision" and "[t]he board's decision may be appealed to the Commissioner of Education[.]" N.J.S.A. 18A:37-15(b)(6)(e). Here, Dr. Figueroa, the Assistant Superintendent, wrote a letter to J.R.'s parents in which he specifically informed them that J.R. committed an act of HIB against another student because she "electronically bullied the victim." The inference here is that J.R. "electronically bullied" N.C. by showing the sheep meme to others on J.R.'s smartphone. And there is no mention in the letter of a finding that J.R. bullied N.C. by calling her "fat."

Then, in the written decision issued by the Board to J.R.'s parents on August 3, 2018, the Board stated that it had "reviewed" the HIB reports issued by Ms. Papp, the Anti-Bullying Specialist, that "[d]uring the ABS' investigation, your daughter *admitted* to showing the meme to other students in school," and that "the Board found that your daughter's conduct did meet the HIB criteria as she *created* and *disseminated* a meme regarding the other student's

weight and appearance."[3] (Emphasis added). J.R.'s involvement with the sheep meme is the sole stated basis for the Board's determination that J.R. committed HIB against N.C. And this written decision by the Board (including the determination that J.R. was not the victim of HIB) was what I.R., as was his right under the HIB statute, appealed to the Commissioner.

The problem with the Board's written decision is that the stated basis for the Board's determination that J.R. committed HIB against N.C. does not align with the evidence in the record. First, at no point during her interview did J.R. admit that she showed the meme to other students.[4] If she had admitted to this, the Board would undoubtedly have reason to conclude that such misconduct, and its effect on the victim, constituted HIB. Yet the Board mistakenly relied on J.R.'s "admission" to conclude that J.R. committed HIB by sharing the hurtful meme with others. The Board compounded its error by stating that J.R. "created" the meme, another misstatement of the facts, as another student admitted to creating the meme without J.R. Finally, and contrary to the Board's leading argument in its post-hearing brief, nowhere in the Board's written decision did that body specifically "determine[] that J.R. violated the HIB policy by repeatedly calling [N.C.] 'fat,' a 'fat pig,' and a 'fat toddler' multiple times a day for several months." Instead, the Board's stated reason for finding that J.R. committed an act of HIB against N.C. was that J.R. "created and disseminated a meme regarding the other student's weight and appearance."

It Is clear from the evidence that J.R. did not create the meme. It is not clear whether, without J.R.'s "admission" that she shared the meme, the Board would have concluded that she did. While N.C. stated in her interview that she saw J.R. showing the meme to other students, none of the other students who were interviewed by Ms. Papp mentioned anything about this happening. Instead, the student who actually created and posted the hurtful meme

[3] In her report on the HIB investigation against J.R. (R-2), Ms. Papp does not specifically state the basis for her HIB finding. The report is written on what appears to be a standard form that is used for all HIB incidents. In the report, she merely recites in a "Factual Findings" section the numerous statements by the accused, the accuser, and witnesses, and then in the section, "Distinguishing Characteristic Motivating the Incident," puts an "X" next to "OTHER actual or perceived characteristic (identify):" and writes "Weight/Physical appearance" as the distinguishing characteristic," and places "X's" next to the applicable categories in the section "Effect of HIB (check all that apply)."

[4] In fact, it appears from a review of the HIB reports that J.R. was never even asked by Ms. Papp whether she shared the meme and laughed about it with other students.

stated that "[J.R.] had nothing to with it and then [N.C.] went up to her and hit her;" another student recalled that "Before period 1, [J.R.] *said something* to [N.C.] [J.R.] also said something to [N.C.] right before she fought her and [N.C.] just got fed up and went for it" (emphasis added); another student said that "*when they put the 'fat' picture up* [N.C.] had enough" (emphasis added); and finally, another student offered that "So, [N.C.] went up to [J.R.] and said, 'Why did you post that about me with O2?' [J.R.] tried to hit her." These witness accounts at least suggest a different impetus for the fight – not that J.R. "shared" the meme, but that N.C. thought she had something to do with creating and posting the meme.

What is known is that the Board erroneously found that J.R. admitted to sharing the meme, and this supposed admission by J.R., not N.C.'s allegation, was the specific finding made by the Board in its written decision and the presumptive basis for the Board's conclusion that J.R. "disseminated" the meme.

While the Board argues that "these errors were . . . de minimis because the Board fulfilled its procedural mandate to release a written decision affirming, rejecting, or otherwise modifying the factfinder's decision," these errors were not "de minimis," but substantive, and cause for reversing the Board's determination that J.R. committed HIB against N.C. The HIB statute does not specify the level of detail required in a school board's written decision "to affirm, reject, or modify the superintendent's decision." Perhaps it would be sufficient for a school board to simply write that "we affirm," or "we reject," or "we modify" the superintendent's decision, and leave it at that. However, here, the Board detailed the findings undergirding its decision and, unfortunately, the stated reasons do not support the Board's conclusion.

I.R. appealed the Board's written decision that J.R. committed HIB because she "admitted" to sharing the sheep meme with others, and that she "created and disseminated the meme;" the written decision that I.R. appealed included no mention or finding regarding instances in which J.R. called N.C. "fat" or some variation thereof. And while a school board's decision is entitled to a presumption of correctness, there is nothing correct about the Board's determination that J.R. committed HIB by "creating" and "admitting" to "disseminating" the

sheep meme. As such, I **CONCLUDE** that the Board's decision that J.R. committed HIB against N.C. must be **REVERSED**.

II. The Board's determination that N.C. did not commit an act of HIB against J.R. must be affirmed.

Second, I **CONCLUDE** that the Board's determination that N.C. did not commit an act of HIB when she physically attacked J.R. because N.C.'s actions were not "reasonably perceived as being motivated either by any actual or perceived characteristic," as required under N.J.S.A. 18A:37-14. Whether N.C. fought J.R. because she thought J.R. shared the meme or because, as N.C. wrote in a statement about the incident, J.R. and her group of friends were "bullying me and posting mean things about me and calling me fat and I had enough, so I hit [J.R.]," the Board reasonably concluded that N.C. did not fight J.R. because of "any actual or perceived characteristic" of J.R.

Contrary to I.R.'s argument, and consistent with the Board's argument, "exclusion" from a group or a "falling out" between friends is not a distinguishing characteristic that is protected under the HIB statute. And, as the Board also argues, there is no support for I.R.'s assertion that N.C. attacked J.R. because J.R. is "small." None of the students interviewed by Ms. Papp, including J.R., mentioned J.R.'s physical stature as a possible factor that motivated N.C.'s actions.

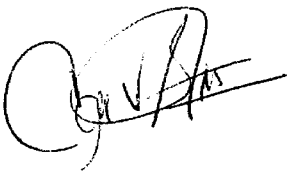
ORDER

Based upon the foregoing, it is hereby **ORDERED** that (1) the Board's determination that J.R. committed an act of HIB against N.C. is **REVERSED** while (2) the Board's determination that N.C. did not commit a HIB act against J.R. is **AFFIRMED**.

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

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

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



August 18, 2023
DATE

CARL V. BUCK III, ALJ

Date Received at Agency:

Date Mailed to Parties:

CVB/tat

APPENDIX

WITNESSES

For Petitioner:

I.R.

For Respondent:

Mark Sutor, Principal of Churchill Junior High School

Dr. Louis Figueroa, Assistant Superintendent and District Anti-Bullying Coordinator

EXHIBITS

For Petitioner:

P-1 J.R.'s Hammarskjold Grades

P-2 J.R.'s Churchill Grades

For Respondent:

R-1 Initial Memorandum, dated May 12, 2018

R-2 Reporting Form of N.C., dated May 16, 2018

R-3 Reporting Form of J.R.'s parent

R-4 Informal Reporting Form

R-5 Principal Summary Report for HIB 23

R-6 Principal Summary Report for HIB 24

R-7 Summary Letter regarding June 13, 2018 Meeting

R-8 Dr. Figueroa's Letter, dated June 18, 208

R-9 Ms. R's Letter to the Board, dated July 25, 2018

R-10 Determination Letter

R-11 Certification of Completion

R-12 Olweus Certification of Completion

R-13A Direct Examination Questions of Tiffany Papp

R-13B Cross-Examination of Tiffany Papp by I.R.

329-23

New Jersey Commissioner of Education

Final Decision

Haifa Zahroon,

Petitioner,

v.

Board of Education of the City of Paterson,
Passaic County,

Respondent.

Synopsis

Pro se petitioner sought to purchase service credit from the New Jersey Division of Pension and Benefits (Division) for 1995-1997. The respondent Board was unable to locate and provide her payroll records for those years, as they were likely destroyed in a flood of the Board's administrative offices, and provided alternate documentation which was rejected as inadequate by the Division. Petitioner subsequently filed the within petition. The Board filed a motion to dismiss for failure to state a claim upon which relief may be granted.

The ALJ found, *inter alia*, that: petitioner alleged that the Board was negligent in maintaining her records and failed to notify her that the records had been destroyed, but did not allege any violation of New Jersey's school laws; the relief sought by the petitioner, *i.e.* retirement benefits, can only be obtained from the Division, not the Board. Accordingly, the ALJ concluded that the petition failed to state a claim upon which relief can be granted and dismissed the petition.

Upon review, the Commissioner adopted the Initial Decision of the OAL as the final decision in this matter. In so doing, the Commissioner concurred with the ALJ that the relief sought by petitioner does not fall under the school laws, and -- pursuant to *N.J.S.A.* 18A:6-9 – the Commissioner's jurisdiction is limited to controversies and disputes arising under the school laws. The Commissioner does not have the authority to order the award of retirement benefits to petitioner, as that authority lies solely with the Division. Accordingly, the petition was dismissed.

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

329-23
OAL Dkt. No. 04190-23
Agency Dkt. No. 32-2/23

New Jersey Commissioner of Education

Final Decision

Haifa Zahroon,

Petitioner,

v.

Board of Education of the City of Paterson, Passaic County,

Respondent.

The record of this matter, the Initial Decision of the Office of Administrative Law (OAL), the exceptions filed by the petitioner pursuant to *N.J.A.C.* 1:1-18.4, and the reply thereto by the Paterson Board of Education (Board), have been reviewed and considered.[1]

Petitioner has been employed by the Board since 1995. The first two years of her employment were not included in her years of service for pension purposes due to the nature of her position at that time. Petitioner attempted to purchase service credit from the New Jersey Division of Pension and Benefits (Division) for 1995-1997, but the Board was unable to locate and provide her payroll records for those years, possibly because they had been destroyed in a flood at the Board's administrative offices. The Board attempted to provide alternative documentation, such as Board meeting minutes approving petitioner's employment, a Form W2, and a personnel transaction form. However, the Division found that those records

[1] An email from petitioner dated October 13, 2023, in response to the Board's reply, was not considered because sur-replies are not permitted by the applicable rules.

were insufficient and, in the absence of petitioner's payroll records, denied petitioner's purchase request. This appeal followed.

Following the Board's motion to dismiss, the Administrative Law Judge (ALJ) found that although petitioner alleged that the Board was negligent in maintaining her records and failed to notify her that the records had been destroyed, petitioner had failed to allege any violation of New Jersey's school laws. The ALJ further found that the relief petitioner sought – retirement benefits – could not be obtained from the Board, but only from the Division. Accordingly, the ALJ concluded that the petition failed to state a claim upon which relief can be granted and dismissed the petition.

In her exceptions, petitioner argues that she has provided adequate evidence of her employment and that the Board should provide a letter certifying her employment so that she can purchase her pension service credit. In reply, the Board contends that it has already provided a letter to the Division in support of petitioner's service credit purchase request, and that there is nothing else it can do because any resolution is in the hands of the Division, such that the ALJ properly granted its motion to dismiss.

Upon review, the Commissioner concurs with the ALJ that the petition must be dismissed. Pursuant to *N.J.S.A.* 18A:6-9, the Commissioner's jurisdiction is limited to controversies and disputes arising under the school laws. Petitioner has not alleged any violation of *N.J.S.A.* 18A:1-1 *et seq.* or *N.J.A.C.* 6A:1-1.1 *et seq.* Furthermore, the Commissioner does not have the authority to order the award of retirement benefits to petitioner, as that authority lies solely with the Division.

Accordingly, the Board's motion to dismiss is granted, and the petition of appeal is hereby dismissed.

IT IS SO ORDERED.[2]

Angelina Allen McMillan, Ed.D.
ACTING COMMISSIONER OF EDUCATION

Date of Decision: November 2, 2023
Date of Mailing: November 3, 2023

[2] This decision may be appealed to the Appellate Division of the Superior Court pursuant to *N.J.S.A.* 18A:6-9.1. Under *N.J.Ct.R.* 2:4-1(b), a notice of appeal must be filed with the Appellate Division within 45 days from the date of mailing of this decision.

State of New Jersey
OFFICE OF ADMINISTRATIVE LAW

INITIAL DECISION
DISMISSAL
OAL DKT. NO. EDU 04190-23
AGENCY DKT. NO. 32-2/23

HAIFA ZAHROON,
Petitioner,
v.
BOARD OF EDUCATION OF THE CITY OF PATERSON, PASSAIC COUNTY,
Respondent.

Haifa Zahroon, petitioner, pro se

Sandra A. Graise, Esq., for respondent (Florio, Perrucci, Steinhardt, Cappelli, Tipton & Taylor, attorneys)

Record Closed: August 3, 2023 Decided: September 28, 2023

BEFORE **KELLY J. KIRK**, ALJ:

On February 7, 2023, petitioner Haifa Zahroon filed a Pro Se Petition of Appeal (Petition) and attachments with the New Jersey Department of Education (Department) requesting that the Commissioner consider a controversy that had arisen between petitioner and respondent Board of Education of the City of Paterson, Passaic County, New Jersey (Board). The Board filed an answer on May 9, 2023.

On May 12, 2023, the Department transmitted the case to the Office of Administrative Law under the Administrative Procedure Act, N.J.S.A. 52:14B-1 to -15, and the act establishing the office, N.J.S.A. 52:14F-1 to -23, for a hearing under the Uniform Administrative Procedure Rules, N.J.A.C. 1:1-1.1 to -21.6, and the rules of procedure established by the Department to hear and decide controversies and disputes arising under school laws, N.J.A.C. 6A:3-1.1 to -1.17. Jurisdiction to hear and determine controversies and disputes arising under the school laws is conferred under N.J.S.A. 18A:6-9.

On July 5, 2023, the Board filed a motion to dismiss the Petition, consisting of a brief and three exhibits. On July 7, 2023, petitioner filed opposition to the Board's motion, consisting of a letter and nine exhibits. On July 24, 2023, the Board filed a letter brief in reply, and on August 3, 2023, petitioner filed a surreply.

To initiate a contested case for the Commissioner's determination of a "controversy or dispute arising under the school laws," a petitioner must prepare a petition of appeal conforming to the requirements of N.J.A.C. 6A:3-1.4 and serve such petition upon each respondent, together with any supporting papers the petitioner may include with the petition. N.J.A.C. 6A:3-1.3(a). The petitioner must name as a party any person or entity indispensable to the hearing of a contested case and failure to do so may be grounds for dismissal of the petition pursuant to N.J.A.C. 6A:3-1.10. N.J.A.C. 6A:3-1.3(b).

A petition must include, inter alia, a statement of the specific allegation(s) and essential facts supporting them that have given rise to a dispute "under the school laws"; the relief petitioner is seeking; and a statement of verification or certification in lieu of affidavit for each petitioner. N.J.A.C. 6A:3-1.4. The petition should also cite, if known to petitioner, the section or sections of the school laws under which the controversy has arisen. N.J.A.C. 6A:3-1.4. The respondent(s) must serve an answer upon the petitioner and the answer must state in short and plain terms the defenses to each claim asserted and shall admit or deny the allegation(s) of the petition. N.J.A.C. 6A:3-1.5(a). However, nothing in N.J.A.C. 6A:3 precludes the filing of a motion to dismiss in lieu of an answer to a petition, provided that such motion is filed within the

time allotted for the filing of an answer. N.J.A.C. 6A:3-1.5(g). Briefing on such motions shall be in the manner and within the time fixed by the Commissioner, or by the administrative law judge if the motion is to be briefed following transmittal to the OAL. N.J.A.C. 6A:3-1.5(g). At any time prior to transmittal of the pleadings to the OAL, in the Commissioner's discretion or upon motion to dismiss filed in lieu of answer, the Commissioner may dismiss the petition on the grounds that the petitioner has advanced no cause of action even if the petitioner's factual allegations are accepted as true or for lack of jurisdiction, failure to prosecute, or other good reason. N.J.A.C. 6A:3-1.10.

The "Statement of Specific Allegations and Essential Supporting Facts" in the Petition states as follows:

> I was employed by the Paterson Public Schools Board of Education from December 1995 to November 24, 1997, as a research assistant. I was hired for this role along with over twenty-five other people. This team was created and funded by the Comer Grant and was under the supervision of Dr. Gloria Hagopian. At that time, the district did not pay toward pension or health benefits because we were considered part-time employees although we worked over 40 hours a week. On November 24, 1997, the district created the Division of Assessment, Planning, and Evaluation within the Paterson Public Schools, and Dr. Gloria Hagopian was appointed Director of the department. I was hired under Dr. Hagopian's purview as a full-time research assistant. I worked for the Paterson Board of Education until my retirement date on December 1, 2022. Due to a number of health issues, I decided to retire early which would leave me with 27 years of service to the district. According to Paterson Public Schools, I was to retire with 25 years of service instead of 27 years as my first two years were not properly considered, according to their lack of records. There have been endless attempts on my end, to purchase the 22 months of service from December 1995 to November 1, 1997, so that they may be calculated accordingly into my retirement.
>
> In March 2022, I met with Eileen Shafer, Superintendent of Paterson Public Schools, and informed her about my decision to purchase time to retire early due to my health issues. I also spoke with Luis Rojas, Assistant Superintendent of Human Resources, and Esther Boone, Employee Services Representative, and informed them that I

wanted to purchase 22 months of pension service credit. I was told that the Board of Education does not have any of my previous employment and payroll records for the above-mentioned time frame. Therefore, they were not going to certify my purchase request.

I was employed during the months in question as evidenced by the issuance of IRS W-2 Tax Forms by the Paterson Public School District for the years 1995, 1996, and 1997. These tax forms would not have been issued had I not been employed and paid by Paterson Public Schools. Social Security contributions were deducted from my salary for those years as shown by a signed statement dated March 23, 2022, from the Social Security Administration. Payroll deductions could not have been made had I not been employed and paid by the Paterson Public School District during this period.

Also, statements were collected from co-workers based on their personal knowledge that the duration of my employment supports my claim. I have spent countless hours and numerous attempts to purchase the needed time to retire. The district Director of Employee Services repeatedly stated that there was no record of my employment or my payroll records for the months requested and that I needed to be certified. District Counsel, Boris Zaydel got involved and he was able to locate minutes recorded for a 1996 Board of Education Meeting. In addition, he was able to find a Board Approval document reflecting the approval to hire me and other individuals as research assistants for the Comer Grant under the supervision of Dr. Gloria Hagopian.

Still, even with this latest discovery the Director of Employee Services continued to assert in her reply to the State of New Jersey Pension Division that Paterson Public Schools had no payroll records to support my claim and therefore my request was denied by the New Jersey Division of Pension on October 7, 2022.

According to the district response to the newspaper inquiry, no one knows what happened to my employment records from December 1995 to November 23, 1997, when I was hired as a full-time employee.

Below is the only explanation the district provided

"It is important to note that while there has been a belief that the records Ms. Zahroon, is seeking may have been water-

> damaged, we cannot definitively say why the detailed records the state requires of her per-diem, part-time employment are missing," said the district spokesman Paul Brubaker.
>
> Or is it possible that my records were destroyed, specifically, the federal grant documents because of the multiple federal investigations of wrongdoings by administrators within the Paterson Public Schools?
>
> This situation has been ongoing for a year and there have been endless hours, constant correspondence, and profound dedication on my end to tend to the matter to see it resolved once and for all. It has negatively impacted my health and overall well-being. I have had two back operations within a three-month period between March and June of 2022, and it was the first time in the 27 years that I was on paid long medical leave. I had to use all of my sick and vacation days. It has caused me a substantial amount of stress. I have not been able to recuperate properly as this has taken a toll on me in every sense of the word.
>
> Please see the attached Newspaper article that was published in the North Jersey records on December 9th, 2022, by Joe Malinconico.

The "Relief Request" in the petition states as follows:

> The district Communication Director stated in the Newspaper that "that Schools Superintendent Eileen Shafer is committed to contacting the state pension office to try to help Zahroon get "all of the retirement benefits to which she is entitled."
>
> The relief that I'm looking for is to receive all the retirement benefits to which I'm entitled, as the schools superintendent stated in the Newspaper article.

Petitioner filed an application to purchase service credit with the State of New Jersey Division of Pensions and Benefits (Division). A letter dated March 11, 2022, ostensibly from the Division to Zahroon, states as follows:

> This will acknowledge receipt of your Application to Purchase Service Credit through the Member Benefits Online System (MBOS) for **UNCREDITED** service.

> Please note that the processing time varies depending on the purchase type selected and the extent of research required for determining your eligibility in accordance with the provisions of New Jersey laws. Since the cost of your request will be based upon your nearest age and highest salary earnings at the time the Division of Pensions and Benefits receives your application, any processing delays will not result in an increased cost to you. If you qualify to purchase pension service, you will receive a Cost Quotation letter and will have 90 days from the date of the letter to authorize the purchase.
>
> Should you wish to view the status of your purchase request, you may do so by logging onto your MBOS account and selecting "'Purchase Service Credit"' button.
>
> If you require any assistance, please contact the Division of Pensions and Benefits Office of Client Services at (609) 292-7524.
>
> **Chapter 78, P.L. 2011 changed how purchases of service credit made after June 28, 2011 affect the cost of post-retirement medical benefits. For additional details, see Fact Sheet #11 at http://www.nj.gov/treasury/pensions/documents/factsheets/factl1.pdf**

A letter dated March 14, 2022, ostensibly from the Division to the Board, states as follows:

> The above referenced member has submitted an Application to Purchase Service Credit for **TEMPORARY/SUBSTITUTE** service from **January 1, 1996** to **October 30, 1997**.
>
> Based on the member's employment records at your location, please complete a Purchase Certification through the Employer Pensions and Benefits Information Connection (EPIC) **under [XX-XXXXX-XX]**. After you have logged onto EPIC, select the "Purchase Certification" button and complete the required information.
>
> Should you require any assistance, please contact the Division of Pensions and Benefits Office of Client Services at (609) 292-7524.

A letter dated March 24, 2022, ostensibly from Paterson Public Schools (District) to the Division, states as follows:

> Our employee, Haifa Zahroon, is requesting to Purchase Service Credit for the period from 01/01/1996 through 10/30/1997. Please accept this request to purchase service credit for the employment period listed above.
>
> Please note that there are "No Records on File" for this employee. Enclosed is the Employment Verification form.
>
> If you have any questions, please contact the Pension Office at 973-321-0603.

A letter dated March 29, 2022, ostensibly from the Division to Zahroon, states as follows:

> This is in reference to your recent request to purchase **TEMPORARY/SUBSTITUTE** pension service credit. A determination has been made that this purchase is not permitted based upon the following eligibility criteria:
>
> We have received a response from **PATERSON BD OF ED** indicating they have no record of your employment from **January 1, 1996** to **October 30, 1997**. Based on this information we cannot determine your eligibility and therefore, cannot allow you to purchase this service. If you can provide any evidence to substantiate your employment, please notify your employer to provide our office with supporting documentation which includes your official payroll title, specific dates of employment, salary earnings information, and Social Security coverage. Upon receipt of such documentation, we will reconsider your request to purchase service.
>
> Should you have any questions regarding this matter, please contact the Office of Client Services at (609) 292-7524.

A letter dated May 5, 2022, ostensibly from the Division to Zahroon, states as follows:

> This is in response to your appeal of the denial to purchase additional pension service credit with Paterson Board of Education (BOE).
>
> The denial letter issued on March 29, 2022, was based on the Employment Certification submitted by the BOE certifying they have no records on file.
>
> In order for our office to process your purchase request, we require detailed employment history records indicating the exact beginning and ending dates of your employment; salary earnings for each year of employment; your appointment status; official payroll title/s; and/or dates of any leaves of absence; and number of days worked if employed as a substitute teacher.
>
> Our office is in receipt of the Social Security Itemized Statement of Earnings for 1995 to 1998 and W-2 statements from 1996 to 1999 that indicate you were employed with BOE. However, the ISE and W-2 statements do not provide sufficient information to determine purchase eligibility. In addition, our office contacted the BOE to verify your employment. The BOE again confirmed they have no additional records of your employment from January 1, 1996 to June 30, 1997.
>
> In light of the above, we do not have sufficient Information to determine purchase eligibility. If you and/or your employer can remit additional data that supports all of the aforementioned payroll information and employment history, please forward the documents to our office for review. Absent any new Information, we are unable to process your request.

A letter dated May 17, 2022, ostensibly from Michelle Santaniello, states as follows:

> I am writing this letter to attest to working with Haifa Zahroon. We both worked as research assistants for the Paterson Public Schools, starting in 1995. We worked under the Supervision of Dr. Gloria Hagopian.
>
> Ms. Zahroon and I continued to work for Paterson Public Schools, in different capacities, upon the completion of the research project.

> If you need any further information, please feel free to contact me at [email].

A letter dated May 18, 2022, ostensibly from Peter Affinito, states as follows:

> My name is Peter D. Affinito. I was employed by the Paterson Public Schools from 1986 to 2018. During that time . . . I served as a High School Department Chairperson and District Director of Guidance. In 1995, I met Haifa in the office of . . . Dr. Gloria Hogapian [sic] and from that time until my retirement in 2018, we worked together on a continuous base [sic].
>
> If I can be of further assistance with questions or concerns, please feel free to contact me at [email].

A letter dated May 19, 2022, ostensibly from Lena Halayjian, states as follows:

> I am writing this letter to attest to working with Haifa Zahroon. I began working with Ms. Zahroon as a Research Assistant in 1997 for the Paterson Public Schools. Together, we worked under the supervision of Dr. Gloria Hagopian.
>
> Upon the completion of the research project, Ms. Zahroon and I continued to work for Paterson Public Schools in different capacities, including when I moved into the school system as an elementary teacher.
>
> If you need further information, please do not hesitate to contact me at [email].

A May 20, 2022, letter, ostensibly from Barbara Scarfo, states as follows:

> Haifa Zahroon started working for Dr. Gloria Hagopian, then the principal of Norman S. Weir, at the Paterson Public Schools as a research assistant at end of 1995 to November 1997. When Dr. Hagopian was promoted to Director of Assessment, Planning, and Evaluation in the district, she hired four of the research assistants to be part of her team at the Central Office building at 133 Ellison Street in Paterson. Haifa Zahroon was one of the four individuals hired in November 1997.

> From 1995 to November 1997, Haifa worked more than 40 hours a week and was paid by the Paterson Public Schools with no medical or pension benefits. Her medical and pension benefits started in November 1997 when she was hired as a full-time employee under Dr. Gloria Hagopian.
>
> I, Barbara Scarfo, was one of the supervisors in the department of Assessment, Planning and Evaluation. Haifa Zahroon worked under my supervision until I retired.

A letter dated May 25, 2022, ostensibly from Betty Jean Pellettere, states as follows:

> I met Haifa Zahroon in 1995 when she was hired to work for my principal, Dr. Gloria Hagopian. Dr. Hagopian was working on a federal grant to create students database, by taking all students Records from the schools yellow cards and inputting the data into a computer database. There were more than 20 research data enters working with Dr. Hagopian. Charlotte Sanderson, school #26 secretary and myself worked after school hours to research Payrolls time sheets and help with the research paperwork.
>
> Payroll for workers was done by tabulating their weekly hours, and have them review and sign. Then, Dr. Hagopian would sign. Copies were made before sending the original to payroll at 33 Church Street. Ms. Alicia Walton was in charge of payroll at that time.
>
> Haifa continued to work with Dr. Hagopian and in November of 1997, the District hired her to work full time as Research Assistant in the Department of Testing, Planning and Evaluation with Dr. Hagopian as the Director.
>
> If you have any questions, or need additional information, feel free to contact me at: [email].

A letter dated May 31, 2022, ostensibly from Aubrey Johnson, states as follows:

> I met Haifa Zahroon at the Norman S. Weir School in Paterson, New Jersey in 1996 while she was working for Dr. Gloria Hagopian as a research assistant, tracking students' data elements in grades K–12.

> At the time, I was a teacher at Schoof #12 and was assigned a special project to develop a school wide plan with student demographic and achievement data over three years. Dr. Gloria Hagopian was the principal of the Norman S. Weir School and she was assisting me in interpreting our school's data.
>
> A few years later, Dr. Hagopian became the district's Director of Assessment, Planning & Evaluation and years later when the position was vacated, I served in the same capacity from 2009–2012. During my tenure as Director of Assessment, Planning & Evaluation, I supervised a team of six individuals and was very familiar with the skill set of Haifa Zahroon, since I recalled working with her in 1966 [sic] under Dr. Hagopian.
>
> I have worked with many outstanding and dedicated employees and Mrs. Zahroon is an example of one of the finest. She performed her job responsibilities in a highly effective manner and worked closely with the school administrators and teachers to create school cultures that were conducive to their academic growth.
>
> If you have any questions, feel free to call me at [number].

An undated letter, ostensibly from Maribel Franco, states as follows:

> Please be advised, I have known Ms. Haifa Zahroon, since 1995, she was working for Dr. Gloria Hagopian and I was working with Ms. Brenda Patterson at that time for the Office of Special Programs.
>
> Please feel free to contact me should you have any questions or concerns at [number].

A letter dated July 8, 2022, ostensibly from the Division to Zahroon, states as follows:

> This is in response to your request for a reconsideration of the denial to purchase additional pension service credit from January 1, 1996 to October 30, 1997 with Paterson Board of Education (BOE).
>
> Included with your correspondence were W-2 statements from 1995 to 1997, the Social Security Itemized Statement of

> Earnings (ISE) for 1995 to 2000, personal statements from various co-workers and two articles pertaining to Paterson Public School.
>
> Although the W-2 statements and the ISE support Ms. Zahroon was employed with the BOE, the W-2 statements and the ISE do not provide sufficient information to determine purchase eligibility. In order for our office to process your purchase request, we require detailed employment history records indicating the exact beginning and ending dates of your employment; salary earnings for each year of employment; your appointment status; official payroll title/s; and/or dates of any leaves of absence: and number of days worked if employed as a substitute teacher.
>
> Based on the above, we do not have sufficient information to determine purchase eligibility. Absent any new information, we are unable to process your request.
>
> If you disagree with my determination and wish to appeal my findings, you may submit a written request with all relevant supporting documentation to:
>
> Jeff Ignatowitz, Board Secretary Public Employee's Retirement System Division of Pensions and Benefits
> PO Box 295
> Trenton, NJ 08625-0295
>
> I regret that my determination could not be more favorable. Please understand that my determination must be based upon the rules and regulations governing the pension system.

A letter dated August 23, 2022, ostensibly from the Division to Zahroon, states as follows:

> This will acknowledge receipt of your Application to Purchase Service Credit through the Member Benefits Online System (MBOS) for **TEMPORARY/SUBSTITUTE** service.
>
> Please note that the processing time varies depending on the purchase type selected and the extent of research required for determining your eligibility in accordance with the provisions of New Jersey laws. Since the cost of your request will be based upon your nearest age and highest salary earnings at the time the Division of Pensions and

> Benefits receives your application, any processing delays will not result in an increased cost to you. If you qualify to purchase pension service, you will receive a Cost Quotation letter and will have 90 days from the date of the letter to authorize the purchase.
>
> Should you wish to view the status of your purchase request, you may do so by logging onto your MBOS account and selecting "Purchase Service Credit" button.
>
> If you require any assistance, please contact the Division of Pensions and Benefits Office of Client Services at (609) 292-7524.
>
> **Chapter 78, P.L. 2011 changed how purchases of service credit made after June 28, 2011 affect the cost of post-retirement medical benefits. For additional details, see Fact Sheet #11 at http://www.nj.gov/treasury/pensions/documents/factsheets/factl1.pdf**

A letter dated September 14, 2022, ostensibly from Paterson Public Schools to the Division, states as follows:

> This letter responds to your letter of August 29th to Haifa Zahroon, regarding her pension service credit application. In that letter, you advised that you were unable to determine eligibility because Paterson Public Schools had not provided any records showing that it had employed Ms. Zahroon during the period from August 1, 1997, through November 1, 1997. Attached are the following records documenting Ms. Zahroon's employment during the period.
>
> - BOE meeting minutes, dated 9/6/1996, documenting appointment as a part-time Research Assistant at $10.00 an hour, not to exceed $12,000 for the 1996–1997 school year.
> - Personnel Transaction Form and Data Sheet, dated 10/16/1997, documenting a change from part-time employment as Research Assistant to full-time, effective 11/24/1997; and
> - Form W2, showing $28,220.35 in gross wages paid by Paterson Public Schools.
>
> Unfortunately, we cannot provide documentation of work hours for the period in question because we believe Ms. Zahroon's payroll records were inadvertently destroyed

> and discarded after a flood event at our old administrative offices. Hopefully the attached records will be deemed sufficient to determine Ms. Zahroon's pension credit eligibility in the absence of payroll records.
>
> Please contact me directly if you have any questions or need additional information.

Specifically, the September 25, 1996, Board meeting minutes reflect the following:

> 97-A108 Approval to employ the following list of Research Assistants for gathering and analyzing data for Comer Programs and Student Database Project at $10.00 an hour, not to exceed $12,000 for the 1996–1997 school year: . . . Haifa Zahroon . . . .

A letter dated October 7, 2022, ostensibly from the Division to Zahroon, states as follows:

> This is in reference to your appeal of the denial to purchase additional pension service credit from January 1, 1996 to October 30, 1997 with Paterson Board of Education (BOE).
>
> Our office is in receipt of the BOE's Board Minutes dated September 25, 1996. According to the Board Minutes you were approved as a Research Assistant at $10.00 per hour for the 1996–1997 school [sic].
>
> While the Board Minutes, ISE, and W-2's support your employment with the BOE, they do not support whether your employment was continuous without interruption leading to permanent employment.
>
> In accordance with N.J.S.A. 43:1SA-11:
>
> > "Any person employed temporarily by an employer whose temporary employment resulted, without interruption, in permanent employment may purchase credit for that temporary service."
>
> Therefore, we are still unable to determine purchase eligibility. Please be advised, there will be no further review of your purchase request unless you or your employer are

> able to provide payroll information for the period covering January 1, 1996 to October 30, 1997.

Although a motion to dismiss is not specifically referenced in the UAPR, a respondent is not precluded from filing a motion to dismiss in lieu of an answer to a petition. N.J.A.C. 6A:3-1.5(g). Further, per N.J.A.C. 1:1-1.3(a), in the absence of a rule, a judge may proceed in accordance with the New Jersey Court Rules, provided the rules are compatible. In this regard, Rule 4:6-2 states, in part: Every defense, legal or equitable, in law or fact, to a claim for relief in any complaint, counterclaim, cross-claim, or third-party complaint shall be asserted in the answer thereto, except that the following defenses, unless otherwise provided by R. 4:6-3, may at the option of the pleader be made by motion, with briefs: (a) lack of jurisdiction over the subject matter, (b) lack of jurisdiction over the person, (c) insufficiency of process, (d) insufficiency of service of process, (e) failure to state a claim upon which relief can be granted, and (f) failure to join a party without whom the action cannot proceed.

In its motion to dismiss, the Board argues that the District is not the real party in interest and "is not responsible for petitioner's alleged claims as a matter of law," and that the petition must be dismissed for failure to state a claim upon which relief can be granted. In her opposition, Zahroon asserts, inter alia, negligence and wrongful acts on the part of the District and that the District violated its "duty of care" in maintaining and preserving her employment records and violated a "notice requirement" to notify her of the destruction or loss of her employment records.

Considering the Petition and its attachments, there is little question that petitioner has expended considerable time and effort in obtaining documentation of her employment from approximately twenty-five years ago—including Board minutes, tax documents, and letters from numerous former coworkers—in order to satisfy the Division's requirements to purchase service credit. However, Zahroon has failed to cite to N.J.S.A. 18A (Education) or to N.J.A.C. 6A (Education) in support of her Petition or in support of the assertions in her opposition relative to a duty of care, notice requirements, negligence, or wrongful conduct.

Based upon the references in the letters from the Division, it appears that petitioner was enrolled in the Public Employees' Retirement System. N.J.S.A. 43:15A-7 establishes the Public Employees' Retirement System of New Jersey in the Division of Pensions and Benefits of the Department of the Treasury. The general responsibility for the proper operation of the Public Employees' Retirement System is vested in the board of trustees, and, as specified, the committees established pursuant to N.J.S.A. 43:15A-17(b). N.J.S.A. 43:15A-17(a)(1). Pursuant to N.J.S.A. 43:15A-11—a Title 43 "Pensions and Retirement and Unemployment Compensation" statute and not a Title 18A "Education" statute—"any person employed temporarily by an employer whose temporary employment resulted, without interruption, in permanent employment may purchase credit for that temporary service."

Thus, even accepting, arguendo, the allegations in the Petition, I **CONCLUDE** that the Petition has advanced no cause of action under "school laws" against the Board because the relief petitioner seeks—specifically, "all of the retirement benefits to which [she is] entitled"—cannot be obtained from the Board. Rather, such relief may only be obtained from the Division. Accordingly, I further **CONCLUDE** that the Petition should be dismissed for failure to state a claim upon which relief can be granted.

ORDER

It is hereby **ORDERED** that the Petition is **DISMISSED**.

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

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

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

Kelly J Kirk

September 28, 2023

DATE

KELLY J. KIRK, ALJ

Date Received at Agency:

Date Mailed to Parties:
db

330-23SEC

New Jersey Commissioner of Education

Final Decision

Laurie Tietjen,

Complainant,

v.

Pamela Rogers, Robin Stella, and Nicholas Di Franco, Middletown Township Public Schools Board of Education, Monmouth County,

Respondent.

Synopsis

Complainant alleged, *inter alia*, that respondent Pamela Rogers, a member of the Middletown Township Public Schools Board of Education, violated *N.J.S.A.* 18A:12-24(a), *N.J.S.A.* 18A:12-24.1(b), *N.J.S.A.* 18A:12-24.1(e), *N.J.S.A.* 18A:12-24.1(f), and *N.J.S.A.* 18A:12-24.1(j) of the School Ethics Act, *N.J.S.A.* 18A:12-21 *et seq* through actions she took relating to the planning of a rally on school grounds that was not a Board-sponsored event, including the use of her Board email account in a politically motivated way. The School Ethics Commission (SEC) determined that the respondent's actions violated *N.J.S.A.* 18A:12-24.1(e) and *N.J.S.A.* 18A:12-24.1(f) of the Code of Ethics for School Board Members, and recommended a penalty of reprimand for the violations.

The case was forwarded to the Commissioner for final determination of the appropriate penalty in this matter. Upon review, the Commissioner concurred with the penalty recommendation of the SEC. Accordingly, the respondent shall be reprimanded as a school official found to have violated the School Ethics Act.

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

330-23SEC
SEC Dkt. No. C59-20
OAL Dkt. No. EEC 02706-21
Agency Dkt. No. 259-9/23

New Jersey Commissioner of Education

Final Decision

Laurie Tietjen,

Complainant,

v.

Pamela Rogers, Robin Stella, and Nicholas Di Franco, Middletown Township Public Schools Board of Education, Monmouth County,

Respondents.

The Commissioner has reviewed the record of this matter and the September 26, 2023 decision of the School Ethics Commission (Commission). The Commission found that respondent Pamela Rogers, a member of the Middletown Township Public Schools Board of Education (Board), violated *N.J.S.A.* 18A:12-24.1(e) and *N.J.S.A.* 18A:12-24.1(f) of the Code of Ethics for School Board Members. The Commission recommended a penalty of reprimand for the violation. The Commission's decision was forwarded to the Commissioner for final determination on the recommended penalty pursuant to *N.J.S.A.* 18A:12-29(c).[1] Respondent

[1] The Commission dismissed the complaint as to respondents Robin Stella and Nicholas DiFranco. Because *N.J.S.A.* 18A:12-29(c) only authorizes the Commissioner to act on the Commission's recommendation regarding sanctions, the portion of the Commission's decision dismissing the complaint as to Stella and DiFranco is not at issue here.

neither filed exceptions to the recommended penalty nor instituted an appeal, pursuant to *N.J.A.C.* 6A:4-1 *et seq.*, of the Commission's underlying finding of violation.

Upon review, the Commissioner concurs with the penalty recommended by the Commission for respondent's actions in using her Board email to plan a rally that was not a Board-sponsored event.

Accordingly, respondent is hereby reprimanded as a school official found to have violated the School Ethics Act.

IT IS SO ORDERED.[2]

Angelica Allen-McMillan, J.D.S.
ACTING COMMISSIONER OF EDUCATION

Date of Decision: November 2, 2023
Date of Mailing: November 3, 2023

[2] This decision may be appealed to the Appellate Division of the Superior Court pursuant to *N.J.S.A.* 18A:6-9.1. Under *N.J.Ct.R.* 2:4-1(b), a notice of appeal must be filed with the Appellate Division within 45 days from the date of mailing of this decision.

Before the School Ethics Commission
OAL Docket No.: EEC 02706-21
SEC Docket No.: C59-20
Final Decision

Laurie Tietjen,
Complainant

v.

Pamela Rogers, Robin Stella, and Nicholas DiFranco,
Middletown Township Public Schools Board of Education, Monmouth County,
Respondents

I. Procedural History

This matter arises from a Complaint that was filed on October 2, 2020,[1] by Laurie Tietjen (Complainant), alleging that Pamela Rogers (Respondent Rogers), Robin Stella (Respondent Stella), and Nicholas DiFranco (Respondent DiFranco) (collectively referred to as Respondents), members of the Middletown Township Public Schools Board of Education (Board), violated the School Ethics Act (Act), *N.J.S.A.* 18A:12-21 *et seq*. The Complaint alleges that Respondents violated *N.J.S.A.* 18A:12-24(b) and *N.J.S.A.* 18A:12-24.1(a) in Count 1, *N.J.S.A.* 18A:12-24.1(b) in Count 2, *N.J.S.A.* 18A:12-24.1(e) in Count 3, *N.J.S.A.* 18A:12-24.1(f) in Count 4, and *N.J.S.A.* 18A:12-24.1(j) in Count 5.

At its meeting on February 23, 2021, and after reviewing Respondents' Motion to Dismiss in Lieu of Answer (Motion to Dismiss) and Complainant's response thereto, the Commission voted to grant the Motion to Dismiss as to the allegations in Count 1, Count 2, and Count 5, but to deny the Motion to Dismiss as to the allegations in Count 3 and Count 4. Based on its decision, the Commission also voted to direct Respondents to file an Answer to Complaint (Answer) as to the remaining allegations (Count 3 and Count 4). In light of the fact that the remaining allegations in the Complaint only involve violations of the Code of Ethics for School Board Members (Code), the Commission additionally voted to transmit the matter to the Office of Administrative Law (OAL) following receipt of the Answer, which Respondents filed on March 5, 2021.

A hearing was held at the OAL on July 19 and September 26, 2022. Thereafter, the Administrative Law Judge (ALJ) issued an Initial Decision on July 12, 2023. Respondent Rogers

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[1] On October 2, 2020, Complainant filed a deficient Complaint; however, on October 6, 2020, Complainant cured all defects and filed an Amended Complaint that was deemed compliant with the requirements detailed in *N.J.A.C.* 6A:28-6.3.

filed exceptions to the Initial Decision, in accordance with *N.J.A.C.* 1:1-18.4. Complainant did not file a reply.

At its meeting on August 22, 2023, the Commission considered the full record in this matter. Thereafter, at its meeting on September 26, 2023, the Commission voted to adopt the Initial Decision's legal conclusion that Respondent Rogers violated *N.J.S.A.* 18A:12-24.1(e) and *N.J.S.A.* 18A:12-24.1(f) and the recommended penalty of reprimand. Additionally, the Commission voted to adopt the Initial Decision's legal conclusion that Respondents Stella and DiFranco did not violate *N.J.S.A.* 18A:12-24.1(e) and/or *N.J.S.A.* 18A:12-24.1(f), and to dismiss the Complaint against them.

II. Initial Decision

Spread Love Not Hate (SLNH) was an entity created for a short time to promote a cause regarding social justice. *Initial Decision* at 15. An SLNH "Unity Walk" was scheduled for June 28, 2020, at the Middletown North High School that, according to Complainant's testimony, "was advertised as 'no politics, no sides, no finger pointing' and would strive to 'erase all lines' in relation to police and the community." *Id.* at 4. Prior to the rally taking place, it was not discussed in public or approved at a Board meeting, voted on by the Board members, or submitted for public comment. *Id.* at 15. According to Respondent Rogers' testimony, a Board resolution was "not necessary" since the Superintendent authorized the march on school property, and the Superintendent asked her to contact the Board members to see if they agreed to the rally. *Id.* at 10. Respondent Rogers "polled" four Board members about the rally, and after a "majority" agreed, she "went ahead and reported to [the Superintendent] that the Board approved the rally, even though the rest of the Board members were not informed." *Id.* at 15.

While it is undisputed that the event was not Board-sponsored, according to Complainant, the school "promoted" the rally on its website, the Board and teachers "work[ed] the tables and marched," and the District paid for security. *Id.* at 5. Complainant also asserts that Respondent Rogers promoted the rally on her personal social-media page as a Black Lives Matter (BLM) rally. *Ibid.* Respondent Rogers acknowledged that she communicated with the SLNH members from her Board email account and used her Board Twitter account to promote the rally. *Id.* at 11. While it appears that the Superintendent coordinated the event, which included providing portable toilets and a sound system, Respondent Rogers was involved in the planning of the substance of the event. *Exhibits R-M, R-N, R-Q.* Respondent Rogers sent an email from her Board email account on June 17, 2020, to a Township administrator, requesting volunteers to speak at the rally, such as the police chief, Mayor, and Superintendent or pastors. *Exhibit R-H.* The email also sought donations of the stage, water bottles and a disc jockey. *Ibid.*

Prior to the rally, Respondent Rogers used her Board email account to write an email on June 11, 2020, to a contact at a political entity, the Progressive Democrats of New Jersey, to solicit help with the rally, stating:

> Hey, My love! How are you? Just between you and me, there's a blm rally in the works for Middletown. Frank Meade (District resident, sophomore at Seton Hall studying political science and

> phone banking for the progressive candidate in district 6) is running it. It'll be at high school north end of June. I told him I'd give you his number and maybe you could contact him w advice about the rally and/or making the dem club at seton hall more active. Thought you'd be a great mentor for Frank! [cell phone number]
>
> [*Id.* at 6, 15-16.]

According to Complainant, about 125 students attended the rally, along with several adults, including teachers and Board members, and "the speeches 'were mainly focused on the belief of police brutality and systemic racism.'" *Id.* at 4. Following the event, Respondent Rogers sent an email directing that a staff member "combat the false accusations against the [Board] members on social media," further adding, "I don't have the time to attend to this." *Id.* at 16.

Respondent Stella had limited involvement with the rally. *Ibid.* According to Respondent Stella, she attended one planning meeting for the rally after Respondent Rogers asked her to attend in her place. *Id.* at 12. Respondent Stella testified that she did not engage in promoting the rally, by sending emails or otherwise. *Ibid.* Respondent Stella also stated the Board President (Respondent Rogers) polled the Board members about their approval of a rally, when normally there would be a vote by the Board as to whether an action requested by the Superintendent would be approved or not. *Id.* at 13.

Respondent DiFranco only attended the rally with his family and friends. *Id.* at 16. Except for attending the rally, Respondent DiFranco was not involved in the planning of the rally. *Ibid.*

With respect to *N.J.S.A.* 18A:12-24.1(e), the ALJ reiterates that the June 11, 2020, email that Respondent Rogers sent from her Board email account to her contact at the political entity demonstrates Respondent Rogers "clearly intended to hide information by virtue of her own words written in this email [('just between you and me')], and dispels any argument made on her behalf that she was not politically motivated to assist an organized group." *Id.* at 19. The evidence demonstrates Respondent Rogers "made personal promises or took private action that might compromise the Board in violation of *N.J.S.A.* 18A:12-24.1(e)"; and therefore, the ALJ concludes that Respondent Rogers violated *N.J.S.A.* 18A:12-24.1(e). *Id.* at 19-20. On the contrary, the evidence does not prove that Respondents Stella and DiFranco made personal promises or took any action that would compromise the Board, and therefore, the ALJ concludes Respondents Stella and DiFranco did not violate *N.J.S.A.* 18A:12-24.1(e). *Id.* at 20.

As to a violation of *N.J.S.A.* 18A:12-24.1(f), the ALJ asserts that Complainant has demonstrated that Respondent Rogers "took action on behalf of ... a special-interest group or persons organized and voluntarily united in opinion when she planned and promoted the rally and used her official [Board] email in order to accomplish her goals that were outside her [Board] duties"; and therefore, concludes Respondent Rogers violated *N.J.S.A.* 18A:12-24.1(f). *Ibid.* The ALJ further concludes Respondents Stella and DiFranco did not violate *N.J.S.A.*

18A:12-24.1(f) as they did not take action at the request of a special-interest group. *Ibid.* Therefore, the charges against Respondents Stella and DiFranco are dismissed. *Id.* at 21.

The ALJ recommends a penalty of **reprimand** for Respondent Rogers' violations of *N.J.S.A.* 18A:12-24.1(e) and *N.J.S.A.* 18A:12-24.1(f). *Ibid.*

III. Exceptions

Respondent Rogers' Exceptions

In her Exceptions, and as to a violation of *N.J.S.A.* 18A:12-24.1(e), Respondent Rogers argues that the Commission's Decision on the Motion to Dismiss determined that if Complainant could prove that "while acting in their official capacities ... Respondents *unilaterally authorized the use of District funds and/or resources* ..." a violation of *N.J.S.A.* 18A:12-24.1(e) may be sustained. However, Respondent Rogers further argues the evidence proves the expenditure of Board funds is done through the Business Administrator and the Superintendent, with the Board approving the same after the fact. Respondent notes the ALJ found a violation of *N.J.S.A.* 18A:12-24.1(e) based on an email that Respondent Rogers sent to a political contact informing them of the event at the high school and concluded this email was "sufficient by itself" to prove that Respondent Rogers made personal promises or took private action that might compromise the Board. Respondent Rogers maintains she did not take any "unilateral actions" such as authorizing funds as the Commission indicated was necessary, Respondent Rogers' alleged political motivation is not "an element" to sustain a violation of *N.J.S.A.* 18A:12-24.1(e). Furthermore, according to Respondent Rogers, the evidence and witness testimony show that the SLNH rally had the full support of the administration. Respondent Rogers notes the Superintendent, Assistant Superintendent and the Business Administrator, were in communication with the rally organizers. Moreover, Respondent contends the evidence demonstrates that the Superintendent was the "driving force" behind the rally and Respondent Rogers was "involved, to a degree, in supporting the Administration meet its desired outcome." Respondent Rogers argues it was the administration that authorized the spending of District funds and allowed the SLNH group to use the sound system, not Respondent. According to Respondent Rogers, the Unity Walk was not a Board sponsored event, so it was not beyond the scope of Respondent Rogers' duties to consult with the other Board members about the appropriateness of such an event. Therefore, Respondent Rogers contends, based on the arguments above, the ALJ erred in finding a violation of *N.J.S.A.* 18A:12-24.1(e).

As to a violation of *N.J.S.A.* 18A:12-24.1(f), Respondent Rogers argues, Complainant did not provide any evidence to demonstrate that Respondent Rogers "surrendered her independent judgment to a special interest group ... ." Respondent Rogers further argues Complainant did not present any proof that indicates Respondent Rogers took any action on behalf of, or at the request of SLNH, or that they used the schools to gain a benefit for themselves or their families. Respondent Rogers contends despite the numerous emails and social media postings presented by Complainant alleging that SLNH was given preferential treatment, they do not support the allegation that Respondent Rogers took any action to effectuate the "supposedly preferential treatment." On the contrary, the evidence demonstrates that the Business Administrator and Superintendent were the individuals who approved the rally, allowed it to occur in the parking

lot, ensured that security was present and allowed the group to proceed without insurance. Therefore, based on the testimony and evidence, Respondent Rogers asserts the ALJ incorrectly found that Respondent Rogers violated *N.J.S.A.* 18A:12-24.1(f). As such, Respondent contends the Complaint against her should be dismissed.

IV. Analysis

Upon a careful, thorough, and independent review of the record, the Commission agrees with the ALJ's conclusion that Respondent Rogers violated *N.J.S.A.* 18A:12-24.1(e) and *N.J.S.A.* 18A:12-24.1(f) and the recommended penalty of reprimand. The Commission also concurs with the ALJ that Respondent Stella and Respondent DiFranco did not violate *N.J.S.A.* 18A:12-24.1(e) and/or *N.J.S.A.* 18A:12-24.1(f), and the Complaint against them should therefore be dismissed.

Pursuant to *N.J.S.A.* 18A:12-24.1(e), a board member must recognize that authority rests with the board and a board member shall not make any personal promises or take any action that may compromise the board. Respondent Rogers sent a June 11, 2020, email from her Board email account to her contact at a known political entity, the Progressive Democrats of New Jersey. Within that email Respondent Rogers states, "just between you and me, there's a blm rally in the works for Middletown." Respondent Rogers misrepresents that there will be a BLM rally at the District, rather than a SLNH rally, which was advertised as "no politics." The wording of the email – "just between you and me" – demonstrates that Respondent Rogers is hiding information and/or attempting to hide information regarding the purpose of the rally. And the Commission agrees with the ALJ that the contents of Respondent's email sent from her Board email address suggest that Respondent was politically motivated in promoting the event. *Initial Decision*, at 15-16. Further, as Respondent Rogers sent this email from her Board email address, it gives the impression that her statements were on behalf of the Board, despite the representations that the event was not Board-sponsored, potentially comprising the Board. Additionally, Respondent Rogers' involvement in planning the Unity Walk, specifically the substance of the event, such as scheduling speakers and seeking donations – while using her Board email address, even though the event was not District-sponsored or approved by the Board – further compromises the Board because it appears as though the Board is sponsoring the event, requesting speakers, and asking for donations. The Commission is not convinced by Respondent Rogers' arguments in her exceptions that the Superintendent and Business Administrator were the driving force behind the event and her involvement was limited; the involvement of the Superintendent and Business Administrator are not the subject of this matter, and Respondent Rogers' involvement in planning the rally, an event that was not a Board-sponsored event, through the use of her Board email, was inappropriate. Moreover, the Commission will defer to the ALJ's credibility findings in which the ALJ found that Respondent was not "always straightforward, and at times provided elusive responses." *Id.* at 14. In making those observations, the ALJ found that, "Respondent reluctantly acknowledged, after persistent questioning by the complainant, that she sent emails from her BOE email to public officials and rally organizers before and after the rally" and "tried to excuse her behavior" by claiming she was complying with the Superintendent's wishes. *Ibid.* Clearly, the ALJ did not find Respondent's explanation plausible, and the Commission accepts that finding. For these reasons, the Commission finds Respondent Rogers violated *N.J.S.A.* 18A:12-24.1(e).

N.J.S.A. 18A:12-24.1(f) prohibits Board members from surrendering their judgment to special interest or partisan political groups or using the schools for personal gain or for the gain of friends. Respondent Rogers' June 11, 2020, email to her contact at the Progressive Democrats of New Jersey, alerted the political group of the event, claimed that there was going to be a BLM rally when it was not advertised as a BLM rally, and sought to connect the political entity with an SLNH organizer for advice and mentorship. The ALJ correctly found, and the Commission accepts, there is no question that Respondent Rogers was politically motivated in sending the email. She did not extend the invitation to all political groups or organizations, but rather only to one side. Respondent Rogers attempted to coordinate two aligned political groups for a common cause, while using her Board email account to do so. The Commission finds this conduct violates *N.J.S.A.* 18A:12-24.1(f).

The Commission agrees with the ALJ that Respondent Stella and Respondent DiFranco were not involved in the planning of the SLNH Rally as Respondent Stella went to one meeting at the request of Respondent Rogers, and Respondent DiFranco only attended the event; therefore, Respondents Stella and DiFranco did not *N.J.S.A.* 18A:12-24.1(e) and/or *N.J.S.A.* 18A:12-24.1(f).

The Commission further agrees with the ALJ that a **reprimand** is the appropriate penalty for Respondent Rogers' violations of *N.J.S.A.* 18A:12-24.1(e) and *N.J.S.A.* 18A:12-24.1(f). Respondent Rogers' behavior in sending a politically motivated email and involving herself in the planning of an event that was not Board-sponsored, through the continued use of her Board email, is inappropriate behavior that cannot be condoned. However, it appears as though this is Respondent Rogers' first violation, and as such the Commission finds that a penalty of reprimand is appropriate.

IV. Decision

For all of the aforementioned reasons, the Commission adopts the Initial Decision of the OAL, which concludes that Respondent Rogers violated *N.J.S.A.* 18A:12-24.1(e) and 18A:12-24.1(f), and adopts the recommended penalty of **reprimand** for the violations. The Commission also adopts the Initial Decision's conclusion that Respondent Stella and Respondent DiFranco did not violate *N.J.S.A.* 18A:12-24.1(e) and/or 18A:12-24.1(f), and the dismissal of the Complaint against them.

Pursuant to *N.J.S.A.* 18A:12-29(c), this decision shall be forwarded to the Commissioner of Education for review of the Commission's recommended penalty. The parties may either: 1) file exceptions to the recommended sanction; 2) file an appeal of the Commission's finding of a violation; or 3) file both exceptions to the recommended sanction together with an appeal of the finding of a violation.

Parties taking exception to the recommended sanction of the Commission but *not disputing* the Commission's finding of a violation may file, **within thirteen (13) days** from the date the Commission's decision is forwarded to the Commissioner, written exceptions regarding the recommended penalty to the Commissioner. The forwarding date shall be the mailing date to

the parties, as indicated below. Such exceptions must be forwarded to: Commissioner of Education, c/o Bureau of Controversies and Disputes, P.O. Box 500, Trenton, New Jersey 08625, marked "Attention: Comments on Ethics Commission Sanction," as well as to (ControversiesDisputesFilings@doe.nj.gov). A copy must also be sent to the Commission (school.ethics@doe.nj.gov) and all other parties.

Parties seeking to appeal the Commission's finding of violation *must* file an appeal pursuant to the standards set forth at *N.J.A.C.* 6A:4:1 *et seq.* **within thirty (30) days** of the filing date of the decision from which the appeal is taken. The filing date shall be three (3) days after the date of mailing to the parties, as shown below. In such cases, the Commissioner's review of the Commission's recommended sanction will be deferred and incorporated into the Commissioner's review of the finding of violation on appeal. Where a notice of appeal has been filed on or before the due date for exceptions to the Commission's recommended sanction (thirteen (13) days from the date the decision is mailed by the Commission), exceptions need not be filed by that date, but may be incorporated into the appellant's briefs on appeal.

Robert W. Bender, Chairperson

Mailing Date: September 26, 2023

Resolution Adopting Decision
in Connection with C59-20

Whereas, at its meeting on February 23, 2022, the School Ethics Commission (Commission) voted to transmit the above-captioned matter to the Office of Administrative Law (OAL) for a plenary hearing; and

Whereas, the Administrative Law Judge (ALJ) issued an Initial Decision dated July 12, 2023; and

Whereas, the ALJ found that Respondent Rogers violated *N.J.S.A.* 18A:12-24.1(e) and *N.J.S.A.* 18A:12-24.1(f), and recommended that Respondent Rogers be reprimanded, but also found that Respondents Stella and DiFranco did not violate *N.J.S.A.* 18A:12-24.1(e) and/or *N.J.S.A.* 18A:12-24.1(f), and dismissed the Complaint against them; and

Whereas, Respondent Rogers filed exceptions to the Initial Decision, but Complainant did not file a reply to Respondent Rogers' exceptions; and

Whereas, at its meeting on August 22, 2023, the Commission reviewed the record in this matter, and discussed adopting the ALJ's conclusion that Respondent Rogers violated *N.J.S.A.* 18A:12-24.1(e) and *N.J.S.A.* 18A:12-24.1(f), the recommended penalty of reprimand, the conclusion that Respondents Stella and DiFranco did not violate *N.J.S.A.* 18A:12-24.1(e) and/or *N.J.S.A.* 18A:12-24.1(f), and the dismissal of the Complaint against them.

Whereas, at its meeting on September 26, 2023, the Commission reviewed and voted to approve the within decision as accurately memorializing its actions/findings from its meeting on August 22, 2023; and

Now Therefore Be It Resolved, the Commission hereby adopts the within decision.

Robert W. Bender, Chairperson

I hereby certify that this Resolution was duly adopted by the School Ethics Commission at its regularly scheduled meeting on September 26, 2023.

Brigid C. Martens, Acting Director
School Ethics Commission

331-23SEC

New Jersey Commissioner of Education

Final Decision

Jim Giannakis, Keith Both, Thomas Cassio, Pio Pennisi, Doug Chapman, and William Seesselberg,

Complainants,

v.

Debbie Boyle, South Plainfield Board of Education, Middlesex County,

Respondent.

Synopsis

Complainants alleged, *inter alia*, that respondent, a member of the South Plainfield Board of Education, violated *N.J.S.A.* 18A:12-24.1(c), *N.J.S.A.* 18A:12-24.1(d), *N.J.S.A.* 18A:12-24.1(e), *N.J.S.A.* 18A:12-24.1(f), *N.J.S.A.* 18A:12-24.1(i), and *N.J.S.A.* 18A:12-24.1(j) of the Code of Ethics for School Board Members when she, *inter alia*, sent an email that was critical of the Superintendent to the Board as well as the Superintendent and her assistant, and directly contacted high school band and chorus teachers to request that the marching band and chorus perform at an event on behalf of an organization for which respondent serves as secretary. The School Ethics Commission (SEC) determined that the respondent's actions violated *N.J.S.A.* 18A:12-24.1(d), *N.J.S.A.* 18A:12-24.1(e), *N.J.S.A.* 18A:12-24.1(i) and *N.J.S.A.* 18A:12-24.1(j) of the Code of Ethics for School Board Members. The SEC recommended a penalty of censure for these violations.

The case was forwarded to the Commissioner for a final determination of the appropriate penalty in this matter. Upon review, the Commissioner concurred with the penalty recommendation of the SEC for respondent's actions. Accordingly, the respondent shall be censured as a school official found to have violated the School Ethics Act.

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

331-23SEC
SEC Dkt. No. C86-21
OAL Dkt. No. EEC 03124-22
Agency Dkt. No. 260-9/23

New Jersey Commissioner of Education

Final Decision

Jim Giannakis, Keith Both, Thomas Cassio, Pio Pennisi, Doug Chapman, and William Seesselberg,

Complainants,

v.

Debbie Boyle, South Plainfield Board of Education, Middlesex County,

Respondent.

The Commissioner has reviewed the record of this matter and the September 26, 2023 decision of the School Ethics Commission (Commission). The Commission found that respondent Debbie Boyle, a member of the South Plainfield Board of Education (Board), violated *N.J.S.A.* 18A:12-24.1(d), *N.J.S.A.* 18A:12-24.1(e), *N.J.S.A.* 18A:12-24.1(i), and *N.J.S.A.* 18A:12-24.1(j) of the Code of Ethics for School Board Members. The Commission recommended a penalty of censure for the violation. The Commission's decision was forwarded to the Commissioner for final determination on the recommended penalty pursuant to *N.J.S.A.* 18A:12-29(c). Respondent neither filed exceptions to the recommended penalty nor instituted an appeal, pursuant to *N.J.A.C.* 6A:4-1 *et seq.*, of the Commission's underlying finding of violation.

Upon review, the Commissioner concurs with the penalty recommended by the Commission for respondent's actions in bypassing the chain of the command and criticizing and questioning district administrators.

Accordingly, the respondent is hereby censured as a school official found to have violated the School Ethics Act.

IT IS SO ORDERED.[1]

Angelica Allen-McMillan, Ed.D.
ACTING COMMISSIONER OF EDUCATION

Date of Decision: November 2, 2023
Date of Mailing: November 3, 2023

[1] This decision may be appealed to the Appellate Division of the Superior Court pursuant to *N.J.S.A.* 18A:6-9.1. Under *N.J.Ct.R.* 2:4-1(b), a notice of appeal must be filed with the Appellate Division within 45 days from the date of mailing of this decision.

Before the School Ethics Commission
OAL Docket No.: EEC-03124-22
SEC Docket No.: C86-21
Final Decision

Jim Giannakis, Keith Both, Thomas Cassio, Pio Pennisi, Doug Chapman, and William Seesselberg,

Complainants

v.

Debbie Boyle,
South Plainfield Board of Education, Middlesex County,
Respondent

I. Procedural History

The above-captioned matter arises from a Complaint that was filed on November 24, 2021,[1] by Jim Giannakis, Keith Both, Thomas Cassio, Pio Pennisi, Doug Chapman, and William Seesselberg (collectively referred to as Complainants) alleging that Debbie Boyle (Respondent), a member of the South Plainfield Board of Education (Board), violated the School Ethics Act (Act), *N.J.S.A.* 18A:12-21 *et seq*. The Complaint avers that Respondent violated *N.J.S.A.* 18A:12-24.1(c) (Counts 1-2), *N.J.S.A.* 18A:12-24.1(d) (Counts 1-2), *N.J.S.A.* 18A:12-24.1(e) (Counts 1-2), *N.J.S.A.* 18A:12-24.1(f) (Count 2), *N.J.S.A.* 18A:12-24.1(i) (Counts 1-2), and *N.J.S.A.* 18A:12-24.1(j) (Counts 1-2) of the Code of Ethics for School Board Members (Code).

At its meeting on March 22, 2022, and after reviewing Respondent's Motion to Dismiss in Lieu of Answer (Motion to Dismiss) and Complainants' response thereto, the Commission voted to grant the Motion to Dismiss as to the alleged violations of *N.J.S.A.* 18A:12-24.1(c), *N.J.S.A.* 18A:12-24.1(i), and *N.J.S.A.* 18A:12-24.1(j) in Count 1; deny the Motion to Dismiss as to the alleged violations of *N.J.S.A.* 18A:12-24.1(d) and *N.J.S.A.* 18A:12-24.1(e) in Count 1; and to deny the Motion to Dismiss as to Count 2 (in its entirety). Based on its findings, the Commission also voted to direct Respondent to file an Answer to Complaint (Answer), and to transmit the matter to the Office of Administrative Law (OAL) following receipt of the Answer.

On April 7, 2022, Respondent filed an Answer as directed. The Commission subsequently transmitted the matter to the OAL for a plenary hearing where Complainants would carry the burden to prove the remaining violations of the Code as set forth in the Complaint.

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[1] On November 24, 2021, Complainants filed a deficient Complaint; however, on December 12, 2021, Complainants cured all defects and filed an Amended Complaint that was deemed compliant with the requirements detailed in *N.J.A.C.* 6A:28-6.3.

At the OAL, a hearing was held on February 13 and 14, 2023. Thereafter, the Administrative Law Judge (ALJ) issued an Initial Decision on July 17, 2023. Respondent filed exceptions to the Initial Decision, in accordance with *N.J.A.C.* 1:1-18.4, and Complainants filed a reply thereto.

At its meeting on August 22, 2023, the Commission considered the full record in this matter. Thereafter, at its meeting on September 26, 2023, the Commission voted to modify the Initial Decision by adopting the Initial Decision's conclusion that Respondent violated *N.J.S.A.* 18A:12-24.1(e) in Count 1 and *N.J.S.A.* 18A:12-24.1(d), *N.J.S.A.* 18A:12-24.1(e), *N.J.S.A.* 18A:12-24.1(i) and *N.J.S.A.* 18A:12-24.1(j) in Count 2, adopting the Initial Decision's conclusion that Respondent did not violate *N.J.S.A.* 18A:12-24.1(f) in Count 2, but rejecting the Initial Decision's conclusion that Respondent violated *N.J.S.A.* 18A:12-24.1(d) in Count 1 and/or *N.J.S.A.* 18A:12-24.1(c) in Count 2. The Commission also voted to adopt the recommended penalty of censure.

II. Initial Decision

A. Count 1

In Count 1, Complainants allege that Respondent violated *N.J.S.A.* 18A:12-24.1(d) and *N.J.S.A.* 18A:12-24.1(e) when she sent an email that was critical of the Superintendent to the entire Board, the Superintendent and the Superintendent's assistant.

According to the testimony of Diana Joffe, the South Plainfield Education Association (SPEA) President, in 2021, the Superintendent abruptly changed the time of the high school graduation from evening to morning, which upset teachers who would no longer be able to participate in the ceremony. *Id.* at 10. Joffe was not on speaking terms with the Superintendent, so she testified that she called Respondent and asked her to speak with the Superintendent about her concerns. *Ibid.* According to her testimony, Joffe had been told that the Superintendent changed the time of graduation because her daughter's graduation was scheduled for the same time. *Ibid.*

Thereafter, in response to the Superintendent's "Friday packet" containing information about graduation, Respondent sent an email on May 28, 2021, to the Superintendent, the Superintendent's administrative assistant, and all Board members, which stated:

> Good morning[.] I'm reading the notes with regards to the high school graduation and Diane Joffe is the current SPEA president not the former. Her discussion was that she was not concerned about the time change[;] she was concerned that the reason for the time change was not based on the needs of the parents and the students but rather[,] for your own personal needs which she discussed and the fact that the rationale was disingenuous. The parents which [sic] have publicly stated and the students we're [sic] upset because of the abrupt change in time and [sic] speaking

> to a number of board members[,] no one was informed except at the bottom of the Friday packet information under events [sic] various events were taking place and Middle School graduation was put in there and so was the high school graduation. This was never discussed with the entire board[.] [T]his is [sic] the issues that came forward by parents and students. In any event[,] if you have issues with the current acting SPEA president [D.J.] please reach out to her to have that discussion. Thank you.
>
> [*Id.* at 3-4.]

With respect to *N.J.S.A.* 18A:12-24.1(d), the ALJ found that Respondent did not violate the provision because she did not issue the Superintendent a direct order in the May 28, 2021, email. *Initial Decision* at 16. However, the ALJ found that Respondent did violate *N.J.S.A.* 18A:12-24.1(d) when she had a private conversation with the SPEA President without notifying the Board or Superintendent, and instead, Respondent should have directed Joffe to speak directly with the Board President or the Superintendent or Respondent should have contacted the Superintendent and Board before sending the May 28, 2021, email. *Id.* at 18.[2]

In finding a violation of *N.J.S.A.* 18A:12-24.1(e), the ALJ determined that Respondent acted beyond the scope of her duties by allowing herself to be the messenger for the SPEA president. *Id.* at 19. The ALJ noted Respondent should have persuaded the SPEA President to bring her issues directly to the Superintendent. *Ibid.*

B. Count 2

In Count 2, Complainants allege that Respondent violated *N.J.S.A.* 18A:12-24.1(c), *N.J.S.A.* 18A:12-24.1(d), *N.J.S.A.* 18A:12-24.1(e), *N.J.S.A.* 18A:12-24.1(f), *N.J.S.A.* 18A:12-24.1(i), and *N.J.S.A.* 18A:12-24.1(j) when she directly contacted the high school band and chorus teachers to request that the marching band and choir perform at an event for the Plainfield Chapter of UNICO, an Italian American Service Organization, of which Respondent is the secretary.

On September 16, 2021, Respondent sent an email to the band teacher asking if the marching band would play at the UNICO's annual Columbus Day program as they had in the past. *Initial Decision* at 4. Respondent sent the email from her personal email address and signed it using her title as secretary of UNICO's Plainfield Chapter. *Ibid.* When she did not get a response, Respondent emailed the high school principal on September 27, 2021, inquiring about the marching band's participation in the Columbus Day program, again using her personal email. *Ibid.* The principal responded and indicated that he would speak with the marching band teacher about the request. *Id.* at 4-5. The next day, the principal informed Respondent that the marching

[2] While the Order at the conclusion of the Initial Decision dismisses *N.J.S.A.* 18A:12-24.1(d) in Count 1, the ALJ indicated in the Legal Discussion section of the Initial Decision that Respondent did violate *N.J.S.A.* 18A:12-24.1(d) in Count 1. Although the Order and the Legal Discussion are contradictory, the Commission considers the findings in the ALJ's Legal Discussion to be the ALJ's intention.

band would not be able to attend the event. *Id.* at 5. On September 30, 2021, Respondent sent a text message to the chorus teacher asking for a call back regarding the chorus participating in the Columbus Day event. *Exhibit R-20.* The chorus teacher responded by text and indicated that the principal "says that the choir and band are not doing the Columbus Day ceremony." *Ibid.* Respondent clarified that she was asking about the chorus, while her previous request had been for the band. Respondent asked, "what is the reasoning that you are not going to be able to participate when you have done this all these years and enjoyed it." *Exhibit R-21.* The chorus teacher reiterated, "I spoke to [the principal] about performing and unfortunately we are not going to be able to participate this year." *Ibid.*

The ALJ found it is undisputed that Respondent directly contacted District staff via email and text and, although she contacted them from her personal accounts, she used information obtained as a Board member (e.g., email addresses that were not on the District's website), to contact the staff. *Id.* at 20-21. The ALJ found Respondent violated *N.J.S.A.* 18A:12-24.1(c) when she acted outside the scope of her duties in bypassing the Superintendent and in sending invitations directly to District staff. *Id.* at 21.

The ALJ explained Respondent requested clarification from the chorus teacher regarding why the chorus could not perform at the Columbus Day ceremony in a text message because Respondent had a friendship with the chorus teacher and had her personal cell phone number. *Id.* at 22. According to the ALJ, Respondent put the chorus teacher in a "difficult position," and therefore, found that Respondent's request for an explanation from a teaching staff member was an inappropriate attempt to administer the schools in violation of *N.J.S.A.* 18A:12-24.1(d). *Ibid.*

Regarding a violation of *N.J.S.A.* 18A:12-24.1(e), the ALJ contended Respondent placed the chorus teacher in an "awkward" position when Respondent questioned the principal's directive and asked the chorus teacher to explain that decision, and such action potentially compromised the Board's integrity and implied that Respondent was acting on behalf of the Board. *Id.* at 23. Therefore, the ALJ found that Respondent's actions in using a staff member's personal cell phone to request that students participate in an outside activity, on behalf of an outside organization, without clearly identifying Respondent's role violates *N.J.S.A.* 18A:12-24.1(e). *Ibid.*

The ALJ further contended that although Respondent's process for requesting that students participate in the events was flawed, she did not use the schools for her personal gain or for the gain of her friends because the invitation was ultimately rejected and the students did not participate; therefore, the ALJ found that Complainants did not meet their burden to prove that Respondent violated *N.J.S.A.* 18A:12-24.1(f). *Id.* at 23-24.

As to a violation of *N.J.S.A.* 18A:12-24.1(i), the Superintendent testified that despite prior practice, in 2017 she established new protocol requiring Board members to contact her before contacting staff, and Respondent's emails and texts to the high school principal and staff were in direct opposition to that directive. *Id.* at 24. In addition, Respondent was a "Master Board Member" and received training, and therefore, her testimony that she was unaware of the protocol was not credible, thus the ALJ found that Respondent violated *N.J.S.A.* 18A:12-24.1(i). *Ibid.*

Finally, as to a violation of *N.J.S.A.* 18A:12-24.1(j), the ALJ noted it was undisputed that Respondent was unhappy that the marching band and choir were not going to participate in the events and that Respondent requested an explanation. *Id.* at 25. According to the ALJ, Respondent's actions are "tantamount to initiating an investigation prior to administrative action" and Respondent initiated an inquiry prior to the referral to the Superintendent; therefore, the ALJ found Respondent violated *N.J.S.A.* 18A:12-24.1(j). *Ibid.*

C. Penalty

With respect to the appropriate penalty, the ALJ opined that Respondent's actions were not *de minimis*, but rather, a blatant disregard for the chain of communication, and a serious lack of judgment. Therefore, as Respondent is no longer on the Board, the ALJ concluded that a penalty of **censure** should be imposed. *Ibid.*

III. Exceptions

Respondent's Exceptions

In her exceptions, Respondent asserts the ALJ erred when she determined that Respondent violated *N.J.S.A.* 18A:12-24.1(d) and *N.J.S.A.* 18A:12-24.1(e) in Count 1 by sending the May 28, 2021, email. Respondent argues she was relaying a message to the Superintendent and the Board regarding the concerns she obtained from the SPEA President. The ALJ suggests that Respondent could have contacted the Superintendent and the Board prior to sending the email, which Respondent argues is exactly what she did. According to Respondent, by sending the email, she "relayed the SPEA President's concerns to both the Superintendent and the remaining Board [m]embers," and as such, did not violate *N.J.S.A.* 18A:12-24.1(d). Respondent maintains that the ALJ's finding that she violated *N.J.S.A.* 18A:12-24.1(e) is also incorrect. According to Respondent, regardless of the reason the SPEA President shared her concerns with Respondent rather than another Board member, Respondent was obligated to share that information with the Superintendent and the Board. Respondent further maintains Complainants did not provide any evidence to demonstrate that Respondent made any promises to the SPEA President, and relaying information received from a friend is not beyond the scope of Respondent's duties.

Regarding the allegations in Count 2 as they relate to Respondent's direct communications with the band and chorus teachers, Respondent argues the ALJ erred when she stated that the high school staff emails are not on the District's website and that Respondent used information that was available to her as a Board member, not a member of the public. Respondent further argues Complainants did not provide any evidence to support that Respondent contacted the District staff in her capacity as a Board member and contrary to the ALJ's determination, staff email contacts can be located on the website; therefore, a violation of *N.J.S.A.* 18A:12-24.1(c) cannot be sustained. As to her inquiry to the staff about why the chorus could not attend the event, Respondent contends she requested whether the band and chorus could attend the event and only received a response back about the band, not the chorus; hence, she followed up with an inquiry related to the chorus' availability. Respondent further contends

that the testimonies from the staff did not indicate that they "felt any pressure to comply with the request" nor that Respondent was issuing an order. According to Respondent, Complainants did not provide any evidence to demonstrate that Respondent obtained the chorus teacher's phone number in her role as a Board member, and therefore, a violation of *N.J.S.A.* 18A:12-24.1(d) should be dismissed. As to a violation of *N.J.S.A.* 18A:12-24.1(e), Respondent asserts the record does not reflect that she made any personal promises that would compromise the Board. Respondent notes her requests were made as a private citizen, on behalf of an outside organization, and none of the testimony supports the fact that Respondent was communicating with the staff as a Board member. According to Respondent, the ALJ determined Respondent violated *N.J.S.A.* 18A:12-24.1(i) because the Superintendent had established protocol regarding submitting requests to the Superintendent to contact District staff back in 2017; however, Respondent maintains Complainants did not submit any evidence of such a "written protocol." Finally, as to a violation of *N.J.S.A.* 18A:12-24.1(j), Respondent reaffirms the ALJ erred when she determined Respondent's inquiry as to why the chorus and band could not participate at the event was "tantamount to conducting an inquiry or investigation." Respondent argues the ALJ maintained that Respondent was acting in her capacity as a member of UNICO when she made the request of the band/chorus as evidenced by the emails sent from her personal account. Therefore, if the requests were made in her private capacity, Respondent contends it would only stand to reason that any inquiries as to why the chorus could not perform were also made in the same capacity, not as a Board member.

With the above in mind, Respondent asserts the Initial Decision should be rejected and the Commission should find that she was not in violation of any provisions of the Code.

Complainants' Reply to Respondent's Exceptions

In their reply, Complainants note Respondent's exceptions "mainly rely on the arguments expressed in her original brief," which is not an acceptable submission, and which have also been previously considered by the ALJ before the Initial Decision was issued. Therefore, because Respondent did not raise any new arguments and because, according to Complainants, the ALJ's decision is accurate and previously outlined and considered Respondent's arguments and reasoning, there "is nothing else for the Commission to consider," and the Initial Decision should be adopted.

IV. Analysis

Upon a careful, thorough, and independent review of the record, the Commission agrees with the ALJ that Respondent violated *N.J.S.A.* 18A:12-24.1(e) in Count 1 and *N.J.S.A.* 18A:12-24.1(d), *N.J.S.A.* 18A:12-24.1(e), *N.J.S.A.* 18A:12-24.1(i) and *N.J.S.A.* 18A:12-24.1(j) in Count 2, and also agrees with the ALJ that Respondent did not violate *N.J.S.A.* 18A:12-24.1(f) in Count 2. However, the Commission disagrees with the ALJ and finds that Respondent did not violate *N.J.S.A.* 18A:12-24.1(d) in Count 1 and/or *N.J.S.A.* 18A:12-24.1(c) in Count 2. Nonetheless, the Commission agrees with the ALJ's recommended penalty of censure.

