7-06

7-06SEC

AGENCY DKT NO. 364-12/05

IN THE MATTER OF DIANA LOBOSCO,	:	
PASSAIC COUNTY EDUCATIONAL SERVICES	:	COMMISSIONER OF EDUCATION
COMMISSION, PASSAIC COUNTY.	:	DECISION
	:	

SYNOPSIS

The School Ethics Commission (Commission) determined that Passaic County Educational Services Commission Board of Education member Diana Lobosco violated *N.J.S.A.* 18A:12-24.1(c) of the Code of Ethics for School Board Members when, as Board President, she voted to award a Board contract to the Passaic County Technical Institute, where Ms. Lobosco is employed as Superintendent. After considering the nature of the charge, the Commission recommended that the Commissioner of Education impose a penalty of reprimand.

Upon a thorough review of the record, the Commissioner, whose decision was restricted solely to a review of the Commission's recommended penalty pursuant to *N.J.S.A.* 18A:12-29(c) and *N.J.A.C.* 6A:3-9.1, concurred with the Commission's recommendation. The Commissioner thus ordered that Diana Lobosco 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.

January 10, 2006

AGENCY DKT. NO. 364-12/05

IN THE MATTER OF DIANA LOBOSCO,	:	
PASSAIC COUNTY EDUCATIONAL SERVICES COMMISSION, PASSAIC COUNTY.	:	COMMISSIONER OF EDUCATION
	:	DECISION

The record of this matter and the decision of the School Ethics Commission ("Commission"), finding Passaic County Educational Services Commission Board of Education member Diana Lobosco violated *N.J.S.A.* 18A:12-24(c) when, as Board President, she voted to award a Board contract to the Passaic County Technical Institute, where she is employed as Superintendent, along with the Commission's recommended penalty of reprimand, have been reviewed. Upon issuance of the decision of the Commission, Ms. Lobosco was provided thirteen days from the mailing date of the decision to file written comments on the recommended penalty for the Commissioner's consideration. Comments from Greg K. Vitali, Esq., counsel for Ms. Lobosco, were timely filed.

Counsel's comments propose that the Commission's recommended sanction of reprimand is too harsh and severe under the circumstances. In support of this assertion, counsel essentially argues that the Commission, in finding that Ms. Lobosco violated *N.J.S.A.* 18A:12-24(c), adopted a too stringent application of *N.J.S.A.* 18A:12-24(h), which he urges should be applicable here. Furthermore, he submits:

> Ms. Lobosco's participation in this particular vote is clearly not the type of action or conduct that the School Ethics Act is designed to discourage or protect against. The imposition of the sanction of reprimand, therefore, will serve only to blemish an otherwise enviable record of longtime faithful and dedicated public service, a result which the Legislature in adopting the School Ethics Act clearly did not have in mind.

As such, counsel for Ms. Lobosco urges that the Commissioner find that, under the particular conditions here, no penalty is appropriate.

Initially, it must be emphasized that, pursuant to *N.J.S.A.* 18A:12-29(c) and *N.J.A.C.* 6A:3-9.1, the determination of the Commission as to violation of the School Ethics Act is **not reviewable by the Commissioner** herein. Only the Commission may determine whether a violation of the School Ethics Act occurred. The Commissioner's jurisdiction is limited to reviewing the sanction to be imposed based upon a finding of a violation by the Commission. Therefore, this decision is restricted to a review of the Commission's recommended penalty.

Upon a thorough review of the record, the Commissioner notes that, contrary to the apparent misapprehension of counsel for Ms. Lobosco, having found a violation of the School Ethics Act, the Commission was statutorily obligated to recommend a sanction for this infraction (See *N.J.S.A.* 18A:12-29c.). As evidenced in its decision, upon full consideration of the nature of the offense and after weighing the effects of aggravating and mitigating circumstances, the Commission recommended the least onerous penalty possible. The Commissioner finds no cause to disturb the Commission's recommended penalty.

Accordingly, IT IS hereby ORDERED that Diana Lobosco be reprimanded as a school official found to have violated the School Ethics Act.

IT IS SO ORDERED.*

Lucille E Davy

ACTING COMMISSIONER OF EDUCATION

Date of Decision: 01/10/06

Date of Mailing: 01/10/06

* This decision may be appealed to the State Board of Education pursuant to *N.J.S.A.* 18A:6-27 *et seq.* and *N.J.A.C.* 6A:4-1.1 *et seq.*

IN THE MATTER OF	:	**BEFORE THE SCHOOL ETHICS COMMISSION**
DIANA LOBOSCO *PASSAIC COUNTY EDUCATION SERVICES COMMISSION* *PASSAIC COUNTY*	:	**Docket No. C31-05**
	:	**DECISION**

PROCEDURAL HISTORY

This matter arises from a complaint filed on June 21, 2005 by Howard Solomon alleging that Ms. Lobosco, President of the Passaic County Educational Services Commission Board of Directors (Board), violated N.J.S.A. 18A:12-24(b), (c) and (f) of the School Ethics Act (Act), N.J.S.A. 18A:12-21 et seq., when, at the June 24, 2004 Board meeting, she voted to award a Board contract to the Passaic County Technical Institute (Institute) where she is employed as Superintendent.

After the Commission granted an extension, for good cause, of time to file an answer, Ms. Lobosco filed an answer, through her attorney, Greg K. Vitali, Esq. In her answer, Ms. Lobosco denied that her vote on June 24, 2004 violated the Act.

The Commission invited the parties to attend its August 23, 2005 meeting to present witnesses and testimony, but did not require that they be present. The parties did not attend the meeting. At its August 23, 2005 meeting, the Commission voted to find probable cause to credit the allegations that Ms. Lobosco violated N.J.S.A. 18A:12-24(c) of the Act. The Commission also voted to find no probable cause to credit the allegations that Ms. Lobosco violated N.J.S.A. 18A:12-24(b) and (f).

The Commission found that the material facts were not in dispute with respect to the issue upon which it found probable cause and, therefore, advised Ms. Lobosco's attorney that it would decide the matter on the basis of written submissions. Mr. Vitali was invited to provide a written submission to the Commission by October 21, 2005, and set forth why the Commission should not find Ms. Lobosco in violation of N.J.S.A. 18A:12-24(c) of the Act. Mr. Vitali was also told that his written submission should include his position on an appropriate sanction for Ms. Lobosco should the Commission determine that the Act was violated. Mr. Vitali filed a timely response to the Commission's probable cause decision. In his response, Mr. Vitali argued that the approval of the contract resulted in a loss to the Institute and did not affect Ms. Lobosco's salary and compensation. He further argued that Ms. Lobosco's position as Superintendent of the Institute does not constitute an interest as defined by N.J.S.A. 18A:12-22. He further argued that N.J.S.A. 18A:12-24(h) applied and the Commission should dismiss the complaint. Mr. Vitali submitted that should the Commission fail to

dismiss the matter in its entirety, it should impose a penalty no greater than that of a reprimand.

FACTS

The Commission based its finding of probable cause on the following facts.

At all times relevant to the complaint Ms. Lobosco was President of the Board and Superintendent of the Institute.

Prior to the June 24, 2005 Board meeting, the Institute provided emergency computer services to the Board whenever the computer consulting company under contract with the Board failed to provide adequate services. At the June 24, 2005 Board meeting, the interim Superintendent recommended that the Board approve a contract with the Institute that would pay $35 an hour for each technician. This amount is half of what the state contract rate is for computer technicians. Ms. Lobosco voted in the affirmative to approve the contract recommended by the Interim Superintendent. The contract was approved by a unanimous vote.

ANALYSIS

The Commission found probable cause that Ms. Lobosco violated N.J.S.A. 18A:12-24(c) when, as President of Board, she voted to award a Board contract to the Institute where she is employed as Superintendent. N.J.S.A. 18A:12-24(c) provides:

> 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;

In its probable cause decision, the Commission determined that Ms. Lobosco does not have a direct financial involvement in the contract between the Institute and the Board. However, the Commission found that she does have an indirect financial involvement that might reasonably be expected to impair her objectivity or independence of judgment. In I/M/O Bruce White, C01-01 (July 24, 2001), the Commission found that a board member had an indirect financial involvement when he voted on the payment of tuition to the Mercer County Vocational School where he was employed as a Principal. In White, the Commission noted that the tuition payment was not earmarked for any particular purpose and that the funds go into the general fund. Based on that fact, the Commission reasoned that the board member had an indirect financial involvement. In its probable cause decision, the Commission reasoned that this complaint is similar to

White in that Ms. Lobosco voted to approve a contract between the Board of which she is President and the Institute where she is employed as Superintendent.

In his response to the Commission's probable cause determination, Mr. Vitali argued that it is undisputed that the approval of the contract resulted in the Institute operating at a loss and that Ms. Lobosco's salary and compensation was in no way affected by the approval of the contract. He further argued that since the contract was a mere extension of the goodwill that the Institute was already providing the Board in emergency situations, that Ms. Lobosco's objectivity or independence of judgment was not impaired when she participated in the vote on the contract. The Commission does not dispute that the contract resulted in an operating loss for the Institute. However, as the Commission noted in its probable cause decision, before the Institute entered into the contract, it was providing services to the Board at an even greater loss, and the contract cut those losses in half since the Institute receives some remuneration under the contract.

Mr. Vitali also argued that Ms. Lobosco is an employee of the Institute and owns no interest in the Institute as defined by N.J.S.A. 18A:12-23. The Commission agrees that Ms. Lobosco does not have an interest in the Institute. However, she is an employee of the Institute and, similar to all employees, she has an indirect interest in the financial integrity of the Institute. The contract Ms. Lobosco voted for brought additional funds to the Institute. The Commission noted in its probable cause decision that there is no information to show that the contract funds are earmarked for any particular purpose. There is also no information to show where the contract funds are dedicated. Similar to the White decision, Ms. Lobosco had an indirect financial involvement that might reasonably be expected to impair her objectivity or independence of judgment. Based on the foregoing, the Commission finds that Ms. Lobosco violated N.J.S.A. 18A:12-24(c) when, as Board President, she voted to award a Board contract to the Institute, where she is employed as Superintendent.

In his response to the Commission's probable cause determination, Mr. Vitali argued that N.J.S.A. 18A:12-24(h) applies to Ms. Lobosco's vote on the contract because no material or monetary gain accrued to Ms. Lobosco as a result of her participation in the vote on the contract. N.J.S.A. 18A:12-24(h) provides:

> No school official shall be deemed in conflict with these provisions if, by reason of his participation in any matter required to be voted upon, no material or monetary gain accrues to him as a member of any business, profession, occupation, or group, to any greater extent than any gain could reasonably be expected to accrue to any other member of that business, profession, occupation or group;

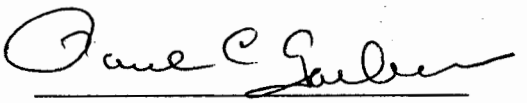
If Ms. Lobosco was a member of any business, profession, occupation or group, then she could vote on the contract if no material or monetary gain accrues to her greater than any gain could reasonably be expected to accrue to any other member. However, Mr. Vitali fails to identify the business, profession, occupation or group of which Ms. Lobosco is a member. The Commission cannot find a business, profession, occupation or

group of which Ms. Lobosco is a member to make this section applicable. Therefore, N.J.S.A. 18A:12-24(h) does not apply.

DECISION

For the reasons discussed above, the Commission finds that Diana Lobosco violated N.J.S.A. 18A:12-24(c) of the Act. The Commission recommends that the Commissioner of Education impose a penalty of reprimand for the reasons provided by Mr. Vitali.

This decision has been adopted by a formal resolution of the School Ethics Commission. This matter shall now be transmitted to the Commissioner of Education for action on the Commission's recommendation **for sanction only**, pursuant to N.J.S.A. 18A:12-29. Within 13 days from the date on which the Commission's decision was mailed to the parties, Ms. Lobosco may file written comments on the recommended sanction with the Commissioner of Education, c/o Bureau of Controversies and Disputes, P.O. Box 500, Trenton, NJ 08625, marked "Attention: Comments on Ethics Commission Sanction." A copy of any comments filed must be sent to the School Ethics Commission and all other parties.



Paul C. Garbarini
Chairperson

Resolution Adopting Decision – C31-05

Whereas, the School Ethics Commission has considered the pleadings filed by the parties and the documents submitted in support thereof; and

Whereas, at its meeting of October 25, 2005, the Commission found that Diana Lobosco violated N.J.S.A. 18A:12-24(c) of the Act and recommended that the Commissioner of Education impose a sanction of reprimand; and

Whereas, at its meeting of November 22, 2005, the Commission reviewed a draft decision prepared by its staff and agrees with the decision;

Now Therefore Be It Resolved that the Commission hereby adopts the proposed decision referenced as its decision in this matter and directs its staff to notify all parties to this action of the Commission's decision herein.

Paul C. Garbarini, Chairperson

I hereby certify that the Resolution
was duly adopted by the School
Ethics Commission at its public meeting
on November 22, 2005.

Lisa James-Beavers
Executive Director

PCG/LJB/MET/ethics/decisions/C31-05

6-06E

6-06

OAL DKT. NO. EDU 12683-05
AGENCY DKT. NO. 347-12/05

JOSEPH A. NATOLI CONSTRUCTION CORP.,	:	
PETITIONER,	:	COMMISSIONER OF EDUCATION
V.	:	DECISION ON MOTION
BOARD OF EDUCATION OF THE TOWNSHIP OF WYCKOFF, BERGEN COUNTY, AND VRH CONSTRUCTION CORP. AND DOBCO, INC.,	:	
RESPONDENTS.	:	

The Initial Order of the Office of Administrative Law denying petitioner's application for emergent relief pursuant to *N.J.A.C.* 6A:3-1.6 has been reviewed.

Upon such review, the Commissioner concurs with the Administrative Law Judge (ALJ), for the reasons fully set forth in the Initial Order, that petitioner has not met the criteria necessary for grant of extraordinary restraints.

Accordingly, petitioner's application is denied. This matter shall proceed to plenary hearing as the parties deem necessary or desirable, consistent with the order of the ALJ.

IT IS SO ORDERED.*

Lucille Edney
ACTING COMMISSIONER OF EDUCATION

Date of Decision: 01/10/06
Date of Mailing: 01/10/06

* This decision may be appealed to the State Board of Education pursuant to *N.J.S.A.* 18A:6-27 *et seq.* and *N.J.A.C.* 6A:4-1.1 *et seq.*

State of New Jersey
OFFICE OF ADMINISTRATIVE LAW

ORDER ON APPLICATION
FOR EMERGENT RELIEF
OAL DKT. NO. EDU 12683-05
AGENCY DKT. NO. 347-12/05

JOSEPH A. NATOLI CONSTRUCTION CORP.,
Petitioner,
v.
BOARD OF EDUCATION OF THE TOWNSHIP OF WYCKOFF, BERGEN COUNTY AND VRH CONSTRUCTION CORP. AND DOBCO, INC.,
Respondent.

Richard M. Salsberg, Esq., for petitioner
(Mandelbaum, Salsberg, Gold, Lazris, Discenza & Steinberg, attorneys)

Mark G. Sullivan, Esq., for Wyckoff Township BOE, respondent
(Sullivan and Sullivan, attorneys)

Robert Drucker, Esq., for VRH Construction Corp., respondent
(Peckar & Abramson, attorneys)

Christopher L. Weiss, Esq., for DOBCO, Inc., respondent
(Ferro, Labella & Zucker, LLC, attorneys)

Record Closed: December 16, 2005 Decided: December 22, 2005

BEFORE, **STEPHEN G. WEISS,** ALJ:

PROCEDURAL HISTORY

This matter was transmitted to the Office of Administrative Law by the Department of Education on December 7, 2005 following transfer of the case from the New Jersey Superior Court, Law Division, Bergen County to that agency pursuant to an Order filed on December 1, 2005 by the Honorable Jonathan N. Harris, JSC, before whom the matter initially had been brought. See *Joseph A. Natoli Const. Corp. v. Tp. of Wyckoff Bd. of Educ., et als,* Superior Court of N.J., Law Division: Bergen County, Docket No. L-814705. Since the subject matter of the dispute involved the propriety of actions taken by the Wyckoff Board of Education (Wyckoff) and the "low" bidder, VRH Construction Corp. (VRH) in connection with the acceptance of the bid of VRH on a school construction project, Judge Harris determined that "primary jurisdiction" was with the Department of Education pursuant to *N.J.S.A.* 18A:6-9. An unsuccessful bidder, petitioner Joseph A. Natoli Const. Corp. (Natoli) had filed a Verified Complaint, Order to Show Cause and an application for a stay in the Law Division. Following Judge Harris' determination to deny the stay and transfer the matter to the Department of Education, an interlocutory appeal was taken by Natoli to the Appellate Division for leave to appeal and for a stay, both of which were rejected. Thus, the matter now is proceeding before the Office of Administrative Law.[1] Oral argument on the emergency relief application was conducted on December 13, 2005. Counsel for respondent Dobco, Inc., the second low bidder after VRH, advised me by letter that his client did not intend to participate in the case.

The Verified Complaint filed by Natoli in the Law Division alleged that on or about September 30, 2005, Wyckoff promulgated plans and specifications and solicited bids on a substantial school construction project involving additions and alterations to its Eisenhower Middle School. The project generally consists of the construction of two additions to, and alterations of, the existing school building. The bid solicitation provided

[1] Counsel for Natoli indicated at oral argument that he wished to reserve the issue of "subject matter jurisdiction", but was not intending to pursue that issue before me at the present time.

that Wyckoff intended to enter into a single prime contract pursuant to *N.J.S.A.* 18A: 18A-18(b). Bids were received and opened on November 15, 2005 and the three lowest base bids of a total of 14 bids were as follows:

A.	VRH	($14,198,000)
B.	Dobco	($14,439,000)
C.	Natoli	($14,787,000)

In its submission VRH designated S&J Electric Contracting Inc. (S&J) as its electrical subcontractor which had a total aggregate authorization of $2,500,000. However, at the time of the VRH bid submission S&J had a balance of approximately $1.2 million in "uncompleted work", leaving an approximate "net" amount available for performing the job in Wyckoff of $1.3 million. The total cost of the electrical portion of the work was about $2 to $2.5 million. Shortly after bids were opened Natoli reviewed the documentation and suggested to its counsel that S&J was not qualified to perform the electrical work since the fair value of the same (at least $2 million) exceeded the subcontractor's dollar limit (about $1.3 million) at the time of the bid. According to the Verified Complaint, VRH and S&J took the position that the undertaking by S&J as the electrical subcontractor for VRH was for "labor only" and that the general contractor would supply all of the material. Natoli, on the other hand, had named as its electrical subcontractor an entity which had a financial aggregate rating of $2.5 million which was sufficient to cover the entire cost of its portion of the project. Thus, according to Natoli, the VRH bid was materially deficient in that S&J was not qualified to meet the aggregate rating limit for performance of that portion of the contract. The action taken by VRH, according to Natoli, in "dividing up" the work between labor and materials in order to qualify its subcontractor was nothing less than a manipulation which subverted the intent and purpose of the public bidding requirements concerning classification of bidders. VRH's action, it claimed, created a "unique and improper competitive advantage" which ran counter to the policy of the Legislature and the courts of this State which is that the bidding statutes are designed to and must be interpreted as protecting against favoritism, improvidence, extravagance and corruption.

Thus, Natoli asserted that since Wyckoff had awarded the contract to VRH in violation of pertinent statutes and regulations, the integrity of the bidding process could seriously be impinged and a stay absolutely was necessary on an emergent basis in order to avoid irrevocable injury to Natoli, not to mention the taxpayers of the of school district and even other bidders. Thus, a temporary restraining order with respect to implementation of the contract was sought and/or a vacation of any award, as well as a determination that since Natoli's bid was the lowest responsible and responsive bid on the subject contract it was entitled to any award.[2]

In a Certification in Support of the Verified Complaint and Order to Show Cause for Temporary Restraints, Paul R. Natoli, petitioner's Vice President and Director of Project Management and the person directly responsible for preparation and submission of the bid in this case, asserted that the specifications for prospective bidders required that electrical subcontractors who were to be engaged to perform any electrical work not only had to be qualified to perform the work, but also had to have an aggregate financial limitation adequate to meet the totality of the electrical work as specified in the bid. This, he insisted, included not merely labor but also material supply and installation. Thus, in Natoli's view, only electrical subcontractors meeting those qualifications were acceptable and had his company been apprised that a bidder could do what VRH did, Natoli possibly would have recalculated its costs and made a lower bid. Natoli also maintained in his Certification that his company has bid upon scores of governmental projects and always followed what he believes to be the statutory mandate that subcontractors must not only be qualified in their classifications *per se*, but also within their financial aggregate limit. He also commented that the materials necessary to complete the electrical portion of the project were, "in the main, technical in nature and not readily discernible from the plans and specifications except by a qualified electrician." Thus, general contractors such as VHR are not qualified to seek out and obtain these materials safely without the active participation of their electrical subcontractors. Since S&J has an approved limit of only $1.3 million remaining out of the $2.5 million total, it is impossible, he said, for S&J to perform the entire contract where quotes received from potential subcontractors ranged from $2 million to $2.4 million.

[2] Dobco, too, allegedly had done the same thing as VRH with respect to the electrical subcontractor's scope of work. As noted, Dobco has advised that it has no further interest in the proceedings.

Attached to Natoli's Certification was an excerpt from the bid specifications which included, *inter alia*, the following language with respect to prequalification requirements: "the Bidder certifies that the Bidder and the subcontractor . . . are pre-qualified . . . pursuant to *N.J.S.A.* 18A:7G-33 *et seq.* in that, since the latest pre-qualification application was filed by the Bidder . . . at the time of this bid submittal, the amount of the bid proposal and the value of all outstanding incomplete contracts does not exceeds the firms existing aggregate rating limit . . ." According to Natoli, the literal language, if not the spirit of that provision at least, deliberately was circumvented by VRH since S&J's existing aggregate rating limit is $1.3 million, not $2.5 million.

After the matter was transmitted to the Office of Administrative Law by the Department of Education as a contested case, a Brief in Opposition was filed by VRH, accompanied by a Certification from its President, Victor D. Wormann, Jr., to which were attached a variety of documents. In that response, VRH took the position (not unexpectedly) that all of its activities in connection with this project strictly conformed with all statutes, rules, regulations and whatever other legal principals applied. In that respect, the Certification by Wortmann observed that in response to a solicitation for single bids from general contractors for the work in Wyckoff, VRH submitted a base rate in the amount of $14.2 million which was the lowest one submitted. In addition, VHR provided the requisite prequalification affidavit and documented its own classification as "unlimited". As part of the bid package, VRH also submitted, as required, a list of the subcontractors it intended to engage, including for electrical work S&J. Simultaneous with that submission VRH also provided the prequalification affidavit of S&J openly disclosing that although it was qualified by the Department of Treasury for an approved amount of $2.5 million, with current uncompleted work $1.2 million outstanding, the total aggregate limit that S&J had at the time of the bid was $1.3 million, which still was sufficient to allow it to perform the work required of it.

Further according to Wortmann, VRH openly disclosed its intent to furnish some materials itself. Thus, all work was to be subcontracted to S&J was for an amount less than $1.3 million which was within the limits of S J's prequalification. Wortmann also

pointed out with regard to the furnishing of materials that it was VRH's intent directly to purchase building and stage lighting fixture materials and switch gear materials which it had done on other projects; albeit, the actual installation would be performed by S&J.

In addition to VRH, Wyckoff also responded to the Verified Complaint. In a Certification by its Business Administrator and Secretary, Allan C. Reiffe, he pointed out that after all bids were opened it was determined that VRH was the lowest responsible bidder and that work should promptly start since a stay of the project would cause a delay of at least one day for every day no work is done and freezing weather would complicate the matter further. Finally, he noted that any delay would expose the Board to additional costs not previously contemplated, all to the detriment of the public's interest.

Accompanying Reiffe's affidavit was a letter memorandum which Wyckoff's counsel had submitted to the Appellate Division in opposition to the interlocutory appeal filed by Natoli from Judge Harris' Order. After discussing the propriety of Judge Harris' decision not to entertain the case, counsel for Wyckoff directed his attention to the "underlying merits" and maintained that there is nothing in any applicable statute or regulation, or in the bid specifications themselves, which preclude the general contractor (VRH) from providing the materials to be utilized in the work by its electrical subcontractor (S&J), provided the subcontractor is properly licensed and fiscally qualified for the work it is to perform. Counsel points as well, to Article 3.4.1 of the form contract utilized in this matter which provides that unless otherwise noted it is the contractor's (VRH) responsibility to provide and pay for labor, materials, etc. which VRH intends fully to do in this case. Thus, since VRH was the lowest bidder and has unlimited financial prequalification itself, it clearly can engage S&J for the amount of work it wanted it to do. Even though S&J, itself, did not have a total aggregate rating at this time equal to the total project that did not matter since it was only providing labor and some material which was within its remaining aggregate.

Counsel for Wyckoff also argued to the Appellate Division that not only will Wyckoff taxpayers suffer immediate and irrevocable damage if the project is delayed, they will benefit from the VRH award since the base bid was $589,000 lower than the Natoli bid.

Attached to Wyckoff counsel's memorandum was the Certification of Peter Greico, Architect of Record for the project. In it, Greico also notes that the form contract which has been prescribed is the AIA form, and as set forth in Article 3.4.1, it is the contractor (VRH) which has agreed to provide and pay for labor and materials. Since VRH has an "unlimited" financial classification, the fact that S&J does not have an aggregate rating limit of more than $1.3 million is irrelevant so long as it is qualified to do the dollar amount of work up to its existing limit and is licensed. Finally, Greico points out that nowhere in the bid solicitation materials is there a requirement that any electrical subcontractor must supply all material and labor to complete the electrical phase of the project.

In addition to the letter brief he filed with the Appellate Division, counsel for Wyckoff also submitted a supplemental brief to me which addressed, in part, the requirements of *N.J.A.C.* 6A:3-1.6 dealing with the grant of emergent relief, the context of the present case. Counsel points out that in order to be entitled to such relief a petitioner must demonstrate: (1) it will suffer irreparable harm if the requested relief is not granted; (2) the legal right underlying the claim is settled; (3) the petitioner has a likelihood of prevailing on the merits of the underlying claim; and (4) when the equities and relative interests of the parties are balanced, the petitioner will suffer greater harm than the respondent if the requested relief is not granted. See *Crowe v. DiGoia*, 90 *N.J.* 126 (1982). With respect to those elements, counsel argues that a monetary loss does not constitute irreparable harm, there is no demonstration that the legal right underlying Natoli's claim is at all settled, there is no indication that petitioner has a likelihood of prevailing on the merits and it is the taxpayers of Wyckoff who will suffer most if a stay is granted.

Counsel goes on to conclude that the plain language of *N.J.S.A.* 18A:18A-18, the local Public School Contracts Law, mandates that the Wyckoff Board award the bid to VRH since it was the lowest responsible bidder for the work, goods and services required to complete the project in a single overall contract and for petitioner to prevail in this case there would have to be creation of "new law". Given the difference in dollar value between the VRH and the Natoli base bids ($589,000) and the need for the Board

promptly to move forward to complete the school additions and alterations as winter sets in, the notion that emergent relief is warranted should be rejected.

Following oral argument on December 13, 2005, I gave counsel for Natoli until December 16, 2005 to file a supplemental memorandum in response to the briefs submitted to me on the day of the oral argument by opposing counsel. That memorandum was timely filed.

DISCUSSION

Intertwined in this public school construction bidding case are two separate legal principals. First, there is a substantial body of law which touches both generally and specifically on public bidding and, in particular, the duties placed upon and the interests of the parties. The second legal "thread" is the fact that at this stage the matter has been transmitted to OAL for "emergent relief" and the regulations and case law pertinent to that context also play a major role.

With respect to the propriety of emergent relief, a stay of the award of any bid or the commencement of construction by a "low" bidder is extraordinary relief and should be ordered only in the most exigent circumstances and primarily to prevent irreparable injury which a subsequent hearing or trial cannot cure. *See e.g., Zoning Board of Adjustment of Sparta Township v. Service Electric Cable Television of New Jersey, Inc.* 198 *N.J. Super* 370 (App. Div. 1985). Only where by clear and convincing evidence has a showing of need been made should entitlement to such relief be found. See *e.g., Dolan v. DeCapua,* 16 *N.J.* 599, 614 (1954).

The so called "seminal case" that courts generally cite in dealing with emergent relief applications is of course, *Crowe v. DiGoia, supra.* Pursuant to *Crowe* a moving party must satisfy four separate requirements: (1) irreparable harm is likely to occur if the relief is not granted; (2) any applicable underlying law is well settled; (3) the material facts are not substantially in dispute and there exists a reasonable probability of the movant's ultimate success on the merits; (4) in balancing the respective hardships to the

parties, the balance tips in favor of issuance of the requested relief. *Crowe v. DeGoia, supra*, 90 *N.J. Super* at 132-134.

With respect to the first prong, the potential of irreparable harm, respondents concede that money damages likely are not available if the emergent relief is denied and it ultimately turns out that the contract should have been awarded to Natoli and not to VRH.

The second prong of Crowe requires a determination that the applicable underlying law is "well-settled". I will defer discussion of that factor since it involves consideration of the case law dealing with public bidding. So too, the third prong requires me to determine whether there exists a reasonable probability of ultimate success on the merits. That element, too, relates to the statutory and case law on bidding. Finally, with respect to the last element, balancing the relative hardships to the parties, provided a prompt hearing can be arranged if the stay were to be granted the balance in my view tips in favor of Natoli.

The second legal thread running through this case requires application of the public bidding laws to the particular circumstances. I start with another "seminal case". Specifically, in *Township of Hillside v. Sternin* 25 *N.J.* 317 (1957), the New Jersey Supreme Court made eminently clear that public bidding statutes were for the benefit of the taxpayers and were to be construed as nearly as possible with sole reference to that objective in order to prevent the insidious introduction of favoritism, improvidence, extravagance or corruption. The ultimate aim is to secure unfettered competition. Thus, as the Court held in *Sternin*, material conditions contained in bid specifications may not be waived. See also, *Terminal Construction Corp. v. Atlantic City Sewage Authority* 67 *N.J.* 403 (1975). On the other hand, the *Terminal* decision also observed that where problems arise with bids they should be resolved in a sensible or practical way, such as determining that the condition perhaps was not so critical that it could not be waived, or if a defect is present, can it appropriately and timely be cured. See *T. Michellotti & Sons, Inc. v. Borough of Fairlawn*, 56 *N.J. Super* 199 (App. Div. 1959), *app. dism.*, 31 *N.J.* 556 (1960); *Township of Rivervale v. R.J. Longo Construction Co., Inc.* 127 *N.J. Super* 207

(Law Div. 1974); Basically, the inquiry is whether the claimed defect or variance from the strict requirements of public bidding, if tolerated, will result in frustration of the salutary policies which underlie the competitive process, or might create a fertile ground for improvidence, favoritism or extravagance.

Of course, in the present case, the complaint lodged by Natoli does not go to VRH's ability to perform the contract. Rather, Natoli argues that the process used by VRH, perhaps deliberately, palpably created an unfair advantage since VRH "secretly reserved" its intention to supplement its subcontractor's inadequate aggregate limit with its own by artificially dividing the electrical work between labor and materials. According to Natoli, this makes a mockery of the need for a "level playing field" and such conduct is unfair and cannot be tolerated.

For the reasons which follow, while I commend petitioner's counsel for the creativity of his arguments, I do not believe that the facts rise to such a level that it can be determined that's its position is "well settled" law or even that Natoli, following a plenary hearing, even has a reasonable likelihood of succeeding on the merits. Thus, neither the second or third prongs of *Crowe* have been satisfied.

First, my own scrutiny of the public bidding statutes and pertinent regulations fails to provide any sound basis for the conclusion that they prohibit either expressly or by clear implication what VRH did here. While it is quite true, as Natoli points out, that the statutes or regulations do not appear to authorize it either, I do not believe this to be a pre-requisite. This dispute is unlike the situation in *P&A Construction, Inc. v. Tp. of Woodbridge*, 365 *N.J. Super* 164 (App. Div. 2004) where the municipality waived in advance any defect not expressly set forth in the statute. That is not what Wyckoff did here.

Second, I see no "secrecy" in the process followed which would fatally taint the VRH award. VRH submitted a single overall bid which indicated that its own classification was "unlimited". Ultimately, VRH is responsible financially for the successful completion of the entire project, including the electrical portion. While it may not have "highlighted"

the limit that its subcontractor had, it did submit with its bid the appropriate documents which fully disclosed the $1.3 million aggregate limit. No one was misled and nothing was hidden. There was no post-bid manipulation. Perhaps some would call what VRH did a "sharp practice". However, even if so, that does not make it illegal or violative of any common law principle of fair dealing.

Third, I fail to discern where the public interest has been harmed. Whether or not the process used by VRH will increase competition as VRH claims is not easily capable of quantification. As I view it, what matters is that the labor for the electrical portion of the project will be performed by a contractor (S&J) who has proper prequalification and sufficient financial ability to cover all of the electrical work it will do. I fail to see any impingement on the public good in that regard.

An additional advantage that arises from an award to VRH is that on an overall basis, it will save the taxpayers of the school district almost $600,000.[3] While that is not a determining factor where challenges of this sort are made, it is an element that can and should be considered where the "public interest" is involved.

I have also scrutinized the bid specifications, the bids themselves, the AIA contract and other documentation relevant to the instant case and I **FIND** no fatal flow which would justify emergent relief.

There are, of course, in addition to the cases previously cited, a myriad of other decisions dealing with bid challenges in the public context. Many, if not most of course, are fact sensitive; in particular, those dealings with whether failure to comply with a bid specification is a "material" deviation justifying rejection of the bids. See, for example, *Twp. of River Vale v. R.J. Longo Construction Co., Inc., supra; Marvec Allstate, Inc. v. Gray and Fear, Inc.*, 148 *N.J. Super.* 481 (App. Div. 1977); *Palamar Construction, Inc. v. Twp. of Pennsauken*, 196 *N.J. Super.* 241 (App. Div. 1983); *Hall Construction Co., Inc. v. N.J. Sports Expos. Auth.*, 336 *N.J. Super* 126 (App. Div. 2000). Often, despite divergent results, the same case law is cited. Thus, examination of the particular facts is essential.

[3] The actual amount is somewhat less due to "alternate" bids on some items. However, they do not change the resulting savings in any substantial way.

In my view, absent a question as to the financial responsibility of VRH and to S&J perform the work. VRH was entitled to receive the contract award as a matter of right. Its status as low bidder in the competitive process should not lightly be disregarded. Of primary concern is whether there actually has been an element of such illegally or unfairness that one can say that the competitive bid process has been fatally undermined. If not, the low bidder is entitled to the award. In all cases, of course, strict adherence to the requirements of the bidding statutes is required and the tolerance level for variances or deviations must be set extremely low for the protection of the public interest. However, as noted, the particular facts of each case must be scrutinized rather than relying simply upon the broad language which the courts use to articulate and rearticulate the legal principles involved. For example, in the Sternin case itself, the low bid was rejected not only for a failure to submit any form of security with the bid, but at no time following the submission did the bidder evidence any intention to cure the defect. It takes little imagination to identify the potential for harm in that context. See also *Albert F. Ruehl v. Bd. of Trustees, Industrial Ed.* 85 *N.J. Super.* 4 (Law Div. 1964). Compare with T. Michelotti & *Sons, Inc., supra; Hanover Twp. v. Inter. Fidelity Insurance Co.*, 122 *N.J. Super.* 544 (App. Div. 1973).

The provisions of Title 18A:18A are no different in terms of interpretation of its salutary intent and purposes than other such statutes. Both it and the Local Public Contracts Law governing bidding procedures for local authorities, not to mention statutes pertinent to State contracts, are intended to provide the public with both "benefits of unfettered competition" and to "achieve the most economic result." *PEN PAC, Inc. v. Morris Co. Mun. Util. Auth.*, 299 *N.J. Super.* 288, 294 (App. Div. 1997). That is what took place here.

Accordingly, in my view, the particular circumstances of this case do not allow me to conclude that there exists a reasonable likelihood that any legal principles underlying public bidding have been subverted. Moreover, in the context of this application for emergent relief, given the circumstances I cannot say either that the law in this area is "well-settled" in favor of Natoli. Absent the establishment of those two prongs, at least,

emergent relief is not warranted under the case law or the emergency rules in Titles 6A or Title 1. To put it another way, I discern no clear and convincing proof to support petitioner's contention that the VRH bid cannot lawfully be considered the lowest responsible and responsive one. To the contrary, I believe that it was.

Accordingly, for the reasons set forth above, I **FIND** that petitioner has failed to demonstrate the necessary prerequisites for entitlement to emergent relief and its application for a stay of the award of the contract to VRH and/or the commencement of construction work following the award is **DENIED.**

Finally, I should note that over objection, I have read the letters sent to Mr. Salsburg from Mr. Callahan, counsel to the National Electrical Contractors Association, Northern New Jersey chapter, and Mr. O'Shea, Executive Director of the Mechanical Contractors Association of New Jersey, Inc. Neither has dissuaded me from reaching the decision I have made *vis a vis* emergent relief. Of course, as counsel for VRH aptly observed, those submissions do not comport with the OAL rules regarding participation or intervention (*N.J.A.C.* 1:1-16.1 *et seq).* If either or both of those entities wish to join the case as intervenor – parties or as participants it must be done by formal motion with opportunity given to the other parties to object. No such motion has been filed.

Counsel kindly shall confer and provide me with alternative dates for a plenary hearing if they believe one is necessary or desirable. See *N.J.A.C.* 1:1-12.6(k).

This order on application for emergency relief may be adopted, modified or rejected by the **COMMISSIONER OF EDUCATION**, who by law is authorized to make a final decision in this matter. The final decision shall be issued without undue delay, but no later than forty-five (45) days following the entry of this order. If the Commissioner of Education does not adopt, modify or reject this order within forty-five (45) days, this recommended order shall become a final decision on the issue of emergent relief in accordance with *N.J.S.A.* 52:14B-10.

December 22, 2005
DATE

STEPHEN G. WEISS, ALJ

sej

10-06

BARBARA SOTTILARO,	:	
PETITIONER,	:	
V.	:	COMMISSIONER OF EDUCATION
BOARD OF EDUCATION OF THE BOROUGH OF MIDDLESEX, MIDDLESEX COUNTY,	:	DECISION
RESPONDENT.	:	

SYNOPSIS

Petitioner, a tenured Media Specialist employed by the Board, contends that respondent acted outside its area of authority in withholding her salary increment for the 2004-2005 school year. Respondent contends its action was reasonable and within its statutory authority, and based upon documented observations of petitioner's negative behaviors during the 2003-2004 school year.

The ALJ found, *inter alia*, that: the respondent has the managerial prerogative to withhold an increment for inefficiency or other good cause; the petitioner has the burden of proof to demonstrate that the Board's decision was arbitrary and capricious; the petitioner did not challenge the underlying facts of the incidents that occurred in the 2003-2004 school year, but argued that the Board's reliance upon these incidents as part of the basis for withholding her increment for the 2004-2005 school year was untimely and *ultra vires*; it was reasonable for the Board to give petitioner a chance to correct deficiencies noted in her June 2003 evaluation, and – failing to do so as evidenced by incidents reported during the 2003-2004 school year – to use this evaluation as a factor in deciding to withhold the increment. The ALJ concluded that the instant petition should be dismissed.

The Commissioner determined that summary decision is appropriately granted to the Board, as she concurs with the ALJ that the denial of petitioner's increment was not improper. In so deciding, the Commissioner notes that it is well-settled that actions concerning increment withholding may not be upset unless they can be demonstrated to be patently arbitrary, capricious, unlawful or induced by improper motive; that the burden of proof of such rests with the petitioner; that the Board did not exceed its discretionary authority; and that the petitioner did not meet her burden of establishing otherwise. Accordingly, the Initial Decision of the OAL is adopted as the final decision in this matter.

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.

January 10, 2006

OAL DKT. NO. EDU 8414-04
AGENCY DKT. NO. 269-8/04

BARBARA SOTTILARO,	:	
PETITIONER,	:	
V.	:	COMMISSIONER OF EDUCATION
BOARD OF EDUCATION OF THE BOROUGH OF MIDDLESEX, MIDDLESEX COUNTY,	:	DECISION
RESPONDENT.	:	

The record of this matter and the Initial Decision of the Office of Administrative Law (OAL) have been reviewed. Petitioner's exceptions and the Board's reply thereto, were filed in accordance with *N.J.A.C.* 1:1-18.4.

Petitioner's exceptions essentially recast and reiterate her arguments advanced below which the Commissioner determines were fully considered and appropriately addressed by the Administrative Law Judge (ALJ) in his decision and, therefore, will not be revisited here.

Upon a careful and independent review of the record, the Commissioner determines that summary decision is appropriately granted to the Board, as she concurs with the findings and conclusion of the ALJ -- for the reasons stated in his decision -- that the Board's denial of petitioner's 2004-2005 increment was not improper.

It is well-settled that actions concerning increment withholding may not be upset unless they can be demonstrated to be patently arbitrary, capricious, unlawful or induced by improper motive. *Kopera v. West Orange Bd. of Educ.*, 60 *N.J. Super.* 288, 294 (App. Div. 1960) Further, the burden of proof that an action was so deficient rests with the

person challenging the decision. *Kopera* at 297. The Commissioner determines that, based on the record before her, the Board's decision to withhold petitioner's increment did not exceed the valid exercise of its discretionary authority and, moreover, that the petitioner has not met her burden of establishing otherwise.

Accordingly, for the reasons articulated therein and further explicated above, the Commissioner adopts the Initial Decision of the OAL as the final decision in this matter. Summary decision is hereby granted to the Board and the instant Petition of Appeal is dismissed.

IT IS SO ORDERED.*

Lucille E Davy

ACTING COMMISSIONER OF EDUCATION

Date of Decision: 01/10/06

Date of Mailing: 01/11/06

* This decision may be appealed to the State Board of Education pursuant to *N.J.S.A.* 18A:6-27 *et seq.* and *N.J.A.C.* 6A:4-1.1 *et seq.*

State of New Jersey
OFFICE OF ADMINISTRATIVE LAW

INITIAL DECISION

OAL DKT. NO. EDU 8414-04

AGENCY DKT. NO. 269-8/04

BARBARA SOTTILARO,

Petitioner,

v.

BOARD OF EDUCATION OF THE BOROUGH OF MIDDLESEX COUNTY,

Respondent.

Sasha A. Wolf, Esq., for petitioner (Oxfeld Cohen, attorneys)

Rita F. Barone, Esq., for respondent (Purcell, Reis, Shannon, Mulchay & O'Neill, attorneys)

Record Closed: October 26, 2005 Decided: November 30, 2005

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

STATEMENT OF CASE AND PROCEDURAL HISTORY

Petitioner contends that Respondent acted outside its area of authority in withholding Petitioner's salary increment for the 2004-2005 school year. Respondent contends its action was reasonable and within its statutory authority.

Petitioner filed a Petition of Appeal on August 2, 2004. On August 18, 2004, Respondent filed an Answer and Affirmative Defenses. The Department of Education, Bureau of

Controversies and Disputes, transferred this matter to the Office of Administrative Law, where it was filed on October 5, 2004. The parties then filed cross-motions for summary decision. The record closed on October 26, 2005, with the filing of the final summary decision brief.

STATEMENT OF FACTS

There is no material dispute to the following facts.

Petitioner is a tenured Media Specialist employed by the Middlesex Board of Education at the Von E. Mauger Middle School. On May 17, 2004, the Board passed a resolution to withhold Petitioner's salary increment for the 2004-05 school year. The Board based its resolution on the existence of the negative environment created by Petitioner in the school's media center and on the following documents:

- On January 18, 2003, middle school principal, Elizabeth Tallman observed Petitioner performing her duties. Based on her observations, Ms. Tallman completed a "Teacher Observation Report," dated January 22, 2003, in which she commented negatively on Petitioner's communication, positive feedback to students, flexibility and responsiveness. Also, based on her observation, Ms. Tallman completed a "Teacher Confidential Evaluation," dated June 2, 2003, in which she wrote that Petitioner did not meet her expectations for a media specialist.

- On October 1, 2003, Principal Robert Heidt observed Petitioner chastising an individual child in front of the class. Mr. Heidt wrote Petitioner a memorandum, the same day, reminding her that such action was in violation of the school's Student Discipline Policy.

- On October 26, 2003, Mr. Heidt wrote a letter to Petitioner informing her that, by criticizing Ms. Karen Brown in front of her students, she had violated Contract Agreement Article 4.7 requiring any criticism of another employee be done in private.

- In a March 9, 2004, letter, Mr. Heidt informed Petitioner of complaints from other staff about her inappropriate and unprofessional verbal treatment of her 5th grade Information Literacy class. The same letter informed Petitioner that Mr. Heidt would be forwarding his recommendation to the Superintendent to withhold Petitioner's salary increment for the 2004-05 school year.

LEGAL DISCUSSION

N.J.S.A. 18A:29-14 allows a board of education to withhold any member's employment increase for inefficiency or other good cause. The purpose of the statute is to "reward only those who have contributed to the educational process thereby encouraging high standards of performance." *Board of Education of the Township of Bernards v. Bernards Township Education Association,* 79 *N.J.* 311, 321, (1979). "The decision to withhold an increment is therefore a manner of essential managerial prerogative which has been delegated by the Legislature to the board." *Ibid.*

The Petitioner has the burden of proof to demonstrate that the Board's decision was arbitrary and capricious. *Gnatt v. Board of Education of the Manalapan-Englishtown Regional School District* 92 *N.J.A.R.* 2d (EDU) 589. When reviewing a board's determination to withhold a teaching increment, the scope of the Commissioner's review is to determine (1) whether the underlying facts were as those who made the evaluations claimed, and (2) whether it was unreasonable for them to conclude as they did based upon those facts. *Id.* at 594. The Commissioner is not to substitute his judgment for that of those who made the evaluation. *Id.* at 594.

In this case, Petitioner's motion papers do not indicate that she challenges whether the underlying facts, that is the incidents listed above from January 2003 – March 2004, "were as those who made the evaluations claimed, and whether it was unreasonable for them to conclude as they did based upon those facts." *Ibid.* Instead, Petitioner argues that the Board's decision to

use incidents that occurred in the 2002-03 school year as part of the basis for withholding her salary during the 2004-05 school year is untimely and ultra vires.[1]

In *Newark Teachers Union v. Board of Education of the City of Newark*, 1984 *S.L.D.* 1045, the Newark Board decided to withhold the adjustment of 22 tenured teachers who were represented by the union. The union argued that the Newark Board's decision on September 2, 1983, to withhold the 1983 – 1984 increment of tenured teachers was untimely. *Id.* at 1049. ALJ Weiss held that "unless a board has acted to withhold an increment prior to June 30 where, as here, a binding salary schedule is to take effect on July 1, the board cannot, after July 1 take such action." *Ibid.* The Commissioner agreed with the ALJ's decision but not his reasoning. *Id.* at 1056. The Commissioner believed that "as a matter of equity and reasonableness," any action to withhold an increment should be taken with enough time to ensure that the staff member is informed of the withholding when he is notified of his salary for the upcoming year. *Ibid.* The Commissioner determined that a board "must act prior to September 1 of a given school year to withhold the increment of a staff member" employed from September to June. *Ibid.*

In this case the Petitioner, citing *Sutton, infra*, asserts that "a school board may not withhold an increment based on events that occurred over one school year prior to the commencement of the current academic year in which the salary withholding is to take place."[2] In *Sutton v. Board of Education of the City of Orange*, 1986 *S.L.D.* 2473, petitioners, who were tenured teachers, argued that the Orange Board did not act in a timely manner to withhold their increments. The Orange Board voted to withhold the petitioners' increments on September 10, 1985. *Id.* at 2476-77. The school year began on September 4, 1985. *Ibid.* A retroactive withholding of increments is not allowed; instead the withholding must be effected prior to the start of the academic year. *Id.* at 2480. The ALJ, citing *Newark Teachers Union, supra,* noted that "once an increment has accrued or vested at the beginning of the school year, it is no longer a proposed raise, which could be withheld, but a part of the employee's contractual salary." *Id.* at 2481.

[1] See Petitioner's October 14, 2005, Brief at page 4
[2] See Petitioner's October 14, 2005 Brief at page 3.

Petitioner's reliance upon *Sutton* is misplaced; it does not support the assertion made by the Petitioner. *Sutton* stands for the proposition that if a school board is going to withhold an increment it must vote to do so in a pubic session prior to the start of the academic year. *Id.* at 2480, 2483. The impact of past conduct on a teacher's salary increment was specifically addressed in *Trautwein v. Board of Education of the Borough of Bound Brook*, 1979 *S.L.D.* 876. There the Bound Brook Board withheld a teacher's salary increment due to excessive absences. The State Board decided that a teacher's entire record of absenteeism could be considered, even though earlier incidents become less relevant with time. *Ibid.* "[I]n the case of withholding an increment, past conduct over a reasonably relevant period of time may properly be considered by a board of education in determining whether or not a teacher's increment should be withheld." *Id.* at 877. Thus, the State Board believed that the Commissioner erred in finding that the school board could not count petitioner's absences from February through June 1975. *Id.* at 876.

Based on *Trautwein*, the Board in this case could consider the past conduct from the 2002-03 school year in determining whether Petitioner's increment should be withheld. Based on *Newark Teachers Union* and *Sutton*, the Board must decide to withhold the salary increment prior to the start of the academic year in which it is to take effect. In this case, the Board passed its resolution to withhold Petitioner's 2004-05 salary increment on May 17, 2004, which is well before the start of the 2004-05 academic year.

A. Laches

Petitioner argues that the Board's decision to withhold her increment is untimely under the doctrine of laches. The courts have defined the equitable defense of laches as a "defense when there is a delay, unexplained and inexcusable, in enforcing a known right, and prejudice has resulted to the other party because of that delay." *Gladden v. Public Employees' Retirement System Trustee Board*, 171 *N.J. Super.* 364, 371 (App. Div. 1979). Laches requires both knowledge of a right and prejudice to the other party as a result of the delay in enforcing the right. The policy behind the doctrine is the discouragement of stale claims. *Ibid.* Determining whether a claim is stale is based on whether a party had a reason to assert the claim at an earlier date but failed to do so. *Berkeley Development Corporation v. Great Atlantic and Pacific Tea Co.*, 214 *N.J. Super.* 227, 243 (Law Div. 1986).

It is also important to note that laches, much like estoppel, is "not applied against the State to the same extent as against private parties." *O'Neill v. State Highway Department,* 50 *N.J.* 307, 319 (1967). The State has a long history of limiting the applicability of the doctrine in matters which involve the public interest. *Hyland v. Kirkman,* 157 *N.J. Super.* 565, 581-82 (Ch. Div. 1978). It is well established that laches cannot be invoked against the government nor can the neglect or omissions of public officials, as to their public duties, work an estoppel against the government. *Seaside Improvement Co. v. Atlantic City Steel Pier Co.,* 110 *N.J.* 510, 519 (Ch. 1932), *aff'd* 114 *N.J. Eq.* 22 (Err. & App. 1933). This limitation holds especially true in matters where the government is acting to enforce a public right or seeking to protect the public interest. *Hyland v. Kirkman, supra,* 157 *N.J. Super.* at 581-82; *Hill v. Board of Adjustment of Eatontown,* 122 *N.J. Super.* 156, 163 (App. Div. 1972). In other words, laches must not be applied if doing so would prejudice an essential government function. Town of Secaucus v. City of Jersey City, 19 *N.J. Tax* 10, 27 (2000) (*citing East Orange v. Livingston Township,* 102 *N.J. Super.* 512, 522 (Law Div. 1968), *aff'd* 54 *N.J.* 96 (1969)).

The doctrine of laches was addressed, in an educational context, in *Lavin v. Board of Education of the City of Hackensack,* 90 *N.J.* 145 (1982). In *Lavin* the Court held that the doctrine of laches barred petitioner's claim for employment credit, which was made nine years after her employment began. "Laches in a general sense is the neglect, for an unreasonable and unexplained length of time, under circumstances permitting diligence, to do in law what should have been done. More specifically, it is inexcusable delay in asserting a right." *Id* at 151 (quoting *Atlantic City v. Civil Service Commission,* 3 *N.J. Super.* 57, 60 (App. Div. 1949)). Factors to be considered are the length of the delay, reasons for the delay and changing conditions of either party during the delay. Id. at 152. However, prejudice to the party asserting laches is the most important factor that must be established in order to successfully invoke the defense. *Enfield, supra,* 256 *N.J. Super.* at 253. Indeed,

> [m]ere lapse of time is not enough to constitute laches, however, a "long lapse of time, if unexplained, may create or justify a presumption against existence or validity of plaintiff's rights." Laches depends on more than inexcusable delay in asserting a claim; it depends on inexcusable delay causing undue prejudice to the party against whom the claim is asserted. One who would

> invoke laches must show a delay which has subjected that party to a disadvantage in asserting and establishing their claimed right or defense caused by their detrimental reliance on their adversary's conduct.
> [*Ibid.* (citations omitted).]

The length of time between the June 2003 evaluation and the Board's decision to withhold the increment, May 17, 2004, is approximately one year. The Board's motion papers do not provide any reason for deciding to withhold Petitioner's increment during the 2004-05 school year as opposed to the 2003-04 school year. The only changing conditions mentioned in the papers are the subsequent negative evaluations of the Petitioner during the 2003-04 school year.

The Board taking into consideration an incident a year prior to its decision is not unreasonable because, based on *Trautwein, supra*, the Board can consider a staff member's past conduct and attach relevance to the conduct depending on how far back it occurred. Moreover, unlike *Lavin*, which had a nine-year delay, the delay here is only one year. It is reasonable for the Board to give Petitioner a chance to correct the deficiencies listed in the June 2003 evaluation, and then when she failed to do so, as shown by the incidents during the 2003-04 school year, use it as factor in deciding to withhold the increment. Nor has Petitioner shown how consideration of the June 2003 evaluation caused her any disadvantage in asserting and establishing her claimed right or that she detrimentally relied on the Board's conduct.

CONCLUSION AND ORDER

N.J.S.A. 18A:29-14 allows a board of education to withhold any member's employment increase for inefficiency or other good cause. Petitioner does not argue against the substance of the incidents that the Board used in making its withholding decision. Instead, Petitioner argues that the withholding is improper because the Board considered the June 2003 teacher evaluation as part of its determination to withhold Petitioner's 2004-05 increment.

However, *Trautwein* allows the Board to consider a teacher's past conduct over a reasonably relevant period of time. Also, *Newark Teachers Union* and *Sutton* require the Board to make its withholding decision prior to the start of the school year in which the withholding is

to take place. In this case, the Board made its decision on May 17, 2004, well before the start of the 2004-05 school year. Nor would the doctrine of laches bar the Board's action given that *Trautwein* allows the Board to consider past conduct and that it is reasonable for the Board to give Petitioner a chance to remedy any problems cited in her June 2003 evaluation before considering it and her actions, during the 2003-04 school year, in its decision.

Based on the foregoing, it is hereby **ORDERED** 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 (45) days and unless such time limit is otherwise extended, this recommended decision shall become a final decision in accordance with *N.J.S.A.* 52:14B-10.

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

November 30, 2005

DATE

DOUGLAS H. HURD, ALJ

Receipt Acknowledged:

11-30-05

DATE

DEPARTMENT OF EDUCATION

Mailed to Parties:

DEC - 6 2005

DATE

OFFICE OF ADMINISTRATIVE LAW

/lam

12-06

OAL DKT. NO. EDU 6093-04
AGENCY DKT. NO. 228-6/04

IN THE MATTER OF THE TENURE HEARING OF DONNA MOSLEY, SCHOOL DISTRICT OF THE CITY OF TRENTON, MERCER COUNTY	COMMISSIONER OF EDUCATION DECISION

This matter has been presented to the Commissioner as an Initial Decision approving a settlement agreed to by the parties and ordering compliance with the settlement terms.

On June 28, 2004, the Trenton Board of Education certified to the Commissioner two tenure charges against respondent, a tenured secretary: unbecoming conduct/excessive absenteeism, and abandonment of position. The allegations in the first charge describe poor attendance over a period of years, beginning in 1996 and continuing through the 2003-2004 school year. During most years, respondent allegedly used more than her allotment of leave days: 11 in the 1998-1999 school year, 28 in the 1999-2000 school year, 12 in the 2000-2001 school year, 1 in the 2001-2002 school year, 45.5 in the 2002-2003 school year and 100 in the 2003-2004 school year. The second charge alleged that respondent abandoned her position by being absent without permission or a doctor's note from December 15, 2003 to April 5, 2004.

Respondent's answer, submitted on July 12, 2004, included no response to the second tenure charge. As to the first tenure charge, respondent neither admitted nor denied most of the factual allegations.

On September 12, 2005, the parties held a conference with the Administrative Law Judge (ALJ) concerning settlement negotiations that they had conducted prior to that date. The ALJ received a memorialization of the settlement on November 7, 2005, and issued his Initial Decision approving it on November 23, 2005.

In the settlement, respondent "admits" that her absence from employment from December 15, 2003 through April 5, 2004 was due to her participation in a substance abuse rehabilitation program, and that her absenteeism over the period of years mentioned in the charges was due to a substance addiction.

Accordingly, the parties agreed -- subject to the Commissioner's approval -- that respondent will be reinstated to her former position with the following conditions:

1. Respondent agrees to comply with a Health Improvement Program, a signed copy of which is annexed to the settlement document;
2. Respondent's employment record will show -- for disciplinary purposes -- the 120-day suspension without pay that was imposed following certification of the tenure charges;
3. Respondent acknowledges that she is not entitled to back pay or attorney fees from petitioner; and
4. The parties agree that respondent has not, by accepting the disciplinary suspension without pay, admitted any guilt or wrongdoing.

The Health Improvement Program (HIP) with which respondent has agreed to comply contains acknowledgements that <u>past</u> substance addiction or attendance at a drug rehabilitation program may be a handicap -- under the New Jersey Law Against Discrimination (NJLAD) and the Americans with Disabilities Act (ADA) -- as to which employers must provide

reasonable accommodation. *Bosshard v. Hackensack University Medical Center*, 345 *N.J. Super.* 78, 85-89 (App. Div. 2001). However, also in the HIP is an acknowledgement by respondent that -- to retain her position -- she must be able to perform her duties, "including but not limited to maintaining sobriety and having a satisfactory record of attendance." She also acknowledges that, consistent with *In re Yaniello,* Commissioner's Decision No. 203-95, decided June 12, 1995, pages 5-8, *aff'd* State Board January 8, 1997, *aff'd* App. Div. A-3482-96T1 April 2, 1998, petitioner may lawfully hold respondent to the terms of a return to work agreement (the HIP) containing protections against drug use in the workplace or off-duty use of drugs that affects workplace performance.

To address these considerations, the HIP recites that petitioner will ask the Commissioner to allow the tenure charges against respondent to be withdrawn or dismissed with prejudice in exchange for respondent's agreement that she will acquiesce to blood testing upon evidence or suspicion of any return to substance abuse, and acknowledgement that her employment will be terminated if the result of split sample testing is positive. In addition, for an indefinite period after the effective date of the HIP, respondent will be subject to random blood testing, with the same outcome in the event of a positive result.

The Commissioner adopts the ALJ's approval of the settlement proposed by the parties. It is a supportable balance between the rights under federal and State law that are due to an employee who has done rehabilitation for the handicap of a substance addiction, and the necessity of a high standard of conduct from school employees, who are influential forces in students' lives, and who consequently must hold the confidence of the public which entrusts students into their care.

The ALJ properly determined that respondent entered into the agreement with full understanding of her rights, and that the agreement is dispositive of all issues and consistent with the law and public interest. *N.J.A.C.* 1:1-19.1(a) and (b). *In re Cardonick*, decided by the Commissioner April 7, 1982, *aff'd* State Board April 6, 1983, 1990 *S.L.D.* 850-851. The Commissioner notes that although petitioner's attorney did not execute the settlement document, the file includes a copy of the minutes of petitioner's October 11, 2005 meeting during which petitioner approved the settlement by a majority vote.

Accordingly, the Commissioner approves the settlement terms, and adopts the ALJ's Initial Decision, as supplemented by the foregoing, as the final decision in this case. The matter is hereby dismissed, subject to compliance with the terms of the settlement.

IT IS SO ORDERED

Lucille E Davy

ACTING COMMISSIONER OF EDUCATION

Date of Decision: 1/11/06

Date of Mailing: 1/11/06

State of New Jersey
OFFICE OF ADMINISTRATIVE LAW

INITIAL DECISION - SETTLEMENT
OAL DKT. NO. EDU 6093-04
AGENCY DKT. NO. 228-6/04

IN THE MATTER OF THE TENURE HEARING OF DONNA MOSLEY, SCHOOL DISTRICT OF THE CITY OF TRENTON, MERCER COUNTY

Thomas W. Summers, Jr., Esq. appearing for petitioner, (Sumners & George, attorneys)

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

Record Closed – November 7, 2005 Decided – November 23, 2005

BEFORE **JOHN R. FUTEY**, ALJ:

This matter was transmitted to the Office of Administrative Law (hereinafter OAL) on July 23, 2004, for determination as a contested case, pursuant to *N.J.S.A.* 52:14B-1 to -15 and *N.J.S.A.* 52:14F-1 to -13.

The matter was scheduled and heard as an in-person pre-hearing conference at the OAL. Mercerville, N.J. on January 27, 2005, after that conference set for October 27, 2004, had been adjourned due to scheduling conflicts by petitioner's counsel. It was set for plenary hearing for September 19 and 20, 2005. Prior to those dates the parties met and negotiated the matter and conferenced with this administrative law judge on September 12, 2005.

The parties have agreed to a settlement and have prepared a Settlement Agreement indicating the terms thereof, which is attached and fully incorporated herein. (J-1) It was received on November 7, 2005, with all of the requisite signatures affixed thereto.

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

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

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

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

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

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

November 23, 2005
DATE

JOHN R. FUTEY, ALJ

Receipt Acknowledged:

Dec 1, 2005
DATE

DEPARTMENT OF EDUCATION

Mailed to Parties:

DIRECTOR AND
CHIEF ADMINISTRATIVE LAW JUDGE

DEC - 5 2005
DATE

OFFICE OF ADMINISTRATIVE LAW

JRF/mamf

DOCUMENTS IN EVIDENCE

Jointly submitted

J-1 Settlement agreement received at the OAL on November 7, 2005

SUMNERS GEORGE
A Professional Corporation
849 West State Street
Trenton, NJ 08618
(609) 393-6604
Attorneys for Petitioner, Trenton Board of Education

In Evidence
11-7-05

RECEIVED
2005 NOV -7 A 10:33
OFFICE OF ADMINISTRATIVE LAW

	:	BEFORE THE COMMISSIONER OF
	:	EDUCATION, STATE OF NEW JERSEY
IN THE MATTER OF THE	:	
TENURE CHARGES AGAINST	:	AGENCY DOCKET NO. 228-6/04
DONNA MOSLEY, BOARD OF	:	OAL DOCKET NO. EDU 6093-2004S
EDUCATION OF THE CITY OF	:	
TRENTON, MERCER COUNTY	:	
	:	***SETTLEMENT AGREEMENT***

WHEREAS, this Settlement Agreement is made between the Petitioner, Board of Education of the City of Trenton ("Board"), and Respondent, Donna Mosley ("Mosley"); and

WHEREAS, Mosley is a tenured secretary within the meaning of the education laws and regulations governing the State of New Jersey employed by the Board; and

WHEREAS, the Board filed tenure charges with the Commissioner of Education, Agency Docket No. 228-6/04, OAL Docket No. EDU 6093-2004S; and

WHEREAS, the charges allege that from the 1995-96 through the 2003-04 school years, Mosley has had excessive absenteeism; and

WHEREAS, the charges also allege that Mosley had abandoned her employment from December 15, 2003 through April 5, 2004; and

WHEREAS, Mosley admits that her absence from employment from December 15, 2003 through April 5, 2004 was the direct result of her participation in a substance abuse rehabilitation program and her absenteeism over the last few school years was the result of a substance abuse addiction; and

WHEREAS, it is now the desire of both parties to resolve any and all issues and disputes in this proceeding because of the uncertainty of the outcome should this matter proceed to hearing;

THEREFORE, in consideration for the mutual promises and covenants contained herein, the parties agree as follows:

1. Respondent will be reinstated to her former position as a tenured secretary upon approval of this settlement agreement by the Commissioner of Education;

2. Respondent has agreed to a Health Improvement Program with the Petitioner as a condition to this agreement **(See Exhibit A)**;

3. In accordance with state tenure laws, the Respondent was suspended without pay for 120 days following certification of the tenure charges. The parties agree that this period of suspension without pay shall be deemed to be a disciplinary suspension without pay and may be treated as a disciplinary suspension by the Petitioner for purposes of the Respondent's employment record with the Petitioner.

4. It is agreed that the Respondent's acceptance of this disciplinary suspension without pay does not constitute an admission of guilt by her to any of the allegations set forth in the tenure charges or an acknowledgment that she engaged in any wrongdoing of any kind, including that set forth in the tenure charges. Respondent has entered into this settlement agreement due to the uncertainty of the outcome and in an effort to dispose of this matter in a way that will allow her to return to work.

5. Respondent acknowledges that she is not entitled to any back pay as a part of this settlement agreement, nor is she entitled to have any of her attorney's fees paid by the Petitioner.

6. This agreement constitutes a full and final settlement of all claims in dispute, which were raised, or could have been raised, in this matter. Both parties waive any rights to any further appeals with respect to this matter, or any other proceedings to contest the matters which were raised in this proceeding, or could have been raised, except that either party may file an appropriate action to enforce the terms of this settlement agreement.

7. The parties agree that this settlement agreement will be incorporated as part of an Initial Decision issued by the Honorable John R. Futey, ALJ, and will be presented to the Commissioner of Education to accept as a final decision in this matter.

8. The Respondent by signing this agreement below represents and warrants that she has had an opportunity to review this agreement with her attorney, Michael T. Barrett, Esq., Bergman and Barrett, and warrants that she is satisfied with the services of Mr. Barrett and his firm and with the representation that she has received from the Trenton Educational Secretaries Association.

9. This agreement is entered into voluntarily, without duress and of free will and that there are no agreements between the parties other than that which are set forth herein.

10. The representatives of the Petitioner signing this agreement represents and warrants that they are authorized by the Petitioner to enter into this agreement based upon a public action approving the agreement by the Petitioner and their signatures bind the Petitioner to the terms set forth herein.

Bernard J. McMullan, Ph.D.
President
Trenton Board of Education

10/11/05
Date

Nancy Swirsky
Interim Board Secretary
Trenton Board of Education

Michael T. Barrett, Esq.
Respondent's Attorney

10/23/05
Date

Donna D. Mosley
Donna Mosley
Respondent

	:	BEFORE THE COMMISSIONER OF
	:	EDUCATION, STATE OF NEW JERSEY
IN THE MATTER OF THE	:	
TENURE CHARGES AGAINST	:	AGENCY DOCKET NO. 228-6/04
DONNA MOSLEY, BOARD OF	:	OAL DOCKET NO. EDU 6093-2004S
EDUCATION OF THE CITY OF	:	
TRENTON, MERCER COUNTY	:	
	:	

HEALTH IMPROVEMENT PROGRAM CONTRACT

THIS HEALTH IMPROVEMENT PROGRAM CONTRACT (hereinafter referred to as "Contract") is made and entered into this 11th day of October 2005 by and between the Trenton Board of Education ("BOARD") and Donna Mosley ("MOSLEY") (hereinafter collectively referred to as the "parties."

WITNESSETH

WHEREAS, the BOARD and MOSLEY have each retained independent counsel of their own choosing, and have agreed to this resolution concerning the tenure hearing. The parties have knowingly, intelligently, and voluntarily agreed to waive such rights as ordinarily available in such a matter.

WHEREAS, past drug addiction or attendance at a drug rehabilitation program is acknowledged as a handicap with the protection of the New Jersey Law Against Discrimination ("NJLAD") and the Americans with Disabilities Act ("ADA") as touted in ***Bosshard v. Hackensack University Medical Center***, 345 ***N.J.Super.*** 78, 783 ***A.2d*** 731 (***App.Div.*** 2001). The BOARD acknowledges that under the NJLAD and the ADA, it is required to formulate a reasonable accommodation for employees with disabilities. Similarly, MOSLEY realizes that though the BOARD has a duty to reasonably accommodate her disability, she must be able to perform her duties, including but not limited to maintaining sobriety and having a satisfactory record of attendance and that, consistent with ***In re Yaniello***, CD 203-95 (Jun. 12, 1995), *aff'd.* S.B. 78-95 (Jan. 8, 1997), *aff'd.* App.Div. Dkt. No. A-3482-96T1 (Apr.2, 1998) (unreported), the BOARD may lawfully hold MOSLEY to the terms of a return to work agreement. The BOARD cannot assume that, without the following protections contained in the Contract, MOSLEY will limit possible drug consumption to off-duty hours, or that the effects of drugs will be dissipated by the time the workday commences.

NOW THEREFORE, the matters in dispute having been amicably adjusted by and between the parties, it is hereby represented, warranted, promised, covenanted and agreed as follows:

EXHIBIT A

1. The recitals in the Settlement Agreement are made part of the Contract by reference.

2. The BOARD will seek the Commissioner's approval for this Contract, and if the Commissioner approves the Contract without modification, ask the Commissioner to allow the tenure charges against MOSLEY to be withdrawn and dismissed with prejudice.

3. Upon suspicion or evidence of MOSLEY's return to drug abuse after the execution of the Contract, MOSLEY consents in advance to submit to blood testing. The BOARD's demand for blood testing shall be provided in writing and delivered to MOSLEY by personal delivery. MOSLEY must present herself at the place designated for testing for the presence of controlled dangerous substance (CDS) in her body within 1 (one) hour upon receipt of the demand unless extended by the BOARD in writing. Blood testing is to take place at a licensed, BOARD-designated hospital, clinic, hospice, laboratory or other healthcare provider utilizing a split sample method, with the sample to be split into three parts. In the event that the first part of the sample tests positive utilizing the then-current standards accepted by the U.S. Department of Transportation, the BOARD may immediately suspend MOSLEY in accordance with ***N.J.S.A.*** 18A:6-10, ***et seq.***, and the second part of the sample will be forwarded promptly and directly by the licensed, BOARD-designated healthcare provider described above to a facility operated by Quest Diagnostics or its successor by merger or acquisition (which MOSLEY agrees, in advance, is an independent laboratory of her choice). MOSLEY will pay for the analysis of the second part of the sample. In the event that the second part of the sample tests positive, the BOARD will consider the result as a violation of this agreement by MOSLEY. In the event that the second part of the sample tests negative, Laboratory Corporation of America or its successor will test the third part by merger or acquisition at the expense of the BOARD. The third test shall be conclusive. In the event that the third part of the sample tests positive, the BOARD will consider the result as a violation of this agreement by MOSLEY. In the event of a violation of this agreement by MOSLEY, following the principles articulated in ***Yaniello***, ***supra***, MOSLEY acknowledges that she will be subject to the termination of her employment and tenure;

4. For an indefinite period after the full and final execution of this agreement, MOSLEY consents in advance to submit to random blood testing. The BOARD's demand for blood testing shall be provided in writing and delivered to MOSLEY by personal delivery. MOSLEY must present herself at the place designated for testing for the presence of controlled dangerous substance (CDS) in her body within 1 (one) hour upon receipt of the demand unless extended by the BOARD in writing. Blood testing is to take place at a licensed, BOARD-designated hospital, clinic, hospice, laboratory or other healthcare provider utilizing a split sample method, with the sample to be split into three parts. In the event that the first part of the sample tests positive utilizing the then-current standards accepted by the U.S. Department of Transportation, the BOARD may immediately suspend MOSLEY in accordance with ***N.J.S.A.*** 18A:6-10, ***et seq***., and the second part of the sample will be forwarded promptly and directly by the licensed, BOARD-designated healthcare provider described above to a facility operated by Quest Diagnostics or its successor by merger or acquisition (which MOSLEY agrees, in advance, is an independent laboratory of her choice). MOSLEY will pay for the analysis of the second

part of the sample. In the event that the second part of the sample tests positive, the BOARD will consider the result as a violation of this agreement by MOSLEY. In the event that the second part of the sample tests negative, Laboratory Corporation of America or its successor will test the third part by merger or acquisition at the expense of the BOARD. The third test shall be conclusive. In the event that the third part of the sample tests positive, the BOARD will consider the result as a violation of this agreement by MOSLEY. In the event of a violation of this agreement by MOSLEY, following the principles articulated in ***Yaniello***, MOSLEY acknowledges that she will be subject to the termination of her employment and tenure.

IN WITNESS WHEREOF, the Parties have executed this Agreement on the date first hereinabove written.

WITNESS:

Michael T. Barrett, Esq.
Bergman & Barrett

By: Donna Mosley 10/23/05
Donna Mosley

WITNESS:

Nancy Swirsky
Interim Board Secretary
Trenton Board of Education

By:
Bernard J. McMullan, Ph.D.
President
Trenton Board of Education

11-06

OAL DKT. NO. EDU 9574-99
AGENCY DKT. NO. 156-6/99

RITA HAWKS,	:	
PETITIONER,	:	
V.	:	COMMISSIONER OF EDUCATION
BOARD OF EDUCATION OF THE TOWN OF KEARNY, HUDSON COUNTY,	:	DECISION
RESPONDENT.	:	

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

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

IT IS SO ORDERED.

Lucille E. Davy
ACTING COMMISSIONER OF EDUCATION

Date of Decision: 1/11/06

Date of Mailing: 1/11/06

State of New Jersey
OFFICE OF ADMINISTRATIVE LAW

INITIAL DECISION

SETTLEMENT

OAL DKT. NO. EDU 9574-99

AGENCY DKT. NO. 156-6/99

RITA HAWKS,

Petitioner,

v.

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

Respondent.

Gail Oxfeld Kanef, Esq., for petitioner
(Oxfeld Cohen, LLC, attorney)

Kenneth J. Lindenfelser, Esq., for respondent
(Koch, Koch & Bennett, attorneys)

Record Closed: November 29, 2005 Decided: November 30, 2005

BEFORE **ELINOR R. REINER**, ALJ:

On or about June 11, 1999, petitioner, Rita Hawks, filed a petition of appeal with the Commissioner of Education, alleging that respondent improperly charged her sick days for time lost due to a work-related injury in violation of *N.J.S.A.* 18A:30-2.1. On or

about August 25, 1999, respondent filed its answer requesting dismissal of the petition and alleging that petitioner's claim must be reduced by any recovery received in Workers' Compensation. On August 31, 1999, the Department of Education, Bureau of Controversies and Disputes, transmitted this matter 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.

On October 18, 1999, the matter was assigned to Administrative Law Judge Thomas R. Vena, and a prehearing conference was scheduled for December 2, 1999. With consent of counsel, by order dated February 16, 2000, ALJ Vena placed this matter on the inactive list for three months pending the determination of petitioner's Workers' Compensation claim. The case was continued on the inactive list for six months by Order dated October 18, 2000. The matter was reassigned to Administrative Law Judge Thomas E. Clancy, who also ordered the above matter continued on the inactive list for various time periods, until petitioner's attorney advised Judge Clancy by letter dated August 3, 2004 that the matter should be listed for hearing.

On September 7, 2004, the case was assigned to the undersigned judge, and a hearing scheduled for April 20, 2005. The hearing was adjourned to June 21, 2005 and then again to August 11, 2005. On that date, the parties appeared and settlement discussions were held. A settlement was reached, and the parties signed a Settlement Agreement. As a result, the hearing was adjourned. The settlement was contingent upon approval by the Board. Despite requests for the Board Resolution approving the settlement, it was not received by the undersigned until November 29, 2005.

The parties have agreed to settle this matter and have prepared the attached Settlement Agreement and Board Resolution, indicating the terms of settlement.

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

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

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

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

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

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

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 30, 2005
DATE

Elinor R Reiner
ELINOR R. REINER, ALJ

Receipt Acknowledged:

12-2-05
DATE

Kathleen Duncan/CH
DEPARTMENT OF EDUCATION

Mailed to Parties:

DEC 6 2005
DATE

Laura Sanders
DIRECTOR AND
CHIEF ADMINISTRATIVE LAW JUDGE
OFFICE OF ADMINISTRATIVE LAW

al

Rita Hawks Petitioner v. Kearny Board of Educ Respondent	State of New Jersey Office of Administrative OAL Docket EDU 9574-9 Settlement Agreement

WHEREAS Petitioner has brought this claim seeking reinstatement of 110.5 charged sick days taken in connection with an adjudicated Workers Compensation injury and

WHEREAS the parties wish to avoid the expenses and uncertainties of litigation, the parties agree as follows:

1. Respondent shall reinstate 83 sick days with a value of $29,548. This sum represents the approximate value of 110.5 sick days less the cost of guest dates incurred by Respondent.

2. Payment of the above amount shall be made in two installments. The first payment

of $14,774 shall be made within 30 days of this agreement. The second payment of $14,774 shall be made on January 2, 2006.

3. Petitioner shall withdraw this petition with prejudice upon formal Board approval.

Rita Nancy Hawks
Rita Nancy Hawks

Kenneth Sigmon
Kenneth Sigmon
attorney for Board of Education

Gail O'Neal
Gail O'Neal, Esq. &
attorney for Hawks

Dated: 8-11-05

CERTIFIED TO BE A TRUE COPY OF THE RESOLUTION AS IT WILL APPEAR IN THE MINUTES OF THE AUGUST 15, 2005 REGULAR MEETING OF THE KEARNY BOARD OF EDUCATION

BY: Leslie J. Gaudet

Business Administrator/Board Secretary

The following resolution was moved by Mr. Doffont, seconded by Mrs. Mc Donald and unanimously carried:

APPROVAL OF SETTLEMENT

The Kearny Board of Education, based upon the recommendation of the Board Attorney, hereby approves the negotiated settlement with former staff member "R.H." by the reinstatement of eighty-three (83) sick days with a total reimbursement value of $29,548.

Rita Hawks Petitioner v. Kearny Board of Educ Respondent	State of New Jersey Office of Admin Law OAL Docket EDU 9574-9 Settlement Agreement

WHEREAS Petitioner has brought this claim seeking reinstatement of 110.5 charged sick days taken in connection with an adjudicated Worker's Compensation injury and

WHEREAS the parties wish to avoid the expenses and uncertainties of litigation, the parties agree as follows:

1. Respondent shall reinstate 83 sick days with a value of $29,548. This sum represents the approximate value of 110.5 sick days less the cost of guest rates incurred by Respondent.

2. Payment of the above amount shall be made in two installments. The first payment

of #14,774 shall be made within 30 days of this agreement. The second payment of #14,774 shall be made on January 2, 2006.

3. Petitioner shall withdraw this petition with prejudice upon formal Board approval.

Rita Nancy Hawks
Rita Nancy Hawks

Kenneth Lindenfelser
attorney for Board of Education

Gail Offield Hand
Gail Offield Hand &
attorney for Hawks

Dated: 8-11-05

of #14,774 shall be made within 30 days of this agreement. The second payment of #14,774 shall be made on January 2, 2006.

3. Petitioner shall withdraw this petition with prejudice upon formal Board approval.

Rita Nancy Hawks
Rita Nancy Hawks

Kenneth Sindenfelser
attorney for Board of Education

Gail Offield Hazel
attorney for Hawks

Dated: 8-11-05

Rita Hawks Petitioner v. Kearny Board of Educ Respondent	State of New Jersey Office of Administrative Law OAL Docket EDU 9574-99 Settlement Agreement

WHEREAS Petitioner has brought this claim seeking reinstatement of 110.5 charged sick days taken in connection with an adjudicated Worker's Compensation injury and

WHEREAS the parties wish to avoid the expenses and uncertainty of litigation, the parties agree as follows:

1. Respondent shall reinstate 83 sick days with a value of $29,548. This sum represents the approximate value of 110.5 sick days less the cost of substitutes incurred by Respondent.

2. Payment of the above amount shall be made in two installments. The first payment

13-06

OAL DKT. NO. EDU 11546-04
AGENCY DKT. NO. 304-9/04 (PARTIAL)

BLOOMFIELD EDUCATION ASSOCIATION,	:	
PETITIONER,	:	COMMISSIONER OF EDUCATION
V.	:	DECISION (PARTIAL)
BOARD OF EDUCATION OF THE TOWNSHIP OF BLOOMFIELD, ESSEX COUNTY,	:	
RESPONDENT.	:	

The record of this matter, the proposed settlement agreement as to petitioning association member Daniela DiCarlo, and the Partial Initial Decision issued by the Office of Administrative Law (OAL) pursuant to *N.J.A.C.* 1:1-19.1, have been reviewed.

Upon such review, the Commissioner approves the settlement terms and adopts the settlement as her final decision with respect to Ms. DiCarlo, so that this matter is hereby dismissed as to that petitioner, subject to compliance with the terms of the settlement.

IT IS SO ORDERED.

Lucille Davy

ACTING COMMISSIONER OF EDUCATION

Date of Decision: 1/11/06
Date of Mailing: 1/11/06

State of New Jersey
OFFICE OF ADMINISTRATIVE LAW

INITIAL DECISION

PARTIAL SETTLEMENT

OAL DKT. NO. EDU 11546-04

AGENCY DKT. NO. 304-9/04

BLOOMFIELD EDUCATION ASSOCIATION,

Petitioner,

v.

BOARD OF EDUCAITON OF THE TOWNSHIP OF BLOOMFIELD,

Respondent.

John A. Boppert, Esq., for petitioner
(Oxfeld Cohen, attorneys)

Mark A. Wenczel, Esq., for respondent
(Gaccione, Pomaco & Malanga, attorneys)

Record Closed: December 5, 2005 Decided: December 6, 2005

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

This matter was transmitted to the Office of Administrative Law ("OAL") on November 16, 2004 for hearing as a contested case pursuant to *N.J.S.A.* 52:14B-1 to –13 and *N.J.S.A.* 52:14F-1 to –15.

Petitioner Bloomfield Education Association sought salary and benefits on behalf of 10 teachers employed by the Bloomfield Board of Education. One of those individual teachers, Daniela DiCarlo, has entered into a settlement of her claim against the Board.

Ms. DiCarlo and the Board have agreed to settle this matter and have prepared the attached stipulation indicating the terms of settlement. I have reviewed the record and the settlement terms and **FIND:**

1. Ms. DiCarlo and the Board voluntarily agreed to the settlement as evidenced by their signatures.

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

3. This partial settlement does not affect the rights and obligations of any of the other nine named individuals in this case.

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

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

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

Dec. 6, 2005
DATE

Ken R. Springer
KEN R. SPRINGER, ALJ

Receipt Acknowledged:

10/14/05
DATE

DEPARTMENT OF EDUCATION

Mailed to Parties:

DEC 15 2005
DATE

DIRECTOR AND
CHIEF ADMINISTRATIVE LAW JUDGE
OFFICE OF ADMINISTRATIVE LAW

al

RECEIVED
STATE OF
OFFICE OF
2005 DEC -5 A 9:03

GACCIONE, POMACO & MALANGA
A Professional Corporation
524 Union Avenue
P.O. Box 96
Belleville, New Jersey 07109
(973) 759-2807
Attorneys for Respondent

BLOOMFIELD EDUCATION ASSOCIATION, Petitioner, v. BOARD OF EDUCATION OF THE TOWNSHIP OF BLOOMFIELD, COUNTY OF ESSEX, Respondent.	STATE OF NEW JERSEY DEPARTMENT OF EDUCATION COMMISSIONER OF EDUCATION AGENCY DOCKET NO. 304-9/04 OAL DOCKET NO. EDUOT-11546-2004N **SETTLEMENT AGREEMENT AS TO DANIELA DI CARLO**

WHEREAS the Bloomfield Education Association ("Association") has filed this action on behalf of several members of the Association to dispute the manner in which the Respondent, Board of Education of the Township of Bloomfield ("Board"), interpreted their resignation dates from employment with the Board, and

WHEREAS the parties have amicably adjusted and settled their differences with respect to one member: Daniela DiCarlo;

NOW THEREFORE the parties hereby set forth the terms of settlement as to Daniela DiCarlo's claim only:

Respondent, Board of Education of the Township of Bloomfield, shall pay Daniela DiCarlo the amount of $612.22 within thirty days of the approval by the Commissioner of Education of this Settlement Agreement.

In exchange for the representations made by the Respondent, Petitioner, DiCarlo, hereby releases and gives up any and all claims and rights which she may have against Respondent, Board of Education of the Township of Bloomfield for anything which has happened up to now, pertaining to her employment with Respondent, Board of Education of the Township of Bloomfield.

Dated: 11/25/05

Daniela DiCarlo
DANIELA DI CARLO, Petitioner

Dated: 11/30/05

MARK A. WENCZEL, ESQ.
Authorized Representative for the Board of Education of the Township of Bloomfield

16-06

OAL DKT. NO. EDU 10052-05
AGENCY DKT. NO. 365-12/05

D.W., on behalf of minor child B.W., and D.W., individually, and C.C., on behalf of minor child S.D.C., and C.C., individually,	
PETITIONERS,	COMMISSIONER OF EDUCATION
V.	DECISION ON
	APPLICATION FOR EMERGENT RELIEF
BOARD OF EDUCATION OF THE CITY OF CAMDEN, CAMDEN COUNTY,	
RESPONDENT.	

Upon independent review of the record and the Initial Order of the Office of Administrative Law (OAL), the Commissioner adopts the determination of the administrative law judge (ALJ) that petitioners have not met their burden to entitle them to relief on an emergent basis.

This case began on December 8, 2005 with a petition demanding that B.W. and S.D.C. be given credit for Algebra I and allowed to participate in Algebra II for the rest of the 2005-2006 school year. The petition was accompanied by a brief and certification purporting to support a motion for emergent relief. Respondent's answer was filed on December 14, 2005 with the OAL, to which the case had already been transmitted. In essence, respondent maintained that: both students had failed their respective 9th grade Algebra I classes; had not taken any of the remedial classes for Algebra I that had been approved by the district, or by the

principal of their school; and were ineligible to take Algebra II until they passed an approved Algebra I course. A hearing was held in the OAL on December 14, 2005, at which the ALJ rendered an oral order denying petitioners' application for emergent relief.

It is undisputed that B.W. and S.D.C. (the Students) received failing grades in Algebra I at the end of their freshman year (2003-2004) at Dr. Charles E. Brimm Medical Arts High School (Brimm). It is also undisputed that during the summer of 2004, respondent operated summer school remedial courses for juniors and seniors only. The students were consequently obliged to seek other alternatives for remediation in Algebra I.

Plaintiffs submitted a copy of an undated letter from a Brimm guidance counselor, Frederick W. Clayton (P-6), wherein he stated that he had met with B.W.'s mother and "It was resolved from [their] meeting [that B.W.] and another student would resolve their deficiency in Algebra I by completing the required hours and review work with the same teacher and the same curriculum which the Camden Board of Education used in Summer School 2004."

In a letter dated January 20, 2005 (P-5), the director of the Camden area Upward Bound reported that S.D.C. had attended a six-week program during Summer 2004 which included an Algebra I component for which S.D.C. received a final grade of 75 (P-5). The Algebra I instruction was given by a Camden City school teacher who, according to the testimony of Camden Assistant Superintendent Luis Pagan, has a certificate in elementary education and taught mathematics in a Camden middle school. The Algebra I instruction that B.W. obtained in summer 2004 was apparently from a Brimm mathematics teacher, Ms. Cloth, who submitted a note dated June 16, 2005 stating that B.W. had "attended summer school in '04 and completed Alg I [sic] with me. She received a B and passed."

It is undisputed that no prior recommendation or approval was obtained from the principal of Brimm for either student's summer instruction. It is also undisputed that neither the students nor the respective teachers forwarded to Brimm an evaluation and description of the provided instruction and an account of the number of hours of classroom instruction. Further, it is undisputed that the Upward Bound teacher held no endorsement in mathematics. While Ms. Cloth is certified to teach secondary school mathematics, she was not, according to Pagan's testimony, assigned by the district to teach Algebra I during summer 2004.

Although the students were initially scheduled to repeat Algebra I in their sophomore year (2004-2005 school year), it is undisputed that they were both allowed to take Geometry (P-4), and that they both passed the course. A copy of a memorandum dated September 6, 2005 from Joseph D. Carruth, Principal of Brimm, to Luis A. Pagan, Assistant Superintendent of the respondent district (P-3), indicated that prior to being switched to Geometry, B.W. had been given an examination for Algebra I and had passed it. The same memo details Carruth's recollections regarding the changing of B.W. and S.D.C.'s Algebra I grades from F to D. There was conflicting evidence at the OAL hearing as to whether the students' failing grades for Algebra I had ever been changed to D's, but Pagan testified that he had never approved same (R-1), and that the students' current official transcripts show F's.

At the end of the 2004-2005 school year, Pagan wrote to D.W., B.W.'s father and former member of the respondent Board of Education, that B.W. could not receive credit for her instruction in summer 2004 because the requirements of *N.J.A.C.* 6:3-1.8 [now *N.J.A.C.* 6A:32-10.5] had not been met. *N.J.A.C.* 6A:32-10.5 mandates that it is a student's principal who must recommend any summer school remedial course, in accordance with district board policies, and that he/she must identify the specific course and the purpose for which it is

taken. *N.J.A.C.* 6A:32-10.5(a). Further, credit for remedial courses may not be granted unless an evaluation and description of the course is provided to the principal, *N.J.A.C.* 6A:32-10.5(b) and (d), and unless the course is given for 60 hours "under standards equal to those during the regular term or through an established number of curricular activities as determined by the district board of education and approved by the county superintendent . . . ." *N.J.A.C.* 6A:32-10.5(d).

Pagan stated in his letter, which was dated June 27, 2005, that he had found no evidence of compliance with the foregoing. He suggested that B.W. take an approved Camden County Algebra I course during summer 2005 so that she could take Algebra II as a Junior, and he attached to his letter a list of approved summer school programs in Camden County (R-2).

It is undisputed that neither B.W. nor S.D.C. took remedial Algebra I during summer 2005. Accordingly, both were scheduled to take Algebra I for the 2005-2006 school year. Contrary to the allegations in the petition, it is now undisputed that both students have been in Algebra I for four months, i.e., since the beginning of the school year.

Finally, although petitioners initially alleged that four courses in mathematics are needed for graduation from Brimm, they could offer no supporting proof. To the contrary, annexed to respondent's Answer are a copy of an excerpt from Camden City Public School's Program of Studies for Grades 9-12, and an affidavit by the Brimm course scheduler, both of which verify that only three mathematics courses are necessary under State standards and Brimm's own graduation requirements.

The foregoing facts having been established, the ALJ issued an oral opinion, applying the standards for granting emergent relief, as articulated in *Crowe v. DeGioia*, 90 *N.J.* 126 (1982). Under *Crowe v. DeGioia*, petitioners must show (1) that they will suffer irreparable

harm if the requested relief is not granted; (2) the legal right underlying petitioners' claim is settled; (3) petitioners have a likelihood of prevailing on the merits of the underlying claim; and (4) a balancing of the equities and interests of the parties reveals that petitioners would suffer greater harm than respondent would suffer from an adverse ruling.

At the outset, the ALJ expressed concern that petitioners had presented insufficient proofs to support the allegations that formed the basis of their claim. For example, petitioners were not able to support their allegations that the students had initially been allowed to take Algebra II but were subsequently removed from same. The facts established at the hearing revealed that the students had been in Algebra I from the beginning of the 2005-2006 school year, since they had not taken remedial Algebra I during summer 2005, despite Pagan's June 27, 2005 letter advising petitioners of the necessity to do so.

The ALJ mentioned also that while there was testimony that Pagan gave permission for B.W. to be given an Algebra I final exam -- and while there was a written hearsay statement that she had passed it (P-3) -- there was a factual dispute about whether Pagan ever saw the exam, and about the purpose or significance of the exam. The Commissioner notes that petitioners' own exhibit (P-3) indicates that the exam was administered not to assess whether B.W. could proceed to Algebra II, but rather to assess whether B.W. should be allowed to take Geometry in 2004-2005.

Most significantly, the ALJ found that petitioners presented no proof at the hearing that the instruction the students had taken in summer 2004 qualified for Algebra I remedial credit under *N.J.A.C.* 6A:32-10.5, *supra.* Nor did petitioners show that they had, at any time, presented to the Camden district the information it needed to assess the instruction.

The remaining weakness in petitioners' proofs related to the alleged approval that guidance counselor Clayton gave to the students for remedial summer instruction in Algebra I. Petitioners argue that Clayton's approval of the students' summer 2004 instruction was apparent authority upon which petitioners were entitled to rely. However, according to petitioners' own exhibit P-6, the remedial plan that Clayton "approved" required completion of "the required hours and review work with the same teacher and the same curriculum which the Camden Board of Education used in Summer School 2004." The record shows that S.D.C. did not comply with such a plan, and, as stated above, petitioner did not offer proof that B.W.'s instruction included "the required hours and review work," and covered "the same curriculum which the Camden Board of Education used in Summer School 2004." The ALJ further found that even if the students had received the instruction proposed by Clayton, petitioners were not entitled to rely upon Clayton's representations: "The parents had an affirmative obligation in order to understand and know the parameters of the relevant regulations . . . ." (Transcript of ALJ's Oral Order on Emergent Relief, p. 4) The principal, not a guidance counselor, is authorized to recommend or approve summer schooling, and the Brimm principal did not do so for the petitioners' children.

Applying the *Crowe* standards to the facts that were actually established at the hearing and through affidavits, the ALJ found that petitioners did not meet their burden to prove that their situation warrants emergent relief. The Commissioner agrees.

First, the petitioners did not prove that the students would suffer irreparable harm if they did not enter Algebra II in January 2006. Providing they both pass Algebra I this year, they can both meet the graduation requirement of 15 credits of mathematics by taking Algebra II when they are seniors. And if they take Algebra II in summer school, they can take a fourth

mathematics course when they are seniors. In fact, switching into Algebra II when they have missed four months and have never provided the information necessary to prove that they mastered Algebra I would appear to hold more potential harm for the students and their classmates than keeping the status quo – despite the unsubstantiated allegations that the Brimm Algebra II teacher said it would not be a problem.

Second, the Commissioner agrees that petitioners did not show that there is a settled legal right for a student to be placed in a course when credit for the prerequisite course has not been approved by the principal, due to failure by the student to take remedial instruction that complies with *N.J.A.C.* 6A:32-10.5 and/or due to failure by the student, parents or instructors to provide information about the remedial coursework that is required by *N.J.A.C.* 6A:32-10.5.

Third, for the reasons articulated above, petitioners have not presented a case strong enough to persuade the Commissioner that they will prevail on the underlying merits at the OAL plenary hearing scheduled for February 10, 2006.

Fourth, in balancing the interests and equities of the parties, the Commissioner finds, on the one hand, that there is no irreparable harm to the students if they stay in Algebra I this year, since they can complete their graduation requirements in mathematics and, if they avail themselves of summer school, take a fourth year of mathematics in the 2006-2007 school year. On the other hand, there is a reasonable chance that allowing the students to transfer into an Algebra II class after four months would lead to disruption to the education of all the students in the class. Further, the Commissioner is concerned that disregard of the regulations that enable the principal to scrutinize remedial work could open the door to inconsistent curricular standards. Clearly, the interest of respondent in maintaining fairness to all students would be implicated.

See, e.g., G.B.C. On Behalf of Minor Child J.T.C. v. Board of Education of the Borough of Haddonfield, Camden County, 1986 *S.L.D.* Vol. I, p.54. Thus, the equities do not favor granting the requested emergent relief.

For the reasons articulated herein, the Commissioner adopts the determination of the ALJ that petitioners' application for emergent relief should be denied, and the matter shall proceed to a plenary hearing on February 10, 2006.

IT IS SO ORDERED.[1]

Lucille E Davy

ACTING COMMISSIONER OF EDUCATION

Date of Decision: 1/18/06

Date of Mailing: 1/18/06

[1] This decision may be appealed to the State Board of Education pursuant to *N.J.S.A.* 18A:6-27 *et seq.* and *N.J.A.C.* 6A:4-1.1 *et seq.*

State of New Jersey
OFFICE OF ADMINISTRATIVE LAW

ORAL ORDER ON
EMERGENT RELIEF
OAL DKT. NO. EDU 10052-05
AGENCY DKT. NO. 365-12/05

D.W., O/B/O MINOR CHILD,
B.W. & D.W. INDIVIDUALLY AND
C.C. ON BEHALF OF MINOR CHILD,
S.D.C. & C.C. INDIVIDUALLY,
Petitioners,

v.

BOARD OF EDUCATION OF THE
CITY OF CAMDEN, CAMDEN COUNTY
Respondent.

Saul J. Steinberg, Esq., appearing for petitioner, (Sufrin, Zucker, Steinberg, Waller &Wixted, attorneys)

Linda A. Olsen, Esq., appearing for respondent, (Ronan, Tuzzio & Giannone, attorneys)

The following represents a transcript of an Oral Order rendered by ALJ Futey at an emergent hearing on December 14, 2005, at the Office of Administrative Law, Trenton, New Jersey.

BEFORE **JOHN R. FUTEY,** ALJ:

This is an Oral order rendered as a result of the petition being filed with the Department of Education with an answer or response by respondent being submitted to the Office of

Administrative Law, as of December 14, 2005 at 12:10 pm with the matter being listed for emergent relief hearing for 1:30 that same afternoon. Counsel have appeared on behalf of both sides, Saul Steinberg, representing the petitioners and Linda Olsen, representing the respondent district. It should be also noted parenthetically that only one of the petitioner parents, D.W. has appeared. The other parent was unable to attend today but I could not find any harm by the person not showing for today, it being so noted for the record.

In any event, these represent applications for emergent relief on behalf of both students D.W. and S.C. respectively by their respective parents to allow to be "placed in" (as opposed to the term "not returned to") the Algebra II class which had been alleged in the transmittal which had been received at the OAL on December 9, 2005, from the Department of Education. In the transmittal it appears that there was an error or a misrepresentation or misunderstanding by petitioner as to what the issue was. That issue as framed in the transmittal indicates: "Parents appeal Boards refusal to honor passing grades received by there children in summer Algebra I course and seek there return to Algebra II class from which they were removed." Rather, they never did commence the Algebra II class in September, 2005. They were placed in the Algebra I class by the district.

I have had an opportunity to consider the arguments raised by counsel. We also have had sizable discussions on the record and all of it was contained on the record with reference to the parameters of the emergent relief applications. Emergent relief may be granted in accordance with the standards which have been enunciated in the seminal case of "*Crowe v. DeGoia*, 90 N.J. 126, (1982). The standards are four in nature. (1) Petitioner will suffer irreparable harm if the requested relief is not granted; and (2) the legal right underlying petitioner's claim is settled; and (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.

I have had a very full opportunity to assess the arguments raised as well as the testimony received by assistant superintendent Luis Pagan who appeared this afternoon to present some relevant testimony regarding some of the issues in this matter.

Let me indicate to all of you at the outset that I find the issues to be very complex. The question regarding the disputed proofs or disputed facts are significant and because of that I am not satisfied that there is sufficient information here before me to render an emergent relief order in favor of the petitioners for a whole list of reasons, not the least of which is the fact that there is, at a minimum, a dire paucity of relevant proofs to support their allegations or claims in this matter. Specifically, although it was averred in the moving papers that the students are currently placed in a Algebra II class and that they were removed sometime in November of this year, thereby subjecting them to humiliation by their peers as well as teachers because of that removal and returned by the district to Algebra I, it nonetheless appears more readily apparent that the students were never placed in the Algebra II class setting at all. And in fact and instead they were placed back in the Algebra I class at the beginning of September 2005, school year, this having occurred after both students and their respective parents were placed on notice by the district in June of 2005, that the students would be required to retake the Algebra I class at that time or take a summer school class to make it up during the summer or 2005 prior to commencing the 2005/2006 school year. It also appears that neither student availed herself of that opportunity to take any make-up class in order to get a satisfactory placement in an Algebra II setting this current year.

It also appears on its face that there has been no proof submitted to the district over time to corroborate and confirm that the make-up course which the respective students took in the summer of 2004 did in fact qualify them to get credit for the Algebra I make-up course for that period of time. Specifically there appeared to be questions regarding whether or not the students attended make-up courses which were mandated or required under State law, eg., to get (1) the approval of the principal of the school, (2) to have a certified teacher in order to administer the course and (3) to have satisfactory proof of the hours spent in course content or anything else to demonstrate the sufficiency of the courses which they respectively took.

In addition, it appears that the student S.C. may have in fact taken a course which was not a remedial course, which was what was required, but instead took an enhancement course which does not appear on its face at all to comply with the standards of receiving credit for a Algebra I make-up for that period of time. So, at a minimum, as for that the student S.C. there may have in

fact been an initial deficiency in that she may not have even taken any course relating specifically to that which is permitted and to allow for such credit for make-up.

Now, as to D.W., there is also a sizable question and concern regarding who taught the course, whether that make-up course was taught by a teacher who was authorized to administer the course during that summer period of time and similarly whether or not she took the requisite number of hours in order to satisfactorily meet that minimum basic requirement. These are basic and, if you will, threshold concerns that were raised by the respondent district in order to deny the appropriate academic course credit being applied to both students under the circumstances. On cross examination Mr. Pagan had acknowledged that there was, in fact, an authorization by him to allow the students to take a qualifying test to confirm that, even though the courses were not necessarily approved, that perhaps they had otherwise mastered the Algebra I skills sufficiently in order to get a passing grade. And yet, he has been presented with no proof, nor have I been presented with any proof, to demonstrate that they did take an appropriate test in order to demonstrate that. And, once again, I **FIND** that the district was left in the lurch regarding its ability to properly access that which the students did take during that summer session in 2004.

One of the additional issues that I have to come of grips with involves (1) what was represented to the parents about taking those alternate summer school make-up classes, (2) who represented those facts to the parents and (3) whether the person who represented those facts to the parents was even authorized to make such representations. It appears that a guidance counselor, who was strictly in a guidance counselor capacity at that time, (and this is a person identified as Mr. Frederick Clayton) was that guidance counselor and the question becomes whether or not he had appropriate authority in order to direct the parents and the children accordingly, it being argued by the parents that even if that was not the case that there should be a form of estoppel because the parents relied upon his representation. I do not **FIND** that argument persuasive. The parents had an affirmative obligation in order to understand and know the parameters of the relevant regulations, as does the school district. It appears on its face that the guidance counselor was not the person who was authorized to approve or disapprove any type of summer schooling but rather that right is reserved to the recommendation by the principal of

the school, which was apparently not forthcoming at the time. And further that there were no other proofs submitted to demonstrate that the course that was provided for either student, whether it was a remedial course or a tutoring course or an enhancement course, constituted an appropriate type of course for that purpose anyway.

I am satisfied that the parents should not be entitled to any relief for emergent relief for that reason alone. But, in addition, I am concerned that in looking at the four criteria set under the *Crowe* standard that (1) there will be not irreparable harm suffered by the students in if I were not to grant the relief at this time. The relief that they are requesting is that they be placed in Algebra II right now here in December or, if you will, the beginning of January 2006. It has been represented to me by the parents that the current teacher of Algebra II would testify that there would be no harm for the students to enter that Algebra II setting at this point and that there would be no adverse impact upon them or any other students in the class. Although it is so represented as such, I am not satisfied at this point in time that would necessarily cure the problem that these two students have because right now we have yet to determine whether or not they have satisfactorily complied with the Algebra I class requirement. I am also not satisfied that the legal right underlying that the petitioners' claims respectively are settled. That is to say, I am satisfied that there is no absolute right for a student to or have a parent insist upon placement in an advance course when it has not been adequately determined that the student has met the official requirement of the required course. In addition, although it was represented in the moving papers that the school requires four continuous years of mathematics in order to graduate, the State requirement which has been pointed out by the respondent counsel would appear to suggest something to the contrary, and that is that only 15 credits are required in order to graduate in the mathematics area and nothing more than that.

That being the case, I am satisfied that the legal right underlying petitioners' claims is not settled also. Further, and based upon that, I am satisfied the petitioners do not have a likelihood of prevailing on the merits of the underlying claims as a result. Because, if in fact, the State standard is to be applied to the Camden district (that is to say, that only three course of mathematics are required) then, in fact, the students can cure their problems by taking additional summer courses to get them into advanced courses if they so prefer. But that's not even required for graduation. And, therefore, when I balance the equities and interests of the parties, I do not

FIND that either petitioner would suffer greater harm than the respondent district would suffer if the requested relief is not granted. They are both presently in Algebra I. I trust that they will be exemplary, or at least satisfactory, in the completion of their Algebra I studies this year. Whether or not they are "bored" or not, as suggested by the one parent at the hearing today, I am nonetheless satisfied that, unless there are other proofs which would demonstrate that they have otherwise satisfied the necessary regulatory requirements regarding the matriculation of Algebra I, that they will remain in Algebra I through the remainder of this school year and that it is up to them to decide whether or not they want to attempt to go into any additional coursing, for example, Algebra II, during the summer if that is otherwise approved by the district or whether or not they wish to wait until next year and take Algebra II in their last year of school.

Therefore, based upon all of these factors, I am a satisfied that the application fails on all four grounds as to each of these petitioners. It is so **ORDERED**. In doing so, I am herewith setting this matter down for a full plenary hearing since I am denying the emergent relief application as to both students at this time. The plenary hearing shall be held here at the Office of Administrative Law, in Mercerville, N.J. commencing at 9:00 am on Friday February 10, 2006. In addition, and prior to that, no later than January 20, 2006 the parties shall exchange and submit to me all of their exhibits premarked for identification as follows: for the petitioner it will be P-1 etc. upper right hand corner of each document and, in fact, I would suggest to petitioners' counsel to separate them. Perhaps it should be P-D.W.-1 and P-S.D.C.-1 etc. And on the behalf of the respondent of course it will be R-1 etc. I would like to have all of the exhibits in loose leaf notebooks with index separators between each document along with a table of contents. At the same time of exchanging and submitting to me by January 20, 2006, each of the premarked exhibits I also want a complete and final witness list exchanged and submitted to me at the same time.

This is my Order and my prehearing Order relative to the emergent relief applications today.

This order on application for emergency relief may be adopted, modified or rejected by the **COMMISSIONER OF THE DEPARTMENT OF EDUCATION**, who by law is authorized to make a final decision in this matter. The final decision shall be issued without undue delay, but no later than forty-five (45) days following the entry of this order. If (title of agency head) does not adopt, modify or reject this order within forty-five (45) days, this recommended order shall become a final decision on the issue of emergent relief in accordance with *N.J.S.A.* 52:14B-10.

December 19, 2005
DATE

JOHN R. FUTEY, ALJ

mmf/cad

END OF TRANSCRIPT

I, Lisa G Martino certify that the foregoing is a true and accurate transcript, to the best of my ability, of Judge Futey's oral decision rendered in the above matter on December 15, 2005.

12-19-05
DATE

Lisa Martino
Lisa Martino, Supervisor

December 19, 2005
DATE

JOHN R. FUTEY, ALJ

TRANSMISSION VERIFICATION REPORT

TIME : 12/19/2005 02:34
NAME : OFFICE OF ADMIN LAW
FAX : 6095886574
TEL :
SER.# : BROK5J360782

DATE,TIME	12/19 02:32
FAX NO./NAME	97774099
DURATION	00:02:46
PAGE(S)	10
RESULT	OK
MODE	STANDARD ECM

State of New Jersey
OFFICE OF ADMINISTRATIVE LAW

FAX TRANSMITTAL

DATE: **12/19/05**
TIME: **2:30 p.m.**

TELECOPIED TO:	**FAX NO:**
Lucille Davy, Acting Commissioner	**609-777-4099**
Saul J. Steinberg, Esq.	**856-338-0217**
Linda A. Olsen, Esq.	**732-918-8505**

FROM: John R. Futey, ALJ

Office of Administrative Law: Newark, Trenton, Atlantic City
OFFICE (CIRCLE ONE)

TRANSMISSION VERIFICATION REPORT

TIME : 12/19/2005 02:38
NAME : OFFICE OF ADMIN LAW
FAX : 6095886574
TEL :
SER.# : BROK5J360782

DATE,TIME	12/19 02:36
FAX NO./NAME	918563380217
DURATION	00:02:45
PAGE(S)	10
RESULT	OK
MODE	STANDARD ECM

State of New Jersey
OFFICE OF ADMINISTRATIVE LAW

FAX TRANSMITTAL

DATE: **12/19/05**
TIME: **2:30 p.m.**

TELECOPIED TO:	**FAX NO:**
Lucille Davy, Acting Commissioner	**609-777-4099**
Saul J. Steinberg, Esq.	**856-338-0217**
Linda A. Olsen, Esq.	**732-918-8505**

FROM: John R. Futey, ALJ

Office of Administrative Law: Newark, Trenton, Atlantic City
OFFICE (CIRCLE ONE)

TRANSMISSION VERIFICATION REPORT

TIME : 12/19/2005 02:42
NAME : OFFICE OF ADMIN LAW
FAX : 6095886574
TEL :
SER.# : BROK5J360782

DATE,TIME	12/19 02:39
FAX NO./NAME	917329188505
DURATION	00:02:47
PAGE(S)	10
RESULT	OK
MODE	STANDARD ECM

State of New Jersey
OFFICE OF ADMINISTRATIVE LAW

FAX TRANSMITTAL

DATE: **12/19/05**
TIME: **2:30 p.m.**

TELECOPIED TO:	**FAX NO:**
Lucille Davy, Acting Commissioner	**609-777-4099**
Saul J. Steinberg, Esq.	**856-338-0217**
Linda A. Olsen, Esq.	**732-918-8505**

FROM: John R. Futey, ALJ

Office of Administrative Law: Newark, Trenton, Atlantic City
OFFICE (CIRCLE ONE)

609-588-6588

18-06

OAL DKT. NO. EDU 8148-05
AGENCY DKT. NO. 228-9/05

T.B., on behalf of minor child, K.L.,	:	
PETITIONER,	:	
V.	:	COMMISSIONER OF EDUCATION
BOARD OF EDUCATION OF THE LENAPE REGIONAL HIGH SCHOOL DISTRICT, BURLINGTON COUNTY,	:	DECISION
RESPONDENT.	:	

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

Upon such review, the Commissioner observes that the Director of Programs and Planning signed the Settlement Agreement & Release on behalf of the Board. In that neither the file nor the settlement agreement contains a copy of the Board's resolution approving the settlement and designating the Director of Programs and Planning to sign the agreement on its behalf nor, in the alternative, is the agreement signed by the Board attorney -- who is the Board's duly authorized representative in litigation -- the Commissioner cannot approve the within settlement agreement.

Accordingly, the Commissioner hereby remands this matter to the OAL for revision of the Settlement Agreement & Release consistent with the concerns set forth above. If the parties are unwilling or unable to reach accord on a modified agreement for submission to the Commissioner, the matter shall proceed to hearing.