Under *N.J.S.A.* 18A:12-24.1(d), board members must not administer the schools, but instead see that they are well run. The Commission finds that Respondent's May 28, 2021, email

neither gave a direct order to the Superintendent, nor was it an attempt to become directly involved in the day-to-day administration of the District. The Commission agrees with Respondent and notes that Respondent's May 28, 2021, email was not a directive, but rather was consistent with Respondent's responsibility to refer a complaint to the chief school administrator. As such, the Commission finds that Respondent did not violate *N.J.S.A.* 18A:12-24.1(d) in Count 1.

Pursuant to *N.J.S.A.* 18A:12-24.1(e), a board member must recognize that authority rests with the board and a board member shall not make any personal promises or take any action that may compromise the board. The Commission concurs that Respondent acted beyond the scope of her duties as a Board member when she took it upon herself to make accusations against the Superintendent that she was acting disingenuous and changed the time of graduation for personal reasons. Respondent's actions in undermining the Superintendent on an email that included the Superintendent's administrative assistant and the entire Board, by its nature, has the potential to compromise the Board. As such, the Commission finds Respondent violated *N.J.S.A.* 18A:12-24.1(e) in Count 1.

Pursuant to *N.J.S.A.* 18A:12-24.1(c), board members must confine board action to "policy making, planning, and appraisal" and "frame policies and plans only after the board has consulted those who will be affected by them." The Commission finds that in Count 2, while it disagrees with Respondent's actions in contacting the band and chorus teachers to request that they participate at an event, rather than going through the proper channels, such action does not constitute official action to effectuate policies and plans. Although Respondent circumvented the process, her actions did not involve the implementation of policies or plans, and as such does not violate *N.J.S.A.* 18A:12-24.1(c).

Under *N.J.S.A.* 18A:12-24.1(d), board members must carry out their responsibility not to administer the schools, but see that they are well run. When Respondent sent a text message to the chorus teacher questioning her as to why the chorus could not perform at the Columbus Day event, Respondent inserted herself into activities that are the responsibility of school personnel and well beyond the role of a secretary of an outside organization. Respondent claims she was making the request as a UNICO secretary, but if such a claim were true, she would have had to follow the proper protocol and make the request and direct any inquiries to the principal or Superintendent as any member of the public would have to do. Instead, she questioned the principal's decision to his subordinate and was only presented with that opportunity because of her role as a Board member. As such, the Commission agrees with the ALJ that Respondent's request for an explanation from a teaching staff member was an inappropriate attempt to administer the schools in violation of *N.J.S.A.* 18A:12-24.1(d).

According to *N.J.S.A.* 18A:12-24.1(e), a board member must recognize that authority rests with the board and a board member shall not make any personal promises or take any action that may compromise the board. When Respondent solicited the band and chorus teachers directly by email and/or text message to participate in the Columbus Day event, and then questioned the chorus teacher by text message as to why the principal would not allow the chorus to participate, she took action that could compromise the Board. Respondent was using information that she had as a Board member to contact the band and chorus teachers, instead of

directing her inquiries and/or requesting an explanation from proper authorities, as any other member of the public would be required to do. Although Respondent claims that she sent the email from her personal email account and as the secretary for UNICO, and therefore, was not making the request as a Board member, but for Respondent's position as a Board member, she would never have been able to contact the teachers directly, and as such, was acting beyond the scope of her duties. Respondent, a Board member, did not follow the chain of command that is required of any member of the public when making a request of District personnel, and further challenged the administration's decision-making to a teaching staff member. In doing so, it appears that Respondent circumvented the principal's authority, placed the chorus teacher in the impossible situation of being in the middle of a Board member and the teacher's direct supervisor, and presented the appearance that Board members are in disagreement with the administration, which compromises the Board. Accordingly, Respondent's direct communication with the band and chorus teachers, as well as her text message communication with the chorus teacher challenging the principal's determination that the chorus was unavailable to participate in a private event, violated *N.J.S.A.* 18A:12-24.1(e).

N.J.S.A. 18A:12-24.1(f) prohibits Board members from surrendering their judgment to special interest or partisan political groups or using the schools for personal gain or for the gain of friends. The Commission finds that Respondent did not use the schools for personal gain or for that of friends as members of the public are permitted to follow protocol and submit requests for the band and chorus to participate in a community event. The concern with Respondent's behavior was the way in which she communicated with staff members directly (rather than following the established process) and questioned the principal's determination, and not that she was seeking for the band and chorus to participate in the Columbus Day event. Accordingly, the Commission finds Respondent did not violate *N.J.S.A.* 18A:12-24.1(f).

According to *N.J.S.A.* 18A:12-24.1(i), Board members must support and protect school personnel in the proper performance of their duties. The Superintendent testified that a protocol was implemented in 2017 whereby Board members were to contact the Superintendent rather than staff members. Contrary to the protocol, Respondent directly contacted the band teacher, chorus teacher, and the principal. Such action violates the Superintendent's directive and does not support school personnel in the proper performance of their duties, in violation of *N.J.S.A.* 18A:12-24.1(i). While Respondent argues that a written copy of the protocol was not included in evidence, the Commission notes that the Superintendent provided testimony on the protocol. The ALJ also found Respondent's testimony that she was unaware of the protocol not credible. The Commission finds no basis to disturb the credibility findings of the ALJ, who had the opportunity to observe and assess Respondent during her testimony. Additionally, Respondent's actions in questioning a teacher as to why the principal would not permit the chorus to perform at an event also fails to support and protect the school personnel in the proper performance of their duties, and places the chorus teacher in an uncomfortable situation where a Board member is challenging the teacher's direct supervisor, in violation of *N.J.S.A.* 18A:12-24.1(i).

Finally, *N.J.S.A.* 18A:12-24.1(j) requires Board members to refer all complaints to the chief administrative officer and act on complaints at public meetings only after the failure of an administrative solution. The Commission agrees with the ALJ that Respondent's actions in sending a text message to the choir teacher requesting an explanation as to why the principal had

decided that the choir was unavailable for the Columbus Day event was "tantamount" to an investigation prior to referral of the matter to the Superintendent. If Respondent was unhappy with the principal's decision that the band and choir were unavailable to participate in the event, she should have addressed her concerns with the Superintendent rather than questioning a teacher about the principal's reasoning for the decision. As such, Respondent's direct inquiries to a district staff member regarding Respondent's disagreement with the principal's decision without referring the matter to the Superintendent violates *N.J.S.A.* 18A:12-24.1(j).

The Commission further agrees with the ALJ that a **censure** is the appropriate penalty for such a violation. Respondent's actions violated five provisions of the Code, which demonstrates the severity of her actions. As stated by the ALJ, "the blatant disregard for the chain of communication, and blurred lines of professional and personal relationships evidences a serious lack of judgment." *Initial Decision* at 26. Respondent was a Board member for 15 years, serving as President and Vice President. She also served as President of the Middlesex County Board of Education for four years, and earned a Master Board Member designation from the New Jersey School Boards Association. As a seasoned Board member who had undergone years of ethics training, Respondent should have been well aware of her ethical obligations. The Commission notes that as Respondent is no longer on the Board, it is limited to the issuance of a reprimand or a censure, and it seeks to impose the more severe penalty of censure given the serious nature of Respondents numerous violations of the Code.

IV. Decision

For all of the aforementioned reasons, the Commission modifies the Initial Decision of the OAL. Specifically, the Commission adopts the Initial Decision's conclusions that Respondent violated *N.J.S.A.* 18A:12-24.1(e) in Count 1; *N.J.S.A.* 18A:12-24.1(d), *N.J.S.A.* 18A:12-24.1(e), *N.J.S.A.* 18A:12-24.1(i) and *N.J.S.A.* 18A:12-24.1(j) in Count 2; and did not violate *N.J.S.A.* 18A:12-24.1(f) in Count 2. However, the Commission modifies the Initial Decision to reject the conclusion that Respondent violated *N.J.S.A.* 18A:12-24.1(d) in Count 1 and/or *N.J.S.A.* 18A:12-24.1(c) in Count 2. Accordingly, the Commission adopts the recommended penalty of **censure** for the violations.

Pursuant to *N.J.S.A.* 18A:12-29(c), this decision shall be forwarded to the Commissioner of Education for review of the Commission's recommended penalty. The parties may either: 1) file exceptions to the recommended sanction; 2) file an appeal of the Commission's finding of a violation; or 3) file both exceptions to the recommended sanction together with an appeal of the finding of a violation.

Parties taking exception to the recommended sanction of the Commission but *not disputing* the Commission's finding of a violation may file, **within thirteen (13) days** from the date the Commission's decision is forwarded to the Commissioner, written exceptions regarding the recommended penalty to the Commissioner. The forwarding date shall be the mailing date to the parties, as indicated below. Such exceptions must be forwarded to: Commissioner of Education, c/o Bureau of Controversies and Disputes, P.O. Box 500, Trenton, New Jersey 08625, marked "Attention: Comments on Ethics Commission Sanction," as well as to

(ControversiesDisputesFilings@doe.nj.gov). A copy must also be sent to the Commission (school.ethics@doe.nj.gov) and all other parties.

Parties seeking to appeal the Commission's finding of violation *must* file an appeal pursuant to the standards set forth at *N.J.A.C.* 6A:4:1 *et seq.* **within thirty (30) days** of the filing date of the decision from which the appeal is taken. The filing date shall be three (3) days after the date of mailing to the parties, as shown below. In such cases, the Commissioner's review of the Commission's recommended sanction will be deferred and incorporated into the Commissioner's review of the finding of violation on appeal. Where a notice of appeal has been filed on or before the due date for exceptions to the Commission's recommended sanction (thirteen (13) days from the date the decision is mailed by the Commission), exceptions need not be filed by that date, but may be incorporated into the appellant's briefs on appeal.

Robert W. Bender, Chairperson

Mailing Date: September 26, 2023

Resolution Adopting Decision in Connection with C86-21

Whereas, at its meeting on March 22, 2022, the School Ethics Commission (Commission) voted to transmit the above-captioned matter to the Office of Administrative Law (OAL) for a plenary hearing; and

Whereas, the Administrative Law Judge (ALJ) issued an Initial Decision dated July 17, 2023; and

Whereas, the ALJ found that Respondent violated *N.J.S.A.* 18A:12-24.1(d) and *N.J.S.A.* 18A:12-24.1(e) in Count 1, and *N.J.S.A.* 18A:12-24.1(c), *N.J.S.A.* 18A:12-24.1(d), *N.J.S.A.* 18A:12-24.1(e), *N.J.S.A.* 18A:12-24.1(i) and *N.J.S.A.* 18A:12-24.1(j) in Count 2, but did not violate *N.J.S.A.* 18A:12-24.1(f) in Count 2, and recommended that Respondent be censured; and

Whereas, Respondent filed exceptions to the Initial Decision and Complainants filed a reply to Respondent's exceptions; and

Whereas, at its meeting on August 22, 2023, the Commission reviewed the record in this matter, and discussed adopting the ALJ's conclusions that Respondent violated *N.J.S.A.* 18A:12-24.1(e) in Count 1, and *N.J.S.A.* 18A:12-24.1(d), *N.J.S.A.* 18A:12-24.1(e), *N.J.S.A.* 18A:12-24.1(i) and *N.J.S.A.* 18A:12-24.1(j) in Count 2, but did not violate *N.J.S.A.* 18A:12-24.1(f) in Count 2.

Whereas, at its meeting on August 22, 2023, the Commission also discussed modifying the Initial Decision to reject conclusion that Respondent violated *N.J.S.A.* 18A:12-24.1(d) in Count 1 and/or *N.J.S.A.* 18A:12-24.1(c) in Count 2, but adopting the penalty of censure; and

Whereas, at its meeting on September 26, 2023, the Commission reviewed and voted to approve the within decision as accurately memorializing its actions/findings from its meeting on August 22, 2023; and

Now Therefore Be It Resolved, the Commission hereby adopts the within decision.

Robert W. Bender, Chairperson

I hereby certify that this Resolution was duly adopted by the School Ethics Commission at its regularly scheduled meeting on September 26, 2023.

Brigid C. Martens, Acting Director
School Ethics Commission

332-23
OAL Dkt. No. EDU 11519-22
Agency Dkt. No. 322-11/22

New Jersey Commissioner of Education

Final Decision

D.E. and J.E., on behalf of minor children, A.E., E.E., and C.E.,

Petitioners,

v.

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

Respondent.

On July 12, 2023, a final agency decision was rendered in this matter, wherein the Commissioner found D.E. and J.E. liable for tuition in the amount of $53,808.06, representing tuition for a period of ineligible attendance by their minor children, A.E., E.E., and C.E., in the Board's school district during the period from November 1, 2022 through the end of the 2022-2023 school year. The Board subsequently requested that the Commissioner seek entry of the assessment on the judgment docket of the Superior Court pursuant to *N.J.S.A.* 2A:58-10. D.E. and J.E. offered no reasons why the judgment against them should not be so docketed, although given an opportunity by this agency to do so. Accordingly, pursuant to *N.J.S.A.* 2A:58-10, John Ezmat and Danielle Ezmat are now subject to entry of a judgment by the court in the

amount of $53,808.06, which represents the payment ordered at the conclusion of the case before the Commissioner, with interest to accrue as provided by law.

IT IS SO ORDERED.

Angelica Allen-McMillan, Ed.D.
ACTING COMMISSIONER OF EDUCATION

Date of Decision: November 6, 2023
Date of Mailing: November 6, 2023

333-23
OAL Dkt. No. EDU 10384-22
Agency Dkt. No. 286-10/22

New Jersey Commissioner of Education

Final Decision

In the Matter of the Suspension of the Teaching Certificate of Helene Nguessan, Team Academy Charter School, Essex County

The record of this matter, the Initial Decision of the Office of Administrative Law (OAL), the exceptions filed by petitioner, TEAM Academy Charter School, Inc., pursuant to *N.J.A.C.* 1:1-18.4, and the reply filed by respondent, Helene Nguessan, have been reviewed and considered.

Petitioner initiated this matter to suspend respondent's teaching certificate pursuant to *N.J.S.A.* 18A:26-10, alleging that she resigned from her teaching position with the TEAM Academy Charter School without providing sixty days' notice as was required under her employment contract. After respondent filed an answer, the matter was transmitted to the OAL for a contested hearing. The Administrative Law Judge (ALJ) made numerous factual findings and concluded that respondent's certificate should not be suspended. The ALJ reasoned that respondent did not cease to perform her duties before the expiration of the sixty-day notice period because: (1) on September 2, 2022, her doctor determined that she could not return to work due to a stress-related issue, and (2) on that same day, petitioner terminated her employment.

In their exceptions, petitioner denies that it terminated respondent's employment and claims instead that respondent voluntarily abandoned her position on September 2, 2022. Specifically, petitioner takes issue with the ALJ's finding regarding an email dated September 2, 2022, from petitioner to respondent. Petitioner's Exceptions, at 9. Page 6 of the ALJ's Initial Decision states: "Nguessan received an email from KIRA [the location at which respondent was employed] dated September 2, 2022, stating that September 2, 2022, was her last day and she would be paid until September 15, 2015 [sic]." Initial Decision, at 6. Petitioner asserts that no such email was presented at the hearing "because it does not exist" and that, therefore, the ALJ's finding regarding the termination is unfounded. Petitioner's Exceptions, at 9.

In reply, respondent argues, among other things, that petitioner did terminate her employment on September 2, 2022, before the sixty-day notice period ended. Regarding the email referenced by the ALJ in her Initial Decision, respondent claims that it does exist "but was dated September 20, 2022," not September 2, 2022, which suggests that the ALJ made a typographical error. Respondent's Reply, at 4. Respondent further asserts that although testimony was taken about the September 20, 2022, email during the hearing, the email was not moved into evidence because respondent's counsel "only received it the day of the hearing." *Id.* at 4-5.

Upon careful review and consideration, the Commissioner is constrained to remand this matter to the OAL to resolve the evidentiary issue raised in petitioner's exceptions regarding the September 2, 2022, email referenced on page 6 of the ALJ's Initial Decision, and to resolve

the related factual dispute concerning whether petitioner terminated respondent's employment on September 2, 2022.

Although the Initial Decision suggests that the ALJ relied upon an email dated September 2, 2022, to support her finding that petitioner terminated respondent on that date, the case record received from the OAL does not contain a copy of that email. Adding to the confusion, respondent supplied an email to the Commissioner with her reply exceptions dated September 20, 2022, related to her separation from employment with petitioner and suggested that this email was in fact the email referenced by the ALJ in the Initial Decision. But this email is not contained in the case file, either. The Commissioner cannot consider evidence that is not part of the record when rendering a final decision. *See N.J.S.A.* 52:14B-10(d) ("A final decision shall include findings of fact and conclusions of law, separately stated and shall be based only upon the evidence of record at the hearing . . . ."). Furthermore, neither party provided the Commissioner with the hearing transcripts, and it is unclear from the Initial Decision whether any of the witnesses testified about either an email dated September 2, 2022, or an email dated September 20, 2022.

Accordingly, the Commissioner hereby remands this matter to the OAL for the ALJ to clarify whether the September 2, 2022, email referenced on page 6 of the Initial Decision was moved into evidence. If the ALJ's findings regarding the September 2, 2022, email were intended to describe the email dated September 20, 2022 (supplied by respondent with her reply exceptions), the ALJ should clarify same and confirm whether that email was moved into evidence. In addition, the ALJ should clarify whether there was an alternative evidentiary basis

for her finding that petitioner terminated respondent on September 2, 2022 (e.g., witness testimony), independent of any emails from petitioner to respondent.

IT IS SO ORDERED.[1]

Angelica Allen-McMillan, Ed.D.
ACTING COMMISSIONER OF EDUCATION

Date of Decision: November 6, 2023
Date of Mailing: November 8, 2023

[1] This decision may be appealed to the Appellate Division of the Superior Court pursuant to *N.J.S.A.* 18A:6-9.1. Under *N.J.Ct.R.* 2:4-1(b), a notice of appeal must be filed with the Appellate Division within 45 days from the date of mailing of this decision.

State of New Jersey
OFFICE OF ADMINISTRATIVE LAW

AMENDED
INITIAL DECISION
OAL DKT. NO. EDU 10384-22
AGENCY DKT. NO. 286-10/22

IN THE MATTER OF THE SUSPENSION OF THE TEACHING CERTIFICATE OF HELENE NGUESSAN TEAM ACADEMY CHARTER SCHOOL, ESSEX COUNTY,

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Thomas O. Johnston, Esq. for Petitioner (The Johnson Law Group, LLC)

Steven V. Schusler, Esq., for Respondent

Record Closed: August 17, 2023 Decided: August 25, 2023

BEFORE **KIMBERLY A. MOSS**, ALJ:

Respondent Helene Nguessan opposes the suspension of her teaching certificates for allegedly resigning from the Team Academy Charter School, (TACS or petitioner) without giving sixty days' notice.

This matter was forwarded to the Office of Administrative Law from the Department of Education on November 17, 2022, as a contested matter. The hearing was held on June 1, 2023. Closing briefs were received on July 7, 2023. Reply briefs were received on August 17, 2023, at which time I closed the record.

FACTUAL DISCUSSION

TESTIMONY

Dana Kerrihard

Dana Kerrihard (Kerrihard) is the employee relations manager at TACS. KIP Team and Family is the corporate office that manages TACS. Kerrihard supports schools in human relations, teaching certificates and school-based employment matters. One of the KIP schools is KIP Upper Roseville School (KIRA). When an employ resigns, the resignation goes to employee relations to determine the last date of employment. Nguessan was employed by TACS at KIRA. She began prior to 2022. Nguessan's 2022-2023 employment contract with TACS states the renewal job location and salary. The contract is signed by the executive director of TACS and Nguessan. Nguessan signed the contract digitally on May 17, 2022. Nguessan was offered the position of teacher at KIRA in the 2022-2023 contract. The contract states that if Nguessan resigns, she must give sixty days' notice. Nguessan's resignation letter was dated August 3, 2022. It stated that she was leaving her position on August 12, 2022. This was not compliant with the sixty days' notice required by the contract. The students start back to school in mid-August.

On August 9, 2022, Nguessan agreed to comply with the sixty-day notice requirement. Her retirement date would be October 3, 2022. Nguessan was a Kindergarten teacher. She was moved to the position of enrichment teacher. Nguessan was given two paid time off days. She did not appear at the school in September 2022. She did not work until October 3, 2022. Nguessan provided a doctor's note dated September 2, 2022, stating that she was in the doctor's office on that date and that she was not cleared to return to work.

On August 30, 2022, Nguessan stated that she would only come to work through the end of the week. Nguesan's termination was effective September 2, 2022. She was paid through September 15, 2022.

Nguessan had issues with being an enrichment teacher and not receiving the swag that the other teachers received. Nguessan felt that she was being treated unfairly and felt that there was a lack of honesty. Kerrihard was unclear as to what the lack of honesty was that Nguessan referred to.

Helene Nguessan

Nguessan taught kindergarten at KIRA for three years. In May 2022, she signed a contract with TACS for the 2022-2023 school year. She intended to teach at KIRA that year. In mid-July 2023, she was contacted by a Paterson school administrator who had saw her resume. She interviewed for a teaching position at Paterson Art and Science Middle School. She was offered the position in Patterson on July 29, 2022. She accepted the position at Paterson on August 1, 2022.

Nguessan gave TASC two weeks' notice that she would be leaving. She spoke to Sam Geffrard on August 3, 2023, regarding her resignation. Nguessan was informed that she was required to give sixty days' notice, which she agreed to do. The 2022-2023 contract that Nguessan signed required her to give two months' notice if she resigned. She did not remember this provision of the contract when she gave KIRA two weeks' notice. Nguessan had previously been a teacher in Connecticut, where teachers had to give two weeks' notice when they left.

On August 8, 2022, an enrichment teacher, Thompson expressed to Nguessan that she wanted to return to kindergarten teaching. Nguessan told Thompson that there was a position open at KIRA since Nguessan was leaving. Thompson took over the kindergarten teaching position on August 10, 2022.

There was a change in the pattern of communication with the teachers at KIRA at this time. Nguessan did not receive communications. Her schedule was not set. Nguessan asked Geffrard if she could use PTO days to attend orientation at Paterson Art and Science Middle School but was refused. Nguessan intended to complete her

contract with TACS through October 3, 2022, but she felt under pressure every day since she gave her resignation.

Having reviewed the testimony and evidence, I **FIND** the following **FACTS** in this case.

KIP Team and Family is a corporate office that manages TACS. Kerrihard is an employee relations manager at TACS. KIP Team and Family through TACS owns KIRA.

Nguessan was employed by TACS at KIRA. She was employed as a kindergarten teacher at KIRA for three years. Nguessan was told in January 2022 that she would be offered the position of Kindergarten Grade Level Chair at KIRA. Nguessan signed the employment contract with TASC in May 2022. The contract was for teaching at KIRA for the 2022-2023 school year. The contract did not state that Nguessan would be the Kindergarten Grade Level Chair. The contract stated that if Nguessan were to resign, she would have to give sixty days' notice. If an employee does not give adequate notice, the employee will be referred to the Department of Education for not following through on the contract agreement. This affects the status of teaching certificates.

On August 3, 2022, Nguessan submitted a resignation letter to TASC stating that she was leaving her position on August 12, 2022. Once Kerrihard received Nguessan's resignation letter, she informed Nguessan of the sixty-day requirement which would mean that her resignation date is October 3, 2022. Nguessan was told that if she did not comply, that the matter would be referred to the Department of Education.

On August 9, 2022, Nguessan agreed to comply with the sixty-day notice provision of her contract. Nguessan was to be an enrichment teacher until she completed the sixty-day notice period. Her resignation would be effective on October 3, 2022.

Enrichment teachers support other teachers. Another teacher, Thompson, was moved to the kindergarten teacher position. Teachers can be moved to other teaching positions. The contract signed by Nguessan did not limit Nguessan's duties to kindergarten teacher. Thompson and Nguessan's positions were switched. On August 18, 2022, Nguessan confirmed that the kindergarten teacher position had been filled. Nguessan believed that with the kindergarten teaching position filled she could leave KIRA prior to October 3, 2022, sixty days after she gave notice of her resignation. Nguessan received an email from Kerrihard on August 19, 2022, stating it was necessary for her to fulfill her contractual obligation. The school can agree to an earlier resignation notice time if the position is filled before the sixty-day notice period. In this matter TACS needed to hire a new teacher and it is difficult getting new teachers in August.

Nguessan on August 21, 2022, was offered a higher position at KIRA of kindergarten grade level chair by Geffrard. She had previously been offered the position in January 2022, but it was not the position listed in her 2022-2023 contract. She refused the position. TACS was not originally going to have this position.

In August 2022, there was a staff development day. Swag was put out for the staff by their name tags. There was no swag put out for Nguessan. This was an oversight and Nguessan later received the swag. There was a change in the pattern of communication with the teachers at KIRA at this time at this time. Nguessan did not receive communications. Her schedule was not set.

Jasmine Ballard, the Director of Operations at KIRA told Nguessan at 7:15 a.m. one day in August 2022, that she had to move her belongings to another room. Nguessan was not assigned a room to put her belongings in as an enrichment teacher. She was told to put her belongings in Thompson's former room. One day the door to Thompson's former room was locked.

Nguessan was frustrated at how she was being treated at KIRA. She also began having physical problems. She did not have a set schedule; nothing was consistent after she gave her resignation notice. She felt that she was being punished because she did not accept the kindergarten grade level chair position.

On September 2, 2022, Nguessan was again asked to move her belongings to another room. She was told that the room where she had her belongings was going to be used later in the day. She began experiencing stress. She scheduled a doctor's appointment within one hour of being told to remove her belongings. She asked staff at KIRA if she could see a doctor. Nguessan had an enrichment class from 9:30-11:00a.m. She was told that she could not leave. Eventually, the head of the department took over the enrichment class and Nguessan went to the doctor's appointment.

Nguessan went to Dr. Rena Levykh-Chase on September 2, 2022, who wrote that Nguessan is currently under stress and needs further time off. Nguessan needed to be referred to a psychiatrist. Dr. Rena Levykh-Chase also noted that Nguessan cannot return to work.

Nguessan received an email from KIRA dated September 2, 2022, stating that September 2, 2022, was her last day and she would be paid until September 15, 2015. Nguessan received counseling with Care Plus. She was having anxiety and in tears. Her initial appointment with Care Plus was within five days of the referral. The initial appointment was an intake there was a waiting list for another appointment. Her follow up appointment was on November 15, 2022. Nguessan started her job with Paterson on September 22, 2022.

Kerrihard stated that it is her obligation to notify the state if Nguessan does not comply with the terms of the contract. TACS asked for Nguessan's credentials to be suspended. Kerrihard checked the employee contract to make sure that resigning employees give the correct amount of notice.

LEGAL ANALYSIS AND CONCLUSION

N.J.S.A. 18a:28-8 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.

N.J.S.A. 18a:26-10 provides:

> Any teaching staff member employed by a board of education or an approved private school for the disabled, who shall, without the consent of the board or, in the case of an approved private school for the disabled, the board of directors of the school, cease to perform his duties before the expiration of the term of his employment, shall be deemed guilty of unprofessional conduct, and the commissioner may, upon receiving notice thereof, suspend his certificate for a period not exceeding one year.
>
> As used in this section, "approved private school for the disabled" means a private entity approved by the Department of Education to provide special education and related services to students with disabilities who have been placed by the district board of education or charter school responsible for providing their education.

In this matter Nguessan on August 3, 2022, submitted a resignation letter from KIRA stating her final day would be August 12, 2022. Once she was informed what her contract requires, she gave sixty days' notice before her resignation, she agreed to stay at KIRA until October 3, 2022. Her position was switched from kindergarten teacher to enrichment teacher. There was an event at KIRA in August 2022 where all of the teachers at KIRA were given swag at an event and Nguessan was not. Nguessan was told to leave her belongings in Thompson's former office, but it was not always open. On more than one occasion Nguessan was told to move her belongings to another area in August 2022. These things have caused Nguessan to experience stress to the extent that on September 2, 2022, after being told again to move her belongings, she scheduled an emergency doctor's appointment for the same day. She saw the doctor on September 2, 2022, who wrote that she could not return to work due to due to being under stress and that she needed to see a psychiatrist. TASC terminated Nguessan on September 2, 2022.

Nguessan did not cease to perform her duties prior to the expiration of the sixty-day notice. Her doctor stated that she could not return to work on September 2, 2022, which is the same day that TASC terminated Nguessan.

I **CONCLUDE** Nguessan did not cease to perform her duties before the expiration of the sixty-day notice period because on September 2, 2022, her doctor provided a letter stating that she could not return to work, and Nguessan was terminated on September 2, 2022.

ORDER

Based on the foregoing, it is **ORDERED** that TACS request that Nguessan's teaching certificates be suspended is **DENIED**.

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

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

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

August 25, 2023

DATE

KIMBERLY A. MOSS, ALJ

Date Received at Agency: August 25, 2023

Date Mailed to Parties: August 25, 2023

ljb

WITNESSES

For Petitioner

Dana Kerrihard

For Respondent

EXHIBITS

For Petitioner

P-1 Nguessan Employment Agreement for 2022-2023

R-2 Email dated August 21, 2022 from Nguessan

R-3 Email Response to Nguessan dated August 23, 2022

For Respondent

R-1 Resignation letter related documents

R-2 Not in Evidence

R-3 Emails

R-4 Doctor's Note Dated September 2, 2022

R-5 Resignation Letter of Nguessan

R—6 Paterson ASCs Teacher Contract

R-7 Nguessan Resume

R-8 Nguessan Medical Records

R-9 Nguessan Contract for 2022-2023 with TACS

R-10 Not in Evidence

R-11 Not in evidence

334-23
Agency Dkt. No. 102-4/23

New Jersey Commissioner of Education

Final Decision

In the Matter of the Tenure Hearing of
Tracie Sims, School District of the
City of East Orange, Essex County.

For the Petitioner, Ramon E. Rivera, Esq.

For the Respondent, Jamal Barnes, Esq.

The record of this matter and the proposed settlement agreement and general release have been reviewed. Upon such review, the Commissioner finds that the proposed settlement is consistent with established standards governing settlement of tenure matters. *In re Cardonick*, decided by the Commissioner April 7, 1982, *aff'd* State Board April 6, 1983, 1990 *S.L.D.* 842, 846. Accordingly, the settlement is hereby approved, and the tenure charges are dismissed, subject to compliance with the terms of the settlement.

IT IS SO ORDERED.

Angelina Allen McMillan, J.d.D.
ACTING COMMISSIONER OF EDUCATION

Date of Decision: November 6, 2023
Date of Mailing: November 8, 2023

335-23
Agency Dkt. No. 232-8/23

New Jersey Commissioner of Education

Final Decision

In the Matter of the Tenure Hearing of
Georgiana Cleary, School District of the
City of East Orange, Essex County

For the Petitioner, Ramon E. Rivera, Esq.

No appearance by or on behalf of Respondent, Georgiana Cleary

This matter was opened before the Commissioner of Education on August 24, 2023, through tenure charges of excessive absenteeism and other just cause certified by AbdulSaleem Hasan, Superintendent of the East Orange School District ("District"), together with supporting evidence against respondent, Georgiana Cleary, a tenured teacher in the District's employ. The District provided respondent with written notice of such certification at the respondent's current known address, via UPS.

On August 28, 2023, the Commissioner issued a notice to respondent via email, directing her to file an answer to the charges. This communication provided notice to respondent that, pursuant to *N.J.A.C.* 6A:3-5.3 and 6A:3-5.4, an individual against whom tenure charges are certified *"shall have 15 days from the day such charges are filed with the Commissioner to file a written response to the charges with the Commissioner,"* and that failure to answer within the prescribed period would – absent granting of an extension for good cause shown – result in the charges being deemed admitted. On September 18, 2023, the Commissioner sent a second email to respondent. On September 25, 2023, the Commissioner

sent a notice to respondent via regular mail. No reply to the tenure charges has been received from or on behalf of the respondent.

The certified tenure charges and statement of supporting evidence filed by the District in this matter indicate that the respondent has a history of excessive absenteeism dating back to the 2021-2022 school year. Respondent has reported to work only three times since November 28, 2022. Deeming the allegations to be admitted and noting that the respondent has failed to respond to the charges certified against her before the Commissioner, the Commissioner finds that the District's charge of excessive absenteeism has been proven and warrants the respondent's dismissal. Accordingly, summary decision is hereby granted to the District, and the respondent is dismissed from her tenured position with the East Orange School District.

IT IS SO ORDERED.[1]

Angelica Allen-McMillan, Ed.D.
ACTING COMMISSIONER OF EDUCATION

Date of Decision: November 6, 2023
Date of Mailing: November 8, 2023

[1] This decision may be appealed to the Appellate Division of the Superior Court pursuant to *N.J.S.A.* 18A:6-9.1. Under *N.J.Ct.R.* 2:4-1(b), a notice of appeal must be filed with the Appellate Division within 45 days from the date of mailing of this decision.

340-23

New Jersey Commissioner of Education

Final Decision

Denise Davis,

Petitioner,

v.

Board of Education of the City of Newark,
Essex County,
Respondent.

Synopsis

The petitioner was hired as a custodian by the respondent Board's school district and commenced working on January 19, 2021. Her employment was terminated at the end of her 90-day working test period, on April 19, 2021. Petitioner filed the within appeal of her termination with the Commissioner on July 23, 2023. The Board filed a motion to dismiss on the basis that the Department of Education does not have jurisdiction over this termination, which should have been filed with the Civil Service Commission (CSC).

The ALJ found, *inter alia*, that: the Department of Education does not have jurisdiction over this matter, and the case must be dismissed as a matter of law; the petitioner conceded that she filed the dispute with the wrong State agency and agrees with the Board that her petition should have been filed with the CSC; the petitioner sought to have the case deemed to have been filed with the CSC, but there is no authority to do so; further, the petitioner received a letter from the Board giving her proper notice that, pursuant to *N.J.A.C.* 4A:2-4.2, an appeal of her termination needed to be filed with the CSC within twenty days of written notice of termination. Accordingly, the ALJ granted the Board's motion to dismiss.

Upon review, the Commissioner concurred with the ALJ's findings and conclusions and adopted the Initial Decision as the final decision in this matter. In so doing, the Commissioner noted that the petitioner both failed to allege any violation of the school laws in her appeal and filed her petition beyond the statutory time limit for the filing of appeals with either the CSC or the Commissioner. Accordingly, the petition of appeal was dismissed.

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

340-23
OAL Dkt. No. 06963-21
Agency Dkt. No. 110-7/21

New Jersey Commissioner of Education

Final Decision

Denise Davis,

Petitioner,

v.

Board of Education of the City of Newark,
Essex County,

Respondent.

The record of this matter, the Initial Decision of the Office of Administrative Law (OAL), the exceptions filed by the petitioner pursuant to *N.J.A.C.* 1:1-18.4, and the reply thereto by the Newark Board of Education (Board), have been reviewed and considered.

Petitioner was employed by the Board as a custodian beginning on January 19, 2021. She was terminated on April 19, 2021, at the end of her 90-day working test period. Petitioner filed her petition of appeal on July 23, 2023. The Administrative Law Judge (ALJ) granted respondent's motion to dismiss, concluding that the Commissioner does not have jurisdiction over this matter, which should have been filed with the Civil Service Commission (CSC). The ALJ found that there was no authority to grant petitioner's request that the matter be deemed to have been filed with the CSC.

In her exceptions, the petitioner acknowledges that the CSC, not the Commissioner, has exclusive jurisdiction over this type of appeal. Petitioner argues that she is not legally savvy and

that her mistake in filing her petition with the Commissioner rather than the CSC should not result in dismissal, because if she had filed with the CSC, that agency would have transmitted the case to the OAL. Accordingly, the petitioner requests that the matter be transferred to the CSC.

In reply, the Board argues that the ALJ appropriately dismissed the case and urges the Commissioner to adopt the Initial Decision.

Upon review, the Commissioner concurs with the ALJ that the petition must be dismissed. It is clear – and petitioner concedes – that the CSC has exclusive jurisdiction over this type of appeal. Furthermore, the Commissioner's authority pursuant to *N.J.S.A.* 18A:6-9 is limited to controversies and disputes arising under the school laws, but petitioner has not alleged any violation of *N.J.S.A.* 18A:1-1 *et seq.* or *N.J.A.C.* 6A:1-1.1 *et seq.* Finally, the petitioner points to no legal authority allowing the Commissioner to transfer the case to another state agency such as the CSC, and the Commissioner has previously declined to do so in similar circumstances. *See Brianna Butts v. Bd. of Educ. of the City of Newark, Essex Co.,* Commissioner Decision No. 74-22 (decided Apr. 14, 2022). In further support of this conclusion, the Commissioner notes that *N.J.A.C.* 4A:2-4.1 provides that an employee terminated at the end of a working test period has twenty days to request a hearing before the CSC, and the record reflects that petitioner did not meet that deadline.

Additionally, even if the petitioner had alleged a violation of the school laws, her appeal to the Commissioner was untimely pursuant to *N.J.A.C.* 6A:3-1.3(i), which requires all petitions to be filed within 90 days of the decision being contested. The petitioner was terminated on

April 19, 2021, and 90 days thereafter was July 20, 2021; however, petitioner did not file her petition until July 23, 2021, making it untimely.

Accordingly, the Initial Decision is adopted as the final decision in this matter, and the petition of appeal is hereby dismissed.

IT IS SO ORDERED.[1]

Angelica Allen-McMillan, J.D.S.
ACTING COMMISSIONER OF EDUCATION

Date of Decision: November 20, 2023
Date of Mailing: November 22, 2023

[1] This decision may be appealed to the Appellate Division of the Superior Court pursuant to *N.J.S.A.* 18A:6-9.1. Under *N.J.Ct.R.* 2:4-1(b), a notice of appeal must be filed with the Appellate Division within 45 days from the date of mailing of this decision.

State of New Jersey
OFFICE OF ADMINISTRATIVE LAW

INITIAL DECISION ON
MOTION TO DISMISS
OAL DKT. NO. EDU 06963-21
AGENCY DKT. NO. 110-7/21

DENISE DAVIS,
Petitioner,
v.
BOARD OF EDUCATION OF THE CITY OF NEWARK, ESSEX COUNTY,
Respondent.

Arnold Shep Cohen, Esq., for petitioner Denise Davis (Oxfeld Cohen, attorneys)

Bernard Mercado, Esq., for respondent City of Newark Board of Education (Office of General Counsel, attorneys)

Record Closed: October 12, 2023 Decided: October 16, 2023

BEFORE **GAIL M. COOKSON**, ALJ:

STATEMENT OF THE CASE

Petitioner, Denise Davis (Davis or petitioner) appeals her termination by the City of Newark Board of Education (Board or respondent) on April 19, 2021, at the end of her 90-day working test period (WTP). She had been hired as a custodian worker by the Board and commenced her employment on January 19, 2021.

PROCEDURAL HISTORY

On July 23, 2021, petitioner filed her Petition of Appeal with the Commissioner of Education. On August 17, 2021, this matter was transmitted by the Department of Education, Bureau of Controversies and Disputes, to the Office of Administrative Law (OAL) where it was filed as a contested matter pursuant to N.J.S.A. 52:14B-1 to -15 and N.J.S.A. 52:14F-1 to -13. The matter was assigned to the undersigned on August 20, 2021. I convened a series of telephonic case management conferences, several of which petitioner failed to participate in. Petitioner then advised that she was seeking representation either with an attorney or through the union.

On November 9, 2021, we were informed that petitioner had obtained counsel with Oxfeld Cohen, P.C. It was also suggested that counsel consult with his client to see if she would consider a voluntary withdrawal in light of the jurisdictional issues asserted by the Deputy Attorney General. Months passed without any communications notwithstanding regular requests for a status update from my chambers. Finally, in the spring of this year, we convened a case management conference, at which time a briefing schedule was established on the jurisdictional questions.

On July 14, 2023, the Board filed a Notice of Motion for Dismissal on the merits of petitioner's appeal on the basis that the Department of Education does not have jurisdiction over this termination, which should have been filed with the Civil Service Commission. After several reminders and then warnings to counsel, petitioner filed its response to the motion on October 12, 2023. The matter is now ripe for determination. For the reasons set forth herein, I hold that the respondent's Motion to Dismiss must be granted with prejudice.

LEGAL ANALYSIS AND CONCLUSIONS OF LAW

On a motion to dismiss, the legal standard to be applied is whether the moving party is entitled to relief as a matter of law even granting the factual pleadings alleged in the petition the presumption of truth. Printing Mart-Morristown v. Sharp Elecs. Corp., 116

N.J. 739 (1989). Here, petitioner concedes that she filed the dispute with the wrong State agency and agrees with the Board that her petition should have been filed with the Civil Service Commission.

Insofar as there is no dispute that the Department of Education does not have jurisdiction over this matter, this case must be dismissed as a matter of law. While petitioner seeks to have the undersigned merely deem the case as having been filed under the Civil Service Commission, there is no authority for such to take place. The OAL is a forum of limited jurisdiction derived specifically in each case by the matter and issues transmitted by a State agency head over to it for hearing as a contested dispute. In fact, it is a first principal of administrative law that --

> The Office of Administrative Law shall acquire jurisdiction over a matter only after it has been determined to be a contested case by an agency head and has been filed with the Office of Administrative Law or as otherwise authorized by law, except as provided by N.J.A.C. 1:1-17. The Office of Administrative Law shall not receive, hear or consider any pleadings, motion papers, or documents of any kind relating to any matter until it has acquired jurisdiction over that matter; . . .
>
> [N.J.A.C. 1:1-3.2.]

Furthermore, it is the head of each such agency that determines whether to retain a case for in-house determination or transmit a dispute to the OAL for hearing, as well as which asserted issues the Administrative Law Judge is granted jurisdiction to determine.

> It is the agency head who determines initially whether a case is contested and, if so, whether the case should be sent to the OAL for an adjudicatory hearing to be conducted by an administrative law judge. See N.J.A.C. 1:1-2.2(a) (OAL jurisdiction limited to cases submitted to it by the agency head after agency head determines that the case is contested and appropriate for a hearing).
>
> In re Appeal of Certain Sections of Uniform Administrative Procedure Rules, 90 N.J. 85, 105 (1982)

This case is virtually identical to that of Butts v. Bd. of Education of the City of Newark 2022 N.J. AGEN LEXIS 365, *5, Initial Decision (March 2, 2022), aff'd by Final Decision (April 14, 2022), and I **CONCLUDE** that the result shall be identical.

Furthermore, petitioner received a letter from the Board stating that if she wanted to appeal her termination, the appeal had to be filed with the Civil Service Commission within twenty days. Pursuant to N.J.A.C. 4A:2-4.2: "An appeal shall be made in writing to the Civil Service Commission no later than 20 days from the employee's receipt of written notification from the appointing authority of the termination from service." The Board provided proper notice but petitioner did not file until July 23, 2023, ninety (90) days after that notice. I **CONCLUDE** that petitioner failed to file her appeal within twenty days with either agency, which is another jurisdictional basis for dismissing her appeal.

ORDER

Accordingly, and for the reasons articulated above, it is **ORDERED** that the motion of respondent Newark Board of Education for an Order Granting Dismissal is hereby **GRANTED**. It is further **ORDERED** that the appeal of petitioner Denise Davis for relief from her termination during her working test period is hereby dismissed with prejudice.

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

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

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

Gail M. Cookson

October 16, 2023
DATE

GAIL M. COOKSON, ALJ

Date Received at Agency: 10/16/23

Date Mailed to Parties: 10/16/23
id

341-23

New Jersey Commissioner of Education

Final Decision

S.M., on behalf of J.C.,

Petitioner,

v.

Board of Education of the City of Elizabeth,
Union County,

Respondent.

Synopsis

In this matter on remand, *pro se* petitioner appealed the determination of the respondent Board that her daughter – who has now reached the age of majority and graduated – was not entitled to a free public education in Elizabeth schools during the period from February 2023 through the end of June 2023. The Board contended that J.C. lived in Roselle during this period. Petitioner asserted that she and her daughter were domiciled in Elizabeth during the period in question; however, J.C. spends time before and after school at her grandmother's home in Roselle because there is no internet service in the Elizabeth apartment. The Board sought tuition reimbursement for the period of J.C.'s alleged ineligible attendance in Elizabeth schools. The Commissioner remanded the matter to the OAL for the limited purpose of allowing the ALJ to make factual findings regarding two of the Board's exhibits which were not addressed in the Initial Decision and which the Board contends prove that J.C. was living in Roselle and not Elizabeth during the period in question.

On remand, the ALJ found, *inter alia*, that: J.C.'s testimony regarding the exhibits in question indicated that Roselle was listed as the address on her driver's license and bank account because her vehicle is leased and her mother wanted her to park the car at her grandmother's house where parking is easier; further, J.C. experienced some issues with mail getting lost when sent to the Elizabeth address; J.C. used her Elizabeth address on other documents such as employment records; J.C.'s testimony made sense and was very credible; and there was no intent on the part of the petitioner and her daughter to evade school officials. The ALJ concluded that the petitioner met her burden of proof regarding J.C.'s residency in Elizabeth. Accordingly, the ALJ reversed the Board's determination that J.C. was not entitled to a free public education in Elizabeth schools and denied the Board's counterclaim for tuition.

Upon review, the Commissioner concurred with the findings and conclusions of the ALJ on remand and adopted the Initial Decision of the OAL as the final decision in this case. Accordingly, the petition of appeal was granted, and respondent's counterclaim for tuition was dismissed.

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

341-23
OAL Dkt. No. EDU 09106-23 (EDU 02774-23 on remand)
Agency Dkt. No. 80-3/23

New Jersey Commissioner of Education

Final Decision

S.M., on behalf of J.C.,

Petitioner,

v.

Board of Education of the City of Elizabeth, Union County,

Respondent.

The record of this matter, the Initial Decision of the Office of Administrative Law (OAL) issued July 19, 2023, respondent Board's exceptions thereto, and the Initial Decision of the OAL on remand issued October 13, 2023, have been reviewed and considered.

This matter concerns the Board's determination that J.C., who has reached the age of majority, was not domiciled in Elizabeth from February 2023 through the end of June 2023 and the resultant demand for payment of tuition in the amount of $4,084.43. The petitioner appealed the Board's determination, claiming that she and her daughter resided in Elizabeth during the time period at issue, and the matter was transmitted to the OAL for a contested hearing. S.M., J.C., and the Board's investigator testified at the hearing.

In an Initial Decision issued July 19, 2023, the Administrative Law Judge (ALJ) concluded that the very credible testimony of S.M. and J.C., coupled with documents in evidence presented by both parties, constituted sufficient credible evidence to establish that J.C. resided in Elizabeth

during the time period in question even though she also spent time at a relative's home in Roselle before and after school. Consequently, the ALJ granted petitioner's appeal and denied the Board's counterclaim for tuition.

In their exceptions, the Board contended, among other things, that prior to the hearing, "J.C. provided her driver's license and bank statement," marked in evidence as R-11 and R-12, "which indicated her address was [in] Roselle."[1] Respondent's Exceptions, at 3. The Board further contended that neither S.M. nor J.C. addressed these documents during their hearing testimony; however, the Commissioner could not verify same because the record does not contain the hearing transcripts. For these reasons, the Commissioner remanded the matter to the OAL pursuant to *N.J.A.C.* 1:1-18.7(a) for the purpose of allowing the ALJ to render factual findings pertaining to R-11 and R-12, to explain the weight she assigned to those exhibits, and to discuss the effect, if any, those exhibits had on her ultimate conclusions of law.[2]

In response to the remand, the ALJ issued a supplemental Initial Decision on October 13, 2023, in which she rendered the additional factual findings requested by the Commissioner. Specifically, the ALJ found as fact that J.C. testified that she used her grandmother's Roselle address on her driver's license (as shown on R-11) and bank account (as shown on R-12) because

[1] R-11 is a photograph of J.C.'s New Jersey Probationary Auto License, issued July 11, 2022, and lists her address as a relative's home in Roselle. R-12 is a copy of J.C.'s monthly bank statement for April 2023 which also lists the same Roselle address.

[2] The Commissioner finds the remaining contentions in respondent's exceptions to be unpersuasive. Respondent seeks to rely primarily upon physical and electronic surveillance activities conducted by its investigator—some of which took place on weekends, holidays, and even after the school year ended. The Commissioner agrees with the ALJ, who thoroughly considered the relevant documentary evidence as well as the investigator's testimony, that his investigation was incomplete. The Commissioner finds that the information obtained by the investigator was, at best, inconclusive. Furthermore, the Commissioner rejects respondent's contention that petitioner's failure to call S.N. as a witness should result in an adverse inference. Aside from the fact that it does not appear from the record that respondent ever asked the ALJ to draw an adverse inference, there is nothing in the record to suggest that anything prevented respondent from calling S.N. as a witness had it wished to do so.

of where her mother wanted her to park her vehicle and because she experienced some issues with mail getting lost when sent to the Elizabeth address.[3] The ALJ also found that J.C.'s Elizabeth address appeared on various documents including a pay stub, a W-2, and a job application, as shown on exhibits marked P-1, P-2, and P-3 in evidence. Moreover, the ALJ found that J.C.'s testimony regarding R-11 and R-12 was "very credible" and "made sense." Initial Decision (supplemental), at 2. In addition, the ALJ found that "J.C. made conscious, thought-out decisions every time she was required to provide an address to a third party" and that "[n]one of this was done to evade school officials." *Ibid.*

The Commissioner adopts the ALJ's Initial Decision issued July 19, 2023, as supplemented by the Initial Decision issued October 13, 2023, as the final decision in this matter. Upon consideration of the additional factual findings made by the ALJ, coupled with the ALJ's determination that J.C. testified very credibly regarding R-11 and R-12, the Commissioner is satisfied that petitioner's residency appeal should be granted.

When reviewing an ALJ's Initial Decision, the Commissioner "may not reject or modify any findings of fact as to issues of credibility of lay witness testimony unless it is first determined from a review of the record that the findings are arbitrary, capricious or unreasonable or are not supported by sufficient, competent and credible evidence in the record." *N.J.S.A.* 52:14B-10(c); *Parsells v. Bd. of Educ. of Borough of Somerville, Somerset Cnty.*, 254 *N.J.* 152, 159 (2023) (holding that the ALJ's credibility findings are entitled to deference). "When such a record, involving lay witnesses, can support more than one factual finding, it is the ALJ's credibility findings that

[3] In the Initial Decision issued July 19, 2023, the ALJ found that S.M. very credibly testified that she required J.C. to park her leased vehicle at the Roselle address because parking was insufficient or unsafe at the Elizabeth address, and S.M. was concerned about the vehicle acquiring damage.

control, unless they are arbitrary or not based on sufficient credible evidence in the record as a whole." *Cavalieri v. Bd. of Trs. of Pub. Empl. Ret. Sys.*, 368 *N.J. Super.* 527, 537 (App. Div. 2004).

Following a careful review of the entire record, the Commissioner has identified nothing arbitrary, capricious, or unreasonable about the ALJ's findings, which are adequately supported by sufficient, competent, and credible evidence. The Commissioner concurs with the ALJ that J.C. was domiciled in Elizabeth between February 2023 through the end of June 2023, and that J.C. was therefore entitled to a free education in Elizabeth's public schools during that time period. Thus, the Board is not entitled to reimbursement from the petitioner for tuition costs.

Accordingly, the petition of appeal is hereby granted, and respondent's counterclaim for tuition is hereby dismissed.

IT IS SO ORDERED.[4]

Angelina Allen McMillan, J.d.S.
ACTING COMMISSIONER OF EDUCATION

Date of Decision: November 20, 2023
Date of Mailing: November 22, 2023

[4] This decision may be appealed to the Appellate Division of the Superior Court pursuant to *N.J.S.A.* 18A:6-9.1. Under *N.J.Ct.R.* 2:4-1(b), a notice of appeal must be filed with the Appellate Division within 45 days from the date of mailing of this decision.

State of New Jersey
OFFICE OF ADMINISTRATIVE LAW

INITIAL DECISION
(SUPPLEMENTAL)
OAL DKT. NO. EDU 09106-23
AGENCY DKT. NO. 80-3/23
(ON REMAND)
OAL DKT. EDU 02774-23

S.M., ON BEHALF OF MINOR CHILD J.C.,
Petitioner
v.
BOARD OF EDUCATION OF THE CITY OF ELIZABETH, UNION COUNTY,
Respondent.

S.M. and **J.C.**, pro se

Brian Kane, Esq., for respondent Elizabeth Board of Education (LaCorte, Bundy, Varady and Kinsella, attorneys)

Record Closed: October 9, 2023 Decided: October 13, 2023

BEFORE **GAIL M. COOKSON,** ALJ:

STATEMENT OF THE CASE

This matter involved an appeal by S.M. from the non-residency determination made by the Board of Education of the City of Elizabeth (Board) with respect to her daughter J.C., who has now reached the age of majority and graduated. Petitioner

challenged the finding of the Board that they were not domiciled in the district and that J.C. was not entitled, therefore, to a free education.

PROCEDURAL HISTORY

By Initial Decision dated July 19, 2023, I ruled in favor of petitioner's appeal of the Board's residency determination. The matter was then reviewed by the Commissioner who determined on August 22, 2023, that the factual record was unclear as to two exhibits (R-11, R-12) that related to the assertion of residency in the district of Elizabeth. Accordingly, the matter was remanded to the OAL on September 13, 2023.

FACTUAL DISCUSSION

I will not burden the record with duplicative information from the record already admitted during the prior plenary hearing and evaluated in the Initial Decision.

I apologize to the Commissioner and the parties that I did not comment on and refer to Exhibits R-11 and R-12. In reviewing the record, it is clear to me and I **FIND** that J.C. testified that she used her grandmother's Roselle address on her driver's license (R-11) and bank account (R-12) because of where her mother wanted the vehicles parked and some issues with mail getting lost when addressed to 1422 Lower. She did use her 1422 Lower address on her job applications, and for her payroll and tax information.

I **FIND** the testimony of J.C. to have been very credible with respect to Exhibits R-11 and R-12. They made sense and it was clear that J.C. made conscious, thought-out decisions every time she was required to provide an address to a third party. None of this was done to evade school officials and I so **FIND**.

CONCLUSIONS OF LAW

Accordingly, I **CONCLUDE** that petitioner S.M. has met the burden of proof on her appeal of the Board's non-residency and de-enrollment determinations. Therefore, I also

CONCLUDE that the Board is not entitled to an award in its favor on the counterclaim for the full amount of the partial school year tuition cost.

ORDER

Based on the foregoing findings of fact and conclusions of law, it is **ORDERED** that the relief requested by S.M. on behalf of J.C. be and the same is **GRANTED** and her residency appeal is **UPHELD**. The decision of the Board with respect to J.C.'s right to a free public education in Elizabeth is **REVERSED**. Accordingly, it is further **ORDERED** that respondent City of Elizabeth Board of Education's counterclaim for tuition reimbursement be and the same is **DENIED**.

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

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

Gail M. Cookson

October 13, 2023
DATE

GAIL M. COOKSON, ALJ

Date Received at Agency: 10/13/23

Date Mailed to Parties: 10/13/23

id

APPENDIX

LIST OF EXHIBITS

All Exhibits were provided with the original Initial Decision EDU 02774-23

For Petitioner:

P-1 J.C. Paystub

P-2 J.C. W-2

P-3 Elizabeth Department of Recreation Application, Summer 2022

For Respondent:

R-1 Petitioner J.C.'s Demographics

R-2 Residency Affidavit C – Temporary Housing, dated September 9, 2021

R-3 S.N. CLEAR Background Check

R-4 Electronic data of J.C.'s school laptop locations

R-5 Notice of Initial Determination of Ineligibility, dated February 23, 2023

R-6 Documents submitted by S.M. on behalf of J.C.

R-7 Notices of Final Ineligibility for J.C., dated March 8, 2023

R-8 Summary of Residency File Report, dated March 28, 2023

R-9 Petitioner J.C.'s CLEAR Background Check

R-10 Petitioner J.C.'s CLEAR Background Check for Elizabeth, NJ

R-11 Petitioner J.C.'s Driver's License

R-12 Petitioner J.C.'s Bank Statement S.M. on behalf of minor children, J.C.

R-13 Photograph Surveillance, dated June 7, 2023

342-23
SEC Dkt. No. C75-18
OAL Dkt. No. EEC 10572-19
Agency Dkt. No. 7-7/23A

New Jersey Commissioner of Education

Final Decision

In the Matter of Ardie Walser,
Board of Education of the Township of
Teaneck, Bergen County

This matter involves an appeal of a School Ethics Commission (Commission) decision issued on June 27, 2023, determining that appellant – a member of the Teaneck Board of Education (Board) – violated *N.J.S.A.* 18A:12-24(a), *N.J.S.A.* 18A:12-24(c), and *N.J.S.A.* 18A:12-24(d) of the School Ethics Act (Act) by using his Board email account and the Board website to promote his personal business. The Commission recommended that appellant be censured for the violation. For the reasons explained herein, the Commissioner remands the matter to the Commission for further proceedings.

The Commission transmitted this matter to the Office of Administrative Law (OAL) on or about July 26, 2019. In March 2021, the Commission served interrogatories and requests for production of documents on appellant through his counsel, Philip E. Stern, Esq. (Stern) of the law firm of DiFrancesco, Bateman, Kunzman, Davis, Lehrer & Flaum, PC. Stern failed to respond to the discovery requests. In March 2022, the Commission served requests for admissions on Stern; he again failed to respond. During 2022, Stern also failed to appear for three conferences scheduled by the Administrative Law Judge (ALJ). In May 2022, the Commission filed a motion to deem admitted the requests for admission and to strike appellant's answer for failure to respond to discovery requests. In January 2023, the ALJ granted the motion, and the parties requested that the file be returned to the Commission. On April 14, 2023, the ALJ issued an Initial decision dismissing the matter. On

June 27, 2023, the Commission rejected the Initial Decision, finding that because the answer had been stricken, the matter was no longer a contested case, and the Commission's regulations provide that the matter should be determined on a summary basis. The Commission found that appellant had violated the Act and recommended a penalty of censure.

On appeal, Stern states that he "failed to competently represent" appellant and that he "failed to communicate those failures" to appellant. Stern characterizes his actions as a "betrayal" of appellant, stating that he "cannot overemphasize his injurious role in this fiasco" and that he failed "miserably." Although Stern cites to a litany of personal issues, he acknowledges that he is "acutely aware that he is not unique in having to deal with personal crises while taking responsibility for clients." He also admits that he is a part of a law firm that was available to assist "in a heartbeat" with the "fairly rudimentary task" of answering discovery requests, but he failed to seek any assistance from his firm. Stern argues that the Commission incorrectly found that appellant had violated the Act and, if the Commission's decision is not reversed, the case should be remanded to the Commission for a full hearing on the merits.

Upon review, the Commissioner concludes that appellant was not responsible for the behavior of his attorney, and that it is in the interests of justice to remand this matter to the Commission for further proceedings. While not directly on point, the Commissioner finds case law surrounding default judgments to be instructive here. Under *N.J.Ct.R.* 4:50-1(a), a default judgment may be vacated based on excusable neglect. "Carelessness may be excusable when attributable to an honest mistake that is compatible with due diligence or reasonable prudence." *Mancini v. Eds*, 132 *N.J.* 330, 335 (1992). Here, Stern's neglect was inexcusable. As he admits, attorneys routinely deal with issues in their personal lives while representing their clients. Moreover, Stern is not a solo practitioner, but is employed by a firm that includes numerous other attorneys. If Stern's personal

issues were so insurmountable that he could not competently represent appellant, then he could easily have sought assistance from his firm, but he failed to do so.

Default judgments may also be vacated for any other reason justifying relief. *N.J.Ct.R.* 4:50-1(f). The New Jersey Supreme Court has stated that a court should view the opening of default judgments "with great liberality." *Mancini, supra*, 132 *N.J.* at 334. It is clear that appellant intended to contest the facts alleged in the complaint, and he would have done so if not for Stern's failures. The Commissioner finds that it would be unjust to hold appellant responsible for his attorney's failures by affirming the decision the Commission made on a summary basis.[1] However, the Commissioner finds that it is premature to reach a decision on the merits, as the record has not been fully developed through proceedings at the OAL.

Accordingly, this matter is remanded to the Commission for further proceedings consistent with this decision.

IT IS SO ORDERED.

Angelina Allen-McMillan, J.d.D.
ACTING COMMISSIONER OF EDUCATION

Date of Decision: November 20, 2023
Date of Mailing: November 22, 2023

[1] The Commissioner notes that it was entirely appropriate for the Commission to proceed on a summary basis following the striking of appellant's answer. Only the information presented to the Commissioner on appeal regarding Stern's conduct, which was never presented to the Commission, requires a different outcome.

Before the School Ethics Commission
OAL Docket No.: EEC-10572-19
SEC Docket No.: C75-18
Final Decision

I/M/O Ardie Walser,
Teaneck Board of Education, Bergen County

I. Procedural History

The above-captioned matter arises from a Complaint that was filed on December 5, 2018,[1] by Michael Pagan (Complainant) alleging that Ardie Walser (Respondent) a member of the Teaneck Board of Education (Board), violated the School Ethics Act (Act), *N.J.S.A.* 18A:12-21 *et seq.*[2] More specifically, the Complaint alleged that Respondent violated *N.J.S.A.* 18A:12-24(a), *N.J.S.A.* 18A:12-24(c) and *N.J.S.A.* 18A:12-24(d), based on four instances of using his Board email account or Board website to promote his personal business.

On January 22, 2019, Respondent filed a Motion to Dismiss in Lieu of an Answer (Motion to Dismiss) and also alleged that the Complaint is frivolous. On February 11, 2019, Complainant filed a response to the Motion to Dismiss and allegation of frivolous filing.

At its meeting on March 26, 2019, the Commission considered the filings in this matter and, at a special meeting on May 2, 2019, the Commission voted to deny the Motion to Dismiss in its entirety, and to direct Respondent to file an Answer. The Commission also voted to find the Complaint not frivolous, and to deny the request for sanctions. On May 23, 2019, Respondent filed an Answer as directed.

At its special meeting on July 23, 2019, the Commission adopted a decision finding probable cause for all of the allegations in the Complaint. Based on its finding of probable cause, the Commission transmitted the above-captioned matter to the Office of Administrative Law (OAL) for a plenary hearing, and, pursuant to *N.J.A.C.* 6A:28-10.7(b), the attorney for the Commission (Petitioner) was charged with prosecuting the allegations in the Complaint which the Commission found probable cause to credit.

At the OAL, following Respondent's failure to answer discovery requests, the Administrative Law Judge (ALJ) issued an Order on January 13, 2023, deeming the unanswered Requests for Admission "Admitted" and suppressing Respondent's Answer with Defenses.

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[1] On December 5, 2018, Complainant filed a deficient Complaint; however, on December 14, 2018, Complainant cured all defects and filed an Amended Complaint that was deemed compliant with the requirements detailed in *N.J.A.C.* 6A:28-6.3.

[2] The Complaint also alleged that Shahanzaz Arjumand (Respondent Arjumand) violated *N.J.S.A.* 18A:12-24(a), *N.J.S.A.* 18A:12-24(c) and *N.J.S.A.* 18A:12-24(d) in Count 3. Complainant voluntarily withdrew all allegations against Respondent Arjumand.

Thereafter, on April 14, 2023, the ALJ issued an Initial Decision dismissing the matter without prejudice.

Petitioner filed Exceptions to the Initial Decision, in accordance with *N.J.A.C.* 1:1-18.4. Respondent did not file a Reply.

At its regularly scheduled meeting on May 23, 2023, the Commission considered the full record in this matter. Thereafter, at its meeting on June 27, 2023, the Commission voted to reject the Initial Decision and issue a determination on a summary basis, finding that Respondent violated *N.J.S.A.* 18A:12-24(a), *N.J.S.A.* 18A:12-24(c) and *N.J.S.A.* 18A:12-24(d) and recommending a penalty of censure.

II. Order and Initial Decision

After transmittal of this matter in July 2019, and a delay in the proceedings that appears to have been due in part to the COVID-19 pandemic, the ALJ issued an Order on January 13, 2023 to address Respondent's outstanding discovery requests. In the written Order, the ALJ noted that Respondent's counsel failed to appear for at least three telephone conferences in 2022 and did not reply to Petitioner's discovery requests. As a result of the outstanding discovery, Petitioner filed a motion on May 26, 2022, seeking to have the Requests for Admission deemed admitted and sanctions, including striking Respondent's Answer. Respondent did not respond to the discovery or the motion. Accordingly, in the January 13, 2023, Order, the ALJ granted the requested relief, deeming the Requests for Admission "Admitted" and suppressing Respondent's Answer with Defenses.

Thereafter, on April 14, 2023, the ALJ issued an Initial Decision finding the January 13, 2023, Order was dispositive of the case. The ALJ concluded that he was "unable to address the merits" of this matter, deemed the matter closed, and returned the file to the Commission. The ALJ further indicated Respondent's attorney "reserves his right to seek to have the matter re-opened." *Initial Decision* at 2. As such, the ALJ dismissed the matter without prejudice.

III. Exceptions

In its exceptions, Petitioner argues that the ALJ erred in dismissing the Complaint without prejudice because the Complaint was never dismissed. Instead, Petitioner explains the matter was returned to the agency because Respondent's Answer was stricken due to his failure to provide discovery responses and was, therefore, no longer a contested case. As such, the case should have been returned to the agency for the Commission to determine on a summary basis, pursuant to *N.J.A.C.* 6A:28-10.7(c)(2)(i),[3] as the facts are no longer in dispute.

Petitioner also takes exception to the statement in the Initial Decision that Respondent's attorney "reserves his right to seek to have the matter re-opened." *Exceptions* at 4. Petitioner notes that Respondent did not "open" the matter initially, so he could not reserve a right to "re-open" the case. *Id.* at 6. Further, Petitioner surmises that "[p]erhaps the ALJ confused this case for one where the State agency was the respondent rather than the petitioner." *Id.* at 5.

[3] As this matter was initiated before March 6, 2023, the rules in effect prior to that date are applicable to this matter.

Accordingly, Petitioner reiterates that the matter is no longer contested, the facts are not in dispute, and therefore, the Commission should determine whether there is a violation on a summary basis.

Respondent did not file exceptions and/or a reply to Petitioner's exceptions.

IV. Analysis of the Initial Decision

After review, the Commission finds the Initial Decision in the above-captioned matter must be **rejected**. In the January 13, 2023, Order, the ALJ deemed the Requests for Admission "Admitted" and determined to strike Respondent's Answer due to failure to respond to discovery requests for an extended period of time. Without an Answer, the matter is no longer a contested case. Pursuant to *N.J.A.C.* 6A:28-10.7(c)(2)(i), "where a matter is transmitted to the OAL and the respondent fails to appear before the OAL and the matter is returned to the Commission for disposition, the allegation(s) which the Commission found probable cause to credit shall be deemed admitted and the Commission may proceed to a determination of a violation on a summary basis." While this matter was not returned for Respondent's failure to appear, the matter was returned to the Commission as the Answer was stricken, which would similarly require a determination on a summary basis. The Commission found probable cause that Respondent violated *N.J.S.A.* 18A:12-24(a), *N.J.S.A.* 18A:12-24(c) and *N.J.S.A.* 18A:12-24(d). As such, the ALJ's dismissal of this matter without prejudice before a determination on those allegations is inappropriate, and must be rejected. Accordingly, the Commission will decide this matter summarily.

V. Summary Decision

A. Factual Findings

As Respondent's Answer has been stricken in accordance with the January 13, 2023, Order, the facts alleged in the Complaint are uncontested. By way of background, Respondent's bio on the Board website provided that he is the co-founder and director of Math Adventures and Word Play (MAWP), a private tutoring program.

According to the Complaint, on October 10, 2018, an email was sent from the Whittier Elementary School/Teaneck Public Schools District (District) email account to the parents/guardians of students in the District, which contained a link for MAWP and directed anyone interested to contact "Ardie Walser" via email or telephone. Additional contact information was provided for two other people, including "Ardie Walser's spouse." Complainant asserted that although well intended, this program should not have been promoted within the District, and therefore, Respondent violated *N.J.S.A.* 18A:12-24(a), *N.J.S.A.* 18A:12-24(c) and *N.J.S.A.* 18A:12-24(d) in Count 1, because he is a member of the Board/Board President and there is "inherently a conflict with his official role and this role." According to Complainant, it places a principal, administrative official, or teacher in an "uncomfortable position" when correspondence is being requested which includes the name of, or at the request of, the Board President and Respondent is "directly interacting with [District] students and making commentary on the academic work they are being exposed to in the schools."

Complainant further asserted that on or about October 7, 2018, the Board authorized a flyer to be posted on the Board's website for MAWP. The flyer names "Ardie Walser," as the contact person. Complainant alleged that Respondent is Board President and has the authority to determine what information is, and is not, posted on the Board's website, and therefore, Respondent violated *N.J.S.A.* 18A:12-24(a), *N.J.S.A.* 18A:12-24(c) and *N.J.S.A.* 18A:12-24(d) in Count 2, because he is a member of the Board/Board President, and this is in "conflict with his duties in the eye of the public interest." Once again, this information places a principal, administrative official or teacher in an uncomfortable position.

Complainant maintained that on or about November 17, 2018, "various PTO organizations" posted information regarding events that MAWP was hosting, after Respondent sent an email containing the information. Complainant asserted the events, which are "pushed by various board members and the school," appear to be "official events" and may "prejudice the independence and judgments of official action." Therefore, Respondent violated *N.J.S.A.* 18A:12-24(a), *N.J.S.A.* 18A:12-24(c) and *N.J.S.A.* 18A:12-24(d) in Count 3, because the topic of discussion relates to the operation of the schools, specifically technology and education, and Respondent Walser's role as director of this program "blurs the line between" public and private life, and makes it appear that this is an official Board event.

Finally, Complainant contended that on November 19, 2018, Respondent replied to an email from a community member (and possible Board candidate), who was expressing her discontent with a recent Board meeting. In his reply, which was sent from his Board email account, Respondent told the member that if she would like to discuss her concerns further, she could meet him on Saturday, while he was working with students and their families to "improve education for ALL..." and directed her to the MAWP website. Also copied on the email, was the superintendent, Board members, and members of the public, and therefore, Complainant alleged that Respondent violated *N.J.S.A.* 18A:12-24(a), *N.J.S.A.* 18A:12-24(c) and *N.J.S.A.* 18A:12-24(d) in Count 3, because he is urging members of the public to come to his event to discuss official Board actions/matters, which blurs the line between a Board member and his private life/business. This is compounded by the fact that Respondent used his District email account to advertise the event, and included the superintendent and other Board members on the email, thus giving the perception that the event is Board/District approved.

In addition to the facts established in the Complaint, the January 13, 2023, Order of the OAL, also deems the twenty-five Requests for Admission "Admitted." The relevant facts determined "Admitted" in the Requests for Admission, without repeating those that are already deemed uncontested in the Complaint, are as follows:

> ... 16. When various PTOs posted information about MAWP events, these events appear to be official Board events and may prejudice the independence and judgments of official action. ...
>
> 21. Your business/employment with MAWP is in substantial conflict with the proper duties as a Board member and Board President.
>
> 22. In your capacity as a Board member/President, you used or otherwise directed the use of the District's e-mail and website to promote your personal business.

23. The nature of your employment by/with MAWP in and of itself might reasonably be expected to prejudice your independence of judgment in the exercise of your official duties as a Board member and Board President.

24. In your capacity as a Board member/President, you directed PTO organizations to advertise the work of your personal business.

25. In your capacity as a Board member/President, you used or otherwise directed the use of the District resources to promote "the good work" of your personal business.

B. Analysis and Conclusions of Law

Based upon its review of this matter, including the uncontested facts and the "Admitted" facts and findings in the record, the Commission concludes that Respondent violated *N.J.S.A.* 18A:12-24(a), *N.J.S.A.* 18A:12-24(c) and *N.J.S.A.* 18A:12-24(d), which provide:

> a. No school official or member of his immediate family shall have an interest in a business organization or engage in any business, transaction, or professional activity, which is in substantial conflict with the proper discharge of his duties in the public interest;
>
> c. No school official shall act in his official capacity in any matter where he, a member of his immediate family, or a business organization in which he has an interest, has a direct or indirect financial involvement that might reasonably be expected to impair his objectivity or independence of judgment. No school official shall act in his official capacity in any matter where he or a member of his immediate family has a personal involvement that is or creates some benefit to the school official or member of his immediate family;
>
> d. No school official shall undertake any employment or service, whether compensated or not, which might reasonably be expected to prejudice his independence of judgment in the exercise of his official duties;

With respect to Count 1, Respondent's use of his District email account to promote his personal business by sending parents/guardians in the District a link for MAWP and directing those interested to contact him or his spouse violates *N.J.S.A.* 18A:12-24(a), *N.J.S.A.* 18A:12-24(c) and *N.J.S.A.* 18A:12-24(d). The use of his District email to seek clients for the financial benefit of his business demonstrates that Respondent used his official capacity on the Board for personal gain. Additionally, the direct interaction with District students regarding their academic work through his private business demonstrates a direct and substantial conflict with his ability to discharge his duties as a Board member, and the nature of Respondent's employment at his private tutoring company, which he sought to promote through his Board email, can reasonably be expected to impair his objectivity and prejudice his independence of judgment.

When Respondent, in his position as Board President, authorized a flyer to be posted on the Board's website that advertised his personal business, his personal interests were substantially in conflict with his duties in the public interest, and he used his official capacity as a Board member to publicize his business in order to obtain a financial benefit. Respondent's use of his official capacity on the Board to financially benefit his business, and the nature of his employment as co-founder of MAWP, can reasonably be expected to prejudice his independence of judgment in his duties as a Board member. As such, Respondent violated *N.J.S.A.* 18A:12-24(a), *N.J.S.A.* 18A:12-24(c) and *N.J.S.A.* 18A:12-24(d) in Count 2.

In Count 3, Respondent sent an email to "PTO organizations" regarding upcoming events MAWP was hosting that urged the organizations to post and advertise the events. The use of his position on the Board to promote his personal business, which creates the appearance that such events are official school events, creates a substantial conflict as it blurs the line between his financial interest in MAWP and his position on the Board. Respondent's direct role in approving the website content in order to market his private company illustrates his blatant use of his official capacity on the Board for personal, financial gain. These actions, and Respondent's leadership position at MAWP, may result in his inability to exercise sound judgment in his official duties. As such, Respondent is in violation of *N.J.S.A.* 18A:12-24(a), *N.J.S.A.* 18A:12-24(c) and *N.J.S.A.* 18A:12-24(d).

Respondent's use of his Board email account to communicate with the public and solicit a meeting with a community member during a time when he would be working with students and families through MAWP, as established in Count 4, violates *N.J.S.A.* 18A:12-24(a), *N.J.S.A.* 18A:12-24(c) and *N.J.S.A.* 18A:12-24(d). Respondent deliberately used his official capacity in responding to an email as a Board member to set up a meeting at his private tutoring company, in which he has a financial interest. Respondent's actions to promote his personal business create an obvious and substantial conflict as he is attempting to conduct responsibilities for his position on the Board at the same time as he is working in his capacity as co-founder and director of MAWP. Such a conflict gives the appearance as though his personal MAWP event is also a Board event and his employment at MAWP can, therefore, reasonably be expected to prejudice his independence of judgment when executing his Board member duties.

Accordingly, and based on a complete and thorough review of the record, and the undisputed evidence as set forth herein, the Commission finds that Respondent violated *N.J.S.A.* 18A:12-24(a), *N.J.S.A.* 18A:12-24(c) and *N.J.S.A.* 18A:12-24(d) in Counts 1-4 of the Complaint.

VI. Recommended Penalty

Having found that Respondent violated *N.J.S.A.* 18A:12-24(a), *N.J.S.A.* 18A:12-24(c) and *N.J.S.A.* 18A:12-24(d), the Commission is authorized to recommend to the Commissioner of Education (Commissioner) an appropriate penalty, which may range from reprimand to removal. *N.J.S.A.* 18A:12-29(c).

In reaching its determination of a penalty in this matter, the Commission emphasizes the severity of Respondent's violations of the Act, which did not occur once, but rather in several instances. The Commission finds that based on the undisputed record before it, Respondent deliberately and intentionally used his position on the Board to benefit financially through soliciting clients for his personal tutoring business. The Commission finds such blatant violations

of the Act are egregious. The Commission, therefore, recommends a penalty of **censure** for Respondent's violations of the Act.[4]

Pursuant to *N.J.S.A.* 18A:12-29(c), this decision shall be forwarded to the Commissioner of Education for review of the Commission's recommended penalty. The parties may either: 1) file exceptions to the recommended sanction; 2) file an appeal of the Commission's finding of a violation; or 3) file both exceptions to the recommended sanction together with an appeal of the finding of a violation.

Parties taking exception to the recommended sanction of the Commission but *not disputing* the Commission's finding of a violation may file, **within thirteen (13) days** from the date the Commission's decision is forwarded to the Commissioner, written exceptions regarding the recommended penalty to the Commissioner. The forwarding date shall be the mailing date to the parties, as indicated below. Such exceptions must be forwarded to: Commissioner of Education, c/o Bureau of Controversies and Disputes, P.O. Box 500, Trenton, New Jersey 08625, marked "Attention: Comments on Ethics Commission Sanction," as well as to (ControversiesDisputesFilings@doe.nj.gov). A copy must also be sent to the Commission (school.ethics@doe.nj.gov) and all other parties.

Parties seeking to appeal the Commission's finding of violation *must* file an appeal pursuant to the standards set forth at *N.J.A.C.* 6A:4:1 *et seq.* **within thirty (30) days** of the filing date of the decision from which the appeal is taken. The filing date shall be three (3) days after the date of mailing to the parties, as shown below. In such cases, the Commissioner's review of the Commission's recommended sanction will be deferred and incorporated into the Commissioner's review of the finding of violation on appeal. Where a notice of appeal has been filed on or before the due date for exceptions to the Commission's recommended sanction (thirteen (13) days from the date the decision is mailed by the Commission), exceptions need not be filed by that date, but may be incorporated into the appellant's briefs on appeal.

Robert W Bender

Robert W. Bender, Chairperson
School Ethics Commission

Mailing Date: June 27, 2023

[4] The Commission acknowledges that Respondent is no longer a member of the Board, but notes that there is precedent for issuing a penalty of censure against a respondent who is no longer a board member. *See I/M/O Daniel Leonard,* Toms River Board of Education, Ocean County, Commission Docket Nos. C56-19 and C57-10 (Consolidated), decided November 16, 2021, *penalty adopted* Commissioner Decision No. 201-22SEC, dated August 12, 2022 (issuing a censure for a violation of *N.J.S.A.* 18A:12-24.1(e) after the respondent's term on the board of education had ended).

Resolution Adopting Decision in Connection with C75-18

Whereas, at its meeting on July 23, 2019, the School Ethics Commission adopted a decision finding probable cause for the alleged violations of *N.J.S.A.* 18A:12-24(a), *N.J.S.A.* 18A:12-24(c) and *N.J.S.A.* 18A:12-24(d), and transmitting the above-captioned matter to the Office of Administrative Law (OAL) for a plenary hearing; and

Whereas, on January 13, 2023, the administrative Law judge issued an Order deeming the Requests for Admission that Respondent failed to answer "Admitted" and suppressing Respondents Answer with Defenses;

Whereas, on April 14, 2023, the ALJ issued an Initial Decision dismissing the matter without prejudice; and

Whereas, Petitioner filed exceptions to the Initial Decision, and Respondent did not file exceptions and/or a reply to Petitioner's exceptions; and

Whereas, at its meeting on May 23, 2023, the Commission reviewed and discussed the full record; and

Whereas, at its meeting on May 23, 2022, the Commission discussed rejecting the Initial Decision and issuing a determination on a summary basis, finding violations *N.J.S.A.* 18A:12-24(a), *N.J.S.A.* 18A:12-24(c) and *N.J.S.A.* 18A:12-24(d), and recommending a penalty of censure;

Whereas, at its meeting on June 27, 2023, the Commission reviewed and voted to approve the within decision as accurately memorializing its actions/findings; and

Now Therefore Be It Resolved, the Commission hereby adopts the within decision.

Robert W. Bender

Robert W. Bender, Chairperson

I hereby certify that this Resolution was duly adopted by the School Ethics Commission at its meeting on June 27, 2023.

Brigid C. Martens

Brigid C. Martens, Acting Director
School Ethics Commission

343-23SEC
SEC Dkt. No. D03-23
Agency Dkt. No. 280-10/23

New Jersey Commissioner of Education

Final Decision

In the Matter of Sapreet Saluja,
Empowerment Academy Charter School,
Hudson County.

The Commissioner has reviewed the record of this matter and the decision of the School Ethics Commission (SEC) finding that respondent violated the School Ethics Act for failure to timely file Personal/Relative and Financial Disclosure Statements ("Disclosure Statements") in accordance with *N.J.S.A.* 18A:12-25, *N.J.S.A.* 18A:12-26, and *N.J.A.C.* 6A:28-3.1. The SEC's decision was forwarded to the Commissioner for final determination on the recommended penalty pursuant to *N.J.S.A.* 18A:12-29(c). The SEC recommended a sanction of censure. Respondent has neither filed exceptions to the recommended penalty, nor instituted an appeal of the SEC's underlying finding of violation pursuant to *N.J.A.C.* 6A:4-1 *et seq.*

Upon review, the Commissioner concurs with the penalty recommended by the SEC for respondent's failure to timely honor an obligation placed upon school officials by law. Accordingly, respondent is censured for violating the School Ethics Act.

IT IS SO ORDERED.[1]

Angelica Allen-McMillan, J.D.S.
ACTING COMMISSIONER OF EDUCATION

Date of Decision: November 20, 2023
Date of Mailing: November 22, 2023

[1] This decision may be appealed to the Appellate Division of the Superior Court pursuant to *N.J.S.A.* 18A:6-9.1. Under *N.J.Ct.R.* 2:4-1(b), a notice of appeal must be filed with the Appellate Division within 45 days from the date of mailing of this decision.

Before the School Ethics Commission
Docket No.: D03-23
Decision for Failure to File Personal/Relative and Financial Disclosure Statements

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I/M/O Sapreet Saluja,
Empowerment Academy Charter School, Hudson County

I. Procedural History

This matter arises from an Order to Show Cause (OTSC) that was issued by the School Ethics Commission (Commission) at its meeting on September 26, 2023, directing Respondent, a "school official" as defined in *N.J.S.A.* 18A:12-23 of the School Ethics Act (Act), *N.J.S.A.* 18A:12-21 *et seq.*, to show cause as to why the Commission should not find her in violation of the Act for failing to file Personal/Relative and Financial Disclosure Statements (Disclosure Statements) as required by *N.J.S.A.* 18A:12-25, *N.J.S.A.* 18A:12-26, and *N.J.A.C.* 6A:28-3.1.

In the OTSC that was served on September 26, 2023, the Commission notified Respondent that she had twenty (20) days to respond to the OTSC. Respondent was further advised that failure to respond would be deemed an admission of the facts set forth in the OTSC, and the Commission may take action on a summary basis, in accordance with *N.J.A.C.* 6A:28-1.6(c).

II. Analysis

The Act was enacted by the New Jersey State Legislature to ensure and preserve public confidence in members of local boards of education and local school administrators. By virtue of *N.J.S.A.* 18A:12-23.1, the breadth of the Act was expanded to include charter school trustees and administrators.

Pursuant to *N.J.S.A.* 18A:12-25, *N.J.S.A.* 18A:12-26, and *N.J.A.C.* 6A:28-3.1(a), all school officials must file, on forms prescribed by the Commission, Disclosure Statements with their local board secretaries or charter school designees, and must do so on or before April 30th of each year. In addition, all newly elected board members or board members appointed to fill vacancies, newly appointed members of a board of trustees of a charter school, and administrators appointed to fill a vacancy must file their Disclosure Statements within thirty (30) days of appointment or taking office. *N.J.A.C.* 6A:28-3.1(c), *N.J.A.C.* 6A:28-3.1(d), *N.J.A.C.* 6A:28-3.1(e), and *N.J.A.C.* 6A:28-3.1(f).

If a school official fails to file the required Disclosure Statements, the Commission is authorized, pursuant to *N.J.A.C.* 6A:28-3.3(b), to issue an Order to Show Cause. Moreover, failure to timely file the required Disclosure Statements "shall constitute a violation of the Act, and may result in the reprimand, censure, suspension, or removal of a school official." *N.J.A.C.* 6A:28-3.3(a).

With the above in mind, Respondent is a returning school official and, therefore, was required to file Disclosure Statements by April 30, 2023. Despite this fact, and even though Respondent received reminders as further detailed below, Respondent failed to file Disclosure Statements within the statutorily required timeframe.

More specifically, throughout the months of July through September, the Commission's staff sent repeated messages to the Board Secretary advising that Respondent had not yet filed Disclosure Statements. The electronic correspondence to the Board Secretary further advised that if Respondent failed to file Disclosure Statements, the Commission had the authority to issue an OTSC, find Respondent in violation of the Act, and recommend a penalty up to and including removal for non-compliance.

In addition, by electronic correspondence dated August 1, 2023, August 30, 2023, and September 11, 2023, Respondent was reminded that her Disclosure Statements had not yet been filed. Respondent was further advised that continued failure to file Disclosure Statements would result in the Commission issuing an OTSC, and recommending a penalty, up to and including removal.

When Respondent failed to file Disclosure Statements as required by *N.J.S.A.* 18A:12-25, *N.J.S.A.* 18A:12-26, and *N.J.A.C.* 6A:28-3.1, an OTSC was issued by the Commission at its meeting on September 26, 2023. After having been served with the OTSC, Respondent filed her Disclosure Statements on October 16, 2023, and submitted a written statement noting that her failure to file "was a simple miss on [her] part." She also notes that she "erroneously thought [she] had submitted it."

III. Decision/Penalty Recommendation

Based on the record as set forth above, and at its meeting on October 17, 2023, the Commission found that Respondent violated *N.J.S.A.* 18A:12-25, *N.J.S.A.* 18A:12-26, and *N.J.A.C.* 6A:28-3.1 because she did not timely file Disclosure Statements. Although Respondent ultimately filed her Disclosure Statements, the filing was several months late, and submitted only after multiple reminders were sent reiterating her statutory obligation to file Disclosure Statements.

Where a violation of the Act is found by the Commission, it may recommend to the Commissioner of Education that a penalty be imposed on the school official. The recommended penalty can include a reprimand, censure, suspension or removal of the school official. *N.J.A.C.* 6A:28-3.3(a); *N.J.A.C.* 6A:28-9.11. Specifically, unless good cause is shown or the school official previously has been the subject of an OTSC, "the Commission shall recommend that a school official who completes the disclosure statements after the issuance of an Order to Show Cause, but before the Commission issues its decision, receives a censure." *N.J.A.C.* 6A:28-3.3(c). For the reasons set forth above, the Commission recommends that the Commissioner of Education impose a penalty of **censure**.

Pursuant to *N.J.S.A.* 18A:12-29(c), this decision shall be forwarded to the Commissioner of Education for review of the Commission's recommended penalty. Respondent may either: 1) file exceptions to the recommended sanction; 2) file an appeal of the Commission's finding of

a violation; or 3) file both exceptions to the recommended sanction together with an appeal of the finding of a violation.

Parties taking exception to the recommended penalty of the Commission but *not disputing* the Commission's finding of a violation may file, within **thirteen (13) days** from the date the Commission's decision is forwarded to the Commissioner, written exceptions regarding the recommended penalty to the Commissioner. The forwarding date shall be the mailing date to the parties, as indicated below. Such exceptions must be forwarded to: Commissioner of Education, c/o Bureau of Controversies and Disputes, P.O. Box 500, Trenton, New Jersey 08625, marked "Attention: Comments on Ethics Commission Sanction." as well as to (ControversiesDisputesFilings@doe.nj.gov). A copy must also be sent to the Commission (school.ethics@doe.nj.gov) and all other parties.

Parties seeking to appeal the Commission's finding of violation *must* file an appeal pursuant to the standards set forth at *N.J.A.C.* 6A:4-1 *et seq.* within **thirty (30) days** of the filing date of the decision from which the appeal is taken. The filing date shall be three (3) days after the date of mailing to the parties, as shown below. In such cases, the Commissioner's review of the Commission's recommended sanction will be deferred and incorporated into the Commissioner's review of the finding of violation on appeal. Where a notice of appeal has been filed on or before the due date for exceptions to the Commission's recommended sanction (thirteen (13) days from the date the decision is mailed by the Commission), exceptions need not be filed by that date, but may be incorporated into the appellant's brief on appeal.

Robert W. Bender

Robert W. Bender, Chairperson

Mailing Date: October 17, 2023

Resolution Adopting Decision for Failure to File Personal/Relative and Financial Disclosure Statements
Docket No.: D03-23

Whereas, Respondent is a "school official," as defined in *N.J.S.A.* 18A:12-23 of the School Ethics Act (Act); and

Whereas, as a school official, Respondent was required to file Personal/Relative and Financial Disclosure Statements (Disclosure Statements) by April 30, 2023; and

Whereas, Respondent failed to file Disclosure Statements within the statutorily required timeframe; and

Whereas, at its meeting on September 26, 2023, the School Ethics Commission (Commission) issued an Order to Show Cause (OTSC) directing Respondent to show cause why she failed to file Disclosure Statements as required by *N.J.S.A.* 18A:12-25, *N.J.S.A.* 18A:12-26, and *N.J.A.C.* 6A:28-3.1; and

Whereas, after having been served with the OTSC, Respondent filed her Disclosure Statements, and submitted a written statement explaining why a penalty should not be imposed; and

Whereas, at its meeting on October 17, 2023, the Commission found that Respondent violated *N.J.S.A.* 18A:12-25, *N.J.S.A.* 18A:12-26, and *N.J.A.C.* 6A:28-3.1 by failing to timely file Disclosure Statements; and

Whereas, at its meeting on October 17, 2023, the Commission recommended that the Commissioner of Education impose a penalty of censure; and

Whereas, at its meeting on October 17, 2023, the Commission agreed that the within decision accurately memorializes its findings and recommendations; and

Now Therefore Be It Resolved, that the Commission hereby adopts the within decision and directs its staff to notify all parties to this action of the decision.

Robert W. Bender, Chairperson

I hereby certify that the within Resolution
was duly adopted by the School Ethics Commission
at a special meeting on October 17, 2023.

Brigid C. Martens, Acting Director
School Ethics Commission

344-23SEC
SEC Dkt. No. D05-23
Agency Dkt. No. 281-10/23

New Jersey Commissioner of Education

Final Decision

In the Matter of Karen Eastman,
Middlesex County Vocational and Technical
School Board of Education, Middlesex County.

The Commissioner has reviewed the record of this matter and the decision of the School Ethics Commission (SEC) finding that respondent violated the School Ethics Act for failure to timely file Personal/Relative and Financial Disclosure Statements ("Disclosure Statements") in accordance with *N.J.S.A.* 18A:12-25, *N.J.S.A.* 18A:12-26, and *N.J.A.C.* 6A:28-3.1. The SEC's decision was forwarded to the Commissioner for final determination on the recommended penalty pursuant to *N.J.S.A.* 18A:12-29(c). The SEC recommended a sanction of removal effective upon the adoption of the decision by the Commissioner. Alternatively, if the respondent filed the Disclosure Statements before the issuance of the Commissioner's final decision and notified the SEC accordingly, the SEC recommended a sanction of a thirty-day suspension. To date, respondent has not notified the SEC that she has filed the Disclosure Statements. Respondent has neither filed exceptions to the recommended penalty, nor instituted an appeal of the SEC's underlying finding of violation pursuant to *N.J.A.C.* 6A:4-1 *et seq.*

Upon review, the Commissioner concurs with the penalty recommended by the SEC for respondent's failure to timely honor an obligation placed upon school officials by law. Accordingly, respondent is hereby removed from the board for violating the School Ethics Act.

IT IS SO ORDERED.[1]

Angelica Allen-McMillan, J.D.S.
ACTING COMMISSIONER OF EDUCATION

Date of Decision: November 20, 2023
Date of Mailing: November 22, 2023

[1] This decision may be appealed to the Appellate Division of the Superior Court pursuant to *N.J.S.A.* 18A:6-9.1. Under *N.J.Ct.R.* 2:4-1(b), a notice of appeal must be filed with the Appellate Division within 45 days from the date of mailing of this decision.

Before the School Ethics Commission
Docket No.: D05-23
Decision for Failure to File Personal/Relative and Financial Disclosure Statements

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I/M/O Karen Eastman,
Middlesex County Vocational and Technical School Board of Education, Middlesex County

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I. Procedural History

This matter arises from an Order to Show Cause (OTSC) that was issued by the School Ethics Commission (Commission) at its meeting on September 26, 2023, directing Respondent, a "school official" as defined in *N.J.S.A.* 18A:12-23 of the School Ethics Act (Act), *N.J.S.A.* 18A:12-21 *et seq.*, to show cause as to why the Commission should not find her in violation of the Act for failing to file Personal/Relative and Financial Disclosure Statements (Disclosure Statements) as required by *N.J.S.A.* 18A:12-25, *N.J.S.A.* 18A:12-26, and *N.J.A.C.* 6A:28-3.1.

In the OTSC that was served on September 26, 2023, the Commission notified Respondent that she had twenty (20) days to respond to the OTSC. Respondent was further advised that failure to respond would be deemed an admission of the facts set forth in the OTSC, and the Commission may take action on a summary basis, in accordance with *N.J.A.C.* 6A:28-1.6(c).

II. Analysis

The Act was enacted by the New Jersey State Legislature to ensure and preserve public confidence in members of local boards of education and local school administrators. By virtue of *N.J.S.A.* 18A:12-23.1, the breadth of the Act was expanded to include charter school trustees and administrators.

Pursuant to *N.J.S.A.* 18A:12-25, *N.J.S.A.* 18A:12-26, and *N.J.A.C.* 6A:28-3.1(a), all school officials must file, on forms prescribed by the Commission, Disclosure Statements with their local board secretaries or charter school designees, and must do so on or before April 30th of each year. In addition, all newly elected board members or board members appointed to fill vacancies, newly appointed members of a board of trustees of a charter school, and administrators appointed to fill a vacancy must file their Disclosure Statements within thirty (30) days of appointment or taking office. *N.J.A.C.* 6A:28-3.1(c), *N.J.A.C.* 6A:28-3.1(d), *N.J.A.C.* 6A:28-3.1(e), and *N.J.A.C.* 6A:28-3.1(f).

If a school official fails to file the required Disclosure Statements, the Commission is authorized, pursuant to *N.J.A.C.* 6A:28-3.3(b), to issue an Order to Show Cause. Moreover, failure to timely file the required Disclosure Statements "shall constitute a violation of the Act, and may result in the reprimand, censure, suspension, or removal of a school official." *N.J.A.C.* 6A:28-3.3(a).

With the above in mind, Respondent is a returning school official and, therefore, was required to file Disclosure Statements by April 30, 2023. Despite this fact, and even though Respondent received reminders as further detailed below, Respondent failed to file Disclosure Statements within the statutorily required timeframe.

More specifically, throughout the months of July through September, the Commission's staff sent repeated messages to the Board Secretary advising that Respondent had not yet filed Disclosure Statements. The electronic correspondence to the Board Secretary further advised that if Respondent failed to file Disclosure Statements, the Commission had the authority to issue an OTSC, find Respondent in violation of the Act, and recommend a penalty up to and including removal for non-compliance.

In addition, by electronic correspondence dated August 2, 2023, August 30, 2023, and September 11, 2023, Respondent was reminded that her Disclosure Statements had not yet been filed. Respondent was further advised that continued failure to file Disclosure Statements would result in the Commission issuing an OTSC, and recommending a penalty, up to and including removal.

When Respondent failed to file Disclosure Statements as required by *N.J.S.A.* 18A:12-25, *N.J.S.A.* 18A:12-26, and *N.J.A.C.* 6A:28-3.1, an OTSC was issued by the Commission at its meeting on September 26, 2023. After having been served with the OTSC, Respondent still failed to file Disclosure Statements, or to otherwise respond to the OTSC.

III. Decision/Penalty Recommendation

Based on the record as set forth above, and at its meeting on October 17, 2023, the Commission found that Respondent violated *N.J.S.A.* 18A:12-25, *N.J.S.A.* 18A:12-26, and *N.J.A.C.* 6A:28-3.1 because she did not timely file Disclosure Statements.

Where a violation of the Act is found by the Commission, it may recommend to the Commissioner of Education that a penalty be imposed on the school official. The recommended penalty can include a reprimand, censure, suspension or removal of the school official. *N.J.A.C.* 6A:28-3.3(a); *N.J.A.C.* 6A:28-9.11. Specifically, unless good cause is shown or the school official previously has been the subject of an OTSC, "the Commission shall recommend that a school official who completes and files the disclosure statements after the Commission issues a decision, but before the Commissioner issues a final decision, receives a suspension for 30 days." *N.J.A.C.* 6A:28-3.3(d). However, "the Commission will only recommend this penalty if the school official notifies the Commission, in writing, that the school official successfully completed and filed the disclosure statements before the Commissioner issues a final decision." *N.J.A.C.* 6A:28-3.3(d). If the school official has not filed the disclosure statements as of the date the Commissioner issues its final decision, the Commission will recommend removal of the school official from his or her position. *N.J.A.C.* 6A:28-3.3(e).

For the reasons set forth above, the Commission recommends that the Commissioner of Education impose a penalty of **removal**, with such removal to become effective immediately upon adoption by the Commissioner of Education. However, if Respondent files Disclosure Statements before the Commissioner of Education adopts a final decision (which will be within forty-five (45) days after the mailing date of this decision), then the Commission recommends that the Commissioner of Education, in lieu of removal, impose a **thirty (30) day suspension**, with such suspension to become effective immediately upon adoption by the Commissioner of Education, provided the school official provides written notice that the disclosure statement has been completed and filed.

Pursuant to *N.J.S.A.* 18A:12-29(c), this decision shall be forwarded to the Commissioner of Education for review of the Commission's recommended penalty. Respondent may either: 1) file exceptions to the recommended sanction; 2) file an appeal of the Commission's finding of a violation; or 3) file both exceptions to the recommended sanction together with an appeal of the finding of a violation.

Parties taking exception to the recommended penalty of the Commission but *not disputing* the Commission's finding of a violation may file, within **thirteen (13) days** from the date the Commission's decision is forwarded to the Commissioner, written exceptions regarding the recommended penalty to the Commissioner. The forwarding date shall be the mailing date to the parties, as indicated below. Such exceptions must be forwarded to: Commissioner of Education, c/o Bureau of Controversies and Disputes, P.O. Box 500, Trenton, New Jersey 08625, marked "Attention: Comments on Ethics Commission Sanction." as well as to (ControversiesDisputesFilings@doe.nj.gov). A copy must also be sent to the Commission (school.ethics@doe.nj.gov) and all other parties.

Parties seeking to appeal the Commission's finding of violation *must* file an appeal pursuant to the standards set forth at *N.J.A.C.* 6A:4-1 *et seq.* within **thirty (30) days** of the filing date of the decision from which the appeal is taken. The filing date shall be three (3) days after the date of mailing to the parties, as shown below. In such cases, the Commissioner's review of the Commission's recommended sanction will be deferred and incorporated into the Commissioner's review of the finding of violation on appeal. Where a notice of appeal has been filed on or before the due date for exceptions to the Commission's recommended sanction (thirteen (13) days from the date the decision is mailed by the Commission), exceptions need not be filed by that date, but may be incorporated into the appellant's brief on appeal.

Robert W. Bender

Robert W. Bender, Chairperson

Mailing Date: October 17, 2023

Resolution Adopting Decision for Failure to File Personal/Relative and Financial Disclosure Statements
Docket No.: D05-23

Whereas, Respondent is a "school official," as defined in *N.J.S.A.* 18A:12-23 of the School Ethics Act (Act); and

Whereas, as a school official, Respondent was required to file Personal/Relative and Financial Disclosure Statements (Disclosure Statements) by April 30, 2023; and

Whereas, Respondent failed to file Disclosure Statements within the statutorily required timeframe; and

Whereas, at its meeting on September 26, 2023, the School Ethics Commission (Commission) issued an Order to Show Cause (OTSC) directing Respondent to show cause why she failed to file Disclosure Statements as required by *N.J.S.A.* 18A:12-25, *N.J.S.A.* 18A:12-26, and *N.J.A.C.* 6A:28-3.1; and

Whereas, Respondent failed to file her Disclosure Statements following issuance of the OTSC; and

Whereas, Respondent failed to file a response to the OTSC; and

Whereas, at its meeting on October 17, 2023, the Commission found that Respondent violated *N.J.S.A.* 18A:12-25, *N.J.S.A.* 18A:12-26, and *N.J.A.C.* 6A:28-3.1 by failing to file Disclosure Statements; and

Whereas, at its meeting on October 17, 2023, the Commission recommended that the Commissioner of Education impose a penalty of removal, with such removal to become effective immediately upon adoption by the Commissioner of Education. However, if Respondent files Disclosure Statements before the Commissioner of Education adopts a final decision (which will be within forty-five (45) days after the mailing date of the this decision), then the Commission recommends that the Commissioner of Education, in lieu of removal, impose a thirty (30) day suspension, with such suspension to become effective immediately upon adoption by the Commissioner of Education, provided the school official provides written notice that the disclosure statement has been completed and filed; and

Whereas, at its meeting on October 17, 2023, the Commission agreed that the within decision accurately memorializes its findings and recommendations; and

Now Therefore Be It Resolved, that the Commission hereby adopts the within decision and directs its staff to notify all parties to this action of the decision.

Robert W. Bender

Robert W. Bender, Chairperson

I hereby certify that the within Resolution
was duly adopted by the School Ethics Commission
at a meeting on October 17, 2023.

Brigid C. Martens

Brigid C. Martens, Acting Director
School Ethics Commission

345-23SEC
SEC Dkt. No. D06-23
Agency Dkt. No. 282-10/23

New Jersey Commissioner of Education

Final Decision

In the Matter of Anthony Remy,
Asbury Park Board of Education,
Monmouth County.

The Commissioner has reviewed the record of this matter and the decision of the School Ethics Commission (SEC) finding that respondent violated the School Ethics Act for failure to timely file Personal/Relative and Financial Disclosure Statements ("Disclosure Statements") in accordance with *N.J.S.A.* 18A:12-25, *N.J.S.A.* 18A:12-26, and *N.J.A.C.* 6A:28-3.1. The SEC's decision was forwarded to the Commissioner for final determination on the recommended penalty pursuant to *N.J.S.A.* 18A:12-29(c). The SEC advises that the respondent ultimately completed training after the issuance of the September 26, 2023 Order to Show Cause but prior to the SEC's October 17, 2023 meeting.[1] The SEC recommended a sanction of a sixty-day suspension, because respondent was previously the subject of an Order to Show Cause regarding his failure to timely complete board member training. Respondent has neither filed exceptions to the recommended penalty, nor instituted an appeal of the SEC's underlying finding of violation pursuant to *N.J.A.C.* 6A:4-1 *et seq.*

[1] The Analysis section of the SEC's decision indicates that respondent failed to file the Disclosure Statements or to otherwise respond to the Order to Show Cause. However, this statement appears to be in error. In the Decision/Penalty Recommendation section, the SEC's decision indicates that respondent filed his Disclosure Statement on September 27, 2023, and the record reflects same.

Upon review, the Commissioner notes that in other similar matters, when a respondent board member met an obligation after the issuance of an Order to Show Cause but prior to the SEC's meeting date, and previously had been the subject of an Order to Show Cause that resulted in a reprimand, the penalty for the second violation has been a thirty-day suspension. *In the Matter of Annette Beasley, Irvington Board of Education, Essex County*, Commissioner Decision No. 279-22SEC, decided October 24, 2022; *In the Matter of Kecia Teller, The John P. Holland Charter School, Passaic County*, Commissioner Decision No. 1-20SEC, decided January 3, 2023; *In the Matter of Craig Woolridge, College Achieve Paterson Charter School, Passaic County*, Commissioner Decision No. 5-20SEC, decided January 3, 2020. As the instant case arises from the same circumstances, the Commissioner finds that a thirty-day suspension is the appropriate penalty for the respondent's failure to timely file the Disclosure Statements. Accordingly, respondent is suspended from the board for thirty days for violating the School Ethics Act.

IT IS SO ORDERED.[2]

Angelica Allen-McMillan, J.D.S.
ACTING COMMISSIONER OF EDUCATION

Date of Decision: November 20, 2023
Date of Mailing: November 22, 2023

[2] This decision may be appealed to the Appellate Division of the Superior Court pursuant to *N.J.S.A.* 18A:6-9.1. Under *N.J.Ct.R.* 2:4-1(b), a notice of appeal must be filed with the Appellate Division within 45 days from the date of mailing of this decision.

Before the School Ethics Commission
Docket No.: D06-23
Decision for Failure to File Personal/Relative and Financial Disclosure Statements

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I/M/O Anthony Remy,
Asbury Park Board of Education, Monmouth County

I. Procedural History

This matter arises from an Order to Show Cause (OTSC) that was issued by the School Ethics Commission (Commission) at its meeting on September 26, 2023, directing Respondent, a "school official" as defined in *N.J.S.A.* 18A:12-23 of the School Ethics Act (Act), *N.J.S.A.* 18A:12-21 *et seq.*, to show cause as to why the Commission should not find him in violation of the Act for failing to file Personal/Relative and Financial Disclosure Statements (Disclosure Statements) as required by *N.J.S.A.* 18A:12-25, *N.J.S.A.* 18A:12-26, and *N.J.A.C.* 6A:28-3.1.

In the OTSC that was served on September 26, 2023, the Commission notified Respondent that he had twenty (20) days to respond to the OTSC. Respondent was further advised that failure to respond would be deemed an admission of the facts set forth in the OTSC, and the Commission may take action on a summary basis, in accordance with *N.J.A.C.* 6A:28-1.6(c).

II. Analysis

The Act was enacted by the New Jersey State Legislature to ensure and preserve public confidence in members of local boards of education and local school administrators. By virtue of *N.J.S.A.* 18A:12-23.1, the breadth of the Act was expanded to include charter school trustees and administrators.

Pursuant to *N.J.S.A.* 18A:12-25, *N.J.S.A.* 18A:12-26, and *N.J.A.C.* 6A:28-3.1(a), all school officials must file, on forms prescribed by the Commission, Disclosure Statements with their local board secretaries or charter school designees, and must do so on or before April 30th of each year. In addition, all newly elected board members or board members appointed to fill vacancies, newly appointed members of a board of trustees of a charter school, and administrators appointed to fill a vacancy must file their Disclosure Statements within thirty (30) days of appointment or taking office. *N.J.A.C.* 6A:28-3.1(c), *N.J.A.C.* 6A:28-3.1(d), *N.J.A.C.* 6A:28-3.1(e), and *N.J.A.C.* 6A:28-3.1(f).

If a school official fails to file the required Disclosure Statements, the Commission is authorized, pursuant to *N.J.A.C.* 6A:28-3.3(b), to issue an Order to Show Cause. Moreover, failure to timely file the required Disclosure Statements "shall constitute a violation of the Act, and may result in the reprimand, censure, suspension, or removal of a school official." *N.J.A.C.* 6A:28-3.3(a).

With the above in mind, Respondent is a returning school official and, therefore, was required to file Disclosure Statements by April 30, 2023. Despite this fact, and even though Respondent received reminders as further detailed below, Respondent failed to file Disclosure Statements within the statutorily required timeframe.

More specifically, throughout the months of July through September, the Commission's staff sent repeated messages to the Board Secretary advising that Respondent had not yet filed Disclosure Statements. The electronic correspondence to the Board Secretary further advised that if Respondent failed to file Disclosure Statements, the Commission had the authority to issue an OTSC, find Respondent in violation of the Act, and recommend a penalty up to and including removal for non-compliance.

In addition, by electronic correspondence dated August 2, 2023, September 5, 2023, September 11, 2023, and September 21, 2023, Respondent was reminded that his Disclosure Statements had not yet been filed. Respondent was further advised that continued failure to file Disclosure Statements would result in the Commission issuing an OTSC, and recommending a penalty, up to and including removal.

When Respondent failed to file Disclosure Statements as required by *N.J.S.A.* 18A:12-25, *N.J.S.A.* 18A:12-26, and *N.J.A.C.* 6A:28-3.1, an OTSC was issued by the Commission at its meeting on September 26, 2023. After having been served with the OTSC, Respondent still failed to file Disclosure Statements, or to otherwise respond to the OTSC.

III. Decision/Penalty Recommendation

Based on the record as set forth above, and at its meeting on October 17, 2023, the Commission found that Respondent violated *N.J.S.A.* 18A:12-25, *N.J.S.A.* 18A:12-26, and *N.J.A.C.* 6A:28-3.1 because he did not timely file Disclosure Statements. Although Respondent ultimately filed his Disclosure Statement on September 27, 2023, the filing was several months late, and submitted only after multiple reminders were sent reiterating his statutory obligation to file Disclosure Statements. Additionally, the Commission notes Respondent was previously issued a reprimand for failing to complete his mandatory training requirement in a timely fashion (T28-21).

Where a violation of the Act is found by the Commission, it may recommend to the Commissioner of Education that a penalty be imposed on the school official. The recommended penalty can include a reprimand, censure, suspension or removal of the school official. *N.J.A.C.* 6A:28-3.3(a); *N.J.A.C.* 6A:28-9.11. Specifically, unless good cause is shown or the school official previously has been the subject of an OTSC, "the Commission shall recommend that a school official who completes and files the disclosure statements after the Commission issues a decision, but before the Commissioner issues a final decision, receives a suspension for 30 days." *N.J.A.C.* 6A:28-3.3(d). However, "the Commission will only recommend this penalty if the school official notifies the Commission, in writing, that the school official successfully completed and filed the disclosure statements before the Commissioner issues a final decision." *N.J.A.C.* 6A:28-3.3(d). If the school official has not filed the disclosure statements as of the date the Commissioner issues its final decision, the Commission will recommend removal of the school official from his or her position. *N.J.A.C.* 6A:28-3.3(e).

Given that Respondent was previously the subject of an OTSC, the Commission recommends that the Commissioner of Education impose a penalty of **60-day suspension**, with such suspension to become effective immediately upon adoption by the Commissioner of Education.

Pursuant to *N.J.S.A.* 18A:12-29(c), this decision shall be forwarded to the Commissioner of Education for review of the Commission's recommended penalty. Respondent may either: 1) file exceptions to the recommended sanction; 2) file an appeal of the Commission's finding of a violation; or 3) file both exceptions to the recommended sanction together with an appeal of the finding of a violation.

Parties taking exception to the recommended penalty of the Commission but *not disputing* the Commission's finding of a violation may file, within **thirteen (13) days** from the date the Commission's decision is forwarded to the Commissioner, written exceptions regarding the recommended penalty to the Commissioner. The forwarding date shall be the mailing date to the parties, as indicated below. Such exceptions must be forwarded to: Commissioner of Education, c/o Bureau of Controversies and Disputes, P.O. Box 500, Trenton, New Jersey 08625, marked "Attention: Comments on Ethics Commission Sanction." as well as to (ControversiesDisputesFilings@doe.nj.gov). A copy must also be sent to the Commission (school.ethics@doe.nj.gov) and all other parties.

Parties seeking to appeal the Commission's finding of violation *must* file an appeal pursuant to the standards set forth at *N.J.A.C.* 6A:4-1 *et seq.* within **thirty (30) days** of the filing date of the decision from

which the appeal is taken. The filing date shall be three (3) days after the date of mailing to the parties, as shown below. In such cases, the Commissioner's review of the Commission's recommended sanction will be deferred and incorporated into the Commissioner's review of the finding of violation on appeal. Where a notice of appeal has been filed on or before the due date for exceptions to the Commission's recommended sanction (thirteen (13) days from the date the decision is mailed by the Commission), exceptions need not be filed by that date, but may be incorporated into the appellant's brief on appeal.

Robert W. Bender

Robert W. Bender, Chairperson

Mailing Date: October 17, 2023

Resolution Adopting Decision for Failure to File Personal/Relative and Financial Disclosure Statements
Docket No.: D06-23

Whereas, Respondent is a "school official," as defined in *N.J.S.A.* 18A:12-23 of the School Ethics Act (Act); and

Whereas, as a school official, Respondent was required to file Personal/Relative and Financial Disclosure Statements (Disclosure Statements) by April 30, 2023; and

Whereas, Respondent failed to file Disclosure Statements within the statutorily required timeframe; and

Whereas, at its meeting on September 26, 2023, the School Ethics Commission (Commission) issued an Order to Show Cause (OTSC) directing Respondent to show cause why he failed to file Disclosure Statements as required by *N.J.S.A.* 18A:12-25, *N.J.S.A.* 18A:12-26, and *N.J.A.C.* 6A:28-3.1; and

Whereas, after having been served with the OTSC, Respondent filed his Disclosure Statements, but did not dispute that his filing was untimely, or otherwise submit anything explaining why a penalty should not be imposed; and

Whereas, Respondent was previously issued a reprimand for failing to complete his mandatory training in a timely fashion; and

Whereas, at its meeting on October 17, 2023, the Commission found that Respondent violated *N.J.S.A.* 18A:12-25, *N.J.S.A.* 18A:12-26, and *N.J.A.C.* 6A:28-3.1 by failing to file Disclosure Statements; and

Whereas, at its meeting on October 17, 2023, the Commission recommended that the Commissioner of Education impose a penalty of 60-day suspension, to become effective immediately upon adoption by the Commissioner of Education; and

Whereas, at its meeting on October 17, 2023, the Commission agreed that the within decision accurately memorializes its findings and recommendations; and

Now Therefore Be It Resolved, that the Commission hereby adopts the within decision and directs its staff to notify all parties to this action of the decision.

Robert W. Bender

Robert W. Bender, Chairperson

I hereby certify that the within Resolution
was duly adopted by the School Ethics Commission
at a meeting on October 17, 2023.

Brigid C. Martens

Brigid C. Martens, Acting Director
School Ethics Commission

346-23SEC
SEC Dkt. No. D07-23
Agency Dkt. No. 283-10/23

New Jersey Commissioner of Education

Final Decision

In the Matter of Linda Koenig,
Union County Educational Services Commission
Board of Education, Union County.

The Commissioner has reviewed the record of this matter and the decision of the School Ethics Commission (SEC) finding that respondent violated the School Ethics Act for failure to timely file Personal/Relative and Financial Disclosure Statements ("Disclosure Statements") in accordance with *N.J.S.A.* 18A:12-25, *N.J.S.A.* 18A:12-26, and *N.J.A.C.* 6A:28-3.1. The SEC's decision was forwarded to the Commissioner for final determination on the recommended penalty pursuant to *N.J.S.A.* 18A:12-29(c). The SEC recommended a sanction of censure. Respondent has neither filed exceptions to the recommended penalty, nor instituted an appeal of the SEC's underlying finding of violation pursuant to *N.J.A.C.* 6A:4-1 *et seq.*

Upon review, the Commissioner concurs with the penalty recommended by the SEC for respondent's failure to timely honor an obligation placed upon school officials by law. Accordingly, respondent is censured for violating the School Ethics Act.

IT IS SO ORDERED.[1]

Angelica Allen-McMillan, Ed.D.
ACTING COMMISSIONER OF EDUCATION

Date of Decision: November 20, 2023
Date of Mailing: November 22, 2023

[1] This decision may be appealed to the Appellate Division of the Superior Court pursuant to *N.J.S.A.* 18A:6-9.1. Under *N.J.Ct.R.* 2:4-1(b), a notice of appeal must be filed with the Appellate Division within 45 days from the date of mailing of this decision.

Before the School Ethics Commission
Docket No.: D07-23
Decision for Failure to File Personal/Relative and Financial Disclosure Statements

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I/M/O Linda Koenig,
Union County Educational Services Commission Board of Education, Union County

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I. Procedural History

This matter arises from an Order to Show Cause (OTSC) that was issued by the School Ethics Commission (Commission) at its meeting on September 26, 2023, directing Respondent, a "school official" as defined in *N.J.S.A.* 18A:12-23 of the School Ethics Act (Act), *N.J.S.A.* 18A:12-21 *et seq.*, to show cause as to why the Commission should not find her in violation of the Act for failing to file Personal/Relative and Financial Disclosure Statements (Disclosure Statements) as required by *N.J.S.A.* 18A:12-25, *N.J.S.A.* 18A:12-26, and *N.J.A.C.* 6A:28-3.1.

In the OTSC that was served on September 26, 2023, the Commission notified Respondent that she had twenty (20) days to respond to the OTSC. Respondent was further advised that failure to respond would be deemed an admission of the facts set forth in the OTSC, and the Commission may take action on a summary basis, in accordance with *N.J.A.C.* 6A:28-1.6(c).

II. Analysis

The Act was enacted by the New Jersey State Legislature to ensure and preserve public confidence in members of local boards of education and local school administrators. By virtue of *N.J.S.A.* 18A:12-23.1, the breadth of the Act was expanded to include charter school trustees and administrators.

Pursuant to *N.J.S.A.* 18A:12-25, *N.J.S.A.* 18A:12-26, and *N.J.A.C.* 6A:28-3.1(a), all school officials must file, on forms prescribed by the Commission, Disclosure Statements with their local board secretaries or charter school designees, and must do so on or before April 30th of each year. In addition, all newly elected board members or board members appointed to fill vacancies, newly appointed members of a board of trustees of a charter school, and administrators appointed to fill a vacancy must file their Disclosure Statements within thirty (30) days of appointment or taking office. *N.J.A.C.* 6A:28-3.1(c), *N.J.A.C.* 6A:28-3.1(d), *N.J.A.C.* 6A:28-3.1(e), and *N.J.A.C.* 6A:28-3.1(f).

If a school official fails to file the required Disclosure Statements, the Commission is authorized, pursuant to *N.J.A.C.* 6A:28-3.3(b), to issue an Order to Show Cause. Moreover, failure to timely file the required Disclosure Statements "shall constitute a violation of the Act, and may result in the reprimand, censure, suspension, or removal of a school official." *N.J.A.C.* 6A:28-3.3(a).

With the above in mind, Respondent is a returning school official and, therefore, was required to file Disclosure Statements by April 30, 2023. Despite this fact, and even though Respondent received reminders as further detailed below, Respondent failed to file Disclosure Statements within the statutorily required timeframe.

More specifically, throughout the months of July through September, the Commission's staff sent repeated messages to the Board Secretary advising that Respondent had not yet filed Disclosure Statements. The electronic correspondence to the Board Secretary further advised that if Respondent failed to file Disclosure Statements, the Commission had the authority to issue an OTSC, find Respondent in violation of the Act, and recommend a penalty up to and including removal for non-compliance.

In addition, by electronic correspondence dated August 3, 2023, September 6, 2023, September 18, 2023, and September 25, 2023, Respondent was reminded that her Disclosure Statements had not yet been filed. Respondent was further advised that continued failure to file Disclosure Statements would result in the Commission issuing an OTSC, and recommending a penalty, up to and including removal.

When Respondent failed to file Disclosure Statements as required by *N.J.S.A.* 18A:12-25, *N.J.S.A.* 18A:12-26, and *N.J.A.C.* 6A:28-3.1, an OTSC was issued by the Commission at its meeting on September 26, 2023. After having been served with the OTSC, Respondent filed her Disclosure Statements on September 27, 2023, and submitted a written statement noting that she filed Disclosure Statement for her "local board," and thought she completed her Disclosure Statements for the Union County Educational Services Commission. She also notes that she did not respond to the Commission's correspondence because she "rarely go[es] on-line or do[es] email."

III. Decision/Penalty Recommendation

Based on the record as set forth above, and at its meeting on October 17, 2023, the Commission found that Respondent violated *N.J.S.A.* 18A:12-25, *N.J.S.A.* 18A:12-26, and *N.J.A.C.* 6A:28-3.1 because she did not timely file Disclosure Statements. Although Respondent ultimately filed her Disclosure Statements, the filing was several months late, and submitted only after multiple reminders were sent reiterating her statutory obligation to file Disclosure Statements.

Where a violation of the Act is found by the Commission, it may recommend to the Commissioner of Education that a penalty be imposed on the school official. The recommended penalty can include a reprimand, censure, suspension or removal of the school official. *N.J.A.C.* 6A:28-3.3(a); *N.J.A.C.* 6A:28-9.11. Specifically, unless good cause is shown or the school official previously has been the subject of an OTSC, "the Commission shall recommend that a school official who completes the disclosure statements after the issuance of an Order to Show Cause, but before the Commission issues its decision, receives a censure." *N.J.A.C.* 6A:28-3.3(c). For the reasons set forth above, the Commission recommends that the Commissioner of Education impose a penalty of **censure**.

Pursuant to *N.J.S.A.* 18A:12-29(c), this decision shall be forwarded to the Commissioner of Education for review of the Commission's recommended penalty. Respondent may either:

1) file exceptions to the recommended sanction; 2) file an appeal of the Commission's finding of a violation; or 3) file both exceptions to the recommended sanction together with an appeal of the finding of a violation.

Parties taking exception to the recommended penalty of the Commission but *not disputing* the Commission's finding of a violation may file, within **thirteen (13) days** from the date the Commission's decision is forwarded to the Commissioner, written exceptions regarding the recommended penalty to the Commissioner. The forwarding date shall be the mailing date to the parties, as indicated below. Such exceptions must be forwarded to: Commissioner of Education, c/o Bureau of Controversies and Disputes, P.O. Box 500, Trenton, New Jersey 08625, marked "Attention: Comments on Ethics Commission Sanction." as well as to (ControversiesDisputesFilings@doe.nj.gov). A copy must also be sent to the Commission (school.ethics@doe.nj.gov) and all other parties.

Parties seeking to appeal the Commission's finding of violation *must* file an appeal pursuant to the standards set forth at *N.J.A.C.* 6A:4-1 *et seq.* within **thirty (30) days** of the filing date of the decision from which the appeal is taken. The filing date shall be three (3) days after the date of mailing to the parties, as shown below. In such cases, the Commissioner's review of the Commission's recommended sanction will be deferred and incorporated into the Commissioner's review of the finding of violation on appeal. Where a notice of appeal has been filed on or before the due date for exceptions to the Commission's recommended sanction (thirteen (13) days from the date the decision is mailed by the Commission), exceptions need not be filed by that date, but may be incorporated into the appellant's brief on appeal.

Robert W. Bender

Robert W. Bender, Chairperson

Mailing Date: October 17, 2023

Resolution Adopting Decision for Failure to File Personal/Relative and Financial Disclosure Statements
Docket No.: D07-23

Whereas, Respondent is a "school official," as defined in *N.J.S.A.* 18A:12-23 of the School Ethics Act (Act); and

Whereas, as a school official, Respondent was required to file Personal/Relative and Financial Disclosure Statements (Disclosure Statements) by April 30, 2023; and

Whereas, Respondent failed to file Disclosure Statements within the statutorily required timeframe; and

Whereas, at its meeting on September 26, 2023, the School Ethics Commission (Commission) issued an Order to Show Cause (OTSC) directing Respondent to show cause why she failed to file Disclosure Statements as required by *N.J.S.A.* 18A:12-25, *N.J.S.A.* 18A:12-26, and *N.J.A.C.* 6A:28-3.1; and

Whereas, after having been served with the OTSC, Respondent filed her Disclosure Statements, and submitted a written statement explaining why a penalty should not be imposed; and

Whereas, at its meeting on October 17, 2023, the Commission found that Respondent violated *N.J.S.A.* 18A:12-25, *N.J.S.A.* 18A:12-26, and *N.J.A.C.* 6A:28-3.1 by failing to timely file Disclosure Statements; and

Whereas, at its meeting on October 17, 2023, the Commission recommended that the Commissioner of Education impose a penalty of censure; and

Whereas, at its meeting on October 17, 2023, the Commission agreed that the within decision accurately memorializes its findings and recommendations; and

Now Therefore Be It Resolved, that the Commission hereby adopts the within decision and directs its staff to notify all parties to this action of the decision.

Robert W. Bender, Chairperson

I hereby certify that the within Resolution
was duly adopted by the School Ethics Commission
at a special meeting on October 17, 2023.

Brigid C. Martens, Acting Director
School Ethics Commission

347-23SEC
SEC Dkt. No. D08-23
Agency Dkt. No. 284-10/23

New Jersey Commissioner of Education

Final Decision

In the Matter of Simone Patterson,
Greenwich Township Board of Education,
Warren County.

The Commissioner has reviewed the record of this matter and the decision of the School Ethics Commission (SEC) finding that respondent violated the School Ethics Act for failure to timely file Personal/Relative and Financial Disclosure Statements ("Disclosure Statements") in accordance with *N.J.S.A.* 18A:12-25, *N.J.S.A.* 18A:12-26, and *N.J.A.C.* 6A:28-3.1. The SEC's decision was forwarded to the Commissioner for final determination on the recommended penalty pursuant to *N.J.S.A.* 18A:12-29(c). The SEC recommended a sanction of removal effective upon the adoption of the decision by the Commissioner. Alternatively, if the respondent filed the Disclosure Statements before the issuance of the Commissioner's final decision and notified the SEC accordingly, the SEC recommended a sanction of a thirty-day suspension. To date, respondent has not notified the SEC that she has filed the Disclosure Statements. Respondent has neither filed exceptions to the recommended penalty, nor instituted an appeal of the SEC's underlying finding of violation pursuant to *N.J.A.C.* 6A:4-1 *et seq.*

Upon review, the Commissioner concurs with the penalty recommended by the SEC for respondent's failure to timely honor an obligation placed upon school officials by law. Accordingly, respondent is removed from the board for violating the School Ethics Act.

IT IS SO ORDERED.[1]

Angelica Allen-McMillan, Ed.D.
ACTING COMMISSIONER OF EDUCATION

Date of Decision: November 20, 2023
Date of Mailing: November 22, 2023

[1] This decision may be appealed to the Appellate Division of the Superior Court pursuant to *N.J.S.A.* 18A:6-9.1. Under *N.J.Ct.R.* 2:4-1(b), a notice of appeal must be filed with the Appellate Division within 45 days from the date of mailing of this decision.

Before the School Ethics Commission
Docket No.: D08-23
Decision for Failure to File Complete Personal/Relative and Financial Disclosure Statements

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I/M/O Simone Patterson,
Greenwich Township Board of Education, Warren County

I. Procedural History

This matter arises from an Order to Show Cause (OTSC) that was issued by the School Ethics Commission (Commission) at its meeting on September 26, 2023, directing Respondent, a "school official" as defined in *N.J.S.A.* 18A:12-23 of the School Ethics Act (Act), *N.J.S.A.* 18A:12-21 *et seq.*, to show cause as to why the Commission should not find her in violation of the Act for failing to file complete Personal/Relative and Financial Disclosure Statements (Disclosure Statements) as required by *N.J.S.A.* 18A:12-25, *N.J.S.A.* 18A:12-26, and *N.J.A.C.* 6A:28-3.1.

In the OTSC that was served on September 26, 2023, the Commission notified Respondent that she had twenty (20) days to respond to the OTSC. Respondent was further advised that failure to respond would be deemed an admission of the facts set forth in the OTSC, and the Commission may take action on a summary basis, in accordance with *N.J.A.C.* 6A:28-1.6(c).

II. Analysis

The Act was enacted by the New Jersey State Legislature to ensure and preserve public confidence in members of local boards of education and local school administrators. By virtue of *N.J.S.A.* 18A:12-23.1, the breadth of the Act was expanded to include charter school trustees and administrators.

Pursuant to *N.J.S.A.* 18A:12-25, *N.J.S.A.* 18A:12-26, and *N.J.A.C.* 6A:28-3.1(a), all school officials must file, on forms prescribed by the Commission, Disclosure Statements with their local board secretaries or charter school designees, and must do so on or before April 30th of each year. In addition, all newly elected board members or board members appointed to fill vacancies, newly appointed members of a board of trustees of a charter school, and administrators appointed to fill a vacancy must file their Disclosure Statements within thirty (30) days of appointment or taking office. *N.J.A.C.* 6A:28-3.1(c), *N.J.A.C.* 6A:28-3.1(d), *N.J.A.C.* 6A:28-3.1(e), and *N.J.A.C.* 6A:28-3.1(f).

When it is determined that a school official's otherwise timely filed Disclosure Statements are incorrect or incomplete, the filing shall be returned to the school official, and she shall have twenty (20) days from receipt of the returned filing to correct and/or complete the Disclosure Statements, and to resubmit them to the local board secretary or charter school designee. *N.J.A.C.* 6A:28-3.4(a), *N.J.A.C.* 6A:28-3.4(b). At the expiration of twenty (20) days, or upon receipt of a filing which continues to fail to provide the information required by *N.J.S.A.* 18A:12-25 and/or *N.J.S.A.* 18A:12-26, the Commission shall issue an Order to Show Cause, directing the school official to show cause as to why the Commission should not impose a sanction. *N.J.A.C.* 6A:28-3.4(c). If the school official fails to submit a response within twenty (20) days, or if school official fails to properly file, "the Commission may regard the school official's incomplete filing as a failure to file, and the Commission shall proceed in accordance with *N.J.A.C.* 6A:28-3.3." *N.J.A.C.* 6A:28-3.4(d). As set forth in *N.J.A.C.* 6A:28-3.3(a), failure to timely file the required Disclosure Statements "shall constitute a violation of the Act, and may result in the reprimand, censure, suspension, or removal of a school official."

With the above in mind, Respondent is a returning school official and, therefore, was required to file complete Disclosure Statements by April 30, 2023. Although Respondent filed Disclosure Statements on August 16, 2023, her filing was rejected. Despite receiving reminders as further detailed below, Respondent failed to file complete Disclosure Statements.

More specifically, throughout the months of July through September, the Commission's staff sent repeated messages to the Board Secretary advising that Respondent had not yet filed complete Disclosure Statements. The electronic correspondence to the Board Secretary further advised that if Respondent failed to file complete Disclosure Statements, the Commission had the authority to issue an OTSC, find Respondent in violation of the Act, and recommend a penalty up to and including removal for non-compliance.

In addition, by electronic correspondence dated August 2, 2023, August 3, 2023, September 6, 2023, September 8, 2023, and September 12, 2023, Respondent was reminded that she did not file complete Disclosure Statements. Respondent was further advised that continued failure to file complete Disclosure Statements would result in the Commission issuing an OTSC, and recommending a penalty, up to and including removal.

When Respondent failed to file complete Disclosure Statements as required by *N.J.S.A.* 18A:12-25, *N.J.S.A.* 18A:12-26, and *N.J.A.C.* 6A:28-3.1, an OTSC was issued by the Commission at its meeting on September 26, 2023. After having been served with the OTSC, Respondent still failed to file complete Disclosure Statements, or to otherwise respond to the OTSC.

III. Decision/Penalty Recommendation

Based on the record as set forth above, and at its meeting on October 17, 2023, the Commission found that Respondent violated *N.J.S.A.* 18A:12-25, *N.J.S.A.* 18A:12-26, and *N.J.A.C.* 6A:28-3.1 because she did not file complete Disclosure Statements.

Where a violation of the Act is found by the Commission, it may recommend to the Commissioner of Education that a penalty be imposed on the school official. The recommended penalty can include a reprimand, censure, suspension or removal of the school official. *N.J.A.C.* 6A:28-3.3(a); *N.J.A.C.* 6A:28-9.11. Specifically, unless good cause is shown or the school official previously has been the subject of an OTSC, "the Commission shall recommend that a school official who completes and files the disclosure statements after the Commission issues a decision, but before the Commissioner issues a final decision, receives a suspension for 30 days." *N.J.A.C.* 6A:28-3.3(d). However, "the Commission will only recommend this penalty if the school official notifies the Commission, in writing, that the school official successfully completed and filed the disclosure statements before the Commissioner issues a final decision." *N.J.A.C.* 6A:28-3.3(d). If the school official has not filed the disclosure statements as of the date the Commissioner issues its final decision, the Commission will recommend removal of the school official from his or her position. *N.J.A.C.* 6A:28-3.3(e).

For the reasons set forth above, the Commission recommends that the Commissioner of Education impose a penalty of **removal**, with such removal to become effective immediately upon adoption by the Commissioner of Education. However, if Respondent files Disclosure Statements before the Commissioner of Education adopts a final decision (which will be within forty-five (45) days after the mailing date of this decision), then the Commission recommends that the Commissioner of Education, in lieu of removal, impose a **thirty (30) day suspension**, with such suspension to become effective immediately upon adoption by the Commissioner of Education, provided the school official provides written notice that the disclosure statement has been completed and filed.

Pursuant to *N.J.S.A.* 18A:12-29(c), this decision shall be forwarded to the Commissioner of Education for review of the Commission's recommended penalty. Respondent may either: 1) file exceptions to the recommended sanction; 2) file an appeal of the Commission's finding of a violation; or 3) file both exceptions to the recommended sanction together with an appeal of the finding of a violation.

Parties taking exception to the recommended penalty of the Commission but *not disputing* the Commission's finding of a violation may file, within **thirteen (13) days** from the date the Commission's decision is forwarded to the Commissioner, written exceptions regarding the recommended penalty to the Commissioner. The forwarding date shall be the mailing date to the parties, as indicated below. Such exceptions must be forwarded to: Commissioner of Education, c/o Bureau of Controversies and Disputes, P.O. Box 500, Trenton, New Jersey 08625, marked "Attention: Comments on Ethics Commission Sanction." as well as to (ControversiesDisputesFilings@doe.nj.gov). A copy must also be sent to the Commission (school.ethics@doe.nj.gov) and all other parties.

Parties seeking to appeal the Commission's finding of violation *must* file an appeal pursuant to the standards set forth at *N.J.A.C.* 6A:4-1 *et seq.* within **thirty (30) days** of the filing date of the decision from which the appeal is taken. The filing date shall be three (3) days after the date of mailing to the parties, as shown below. In such cases, the Commissioner's review of the Commission's recommended sanction will be deferred and incorporated into the Commissioner's review of the finding of violation on appeal. Where a notice of appeal has been filed on or before the due date for exceptions to the Commission's recommended sanction (thirteen (13) days from the date the decision is mailed by the Commission), exceptions need not be filed by that date, but may be incorporated into the appellant's brief on appeal.

Robert W. Bender

Robert W. Bender, Chairperson

Mailing Date: October 17, 2023

Resolution Adopting Decision for Failure to File Complete Personal/Relative and Financial Disclosure Statements
Docket No.: D08-23

Whereas, Respondent is a "school official," as defined in *N.J.S.A.* 18A:12-23 of the School Ethics Act (Act); and

Whereas, as a school official, Respondent was required to file Personal/Relative and Financial Disclosure Statements (Disclosure Statements) by April 30, 2023; and

Whereas, Respondent failed to file complete Disclosure Statements within the statutorily required timeframe; and

Whereas, at its meeting on September 26, 2023, the School Ethics Commission (Commission) issued an Order to Show Cause (OTSC) directing Respondent to show cause why she failed to file complete Disclosure Statements as required by *N.J.S.A.* 18A:12-25, *N.J.S.A.* 18A:12-26, and *N.J.A.C.* 6A:28-3.1; and

Whereas, Respondent failed to file complete Disclosure Statements following issuance of the OTSC; and

Whereas, Respondent failed to file a response to the OTSC; and

Whereas, at its meeting on October 17, 2023, the Commission found that Respondent violated *N.J.S.A.* 18A:12-25, *N.J.S.A.* 18A:12-26, and *N.J.A.C.* 6A:28-3.1 by failing to file complete Disclosure Statements; and

Whereas, at its meeting on October 17, 2023, the Commission recommended that the Commissioner of Education impose a penalty of removal, with such removal to become effective immediately upon adoption by the Commissioner of Education. However, if Respondent files complete Disclosure Statements before the Commissioner of Education adopts a final decision (which will be within forty-five (45) days after the mailing date of the this decision), then the Commission recommends that the Commissioner of Education, in lieu of removal, impose a thirty (30) day suspension, with such suspension to become effective immediately upon adoption by the Commissioner of Education, provided the school official provides written notice that the disclosure statement has been completed and filed.; and

Whereas, at its meeting on October 17, 2023, the Commission agreed that the within decision accurately memorializes its findings and recommendations; and

Now Therefore Be It Resolved, that the Commission hereby adopts the within decision and directs its staff to notify all parties to this action of the decision.

Robert W. Bender

Robert W. Bender, Chairperson

I hereby certify that the within Resolution
was duly adopted by the School Ethics Commission
at a meeting on October 17, 2023.

Brigid C. Martens

Brigid C. Martens, Acting Director
School Ethics Commission

348-23
OAL Dkt. Nos. EDU 00249-21, 03718-21
Agency Dkt. No. 248-12/20, 47-3/21

New Jersey Commissioner of Education

Final Decision

Board of Education of the City of Vineland, Cumberland County,

Petitioner,

v.

Board of Education of the Cumberland County Vocational School District, Cumberland County,

Respondent.

AND

Board of Education of the City of Vineland, Cumberland County,

Petitioner,

v.

Cumberland County Board of Vocational Education, Cumberland County,

Respondent.

The record of this matter, the proposed Settlement Agreement and Release (Agreement), the Initial Decision issued by the Office of Administrative Law pursuant to *N.J.A.C.* 1:1-19.1, the exceptions filed by the Vineland Board of Education (Vineland) pursuant to *N.J.A.C.* 1:1-18.4, and the reply thereto filed by the Cumberland County Vocational School District Board of Education (Cumberland), have been reviewed and considered.

This matter arises out of a dispute between the parties regarding tuition for students sent by Vineland to Cumberland pursuant to a sending-receiving agreement. On October 16, 2023, Administrative Law Judge (ALJ) Kim C. Belin issued an Initial Decision approving a settlement

agreement between the parties. On October 25, 2023, Vineland filed a motion to enforce the settlement with the ALJ. On November 6, 2023, Vineland filed exceptions to the Initial Decision, requesting that the Commissioner decline to affirm the ALJ's Initial Decision until the motion to enforce the settlement was decided. Vineland also resubmitted the motion to enforce the settlement for the Commissioner's consideration. Cumberland replied to Vineland's exceptions, arguing that there is currently no dispute between the parties that requires resolution by the Commissioner.

Upon review, the Commissioner finds that Vineland's motion to enforce the settlement is premature. A settlement of litigation before the Commissioner is not binding until the Commissioner has approved the settlement. Accordingly, until the issuance of the decision herein, there was no settlement to be enforced.

Furthermore, pursuant to *N.J.A.C.* 6A:3-3.1(b), parties seeking enforcement of judgments of the Commissioner shall bring an action in Superior Court. If Vineland believes that Cumberland has violated the now-approved settlement, Vineland may bring an action in Superior Court. To the extent that there is a need for further determination on a school law issue, Vineland may file a new petition of appeal in accordance with *N.J.A.C.* 6A:3-3.1(b)(1).

In light of the foregoing, the Commissioner adopts the Initial Decision approving the settlement agreement as the final decision in this matter.

IT IS SO ORDERED.

Angelica Allen-McMillan, Ed.D.

ACTING COMMISSIONER OF EDUCATION

Date of Decision: November 27, 2023
Date of Mailing: November 30, 2023

State of New Jersey
OFFICE OF ADMINISTRATIVE LAW

INITIAL DECISION
SETTLEMENT

CITY OF VINELAND
BOARD OF EDUCATION,
CUMBERLAND COUNTY
Petitioner,
v.
CUMBERLAND COUNTY
VOCATIONAL SCHOOL DISTRICT
BOARD OF EDUCATION, CUMBERLAND COUNTY.
Respondent,

OAL DKT. NO. EDU 00249-21
AGENCY DKT. NO. 248-12/20

And

CITY OF VINELAND
BOARD OF EDUCATION,
CUMBERLAND COUNTY
,
Petitioner,
v.
CUMBERLAND COUNTY,
BOARD OF EDUCATION.
Respondent.

OAL DKT. NO. EDU 03718-21
AGENCY DKT. NO. 47-3/21

Robert A. DeSanto, Esq., for petitioners (Gruccio, Pepper, De Santo & Ruth, P.A., attorneys)

Kerri A. Wright, Esq., for respondents (Porzio, Bromberg, & Newman PC, attorneys)

Record Closed: October 10 2023 Decided: October 16, 2023

BEFORE **KIM C. BELIN**, ALJ:

This case arises under the Individuals with Disabilities Education Act, 20 U.S.C. §§1400 to 1482. The parties have voluntarily agreed to resolve all disputed matters and have entered into a settlement as set forth in the attached document.

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

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

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

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

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

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

October 16, 2023 — Kim C. Belin
DATE — **KIM C. BELIN**, ALJ

Date Received at Agency: October 23, 2023

Date Sent to Parties: October 23, 2023

KCB/am

SETTLEMENT AGREEMENT AND RELEASE

This Settlement Agreement and General Release ("Agreement") is made and entered into by and between the **Cumberland County Board of Vocational Education ("Cumberland"),** on the one hand, **and the City of Vineland Board of Education ("Vineland")** (collectively "the Parties") on the other, including their affiliates, predecessors, successors or assigns, and their respective officers, directors, trustees, representatives, agents and employees, in full settlement of all claims arising from the Parties' tuition contracts from the 2007-2008 through 2020-2021 school years.

WITNESSETH

WHEREAS, Vineland and Cumberland are parties to a send-receive relationship whereby Cumberland receives students from Vineland in exchange for tuition payments; and

WHEREAS, the reimbursement process for the payment of this tuition is provided via statute, and is a multi-year process under which the Parties enter into annual tentative tuition agreements, the Department of Education sets a certified tuition rate, and the Parties later true up the difference between the tentative tuition rate and the certified rate; and

WHEREAS, a dispute arose between the Parties regarding the tuition reimbursement process for the years from 2007-2008 through 2020-2021, which resulted in Vineland filing three petitions of appeal with the Commissioner of Education bearing OAL docket numbers EDU 00249-21; EDU 003718-21; and EDU 02861-22; and

WHEREAS, the Parties engaged in mediation with the Honorable Barry E. Moscowitz, Acting Director of the Office of Administrative Law & Chief A.L.J., on May 15, 2023, and June 20, 2023; and

WHEREAS, the Parties desire to resolve amicably any and all claims which were or could have been asserted in connection with their tuition contracts and their send-receive relationship generally for the years in question in accordance with the terms agreed to at mediation and memorialized by the term sheet signed by the Parties' representatives and counsel on June 20, 2023, and attached hereto as **Exhibit "A."**

NOW, THEREFORE, in consideration of the mutual covenants and agreements contained herein, the Parties agree as follows:

1. **Tuition Credits**. Cumberland hereby agrees to remit to Vineland the amount of $1,900,000, which shall be payable as two equal tuition credit installments. The first credit of $950,000 shall be provided in September 2023; the second tuition credit of $950,000 shall be provided in September 2024.

2. **General Release And Waiver**. In exchange for the tuition credit provided in Section 1, as well as the other valuable consideration set forth herein, the Parties hereby mutually, irrevocably and unconditionally release, relinquish, and give up any and all claims and rights,

whether known or unknown, of any nature whatsoever, they may have against each other for any damages, losses, protections, injuries, equitable relief and/or attorneys' fees stemming from their tuition contracts for the years from 2007-2008 through 2020-2021, and from the three petitions of appeal filed by Vineland bearing OAL docket numbers EDU 00249-21; EDU 003718-21; and EDU 02861-22. The Parties agree that this mutual General Release and Waiver releases any and all claims stemming from the tuition contracts for the years 2007-2008 through 2020-2021 and from the above-referenced petitions filed by Vineland, and that have accrued on or before the Agreement is executed by the Parties, regardless of whether specifically referenced above, whether known or unknown, to the fullest extent permitted by law. The Parties further agree that the mutual releases contained in this Agreement shall apply to their employees, attorneys, agents, servants, representatives, predecessors and successors, insurance carriers, and all other persons or entities for whom any of the above have been or may be legally responsible.

3. **Publicity**. The Parties agree that neither they nor their respective board members, employees, or other agents, shall take any action to publicize this matter, discuss the terms of this matter, or otherwise to speak publicly about this matter, including, but not limited to, taking actions such as making or providing statements to the press, or making public announcements during a board meeting. Public discussion of this matter shall be limited to those discussions or proclamations made at a public board meeting as required by law

4. **Public Records**. The Parties agree that neither they nor their respective board members, employees, or other agents, shall take any action, either on their own behalf or by using, soliciting, or encouraging any other person, to request this Agreement or other documents relating to this Agreement, through the Open Public Records Act, the common law right of access, or any other public records statute, ordinance, or common law right.

5. **Recommendation of Ratification**. The Parties' respective Attorneys, Superintendents, and Board Presidents agreed during mediation on June 20, 2023, as memorialized in the signed term sheet attached hereto as **Exhibit "A"**, that they shall recommend to their respective Boards of Education that the Boards ratify this Agreement. The Parties' representatives further affirmed, as provided in the term sheet attached hereto as **Exhibit "A,"** that they conferred with their respective boards of education Presidents who have been updated on the terms of this Agreement and agree to support this Agreement before their respective full board.

6. **Tuition for the 2021-2022 School Year**. Notwithstanding the terms of this Agreement, Vineland shall be entitled to the amount of $296,259.25 for the 2021-2022 school year, which shall be provided as a credit to Vineland in September 2023. The Parties agree that this amount represents the total amount owed by Cumberland for the 2021-2022 school year.

7. **No Addmission of Fault**. The Parties agree that they have entered into this Agreement in order to resolve this dispute amicably and to avoid the uncertainties of continued litigation. Accordingly, this Agreement may not be used to establish precedent in any future proceeding of any type whatsoever and it shall be inadmissible in any such proceeding, other than a proceeding to enforce or prove the existence of same. This Agreement shall not be construed as an admission by the Parties of any wrongdoing. Neither Party shall be deemed a prevailing party, nor shall any party be entitled to recovery of attorneys' fees and costs in connection with this matter.

8. **Board Resolution**. The Parties' respective boards of education shall pass the following resolution approving the terms of this Agreement:

RESOLUTION APPROVING SETTLEMENT

BE IT RESOLVED that the _____ Board of Education hereby approves the Settlement Agreement and Release on file with the Board Secretary regarding the pending matters before the Commissioner of Education bearing OAL docket numbers EDU 00249-21; EDU 003718-21; and EDU 02861-22; and authorizes the Board President, Superintendent of Schools, Business Administrator, and Board Attorney to take all actions necessary to effectuate this resolution.

9. **General Provisions**.

a. This Settlement Agreement and General Release, including the attached **Exhibit "A,"** constitutes the sole and entire agreement between the Parties, and fully supersedes any and all prior agreements and understanding between the Parties pertaining to the subject matter of the Agreement. No other promises or agreements shall be binding unless in writing, signed by the Parties, and expressly stated to be a modification of this Agreement. This Agreement may not be modified except by a mutually signed writing after the effective date of this Agreement.

b. The Parties acknowledge that they have been assisted by legal counsel in the preparation of this Agreement and agree, therefore, that any uncertainty or ambiguity shall not be construed for or against any Party based on attribution of drafting to any Party.

c. The terms and provisions of this Agreement are acknowledged by the Parties to be required for the reasonable protection of the other. If any of the provisions, terms, clauses, or waivers or releases of claims or rights contained in this Settlement Agreement are declared unlawful, unenforceable, or ineffective in a legal forum of competent jurisdiction, then such provisions, terms, clauses, or waivers or releases of claims or rights shall be deemed severable, such that all other provisions, terms, clauses, and waivers and releases of claims or rights contained in this Agreement shall remain valid and binding upon the Parties. Notwithstanding the forgoing, if the provisions of Section 1 or Section 2 of this Agreement are found to be unenforceable, in whole or in part, both Parties agree to execute new terms for these Sections that are enforceable.

d. In addition to or in lieu of any other remedy set forth herein, if any Party fails to perform an obligation under this Agreement, a cause of action for the enforcement of such obligation may be deemed to arise within the exclusive jurisdiction of the Commisioner of Education of the State of New Jersey, to the extent the dispute arises from interpretation of the school laws of the State of

New Jersey, or the Superior Court of the State of New Jersey, as the case may be. The Parties further agree that any legal proceeding arising out of or related to this Agreement shall be governed by New Jersey law.

e. This Agreement may be executed in counterparts, each of which shall be deemed an original, but all of which taken together shall constitute one and the same instrument. Delivery of an executed counterpart by facsimile, email or other electronic means will be effective as delivery of a manually executed counterpart.

f. The Parties and their agents are bound by this Settlement Agreement. Those who succeed to their rights and responsibilities, such as heirs, successors in interest, or their personal or legal representatives, are also bound.

g. The Parties agree that neither they nor their attorneys, nor representatives shall reveal to anyone, other than their attorney or as otherwise required by law, verbally or in writing, other than as may be mutually agreed to in writing, any of the terms of this Agreement.

IN WITNESS WHEREOF, the Parties have hereunto set their hands and seals the date and year aforesaid.

Ruth Hands

Ruth Hands, Board President
Cumberland County Board of
Vocational Education

Dated: 6/29/23

_____

Meghan Spinelli, Board President
Vineland Board of Education

Dated: _____

New Jersey, or the Superior Court of the State of New Jersey, as the case may be. The Parties further agree that any legal proceeding arising out of or related to this Agreement shall be governed by New Jersey law.

e. This Agreement may be executed in counterparts, each of which shall be deemed an original, but all of which taken together shall constitute one and the same instrument. Delivery of an executed counterpart by facsimile, email or other electronic means will be effective as delivery of a manually executed counterpart.

f. The Parties and their agents are bound by this Settlement Agreement. Those who succeed to their rights and responsibilities, such as heirs, successors in interest, or their personal or legal representatives, are also bound.

g. The Parties agree that neither they nor their attorneys, nor representatives shall reveal to anyone, other than their attorney or as otherwise required by law, verbally or in writing, other than as may be mutually agreed to in writing, any of the terms of this Agreement.

IN WITNESS WHEREOF, the Parties have hereunto set their hands and seals the date and year aforesaid.

Ruth Hands, Board President
Cumberland County Board of
Vocational Education

Dated:_____

Meghan Spinelli

Meghan Spinelli, Board President
Vineland Board of Education

Dated: 07/12/2023

7382780

EXHIBIT A

Term Sheet

City of Vineland Board of Education v. Cumberland County Board of Vocational Education

Agreed Upon At Mediation, June 20, 2023

The parties hereby agree that Cumberland shall remit to Vineland the amount of $1,900,000. This amount shall be payable as two equal tuition credit installments. The first credit of $950,000 shall be provided in September 2023, the second tuition credit of $950,000 shall be provided in September 2024.

In exchange for the above tuition credit, the parties hereby agree to release each other, as well as their successors, agents, and assigns from any and all claims, known or unknown, relating to the parties' tuition contracts from 2007-2008 through 2020-2021, and from the three presently pending petitions of appeal filed by Vineland.

The parties agree that neither they nor their respective board members, employees, or other agents shall take any action to publicize this matter or to otherwise speak publicly about this matter, except at a public board meeting as required by law.

The parties agree that neither they nor their respective board members, employees, or other agents, shall take any action, either on their own behalf or by using, soliciting, or encouraging any other person, to request the parties' settlement agreement or other documents relating to the settlement agreement, through the Open Public Records Act, the common law right of access, or any other public records statute, ordinance, or common law right.

By entering into this agreement, neither party admits to any unlawful or wrongful act, nor admits to any fault or liability.

The parties' respective Attorneys, Superintendents, and Board presidents agree that they shall recommend to their respective Boards of Education that the Boards ratify this agreement as set forth in this term sheet and in any formalized settlement agreement based on the terms of this term sheet. The parties acknowledge that they have conferred with their respective boards of education presidents who have been updated on this settlement and agree to support this settlement before their respective full board.

Notwithstanding the terms of this term sheet, Vineland shall be entitled to the amount of $296,259.25 for the 2021-2022 school year, which shall be provided as a credit to Vineland in September 2023.

The terms of this term sheet shall be subject to approval by each parties' board of education.

M. Rosa, Ed.D.

For Cumberland
Superintendent
Dated: June 20, 2023

For Vineland
Superintendent
Dated June 20, 2023

7730869

For Cumberland
Business Administrator
Dated: June 20, 2023

For Vineland
Business Administrator
Dated June 20, 2023

For Cumberland
Board Attorney
Dated: June 20, 2023

For Vineland
Board Attorney
Dated June 20, 2023

7380869

349-23

New Jersey Commissioner of Education

Final Decision

E.C.-G., on behalf of A.J.G.,

Petitioner,

v.

Board of Education of the City of Jersey City, Hudson County,

Respondent.

Synopsis

Pro se petitioner filed a petition on June 20, 2023, seeking emergent relief against the respondent Board in the form of an Order requiring the District to allow her son A.J.G. to graduate with a diploma at the scheduled commencement ceremony on June 23, 2023. Emergent relief was denied, and the matter was continued at the Office of Administrative Law (OAL) in order to bring the matter to closure.

The ALJ found that: at the conclusion of the emergent hearing, A.J.G. was required to complete his missing credits over the summer in order to receive his diploma; a status conference was held in August 2023 and petitioner confirmed that A.J.G. had earned the required credits and received his diploma in time to begin college; petitioner also confirmed that she was seeking no other relief, and agreed that the rest of the petition would be withdrawn from the OAL; to date, petitioner has not submitted a formal written or electronic confirmation of her withdrawal of the case. The ALJ concluded that the petitioner has abandoned her appeal and returned the file to the Department of Education.

Upon review, the Commissioner concurred with the ALJ that this matter should be dismissed as the petitioner has indicated that no issues remain to be addressed following the resolution of her motion for emergent relief. Accordingly, the Initial Decision of the OAL was adopted as the final decision in this matter and the petition was dismissed.

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

349-23
OAL Dkt. No. EDU 05399-23
Agency Dkt. No. 165-6/23

New Jersey Commissioner of Education

Final Decision

E.C.-G., on behalf of A.J.G.,

Petitioner,

v.

Board of Education of the City of Jersey City, Hudson County,

Respondent.

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

Upon review, the Commissioner concurs with the Administrative Law Judge that this matter should be dismissed because the petitioner indicated that no issues remain to be addressed following the resolution of her motion for emergent relief.

Accordingly, the Initial Decision is adopted as the final decision in this matter, and the petition of appeal is hereby dismissed.

IT IS SO ORDERED.[1]

Angelica Allen-McMillan, Ed.D.
ACTING COMMISSIONER OF EDUCATION

Date of Decision: November 27, 2023
Date of Mailing: November 29, 2023

[1] This decision may be appealed to the Appellate Division of the Superior Court pursuant to *N.J.S.A.* 18A:6-9.1. Under *N.J.Ct.R.* 2:4-1(b), a notice of appeal must be filed with the Appellate Division within 45 days from the date of mailing of this decision.

State of New Jersey
OFFICE OF ADMINISTRATIVE LAW

INITIAL DECISION
FAILURE TO APPEAR
OAL DKT. NO. EDU 05399-23
AGENCY DKT. NO. 165-6/23

E.C.-G. ON BEHALF OF MINOR CHILD A.J.G.,
Petitioner,
v.
BOARD OF EDUCATION OF THE CITY OF JERSEY CITY, HUDSON COUNTY,
Respondent.

E.C.-G., o/b/o **A.J.G.** petitioner pro se

Cherie L. Adams, Esq., for respondent Board of Education of the City of Jersey City (Adams, Gutierrez and Lattiboudere, attorneys)

Record Closed: September 21, 2023 Decided: October 25, 2023

BEFORE **GAIL M. COOKSON**, ALJ:

STATEMENT OF THE CASE

Petitioner E.C.-G. filed a Petition of Appeal electronically with the Department of Education on Sunday, June 18, 2023, and perfected it on June 20, 2023, seeking emergent relief against the Board of Education of the City of Jersey City (Jersey City or District) in the

form of an Order requiring the District to allow her son A.J.G. to graduate with a diploma and at the commencement ceremony scheduled for tomorrow, Friday, June 23, 2023.

PROCEDURAL HISTORY

The Department of Education, Office of Controversies and Disputes (DOE), transmitted the Application for Emergent Relief to the Office of Administrative Law (OAL) on June 20, 2023. The matter was assigned to the undersigned for oral argument and was scheduled for June 22, 2023. On that date, I entered an oral decision on the record in order to facilitate expedited review by the Commissioner, which was then memorialized in a written Order of the same date, incorporated herein without the necessity of repetition. I denied the requested emergent relief and did not require the District to allow petitioner's son to graduate and participate in the ceremony in June. Instead, he was required to complete some credits over the summer, at which time he would receive his diploma.

Following the completion of the emergent aspects of this matter, I convened a status conference on August 21, 2023, in order to determine if the summer credits had been earned and petitioner's son had received his diploma in time for begin college. Petitioner confirmed that her son did receive his diploma and that there was no other relief she was seeking. She agreed that the rest of the petition would be withdrawn from the OAL. Accordingly, my office sent several reminders in August and September to petitioner that we were awaiting her written or electronic confirmation of her withdrawal of the case. We received no response from any of these requests.

CONCLUSIONS OF LAW

N.J.A.C. 1:1-14.4(a) provides that if, after appropriate notice, a party does not appear in any proceeding scheduled by a judge, the judge shall hold the matter for one day before taking any action. If the judge does not receive an explanation, the judge may direct the Clerk to return the matter to the transmitting agency for appropriate disposition. Petitioner has failed to formally "withdraw" her petition but did so indicate on the telephonic conference call that she had no other issues needing to be tried. Based on

the foregoing facts and the applicable law, I **CONCLUDE** that petitioner E.C.-G. has abandoned this appeal and that it should be returned to the transmitting agency.

ORDER

Based upon the foregoing, it is **ORDERED** that the appeal filed by petitioner E.C.-G. for relief against the respondent Board of Education of the City of Jersey City be returned to the Department of Education for appropriate disposition.

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

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

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

Gail M. Cookson

October 25, 2023
DATE

GAIL M. COOKSON, ALJ

Date Received at Agency: 10/25/23

Date Mailed to Parties: 10/25/23

id

STATE OF NEW JERSEY
DEPARTMENT OF EDUCATION

IN THE MATTER OF TENURE CHARGES	)	
	)	
- against -	)	
	)	
SANYIKA MONTAGUE,	)	OPINION
Respondent Teacher	)	AND
	)	AWARD
- filed by -	)	
	)	
BOARD OF EDUCATION OF THE CITY OF NEWARK,	)	
Petitioner	)	
	)	
AGENCY DOCKET NO. 221-8/22	)	

Before: Robert T. Simmelkjaer, Esq.
Arbitrator

APPEARANCES

FOR THE PETITIONER BOARD OF EDUCATION

Adam S. Herman, Esq., Adams Gutierrez & Lattiboudere, LLC

FOR THE RESPONDENT

Colin M. Lynch, Esq., Of Counsel, Zazzali, Fagella, Nowak Kleinbaum & Friedman

STATEMENT OF THE CASE

This case arises under the Teacher Effectiveness and Accountability for the Children of New Jersey Act ("TEACHNJ") N.J.S.A. 18A:6-11 and N.J.A.C. 6A:3-5.1. The instant case involves a tenure charge of inefficiency filed by the City of Newark Board of Education ("Petitioner" or "District") against Sanyika Montague ("Respondent"), who is a tenured teacher assigned to the Rafael Hernandez Elementary School.

Pursuant to N.J.S.A. 18:6A-10, "No person shall be dismissed or reduced in compensation...if he is or shall be under tenure of office, position or employment during good behavior and efficiency in the public school system of the state...except for inefficiency, unbecoming conduct or other just cause." Inefficiency charges are governed by TEACHNJ.

TEACHNJ provides, in pertinent part, that if a classroom teacher receives annual summative ratings of Partially Effective and Ineffective in two (2) consecutive school years s(he) will be subject to a tenure charge of inefficiency. N.J.S.A. 18A:6-17.2(d) places the "ultimate burden" on the District "of demonstrating to the arbitrator that the statutory criteria for tenure charges have been met." In addition, the ACT provides that "[t]he only evaluations which may be used for the purposes of this section are those evaluations conducted in accordance with a rubric adopted by the board and approved by the Commissioner pursuant to P.L. 2012, C.26 (C.18A:6-117 et al.)." N.J.S.A. 18A:6-17.3.

Respondent earned the rating of "Partially Effective" for the 2020-2021 school year and the rating of "Ineffective" for the 2021-2022 school year.

When inefficiency charges are certified to the New Jersey Commissioner of Education and then transmitted to an Arbitrator, said tenure charges are subject to a limited scope of review. The Arbitrator's jurisdiction is expressly circumscribed by Section 23 of TEACHNJ. S(he) is "precluded from reviewing any evaluator's determination of the quality of her classroom performance, including the findings and conclusions in the observation report upon which the District has based its charge of inefficiency against her." In other words, "an Arbitrator is precluded from modifying [Respondent's] classroom observations, Mid-Year Reviews and Annual Summative Evaluations."

In the event, the District can meet its burden by a preponderance of the evidence, then pursuant to N.J.S.A. 18A:6-17.2, the ACT provides several statutory defenses to a tenure charge alleging inefficiency in teacher performance as follows:

As set forth in the TEACHNJ statute:

a. In the event that the matter before the arbitrator pursuant to section 22 of this act is employee inefficiency pursuant to section 25 of this act, in rendering a decision the arbitrator shall only consider whether or not:

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

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

(3) The charges would not have been brought but for considerations of political affiliation, nepotism, union activity,

discrimination as prohibited by state or federal law, or other conduct prohibited by state or federal law; or

(4) The district's actions were arbitrary and capricious.

b. In the event that the employee is able to demonstrate that any of the provisions of paragraphs (1) through (4) of subsection a. of this section are applicable, the arbitrator shall then determine if that fact materially affected the outcome of the evaluation. If the arbitrator determines that it did not materially affect the outcome of the evaluation, the arbitrator shall render a decision in favor of the board and the employee shall be dismissed.

c. The evaluator's determination as to the quality of an employee's classroom performance shall not be subject to an arbitrator's review.

NEWARK BOARD OF EDUCATION TEACHER OBSERVATIONS AND EVALUATIONS

A. Framework of Effective Teaching Evaluative System

The Framework for Effective Teaching Guidebook outlines the process through which administrators in the Newark School District support and evaluate teachers in their professional practice. The Guidebook is the result of a collaborative process between the District and the Newark Teachers Union. This collaborative process was described by the District's Superintendent:

> Over the past year, we worked together with the teachers' union to review and revise the Framework for Effective Teaching. We believe this updated framework results in an improved evaluation of a teacher's practice over the course of the school year because it is informed by class observations, student outcomes and professional behavior. The Competencies and Indicators of the framework describe the actions that effective and highly effective teachers possess to move students toward mastery of standards and college and career readiness. Consequently, the framework provides a roadmap for coaching as well as a measure for evaluation. (D. Exs. #24 and #25).