IT IS SO ORDERED.*

Lucille Edney

ACTING COMMISSIONER OF EDUCATION

Date of Decision: 1/19/06

Date of Mailing: 1/19/06

* This decision may be appealed to the State Board of Education pursuant to *N.J.S.A.* 18A:6-27 *et seq.* and *N.J.A.C.* 6A:4-1.1 *et seq.*

State of New Jersey
OFFICE OF ADMINISTRATIVE LAW

INITIAL DECISION

SETTLEMENT

OAL DKT. NO. EDU 8148-05

AGENCY DKT. NO. 228-9/05

T.B., ON BEHALF OF MINOR CHILD, K.L.,

Petitioner,

v.

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

Respondent.

T.B., petitioner, *pro se*

Susan S. Hodges, Esq., for respondent (Archer & Greiner, attorneys)

Record Closed: December 15, 2005 Decided: December 19, 2005

BEFORE **PATRICIA M. KERINS**, ALJ:

This matter was transmitted to the Office of Administrative Law on October 13, 2005, 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 November 16, 2005. On the scheduled hearing date my office received a telephone call advising that the matter had been settled. The parties have

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

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

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

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

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

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

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

December 19, 2005

DATE

Patricia M. Kerins

PATRICIA M. KERINS, ALJ

Receipt Acknowledged:

12/21/05

DATE

DEPARTMENT OF EDUCATION

Mailed to Parties:

DEC 22 2005

DATE

OFFICE OF ADMINISTRATIVE LAW

/slf

ARCHER & GREINER
A Professional Corporation
One Centennial Square
Haddonfield, NJ 08033-0968
(856) 795-2121
Attorneys for Respondent,
Lenape Regional High School District Board of Education

BY: SUSAN H. HODGES

2005 DEC 15 P 3:30

T.B. o/b/o K.L., Petitioner, v. LENAPE REGIONAL HIGH SCHOOL DISTRICT BOARD OF EDUCATION Respondent.	STATE OF NEW JERSEY OFFICE OF ADMINISTRATIVE LAW OAL DOCKET NO. EDUOS-8148-2005S AGENCY REF. NO.: 228-9/05 **SETTLEMENT AGREEMENT & RELEASE**

THIS MATTER having been opened to the Court, pursuant to a Petition challenging a residency determination filed by the Petitioner, T.B. o/b/o K.L., against the Respondent, Lenape Regional High School District Board of Education (the "Board"), represented by Susan H. Hodges, Esquire, of Archer & Greiner, P.C. (Petitioner and the Board collectively referred to herein as the "Parties");

AND Petitioner having requested that the Court overturn the Board's determination regarding K.L.'s residency, and allow K.L. to attend school in the Lenape Regional High School District at Cherokee High School as a non-tuition paying student for the 2005-2006 school year;

AND the Parties having entered into this Settlement Agreement & Release ("Agreement") to express the full and complete terms of the agreement;

THE PARTIES HEREBY AGREE THAT:

1. In consideration of the monetary payments and releases set forth below, the Board agrees that K.L. may attend school in the Lenape Regional High School at Cherokee High

School as a non-tuition paying student for the 2005-2006 school year, and further agrees to waive any claim or entitled to tuition for K.L.'s attendance in the Lenape Regional High School District at Cherokee High School other than as set forth in paragraph 2 below.

2. In consideration of the Board's agreement to allow K.L. to attend school in the Lenape Regional High School at Cherokee High School as a non-tuition paying student for the 2005-2006 school year, T.B. agrees to pay the Board the amount of $2,876.70 -- which represents the tuition due from September 6, 2005 to November 9, 2005 -- by June 1, 2006, and further agrees to waive any claim, or potential claim that Petitioners have, or may have against the Board up to the date of this Agreement:

a. for payment of legal fees, medical fees, and all other fees or costs and all other claims under the Individuals with Disabilities in Education Act, 20 U.S.C. §1400, *et seq.* ("IDEA") and the federal and state regulations promulgated thereunder;

b. under the Family Educational Rights and Privacy Act, 20 U.S.C. §1232g, *et seq.*;

c. under the Americans with Disabilities Act, 42 U.S.C. §12101 as it pertains to his placement at the Regional Enrichment Learning Center ("REAL");

d. under Section 504 of the Rehabilitation Act of 1973 as it pertains to his placement at the Regional Enrichment Learning Center ("REAL");

e. and all other claims under the IDEA and the federal and state regulations promulgated thereunder as it pertains to K.L.'s attendance at Cherokee High School;

3. The Parties also willingly and knowingly agree that they will bear their own costs and attorneys' fees incurred up to the date of this Agreement.

4. The Parties agree that the terms of this Agreement are confidential, and hereby agree not to disclose the terms of this Agreement, or the Agreement itself, to any third-party, for whatever reason, orally or in writing, without the express written consent of the other party or a court order;

5. In the event that either Party breaches any term of this Agreement, the non-breaching party may bring an action in the New Jersey Superior Court, Chancery Division for injunctive and compensatory relief, and the breaching party shall be responsible to the non-breaching party for all legal fees and costs incurred in such action;

6. The Parties specifically consent to the entry of an Order and Final Decision incorporating this Agreement.

7. This Agreement contains the entire agreement and understanding of the Parties with respect to the subject matter hereof, supersedes all prior understandings, representations, and agreements, whether oral or written, and may not be amended or modified except by written agreement of the Parties;

8. The Parties acknowledge that they have had the opportunity to review the terms of this Agreement with counsel and are satisfied with the representation provided, if any. The Parties enter into this Agreement knowingly, and without coercion or other improper influence.

THE PARTIES HEREBY AGREE WITH THE TERMS OF THIS AGREEMENT

LENAPE REGIONAL HIGH SCHOOL DISTRICT
BOARD OF EDUCATION

BY: _____
Carol L. Birnbohm, Director of Programs and Planning Dated: 12-14-05

T.B. o/b/o K.L.

_____
T.B. o/b/o K.L. Dated: 12/12/05

2048297v1

17-06

OAL DKT. NO. EDU 1266-04
AGENCY DKT. NO. 11-1/04

M.L. DeM., on behalf of minor child, A.P.,	:	
PETITIONER,	:	COMMISSIONER OF EDUCATION
V.	:	DECISION
BOARD OF EDUCATION OF THE TOWNSHIP OF GLEN RIDGE BOROUGH, ESSEX COUNTY,	:	
RESPONDENT.	:	

The record of this matter, returned to the Commissioner by the Office of Administrative Law (OAL) on December 30, 2005 as a withdrawal pursuant to *N.J.A.C.* 1:1-19.2, has been reviewed.

Upon such review, the Commissioner notes that this matter was deemed withdrawn by the OAL based upon the Board's October 20, 2005 submission of its resolution approving settlement of a tuition counterclaim against petitioner, subject to her payment of $2,000 in two installments, due November 1, 2005 and January 1, 2006. However, the record contains no indication whatsoever that petitioner has agreed to these terms, either by her explicit consent to settlement or by payment of the amounts stated.

Accordingly, this matter is remanded to the OAL for amplification of the record so as to enable the Commissioner to approve its settlement or withdrawal, as appropriate, or for such further proceedings as are otherwise necessary to resolve the parties' claims.

IT IS SO ORDERED.*

Lucille Edney

ACTING COMMISSIONER OF EDUCATION

Date of Decision: 1/19/06
Date of Mailing: 1/19/06

* This decision may be appealed to the State Board of Education pursuant to *N.J.S.A.* 18A:6-27 *et seq.* and *N.J.A.C.* 6A:4-1.1 *et seq.*

#19-06

OAL DKT. NO. EDU 8078-05
AGENCY DKT. NO. 259-10/05

J.D. on behalf of minor child, L.S.,	:	
PETITIONER,	:	
V.	:	COMMISSIONER OF EDUCATION
BOARD OF EDUCATION OF THE EASTERN CAMDEN COUNTY REGIONAL SCHOOL DISTRICT, CAMDEN COUNTY, DR. HAROLD MELLEBY, SUPERINTENDENT, AND RONALD W. SAHLI, SOLICITOR.	:	DECISION
RESPONDENTS.	:	

The record of this matter and advisement of failure to appear transmitted to the Commissioner by the Office of Administrative Law (OAL) pursuant to *N.J.A.C.* 1:1-14.4 -- along with copies of notifications sent to the parties by OAL on December 23, 2005, providing petitioner thirteen days to submit an explanation for such nonappearance -- have been reviewed. There being no explanation filed, this matter is no longer deemed to be a contested matter before the Commissioner and is hereby dismissed with prejudice.*

IT IS SO ORDERED.

Lucille Eday
ACTING COMMISSIONER OF EDUCATION

Date of Decision: 1/19/06
Date of Mailing: 1/19/06

* This decision, as the Commissioner's final determination in the instant matter, may be appealed to the State Board of Education pursuant to *N.J.S.A.* 18A:6-27 *et seq.* and *N.J.A.C.* 6:4 -1.1 *et seq.*

20-06

OAL DKT. NO. EDU 7404-00
AGENCY DKT. NO. 177-5/00

RITA VAN SANTEN,	:	
PETITIONER,	:	
V.	:	COMMISSIONER OF EDUCATION
STATE-OPERATED SCHOOL DISTRICT OF THE CITY OF PATERSON, PASSAIC COUNTY,	:	DECISION
RESPONDENT.	:	

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

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

IT IS SO ORDERED.

Lucille E Davy

ACTING COMMISSIONER OF EDUCATION

Date of Decision: 1/19/06

Date of Mailing: 1/19/06

State of New Jersey
OFFICE OF ADMINISTRATIVE LAW

INITIAL DECISION

SETTLEMENT

OAL DKT. NO. EDU 7404-00

AGENCY DKT. NO. 177-5/00

RITA VAN SANTEN,

Petitioner,

v.

STATE-OPERATED SCHOOL DISTRICT OF THE CITY OF PATERSON, PASSAIC COUNTY,

Respondent.

Gregory T. Syrek, Esq., for Petitioner
(Bucceri & Pincus, attorneys)

Joanne Butler, Esq., for Respondent
(Schenck, Price, Smith & King, attorneys)

Record Closed: November 22, 2005 Decided: December 2, 2005

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

This matter was transmitted to the Office of Administrative Law (OAL) from the Department of Education on August 10, 2000, 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 assigned to Administrative Law Judge Edith Klinger on September 18, 2000.

At the request of the parties, on November 30, 2000, ALJ Klinger ordered that this matter be placed on the inactive list for a period of six months pending the resolution of a Worker's Compensation proceeding brought by the Petitioner against the Respondent. After six months, the Worker's Compensation claim had not been decided; therefore, the parties requested that the matter continue inactive. Accordingly, this matter continued inactive until the resolution of the Worker's Compensation claim. On October 7, 2004, a request was made to restore case to active status. Subsequently, this matter was assigned to the undersigned.

A hearing was scheduled for September 12 & 13, 2005 at the OAL, 33 Washington Street, Newark, New Jersey. At the hearing on September 12, 2005, settlement discussions were held and a settlement was reached.

The parties have agreed to a settlement and have prepared a Stipulation of Settlement and Dismissal as well as the Board's resolution indicating the terms thereof, which is attached and fully incorporated herein.

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

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

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

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

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

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

December 2, 2005
DATE

Maria M La Fiandra
MARIA MANCINI LA FIANDRA, ALJ

Receipt Acknowledged:

12-7-05
DATE

M. Kathleen Duncan /CK
DEPARTMENT OF EDUCATION

Mailed to Parties:

DIRECTOR AND
CHIEF ADMINISTRATIVE LAW JUDGE

DEC 8 2005
DATE

OFFICE OF ADMINISTRATIVE LAW

jb

RECEIVED
STATE OF NEW JERSEY
OFFICE OF ADMINISTRATIVE LAW
2005 NOV 22 P 3:54

BUCCERI & PINCUS, ESQS.
1200 Route 46
Clifton, NJ 07013-2440
(973) 773-5665
Counsel for Petitioner

RITA VAN SANTEN,	:	BEFORE THE COMMISSIONER OF EDUCATION/OFFICE OF ADMINISTRATIVE LAW
Petitioner,	:	
v.	:	AGENCY REF. NO. 177-5/00 OAL DKT. NO. EDU 7404-00
STATE-OPERATED SCHOOL DISTRICT OF PATERSON,	:	
Respondent.	:	**STIPULATION OF SETTLEMENT AND DISMISSAL**

This matter having come before the Court by way of Verified Petition, and the parties having determined to resolve this matter without resort to hearing, herein agree as follows:

1. Respondent State-Operated School District of Paterson (hereinafter "Respondent") will pay to Petitioner the sum of $468.00, which represents the payment of an agreed-upon amount in lieu of sick days to which Petitioner claims she is entitled.

2. Petitioner will voluntarily dismiss her Petition, bearing Docket No. EDU 7404-00.

3. This Settlement is the resolution of disputed claims and does not constitute an admission of wrongdoing or liability by either party.

4. Petitioner herein waives any and all rights to make any claim against Respondent related to the injuries, medical treatment, sick leave entitlement, and the like arising out of or pertaining to the injuries or timeframes at issue in this litigation, bearing Docket No. EDU 7404-00.

This Agreement is subject to approval by the State-Operated School District of Paterson.

Rita Van Santen, Petitioner
Dated:

Michael E. Glascoe, Respondent
Dated: 11/16/05

RECEIVED
STATE OF NEW JERSEY
OFFICE OF ADMINISTRATIVE LAW
2005 NOV 22 P 3:54

OAL-A745

PATERSON PUBLIC SCHOOL DISTRICT
ACTION FORM

1. Curricular recommendations must include, if appropriate, school, student initials, tuition rate and/or other needed information.
2. Fiscal recommendations must include all appropriate fiscal information.
3. This Action Form must be in the State District Superintendent's office according to cutoff date before the meeting of the Board of Education.

Recommendation/Resolution:

In the matter of a verified Petition before The State of New Jersey Administrative Law involving a claim for sick days in 2001 by former employee Rita Van Santen. OAL Docket Number EDU-7404-00.

Be It Resolved that the Paterson Public Schools settles this matter for the sum of $468.00. This settlement is for the resolution for disputed claims and does not constitute an admission of wrong doing or liability by either party.

APPROVALS REQUIRED

1. Submitted by Rhonda Stephens (Name, Title) Labor Relations Liaison _____ 9/27/05 Date
2. Approval by Divisional Administrator _____ 9/29/05 Date
   State District Superintendent, Assistant Superintendent or Business Administrator
3. Account No. 11.000.291.260.269.294.0000.000
   Certification of Funds _____ Signature _____ Date
   Funds Available ☐ Funds Not Needed ☐
   Funds Not Available ☐ Non-Budget Item ☐
4. Verification by Legal Department, if required _____ Date
5. Approval - State District Superintendent Richard E. Hanson 9/29/05 Date
6. Board Adoption Date N/A Resolution Number —

Copies as follows:
White-To Board Office Green-To #5 Yellow-To Business Administrator Pink-To #1 Gold-To #2

2/99

21-06

OAL DKT. NO. EDU 12062-04
AGENCY DKT. NO. 281-8/04

JACQUELINE HINKSON,	:	
PETITIONER,	:	
V.	:	COMMISSIONER OF EDUCATION
STATE-OPERATED SCHOOL DISTRICT OF THE CITY OF NEWARK, ESSEX COUNTY,	:	DECISION
RESPONDENT.	:	

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

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

IT IS SO ORDERED.

ACTING COMMISSIONER OF EDUCATION

Date of Decision: 1/20/06

Date of Mailing: 1/20/06

State of New Jersey
OFFICE OF ADMINISTRATIVE LAW

INITIAL DECISION

SETTLEMENT

OAL DKT. NO. EDU 12062-04

AGENCY DKT NO. 281-8/04

JACQUELINE HINKSON,

Petitioner,

v.

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

Respondent.

Gail Oxfeld, Esq., for petitioner (Oxfeld Cohen, attorneys)

Adam S. Herman, Esq., Associate Counsel, for respondent

Record Closed: December 21, 2005 Decided: December 21, 2005

BEFORE **MARGARET M. MONACO**, ALJ:

Petitioner, Jacqueline Hinkson, filed a Petition of Appeal alleging that the respondent, the State-Operated School District of the City of Newark, reduced her salary for absences in violation of petitioner's tenure rights. On or about November 4, 2004, respondent filed an Answer to Verified Petition. The Department of Education transmitted the matter to the Office of Administrative Law where, on December 28, 2004, it was filed for determination as a contested case pursuant to *N.J.S.A.* 52:14B-1 to -15 and *N.J.S.A.* 52:14F-1 to -13. The matter was scheduled to be heard on October 26 and 27, 2005.

Prior to the hearing, respondent filed a Motion to Dismiss. An in person conference was held on October 26, 2005 and counsel engaged in discussions toward an amicable resolution of the matter. Subsequently, the undersigned was advised that the parties had reached a settlement. Counsel for respondent, thereafter, submitted the attached Settlement Agreement setting forth the terms of agreement, which the undersigned received on December 21, 2005.

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

1. The parties have voluntarily agreed to the settlement as evidenced by their signatures or the signatures of their representatives.
2. The settlement fully disposes of all issues in controversy and is consistent with the law.

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

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

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

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

December 21, 2005
DATE

MARGARET M. MONACO, ALJ

Receipt Acknowledged:

12-23-05
DATE

DEPARTMENT OF EDUCATION

Mailed to Parties:

DIRECTOR AND CHIEF ADMINISTRATIVE LAW JUDGE

DEC 28 2005
DATE

OFFICE OF ADMINISTRATIVE LAW

db

NEWARK PUBLIC SCHOOLS
Office of the General Counsel
2 Cedar Street
Newark, New Jersey 07102
(973) 733-7139
Attorney for Respondent

RECEIVED
STATE OF NEW JERSEY
OFFICE OF ADMIN. LAW
2005 DEC 21 P 2:11

JACQUELINE HINKSON, Petitioner, vs. STATE-OPERATED SCHOOL DISTRICT OF THE CITY OF NEWARK , Respondent.	BEFORE THE COMMISSIONER OF EDUCATION OF NEW JERSEY OAL DKT. NO. EDUOR 12062-2004N AGENCY REF. NO. 281-8/04 **SETTLEMENT AGREEMENT**

The above parties in this appeal have voluntarily resolved all disputed matters and enter into the following settlement agreement, which fully disposes of all issues in controversy between them.

1. Petitioner agrees to voluntarily dismiss her Petition of Appeal with prejudice.
2. Respondent agrees to credit Petitioner fifteen (15) sick days upon approval of the settlement agreement by the Commissioner of Education.
3. Petitioner waives all claims against the Respondent with regard to this matter, including any awards of back pay, counsel fees or other monetary relief, except as otherwise provided herein.
4. Nothing in this agreement shall be deemed to be an admission of liability on behalf of either party.
5. This agreement shall not constitute a precedent in matters involving other employees.

6. Both parties agree to waive the right to file exceptions and cross-exceptions.

7. Nothing in this settlement agreement shall be deemed to affect Petitioner's rights in pursuing her other petition filed on April 27, 2004 and identified by Docket Number EDUOR 03804-2004 and Agency Number 26-1/04.

8. This agreement is subject to the approval of the State District Superintendent of the State-operated School District of the City of Newark.

Dec 9, 2005
DATED

Jacqueline Hinkson
JACQUELINE HINKSON

DATED

MARION A. BOLDEN
STATE DISTRICT SUPERINTENDENT

STATE-OPERATED SCHOOL DISTRICT
OF THE CITY OF NEWARK

CERTIFICATION

I, Jacqueline Hinkson, being the Petitioner in this matter, hereby certify that I have reviewed this Settlement Agreement and fully understand its meaning and terms. I acknowledge that my representative questioned my understanding and 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 also understand that if this Settlement Agreement is approved by the Commissioner of Education, my claim against Respondent will terminate.

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.

Jacqueline Hinkson

JACQUELINE HINKSON

DATED: Dec 9, 2005

22-06

22-06

OAL DKT. NO. EDU 6706-03
AGENCY DKT. NO. 292-8/03

CENTRAL JERSEY INSTRUCTIONAL MEDIA SERVICES,	:	
PETITIONER,	:	
V.	:	COMMISSIONER OF EDUCATION
BOARD OF EDUCATION OF THE BOROUGH OF SOMERVILLE, SOMERSET COUNTY,	:	DECISION
RESPONDENT.	:	

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

Upon a full and independent review of the record, the Commissioner concurs with the Administrative Law Judge -- for the reasons stated in her decision[1] -- that summary decision is appropriately granted to petitioner.

Accordingly, the Initial Decision of the OAL is adopted as the final determination in this matter. The Board of Education of the Borough of Somerville is hereby directed to pay petitioner participation assessments of $7,820.40 for the 2002-2003 school year and $7,908.60 for the 2003-2004 school year.

IT IS SO ORDERED.[2]

Lucille Eday

ACTING COMMISSIONER OF EDUCATION

Date of Decision: 1/20/06

Date of Mailing: 1/20/06

[1]The Commissioner is compelled to clarify, however, that the October 27, 1982 Attorney General's Memorandum Opinion discussed by the ALJ on pages 3-4 of the Initial decision was not a "formal opinion" but, rather, informal advice which the agency could choose to accept or reject and, therefore, has no binding precedential value. See *Board of Education of West Windsor-Plainsboro Reg'l. Sch. Dist., Mercer County v. Bd. of Educ. of the Township of Delran, Burlington County, supra,* at 493.

[2] This decision may be appealed to the State Board of Education pursuant to *N.J.S.A.* 18A:6-27 *et seq.* and *N.J.A.C.* 6A:4-1.1 *et seq.*

State of New Jersey
OFFICE OF ADMINISTRATIVE LAW

INITIAL DECISION
GRANTING PETITIONER'S
MOTION FOR SUMMARY DECISION
OAL DKT. NO. EDU 6706-03
AGENCY DKT. NO. 292-8/03

CENTRAL JERSEY INSTRUCTIONAL MEDIA SERVICES,

Petitioner,

v.

BOARD OF EDUCATION OF THE BOROUGH OF SOMERVILLE, SOMERSET COUNTY,

Respondent.

Judith A. Kopen, Esq., for petitioner (Gebhardt & Kiefer, attorneys)

Michael J. Rogers, Esq., for respondent (McDonald & Rogers, attorneys)

Record Closed: December 21, 2005 Decided: December 22, 2005

BEFORE: **ANA C. VISCOMI**, ALJ:

STATEMENT OF THE CASE AND PROCEDURAL HISTORY

The sole issue in this matter is whether the respondent school district, a member of the county educational audiovisual aids commission, Central Jersey Instructional Media Services

(hereinafter "CJIMS") organized pursuant to *N.J.S.A.* 18A:51-1 to -12 properly withdrew its participation therein for the school years 2002-2003 and 2003-2004. The parties submitted the matter by way of summary decision motion and upon review on December 21, 2005, I determined this Initial Decision will be dispositive of the within matter and closed the record.

FACTUAL DISCUSSION

The following facts are not in dispute and thus constitute the **FINDINGS OF FACT:**

1. Petitioner CJIMS, a county educational audiovisual aids commission organized pursuant to *N.J.S.A.* 18A:51-1 to -12, provides media services and resources to participating school districts, which, in accordance with *N.J.S.A.* 18A:51-7, pay for the services on a per pupil basis.

2. The respondent (hereinafter the "Board") was a participating school district in CJIMS and the audiovisual aids center it managed.

3. On December 17, 2001, the Board's business administrator wrote a letter to CJIMS advising that it would no longer participate in CJIMS' program for the 2002-2003 school year.

4. On December 19, 2001, Ronald MacIntyre, CJIMS' director, responded in writing that the letter was insufficient and that pursuant to *N.J.S.A.* 18A:51 the notice of withdrawal must be received by August 1 of a given year for withdrawal the following year and in addition, a board resolution authorizing the withdrawal must also be sent. The letter also stated that these requirements "can be sent to us anytime between now and August 1, 2002" for withdrawal for the following school year.

5. CJIMS sent the Board an invoice dated June 7, 2002, in the amount of $7,820.40 for the 2002-2003 school year. That invoice has not been paid.

6. For the entire 2002-2003 school year, the Somerville School District used CJIMS resources and services, specifically requesting 493 items either by telephone, or by a request transmitted over the internet.

7. In his affidavit opposing the within motion, school business administrator Bryan Boyce, requests that Somerville not be held responsible for membership fees for the 2003-2004 school year. As such, he does not dispute the $7,820.40 owed for the 2002-2003 school year.

8. On October 11, 2002, the Board's attorney advised CJIMS that the Board had passed a resolution on September 10, 2002, formally withdrawing from CJIMS effective June 30, 2003.

9. CJIMS sent the Board an invoice dated June 6, 2003, in the amount of $7,908.60 for the 2003-2004 school year. That invoice has not been paid.

10. For the entire 2003-2004 school year, the Somerville School District used CJIMS resources and services, specifically requesting 229 items either by telephone, or by a request transmitted over the internet.

LEGAL ANALYSIS

N.J.S.A. 18A:51-12, provides in pertinent part,

> Any board of education of any participating school district may withdraw as a participating district pursuant to resolution duly adopted by said board and notice of intention to withdraw given to the secretary of the commission on or before August 1 in any year....

Further, the Attorney General issued an opinion regarding the construction of this statutory language that fully supports the interpretation that withdrawal must occur on or before August 1 of the prior school year. Specifically, the opinion provides "a withdrawal of a member board of education of a county audiovisual education commission pursuant to *N.J.S.A.* 18A: 51-12 is effective only with respect to the commission programs to be implemented commencing

with the school year beginning one year thereafter." *Attorney General's Memorandum Opinion*, M82-5158, October 27, 1982. Pursuant to *N.J.S.A.* 52:17A-4(e), the Attorney General is vested with the duty of interpreting statutes. In general, "formal Attorney General opinions are binding on most administrative agencies. *Board of Educ. of West Windsor-Plainsboro Reg'l Sch. Dist., Mercer County v. Bd. of Educ. of Township of Delran, Burlington County*, 361 *N.J. Super.* 488, 494 (App. Div. 2003). The Attorney General's Opinion supports the plain meaning of the statute.

N.J.A.C. 1:1-12.5 sets forth the summary decision standard. It is substantially similar to the summary judgment standard utilized in civil matters pending before the Courts. *R.* 4:46-2 sets forth the requirements for filings in connection with a summary judgment motion. *R.* 4:46-5 requires an adverse party to respond by affidavit meeting the requirements of *R.* 4:46-2(b). *R.* 4:46-2(b) requires a party opposing the motion to file a responding statement either admitting or disputing each of the facts in the movant's statement. Here, school business administrator Boyce never addressed CJIMS' director MacIntyre's affidavit, that the Board utilized CJIMS services for the 2003-2004 year.

Based on the foregoing, I further **FIND** that the respondent school district never properly withdrew from participation in CJIMS pursuant to *N.J.S.A.* 18A:51-12 for the school years 2002-2003 and 2003-2004 and therefore was a member during those school years. I **FIND** that the attempts made by the respondent school district were deficient and did not comply with the clear requirements of the statute. I also **FIND** that even if the district could argue that prior to December 19, 2001, it was not aware of the requirements for proper withdrawal from CJIMS, the letter of that date from MacIntyre was very specific. I further **FIND** that the respondent school district no longer contests its membership for the 2002-2003 school year and does not dispute that it availed itself of CJIMS services for the 2003-2004 school year.

DECISION AND ORDER

Summary Decision on behalf of the petitioner is hereby **GRANTED.** Respondent is hereby **ORDERED** to pay the petitioner the following assessments: $7,820.40 for the 2002-2003 school year; and $7,908.60 for the 2003-2004 school year.

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

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

December 22, 2005
DATE

Ana C. Viscomi
ANA C. VISCOMI, ALJ

E-mail Receipt of Initial Decision Confirmed by the Department of Education on:

12-22-05
DATE

Mailed to Parties:

DEC 27 2005
DATE

OFFICE OF ADMINISTRATIVE LAW

jh

#23-06L

23-06

State of New Jersey

DEPARTMENT OF EDUCATION
PO Box 500
TRENTON, NJ 08625-0500

JON S. CORZINE
Governor

LUCILLE E. DAVY
Acting Commissioner

January 20, 2006

Jeffrey D. Light, Esq.
Goldenberg, Mackler, Sayegh,
Mintz, Pfeffer, Bonchi & Gill
660 New Road, Suite 1-A
Northfield, NJ 08225

Lisa S. Grosskreutz, Esq.
Parker McCay
Three Greentree Centre
7001 Lincoln Drive West
P.O. Box 974
Marlton, NJ 08053

Dear Counsel:

I have reviewed the papers filed in the matter of *Christopher M. Possumato et al. v. Board of Education of the City of Vineland, Cumberland County, et al.,* Agency Dkt. No. 363-11/05, including the parties' respective memoranda in response to the Department's letter seeking argument as to why this matter should proceed as a controversy before the Commissioner of Education pursuant to *N.J.S.A.* 18A:6-9, notwithstanding that the Petition/Complaint appeared neither to raise allegations nor to seek relief under the school laws, and that it presented as a class action litigation for which no provision is made in statute or rule governing administrative proceedings. Upon such review, I have determined that the appropriate disposition of this matter is dismissal on jurisdictional grounds, without adjudication of its merits.

The Board of Education—on whose motion this matter was transferred from Superior Court—contends that, such transfer having now been made and the effectuating court order having not been vacated, I have no authority to decline consideration of it on jurisdictional grounds. (Board's Memorandum at 4) Furthermore, the Board opines, the Commissioner of Education is in the best position to judge this matter "by virtue of his statutory status, administrative competence and regulatory expertise" and because the issue at hand "potentially affects hundreds, if not thousands, of school employees" (*Id.* at 2, 11). According to the Board, it is the Commissioner of

Education who has fundamental and indispensable jurisdiction over all disputes and controversies arising under the school laws, which empower the Commissioner to resolve disputes involving, *inter alia*, district board of education management of schools, fixing of employee compensation and making of rules governing employment. (*Id.* at 4-10, citations omitted)

Petitioners in turn contend that the matters at issue and the remedies sought clearly arise under the Civil Service laws, specifically Title 11A and its implementing regulations, not the school laws, and that jurisdiction is not conferred on the Commissioner of Education by the mere fact that a matter involves school employees. (Petitioner's Memorandum at 5-9, citations omitted) As to the court's transfer order, petitioners note that the court cannot confer jurisdiction where none exists, and that the Commissioner's first obligation in reviewing a contested case is to determine whether it falls within the agency's jurisdictional authority. (*Id.* at 4-5)

After careful review of the pleadings, I concur with petitioners that this matter does not arise in whole or part under the school laws and -- for that reason -- I neither have jurisdiction over it nor am compelled to decide its merits, notwithstanding its transfer to me by the Superior Court. Although petitioners are school employees and their dispute has arisen in the school setting, the claims they assert are entirely beyond the scope of authority granted to me by *N.J.S.A.* 18A:6-9, on either a primary or an ancillary basis; moreover, the matter is expressly pled as a class action, for which no provision is made in statute or regulation governing administrative practice. While, as the Board correctly states, petitioners could have appealed the court's order of transfer, the fact that they did not does not confer upon me jurisdiction which I would not otherwise have; indeed, the Commissioner has previously been faulted for deferring to a trial judge's erroneous determination of jurisdiction. *Bd. of Educ. v. Murnick*, 224 *N.J. Super.* 504, 513 (*N.J. Super. Ct.* 1988); cert. denied, *Board of Education v. Murnick*, 111 N.J. 625 (N.J. 1988)

Accordingly, I find that I have no authority over petitioners' claims and I hereby dismiss the Petition of Appeal on that basis, without prejudice to petitioners' ability to pursue the matter in a forum of competent jurisdiction.

Sincerely,

Lucille E. Davy
Acting Commissioner

c: Cumberland County Superintendent

24-06

OAL DKT. NO. EDU 3302-01
AGENCY DKT. NO. 61-3/01

RITA VAN SANTEN,	:	
PETITIONER,	:	
V.	:	COMMISSIONER OF EDUCATION
STATE-OPERATED SCHOOL DISTRICT OF THE CITY OF PATERSON, PASSAIC COUNTY,	:	DECISION
RESPONDENT	:	

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

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

IT IS SO ORDERED.

Lucille E Davy
ACTING COMMISSIONER OF EDUCATION

Date of Decision: 01/20/06

Date of Mailing: 01/20/06

State of New Jersey
OFFICE OF ADMINISTRATIVE LAW

INITIAL DECISION

SETTLEMENT

OAL DKT. NO. EDU 3302-01

AGENCY DKT. NO. 61-3/01

RITA VAN SANTEN,

Petitioner,

v.

STATE-OPERATED SCHOOL DISTRICT OF PATERSON, PASSAIC COUNTY,

Respondent.

Gregory T. Syrek, Esq., for petitioner
(Bucceri & Pincus, attorneys)

Joanne L. Butler, Esq., for respondent
(Schenck, Price, Smith & King, LLP, attorneys)

Record Closed: November 28, 2005 Decided: December 5, 2005

BEFORE **ELINOR R. REINER**, ALJ:

On or about March 8, 2001, petitioner, Rita Van Santen, filed a Verified petition of appeal with the Commissioner of Education, alleging that respondent improperly charged her sick days for time lost due to a work-related injury, in violation of *N.J.S.A.*

18A:30-2.1. On March 21, 2001, respondent filed its answer, requesting dismissal of the petition and a stay of the proceedings pending the disposition of a claim before the Division of Workers' Compensation. On April 18, 2001, the Department of Education, Bureau of Controversies and Disputes, transmitted this matter to the Office of Administrative Law (OAL) 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.

On April 26, 2001, the matter was assigned to Administrative Law Judge Edith Klinger, and a prehearing conference was scheduled for May 21, 2001. With consent of counsel, by order dated May 17, 2001, ALJ Klinger placed this matter on the inactive list for six months pending the determination of petitioner's workers' compensation claim. The case was continued on the inactive list until April 8, 2002, by order dated December 7, 2001, and then until September 18, 2002, by order dated April 1, 2002. The matter was reassigned to Administrative Law Judge Thomas E. Clancy on August 19, 2002, and by letter dated January 28, 2004, counsel for petitioner advised Judge Clancy that the matter should remain on the inactive list. By letter dated August 13, 2004, ALJ Clancy was advised by counsel for petitioner that the workers' compensation case had been finalized through an Order Approving Settlement and that the instant case should be restored to the active list.

On September 7, 2004, the case was assigned to the undersigned judge, and a hearing was scheduled for March 31, 2005. At the request of counsel for respondent, the hearing was adjourned and rescheduled to August 8, 2005. On that date, the parties appeared and settlement discussions were held. Additional telephone conferences were held on August 23 and 30, 2005, and the hearing was rescheduled to September 6, 2005. On that date, the parties appeared and reached a settlement which was contingent upon approval by the District. The fully executed Stipulation of Settlement and Dismissal, and a copy of the District Action Form approving the settlement, were filed on November 28, 2005.

The parties have agreed to settle this matter and have prepared the attached Stipulation of Settlement and Dismissal and Paterson Public School District Action Form, indicating the terms of settlement.

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

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

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

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

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

This recommended decision may be adopted, modified or rejected by the **COMMISSIONER OF THE DEPARTMENT OF EDUCATION,** who by law is authorized to make a final decision in this matter. If the Commissioner of the Department of

Education does not adopt, modify or reject this decision within forty-five (45) days and unless such time limit is otherwise extended, this recommended decision shall become a final decision in accordance with *N.J.S.A.* 52:14B-10.

December 5, 2005
DATE

Elinor R. Reiner
Elinor R. Reiner, ALJ

Receipt Acknowledged:

12-7-05
DATE

M. Kathleen Dunham
DEPARTMENT OF EDUCATION

Mailed to Parties:

Laura Sandoss
DIRECTOR AND
CHIEF ADMINISTRATIVE LAW JUDGE

DEC 8 2005
DATE

OFFICE OF ADMINISTRATIVE LAW

al

Rita Van Santen,
Petitioner

v.

State Operated School
District of Paterson

STATE OF NEW JERSEY
OFFICE OF ADMINISTRATIVE LAW
RECEIVED
STATE OF NEW JERSEY
OFFICE
OAL DKT. NO. EDU 3302-01N
2005 NOV 28 A 8:09

Stipulation of Settlement
And Dismissal

This matter having come before the Court by way of Verified Petition, and the parties having determined to resolve this matter without resort to hearing, herein agree as follows:

1. Respondent State Operated School District of Paterson (hereinafter "Respondent") will pay to Petitioner the sum of $3000.00, which represents payment of an agreed-upon amount in lieu of sick days to which Petitioner claims she is entitled.

2. Petitioner will voluntarily dismiss her Petition, bearing Docket No. EDU 3302-01N

3. This Settlement is the resolution of disputed claims and does not constitute an admission of wrongdoing or liability by either party.

4. Petitioner herein waives any and all rights to make any claim against Respondent related to the injuries, medical treatment, sick leave entitlement, and the like arising out of or pertaining to the injuries or timeframes at issue in this litigation, bearing Docket No. EDU 3302-01N.

5. This agreement is subject to approval by the State Operated School District of Paterson.

Rita Van Santen 8/6/05
Petitioner Date

Michael E. Glover
Respondent Dat

06-A661

PATERSON PUBLIC SCHOOL DISTRICT
ACTION FORM

1. Curricular recommendations must include, if appropriate, school, student initials, tuition rate and/or other needed information.
2. Fiscal recommendations must include all appropriate fiscal information.
3. This Action Form must be in the State District Superintendent's office according to cutoff date before the meeting of the Board of Education.

Recommendation/Resolution:

In the matter of a verified Petition before The State of New Jersey Administrative Law involving a claim for sick days in 2001 by former employee Rita Van Santen. OAL Docket Number EDU-3302-014.

Be It Resolved that the Paterson Public Schools settles this matter for the sum of $3,000.00. This settlement is for the resolution for disputed claims and does not constitute an admission of wrong doing or liability by either party.

APPROVALS REQUIRED

1. Submitted by Lyndon Smith-Kirk Nat Supervisor _____ _____
(Name, Title) Date

2. Approval by Divisional Administrator _____ _____
State District Superintendent, Assistant Superintendent or Business Administrator Date

3. Account No. 11.000.291.260.260.291.0000.000

Certification of Funds _____ _____
Signature Date

Funds Available ☐ Funds Not Needed ☐
Funds Not Available ☐ Non-Budget Item ☐

4. Verification by Legal Department, if required _____ _____
Date

5. Approval - State District Superintendent _____ _____
Date

6. Board Adoption Date N/A Resolution Number _____

Copies as follows:
White-To Board Office Green-To #5 Yellow-To Business Administrator Pink-To #1 Gold-To #2

DCT-20 P02:51

2/06

IN THE MATTER OF WILLIAM LAHN, :
DELSEA BOARD OF EDUCATION, :
GLOUCESTER COUNTY. :

COMMISSIONER OF EDUCATION

DECISION

SYNOPSIS

The School Ethics Commission (Commission) determined that Delsea Board of Education member William Lahn violated *N.J.S.A.* 18A:12-24.1(d) of the Code of Ethics for School Board Members when he, *inter alia,* requested copies of the 2004 and 2005 SAT reports from the guidance secretary, and when he inspected the boys' locker room and instructed district employees regarding supervision of students. After considering the nature of the charge, the Commission recommended that the Commissioner of Education impose a penalty of censure.

Upon a thorough review of the record, the Commissioner, whose decision was restricted solely to a review of the Commission's recommended penalty pursuant to *N.J.S.A.* 18A:12-29(c) and *N.J.A.C.* 6A:3-9.1, concurred with the Commission's recommendation. The Commissioner thus ordered that William Lahn 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.

Mailed 1/23/06

25-06SEC

AGENCY DKT. NO. 383-12/05

IN THE MATTER OF WILLIAM LAHN,	:	COMMISSIONER OF EDUCATION
DELSEA BOARD OF EDUCATION,	:	DECISION
GLOUCESTER COUNTY.	:	

The record of this matter and the decision of the School Ethics Commission ("Commission"), including the recommended penalty of censure, have been reviewed.

This matter comes before the Commissioner to impose a sanction upon Respondent William Lahn, member of the Delsea Board of Education, based upon findings of fact and conclusions of law by the Commission that he violated *N.J.S.A.* 18A:12-24.1(d) of the School Ethics Act when he went directly to a guidance secretary and requested a copy of the 2004 and 2005 SAT reports, and when he went into the boys' locker room, inspected the lockers and instructed district employees regarding the supervision of students. The Commission further found that Mr. Lahn violated *N.J.S.A.* 18A:12-24.1(j) when he took a complaint from a parent to the Principal rather than the Superintendent.

Upon issuance of the decision of the Commission, respondent was provided 13 days from the mailing of such decision to file written comments on the recommended penalty for the Commissioner's consideration. Mr. Lahn's submitted comments argue that the violations that the Commission found were "clearly unintentional," will not be repeated in the future, and were "minor" compared to other issues which have come before the Commission. He, therefore, urges that the Commissioner impose no sanction or, if a sanction is absolutely necessary, that the absolute minimum is appropriate.

Initially, it must be emphasized that pursuant to *N.J.S.A.* 18A:12-29(c) and *N.J.A.C.* 6A:3-9.1, the determination of the Commission as to violation of the School Ethics Act is **not reviewable by the Commissioner** herein. Only the Commission may determine whether a violation of the School Ethics Act occurred. The Commissioner's jurisdiction is limited to reviewing the sanction to be imposed following a finding of a violation by the Commission. Therefore, this decision is restricted solely to a review of the Commission's recommended penalty.

Upon a thorough review of the record, the Commissioner notes that having found violations of the School Ethics Act, the Commission was statutorily obligated to recommend a sanction for these infractions (See *N.J.S.A.* 18A:12-29c.). As evidenced in its decision, the Commission -- in making its penalty determination -- recommended the more stringent penalty of censure because "Mr. Lahn's conduct violated the Act on more than one occasion and because his conduct put the guidance secretary in a difficult situation that ultimately resulted in her being reprimanded." (Commission Decision at 4). The Commissioner finds no cause to disturb the Commission's recommended penalty in this matter.

Accordingly, IT IS hereby ORDERED that William Lahn be censured as a school official found to have violated the School Ethics Act.

IT IS SO ORDERED.*

Lucille Edary

ACTING COMMISSIONER OF EDUCATION

Date of Decision: 01/23/06

Date of Mailing: 01/23/06

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

...BOY
...ERSIES
AND DISPUTES
DEC 21 PM 12:10

IN THE MATTER OF	:	**BEFORE THE SCHOOL ETHICS COMMISSION**
WILLIAM LAHN	:	**Docket No. C25-05**
DELSEA BOARD OF EDUCATION	:	
GLOUCESTER COUNTY	:	**DECISION**

PROCEDURAL HISTORY

This matter arises from a complaint filed on May 27, 2005 by Richard T. Durham alleging that William Lahn, a member of the Delsea Board of Education (Board), violated the School Ethics Act (Act), N.J.S.A. 18A:12-21 et seq. Mr. Durham specifically alleges that Mr. Lahn violated N.J.S.A. 18A:12-24.1(d) when he went directly to a guidance secretary and requested a copy of the 2004 and 2005 SAT reports including the names of the students, when he went into the boys locker room and inspected the lockers, and when he went into the school cafeteria to eat lunch. Mr. Durham also alleged that Mr. Lahn violated N.J.S.A. 18A:12-24.1(j) when he took a complaint from a parent to the Principal rather than the Superintendent. Mr. Lahn filed a timely answer in which he denied violating the Act and asked the Commission to find the complaint frivolous and sanction the complainant pursuant to N.J.S.A. 18A:12-29(e).

The Commission invited the parties to attend its August 23, 2005 meeting to present witnesses and testimony, but did not require that they be present. Mr. Durham attended the meeting and testified before the Commission. Mr. Lahn did not attend the meeting. At its August 23, 2005 meeting, the Commission voted to find probable cause to credit the allegation that Mr. Lahn violated N.J.S.A. 18A:12-24.1(d) of the Act when, as a member of the Board, he went directly to the guidance secretary and asked for a copy of the 2004 and 2005 SAT reports, and when he went into the boys locker room to inspect the lockers and instructed district employees on the supervision of students. The Commission also found probable cause to credit the allegation that Mr. Lahn violated N.J.S.A. 18A:12-24.1(j) when he took a parental complaint directly to the Principal rather than to the Superintendent. Finally, the Commission found no probable cause to credit the allegation that Mr. Lahn violated N.J.S.A. 18A:12-24.1(d) and (j) when he went into the school cafeteria to eat lunch. Since the Commission found probable cause to credit the allegations that Mr. Lahn violated N.J.S.A. 18A:12-24.1(d) and (j) of the Act, it did not consider Mr. Lahn's request to find the complaint frivolous and sanction the complainant.

The Commission found that the material facts were not in dispute with respect to the issue upon which it found probable cause and, therefore, advised Mr. Lahn that it would decide the matter on the basis of written submissions. Mr. Lahn was invited to provide a written submission to the Commission by November 7, 2005, and set forth why the Commission should not find him in violation of N.J.S.A. 18A:12-24.1(d) and (j) of

the Code of Ethics for School Board Members in the Act when, as a member of the Board, he went directly to the guidance secretary and asked for a copy of the 2004 and 2005 SAT reports, when he went into the boys locker room to inspect the lockers and when he took a parental complaint directly to the Principal rather than to the Superintendent. Mr. Lahn was also told that his written submission should include his position on an appropriate sanction should the Commission determine that the Act was violated.

Mr. Lahn did not submit an answer to the Commission's probable cause decision. At its meeting of November 22, 2005, the Commission found that Mr. Lahn violated N.J.S.A. 18A:12-24.1(d) and (j) of the Code of Ethics for School Board Members in the Act when, as a member of the Board, he went directly to the guidance secretary and asked for a copy of the 2004 and 2005 SAT reports, when he went into the boys locker room to inspect the lockers and when he took a parental complaint directly to the Principal rather than to the Superintendent. The Commission voted to recommend that the Commissioner of Education impose a penalty of censure.

FACTS

The Commission based its finding of probable cause on the following facts.

At all times relevant to the complaint Mr. Lahn was a member of the Board and a member of the Building and Grounds Committee.

In 2004, Mr. Lahn obtained SAT scores from the Guidance Office that did not include information regarding the scores of individual students. On January 11, 2005, Mr. Lahn went into the guidance office and asked the guidance secretary to provide him with the SAT scores from last year and this year. The guidance secretary told Mr. Lahn that she could not give out that information. Mr. Lahn told the guidance secretary that Mrs. Orsi always provided him with a report of the average scores for the SAT administration. The guidance secretary could not find such a report. The guidance secretary claimed that Mr. Lahn then asked for a copy of the reports that included the students' names. In Mr. Lahn's certified answer, he denied asking for copies of the report with the students' names. The guidance secretary eventually made a copy of the SAT reports without the students' names and gave it to Mr. Lahn. In a letter attached as an exhibit to the complaint, the guidance secretary wrote that she felt uncomfortable with Mr. Lahn's request and felt as if she had no choice but to give him the copies since he was a member of the Board. A letter of reprimand was put into the guidance secretary's file for giving Mr. Lahn the SAT reports. Mr. Lahn later went into the guidance secretary's office to apologize if he made her feel uncomfortable. The guidance secretary also wrote that she told Mr. Lahn that she felt that he used his position on the Board to get what he wanted.

In January 2005, Mr. Lahn went to the High School to attend a basketball game where his daughter was cheerleading. Mr. Lahn instructed a district employee that more supervision was needed in the boys' locker room when the students were present. Mr.

Lahn also went into the boys' locker room and inspected the lockers. At the next Building and Grounds Committee meeting, when the Superintendent and the Business Administrator recommended that new lockers should be purchased for the boys' locker room, Mr. Lahn said that he did not think that new lockers were needed.

Sometime in April 2005, late one evening, a parent called Mr. Lahn with a complaint. Mr. Lahn told the parent to call the School Administrator the next day with the complaint. On the following morning, Mr. Lahn went to the Principal's office and told the Principal that a parent had called him with a complaint regarding a conflict her son was having between his involvement in the track team and the school play. The Principal told Mr. Lahn that he was aware of the situation and it had been taken care of. Mr. Lahn then said that it was fine and he just wanted to give the Principal a heads up. The Principal certified that Mr. Lahn did not petition him on behalf of the parent, but were merely informing him of a potential problem. The Superintendent certified that the parent had called Mr. Lahn after the Principal had resolved the situation. The Superintendent also certified that neither he nor the Board had prior knowledge of the complaint.

ANALYSIS

The Commission found probable cause that Mr. Lahn violated N.J.S.A. 18A:12-24.1(d) of the Code of Ethics for School Board Members when, as a member of the Board, he went directly to the guidance secretary and asked for a copy of the 2004 and 2005 SAT reports and when he went into the boys locker room to inspect the lockers.

N.J.S.A. 18A:12-24.1(d) provides:

> I will carry out my responsibility, not to administer the schools, but, together with my fellow board members, to see that they are well run.

To find a violation of N.J.S.A. 18A:12-24.1(d), the Commission must determine if Mr. Lahn's conduct rose to the level of administering the schools. Previously, in Sanders v. Smith, C03-04 (July 27, 2004), the Commission found that the actions of a board member going into the schools to determine what the district needs does not rise to the level of administering the schools. However, in this case, Mr. Lahn did more than just enter the schools to determine the district's needs. Mr. Lahn went directly to the guidance secretary and requested SAT reports. When the guidance secretary could not find the reports that Mr. Lahn described, he again insisted that he receive a copy of the reports. As a result of Mr. Lahn's conduct, the guidance secretary received a letter of reprimand, which was placed in her file. Mr. Lahn's conduct had a direct impact on an employee of the school. Mr. Lahn also personally inspected the boys' lockers to determine if new lockers were needed and, in doing so, he instructed district employees to provide more supervision when the students were present. Mr. Lahn's personal interactions with district personnel were administrative by nature. His conduct rose to the level of administering the schools because Mr. Lahn instructed district employees

regarding their job duties. Therefore, the Commission finds that Mr. Lahn violated N.J.S.A. 18A:12-24.1(d) when he went directly to a guidance secretary and requested a copy of the 2004 and 2005 SAT reports, and when he went into the boys' locker room, inspected the lockers and instructed district employees regarding the supervision of students.

The Commission also found probable cause that Mr. Lahn violated N.J.S.A. 18A:12-24.1(j) when he took a complaint from a parent to the Principal rather than to the Superintendent. N.J.S.A. 18A:12-24.1(j) provides:

> I will refer all complaints to the chief school administrative officer and will act on the complaints at public meetings only after failure of an administrative solution.

Mr. Lahn admitted receiving a complaint from a parent. Mr. Lahn also admitted that the next morning he went directly to the Principal's office with that parent's complaint. Mr. Lahn did not take the complaint to the Superintendent or the Board. In this case, the Principal had already resolved the parent's complaint and the parent was then turning to Mr. Lahn for some further resolution. This is an example of what can happen when a board member does not refer all complaints to the chief administrative officer. It creates confusion in the administration of the school. Based on the foregoing, the Commission finds that Mr. Lahn violated N.J.S.A. 18A:12-24.1(j) when he took the parental complaint directly to the Principal instead of referring it to the Superintendent.

DECISION

For the reasons discussed above, the Commission finds that William Lahn violated N.J.S.A. 18A:12-24.1(d) and (j) of the Code of Ethics for School Board Members in the Act. The Commission recommends that the Commissioner of Education impose a penalty of censure since Mr. Lahn's conduct violated the Act on more than one occasion and because his conduct put the guidance secretary in a difficult situation that ultimately resulted in her being reprimanded.

This decision has been adopted by a formal resolution of the School Ethics Commission. This matter shall now be transmitted to the Commissioner of Education for action on the Commission's recommendation **for sanction only**, pursuant to N.J.S.A. 18A:12-29. Within 13 days from the date on which the Commission's decision was mailed to the parties, Mr. Lahn may file written comments on the recommended sanction with the Commissioner of Education, c/o Bureau of Controversies and Disputes, P.O. Box 500, Trenton, NJ 08625, marked "Attention: Comments on Ethics Commission Sanction." A copy of any comments filed must be sent to the School Ethics Commission and all other parties.

Paul C. Garbarini, Chairperson

Resolution Adopting Decision – C25-05

Whereas, the School Ethics Commission has considered the pleadings filed by the parties and the documents submitted in support thereof; and

Whereas, at its meeting of November 22, 2005, the Commission found that William Lahn violated N.J.S.A. 18A:12-24.1(d) and (j) of the Code of Ethics for School Board Members in the Act and recommended that the Commissioner of Education impose a sanction of censure; and

Whereas, at its meeting of December 20, 2005, the Commission reviewed a draft decision prepared by its staff and agrees with the decision;

Now Therefore Be It Resolved that the Commission hereby adopts the proposed decision referenced as its decision in this matter and directs its staff to notify all parties to this action of the Commission's decision herein.

Paul C. Garbarini

Paul C. Garbarini, Chairperson

I hereby certify that the Resolution
was duly adopted by the School
Ethics Commission at its public meeting
on December 20, 2005.

Lisa James-Beavers

Lisa James-Beavers
Executive Director

PCG/LJB/MET/ethics/decisions/C25-05

26-06

IN THE MATTER OF KAREN JACKSON, :
GALLOWAY COMMUNITY CHARTER :
SCHOOL, ATLANTIC COUNTY. :
:

COMMISSIONER OF EDUCATION

DECISION

SYNOPSIS

The School Ethics Commission (Commission) determined that Galloway Community Charter School Board of Trustees member Karen Jackson violated *N.J.S.A.* 18A:12-24.1(i) of the Code of Ethics for School Board Members when she made a derogatory statement regarding a student-created project proposed by a teaching staff member, which was intended to provide instruction to fulfill the Core Curriculum Content Standards for Holocaust Education. After considering the nature of the charge, the Commission recommended that the Commissioner of Education impose a penalty of reprimand.

Upon a thorough review of the record, the Commissioner, whose decision was restricted solely to a review of the Commission's recommended penalty pursuant to *N.J.S.A.* 18A:12-29(c) and *N.J.A.C.* 6A:3-9.1, concurred with the Commission's recommendation. The Commissioner thus ordered that Karen Jackson 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.

January 24, 2006

26-06SEC

AGENCY DKT NO. 382-12/05

IN THE MATTER OF KAREN JACKSON, GALLOWAY COMMUNITY CHARTER SCHOOL, ATLANTIC COUNTY.	:	COMMISSIONER OF EDUCATION DECISION

The record of this matter and the decision of the School Ethics Commission ("Commission"), finding that Galloway Community Charter School Board of Trustees member Karen Jackson violated *N.J.S.A.* 18A:12-24.1(i) of the Code of Ethics for School Board members when she made a derogatory statement regarding a student-created project proposed by a teaching staff member, which was intended to provide instruction to fulfill the Core Curriculum Content Standards for Holocaust Education. Upon issuance of the decision of the Commission, Ms. Jackson was provided 13 days from the mailing date of the decision to file written comments on the recommended penalty for the Commissioner's consideration.

No comments were filed by or on behalf of Ms. Jackson.

Initially, it must be emphasized that, pursuant to *N.J.S.A.* 18A:12-29(c) and *N.J.A.C.* 6A:3-9.1, the determination of the Commission as to violation of the School Ethics Act is **not reviewable by the Commissioner** herein. Only the Commission may determine whether a violation of the School Ethics Act occurred. The Commissioner's jurisdiction is limited to reviewing the sanction to be imposed based upon a finding of a violation by the Commission. Therefore, this decision is restricted solely to a review of the Commission's recommended penalty.

cause, it reconsidered the matter and voted to amend the probable cause decision to credit the allegation that Ms. Jackson did violate N.J.S.A. 18A:12-24.1(j) of the Code of Ethics.

The Commission found that the material facts were not in dispute with respect to the issue upon which it found probable cause and, therefore, advised Ms. Jackson that it would decide the matter on the basis of written submissions. Ms. Jackson was invited to provide a written submission to the Commission by September 23, 2005, and set forth why the Commission should not find her in violation of N.J.S.A. 18A:12-24.1(b), (c), (i) and (j) of the Code of Ethics for School Board Members in the Act when, at the February 23, 2005 Board meeting, she made a derogatory statement regarding a student created project proposed by a teaching staff member. Ms. Jackson was also told that her written submission should include her position on an appropriate sanction should the Commission determine that the Act was violated.

Ms. Jackson filed a timely response to the Commission's probable cause decision. In her response, Ms. Jackson denied that she violated the Code of Ethics for School Board Members. Ms. Jackson did not provide her position on an appropriate sanction should the Commission find a violation of the Act.

FACTS

The Commission based its finding of probable cause on the following facts.

At all times relevant to the complaint, Ms. Jackson was President of the Board. Ms. Jackson served on the Board for eight years and she resigned from the Board on April 22, 2005, prior to the Commission's hearing on this matter. The complainants are faculty members of the School.

At the February 23, 2005 public comment section of the Board meeting, there was a discussion regarding a project created by students to represent the deaths that resulted during the Holocaust. The lesson was a fulfillment of the requirement at N.J.S.A. 18A:35-28 that every board of education include instruction on the Holocaust and genocides in the curriculum of all elementary and secondary school pupils. A teaching staff member asked if there would be a place on the school grounds to host a "Holocaust Rock Garden." Ms. Jackson responded that she had a number of concerns regarding the project. While communicating her concerns, she said that she "didn't want Jews lined up on Route 9 with their rocks and no where to put them."

ANALYSIS

The Commission found probable cause that Ms. Jackson violated N.J.S.A. 18A:12-24.1(b), (c), (i) and (j) of the Code of Ethics for School Board Members when, at the February 23, 2005 Board meeting, she made a derogatory statement regarding a student created project proposed by a teaching staff member. The project was created and proposed by the teacher in order to provide instruction to fulfill the Core Curriculum

Content Standards requirements on Holocaust Education. Each provision will be discussed in turn.

N.J.S.A. 18A:12-24.1(b) provides:

> I will make decisions in terms of the educational welfare of children and will seek to develop and maintain public schools that meet the individual needs of all children regardless of their ability, race creed, sex, or social standing.

The Commission found probable cause to credit the allegation that Ms. Jackson violated N.J.S.A. 18A:12-24.1(b), because her statement failed to fulfill her Board responsibility to support the educational welfare of the students. The Commission found that, while it would have been reasonable for Ms. Jackson to discuss her concerns regarding curriculum at the School, her statement during a public meeting of the Board that she "didn't want Jews lined up on Route 9 with their rocks and no where to put them," was a derogatory statement that focused on a specific religious group. In her response to the Commission's probable cause determination, Ms. Jackson admitted making the statement, but denied that it showed that her decisions did not support the educational welfare of the children. Ms. Jackson argued that, for eight years, she made decisions in terms of the educational welfare of the children and has sought to develop schools that met the individual needs of all the students regardless of their ability, race, creed, sex or social standing. As the Commission noted in its probable cause determination, Ms. Jackson's statement is a prime example of religious intolerance. However, after considering Ms. Jackson's response, the Commission is persuaded that merely making such a statement does not prove that Ms. Jackson's decisions as a Board member failed to support the educational welfare of the children. Therefore, the Commission finds that Ms. Jackson did not violate N.J.S.A. 18A:12-24.1(b).

N.J.S.A. 18A:12-24.1(c) provides:

> I will confine my board action to policy making, planning, and appraisal, and I will help to frame policies and plans only after the board has consulted those who will be affected by them.

The Commission found probable cause that Ms. Jackson violated N.J.S.A. 18A:12-24.1(c), because her statement at the public Board meeting was unrelated to policy making, planning and appraisal. In her response to the Commission's probable cause determination, Ms. Jackson argued that, at the meeting, she adamantly expressed the need to follow policy and procedures for all projects and visitors in the building. She argued that her concern was to fulfill her responsibility for upholding the safety, the conditions of the building lease and the policies for visitors. Thus, it appears that although her statement was derogatory, it was related to the Board's policies. Therefore, the Commission finds that Ms. Jackson did not violate N.J.S.A. 18A:12-24.1(c).

N.J.S.A. 18A:12-24.1(i) provides:

> I will support and protect school personnel in proper performance of their duties.

The Commission found probable cause that Ms. Jackson violated N.J.S.A. 18A:12-24.1(i), because her statement created a hindrance in the teacher's ability to move forward with the curriculum of the Holocaust. In her response to the Commission's probable cause decision, Ms. Jackson argued that the teacher did not follow policy and procedure because she did not contact the landlord prior to her creation of the project. After the Board meeting, Ms. Jackson contacted the landlord and discussed with him where all of the stones would be placed. Whether or not the teacher contacted the landlord, the Commission notes that the statement made by Ms. Jackson was the antithesis of the instruction on Holocaust required by N.J.S.A. 18A:35-28. The teacher was fulfilling her duties to provide instruction on the Holocaust and Ms. Jackson's statement demeaned the teacher. It was not supportive of the teacher or the lesson. Therefore, the Commission finds that Ms. Jackson violated N.J.S.A. 18A:12-24.1(i) when she made an insensitive and derogatory statement that did not support the teacher in her proper performance of her duties.

N.J.S.A. 18A:12-24.1(j) provides:

> I will refer all complaints to the chief school administrative officer and will act on the complaints at public meetings only after failure of an administrative solution.

The Commission found probable cause that Ms. Jackson violated N.J.S.A. 18A:12-24.1(j) because she did not fulfill her duty to report her concerns regarding the lesson on the Holocaust to the chief school administrative officer before raising the issue at a public meeting of the Board. In her response to the Commission's probable cause decision, Ms. Jackson argued that she did refer her complaint to the chief school administrative officer, Ms. Nataloni, when she informed Ms. Nataloni that there would be a quorum for the meeting. At that time, Ms. Nataloni told Ms. Jackson that the issue could be addressed at the meeting because the teacher would be there to discuss the garden and any questions that the Board had. Since Ms. Jackson did refer her complaint to the chief school administrative officer who told her that she could discuss it at the public Board meeting, the Commission finds that Ms. Jackson did not violate N.J.S.A. 18A:12-24.1(j).

DECISION

For the reasons discussed above, the Commission finds that Karen Jackson violated N.J.S.A. 18A:12-24.1(i) of the Code of Ethics for School Board Members in the Act. The Commission recommends that the Commissioner of Education impose a penalty of reprimand since Ms. Jackson has resigned from the Board.

This decision has been adopted by a formal resolution of the School Ethics Commission. This matter shall now be transmitted to the Commissioner of Education for action on the Commission's recommendation **for sanction only**, pursuant to N.J.S.A. 18A:12-29. Within 13 days from the date on which the Commission's decision was mailed to the parties, Ms. Jackson may file written comments on the recommended sanction with the Commissioner of Education, c/o Bureau of Controversies and Disputes, P.O. Box 500, Trenton, NJ 08625, marked "Attention: Comments on Ethics Commission Sanction." A copy of any comments filed must be sent to the School Ethics Commission and all other parties.

Paul C. Garbarini «
Paul C. Garbarini
Chairperson

Resolution Adopting Decision – C08-05

Whereas, the School Ethics Commission has considered the pleadings filed by the parties and the documents submitted in support thereof; and

Whereas, at its meeting of December 20, 2005, the Commission found that Karen Jackson violated N.J.S.A. 18A:12-24.1(i) of the Code of Ethics for School Board Members in the Act and recommended that the Commissioner of Education impose a sanction of reprimand; and

Whereas, the Commission reviewed a draft decision prepared by its staff and agrees with the decision;

Now Therefore Be It Resolved that the Commission hereby adopts the proposed decision referenced as its decision in this matter and directs its staff to notify all parties to this action of the Commission's decision herein.

Paul C. Garbarini, Chairperson

I hereby certify that the Resolution
was duly adopted by the School
Ethics Commission at its public meeting
on December 20, 2005.

Lisa James-Beavers
Executive Director

PCG/LJB/MET/ethics/decisions/C08-05

#27-06 SEC

27-06

AGENCY DKT. NO. 5-1/06

IN THE MATTER OF MALCOLM X. OUTLAW,	:	
STATE-OPERATED SCHOOL DISTRICT OF	:	COMMISSIONER OF EDUCATION
NEWARK, ESSEX COUNTY	:	DECISION

The record of this matter and the decision of the School Ethics Commission, forwarded to the Commissioner pursuant to N.J.S.A. 18A:12-29 solely for review of the Commission's recommended penalty, have been reviewed. No comments were filed by the above-named respondent.

Upon such review, the Commissioner concurs with the penalty recommended by the Commission, and additionally admonishes the respondent for failure to timely file the requisite statement in that such delay has resulted in a waste of administrative and adjudicative time by local, county and State education officials.

Accordingly, the above-named respondent is hereby reprimanded as a school official found to have violated the School Ethics Act.

IT IS SO ORDERED. *

Lucille E Davy

ACTING COMMISSIONER OF EDUCATION

Date of Decision: 01/24/06

Date of Mailing: 01/24/06

* This decision, as the Commissioner's final determination regarding penalty in the instant matter, may be appealed to the State Board of Education pursuant to *N.J.S.A.* 18A:6-27 *et seq.* and *N.J.A.C.* 6A:4-1.1 *et seq.* Pursuant to *N.J.A.C.* 6A:4-1.4(a), Commissioner decisions are deemed filed three days after the date of mailing to the parties.

State of New Jersey

DEPARTMENT OF EDUCATION
PO BOX 500
TRENTON, NJ 08625-0500

RICHARD J. CODEY
Acting Governor

LUCILLE E. DAVY
Acting Commissioner

RECEIVED
JAN - 3 2006

December 27, 2005

Mr. Malcolm X Outlaw
89A Parkway Drive West
East Orange, NJ 07052

Subject: Resolution for Failure to File Disclosure Statements
School Ethics Commission Docket No. D17-05

Dear Mr. Outlaw:

At its meeting of December 20, 2005, the School Ethics Commission passed the enclosed resolution wherein it found that your failure to file a disclosure statement within the designated timeline was a violation of N.J.S.A. 18A:12-25 and 26. Although you filed the disclosure statement, you did not do so until the Commission issued the Order to Show Cause. The resolution also recommends to the Acting Commissioner of Education that she impose the sanction of a reprimand.

Pursuant to N.J.S.A. 18A:12-29, this matter is transmitted to the Commissioner of Education for action on the Commission's recommendation **for sanction only**. Within thirteen (13) days from the date of this letter, you may file written comments on the recommended sanction with the Commissioner of Education, c/o Bureau of Controversies and Disputes, 100 Riverview Plaza, P. O. Box 500, Trenton, NJ 08625, marked "Attention: Comments on Ethics Commission Sanction." A copy of any comments filed must be sent to the School Ethics Commission.

Sincerely,

Lisa James-Beavers
Executive Director

LJB/MET/disclosure/correspondence/17-05reprimand
Enclosure
c: Board Secretary
County Superintendent
Kathleen Duncan, Director of Controversies and Disputes

SCHOOL ETHICS COMMISSION	:	**BEFORE THE SCHOOL ETHICS COMMISSION**
V.	:	
	:	**Docket No.: D17-05**
MALCOLM X OUTLAW NEWARK BOARD OF EDUCATION ESSEX COUNTY	:	**RESOLUTION FOR FAILURE TO FILE A DISCLOSURE STATEMENT**

WHEREAS, N.J.S.A. 18A:12-25 of the School Ethics Act requires each school official to file a personal/relative disclosure statement and N.J.S.A. 18A:12-26 requires each school official to file a financial disclosure statement with the School Ethics Commission; and

WHEREAS, Malcolm X. Outlaw is a "school official" under N.J.S.A. 18A:12-23 of the Act and N.J.A.C. 6A:28-1.2 of the Code; and

WHEREAS, the deadline to file these disclosure statements was April 29, 2005 for school officials in office since January 30, 2005 and 30 days from swearing-in or start of employment for newly elected or appointed board members and administrators; and

WHEREAS, the School Ethics Commission was advised by the County Superintendent that this school official did not file a disclosure statement with his school district and the County Superintendent's office as required by the Act; and

WHEREAS, the Commission sent a reminder letter to him on October 7, 2005, indicating that if the completed statement was not filed by October 21, 2005, the Commission would issue an Order to Show Cause that could result in disciplinary action; and

WHEREAS, the Commission issued an Order on November 4, 2005, directing this school official to Show Cause why the Commission should not find him in violation of the Act for failing to file the disclosure statements; and

WHEREAS, the school official filed the completed disclosure statement, but not until after the Commission issued the Order to Show Cause; and

WHEREAS, in its letter enclosing the Order, the Commission notified this school official that he had 20 days to respond to the Order, that the Commission would discuss this matter at its December 20, 2005 meeting, that he had the right to attend the meeting, and he could be found in violation of the School Ethics Act and receive a penalty up to removal; and

WHEREAS, the Commission finds that the failure to file a disclosure statement within the designated timeline constitutes a clear violation of N.J.S.A. 18A:12-25 and 26; and

WHEREAS, this school official did not provide an answer to the Commission's Order; and

WHEREAS, the Commission finds that this school official was given ample opportunity to provide the complete disclosure statement; and

WHEREAS, the appropriate penalty for the violation is reprimand especially in light of the failure to respond to either the Commission's reminder letter or its Order.

NOW THEREFORE BE IT RESOLVED that the School Ethics Commission finds that Malcolm X. Outlaw violated N.J.S.A. 18A:12-25 and 26 of the School Ethics Act and recommends that the Commissioner of Education impose a sanction of reprimand.

Paul C. Garbarini, Chairperson
School Ethics Commission

Dated: December 27, 2005

This matter shall be transmitted to the Commissioner of Education for action on the Commission's recommendation for sanction pursuant to N.J.S.A. 18A:12-29. Within thirteen (13) days from the date on which the Commission's decision was mailed to you, you may file written comments on the recommended sanction with the Commissioner of Education, c/o Bureau of Controversies and Disputes, 100 Riverview Plaza, P.O. Box 500, Trenton, NJ 08625, marked "Attention: Comments on Ethics Commission Sanction." A copy of any comments filed must be sent to the School Ethics Commission.

28-06

#28-06SEC

AGENCY DKT. NO. 2-1/06

IN THE MATTER OF	:	
KAREN HARRISON-BOWERS,	:	COMMISSIONER OF EDUCATION
NEW HORIZONS COMMUNITY	:	DECISION
CHARTER SCHOOL, ESSEX COUNTY	:	
	:	

The record of this matter and the decision of the School Ethics Commission, forwarded to the Commissioner pursuant to N.J.S.A. 18A:12-29 solely for review of the Commission's recommended penalty, have been reviewed. No comments were filed by the above-named respondent and the required disclosure statement(s) had not been filed as of the date of this decision.

Upon such review, the Commissioner concurs with the penalty recommended by the Commission, and additionally admonishes the respondent for failure to thus far file the requisite statement in that such disregard of the law has resulted in a waste of administrative and adjudicative time by local, county and State education officials.

Accordingly, the above-named respondent is hereby suspended as a school official found to have violated the School Ethics Act, such suspension to remain in effect until the completed disclosure statement(s) are filed, provided, however, that if such statement(s) are not filed within 30 days of the mailing date of this decision, the above-named school official shall be summarily removed from office.

IT IS SO ORDERED.*

Lucille E Davy

ACTING COMMISSIONER OF EDUCATION

Date of Decision: 01/24/06

Date of Mailing: 01/24/06

* This decision, as the Commissioner's final determination regarding penalty in the instant matter, may be appealed to the State Board of Education pursuant to *N.J.S.A.* 18A:6-27 *et seq.* and *N.J.A.C.* 6A:4-1.1 *et seq.* Pursuant to *N.J.A.C.* 6A:4-1.4(a), Commissioner decisions are deemed filed three days after the date of mailing to the parties.

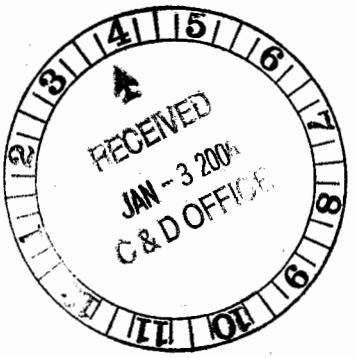
State of New Jersey

DEPARTMENT OF EDUCATION
PO Box 500
TRENTON, NJ 08625-0500

RICHARD J. CODEY
Acting Governor

LUCILLE E. DAVY
Acting Commissioner

December 27, 2005



Ms. Karen Harrison-Bowers
New Horizons Community CS
45-59 Hayes Street
Newark, NJ ~~08010~~ 07103

Subject: Resolution for Failure to File Disclosure Statements
School Ethics Commission Docket No. D23-05

Dear Ms. Harrison-Bowers:

At its meeting of December 20, 2005, the School Ethics Commission passed the enclosed resolution wherein it found that your failure to file a disclosure statement within the designated timeline was a violation of N.J.S.A. 18A:12-25 and 26. The resolution also recommends to the Acting Commissioner of Education that she impose the sanction of a suspension until you file a disclosure statement, removal if the disclosure statement is not filed within 30 days of the Commissioner's decision on penalty, and reprimand if the disclosure is filed prior to issuance of the Commissioner's decision.

Pursuant to N.J.S.A. 18A:12-29, this matter is transmitted to the Commissioner of Education for action on the Commission's recommendation **for sanction only**. Within thirteen (13) days from the date of this letter, you may file written comments on the recommended sanction with the Commissioner of Education, c/o Bureau of Controversies and Disputes, 100 Riverview Plaza, P. O. Box 500, Trenton, NJ 08625, marked "Attention: Comments on Ethics Commission Sanction." A copy of any comments filed must be sent to the School Ethics Commission.

Sincerely,

Lisa James-Beavers
Executive Director

LJB/MET/disclosure/correspondence/D23-05suspend-reprimand
Enclosure
c: Board Secretary
County Superintendent
Kathleen Duncan, Director of Controversies and Disputes

SCHOOL ETHICS COMMISSION **V.** **KAREN HARRISON-BOWERS** **NEW HORIZONS COMMUNITY** **CHARTER SCHOOL** **ESSEX COUNTY**	:	**BEFORE THE SCHOOL ETHICS COMMISSION** **Docket No.: D23-05** **RESOLUTION FOR FAILURE TO FILE A DISCLOSURE STATEMENT**

WHEREAS, N.J.S.A. 18A:12-25 of the School Ethics Act requires each school official to file a personal/relative disclosure statement and N.J.S.A. 18A:12-26 requires each school official to file a financial disclosure statement with the School Ethics Commission; and

WHEREAS, Karen Harrison-Bowers is a board member of the Board of Education for the Beverly City school district and thus a "school official" under N.J.S.A. 18A:12-23 of the Act and N.J.A.C. 6A:28-1.2 of the Code; and

WHEREAS, the deadline to file these disclosure statements was April 29, 2005 for school officials in office since January 30, 2005 and 30 days from swearing-in or start of employment for newly elected or appointed board members and administrators; and

WHEREAS, the School Ethics Commission was advised by the County Superintendent that this school official did not file a disclosure statement with her school district and the County Superintendent's office as required by the Act; and

WHEREAS, the Commission sent a reminder letter to her on October 7, 2005, indicating that if the completed statement was not filed by October 21, 2005, the Commission would issue an Order to Show Cause that could result in disciplinary action; and

WHEREAS, the Commission issued an Order on November 4, 2005, directing this school official to Show Cause why the Commission should not find her in violation of the Act for failing to file the disclosure statements; and

WHEREAS, in its letter enclosing the Order, the Commission notified this school official that she had 20 days to respond to the Order, that the Commission would discuss this matter at its December 20, 2005 meeting, that she had the right to attend the meeting, and she could be found in violation of the School Ethics Act and receive a penalty up to removal; and

WHEREAS, this school official did not provide an answer to the Commission's Order and has failed to file a disclosure statement; and

WHEREAS, the Commission finds that the failure to file a disclosure statement constitutes a clear violation of N.J.S.A. 18A:12-25 and 26; and

WHEREAS, the Commission finds that this school official was given ample opportunity to provide the complete disclosure statement; and

WHEREAS, the appropriate penalty for the violation is suspension until Ms. Harrison-Bowers files a disclosure statement, removal if the disclosure statement is not filed within 30 days of the Commissioner's decision on penalty, and reprimand if the disclosure statement is filed prior to issuance of the Commissioner's decision.

NOW THEREFORE BE IT RESOLVED that the School Ethics Commission finds that Karen Harrison-Bowers violated N.J.S.A. 18A:12-25 and 26 of the School Ethics Act and recommends that the Commissioner of Education impose a sanction of suspension until she files a disclosure statement, removal if the disclosure statement is not filed within 30 days of the Commissioner's decision on penalty, and reprimand if the disclosure statement is filed prior to issuance of the Commissioner's decision.

Paul C. Garbarini, Chairperson
School Ethics Commission

Dated: December 27, 2005

This matter shall be transmitted to the Commissioner of Education for action on the Commission's recommendation for sanction pursuant to N.J.S.A. 18A:12-29. Within thirteen (13) days from the date on which the Commission's decision was mailed to you, you may file written comments on the recommended sanction with the Commissioner of Education, c/o Bureau of Controversies and Disputes, 100 Riverview Plaza, P.O. Box 500, Trenton, NJ 08625, marked "Attention: Comments on Ethics Commission Sanction." A copy of any comments filed must be sent to the School Ethics Commission.

29-06

#29-06SEC

AGENCY DKT. NO. 1-1/06

IN THE MATTER OF ANTHONY MARCHADO,	:	
STATE-OPERATED SCHOOL DISTRICT OF	:	COMMISSIONER OF EDUCATION
NEWARK, ESSEX COUNTY	:	DECISION

The record of this matter and the decision of the School Ethics Commission, forwarded to the Commissioner pursuant to N.J.S.A. 18A:12-29 solely for review of the Commission's recommended penalty, have been reviewed. No comments were filed by the above-named respondent.

Upon such review, the Commissioner concurs with the penalty recommended by the Commission, and additionally admonishes the respondent for failure to timely file the requisite statement in that such delay has resulted in a waste of administrative and adjudicative time by local, county and State education officials.

Accordingly, the above-named respondent is hereby reprimanded as a school official found to have violated the School Ethics Act.

IT IS SO ORDERED.*

Lucille E Davy

ACTING COMMISSIONER OF EDUCATION

Date of Decision: 01/24/06

Date of Mailing: 01/24/06

* This decision, as the Commissioner's final determination regarding penalty in the instant matter, may be appealed to the State Board of Education pursuant to *N.J.S.A.* 18A:6-27 *et seq.* and *N.J.A.C.* 6A:4-1.1 *et seq.* Pursuant to *N.J.A.C.* 6A:4-1.4(a), Commissioner decisions are deemed filed three days after the date of mailing to the parties.

State of New Jersey

DEPARTMENT OF EDUCATION
PO Box 500
TRENTON, NJ 08625-0500

RICHARD J. CODEY
Acting Governor

LUCILLE E. DAVY
Acting Commissioner

December 27, 2005

Mr. Anthony Marchado
Newark Public Schools
2 Cedar Street
Newark, NJ 07102

Subject: Resolution for Failure to File Disclosure Statements
School Ethics Commission Docket No. D13-05

Dear Mr. Marchado:

At its meeting of December 20, 2005, the School Ethics Commission passed the enclosed resolution wherein it found that your failure to file a disclosure statement within the designated timeline was a violation of N.J.S.A. 18A:12-25 and 26. Although you filed the disclosure statement, you did not do so until the Commission issued the Order to Show Cause. The resolution also recommends to the Acting Commissioner of Education that she impose the sanction of a reprimand.

Pursuant to N.J.S.A. 18A:12-29, this matter is transmitted to the Commissioner of Education for action on the Commission's recommendation **for sanction only**. Within thirteen (13) days from the date of this letter, you may file written comments on the recommended sanction with the Commissioner of Education, c/o Bureau of Controversies and Disputes, 100 Riverview Plaza, P. O. Box 500, Trenton, NJ 08625, marked "Attention: Comments on Ethics Commission Sanction." A copy of any comments filed must be sent to the School Ethics Commission.

Sincerely,

Lisa James-Beavers
Executive Director

LJB/MET/disclosure/correspondence/D13-05reprimand
Enclosure
c: Board Secretary
County Superintendent
Kathleen Duncan, Director of Controversies and Disputes

SCHOOL ETHICS COMMISSION	:	**BEFORE THE SCHOOL ETHICS COMMISSION**
V.	:	
	:	**Docket No.: D13-05**
ANTHONY MARCHADO NEWARK BOARD OF EDUCATION ESSEX COUNTY	:	**RESOLUTION FOR FAILURE TO FILE A DISCLOSURE STATEMENT**

WHEREAS, N.J.S.A. 18A:12-25 of the School Ethics Act requires each school official to file a personal/relative disclosure statement and N.J.S.A. 18A:12-26 requires each school official to file a financial disclosure statement with the School Ethics Commission; and

WHEREAS, Anthony Marchado is a "school official" under N.J.S.A. 18A:12-23 of the Act and N.J.A.C. 6A:28-1.2 of the Code; and

WHEREAS, the deadline to file these disclosure statements was April 29, 2005 for school officials in office since January 30, 2005 and 30 days from swearing-in or start of employment for newly elected or appointed board members and administrators; and

WHEREAS, the School Ethics Commission was advised by the County Superintendent that this school official did not file a disclosure statement with his school district and the County Superintendent's office as required by the Act; and

WHEREAS, the Commission sent a reminder letter to him on October 7, 2005, indicating that if the completed statement was not filed by October 21, 2005, the Commission would issue an Order to Show Cause that could result in disciplinary action; and

WHEREAS, the Commission issued an Order on November 4, 2005, directing this school official to Show Cause why the Commission should not find him in violation of the Act for failing to file the disclosure statements; and

WHEREAS, the school official filed the completed disclosure statement, but not until after the Commission issued the Order to Show Cause; and

WHEREAS, in its letter enclosing the Order, the Commission notified this school official that he had 20 days to respond to the Order, that the Commission would discuss this matter at its December 20, 2005 meeting, that he had the right to attend the meeting, and he could be found in violation of the School Ethics Act and receive a penalty up to removal; and

WHEREAS, the Commission finds that the failure to file a disclosure statement within the designated timeline constitutes a clear violation of N.J.S.A. 18A:12-25 and 26; and

WHEREAS, this school official did not provide an answer to the Commission's Order; and

WHEREAS, the Commission finds that this school official was given ample opportunity to provide the complete disclosure statement; and

WHEREAS, the appropriate penalty for the violation is reprimand especially in light of the failure to respond to either the Commission's reminder letter or Order.

NOW THEREFORE BE IT RESOLVED that the School Ethics Commission finds that Anthony Marchado violated N.J.S.A. 18A:12-25 and 26 of the School Ethics Act and recommends that the Commissioner of Education impose a sanction of reprimand.

Paul C. Garbarini, Chairperson
School Ethics Commission

Dated: December 27, 2005

This matter shall be transmitted to the Commissioner of Education for action on the Commission's recommendation for sanction pursuant to N.J.S.A. 18A:12-29. Within thirteen (13) days from the date on which the Commission's decision was mailed to you, you may file written comments on the recommended sanction with the Commissioner of Education, c/o Bureau of Controversies and Disputes, 100 Riverview Plaza, P.O. Box 500, Trenton, NJ 08625, marked "Attention: Comments on Ethics Commission Sanction." A copy of any comments filed must be sent to the School Ethics Commission.

30-06M

30-06

OAL DKT. NO. EDU 13079-05
AGENCY DKT. NO. 381-12/05

BENERANDA MIGLIORE,	:	
PETITIONER,	:	
V.	:	COMMISSIONER OF EDUCATION
BOARD OF EDUCATION OF THE CITY OF ELIZABETH, UNION COUNTY,	:	DECISION ON MOTION
RESPONDENT.	:	

The record of this emergent matter, which included the audiotape of the hearing conducted at the Office of Administrative Law, and the recommended Order of the Administrative Law Judge (ALJ) have been reviewed.

Upon such review, the Commissioner adopts the recommended Order denying emergent relief as he concurs with the ALJ's determination -- clearly set forth on the audiotape of the hearing -- that petitioner has failed to satisfy the requirements necessary for the granting of such extraordinary relief as set forth in *Crowe v. DeGioia*, 90 *N.J.* 126 (1982), most notably that the legal right underlying her claim is settled, that she will suffer irreparable harm absent the requested relief, or that a balancing of the equities and interests of the parties inures to her favor.

Accordingly, the instant application for emergent relief is hereby denied. This matter shall proceed to plenary hearing on its merits, scheduled for April 4, 2006, as directed by the ALJ.

IT IS SO ORDERED.*

Lucille E Davy
ACTING COMMISSIONER OF EDUCATION

Date of Decision: 1/24/06
Date of Mailing: 1/24/06

* This decision may be appealed to the State Board of Education pursuant to *N.J.S.A.* 18A:6-27 *et seq.* and *N.J.A.C.* 6A:4-1.1 *et seq.*

State of New Jersey
OFFICE OF ADMINISTRATIVE LAW
33 Washington Street
Newark NJ 07102
Tel No. (973) 648-6054
Fax No. (973) 648-6124

Ken R. Springer
Administrative Law Judge

January 12, 2006

The Honorable Lucille Davy
Acting Commissioner
Department of Education
100 Riverview Plaza, 4th Floor
P.O. Box 500
Trenton, New Jersey 08625-0500

Re: Miglore v. Elizabeth Bd. of Educ.
OAL Dkt. No. EDU 13079-05

Dear Commissioner Davy:

Enclosed please find a copy of an order entered regarding an application for emergency relief in the above-captioned matter. Pursuant to *N.J.A.C.* 1:1-12.6(j), this order will become effective forty-five (45) days from the date of its entry unless, for good cause shown under *N.J.A.C.* 1:1-18.8(e), the time period is extended by the joint action of the Director of the Office of Administrative Law and the agency head.

Very truly yours,

Ken R. Springer
Administrative Law Judge

KRS/al
cc Jennifer Borja, Esq.
Karen A. Murray, Esq.
William Speziale, Deputy Clerk

RECEIVED
STATE OF NEW JERSEY
OFFICE OF ADMINISTRATIVE LAW
2006 JAN 12 P 4:44

State of New Jersey
OFFICE OF ADMINISTRATIVE LAW

ORDER

EMERGENT RELIEF

OAL DKT. NO. EDU 13079-05
AGENCY DKT. NO. ~~3710~~12-05
381-12/05

BENERANDA MIGLIORE,
Petitioner,
v.
BOARD OF EDUCATION OF THE CITY OF ELIZABETH,
Respondent.

This matter having been opened to the Office of Administrative Law on January 12, 2006 for argument on petitioner's motion for emergent relief pursuant to *N.J.A.C.* 6A:3-1.6; and Jennifer Borja, Esq., of the law firm of LaRocca, Feeley, Smith & Rosellini, appearing on behalf of petitioner; and Karen A. Murray, Esq. of The Murray Law Firm, appearing on behalf of respondent; and the administrative law judge having considered the moving papers filed by petitioner on December 19, 2005 and the opposing papers filed by respondent on January 4, 2006; and the judge having considered the oral argument of counsel; and good cause having been shown,

It is on this 17th day of January 2006

ORDERED that petitioner's motion for emergent relief is denied for the reasons stated on the record.

And further **ORDERED** that this matter be set down for full hearing on April 4, 2006 at 9:00 a.m. at the Office of Administrative Law, 33 Washington Street, Newark, New Jersey 07106.

This order on application for emergency relief may be adopted, modified or rejected by the **ACTING COMMISSIONER, DEPARTMENT OF EDUCATION**, which by law is authorized to make a final decision in this matter. The final decision shall be issued without undue delay, but no later than forty-five (45) days following the entry of this order. If the **Acting Commissioner, Department of Education** does not adopt, modify or reject this order within forty-five (45) days, this recommended order shall become a final decision on the issue of emergent relief in accordance with *N.J.S.A.* 52:14B-10.

January 12, 2006
DATE

KEN R. SPRINGER, ALJ

KRS/al

#31-06 SEC

31-06

AGENCY DKT. NO. 6-1/06

IN THE MATTER OF MARILYN J. MITCHELL,	:	
STATE-OPERATED SCHOOL DISTRICT OF	:	COMMISSIONER OF EDUCATION
NEWARK, ESSEX COUNTY	:	DECISION

The record of this matter and the decision of the School Ethics Commission, forwarded to the Commissioner pursuant to N.J.S.A. 18A:12-29 solely for review of the Commission's recommended penalty, have been reviewed. No comments were filed by the above-named respondent.

Upon such review, the Commissioner concurs with the penalty recommended by the Commission, and additionally admonishes the respondent for failure to timely file the requisite statement in that such delay has resulted in a waste of administrative and adjudicative time by local, county and State education officials.

Accordingly, the above-named respondent is hereby reprimanded as a school official found to have violated the School Ethics Act.

IT IS SO ORDERED.*

Rochelle Hendricks

ACTING COMMISSIONER OF EDUCATION

Date of Decision: 01/24/06

Date of Mailing: 01/25/06

* This decision, as the Commissioner's final determination regarding penalty in the instant matter, may be appealed to the State Board of Education pursuant to *N.J.S.A.* 18A:6-27 *et seq.* and *N.J.A.C.* 6A:4-1.1 *et seq.* Pursuant to *N.J.A.C.* 6A:4-1.4(a), Commissioner decisions are deemed filed three days after the date of mailing to the parties.

State of New Jersey

DEPARTMENT OF EDUCATION
PO Box 500
TRENTON, NJ 08625-0500

RICHARD J. CODEY
Acting Governor

LUCILLE E. DAVY
Acting Commissioner

December 27, 2005

Ms. Marilyn J. Mitchell
24 Brookside Road
West orange, NJ 07052

Subject: Resolution for Failure to File Disclosure Statements
School Ethics Commission Docket No. D14-05

Dear Ms. Mitchell:

At its meeting of December 20, 2005, the School Ethics Commission passed the enclosed resolution wherein it found that your failure to file a disclosure statement within the designated timeline was a violation of N.J.S.A. 18A:12-25 and 26. Although you filed the disclosure statement, you did not do so until the Commission issued the Order to Show Cause. The resolution also recommends to the Acting Commissioner of Education that she impose the sanction of a reprimand.

Pursuant to N.J.S.A. 18A:12-29, this matter is transmitted to the Commissioner of Education for action on the Commission's recommendation **for sanction only**. Within thirteen (13) days from the date of this letter, you may file written comments on the recommended sanction with the Commissioner of Education, c/o Bureau of Controversies and Disputes, 100 Riverview Plaza, P. O. Box 500, Trenton, NJ 08625, marked "Attention: Comments on Ethics Commission Sanction." A copy of any comments filed must be sent to the School Ethics Commission.

Sincerely,

Lisa James-Beavers
Executive Director

LJB/MET/disclosure/correspondence/D13-05reprimand
Enclosure
c: Board Secretary
County Superintendent
Kathleen Duncan, Director of Controversies and Disputes

SCHOOL ETHICS COMMISSION	:	**BEFORE THE SCHOOL ETHICS COMMISSION**
V.	:	
	:	**Docket No.: D14-05**
MARILYN J. MITCHELL NEWARK BOARD OF EDUCATION ESSEX COUNTY	:	**RESOLUTION FOR FAILURE TO FILE A DISCLOSURE STATEMENT**

WHEREAS, N.J.S.A. 18A:12-25 of the School Ethics Act requires each school official to file a personal/relative disclosure statement and N.J.S.A. 18A:12-26 requires each school official to file a financial disclosure statement with the School Ethics Commission; and

WHEREAS, Marilyn J. Mitchell is a "school official" under N.J.S.A. 18A:12-23 of the Act and N.J.A.C. 6A:28-1.2 of the Code; and

WHEREAS, the deadline to file these disclosure statements was April 29, 2005 for school officials in office since January 30, 2005 and 30 days from swearing-in or start of employment for newly elected or appointed board members and administrators; and

WHEREAS, the School Ethics Commission was advised by the County Superintendent that this school official did not file a disclosure statement with her school district and the County Superintendent's office as required by the Act; and

WHEREAS, the Commission sent a reminder letter to her on October 7, 2005, indicating that if the completed statement was not filed by October 21, 2005, the Commission would issue an Order to Show Cause that could result in disciplinary action; and

WHEREAS, the Commission issued an Order on November 4, 2005, directing this school official to Show Cause why the Commission should not find her in violation of the Act for failing to file the disclosure statements; and

WHEREAS, the school official filed the completed disclosure statement, but not until after the Commission issued the Order to Show Cause; and

WHEREAS, in its letter enclosing the Order, the Commission notified this school official that she had 20 days to respond to the Order, that the Commission would discuss this matter at its December 20, 2005 meeting, that she had the right to attend the meeting, and she could be found in violation of the School Ethics Act and receive a penalty up to removal; and

WHEREAS, the Commission finds that the failure to file a disclosure statement within the designated timeline constitutes a clear violation of N.J.S.A. 18A:12-25 and 26; and

WHEREAS, this school official did not provide an answer to the Commission's Order; and

WHEREAS, the Commission finds that this school official was given ample opportunity to provide the complete disclosure statement; and

WHEREAS, the appropriate penalty for the violation is reprimand especially in light of the failure to respond to either the Commission's reminder letter or its Order.

NOW THEREFORE BE IT RESOLVED that the School Ethics Commission finds that Marilyn J. Mitchell violated N.J.S.A. 18A:12-25 and 26 of the School Ethics Act and recommends that the Commissioner of Education impose a sanction of reprimand.

Paul C. Garbarini, Chairperson
School Ethics Commission

Dated: December 27, 2005

This matter shall be transmitted to the Commissioner of Education for action on the Commission's recommendation for sanction pursuant to N.J.S.A. 18A:12-29. Within thirteen (13) days from the date on which the Commission's decision was mailed to you, you may file written comments on the recommended sanction with the Commissioner of Education, c/o Bureau of Controversies and Disputes, 100 Riverview Plaza, P.O. Box 500, Trenton, NJ 08625, marked "Attention: Comments on Ethics Commission Sanction." A copy of any comments filed must be sent to the School Ethics Commission.

32-06

#32-06SEC

AGENCY DKT. NO. 4-1/06

IN THE MATTER OF TONY MOTLEY,	:	
STATE-OPERATED SCHOOL DISTRICT OF	:	COMMISSIONER OF EDUCATION
NEWARK, ESSEX COUNTY	:	DECISION

The record of this matter and the decision of the School Ethics Commission, forwarded to the Commissioner pursuant to N.J.S.A. 18A:12-29 solely for review of the Commission's recommended penalty, have been reviewed. No comments were filed by the above-named respondent.

Upon such review, the Commissioner concurs with the penalty recommended by the Commission, and additionally admonishes the respondent for failure to timely file the requisite statement in that such delay has resulted in a waste of administrative and adjudicative time by local, county and State education officials.

Accordingly, the above-named respondent is hereby reprimanded as a school official found to have violated the School Ethics Act.

IT IS SO ORDERED. *

Lucille E Davy

ACTING COMMISSIONER OF EDUCATION

Date of Decision: 01/24/06

Date of Mailing: 01/25/06

* This decision, as the Commissioner's final determination regarding penalty in the instant matter, may be appealed to the State Board of Education pursuant to *N.J.S.A.* 18A:6-27 *et seq.* and *N.J.A.C.* 6A:4-1.1 *et seq.* Pursuant to *N.J.A.C.* 6A:4-1.4(a), Commissioner decisions are deemed filed three days after the date of mailing to the parties.

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

RICHARD J. CODEY
Acting Governor

LUCILLE E. DAVY
Acting Commissioner

December 27, 2005

Mr. Tony Motley
1053 Bertram Terrace
Union, NJ 07083

Subject: Resolution for Failure to File Disclosure Statements
School Ethics Commission Docket No. D16-05

Dear Mr. Motley:

At its meeting of December 20, 2005, the School Ethics Commission voted to find that your failure to file a disclosure statement within the designated timeline was a violation of N.J.S.A. 18A:12-25 and 26. The Commission also voted to recommend to the Acting Commissioner of Education that she impose the penalty of a reprimand if you filed the disclosure statement by December 21, 2005. But, if you failed to file the statement by December 21, 2005, the Commission voted to recommend the penalty of suspension until you file a disclosure statement, removal if the disclosure statement is not filed within 30 days of the Commissioner's decision on penalty, and reprimand if the disclosure is filed prior to issuance of the Commissioner's decision. Since you filed the disclosure statement on December 20, 2005, enclosed you will find a resolution recommending to the Acting Commissioner of Education that she impose the penalty of a reprimand.

Pursuant to N.J.S.A. 18A:12-29, this matter is transmitted to the Commissioner of Education for action on the Commission's recommendation **for sanction only**. Within thirteen (13) days from the date of this letter, you may file written comments on the recommended sanction with the Commissioner of Education, c/o Bureau of Controversies and Disputes, 100 Riverview Plaza, P. O. Box 500, Trenton, NJ 08625, marked "Attention: Comments on Ethics Commission Sanction." A copy of any comments filed must be sent to the School Ethics Commission.

Sincerely,

Lisa James-Beavers
Executive Director

LJB/MET/disclosure/correspondence/D06-05suspend-reprimand
Enclosure
c: Board Secretary
County Superintendent
Kathleen Duncan, Director of Controversies and Disputes

SCHOOL ETHICS COMMISSION	:	**BEFORE THE SCHOOL ETHICS COMMISSION**
V.	:	
	:	**Docket No.: D16-05**
TONY MOTLEY NEWARK BOARD OF EDUCATION ESSEX COUNTY	:	**RESOLUTION FOR FAILURE TO FILE A DISCLOSURE STATEMENT**

WHEREAS, N.J.S.A. 18A:12-25 of the School Ethics Act requires each school official to file a personal/relative disclosure statement and N.J.S.A. 18A:12-26 requires each school official to file a financial disclosure statement with the School Ethics Commission; and

WHEREAS, Tony Motley is a "school official" under N.J.S.A. 18A:12-23 of the Act and N.J.A.C. 6A:28-1.2 of the Code; and

WHEREAS, the deadline to file these disclosure statements was April 29, 2005 for school officials in office since January 30, 2005 and 30 days from swearing-in or start of employment for newly elected or appointed board members and administrators; and

WHEREAS, the School Ethics Commission was advised by the County Superintendent that this school official did not file a disclosure statement with his school district and the County Superintendent's office as required by the Act; and

WHEREAS, the Commission sent a reminder letter to him on October 7, 2005, indicating that if the completed statement was not filed by October 21, 2005, the Commission would issue an Order to Show Cause that could result in disciplinary action; and

WHEREAS, the Commission issued an Order on November 4, 2005, directing this school official to Show Cause why the Commission should not find him in violation of the Act for failing to file the disclosure statements; and

WHEREAS, the school official filed the completed disclosure statement, but not until after the Commission issued the Order to Show Cause; and

WHEREAS, in its letter enclosing the Order, the Commission notified this school official that he had 20 days to respond to the Order, that the Commission would discuss this matter at its December 20, 2005 meeting, that he had the right to attend the meeting, and he could be found in violation of the School Ethics Act and receive a penalty up to removal; and

WHEREAS, the Commission finds that the failure to file a disclosure statement within the designated timeline constitutes a clear violation of N.J.S.A. 18A:12-25 and 26; and

WHEREAS, this school official did not provide an answer to the Commission's Order; and

WHEREAS, the Commission finds that this school official was given ample opportunity to provide the complete disclosure statement; and

WHEREAS, the appropriate penalty for the violation is reprimand especially in light of the failure to respond to the either Commission's reminder letter or its Order.

NOW THEREFORE BE IT RESOLVED that the School Ethics Commission finds that Tony Motley violated N.J.S.A. 18A:12-25 and 26 of the School Ethics Act and recommends that the Commissioner of Education impose a sanction of reprimand.

Paul C. Garbarini, Chairperson
School Ethics Commission

Dated: December 27, 2005

This matter shall be transmitted to the Commissioner of Education for action on the Commission's recommendation for sanction pursuant to N.J.S.A. 18A:12-29. Within thirteen (13) days from the date on which the Commission's decision was mailed to you, you may file written comments on the recommended sanction with the Commissioner of Education, c/o Bureau of Controversies and Disputes, 100 Riverview Plaza, P.O. Box 500, Trenton, NJ 08625, marked "Attention: Comments on Ethics Commission Sanction." A copy of any comments filed must be sent to the School Ethics Commission.

#39-06SEC

AGENCY DKT. NO. 19-1/06

IN THE MATTER OF JOHN LORENZINI,	:	
NORTHVALE BOARD OF EDUCATION,	:	COMMISSIONER OF EDUCATION
BERGEN COUNTY	:	DECISION

The record of this matter and the decision of the School Ethics Commission, forwarded to the Commissioner pursuant to N.J.S.A. 18A:12-29 solely for review of the Commission's recommended penalty, have been reviewed. Respondent filed his disclosure statement after the School Ethics Commission issued its decision.

Upon such review, the Commissioner concurs with the penalty recommended by the Commission and additionally admonishes the respondent for failure to timely file the requisite statement, in that such delay has resulted in a waste of administrative and adjudicative time by local, county and State education officials.

Accordingly, the above-named respondent is hereby reprimanded as a school official found to have violated the School Ethics Act.

IT IS SO ORDERED.*

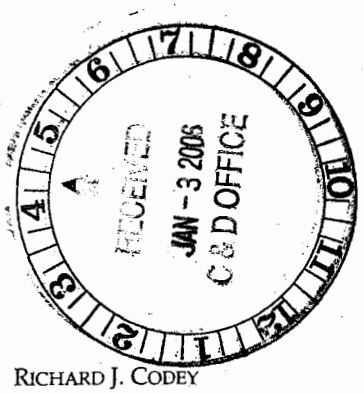
Lucille E. Davy

ACTING COMMISSIONER OF EDUCATION

Date of Decision: 01/27/06

Date of Mailing: 01/27/06

* This decision, as the Commissioner's final determination regarding penalty in the instant matter, may be appealed to the State Board of Education pursuant to *N.J.S.A.* 18A:6-27 *et seq.* and *N.J.A.C.* 6A:4-1.1 *et seq.* Pursuant to *N.J.A.C.* 6A:4-1.4(a), Commissioner decisions are deemed filed three days after the date of mailing to the parties.



RICHARD J. CODEY
Acting Governor

State of New Jersey

DEPARTMENT OF EDUCATION
PO BOX 500
TRENTON, NJ 08625-0500

LUCILLE E. DAVY
Acting Commissioner

December 27, 2005

Mr. John Lorenzini
103 Rockland Avenue
Northvale, NJ 07647

Subject: Resolution for Failure to File Disclosure Statements
School Ethics Commission Docket No. D03-05

Dear Mr. Lorenzini:

At its meeting of December 20, 2005, the School Ethics Commission passed the enclosed resolution wherein it found that your failure to file a disclosure statement within the designated timeline was a violation of N.J.S.A. 18A:12-25 and 26. The resolution also recommends to the Acting Commissioner of Education that she impose the sanction of a suspension until you file a disclosure statement, removal if the disclosure statement is not filed within 30 days of the Commissioner's decision on penalty, and reprimand if the disclosure is filed prior to issuance of the Commissioner's decision.

Pursuant to N.J.S.A. 18A:12-29, this matter is transmitted to the Commissioner of Education for action on the Commission's recommendation **for sanction only**. Within thirteen (13) days from the date of this letter, you may file written comments on the recommended sanction with the Commissioner of Education, c/o Bureau of Controversies and Disputes, 100 Riverview Plaza, P. O. Box 500, Trenton, NJ 08625, marked "Attention: Comments on Ethics Commission Sanction." A copy of any comments filed must be sent to the School Ethics Commission.

Sincerely,

Lisa James-Beavers
Executive Director

LJB/MET/disclosure/correspondence/D03-05suspend-reprimand
Enclosure
c: Board Secretary
County Superintendent
Kathleen Duncan, Director of Controversies and Disputes

SCHOOL ETHICS COMMISSION **V.** **JOHN LORENZINI** **NORTHVALE BOARD OF EDUCATION** **BERGEN COUNTY**	:	**BEFORE THE SCHOOL ETHICS COMMISSION** **Docket No.: D03-05** **RESOLUTION FOR FAILURE TO FILE A DISCLOSURE STATEMENT**

WHEREAS, N.J.S.A. 18A:12-25 of the School Ethics Act requires each school official to file a personal/relative disclosure statement and N.J.S.A. 18A:12-26 requires each school official to file a financial disclosure statement with the School Ethics Commission; and

WHEREAS, John Lorenzini is a board member of the Board of Education for the Northvale school district and thus a "school official" under N.J.S.A. 18A:12-23 of the Act and N.J.A.C. 6A:28-1.2 of the Code; and

WHEREAS, the deadline to file these disclosure statements was April 29, 2005 for school officials in office since January 30, 2005 and 30 days from swearing-in or start of employment for newly elected or appointed board members and administrators; and

WHEREAS, the School Ethics Commission was advised by the County Superintendent that this school official did not file a disclosure statement with his school district and the County Superintendent's office as required by the Act; and

WHEREAS, the Commission sent a reminder letter to him on October 7, 2005, indicating that if the completed statement was not filed by October 21, 2005, the Commission would issue an Order to Show Cause that could result in disciplinary action; and

WHEREAS, the Commission issued an Order on November 4, 2005, directing this school official to Show Cause why the Commission should not find him in violation of the Act for failing to file the disclosure statements; and

WHEREAS, in its letter enclosing the Order, the Commission notified this school official that he had 20 days to respond to the Order, that the Commission would discuss this matter at its December 20, 2005 meeting, that he had the right to attend the meeting, and he could be found in violation of the School Ethics Act and receive a penalty up to removal; and

WHEREAS, this school official did not provide an answer to the Commission's Order and has failed to file a disclosure statement; and

WHEREAS, the Commission finds that the failure to file a disclosure statement constitutes a clear violation of N.J.S.A. 18A:12-25 and 26; and

WHEREAS, the Commission finds that this school official was given ample opportunity to provide the complete disclosure statement; and

WHEREAS, the appropriate penalty for the violation is suspension until Mr. Lorenzini files a disclosure statement, removal if the disclosure statement is not filed within 30 days of the Commissioner's decision on penalty, and reprimand if the disclosure statement is filed prior to issuance of the Commissioner's decision.

NOW THEREFORE BE IT RESOLVED that the School Ethics Commission finds that John Lorenzini violated N.J.S.A. 18A:12-25 and 26 of the School Ethics Act and recommends that the Commissioner of Education impose a sanction of suspension until he files a disclosure statement, removal if the disclosure statement is not filed within 30 days of the Commissioner's decision on penalty, and reprimand if the disclosure statement is filed prior to issuance of the Commissioner's decision.

Paul C. Garbarini, Chairperson
School Ethics Commission

Dated: December 27, 2005

This matter shall be transmitted to the Commissioner of Education for action on the Commission's recommendation for sanction pursuant to N.J.S.A. 18A:12-29. Within thirteen (13) days from the date on which the Commission's decision was mailed to you, you may file written comments on the recommended sanction with the Commissioner of Education, c/o Bureau of Controversies and Disputes, 100 Riverview Plaza, P.O. Box 500, Trenton, NJ 08625, marked "Attention: Comments on Ethics Commission Sanction." A copy of any comments filed must be sent to the School Ethics Commission.

#38-06SEC

AGENCY DKT. NO. 18-1/06

IN THE MATTER OF PAT YOUNG,	:	
PLEASANTECH ACADEMY CHARTER SCHOOL,	:	COMMISSIONER OF EDUCATION
ATLANTIC COUNTY.	:	DECISION
	:	

The record of this matter and the decision of the School Ethics Commission, forwarded to the Commissioner pursuant to N.J.S.A. 18A:12-29 solely for review of the Commission's recommended penalty, have been reviewed. No comments were filed by the respondent.

Upon such review, the Commissioner concurs with the penalty recommended by the Commission and additionally admonishes the respondent for failure to timely file the requisite statement, in that such delay has resulted in a waste of administrative and adjudicative time by local, county and State education officials.

Accordingly, the above-named respondent is hereby reprimanded as a school official found to have violated the School Ethics Act.

IT IS SO ORDERED.*

Lucille Edday

ACTING COMMISSIONER OF EDUCATION

Date of Mailing: 01/27/06

Date of Decision: 01/27/06

* This decision, as the Commissioner's final determination regarding penalty in the instant matter, may be appealed to the State Board of Education pursuant to *N.J.S.A.* 18A:6-27 *et seq.* and *N.J.A.C.* 6A:4-1.1 *et seq.* Pursuant to *N.J.A.C.* 6A:4-1.4(a), Commissioner decisions are deemed filed three days after the date of mailing to the parties.

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

RICHARD J. CODEY
Acting Governor

LUCILLE E. DAVY
Acting Commissioner

RECEIVED
JAN - 3 20
C&D OFF

December 27, 2005

Mr. Pat Young
PleasanTech Academy
535 Martin Luther King Avenue
Pleasantville, NJ 08232

Subject: Resolution for Failure to File Disclosure Statements
School Ethics Commission Docket No. D01-05

Dear Mr. Young:

At its meeting of December 20, 2005, the School Ethics Commission passed the enclosed resolution wherein it found that your failure to file a disclosure statement within the designated timeline was a violation of N.J.S.A. 18A:12-25 and 26. Although you filed the disclosure statement, you did not do so until the Commission issued the Order to Show Cause. The resolution also recommends to the Acting Commissioner of Education that she impose the sanction of a reprimand.

Pursuant to N.J.S.A. 18A:12-29, this matter is transmitted to the Commissioner of Education for action on the Commission's recommendation **for sanction only**. Within thirteen (13) days from the date of this letter, you may file written comments on the recommended sanction with the Commissioner of Education, c/o Bureau of Controversies and Disputes, 100 Riverview Plaza, P. O. Box 500, Trenton, NJ 08625, marked "Attention: Comments on Ethics Commission Sanction." A copy of any comments filed must be sent to the School Ethics Commission.

Sincerely,

Lisa James-Beavers
Executive Director

LJB/MET/disclosure/correspondence/D01-05reprimand
Enclosure
c: Board Secretary
County Superintendent
Kathleen Duncan, Director of Controversies and Disputes

SCHOOL ETHICS COMMISSION	:	**BEFORE THE SCHOOL ETHICS COMMISSION**
V.	:	
	:	**Docket No.: D01-05**
PAT YOUNG PLEASANTECH ACADEMY CHARTER SCHOOL ATLANTIC COUNTY	:	**RESOLUTION FOR FAILURE TO FILE A DISCLOSURE STATEMENT**

WHEREAS, N.J.S.A. 18A:12-25 of the School Ethics Act requires each school official to file a personal/relative disclosure statement and N.J.S.A. 18A:12-26 requires each school official to file a financial disclosure statement with the School Ethics Commission; and

WHEREAS, Pat Young is a board member of the Board of Trustees for the PleasanTech Academy Charter School and thus a "school official" under N.J.S.A. 18A:12-23 of the Act and N.J.A.C. 6A:28-1.2 of the Code; and

WHEREAS, the deadline to file these disclosure statements was April 29, 2005 for school officials in office since January 30, 2005 and 30 days from swearing-in or start of employment for newly elected or appointed board members and administrators; and

WHEREAS, the School Ethics Commission was advised by the County Superintendent that this school official did not file a disclosure statement with his school district and the County Superintendent's office as required by the Act; and

WHEREAS, the Commission sent a reminder letter to him on October 17, 2005, indicating that if the completed statement was not filed by October 21, 2005, the Commission would issue an Order to Show Cause that could result in disciplinary action; and

WHEREAS, the Commission issued an Order on November 4, 2005, directing this school official to Show Cause why the Commission should not find him in violation of the Act for failing to file the disclosure statements; and

WHEREAS, the school official filed the completed disclosure statement, but not until after the Commission issued the Order to Show Cause; and

WHEREAS, in its letter enclosing the Order, the Commission notified this school official that he had 20 days to respond to the Order, that the Commission would discuss this matter at its December 20, 2005 meeting, that he had the right to attend the meeting, and he could be found in violation of the School Ethics Act and receive a penalty up to removal; and

WHEREAS, the Commission finds that the failure to file a disclosure statement within the designated timeline constitutes a clear violation of N.J.S.A. 18A:12-25 and 26; and

WHEREAS, this school official did not provide an answer to the Commission's Order; and

WHEREAS, the Commission finds that this school official was given ample opportunity to provide the complete disclosure statement; and

WHEREAS, the appropriate penalty for the violation is reprimand especially in light of the failure to respond to either the Commission's reminder letter or its Order.

NOW THEREFORE BE IT RESOLVED that the School Ethics Commission finds that Pat Young violated N.J.S.A. 18A:12-25 and 26 of the School Ethics Act and recommends that the Commissioner of Education impose a sanction of reprimand.

Paul C. Garbarini, Chairperson
School Ethics Commission

Dated: December 27, 2005

This matter shall be transmitted to the Commissioner of Education for action on the Commission's recommendation for sanction pursuant to N.J.S.A. 18A:12-29. Within thirteen (13) days from the date on which the Commission's decision was mailed to you, you may file written comments on the recommended sanction with the Commissioner of Education, c/o Bureau of Controversies and Disputes, 100 Riverview Plaza, P.O. Box 500, Trenton, NJ 08625, marked "Attention: Comments on Ethics Commission Sanction." A copy of any comments filed must be sent to the School Ethics Commission.

#37-06SEC

AGENCY DKT. NO. 17-1/06

IN THE MATTER OF WARREN WILLIAMS, SR.,	:	
STATE-OPERATED SCHOOL DISTRICT OF	:	COMMISSIONER OF EDUCATION
NEWARK, ESSEX COUNTY	:	DECISION

The record of this matter and the decision of the School Ethics Commission, forwarded to the Commissioner pursuant to N.J.S.A. 18A:12-29 solely for review of the Commission's recommended penalty, have been reviewed. No comments were filed by the above-named respondent.

Upon such review, the Commissioner concurs with the penalty recommended by the Commission, and additionally admonishes the respondent for failure to timely file the requisite statement in that such delay has resulted in a waste of administrative and adjudicative time by local, county and State education officials.

Accordingly, the above-named respondent is hereby reprimanded as a school official found to have violated the School Ethics Act.

IT IS SO ORDERED. *

Lucille Davy

ACTING COMMISSIONER OF EDUCATION

Date of Decision: 01/27/06

Date of Mailing: 01/27/06

* This decision, as the Commissioner's final determination regarding penalty in the instant matter, may be appealed to the State Board of Education pursuant to *N.J.S.A.* 18A:6-27 *et seq.* and *N.J.A.C.* 6A:4-1.1 *et seq.* Pursuant to *N.J.A.C.* 6A:4-1.4(a), Commissioner decisions are deemed filed three days after the date of mailing to the parties.

State of New Jersey

DEPARTMENT OF EDUCATION
PO Box 500
TRENTON, NJ 08625-0500

RICHARD J. CODEY
Acting Governor

LUCILLE E. DAVY
Acting Commissioner

RECEIVED
JAN - 3 2006
C & D OFFICE

December 27, 2005

Mr. Warren Williams, Sr.
922 Hunterdon Street
Newark, NJ 070112

Subject: Resolution for Failure to File Disclosure Statements
School Ethics Commission Docket No. D22-05

Dear Mr. Williams, Sr.:

At its meeting of December 20, 2005, the School Ethics Commission passed the enclosed resolution wherein it found that your failure to file a disclosure statement within the designated timeline was a violation of N.J.S.A. 18A:12-25 and 26. Although you filed the disclosure statement, you did not do so until the Commission issued the Order to Show Cause. The resolution also recommends to the Acting Commissioner of Education that she impose the sanction of a reprimand.

Pursuant to N.J.S.A. 18A:12-29, this matter is transmitted to the Commissioner of Education for action on the Commission's recommendation **for sanction only**. Within thirteen (13) days from the date of this letter, you may file written comments on the recommended sanction with the Commissioner of Education, c/o Bureau of Controversies and Disputes, 100 Riverview Plaza, P. O. Box 500, Trenton, NJ 08625, marked "Attention: Comments on Ethics Commission Sanction." A copy of any comments filed must be sent to the School Ethics Commission.

Sincerely,

Lisa James-Beavers
Executive Director

LJB/MET/disclosure/correspondence/17-05reprimand
Enclosure
c: Board Secretary
County Superintendent
Kathleen Duncan, Director of Controversies and Disputes

SCHOOL ETHICS COMMISSION V. WARREN WILLIAMS, SR. NEWARK BOARD OF EDUCATION ESSEXD COUNTY	:	BEFORE THE SCHOOL ETHICS COMMISSION Docket No.: D22-05 RESOLUTION FOR FAILURE TO FILE A DISCLOSURE STATEMENT

WHEREAS, N.J.S.A. 18A:12-25 of the School Ethics Act requires each school official to file a personal/relative disclosure statement and N.J.S.A. 18A:12-26 requires each school official to file a financial disclosure statement with the School Ethics Commission; and

WHEREAS, Warren Williams, Sr. is a "school official" under N.J.S.A. 18A:12-23 of the Act and N.J.A.C. 6A:28-1.2 of the Code; and

WHEREAS, the deadline to file these disclosure statements was April 29, 2005 for school officials in office since January 30, 2005 and 30 days from swearing-in or start of employment for newly elected or appointed board members and administrators; and

WHEREAS, the School Ethics Commission was advised by the County Superintendent that this school official did not file a disclosure statement with his school district and the County Superintendent's office as required by the Act; and

WHEREAS, the Commission sent a reminder letter to him on October 7, 2005, indicating that if the completed statement was not filed by October 21, 2005, the Commission would issue an Order to Show Cause that could result in disciplinary action; and

WHEREAS, the Commission issued an Order on November 4, 2005, directing this school official to Show Cause why the Commission should not find him in violation of the Act for failing to file the disclosure statements; and

WHEREAS, the school official filed the completed disclosure statement, but not until after the Commission issued the Order to Show Cause; and

WHEREAS, in its letter enclosing the Order, the Commission notified this school official that he had 20 days to respond to the Order, that the Commission would discuss this matter at its December 20, 2005 meeting, that he had the right to attend the meeting, and he could be found in violation of the School Ethics Act and receive a penalty up to removal; and

WHEREAS, the Commission finds that the failure to file a disclosure statement within the designated timeline constitutes a clear violation of N.J.S.A. 18A:12-25 and 26; and

WHEREAS, this school official did not provide an answer to the Commission's Order; and

WHEREAS, the Commission finds that this school official was given ample opportunity to provide the complete disclosure statement; and

WHEREAS, the appropriate penalty for the violation is reprimand especially in light of the failure to respond to either the Commission's reminder letter or its Order.

NOW THEREFORE BE IT RESOLVED that the School Ethics Commission finds that Warren Williams, Sr. violated N.J.S.A. 18A:12-25 and 26 of the School Ethics Act and recommends that the Commissioner of Education impose a sanction of reprimand.

Paul C. Garbarini, Chairperson
School Ethics Commission

Dated: December 27, 2005

This matter shall be transmitted to the Commissioner of Education for action on the Commission's recommendation for sanction pursuant to N.J.S.A. 18A:12-29. Within thirteen (13) days from the date on which the Commission's decision was mailed to you, you may file written comments on the recommended sanction with the Commissioner of Education, c/o Bureau of Controversies and Disputes, 100 Riverview Plaza, P.O. Box 500, Trenton, NJ 08625, marked "Attention: Comments on Ethics Commission Sanction." A copy of any comments filed must be sent to the School Ethics Commission.

#36-06SEC

AGENCY DKT. NO. 11-1/06

IN THE MATTER OF ROBERT CRAWFORD,	:	
STATE-OPERATED SCHOOL DISTRICT OF	:	COMMISSIONER OF EDUCATION
NEWARK, ESSEX COUNTY	:	DECISION

The record of this matter and the decision of the School Ethics Commission, forwarded to the Commissioner pursuant to N.J.S.A. 18A:12-29 solely for review of the Commission's recommended penalty, have been reviewed. No comments were filed by the respondent.

Upon such review, the Commissioner concurs with the penalty recommended by the Commission and additionally admonishes the respondent for failure to timely file the requisite statement, in that such delay has resulted in a waste of administrative and adjudicative time by local, county and State education officials.

Accordingly, the above-named respondent is hereby reprimanded as a school official found to have violated the School Ethics Act.

IT IS SO ORDERED.*

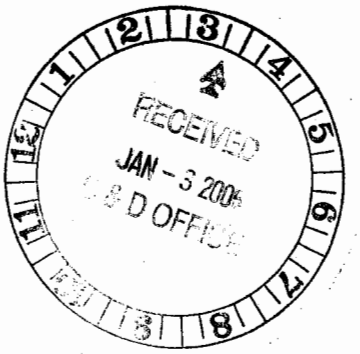
Lucille Davy

ACTING COMMISSIONER OF EDUCATION

Date of Decision: 01/27/06

Date of Mailing: 01/27/06

* This decision, as the Commissioner's final determination regarding penalty in the instant matter, may be appealed to the State Board of Education pursuant to *N.J.S.A.* 18A:6-27 *et seq.* and *N.J.A.C.* 6A:4-1.1 *et seq.* Pursuant to *N.J.A.C.* 6A:4-1.4(a), Commissioner decisions are deemed filed three days after the date of mailing to the parties.



State of New Jersey

DEPARTMENT OF EDUCATION
PO Box 500
TRENTON, NJ 08625-0500

RICHARD J. CODEY
Acting Governor

LUCILLE E. DAVY
Acting Commissioner

December 27, 2005

Mr. Robert Crawford
1465 Stanley Terrace
Hillside, NJ 07205

Subject: Resolution for Failure to File Disclosure Statements
School Ethics Commission Docket No. D10-05

Dear Mr. Crawford:

At its meeting of December 20, 2005, the School Ethics Commission passed the enclosed resolution wherein it found that your failure to file a disclosure statement within the designated timeline was a violation of N.J.S.A. 18A:12-25 and 26. Although you filed the disclosure statement, you did not do so until the Commission issued the Order to Show Cause. The resolution also recommends to the Acting Commissioner of Education that she impose the sanction of a reprimand.

Pursuant to N.J.S.A. 18A:12-29, this matter is transmitted to the Commissioner of Education for action on the Commission's recommendation **for sanction only**. Within thirteen (13) days from the date of this letter, you may file written comments on the recommended sanction with the Commissioner of Education, c/o Bureau of Controversies and Disputes, 100 Riverview Plaza, P. O. Box 500, Trenton, NJ 08625, marked "Attention: Comments on Ethics Commission Sanction." A copy of any comments filed must be sent to the School Ethics Commission.

Sincerely,

Lisa James-Beavers
Executive Director

LJB/MET/disclosure/correspondence/D10-05reprimand
Enclosure
c: Board Secretary
County Superintendent
Kathleen Duncan, Director of Controversies and Disputes

SCHOOL ETHICS COMMISSION	:	**BEFORE THE SCHOOL ETHICS COMMISSION**
V.	:	
	:	**Docket No.: D10-05**
ROBERT CRAWFORD NEWARK BOARD OF EDUCATION ESSEX COUNTY	:	**RESOLUTION FOR FAILURE TO FILE A DISCLOSURE STATEMENT**

WHEREAS, N.J.S.A. 18A:12-25 of the School Ethics Act requires each school official to file a personal/relative disclosure statement and N.J.S.A. 18A:12-26 requires each school official to file a financial disclosure statement with the School Ethics Commission; and

WHEREAS, Robert Crawford is a "school official" under N.J.S.A. 18A:12-23 of the Act and N.J.A.C. 6A:28-1.2 of the Code; and

WHEREAS, the deadline to file these disclosure statements was April 29, 2005 for school officials in office since January 30, 2005 and 30 days from swearing-in or start of employment for newly elected or appointed board members and administrators; and

WHEREAS, the School Ethics Commission was advised by the County Superintendent that this school official did not file a disclosure statement with his school district and the County Superintendent's office as required by the Act; and

WHEREAS, the Commission sent a reminder letter to him on October 7, 2005, indicating that if the completed statement was not filed by October 21, 2005, the Commission would issue an Order to Show Cause that could result in disciplinary action; and

WHEREAS, the Commission issued an Order on November 4, 2005, directing this school official to Show Cause why the Commission should not find him in violation of the Act for failing to file the disclosure statements; and

WHEREAS, the school official filed the completed disclosure statement, but not until after the Commission issued the Order to Show Cause; and

WHEREAS, in its letter enclosing the Order, the Commission notified this school official that he had 20 days to respond to the Order, that the Commission would discuss this matter at its December 20, 2005 meeting, that he had the right to attend the meeting, and he could be found in violation of the School Ethics Act and receive a penalty up to removal; and

WHEREAS, the Commission finds that the failure to file a disclosure statement within the designated timeline constitutes a clear violation of N.J.S.A. 18A:12-25 and 26; and

WHEREAS, this school official did not provide an answer to the Commission's Order; and

WHEREAS, the Commission finds that this school official was given ample opportunity to provide the complete disclosure statement; and

WHEREAS, the appropriate penalty for the violation is reprimand especially in light of the failure to respond to the either Commission's reminder letter or its Order.

NOW THEREFORE BE IT RESOLVED that the School Ethics Commission finds that Armando Cepero violated N.J.S.A. 18A:12-25 and 26 of the School Ethics Act and recommends that the Commissioner of Education impose a sanction of reprimand.

Paul C. Garbarini, Chairperson
School Ethics Commission

Dated: December 27, 2005

This matter shall be transmitted to the Commissioner of Education for action on the Commission's recommendation for sanction pursuant to N.J.S.A. 18A:12-29. Within thirteen (13) days from the date on which the Commission's decision was mailed to you, you may file written comments on the recommended sanction with the Commissioner of Education, c/o Bureau of Controversies and Disputes, 100 Riverview Plaza, P.O. Box 500, Trenton, NJ 08625, marked "Attention: Comments on Ethics Commission Sanction." A copy of any comments filed must be sent to the School Ethics Commission.

#35-06SE

AGENCY DKT. NO. 10-1/06

IN THE MATTER OF RAYMOND WOODROW, :

BOARD OF EDUCATION OF BEVERLY CITY, : COMMISSIONER OF EDUCATION

BURLINGTON COUNTY. : DECISION

The record of this matter and the decision of the School Ethics Commission, forwarded to the Commissioner pursuant to N.J.S.A. 18A:12-29 solely for review of the Commission's recommended penalty, have been reviewed. No comments were filed by the respondent and the required disclosure statement(s) had not been filed as of the date of this decision.

Upon review, the Commissioner concurs with the penalty recommended by the Commission and additionally admonishes the respondent for failure to file the requisite statement, in that such disregard of the law has resulted in a waste of administrative and adjudicative time by local, county and State education officials.

Accordingly, the above-named respondent is hereby suspended as a school official found to have violated the School Ethics Act, such suspension to remain in effect until the required disclosure statement(s) are filed; provided, however, that if such statement(s) are not filed within 30 days of the mailing date of this decision, the above-named respondent shall be summarily removed from office.

IT IS SO ORDERED.*

Lucille E Davy

ACTING COMMISSIONER OF EDUCATION

Date of Decision: 01/27/06

Date of Mailing: 01/27/06

* This decision, as the Commissioner's final determination regarding penalty in the instant matter, may be appealed to the State Board of Education pursuant to *N.J.S.A.* 18A:6-27 *et seq.* and *N.J.A.C.* 6A:4-1.1 *et seq.* Pursuant to *N.J.A.C.* 6A:4-1.4(a), Commissioner decisions are deemed filed three days after the date of mailing to the parties.

State of New Jersey

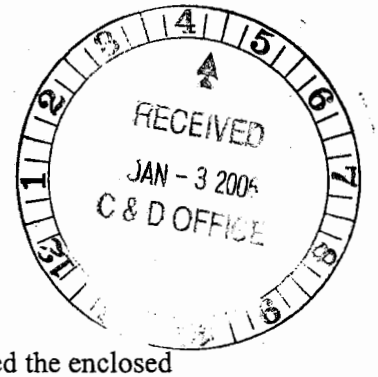
DEPARTMENT OF EDUCATION
PO Box 500
TRENTON, NJ 08625-0500

RICHARD J. CODEY
Acting Governor

LUCILLE E. DAVY
Acting Commissioner

December 27, 2005

Mr. Raymond Woodrow
Beverly City School District
601 Bently Avenue
Beverly, NJ 08010



Subject: Resolution for Failure to File Disclosure Statements
School Ethics Commission Docket No. D04-05

Dear Mr. Woodrow:

At its meeting of December 20, 2005, the School Ethics Commission passed the enclosed resolution wherein it found that your failure to file a disclosure statement within the designated timeline was a violation of N.J.S.A. 18A:12-25 and 26. The resolution also recommends to the Acting Commissioner of Education that she impose the sanction of a suspension until you file a disclosure statement, removal if the disclosure statement is not filed within 30 days of the Commissioner's decision on penalty, and reprimand if the disclosure is filed prior to issuance of the Commissioner's decision.

Pursuant to N.J.S.A. 18A:12-29, this matter is transmitted to the Commissioner of Education for action on the Commission's recommendation **for sanction only**. Within thirteen (13) days from the date of this letter, you may file written comments on the recommended sanction with the Commissioner of Education, c/o Bureau of Controversies and Disputes, 100 Riverview Plaza, P. O. Box 500, Trenton, NJ 08625, marked "Attention: Comments on Ethics Commission Sanction." A copy of any comments filed must be sent to the School Ethics Commission.

Sincerely,

Lisa James-Beavers
Executive Director

LJB/MET/disclosure/correspondence/D04-05suspend-reprimand
Enclosure
c: Board Secretary
County Superintendent
Kathleen Duncan, Director of Controversies and Disputes

SCHOOL ETHICS COMMISSION	:	**BEFORE THE SCHOOL ETHICS COMMISSION**
V.	:	
	:	**Docket No.: D04-05**
RAYMOND WOODROW BEVERLY CITY BOARD OF EDUCATION BURLINGTON COUNTY	:	**RESOLUTION FOR FAILURE TO FILE A DISCLOSURE STATEMENT**

WHEREAS, N.J.S.A. 18A:12-25 of the School Ethics Act requires each school official to file a personal/relative disclosure statement and N.J.S.A. 18A:12-26 requires each school official to file a financial disclosure statement with the School Ethics Commission; and

WHEREAS, Raymond Woodrow is a board member of the Board of Education for the Beverly City school district and thus a "school official" under N.J.S.A. 18A:12-23 of the Act and N.J.A.C. 6A:28-1.2 of the Code; and

WHEREAS, the deadline to file these disclosure statements was April 29, 2005 for school officials in office since January 30, 2005 and 30 days from swearing-in or start of employment for newly elected or appointed board members and administrators; and

WHEREAS, the School Ethics Commission was advised by the County Superintendent that this school official did not file a disclosure statement with his school district and the County Superintendent's office as required by the Act; and

WHEREAS, the Commission sent a reminder letter to him on October 7, 2005, indicating that if the completed statement was not filed by October 21, 2005, the Commission would issue an Order to Show Cause that could result in disciplinary action; and

WHEREAS, the Commission issued an Order on November 4, 2005, directing this school official to Show Cause why the Commission should not find him in violation of the Act for failing to file the disclosure statements; and

WHEREAS, in its letter enclosing the Order, the Commission notified this school official that he had 20 days to respond to the Order, that the Commission would discuss this matter at its December 20, 2005 meeting, that he had the right to attend the meeting, and he could be found in violation of the School Ethics Act and receive a penalty up to removal; and

WHEREAS, this school official did not provide an answer to the Commission's Order and has failed to file a disclosure statement; and

WHEREAS, the Commission finds that the failure to file a disclosure statement constitutes a clear violation of N.J.S.A. 18A:12-25 and 26; and

WHEREAS, the Commission finds that this school official was given ample opportunity to provide the complete disclosure statement; and

WHEREAS, the appropriate penalty for the violation is suspension until Mr. Woodrow files a disclosure statement, removal if the disclosure statement is not filed within 30 days of the Commissioner's decision on penalty, and reprimand if the disclosure statement is filed prior to issuance of the Commissioner's decision.

NOW THEREFORE BE IT RESOLVED that the School Ethics Commission finds that Raymond Woodrow violated N.J.S.A. 18A:12-25 and 26 of the School Ethics Act and recommends that the Commissioner of Education impose a sanction of suspension until he files a disclosure statement, removal if the disclosure statement is not filed within 30 days of the Commissioner's decision on penalty, and reprimand if the disclosure statement is filed prior to issuance of the Commissioner's decision.

Paul C. Garbarini, Chairperson
School Ethics Commission

Dated: December 27, 2005

This matter shall be transmitted to the Commissioner of Education for action on the Commission's recommendation for sanction pursuant to N.J.S.A. 18A:12-29. Within thirteen (13) days from the date on which the Commission's decision was mailed to you, you may file written comments on the recommended sanction with the Commissioner of Education, c/o Bureau of Controversies and Disputes, 100 Riverview Plaza, P.O. Box 500, Trenton, NJ 08625, marked "Attention: Comments on Ethics Commission Sanction." A copy of any comments filed must be sent to the School Ethics Commission.

33-06SEC

AGENCY DKT. NO. 3-1/06

IN THE MATTER OF REGINA MOSES,	:	
STATE-OPERATED SCHOOL DISTRICT OF	:	COMMISSIONER OF EDUCATION
NEWARK, ESSEX COUNTY	:	DECISION

The record of this matter and the decision of the School Ethics Commission, forwarded to the Commissioner pursuant to N.J.S.A. 18A:12-29 solely for review of the Commission's recommended penalty, have been reviewed. No comments were filed by the above-named respondent.

Upon such review, the Commissioner concurs with the penalty recommended by the Commission, and additionally admonishes the respondent for failure to timely file the requisite statement in that such delay has resulted in waste of administrative and adjudicative time by local, county and State education officials.

Accordingly, the above-named respondent is hereby reprimanded as a school official found to have violated the School Ethics Act.

IT IS SO ORDERED.*

Lucille E Davy

ACTING COMMISSIONER OF EDUCATION

Date of Decision: 1/25/06

Date of Mailing: 1/25/06

* This decision, as the Commissioner's final determination regarding penalty in the instant matter, may be appealed to the State Board of Education pursuant to *N.J.S.A.* 18A:6-27 *et seq.* and *N.J.A.C.* 6A:4-1.1 *et seq.* Pursuant to *N.J.A.C.* 6A:4-1.4(a), Commissioner decisions are deemed filed three days after the date of mailing to the parties.

State of New Jersey

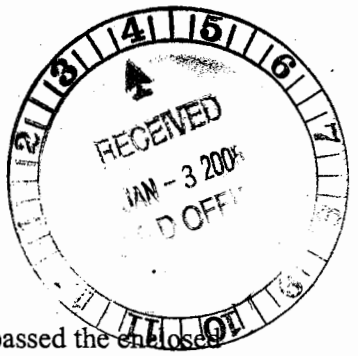
DEPARTMENT OF EDUCATION
PO BOX 500
TRENTON, NJ 08625-0500

RICHARD J. CODEY
Acting Governor

LUCILLE E. DAVY
Acting Commissioner

December 27, 2005

Ms. Regina Moses
368 Seymour Avenue
Newark, NJ 07112



Subject: Resolution for Failure to File Disclosure Statements
School Ethics Commission Docket No. D15-05

Dear Ms. Moses:

At its meeting of December 20, 2005, the School Ethics Commission passed the enclosed resolution wherein it found that your failure to file a disclosure statement within the designated timeline was a violation of N.J.S.A. 18A:12-25 and 26. Although you filed the disclosure statement, you did not do so until the Commission issued the Order to Show Cause. The resolution also recommends to the Acting Commissioner of Education that she impose the sanction of a reprimand.

Pursuant to N.J.S.A. 18A:12-29, this matter is transmitted to the Commissioner of Education for action on the Commission's recommendation **for sanction only**. Within thirteen (13) days from the date of this letter, you may file written comments on the recommended sanction with the Commissioner of Education, c/o Bureau of Controversies and Disputes, 100 Riverview Plaza, P. O. Box 500, Trenton, NJ 08625, marked "Attention: Comments on Ethics Commission Sanction." A copy of any comments filed must be sent to the School Ethics Commission.

Sincerely,

Lisa James-Beavers
Executive Director

LJB/MET/disclosure/correspondence/D11-05reprimand
Enclosure
c: Board Secretary
County Superintendent
Kathleen Duncan, Director of Controversies and Disputes

SCHOOL ETHICS COMMISSION	:	**BEFORE THE SCHOOL ETHICS COMMISSION**
V.	:	**Docket No.: D15-05**
REGINA MOSES NEWARK BOARD OF EDUCATION ESSEX COUNTY	:	**RESOLUTION FOR FAILURE TO FILE A DISCLOSURE STATEMENT**

WHEREAS, N.J.S.A. 18A:12-25 of the School Ethics Act requires each school official to file a personal/relative disclosure statement and N.J.S.A. 18A:12-26 requires each school official to file a financial disclosure statement with the School Ethics Commission; and

WHEREAS, Regina Moses is a "school official" under N.J.S.A. 18A:12-23 of the Act and N.J.A.C. 6A:28-1.2 of the Code; and

WHEREAS, the deadline to file these disclosure statements was April 29, 2005 for school officials in office since January 30, 2005 and 30 days from swearing-in or start of employment for newly elected or appointed board members and administrators; and

WHEREAS, the School Ethics Commission was advised by the County Superintendent that this school official did not file a disclosure statement with her school district and the County Superintendent's office as required by the Act; and

WHEREAS, the Commission sent a reminder letter to her on October 7, 2005, indicating that if the completed statement was not filed by October 21, 2005, the Commission would issue an Order to Show Cause that could result in disciplinary action; and

WHEREAS, the Commission issued an Order on November 4, 2005, directing this school official to Show Cause why the Commission should not find her in violation of the Act for failing to file the disclosure statements; and

WHEREAS, the school official filed the completed disclosure statement, but not until after the Commission issued the Order to Show Cause; and

WHEREAS, in its letter enclosing the Order, the Commission notified this school official that she had 20 days to respond to the Order, that the Commission would discuss this matter at its December 20, 2005 meeting, that she had the right to attend the meeting, and she could be found in violation of the School Ethics Act and receive a penalty up to removal; and

WHEREAS, the Commission finds that the failure to file a disclosure statement within the designated timeline constitutes a clear violation of N.J.S.A. 18A:12-25 and 26; and

WHEREAS, this school official did not provide an answer to the Commission's Order; and

WHEREAS, the Commission finds that this school official was given ample opportunity to provide the complete disclosure statement; and

WHEREAS, the appropriate penalty for the violation is reprimand especially in light of the failure to respond to either the Commission's reminder letter or its Order.

NOW THEREFORE BE IT RESOLVED that the School Ethics Commission finds that Regina Moses violated N.J.S.A. 18A:12-25 and 26 of the School Ethics Act and recommends that the Commissioner of Education impose a sanction of reprimand.

Paul C. Garbarini, Chairperson
School Ethics Commission

Dated: December 27, 2005

This matter shall be transmitted to the Commissioner of Education for action on the Commission's recommendation for sanction pursuant to N.J.S.A. 18A:12-29. Within thirteen (13) days from the date on which the Commission's decision was mailed to you, you may file written comments on the recommended sanction with the Commissioner of Education, c/o Bureau of Controversies and Disputes, 100 Riverview Plaza, P.O. Box 500, Trenton, NJ 08625, marked "Attention: Comments on Ethics Commission Sanction." A copy of any comments filed must be sent to the School Ethics Commission.

AGENCY DKT. NO. 13-1/06

IN THE MATTER OF ROSE LOVE,	:	
STATE-OPERATED SCHOOL DISTRICT OF	:	COMMISSIONER OF EDUCATION
NEWARK, ESSEX COUNTY	:	DECISION

The record of this matter and the decision of the School Ethics Commission, forwarded to the Commissioner pursuant to N.J.S.A. 18A:12-29 solely for review of the Commission's recommended penalty, have been reviewed. No comments were filed by the respondent.

Upon such review, the Commissioner concurs with the penalty recommended by the Commission and additionally admonishes the respondent for failure to timely file the requisite statement, in that such delay has resulted in a waste of administrative and adjudicative time by local, county and State education officials.

Accordingly, the above-named respondent is hereby reprimanded as a school official found to have violated the School Ethics Act.

IT IS SO ORDERED. *

Lucille Edaig

ACTING COMMISSIONER OF EDUCATION

Date of Decision: 1/27/06

Date of Mailing: 1/27/06

* This decision, as the Commissioner's final determination regarding penalty in the instant matter, may be appealed to the State Board of Education pursuant to *N.J.S.A.* 18A:6-27 *et seq.* and *N.J.A.C.* 6A:4-1.1 *et seq.* Pursuant to *N.J.A.C.* 6A:4-1.4(a), Commissioner decisions are deemed filed three days after the date of mailing to the parties.

State of New Jersey

DEPARTMENT OF EDUCATION
PO BOX 500
TRENTON, NJ 08625-0500

RICHARD J. CODEY
Acting Governor

LUCILLE E. DAVY
Acting Commissioner

December 27, 2005

Ms. Rose Love
P.O. Box 25153
Newark, NJ 07101

Subject: Resolution for Failure to File Disclosure Statements
School Ethics Commission Docket No. D12-05

Dear Ms. Love:

At its meeting of December 20, 2005, the School Ethics Commission passed the enclosed resolution wherein it found that your failure to file a disclosure statement within the designated timeline was a violation of N.J.S.A. 18A:12-25 and 26. Although you filed the disclosure statement, you did not do so until the Commission issued the Order to Show Cause. The resolution also recommends to the Acting Commissioner of Education that she impose the sanction of a reprimand.

Pursuant to N.J.S.A. 18A:12-29, this matter is transmitted to the Commissioner of Education for action on the Commission's recommendation **for sanction only**. Within thirteen (13) days from the date of this letter, you may file written comments on the recommended sanction with the Commissioner of Education, c/o Bureau of Controversies and Disputes, 100 Riverview Plaza, P. O. Box 500, Trenton, NJ 08625, marked "Attention: Comments on Ethics Commission Sanction." A copy of any comments filed must be sent to the School Ethics Commission.

Sincerely,

Lisa James-Beavers
Executive Director

LJB/MET/disclosure/correspondence/D11-05reprimand
Enclosure
c: Board Secretary
County Superintendent
Kathleen Duncan, Director of Controversies and Disputes

SCHOOL ETHICS COMMISSION	:	**BEFORE THE SCHOOL ETHICS COMMISSION**
V.	:	**Docket No.: D12-05**
ROSE LOVE NEWARK BOARD OF EDUCATION ESSEX COUNTY	:	**RESOLUTION FOR FAILURE TO FILE A DISCLOSURE STATEMENT**

WHEREAS, N.J.S.A. 18A:12-25 of the School Ethics Act requires each school official to file a personal/relative disclosure statement and N.J.S.A. 18A:12-26 requires each school official to file a financial disclosure statement with the School Ethics Commission; and

WHEREAS, Rose Love is a "school official" under N.J.S.A. 18A:12-23 of the Act and N.J.A.C. 6A:28-1.2 of the Code; and

WHEREAS, the deadline to file these disclosure statements was April 29, 2005 for school officials in office since January 30, 2005 and 30 days from swearing-in or start of employment for newly elected or appointed board members and administrators; and

WHEREAS, the School Ethics Commission was advised by the County Superintendent that this school official did not file a disclosure statement with her school district and the County Superintendent's office as required by the Act; and

WHEREAS, the Commission sent a reminder letter to her on October 7, 2005, indicating that if the completed statement was not filed by October 21, 2005, the Commission would issue an Order to Show Cause that could result in disciplinary action; and

WHEREAS, the Commission issued an Order on November 4, 2005, directing this school official to Show Cause why the Commission should not find her in violation of the Act for failing to file the disclosure statements; and

WHEREAS, the school official filed the completed disclosure statement, but not until after the Commission issued the Order to Show Cause; and

WHEREAS, in its letter enclosing the Order, the Commission notified this school official that she had 20 days to respond to the Order, that the Commission would discuss this matter at its December 20, 2005 meeting, that she had the right to attend the meeting, and she could be found in violation of the School Ethics Act and receive a penalty up to removal; and

WHEREAS, the Commission finds that the failure to file a disclosure statement within the designated timeline constitutes a clear violation of N.J.S.A. 18A:12-25 and 26; and

WHEREAS, this school official did not provide an answer to the Commission's Order; and

WHEREAS, the Commission finds that this school official was given ample opportunity to provide the complete disclosure statement; and

WHEREAS, the appropriate penalty for the violation is reprimand especially in light of the failure to respond to either the Commission's reminder letter or Order.

NOW THEREFORE BE IT RESOLVED that the School Ethics Commission finds that Rose Love violated N.J.S.A. 18A:12-25 and 26 of the School Ethics Act and recommends that the Commissioner of Education impose a sanction of reprimand.

Paul C. Garbarini, Chairperson
School Ethics Commission

Dated: December 27, 2005

This matter shall be transmitted to the Commissioner of Education for action on the Commission's recommendation for sanction pursuant to N.J.S.A. 18A:12-29. Within thirteen (13) days from the date on which the Commission's decision was mailed to you, you may file written comments on the recommended sanction with the Commissioner of Education, c/o Bureau of Controversies and Disputes, 100 Riverview Plaza, P.O. Box 500, Trenton, NJ 08625, marked "Attention: Comments on Ethics Commission Sanction." A copy of any comments filed must be sent to the School Ethics Commission.

41-06SEC

AGENCY DKT. NO. 12-1/06

IN THE MATTER OF BARBARA J. BONDS,	:	
STATE-OPERATED SCHOOL DISTRICT OF	:	COMMISSIONER OF EDUCATION
NEWARK, ESSEX COUNTY	:	DECISION

The record of this matter and the decision of the School Ethics Commission, forwarded to the Commissioner pursuant to N.J.S.A. 18A:12-29 solely for review of the Commission's recommended penalty, have been reviewed. No comments were filed by the respondent and the required disclosure statement(s) had not been filed as of the date of this decision.

Upon review, the Commissioner concurs with the penalty recommended by the Commission and additionally admonishes the respondent for failure to file the requisite statement, in that such disregard of the law has resulted in a waste of administrative and adjudicative time by local, county and State education officials.

Accordingly, the above-named respondent is hereby suspended as a school official found to have violated the School Ethics Act, such suspension to remain in effect until the required disclosure statement(s) are filed; provided, however, that if such statement(s) are not filed within 30 days of the mailing date of this decision, the above-named respondent shall be summarily removed from office.

IT IS SO ORDERED. *

Lucille Eday

ACTING COMMISSIONER OF EDUCATION

Date of Decision: 1/27/06

Date of Mailing: 1/27/06

* This decision, as the Commissioner's final determination regarding penalty in the instant matter, may be appealed to the State Board of Education pursuant to *N.J.S.A.* 18A:6-27 *et seq.* and *N.J.A.C.* 6A:4-1.1 *et seq.* Pursuant to *N.J.A.C.* 6A:4-1.4(a), Commissioner decisions are deemed filed three days after the date of mailing to the parties.

State of New Jersey

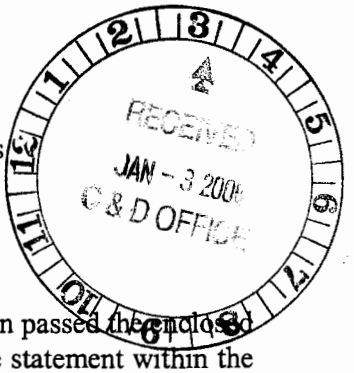
DEPARTMENT OF EDUCATION
PO BOX 500
TRENTON, NJ 08625-0500

RICHARD J. CODEY
Acting Governor

LUCILLE E. DAVY
Acting Commissioner

December 27, 2005

Ms. Barbara Bonds
3 Ginesi Court
Edison, NJ 08817



Subject: Resolution for Failure to File Disclosure Statements
School Ethics Commission Docket No. D08-05

Dear Ms. Bonds:

At its meeting of December 20, 2005, the School Ethics Commission passed the enclosed resolution wherein it found that your failure to file a completed disclosure statement within the designated timeline was a violation of N.J.S.A. 18A:12-25 and 26. The resolution also recommends to the Acting Commissioner of Education that she impose the sanction of a suspension until you file a completed disclosure statement, removal if the completed disclosure statement is not filed within 30 days of the Commissioner's decision on penalty, and reprimand if the completed disclosure is filed prior to issuance of the Commissioner's decision.

Pursuant to N.J.S.A. 18A:12-29, this matter is transmitted to the Commissioner of Education for action on the Commission's recommendation **for sanction only**. Within thirteen (13) days from the date of this letter, you may file written comments on the recommended sanction with the Commissioner of Education, c/o Bureau of Controversies and Disputes, 100 Riverview Plaza, P. O. Box 500, Trenton, NJ 08625, marked "Attention: Comments on Ethics Commission Sanction." A copy of any comments filed must be sent to the School Ethics Commission.

Sincerely,

Lisa James-Beavers
Executive Director

LJB/MET/disclosure/correspondence/D05-05suspend-reprimand
Enclosure
c: Board Secretary
County Superintendent
Kathleen Duncan, Director of Controversies and Disputes

SCHOOL ETHICS COMMISSION	:	**BEFORE THE SCHOOL ETHICS COMMISSION**
V.	:	
	:	**Docket No.: D08-05**
BARBARA J. BONDS NEWARK BOARD OF EDUCATION ESSEX COUNTY	:	**RESOLUTION FOR FAILURE TO FILE A DISCLOSURE STATEMENT**

WHEREAS, N.J.S.A. 18A:12-25 of the School Ethics Act requires each school official to file a personal/relative disclosure statement and N.J.S.A. 18A:12-26 requires each school official to file a financial disclosure statement with the School Ethics Commission; and

WHEREAS, Barbara J. Bonds is a "school official" under N.J.S.A. 18A:12-23 of the Act and N.J.A.C. 6A:28-1.2 of the Code; and

WHEREAS, the deadline to file these disclosure statements was April 29, 2005 for school officials in office since January 30, 2005 and 30 days from swearing-in or start of employment for newly elected or appointed board members and administrators; and

WHEREAS, the School Ethics Commission was advised by the County Superintendent that this school official did not file a disclosure statement with her school district and the County Superintendent's office as required by the Act; and

WHEREAS, the Commission sent a reminder letter to her on October 7, 2005, indicating that if the completed statement was not filed by October 21, 2005, the Commission would issue an Order to Show Cause that could result in disciplinary action; and

WHEREAS, the Commission issued an Order on November 4, 2005, directing this school official to Show Cause why the Commission should not find her in violation of the Act for failing to file the disclosure statements; and

WHEREAS, in its letter enclosing the Order, the Commission notified this school official that she had 20 days to respond to the Order, that the Commission would discuss this matter at its December 20, 2005 meeting, that she had the right to attend the meeting, and she could be found in violation of the School Ethics Act and receive a penalty up to removal; and

WHEREAS, this school official answered to the Commission's Order by filing a disclosure statement on November 10, 2005; and

WHEREAS, on November 28, 2005, the Commission responded to Ms. Bonds filing by returning the statement she had filed because it was incomplete and the Commission notified her that she must file a completed statement; and

WHEREAS, Ms. Bonds failed to file a completed disclosure statement; and

WHEREAS, the Commission finds that the failure to file a completed disclosure statement constitutes a clear violation of N.J.S.A. 18A:12-25 and 26; and

WHEREAS, the Commission finds that this school official was given ample opportunity to provide the completed disclosure statement; and

WHEREAS, the appropriate penalty for the violation is suspension until Ms. Bonds files a completed disclosure statement, removal if the disclosure statement is not filed within 30 days of the Commissioner's decision on penalty, and reprimand if the completed disclosure statement is filed prior to issuance of the Commissioner's decision.

NOW THEREFORE BE IT RESOLVED that the School Ethics Commission finds that Barbara J. Bonds violated N.J.S.A. 18A:12-25 and 26 of the School Ethics Act and recommends that the Commissioner of Education impose a sanction of suspension until she files a completed disclosure statement, removal if the completed disclosure statement is not filed within 30 days of the Commissioner's decision on penalty, and reprimand if the completed disclosure statement is filed prior to issuance of the Commissioner's decision.

Paul C. Garbarini, Chairperson
School Ethics Commission

Dated: December 27, 2005

This matter shall be transmitted to the Commissioner of Education for action on the Commission's recommendation for sanction pursuant to N.J.S.A. 18A:12-29. Within thirteen (13) days from the date on which the Commission's decision was mailed to you, you may file written comments on the recommended sanction with the Commissioner of Education, c/o Bureau of Controversies and Disputes, 100 Riverview Plaza, P.O. Box 500, Trenton, NJ 08625, marked "Attention: Comments on Ethics Commission Sanction." A copy of any comments filed must be sent to the School Ethics Commission.

AGENCY DKT. NO. 14-1/06

IN THE MATTER OF CHONITA SPENCER,	:	
STATE-OPERATED SCHOOL DISTRICT OF	:	COMMISSIONER OF EDUCATION
NEWARK, ESSEX COUNTY	:	DECISION

The record of this matter and the decision of the School Ethics Commission, forwarded to the Commissioner pursuant to N.J.S.A. 18A:12-29 solely for review of the Commission's recommended penalty, have been reviewed. No comments were filed by the above-named respondent.

Upon such review, the Commissioner concurs with the penalty recommended by the Commission, and additionally admonishes the respondent for failure to timely file the requisite statement in that such delay has resulted in a waste of administrative and adjudicative time by local, county and State education officials.

Accordingly, the above-named respondent is hereby reprimanded as a school official found to have violated the School Ethics Act.

IT IS SO ORDERED.*

Lucille Davy

ACTING COMMISSIONER OF EDUCATION

Date of Decision: 1/27/06

Date of Mailing: 1/27/06

* This decision, as the Commissioner's final determination regarding penalty in the instant matter, may be appealed to the State Board of Education pursuant to *N.J.S.A.* 18A:6-27 *et seq.* and *N.J.A.C.* 6A:4-1.1 *et seq.* Pursuant to *N.J.A.C.* 6A:4-1.4(a), Commissioner decisions are deemed filed three days after the date of mailing to the parties.

State of New Jersey

DEPARTMENT OF EDUCATION
PO BOX 500
TRENTON, NJ 08625-0500

RICHARD J. CODEY
Acting Governor

LUCILLE E. DAVY
Acting Commissioner

RECEIVED
JAN - 3 2006
C & D OFFICE

December 27, 2005

Ms. Chonita Spencer
4 Spooky Brook
Somerset, NJ 08873

Subject: Resolution for Failure to File Disclosure Statements
School Ethics Commission Docket No. D20-05

Dear Ms. Spencer:

At its meeting of December 20, 2005, the School Ethics Commission passed the enclosed resolution wherein it found that your failure to file a disclosure statement within the designated timeline was a violation of N.J.S.A. 18A:12-25 and 26. Although you filed the disclosure statement, you did not do so until the Commission issued the Order to Show Cause. The resolution also recommends to the Acting Commissioner of Education that she impose the sanction of a reprimand.

Pursuant to N.J.S.A. 18A:12-29, this matter is transmitted to the Commissioner of Education for action on the Commission's recommendation **for sanction only**. Within thirteen (13) days from the date of this letter, you may file written comments on the recommended sanction with the Commissioner of Education, c/o Bureau of Controversies and Disputes, 100 Riverview Plaza, P. O. Box 500, Trenton, NJ 08625, marked "Attention: Comments on Ethics Commission Sanction." A copy of any comments filed must be sent to the School Ethics Commission.

Sincerely,

Lisa James-Beavers
Executive Director

LJB/MET/disclosure/correspondence/17-05reprimand
Enclosure
c: Board Secretary
County Superintendent
Kathleen Duncan, Director of Controversies and Disputes

SCHOOL ETHICS COMMISSION	:	**BEFORE THE SCHOOL ETHICS COMMISSION**
V.	:	**Docket No.: D20-05**
CHONITA SPENCER NEWARK BOARD OF EDUCATION ESSEX COUNTY	:	**RESOLUTION FOR FAILURE TO FILE A DISCLOSURE STATEMENT**

WHEREAS, N.J.S.A. 18A:12-25 of the School Ethics Act requires each school official to file a personal/relative disclosure statement and N.J.S.A. 18A:12-26 requires each school official to file a financial disclosure statement with the School Ethics Commission; and

WHEREAS, Chonita Spencer is a "school official" under N.J.S.A. 18A:12-23 of the Act and N.J.A.C. 6A:28-1.2 of the Code; and

WHEREAS, the deadline to file these disclosure statements was April 29, 2005 for school officials in office since January 30, 2005 and 30 days from swearing-in or start of employment for newly elected or appointed board members and administrators; and

WHEREAS, the School Ethics Commission was advised by the County Superintendent that this school official did not file a disclosure statement with her school district and the County Superintendent's office as required by the Act; and

WHEREAS, the Commission sent a reminder letter to her on October 7, 2005, indicating that if the completed statement was not filed by October 21, 2005, the Commission would issue an Order to Show Cause that could result in disciplinary action; and

WHEREAS, the Commission issued an Order on November 4, 2005, directing this school official to Show Cause why the Commission should not find her in violation of the Act for failing to file the disclosure statements; and

WHEREAS, the school official filed the completed disclosure statement, but not until after the Commission issued the Order to Show Cause; and

WHEREAS, in its letter enclosing the Order, the Commission notified this school official that she had 20 days to respond to the Order, that the Commission would discuss this matter at its December 20, 2005 meeting, that she had the right to attend the meeting, and she could be found in violation of the School Ethics Act and receive a penalty up to removal; and

WHEREAS, the Commission finds that the failure to file a disclosure statement within the designated timeline constitutes a clear violation of N.J.S.A. 18A:12-25 and 26; and

WHEREAS, this school official did not provide an answer to the Commission's Order; and

WHEREAS, the Commission finds that this school official was given ample opportunity to provide the complete disclosure statement; and

WHEREAS, the appropriate penalty for the violation is reprimand especially in light of the failure to answer either the Commission reminder letter or its Order.

NOW THEREFORE BE IT RESOLVED that the School Ethics Commission finds that Chonita Spencer violated N.J.S.A. 18A:12-25 and 26 of the School Ethics Act and recommends that the Commissioner of Education impose a sanction of reprimand.

Paul C. Garbarini, Chairperson
School Ethics Commission

Dated: December 27, 2005

This matter shall be transmitted to the Commissioner of Education for action on the Commission's recommendation for sanction pursuant to N.J.S.A. 18A:12-29. Within thirteen (13) days from the date on which the Commission's decision was mailed to you, you may file written comments on the recommended sanction with the Commissioner of Education, c/o Bureau of Controversies and Disputes, 100 Riverview Plaza, P.O. Box 500, Trenton, NJ 08625, marked "Attention: Comments on Ethics Commission Sanction." A copy of any comments filed must be sent to the School Ethics Commission.

43-06SEC

AGENCY DKT. NO. 15-1/06

IN THE MATTER OF DEBORAH TERELL DAVIS,	:	
STATE-OPERATED SCHOOL DISTRICT OF	:	COMMISSIONER OF EDUCATION
NEWARK, ESSEX COUNTY	:	DECISION

The record of this matter and the decision of the School Ethics Commission, forwarded to the Commissioner pursuant to N.J.S.A. 18A:12-29 solely for review of the Commission's recommended penalty, have been reviewed. No comments were filed by the above-named respondent.

Upon such review, the Commissioner concurs with the penalty recommended by the Commission, and additionally admonishes the respondent for failure to timely file the requisite statement in that such delay has resulted in a waste of administrative and adjudicative time by local, county and State education officials.

Accordingly, the above-named respondent is hereby reprimanded as a school official found to have violated the School Ethics Act.

IT IS SO ORDERED.*

Lucille Davy

ACTING COMMISSIONER OF EDUCATION

Date of Decision: 1/27/06

Date of Mailing: 1/30/06

* This decision, as the Commissioner's final determination regarding penalty in the instant matter, may be appealed to the State Board of Education pursuant to *N.J.S.A.* 18A:6-27 *et seq.* and *N.J.A.C.* 6A:4-1.1 *et seq.* Pursuant to *N.J.A.C.* 6A:4-1.4(a), Commissioner decisions are deemed filed three days after the date of mailing to the parties.

State of New Jersey

DEPARTMENT OF EDUCATION
PO Box 500
TRENTON, NJ 08625-0500

RICHARD J. CODEY
Acting Governor

LUCILLE E. DAVY
Acting Commissioner

RECEIVED
JAN - 3 2006
C & D OFFICE

December 27, 2005

Ms. Deborah Terell Davis
Newark Public Schools
2 Cedar Street
Newark, NJ 07102

Subject: Resolution for Failure to File Disclosure Statements
School Ethics Commission Docket No. D21-05

Dear Ms. Terell Davis:

At its meeting of December 20, 2005, the School Ethics Commission passed the enclosed resolution wherein it found that your failure to file a disclosure statement within the designated timeline was a violation of N.J.S.A. 18A:12-25 and 26. Although you filed the disclosure statement, you did not do so until the Commission issued the Order to Show Cause. The resolution also recommends to the Acting Commissioner of Education that she impose the sanction of a reprimand.

Pursuant to N.J.S.A. 18A:12-29, this matter is transmitted to the Commissioner of Education for action on the Commission's recommendation **for sanction only**. Within thirteen (13) days from the date of this letter, you may file written comments on the recommended sanction with the Commissioner of Education, c/o Bureau of Controversies and Disputes, 100 Riverview Plaza, P. O. Box 500, Trenton, NJ 08625, marked "Attention: Comments on Ethics Commission Sanction." A copy of any comments filed must be sent to the School Ethics Commission.

Sincerely,

Lisa James-Beavers
Executive Director

LJB/MET/disclosure/correspondence/17-05reprimand
Enclosure
c: Board Secretary
County Superintendent
Kathleen Duncan, Director of Controversies and Disputes

SCHOOL ETHICS COMMISSION	:	**BEFORE THE SCHOOL ETHICS COMMISSION**
V.	:	**Docket No.: D21-05**
DEBORAH TERELL DAVIS NEWARK BOARD OF EDUCATION ESSEX COUNTY	:	**RESOLUTION FOR FAILURE TO FILE A DISCLOSURE STATEMENT**

WHEREAS, N.J.S.A. 18A:12-25 of the School Ethics Act requires each school official to file a personal/relative disclosure statement and N.J.S.A. 18A:12-26 requires each school official to file a financial disclosure statement with the School Ethics Commission; and

WHEREAS, Deborah Terell Davis is a "school official" under N.J.S.A. 18A:12-23 of the Act and N.J.A.C. 6A:28-1.2 of the Code; and

WHEREAS, the deadline to file these disclosure statements was April 29, 2005 for school officials in office since January 30, 2005 and 30 days from swearing-in or start of employment for newly elected or appointed board members and administrators; and

WHEREAS, the School Ethics Commission was advised by the County Superintendent that this school official did not file a disclosure statement with her school district and the County Superintendent's office as required by the Act; and

WHEREAS, the Commission sent a reminder letter to her on October 7, 2005, indicating that if the completed statement was not filed by October 21, 2005, the Commission would issue an Order to Show Cause that could result in disciplinary action; and

WHEREAS, the Commission issued an Order on November 4, 2005, directing this school official to Show Cause why the Commission should not find her in violation of the Act for failing to file the disclosure statements; and

WHEREAS, the school official filed the completed disclosure statement, but not until after the Commission issued the Order to Show Cause; and

WHEREAS, in its letter enclosing the Order, the Commission notified this school official that she had 20 days to respond to the Order, that the Commission would discuss this matter at its December 20, 2005 meeting, that she had the right to attend the meeting, and she could be found in violation of the School Ethics Act and receive a penalty up to removal; and

WHEREAS, the Commission finds that the failure to file a disclosure statement within the designated timeline constitutes a clear violation of N.J.S.A. 18A:12-25 and 26; and

WHEREAS, this school official did not provide an answer to the Commission's Order; and

WHEREAS, the Commission finds that this school official was given ample opportunity to provide the complete disclosure statement; and

WHEREAS, the appropriate penalty for the violation is reprimand especially in light of the failure to answer either the Commission reminder letter or its Order.

NOW THEREFORE BE IT RESOLVED that the School Ethics Commission finds that Deborah Terell Davis violated N.J.S.A. 18A:12-25 and 26 of the School Ethics Act and recommends that the Commissioner of Education impose a sanction of reprimand.

Paul C. Garbarini, Chairperson
School Ethics Commission

Dated: December 27, 2005

This matter shall be transmitted to the Commissioner of Education for action on the Commission's recommendation for sanction pursuant to N.J.S.A. 18A:12-29. Within thirteen (13) days from the date on which the Commission's decision was mailed to you, you may file written comments on the recommended sanction with the Commissioner of Education, c/o Bureau of Controversies and Disputes, 100 Riverview Plaza, P.O. Box 500, Trenton, NJ 08625, marked "Attention: Comments on Ethics Commission Sanction." A copy of any comments filed must be sent to the School Ethics Commission.

45-06

#45-06SEC

AGENCY DKT. NO. 20-1/06

IN THE MATTER OF ARMANDO CEPERO,	:	
STATE-OPERATED SCHOOL DISTRICT OF	:	COMMISSIONER OF EDUCATION
NEWARK, ESSEX COUNTY	:	DECISION

The record of this matter and the decision of the School Ethics Commission, forwarded to the Commissioner pursuant to N.J.S.A. 18A:12-29 solely for review of the Commission's recommended penalty, have been reviewed. No comments were filed by the respondent.[1]

Upon such review, the Commissioner concurs with the penalty recommended by the Commission and additionally admonishes the respondent for failure to timely file the requisite statement, in that such delay has resulted in a waste of administrative and adjudicative time by local, county and state Education officials.

Accordingly, the above-named respondent is hereby reprimanded as a school official found to have violated the School Ethics Act.

IT IS SO ORDERED.[2]

Lucille E Davy

ACTING COMMISSIONER OF EDUCATION

Date of Decision: 01/27/06

Date of Mailing: 01/30/06

[1] The respondent did send a letter to the Commission apologizing for his inadvertent lapse and assuring that it would not be repeated. The Commission forwarded this letter to the Commissioner for inclusion in the record.

[2] This decision, as the Commissioner's final determination regarding penalty in the instant matter, may be appealed to the State Board of Education pursuant to *N.J.S.A.* 18A:6-27 *et seq.* and *N.J.A.C.* 6A:4-1.1 *et seq.* Pursuant to *N.J.A.C.* 6A:4-1.4(a), Commissioner decisions are deemed filed three days after the date of mailing to the parties.

State of New Jersey

DEPARTMENT OF EDUCATION
PO Box 500
TRENTON, NJ 08625-0500

RICHARD J. CODEY
Acting Governor

LUCILLE E. DAVY
Acting Commissioner

RECEIVED
JAN - 3 2006
C & D OFFICE

December 27, 2005

Mr. Armando Cepero
41 Fieldstone
Morristown, NJ 07960

Subject: Resolution for Failure to File Disclosure Statements
School Ethics Commission Docket No. D09-05

Dear Mr. Cepero:

At its meeting of December 20, 2005, the School Ethics Commission passed the enclosed resolution wherein it found that your failure to file a disclosure statement within the designated timeline was a violation of N.J.S.A. 18A:12-25 and 26. Although you filed the disclosure statement, you did not do so until the Commission issued the Order to Show Cause. The resolution also recommends to the Acting Commissioner of Education that she impose the sanction of a reprimand.

Pursuant to N.J.S.A. 18A:12-29, this matter is transmitted to the Commissioner of Education for action on the Commission's recommendation **for sanction only**. Within thirteen (13) days from the date of this letter, you may file written comments on the recommended sanction with the Commissioner of Education, c/o Bureau of Controversies and Disputes, 100 Riverview Plaza, P. O. Box 500, Trenton, NJ 08625, marked "Attention: Comments on Ethics Commission Sanction." A copy of any comments filed must be sent to the School Ethics Commission.

Sincerely,

Lisa James-Beavers
Executive Director

LJB/MET/disclosure/correspondence/D09-05reprimand
Enclosure
c: Board Secretary
County Superintendent
Kathleen Duncan, Director of Controversies and Disputes

SCHOOL ETHICS COMMISSION	:	**BEFORE THE SCHOOL ETHICS COMMISSION**
V.	:	
	:	**Docket No.: D09-05**
ARMANDO CEPERO NEWARK BOARD OF EDUCATION ESSEX COUNTY	:	**RESOLUTION FOR FAILURE TO FILE A DISCLOSURE STATEMENT**

WHEREAS, N.J.S.A. 18A:12-25 of the School Ethics Act requires each school official to file a personal/relative disclosure statement and N.J.S.A. 18A:12-26 requires each school official to file a financial disclosure statement with the School Ethics Commission; and

WHEREAS, Armando Cepero is a "school official" under N.J.S.A. 18A:12-23 of the Act and N.J.A.C. 6A:28-1.2 of the Code; and

WHEREAS, the deadline to file these disclosure statements was April 29, 2005 for school officials in office since January 30, 2005 and 30 days from swearing-in or start of employment for newly elected or appointed board members and administrators; and

WHEREAS, the School Ethics Commission was advised by the County Superintendent that this school official did not file a disclosure statement with his school district and the County Superintendent's office as required by the Act; and

WHEREAS, the Commission sent a reminder letter to him on October 7, 2005, indicating that if the completed statement was not filed by October 21, 2005, the Commission would issue an Order to Show Cause that could result in disciplinary action; and

WHEREAS, the Commission issued an Order on November 4, 2005, directing this school official to Show Cause why the Commission should not find him in violation of the Act for failing to file the disclosure statements; and

WHEREAS, the school official filed the completed disclosure statement, but not until after the Commission issued the Order to Show Cause; and

WHEREAS, in its letter enclosing the Order, the Commission notified this school official that he had 20 days to respond to the Order, that the Commission would discuss this matter at its December 20, 2005 meeting, that he had the right to attend the meeting, and he could be found in violation of the School Ethics Act and receive a penalty up to removal; and

WHEREAS, the Commission finds that the failure to file a disclosure statement within the designated timeline constitutes a clear violation of N.J.S.A. 18A:12-25 and 26; and

WHEREAS, this school official did not provide an answer to the Commission's Order; and

WHEREAS, the Commission finds that this school official was given ample opportunity to provide the complete disclosure statement; and

WHEREAS, the appropriate penalty for the violation is reprimand especially in light of the failure to respond to either the Commission's reminder letter or its Order.

NOW THEREFORE BE IT RESOLVED that the School Ethics Commission finds that Armando Cepero violated N.J.S.A. 18A:12-25 and 26 of the School Ethics Act and recommends that the Commissioner of Education impose a sanction of reprimand.

Paul C. Garbarini, Chairperson
School Ethics Commission

Dated: December 27, 2005

This matter shall be transmitted to the Commissioner of Education for action on the Commission's recommendation for sanction pursuant to N.J.S.A. 18A:12-29. Within thirteen (13) days from the date on which the Commission's decision was mailed to you, you may file written comments on the recommended sanction with the Commissioner of Education, c/o Bureau of Controversies and Disputes, 100 Riverview Plaza, P.O. Box 500, Trenton, NJ 08625, marked "Attention: Comments on Ethics Commission Sanction." A copy of any comments filed must be sent to the School Ethics Commission.

44-06

AGENCY DKT. NO. 16-1/06

IN THE MATTER OF JUAN PARRILLA,	:	
STATE-OPERATED SCHOOL DISTRICT OF	:	COMMISSIONER OF EDUCATION
NEWARK, ESSEX COUNTY	:	DECISION

The record of this matter, the decision of the School Ethics Commission, forwarded to the Commissioner pursuant to N.J.S.A. 18A:12-29 solely for review of the Commission's recommended penalty, and respondent's comments have been reviewed.

Upon such review, the Commissioner concurs with the penalty recommended by the Commission and additionally admonishes the respondent for failure to timely file the requisite statement, in that such delay has resulted in a waste of administrative and adjudicative time by local, county and State education officials.

Accordingly, the above-named respondent is hereby reprimanded as a school official found to have violated the School Ethics Act.

IT IS SO ORDERED.*

Lucille Edays

ACTING COMMISSIONER OF EDUCATION

Date of Decision: 1/27/06

Date of Mailing: 1/30/06

* This decision, as the Commissioner's final determination regarding penalty in the instant matter, may be appealed to the State Board of Education pursuant to *N.J.S.A.* 18A:6-27 *et seq.* and *N.J.A.C.* 6A:4-1.1 *et seq.* Pursuant to *N.J.A.C.* 6A:4-1.4(a), Commissioner decisions are deemed filed three days after the date of mailing to the parties.

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

RICHARD J. CODEY
Acting Governor

LUCILLE E. DAVY
Acting Commissioner

RECEIVED
JAN - 3 2006
SCHOOL ETHICS OFFICE

December 27, 2005

Mr. Juan Parilla
368 Parker Street
Newark, NJ 070104

Subject: Resolution for Failure to File Disclosure Statements
School Ethics Commission Docket No. D18-05

Dear Mr. Parilla:

At its meeting of December 20, 2005, the School Ethics Commission passed the enclosed resolution wherein it found that your failure to file a disclosure statement within the designated timeline was a violation of N.J.S.A. 18A:12-25 and 26. Although you filed the disclosure statement, you did not do so until the Commission issued the Order to Show Cause. The resolution also recommends to the Acting Commissioner of Education that she impose the sanction of a reprimand.

Pursuant to N.J.S.A. 18A:12-29, this matter is transmitted to the Commissioner of Education for action on the Commission's recommendation **for sanction only**. Within thirteen (13) days from the date of this letter, you may file written comments on the recommended sanction with the Commissioner of Education, c/o Bureau of Controversies and Disputes, 100 Riverview Plaza, P. O. Box 500, Trenton, NJ 08625, marked "Attention: Comments on Ethics Commission Sanction." A copy of any comments filed must be sent to the School Ethics Commission.

Sincerely,

Lisa James-Beavers
Executive Director

LJB/MET/disclosure/correspondence/17-05reprimand
Enclosure
c: Board Secretary
County Superintendent
Kathleen Duncan, Director of Controversies and Disputes

SCHOOL ETHICS COMMISSION	:	**BEFORE THE SCHOOL ETHICS COMMISSION**
V.	:	
	:	**Docket No.: D18-05**
JUAN PARILLA NEWARK BOARD OF EDUCATION ESSEXD COUNTY	:	**RESOLUTION FOR FAILURE TO FILE A DISCLOSURE STATEMENT**

WHEREAS, N.J.S.A. 18A:12-25 of the School Ethics Act requires each school official to file a personal/relative disclosure statement and N.J.S.A. 18A:12-26 requires each school official to file a financial disclosure statement with the School Ethics Commission; and

WHEREAS, Juan Parilla is a "school official" under N.J.S.A. 18A:12-23 of the Act and N.J.A.C. 6A:28-1.2 of the Code; and

WHEREAS, the deadline to file these disclosure statements was April 29, 2005 for school officials in office since January 30, 2005 and 30 days from swearing-in or start of employment for newly elected or appointed board members and administrators; and

WHEREAS, the School Ethics Commission was advised by the County Superintendent that this school official did not file a disclosure statement with his school district and the County Superintendent's office as required by the Act; and

WHEREAS, the Commission sent a reminder letter to him on October 7, 2005, indicating that if the completed statement was not filed by October 21, 2005, the Commission would issue an Order to Show Cause that could result in disciplinary action; and

WHEREAS, the Commission issued an Order on November 4, 2005, directing this school official to Show Cause why the Commission should not find him in violation of the Act for failing to file the disclosure statements; and

WHEREAS, the school official filed the completed disclosure statement, but not until after the Commission issued the Order to Show Cause; and

WHEREAS, in its letter enclosing the Order, the Commission notified this school official that he had 20 days to respond to the Order, that the Commission would discuss this matter at its December 20, 2005 meeting, that he had the right to attend the meeting, and he could be found in violation of the School Ethics Act and receive a penalty up to removal; and

WHEREAS, the Commission finds that the failure to file a disclosure statement within the designated timeline constitutes a clear violation of N.J.S.A. 18A:12-25 and 26; and

WHEREAS, this school official did not provide an answer to the Commission's Order; and

WHEREAS, the Commission finds that this school official was given ample opportunity to provide the complete disclosure statement; and

WHEREAS, the appropriate penalty for the violation is reprimand especially in light of the failure to respond to either the Commission's reminder letter or its Order.

NOW THEREFORE BE IT RESOLVED that the School Ethics Commission finds that Juan Parilla violated N.J.S.A. 18A:12-25 and 26 of the School Ethics Act and recommends that the Commissioner of Education impose a sanction of reprimand.

Paul C. Garbarini, Chairperson
School Ethics Commission

Dated: December 27, 2005

This matter shall be transmitted to the Commissioner of Education for action on the Commission's recommendation for sanction pursuant to N.J.S.A. 18A:12-29. Within thirteen (13) days from the date on which the Commission's decision was mailed to you, you may file written comments on the recommended sanction with the Commissioner of Education, c/o Bureau of Controversies and Disputes, 100 Riverview Plaza, P.O. Box 500, Trenton, NJ 08625, marked "Attention: Comments on Ethics Commission Sanction." A copy of any comments filed must be sent to the School Ethics Commission.

46-06

#46-06SEC

AGENCY DKT. NO. 21-1/06

IN THE MATTER OF DORA JAMES, :

BOARD OF EDUCATION OF BEVERLY CITY, : COMMISSIONER OF EDUCATION

BURLINGTON COUNTY. : DECISION

The record of this matter and the decision of the School Ethics Commission, forwarded to the Commissioner pursuant to N.J.S.A. 18A:12-29 solely for review of the Commission's recommended penalty, have been reviewed. No comments were filed by the respondent and the required disclosure statement(s) had not been filed as of the date of this decision.

Upon review, the Commissioner concurs with the penalty recommended by the Commission and additionally admonishes the respondent for failure to file the requisite statement, in that such disregard of the law has resulted in a waste of administrative and adjudicative time by local, county and State education officials.

Accordingly, the above-named respondent is hereby suspended as a school official found to have violated the School Ethics Act, such suspension to remain in effect until the required disclosure statement(s) are filed; provided, however, that if such statement(s) are not filed within 30 days of the mailing date of this decision, the above-named respondent shall be summarily removed from office.

IT IS SO ORDERED.*

Lucille Davy

ACTING COMMISSIONER OF EDUCATION

Date of Decision: 01/27/06

Date of Mailing: 01/30/06

* This decision, as the Commissioner's final determination regarding penalty in the instant matter, may be appealed to the State Board of Education pursuant to *N.J.S.A.* 18A:6-27 *et seq.* and *N.J.A.C.* 6A:4-1.1 *et seq.* Pursuant to *N.J.A.C.* 6A:4-1.4(a), Commissioner decisions are deemed filed three days after the date of mailing to the parties.

State of New Jersey

DEPARTMENT OF EDUCATION
PO Box 500
TRENTON, NJ 08625-0500

RICHARD J. CODEY
Acting Governor

LUCILLE E. DAVY
Acting Commissioner

RECEIVED
JAN - 3 2006
C & D OFFICE

December 27, 2005

Ms. Dora James
Beverly City School District
601 Bently Avenue
Beverly, NJ 08010

Subject: Resolution for Failure to File Disclosure Statements
School Ethics Commission Docket No. D05-05

Dear Ms. James:

At its meeting of December 20, 2005, the School Ethics Commission passed the enclosed resolution wherein it found that your failure to file a disclosure statement within the designated timeline was a violation of N.J.S.A. 18A:12-25 and 26. The resolution also recommends to the Acting Commissioner of Education that she impose the sanction of a suspension until you file a disclosure statement, removal if the disclosure statement is not filed within 30 days of the Commissioner's decision on penalty, and reprimand if the disclosure is filed prior to issuance of the Commissioner's decision.

Pursuant to N.J.S.A. 18A:12-29, this matter is transmitted to the Commissioner of Education for action on the Commission's recommendation **for sanction only**. Within thirteen (13) days from the date of this letter, you may file written comments on the recommended sanction with the Commissioner of Education, c/o Bureau of Controversies and Disputes, 100 Riverview Plaza, P. O. Box 500, Trenton, NJ 08625, marked "Attention: Comments on Ethics Commission Sanction." A copy of any comments filed must be sent to the School Ethics Commission.

Sincerely,

Lisa James-Beavers
Executive Director

LJB/MET/disclosure/correspondence/D05-05suspend-reprimand
Enclosure
c: Board Secretary
County Superintendent
Kathleen Duncan, Director of Controversies and Disputes

SCHOOL ETHICS COMMISSION	:	**BEFORE THE SCHOOL ETHICS COMMISSION**
V.	:	**Docket No.: D05-05**
DORA JAMES BEVERLY CITY BOARD OF EDUCATION BURLINGTON COUNTY	:	**RESOLUTION FOR FAILURE TO FILE A DISCLOSURE STATEMENT**

WHEREAS, N.J.S.A. 18A:12-25 of the School Ethics Act requires each school official to file a personal/relative disclosure statement and N.J.S.A. 18A:12-26 requires each school official to file a financial disclosure statement with the School Ethics Commission; and

WHEREAS, Dora James is a board member of the Board of Education for the Beverly City school district and thus a "school official" under N.J.S.A. 18A:12-23 of the Act and N.J.A.C. 6A:28-1.2 of the Code; and

WHEREAS, the deadline to file these disclosure statements was April 29, 2005 for school officials in office since January 30, 2005 and 30 days from swearing-in or start of employment for newly elected or appointed board members and administrators; and

WHEREAS, the School Ethics Commission was advised by the County Superintendent that this school official did not file a disclosure statement with her school district and the County Superintendent's office as required by the Act; and

WHEREAS, the Commission sent a reminder letter to her on October 7, 2005, indicating that if the completed statement was not filed by October 21, 2005, the Commission would issue an Order to Show Cause that could result in disciplinary action; and

WHEREAS, the Commission issued an Order on November 4, 2005, directing this school official to Show Cause why the Commission should not find her in violation of the Act for failing to file the disclosure statements; and

WHEREAS, in its letter enclosing the Order, the Commission notified this school official that she had 20 days to respond to the Order, that the Commission would discuss this matter at its December 20, 2005 meeting, that she had the right to attend the meeting, and she could be found in violation of the School Ethics Act and receive a penalty up to removal; and

WHEREAS, this school official did not provide an answer to the Commission's Order and has failed to file a disclosure statement; and

WHEREAS, the Commission finds that the failure to file a disclosure statement constitutes a clear violation of N.J.S.A. 18A:12-25 and 26; and

WHEREAS, the Commission finds that this school official was given ample opportunity to provide the complete disclosure statement; and

WHEREAS, the appropriate penalty for the violation is suspension until Ms. James files a disclosure statement, removal if the disclosure statement is not filed within 30 days of the Commissioner's decision on penalty, and reprimand if the disclosure statement is filed prior to issuance of the Commissioner's decision.

NOW THEREFORE BE IT RESOLVED that the School Ethics Commission finds that Dora James violated N.J.S.A. 18A:12-25 and 26 of the School Ethics Act and recommends that the Commissioner of Education impose a sanction of suspension until she files a disclosure statement, removal if the disclosure statement is not filed within 30 days of the Commissioner's decision on penalty, and reprimand if the disclosure statement is filed prior to issuance of the Commissioner's decision.

Paul C. Garbarini, Chairperson
School Ethics Commission

Dated: December 27, 2005

This matter shall be transmitted to the Commissioner of Education for action on the Commission's recommendation for sanction pursuant to N.J.S.A. 18A:12-29. Within thirteen (13) days from the date on which the Commission's decision was mailed to you, you may file written comments on the recommended sanction with the Commissioner of Education, c/o Bureau of Controversies and Disputes, 100 Riverview Plaza, P.O. Box 500, Trenton, NJ 08625, marked "Attention: Comments on Ethics Commission Sanction." A copy of any comments filed must be sent to the School Ethics Commission.

#49-06SEC

49-06

AGENCY DKT. NO. 27-1/06

IN THE MATTER OF ELARIS ROBINSON,	:	
CHESILHURST SCHOOL DISTRICT,	:	COMMISSIONER OF EDUCATION
CAMDEN COUNTY.	:	DECISION

The record of this matter and the decision of the School Ethics Commission, forwarded to the Commissioner pursuant to N.J.S.A. 18A:12-29 solely for review of the Commission's recommended penalty, have been reviewed. No comments were filed by the respondent, and the required disclosure statement(s) had not been filed as of the date of this decision.

Upon such review, the Commissioner concurs with the penalty recommended by the Commission and additionally admonishes the respondent for failure to file the requisite statement, in that such disregard of the law has resulted in the waste of administrative and adjudicative time by local, county and State education officials.

Accordingly, the above-named respondent is hereby suspended as a school official found to have violated the School Ethics Act, such suspension to remain in effect until the completed disclosure statement(s) are filed, provided, however, that if such statement(s) are not filed within 30 days of the mailing date of this decision, the above-named respondent shall be summarily removed from office.

IT IS SO ORDERED.*

Lucille E. Davy

ACTING COMMISSIONER OF EDUCATION

Date of Decision: 01/31/06

Date of Mailing: 01/31/06

* This decision, as the Commissioner's final determination regarding penalty in the instant matter, may be appealed to the State Board of Education pursuant to *N.J.S.A.* 18A:6-27 *et seq.* and *N.J.A.C.* 6A:4-1.1 *et seq.* Pursuant to *N.J.A.C.* 6A:4-1.4(a), Commissioner decisions are deemed filed three days after the date of mailing to the parties.

SCHOOL ETHICS COMMISSION	:	**BEFORE THE SCHOOL ETHICS COMMISSION**
V.	:	
	:	**Docket No.: D06-05**
ELARIS ROBINSON CHESILHURST BOARD OF EDUCATION CAMDEN COUNTY	:	**RESOLUTION FOR FAILURE TO FILE A DISCLOSURE STATEMENT**

WHEREAS, N.J.S.A. 18A:12-25 of the School Ethics Act requires each school official to file a personal/relative disclosure statement and N.J.S.A. 18A:12-26 requires each school official to file a financial disclosure statement with the School Ethics Commission; and

WHEREAS, Elaris Robinson is a board member of the Board of Education for the Chesilhurst school district and thus a "school official" under N.J.S.A. 18A:12-23 of the Act and N.J.A.C. 6A:28-1.2 of the Code; and

WHEREAS, the deadline to file these disclosure statements was April 29, 2005 for school officials in office since January 30, 2005 and 30 days from swearing-in or start of employment for newly elected or appointed board members and administrators; and

WHEREAS, the School Ethics Commission was advised by the County Superintendent that this school official did not file a disclosure statement with his school district and the County Superintendent's office as required by the Act; and

WHEREAS, the Commission sent a reminder letter to him on October 7, 2005, indicating that if the completed statement was not filed by October 21, 2005, the Commission would issue an Order to Show Cause that could result in disciplinary action; and

WHEREAS, the Commission issued an Order on November 4, 2005, directing this school official to Show Cause why the Commission should not find him in violation of the Act for failing to file the disclosure statements; and

WHEREAS, in its letter enclosing the Order, the Commission notified this school official that he had 20 days to respond to the Order, that the Commission would discuss this matter at its December 20, 2005 meeting, that he had the right to attend the meeting, and he could be found in violation of the School Ethics Act and receive a penalty up to removal; and

WHEREAS, this school official did not provide an answer to the Commission's Order and has failed to file a disclosure statement; and

WHEREAS, the Commission finds that the failure to file a disclosure statement constitutes a clear violation of N.J.S.A. 18A:12-25 and 26; and

WHEREAS, the Commission finds that this school official was given ample opportunity to provide the complete disclosure statement; and

WHEREAS, the appropriate penalty for the violation is suspension until Mr. Robinson files a disclosure statement, removal if the disclosure statement is not filed within 30 days of the Commissioner's decision on penalty, and reprimand if the disclosure statement is filed prior to issuance of the Commissioner's decision.

NOW THEREFORE BE IT RESOLVED that the School Ethics Commission finds that Elaris Robinson violated N.J.S.A. 18A:12-25 and 26 of the School Ethics Act and recommends that the Commissioner of Education impose a sanction of suspension until he files a disclosure statement, removal if the disclosure statement is not filed within 30 days of the Commissioner's decision on penalty, and reprimand if the disclosure statement is filed prior to issuance of the Commissioner's decision.

Paul C. Garbarini, Chairperson
School Ethics Commission

Dated: December 27, 2005

This matter shall be transmitted to the Commissioner of Education for action on the Commission's recommendation for sanction pursuant to N.J.S.A. 18A:12-29. Within thirteen (13) days from the date on which the Commission's decision was mailed to you, you may file written comments on the recommended sanction with the Commissioner of Education, c/o Bureau of Controversies and Disputes, 100 Riverview Plaza, P.O. Box 500, Trenton, NJ 08625, marked "Attention: Comments on Ethics Commission Sanction." A copy of any comments filed must be sent to the School Ethics Commission.

50-06

#50-06SEC

AGENCY DKT. NO. 28-1/06

IN THE MATTER OF DAWN POPE,	:	
SOMERDALE SCHOOL DISTRICT,	:	COMMISSIONER OF EDUCATION
CAMDEN COUNTY.	:	DECISION

The record of this matter and the decision of the School Ethics Commission, forwarded to the Commissioner pursuant to N.J.S.A. 18A:12-29 solely for review of the Commission's recommended penalty, have been reviewed. No comments were filed by the respondent.

Upon such review, the Commissioner concurs with the penalty recommended by the Commission and additionally admonishes the respondent for failure to timely file the requisite statement, in that such delay has resulted in the waste of administrative and adjudicative time by local, county and State education officials.

Accordingly, the above-named respondent is hereby reprimanded as a school official found to have violated the School Ethics Act.

IT IS SO ORDERED.*

Lucille Edney

ACTING COMMISSIONER OF EDUCATION

Date of Decision: 01/31/06

Date of Mailing: 01/31/06

* This decision, as the Commissioner's final determination regarding penalty in the instant matter, may be appealed to the State Board of Education pursuant to *N.J.S.A.* 18A:6-27 *et seq.* and *N.J.A.C.* 6A:4-1.1 *et seq.* Pursuant to *N.J.A.C.* 6A:4-1.4(a), Commissioner decisions are deemed filed three days after the date of mailing to the parties.

SCHOOL ETHICS COMMISSION	:	**BEFORE THE SCHOOL ETHICS COMMISSION**
V.	:	
	:	**Docket No.: D07-05**
DAWN POPE SOMERDALE BOARD OF EDUCATION CAMDEN COUNTY	:	**RESOLUTION FOR FAILURE TO FILE A DISCLOSURE STATEMENT**

WHEREAS, N.J.S.A. 18A:12-25 of the School Ethics Act requires each school official to file a personal/relative disclosure statement and N.J.S.A. 18A:12-26 requires each school official to file a financial disclosure statement with the School Ethics Commission; and

WHEREAS, Dawn Young is a board member of the Board of Education for the Somerdale school district and thus a "school official" under N.J.S.A. 18A:12-23 of the Act and N.J.A.C. 6A:28-1.2 of the Code; and

WHEREAS, the deadline to file these disclosure statements was April 29, 2005 for school officials in office since January 30, 2005 and 30 days from swearing-in or start of employment for newly elected or appointed board members and administrators; and

WHEREAS, the School Ethics Commission was advised by the County Superintendent that this school official did not file a disclosure statement with her school district and the County Superintendent's office as required by the Act; and

WHEREAS, the Commission sent a reminder letter to her on October 7, 2005, indicating that if the completed statement was not filed by October 21, 2005, the Commission would issue an Order to Show Cause that could result in disciplinary action; and

WHEREAS, the Commission issued an Order on November 4, 2005, directing this school official to Show Cause why the Commission should not find her in violation of the Act for failing to file the disclosure statements; and

WHEREAS, the school official filed the completed disclosure statement, but not until after the Commission issued the Order to Show Cause; and

WHEREAS, in its letter enclosing the Order, the Commission notified this school official that she had 20 days to respond to the Order, that the Commission would discuss this matter at its December 20, 2005 meeting, that she had the right to attend the meeting, and she could be found in violation of the School Ethics Act and receive a penalty up to removal; and

WHEREAS, the Commission finds that the failure to file a disclosure statement within the designated timeline constitutes a clear violation of N.J.S.A. 18A:12-25 and 26; and

WHEREAS, this school official did not provide an answer to the Commission's Order; and

WHEREAS, the Commission finds that this school official was given ample opportunity to provide the complete disclosure statement; and

WHEREAS, the appropriate penalty for the violation is reprimand especially in light of the failure to respond to either the Commission's reminder letter or its Order.

NOW THEREFORE BE IT RESOLVED that the School Ethics Commission finds that Dawn Pope violated N.J.S.A. 18A:12-25 and 26 of the School Ethics Act and recommends that the Commissioner of Education impose a sanction of reprimand.

Paul C. Garbarini, Chairperson
School Ethics Commission

Dated: December 27, 2005

This matter shall be transmitted to the Commissioner of Education for action on the Commission's recommendation for sanction pursuant to N.J.S.A. 18A:12-29. Within thirteen (13) days from the date on which the Commission's decision was mailed to you, you may file written comments on the recommended sanction with the Commissioner of Education, c/o Bureau of Controversies and Disputes, 100 Riverview Plaza, P.O. Box 500, Trenton, NJ 08625, marked "Attention: Comments on Ethics Commission Sanction." A copy of any comments filed must be sent to the School Ethics Commission.

54-06L

54-06

State of New Jersey

DEPARTMENT OF EDUCATION
PO BOX 500
TRENTON, NJ 08625-0500

JON S. CORZINE
Governor

February 3, 2006

LUCILLE E. DAVY
Acting Commissioner

Ivy Amarh'-Kwantreng, *Pro Se*
1190 Laurel Road – Y214
Lindenwold, New Jersey 08021

Dear Ms. Amarh'-Kwantreng:

Upon review of the papers filed in the matter captioned *I.A.-K., on behalf of minor child, K.N. v. Pope Paul VI High School Board of Education, et al. and Board of Education of Haddon Township, et al., Camden County*, Agency Dkt. No. 334-11/05, I have determined to dismiss the above-identified petition for failure to prosecute.

This matter was opened November 29, 2005 by way of the filing of a Petition of Appeal. The petition was acknowledged by communication of the same date which clearly informed petitioner that no action would be taken on this matter until, pursuant to *N.J.A.C.* 6A:3-1.4, she provided the Bureau of Controversies and Disputes with proof that she had served each named respondent in this matter with a full copy of all submitted materials. On December 21, 2005 petitioner was sent a second communication again reminding her that no action would be taken on her matter until respondents were properly served and proof of such service submitted to the Bureau. Because petitioner failed to respond to the November 29, 2005 and December 21, 2005 notifications, on January 3, 2006 a final letter was sent via certified and regular mail,* clearly informing petitioner that failure to provide proof of service of the Petition of Appeal on both respondents within ten (10) days of receipt of this notice would result in dismissal of her petition for failure to prosecute the appeal. To-date, no proof of service has been received.

Accordingly, in that petitioner has not submitted the requested proof of service within the time specified, nor has she responded to any of the three notifications in any manner, I have determined to dismiss the instant petition for failure to prosecute.

Sincerely,

Lucille E. Davy
Acting Commissioner

LED/IB/MIKD/MH
c: Alan R. Schmoll, Esq.
Clare M. Diemer, Esq.

* Although the certified copy of this letter was returned with "Other" indicated as the reason for non-delivery, the letter sent via regular mail was not returned and is, thus, presumed to have been received.

55-06

55-06L

State of New Jersey

DEPARTMENT OF EDUCATION
PO Box 500
TRENTON, NJ 08625-0500

JON S. CORZINE
Governor

LUCILLE E. DAVY
Acting Commissioner

February 3, 2006

Stephne R. Coney, *Pro Se*
364 Raritan Street
Camden, New Jersey 08105

Alan R. Schmoll, Esq.
Capehart & Scatchard
Laurel Corporate Center
8000 Midlantic Drive, Suite 300
Mount Laurel, New Jersey 08054

Clare M. Diemer, Esq.
McKernan, McKernan & Godino
113 North Sixth Street
Camden, New Jersey 08102-1269

Dear Parties:

I have reviewed the Petition of Appeal and the papers filed in connection with both respondents' Motions to Dismiss in Lieu of Answer in the matter captioned *S.R.C., on behalf of minor child, S.C. v. Pope Paul VI High School Board of Education, et al and Board of Education of Haddon Township, et al., Camden County*, Agency Dkt. No. 277-10/05. Upon such review, I have determined, for the reasons set forth below, to transfer the instant petition to the Division on Civil Rights in accordance with *Hinfey v. Matawan Regional Board of Education*, 77 *N.J.* 514 (1978).

In the Petition of Appeal, petitioner - whose daughter is a student at Pope Paul VI Catholic High School - alleges that her daughter has been the victim of numerous acts of racial and cultural discrimination and harassment at the hands of school administrators and faculty. The Board of Education of Haddon Township is, additionally, named as a respondent in her petition because she alleges that this District serves as the fiscal agent for any federal and/or state funds for which Pope Paul VI may be eligible and, thus, has an obligation to compel staff of Pope Paul VI to discontinue what, petitioner urges, are their illegal discrimination and harassment practices. Petitioner seeks, *inter alia*, that I grant her the following relief: terminate all state and/or federal funds to Pope Paul VI due to racial and cultural discrimination; a refund of moneys she has expended at the school for tuition, books and clothing; a public apology to all visitors and students; that diversity training - provided by an outside federal or state agency - be

ordered for all faculty, staff and administrators at the school and the Camden Diocese; and that the school be compelled to conduct more minority recruitment.

Contrary to the assertions of the Superintendent for respondent Haddon Township Board of Education in his September 12, 2005 reply to a formal complaint petitioner had filed with that Board on August 31, 2005, the New Jersey State Department of Education does not approve educational programs developed by Pope Paul VI. The Commissioner's authority with respect to programs for private school students is limited to services provided to non-public school students pursuant to *N.J.S.A.* 18A:46-19.1 *et seq.* (remedial services for handicapped children in non-public schools) and *N.J.S.A.* 18A:46A-1 *et seq.* (auxiliary services to non-public school children). Therefore, withholding of funds for services under those two statutory provisions is the only relief the Commissioner might award if there were to be a finding that respondent Pope Paul VI was not in compliance with the requirements of Title VI of the Civil Rights Act of 1964. See *N.J.S.A.* 18A:46-19.2(b) and *N.J.S.A.* 18A:46A-2(b). I am not empowered to grant any of the other relief requested by petitioner. Because charges of racial and cultural discrimination and harassment would appear to fall under the intendment of the New Jersey Law Against Discrimination, *N.J.S.A.* 10:5-1 *et seq.*, and such matters are within the particular expertise of the Director of the Division on Civil Rights, I conclude that the venue for this type of action would most properly be the New Jersey Division of Civil Rights.

Accordingly, I hereby transfer the entire matter to the New Jersey Division of Civil Rights for review and action, if any, as that agency deems appropriate. I do not retain jurisdiction; if the Director of the Division on Civil Rights ultimately determines that relief is warranted, the matter may be returned to me to consider petitioner's request that funds be withheld.

Sincerely,

Lucille E. Davy
Acting Commissioner

LED/IB/MKD/MH
c: County Superintendent
Director, Division of Civil Rights (with petition)

57-06

J.G. and D.G., on behalf of minor child, H.M.,	:	
PETITIONER,	:	
V.	:	COMMISSIONER OF EDUCATION
BOARD OF EDUCATION OF THE TOWNSHIP OF LAKEWOOD, OCEAN COUNTY,	:	DECISION
RESPONDENT.	:	

SYNOPSIS

Petitioners sought restoration of passing grades in three classes in which minor child H.M. was assigned failing marks based on tardiness, and damages for alleged failure of the respondent Board to provide a hearing prior to the banning of H.M. from participating in high school interscholastic wrestling competition. H.M. graduated from the District's schools in June 2004. The ALJ advised petitioner on October 20, 2003 of the option of an accelerated proceeding in order to hear the matter before petitioner's scheduled graduation date; respondent Board consented to the accelerated proceeding option, but petitioner declined to request same. Respondent Board filed a motion to dismiss the matter.

The ALJ granted respondent's motion to dismiss, finding the matter moot given the fact that petitioner declined the accelerated hearing which would have allowed timely consideration of the issues prior to petitioner's graduation date. The ALJ additionally found that petitioner had not met the burden of proof in this matter, failing to support allegations of lack of notice of suspension from extra-curricular activities, lack of due process, arbitrary application of student regulations, and bias.

The Commissioner concurred with the ALJ for the reasons clearly stated in her decision, 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.

February 6, 2006

OAL DKT. NO. EDU 2894-03
AGENCY DKT. NO. 120-4/03

J.G. and D.G., on behalf of minor child, H.M.,	:	
PETITIONER,	:	
V.	:	COMMISSIONER OF EDUCATION
BOARD OF EDUCATION OF THE TOWNSHIP OF LAKEWOOD, OCEAN COUNTY,	:	DECISION
RESPONDENT.	:	

The record of this matter and the Initial Decision of the Office of Administrative Law (OAL) have been reviewed. Petitioners' exceptions -- dated January 25, 2006 and filed January 30, 2006, in response to an Initial Decision mailed to the parties on January 11, 2006 -- are untimely pursuant to *N.J.A.C.* 1:1-18.4 and, therefore, are not considered herein.

Upon a full and independent review of the record, which included transcripts of the hearing conducted at the OAL on April 26, 2004, the Commissioner concurs with the Administrative Law Judge, for the reasons clearly stated in her decision, that the Board's motion to dismiss is appropriately granted.

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

IT IS SO ORDERED.*

Lucille E. Davy

ACTING COMMISSIONER OF EDUCATION

Date of Decision: _____

Date of Mailing: _____

* This decision may be appealed to the State Board of Education pursuant to *N.J.S.A.* 18A:6-27 *et seq.* and *N.J.A.C* 6A:4-1.1 *et seq.*

47-06SEC

4-
47-06

AGENCY DKT. NO. 22-1/06

IN THE MATTER OF WANDA LONG-BROOKS,	:	
STATE-OPERATED SCHOOL DISTRICT OF	:	COMMISSIONER OF EDUCATION
NEWARK, ESSEX COUNTY	:	DECISION

The record of this matter and the decision of the School Ethics Commission, forwarded to the Commissioner pursuant to N.J.S.A. 18A:12-29 solely for review of the Commission's recommended penalty, have been reviewed. No comments were filed by the respondent.

Upon such review, the Commissioner concurs with the penalty recommended by the Commission and additionally admonishes the respondent for failure to timely file the requisite statement, in that such delay has resulted in a waste of administrative and adjudicative time by local, county and State education officials.

Accordingly, the above-named respondent is hereby reprimanded as a school official found to have violated the School Ethics Act.

IT IS SO ORDERED. *

Lucille E Davy

ACTING COMMISSIONER OF EDUCATION

Date of Decision: 1/27/06

Date of Mailing: 1/30/06

* This decision, as the Commissioner's final determination regarding penalty in the instant matter, may be appealed to the State Board of Education pursuant to *N.J.S.A.* 18A:6-27 *et seq.* and *N.J.A.C.* 6A:4-1.1 *et seq.* Pursuant to *N.J.A.C.* 6A:4-1.4(a), Commissioner decisions are deemed filed three days after the date of mailing to the parties.

State of New Jersey

DEPARTMENT OF EDUCATION
PO BOX 500
TRENTON, NJ 08625-0500

RICHARD J. CODEY
Acting Governor

LUCILLE E. DAVY
Acting Commissioner

December 27, 2005

Ms. Wanda Long-Brooks
19 Gold Star Drive
Princeton, NJ 08540

Subject: Resolution for Failure to File Disclosure Statements
School Ethics Commission Docket No. D11-05

Dear Ms. Long-Brooks:

At its meeting of December 20, 2005, the School Ethics Commission passed the enclosed resolution wherein it found that your failure to file a disclosure statement within the designated timeline was a violation of N.J.S.A. 18A:12-25 and 26. Although you filed the disclosure statement, you did not do so until the Commission issued the Order to Show Cause. The resolution also recommends to the Acting Commissioner of Education that she impose the sanction of a reprimand.

Pursuant to N.J.S.A. 18A:12-29, this matter is transmitted to the Commissioner of Education for action on the Commission's recommendation **for sanction only**. Within thirteen (13) days from the date of this letter, you may file written comments on the recommended sanction with the Commissioner of Education, c/o Bureau of Controversies and Disputes, 100 Riverview Plaza, P. O. Box 500, Trenton, NJ 08625, marked "Attention: Comments on Ethics Commission Sanction." A copy of any comments filed must be sent to the School Ethics Commission.

Sincerely,

Lisa James-Beavers
Executive Director

LJB/MET/disclosure/correspondence/D11-05reprimand
Enclosure
c: Board Secretary
County Superintendent
Kathleen Duncan, Director of Controversies and Disputes

SCHOOL ETHICS COMMISSION	:	**BEFORE THE SCHOOL ETHICS COMMISSION**
V.	:	**Docket No.: D11-05**
WANDA LONG-BROOKS NEWARK BOARD OF EDUCATION ESSEX COUNTY	:	**RESOLUTION FOR FAILURE TO FILE A DISCLOSURE STATEMENT**

WHEREAS, N.J.S.A. 18A:12-25 of the School Ethics Act requires each school official to file a personal/relative disclosure statement and N.J.S.A. 18A:12-26 requires each school official to file a financial disclosure statement with the School Ethics Commission; and

WHEREAS, Wanda Long-Brooks is a "school official" under N.J.S.A. 18A:12-23 of the Act and N.J.A.C. 6A:28-1.2 of the Code; and

WHEREAS, the deadline to file these disclosure statements was April 29, 2005 for school officials in office since January 30, 2005 and 30 days from swearing-in or start of employment for newly elected or appointed board members and administrators; and

WHEREAS, the School Ethics Commission was advised by the County Superintendent that this school official did not file a disclosure statement with her school district and the County Superintendent's office as required by the Act; and

WHEREAS, the Commission sent a reminder letter to her on October 7, 2005, indicating that if the completed statement was not filed by October 21, 2005, the Commission would issue an Order to Show Cause that could result in disciplinary action; and

WHEREAS, the Commission issued an Order on November 4, 2005, directing this school official to Show Cause why the Commission should not find her in violation of the Act for failing to file the disclosure statements; and

WHEREAS, the school official filed the completed disclosure statement, but not until after the Commission issued the Order to Show Cause; and

WHEREAS, in its letter enclosing the Order, the Commission notified this school official that she had 20 days to respond to the Order, that the Commission would discuss this matter at its December 20, 2005 meeting, that she had the right to attend the meeting, and she could be found in violation of the School Ethics Act and receive a penalty up to removal; and

WHEREAS, the Commission finds that the failure to file a disclosure statement within the designated timeline constitutes a clear violation of N.J.S.A. 18A:12-25 and 26; and

WHEREAS, this school official provided an answer to the Commission's Order wherein she indicated that she had already filed a disclosure statement, but she refiled it on November 28, 2005; and

WHEREAS, the Commission finds that this school official was given ample opportunity to provide the complete disclosure statement; and

WHEREAS, the appropriate penalty for the violation is reprimand.

NOW THEREFORE BE IT RESOLVED that the School Ethics Commission finds that Wanda Long-Brooks violated N.J.S.A. 18A:12-25 and 26 of the School Ethics Act and recommends that the Commissioner of Education impose a sanction of reprimand.

Paul C. Garbarini, Chairperson
School Ethics Commission

Dated: December 27, 2005

This matter shall be transmitted to the Commissioner of Education for action on the Commission's recommendation for sanction pursuant to N.J.S.A. 18A:12-29. Within thirteen (13) days from the date on which the Commission's decision was mailed to you, you may file written comments on the recommended sanction with the Commissioner of Education, c/o Bureau of Controversies and Disputes, 100 Riverview Plaza, P.O. Box 500, Trenton, NJ 08625, marked "Attention: Comments on Ethics Commission Sanction." A copy of any comments filed must be sent to the School Ethics Commission.

59-06

BOARD OF EDUCATION OF THE TOWNSHIP OF HAMILTON, MERCER COUNTY,	:	
PETITIONER,	:	
V.	:	COMMISSIONER OF EDUCATION
LEWIS C. SHINKLE, JR.,	:	DECISION
RESPONDENT.	:	

SYNOPSIS

The petitioning Board sought to recover salary and benefits paid to respondent while he was suspended pending resolution of both criminal and tenure charges based on allegations of sexual misconduct with a student. Respondent had received salary and benefits totaling $312,347.46 from the date of his suspension in May 1997 until tenure charges were sustained by the Commissioner in August 2004. Respondent filed a counterclaim seeking indemnification for expenses he had incurred while defending against a civil suit and the criminal charges that were dismissed. The parties filed cross motions for summary decision.

The ALJ found that: 1) respondent withheld records which would have quantified set-off income that respondent had received from substituted employment during his period of suspension; 2) respondent's failure to provide requested records pursuant to *N.J.S.A.* 18A:6-14 warranted an adverse inference concerning the scope of his outside earnings; and 3) respondent is therefore obligated to pay full restitution of all income received from petitioner during his suspension. The ALJ also found that respondent's motion for indemnification is without merit, as the criminal and civil charges against respondent did not arise from the performance of his duties as a teacher. Thus, the ALJ concluded that the petitioner is entitled to recoup $312,347.46, and that respondent is not entitled to indemnification.

The Commissioner concurs with the determinations of the ALJ, and adopts the Initial Decision, with supplementation, as the final decision in this matter. In so deciding, the Commissioner emphasizes that: the amount of respondent's "substituted" income during the period of his suspension is clearly relevant to the application of *N.J.S.A.* 18A:6-14 and was not independently ascertainable without respondent's W-2 forms; respondent did not meet his burden to show that his substitute earnings were less than the total amount paid out by petitioner; respondent's failure to produce records warrants the inference that they are unfavorable to respondent's position; and the conduct which precipitated the criminal and civil proceedings against respondent – engaging in sexual relations with a minor – clearly did not arise from the duties of his employment. The Commissioner dismisses respondent's counter-claim, and respondent is ordered to pay petitioner $312,347.46.

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.

February 9, 2006

OAL DKT. NO. EDU 213-05
AGENCY DKT. NO. 436-12/04

BOARD OF EDUCATION OF THE TOWNSHIP OF HAMILTON, MERCER COUNTY,	:	
PETITIONER,	:	
V.	:	COMMISSIONER OF EDUCATION
LEWIS C. SHINKLE, JR.,	:	DECISION
RESPONDENT.	:	

The record of this matter and the Initial Decision of the Office of Administrative Law (OAL) have been reviewed. Respondent's exceptions and petitioner's replies to the exceptions were fully considered by the Commissioner of Education (Commissioner) in reaching her determination.

Pursuant to *N.J.S.A.* 18A:6-14, petitioner seeks the recoupment of seven years of salary and payments in lieu of benefits that it paid respondent during the pendency of tenure charges which were sustained in a prior proceeding (the tenure case). Respondent counterclaims for indemnification for attorney fees and costs incurred in defending against criminal charges and civil litigation that arose from the same set of facts which triggered the tenure charges. The matter was decided in the OAL by way of cross motions for summary judgment. For the reasons which follow, the Commissioner herein adopts the findings and conclusions in the initial decision, as supplemented herein.

The record reveals that on May 5, 1997, upon receipt of allegations that respondent had had sexual relations with a 16-year-old student between February 28 and May 1 of 1997, petitioner suspended respondent with pay. On November 25, 1997, after the conclusion

of a local criminal investigation, petitioner instituted tenure charges against respondent. The tenure matter was held in abeyance while county and State criminal proceedings progressed to their conclusion in November 2000. The tenure charges were ultimately decided on August 19, 2004, when the Commissioner adopted the findings and determinations of the Administrative Law Judge (ALJ), and ordered that respondent be dismissed from his teaching position for unbecoming conduct.

The ALJ in the tenure case found that during the 1997/1998 school year respondent had been employed by petitioner as a social studies teacher at Nottingham High School. He had also served as the yearbook advisor and as the stage crew manager for the annual school play. A sixteen-year-old eleventh grader had served as assistant stage manager for the play. This student reported that on February 28, 1997 respondent had initiated an affair with her by asking her to accompany him to the school's audio-visual room to get extension cords, and initiating sexual contact after finding the cords. Later that evening respondent invited her into the music room, where he pulled her onto his lap and rubbed her back.

After a few more meetings the two engaged in sexual intercourse in a number of locations in the school, including the girls' locker room, respondent's classroom, the yearbook room, the audio-visual room, and a loft above the janitor's closet; one encounter occurred in the respondent's home. The student kept a diary with reflections on these events, which diary was entered into evidence as P-55 at the tenure hearing.

On one occasion in the loft above the janitor's closet, the student and respondent had sexual relations while leaning against a ladder. Testing of semen on the ladder conclusively identified respondent as the donor. In addition, the chairperson of respondent's department at the high school, who was friendly with respondent, testified that after respondent had been

suspended, he had asked this friend to go to the loft with cleaning supplies and wipe away any ejaculate that might be present. The ALJ, three counsel and an assistant principal visited the loft and found it large enough to accommodate the alleged activities.

Other school employees reported seeing respondent and the student, after hours, exiting the darkened and locked yearbook room, with respondent's undershirt hanging from under his shirt, and his belt hanging loosely. In addition, the high school principal came into possession of a spiral notebook, entered as P-72 at the tenure hearing, in which the student and some of her friends discussed her relationship with respondent.

It is undisputed that from respondent's May 5, 1997 suspension to his August 19, 2004 dismissal, petitioner paid respondent full salary and payments in lieu of benefits totaling $312,347.46. Petitioner maintains, and respondent does not contradict, that the salary petitioner paid to respondent during his suspension included salary increases.

In his answer to the petition in the present case, respondent admits that between the date of his suspension and the date of his dismissal he realized "income, salary, wages, and/or other remuneration from sources other than and in addition to the salary/or other funds paid to him by" respondent. Petitioner maintains that under *N.J.S.A.* 18A:6-14, petitioner is entitled to recoup this remuneration from respondent, up to the sum of $312,347.46. There is correspondence in the record indicating that in a telephone conference prior to November 15, 2005, the ALJ had asked the parties to submit a joint stipulation regarding the amount of salary that respondent had received for the other employment during his suspension. The same correspondence, from petitioner's counsel to the ALJ, stated that the parties were collecting the information. A subsequent letter from respondent's counsel advised the ALJ that

respondent's W-2 forms would not be forthcoming because respondent had not forwarded them to counsel.

There is no dispute that respondent was the subject of local and state criminal investigations into the same facts that underlay the tenure charges, and that he was indicted by a State grand jury on March 22, 1999, on nine counts of sexual assault, three counts of criminal sexual contact, one count of official misconduct, one count of tampering with witnesses and informants and one count of hindering apprehension or prosecution. *State v. Lewis C. Shinkle, Jr.*, State Grand Jury No. SCJ-409-99-10. It is also undisputed that the indictment was dismissed on November 6, 2000, after the State withdrew its opposition to respondent's motion to dismiss. Petitioner points out that the order dismissing the indictment was without prejudice; however, respondent maintains that a dismissal of the criminal charges with or without prejudice entitles him to indemnification. There are no details in the record about the civil litigation.

The ALJ in the present case agreed with petitioner that under *N.J.S.A.* 18A:6-14, it is entitled to deduct from salary paid to respondent -- while he was suspended -- any sums he received by way of pay or salary from any substituted employment assumed during the period of suspension. In so doing, the ALJ relied upon *Ernest E. Gilbert v. Board of Education of the Township of Willingboro, Burlington County,* 1982 *S.L.D.*, Vol. 1, p.674-686. The ALJ further determined that respondent's unexplained choice to decline disclosure of the amount of his outside earnings, created the adverse inference that the earnings equaled or exceeded the payments he received from petitioner during his suspension. (Initial Decision at 3)

As to respondent's claim for indemnification, the ALJ noted that even though the indictment against respondent had been dismissed, the tenure proceeding established that respondent engaged in sexual relations with a minor student. He opined that *dicta* in *Bower v.*

Board of Education of the City of East Orange, 149 *N.J.* 416 (1997) denotes that any proofs of wrongdoing, even findings in a tenure proceeding precipitated by the same facts upon which a criminal or civil proceeding is based, are cause for a fact-finder to deny indemnification for legal fees incurred in the defense of the criminal or civil action. He further cited *Nicholas A. Ciufi v. Board of Education of the Township of Irvington*, Docket No. EDU 7548-94, 96 *N.J.A.R.* 2d (EDU) 980 (Initial Decision), adopted by the Commissioner, May 15, 1998, for the same proposition. (*Id.* at 3-4)

Both petitioner's claim for recoupment of salary paid to the respondent during his suspension, and respondent's counterclaim for indemnification for legal fees incurred by respondent in defending against criminal charges, warrant discussion supplemental to the initial decision.

I. Recoupment of Salary Paid to Respondent During His Suspension

Nowhere in his exceptions does respondent refute petitioner's claim that *N.J.S.A.*18A:6-14 mandates petitioner's recoupment of remuneration paid to respondent during his period of suspension, up to the amount that respondent earned from employment outside of the school district. He contends only that he should not have to reimburse all of the $312,347.46 that petitioner paid him. More specifically, he argues that it was arbitrary and unreasonable for the ALJ to conclude that his failure to produce his W-2 forms created the inference that his outside earnings were at least equal to what petitioner paid him during the period of suspension. (Respondent's Exceptions at 8-9)

Respondent characterizes the situation as a "dispute of material fact between parties to a summary judgment motion" and, citing *Brill v. Guardian Life Ins. Co. of America*, 142 *N.J.* 520, 523 (1995), asserts that "the finder of fact is obliged to conduct a fact hearing in

order that the relevant facts may be found." (Respondent's Exceptions at 8) In addition, respondent maintains, citing *Ulman v. Hartford Fire Ins. Co.*, 87 *N.J. Super.* 409, 415 (App. Div. 1965), that

> [t]he production of tax returns should not be ordered unless it clearly appears that they are relevant to the subject matter of the action or to the issues raised thereunder, and further, that there is a compelling need therefore because the information contained therein is not otherwise readily obtainable.

Also, according to respondent, if the ALJ had wished to obtain respondent's tax records, he should have issued a subpoena for them. (*Id.* at 9)

The Commissioner rejects respondent's exceptions as meritless. As regards the appropriateness of requesting respondent's tax documents, the amount of respondent's "substituted" income was clearly relevant to the application of *N.J.S.A.* 18A:6-14 and was not independently ascertainable by petitioner or the ALJ. It appears that only respondent's W-2 forms were sought, and that they were the most reliable way of establishing the total outside income. Respondent's privacy was not unreasonably implicated. Further, the ALJ specifically requested the information from respondent via telephone conference, allowed the respondent ample time to produce it, and apparently received no objections about the production of the information prior to submission of his exceptions to the initial decision.

Nor does respondent's argument concerning summary judgment standards help him. To the extent that respondent contends that there is a dispute of fact, he is obliged to provide the basis for that contention. It is undisputed that he earned outside income. There is no "dispute" as to how much, because petitioner cannot access that information and respondent has refused to provide it. Petitioner has sustained its burden to show that there is substitute income to recoup, and that the salary paid to respondent during the period of suspension was

Further, the failure to produce records warrants the inference that they are unfavorable to respondent's position. *Wild v. Roman*, 91 *N.J. Super* 410 (App. Div. 1966); *Hickman v. Pace*, 82 *N.J. Super* 483 (App. Div. 1964). The prerogative to draw such an inference is not limited to a jury; the trier of fact in a non-jury case may also do so. *Robinson v. Equitable Life Assur. Soc. of United States*, 126 *N.J. Eq.* 242 (E. & A. 1939); *Series Publishers v. Greene*, 9 *N.J. Super* 166 (App. Div. 1950). More generally, a [party] is not entitled to benefit from a strategic decision to withhold evidence. *See, e.g., State v. Drisco*, 355 *N.J. Super.* 283, 290-91, (App. Div. 2002), *certif. denied*, 178 *N.J.* 252 (2003).

Accordingly, it was entirely reasonable for the ALJ to conclude that petitioner was entitled to recoup the entirety of what it paid respondent during the period of suspension. Because the Commissioner adopts the ALJ's conclusion that petitioner is entitled to recoup the full amount that it paid respondent, the issues of recoupment of increments and recoupment of remuneration paid to respondent while he was under indictment are moot.

II. Indemnification for Legal Fees.

In his exceptions, respondent challenges the ALJ's determination that respondent is not entitled to indemnification for the expenses of defending criminal charges and a civil suit. He does not dispute that the controversy turns on an analysis of *N.J.S.A.*18A:16-6 and *N.J.S.A.* 18A:16-6.1, and related case law, but disagrees with the ALJ's application of that law to the facts of this case.

N.J.S.A. 18A:16-6 states in pertinent part:

> **Indemnity of officers and employees against civil actions**
>
> 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 . . . , for any act or omission arising out of and

> in the course of the performance of the duties of such office, position, employment . . . , 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 . . . . (Emphasis added.)

Similarly, *N.J.S.A.* 18A:16-6.1 states in pertinent part:

> **Indemnity of officers and employees in certain criminal actions**
>
> 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. (Emphasis added.)

Although *N.J.S.A.* 18A:16-6.1 does not expressly refer to acts and omissions arising out of and in the course of the performance of the duties of [a school employee's] office, position or employment, the phrase "any such act or omission" is interpreted to refer back to the above underlined language set forth in *N.J.S.A.* 18A:16-6. In other words, respondent may not be indemnified for his criminal defense expenses unless the criminal charges related to acts or omissions arising out of and during the course of the performance of his duties. *See, e.g., Scirrotto v. Warren Hills Bd. of Educ.*, 272 *N.J. Super.* 391 (App. Div. 1994).