When the Framework for Effective Teaching was developed, the District designed it with inputs from educators addressing the following themes:

- **Teaching for student mastery:** The Framework focuses attention on both teacher behaviors and student actions that lead to student mastery of content. The Framework focuses not just on what is being taught, but whether or not students are actually learning the content and concepts presented.

- **High expectations:** The Framework requires that teachers hold high expectations for all students to achieve at high levels. This includes establishing learning goals that reflect the critical thinking skills that will put students in the pathway to college, providing evidence-based feedback to students, and effectively interacting with students to establish a culture and expectation that all students can and will master the content.

- **Elements observable in one lesson and over the course of the year:** NBOE recognizes that individuals, discrete classroom observations do not provide the complete picture of a teacher's performance and students' success at mastering content. As such, the Framework articulates both behaviors that are observable in an individual classroom lesson as well as behaviors that are observable over the course of the school year. This over-time guidance allows teachers and observers to identify and assess teacher behaviors and student actions that, as they build over the course of the year, lead to student mastery.

- **Accommodating individual needs:** Teachers should tailor instruction to address the diverse needs of all students and move all students toward mastery. This requires that teachers build relationships with their students and learn how to motivate and engage all students. Many students have special needs, which may be intellectual, emotional or physical. Each type of difference suggests different accommodations, from selecting instructional goals and designing instruction, to interacting with students and designing classroom norms. The Framework allows for, and encourages, this differentiation as critical to a teacher's practice.

The Guidebooks are distributed at the beginning of the year to all teachers. An electronic version of the Guidebook is posted on the District

website. Teachers and administrators receive training on all aspects of Competencies and Indicators. (Tr. @ 710-713 – 3128/23).

A. COMPETENCIES INCLUDING IN THE RUBRIC.

The structure of the Framework includes five (5) competencies, which set forth the overall expectations for each District teacher. These five (5) competencies, which are the core professional standards to which teachers will be held accountable, are:

- Competency 1 – Lesson Design and Focus: Students sustain focus on a specific, standards-aligned objectives that moves them toward mastery. Competency 1 outlines behaviors that ensure students are focused on the right content, in the right order, at the right pace. The Indicators associated with this Competency assess whether the teacher's lesson design and execution is effective in focusing students on a clear and appropriate objective *today* while driving students toward mastery of grade level standards over time. Competency 1 includes four individual Indicators and two over the course of a year Indicators.
- Competency 2 – Rigor and Inclusiveness: Instructional strategies challenge all students and provide multiple pathways to mastery. Competency 2 sets forth expectations for the rigor of the teacher's instruction, the learning demands on students, and the strategies the teacher uses to deliver content. This Competency ensures a rigorous classroom and articulates the characteristics of an inclusive classroom.

Competency 2 includes four individual lesson Indicators and two over the course of a year Indicators.

- Competency 3 – Culture of Achievement: A learning-focused environment of shared high expectations promotes mastery. The Guidebook makes clear that the most effective classrooms have strong classroom cultures. Competency 3 includes four individual lesson Indicators and two over the course of a year Indicators.
- Competency 4 – Student Progress Toward Mastery: Students show evidence of, and teacher monitors, growth. The Guidebook makes clear that in the District teachers are accountable for whether or not students learn – which is the ultimate focus as educators. This Competency sets forth mechanisms to identify whether students are learning. This Competency requires evidence of significant student growth and for teachers to measure, track and share information regarding progress. Competency 4 includes three individual lesson Indicators and three over the course of a year Indicators.
- Competency 5 – Commitment to Personal and Collective Excellence: The teacher demonstrates commitment to excellence and to the professional growth of his/her school and peers. This Competency articulates expectations for the teacher to prioritize the continuous improvement of his or her own practice and that of his or her peers. The Competency further articulates baseline expectations of professional behavior and

compliance with basic employment policies. Competency 5 includes 4 over the course of a year Indicators.

B. INDICATORS INCLUDED IN THE RUBRIC

Indicators describe specific components or behaviors of the particular Competency. Indicators can be observed during individual lessons or over the course of the year. Competencies 1 through 4 include both in-one-lesson indicators and over-time indicators. Competency 5 includes only over-time Indicators. (D. Exs. #24, #25).

Competency 1 – Lesson Design and Focus: As set forth in the Guidebook for Teachers and Administrators, this Competency outlines how students sustain focus on a specific objective that moves the forward toward mastery. (Exhibits D-24 and D-25). Competency 1 outlines behaviors that ensure students are focused on the right content, in the right order, at the right pace. (D Exs. #-24 and #24); (Tr. @ 717-733).

The below listed indicators assess whether the teacher's lesson design is effective in focusing students on a clear and appropriate objective today while driving students toward mastery of grade level standards over time. (D Exs. # 24 and #25).

- **Indicator 1a – Lesson Sequence:** Individual, standards-aligned lessons build on previous lessons and on students' prior knowledge. This indicator is an "in an individual lesson" indicator.
- **Indicator 1b – Lesson Components:** Lesson components are standards-aligned and move students toward mastery of an objective that

is aligned to essential understandings in the standards. This indicator is an "in an individual lesson" indicator.

- **Indicator 1c – Pacing and Momentum:** Teacher maximizes learning time. This indicator is an "in an individual lesson" indicator.
- **Indicator 1d – Clarity:** Teacher clarity and accurately communicates content and instructions. This indicator is an "in an individual lesson" indicator.
- **Indicator 1e – Coherent Planning:** Lesson plans are also standards-based, grade-level appropriate, and reflect work towards annual student achievement goals. Lesson plans are, when applicable, collaboratively developed with other staff who will be helping to implement the lesson plan. This indicator is an "over the course of a year" indicator.
- **Indicator 1f – Progression of Instruction:** Lesson objectives fit into a larger, coherent sequence that leads to student mastery of the appropriate standards. This indicator is an "over the course of a year" indicator.

Competency 2 – Rigor and Inclusiveness: As set forth in the Guidebook for Teachers and Administrators, this Competency outlines how instructional strategies challenge all students and provide multiple pathways to mastery. (D Exs.#24 and #25). Competency 2 articulates expectations for the rigor of the teacher's instruction, the learning demands on students and the strategies the teacher uses to deliver content. (D Exs.#24 and #25).

The below listed indicators assess and ensure a rigorous and inclusive classroom, which means that the teacher is expected to tailor instructional

strategies to meet the learning needs of all students and holds all students to a high standard. (D Exs. #24 and #25).

- **Indicator 2a – Tailored Instruction:** Teacher tailors instruction to move all students toward mastery. This indicator is an "in an individual lesson" indicator.
- **Indicator 2b – Questions & Tasks:** Questions & Tasks ensure student comprehension and ask for application, analysis and/or synthesis. This indicator is an "in an individual lesson" indicator.
- **Indicator 2c – Responsiveness:** Teacher anticipates and responds to student reactions and misunderstandings by adjusting instructional strategies. This indicator is an "in an individual lesson" indicator.
- **Indicator 2d – Precision & Evidence:** Teacher and students require Precision & Evidence in tasks and responses. This indicator is an "in an individual lesson" indicator.
- **Indicator 2e – Revisions:** Student work includes revisions based on teacher and some peer feedback, especially revised explanations and justifications to demonstrate student movement towards mastery. This indicator is an "over the course of a year" indicator.
- **Indicator 2f – Depth of Knowledge:** Lesson objectives, tasks and materials require students to demonstrate the following skills: Recall & Reproduction; Basic Application of Concept; Strategic Thinking; and Extended Thinking. This indicator is an "over the course of a year" indicator.

Competency 3 – Culture of Achievement: As set forth in the Guidebook for Teachers and Administrators, this Competency outlines how a learning-focused environment of shared high expectations promotes mastery. (D Exs. #24 and # 25).

The below listed indicators assess whether there is explicit, positive interpersonal norms; rigorous instruction that builds students' abilities to persist through difficult concepts and tasks; strong processes that maximize instructional time; and joy in learning. (D Exs. #24 and #25).

- **Indicator 3a – Active Engagement in Learning:** Students express satisfaction as they solve problems and master new material. This indicator is an "in an individual lesson" indicator.
- **Indicator 3b – Persistence:** Students show persistence in confronting demanding concepts and tasks. This indicator is an "in an individual lesson" indicator.
- **Indicator 3c – Community:** Classroom norms promote positive and productive teacher-student and student-student relationships. This indicator is an "in an individual lesson" indicator.
- **Indicator 3d – Attention:** Teacher's strategies and routines capture and maintain student attention on learning. This indicator is an "in an individual lesson" indicator.
- **Indicator 3e – High Expectations:** The teacher fosters a classroom culture that is consistently one of high expectations and hard work. This indicator is an "over the course of a year" indicator.

- **Indicator 3f – Peer Accountability:** Students hold themselves and their peers accountable for learning and supporting the culture of the classroom. This indicator is an "over the course of a year" indicator.

Competency 4 – Student Progress Towards Mastery: As set forth in the Guidebook for Teachers and Administrators, this Competency outlines how students show evidence of, and the teacher monitors, growth. (Exhibits D-24 and D-25). This competency further outlines mechanisms for identifying whether students are learning in one lesson and over the course of the year, as teachers are accountable for whether or not students learn. (Exhibits D-24 and D-25).

The below listed indicators assess whether there is evidence of significant student growth. Which may include mastery of grade-level content, progression towards mastery, or in some cases, mastery of content beyond the students' current grade level. (D Exs. #24 and #25).

- **Indicator 4a – Checks for Understanding:** Teacher consistently checks for understanding. This indicator is an "in an individual lesson" indicator.
- **Indicator 4b – Feedback:** Teacher and students give and receive timely, specific, and constructive feedback. This indicator is an "in an individual lesson" indicator.
- **Indicator 4c – Demonstration of Learning:** Students know more at the end of the year than they did at the start. This indicator is an "in an individual lesson" indicator.
- **Indicator 4d – Using Data:** Teacher tracks assessment data to understand each student's progress towards mastery and uses results to

guide planning and instruction. This indicator is an "over the course of a year" indicator.

- **Indicator 4e – Understanding of Growth:** Teacher can articulate specifically (and with evidence) whether or not each student has met grade-level standards and, if not, what they still need to learn. This indicator is an "over the course of a year" indicator.
- **Indicator 4f – Progress Toward Goals:** Data reflects that students are progressing towards mastery of the objectives of the focus areas, leading towards mastery of grade-level standards. This indicator is an "over the course of a year" indicator.

Competency 5 – Commitment to Personal and Collective Evidence: As set forth in the Guidebook for Teachers and Administrators, this Competency outlines the baseline expectations of professional behavior in any field and compliance with basic employment policies. (D Exs. #24 and #25).

The below listed indicators articulate expectations for the teacher to prioritize the continuous improvement of his or her own practice and that of his or her peers. (D Exs. #24 and #25).

- **Indicator 5a – Commitment to Continuous Improvement:** The teacher accurately self-assesses strengths and substantive growth areas, seeks and incorporates feedback from others, and actively engages in their own growth and development. This indicator is an "over the course of a year" indicator.

- **Indicator 5b – Collaboration:** The teacher contributes ideas and expertise to further colleagues' and the school's growth and incorporates productive insights into their own instruction. This indicator is an "over the course of a year" indicator.
- **Indicator 5c – Communication of Student Progress:** Teacher communicates student progress clearly and consistently to students, families, and school leaders. This indicator is an "over the course of a year" indicator.
- **Indicator 5d – Attendance and Promptness:** The teacher is present and prompt and attendance reflects their focus on student learning as a priority. This indicator is an "over the course of a year" indicator.

C. LEVELS OF PERFORMANCE INCLUDED IN THE RUBRIC.

As set forth in the Guidebook for Teachers and Administrators, descriptors identify evidence of the Indicator at each of the four levels of performance: highly effective, effective, partially effective and ineffective. (D Exs. #24 and #25). Specifically:

- **Highly Effective:** a Highly Effective teacher ensures exceptional rates of student growth. Such classrooms consist of a community of learners with highly motivated and engaged students who assume considerable responsibility for their own learning. Highly Effective teachers have the knowledge, skills, and capacity to serve as models for other teachers. This performance level is reserved for teachers who are truly exceptional at their practice.

- **Effective:** An Effective teacher consistently meets the expectations set forth by the Framework. Effective teachers have a broad repertoire of strategies and activities to ensure students achieve mastery. Years of experience are not, in and of themselves, an Indicator of effectiveness. Students grow in effective teachers' classes.
- **Partially Effective:** A Partially Effective teacher may meet some expectations articulated in the Framework, but either does not meet all expectations or is inconsistent in meeting these expectations. Typically, there are clear areas where the teacher might improve his or her practice to achieve effectiveness. Partially Effective performance should not denote meeting expectations.
- **Ineffective:** An Ineffective Teacher is not meeting expectations for teaching in the District. There are several clear areas where the teacher must improve his or her practice to achieve effectiveness. In some instances, performance at the Ineffective level represents that teaching is below the licensing standard of "do no harm." Immediate improvement is required for teachers at the Ineffective level to remain in the District.

OVERVIEW OF THE DISTRICT'S CLASSROOM OBSERVATION AND SUMMATIVE EVALUATION PROCESS

TEACHNJ sets a minimum number of observations that must be conducted during the school year. For a tenured teacher, there must be a minimum of two formal classroom observations. The minimum number of observations increases to three (3) when the teacher is on a Corrective Action Plan ("CAP"). All teachers are required to have at least one announced and one

unannounced observation during the school year. The District's practice is that everyone has a second observer. (Tr. @ 51). Specifically, the first observation is conducted by the immediate supervisor. The second observation is typically conducted by a different administrator. In the event there is a third observation due to a CAP, the Principal conducts an observation. (D. Exs. #24, #25).

A formal observation can be either announced or unannounced. Formal observations must last at least 20 minutes. An unannounced observation occurs when the teacher has not been notified in advance. During an observation, "the observer captures evidence of teacher practice related to the Indicators of the Framework for Effective Teaching." The observer must choose a performance level for each Competency and Indicator observed "based upon a preponderance of low inference level evidence collected in that lesson." (D. Exs. #24, #25).

Irrespective of whether the observation was announced or unannounced, a post-observation conference is held wherein the teacher has an opportunity to review the lesson with the observer, receive positive and negative feedback, and incorporate this information into their practice.

Regarding the timing of observations for teachers on a CAP, the first observation is due by the end of November. The second observation is due by the end of December. The third and final observation is due by April.

Regarding summative evaluations for teachers on a CAP, the Mid-year review must be concluded by February 15th, while Annual review must be concluded by May 13th. (D. Exs. #24, #25).

The Rafael Hernandez School

The Rafael Hernandez School is comprised of 590 students in pre-Kindergarten through the 8th grade. The school has one principal, three vice-principals, and approximately fifty teachers.

During the subject years, Natasha Pared served as Principal and LaContee Hill, Kinyetta Bird and Stephanie Vargas served as Vice Principals.

Principal Pared has worked for the District for approximately 12 years. She has served as Principal for 5 years.

Vice Principal Bird has worked for the District for 26 years. She has served as Vice Principal for 5 years. All administrators have been trained on the Guidebook which is used to evaluate teacher performance.

THE DISTRICT'S EXPECTATIONS REGARDING WRITTEN LESSON PLANS

District teachers are required to submit written lesson plans every two (2) weeks. The District's expectation is that teachers will utilize the lesson plan template provided to them, fill in the template, and submit their written lesson plan bi-weekly via the Google Drive by uploading their written lesson plans into their specific electronic folder. Dr. Fuentes explained that the entire process is easy and straightforward, whereby the teacher saves the final lesson plan document to their computer and then "drags" the document to his or her assigned folder on the Google Drive. (Tr. @ 739-740; 116-117).

HOW THE SUBMISSION OF WRITTEN LESSON PLANS, OR THE LACK THEREOF, AFFECTS OBSERVATION AND EVALUATION RATINGS

The Guidebook states that:

> All good instruction begins with solid planning. The Framework contains Indicators that explicitly outline the observable elements of planning, most notably in over-time indicators and in Competency 1: Lesson Design & Focus. Additionally, elements of planning can be found throughout all of the Competencies of the Framework...

Procedural History

The hearing was transcribed and in-person hearings were held on March 3, 2023, March 6, 2023, March 13, 2023, March 13, 2023, 17, 2023, March 28, 2023, March 31, 2023, April 25, 2023, April 27, 2023, May 10, 2023, May 12, 2023, May 22, 2023 and May 25, 2023. The parties submitted post-hearing briefs dated September 27, 2023.

RESPONDENT'S TEACHING PERFORMANCE DURING THE 2020-2021 AND 2021-2022 SCHOOL YEAR

District Position

A. 2020-2021 School Year

(1) Individual Professional Development Plan ("IPDP")

The IPDP outlines goals for the teacher's students as well as professional growth goals that the teacher may have based on prior ratings. The IPDP is jointly developed between the teacher and the administrator.

In September 2020, Respondent and Principal Pared convened to reflect on the prior year's teaching performance (2019-2020) and the goals for the 2020-2021 school year. (D. Ex. #2) (Tr. @ 83-93). Respondent and Principal Pared established three (3) student goals:

- Goal 1: For 18 out of 44 7th grade students to demonstrate mastery of 7th grade standard 7.NS (The Number System) by achieving a 70%+ on the School Board Assessment, and for 26 out of 44 7th grade students to demonstrate growth towards mastery of 7th grade standard 7.NS (The Number System) by

achieving a 20% growth or more on the School Board Assessment.

- Goal 2: For 5 out of 23 7th grade students to demonstrate mastery of 6th grade standard 6.NS (The Number System) by achieving a 70%+ on the School Board Assessment and for 18 out of 23 6th grade students to demonstrate growth towards mastery of 6th grade standard 6.NS (the Number System) by achieving a 20% growth or more on the School Board Assessment.

- Goal 3: For 55% or more of 6th and 7th grade students to meet growth goal as determined through the MAP Growth for Math.

Additionally, Respondent and Principal Pared established three (3) growth areas:

- Indicator 4a – Checks for Understanding

- Indicator 1a – Pacing and Momentum.

- Indicator 2b – Tailored Instruction.

The Growth Areas included Action Steps, Metrics & Processes. (D. Ex. #2) (Tr. @ 83-93).

(2) Respondent's First Classroom Observation by Principal Pared

Respondent was formally observed by Principal Pared on November 3, 2020. Respondent's post-observation conference was held on November 13, 2020. (D. Ex. #3).

The Respondent was rated "effective" overall for the lesson. However, for Indicator 2b he received a "partially effective" with respect to "Tailored Instruction." Principal Pared made suggestions on how Respondent could improve Indicator 1b – Lesson Components; Indicator 2b – Tailored Instruction; and 2c – Responsiveness. With respect to Indicator 2b - Tailored Instruction, Principal Pared noted that "Respondent is to create a digital vocabulary wall so

that students have access to terminology before, during and after class, especially since he focuses on terms when presenting new information." (D. Ex. #3).

(3) October 13, 2020 Lesson Plan Feedback Form

Pursuant to this feedback form, Principal Pared notified Respondent that his lesson plans were overdue and directed him to submit the plans the following day. (D. Exs. #59, #67).

(4) By Memorandum dated December 8, 2020, Principal Pared advised Respondent that his lesson plans were due on December 3, 2020 and stated that "[u]pon entering your lesson plan folder, it was noted that yet again, no lesson plans were present." She further stated that "[t]o date there is 1 lesson plan in your folder." (D. Ex. #14).

(5) January 28, 2021 Lesson Feedback Form

Principal Pared notified Respondent that his lesson plans were overdue and directed him to submit the plans the following day. (D. Exs. #60, #68).

(6) March 5, 2021 Lesson Feedback Form

Principal Pared notified Respondent that his lesson plans were overdue and directed him to submit the plans the following day. (D. Exs. #61, #69).

(7) March 6, 2021, Written Warning for Not Submitting Lesson Plans

By Memorandum dated March 6, 2021, Principal Pared reminded Respondent that his lesson plans were due on March 4, 2021, that he had been previously reminded in January 2021 and that he had not submitted plans as per the schedule. Principal Pared stated that "[p]lans are not submitted via the

lesson planning folder nor via email as suggested if [Respondent was] unable to submit using the Google folder." At the end of the Memorandum, Principal Pared advised Respondent that "[f]ailure to submit completed lesson plans may result in more severe disciplinary action up to and including loss of employment." (D. Ex. #16).

(8) Respondent's Second Classroom Observation

Respondent was observed for a second time during the 2020-2021 school year on March 29, 2021 by Vice Principal LaContee Hill. (D. Ex. #4) (Tr. @ 99-111). The post-observation conference was held on March 30, 2021. While Respondent was rated "effective" for the lesson, Respondent received "partially effective" ratings for three (3) Indicators.

For Indicator 1a – Lesson Sequence, Respondent was rated "partially effective." Vice Principal Hill noted that Respondent "did not effectively demonstrate that the March 22, 2021 lesson was an individual, standards-aligned lesson built on previous lessons and on students' prior knowledge." Vice Principal Hill suggested that Respondent's "lesson begin with what the past few lessons have been about, the learning intention for the day and how the lesson ties into the unit."

For Indicator 2b – Tailored Instruction, which was rated partially effective, Vice Principal Hill noted that although Respondent had two (2) students in a breakout session[1] for the period, there was no other evidence of tailored instruction. As such, Vice Principal Hill suggested that Respondent have a point

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[1] Classroom instruction during the 2020-2021 COVID pandemic was conducted virtually using Zoom, including breakout sessions.

of reference such as an anchor chart or word wall for students to look at when working on what should be a review lesson."

For Indicator 4c – Demonstration of Learning, which was rated "partially effective," VP Hill noted that Respondent "did not effectively demonstrate that students knew more at the end of the lesson than they did at the start of the lesson." She noted that a "specific objective was not laid out for the lesson, the lesson objective was unclear, too broad, not measurable or not aligned to grade level standards." She further noted that the class ended with students working independently whereas Respondent "should have had the students complete an exit ticket directly related to the success criteria."

(9) Write-Up by Vice Principal Hill for Respondent's Conduct Unbecoming Behavior

By letter dated April 29, 2021, VP Hill issued a written memorandum regarding an inappropriate statement that Respondent had made to a parent about her child. Specifically, Respondent had told the parent that the child should spend some time with Respondent whereby Respondent could give the child a "whooping" and straighten him out. VP Hill advised Respondent that "his statement constituted conduct unbecoming and reminded him that it was not his role or responsibility to make any such comment." (D. Exs. #64, #66).

(10) Respondent's Summative Annual Evaluation for 2020-2021

Principal Pared provided Respondent's summative annual evaluation on May 4, 2021. (D. Ex. #5). Respondent earned a partially effective rating for the school year. The post-observation conference was held on May 6, 2021.[2]

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[2] Respondent did not file a rebuttal with the District challenging any of the determinations or ratings.

Respondent earned a Partially Effective in Competency 1, which evaluates "Lesson Design and Focus." Within Competency 1, Respondent earned a "Partially Effective" rating for Indicator 1a (Lesson Sequence). Principal Pared noted that Respondent's classroom lessons did not effectively demonstrate that lessons were individual, standards-aligned lessons built on previous lessons and on students' prior knowledge. Principal Pared suggested that Respondent's lessons begin with what the past few lessons have been about, the learning intention for the day and how the day's lesson ties into the unit. Respondent also earned an "Ineffective" rating for Indicator 1e (Coherent Planning). Pursuant to the Framework, lesson plans are to be standards-based, grade-level appropriate, and reflect work toward annual student achievement goals. (D Ex. #5). Lesson plans are also required to be submitted on a bi-weekly basis. Respondent earned an "Ineffective" for Indicator 1E because he only submitted one set of lesson plans for the entire school year. Since Respondent taught 6th and 7th grade classes, he was required to submit lesson plans for both grade levels on a bi-weekly basis but failed to do so. (D. Ex. #5) (Tr. @ 115-116). Principal Pared explained that she checked Respondent's folder on the Google drive and confirmed that with the exception of a set of lesson plans that Respondent submitted for the first week of school, no other lesson plans were submitted by Respondent or on his behalf. (Tr. @ 115, 117-119).

Respondent also earned an "Ineffective" rating for Indicator 1f (Progression of Instruction). Pursuant to the Framework, lesson objectives must fit into a larger, coherent sequence that leads to mastery of the appropriate

standards. When reviewing Respondent's lesson plan submissions for the school year, Principal Pared noted that "[Respondent] has submitted one lesson plan as of May 4, 2021 during the 2020-2021 school year..." (D. Ex. #5). Principal Pared explained that Respondent was not able to demonstrate how his lessons progressed through time because he did not submit any lesson plans. With three (3) Effective Indicators, one (1) Partially Effective Indicator and two (2) Ineffective Indicators, the preponderance of the evidence of the Indicators equates to a scoring of Partially Effective. (Tr. @ 120-121).

Respondent earned a "Partially Effective" for Competency 2, which evaluates "Rigor and Inclusiveness." Within Competency 2, Respondent earned a "Partially Effective" rating for Indicator 2a (Tailored Instruction). Respondent did not effectively tailor instruction to move all students toward mastery. Respondent also earned an "Ineffective" rating for Indicator 2a (Revisions). For this Indicator, a teacher must demonstrate that student work includes revisions based on teacher and peer feedback, with especially revised explanations and justifications to demonstrate student movement towards mastery. Principal Pared, however, noted that Respondent failed to share any student work samples with the administration. Respondent did not provide any evidence of student feedback or revisions of student work. Respondent also earned an "Ineffective" rating for Indicator 2f (Depth of Knowledge). For this Indicator, the teacher must show that lesson objectives, tasks and materials require students to demonstrate a range of skills. Principal Pared, however, noted that because Respondent failed to share evidence and failed to submit lesson plans during the

school year, administration could not access the level of knowledge required of students throughout the school year. Principal Pared was unable to see lesson objectives over time and there was no evidence provided by Respondent to demonstrate that there was a depth of knowledge in his class over time. (D. Ex. #5) (Tr. @ 122-125).

Respondent earned a "Partially Effective" for Competency 3, which evaluates "Culture of Achievement." Within Competency 3, Respondent earned an "Ineffective" rating for Indicator 3e (High Expectations). This Indicator outlines whether or not a teacher is modeling excellence for their students in their preparation, lesson delivery, and in the overall work ethic. (D. Ex. #5) (Tr. @ 125-126). Respondent did not foster a classroom culture that was consistently one of the high expectations and hard work that modelled excellence. Principal Pared noted in the evaluation document that:

> [Respondent] has rarely demonstrated high expectations. He has not submitted lesson plans according to schedule, having only submitted 1 lesson plan to date. He has made a statement to a parent regarding a child's behavior and his need for a "whooping" during a child study team meeting. His WebEx classes have often begun late as demonstrated by the notes sent by students via the 6th grade Google Classroom, or at times, he has not hosted class at all. (D. Ex. #5).

Principal Pared also explained that Respondent's failure to prepare and submit lesson plans demonstrated a lack of classroom preparation and a lack of effort into the classroom and the learning that is supposed to occur. (Tr. @ 122, 125-26).

Respondent earned a "Partially Effective" for Competency 4, which evaluates "Student Progress Toward Mastery." (Tr. @ 128). Within Competency

4, Respondent earned a "Partially Effective" rating for Indicator 4c (Demonstration of Learning). This Indicator evaluates if students know more at the end of a lesson than they did at the start. No specific objective was laid out for the students for the lesson observed by Vice Principal Hill. Respondent also ended that lesson by having students work independently whereas Respondent should have had student do an exit ticket at the end of the class that was directly related to the success criteria that would show where a student is in their learning. (Tr. @ 129).

Respondent earned an "Ineffective" rating for Indicator 4d (Using Data). As noted by Principal Pared, "[Respondent] has not shared lesson plans demonstrating his use of data as he has only shared a lesson plan for the 1st week of school. He has not shared trackers with student data as per the schedule..." Principal Pared expressed concern when she testified that the respondent did not provide any evidence of data collection or how it was being used. (D. Ex. #5) (Tr. @ 130-133).

Respondent earned an "ineffective" rating for Indicator 4e (Understanding of Growth). Principal Pared stated that "[Respondent] has not provided evidence of student growth over time. He has not shared student work samples, data reflections and his data trackers are not current...Data on all math standards taught to date have not been supplied." Principal Pared expressed concern when she testified that Respondent did not provide any evidence.

In the Summary section of the annual summative evaluation, Principal Pared stated that:

> [Respondent's] lack of planning and preparation has hindered his progress this year. He is to focus on lesson planning during the 2021-2022 school year. It is also note that his focus should shift and maintaining his professionalism at all times.(D. Ex. #5).

(11) Coaching and Professional Development during the 2020-2021 school year

Respondent received support from the Math Coach and other administrators, which included focus on curriculum, classroom feedback and lesson plan feedback. Respondent received in-class support and in-class modeling. Respondent also participated in Professional Learning Community ("PLC") meetings for additional support and assistance. (D. Exs. #1, #11, #12).

Respondent Position

The Respondent initially argues that "[i]n light of the indisputable direct evidence of discriminatory animus and/or retaliatory intent, the District cannot and has not met its burden of proving the instant charges are not a product of retaliation or discrimination."

According to Respondent, "(1) the charges would not have been brought but for considerations of political affiliation, nepotism, union activity, discrimination as prohibited by state or federal law, or conduct prohibited by state or federal law; (2) Montague's evaluations failed to adhere substantially to the evaluation process, including but not limited to providing a Corrective Action Plan; and (3) the District's actions were arbitrary and capricious."

Although the Respondent acknowledges that he was evaluated pursuant to an evaluation rubric governed by the Framework, the Arbitrator is urged "to look beyond the ratings issued, otherwise, the available defenses, and indeed,

the very concept of tenure, would be rendered meaningless." The Respondent contends that "even if those procedures were followed, the Arbitrator may look toward whether they were applied in an 'arbitrary and capricious' manner. And lastly, but certainly not least, the Arbitrator may look toward whether the charges are the product of 'bias' in the form of unlawful retaliation, including discrimination and retaliation for engaging in Union activity or other lawful activity."

Respondent notes that "the Framework utilized by the District has inherently subjective elements, including but not limited to the over-the-year indicators, and others through which an observer or evaluator seeking to undertake mischief, has ample room to undermine a rating – not only by what they choose to see, but what they elect to ignore, or focus upon, or even let slide." In the Respondent's view, even where "norming" is utilized to avoid subconscious bias – "that does not work and cannot work when the bias is intentional and manipulative." It further notes that "the observation and evaluation process upon which the District relies is fundamentally predicated on the 'good faith' of the observers and evaluators."

Since Respondent maintains that despite multiple observers, which potentially and in theory can ameliorate bias, "Pared's observations and evaluations were, as a practical matter determinative of Montague's ratings, according to her own self-process policies and procedures of 'rounding-down.'"

From Respondent's perspective, "once demonstrated bad faith is injected in the process, the ratings themselves are little to no value." According to Respondent, the evidentiary record reveals not only substantial evidence or bad

faith but also direct evidence of retaliatory intent exhibited not only by Principal Pared but also by her loyal Vice Principals."

In support of this contention, Respondent relies on the recently decided case of I/M/O Newark School District v. Jennifer Ferrara (Agency Docket No. 221-8/22 (September 18, 2023) wherein Arbitrator Lang dismissed the charges against Respondent finding, inter alia, that "Pared arbitrarily elected to observe Ferrara in a make or break observation in a 'test-prep' session not prepared by her, as compared to a normal lesson." In addition, Arbitrator Lang found:

> Pared's intrusion into Union meetings, antipathy for Montague and interference in RHS Union leadership selection, convince me Ms. Ferrara's participation in NTU complaints tainted Administration's ratings of her teaching performance.
>
> Based on the entire record in this matter I find the District's Ratings of Respondent violated the Provisions of TeachNJ; that they were influenced by Farrara's Union activity, were arbitrary and capricious, and failed to adhere to prescribed evaluation processes. I find all of that materially affected Ms. Ferrara's Observations and Evaluation.

I. Anti-Union Animus

To establish that an employer to adverse employment action against an employee in retaliation for protected Union activity by that employee, employee need first show that "the employee engaged in protected activity, the employer knew of this activity, and that the employer was hostile toward the exercise of the protected rights." Once this is shown, "in a dual motive case, supported by direct evidence of discriminatory or retaliatory animus, the burden shifts to the employer to show that it would have reached the same decision even in the

absence of the protected activity." See, Bridgewater Twp. v. Bridgewater Public Works Assn. 95 N.J. 235 (1984).

Insofar as the 2020-2021 ratings are concerned, the Respondent perceives a retaliatory intent in that VP Hill, who conducted his second observation, was removed and replaced with VP Bird who "either outright shared Pared's sentiments or was at least willing to share them." Evidence of retaliation toward Hill, who purportedly "declined to toe the proverbial line in the issuance of observation ratings and received a Partially Effective rating herself," is her removal from supervision of Respondent on January 6th, 2022. VP Hill did not testify at the hearing "because the District did not trust her."

A key element in Respondent's claim of Union animus, discrimination and retaliation involves an April 28, 2021 faculty meeting "when she threatened her entire faculty and staff with what amounted to thinly veiled consequences if they spoke to the Union or Montague on matters or subjects she personally disagreed with."

Contrary to Pared's testimony that the "crux" of the meeting involved the "chain of command," the Respondent contends that this meeting entailed "a classic anti-union threat by a supervisor and an inherent threat of discipline." In advising the faculty of what they could speak to the NTU and Montague about (contract issues) and what they could not ("silly little things"), Respondent maintains that Pared was engaged in anti-union animus. Although Principal Pared eventually acknowledged at the hearing that her requirement that office staff and non-tenured staff report for in-person instruction and stay past 1:30 pm

when students were remote and the building was designated for cleaning, was a "Union issue," her comment to staff about when they could speak to the Union representative was anti-Union animus. Moreover, Principal Pared's projection of "consequences" for speaking to the Union, namely not having a relationship with the "administrative team," including Vargas and Bird, and excluding them from the "family" or the "community" compounded the problem.

The mask break issue raised on April 28th is considered further evidence of retaliation and anti-Union animus. Principal Pared denied mask breaks to Montague, Ferrara and Crowe as well as others who were talking to Montague at the time of their alleged violation of the mask break protocol. These teachers were told that they would be "treated like children" by having other staff take their students on mask breaks for the remainder of the year. According to Respondent, the April 28th meeting was "instigated by Union objections to Pared requiring staff to work in person while students were remote on Wednesdays, to clean the building." Rather than being imposed for the health of the students, the Respondent argues that the disciplinary actions "were out of concern for Montague's Union activity and what she perceived to be his interference and 'disrespect.'"

According to Respondent, "Evidence of hostility to Union activity and association in connection with the charge "is manifest in (1) Pared's interference with Montague's appointment as building representative; (2) her either listening in on Union meetings or claiming to do so; (3) threatening faculty if they associated with or communicated with either the NTU or Montague." These activities

persuade Respondent that "Pared and her administrative team intended to retaliate against Montague and others associated with him, with respect to performance evaluations and observations, including those which form the basis of the instant charge against Montague for 'inefficiency' in performance."

Citing the Employer Employee Relations Act ("EERA"), N.J.S.A. 34:13A-5.3 which states, "public employees shall have, and shall be protected in the exercise of, the right, freely and without fear of penalty or reprisal to form, join and assist any employee organization," Respondent asserts that the "hostility exhibited by Pared – openly and wantonly" is "in plain violation of State law."

II. Other Retaliation

With respect to the April 29, 2021 Write-Up authored by VP Hill, Respondent denies the incident occurred as reported. The claim by VP Hill that Respondent told a parent that her child needed a "whooping" was relied upon by Pared in rating Respondent "partially effective" for the 2020-2021 school year. Clearly, this incident/write-up is mentioned in Respondent's 2020-2021 Summative Annual Evaluation, specifically cited for Competency 3e, "Culture of Achievement," where Respondent received an "ineffective" rating for the "whooping" statement he made to a parent during a child study meeting. Respondent deems noteworthy the fact that the Write-up letter was written one day after the April 28, 2021 WebEx meeting.

The alleged incident occurred during a child study team meeting in which Ferrara participated as part of her duties. Ferrara testified that she did not hear Montague make the statement, despite VP Hill's disciplinary letter. Moreover,

Respondent, who did not challenge the write-up when it was written, argues that since neither VP Hill nor Principal Pared spoke Spanish they could not have understood what the parent was saying." "The bottom line is that Pared simply made it up to justify reducing his rating and she demonstrated a proclivity to invent facts to support her narrative." Absent the date of the child study meeting, which is not specified in the write-up, since Ferrera testified that the same cohort of teachers met during the child study team meetings for IEP students, Respondent argues that Ferrara's recollection she never heard him make the "whooping" statement should be credited. (Tr. @ 1279).

The Respondent contends that "Pared's 2020-2021 Annual Evaluation Rating of Montague by Pared is Evidence of Retaliation." According to Respondent, "Pared elected to take what amounts to a single alleged performance deficiency and use it to downgrade his annual evaluation in every Competency in the evaluation rubric to ensure he received a partially effective for the year." Alluding to the testimony of Iovino, Respondent contends that "running one procedural deficiency as a thread through all areas of teacher practice, including practice areas that have no relationship to lesson plan submission, is illogical and contrary to the spirit of the Framework."

Respondent contends that Principal Pared unfairly utilized over-the-year indicators, "which were uniquely in her control," to downgrade Montague while, at the same time, "ignoring his observed effective performance in lesson design and other areas of teacher practice."

Respondent disputes Pared's contention that there was only "one plan" in the folder for the entire school year. She wrote "one lesson plan" in the evaluation as opposed to one cycle of Lesson Plans. (Tr. @ 115-118).

Respondent distinguishes the submission of lesson plans from lesson planning. "His colleagues Montero and Bishop testified to his planning for lessons, their collaborative efforts with respect to same and their assistance to him in connection with both the planning and the submission of plans and data. There is no dispute that Montague is not tech savy, since he acknowledged it at the hearing, and he relied on others. Pared was aware of that weakness and seized upon it to justify undermining his rating. It is worth noting that this is not a 'new' weakness and presumably it has persisted during his time entire time at RHS and with the District. Yet, it is only now – after his appointment as the representative; after the interference in that appointment; and after her threat of retaliation, that it is being radically used by Pared in an effort to seek his termination."

Irrespective of whether Respondent submitted lesson plans, he maintains that he planned. "When formally observed, there was evidence of effective planning – and using data to inform same during Grade Level Meetings ("GLMs") and PLCs." In this regard, Respondent relies on the testimony of Iovino that "a procedural failing is not demonstrative of a less-than-effective teacher. Also, other tools are available, such as increment withholding, to correct an educator's professional shortcoming. Iovino testified that "tanking" a teacher's entire

performance evaluation based upon one single area of teacher practice is inappropriate.

Whereas the Framework directs administrators to "gather" evidence through formal and informal observations, Respondent contends that "Pared never bothered to informally observe Montague at all. She did one formal observation at the beginning of the year, which she rated 'effective' prior to Montague becoming the representative, and then popped in his class for a few minutes at Montague's request one other time. This was the extent of Pared's 'gathering' and informal observation."

The Respondent further takes issue with Pared's evaluation where it states in Competency 4e, "Data on all math standards taught to date have not been supplied." (D. Ex. #6). The testimony of Pared that the data was provided by his Math Coach, Ms. Bishop, persuades the Respondent that his "ineffective" rating was unfair. The testimony of Bishop that part of her job as Math Coach was to assist teachers with data collection is deemed supportive of Respondent's effective performance on this indicator, which further states, "Mr. Montague has not provided evidence of student growth over time. He has not shared student work samples, data reflections and his data trackers are not correct as of May 4th..."

With respect to his 2020-2021 summative evaluation, Respondent takes issue with his over-the-year rating of "Slightly Below Expectation" on Indicator 5a "for not seeking professional development beyond that offered by the District." The testimony of Fuentes that the District provides sufficient Professional

Development hours, obviating the need for additional Professional Development, negates this contention.

Finally, Respondent denies encouraging teachers "to rip down their bulletin boards because this was going above and beyond." He testified that "decorating a classroom with a bulletin board material and poster paper is the 'bare minimum' and the statement attributed to him was 'inconsistent with his practice.'"

2021-2022 School Year

District Position

As a result of the Respondent's 2020-2021 Summative Annual Evaluation where he was rated "Partially Effective," the Respondent was placed on a Corrective Action Plan ("CAP") for the 2021-2022 school year. (D. Ex. #6).

The Guidance section of the CAP reads as follows:

> At the beginning of the year, the employee and their supervisor sit down to reflect on last year's performance and the goals for the current year. This is an opportunity to collaboratively map out development areas and opportunities for the employee as well as set goals for their students (otherwise known as Student Growth Objectives).

Respondent and VP Hill collaborated on the CAP and set two student goals, indicating what Montague's students would demonstrate by the end of the school year as follows:

- Goal 1: By April 2022, for 9 out of 18 7th grade students to demonstrate mastery of 7th grade level standards by achieving a score of 75% mastery or above as assessed using the Into Math End of Year Assessment – AND – By April 2022, for 12 out of 18 7th grade students to demonstrate growth towards mastery of 7th grade level standards by achieving a score of 60%-75% mastery as assessed using the Into MAP Growth Assessment.

- Goal 2: By April 2022, for 10 out of 24 6th grade students to demonstrate mastery of 6th grade level standards by achieving a score of 75% mastery or above as assessed using the Into Math End of Year Assessment – AND – By April 2022, for 10 out of 24 6th grade students to demonstrate growth towards mastery of 6th grade level standards by achieving a score of 60%-75% mastery as assessed using the Into MAP Growth Assessment.

Additionally, Respondent and Vice Principal Hill established four (4) growth areas:

- Indicator 4a – Checks for Understanding
- Indicator 1a – Pacing and Momentum.
- Indicator 1a – Lesson Sequence.
- Indicator 3e – High Expectations. (D. Ex. #6).

The Growth Areas included Action Steps, Metrics and Processes. As part of Growth Area #4, Respondent agreed that "lesson plans will be submitted according to the schedule and the teacher will be ready at the start of the class." (D. Ex. #6) (Tr. @ 163).

(1) September 10, 2021 Lesson Feedback Form

Pursuant to the RHS Lesson Feedback Form, VP Hill informed Respondent that his lesson plans were overdue and directed him to submit the plans the following day. (D. Exs. #62, #70).

(2) September 23, 2021 Lesson Feedback Form

On September 23, 2021, VP Hill notified Montague that his lesson plans were overdue and directed him to submit the plans the following days. (D. Exs. #63, #71).

(3) First Classroom Visit by Vice Principal Hill

On November 10, 2021, VP Hill conducted a formal observation of Respondent's classroom. Although Respondent was rated "Effective" for the

lesson, he received a "Partially Effective" rating for one Competency and received a "Partially Effective" rating in three (3) Indicators.

In Competency 1 – Lesson Design and Focus – Respondent earned a "Partially Effective" in Indicator 1a – Lesson Sequence. VP Hill observed that the lesson did not build on previous lessons and on students' prior knowledge. Specifically, VP Hill stated that Respondent failed to review with the class what was discussed in the prior lesson and also failed to connect the prior lesson to the November 10, 2021 lesson. (D. Ex. #7) (Tr. @ 165).

Respondent earned a "Partially Effective" in Competency 2, which evaluates "Rigor and Inclusiveness." With Competency 2, Respondent earned a "Partially Effective" in Indicator 2c, which evaluates "Responsiveness." VP Hill noted that Respondent ran through the math problem steps with the students but did not effectively recognize student misunderstandings and adjust his instructional strategy. VP Hill suggested that Respondent ensure that his students have a deeper understanding of the lesson. (D. Ex. #7) (Tr. @ 165). Respondent also earned a "Partially Effective" in Indicator 2d, which evaluates "Precision & Evidence." VP Hill noted that while students were able to respond, Respondent did not consistently challenge his students to provide evidence of reasoning for their responses. (Tr. @ 167).

In the summary section of the observation, VP Hill explained how Respondent could improve. Specifically, VP Hill stated that:

> By incorporating Habits of Discussion into the lesson, this will allow students to engage in academic discourse with one another where they will be able to demonstrate their knowledge and understanding (4c) and encourage students to provide evidence (2d) from one

another to justify their response. Lastly, as students share out, it will help to address misconceptions (2c) students might have. (D. Ex. #7).

(4) Change of Supervisors: Vice Principal Bird Replaces Vice Principal Hill as Respondent's Immediate Supervisor

As of January 6, 2022, VP Bird became Montague's supervisor. Dr. Fuentes testified that he facilitated the change when he discovered that certain teachers assigned to the RHS "had not received the proper number of observations in a timely manner. It was a concern because teachers on a CAP such as Montague had not been observed in accordance with the schedule."

According to Dr. Fuentes, VP Hill was "overwhelmed with other responsibilities, including testing, and had fallen behind with her observation duties." (Tr. @ 757-759). As a result of his discussion with Principal Pared, she redistributed the observation duties among the three Vice Principals to reduce VP Hill's workload. As a result, VP Bird assumed the observation duties of VP Hill.

(5) Respondent's Second Classroom Observation by Principal Pared

On December 16, 2021, Respondent was formally observed by Principal Pared. He received an overall "Partially Effective" rating for the classroom lesson. (D. Ex. #8) (Tr. @ 169-170).

In the course of evaluating the 6th grade lesson taught by the Respondent, Principal Pared testified that "[as of December 16th] no lesson plans were submitted for the date of the observation..." (D. Ex. #8) (Tr. @ 168-194).

As for the actual lesson, Respondent earned a "Partially Effective" for Competency 1, which evaluates "Lesson Design and Focus." (D. Ex. #8) (Tr. @

170). Respondent earned a "Partially Effective" for Indicator 1a – Lesson Design and Focus. Respondent did not review the lesson objective with his class. Principal Pared reminded Respondent to utilize the "Look Forward" technique from Teach Like a Champion, which includes: (a) to post on agendas and communicate to students in a way that gets them invested in completing the work to come; and (b) to introduce the objective to students, have them write it in their notebooks with the daily instructional task so that students are aware of the expectations for the lesson. (Tr. @ 171-172). Respondent earned a "Partially Effective" in Indicator 1b, which evaluates "Lesson Components." Principal Pared noted that Respondent prepared a worksheet that was not aligned to the lesson as per the curriculum. Students did not utilize any physical or virtual manipulatives, and vocabulary was not taught as per the curriculum. Ultimately, only 1 out of 13 students were able to complete the worksheet correctly. (D. Ex. #8) (Tr. @ 172-173). Respondent earned a "Partially Effective" in Indicator 1c, which evaluates "Pacing and Momentum." Principal Pared noted that Respondent did not maximize learning time. Principal Pared noted that the lesson started over 18 minutes late and too much time was spent on the Do Now, which did not leave an appropriate amount of time for the lesson. (Tr. @ 171-175). Respondent earned a "Partially Effective" in Indicator 1d, which evaluates "Clarity." Principal Pared noted that Respondent's lesson was unclear at times. She also observed student confusion in the classroom. Principal Pared observed two (2) students confused as to the next steps, and then observed several

students in the back of the room seeking support because they did not understand the lesson. (D. Ex. #8) (Tr. @ 176).

Respondent earned a "Partially Effective" for Competency 2, which evaluates "Rigor and Inclusiveness." (Tr. @ 177). Respondent earned a Partially Effective for Indicator 2a – Tailored Instruction – because aside from referencing a chart in the back of the classroom, no tailoring of instruction occurred. (D. Ex. #8) (Tr. @ 184). Respondent earned a "Partially Effective" for Indicator 2b – Questions & Tasks – because Respondent asked lower-level questions which were not synthesis based. (Tr. @ 186, 198). Respondent earned a "Partially Effective" for Indicator 2c – Responsiveness – because Respondent did not properly recognize student misunderstandings. Respondent did not plan for error, which resulted in him having to pause the lesson and reset. (D. Ex. #8) (Tr. @ 186-187).

Although Respondent earned an Effective rating for Competency 3, he earned a "Partially Effective" rating in Indicator 3b – Persistence. (Tr. @ 188-189).

Respondent earned a "Partially Effective" for Competency 4, which evaluates "Student Progress Towards Mastery." (Tr. @ 189). Respondent earned a "Partially Effective" for Indicator 4a – Checks for Understanding – because Respondent did not adequately check to see if his students were understanding the lesson overall, and simply focused on formulas for area and perimeter. (Tr. @ 189-191). Respondent earned an "Ineffective" for Indicator 4c – Demonstration of Learning – because only 1 out of 14 students were able to

respond to the question posed without direct support from Respondent. (D. Ex. #8) (Tr. @ 191-192). In the summary section of the observation document, Principal Pared noted that although Respondent understands the concepts he is teaching, he again failed to plan and prepare, which hinders his delivery of instruction and his student's acquisition of knowledge. (D. Ex. #8) (Tr. @ 191-194).

(6) January 13, 2022 Written Warning for Not Submitting Lesson Plans

VP Bird issued a letter dated January 13, 2022 informing Respondent that he had failed to submit his bi-weekly lesson plans. Instead of having lesson plans in his folder, Respondent only placed a copy of the curriculum in his folder. (D. Ex. #15).

(7) Respondent's Mid-Year Summative Evaluation for the 2021-2022 School Year by VP Bird

Montague's mid-year evaluation pursuant to his CAP was rated "Ineffective" by VP Bird.[3] (D. Ex. #5).

VP Bird created Respondent's 2021-2022 Mid-Year Annual Summative Evaluation on January 12, 2022. Respondent, who refused to sign the document, viewed it on February 24, 2022. He earned an inefficient rating at the mid-year point for the school year.[4] (D. Ex. #9).

Respondent earned a "Partially Effective" in Competency 1, which evaluates "Lesson Design and Focus." Within Competency 1, Respondent earned a "Partially Effective" rating for Indicator 1a (Lesson Sequence), a

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[3] Respondent's last day of work was January 25, 2022.

[4] Respondent did not file a rebuttal with the District challenging any of the documentation or ratings for the Mid-Year Annual Summative Evaluation.

Partially Effective for Indicator 1b (Lesson Components), a "Partially Effective" for Indicator 1c (Pacing and Momentum), a Partially Effective for Indicator 1d (Clarity), an "Ineffective" for Indicator 1e (Coherent Planning) and an "Ineffective" for Indicator 1f (Progression of Instruction). The overall rating for Competency 1 was based on Respondent's two (2) classroom observations and the undisputed fact that Respondent had not submitted any written lesson plans and data. (D. Ex. #9) (Tr. @ 598).

Respondent earned a "Partially Effective" in Competency 2, which evaluates "Rigor and Inclusiveness." Within Competency 2, Respondent earned a "Partially Effective" rating for Indicator 2a (Tailored Instruction), a "Partially Effective" for Indicator 2b (Questions & Tasks), a "Partially Effective" for Indicator 2c (Responsiveness), a "Partially Effective" for Indicator 2d (Precision & Evidence), an "Ineffective" for Indicator 2e (Revisions) and an "Ineffective" for Indicator 2f (Depth of Knowledge). The overall rating for Competency 2 was based on Respondent's two (2) classroom observations and the undisputed fact that Respondent had not submitted any written lesson plans and student work samples.

Respondent earned a "Partially Effective" in Competency 3, which evaluates "Culture of Achievement." Within Competency 3, Respondent earned a "Partially Effective" rating for Indicator 3b (Persistence), an "Ineffective" for Indicator 3e (High Expectations) and an "Ineffective" for Indicator 3f (Peer Accountability). The overall rating for Competency 3 was based on Respondent's two (2) classroom observations and the undisputed fact that

Respondent had not submitted any written lesson plans or shared his Google Classroom. (D. Ex. #9) (Tr. @ 598-639).

Respondent earned a "Partially Effective" in Competency 4, which evaluates "Student Progress Towards Mastery." Within Competency 4, Respondent earned a "Partially Effective" rating for Indicator 4a (Checks for Understanding), a "Partially Effective" for Indicator 4c (Demonstration of Learning), an "Ineffective" for Indicator 4d (Using Data), an "Ineffective" for Indicator 4e (Understanding of Growth), and an "Ineffective" for Indicator 4f (Progress Towards Goals). The overall rating for Competency 4 was based on Respondent's two (2) classroom observations and the undisputed fact that Respondent had not submitted any written lesson plans, had not submitted any data showing student growth, and had not submitted any student work samples. (D. Ex. #9) (Tr. @ 568-639). Respondent was rated "Significantly Below Expectations" for Competency 5 – Progress toward Goals.

(8) Respondent's Year-End Summative Evaluation for the 2020-2022 School Year

Respondent ceased reporting to work on January 15, 2022. When Respondent did not report to work for a third (3rd) formal classroom observation, VP Bird reiterated his mid-year assessment, namely an "Ineffective" rating summarizing Respondent's two (2) prior formal classroom observations.

VP Bird determined that Respondent's "ineffective' ratings for several of the over-the-year indicators such as Coherent Planning (1e), Progression of Instruction (1f),Progress towards Goals (SGOs) (Competency 5) and Commitment toward Continuous Improvement, predominately due to not

submitting lesson plans and not submitting samples of student work warranted an overall 'Ineffective rating for the Mid-Year Evaluation.

VP Bird cited a District policy which provides that if a first observation of "effective" is followed by a second observation of "partially effective," the second observation is accorded more weight. However, in the instant case, Respondent's potential "partial effective" for the Mid-Year was reduced by over-the-year indicators of "ineffective" in several categories. With ratings of "partially effective" for Competencies 1, 2 and 3 and ratings of "ineffective" for Competencies 4 and 5, VP Bird gave Montague an overall rating of "ineffective." (Tr. @ 638-639, 664).

(9) Respondent's Leaves of Absence

Respondent's request for approved leave covering the January 25, 2022 through March 1, 2022 time period was retroactively approved on March 1, 2022. Although Respondent was expected to report to work on March 2, 2022, he did not. By email dated March 21, 2022, Respondent was reminded by the District's Human Resources Department that since his approved leave expired on March 1, 2022, he was deemed to be out on unauthorized leave and considered AWOL afterwards. (D. Exs. #17, #18).

Due to Respondent's late application seeking an extension of his approved FMLA, it was not until April 13, 2022 that the District's HR Department approved his leave from March 2, 2022 through April 22, 2022. Respondent was reminded to report to work on April 25, 2022. (D. Ex. #19). He did not report.

By email dated June 8, 2022, Respondent was notified by HR that his request to extend his FMLA from April 22, 2022 to June 23, 2022 was denied "because he had exhausted his statutory 12 weeks of FMLA leave and further because the medical reasoning submitted did not warrant a contractual illness leave. (D. Ex. #20).

According to the District, Respondent did not timely submit his requests for approved absences under the Family Medical Leave Act ("FMLA"). Ultimately, the District contends that he "blew off his obligation to report to work for the last two (2) months of school."

(10) Coaching and Professional Development During the 2021-2022 School Year

The District maintains that Montague received support from the Math Coach and other administrators, including focus on curriculum, classroom feedback, lesson plan feedback, in-class support and in-class modeling. Respondent also participated in PLCS. (D. Exs. #1, #11 and #12).

(11) Principal Pared's Written Recommendation for Inefficiency Tenure Charges Against Respondent

On July 29, 2022, Principal Pared listed twenty-eight reasons for the Tenure Charge of Inefficiency against Montague, encompassing Respondent's rating of "Partially Effective" in his Annual Summative Evaluation for 2020-2021 and his "Ineffective" rating for his Annual Summative Evaluation for 2021-2022.

Respondent Position

I. Anti-Union Animus

The Respondent has predicated his defense to the tenure charges for the 2020-2021 and 2021-2022 school years on anti-Union animus, discrimination,

and bias on the part of Principal Pared. According to the Respondent, the bias of Principal Pared was manifested in actions she took that "failed to adhere substantially to the evaluation process," deviated from the "spirit" of the Framework and introduced "arbitrary and capricious" elements.

From the Respondent's perspective, Principal Pared's retaliatory intent commenced with her inference in the lawful Union activity of electing Montague as the building representative for RHS. The Respondent perceives an inextricable connection between his role as Union leader and Pared's less than effective ratings of his performance during classroom observations, his Corrective Action Plan, his "ineffective" mid-year report and his annual summative evaluations of partially effective and ineffective over two years. Principal Pared's anti-Union animus and retaliatory motives have extended not only to the instant tenure charges against him, but also to the tenure charges brought against Jennifer Ferrara – charges recently dismissed by Arbitrator Lang.

Relying on the testimony of Montague and other witnesses at the hearing, Respondent contends that at the beginning of the 2020-2021 school year when the teaching staff found problematic the representation provided by then NTU building representative, Herman Gonzalez, Principal Pared interfered with the selection process. Although "Gonzalez himself had offered to step down and displayed no interest in continuing in the position, Pared refused to accept the transition to Montague absent a vote by the staff, but also demanded that Gonzalez be placed on the ballot."

Given the testimony of Michael Iovino, Secretary-Treasurer of the Newark

Teachers Union ("NTU") "that there was no 'Union' reason for a vote" and Gonzalez was "appointed" previously, Principal Pared's interference constituted anti-Union animus. Since Pared as principal assumed an adversarial role vis-à-vis the NTU, her preference for Gonzalez over Montague pursuant to the pro forma Union prerogative of appointing a building representative is deemed "wildly inappropriate."

Montague testified that after he was elected building representative in September 2020, he held his first meeting with Principal Pared on or about January 21, 2021. In her email summarizing the meeting Pared wrote: "Mr. Montague will provide me with all Union meeting dates." (R. Ex. #39) (Tr. @ 1434).

Whereas Pared was able to "surreptitiously attend Union meetings" during the pandemic provided she had the link, once virtual meetings ended, she demanded to know the dates and times of these meetings. In her emails to Montague, first demanding to know the dates and times of Union meetings and, if not provided, asserting there will be no meetings in the future unless her demand was met, constituted unreasonable intrusion into Union business. Contrary to the District's contention that the NTU contract gives the Principal the right to know meeting times and dates, the Respondent avers that the contract language pertains to in-person meetings on District property as opposed to remote meetings. (D. Ex. #27).

Subsequent to Pared's interference with the staff's selection of Montague, she is reported as informing staff that she "listens in on or 'knows what goes on

in' Union meetings." These comments made during faculty meetings, which were attended by witnesses Ferrara, Dixon, Crowe and Hunter, had the effect of intimidating staff and undermining the Union and Montague. It had a chilling effect on staff expressions of complaints regarding Pared and the school administration.

Notwithstanding Pared's testimony that she never actually listened in on Union meetings, the Respondent relies on the testimony of both Carnemolla and Crowe that she made statements indicative of being present at a meeting. Moreover, Respondent contends that even the threat that she was listening in on Union meetings would be sufficient to intimidate the free expression of staff at such meetings.

Pared's anti-Union animus reached its apex during the April 28, 2021 meeting discussed supra where Pared attempted to restrict the communication of staff to Montague and the NTU. The consequence of deviating from Pared's so-called "chain of command" was exclusion from the "family" or the "community" – tantamount to the administrative team. Montague testified that shortly after the April 28, 2021 meeting Union attendance at meetings declined 35-40 percent.

Beginning with the 2021-2022 school year, Respondent was placed on a CAP, had his lunch period and his teaching cohort changed. Prior to these changes, his cohort consisted of Ferrara – ELA, Dixon – Science, while he taught 6th and 7th grade math. On January 6, 2022, his immediate supervisor was changed from VP Hill to VP Bird.

The change of Montague's cohort teaching group coincides with the group's complaint about Pared and her administrative team that they brought to a June 2021 meeting with Joanne Watson of Labor Relations.

On January 5, 2022, Pared called an emergency meeting termed the Culture and Climate Meeting, where she "basically apologized to the staff for any miscommunication of information that had caused hard feelings or just the general environment of the building to be less than what it should have." (Tr. @ 1512). Montague also spoke at the meeting and addressed what he considered to be the "toxic and retaliatory climate at the school." VP Bird also spoke at the meeting and described in the meeting that it is "us v. you."

The next day not only was Respondent's immediate supervisor changed from VP Hill to VP Bird but the supervisors of Ferrara and Crowe, who spoke at the meeting, also changed. VP Hill was removed from supervising and observing Montague, Ferrara and Crowe. According to Respondent, VP Hill was removed and denied access to the Whetstone System to conduct observations because she would not rate these three teachers less than effective. When Ferrara inquired about the need for the changes, "Hill confirmed to Ferrara...that the three of them were a 'package deal.'" At this time, Pared was preparing tenure charges against Montague and Ferrara circa January 13, 2022.

II. Respondent's Evaluation failed to adhere substantially to the Evaluation Process, including but not limited to providing a Corrective Action Plan

According to Respondent, "the CAP was invalid. The SGOs contained within the CAP are unlawful as are the 'Action Steps' for administration to provide assistance. However, even assuming the CAP was lawfully proper, the fact

remains that it was not implemented – that is, the meager assistance offered to Montague to help him become 'Effective' (assuming that he was properly rated to begin with) was not only not provided but was actively and intentionally undermined by Pared."

"The purported CAP assistance was limited to: (1) formal and informal lesson plans; (2) lesson plan feedback; and (3) coaching support. Both (1) and (2) are not CAP support at all, since all teachers receive them, whether tenured or not tenured, whether Effective, Highly Effective, or not, and whether they are or are not on a CAP. The same is true with (3), as well – all teachers receive generic 'coaching.' But at least, in theory, coaching was potentially available to Montague."

Respondent maintains that he received "virtually no CAP specific 'coaching.'" Similarly, other CAP teachers such as Ferrara received insufficient CAP-based assistance. Given the testimony of Bishop, the Math Coach at the time, as to what "coaching" was needed for a teacher who required "specific individualized assistance," the District purportedly fell short.

"It is not routine PLC's or participation in routine GLMs, or even routine classroom support. Here, it is undisputed that Montague received no CAP coaching at all, beyond a single introductory meeting, there was only a single meeting in November regarding binders – this comes straight from the mouth of the Bishop, the 'Math Coach' who was the only one who could provide it. Why? Because Pared cancelled the coaching cycle prep period. The cycle was cancelled not just for Montague but Ferrara as well. It is also worth pointing out

that the other 'Coach,' ELA Coach Carnemolla, quit. She not only quit – she quit because of the toxic and retaliatory environment that Pared and her administrative team fostered at RHS."

Respondent takes issue with Pared's testimony that Bishop provided adequate CAP support. Bishop denied that the PLCs and GLMs that she participated in where Montague was present constituted individualized coaching. "She attempted to coach Montague individually, meeting with him two times early in the year during the coaching cycle (one of which was introductory) but the coaching cycle was cancelled."

In Respondent's recollection, CAP Coaching was indispensable for him as a "necessary reason to improve performance."

Respondent disputes the District's contention that the "coaching cycle" was just an extra prep period. By cancelling the coaching cycle and not replacing it, the Respondent attributes ulterior motives to Principal Pared, namely preventing the improvement of Montague and Ferrara to facilitate their departure.

Whereas Pared attributed VP Hill's "partially effective" rating to her "lack of oversight and assistance provided to Respondent," Respondent contends that VP Hill's unwillingness to go along with the retaliation was the source of VP Hill's negative rating.

Respondent also considers his prior history of Effective ratings not only for the decade preceding the 2021-2022 school year but also his two Effective formal ratings, including Competency 1, for Lesson Design and Planning, prior to the 2020-2021 annual rating on May 4, 2021 evidence of his competence.

Respondent deems noteworthy that "Pared undertook the annual evaluation on May 4, 2021 less than a week following her threats of retaliation at the April 28, 2021 WebEx meeting when the District Framework affords a Principal throughout both the full months of May and June to evaluate a tenured teacher not on a CAP..." (D. Ex. #24).

The Respondent challenges his rating of "Partially Effective" for Competency 3 under Culture of Achievement. Pared wrote: "Respondent has rarely demonstrated high expectations. He has not submitted lesson plans according to schedule, having submitted one (1) lesson plan to date." Respondent asks: "What lesson plan submission has to do with that? The answer is nothing – one need only look at the District's own description of that Competency for the answer."

Respondent also argues that Pared's efforts to undermine the credibility of Montero and Bishop regarding their testimony that they submitted Lesson Plans on Montague's behalf, particularly with respect to the 2021-2022 school year. The Arbitrator is urged to reject Pared's claims regarding what was in Montague's folder and that "Montero went into his google drive post-testimony. It must be remembered that Pared is in control of these files."

Respondent casts doubt on "a series of 'lesson plan feedbacks' ostensibly issued by Hill," noting that the emails "came not from Hill's email account – but Pared's personal/home email account." Absent Hill's testimony, her rating of partially effective for, inter alia, "failing to provide Montague with lesson plan feedback or other support is challenged."

The Respondent further maintains that the SGOs in his CAP are invalid because they were imposed on him. "The mastery levels of the students, (e.g., 9 out of 18 students will demonstrate 75% mastery or above as assessed using the intro Math End of Year Assessment) 'do not identify the students to which they apply. They do not even attempt to measure 'growth,' but rather 'mastery.'" "The two concepts are distinct. A student could be far short of 'mastery,' but demonstrate tremendous growth depending on their starting level. There does not appear to be a definition of 'mastery.' There is no beginning point from which growth could even be measured. The District's failing is not some minor procedural misstep. Ignoring SGOs flies in the face of the very law, the TeachNJ Act, which created the very inefficiency standards which the District is now attempting to utilize to terminate Montague's employment, and they were used to assess Montague's rating under Competency 4 in his annual rating."

Department of Education ("DOE") guidance provides that SGOs must "be specific and measurable" and undertaken "by teachers in consultation with their supervisors. SGOs may not be set 'school-wide' or even generically "class-wide." They are to be "tailored" to the teachers' students in consultation with them. (See, DOE Guidance on SGOs). What an SGO should look like and how they are meant to be implemented are further identified in DOE guidance.

"The SGO's contained in Montague's CAP do not even attempt to meet these requirements. First, if nothing else, they were imposed on Montague and not done in consultation. The testimony is that it was VP Hill, who prepared the CAP and SGOs, presumably on the directive of Pared with respect to SGOs.

Her claims of 1,000% growth during remote instruction during an unprecedented pandemic are fanciful and the SGOs like reflect that unrealistic claim. Even if class wide, an SGO cannot simply be imposed, must be created in consultation with the teacher, must be specific and measurable, and tailored to the actual students – not simply some arbitrary level of 'mastery,' since students may not be capable of reaching that goal – particularly after a Covid shutdowns and virtual instruction. Arbitrators have found that this single failing, standing alone, may warrant dismissal of a tenure charge." See, In the Matter of Dale Brown and State Operated Sch. Dist. of Newark, Agency DKT NO.: 254-9/16 (May 24, 2017) (dismissing charge finding insufficient SGO for, among other failings, the lack of specification as to which students were included in the pool, how those students were selected, or which of the respondent's classes those students were to come from)."

The Respondent contends that there "are no valid 'Action Steps' for Administration."

"Pursuant to applicable regulation, a CAP must include: "specific, demonstrable goals for improvement," and more importantly, "include responsibilities of the evaluated employee and the school district for the plan's implementation." And, perhaps most importantly, the CAP must "include timelines for meeting the goal(s)." See N.J.A.C. 6A:10-2.5. Guidance issued by the New Jersey Department of Education advises that a CAP, must include a description of the teacher's deficiencies, timeliness for corrective action, and responsibilities of the individual teaching staff member and the district, including

actions and professional learning activities to improve the staff member's performance. (See State of New Jersey Department of Education, Summary of Legal Requirements for Teacher Evaluation and Tenure Cases) (emphasis added). This is not only a regulatory requirement, but also a statutory requirement necessary to pursue charges of inefficiency under the TeachNJ Act." See, N.J.S.A. 18A:6-119.

The District's own Guidebook declares that "a CAP is similar to, but more robust than an IPDP to ensure struggling teachers receive the necessary support for their growth" (See Guidebook, D-24, p. 15) (emphasis added). Furthermore, it provides that, "an administrator with a teacher on a CAP is responsible for reviewing and co-developing the CAP with the teacher and then supporting the teacher in meeting the development goals outlined in the CAP. (Id.). It provides, the "CAP should explicitly articulate actions the administrator will take to directly support the teacher." (Id.) (emphasis added). Further a CAP "shall...include specific metrics for monitoring progress toward goals, timelines for corrective action, responsibilities of the individual teaching staff member and his/her administrator for implementing the plan, and specific support that the district shall provide." (Id. at p. 29) (emphasis added)."

"Montague's CAP is a charade. It failed to include any specific individualized Action Steps to be provided by the administration to improve his teaching practice, nor any timelines for the provision of or completion of same. It also fails to identify Montague's purported deficiencies. Two of the three areas of teacher growth identified in the CAP, identify areas in which Montague was rated

Effective the prior year. It is undisputed that the only administrative Action Steps listed in the CAP are generic support that all teachers receive and are not specific for teachers on a CAP: (1) formal and informal observations; (2) lesson plan feedback; (3) coaching. All teachers receive informal and formal observations and lesson plan feedback, as well as 'coaching.' That much was admitted to by Pared and Fuentes. The CAP offers nothing that any teacher would otherwise receive. Thus, the CAP provides for zero individualized supports and, of course, no timelines are set forth in the CAP to provide or complete the existing supports. Though the CAP is supposed to be more 'robust' than an Individualized Professional Improvement Plan ('IPDP') for non-CAP teachers, a comparison between Montague's IPDP for 2020-21 and his CAP for 2021-22 shows, if anything, less robust supports. (Compare D-2 to D-7). These facts alone render the CAP invalid under applicable regulations and render Montague's annual summative evaluation procedurally defective. Of course, even these 'supports' were not provided, as discussed below."

In addition, Respondent argues that he was not afforded: (1) an announced observation; (2) three formal observations as a teacher on a CAP; and (3) a mid-year or annual evaluation conference.

In 2021-2022, Respondent received two observations, one of which had to be announced. Hill's observation (D. Ex. #7) does not indicate whether or not it was announced. Pared testified that she did not know, and VP Hill did not testify. Similarly, Pared's own observation (D. Ex. #8) is unclear on this point.

Teachers on a CAP are entitled to three observations per year. Montague had only two formal observations. The Respondent contends that Montague's absence from the beginning of January 2022 to the end of the school year neither excused the failure to provide a third observation, the mid-year conference or an annual evaluation conference. Since he was using his sick leave and/or was on an approved leave of absence, he should not be penalized. "By the time Montague is advised that his extension request is denied, it is well past the time for a mid-year evaluation or third observation. Rather than charge Montague with "inefficiency" while absence, Respondent argues that his increment could have been withheld.

Finally, in addition to the defenses of Retaliation and Procedural violations, Respondent argues that even in the absence of anti-Union animus, procedural violations, including the CAP deficiencies, "the conduct of the observation and evaluation process was otherwise arbitrary and capricious, such that it materially affected the outcome of Montague's evaluation. Evidence of Principal Pared's conduct deemed illustrative of the arbitrary and capricious behavior are as follows: (1) undermining Montague's 2020-2021 performance evaluation by citing false uncorroborated, or irrational justification in the over-the-year indicators; (2) removing Montague from his teaching cohort; (3) changing his lunch period; (4) imposing unlawful SGOs; implement a patently defective CAP; (5) denying Montague CAP assistance by cancelling the CAP coaching cycle;

(6) retaliating against his co-worker Ferrara; (7) removing his direct supervisor to avoid her evaluating him; (8) preparing tenure charges against him prior to his mid-year evaluation; (9) conducting a mid-year evaluation in the absence of a conference while his is on District approved FMLA leave; (10) conducting an annual evaluation in the absence of a conference; and (11) evaluating Montague in the absence of three required formal observations. "The foregoing is only a sampling of the arbitrary and capricious nature of Montague's evaluation process during the two-years at issue in this case, and is enough, putting even all other considerations aside, to have materially affected the outcome of his evaluations such that the instant tenure charges should be dismissed."

DISCUSSION

I. Union Animus

The Arbitrator is persuaded by a preponderance of the credible evidence that the administration of the Raphael Hernandez School, particularly Principal Pared, engaged in anti-Union discriminatory conduct prohibited by the State and Federal law. In the Arbitrator's opinion, "the charges would not have been brought but for considerations of...Union activity, discrimination as prohibited by State or federal law."

There is preponderant evidence which establishes that Principal Pared from the outset was hostile to the election of Respondent as building representative commencing with the 2020-2021 school year and continuing until efficiency charges were filed against him on July 29, 2022.

Considering the testimony of Montague and other witnesses at the hearing, supported by documentary evidence, the Arbitrator finds that Principal Pared interfered with the protected right of staff at RHS to select the building representative without coercion or intimidation. The evidence reveals that Pared displayed her anti-Union animus by initially insisting that the building representative be elected rather than appointed as had been the Union's practice, and that the former building representative, Herman Gonazlez, remain on the ballot when he had offered to step down. Whereas the staff perceived that Gonzalez had not been effective as Union building representative, Montague had been outspoken and critical of the principal and the school environment.

Early in Montague's role as building representative, Pared's demanded that she be given the times and dates of Union meetings, contrary to the Union's position that the NTU contract provision did not mandate that such information be given but rather a courtesy. Respondent construed the request as Pared's continued her interference with Union business.

In the Arbitrator's interpretation of Section 5, Union Meetings in the NTU contract, which states that while principals are required to cooperate with the Union "to facilitate the holding of such meetings despite relatively short notice and shall not schedule any activity or program which will interfere with the conduct of said Union meetings, except in cases of emergency" he finds that there is no explicit language requiring the Union to provide advance notice of all of its meetings for a school year. While it is clearly in the interests of both parties to reconcile the schedule of Union meetings with other activities the principal may

have scheduled in advance of notice from the Union, there is no mandatory requirement such as that sought by Principal Pared from Respondent.

Further evidence of anti-Union animus was Principal Pared's comment to staff that she "listened in" or "knew" what was going on in Union meetings. During a period where Union meetings were held virtually due to the restrictions imposed by the pandemic, Principal Pared's comments had the effect of intimidating Union members, undermining the Union and Montague, and chilling free expression by staff on matters of concern.

The Respondent reasonably relied on the testimony of Ms. Jessica Carnemolla, a literary coach, who resigned citing the toxic environment. She recalled that Pared had complimented her on a correction she had made concerning coaches at a Union meeting. (Tr. @ 1049). Similarly, Ms. Crowe recalled that Pared "said she heard some things were going on in our Union meeting." Vangela Crowe's contract was not renewed. The Arbitrator concurs with Respondent that irrespective of whether Pared actually listened in on Union meetings, which she denied, the statements alone would constitute interference with Union activity.

There is clear and convincing evidence that Principal Pared maximized her anti-union animus during an April 28, 2021 faculty meeting. In the audio and video recording of the meeting, Pared can be heard telling faculty that certain communications to the Union would result in negative consequences such as exclusion from the "family" or the "community." The so-called "chain of command" meeting was an overt attempt by Pared to restrict staff

communication with Montague on subjects she deemed improper that were in fact related to their conditions of employment. In asking, "Why do we need an intermediary?" Pared was engaged in blatant anti-union behavior.

In addition, during the April 28th meeting, Pared singled out Montague, Ferrara and Crowe for discipline by having other faculty take their students on mask breaks for the remainder of the school year. Ferrara and Crowe had been speaking to Montague when their deviation from the mask break protocol, namely, conversing with Montague outside of their designated areas, had occurred.

The 2020-2021 school year, insofar as Union activity was concerned, culminated with a group visit to the central administration and a meeting with Joanne Watson of Labor Relations. Montague, Ferrara and Crowe traveled to "765 Broad Street," Newark Board of Education, to complain about the Pared administration.

There is evidence that Principal Pared retaliated against Montague and Ferrara for their Union activity and criticism at the commencement of the 2021-2022 school year. Montague's 6th and 7th grade cohort, with Ferrara teaching E.L.A. and Dixon teaching science, was changed without explanation. While the principal undoubtedly had the discretion to make administrative changes she deemed conducive to the goals and objectives of the school, these changes, which affected only those Union members who were also the most critical of the administration, were suspect. Notice of the changes was conveyed in mid-June shortly after the Watson meeting. It is noteworthy that at this juncture,

Respondent had been rated "partially effective" for the 2020-2021 school year and would be placed on a CAP for 2021-2022.

Additional changes for 2021-2022 included a change in Montague's lunch period. Significantly, immediately after the January 5, 2022 Climate and Culture Meeting, Montaque's immediate supervisor was changed from VP Hill to VP Bird, effective January 6, 2022. It is noteworthy that VP Hill had rated Montague effective for each of the lessons she had observed in 2020-2021 and 2021-2022.

Notwithstanding the recollection of the participants at the Climate and Culture Meeting that Pared offered an "apology" to the staff, Montague, Ferrara and others had reiterated their concerns regarding what they perceived to be a continuing "retaliatory environment." VP Bird's adversarial "us v. you" comment reinforced this perspective.

There is also some evidence that Pared's distribution of a mug shot of Montague obtained from the Essex County jail following his "false arrest" (with charges ultimately dismissed) was designed to undermine his status at the school.

Clearly, the administration of Principal Pared was replete anti-Union animus or bias and, but for this factor, it is not probable that the tenure charges against the Respondent would have been brought. However, the TEACHNJ statute does not consider the presence of anti-union animus dispositive of a tenure charge of inefficiency. It requires a further determination by the arbitrator that this fact "materially affected the outcome of the evaluation."

II. Alleged Material Effects on the Outcome of the Respondent's Evaluation

Given the statutory criteria to be considered by the Arbitrator includes: "(1) The employee's evaluation failure to adhere substantially to the evaluation process, including, but not limited to providing a corrective action plan," the Respondent claims the following procedural violations materially affected the outcome of his evaluation:

(1) the absence of a legally valid CAP;

(2) the absence of and, in fact, undermining of any assistance to Montague as a teacher on a CAP;

(3) the absence of an "announced" observation or three required formal observations;

(4) the lack of both a mid-year and summative evaluation conference.

The Respondent claims that his CAP was invalid, inter alia, because the Student Growth Objectives ("SGOs") in his CAP were imposed on him. He disputes the Goal 1 terminology that "[b]y April 2022, 9 of the 18 7th grade students would demonstrate mastery of 7th grade level standards by achieving a score of 75% mastery or above." A similar metric is cited for the 6th grade. The District notes that "the Growth Areas included Action Steps, Metrics & Processes and as part of Growth Area #4 that 'lesson plans will be submitting according to the schedule and the teacher will be ready at the start of the class.'" (D. Ex. #6).

Respondent takes issue that the students to be assessed are not identity, "they do not attempt to measure 'growth,' but rather 'mastery' and there are no beginning points from which growth could even be measured."

The Arbitrator disagrees. Clearly, the students are identified as those students in Respondent's 6th and 7th grade classes, 50% of which (9 out of 18)

are to achieve mastery defined as a score of 75% or above using the Math End of Year Assessment. And the timeframe for the "Growth" measurement is from the beginning of the school year until April 2022.

More importantly, the evidence established that Respondent in a collaborative process sat down with Vice Principal Hill and agreed on the SGOs. (D. Ex. #6). The record indicates that Montague viewed his CAP on November 1, 2021 after it was created on September 9, 2021 and therefore had an opportunity to revise it. Respondent testified that he and VP Hill were involved in creating his CAP. Inasmuch as Respondent testified that VP Hill treated him fairly and considered her removal as his supervisor indicative of Principal Pared's retaliatory intent, the Arbitrator is reluctant to credit Respondent's argument, without proof, that his CAP SGOs were imposed on him.

The Respondent's second claim is that his CAP contains no valid action steps. According to Respondent, his CAP lacked "demonstrable goals for improvement, responsibilities of the evaluated employees, timelines for meeting the goals and corrective action and professional learning activities to improve the staff member's performance." Here again, the Arbitrator finds that the Action Steps for Growth Areas Nos. 1-4 were collaboratively prepared by VP Hill and Respondent with no evidence that they were unilaterally imposed on him by his supervisor.

Respondent's third claim is that he was denied adequate coaching assistance required for a teacher on a CAP. Although Montague acknowledged that a coaching cycle was set up with Gloria Bishop, Math Coach, "to provide me

with some assistance because I was a teacher on a CAP," he testified that Principal Pared cancelled the coaching cycle in October/November 2021. (Tr. @ 1504). Referring to RHS topics and Support Person Schedule for 2021-2022, Respondent described the several PLC entries as "nothing unique or specific to anything to assist me. That's assistance for all teachers." (Tr. @ 1506). Other than the November 1, 2021 meeting on the topic of Binder Expectations, Respondent argues that he was provided "zero individualized supports or any individualized Action Steps" to improve his teaching practice.

The Arbitrator is persuaded that the District failed to adhere substantially to the evaluation process, primarily because Respondent was not provided with an adequate corrective action plan.

The Respondent's observations for 2020-2021 began with Principal Pared's first classroom observation on November 10, 2021 where Montague was overall rated a "effective." Pared rated Respondent "partially effective" with respect to "Tailored Instruction," and gave him suggestions on how he could improve Indicator 2b – Lesson Components.