In his exceptions, respondent contends that the ALJ erred in finding that his actions did not arise from the performance of his duties. He argues that the charges "arose in the course of respondent's employment and within the period of time and at the place where he was an employee of the board of education, where he was expected to be fulfilling his duties and responsibilities." (Respondent's Exceptions at 1-2)

Respondent maintains that the criminal charges were dismissed for lack of evidence, that there is consequently no evidence in the criminal record of any conduct other than

respondent's presence in the school and performance of his lawful duties, and that petitioner is therefore obliged to indemnify him for his criminal defense. Addressing *dictum* from *Bower v. Board of Educ. of the City of East Orange,* 149 *N.J.* 416, 43 1-33 (1997) -- upon which the ALJ relied to conclude that fact-finding from a tenure hearing can be used to bar an employee's claim for indemnification of criminal defense expenses -- respondent argues that since there was no evidence of wrongdoing in the criminal proceeding, he should be indemnified regardless of the existence of proofs of his wrongdoing brought to light in other proceedings. (*Ibid.)*

Respondent concedes that there is precedent for adverse fact findings in administrative proceedings, such as tenure hearings, to serve as bars to indemnification of defense expenses in related criminal matters. However, he urges that the order of disposition of criminal and administrative proceedings arising from the same conduct can be determinative of whether fact-finding in the administrative proceeding can be used to defeat an indemnification claim for defense costs in the criminal action. Thus, respondent distinguishes *Ciufi v. Board of Education of the Township of Irvington, supra,* in which the Commissioner found that fact-finding in a tenure hearing precluded indemnification of defense expenses that the respondent in that case incurred during a criminal trial based on the same conduct that was addressed in the tenure proceeding. Respondent suggests that the administrative fact-finding in *Ciufi* could defeat the respondent's claim because the tenure hearing in that case preceded the criminal proceeding, but that the administrative fact-finding in this case may not defeat respondent's indemnification claim because the tenure hearing succeeded the criminal proceeding. (*Id.* at 3)

*N.J.S.A.*18A:16-6.1 and related case law articulate two conditions that a school employee seeking indemnification must satisfy. First, the charges against the employee must be dismissed or otherwise result in a favorable disposition. Second, and additionally, the charges

must be triggered by acts or omissions arising out of and in the course of the performance of the employee's duties.

In its reply exceptions, petitioner argues that the first condition is not satisfied by respondent's dismissal without prejudice. *Ciufi v. Board of Education of the Township of Irvington, supra,* is instructive in this regard. In that case, in which the Commissioner adopted both the ALJ's findings of fact and his conclusions of law, the ALJ discussed the significance of a "dismissal without prejudice" of an indictment:

> Since a second grand jury is free to return a new indictment, the Board argues that Ciufi has not been "determined innocent, or exonerated" of the criminal charge made against him.
>
> . . . .
>
> [However,] currently there are no charges pending against Ciufi.
>
> . . . .
>
> Often the failure to obtain an indictment is a reflection of the weakness of the State's case. In a somewhat different context, the Appellate Division held that an administrative dismissal of a criminal complaint constitutes "a favorable termination of a criminal proceeding for purposes of a malicious prosecution action." *Rubin v. Nowak*, 248 *N.J. Super.* 80, 84 (App. Div. 1991). Speaking in terms of "a presumption of favorable termination," the court found nothing in the [criminal] record to suggest that the prosecutor acted for any reason other than a careful determination of plaintiff's innocence.
>
> *Ciufi, supra,* at 5-6.

Considering the foregoing, the Commissioner is reluctant to find that a dismissal without prejudice cannot be regarded as a favorable disposition. However, this issue need not be reached, because the Commissioner agrees with the ALJ and petitioner that the facts of this case do not satisfy the second condition precedent to indemnification for respondent's costs of defending against criminal charges and a civil lawsuit. More specifically, respondent has failed

to show that the conduct which precipitated the criminal and civil proceedings arose from the duties of his employment.

Much of the conduct that precipitated the criminal and tenure charges may have taken place on the school premises, and some of it may have taken place within normal school hours, or during hours that were supposed to be devoted to school-sponsored clubs and organizations for which respondent served as advisor or manager. That does not, however, qualify the conduct as the performance of the duties of respondent's employment and, consequently, does not qualify the criminal action against respondent as an action brought "for any act or omission arising out of or in the course of the performance of the duties of" his employment. Clearly, engaging in sexual relations with a minor cannot be characterized as conduct related to respondent's teaching duties. Respondent's behavior was not a reaction to a pedagogical event or situation; was driven purely by personal motives unrelated to his job; and, in fact, was antithetical to the goals of education.

Further, as regards indemnification claims, there is school law precedent that conduct that has been substantiated as unbecoming in a tenure hearing does not qualify as conduct which arises out of a school employee's duties, for purposes of the indemnification statute. In *Bower v. Board of Educ. of the City of East Orange, supra,* the Supreme Court stated: "Had the local board seen fit to institute [] dismissal proceedings, we assume that any evidence adduced at the hearing addressing those charges would have been material to the proceeding instituted by Bower for indemnification of his legal expenses [defending criminal charges that were dismissed]." *Bower, supra,* at 433.

Subsequent to *Bower*, in *Ciufi, supra*, the Commissioner adopted the ALJ's determination that that case presented the precise situation alluded to in the *Bower dictum* set

forth above. In *Ciufi,* the Irvington Board filed tenure charges and, after a trial-type hearing, including full opportunity for discovery, cross-examination and subpoena of witnesses, the Commissioner made findings that Ciufi sexually assaulted a student. A criminal proceeding precipitated by the same conduct that triggered the tenure hearing was eventually dismissed. Ciufi brought a subsequent proceeding to obtain indemnification. In this latter proceeding the ALJ concluded (and the Commissioner concurred) that "to sustain the tenure charges, the Commissioner must necessarily have determined that Ciufi's improper conduct occurred outside the regular course of his teaching duties." *Ciufi, supra*, at 6. Thus,

> [i]t would clearly be incongruous for the Commissioner to uphold the board's dismissal of Ciufi for unbecoming conduct, while ordering the board to pay his counsel fees for defense of criminal charges arising out of the same transaction. Rather, as the Supreme Court anticipated, the evidence adduced at the tenure hearing must be regarded as "material" to the indemnification proceeding. *Bower*, at 433. Accordingly, the Commissioner's prior determination that Ciufi committed a sexual assault against his student is binding on the parties and dispositive of Ciufi's claim for indemnification of counsel fees.
>
> *Ciufi, supra,* at 7. [1]

For purposes of an indemnification determination, there is no significant difference between *Ciufi, Yatauro,* and the present case. The Commissioner found in the tenure proceeding that respondent had sexual relations with his student, a minor. This is clearly not in his job description. It is irrelevant that the disposition of the tenure matter came after the dismissal of the criminal charges; the Commissioner is now asked to order indemnification, in a case where it has been established that respondent was acting outside the duties of his

[1] In *Board of Education of the Township of Lacey v. Brian Yatauro,* EDU 00793-99, the ALJ similarly determined, and the Commissioner concurred, that "where a tenured employee seeks to recover salary which was withheld after an indictment from which the employee has obtained a favorable disposition, but where the employee has subsequently been proven in a tenure proceeding to have committed the same misconduct which was the essential subject of the criminal charges, the employee may not recover salary withheld during the pendency of the indictment."

employment. To grant respondent's counterclaim would be to contravene statutory and common law, and defy common sense.

Accordingly, the Initial Decision of the OAL, as supplemented herein, is adopted as the final decision in this matter. Respondent's counter-claim is dismissed and respondent is ordered to pay petitioner $312,347.46 as reimbursement for salary and payments in lieu of benefits that petitioner paid him during his period of suspension from employment.

IT IS SO ORDERED.[2]

ACTING COMMISSIONER OF EDUCATION

Date of Decision: 2/9/06

Date of Mailing: 2/9/06

[2] This decision may be appealed to the State Board of Education pursuant to *N.J.S.A.* 18A:6-27 *et seq.* and *N.J.A.C.*6A:4-1.1 *et seq.*

State of New Jersey
OFFICE OF ADMINISTRATIVE LAW

INITIAL DECISION

OAL DKT. NO. EDU 213-05

AGENCY DKT. NO. 436-12/04

HAMILTON TOWNSHIP
BOARD OF EDUCATION,
MERCER COUNTY,

Petitioner,

v.

LEWIS C. SHINKLE JR.,

Respondent.

Michael R. Paglione, Esq. and **Christopher S. Tretola**, Esq., for the petitioner (Paglione & Massi, attorneys)

Arnold M. Mellk, Esq., for the respondent (Wills, O'Neill & Mellk, attorneys)

Record Closed: December 1, 2005 Decided: December 7, 2005

BEFORE **SOLOMON A. METZGER**, ALJ:

This matter arises out of a petition filed by the Hamilton Township Board of Education with the Commissioner of Education, pursuant to *N.J.S.A.* 18A:6-9, seeking to recover salary and benefits paid respondent while he was suspended pending resolution of tenure charges. Respondent has filed a counterclaim seeking indemnification for expenses incurred while defending against a civil suit and criminal indictments that were dismissed. The matter was transmitted to the Office of Administrative Law as a contested case, pursuant to *N.J.S.A.* 52:14B-

1 to -15. The parties have filed cross-motions for summary decision, pursuant to *N.J.A.C.* 1:1-12.5; *Brill v. Guardian Life Ins. Co.*, 142 *N.J.* 520 (1995).

The background facts are undisputed. On May 5, 1997 respondent was suspended from his teaching position based on allegations of sexual misconduct with a student. Tenure charges were filed on November 25, 1997 and the administrative process was postponed to await the results of criminal proceedings. A Mercer County Grand Jury failed to indict respondent, but thereafter a State Grand Jury returned a 15 count indictment in March 1999. This indictment was dismissed without prejudice in November 2000. Proceedings in the OAL commenced in November 2003 and the tenure charges were sustained in an initial decision issued in July 2004. These findings were adopted by the Commissioner in August 2004, at which time the District stopped paying respondent. Subsequently, the State Board of Education affirmed the decision of the Commissioner and it is my understanding from the motion papers that an appeal is pending in the Superior Court, Appellate Division. From suspension to removal respondent received salary and payments in lieu of benefits from the District in the amount of $312,347.46[1].

N.J.S.A. 18A:6-14 makes no general provision for the recovery of salary paid to a suspended teacher when tenure charges are proven. The District was thus put to trying to recover portions of the money paid respondent under various other theories. The Board is aware that respondent earned money from other employment while suspended and believes that N.J.S.A. 18A:6-14 requires such amounts to be set off against money it paid him. The District maintains also that it is entitled to recover increments paid respondent during his suspension and any salary he received while under indictment.

After reviewing the motion papers, which were filed during the summer of 2005, it appeared that the issues had been addressed abstractly and that the process would be better served if the financial data appropriate to each of the categories of recovery sought were provided. A decision without the data might encourage an additional round of litigation about the numbers. I contacted counsel and both agreed to pursue this information. A few months time was given for this purpose and petitioner sought respondent's tax returns. By letter of November

[1] The Board's brief mentions a slightly lower figure of $307,453; the later and higher number is accompanied by supporting financial data. There has been no dispute concerning this figure.

28, 2005, counsel for respondent informed me that he has "...not received from Mr. Shinkle the subject W-2 forms. Accordingly, we will not be submitting the same on his behalf". Petitioner responds that in that case it is entitled to the inference that respondent's earnings were at least equal to the monies it paid him. This is the substance of the record.

N.J.S.A. 18A:6-14 plainly expects the District to set-off income from substituted employment against salary. I have seen no judicial precedents on point, but the administrative decisions in the area consistently approve such recaptures, see, e.g. *Willingboro et al. v. Gilbert*, 3 N.J.A.R. 206 (1982). Respondent made no legal argument to the contrary. Moreover, by choosing to withhold records quantifying his outside earnings, respondent makes setoff calculations impossible. He has not explained the decision, nor argued that the information is not discoverable. Respondent is ably represented by experienced counsel and this is undoubtedly a considered stance that, for whatever reason, is willing to suffer an adverse inference concerning the scope of outside earnings. I therefore find that respondent is obligated to full restitution of all payments received during his suspension.

Petitioner's other arguments need not be pursued at any length. Nonetheless, I agree that increments are a reward for sound performance and need not be given where, as here there was no performance, see, *Bd. Of Ed. Bernards Tp. V. Bernards Tp. Ed. Assn.*, 79 N.J. 311, 321, (1979); *In re Castaldo*, 1986 SLD 3026, 3030. Additionally, employees suspended by reason of indictment need not be paid pending those proceedings, see, N.J.S.A. 18A:6-8.3; *Romanowski v. Bd. of Ed. of Jersey City,* 89 N.J. Super 38 (App. Div. 1965); *Lacey Tp. Bd. of Ed. V. Yatauro*, EDU 00793-99; *Bd. of Ed, City of Camden v. Hovington*, EDU 6675-97. It follows that increments and salary paid under these circumstances are subject to recovery.

Respondent's motion for indemnification is without merit. Employees who must defend against charges for acts or omissions arising from the performance of their duties are entitled to indemnification, *N.J.S.A.* 18A:16-6 and 18A:16-6.1. In *Bower v. Bd. Of Educ. Of East Orange*, 149 N.J. 416 (1997), the New Jersey Supreme Court analyzed these statutory sections in the context of a teacher against whom indictments on charges of sexual misconduct were dismissed, but which were not thereafter followed by tenure proceedings. In a 4-3 decision the Justices analyzed refined burden shifting questions and the majority held for restitution because the

teacher was under no obligation to establish his innocence once indictments were dismissed. The issue here is crucially different. Fact finding has determined that respondent had sexual relations on multiple occasions with a minor student. It is plain in the *Bower dicta* that any actual proofs of wrongdoing would have turned the majority decidedly against indemnification, *Bower*, at 433; see also, *Ciufi v. Bd. of Ed. of Township of Irvington,* EDU 7548-94, Initial Decision, March 30, 1998, adopted by Commissioner, May 15, 1998, http://www.rutgers.edu/oal.

Based on the foregoing, I conclude that the district is entitled to recoup $312,347.46, the sum of its payments to respondent, and that respondent is not entitled to indemnification. It is so ordered.

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

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

Within thirteen (13) days from the date on which this recommended decision was mailed to the parties, any party may file written exceptions with the **COMMISSIONER OF THE DEPARTMENT OF EDUCATION, 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.

12/7/05
DATE

SOLOMON A. METZGER, ALJ

E-mail Receipt of Initial Decision Confirmed by the Department of Education on:

12/7/05
DATE

Mailed to Parties:

DEC 13 2005
DATE

CHIEF ADMINISTRATIVE LAW JUDGE

OFFICE OF ADMINISTRATIVE LAW

/cad

WITNESSES

For the Petitioner:

None

For the Respondent:

None

EXHIBITS

For the Petitioner:

None

For the Respondent:

None

63-06

RANDALL MC CANN,

PETITIONER,

V. : COMMISSIONER OF EDUCATION

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

RESPONDENT.

SYNOPSIS

Following an incident in July 2003 in which petitioner entered and used a boy's bathroom at South Plainfield High School – allegedly before a female employee of a summer camp program could finish cleaning the lavatory – respondent imposed a requirement on the petitioner that if a school facility does not have a sign in/out procedure, he must notify a school administrator when he is on school premises. Petitioner – a South Plainfield parent – seeks monetary damages, attorney fees, and reversal of respondent's determination.

The ALJ determined, *inter alia*, that: petitioner's conduct was disrespectful and demonstrated bad judgment; petitioner failed to appreciate that his actions were inappropriate; petitioner did not meet his burden of proof to show that the actions of respondent were unlawful, arbitrary, capricious or unreasonable; respondent acted in a reasonable way in imposing a minor restriction on petitioner; and respondent was within its authority to impose such a restriction given its responsibility to maintain order, ensure the safety of its students and regulate its property. The ALJ ordered that the petition be dismissed, and affirmed the actions of the respondent Board.

The Commissioner concurs with the ALJ. The Commissioner also notes that there is no authority under the school laws for grants of the type of money damages and attorney fees that the petitioner seeks. Accordingly, the Initial Decision of the OAL is adopted as the final decision in this matter, and the petition is 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.

OAL DKT. NO. EDU 8243-04
AGENCY DKT. NO. 226-6/04

RANDALL MC CANN,	:	
PETITIONER,	:	
V.	:	COMMISSIONER OF EDUCATION
BOARD OF EDUCATION OF THE BOROUGH OF SOUTH PLAINFIELD, MIDDLESEX COUNTY,	:	DECISION
RESPONDENT.	:	

The Commissioner has reviewed the record of this matter and the Initial Decision of the Office of Administrative Law (OAL). Neither party submitted exceptions.

This controversy was precipitated by an incident that took place in South Plainfield High School on July 11, 2003. It is undisputed that during the summer of 2003, two groups were using the high school facility. The South Plainfield Recreation Department was running a sports camp, for which Tammy Zurka – a high school teacher and coach – served as director; a community theater group was using the high school stage and auditorium to present a play. The theater group's producer had hired petitioner, who lives in South Plainfield and has two children in respondent's schools, to build a set for the play.

It is further undisputed that in the morning of July 11, 2003, petitioner was working on the high school stage and Zurka was supervising the sports camp. After two boys told her that some campers had made a mess in the boys' bathroom, she entered the empty bathroom to tend to the mess. She testified that she left two boys outside the room to warn her if anyone came to use the facilities.

The boys apparently failed to follow those instructions, because petitioner entered the room while Zurka was still cleaning up. The respective parties' accounts of what happened in the bathroom diverge. At the OAL hearing Zurka testified that she had told petitioner that she was the camp director cleaning up after her charges, would be finished in a minute, and asked petitioner to wait. Instead of waiting, petitioner told her that he had to use the bathroom right away, and proceeded to unzip his fly. She hastened to leave, but heard petitioner urinating before she reached the door. Petitioner's testimony at the hearing was that Zurka did not identify herself,[1] that he had not unzipped his fly within Zurka's range of vision, and that Zurka had exited the room before he started urinating.

There appears to be no dispute that the incident occurred shortly before the close of camp hours, that Zurka supervised the pick-up of the campers by their parents, and that she subsequently reported the incident to the then assistant principal of the high school, Kenneth May. May was apparently unaware of petitioner's presence in the building, identity, or purpose in being on the premises. Fearing that there was a stranger on school grounds who had behaved inappropriately toward staff and whose presence could be detrimental to students, May notified the district superintendent, Dr. Rosado, and the police, and went to look for the individual, accompanied by Zurka.

They found petitioner working on the stage. While there was conflicting testimony about what May said to petitioner, it is undisputed that petitioner acknowledged that it was he who entered the boys' bathroom while Zurka was there. May testified that petitioner's response to questioning about the bathroom incident was: "When you got to go, you got to go." May ordered petitioner to gather his things and leave the auditorium.

---

[1] At the OAL hearing petitioner's counsel stated that petitioner has a 60% hearing loss in both ears.

Rosado and the police arrived at about the same time. The police interviewed Zurka and petitioner. McCann conceded at the hearing that he told the police that 'even if Zurka's account of the incident had been true, what was the big deal.' The police conveyed petitioner's attitude to Rosado and May. Because of the attitude petitioner displayed, May recommended to Rosado that petitioner not be allowed to continue working on the school premises. Rosado agreed, relying on paragraph F of the district's policy about visitors:

> F. Any visitor to the school whose presence or conduct is disruptive, or whose behavior, past or present suggests that he/she intends or is likely to become disruptive, may be requested to leave the school premises. If the visitor so addressed does not withdraw, the superintendent may summon assistance from the local law enforcement agency.

Since that time, petitioner has been required to sign in and out of any school building that he enters (this is not required if he is just dropping off or picking up his children outside the facility), and advise a school administrator of his presence if there is no mechanism for signing in and out. The requirement to sign in and out is applicable to all parents or other persons who are not employees of the South Plainfield Board of Education, pursuant to paragraph B of the district's policy:

> B. Upon their arrival at school, visitors must register at the main office where they will receive instructions, permission, and/or a pass.

Rosado testified that if petitioner were willing to acknowledge the inappropriateness of his July 11, 2003 behavior, he was willing to rescind the requirement that in the absence of sign-in procedures petitioner advise an administrator of his presence in a school facility. However, petitioner was apparently not willing to so acknowledge.

Instead of filing a standard appeal with the Commissioner, petitioner submitted papers that he had previously filed in Superior Court. Among those papers was a notice of motion requesting an order:

> 1. Allowing [petitioner] to participate in school activities.
> 2. Allowing [petitioner] to enter South Plainfield schools without having to sign in and out.
> 3. Compelling [respondent] to treat [petitioner] as they would any parent of any child in the school system.

The Administrative Law Judge (ALJ) correctly found that, in view of section B. of respondent's visitor policy (set forth above), petitioner was not being treated differently from other parents by having to sign in and out when entering school facilities. The ALJ also found, and the Commissioner agrees, that there was no evidence at the hearing that would support a claim that petitioner had been prevented from participating in school activities relating to his children. Consequently, the ALJ correctly concluded that:

> The only action taken by Respondent that puts a requirement on petitioner that does not apply to other parents is the following: If petitioner is entering a school building and that building does not have a sign in/out procedure in place, then Petitioner must notify a school administrator that he is on the premises. Such a situation would typically occur after hours when the staff at the main office (where signing in and out occurs) has left for the day. That requirement is the issue in this case; namely, whether the Board acted arbitrary [sic] and capricious [sic] in imposing this requirement on Petitioner.

In articulating the facts of this case, the ALJ found that Zurka was a very credible witness, and her testimony was harmonious with other evidence offered at the OAL hearing. By way of contrast, petitioner was arrogant, and his testimony was often vague and inconsistent. The Commissioner cannot find differently. The ALJ's determinations about credibility must be given deference. *S.D. v. Div. Med. Assistance and Health Services,* 349 *N.J. Super.* 480, 485

(App. Div. 2002) (Credibility findings of an ALJ concerning a lay witness may not be modified or rejected unless it is explained why they are arbitrary and capricious or unsupported in the record). Having reviewed the hearing transcript and accompanying exhibits, the Commissioner finds no reason not to adopt the ALJ's credibility determinations.

The Commissioner further adopts the ALJ's findings that the petitioner did disrespect Zurka by unzipping his trousers within a few feet of her, and urinating before she left the room. Not only was Zurka credible, but there was also no indication in the record that the petitioner, at the time he was interviewed by the police, had denied that the incident – as described by Zurka – had occurred. And the Commissioner adopts the ALJ's finding that at the hearing in this matter, the petitioner still did not appreciate that his actions as alleged by Zurka, if true, would reasonably cause "Zurka or any other woman to be upset."

Based upon his findings that petitioner did conduct himself on July 11, 2003, in the manner described by Zurka – and that petitioner continued to show bad judgment in not appreciating how disrespectful and offensive his actions were – the ALJ concluded that petitioner, who has the burden of proving that respondent's actions were arbitrary or capricious in imposing the "minor" restriction of notifying administrators of his presence when no sign-in procedure is available, had not met that burden. The ALJ further expressed regret that a teacher, principal and superintendent had to miss most of the first day of school to respond to a frivolous case, which could have been resolved by a simple apology by petitioner.

The Commissioner agrees. Where board or administrative actions are challenged, the challenger bears the burden of proving that such actions were unlawful, arbitrary, capricious or unreasonable. *Shuster v. Board of Education of Montgomery Tp.*, 96 *N.J.A.R.* 2d (EDU) 670, 676. In other words, actions of local boards [of education] which lie within the area of their

discretionary powers may not be upset unless patently without rational basis or induced by improper motives. *Kopera v. Bd. of Educ. of West Orange*, 60 *N.J. Super.* 288, 294 (App. Div. 1960).

Regulation of visitors to school property is clearly action which lies within respondent's discretionary powers. *N.J.S.A.* 18A:20-20. There is nothing in the record to suggest that respondent – through its representatives Rosado and May – had any improper motives for imposing the reporting restrictions upon petitioner, and the Commissioner cannot say that it was irrational to ask petitioner – who has continued to show bad judgment in evaluating his conduct – to advise school administrators when he is on school premises.

Accordingly, the Commissioner adopts the Initial Decision dismissing the petition.[2]

IT IS SO ORDERED.[3]

ACTING COMMISSIONER OF EDUCATION

Date of Decision: 2/10/06

Date of Mailing: 2/10/06

[2] In the complaint that petitioner filed in New Jersey Superior Court and submitted to the Commissioner in lieu of the standard petition of appeal, petitioner asked for monetary damages and attorney fees. The Commissioner cannot grant monetary damages, absent specific statutory authority. *Spivak v. Clark,* 97 *N.J.A.R.* 2d (EDU) 270.; *Balsley v. North Hunterdon Board of Education,* 117 *N.J.* 434, 442-43 (1990); *Board of Education of the Township of Livingston v. E.J.B. and J.H.B.*, 96 *N.J.A.R.* 2d (EDU) 536. Petitioner has cited no authority, nor is there any, that allows the Commissioner to award the type of damages petitioner seeks.

[3] This decision may be appealed to the State Board of Education pursuant to *N.J.S.A.* 18A:6-27 *et seq.* and *N.J.A.C.* 6A:4-1.1 *et seq.*

State of New Jersey
OFFICE OF ADMINISTRATIVE LAW

INITIAL DECISION

OAL DKT. NO. EDU 8243-04

AGENCY DKT. NO. 226-6/04

RANDALL MC CANN,

Petitioner,

v.

BOARD OF EDUCATION OF THE BOROUGH OF SOUTH PLAINFIELD, MIDDLESEX COUNTY AND KENNETH MAY,

Respondents.

Barbara Einhorn, Esq., for petitioner

Marc H. Zitomer, Esq., for respondent (Schwartz, Simon, Edelstein, Celso & Kessler, attorneys)

Record Closed: October 27, 2005 Decided: November 9, 2005

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

STATEMENT OF THE CASE AND PROCEDURAL HISTORY

Based upon Petitioner's conduct on July 11, 2003, Respondent determined when entering a school facility Petitioner would have to (1) sign in and out of the facility if the facility had such a procedure and (2) if no such procedure existed, Petitioner had to notify an administrator of the facility that he was on the premises. The first restriction applies to all parents and visitors to

school facilities, but the second restriction was imposed on Petitioner due to his conduct on July 11, 2003.

On June 20, 2004, Petitioner appealed and requested that he be treated like all other parents. On August 9, 2004, Respondent provided an Answer to the appeal. The matter was transmitted to the Office of Administrative Law, where it was filed on September 27, 2004. A hearing was held on September 7, 2005. Respondent submitted a post-hearing brief on October 27, 2005. Petitioner has not submitted a post-hearing brief, even though many phone calls were placed and messages were left with Petitioner's counsel's office requesting the brief. No response by phone or in writing was provided by counsel for Petitioner. Accordingly, the record closed on October 27, 2005, the date of Respondent's post-hearing brief.

FINDINGS OF FACT

The Petitioner's complaint filed with the Department seeks to allow him "to participate in all school activities . . . and to enter the school without having to sign in and out". Petitioner also requests that he be "treated as any other parent would be". The evidence presented at the hearing resulted in a clarification of the issue before me. The only action taken by Respondent that puts a requirement on Petitioner that does not apply to other parents is the following: If Petitioner is entering a school building and that building does not have a sign in/out procedure in place, then Petitioner must notify a school administrator that he is on the premises. Such a situation would typically occur after hours when the staff at the main office (where signing in and out occurs) has left for the day. That requirement is the issue in this case; namely, whether the Board acted arbitrary and capricious in imposing this requirement on Petitioner.

Based on the testimony and evidence provided at the hearing, I find the following facts:

In July 2003, Petitioner was employed by a summer theater workshop program, a non-profit community program that is not affiliated with the Board, but simply uses school property. On July 11, 2003, he was working at the South Plainfield high school with this program to help design and construct a theater set. Petitioner has two children that are students with the district, but at the time were not of high school age.

Tammy Zurka, on July 11, 2003, was also at the high school. She is a teacher for the District and that summer she was working as a camp director for a youth basketball camp run by the South Plainfield Recreation Department. At the time of the incident, Zurka had never seen Petitioner before. On July 11, 2003, she was cleaning a boys' bathroom in the high school because two of the children at the camp reported to her that it was a mess. Zurka went to the bathroom and started cleaning it. There was nobody in the bathroom at the time. Then, Petitioner walked in to the bathroom. Zurka immediately told Petitioner she was the Camp Director, that she was cleaning up the bathroom and that she would be done in a minute or two. Petitioner responded that he "really had to go". Zurka repeated that she would just be a minute and asked Petitioner to leave. Petitioner refused to leave or wait.

Petitioner proceeded to the toilet and, just after taking a few steps past Zurka, he began unzipping his pants. At this time, Petitioner was only a few feet away from Zurka. Zurka felt violated by Petitioner's actions and immediately proceeded to leave the bathroom. Prior to her actually leaving, Petitioner began urinating.

After the basketball camp concluded for the day, Zurka went and located Kenneth May, then Assistant Principal, and reported the incident to him. May became concerned after hearing Zurka's report because he did not recognize the description of Petitioner and thought a stranger was in the building. He therefore called the police and Dr. Rosado, the Superintendent. May and Zurka then went through the building to find Petitioner. He was located in the auditorium working on the set. Two police officers arrived and took a statement from Petitioner. The Petitioner told the police that even if Zurka's account of what happened was true, that there is no crime for unzipping your fly near a woman. According to Rosado, the police told him that Petitioner clearly did not appreciate the gravity of his actions. The police report notes Petitioner's "lack of judgment".

Based on this incident, Rosado imposed a requirement on Petitioner that if a school facility does not have a sign in/out procedure (because it is after hours or for any other reason), then Petitioner must notify a school administrator he is on the premises. Rosado imposed this requirement because of Petitioner's blatant disregard of Zurka's request to wait until she left the

bathroom before he urinated, his complete lack of judgment and respect and because of what the police officers relayed to him about Petitioner's lack of judgment. This policy still remains in effect. Rosado testified that he would have revoked this policy if Petitioner simply would have apologized and appreciated that what he did was wrong.

Petitioner denied that he did in fact unzip his pants in front or near Zurka. He testified that she had left the bathroom when he unzipped his fly. He, however, did not say that he heard the door shut prior to unzipping his pants and urinating.

Determining credibility can be tricky, however, in this case it was very easy. Simply put, Petitioner had no credibility and Zurka was completely credible. Zurka was detailed, genuine, and straightforward in her testimony. Her testimony was consistent with the other evidence presented at the hearing. She was simply doing her job when this happened and I do believe this incident upset her very much. Petitioner, on the other hand, was arrogant, hesitant and inconsistent in his testimony. There is no credible evidence that he even denied this incident took place when questioned by police. Moreover, although he testified that he didn't unzip his pants until after Zurka left the bathroom, he said he unzipped his pants without hearing the door shut. Most amazingly, Petitioner testified that even if he did unzip his pants near Zurka that it is not a big deal since he didn't expose himself and it is not a crime. It is troubling that Petitioner doesn't appreciate that his actions would cause Zurka or any other woman to be upset.

The testimony and documents also established that all parents and visitors to school buildings with sign in and sign out procedures, must in fact sign in and out when entering and leaving a school building. Petitioner must do this like all parents and visitors. Furthermore, Petitioner has not been denied the opportunity to participate in any school activities. The only claim on this issue is that Petitioner was denied the opportunity to be Santa Claus for a school fundraiser. This claim simply had no evidence supporting it. First, there was no evidence that the fundraiser was a school sanctioned activity. Second, there was no evidence that any school official took action that led to Petitioner not being able to be Santa Claus. Finally, Petitioner, as all parents, is not required to sign in/out or notify a school administrator when he is simply dropping off his child at school and not entering a school building.

CONCLUSIONS OF LAW

Petitioner has the burden of proving that the actions of Respondent were unlawful, arbitrary, capricious or unreasonable. Petitioner does not come close to meeting his burden. Rather, the evidence demonstrates that Respondent acted completely reasonable in imposing a minor restriction on Petition. In addition, Respondent clearly was within its authority to impose such a restriction given its responsibility to maintain order, ensure the safety of its students and regulate its property.

Respondent's actions were reasonable in light of Petitioner's actions in (1) disregarding Zurka's requests to wait a minute for her to leave the bathroom; (2) unzipping his pants while standing only a few feet away from Zurka; (3) beginning to urinate before Zurka could leave the bathroom; and (4) not appreciating that his actions were completely inappropriate. Given this conduct, Dr. Rosado's determination to require Petitioner to notify a school administrator when he is present at a school building (where there is no sign in/out procedure), is completely reasonable.

It is unfortunate, to say the least, that such a frivolous case had to cause the Superintendent, a Principal and a teacher to miss a large part of the first day of school. This is especially true, given that the Respondent would have lifted this restriction if Petitioner simply apologized for his conduct.

ORDER

Based on the foregoing, it is hereby **ORDERED** that Petitioner's petition be **DISMISSED** and that the actions of Respondent be **AFFIRMED**.

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

This recommended decision may be adopted, modified or rejected by the **COMMISSIONER OF THE DEPARTMENT OF EDUCATION,** who by law is authorized

to make a final decision in this matter. If the Commissioner of the Department of Education does not adopt, modify or reject this decision within forty-five (45) days and unless such time limit is otherwise extended, this recommended decision shall become a final decision in accordance with *N.J.S.A.* 52:14B-10.

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

November 9, 2005

DATE

DOUGLAS H. HURD, ALJ

E-mail Receipt of Initial Decision Confirmed by the Department of Education on:

DATE

Mailed to Parties:

NOV 17 2005

DATE

OFFICE OF ADMINISTRATIVE LAW

/lam

EVIDENCE

For Petitioner:

P-1 Diagram of Bathroom

P-2 Letter from Board Attorney, dated July 25, 2003

P-3 Letter from Board Attorney, dated August 21, 2003

P-4 Operation Report

P-5 Certification of Zurka

P-6 Letter from Petitioner's Attorney, dated July 17, 2003

For Respondent:

R-1 Diagram of Building

R-2 Board Policy

WITNESSES

For Petitioner:

Randall McCann, Petitioner

Gerard Appel

For Respondent:

Tammy Zurka, Teacher

Dr. Kenneth May, Principal

Robert Rosado, Superintendent

#65-06

65-06

OAL DKT. NO. EDU 3359-04
AGENCY DKT. NO. 7-1/04

SAL PAUCIELLO,	:	
PETITIONER,	:	
V.	:	COMMISSIONER OF EDUCATION
BOARD OF EDUCATION OF THE CITY OF EAST ORANGE, ESSEX COUNTY,	:	DECISION
RESPONDENT.	:	
	:	

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

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

IT IS SO ORDERED.

ACTING COMMISSIONER OF EDUCATION

Date of Decision: 2/16/06

Date of Mailing: 2/16/06

State of New Jersey
OFFICE OF ADMINISTRATIVE LAW

INITIAL DECISION

SETTLEMENT

OAL DKT. NO. EDU 3359-04

AGENCY DKT. NO. 7-1/04

SAL PAUCIELLO,

Petitioner,

v.

BOARD OF EDUCATION OF THE CITY OF EAST ORANGE, ESSEX COUNTY,

Respondent.

Timothy R. Smith, Esq., for petitioner
(Timothy R. Smith and Associates, LLC, attorneys)

Marc H. Zitomer, Esq., for respondent
(Schartz, Simon, Edelstein, Celso & Kessler, attorneys)

Record Closed: January 25, 2006 Decided: January 27, 2006

BEFORE **ELINOR R. REINER**, ALJ:

On or about January 8, 2004, Sal Pauciello, filed a petition of appeal with the Commissioner of Education, alleging that respondent failed to reimburse his attorneys for reasonable fees associated with the legal defense of a criminal action which resulted in a final disposition in his favor. On or about February 9, 2004, respondent

filed its answer denying certain of the allegations and requesting dismissal of the petition. On March 24, 2004, the Department of Education, Bureau of Controversies and Disputes, transmitted this matter to the Office of Administrative Law (OAL) 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.

On April 19, 2004, the matter was assigned to Administrative Law Judge Margaret Hayden who scheduled a telephone prehearing conference for July 20, 2004 and a hearing for December 1, 2004. The matter was reassigned to the undersigned judge on July 26, 2004 and during the telephone prehearing conference held on September 27, 2004, the issues were isolated and a settlement conference was scheduled for November 9, 2004. During the conference held on that date, dates for the completion of discovery were established and an additional settlement conference was scheduled. Various scheduled conferences were adjourned due to substitution of counsel or the unavailability of counsel. By conference call of July 12, 2005, counsel advised that a settlement might be reached, and on September 14, 2005, confirmed that the matter was settled and an agreement and Board Resolution would be filed. Additional telephone calls were made to counsel by the undersigned requesting the settlement documents.

The parties have agreed to settle this matter and have prepared the attached Stipulation of Settlement and Release and Board Resolution, indicating the terms of settlement.

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

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

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

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

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

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

January 27, 2006
DATE

Elinor R. Reiner
Elinor R. Reiner, ALJ

Receipt Acknowledged:

2-1-06
DATE

DEPARTMENT OF EDUCATION

Mailed to Parties:

FEB 2 2006
DATE

DIRECTOR AND CHIEF ADMINISTRATIVE LAW JUDGE

OFFICE OF ADMINISTRATIVE LAW

al

EXTRACT FROM THE MINUTES OF A MEETING
OF THE BOARD OF EDUCATION OF THE CITY OF EAST ORANGE, NEW JERSEY
AS RECORDED IN THE OFFICIAL MINUTE BOOK

RECEIVED
STATE OF NEW JERSEY
OFFICE OF ADMIN. LAW
2006 JAN 25 P 1:07

The Board of Education of the City of East Orange in the County of Essex, New Jersey convened a Regular Meeting on Tuesday, January 10, 2006 at 6:07 p.m.

The following members of the Board were present:

Mr. Reginald Davis, Mr. Vernon Pullins, Jr., Mrs. Marsha B. Wilkerson, Mr. Arthur L. Wright, Mr. Everett Jennings and Mrs. Patricia Hall

The following resolution was offered by Mr. Vernon Pullins, Jr., duly seconded by Mrs. Marsha B. Willkerson and adopted by the Board of Education:

Resolution

RESOLVED: that the Board hereby approves the settlement in Sal Pauciello v. East Orange Board of Education, OAL Docket No. EDUOR03359-2004N, Agency Docket No. 7-1/04, in accordance with the terms and conditions set forth in the Stipulation of Settlement and Release between the parties dated December 31, 2005, a copy of which shall be included in the permanent minutes of this meeting; and

BE IT FURTHER RESOLVED, that the Board President is hereby authorized to execute this Stipulation of Settlement and Release on behalf of the Board.

ROLL CALL: AYES: 6
ABSENT: 1

STATE OF NEW JERSEY}
} ss
COUNTY OF ESSEX}

I, Jamie L. Adams, Interim Board Secretary of the Board of Education, of the East Orange Board of Education, in the County of Essex, State of New Jersey, hereby certify that the foregoing extract from the minutes of the meeting of the Board of said district, fully called and held on Tuesday, January 10, 2006 has been compared by me with the original minutes as officially recorded in my office in the minute book of said East Orange Board of Education, original minutes so far as the same related 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 19th day of January 2006.

Jamie L. Adams, Interim Board Secretary

SCHWARTZ SIMON EDELSTEIN CELSO & KESSLER, LLC
Ten James Street
Florham Park, New Jersey 07932
(973) 301-0001; Fax (973) 301-0203
Attorneys for Respondent,
East Orange Board of Education

RECEIVED
STATE OF NEW JERSEY
OFFICE OF ADMINISTRATIVE LAW
2006 JAN 25 P 1:07

SAL PAUCIELLO Petitioner, -vs.- EAST ORANGE BOARD OF EDUCATION, ESSEX COUNTY Respondent.	BEFORE THE COMMISSIONER OF EDUCATION OFFICE OF ADMINISTRATIVE LAW OAL DOCKET NO. EDUOR-03359-2004N Agency Reference No. 7-1/04 **STIPULATION OF SETTLEMENT AND RELEASE**

This Stipulation of Settlement and Release is made by and between the East Orange Board of Education (the "Board") with administrative offices located at 715 Park Avenue, East Orange, New Jersey, 07017 and Sal Pauciello, whose address is 9 Stanley Street, Irvington, New Jersey, 07111-2527 (the "Petitioner"). In consideration of the mutual promises and undertakings contained in this Stipulation of Settlement and Release and for good and valuable consideration, the receipt of which is hereby acknowledged, the undersigned parties state:

WHEREAS, on May 15, 2003, Petitioner was employed by the Board as a teaching staff member; and

WHEREAS, Petitioner was charged with a criminal action for certain acts alleged to have occurred on May 15, 2003, while Petitioner was in the employ of the Board; and

WHEREAS, on July 23, 2003, the criminal complaint against Petitioner was dismissed; and

WHEREAS, the Petitioner filed a Petition of Appeal with the Commissioner of Education on or about December 6, 2003, pursuant to N.J.S.A. 18A:16-6.1, seeking reimbursement from the Board for Petitioner's attorneys' fees and costs associated with the legal defense of the criminal action with which Petitioner had been charged; and

WHEREAS, on February 6, 2004, the Board filed its answer to the Petition of Appeal with Affirmative Defenses; and

WHEREAS, the parties have determined that it is in their respective best interests to enter into this Stipulation of Settlement and Release to avoid the need for litigation;

NOW, THEREFORE, in consideration of the mutual promises and covenants, the parties agree as follows:

1. The Board will pay to the Petitioner the sum of Six Hundred and Seventy Dollars ($670.00) as the settlement amount (the "Settlement Amount") in full and complete satisfaction of the amount Petitioner is claiming to be due and owing to him in reimbursement from the Board for Petitioner's attorneys' fees and costs.
2. This Settlement Amount will be paid directly to the Petitioner's legal counsel, Timothy Smith, Esq. of Larocca, Feeley & Smith, Esqs., , 76 South Orange Avenue, Suite 211, South Orange, New Jersey, 07079, following the approval of this Stipulation of Settlement and Release by the Commissioner of Education.
3. Petitioner, in consideration of Settlement Amount and the provisions of this Stipulation of Settlement and Release, hereby releases the Board, individually and collectively, and its agents, servants and employees from any and all claims, causes of action, suits, actions at law and in equity, administrative proceedings, and judicial and quasi-judicial proceedings of any kind whatsoever, which have been brought, or

could be brought, arising under or relating in any way to the subject matter set forth in the Petition of Appeal now and forever, except to enforce the terms of this Stipulation of Settlement and Release.

4. Petitioner acknowledges that he has reviewed this Stipulation of Settlement and Release with his own independent legal counsel and that he enters into it without duress, and of his own free will and volition. He further acknowledges that he fully understands the terms of this Stipulation of Settlement and Release and the duties and obligations enumerated herein.
5. Petitioner, in consideration of this Stipulation of Settlement and Release and in full, final and complete settlement of this matter hereby withdraws, with prejudice, the above-docketed Petition of Appeal.
6. Nothing contained in this Stipulation of Settlement and Release should be construed as an admission of wrongdoing by either party and neither party shall be considered a prevailing party for any reason.
7. This Stipulation of Settlement and Release is conditioned upon approval of the Board.
8. The Board's President is authorized to execute this Stipulation of Settlement and Release on behalf of the Board.
9. This Stipulation of Settlement and Release contains the entire agreement between the parties, and no other representations, whether verbal or in writing shall be binding upon them.
10. All terms of this Stipulation of Settlement and Release are deemed material. This instrument may not be altered, amended, modified or revoked except by a new instrument executed in writing by the parties.

11. This Stipulation of Settlement and Release is an agreement which is to be construed in accordance with the laws of the State of New Jersey.

IN WITNESS WHEREOF, the parties, or their duly authorized representatives, do set forth their hands and seal as of the date(s) set forth below.

FOR THE EAST ORANGE BOARD OF EDUCATION:

By: _____
Patricia Hall, Board President

Date: 1/10/06

By: _____
, Witness

PETITIONER:

_____
Sal Pauciello

Date: 12-31-05

Sworn and subscribed before me this
31 day of DEC, 2005

_____
Notary Public

AARON M. GRUBER
A NOTARY PUBLIC OF N.J.
My Commission Expires
June 29, ~~1999~~ 2008

70-06

#70-06

IN THE MATTER OF THE TENURE	:	
HEARING OF RALPH McCULLOUGH	:	COMMISSIONER OF EDUCATION
SCHOOL DISTRICT OF THE CITY	:	DECISION
OF TRENTON, MERCER COUNTY.	:	
	:	

SYNOPSIS

In August 2003, the Trenton Board of Education certified tenure charges of unbecoming conduct and incapacity against respondent, a tenured school custodian. Hearings were held at the OAL in late 2003 and early 2004, after which the presiding judge was recused from the proceedings following a motion from respondent's counsel. The case was reassigned to another ALJ, additional hearings were held, and the record closed on November 7, 2005. Respondent vigorously argued that an entire new hearing was necessary to prevent any undue influence on the new judge as a result of the previous judge's actions.

The ALJ found, *inter alia,* that: respondent was rude and abusive during a January 2003 meeting with his supervisors, during which respondent made it clear that he was capable of violence; and there is enough in the record – and the respondent's documented history of conduct in the workplace – to suggest that he could be a potential danger if he returned to work. Thus, the ALJ concluded that respondent's conduct was unbecoming and insubordinate, and the Board has established that respondent represents a potential danger if he is returned to work. The ALJ ordered that tenure be removed.

Upon a full and independent review of the record, the Commissioner concurs with the ALJ that the charges against respondent have been sustained by a preponderance of the credible evidence and that the proven charges warrant respondent's removal from his tenured position; accordingly, the Initial Decision of the OAL is hereby adopted. In so deciding, the Commissioner emphasizes that it cannot be credibly advanced that the ALJ's March 2005 letter order decision – which concluded that a whole new hearing was unnecessary, but, rather, the matter could proceed based on his review of prior hearing transcripts and forthcoming testimony – in any way compromised the fair discharge of his judicial duties or resulted in prejudice to the respondent.

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.

February 17, 2006

#70-06

OAL DKT. NO. EDU 6702-03
AGENCY DKT NO. 310-8/03

IN THE MATTER OF THE TENURE	:	
HEARING OF RALPH McCULLOUGH	:	COMMISSIONER OF EDUCATION
SCHOOL DISTRICT OF THE CITY	:	DECISION
OF TRENTON, MERCER COUNTY.	:	
	:	

The record and Initial Decision issued by the Office of Administrative Law (OAL) have been reviewed. Respondent's exceptions, dated and filed January 24, 2006 in response to an Initial Decision mailed to the parties on January 10, 2006, were untimely pursuant to *N.J.A.C.* 1:1-18.4 and, therefore, these and the Board's reply exceptions were not considered herein.[1]

Upon full and independent review of the record in this matter, which included transcripts of the hearing at the OAL,[2] the Commissioner concurs with the Administrative Law Judge (ALJ), for the reasons clearly set forth in his decision, that the charges against respondent have been sustained by a preponderance of the credible evidence and that the proven charges warrant respondent's removal from his tenured position.

At this point, the Commissioner is compelled to elaborate and comment on a prior Order of the Administrative Law Judge (ALJ) in this matter, discussed briefly at pages 1-2 of the Initial Decision. Subsequent to the reassignment of this case to ALJ Masin as a consequence of ALJ Schuster's

[1] Respondent's exception submission included the following introductory colloquy: "Although the decision certifies that it was mailed to the undersigned on January 10th, it was not received in this office until January 17, 2006, when my next door neighbor brought it over and indicated that it had been put in their mail box on Saturday the 14th. We were closed on January 16th in observation of Martin Luther King day." It is specifically noted that, notwithstanding what respondent views as valid justification for the filing of his late exceptions, *at no time subsequent to his receipt of the Initial Decision and prior to the expiration of the regulatory timeline for the filing of exceptions did he seek an extension of time within which to file.*

[2] Hearing in this matter was conducted on November 10, 2003, January 7, 8, and 30, 2004, February 20, 2004, April 4, 2005 and June 27, 2005.

recusal mid-trial, two options were available to him: 1) conduct a complete re-presentation of all testimony from the beginning or 2) review the transcripts of the testimony already taken and continue the hearing from that point. Respondent McCullough vigorously argued for an entire new trial, contending that such was necessary for an assessment of credibility and to preclude bias from existing transcripts where – respondent charged – ALJ Schuster engaged in excessive questioning of Board witnesses. By letter-order dated March 10, 2005, ALJ Masin concluded that this matter could proceed based upon his review of the prior hearing transcripts and additional forthcoming testimony and it was not necessary to recall the prior witnesses and re-present the entire hearing. In so determining, ALJ Masin stated that, after a review of the transcripts to-date, he could "state without any doubt that there is nothing in those transcripts which interferes with my ability to fairly and impartially assess the testimony of the witnesses and determine the facts in the case." (ALJ Masin letter-order dated March 10, 2005). The Commissioner's comprehensive consideration of the hearing transcripts and the Initial Decision persuades her that it cannot be credibly advanced that the ALJ's March 10, 2005 letter order decision in any way compromised the fair discharge of his judicial duties or resulted in prejudice to the respondent.

Accordingly, the Initial Decision of the OAL is adopted for the reasons articulated therein. The Commissioner hereby directs that Ralph McCullough be dismissed from his employment as a tenured custodian with the School District of the City of Trenton as of the date of this decision.

IT IS SO ORDERED.[3]

Lucille S Davy

ACTING COMMISSIONER OF EDUCATION

Date of Decision: 2/17/06

Date of Mailing: 2/17/06

[3] This decision may be appealed to the State Board of Education pursuant to *N.J.S.A.* 18A:6-27 *et seq.* and *N.J.A.C.* 6A:4-1.1 *et seq.*

State of New Jersey
OFFICE OF ADMINISTRATIVE LAW

INITIAL DECISION
OAL DKT. NO. EDU 06702-03S
AGENCY DKT. NO. 310-8/03

IN THE MATTER OF THE TENURE HEARING OF RALPH McCULLOUGH.

Thomas W. Sumners, Jr., Esq., for petitioner, Trenton Board of Education (Sumners George, attorneys)

Stephen E. Klausner, Esq., for respondent, Ralph McCullough (Klausner & Hunter, attorneys)

Record Closed: November 7, 2005 Decided: January 5, 2006

BEFORE **JEFF S. MASIN,** ALJ:

On August 29, 2003, the Trenton Board of Education ("Board") certified tenure charges against Ralph McCullough, a tenured school custodian. The Commissioner of Education received the charges and after an Answer was filed on September 19, 2003, the Commissioner transferred the charges for a hearing before the Office of Administrative Law ("OAL") on September 29, 2003. Hearings were held before Honorable John Schuster, III, on November 10, 2003 and January 7, 8 and 30 and February 20, 2004. Thereafter, counsel for Mr. McCullough moved before Judge Schuster to recuse the judge from the proceedings. Judge Schuster denied the motion; however, on interlocutory appeal OAL Chief Judge and Director Laura Sanders reversed that decision and ordered that Judge Schuster be recused. The case was then re-assigned to this judge. After consideration of the respondent's request for the re-presentation of all witnesses and a review of the respondent's concerns regarding what he perceived to be excessive involvement of Judge Schuster in the prior proceedings and certain comments made by the judge

which counsel felt could improperly influence my consideration of the case, I concluded that I could readily consider the prior testimony based upon the transcripts thereof and could weigh the credibility of the witnesses already presented without the need for the re-presentation of such witnesses. I also determined that the comments of which counsel expressed concern would not in any way interfere with my ability to fairly and impartially judge the case and that to the extent that Judge Schuster had inserted himself into the questioning of witnesses, there was no danger that such questioning by the judge would improperly influence my considerations. Indeed, I must note that while recusal was no doubt appropriate due to certain specific comments made by the judge, the criticism of Mr. McCullough's counsel regarding the level and nature of Judge Schuster's questioning of witnesses was completely without merit. While some of it was extensive, Judge Schuster's questions did not involve any prejudice to the respondent nor did it involve a degree or type of questioning likely to affect this judge's consideration of the testimony. As will be detailed, that questioning played little role in the conclusions drawn from the testimony of the various witnesses. In view of my analysis of the motion, I ordered that the case proceed, with additional hearings as necessary to present the remaining witnesses. These hearings were held on April 4 and June 27, 2005. Counsel obtained the transcripts of these hearing dates and filed briefs and the record closed on November 7, 2005.

The Charges

In its Statement of Tenure Charges, the Board alleged that Mr. McCullough had been guilty of unbecoming conduct during a meeting held with other school employees on January 29, 2003. He was purportedly rude, abusive and made a statement that was perceived by these employees as threatening. The Charge claims that he "stated that a person under the stress from the harassment on the job that he was receiving could kill someone." In view of these facts and a "history of disruptive behavior with school staff which previously resulted in the filing of tenure charges against him," which charges resulted in a determination that he had been guilty of insubordination "by rudely interrupting a conversation between two school administrators in a loud and abusive manner," he should be terminated from his employment pursuant to *N.J.S.A.* 18A:6-10 *et seq.* In addition, the Board alleged that Mr. McCullough was incapacitated from the performance of his duties. It based this charge upon a psychiatric evaluation performed by James L. Hewitt, M.D., who determined that it was not safe for McCullough to return to work "due to

his mixed personality disorder and constant threatening statements to co-workers." Hewitt also reported that the "Respondent's habit of frightening others and not being held accountable for his actions was due to his suffering from Paranoid Schizophrenia or some other mental illness." Again, the Board sought Mr. McCullough's termination.

Evidence

The Board's first witness was Bee Jay Cooper. At the time of his testimony and on the occasion of the incident under consideration, Mr. Cooper was the Head Custodian for the Trenton Board of Education. He was assigned to the Southwood DayLight/Twilight Program, a program designed for adults seeking to obtain their high school diplomas. He was assigned to the St. Stanslaus building where the program was held. Respondent Ralph McCullough was assigned to the school as an assistant custodian. Mr. Cooper testified that on January 29, 2003, he attended a meeting with Evan Collins, the director of buildings and grounds, Raul Sanchez, facilitator of the school and Jeanette Harris, the vice principal of the school, along with Mr. McCullough. He described the purpose of this meeting as "to get some common ground of a check list of getting communication between" himself and McCullough. McCullough related that he had such a list. He had told Cooper that he wanted such a list in black and white, "instead of me coming to him, or any of us coming to him for what his job is to do, what part of the building to clean."

According to Cooper, at the meeting on the 29th he felt that his life was threatened. He described Mr. McCullough's conduct at the meeting as "irate," "much controlling and trying to dominate the meeting."

> He started talking about when his - - his past, when he was younger, up until he said he found the Lord, but he still can go back to his tactics, the things that he's done, and he was talking with his hands, and moving around, and he just kept getting louder, and louder, you couldn't get a word in to say anything, to try to say where are you going with this, we were working on something and he went to somewhere else where it wouldn't have went . . .
>
> . . . .

> As his past he said he was homeless at the time that he was drinking, he was doing drugs, and he used to knock people up, take their money from them, whatever he had to do to get what he needed, what kind of substance it was he would do it to get it, and the whole thing of the meeting was nothing pertaining his past or anyone's past, and it was just uncomfortable hearing this, listening to this.
>
> . . . .
>
> It reached a certain point that he had stated to the people in the room that, you know, you're messing with my livelihood and that could put yourself in danger, and we're like we're not messing with anyone's livelihood, we were just - - no one said nothing. I'm just sitting there saying to myself we're not talking about his livelihood, we're just talking about a piece of paper for communication, and he just kept on going and he got to a point and said, you know, "Under stress, you know, things can happen under stress, and you know, I - - well, under the stress that I'm under I'm - - I can kill somebody, I can kill you,". . . .
> [Transcript of hearing of January 7, 2004, pages 25-27.]

At this point in the meeting, Raul Sanchez asked McCullough, "Are you threatening us, or what are you saying." According to Mr. Cooper, McCullough responded,

> "I can kill you." When he said that he looked directly at me and Mr. Sanchez . . . and my expression never changed, because I didn't want him - - to let him know that he got the best of me at that point in time. . . I felt threatened, I felt scared for my life, because I have two young kids, and my wife . . . . To this day, you know, I'm thinking about it now, I'm holding myself not to be shaking and my eyes are starting to water to tell you the truth.
> [Transcript of hearing of January 7, 2004, page 27, 28]

The meeting lasted for about forty-five minutes, or one hour and ten minutes. He felt that McCullough intended to threaten him. After the incident, when he would go to work at 5:30 p.m., he would "look over my shoulders left to right" as he opened the locks on the gates in the dark, "because I don't know, it could be him, it could be anybody coming, you know, from what happened, you know, so I'm nervous."

Mr. Cooper testified that a few days before this meeting, Mr. McCullough had given him a check list relating to the cleaning of the building. McCullough thought that he was cleaning the

whole building and that Cooper was not doing anything. There was a preliminary meeting on the 28th between McCullough, Sanchez and Cooper at Belleview. At that meeting, McCullough started to talk, wanted his way, let no one else get a word in and said that he was leaving and walked out. That meeting lasted about six minutes.

Mr. Cooper acknowledged that at the meeting at which the above-quoted statements were made, McCullough made no moves towards him or towards anyone else. He never took anything into his hands other than a tape recorder. He did not accuse Cooper of lying about him cleaning rooms. The threats were made about half-way through the meeting. Cooper did not leave the meeting after McCullough voiced the threat, which was stated only once, although McCullough kept speaking, not letting anyone else get a word in. He did repeat "you're putting your life in danger" more than once, although the witness could not recall how many times he said this. He did not leave because, "I'm a man - -if I'm in a meeting I'm going to stay until the meeting is over. I don't just get up and walk out of a meeting. . . The meeting had to continue, so I wasn't just going to leave." However, after the meeting the police were called.

No one from the Trenton Board ever told Cooper that McCullough liked to fight or was a violent man. He agreed that he had worked overtime at the school both before McCullough arrived to work at the school a couple of months earlier and after McCullough left the school. He estimated that during the entire seventy minute meeting, Mr. McCullough spoke for forty-five to fifty minutes.

Raul Sanchez is a teacher leader in the Daylight/Twilight High School at the satellite site at St. Stanislaus. He functioned somewhat like a building supervisor, although Jeannette Harris was assigned there as a vice-principal. Mr. Sanchez was present at the January 29 meeting with Mr. McCullough, a meeting that stemmed from McCullough's complaints about being unfairly assigned cleaning work. A meeting had been held on the 28th with Cooper, McCullough and Sanchez, where McCullough voiced this concern. That meeting did not last long because when Sanchez tried to speak

> before I could get the words out, he said, "You be quiet while I'm talking because I'm a man." And I said, "Mr. McCullough, we're all men here," and he said, "Some of us are, some of us aren't,"

> and at that point I said, "Mr. McCullough, I'm sorry, under those terms we can't continue," and I left the room.
> Transcript of hearing of January 8, 2004, pages 20, 21]

Sanchez insisted that someone from administration be present at the meeting on the 29th. At that meeting McCullough referred to Sanchez as a "puppet." He said that he did not recognize Ms. Harris' authority and questioned why she was at the meeting. He spoke about his own background, including references to having been a crack addict and having assaulted people "and he described a prior incident in his job in which someone tried to get him fired and that he was willing to, you know, go to the person's house. . . something like that and that he was willing to go to their houses, kick the door down and as I understood it, you know, do them in." Asked what he meant by that term, Sanchez responded, "Kill them," acknowledging that to represent his interpretation of the term. "I'm not sure if he said the word specifically, but that was my interpretation." He also acknowledged that he could not recall if McCullough had specifically used the words "do him in." He never made any specific comments directed towards Sanchez other than the "puppet" remark. During the meeting he walked around and Ms. Harris asked that he sit down.

Mr. Sanchez recalled the meeting lasting for one and one-half to two hours. He recalled that

> Most of what he was saying initially was threats. He was saying that we were playing with his - - with his income, we were playing with his family and in doing so we were playing with our lives. He said, "You can get killed playing with a man's car and his house." And that was, you know, mixed in with -- once he was talking about with the prior incident where he was willing to go to somebody's house and kick the door in. . . . So I asked him, "Do you mean that you would, you know, kill us, I mean, is that what you're saying?" and he said, "Yeah, under the stress I'm in, yeah. That's - - that's what I do."
> [Transcript of hearing of January 8, 2004, page 28]

These comments left Sanchez "frozen," as he recognized that McCullough was, "not only abusive, but also violent and dangerous." He was a "verbal menace," and "appeared to be out of control. It appeared that he was just going to do what he was going to do." However, he did not

do anything except talk. Sanchez, who did not know that Mr. McCullough was an ordained minister, described him as often talking in a loud voice at times other than at this meeting.

Mrs. Harris said that she would have to end the meeting, but she did not do so, "I think she was trying to continue to see if we could resolve this issue and - - and - - get past this. The meeting went on for another half hour, but it wasn't resolved." After it ended, the police were called. Sanchez, who had never been threatened that way before even though he grew up "in a rough neighborhood," was stressed. He felt that McCullough was trying to intimidate and it had worked.

Mr. Sanchez explained that two teachers had complained to Mr. Cooper that their rooms had not been cleaned properly, but they were unsure who was responsible for cleaning their particular rooms. They did not place their complaints in writing.

The witness acknowledged that at a prior time a serious verbal allegation had been made against him. Mr. McCullough prayed with him, coming to him to provide comfort and assistance.

On cross-examination, Mr. Sanchez was questioned about what he did after the meeting ended. After a short time in Ms. Harris's office, he returned to St. Stanislaus. He understood at that point in time Mr. McCullough's shift had ended. Despite his fear of McCullough following the events at the meeting, he did not see McCullough's car, a "large green Cadillac," so he felt safe that he was not there and did not "check out the building to see if Ralph McCullough was laying in wait for" him. Explaining further why he did not do so, he said,

> Nothing had happened to Ralph McCullough yet. He hadn't been fired. He had been told to report the next day to work by his boss. So I expected to see him, but I expected to see him the next day at eight o'clock.
> [Transcript of hearing on January 8, 2004, page 96]

Questioned by Mr. McCullough's counsel as to whether his client was "a legend for violence," Sanchez reported that he had heard McCullough lose his temper several times before January 28th, directing himself toward Mr. Cooper on several occasions in the office or on the

stairwell. Once he called Sanchez to a stairwell to show him that Cooper had not done his job right and was trying to blame McCullough for this. Sanchez also responded to a query as to whether he truly believed that McCullough was going to kill Sanchez, saying that he did, "I believed that if we were together at some point, something would happen and yeah, that he was very capable." He based this belief upon the forty minutes during which he heard the respondent speak of his past history as an addict and his comments that "I'd be out on the street and I'd get somebody, I'd knock him on the head and I'd do this." He did not understand McCullough's comments as an analogy. Instead "he was directing it at me because I was talking about me. I was concerned about me. I was trying to say, 'You don't really mean this, do you?' and he said, 'Yes, I do. Under conditions.' " When he learned that McCullough was suspended he spent a couple of weeks in fear or apprehension, but did not see a medical professional about it.

Jeanette Harris, who was the vice-principal for the Daylight/Twilight program, has been with the district for two and one-half years. Previously, she held a position with the Department of Education in school review and improvement. She is a certified teacher and administrator. Her first encounter with Mr. McCullough was at the January 29th meeting. He acted in a very inappropriate manner while she was there. She found his behavior rude and insulting. In the course of the meeting, which she understood had been called to deal with some concerns that Mr. McCullough had about job assignments, Mr. McCullough referred to Mr. Cooper as a liar. At the very start of the meeting, McCullough questioned her presence, saying "I don't know who this is. Who is this woman? You know, she doesn't - - what business is this of hers to be here." She had not even had the opportunity to introduce herself at that point and let him know why she was there. Even after she identified herself and her purpose, he remained rude. At one point, McCullough

> began to talk to the people at the table about - - he mentioned to us that "when you mess with my livelihood" and specifically, you know, his house, you know, food, shelter, those types of things, 'that you're messing with your life." And then after he made such statement, Mr. Sanchez asked him, "Are you saying that, you know, you would kill someone," and he said under stressful conditions, he could.
>
> In addition to that, he also then referred to a - - a specific person that I - - apparently had tried to have him fired prior to him working I guess at south - - at the south site, and you know, how he

> had planned to kick his door down and - - and he had planned to kill him but the wife - - his wife, you know, stopped him from doing that. And so those comments I found to be very disturbing. Very disturbing.
> [Transcript of hearing of January 8, 2004, pages 163,164.]

Ms. Harris recalled that the meeting lasted for thirty-five to forty minutes and the comment about being under stress and he could kill someone was made "probably" twenty to twenty-five minutes into the conference. She recalled that the meeting ended after "everyone said pretty much what they needed to say" and the ending was not a rude one. After the meeting ended, Sanchez and Cooper were each concerned about what had been said by McCullough, concerned about the safety of the staff and "of course themselves . . . because they felt threatened. They expressed that they did not feel safe, that Mr. McCullough still had keys to the building . . . ." As for herself, Harris had never before had such an experience "where an employee said things that I considered to be a little bit extreme or bizarre." Both his conduct and his statements were "extreme." He was loud at times, animated, but he did not make any physical gestures or movements of a threatening sort and she did not see him looking at anyone in particular as he said these things. She did perceive McCullough as being serious in what he said. "I think that Mr. McCullough was intentionally trying to intimidate the people at the table. That was my feeling." She agreed that it was Mr. Sanchez who injected the word "kill" into the conversation. McCullough never told either Cooper or Sanchez that he was going to kill them. McCullough did indicate at the meeting that he felt that he was being harassed and stated that there were teachers who would corroborate that Cooper was lying. Harris believed that at the meeting that McCullough was angry and was venting, but she did not believe during the meeting that she was in any danger. The meeting continued for about twenty minutes after McCullough's comments.

The witness explained that after this incident she did have some apprehension about McCullough, yet she did not have fear.

> I figured first of all that was my first encounter with him. If he was directing really you know threatening, it was probably more directed to the other people at the table since he had not known me prior to that. I - -I will tell you that I was - - I did have some concern during the summer and during the first couple of months

> of school because I was actually working in the building. Mr. McCullough had keys to the building and that was cause for concern, that, you know, at that time he wasn't in the building. He wasn't working and so then I - -I was a little bit more concerned about it. I didn't file any police report. I hadn't done one before. [Transcript of hearing of January 8, 2004, page 207.]

Everett O. Collins, Executive Administrator for Buildings and Grounds for the Board, testified that he called the January 29th meeting to resolve issues regarding the work schedule that Bee Jay Cooper had presented to Ralph McCullough. McCullough felt that he had been wrongly accused and that there was some attempt to try to get him terminated. Collins denied that this was the intent, instead the purpose of the meeting was to "give clear direction as to what his job duties were and what his responsibilities were to break it up in that manner."

Collins recalled that when McCullough entered the meeting room he first walked over to Jeanette Harris, leaned over and asked "who are you and why are you here," which Collins felt was an inappropriate comment. She then explained who she was. Collins confirmed the prior witnesses' testimony about McCullough's comments about putting his livelihood in jeopardy, his home, car, wife and children and

> basically he stated that a man under those conditions could do basically anything and Mr. Sanchez, at that point, did lean forward and say "Are you referring to -- you're saying you - - you would kill us," and Mr. McCullough's response, to the best of my recollection was that, "a man can do anything under these conditions."
> [Transcript of Hearing of February 20, 2004, page 14.]

Collins was taken aback by these comments. The meeting continued for a "little beyond that," and as he recalled, Ms. Harris was the one who said that she did not feel that the meeting could continue under these conditions and said that the meeting should be terminated. When McCullough asked if he was not to report to work the next day, Collins told him he needed to report tomorrow and get back to your job. After the meeting had ended, Sanchez and Cooper expressed that they felt threatened by McCullough's comments. Sanchez was upset that Collins was allowing McCullough back in the building in view of what Sanchez believed was a threat to his life. The police were called and a statement was given.

The witness described McCullough's speech and character at the January 29th meeting as "very consistent" with his observations of McCullough on prior occasions. He was loud and dominating, he

> controlled the conversation, he didn't - - it wasn't a conversation. It was a one speech thing for Mr. McCullough. He just kept on going until I asked him to please sit down so we could have the meeting. He was still standing up, shouting at Mrs. - - Ms. Janette Harris about who was she, what right she had to be here and she didn't know him and . . .. He stood there and he - - he was expounding and he hollered and screamed, so was he consistent? Yes.
>
> I had seen him do things of this nature - - not just hollering and screaming, but speaking loud and controlling conversations as his demeanor, is the word I would use. . . . Some people feel intimidated, you know, and they do, I guess. I don't know, but that's the way he conducts his conversations.
>
> [Transcript of hearing of February 20, 2004, pages 27 & 28.]

In response to cross-examination, Mr. Collins described the respondent's body language as "of a threatening tone. He was walking back and forth, he was moving around, and he never sat down. All three people were sitting down calm and collected. He was moving around pacing, carrying his coat on his arm and his hat in his arm." He came within eighteen to twenty-four inches of Harris when he walked into the room.

Asked to assess the situation at and following the meeting, Mr. Collins explained that he was not afraid that McCullough was going to kill someone. Asked if the comments were "hyperbole," he responded,

> I wouldn't dismiss it like in that statement. I wouldn't say that he was going to kill somebody. Was he upset where he potentially might have done something to somebody, I don't feel confident he might have done that, but I felt that over a period of time that Ralph would - - my words - - regain himself and go do his job like I wanted him to do and I gave Ralph that opportunity, but Ralph, through his explosive attitude and his voice and everything else, that -- I guess that wasn't possible.
>
> [Transcript of hearing of February 20, 2004, pages 68 & 69.]

The last witness for the Board was James Lester Hewitt, M.D. Dr. Hewitt has been licensed to practice medicine in New Jersey since 1977. Dr. Hewitt testified as an expert in psychiatry. He conducts a private practice in which about one-third of his patients are adults. Dr. Hewitt examined Mr. McCullough on June 12, 2003, and rendered a report to the Board of Education. In preparation for that examination, Dr. Hewitt "briefly" reviewed some records, but he "wanted to remain as objective and neutral" as he could, "so my thorough evaluation of the records took place after the visit." Among the materials he reviewed was information from school employees that dealt with a tenure charge against Mr. McCullough that had been the subject of a previous administrative hearing, as well as information from Mr. McCullough's attorney in that matter in which there was a denial of those charges. He also reviewed either the initial decision of the administrative law judge in the prior matter and/or the Commissioner of Education's final decision in that matter. Additional information related to the current charges. Dr. Hewitt explained that this material

> provided an ability to see detailed information about Mr. McCullough from other people's perspective. If an individual is alleging harassment, or having to work in a hostile work environment it's important to have information about that environment in order to come to some psychiatric conclusion about the individual in terms of perceived unfriendliness of others, versus paranoid delusional thinking, versus an accurate reflection of a hostile work environment.
> [Transcript of hearing of January 7, 2004, page 119.]

The witness testified that there was an "apparent pattern of mental instability" related to Mr. McCullough's work history. He cited apparent threats and verbal intimidation of others, more specifically with a payroll clerk that he made feel uncomfortable and unsafe, confrontations with a principal suggestive of difficulties in accepting the hierarchical structure within the school, an inability to accept direction and criticism and an inability to "accept that someone else's point of view is the relevant issue at a moment, not the subordinate's point of view or priorities of what should be done and not done." He seemed to have an egocentric view of the world. He saw a pattern of using confrontation and intimidation in response to criticism.

Dr. Hewitt specifically noted as information he utilized in formulating his conclusion of mental instability, pattern of confrontation, difficulty with authority and egocentricity, a

handwritten note from a Mrs. Blank, dated June 17, 1998, regarding an allegation that she left work early out of fears because McCullough left areas unlocked and a stranger had on one occasion walked into the building and startled her. Hewitt explained that he used this document to understand Mrs. Blank's perceptions of McCullough, which he agreed could be objective or subjective, accurate or inaccurate. He acknowledged that he had no independent way of knowing truth and that he had evidence that the judge in the prior tenure hearing "did not consider it truthful or objective. . . credible." Hewitt also considered Mr. McCullough's complaint that the head janitor, Mr. Hatcher, was spying on him.

The interview with Mr. McCullough lasted for about one hour. During that time, Mr. McCullough told Hewitt much about his past life up until 1988, his significant drug and alcohol use and his exploitation of others, "making his way in the world as best he could," hopes of a career as an entertainer, "and in some ways not getting serious about life and falling into a life-style typical of people who are abusing hard drugs." He also spoke of alienating everyone who cared about him and then "reconnecting to his religious faith and that that enabled him to move forward in his life."

Referring to his discussions with McCullough regarding the respondent's work experiences with the Board, Dr. Hewitt referred to "statements which I found difficult to verify and difficult to follow up with him objectively, such as what I quote in my report, "We just don't like you, Ralph." McCullough saw himself as either the only, or one of a very few people conscientious about his job, and feeling that others were blaming him for the shortcomings of his supervisor. Without being in a position to evaluate his work performance, Hewitt posited that while it was possible that McCullough could be the only conscientious employee and that he is being persecuted for this, such a scenario was not plausible. "That was Mr. McCullough's point of view, and when I tried to gather more information to see if he was in fact correct he just made more general statements with raise of the volume of his voice, and repeating self as if doing so would convince me, but it did not."

The doctor tried to discuss the apparently threatening remarks with McCullough, but this was "difficult." He did seem capable of understanding that he might have intended something that might have been conceived differently. Hewitt found him to be very precise in the use of

language, thus Hewitt ruled out the possibility that he made a statement "using inexact language in a way that was an honest mistake." He asked McCullough about his treatment with Dr. Richard Cohen. He could not determine from McCullough whether he had taken medicine or whether Dr. Cohen had ordered medicine. Dr. Hewitt commented upon Dr. Cohen's report of February 21, 2003, which stated that the doctor had prescribed Paxil, an antidepressant. McCullough also told Hewitt that he had paranoid schizophrenia in the past, which if he did have it is not something that can be cured. The doctor could not be sure whether McCullough was referring to this accurately, as given his past drug use, it might be that what he really had was an episode of paranoid psychosis in response to cocaine abuse.

In his discussions with McCullough about work, the witness observed that the respondent

> seemed unable to accept - - he could intellectually understand, but he could not emotionally accept and deal with the fact that demands could be made of him that he felt were unfair, or possibly based on malevolent attempt, that is an attempt to document so he could be fired.
> [Transcript of hearing of January 7, 2004, page 168.]

As for the January 29th meeting and the remarks allegedly made there by McCullough, Hewitt saw signs

> that the themes that I identified earlier, . . . ,egocentricity, emotional instability, the use of verbal intimidation, the inability to listen and to accept that someone else's point of view though different is the relevant issue, not right or wrong, but if a boss asks you to do something it's then your job duty, . . . So I felt that Mr. McCullough was unable to accept that he was not the center of the universe. He was not the person who would say what was going to be done, that the issue of a check list was something his supervisor had implemented to determine whether Mr. McCullough was doing his work or not in order to objectively assess whether he was doing his job or not. . . . but I could tell from the proceedings, that is those three things, that Mr. McCullough was showing evidence of a significant mixed personality disorder highlighted by affective instability, grandiosity, egocentricity, non-dilutional (sic) paranoia, that is an excessive suspiciousness of others, and that there was a potential for dangerousness to others in terms of if he is held accountable or he does not like what is demanded of him he might resort to physical aggression towards others.
> [Transcript of hearing of January 7, 2004, pages 169 & 170.]

The doctor was not aware of any form of physical aggression having been performed at work, but this did not minimize his concerns. The absence of such physical violence in the workplace is "encouraging, but the persistent use of either direct or implied threats. . . What's going to happen if he doesn't get his way? That concerns me. His verbal intimidation always led to having things his way, so there was not need for any more than that." Transcript of Hearing of January 7, 2004, pages 170-171.

Dr. Hewitt defended his ability to reach his conclusions based upon a one hour interview and review of records. He thought that in most instances repeated interviews were the exception in forensic psychiatric work. His conclusions concerning dangerousness were not based upon any specific textbook or article, but on many years

> of reviewing articles, and working with school districts in terms of say dealing with bullying behavior, safety in the school system, working with employees of school system where there's a problem with getting along with other workers, arguments, threats, pushing students, excessive force in restraining a violent student, so all those things have led to my - - providing the foundation for my impressions.
> Transcript of Hearing of January 7, 2004, page 176.]

In this case, Dr. Hewitt's conclusion to a reasonable degree of medical certainty was that he "did not think that it would be safe for him to return to his former duties." A mixed personality disorder does not come within the terms of specific types of personality disorders. McCullough could not control his emotions or accept frustration or understand priorities in a social context, had an inability to control feelings of grandiosity and a tendency to blame others rather than to accept responsibility. While the diagnosis does not in itself pose a threat to the safety of others, the inability to accept directions and see boundaries in terms of limits of how he should act in a work setting were significant factors in the concern about safety.

> I have questions about whether Mr. McCullough would understand the limits of what he should be doing when he as a custodian sees unruly behavior in students, whether it's fighting, vandalism, being out of class when they should be in class.
>
> . . .
>
> I think that if he is held accountable and made to do what is assigned to him I have concerns and I think there's a reasonable

> chance he would resort to verbal intimidation, and he by his own admission has said people can under those circumstances, and I take that as a valid reference to himself, take action on those feelings and kill other people.
> Transcript of Hearing of January 7, 2004, pages 180 & 181.]

On cross-examination, the doctor identified the Diagnostic and Statistical Manual-IV (DSM-IV) and his psychoanalytic training as the guides for determining personality disorders. Dr Hewitt did not speak to any "informants" in regard to Mr. McCullough. He did not request any information from Dr. Cohen, although he did see a two-page report prepared by that physician.

Counsel for Mr. McCullough questioned the doctor as to his use of information regarding the perceptions of persons involved in the first tenure charge against Mr. McCullough. He considered the perceptions of these people even if the charges were not sustained and even though the information was rejected in the judge's decision. He considered it to be the ordinary practice of psychiatrists in New Jersey to use unsubstantiated or rejected allegations as part of the basis for making a diagnosis. He explained,

> To me, by definition, from a psychiatrist, the idea of gathering information from informants is inherently subjective. One has to be open to the idea that there could be lies, misstatements, distortions, narrow perceptions which distort the overall picture. That's what informants are. . . .
> [Transcript of Hearing of January 30, 2004, page 40.]

In response to a question from the then trial judge about how he considered the packet of materials provided to him by the Board, Hewitt added that while he did not take the information as "fact," or the statements of others as "truthful documents," and he recognized the "inherently subjective" nature of the material and that it is "typically biased against the employee," he was looking for

> Pattern recognition, consistency among different perspectives, different descriptions at different points in time and then comparing that to what I see, what the patient tells me, what I discover and how he advocates for himself and what I discover through my indirect questioning.
> [Transcript of Hearing of January 30, 2004, page 217].

Antecedents of a personality disorder pre-exist the age of eighteen years, by which age it becomes technically appropriate to diagnose a personality disorder. He agreed that it is "often necessary to conduct more than one interview and space these over time," to properly diagnose such a disorder, but that same statement (read to him for approval by Mr. McCullough's attorney) acknowledges that a single interview is "sometimes sufficient for making the diagnosis." In making his diagnosis, Dr. Hewitt assumed that from the information he obtained from Mr. McCullough that Dr. Cohen was making a diagnosis related to symptoms of depression and anxiety, but he did not have Cohen's formal diagnosis until later. In fact, Dr. Cohen diagnosed a Major Depressive Disorder First Episode and Anxiety Disorder. Dr. Hewitt acknowledged that a clinician had to exercise caution in diagnosing personality disorders "during an episode of mood disorder and/or an anxiety disorder" because these could make it "more difficult to evaluate retrospectively the individual's long-term patterns of functioning." He agreed that if the "episode" was "acute" then more account had to be given to it, if, however, the problem was "chronic" then less of an account need be paid to it.

Dr. Hewitt did not speak to anyone else about Mr. McCullough, such as family members or his wife, did not obtain any medical records relating to his adolescent years or any school records. The information regarding McCullough's adolescent years up through age twenty-five was obtained from his discussion with McCullough on that subject, which lasted from five to fifteen minutes. There was no second interview. Dr. Hewitt confirmed that other than what he obtained in this conversation he had no other information that he relied upon that led him to conclude that McCullough had a personality disorder-not otherwise specified. To make an assessment of personality disorder one must "put the person's personality in the context of their culture, where they came from." McCullough was born in Griffin, Georgia. Dr. Hewitt grew up near there. There area was segregated in 1959 when Mr. McCullough was born. McCullough left this "still . . . very racist society" in 1972. The doctor took these factors into account in his assessment.

> I asked a general question about what life was like there. I have no recall that he addressed the issue of racism or how buffered he might have been from racism by the fact that there was so much segregation that up to a certain age, you could be kind of in a

> bubble. It might not be a very nice bubble, but it would insulate you . . . and you run up against the boundaries. That's what destroys people and can sometimes lead to defensive grandiosity or excessive paranoia. So, that the culture and the issue of racism was taken into account when I evaluated Mr. McCullough's grandiose statements and statements of paranoid feelings about how he was treated. So, I felt that it was important to give him the benefit of being in that environment before I jumped to any conclusions about what on the surface sounded like grandiosity and paranoia.
> [Transcript of Hearing of January 30, 2004, page 79-80.]

One with a personality disorder, which typically has an early onset,

> is rigid and not adaptive to new circumstances, the fact that it causes problems. It leads to taking a bad situation and making it worse, being less flexible, being limited in terms of being able to see a situation from multiple perspectives or being able to adapt based on new information.
> [Transcript of Hearing of January 30, 2004, page 81.]

Dr. Hewitt agreed that to the extent that he relied upon any information from "informants" such as district employees whose information was supplied to him and was gathered in regard to the first tenure charge, he probably only reviewed this information after he had interviewed McCullough. Thus, McCullough did not have any opportunity to respond to him regarding any of the information contained in those writings. He never took any steps to determine the veracity of these people's perceptions or of the writings they produced, but insisted that this is an accepted practice among psychiatrists.

Queried about his expressed concern that McCullough's return to school could pose a threat to the safety of students, Dr. Hewitt remarked that he had concerns that the sort of dispute as occurred between Mr. Ramsey and Mr. McCullough "could easily take place between Mr. McCullough and a student who would not have the self control of the principal, and it might provoke a reaction in Mr. McCullough that would be harmful to students, people involved." However, he had no evidence that McCullough had ever threatened or touched any employee of the district. He agreed that McCullough had a "strong voice, he comes across strong, positive, with a certain conviction in things that he says, no timidity in his voice." This could come across to others as threatening or intimidating. However, he also thought that at the worksite, where

people "would understand him better and would be more familiar with people talking loudly, . . . he would be less likely to be misperceived in that environment than if he were to be in an environment where there weren't other men of color talking loudly."

If Dr. Hewitt were treating Mr. McCullough, he would have made an effort to contact other persons about McCullough. But as an independent medical examiner, he did not do so. But when asked to compare his report with that of Dr. Cohen, he contended that he had more information from McCullough "that's not reported here that would lend credence to the idea of a personality disorder, referring specifically to "statements from other sources, other informants that made me aware of the role of a personality disorder. I interpreted Mr. McCullough's mode of restlessness and irritability as not being in response to something internal but more just anger at things not going his way. Whereas, Dr. Cohn (sic) was sort of seeing it as an internal problem." When Hewitt saw McCullough, he was not depressed or anxious. He did not see him as having Internal Anxiety Disorder, but instead "more of a response to external events."

In his report, Dr. Hewitt referred to a letter faxed on May 9, 2002, "to all staff of the Board." The letter caused Hewitt to be concerned about McCullough's "stability, ability to properly edit his comments and behavior in the work setting." It made him consider the issue of safety. He assumed that this letter had been sent from the McCullough's. More specifically, he was concerned by such language as

> "What each of you contributed, I pray that God will pay you back 100 fold, pressed down, shaken up, and running over." Sounds like a threat underneath there, because I really don't think that he's thanking people for mistreating him or doing what he thinks - - or doing him wrong in his perception. So, it that's sarcastic, then, that implies that this paragraph is a threat, and so it has the same style of other alleged remarks that Mr. McCullough has made. It's consistent with the diagnosis that I have made. It's consistent with statements that Mr. McCullough has made about the role of faith in this life and his role as a minister and his views about God. So, it all hangs together.
> [Transcript of Hearing of January 30, 2004, pages 181 & 182.]

The fact that there was no evidence that McCullough had ever attempted to carry out any threats was taken into account, but Hewitt noted that this did not change his concerns about

safety, as there had been several tragic episodes of workplace violence where the perpetrator had no history of physical threats to others. "So, the absence of physical threats doesn't change - - it doesn't erase the dangers. Certainly, the presence of those things would heighten the danger." As for his concerns about the possible danger to students, again the lack of even verbal threats to students did not lessen his concern, as he believed that due to the student's lack of maturity and McCullough's vulnerabilities, incidents involving them were more likely to escalate. Given his perceptions and rigidities, the potential mix involving students was "even more risky than with adults." Dr. Hewitt further explained that while, in contrast to Dr. Cohen, he did not find McCullough to be depressed or anxious when he saw him, he did not believe that McCullough could return to work due to considerations of "safety." He was "emphasizing the potential for bad to happen; not something existing at that time," whereas he saw Dr. Cohen as having recommended that McCullough stay out of work due to his findings of depression and anxiety.

Respondent's Witnesses

The respondent's expert in psychiatry was Richard W. Cohen, M.D., Dr. Cohen is a graduate of the University of Pennsylvania and received his medical degree from Temple University. He is Board Certified in psychiatry and has been in private practice since 1981. He currently serves as an expert witness in Social Security disability and SSI hearings.

Dr. Cohen treated Mr. McCullough two years prior to the hearing. He "guesses" he saw him twenty times. His diagnosis was that his patient had a Major Depressive Disorder with neurovegetative signs of depression and an Anxiety Disorder. His drug dependency was then in full remission. He had trouble sleeping, problems with energy, concentration, and blunted affect, all of which are signs of depression. In addition he had a lot of anxiety and motor restlessness. He was withdrawn, secluded and irritable. His anxiety was causing him to have chest pains. In his professional opinion at the time, he told Mr. McCullough that he needed to take a couple of weeks off from work. However, he wanted McCullough to "eventually" return to work. To a reasonable degree of psychiatric certainty, Dr. Cohen did not see McCullough as a danger to himself or to others. Cohen did not see the patient as psychotic nor did he believe that he had any organic problem. Indeed, if Mr. McCullough stayed out of work for too long a period, his symptoms could exacerbate. But he did need "some time off to get better."

Dr. Cohen had reviewed Dr. Hewitt's report. While he agreed with the diagnosis of "poly substance abuse in apparent remission," he disagreed with Hewitt's diagnosis of "mixed personality disorder." A definition of a personality disorder is "very difficult. You never say never and you never say always in medicine. But it takes longer than a one time evaluation to make that diagnosis." However, he conceded that on some occasions he himself had made such a diagnosis based upon one visit. Nevertheless, he noted that a "personality disorder is a long-standing maladaptive way of dealing with the world, where the person is egocentric [comfortable with the symptoms] to their symptomolgy." But Mr. McCullough was "egodistonic [uncomfortable with the symptoms], and therefore, that would go against the diagnosis of personality disorder."

> This doctor is not giving him an Axis One diagnosis and is just putting down an Axis Two diagnosis, which is very difficult. If he knew him over a five to ten session evaluation period of time, then, I would - - I would think to myself well, maybe there is that there. But to make that diagnosis on a one short [sic] deal is very difficult, and I think most psychiatrists would tell you that also. [Transcript of Hearing of June 27, 2005, page 17.]

Dr. Hewitt "neglected the neurovegitative signs of depression and anxiety." To have a diagnosis of Mixed Personality Disorder, "you need a longitudinal maladaptive way of dealing with the world."

Dr. Cohen, who could not locate his chart for Mr. McCullough, has not seen the respondent for two years. He does not recall if McCullough was released by him from care or simply stopped coming. He does not recall whether he saw any documents from McCullough or what the "ongoing fight with the Trenton school board," which he refers to in his report, meant, nor can he recall what his reference to "anti-social behavior" referred to. He would not have read the decision in Mr. McCullough's previous tenure hearing, as he will "read medical records. I don't read legal documents." McCullough appeared to be a "good historian," supplying a good history of what had been going on. A psychiatrist does not usually review statements that describe "certain events Mr. McCullough was involved in." Cohen was "just trying to help him through a depression and anxiety and make him feel better."

The witness did not think that Mr. McCullough had a "thought disorder." He did not feel that McCullough was paranoid, a condition that he can usually detect. He did not exhibit such "thought disorder," any related symptoms such as "hallucinations, delusions, ideas of reference." This is why Dr. Cohen did not feel that he had a personality disorder, such as schizophrenia.

Dr. Cohen was unaware of the allegations that McCullough had been accused of threatening co-workers. If he had known of these allegations, he would have had to see the statements and speak to McCullough. After such a conversation he would use his clinical judgment as to the impact of these allegations.

The witness had no idea whether the problems that he saw affecting the respondent in February 2003 were resolved as of the time of the hearing.

Ralph McCullough testified concerning his background, which saw him quitting school, living on the streets, drinking and taking drugs. However, he eventually obtained his GED degree, became employed, obtained a Boiler license and is an ordained minister. He is in the process of obtaining a building and grounds certification from Rutgers.

Mr. McCullough explained that he saw Dr. Hewitt for approximately fifteen to twenty minutes. He was not asked about any documents or about any incidents described in any documents. He recounted his version of an incident involving Mr. Ramsey, the principal at Trenton High School, which was a subject of the prior tenure case. He disputed that he had become irate; instead, it was Ramsey who had done so. Hewitt never asked him about this incident.

Referring to the current set of charges, McCullough recounted that he had requested Mr. Collins to have a meeting in January 2003. He felt that Mr. Cooper had lied about him and his job performance and had concluded that Cooper was "trying to build a case." Mr. Cooper never gave him a list of duties, as McCullough had understood he was to receive. As a result of this incident, McCullough wrote up a list of duties. When he presented his own list to Cooper, Cooper told him to "Throw that away. I don't want that one. I'll type my own." When Cooper

did give him a list, it contained not only all of the work that McCullough performed, but also all that Cooper was responsible for. In response to this, he told Cooper that the school was so small, "You know what? Put it all on one. I'll do all the work." Cooper kept telling him that "the people upstairs," were complaining that their rooms were not clean. This reference meant Mrs. Rodriquez and other teachers, who, when McCullough asked them about such complaints, told him that they had been complaining about Cooper and had no complaints about the way McCullough cleaned. McCullough told Mr. Sanchez, the interim principal at St. Stanislaus, about his problem with Cooper, but he felt that Sanchez was brushing him off. Two days later, McCullough asked for a meeting, which was held in the basement. Sanchez, Cooper and McCullough were present. Sanchez smiled and said, "B.J. does what he wants at the school." Hearing this, McCullough left and drove to the Building and Grounds office and left a note for Mr. Collins, who was not in. He explained in the note that he was having a problem at the school. He waited a long time and when Collins did not appear, he told the secretary that his blood pressure was up and he was taking a half sick day. The next day, Collins called him. He told McCullough that there would be a meeting at the school where McCullough worked. However, he received a call telling him that the meeting would instead be held at the Daylight/Twilight school at Belleview. When he arrived for the meeting, he noted the presence of a lady and queried who she was, as the problem was only between him and Sanchez and Cooper. He wanted to know who this person was because he felt that the meeting would be discussing "personal information." In response to his question, "they said, 'Mr. McCullough, just sit down.' " He also questioned where his union representative was. He then added, "You know what? Let's just have the meeting, because if the meeting's going to go right, we can just end this stuff right now, and I just go on back to work." The others appeared to ignore his question as to where his union representative was. After he was asked what his problem was, "they turned the meeting around as if they had called the meeting, and I was in the wrong." "I said, 'Hold it. Hold it. I called this meeting. Can I say what problems I' - - they wasn't letting me - - so, I said, 'Look. I'm going to leave. I'm leaving, because I see this meeting is being turned around as if you're all bringing me here to reprimand me.' And they were a bit angered at me knowing what I'm doing."

McCullough continued describing what happened at the meeting. After Ms. Harris asked why they were meeting, McCullough said,

> "If I do my job, why are we here? I called this meeting, because I have to go back to a school where my supervisor is going to hang [sic] on me. I can't go back there. I just came out of tenure hearing for three years, lost my job, family. I almost lost my house. I almost lost my car. Went through great mental emotional stress." And I told her -- I told -- I said, "Look. They fired a guy named Robert Tarber (phonetic)." He said, "Ralph, let's go over Mr. Richardson's house. I going to over there and kick his door in," and I begged him not to do it. This guy used to be a football player.
>
> . . .
>
> And by me being of a righteous man, I talked him out of it, and I was telling him "you cannot mess with a man's livelihood, hiring incompetent supervisors over people who have never had any prior supervision experience." That's what they're doing. "And people's livelihood, someone could get hurt." And I don't know how it - - where "killing" came in at. And they were, "What are you saying, Mr. McCullough?" I might have said, "Well, people can get - - can get killed or hurt on these jobs. You see it everyday, people coming into companies with guns. You're creating an unsafe working environment here, a hazardous work environment here. Because you see fights, the head custodian given favoritism over different custodians . . ." I told them, "This stuff could cause somebody to get hurt." I never threatened any - - and they said, "Are you saying you're going to kill us?" Mr. Sanchez jumped up. "He says he's going to kill us. Are you going to kill us?" I said, "No, I'm not going to kill you." I said, "No, I didn't say that." "Yes you did." And they said, "Mr. Sanchez would you please sit down. The man didn't say he was going to kill us. . ."
>
> . . .
>
> I said, "Mr. Sanchez, I did not say I was going to kill anybody, but if that's what you want to think in yourself, you can think that." The meeting proceeded, and I said goodbye to everybody, "Have a nice day," and I walked out. And Mrs. Gibson said, "Mr. McCullough, we will be calling you, giving you a date when you can come back to work."
>
> [Transcript of hearing of April 4, 2005, pages 63-67]

Mr. McCullough did not stand up or touch anyone at the meeting. He never exhibited a weapon of any sort. He never threatened any of the participants during the meeting, which he estimated lasted for between forty-five to sixty minutes. He believes that when he left the meeting he shook hands with Mrs. Harris and possibly with Mr. Collins. He has never assaulted any personnel since he has been employed with the district. He never was accused of any

incidents involving students and there were none. He conceded that he might have been "politely rude" to Mrs. Harris. He believed that the other participants in the meeting "felt I was being rude, because I wasn't allowing them to take control of the meeting that I had requested." He was not shouting, was not loud or

> "abruptive." I was just showing my concern that we needed to address the issue in which I called this meeting for, and I felt that the meeting was steering towards making me the reason for the meeting . . . and I was just trying to take back control of the meeting to get to the point at hand, which was I had been lied on by my supervisor.
> [Transcript of hearing of April 4, 2005, pages 97-98.]

In response to questions from the Board's attorney, Mr. McCullough contended that he entered the meeting on the 29th with "proof" that Cooper and Sanchez "had lied on me." However, he disputed that he remarked that if "someone would harass someone on the job, then, that could lead to somebody killing somebody." He explained,

> I wasn't concerned about them hurting me, because they can't hurt me. I was concerned that they would - - I have control over myself. I have temperaments. I'm a praying man. But there's people there that come from the streets who are uneducated, angry, and I was afraid of somebody just flying off the rockers. There's children there. That's a dangerous situation. . . . I told him [Sanchez] "I wasn't going to kill anybody." I said, "But somebody could get killed. Because when you're bothering people, and you've got insufficient supervisors here, you're causing that person problems, but you don't see that person's family, that person's car, that person's house, that person's children's lunch money." I explained it in such a nice manner, and I don't have a college degree. I have a GED.
> [Transcript of hearing of April 4, 2005, pages 139, 141, 142]

Mr. McCullough agreed that during the meeting he did mention what kind of car he drove and what kind of house he had, as well as that he had a family. He was questioned about whether he had said that under stressful circumstances he might kill someone.

> No, I told him - - he asked me, "Are you saying you're going to kill us?" And I said, "No, I'm not going to kill you." He said, "Are you saying that you could kill someone?" And I had to answer questions according to the Bible that I live by. The Bible says that the heart of every man is wicked and evil and who can trust it. And I said, "Yes, I'm capable," . . . .
> [Transcript of hearing of April 4, 2005, page 150.]

Asked if he had related this comment to the others by referring to the Bible as he had in this testimony, he said, "Basically, Mr. - - Your Honor, I told them, 'Listen, I'm a minister, so I have to base my answers off the Bible." He claimed that when he related this, the others said, "Mmmm, that's true."

Mr. McCullough conceded that he was the author of a letter faxed to the Board dated May 9, 2002. He claimed that it was being perceived incorrectly.

The Prior Disciplinary Action

Because the Board's tenure charge referred to Mr. McCullough's "history of disruptive behavior with school district staff" it is necessary to review that history. Mr. McCullough was the target of tenure charges filed by the Board in December 1999. Hearings were held before Honorable Joseph F. Martone, ALJ. In an initial decision issued on July 22, 2002, Judge Martone determined that Mr. McCullough was guilty of insubordination and unbecoming conduct which could "adversely affect the moral and efficiency of the school in which the employee is a part and has a tendency to disrupt public respect for school employees and public confidence in the operation of the schools." This determination arose regarding an incident occurring on October 21, 1998, in which Judge Martone found that the Trenton High School building principal, Mr. Ramsey, had observed McCullough talking to a secretary and questioned him as to whether he was working or on a lunch break. He responded "neither," which response the Judge found "not an appropriate response." Ramsey left and was speaking privately with an assistant principal in the hall when McCullough approached and "rudely interrupted their conversation by stating in a loud and abusive manner that he serves only one master, the Coordinator of Custodians, and not Mr. Ramsey." When Ramsey pointed out as the principal, he was in charge of the building, McCullough "kept insisting that only Mr. Richardson was his

boss." Judge Martone found that a ninety-day suspension was warranted. He also dismissed other charges pending against McCullough. The Commissioner of Education sustained Judge Martone's finding that a tenurable offense had occurred, but the Commissioner limited the penalty to forfeiture of the 120-days pay that had already been withheld pursuant to *N.J.S.A.* 18A:6-14. The State Board of Education affirmed the Commissioner's Final Decision.

Discussion

In determining exactly what happened at the meeting on January 29, 2003, it is interesting to note that there are certain basic elements of the conversations held that day that are common to each version of the events related by the five participants. While there is no doubt a dispute between the four Board witnesses and Mr. McCullough regarding the exact words and phrasing, at the core of the five versions are the words and phrases that involved the topics of stress, killing, and the ability or the capacity to kill. Thus, Mr. Cooper says McCullough said, "[u]nder stress, you know, I –well, under the stress that I'm under I'm - - I can kill somebody, I can kill you." Mr. Sanchez says that when McCullough spoke of how "you can get killed playing with a man's car and his house," Sanchez asked if he meant that he "would kill us." McCullough responded, "Yeah, under the stress I'm in, yeah, that's what I do." Mrs. Harris says McCullough spoke about that his life was being messed with and when Sanchez asked if he was saying "you will kill someone," McCullough replied that under stressful circumstances he could. Mr. Collins recalled that McCullough, "basically . . . stated that a man under those conditions could do basically anything" and then responded to Sanchez's query as to whether he was saying that "you would kill us," "a man can do anything under these conditions." Finally, Mr. McCullough himself testified that while he did not tell Sanchez that he was going to kill anybody, he did refer to how "somebody could get killed," and that when Sanchez asked if he was "saying you're going to kill us," he denied that he was, but added that he did acknowledge that he was "capable."

Thus, there is a basic undisputed core of commonality to each version which confirms that during this meeting the four Board witnesses were in fact meeting with a man who, even by his own admission, did state that he was capable of killing under the weight and stress of events. While it must be emphasized that this conclusion does not mean that he meant what he said, or

that he is in fact capable of killing, it nevertheless means that the four Board witnesses did not invent the story of McCullough speaking of killing under stress out of whole cloth. There is a basic truth to their testimony as to what was discussed, even though Mr. McCullough's version differs to some extent as to the exact sentences spoken and even though in his testimony he speaks of the conversation as more of a hypothetical about "others" who might be more prone than he to react violently to stress and harassment. In the end, he agrees that he did tell the other participants that in such a stressful circumstance he was capable of killing, and in the end, what the four Board witnesses took from the meeting as to what they felt McCullough was conveying to them is more significant than what the exact sentences or phrases spoken were or even what Mr. McCullough may have in all honesty thought that he was saying or intending to convey to his listeners. Even if McCullough had no intention that his words convey any threat to his listeners, even if he spoke in hypotheticals and about "others," the tone and context, the message the listeners "heard" as either a direct or implicit threat, was more important than what he actually intended. If reasonable people would be concerned and threatened, made uneasy and worried by what he said, then there is cause to be troubled that he said it in the first place, regardless of his own intentions. And while in the course of grievance presentation or negotiations, or even simply discussions between employees and supervisors that might not reach a level of legal status to qualify as either of these more "formal" contexts, sometime strong words and emotions can come out, threats of physical violence and harm are not simply "strong" or even "offensive" words. And while counsel for the respondent cites First Amendment cases in support of his contention that McCullough's statements are protected by that Constitutional right, he fails to discuss the case law that makes clear that the rights of government employees to speak in the employment setting may in some instances be subject to limitations that would certainly not be permissible in the non-governmental employment realm.

> To be protected, the speech must be on a matter of public concern, and the employee's interest in expressing herself on this matter must not be outweighed by any injury the speech could cause to "'the interest of the State, as an employer, in promoting the efficiency of the public services it performs through its employees.'" *Connick, supra*, 461 *U.S.* at 142 *Connick v. Myers*, 461 *U.S.* 138, 103 *S.Ct.* 1684, 75 *L.Ed.*2d 708 (1983)(quoting *Pickering* v. *Board of Ed. of Township High School Dist. 205, Will Cty.*, 391 *U.S.* 563, 568, 88 S. Ct. 1731, 20 *L. Ed.* 2d 811 (1968)). *[Waters v. Churchill*, 511 *U.S.* 661, 671 (1994) (O'Connor, J., plurality opinion)]

The New Jersey Supreme Court spoke about the "state interests" that might support an employer's limitation of employee speech. In *Hall v. Mayor & Director of Public Safety*, 176 *N.J. Super.* 229 (App. Div. 1980), the Court said, "certain legitimate state interests may limit a public employee's First Amendment right of speech. Some of these interests are: (1) the need to maintain discipline or harmony among co-workers; (2) the need for confidentiality; (3) the need to limit conduct which impedes the public employee's proper and competent performance of his duties, and (4) the need to encourage close and personal relationships between employees and their superiors."

Here, in a context that did not involve matters of public concern, Mr. McCullough spoke words and addressed topics that caused apprehension severe enough in these supervisory employees that when the meeting ended the police were called. That the police told them that no police response was appropriate does not lessen the fact that surely when they emerged from the meeting, the Board witnesses were shaken by what they heard and what they felt was either directly stated or implied by the respondent, a fellow employee and a subordinate. And while Mr. McCullough presents his version as having involved references and concerns about the possible reaction of others less in control of themselves than he, I am persuaded by the circumstances, by his own testimony, by his reaction to what he perceived was being done to him, by his belief that Cooper was lying, that he did not simply suggest or mean to convey that other hypothetical employees might react violently but that his listeners should know that he would not, but that he did intend to at least plant the seed of doubt, worry, concern and distress in these supervisors. This finding as to the credibility of the respondent is based upon my hearing him testify, but also on the overall circumstances of the events surrounding the meeting and of Mr. McCullough's clear intent to dominate the meeting, which he, by his own admission, saw as

happening at his request and which he clearly did not intend to let anyone else control and his quite apparent and immediate reaction to the presence of Mrs. Harris, which set him off at the very start of the meeting, as he was clearly upset and disturbed by her appearance at the session.

I **FIND** that Mr. McCullough was rude and abusive to the attendees at the January 29th meeting. He stated that under the stresses that he was complaining of, he could kill. Such a statement made to his supervisors was in itself abusive. It is true that Mr. Sanchez appears to have been the first to directly address the question of whether McCullough was saying that he could kill under the circumstances he was claiming were affecting him, but Mr. McCullough did make it clear enough that he was affirming that he was capable of such action so as to put the listeners in reasonable distress. That they did not flee the room in terror, that the meeting continued, does not mean that they were not abused and stressed by this unnecessary and provocative statement that the respondent was capable of resorting to the most violent of acts. The fact of the call to the police shows that while they chose to try to finish the meeting they were sufficiently disturbed so as to need to refer the matter to the police.

I **CONCLUDE** that Mr. McCullough's conduct and language at the meeting was unbecoming for a public employee and was insubordinate, as it conveyed to supervisors at least the suggestion that if they did not do as he wanted he could respond not simply by saying no to a direction, but by violent action. Such conduct is without doubt disruptive and disharmonious, calculated to impose his views and his desires on others, and no employer should be required to tolerate such conduct.

In truth, I do not know whether Mr. McCullough is a threat to the lives or physical well-being of anyone. The psychiatrists who examined him have differing positions on this serious issue. Dr, Cohen, who treated him for some time two years and more before he testified, did not believe him to be a threat, but did agree that he had some emotional/ mental concerns, a major depressive disorder and anxiety. He is unsure whether the respondent ever completed his course of treatment and whether he ever discharged him. Dr. Hewitt, who saw McCullough one time, felt that even with this very limited base he could diagnose a personality disorder. He referred to an inability to accept the idea that others' views and directions in the workplace could be paramount to his own opinions and his paranoia and intimidation of others as elements that were

of concern and indeed aspects of his mental instability. I must confess that based upon the record and my own observations of the respondent that I can understand much of what Dr. Hewitt expressed. The question of who is actually a threat, who may truly erupt in a violent way in the workplace, is no doubt a difficult one, maybe even impossible to determine in many cases. Here, Mr. McCullough's behavior at the meeting, coupled with his prior suspension for disruptive interaction in the workplace, where he was again rude and appeared unable to accept supervision, leads to the conclusion that his tenure should be terminated. As for his alleged dangerousness, the preponderance of the credible evidence offered by two competent experts, is such that I **FIND** the scale to weigh in favor of the concerns expressed by Dr. Hewitt, with the significant caveat that I do not suggest that Mr. McCullough is in fact a danger. While I am convinced that in a criminal proceeding, or one in which the higher civil standard of proof of clear and convincing evidence prevailed, the evidence would not suffice to meet the Board's burden on this issue, in this administrative action, where the normal civil standard of preponderance of the credible evidence applies, I **FIND** that there is enough in the record, enough in Mr. McCullough's documented history of conduct, including his conduct in this incident, to weigh the scale a little bit more toward Dr. Hewitt's view than to Dr. Cohen's. Despite the evidence that McCullough has not previously assaulted any employee of the Board, or for that matter any student, there is enough expert opinion here to support the Board's cautions. Thus, I **CONCLUDE** that the Board has established that Mr. McCullough represents a potential danger if he is returned to work, but I emphasize that while this ruling is itself a close one, even without a finding of dangerousness, for the reasons previously expressed, I **CONCLUDE** that tenure must be removed. It is so **ORDERED**.

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

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

Within thirteen (13) days from the date on which this recommended decision was mailed to the parties, any party may file written exceptions with the **COMMISSIONER OF THE DEPARTMENT OF EDUCATION, 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, 2006
DATE

JEFF S. MASIN, ALJ

E-mail Receipt of Initial Decision Confirmed by the Department of Education on:

January 5, 2006
DATE

Mailed to Parties:

JAN 10 2006
DATE

OFFICE OF ADMINISTRATIVE LAW

mjm

EXHIBIT LIST

FOR THE PETITIONER:

P-1 Memorandum dated 1/30/03 from Bee Jay Cooper to Charlie Ramsey

P-2 Memorandum dated 1/30/03 from Jeannette Harris to Charlie Ramsey

P-3 Memorandum dated 1/30/03 from Raul Sanchez to Charlie Ramsey

P-4 Memorandum dated 1/30/03 from Everett O. Collins to Carolyn Gibson

P-5 Police Report reported by Raul Sanchez dated 1/29/05

P-6 *Curriculum Vitae* of James L. Hewitt, M.D.

P-7 Psychiatric Evaluation of Ralph McCullough by James L. Hewitt, M.D., dated 7/5/03

P-8 Not in evidence

P-9 Note from Ralph McCullough to Mr. Collins dated 1/29/03

P-10 Letter dated 2/12/03 from Ralph McCullough to Carolyn Gibson

P-11 Complaint of Harrassment (sic) Report by Ralph McCullough

P-12 Report of Walden M. Holl, Jr., M.D., dated 10/27/03 regarding evaluation of Ralph McCullough

P-13 Psychiatric Evaluation of Ralph McCullough dated 2/21/03 by Richard W. Cohen, M.D.

P-14 Unsigned letter dated 5/9/02 from Ralph McCullough to All Staff, Trenton Board of Education

P-15 Unsigned letter dated 2/26/03 from Ralph McCullough to Carolyn Gibson

FOR THE RESPONDENT:

R-1 Mr. Cooper's diagram of meeting table-1/29/03

R-2 Mr. Sanchez' diagram of meeting table-1/29/03

R-3 Ms. Harris' diagram of meeting table-1/29/03

R-4 Not in evidence

R-5 Not in evidence

R-6 Not in evidence

R-7 Not in evidence

R-8 Not in evidence

R-9 Certification of Ordination for Ralph McCullough

R-10 Certificate of License for Ralph McCullough for the Gospel Ministry issued by Light of Life Faith Ministries, Inc.

R-11 Assistant Custodian work duties

R-12 Letter dated 4/2/03 from Carolyn Gibson to Ralph McCullough recommending transfer

R-13 Letter dated 1/30/03 from Fougere J. Aupont to Ralph McCullough

R-14 Letter dated 2/19/03 from Carolyn Gibson to Ralph McCullough

R-15 Letter dated 8/6/03 from Melvin L. Wyns to Ralph McCullough

71-06

#71-06

OAL DKT. NO. EDU 11546-04
AGENCY DKT. NO. 304-9/04 (PARTIAL)

BLOOMFIELD EDUCATION ASSOCIATION,	:	
PETITIONER,	:	COMMISSIONER OF EDUCATION
V.	:	DECISION (PARTIAL)
BOARD OF EDUCATION OF THE TOWNSHIP OF BLOOMFIELD, ESSEX COUNTY,	:	
RESPONDENT.	:	

The record of this matter, the proposed settlement agreement as to petitioning association member Benedict Salamone, and the Partial Initial Decision issued by the Office of Administrative Law (OAL) pursuant to *N.J.A.C.* 1:1-19.1, have been reviewed.

Upon such review, the Commissioner approves the settlement terms and adopts the settlement as her final decision with respect to Mr. Salamone, so that this matter is hereby dismissed as to that petitioner, subject to compliance with the terms of the settlement.

IT IS SO ORDERED.

Lucille EDay
ACTING COMMISSIONER OF EDUCATION

Date of Decision: 2/21/06
Date of Mailing: 2/21/06

State of New Jersey
OFFICE OF ADMINISTRATIVE LAW

INITIAL DECISION
PARTIAL SETTLEMENT
OAL DKT. NO. EDU 11546-04
AGENCY DKT. NO. 304-9/04

BLOOMFIELD EDUCATION ASSOCIATION,
Petitioner,
v.
BOARD OF EDUCAITON OF THE TOWNSHIP OF BLOOMFIELD,
Respondent.

John A. Boppert, Esq., for petitioner
(Oxfeld Cohen, attorneys)

Mark A. Wenczel, Esq., for respondent
(Gaccione, Pomaco & Malanga, attorneys)

Record Closed: December 6, 2005 Decided: December 6, 2005

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

This matter was transmitted to the Office of Administrative Law ("OAL") on November 16, 2004 for hearing as a contested case pursuant to *N.J.S.A.* 52:14B-1 to –13 and *N.J.S.A.* 52:14F-1 to –15.

Petitioner Bloomfield Education Association sought salary and benefits on behalf of 10 teachers employed by the Bloomfield Board of Education. One of those individual teachers, Benedict Salamone, has entered into a settlement of his claim against the Board.

Mr. Salamone and the Board have agreed to settle this matter and have prepared the attached stipulation indicating the terms of settlement. I have reviewed the record and the settlement terms and **FIND:**

1. Mr. Salamone and the Board voluntarily agreed to the settlement as evidenced by their signatures.

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

3. This partial settlement does not affect the rights and obligations of any of the other nine named individuals in this case.

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

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

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

Dec. 6, 2005
DATE

Ken R. Springer
KEN R. SPRINGER, ALJ

Receipt Acknowledged:

Jan 13, 2006
DATE

Karen Kennedy
DEPARTMENT OF EDUCATION

Mailed to Parties:

DATE

OFFICE OF ADMINISTRATIVE LAW

al

RECEIVED
STATE OF
OFFICE
2005 DEC -6 P 1:56

GACCIONE, POMACO & MALANGA
A Professional Corporation
524 Union Avenue
P.O. Box 96
Belleville, New Jersey 07109
(973) 759-2807
Attorneys for Respondent

BLOOMFIELD EDUCATION ASSOCIATION, Petitioner, v. BOARD OF EDUCATION OF THE TOWNSHIP OF BLOOMFIELD, COUNTY OF ESSEX, Respondent.	STATE OF NEW JERSEY DEPARTMENT OF EDUCATION COMMISSIONER OF EDUCATION AGENCY DOCKET NO. 304-9/04 OAL DOCKET NO. EDUOT 11546-2004N **SETTLEMENT AGREEMENT AS TO BENEDICT SALAMONE**

WHEREAS the Bloomfield Education Association ("Association") has filed this action on behalf of several members of the Association to dispute the manner in which the Respondent, Board of Education of the Township of Bloomfield ("Board"), interpreted their effective resignation dates from employment with the Board; and

WHEREAS the parties have amicably adjusted and settled their differences with respect to one of the members: Benedict Salamone;

NOW THEREFORE the parties hereby set forth the terms of settlement as to Benedict Salamone's claim only:

Respondent, Board of Education of the Township of Bloomfield, shall pay Benedict Salamone the amount of $3,324.00 within thirty days of the approval by the Commissioner of Education of this Settlement Agreement. Upon approval of this Settlement Agreement, Benedict Salamone shall appeal to the State Board of Pensions for an adjustment in his effective

retirement date from September 1, 2001 to October 1, 2001. If the Board of Pensions grants Benedict Salamone's appeal, Respondent shall have no further obligation to him. If, however, the Board of Pensions denies Mr. Salamone's appeal, the Respondent shall pay him an additional amount of $1,180.50 upon receipt of proof of the filing of the appeal upon the Commissioner of Education's approval of this Agreement and the rejection/denial of his appeal by the State Board of Pensions.

In exchange for the representations made by the Respondent, Petitioner, Salamone, hereby releases and gives up any and all claims and rights which he may have against Respondent, Board of Education of the Township of Bloomfield, for anything which has happened up to now pertaining to his employment with Respondent, Board of Education of the Township of Bloomfield.

Dated:) 28 Nov 05

Benedict Salamone
BENEDICT SALAMONE, Petitioner

Dated: 2 Dec 05

MARK A. WENCZEL, ESQ.
Authorized Representative for the Board of Education of the Township of Bloomfield

73-06

W.V. and L.V., on behalf of minor children C.V. and CH.V.,

PETITIONERS,

V.

BOARD OF EDUCATION OF THE TOWNSHIP OF MONTVILLE, MORRIS COUNTY,

RESPONDENT.

COMMISSIONER OF EDUCATION

DECISION

SYNOPSIS

By petition dated April 21, 2005, petitioners appealed a November 17, 2004 determination by the respondent that C.V. and Ch. V. would not receive credit for the 2003-2004 school year because of non-compliance with the attendance policy of the Board. Respondent filed a motion to dismiss the petition based on untimeliness pursuant to *N.J.A.C.* 6A:3-1.3 (i).

The ALJ found that: letters to petitioners dated November 17, 2004 advising that their children would not be promoted constituted the notice of a final action that triggered the 90-day limitations period for filing appeals to the commissioner; the absence of petitioners' child advocate at the subsequent Board hearing concerning the children's retention did not toll the limitation of action prescribed by the ninety day rule; no basis exists to warrant relaxation or waiver of the ninety day rule, as petitioners failed to appropriately identify any substantial constitutional issue or one of fundamental public interest beyond that of concern to petitioners themselves, and failed to demonstrate that strict adherence to the ninety day rule would be inappropriate, unnecessary and result in injustice, pursuant to *N.J.A.C.* 6A:3-1.16. The ALJ thus concluded that petitioners' claim was not timely filed pursuant to *N.J.A.C.* 6A:3-1.3 (i); that the circumstances do not warrant relaxation of the ninety day rule; and that the respondent's motion to dismiss the petition should be granted.

The Commissioner concurs with the ALJ for the reasons set forth in the Initial Decision, adopts the Initial Decision as the final decision in this matter and dismisses the petition for untimeliness, emphasizing that the submission date was well in excess of the 90-day allowance for appeals and that the petitioners did not offer facts that would warrant relaxation of the "90-day rule."

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.

OAL DKT. NO. EDU 5402-05
AGENCY DKT. NO. 104-5/05

W.V. and L.V., on behalf of minor children C.V. and CH.V.,	:	
PETITIONERS,	:	
V.	:	COMMISSIONER OF EDUCATION
BOARD OF EDUCATION OF THE TOWNSHIP OF MONTVILLE, MORRIS COUNTY,	:	DECISION
RESPONDENT.	:	

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

Upon full and independent review of the record, the Commissioner concurs with the Administrative Law Judge (ALJ) that petitioners' appeal was untimely, that there were no extraordinary circumstances that would allow relaxation of the 90-day limitation period in which appeals may be filed, and that the petition of appeal should, therefore, be dismissed.

Petitioners were notified on April 27, 2004 that C.V. and Ch.V. would be retained in their respective grades in high school because, in violation of the district's attendance policy, their absences far exceeded 10% of the total days that school was in session. (Exhibits A and D of respondent's motion to dismiss the petition.) The parties stipulated that the "parents and students were provided with notice of this policy." Included in the policy is the Board of Education's right to require verification of the reasons that are offered for student absences, and to investigate the causes of prolonged absences. (Exhibit G to respondent's motion to dismiss the petition.)

Petitioners took the matter to the district superintendent, Mary Louise Malyska, who ultimately, on November 3, 2004, notified them that they had not provided sufficient information to

serve as a basis for reversing the determination of the high school principal that the children – as a result of their absences – did not qualify for promotion to the next grade. (Exhibit B to respondent's motion to dismiss the petition.) Malyska invited petitioners to meet with the Board of Education (Board) on November 16, 2004.

After considering the facts and analyses presented by the petitioners and the district superintendent at the November 16 meeting, the Board determined that the petitioners had not provided adequate support for exemptions from the district attendance policy. By letter dated November 17, 2004, the Board president notified petitioners of this decision. (Exhibits C and E of respondent's motion to dismiss the petition.)

Petitioners' appeal was dated April 21, 2005 and arrived in the Bureau of Controversies and Disputes on May 2, 2005 – over five months after the Board's action. This is well in excess of the 90-day allowance for appeals set forth in *N.J.A.C.* 6A:3-1.3 (i). The Commissioner agrees with the ALJ that petitioners did not offer facts that would warrant relaxation of the "90-day rule."

The Initial Decision of the OAL is adopted as the final decision in this matter. For the reasons set forth in the Initial Decision, the petition is dismissed for untimeliness.

IT IS SO ORDERED*

Lucille E Davy

ACTING COMMISSIONER OF EDUCATION

Date of Decision: 2/21/06

Date of Mailing: 2/22/06

* This decision may be appealed to the State Board of Education pursuant to *N.J.S.A.* 18A:6-27 *et seq.* and *N.J.A.C.* 6A:4-1.1 *et seq.*

State of New Jersey
OFFICE OF ADMINISTRATIVE LAW

INITIAL DECISION
OAL DKT. NO. EDU 5402-05
AGENCY REF. NO. 104-5/05

W.V. & L.V., ON BEHALF OF
MINOR CHILDREN C.V. & CH. V.,
Petitioners,
v.
BOARD OF EDUCATION OF THE TOWNSHIP
OF MONTVILLE, MORRIS COUNTY
Respondent

Donald H. Larsen, Esq., for Petitioners

Robin S. Ballard, Esq., for respondent (Schwartz, Simon, Edelstein, Celso & Kessler, attorneys)

Before **ROBERT J. GIORDANO**, ALJ:

Record Closed: November 23, 2005 Decided: January 6, 2006

STATEMENT OF THE CASE AND PROCEDURAL HISTORY

Petitioners, W.V. and L.V. filed a petition with the Commissioner of Education dated April 21, 2005, on behalf of their minor children, C.V. and Ch. V., seeking an

Order compelling the Respondent, Board of Education of the Township of Montville to restore the minor children to "their proper grade levels" and for other relief. This petition was in response to the determination by the Respondent that C.V. and Ch. V. would not receive credit for the 2003-2004 school year. The Respondent filed a motion to dismiss the petition in lieu of an answer, pursuant to *N.J.A.C.* 6A;3-1.5(g), on May 3, 2005. The basis for the motion was the timeliness of the petition, in accordance with the "ninety day rule". The Petitioner filed a letter memorandum in lieu of a more formal brief in opposition to the Respondent's motion on May 13, 2005. Thereafter, the Respondent filed a reply to the opposition by letter dated May 18, 2005.

The matter was transmitted to the Office of Administrative Law (OAL) on January 25, 2002 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 June 24, 2005, and a pre-hearing conference was held on July 12, 2005. The hearing scheduled for August 1, 2005 was adjourned to September 6, 2005, pending the outcome of the motion to dismiss. At the request of the parties, the September 6, 2005 hearing date was adjourned, due to the unavailability of witnesses. The hearing was rescheduled for September 26, 2005.

A conference was conducted on September 26, 2005, at which time the parties agreed that the only issue before the undersigned was whether the minor children C.V. & Ch. V. should have their credits for the 2003-2004 school year reinstated. In that regard, the parties agreed to submit joint stipulated facts as to facts not in dispute regarding the motion to dismiss the Petition under the ninety day rule. The parties further agreed to supplement the stipulated facts with certifications as to alleged facts still in dispute, in support of their respective positions. Stipulations of fact were received by the undersigned under cover of letter dated October 13, 2005. In addition, the petitioners submitted the certification of L.V. as to facts alleged to be in dispute. The respondent submitted a certification and supplemental certification from Jo Ann Lynch, Supervisor of Special Services, regarding the alleged facts in dispute. Thereafter, upon review of the record in the within matter, the record was closed on November 23, 2005.

ISSUE PRESENTED

The threshold issue in this motion to dismiss the Petition is whether petitioners claim was timely filed pursuant to *N.J.A.C.* 6A:3-1.3(d).

STIPULATED FACTS

The parties submit the following Joint Stipulation of Facts, and for the purpose of the within motion to dismiss, I **FIND**:

1. C.V. and Ch. V. reside in the Township of Montville and are currently enrolled in the Montville Township School District.
2. C.V. currently is scheduled to attend Shepard High School in Morristown, New Jersey.
3. Ch. V. currently attends Montville Township High School.
4. W. V. and L.V. reside in the Township of Montville and are the natural parents of C.V. and Ch. V.
5. The Montville Township Board of Education is a public agency and instrumentality of the municipality, charged with the administration and operation of the Public School System in the Township of Montville.
6. The Attendance Policy of the Board of Education requires 90% attendance.
7. The parents and students were provided with notice of the Board's Attendance Policy.
8. The sole issue before the Honorable Court is whether C.V. and Ch. V. should have their credits for the 2003-2004 school year reinstated.
9. During the 2003-2004 school year, Ch. V. was classified as eligible for special education and related services based upon the category of Multiply Disabled.
10. Ch. V. received special education services during the 2003-2004 school year through Individualized Education Plans (IEPs), prepared on May 28, 2003 and May 26, 2004.
11. Neither IEP exempted Ch. V. from the District's attendance policies.
12. On April 27, 2004, W.V. and L.V. were notified by Dr. Steven Kramer, principal of the Montville Township High School, that Ch. V. lost credit for the 2003-2004 school year, for non-compliance with the Attendance Policy of the Board of Education, as he had been absent for 44 ½ days at that time.

13. During the 2003-2004 school year C.V. was not classified as eligible for special education and related services.
14. During the 2003-2004 school year, C.V. did not have a 504 Plan.
15. On April 27, 2004, W.V. and L.V. were notified by Dr. Kramer that C.V. lost credit for the 2003-2004 school year, for non-compliance with the Attendance Policy of the Board of Education, as he had been absent from school for 331/2 days at the time.
16. On September 17, 2004, after the beginning of the 2004-2005 school year, W.V. and L.V. asked Dr. Mary Louise Malyska, Superintendent of Schools in Montville Township, to overturn the decisions of Dr. Kramer and promote C.V. and Ch. V.
17. Dr. Malyska upheld the decisions of Dr. Kramer and denied the parents request for C.V. and Ch. V. to be promoted.
18. The parents obtained representation from Lynnette Joy Goodman, Parent/Child Advocate, to assist them with their sons' educations.
19. The parents requested a hearing with the Board of Education to challenge the determinations of Dr. Kramer and Dr. Malyska.
20. The President of the Board of Education invited the parents to a hearing to be held at the Executive Session of a meeting of the Board of Education on November 16, 2004 with their advocate, if they wanted the advocate to attend.
21. The parents made their appeal at the hearing with the Board of Education on November 16, 2004, without their advocate present.
22. By letter dated November 17, 2004, the Board denied the parents' appeal of the denial of credit for C.V. and Ch. V. for the 2003-2004 school year.

CERTIFICATIONS OF THE PARTIES

The parties submitted certifications related to alleged factual disputes regarding facts not stipulated by the parties. The following is a summary of the pertinent facts alleged to be in dispute.

Petitioners

L.V. certified that she and her husband, W.V. retained the services of Lynette Goodman to assist them in appealing the Board's determination to retain the minor

child, C.V.[1] in his prior grade due to alleged excessive absences. Although one of the services that Ms. Goodman was to provide was to appear at the hearing of that matter before the Board, she was unable to attend on the scheduled date. L.V. maintains that she and her husband requested an adjournment of that hearing. According to L.V., the Board denied the request for adjournment and "pressured" them to go forward with the hearing without representation.

L.V. indicated that she and W.V. appeared before the Board with insufficient time and opportunity to present their case. L.V. also maintains they were not fully permitted to voice their concerns to the Board. They assert the Board summarily and without basis affirmed the decision to retain C.V. in his prior grade. L.V. asserts that the Board failed to treat them fairly in denying them proper representation at the hearing. The Board further failed to advise the petitioners that they were required to file an appeal from the Board decision within ninety days. L.V. stated that during the time period through February 18, 2005, they were not in communication with Ms. Goodman. They retained their present counsel approximately one month later. He immediately requested another hearing before the Board with Ms. Goodman there to testify. When the Board denied the request for another hearing, the petitioners filed the instant appeal.

Respondent

Jo Ann Lynch certified in pertinent part that the parents and their advocate were invited to attend a hearing during a meeting of the Board of Education on November 16, 2004. The parents arrived at the meeting without their parent advocate. Ms. Lynch asserts that the parents were specifically asked whether they wanted to proceed with the hearing without their representative. She further asserted in her certification that the parents wanted to continue with the hearing on that date. Although the Board denied the parents' appeal of the denial of credit for C.V. and Ch. V. for the 2003-2004 school year as confirmed in the letters to the petitioners dated November 17, 2004, the parents

[1] It is noted that the petitioners never asserted that the advocate was retained for any purpose related to the educational services provided to Ch. V. In light of the ultimate determination herein, this is not

took no action to challenge that decision until they filed the instant appeal with the Commissioner on April 21, 2005.

By supplemental certification Ms. Lynch asserted that the petitioners were provided ample time to present their case to the Board on November 16, 2004. The parents were provided the basis for the Boards determination in the November 17, 2004 letters. Although L.V. asserted in her certification that the parents had no communication with Ms. Goodman during the period from November 18, 2004 to February 18, 2005, Ms. Lynch submitted a copy of an attendance sheet for an eligibility conference held on December 8, 2004 regarding C.V., which was signed by Ms. Goodman, and a sign-in sheet for an IEP conference regarding C.V. on January 28, 2005, also signed by Ms. Goodman.

LEGAL DISCUSSION

Title 6A of the New Jersey Administrative Code provides that a petitioner may challenge the action of a board of education by filing a petition conforming to the requirements of *N.J.A.C.* 6A:3-1.4. However, the Code provides for a limitation of action with respect to the initiation of a contested case for the Commissioner's determination of a controversy or dispute arising under the school laws. The petition must be filed no later than the 90th day from the date of receipt of the notice of a final order, ruling or other action by the district board of education, individual party, or agency, which is the subject of the requested contested case hearing. *N.J.A.C.* 6A:3-1.3(h)(4)(i). This limitation related to the filing of a contested case is often referred to as the "ninety day rule".

Generally speaking, limitations of actions serve two salutary purposes. The Supreme Court reemphasized the importance of limitations of actions in *Ochs v. Federal Ins. Co.*, 90 *N.J.* 108, 112 (1982). The Court expressed there that the initial purpose is "to stimulate litigants to pursue a right of action within a reasonable time so that the opposing party may have a fair opportunity to defend, thus preventing the

considered to be a relevant consideration.

litigation of stale claims." Second is to "penalize dilatoriness and serve as a measure of repose." *Id.* at 112 (quoting *Farrell v. Votator Division of Chemtron Corp.*, 62 *N.J.* 111, 115 (1975)).

Sometime later, the Supreme Court expressly affirmed the validity of the ninety day rule as applied to school law cases (then codified as *N.J.A.C.* 6:24-1.2(c)) in *Kaprow v. Berkeley Township Bd. Of Educ.*, 131 *N.J.* 572, 588 (1993). The *Kaprow* Court held that *N.J.A.C.* 6:24-1.2(c) represents a fair and reasonably-necessary requirement for the proper and efficient resolution of disputes under the school laws. The Supreme Court there concluded that even an unofficial, informal note from the board secretary to the petitioner stating that two positions had been created and filled was sufficient to trigger the start of the ninety day period. The *Kaprow* Court stated that the time limitation, while arguably short, provides a "measure of repose, an essential element in the proper and efficient administration of the school laws." *Id.* at 582. In addition, the limitation period gives school districts the security of knowing that administrative decisions regarding the operation of the school cannot be challenged after ninety days. *Ibid.*

The ninety day requirement has been strictly followed by the Commissioner and State Board and is applied almost invariably. For example, a petition filed only two days after the ninety day period was dismissed as untimely in *Dreher v. Jersey City Board of Education*, 1987 *S.L.D.* 1706, *aff'd*, St. Bd., 1988 *S.L.D.* 2439. The ninety day period begins running as of the date on which the final action of the board took place; not the date on which the petitioner claims that a substantive right accrued. *Nissman v. Board. of Educ.*, 272 *N.J. Super.* 373, 381 (App. Div.), *certif. denied*, 137 *N.J.* 315 (1994). Regardless of whether the board complies with statutory (administrative or regulatory) requirements, a petitioner is required to file the petition no later than ninety days after receipt of notice of the final decision. *Portee v. Newark Bd. of Educ.*, 94 *N.J.A.R.*2d (EDU) 381, 383.

The Commissioner of Education has consistently held that the ninety day filing requirement is to be strictly construed and that "a showing of emotional stress alone,

without the showing of circumstances amounting to genuine incapacity, is not enough to toll the time limit for appeal." *Carol Unangst v. Board of Education of the Township of Redon, Sussex County*, OAL DKT. No. EDU 9828-98, Agency DKT. No. 434-9/98, decided May 1, 2003. The Commissioner has further held that "requests to a board [of education] for reconsideration of its final determination do not toll the running of the ninety day rule." *Pacio v. Lakeland Reg. High Sch. Dist. Bd. of Educ.*, 1989 *S.L.D.* 2060, 2069. Similarly, in a recent case, Administrative Law Judge Elinor L. Reiner held that:

> Attempts to resolve a claim through negotiation with the local board of education are irrelevant. Such efforts do not negate the fact of receipt of adequate notice nor do they toll the running of the time limits for filing a petition of appeal. [M.N. and E.Y. o/b/o K.N. v. Jersey City Sch. Dist., EDU 11336-03 (June 17, 2004) adopted Comm'r (July 21, 2004).]

In any event, in order that notice be adequate under the regulation, it must be sufficient to further the purpose of the ninety day limitations period. The notice requirement should effectuate concerns for individual justice by not triggering the limitations period until the petitioner has been alerted to the existence of facts that would be adverse to it. At the same time, it should further considerations of repose by establishing an objective event to trigger the limitations period in order "to enable the proper and efficient administration of the affairs of government." *Borough of Park Ridge v. Salimone*, 21 *N.J.* 28, 48 (1956). Such triggering event was considered by the State Board of Education in *Eisenberg v. Fort Lee Bd. of Educ.*, State Bd. of Educ. (Nov. 5, 2003). The State Board there clarified the importance of the petitioner either receiving notice of the final decision or "knowing of facts that enabled [the petitioner] to file a timely claim." In *Eisenberg*, the petitioner received "final" notice of his non-renewal on April 3, 2001, and requested a statement of reasons for his non-renewal, which he received on May 1, 2001. On May 10, 2001, Eisenberg requested a public meeting with the board to discuss his non-renewal and the meeting was held on July 2, 2001 (Eisenberg requested the public meeting be held after the end of the school year). On July 3, 2001, Eisenberg received a "final determination regarding [his] employment status," which letter indicated that the board had upheld its decision not to renew his contract. Eisenberg filed his petition of appeal with the Commissioner on September 29, 2001, challenging the board's action. The board contended that its final action took

place on April 3, 2001, and the ninety day limitation period started to run at that point. The ALJ disagreed with the board and determined that the final decision was not until July 3, 2001. On appeal to the Commissioner, the ALJ's initial decision was reversed when the Commissioner agreed that the "Superintendent's letter of April 3, 2001, had alerted the petitioner to the existence of facts that might equate in law with a cause of action." *Ibid.* On appeal, the State Board of Education reversed the Commissioner's decision, holding that, in this particular set of circumstances, the final notice did not take place until July 3, 2001. The State Board determined that Eisenberg only learned of pertinent information just prior to the July 2001 meeting, which, if reviewed by the board, would possibly have changed its renewal decision. Thus, it was the July 3, 2001, decision that was the "final" decision and the petitioner's petition in September 2001 was timely.

Also in issue is whether the circumstances warrant relaxation of the rule so as to permit the petition to be filed after the ninety day period has lapsed. The regulation provides in pertinent part as follows:

> The rules in this chapter shall be considered general rules of practice to govern, expedite and effectuate the procedure before, and the actions of the Commissioner in connection with, the determination of controversies and disputes under the school laws. Where such rules do not reflect a specific statutory requirement or an underlying rule of the OAL, they may be relaxed or dispensed with by the Commissioner, in 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.]

The ninety day rule may only be relaxed under exceptional circumstances or if there is a "compelling" reason to do so. *Kaprow, supra*, 131 *N.J.* at 590. Certain cases are excepted from the rule, which include "cases involving (1) important and novel constitutional questions; (2) informal or *ex parte* determinations of legal questions by administrative officials; and (3) important public rather than private interests which require adjudication or clarification." Brunetti v. Borough of New Milford, 68 N.J. 576, 586 (1975). The expenditure of public funds is not a sufficient public interest to justify a waiver or relaxation of the ninety day rule. *Elmwood Park Bd. of Educ. v. Farrell,* 95

N.J.A.R. 2d (EDU) 375, 378. Moreover, the authority to relax or waive the ninety day rule is rarely invoked and is generally unsuccessful unless strict adherence would be inappropriate, unnecessary or where injustice would occur. *DeMaio v. New Providence Bd. of Educ.,* 96 *N.J.A.R.* 2d (EDU) 449, 453 (*citing Gordon v. Passaic Bd. of Educ.,* 1985 *S.L.D.* 1929, 1931, *aff'd,* A-3294-84 (App. Div. May 27, 1986), *certif. denied,* 105 N.J. 534 (1986)). On the other hand, the Appellate Division has held there is justification for relaxation of the ninety day rule where "the Commissioner's findings that [a] petitioner was reasonably led to believe that he could continue to informally seek relief and not be concerned about the time limitations for filing his formal petition are adequately supported by the record and that strict adherence to the ninety day time limitation . . . would result in individual justice not being served." *Brown v. Bd. of Educ. of the Vocational School in the County of Sussex,* A-4854-83T7 (App. Div. April 4, 1985).

Administrative Law Judge Steven Weiss addressed the issue of relaxation of the ninety day rule as it applies to controversies before the Commissioner of Education, in *Twp. of Springfield Bd. Of Educ. v. N.J. State Dept. of Educ., et als.*, OAL DKT. NO. EDU 5987-02. Judge Weiss succinctly stated:

> The relaxation rule as to appeals to the Commissioner is the starting point for the inquiry in this case, too. Thus, *N.J.A.C.* 6A:3-1.16 specifically provides that where time limits are not contained in a statute, or in or underlying OAL rule, they may be relaxed or dispensed with by the Commissioner where, " . . . strict adherence thereto may be deemed inappropriate or unnecessary or may result in injustice." What constitutes "strict adherence" is a fact sensitive issue as witnessed by the many cases decided by the Commissioner concerning the same. However, as the Springfield Board accurately points out, cases relaxing or waiving the 90-day with regard to controversies and disputes generally are rare and the rule is sparingly invoked. *See, e.g., DeMaio v. New Providence Bd. of Ed.*, 96 *N.J.A.R.* 2d (EDU) 449; *Gordon v. Passaic Bd. of Ed.* 1985 *S.L.D.* 1929, *aff'd* New Jersey Superior Court, Appellate Division, Dkt. No. A-3294-84T7 (May 27, 1986) (unreported), *certif. den.* 105 N.J. 534 (1986); Dreher v. Jersey City Bd. of Ed., EDU 2777-87 (decided by the Commissioner February 2, 1988), aff'd State Board of Education (July 8, 1988); *Unangst v. Township of Fredon, supra.*

CONCLUSIONS OF LAW

Initially, the petitioners asserted that the petition filed on April 21, 2005 was timely filed. This was apparently based on a letter from respondent's counsel dated April 4, 2005, stating the respondent would refuse to do anything to address the concerns then raised by the petition. (Petitioner's letter brief to Commissioner, May 13, 2005). Clearly, that letter could not be reasonably construed to be the final action of the Board. An attempt to have the Board reconsider the initial decision does not toll the ninety day period. I **CONCLUDE** that the notice of a final order, ruling or other action by the district board of education contemplated by the regulation was properly the letters to the petitioners dated November 17, 2004 (Exhibits C & E, Respondents letter brief to Commissioner, May 3, 2005).

Petitioners next assert that in any event, the limitations period should be relaxed under the circumstances extant. The specific circumstances cited, which petitioners maintain give rise to just cause for the relaxation of the ninety day rule relate to the assertion that the petitioners were somehow coerced into appearing at the November 16, 2004 hearing without adequate representation. Regardless of the veracity of such assertions, which need not be resolved here, I **CONCLUDE** that the failure to have adequate representation at the hearing does not toll the limitation of action prescribed by the ninety day rule. In point of fact, there is nothing that could be reasonably gleaned from the stipulated facts or the certifications submitted that would lend to that ultimate conclusion here.

Generally, a court may relieve a party from a final judgment for mistake, inadvertence, surprise, or excusable neglect or for any other reason justifying relief from the operation of the judgment or order. *N.J. Ct. R.* 4:50-1(a), (f). The rule is designed to reconcile the strong interests in finality of judgments and judicial efficiency with the equitable notion that courts should have authority to avoid an unjust result in any given case. Excusable neglect is that carelessness attributable to an honest mistake that is compatible with due diligence or reasonable jurisprudence. Only where a mistake of law is reasonable and there is some justification for a lack of determination of the

correct law will the court grant equitable relief. Mere ignorance of the law, however, is not a sufficient basis to excuse compliance with the requirements of an established rule of law.

Much as the Judge Weiss concluded in the *Springfield* case, I am convinced that there are no compelling circumstances extant dictating that I recommend to the Commissioner of Education that the ninety day rule be relaxed in the instant case. There are no overriding issues of public importance. Nor is there any indication, as there sometimes is asserted in various cases, that the person against whom the rule is sought to be applied has somehow deliberately been misled or has been prevented from knowing and understanding his or her rights. Indeed, a lack of sophistication with regard to the time limit is no excuse.

Having considered these arguments, I **CONCLUDE** that no basis exists to warrant relaxation or waiver of the ninety day rule. In sum, petitioners have failed to appropriately identify any substantial constitutional issue or one of fundamental public interest beyond that of concern to petitioners themselves regarding which grade C.V. and Ch. V. would enter in the 2003-2004 school year. Petitioners have failed to demonstrate that strict adherence to the ninety day rule would be inappropriate, unnecessary and result in injustice.

I thus **CONCLUDE** that petitioners' claim was not timely filed pursuant to *N.J.A.C.* 6A:3-1.3(h)(1)(i) and that the circumstances do not warrant relaxation of the ninety day rule pursuant to *N.J.A.C.* 6A:3-1.16.

ORDER

Based on the foregoing, I hereby **ORDER** that the appeal of petitioners is and shall be **DISMISSED.**

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

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

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

1/6/06
DATE

Robert J. Giordano
ROBERT J. GIORDANO, ALJ

Receipt Acknowledged:

Jan 11 2006
DATE

Karen Kennedy
DEPARTMENT OF EDUCATION

Mailed to Parties:

JAN 13 2006
DATE

DIRECTOR AND CHIEF ADMINISTRATIVE LAW JUDGE
OFFICE OF ADMINISTRATIVE LAW

els

75-06

RECORD SEALED

BOARD OF EDUCATION OF THE BOROUGH OF BOUND BROOK, SOMERSET COUNTY,	:	COMMISSIONER OF EDUCATION
PETITIONER,	:	DECISION
V.	:	
NEW JERSEY STATE DEPARTMENT OF EDUCATION, DIVISION OF FINANCE, AND R.B.,	:	
RESPONDENTS.	:	

SYNOPSIS

Petitioning Board of Education appealed the Department of Education's determination that it was the district of residence for pupil B.P. and was financially responsible for his education during the 2001-02 school year. The district contended that B.P.'s parent, R.B., did not reside in the district during the period in question and sought return of State aid monies withheld from the district in payment for B.P.'s educational costs.

The ALJ concurred with the district, finding, *inter alia*, that R.B. had no fixed, regular and adequate residence, and that she did not reside in Bound Brook during the school year at issue, notwithstanding that she may have used her father-in-law's Bound Brook address for "pit stops," receipt of mail and other similar purposes. The ALJ concluded that – under applicable school funding law – Bound Brook was not the "district of residence" for B.P. during the 2001-02 school year and that the Department must provide State aid to the district in the amount of $51,165.28, which represents the amount erroneously withheld from the Board's State aid to cover B.P.'s educational costs.

The Deputy Commissioner, to whom the matter was delegated pursuant to *N.J.S.A.* 18A:4-33, adopted the Initial Decision as the final decision in this matter.

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.

OAL DKT. NO. EDU 2946-02
AGENCY DKT. NO. 109-4/02

RECORD SEALED

BOARD OF EDUCATION OF THE BOROUGH OF BOUND BROOK, SOMERSET COUNTY,	:	COMMISSIONER OF EDUCATION
PETITIONER,	:	DECISION
V.	:	
NEW JERSEY STATE DEPARTMENT OF EDUCATION, DIVISION OF FINANCE, AND R.B.,	:	
RESPONDENTS.	:	

The record of this matter and the Initial Decision of the Office of Administrative Law (OAL) have been reviewed by the Deputy Commissioner, to whom this matter has been delegated pursuant to *N.J.S.A.* 18A:4-33, as have the Department of Education's (Department) exceptions and the Board of Education's (Board) reply.

The Department first excepts to the determination of the Administrative Law Judge (ALJ) that R.B. was a credible witness, pointing out the instances on record where R.B. indicated that she lied about her residency for purposes of mail receipt, motor vehicle and insurance documents, welfare benefits, court proceedings and interactions with the Division of Youth and Family Services (DYFS). The Department also objects to the ALJ's statement that W.B. indicated to the school attendance officer that he did not know where R.B. lived, citing testimony and documents indicating that while W.B. said he did not know where R.B.'s *children* lived, he *also* said that R.B. did live at his Bound Brook address. Finally, the Department contends that R.B.'s residency in Bound Brook during the 2001-02 school year can be inferred from her statements during a 2003 DYFS proceeding, notwithstanding that she was not specifically questioned about that period of time. (Department's Exceptions at 1-4)

In reply, the Board contends that this matter turns on R.B.'s residency during the period in question; that only R.B. knows the truth in this regard, and she testified that she did not live in Bound Brook; and that there is no basis in the record to attack the ALJ's credibility determination, which is entitled to deference pursuant to longstanding decisional precedent. (Board's Reply at 1-5)

Upon review of the record and submissions on exception, the Deputy Commissioner determines to adopt the Initial Decision of the ALJ, subject to one correction in fact-finding as noted below.

As the Board recognizes, the outcome of this matter substantially depends upon R.B.'s assertions that she did not reside in Bound Brook during the period at issue. With respect to the credibility of any lay witness during contested case proceedings, *N.J.S.A.* 52:14B-10(c) states in pertinent part:

> The agency head 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. In rejecting or modifying any findings of fact, the agency head shall state with particularity the reasons for rejecting the findings and shall make new or modified findings supported by sufficient, competent, and credible evidence in the record.

Here, the Deputy Commissioner is satisfied that there is sufficient evidence in the record to support the ALJ's assessment that R.B. was telling the truth about living "from place to place" while using her father-in-law's Bound Brook address for official purposes and as an "occasional pit stop." (Initial Decision at 11, 18) *In re Taylor,* 158 *N.J.* 644 (1999) In so holding, the Deputy Commissioner is cognizant that the ALJ's credibility determination is entitled to deference, since the ALJ, as finder of fact, had the greatest opportunity to observe the witness's demeanor. *In the Matter of the Tenure Hearing of Tyler,* 236 *N.J. Super.* 478, 485 (App. Div.), *certif. denied,* 121 *N.J.* 615 (1989); *In the Matter of the Tenure Hearing of Frank Roberts,* 96 *N.J.A.R.* 2d (EDU) 549, 550 (1996).

Moreover, although the Department is correct that the record belies the ALJ's finding (Initial Decision at 11) that W.B. claimed R.B. was not living with him – and the Deputy Commissioner here modifies the fact-finding in this matter to so indicate – reversal of this one finding does not sufficiently tip the balance of evidence and testimony so as to alter the final conclusion to be drawn from the record. Similarly, although the Deputy Commissioner is not persuaded that any reliable inference can be drawn from R.B.'s 2003 DYFS proceeding statements, even if such an inference were to be accepted, *arguendo*, it would be outweighed by the bulk of credible testimony on record.

Accordingly, for the reasons expressed therein subject to modification of fact-finding in the one instance noted above, the Initial Decision of the OAL – finding that Bound Brook is not the district of residence for B.P. and directing the Department to provide the $51,165.28 it withheld from the Board's State aid as a consequence of its determination to the contrary[1] – is adopted as the final decision in this matter. In the interest of protecting the confidentiality of the numerous DYFS records contained in the file, the Deputy Commissioner directs that the record of this matter be sealed.

IT IS SO ORDERED.[2]

DEPUTY COMMISSIONER OF EDUCATION

Date of Decision: 2/21/06

Date of Mailing: 2/22/06

[1] The Deputy Commissioner notes that such determination was made on the basis of information supplied by DYFS and that the Department acted appropriately based on the information it had. See Initial Decision at 7-8.

[2] This decision may be appealed to the State Board of Education pursuant to *N.J.S.A.* 18A:6-27 *et seq.* and *N.J.A.C.* 6A:4-1.1 *et seq.*

State of New Jersey
OFFICE OF ADMINISTRATIVE LAW

INITIAL DECISION

OAL DKT. NO. EDU 2946-02

AGENCY DKT. NO. 109-4/02

BOUND BROOK
BOARD OF EDUCATION,

Petitioner,

v.

DEPARTMENT OF EDUCATION,
DIVISION OF FINANCE,
AND R.B., INDIVIDUALLY,

Respondents.

James F. Schwerin, Esq., for petitioner Bound Brook Board of Education (Parker McCay, attorneys)

Carolyn G. Labin, Deputy Attorney General, for respondent New Jersey Department of Education, Division of Finance (Peter C. Harvey, Attorney General of New Jersey, attorney)

No appearance by or for respondent R.B.

Record Closed: December 21, 2005 Decided: January 4, 2006

BEFORE **JOHN R. TASSINI**, ALJ:

STATEMENT OF THE CASE

This case requires a determination of the "district of residence" of a school-age child. *N.J.S.A.* 18A:7B-12, -12.1. Local boards of education are generally responsible for the education of school-age children who reside in their respective districts and the children's districts of residence are relevant for purposes of the Department of Education's funding of local boards of education. Relevant laws provide that if a school district fails to comply with a rule, standard or directive of the Commissioner of Education and/or State Board of Education, the Commissioner may withhold all or part of the State aid that the Department of Education would otherwise provide to the district and/or direct the State Treasurer to withhold from the district funds otherwise payable by the State. *See N.J.S.A.* 18A:7B-12, -12.1; *see also N.J.S.A.* 18A:7F-5, -9; *N.J.S.A.* 18A:38-1; *N.J.S.A.* 18A:55-2; *N.J.A.C.* 6A:23-5.2, -5.3.

The facts can be summarized: B.P. is the school-age son of respondent R.B. and an unidentified father. In 2000 the Division of Youth and Family Services (DYFS) removed R.B.'s children, including B.P., from R.B.'s home in Phillipsburg and placed them in foster homes. B.P., who was placed in a foster home in Elizabeth, was classified for special education and related services and, during the 2001-02 school year, pursuant to an Individualized Education Program (IEP) developed by the Phillipsburg public school system, B.P. was placed in a private school. *See* 20 *U.S.C.A.* §§ 1400 *et seq.*; *N.J.A.C.* 6A:14-3.5, -3.7. R.B. testified that after the DYFS took custody of her children she stayed in various places, although in 2001 she made representations for certain purposes, including official records, that she resided in the Borough of Bound Brook. Consistent with R.B.'s representations, the Division of Finance determined that during the 2001-02 school year Bound Brook was R.B.'s "district of residence," and the Division deducted $51,165.28, *i.e.*, the cost of B.P.'s placement in the private school for the 2001-02 school year, from funds the Department granted to the Bound Brook Board of Education (BOE). *See N.J.S.A.* 18A:7F-5. However, in this case R.B. testified that between 2000 and 2005, although she used a Bound Brook address for certain purposes, she really lived from place to place, *i.e.*, she was homeless. The BOE submits that given R.B.'s testimony and other evidence in this case, Bound Brook was not B.P.'s "district of residence," and it claims that the Division of Finance should restore the deducted amount to its funding. *N.J.S.A.* 18A:7B-12, -12.1.

PROCEDURAL HISTORY

By letter dated November 13, 2001, the Department's Division of Finance notified the BOE of its determinations that Bound Brook was R.B.'s district of residence and that the BOE was financially responsible for the education of B.P. during the 2001-02 school year. DOE-1. In a letter dated December 11, 2001, the BOE's superintendent denied that Bound Brook was the district of residence and enumerated factors supporting that denial. DOE-2. By letter dated February 8, 2002, Assistant Commissioner Peter Genovese notified the BOE of his agreement with the determination that Bound Brook was R.B.'s district of residence and that, pursuant to *N.J.A.C.* 6A:3-1.1 *et seq.*, the BOE could request a hearing on the matter. DOE-3. On April 1, 2002, the BOE's petition naming R.B., individually and as mother of B.P., as respondent was filed with the Department. On April 12, 2002, the BOE's Amended Verified Petition, adding the Department as a respondent, was so filed, demanding an order ruling that Bound Brook is not the district of residence and that the BOE is not the school district financially responsible for B.P.'s education. *N.J.S.A.* 18A:6-9. On May 15, 2002, the Department's answer was filed. The Department then transmitted the contested case to the Office of Administrative Law (OAL), where it was filed on May 23, 2002. *N.J.S.A.* 52:14B-2(b). The case was assigned to Administrative Law Judge Kathryn Clark, who fell ill. The case was reassigned to me and was the subject of a series of conferences related to a possible settlement and motions related to discovery. I heard the case on August 16 and 18, 2005. Thereafter, R.B., who never filed an answer to the petition, became available to testify, and on November 7, 2005, another day of hearing was held for that purpose. By the record-closed date, the parties had submitted their written summations and memoranda.

THE RECORD

R.B. testified as follows: She was born on February 5, 1967, in Paterson. Her maiden name is R.P. She spent much of her childhood in her parents' home in Belvidere, Warren County. She graduated from high school and attended Warren County Community College.

R.B. is the mother of six children: P.P., born January 17, 1986; B.P., born December 17, 1990; M.B.B. born April 27, 1993; K.A.B., born August 30, 1995; C.B., born May 4, 1997; and D.B., born December 11, 1998. She was not married to the father or fathers of P.P., B.P., and C.B. and she does not know the locations of their father or fathers. On February 15, 1998, she married B.B., who is the father of M.B.B., K.A.B., and D.B. Although C.B. was born after R.B. had children by B.B. and although C.B. uses B.B.'s last name, B.B. is not C.B.'s father. Also, in 2001, although R.B. was married to B.B., she was pregnant by another man, but she miscarried.

In response to questions about the dates and locations of her residences, R.B.'s testimony, which was inexact, was as follows: Beginning about 1987 and 1988 she and P.P. resided in Phillipsburg. About 1994 or 1995 she returned to her parents' residence. Beginning about 1995 she resided with B.B. in a row house in Washington Borough, Warren County. Beginning about 1998 she and B.B. resided in Phillipsburg. In December 2000 the DYFS took custody of her children. Thereafter, R.B. and B.B. left their Phillipsburg residence and they did not reside together: B.B. first stayed in a rooming house in Phillipsburg and he then resided in a two-bedroom, single-family house his father, W.B., rented at 24 Romney Road in Bound Brook. R.B. stayed wherever she could, including with friends and in her car. She used the Bound Brook address for receipt of mail and, occasionally, she stayed there, showered, and cooked. By 2001 she was pregnant by a man other than B.B. and, for a few weeks after she miscarried in May 2001, she stayed in the Bound Brook house. However, several members of W.B.'s family residing in the Bound Brook house were alcoholics, R.B. did not want to stay there, and she left the Bound Brook house.

Bernadette Joslin, a DYFS worker, testified as follows: R.B.'s children all appeared to have suffered neglect and/or abuse. The DYFS has had a long period of involvement with R.B. and all of R.B.'s children have been the subjects of DYFS cases. The DYFS filed a Superior Court complaint resulting in orders which restricted R.B.'s parental rights relative to her children. *See* DOE-20. The DYFS placed R.B.'s children in foster homes in various locations in New Jersey. B.P., classified as "emotionally disturbed" for special education and related services, was placed in a foster home in Elizabeth. *N.J.A.C.* 6A:14-3.5(c)(5).

The DYFS's records of the dates and locations of R.B.'s residences show the following: From 1986 to 1988, R.B. resided in Belvidere. In 1991, R.B. resided in Phillipsburg. In 1995, R.B. reported that she again resided in Belvidere. The DYFS does not have a record of R.B.'s residence at other times between 1988 and 1999. From 1999 to March 15, 2001, R.B. resided at several locations in Phillipsburg. Since Belvidere and Phillipsburg are Warren County municipalities, the DYFS's Warren District Office managed R.B.'s children's cases, and R.B. had a number of appearances in the Superior Court, Warren County. The case was later transferred to Somerset County. The DYFS monitored whether R.B. complied with orders governing her contact with her children. DOE-11; DOE-17.

As written above, in December 2000 B.B., R.B., and R.B.'s children were residing in Phillipsburg and the DYFS took custody of R.B.'s children. In 2001 Catholic Charities, a DYFS contractor, began to supervise R.B.'s visits with her children. The DYFS records show that in April 2001 R.B. stated to DYFS workers that she was having difficulties with B.B., but that they were residing in the Bound Brook house. However, there is no competent evidence detailing that alleged statement.

R.B. testified here as follows: She did not sign a lease for the Bound Brook residence and she did not authorize anyone to enter her name on any lease for the Bound Brook residence. However, she stayed there from time to time after December 2000. She needed an address for purposes including mail, service of papers related to the Superior Court case, her driver's license, motor vehicle registration, and motor vehicle insurance, and the DYFS's records. Consequently, she asked W.B. to say that she resided in the Bound Brook residence, she asked W.B. to accept calls, mail, and papers for her there, and she represented to the court and to the Motor Vehicle Commission that she resided in the Bound Brook residence. DOE-22; DOE-23. During this period she was staying from place to place and, occasionally, she stayed in the Bound Brook residence. DYFS officials also telephoned her on her cellular telephone when she was at work at Wal-Mart in Union. When she needed to meet with DYFS or Catholic Charities officials, *e.g.*, before traveling to visit with her children, she would travel from wherever she was staying and meet them at the Bound Brook house.

R.B. testified here that she lied when she testified in the Superior Court case that she began to reside in the Bound Brook house in about April 2001. She also testified there that between "the end of" 2002 and January 2003 she "kind of bounced between Jersey City and Newark, [and] stayed with friends." DOE-20.

The DYFS's Warren District Office notified the DYFS's District Office for Somerset County (where Bound Brook is located) that R.B.'s children's cases should be transferred to Somerset. Susan Mizak, of the DYFS's Warren District Office, then met with Carole Murray, the DYFS's Somerset District office supervisor, and William Brophy, the Somerset District Office transfer liaison. Ms. Mizak described the children's placements. Mr. Brophy could not say that Ms. Mizak personally knew of R.B.'s residence and he could not recall that he personally confirmed R.B.'s residence. However, he testified that consistent with normal procedure, within thirty days of notice of the proposed transfer of a case, a DYFS worker would meet at the reported new residence to confirm and document the residence, and, in this case, Kathleen Brown conducted that meeting. Thereafter, the DYFS mailed numerous items to R.B. at the Bound Brook address. DOE-11; DOE-17.

Kathleen Brown has certified the following: She was a DYFS Warren District Office worker who managed B.P.'s case. On April 19, 2001, she visited the Bound Brook house and performed an assessment of R.B. and B.B. During the visit, W.B., B.B.'s father, stated that R.B. was residing there and that she could remain there until she found another place to reside. R.B. stated that she was looking for a place to live in Bound Brook. B.B. stated that when R.B. found another residence, he intended to remain in his father's house. DOE-13; DPE-16.

In July 2001, consistent with B.P.'s IEP developed by the Phillipsburg public school system, the DYFS placed B.P. in Willowglen Academy in Sparta, a private school, for the 2001 extended school year and for the 2001-02 school year. *N.J.A.C.* 6A:14-3.7. R.B. testified that she knew of, but did not participate in the development of, the IEP.

The DYFS mailed notices to R.B. at the Bound Brook address and the postmaster advised the DYFS that R.B.'s mail was directed to her at the Bound Brook address. Several times between 2001 and 2003, when Ms. Joslin and Heidi Zorde, another DYFS worker and a credible

witness, appeared at the Bound Brook house, R.B. was not present, but a man there told them that R.B. did live there. DOE-6. Once B.B. told Ms. Zorde that R.B. was out, but that she returned in the evenings; however, when Ms. Zorde appeared at the Bound Brook house that evening R.B. was not present there. Ms. Zorde communicated with R.B., by way of R.B.'s cellular telephone, when R.B. was at work at Wal-Mart in Union. The DYFS received a report that R.B. had a "boyfriend" who resided somewhere other than in Bound Brook, but the DYFS's investigation did not show that she resided with the boyfriend and R.B. continued to represent to the DYFS workers that she resided in the Bound Brook house. In 2003, Karin Erickson, of Catholic Charities, twice transported R.B. from the Bound Brook house to Phillipsburg for visits with her children and, after the visits, Ms. Erickson returned R.B. to the Bound Brook house. DOE-4; DOE-4A.

Believing R.B. to reside in Bound Brook, in 2001 the DYFS reassigned its cases involving R.B. to its Somerset District Office. R.B. testified here that (on a date she did not provide) someone from the Bound Brook BOE telephoned the Bound Brook residence and told her that she should register her children in the Bound Brook school system for the 2001-02 school year, so she did so.

Karen Gagné testified as follows: She is a certified school social worker employed by the Office of Education in the Department of Human Services (DHS). She obtains information from the DYFS relative to the residences of parents and children who are the subject of DYFS cases and enters the information on forms to be submitted to the Department of Education's Office of School Funding for a determination of the "district of residence." *N.J.S.A.* 18A:7B-12. Ms. Gagné spoke with Ms. Zorde to obtain information about where R.B. lived. However, Ms. Gagné did not personally confirm R.B.'s residence, *e.g.*, by appearing at the Bound Brook house to make observations. Ms. Gagné entered the information provided by Ms. Zorde on the form and forwarded the form to the Department of Education's Office of School Funding.

Raymond Hoffelder is a planning associate in the Department of Education's Office of School Funding and he was a credible witness here. He is responsible for the initial determination of the "district of residence" of school children placed by the DYFS. *N.J.S.A.* 18A:7B-12. In doing this, he usually reviews information received from the DHS on the above-

described form. On December 21, 2001, having received the form relative to R.B. and B.P., Mr. Hoffelder requested that Ms. Gagné provide additional information. Ms. Gagné, in a responding letter dated January 4, 2002, wrote that Ms. Zorde had confirmed that the Bound Brook residence was R.B.'s address and that R.B. retained legal guardianship over B.P. DOE-11. Mr. Hoffelder did not personally confirm the information.

As described in the procedural history above, by letter dated November 13, 2001, the Department's Division of Finance notified the Bound Brook BOE of its determinations that Bound Brook was the district of residence for B.P. and that, since the Bound Brook BOE was responsible for the cost of B.P.'s education during the 2001-02 school year, the Department would deduct that cost from funds it would otherwise grant to the BOE. DOE-1. In a letter dated December 11, 2001, the BOE's superintendent denied that Bound Brook was the district of residence and enumerated factors supporting that denial. DOE-2. By letter dated February 8, 2002, Assistant Commissioner Peter Genovese notified the BOE that he agreed that Bound Brook was R.B.'s district of residence and that the BOE could request a hearing on the issue. DOE-3; *see N.J.A.C.* 6A:3-1.1 *et seq.* On April 1, 2002, the BOE's petition was filed with the Department and, thereafter, the BOE filed an amended petition.

Gloria Imbriani testified here as follows: During relevant times she has served as the Bound Brook BOE's attendance officer. The BOE's superintendent requested that she investigate R.B.'s residency. On November 20, 2001, she appeared at the Bound Brook house and W.B., who answered the door, said that he was R.B.'s grandfather and that R.B. did reside there but that B.P. did not. Thereafter, she telephoned D.S., shown on tax records as the owner of the residence, and he told her that R.B.'s name was on the lease, but that he had not met her. On November 26 or 27, 2001, she returned to the Bound Brook house with Donna Bodnar, the BOE's supervisor of special services. W.B., who again answered the door, said that R.B. was his daughter, and then said she was his daughter-in-law and that she worked at a Wal-Mart in Union, and he gave her the names of all of R.B.'s children, but he said he did not know where they lived. On November 28, 2001, she telephoned R.B. at the Wal-Mart, but R.B. hung up on her. BB-1. A few days later she returned to the Bound Brook house and knocked, but no one answered; a woman who identified herself as the next-door neighbor stated that a woman did not reside there. Ms. Imbriani did not obtain the woman's name.

As a result of the Division of Finance's determination that Bound Brook was the district of residence for B.P., it deducted $51,165.28, *i.e.*, the cost of B.P.'s placement in Willowglen Academy for the 2001-02 school year, from school funding the Department would otherwise have provided to the BOE.

In the Superior Court case, on June 5, 2003, R.B. testified as follows: Beginning in July 2001 she worked in the Wal-Mart in Union and, every two weeks, depending on the amount of her pay check, she gave W.B. about $30 to $50 out of her check and she bought food (for the Bound Brook house residents). About February or March 2003 she returned to the Bound Brook house and W.B., B.B., her brother-in-law and she all resided there. DOE-20.

B.P.'s most recent placement is in the Peter Paul House, a group home in Phillipsburg. R.B. testified that she had not seen B.P. regularly, but that the day before she testified here, she saw him at her parents' home.

In R.B.'s testimony here she denied that the Bound Brook house was her residence. She testified that she still receives some mail at the Bound Brook house and she received papers related to this case and the costs of B.P.'s education there. However, she testified that the DYFS already takes some of her income for support of her children and she thought she was not responsible for the costs of education of her children. Consequently, she did not respond to the papers related to this case and she did not participate in this case. Since June 2005 she has resided in a third-floor apartment at 653 Jefferson Avenue, Elizabeth, but she never gave the DYFS her present address, because she does not want the DYFS further involved in her life. She has not filed a complaint for divorce from B.B.

FINDINGS OF FACT

Having had an opportunity to observe the witnesses and consider their credibility and to consider all of the evidence, I make the following findings of fact:

R.B. was not married to B.P.'s father and she does not know the location of B.P.'s father or the location of the father or fathers of her other children, except B.B. B.B. is the father of several of R.B.'s children born between 1993 and 1998.

Prior to 2000, R.B. resided in Belvidere, Phillipsburg, Washington Borough, and again in Phillipsburg. In 2000, B.B., R.B., and R.B.'s children, including B.P., resided in Phillipsburg.

In December 2000, the DYFS removed B.P. from R.B.'s Phillipsburg home. Thereafter, the DYFS placed R.B.'s children in foster homes. The DYFS placed B.P. in a foster home in Elizabeth. B.P. is classified as emotionally disturbed for special education and related services and, for the 2001-02 school year, pursuant to an IEP developed by the Phillipsburg public school system, B.P. was placed in the private Willowglen Academy in Sparta.

R.B. testified that between 2000 and 2005 she lived from place to place, and that until 2005, although she used the Bound Brook address for certain purposes, she did not have a fixed, regular and adequate residence. There are circumstances that make it appear that during the 2001-02 school year R.B. may have resided in the Bound Brook house, and these circumstances include the following: R.B. used the Bound Brook address for receipt of mail, for her driver's license, for her motor vehicle registration, for car insurance purposes, for her dealings with the DYFS, and for her dealings with the Superior Court. In April 2001 W.B. told the DYFS's Ms. Brown that R.B. resided in the Bound Brook house. R.B. registered B.P. in the BOE's school system. R.B. testified that, depending upon the amount of her paycheck, she gave W.B. money and bought food for the Bound Brook residence. DYFS and Catholic Charities officials met R.B. at the Bound Brook house, *e.g.*, before traveling to see her children. R.B. testified in Superior Court that in about April 2001 she began to reside in Bound Brook and she testified here that, (at least) occasionally, she stayed in the Bound Brook house and that, while there, she showered, and also cooked. As a result of the Division of Finance's determination that Bound Brook was the district of residence for B.P., it deducted $51,165.28, *i.e.*, the cost of B.P.'s placement in Willowglen Academy for the 2001-02 school year, from school funding the Department would otherwise have provided to the BOE.

However, there are circumstances that are consistent with the finding that during the 2001-02 school year R.B. had no fixed, regular, and adequate residence and that she did not reside in the Bound Brook house: There is no competent evidence here that R.B.'s name appeared on a lease for the Bound Brook house or that she paid the Bound Brook house landlord rent. R.B., who has led a mixed-up life, testified that between 2000, when she left Phillipsburg, and 2005 she lived from place to place and, having no other address, she used the Bound Brook address only for contact with officials and for an occasional pit stop. R.B. testified here that after the DYFS took custody of her children in December 2000 she stayed with friends and in her car and that she stayed in the Bound Brook house only occasionally. Between 2001 and 2003, when DYFS officials appeared unannounced at the Bound Brook residence to visit R.B., she was not present and, even when a DYFS official returned to the house one evening, R.B. was not present. DYFS officials communicated with R.B. by way of cellular telephone while R.B. was at work in Union. R.B. testified that she would travel from wherever she was staying to meet the DYFS and/or Catholic Charities officials at the Bound Brook house before traveling for visitation with her children. In April 2001 W.B. told the DYFS's Ms. Brown that R.B. resided in the Bound Brook house, *but also that she could remain there until she found another residence and R.B. told Ms. Brown that she was looking for a residence.* The DYFS's records also showed that by 2001 R.B. had a new boyfriend and that she was not residing in Bound Brook, and R.B.'s uncontradicted testimony here was that *in 2001 she was pregnant by a man other than B.B.* R.B. testified in Superior Court that in about April 2001 she began to reside in Bound Brook, but there is no record here that she testified in Superior Court that she resided there during the 2001-02 school year. R.B. testified here that, because several members of B.B.'s family in the Bound Brook house were alcoholics, she did not want to live there, and W.B. and the members of his family would have made the two-bedroom Bound Brook house crowded. Ms. Imbriani, the BOE's attendance officer, testified that in November 2001, *i.e.*, during the 2001-02 school year, when she appeared at the Bound Brook house, W.B. stated that he did not know where R.B. lived. R.B.'s testimony that between the time that she left her Phillipsburg residence in 2000 and the time that she obtained the apartment in Elizabeth in 2005 (during the 2001-02 school year) she did not have a permanent residence is consistent with these circumstances.

Having had an opportunity to observe the witnesses and to consider all of the evidence, I find R.B. credible in her testimony describing her life as transient between 2000 and 2005. I do not find sufficient, competent and credible evidence that, during the 2001-02 school year, the Bound Brook house constituted a fixed, regular and adequate residence for R.B. *See N.J.S.A.* 18A:7B-12(c). To the contrary, I accept that beginning in December 2000 she lived from place to place and she was basically homeless, until 2005, when she obtained the apartment in Elizabeth.

CONCLUSIONS OF LAW

The Legislature is to "provide for the maintenance and support of a thorough and efficient system of free public schools for the instruction of all the children in the State between the ages of five and eighteen years." *N.J. Const.* art. VIII, § 4, ¶ 1.

The Legislature has provided that local boards of education are generally responsible for the education of school-age children who reside in their respective districts and, under the State Facilities Education Act of 1979, the children's districts of residence are relevant for purposes of the Department of Education's funding of local boards of education. *See N.J.S.A.* 18A:7B-12; *see also N.J.S.A.* 18A:7F-5; *N.J.S.A.* 18A:38-1.

Relevant laws provide that if a school district fails to comply with a rule, standard or directive of the Commissioner of Education and/or State Board of Education, the Commissioner may withhold all of part of the State aid that the Department of Education would otherwise provide to the district and/or direct the State Treasurer to withhold from the district funds otherwise payable by the State. *N.J.S.A.* 18A:7F-9; *see N.J.S.A.* 18A:7B-12, -12.1; *see also N.J.S.A.* 18A:7F-5; *N.J.S.A.* 18A:38-1; *N.J.S.A.* 18A:55-2; *N.J.A.C.* 6A:23-5.2, -5.3.

The Resource Family Parent Licensing Act was amended, effective August 27, 2004, so that in *N.J.S.A.* 30:4C-27.1 "foster family" was replaced with "resource family." *L.* 2004, *c.* 130, § 69. *N.J.S.A.* 30:4C-27.1 now states:

As used in this act "resource family parent" shall mean any

> person with whom a child in the care, custody or guardianship of the Department of Human Services is placed by the department, or with its approval, for care and shall include any person with whom a child is placed by the Division of Youth and Family Services for the purpose of adoption until the adoption is finalized.

That is, "[r]esource family homes include homes previously categorized as foster homes, adoptive homes, family friend homes and relative care homes." 37 *N.J.R.* 2807(a) (August 1, 2005).

The State Facilities Education Act of 1979 was also amended, effective, August 27, 2004, so that in *N.J.S.A.* 18A:7B-12(a) "foster family" was replaced with "resource family." *L.* 2004, *c.* 130, § 39. *N.J.S.A.* 18A:7B-12 now states:

> For school funding purposes, the Commissioner of Education shall determine district of residence as follows:
>
> a. *The district of residence for children in resource family homes shall be the district in which the resource family parents reside. If a child in a resource family home is subsequently placed in a State facility or by a State agency, the district of residence of the child shall then be determined as if no such resource family placement had occurred.*
>
> b. The district of residence for children who are in residential State facilities, or who have been placed by State agencies in group homes, skill development homes, private schools or out-of-State facilities, shall be the present district of residence of the parent or guardian with whom the child lived prior to his most recent admission to a State facility or most recent placement by a State agency.
>
> If this cannot be determined, the district of residence shall be the district in which the child resided prior to such admission or placement.
>
> c. 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.
>
> d. If the district of residence cannot be determined according to the criteria contained herein, or if the criteria contained herein identify a district of residence outside of the State, the State shall assume fiscal responsibility for the tuition of the child. The tuition shall equal the approved per pupil cost established pursuant to [*N.J.S.A.* 18A:7F-1 *et seq.*]. This amount shall be appropriated in the same manner as other State aid under this act. The Department of Education shall pay the amount to the Department of Human Services, the Department of Corrections or the Juvenile Justice Commission established pursuant to [*N.J.S.A.* 52:17B-170] or, in the case of a homeless child, the Department of Education shall pay the appropriate T&E amount and any appropriate additional cost factor for special education pursuant to [*N.J.S.A.* 18A:7F-19] to the school district in which the child is enrolled.
>
> e. If the State has assumed fiscal responsibility for the tuition of a child in a private educational facility approved by the Department of Education to serve children who are classified as needing special education services, the department shall pay to the Department of Human Services or the Juvenile Justice Commission, as appropriate, the aid specified in subsection d. of this section and in addition, such aid as required to make the total amount of aid equal to the actual cost of the tuition.

[Emphasis added.]

The State Facilities Education Act of 1979 further states:

> The district of residence for a homeless child determined pursuant to [*N.J.S.A.* 18A:7B-12] shall be responsible for the education of the homeless child. The district of residence shall determine the educational placement of the child after consulting with the parent or guardian. This determination shall be: a. to continue the child's education in the school district of last attendance, b. to enroll the child in the district of residence if the district of residence is not the district of last attendance, or c. to enroll the child in the school district where the child is temporarily living, whichever is in the child's best interest. If the parent or guardian objects to the determination made by the district of

> residence, the county superintendent of schools shall be notified and within 48 hours shall determine the placement of the child based on criteria established by the State Board of Education. Any appeals regarding the determination shall be resolved according to rules established by the State Board of Education.
>
> When the homeless child attends school in a district other than the district of residence, the district of residence shall pay the costs of tuition for the child to attend school in that district and shall pay for any transportation costs incurred by that district. When the homeless child attends school in the district of residence while temporarily residing in another district, the district of residence shall provide for transportation to and from school pursuant to the provisions of [*N.J.S.A.* 18A:58-7].
>
> [*N.J.S.A.* 18A:7B-12.1.]

Department of Education regulations provide criteria for determination of a school child's district of residence:

> (a) The district of residence for school funding purposes shall be determined according to the following criteria:
>
> > 1. The "present district of residence" of a child in a residential state facility defined in *N.J.S.A.* 18A:7F-3 and referred to in the first paragraph of *N.J.S.A.* 18A:7B-12b means the New Jersey district of residence of the child's parent(s) or guardian(s) 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, private school or out-of-State facility also referred to in the first paragraph of *N.J.S.A.* 18A:7B-12b means the New Jersey district of residence of the child's parent(s) or guardian(s) as of the date of the child's initial placement by the State agency. In subsequent school years spent in the educational placement made by a State agency, the child's "present district of residence" shall be determined in the same manner as for a child in a residential State facility as set forth in (a)1 above. The "district of residence" referred to in the second paragraph of *N.J.S.A.* 18A:7B-12b means the New Jersey district of residence in which the child resided immediately prior to his or her most recent admission to a State facility or most recent placement by a

State agency.

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-12b shall be determined by the Commissioner or his or her designee based upon the address submitted by the Department of Corrections, the Department of Human Services 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 that a dispute exists to the Assistant Commissioner, Division of Finance, within 30 days of the receipt of a final notice that a child was determined to be a resident of the district for purposes of State funding. As part of this written notice, the following information shall be submitted:

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

2. Written rationale for rejecting the determination of the Department; and

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

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

(f) A district board of education may initiate a formal

> proceeding before the Commissioner to resolve such a dispute if the Division of Finance is unable to resolve a dispute within the 90 day time limit, by filing a Petition of Appeal with the Commissioner pursuant to the provisions of *N.J.A.C.* 6A:3.
>
> (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 district board of education 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.A.C.* 6A:23-5.2.]

Department of Education regulations further provide relative to determination of a school child's district of residence:

> (a) The address submitted to the Department for determining the district of residence for school funding purposes for a child described below shall be the address defined below:
>
> > 1. *If the State has custody of the child* or if a court or the State has appointed a third party as the custodian of the child, the present address of the parent(s) or guardian(s) with whom the child resided immediately prior to his or her initial admission to a State facility or placement by a State agency shall be submitted. *If the child resides in a foster home* or with relatives, *the present address of the foster parent(s) or relatives shall be submitted pursuant to N.J.S.A.* 18A:7B-12.
> >
> > 2. If the child's parents are divorced with joint guardianship, the present address of the individual parent with whom the child resided as of the date required by *N.J.A.C.* 6A:23-5.2(a)1 or 2 shall be submitted.
> >
> > 3. If the child's parents are divorced with joint guardianship and the child resides with each parent one-half of the time, the present address of both the child's father and mother as of the date required by *N.J.A.C.* 6A:23-5.2(a) 1 or 2 shall be submitted.
> >
> > 4. If the child's sole parent or legal guardian resides in a State facility, the State will assume financial

> responsibility for the child's educational costs until such time as the parent or guardian no longer resides in the State facility.
>
> 5. If the child resides with a relative such as an aunt or grandmother for less than one year immediately prior to the child's initial admission to a State facility or initial placement by a State agency, the present address of the child's parent(s) or guardian(s) at the time this initial placement is submitted.
>
> 6. If the child resides with a relative such as an aunt or grandmother pursuant to *N.J.S.A.* 18A:38-1d for one or more years immediately prior to the child's initial admission to a State facility or initial placement by a State agency, the present address of the child's relative(s) at the time of this initial placement is submitted.
>
> 7. If the child is age 18 or older, or has been legally emancipated and has lived on his or her own before the initial placement, the present address of the child as of the date required by *N.J.A.C.* 6A:23-5.2(a)1 or 2 is submitted.
>
> [*N.J.A.C.* 6A:23-5.3, emphasis added.]

In December 2000 the DYFS removed B.P. from R.B.'s Phillipsburg home and placed B.P. in a foster home, now known as a resource home, in Elizabeth. Consistent with the IEP developed by the Phillipsburg public school system, B.P. was placed in the private Willowglen Academy for the 2001-02 school year. The location of B.P.'s father is unknown. From 2000, when R.B. left her Phillipsburg residence, until 2005 when she obtained an apartment in Elizabeth, she used the Bound Brook address for purposes including receipt of mail and she stayed there occasionally, but she really lived from place to place. That is, R.B. had no fixed, regular and adequate residence and she did not reside in Bound Brook during the subject school year. Consistent with these facts and the above-cited laws, on the record here, "[f]or school funding purposes" Bound Brook was not the "district of residence" for B.P. during the 2001-02 school year. *N.J.S.A.* 18A:7B-12.

Consistent with the above findings of fact and conclusions of law, the Division of Finance (the Department) should not withhold or cause the withholding of funding and should

provide $51,165.28, *i.e.*, the cost of B.P.'s placement in Willowglen Academy for the 2001-02 school year, in school funding to the BOE.

ORDER

I **ORDER** the Division of Finance to restore $51,165.28, *i.e.*, the cost of B.P.'s placement in Willowglen Academy for the 2001-02 school year, to funding provided to the BOE and to take such other steps as reasonably necessary so that that amount is provided to the BOE.

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

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

Within thirteen (13) days from the date on which this recommended decision was mailed to the parties, any party may file written exceptions with the **COMMISSIONER OF THE DEPARTMENT OF EDUCATION, 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 4, 2006
DATE

JOHN R. TASSINI, ALJ

E-mail Receipt of Initial Decision Confirmed by the Department of Education on:

1-5-06
DATE

Mailed to Parties:

JAN 10 2006
DATE

OFFICE OF ADMINISTRATIVE LAW

mph

EXHIBITS

Board of Education's Exhibits:

BB-1	Memorandum by Imbriani, BOE Attendance Officer, November 29, 2001 EV
BB-2	Memorandum by Bodnar, BOE Supervisor of Special Services, November 26, 2001 ID

Department of Education's Exhibits:

DOE-1	Letter from Department to BOE, November 13, 2001 ID
DOE-2	Letter from BOE to Department, December 11, 2001 ID
DOE-3	Letter from Department to BOE, February 8, 2002 ID
DOE-4	Certification of Karin Erickson EV
DOE-4A	Supervised Visitation Report from Catholic Charities, April 9, 2003 EV
DOE-5	Letter from DYFS, October 15, 2004 ID
DOE-6	DYFS Contact Sheet, June 28, 29, 2001 ID
DOE-7	E-mail from DYFS, H. Zorde, June 4, 2002 ID
DOE-8	Letter from DYFS, October 20, 2004 ID
DOE-9	DYFS Part II, Case Plan, January 14, 2000 ID
DOE-10	Letter from DHS, Office of Education, Karen Gagné, January 4, 2002 ID
DOE-11	E-mail from DYFS, H. Zorde, August 1, 2001 ID
DOE-12	Certification of Brophy ID
DOE-13	Certification of Brown EV
DOE-13A	DYFS Contact Sheet, April 19, 2001 EV
DOE-14	Transcript of Deposition of Karin Erickson EV
DOE-15	Transcript of Deposition of Murray ID
DOE-16	Transcript of Deposition of Brown EV
DOE-17	Transcript of Deposition of Brophy EV
DOE-18	Transcript of Deposition of Joslin ID
DOE-19	Transcript of Deposition of Zorde ID

DOE-20 Transcript of Testimony of R.B., *IMO Guardianship of K.A.B. and M.B.B.*, In Camera Hearing, N.J. Super., Ch. Div., Family Part, Somerset County, Dkt. No. F-18-105-02, June 5, 2003 ID

DOE-21 Transcript of Testimony of R.B., *IMO Guardianship of K.A.B. and M.B.B.*, In Camera Hearing, N.J. Super., Ch. Div., Family Part, Somerset County, Dkt. No. F-18-105-02, June 5, 2003, pp. 99, 100 ID

DOE-22 R.B.'s New Jersey Vehicle Registration Renewal Application, filed Sept. 8, 2001 EV

DOE-23 R.B.'s New Jersey Driver License Application, September 2002 EV

WITNESSES

Board of Education's Witness:

R.B.

Gloria Imbriani

Department of Education's Witnesses:

Karen Gagné

Raymond Hoffelder

Bernadette Joslin

Heidi Zorde

STATE OF NEW JERSEY

OFFICE OF ADMINISTRATIVE LAW

TO: Administrative Practice Officers
and Other Interested Parties

FROM: Mark M. Stanton
Manager, Division of
Administrative Rules

RE: Notice of Proposed Readoption with Amendments and Repeal
Rules for Agency Rulemaking
N.J.A.C. 1:30

DATE: February 17, 2006

Enclosed please find a copy of the notice of proposed readoption with amendments and repeal of the Office of Administrative Law's Rules for Agency Rulemaking, N.J.A.C. 1:30. This chapter is scheduled to expire on July 16, 2006. This notice will be published in the February 21, 2006 New Jersey Register at 38 N.J.R. 1117(a).

Written comments may be submitted by April 22, 2006 to:

Patricia Prunty, Assistant Director
Office of Administrative Law
Quakerbridge Plaza, Bldg. 9
PO Box 049
Quakerbridge Road
Trenton, New Jersey 08625-0049

ADMINISTRATIVE LAW
OFFICE OF ADMINISTRATIVE LAW

Rules For Agency Rulemaking

Proposed Readoption with Amendments: N.J.A.C. 1:30

Proposed Repeal: N.J.A.C. 1:30-5.8

Authorized By: Laura Sanders, Director, Office of Administrative Law.

Authority: N.J.S.A. 52:14B-4 and 7, and 52:14F-5(f), (h) and (i).

Calendar Reference: See Summary below for explanation of exception to the calendar requirement

Proposal Number: PRN 2006-47.

Submit written comments by April 22, 2006 to:

Patricia Prunty, Assistant Director

Office of Administrative Law

Quakerbridge Plaza, Bldg. 9

PO Box 049

Quakerbridge Road

Trenton, New Jersey 08625-0049

The agency proposal follows:

Summary

Pursuant to the requirements of Executive Order No. 66 (1978) and N.J.S.A. 52:14B-5.1, the Office of Administrative Law (OAL) proposes to readopt with amendments the current OAL Rules for Agency Rulemaking found at N.J.A.C. 1:30, which would otherwise expire on July 15, 2006, in accordance with N.J.S.A. 52:14B-5.1.c.

These rules were initially adopted in 1981, and were subsequently readopted with amendments in 1986, 1991, 1996 and 2001 (see 13 N.J.R. 255(d), 18 N.J.R. 469(a), 23 N.J.R. 399(a), 28 N.J.R. 1198(a) and 33 N.J.R. 549(a), respectively). The significant 1986 amendments included new and clarified definitions; actions to be taken by OAL in the event of non-compliance with rulemaking requirements; a

revised document clarity standard; clarification of the proposal notice and opportunity to be heard requirements; the procedure for negotiating a rule; revision of expiration dates from the subchapter to the chapter level; and clarification of emergency rulemaking documentation. The significant 1991 amendments included new and clarified definitions; clarification of what can be corrected administratively and introduction of the administrative change process; clarification concerning secondary notice of proposals; the allowance of informal public input prior to proposal; clarification as to allowing oral comments and public hearing notice; incorporation of the Administrative Procedure Act requirements for mandatory requested public hearings and for a summarization of hearing officer's recommendations and agency responses thereto; and clarification as to agency replies to petitions for rulemaking, and the contents of notices of adoption. The significant 1996 amendments included a new rule concerning publication filing deadlines; inclusion of the requirement for a Jobs Impact Statement in proposals, pursuant to P.L. 1995, c. 166; and a new rule concerning timely filing of notices of adoption. The 2001 readoption included only technical amendments; however, following the enactment of P.L. 2001, c. 5 amending the Administrative Procedures Act, N.J.S.A. 52:14B-1 et seq., a subsequent 2001 rulemaking substantively amended the chapter concerning the standard of clarity for rules; rulemaking calendars; petitions for rulemaking; and providing public hearings on rulemaking or extending public comment period based upon sufficient public interest. See 33 N.J.R. 915(a) and 1927(a)

In compliance with Executive Order No. 66 (1978), OAL has reviewed the current chapter and has determined that it remains adequate, reasonable and necessary for the purposes for which it was originally promulgated, that is, the implementation and coordination of uniform rules for agency rulemaking. As a result of this review, OAL also proposes a few amendments to the rulemaking rules.

The following summarizes the current rules and the proposed amendments:

Subchapter 1 contains general provisions.

N.J.A.C. 1:30-1.1 states the title of the rules.

N.J.A.C. 1:30-1.2 is the chapter definitions section.

N.J.A.C. 1:30-1.3 states the Division of Administrative Rules' address and hours of operation.

N.J.A.C. 1:30-1.4, 1.5 and 1.6 specify how the New Jersey Administrative Code, New Jersey Register and New Jersey statutes should be cited, respectively.

N.J.A.C. 1:30-1.7 discusses the use of the rule headings.

N.J.A.C. 1:30-1.8 states that the public has access to rulemaking documents and the location and time for such access.

N.J.A.C. 1:30-1.9 sets forth the fees for copies of rule-related documents.

N.J.A.C. 1:30-1.10 states that OAL may prescribe forms and formats for use in rule submissions.

N.J.A.C. 1:30-1.11 is reserved.

N.J.A.C. 1:30-1.12 outlines rulemaking compliance requirements, including actions to be taken by OAL when a submission is found not in compliance with this chapter.

N.J.A.C. 1:30-1.13 describes the noticing of an invalidated rule.

N.J.A.C. 1:30-1.14 describes the schedule for filing of documents for publication in the New Jersey Register, sets forth what types of documents need to be filed by the scheduled proposal and adoption deadlines, and provides that documents for a particular Register filed beyond those deadlines will be accepted at OAL's discretion based on specified considerations.

N.J.A.C. 1:30-1.15 explains the procedure for receiving and filing a rulemaking document.

Subchapter 2 contains rules on rulemaking generally.

N.J.A.C. 1:30-2.1 states that documents submitted and rules must be written clearly in order to be acceptable for filing. This section reiterates the standard of clarity in N.J.S.A. 52:14B-4.1a.

N.J.A.C. 1:30-2.2 explains how source documents are incorporated by reference.

N.J.A.C. 1:30-2.3 requires that each rule section embrace a single subject.

N.J.A.C. 1:30-2.4 specifies the proper authorization for rule activity.

N.J.A.C. 1:30-2.5 specifies the effect of statements that are part of notice of proposal and adoption.

N.J.A.C. 1:30-2.6 states what constitutes the authoritative text of any rule printed, or not printed, in the New Jersey Register.

N.J.A.C. 1:30-2.7 set forth the standards for amendment to a rule by administrative correction or change.

N.J.A.C. 1:30-2.8 outlines the use of appendices in rules.

N.J.A.C. 1:30-2.9 serves to reiterate the requirements of N.J.S.A. 52:14B-3(1) and (2), that State agencies promulgate organizational rules and rules of practice.

N.J.A.C. 1:30-3 sets forth requirements for the quarterly publication in the New Jersey Register of agency rulemaking calendars, in accordance with N.J.S.A. 52:14B-3(4).

N.J.A.C. 1:30-3.1 requires each agency to publish in the first New Jersey Register for the months of January, April, July and October, a quarterly calendar setting forth a schedule of the agency's anticipated rulemaking proposal activities for the next six months.

N.J.A.C. 1:30-3.2 prescribes the form of notice to be filed with OAL when an agency wishes to amend its rulemaking calendar.

N.J.A.C. 1:30-3.3 sets forth exceptions to the calendar requirements, five circumstances in which an agency need not include a rulemaking activity in a rulemaking proposal calendar before proceeding with the proposal.

N.J.A.C. 1:30-3.4 prescribes how each agency shall publicize that copies of its calendar are available to interested persons, and the fee to be charged for such copies.

The OAL notes that since the rulemaking calendar requirements became operative on July 1, 2001, rather than publish rulemaking calendars, State agencies have opted to utilize the calendar exception at N.J.A.C. 1:30-3.3(a)5 and provide a 60-day comment period for almost all proposals.

Subchapter 4 contains the rules on petitions for rulemaking.

N.J.A.C. 1:30-4.1 sets forth requirements for the content of a petition and of the notice of receipt of a petition to be submitted by the receiving agency to the OAL for publication in the New Jersey Register.

N.J.A.C. 1:30-4.2 sets for the requirements for agency action on a petition.

N.J.A.C. 1:30-4.3 concerns agency failure to respond to a petition within the time frames established under N.J.A.C. 1:30-4.2(a). In keeping with the establishment of specific time frames for action in the petition for rulemaking process under N.J.S.A. 52:14B-4(f), and in order to establish a reasonable period for conclusion of the proceedings under this section, the OAL proposes to amend N.J.A.C. 1:30-4.3(e) to require that the report of the person who conducted the public hearing on the petition under this section, summarizing the factual record presented and the arguments for an against proceeding with a rule proposal based on the petition, be completed within 90 days after the public hearing. The sentence structure of the subsection is also proposed for amendment, for improved clarity.

Subchapter 5 contains rules that regulate the proposal process.

N.J.A.C. 1:30-5.1 specifies what must be included as part of a notice of proposal.

N.J.A.C. 1:30-5.2 sets forth the action to be taken by OAL and the submitting agency concerning a notice of proposal, including the additional forms of notice concerning the proposal that the agency must provide.

N.J.A.C. 1:30-5.3 specifies the requirements for when an agency wishes to provide an opportunity for informal public input on a rule matter, and for when an agency wishes to more formally "pre-propose" a rule. A technical amendment is proposed at N.J.A.C. 1:30-5.3(c)4i, correcting a cross-

reference to a prior codification of N.J.A.C. 1:30-5.4.

N.J.A.C. 1:30-5.4 states the requirements for providing public opportunity to be heard on a proposed rulemaking, including provisions concerning a 30-day comment period extension and/or conducting a public hearing if sufficient public interest is generated.

N.J.A.C. 1:30-5.5 sets forth the requirements for public hearings on a proposed rulemaking.

N.J.A.C. 1:30-5.6 establishes the rulemaking record that an agency must maintain.

N.J.A.C. 1:30-5.7 outlines the requirements for negotiating a rule.

N.J.A.C. 1:30-5.8 defines a Federally required proposed rule and provides that, unlike other proposals, such is not required to be submitted to the Legislature, pursuant to N.J.S.A. 52:14B-4.4. As P.L. 2001, c. 5, §11 repealed N.J.S.A. 52:14B-4.4 was repealed effective July 1, 2001, this section is likewise proposed for repeal.

Subchapter 6 contains rules that regulate the adoption procedure.

N.J.A.C. 1:30-6.1 sets forth the requirements for a notice of adoption.

N.J.A.C. 1:30-6.2 outlines the time requirements for filing a notice of adoption.

N.J.A.C. 1:30-6.3 establishes a framework for determining the propriety of substantive and technical changes upon adoption to a proposed rule or amendment.

N.J.A.C. 1:30-6.4 outlines Executive Order No. 66 (1978) and N.J.S.A. 52:14B-5.1 rule expiration requirements. The OAL proposes to amend N.J.A.C. 1:30-6.4(f) to provide that, in order to maintain chapter effectiveness, the rules must be duly proposed for readoption, adopted and filed "on or before" (changed from "prior to") the chapter expiration date. This amendment reconciles this sentence with subsequent subsection language, conforming to established OAL practice.

N.J.A.C. 1:30-6.5 contains the procedure for filing an emergency adoption.

N.J.A.C. 1:30-6.6 specifies when adopted rules become effective.

N.J.A.C. 1:30-6.7 concerns the timely filing of a notice of adoption in order to avoid the expiration of a chapter or a proposed rulemaking, or to avoid a break in effectiveness between an emergency adoption and the adoption of a concurrent proposal.

As the OAL has provided a 60-day comment period on this notice of proposal, this notice is excepted from the rulemaking calendar requirements, pursuant to N.J.A.C. 1:30-3.3(a)5.

Social Impact

The readoption of N.J.A.C. 1:30, Rules for Agency Rulemaking, primarily affects all State agencies which are required or authorized by law to promulgate rules necessary to implement their respective statutory responsibilities. These rules provide uniform application and administration of the rule promulgation process as established under the Administrative Procedure Act, N.J.S.A. 52:14B-1 et seq., and ensure that the public is afforded notice of an agency's proposed rulemaking action and the opportunity to comment on that proposed action. No social impact is anticipated from the proposed amendments and repeal.

Economic Impact

Although primarily procedural rules, N.J.A.C. 1:30 may have an economic impact on State agencies in that both administrative and professional staffs may be required to comply with the procedural requirements of the rulemaking rules. There may be an economic impact in that agency staff is required to draft Summaries and other statements for proposals, prepare summaries of public comments and agency responses for adoptions, respond to rulemaking petitions, conduct public hearings, and compile and retain the rulemaking record.

While the public input permitted under the Administrative Procedure Act rulemaking process may result in a non-quantifiable economic benefit to those regulated and society at large, except for the copy charge permitted under N.J.S.A. 47:1A-2 and any expense that would be incurred in preparing a petition for rulemaking, the application of these amended rules should have no direct economic impact on the public.

The review and maintenance of documents subject to these rules necessitates the employment of professional and administrative staff by OAL. Such staff cost is part of the OAL annual budget, and is not anticipated to change as a result of the rules proposed for readoption with amendments and repeal.

Federal Standards Statement

The Rules for Agency Rulemaking are promulgated under the authority of the Administrative Procedure Act, N.J.S.A. 52:14B-1 et seq., and are not subject to any Federal statutes, regulations or standards. Therefore, an analysis pursuant to Executive Order No. 27 (1994)/N.J.S.A. 52:14B-23 is not required.

Jobs Impact

The OAL does not anticipate that any jobs will be generated or lost by virtue of the rules proposed for readoption with amendments and repeal.

Agriculture Industry Impact

Except for the requirement to include in a notice of proposal an Agriculture Industry Impact

statement, the rules proposed for readoption with amendments and repeal are not anticipated to have any impact upon the agriculture industry beyond those impacts generally described above. The requirement for inclusion of an Agriculture Industry Impact statement, at N.J.A.C. 1:30-5.1(c)6, merely reflects the requirement for such statement under N.J.S.A. 4:1C-10.3.a and 52:14B-4(a)(2). The presence of an Agriculture Industry Impact statement in proposals may serve to enhance awareness on the part of the agriculture community of the impact of State regulatory proposals, and, in conjunction with proposing agency consultation with the State Agricultural Development Committee, required in the circumstances specified in N.J.S.A. 4:1C-10.3.c, to lessen adverse economic effects of the proposal on the industry.

Regulatory Flexibility Analysis

The rules proposed for readoption with amendments and repeal primarily affect State agencies in regulating the rule promulgation process and, with the exceptions discussed below, do not impose reporting, recordkeeping or other compliance requirements on small businesses as the term is defined under the Regulatory Flexibility Act, N.J.S.A. 52:14B-16 et seq.

Those requesting copies of rule-related documents from OAL, or a copy of a rulemaking calendar from an agency, whether individuals or entities, must pay the copy fees set forth in N.J.A.C. 1:30- 1.9. These fees reflect the statutory charges at N.J.S.A. 47:1A-2. No small business would have to employ professional services to request copies or pay these fees. As the cost of document reproduction, in terms of equipment and labor, is unrelated to the business size of an entity requesting copies, no lesser fees or fee exceptions are provided small businesses.

N.J.A.C. 1:30-4.1(b) sets forth the content requirements of a petition for rulemaking, reiterating those established under N.J.S.A. 52:14B-4(f). These requirements apply to anyone, including a small business, submitting a petition, and would involve only the costs of drafting and submitting the petition to an agency. No professional services need be employed to comply with these requirements. As the requirements are statutory, there is no differentiation in requirements based on business size.

In a case in which an agency in receipt of a petition for rulemaking has not complied with the mandatory time frames for response, a petitioner's request to the OAL Director to order a public hearing on the petition must be in writing. The only costs involved would be those for the preparation and delivery of the written request, and no professional services need be employed to comply. As this requirement arises under statute (N.J.S.A. 52:14B-4(h)), no lesser requirement or exception can be provided for a small business petitioner.

Smart Growth Impact

Executive Order No. 4 (2002) requires State agencies to include a Smart Growth Impact statement in rulemaking notices of proposal. The requirement for this statement is reiterated in the Rules for Agency Rulemaking at N.J.A.C. 1:30-5.1(c)8. The statement is to relate the rulemaking's impact on the achievement of smart growth and the implementation of the State Development and Redevelopment Plan (State Plan). By providing the public and other interested parties information concerning the smart growth-related effects of a proposed rulemaking, the requirement for this statement may be viewed as having a positive impact on the achievement of smart growth and the implementation of the State Plan.

Full text of the rules proposed for readoption may be found in the New Jersey Administrative Code at N.J.A.C. 1:30.

Full text of the proposed amendments and repeal follows (additions indicated in boldface thus; deletions indicated in brackets [thus]):

1:30-4.3 Failure to respond to petition

(a) - (d) (No change.)

(e) The petitioner and the agency shall participate in the public hearing. [and] At the hearing, they shall present a summary of their positions on the petition and a summary of the factual information on which their positions on the petition are based. [and] They also shall respond to questions posed by any interested party. The hearing procedure shall otherwise be consistent with the requirements for the conduct of a public hearing as prescribed in N.J.A.C. 1:30-5.5(d), except that, within 90 days after the hearing, the person assigned to conduct the hearing shall make a report summarizing the factual record presented and the arguments for and against proceeding with a rule proposal based upon the petition.

(f) (No change.)

1:30-5.3 Informal public input; notice of pre-proposal

(a) - (b) (No change.)

(c) The notice of pre-proposal shall include:

1. - 3. (No change.)

4. An announcement of the public's opportunity to be heard regarding the contemplated action, which shall include:

i. Where, when and how persons may present their comments orally or in writing (see N.J.A.C. 1:30-[3.3]5.4, Opportunity to be heard); and

ii. (No change.)

5. (No change.)

(d) (No change.)

1:30-5.8 [Federally required rule] (Reserved)

[(a) Pursuant to N.J.S.A. 52:14B-4.4, a Federally required proposed rule is not required to be submitted to the Legislature.

(b) A proposed rule is a Federally required rule if the specific provisions of the proposed rule are prescribed by Federal statute, rule or ruling, so that the agency exercises no discretion as to whether to promulgate the rule and as to what is prescribed by the rule.

(c) Where an agency claims that a proposed rule is Federally required, the agency shall submit as part of the notice of proposal a citation for the Federal statute, rule or ruling involved and an explanation of the Federal requirement.]

1:30-6.4 Expiration date for adopted rule

(a) - (d) (No change.)

(f) In order to maintain the effectiveness of a chapter of rules, the rules must be duly proposed for readoption, adopted and filed [prior to] on or before the chapter expiration date. Upon the filing of a notice of proposed readoption, the expiration date of the subject chapter shall be extended for 180 days, if such notice is filed with the Office of Administrative Law on or before the chapter expiration date. If the chapter expiration date falls on a Saturday, Sunday or legal holiday, the 180-day expiration date extension shall take effect if the filing of the notice of proposed readoption occurs no later than the next business day after the expiration date. The readopted rules are effective upon filing with the Office of Administrative Law.

1. - 2. (No change.)

(g) - (h) (No change.)

76-06

OAL DKT. NO. EDU 05173-01
AGENCY DKT. NO. 121-4/01

ANITA HUGGINS,	:	
PETITIONER,	:	
V.	:	COMMISSIONER OF EDUCATION
STATE-OPERATED SCHOOL DISTRICT OF THE CITY OF JERSEY CITY, HUDSON COUNTY,	:	DECISION
RESPONDENT.	:	

The record of this matter, the proposed settlement agreement and the Initial Decision issued by the Office of Administrative Law (OAL) pursuant to *N.J.A.C.* 1:1-19.1, have been reviewed.

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

IT IS SO ORDERED.

Lucille Edary

ACTING COMMISSIONER OF EDUCATION

Date of Decision: 2/23/06

Date of Mailing: 2/23/06

State of New Jersey
OFFICE OF ADMINISTRATIVE LAW

INITIAL DECISION

SETTLEMENT

OAL DKT. NO. EDU 05173-01

AGENCY DKT. NO. 121-4/01

ANITA HUGGINS,

Petitioner,

v.

STATE-OPERATED SCHOOL DISTRICT OF THE CITY OF JERSEY CITY, HUDSON CONTY,

Respondent.

Alan S. Porwich, Esq., for petitioners (Feintuch, Porwich and Feintuch, attorneys)

Charlotte Kitler, Esq., for respondent

Record Closed: December 21, 2005 Decided: January 4, 2006

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

This matter was transmitted to the Office of Administrative Law (OAL) on June 7, 2001, for resolution as a contested case pursuant to *N.J.S.A.* 52:14B-1 to -15 and *N.J.S.A.* 52:14F1 to -13.

During the pendency of the case at the Office of Administrative Law, the parties settled their differences as provided in the attached Stipulation of Settlement.

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

Accordingly, I **CONCLUDE** that the attached Stipulation of Settlement meets the requirements of *N.J.A.C.* 1:1-19.1(d) and I hereby **APPROVE** same. In conjunction therewith, I **ORDER** that the parties comply with its contents and that these proceedings **BE** (and are hereby) **TERMINATED**.

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

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

1-4-06
DATE

Thomas E. Clancy
THOMAS E. CLANCY, ALAJ

Receipt Acknowledged:

Jan 11 2006
DATE

Karen Kennedy
DEPARTMENT OF EDUCATION

Mailed to Parties:

JAN 13 2006
DATE

DIRECTOR AND CHIEF ADMINISTRATIVE LAW JUDGE
OFFICE OF ADMINISTRATIVE LAW

da

CHARLOTTE KITLER
General Counsel
State-Operated School District
of Jersey City
346 Claremont Avenue
Jersey City, New Jersey 07305
(201) 915-6231
Attorney for Respondent

DEC 23 2005
OFFICE OF ADMINISTRATIVE LAW
33 WASHINGTON STREET
NEWARK, NJ 07102

ANITA HUGGINS, Petitioner, v. STATE-OPERATED SCHOOL DISTRICT OF JERSEY CITY, COUNTY OF HUDSON, Respondent.	BEFORE THE COMMISSIONER OF EDUCATION OF NEW JERSEY Agency Dkt. No. 121-4/01 OAL Dkt. No. EDUOr 05173-01 ***STIPULATION OF SETTLEMENT***

This Agreement is entered into as a resolution of the within matter regarding petitioner's claim for restoration of certain sick days pursuant to N.J.S.A. 18A:30-2.1 for absences from work from December 4, 2000 through January 26, 2001, alleged to be due to work-related injuries. The petitioner and respondent hereby agree to an amicable resolution of the within matter as follows:

1. The parties agree that this Stipulation of Settlement represents the compromise of disputed claims and is not an admission of liability or wrongdoing by either party.

2. The petitioner withdraws her petition in the within matter.

3. The respondent Jersey City School District agrees to restored sixteen (16) sick days to petitioner's sick bank as being due to injury on the job.

4. It is understood that this Stipulation will take effect upon its approval by the Administrative Law Judge and by the Commissioner of Education.

ANITA HUGGINS

DATED: December 12, 2005

ALAN S. PORWICH, Esq.
Attorney for Petitioner

DATED: December 15, 2005

CHARLOTTE KITLER, Esq.
Attorney for Respondent

DATED: 12/21/05

80-06

J. M-P. on behalf of minor child T.P.,	:	
PETITIONER,	:	
V.	:	COMMISSIONER OF EDUCATION
BOARD OF EDUCATION OF THE SOUTH ORANGE-MAPLEWOOD SCHOOL DISTRICT, ESSEX COUNTY	:	DECISION
RESPONDENT.	:	

SYNOPSIS

Petitioner appealed her minor child, T.P.'s, long-term suspension following an incident in September 2005 in which the child allegedly threatened and verbally abused a teacher. She contended that the respondent Board did not consider the child's medical condition when imposing the penalty of a suspension for the balance of the school year, and she requested that T.P. be returned to school. An application for emergent relief was filed, and a hearing scheduled.

Settlement discussions apparently took place on or prior to the hearing date although the record is unclear in this regard. The ALJ issued an Order of Dismissal of the emergent application and an Initial Decision dismissing the petition, stating that the case had been settled, and that T.P. had been returned to school on December 19, 2005.

Having received no exceptions stating to the contrary, the Commissioner is constrained to find that the petition and the application for emergent relief are moot, and accordingly adopts the Order of Dismissal of the emergent application and the Initial Decision dismissing the petition as the final decision in this matter.

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.

February 27, 2006

OAL DKT. NO. EDU 12344-05
AGENCY DKT. NO. 321-11/05

J. M-P. on behalf of minor child T.P.,	:	
PETITIONER,	:	
V.	:	COMMISSIONER OF EDUCATION
BOARD OF EDUCATION OF THE SOUTH ORANGE-MAPLEWOOD SCHOOL DISTRICT, ESSEX COUNTY	:	DECISION
RESPONDENT.	:	

The Commissioner has reviewed the record of this matter, the Order of Dismissal issued by the Office of Administrative Law (OAL) on January 11, 2006, and the Initial Decision dated January 17, 2006. No exceptions were filed.

The petition and application for emergent relief were submitted to the Bureau of Controversies and Disputes on November 10, 2005, requesting that petitioner's minor child, T.P., be returned to school. T.P. had been suspended for the balance of the school year, with the possibility of returning to school sooner, provided certain conditions were met, including a mental health evaluation. The case was immediately transmitted to the OAL for a hearing.

A hearing on the emergent application was scheduled for November 21, 2005, and on November 18, 2005, respondent submitted its papers opposing the requested emergent relief. In both the above referenced Order of Dismissal and the Initial Decision, it states that "[d]uring the hearing, the parties requested that the case be continued to another date because they were discussing settlement terms."

Correspondence dated November 29, 2005, from respondent's counsel advised the Administrative Law Judge (ALJ) that respondent had agreed to meet to reconsider T.P.'s disciplinary case. Respondent asked that petitioner provide a medical report/evaluation, including information

about T.P.'s medication and treatment, and an opinion about whether she posed a danger to herself or others. After the submission of that information, petitioner and respondent's superintendent would meet, the superintendent would make a recommendation to the respondent Board of Education (Board), and the Board would make a decision. It states in both the Order of Dismissal and Initial Decision that the OAL hearing was consequently adjourned to December 14, 2005.

On December 13, 2005, the day before the scheduled hearing, respondent's counsel submitted a letter brief and certifications urging that petitioner had neither sustained her burden to justify a grant of emergent relief, nor shown that respondent had acted arbitrarily or capriciously in imposing the suspension upon T.P.

Notwithstanding this indication that the issues in this matter were still unresolved on December 13, 2005, the ALJ reported in both the Order of Dismissal and the Initial Decision that the hearing date of December 14, 2005 "was adjourned because the case had been settled. T.P. was returned to school on December 19, 2005." Having received no exceptions stating to the contrary, the Commissioner is constrained to find that the petition and the application for emergent relief are moot.

Accordingly, the Commissioner adopts the Order of Dismissal of the emergent application and the Initial Decision dismissing the petition.

IT IS SO ORDERED.[1]

Lucille Edy

ACTING COMMISSIONER OF EDUCATION

Date of Decision: 2/27/06

Date of Mailing: 2/27/06

[1] This decision may be appealed to the State Board of Education pursuant to *N.J.S.A.* 18A:6-27 *et seq.* and *N.J.A.C.* 6A: 4-1.1 *et seq.*

State of New Jersey
OFFICE OF ADMINISTRATIVE LAW

INITIAL DECISION

DISMISSAL

OAL DKT. NO. EDU 12344-05

AGENCY DKT. NO. 321-11/05

J.M.-P O/B/O MINOR CHILD T.P..,

Petitioner,

v.

BOARD OF EDUCATION OF SOUTH ORANGE-MAPLEWOOD SCHOOL DISTRICT,

ESSEX COUNTY,

Respondent.

J.M.P., petitioner, *pro se*

Rita Barrone, Esq., for respondent
(Purcell, Ries, Shannon, Mulcahy & O'Neill, attorneys)

Record Closed: December 16, 2005 Decided: January 17, 2006

BEFORE **JEFFREY A. GERSON,** ALAJ:

On November 9, 2005 J.M.-P filed an application for Emergent Relief with the Commissioner of Education seeking the immediate return of her daughter T.P. to school while her appeal of suspension was pending. The matter was then transmitted to the Office of Administrative Law on November 17, 2005 and scheduled for hearing on November 21, 2005. During the hearing, the parties requested that the case be

continued to another date because they were discussing settlement terms. The matter was then continued to December 14, 2005 but that date was adjourned because the case had been settled. T.P. was returned to school on December 19, 2005.

Accordingly, I hereby **ORDER** that this case **BE** (and is hereby) **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 (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.

January 17, 2006

DATE

JEFFREY A. GERSON, ALJ

E-mail Receipt of Initial Decision Confirmed by the Department of Education on:

1/17/06

DATE

Mailed to Parties:

DIRECTOR AND
CHIEF ADMINISTRATIVE LAW JUDGE

JAN 18 2006

DATE

OFFICE OF ADMINISTRATIVE LAW

sej

81-06

OAL DKT. NO. EDU 12682-05
AGENCY DKT. NO. 332-11/05

M.F. on behalf of O.O.,	:	
PETITIONER,	:	
V.	:	COMMISSIONER OF EDUCATION
BOARD OF EDUCATION OF THE TOWNSHIP OF IRVINGTON, ESSEX COUNTY	:	DECISION
RESPONDENT.	:	

The record of this matter, the proposed settlement agreement and the Initial Decision issued by the Office of Administrative Law (OAL) pursuant to *N.J.A.C.* 1:1-19.1, have been reviewed.

Upon such review, to the extent that the settlement terms fall within her jurisdiction, the Commissioner approves the settlement and adopts the Initial Decision as the final decision in this case. In the event that future disputes pertaining to special education issues arise, as to which one or both of the parties wish to appeal, such appeals should be forwarded to the Office of Special Education of the Department of Education, which has jurisdiction over special education controversies.

The matter is hereby dismissed, subject to compliance with the terms of the settlement.

IT IS SO ORDERED.

Rochelle Edwards
ACTING COMMISSIONER OF EDUCATION

Date of Decision: 2/27/06

Date of Mailing: 2/27/06

State of New Jersey
OFFICE OF ADMINISTRATIVE LAW

INITIAL DECISION

SETTLEMENT

OAL Dkt. No. EDU 12682-05

Agency Ref. No. 332-11/05

M.F. on behalf of O.O.

Petitioner,

v.

BOARD OF EDUCATION OF

THE TOWNSHIP OF IRVINGTON,

Respondent.

Koren L. Bell, Esq., for petitioner (Education Law Center)

Ronald Hunt, Esq. for respondent (Hunt, Hamlin & Ridley, attorneys)

Record Closed: January 5, 2006 Decided: January 6, 2006

BEFORE **ROBERT J. GIORDANO**, ALJ:

On December 7, 2005, this matter was transmitted to the Office of Administrative Law (OAL) for hearing on emergent relief as a contested case pursuant to *N.J.S.A.* 52:14B-1 to -15 and *N.J.S.A.* 52:14F1 to -13. A hearing was scheduled on December 8, 2005 at the OAL in Newark, New Jersey.

The hearing was held over three days on December 8, 9, and 16, 2005, during which there were extensive settlement discussions. On December 16, 2005, the parties entered into a tentative settlement agreement and the terms of that agreement were placed on the record. The parties prepared and submitted the attached settlement indicating the terms of agreement which are incorporated herein by reference.

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

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

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

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

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

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

1/6/06
DATE

ROBERT J. GIORDANO, ALJ

Receipt Acknowledged:

Jan 11 2006
DATE

DEPARTMENT OF EDUCATION

Mailed to Parties:

JAN 13 2006
DATE

DIRECTOR AND CHIEF ADMINISTRATIVE LAW JUDGE
OFFICE OF ADMINISTRATIVE LAW

jlb

Final Settlement Agreement - M.F. & O.O. v. Irvington Board of Education

RECEIVED
STATE OF NEW JERSEY
OFFICE OF ADMINISTRATIVE LAW
2006 JAN -5 P

The parties agree:

(1) Petitioner O.O. shall be immediately provided by the Irvington Board of Education with temporary home instruction to begin the week of Monday, December 19, 2005. Such instruction shall be for a minimum of 10 hours per week and shall be in accordance with the Core Curriculum Content Standards and all other governing regulatory and statutory requirements. Home instruction shall continue until the appropriate program and placement for the petitioner O.O. has been determined, and he has been placed in that setting, pursuant to the assessment(s) and plan(s) described in (2) and (3) below. Petitioner O.O. shall make himself accessible to the instructor in accordance with the agreed-to schedule throughout the duration of the home instruction.

(2) On or before January 15, 2006, the Irvington Board of Education shall conduct an assessment of petitioner O.O.'s eligibility for special education and related services, pursuant to N.J.A.C. 6A:14-3.4, and conduct an eligibility meeting, pursuant to N.J.A.C. 6A:14-3.5; 6A:14-2.3(i). If the Eligibility Team determines that petitioner O.O. is in fact eligible for special education services, an IEP conference shall be held as soon as possible, but no later than 10 days from the completion of this assessment, and an IEP shall be prepared in collaboration with petitioners M.F. and O.O. In addition to special education and related services, the IEP developed for petitioner O.O. at this conference shall include provisions for all of the required and needed educational and educationally-related programs and services to which petitioner O.O. is entitled under the Abbott v. Burke rulings and implementing regulations, as well as any programs and services required by N.J.A.C. 6A:16-8.1; 16-8.2.

(3) In the event that petitioner O.O. is determined not to be eligible for special education services, the Irvington Board of Education shall, on or before January 31, 2006, complete an assessment by a multidisciplinary Intervention and Referral Team, see N.J.A.C. 6A:16-8.1, of his academic, behavioral, social and health needs, and shall provide a written report of the assessment to petitioners M.F. and O.O. and petitioners' counsel. Based on this assessment, the parties shall meet and collaboratively prepare, on or before February 15, 2006, an educational plan for petitioner O.O. that includes: (1) recommendations for petitioner O.O.'s placement in the traditional or alternative high school program that best fits his needs, upon compliance with the requirements of procedural due process and fundamental fairness, or parental consent; (2) provisions for all of the educational and educationally-related programs and services, to which petitioner O.O. is entitled under the Abbott v. Burke rulings and implementing regulations, as well as governing New Jersey regulation (e.g. N.J.A.C. 6A:16-1.1; 16-8.1; 16-8.2; 16-9.2), that are required and needed to address petitioner O.O.'s academic, behavioral, social, and health needs; and (3) goals and measurable benchmarks to insure that petitioner O.O. has a meaningful opportunity to earn a high school diploma in a timely manner. Thereafter, this educational plan should be reviewed at least annually for effectiveness by the multidisciplinary Intervention and Referral Team and petitioners M.F. and O.O., and modified as appropriate, as provided by N.J.A.C. 6A:16-8.2.

(4) Upon completion of the IEP, or in the alternative, of the educational plan, and agreement of the parties, the Board of Education of Irvington shall immediately implement the plan. Once the plan is implemented, petitioner O.O. shall agree to abide by all attendance and disciplinary regulations applicable to all students.

(5) If, despite reasonable efforts by both parties, petitioner O.O. has not met graduation requirements by age 20 (if he is not special-education eligible) or age by 21 (if he is eligible for special education services), the Irvington Board of Education shall continue to provide him with all of the required and necessary educational and educationally-related programs and services set forth in the IEP or educational plan developed in accordance with (2) or (3) above until his 21st birthday (if he is not special-education eligible), or until his 22nd birthday (if he is eligible for special education services), as needed.

(6) The Irvington Supervisor of Guidance will contact St. Mary's High School in Jersey City and obtain an official transcript for petitioner O.O., and the Irvington Board of Education will then apply any valid credits to O.O.'s Irvington transcript.

The foregoing agreement does not waive petitioners' right to enforce compliance with any of the above provisions in accordance with this agreement, or any of the district's defenses.

Marie O. Francois
Marie Francois (Petitioner)

12-20-05
Date

Ogu Osias (Petitioner)

12/20/05
Date

Koren L. Bell
Koren L. Bell, Esq., pursuant to R. 1:21-3(c)
Education Law Center
Attorney for Petitioners

12/20/05
Date

Elizabeth Athos
Elizabeth Athos, Esq.
Education Law Center
Attorney for Petitioners

12/19/05
Date

Ethel St. Davern
Irvington Board of Education
(Respondent)

12/29/05
Date

Ronald Hunt, Esquire
Hunt, Hamlin & Ridley
Attorney for Respondent Board

12/29/05
Date

82-06

JOSEPH V. CIDONI,	:	
PETITIONER,	:	COMMISSIONER OF EDUCATION
V.	:	DECISION
BOARD OF EDUCATION OF THE CITY OF CAMDEN, CAMDEN COUNTY, AND NEW JERSEY STATE DEPARTMENT OF EDUCATION,	:	
RESPONDENTS.	:	

SYNOPSIS

Former school security officer sought nullification of the Department's determination disqualifying him from school employment pursuant to *N.J.S.A.* 18A:6-7.1, as well as reinstatement to his position with the Board of Education, from which he was terminated as a result of the disqualification. Petitioner contended that the criminal history record check conducted on him in 2003 – when it was discovered that no record existed of a prior check – should have been reviewed under the standards in effect in 1991, when petitioner was first employed by the Board and did everything necessary for the Board to initiate the required check. Petitioner further contended that the Department and Board should not be permitted to invoke *N.J.S.A.* 18A:6-7.1 against him now, after not raising any issue as to his qualification during twelve years of employment.

The ALJ found that the Department acted correctly in its application of *N.J.S.A.* 18A:6-7.1, which on its face requires the more stringent standards enacted in 1998 to apply to all record checks conducted thereafter, apart from certain specified exceptions not applicable to petitioner. The ALJ further found that the Board was required to terminate petitioner's employment upon the Department's finding of disqualification. In considering petitioner's equitable claim, the ALJ found that petitioner did not respond truthfully to job application questions regarding prior convictions. The ALJ thus upheld the actions of the Department and Board and dismissed the Petition of Appeal.

The Commissioner adopted the Initial Decision as the final decision in this matter.

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.

February 27, 2006

OAL DKT. NO. EDU 6088-03
AGENCY DKT. NO. 219-6/03

JOSEPH V. CIDONI,	:	
PETITIONER,	:	COMMISSIONER OF EDUCATION
V.	:	DECISION
BOARD OF EDUCATION OF THE CITY OF CAMDEN, CAMDEN COUNTY, AND NEW JERSEY STATE DEPARTMENT OF EDUCATION,	:	
RESPONDENTS.	:	

The record of this matter and the Initial Decision of the Office of Administrative Law (OAL) have been reviewed, as have timely exceptions filed by petitioner and replies thereto by the Department of Education (Department) and the Camden Board of Education (Board).