For his second observation, conducted by VP Hill on March 29, 2021, Respondent was rated overall "effective." However, he was rated "partially effective" for Lesson Sequence because VP Hill wrote that his lesson "did not effectively demonstrate that the lesson was an individual standards-aligned lesson built on previous lessons and on students' prior knowledge. " In his 2020-2021 Summative Annual Evaluation" he was overall rated "partially effective." He was rated "partially effective" for Competency 1 "Lesson Design and Focus,"

"partially effective" for Lesson Sequence, Indicator (1a) and "ineffective" for Coherent Planning, Indicator (1e); "partially effective" in Competency 2, Rigor and Inclusiveness; "partially effective" for Competency 3, Culture of Achievement; "partially effective" for Competency 4; Student Progress Toward Mastery; "Significantly Below Expectations" for Commitment to Personal and Collective Excellence.

Clearly, placement of the Respondent on a CAP for the 2021-2022 school year was designed to address these ongoing deficiencies predominately focused on lesson design, lesson planning, lesson sequence and tailored instruction.

Despite the focus in the CAP on Growth Areas that encompassed Indicator 1a – Lesson Sequence, with Respondent agreeing that "lesson plans will be submitted according to the schedule and the teacher will be ready at the start of the class," Respondent claims that during the 2021-2022 school year his coaching support was abruptly cancelled by Principal Pared.

Respondent recalled the process as follows:

Q. Are those things unique to you on a CAP?
A. No.
Q. What do you mean by that?
A. Every teacher gets informal and formal classroom observations. Every teacher is supposed to get coaching from administrators, and we certainly did from our actual coaches, the math coach and the literacy coach, and everyone gets lesson plan feedback.
Q. Did you get any unique assistance or support while on the CAP?
A. No, I did not.
Q. Where would that have come from?
A. It would have to be something that was set up by the administrative team.
Q. Administrative team being who?
A. Principal Pared and the vice principals of which we had three at the time.
Q. To your knowledge, was anything set up?

A. Initially, yes. Correction. There was something initially set up that was supposed to be additional support for us – or for myself, I should say, specifically as on a CAP.
Q. And what was that?
A. It was an additional coaching cycle with math coach Gloria Bishop.
Q. And what happened with that coaching cycle?
A. We had two coaching cycle meetings. The first one was basically introductory. I have a very positive relationship with match coach Gloria Bishop, and she basically came in and said she was scheduled to start meeting with me to provide me with some assistance because I was a teacher on a CAP. So, the first meeting was kind of introductory.

And then we had a second meeting where we specifically went over the format to create binders, and that was the end of the coaching cycle.
Q. Did you know what happened to the coaching cycle?
A. It was cancelled by Principal Pared.
Q. And did you receive any specific CAP assistance from Mrs. Bishop following that?
A. No, none.
Q. And do you recall when that last meeting was, approximately?
A. It had to be some time October/November, somewhere along those lines...
Q. And so there's a series of entries in here, some of them refer to – on the right-hand column, support person. I think there's a topic and on the left hand side there's a date, correct?
A. Yes.
Q. And you see the references to Gloria Bishop?
A. Yes, I do.
Q. You now, I think the first one starts at October 13, 2021.
A. I see it.
Q. And then they run through – just with respect to her, January 12, 2022.
Do you see that?
A. Yes.
Q. Okay, Do any of those entries to your knowledge, reflect specific individualized support for you on your Corrective Action Plan?
A. Absolutely not.
Q. What's your understanding of what the entries are?
A. The majority of these are PLCs. I noticed a lot of them it's PLCs. That's our Professional Learning Community. That's where all the teachers meet. So there's nothing unique or specific to anything to assist me. That's assistance for all teachers.

And then several of the dates appear to be nothing more than her regularly scheduled visits to my classroom. As a math

coach, that's part of her professional responsibility. She visits classrooms.

Q. And, in fact, do any of these – just looking at that page here, can you identify the meeting that you had had, the CAP support

meeting you had had on here? And the dates are on the left-hand column, and the subject matter is in the middle.

A. the 11/1 meeting is definitely an individual support meeting.

Q. And how do you know that?

A. Because that's the Binder Expectations, and we did discuss binders individually. So, I'm assuming – I don't actually remember if these dates correspond to what actually took place, but I do definitely know that the binder-expectation meeting was myself and Ms. Bishop and one other individual... (Tr. @ 1502-1507).

The testimony of Gloria Bishop, Math Coach, corroborates the Respondent's recollection of his CAP support. Referring to the RHS Teacher Support Schedule for 2021-2022, Bishop testified that the October 25, 2021, Planning for the Next Lesson; November 1, 2021, Binder Expectations; and the November 22, 2021 Conference were the only three sessions that were individualized for Respondent. Although she was originally scheduled to meet with Montague during an additional preparation period – "at a designated time other than his prep...for me to meet with him individually for the coaching cycle," "it was discontinued." (Tr. @ 984). Bishop distinguished the In-Class Support entries on the schedule as "something I would do with all the teachers. I come into their classrooms. I would team teach. I would observe the lesson and provide feedback." (Tr. @ 982).

Bishop further distinguished from the one-on-one CAP coaching, the In-Class Support she provided Montague in his classroom on November 17, 2021,

January 3, 2022, January 4, 2022 (virtual), January 5, 2022 and January 6, 2022 (virtual).

Similarly, she described the PLCs, Planning for Small Group, as group meetings where the "math teachers of the school met to collaborate and train on teaching strategies, planning, etc."

Bishop testified, on redirect examination, that following the October 25, 2021 meeting where expectations for the coaching during the CAP were discussed and after the November 1, 2021 Binder meeting, "I didn't have any additional prep to coach him. All the other coachings were the coaching cycle I would give a normal teacher." (Tr. @ 1005).

Principal Pared acknowledged that she cancelled the coaching cycle, which was tantamount to Respondent having a sixth prep or an extra prep because Respondent was only entitled to have five (5) preparation periods. (Tr. @ 450-451). Shortly before the cancellation of the coaching cycle, VP Hill, following her November 10, 2021 formal observation of Montague, had rated the overall lesson "effective" and noted as "effective" progress toward two of the three professional learning goals planned at the start of the year, with (1a) Lesson Sequence rated as "partially effective." (D. Ex. #8).

Subsequently, on January 6, 2022, VP Bird replaced VP Hill as Respondent's supervisor, and VP Bird conducted his mid-year evaluation on January 12, 2022 rating him "partially effective," in reliance on the VP Hill "effective" observation of November 10, 2021 and Principal Pared's "partially effective" rating on December 16,2021. It is noteworthy that for the 2021-2022

school year VP Hill herself was rated "partially effective" by Principal Pared for, inter alia, "not providing ample lesson plan feedback to Montague."

Given the absence of Montague from approximately January 25, 2022 until the end of the school year, Respondent's observations and CAP support, if any, ceased. VP Bird, for her part, had no role in Respondent's CAP development. VP Bird issued Respondent's Mid-Year Review on January 12, 2021, but due to Montague's sick leave absence on January 10th, 11th, 12th and 13th, 2022 and a personal leave day on January 18th, she did not conduct a Mid-Year Review Conference which the Framework "required for teachers on a Corrective Action Plan."

In preparing the Mid-Year Review, "the administrator considers evidence gathered through formal and informal observations completed to date, evidence of over-time indicators, and evidence of progress toward learning goals. Based on this evidence, the administrator assigns a performance level to all five Competencies, focusing on Competencies that are most critical in order for the teacher to meet his/her goals." In focusing on Respondent's lesson plan deficiencies, VP Bird did not confer with VP Hill who jointly designed the CAP with Montague.

With Respondent unavailable after January 22, 2022, the remaining evaluation claims of Respondent need not be addressed. Neither a third observation for a teacher on a CAP nor whether he was entitled to an announced observation, absent evidence that either of his first two observations were announced, can be considered. Although Respondent's FMLA leaves of

absence requests were retroactively approved by the District initially to March 2, 2022 (for the period January 25, to March 1, 2022) and subsequently to April 22, 2022 (for the period March 2, 2022 to April 22, 2022), his third request for an extension was denied. From the documentary record, the Arbitrator concludes that from April 25, 2022 to the end of the school year, Respondent was not on any approved leave of absence.

In the Arbitrator's opinion, but for the deficiencies in the District's administration of Respondent's CAP, there would be preponderant evidence in support of an inefficiency tenure charge. While the District adduced convincing evidence that Respondent was ineffective or partially effective over a two-year period with respect to competencies and indicators related to lesson planning, lesson sequence, lesson design and focus, tailored instruction and coherent planning, and Respondent had been put on notice of this deficiency as early as his first 2020-2021 observation, rated "effective" by Principal Pared, that he needed to tailor instruction to move students toward mastery, Respondent made minimal progress.

In his second 2020-2021 observation, VP Hill wrote that Montague needed to connect the lesson to previous learning objectives. This pattern continued during the 2021-2022 school year when Respondent displayed difficulty demonstrating learning by using data, lesson sequencing and coherent planning.

Overarching the Respondent's performance over the two years was his failure to submit written lesson plans. Although unequivocally required by the District every two weeks in his Google folder, for the 2020-2021 school year,

Montague submitted only set of plans for the first week of school. For the 2021-2022 school year, he only submitted copies of the curriculum.

The testimony of the Principal that there was absolutely no proof that Respondent had submitted his lesson plans is credited by the Arbitrator. On the other hand, the false testimony of Ms. Montiero that she uploaded lesson plans for Montague's 6th grade class to his folder that she had shared with Respondent is discredited. Despite several memos to Respondent charging him with Neglect of Duty and Insubordination for "failure to submit lesson plans" as of his Mid-Year Evaluation dated February 22, 2022, Respondent's Lesson Plan deficiency was unabated.

Clearly, the Respondent's CAP for 2021-2022 provided him with one last chance to correct this deficiency, comport his performance with the expectations of the District, and avoid the instant charge of inefficiency. However, the District's failure to substantially adhere to the evaluation process by denying Respondent the opportunity to receive individualized Match coaching, lesson plan design and training pursuant to his CAP growth areas, action steps and goals, exacerbated by a pervasive environment of anti-Union animus, persuades the Arbitrator to dismiss the instant tenure charge.

The decision of Principal Pared to change Respondent's immediate supervisor from VP Hill to VP Bird, deprived him of the opportunity to work with the administrator with whom he had collaborated on the design and ongoing implementation of his CAP growth areas, action steps and goals. Principal Pared compounded the deprivation of Montague's CAP support by cancelling his Math

coaching cycle. Without the assistance of Math Coach Bishop, many of the instructional deficiencies identified in Respondent's classroom observations, particularly lesson planning and lesson sequencing, could not be addressed.

Together, these decisions had the effect of denying Montague the requisite CAP support mandated under the Framework. Given convincing evidence that Respondent was denied an adequate Corrective Action Plan, the Arbitrator finds that Respondent has established a valid statutory defense to the tenure charge of inefficiency as set forth in TEACHNJ.

In finding that the charges would not have been brought but for considerations of Union activity, the Arbitrator further finds that this fact materially affected the outcome of his evaluation in that Respondent was not provided with an adequate Corrective Action Plan consistent with the Framework for Effective Teaching. Accordingly, the instant tenure charge is dismissed.

November 27, 2023

Robert T. Simmelkjaer
Robert T. Simmelkjaer
Arbitrator

STATE OF NEW JERSEY DEPARTMENT OF EDUCATION.

IN THE MATTER OF TENURE CHARGES BY:

NEWARK BOARD OF EDUCATION
Petitioner

- against -

TONYETTE JACKSON
Respondent

Agency Docket
No. 233-8/23

Pursuant to N.J.S.A. §§ 18A:28-5 and 18A:6-10

APPEARANCES:

FOR THE PETITIONER
MACHADO LAW GROUP
By: Jessika Kleen, Esq.

FOR THE RESPONDENT
ZAZZALI, P.C.
By: Kathleen Naprstek Cerisano, Esq.

BEFORE:

Perry A. Zirkel, Arbitrator

ARBITRATOR APPROVAL

The Newark Board of Education (Petitioner) filed Sworn Tenure Charges against tenured social worker Tonyette Jackson (Respondent) in accordance with N.J.S.A. § 18A:6-11, and served them on Respondent with notice of opportunity to submit evidence and argument inopposition. Thereafter, the Commissioner of Education, following review of the Charges and Respondent's answer, found the Charges were sufficient for referral to an arbitrator. On September 8, 2023, the Office of Controversies and Disputes appointed me as the arbitrator to hear and decide this tenure dispute. Pursuant to a September 18 status conference with the parties, we agreed on hearing dates of October 23 and November 1–2. On October 19, I agreed, upon the parties' request, to postpone the October 23 hearing session pending settlement discussions, on the condition that the sessions on November 1 & 2 (and, if needed, November 3) would remain in place. On or about October 26, I agreed to postpone the remaining hearing sessions based on the parties' assurance that settlement was imminent. On November 3, the parties notified me of their settlement of the case pending final signing. On November 27, after intervening communications about the formal arrangements for the Board's approval, the parties submitted the finally executed settlement agreement along with a separate recitation of compliance with the Cardonick standards.

After a careful review of the Agreement, I hereby conclude that it satisfies the statutory requirements for withdrawal and settlement of tenure charges, as set forth in N.J.A.C. 6A:3-5.6 based on the following findings:

1. The Petitioner specified the charges of inefficiency based on partially ineffective ratings for two consecutive years and provided them to the Respondent with the requisite accompanying documentation. The preamble of the Agreement confirmed the nature of the charges.

2. The preamble of the Agreement also explains that settlement is in the best interest of the parties and the public because it avoids an uncertain conclusion after protracted and costly proceedings. This conclusion is particularly applicable in this case because the Respondent submitted a prehearing brief that raised the issue of whether the restricted standard of review for tenured teachers in inefficiency cases under N.J.S.A. 18A:6-17.2 applies to tenure social workers. Settlement of the alleged inefficiency with Respondent's resignation and use of unused sick days for two months of back pay allows the Petitioner to save the added costs of resolving this complicated issue.

3. The remaining provisions of the Agreement amply confirm the full consent of both parties.

4. These remaining provisions also show that the charged party signed with full understanding of her rights after a detailed discussion with her counsel.

5. The Agreement is in the public interest by saving the notable transaction costs of the detailed statutory proceedings and any further employment with the Petitioner. This conclusion is reinforced by the nature of the charges, which amounted to inefficiency based on partially ineffective ratings rather than illegal or other unbecoming conduct and for which N.J.S.A. 18A:6-17.3 permits, but does not require, bringing tenure charges.

6. As set forth in her Certification that is part of the Agreement, Respondent understands that the Commissioner of Education has the duty to refer these charges to the State Board of Examiners for possible suspension or revocation of certification as it deems appropriate and when such referral is warranted by the nature of the tenure charges.

Thus, I approve the attached Agreement in full resolution of Agency Docket No. 233-8/23.

Perry A. Zirkel, Arbitrator
November 27, 2023

Jessika Kleen, Esq.
MACHADO LAW GROUP
1 Cleveland Place
Springfield, New Jersey 07081
(973) 232-5291
Attorneys for Petitioner
Newark Board of Education

In re	:	
TONYETTE JACKSON	:	
and the	:	SETTLEMENT AGREEMENT DKT. NO. 233-8/23
BOARD OF EDUCATION OF THE CITY OF NEWARK	:	

This Settlement Agreement ("Agreement") is made by and between the Newark Board of Education ("Board"), with an address at 765 Broad Street, Newark, New Jersey 07102, and Tonyette Jackson ("Jackson"), residing at 521 Pemberton Avenue, Plainfield, New Jersey 07060 (collectively, the "Parties").

WHEREAS, Jackson is a tenured teaching staff member employed by the Board;

WHEREAS, on or about August 24, 2023, the Board certified a tenure charge of inefficiency against Jackson;

WHEREAS, upon certification of such charge, Jackson was suspended without pay from her employment with the Board for a period of 120 days;

WHEREAS, the Parties wish to resolve this matter in accordance with the terms set forth herein rather than proceed with arbitration;

WHEREAS, the settlement set forth herein is in the best interest of the Parties and the public because it avoids an uncertain conclusion after protracted and costly proceedings at the expense of the public;

NOW, THEREFORE, the Parties hereby agree as follows:

1. Jackson hereby agrees to voluntarily resign from her tenured position effective October 30, 2023. Attached is a copy of Jackson's signed Letter of Resignation. (Exhibit A). Jackson's separation from employment will be deemed a voluntary resignation in good standing. Other than as required by law, upon inquiry from any third parties, the Board will only confirm Jackson's employment, position, title, salary, and dates of employment.

2. Jackson also agrees to withdraw with prejudice any and all claims or suits that she may have previously filed against the Board that are still pending in any and all courts and/or before any and all agencies with the exception of workers compensation claims. This Settlement is intended to be the final resolution of all outstanding matters between the Board and Jackson. Should Jackson fail to submit letters of withdrawal for any such pending claims or suits, this Settlement Agreement will serve as Jackson's formal written notice of withdrawal of those pending claims or suits, except for workers' compensation claims.

3. In exchange, the Board will allow Jackson to utilize and exhaust the unused days in her bank to receive salary from September 1, 2023 until her date of resignation effective October 30, 2023. Any salary paid as part of this settlement agreement will be minus all standard salary and tax deductions, including pension contributions, and will be paid to Jackson within ten (10) school days after approval and execution of this Agreement by the Board. Other than the salary that Jackson receives until the date of her resignation, Jackson will not receive any other monies or emoluments from the Board in exchange for this Agreement.

4. The Board also agrees not to pursue the tenure charge of inefficiency against Jackson, which could result in the termination of Jackson's employment, so long as this Agreement remains in effect and is not voided by any court or administrative agency of competent jurisdiction. However, if the Agreement is voided, the Board retains the right to refile and pursue the tenure charge of inefficiency against Jackson.

5. As of the effective date of her resignation, all of Jackson's employment rights, including but not limited to salary, insurance coverage, tenure and seniority, will permanently end.

6. Jackson agrees that she will not apply for reemployment with the Board at any time. Specifically, Jackson will be considered to have permanently resigned from her

tenured position as a result of this Agreement. If Jackson does apply for reemployment with the Board and is approved for employment in any capacity, the terms of this Agreement shall control and be grounds for immediate termination of Jackson's employment.

7. This Agreement shall not constitute a precedent in any matters involving other employees.

8. Except as noted above, Jackson waives all claims of any nature against the Board with regard to her employment with and/or her separation from the District, including fees, or other monetary relief, with the exception of workers' compensation claims.

9. By entering into this Agreement, and in exchange for good consideration as set forth in Paragraph 3 and 4 above, the sufficiency of which is hereby acknowledged by the parties, Jackson releases and discharges the Board, the Board Superintendent, its Board of Education and its Board members, and any and all other Board officers, employees, representatives, agents, successors and assigns (collectively, the "Released Parties") with respect to all claims or rights that she has or may have against the Board regarding her employment with the District. This includes without limitation, any and all actions, claims, and liabilities of whatsoever kind or character, in law or in equity, now known or unknown, suspected or unsuspected, directly or indirectly related to Jackson's employment with the Board and separation from the Board except for workers compensation claims. It specifically includes, without limitation, all claims which Jackson may have regarding tenure, withholding of increment, discrimination on any basis, any federal or state civil rights law, any alleged violation of the Age Discrimination in Employment Act, as amended; the Older Worker Benefits Protection Act; Title VII of the Civil Rights Act of 1964, as amended; Sections 1981 through 1988 of Title 42 of the United States Code; the Civil Rights Act of 1991; the Equal Pay Act; the Americans with Disabilities Act; the Rehabilitation Act; the Family and Medical Leave Act; the Fair Labor Standards Act; the Employee Retirement Income Security Act of 1974, as amended; the Worker Adjustment and Retraining Notification Act; the National Labor Relations Act; the Fair Credit Reporting Act; the Occupational Safety and Health Act; the Uniformed Services Employment and Reemployment Act; the Employee Polygraph Protection Act; the Immigration Reform Control Act; the retaliation provisions of the Sarbanes-Oxley Act of

2002; the Federal False Claims Act; the New Jersey Law Against Discrimination; the New Jersey Conscientious Employee Protection Act; the New Jersey Family Leave Act; the New Jersey Wage and Hour Law; the New Jersey Equal Pay Law; the New Jersey Occupational Safety and Health Law; the New Jersey Smokers' Rights Law; the New Jersey Genetic Privacy Act; the New Jersey Fair Credit Reporting Act; New Jersey Wages and Hours Law, unemployment compensations laws, disability benefits laws, the retaliation provisions of the New Jersey Workers' Compensation Law (and including any and all amendments to the above), the United States Constitution, the New Jersey Constitution and/or any other alleged violation of any federal, state or local law, regulation or ordinance, common law and/or contract or implied contract or collective bargaining/ contractual claim or tort law or public policy or whistleblower claim, having any bearing whatsoever on her employment by and the termination of her employment with the District, including, but not limited to, any claim for wrongful discharge, back pay, front pay, vacation pay, sick pay, wage, commission or bonus payment, attorneys fees, costs, and/or future wage loss, except for workers compensation claims. Jackson agrees to save, hold harmless and indemnify the Released Parties for any legal costs and attorneys' fees associated with the enforcement of the terms of this Agreement should enforcement become necessary.

10. Notwithstanding Paragraph 9 of this Agreement, it is understood and agreed that the parties are not prohibited from communicating with or participating in any administrative proceeding before the United States Department of Labor, the Equal Employment Opportunity Commission, or any other federal, state or local law agency. Should any entity, agency, commission or person file a charge, action, complaint or lawsuit against the Board based upon any of the above-released claims in Paragraph 9, Jackson agrees not to seek or accept any resulting relief whatsoever.

11. To comply with the Older Workers Benefit Protection Act of 1990, if applicable, this Agreement advises Jackson of the legal requirements of the Act, and fully incorporates the legal requirements by reference into this Agreement. Accordingly, by executing this Agreement, Jackson acknowledges that she: (i) fully understands the terms and conditions of this Agreement; (ii) has consulted with an attorney to review the Agreement; (iii) specifically waives her right to pursue any current claims she may have under the Age Discrimination in Employment Act; (iv) has been given twenty one days within which to

consider this Agreement; and (v) has seven (7) days from the date of the execution of this Agreement to revoke it. Jackson understands that she may rescind this Agreement within seven (7) calendar days of signing it, and such rescission must be in writing and delivered to counsel for the Board either by hand or by certified mail within the seven-day period.

12. The parties respectively acknowledge that counsel has advised them regarding this Agreement and that each is signing this Agreement freely and voluntarily, without duress, coercion or pressure from the other party.

13. This Agreement constitutes the full agreement between the parties and shall be construed and enforced in accordance with New Jersey law.

14. If any provision or portion of a provision of this Agreement is held by a court of competent jurisdiction, or determined under applicable federal or state law, to be invalid, void, or unenforceable, the remaining provisions or remaining portions of a provision will continue and remain in full force and effect.

15. This Agreement is subject to final approval by the Board and will only become effective upon the approval of the Board. Any disapproval by the Board shall not interfere with the rights of either party to pursue the matter further.

Dated: 11/7/2023

TONYETTE JACKSON

Dated: 11-27-23

MARILYN MITCHELL
Director, Office of Special Education, NBOE

CERTIFICATION OF CONSENT TO SETTLEMENT TERMS PURSUANT TO N.J.A.C. 6A:3-5.6(b)

Dated: 11/27/23

JESSIKA KLEEN, ESQ.
Attorney for Newark Board of Education

CERTIFICATION

I, TONYETTE JACKSON, hereby certify that I have reviewed this Settlement Agreement and fully understand its meaning and terms. I acknowledge that my attorney questioned my understanding and verified my acceptance of the terms of this Settlement Agreement. I am satisfied with my representation and I enter into this Settlement Agreement voluntarily.

I certify that I have been advised of the Commissioner of Education's duty to refer tenure determinations which result in a loss of position, including those where a teaching staff member voluntarily resigns, to the State Board of Examiners for possible suspension or revocation of certificate.

I certify that the foregoing statements made by me are true. I am aware that if any of the foregoing statements made by me are willfully false, I am subject to punishment.

Dated: 11/7/2023

TONYETTE JACKSON

Tonyette Jackson
521 Pemberton Avenue
Plainfield, NJ 07060

October 27, 2023

Roger Leon, Superintendent
Newark Board of Education
765 Broad Street
Newark, New Jersey 07102

Re: Notice of Resignation

Dear Superintendent Leon:

Please accept this letter as my notice of resignation from my position with the Newark Public Schools effective October 30, 2023. I thank the Newark Board of Education for allowing me to serve the Newark Community these many years.

Sincerely,

Tonyette Jackson

307377
12004-143

353-23

New Jersey Commissioner of Education

Final Decision

D.M., on behalf of minor child, C.M.,

Petitioner,

v.

Board of Education of the Township of Hamilton, Mercer County,

Respondent.

Synopsis

Petitioner appealed the determination of the respondent Board suspending his daughter, C.M., for possession and distribution of THC edibles in violation of the school district's Code of Conduct. This case involves an incident that occurred in January 2022 wherein C.M. and another student, L.P., reportedly purchased a "Rice Krispie Treat edible with THC" from an unknown man off school grounds; the following day, C.M. was reported to have eaten a piece of the edible treat in the gymnasium of her middle school; C.M. claimed, *inter alia*, that L.P. "forced" her to eat the treat and distribute it to other students at lunch; afterwards, C.M. became ill and went to the nurse's office; C.M. maintained that she did not know what was in the treat and voluntarily took a drug test arranged by her parent four days after the incident, which was negative for cannabis. The Board contended that C.M.'s actions warranted the maximum code of conduct penalty for possession and distribution of a controlled dangerous substance, and that her one month suspension from school was appropriate. The parties filed cross motions for summary decision.

The ALJ found, *inter alia*, that: there are no material facts at issue in this case, and the matter is ripe for summary decision; it was reasonable to infer that C.M. did not believe she purchased an ordinary Rice Krispies treat from the man behind the Dollar Tree Store; the Board conceded that neither the school nor the Board was able to determine what dangerous substance, if any, the edible treat contained; the Board acknowledged that that C.M. did not know what was in the Rice Krispies treat; there was no knowledge or proof in this case that a controlled dangerous substance was in the edible as none of it was recovered or tested; the absence of substantial, credible evidence in this case renders the Board's suspension decision unreasonable. The ALJ concluded that the respondent acted in an arbitrary, capricious, and unreasonable manner in suspending C.M. for possession and distribution of THC edibles. Accordingly, petitioner's motion for summary decision was granted; petitioner is entitled to expungement and removal of disciplinary action related to this matter from C.M.'s school records.

Upon review, the Commissioner concurred with the ALJ's findings and conclusions, and adopted the Initial Decision of the OAL as the final decision in this matter. Respondent was directed to expunge the disciplinary action taken against C.M. from her student records.

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

353-23
OAL Dkt. No. EDU 03782-22
Agency Dkt. No. 73-4/22

New Jersey Commissioner of Education

Final Decision

D.M., on behalf of minor child, C.M.,

Petitioner,

v.

Board of Education of the Township of Hamilton, Mercer County,

Respondent.

The record of this matter, the Initial Decision of the Office of Administrative Law (OAL), the exceptions filed by the respondent Board of Education pursuant to *N.J.A.C.* 1:1-18.4, as well as petitioner's reply thereto, have been reviewed and considered.

This matter involves petitioner's appeal of the Board's decision to suspend C.M. for "possession and distribution of an illegal substance," described in the record as a "Rice Krispie Treat edible with THC" or simply an "edible," on January 19, 2022.[1] *N.J.S.A.* 18A:37-2(j) – incorporated into District Policy 5600, upon which the Board relies – provides that conduct constituting good cause for suspension includes "[k]nowing possession or knowing consumption without legal authority of . . . controlled dangerous substances on school premises."

[1] According to the petition, C.M. was suspended from school for a period of one month, which constitutes a long-term suspension. *See N.J.A.C.* 6A:16-7.3(a) (explaining that long-term suspensions occur when students are suspended for more than ten consecutive school days).

Following a physical altercation at school during which C.M. was attacked by another student, L.P., C.M. disclosed that several days earlier, she and L.P. had purchased a Rice Krispie treat edible from an unknown male off school grounds. C.M. said that L.P. "forced" her to eat the treat and distribute it to other students. She felt "weird" after eating it, became ill, and went to the nurse's office. L.P. claimed that C.M. brought the treat to school and ate it willingly. Video footage showed the students sitting together at lunch without evidence of any conflict or struggle. C.M. later accused L.P. of putting something in the treat that made her sick and getting her in trouble, which led to the physical altercation. C.M. maintained that she did not know what was in the treat. C.M. voluntarily took a drug test arranged by her parent four days after the incident which yielded a negative result for cannabis.

The school principal informed the Board via letter dated January 24, 2022, that the suspension stemmed from C.M.'s admission that she consumed a "'Rice Krispie Treat edible' with THC" and distributed it to other students while on school grounds. However, during the Board hearing at which she testified, the principal made no mention of THC. When asked how she knew "that there was an illegal substance in the[] edibles," she replied that she knew based upon "the interviewing [she] did with [C.M.]" who told her that she and L.P. "bought an edible." The Board's decision, issued March 1, 2022, concluded that C.M. "believed she was in possession of what she thought to be a dangerous substance" and "distributed same to other students." At the same time, the Board acknowledged that no lab test was performed to "confirm whether the edible was actually laced with a dangerous substance" because the treat was not available for testing.

Once the petition of appeal was transmitted to the OAL, the parties cross-moved for summary decision. After making findings of fact, the Administrative Law Judge (ALJ) concluded that the Board's decision was arbitrary, capricious, and unreasonable as the charge of possession and distribution was unsupported by credible evidence. In her analysis, the ALJ cited the fact that the Board never determined through lab testing what dangerous substance, if any, the treat contained. Furthermore, the ALJ cited the Board's acknowledgment of C.M.'s statement that she did not know what was in the treat. Ultimately, the ALJ found "no knowledge here or proof that a controlled dangerous substance was involved." Initial Decision, at 12. Accordingly, the ALJ granted petitioner's motion for summary decision.

In their exceptions, respondent argues that the ALJ erred because: (1) the Initial Decision misstates the burden of proof and applicable legal standard; (2) C.M. "was not suspended for possessing or distributing THC edibles" but was instead suspended for "consumption and distribution of a controlled dangerous substance"; (3) the discipline was justified based upon C.M.'s belief that the treat was "laced" and her admission that she shared it with other students; (4) the dictionary definition of "edible," which states that it is a food item containing THC, supports the Board's decision because C.M. believed that the treat was an edible; (5) the Initial Decision "ignores the District's obligation to maintain the safe and orderly operation of the schools and to keep students from harm"; and (6) the Initial Decision "creates a dangerous precedent by prohibiting a District from disciplining a student when the student believes they possess contraband, consumes and distributes it to other students, but there is no contraband remaining to have tested by a third party for dangerous substances."

In reply, the petitioner urges the Commissioner to adopt the ALJ's Initial Decision in its entirety. Overall, the petitioner reiterates that the Board's decision to suspend C.M. was patently arbitrary and lacked a rational basis as the record is devoid of evidence to establish that the treat contained THC or any controlled dangerous substances. The petitioner also asserts that the record fails to show that C.M. knowingly possessed and/or distributed THC. Moreover, the petitioner argues that the long-term suspension violated C.M.'s right to a public education and the discipline imposed constituted arbitrary, capricious, and unreasonable board action.

Upon review, the Commissioner adopts the ALJ's Initial Decision as the final decision in this matter for the reasons stated therein. The Legislature granted local boards of education sweeping authority to enact rules regarding operation of their public schools. *N.J.S.A.* 18A:11-1(c), (d); *Bd. of Educ. of City of Plainfield v. Cooperman*, 105 *N.J.* 587, 596 (1987). Board action conducted within the ambit of its broad discretionary authority "may not be upset unless patently arbitrary, without rational basis or induced by improper motives." *Kopera v. W. Orange Bd. of Educ.*, 60 *N.J. Super.* 288, 294 (App. Div. 1960). Board determinations are "entitled to a presumption of correctness and will not be upset unless there is an affirmative showing that such decision was arbitrary, capricious, or unreasonable." *Thomas v. Bd. of Educ. of Twp. of Morris*, 89 *N.J. Super.* 327, 332 (App. Div. 1965), *aff'd*, 46 *N.J.* 581 (1966). The Commissioner may not substitute her judgment for that of the Board. *Schinck v. Bd. of Educ. of Westwood Consol. Sch. Dist.*, 60 *N.J. Super.* 448, 476 (App. Div. 1960).

In this case, the petitioner has demonstrated that the long-term suspension imposed upon C.M. by the Board was arbitrary, capricious, and unreasonable and lacked a rational basis.

Board decisions pertaining to student discipline resulting in a long-term suspension "shall be based, at a minimum, on the preponderance of competent and credible evidence." *N.J.A.C.* 6A:16-7.3(a)(10)(iv). As the ALJ correctly concluded, the record does not contain any credible evidence to establish that the treat contained THC or any other controlled dangerous substance. Thus, the record fails to establish that C.M. knowingly possessed or knowingly consumed a controlled dangerous substance on school premises in violation of *N.J.S.A.* 18A:37-2(j) and District Policy 5600.

The Board's exceptions are unavailing. At the outset, the ALJ stated and applied the correct legal standard. Furthermore, the Board's attempt in its exceptions to reframe the suspension as one for "possession and distribution of an illegal substance," and not concerning an edible alleged to have contained THC, is disingenuous. Page 5 of the Board hearing transcript reflects that the Board's own attorney stated that "[t]he charges here are possession and distribution of THC edibles, occurring on January 19, 2022." Additionally, the January 24, 2022, letter from the school principal to the Board describing the code of conduct violation references C.M.'s possession and consumption of a "'Rice Krispie Treat edible' with THC" as the basis for the suspension.

According to the testimony given at the Board hearing, the principal apparently assumed the treat contained THC because C.M. referred to it as an "edible" purchased from an unknown person. However, C.M. maintained that she did not know what the treat contained. Neither she nor anyone else involved ever stated that the treat contained THC, and the treat was never evaluated to determine what, if anything, it contained. Contrary to the Board's contention, the dictionary definition of "edible" fails to support the conclusion that the treat at

issue in this case actually contained THC or any other controlled dangerous substance. Neither does C.M.'s belief that L.P. might have put "something" in the treat.

Furthermore, the Commissioner rejects the Board's assertion that the Initial Decision "creates a dangerous precedent" and ignores the Board's obligation to maintain the safe and orderly operation of the schools and protect students. While the Commissioner does not condone C.M.'s actions, the ALJ correctly found and concluded under the applicable legal standard that the Board's disciplinary charges against C.M. were unsupported by credible evidence. The holding in this case is limited to the unique facts described herein and in no way ignores a Board's obligation to maintain the safe and orderly operation of schools and to keep students from harm, nor does it prevent Boards from disciplining students in accordance with applicable law and regulations.

Accordingly, the Board's motion for summary decision is denied, and the petitioner's motion for summary decision is granted. Respondent is directed to expunge the disciplinary action taken against C.M. from her student record.

IT IS SO ORDERED.[2]

Angelica Allen-McMillan, J.D.S.
ACTING COMMISSIONER OF EDUCATION

Date of Decision: November 30, 2023
Date of Mailing: December 1, 2023

[2] This decision may be appealed to the Appellate Division of the Superior Court pursuant to *N.J.S.A.* 18A:6-9.1. Under *N.J.Ct.R.* 2:4-1(b), a notice of appeal must be filed with the Appellate Division within 45 days from the date of mailing of this decision.

State of New Jersey
OFFICE OF ADMINISTRATIVE LAW

INITIAL DECISION
SUMMARY DECISION
OAL DKT. NO. EDU 03782-22
AGENCY DKT. NO. 73-4/22

D.M. ON BEHALF OF MINOR CHILD, C.M.,
Petitioner,
v.
BOARD OF EDUCATION OF THE TOWNSHIP OF HAMILTON, MERCER COUNTY,
Respondent.

Williams R. Burns, Esq., for petitioner (Kalavruzos, Mumola, Hartman, Lento & Duff, LLC., attorneys)

Michael A. Pattanite, Esq., for respondent (Lenox, Socey, Formidoni, Giordano, Cooley, Lang &Casey, PLC, attorneys)

Record Closed: July 27, 2023 Decided: October 24, 2023

BEFORE **JOAN M. BURKE**, ALJ:

STATEMENT OF THE CASE

Petitioner, D.M., appeals the determination of the respondent, the Board of Education for the Township of Hamilton (the "Board"), suspending his daughter C.M. for possession and distribution of THC edibles on January 19, 2022, in violation of District Regulation 5600.

PROCEDURAL HISTORY

On March 1, 2022, the petitioner was notified of the Board's findings and that C.M. could return to school with a suspension in her discipline record consistent with the code of conduct for possession and distribution. On April 4, 2022, the petitioner filed a timely appeal. On May 16, 2022, the New Jersey State Department of Education, Bureau of Controversies and Disputes, transmitted the matter to the Office of Administrative Law (OAL) pursuant to N.J.A.C. 1:1-8.2. On August 15, 2022, notification was received that the petitioner had retained counsel. A status conference was held on October 4, 2022. The parties believed that they could resolve the issue and was given an opportunity to do so. On November 4, 2022, a status conference was held and the petitioner informed the tribunal that he would be filing a motion to compel discovery. A motion schedule to compel discovery was issued. After several requests for extensions to file the motion (January 5, 2023; February 10, 2023; March 14, 2023) by the parties the tribunal was notified on May 3, 2023, that a motion to compel discovery was no longer necessary. On May 11, 2023, pursuant to a telephone conference held with the undersigned and the parties, leave was given to file Cross-Motions for Summary Decision. On June 13, 2023, petitioner filed his Motion for Summary Decision. On June 14, 2023, respondent filed its Motion for Summary Decision. On June 20, 2023, petitioner filed its reply brief, however same was not received by the OAL until July 27, 2023. The record closed then. The Acting Director and Chief Administrative Law Judge granted an extension of time for the Initial Decision on September 11, 2023.

Respondent's Position

This matter involves a disciplinary suspension administered by respondent Hamilton Township School District. (Respondent's Brief at para 1.) The incident that gave rise to the discipline occurred on Wednesday January 19, 2022. C.M., at the time, was an eighth grade student attending the Reynolds Middle School. (Respondent's Brief at Exhibit A.) On January 18, 2022, C.M. and another student[1] walked behind the Dollar Tree Store located at the shopping center at Yardville-Hamilton Square Road and Route 33. (Respondent's Brief at para 3.) A purchase was made of a Rice Krispy treat edible or treat from an unidentified man. (Ibid at para 4.) Both C.M. and the other student blame each other.

On January 19, 2022, CM. was reported to have eaten a piece of the edible treat while in the gymnasium's bleachers. An investigation was conducted by respondent. In the investigation, C.M. stated that another student gave her the "edible and or treat to eat and after she "felt weird" and did not know there was something in it." (Id. at para. 5-6.) At lunch C.M claimed the other student provided her with the edible or treat and "forced" her to eat it and distribute it to other students. Ibid. The other student claimed C.M. brought the edible or treat to school and ate it willingly. (Id. at para. 7-8.) A video was taken of the incident. The video showed that the students were sitting together during lunch, neither appeared to be forced. The video revealed both C.M. and the other student eating the edible and distributing it to other students. (Id. at para 11.) It was not clear which students received the edibles from C.M. and C.M. was not clear or could not remember who she gave the edibles. (Ibid.)

On January 19, 2022, after lunch, C.M. became ill and went to the nurse's office. (Id. at para 13.) Later that evening C.M. texted the other student stating she "got her in trouble" because the other student put something in the Rice Krispy treat she gave her. On January 21, 2023, C.M. and the other student were involved in a fight. The other

[1] The other student is referenced as L.P

student claimed that C.M. was spreading rumors that she laced the Rice Krispy treat and was trying to send her to jail. (Id. at para 14.)

The District believing that C.M. possessed the Rice Krispy edible and distributed it to other students, and that it contained an illegal substance, suspended C.M. pending an administrative hearing. (Respondent's Brief at para 16.) An administrative hearing was held by a Board committee on February 15, 2022. The Board was provided with documentary evidence to support the administration's position that C.M. violated the code of conduct. (Respondent's Brief at Exhibit B, Transcript.)

At the hearing, Principal Patricia Landolfi-Collins (Principal Landolfi-Collins) testified on behalf of the Board. (TR at 6:17-14:18) Principal Landolfi-Collins testified that she first learned of the issue in this matter after the fight that broke out on January 21, 2022, when the other student attacked C.M. (TR at 8:2-6). Principal Landolfi-Collins testified that after questioning both girls and other students they found out that the fight stemmed from an incident that occurred on Tuesday, January 18 and Wednesday, January 19, 2022. The girls were behind the Dollar Tree Store on Tuesday, January 18 and purchased edibles from an unidentified man. On Wednesday when they got to school, they went to the gym because that is where eighth graders sit for the morning program. After speaking with both girls, C.M did take part of the edible. At lunchtime C.M. had the baggie of edible and she was being forced by the other student to distribute it to other students. (TR at 8:5-25, TR 9 at 1-2.)

Principal Landolfi-Collins testified that they viewed a video, and it showed both girls sitting together at lunch side-by-side. There was a bag in C.M.'s lap but they were unable to identify exactly what it was. C.M. was not sure how many students she gave the edible to. After lunch that day C.M. got sick, went to the bathroom, vomited. "Later that evening, I think there was some type of dispute or conflict between C.M. and the other student feeling as though, one might have put something in the treat and one was at blame for what happened." (TR at 9:3-23) The parent had a discussion with Principal Landolfi-Collins on February 21, 2022. The parent had reported that "something a little off" with C.M. on Tuesday. (TR at 10:13-14.)

On cross-examination, Principal Landolfi-Collins admitted that the fight that was shown on the video really was not a fight between C.M. and the other student L.M. (TR at 12: 7-19.) C.M. "was submissive and got punched in the head and hair pulled." (TR at 13: 2-3.) Principal Landolfi-Collins admitted that she did not do a drug test and it would only be done "if there was suspicion on the day of." (TR at 13:11-14.)

Principal Landolfi-Collins testified that the edibles were never found. While C.M. is charged with possession and distribution of an illegal substance, Principal Landolfi-Collins testified that she only knew of an illegal substance in the edibles based on her interview with C.M. and the answers C.M. provided. (TR at 13: 21-22.) According to Principal Landolfi-Collins, C.M. could not identify what was in the edibles. In addition, C.M. told Principal Landolfi-Collins that "L.P. probably laced whatever she gave her" because C.M. became sick from it. (TR at 14: 6-17.)

C.M. did not testify at the hearing. However, petitioner presented evidence of a drug screening that was negative for cannabis in her biological system four days after the incident. (Respondent's Brief at 39.) On February 22, 2022, the full Board considered the full recommendation from the Board Committee who presided over the hearing. (Respondent's Brief at para 42.)

On March 1, 2022, the Board sent a letter to D.M. In that letter the Board finds the following:

> that C.M. believed she was in possession of what she thought to be a dangerous substance and distributed same to other students, which warrants a finding of a violation of the code of conduct and suspension. C.M.'s admissions to Ms. Landolfi-Collins were unrebutted and support this finding. The circumstances of how she acquired the edible are highly concerning in that she purchased it from an unidentified man behind a store. If C.M. believed this to be a regular Rice Krispies treat, then the purchase would have been routine in a regular store and the series of events that occurred after would not have occurred. C.M brought the edible to school thereby bringing her conduct that occurred off school grounds

> to the school. C.M. admitted to consuming edible on school grounds and to feeling sick after causing her to vomit. C.M. admitted to distributing the edible to other students. Again, if C.M. thought she was handing out a regular store-bought Rice Krispies treat, then all this would have been unremarkable and would not have led to the issue with LP.
>
> [Respondent's Exhibit C.]

The Board further found "C.M. should return to Reynolds henceforth with a suspension in her discipline record consistent with the code of conduct maximum for possession and distribution and that the administration use its judgment with regard to ensuring C.M.'s safety upon reentry". Ibid. Respondent argues that pursuant to the District Policy 5600-Pupil Discipline/Code of Conduct, "knowing possession or consumption of a controlled dangerous substance as a basis for suspension from school." (Respondent's Brief at para.49.) And that the Board's discipline was appropriate. (Respondent's Brief at para 55.)

Petitioner's Position

Petitioner filed a Motion for Summary Decision and a reply in opposition to Respondent's motion for summary decision in which he seeks reversal of respondent's decision and expungement of the imposed discipline.

Petitioner argues that neither "Respondent's Undisputed Material Facts nor the Transcript indicate that C.M. knowingly possessed and/or distributed THC." (Petitioner's Brief at 1.) In petitioner's "Counterstatement of Facts," it contends at lunchtime on January 19, 2022, "L..P gave her a baggie containing the rest of the Rice Krispie treat 'forced her to eat and distribute it.'" (Petitioner's Brief, June 20, 2023, at 3.) There was no evidence that C.M. was under the influence of a controlled dangerous substance while on school premises and the "Rice Krispie treat was not recovered" by the Board. (Ibid.)

Petitioner states that "the incident report (Exhibit A) indicates that in the evening of January 19, 2022, C.M. texted L.P. and told L.P. she got in trouble because she [LP.] put 'something' in the Rice Krispie treat she gave her. (Petitioner's Brief, June 20, 2023,

at 3.) "L.P. was suspended per the code of conduct for five days, and negative drug test.." C.M. was not subjected to drug testing by respondent; however L.P. was subjected to a drug test and received a short-term suspension while C.M. received no drug test but long-term suspension. Ibid. Four days after the incident, C.M. had a voluntary drug test that showed there were no drugs in her system including no cannabis. Ibid.

According to the transcript C.M. was charged with "possession and distribution of THC edibles, occurring on January 19, 2022." (Petitioner's Brief, June 20, 2023, at 3.) According to petitioner, there is no shred of evidence that "CM was in possession of or distributed THC." Ibid. Petitioner argues that C.M. was specifically charged with possession and distribution of a specific controlled dangerous substance "to wit THC." Furthermore, "C.M. was found guilty and disciplined for possessing, consuming, and distributing THC, even though the record is completely devoid of any evidence proving the same." (Id. at 5.)

FINDINGS OF FACT

Based on the undisputed documents presented by the parties, I **FIND** the following **FACTS**:

The incident that gave rise to C.M.'s suspension occurred between January 18 and January 19, 2022. See Respondent Exhibit A at 6–7 (incident report). The facts became known to administrators on January 21, 2022, after another student, L.P., assaulted C.M. for allegedly spreading rumors about L.P.'s role in the incident.

At all times relevant, C.M. was a student in the eighth grade at Reynolds Middle School. On January 18, 2022, C.M. and L.P. purchased a Rice Krispies treat, alleged to be an edible infused with THC, from an unidentified man behind the Dollar Tree Store at the Hamilton Square Shopping Center. Ibid. The Dollar Tree is about a half mile from the school. Both students blamed the other for purchasing the treat. Ibid.

On January 19, 2022, C.M. and L.P. came to school and reported to the gym bleachers, where eighth graders sit for the morning program. (TR at. 8:16–19) One of the girls took the Rice Krispies treat out of a bag, and C.M. ate a piece while sitting in the bleachers. See Respondent's Exhibit A. C.M. says that L.P. gave her the rest of the Rice Krispies treat and made her share it with other students at lunch. Ibid. It is not clear to whom, or to how many students, C.M. gave pieces of the Rice Krispies treat. Ibid. See TR at. 9:9–13. Video footage of the girls at lunch did not show any signs of "struggle or anything uncomfortable" between them. (TR at 9:3–9.)

After lunch, C.M. felt sick. She vomited in the lavatory, went to the nurse's office, and texted her dad. She was absent from school the next day, January 20, 2022. Ex. A. Other students told L.P. that C.M. blamed L.P. for putting something in the Rice Krispies treat that made her sick. Ibid. When C.M. returned to school on January 21, 2022, L.P. attacked her from behind. Ibid. Administrators intervened and spoke to C.M., L.P., and other students, gleaning the facts summarized herein. L.P. was suspended for five days for fighting, while C.M. was suspended pending a Board hearing. C.M. had no prior history of discipline or misbehavior.

Administrators searched both girls' lockers and contacted their parents, who came to the school. Officer Tobolski, the school resource officer, was also informed of what happened. Ibid. No edibles or other intoxicating substances were ever recovered. (TR at 13:6–15). Consistent with what C.M. told administrators, testimony from the disciplinary hearing revealed that she did not know what substance, if any, was in the Rice Krispies treat. (TR at 14:2–8.) Indeed, the letter from the Board communicating its discipline decision, dated March 1, 2022, notes "that there was no determination that the rice krispies treat actually contained a dangerous substance by way of lab test."See Respondent's Exhibit C. Four days after the incident, C.M. voluntarily submitted to a drug test, which came back negative, though it is unclear if the type of test she took would have detected illicit substances that long after ingestion.

At the hearing held on February 22, 2022, the charges noted in the transcript are "possession and distribution of THC edibles , occurring on January 19, 2022. (TR at 5:10-12.)

There was no testing done for THC, and no evidence that supports a finding that THC was in the Rice Krispies treat.

ANALYSIS AND LEGAL CONCLUSIONS

The underlying issue in this matter is whether the respondent Hamilton Township School District acted appropriately in suspending C.M. for possession and distribution of THC edibles.

The standard for granting summary judgment (decision) is found in Brill v. Guardian Life Insurance Co. of America, 142 N.J. 520 (1995). In Brill, the Court looked at the precedents established in Matsushita Electric Industrial Company v. Zenith Radio Corporation, 475 U.S. 574, 106 S. Ct. 1348, 89 L. Ed. 2d 538 (1986); Anderson v. Liberty Lobby, 477 U.S. 242, 106 S. Ct. 2505, 91 L. Ed. 2d 202 (1986); and Celotex Corporation v. Catrett, 477 U.S. 317, 106 S. Ct. 2548, 91 L. Ed. 2d 265 (1986), wherein the Supreme Court adopted a standard that "requires the motion judge to engage in an analytical process essentially the same as that necessary to rule on a motion for a directed verdict, i.e. 'whether the evidence presents a sufficient disagreement to require submission to a jury or whether it is so one-sided that one party must prevail as a matter of law.'" Brill, 142 N.J. at 533 (quoting Liberty Lobby, 477 U.S. at 251-252, 106 S. Ct. at 2512, 91 L. Ed. 2d at 214). The Court stated that under the new standard:

> A determination whether there exists a "genuine issue" of material fact that precludes summary judgment requires the motion judge to consider whether the competent evidential materials presented, when viewed in the light most favorable to the non-moving party, are sufficient to permit a rational fact-finder to resolve the alleged disputed issue in favor of the non-moving party. The "judge's function is not himself [or herself] to weigh the evidence and determine the truth of the matter but to determine whether there is a genuine issue for trial.

> [Id. at 540 (quoting Liberty Lobby, 477 U.S. at 251-252, 106 S. Ct. at 2512, 91 L. Ed. 2d at 214).]

The Brill standard contemplates that the analysis performed by the trial judge in determining whether to grant summary judgment should comprehend the evidentiary standard to be applied to the case or issue if it went to trial. "To send a case to trial, knowing that a rational jury can reach but one conclusion, is indeed worthless and will serve no useful purpose." Id. at 541.

In addressing whether the Brill standard has been met in this case, further guidance is found in R. 4:46-2:

> An issue of fact is genuine only if, considering the burden of persuasion at trial, the evidence submitted by the parties on the motion, together with all legitimate inferences therefrom favoring the non-moving party, would require submission of the issues to the trier of fact.

As the material facts are undisputed, summary decision is appropriate.

Standard of Review and Applicable Law

The Commissioner of Education will not overturn the decision of a local school board in the absence of a finding that the board's decision was arbitrary, capricious, or unreasonable. T.B.M. v. Moorestown Bd. of Educ., EDU 2780-07, Initial Decision (February 6, 2008) (citing Thomas v. Morris Twp. Bd. of Educ., 89 N.J. Super. 327, 332 (App. Div. 1965), aff'd, 46 N.J. 581(1966)), adopted, Comm'r (April 7, 2008), <http://njlaw.rutgers.edu/collections/oal/>. Further, the Commissioner will not substitute his judgment for that of the board of education, whose exercise of its discretion may not be disturbed unless shown to be "patently arbitrary, without rational basis or induced by improper motives." Kopera v. W. Orange Bd. of Educ., 60 N.J. Super. 288, 294 (App. Div. 1960). New Jersey courts have held that "[w]here there is room for two opinions, action is not arbitrary or capricious when exercised honestly and upon due consideration, even though it may be believed that an erroneous conclusion has been reached."

Bayshore Sewage Co. v. Dep't of Envtl. Prot., 122 N.J. Super. 184, 199–200 (Ch. Div. 1973), aff'd, 131 N.J. Super. 37 (App. Div. 1974). Thus, in order to prevail, the petitioner must demonstrate that the Board acted in bad faith, or in utter disregard of the circumstances before it. T.B.M., EDU 2780-07, Initial Decision (February 6, 2008), <http://njlaw.rutgers.edu/collections/oal>.

N.J.S.A. 18A:37-2 and District Regulation 5600 provide, in pertinent part, that:

> Conduct which shall constitute good cause for suspension or expulsion of a pupil guilty of such conduct shall include, but not be limited to . . .[k]nowing possession or knowing consumption without legal authority of alcoholic beverages or controlled dangerous substances on school premises, or being under the influence of intoxicating liquor or controlled dangerous substances while on school premises.
>
> [N.J.S.A. 18A:37-2(j); Hamilton Township School District Regulation 5600(C).]

Petitioner argues that the Board's decision was arbitrary, capricious, and unreasonable because it was not supported by credible evidence. More specifically, petitioner claims "[t]he District failed to prove by a preponderance of competent and credible evidence that C.M. knowingly possessed, consumed, or distributed a controlled dangerous substance while on school premises." Petitioner also argues that the imposition of a long-term suspension was not narrowly tailored to achieve the school's interests.

Respondent argues that the Board's decision was based on unrefuted, competent, credible evidence. Respondent further avers that "the attempted distribution of a substance the student believes to be contraband must be disciplined." Emphasizing the deference given to the Board of Education's actions, respondent insists that the Board's decision to suspend the student must be upheld as a matter of law. However, in her testimony, Principal Landolfi-Collins was asked how she knew that there was illegal substance in the Rice Krispies. She responded, "Just the interviewing that I did with C.M. and the answers she provided me." (T 13:16-21.) In addition, that C.M. "mentioned that

L.P. possibly laced whatever she gave her." while Vice -Principal Hart stated that "[I] don't think that she knew what it was. My recollection is that she didn't know what was in it." See T14: 2-14. Respondent did not perform a test for TCH and did not see the edible. In fact, Principal Landolfi-Collins testified that "[w]e noticed something in C.M.'s lap from the video. We could not identify exactly what it was. At lunch recess we were told that C.M. had handed a piece of it to another student or possibly a few students. We don't have exactly how many students that she gave it to. She was telling us that she was having a hard time remembering." (T 9:7-14.) However, the respondent has determined based on this sketchy evidence that C.M. possessed and distributed THC edibles.

Petitioner has demonstrated that respondent acted in disregard of the circumstances before it, and that its decision was not supported by credible evidence. While it is reasonable to infer that C.M. did not believe she purchased an ordinary Rice Krispies treat from the man behind the Dollar Tree Store, respondent concedes that neither the school nor the Board was able to determine what dangerous substance, if any, the Rice Krispies treat contained. Respondent likewise acknowledges that C.M. did not know what was in the Rice Krispies treat. Contrary to respondent's assertion that C.M.'s mere belief that she possessed contraband is sufficient to justify the suspension, the District Code of Conduct specifically penalizes "[k]nowing possession or knowing consumption without legal authority of . . . controlled dangerous substances on school premises" and "being under the influence of . . . controlled dangerous substances while on school premises." There was no knowledge here or proof that a controlled dangerous substance was involved, and the Board offered scant details about the alleged distribution. The absence of substantial, credible evidence in this case renders the Board's decision unreasonable. Accordingly, I **CONCLUDE** that respondent acted in a manner that is arbitrary, capricious, and unreasonable and the charge of possession and distribution of TCH is unfounded.

Based upon the foregoing, I **CONCLUDE** that the respondent's actions in suspending C.M. for possession and distribution of THC edibles was improper. Accordingly, respondent's Motion for Summary Decision is **DENIED**.

I further **CONCLUDE** that the petitioner has met his burden and is entitled to expungement and removal of disciplinary action in C.M.'s record on the basis of possession and distribution of THC edibles. For the foregoing reasons, petitioner's Motion for Summary Decision is **GRANTED**.

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

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

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

October 24, 2023
DATE

JOAN M. BURKE

Date Received at Agency: _____

Date Mailed to Parties: _____

JMB/jm/mph

APPENDIX

EXHIBITS

For Petitioner

1) Petitioner's Brief in Support of Petitioner's Motion for Summary Decision, June 13, 2023
2) Petitioner's Reply Brief to Respondent's Motion for Summary Decision and in support of Petitioner's Motion for Summary Decision, June 20, 2023

For Respondent

1) Respondent's Brief in support of Respondent's Motion for Summary Decision – Exhibits A through E

354-23

New Jersey Commissioner of Education

Final Decision

In the Matter of the Suspension of the Teaching Certificate of Shazia Ahmad, Empowerment Academy Charter School, Hudson County.

Synopsis

On November 10, 2022, Empowerment Academy Charter School (Empowerment) filed an Order to Show Cause with the Commissioner against respondent Shazia Ahmad, a mathematics teacher at the school. The Commissioner ordered that the respondent show cause as to why an Order suspending her teaching certificate should not be entered for unprofessional conduct pursuant to *N.J.S.A.* 18A:26-10 after she resigned her position without giving the sixty-day (60) notice required by her contract with the petitioner. The respondent filed an answer stating that she was unable to fulfill her contractual obligations because of an urgent family matter involving the medical needs of her child.

The ALJ found, *inter alia*, that: the respondent did nothing to help Empowerment minimize the impact on her students when she left employment, nor did she seek assistance or accommodations to allow her to continue her teaching role at Empowerment; further the mitigating circumstances put forth by the respondent lacked adequate contemporaneous documentation or support; the medical needs of respondent's son when she resigned were unclear, but did not impact her ability to work essentially full-time as a substitute teacher immediately after her resignation and for many months thereafter. The ALJ concluded that petitioner failed to present exceptional circumstances or compelling reasons that would warrant a lesser suspension for her failure to provide the notice required under her contract. Accordingly, the ALJ ordered that respondent's teaching certificate be suspended for one year for resigning without providing the required notice, in violation of *N.J.S.A.* 18A:26-10.

Upon review, the Commissioner concurred with the Administrative Law Judge that respondent's resignation from employment on short notice justifies suspension of respondent's teaching certificates pursuant to *N.J.S.A.* 18A:26-10 and *N.J.S.A.* 18A:28-8. Accordingly, respondent's teaching certificates were suspended for a period of one year from the filing date of the Commissioner's decision, a copy of which was forwarded to the State Board of Examiners for implementation of the suspension.

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

354-23
OAL Dkt. No. EDU 00960-23
Agency Dkt. No. 308-11/22

New Jersey Commissioner of Education

Final Decision

In the Matter of the Suspension of the Teaching Certificate of Shazia Ahmad, Empowerment Academy Charter School, Hudson County.

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

Upon review, the Commissioner adopts the Initial Decision as the Final Decision in this matter. The Commissioner concurs with the Administrative Law Judge that respondent's September 26, 2022, resignation from employment on short notice justifies suspension of respondent's teaching certificates pursuant to *N.J.S.A.* 18A:26-10 and *N.J.S.A.* 18A:28-8.

Accordingly, respondent's teaching certificates are suspended for a period of one year from the filing date of this decision, a copy of which shall be forwarded to the State Board of Examiners for implementation of the suspension.

IT IS SO ORDERED.[1]

Angelica Allen-McMillan, Ed.D.
ACTING COMMISSIONER OF EDUCATION

Date of Decision: November 30, 2023
Date of Mailing: December 1, 2023

[1] This decision may be appealed to the Appellate Division of the Superior Court pursuant to *N.J.S.A.* 18A:6-9.1. Under *N.J.Ct.R.* 2:4-1(b), a notice of appeal must be filed with the Appellate Division within 45 days from the date of mailing of this decision.

State of New Jersey
OFFICE OF ADMINISTRATIVE LAW

INITIAL DECISION
OAL DKT. NO. EDU 00960-22
AGENCY DKT. NO. 308-11-22

IN THE MATTER OF THE TEACHING CERTIFICATE OF SHAZIA AHMAD, EMPOWERMENT ACADEMY CHARTER SCHOOL, HUDSON COUNTY

Thomas O. Johnston, Esq., for petitioner (Johnston Law Firm, LLC, attorneys)

Shazia Ahmad, respondent, pro se

Record Closed: September 29, 2023 Decided: October 19, 2023

BEFORE **NANCI G. STOKES**, ALJ:

STATEMENT OF THE CASE

On September 26, 2022, petitioner Shazia Ahamad (Ahamad), a teacher at Empowerment Academy Charter School (Empowerment), resigned immediately despite the sixty-day notice required by her contract and began nearly full-time employment as a substitute teacher. Should Ahmad's teaching certificate be suspended? Yes. Under N.J.S.A. 18A:26-10, the failure to provide such notice is misconduct subject to a one-year certificate suspension, and the Commissioner of Education will reduce the typical suspension in only rare circumstances.

PROCEDURAL HISTORY

On November 10, 2022, Empowerment filed an Order to Show Cause against Ahmad with the Commissioner of the Department of Education (Commissioner). the Commissioner ordered that the respondent show cause as to why an Order suspending her teaching certificate should not be entered for unprofessional conduct and provided her with twenty days to respond. Soon after, Ahmand filed an undated answer.

On January 10, 2023, the Office of Administrative Law (OAL) filed the Commissioner's transmittal of a contested case under the Administrative Procedure Act, N.J.S.A. 52:14B-1 to -15, and the act establishing the OAL, N.J.S.A. 52:14F-1 to -13, for a hearing under the Uniform Administrative Procedure Rules, N.J.A.C. 1:1-1.1 to -21.6.

I held several pre-hearing conferences and scheduled hearings for August 30, 2023, which proceeded via Zoom. I allowed the parties time to file post-hearing summations. On September 29, 2023, the OAL received Empowerment's submission, but no Ahmad filed no summation. On that date, I closed the record.

FINDINGS OF FACT

Based on the records in evidence, my assessment of their sufficiency the testimony presented, and my evaluation of its credibility, I **FIND** the following as **FACT:**

Empowerment Academy is a public charter school in Jersey City, New Jersey.

Ahmad, a non-tenured teacher, resides in Hudson County.

On July 29, 2022, Ahmad executed an employment agreement to work as a teacher at Empowerment for the 2022-2023 school year. The contract specified Ahmad's term of employment as August 17, 2022, until June 30, 2023. Under the

agreement, Ahmad could unilaterally terminate her job by providing sixty days' written notice to the school.

On September 26, 2022, Ahmad submitted a written resignation from her teaching position by email, citing "urgent and unavoidable family matters," effective immediately.

In response, on September 27, 2022, Empowerment's education director, Shona Hendry, emailed Ahmad advising that her contract required her to provide sixty days' notice, or she would be subject to license suspension and a $500 penalty. Henry also expressed concern for Ahmad's situation and offered support. However, Ahmad did not return or seek assistance from Empowerment. Undeniably, Ahmad did not provide sixty days' notice.

Angela Thomas, Empowerment's middle school principal, explained how Ahmad's abrupt departure disrupted the students' education at Empowerment. Specifically, Ahmad served as a sixth-grade mathematics teacher at Empowerment, one of two certified math teachers for that grade. Empowerment expected each teacher to teach half of the school's sixth graders during designated blocks or class periods. However, during the 2022-2023 school year, the school could not fill Ahamad's mathematics teaching role with another certified mathematics teacher, a critical subject area, leaving that instruction short. Ahmad did not assist the school in finding a replacement or transitioning in her absence.

Ahmad asserts that she did not decide to leave Empowerment lightly. Instead, she maintains that her son's psychiatric condition worsened in September 2022, requiring her to leave the position suddenly. Ahmad highlights the loss of substantial income by leaving her full-time job, and her paystubs after her resignation support this assertion. Ahmad maintains that she was "mentally, emotionally and physically occupied" with her son's care when she resigned. Ahmad's husband observed his

wife's stress during this time. Still, Ahmad supplied no medical evidence that her health was at risk when she resigned.

To support her son's medical issues, Ahmad supplied a letter from her son's psychiatrist dated March 25, 2023, explaining that Ahmad's son was under his care for bipolar disorder, ADHD, and oppositional defiance dysfunction. The physician highlights that Ahmad is her son's caretaker, helping him with medications, activities of daily living, and school. The physician further advises that Ahmad's caretaking duties are full-time, making her employment at Empowerment impossible. The physician did not testify to explain his conclusions, and the document contains largely unsupported hearsay, which I give only minimal weight.

Regardless, the physician's note did not specify Ahmad's caretaking needs when she resigned in September 2022. Indeed, the physician highlights no physical disability or an acute crisis involving her son that required Ahmad to quit her job without notice when she did. In September 2022, Ahmad's son was a full-time community college student and attended school for the 2022-2023 school year. Still, Ahmad and her husband provided credible testimony that their son suffered from conditions requiring psychiatric care and medication, necessitating some supervision. Ahmad explained that she often had to stay up to watch over her son through the night. However, Ahmad's claim that she could not provide notice due to her son's sudden worsening condition is not adequately supported or credible.

Ahmad also believed that focusing on her son's care would make her an ineffective teacher, unable to prepare for lessons or discharge her teaching responsibilities professionally. To be sure, a substitute teacher position pays less, making it less desirable, and involves less rigorous planning duties. Although Ahmad asserts that she was overwhelmed with preparing lesson plans, she acknowledges that she sought no assistance or support from Empowerment's administration before abruptly resigning. Further, despite the school's efforts to offer help upon receiving her resignation, she did not respond.

Significantly, Ahmad worked for the Jersey City public school system (Jersey City) after leaving Empowerment. Although Ahmad left Empowerment on September 26, 2022, she worked as a substitute per diem teacher for Jersey City on September 27, 28, 29, and 30, 2022. In other words, she worked the rest of the work week after she left her job at Empowerment.

Ahmad also worked as a per diem substitute teacher for Jersey City on October 3, 4, 6, 7, 11, 12, 13, 17, 18, 19, 20, 21, 25, 26, 27, 28, and 31, 2022. Notably, considering weekends, Columbus Day, a professional development day without students on October 5, and Diwali on October 24, 2022, Ahmad worked nearly every day in the month after leaving Empowerment.[1] The following month, Ahmad worked on November 1, 2, 3, 4, 14, 15, 16, 17, 18, 21, 22, 23, 28, 29, and 30, 2022. After counting the Thanksgiving break and election week's closing, Ahmad worked every open school day in November 2022.[2] This level of employment continued until at least April, and Ahmad acknowledges that she worked as a substitute for Jersey City for the rest of the school year. Indeed, Ahmad's paystubs through April 2023 demonstrate near continuous daily per diem work. Thus, her son's medical needs did not interfere with her ability to work as a substitute for Jersey City nearly all school days in the months after she resigned from Empowerment.

DISCUSSION AND CONCLUSIONS OF LAW

Under N.J.S.A. 18A:26-10, a teaching staff member who ceases to perform their duties before the term of their employment's end absent the Board's consent, "shall be deemed guilty of unprofessional conduct." Ibid. In turn, the Commissioner of Education may suspend the teacher's certificate for up to one year. Id. A teacher may escape liability under the statute by providing appropriate notice, which "is dictated by the terms of the parties' employment contract. Carrelle v. Bd. of Educ. of Bloomfield, Comm'r

[1] I take judicial notice of Jersey City's 2022 published school calendar. https://jerseycityed.com/jersey-city-public-school-district-calendar/

[2] . https://jerseycityed.com/jersey-city-public-school-district-calendar/

Decision No. 49-04 (February 10, 2004), http://www.nj.gov/education/legal/commissioner/; Boguszewski v. Bd. of Educ. of Woodcliff Lake, 1979 S.L.D. 727, 729. Indeed, the statute's purpose is to encourage notice to the school so that it can hire a suitable replacement "without adversely impacting students." Penns Grove-Carneys Point Bd. of Educ. v. Leinen, 94 N.J.A.R.2d (EDU) 405, 407.

Still, the statute "does not dictate the automatic suspension of a teacher's certificate" when a teacher fails to provide the contractual notice. In re Falco, EDU 9283-98, Comm'r (May 24, 1999), aff'g Initial Decision (April 7, 1999), http://njlaw.rutgers.edu/collections/oal/. Instead, the statute gives the Commissioner discretion to withhold or reduce the penalty where warranted. Typically, however, the Commissioner will suspend a teacher's certificate for the one-year maximum when the circumstances show that the teacher failed to provide the sixty-days' notice "for strictly personal reasons, putting their own self-interest above the interests of students and their professional obligation to provide adequate notice to the board." In re Certificates of Chae Hyuk Im, 2018 N.J. Super. Unpub. LEXIS 1748, at 8-9 (App. Div. July 20, 2018).

In rare cases, the Commissioner either declined to suspend a teacher's certificate or imposed a lesser suspension because of mitigating circumstances. For example, in Board of Education of Black Horse Pike Regional School District v. Mooney, 1984 S.L.D. 810, the Commissioner denied a school board's request to suspend a teacher's certificate under N.J.S.A. 18A:26-10 because the teacher only resigned on short notice because her husband took a job in California and because she "gave immediate notice to the Board in writing and she assisted [her replacement] in the development of a program through the end of the school year." Id. at 811, 816.

In In re Bordon, EDU 12810-14, Initial Decision (June 18, 2015), adopted, Comm'r (July 29, 2015), http://www.nj.gov/education/legal/commissioner/, a teacher's certificate was suspended for only three months because she resigned without full

notice to take a lower-paying teaching position at a school closer to her home after suffering a leg injury that made driving difficult. In that case, the administrative law judge concluded, and the Commissioner agreed, that, although the teacher violated N.J.S.A. 18A:26-10 by providing less than the notice required by her contract, a three-month suspension was appropriate because her "conduct was not motivated by personal gain [she took a $20,000 pay cut], but rather by a very real medical crisis," and "because the Board, through its administration, made no effort to acknowledge her medical concerns, or offer to discuss any constructive solution."

Unlike those cases, Ahmad did not help her employer minimize the impact on her students upon leaving or seek assistance or accommodations to allow her to continue her role at Empowerment. I also found that the mitigating circumstances suggested by Ahmad lacked adequate contemporaneous support. Precisely, her son's medical needs when she resigned were unclear and did not impact her ability to work practically full-time as a substitute teacher. This fact also highlights the demand for mathematics teachers and Empowerment's inability to find a certified mathematics teacher as a replacement. Her son is an adult and attended college during the 2022-2023 school year, and Ahmad supplied insufficient evidence of a medical crisis concerning her son or herself when she resigned. Thus, I **CONCLUDE** that Ahmad does not present exceptional circumstances or compelling reasons that warrant a lesser suspension for her failure to provide the notice required under her employment contract in violation of N.J.S.A. 18A:26-10.

ORDER

Given my findings of fact and conclusions of law, I **ORDER** that Ahmad's teaching certificate be suspended for one year because she resigned without providing required notice in violation of N.J.S.A. 18A:26-10.

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

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

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

October 19, 2023

DATE

NANCI G. STOKES, ALJ

Date Received at Agency: October 19, 2023

Date Mailed to Parties:

Ljb

APPENDIX

Testimony

For Petitioner:

Angela Thomas

For Respondent:

Shazia Ahmad

Athkar Javaid

Evidence

For Petitioner:

P-1 November 10, 2022 Petition with Exhibits
P-2 Undated Letter from S. Ahmad to the Commissioner of Dept. of Education
P-3 March 25, 2023 Letter from Dr. Thomas D'Amato
P-4 June 11, 2023 S. Ahmad Email Transmittal of Pay Stubs
P-5 Jersey City Public Schools Paystubs

For Respondent:

R-1 Undated Letter from S. Ahmad to the Commissioner of Dept. of Education (P-2)
R-2 March 25, 2023 Letter from Dr. Thomas D'Amato (P-3)

355-23

New Jersey Commissioner of Education

Final Decision

In the Matter of the Suspension of the Teaching Certificates of Asem Ahmed, Board of Education of the Passaic County Manchester Regional High School District, Passaic County.

Synopsis

The petitioning Board sought the suspension of the teaching certificates of respondent – a non-tenured Art teacher – following his resignation without providing the 60-day notice required under *N.J.S.A.* 18A:26-10. Respondent began working for the Board on February 21, 2023, under an Employment Agreement that extended through June 30, 2023. On March 23, 2023, the respondent submitted a letter of resignation with an effective date of May 24, 2023, initially providing the required 60-day notice. However, after meeting with the Superintendent on March 27th and verbally agreeing to finish out the school year, the respondent abruptly resigned effective March 28th, leaving no lesson plans or information to assist his replacement.

The ALJ found, *inter alia*, that: there is no question that the respondent ceased to perform his duties before the expiration of the term of employment; further, there is no question that respondent clearly understood the 60-day notice requirement in his contract, as he had structured his starting date with the Board based on fulfilling his 60-day notice obligation to his previous employer; respondent compounded his contractual breach by failing to provide lesson plans or other transitional materials to assist substitute teachers who were hired to cover respondent's classes after his resignation; and respondent's resignation with only one day of notice was highly unprofessional. The ALJ concluded that the respondent's teaching certificate should be suspended for the maximum period allowed by *N.J.S.A.* 18A:26-10. Accordingly, the ALJ ordered respondent's certificate suspended for a period of one year.

Upon review, the Commissioner concurred with the ALJ's findings and conclusions, and adopted the Initial Decision as the final decision in this matter. Respondent's certificates were suspended for one year from the filing date of this decision, a copy of which has been forwarded to the State Board of Examiners for implementation of the suspension.

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

355-23
OAL Dkt. No. 06030-23
Agency Dkt. No. 180-7/23

New Jersey Commissioner of Education

Final Decision

In the Matter of the Suspension of the Teaching Certificates of Asem Ahmed, Board of Education of the Passaic County Manchester Regional High School District, Passaic County.

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

Upon review, the Commissioner concurs with the Administrative Law Judge that respondent's resignation from employment with only one day's notice justifies suspension of respondent's teaching certificates pursuant to *N.J.S.A.* 18A:26-10 and *N.J.S.A.* 18A:28-8.

Accordingly, the Board's motion for summary decision is granted, and respondent's teaching certificates are suspended for a period of one year from the filing date of this decision, a copy of which shall be forwarded to the State Board of Examiners for implementation of the suspension.

IT IS SO ORDERED.[1]

Angelica Allen-McMillan, J.D.S.
ACTING COMMISSIONER OF EDUCATION

Date of Decision: November 30, 2023
Date of Mailing: December 1, 2023

[1] This decision may be appealed to the Appellate Division of the Superior Court pursuant to *N.J.S.A.* 18A:6-9.1. Under *N.J.Ct.R.* 2:4-1(b), a notice of appeal must be filed with the Appellate Division within 45 days from the date of mailing of this decision.

State of New Jersey
OFFICE OF ADMINISTRATIVE LAW

INITIAL DECISION
OAL DKT. NO. EDU 06030-23
AGY. DKT. NO. 180-7/23

IN THE MATTER OF THE SUSPENSION OF THE TEACHING CERTIFICATES OF ASEM AHMED, PASSAIC COUNTY MANCHESTER REGIONAL HIGH SCHOOL DISTRICT BOARD OF EDUCATION.

Rodney T. Hara, Esq., appearing for Petitioner, Passaic County Manchester Regional High School District Board of Education (Fogarty & Hara, attorneys)

No appearance by respondent, **Asem Ahmed**

Record Closed: October 23, 2023 Decided: October 25, 2023

STATEMENT OF THE CASE AND PROCEDURAL HISTORY

Petitioner filed a Verified Petition together with an Order to Show Cause (OTSC) with the Office of Controversies and Disputes of the New Jersey Department of Education on June 29, 2023. Copies of the same were sent to the Respondent.

The OTSC was signed by the Acting Commissioner of Education and the same was served upon the Respondent on July 6, 2023.

The matter was transferred to the Office of Administrative Law (OAL) as a contested case on July 11, 2023.

A prehearing conference was held on July 24, 2023, and a prehearing Order was entered on the same date.

Petitioner requested a telephone conference to address a discovery issue. That telephone conference was held on October 12, 2023. Petitioner dialed in. Respondent did not. Respondent was provided with notice of the conference to his correct email address.

Petitioner filed a motion on October 20, 2023 to suppress Respondent's answer and to bar his testimony for failure to provide discovery. Respondent did not file a response.

The hearing was held on October 23, 2023. The Notice of Hearing specified 9:00 a.m. as the start time and the Office of Administrative Law at 33 Washington Street, Newark, New Jersey as the location. Petitioner and counsel appeared timely. Respondent did not appear at 9:00 a.m. The undersigned allowed thirty minutes for Respondent to appear. He did not appear. No explanation, or adjournment request, was received by Respondent.

In accordance with N.J.A.C. 1:1-10.5 and N.J.A.C. 1:1-14.14, Petitioner's motion to suppress Respondent's Answer was granted on the record. The request in the motion to bar Respondent's testimony was moot as he failed to appear.

In accordance with N.J.A.C. 1:1-14.4(d) the matter proceeded as an ex parte presentation of Petitioner's proofs.

FINDINGS OF FACT

Based upon the evidence presented at the hearing as well as on the opportunity to observe the witness and assess his credibility, I **FIND** the following:

1. Respondent, Asem Ahmed, holds a Teaching Certificate, 01686194, in Art instruction. (P-1)

2. Mr. Ahmed was employed by Passaic County Manchester Regional High School District Board of Education as a Teacher of Art in accordance with an Employment Agreement. Said employment was to commence on February 21, 2023, through June 30, 2023. (P-2)

3. In accordance with the Employment Agreement, either party could cancel said agreement with sixty (60) days prior notice. (P-2)

4. Mr. Ahmed's teaching class schedule was Monday through Friday, commencing at 7:45 a.m. to 2:49 p.m. The schedule included six (6) class periods, a period for PROF, a period for PREP and a period for LUNCH. (P3)

5. When Ahmed was interviewed by Superintendent Gary Lubisco, Jr., he advised the Superintendent that he could not start immediately as he had to honor his sixty (60) day notice requirement to his previous employer. Accordingly, his start date was set as February 21, 2023. The art teacher position had become vacant on January 4, 2023, after that teacher had satisfied her sixty (60) day notice requirement when she resigned. (Lubisco testimony, 10/23/23 @ 9:38 – 9:39 a.m.)

6. Mr. Ahmed was well aware that he was required to provide sixty (60) days prior notice should he resign. He indicated the same in his interview with Superintendent Lubisco. (Lubisco testimony, 10/23/23 @ 9:41)

7. The prior art teacher, prior to her departure, provided the district with lesson plans for her successor to continue art instruction. (Lubisco testimony, 10/23/23 @ 9:39 a.m.)

8. On March 23, 2023 Mr. Ahmed submitted a letter of resignation to John Coviello, effective March 24, 2023 with sixty (60) days notice. (P-4)

9. Superintendent Lubisco met with Mr. Ahmed on March 27, 2023 to discuss his resignation. During said meeting Mr. Ahmed agreed to finish out

the school year, as opposed to the required sixty (60) day notice, which would end on May 24, 2023. (Lubisco testimony, 10/23/23 @ 9:45 – 9:46 a.m.)

10. Superintendent Lubisco confirmed this conversation in an email dated March 27, 2023, to Mr. Coviello and Ms. Moser. (P-5)

11. Thereafter, Superintendent Lubisco learned that Mr. Ahmed advised his supervisor that his last day was March 28, 2023. (P-6 and Lubisco testimony, 10/23/23 @ 9:49 – 9:50 a.m.)

12. Superintendent Lubisco, via email dated March 29, 2023, informed Mr. Ahmed that he was contractually required to work until May 24, 2023, and that failure to do so could result in the suspension of his teaching certificate for up to one year. (P-6)

13. Thereafter, Superintendent Lubisco telephoned Mr. Ahmed on March 31, 2023 regarding the abandonment of his teaching position, wherein Mr. Ahmed said he would think about his contractual obligation over the weekend. Superintendent Lubisco confirmed the conversation via email dated March 31, 2023. (P-7 and . (Lubisco testimony, 10/23/23 @ 9:53 – 9:54 a.m.)

14. Superintendent Lubisco followed up with another email, dated April 4, 2023 advising that a decision by Mr. Ahmed was needed that date. (P-8 and . (Lubisco testimony, 10/23/23 @ 9:55 – 9:56 a.m.)

15. Superintendent Lubisco received no response from Mr. Ahmed. (Lubisco testimony, 10/23/23 @ 9:55 – 9:56 a.m.)

16. The failure of Mr. Ahmed to fulfill his contractual obligation caused a significant strain on the District. Mr. Ahmed did not provide lesson plans for his successor. This is outside the norm of professional conduct for teachers. (Lubisco testimony, 10/23/23 @ 9:57 – 9:59 a.m.)