In his exceptions, petitioner objects to the Administrative Law Judge's (ALJ) failure to consider the Exhibits appended to Petitioner's certification—the authenticity of which was not disputed by respondents—as well as other evidence clearly indicating that petitioner did all that was required of him by way of authorizing a criminal history record check at the time he was first employed by the district. Such evidence, petitioner contends, demonstrates that: petitioner completed the requisite State background check form on September 3, 1991, and the document was notarized by a board employee and placed in petitioner's district personnel file; the document was recorded as received by a board employee on the district's internal personnel form; and petitioner completed a second, local district authorization form when asked a few months

later in January 1992. In other words, petitioner asserts, he acted to provide all that was needed for the Board to initiate the criminal history record check required by *N.J.S.A.* 18A:6-7.1 as it then existed, and had the check been conducted as required, petitioner would have been found qualified for employment because the offense for which he was subsequently disqualified was not disqualifying at that time; he should not then – after twelve years of employment during which the issue of his background was never raised by respondents – have been made to undergo a retroactively applicable check in 2003, by which time the law had changed. (Petitioner's Exceptions at 1-6)

Petitioner also contends that the ALJ misapplied case law relating to the issues in this matter, arguing that *Garvin, supra*, is based upon the entirely different premise of an employee claiming that he should be found qualified because his *offense* occurred prior to the law's effective date, notwithstanding that his *check* was timely conducted after the amended law went into effect; and that *Nunez, supra*, supports rather than undermines petitioner's position, since the two petitioners' situations—both disqualified under the amended law when their checks should have been conducted under the prior law but were not through no fault of their own—are identical and Mr. Nunez was afforded relief despite the fact that he was found to have been untruthful in a subsequent authorization form, based upon the special circumstances of his case. (Petitioner's Exceptions at 6-8)

Finally, petitioner argues that, in any event, such inaccuracies as may appear in his local district employment applications cannot thwart a conclusion that he is entitled to reinstatement. Petitioner stresses that the Board's sole proffered reason for terminating his employment was his disqualification as a result of a State criminal history

record check, and that—prior to post-pleading communications arising within the instant proceeding—misrepresentation in his application forms is nowhere mentioned as a reason for his termination, despite the Board having notice and access to his personnel files. Moreover, petitioner contends, the Board has not demonstrated that petitioner would have been terminated on this basis apart from State disqualification, nor could it do so given the length of time since his conviction, the nature and circumstances of his offense, and his good performance record as a Board employee. (Petitioner's Exceptions at 8-10)

In reply, the Department urges that the ALJ was entirely correct in concluding that petitioner's check was required to be assessed under the law as it existed at the time of the check, regardless of the date of petitioner's offense and regardless of any claim, where no record of a check can be found, that a prior check should have been conducted. The Department further argues that its position is supported, not undermined, by *Nunez, supra*, which held that the Department had applied the statute properly under similar circumstances. With respect to the amount of time petitioner remained employed without question of his criminal record, the Department notes the complete absence of any evidence indicating that a State record check had been initiated prior to 2003, so that petitioner cannot possibly meet his burden of proving intentional misrepresentation or concealment of facts, as would be necessary for him to invoke laches and equitable estoppel against the Department. Finally, the Department contends that the central issue herein is whether petitioner is disqualified from school employment, so that any argument on his part that misrepresentations on job applications are not relevant to termination of his employment should be ignored. (Department's Reply at 1-10)

For its part, the Board replies by emphasizing that the ALJ was correct in finding petitioner disqualified from school employment, and that the *Nunez* decision supports her conclusion in this regard. (Board's Reply at 1-3) To the extent that *Nunez* opens the door to equitable relief, the Board contends that Petitioner is precluded from receiving the benefits of equitable remedies because he deceived the Board about his background from the inception of his employment. (*Id.* at 3-4) The Board urges:

> "He who seeks equity must do equity." *Kingsdorf v. Kingsdorf,* 351 *N.J. Super.* 144, 157 (App. Div. 2002) citing *Morsemere Federal Savings and Loan Association v. Nicolaou,* 206 *N.J. Super.* 637, 645 (App. Div. 1986). The doctrine of unclean hands precludes any equitable remedy on Petitioner's behalf. The unclean hands doctrine is "that a suitor in equity must come into court with clean hands and he must keep them clean after his entry and throughout the proceedings." *Id.* at 156 citing *Borough of Princeton v. Board of Chosen Freeholders,* 169 *N.J.* 135 (2001). Unclean hands "gives expression to the equitable principle that a court should not grant relief to one who is a wrongdoer with respect to the subject matter in suit." *Id.* citing *Faustin v. Lewis*, 85 *N.J.* 507, 511 (1981). "Consequently, 'where the bad faith, fraud or unconscionable acts' of a party seeking equitable relief form the basis of his contention, equity may deny him its remedies." *Id.* citing *Rolnick v. Rolnick,* 262 *N.J. Super.* 343 (App. Div. 1993). (*Id.* at 3)

Upon careful review and consideration, the Commissioner adopts the Initial Decision of the ALJ, for the reasons expressed therein as further explicated below.

Initially, the Commissioner observes that, although the ALJ does not cast it in exactly this manner, the fundamental issue here is the same as was addressed in *Nunez, supra*: whether an employee who, at the time of initial employment, did all that was necessary for the employing board of education to initiate the criminal history record check required by *N.J.S.A.* 18A:6-7.1, is entitled – when it is later discovered that no check was ever conducted – to have the resulting "corrective action" check conducted

under the terms of the law as it existed at the time the check should have been conducted rather than under the terms currently in effect.

Here, as in *Nunez*, the Commissioner holds clearly and unequivocally that *any* application for criminal history record check received by the Department must be reviewed and effectuated based upon the standards of law then in effect. *N.J.S.A.* 18A:6-7.1 states on its face that the provisions of *P.L.* 1998, *c.* 31 shall apply to criminal history record checks *conducted* on or after the effective date of that act (June 30, 1998), except in the case of an individual employed by a board of education who is required to undergo a check upon employment with another board of education.[1] In petitioner's case, as in *Nunez*, there is no evidence that any record check application on behalf of petitioner was received by the Department, and consequently no check was conducted prior to the remedial check of 2003; because petitioner's application at that time did not fall within the statutory exception provision of being checked in conjunction with changing employment from one school district to another, the Department acted in the only manner permitted to it by law in applying current standards to the results of petitioner's check and declaring him disqualified from school employment on that basis. Similarly, as a consequence of State disqualification, the respondent Board of Education had no alternative but to terminate petitioner's employment.[2]

However, again as in *Nunez*, the Commissioner must recognize the possibility of an equitable entitlement, demonstrable on appeal, for a petitioner to have his or her "corrective action" check re-evaluated by the Department on a *nunc pro tunc*

[1] Although the Commissioner concurs with petitioner that *Garvin, supra*, is not particularly germane to the pivotal issue herein, it does reinforce the general principle that application of *N.J.S.A.* 18A:6-7.1 is triggered by the date on which a record check is actually conducted, and not by the date of any prior event.

[2] It is noted that petitioner neither requested nor obtained a stay of such disqualification pending appeal pursuant to *N.J.A.C.* 6A:3-1.6.

basis, and, assuming a favorable outcome, to make a claim for reinstatement by the employing board of education. The question on which this matter ultimately turns, then, is whether petitioner has demonstrated such an entitlement.

Upon consideration of the record, the Commissioner concludes that petitioner has not. Although petitioner has borne his burden of demonstrating, through the documentation cited in his briefs and on exception, that he did everything necessary to enable the respondent Board to initiate the requisite criminal record check upon his initial employment in the Fall of 1991, his conduct subsequent to that time militates against a finding that he is entitled to equitable relief.

Specifically, the Commissioner notes that while petitioner truthfully swore on his September 3, 1991 State record check application that he had not been convicted of any of the *enumerated* crimes and offenses, he filled out a district form in conjunction with the same application wherein he responded "No" to the question of whether he had ever been convicted of *any* misdemeanor (Stipulation No. 8, Exhibit 6); he further signed a form in January 1992 authorizing release of criminal background information to the respondent Board, which form stated on its face that failure to disclose information about prior convictions could lead to disqualification from the job or dismissal if hired (Petitioner's Certification, Exhibit C). Subsequently, petitioner filled out a district form in conjunction with his 1994 application for the position of school security guard, wherein he indicated that he had never been convicted of any crime (Stipulation No. 10, Exhibit 7); he completed a similar form in conjunction with his 1997 application for the position of school security guard/law enforcement, wherein he again indicated that he had never been convicted of a crime (Stipulation No. 10, Exhibit 8). Both of these forms

included a statement – signed by petitioner – attesting to the truth of the information set forth therein.

Neither is the Commissioner persuaded by petitioner's argument based upon *Nunez, supra,* the facts of which are distinguishable from those herein. In *Nunez,* the sole "misrepresentation" by petitioner – who had been consistently truthful otherwise and was found to be a credible witness at hearing – was to sign what appeared to be, but was not because of the intervening change in the law, the same form he had already signed a few years previously and was told needed to be redone. Under the specific factual circumstances of that matter, the Commissioner declined to find that this incident alone should foreclose the petitioner from the equitable relief to which he had otherwise demonstrated entitlement. Here, in contrast, the Commissioner is confronted with a petitioner who repeatedly denied ever being convicted of *any* crime or misdemeanor, and whose explanation for his misrepresentation – that he didn't think of his conviction as a crime, but as a "minor licensing infraction" (Petitioner's Certification No. 7) – is belied by the documentation surrounding his arrest and conviction, which attests to his carrying of a concealed, fully loaded handgun for which he had neither a license nor legal authority to so carry under the applicable statute, and to his having been fined $500 and placed on two years' probation. (Stipulation Nos. 4, 5, 6; Exhibits 1, 4)

Finally, the Commissioner is not persuaded by petitioner's argument that any "inaccuracies" on his local district employment application forms are of no import in this matter. Given that petitioner is arguing for equity, it is disingenuous in the extreme for him to ignore the fact that truthful responses on those forms – of which there were three spanning several years beginning with his initial employment, one of them for a bus

aide position and two of them for school security positions – would surely have alerted the Board to a need to make further inquiry into his criminal record, or to verify the results of his State record check, before entrusting him with the safety of school children as a bus aide or security officer.

Accordingly, the Initial Decision of the OAL, affirming petitioner's disqualification from school employment and dismissing the Petition of Appeal, is adopted for the reasons expressed therein and above.

IT IS SO ORDERED.[3]

Lucille E Davy

ACTING COMMISSIONER OF EDUCATION

Date of Decision: 2/27/06

Date of Mailing: 2/27/06

[3] This decision may be appealed to the State Board of Education pursuant to *N.J.S.A.* 18A:6-27 *et seq.* and *N.J.A.C.* 6A:4-1.1 *et seq.*

State of New Jersey
OFFICE OF ADMINISTRATIVE LAW

INITIAL DECISION
GRANTING RESPONDENTS' MOTION FOR SUMMARY DECISION
OAL DKT. NO. EDU 6088-03
AGENCY DKT. NO. 219-6/03

JOSEPH V. CIDONI,
Petitioner,
v.
BOARD OF EDUCATION OF THE CITY OF CAMDEN, CAMDEN COUNTY AND NEW JERSEY STATE DEPARTMENT OF EDUCATION, OFFICE OF CRIMINAL HISTORY,
Respondents.

Michael Damm, Esq., for petitioner (Selikoff and Cohen, attorneys)

Patricia M. O'Neill, Deputy Attorney General, for respondent Department of Education (Peter C. Harvey, Attorney General of New Jersey, attorney)

Karen A. Murray, Esq., for respondent Camden City Board of Education (The Murray Law Firm, attorneys)

Record Closed: December 22, 2005 Decided: January 11, 2006

BEFORE **ANA C. VISCOMI**, ALJ:

STATEMENT OF THE CASE AND PROCEDURAL HISTORY

Petitioner appeals from termination of his employment as a school law enforcement officer due to a criminal background check result pursuant N.J.S.A. 18A:6-7.1. He requested a hearing and the matter was transmitted to the Office of Administrative Law (OAL) for a hearing as a contested case pursuant to N.J.S.A. 52:14F-1 to -13 and N.J.S.A. 52:14B-1 to -15. The parties have stipulated no genuine issue of material fact exists in this matter and have submitted cross-motions for summary decision pursuant to N.J.A.C. 1:1-12.5. The sole issue presented is whether or not the petitioner should have been disqualified from his employment pursuant to N.J.S.A. 18A:6-7.1.

FACTUAL DISCUSSION

The parties have stipulated the following facts which shall constitute **FINDINGS OF FACT**. On March 23, 1984, Joseph Cidoni was arrested in East Lampeter Township, Pennsylvania, and charged with violating 6106A of the Uniform Firearms Act, Chapter 61; i.e., carrying a firearm without a license. (J-1) On January 29, 1984, Cidoni had been issued a permit to purchase a handgun and form of register by the state of New Jersey. (J-2) On July 11, 1984, Cidoni pled guilty in the Court of Common Pleas, Lancaster County, Pennsylvania. (J-4) On October 1, 1991, the Camden Board of Education (hereinafter "BOE") hired Cidoni as a bus/teacher aide. (J-5) He completed an application for this position but does not recall the date. (J-6) The State Department of Education Criminal History Review Unit has no documentation regarding any criminal history background check performed in connection with his employment with the Board in 1991 or any subsequent time until the year 2003. He submitted an application dated February 16, 1994, for the position of school security guard and on November 21, 1997, for school security guard/law enforcement. He was reappointed on an annual basis as a bus/teacher aide until he was appointed a school law enforcement officer on July 30, 2001. (J-9) This employment continued through the 2001-2002 school year. He was thereafter appointed to this position for the 2002-2003 school year. (J-10) Based upon a check of Cidoni's fingerprints dated May 6, 2003, a report was prepared for the Department of Education, Office of Criminal

History Review (hereinafter "DOE"), which contained an entry "Court-State Police Harrisburg," " Charge CC6106A Firearm Carried w/o a licen M1 Sentence – Conviction/Plead Guilty/County Probation/Max – Sentence 02 Yrs/Costs/Restitution." (J-12) By letter dated May 12, 2003, Carl Carabelli, Manager of the Criminal History Review Unit, advised Cidoni that a fingerprint check revealed the disqualifying offense of "carrying firearm without license" and that he was "permanently disqualified from employment in any position with a school or other educational institution under the supervision of the Department of Education or with a contracted service provided under contract with said school or educational facility." (J-13) By letter dated May 12, 2003, Carabelli advised Camden City BOE Superintendent Annette Knox of the results of the fingerprint check and the notification to Cidoni. He also requested she advise the DOE "as to the final disposition of the applicant's employment." (J-14) By letter of May 16, 2003, Camden City BOE informed Cidoni that based upon its receipt of a notice of disqualification from employment from the State, and pursuant to N.J.S.A. 18A:6-7.1, that he would be terminated immediately. (J-15) By Board action on May 28, 2003, Cidoni's employment was terminated effective June 1, 2003, based solely on his fingerprint disqualification. (J-16) By letter dated May 30, 2003, Cidoni was informed that his employment was terminated effective June 1, 2003 due to fingerprint disqualification. (J-17)

LEGAL ANALYSIS

N.J.S.A. 18A:6-7.1 provides, in pertinent part,

> (A) ... school, or school system under the supervision of the Department of Education and board of education ... involved in the education of children under the age of 18 shall not employ or contract for the services of any teaching staff member or substitute teacher, teacher aide, ... school law enforcement officer, ... 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. ...
>
> An individual, except as provided in subsection g. of this section, 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
>
> a. An offense as set forth in chapter 14 of Title 2C of the New Jersey Statutes, or as set forth in N.J.S.2C:24-4 and 2C:24-7, or as set forth in R.S.9:6-1 et seq., or as set forth in N.J.S.2C:29-2; or ...
>
> d. For 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 equivalent crime or other offense. .....
>
> g. This section shall first apply to criminal history record checks conducted on or after the effective date of P.L. 1998, c. 31 (C.18A:6-7.1c et al.); except that in the case of an individual employed by a board of education or a contracted service provider who is required to undergo a check upon employment with another board of education or contracted service provider, the individual shall be disqualified only for the following offenses:
>
> (1) any offense enumerated in this section prior to the effective date of P.L. 1998, c. 31 (C.18A:6-7.1cetal.);and
>
> (2) any offense enumerated in this section which had not been enumerated in this section prior to the effective date of P.L. 1998, c. 31 (C.18A:6-7.1c et al.), if the person was convicted of that offense on or after the effective date of that act.

This statute was in effect in 2002. Petitioner asserts this amended version of N.J.S.A. 18A:6-7.1 should not apply to him because the 2003 background check revealed the 1984 conviction which was not a disqualifying offense in 1991 when a prior version of the statute was in effect. He asserts that the current version of the statute should not be applied to him "retroactively" so as to terminate his employment, which he has had for approximately 12 years. He asserts the statute was not meant to apply to current employees. He further asserts, but offers no proofs, that he is being treated differently than other employees of Boards of Education hired prior to the statutory amendments and that those employees were not disqualified from employment despite having a disqualifying conviction under the amended statute. He asserts that by not raising an issue with regard to his background for 12 years, the BOE should now be foreclosed from applying the provisions of the amended statute retroactively. Finally, he asserts this matter is similar to Nunez v. New Jersey Department of Education, wherein the Commissioner found that

Nunez complied with the necessary criminal background check and was afforded the opportunity to demonstrate rehabilitation pursuant to the statute. OAL Docket No. EDU 6088-03, reversed and remanded, Commissioner (May 26, 2005) Petitioner asserts he complied with each succeeding request over the course of his 12 year employment history with the BOE, was convicted of a less serious offense than Nunez and had an excellent employment history as evidenced by the letters from Principal Davida Coe (J-F) and Chief of Security James Thornton. (J-G)

Respondents contend in separate oppositions and cross motions that the statute is not being applied retroactively to the petitioner and that he has misinterpreted the statute to read that it does not apply to current employees. They assert the language of the statute is clear that it shall apply to criminal history background checks performed on or after June 30, 1998. The triggering event is the date of the background check and not the date of conviction. Thus, there is no viable concern of retroactive application of the statute; it is prospectively being applied to Cidoni and the criminal background check which occurred in 2003, approximately five years after the effective date of the statute. I concur, and **FIND** the respondents' interpretation of the statute is supported by the plain meaning of the statute and further by Commissioner's decision in Anthony Garvin v. New Jersey State Board of Examiners, OAL Docket No. EDU 7455-55 (March 27, 2002), aff'd, Commissioner (May 20, 2002).

Based on the foregoing, I **FIND** and **CONCLUDE** that the respondent DOE properly disqualified petitioner from employment in any position under its supervision and the respondent Camden City BOE properly thereafter terminated his employment effective June 1, 2003.

Although this resolves the issue, other matters raised by petitioner necessitate further, but brief, comment. The exception to the statute, in section g, does not apply to the petitioner as he contends. That applies only to employees or contracted service providers required to undergo a background check upon employment with another board of education. Petitioner's assertion of selective application of the statute is hearsay unsupported by the Residuum Rule. N.J.A.C. 1:1-15.5. Nunez cannot be interpreted to allow petitioner herein an opportunity to demonstrate rehabilitation. In Nunez, the Commissioner found the petitioner answered the questions asked of him truthfully. Although the petitioner herein was disqualified and subsequently terminated

based on the fingerprint results only, I **FIND** based upon a review of the applications he submitted that he did not answer truthfully on: the February 16, 1994 application for school security guard position wherein he certified that he had never been convicted of a crime; and the November 21, 1997 application for school law enforcement officer wherein he certified he had never been convicted of a crime.

DECISION AND ORDER

Petitioner's disqualification from employment in any position under the supervision of the New Jersey Department of Education and termination from employment with the Camden City Board of Education effective June 1, 2003, pursuant to N.J.S.A. 18A:6-7.1 is hereby **AFFIRMED** and petitioner's appeal is **DISMISSED.**

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

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

Within thirteen (13) days from the date on which this recommended decision was mailed to the parties, any party may file written exceptions with the **COMMISSIONER OF THE DEPARTMENT OF EDUCATION, 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 11, 2006
DATE

Ana C. Viscomi
ANA C. VISCOMI, ALJ

E-mail Receipt of Initial Decision Confirmed by the Department of Education on:

1-11-06
DATE

Mailed to Parties:

JAN 17 2006
DATE

CHIEF ADMINISTRATIVE LAW JUDGE
OFFICE OF ADMINISTRATIVE LAW

jh

84-06

#84-06SEC

IN THE MATTER OF JOHN TALTY :

AND SHARON KIGHT, :

BRICK TOWNSHIP BOARD OF EDUCATION, :

OCEAN COUNTY. :

COMMISSIONER OF EDUCATION

DECISION

SYNOPSIS

This matter arose from complaints filed against two members of the Brick Township Board of Education, alleging violations of the School Ethics Act, *N.J.S.A.* 18A:12-21 et seq. The two complaints were filed by one individual, Robert Lanzieri, and alleged that both respondents physically and verbally attacked Mr. Lanzieri at the March 17, 2005 Board Meeting.

Following a hearing and review of written summations, the School Ethics Commission (Commission) found that: 1) Mr. Talty did not violate *N.J.S.A.* 18A:12-24.1 (e) of the Code of Ethics for School Board Members, and 2) Ms. Kight did violate *N.J.S.A.* 18A:12-24.1 (e); the Commission recommended a sanction of a two-month suspension for Ms. Kight.

Upon a thorough review of the record, the Commissioner, whose decision was restricted solely to a review of the Commission's recommended penalty pursuant to *N.J.S.A.* 18A:12-29(c) and *N.J.A.C.* 6A:3-9.1, concurred with the Commission's recommendation. The Commissioner thus ordered that Sharon Kight be suspended from the Brick Township Board of Education for a period of two months.

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.

March 1, 2006

AGENCY DKT. NO. 51-1/06

IN THE MATTER OF JOHN TALTY	:	
AND SHARON KIGHT,	:	COMMISSIONER OF EDUCATION
BRICK TOWNSHIP BOARD OF EDUCATION,	:	DECISION
OCEAN COUNTY.	:	
	:	

The record of this matter and the decision of the School Ethics Commission ("Commission"), including the recommended penalty of a two month suspension, have been reviewed.

This matter comes before the Commissioner to impose a sanction upon Sharon Kight, member of the Brick Township Board of Education, based upon findings of fact and conclusions of law by the Commission that she violated *N.J.S.A.* 18A:12-24.1(e) of the Code of Ethics for School Board Members in the School Ethics Act when she took private action in confronting a member of the public in a verbal and physical manner regarding his comments during the public comment session at the March 17, 2005 Board meeting.[1]

Upon issuance of the decision of the Commission, the parties were provided 13 days from the mailing of such decision to file written comments on the recommended penalty for the Commissioner's consideration. Comments on behalf of Ms. Kight and complainant, Robert Lanzieri, were timely filed by their respective counsel.[2] Ms. Kight's comments profess that, based on the facts of this matter, a penalty of a two-month suspension is "disproportionately

[1] It is noted that at its January 24, 2006 public meeting, the School Ethics Commission found that Mr. Talty did not violate *N.J.S.A.* 18A:12-24.1(e) and voted to dismiss the complaint against him.

[2] Stephen K. Foran, Esq. for Ms. Kight; John G. Koufos Esq. for Mr. Lanzieri

severe" in that the Commission's decision readily admits that there was contradictory testimony with respect to the interaction which took place with Mr. Lanzieri. Moreover, she advances, there was "no reasonable proof" offered that she either had physical contact with him or that she used any inappropriate language. Although it is true that she was admittedly "upset" with Mr. Lanzieri, Ms. Kight urges that a board member's tone of voice and annoyed demeanor are simply insufficient justification for imposing the draconian penalty of a two-month suspension. (Ms. Kight's comments at 1)

Ms. Kight further contends that the Commission's finding that her actions intimidated Mr. Lanzieri and made him fearful of addressing the Board in the future are unfounded. Rather, she points out, the "lengthy diatribes" which he addressed to the Board prior to this incident continued subsequent to that time. Specifically, she contends, he spoke at length at Board meetings of July 11, August 25, September 15 and November 17, 2005, wholly dispelling notions of fear and intimidation. (*Id.*)

Finally, Ms. Kight cites to three prior Ethics Commission cases which she proposes evidence the undue harshness of the sanction imposed here, *i.e.*, *In the Matter of Edmund J. Zilinski, Bloomfield Board of Education, Essex County*, decided by the Commissioner November 23, 2005, (Board member organized confidential information containing the names of suspended students on a spreadsheet and accidentally transmitted the information to other Board members); *In the Matter of Bruce Freilich, Washington Township Board of Education, Burlington County*, decided by the Commissioner April 4, 2005, (Board member sent an unauthorized letter to a private donor); and *In the Matter of Alphonse A. DeMeo, Bellville Board of Education, Essex County,* decided by the Commissioner November 17, 2004, (Board member endorsed a municipal council candidate by mailing letters on stationery which could be viewed

as an endorsement made in the Board member's capacity as Board President). Ms. Kight submits that, unlike the situation here which the Commission concedes is based on unclear and disputed facts, each of the cited cases was based on uncontested facts and the penalty imposed was only a reprimand. Ms. Kight argues that, under these circumstances and in light of the nature of her offense, logic dictates a lesser not more severe penalty be imposed. (Ms. Kight's comments at 2)

Mr. Lanzieri's comments urge the Commissioner to uphold the Commission's recommended penalty arguing that it is entirely appropriate "given Ms. Kight's unprofessional, irrational and violent behavior which has a chilling effect on how others may exercise their right to public comment in the future." (Mr. Lanzieri's comments at 1)

Initially, it must be emphasized that pursuant to *N.J.S.A.* 18A:12-29(c) and *N.J.A.C.* 6A:3-9.1, the determination of the Commission as to violation of the School Ethics Act is **not reviewable by the Commissioner** herein. Only the Commission may determine whether a violation of the School Ethics Act occurred. The Commissioner's jurisdiction is limited to reviewing the sanction to be imposed following a finding of a violation by the Commission. Therefore, this decision is restricted solely to a review of the Commission's recommended penalty.

Upon a thorough review of the record, the Commissioner finds Ms. Kight's arguments in support of mitigation of penalty unpersuasive. Notwithstanding the Commission's recognition of the existence of contradictory evidence as to *exactly* what transpired in the Kight/Lanzieri interaction, it specifically found:

> [t]he weight of the evidence shows that Ms. Kight approached Mr. Lanzieri in an aggressive manner, screamed at him and threatened him. There is also evidence to show that she made some type of physical contact with Mr. Lanzieri. The evidence

> also shows that her actions have had an impact on both Mr. Lanzieri and Mr. Dubrosky, who do not feel comfortable speaking at Board meetings. The Commission finds that such aggressive actions had the potential to compromise the Board because the actions hurt the integrity of the Board and intimidated the public from coming forward and addressing the Board.
> (Ethics Commission Decision at 5)

It cannot reasonably be disputed that a Board member's loss of control with a member of the public does a disservice to her Board, which relies upon her to conduct herself properly and appropriately in fulfilling her responsibilities, and that such an interaction could have deleterious effects on not only Mr. Lanzieri and Mr. Dubrosky but other members of the public viewing the altercation and, therefore, must be viewed as serious in nature.[3] The Commissioner's review persuades her that, in recommending a penalty for this violation, the Commission fully considered the nature of the offense and weighed the effects of aggravating and mitigating circumstances. Consequently, the Commissioner finds no cause to disturb the Commission's recommended penalty in this matter.

Accordingly, IT IS hereby ORDERED that Sharon Kight be suspended from the Brick Township Board of Education for a period of two months[4]

IT IS SO ORDERED.[5]

Lucille E Davy
ACTING COMMISSIONER OF EDUCATION

Date of Decision: 3/01/06
Date of Mailing: 3/01/06

[3] It is noted that none of the cases advanced by Ms. Kight in support of her position is similar enough in nature or factual circumstances to the instant matter so as to provide precedential support for her position.

[4] Such suspension shall be effective beginning three days after the issuance of this decision.

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

RECEIVED BY
CONTROVERSIES
AND DISPUTES
2006 JAN 27 PM 7:11

IN THE MATTER OF	:	**BEFORE THE SCHOOL ETHICS COMMISSION**
JOHN TALTY and SHARON KIGHT	:	**Docket No. C18-05 and C19-05**
BRICK TOWNSHIP	:	
BOARD OF EDUCATION	:	
OCEAN COUNTY	:	**DECISION**

PROCEDURAL HISTORY

This matter arises from two complaints filed by Robert Lanzieri against John Talty and Sharon Kight, both members of the Brick Township Board of Education (Board) alleging violations of the School Ethics Act (Act) N.J.S.A. 18A:12-21 et seq. The first complaint, C18-05, filed on April 15, 2005, alleges that Mr. Talty violated N.J.S.A. 18A:12-24.1(e) of the Code of Ethics for School Board Members in the Act when, at the March 17, 2005 Board meeting, he physically and verbally attacked Mr. Lanzieri. The second complaint, C19-05, also filed on April 15, 2005, alleges that Ms. Kight violated N.J.S.A. 18A:12-24.1(e) of the Code of Ethics for School Board Members when, at the March 17, 2005 Board meeting, she physically and verbally attacked Mr. Lanzieri.

After receipt of the complaints, the Commission forwarded both complaints to Mr. Talty and Ms. Kight and notified them that, pursuant to N.J.A.C. 6A:28-6.5(a), they had 20 days to submit an answer under oath to the Commission. Mr. Talty and Ms. Kight filed timely responses wherein they both denied that they physically and verbally assaulted Mr. Lanzieri. They also both denied that they violated N.J.S.A. 18A:12-24.1(e) of the Code of Ethics for School Board Members. Ms. Kight informed the Commission that a hearing on assault charges was pending in municipal court. Therefore, pursuant to N.J.S.A. 18A:12-32, the Commission had to hold the matter in abeyance until such time as the municipal matter was resolved. On October 14, 2005, Mr. Lanzieri's attorney informed the Commission that the criminal complaint had been withdrawn, but that Mr. Lanzieri still intended to go forward with the ethic's complaint.

The Commission invited Mr. Lanzieri and his attorney, John Koufos, Esquire, and Mr. Talty and Ms. Kight and their attorney, Thomas Monahan, Esquire, to attend its November 22, 2005 meeting to present witnesses and testimony for a hearing to determine whether the respondents' conduct violated the Code of Ethics. The parties were also notified that their attendance at the hearing was not required. All the parties and their attorneys attended the hearing. At its November 22, 2005 meeting, the Commission consolidated C18-05 and C19-05 for a hearing. Mr. Lanzieri and his witnesses John Bendokas, a former Board member, and Geoffrey Dubrosky testified. Pursuant to N.J.A.C. 6A:28-6.8, cross-examination of the witnesses was allowed. Mr. Talty and Ms. Kight and their witnesses Danielle Medina and John Barrett also testified.

At the November 22, 2005 meeting, after presentation of the testimony, the Commission voted to table the matter and requested that counsel for both parties provide simultaneous written summations on behalf of their clients by December 12, 2005.

The closing statement of Mr. Talty and Ms. Kight was timely filed by Mr. Monohan, Esq. on December 9, 2005. In his closing statement, Mr. Monahan stressed that Mr. Lanzieri had withdrawn the criminal complaint he had filed against Mr. Talty and Ms. Kight in the Brick Township Municipal Court based on the same facts that gave rise to the complaints filed before the Commission. Mr. Monahan argues that the voluntary withdrawal of those charges contradicts any testimony which Mr. Lanzieri or his witnesses gave during the November 22, 2005 hearing before the Commission. Mr. Monahan argued that there was no evidence that Mr. Talty physically and verbally abused Mr. Lanzieri at the March 17, 2005 Board meeting. Instead, Mr. Monahan claimed that Mr. Talty knew Mr. Lanzieri from church and other activities and had approached Mr. Lanzieri in an attempt to calm him down. In the closing statement, it is admitted that Mr. Talty placed his hand upon the shoulder of Mr. Lanzieri; however, Mr. Monahan maintains that it was done for the purpose of calming Mr. Lanzeiri and was not a violation of N.J.S.A. 18A:12-24.1(e).

With respect to Ms. Kight, Mr. Monahan maintains that, prior to the executive session of the Board on March 17, 2005, Ms. Kight walked up the aisle not to confront Mr. Lanzieri, but to meet with her husband as was her usual custom. Mr. Monahan maintains that because Ms. Kight felt that Mr. Lanzieri belittled Mr. Talty, she briefly exchanged words with Mr. Lanzieri and continued up the aisle to meet her husband. Mr. Monahan points out that the newspaper reporter, Danielle Medina, would have prepared a newspaper article if anything significant had happened between Ms. Kight and Mr. Lanzieri, but since there was just a brief exchange of words, there was no newspaper story. Mr. Monahan maintains that Ms. Kight was merely expressing her opinion when she spoke with Mr. Lanzieri, which is not a violation of N.J.S.A. 18A:12-24.1(e). Mr. Monahan argues that, based on previous Commission decisions, there was no private action taken by either Ms. Kight or Mr. Talty and, thus Mr. Lanzeiri failed to demonstrate a violation of N.J.S.A. 18A:12-24.1(e).

The Commission reviewed and considered the closing statements of the parties at its December 20, 2005 meeting and voted to find that Mr. Talty did not violate N.J.S.A. 18A:12-24.1(e) of the Code of Ethics for School Board Members in the Act. The Commission voted to find that Ms. Kight violated N.J.S.A. 18A:12-24.1(e) and recommended a sanction of a two-month suspension.

FACTS

The Commission based its findings on the following facts.

At all times relevant to these complaints, Mr. Talty and Ms. Kight were members of the Board. Subsequent to the filing of the complaint, Ms. Kight became Board

President. Mr. Lanzieri co-founded Friends of Parents of Autistic Children (POAC). Mr. Lanzieri and Mr. Talty know each other from church and other functions.

At the March 17, 2005 Board meeting, Mr. Talty asked the Superintendent if the funds set aside for the roof were going to be spent to fix the roof. Mr. Talty testified that in the past this had been a problem with the roof leaking and many parents had complained about the leaky roof. The Superintendent told Mr. Talty that the funds would be spent to fix the leaky roof.

Mr. Lanzieri testified that, at the March, 17, 2005 Board meeting, he was sitting in the back on the right on an end seat and Mr. Bendokas was sitting in front of him. He further testified that, at that time, he was recovering from very recent back surgery. During the public comment portion of the meeting, Mr. Lanzieri got up to speak. Although, Mr. Lanzieri testified that he spoke to the Board as a whole, there is testimony from Mr. Talty, Ms. Kight and Ms. Medina that Mr. Lanzieri directed his comments towards Mr. Talty. There is contradictory testimony regarding exactly what Mr. Lanzieri said when he addressed the Board; however, there is consensus that he made comments regarding the fact that the Board was focusing on the roof when they should be focusing on the loss of 22 positions. Mr. Talty responded to Mr. Lanzieri's comments, and Mr. Lanzieri made another comment. The Board President stopped Mr. Talty from responding again and cut off further discussion on the subject. Ms. Kight testified that the comments from Mr. Lanzieri made her very upset to the point that she was shaking.

Mr. Lanzieri testified that, generally, when the meetings go into executive session, the Board members usually leave to the right. However, both Ms. Kight and Ms. Medina testified that Ms. Kight usually talks to her husband before the Board's executive sessions. Thus, she usually goes to meet her husband who is in the audience.

There is contradictory testimony regarding Ms. Kight's behavior when the Board broke for executive session. Mr. Lanzieri testified that Ms. Kight came up to him screaming. He said she pointed her finger and pushed him with her forearm and elbow. He further testified that she said that she would get him and her organization. Mr. Bendokas, who was sitting right in front of Mr. Lanzieri, testified that Ms. Kight approached Mr. Lanzieri with a very direct and focused movement. He further testified that she was shouting at Mr. Lanzieri regarding his comments to Mr. Talty and then she poked Mr. Lanzieri with her finger. Mr. Dubrowsky testified that he saw Ms. Kight running toward Mr. Lanzieri saying that she will get him. Mr. Lanzieri testified that Ms. Kight's husband pulled her away from the commotion. Ms. Medina testified that Ms. Kight was very upset and annoyed as her husband led her out.

Ms. Kight testified that when the Board went into executive session, she picked up her binder and folders and headed up the aisle toward her husband to ask him if he wanted to stay. She further testified that she then turned to Mr. Lanzieri and said that what he had said to Mr. Talty was cruel and uncalled for. She testified that she did not touch Mr. Lanzieri since her hands were full with her notebook and folders. Ms. Kight demonstrated by standing up with a lagre binder in her hands to show that she could not

have possibly touched Mr. Lanzieri because of the size of the binder. However, the Commission notes that in her demonstration, she put the large binder in her right hand while she gestured with her left hand. Ms. Kight further testified that her husband, who was sitting across the aisle from Mr. Lanzieri, grabbed her to lead her away from Mr. Lanzieri.

After Ms. Kight was led away by her husband, Mr. Talty headed up the aisle on the right. Mr. Talty testified that he heard an argument between Ms. Kight's son and Mr. Lanzieri regarding Ms. Kight. He further testified that he saw Mr. Lanzieri and put his hand on Mr. Lanzieri's shoulder. Mr. Lanzieri told him to take his hand off, which he did. Mr. Lanzieri and Mr. Dubrowsky both testified that Mr. Talty placed his hand on Mr. Lanzieri's shoulder twice. Mr. Bendokas, Mr. Dubrowsky and Ms. Medina all testified that when Mr. Talty put his hand on Mr. Lanzieri's shoulder, it was in an attempt to diffuse the situation and calm down Mr. Lanzieri. Mr. Talty testified that after his attempt to speak with Mr. Lanzieri he left saying, "There is no talking to you tonight."

Both Mr. Lanzieri and Mr. Dubrowsky testified that, after the events at the March 17, 2005 Board meeting, they do not feel comfortable speaking out at Board meetings.

ANALYSIS

As an initial matter, the Commission notes that Mr. Lanzieri bears the burden of proving factually any violations of the Code of Ethics for School Board Members under N.J.S.A. 18A:12-29.

Mr. Lanzieri alleges that Mr. Talty and Ms. Kight violated N.J.S.A. 18A:12-24.1(e) of the Code of Ethics for School Board Members in the Act when, at the March 17, 2005 Board meeting, they both physically and verbally attacked Mr. Lanzieri. N.J.S.A. 18A:12-24.1(e) provides:

> I will recognize that authority rests with the board of education and will make no personal promises nor take any private action that may compromise the board.

Since there is no promise involved, in order to prove a violation of N.J.S.A. 18A:12-24.1(e), Mr. Lanzieri must show that Mr. Talty and Ms. Kight took private action that had the potential to compromise the Board. When Mr. Talty approached Mr. Lanzieri after the Board broke for executive session at the March 17, 2005 Board meeting, he did place his hand on Mr. Lanzieri's shoulder twice. However, the evidence shows that he did so in an attempt to calm Mr. Lanzieri down. Furthermore, he walked away from Mr. Lanzieri when he realized that he could not get through to him. Mr. Talty's actions had no potential to compromise the Board because he was trying to diffuse the situation; he was not there to confront or argue with Mr. Lanzieri. Therefore, the Commission finds that Mr. Talty did not violate N.J.S.A. 18A:12-24.1(e).

In regards to Ms. Kight, the Commission notes that there is contradictory testimony regarding her interaction with Mr. Lanzieri. Ms. Kight testified that she was so upset with Mr. Lanzieri's comments during the public comment portion of the meeting that she was shaking. She further testified that she walked calmly towards her husband and turned to Mr. Lanzieri. However, Mr. Lanzieri and two witnesses testified that she walked up to Mr. Lanzieri in an aggressive manner. Ms. Kight denies that she touched Mr. Lanzieri. However, Mr. Lanzieri and two witnesses testified that she either pointed her finger at him or pushed him. There is also evidence that Ms. Kight told Mr. Lanzieri that she would get him and his organization. Even Ms. Kight's witness, Ms. Medina testified that Ms. Kight was upset and annoyed as her husband led her out. All the witnesses agree that the interaction between Ms. Kight and Mr. Lanzieri was so heated that her husband had to pull her away.

Ms. Kight's actions were clearly private actions since they occurred during a break in the Board meeting. She was not acting in her official Board capacity since she was no longer engaged in the Board meeting. The evidence shows that she was headed towards her husband to see if he was going to stay while she was participating in the executive session of the Board. She testified that she then turned towards Mr. Lanzieri to discuss his comments. The Commission must determine if Ms. Kight's private action had the potential to compromise the Board. The weight of the evidence shows that Ms. Kight approached Mr. Lanzieri in an aggressive manner, screamed at him and threatened him. There is also evidence to show that she made some type of physical contact with Mr. Lanzieri. The evidence also shows that her actions have had an impact on both Mr. Lanzeiri and Mr. Dubrosky, who do not feel comfortable speaking at Board meetings. The Commission finds that such aggressive actions had the potential to compromise the Board because the actions hurt the integrity of the Board and intimidated the public from coming forward and addressing the Board. Therefore, the Commission finds that Ms. Kight violated N.J.S.A. 18A:12-24.1(e) when she took private action in confronting Mr. Lanzieri in a verbal and physical manner regarding his comments during the public comment session at the March 17, 2005 Board meeting.

DECISION

For the reasons discussed above, the Commission finds that Mr. Talty did not violate N.J.S.A. 18A:12-24.1(e) and dismisses the complaint against him. The Commission also finds that Ms. Kight violated N.J.S.A. 18A:12-24.1(e) when she took private action in confronting Mr. Lanzieri in a verbal and physical manner regarding his comments during the public comment session at the March 17, 2005 Board meeting. The Commission recommends that the Commissioner of Education impose a penalty of a two-month suspension because of Ms. Kight's aggressive interaction with a member of the public who commented during a Board meeting.

This decision has been adopted by a formal resolution of the School Ethics Commission. This matter shall now be transmitted to the Commissioner of Education for action on the Commission's recommendation **for sanction only**, pursuant to N.J.S.A. 18A:12-29. Within 13 days from the date on which the Commission's decision was

mailed to the parties, Ms. Kight may file written comments on the recommended sanction with the Commissioner of Education, c/o Bureau of Controversies and Disputes, P.O. Box 500, Trenton, NJ 08625, marked "Attention: Comments on Ethics Commission Sanction." A copy of any comments filed must be sent to the School Ethics Commission and all other parties.

Paul C. Garbarini 8/9/13

Paul C. Garbarini
Chairperson

Resolution Adopting Decision – C18-05 & C19-05

Whereas, the School Ethics Commission has considered the pleadings filed by the parties and the documents submitted in support thereof; and

Whereas, at its meeting of November 22, 2005 the Commission held a hearing on whether John Talty and Sharon Kight violated N.J.S.A. 18A:12-24.1(e) of the Code of Ethics for School Board Members in the Act; and

Whereas, at its meeting of December 20, 2005, the Commission reviewed and considered the final written summations of the parties and voted to dismiss the complaint against Mr. Talty, to find that Ms. Kight violated N.J.S.A. 18A:12-24.1(e) of the Code of Ethics for School Board Members in the Act and to recommend to the Acting Commissioner that Ms. Kight be suspended for a period of two months; and

Whereas, the Commission reviewed a draft decision prepared by its staff and agrees with the decision;

Now Therefore Be It Resolved that the Commission hereby adopts the proposed decision referenced as its decision in this matter and directs its staff to notify all parties to this action of the Commission's decision herein.

Paul C. Garbarini, Chairperson

I hereby certify that the Resolution
was duly adopted by the School
Ethics Commission at its public meeting
on January 24, 2006.

Lisa James-Beavers
Executive Director

92-06

OAL DKT. NOS. EDU 9919-05 AND EDU 9956-05 (CONSOLIDATED)
AGENCY DKT. NOS. 176-7/05 AND 210-8/05

VINCENT J. TAFFARO,	:	
PETITIONER,	:	
V.	:	COMMISSIONER OF EDUCATION
BOARD OF EDUCATION OF THE BOROUGH OF FORT LEE, BERGEN COUNTY,	:	DECISION
RESPONDENT.	:	

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

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

IT IS SO ORDERED.

Lucille E. Davy
ACTING COMMISSIONER OF EDUCATION

Date of Decision: 3/07/06

Date of Mailing: 3/07/06

State of New Jersey
OFFICE OF ADMINISTRATIVE LAW

INITIAL DECISION

SETTLEMENT - CONSOLIDATED

OAL DKT. NOS. EDU 9919-05 & EDU 9956-05

AGENCY DKT. NOS. 176-7/05 & 210-8/05

VINCENT J. TAFFARO,

Petitioner,

v.

BOARD OF EDUCATION OF THE BOROUGH OF FORT LEE, BERGEN COUNTY,

Respondent.

Andrew Babiak, Esq., for Petitioner

Robert T. Tessaro, Esq., for Respondent

Record Closed: January 25, 2006 Decided: January 30, 2006

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

These matters were transmitted to the Office of Administrative Law (OAL) from the Department of Education on September 6, 2005, 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 telephone conference was conducted on November 16, 2005. Prior to a hearing being scheduled, settlement discussions were held and a settlement was reached.

In order to facilitate disposition of these two matters in which the parties are identical and the issue related, I hereby **ORDER** they be and hereby are consolidated.

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, as well as the Board's resolution approving said settlement.

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

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

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

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

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

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

January 30, 2006
DATE

Maria M. La Fiandra
MARIA MANCINI LA FIANDRA, ALJ

Receipt Acknowledged:

2-3-06
DATE

M. Kathleen Dunscomb
DEPARTMENT OF EDUCATION

Mailed to Parties:

FEB 8 2006
DATE

DIRECTOR AND
CHIEF ADMINISTRATIVE LAW JUDGE
OFFICE OF ADMINISTRATIVE LAW

jb

RECEIVED
STATE OF NEW JERSEY
OFFICE OF ADMINISTRATIVE LAW
2006 JAN 25 P 2:30

ROBERT T. TESSARO, ESQ.
1624 Palisade Avenue
P. O. Box 2083
Fort Lee, New Jersey 07024
(201) 944-2332
Attorney for Respondent,
Fort Lee Board of Education

Vincent J. Taffaro
Petitioner
vs.

Fort Lee Board of Education
Respondent

OFFICE OF ADMINISTRATIVE LAW

OAL Docket No. EDU 9919-05
&
OAL Docket No. EDU 9956-05

STIPULATION OF SETTLEMENT

The parties hereby stipulate and agree that all issues raised in the Petitions bearing the Docket Numbers set forth above shall be resolved upon payment of the sum of $5,000.00 less applicable tax withholding from Respondent to Petitioner within 30 days from the date of the Commissioner of Education's approval of this settlement. The parties further stipulate and agree that any and all issues regarding Petitioner's employment and separation from employment are hereby waived.

This stipulation has been executed by Counsel for Petitioner per Petitioner's authorization and approval and by Counsel for Respondent as authorized by Resolution adopted by the Fort Lee Board of Education at a meeting held on January 23, 2006. A copy of said Resolution is attached hereto and made part hereof.

Andrew Babiak, Esq., Attorney for Petitioner

Vincent J. Taffaro

Robert T. Tessaro, Attorney for Respondent
Fort Lee Board of Education

Dated: January 24, 2006

10P

PERSONNEL COMMITTEE

RESOLUTION NO. 19877

BE IT RESOLVED, that the Fort Lee Board of Education hereby authorizes and approves the settlement of the matters entitled Vincent J. Taffaro v Fort Lee Board of Education, Docket No's EDU-9919-05 & EDU-9956 based on the payment of the gross sum of $5,000, less standard deductions;

BE IT FURTHER RESOLVED that the Board Attorney is hereby authorized and directed to execute a Stipulation of Settlement and such other documents as are necessary and appropriate regarding this settlement

BE IT ALSO RESOLVED that the Business Administrator/Board Secretary is hereby authorized and directed to issue a check in the net amount due under the terms of this settlement.

Offered By Gail Schmelzer

Seconded By Paul Leale

Dated: January 23, 2006

This is certified to be a true copy of the resolution adopted by the Fort Lee Board of Education on January 23, 2006.

Nicholas J. Girone
Business Administrator/Board Secretary

		AYES	NAYS	ABSENT	ABSTAINED
ROLL CALL	MRS. ANGELINI	X			
	MR. DAMATO	X			
	MRS. FEDERICO	X			
	MR. LEALE	X			
	MRS. SCHMELZER	X			
	MRS. STUX-RAMIREZ	X			
	MR. SURACE	X			
	MRS. STERN	X			

State of New Jersey

DEPARTMENT OF EDUCATION
PO BOX 500
TRENTON, NJ 08625-0500

JON S. CORZINE
Governor

LUCILLE E. DAVY
Acting Commissioner

March 7, 2006

Robert J. Madden, Sr., Pro Se
1992 Route 206
Southampton, NJ 08088

David M. Serlin, Esq.
505 South Lenola Road
Blason II, Suite 120
Moorestown, NJ 08057

Dear Parties:

R.J.M., SR., on behalf of minor child, R.J.M., JR. V. BOARD OF EDUCATION OF THE TOWNSHIP OF SOUTHAMPTON, BURLINGTON COUNTY, OAL DKT. NO. EDU 8448-05, AGENCY DKT. NO. 237-9/05

We are enclosing a copy of the decision of the Commissioner of Education dated March 6, 2006, in the above-captioned matter. Appeals of Commissioner decisions, other than State Department of Education employee contractual determinations and matters involving the New Jersey State Interscholastic Athletic Association, may be filed with the State Board of Education pursuant to *N.J.A.C. 6A:4-1.1* et seq.

Please note that this office is no longer providing an additional copy of the initial decision to the parties in this case.

Additionally, please note that, pursuant to *N.J.A.C.* 6A:4-1.4(a), the Commissioner's decision is mailed to the parties three days prior to the date it is deemed officially filed. This provides counsel and *pro se* litigants with the decision before it is made public by the Department. Parties and counsel are requested to refrain from making Commissioner decisions public prior to the filing date. Your cooperation is appreciated.

Very truly yours,

M. Kathleen Duncan

M. Kathleen Duncan, Director
Bureau of Controversies and Disputes

MKD/mbo:o/dec ltr/rjm237-9-05
Enclosure
c: Clair Applegate, OAL Library
Jones Addo, State Library

#90-06

OAL DKT. NO. EDU 8448-05
AGENCY DKT. NO. 237-9/05

R.J.M., SR., ON BEHALF OF MINOR CHILD, R.J.M., JR.,		
PETITIONER,	:	
V.	:	COMMISSIONER OF EDUCATION
BOARD OF EDUCATION OF THE TOWNSHIP OF SOUTHAMPTON, BURLINGTON COUNTY,	:	DECISION
RESPONDENT.	:	

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

Upon review, the Commissioner approves the settlement terms and adopts the settlement agreement as the final decision in this matter.

Accordingly, the settlement is adopted as the final decision and the matter is dismissed, subject to compliance with the terms of the settlement.

IT IS SO ORDERED.

Lucille E Davy

ACTING COMMISSIONER OF EDUCATION

Date of Decision: 3/06/06

Date of Mailing: 3/07/06

State of New Jersey
OFFICE OF ADMINISTRATIVE LAW

INITIAL DECISION
SETTLEMENT
OAL DKT. NO. EDU 8448-05
AGENCY DKT. NO. 237-9/05

R.J.M., Sr. o/b/o MINOR CHILD, R.J.M., Jr.,
Petitioner,
v.
BOARD OF EDUCATION OF THE TOWNSHIP OF SOUTHAMPTON, BURLINGTON COUNTY,
Respondent.

R.J.M., Sr., on behalf of **R.J.M., Jr.**, petitioner *pro se*
David M. Serlin, Esq., for respondent

Record Closed: January 13, 2006 Decided: January 13, 2006

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

The petitioner herein challenged the residency determination of respondent Board of Education. This matter was transmitted to the Office of Administrative Law on October 31, 2005, 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 November 30, 2005, on which date the parties met and reached a settlement agreement. The settlement terms were placed on the record, and the parties requested that the matter be held until the Board of Education could meet on December 19, 2005, and approve the terms of the settlement.

On December 27, 2005, the parties filed an executed Settlement Agreement together with a copy of a Board Resolution authorizing the settlement. On January 13, 2006, respondent's attorney provided an original Board Resolution with the raised seal of the School District authorizing the settlement. The Board Resolution and the terms of that Settlement Agreement 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.

2. The settlement and Board Resolution complies with the requirements of *N.J.A.C.* 6A:3-1.13(d) which provides that where the district board of education is a party to a contested matter, any proposed settlement, whether submitted to the Commissioner or to the OAL, shall indicate, by signature of the board attorney or inclusion of a district board of education resolution authorizing settlement, that the district board of education has consented to the terms of the settlement.

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

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

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

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

January 13, 2006
DATE

JOSEPH F. MARTONE, ALJ

Receipt Acknowledged:

Jan 19, 2006
DATE

DEPARTMENT OF EDUCATION

Mailed to Parties:

JAN 20 2006
DATE

OFFICE OF ADMINISTRATIVE LAW

mph

DAVID M. SERLIN, ESQUIRE
505 South Lenola Road
Blason II, Suite 120
Moorestown, New Jersey 08057
(856) 222-9460
Attorney for Respondent Board of Education of the Township of Southampton

2005 DEC 27 A 11:59
OFFICE OF ADMIN LAW

R.J.M., SR. on behalf of minor child R.J.M., JR. Petitioner, v. BOARD OF EDUCATION OF THE TOWNSHIP OF SOUTHAMPTON Respondent.	**STATE OF NEW JERSEY** **DEPARTMENT OF EDUCATION** **BURLINGTON COUNTY** **AGENCY DOCKET NO.: 237-9/05** **Residency Appeal** **SETTLEMENT AGREEMENT**

This matter having been brought before the Office of Administrative Law upon Petitioner having filed a Pro Se Residency Appeal for the 2005-2006 school year on behalf of R.J.M., Jr., a student attending the Southampton Township Schools; and

WHEREAS, Respondent Southampton Township Board of Education has determined that R.J.M., Jr., was not domiciled within the Township of Southampton for the 2004-2005 school year when he received an education from the Township of Southampton School District for which tuition can be assessed in excess of $12,000.00; and

WHEREAS, Petitioner has presented information which the Southampton Township Board of Education accepts establishing that at this time R.J.M., Jr. is domiciled within the Township of Southampton; and

WHEREAS, in settlement of this matter Petitioner has agreed to withdraw his Petition of Appeal and accept responsibility for payment of tuition for the 2004-2005 school year; and

WHEREAS, in recognition of Petitioner's financial circumstances the parties have agreed

to reduce the amount of tuition owed for the 2004-2005 school year to $2,500.00 payable at the rate of $75.00 per month, commencing on January 1, 2006 and to be paid on or before the first day of each month thereafter until paid in full; and

WHEREAS, the terms of the settlement were placed on the record before the Administrative Law Judge Joseph F. Martone, however, this agreement was concluded by the parties without the participation of the court.

IT IS on this ~~28th~~ 13th day of ~~December~~ January, 2006, **ORDERED** that this matter be dismissed based upon the following agreement between the parties:

1. Petitioner shall withdraw his Petition of Appeal.

2. Respondent shall agree not to pursue further tuition payments for the 2004-2005 calendar year upon Petitioner's payment of $2,500.00, to be paid at the rate of $75.00 per month commencing on January 1, 2006 and to be paid on or before the first day of each month thereafter until paid in full.

3. R.J.M., Jr., shall be permitted to attend school in the Southampton Township School District as long as his domicile continues to be in the Township of Southampton.

4. This settlement shall not become effective until a resolution shall be approved by the Southampton Township Board of Education and Petitioner has affixed his signature thereby certifying that he has entered into this Settlement Agreement voluntarily and that R.J.M., Jr., must continue to be domiciled within the Township of Southampton to be entitled to a free public education from the Southampton Township School District.

JOSEPH F. MARTONE,
ADMINISTRATIVE LAW JUDGE

I hereby agree to the form and content
of the Settlement Agreement.

ROBERT J. MADDEN, SR., Petitioner

I hereby agree to the form and content
of the Settlement Agreement.

David M. Serlin, Attorney
Southampton Township Board of Education

C:\MyFiles\STBE2005-4\settlement agreement

RESOLUTION OF THE SOUTHAMPTON TOWNSHIP BOARD OF EDUCATION AUTHORIZING BOARD ATTORNEY DAVID M. SERLIN, ESQUIRE TO EXECUTE THE SETTLEMENT AGREEMENT IN THE MATTER OF *R.J.M, SR. ON BEHALF OF MINOR CHILD R.J.M., JR. v. BOARD OF EDUCATION OF THE TOWNSHIP OF SOUTHAMPTON*

WHEREAS, R.J.M., Sr. has filed a Pro Se Residency Appeal; and

WHEREAS, it is in the interest of the Southampton Township Board of Education to enter into the attached Settlement Agreement.

NOW THEREFORE, be it resolved by the Board of Education of the Township of Southampton, that Board Attorney, David M. Serlin, Esquire is authorized to execute the attached Settlement Agreement on behalf of the Southampton Township Board of Education and to forward a certified copy to Administrative Law Judge Joseph F. Martone so that this matter can be settled.

2005 DEC 27 A 11:59
STATE OF NEW JERSEY
OFFICE OF ADMIN LAW

C:\MyFiles\STBE2005-4\resolution

#91-06

LYDIA ANDERSON,	:	
PETITIONER,	:	
V.	:	COMMISSIONER OF EDUCATION
BOARD OF EDUCATION OF THE TOWNSHIP OF IRVINGTON, ESSEX COUNTY,	:	DECISION
RESPONDENT.	:	

SYNOPSIS

Petitioner, a non-tenured teacher formerly employed by the Board, challenged the determination of the respondent to not renew her contract for the 2002-2003 school year. She asserts the actual reason for non-renewal is her national origin, specifically that she is foreign born. Respondent Board asserts that petitioner's non-renewal was the result of budgetary concerns and unsatisfactory performance in the classroom.

The ALJ found, *inter alia*, that: petitioner's testimony regarding hearsay remarks of a discriminatory nature lacked credibility; petitioner failed to prove, by a preponderance of evidence, a *prima facie* case of discrimination; and respondent Board established a legitimate basis for non-renewal of petitioner based on budgetary reasons and performance reasons. The ALJ ordered that the determination of the respondent Board be affirmed, and dismissed the petition with prejudice.

Upon a thorough and independent review of the record, the Commissioner concurs with the findings and conclusions of the ALJ, and adopts the Initial Decision of the OAL as the final decision in this matter.

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.

March 7, 2006

#91-06

OAL DKT. NO. EDU 7641-03
AGENCY DKT. NO. 170-5/03

LYDIA ANDERSON,	:	
PETITIONER,	:	COMMISSIONER OF EDUCATION
V.	:	DECISION
BOARD OF EDUCATION OF THE TOWNSHIP OF IRVINGTON, ESSEX COUNTY,	:	
RESPONDENT.	:	

The record of this matter and the Initial Decision of the Office of Administrative Law (OAL) have been reviewed, as have exceptions submitted by petitioner and replies thereto by the Board of Education (Board).[1]

Petitioner takes exception to the Administrative Law Judge's (ALJ) findings of fact, reiterating her contention that the evaluations on which the Board purportedly relied in determining not to renew her contract of employment were fabricated, and that these—together with the budget crisis on which the Board also purportedly relied—were nothing more than a pretense to cover the Board's real reason for nonrenewal, that is, discrimination based on petitioner's national origin. Petitioner also argues that the Board never voted on her nonrenewal, that she received communications from the district suggesting she was still employed for the following school year, that the statements treated as hearsay by the ALJ occurred exactly as petitioner reported them and should have been credited accordingly, and that certain arguments submitted in Board briefs should have been disregarded because they went

[1] It is noted that petitioner is no longer represented by counsel and submitted exceptions on her own behalf.

beyond the topic of briefing requested by the ALJ. Petitioner asks that her claim be remanded to the ALJ for "retrial as stated in Article 10 of the Universal Declaration of Human Rights," since she did not receive the "fair hearing" to which she is entitled. (Petitioner's Exceptions at 1-10, quotation at 13-10) In reply, the Board contends that petitioner's exceptions provide no basis on which to upset the ALJ's ruling, and that they further fail to comport with the requirements of *N.J.A.C.* 1:1-18.4. (Board's Reply at 1-2)

Upon careful consideration of the record in light of arguments on exception, the Commissioner adopts the Initial Decision of the ALJ.

Initially, the Commissioner notes that virtually all of petitioner's objections to the Initial Decision are fundamentally rooted in her disagreement with the ALJ's credibility determinations and with the resultant weighing of testimonial and documentary evidence, including the extent to which the ALJ credited hearsay and written communications which petitioner claimed to have, but did not produce at hearing.

The standard of law with respect to objections of this type is well established,[2] and in the present instance, the Commissioner finds the ALJ's credibility and fact determinations to be both clearly explained in the Initial Decision and sufficiently supported by the record. She further finds that petitioner has offered nothing in her exceptions that would warrant disturbing the deference to which the ALJ—as the

---

[2] *N.J.S.A.* 52:14B-10(c) states in pertinent part:

> The agency head 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. In rejecting or modifying any findings of fact, the agency head shall state with particularity the reasons for rejecting the findings and shall make new or modified findings supported by sufficient, competent, and credible evidence in the record.

See also, *In the Matter of the Tenure Hearing of Tyler,* 236 *N.J. Super.* 478, 485 (App. Div.), *certif. denied,* 121 *N.J.* 615 (1990); *S.D. v. Div. Med. Assistance and Health Services,* 349 *N.J. Super.* 480, 485 (App. Div. 2002)

finder of fact who had the greatest opportunity to observe the demeanor of witnesses—is entitled in this regard. *In re Morrison*, 216 *N.J. Super.* 143, 158 (App. Div. 1987).

Additionally, to the extent that petitioner places import on the fact that the Board did not actually vote to nonrenew her employment, the Commissioner observes that no such vote is required, either initially upon the superintendent's recommendation or following the employee's informal appearance before the board. *N.J.S.A.* 18A:27-4.1(b);[3] *Angelo Velasquez v. Board of Education of the Borough of Brielle, Monmouth County,* State Board of Education, August 6, 1997.

Finally, the Commissioner finds nothing in the record to suggest that petitioner was denied any right of due process to which she was entitled in the present proceeding, and, consequently, there is no basis on which to conclude that this matter should be remanded to the OAL for "retrial" as petitioner requests.

Accordingly, for the reasons expressed therein, the Initial Decision of the OAL is adopted as the final decision in this matter, and the Petition of Appeal is dismissed.

IT IS SO ORDERED.[4]

Lucille E Davy

ACTING COMMISSIONER OF EDUCATION

Date of Decision: 3/07/06

Date of Mailing: 3/07/06

[3] The statute reads in pertinent part:

> A board of education shall renew the employment contract of a certificated or non-certificated officer or employee only upon the recommendation of the chief school administrator and by a recorded roll call majority vote of the full membership of the board. The board shall not withhold its approval for arbitrary and capricious reasons. *A nontenured officer or employee who is not recommended for renewal by the chief school administrator shall be deemed nonrenewed.* (*Emphasis supplied.*)

[4] This decision may be appealed to the State Board of Education pursuant to *N.J.S.A.* 18A:6-27 *et seq.* and *N.J.A.C.* 6A:4-1.1 *et seq.*

State of New Jersey
OFFICE OF ADMINISTRATIVE LAW

INITIAL DECISION

OAL DKT. NO. EDU 7641-03

AGENCY DKT. NO. 170-5/03

LYDIA ANDERSON,

Petitioner,

v.

BOARD OF EDUCATION OF THE TOWNSHIP OF IRVINGTON,

Respondent.

Stephen M. Latimer, Esq., appearing for Petitioner
(Loughlin & Latimer, attorneys)

Lester E. Taylor, Esq., appearing for Respondent
(Hunt, Hamlin & Ridley, attorneys)

Record Closed: December 12, 2005 Decided: January 20, 2006

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

STATEMENT OF THE CASE AND PROCEDURAL HISTORY

Petitioner, a non-tenured teacher, is challenging the determination of the District to not renew her contract for the 2002-03 school year. She asserts the actual reason for the non-renewal is her national origin, specifically, she is foreign born.[1]

[1] I note there is nothing in the record which even approaches discrimination based on a specific national origin or ethnic background. As I set forth in the Findings of Fact, Petitioner alleges she was non-renewed because she is a foreigner.

On August 15, 2003, the Department of Education transmitted the matter to the Office of Administrative Law (OAL) for determination as a contested case pursuant to *N.J.S.A.* 52:14B-1 to –15 and *N.J.S.A.* 52:14F-1 to –13.

Respondent filed an application to dismiss for lack of timeliness in filing the petition and a briefing schedule was set. On May 5, 2004, I entered an order denying the application to dismiss the petition and ordering the parties to proceed with discovery. The hearing was scheduled for January 7, 10, and 11, 2005; however, these dates were adjourned at the request Petitioner and with the concurrence of Respondent. The matter was rescheduled for hearing on September 7 and 8, 2005, at which time the hearing took place.

The parties requested an opportunity to submit written summations and a schedule was set; Petitioner requested and received an extension of time to submit her argument to which Respondent submitted a response. The record closed on December 12, 2005, after my receipt of both summations and my review of the file.

FINDINGS OF FACT

Based on the evidence presented at the hearing as well as on the opportunity to observe the witnesses and assess their credibility, I make the following findings of fact, which are essentially undisputed, in this matter.

1) Respondent is a local Board of Education operating pursuant to mandates promulgated by New Jersey Statutes Title 18A and certain other Administrative authority, State and Federal Law.

2) Petitioner is a woman of West Indian origin. She had 15 years teaching experience in Jamaica before coming to the United States. She holds a K-8 teaching certificate issued by the State Board of Examiners.

3) Petitioner was hired by Respondent as a third grade teacher, effective September 1, 2000 (P-5).

4) Petitioner taught a self-contained third grade class.

5) Petitioner received a letter on May 14, 2002, informing her that the then Superintendent of Schools, Dr. Ernest H. Smith, Jr., would not be recommending the renewal of her employment contract for the 2002-03 school year (R-2).

6) After timely notification of her non-renewal, Petitioner requested a statement of reasons for the non-renewal from the Superintendent (R-3; R-4).

7) On August 16, 2002, Petitioner received a letter from Dr. Smith enumerating the reasons for her non-renewal. The reasons are:

(1) budgetary issues;
(2) November 1, 2001 unsatisfactory evaluation;
(3) January 31, 2002 unsatisfactory evaluation;
(4) Poor classroom management skills;
(5) Failure to demonstrate effective teaching strategies necessary to engage students;
(6) Failure to create atmosphere conducive to learning (R-5).

8. Petitioner requested an informal appearance before the Board to try and convince the Board to offer re-employment, despite the decision of the Superintendent to non-renew. No action was taken by the Board to offer employment.

9. On February 26, 2003, Petitioner alleged having an unsolicited conversation with a member who took office in April 2002.

10. Ethel Davion, Assistant Superintendent for Academic Affairs, informally observed Petitioner numerous times, conducted walk throughs and spoke with the math supervisor at least two times regarding concerns about Petitioner's performance.

11. After a walkthrough conducted by Ms. Davion during the 2001-02 school year, she reported to Petitioner's supervisor and the building principal her concerns of Petitioner's lack of classroom control and the fact that Petitioner had asked her to watch her students.

12. Ms. Davion noted that Petitioner was working hard, but ineffectively and inefficiently.

13. Petitioner's building Principal, Richard Graves, never received any complaints from Petitioner regarding the alleged discriminatory remarks she claims to have overheard from various staff members regarding her national origin.

14. Graves further indicated that he had concerns regarding Petitioner's quality of teaching and that supervisors would go to certain teachers' classrooms more frequently in part based upon classroom management skills.

15. Petitioner has not alleged any discriminatory intent or motive on behalf of the former Superintendent, Dr. Smith, or Ms. Davion, Assistant Superintendent of Academic Affairs and part of the executive cabinet that reviewed personnel matters and made decisions to non-renew.

16. Petitioner was evaluated in November 2001 and was given an unsatisfactory evaluation (R-6).

17. The pre-observation conference is listed as November 1, 2001. The date of the evaluation is listed on the evaluation form as November 1, 2001 (R-8).

18. Ms. Anderson's attendance records for that date show that she was not in school on November 1, 2001 (P-2).

ANALYSIS AND CONCLUSIONS OF LAW

The issue to be resolved in this matter is whether Petitioner sustained her burden of proving, by a preponderance of credible evidence, the overriding reason for the non-renewal of her contract as a non-tenured teacher by the District was discriminatory in nature in violation of the New Jersey Law Against Discrimination. *N.J.S.A.* 10:5-1 *et seq.* Because Petitioner's claim is premised on a purported remark made by the deceased President of the Board of Education and purportedly reported to Petitioner at a chance meeting months after Petitioner's contract was not renewed, I requested the parties to also brief the issue of the admissibility of certain statements allegedly made by a declarant who was unavailable to testify.

In order to resolve whether the statement which, it has been alleged, was made by the President of the Irvington Board of Education, is admissible, I must first determine whether the statement is hearsay and, if it is, whether it falls within one of the several exceptions to the to the hearsay exclusion. Hearsay is defined as an out of court statement, offered in evidence to prove the truth of the matter asserted. *N.J.R.E.* 801(c). Generally, hearsay is not admissible; there are, however, a number of specific exceptions to the general rule. *N.J.R.E.* 802.[2]

In this case, Petitioner testified she encountered a former Board member several months after her employment ended. According to Petitioner, at this chance encounter, the Board member reported a remark made by the Board President which the Board member claimed to have heard. Specifically, according to Petitioner, that remark was: "Even if she's right, she is a foreigner, why are you taking sides with her," (sic)

There is no question this purported remark is an out of court statement; moreover, because Petitioner is claiming discrimination based on national origin, it is offered as evidence of a discriminatory bias on the part of the Board President. Accordingly, I **FIND,** it is offered as evidence of the truth of Petitioner's claim of a

[2] It is well-established that hearsay is admissible in this forum. *N.J.A.C.* 1:1-15.5.

discriminatory intent on the part of the Board in not renewing her contract. Accordingly, it appears the statement is hearsay. As noted above, however, there are a number of exceptions to the hearsay exclusion and so I must now determine whether the alleged remark falls within the exception as asserted by Petitioner so as to make it admissible.

Among the statements which are not excluded by the hearsay rules is one offered against a party where the hearsay is a statement by an agent or servant of the party concerning a matter within the scope of the agency and made during the existence of the relationship. *N.J.R.E.* 803(B)(4). Since the Board of Education is a party to this litigation, the comment of the Board President, made as a representative of the Board, fits squarely within this exception to the hearsay exclusion, and I do so **FIND.** I further **FIND,** therefore, the statement is admissible as an exception to the hearsay exclusion, *i.e.*, standing by itself, it may be competent evidence of the matter at issue.

The rationale behind the hearsay exclusion is hearsay is deemed to be untrustworthy and unreliable. Certain exceptions are justified because the circumstances under which the hearsay statements were made provide strong *indicia* of reliability. *Biunno, Current N.J. Rules of Evidence, Comment to N.J.R.E. 802.* Accordingly, as Respondent argues, the circumstances under which the statement was made must be examined to determine the reliability of the statement. In short, there must be a probability that the statement is trustworthy from the circumstances surrounding its making. *State v. White*, 158 *N.J.* 230, 246-247 (1999). In this case, the only factor which has been established conclusively is that the declarant is deceased.[3] There is nothing in the record to indicate the circumstances under which the statement may have been made such as who, other than the one board member who allegedly heard the statement but who was not produced as a witness, was present when the comment was made or the context in which it was made. Moreover, except for the testimony of Petitioner, there is no evidence the declarant actually made the statement. In addition, although Petitioner testified to the efforts she made to contact the board member who relayed the remark, I take note that no attempt was made to subpoena that member.

[3] The fact that the declarant is deceased and, therefore, unavailable to testify is of no importance with regard to this exception to the hearsay exclusion. See *N.J.R.E.* 803.

Petitioner argues the issue of "hearsay within hearsay"[4] is not a problem with regard to the admissibility of this statement; it does, however, affect the trustworthiness and reliability of the statement. The farther the reported conversation gets from the original source of communication, the more opportunity for distortion of that which was expressed. In this case, the remark was made, purportedly, by the Board President, relayed to Petitioner by a Board member; then, it was relayed to the court by Petitioner.

I cannot overlook the fact that all evidence regarding bias came in through the testimony of Petitioner who has an interest in the outcome of the matter. There is no independent, objective evidence to support Petitioner's testimony with regard to this remark or other remarks she claims were made. Accordingly, I ascribe no weight to the purported remark of the Board President.

As noted above, I recognize there are other comments purported to have been made by fellow teachers and administrative personnel which Petitioner testified she overheard. While these comments may be admissible under the same exception to the hearsay rule, once again, the reliability and trustworthiness of the circumstances are at issue. There were, purportedly, at least two statements which would tend to indicate bias on the part of some colleagues or administrators. They were not, however, reported at the time they were made. The failure to report the statements when they occurred, along with the fact that, apparently no one else heard them, since no other witnesses were called to corroborate Petitioner's testimony, critically undermines the trustworthiness and reliability of the purported statements. Accordingly, I accord them no weight.

In addition, Petitioner testified she had written to members of the Board numerous times regarding her non-renewal; however, she did not have copies of the letters with her. Consequently, based on the foregoing as well as the tone of the document admitted into evidence as R-9, I **FIND** Petitioner's testimony to be lacking in

[4] Hearsay within hearsay, or "double hearsay" occurs when an out of court statement of one person is relayed, out of court to another person, who then testifies about the original statement, which is the situation in this case.

credibility in the legal sense, *i.e.,* it lacks the trustworthiness and reliability required of competent evidence. Therefore, I accord it no weight.

Since I have determined to accord the evidence of a discriminatory intent no weight, I must further **CONCLUDE** Petitioner has failed to prove, by a preponderance of evidence, a *prima facie* case of discrimination.

On the other hand, Respondent has articulated five grounds for the decision not to renew Petitioner's contract. Those five reasons are:

- budgetary concerns which resulted in a reduction of teaching staff;
- two unsatisfactory performance evaluations;[5]
- poor class room management skills;
- failure to demonstrate effective teaching strategies necessary to engage students; and
- failure to create atmosphere conducive to learning.

There is testimony in the record which reflects during the period of time when Petitioner was non-renewed, there was, in fact, a budget crisis in Irvington. Ms. Davion, who was Acting Superintendent at the time of the hearing and who has been Assistant Superintendent for Student Affairs for five years testified as a result of the budget crisis facing Irvington, the District was forced to cut 252 teaching staff positions. This testimony was unrebutted. I **FIND** Ms. Davion's testimony on this point to be credible. I further **FIND** there was a budget crisis in Irvington at the time Petitioner was non-renewed; and I further **FIND** Respondent has established a legitimate basis for the non-renewal based on budgetary reasons.

Having determined there was a legitimate basis for the non-renewal, there is no need to further analyze other reasons cited by the District, except to note, with respect to the November 2001 evaluation, although it is clear Petitioner was absent on November 1, the date which appears on the evaluation form, it is equally clear that the form was signed by the evaluator later in the month; moreover, Petitioner never denied the evaluation took place on a subsequent date nor is there any indication on the form itself which is unsigned by Petitioner that Petitioner denied it happened. From the

[5] Findings of Fact #7 list these as two separate grounds for the non-renewal.

contents of R-9, which is addressed to the supervisor who conducted the evaluation, it is clear Petitioner was aware of the evaluation and the evaluation form. From the tone of R-9, it is equally clear that she disagreed strongly with the contents; what is missing from R-9 is a denial that the evaluation ever not took place. All of this impinges on the credibility of Petitioner and, as noted above, her testimony is simply not reliable.

Accordingly, I **CONCLUDE** Respondent has demonstrated a legitimate basis for the non-renewal; I further **CONCLUDE** the determination of Respondent should be affirmed.

ORDER

I hereby **ORDER** the determination of Respondent be and hereby is **AFFIRMED;** I further **ORDER** this petition be and hereby is **DISMISSED WITH PREJUDICE.**

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

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

Within thirteen (13) days from the date on which this recommended decision was mailed to the parties, any party may file written exceptions with the **COMMISSIONER OF THE DEPARTMENT OF EDUCATION, 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, 2006
DATE

Maria M La Fiandra
MARIA MANCINI LA FIANDRA, ALJ

E-mail Receipt of Initial Decision Confirmed by the Department of Education on:

January 20, 2006
DATE

Mailed to Parties:

Laura Sanders
DIRECTOR AND
CHIEF ADMINISTRATIVE LAW JUDGE

JAN 23 2006
DATE

OFFICE OF ADMINISTRATIVE LAW

jb

APPENDIX

Witnesses

Lydia Anderson
Ethel Davion
Richard Graves

Exhibits

For Petitioner:

P-1 Irvington Board of Education Policy & Procedure for Evaluation
P-2 Personnel Sheet of Attendance
P-3 Evaluation of Petitioner by Walter F. Rusak, April 2001
P-4 Evaluation of Petitioner by Mr. Rusak, June 2001
P-5 Letter - Dr. Smith to Petitioner, August 18, 2000
P-6 Letter - Petitioner to Dr. Smith, July 22, 2002
P-7 Letter - Petitioner to Pat Dunn, August 24, 2002

For Respondent:

R-1 Irvington Board of Education Policy on Non-Renewal (non-tenured staff)
R-2 Letter - Dr. Smith to Petitioner, May 14, 2002
R-3 Letter - Dan S. Smith to Dr. Smith, May 15, 2002
R-4 Letter - Petitioner to Dr. Smith, May 16, 2002
R-5 Letter - Dr. Smith to Petitioner, August 16, 2002
R-6 Evaluation of Petitioner by Dr. Hangge, February 14, 2001

* R-7 Teacher Evaluation
R-8 Evaluation of Petitioner by Suzanne Steele, November 1, 2001
R-9 Letter - Petitioner to Ms. Steele, December 21, 2001
R-10 Memo - Mr. Rusak to Petitioner, February 22, 2001
R-11 Memo - Mr. Graves to Petitioner, January 3, 2002
R-12 Evaluation of Petitioner by Mr. Rusak, October 1, 2000
R-13 Letter - Dr. Smith to Petitioner, March 22, 2002
R-14 Memo - Mr. Rusak to Petitioner, February 22, 2001 (same as R-10)
R-15 Letter - Petitioner to William L. Librera, Commissioner, May 23, 2003
R-16 Letter - Petitioner to Mr. Graves, January 3, 2002

* Identification only.

G.P. ON BEHALF OF MINOR CHILD, R.P.,

PETITIONER,

V.

BOARD OF EDUCATION OF THE TOWNSHIP OF WEST ORANGE, ESSEX COUNTY,

RESPONDENT.

COMMISSIONER OF EDUCATION

DECISION

SYNOPSIS

Petitioner challenged the Board's residency determination that his niece, R.P., was not eligible for a free education in the West Orange Public Schools based on family or economic hardship. Petitioner's appeal included an affidavit from R.P.'s mother, who resides in Haiti, alleging economic hardship and persecution of her family for its political beliefs. The matter was originally heard in June 2005, and an initial decision dismissing the petition and ordering petitioner to pay tuition was filed based on petitioner's failure to appear at the hearing. The Commissioner remanded the matter to the OAL for a hearing on the merits, which was held on January 17, 2006.

The ALJ found that: petitioner's supplemental submissions and testimony were credible and demonstrate that R.P.'s parents lack the economic ability to provide for their child; R.P.'s parents are suffering from political persecution; the family is in fear for their lives; and G.P. brought his niece into respondent's district for reasons other than providing her a superior education. The ALJ concluded that petitioner has met his burden of proof that R.P. is domiciled in the district, and that he is providing care for R.P., gratis, due to family and economic hardships. Accordingly, the ALJ ordered that R.P. is entitled to a free education in the West Orange Public Schools, and denied the respondent's application for tuition reimbursement.

The Commissioner must give deference to the credibility determinations of the ALJ, and therefore agrees with the ALJ's conclusion that R.P. meets the standards set forth in N.J.S.A. 18A:38-1(b)(1) which allow a free public education to a student who resides in the home of a person domiciled in the district, is supported by that person gratis, is not in the district solely for the purpose of receiving a free education, and whose parents cannot support or care for her due to hardship. Accordingly, the Commissioner adopts the Initial Decision of the OAL in this matter.

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.

Mailed 3/13/06

95-06R

OAL DKT. NO. EDU 11591-05
(OAL DKT. NO. EDU 10926-04 ON REMAND)
AGENCY DKT. NO. 373-10/04

G.P. ON BEHALF OF MINOR CHILD, R.P.,	:	
PETITIONER,	:	COMMISIONER OF EDUCATION
V.	:	DECISION ON REMAND
BOARD OF EDUCATION OF THE TOWNSHIP OF WEST ORANGE, ESSEX COUNTY,	:	
RESPONDENT.	:	

The record in this matter and the Initial Decision of the Office of Administrative Law (OAL) have been reviewed. No exceptions were submitted.

The controversy stems from G.P.'s (petitioner) application to the West Orange Board of Education (respondent) to allow his niece, R.P., to receive a free public education in West Orange, and respondent's denial of the application on September 13, 2004, for the stated reason that it did not meet the statutory requirement that the application be precipitated by family or economic hardship. On October 25, 2004 the Commissioner of Education received an appeal from the petitioner which included an affidavit dated October 21, 2004, from R.P.'s mother, R.D.P.

In the affidavit, R.D.P. alleged that her family members had been persecuted for their political beliefs; that they had lived from house to house in fear; that after a beating in retaliation for attendance at a protest against Haiti's president, R.P.'s brother had fled to the United States and applied for asylum; that before R.P. arrived in the United States to live with her uncle, the petitioner, she had been in hiding from the militia, which had tried to kidnap her; that R.P. had been traumatized

G.P. ON BEHALF OF MINOR CHILD, R.P.,

PETITIONER,

V.

BOARD OF EDUCATION OF THE TOWNSHIP OF WEST ORANGE, ESSEX COUNTY,

RESPONDENT.

COMMISSIONER OF EDUCATION

DECISION

SYNOPSIS

Petitioner challenged the Board's residency determination that his niece, R.P., was not eligible for a free education in the West Orange Public Schools based on family or economic hardship. Petitioner's appeal included an affidavit from R.P.'s mother, who resides in Haiti, alleging economic hardship and persecution of her family for its political beliefs. The matter was originally heard in June 2005, and an initial decision dismissing the petition and ordering petitioner to pay tuition was filed based on petitioner's failure to appear at the hearing. The Commissioner remanded the matter to the OAL for a hearing on the merits, which was held on January 17, 2006.

The ALJ found that: petitioner's supplemental submissions and testimony were credible and demonstrate that R.P.'s parents lack the economic ability to provide for their child; R.P.'s parents are suffering from political persecution; the family is in fear for their lives; and G.P. brought his niece into respondent's district for reasons other than providing her a superior education. The ALJ concluded that petitioner has met his burden of proof that R.P. is domiciled in the district, and that he is providing care for R.P., gratis, due to family and economic hardships. Accordingly, the ALJ ordered that R.P. is entitled to a free education in the West Orange Public Schools, and denied the respondent's application for tuition reimbursement.

The Commissioner must give deference to the credibility determinations of the ALJ, and therefore agrees with the ALJ's conclusion that R.P. meets the standards set forth in N.J.S.A. 18A:38-1(b)(1) which allow a free public education to a student who resides in the home of a person domiciled in the district, is supported by that person gratis, is not in the district solely for the purpose of receiving a free education, and whose parents cannot support or care for her due to hardship. Accordingly, the Commissioner adopts the Initial Decision of the OAL in this matter.

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.

Mailed 3/13/06

OAL DKT. NO. EDU 11591-05
(OAL DKT. NO. EDU 10926-04 ON REMAND)
AGENCY DKT. NO. 373-10/04

G.P. ON BEHALF OF MINOR CHILD, R.P.,	
PETITIONER,	COMMISIONER OF EDUCATION
V.	DECISION ON REMAND
BOARD OF EDUCATION OF THE TOWNSHIP OF WEST ORANGE, ESSEX COUNTY,	
RESPONDENT.	

The record in this matter and the Initial Decision of the Office of Administrative Law (OAL) have been reviewed. No exceptions were submitted.

The controversy stems from G.P.'s (petitioner) application to the West Orange Board of Education (respondent) to allow his niece, R.P., to receive a free public education in West Orange, and respondent's denial of the application on September 13, 2004, for the stated reason that it did not meet the statutory requirement that the application be precipitated by family or economic hardship. On October 25, 2004 the Commissioner of Education received an appeal from the petitioner which included an affidavit dated October 21, 2004, from R.P.'s mother, R.D.P.

In the affidavit, R.D.P. alleged that her family members had been persecuted for their political beliefs; that they had lived from house to house in fear; that after a beating in retaliation for attendance at a protest against Haiti's president, R.P.'s brother had fled to the United States and applied for asylum; that before R.P. arrived in the United States to live with her uncle, the petitioner, she had been in hiding from the militia, which had tried to kidnap her; that R.P. had been traumatized

as a result of the conditions in Haiti; and that petitioner would care for R.P. gratis because of her mother's inability to provide her with security and basic necessities.

Respondent filed an answer on November 30, 2004, including a counterclaim for tuition reimbursement for the period in which R.P. had attended school in West Orange, and the matter was transmitted to the OAL. On February 7, 2005, the OAL sent a notice to the parties advising that the hearing would take place on June 3, 2005, at 9 a.m.

Petitioner did not appear at the hearing on June 3, 2005, and did not call the OAL to request an adjournment or explain his absence. (EDU 10926-04, Initial Decision at 2) On June 3, respondent moved for dismissal of the petition and an award of tuition reimbursement. *(Ibid.)* Testimony was presented about R.P.'s school attendance and about tuition rates in West Orange. *(Ibid.)* The matter was held until Monday, June 6, 2005. *(Ibid.)* When petitioner failed to appear, respondent's motion for dismissal of the petition and an award of tuition fees was granted. *(Ibid.)*

The administrative law judge's (ALJ) Initial Decision in EDU 10926-04 was issued on June 8, 2005. She concluded that since petitioner failed to attend the hearing, and in so doing failed to meet his burden to show that R.P.'s residency with him entitles her to a free education in West Orange, pursuant to N.J.S.A. 18A:38-1(b)(1), the petition should be dismissed. (EDU 10926-04, Initial Decision at 3) In addition, she concluded that, pursuant to N.J.S.A.18A:38-1(b)(2), and based upon the evidence, petitioner owed respondent tuition for the 2004-2005 school year. (EDU 10926-04, Initial Decision at 4)

Nine days after the Initial Decision in EDU 10926-04, on June 17, 2005, petitioner hand delivered to the office of the Commissioner of Education a letter reporting that he did not know about the hearing until two days after it took place. The letter stated:

> If I were to know, I would not have ever made the mistake of not attending, I was waiting for that chance for so long. Please I would like to have the opportunity to prove my case. I am pleading for another chance to be able to do so.

Because the letter was filed within the time allowed for exceptions to the Initial Decision, because there was no evidence that there had been any communication between the court and the parties during the four months between the notice of the hearing and the date of the hearing, and because the facts alleged in the affidavit of R.P.'s mother, if true, could arguably have justified R.P.'s residence with her uncle in West Orange, and R.P.'s attendance at West Orange High School, the Commissioner granted petitioner's request for a hearing, and remanded the case to the OAL.

A hearing on the merits was held in the OAL on January 17, 2006. As a threshold matter, in her Initial Decision on Remand issued January 25, 2006, the ALJ found G.P. to be credible. (Initial Decision at 6) His testimony was consistent with the facts set forth in the affidavit of R.P.'s mother. Significantly, the ALJ noted that R.P.'s mother's affidavit had been incomplete due to the fact that R.P.'s mother neither speaks, reads nor writes in English, and consequently had to find an interpreter to compose her affidavit and letters, which she then signed. (Initial Decision at 3) The Commissioner notes that the vocabulary and syntax of the affidavit suggest that the interpreter was not fluent in English.[1] Thus, G.P.'s testimony at the hearing supplemented the affidavit and clarified the conditions under which R.P.'s family had been and still were living.[2]

Thus, the ALJ found that R.P. had gone to school in Haiti only on an intermittent basis because of political unrest and security issues. (Initial Decision at 2) In July, 2004, G.P. paid for her air fare to bring her to his home in West Orange, and has since been her sole source of support. (Initial Decision at 3) She has never returned to Haiti, and intends to stay in the United States and go to college. G.P. has applied to sponsor her for a green card. (Initial Decision at 4)

---

[1] Although the affidavit included a paragraph that stated that R.P. was being placed with her uncle "solely for the purpose of receiving a free public education" in West Orange, the ALJ found that the context of the affidavit necessitated the conclusion that the affiant meant to state that her daughter's residency with G.P. was not "solely for the purpose of receiving a free public education." (Initial Decision at 4)

[2] Indeed the conditions which R.P.'s mother described are consistent with journalistic and scholarly accounts of the last decade and a half in Haiti. *See, e.g.* Elizabeth D. Gibbons, *Sanctions in Haiti: Human Rights and Democracy under Assault*, Center for Strategic and International Studies, Washington, D.C., 1999.

G.P. testified on January 17, 2006 that R.P.'s parents still live in Haiti in a two-room house with no running water, electricity or telephone. (Initial Decision at 3) (The above-referenced affidavit from October 21, 2004, stated that they slept "house to house" because of political persecution.) R.P.'s father, a mason, could not find work because he unsuccessfully ran for mayor in his town as an opposition candidate to the incumbent regime. (Initial Decision at 3) He is also periodically harassed by rebel forces to the point where he flees over the border to Santo Domingo and "stays there for a while." (*Ibid*) R.P.'s mother earns some income by buying food and clothing in Miami and selling it in Haiti. G.P. gave her $2000 to initiate this retail business; it costs her $150-200 to make each trip, and her profits provide a meager living for her and R.P.'s father. (*Ibid.*)

R.P.'s two older brothers have fled Haiti. (Initial Decision at 2) One fled dressed as a woman, after having been beaten by the "Chumeras Lavales" [Haitian President Aristede's political enforcers], and is currently applying for political asylum. (Initial Decision at 4) G.P. assists both young men financially, as they are employed only sporadically. (Initial Decision at 3)

The Commissioner agrees with the ALJ's determination that R.P. meets the standards set forth in *N.J.S.A.* 18A:38-1(b)(1) which allow a free public education to an "affidavit student," i.e., a student who: resides in the home of a person domiciled in a school district; is supported by that person gratis; is not in the district solely for the purpose of receiving a free education; and whose parents cannot support or care for her due to hardship.

As a threshold matter, the Commissioner is bound by the ALJ's determination that G.P.'s testimony was credible. *S.D. v. Div. of Med. Assistance and Health Services*, 349 *N.J. Super* 480, 485 (App. Div. 2002). That testimony established that R.P.'s parents live in an environment that is economically depressed and ranges from politically unstable to dangerous. More specifically, they are poor, and cannot count on the consistent operation of such institutions as schools and the administration of justice and law enforcement. Further, the evidence at the hearing showed that G.P. is not only supporting R.P. gratis, but is helping her brothers and has assisted her parents.

Accordingly, the Commissioner adopts the Initial Decision for the reasons expressed therein and supplemented above. G.P.'s petition is granted; R.P. is entitled to receive a free public education in the school district of West Orange. Respondent's request for tuition is denied.

IT IS SO ORDERED.[3]

Lucille E. Davy
ACTING COMMISSIONER OF EDUCATION

Date of Decision: 3/13/06

Date of Mailing: 3/13/06

[3] This decision may be appealed to the State Board of Education pursuant to *N.J.S.A.* 18A:6-27 *et seq.* and *N.J.A.C.* 6A:4-1.1 *et seq.*

STATE OF NEW JERSERY
OFFICE OF ADMINISTRATIVE LAW

INITIAL DECISION

OAL DKT. NO. EDU 11591-05

OAL DKT. NO. EDU 10926-04 (**ON REMAND**)

AGENCY DKT. NO. 373-10/04

G.P., ON BEHALF OF MINOR CHILD,

R.P.,

Petitioners,

v.

BOARD OF EDUCATION OF THE TOWNSHIP OF WEST ORANGE, ESSEX COUNTY,

Respondents.

G.P., *pro se*

Stephen J. Christiano, Esq., for the respondent

Record Closed: January 17, 2006 Decided: January 25, 2006

BEFORE **CAROL I. COHEN**, ALJ:

STATEMENT OF THE FACTS AND PROCEDURAL HISTORY

The petitioner, (G.P.) appeals from the denial by the Board of Education of the Township of West Orange, Essex County (respondent) of his application to allow his

niece (R.P.) to be educated in the West Orange Public Schools. The procedural history of this matter was outlined in the Decision of the Commissioner of Education July 14, 2005 and is incorporated herein. (See attached). The Commissioner remanded the matter to the Office of Administrative Law (OAL) for a hearing on the merits of the petitioner's appeal. The file was returned to the OAL on October 6, 2005 and re-assigned to the judge on October 31, 2005. The case was scheduled for a hearing on January 17, 2006 and heard on that date.

ISSUES

1. Whether the child's parents are incapable of supporting or providing care for the child due to a family or economic hardship.

2. Whether the District is entitled to tuition reimbursement.

FINDINGS OF FACT

Based on the testimony presented and the documentary evidence submitted, and having had an opportunity to observe the witnesses and to assess their credibility, I make the following **FINDINGS OF FACT:**

1. G.P. owns a home at 77 High Street, West Orange, New Jersey. He resides there with his wife, three daughters and niece, R.P. (G.P. is her paternal uncle.) Mr. and Mrs. P. are employed full time. Their daughters, who are 25, 24 and 16 years old, attend school or are employed.
2. R.P. is presently nineteen years of age and is in the twelfth grade at West Orange High School. She is due to graduate in June 2006.
3. R.P. went to school in Haiti, but only on an intermittent basis, because of the unrest in her country.
4. R.P.'s parents reside in Haiti. She has two adult brothers, who do not live at home. One lives in Miami and the other in Santo Domingo. The

brothers are employed sporadically and G.P. helps provide money for their support.

5. G.P. brought R.P. to the United States on July 19, 2004. R.P.'s mother, Rose P., originally came to New Jersey with her daughter. (G.P. paid for their air fare.) However, she returned to Haiti shortly thereafter.
6. G.P. is the sole source of support for R.P. and provides this support gratis.
7. R.P.'s father is a mason by trade, but he only works sporadically. He ran for mayor in his town in Haiti, as an opposition candidate, but was not elected. As a result of his running for office, he became the target of persecution by former President Aristede. Since his overthrow, R.P.'s father has been subject to harassment by rebel forces, which periodically come to his house with guns. When things get difficult, R.P.'s father sneaks over the border into Santo Domingo and stays there for awhile.
8. G.P. gave his sister-in-law, Rose P., $2,000.00 in order for her to start a business. His sister-in-law purchases food and clothing in Miami and then brings the products back to Haiti for sale. Once she has sold the goods, she returns to Miami to purchase more. It costs her between $150-200 round trip to go back and forth to Haiti. This business provides a subsistence income for herself and R.P.'s father, who is basically unemployed.
9. G.P.'s brother and sister-in-law live in a two room house. There is no running water or electricity. They do not have a telephone or car.
10. Rose P. does not read or write English. Therefore, the Affidavit of Parent (*P-1* and *R-1*) and the two letters "To Whom it may Concern" (*P-2 & R-3*) were not written by Rose P. Rather, she signed the statements composed by someone else.
11. The Affidavit of Parent, which was signed by R.P. on October 21, 2004, and which was not part of the original registration material, but was submitted as part of the appeal, states: "Because of the political persecution we do not have no place to live we sleep the house to house because we are afraid to be apprehended and kill by the terrorist militia of

the ancient regime." It goes on to say that the mother is not capable of supporting and providing care and security for her daughter because of the fear of persecution. In order for her son to flee the county after he was beaten by the "Chumeras Lavalas", he had to dress like a women. He is presently applying for political asylum. R.P.'s mother also claims in the affidavit that R.P. did not attend school, because the terrorist militia threatened to kidnap her. The document also states that she is placing R.P. with her uncle "solely for the purpose of receiving a free public Education in west orange."

12. From the context of the Affidavit it appears that the affidavit was meant to read "*not* solely for the purpose of receiving a free public education."

13. The original documents, submitted to the school at the time of registration, did not mention political persecution or the parents being unemployed and unable to support R.P. Nor did it say that R.P. had missed school in Haiti because of the militia

14. R.P. has not gone back to Haiti since she arrived in the United States. She intends to remain in the United States and attend college, once she graduates. G.P. has made application with the INS to sponsor her, so R.P. can obtain her green card.

15. According to the Affidavit submitted by Josefa Lopez, Register for the West Orange Board of Education, the amount spent in tuition payments for R.P. for the 2004-2005 school year was $12,655.00 and for the period from September 7, 2005 to January 17, 2006 (81 days) $5,694.30, for a total of $18,349.30.

LEGAL DISCUSSION

Public education must be provided free to persons over six and up to twenty years of age, who are domiciled within the School District - *N.J.S.A.* 18A:38-1(a). Under section b(1) of this statute, there are certain requirements for any person who is kept in

the home of another person domiciled within school district. These requirements state that, the petitioner must show that they are:

> supporting the child gratis and will assume all personal obligations for the child relative to school requirements; that he intends so to keep supporting the child gratuitously for a longer time than merely through the school term ...that the child's parents or guardian are 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...

The petitioner has the burden of proof by a preponderance of the evidence that the child is eligible for a free education under the criteria.

The school district argued that while there is no doubt that the educational system is better in the United States than in Haiti and the overall condition is better here, that is not sufficient to meet the legal standard under the statute to show family or economic hardship that prevents the parents from providing support for the child. The Board pointed out that R.P.'s mother was in Florida at least three times in 2004. She was able to pay for these trips and return to Haiti to conduct her business. While the standard of living is much lower in Haiti, this does not mean that her parents were unable to support R.P. in her native country. They also argued that R.P.'s ability to graduate on time demonstrated that she did not in fact miss school in Haiti, due to the threat of violence against her. In addition, the District argued that the fact that R.P.'s mother was able to travel freely back and forth to Miami demonstrated that she was not in fear of her life and therefore discounts the political persecution claim. In addition, the fact that R.P.'s father went to and from Santo Domingo showed that he was not being persecuted. The respondent also pointed out that there was no mention in the original registration material about political persecution and economic hardship. The district emphasized that this is an intact two parent household, where the mother and father have both traveled freely outside of their native country and have some means of support. The respondent asserted that this was just a case of parents wanting a better life and education for their child. While this is commendable, it is not the standard to

permit R.P. to receive a free education in West Orange at the expense of other taxpayers. Further, they argue that there is no question, at this point, that R.P. will be removed from the school, since she is graduating in June. Rather it is a question of the taxpayers being reimbursed for the cost of her tuition.

On the petitioner's side he argued that he had no idea, when he went to register R.P., what kind of documents he needed to show the district that the student qualified for a free public education. No one explained to him the criteria that had to be met. His grasp of English is limited and he did the best he could in providing the papers that he believed were needed. It was not until after the school denied R.P.'s request that he came to understand what documents were required to prove his case. G.P. has tried to comply with the production of those documents. However, R.P.'s mother does not speak or write English. Therefore, some of the papers supplied by G.P. do not clearly show the extent of the economic and political hardship that the family suffers. G.P. emphasized that his brother and sister-in-law are just scrapping by on the little that she earns from selling food and clothes. There is not enough to provide for their daughter. In addition, the fact that R.P.'s parents slip in and out of Haiti, does not mean that they are not persecuted, when they are Haiti. Further, there was no evidence presented that they can leave Haiti permanently. G.P. argued further that the District's assertion that R.P. will be graduating on time, shows that she did not miss school in Haiti, is flawed logic. G.P. asserted that R.P. was so motivated to get a good education that she has worked hard to catch up to her grade. She should not be punished for being a diligent student.

While, it is clear that the initial documents presented by the petitioner did not meet the standards under the statute, the supplemental submissions and the testimony of G.P., which **I FIND** to be credible, demonstrate that R.P.'s parents lack the economic ability to provide for their child. Further, the testimony and evidence shows that R.P.'s parents are suffering from political persecution and the family is in fear of their life. It is therefore clear that G.P. has brought his niece into the district for reasons other than providing her with a superior education.

CONCLUSION

Thus, I **CONCLUDE** that the petitioner has met his burden of proof under *N.J.S.A.* 18A:38-1b(1), that R.P. is domiciled within the district; that G.P. is supporting her gratis and assumes all personal obligations for her. Further, R.P.'s parents are incapable of supporting and protecting her. I therefore **CONCLUDE** that G.P. is providing care for R.P. due to family and economic hardships.

ORDER

Based on the foregoing, I hereby **ORDER** that the relief sought by G.P. on behalf of R.P. be granted and that R.P. is entitled to a free education in the West Orange Public Schools.

I further **ORDER** that the District's application for tuition reimbursement is hereby **DENIED**.

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

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

Within thirteen (13) days from the date on which this recommended decision was mailed to the parties, any party may file written exceptions with the **COMMISSIONER OF THE DEPARTMENT OF EDUCATION, 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.

1/25/06
DATE

Carol I. Cohen
CAROL I. COHEN, ALJ

E-mail Receipt of Initial Decision Confirmed by the Department of Education on:

1/25/06
DATE

Mailed to Parties:

DIRECTOR AND
CHIEF ADMINISTRATIVE LAW JUDGE

JAN 26 2006
DATE

OFFICE OF ADMINISTRATIVE LAW

id

APPENDIX

WITNESSES

For Petitioner:

G. P.

Emmanes Doxy—Translator and Assistant to Petitioner

For Respondent:

Josefa Lopez, Registrar, West Orange Board of Education

EXHIBITS

Petitioner:

P-1 Affidavit of Parent, October 21, 2004 (2 pages)

P-2 Letter from Mother, August 23, 2004

Respondent:

R-1 Parent Affidavit, September 6, 2004 (2 pages)

R-2 New Student Registration Form

R-3 Letter from Rose P., September 24, 2004

R-4 Affidavit for Non-Resident Pupil Enrollment

R-5 Letter from Board of Education (2 sides)

R-6 Tuition Costs (2 pages)

State of New Jersey

DEPARTMENT OF EDUCATION
PO BOX 500
TRENTON, NJ 08625-0500

RICHARD J. CODEY
Acting Governor

WILLIAM L. LIBRERA
Commissioner

July 14, 2005

Gabriel Previl, *Pro Se*
77 High Street
West Orange, NJ 07052

Stephen J. Christiano, Esq.
49 Mt. Pleasant Avenue
West Orange, NJ 07052

G.P., ON BEHALF OF MINOR CHILD, R.P. V. BOARD OF EDUCATION OF THE TOWNSHIP OF WEST ORANGE, ESSEX COUNTY, AGENCY DKT. NO. 373-10/04, OAL DKT. NO. EDU 10926-04

Dear Parties:

We are enclosing a copy of the decision of the Commissioner of Education dated, July 14, 2005, in the above-captioned matter. Appeals of Commissioner decisions, other than State Department of Education employee contractual determinations and matters involving the New Jersey State Interscholastic Athletic Association, may be filed with the State Board of Education pursuant to *N.J.A.C. 6A:4-1.1* et seq.

Please note that this office is no longer providing an additional copy of the initial decision to the parties in this case.

Additionally, please note that, pursuant to *N.J.A.C.* 6A:4-1.4(a), the Commissioner's decision is mailed to the parties three days prior to the date it is deemed officially filed. This provides counsel and *pro se* litigants with the decision before it is made public by the Department. Parties and counsel are requested to refrain from making Commissioner decisions public prior to the filing date. Your cooperation is appreciated.

Very truly yours,

M. Kathleen Duncan

M. Kathleen Duncan, Director
Bureau of Controversies and Disputes

MKD/cc:o/dec ltr/GPWestOrange.251-05
Enclosure
c: Clair Applegate, OAL Library
Jones Addo, State Library
(w/copy of initial decision)

#251-05

G.P. ON BEHALF OF MINOR CHILD, R.P.,	:	
PETITIONER,	:	COMMISSIONER OF EDUCATION
V.	:	DECISION
BOARD OF EDUCATION OF THE TOWNSHIP OF WEST ORANGE, ESSEX COUNTY,	:	
RESPONDENT.	:	

SYNOPSIS

Petitioner challenged the Board's residency determination that his niece, R.P., was not eligible for a free education in the Township of West Orange School District based on family or economic hardship. Petitioner's appeal included an affidavit from R.P.'s mother, who resides in Haiti, alleging persecution of her family for its political beliefs. Petitioner did not appear at the OAL hearing and respondent moved for dismissal of the petition and an award of tuition reimbursement.

The ALJ found that: petitioner enrolled his niece, R.P., in West Orange High School in September 2004; R.P. attended the school on a regular basis through the date of the hearing on June 3, 2005; the tuition rate at West Orange High School for the 2004-05 school year was $12,655; and petitioner failed to attend the scheduled hearing or call to ask for an adjournment or to explain the reason for his failure to appear. Based on the petitioner's failure to appear at hearing, the ALJ concluded that he failed to meet his burden of proof pursuant to *N.J.S.A.* 18A:38-1(b) (1), and further concluded that respondent did meet its burden under *N.J.S.A.* 18A:38-1(b) (2), and is entitled to tuition reimbursement and removal of R.P. from the district schools; the ALJ so ordered.

Upon review of the record, the initial decision of the OAL, and a letter from petitioner dated June 17, 2005, the Commissioner rejects the ALJ's recommendations, and remands the matter to the OAL for a hearing on the merits. In so deciding, he states that there is enough in the record to justify, at minimum, a hearing to determine whether the allegations in R.P.'s mother's affidavit about the family's political oppression and economic hardship in Haiti are legitimate and sufficient to justify tuition-free attendance for R.P. in West Orange schools, and notes that such an important inquiry should not be short-circuited by dismissal of petitioner's appeal, where petitioner is *pro se*, where there was one hearing notice four months before hearing date and no further communication between the parties and the OAL, and where petitioner promptly took action when he learned that he missed the hearing. Accordingly, the Commissioner remands this matter to the OAL for an expedited hearing.

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.

July 14, 2005

OAL DKT. NO. EDU 10926-04
AGENCY DKT. NO. 373-10/04

G.P. ON BEHALF OF MINOR CHILD, R.P.,	:	
PETITIONER,	:	COMMISSIONER OF EDUCATION
V.	:	DECISION
BOARD OF EDUCATION OF THE TOWNSHIP OF WEST ORANGE, ESSEX COUNTY,	:	
RESPONDENT.	:	

The record in this matter, the initial decision of the Office of Administrative Law (OAL), and a communication from the petitioner, a copy of which is annexed hereto, have been reviewed. Upon consideration of the foregoing, the Commissioner of Education (Commissioner) remands the matter to the OAL for a hearing on the merits.

Factual and Procedural History

G.P. (petitioner) applied to the West Orange Board of Education (respondent) to allow his niece, R.P., to receive a free public education in West Orange. Respondent denied his application on September 13, 2004, for the stated reason that it did not meet the statute's requirement of family or economic hardship. On October 25, 2004 the Commissioner of Education received an appeal from the petitioner which included an affidavit dated October 21, 2004, from R.P.'s mother, R.D.P., who resides in Haiti.

In the affidavit, R.D.P. alleged that her family was persecuted for its political beliefs: that they lived from house to house in fear; that after a beating in retaliation for attendance at a protest against Haiti's president, R.P.'s brother fled to the United States and applied for asylum; that before R.P. arrived in the United States to live with her uncle, the petitioner, she had been in hiding from the militia, which had tried to kidnap her; that R.P. was traumatized as a result of the conditions in Haiti; and that petitioner would care for R.P. gratis because of her mother's inability to provide her with security and basic necessities.

Respondent filed an answer on November 30, 2004, including a counterclaim for tuition reimbursement for the period in which R.P. had attended school in West Orange, and the matter was transmitted to the OAL. On February 7, 2005, the OAL sent a notice to the parties advising that the hearing would take place on June 3, 2005, at 9 a.m.

Petitioner did not appear at the hearing on June 3, 2005, and did not call the OAL to request an adjournment or explain his absence (Initial Decision, p.2). Respondent's counsel represented that he had left petitioner a telephone message on June 2, 2005, with the date and location of the hearing and his telephone number, but petitioner had not returned the call. *Ibid.* At 10:15 a.m. on June 3, respondent moved for dismissal of the petition and an award of tuition reimbursement. *Ibid.* Testimony was presented about R.P.'s school attendance and about tuition rates in West Orange. *Ibid.* The matter was held until Monday, June 6, 2005. *Ibid.* When petitioner failed to appear, respondent's motion for dismissal of the petition and an award of tuition fees was granted. *Ibid.*

The administrative law judge's (ALJ) initial decision was issued on June 8, 2005. The ALJ found that petitioner enrolled R.P. as an eleventh grader in West Orange High School on September 13, 2004; that she attended the school regularly throughout the year; that tuition

for the 2004-2005 school year was $12,655; and that petitioner failed to attend the hearing scheduled to adjudicate R.P.'s right to a free education in West Orange (Initial Decision, p.3). He concluded that since petitioner failed to attend the hearing, and in so doing failed to meet his burden to show that R.P.'s residency with him entitles her to a free education in West Orange, pursuant to *N.J.S.A.* 18A:38-1(b)(1), the petition should be dismissed. *Ibid.* In addition, he concluded that, pursuant to *N.J.S.A.* 18A:38-1(b)(2), and based upon the evidence, petitioner owed respondent tuition for the 2004-2005 school year (*id.* at 4).

Nine days after the initial decision, on June 17, 2005, petitioner hand delivered to the office of the Commissioner of Education the letter, a copy of which is annexed hereto, wherein he reports that he did not know about the hearing until two days after it took place. The letter further states in pertinent part:

> If I were to know, I would not have ever made the mistake of not attending, I was waiting for that chance for so long. Please I would like to have the opportunity to prove my case. I am pleading for another chance to be able to do so.

Discussion

Petitioner's letter was submitted within the time allowed for exceptions and can be regarded as a challenge to the initial decision. While the letter does not set forth specific facts explaining why petitioner did not know about the hearing date, the Commissioner notes that there was no contact between the parties and the OAL between the February 7, 2005 hearing notice and the June 3, 2005 hearing date, a period of four months. Also, respondent's counsel's representation that he left a message for petitioner on the day before the hearing is not grounds for concluding that petitioner knew about the hearing. The reference in the initial decision to

counsel's representation contains no specifics about how counsel left the message and with whom.

N.J.S.A. 18A:38-1(b)(1) allows a free public education for anyone (of qualifying age) who lives with and is supported gratis by a person domiciled in the school district, so long as the supporting person makes certain representations, and the parent of the student shows reasons why he or she cannot support or care for the student. More specifically, *N.J.S.A.* 18A:38-1(b)(1) states in pertinent part:

> Any person who is kept in the home of another person domiciled within the school district and is supported by such other person gratis as if he were such other person's own child, upon filing by such other person with the secretary of the board of education of the district, if so required by the board, a sworn statement that he is domiciled 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.

The record does not include what, if anything, petitioner initially submitted to respondent concerning his domicile, his intention to support R.P., and his commitment to assume responsibility for her for the long term. However, respondent does not appear to be challenging those issues. Respondent alleges that R.P.'s parents have not made a showing that economic or family hardship warrants that R.P. live with her uncle.

The Commissioner has determined that there is enough in the record to justify, at a minimum, a hearing to determine whether the allegations in R.P.'s mother's affidavit about the family's political oppression and economic hardship in Haiti are legitimate and sufficient to justify tuition-free attendance for R.P. at West Orange High School. Such an important inquiry should not be short-circuited by dismissal of petitioner's appeal, where petitioner is *pro se*, where there was one hearing notice four months before the hearing date and no further communications between the parties and the OAL, and where petitioner promptly took action when he learned that he missed the hearing.

Accordingly, for the reasons stated herein, the Commissioner remands this matter to the OAL for an expedited hearing on the merits of petitioner's appeal.

IT IS SO ORDERED.[1]

COMMISSIONER OF EDUCATION

Date of Decision: 7/14/05

Date of Mailing: 7/14/05

[1] This decision may be appealed to the State Board of Education pursuant to *N.J.S.A.* 18:6-27 *et seq.* and *N.J.A.C.* 6A:4-1.1 *et seq.*

GABRIEL PREVIL
77 HIGH STREET
WEST ORANGE, NJ 07052
TEL: (973) 324-5706

COMMISSIONER OF THE DEPARTMENT OF EDUCATION
ATTN: BUREAU OF CONTROVERSIES AND DISPUTES
100 RIVERVIEW PLAZA 4TH FL.
P.O. BOX 500
TRENTON, NJ 08625-0500

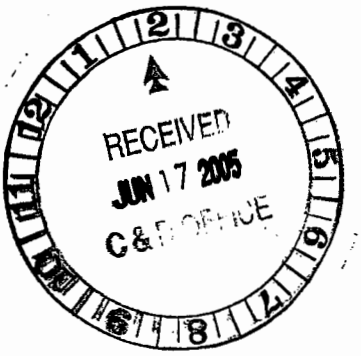
June 17, 2005

To Whom It May Concern:

This is to inform you that I had missed the hearing because I did not know about it until two days after. If I were to know, I would not have ever made the mistake of not attending, I was waiting for that chance for so long. Please I would like to have the opportunity to prove my case.
I am pleading for another chance to be able to do so.

Sincerely,

Gabriel Previl



94-06

OAL DKT. NO. EDU 3237-05
AGENCY DKT. NO. 447-12/04

MARIA SACO,	:	
PETITIONER,	:	
V.	:	COMMISSIONER OF EDUCATION
BOARD OF EDUCATION OF THE CITY OF PASSAIC, PASSAIC COUNTY,	:	DECISION
RESPONDENT.	:	

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

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

IT IS SO ORDERED.

Lucille E Davy
ACTING COMMISSIONER OF EDUCATION

Date of Decision: 3/08/06

Date of Mailing: 3/08/06

State of New Jersey
OFFICE OF ADMINISTRATIVE LAW

INITIAL DECISION
SETTLEMENT
OAL DKT. NO. EDU 3237-05
AGENCY DKT. NO. 447-12/04

MARIA SACO,
Petitioner,
v.
BOARD OF EDUCATION OF THE CITY OF PASSAIC,
Respondent.

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

Joel M. Miklacki, Esq., for respondent
(Law Office of Joel M. Miklacki, attorney)

Record Closed: January 26, 2006 Decided: January 31, 2006

BEFORE **STEPHEN G. WEISS** ALJ:

STATEMENT OF THE CASE

In this matter the petitioner, Maria Saco, challenged her suspension without pay by the Board of Education on the basis that it was in violation of statutory and case law. A plenary hearing was scheduled before the undersigned Administrative Law Judge for November 2 and November 3, 2005. However, in advance of those hearing dates I was

advised by counsel that the matter had been settled. Subsequently, a Stipulation of Settlement and Release was submitted to me for review which is attached hereto and made part hereof. The document is signed by petitioner and by the President of the Passaic Board of Education. Also attached hereto is a certification from the Board Secretary attesting to the adoption of the settlement by the Board on October 31, 2005.

I have reviewed the terms of the Settlement Agreement and I **FIND** as follows:

(1) The parties voluntarily have agreed to the settlement as evidenced by the signatures which appear thereon, together with the Board Resolution;

(2) The Settlement Agreement fully disposes of all issues in controversy and is consistent with the law.

Therefore, it is **ORDERED** that the parties comply with the settlement terms and that the proceedings in this matter be concluded.

I hereby **FILE** my initial decision with the **DEPARTMENT OF EDUCATION** for consideration.

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

January 31, 2006
DATE

STEPHEN G. WEISS, ALJ

Receipt Acknowledged:

2-3-06
DATE

DEPARTMENT OF EDUCATION

Mailed to Parties:

DIRECTOR AND
CHIEF ADMINISTRATIVE LAW JUDGE

FEB 8 2006
DATE

OFFICE OF ADMINISTRATIVE LAW

nd

RECEIVED
STATE OF NEW JERSEY
2005 DEC 22 P 2:

SETTLEMENT AGREEMENT AND RELEASE

This Settlement Agreement and Release (hereinafter referred to as the "Agreement" is entered into this _____ day of November, 2005 between the Passaic Board of Education (hereinafter referred to as the "Board") and Maria Saco (hereinafter referred to as "Saco" or the "Employee").

WHEREAS, Employee was employed with the Board, and

WHEREAS, Employee and the Board desire to resolve all outstanding issues with respect to the circumstances surrounding the Employee's resignation;

NOW THEREFORE, in consideration for the promises and conditions set forth herein, the Board and Saco agree as follows:

1. TERMS

a. Saco agrees to accept and the Board agrees to tender the sum of $7,984.64 as full compensation for her suspension without pay.

b. Saco further agrees to waive all monetary claims including, but not limited to, attorneys' fees with respect to this matter.

c. By entering into the within Agreement, the Board hereby releases the Employee from any and all claims the Board may have for a credit for tuition reimbursement, which was paid to the Employee for her pursuit of advanced degrees, pursuant to the terms and conditions of Collective Bargaining Agreement Section 20.14.

d. All matters presently pending in connection with the within matter, including Saco v. Bd. of Ed. of the City of Passaic, OAL Docket No. EDUOR-3237-2005 are hereby dismissed with prejudice.

2. COMPLETE RELEASE

a. Saco and her heirs, assigns and agents, in consideration of the terms described in Paragraph 1 of this Agreement, hereby release, waive and discharge the Board, its individual members, its affiliated companies, and its officers, trustees, agents, employees, successors and assigns (hereinafter collectively referred to as the "Releasees") from each and every claim, demand, cause of action, obligation, damage, complaint, expense, compensation or action or writ of any kind, nature, character or description that Saco had, has, or may in the future have against the Releasees on account of or arising out of the instant disciplinary action. This Complete Release includes, but is not limited to, any claim, demand, cause of action, obligation, damage, complaint, expense, compensation, or action or writ of any kind, nature, character or description arising out of or under Federal, State or municipal statute or ordinance and any other law (whether such be common law, decisional law or statutory law), rule, regulation, executive order or guideline, and any and all claims for attorneys' fees and costs arising from the instant disciplinary action, including, but not limited to:

i. Any claim, cause of action, demand or complaint arising out of or under the New Jersey Law Against Discrimination (NJAD) which, among other things, prohibits discrimination in employment on the basis of an individual's race, creed, color, religion, sex, national origin, ancestry, age, marital status, affectional or sexual orientation, familial status, handicap, atypical hereditary cellular or blood trait or liability for service in the Armed Forces of the United States.

ii. Any claim, cause of action, demand or complaint arising out of or under Title VII of the Civil Rights Act of 1964 (Title VII) or the Civil Rights Act of 1991, as

amended, which, among other things, prohibits discrimination in employment on account of a person's race, color, religion, sex or national origin.

iii. Any claim, cause of action, demand or complaint arising out of or under the Federal Age Discrimination in Employment Act of 1967, as amended (ADEA), which, among other things, prohibits discrimination in employment on account of a person's age.

iv. Any claim, cause of action, demand or complaint arising out of or under the Federal Americans with Disabilities Act (ADA) which, among other things, prohibits discrimination in employment on account of a person's disability or handicap.

v. Any claim, cause of action, demand or complaint arising out of or under the Federal Family and Medical Leave Act (FMLA) which, among other things, entitles an employee to take reasonable leave for medical reasons for the birth or adoption of a child, and for the care of a child, spouse or parent who has a serious health condition, and any claim, cause of action, demand or complaint arising under the New Jersey Family Leave Act.

vi. Any claim, cause of action, demand or complaint arising out of or under the Federal Rehabilitation Act of 1973, as amended, which, among other things, prohibits discrimination in employment by Federal contractors against individuals with disabilities.

vii. Any claim, cause of action, demand or complaint arising out of or under the Federal Employee Retirement Income Security Act of 1974, as amended (ERISA), which, among other things, regulates pension and welfare plans and prohibits interference with individual rights protected under that statute.

viii. Any claim, cause of action, demand or complaint arising out of or under the Federal Older Workers Benefit Protection Act (OWBPA) which, among other things,

amends provisions of ADEA and prohibits discrimination in employment and employment benefits on account of a person's age.

b. Saco has not filed and shall not hereafter file any claim, charge or complaint of any nature with the New Jersey Division of Civil Rights, the U.S. Equal Employment Opportunity Commission (EEOC), Commissioner of Education or with any Federal, State or local court or agency against the Board or the Releasees concerning the instant disciplinary action. If Saco violates this Complete Release by filing any claim, charge or complaint as prohibited in this subparagraph, Saco agrees to pay all costs and expenses of defending against the suit incurred by Board and/or Releasees including reasonable attorney's fees.

3. CONSULTATION WITH ATTORNEY.

Saco has consulted with her attorney, Harold Springstead, Esq., with respect to this Agreement and reviewed with her attorney all the terms and conditions of this Agreement prior to executing this Agreement.

4. COMPLETE AGREEMENT

This Agreement contains the entire agreement between Saco and the Board with respect to the subject matter and supercedes all prior agreements or understandings dealing with the same subject matter. There is no agreement on the part of the Board to do anything other than as is expressly stated in this Agreement. This Agreement shall in all respects be interpreted, enforced and governed by the Laws of the State of New Jersey.

5. MODIFICATION

No modification or amendment of this Agreement will be enforceable unless it is in writing and signed by the party to be charged.

6. SEVERABILITY

Should any provision of this Agreement be declared or determined by any court of competent jurisdiction to be illegal, invalid or unenforceable, the legality, validity, and enforceability of the remaining parts, terms, or provisions shall not be affected thereby and said illegal, enforceable or invalid part, term, or provision shall be deemed not to be a part of this Agreement.

7. SACO ATTESTS.

Saco Represents and warrants that she has carefully read each and every provision of this Agreement and that she fully understands all of the terms and conditions contained in each provision of this Agreement. Saco represents and warrants that she enters into this Agreement voluntarily, on her own free will, without any pressure or coercion from any person or entity including, but not limited to, the Board and the Releasees.

IN WITNESS WHEREOF, and intending to be legally bound hereby, I, Maria Saco, execute the following Agreement this 22 day of November, 2005.

Maria C Saco
MARIA SACO

Sworn and subscribed to before me
This 22nd day of November, 2005

NOTARY PUBLIC
KATHRYN HOCHSTAEDT
NOTARY PUBLIC OF NEW JERSEY
MY COMMISSION EXPIRES MARCH 17, 2008

DATE:

PASSAIC BOARD OF EDUCATION

BY: President

JOEL M. MIKLACKI
ATTORNEY AT LAW
ONE HOWE AVENUE
SUITE 301
PASSAIC, NEW JERSEY 07055

Tel (973) 779-3300
Fax (973) 779-3330

JOEL M. MIKLACKI, ESQ.
MEMBER NEW JERSEY AND NEW YORK BARS

NEW YORK OFFICE

April Fronduto –Slavin, Esq.
MEMBER NEW JERSEY BARS

☐ **REPLY TO: 230 Hilton Avenue**
HEMPSTEAD, NEW YORK 11550
(516) 565-4123

RECEIVED
STATE OF NEW JERSEY
OFFICE OF ADMIN. LAW
2006 JAN 26 P 3:19

January 24, 2006

State of New Jersey
Office of Administrative Law
33 Washington Street
Newark, New Jersey 07102
ATTN: Stephen G. Weiss, ALJ

RE: Maria Saco vs. Board of Education of the City of Passaic
OAL Docket No.: EDU 3237-05 – Agency Docket No.: 447-12/04

Dear Judge Weiss:

As per your recent request, enclosed please find a copy of the resolution settling the above captioned matter as any and all claims. If you have any question or I can be of any further assistance to the court please do not hesitate to call my office.

Respectfully yours,

JOEL M. MIKLACKI

JMM/ml
CC: Harold N. Springstead, Esq.

EXTRACT FROM THE MINUTES OF A MEETING OF THE BOARD OF EDUCATION OF THE CITY OF PASSAIC, PASSAIC COUNTY, N.J., AS RECORDED IN THE OFFICIAL MINUTE BOOK

Resolution for Settlement of Litigation

WHEREAS, the Passaic Board of Education is involved in a lawsuit challenging the termination of an employee, Maria Saco, OAL Docket No. EDU 3237-05; and

WHEREAS, it is in the best interests of the Passaic School District to settle this matter amicably;

NOW THEREFORE BE IT RESOLVED, that the Passaic Board of Education hereby authorizes the Board Attorney to enter into an agreement settling and resolving this matter between the parties to this litigation, OAL Docket NO. EDU 3237-05 in accordance with the approval settlement agreement between the parties; and

BE IT FURTHER RESOLVED, that the Board Attorney and the Superintendent of Schools or his designee are authorized to take whatever action is necessary to effectuate the purpose of this resolution.

I, Henry J. Lee, Secretary of the Board of Education of the City of Passaic in the County of Passaic, State of New Jersey, hereby certify that the foregoing extract from the minutes of the meeting of the Passaic Board of Education duly called and held on October 31, 2005 has been compared by me in the original minutes as officially recorded in my office in the minutes book of said Passaic Board of Education is a true, complete copy thereof and of the whole of said original minutes so far as the same related to the subject matter referred to in said extract. I witness I have hereunto set my hand and affixed the corporate seal in the Passaic Board of Education this 12th day of January 2006.

Henry J. Lee, Board Secretary, Business Administrator

93-06

DANIEL MC HARRIS,	:	
PETITIONER,	:	
V.	:	COMMISSIONER OF EDUCATION
BOARD OF EDUCATION OF NORTH BRUNSWICK TOWNSHIP, MIDDLESEX COUNTY,	:	DECISION
RESPONDENT.	:	

SYNOPSIS

Petitioner, formerly employed by the respondent Board as an In-School Suspension supervisor, claims entitlement to indemnification pursuant to N.J.S.A. 18A:16-6.1 for defense of criminal charges of official misconduct and sexual harassment relating to four North Brunswick High School students, for which he was acquitted. Petitioner submitted itemization of fees totaling $310,818.50.

The ALJ found, *inter alia,* that: the alleged acts arose out of and in the course of the performance of petitioner's duties; a second chair at trial was reasonable under the circumstances of this case to assure appropriate trial preparation; petitioner is entitled to reimbursement of reasonable legal fees directly related to his defense against criminal charges; petitioner's itemization of fees incorporated legal fees for other matters not associated with the criminal charges; certain itemized administrative expenses are not subject to indemnification; certain itemized billing entries related to legal research performed by lead counsel or second chair for the petitioner are deemed unreasonable and therefore not subject to indemnification, or are subject to indemnification at the lower hourly rate of a law clerk. Based on the foregoing, the ALJ adjusted the total amount of petitioner's itemized fees to reflect reasonable fees directly related to his defense against criminal charges, and issued an Initial Decision awarding petitioner $174,593.00 in legal fees and $9,103.05 in costs.

Upon an independent and comprehensive review of the record in this matter, the Commissioner adopts the Initial Decision as the final decision in this matter, and directs the respondent Board to pay petitioner criminal charge defense indemnification of $174,593.00 in legal fees and $9,103.05 in costs.

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.

March 7, 2006

OAL DKT. NO. EDU 4968-01
AGENCY DKT. NO. 263-7/01

DANIEL MC HARRIS,	:	
PETITIONER,	:	
V.	:	COMMISSIONER OF EDUCATION
BOARD OF EDUCATION OF NORTH BRUNSWICK TOWNSHIP, MIDDLESEX COUNTY,	:	DECISION
RESPONDENT.	:	

The record of this matter and the Initial Decision of the Office of Administrative Law (OAL) have been reviewed. Petitioner requested and was granted an extension of time within which to file exceptions to the Initial Decision. Primary and reply exceptions of both parties were timely filed within the intendment of *N.J.A.C.* 1:1-18.4, and all submissions were fully considered by the Commissioner in reaching her determination herein and are presented, in relevant part, below.

The Board first excepts to the Administrative Law Judge's determination that the two-prong test outlined in *Bower, et al. v. Board of Education of the City of East Orange*, 149 *N.J.* 416 (1997) was satisfied, thereby entitling petitioner to indemnification for fees incurred in defense of the criminal charges against him. Although conceding satisfaction of one prong, that the underlying criminal action resulted in a favorable disposition or dismissal, it vigorously argues that petitioner has not met the second equally important prong, *i.e.*, that the acts or omissions which form the basis of the criminal charges arose out of or occurred during the course of his performance of his duties and responsibilities. This assertion is apparently based on the fact that because two of the alleged victims, A.D. and L.L., were not assigned to In-School Suspension (ISS) and were not, therefore, students of petitioner, the majority of the underlying acts which gave rise to the criminal

charges cannot be viewed as arising from his employment duties and responsibilities. (Board's Exceptions at 1-2)

In reply, petitioner points out that in *Bower, supra,* the Supreme Court found that dismissal of an indictment necessitates the assumption that the employee committed no acts other than to perform the duties of his employment. The Court further concluded that "where the record in the criminal proceeding reveals no evidence of any conduct other than the employee's performance of his lawful duties, the factual basis for the indictment becomes inextricably linked with the employee's duties as a teacher. *Id.* at 431. (Petitioner's Reply Exceptions at 14) Here, petitioner avers, the criminal charges were tried to conclusion, petitioner testified under oath denying that the alleged acts had occurred and the result was an acquittal on each and every charge. Petitioner further posits that trial testimony establishes that all alleged acts supposedly took place in the ISS classroom during school hours. Consequently, he argues, the evidence is more than sufficient to establish the requisite nexus between the charges and his employment. (*Id.* at 14-15)

The Board next objects to the ALJ determination that the $265 "blended rate" billed by petitioner's counsel was reasonable. It advances that, while in no way denigrating the skills and professionalism of associate Mr. Montenegro – given that he was wholly inexperienced in criminal actions conducted in Superior Court – the billing of his time at a rate of $265 an hour was "grossly inappropriate". (Board's Exceptions at 4)

Responding, petitioner urges that the ALJ's conclusion in this regard was wholly appropriate. He explains that – pursuant to a retainer agreement with Wilbert, Montenegro & Thompson – petitioner was billed at a flat "blended rate" of $265 an hour for the services of senior partner Wilbert, a criminal defense expert, and associate Montenegro, an education law specialist. Such rate was calculated by averaging the hourly rates of each of these individuals, $330 and $200, respectively. Petitioner avers that the record substantiates that this billing method was utilized because of the interplay of criminal and educational law issues, necessitating collaborative work

between these two attorneys. Petitioner points to hearing testimony elicited from attorney "experts" which, he contends, confirms the reasonableness of such an arrangement under the circumstances. Moreover, he proposes, the use of this "blended rate," in light of the billed hours disallowed in the Initial Decision, operates to reduce the Board's indemnification obligation. Such is the case because the majority of disallowed hours were education law related, performed by the associate, while the bulk of the allowed hours were performed by senior partner Wilbert. (Petitioner's Reply Exceptions at 17-19)

Petitioner objects to the ALJ's summary denial of his claim for reimbursement of counsel costs and fees related to the prosecution of the instant indemnification action. Such denial, he asserts, was improperly based on *N.J.S.A.* 18A:16-6(a), which prohibits reimbursement for the defense or appeal of disciplinary actions against Board employees. The instant action, petitioner submits, can in no way be deemed a disciplinary action or appeal thereof. In support of his entitlement to these costs, petitioner cites to a number of Civil Rights cases which, he contends, stand for the proposition that when an award of counsel fees is statutorily authorized, the reasonable costs associated with prosecuting the claim should be included in the award. Furthermore, he argues, denial of these costs would operate to "encourage public entities to refuse to comply with their obligations pursuant to *N.J.S.A.* 18A:16-6.1 by utilizing the costs and time associated with prosecuting an indemnification claim to thwart a Petitioner's right pursuant to the statute." (Petitioner's Exceptions at 1-3)

The Board advances that petitioner's claim in this regard is supported by no education law authority. The Civil Rights cases cited by petitioner in support of his entitlement to recovery here are of no precedential benefit to him. Counsel fees are a stated element of damages to the victim pursuant to the statutes involved in Civil Rights actions. Such statutes, it professes, are "remedial in nature and intended to compensate an injured party in all aspects of loss including compensatory, punitive damages and counsel fees incurred." In contrast, *N.J.S.A.* 18A:16:6.1, on its

face, specifically enumerates that an individual be reimbursed for "reasonable counsel fees and expenses of the original hearing or trial and all appeals," and provides no authorization whatsoever for any other consequential costs which may be incurred. Neither has petitioner cited to any Rule of Court or case law interpreting this particular provision which would support his position. As such, the Board argues, "[i]n the absence of a rule, statute or common law right to reimbursement, the counsel fees incurred in pursuing the claim for indemnification are clearly not reimbursable." (Board's Reply Exceptions at 1-2)

Petitioner next charges that in awarding him legal fees and costs on Page 13 of her decision, the ALJ neglected to award him interest. He contends that his June 23, 2001 Petition of Appeal filed in this matter requested such an award and, now that he has successfully established his entitlement to indemnification, he "should be awarded by the Commissioner prejudgment interest inasmuch as the Board's denial of the Petitioner's monetary claim for almost five years was taken in deliberate violation of *N.J.S.A.* 18A:16-6.1 ***as well as an award of postjudgment interest if payment is not made within 60 days of December 9, 2005." (Petitioner's Exceptions at 4-5)

The Board submits in reply that this case is not one which warrants the imposition of interest. Prejudgment interest should only be awarded in circumstances where failure to pay a monetary claim is done in "bad faith" or found to be in "direct violation of a statute or rule." Here, there can be no credible assertion made that the Board acted inappropriately in compelling petitioner to substantiate his claim for reimbursement prior to compensating him. As to post-judgment interest, the Board proffers that such an award is premature since the exact amount of any award will not be known until the Commissioner of Education rules on this matter. (Board's Reply Exceptions 2-3)

Upon an independent and comprehensive review of the record – which includes transcripts of the hearing conducted at the OAL[1], as well as the full transcripts of the criminal trial[2],

[1] OAL hearing in this matter was conducted on January 15 and 29, 2003, July 18, 2003, October 1, 2003 and December 9, 2003.

along with the parties' exception submissions and all exhibits – the Commissioner adopts the findings and conclusions of the Initial Decision.

In so determining, the Commissioner initially concurs with the ALJ that petitioner has satisfied the requisite criteria pursuant to *N.J.S.A.* 18A:16-6.1, read in conjunction with *N.J.S.A.* 18A:16-6, and the N. J. Supreme Court's interpretation of these provisions in *Bower, supra,* so as to entitle him to indemnification for legal fees and costs incurred in connection with the criminal charges brought against him. Specifically, the statutory provisions and this case law require 1) that the alleged criminal actions involved acts or omissions arising out of and in the course of the performance of petitioner's duties as an ISS supervisor, and 2) that petitioner received a favorable disposition on the charges. Notwithstanding that it is without question that petitioner received a favorable outcome on adjudication of the criminal charges, the Board challenges petitioner's satisfaction of the prong which requires that such charges arose in the course of petitioner's duties as an ISS supervisor. The Commissioner determines that the record here clearly establishes that there is no evidence – from the criminal charges, which resulted in a full acquittal; the tenure proceedings, which concluded in settlement rather than proceeding to adjudication; nor the instant indemnification action – of any conduct, other than petitioner's presence in the classroom at school performing his classroom duties, which formed the basis of the charges against him. It is noted that the Supreme Court in *Bower, supra,* finding that:

> [t]he only 'conduct forming the basis of the charge' that is undisputed is 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. (at 432)

thus concluded:

> [t]here being proof of no underlying act other than Bower's presence in the school and performance of his classroom duties, the indictment

---

[2] The criminal trial was conducted on April 4, 5, 9, 10, 11, and 12, 2001.

> and its dismissal – unrebutted by any other evidence – clearly satisfied Bower's burden of proof under the statute.
> *Bower, supra,* at 434.

The Commissioner, therefore, finds that the necessary requirements entitling petitioner to indemnification for the costs of defending the criminal charges against him have been satisfied.

Next, full review of testimony and the specific circumstances existing in this matter persuades the Commissioner that the ALJ correctly concluded that petitioner has met his burden of proof with respect to the "reasonableness" of the use of a blended billing rate and the necessity of a second chair at trial.

With respect to petitioner's request for counsel fees related to the prosecution of the within indemnification action, as was properly pointed out in the Board's reply exceptions, while *N.J.S.A.* 18A:16-6.1 provides reimbursement for "reasonable counsel fees and expenses of the original hearing or trial and all appeals," unlike the statutes involved in Civil Rights matters, this education provision provides no authorization for any other consequential costs which may be incurred. Absent express statutory, court rule or contractual authorization for such costs, they are not recoverable. *See State Dept. of Environ Protect. v. Ventron Corp.*, 94 *N.J.* 473, 504 (1983), *Also See Balsley v. North Hunterdon Bd of Educ.*, 117 *N.J.* 434, 442, 443 (1990). Additionally, notwithstanding petitioner's attempt to categorize work accomplished during the course of the tenure proceedings and appearances in family court as "criminal defense representation," the Commissioner finds, as did the ALJ, that petitioner's advances in this regard are unpersuasive. Rather, indemnification for fees and costs of the tenure proceedings is precluded by *N.J.S.A.* 18A:16-6, and the family court appearances are "collateral and unrelated to the criminal charges and not contemplated nor provided for pursuant to *N.J.S.A.* 18A:16-6.1." (Initial Decision at 5-6)

Finally, the Commissioner declines to grant petitioner's request for interest in this matter. With respect to pre-judgment interest, the Commissioner concludes that the record before her does not support a finding that the Board's actions were taken in bad faith or in deliberate violation

of the law (*N.J.A.C.* 6A:3-1.17(c)(1)). As to post-judgment interest, such a request is premature, as the 60-day timeline relative to the granting of this interest does not even begin to toll until the Commissioner renders her decision in the instant matter. (*N.J.A.C.* 6A:3-1.17(c)(2).

Accordingly, the Initial Decision of the OAL, as expounded on above, is adopted as the final decision in this matter for the reasons articulated therein. The North Brunswick Board of Education is hereby directed to pay petitioner criminal charge defense indemnification of $174,593.00 in legal fees and $9,103.05 in costs.[3]

IT IS SO ORDERED.[4]

ACTING COMMISSIONER OF EDUCATION

Date of Decision: 3/07/06

Date of Mailing: 3/07/06

[3] The Commissioner's thorough review persuades her that each deduction/reduction made by the ALJ on pages 8-13 of the Initial Decision must be sustained for the reasons clearly explained therein.

[4] This decision may be appealed to the State Board of Education pursuant to *N.J.S.A.* 18A:6-27 *et seq.* and *N.J.A.C.* 6A:4-1.1 *et seq.*

State of New Jersey
OFFICE OF ADMINISTRATIVE LAW

INITIAL DECISION
OAL DKT. NO. EDU 4968-01
AGENCY REF NO. 263-7/01

DANIEL MC HARRIS,
Petitioner,
v.
NORTH BRUNSWICK BOARD OF EDUCATION,
Respondent.

Ben A. Montenegro, Esq., for petitioner (Montenegro, Thompson, Montenegro & Genz)
Michael E. Wilbert, Esq., for petitioner (Law Office of Michael E. Wilbert)[1]
Anthony B. Vignuolo, Esq., for respondent (Borrus, Goldin, Foley, Vignuolo, Hyman & Stahl)

Record Closed: June 3, 2004 Decided: December 8, 2005

BEFORE: **ANA C. VISCOMI**, ALJ

STATEMENT OF THE CASE AND PROCEDURAL HISTORY

Petitioner claims entitlement to indemnification pursuant to *N.J.S.A.* 18A: 16-6.1 for defense of criminal charges of which he was acquitted. The matter was transmitted to the Office of Administrative Law (OAL) on August 28, 2001, for a hearing as a contested case pursuant to *N.J.S.A.* 52:14F-1 to -13 and *N.J.S.A.* 52:14B-1 to -15. It was previously assigned to the

[1] Mr. Wilbert and Mr. Montenegro had previously been with the law firm of Wilbert, Montenegro and Thompson.

Honorable Bruce Campbell, ALJ and upon his retirement was reassigned to the undersigned ALJ on March 21, 2002. A companion matter involving tenure removal charges (EDU 4390-01) had been settled before Judge Campbell but remanded pursuant to *In the Matter of the Tenure Hearing of Frank Cardonick,* OAL Dkt. No. EDU 7094-81 (Feb. 17, 1982), rem. Comm'r of Ed. (Apr. 7, 1982), dec. St. Bd. of Ed. (Aug. 4, 1982). The parties reformed the settlement agreement in accordance with the Remand Decision and submitted same to the undersigned. An Initial Decision approving the settlement was thereafter issued by the undersigned and a Final Decision approving the settlement was then issued by the Commissioner. The within matter proceeded upon receipt of that Final Decision. After discovery, motion practice and settlement discussions, the hearing with regard to this matter proceeded over the course of several days from January 15, 2003 through December 9, 2003. Written summations were submitted by March 22, 2004 and the record closed upon their review on June 3, 2004.

FACTUAL DISCUSSION AND LEGAL ANALYSIS

Undisputed Facts

Petitioner McHarris was employed by the North Brunswick BOE as an In-School Suspension (ISS) supervisor. On August 17, 1999, he was arrested and charged with two counts in violation of *N.J.S.A.* 2C:14(c)-3(b) and two counts in violation of *N.J.S.A.* 2C:30-2 in relation to allegations surrounding L.L. and A.D., two former, then current, North Brunswick Township High School students. By superseding 6 count indictment of April 11, 2000, petitioner was charged with 4 counts of official misconduct and 2 counts of criminal sexual contact relating to a total of 4 North Brunswick Township High School students; L.L., A.D, E.R. and S.M. The counts generally averred inappropriate sexual contact and sexual harassment. He was acquitted of all charges after a jury returned a verdict of not guilty on April 12, 2001.

Thereafter, the parties herein settled the tenure removal matter. As part of that settlement agreement executed by the parties and approved by Final Decision of the Commissioner, the parties agreed,

> 7. This settlement shall, in no way, release the Board or preclude McHarris' claim for indemnification pursuant to *N.J.S.A.* 18A:16-6.1, currently pending before the Office of Administrative Law, Docket Number 263-7/01. The parties agree that the aforesaid litigation shall be confined to the reasonableness of the fees and

> costs incurred and whether such costs "arose out of" McHarris'employment as defined in New Jersey law. The parties agree that the remaining proceeding shall not involve the validity of the Tenure Charges but, instead, shall be limited to the above issues.

Thus, two issues are presented; whether the costs incurred are subject to indemnification pursuant to *N.J.S.A.* 18A:16-6.1, and if so, were the costs and fees reasonable.

1. Were the costs incurred subject to indemnification pursuant to *N.J.S.A.* 18A:16-6.1

N.J.S.A. 18A:16-6.1 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 costs of defending such proceeding, including reasonable counsel fees and expenses of the original hearing or trial and all appeals.

This statute, which provides for indemnification in criminal actions, refers back to *N.J.S.A.* 18A: 16-6, which provides for indemnification for civil, administrative or other legal proceedings. Bower et al v Board of Education of the City of East Orange, 149 *N.J.* 416, 423, citing Scirrotto v Warren Hills Bd of Educ., 272 *N.J. Super* 391,396 (App. Div. 1994) The Supreme Court in Bower adopted a two-part standard for determining whether board of education employees are entitled to indemnification of counsel fees and expenses incurred in the defense of criminal charges. Bower, *supra,* at 423. In order to prevail, petitioner McHarris must demonstrate by a preponderance of the evidence that any act or omission on which the criminal charges are based arose "out of and in the course of the performance of his duties" as ISS supervisor, and that the charges were either dismissed or resulted in a final disposition favorable to him. *Id.,* at 424, 434.

McHarris has satisfied the second prong; he was acquitted of all charges. The inquiry then focuses on whether the acts on which the criminal charges are based arose of out and in the course of the performance of his duties as ISS supervisor. In that regard, as part of the post

hearing summations, petitioner offered his testimony from the criminal matter.[2] **Daniel McHarris** testified that he allowed non-ISS assigned students to have their lunch break in that classroom. He also testified that on a daily basis the principal; the assistant principals, including Peter Clark and Geraldine Margin; visited the ISS room. On a daily basis, other teachers bringing assignments for the ISS students also visited.

At this hearing, **Geraldine Margin** testified on behalf of respondent. She was the Assistant Principal of North Brunswick Township High School. She testified that a review the discipline records from the 1998-1999 school year, indicates that neither AD nor LL were assigned to ISS during the time period of the allegations. Any such assignments would have been made by an assistant principal. She testified students not assigned to ISS were not permitted to enter that designated room. While there was no written policy in that regard, she testified that this policy would hold true for any classroom; any student not assigned to a class is not permitted to be there. AD's alleged events took place solely in the ISS room.[3] However, she testified that assistant principal Peter Clark was the ISS supervisor overseeing McHarris, and he would have been the one responsible for addressing this issue with petitioner. At the criminal trial, Margin conceded that when she visited the ISS room, in addition to finding unassigned students, she also encountered police officers assigned to the high school and other teachers.

Peter Clark testified at the criminal trial that ISS students were not allowed to have visitors in that classroom. But he testified that at times it was difficult to keep non-ISS students out of that room.

I **FIND** and **CONCLUDE** that while assistant principal Margin testified that only ISS assigned students should have been in the ISS room, there was no written policy in that regard and no proof of any verbal instruction to the petitioner of this. The administration was certainly on notice that McHarris permitted non assigned students in that classroom, and it appears that he allowed them in there during a free period; either for lunch or individual counseling. Based on the foregoing, I **FIND** and **CONCLUDE** the alleged acts arose out of and in the course of the

[2] The transcripts of the entire criminal matter proceedings were submitted thereafter as part of the post hearing summations. This should not have been in dispute and indeed, the hearing focused primarily on the fees dispute.
[3] One of the alleged victims originally signed a sworn statement alleging misconduct out of the school on the part of the petitioner herein; however, she denied that at the criminal trial.

performance of petitioner's duties and that he is entitled to reimbursement pursuant to *N.J.S.A.* 18A:16-6.1.

2.Were the costs and fees reasonable?

While respondent has not contested the reasonableness of the costs incurred, I **FIND** the following expenses to be related to the administrative matter and therefore not subject to indemnification, $65 messenger service to NJDOE on 11/15/99; $65.00 messenger service to Borus office on 11/15/99; and $175.00 filing fee appellate Division May 16, 2000, so petitioner is entitled to indemnification of the costs in the amount of $9, 103.05.

Preliminarily, petitioner submitted an itemization of fees totaling $310,818.50. Petitioner also seeks an award for fees to prosecute the claim for indemnification. As a result of a pre-hearing conference with the undersigned, it was learned that petitioners itemization of fees also incorporated legal fees associated with a family court matter, motor vehicle matter,[4] the prosecution of the indemnification and the teacher tenure removal matter. At the request of the undersigned, petitioner thereafter resubmitted the itemization segregating the fees by litigation type. *N.J.S.A.* 18A:16-6 provides, in pertinent part, that

> 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.

N.J.S.A. 18A:16-6(a).[5] As such, petitioner is not entitled to indemnification of the 398.9 hours expended by counsel from August 21, 1999 through April 19, 2001 in defending the teacher tenure removal matter (P4, P5, P7) or the fees related to this litigation totaling 123.8 hours from August 2, 2000 through December 13, 2002 or any fees thereafter in relation to prosecuting the within claim. I **FIND** counsel's assertion that petitioner was attempting to obtain discovery to assist the criminal defense matter unpersuasive.

[4] The request for reimbursement related to motor vehicle matter was withdrawn by counsel at this hearing.
[5] This provision became effective July 26, 2001 and was deemed to apply to any claim for reimbursement, defrayal or indemnity made in writing to a board in the two years preceding the effective date. See *N.J.S.A.* 18A:16-6 and *N.J.S.A.* 18A:12-20, Historical and Statutory Note.

It should also be noted that petitioner sought and obtained dismissal of those charges prior to the re-filing of same. (J-1, R-11) Similarly, the fact that counsel chose to represent petitioner at the Family Court proceeding relating to child support payments, in order to potentially invoke his 5th Amendment rights in case the presiding judge questioned him regarding the criminal allegation, does not require reimbursement of the 31.1 hours expended from August 21, 1999 through April 19, 2001. These were collateral and unrelated to the criminal charges and not contemplated nor provided for pursuant to *N.J.S.A.* 18A:16-6.1. As a result, the remainder fees indicated to be related to defense of the criminal matter totaled 762.1 hours. (P-4, P-5)

A discussion of "reasonableness" of fees also incorporates a discussion of "necessity" of fees. Rosenberg v Rosenberg, 286 *N.J. Super* 58, 68 (App Div 1995) The Supreme Court has held that retainer agreements are generally enforceable, provided that they satisfy both the general requirements for contracts and the special requirements for professional ethics. Cohen v Radio-Electronics Officers Union, 146, *N.J.* 140, 155,156 (1996)

In this matter, the retainer agreement provided that the fee was $265.00 per hour for all services and that N.J.E.A. would pay $110.00 for the fee[6] with the difference, $155.00, to be the responsibility of the petitioner. (P-2)[7] As to the defense of the criminal matter, and based on counsel's indication and itemization that 762.1 hours were expended, the total cost of fees petitioner seeks indemnification is $201, 956.50. (P-4, P-5)

The key issues with regard to the reasonableness of this fee focuses on three factors: the concept of a "blended" hourly rate of $265.00 for noted criminal trial counsel Michael Wilbert and his associate Ben Montenegro; the billing for a second chair at the criminal trial; and specific itemizations.

the blended rate

[6] Petitioner signed a separate agreement with N.J.E.A./N.E.A. Legal Services Program agreeing to reimburse N.J.E.A. in the amount of its financial assistance. (P-8)

[7] It is also important to note, for reasons to be discussed further within this Initial Decision, that the agreement provided further as follows:

> You understand that we as your lawyers will not handle every detail of your case. We will supervise the work of others at all times and we will have the assistance from paralegals and law clerks.

Petitioner's expert, **Henry Furst**, Esq., testified that the blended rate was a reasonable accommodation considering the criminal defense experience of Michael Wilbert and the education law background of associate Ben Montenegro, who was admitted to practice in 1996. Had the blended rate not been used, Wilbert would have billed at his then prevailing rate of $330.00 per hour and Montenegro, at $150.00 per hour. (P-10) Respondent's expert, **Steven Altman,** Esq. testified that he has never spoken to anyone or heard of a blended rate in his thirty years of practice. (R-8) Altman conceded; however, that an associate in Middlesex county with five years experience, (which Montenegro had at the time of trial), would bill at a rate of $150.00.

The concept of a "blended" billing rate is not novel. A New Jersey Law Journal article cited to an ABA report recommending alternative to the billable hour system, such as flat fees and partial and whole-contingent fees.[8] While the ABA report focused on alternative to a billable hour system, the concept of a blended rate achieves a reduction in rates when one considers that the highest tier hourly rate is reduced to achieve a compromise rate in hourly billing. Also, no ethical proscription in regard to same has been raised by respondent (R-7), and as such the retainer agreement in this regard should be enforced. Cohen, *supra,* at 155-156.

second chair at trial

The retainer agreement signed by petitioner does not reference the use of a second chair at the criminal chair. Altman testified that in his experience, second chair has been used rarely and usually for a capital murder trial and in this instance, there were no expert witnesses or unique evidence issues. In addition, Mr. Montenegro never cross-examined any witnesses. Furst testified that in his experience, he has sat second chair in many non capital trials and has used a second chair in multiple witness or documents cases. Second chair has usually been a junior attorney. He cited an example of noted criminal defense attorney Joseph Hayden, Jr., Esq. sitting second chair to noted criminal defense attorney Justin Walder in a non-capital criminal case tried in Ocean County. Having read the criminal trial transcripts, considered the testimony of the respective experts and that of Mr. Wilbert regarding the necessity of a second chair in this matter, and having reviewed the itemized bills from August 21, 1999 through April 18, 2001, I **FIND** and **CONCLUDE** that petitioner has met the burden of proof as to the reasonableness of a

[8] 170 NJLJ 1026, December 23, 2002, pp 25-26.

second chair at this trial. Petitioner's defense at this trial involved analysis of four respective students' statements provided to school officials regarding their individual allegations and comparison with grand jury testimony. In addition, issues of coercion or duress in making allegations against the petitioner, different versions of a journal kept by an alleged victim, and motives by some of the respective students and their respective friends involved multiple layers of trial preparation. While the bulk of this billing was done by Mr. Wilbert, nonetheless a second chair was reasonable under the circumstances in order to assure efficient cross-examination, thorough analysis, document retrieval and preparation for each witness.

specific itemized billing entries

As previously indicated, the retainer agreement provided that counsel would utilize paralegals and law clerks in defense of the criminal matter. That did not happen; however, and some of the work billed for as further discussed below should not have been completed by an attorney.

Extensive legal research was conducted by either Mr. Wilbert or Mr. Montenegro with regard to a series of either filed or contemplated motions. Mr. Wilbert testified, and Mr. Furst agreed, that regardless of whether motions were actually filed, the research had to be completed. Mr. Altman; however, asserted that some of the motions should not have been researched as they only would have been relevant post-verdict. These motions are individually discussed below.

15.3 hours were billed for legal research relating to speedy trial issue with 11.6 of those hours being billed by Mr. Wilbert. I **FIND** that given the stature of Mr. Wilbert in the criminal defense bar, that such research was not reasonable and deduct it in its entirety. The same applies to the following legal research billed by Mr. Wilbert, all of which I **FIND** not reasonable: 8.9 hours on prosecutorial misconduct; 2.6 hours (.8 being billed by Mr. Montenegro to copy cases) on the applicability of the *de minimus* statute; 12.4 hours on official misconduct; 2.1 hours on cruel and unusual punishment; 1.8 hours on the defendant's right and ability to subpoena documentary evidence beyond the state's discovery; 3.6 hours on prior bad acts character evidence; 3.3 hours on the clear and convincing standard of proof; 4.7 hours on evidence rule 609 regarding impeachment; 2.2 hours on change of venue (by Mr. Montenegro); and 4.2 hours (2.2 being billed by Mr. Montenegro) on exculpatory evidence. I agree with respondent's expert that this billing was excessive and that legal research is ordinarily completed by an associate

rather than a senior partner. (R-9) In addition, the retainer agreement provided that law clerks and paralegals would be utilized on this case. They were not. I also believe however, that the reason an attorney of Mr. Wilbert's stature in the criminal defense field was retained was precisely for his expertise and knowledge of criminal law. There is presumed a certain knowledge in one's area of expertise that need not be researched. While shephardizing of cases would have been reasonable if completed by a law clerk, such was not the case here. Thus I **FIND** that none of this billing is subject to indemnification. The following legal research I will allow but at a reduced rate of $75.00 for a law clerk; research relating to: criminal discovery (6.1 hours); physical force as an element of prima facie case (3.9 hours); penetration and coercion (2.9 hours); voiding statute on grounds of vagueness (2.1 hours); and preparation of case summaries on motion to dismiss (4.2 hours) and cases cited by opposition (of the 3.7 hours billed by Mr. Wilbert for review and preparation of case summaries, I am considering 1.8 hours for law clerk time.)

Finally, the following represents miscellaneous billing having reviewed all the itemizations designated by petitioner's counsel as related to criminal defense which I **FIND** not reasonable and therefore not subject to indemnification. (P-4, P-5)

(The following are based on a review of P-4)

1. page 1, 8/26/99 – 4 hours billed by BENM re: review of case re: indemnification and back pay issue. This was clearly related to the tenure case.

2. page 2, 8/27/99 -- .6 hours billed by BENM re: telephone conference with client re: background of tenure charges. This was clearly related to the tenure case.

3. page 5, 9/13/99 – 1.4 hours billed by MEW re: receipt and review of entire file of prior counsel Klausner. This was clearly related to the tenure matter as Steven Klausner, Esq. was prior counsel on the tenure case.

4. page 10, 9/30/99 – I am reducing the 1.6 billed by MEW by .8 because the retainer agreement provided that law clerks and paralegals would be utilized in Mr. Mc Harris' case and none were. It is not reasonable for an attorney to be

indexing documents at $265.00 per hour. Rather, it will be billed at the paralegal rate of $50.00/hour.[9]

5. page 11, 10/1/99. I am again reducing the 3.9 hours billed by MEW for, in part, indexing documents, by 2 hours and billing the two hours at the paralegal rate.

6. page 12, 10/7/99. For the reasons set forth above, I am reducing the 1.9 hours billed by MEW for, in part, indexing documents, by 1 hour, and billing that hour at the paralegal rate.

7. page 13, 10/12/99. For the reasons set forth above, I am reducing the 2.8 hours billed by MEW for, in part, indexing documents, by 1.4 hour, and billing that hour at the paralegal rate.

8. pages 13-14, 10/12/99. For the reasons set forth above, I am reducing the .9 hours billed by MEW for, in part, indexing documents, by .4 hours, and billing that hour at the paralegal rate.

9. page 14, 10/15/99. For the reasons set forth above, I am reducing the 1.7 hours billed by MEW for, in part, indexing documents, by .8 hours, and billing that hour at the paralegal rate.

10. page 18, 10/29/99. For the reasons set forth above, I am reducing the 2.1 hours billed by MEW for, in part, indexing documents, by 1 hour, and billing that hour at the paralegal rate.

11. page 19, 11/01/99. BENM billed 1.3 hours in connection with drafting a tort claim notice. This is clearly not related to the criminal matter.

[9] During the course of this hearing, the undersigned requested Mr. Wilbert advise whether his office utilized a paralegal. He advised and memorialized in writing (C-1) that one paralegal was hired for complex mass tort cases venued in Middlesex County and that the paralegal billed at a rate of $120.00. The undersigned advised counsel that in her former capacity as a Special Master for mass tort litigation venued in Middlesex County, she was aware of this litigation and that $120 per hour for a paralegal was not the norm and certainly not in Ocean County in the year 2000. Counsel conceded that the firm hired this paralegal with experience in mass torts in consideration of the deadlines imposed in that litigation and that this was a special circumstance.

12. pages 25-26, 11/12/99. BENM billed .5 hours for strategy conference re: handling 11/16 Board of Ed hearing. This was not related to the criminal matter.

13. page 56, 1/13/00. BENM billed .8 hours in connection with Mr. McHarris' arrest on support warrant. This was not related to the criminal matter.

14. page 57, 1/13/00. BENM billed .2 hours in connection with a telephone call with Mrs. McHarris confirming Mr. McHarris' release. This was related to the child support matter.

15. page 63, 2/3/00. BEN billed .3 hours re: worker's compensation claim. This is not related to the criminal matter.

16. page 63, 2/3/00. MEW billed .2 hours for telephone conference with client re: unemployment hearing. This is not related to the criminal matter.

17. page 66, 2/11/00. MEW billed .2 hours for telephone conference with client re:status of indictment and problem with unemployment. I am disallowing .1 of that billing.

18. page 67, 2/11/00. BENM billed 1.9 hours researching issue of suspension by reason of indictment while tenure charges pending. This is not related to the criminal matter.

19. page 67, 2/11/00. MEW billed .2 for telephone conference with client re: scheduling shoulder surgery. This is not related to criminal matter.

20. page 73, 2/23/00. MEW billed 1.1 hours for review of client's disability file and timing of claims to Board of ed tenure action. This is not related to criminal matter.

21. page 74, 2/24/00. MEW billed a total of .5 in relation to impact of Hudson case on 120 day time period for salary withholding and telephone conference with his client in relation to same. This is not related to the criminal matter.

22. page 76, 3/3/00. BENM billed 2.3 hours to index documents. Again this is a paralegal function and the entire 2.3 hours will be billed at the paralegal rate.

23. page 79, 2/15/00. I am disallowing .2 of billing by BENM re: a disability meeting with insurance representative as not related to the criminal matter.

24. pages 82-83, 4/3/00. BENM billed .2 hours for a telephone conference regarding status of criminal/tenure charge in relation to the worker's comp matter. This is unrelated to the criminal matter.

25. page 86, 4/10/00. BENM billed .2 hours for a telephone conference with Mr. McHarris re accepting a sales job. This is unrelated to the criminal matter.

26. page 86, 4/10/00. MEW billed .3 hours for a telephone conference with his client re false arrest (in relation to child support) and preparing notice of tort claim. This is unrelated to the criminal matter.

27. page 87, 4/11/00. MEW billed .2 hours for a telephone conference with his client regarding a news paper article on the arrest of the BOE president's spouse for alleged misappropriation of funds. This is not related to the criminal matter and disallowed.

28. page 101, 6/19/00. MEW billed 2.3 hours for receipt and review of grand jury transcript (second indictment); preparation of transcript outline with page references; preparation of note to file. I am disallowing 1.1 hours for the preparation of the transcript outline at the blended rate and allowing it to be billed at $50.00 hour for paralegal time as this is a paralegal function.

29. page 107, 7/19/00 BENM billed a total of 2.8 to research rules of evidence re: inconsistent statements and credibility. As Mr. Montenegro did not cross examine any witnesses at trial, and Mr. Wilbert is familiar with the rules of evidence, I am disallowing this billing in its entirety.

(The following is based on a review of P-5.)

30. page 16, 1/22/01. BAM billed .2 for telephone conference with client to discuss employment status and impact on back pay reimbursement. This is not related to the criminal matter.

31. page 27, 4/12/01. MEW billed .2 for a phone call to the *Asbury Park Press* re: the verdict. This was not necessary.

32. page 27, 4/16/01. BAM billed .5 to speak with the client re:return to work and with a Ms. D'Errico regarding the verdict and status of tenure charges. This was not related to the criminal matter.

Based on the foregoing, there is a deduction of $27,363.50 yielding a total of $174,593.00, which represents the total defense legal fees that are subject to indemnification. That figure was arrived at as follows. The disallowed legal research on page 8 of this opinion resulted in a deduction of 61.1 hours at the blended rate of $265.00/hour; or ($16,191.50 deduction); the allowed legal research of 21 hours but at a law clerk rate of $75.00/hour resulted in a net deduction of $3,990.00; and the miscellaneous items on pages 9-13 resulted in a net deduction of $7,182.00.

DECISION AND ORDER

Petitioner is awarded $174,593.00 in legal fees and $9.103.05 in costs.

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

This recommended decision may be adopted, modified or rejected by the **COMMISSIONER OF THE DEPARTMENT OF EDUCATION,** who by law is authorized to make a 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.

December 8, 2005
DATE

Ana C. Viscomi
ANA C. VISCOMI, ALJ

E-mail Receipt of Initial Decision Confirmed by the Department of Education on:

December 8, 2005
DATE

Mailed to Parties:

DEC 13 2005

DIRECTOR AND
CHIEF ADMINISTRATIVE LAW JUDGE

DATE

OFFICE OF ADMINISTRATIVE LAW

/tmp

APPENDIX

WITNESSES

For petitioner:

Michael Wilbert, Esq.

Henry Furst, Esq.

Ben Montenegro, Esq.

For respondent:

Geraldine Margin

Steven Altman, Esq.

EXHIBITS

Joint:

*J-1 October 21, 1999 Dismissal Without Prejudice of Tenure Charges, Initial Decision of Jeff Masin of February 1, 2000, State Board of Education Decision of April 5, 2000, Appellate Division Decision of July 3, 2001

Court:

*C-1 September 30, 2003 correspondence of Ben Montenegro

Petitioner:

*P-1 New Jersey Law Journal Article of August 29, 1991

*P-2 Retainer Agreement

*P-3 Indictment and superseding indictment

*P-4 Itemized bill

*P-5 Itemized bill

*P-6 Itemized bill relating to indemnification only

*P-7 Chart reflecting color coded billing

*P-8 Application and Agreement for legal services through NJEA

*P-9 Middlesex County Prosecutor's Office list of witnesses

*P-10 Petitioner's expert report

*P-11 January 6, 2002 amendment to petitioner's expert report

*P-12 January 22, 2003 supplemental petitioner's expert report

*P-13 Motion to Dismiss indictment

*P-14 Motion to Dismiss indictment

*P-15 Defendant's brief and opposition to State's notice of motion to admit 404B evidence

*P-16 Interview summary of SM

Respondents:

R-1 Monthly statements to NJEA

R-2 Motion of November 29, 1999

R-3 Chancery complaint

R-4 Motion to dismiss

R-5 A. Melk billed to North Brunswick Board of Education

*R-6 Statement of initial tenure charges

*R-7 July 9, 2002 respondent's expert report

*R-8 Supplemental respondent expert report of August 8, 2002

*R-9 Supplemental expert report of January 3, 2003

*R-10 Statement of A.R.

* Denotes admitted into evidence

#97-06

OAL DKT. NO. EDU 11038-02
(OAL DKT. NOS. EDU 9511-97 and 9512-97 ON REMAND)
AGENCY DKT. NOS. 269-7/97 AND 276-7/97

MONTCLAIR EDUCATION ASSOCIATION, on behalf of itself and member MOIRA PALISITS,	:	
PETITIONERS,	:	
V.	:	
BOARD OF EDUCATION OF THE TOWNSHIP OF MONTCLAIR, ESSEX COUNTY, et al,	:	
RESPONDENTS.	:	COMMISSIONER OF EDUCATION
	:	DECISION ON REMAND
- - - - - - - - - - - - - - - - - - - -	:	
MONTCLAIR EDUCATION ASSOCIATION, on behalf of itself and member CYNTHIA SAMUEL,	:	
PETITIONERS,	:	
V.	:	
BOARD OF EDUCATION OF THE TOWNSHIP OF MONTCLAIR, ESSEX COUNTY, et al., [1]	:	
RESPONDENTS.	:	

The record of this matter, the proposed settlement agreement and the Initial Decision issued by the Office of Administrative Law (OAL) pursuant to *N.J.A.C.* 1:1-19.1 have been reviewed.

[1] The other respondents were dismissed from the action prior to the remand of this case.

Petitioners brought this action in 1997 for relief from respondent's actions abolishing their school nurse positions for economic reasons and contracting with the Montclair Department of Health (Montclair DOH) for the provision of nursing services to the Montclair public schools. The Commissioner of Education (Commissioner) found that, based upon the record before him, respondent appeared to have acted within its authority as regards both actions. Accordingly, he ruled that no relief was due petitioners.

However, the Commissioner directed respondent to review its contracts with the Montclair DOH to ensure that – pursuant to *N.J.S.A.* 18A:40-3.3 and other relevant statutes, regulations and case law – all duties specifically reserved for certificated school nurses were being performed by the remaining certificated school nurses employed by respondent, and not by non-certificated nurses supplied by the Montclair DOH. Respondent was further directed to make revisions to the contracts to correct any violations, and to submit a report to the Essex County Superintendent of Schools.

As a result of petitioners' appeal, the State Board of Education reviewed the matter. It found that "it was appropriate for the Commissioner to direct the Board to review any contract it had with DOH and the attendant job descriptions to ensure that duties being performed by nurses provided by DOH did not conflict with those reserved by law for 'school nurses' employed by the Board." (State Board Decision at 8-9.)

It also noted that there was information in the record that raised a question about the adequacy of school nurse staffing in the district, which had three school nurses and over ten schools. To resolve this question, which in turn would be determinative of whether petitioners might have been inappropriately 'riffed,' and might be entitled to relief, the State Board ordered a remand to supplement the record.

Finally, the State Board stressed that in the event that respondent was currently supplementing its nursing services with contract [non-certificated] nurses, respondent was required to comply with the terms of *N.J.S.A.* 18A:40-3.3.

Upon the remand, the parties have agreed to a settlement whereby the individual petitioners will receive remuneration in exchange for the waiver of all claims against respondent. Upon review, the Commissioner approves the settlement terms and accordingly adopts as the final decision in this matter the Initial Decision which incorporates and approves the settlement and orders compliance with the settlement terms. The Commissioner also directs that respondent review the district's nursing services for compliance with *N.J.S.A.* 18A:40-3.3, if it has not already done so, in accordance with the prior decisions of the Commissioner and the State Board.

IT IS SO ORDERED.

Lucille E Davy

ACTING COMMISSIONER OF EDUCATION

Date of Decision: 3/14/06

Date of Mailing: 3/14/06

State of New Jersey
OFFICE OF ADMINISTRATIVE LAW

INITIAL DECISION

SETTLEMENT

OAL DKT. NO. EDU 11038-02
AGENCY DKT. NOS. 269-7/97 and 276-7/97

MONTCLAIR EDUCATION ASSOCIATION, *ET ALS.*,

Petitioners,

v.

BOARD OF EDUCATION OF THE TOWNSHIP OF MONTCLAIR, *ET ALS.*,

Respondents.

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

Richard H. Bauch, Esq., for respondent (Schenck, Price, Smith & King, attorneys)

Record Closed: January 24, 2006 Decided: January 26, 2006

BEFORE **EDITH KLINGER,** ALJ:

This matter was transmitted to the Office of Administrative Law on December 19, 2002, for determination as a contested case pursuant to *N.J.S.A.* 52:14B-1 to -15 and *N.J.S.A.* 52:14F-1 to -13.

The parties have agreed to settle this matter and have prepared the attached Stipulation of Settlement indicating the terms of settlement, which was received by the undersigned on January 25, 2006.

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

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

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

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

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

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

January 26, 2006
DATE

EDITH KLINGER, ALJ

Receipt Acknowledged:

2-1-06
DATE

DEPARTMENT OF EDUCATION

Mailed to Parties:

DIRECTOR AND
CHIEF ADMINISTRATIVE LAW JUDGE

FEB 2 2006
DATE

OFFICE OF ADMINISTRATIVE LAW

pb

SCHENCK, PRICE, SMITH & KING, LLP
10 Washington Street
P.O. Box 905
Morristown, New Jersey 07963-0905
Attorneys for Respondent,
Board of Education of the
Township of Montclair, Essex County

RECEIVED
STATE OF NEW JERSEY
OFFICE OF ADMINISTRATIVE LAW
2006 JAN 25 P 2:30

MONTCLAIR EDUCATION ASSOCIATION, on behalf of itself and the member named herein, MOIRA PALISITS,

PETITIONERS,

-v.-

BOARD OF EDUCATION OF THE TOWNSHIP OF MONTCLAIR, ESSEX COUNTY, DEPARTMENT OF HEALTH OF THE TOWNSHIP OF MONTCLAIR AND THE TOWNSHIP OF MONTCLAIR, ESSEX COUNTY,

RESPONDENTS.

STATE OF NEW JERSEY
OFFICE OF ADMINISTRATIVE LAW

OAL Docket No. EDUOA 11038-2002N
Agency Ref. Nos. 269-7/97 and 276-7/97

STIPULATION OF SETTLEMENT

MONTCLAIR EDUCATION ASSOCIATION, on behalf of itself and the member named herein, CYNTHIA SAMUEL,

PETITIONERS,

-v.-

BOARD OF EDUCATION OF THE TOWNSHIP OF MONTCLAIR, ESSEX COUNTY, DEPARTMENT OF HEALTH OF THE TOWNSHIP OF MONTCLAIR AND THE TOWNSHIP OF MONTCLAIR, ESSEX COUNTY,

RESPONDENTS.

STATE OF NEW JERSEY
OFFICE OF ADMINISTRATIVE LAW

OAL Docket No. EDUOA 11038-2002N
Agency Ref. Nos. 269-7/97 and 276-7/97

STIPULATION OF SETTLEMENT

This Stipulation of Settlement ("the Stipulation") is entered into and made effective this ___ day of December, 2005 ("the Effective Date"), by and between Petitioners, Montclair Education Association, Moira Palisits, and Cynthia Samuel, hereinafter "Petitioners", in the above captioned action and the Board of Education of the Township of Montclair, Essex County, hereinafter "Respondent" in said action.

RECITALS:

WHEREAS, Petitioners filed Petitions of Appeal with the Commissioner of Education during July, 1997, challenging, *inter* alia, the actions of Respondent Board in contracting with Respondent Montclair Department of Health ("DOH") to provide nursing services and in abolishing the positions of two of its school nurse positions for reasons of economy, effective June 30, 1997, resulting in the separation from employment with the Board of Petitioners, Palisits and Samuel; and

WHEREAS, the Petitions were consolidated and transferred to the Office of Administrative Law ("Court") for hearing; and

WHEREAS, by order of June 5, 1998, the Court dismissed the DOH from the case because the Commissioner did not have jurisdiction to grant relief against the DOH; and

WHEREAS, the Court, in its Initial Decision, on a stipulated record, recommended that the Petitions be dismissed in their entirety; and

WHEREAS, the Commissioner adopted the Court's initial decision with modification; and

WHEREAS, on appeal filed by Petitioners, the State Board of Education ("State Board") issued a decision on November 6, 2002, affirming the Commissioner's decision, in part, and remanding in part for additional proceedings before the Office of Administrative Law ("OAL" or "Court"); and

WHEREAS, the completion of such additional remand proceedings would involve a significant dedication of time and legal expense for both parties in order to develop a full and complete record as required by the State Board's remand order; and

WHEREAS, the parties are of the opinion that the amount of time and expense required to continue this proceeding far outweighs the limited backpay and incidental damages at issue herein; and

WHEREAS, under all the circumstances, all parties are of the opinion that this matter should be settled upon reasonable terms mutually agreed to by the parties; and

WHEREAS, both parties agree that this settlement is merely a means to resolve a dispute by means of compromise and in no way may be interpreted or used as an admission of liability or of wrongdoing by any party; and

WHEREAS, following good faith negotiations, the parties and their designated representatives, hereby stipulate and agree to settle and to request the dismissal of the above captioned proceeding upon the following terms and conditions:

1. Within thirty (30) days following the approval of this Stipulation by the Court and the Commissioner of Education, the Board will pay to Petitioner Moira Palisits the sum of $8,000.00, less legally required deductions.

2. Within thirty (30) days following the approval of this Stipulation by the Court and the Commissioner of Education, the Board will pay to Petitioner Cynthia Samuel the sum of $4,000.00, less legally required deductions.

3. The Petitioners, individually and collectively, hereby release, waive and give up any and all claims and rights, which they may have against the Board, its members, its employees, and agents and attorneys, including those claims which they may not be aware, arising out of or otherwise related to the claims set forth in the Petitioners' Petitions of Appeal

filed in this matter, except those claims which may arise out of a breach of the terms of this Stipulation. The foregoing release applies to any claim/request or demand of any nature, which was included in settlement discussions or resulting from anything which has happened up to now or which failed to occur. The Plaintiffs specifically release the following claims: any and all claims which have been raised or could have been raised for money damages, backpay, interest, equitable relief, and any and all other relief, including, but not limited to any claims related to their separation from employment with the Board, all claims arising under the United States Constitution, including, but not limited 42 U.S.C. 1983, et seq.; Title VII of the Civil Rights Act of 1964, as amended, 42 U.S.C. 2000 *et seq.*; the Civil Rights Act of 1866, 42 U.S.C. 791 *et seq.;* the First, Second and Fourteenth Amendments to the United States Constitution, the New Jersey Constitution; the Education Laws of the State of New Jersey, *N.J.S.A.* 18A:1-1, *et seq.*; the New Jersey Employer-Employee Relations Act, *N.J.S.A.* 34:13A-1; all regulations promulgated pursuant to any of the aforementioned laws; any other federal, State, county, local or common law, statutes, ordinances, resolutions, regulations, Board policies and administrative regulations and directives not mentioned above, including, but not limited to, claims for defamation, libel, or claims on any other basis, for damages, costs, and fees of any type whatsoever, including, but not limited to attorneys' fees. The foregoing release also includes all claims which could not have been brought in the current forum due to jurisdictional reasons.

4. This Stipulation is not to be construed as a past practice, precedent or as an admission of liability or wrongdoing of any kind on the part of any party and may not be used in any subsequent legal or contractual proceeding for any purpose, provided that either party may refer to and use this Stipulation in any legal or contractual proceeding to enforce its terms and conditions.

5. This Stipulation is made and entered into in the State of New Jersey and shall in all respects be interpreted, enforced and governed under the laws of the State of New Jersey.

6. The terms and conditions of this Stipulation shall be construed according to their plain meaning, and shall not be construed in favor of or against the Petitioners or the Respondent.

7. All parties are bound by this Stipulation and each of its provisions. Anyone who succeeds to their rights and responsibilities, such as their successors and assigns, as well as the parties' heirs and the executors of their estates, also are bound. This Stipulation is made for the benefit of all the parties hereto and all who succeed to their rights and responsibilities, and expressly includes their officials, employees, agents, attorneys, successors and assigns.

8. The parties acknowledge that they are signing this Stipulation with full knowledge or their rights, voluntarily, and of their own free will, and not under duress or coercion of any kind.

9. If this Stipulation is not fully executed by all parties, then it shall become null and void and shall be of no effect.

10. This Stipulation embodies the entire agreement between the parties hereto and supersedes any prior or contemporaneous agreement, representation or understanding, whether written or oral. This Stipulation may not be modified except by written instrument executed by all the parties hereto.

[REMAINDER OF PAGE LEFT INTENTIONALLY BLANK]

IT IS THEREFORE STIPULATED AND AGREED BY THE PARTIES AND THEIR COUNSEL OF RECORD THAT THE ABOVE CAPTIONED MATTER BE DISMISSED, WITH PREJUDICE.

BOARD OF EDUCATION OF THE
TOWNSHIP OF MONTCLAIR, ESSEX COUNTY

By: Deborah M-W

President

ATTEST:

DATED: 1/10/06

MONTCLAIR EDUCATION ASSOCIATION

By:

President

ATTEST: Patricia Jones

DATED: December 8, 2005

Moira Palasits Rosado

MOIRA PALISITS

ATTEST:

DATED: November 29 '05

Cynthia Samuel

CYNTHIA SAMUEL

ATTEST:

DATED: December 3, 2005

SCHENCK, PRICE, SMITH & KING, LLP
Attorneys for Respondent, Board of Education of the
Township of Montclair, Essex County

By: _____
Richard H. Bauch

DATED: 1/24/06

ZAZZALI, FAGELLA, NOWAK, KLEINBAUM & FRIEDMAN
Attorneys for Petitioners

By: _____
Kathleen Naprstek Cerisano

DATED: 12/15/05

9806

S.B. on behalf of minor children, C.B. and K.M.,	:	
PETITIONER,	:	
V.	:	COMMISSIONER OF EDUCATION
BOARD OF EDUCATION OF THE KINGSWAY REGIONAL HIGH SCHOOL DISTRICT, GLOUCESTER COUNTY,	:	DECISION
RESPONDENT.	:	

SYNOPSIS

Petitioner – a former resident whose family moved out of the district in April 2004 with the intent to return upon building a new home – challenged the respondent Board's finding that her son and brother are not domiciled in the district and must consequently pay tuition. Petitioner contends that her family has complied with the district's policy regarding future residents. She bases her contention upon a May 2005 agreement to purchase vacant land in the district and a residential lease dated November 2005, showing that she resides in a district serviced by the respondent district. Respondent moved for dismissal of the case, asserting that petitioner had failed to supply the lease and building plans, permits, etc. for her property located in the district.

The ALJ found, *inter alia,* that: petitioner meets the conditions of the future resident policy, having satisfied the implicit good faith understanding connected with a commitment to build; petitioner presented the district with a bona fide contract for the purchase of vacant land in May 2005; and dismissal of the case based on discovery violations is unwarranted. The ALJ consequently denied respondent's motion to dismiss; concluded that petitioner qualified as a "Future Resident"; and ordered that C.B. and K.M. are eligible for a free public school education in respondent's district, subject to sending district Logan Township's verification that petitioner resides therein.

The Commissioner concurs with the ALJ that petitioner satisfied the conditions of the district's future resident policy, and adopts the ALJ's conclusions that: C.B. and K.M. are entitled to enroll in Kingsway for the 2005-2006 school year without paying tuition; and they are now entitled to attend school at Kingsway as residents of a district that has contracted to send its high school students there. Accordingly, the Commissioner orders that C.B. and K.M. continue as students at Kingsway, subject to verification by the Logan Township school district that petitioner resides therein, and orders petitioner to pay respondent tuition for the 2004-2005 school year in the amount of $3,590.40, as stipulated, unless respondent agrees to the lower amount set forth in petitioner's post-hearing brief.

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.

March 14, 2006

OAL DKT. NO. EDU 8151-05
AGENCY DKT. NO. 230-9/05

S.B. on behalf of minor children, C.B. and K.M.,	:	
	:	
PETITIONER,	:	
V.	:	COMMISSIONER OF EDUCATION
BOARD OF EDUCATION OF THE KINGSWAY REGIONAL HIGH SCHOOL DISTRICT, GLOUCESTER COUNTY,	:	DECISION
	:	
RESPONDENT.	:	

The record in this case and the Initial Decision of the Office of Administrative Law (OAL) have been reviewed. No transcripts were transmitted to this office and no exceptions were submitted by the parties.

The matter was precipitated by respondent's August 16, 2005, determination that C.B. and K.M., petitioner's son and brother, were not residents of the Kingsway Regional High School District and were consequently not entitled to a free, public education in the district for the 2005-2006 school year. Petitioner appealed this determination, based upon the following facts, which do not appear to be disputed.

C.B. and K.M. are both currently in the 12th grade. They have attended Kingsway Regional High School (Kingsway) since the beginning of 9th grade. In April of 2005, S.B. and her husband sold their house in the Kingsway district and moved to a rental outside of the district, with the intent to return to the district upon building a new home. The parties have

stipulated that for the last two months of the 2004-2005 school year, petitioner will pay respondent tuition of $3590.40 for her son and her brother. (Initial Decision, p. 2)[1]

On May 24, 2005, petitioner and her husband entered into a contract to buy a five-acre tract of vacant land in the Kingsway district. (R-1) The purpose of the purchase was to build a home on a portion of the land and subdivide the rest to a relative. Petitioner gave a copy of the contract to Terrence Crowley, the superintendent of the Kingsway district, and communicated with him a number of times, between the end of May and August 2005, about her plans to move back into the Kingsway school district.

On July 20, 2005, Crowley sent petitioner a letter stating that because petitioner was buying property without a dwelling, and since the closing would not be until September 15, 2005, after school began, her children would not qualify as district residents for the 2005-2006 school year. (R-3) Petitioner requested an appearance before the respondent board of education, and the matter was put on the agenda for August 16, 2005 (R-2). Unfortunately, petitioner's mother-in-law passed away suddenly on or about August 16, 2005, which required petitioner to go to Florida. She testified that she did not contact Crowley at that time because she had incorrectly calendared the board meeting for a different date.

At respondent's August 16, 2005, meeting it passed a motion that found that "based upon the evidence presented, the 'B' family are not residents of the district and are not entitled to a free public education and further that their residency ceased on April 30, 2005 and as such are responsible for tuition of $8,245.60 for the months of May and June, 2005." (P-6) After her return from Florida, petitioner asked that the residency hearing be rescheduled, and was

[1] Prior to the hearing in this matter, respondent moved that the petition be dismissed for petitioner's failure to produce certain documents, and petitioner countered that respondent had failed to produce its written policy concerning future residents. The administrative law judge (ALJ) ruled that since most of these issues were resolved at least three weeks prior to the hearing, neither party was prejudiced and dismissal of the case was not warranted. The Commissioner adopts the ALJ's ruling.

advised that the residency decision for the 2005-2006 school year had been made. She subsequently attended a board meeting to discuss the issue but was told that respondent's August 16, 2005, decision was final and she could appeal to the Commissioner of Education. She did so on September 2, 2005 (P-4), and the matter was transmitted to the OAL for an expedited hearing. Her appeal allowed her children to begin the school year at Kingsway.

The closing, transferring the five acres to petitioner and her relatives, occurred on September 15, 2005. (P-3) Petitioner and her husband still hoped, at that time, that their home would be built within three months. However, the surveyor whom they hired did not perform in a timely manner and had to be replaced. This delayed the design of a septic or sewer system, which design was a prerequisite to building permit approvals. When it became apparent that their new home would not be completed by the end of 2005, petitioner and her husband rented an apartment in Logan Township (P-2), a district that sends its high school students to Kingsway. The lease was for six months and began on December 1, 2005. In the meanwhile, petitioner and her husband continued to pursue the permits and approvals necessary to construct a home in the district, and have been paying taxes on the land since September 2005.

Based upon the foregoing facts, the petitioner urged that her children met the conditions of respondent's policy allowing "future residents" to attend Kingsway without paying tuition. That policy, set forth in petitioner's exhibit P-1 (page 2 of 3), states in pertinent part:

> Future Residents
>
> A child otherwise eligible for attendance whose parent/guardian has signed a contract to buy, build or rent a residence in this District shall be enrolled for a period not to exceed 90 days previous to the anticipated date of residency without tuition charges. If the child has not become a resident of the District by the end of the period of free attendance, tuition shall be required for the remainder of the time until residency is established.

> Parents/guardians of children who are future residents shall be required to demonstrate proof of the anticipated residency. The Board reserves the right to verify such claims and to remove from school a nonresident pupil whose claim cannot be verified.

The ALJ found that the petitioner satisfied the conditions, as does the Commissioner. By virtue of the fact that petitioner and her husband had – prior to the 2005-2006 school year – signed a contract to buy land in respondent's district upon which to build a home, had closed on the land two weeks after school started, had entered into contracts (with surveyors and a septic engineering firm) to begin the building process, and had secured a rental property in Logan Township by November 20, 2005, the children were residents of respondent's district or, at least, residents of a district within the region served by respondent. And they achieved that status within the 90-day period contemplated by respondent's "future resident" policy.

Respondent has not adequately rebutted petitioner's arguments about the future resident policy. In its August 16, 2005 determination, respondent neglected to address the question of whether the children could be considered future residents. At the OAL hearing respondent apparently argued that since the children were not "pre-qualified" as future residents, they did not qualify for the tuition-free 90-day period. However, the sales contract for the tract in respondent's district had been presented to respondent's representative, and petitioner had communicated to him on multiple occasions that her family expected to return to the district in the near future. Respondent cannot argue that petitioner's children were not pre-qualified, when petitioner had provided that information and respondent had failed to address it when it made its ruling about C.B. and K.M. Nor did respondent submit a post hearing brief addressing the future resident issue.

In view of the foregoing, the Commissioner adopts the ALJ's conclusions that: 1) C.B. and K.M. were entitled, under the future resident policy, to enroll in Kingsway for the

2005-2006 school year without paying tuition; and 2) they are now entitled to attend school at Kingsway as residents of a district that has contracted to send its high school students there. [2]

Accordingly, the Commissioner orders that C.B. and K.M. continue as students at Kingsway, subject to verification by the Logan Township school district that petitioner resides therein. Petitioner is ordered to pay respondent tuition for the 2004-2005 school year in the amount of $3,590.40, as stipulated, unless respondent agrees to the lower amount set forth in petitioner's post-hearing brief.

IT IS SO ORDERED[3]

Lucille E Davy

ACTING COMMISSIONER OF EDUCATION

Date of Decision: 3/14/06

Date of Mailing: 3/14/06

[2] In the ALJ's initial decision is a brief discussion about the children's best interests. As a matter of common sense, the Commissioner cannot disagree that it will be advantageous for the children to be able to finish their secondary education in Kingsway; however, "best interests" is not the applicable legal standard for this controversy.

[3] The Commissioner's decision may be appealed to the New Jersey State Board of Education, pursuant to *N.J.S.A.* 18A:6-27 *et seq.* and *N.J.A.C.* 6A:4-1.1 *et seq.*

State of New Jersey
OFFICE OF ADMINISTRATIVE LAW

INTITIAL DECISION

OAL DKT NO. EDU 8151-05

AGENCY DKT. 230-9/05

S.B. ON BEHALF OF MINOR CHILDREN, C.B. AND K.M.,

Petitioner,

v.

KINGSWAY REGIONAL HIGH SCHOOL DISTTICT, GLOUCESTER COUNTY,

Respondent.

Samuel H. Bullock, Esq., for petitioner

Raymond J. Zane, Esq., for respondent (Zane and Lozuke, attorneys)

Record Closed: December 29, 2005 Decided: December 30, 2005

BEFORE **W. TODD MILLER,** ALJ:

STATEMENT OF THE CASE AND PROCEDURAL HISTORY

The New Jersey Department of Education Bureau of Controversies received a request for relief on September 6, 2005. Petitioner challenges the district's finding that her children are not domiciled in District and consequently must pay tuition. The matter was transmitted to the Office

of Administrative Law (OAL) on October 13, 2005 to be heard as an expedited matter. *N.J.S.A.* 18A:38-1 The Director of the OAL assigned the undersigned to hear this as an expedited matter pursuant to 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 plenary hearing on November 21, 2005. The hearing was adjourned to allow petitioners to obtain counsel. The hearing was rescheduled for December 13, 2005, at the OAL office in Atlantic City, New Jersey. The record remained open until December 29, 2005, to enable the parties to submit **simultaneous** closing arguments. Petitioner's closing submission was received on December 23, 2005. Respondent's was received on December 29, 2005. No advantage was gained by the timing difference because petitioner's closing submission was only provided to this tribunal. The record closed on December 29, 2005.

STIPULATIONS BY THE PARTIES

For school year 2004-2005, petitioner[1] had four children attending school within the District. Two students were juniors and two students were seniors. The family moved out of district on or about April 15, 2004, with the intent to return upon building a new home. The school year concluded on or about June 15, 2004. The school has a policy (P-1) to allow seniors to complete the school year without being assessed tuition, even when they are out of district. The policy does not apply to juniors or other underclassmen. As a result, the parties stipulated that for the completion of the school year 2004-2005 (April 15 through June 15, 2004) that the two students who were juniors owed tuition from April 15 through June 15 because they were not covered by the exception in the non-resident student policy. Similarly, the District stipulated that the two seniors would be permitted the benefits of the Non-Resident Student Policy - Completion of Senior Year, and, therefore, would not owe any tuition. The parties further stipulated that the tuition for the two juniors to be $3,590.40. These stipulations resolved all issues for the school year 2004-2005, except for when the tuition moneys would be due and owing the District.

[1] Petitioner is the student's mother, S.B. Their father, C.B. was present but did not testify at the hearing. This Initial Decision may refer to petitioner as petitioners because some of the testimony was referring to both the mother and father of the children. C.B. is not in the caption in the agency transmittal.

SUMMARY OF RELEVANT TESTIMONY

Petitioner and her children resided within the District encompassing the Kingsway Regional High School for at least three to four years. Her four children, who among them included her brother who is an Affidavit student, attended the Kingsway Regional High School for approximately 3¾ years. In or around April 15, 2005, the family sold their house that was within the District and moved Mullica Hill, which is out of district. The four children completed the 2004-2005 school year at the Kingsway Regional High School.

On or about May 24, 2005, petitioner signed "Contract for the Sale of **Vacant Land** for One Family Dwelling." (R-1). On or about the same date, petitioner provided the school district, in particular, Terrence Crowley, Superintendent of the Kingsway Regional High School District, with a copy of the Contract.

Petitioner and Superintendent Crowley had several telephone conferences or meetings between the period May 2005 and August 2005. The conferences revolved around petitioner's residency or domicile in anticipation of the 2005-2006 school year. The real estate agreement called for settlement to occur on or before September 15, 2005. Superintendent Crowley reviewed the Contract for Sale of Vacant Land and incorrectly assumed that it was for the purchase of a property with improvements. In other words, Superintendent Crowley believed petitioner was buying a house. He stated that he had conversations with petitioner that led him to believe that petitioner would be moving into a house in September 2005. Notwithstanding Superintendent Crowley's testimony, the agreement caption states that it is a **contract for sale of vacant land** and paragraph 1 of the Contract clearly states seller and buyer agree under the terms of this Contract that the Buyer agrees to purchase a "certain tract or **vacant parcel of land** in the Municipality of Mullica Hill," (also known as South Harrison). The property identified under the Contract would fall within one of the Kingsway Regional's sending districts.

Subsequent to receipt of the Contract, Superintendent Crowley investigated the situation further. He contacted the local building department and found that petitioner had not secured any building permits between the period May 2005 through August 2005. He learned that the property did not contain a dwelling or any other improvements. Petitioner had not retained a

builder. Crowley was not convinced that a house would be constructed within a reasonable period during the 2005-2006 school years.

By letter dated July 20, 2005 (R-3), Crowley notified petitioner that

> I have received the Contract of Sale for a property located at 568 Franklinville Road in South Harrison Township. In reviewing the document, I must note that this is a vacant piece of land, not a residence, and the settlement date is September 15, 2005. Therefore, this does not qualify as living in the district.
>
> My previous letters regarding residence stand and if you would like to appear before the Board, please advise me no later than July 25, 2005.

It is clear that on or before July 20, 2005, the District had notified petitioner that they were not going to be considered residents for purposes of entering the Kingsway Regional District for the 2005-2006 year. On July 27, 2005, Crowley notified petitioners of their right to appear before the Board. Crowley's letter, dated July 25, 2005 (R-2), states

> You have requested to appear before the Board of Education regarding your residence and your child [C.] and [K.M.]. This is scheduled for Tuesday, August 16, 2005, at 8:30 p.m., or as soon thereafter as is possible and will be held in the Middle School Media Center. The Board will make a decision that evening.
>
> You have a right to be present, be represented by an attorney, at your expense, present witnesses on your behalf and question witnesses against you. Please advise me by August 12, 2005 if an attorney will be representing you.

Petitioner acknowledged receiving both of Superintendent Crowley's letters. Petitioner also stated that she intended to appear before the Board of Education on August 16, 2005. On August 16, 2005, the Board of Education met and decided as follows:

> RESIDENCY
>
> Motion by Walsh, second by DiGiovacchino, that the Board of Education find that based upon the evidence presented, the "B"

> family are not residents of the district and are not entitled to a free public education and further that their residency ceased on April 30, 2005 and as such are responsible for tuition of $8,245.60 for the months of May and June, 2005. The Board directs the solicitor to file the appropriate legal proceedings to recover the tuition due.
>
> Motion carried unanimously. (P-6)

Petitioner's mother-in-law suddenly passed away on or around August 16, 2005. The family left to attend the funeral in Florida. As a result, they were unable to attend the School Board meeting intended to discuss the residency issue. Petitioner did not contact the District because she believed the School Board was actually meeting on a different date. Consequently, she thought she could attend the funeral in Florida and also attend the School Board residency hearing. When she returned from Florida, she realized that she had incorrectly calendared the meeting date and had actually missed the hearing.

Petitioner contacted the District and asked if she could reschedule the residency hearing. She was advised that the School Board had already made a decision on the residency issue involving her children for the 2005-2006 school year. However, petitioner was advised that she could attend a regular meeting and discuss the matter with the Board. Sometime between August 16 and September 1, petitioner attended a regular School Board meeting and pressed her case. She was advised that the District's decision was final and that she could appeal their determination to the Commissioner of Education.

On September 2, 2005, petitioner filed a *pro se* residency appeal. (P-4). Petitioner's appeal states as follows:

> We are currently not in the school district. We sold our house in April and moved to a rental. We brought (*sic*) property in the school District and plan to move to it within 2 months. My son and brother started at Kingsway as freshman and I would like them to finish their High School Education there. And since we are moving back to the District during this school year I don't want to disrupt their senior year to transfer them back and forth.

Upon filing the appeal, petitioner's children were eligible to enter the District subject to reimbursement of tuition if they were unsuccessful. (P-4, ¶ 6).

Petitioners were unable to complete the construction of a new home within the District during the first half of 2005. Petitioner testified that the process was much more involved than anticipated. Petitioner's husband works in the construction field and is going to act as the general contractor for the project. Petitioner was completing most of the paperwork for the project. Petitioner testified that in order to procure building permits, the property owner must first obtain sewer or septic approval. In order to obtain sewer or septic approval, they are required to obtain a survey and submit it to a septic engineer. The property in question involves five acres. Petitioner and her husband intend to initially build on the five acre site and then subdivide a portion thereof to petitioner's brother-in-law.

Petitioner's initial surveyor was not responsive. Petitioner hired a second surveyor in the Fall of 2005 who completed the survey within two weeks. The survey was submitted to the septic engineering company. The septic engineers are still working on this aspect of the project as of December 2005. Petitioner stated that she anticipated getting septic approval sometime in mid-December. Once septic approval is received from the County, petitioners can then apply for building permits.

Petitioner conceded that the process was much more involved than she anticipated. In hindsight, her initial expectations of moving into a newly constructed home within the District within two months of September 2005 were not practical or feasible. However, petitioner reiterated that her intentions in May 2005 were to purchase vacant land, build a house and return to the District within the 2005-2006 school year. She supported her intentions by reference to her continued discussions with Superintendent Crowley as well as her actions, which initially started in May 2005. Since May 2005, she sought assistance from the District on the basis that she intended to return. She had meetings and telephone calls with the District, supplied the District with proof of a contract to purchase and build, and has been pursuing, to the best of her ability, the various approvals necessary to construct a home. Consequently, petitioner urges that her intent was genuine and sincere with regard to moving back within the District. She resided

herein for several years and owns a parcel of land valued at $135,000 and, thus, is paying real estate taxes.

Petitioner secured a residential lease in a sending district in November 2005, after it became apparent that the new home would not be completed. The occurred within in the 90 day tuition free window embodied in the "Future Resident" policy.

LEGAL ANALYSIS AND DISCUSSION

Petitioner contends that her children are presently domiciled in the Kingsway Regional school district. Petitioner's contention is based on the May 24, 2005, agreement to purchase vacant land with the intent to build a home and the residential lease dated November 10, 2004. (P-2). Based upon these agreements, petitioner urges that they have complied with the District's policy involving future residents.

The relevant statute is *N.J.S.A.* 18A:38-1 and it provides in 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;
>
> 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.

Where a local board of education removes a student, the parent may appeal to the Commissioner of Education. *N.J.S.A.* 18A:39-1(b)(2). In the proceeding before the Commissioner, the parent has the burden of proof by a preponderance of the evidence that the child meets eligibility requirements for a free education. *Ibid.* The child shall not be removed while the matter is pending before the Commissioner. *Ibid.* If the evidence does not support the parent's claim, the Commissioner shall assess the parent tuition for the student prorated to the time of the student's ineligible attendance in the schools of the district. *Ibid.*

Attendance at public schools shall be free to any person who is domiciled within a school district and meets age requirements. *N.J.S.A.* 18A:38-1(a). A person's domicile is "the place where he has his true, fixed, permanent home and principal establishment, and to which, whenever he is absent, he has an **intention of returning**, and from which he has no intention of moving." *Kurilla v. Roth*, 132 *N.J.L* 213, 215 (Sup. Ct. 1944). A person may have multiple residences but only one domicile. *State v. Benny*, 20 *N.J.* 238, 251 (1955). As set forth in *Mercadante v. City of Paterson*, 111 *N.J. Super.* 35 (Ch. Div. 1970), *aff'd,* 58 *N.J.* 112 (1971), the following factors are important in determining a person's 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. [*Id.* at 39-40].

Establishment of a domicile is an act of volition. *Matter of Unanue*, 255 *N.J. Super.* 362, 375 (Law Div. 1991). "[A] choice of domicile by a person, irrespective of the motive, will be honored by the court, provided there are sufficient objective indicia, by way of proofs, supporting the actual existence of that domicile." *Id.* at 376.

Three elements which must be considered in regard to a change of domicile are: "(1) whether there has been an actual and physical taking up of an abode in a particular state; (2) whether the subject had an **intention to make his home there permanently** or [at] least indefinitely; and (3) whether the subject had an **intention to abandon his old domicile**." *Ibid.* Once established, a domicile continues until superseded by a new one. *Id.* at 377.

Petitioner urges that her family satisfied the terms and conditions of Kingsway Regional's "Future Residents" policy by purchasing land in the district with the intention of building a residential home.

The present controversy specifically centers on the applicability and interpretation of the Kingsway Regional School District's non-resident policy (P-1, p. 2) and petitioner's intentions. The District articulated a policy concerning "future residents". It addresses circumstances similar to the present. The policy provides:

> A child otherwise eligible for attendance whose parent/guardian has **signed a contract** to buy, **build** or **rent** a residence in the District **shall be enrolled for a period not to exceed 90 days** previous to the anticipated date of residency without tuition charges. If the child has not become a resident of the District by the end of the period of free attendance, tuition shall be required for the remainder of the time until residency is established.
>
> Parents/guardians of children who are future residents shall be required to demonstrate proof of the anticipated residency. The Board reserves the right to verify such claims and to remove from school a nonresident pupil whose claim cannot be verified.
>
> [Emphasis added]

Notably, this policy was not discussed by the Kingsway Board of Education on August 16, 2005. The minutes do not reflect a discussion of the contract to purchase **vacant** land. Nor do the minutes reflect the Boards reasoning why the contract did or did not satisfy its policy. Moreover, Crowley incorrectly thought petitioner's were buying a home and explained that he felt deceived. No such deception occurred. The contract provided to Crowley in May 2005 plainly stated **vacant land**. Crowley admittedly misread the agreement. He stated that he is not experienced with real estate agreements. Consequently, the Board may have also misread the agreement, been misinformed or misunderstood petitioner's intentions. The policy should have been discussed and the Board's reasons set forth in the minutes.

Petitioner submits that they have complied with the District's policy in regard to future residency. Petitioner signed an agreement of sale for vacant land with **intentions** to construct a home upon that vacant land. (R-1). The agreement is dated May 24, 2005, and was provided to the District by petitioners on or about the same date. Petitioners assert that whether or not they actually completed the construction within the 90 day period is irrelevant.

I **FIND** so long as petitioners submitted to the District, in good faith, a contract to purchase with intent build a home, they meet the clear expressed conditions of the future resident policy. Petitioner testified that a surveyor, septic engineer were retained. They have been pressing forward to obtain building permits. Unfortunately, petitioner and her husband are inexperienced and have been unsuccessful in expediting the process. In fact, petitioners concede that they have been visited with delays from inception. Initially, they intended to settle on the vacant land in or around July 15, 2005. That date was extended to September 15, but petitioners could close on or before September 15, 2005, if funds were available sooner. Petitioners indicated that the five acre site was being purchased jointly with a brother-in-law. The brother-in-law was having difficulty coming up with his share of the purchase price. The purchase price is $135,000.00 cash (with no mortgage). Petitioners were able to settle on the property, in accordance with the Contract, on September 15, 2005. The Deed was executed on this date (P-3). Petitioners still had expectation that they could have completed the construction of their home within the 90 days. It has proved to be wishful thinking.

The Board's "Future Residents" policy does not contain a specific means or probability test. The residency policy simply states that the parent or guardian [must have a] signed contract to "buy, **build** or rent a residence." There is an implicit good faith understanding connected with a commitment to build which, I **FIND** petitioners satisfied. Petitioners presented the District with a signed contract for vacant land on or about May 24, 2005. Petitioner's four children attended the District for three to four consecutive years. They stated from inception when they sold their in-district home that they intended to return to the district. They entered into an agreement, purchased land and became taxpayers within the district. The purchase of land and payment of taxes confirm, in part, their intentions to return as residents. Their intentions were further confirmed during various meetings and telephone calls with Superintendent Crowley. Crowley confirmed that petitioner repeatedly stated that they intended to return to the district. Finally, when the construction delays interfered with the probability or likelihood of their timely return, they leased an apartment on November 20, 2005. Again, this reaffirmed their intentions and satisfied the "Future Residents" policy. Furthermore, there is a sufficient nexus or continuity between the May 2005 contract to purchase vacant land to build a home and the November 2005 lease, to grant petitioner the benefit of the District's "Future Resident" policy.

I **FIND** that petitioners presented the District with a bona fide contract for vacant land with the intentions to build a dwelling, in district, upon the land in May 2005. This complies with the District's "Future Resident" policy negating petitioner's obligation to pay tuition. While petitioners experienced construction problems and delays, their actions were not a subterfuge of the policy. Petitioners clearly and convincingly expressed their intentions of returning to a newly built home. Delays related to real estate closings and new home construction are common events. Thus, the arguments concerning delays that were raised by petitioners are plausible and believable.

The "Future Residents" policy further states that if a child has not become a resident of the District by the end of the period of free attendance, tuition shall be required for the remainder of the time until residency is established. The parties stipulated that, under these circumstances, if a qualified future resident failed to establish a bona fide residence within the District within the 90 day window, they would be responsible for tuition on a prospective basis. In other words, if they fail to reside or be domiciled within District after the expiration of the 90 days, tuition

would be due starting from the 91st day. It would not be retroactive to the first day. In this instance, tuition would be due and owing on December 1st, should petitioners fail to meet the 90 day requirement. The tuition would not be retroactive to September 1st.

One exception asserted by the District was that petitioners failed to pre-qualify for the Future Resident policy as of the Board of Education's decision on August 16, 2005. In other words, the District does not accept tuition-paying students. Hence, if the Board determined that a child was not a resident or not qualified under the policy as a future resident, they must be considered a tuition-paying student. Here, petitioner's children were not pre-qualified to attend the District for 2005-2006 according the respondent as a result of the Board's August 16, 2005, decision. Under these circumstances, a non-pre-qualified student would owe tuition retroactive to September 1st, should they fail to be a resident or domiciled within the District by the end of the 90 day period.

The school year commenced September 1, 2005. The expiration of 90 days would occur on or about November 30, 2005. I have already found that the May 2005 contract to purchase and build on vacant land satisfied the "Future Resident" policy. Petitioner was unsuccessful in completing the construction of the home within the 90 day window mentioned in the policy. In response, petitioners secured a rental property in Logan Township on November 20, 2005. (P-2). Logan Township is not within the Kingsway Regional High School District, but is a tuition-paying sending district to Kingsway. Petitioners stated that they began moving out of Mullica Hill and into Logan Township between the period November 20, 2005 and December 1, 2005. Petitioner stated that she currently resides at the location stated within the lease. (P-2).

Petitioner has had some casual contact with the Logan District for purposes of arranging transportation. More particularly, petitioner left a note with the Kingsway Regional District, in particular, Secretary Savage, stating that she has moved into a sending District, provided a new address and requested transportation for her children. She contacted the Logan School District and left similar messages. Since December 1, 2005, her children have been receiving bus

transportation from the Logan District to Kingsway Regional High School, either intentionally arranged or simply by boarding a bus in the neighborhood[2].

Finally, in response to questioning by this ALJ, Superintendent Crowley agreed that continuity of educational programs is an important consideration. Here, the students in question spent most their high school experience at Kingsway Regional. It would be disruptive to bounce the students around in different programs for their senior year due to construction/housing issues. Crowley observed that he as a dual responsibility; one to the taxpayers and one to the education of children. In this instance, Crowley believed that petitioners were really **not intent** on returning back in the district. But, the proofs submitted by petitioners clearly refute any such assumption made by the District. Petitioner's intent is clear; the family is moving back. Thus, I **FIND** that it is in the best interest of the children to remain in the Kingsway School District tuition free for the 2005-2006 school year in view of the construction delays. The rental agreement signed in November 2005 (within 90 days of the September 1, 2005) is sufficient to replace the construction plans and meets the terms of the "Future Resident" policy.

Finally, on November 21, 2005, respondent moved that petitioner's case be dismissed for discovery violations. Respondent asserted that petitioner failed to supply the lease, building plans, permits contracts and other similar items. Similarly petitioner asserted that the District did not supply a copy of the "Future Resident" policy prior to this date. Some of these outstanding discovery claims of both sides were resolved on November 21, 2005. The policy was supplied by the District and the lease was supplied by petitioners. I **FIND** and **CONCLUDE** that dismissal of the case under these circumstance is not warranted. The matter was adjourned until December 13, 2005. This provided both sides equal time to resolve all outstanding discovery issues. Petitioners retained counsel. No new or continuing discovery violations were raised on December 13, 2005. Consequently, neither side suffered any significant prejudice. Accordingly, the District's motion to dismiss petitioner's case for discovery violations is **DENIED**.

[2] Petitioner submitted proof of registration for December 19, 2005, for Logan Township residents with its closing brief.

CONCLUSION AND ORDER

Based upon the foregoing, I **CONCLUDE** that petitioner qualified as a "Future Resident" on May 24, 2005, by entering into and submitting to the Superintendent an agreement to "Build...a residence in the District." (P-1). I **ORDER** the petitioner's two children are eligible for free public school education, subject to Logan Township school district verifying or certifying that petitioner resides therein. Kingsway Regional shall cooperate with petitioner and the Logan District for such matters as tuition, transportation, confirmation of residency and any other related issues. Petitioner is ordered to pay tuition in the amount of $3,590.40[3] for two children (juniors) in regard to the 2004-2005 school year as stipulated. (April 15 to June 15).

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

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

[3] Petitioner's closing brief submitted on December 21, 2005, states the stipulated tuition for the 2004-2005 school year (two juniors) is 3,495.00. My notes reflect $3590.40 being the stipulated amount. The difference is $95.40. If respondent agrees with petitioner than the amount shall be adjust accordingly. If the amount remains in dispute, the parties are free to request a copy of the hearing tape and settlement amount in dispute by listening to the tape.

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.

December 30, 2005
DATE

W. TODD MILLER, ALJ

E-mail Receipt of Initial Decision Confirmed by the Department of Education on:

DATE

Mailed to Parties:

CHIEF ADMINISTRATIVE LAW JUDGE

JAN 6 2006
DATE

OFFICE OF ADMINISTRATIVE LAW

/sd

WITNESSES AND DOCUMENTS IN EVIDENCE

WITNESSES

For Petitioner:

S.B., petitioner

For Respondent:

Terrence Crowley, Superintendent

EXHIBITS

For Petitioner:

P-1 Kingsway Regional High School Policy
P-2 Residential Lease
P-3 Deed
P-4 *Pro se* Residency Appeal
P-5 Letter, Terrence J. Crowley, Superintendent to Mr. and Mrs. [C.B.], May 4, 2005
P-6 Board of Education Minutes, August 16, 2005
P-7 Letter, Nancy E. Kearns, RMC to To Whom It May Concern, June 14, 2005

For Respondent:

R-1 Contract for Sale of Vacant Land for One Family Dwelling, May 24, 2005
R-2 Letter, Terrence J. Crowley, Superintendent to Mr. and Mrs. [C.B.], July 27, 2005
R-3 Letter, Terrence J. Crowley, Superintendent to Mr. and Mrs. [C.B.], July 20, 2005

R-4 Letter, John R. Herbst, Superintendent of Logan Township School District to Terrence J. Crowley, Superintendent, Kingsway Regional High School, December 12, 2005

R-5 Letter, Nancy E. Kearns to Kingsway Regional High School, December 12, 2005

R-6 Certification of Andrew Eubanks, December 12, 2005

100-06

#100-06

R.O. on behalf of minor child, R.O., II,	:	
PETITIONER,	:	
V.	:	COMMISSIONER OF EDUCATION
BOARD OF EDUCATION OF THE WEST WINDSOR-PLAINSBORO SCHOOL DISTRICT, MERCER COUNTY,	:	DECISION
RESPONDENT.	:	

SYNOPSIS

Petitioner challenged a ten-day suspension imposed on his son for possession of a knife on school property, and seeks a due-process hearing and a reversal or expungement of the suspension. Respondent Board moved for summary decision, arguing, *inter alia,* that the issues determinative to this matter had already been adjudicated in New Jersey Superior Court.

The ALJ found, *inter alia,* that: the doctrine of issue preclusion prevents any re-litigation; the school record of petitioner's son cannot be determined to be "inaccurate, irrelevant or otherwise improper" and therefore does not meet the criteria for expungement under *N.J.A.C.* 6:3-6.7; information about R.O.'s delinquency proceeding was properly released pursuant to N.J.S.A. 2A:4A-60d(1); there is no genuine issue as to any material fact, and the respondent is entitled to prevail as a matter of law. Accordingly, the ALJ granted respondent's motion for summary decision, and dismissed the petition.

The Commissioner found no merit in petitioner's twenty-one exceptions; concurred with the ALJ's determinations articulated in the Initial Decision; supplemented the Initial Decision; granted the respondent's motion for summary judgment 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.

March 17, 2006

OAL DKT. NO. EDU 2010-05
AGENCY DKT. NO. 33-2/05

R.O. on behalf of minor child, R.O., II, PETITIONER,	:	
V.	:	COMMISSIONER OF EDUCATION
BOARD OF EDUCATION OF THE WEST WINDSOR-PLAINSBORO SCHOOL DISTRICT, MERCER COUNTY, RESPONDENT.	:	DECISION

The record in this matter, the Initial Decision of the Office of Administrative Law (OAL), petitioner's exceptions and respondent's reply exceptions have been thoroughly and independently reviewed.[1] After considering the facts and applicable law, the Commissioner adopts the administrative law judge's (ALJ) decision to grant respondent summary judgment, dismissing the petition.

This case was initiated on February 9, 2005, by petitioner's appeal to the Commissioner from respondent's denial of petitioner's request to remove from his minor son's (R.O.) school record any mention of a ten-day suspension that had been imposed on March 3, 2004, as a result of R.O.'s possession of a knife on school premises. Petitioner also requested a "hearing to challenge the school suspension," and the "names and identities" of students who could possibly provide facts about the conduct that precipitated the suspension. (Petition at 2) General reference to such students had been made in a June 16, 2004, memorandum by Donna Gibbs-Nini, one of two assistant principals in R.O.'s school. The matter was transmitted to the OAL on March 8, 2005.

[1] Replies to reply exceptions are not contemplated by *N.J.A.C.* 1:1-18.4. Consequently, petitioner's reply to respondent's reply exceptions was not considered.

On September 23, 2005, petitioner moved before the Commissioner for interlocutory review of an order by the ALJ denying petitioner leave to supplement the original petition. On October 6, 2005, the Commissioner issued an order granting interlocutory review, adopting the ALJ's order denying supplementation of the original petition, and stating that the appropriate course of action would be for petitioner to raise his new claims in a separate petition of appeal. Accordingly, petitioner filed a second petition – Agency Dkt. No. 274-10/05, OAL Dkt. No. EDU 8827-05 – on October 9, 2005, alleging violation of R.O.'s due process rights (First Count), racial discrimination (Second Count) and violation of R.O.'s civil rights (Third Count). The Commissioner dismissed the Second Count for lack of jurisdiction on November 4, 2005, and the matter was transmitted to the OAL on November 9, 2005.

Petitioner once again moved before the Commissioner for interlocutory review on October 20, 2005. On this occasion, petitioner challenged the ALJ's October 19, 2005 order denying reconsideration of his September 30, 2005 order denying petitioner's motion to compel respondent to answer a new set of interrogatories. The Commissioner declined interlocutory review on October 28, 2005.

On October 19, 2005, respondent resubmitted a motion for summary judgment that had originally been filed, and denied, in the previous month. The gravamen of respondent's motion was that the question of whether R.O. had possessed a knife on school premises on March 3, 2004 had already been decided in the affirmative in a proceeding in family court on February 3, 2005. On that occasion, R.O. had been adjudicated delinquent for possessing a dangerous knife while on the grounds of an educational institution without written authorization from the governing officer of the institution, in violation of *N.J.S.A.* 2C:39-5(e)(2), a fourth degree crime. Respondent argued that the doctrine of issue preclusion – as articulated, for example, in *State v. Gonzalez*, 75 *N.J.* 181, 186 (1977) – bars petitioner from litigating the issue again. Further, since R.O. had been found guilty of

possessing a knife on the grounds of an educational institution, there was no basis under *N.J.A.C.* 6A:32-7.7(a)(1) for expungement of the suspension from his record.

Petitioner's responses to the summary judgment motion contained a number of arguments. First, petitioner maintained that certain alleged erroneous rulings by the family court judge, and the appealability of the delinquency determination, barred summary judgment. Second, petitioner asserted that it was improper for respondent to use and disclose, in the present proceeding, transcripts and orders from R.O.'s juvenile delinquency trial. While not expressly stated in his papers, petitioner presumably intended that the ALJ deny summary judgment because respondent's grounds for same were offered to the ALJ via these documents from the family court action.

Third, petitioner appeared to contend that summary judgment could not be granted because R.O. was improperly denied a hearing before the respondent board. For the proposition that R.O. was entitled to such a hearing, petitioner relied upon *N.J.A.C.* 6A:16-5.5, *N.J.A.C.* 6A:16-5.6 and *N.J.A.C.* 6A:16-5.7, which provide that students who commit certain offenses must receive certain due process rights, including hearings before the board of education.

The ALJ found that the following facts in this matter are undisputed. On March 3, 2004, R.O. was a seventh grade student at Community Middle School in the West Windsor-Plainsboro school district. On that date, he was suspended for ten days for possessing a weapon on school grounds. No written explanation was given to R.O.'s parents on March 3, 2004 or immediately thereafter, and no formal hearing was held by respondent before or after imposition of the suspension. R.O.'s parents requested a copy of an incident report prepared by a school employee. (Initial Decision at 2-3)

The ALJ also found that certain facts relating to R.O.'s family court proceeding are also undisputed. They are as follows. On May 10, 2004, a juvenile delinquency complaint was filed against petitioner in New Jersey Superior Court, Chancery Division Family Part, Middlesex County, containing – among other charges – allegations that on March 3, 2004, R.O. purposefully and

knowingly possessed a dangerous knife while on the property of an educational institution in violation of *N.J.S.A.* 2C:39-5(e)(2) – 4th degree. On February 3, 2005, the Superior Court judge found that R.O. had claimed that on March 3, 2004, he had found a knife on the school bus, that the bus had arrived at the school at approximately 7:00 a.m., and that R.O. had not given the knife to Assistant Principal Donna Gibbs-Nini until after he was summoned, at approximately 11:20 a.m. The judge then found the above-articulated allegations in the juvenile delinquency complaint to be true, and adjudicated R.O. delinquent. (Initial Decision at 3-4)

Since it was undisputed that a court had already adjudicated R.O. guilty of possessing a dangerous knife on the grounds of an educational institution, the ALJ agreed with respondent that – under the doctrine of issue preclusion – the Department of Education cannot relitigate the matter, and the petition must be dismissed as a matter of law. He reasoned further that there is no basis to expunge information about R.O.'s ten-day suspension from his school record. Under *N.J.A.C.* 6A:32-7.7(a)(1), information in a student's school record must be inaccurate, irrelevant or otherwise improper for it to warrant expungement. The ALJ found that the record of R.O.'s suspension meets none of those criteria. (Initial Decision at 4-6)

The ALJ also rejected petitioner's claim that R.O. was entitled to a hearing before the board of education. He agreed with respondent that *N.J.A.C.* 6A:16-5.5, *N.J.A.C.* 6A:16-5.6 and *N.J.A.C.* 6A:16-5.7 – regulations that pertain, respectively, to student possession of firearms, assaults with weapons, and assaults on board of education members and employees – are irrelevant to the level of process due to R.O. The foregoing regulations address offenses that carry serious penalties, including expulsion and suspensions up to a year or more. The penalty imposed on R.O. was what the Department of Education's regulations consider short-term, and is subject to the requirements of *N.J.A.C.* 6A:16-7.2. The ALJ determined that R.O. had received the informal hearing required by *N.J.A.C.* 6A:16-7.2 (a)(2). (Initial Decision at 6)

As for petitioner's contention that respondent improperly used documents from R.O.'s delinquency proceeding, the ALJ noted that petitioner himself had continually referred to the family court proceeding during the pendency of this matter in the OAL, and that the information was properly released pursuant to *N.J.S.A.* 2A:4A-60 (d)(1). (Initial Decision at 4)

Finally, the ALJ revisited the summary decision standards set forth in *N.J.A.C.* 1:1-12.5 (b). He found that respondent's brief and certifications had met its burden to show that there were no disputes of material fact, and that respondent was entitled to prevail as a matter of law. Petitioner, on the other hand, had failed to respond with any opposing certifications showing that there were, in fact, genuine issues of material fact that required determination at an evidentiary hearing. (Initial Decision at 6)

The Commissioner finds no merit in petitioner's twenty-one exceptions, most of which are duplicative of his arguments in opposition to respondent's application for summary judgment. In his exceptions 10, 11 and 12, petitioner maintains that the ALJ omitted certain findings of fact. And in exception 16, petitioner claims that the ALJ erroneously denied him access to students who might have had relevant information. Based upon these allegations, petitioner argues in his first exception that outstanding disputes of fact render summary judgment inappropriate. However, the undisputed facts in this case are sufficient to support the suspension that was imposed upon R.O. He had a four-inch knife in his possession in school for over four hours and produced it from his pocket when asked about it. Nothing in the record suggests that he was prevented from turning over the knife during the four hours. Any remaining facts, including the "newly discovered facts" referenced in petitioner's exception 13, are not material, and consequently do not serve as a bar to summary judgment. Even though the allegations of the pleadings may raise issues of fact, if the other papers show that, in fact, there is no real material issue, then summary judgment can be granted. *Judson v. People's Bank & Trust Co. of Westfield*, 17 *N.J.* 67, 75 (1954). *See, also, Brill v.*

Guardian Life Ins. Co., 142 *N.J.* 520, 530 (1995) (disputed issues that are of an insubstantial nature cannot overcome a motion for summary judgment).

Further, petitioner provided no evidential support for his allegations, such as a certification from R.O. about any fact which he deemed relevant to his position, but which was not adduced at the delinquency trial. Bare conclusions in the pleadings, without factual support in tendered affidavits, will not defeat a meritorious application for summary judgment. *United States Pipe & Foundry Co. v. American Arbitration Ass'n,* 67 *N.J. Super.* 384, 399-400 (App. Div. 1961).

Petitioner's exceptions 2, 3 and 4, in which he contends that respondent improperly utilized R.O.'s juvenile records, are also meritless. As the ALJ observed, petitioner himself submitted the juvenile records to the court. The juvenile delinquency complaint against R.O. was annexed to the petition, and it appears – from a letter by petitioner, dated September 15, 2005 – that petitioner sent the ALJ a copy of the transcript of the juvenile delinquency proceeding. If a party offers or allows evidence with full knowledge of the risks, he will be regarded as waiving, irrevocably, his right to have his evidence excluded. *Administrator of Monfort v. Rowland*, 38 *N.J. Eq.* 181 (N.J. Ch. 1884); *Berryman v. Graham*, 21 *N.J. Eq.* 370 (E.E.A. 1869); *Boone v. Ridgway Exrs.*, 29 *N.J. Eq.* 543 (N.J. Ch. 1878).

Moreover, *N.J.S.A.* 2A:4A-60 does not bar the availability of R.O.'s juvenile records in this proceeding. The Commissioner agrees with the ALJ that *N.J.S.A.* 2A:4A-60(d) allows public disclosure of information about R.O.'s delinquency proceeding. Further, the Commissioner finds that information about the delinquency proceeding was properly disclosed to respondent under *N.J.S.A.* 2A:4A-60(c) (2). Respondent was the equivalent of "the agency which filed the complaint." Respondent reported the offense to the police, and served – through Assistant Principal Gibbs-Nini – as the complaining witness. In addition, the Commissioner agrees with respondent that *N.J.S.A.*2A:4A-60 (A) (6) pertains. Respondent is an agency that has an interest in the case and

made, through counsel, a request to the court to obtain the records of R.O.'s family court proceeding, which request was granted.

The Commissioner similarly finds no merit in petitioner's argument, in his exception 5, that respondent's absence as a party in the delinquency proceeding bars the application of the doctrine of issue preclusion. R.O. was found to have knowingly possessed a dangerous knife on school premises in a prior proceeding. R.O. is seeking, in the present proceeding, to dispute his liability for the same offense. It is R.O., the party against whom the doctrine of issue preclusion is asserted, that must have been a party (or in privity with a party) in the prior proceeding. *Board of Trustees of Trucking Employees of North Jersey Welfare Fund, Inc. v. Centra*, 983 *F.*2d 495, 505 (3d Cir. 1992); *State v. Gonzalez*, 75 *N.J.* 181, 186 (1977). Respondent's lack of participation in that proceeding is irrelevant.

The Commissioner also finds that petitioner's fourteenth exception is irrelevant to the instant controversy. In that exception, petitioner invokes standards for criminal trials, which standards do not govern these administrative proceedings.