LEGAL ANALYSIS AND CONCLUSION

In his several emails to Mr. Ahmed, Superintendent Lubisco cites N.J.S.A. 18A:28-8, which states:

> 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.

However, the record clearly demonstrates that Mr. Ahmed was a non-tenured teacher. His employment agreement states as much, referring to him as a non-tenured certificated employee. Accordingly, N.J.S.A. 18A:28-8 is not the applicable statute.

N.J.S.A. 18A:26-10 would be the controlling statute, which states in pertinent part:

> Any teaching staff member employed by a board of education or an approved private school for the disabled, who shall, without the consent of the board or, in the case of an approved private school for the disabled, the board of directors of the school, cease to perform his duties before the expiration of the term of his employment, shall be deemed guilty of unprofessional conduct, and the commissioner may, upon receiving notice thereof, suspend his certificate for a period not exceeding one year.

In the instant matter, there is no question that Mr. Ahmed ceased to perform his duties before the expiration of the term of employment. He failed to provide the requisite sixty (60) day prior notice as spelled out in his employment contract. He was well aware he was required to provide such notice. The only question remaining is to what, if any suspension would be appropriate.

Mr. Ahmed, by simply leaving his teaching position, placed the District in a very difficult position, as described by the testimony of Superintendent Lubisco. The District

was compelled to hire substitute teachers and utilize other methods which provided a lesser learning experience for the student. He compounded his contractual breach by failing to provide any transitional materials. He did nothing to help smooth the transition. He did not provide lesson plans which could have been used by the substitute teachers. He acted in an extremely unprofessional manner.

Based upon the foregoing I **CONCLUDE** that Respondent's teaching certificate should be suspended for the maximum period allowable by N.J.S.A. 18A:26-10.

ORDER

It is hereby **ORDERED** that the Certificate of Respondent, Asem Ahmed, be suspended for a period of one year.

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

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

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

October 25, 2023
DATE

THOMAS R. BETANCOURT, ALJ

Date Received at Agency:

Date Mailed to Parties:
db

APPENDIX

List of Witnesses

For Petitioner:

Gary Lubisco, Jr.

For Respondent:

None

List of Exhibits

For Petitioner:

P-1 Teaching Certificates of Respondent, Asem Ahmed
P-2 Employment Agreement
P-3 Email from John Coviello dated June 27, 2023
P-4 Formal resignation of Asem Ahmed
P-5 Email from Gary Lubisco, Jr. dated March 27, 2023
P-6 Email from Gary Lubisco, Jr. dated March 29, 2023
P-7 Email from Gary Lubisco, Jr. dated March 31, 2023
P-8 Email from Gary Lubisco, Jr. dated April 4, 2023

For Respondent:

None

Motion Papers:

For Petitioner:

Letter brief dated October 20, 2023 with motion to suppress Respondent's Answer and preclude Respondent's testimony with Exhibits A and B

Proof of Filing and Service

Certification of Rodney T. Hara, Esq, with Exhibits A through D

For Respondent:

None

Pleadings

Order to Show Cause (OTSC)

Verified Petition

Answer

357-23

New Jersey Commissioner of Education

Final Decision

Friends of Team Charter School, Inc.,

Petitioner,

v.

Board of Education of the City of Newark,
Essex County,

Respondent.

Synopsis

In this twice remanded matter, petitioner challenged the respondent Board's attempt to exercise its right of reversion regarding the Maple Avenue School – one of several properties transferred from the Board to the Newark Housing Authority (NHA) under the terms of a 2016 site disposition and development agreement (Agreement) in which the NHA agreed to convey the buildings to third parties to benefit the Board and the City of Newark. Petitioner purchased Maple Avenue School from a third party in March 2020 for development as a public charter school. In April 2020, the Board filed a Superior Court suit against the NHA, seeking to exercise its right to reversion based on the argument that NHA had failed to complete a site project and that the property was not being used for one of the Agreement's permitted uses. Petitioner filed the within matter, alleging that the Board was not authorized to file the Superior Court complaint and had failed to comply with facilities regulations. The issue for resolution here is the novel legal question of whether the Superior Court action could constitute land acquisition and/or a school facilities project that is subject to applicable statutes and regulations; this requires careful interpretation of relevant provisions of the Educational Facilities Construction and Financing Act (EFCFA), *N.J.S.A.* 18A:7G-1 to -48 and related regulations.

On remand, the ALJ concluded that the Superior Court litigation was not a school facilities project, finding, *inter alia*, that: the litigation does not meet the definition of a school facilities project under *N.J.A.C.* 6A:26-1.2; the Board was neither attempting to purchase the Maple Avenue School nor trying to acquire it by condemnation, gift, or grant; if the Board succeeds in Superior Court, the property will revert back to the Board based on language in the Agreement; and *N.J.A.C.* 6A:26-7.1, which describes the process by which school districts or the School Development Authority may obtain Commissioner approval for land acquisition in connection with school facilities projects, does not apply.

Upon review, the Commissioner, *inter alia*, concurred with the ALJ that the enforcement litigation is not a school facilities project or land acquisition as contemplated under EFCFA and related regulations. Accordingly, the Board was not required to seek approval from the Commissioner prior to initiating the ligation aimed at reacquiring land upon which it previously operated a public school that could potentially be utilized for a future school facilities project. The Board's motion for summary decision was granted and the petition was dismissed.

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

357-23
OAL Dkt. No. EDU 10019-21 (EDU 04320-21 on remand)
Agency Dkt. No. 55-4/21

New Jersey Commissioner of Education

Final Decision

Friends of TEAM Charter Schools, Inc.,

Petitioner,

v.

Board of Education of the City of Newark, Essex County,

Respondent.

The record of this matter, the Initial Decision of the Office of Administrative Law (OAL), the exceptions filed by petitioner pursuant to *N.J.A.C.* 1:1-18.4, and respondent Board's reply thereto, have been reviewed and considered.

By way of introduction, this matter, which the Commissioner twice remanded to the OAL for further proceedings, has a protracted procedural history. The sole legal question to be resolved is whether a pending Superior Court enforcement action initiated by respondent to reclaim title to the former Maple Avenue School site "could constitute land acquisition and/or a school facilities project, subject to applicable statutes and regulations." *Friends of Team Charter Sch., Inc. v. Bd. of Educ. of the City of Newark, Essex Cnty.*, Commissioner Decision No. 258-21 at 4-5 (October 19, 2021).

Resolution of this novel legal question requires interpretation of relevant provisions of the Educational Facilities Construction and Financing Act (EFCFA), *N.J.S.A.* 18A:7G-1 to -48, and related regulations. The Legislature "enacted EFCFA to fulfill its constitutional obligation to fund new

school construction mandated by th[e] Court in *Abbott v. Burke*." *Lonegan v. State*, 176 *N.J.* 2, 6 (2003); *Abbott v. Burke*, 153 *N.J.* 480, 524 (1998). EFCFA "regulat[es] the planning, design, and construction of school facilities" and "is intended to ensure the educational adequacy of such facilities and the safety of students who attend them." *Bd. of Educ. of Clifton v. Zoning Bd. of Adj. of Clifton*, 409 *N.J. Super.* 389, 441 (App. Div. 2009). In particular, the legislation aims to address facilities-related inadequacies among the State's school districts. *Lonegan v. State*, 174 *N.J.* 435, 458 (2002) (quoting *N.J.S.A.* 18A:7G-2(b)).

"Amendments to the EFCFA in 2007 established the School Development Authority (SDA) to provide for the financing and construction of school facility projects in low-income districts – which the statute refers to as 'SDA districts.'" *Educ. Law Ctr. v. N.J. Dep't of Educ., Off. of Sch. Facilities*, Commissioner Decision No. 217-13 at 2 (June 13, 2013) (citing *N.J.S.A.* 18A:7G-3).[1] The Legislature recognized that "[e]ducational infrastructure inadequacies are greatest in the SDA districts where maintenance has been deferred and new construction has not been initiated due to concerns about cost." *N.J.S.A.* 18A:7G-2(c). Consequently, it required the State to "fund the entire cost of repairing, renovating and constructing the new school facilities determined by the Commissioner of Education to be required to meet the school facilities efficiency standards in the SDA districts" while also "protect[ing] the interests of taxpayers who will bear the burden of this obligation." *N.J.S.A.* 18A:7G-2(c), (d).

Accordingly, EFCFA provides "for the planning, financing, and construction of" school facilities projects and "sets out a detailed process for the[ir] proposal, review, and approval" by the Commissioner. *E. Orange Bd. of Educ. v. N.J. Schs. Constr. Corp.*, 405 *N.J. Super.* 132, 136-40 (App. Div. 2009); *Bd. of Educ. of Clifton,* 409 *N.J. Super.* at 439. As a SDA district, "Newark's traditional

[1] These districts were historically referred to as "Abbott districts." *E. Orange Bd. of Educ. v. N.J. Schs. Constr. Corp.*, 405 *N.J. Super.* 132, 136 (App. Div. 2009).

public schools receive one hundred percent facilities funding" under EFCFA. *J.D. ex rel. Scipio-Derrick v. Davy*, 415 *N.J. Super.* 375, 377 (App. Div. 2010).

The material facts in the instant matter are undisputed. In 2016, the Board transferred title of the Maple Avenue School site, along with other underutilized school sites, to the Newark Housing Authority (NHA) for nominal consideration, to be redeveloped pursuant to a Site Disposition and Development Agreement (Agreement). In so doing, the Board sought to save money, generate revenue for capital improvements, increase city tax ratables, and enhance employment opportunities for Newark residents. The Agreement required the NHA to "work diligently to investigate and identify feasible housing, redevelopment and economic development opportunities at each Site (each, a 'Site Project')."

Article V, Section 5.2 of the Agreement sought to create a right of reversion to the sites exercisable by the Board "if and to the extent, the NHA has not developed a Site Project or demonstrable plans for such Site" within three years of the Agreement's execution. The Agreement permitted NHA to transfer title of the sites to third parties to effectuate Site Projects, subject to various restrictions, so long as any such transfer granted reversionary rights to NHA to be exercised if certain performance milestones were not met. The Agreement further provided that "[t]his right of reversion shall not be included in any deed, or otherwise recordable document, from [the Board] to NHA for any Site; and if requested by NHA or any third party developer, [the Board] shall execute and deliver a document to discharge this right of reversion."

In December 2017, the NHA sold the Maple Avenue School site to a third party, 33 Maple Urban Renewal, LLC. The Board received approximately $1 million from the sale. In March 2020, 33 Maple Urban Renewal, LLC sold the site to petitioner for $10 million. Petitioner leased the site,

which underwent substantial renovation, to TEAM Academy Charter School, Inc., to house over five hundred charter school students.

In April 2020, the Board filed a complaint in the Superior Court, Chancery Division, claiming that the NHA violated the Agreement in various ways. Among the remedies requested by the Board was to compel the NHA to exercise its right of reversion to the Maple Avenue School site—which the Board claimed was allegedly developed and utilized for an improper purpose contrary to the Agreement—so that the Board could then exercise its own right of reversion and reclaim title to the site. In an amended complaint, the Board added petitioner as a defendant and alleged that it tortiously interfered with the Agreement. The Superior Court trial is on hold pending the outcome of the instant matter before the Commissioner.

In April 2021, petitioner filed the instant matter with the Commissioner. In short, petitioner alleged that because the Superior Court litigation was aimed at reacquiring the Maple Avenue School site, the litigation constituted a school facilities project under EFCFA and related regulations and therefore required both a Board resolution and Commissioner approval prior to its commencement. It also alleged that, absent approval from the Commissioner, the Board was prohibited from undertaking land acquisition or development activities for any planned school facilities project at the site. For those reasons, petitioner sought an order restraining the Board from further prosecuting the Superior Court litigation.

The matter was transmitted to the OAL for a contested hearing, and the Board moved for summary decision. In July 2021, the ALJ issued an Initial Decision granting the Board's motion upon concluding that the Agreement is not a school facilities project and that, in any event, the petition was untimely filed. The Commissioner disagreed with the ALJ's conclusion that the petition was untimely. Additionally, while the Commissioner concurred that the Agreement was not a school

facilities project, she remanded the matter in October 2021 for further proceedings to determine whether the Superior Court litigation "could constitute land acquisition and/or a school facilities project, subject to applicable statutes and regulations."

Thereafter, once the matter returned to the OAL, the parties cross-moved for summary decision. In October 2022, the ALJ issued an order denying the motions for summary decision and concluding that it would be premature to decide whether the Superior Court litigation constituted a school facilities project prior to the Superior Court's ruling in that matter. The ALJ reasoned that if the Superior Court ruled against the Board, then the instant petition would be moot.

Petitioner sought interlocutory review of the ALJ's October 2022 order. In November 2022, the Commissioner again remanded the matter to the OAL upon concluding that the question of whether the filing of the Superior Court complaint required approval of the Board via resolution, or of the Commissioner as a school facilities project, was ripe for review. The Commissioner explained that these determinations depend upon an application of the school laws, which are within the Commissioner's jurisdiction. Furthermore, the Commissioner disagreed with the ALJ that a ruling against the Board in the Superior Court matter would render the petition moot. The Commissioner indicated that if it is determined that the Superior Court complaint constitutes a school facilities project, and the Board should have obtained approval of that project from the Commissioner prior to filing the complaint, then the complaint should not proceed.

Once the matter returned to the OAL for a second time, the ALJ considered supplemental briefs and issued an Initial Decision in September 2023 in which she granted the Board's motion for summary decision. Citing the definition of "school facilities project" found in *N.J.A.C.* 6A:26-1.2, the ALJ concluded that the Superior Court litigation was not a school facilities project because it was neither new construction to meet the housing needs of unhoused students, nor rehabilitation to

keep a school facility functional for its original purpose or for a new purpose accomplished within the gross square footage of the original building. Next, citing the definition of "land acquisition" found in *N.J.A.C.* 6A:26-1.2, the ALJ concluded that the Superior Court litigation was not a land acquisition because the Board was neither attempting to purchase the Maple Avenue School nor attempting to acquire it by condemnation, gift, or grant. The ALJ reasoned that if the Board succeeds in Superior Court, then the property will revert to it based upon language in the Agreement. The ALJ further found that *N.J.A.C.* 6A:26-7.1, which describes the process by which a school district or the SDA may obtain Commissioner approval for land acquisition "in connection with a school facilities project," did not apply.

In their exceptions, petitioner primarily argues that contrary to the ALJ's findings and conclusions, the Board violated EFCFA and related regulations by failing to obtain Commissioner approval to commence the Superior Court litigation. Specifically, petitioner contends that the ALJ ignored the definition of school facilities project found in *N.J.S.A.* 18A:7G-3 and misinterpreted the regulations when she erroneously concluded that the Superior Court litigation was neither a school facilities project nor a land acquisition. Relying upon the statutory definition, petitioner asserts that a school facilities project includes related "legal services" and "site acquisition." Consequently, according to petitioner, the Superior Court litigation satisfies the statutory definition of school facilities project. Citing *N.J.A.C.* 6A:26-7.1, petitioner also contends that a "land acquisition" requires Commissioner approval even if not part of a school facilities project.

Alternatively, petitioner argues that even if the litigation is neither a school facilities project nor a land acquisition, it constitutes "preconstruction activities" per *N.J.A.C.* 6A:26-3.9(b)(1), a "capital project" per *N.J.A.C.* 6A:26-3.1(a), and a project to "acquire an existing facility" per *N.J.A.C.* 6A:26-7.3(a), all of which require the Commissioner's approval. Petitioner claims that because the

ALJ failed to decide these issues, the Initial Decision is facially deficient. In addition, petitioner contends that the ALJ ignored and failed to address the fact that the Board violated EFCFA and related regulations as it did not approve the filing of the Superior Court litigation via resolution or motion.

In reply, the Board argues that the ALJ correctly determined that the Superior Court litigation is not a school facilities project. It contends that was the only question before the ALJ, and that petitioner's exceptions attempt to impermissibly broaden the scope of the remand. The Board maintains that the Superior Court litigation is an attempt to exercise its already-existing property and contract rights regarding the Maple Avenue School site, and asserts that petitioner has not cited any legal authority holding or suggesting that a lawsuit to enforce contract and property rights can be considered a school facilities project within the meaning of *N.J.A.C.* 6A:26-1.2. In addition, the Board argues that neither EFCFA's plain language nor its legislative history supports petitioner's argument. It maintains that just as not every legal action involving a school board arises under the school laws, not every action involving a school property is a school facilities project—even if the property at issue may be the subject of a school construction or rehabilitation project at some point in the future.

Upon review, the Commissioner adopts the ALJ's findings of fact and conclusions of law, as modified. The Commissioner holds that the Board's filing of the Superior Court complaint to enforce the Agreement and reclaim title to the former Maple Avenue School site neither violated EFCFA nor the related regulations. The Commissioner concurs with the ALJ that the enforcement litigation is neither a school facilities project nor a land acquisition as contemplated under EFCFA and the regulations. Consequently, neither EFCFA nor the related regulations required the Board to seek approval from the Commissioner prior to initiating the litigation aimed at reacquiring land

upon which it previously operated a public school that could potentially be utilized for a future school facilities project. To the extent that the ALJ focused primarily upon the regulatory definition of school facilities project and regulations pertaining to land acquisition in her analysis, the Commissioner modifies the Initial Decision as explained herein to include analysis of the statutory definition of school facilities project, the overall statutory scheme, and legislative intent.

EFCFA broadly defines "school facilities project" as "the planning, acquisition, demolition, construction, improvement, alteration, modernization, renovation, reconstruction or capital maintenance of all or any part of a school facility or of any other personal property necessary for, or ancillary to, any school facility, and shall include fixtures, furnishings and equipment, and shall also include, but is not limited to, site acquisition, site development, the services of design professionals, such as engineers and architects, construction management, legal services, financing costs and administrative costs and expenses incurred in connection with the project." *N.J.S.A.* 18A:7G-3. Per EFCFA's regulations, "[t]o qualify as a school facilities project, the project must be new construction to meet the housing needs of unhoused students, or rehabilitation to keep a school facility functional for its original purpose or for a new purpose accomplished within the gross square footage of the original building." *N.J.A.C.* 6A:26-1.2. In addition, the regulations specify that school facilities projects not only include new construction and rehabilitation, but also "[a]cquisition of existing buildings to accommodate unhoused students." *N.J.A.C.* 6A:26-3.2(a).

Because EFCFA "provided only limited funding" for school facilities projects, the legislation "established a fairly complex procedure for the allocation of those limited resources among the many school districts in need of funds for renovations or new buildings; first, through a long range planning stage within each district, *N.J.S.A.* 18A:7G-4, and then through the approval of specific projects on a district-by-district basis." *E. Orange Bd. of Educ.,* 405 *N.J. Super.* at 144 (citing *N.J.S.A.*

18A:7G-5). Accordingly, to qualify for funding for a school facilities project, "[e]ach school district must submit to the DOE [Department of Education], for review and approval, a long-range facilities plan [LRFP] addressing the district's school facilities needs and its plans to meet those needs in the following five years" in accordance with *N.J.S.A.* 18A:7G-4. *Bd. of Educ. of Clifton,* 409 *N.J Super.* at 439. Districts may, at any time, submit amended LRFPs to the Commissioner for approval. *N.J.S.A.* 18A:7G-4(c). Additionally, districts "seeking to fund a project must submit a detailed application to the Commissioner" separate and apart from the LRFP. *E. Orange Bd. of Educ.*, 405 *N.J. Super.* at 139. Pursuant to *N.J.S.A.* 18A:7G-5(d)(1) and *N.J.A.C.* 6A:26-3.2(b), "Any district seeking to initiate a school facilities project shall apply to the commissioner for approval of the project."

The Commissioner reviews the application to determine whether it is eligible for funding under EFCFA. Specifically, the Commissioner assesses whether the proposed project is consistent with the district's LRFP and compliant with facilities efficiency standards. *N.J.S.A.* 18A:7G-5(e). If the project is compliant, then the Commissioner "shall calculate the preliminary eligible costs of the project." *N.J.S.A.* 18A:7G-5(f). For SDA district projects, the preliminary eligible costs "equal the estimated cost as determined by the development authority."[2] *Ibid.* Generally, the Commissioner must decide whether to approve the application within 90 days from the date it is deemed complete. *N.J.S.A.* 18A:7G-5(e); *N.J.A.C.* 6A:26-3.3(a), (b). If more time is needed, the Commissioner may take an additional 60 days to render a decision. *Ibid.* If, however, the decision is not made prior to the expiration of the additional 60 days, the project is automatically deemed approved. *Ibid.*

[2] Because of the aforementioned funding limitations, applications from SDA districts are also evaluated based upon the project's educational priority ranking and the Statewide strategic plan, developed in accordance with *N.J.S.A.* 18A:7G-5(m). *N.J.S.A.* 18A:7G-5(e).

Once a school facilities project is approved, certain additional steps must be completed by the Commissioner if the project involves an SDA district. *N.J.S.A.* 18A:7G-5(h)(2). For instance, "the Commissioner must prepare a preliminary report describing the project along with, among other factors, its costs and priority ranking." *E. Orange Bd. of Educ.*, 405 *N.J. Super.* at 139 (citing *N.J.S.A.* 18A:7G-5(h)(2)). "After receiving the Commissioner's preliminary report, the [SDA] must submit to the Commissioner detailed recommendations with regard to the project." *Ibid.* (citing *N.J.S.A.* 19A:7G-5(i)). "The Commissioner and the [SDA] then work together to determine what changes must be made before a project receives final approval." *Id.* at 139-40. "No construction may commence until the Commissioner 'transmits to the [SDA] a final project report and the district complies with the approval requirements for the local share, if any, pursuant to [*N.J.S.A.* 18A:7G-11.]'" *Id.* at 140 (quoting *N.J.S.A.* 18A:7G-5(j)). "For the SDA districts, the State share shall be 100% of the final eligible costs." *N.J.S.A.* 18A:7G-5(k).

"The paramount goal when interpreting a statute is to 'determine and give effect to the Legislature's intent.'" *Facebook, Inc. v. State*, 254 *N.J.* 329, 353 (2023) (quoting *State v. Lopez-Carrera*, 245 *N.J.* 596, 612 (2021)). "The plain language of a statute 'is typically the best indicator of intent.'" *Ibid.* (quoting *Lopez-Carrera*, 245 *N.J.* at 613). "When the text is clear, [the] inquiry is complete." *Ibid.* (quoting *Malanga v. Twp. of W. Orange*, 253 *N.J.* 291, 311 (2023)). If the text is ambiguous, "extrinsic materials, including legislative history" may be considered. *Malanga*, 253 *N.J.* at 311. Regulations are interpreted "in the same manner" as statutes. *L.R. v. Camden City Pub. Sch. Dist.*, 238 *N.J.* 547, 558 (2019).

The Commissioner holds that the Board's enforcement litigation, which could potentially result in the reacquisition of title to the Maple Avenue School site based upon the Agreement's

terms, does not fall within the plain language statutory or regulatory definitions of school facilities project.

First, the litigation itself is not "planning, acquisition, demolition, construction, improvement, alteration, modernization, renovation, reconstruction or capital maintenance of all or any part of a school facility or of any other personal property necessary for, or ancillary to, any school facility." *N.J.S.A.* 18A:7G-3. If the litigation is decided in the Board's favor, it may result in a future reacquisition of the Maple Avenue School site based upon the Agreement's terms. But because the litigation's outcome is uncertain, an application from the Board to the Commissioner for approval of a school facilities project involving the Maple Avenue School site prior to the commencement of the litigation was unnecessary.

Second, the litigation itself is not "new construction to meet the housing needs of unhoused students, or rehabilitation to keep a school facility functional for its original purpose or for a new purpose accomplished within the gross square footage of the original building." *N.J.A.C.* 6A:26-1.2. It is an enforcement lawsuit claiming various parties breached the Agreement. Similarly, the litigation itself is not "[a]cquisition of existing buildings to accommodate unhoused students." *N.J.A.C.* 6A:26-3.2(a). Again, the outcome of the litigation is uncertain. Therefore, an application from the Board to the Commissioner for approval of a school facilities project involving the Maple Avenue School site prior to the commencement of the litigation was not necessary.

The unique factual scenario presented here was clearly neither contemplated by the Legislature nor by those who drafted the regulations, and petitioner has not cited any decisional law on point that directly supports its position. But in keeping with the legislative intent and constitutional obligations to the public-school students in our state, it is important to recognize that EFCFA requires the Commissioner to review and approve school facilities projects to ensure their

educational adequacy and safety. *Bd. of Educ. of Clifton*, 409 *N.J. Super.* at 441; *N.J.S.A.* 18A:7G-5(e). That review must include assessment of whether the project is consistent with the district's LRFP and compliant with facilities efficiency standards. *N.J.S.A.* 18A:7G-5(e). Also inherent in the review process is the need to protect taxpayers' interests. *N.J.S.A.* 18A:7G-2(c), (d).

Petitioner's position that the Board should have been required under EFCFA to obtain Commissioner approval prior to filing the enforcement litigation is not consonant with these goals. In other words, the Commissioner's approval of the filing of the enforcement litigation at such an early stage—with its outcome unknown—would not fulfill the legislative intent. As a practical matter, the Commissioner cannot be expected to conduct a thorough review of a school facilities project for educational adequacy and safety, and to render a fully informed decision in an expedited manner as required by EFCFA when the project's location is as yet unconfirmed. Moreover, neither EFCFA nor the regulations set any deadline for the filing of a school facilities project application; the districts decide when to initiate a project. *See N.J.S.A.* 18A:7G-5(d)(1) ("Any district seeking to initiate a school facilities project shall apply to the commissioner for approval of the project.").[3]

Furthermore, the Commissioner rejects petitioner's contention that because the phrases "legal services" and "site acquisition" appear in the statutory definition at *N.J.S.A.* 18A:7G-3, the litigation itself constitutes a school facilities project.

Applications for school facilities projects are initiated by districts seeking funding. *See East Orange Bd. of Educ.*, 405 *N.J. Super.* at 139 (explaining that districts "seeking to fund a project must submit a detailed application to the Commissioner"). The Legislative history of EFCFA makes clear that "legal services" and "site acquisition" were included as part of the broad statutory definition of

[3] That said, the statute is clear that no construction on SDA projects may commence without first obtaining all required Commissioner approvals. *N.J.S.A.* 18A:7G-5(j). Petitioner is not alleging that the Board has commenced construction absent the required approvals.

school facilities project as "preliminary eligible costs," specifically "soft costs," for which districts could receive funding in connection with a school facilities project. *See Sponsor's Statement to S. 200* 84 (Feb. 17, 2000) ("[P]reliminary eligible costs for all school construction projects . . . will include State support of 'soft costs' including site acquisition, site development, issuance costs, legal fees, and fees for professional services."); *S. Educ. Comm. Statement to S. 2000* 2 (May 4, 2000) (repeating same language). There is nothing in the record to indicate that the Board is seeking State funding under EFCFA to potentially reacquire the Maple Avenue School site via litigation.

The Commissioner also holds that the enforcement litigation does not constitute "land acquisition" as contemplated under a plain language reading of EFCFA and its regulations.

EFCFA addresses funding of land acquisition as part of school facilities projects. *N.J.S.A.* 18A:7G-45(a) states that the SDA may "fund[] 100% of the cost of the acquisition of land for the construction of a school facilities project." Although not defined in EFCFA, *N.J.A.C.* 6A:26-1.2 defines "land acquisition" as "an acquisition of land, whether by purchase, condemnation, or by gift or grant, to be used as a school site."

The enforcement litigation, in and of itself, is not a land acquisition. It is a matter brought to enforce the Board's rights under the Agreement. Even assuming the Board prevails, it will not be reacquiring the Maple Avenue School site as contemplated under *N.J.A.C.* 6A:26-1.2., i.e., "by purchase, condemnation, or by gift or grant." Instead, the Board's case is premised upon its position that it is entitled to reacquire the site based upon a reversionary interest expressed within the Agreement. "A reversionary interest is any future interest left in a transferor or his successor in interest." *Restatement of the Law, Property* § 154 (Am. Law Inst. 1936). Essentially, the Board is claiming that it retained an interest in the Maple Avenue School site even after the sale of the

property. Because the enforcement litigation is not a land acquisition as defined by the regulations, *N.J.A.C.* 6A:26-7.1, which describes the process by which districts, or the SDA on behalf of a district, may obtain approval (and ultimately, funding) for land acquisition "in connection with a school facilities project," is inapplicable to the enforcement litigation.

Additionally, EFCFA's regulations explain that "[s]chool districts may seek to acquire land as part of a school facilities project or prior to approval of a school facilities project." *N.J.A.C.* 6A:26-3.12(b). Thus, "acquisition of land" can be a "preconstruction activity" that is "undertaken prior to submission of a school facilities project application." *N.J.A.C.* 6A:26-3.9(b)(1). However, school facilities projects in SDA districts are constructed by the SDA. *N.J.A.C.* 6A:26-3.5(a). If the district is an SDA district, then the SDA is the entity that undertakes preconstruction activities following authorization by DOE. *N.J.A.C.* 6A:26-3.9(b)(1). An enforcement lawsuit filed by the Board, therefore, is not a preconstruction acquisition of land as contemplated under EFCFA's regulatory scheme as it is not being undertaken by the SDA.

Petitioner's alternative claims—that even if the litigation is neither a school facilities project nor a land acquisition, it constitutes "preconstruction activities" per *N.J.A.C.* 6A:26-3.9(b)(1), a "capital project" per *N.J.A.C.* 6A:26-3.1(a), and a project to "acquire an existing facility" per *N.J.A.C.* 6A:26-7.3(a)—lack merit for several reasons. At the outset, the ALJ was under no obligation to decide these issues because they are beyond the scope of the remand. Further, the petition failed to assert any claim that the enforcement litigation constituted "preconstruction activities" or a "capital project." Moreover, as noted previously, the litigation does not constitute preconstruction activities as contemplated under the regulations because it was not undertaken by the SDA.

While the petition did cite *N.J.A.C.* 6A:26-7.3(a), which pertains to the acquisition of an existing facility, the Commissioner finds that said regulation is inapplicable to the enforcement

litigation. In January 2022, the Board sought a major amendment to its LRFP, which the DOE approved in March 2022. According to page seven of the DOE's summary of the LRFP, as amended, the Board intends to demolish the former Maple Avenue School and construct a new Maple Avenue School. Thus, even if it successfully reclaims title to the property, the record reflects that it intends to demolish the existing facility at the Maple Avenue School site. For these reasons, the record fails to support petitioner's assertion that the Commissioner should have approved the existing facility "in accordance with *N.J.A.C.* 6A:26-3", per *N.J.A.C.* 6A:26-7.3(a), prior to the commencement of the enforcement litigation.

Additionally, petitioner incorrectly asserts in its exceptions that the ALJ's September 2023 Initial Decision ignored and failed to address whether the Board violated EFCFA and related regulations by declining to approve the Superior Court litigation via resolution or motion. On the contrary, the record confirms that the ALJ's September 2023 Initial Decision adequately addressed the issue, and the Commissioner concurs with her findings and conclusions. The ALJ found that "[t]he filing of the [Superior Court] Complaint and Amended Complaint were not authorized by a resolution by the Board." Initial Decision, at 3. The ALJ further found that "[r]espondent argues that the pursuit of litigation does not require the Board's or the Commissioner's approval." *Ibid.* In her analysis, the ALJ concluded that "[t]he regulations [*N.J.A.C.* 6A:26-3.2(b)(13)] require a resolution from the Board of Education of the district authorizing the submitting of the application to the Department of Education for a school facilities project." *Id.* at 4. Ultimately, however, the ALJ concluded that the enforcement litigation was not a school facilities project. *Id.* at 5. Consequently, although not explicitly stated by the ALJ, it follows that a Board resolution was not required under EFCFA or its regulations prior to commencement of the enforcement litigation.

Finally, the Commissioner emphasizes that the holding in this matter is limited to the unique facts presented in this case, i.e., that the Board's filing of the Superior Court litigation to enforce the Agreement and reclaim title to the former Maple Avenue School site neither violated EFCFA nor the related regulations; that the enforcement litigation at issue here is neither a school facilities project nor a land acquisition as contemplated under EFCFA and the regulations; and that neither EFCFA nor the related regulations required the Board to seek approval from the Commissioner prior to initiating the enforcement litigation. If the Board ultimately obtains title to the Maple Avenue School site and decides to initiate a school facilities project at that location in the future, then it will be expected to follow the process set forth in EFCFA and related regulations.

Accordingly, the Board's motion for summary decision is granted, and the petition of appeal is hereby dismissed.

IT IS SO ORDERED.[4]

Angelica Allen-McMillan, J.D.S.
ACTING COMMISSIONER OF EDUCATION

Date of Decision: December 5, 2023
Date of Mailing: December 6, 2023

[4] This decision may be appealed to the Appellate Division of the Superior Court pursuant to *N.J.S.A.* 18A:6-9.1. Under *N.J.Ct.R.* 2:4-1(b), a notice of appeal must be filed with the Appellate Division within 45 days from the date of mailing of this decision.

State of New Jersey
OFFICE OF ADMINISTRATIVE LAW

INITIAL DECISION
SUMMARY DECISION
OAL DKT.NO. EDU 10019-21
AGENCY DKT. NO. 55-4/21

(ON REMAND EDU 04320-21)

FRIENDS OF TEAM CHARTER SCHOOL, INC
Petitioner,
v.
BOARD OF EDUCATION OF THE CITY OF NEWARK, ESSEX COUNTY,
Respondent.

Thomas O Johnson, Esq. for petitioners (Johnson Law Firm LLC, attorneys)

Matthew J. Tharney, Esq., for respondent, (Sattiraju & Tharney, LLP, attorneys)

BEFORE **KIMBERLY A. MOSS**, ALJ:

Record Closed: September 8, 2023 Decided: September 15, 2023

By way of background, the matter was originally filed at the Office of Administrative Law (OAL) as a contested matter on May 11, 2021, with docket number EDU 04320-21. Respondent filed a motion for summary decision in that matter on April 13, 2021. Petitioner filed opposition to the motion on June 23, 2021. Respondent filed a reply to the opposition on July 14, 2021. I granted respondent's motion on July 22, 2021. On

October 19, 2021, the New Jersey Commission of Education remanded the matter, where it was filed with the OAL on December 8, 2021. Respondent filed a motion for summary decision on June 2, 2022. Petitioner filed a motion for summary decision on June 8, 2022. Both parties filed opposition to the others motion for summary decision on June 20, 2022. Respondent filed a reply brief on July 15, 2022. On August 18, 2022, I denied both summary decision motions and the matter closed. The matter was remanded from the Department of Education to decide the motion on the merits. Supplemental briefs were sent by the parties on September 8, 2023 at which time I closed the record.

FACTUAL DISCUSSION

As stated in the prior decisions, on April 2016, Newark Board of Education (Board or NBE or respondent) entered into a site disposition and development agreement (Agreement) with the Newark Housing authority (NHA). The Board agreed to transfer twelve school buildings to NHA. NHA agreed to convey those buildings to third parties for the benefit of the Board and the City of Newark.

There is also a provision in the agreement Article 5.2 which states:

> "Any sites conveyed to the NHA shall be subject to a right of reversion exercisable by Newark Public Schools (NPS) if and to the extent the NHA has not developed a site project or demonstrable plans for such site within three years from the date of execution of this agreement."

Maple Avenue School was included in the agreement. The Board transferred the title of Maple Avenue School to NHA on June 30, 2016.

On or about December 27, 2017, NHA sold the Maple Avenue School property 33 Maple Avenue Urban renewal LLC (33 Maple LLC). On March 12, 2020, 33 Maple LLC sold the property to petitioner. Petitioner is developing the property as a public school.

On April 6, 2020, the Board filed a complaint in Superior Court Chancery Division Essex County titled Newark Board of Education v. Newark Housing Authority Docket No ESX-C 67-20. The Complaint is for breach of covenant of good faith and fair dealing,

tortious interference with contract, and unjust enrichment. The Board seeks to enforce its rights of reversion to Maple Avenue School on the grounds that a site project had not been completed and the property was not being used for one of the agreements permitted uses. The Board's attorneys in that matter are Sattiraju & Tharney LLP who were among the law firms selected in accordance with the Board's policies and procedures for ensuring prudent use of legal services and authorized by resolution the Board to represent its interests. Sattiraju & Tharney LLP were assigned this matter by the Board's general counsel.

On April 27, 2020, an amended complaint was filed naming plaintiff as a defendant. The amended complaint was served on plaintiff on May 4, 2020. The Board filed a second amended complaint on August 31, 2020. Plaintiff filed a motion to dismiss the Superior Court Complaint on October 2, 2020. That motion was denied on December 20, 2020.

The filing of the Complaint and Amended Complaint were not authorized by a resolution by the Board. The Board is being advised of the status of the civil action. The Board did not obtain the Commission of Education's approval to obtain property. Roger Leon, the Superintendent of Schools in Newark, in a deposition on May 3, 2022, testified that if the litigation was successful, the property would be used for student instructional purposes.

Petitioner alleges that this is a school facility matter and that in addition to not having a Board resolution, respondent did not obtain the Commissioners approval to acquire property. Respondent argues that the pursuit of litigation does not require the Board's or the Commissioner's approval. Respondent also argues that the filing of the litigation is not a school facility project. The civil action is currently pending in Superior Court.

LEGAL ANALYSIS AND CONCLUSION

Petitioner and respondent seeks to summarily dismiss petitioner's claim. The rules governing motions for summary decision in an OAL matter are embodied N.J.A.C. 1:1-

12.5. These provisions mirror the language of Rule 4:46-2 and the New Jersey Supreme Court's decision in Judson v. Peoples Bank and Trust Company of Westfield, 17 N.J. 67 (1954). Under N.J.A.C. 1:1-12.5(b), the determination to grant summary judgment should be based on the papers presented as well as any affidavits, which may have been filed with the application. In order for the adverse, i.e., the non-moving party to prevail in such an application, responding affidavits must be submitted showing that there is indeed a genuine issue of fact, which can only be determined in an evidentiary proceeding. The Court in Brill v. Guardian Life Insurance Company of America, 142 N.J. 520, 523 (1995), set the standard to be applied when deciding a motion for summary judgment. Therein the Court stated:

> The determination whether there exists a genuine issue with respect to a material fact challenged requires the Motion Judge to consider whether the competent evidential materials presented, when viewed in the light most favorable to the non-moving party . . . are sufficient to permit a rational fact finder to resolve the alleged disputed issue in favor of the non-moving party. There is no issue of material fact.

Petitioner argues that respondent was required to obtain Board approval and approval of the Commissioner to file the civil action. It cites the Educational Facilities Construction and Finance Act (EFCFA) N.J.S.A. 18A:7G-1 et seq. The Department of Education is responsible for review and approval of school facilities projects. The regulations require a resolution from the Board of Education of the district authorizing the submitting of the application to the to the Department of Education for a school facilities project.

In the civil action, respondent argues that it is entitled to revision of the property in question due to violation of the contract and Petitioner did not provide any regulation that states that a superintendent cannot commence a civil action without a resolution by the Board of Education.

N.J.A.C. 6A: 26-1.2 defines school facility project as:

> "School facilities project" means the acquisition, demolition, construction, improvement, repair, alteration, modernization, renovation, reconstruction,

> or capital maintenance of all or any part of a school facility or any other personal property necessary for, or ancillary to, any school facility. School facilities project includes, but is not limited to, fixtures; furnishings and equipment; site acquisition; site development; services of design professionals such as engineers and architects; construction management; legal services; financing costs; and administrative costs and expenses incurred in connection with the project. **To qualify as a school facilities project, the project must be new construction to meet the housing needs of unhoused students, or rehabilitation to keep a school facility functional for its original purpose or for a new purpose accomplished within the gross square footage of the original building**. Maintenance projects intended solely to achieve the design life of a school facility and routine maintenance do not constitute school facilities projects.

N.J.A.C. 6A:1.2 defines land acquisition as:

> Land acquisition" means an acquisition of land, whether by purchase, condemnation, or by gift or grant, to be used as a school site. Land acquisition is either an eligible cost of a school facilities project or another capital project not eligible for funding pursuant to EFCFA.

N.J.A.C. 6A: 26-3.2 (a) (1)(2) (3) provides:

> (a) Any school district seeking to initiate a school facilities project shall apply to the Division on a Commissioner-provided form for approval of the school facilities project. School facilities projects include:
>
> 1. New construction;
> 2. Rehabilitation, provided that the rehabilitation or capital maintenance consists of the entire building system in the same school facility building section, as building section is defined in the approved LRFP, unless one or more of the components of a mechanical, electrical, or plumbing building system is required for the continued operation of such system;
> 3. Acquisition of existing buildings to accommodate unhoused students;

This matter is not a school facility project. It is not new construction to meet the housing needs of unhoused students or rehabilitation to keep a school facility functional for its original purpose. NBOE is not attempting to purchase the Maple Avenue school. It is not attempting to acquire the Maple Avenue School by condemnation, gift, or grant. If NBOE wins the lawsuit in Superior Court, it will not be granted the property, the property will revert to it due to the language of the contract.

N.J.A.C. 6A: 26-7.1 provides:

> (a) A school district may obtain voter approval pursuant to N.J.A.C. 6A:26-3 or 9 for funding of land acquisition prior to Division approval of the land acquisition. A school district shall not take any action to acquire the land prior to obtaining Division approval.
> (b) A school district, or the Development Authority on behalf of a school district, shall submit to the Division the following information to obtain approval under (a) above for land in connection with a school facilities project. The following requirements do not address requirements of other State agencies having approval or permitting jurisdiction over land acquisition.
> (c) A school district that intends to acquire land not in connection with a school facilities project shall submit all of the information required under (b) above except (b)1ii and iii and shall further be excepted from the requirements of (d) and (e) below. If the school district later intends to change the use of the land and use as a school site, the school district shall be required to submit all of the information required under this section and the aforementioned exceptions shall no longer apply.

In this matter, respondent filed a civil action in Superior Court for reversion of the property that was Maple Avenue School to revert to respondent because the contract that transferred the property was breached. If NBOE is successful in the civil litigation the land will revert to them.

The civil action is not a new construction to meet the housing needs of unhoused students, or rehabilitation to keep a school facility functional for its original purpose or for a new purpose accomplished within the gross square footage of the original building which are the requirements for a school facilities project in the regulation. The civil action is based on whether respondent is entitled to reversion of the property based on the contract. Since this is not a school facility matter or land acquisition N.J.A.C. 6A:26-7.1 does not apply.

ORDER

Based on the foregoing, it is **ORDERED** that Petitioner's motions for Summary decision is **DENIED**.

It is further **ORDERED** that respondent's Motion for summary decision is hereby **GRANTED**.

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

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

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

September 15, 2023

DATE

KIMBERLY A. MOSS, ALJ

Date Received at Agency: September 15, 2023

Date Mailed to Parties: September 15, 2023

ljb

358-23

New Jersey Commissioner of Education

Final Decision

S.U. and G.L. on behalf of minor child, M.D.U.,

Petitioners,

v.

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

Respondent.

Synopsis

The petitioners appealed a final determination by the respondent Board to deny their son entry into the school district's enrichment program for gifted students. By email dated January 25, 2022, the superintendent of schools notified petitioners that the Board had affirmed the school district's determination that their son was not eligible for the enrichment program. Petitioners emailed their petition of appeal to the Office of Controversies and Disputes (Office) at 5:58 p.m. on April 25, 2022, after the close of business on the 90th day following notification of the Board's final determination. The Board filed a motion to dismiss the petition as untimely pursuant to *N.J.A.C.* 6A:3-1.2 and 6A:3-1.3(i), which provides that petitions shall be filed "no later than the 90th day from the date of receipt of the notice of a final order, ruling, or other action by the district board of education."

The ALJ found, *inter alia*, that: the substantive facts are largely immaterial in this case, which can be decided on procedural grounds; the 90-day rule is a reasonable procedural requirement that is meant to be strictly construed, petitioners' arguments were unpersuasive, and they offered no compelling reason to relax the 90-day rule; and the case must be dismissed as a matter of law. The ALJ concluded that the petitioners' appeal is out of time. Accordingly, the Board's motion to dismiss was granted.

Upon review, the Commissioner, *inter alia*, concurred with the ALJ's findings and conclusions, and—finding the petitioners' exceptions to be unpersuasive—adopted the Initial Decision as the final decision in this matter. Accordingly, the petition of appeal was dismissed.

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

358-23
OAL Dkt. No. EDU 03889-22
Agency Dkt. No. 91-4/22

New Jersey Commissioner of Education

Final Decision

S.U. and G.L., on behalf of minor child, M.D.U.,

Petitioners,

v.

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

Respondent.

The record of this matter, the Initial Decision of the Office of Administrative Law (OAL), the exceptions filed by petitioners pursuant to *N.J.A.C.* 1:1-18.4, and the Board's reply thereto, have been reviewed and considered.

By email dated January 25, 2022, the Board notified petitioners of its decision to deny their minor child entry into the Southampton Township Enrichment Program (STEP) for the 2021-22 school year. Petitioners emailed their petition of appeal to the Office of Controversies and Disputes (Office) at 5:58 p.m. on April 25, 2022, after the close of business on the 90th day following notification of the Board's determination. The Office deemed the petition filed on the following day, April 26, 2022, pursuant to the definition of "day" found in *N.J.A.C.* 6A:3-1.2, which states that "[f]ilings received after the close of business (4:15 P.M.) shall be deemed filed on the next business day."

The Board moved to dismiss the petition as untimely pursuant to *N.J.A.C.* 6A:3-1.2 and 6A:3-1.3(i), which provides that petitions shall be filed "no later than the 90th day from the date of receipt of the notice of a final order, ruling, or other action by the district board of education."

The Administrative Law Judge (ALJ) granted the Board's motion to dismiss the petition upon concluding that it was filed one day late. Citing relevant case law, the ALJ explained that the 90-day rule is a reasonable procedural requirement that is to be strictly construed. Moreover, the ALJ found that petitioners did not offer a compelling reason for the 90-day rule to be relaxed. The ALJ considered and rejected as unpersuasive petitioners' arguments that: (1) the Board's motion did not contain proof of service and should be dismissed; (2) the definition of "day" at *N.J.A.C.* 6A:3-1.2 is inapplicable; (3) dismissal of the petition would be unduly harsh because it was received so soon after the filing deadline; and (4) the 90-day rule should be relaxed because the appeal involves a matter of significant public interest.

In their exceptions, petitioners reiterate the arguments they made before the ALJ. Additionally, they contend that the ALJ should have considered the fact that the OAL relaxed its procedural requirements during the COVID-19 pandemic, and that the Board sent petitioners notice of its decision at 5:04 P.M. on January 25, 2022—after the 4:15 P.M. close of business cited in the Department's regulations. Furthermore, petitioners contend that case law cited by the ALJ regarding the 90-day rule is "beyond inapposite," and that the ALJ should have considered New Jersey Court Rule 1:1-2, which states that the Superior Court may relax its rules if adherence thereto would result in an injustice.

In its reply, the Board argues overall that the Commissioner should adopt the ALJ's Initial Decision and asserts that petitioners' exceptions simply restate unpersuasive arguments made below and rejected by the ALJ.

Upon review, the Commissioner adopts the Initial Decision as the final decision in this matter. The Commissioner concurs with the ALJ that the instant petition is appropriately dismissed because it was filed outside the 90-day limitation period set forth in *N.J.A.C.* 6A:3-1.3(i). The Commissioner agrees with the ALJ that there is no compelling reason to relax the 90-day limitation period in this case. The Commissioner also finds that the ALJ properly rejected as unpersuasive petitioners' arguments regarding procedural deficiencies in the Board's motion, the inapplicability of the definition of "day" at *N.J.A.C.* 6A:3-1.2, and in favor of relaxation of the 90-day rule to avoid undue harshness or because the petition involved a matter of significant public interest.

The Commissioner further finds and concludes that the other contentions advanced by petitioners in their exceptions lack merit. The OAL's relaxation of certain procedural requirements during the COVID-19 pandemic has no bearing upon the applicability of the Department's regulations, specifically *N.J.A.C.* 6A:3-1.2 and 6A:3-1.3(i), to this case. Moreover, the fact that the Board sent petitioners notice of its decision via email at 5:04 P.M. on January 25, 2022, in no way prejudiced them because—as the Board points out in its reply—the 90-day period did not start to run until January 26, 2022. Additionally, the case law cited by the ALJ regarding the 90-day rule, including but not limited to *Kaprow v. Board of Education of Berkeley Township*, 131 *N.J.* 572, 583 (1993), is relevant and instructive. Finally, there was no need for the ALJ to consider New Jersey Court Rule 1:1-2, which does not apply to

administrative proceedings at the OAL. *See N.J. Ct. R.* 1:1-1 (explaining that "the rules in Part I are applicable to the Supreme Court, the Superior Court, the Tax Court, the surrogate's courts, and the municipal courts").

Accordingly, the petition of appeal is hereby dismissed.

IT IS SO ORDERED.[1]

Angelica Allen-McMillan, J.D.S.
ACTING COMMISSIONER OF EDUCATION

Date of Decision: December 5, 2023
Date of Mailing: December 6, 2023

[1] This decision may be appealed to the Appellate Division of the Superior Court pursuant to *N.J.S.A.* 18A:6-9.1. Under *N.J.Ct.R.* 2:4-1(b), a notice of appeal must be filed with the Appellate Division within 45 days from the date of mailing of this decision.

State of New Jersey
OFFICE OF ADMINISTRATIVE LAW

INITIAL DECISION
OAL DKT. NO. EDU 03889-22
AGENCY DKT. NO. 91-4/22

S.U. AND G.L. ON BEHALF OF MINOR CHILD, M.D.U.,
Petitioners,
v.
BOARD OF EDUCATION OF THE TOWNSHIP OF SOUTHAMPTON, BURLINGTON COUNTY,
Respondent.

S.U., petitioner, pro se

Robert A. Muccilli, Esq., for respondent Southampton Board of Education (Capehart Scatchard, attorneys)

Record Closed: November 29, 2022 Decided: November 2, 2023

BEFORE **ELIA A. PELIOS,** ALJ:

STATEMENT OF THE CASE

Respondent, the Southampton Board of Education (Board), moves to dismiss as untimely petitioners S.U. and G.L.'s appeal challenging the Board's decision to deny their son M.D.U. admittance into the District's enrichment program for gifted students.

PROCEDURAL HISTORY

On or about September 27, 2021, petitioners' son, M.D.U., was denied entry into the Southampton Township Enrichment Program. Petitioners filed a complaint with the Board on December 20, 2021, seeking to reverse the Board's decision. At the Board meeting convened on January 24, 2022, the Board considered petitioners' complaint challenging its determination. By email dated January 25, 2022, petitioners received notice from the superintendent of schools that the Board affirmed the administration's determination of ineligibility. Petitioners filed their petition of appeal with the Department of Education at 5:58 p.m. on April 25, 2022, ninety days after the Board's determination. On May 13, 2022, the Board moved to dismiss petitioners' petition of appeal as untimely. The matter was transmitted to the Office of Administrative Law, where it was filed on May 16, 2022, for hearing as a contested case pursuant to N.J.S.A. 52:14B-1 to -15 and N.J.S.A. 52:14F-1 to -13. A pre-hearing telephone conference was held on August 2, 2022, and an oral argument was conducted via Zoom on November 29, 2022, after which the record closed.

FACTUAL DISCUSSION

The substantive facts are largely immaterial to the matter at hand, which can be decided on procedural grounds. In the interest of thoroughness, the relevant facts are as follows.

The District uses a points-based matrix to determine eligibility for the Southampton Township Enrichment Program (STEP) based on students' scores in the following areas: staff ratings, the F&P Benchmark assessment, the Star 360 Reading and Math tests, the Otis-Lennon School Ability Test, and the Screening Assessment for Gifted Elementary

Students. Typically, only the top 10 percent of scorers are invited to participate in the program each year. Petitioners' son participated in STEP in the three years preceding the 2021–2022 school year. M.D.U. scored below the cutoff score for the 2021–2022 school year, and, consequently, was denied admittance into the program for that year.

In essence, petitioners' appeal alleges that the test scores were misapplied in the District's points-based system—that the matrix scoring system for the Star 360 Reading and Math tests is flawed because the District uses students' percentile rank (PR) scores as absolute values rather than considering the entire PR ranges generated by the tests. As a result of the District's error, M.D.U. was wrongfully excluded from STEP.

LEGAL ANALYSIS AND CONCLUSION

Under the rules of procedure for the filing of petitions with the Commissioner of Education to hear and decide controversies and disputes arising under school laws, N.J.A.C. 6A:3-1.1 to -1.17, "[t]he petitioner shall file a petition no later than the 90th day from the date of receipt of the notice of a final order, ruling, or other action by the district board of education, individual party, or agency, that is the subject of the requested contested case hearing." N.J.A.C. 6A:3-1.3(i). "'Day' means . . . calendar day when the period specified is seven days or more." N.J.A.C. 6A:3-1.2. The day of the order, ruling, or action being challenged is not included in the calculation of time periods, but the last day is counted "unless such day falls on a Saturday, Sunday or holiday, in which case the last day shall be deemed the next business day immediately following." Ibid. In addition, "[f]ilings received after the close of business (4:15 P.M.) shall be deemed filed on the next business day." Ibid.

The ninety-day rule has been recognized as a "*reasonable* procedural requirement" that both affords litigants a meaningful opportunity to file a petition and promotes finality in education matters. Kaprow v. Bd. of Educ. of Berkeley Twp., 131 N.J. 572, 583 (1993). This rule has been strictly construed by the Commissioner of Education, the State Board of Education, and New Jersey courts. See Riely v. Bd. of Educ. of Hunterdon Cent. Reg'l High Sch. Dist., 173 N.J. Super. 109, 113 (App. Div. 1980). While the Commissioner of Education has broad discretion to relax the rules, such authority is

rarely invoked "unless there are compelling reasons . . . or where circumstances are such that strict adherence would be inappropriate, unnecessary[,]" or unjust. DeMaio v. New Providence Bd. of Educ., 96 N.J.A.R.2d (EDU) 449, 453 (citation omitted). Circumstances potentially justifying relaxation include "[w]here a substantial constitutional issue was presented, where judicial review was sought of an informal administrative determination, and where a matter of significant public interest is involved." Portee v. Bd. of Educ. of Newark, 94 N.J.A.R.2d (EDU) 381 (citation omitted).

The purpose of a limitation on the filing of actions is twofold. First, it serves "to stimulate litigants to pursue a right of action within a reasonable time so that the opposing party may have a fair opportunity to defend, thus preventing the litigation of stale claims." Ochs v. Fed. Ins. Co., 90 N.J. 108, 112 (1982) (citations omitted). "The second function is to 'penalize dilatoriness and serve as [a] measure[] of repose.'" Ibid. (quoting Farrell v. Votator Div. of Chemetron Corp., 62 N.J. 111, 115 (1975)).

Respondent argues that petitioners' appeal is untimely. According to respondent, petitioners' appeal, filed after the close of business ninety days after the challenged decision, is deemed to have been received the next business day, putting it beyond the ninety-day timeline.

In response, petitioners advance four main arguments. First, they argue that respondent's motion did not contain proof of service and that the motion should be dismissed on that basis alone. Second, they argue that the definition of "day" does not apply in this case based on prefatory language contained in N.J.A.C. 6A:3-1.2 ("unless the context clearly indicates otherwise"). Third, they argue, essentially, that their appeal was received so soon after the deadline that dismissal would be unduly harsh. And finally, they argue that the ninety-day rule, if it was violated, should be relaxed because their appeal "involve[s] a matter of significant public interest—whether Respondent's arbitrary and capricious conduct violated the Strengthening Gifted and Talented Education Act, N.J.S.A. 18A:35-34." Petitioners maintain that their lawsuit impacts "similarly situated students that were denied enrichment."

Petitioners' arguments are unpersuasive. Petitioners received notice of respondent's motion and were given an opportunity to respond. Under the rules, "[f]ilings received after the close of business (4:15 P.M.) shall be deemed filed on the next business day." N.J.A.C. 6A:3-1.2. This provision explicitly applies to Chapter 3 of Title 6A of the New Jersey Administrative Code, dealing with Controversies and Disputes before the Commissioner of Education. See ibid. Because petitioners' appeal was filed at 5:58 p.m. ninety days after the challenged action, it is deemed to have been filed on the ninety-first day. As the ninety-day rule is strictly construed, and petitioners have not offered a compelling reason why the rule should be relaxed, dismissal is appropriate. Accordingly, I **CONCLUDE** that petitioners' appeal is out of time.

ORDER

It is **ORDERED** that respondent's motion to dismiss is **GRANTED** and petitioners' appeal is **DISMISSED** with prejudice.

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

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

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

November 2, 2023
DATE

ELIA A. PELIOS, ALJ

Date Received at Agency: _____

Date Mailed to Parties: _____

/caa

APPENDIX

Witnesses

None

Exhibits

None

359-23
State Board of Examiners Dkt No. 1718-102
OAL Dkt. No. EDE 02477-18
Agency Dkt. No. 1-4/23A

New Jersey Commissioner of Education

Final Decision

In the Matter of the Certificates of
Richard Chambers, State Board of Examiners,
New Jersey Department of Education.

Order of Revocation by the State Board of Examiners, March 3, 2023

For the Appellant, Edward Cridge, Esq.

For the Respondent State Board of Examiners, Michal Czarnecki, DeputyAttorney General (Matthew J. Platkin, Attorney General of New Jersey)

The Commissioner has reviewed the record and the papers filed in connection with appellant Richard Chambers' appeal of the Order of the State Board of Examiners (Board), dated March 3, 2023, revoking his Teacher of Music certificate. Following the issuance of an Order to Show Cause and a hearing at the Office of Administrative Law (OAL), the Administrative Law Judge (ALJ) found that appellant engaged in conduct unbecoming a teacher and recommended that appellant's certificate be revoked. The ALJ found that petitioner, a middle school music teacher, grabbed student M.L. by the collar on two occasions, and that he threw M.L. on the ground on one of those occasions. The ALJ further found that, in another incident, appellant grabbed student J.S. and threw him against a wall. Thereafter, the Board adopted the Initial Decision of the ALJ and revoked appellant's certificate.

On appeal, appellant argues that the determination regarding J.S. was based on hearsay with no residuum of competent evidence. Appellant also contends that the ALJ erroneously concluded that M.L.'s testimony was credible, and appellant's testimony was not credible. According to appellant, even if all the findings of the ALJ are accepted, revocation is an excessive penalty and not in line with penalties imposed by the Board in other cases. Appellant also points to his lengthy career without any allegations until those at issue in this matter.

In reviewing appeals from decisions of the Board, the Commissioner may not substitute her judgment for that of the Board so long as the appellant received due process and the Board's decision is supported by sufficient credible evidence in the record. Further, the Board's decision should not be disturbed unless the appellant demonstrates that it is arbitrary, capricious, or unreasonable. *N.J.A.C.* 6A:4-4.1(a). With regard to reviewing a sanction imposed by the Board, the Appellate Division has defined the standard as determining whether the "punishment is so disproportionate to the offense, in light of all the circumstances, as to be shocking to one's sense of fairness." *In re Certificates of Benjamin Norton*, 2016 *N.J. Super.* Unpub. LEXIS 2291, *6-7 (internal citations and quotations omitted).

Upon review of the record, the Commissioner finds that appellant received due process and concurs with the Board that appellant has engaged in unbecoming conduct. The Commissioner also finds that the Board's decision to revoke appellant's certificate was not arbitrary, capricious, or unreasonable.

Pursuant to *N.J.S.A.* 52:14B-10(c), an ALJ's credibility findings may not be rejected or modified unless those findings are "arbitrary, capricious or unreasonable or are not supported by sufficient, competent, and credible evidence in the record." Having thoroughly reviewed the

record, the Commissioner finds no reason to disturb the ALJ's finding that M.L.'s testimony was credible, while appellant's testimony was not. Having observed the witnesses' demeanor, tone, and physical actions, the ALJ was in the best position to make credibility determinations. With regard to M.L., the ALJ specifically acknowledged that certain areas of his testimony appeared to be partially embellished, but the ALJ nonetheless found that M.L.'s testimony that appellant had inappropriately touched him was credible and persuasive. The ALJ's findings were further supported by the fact that both M.L.'s own statement to the Department of Children and Families Institutional Abuse Investigation Unit (IAIU) investigator, taken shortly after the classroom incident, as well the statements made to the investigator by other students who witnessed the incident, corroborated the version of events he set forth in his testimony. The minor inconsistencies in M.L.'s testimony that appellant identifies do not change this conclusion.

The Commissioner finds that it was not inappropriate for the Board to consider evidence of the incident between appellant and J.S. In *IMO of the Tenure Hearing of M. William Cowan, Sch. Dist. of the Borough of Bernardsville*, 224 *N.J. Super.* 737, 740 (App. Div. 1988), a tenured teacher (Cowan) was dismissed for unbecoming conduct based, in part, on an incident of alleged assault, which Cowan denied had occurred. Evidence of the assault consisted of: 1) the testimony of the school's principal, who did not witness the incident; 2) the principal's memorandum to Cowan, recounting the facts the principal had learned from eyewitnesses; and 3) Cowan's memorandum in response, denying the allegations. *Id.* at 748. The teacher contended that all of this evidence was inadmissible hearsay, and the Appellate Division agreed. *Id.* at 749. However, the Appellate Division "nonetheless conclude[d] that application

of the residuum rule does not require that hearsay evidence of the assault be ignored." *Id.* at 750. The Appellate Division stated:

> Applying the residuum rule requires identifying the "ultimate finding of fact" that must be supported by a residuum of competent evidence. Here the "ultimate finding of fact" was that during the years 1974, 1975, 1980, 1982 and 1984 appellant engaged in one or more of eleven acts of alleged misconduct that were "unbecoming." Alternatively, one might characterize as the "ultimate finding of fact" that appellant was engaged in a course of unbecoming conduct of which the acts charged were examples. Whether each of the acts charged is viewed as unbecoming conduct, as corroborative evidence that one or more of the other acts charged were unbecoming conduct, or only as examples of a course of unbecoming conduct, there need not be a residuum of competent evidence to prove each act considered by the Commissioner so long as "the combined probative force of the relevant hearsay and the relevant competent evidence" sustains the Commissioner's ultimate finding of unbecoming conduct.

Ibid. (citing to *Weston v. State*, 60 *N.J.* 36, 52 (1972)).

Here, the evidence of the incident between appellant and J.S. is similar to the evidence presented in Cowan, including: 1) the testimony of IAIU investigator Tamika Solomon, who did not witness the event; 2) Solomon's report, recounting the facts as described to her by the students who witnessed the incident with J.S.; and 3) appellant's testimony denying the allegations regarding J.S. There is additional evidence in the form of written statements from the student witnesses, given on the same day as the incident. As in *Cowan*, all of the pieces of evidence against appellant are hearsay. Nonetheless, as in *Cowan*, the application of the residuum rule did not require the Board to disregard evidence of the incident with J.S., because there does not need to be a residuum of competent evidence to prove each act considered by the Board. The Commissioner concludes that the combined probative force of all of the evidence – the competent evidence regarding the two incidents with M.L. and the hearsay

evidence regarding the incident with J.S. – sustains the Board's ultimate finding of unbecoming conduct.

The Commissioner concludes that the Board's decision to impose the penalty of revocation is not arbitrary, capricious, or unreasonable. In *IMO the Certificate of Julius Young*, State Board of Examiners, decided July 25, 2006, the Board revoked the certificate of a teacher who choked a student into unconsciousness. In doing so, the Board noted that the teacher demonstrated a lack of self-restraint and stated that such "volatility does not belong in a classroom." *Ibid.* In *IMO the Certificates of Laurie Rosen*, State Board of Examiners, decided October 20, 2005, the Board revoked the certificates of a teacher who kicked a student, hit him in the head with an open hand, and hit his head against a wooden divider.[1] In doing so, the Board quoted the ALJ, who found that it was irrelevant whether the student was the aggressor and stated, "Rosen should have known better and her failure to take alternative, acceptable corrective action short of striking the child clearly constituted unbecoming conduct." *Ibid.* Here, while appellant's actions toward J.S. and M.S. may be less severe than the actions of Young or Rosen, his loss of control resulted in aggressive behavior on multiple occasions.[2] It does not "shock the sense of fairness" for the Board to revoke the certificate of a teacher who demonstrates this type of volatility and lack of judgment.

While appellant argues that revocation is too severe a penalty based on decisions in tenure matters imposing lesser penalties, the Commissioner does not find this argument

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[1] The Commissioner notes that criminal charges were also filed against Laurie Rosen. Despite appellant's argument to the contrary, the Commissioner does not find this distinction persuasive. Rosen entered a pre-trial intervention program and, accordingly, was not convicted of any criminal charges.

[2] Furthermore, his behavior was more egregious than the behavior of the teachers in the cases cited by appellant in support of his argument for a lesser penalty.

persuasive. Initially, the majority of cases cited by appellant do not involve a teacher engaging in physical contact with a student, and those cases are therefore inapposite to the Board's determination here. Those cases that do involve physical contact are factually distinguishable and, even if they had involved the same conduct committed by appellant, they would not be relevant because the Board is not bound by penalties assessed in tenure proceedings. Tenure proceedings and Board proceedings are separate proceedings undertaken for different purposes. Tenure proceedings are limited to a determination as to whether any proven tenure charges warrant the teacher's dismissal from employment or reduction in salary. *N.J.S.A.* 18A:6-38. Board proceedings include a determination of whether the teacher's conduct warrants revocation or suspension of his certificate. *N.J.A.C.* 6A:9B-4.4(a). The Commissioner has previously held that even in proceedings against the same individual involving the same conduct, the Board is not precluded from imposing a higher penalty than an arbitrator imposed in tenure proceedings. *In the Matter of the Certificates of Nicholas Cilento, State Board of Examiners, New Jersey Department of Education*, Commissioner Decision No. 131-22, decided June 23, 2022; *In the Matter of the Certificates of Scott Levy, State Board of Examiners, New Jersey Department of Education*, Commissioner Decision No. 268-23, decided September 7, 2023.

Furthermore, while appellant argues that he has never been subject to any other discipline or Board action, that alone does not suffice to mitigate appellant's pattern of physical aggression.

Accordingly, the decision of the Board is affirmed. Appellant's Teacher of Music certificate is hereby revoked.[3]

Angelica Allen-McMillan, J.d.S.
ACTING COMMISSIONER OF EDUCATION

Date of Decision: December 5, 2023
Date of Mailing: December 6, 2023

[3] This decision may be appealed to the Appellate Division of the Superior Court pursuant to *N.J.S.A.* 18A:6-9.1. Under N.J. Ct.R. 2:4-1(b), a notice of appeal must be filed with the Appellate Division within 45 days from the date of mailing of this decision.

360-23

New Jersey Commissioner of Education

Final Decision

James Wandling,

Petitioner,

v.

New Jersey Department of Education,
Office of Student Protection,

Respondent.

Synopsis

Petitioner – a school bus driver – appealed the Department's determination to suspend his school bus endorsement pursuant to *N.J.S.A.* 18A:39-28 *et seq.* following an incident in which a Howell Township Middle School student was left on petitioner's school bus at the end of one of his assigned bus routes. Petitioner admitted his mistake in leaving a student on his school bus at the conclusion of the route, but also submitted that his employer, Jay's Bus Service (JBS), suspended him from driving school buses immediately following the March 2, 2023, incident. Petitioner contended that he attended retraining and accepted responsibility for his actions, and that the six-month suspension of his school bus endorsement should be mitigated in length or not imposed based on the time which has elapsed since he was suspended by JBS from driving school buses. The respondent Department filed a motion to dismiss, which was converted to a motion for summary decision.

The ALJ found, *inter alia*, that: there are no material facts at issue in this case, and the matter is ripe for summary decision; petitioner admitted that on March 2, 2023, he did not conduct a full visual inspection of his school bus when he dropped off students at the Howell Township Middle School, before proceeding to his next assigned stop; he did not realize that a student remained on the bus until several stops later, when the Howell Township student tapped him on the shoulder; pursuant to *N.J.S.A.* 18A:39-28, petitioner had an affirmative duty to visually inspect the school bus at the end of the transportation route to determine that no pupil had been left on the bus; and although petitioner had a number of reasons why his school bus endorsement suspension should be offset in full or in part, none of these are sufficient as the penalty imposed under *N.J.S.A.* 18A:39-29(a) is mandatory and not subject to mitigation. Accordingly, the ALJ concluded that there is no factual dispute and as a matter of law, the S endorsement on petitioner's New Jersey driver's license must be suspended for six months.

Upon full review, the Commissioner concurred with the ALJ that the respondent is entitled to summary decision. Accordingly, the petition was dismissed, and respondent was directed to notify the Motor Vehicle Commission of its obligation to suspend petitioner's school bus endorsement pursuant to *N.J.S.A.* 18A:39-26 *et seq.*, and to notify petitioner's employer that he is ineligible for the period of suspension for continued employment as a school bus driver.

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

360-23
OAL Dkt. No. EDU 03264-23
Agency Dkt. No. 72-3/23

New Jersey Commissioner of Education

Final Decision

James Wandling,

Petitioner,

v.

New Jersey Department of Education, Office of Student Protection,

Respondent.

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

Upon review, the Commissioner adopts the comprehensive Initial Decision as the final decision in this matter. The Commissioner concurs with the Administrative Law Judge (ALJ) that the facts are undisputed, and that respondent is entitled to summary decision. On March 2, 2023, petitioner failed to conduct a visual inspection of his school bus, in violation of *N.J.S.A.* 18A:39-28, and a student remained on the bus at the conclusion of his route. For a first offense, *N.J.S.A.* 18A:39-29(a) mandates a six-month suspension of petitioner's school bus "S" endorsement on his driver's license.

Accordingly, respondent's motion for summary decision is granted and the petition of appeal is hereby dismissed. Respondent is directed to notify the New Jersey Motor Vehicle Commission (MVC) of its obligation, pursuant to *N.J.S.A.* 18A:39-29(a), to suspend petitioner's

school bus "S" endorsement on his driver's license for six months beginning on the date of issuance of this final decision. Respondent shall also notify petitioner's employer that, for the period of suspension, he is ineligible for continued employment as a school bus driver.

IT IS SO ORDERED.[1]

Angelica Allen-McMillan, J.d.D.
ACTING COMMISSIONER OF EDUCATION

Date of Decision: December 5, 2023
Date of Mailing: December 6, 2023

[1] This decision may be appealed to the Appellate Division of the Superior Court pursuant to *N.J.S.A.* 18A:6-9.1. Under *N.J.Ct.R.* 2:4-1(b), a notice of appeal must be filed with the Appellate Division within 45 days from the date of mailing of this decision.

State of New Jersey
OFFICE OF ADMINISTRATIVE LAW

INITIAL DECISION

SUMMARY DECISION

OAL DKT. NO. EDU 03264-23

AGENCY DKT. NO. 72-3/23

JAMES WANDLING,

Petitioner,

v.

NEW JERSEY DEPARTMENT OF EDUCATION,

OFFICE OF STUDENT PROTECTION,

Respondent.

James Wandling, petitioner, pro se

Sadia Ahsanuddin, Deputy Attorney General, for New Jersey Department of Education (Matthew J. Platkin, Attorney General of New Jersey, attorney)

Record Closed: September 12, 2023 Decided: October 27, 2023

BEFORE **ROBERT D. HERMAN,** ALJ:

STATEMENT OF THE CASE

Petitioner, James Wandling, is a school bus driver employed with a private company which services Howell Township public schools. When dropping students off at the Howell Middle School, petitioner failed to perform a check of his bus. Three stops into his next route, a middle school student was found on the bus. As a result, the New Jersy Department of Education (DOE), Office of Student Protection (OSP), seeks to impose a six-month suspension of petitioner's "school bus endorsement" on his motor

vehicle license pursuant to N.J.S.A. 18A:39-29(a). The facts as to the incident are not in dispute. Petitioner seeks to avoid or reduce the six-month suspension set forth in the statute.

PROCEDURAL HISTORY

On March 2, 2023, a student was left on petitioner's bus. (DOC 1 at 1.)[1] On March 3, 2023, the DOE notified petitioner via email of the alleged violation of N.J.S.A. 18A:39-28 et seq. and stated that "the referenced statute [sic] involves a 6-month suspension of [his] 'S' endorsement to operate a school bus." (DOC 2 at 1.) On March 15, 2023, petitioner filed an online "Pro Se Petition of Appeal" with the DOE. (DOC 3 at 1.) In conjunction with the appeal, petitioner submitted a letter detailing what transpired. (DOC 5 at 5.)

On April 13, 2023, the DOE filed a motion to dismiss the petition of appeal pursuant to N.J.A.C. 6A:3-1.10, claiming petitioner "failed to set forth a contested matter under N.J.A.C. 6A:3-12.1." (DOC 4 at 1.) The same date, this matter was transmitted to the Office of Administrative Law (OAL), where it was filed, to be heard as a contested case pursuant to N.J.S.A. 52:14B-1 to 14B-15 and N.J.S.A. 52:14F-1 to 14F-13. (DOC 5 at 1-2.)

An initial case conference was scheduled for May 31, 2023. (DOC 6 at 1.) Due to party availability, the initial case conference occurred on June 8, 2023. (DOC 7 at 1.) A subsequent case conference failed to bear fruit and, because of the narrow issues present in the matter, a final case conference was scheduled for July 11, 2023. (DOC 8 at 1; DOC 10 at 1.) In the interim, on or about June 21, 2023, petitioner provided the DOE with a letter from his employer. (DOC 9 at 1.) Again due to party availability, the final case conference was rescheduled to July 25, 2023. (DOC 11 at 1.)

[1]The rolling submissions of the parties as well as documents produced by the OAL form the whole of the record in this matter. For purposes of legibility and review, the documents will be referred to as "Document" or "DOC" along with a reference number.

At the July 25, 2023, case conference, both parties were directed to provide certain information by August 11, 2023. On August 7, 2023, the DOE provided supplemental submissions. (DOC 12; and DOC 13.) On August 9, 2023, petitioner also provided supplemental submissions. (DOC 14, DOC 15; and DOC 16.) On August 10, 2023, a request was made for petitioner to provide additional information. (DOC 17 at 1.) This was followed by a more specific request on August 11, 2023, to further enunciate the information sought. (DOC 18 at 1.) On August 22, 2023, a request was also made for DOE's initial, formal finding against petitioner and whether the DOE stated that penalties or sanctions were imposed as against petitioner. (DOC 20 at 1.) In response, the DOE provided the requested information on August 30, 2023. (DOC 21 at 1-2.)

The last case conference occurred on September 7, 2023. (DOC 22 at 1.) There, the information contained in the March 3, 2023, DOE email was confirmed with both parties. The record was kept open to permit the parties to provide final submissions. On September 8, 2023 (printed September 11, 2023), the final submission was received. (DOC 23 at 1-6.) The matter was converted sua sponte from a motion to dismiss the petition of appeal pursuant to N.J.A.C. 6A:3-1.10 to a motion for summary decision pursuant to N.J.A.C. 1:1-12.5.

On September 12, 2023, the record closed and this decision now follows.

FACTUAL DISCUSSION AND FINDINGS

The following undisputed facts were gleaned from the written submissions of the parties, or otherwise confirmed by the parties, which I adopt and **FIND** as **FACTS**:

1. On March 2, 2023, petitioner was actively employed and working as a school bus driver for a private company, Jay's Bus Service (JBS). (DOC 1 at 1; DOC 5 at 5.)

2. Petitioner has an "S" endorsement on his New Jersey motor vehicle driver's license. The "S" endorsement permits petitioner to drive school buses in New Jersey. (DOC 2 at 1.)

3. In the morning of March 2, 2023, petitioner was involved in his usual activity of picking up and dropping students off at the Howell Township Middle School. (DOC 5 at 5.)

4. After dropping students off at the Howell Township Middle School, petitioner failed to conduct a sweep of his school bus to ensure that all students had disembarked. (DOC 5 at 5.)

5. Approximately three stops into his next school route, petitioner became aware that a student failed to disembark at the middle school drop-off and had remained on the school bus. (DOC 5 at 5.)

6. As a result of failing to perform a "visual inspection" before departing the middle school after student drop-off, and because a child remained on the school bus following departure from the Howell Township Middle School, on March 3, 2023, the DOE sought to impose a six-month suspension of petitioner's New Jersey Motor Vehicle Commission (MVC) "S" endorsement. (DOC 2 at 1.)

7. In the March 3, 2023, DOE email from Investigator Scaringelli, petitioner was advised that he had ten business days "to request, through the filing of a Petition of Appeal. . . , an opportunity to be heard as why OPS should not so notify [MVC]." (DOC 2 at 1-2.)

8. In the March 3, 2023, DOE email from Investigator Scaringelli, petitioner was also advised that, "if a Petition of Appeal is not filed with the Commissioner and copied to the OSP within the aforementioned 10 business days, OPS will promptly notify the MVC that your "S" endorsement is to be suspended without further proceedings." (DOC 2 at 2.)

9. On March 9, 2023, JBS suspended petitioner from driving school buses based on the March 2, 2023, incident, because they "knew right away that a suspension was going to be handed down by the State attorney general office [sic] so. . . his suspension needed to start right away." (DOC 9 at 1.)

10. On March 15, 2023, petitioner filed a petition of appeal online with the DOE. (DOC 3 at 1-2.)

11. As part of petitioner's March 15, 2023, petition of appeal, petitioner provided a letter on JBS letterhead admitting, among other things, that he failed to conduct a "child check" after students disembarked at the Howell Township Middle School and that the student who was accidentally left on the bus tapped him on the shoulder at his third stop into the next school pick-up run. (DOC 5 at 5.)

12. On August 9, 2023, Janice Kennedy, Safety Supervisor with JBS, submitted a letter on behalf of petitioner. In it, Ms. Kennedy stated that petitioner has been through retraining, which includes watching videos "on the process of a posted trip and child check." Ms. Kennedy further advised that petitioner "has been suspended for a long time[,]. . that he has learned from his mistakes[,] and this issue shouldn't happen again." (DOC 16 at 2.)

13. In her August 9, 2023, letter, Ms. Kennedy also advised that petitioner felt remorse for his mistake and stated, "I hope that he can be credited for the time served and that we could have him behind the wheel again. We both know that he will not be able to drive in Howell, but that doesn't change what happened and he [won't] let it happen again." (DOC 16 at 2.)

14. In his August 9, 2023, letter, petitioner noted that he had "learned [his] lesson and it is a lesson [he] will never forget[.]" Further, petitioner believes he should receive "credit for the time that [he was suspended]." (DOC 16 at 4.)

15. On August 10, 2023, petitioner was instructed to provide a writing from JBS "stating the nature, substance, and length of [his] suspension from driving a school bus (if any), along with an affirmation that [petitioner] did not drive a school bus during whatever time period is listed." (DOC 17 at 1.)

16. Because of certain confusion and for completion of the record, more specific instructions were provided to petitioner on August 11, 2023. In the letter to petitioner, petitioner was requested to provide a letter from JBS addressing the following:

1. Stating if you were suspended from driving a school bus;

2. The date your suspension from driving a school bus with students/children in it started (if you were suspended);

3. The date your suspension from driving a school bus with students/children in it ended (if you were suspended);

4. Stating whether the suspension was continuous or stopped at some point;

5. Stating what the suspension imposed by your employer—if any—covered (i.e., just school buses, school buses for a particular township, other school districts, etc.);

6. Whether the suspension—if any—was imposed by any local Board(s) of Education; and that it is

7. Signed by someone authorized by your employer to sign such a letter, and who understands that there may be a penalty if it is found to be inaccurate or untruthful.

[DOC 18 at 1.]

17. On August 22, 2023, and also for a complete record, the DOE was asked to provide the following:

A. The document(s) from the Agency making a formal finding as against Mr. Wandling; and

B. Copies of documents from the Agency stating the penalty(ies) or sanction(s) imposed, it any, by the Agency.

[DOC 20 at 1.]

18. On August 30, 2023, the DOE responded and provided the March 2, 2023, DOE email to petitioner advising of the charge and penalty. (DOC 21 at 1-2.)

19. Based on petitioner's failure to provide the information sought on August 10, 2023, and August 11, 2023, a final conference was scheduled for September 7, 2023. (DOC 22 at 1.)

20. On or about September 8, 2023, JBS provided a supplemental submission. In a letter dated September 7, 2023, JBS stated:

> To whom it may concern,
>
> I'm writing this letter to inform you of what took place after the incident on March 3rd, 2023. Mr. Wandling was suspended for leaving the student on the bus. [Mr. Wandling's] suspension started on March 7th, 2023. [Mr. Wandling's] suspension is still on going [sic] because today[,] on September 7, 2023, which is the 6 month date, he had a phone call with you and I thought the matter will be resolved and he would be on a bus starting next week. We never heard from Howell [S]chool [D]istrict other than to tell me to remove him from their routes and he was[. He] is still on suspension and it never stopped for any reason.
>
> [I'm] hoping that Mr. Wandling will get credit for the time that he has served so he can go back to driving the bus again.
>
> [DOC 23 at 4.]

21. Petitioner has not provided proof of suspension by any governmental agency or body from March 2, 2023, to present.

22. JBS is a private company and is not a government or public entity.

23. Petitioner was notified that, in the absence of an appeal, MVC would be notified and his "S" endorsement would be "suspended without further proceedings." (DOC 2 at 2.)

24. Petitioner did not request that his "S" endorsement be suspended during the pendency of the appeal process.

25. Other than what may be attributed as a result of filing this appeal, petitioner has not requested a stay of any sanctions which may be imposed, including but not limited to the suspension of the S endorsement on his driver's license.

POSITIONS OF THE PARTIES

DOE contends that N.J.S.A. 18A:39-29 mandates a six-month suspension for a first offense where a school bus driver left a student on the school bus at the conclusion of the school bus driver's route. DOE further asserts that it is a strict liability offense and one which does not permit mitigation of the six-month suspension sanction. Because the facts in this matter are established, it is ripe for summary disposition.

Petitioner agrees that he erred by leaving a student on his school bus at the conclusion of the route and accepts responsibility for what occurred. Petitioner submits that JBS suspended him from driving school buses immediately following the March 2, 2023, incident, that he has attended retraining, he is contrite in his views and actions, and that the six-month suspension should be mitigated in length or not imposed based on the time which lapsed between JBS's suspension and the present date.

LEGAL ANALYSIS AND CONCLUSIONS

I have had some difficulty with this matter. On one hand, the law is clear: petitioner failed to conduct a visual inspection and a student remained on his school bus at the conclusion of his route. See N.J.S.A. 18A:39-28 ("A school bus driver shall visually inspect the school bus to which he is assigned at the end of the transportation route to determine that no pupil has been left on the bus."); and N.J.A.C. 6A:3-12.1(a) (setting forth the procedure where "a child was left on the school bus to which the driver was assigned notwithstanding the driver's obligation to conduct a visual inspection at the end of the transportation route to assure that no pupil is left on the bus. . . ."). See also Herman v. N.J. Dept. of Educ., Crim. Hist. Rev. Unit, Final Decision 5 (July 20, 2015) (providing

definitive explanation of the phrase "end of the transportation route" as set forth at N.J.A.C.).[2] Likewise, the sanction for leaving a student on a school bus at the conclusion of a school bus driver's route could not be any more clear:

> In the even that, after notice and opportunity to be heard, a school bus driver is found to have left a pupil on the school bus at the end of his route, his school bus endorsement shall be:
>
> a. suspended for six months, for a first offense; or
> b. permanently revoked, for a second offense.
>
> [N.J.S.A. 18A:39-29.]

Add to this, the six-month first-offense sanction set forth at N.J.S.A. 18A:39-29(a) is not subject to mitigation. See, e.g., Vickery v. N.J. Dept. of Educ., Crim. Hist. Rev. Unit, OAL Docket No. EDU 00083-15 (June 2, 2015) *10-11, adopted, Final Decision (July 9, 2015).[3]

On the other hand, JBS "suspended" petitioner from driving a school bus immediately following the incident on March 2, 2023, and has since precluded him from returning to his school bus driving duties while this appeal was pending. As of the date of this Initial Decision, almost eight months have passed during which petitioner was not driving a school bus for JBS. Granted that there is no law expressly permitting an

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[2]In Herman v. N.J. Dept. of Educ., Crim. Hist. Rev. Unit, Final Decision 5 (July 20, 2015), the Commissioner stated:

> The Commissioner concludes that petitioner violated the School Bus Safety Act when she admittedly failed to visually inspect the school bus at the end of her route—*i.e.*, following the departure of the "PM" Kindergarten students from the bus, and before returning to the depot. As a result of petitioner's failure to perform the required visual inspections, [the student] was left on the bus as petitioner departed the Drew School and traveled to the bus depot.

[3]In Vickery, the ALJ observed:

> **[T]he statute does not permit me to consider mitigating circumstances**, or to consider the fact that, gratefully, this student was unharmed. The statute speaks in the imperative. For this reason, Vickery's reliance on N.J. Department of Children and Families v. M.H., 2014 N.J. Super. Unpub. LEXIS 1778 (App. Div. 2014), is misplaced. There, the driver left a four-year-old child on the bus, after having done no visual inspection at all. Here, the failure to inspect here took place only too late, rather than not at all; and the child left behind was not of tender years, and thus mature enough to advocate for himself, notwithstanding a language barrier. Notwithstanding these differences from the facts in M.H., **the law does not permit me to alter the penalty expressly required by law**.
>
> [Vickery v. N.J. Dept. of Educ., Crim. Hist. Rev. Unit, OAL Docket No. EDU 00083-15 (June 2, 2015) *10-11, adopted, Final Decision (July 9, 2015) (emphasis added).]

employer's private suspension to take the place of the statutory penalty set forth in N.J.S.A. 18A:39-29(a); quite the contrary, actually. There is a question of what is fair, though, under the circumstances. It is with this in mind that the proverbial "rabbit hole" is opened.

To gain a better understanding of the suspension, and more particularly whether it was part of a governmental action—such as a school board—a request was made that petitioner provide the following information:

1. Stating if you were suspended from driving a school bus;

2. The date your suspension from driving a school bus with students/children in it started (if you were suspended);

3. The date your suspension from driving a school bus with students/children in it ended (if you were suspended);

4. Stating whether the suspension was continuous or stopped at some point;

5. Stating what the suspension imposed by your employer—if any—covered (i.e. just school buses, school buses for a particular township, other school districts, etc.);

6. Whether the suspension—if any—was imposed by any local Board(s) of Education; and that it is

7. Signed by someone authorized by your employer to sign such a letter, and who understands that there may be a penalty if it is found to be inaccurate or untruthful.

[DOC 18 at 1.]

For lack of better terms, petitioner's response was anemic.

This is a circumstance where, if there were unitary power or authority, one could easily justify a reduction of the sanction. Here, petitioner's employer, JBS, acted in a way it apparently believed the law required—imposing an immediate suspension. This suspension at least appears to be continuous and far exceeded the mandatory six-month loss of school bus driving privileges. Moreover, petitioner readily acknowledged his

mistake and acted with appropriate contrition. Petitioner was retrained and has anxiously awaited the outcome of this determination, all-the-while maintaining employment with JBS.

With administrative law matters, a "party may move for summary decision upon all or any of the substantive issues in a contested case." N.J.A.C. 1:1-12.5(a). Generally speaking, the components of a summary disposition motion involve a certain level of formality. See N.J.A.C. 1:1-12.5(b) (requirements relating to briefs and affidavits). Within the administrative code, though, the procedural rules "shall be construed to achieve just results, simplicity in procedure, fairness in administration and the elimination of unjustifiable expense and delay." N.J.A.C. 1:1-13(a). Further and other than the burden of proof, "[the] procedural rules may be relaxed or disregarded if the judge determines that adherence would result in unfairness or injustice." N.J.A.C. 1:1-13(b). Provided the circumstances in this matter, I **CONCLUDE** that a more fair and just result warrants a relaxation of the procedural rules, permitting the original motion for dismissal pursuant to N.J.A.C. 6A:3-1.10 to be converted into a motion for summary disposition pursuant to N.J.A.C. 1:1-13, that the motion record be based on the submissions of the parties, and that the motion may proceed in the absence of stipulations and affidavits.

A motion for summary disposition pursuant to N.J.A.C. 1:1-12.5 is essentially the equivalent of a motion for summary judgment pursuant to R. 4:46-2. As set forth in Brill v. Guardian Life Insurance Co. of America, 142 N.J. 520 (1995), the preeminent case involving summary judgment motions, the deciding judge must determine whether a genuine issue of material fact exists and, in doing so, must consider "whether the competent evidential materials presented, when viewed in the light most favorable to the non-moving party, are sufficient to permit a rational factfinder to resolve the alleged disputed issue in favor of the non-moving party." Brill v. Guardian Life Insurance Co. of America, 142 N.J. 520, 540 (1995). In so doing, "[t]he 'judge's function is not . . . to weigh the evidence and determine the truth of the matter but to determine whether there is a genuine issue for trial.'" Brill at 540 (citing Anderson v. Liberty Lobby, Inc., 477 U.S. 242, 249 (1986)). The preeminent question presented here is not the conduct but rather the sanction.

There are a number of reasons, all sounding in equity, why petitioner's school bus endorsement suspension should offset in full or in part. In effect, he was suspended from driving a school bus. Petitioner accepted responsibility and demonstrated contrition. Further, petitioner has undergone retraining and is clearly dedicated to his chosen vocation. These are all valid; unfortunately, none are sufficient.

As noted above, the penalty to be imposed pursuant to N.J.S.A. 18A:39-29(a) is mandatory and not subject to mitigation. No governmental action occurred regarding petitioner's ability to drive a school bus. Rather, all actions pertaining to petitioner's ability to drive a school bus were the result of private conduct, to wit, petitioner's employer, JBS. Further, the March 3, 2023, DOE email specifically states that "if a Petition of Appeal is not filed with the Commissioner and copied to OSP within the aforementioned 10 business days, OSP will promptly notify the MVC that your "S" endorsement is to be suspended without further proceedings." (DOC 2 at 2.) Further, N.J.A.C. 6A:3-12.1 (Request for Hearing Upon Notice of Impending Suspension or Revocation) states:

> a. Where a school bus driver has been notified by the Department's Criminal History Review Unit that a determination has been made that suspension or revocation, as the case may be, of the driver's school bus endorsement is warranted pursuant to N.J.S.A. 18A:39-26 et seq., because a child was left on the school bus to which the driver was assigned notwithstanding the driver's obligation to conduct a visual inspection at the end of the transportation route to assure that no pupil is left on the bus, the driver may contest such determination through the filing of a petition of appeal according to the procedures set forth in N.J.A.C. 6A:3-1.
>
> 1. Such petition shall be filed within 10 business days of the date of the Department's written notice to petitioner of such determination.
>
> 2. In addition to the service requirements of N.J.A.C. 6A:3-1.3(a) and (j), such petition shall additionally be served on the Department c/o Manager, Criminal History Review Unit, New Jersey Department of Education, PO Box 500, Trenton, New Jersey 08625-0500.

b. The following aspects of the Department's determination may be contested:

1. That a pupil was left on the bus at the end of the driver's route;

2. That the incident in question was the driver's second offense;

3. That the pupil was harmed as a result of foreseeable danger; and

4. That the driver acted with gross negligence.

c. Where no petition is filed within the requisite time frame, or where a petitioner does not prevail before the Commissioner in demonstrating that the Department's determination was in error, the Department's Criminal History Review Unit will:

1. Notify the Motor Vehicle Commission of its obligation pursuant to N.J.S.A. 18A:39-26 et seq., to suspend or revoke, as the case may be, the driver's school bus endorsement; and

2. Notify the driver's employer that the driver is ineligible, for the period of suspension or permanently, as the case may be, for continued employment as a school bus driver.

[N.J.A.C. 6A:3-12.1. Emphasis added.]

Put simply, the March 2, 2023, DOE email and N.J.A.C. 6A:3-12.1(c) both state that while the appeal is pending, the suspension pursuant to N.J.S.A. 18A:39-29a does not run. Last, while an argument may be made by petitioner that the matter was improvidently transferred pursuant to N.J.A.C. 6A:3-12.1(b) (jurisdictional limits), and as such, the suspension should have been entered at the time, no such argument or analysis was made.

Based on the foregoing, I **CONCLUDE** that, with no factual dispute, summary disposition is appropriate. I further **CONCLUDE** that, based on the facts and circumstances set forth above, the DOE is entitled to a decision as a matter of law and that its motion for summary disposition is **GRANTED**. As such, I thus **CONCLUDE** that,

with no factual dispute and as a matter of law, the S endorsement on petitioner's New Jersey MVC driver's license shall be suspended for six months from the date of Final Decision pursuant to N.J.S.A. 18A:39-29a. I further **CONCLUDE** that petitioner is not entitled to any reduction of that six-month suspension and that petitioner's appeal must be **DISMISSED**

ORDER

It is **ORDERED** that the DOE's motion for summary decision is **GRANTED**. It is further **ORDERED** that the appeal of this matter be **DISMISSED**.

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

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

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

October 27, 2023
DATE

ROBERT D. HERMAN, ALJ

Date Received at Agency: _____

Date Mailed to Parties: _____

RDH/tat

APPENDIX

WITNESSES

For petitioner:

None

For respondent:

None

LIST OF EXHIBITS

DOC 1	Certification of James Caringelli (undated) (2 pages)
DOC 2	E-mail from Investigator Scaringelli to petitioner (March 3, 2023) (2 pages)
DOC 3	March 15, 2023, Pro Se Petition of Appeal (2 pages)
DOC 4	DOE letter brief (April 13, 2023) (15 ages)
DOC 5	OAL transmittal (April 13, 2023) (6 pages)
DOC 6	May 31, 2023, notice of hearing (1 page)
DOC 7	June 8, 2023, notice of hearing (1 page)
DOC 8	June 20, 2023, notice of hearing (1 page)
DOC 9	Letter from JBC (June 21, 2023) (1 page)
DOC 10	July 11, 2023, notice of hearing (1 page)
DOC 11	July 25, 2023, notice of hearing (1 page)
DOC 12	DOE supplemental letter brief (2 pages)
DOC 13	Certification of James Caringelli (undated, submitted August 7, 2023) (2 pages)
DOC 14	Pro Se Petition of Appeal (March 15, 2023) (submitted August 9, 2023) (two pages)
DOC 15	Letter from JBC (June 21, 2023, resubmitted on August 9, 2023) (one page)

DOC 16 Email from DOE (August 9, 2023); email JBS (August 9, 2023); letter from JBS (August 9, 2023); letter from petitioner (August 9, 2023); letter from petitioner (undated; received August 9, 2023) (6 pages)

DOC 17 Email to petitioner (August 10, 2023) (1 page)

DOC 18 Email to petitioner (August 11, 2023) (1 page)

DOC 19 Email from petitioner (August 11, 2023) (2 pages)

DOC 20 Email to petitioner (August 22, 2023) (1 page)

DOC 21 DOE email (August 30, 2023) (3 pages)

DOC 22 September 7, 2023, notice of hearing (1 page)

DOC 23 DOE email (September 8, 2023); letter from JBS (September 7, 2023); letter from petitioner (September 7, 2023) (6 pages)

361-23

New Jersey Commissioner of Education

Final Decision

Tris S. Groome,

Petitioner,

v.

New Jersey Department of Education,
State Board of Examiners,

Respondent.

Synopsis

Pro-se petitioner appealed the determination of the respondent New Jersey State Board of Examiners (SBE) denying her application for a Teacher of Spanish certificate after it was determined that petitioner had been investigated in Arkansas on child abuse charges which were subsequently dropped under an exception in Arkansas law that allows a parent to use physical discipline on their child. Further, on her application for New Jersey certification, petitioner stated – under penalty – that she had never had an educator certification revoked, suspended, or denied in any state, yet the SBE determined that in 2022, the Wisconsin Department of Public Instruction had denied petitioner's application for a teaching license based on her conduct in Arkansas. Petitioner contended that she did not intend to perjure herself on her New Jersey licensure application, but simply misread the question and accidentally checked the wrong response. The SBE filed a motion to dismiss the petition.

The ALJ found, *inter alia*, that: the issue in this case is whether petitioner satisfied her burden of demonstrating, by a preponderance of the evidence, that the SBE acted in a manner that was arbitrary, capricious, or contrary to law when it determined not to grant her application for a New Jersey teaching license; petitioner was found to have engaged in conduct that fit the definition of abuse in Arkansas; although the parental exemption under Arkansas law ultimately prevented petitioner's name from entering the child abuse registry, that holding cannot alter the nature of the underlying conduct; and the SBE and the Commissioner have consistently held that teachers are entrusted with the care and custody of children and it is their duty to exercise self-restraint and controlled behavior. The ALJ concluded that there was sufficient credible evidence to support the SBE's decision denying petitioner's application for a New Jersey teaching license. Accordingly, the ALJ granted the SBE's motion to dismiss the petition.

Upon review, the Commissioner found, *inter alia,* that: the petition of appeal in this matter was filed in accordance with *N.J.A.C.* 6A:3, not *N.J.A.C.* 6A:4; the ALJ mistakenly applied the wrong standard of review in the Initial Decision, stating that the SBE's decision will not be overturned unless the petitioner proves that the SBE acted in a manner that was arbitrary, capricious or contrary to law; the appropriate standard of review here is whether the SBE's decision was consistent with the applicable statutory and regulatory provisions of *N.J.A.C.* 6A:3; nonetheless, the record demonstrates that the petitioner is not suitable for employment as a teaching staff member in a public school under *N.J.A.C.* 6A:9B-4.1. Accordingly, the Initial Decision of the OAL was modified with respect to the appropriate standard of review and the petition was dismissed.

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

361-23
OAL Dkt. No. 03493-23
Agency Dkt. No. 75-3/23

New Jersey Commissioner of Education

Final Decision

Tris S. Groome,

Petitioner,

v.

New Jersey State Department of Education,
State Board of Examiners,

Respondent.

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

In this case, petitioner Tris Groome filed a petition of appeal under *N.J.A.C.* 6A:3.1 *et seq.* challenging the State Board of Examiners' (Board) decision denying her application for a Teacher of Spanish certificate. The Administrative Law Judge (ALJ) granted the Board's motion to dismiss, determining that the Board's decision was supported by sufficient credible evidence.

As a threshold matter, a discussion of the applicable standard of review for petitions of appeal that are filed under *N.J.A.C.* 6A:3 is necessary. When there is a challenge to a determination made by an office within the Department of Education, the Commissioner is not mandated to give deference to her staff, but instead determines whether the finding was legally appropriate. In certain instances, the Department of Education has limited the scope of review of a subordinate office or division by regulation. However, a decision by the Board denying an application for a certificate is not entitled to the arbitrary, capricious, or unreasonable standard of review that is afforded to appeals filed under *N.J.A.C.* 6A:4, challenging a decision of the Board revoking or

suspending a certificate. These are two distinct types of decisions and two distinct types of proceedings, and the regulatory provisions pertaining to each should not be conflated. *See Jessica Walder v. New Jersey Department of Education, State Board of Examiners,* Commissioner Decision No. 503-14, decided December 29, 2014; *Jaroslaw Nimczyk v. New Jersey State Board of Examiners*, Commissioner Decision No. 98-22, decided May 16, 2022; *Melody Travisano v. New Jersey State Board of Examiners*, Commissioner Decision No. 190-22, decided August 8, 2022; *Wayne Ernst v. New Jersey State Board of Examiners*, Commissioner Decision No. 311-22, decided November 16, 2022; *Stephanie Florio v. New Jersey State Board of Examiners*, Commissioner Decision No. 336-22, decided December 14, 2022; and *Jamie Sebastian v. New Jersey Department of Education, State Board of Examiners*, Commissioner Decision No. 94-23, decided March 30, 2023 (all finding that the Commissioner does not give deference to a decision of the State Board of Examiners denying a request for issuance of a certificate).

Here, the ALJ mistakenly referenced *N.J.A.C.* 6A:4-4.1(a) in the Initial Decision and stated that the Board's decision will not be overturned unless the petitioner proves that the Board acted in a manner that was arbitrary, capricious or contrary to law.[1] The petition of appeal in this matter relates to the Board's denial of an application for a certificate, not the Board's suspension or revocation of a certificate. Therefore, the standard of review that governs appeals filed under *N.J.A.C.* 6A:4 does not apply to this case, and the appropriate standard of review of the Board's decision is whether the decision is consistent with the applicable statutory and regulatory provisions.

Upon a comprehensive review of the record and applying the appropriate standard of review, the Commissioner is in accord with the Board's determination that petitioner is not suitable

[1] The Motion to Dismiss filed by the Deputy Attorney General on behalf of the Board of Examiners also referenced *N.J.A.C.* 6A:4-4.1(a) and the incorrect standard of review that applies in this matter.

for employment as a teaching staff member in a public school under *N.J.A.C.* 6A:9B-4.1. Although the ALJ applied an inaccurate standard of review, the record of the matter demonstrates that the Arkansas Department of Human Services found that petitioner hit her child on the shoulder, causing bruising and welts; this conduct would constitute abuse under Arkansas law, but fell under an exception allowing a parent to use physical discipline on their child.[2] Petitioner later applied to the Wisconsin Department of Public Instruction for a teaching license, and her application was denied based on the conduct that occurred in Arkansas. When the petitioner applied to the Board for a teaching certificate, she falsely stated that she had never had an educator certification revoked, suspended, or denied in any state. Based on these facts, the Commissioner concludes that the Board's decision to deny petitioner's application was consistent with the applicable regulatory provisions.

Accordingly, the Initial Decision is modified with respect to the appropriate standard of review and the petition is hereby dismissed.

IT IS SO ORDERED.[3]

Angelina Allen McMillan, Ed.D.
ACTING COMMISSIONER OF EDUCATION

Date of Decision: December 5, 2023
Date of Mailing: December 6, 2023

[2] Petitioner indicated that her Arkansas teaching license remains in effect.

[3] This decision may be appealed to the Appellate Division of the Superior Court pursuant to *N.J.S.A.* 18A:6-9.1. Under *N.J.Ct.R.* 2:4-1(b), a notice of appeal must be filed with the Appellate Division within 45 days from the date of mailing of this decision.

State of New Jersey
OFFICE OF ADMINISTRATIVE LAW

INITIAL DECISION
MOTION TO DISMISS
OAL DKT. NO. EDU 03943-23
AGENCY DKT. NO. 75-3/23

IN THE MATTER OF THE DENIAL OF RECIPROCAL LICENSURE OF TEACHING CERTIFICATE FOR TRIS S. GROOME, NEW JERSEY DEPARTMENT OF EDUCATION, BOARD OF EXAMINERS.

Tris S. Groome, petitioner, pro se

David L. Kalisky, Deputy Attorney General, for respondent, New Jersey Department of Education, Board of Examiners (Matthew J. Platkin, Attorney General, attorney)

Record Closed: July 19, 2023 Decided: November 2, 2023

BEFORE **JOAN M. BURKE**, ALJ:

STATEMENT OF THE CASE

Petitioner, Tris Groome, challenged the denial of her application for a Teacher of Spanish Certificate by the New Jersey Department of Education, Board of Examiners (the Board). The Board denied the application because the Arkansas Department of Human

Services determination that Groome's action in striking a twelve-year-old child constituted abuse and her failure to disclose the denial of her Wisconsin's educator application when specifically asked during the New Jersey certification application process. Petitioner argues that she mis-read question #2 on the application and checked "no" mistakenly.

PROCEDURAL HISTORY

On March 3, 2023, the Board rendered its written decision denying petitioner's request for a Teacher of Spanish Certificate. On March 21, 2023, petitioner filed an appeal of the Board's decision with the State of New Jersey Department of Education. On May 3, 2023, the respondent filed a Motion to Dismiss in lieu of an Answer, and the contested case was transmitted to the Office of Administrative Law (OAL) where it was filed on May 4, 2023. N.J.S.A. 52:14B-1 to N.J.S.A. 52:14B-15 and N.J.S.A. 52:14F-1 to N.J.S.A. 52:14F-13.

During a telephone conference convened on July 19, 2023, I was informed by the parties, that they were requesting the matter be heard on the papers that were already submitted. I scheduled another status conference which was held on August 24, 2023, which allowed the parties the opportunity to submit additional documentation. Respondent resubmitted the motion papers which were previously submitted and received on August 8, 2023; nothing further was received from the petitioner. The record closed on August 24, 2023. The Acting Director and Chief Administrative Law Judge granted an extension of time for the Initial Decision on September 19, 2023.

FINDINGS OF FACT

The parties do not dispute many of the background facts in this case. I therefore **FIND** the following **FACTS**:

Arkansas Factual History

On September 5, 2020, a report was made to the Child Abuse Hotline that Groome abused G.G. (Resp. Ex. A), Tris Groome v. Ark. Dep't. Hum. Servs, No. 21002054 at 2-3 (Ark. Dep't. Hum. Servs. Office of Appeals and Hearings, Mar. 29, 2022) (final order). Arkansas Division of Children and Family Services ("DCFS") substantiated the allegations, "making true findings" that Groome "abused the juvenile, causing nonaccidental injury." (Resp. Ex. A), Id. at 1-2. Criminal charges were also brought against Groome for the same conduct, but the prosecutor dismissed the charges after ordering Groome to pay several fines.[1] (Resp. Brief at 2), (Resp. Ex. B). Groome appealed the DCFS decision. (Resp. Ex. A), Tris Groome v. Ark. Dep't. Hum. Servs, No. 21002054 at 2-3 (Ark. Dep't. Hum. Servs. Office of Appeals and Hearings, Mar. 29, 2022) (final order).

On appeal, the Arkansas administrative law judge found the following facts:

1. Tris Groome is the biological mother of G.G.

2. G.G. was twelve years old at the time of the alleged maltreatment.

3. "G.G. has numerous mental health diagnoses, including ADHD, adjustment disorder with mixed disturbances and conduct, disruptive dysregulation disorder, and oppositional defiance disorder."

4. "On the day of the report, G.G. had become violent and destructive. He pulled his bedroom door from its frame, used a knife to cut up items in his room, and punched holes in walls."

5. Tris Groome attempted to calm G.G. but was unsuccessful. When he was behaving violently, Tris Groome attempted to spank him with a belt, hitting

[1] Groome states in an email that she did not pay any fines or fees. (Tris Groome, Email to N.J. Dep't. of Edu. and David Kalinsky (May 4, 2023 at 10:59AM)). Respondent, however, provides documentation of Groome being ordered to pay fines in Exhibit B.

him on the shoulder and back leaving "significant marks." This hit did not break skin but did cause bruising and welts.

6. Tris Groome caused nonaccidental physical injury to G.G.

The ALJ determined that Groome's conduct toward G.G. constituted abuse as that term is defined by Arkansas law. (Resp. Ex. A). However, the ALJ also determined that an exception applied, which "excludes from the definition of abuse a parent's use of physical discipline if it is reasonable and moderate and inflicted for the purpose of correcting their child." (Resp. Ex. A), Arkansas Code Annotated § 12-18-101(3)(c)(i). Thus, "the nonaccidental physical injury [caused by Tris Groome was] not abuse," and Groome's name was not added to the Arkansas Child Maltreatment Central Registry. (Resp. Ex. A_(Resp. Ex. A). Groome states that her teaching license remains intact in Arkansas. (Resp. Ex. D), (Tris Groome, Email to Wisc. Dep't. of Pub. Instruction (Apr. 14, 2022 at 11:04:20 AM CDT)).

I. Wisconsin Factual History

On September 28, 2021, Groome applied for a teaching license in the State of Wisconsin. (Resp. Ex. C). The Wisconsin Department of Public Instruction ("DPI") denied her licensure on April 14, 2022, because "[Groome] engaged in immoral conduct," as defined in Wis. State, § 115.31(1)(c)1. (Resp. Ex. C). DPI made this conclusion based on the Arkansas ALJ's decision that defined her striking her son with a belt on September 5, 2020, as "abuse," and as this conduct was "contrary to commonly accepted moral or ethical standards and endangered the health, welfare, or safety of one or more pupils." (Resp. Ex. C).

On April 14, 2022, Groome emailed DPI to request a hearing "to prove why this denial is improper, inaccurate, and wrong." (Resp. Ex. D). She stated that the denial was wrong as she had no intent to hit her son on the back, only to "spank his bottom," and as the criminal charges against her were dropped. (Resp. Ex. D).

On April 22, 2022, Groome's request for a hearing was denied as there was no dispute as to any material fact. (Resp. Ex. E). DPI explained via letter that Groome's argument, that she only intended to hit G.G.'s bottom as opposed to his back, was immaterial to its conclusion that Groome's conduct was "contrary to commonly accepted moral or ethical standards and endangered the health, welfare, or safety of one or more pupils." (Resp. Ex. E). Further "whether [Groome was] ultimately convicted of criminal charges in this incident is immaterial to DPI's finding that striking [her] son with a belt is immoral conduct in and of itself." (Resp. Ex. E). DPI also states that the Arkansas ALJ did not conclude that Groome did not abuse her son, rather that "[she] ultimately benefitted from an exception under Arkansas law which carves out discipline of your child from the definition of abuse." (Resp. Ex. E).

Groome appealed this denial sometime thereafter, however, Groome's appeal was denied with prejudice on August 25, 2022, after she failed to properly serve an authenticated copy of her summons and complaint upon the State Superintendent of Public Instruction within the required statutory time period. (Resp. Brief at 6), (Resp. Ex. F).

II. New Jersey Factual History

On November 21, 2022, Groome applied for a Teacher of Spanish Certificate in New Jersey. (Resp. Ex. G). On her application, Groome stated, under penalty, that she had never had an educator certification revoked, suspended, or denied in any state. (Resp. Ex. G). The New Jersey State Board of Examiners ("the Board") denied Groome's application on March 3, 2023, based on two considerations: 1) Groome's failure to disclose the Wisconsin denial when specifically asked during the New Jersey certification application process and 2) the Arkansas ALJ's "determination that [Groome's] actions in striking a 12-year-old-constituted abuse." (Resp. Ex. G). Groome filed a pro se Petition of Appeal on March 21, 2023. (Groome Pro Se Petition of Appeal, Mar. 21, 2023).

Regarding her failure to disclose Wisconsin's denial of her application for licensure, Groome states that "it was never [her] intent to purger [sic] [her]self," and that she "mis-read [sic]" the question and "checked 'no' mistakenly." (Groome Pro Se Petition of Appeal,

Mar. 21, 2023). Regarding the Arkansas ALJ's determination that she abused G.G., Groome contends that under Arkansas law, she had "not only the right to discipline [her] own child but the right to restrain [her son] reasonably." (Groome Pro Se Petition of Appeal, Mar. 21, 2023). Groome requests relief in the form of "a formal apology, compensation for all hours canceled, and immediate issuance of reciprocal licensure in the state of New Jersey." (Groome Pro Se Petition of Appeal, Mar. 21, 2023).

DISCUSSION AND CONCLUSIONS OF LAW

The issue in this matter is whether the Board's denial is supported by the evidence and is not arbitrary, capricious, or contrary to the law. If not, the Commissioner may reject the Board's determination. N.J.A.C. 6A:4-4. 1 N.J.A.C. 6A:9B-14.5(b)(6); N.J.A.C. 6A:9B-4.12(b).

N.J.A.C. 6A:3-1.10 states:

> At any time prior to transmittal of the pleadings to the OAL, in the Commissioner's discretion or upon motion to dismiss filed in lieu of answer, the Commissioner may dismiss the petition on the grounds that the petitioner has advanced no cause of action even if the petitioner's factual allegations are accepted as true or for lack of jurisdiction, failure to prosecute or other good reason.

In the instant matter, respondent filed its motion to dismiss with the Commissioner. The matter was then transferred to the OAL, where respondent re-filed its motion.

N.J.A.C. 6A:3-1.10 is similar to New Jersey Court Rule 4:6-2(e). The inquiry in a motion to dismiss is "limited to examining the legal sufficiency of the facts alleged on the face of the complaint." Printing Mart-Morristown v. Sharp Elec. Corp., 116 N.J. 739, 746 (1989). Herein, the petition of appeal equates to the complaint.

A careful review of the petition of appeal does not reveal a claim upon which relief may be granted. Nothing contained therein adds to what the Board considered. The petitioner seems to indicate in her petition that the burden was on the Board because the Board's denial was unlawful.

Here, petitioner "carries the burden of demonstrating by a preponderance of the credible evidence that she is entitled to the endorsement she seeks." McQuilken v. N.J. St. Bd. of Exam'rs, OAL Dkt. No. EDU8374-11, Initial Decision (Dec. 13, 2011), adopted Comm'r(January27,2012), http://njlaw.rutgers.edu/collections/oal/search.html. In evaluating determinations by the Board of Examiners, the Commissioner shall not disturb the decision if the decision is supported by sufficient credible evidence in the record, "unless the appellant has demonstrated the State Board of Examiners or the School Ethics Commission acted in a manner that was arbitrary, capricious, or contrary to law." N.J.A.C. 6A:4-4.1 The Department of Education intended the standard of review for Commissioner determinations under Chapter Six to be "appellate in nature." 40 N.J.R. 4606(a).

The arbitrary, capricious, or unreasonable standard consists of three inquiries:

> (1) whether the agency action violates the enabling act's express or implied legislative policies;
>
> (2) whether there is substantial evidence in the record to support the findings upon which the agency based application of legislative policies; and
>
> (3) whether, in applying the legislative policies to the facts, the agency clearly erred by reaching a conclusion that could not reasonably have been made upon a showing of the relevant factors. [Public Serv. Elec. and Gas Co. v. New Jersey Dep't. of Envtl. Protect., 101 N.J. 95, 103 (1985).]

However, "where there is room for two opinions the action is not arbitrary or capricious when exercised honestly and upon due consideration even though the court may believe that an erroneous conclusion has been reached." Bayshore Sewerage Co. v. Department of Environmental Protection, 122 N.J. Super. 184, 199 (App. Div. 1973) (Internal citations omitted). Significantly, a "court should not substitute its judgment for that of an administrative or legislative body if there is substantial evidence to support the ruling." Ibid.

I. Conduct Unbecoming a Teacher

The Board may revoke, suspend, or deny a teaching certificate "on the basis of demonstrated inefficiency, incapacity, conduct unbecoming a teacher, or other just cause." N.J.A.C. 6A:9B-4.4, N.J.A.C. 6A:9B-4.1. Here, the Board has denied Groome a Teacher of Spanish Certificate for conduct unbecoming a teacher.

"Conduct unbecoming a teacher" is a phrase that is not defined in statutes or regulations but is interpreted in case law. Its definition includes a broad range of behavior that impacts on a teacher's ability to perform his duties or otherwise renders him unfit to have the responsibility for the care of children. See State Bd. of Exam's v. Charlton, 96 N.J.A.R.2d (EDE) 18; In re the Certificate of Fargo, 91 N.J.A.R. 2d (EDE) 1. Although "conduct unbecoming" a teacher or other public employee is not defined in the statutes or regulations, it has been described as an "elastic" phrase that includes "any conduct which adversely affects the morale or efficiency of a department; conduct which has a tendency to destroy respect for public employees and their departments; or conduct which destroys confidence in public service." Stratton v. Burlington County Dep't. of Buildings and Grounds, 95 N.J.A.R. 2d. 555, 556 (citations omitted), In re Emmons, 63 N.J. Super. 136, 140 (App. Div. 1960) (citation omitted). There are no statutory or regulatory guidelines addressing when revocation or suspension is the appropriate remedy; "[t]hat decision is discretionary, on a case-by-case basis, after considering the individual facts and circumstances." In re Certificate of Fargo, 91 N.J.A.R.2d (EDE) 1, 3.

Teachers are held to a higher standard of conduct because of the influence they have over students. See, Bradley, 92 N.J.A.R. 2d. (EDE) 13 ("A teacher should possess personal qualities valued by our society because a teacher helps to shape the attitudes of young minds toward that society.") (citing, Adler v. Board of Education of the City of New York, 342 U.S. 485, 493 (1952)); Fargo, 91 N.J.A.R. 2d. (EDE) 1 (citing Adler for the same proposition.); Adler, 342 U.S. 485, 493 ("A teacher works in a sensitive area in a schoolroom. There he shapes the attitude of young minds towards the society in which they live. In this, the state has a vital concern. It must preserve the integrity of the schools. That the school authorities have the right and duty to screen the officials,

teachers, and employees as to their fitness to maintain the integrity of the schools as a part of ordered society, cannot be doubted.")

When considering granting Groome a teaching certificate, Groome must be held to the same high standard to which all teachers in New Jersey are held. She has been a teacher for nearly twenty years, and her actions, both in and out of the classroom, reflect on her as a teacher and the licensing board in charge of certifying her. Groome was found to have engaged in conduct that fit the definition of abuse in Arkansas. While the Arkansas ALJ ultimately held that Groome benefited from an exception to that definition, preventing her from being on the Arkansas Child Maltreatment Central Registry, that holding cannot alter the nature of the underlying conduct. The Board and Commissioner have consistently held that teachers have been entrusted with the care and custody of children and it is their duty to exercise self-restraint and controlled behavior. In re Lucarelli, 97 N.J.A.R.2d (EDU) 537; In re Sammons, 1972 S.L.D. 302. "While teachers are sensitive to the same emotional stresses as all other persons, their particular relationship to children imposes upon them a special responsibility for exemplary restraint and mature self-control." See In re Tenure Hearing of Appleby, 1969 S.L.D. 159, 173 (quoting In re Tenure Hearing of Fulcomer, 1962 S.L.D. 160, 162). It could well be reasoned that Groome has not met this level of self-restraint required of New Jersey teachers, as hitting her son with a belt likely does not indicate that she is executing exemplary restraint and mature self-control.

Further, the overriding framework to determine whether conduct reaches the level of conduct unbecoming was discussed by the Commissioner of Education in Tenure Hearing of Sammons, 1972 S.L.D. 302. Sammons noted that teachers are holders of the public trust and are held to the highest standards of conduct. Id. at 321. The Commissioner stressed that "teachers . . . are professional employees to whom the people have entrusted the care and custody of . . . school children . . . this heavy duty requires a degree of self-restraint and controlled behavior rarely requisite to other types of employment." Ibid. In In Re Certificate of Mary Ann Bauer, ALJ Samuels stated that although an application by the Board for revocation concerns a different claim or cause of action than those proceedings initiated by a school district or by the Commissioner of Education to remove tenure, the statutes and regulations used by both agencies contain

similar standards. In Re Certificate of Mary Ann Bauer, EDE 7696-92, Initial Decision, (August 8, 1996), modified, State Board of Examiners (September 26, 1996) <http://lawlibrary.rutgers.edu/oal/search.html>. Therefore, conduct found to be unbecoming in a tenure case can be considered unbecoming conduct in a denial or revocation case.

The Board argues that if Groome's actions had occurred in the classroom (i.e., if Groome had struck a student on the back with a belt), Groome's actions would clearly constitute conduct unbecoming a teacher. (Resp. Brief at 13-15). The Board cites several cases in which it was decided whether teachers engaged in unbecoming conduct of a teacher, including cases where a teacher slapped a student; a teacher pushed, punched, and kicked a student; and a teacher continuously choked a student until the student lost consciousness. (Resp. Brief at 14-16). See Cf. IMO the Certificates of Alex Ramadanis, State Bd. Of Exam'rs, Agency Dkt. No. 1617-205 (April 13, 2018), IMO the Certificates of Vincent Ajayi, State Bd. Of Exam'rs, Agency Dkt. No. 1617-121 (January 19, 2018), IMO the Certificates of R.A., State Bd. Of Exam'rs, Agency Dkt. No. 0910-228 (June 16, 2011). To conflate Groome's discipline of her child in her home to the actions of a teacher slapping, pushing, punching, kicking, or choking a student, would be incorrect and improper. Groome states that she has never used corporal punishment on a student. (Tris Groome, Email to Kari Race and Wisc. Dep't. of Pub. Instruction (Apr. 14, 2022 at 11:04:20 AM CDT)). However, her use of corporal punishment on her son is relevant, as case law has allowed for the possibility that conduct unbecoming a teacher may relate to a teacher's conduct inside or outside the classroom.[2] See N.J. Board of Examiners v. Krupp, 3 N.J.A.R. 285 (1981) (Conviction of first degree murder was sufficient unbecoming conduct to revoke certification.); Woodbridge Township School District v. Rumage, 1 N.J.A.R. 381 (1980) (Tenured teacher who pled guilty to conspiracy and bookmaking engaged in conduct unbecoming a teacher, although the crimes themselves did not involve moral turpitude.)

[2] These cases consistently find that conduct that occurs outside the classroom may still very well be conduct unbecoming a teacher.

Misrepresentation on Teaching Certification Application

Groome states that she did not intend to falsely answer the application question as to whether she had been denied certification in another state. (Groome Pro Se Petition of Appeal, Mar. 21, 2023). This would mean that her answer was an unintentional misrepresentation. However, it has been consistently held that regardless of intent, entering a false answer in an application for certification constitutes conduct unbecoming a teacher.

In IMO the Certificates of Danielle Picklo, a teacher's certificate was suspended for three years after she certified under oath on her New Jersey certification application that she had never had a certificate revoked or suspended in any state, even though she voluntarily relinquished her certificate in a settlement. State Bd. Of Exam'rs, Agency Dkt. No. 1213-129 (December 6, 2013). In IMO the Certificates of Elliot Ramo, a teacher's license was suspended for three months for unbecoming conduct after he failed to disclose his criminal convictions in his certification application. State Bd. Of Exam'rs, Agency Dkt. No. 1213-172 (January 17, 2014). In IMO the Certificates of Jilla Maria (Mason), a teacher's certificate was revoked after she failed to disclose her arrest for drug use in Pennsylvania and provided false answers to direct inquiries by one or more district administrators regarding her recent drug use. State Bd. Of Exam'rs, Agency Dkt. No. 2021-167 (May 19. 2022). In In re Certificate of Calvin J. Williams, Jr., EDE 3889-94, final decision, (Oct. 5, 1995), the State Board of Examiners imposed a two-year suspension of the respondent's teaching certificates after finding the respondent was negligent in submitting accurate information in an application for a school administrator certificate. In Williams, a teacher with nearly twenty-five years of experience certified that he met the requirements for the school administrator certificate and submitted a job description that created the inference that he held a principal's certificate, when, at the time, he did not. Initially, the ALJ found that Williams had not engaged in any intentional wrongdoing and did not suspend his certificates. After reviewing the initial decision, however, the Board reasoned that "[t]he professional conduct of a 'seasoned educator' mandates the highest degree of responsibility" and suspended Williams' certificates for two years despite agreeing that there was no willful wrongdoing. It is further important to note that, regarding licensure through the Division of Consumer Affairs, it has been held

that a licensing board may deny an applicant who misinforms the board on her sworn application, even if there is no finding of intent to deceive. In re Y.L, 437 N.J. Super. 409. (2014).

Here, whether Groome intended or did not intend to falsely answer a question on the application has no bearing on whether she engaged in conduct unbecoming a teacher. Falsely answering a teaching certification application question has consistently been held to be conduct unbecoming a teacher, regardless of intent, and this is exactly what Groome did. Further, Groome has been a teacher for nearly twenty years, making her a "seasoned educator," just like in Williams, requiring the "highest degree of responsibility" from her. Ibid. Considering the length of time she has been an educator, and that Groome has sought teaching reciprocity in several other states, Groome understands the gravity of falsifying information on a teaching certificate application. Groome learned of her Wisconsin certification denial in August of 2022, yet still answered on her New Jersey certificate application in November of 2022, that she had never been denied a certificate in another state. If the Board was to allow teachers to lie on their certificate applications, it would undermine the fact that the application states that answers are "under penalty," and further would undermine the public's confidence in the Board's decision-making authority. The public must believe in the Board's decisions and must trust and believe that the Board is properly screening those it allows to become a teacher. See Adler, 342 U.S. 485, 493. As such, Groome's action of incorrectly stating that she has never been denied a teaching certificate in another state on her New Jersey teaching certificate application constitutes conduct unbecoming.

The Board determined that pursuant to N.J.A.C. 6A:9b-4, "Notwithstanding that a candidate may meet all requirements for certification, the Board of Examiners may refuse to issue a certificate to that candidate if, based on the record before it, the Board of Examiners determines that, for reasons set forth in N.J.A.C. 6A:9B-4.4, the candidate is not suitable for employment as a teaching staff member in the public school. (R-G.) The Board further concludes that under N.J.A.C. 6A:9B-4.4, "[t]he Board of Examiners may revoke or suspend the certificate(s) of any certificate holder on the basis of demonstrated inefficiency, incapacity, conduct unbecoming a teacher, . . . The Board's denial was in part based on the Arkansas Department of Human Services' determination that Groome's

action in striking a twelve year-old child (albeit her son) constituted abuse in addition to failing to disclose the denial of her Wisconsin educator's application when asked during her New Jersey certification application process. Wisconsin's denial was months before Groome's application to New Jersey. For these combined reasons the Board posits, that Groome's actions constitutes "conduct unbecoming." (R-D.) Accordingly, the Board refused to issue a teaching certificate to Groome.

Groome bears a substantial evidentiary burden to establish a case sufficient to set aside a decision by the Board of Examiners. A decision by the Board of Examiners will not be disturbed unless petitioner "has demonstrated [that] the State Board of Examiners . . . acted in a manner that was arbitrary, capricious, or contrary to law." N.J.A.C. 6A:4-4.1(a). It is not within the province of this forum to substitute its judgment for that of the Board of Examiners. Rather, the pertinent inquiry is to "ascertain whether the decision is supported by sufficient credible evidence in the record[.]" N.J.A.C. 6A:4-4.1(a). Judged against this standard of review and based on a consideration of the documentary evidence presented, I **CONCLUDE** that petitioner has failed to shoulder her burden of proof and that the Board of Examiners' decision is supported by sufficient credible evidence.

Therefore, I **CONCLUDE** that the Board's decision to deny the issuance of a Teacher of Spanish certificate, as set forth in its decision dated March 3, 2023, should be **AFFIRMED**.

ORDER

It is hereby **ORDERED** that the Board's denial of a reciprocal licensure with the issuance of a Teacher of Spanish certificate, to the petitioner Tris Groome, as set forth in its decision dated March 3, 2023, should be **AFFIRMED**; and it is further **ORDERED** that petitioner's appeal is **DISMISSED**.

It is hereby **ORDERED** that the Board of Examiners' Motion to Dismiss is **GRANTED** and the petition of appeal is **DISMISSED**.

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

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

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

November 2, 2023
DATE

JOAN M. BURKE, ALJ

Date Received at Agency: _____

Date Mailed to Parties: _____

JMB/jm/mph

APPENDIX

EXHIBITS

For petitioner

Pro se Petition of Appeal

For respondent

Brief in support of Motion to Dismiss with Exhibits A-J

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

PHILIP D. MURPHY
Governor

TAHESHA L. WAY
Lt. Governor

ANGELICA ALLEN-MCMILLAN, Ed.D.
Acting Commissioner

December 8, 2023

Andrew L. Schwartz, Esq.
Schwartz Law Group, LLC
Monroe Center at Forsgate
12 Center Drive
Monroe Township, NJ 08831

David L. Kalisky, DAG
Division of Law
R.J. Hughes Justice Complex
25 Market Street, P.O. Box 112
Trenton, NJ 08625

Re: *In the Matter of Certificates of Michael Smurro*, State Board of Examiners Dkt. No. 2223-119, OAL Dkt. No. EDE 02281-2023, Agency Dkt. No. 329-12/23

Dear Counsel:

I have considered the papers submitted in connection with respondent's request for interlocutory review of Administrative Law Judge Tricia M. Caliguire's denial of his motion to dismiss the Order to Show Cause issued by the State Board of Examiners in the above-captioned matter.

Upon full consideration of the submitted materials, I have determined not to grant interlocutory review, pursuant to my discretion under *N.J.A.C.* 1:1-14.10 and *N.J.A.C.* 6A:4-3.4.

Accordingly, the request for interlocutory review is hereby denied.

Sincerely,

Angelica Allen-McMillan, Ed.D.
Acting Commissioner

AAM/JS
c: Honorable Tricia M. Caliguire, ALJ
Clerk, Office of Administrative Law

362-23L

363-23
Agency Dkt. No. 13-1/23

New Jersey Commissioner of Education

Final Decision

Toni Ann Salvatore,

Petitioner,

v.

Board of Education of the Borough of Somerville, Somerset County,

Respondent.

Petitioner, a teacher employed by the Somerville Board of Education (Board), suffered an injury in the course of her employment. The Board charged petitioner with the use of 25 sick days during her treatment for the injury. Petitioner filed a worker's compensation matter, which resulted in the entry of an Order restoring the value of the loss caused by the Board. Petitioner thereafter filed a petition of appeal, specifically seeking the restoration of twenty-five sick days.

Upon review and consideration of the record, the Commissioner orders the Board to restore twenty-five (25) sick days to petitioner if it has not already done so.

IT IS SO ORDERED.[1]

Angelica Allen-McMillan, Ed.D.
ACTING COMMISSIONER OF EDUCATION

Date of Decision: December 8, 2023
Date of Mailing: December 8, 2023

[1] This decision may be appealed to the Appellate Division of the Superior Court pursuant to *N.J.S.A.* 18A:6-9.1. Under *N.J.Ct.R.* 2:4-1(b), a notice of appeal must be filed with the Appellate Division within 45 days from the date of mailing of this decision.

364-23

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

PHILIP D. MURPHY
Governor

TAHESHA L. WAY
Lt. Governor

ANGELICA ALLEN-MCMILLAN, Ed.D.
Acting Commissioner

December 8, 2023

VIA EMAIL ONLY

Justin Schwam, Esq.
Weissman & Mintz LLC
220 Davidson Avenue
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Somerset, New Jersey 08873

Sadia Ahsanuddin, DAG
Division of Law
R.J. Hughes Justice Complex
25 Market Street, P.O. Box 112
Trenton, New Jersey 08625

Re: *In the Matter of the Certificates of Nicole M. Maffucci*, State Board of Examiners Dkt. No. 2021-163, Commissioner Appeal Dkt. No. 13-11/23A

Dear Parties:

I have reviewed the materials filed in connection with appellant Nicole M. Maffucci's Motion to Stay the decision of the State Board of Examiners (Board) suspending appellant's certificates for one year.

Pursuant to *N.J.A.C.* 6A:4-3.3(a), a motion to stay a Board determination pending resolution of an appeal filed with the Commissioner must first be made to the Board. Here, appellant sought a stay from the Board that was denied on November 16, 2023. Thereafter, appellant was entitled to seek a stay from the Commissioner in accordance with *N.J.A.C.* 6A:4-3.1. Appellant filed the instant motion with the Commissioner on November 21, 2023.

Pursuant to *N.J.A.C.* 6A:4-4.1(b), a motion for stay is considered an extraordinary remedy that may only be granted upon a finding that appellant has satisfied each prong of the four-pronged standard set forth in *Crowe v. DeGioia*, 90 *N.J.* 126 (1982). Thus, a stay may be granted where necessary to prevent irreparable harm, where the legal right underlying the movant's claim is settled, where there is a likelihood of success on the merits and where the relative hardship to the moving party favors granting such relief. *Id.* at 132-34. The moving party must prove each of the four prongs "by clear and convincing evidence." *Garden State Equality v. Dow*, 216 *N.J.* 314, 320 (2013).

Upon review of the parties' submissions, I find that appellant has failed to meet this exacting standard. Specifically, appellant has failed to demonstrate that the legal right underlying her claim is settled. Appellant argues that the right to appeal a Board decision is settled, but that argument misses the point, as this prong of the *Crowe* standard warrants consideration of her underlying claim – that she did not engage in unbecoming conduct warranting a suspension of her certificates. Such an inquiry is intensely fact sensitive, depends on credibility determinations regarding the testimony of the witnesses in each case, and must be viewed in light of various precedents related to the conduct of teachers. For this reason, the Commissioner cannot conclude that appellant has demonstrated that the legal right underlying her claim is settled.

Because all four prongs of the *Crowe* standard must be proven for a stay to be granted, it is not necessary to analyze the remaining three prongs. Accordingly, appellant's request for a stay of the State Board of Examiner's October 27, 2023, Order of Suspension is hereby DENIED.

Sincerely,

Angelica Allen-McMillan, Ed.D.

Angelica Allen-McMillan, Ed.D.
Acting Commissioner

AAM/JS

364-23L

365-23

New Jersey Commissioner of Education

Decision

K.P., on behalf of minor child, I.M.,

Petitioner,

v.

Board of Education of the Pascack Valley Regional High School District, Bergen County,

Respondent.

Synopsis

Pro se petitioner asserted that her daughter had been the target of discrimination, intimidation, and retaliation during the 2022-2023 school year while a student at Pascack Valley Regional High School. However, the petition failed to state a cause of action and provided no details whatsoever in support of the allegations of discrimination, intimidation, and retaliation. The respondent Board filed a motion to dismiss in lieu of an answer, followed by a brief and affidavit seeking summary decision. There being no response from the petitioner to the Board's second motion, the record closed on November 7, 2023.

The ALJ found, *inter alia*, that: petitioner's *pro se* filing failed to claim a violation of any school laws and provided no specific allegations or supporting facts to describe the basis for the dispute; allegations must be contained in the petition itself, and cannot be assumed to be known simply because the parties have otherwise communicated about the subject of a petitioner's complaint; in this matter, the petitioner provided no factual basis whatsoever for a claim that may involve HIB, and if petitioner's concerns involve something other than HIB, she completely failed to clarify what her specific claim is and a legal basis for the claim, notwithstanding having ample opportunity to do so. The ALJ determined that the matter is ripe for summary decision and concluded that the petitioner failed to state a claim upon which relief may be granted. Accordingly, summary decision was granted to the Board and the petition was dismissed with prejudice.

Upon review, the Commissioner adopted the Initial Decision of the OAL as the final decision in this matter. Accordingly, the petition was dismissed with prejudice.

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

365-23
OAL Dkt. No. EDU 05035-23
Agency Dkt. No. 135-3/23

New Jersey Commissioner of Education

Final Decision

K.P., on behalf of minor child, I.M.,

Petitioner,

v.

Board of Education of the Pascack Valley Regional High School District, Bergen County,

Respondent.

The record of this matter and the decision of the Office of Administrative Law (OAL) have been reviewed and considered. The parties did not file exceptions.

Upon review, the Commissioner concurs with the Administrative Law Judge that petitioner has failed to allege any violation of the school laws.

Accordingly, the OAL decision is adopted as the final decision in this matter, and the petition of appeal is hereby dismissed with prejudice.

IT IS SO ORDERED.[1]

Angelica Allen-McMillan, Ed.D.
ACTING COMMISSIONER OF EDUCATION

Date of Decision: December 8, 2023
Date of Mailing: December 8, 2023

[1] This decision may be appealed to the Appellate Division of the Superior Court pursuant to *N.J.S.A.* 18A:6-9.1. Under *N.J.Ct.R.* 2:4-1(b), a notice of appeal must be filed with the Appellate Division within 45 days from the date of mailing of this decision.

State of New Jersey
OFFICE OF ADMINISTRATIVE LAW

INITIAL DECISION
MOTION FOR SUMMARY DECISION
OAL DKT. NO. EDU 05035-23
AGENCY DKT. NO. 135-3/23

K.P. o/b/o MINOR CHILD I.M.,
Petitioner,
v.
BOARD OF EDUCTION OF THE PASCACK VALLEY REGIONAL HIGH SCHOOL DISTRICT, BERGEN COUNTY,
Respondent.

K.P. on behalf of **I.M.**, petitioner pro se

Rodney T. Hara, Esq. (Fogarty and Hara, attorneys) for respondent

Record Closed: November 7, 2023 Decided: November 8, 2023

BEFORE **ERNEST M. BONGIOVANNI,** ALJ:

STATEMENT OF THE CASE AND PROCEDURAL HISTORY

On June 6, 2023, the Department of Education Office of Controversies and Disputes forwarded to the Office of Administrative Law (OAL), a petition by Petitioner K.P. o/b/o Minor Child I.M. which the transmittal characterized as a challenge of "the

Board's harassment, intimidation and bullying (HIB) determination." The respondent, Pascack Valley Regional High School District, Board of Education, (Board/District) alleging that the petition, among other flaws fails to properly state a cause of action, filed a motion to dismiss in lieu of an answer ("motion in lieu"). As a result, on July 14, 2023, I convened a conference to discuss this motion, partly to make certain that the pro se petitioner knew that she could and should respond to the Answer in lieu of a motion. Further I advised the parties, I intended to treat the motion in lieu of a dispositive motion, whether labeled as a "motion to dismiss" or motion for summary decision, that she should petitioner must respond in writing to the motion in lieu of the requirements of the Administrative Code for proceedings at the Office of Administrative Law. Furthermore, if K.P. did file a response to the motion to dismiss, the Board would be entitled to file a further response to obtain Summary Decision. On July 41, 2014, K.P. did file a response to the Motion in Lieu, and, thereafter, as permitted, on August 14, 2023. respondent filed a brief and affidavit seeking summary decision. As of November 7, 2023, K.P. did not file any response, and so the record closed.

MOTION

The Motion in Lieu, citing N.J.A.C. 6A: 3-1.5 (G) and N.J.A.C. 6A:3-1.10 formally noticed the petitioner that it sought a dismissal of her petition that it was relying for support of its motion on an attached legal brief and a Certification of one Sarah Bilotti. After my review of it, and after conferring with K.P. and the Board's attorney, I ordered that if K.P. files a timely reply to the Motion in lieu, the Board would be given an opportunity to reply and I would treat the motion as one seeking summary decision.

First and foremost, the respondent initially argued that the petition failed to state a claim upon which relief may be granted. Further, it was argued, the petitioner failed to allege the violation of school laws. Finally, the respondent alleged the petition was fatally flawed by not setting for the factual allegations for the allegations in the petition. As will be shown, the respondent was correct on all three grounds. However, as directed by me at the conference, petitioner provided, or at least tried to provide a defense to the motion to dismiss, with an informal, but timely, "to whom it may concern" letter which contained a number of email chains (hereinafter "Letter" or "To Whom it May letter") certified by

her to be the truth and also notarized. This was received by my office on July 31, 2023. Also, as directed at the conference, on August 14, 2023, respondent filed a response to petitioner's letter, with a supplemental brief and affidavit again by Superintendent Billotti. No reply was made to this supplement which closed the record.

Addressing first the simplest argument, the respondent correctly stated that the petition fails to claim a violation of any school law or laws. The form "Pro Se Petition of Appeal" directed the petitioner to set forth "in as many itemized paragraphs as necessary" the specific allegations and supporting facts which constitute the basis the dispute." Petitioner set forth only "discriminated, intimidated and retaliated from school stuff and dancers"[1] (emphasis supplied), No school laws are specifically cited, or described. Any "identifying" of school laws that may have been violated would require speculation and guessing; however the purpose of requiring specifications in the allegation is to identify the specific laws that were violated. Respondent is entitled to know the specific laws contained in the allegations.

Turning to the To whom it May letter by petitioner, and whether petitioner, notwithstanding the defects in the petition has now set forth enough evidence to defeat a motion for summary decision, I find, that like the petition, K.P.'s To whom it May" letter, and documents attached again fail to cite specific violations of law or laws complained of by this specific respondent at any specific time or place. The 13-page (by my count, as the pages are not enumerated) document never once cites a law or laws by name of legal citation. The Letter contains hearings in boldface type, as follows: "Discrimination" "GOD IS GOOD." "Intimidation" "Retaliation" "Retaliation continued" "Retaliation purposely negligence to hurt dancer"

[1] In the Relief requested section of the form appeal, petitioner stated she sought an Order "to admit the truth, apology to my daughter, including all the suffering damage $30,000, we both went through my daughter and I" and "not allowing NOONE to retaliate, intimidate and discriminate my daughter in her last year..." To the extent this demand for relief can be comprehended, I note there is no authority to make the respondent, or any respondent to "admit the truth" or to issue an "apology." Moreover, money damages are not available in OAL proceedings. Finally, the Court has no authority to sign prospective Orders which would overbroadly make sure that "NOONE" intimidates, retaliates her daughter as only the Board of Education is an adverse partly and can't be so ordered as they don't have authority over "NOONE" (that is, everyone).

On the fourth fifth and twelfth page (again using my count in the Order the pages, stapled together were affixed) petitioner does mention OPRA and asks the Court not to decide the case until she receives a decision from the GRC. She also refers to "continuing motion complaints with the District that have been scheduled for August 16, 2023". Finally she also recalls previous cases or a case in what must have been her daughter's prior school District Saddle Brook which resulted in a "deal". The petitioner provided no records regarding such a "deal" despite claiming it had a bearing on the current controversy, nor did she provide documents of previous or pending "complaints" with the District were provided. The petitioner did not provide records of the OPRA case number or any document relating to the controversy, despite her acting to delay the disposition of this matter until said OPRA case was concluded. As the petitioner claims these other proceedings have a bearing on this controversy, even requiring they be "held" until the GRC case is resolved, it was incumbent on her to provide relevant facts on that those claims or controversies mean to this one. Instead the letter only provides confusion.

Included in the near impossible to sort out train of emails, is a Gmail from Superintendent Sarah Bilotti to K.P. which at least indicates that, petitioner's complaint at least in part concerns the School's decision, consistent with, according to Bilotti, past practices to not allow her daughter to drop a Computer Science Class beyond the deadline (a class that she was receiving a "B-minus" in as late as May 30, 2023.) Apparently, without specifying any factual basis, K.P. claims that the refusal to let her child drop the course past the deadline is "discrimination" and or "retaliation." I find that even if K.P. could ultimately prove some teacher or teachers or administrative staff wrongfully failed to permit her daughter to drop a class past or even before the deadline, K.P. provides no factual basis or legal argument as to how such a failure could constitute HIB or some other violation of School law.

Second, the respondent (and the fact finder) must be able to determine from the petition itself the "specific facts which constitute the basis of the dispute." As stated aforesaid, the claim is <u>"discriminated, intimidated, retaliated from school stuff, and dancers."</u> (emphasis supplied) There are literally no facts alleged to support such a claim (if that is a claim.) There is not even a bare bone claim e.g. "My daughter was discriminated against by Teacher X at the dance competition held at the school on May

1, 2023, by Teacher X excluding her for no good reason." Such a claim might suffice for the purpose of the initial pleading, if an otherwise valid claim was made. The allegations must be contained in the petition itself, and can't be assumed to be known simply because the parties have otherwise communicated on the subject, or because the petitioner wrote about her complaints in a letter to the Superintendent. That might be useful at an evidentiary hearing but it doesn't meet the minimal requirements of a pleading. [2]

As for the To Whom it May letter, this response to the Motion in lieu sheds no light on what she K.P. is complaining about. Her attached emails make little sense without explanation and she provides no explanation. For example, several emails involve . advising others (teachers, administrators) not to speak to her daughter. For examples an email from November 16, 2022 states "No one will speak to [I.M.]" "There is no one allowed to speak to [I.M.]" and "don't approach [I.M.]" along with several other categorical commands on what is permitted regarding her daughter. I thought this strange considering the email is labeled "Dance." If her complaint has anything to do a dance course or competition, how can anyone be expected to teach or conduct a dance class or competition if one is being ordered by the parent not to speak to or even "approach" the pupil her daughter? Unfortunately, I can only speculate because that is the level of communication involved. Suffice to say, that K.M. provides no factual basis whatsoever to a claim that may regard HIB, and if it involves something other than HIB, K.P. completely fails to clarify what her specific claim is and a legal basis for the claim, notwithstanding having ample opportunity to do so.

In her Certification dated June 2, 2023 provided for in the Motion in Lieu of Sarah Bilotti, the Superintendent of Schools for the Board stated that based on her review of the petition she could not respond to the petition as the "allegations are general in nature" and "do not set forth facts...to support the general allegations." As a consequence the Superintendent was "not in a position to provide information for the Board's attorney to file an answer."

[2] The petition attached a March 14, 2023 letter to the parents of I.M. informing them that at a March 13, 2023 meeting, determined in an "harassment intimidation and bullying " (HIB) investigation that there was insufficient evidence to conclude an act of HIB had occurred. No other facts whatsoever are stated in the letter. The letter also advises the parents can appeal to the Commissioner of Education within 90 days.

I believe that the initial Certification by Superintendent Billotti was truthful and accurate, given the basically incomprehensible nature of the Petition. Nevertheless I did permit time for K.P. to provide a response to the Boards Motion in Lieu, which she did in the To Whom it May letter and its attachments. In the Board's August 14, 2023 response to same, Superintendent Billotti provided an affidavit, which, understandably, now characterized her knowledge as being "familiar with the facts pertaining to the request for petition to appeal filed by K.P...." In clear and cogent detail the Superintendent provided the following relevant and I believe undisputed facts: I.M. is a 17-year-old student who attended Pascack Hills High School for the 2022-23 school year. I.M. is domiciled in Saddle Brook and its BOE is required to provide a free public education to her. As a result of litigation between Saddle Brook and K.P., Saddle Brook requested that The Pascack Valley School District accept I.M. as a nonresident student for the 2022-2023 school year. The District accepted the enrollment and entered into a tuition contract with Saddle Brook allocating responsibility for the payment of I.M.'S tuition to the Board. However, that agreement was for one year only. On July 26, 2023, the Board unanimously voted to not enroll I.M. for the 2023-2024 school year (Billotti affidavit, Exhibit A).

Bilotti then explained her understanding of the 2022-2023 School year's controversy with K.P. over I.M. The deadline for students to withdraw from a course for the 2022-2023 school year was the end of the marking period January 18, 2023. However, more than four months later, on May 30, 2023, K.P. sought to withdraw I.M. from an honors computer science class and the school denied that request. was Billotti noted that I.M. eventually received a B plus for the course. In a similar dispute over I.M.'s grades, I.M. received a B minus final grade for the course. According to Bilotti the teacher communicated with students on homework and text/quiz requirements for the course. Bilotti found there was sufficient support for the teacher to issue the final B minus grade. I note that I.M. had a 3.58 cumulative average and that the B minus she received was for this honors computer science class, (Billotti Affidavit Exhibit C). Also, at the time K.P. began communicating with Bilotti asking to let her drop the Computer Science Class (May 17, 2023, four months past the deadline to drop classes) I.M. was then averaging a B minus in that class.

LEGAL ANALYSIS

Summary decision may be granted when the papers and discovery that have been filed show that there is no genuine issue as to any material fact challenged and the moving party is entitled to prevail as a matter of law. N.J.A.C. 1:1-12.5(b). No evidentiary hearing need be held if there are no disputed issues of material fact. Frank v. Ivy Club, 120 N.J. 73, 98, cert. denied, 498 U.S. 1073 (1991). A motion for summary decision in the OAL is equivalent to a motion for summary judgement in procedures in New Jersey Superior Court. "When the evidence is so one-sided that one party must prevail as a matter of law, the [tribunal] should not hesitate to grant summary [decision]." Della Vella v. Bureau of Homeowner Prot., New Home Warranty Program, CAF 17020-13, Initial Decision (March 31, 2014), adopted, Comm'r (May 12, 2014), http://njlaw.rutgers.edu/collections/oal/ (quoting Brill v. Guardian Life Ins. Co. of Am., 142 N.J. 520, 529 (1995)).

Further, the non-moving party has the burden "to make an affirmative demonstration . . . that the facts are not as the movant alleges." Spiotta v. William H. Wilson, Inc., 72 N.J. Super. 572, 581 (App. Div. 1962). This requirement, however, does not relieve the moving party from having to initially establish in its moving papers that there was no genuine issue of fact and that they were entitled to prevail as a matter of law. It is the "movant's burden to exclude any reasonable doubt as to the existence of any genuine issue of fact." Conti v. Board of Education, 286 N.J. Super. 106 (App. Div. 1995) (quoting Judson v. Peoples Bank and Trust Co. of Westfield, 17 N.J. 67, 74 (1954)). Here the respondent has demonstrated there is no reasonable doubt as to the existence of any genuine issue of fact.

After reviewing Superintendent's affidavit, its facts and background provide the necessary context to at least make K.P.'s To Whom it May letter mostly comprehensible. However, I cannot agree with K.P. that it does anything to articulate a legal claim against the school district, certainly not under HIB, and since now other law is alluded to, I have to agree that the petition fails to state any claim upon which relief can be granted.[3]

[3] It is even possible that Petitioner did not mean to appeal the failure to find HIB. Although the petition attaches a letter denying a finding a HIB, petitioner neither cited in it nor in her response to the motion to dismiss this important Anti-Bullying law nor even used the by now well-known acronym,

K.P. is obviously upset because her daughter got a B Plus and a B minus on two apparently difficult courses while otherwise averaging an A, and upset with the lack of appreciation by the school for her daughter's dancing abilities. She calls this "retaliation" and discrimination" but these are words, not facts nor arguments about a law, a violation of one, or facts upon which to base such a claim. The only "explanation" that I can grasp is K.P. may believe those teachers are retaliating because the child is an out of the district student or because K.P. has previously complained about I.M. not being allowed in the front of a dance competition or show. She says there were only five dancers ahead of I.M. but I.M. was in the third division of the dancers. She has even made an OPRA request to get the names of the other children who were put ahead of I.M. to further show discrimination and wants to postpone court proceedings until then. There is no cause to believe this was "retaliation".

I agree with respondent who correctly analyzed the applicable law and the basis for it:

> Allegations of dissatisfaction with actions of a dance coach in scheduling students to compete in events, participating in dance activities or scheduling of dance tournaments do not constitute a controversy under the School laws of the State of New Jersey. The same conclusions should be reached with regard to Petitioner's allegations that the athletic director and coach allegedly spoke to I.M. about Petitioner's concerns despite her request not to do so....[A]resolution of the factual disputes do not necessitate a hearing on the allegations since the resolution or the dispute also does not constitute a claim upon which relief can be granted. (Respondent's letter brief 8/14/23 page 2).

Likewise I concur that the dispute over the school's enforcement of its deadlines for withdrawing classes is not a cognizable claim. Even if I did, it is clear that any evidence that the school's actions were retaliation is fanciful at best.

Grades on academic course, participation on sports teams, dance teams and other extra curriculum issues cannot be subject to angry and emotional appeals by parents in the absence of showing the abuse in the Board's exercise of its discretionary powers that is "patently arbitrary, without rational basis or induced by improper motives." Kopera v

West Orange Bd. Of Educ. 60 N.J. Super 288, 296 (App. Div 1960). There is a presumption of correctness in the exercise of such discretionary powers and local board's actions will not be upset where the "controverted action is within the discretionary authority of the board absent a showing that the action is arbitrary capricious or unreasonable". Thomas v Morris Twp. Bd. Of Educ. 89 N.J. Super 327, 332 (App Div. 1965, aff'd 46N.J. 581 (1966)

Finally, even if the complained of actions bore some rational relationship to a cognizable law which somehow has been breached, the OAL has no authority to grant K.P.'s demands, damages, the issuance of prospective orders as described in the demand for relief to everyone in the school district (or beyond) as described or to issue "an apology" for the alleged ordeal K.P or I.M. went through. There has not been given an iota of proof that the Board's actions in its failure to pay "pay damages" to issue prospective Orders forbidding everyone under the Board's purview to not "discriminate" in the future or issue an apology (for not issuing better grades, for the order placement in a dance competition or by its teachers and coaches talking to I.M. despite K.P.'s wishes that they not do so) was "patently arbitrary, without rational basis, or induced by improper motives." Parsippany-Troy Hills Education Assoc. v. BOE of Parsippany-Troy Hills Twp., 188 N.J. Super, 161, 167 (App. Div. 1983). See B.K. v. Tenafly, EDU 02392-20 (Initial Decision, December 18, 2020). Further, "[v]ague allegations of disrespect, violations of the anti-Bullying law and financial damages are not cognizable in this forum". C.B. on behalf of A.J.B. and J.B. v. City of Newark Bd. Of Educ., Essex County, EDU 09183-2021 (Order of Dismissal, March 17, 2022).

The original petition probably should not have survived the initial request for dismissal, at least without a formal and substantial amendment of the pleading, which I add was not requested by petitioner. However, I **CONCLUDE** that the petitioner has failed to state a claim upon which relief can be granted. This is sufficient to hold that respondent's motion for summary decision must now be and is **GRANTED.**

ORDER

Based upon all of the foregoing, I **CONCLUDE** that the petition fails to state a claim upon which relief can be granted. Accordingly, the motion for Summary Decision is granted and this matter is hereby **DISMISSED** with prejudice.

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

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

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

Ernest M. Bongiovanni

November 8, 2023
DATE

ERNEST M. BONGIOVANNI, ALJ

Date Received at Agency: November 8, 2023

Date Mailed to Parties: November 8, 2023

id

366-23

New Jersey Commissioner of Education

Final Decision

W.D., on behalf of minor child, O.L.,

Petitioner,

v.

Board of Education of the Township of Montgomery, Somerset County,

Respondent.

Synopsis

Pro se petitioner W.D. sought to have her son, O.L., a rising sophomore in respondent Board's school district, enrolled in Advanced Placement Calculus BC (AP Calculus BC) for the 2023-2024 school year. Petitioner asserted that the decision of the Board to place O.L. in Advanced Placement Calculus AB (AP Calculus AB) instead of the desired course was a violation of the Strengthening Gifted and Talented Education Act, *N.J.S.A.* 18A:35-34 et seq. Petitioner filed a motion for emergent relief in this matter but withdrew the motion at the hearing on July 7, 2023; the case proceeded on a non-emergent basis. The Board filed a motion for summary decision which was opposed by the petitioner.

The ALJ found, *inter alia*, that: there are no material facts at issue in this case, and the matter is ripe for summary decision; O.L. has taken advanced math courses since the fifth grade, took Honors Precalculus as a ninth grader, and qualified for AP Calculus in tenth grade; and O.L. does not meet the prerequisites for enrollment in the AP Calculus BC class, which require that the student be a rising junior or senior who has earned an honors precalculus grade average above 94%, as well as a teacher recommendation to enter the course. The ALJ concluded that the Board is entitled to prevail in this matter as O.L. does not meet the prerequisites for the desired class, and petitioner has failed to show that the Board's decision was arbitrary, capricious, or induced by any improper motive. Accordingly, the ALJ granted summary decision to the Board and dismissed the petition.

Upon review, the Commissioner concurred with the ALJ's findings and conclusions. Accordingly, the Initial Decision of the OAL was adopted as the final decision in this matter, for the reasons stated therein. The petition was dismissed.

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

366-23
OAL Dkt. No. EDU 05614-23
Agency Dkt. No. 170-6/23

New Jersey Commissioner of Education

Final Decision

W.D., on behalf of minor child, O.L.,

Petitioner,

v.

Board of Education of the Township of Montgomery, Somerset County,

Respondent.

The record of this matter and the decision of the Office of Administrative Law (OAL) have been reviewed and considered. The parties did not file exceptions.

Upon review, the Commissioner concurs with the Administrative Law Judge that the Montgomery Board of Education's decision to enroll O.L. into the Advanced Placement Calculus AB course rather than the Advanced Placement Calculus BC course was not arbitrary, capricious, or unreasonable.

Accordingly, the OAL decision is adopted as the final decision in this matter, and the petition of appeal is hereby dismissed.

IT IS SO ORDERED.[1]

Angelica Allen-McMillan, J.d.D.
ACTING COMMISSIONER OF EDUCATION

Date of Decision: December 8, 2023
Date of Mailing: December 8, 2023

[1] This decision may be appealed to the Appellate Division of the Superior Court pursuant to *N.J.S.A.* 18A:6-9.1. Under *N.J.Ct.R.* 2:4-1(b), a notice of appeal must be filed with the Appellate Division within 45 days from the date of mailing of this decision.

State of New Jersey
OFFICE OF ADMINISTRATIVE LAW

INITIAL DECISION GRANTING
SUMMARY DECISION
OAL DKT. NO. EDU 05614-23
AGENCY DKT. NO. 170-6/23

W.D. ON BEHALF OF MINOR
CHILD O.L.,
Petitioner,
v.
BOARD OF EDUCATION OF
THE TOWNSHIP OF MONTGOMERY,
Respondent.

W.D., petitioner, pro se

Stephen R. Fogarty, Esq., for respondent (Fogarty & Hara, attorneys)

Record Closed: August 30, 2023 Decided: November 6, 2023

BEFORE **KIM C. BELIN**, ALJ:

STATEMENT OF THE CASE

W.D., the petitioner, (W.D. or petitioner) seeks to have her son, O.L., enrolled in Advanced Placement Calculus BC (AP Calculus BC) for the 2023-24 school year and asserts that the decision of the respondent, the Board of Education of the Township of

Montgomery, Somerset County (respondent or Board) not to do so violates the Strengthening Gifted and Talented Education Act, N.J.S.A. 18A:35-34 et seq.

PROCEDURAL HISTORY

Petitioner filed a petition seeking emergent relief dated, June 16, 2023, to have her son enrolled in the respondent's AP Calculus BC class for the 2023-24 school year. The matter was transmitted as a contested case to the Office of Administrative Law (OAL) where it was filed on June 22, 2023. N.J.S.A. 52:14B-1 to -15; N.J.S.A. 52:14F-1 to -13. The respondent filed its answer, dated June 29, 2023. A hearing was held on July 7, 2023, where the petitioner voluntarily withdrew her emergent petition and elected to proceed as a non-emergent contested matter.

Respondent submitted its answer, dated July 17, 2023, to petitioner's due process petition. Respondent submitted a motion for summary decision (motion) on August 21, 2023, and the petitioner submitted her opposition to the respondent's motion on August 22, 2023. Oral Argument on the motion was held on August 30, 2023, where the respondent renewed its motion at the end of the petitioner's case in chief. This tribunal issued an oral decision granting respondent's motion on August 30, 2023.

FACTUAL DISCUSSION AND FINDINGS

The following **FACTS** are undisputed and I, therefore **FIND**:

1. W.D. and O.L. reside in Montgomery Township. O.L. is a rising sophomore at high school. He has taken advanced math courses starting in the fifth grade.

2. Respondent oversees the operation of the Montgomery Township School District. (Certification of Mary E. McLoughlin, dated August 14, 2023, ¶4.)

3. O.L. took Honors Precalculus as a ninth grader, and qualified for AP Calculus class in tenth grade.

4. The respondent offers three AP Calculus courses: AP Calculus AB, C and BC. (Exhibit E, McLoughlin Certification.)

5. For the 2023-24 school year, O.L. was registered for the AP Calculus AB course. (Exhibit D, McLoughlin Certification.)

6. The respondent's Program of Studies describes the AP Calculus AB course in this manner:

> This course is essentially calculus Advanced Placement AB as described in the course outline published by the College Entrance Examination Board. It covers limits, derivatives, and applications of both algebraic and transcendental functions as well as methods and applications of integration. The approach used is that of combining the essentials of the theory with practical applications. A strong background in Honors Precalculus will be required from the beginning of the course, and students will be expected to understand the concepts taught in class, as well as to transfer them to novel applications and problem-solving situations. This course is equivalent to a first semester college calculus course. Graphing calculators are required.
> *Prerequisite: 85% in full school year Precalculus Honors course OR 95% in full school year Precalculus course OR 80% in full school calculus course.* (Exhibit E, McLoughlin Certification.)

7. The respondent's Program of Studies describes the AP Calculus BC course in this manner:

> This course is essentially the College Board Calculus BC curriculum. Students will master material covering two semesters of a college calculus program. Students selected to take this course may elect to take an AP test in math with the possibility of earning one or two semesters' credit at colleges and universities that participate in the College Board program. The course outline is the combination of the Calculus AB description and Calculus C listed above. Students will be expected to understand the

> concepts taught in class as well as transfer them to novel application[s] and problem-solving situations. Graphing calculators are required.
> *Prerequisite: open to students in grades 11 and 12 with Precalculus Honors average over 94% and teacher recommendation.* (Ibid.)

8. The respondent's Program of Studies describes the AP Calculus C class in this manner:

> "Taught as a continuation of Calculus AB, this course covers additional techniques of integration, polar coordinates, series, applications of integrals, parametric graphing and differential equations. The emphasis is on theory and problem-solving techniques. A strong background in AP calculus AB will be required from the beginning of the course, and students will be expected to understand the concepts taught in class, as well as to transfer them to novel applications and problem-solving situations. This course is equivalent to a second semester college calculus course. Graphing calculators are required.
> *Prerequisite: 80% in AP Calculus AB, taken over a full school year.* (Ibid.)

9. O.L. is a high-achieving student in math but does not qualify for the respondent's gifted and talented education program (GATE).

10. O.L. earned a final grade average of 93.6 in Honors Precalculus, which was rounded up to 94%. (Id. at ¶24; Exhibit J.)

11. O.L. does not have a teacher recommendation to take the AP Calculus BC course as required. (Id. at ¶26.)

12. Enrollment in the AP Calculus AB course is intended to be followed up by taking the AP Calculus C class in the following year which affords the student a two-year sequence of in-depth study of calculus. (Respondent's Brief in Support of its Motion for Summary Decision, p. 7.)

13. The AP Calculus AB – C sequence is intended for students seeking high-level post-secondary educational opportunities and ultimately, careers in science, technology, engineering and math (STEM)-related fields. (McLoughlin Certification, ¶14.)

14. Students enrolled in the AP Calculus BC course will not cover all the topics included in the AP Calculus AB – C sequence of classes. (Id. at ¶13; Exhibit F, McLoughlin Certification.)

15. The respondent offers only one section of the AP Calculus BC class. (McLoughlin Certification, ¶12.)

16. There are additional opportunities for O.L. to enhance his calculus studies beyond the AP Calculus AB class through independent projects with teachers and/or other activities offered by the respondent. (McLoughlin Certification, ¶21; Exhibit I.)

LEGAL ANALYSIS AND CONCLUSIONS

A motion for summary decision may be granted if the papers and discovery presented, as well as any affidavits which may have been filed with the application, show that there is no genuine issue of material facts, and the moving party is entitled to prevail as a matter of law. N.J.A.C. 1:1-12.5(b). If the motion is sufficiently supported, the non-moving party must demonstrate by affidavit that there is a genuine issue of fact which can only be determined in an evidentiary proceeding, to prevail in such an application. (Ibid.)

These provisions mirror the summary judgment language of R. 4:46-2(c) of the New Jersey Court Rules.

The motion judge must "consider whether competent evidential materials presented, when viewed in the light most favorable to the non-moving party . . . are sufficient to permit a rational fact finder to resolve the alleged disputed issue in favor of the non-moving party." Brill v. Guardian Life Insurance Company of American, 142 N.J. 520, 523 (1995). And even if the non-moving party comes forward with some evidence,

this forum must grant summary decision if the evidence is "so one-sided that [the moving party] must prevail as a matter of law." Id. at 536.

The issue presented is whether the respondent's decision not to enroll O.L. in the AP Calculus BC class was arbitrary, capricious and unreasonable. The respondent filed the motion contending there is no genuine issue of material fact that O.L. does not meet any of the prerequisites for the AP Calculus BC class. The prerequisites are: honors precalculus grade average over 94%, a teacher recommendation and be a rising junior or senior. It is undisputed that O.L.'s grade average in honors precalculus is 94%; he is not a rising eleventh or twelfth grade student and he does not have a teacher recommendation. Accordingly, the respondent avers that its decision not to enroll him in that class was appropriate. Indeed, the respondent contends that the two-year sequence of AP Calculus AB and C, is the most rigorous program for high achieving students like O.L. who are interested in pursuing calculus in college and ultimately a career in a STEM-related area. The AP Calculus BC class is taught at a faster pace because the class does not cover all the topics comprehensively. Moreover, the respondent contends there are additional opportunities for O.L. to engage in independent projects with the teachers if he does not feel sufficiently challenged in the AP Calculus AB class.

Conversely, the petitioner contends that the respondent's decision violates the Strengthening Gifted and Talented Education Act, which provides:

> a. A board of education shall ensure that appropriate instructional adaptations and educational services are provided to gifted and talented students in kindergarten through grade 12 to enable them to participate in, benefit from, and demonstrate knowledge and application of the New Jersey Student Learning Standards at the instructional level of the student.
>
> b. A board of education shall:
>
> (1) ensure that appropriate instructional adaptations are designed for students who are gifted and talented;
>
> (2) make provisions for an ongoing kindergarten through grade 12 identification process for gifted and

> talented students that includes multiple measures in order to identify student strengths in intellectual ability, creativity, or a specific academic area. School districts shall ensure equal access to a continuum of gifted and talented education services. The identification process shall include consideration of all students, including those who are English language learners and those with Individualized Education Plans or 504 plans;
>
> (3) develop and document appropriate curricular and instructional modifications used for gifted and talented students indicating content, process, products, and learning environment, and including, but not limited to, additional education activities such as academic competitions, guest speakers, and lessons with a specialist;
>
> (4) take into consideration the Gifted Programming Standards, Position Statements, and White Papers of the National Association for Gifted Children in identifying and serving gifted and talented students;
>
> (5) provide the time and resources to develop, review, and enhance instructional tools with modifications for helping gifted and talented students acquire and demonstrate mastery of the required knowledge and skills specified by the standards at the instructional level of the student; and
>
> (6) actively assist and support professional development for teachers, educational services staff, and school leaders in the area of gifted and talented instruction.
> [N.J.S.A.18A:35-36.]

With this law as the backdrop, the petitioner assails the respondent's prerequisites for the AP Calculus BC class. She contends that these prerequisites prevent gifted tenth grade students from equal access to the AP Calculus BC class. She asserts that "over 94%" includes 94% and thus her son qualifies. She believes the teacher recommendation requirement is arbitrary because it does not apply to eleventh grade students. She also believes her son will be bored in the AP Calculus AB class because the class goes into greater depth with the topics and thus is taught at a slower pace. She believes that the two-class sequence (AB and C) will deprive her son of an additional year of advanced

calculus that can be taken at Princeton University. She declares it unfair that her son has been in advanced math classes since fifth grade but is now restricted to learning with his chronological peers instead of his intellectual peers.

All parties agree that O.L. is a high-achieving student who is gifted in math and W.D., as a parent, wants the best for her son. She believes that the AP Calculus BC course is a better fit for son because it is faster paced and keeps him with his academic peers. She disagrees that the design of the two-year sequence is appropriate for gifted tenth grade students with a proclivity for calculus. However, the authority to design the course of study for students has been assigned to the local school district. Specifically, N.J.S.A. 18A:33-1 mandates that each local school district must "provide courses of study suited to the ages and attainments of all pupils between the ages of five and 20 years."

In addition, it is axiomatic that the discretionary decision of the local board of education as to which courses to offer and the contents of such courses is entitled to a presumption of correctness and will not be upset unless there is an affirmative showing that such decision was arbitrary, capricious or unreasonable. Parsippany-Troy Hills Ed. Assn v. Bd. of Ed. of Parsippany-Troy Hills Tp., 188 N.J. Super. 161 (App. Div. 1983), certif. den., 94 N.J. 527 (1983). The general rule is that an "action of the local board which lies within the area of its discretionary powers may not be upset unless patently arbitrary, without rational basis or induced by improper motives." Id. at 167, quoting Kopera v. West Orange Bd. of Ed., 60 N.J. Super. 288, 294 (App. Div.1960). I **FIND** the respondent's decision to create the AP Calculus AB, C and BC classes was a discretionary decision and W.D. must prove that the respondent acted in either bad faith or in disregard of the circumstances.

Here, it is undeniable that the petitioner strongly disagrees with the respondent's decision to enroll her son into the AP Calculus AB class. However, she has not presented any credible evidence that the respondent's standards were established in bad faith or in disregard to O.L.'s circumstances. For example, W.D. did not present testimony from other parents or an educational expert to support her allegations that limiting the AP Calculus BC class to juniors and seniors, requiring a teacher recommendation and having a grade average over 94% was in bad faith. Her disagreement with the requirements does

not establish bad faith. To the extent that the respondent has engaged in mixed messaging from staff and board members about whether the eligibility standard is 94% or over 94%, the program of studies document plainly states that students must have a grade average over 94%. And even assuming arguendo that the petitioner is correct in interpretating that "over 94%" includes 94%, her son lacks the other two requirements.

The Strengthening Gifted and Talented Education Act, (citations omitted) requires equal access to a *continuum* of gifted and talented education *services*. There is no supporting evidence that a classroom experience is the only type of educational service that the respondent can provide. Indeed, in fulfillment of this mandate, the respondent allows gifted students to work on a project with other students or independently to enhance their educational experience. In addition, at the high school level, "academic contests and competitions, groups, clubs, and as well as leadership activities are made available to students through the Media Specialist, supported by supervisors and advisors."[1] I **CONCLUDE** these opportunities comply with the law's continuum requirement.

Petitioner contends that the decision to limit the AP Calculus BC class to juniors and seniors is irresponsible and disregards the needs of gifted tenth graders. She asserts that the neighboring districts offer the AP Calculus BC class to tenth grade students who achieve a 90% grade average. She contends her son and other gifted tenth graders are being held back on purpose by the respondent.

The respondent's decision to restrict access to the AP Calculus BC class to juniors and seniors was based upon the respondent's educational professionals and faculty which included staff with knowledge about the educational characteristics that colleges are seeking. Moreover, there is no mandate that the respondent's class requirements or calculus course of study mirror neighboring districts. The petitioner provided no credible proof that her son and other gifted tenth grade students taking the AP Calculus AB class

[1] https://sites.google.com/mtsd.us/giftedservices/programming?authuser=0

will be at a disadvantage. This is pure speculation.[2] Accordingly, I **CONCLUDE** the petitioner has failed to prove that the respondent's grade restriction is arbitrary, capricious, or induced by improper motive.

Petitioner asserts that her son will miss the opportunity to participate in the high school program at Princeton University by following the respondent's two-year sequence of AP calculus classes. However, the respondent denied any relationship with Princeton University. Thus, this claim is unsubstantiated and must fail. The petitioner asserts in her post-hearing submission that she was not informed about the course selection by school personnel in violation of Board policy #2464. However, this was not raised in the original petition, and thus, will not be addressed here.

The petitioner asserts that there is no clear link to the complaint appeal process on the respondent's website homepage. This tribunal was able to find a link to an overview of the GATE program on the respondent's homepage[3] and a link to appeal the school's decision and an informational video on the respondent's Assessment, Curriculum and Instruction page.[4] The respondent's policy on gifted and talented was also accessible and contained information on appealing to the board of education.[5] However, the policy was not linked to the respondent's website homepage as required. Accordingly, I **FIND** that the petitioner has substantiated her claim that the complaint process is not on the respondent's homepage. However, this does not impact whether the respondent's decision to register O.L. for the AP Calculus AB class was arbitrary, without rational basis or induced by improper motive.

For the reasons stated above, I **CONCLUDE** there is no genuine issue of any material fact and respondent is entitled to prevail as a matter of law because O.L. does not meet the prerequisites for the desired class and the petitioner has not proven that the respondent's decision is arbitrary, capricious or induced by an improper motive.

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[2] Petitioner is not precluded from filing a new petition if O.L. experiences a quantifiable disadvantage by being in theAB class.
[3] https://www.mtsd.k12.nj.us/
[4] https://www.mtsd.k12.nj.us/Page/19829
[5]https://www.straussesmay.com/seportal/Public/DistrictPolicy.aspx?policyid=2464&id=d098afc5c43b49698c600454bc274af6

ORDER

Given my findings of fact and conclusions of law, I **ORDER** that the respondent's motion for summary decision is **GRANTED**; however, the respondent is instructed to put a link to Board Policy 2464 on its website homepage. The petitioner's petition is **DISMISSED**.

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

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

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

November 6, 2023
DATE

Kim C. Belin
KIM C. BELIN, ALJ

Date Received at Agency: _____

Date Mailed to Parties: _____

KCB/am/lam

APPENDIX

EXHIBITS

Joint

J-5 2023-24 Program of Studies

J-6 Form Letter to Tenth Grade Students

J-12 Unit Calendar by Year

J-21 YouTube video of March 28, 2023 School Board Meeting

J-22 Email from School Counselor, dated December 13, 2022 and Calculus options

For petitioner

- Petitioner's Response Opposing Respondent's Motion for Summary Decision with certification and exhibits, dated August 22, 2023

For respondent

- Motion for Summary Decision with certification and exhibits, dated August 15, 2023
- Reply Letter Brief in further support of Respondent's Motion for Summary Decision, dated August 25, 2023

367-23E
OAL Dkt. No. EDU 12728-23
Agency Dkt. No. 291-10/23

New Jersey Commissioner of Education

Final Decision

H.S. and N.B., on behalf of minor child, S.B.,

Petitioners,

v.

Board of Education of the South Orange-Maplewood School District, Essex County,

Respondent.

The record of this emergent matter and the recommended Order of the Administrative Law Judge (ALJ) have been reviewed. Upon such review, the Commissioner concurs with the ALJ – for the reasons thoroughly set forth in the recommended Order – that petitioner has demonstrated entitlement to emergent relief pursuant to the standards enunciated in *Crowe v. DeGioia,* 90 *N.J.* 126 (1982), and codified at *N.J.A.C.* 6A:3-1.6.

Accordingly, the recommended Order, granting the petitioners' application for emergent relief, is adopted. Respondent is ordered to provide transportation for petitioners' child to and from school during the pendency of these proceedings.[1] This case shall continue at the Office of Administrative Law with such proceedings as the parties and the ALJ deem necessary to bring it to closure.

IT IS SO ORDERED.

Angelica Allen-McMillan, Ed.D.
ACTING COMMISSIONER OF EDUCATION

Date of Decision: December 8, 2023
Date of Mailing: December 8, 2023

[1] Respondent is not required to provide transportation from school to petitioners' home on days when their child attends an after-school program.

State of New Jersey
OFFICE OF ADMINISTRATIVE LAW

ORDER GRANTING
EMERGNT RELIEF
OAL DKT. NO. EDU 12728-23
AGENCY DKT. NO. 291-10/23

H.S. AND N.B. ON BEHALF OF MINOR CHILD, S.B. Petitioner

v.

BOARD OF EDUCATION OF THE SOUTH ORANGE-MAPLEWOOD SCHOOL DISTRICT, ESSEX COUNTY,

Respondent

H.S. and N.B., appearing pro se, on behalf of their minor child, S.B.

Patrick Carrigg, Esq., for respondent (Lenox, Socey, Formidoni, Giordano, Carrigg, Lang & Casey, LLC, attorneys)

Record Closed: November 28, 2023 Decided: November 28, 2023

BEFORE **NANCI G. STOKES, ALJ:**

STATEMENT OF THE CASE

Petitioners seek emergent relief compelling the South Orange-Maplewood School District (District or Board) to provide transportation to their minor child from her home to her elementary school and back home. The District denied this request because it maintains that the child lives too close to her school to be eligible for transportation services and did not consider the child's route hazardous. Petitioners dispute the District's distance determination and maintain that their child's route is dangerous, entitling their child to emergent transportation.

FACTUAL DISCUSSION AND PROCEDURAL HISTORY

H.S. and N.B.'s five-year-old child walks to school through recognized hazardous intersections, which exceeds the District's courtesy bus policy distance of 1.25 miles when measured by Strava from their home's entrance to the nearest open school entrance but not "curb to curb" used by the District. Instead, the District's uses Versatrans, which measures the child's route at 1.14 miles, under the 1.25-mile eligibility criteria. Google measurement rounds down the route to 1.1 miles. The District requested New Jersey's Division of Weights and Measures to assess the length of the child's route given the discrepancy, but it has issued no written determination.

On or about October 5, 2023, the District denied H.S. and N.B.'s request to allow their daughter to take the bus from the bus stop three houses down from their home to school. The District explained its differing calculations and highlighted that crossing guards were available on the pedestrian route taken by H.S. and N.B.'s minor child.

Petitioner testified that the bus operating in the District near their home has many open seats, and they supply a parent email that supports seat availability. Still, the District maintains that available seats do not end the analysis. Regardless, should I order emergent relief, the District must comply with or challenge any order with the NJDOE.

Petitioners also note that the District refused its request to transfer their child to a closer school following the District's Mandatory Intentional Integration Initiative (Initiative).

By way of background, the District changed its courtesy student transportation distance from its earlier policy of providing courtesy busing for remote children living more than two miles from school to 1.25 miles from the school. See District Policy 8600, June 2023. That policy also explains that the Board will designate transportation for all non-remote students who must walk to and from school along hazardous routes. To determine hazardous route designations, the Board created and adopted criteria in District Policy 8600.1

Indeed, following two reports by Stonefield Engineering and Design (Stonefield) assessing the safety of pedestrian routes taken by students now required to walk to school after reassignment to farther schools through the Initiative, the District adopted a Hazardous Routes Policy 8600.1 in July 2023. Stonefield focused on intersections and fourteen roadways students may traverse while walking to schools. Stonefield assessed traffic volumes, pedestrian accidents, availability of sidewalks, roadway speeds, traffic signals, visibility concerns, and the presence of crossing guards to mitigate hazardous conditions.

Likewise, Policy 8600.1 identifies thirteen criteria to assess hazardous routes, including those addressed by Stonefield. Undeniably, Stonefield concluded that students walking along the western side of Ridgewood Avenue between Clinton Avenue and Lenox Avenue would be hazardous. When the Board adopted Policy 8600.1, that area carried a known dangerous designation. Further, Stonefield did not recommend that children cross Ridgewood Avenue at Curtiss Place, which is in the hazardous area between Clinton and Lenox Avenues. Curtiss Place is where petitioners and their minor child live.

However, the District asserts that the child should cross Ridgewood Avenue at Baker Street, a non-hazardous roadway, per the Stonefield report. However, the maps

provided by both parties require the child to head southwest on Curtiss Avenue and turn right onto Ridgewood Avenue. Without crossing Ridgewood Avenue from Curtiss Avenue, the child could walk south on the western side of Ridgewood Avenue to the intersection with Baker Street and Ridgewood Avenue to cross onto Baker Street. Yet, there is no sidewalk along the western side of Ridgewood Avenue from Curtiss Place to Baker Street. Still, the intersection at Baker Street and Ridgewood Avenue requires a crossing guard to avoid being hazardous.

Once on Baker Street, the child would pass through intersections at Maplewood Avenue, Dunnell Road, Burnet Street, and Valley Street. According to Stonefield, all intersections require crossing guards to prevent hazardous conditions. Next, the child would turn right onto Valley Street and might cross over the roadway onto Harvard Avenue to reach the school on that street. However, crossing Valley Street at Harvard Avenue is hazardous per Stonefield, requiring the child to cross Valley Street earlier onto Tuscan Road. Notably, the Versatrans map inexplicably has the child's route turning onto Harvard Avenue from Valley Street. Regardless, the intersection at Tuscan Road and Valley Street also requires a crossing guard to avoid danger to a student.

In other words, every intersection, even considering alternate routes, proposed by the District requires the presence of a crossing guard to avoid being hazardous, according to Stonefield's reports. Further, the District does not address the lack of a sidewalk on Ridgewood Avenue, a hazardous route to the intersection with Baker Street. Petitioner supplies a video depicting the proposed walking route and the area the District offers their child to walk. Without a sidewalk, the child would need to walk on the shoulder of a busy roadway.

The Maplewood Police Department's (MPD) list of crossing guards identifies times that intersections will have crossing guards, most shifts ending at 3:45 p.m. However, two posted crossing guard shifts end at 3:20 p.m. at the Dunnell and Burnet Streets intersections with Baker Street along the child's route home. The child's trip home begins after dismissal at 3:23 p.m. Monday to Wednesday and at 4:15 p.m. on Thursday and

Friday. Notably, petitioners' minor child attends an afterschool program on Thursday and Friday afternoons for which the District would not have to supply transportation. In other words, two hazardous intersections had no crossing guards when the District denied the petitioners' transportation request.

In response, the District's security officer, Stanley Valles, spoke with the Chief of Police after petitioners filed this case. On November 27, 2023, the Chief emailed the District indicating that the MPD would adjust crossing guard times at the intersections of Dunnell and Burnett Streets along Baker Street. Yet, his email only highlights that the MPD crossing guard times posted on MPD's website appear inaccurate, at least in part. Notably, MPD's website identifies morning crossing guards at these intersections from 7:45 to 9:15 a.m. Yet, the Chief's email notes he was changing the crossing guard morning postings from 8:30 to 9:00 a.m. to 7:45 to 8:45 a.m., neither timeframe consistent with its website. Also troubling is video footage from those intersections before the Chief's proposed crossing guard shift changes in his November 27, 2023 email. The Chief indicates the current crossing guard posting at Dunnell and Baker Street starts at 8:30 a.m., but no crossing was present at 8:32 a.m. when the child would be crossing the intersection.

The intersection of Maplewood Avenue and Baker Street has no crossing guard. Instead, the MPD is assigned to safeguard this intersection. However, videos from school days of October 19, 2023, and November 27, 2023, of this intersection reveal no officers or crossing guards when the minor child would cross on her way to school. Undeniably, the District does not hire crossing guards or assign police officers to monitor its intersections. Yet, Stonefield's hazardous route assessment requires crossing guards at multiple intersections on the child's route, and the District needed to evaluate the availability of crossing guards under its hazardous route policy.

Petitioners also present a pedestrian accident density analysis prepared before children began walking to school after the Initiative. This record needs more authentication to consider. Still, Stonefield identified pedestrian and bike accidents

through the New Jersey Department of Transportation in its roadway analysis. Undeniably, Tables 3A, 5A, and 7 in Stonefield's April report note multiple pedestrian accidents along Valley Street, South Ridgewood Road, and Baker Street.

The District maintains that the walk to and from school is twenty-seven minutes, which petitioners calculate as ten minutes longer. Still, the District's calculation does not account for time stopping at the numerous intersections along the route, each requiring crossing guards to stop traffic and direct travel across, and gives the minor child little time to reach the crossing guard at Baker Street and Ridgewood Avenue whose shift ends at 3:45 p.m. Again, this portion of Ridgewood Avenue is a designated hazardous route in Policy 8600.1.

On October 23, 2023, petitioners filed an appeal and requested emergent relief. On November 15, 2023, the Department of Education (NJDOE), Office of Controversies and Disputes, transmitted this case to the OAL for hearing as a contested case and resolution of petitioner's motion for emergency relief.

The OAL assigned the case to me, and I requested the Board submit an answer to the petition and reply to the emergent application, which I received on November 20, 2023. The Board submitted its answer to the NJDOE on November 16, 2023. I held a telephone conference on November 21, 2023. The District maintains that petitioners do not meet the standards for emergent relief or eligibility requirements for courtesy transportation to and from school.

Petitioners supplied additional materials on November 22, 27, and 28, 2023, including video footage of many intersections on their child's route. I directed petitioners to stop the sound during the presentation of video footage as their comments are opinions, and the videos speak for themselves about the intersections and the presence or lack of crossing guards.

The Board presented the Chief's email on November 27, 2023, on that date.

I heard oral argument on November 27, 2023. However, I directed petitioners to provide videos taken from that morning and time stamp verification along with any videos submitted with the petition that the NJDOE did not transmit to the OAL. I received those materials on November 28, 2023, and the record closed. Notably, petitioners also took a video of the intersection at Maplewood Avenue and Baker Street today at 8:49 a.m., which I decline to consider as this exceeds the scope of the discussion at oral argument.

LEGAL ANALYSIS AND CONCLUSION

The Commissioner's jurisdiction encompasses "controversies and disputes arising under the school laws" under N.J.S.A. 18A:6-9, Dunellen Bd. of Educ. v. Dunellen Ed. Assoc., 64 N.J. 17, 23 (1973), the New Jersey Supreme Court concluded that "the Legislature enacted provisions entrusting school supervision and management to local school boards . . . subject to the supervisory control [of] . . . the State Commissioner of Education."

The regulations governing such disputes before the Commissioner of Education provide that "[w]here the subject matter of the controversy is a particular course of action by a district board of education or any other party subject to the jurisdiction of the Commissioner, the petitioner may include with the petition of appeal, a separate motion for emergent relief or a stay of that action pending the Commissioner's final decision in the contested case." N.J.A.C. 6A:3-1.6(a).

> A motion for a stay or emergent relief shall be accompanied by a letter memorandum or brief which shall address the following standards to be met for granting such relief pursuant to Crowe v. DeGioia, 90 N.J. 126 (1982):
>
> > 1. The petitioner will suffer irreparable harm if the requested relief is not granted;
> > 2. The legal right underlying petitioner's claim is settled;
> > 3. The petitioner has a likelihood of prevailing on the merits of the underlying claim; and
> > 4. When the equities and interests of the parties are balanced, the petitioner will suffer greater harm than the respondent will suffer if the requested relief is not granted.

[N.J.A.C. 6A:3-1.6(b).]

Indeed, the moving party must demonstrate each element "clearly and convincingly." Waste Management of N.J. v. Union County Utilities Authority, 399 N.J. Super. 508, 520 (App. Div. 2008). Emergent relief is designed "to 'prevent some threatening, irreparable mischief, which should be averted until opportunity is afforded for a full and deliberate investigation of the case.'" Crowe, 90 N.J. at 132 (citation omitted).

Irreparable harm

Harm is generally considered irreparable if monetary damages cannot adequately redress it. Id. at 132-33. In other words, courts describe irreparable harm as "'substantial injury to a material degree coupled with the inadequacy of money damages.'" Judice's Sunshine Pontiac, Inc. v. General Motors Corp., 418 F. Supp. 1212, 1218 (D.N.J. 1976) (citation omitted). An applicant for emergent relief must demonstrate more than a risk of irreparable harm. Continental Group, Inc. v. Amoco Chemicals Corp., 614 F. 2d 351, 359 (D.N.J. 1980). The requisite for injunctive relief requires a "'clear showing of immediate irreparable injury,'" or a "'presently existing actual threat; [an injunction] may not be used simply to eliminate a possibility of a future remote injury, or a future invasion of rights, be those rights protected by statute or by common law.'" Ibid. (citation omitted). Unsupported allegations of irreversible harm are insufficient to excuse the completion of administrative proceedings. Komninos by Komninos v. Upper Saddle River Bd. of Educ., 13 F.3d 775, 779 (3d Cir. 1994).

Here, petitioners rely upon the District's hazardous route evaluations and Policy 8600 and 8600.1 to support their position that the District should allow their child to ride the bus to school. Regardless of any dispute regarding the child's route measurements, the route addresses a designated hazardous area in Policy 8600.1 and multiple intersections that require a crossing guard to reduce risk. Still, the District's reliance on crossing guards failed to acknowledge the child's school schedule and dismissal times, making those crossing guards unavailable to assist this five-year-old child in returning home safely until the MPD provides additional coverage. Still, intersections that the MPD

safeguards are without officers when the child needs to pass through them on her route to school. The risk of irreparable harm to the child's safety is inherent on busy roadways, including a hazardous route designation along Ridgewood Avenue without a sidewalk and at hazardous intersections without crossing guards. Thus, I **CONCLUDE** that petitioners have demonstrated that they meet the first criteria for emergent relief.

Settled Legal Right

Emergent relief "should be withheld when the legal right underlying plaintiff's claim is unsettled." Crowe, 90 N.J. at 133 (citing Citizens Coach Co. v. Camden H. R. Co., 29 N.J.Eq. 299, 304-305 (E & A 1878)).

Each school district must provide a thorough and efficient education system to all its resident children. N.J. Const. art. VIII, § 4, ¶ 1; N.J.S.A. 18A:33-1. To carry out this policy, local boards of education have discretionary authority under N.J.S.A. 18A:11-1C. The boards adopt rules for the management of the district's public schools and act to ensure the lawful and proper conduct of the district's public schools. Still, statutory requirements apply to actions by a school district or a board of education.

To be sure, petitioners have the right to challenge the District's determination as arbitrary, capricious, or unreasonable, even though "a presumption of lawfulness and good faith applies to a board of education's actions." Schuster v. Bd. of Educ. Montgomery Twp., 96 N.J.A.R.2d (EDU) 670, 676 (citing Schnick v. Westwood Ed. of Educ., 60 N.J. Super. 448 (App. Div. 1960), and Quinlan v. Bd. of Educ. of North Bergen Twp., 73 N.J. Super. 40 (App. Div. 1962).

The Board's transportation policies clarify that it must evaluate the safety of the routes that elementary school children must walk to school. There is little support demonstrating that District considered the parent's request according to its policy concerning hazardous routes. Undeniably, a known hazardous route exists for this child to get to school. The remaining areas, especially intersections, are also a significant

concern, according to Stonefield. The District must consider the absence of a sidewalk along the designated hazardous route along Ridgewood Avenue, but the decision does not mention this consideration. The District also must evaluate whether crossing guards are available.

Until yesterday, there was no potential for crossing guard coverage at two intersections on the child's route. In other words, until this petition, none were present, according to the MPD's website and the Chief's email. The intersection at Maplewood Avenue and Baker Street requires a crossing guard, and the videos show no such coverage. The five-year-old child must also get from school to the intersection of Baker Street and Ridgewood Avenue twenty-two minutes after dismissal at 3:23 p.m., after crossing multiple intersections, before the crossing guard at this intersection leaves at 3:45 p.m., if the posted time on the MPD website is accurate. In other words, it is a highly improbable task.

Therefore, I **CONCLUDE** petitioners have satisfied this requirement for emergent relief.

Likelihood of Success on the Merits

Under the third emergent relief standard, "a plaintiff must make a preliminary showing of a reasonable probability of ultimate success on the merits." Crowe, supra, 90 N.J. at 133 (citing Ideal Laundry Co. v. Gugliemone, 107 N.J. Eq. 108, 115-16 (E. & A. 1930)). This requirement is often implicitly tied to whether the right to the underlying claim is settled.

The "arbitrary, capricious and unreasonable" standard of review imposes a heavy burden on challengers of board actions and "means having no rational basis." Piccoli v. Ed. of Educ. of Ramapo Indian Hills Regional School District, OAL DKT. EDU 1839-98 (January 22, 1999) (citing Bayshore Sewage Co. v. Dent. of Envir. Protection, 122 N.J. Super. 184, 199-200 (Ch. Div. 1973), aff'd 131 N.J. Super. 37 (App. Div. 1974). Still,

petitioners present evidence that the District did not consider its transportation policies and the criteria it must employ in evaluating the hazards of a child's pedestrian route to and from school. The District primarily relied upon crossing guards whose shifts ended before the child would need to cross various intersections safely or missing personnel at others.

Thus, I **CONCLUDE** that petitioners have satisfied this criterion for emergent relief.

Balancing of the Equities

Lastly, petitioners meet the fourth emergent relief standard, which involves "the relative hardship to the parties in granting or denying relief." Crowe, 90 N.J. at 134 (citing Isolantite Inc. v. United Elect. Radio & Mach. Workers, 130 N.J.Eq. 506, 515 (Ch.1941), mod. on other grounds, 132 N.J.Eq. 613 (E. & A. 1942)). Petitioners must demonstrate that they will suffer more significant harm than the Board if this tribunal does not grant the requested relief. Moreover, petitioners must show that "the inconvenience or loss to the opposing party will be minimal if the relief is obtained." Zoning Bd. 8 of Adjustment of Sparta Tp. v. Service Elec. Cable Television of New Jersey, Inc., 198 N.J. Super. 370, 379 (App. Div. 1985).

Simply put, the safety risk to the child outweighs the District's financial concerns. It operates buses that could accommodate this child.

Based on the above discussion, I **CONCLUDE** that petitioners' request for emergent relief meets the requirements under N.J.A.C. 6A:3-1.6 and is **GRANTED**. Thus, I **CONCLUDE** that the District must provide busing to petitioners' minor child during the pendency of petitioners' challenge to the appropriateness of the District's determination regarding transportation, although not on afternoons involving aftercare.

ORDER

Therefore, I **ORDER** that petitioner's request for emergency relief be and is hereby **GRANTED** and that the District begin busing the minor child to and from school, absent days involving aftercare, as soon as possible.

This order on application for emergency relief may be adopted, modified, or rejected by the Commissioner of Education, who by law is authorized to make a final decision in this matter. The final decision shall be issued without undue delay but no later than forty-five (45) days following the entry of this order. If the Commissioner of Education does not adopt, modify, or reject this order within forty-five days, this recommended order shall become a final decision on the issue of emergent relief under N.J.S.A. 52:14B-10.

November 28, 2023

DATE

NANCI G. STOKES, ALJ

Date Mailed to Parties:

ljb

APPENDIX

WITNESSES:

For Petitioner:

H.S and S.B.

For Respondent:

Stanley Valles, Chief Security Officer for the District

DOCUMENTS:

For Petitioner:

P-1 Petition with attachments

P-2 Email dated November 22, 2023 with attachments

P-3 Email dated November 27, 2023, with attachments and videos

P-4 Email dated November 28, 2023, with attachments and videos

For Respondent:

R-1 Response to emergent relief application and certification of Eric Burnside

R-2 Email dated November 27, 2023 from the MPD Chief of Police

368-23
OAL Dkt. No. EDU 10137-22
Agency Dkt. No. 257-9/22

New Jersey Commissioner of Education

Final Decision

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

Petitioner,

v.

Raymond Marini, Interim Executive County Superintendent, Board of Education of the Township of Easthampton, Burlington County, and A.T., on behalf of minor children, A.T. and N.C.,

Respondents.

The record of this matter, the proposed Settlement Agreement and General Release (Agreement), and the Initial Decision issued by the Office of Administrative Law pursuant to *N.J.A.C.* 1:1-19.1, have been reviewed. Upon such review, the Commissioner notes that Paragraph 1 of the Agreement references an action that has preceded the consideration of the settlement by the Commissioner of Education. The parties are reminded that a settlement of litigation before the Commissioner is not binding until the Commissioner has approved the settlement.

In light of the foregoing, the Commissioner adopts the Initial Decision as the final decision in this matter, provided that the parties have already implemented the settlement terms or have agreed upon mutually satisfactory alternate dates for the effectuation of the terms of the Agreement. Assuming same, the matter is hereby dismissed.

IT IS SO ORDERED.

Angelica Allen-McMillan, Ed.D.
ACTING COMMISSIONER OF EDUCATION

Date of Decision: December 12, 2023
Date of Mailing: December 14, 2023

State of New Jersey
OFFICE OF ADMINISTRATIVE LAW

INITIAL DECISION

SETTLEMENT

OAL DKT. NO. EDU 10137-22

AGENCY DKT. NO. 257-9/22

BOARD OF EDUCATION OF THE TOWNSHIP OF FLORENCE, BURLINGTON COUNTY,

Petitioner,

v.

RAYMOND MARINI, INTERIM EXECUTIVE COUNTY SUPERINTENDENT, BOARD OF EDUCATION OF THE TOWNSHIP OF EASTAMPTON, BURLINGTON COUNTY, AND A.T., ON BEHLAF OF MINOR CHILDREN, A.T. AND N.C.,

Respondents.

Geoffrey Stark, Esq., for petitioner, Board of Education Township of Florence (Capehart Scatchard, P.A., attorneys)

Laurie Fichera and Colin Klika, Deputy Attorney Generals, for respondent, Raymond Marini (Matthew J. Platkin, Attorney General, State of New Jersey, attorney

Emily E. Strawbridge, Esq., for respondent, Eastampton Township Board of Education (Parker McCay, P.A., attorneys)

A.T., respondent, on behalf of minor children A.T. and N.C., pro se

Record Closed: November 27, 2023 Decided: November 28, 2023

BEFORE **SARAH G. CROWLEY,** ALJ:

This matter was transmitted to the Office of Administrative Law on November 14, 2022, for determination as a contested case, pursuant to N.J.S.A. 52:14B-1 to -15 and N.J.S.A. 52:14F-1 to -13.

The parties have agreed to a settlement and entered into a Settlement Agreement, indicating the terms of settlement, including the withdrawal of the petition and counter-petition. The parties submitted the Settlement Agreement, and the Board Resolution showing that at its meeting on September 19, 2023, the Eastampton Township Board of Education (Board) adopted a resolution approving the settlement, both of which are attached and fully incorporated herein. (J-1.)

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

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

2. The settlement fully disposes of all issues in controversy.

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

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

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

Sarah G. Crowley

November 28, 2023
DATE

SARAH G. CROWLEY, ALJ

Date Received at Agency: November 28, 2023

Date Mailed to Parties: November 28, 2023

SGC/kl/lam

APPENDIX

EXHIBITS

Joint

J-1 Settlement Agreement and Board Minutes of September 19, 2023

SETTLEMENT AGREEMENT BETWEEN THE FLORENCE TOWNSHIP BOARD OF EDUCATION AND EASTAMPTON TOWNSHIP BOARD OF EDUCATION

This Settlement Agreement and General Release ("Agreement") dated September 19th, 2023 is entered into by and between the Florence Township Board of Education ("Florence") and the Eastampton Township Board of Education ("Eastampton") (collectively referred to as the "Parties") to resolve and settle any and all outstanding issues between the Parties regarding financial responsibility for educating students A.T., and N.C. (the "Students").

WHEREAS, Florence is a local public school board of education organized under Title 18A of the New Jersey Statutes with its principal offices at 201 Cedar Street, Florence, New Jersey 08518 in Burlington County;

WHEREAS, Eastampton is a local public school board of education organized under Title 18A of the New Jersey Statutes with its principal offices at 1 Student Drive, Eastampton, New Jersey 08060 in Burlington County;

WHEREAS, a dispute arose between the Parties regarding the issue of which school district is financially responsible for educating the Students for the period running from September 1, 2021 through April 25, 2022;

WHEREAS, after extensive negotiations between counsel and in order to resolve this dispute between the Parties without continuing with time-consuming and costly litigation, the Parties have agreed to a full and final settlement regarding the financial responsibility of educating the Students for the period running from September 1, 2021 through April 25, 2022; and

NOW, THEREFORE, the Parties having a desire to settle the above matter in an amicable way, hereby agree as follows:

1. **Settlement Amount**: Within fifteen (15) school days following execution of this Agreement, Florence shall pay Eastampton the amount of Twelve-Thousand, Six Hundred Fifty-One and 21/100 Dollars ($12,651.21).

2. **Withdrawal of Claims**: Within three (3) business days of Eastampton's receipt of the Settlement Amount set forth in Paragraph 1, above, the Parties shall withdraw their respective Petition of Appeal and Cross Petition of Appeal from the Office of Administrative Law, thereby terminating the litigation captioned Florence Township Board of Education v. Raymond Marini, Interim Executive County Superintendent, New Jersey Department of Education, the Eastampton Township Board of Education, Burlington County, and A.T. o/b/o minor children A.T. and N.C., Docket No.: EDU 10137-2022S; Agency Reference No.: 257-9/22.

3. **Mutual Release**: The Parties, and on behalf of their agents, servants, employees, officers, stockholders, owners, affiliates, representatives, partners, insurers, and successors, do hereby release and forever discharge all claims related to or arising from the issue of financial responsibility of educating the Students for the period running from September 1, 2021 through April 25, 2022.

4. **No Prevailing Party Status**: The Parties agree that neither party shall be deemed a "prevailing party." Each party is responsible for their respective attorney's fees.

5. **No Admission of Liability**: This Agreement shall not constitute or be construed to constitute an admission of liability, or of any wrongdoing, under common law, state law, U.S. law, any other law, or otherwise, by the Parties to this Agreement.

6. **Confidentiality**: The Parties expressly represent, warrant, covenant and agree that the terms, conditions and contents of this Agreement shall be kept confidential and shall not

be disclosed, revealed or otherwise communicated, directly or indirectly, to any person or legal entity in any way whatsoever, excluding, as necessary, (a) to the Parties' current or future insurer or broker or in the course of making application for future insurance; (b) as required in the normal course of business for audits and accountings; (c) to the Parties' legal representatives; (d) by written agreement of the Parties hereto; (e) to enforce this Agreement; (f) pursuant to public records laws; (g) pursuant to a subpoena; or (h) by order of a Court of competent jurisdiction. The Parties may say only that the matter has been amicably resolved. The Parties reserve all remedies, including but not limited to equitable relief, in the event of a breach.

7. **Approval by Board**: This Agreement is subject to formal approval by the Florence Township Board of Education and the Eastampton Township Board of Education. If the Boards do not approve the Agreement, the Parties retain all rights.

8. **Admissibility**: This Agreement and all communications and negotiations relating to the Agreement shall not be admissible in any suit, action or other proceeding, except as shall be necessary to enforce the terms of the Agreement.

9. **Who is Bound**: The Florence Township Board of Education and the Eastampton Township Board of Education are bound by this Agreement. Those who succeed to their rights and responsibilities are also bound.

10. **Governing Law**: This Agreement shall be governed and construed under the laws of the State of New Jersey.

11. **Adequate Consideration**: The Parties acknowledge that the total consideration set forth herein is a fair and sufficient settlement to resolve the released claims.

12. **Voluntary Acceptance:** The Parties have had the opportunity to review this Agreement and the release contained herein with their respective attorneys, and after consultation with their respective attorneys, they voluntarily accept the consideration described in this Agreement for the purpose of making a full and final compromise, adjustment, and settlement of the matters described in this Agreement.

13. **Enforceability:** The Parties expressly reserve the right to enforce this Agreement in a court of competent jurisdiction.

14. **Severability:** In the event that any provision, or portion of a provision, is deemed to be contrary to law, that provision, or portion of a provision, shall be severed from this Agreement, and the remaining provisions of this Agreement shall remain in full force and effect.

15. **Entire Agreement:** This Agreement contains the entire agreement and understanding among the Parties hereto, and supersedes all of their prior negotiations, understandings and agreements regarding the settlement of this matter. There are no oral understandings, terms or conditions between the Parties, and neither party has relied upon any representation or warranty expressed or implied, not expressly set forth in this Agreement. This Agreement may not be changed or amended orally, but only by an agreement in writing signed by the party against whom enforcement of any such change or modification is sought.

16. **Signatures:** The Parties to this Agreement represent that each has read, understands and agrees to the terms of this Agreement and has consulted with its counsel prior to signing this agreement. It is also agreed that no statement or representation, other than those expressed herein have been made or relied upon in connection with making this Agreement. It is understood that this Agreement contains the entire agreement.

17. **Counterparts:** This Agreement may be executed in two or more counterparts, each of which shall be deemed an original, but all of which together shall constitute one and the same instrument. This Agreement shall be binding when one or more counterparts hereof, individually or taken together, shall bear the signatures of the Parties reflected hereon as signatories. As used herein, "counterparts" shall include full copies of this Agreement signed and delivered by facsimile transmission, as well as Portable Document Format ("PDF") copies.

ON BEHALF OF THE FLORENCE TOWNSHIP BOARD OF EDUCATION:

Dr. Christine Skinner
Board President

Dated: _____

Mark Leung
Business Administrator/Board Secretary

Dated: 9/26/2023

ON BEHALF OF THE EASTAMPTON TOWNSHIP BOARD OF EDUCATION

Kerry Douglas
Board President

Dated: 9/20/23

Ashlee Caldwell
Business Administrator/Board Secretary

Dated: 9/20/2023

369-23
OAL Dkt. No. EDU 03270-23
Agency Dkt. No. 19-1/23

New Jersey Commissioner of Education

Final Decision

R.T. and L.T., on behalf of minor child, L.T.,

Petitioners,

v.

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

Respondent.

The record of this matter, the proposed Settlement Agreement and General Release (Agreement) and the Initial Decision issued by the Office of Administrative Law have been reviewed pursuant to *N.J.A.C.* 1:1-19.1. Upon review, the Commissioner approves the terms of the Agreement and adopts the Initial Decision as the final decision in this matter. The case is hereby dismissed, subject to compliance with the terms of the Agreement.

IT IS SO ORDERED.

Angelica Allen-McMillan, J.D.S.

ACTING COMMISSIONER OF EDUCATION

Date of Decision: December 12, 2023
Date of Mailing: December 14, 2023

State of New Jersey
OFFICE OF ADMINISTRATIVE LAW

INITIAL DECISION
SETTLEMENT
OAL DKT. NO. EDU 03270-23
AGENCY DKT. NO. 19-1/23

R.T. AND L.T. ON BEHALF OF L.T.,
Petitioner,
v.
BOARD OF EDUCATION,OF
BOROUGH OF MIDDLESEX,
MIDDLESEX COUNTY,
Respondent.

R.T., petitioner, pro se

Frank J. Morano, Esq., for respondent (Flanagan Barone O'Brien, attorneys)

Record Closed: November 27, 2023 Decided: November 29, 2023

BEFORE **KIM C. BELIN**, ALJ:

This matter was transmitted to the Office of Administrative Law on April 14,2023 for determination as a contested case, pursuant to N.J.S.A. 52:14B-1 to -15 and N.J.S.A. 52:14F-1 to -13.

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

I have reviewed the record and the terms of the Settlement Agreement and I **FIND**:

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

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

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

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

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

Kim C. Belin

November 29, 2023
DATE

KIM C. BELIN, ALJ

Date Received at Agency: November 30, 2023

Date Mailed to Parties: November 30, 2023

KCB/am

Rita F. Barone, Esq.
Attorney ID No. 038211995
FLANAGAN, BARONE & O'BRIEN
4 Essex Avenue – Suite 200
P.O. Box 259
Bernardsville, New Jersey 07924
Attorneys for Respondent, Middlesex Boro Board of Education
Our File: 304-28452 (RFB)

R.T. AND L.T. O/B/O L.T., Petitioner, vs. MIDDLESEX BORO BOARD OF EDUCATION, Respondent.	BEFORE THE OFFICE OF ADMINISTRATIVE LAW STATE OF NEW JERSEY Agency Docket No. 19-1/23 **Settlement Agreement and General Release**

WHEREAS, L.T. is a student residing within the Middlesex Boro Board of Education (hereinafter referred to as the "District" or "Board"); and

WHEREAS, the Petitioners, R.T. and L.T. and. o/b/o L.T. (hereinafter referred to as the "Petitioners" or "Parents") filed a Petition of Appeal alleging that the Harassment Intimidation and Bullying (HIB) charge that was founded against their child, L.T., was unfounded, and

WHEREAS, the Petitioners and Board have agreed to resolve all issues as follows:

1) The Board has voted to rescind the HIB finding on October 18, 2023; and

2) The Board has agreed to refer to the incident that was the subject of the HIB investigation as a violation of the District Code of Conduct; and

3) In consideration of the above, the Parents, individually, and on behalf of L.T. hereby release, acquit and forever discharge the Board, its current and former members, officers, directors, servants, employees, agents, successors, attorneys, assigns and affiliates, of and from any and all issues, causes of action, claims, liabilities, demands, indemnities, which have accrued

regarding the November 15, 2022 finding of the HIB violation against L.T. including, but not limited to, any and all claims and demands directly or indirectly arising from or in any way connected with the Board's November 15, 2022 HIB finding, damages (whether compensatory, incidental, punitive or otherwise), and experts' fee or costs. The Parents specifically waive their right to reimbursement for attorneys' fees and costs, under any State or Federal law, statute, rule or regulation, and regardless of the forum for the claim.

4) This Agreement is made without any admission of liability or responsibility by the Board and shall not be construed as an admission by the Board that it did not, at all times relevant hereto, properly perform its duties and obligations regarding investigation, evaluation, and finding of the HIB violation. This Agreement is a compromise of disputed claims by the Board in order to avoid the cost and expense of litigation only and is not an admission of liability.

5) This Agreement represents the entire Agreement between the Parties, and will not be modified in whole or in part except by a mutual subsequent written and signed Agreement. It is acknowledged that this Agreement has been entered into freely, willingly and voluntarily, without duress or coercion, and with the opportunity to consult with counsel of their choosing and option. The Parties understand the contents of this Settlement Agreement and Release and both parties are satisfied with their respective legal representation.

6) The terms of this Agreement shall be held in strictest confidence by all Parties and shall not be publicized or disclosed in any manner whatsoever, except that: (a) either party may disclose this Agreement in confidence to their attorneys; (b) the Board may disclose this Agreement as necessary to fulfill its obligation under the Open Public Record Act, as well as all other standard or legally required reporting or disclosure requirements; and (c) as necessary with regard to any proceeding for the enforcement of this Agreement or as required by law.

7) This Agreement shall be governed by the Laws of the State of New Jersey and constitutes a legal release of all claims that were or could have been raised as set forth herein.

8) In the event that any provision of this Agreement is held to be void or unenforceable by any court or regulatory authority having jurisdiction thereof, such ruling will not affect the validity of this contract; the remaining provisions shall continue to be in full force and effect.

9) This Agreement constitutes the entire Agreement of the Parties with respect to the subject matter hereof, and supersedes all prior written or oral and all contemporaneous oral agreements, understandings, and negotiations

10) This Agreement may be executed in one or more original, emailed or telecopied counterparts, all of which together shall be one instrument, and all of which shall be considered duplicate originals.

11) This Agreement may only be amended in writing by way of a document signed by all Parties and counsel.

12) The Parties agree to cooperate fully and execute any and all supplementary documents and to take all additional actions which may be necessary or appropriate to obtain the full force and effect of the basic terms and interest of this Settlement Agreement and General Release.

IN WITNESS WHEREOF, the Parties have hereunto set their hands and seals the date and year of aforesaid.

Annette Giordano
Board Secretary
DATE: 11/03/2023

Todd Nicolay
Board President
DATE: 11/03/2023

L.T., Parent

DATE:

R.T., Parent

DATE:

Rita F. Barone, Esq.
Attorney ID No. 038211995
FLANAGAN, BARONE & O'BRIEN
4 Essex Avenue Suite 200
P.O. Box 259
Bernardsville, New Jersey 07924
Attorneys for Respondent, Middlesex Boro Board of Education
Our File: 304-28452 (RFB)

R.T. AND L.T. O/B/O L.T., Petitioner. vs. MIDDLESEX BORO BOARD OF EDUCATION, Respondent.	BEFORE THE OFFICE OF ADMINISTRATIVE LAW STATE OF NEW JERSEY Agency Docket No. 19-1-23 **Settlement Agreement and General Release**

WHEREAS, L.T. is a student residing within the Middlesex Boro Board of Education (hereinafter referred to as the "District" or "Board"); and

WHEREAS, the Petitioners, R.T. and L.T. and, o/b/o L.T. (hereinafter referred to as the "Petitioners" or "Parents") filed a Petition of Appeal alleging that the Harassment Intimidation and Bullying (HIB) charge that was founded against their child, L.T., was unfounded, and

WHEREAS, the Petitioners and Board have agreed to resolve all issues as follows:

1) The Board has voted to rescind the HIB finding on October 18, 2023; and

2) The Board has agreed to refer to the incident that was the subject of the HIB investigation as a violation of the District Code of Conduct; and

3) In consideration of the above, the Parents, individually, and on behalf of L.T. hereby release, acquit and forever discharge the Board, its current and former members, officers, directors, servants, employees, agents, successors, attorneys, assigns and affiliates, of and from any and all issues, causes of action, claims, liabilities, demands, indemnities, which have accrued

regarding the November 15, 2022 finding of the HIB violation against I.I. including, but not limited to, any and all claims and demands directly or indirectly arising from or in any way connected with the Board's November 15, 2022 HIB finding, damages (whether compensatory, incidental, punitive or otherwise), and experts' fee or costs. The Parents specifically waive their right to reimbursement for attorneys' fees and costs, under any State or Federal law, statute, rule or regulation, and regardless of the forum for the claim

4) This Agreement is made without any admission of liability or responsibility by the Board and shall not be construed as an admission by the Board that it did not, at all times relevant hereto, properly perform its duties and obligations regarding investigation, evaluation, and finding of the HIB violation. This Agreement is a compromise of disputed claims by the Board in order to avoid the cost and expense of litigation only and is not an admission of liability.

5) This Agreement represents the entire Agreement between the Parties, and will not be modified in whole or in part except by a mutual subsequent written and signed Agreement. It is acknowledged that this Agreement has been entered into freely, willingly and voluntarily, without duress or coercion, and with the opportunity to consult with counsel of their choosing and option. The Parties understand the contents of this Settlement Agreement and Release and both parties are satisfied with their respective legal representation.

6) The terms of this Agreement shall be held in strictest confidence by all Parties and shall not be publicized or disclosed in any manner whatsoever, except that: (a) either party may disclose this Agreement in confidence to their attorneys; (b) the Board may disclose this Agreement as necessary to fulfill its obligation under the Open Public Record Act, as well as all other standard or legally required reporting or disclosure requirements; and (c) as necessary with regard to any proceeding for the enforcement of this Agreement or as required by law

7) This Agreement shall be governed by the Laws of the State of New Jersey and constitutes a legal release of all claims that were or could have been raised as set forth herein

8) In the event that any provision of this Agreement is held to be void or unenforceable by any court or regulatory authority having jurisdiction thereof, such ruling will not affect the validity of this contract; the remaining provisions shall continue to be in full force and effect

9) This Agreement constitutes the entire Agreement of the Parties with respect to the subject matter hereof, and supersedes all prior written or oral and all contemporaneous oral agreements, understandings, and negotiations

10) This Agreement may be executed in one or more original, emailed or telecopied counterparts, all of which together shall be one instrument, and all of which shall be considered duplicate originals.

11) This Agreement may only be amended in writing by way of a document signed by all Parties and counsel.

12) The Parties agree to cooperate fully and execute any and all supplementary documents and to take all additional actions which may be necessary or appropriate to obtain the full force and effect of the basic terms and interest of this Settlement Agreement and General Release.

IN WITNESS WHEREOF, the Parties have hereunto set their hands and seals the date and year of aforesaid

Annette Giordano
Board Secretary

DATE:

Todd Nicolay
Board President

DATE:

L.L., Parent 11/20/23

DATE:

R.T., Parent

DATE: 11/20/23

375-23
OAL Dkt. No. EDU 2247-23 (EDU 06545-23 on remand)
Agency Dkt. No. 50-3/23

New Jersey Commissioner of Education

Final Decision

R.J., on behalf of minor child, J.C.,

Petitioner,

v.

Board of Education of the Township of Union, Union County,

Respondent.

The record of this matter, which was transmitted to the Commissioner by the Office of Administrative Law (OAL) pursuant to *N.J.A.C.* 1:1-14.4 and includes an advisement of petitioner's failure to appear at the scheduled OAL hearing on November 30, 2023, has been reviewed. Petitioner did not file an explanation for her failure to appear, notwithstanding the opportunity to do so. Accordingly, this matter is no longer deemed to be a contested case before the Commissioner and is hereby dismissed with prejudice.

IT IS SO ORDERED.[1]

Angelica Allen-McMillan, Ed.D.
ACTING COMMISSIONER OF EDUCATION

Date of Decision: December 20, 2023
Date of Mailing: December 20, 2023

[1] This decision may be appealed to the Appellate Division of the Superior Court pursuant to *N.J.S.A.* 18A:6-9.1. Under *N.J.Ct.R.* 2:4-1(b), a notice of appeal must be filed with the Appellate Division within 45 days from the date of mailing of this decision.

State of New Jersey
OFFICE OF ADMINISTRATIVE LAW

INITIAL DECISION

OAL Docket No.: EDU 06545-23

AGENCY DKT. No.: 50-3/23

(ON REMAND)

OAL DKT. NO. EDU 02247-23

R.J. ON BEHALF OF MINOR CHILD J.C.,

Petitioner,

v.

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

Respondent.

R.J. o/b/o minor child, **J.C**. pro se

Robert Devaney, Esq., for respondent (Florio Perrucci Steinhardt Cappelli Tipton and Taylor, attorneys)

Record Closed: December 1, 2023 Decided: December 1, 2023

BEFORE **JUDE-ANTHONY TISCORNIA**, ALJ:

STATEMENT OF THE CASE

The forgoing matter involves a petition challenging residency determination made by the Township of Union (Union) against R.J. on remand from the Commissioner of the New Jersey Department of Education (Commissioner). The original complaint was returned to the agency due to R.J.'s continued failure to appear at telephonic conferences, including a peremptory telephonic conference that had been set for June 21, 2023. The Commissioner found this action improper and directed the undersigned to set the matter down for a hearing.

ISSUE

Notwithstanding the challenge to the underlying residency determination, neither party appeared at the hearing on the scheduled hearing date.

PROCEDURAL HISTORY

The underlying matter, docketed as EDU 02247-2023, was returned by the undersigned to the Department of Education, office of Controversies and Disputes (Department) on or about June 22, 2023. The matter was remanded to the undersigned by Order of the Commissioner dated July 17, 2023. The matter was re-docketed as EDU 06545-2023 and transmitted to the Office of Administrative Law (OAL) on July 20, 2023.

On July 28, 2023, the undersigned receive confirmation via e-mail from both R.J. and the Board's representative, Mr. Devaney, that both were available on August 4, 2023, telephonic conference. The conference was conducted on August 4, 2023, with Mr. Devaney appearing on behalf of the Board, and R.J. failing to appear.

On September 28, 2023, the parties were served with notice of a peremptory hearing date of November 30, 2023, at 9:30 a.m. On the scheduled hearing date, neither party appeared. At approximately 10:00 a.m. on the scheduled hearing date, the

undersigned received a Substitution of Attorney from the office of Lester E. Taylor III, Esq., advising that he was replacing Mr. Devaney as the attorney of record on the matter.

The matter was held by the undersigned for one day. The record was closed on December 1, 2023, with no communication having been received from R.J. by the undersigned.

Legal Conclusion

N.J.A.C. § 1:1-14.4 Failure to appear; sanctions for failure to appear

> **(a)** If, after appropriate notice, neither a party nor a representative appears at any proceeding scheduled by the Clerk or judge, the judge shall hold the matter for one day before taking any action. If the judge does not receive an explanation for the nonappearance within one day, the judge shall, unless proceeding pursuant to (d) below, direct the Clerk to return the matter to the transmitting agency for appropriate disposition pursuant to N.J.A.C. 1:1-3.3(b) and (c).
>
> **(b)** If the nonappearing party submits an explanation in writing, a copy must be served on all other parties and the other parties shall be given an opportunity to respond.
>
> **(c)** If the judge receives an explanation:
>
> > **1.** If the judge concludes that there was good cause for the failure to appear, the judge shall reschedule the matter for hearing; or
> > **2.** If the judge concludes that there was no good cause for the failure to appear, the judge may refuse to reschedule the matter and shall issue an initial decision explaining the basis for that conclusion…

I **Conclude** that the substitution of attorney receive after the date and time of the scheduled hearing date does **not** constitute good cause for the petitioner school board and/or their representative to have failed to appear, as the matter was set down for a

hearing several months in advance and proper notice was issued by the OAL. I further **Conclude** that R.J. has provided no explanation for their failure to appear at the November 30, 2023, hearing.

Based on my conclusions above, and in conjunction N.J.A.C. 1:1-14.4 as cited above, I, hereby, direct the Clerk to return the matter to the transmitting agency for appropriate disposition pursuant to N.J.A.C. 1:1-3.3(b) and (c).

ORDER

Based upon the foregoing, it is **ORDERED** that the foregoing matter shall be returned to the Commissioner of the Department of Education.

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

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

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

December 1, 2023

DATE

JUDE-ANTHONY TISCORNIA, ALJ

Date Received at Agency: 12/1/23

Date Mailed to Parties: 12/1/23

id

376-23
OAL Dkt. No. EDU 10039-23
Agency Dkt. No. 235-9/23

New Jersey Commissioner of Education

Final Decision

Glen Borgenicht,

Petitioner,

v.

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

Respondent.

The record of this matter, which was transmitted to the Commissioner by the Office of Administrative Law (OAL) pursuant to *N.J.A.C.* 1:1-14.4 and includes an advisement of petitioner's failure to appear at the scheduled OAL hearing on November 27, 2023, has been reviewed. Petitioner did not file an explanation for his failure to appear, notwithstanding the opportunity to do so. Accordingly, this matter is no longer deemed to be a contested case before the Commissioner and is hereby dismissed with prejudice.

IT IS SO ORDERED.[1]

Angelica Allen-McMillan, Ed.D.
ACTING COMMISSIONER OF EDUCATION

Date of Decision: December 20, 2023
Date of Mailing: December 20, 2023

[1] This decision may be appealed to the Appellate Division of the Superior Court pursuant to *N.J.S.A.* 18A:6-9.1. Under *N.J.Ct.R.* 2:4-1(b), a notice of appeal must be filed with the Appellate Division within 45 days from the date of mailing of this decision.

377-23

New Jersey Commissioner of Education

Final Decision

J.B., on behalf of minor children, C.B. and C.B.,

Petitioner,

v.

Board of Education of the City of Elizabeth,
Union County,

Respondent.

Synopsis

In this case on remand, *pro se* petitioner appealed the determination of the respondent Board that she and her family are not domiciled in Elizabeth and that her children are therefore not entitled to a free public education in Elizabeth schools. Petitioner admitted that she and her husband and children had been staying temporarily at a relative's home in Hillside due to a family emergency but had been forthcoming with the District as to the situation that necessitated their short-term relocation. Petitioner asserted that the family remains permanently domiciled in Elizabeth and therefore the children are entitled to attend school in the District. The Board filed a counterclaim demanding tuition repayment for the period since March 21, 2023.

On remand, the ALJ found, *inter alia*, that: upon review of issues related to petitioner's R-6, which was not addressed in the original OAL decision in this matter, the changes of address and the affidavit submitted to the Hillside school district by the petitioner were an attempt to comply with what she had been told by the Board, and were undertaken without prejudice to her appeal of the Board's residency determination; the express language of the affidavit indicates that the Hillside residency was temporary; the petitioner's testimony was very credible; and none of petitioner's actions were done to evade school officials. The ALJ concluded that petitioner has proven that the family's residence remains in Elizabeth; accordingly, petitioner's appeal was granted and the Board's counterclaim for tuition was denied.

Upon review on remand, the Commissioner adopted the ALJ's Initial Decision issued August 18, 2023, as supplemented by the Initial Decision issued November 28, 2023, as the final decision in this matter. In so doing, the Commissioner noted that she is satisfied that petitioner's residency appeal should be granted based on the additional factual findings made by the ALJ on remand and the ALJ's determination that petitioner's testimony regarding Exhibit R-6 was highly credible.

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

377-23
OAL Dkt. No. EDU 02537-23, EDU 10585-23 (remand)
Agency Dkt. No. 63-3/23

New Jersey Commissioner of Education

Final Decision

J.B., on behalf of minor children, C.B. and C.B.,

Petitioner,

v.

Board of Education of the City of Elizabeth, Union County,

Respondent.

In this remanded matter, petitioner appealed the determination of the Elizabeth Board of Education (Board) that she and her minor children do not reside in Elizabeth. In an Initial Decision dated August 18, 2023, the Administrative Law Judge (ALJ) concluded that the family had temporarily relocated away from their home in Elizabeth due to a family emergency, but that their residence remained in Elizabeth and that the minor children were, therefore, entitled to a free education in Elizabeth's schools. The Board filed exceptions. The Commissioner remanded the matter for the ALJ to render factual findings regarding Exhibit R-6, consisting of documents that demonstrated that petitioner changed her address with multiple entities and submitted an affidavit to the Hillside school district that she and her children resided there.

In an Initial Decision dated November 28, 2023, the ALJ found that petitioner's changes of address and the affidavit submitted to the Hillside school district were an attempt to comply with what petitioner had been told by the Board, but were undertaken without prejudice to her

appeal of the Board's residency determination. The ALJ noted that the express language of the affidavit indicates that the Hillside residency was temporary. The ALJ found that petitioner's testimony was very credible, and that none of her actions were done to evade school officials. Accordingly, the ALJ granted petitioner's appeal and denied the Board's counterclaim for tuition. The parties did not file exceptions to the November 28, 2023 Initial Decision.

The Commissioner adopts the ALJ's Initial Decision issued August 18, 2023, as supplemented by the Initial Decision issued November 28, 2023, as the final decision in this matter. Upon consideration of the additional factual findings made by the ALJ, coupled with the ALJ's determination that petitioner testified very credibly regarding Exhibit R-6, the Commissioner is satisfied that petitioner's residency appeal should be granted.

When reviewing an ALJ's Initial Decision, the Commissioner "may not reject or modify any findings of fact as to issues of credibility of lay witness testimony unless it is first determined from a review of the record that the findings are arbitrary, capricious or unreasonable or are not supported by sufficient, competent and credible evidence in the record." *N.J.S.A.* 52:14B-10(c); *Parsells v. Bd. of Educ. of Borough of Somerville, Somerset Cnty.*, 254 *N.J.* 152, 159 (2023) (holding that the ALJ's credibility findings are entitled to deference). "When such a record, involving lay witnesses, can support more than one factual finding, it is the ALJ's credibility findings that control, unless they are arbitrary or not based on sufficient credible evidence in the record as a whole." *Cavalieri v. Bd. of Trs. of Pub. Empl. Ret. Sys.*, 368 *N.J. Super.* 527, 537 (App. Div. 2004).

Following a careful review of the entire record, the Commissioner has identified nothing arbitrary, capricious, or unreasonable about the ALJ's findings, which are adequately supported

by sufficient, competent, and credible evidence. The Commissioner concurs with the ALJ that J.B. and her minor children C.B. and C.B. were domiciled in Elizabeth during the 2022-2023 school year and that the minor children were therefore entitled to a free education in Elizabeth's public schools during that time period. Thus, the Board is not entitled to reimbursement from petitioner for tuition costs.

Accordingly, the petition of appeal is hereby granted, and respondent's counterclaim for tuition is hereby dismissed.

IT IS SO ORDERED.[1]

Angelina Allen McMillan, Jd.D.
ACTING COMMISSIONER OF EDUCATION

Date of Decision: December 20, 2023
Date of Mailing: December 20, 2023

[1] This decision may be appealed to the Appellate Division of the Superior Court pursuant to *N.J.S.A.* 18A:6-9.1. Under *N.J.Ct.R.* 2:4-1(b), a notice of appeal must be filed with the Appellate Division within 45 days from the date of mailing of this decision.

State of New Jersey
OFFICE OF ADMINISTRATIVE LAW

INITIAL DECISION
(SUPPLEMENTAL)
OAL DKT. NO. EDU 10585-23
AGENCY DKT. NO. 63-3/23
(ON REMAND)
OAL DKT. EDU 02537-23

J.B. ON BEHALF OF MINOR CHILDREN
C.B. AND C.B.,
Petitioner
v.
CITY OF ELIZABETH BOARD OF EDUCATION
UNION COUNTY,
Respondent.

J.B., pro se

Brian J. Kane, Esq., for respondent Elizabeth Board of Education (LaCorte, Bundy, Varady and Kinsella, attorneys)

Record Closed: October 23, 2023 Decided: November 28, 2023

BEFORE **GAIL M. COOKSON,** ALJ:

STATEMENT OF THE CASE

This matter involved an appeal by J.B. from the non-residency determination made by the Board of Education of the City of Elizabeth (Board) with respect to her children C.B. and C.B., then in sixth and ninth grades. The petitioner challenged the finding of the

Board that they were not domiciled in the district and that her daughters were not entitled, therefore, to a free education.

PROCEDURAL HISTORY

By Initial Decision dated August 18, 2023, I ruled in favor of petitioner's appeal of the Board's residency determination. The matter was then reviewed by the Commissioner who determined on September 29, 2023, that the factual record was unclear as to one exhibit (R-6) that related to the assertion of residency in the district of Elizabeth. Accordingly, the matter was remanded to the OAL on October 5, 2023. It was returned and assigned to me on October 23, 2023.

FACTUAL DISCUSSION

I will not burden the record with duplicative information from the record already admitted during the prior plenary hearing and evaluated in the Initial Decision.

I apologize to the Commissioner and the parties that I did not comment on and refer to Exhibit R-6. In reviewing the record, it is clear to me, and I **FIND** the following supplemental findings:

In early April 2023, petitioner undertook to make changes to the addresses of certain of her accounts (MVC, bank; but not voter registration), and submitted an Affidavit to the Hillside Board of Education seeking to register them there in an attempt to comply with what she was being told by respondent, but without prejudice to her appeal herein. [R-6.] That Affidavit simply stated:

> I [J.B.], will be residing at 1287 White St., Hillside, NJ with my husband [J.B.] and our children [C. and C.B.] to care for our family member in the home [V.B.] until the 1287 house is sold or other a [sic] permanent living accommodation are [sic] established for Mr. [V.B.]

Even the express language of this statement indicates that the Hillside residence was temporary, not permanent, nor intended to be. Furthermore, at the hearing, petitioner testified that Hillside actually refused to register her daughters because the house at 1287

White Street was still owned by the Estate of her mother-in-law and they could provide no affidavit of ownership, lease or other legal documentation.

I **FIND** the testimony of J.B. to have been very credible with respect to Exhibit R-6 and the efforts she made to attempt to comply with what she thought was required of her. A credibility determination requires an overall assessment of the witness' story in light of its rationality, internal consistency, and the manner in which it "hangs together" with the other evidence. Daiichi Pharm. Co. v. Apotex, Inc., 441 F. Supp. 2d 672 (D.N.J. 2006). Ms. B and Mr. B's statements made sense and it was clear that J.B. made conscious, thought-out decisions every time she was required to provide an address to a third party. None of this was done to evade school officials and I so **FIND**.

CONCLUSIONS OF LAW

The right to a thorough and free education in the district of one's New Jersey domicile is well settled. A.M.S. ex rel. A.D.S. v. Bd. of Educ. of City of Margate, 409 N.J. Super. 149, 160-61 (App. Div. 2009). Therein, the court stated:

> N.J.A.C. 6A:22-2.1(b) requires school districts to adopt written policies and procedures related to student residency and to incorporate Department of Education (DOE) regulations pertaining to student residency into each district's policies and procedures. Moreover, in doing so, "a district board of education shall construe the provisions" of DOE regulations governing student residency "liberally so as to effectuate the right of students to a free public education." Ibid.

With Hillside refusing to register these children, respondent was essentially depriving them of a free public education. Moreover, I have found that petitioner still considers her domicile to be Elizabeth, to which they intend to return, and in which they continue to participate in the community. Accordingly, I **CONCLUDE** that petitioner J.B. has met the burden of proof on her appeal of the Board's non-residency determination. Therefore, I also **CONCLUDE** that the Board is not entitled to an award in its favor on the counterclaim for the full amount of the partial school year tuition cost.

ORDER

Based on the foregoing findings of fact and conclusions of law, it is **ORDERED** that the relief requested by J.B. on behalf of her children be and the same is **GRANTED** and her residency appeal is **UPHELD**. The decision of the Board with respect to their right to a free public education in Elizabeth is **REVERSED**. Accordingly, it is further **ORDERED** that respondent City of Elizabeth Board of Education's counterclaim for tuition reimbursement be and the same is **DENIED**.

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

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

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

Gail M. Cookson

November 28, 2023
DATE

GAIL M. COOKSON, ALJ

Date Received at Agency: 11/28/23

Date Mailed to Parties: 11/28/23

id

APPENDIX

LIST OF EXHIBITS

All Exhibits were provided with the original Initial Decision EDU 02537-23

For Petitioner

P-1 GSMLS Listing
P-2 Medical Prescription of Disability of V.B.
P-3 Before and After Photographs
P-4 Email Correspondence re Listing
P-5 Family Texts re Habitability Issues, etc.
P-6 744 Trumbull Payments in Lieu of Rent
P-7 Correspondence with District, with Affidavits
P-8 Worker Compensation and Accident documentation

For Respondent

R-1 Elizabeth BOE Demographics Information on C.B. and C.B.
R-2 Investigation Report of William Buteau, dated May 23, 2023
R-3 Notices of Initial Determinations of Ineligibility, dated February 7, 2023
R-4 Notices of Initial Determinations of Ineligibility, dated February 24, 2023
R-5 Laptop Surveillance
R-6 Petitioner's Proof of Residency
R-7 2022-2023 Elizabeth BOE School Calendar

380-23E+
OAL Dkt. No. EDU 13940-23
Agency Dkt. No. 339-12/23

New Jersey Commissioner of Education

Final Decision

T.B., on behalf of minor children U.B., H.B., K.B., A.B., and K.B.,

Petitioner,

v.

Board of Education of the Woodbury Heights School District, Gloucester County,

Respondent.

The record of this emergent matter and the recommended Order of the Administrative Law Judge (ALJ) have been reviewed. Upon such review, the Commissioner concurs with the ALJ – for the reasons thoroughly set forth in the recommended Order – that petitioner has demonstrated entitlement to emergent relief pursuant to the standards enunciated in *Crowe v. DeGioia,* 90 *N.J.* 126 (1982), and codified at *N.J.A.C.* 6A:3-1.6.

Accordingly, the recommended Order, granting the petitioner's application for emergent relief, is adopted. Petitioner's children shall be entitled to immediately return to school with all prior benefits, including, but not limited to, free breakfast and lunch. Petitioner's request for compensatory education is denied.

As the ALJ found that there are no remaining issues underlying the request for emergent relief, there are no further proceedings necessary in this matter. However, the Commissioner notes that the respondent issued a Final Notice of Ineligibility on December 19, 2023. Should

petitioner wish to contest the Board's decision, she may do so through the filing of a new petition of appeal.

IT IS SO ORDERED.

Angelina Allen-McMillan, Ed.D.

ACTING COMMISSIONER OF EDUCATION

Date of Decision: January 9, 2024
Date of Mailing: January 9, 2024

State of New Jersey
OFFICE OF ADMINISTRATIVE LAW

ORDER ON
EMERGENT RELIEF
OAL DKT. NO. EDU 13940-23
AGENCY DKT. NO. 339-12/23

T.B. ON BEHALF OF MINOR CHILDREN
U.B., H.B., K.B., A.B. and K.B.[1],
Petitioner,
v.
BOARD OF EDUCATION OF THE
WOODBURY HEIGHTS SCHOOL
DISTRICT, GLOUCESTER COUNTY,
Respondent.

Samuel Watson, Esq., for petitioner (South Jersey Legal Services, attorneys)

Geoffrey N. Stark, Esq., for respondent (Capehart Scatchard, attorneys)

BEFORE **DEIRDRE HARTMAN-ZOHLMAN**, ALJ:

STATEMENT OF THE CASE

Petitioner T.B. filed a petition of appeal with the Department of Education on or about December 15, 2023, seeking emergent relief against respondent, the Board of

[1] The transmittal omitted the initials of one of the minor children in the caption. Same is corrected above.

Education of the Woodbury Heights School District (District), from a denial of Woodbury Heights to permit her children to continue to attend school in the District by asserting that petitioner disenrolled her children from the District. Petitioner denies she disenrolled her children from the District and requests that the children be immediately reinstated or reenrolled back into the District.

PROCEDURAL HISTORY

The State Department of Education, Office of Controversies and Disputes (DOE) transmitted the application for emergent relief to the Office of Administrative Law, where it was filed on or about December 15, 2023. N.J.S.A. 52:14B-1 to -15; N.J.S.A. 52:14F-1 to -13. The matter was assigned to the undersigned for oral argument on December 20, 2023, via Zoom. Petitioner amended the appeal by motion at oral argument to additionally seek before and after care and compensatory education services for the time the children have been out of school.

UNDISPUTED FACTS ON EMERGENT PETITION

1. Petitioner has five minor children, U.B. age 11, H.B. age 10, K.B. age 8, A.B. age 8 and K.B. age 6. The minor children have been attending school in Woodbury Heights since September 2023.

2. The petitioner is homeless and has been living in various motels and with friends and relatives. On September 6, 2023, petitioner completed a McKinney-Vento Student Resident Information Form, provided by the District.

3. On November 30, 2023, the District served petitioner with a Preliminary Notice of Ineligibility. Petitioner requested an appeal hearing with the Woodbury Heights Board of Education, which was scheduled for December 12, 2023.

4. On December 8, 2023, petitioner called the school secretary, Ms. Van Zandt, and engaged in a discussion about transferring the children to another school district. Petitioner asserts that she was merely inquiring about the process of transferring

to another district in the event she secured housing in another district. Van Zandt alleges that petitioner specified that December 8, 2023, would be the children's last day, and as such, she prepared and emailed petitioner transfer cards that day.

5. On December 12, 2023, petitioner attended the hearing on the Preliminary Notice of Ineligibility with counsel. Petitioner's counsel advised the Board during that hearing that petitioner did not unenroll her children from the District.

6. On December 13, 2023, petitioner was advised by Mr. Rodia, the school administrator, that her children were not permitted to attend school.

7. On December 19, 2023, a Final Notice of Eligibility was issued by the District. The Final Notice of Eligibility states that the Board has determined that petitioner's children "do not meet the eligibility requirements for attendance" in the District.

LEGAL DISCUSSION AND CONCLUSIONS OF LAW

For the reasons set forth below after due consideration of the written submissions and oral argument received, I **CONCLUDE** that petitioner's request for emergent relief must be **GRANTED**.

Petitioner's petition for emergent relief may only be granted if she satisfies the well-known factors set forth in Crowe v. De Gioia, 90 N.J. 126 (1982), and I determine that the balance of equities favors granting said relief, to wit:

> 1. The petitioner will suffer irreparable harm if the requested relief is not granted;
>
> 2. The legal right underlying the petitioner's claim is settled;
>
> 3. The petitioner has a likelihood of prevailing on the merits of the underlying claim; and
>
> 4. When the equities and interests of the parties are balanced, the petitioner will suffer greater harm than the respondent will suffer if the requested relief is not granted.
>
> [N.J.A.C. 1:6A-12.1(e)]

The touchstone of emergent relief is whether irreparable harm will befall the petitioning party prior to the ability of a forum or agency to hear the underlying merits. In the within matter, the DOE only transmitted the appeal for emergent relief. The issue is the denial of Woodbury Heights to permit petitioner's children to continue to attend school in the District by asserting that petitioner disenrolled her children from the District. Petitioner denies she disenrolled her children from the District and requests that the children be immediately reinstated or reenrolled back into the District.

I start with the factor of irreparable harm and **CONCLUDE** that the removal of the children from the District with no ascending district for them to attend will be extremely disruptive to their academic and social development, deny them free breakfast and lunch provided by the District, deny them a safe and stable daytime environment, and do only harm.

The legal rights underlying this matter is whether petitioner disenrolled her children from the District. While the petitioner could have done so, she denies that she did. Petitioner and her children are homeless and were enrolled in the District through the McKinney-Vento Act. 42 U.S.C. §§11431 et seq. The Act, and the New Jersey regulations governing the education of homeless youth, promote stability by requiring a school district to continue to enroll the children through the duration of their homelessness, even if that homelessness takes them out of the district. Determination of a homeless child's district shall consider a child's best interest, with notice to a parent of enrollment rights, appeal rights, and continued enrollment pending a final resolution. 42 U.S.C. §§11432(g)(3)(E); N.J.A.C. 6A:17-2.7. Unenrollment based upon an asserted and disputed statement by a school secretary undermines the legal rights and due process underlying petitioner's claim. It is settled that petitioner has a right to keep her children enrolled in the District under the McKinney-Vento Act.

The likelihood of success on the merits also favors the petitioner. Although there are differing versions of the conversation between petitioner and a secretary of respondent, the dispute is immaterial. Petitioner's children were enrolled in the District

and are entitled to remain enrolled under the McKinney-Vento Act[2]. There is nothing to support the respondent's position that an assertion by a secretary that petitioner either requested to unenroll her kids, or the secretary's belief that such was requested, followed by the secretary drafting transfer cards and sending same to petitioner, irrevocably vacates the enrollment of the children. The more credible likelihood is as asserted by petitioner, that she was inquiring about the process of a transfer in the event she could secure housing in another district by January 1, 2024. Therefore, petitioner is likely to prevail on the merits.

Lastly, a balance of equities and public interest overwhelmingly lay in favor of the petitioner. Five children, in grades one, two, three, five, and six, some with Individual Education Plans (IEPs), who receive breakfast and lunch at school, were abruptly removed from the school they have been attending since September 2023. This is a disruption to their academic and social development at impressionable ages and a removal from a safe and stable daytime environment.

Accordingly, I **CONCLUDE** that petitioner's application for emergent relief to have her children returned/reenrolled is granted on this emergent appeal and therefore,

It is on this 21st day of December, **ORDERED**:

1. That petitioner's application for emergent relief be and hereby is **GRANTED**;

2. The respondent shall immediately return/reenroll petitioner's children to the District with all prior benefits, including but not limited to before and after care and free breakfast and lunch.

3. Petitioner's request for compensatory education for the period of time that the children have been out of school is hereby **DENIED**.

---

[2] Respondent served petitioner with a Preliminary Notice of Ineligibility, a hearing was held, and a Final Notice of Ineligibility was issued finding the children ineligible based upon residency. This issue is not before me, and petitioner can appeal that determination to the New Jersey Commission of Education.

4. No other issues underlying the emergent application remain.

This Order on application for emergency relief may be adopted, modified or rejected by the **COMMISSIONER OF THE DEPARTMENT OF EDUCATION**, who by law is authorized to make a final decision in this matter. The final decision shall be issued without undue delay, but no later than forty-five days following the entry of this order. If the **COMMISSIONER OF THE DEPARTMENT OF EDUCATION** does not adopt, modify or reject this order within forty-five days, this recommended order shall become a final decision on the issue of emergent relief in accordance with N.J.S.A. 52:14B-10.

December 21, 2023
DATE

DEIRDRE HARTMAN-ZOHLMAN, ALJ

Date Received at Agency: _____

Date Mailed to Parties: _____

DHZ/nn

STATE OF NEW JERSEY
DEPARTMENT OF EDUCATION

In the Matter of Tenure Charges

PLEASANTVILLE SCHOOL DISTRICT,

Petitioner,

-and-

DR. NATAKIE CHESTNUT-LEE

Respondent.

AGENCY DOCKET NO.: 187-7/22

ORDER APPROVING SETTLEMENT

BEFORE: RUTH MOSCOVITCH, Arbitrator

Appearances:

For the Petitioner:

David F. Corrigan
The Corrigan Law Firm
54B West Front Street
Keyport, NJ 07735

For the Respondent:

Robert P. Merenich
Gemmel, Todd & Merenich
767 Shore Road, PO Box 296
Linwood, NJ 08221

This matter comes before me on tenure charges filed with the Bureau of Controversies and Disputes on July 15, 2022. I was appointed the arbitrator to adjudicate this matter on August 5, 2022. Recently, the parties advised me that they have reached a settlement of this matter and all other pending litigation between them. Prior to reaching this settlement agreement, the Respondent withdrew herself from any consideration to renew her Superintendent Contract, which was scheduled to and did end on June 30, 2023. As part of the settlement, the School Board has withdrawn the pending tenure charges.

After reviewing the settlement agreement that has been signed by Respondent and adopted by the Petitioner Board of Education at its December 12, 2023 meeting, I conclude:

1. Both the charged and charging parties consent to the settlement and disposition of this matter.
2. The charged party has had the full benefit of legal counsel and has entered into the Agreement with a full understanding of her rights;
3. Approval of this Agreement is in the public interest, because it results in the resolution by settlement of pending litigation and does not conflict with the public good.

For all of the foregoing reasons, I hereby approve the Settlement Agreement between the parties and order this case dismissed.

Ruth Moscovitch, Arbitrator

Dated: December 22, 2023

ACKNOWLEDGMENT

STATE OF NEW YORK)
) ss.:
COUNTY OF NEW YORK)

On December 22, 2023, RUTH MOSCOVITCH, whom I know, came before me and acknowledged that she executed the foregoing as and for her Order in the above-captioned matter.

Notary Public
My Commission expires

TAREK M ELBARKATAWY
NOTARY PUBLIC-STATE OF NEW YORK
No. 01EL6413650
Qualified in New York County
My Commission Expires 02-01-2025