Respecting petitioner's exceptions 6, 7, 8, 9 and 15, in which petitioner disputes the ALJ's conclusions about the due process required for ten-day suspensions, and about the applicability – or lack thereof – of *N.J.A.C.* 6A:16-7.2 and 7.3, and *N.J.A.C.* 6A:16-5.5 through 5.7 to this issue, the Commissioner adopts the ALJ's determinations, for the reasons set forth in the Initial Decision and supplemented herein.

Petitioner's exception 17 is moot because respondent does not request dismissal of the petition on the basis of timeliness, and petitioner's exception 18 is rendered moot by the recent decision of the State Board of Education regarding petitioner's appeal of the denial of his request for an order compelling answers to twenty-seven interrogatories.

Finally, petitioner's exceptions 19, 20, and 21 pertain to the subject matter of a separate petition filed with the Commissioner on October 9, 2005, and will not be addressed herein.

In summary, for the reasons articulated in the Initial Decision of the OAL, and supplemented herein, respondent's motion for summary judgment is granted, and the petition is dismissed.

IT IS SO ORDERED*

Lucille E Davy

ACTING COMMISSIONER OF EDUCATION

Date of Decision: 3/17/06

Date of Mailing: 3/17/06

* The Commissioner's decision may be appealed to the State Board of Education pursuant to *N.J.S.A.* 18A:6-27 *et seq.* and *N.J.A.C.* 6A:4-1.1 *et seq.*

State of New Jersey
OFFICE OF ADMINISTRATIVE LAW

INITIAL DECISION

SUMMARY DECISION

OAL DKT. NO. EDU 2010-05

AGENCY DKT. NO. 33-2/05

R.O., ON BEHALF OF MINOR CHILD,

R.O., II,

Petitioner,

v.

BOARD OF EDUCATION OF THE WEST WINDSOR-PLAINSBORO SCHOOL DISTRICT, MERCER COUNTY,

Respondent.

R.O., petitioner, *pro se*

Eric L. Harrison, Esq., for respondent (Methfessel & Werbel, attorneys)

Record Closed: November 7, 2005 Decided: November 7, 2005

BEFORE **RICHARD F. WELLS**, ALJ:

STATEMENT OF THE CASE

Petitioner challenges a ten-day suspension imposed upon him due to his possession of a weapon on school property. Petitioner seeks a due-process hearing and a reversal or expungement of the suspension. Petitioner argues that the suspension was based upon a false premise and that no hearing was afforded him before the suspension was imposed. Additionally, petitioner argues that the respondent school district withheld the identity of witnesses and other

information necessary for a full and complete defense of the allegations lodged against him. Still further, petitioner asserts that representatives of respondent school district were guilty of intentional prevarication to his detriment. Concomitantly, petitioner asserts that the suspension imposed was a function of the respondent's discriminatory practices, evidencing selective enforcement.

Respondent had moved for summary decision under *N.J.A.C.* 1:1-12.5. Respondent argues that the gravamen of this matter has already been fully and finally adjudicated in the Superior Court of New Jersey. Therefore, respondent asserts that the doctrine of issue preclusion bars the relitigation of the possession of weapons charge. Additionally, respondent observes that petitioner has filed no appropriate response under the Uniform Administrative Procedure Rules and so the grant of summary decision is mandated.

PROCEDURAL HISTORY

The instant matter was transmitted by the New Jersey State Department of Education to the Office of Administrative Law ("OAL") where, on March 10, 2005, it was docketed as a contested case. Thereupon, this tribunal issued Orders dated June 13, 2005, August 29, 2005, September 22, 2005, September 23, 2005, September 30, 2005, October 17, 2005 and October 19, 2005.

Respondent filed its motion for summary decision on October 19, 2005 and petitioner responded in writing that same date. Thereafter, respondent filed supplemental papers in support of its motion for summary decision on November 1, 2005 and November 3, 2005. Petitioner supplemented his response by letters dated October 30, 2005, November 1, 2005, November 3, 2005, and November 6, 2005.

FINDINGS OF FACT

I **FIND** that there is no dispute over the following facts:

1. On March 3, 2004, petitioner was a seventh grade student at Community Middle School in the West Windsor Plainsboro School District.

2. Petitioner was suspended from school on March 3, 2004.

3. No formal hearing was held prior to or immediately after March 3, 2004.

4. No written explanation was given to petitioner's parents on March 3, 2004 for the suspension.

5. No incident report was given to petitioner's parents prior to the suspension or immediately after the suspension.

6. Petitioner's parent specifically requested a copy of the incident report prepared by the school.

7. Petitioner was suspended for a period of ten days for possessing a weapon on school grounds.

8. On May 10, 2004, a Juvenile Delinquency Complaint was lodged against petitioner wherein it was alleged that on March 3, 2004, petitioner possessed a weapon, namely, a knife, with the purpose to use it unlawfully against the person or property of another, in violation of *N.J.S.A.* 2C:39-4(d), 3rd degree and purposely and knowingly possessing a weapon (knife) while on the property of a school in violation of *N.J.S.A.* 2C:39-5(e)(2) – 4th degree. Said Juvenile Delinquency Complaint was filed in the Superior Court of New Jersey, Chancery Division Family Part, County of Middlesex.

9. On February 3, 2005, petitioner was adjudicated delinquent by a New Jersey Superior Court judge for knowing possession of a weapon on school grounds in violation of *N.J.S.A.* 2C:39-5(e)(2).

10. On February 3, 2005, the Superior Court found that petitioner had knowingly possessed a "dangerous knife" with a four-inch blade.

11. On February 3, 2005, the Superior Court found that petitioner claimed that he found the knife on the school bus, arrived at school on the bus at approximately 7:00 a.m. and did not turn over the knife to Assistant Principal Donna Gibbs-Nini until after he was called to her office at approximately 11:20 a.m.

CONCLUSIONS OF LAW

In the matter before this tribunal, petitioner seeks to challenge the ten-day suspension that he received for possession of a knife on school premises. Petitioner avers that the suspension should be removed from his school records. Essentially, petitioner is making this claim under *N.J.A.C.* 6:3-6.7 that provides for the ability to "expunge inaccurate, irrelevant or otherwise improper information" from the pupil's records.[1] However, the validity of the charge that petitioner possessed a dangerous weapon on school property has already been adjudicated in the New Jersey Superior Court and petitioner has been found guilty beyond a reasonable doubt. Accordingly, I **FIND** that this issue has already been adjudicated and the doctrine of issue preclusion prevents any re-litigation. Parenthetically, this tribunal is without authority to disturb, set aside, interfere with or otherwise overrule the Superior Court's finding on this score.[2]

As noted in the above Findings of Fact, petitioner's possession of a knife on school property was the subject of a prior judicial proceeding, namely, a delinquency proceeding in the Superior Court of New Jersey, Chancery Division, Family Part. Following a hearing, the Superior Court Judge determined that petitioner did knowingly possess a weapon on school grounds and adjudicated him delinquent. Thereafter, the Superior Court Judge sentenced petitioner to a probationary term.

I am satisfied that the juvenile hearing in Superior Court resulted in a final judgment on the merits, which depended entirely on the finding of fact that petitioner wrongly possessed a

[1] *N.J.A.C.* 6:3-6.7 was repealed effective September 6, 2005 and recodified under *N.J.A.C.* 6A:32-7.7. *See* 37 *N.J.R.* 1982(a).

[2] By letter dated November 6, 2005, petitioner raises a new issue for the first time in this dispute. Petitioner argues that the school district is improperly disclosing and relying on his school and juvenile records. I am not persuaded by this argument. I **FIND** petitioner has continuously referred to the Superior Court action during the pendency of this matter before this tribunal. Additionally, I **FIND** the information was properly released pursuant to *N.J.S.A.* 2A:4A-60d(1).

weapon on school property. That matter was litigated in the Superior Court resulting in a final judgment and it would be inappropriate to re-litigate in this forum.

The doctrine of issue preclusion prohibits the re-litigation of any factual or legal issue that was actually determined in an earlier proceeding. *See, e.g., New Jersey Dep't of Law & Pub. Safety v. Gonzalez*, 273 *N.J. Super.* 239, 242 (App. Div. 1994). To invoke the doctrine of issue preclusion, the issues presented within the two proceedings must be identical, and the earlier proceedings must have afforded a full and fair opportunity to the party against whom the doctrine of issue preclusion is invoked to litigate the contested issue. *See also Morton Int'l, Inv. v. Gen. Accident Ins. Co. of Am.*, 266 *N.J. Super.* 300, 321 (App. Div. 1991), *aff'd*, 134 *N.J.* 1 (1993); *Watkins v. Resorts Int'l Hotel & Casino, Inc.*, 124 *N.J.* 398, 412 (1991). The doctrine of issue preclusion is recognized in administrative proceedings. *City of Hackensack v. Winner*, 82 *N.J.* 1, 31-33 (1980). *See also* 37 *New Jersey Practice, Administrative Law and Practice*, § 6.27 at 345 (Steven L. Lefelt, Anthony Miragliotta and Patricia Prunty) (rev. 2d ed. 2000). Further, in appropriate circumstances, a judgment in regard to which an appeal is pending should be given preclusion effect. *Restatement (Second) of Judgments* § 13 comment g (1980); *O'Hara v. Bd. of Educ. of Vocational Sch. in Camden County*, 590 *F. Supp.* 696, 702 (D.C. N.J. 1984), *aff'd*, 760 *F.*2d 259 (3d Cir. 1985). For issue preclusion to apply, the following requirements must be met:

> (1) The identical issue was decided in a prior judication;
>
> (2) There was a final judgment on the merits;
>
> (3) The party against whom the bar is asserted was a party or in privity with a party to the prior adjudication; and
>
> (4) The party against whom the bar is asserted had a full and fair opportunity to litigate the issue in question.
>
> [*Board of Trustees of Trucking Employees of North Jersey Welfare Fund, Inc. v. Centra*, 983 *F.*2d 495, 505 (3d Cir. 1992).]

In the matter before this tribunal, I am satisfied that the above-listed elements are satisfied and that issue preclusion applies. There has already been a full hearing where petitioner had a full and fair opportunity to litigate the issue in question and a final judgment on the merits was rendered wherein petitioner was found to have wrongfully possessed a weapon on school

property. Accordingly, and in reliance on the Superior Court ruling, I **FIND** that petitioner's school record cannot be determined to be "inaccurate, irrelevant or otherwise improper."

As concerns petitioner's ancillary claims of selective enforcement and/or discrimination, I am constrained to conclude that the record before this tribunal fails to so much as establish even a *prima facie* case on either discrimination, selective enforcement, discriminatory enforcement, discriminatory pattern of enforcement or an improper denial of due process.[3] Although this tribunal's file is thick with submittals from petitioner's counsel, what is required to defeat respondent's motion for summary decision has not been proffered. The Uniform Administrative Procedure Rules is clear that when a motion for summary decision is made and supported, an adverse party, in order to prevail, must by responding affidavit, set forth specific facts showing that there is a genuine issue which can only be determined in an evidentiary proceeding. *N.J.A.C.* 1:1-12.5(b) goes on to state: "If the adverse party does not so respond, a summary decision, if appropriate, shall be entered." (Emphasis supplied.)[4]

In the matter before this tribunal, the motion for summary decision was adequately supported by the Transcript of Trial of February 3, 2005, as well as the Certification of Donna Gibbs-Nini, dated September 8, 2005. Petitioner's response has been limited to claims or allegations, all in the absence of adequate support in the record.

CONCLUSION

For the reasons set forth hereinabove, I am satisfied from the papers and supporting documentation submitted, that there is no genuine issue as to any material fact challenged and that the moving party, Board of Education of the West Windsor-Plainsboro School District, Mercer County, is entitled to prevail as a matter of law. Accordingly, respondent's motion for

[3] In his recent November 6, 2005 submittal, petitioner argues he was deprived a hearing and cites *N.J.A.C.* 6A:16-5.5(e) and *N.J.A.C.* 6A:16-5.6(c). The regulations for the Student Development Program were supplemented September 6, 2005 and the correct citations should be *N.J.A.C.* 6A:16-5.5(g) and *N.J.A.C.* 6A:16-5.6(g). In any event, the more relevant regulation section is *N.J.A.C.* 6A:16-7.2(a)2i and the record in this case establishes no impropriety on the part of respondent in this regard. *See also N.J.A.C.* 6A:32-7.7(b). It is noteworthy that *N.J.A.C.* 6A:32-7.7 provides for a ten-day appeal period to either the district board of education or the Commissioner of Education. Petitioner states the final decision of the school district was January 14, 2005, yet the date of petitioner's appeal is February 4, 2005.

[4] Although invited to do so by this tribunal's letter of October 26, 2005, petitioner has offered no affidavits or other suitable information on the subject of whether the duration of the suspension was appropriate for challenge during an evidentiary hearing.

summary decision is **GRANTED** and petitioner's action to expunge inaccurate, irrelevant or otherwise improper information from his records is hereby **DISMISSED**.

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

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

Within thirteen (13) days from the date on which this recommended decision was mailed to the parties, any party may file written exceptions with the **COMMISSIONER OF THE DEPARTMENT OF EDUCATION, 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.

11-7-05

DATE

RICHARD F. WELLS, ALJ

E-mail Receipt of Initial Decision Confirmed by the Department of Education on:

11-7-05

DATE

Mailed to Parties:

NOV 10 2005

DATE

OFFICE OF ADMINISTRATIVE LAW

jh

105-06

LENAPE REGIONAL HIGH SCHOOL DISTRICT BOARD OF EDUCATION, BURLINGTON COUNTY,	:	COMMISSIONER OF EDUCATION
PETITIONER,	:	DECISION
V.	:	
NEW JERSEY STATE DEPARTMENT OF EDUCATION, OFFICE OF SPECIAL EDUCATION PROGRAMS,	:	
RESPONDENT.	:	

SYNOPSIS

Petitioning Board of Education appealed the Department's finding of noncompliance as the result of a complaint investigation conducted by the Office of Special Education Programs pursuant to *N.J.A.C.* 6A:14-9.2. The parties agreed that the matter was appropriately heard as a contested case before the Commissioner.

The ALJ vacated the Department's finding of noncompliance, concluding that the Board's actions were in "substantial compliance" with applicable law and that they were reasonable under the circumstances. The ALJ did not address the question of Commissioner jurisdiction, concluding that the parties' prior agreement – together with transmittal of the matter to the Office of Administrative Law (OAL) by the agency – had resolved the issue. A motion to intervene or participate filed by the parent (A.M.) who initiated the complaint on behalf of her son – raising Commissioner jurisdiction among other issues – was denied by the ALJ, and the Commissioner declined to review the ALJ's ruling on an interlocutory basis.

The Commissioner, upon review of the entire record, expressed serious reservations about her jurisdiction to decide the merits of the matter, and remanded it to the OAL for argument, analysis and recommended conclusions of law on the threshold question of Commissioner jurisdiction. Additionally, solely for purposes of argument on jurisdiction, the Commissioner granted participant status to A.M.

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.

Mailed 3/21/06

OAL DKT. NO. EDU 8853-01
AGENCY DKT. NO. 373-9/01

LENAPE REGIONAL HIGH SCHOOL DISTRICT BOARD OF EDUCATION, BURLINGTON COUNTY,	:	COMMISSIONER OF EDUCATION
PETITIONER,	:	DECISION
V.	:	
NEW JERSEY STATE DEPARTMENT OF EDUCATION, OFFICE OF SPECIAL EDUCATION PROGRAMS,	:	
RESPONDENT.	:	

The record of this matter and the Initial Decision and prior Order of the Office of Administrative Law (OAL) have been reviewed, as have exceptions filed by the Department of Education (Department) and the Board of Education's (Board) reply thereto. "Proposed exceptions" submitted by A.M. on behalf of P.M. – filed in the event that A.M. was granted intervenor or participant status by the Commissioner subsequent to issuance of the Initial Decision, *N.J.A.C.* 1:1-14.10(j)2 – were considered to a limited extent as set forth below, as were the parties' objections to this submission and A.M.'s response.[1]

In its exceptions, the Department contends that the Administrative Law Judge (ALJ) erred in vacating the Office of Special Education Programs' (OSEP) finding of Board noncompliance, improperly relying on a "substantial compliance" standard that is supported by neither the Individuals with Disabilities Education Act (IDEA) nor the

[1] A.M. sought leave from the State Board of Education to appeal the Commissioner's December 12, 2005 denial of her request for interlocutory review of the referenced order (see Initial Decision at 1-2). In a decision dated February 1, 2006, the State Board denied the motion.

State regulations enacted pursuant thereto. The Department further contends that the ALJ effectively shifted the burden of proof in this matter, improperly requiring OSEP to justify its action rather than requiring the Board to demonstrate that such action was arbitrary, capricious or unreasonable. According to the Department, if OSEP's finding of noncompliance is viewed under the correct standard, it must be upheld because the Board clearly failed to act in accordance with specific, applicable law as well as the intent of the IDEA. (Department's Exceptions at 1-3)

In reply, the Board contends that the ALJ did not shift the burden of proof, but rather was persuaded by the Board's demonstration that OSEP's finding was arbitrary, capricious and unreasonable under the circumstances. The Board reiterates prior arguments to the effect that its actions, "when viewed in conjunction with the facts at hand and the actions of A.M.," clearly met the requirements of the IDEA and State regulation. The Board urges the Commissioner to "consider the practical effect of P.M.'s dis-enrollment, recognize [the Board's] efforts to accommodate the special needs of this student, and affirm [the ALJ's] decision vacating OSEP's findings." (Board's Reply at 1-4; quotations at 2, 4)

Upon review, the Commissioner finds that she has serious reservations regarding any attempt on her part to rule on the merits of this matter. As the fully developed record so abundantly indicates – and as the parties' exceptions confirm – the issues in this matter fundamentally arise out of the IDEA and its interpretation, notwithstanding that they also implicate Department actions and State Board regulations adopted in furtherance of the federal law. While it was not unreasonable for the ALJ to conclude that the question of Commissioner jurisdiction did not need to be addressed at

the OAL in light of the fact that the case was transmitted after the parties agreed that such jurisdiction was not an issue in dispute, the fact remains that party agreement cannot confer jurisdiction where none exists, and the act of transmittal does not in itself foreclose further inquiry where the need for it becomes apparent, as it has here.

Although the existing record in this matter contains substantial argument on the question of Commissioner jurisdiction, particularly in the context of briefing on A.M.'s motion to intervene or participate and in A.M.'s proposed exceptions, the Commissioner is loathe to decide so critical an issue without benefit of full adversarial argument and an initial analysis with recommended conclusions of the law by the OAL. Unfortunately, the ALJ's order denying such intervention or participation – together with her conclusion that jurisdiction was not at issue as noted above – effectively precluded a detailed analysis of the adversarial argument on this threshold issue within the Initial Decision.

Therefore, prior to any possible consideration of the merits of this matter, the Commissioner has determined to: 1) grant A.M.'s motion to participate, but *solely* on the question of Commissioner jurisdiction; and 2) remand this matter to the OAL so that the argument, analysis and recommendations necessary for the Commissioner to decide the threshold jurisdictional issue on the most informed basis possible may be developed with A.M.'s participation. A.M.'s participation will add constructively to the case, since she alone is presenting an adversarial perspective on the question of jurisdiction, and it will not delay or confuse the matter because the Commissioner would – even without her involvement – seek further exploration of the jurisdictional question before issuing a final ruling in this matter; moreover, as a parent of disabled child(ren), A.M. has a significant

interest in the outcome of a matter implicating the process by which such parents may seek to resolve complaints against school districts. *N.J.A.C.* 1:1-16.6(a)-(b). In light of these considerations, the Commissioner deems it appropriate for A.M. to have the opportunity to argue orally, file statement(s) or brief(s), and file exceptions to the Initial Decision on Remand. *N.J.A.C.* 1:1-16.6(c).

Accordingly, the Order of the ALJ denying A.M.'s request to intervene or participate in this matter is rejected to the extent that it does not allow A.M. to participate on the question of Commissioner jurisdiction, and the matter is hereby remanded to the OAL for the limited purpose of argument, analysis and recommended conclusions of law on the question of jurisdiction as set forth above.

IT IS SO ORDERED.*

Lucille Edley

ACTING COMMISSIONER OF EDUCATION

Date of Decision: 3/21/06

Date of Mailing: 3/21/06

* This decision may be appealed to the State Board of Education pursuant to *N.J.S.A.* 18A:6-27 *et seq.* and *N.J.A.C.* 6A:4-1.1 *et seq.*

State of New Jersey
OFFICE OF ADMINISTRATIVE LAW

INITIAL DECISION

OAL DKT. NO. EDU 8853-01

AGENCY DKT. NO. 373-9/01

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

Petitioner,

v.

NEW JERSEY STATE DEPARTMENT OF EDUCATION, OFFICE OF SPECIAL EDUCATION,

Respondent.

Arthur Risden, Esq., for petitioner (Archer & Greiner)

Carolyn Labin, Deputy Attorney General, for respondent (Peter C. Harvey, Attorney General of New Jersey, attorney)

Record Closed: December 13, 2005 Decided: December 21, 2005

BEFORE **ANA C. VISCOMI**, ALJ:

STATEMENT OF THE CASE AND PROCEDURAL HISTORY

Petitioner appeals from a finding of non-compliance concerning a student's individualized education plan (IEP). By prior Order, that student's application, through his parent, A.M. o/b/o P.M., to intervene or participate was denied. By letter of December 12, 2005,

Acting Commissioner Lucille E. Davy denied A.M.'s request for interlocutory review. The record then closed upon receipt of that decision. The parties previously consented to jurisdiction.

FACTUAL DISCUSSION

The facts are undisputed and thus constitute the **FINDINGS OF FACT.**

1. P.M. is a twenty-year old Lenape student who, at the relevant timeframe herein, was eligible to receive special education and related services.

2. During the 1998-1999 school year, P.M. was enrolled in the Medford Lakes School District. The IEP developed by his child study team (CST) in July 1999 determined placement at the Shawnee High School for the fall of 1999.

3. A.M. and R.M. filed a due process petition against Lenape on the issue of placement; A.M. et als v Lenape Regional High School District Board of Education, OAL Dkt. No. EDS 00-3028.

4. After several days of hearing, the record closed on November 17, 1999, and the Hon. Bruce Campbell, ALJ issued a Final Decision on November 18, 1999, denying petitioner's claims and ordering P.M. to begin attending Shawnee on November 22, 1999, under the IEP developed in July, 1999. Further pursuant to Judge Campbell's order, a revised IEP was created on December 15, 1999.

5. P.M. never attended Shawnee pursuant to Judge Campbell's order and the school district commenced truancy proceedings.

6. His parents withdrew him from the school district and completed a student exit form on January 14, 2000.

7. A.M. and R.M., thereafter unilaterally placed him at the Pine Ridge School in Williston, Vermont.

8. A.M. and R.M. then appealed from Judge Campbell's Final Decision to the United States District Court for the District of New Jersey. On November 28, 2000, the parties executed a Final Settlement and Release entered as a Consent Order by the Hon. Joel Rosen, USMJ.

9. That settlement provided, in pertinent part, that P.M.'s placement would be at Pine Ridge, the parties would share the cost, a re-evaluation meeting should be convened and a new IEP developed. Specifically, the agreement provided,

> 2)(u)pon request of the plaintiffs, and without being responsible for travel costs, Lenape will provide for a 1. vocational assessment, 2. pre-driving assessment, and 3. recommendations for transition services by the New Jersey United Cerebral Palsy Association. Plaintiffs will indicate request in writing to Lenape.
> ...
> 4. Between January 15, 2001, and February 15, 2001, the IEP team shall convene a re-evaluation meeting to determine the need, if any, for re-evaluations of P.M.

10. The district received a document entitled "Education Plan" on February 9, 2001, from the evaluation team from Pine Ridge, which the parties agreed to use an interim IEP. This was memorialized in a February 16, 2001, letter from Kathrina Semar, of Shawnee, to the parents. That letter also indicated that upon receipt of the parents' fax of February 6, 2001, the district requested United Cerebral Palsy of New Jersey conduct an evaluation of P.M.

11. Lenape's re-evaluations continued through June 21, 2001.

12. On April 27, 2001, P.M.'s parents caused an investigation to be conducted into whether Lenape completed the re-evaluations and whether P.M.'s IEP complied with state and federal statutes and regulations. The IEP in effect at this time was Pine Ridge's "education plan."

13. As a result of that investigation, OSEP concluded that the district completed the evaluations, but improperly utilized Pine Ridge's IEP, the "education plan," determining that it did not meet the IEP requirements of *N.J.A.C.* 6A:14-3.7.

14. An IEP was developed and submitted to OSEP on June 14, 2001, pursuant to the Corrective Action Plan.

15. By letter dated August 15, 2001, OSEP advised Lenape that this IEP complied with the Corrective Action Plan.

16. On September 20, 2001, Lenape filed this appeal seeking a decision vacating OSEP's determination of non-compliance.

LEGAL ANALYSIS

The parties concur that as the facts are not in dispute, summary decision is the appropriate means to resolve the within matter. As such, cross-motions for summary decision were filed.

Petitioner asserts that by November 28, 2000, the date by which the appeal filed by A.M. and R.M. was settled before Magistrate Judge Rosen, P.M. had not attended a district school since immediately prior to the commencement of the 1999-2000 school year and had not been enrolled in the school district since January 14, 2000. Given this extended period of time by which the district received no information regarding P.M., by the parents unilaterally enrolling him at Pine Ridge, the parties – the school district and the parents –agreed to the Pine Ridge education plan as an interim plan. The interim plan was only to remain in place until the school district could obtain the necessary current information, that it had not had access to for almost a year, before an IEP could be developed. *N.J.A.C.* 6A:14-3.7 requires a detailed review by the IEP team. In order to accomplish this, the IEP team needed the re-evaluations, to review P.M.'s progress, completed course work, and other information relating to the year that P.M. spent at Pine Ridge when he was not enrolled in Lenape. Putting together a document in a hasty fashion, or relying on the December 2000 IEP, would not have accurately addressed P.M.'s then current needs, petitioner asserts. Additionally, petitioner asserts that a comparison of the "education

plan" to the IEP that was developed, and approved by OSEP pursuant to the Corrective Action Plan, indicates it to be substantially similar. Petitioner asserts that the two plans contain the same information but it is organized differently. For example, petitioner points out that pages three through 33 of the June 2001 IEP contain P.M.'s level of educational performance at Pine Ridge in accordance with the requirements of *N.J.A.C.* 6A: 14-3.7(d). All of the information came from the strengths and weaknesses section of the Pine Ridge educational plan. In addition, the June 2001 IEP reflects on page 34 that P.M. does not have any visual or hearing impairments, does not require assistive technology, and does not need nor was provided transportation or related services. The Pine Ridge educational plan also recognized that P.M. did not require these accommodations. Further, a review of page 35 of the June 2001 IEP indicates that P.M. would be exempt from Lenape curriculum, credit hour and attendance requirements as a result of the out-of-district placement. The Pine Ridge plan addressed this by indicating the out-of-district placement and since it was developed prior to P.M.'s re-enrollment in Lenape, it would not state that P.M. was exempt from district requirements. OSEP approved the June 2001 IEP in regard to the IEP team's recommendation that P.M. not take the High School Proficiency Test. The Pine Ridge plan required P.M. take achievement tests. In addition, pages 38 through 42 of the June 2001 provide for P.M.'s English and Mathematics goals pursuant to *N.J.A.C.* 6A:14-3.7(d) (2) and this portion of the IEP was taken "word for word" from the Pine Ridge plan. In addition, verbatim copying from the Pine Ridge plan occurred in connection with the career transitioning goals which are contained on pages 43 and 44 of the June 2001 plan. Similarly the behavioral and social goals listed on page 46 of the June 2001 IEP and the instructional strategies and techniques to support P.M.'s personal and social development listed on page 48 are similar to the Pine Ridge plan. The only real difference between the two plans is the organization of the documents, petitioner contends. Based on the foregoing comparisons, petitioner asserts the education plan "substantially complied" with *N.J.A.C.* 6A:14-3.7.

Respondent asserts that a seven month passage of time from the settlement of November 28, 2000, to the June 2001 IEP does not satisfy the "without delay" requirement for the implementation of an IEP pursuant to *N.J.A.C.* 6A:14-3. In addition, although petitioner claims that OSEP did not take into consideration the circumstances in developing an appropriate IEP for P.M., IEPs are to be implemented without delay in order to ensure that children with disabilities are not deprived FAPE. Further the Pine Ridge educational plan did not include or address: a

statement of special education and related services and supplementary aids and services that were to be provided for P.M.; program modifications or supports to advance P.M.'s attaining his goals to be involved and progress in the general education curriculum; and a statement of any individual modifications in the administration of statewide or district wide assessments of student achievement needed for the student to participate in such assessment. Respondent further asserts the regulations do not envision substantial compliance.

N.J.A.C. 6A:14-3.7 sets forth the requirements for an IEP. *N.J.A.C.* 6A:14-3.7(c) provides, in pertinent part,

> when developing the IEP, the IEP team shall:
>
> 1. consider the strengths of the student and the concerns of the parents for enhancing the education of their child;
>
> 2. consider the results of the initial evaluation or most recent evaluation of the student and, as appropriate, the student's performance on any general State or district-wide assessment; ...

OSEP's Findings of Facts in connection with the complaint investigation, provided in pertinent part,

> 1. A reevaluation plan was developed via teleconference IEP meeting with the parent on February 2, 2001. The plan required the district to provide a vocational assessment, pre-driving assessment and an assistive technology assessment as per a settlement between the district and the parent on November 28, 2000.
>
> 2. P.M. resides in an out-of-state placement. As per the parent's request, the United Cerebral Palsy Association of New Jersey completed the evaluation while P.M. was at his New Jersey home from April 24-30, 2001.
>
> 3. The district received two evaluation reports in mid-May 2001 and the third report was provided to the district on June 5, 2001. An IEP meeting is scheduled or June 14, 2001.

As a result, OSEP determined "the district completed the evaluations required by the re-evaluation plan." Therefore, the district was determined to be compliant.

Based on the foregoing, I **FIND AND CONCLUDE** that the petitioner, under the circumstances as presented, acted reasonably in utilizing the Pine Ridge "educational plan" until the IEP that conformed with the federal and state regulations could be developed. While clearly the Pine Ridge "educational plan" lacked discussion of related services and statewide assessments, it otherwise complied with federal and state regulations and thus I **FIND** substantial compliance under the circumstances. Although the settlement was reached before Magistrate Judge Rosen on November 28, 2000, the settlement specifically provided that "upon the request of the plaintiffs (the parents)," Lenape will provide for the assessments. As is evident from OSEP's findings noted above, the parents did not permit those assessments to proceed until P.M. came home to New Jersey in April 2001. Those assessments were completed between April 24 and April 30 by United Cerebral Palsy of New Jersey. Under the circumstances, I **FIND** that the district acted appropriately in allowing the Pine Ridge educational plan, which substantially complied with the requirements of an IEP pursuant to *N.J.A.C.* 6A:14-3.7, to be used as an interim plan. P.M. had not been enrolled in the district for almost one year and had not attended the in-district placement even longer. The district appropriately did not rely on the last IEP it had prepared for P.M., as it was outdated. The sole function of the Pine Ridge educational plan was for it to be an interim IEP. The alternative would have been for the district and other members of the IEP team to work on draft IEPs while awaiting the results of the assessments. This would not have been practical would not have served to benefit P.M. in any measurable manner and the IEP team would have needed to reconvene upon the availability of the assessments. While seven months ordinarily would not satisfy the "without delay" component of implementing an IEP as contemplated by *N.J.A.C.* 6A:14-3, under the circumstances presented in this case, I **FIND** it was appropriate for the district to rely on the "educational plan" as it substantially complied with the regulatory requirements of an IEP.

DECISION AND ORDER

Petitioner's motion for summary decision is hereby **GRANTED** and the finding of non-compliance is hereby **VACATED.** Respondent's cross-motion is hereby **DENIED.**

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

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

Within thirteen (13) days from the date on which this recommended decision was mailed to the parties, any party may file written exceptions with the **COMMISSIONER OF THE DEPARTMENT OF EDUCATION, 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.

12-21-05

DATE

ANA C. VISCOMI, ALJ

E-mail Receipt of Initial Decision Confirmed by the Department of Education on:

12-21-05

DATE

Mailed to Parties:

DEC 29 2005

DATE

OFFICE OF ADMINISTRATIVE LAW

tp/lam

107-06

#107-06S

RECORD SEALED

BOARD OF EDUCATION OF THE TOWNSHIP OF NEPTUNE, MONMOUTH COUNTY,	:	
PETITIONER,	:	
V.	:	COMMISSIONER OF EDUCATION
NEW JERSEY STATE DEPARTMENT OF EDUCATION, DIVISION OF FINANCE,	:	DECISION
RESPONDENT.	:	

SYNOPSIS

Petitioning Board of Education challenged the Department of Education's determination that the school district was responsible for educational costs involved in the placement of Z.S. in the KidsPeace Program following an adjudication of juvenile delinquency in a family court proceeding. Z.S. was enrolled as a regular education student in petitioning Board's high school in September 2004, prior to the Superior Court Judge's Order for placement of Z.S. at KidsPeace in December 2004 as part of his probationary sentence. Cross motions for summary decision were filed by the parties.

The ALJ found that: the Commissioner is without jurisdiction to review the legal propriety of a Superior Court judge's order, and that her role in these proceedings is limited to carrying out the legislative determination as to what responsibility the district of residence should have in funding the educational costs for Z.S.'s placement, pursuant to N.J.S.A. 18A:7B-12(b); Z.S. and his parents are residents of Neptune; the determination that the Board is responsible for the educational costs associated with Z.S.'s education at KidsPeace is legally correct and unassailable. Accordingly, the ALJ granted the Department's motion for summary decision, denied Neptune's cross-motion, and dismissed the petition.

The Commissioner concurs that she does not have jurisdiction to review or change the order of the family court judge, and that because Neptune is the district of residence for Z.S, the district is responsible for his educational placement costs at KidsPeace. The Commissioner adopted the Initial Decision of the OAL as the final decision in this matter.

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.

OAL DKT. NO. EDU 06211-05S
AGENCY DKT. NO. 152-6/05

RECORD SEALED

BOARD OF EDUCATION OF THE TOWNSHIP OF NEPTUNE, MONMOUTH COUNTY,	:	
PETITIONER,	:	
V.	:	COMMISSIONER OF EDUCATION
NEW JERSEY STATE DEPARTMENT OF EDUCATION, DIVISION OF FINANCE,	:	DECISION
RESPONDENT.	:	

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

Upon an independent review of the record, the Commissioner finds that summary decision is appropriately granted to the Department as she concurs with the Administrative Law Judge's determination that the Commissioner of Education does not have jurisdiction to review or change the Order of Disposition issued by Family Court judge, the Honorable Thomas F. Scully, J.S.C., ordering the Department of Human Services, Division of Youth and Family Services, to place Z.S. at KidsPeace.

Accordingly, the Initial Decision of the OAL – concluding that because Neptune is the district of residence for Z.S., it is responsible for the educational costs of his placement in the KidsPeace Program – is adopted as the final decision in this matter.

IT IS SO ORDERED.*

Lucille E Davy

ACTING COMMISSIONER OF EDUCATION

Date of Decision: 3/23/06
Date of Mailing: 3/23/06

* This decision may be appealed to the State Board of Education pursuant to *N.J.S.A.* 18A:6-27 *et seq.* and *N.J.A.C.* 6A:4-1.1 *et seq.*

State of New Jersey
OFFICE OF ADMINISTRATIVE LAW

INITIAL DECISION
OAL DKT. NO. EDU 06211-05S
AGENCY DKT. NO. 152-6/05

RECORD SEALED (Not the Initial Decision)

THE BOARD OF EDUCATION OF THE TOWNSHIP OF NEPTUNE, IN THE COUNTY OF MONMOUTH,
Petitioner,
v.
NEW JERSEY STATE DEPARTMENT OF EDUCATION,
Respondent.

James T. Hundley, Esq., for petitioner (Hundley & Parry, attorneys)

Carolyn Grace Labin, Deputy Attorney General, for respondent (Zulima V. Farber, Attorney General of New Jersey, attorney)

Record Closed: January 17, 2006 Decided: February 8, 2006

BEFORE **JEFF S. MASIN,** ALJ:

The petitioner Board of Education of Neptune ("BOE" or "Neptune") filed a Petition of Appeal with the Department of Education ("DOE"), challenging a determination of DOE that the school district was responsible for the educational costs involved in the educational placement of Z.S. in the KidsPeace Program. The petitioner alleges that the cost of the educational component of this program is $95,040. The petitioner's challenge was filed against both the DOE's Division of Finance and the Department of Human Services' Division of Youth and Family Services ("DYFS"). The Commissioner of Education ("Commissioner") transferred the matter to the Office of

Administrative Law as a contested case, pursuant to N.J.S.A. 52:14B-1 to -15 and N.J.S.A. 52:14F-1 to -13. On September 27, 2005, I issued an Interlocutory Order dismissing DYFS as a party to the case. On December 12, 2005, the DOE moved for summary decision, pursuant to N.J.A.C. 1:1-12.5. Neptune replied on January 17, 2006, filing a cross-motion for summary decision. The parties agree that the facts of the matter are not in dispute and that summary decision is appropriate for one or the other party. Based upon the submissions of the parties and the applicable law, I **CONCLUDE** that the DOE's motion for summary decision is **GRANTED** and Neptune's motion is **DENIED**.

This matter arose during the 2003-04 school year when Honorable Thomas Scully, J.S.C., sitting in the Family Part of the Superior Court, Monmouth County, adjudged Z.S. to be a delinquent. On July 30, 2004, Judge Scully entered an Order of Disposition in the juvenile delinquency proceeding then pending before him. The juvenile was placed on three years probation, conditioned upon his immediate admission to the Woodbridge Child Diagnostic and treatment Center and completion of any program recommended by the Central Regional Assessment Program. The judge acted pursuant to N.J.S.A. 2A:4A-43-(b)(5), which provides, among other possible dispositions for juveniles adjudged delinquent,

> 5) Place the juvenile under the care and responsibility of the Department of Human Services so that the commissioner may designate a division or organizational unit in the department pursuant to P.L.1951, c.138 (C.30:4C-1 et seq.) for the purpose of providing services in or out of the home. Within 14 days, unless for good cause shown, but not later than 30 days, the Department of Human Services shall submit to the court a service plan, which shall be presumed valid, detailing the specifics of any disposition order. The plan shall be developed within the limits of fiscal and other resources available to the department. If the court determines that the service plan is inappropriate, given existing resources, the department may request a hearing on that determination;

Z.S. was enrolled as a regular education student in the Neptune BOE's high school in September 2004. In December 2004, the Central Regional Assessment

Program recommended that Z.S. attend an 18-month program at KidsPeace National Center, a facility located in Pennsylvania. This attendance was to be a part of the juvenile's probation. On December 21, 2004, Judge Scully entered an Amended Order of Disposition, ordering that the juvenile be placed in the "care, custody and supervision of DYFS for placement in Kid's Peace. . . ." As part of this Order, he directed that DYFS pay the educational costs of Z.S.'s placement in the KidsPeace Program. However, on January 7, 2005, the judge issued a second Amended Order of Disposition. This also ordered that Z.S. be placed in the "care custody and supervision of DYFS for placement in KidsPeace-Reside w/grandparents until Place./ . . .," but omitted any direction to DYFS to pay the costs of the educational component and instead ordered "DYFS to complete certification letter for school Dist. Determination (Dept. of Education)." On January 10, 2005, the student was withdrawn from the Neptune School District and placed in KidsPeace. On January 26, 2005, the DOE issued a residency determination finding that the BOE was responsible for the educational costs of Z.S.'s placement at KidsPeace. The BOE appealed this determination and on March 15, 2005, the DOE again determined that the BOE was responsible for the costs. The petition for a hearing followed that second determination.

DOE determined the residency issue pursuant to N.J.S.A. 18A:7B-12 (b). This statute provides that the "district of residence for children who are in residential State facilities, or who have been placed by State agencies in group homes, skill development homes, private schools or out-of-State facilities, shall be the present district of residence of the parent or guardian with whom the child lived prior to his most recent admission to a State facility or most recent placement by a State agency. If this cannot be determined, the district of residence shall be the district in which the child resided prior to such admission or placement." The Board does not deny that Z.S. was a resident of Neptune. However, it contends that the Commissioner has the jurisdiction to review the placement of Z.S. in KidsPeace; contends that the placement was a "private" placement and therefore not one made by a State agency as required by the statute, and that even if the determination is correct that the district would ordinarily bear the costs for the child's education, it should not be held liable for such due to the manner in which the placement was effectuated. It does not appear that either DYFS

or Judge Scully communicated with the Board prior to the determination that Z.S. be placed at KidsPeace.

The DOE argues that the placement in this case was effectuated by an order of the Superior Court which placed the child in DYFS' custody and ordered that DYFS effectuate the placement at KidsPeace pursuant to the recommendation of the Central Regional Assessment Program. The Commissioner is without jurisdiction to review the legal propriety of a Superior Court judge's order; such reviews are reserved for the Appellate Division. As there is no dispute that the application of the statute to the facts relevant to Z.S. leads to the inevitable conclusion that he and his parents are residents of Neptune, the determination that the Board is responsible for the educational costs associated with the child's education at KidsPeace is legally correct and unassailable in this proceeding.

In support of its claim that the Commissioner has jurisdiction to review a determination by DYFS to place a child in a particular educational setting, the Board relies upon Board of Education of the Borough of Prospect Park, Passaic County v. New Jersey Dep't of Educ., Div. Of Finance, Dep't of Human Services, Div. Of Youth and Family Servs., OAL DKT. No. EDU 1512-96 (EDU 3045-94 on remand) 97 N.J.A.R.2d 134 (Dept. of Education), That action involved a challenge by a local board of education to a decision that the Board was responsible for the educational costs of a private school placement effectuated by DYFS for a special education student. The Commissioner determined that although Prospect Park was indeed the district of residence, nevertheless he would not order that it pay the costs of the placement. The reason for this was the failure of DYFS to comply with a requirement under former N.J.A.C. 6:28-7.4(b) that it first consult with the chief school administrator of the district of residence before a placement was determined. However, unlike the present matter, in Prospect Park DYFS did not act as the result of an order issued by a court; indeed, there was no involvement by Family Court. As such, the facts and legal context of that case do not make it a precedent for the present matter, except that it might be argued that here too the Commissioner could determine that even though Neptune is the district of residence under the statute, nevertheless the Commissioner could refrain from imposing the cost of the placement upon the district. It is unclear what would be

the result of such a determination and whether, in such case, DYFS might have some responsibility. Nevertheless, as the placement here was directed to occur by the Family Court judge, the Commissioner cannot undertake to review the propriety of that placement, which was part and parcel of a probationary sentence. And as there is no question that the district of residence here is Neptune, the sole basis for Neptune avoiding the fiscal responsibility would be if the Commissioner declined to impose the costs on Neptune, as he did in Prospect Park. But there, DYFS had failed to follow mandated procedures and it had acted in making the placement on its own, without the imprimateur, indeed without the legal force and authority upon it, that a Superior Court order constitutes. If DYFS did not properly assess the child's educational needs in this case, and the recommendation of the Central Regional Assessment Program was legally or factually incorrect, the place to challenge that determination was in the Family Court. Once Judge Scully ruled, his order constituted the governing authority. The Commissioner cannot now attempt to interfere in the legal proceedings and the results from them.

Petitioner argues that if it cannot pursue a challenge to the funding responsibility here it has no forum to challenge the financial impact that DYFS' recommendation and Judge Scully's order impose upon it. Whether the local school board has, or should have, a right to express its views before the Family Court acts in matters such as were before Judge Scully, is a matter for the courts and the legislature to consider. What provisions should be incorporated in statute or Court Rule to assure that a local school district can have some input in what will quite possibly have a major financial impact upon it must be decided by others than the Commissioner of Education, who has no power over either the Legislature or the Courts. Perhaps the Board could have moved to intervene in the Family Court for the limited purpose of commenting upon the placement issue. Perhaps there are issues of what notice of those proceedings the local board should receive so that it could pursue intervention. But, these are not matters for the Commissioner. His role here is simply to carry out the legislative determination as to what the role of the district of residence should be in funding the educational costs. While in Prospect Park the matter only involved action by DYFS, an Executive Branch agency, and the Commissioner could consider the fault of that agency in carrying out its mandated actions without stepping on the toes of another

equal branch of government, in the present case that situation does not exist. If the Commissioner is to review the actions of DYFS, or the propriety of the decision and order for DYFS to place Z.S. at KidsPeace, the Commissioner must inevitably infringe on the authority of the Judiciary. He cannot do so. As Neptune is indubitably the district of residence, it must bear the costs of the placement.

There are no material facts in dispute and pursuant to Robin Brill v. The Guardian Life Insurance Company of America, et al., 142 N.J. 520 (1995), summary decision in favor of the DOE is proper. The DOE's motion for summary decision is **GRANTED**. The cross-motion for summary decision filed by Neptune is **DENIED** and its challenge to the funding determination is **DISMISSED**.

Pursuant to N.J.A.C. 1:1-14.1, it is **ORDERED** that all evidence, stenographic notes or audiotapes in this case are hereby **SEALED**. No one including the parties and attorneys shall disclose or permit access to the record or any portion thereof, the evidence or any information contained within the evidence, to any person or entity other than the parties, attorneys for the parties, and personnel employed by the Office of Administrative Law or the Department Education involved in the administrative review of this matter.

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

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

Within thirteen (13) days from the date on which this recommended decision was mailed to the parties, any party may file written exceptions with the **COMMISSIONER OF THE DEPARTMENT OF EDUCATION, 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, 2006
DATE

JEFF S. MASIN, ALJ

E-mail Receipt of Initial Decision Confirmed by the Department of Education on:

February 8, 2006
DATE

Mailed to Parties:

FEB 14 2006
DATE

OFFICE OF ADMINISTRATIVE LAW

EXHIBIT LIST

FOR THE PETITIONER:

Petition of Appeal; 9/27/05 OAL Interlocutory Order; Decision of Acting Commissioner dated 10/18/05; Superior Court Juvenile Order of Disposition dated 7/30/04; Amended Order of Disposition dated 12/21/04; Amended Order of Disposition dated 1/7/05; DOE District of Residence Determination dated 1/26/05; DOE letter dated 3/15/05 upholding District of Residence Determination

FOR THE RESPONDENT:

Exhibit A Letter from Director Thomas to Dr. Michael Lake dated 1/26/05

Exhibit B Letter from Richard Rosenberg to James Hundley dated 3/15/05

108-06

OAL DKT. NO. EDU 8214-05
AGENCY DKT. NO. 232-9/05

T.M., on behalf of minor child, A-T.K.,	:	
PETITIONER,	:	
V.	:	COMMISSIONER OF EDUCATION
BOARD OF EDUCATION OF THE BOROUGH OF PINE HILL, CAMDEN COUNTY,	:	DECISION
RESPONDENT.	:	

The record of this matter and advisement of the failure to appear of both petitioner and counsel for respondent, transmitted to the Commissioner by the Office of Administrative Law (OAL) pursuant to *N.J.A.C.* 1:1-14.4 – along with copies of notifications sent to the parties by OAL on February 24, 2006, providing them thirteen (13) days to submit an explanation for such nonappearance – have been reviewed. There being no explanation filed by either party, this matter is no longer deemed to be a contested matter before the Commissioner and is hereby dismissed with prejudice.

IT IS SO ORDERED.*

Lucille E Davy

ACTING COMMISSIONER OF EDUCATION

Date of Decision: 3/22/06

Date of Mailing: 3/23/06

* This decision may be appealed to the State Board of Education pursuant to *N.J.S.A.* 18A:6-27 *et seq.* and *N.J.A.C.* 6A:4-1.1 *et seq.*

123-06

OAL DKT. NO. EDU 13061-05
AGENCY DKT. NO. 305-11/05

U.M. on behalf of minor child N.W.,	:	
PETITIONER,	:	
V.	:	COMMISSIONER OF EDUCATION
BOARD OF EDUCATION OF THE TOWNSHIP OF NUTLEY, ESSEX COUNTY,	:	DECISION
RESPONDENT.	:	

This matter was returned to the Commissioner by the Office of Administrative Law (OAL) on March 15, 2006 for consideration of petitioners' withdrawal of the petition.

Upon review, the Commissioner notes that, notwithstanding petitioner's letter to the OAL indicating that the petition was being withdrawn because "[t]he school district was provided with the appropriate information and documentation and my son was effectively registered for the school year," respondent's answer in this residency matter contains an unresolved request for tuition for the period that the student attended school while he was allegedly ineligible. Consequently, this matter must be remanded to the OAL for disposition of the counterclaim.

IT IS SO ORDERED.* Lucille E Davy

ACTING COMMISSIONER OF EDUCATION

Date of Decision: 4/5/06

Date of Mailing: 4/5/06

* This decision may be appealed to the State Board of Education pursuant to *N.J.S.A.* 18A:6-27 *et seq.* and *N.J.A.C.* 6A:4-1.1 *et seq.*

104-07

OAL DKT. NO. EDU 11589-06
AGENCY DKT. NO. 429-11/06

~~N.B., on~~ behalf of minor child, S.P.,	:	
PETITIONER,	:	
V.	:	COMMISSIONER OF EDUCATION
BOARD OF EDUCATION OF THE TOWNSHIP OF UNION, UNION COUNTY,	:	DECISION
RESPONDENT.	:	

The record of this matter and the Initial Decision of the Office of Administrative Law (OAL) have been reviewed.

Upon review, the Commissioner concurs with the Administrative Law Judge that, in light of the parties' mutual withdrawal of their respective claims, this matter is appropriately dismissed.

Accordingly, the Initial Decision of the OAL is adopted for the reasons expressed therein, and the matter is dismissed.

IT IS SO ORDERED.

COMMISSIONER OF EDUCATION

Date of Decision: 3/20/07
Date of Mailing: 3/20/07

State of New Jersey
OFFICE OF ADMINISTRATIVE LAW

INITIAL DECISION
DISMISSAL
OAL DKT. NO. EDU 11589-06
AGENCY DKT. NO. 429-11/06

N.B. o/b/o MINOR CHILD, S. P..,
Petitioner,
v.
BOARD OF EDUCATION OF THE TOWNSHIP OF UNION, UNION COUNTY,
Respondent.

N.B., pro se

John P. Harrington, Esq., for respondent
(Apruzzese, McDermott, Mastro & Murphy, attorneys)

Record Closed: February 21, 2007 Decided: March 2, 2007

BEFORE: **IRENE JONES**, ALJ

STATEMENT OF THE CASE AND PROCEDURAL HISTORY

Petitioner, N.B., filed a Pro Se Residency appeal with the Commissioner of Education on November 16, 2006. In her appeal, petitioner challenged the decision of the respondent, Union Township Board of Education, Union County that disenrolled S.P., a student in the District's Burnett Middle School. The District alleges that the petitioner is not the legal guardian or the custodial parent of S.P., thus S.P. is not domiciled in Union Township.

On December 6, 2006, the Commissioner transmitted the matter to the Office of Administrative Law for hearing as a contested case. The matter was calendared for hearing on March 1, 2007.

Prior to the hearing, petitioner notified the OAL that she was no longer interested in pursuing the appeal. On February 22, 2007, the District advised that based on the petitioner's withdrawal of the appeal, it would withdraw its counterclaim and consent to a dismissal of this matter.

FINDINGS

Having reviewed the record in this matter, I **FIND** that the parties are no longer interested in pursuing this matter. I **FIND** that the matter is no longer a contested case and thus matter should 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.

3/2/07
DATE

Irene Jones
IRENE JONES, ALJ

E-mail Receipt of Initial Decision Confirmed by the Department of Education on: 3/2/07

Mailed to Parties:
Laura Sanders
DIRECTOR AND
CHIEF ADMINISTRATIVE LAW JUDGE

MAR 6 2007
DATE

OFFICE OF ADMINISTRATIVE LAW

sej

110-06

C.G. and R.G., on behalf of minor child, R.M.G., :

PETITIONER, :

V. : COMMISSIONER OF EDUCATION

BOARD OF EDUCATION OF THE TOWNSHIP OF BRICK, OCEAN COUNTY, : DECISION

RESPONDENT. :

SYNOPSIS

C.G. and R.G. filed a petition in March 2005 seeking reconsideration of their son's grade of 84 in his second quarter 9th grade Honors English class (2003-2004 school year), and amended their petition in May 2005 to include reconsideration of R.M.G.'s grade of 86 in his third quarter 10th grade AP History class (2004-2005 school year). Respondent Board made a motion to dismiss for violation of the 90-day requirement provided in *N.J.A.C.* 6A:3-1.3(i).

The ALJ found that: the petition was filed far beyond the 90-day limitation period in regard to the claim involving the 2003-2004 school year; petitioners' explanation for the delay in filing does not justify a relaxation or tolling of the regulation; and petitioners were unable to meet their burden in proving that R.M.G.'s third quarter AP History grade in the 2004-2005 school year was assigned in an arbitrary, capricious or unreasonable manner. Accordingly, the ALJ ordered that the petition be dismissed.

Upon a thorough and independent review of the record, the Commissioner concurs with the determinations of the ALJ, and adopts the Initial Decision as the final decision in this matter.

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.

March 24, 2006

OAL DKT. NO. EDU 2375-05
AGENCY DKT. NO. 66-3/05

C.G. AND R.G., ON BEHALF OF MINOR CHILD, R.M.G.,	:	
PETITIONERS,	:	COMMISSIONER OF EDUCATION
V.	:	DECISION
BOARD OF EDUCATION OF THE TOWNSHIP OF BRICK, OCEAN COUNTY,	:	
RESPONDENT.	:	

The record of this matter and the Initial Decision of the Office of Administrative Law (OAL) have been reviewed, as have exceptions filed by petitioners pursuant to *N.J.A.C.* 1:1-18.4. A reply to petitioners' exceptions was untimely filed by the Board of Education (Board)[1] and is not considered herein.

In their exceptions, petitioners contend that the Administrative Law Judge (ALJ) erred in finding that relaxation of the 90-day rule was not warranted in their case. Petitioners argue that they first contacted the Department of Education well within 90 days of the action from which they appeal, but were "sent away" and told to contact the County Superintendent. They further claim that throughout numerous subsequent communications, they were led to believe that they should seek relief informally and were at no time told about any time limitation for filing a formal petition. Petitioners reiterate the personal circumstances behind their delay in filing subsequent to September 9, 2004, contending that they never slept on their rights because

[1] The reply, in response to exceptions filed on February 27, 2006, was incorporated into the Board's response (filed March 17, 2006) to the Department's advisement of the Commissioner's intent to take official notice of a document submitted with petitioners' exceptions. See note 4 below.

even during that time they continued to contact State representatives, legal advisors and the press in an effort to help their son. (Petitioners' Exceptions at 1-2)

Petitioners also except to the ALJ's finding that their son's sophomore AP History grade was properly determined and should be upheld. They reiterate their objection to class participation – and consequently class attendance – being a determining factor in such grading, contending that: such reliance is inherently unfair to students who are legitimately absent; the district has no consistent policy on this issue; and other students have been treated differently than their son. (Petitioners' Exceptions at 3-5)[2]

Upon careful and independent review, the Commissioner has determined to adopt the findings and conclusions of the ALJ. Even if petitioners are accorded every inference and the County Superintendent's September 9, 2004 letter is deemed the triggering event for calculating the 90-day filing period, petitioners filed their appeal well beyond the allotted time frame and the personal reasons they advance for this delay do not suffice to warrant relaxation of the rule pursuant to *N.J.A.C.* 6A:3-1.16 – particularly when weighed against the rule's salutary purpose of discouraging dilatoriness and providing a measure of repose in the conduct of school affairs.[3] *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 Township Bd. Of Educ.*, 131 *N.J.* 572, 588 (1993). See also *Carol Unangst v. Board of Education of the Township of Fredon, Sussex County*, decided by the Commissioner May 1, 2003 (a showing of emotional

[2] Petitioners also reiterated their arguments on the merits of their claim regarding R.G.'s English grade; however, given the decision, infra, with respect to the timeliness of this claim, the Commissioner does not summarize that portion of petitioners' exceptions herein.

[3] Contrary to the suggestion of the ALJ that this matter should not have been transmitted to the OAL because petitioners' claim was untimely on its face (Initial Decision at 4), petitioners were entitled – given the representations made in their petition – to present facts and argument as to why relaxation was warranted under the circumstances or why the 90-day rule did not apply.

stress alone, without the showing of circumstances amounting to genuine incapacity, is not enough to toll the time limit for appeal) and *W.V. & L.V., on behalf of minor children C.V. & C.H.V. v. Board of Education of the Township of Montville, Morris County*, decided by the Commissioner February 21, 2006, citing *M.N. and E.Y. on behalf of minor child K.N. v. State-Operated School District of the City of Jersey City, Hudson County, et al.,* decided by the Commissioner July 21, 2004 (attempts to resolve a claim through negotiation do not negate the fact of receipt of adequate notice, nor do they toll the running of the time limits for filing a petition of appeal).

Moreover, petitioners cannot excuse their failure to abide by the 90-day rule by claiming that no one they contacted within the Department specifically told them about a time limitation. Initially, this argument overlooks the general presumption that appellants are charged with knowledge of the law and are not excused from its requirements by claims of ignorance. *Matter of Kovalsky*, 195 *N.J. Super.* 91, 98 (App. Div. 1984). Additionally, it is clear from C.G.'s email to the Department,[4] to which Exhibit R-6 is in response, that C.G. was aware of the existence of rules for the filing of an appeal to the Commissioner at least as early as June 8, 2004.[5] Finally, this matter does not present a circumstance where a *pro se* petitioner sent a letter to the Department specifically seeking to appeal a local board decision but suffered a delay in receiving information on how to file properly, *cf., J.M. and D.M., on behalf of minor*

[4] This document was submitted by petitioners with their exceptions in violation of *N.J.A.C.* 1:1-18.4; however, because it is a public record pursuant to the Open Public Records Act, *N.J.S.A.* 47:1A-1 et seq., the Commissioner took official notice of it as necessary for proper assessment of the Department's response within the context of the issues raised in the case. Upon opportunity for party objection pursuant to *N.J.A.C.* 1:1-15.2(c), neither petitioners nor the Board objected to such notice being taken.

[5] In their comments in response to the advisement of intention to take official notice referenced in Note 4 above, the Board offered a new document as evidence that petitioner C.G. had knowledge of the process for filing a Petition of Appeal at an even earlier date; petitioners objected to this document, contending that it was submitted in violation of N.J.A.C. 1:1-18.4 and that the Board was attempting to attack C.G.'s character by portraying her as "manipulative." Because the proffered document is unnecessary to reach a decision in this matter, the Commissioner declines to take notice of it.

child, J.L.M., v. Board of Education of the City of Summit, Union County, decided by the State Board of Education November 3, 1999; to the contrary, in this instance, both petitioners' communications and their actions consistently reflect a desire to have their issues addressed through alternative means notwithstanding their awareness of the administrative hearing process.[6]

With respect to R.G.'s history grade, the Commissioner finds that petitioners' have offered nothing that would enable her to disturb the fact-finding or credibility assessments of the ALJ. *N.J.S.A.* 52:14B-10(c); *In re Morrison*, 216 *N.J. Super.* 143, 158 (App. Div. 1987). Consequently, the Commissioner must concur with the ALJ's conclusion that the manner in which R.G.'s grade was awarded was within the lawful discretion of the board and was not arbitrary, unreasonable or otherwise improper.[7]

Accordingly, for the reasons expressed therein, the Initial Decision of the OAL is adopted as the final decision in this matter, and the Petition of Appeal is dismissed.

IT IS SO ORDERED.[8]

Lucille E Davy

ACTING COMMISSIONER OF EDUCATION

Date of Decision: March 24, 2006

Date of Mailing: March 24, 2006

---

[6] In this regard, the Commissioner notes that petitioners were not "sent away" by the Department, but were provided with an alternative means of addressing their concerns in light of C.G.'s stated reluctance to file a Petition of Appeal. (Exhibit R-6, expanded version; see note 4 above)

[7] In their exceptions on this issue, petitioners reference the Board's recent denial of their "504" and "IEP" requests and contend that their son is effectively being penalized for his medical condition (Petitioners' Exceptions at 4). Such claims, however, are beyond the scope of a contested case before the Commissioner, whose jurisdiction does not extend to requests for accommodation or special education programming based on medical needs. (Indeed, petitioners were advised at the time they filed their petition that their claim in this forum would not extend to such matters, which fell within the purview of the Office of Special Education Programs to which petitioners were directed for assistance. See Acknowledgement Notice dated March 9, 2005.)

[8] This decision may be appealed to the State Board of Education pursuant to *N.J.S.A.* 18A:6-27 *et seq.* and *N.J.A.C.* 6A:4-1.1 *et seq.*

State of New Jersey
OFFICE OF ADMINISTRATIVE LAW

INITIAL DECISION
OAL DKT. NO. EDU 2375-05
AGENCY DKT. NO. 66-3/05

C.G. and R.G., on behalf of minor child, R.M.G.,
Petitioner,
v.
BOARD OF EDUCATION OF THE TOWNSHIP OF BRICK, OCEAN COUNTY,
Respondent.

C.G. and R.G., on behalf of minor child, **R.M.G.**, pro se

Jean L. Cipriani, Esq., for respondent (Gilmore & Monahan, attorneys)

Record Closed: January 17, 2006 Decided: February 7, 2006

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

STATEMENT OF THE CASE AND PROCEDURAL HISTORY

Petitioners, C.G. and R.G., parents of R.M.G., filed a petition of appeal on his behalf on March 4, 2005. Respondent, the Brick Township Board of Education, filed an answer, which was received by the Bureau of Controversies and Disputes on March 30, 2005. Petitioners filed an amended pleading on May 17, 2005.

Petitioners' pleadings were not clear in setting forth the relief requested. At the hearing, Petitioners clarified the relief sought as pertaining to the following three issues:

1. Whether R.M.G.'s 9th grade, 2nd semester, Honors English class teacher, Sharon Curran's grading system regarding participation was fairly applied to R.M.G. in light of his numerous excused absences.

2. Whether R.M.G.'s 9th grade, 2nd semester, Honors English class teacher, Sharon Curran, acted appropriately in giving R.M.G. a 0 for a quiz that was not taken by R.M.G.

3. Whether R.M.G.'s 10th grade, 3rd semester, AP History class teacher, John Mastandrea's grading system regarding participation was fairly applied to R.M.G. in light of his numerous excused absences.

The first two issues are part of Petitioners' initial pleading and the third issue was part of their amended pleading. Hearings were held on January 12 and 17, 2006. On various dates prior to the hearing, the parties engaged in settlement discussions, some with another ALJ, in an attempt to have this matter amicably resolved.

On the date of the first hearing, counsel for Respondent made a motion to have the petition dismissed for violating the 90-day requirement provided in N.J.A.C. 6A:3-1.3(i). Since the motion was made on the date of the hearing, I advised the parties that it would be addressed in the Initial Decision, after I had an opportunity to review the regulations.

ANALYSIS

1. Motion to Dismiss Pursuant to N.J.A.C. 6A:3-1.3(i).

Respondent contends that the petition should be dismissed because it was filed beyond the 90-day timeline provided in N.J.A.C. 6A:3-1.3(i). The rule, in relevant part, provides as follows:

> The petitioner shall file a petition no later than the 90th day from the date of receipt of the notice of a final order, ruling or other action by the

district board of education, individual party, or agency, which is the subject of the requested contested case hearing.

As noted above, Petitioners' initial petition was filed on March 4, 2005. This petition concerned the first two issues cited above. Those two issues arise from R.M.G.'s 2nd quarter, 9th grade, Honors English class. R.M.G.'s 9th grade year was during the 2003-2004 school-year. The 2nd quarter ended in early February 2004, and R.M.G.'s grades were provided shortly thereafter.

R.M.G. and Petitioners had concerns that R.M.G.'s grade for the 2nd quarter class was made in error and inappropriate in light of his excused absences. R.M.G. received a grade of 84. Petitioners feel the grade should have been in the A range. R.M.G.'s final grade for the year in Honors English was a 92.

Petitioners and Ms. Curran, the teacher, exchanged letters thereafter regarding the grade for the marking period. Ms. Curran provided ample explanation regarding the grade that R.M.G. received. Ms. Curran did not change R.M.G.'s grade.

On April 29, 2004, the Superintendent of Schools, Thomas Seidenberger, Ed.D., wrote a letter to Petitioners upholding Ms. Curran's determination that R.M.G.'s grade should not be changed. Seidenberger explained that Curran acted appropriately. He also explained to Petitioners that R.M.G. could have raised his grade by doing extra credit to make up for the excused absences. Also, Seidenberger explained that Curran acted appropriately with respect to R.M.G.'s failure to take a quiz.

On June 9, 2004, Petitioners wrote a letter to the Department of Education, Office of the Commissioner, regarding their concerns with Curran's grading system. DOE replied to Petitioners on June 11, 2004, that there was nothing it could do and suggested contacting the Ocean County Superintendent. On September 9, 2004, the

County Superintendent advised Petitioners of his position, which did not result in a change to Curran's grade.

Petitioners explained why the petition was not filed until March 4, 2005. Petitioner, C.G., R.M.G.'s mother, testified that after the September 9, 2004, letter that she contacted three attorneys who told her to try and resolve the matter. She also testified that in the fall of 2004 she had a son who was sick and that occupied four months of her time.

Given that the final decision by the District was made on April 29, 2004, by the Superintendent, it is clear that the March 4, 2005, filing date was far beyond the 90-day limitation period. Even if I were to use the September 9, 2004, letter from the County Superintendent as the last ruling, Petitioners are still not in compliance with the 90-day rule. Moreover, Petitioners' explanation for the delay in filing does not come close to justifying a relaxation or tolling of the regulation.

Accordingly, Petitioners' claims made in their initial pleading of March 4, 2005, are barred by their failure to file the petition within 90 days of the District's ruling.[1] Since Petitioners' claims are time barred, it is not necessary to address the merits of the two claims. Nonetheless, it should be noted that the evidence overwhelmingly showed that the District, including Ms. Curran, acted appropriately and reasonably.

As noted above, Petitioners filed an amended pleading on May 17, 2005, regarding the third issue cited above. This claim concerns R.M.G.'s grade for his 3rd quarter, 10th grade, AP History class. The 3rd quarter ended sometime in April 2005, clearly within the 90-day time frame provided in N.J.A.C. 6A:3-1.3(i). Even though the amended pleading is related to the initial pleading, which I find violated the 90-day

[1] Given Petitioners' clear noncompliance with the 90-day requirement, and resulting lack of jurisdiction, it is curious why the matter was transmitted to OAL by the Office of Controversies and Disputes. There was no disputed fact regarding the time periods that required a hearing on the 90-day time requirement.

provision, I will not dismiss the amended pleading claim because it raises a new claim that falls well within the 90-day timeframe.

2. 3rd Quarter, 10th Grade, AP History Grade

As noted by Administrative Law Judge Metzger in M.G. v. Monmouth Regional High School Board of Education, 91 N.J.A.R.2d (EDU) 38, 40, aff'd in part, rev'd in part, State Bd. of Educ., 92 N.J.A.R.2d (EDU) 364: "[The board's] decisions in this matter carry a presumption of validity and [it is the] petitioners who must show that the actions taken were arbitrary and unreasonable, if they are to be disturbed." In adopting the administrative law judge's decision, the Commissioner of Education likewise noted the limited scope of review:

> it is not a proper exercise of a judicial function for the Commissioner to interfere with local boards in the management of their schools unless they violate the law, act in bad faith (meaning acting dishonestly), or abuse their discretion in a shocking manner. Furthermore, it is not the function of the Commissioner in a judicial decision to substitute his judgment for that of the board members on matters which are by statute delegated to the local boards. [91 N.J.A.R 2d (EDU) at 42, quoting Boult v. Bd. of Educ., City of Passaic, 1939-49 S.L.D. 7, 13 (1946), aff'd, State Board of Education (Sept. 13, 1946), aff'd, 135 N.J.L. 329 (Sup. Ct. 1947), aff'd, 136 N.J.L. 521 (E. & A. 1948).]

There are many judicial decisions expressing the same concepts, such as Quinlan v. Board of Education of North Bergen Township, 73 N.J. Super. 40, 46-47 (App. Div. 1962); Kopera v. West Orange Board of Education, 60 N.J. Super. 288, 294 (App. Div. 1960); Thomas v. Morris Township Board of Education, 89 N.J. Super. 327, 332 (App. Div. 1965), aff'd, 46 N.J. 581 (1966); and Boyle v. Riti, 175 N.J. Super. 158, 166 (App. Div. 1980). In Boyle, the court declared:

> It is well established that a presumption of reasonableness attaches to the action of an administrative agency and the party who challenges the validity of that action has the burden of showing that it was arbitrary, unreasonable or capricious. . . . Also, where the administrative record discloses a reasonable basis for findings and accordant administrative action, [the reviewing court's] duty is ordinarily to uphold such action. [175 N.J. Super. at 166 (citations omitted).]

Based upon the foregoing, it is clear that in a matter such as this, the burden of proof is on the petitioners, and the legal standard to be applied is that an action of a local school board that lies within the area of its discretionary powers may not be upset, unless patently arbitrary, without rational basis, or induced by improper motives, Kopera, supra, 60 N.J. Super. at 294. Applying this standard does not leave discretion in this tribunal to recommend, or in the case of the Commissioner of Education, to decide that a new judgment should be substituted. Thus, mere disagreement, if any, with the Board is insufficient legal grounds for substituting one's own judgment for that of the Board. The Board must first be found to have been arbitrary, capricious or unreasonable for reversal or modification to occur. See K.L. v. Bd. of Educ. of Matawan/Aberdeen High School Dist.,91 N.J.A.R. 2d (EDU) 74.

John Mastandrea was R.M.G.'s teacher for 10th grade AP History in the 2004-2005 school year. R.M.G. has a chronic sinus problem that resulted in him missing about 6 classes in the 3rd semester. R.M.G.'s grade for the 3rd semester was an 86. His final grade for the year in AP History was a 92.

Petitioners presented very little evidence to demonstrate that Mastandrea's grading policy and 3rd quarter grade for R.M.G. were arbitrary, capricious or unreasonable. Petitioners were upset about a "C" that R.M.G. received on a day during the "yarn toss". Petitioners claim that R.M.G. was absent the day before, and thus he was at a disadvantage to participate in this activity that involved cooperative learning and repetition. Mastandrea noted that the yarn toss grade for R.M.G. was appropriate in light of the fact that he "passed" on answering a question three times. Mastandrea stated that R.M.G.'s absence from the day before would not have prevented him from being able to participate in the yarn toss.

Mastandrea provided very credible testimony about his grading procedure and, specifically, how he graded R.M.G. His policy is provided in P-14 and is completely reasonable on its face and as applied to R.M.G. Mastandrea testified that R.M.G. was not penalized for his excused absences. He testified to the importance of participation in class, especially in light of the fact that it is an AP class. He said that R.M.G.'s participation started strong and ended strong, but that during the 2nd and 3rd quarters he did not participate as much.

Petitioners should consider themselves fortunate that R.M.G. had a teacher of such high quality. Mastandrea clearly cares about his students, is fluent in the subject and teaches with passion. The evidence was clear that he dealt with R.M.G. fairly and did not penalize him in any way for his absences. Petitioners presented very little evidence to show any arbitrary, capricious or unreasonable actions by Mastandrea or the District on this issue. In fact, it appeared that Petitioners liked Mastandrea and thought he did a good job teaching R.M.G.. R.M.G.'s 86 for that quarter certainly seemed reasonable in light of Mastandrea's testimony regarding R.M.G.'s tests, essays and class participation.

CONCLUSION AND ORDER

In conclusion, it is clear that Petitioners' claims in their initial petition are barred under the 90-day rule provided in N.J.A.C. 6A:3-1.3(i). Petitioners' explanations for delay in filing do not justify relaxing or tolling the 90-day requirement. The amended petition raising a new claim should also be barred because it was amended to the initial pleading which was defective for violating the 90-day requirement. Nonetheless, since the amended claim on its own concerned an issue that was within the 90-day requirement, I addressed the merits of that claim. On the merits, Petitioners presented very little evidence on this issue. The evidence that was presented by Petitioners and Respondent show overwhelmingly that Respondent did not act in an arbitrary, capricious or unreasonable manner. On the contrary, the evidence is clear that Respondent acted reasonably and within its discretionary authority.

Based on the foregoing, I hereby **ORDER** that Petitioner's petition and amended petition be **DISMISSED**.

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

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

February 7, 2006

DATE

DOUGLAS H. HURD, ALJ

E-mail Receipt of Initial Decision Confirmed by the Department of Education on:

2-7-06

DATE

Mailed to Parties:

FEB 14 2006

DATE

OFFICE OF ADMINISTRATIVE LAW

mh/mph/lam

EVIDENCE

For Petitioners:

P-1 Goals & Expectations

P-2 Class Participation Grading System

P-3 Class Participation Grading System

P-4 Second Quarter Extra Credit Assignments

P-5 Letter by Assistant Superintendent

P-6 Participation Chart

P-7 Student Progress Report

P-8 Regulations

P-9 Letter from Assistant Superintendent

P-10 Sprint Bill

P-11 Drug Fair Bill

P-12 Letter from R.G.

P-13 Letter from Curran

P-14 Rules and Grading Policy

P-15 Prescription Form

P-16 Letter from C.G.

P-17 Letter from Superintendent

P-18 Grading Policy

P-19 Examinations, Grading, Testing Policy

P-20 Report Card

P-21 Student Grading

P-22 Report Card

P-23 Numerous letters regarding return to school

P-24 History Test

For Respondent:

R-1 Letter from teacher

R-2 Letter from teacher

R-3 Letter from teacher

R-4 Letter from Brick Twp BOE

R-5 Letter from Petitioners

R-6 E-mail from DOE

R-7 Letter from DOE

R-8 Letter from DOE

WITNESSES

For Petitioners:

C.G., Mother of R.M.G.

R.G., Father of R.M.G.

For Respondents:

John Mastandrea, teacher

Sharon Curran, teacher

#113-06

113-06

OAL DKT. NO. EDU 10034-05
AGENCY DKT. NO. 319-11/05

S.S., on behalf of minor child, M.S.,	:	
PETITIONER,	:	
V.	:	COMMISSIONER OF EDUCATION
BOARD OF EDUCATION OF THE MAINLAND REGIONAL SCHOOL DISTRICT, ATLANTIC COUNTY,	:	DECISION
RESPONDENT.	:	
	:	

The record, Stipulation of Settlement and Dismissal Without Prejudice, and Initial Decision issued by the Office of Administrative Law, pursuant to *N.J.A.C.* 1:1-19.1, have been reviewed.

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

IT IS SO ORDERED.

Lucille E. Davy
ACTING COMMISSIONER OF EDUCATION

Date of Decision: 3/28/06

Date of Mailing: 3/28/06

State of New Jersey
OFFICE OF ADMINISTRATIVE LAW

INITIAL DECISION
SETTLEMENT
OAL DKT. NO. EDU 10034-05
AGENCY DKT. NO. 319-11/05

S.S. O/B/O MINOR CHILD, M.S.,
Petitioner,
v.
BOARD OF EDUCATION OF THE MAINLAND REGIONAL SCHOOL DISTRICT, ATLANTIC COUNTY,
Respondent.

Jack Feinberg, Esq., for petitioner (Mairone, Biel, Zlotnick & Feinberg, attorneys)

Louis J. Greco, Esq., for respondent

Record Closed: February 8, 2006 Decided: February 8, 2006

BEFORE **EDGAR R. HOLMES,** ALJ, T/A

This matter was transmitted to the Office of Administrative Law on December 7, 2005, for determination as a contested case, pursuant to N.J.S.A. 52:14B-1 to -15 and N.J.S.A. 52:14F-1 to -13.

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

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

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

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

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

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

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

2/8/06
DATE

EDGAR R. HOLMES, ALJ, T/A

Receipt Acknowledged:

2-15-06
DATE

DEPARTMENT OF EDUCATION

Mailed to Parties:

FEB 16 2006
DATE

DIRECTOR AND CHIEF ADMINISTRATIVE LAW JUDGE

OFFICE OF ADMINISTRATIVE LAW

/sd

MAIRONE, BIEL, ZLOTNICK & FEINBERG
A PROFESSIONAL CORPORATION
ATTORNEYS AT LAW
3201 ATLANTIC AVENUE
ATLANTIC CITY, N.J. 08401
(609) 344-1173

MARK BIEL
CERTIFIED BY THE SUPREME COURT OF NEW JERSEY AS A MATRIMONIAL LAW ATTORNEY
FELLOW OF THE AMERICAN ACADEMY OF MATRIMONIAL LAWYERS
NORMAN L. ZLOTNICK*
CERTIFIED BY THE SUPREME COURT OF NEW JERSEY AS A CIVIL TRIAL ATTORNEY
JACK FEINBERG
GEORGE C. GODFREY III
JACQUELINE HAWKINS STILES**
* MEMBER OF NJ & NY BAR
** MEMBER OF NJ & PA BAR

ROBERT V. MAIRONE (1966-1987)
MARTIN L. BLATT (1950-1988)
ALEXANDER K. BLATT (1928-1991)

FAX NUMBER
(609) 344-5042

E-MAIL
Jackfeinberg@mbzflaw.com

February 6, 2006

Via Fax: 441-3824
Honorable Edgar Holmes
Office of Administrative Law
1601 Atlantic Avenue
Atlantic City, New Jersey 08401

RECEIVED
2006 FEB -6 P 2:55
STATE OF NEW JERSEY
OFFICE OF ADMIN LAW

RE: SS. O/B/O CHILD MINOR, M.S.
MAINLAND REGIONAL SCHOOL DISTRICT BOE
OAL DOCKET NO: EDUOS 10034-2005S
AGENCY REF. NO: 319-11/05

Dear Judge Holmes:

Enclosed please find duly executed Stipulation of Settlement in the above matter. The originals will be forwarded to Your Honor in the near future.

The matter is currently scheduled for February 7, 2006 and I would respectfully request that same be removed from Your Honor's list for February 7, 2006.

Thank you for Your Honor's kind attention.

Respectfully,

Jack Feinberg

Jack Feinberg
JF/rb

cc: Sandra DeSarno Hlatky, Deputy Clerk
Louis Greco, Esquire *(601-0650)*

MAIRONE, BIEL, ZLOTNICK & FEINBERG
3201 Atlantic Avenue
Atlantic City, New Jersey 08401
(609) 344-1173

Attorney for Petitioner

RECEIVED
2006 FEB -6 P 2:55
STATE OF NEW JERSEY
DEPARTMENT OF LAW

SHERYL SCHERR, Guardian and Natural Parent of Matthew Scherr Petitioner vs MAINLAND REGIONAL BOARD OF EDUCATION Petitioner	:BEFORE THE COMMISSIONER OF EDUCATION OF THE STATE OF NEW JERSEY :OAL Docket #EDUOS 10034-2005S :Agency Ref. #319-11/05 **:STIPULATION OF SETTLEMENT AND DISMISSAL WITHOUT PREJUDICE**

THE PARTIES hereby have agreed as follows:

1. Mainland Regional Board of Education shall withdraw its notice of non-eligibility and shall admit Matthew Scherr to Mainland Regional High School.

2. Sheryl Scherr shall pay to Mainland Regional High School, one half of three and one-half (3-1/2) months of tuition.

3. Sheryl Scherr and Mainland Regional Board of Education hereby mutually release each other from any and all liabilities in regard to the enrollment of Matthew Scherr in Mainland High School and the Notice of Ineligibility issued by Mainland Regional Board of Education.

4. The dismissal of this action shall be without prejudice to either party and shall be subject to Sheryl Scherr completing the purchase of the home at 106 E. Patcong Avenue, Linwood, New Jersey and establishing full time residence at said address.

DATED: 1/31/6

Sheryl Scherr
Sheryl Scherr

Mainland Regional School District Board of Education

DATED:

BY: _____

DATED:

Jack Feinberg, Esquire
Attorney for Sheryl Scherr

DATED:

_____
Louis J. Greco, Esquire
Attorney for Mainland Regional School District Board of Education

MAIRONE, BIEL, ZLOTNICK & FEINBERG
3201 Atlantic Avenue
Atlantic City, New Jersey 08401
(609) 344-1173

Attorney for Petitioner

SHERYL SCHERR, Guardian and Natural Parent of Matthew Scherr Petitioner vs MAINLAND REGIONAL BOARD OF EDUCATION Petitioner	:BEFORE THE COMMISSIONER OF :EDUCATION OF THE STATE OF :NEW JERSEY :OAL Docket #EDUOS 10034-2005S :Agency Ref. #319-11/05 : : : : **:STIPULATION OF SETTLEMENT** **:AND DISMISSAL WITHOUT** **:PREJUDICE**

THE PARTIES hereby have agreed as follows:

1. Mainland Regional Board of Education shall withdraw its notice of non-eligibility and shall admit Matthew Scherr to Mainland Regional High School.

2. Sheryl Scherr shall pay to Mainland Regional High School, three and one-half (3-1/2) months of tuition.

3. Sheryl Scherr and Mainland Regional Board of Education hereby mutually release each other from any and all liabilities in regard to the enrollment of Matthew Scherr in Mainland High School and the Notice of Ineligibility issued by Mainland Regional Board of Education.

4. The dismissal of this action shall be without prejudice to either party and shall be subject to Sheryl Scherr completing the purchase of the home at 106 E. Patcong Avenue, Linwood, New Jersey and establishing full time residence at said address.

DATED:

Sheryl Scherr

Mainland Regional School District Board of Education

DATED:

BY: _____

DATED:

Jack Feinberg, Esquire
Attorney for Sheryl Scherr

DATED:

Louis J. Greco, Esquire
Attorney for Mainland Regional School District Board of Education

#114-06

114-06

OAL DKT. NO. EDU 022-06
(EDU 4936-05 ON REMAND)
AGENCY DKT. NO. 160-6/05

Y.R.L., ON BEHALF OF MINOR CHILD, K.L.,		
PETITIONER,	:	
V.	:	COMMISSIONER OF EDUCATION
BOARD OF EDUCATION OF THE TOWNSHIP OF BERNARDS, ET AL., SOMERSET COUNTY,	:	DECISION ON REMAND
RESPONDENT.	:	

The record, Stipulation of Settlement and Initial Decision on Remand issued by the Office of Administrative Law (OAL) pursuant to *N.J.A.C.* 1:1-19.1 have been reviewed.

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

IT IS SO ORDERED.

Lucille E Davy

ACTING COMMISSIONER OF EDUCATION

Date of Decision: 3/28/06

Date of Mailing: 3/28/06

State of New Jersey
OFFICE OF ADMINISTRATIVE LAW

INITIAL DECISION

SETTLEMENT

OAL DKT. NO. EDU 022-06

(ON REMAND EDU 4936-05)

AGENCY DKT. NO. 160-6/05

Y.R.L., ON BEHALF OF MINOR CHILD, K.L.,

Petitioner,

v.

FRANCIS HOWLETT, PRINCIPAL OF WILLIAM ANNIN MIDDLE SCHOOL, BERNARDS TOWNSHIP, AND BOARD OF EDUCATION OF THE TOWNSHIP OF BERNARDS, SOMERSET COUNTY,

Respondents.

Y.R.L., petitioner, *pro se*

Steven M. Fleischer, Esq., for respondents (Sills, Cummis, Epstein & Gross, attorneys)

Record Closed: January 20, 2006 Decided: February 6, 2006

BEFORE **STEPHANIE M. WAUTERS**, ALJ:

This matter was transmitted to the Office of Administrative Law on January 5, 2006 for determination as a contested case, pursuant to N.J.S.A. 52:14B-1 to -15 and N.J.S.A. 52:14F-1 to -13.

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

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

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

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

3. The Bernards Township Board of Education provided a resolution adopted November 28, 2005 which authorized the execution by its representatives of the attached Settlement, Agency Docket No. 160-6/05, dated October 19, 2005. (See attached Resolution)

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

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

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

February 4, 2006
DATE

Stephanie M. Wauters
STEPHANIE M. WAUTERS, ALJ

Receipt Acknowledged:

2-15-06
DATE

M. Kathleen Duncan/Ch
DEPARTMENT OF EDUCATION

Mailed to Parties:

FEB 16 2006
DATE

Laura Sanders
DIRECTOR AND
CHIEF ADMINISTRATIVE LAW JUDGE
OFFICE OF ADMINISTRATIVE LAW

sh

BERNARDS TOWNSHIP BOARD OF EDUCATION
BASKING RIDGE, NEW JERSEY

Superintendent's Report – BOARD MEETING November 28, 2005

Resolution:

BE IT RESOLVED THAT

4) The Bernards Township Board of Education does hereby authorize execution of settlement agreement Y.R.L. o/b/m K.L.

On motion by Ms. Stevens, seconded by Mr. Koch Item #4 was approved by the following roll call vote:

"Ayes" - Mr. Byrne, Mr. Koch, Ms. McGowan, Ms. Smith, Ms. Stevens, Ms. Winter, Ms. Woolford, Mr. Carlucci
"Noes" - None
"Abstain" - None

I hereby certify that this resolution was adopted by the Bernards Township Board of Education at its meeting held on November 28, 2005.

John T. Murray II, RSBA
Board Secretary

1/9/06

Seal

2006 JAN 20 P 2:02

OAL DKT. NO. EDU 4936-05
AGENCY DKT. NO. 160-6/05

Y.R.L., ON BEHALF OF MINOR CHILD, K.L.,

PETITIONER,

V.

BOARD OF EDUCATION OF THE TOWNSHIP OF BERNARDS, ET AL., SOMERSET COUNTY,

RESPONDENT.

2006 JAN -5 A 11:56

COMMISSIONER OF EDUCATION

DECISION

Wauters
Remand

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

Upon review, the Commissioner observes that neither the file nor the Stipulation of Settlement contains a copy of the Board's resolution approving the settlement and designating Valarie A. Gogar, Yorven R. Liou and Francis T. Howlett to sign the agreement on its behalf, nor is the agreement signed by the Board attorney, who is the Board's duly authorized representative in litigation. The Commissioner consequently cannot approve the within settlement.

Accordingly, the Commissioner hereby remands this matter to the OAL for revision of the Settlement Agreement to include either the Board attorney's signature or a Board resolution approving the settlement and designating the above-noted persons to sign on behalf of the Board. If the parties are unwilling or unable to reach accord on a modified agreement for submission to the Commissioner, the matter shall proceed to hearing.

IT IS SO ORDERED.*

Lucille E Davy
ACTING COMMISSIONER OF EDUCATION

Date of Decision: 12/30/05
Date of Mailing: 12/30/05

* This decision may be appealed to the State Board of Education pursuant to *N.J.S.A.* 18A:6-27 *et seq.* and *N.J.A.C.* 6A:4-1.1 *et seq.*

SILLS CUMMIS EPSTEIN & GROSS P.C.
One Riverfront Plaza
Newark, New Jersey 07102-5400
(973) 643-7000
Attorneys for Respondents,
Bernards Township Board of Education
and Francis T. Howlett

RECEIVED
2005 NOV 14 P 1:56
STATE OF NEW JERSEY
OFFICE OF ADMIN LAW

YORVEN R. LIOU o/b/m K.L.

Petitioners,

v.

BERNARDS TOWNSHIP BOARD OF EDUCATION and FRANCIS HOWLETT

Respondents.

BEFORE THE COMMISSIONER OF EDUCATION OF NEW JERSEY
AGENCY DOCKET NO.: 160-6/05

STIPULATION OF SETTLEMENT

WHEREAS, on or about April 19, 2005, petitioner's son, K.L., was assigned two Saturday detentions; and

WHEREAS, Yorven R. Liou filed a Verified Petition against the Bernards Township Board of Education ("Board" or "District") and Francis T. Howlett (collectively "Respondents") on or about June 22, 2005 appealing this discipline on behalf of his son; and

WHEREAS, respondents expressly deny any wrongdoing and assert that the discipline was properly imposed; and

WHEREAS, the parties have reached an amicable resolution of this matter which protects the interests of all parties and avoids the cost and time necessary to pursue litigation; and

WHEREAS, this resolution serves the public's best interest by avoiding further litigation costs and the uncertainty attendant to litigation;

NOW THEREFORE, the parties agree as follows:

1. Petitioner agrees to withdraw the Petition with prejudice.

2. In complete and full satisfaction of his appeal, petitioner will have the opportunity to have a meeting with the Superintendent of the Bernards Township Schools and Francis T. Howlett to discuss the discipline which is the subject of this appeal. If petitioner would like to avail himself of such a meeting, he will contact the Superintendent within 30 days of the date that this settlement is approved by the Commissioner of Education (assuming such approval is granted). If no request is made by the end of such 30 day period, it will be assumed that petitioner does not wish to have such a meeting and petitioner will have forfeited his right to a meeting.

3. Petitioner expressly understands that the purpose of the meeting is to allow petitioner to express his views on the discipline that was imposed and that respondents may take whatever action they deem appropriate in response to this meeting and that respondents may adhere to their previous position and allow the discipline to stand.

4. Petitioner acknowledges that he has entered into this Agreement voluntarily and entirely of his own free will and that he was not subject to any duress and/or coercion. Petitioner further acknowledges that he has been advised to seek the advice of counsel in connection with the execution of this Stipulation.

5. This Agreement is subject to and contingent upon the approval of the Administrative Law Judge and the Commissioner of Education. In the event such approval is not secured, this Agreement shall be null and void and the parties returned to their respective positions prior to the execution of this Agreement.

For the Bernards Township
Board of Education

By: _____
VALERIE A. GOGER

Dated: October 31, 2005

By: _____
YORVEN R. LIOU

Dated: October 19, 2005

By: _____
FRANCIS T. HOWLETT

Dated: October 31, 2005

#117-06

OAL DKT. NO. EDU 9272-01
AGENCY DKT. NO. 349-9/01

Q.D., on behalf of minor child, H.D.,	:	
PETITIONER,	:	
V.	:	COMMISSIONER OF EDUCATION
BOARD OF EDUCATION OF THE MORRIS HILLS REGIONAL SCHOOL DISTRICT, MORRIS COUNTY,	:	DECISION
RESPONDENT.	:	

The record, Stipulation of Settlement and Mutual Dismissal, and Initial Decision issued by the Office of Administrative Law (OAL), pursuant to *N.J.A.C.* 1:1-19.1, have been reviewed.

Upon such review, the Commissioner observes that the Business Administrator/Board Secretary signed the Settlement Agreement on behalf of the Board. In that neither the file nor the settlement agreement contains a copy of the Board's resolution approving the settlement and designating the Business Administrator/Board Secretary to sign the agreement on its behalf, nor – in the alternative – is the agreement signed by the Board attorney, who is the Board's duly authorized representative in litigation, the Commissioner cannot approve the within settlement agreement.

Accordingly, the Commissioner hereby remands this matter to the OAL for revision of the Settlement Agreement consistent with the concerns set forth above. If the parties

are unwilling or unable to reach accord on a modified agreement for submission to the Commissioner, the matter shall proceed to hearing.

IT IS SO ORDERED.*

Lucille E Davy

ACTING COMMISSIONER OF EDUCATION

Date of Decision: 3/29/06

Date of Mailing: 3/29/06

* This decision may be appealed to the State Board of Education pursuant to *N.J.S.A.* 18A:6-27 *et seq.* and *N.J.A.C.* 6A:4-1.1 *et seq.*

State of New Jersey
OFFICE OF ADMINISTRATIVE LAW

INITIAL DECISION

SETTLEMENT

OAL DKT. NO. EDU 9272-01

AGENCY DKT. NO. 349-9/0

Q.D., O/B/O H.D.,

Petitioner,

v.

BOARD OF EDUCATION OF THE MORRIS HILLS REGIONAL SCHOOL DISTRICT,

Respondent.

John M. Mills, III, Esq., for petitioner
(Mills & Mills, attorneys)

Mariann Crincoli, Esq., Esq., for respondent
(Schenck, Price, Sfmith & King, LLP, attorneys)

Record Closed: Februry 8, 2006 Decided: February 10, 2006

BEFORE **DIANA C. SUKOVICH,** ALJ:

Petitioner filed a petition with the State Department of Education (DOE) DOE to contest action by respondent regarding the attendance of H.D., then a minor child, in repondent's High School, and respondent filed an answer and counterclaim. The DOE transmitted the matter to the Office of Administrative Law for determination as a contested case pursuant to *N.J.S.A.* 52:14F-1 to-13.

Throughout the proceedings, telephone and settlement conferences were conducted and hearing dates were adjourned at the requests of the parties for various reasons. The parties ultimately reached a resolution of the matter and executed a Stipulation of Settlement and Mutual Dismissal; the record was closed on the date of final communications.

Having reviewed the terms of the Stipulation of Settlement, I **FIND** that the parties voluntarily have agreed to the terms and conditions of the settlement, as evidenced by the signatures contained thereon, and that the settlement fully disposes of all issues in controversy and is consistent with the law.

Therefore, I **ORDER** that the parties comply with the terms of the settlement and that these proceedings be and are hereby **CONCLUDED**.

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

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

February 10, 2006
DATE

Diana C. Sukovich
DIANA C. SUKOVICH, ALJ

Receipt Acknowledged:

2-17-06
DATE

M. Kathleen Duncan/CR
DEPARTMENT OF EDUCATION

Mailed to Parties:

FEB 22 2006
DATE

DIRECTOR AND CHIEF ADMINISTRATIVE LAW JUDGE
OFFICE OF ADMINISTRATIVE LAW

lr

SCHENCK, PRICE, SMITH & KING
10 Washington Street P. O. Box 905
Morristown, New Jersey 07963-0905
(201) 539-1000
Attorneys for Morris Hills Regional School District Board of Education

Q.D. o/b/o H.D., **Petitioner,** **v.** **BOARD OF EDUCATION OF THE MORRIS HILLS REGIONAL SCHOOL DISTRICT,** **Respondent.**	**STATE OF NEW JERSEY** **OFFICE OF ADMINISTRATIVE LAW** **OAL DKT. NO. EDUOS 09272-2001N** **Agency Ref. No. 349-9/01** **STIPULATION OF SETTLEMENT AND** **MUTUAL DISMISSAL**

Petitioner Quynh Doan and Respondent/Counterclaimant Board of Education of the Morris Hills Regional School District, herein stipulate and agree as follows:

1. This settlement is being made without any admission of liability or wrongdoing on the part of any party and is for the purpose of amicably resolving this dispute. The parties specifically deny any wrongdoing or liability relating to any other party's claim.

2. In September 2001, Respondent denied H.D. admission to Morris Hills Regional High School. Petitioner challenged Respondent's decision, and, pursuant to law, H.D. remained a student in the District during the pendency of the within matter through her graduation in June 2003.

3. The Petitioner will pay to the Morris Hills Regional School District Board of Education Eleven Thousand Dollars ($11,000.00) in full and final settlement of this

QD

matter. This payment represents the compromised amount of tuition to be paid for the 2001-2002 and 2002-2003 school years when H.D. was attending school in the District although she was not properly eligible for such education in accordance with N.J.S.A. 18A:38-1. Payment shall be made as follows Two thousand dollars payable to the Morris Hills Regional School District on or before August 22, 2005. Two hundred dollars per month for the first 12 months to be paid on or before the 22nd of each month commencing September 2005. Two hundred fifty dollars per month for the second 12 months to be paid on or before the 22nd of each month. Three hundred dollars per month for the final 12 months to be paid on or before the 22nd of each month.

4. The parties waive any and all claims which were or could have been asserted in the within action, and any and all claims arising out of or related to these claims, including attorneys fees and damages pursuant to any federal or State constitutional or civil rights claims, including 42 U.S.C. 1983, and specifically release the other parties from any and all claims which were or could have been asserted in the within action and any claims arising out of or related to these claims.

5. As a result of the foregoing, Petitioner withdraw his Petition against the Board of Education of the Morris Hills Regional School District filed pursuant to N.J.S.A. 18A:38-1, with prejudice, and Respondent/Counterclaimant Board hereby withdraws its Counterclaim against the Petitioner pursuant to N.J.S.A. 18A:38-1, with prejudice.

6. This Stipulation of Settlement and Mutual Dismissal shall be presented to Office of Administrative Law for approval.

~~7. This Stipulation of Settlement and Mutual Dismissal is subject to the approval of the Morris Hills Board of Education.~~ MC

QD. DM SCD

BOARD OF EDUCATION OF THE MORRIS HILLS REGIONAL SCHOOL DISTRICT

QUYNH DOAN, Petitioner

By: Manuel E Deus
Business Admin./Board Sec.

Dated: 7/22/05

Dated: 7/22/05

118-06

OAL DKT. NO. EDU 184-06
(OAL DKT. NO. EDU 8148-05 ON REMAND)
AGENCY DKT. NO. 228-9/05

T.B., on behalf of minor child, K.L.,	:	
PETITIONER,	:	
V.	:	COMMISSIONER OF EDUCATION
BOARD OF EDUCATION OF THE LENAPE REGIONAL HIGH SCHOOL DISTRICT, BURLINGTON COUNTY,	:	DECISION
RESPONDENT.	:	

The record of this matter, the proposed settlement agreement – as revised on remand – and the Initial Decision on Remand issued by the Office of Administrative Law have been reviewed.

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

IT IS SO ORDERED.

Lucille E Davy

ACTING COMMISSIONER OF EDUCATION

Date of Decision: 3/30/06

Date of Mailing: 3/30/06

State of New Jersey
OFFICE OF ADMINISTRATIVE LAW

INITIAL DECISION

SETTLEMENT

OAL DKT. NO. EDU 184-06

OAL DKT. NO. EDU 8148-05 (**ON REMAND**)

AGENCY DKT. NO. 228-9/05

T.B., ON BEHALF OF MINOR CHILD, K.L.,

Petitioners,

v.

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

Respondent.

T.B. on behalf of K.L., petitioner, pro se

Susan S. Hodges, Esq., for respondent (Archer & Greiner, attorneys)

Record Closed: January 26, 2006 Decided: February 14, 2006

BEFORE **PATRICIA M. KERINS**, ALJ:

This matter was transmitted to the Office of Administrative Law on January 23, 2006, 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 19, 2005, an Initial Decision based on a Settlement between the parties was issued. It was remanded by the Acting Commissioner of Education on January 19, 2006, on the following grounds:

> " the Commissioner observes that the Director of Programs and Planning signed the Settlement Agreement & Release on behalf of the Board. In that neither the file nor the settlement agreement contains a copy of the Board's resolution approving the settlement and designating the Director of Programs and Planning to sign the agreement on its behalf nor, in the alternative, is the agreement signed by the Board attorney – who is the Board's duly authorized representative in litigation – the Commissioner cannot approve the within settlement agreement."

The parties have resubmitted the agreement, which is attached and fully incorporated herein. The agreement has been signed by the board's attorney, thereby complying with the Remand Order.

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

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

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

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

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

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

February 14, 2006
DATE

Patricia M. Kerins
PATRICIA M. KERINS, ALJ

Receipt Acknowledged:

2-17-06
DATE

DEPARTMENT OF EDUCATION

FEB 21 2006
DATE

Mailed to Parties:

DIRECTOR AND
CHIEF ADMINISTRATIVE LAW JUDGE
OFFICE OF ADMINISTRATIVE LAW

PMK/bdt/mh

ARCHER & GREINER
A Professional Corporation
One Centennial Square
Haddonfield, NJ 08033-0968
(856) 795-2121
Attorneys for Respondent,
Lenape Regional High School District Board of Education

BY: SUSAN H. HODGES

2005 JAN 31 A 11:55
OFFICE OF ADMINISTRATIVE LAW

T.B. o/b/o K.L., Petitioner, v. LENAPE REGIONAL HIGH SCHOOL DISTRICT BOARD OF EDUCATION Respondent.	STATE OF NEW JERSEY OFFICE OF ADMINISTRATIVE LAW OAL DOCKET NO. EDUOS-8148-2005S AGENCY REF. NO.: 223-9/05 **SETTLEMENT AGREEMENT & RELEASE**

THIS MATTER having been opened to the Court, pursuant to a Petition challenging a residency determination filed by the Petitioner, T.B. o/b/o K.L., against the Respondent, Lenape Regional High School District Board of Education (the "Board"), represented by Susan H. Hodges, Esquire, of Archer & Greiner, P.C. (Petitioner and the Board collectively referred to herein as the "Parties");

AND Petitioner having requested that the Court overturn the Board's determination regarding K.L.'s residency, and allow K.L. to attend school in the Lenape Regional High School District at Cherokee High School as a non-tuition paying student for the 2005-2006 school year;

AND the Parties having entered into this Settlement Agreement & Release ("Agreement") to express the full and complete terms of the agreement;

THE PARTIES HEREBY AGREE THAT:

1. In consideration of the monetary payments and releases set forth below, the Board agrees that K.L. may attend school in the Lenape Regional High School at Cherokee High

School as a non-tuition paying student for the 2005-2006 school year, and further agrees to waive any claim or entitled to tuition for K.L.'s attendance in the Lenape Regional High School District at Cherokee High School other than as set forth in paragraph 2 below.

2. In consideration of the Board's agreement to allow K.L. to attend school in the Lenape Regional High School at Cherokee High School as a non-tuition paying student for the 2005-2006 school year, T.B. agrees to pay the Board the amount of $2,876.70 -- which represents the tuition due from September 6, 2005 to November 9, 2005 -- by June 1, 2006, and further agrees to waive any claim, or potential claim that Petitioners have, or may have against the Board up to the date of this Agreement:

a. for payment of legal fees, medical fees, and all other fees or costs and all other claims under the Individuals with Disabilities in Education Act, 20 U.S.C. §1400, *et seq.* ("IDEA") and the federal and state regulations promulgated thereunder;

b. under the Family Educational Rights and Privacy Act, 20 U.S.C. §1232g, *et seq.*;

c. under the Americans with Disabilities Act, 42 U.S.C. §12101 as it pertains to his placement at the Regional Enrichment Learning Center ("REAL");

d. under Section 504 of the Rehabilitation Act of 1973 as it pertains to his placement at the Regional Enrichment Learning Center ("REAL");

e. and all other claims under the IDEA and the federal and state regulations promulgated thereunder as it pertains to K.L.'s attendance at Cherokee High School;

3. The Parties also willingly and knowingly agree that they will bear their own costs and attorneys' fees incurred up to the date of this Agreement.

4. The Parties agree that the terms of this Agreement are confidential, and hereby agree not to disclose the terms of this Agreement, or the Agreement itself, to any third-party, for whatever reason, orally or in writing, without the express written consent of the other party or a court order;

5. In the event that either Party breaches any term of this Agreement, the non-breaching party may bring an action in the New Jersey Superior Court, Chancery Division for injunctive and compensatory relief, and the breaching party shall be responsible to the non-breaching party for all legal fees and costs incurred in such action;

6. The Parties specifically consent to the entry of an Order and Final Decision incorporating this Agreement.

7. This Agreement contains the entire agreement and understanding of the Parties with respect to the subject matter hereof, supersedes all prior understandings, representations, and agreements, whether oral or written, and may not be amended or modified except by written agreement of the Parties;

8. The Parties acknowledge that they have had the opportunity to review the terms of this Agreement with counsel and are satisfied with the representation provided, if any. The Parties enter into this Agreement knowingly, and without coercion or other improper influence.

THE PARTIES HEREBY AGREE WITH THE TERMS OF THIS AGREEMENT

LENAPE REGIONAL HIGH SCHOOL DISTRICT
BOARD OF EDUCATION

BY: _____
Carol L. Burnbohm, Director of Programs and Planning

Dated: 12-14-05

T.B. o/b/o K.L.

_____
T.B. o/b/o K.L.

Dated: 12/12/05

2048297v1

LENAPE REGIONAL HIGH SCHOOL DISTRICT
BOARD OF EDUCATION

BY: _____
Susan S. Hodges, Board Counsel

Dated: 1/26/06

119-06

OAL DKT. NOS. EDU 04540-98 and EDU 06525-98
AGENCY DKT. NOS. 116-4/98 and 225-7/98
(CONSOLIDATED)

PATRICIA A. WALSH,	:	
PETITIONER,	:	
V.	:	
BOARD OF EDUCATION OF THE TOWNSHIP OF MIDDLETOWN, MONMOUTH COUNTY,	:	
RESPONDENT.	:	
AND	:	COMMISSIONER OF EDUCATION
BOARD OF EDUCATION OF THE TOWNSHIP OF MIDDLETOWN, MONMOUTH COUNTY,	:	DECISION
PETITIONER,	:	
V.	:	
PATRICIA A. WALSH,*	:	
RESPONDENT.	:	

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

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

IT IS SO ORDERED.

ACTING COMMISSIONER OF EDUCATION

Date of Decision 3/30/06

Date of Mailing 3/30/06

* It is noted that this portion of the consolidated case was concluded by the Commissioner's adoption of the Administrative Law Judge's Interlocutory Order granting summary decision to Ms. Walsh and dismissing the Board's petition. (Commissioner Decision February 16, 1999)

State of New Jersey
OFFICE OF ADMINISTRATIVE LAW

INITIAL DECISION

SETTLEMENT

OAL DKT. NO. EDU 04540-98S
AGENCY DKT. NO. 116-4/98

PATRICIA A. WALSH,

Petitioner,

v.

MIDDLETOWN TOWNSHIP BOARD OF EDUCATION,

Respondent,

AND

BOARD OF EDUCATION OF MIDDLETOWN TOWNSHIP, MONMOUTH COUNTY,

Petitioner,

v.

PATRICIA A. WALSH,

Respondent.

OAL DKT. NO. EDU 06525-98S
AGENCY DKT. NO. 225-7/98
CONSOLIDATED

David B. Rubin, Esq., for Patricia A.Walsh

Robert S. Bonney, Jr., for Middletown Township BOE (Lomurro, Davison, Eastman & Munoz, attorneys)

Record Closed: January 27, 2006 Decided: February 15, 2006

BEFORE **JEFF S. MASIN**, ALJ:

Patricia A. Walsh seeks indemnification for legal expenses from the respondent Middletown Township Board of Education ("Board"), pursuant to N.J.S.A. 18A:12-20 (statutory indemnification) or alternatively, seeks indemnification as a discretionary act

by the Board. The Board, in an independent petition to the Commissioner of Education ("Commissioner"), seeks a ruling with respect to the continued participation of Ms. Walsh as a Board member because of a possible conflict of interest arising under N.J.S.A. 18A:12-2. These matters were transmitted to the Office of Administrative Law ("OAL") on May 29 and August 3, 1998, for hearing as contested cases pursuant to N.J.S.A. 52:14B-1 to -15 and N.J.S.A. 52:14F-1 to -13. The two contested cases were consolidated by order dated September 1, 1998. On November 18, 1998, the undersigned issued an Interlocutory Order Denying Cross-Motions for Summary Decision. Thereafter, these cases were placed on the inactive list numerous times pending the resolution of companion litigation in the Superior Court Monmouth County.

Following the Superior Court trial, the parties agreed to a settlement of all issues in dispute and have prepared a Settlement Agreement, which is attached and fully incorporated herein.

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

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

2. The settlement fully disposes of all issues in controversy.

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

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

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

February 15, 2006
DATE

JEFF S. MASIN, ALJ
Receipt Acknowledged:

2-17-06
DATE

M. Kathleen Duncan/eh
DEPARTMENT OF EDUCATION

Mailed to Parties:

FEB 21 2006

Laura Sanders
CHIEF
DATE

OFFICE OF ADMINISTRATIVE LAW

mjm
Attachment

DAVID B. RUBIN, P.C.
Attorney At Law
44 Bridge Street
P. O. Box 4579
Metuchen, New Jersey 08840
(732) 767-0440
Attorney for Petitioner Patricia A. Walsh

PATRICIA A. WALSH, Petitioner, vs. MIDDLETOWN TOWNSHIP BOARD OF EDUCATION, Respondent.	BEFORE THE COMMISSIONER OF EDUCATION OF THE STATE OF NEW JERSEY OAL DKT. NO. EDU 04540-98 AGENCY DKT. NO. 116-4/98 STIPULATION OF SETTLEMENT

This matter having been amicably resolved by the parties, the petition of appeal herein is dismissed with prejudice, on the following terms:

1. Respondent, Board of Education of the Township of Middletown, will promptly pay the sum of $108,000.00 in full satisfaction of all claims asserted in this matter.

2. Petitioner will tender a general release.

DAVID B. RUBIN, P.C.
Attorney for Petitioner

BY: _____ 12/21/04

LOMURRO, DAVISON, EASTMAN & MUNOZ
Attorney for Respondent

BY: _____

State of New Jersey

DEPARTMENT OF EDUCATION
PO Box 500
TRENTON, NJ 08625-0500

JON S. CORZINE
Governor

LUCILLE E. DAVY
Acting Commissioner

March 28, 2006

Alfred F. Maurice, Esq.
Springstead & Maurice
Court House Towers
39 Hudson Street
Hackensack, NJ 07601

John M. Mills, Esq.
Mills & Mills
1 Western Avenue
Morristown, NJ 07960

Dear Parties:

VERONICA TAPERINO V. BOARD OF EDUCATION OF THE MORRIS COUNTY VOCATIONAL SCHOOL DISTRICT, MORRIS COUNTY, AGENCY DKT. NO. 86-2/06

We are enclosing a copy of the decision of the Commissioner of Education dated March 28, 2006, in the above-captioned matter. Appeals of Commissioner decisions, other than State Department of Education employee contractual determinations and matters involving the New Jersey State Interscholastic Athletic Association, may be filed with the State Board of Education pursuant to *N.J.A.C. 6A:4-1.1* et seq.

Please note that this office is no longer providing an additional copy of the initial decision to the parties in this case.

Additionally, please note that, pursuant to *N.J.A.C.* 6A:4-1.4(a), the Commissioner's decision is mailed to the parties three days prior to the date it is deemed officially filed. This provides counsel and *pro se* litigants with the decision before it is made public by the Department. Parties and counsel are requested to refrain from making Commissioner decisions public prior to the filing date. Your cooperation is appreciated.

Very truly yours,

M. Kathleen Duncan

M. Kathleen Duncan, Director
Bureau of Controversies and Disputes

MKD/mbo:o/dec ltr/vtaperino
Enclosure
c: Clair Applegate, OAL Library
Jones Addo, State Library

#112-06

AGENCY DOCKET NO. 86-2/06

VERONICA TAPERINO,	:	
PETITIONER,	:	
V.	:	COMMISSIONER OF EDUCATION
BOARD OF EDUCATION OF THE MORRIS COUNTY VOCATIONAL SCHOOL DISTRICT,	:	DECISION
RESPONDENT.	:	
	:	

Upon review of the parties' submissions, the Commissioner concludes that the proper venue for the above referenced matter is New Jersey Superior Court. Pursuant to *N.J.A.C.* 6A:3-3.1(b), applications for the enforcement of settlements shall be brought in Superior Court, unless resolution of the parties' adjudicated rights requires a further determination on a school law issue. That is not the case here.

The parties have entered into a settlement contract. Petitioner seeks enforcement of the already established terms. No additional school law issues are implicated. Enforcement of such a contract is properly brought in Superior Court, whether the relief sought is pecuniary or injunctive. Accordingly, the Commissioner dismisses the petition for lack of jurisdiction.

IT IS SO ORDERED.*

Lucille E Davy

ACTING COMMISSIONER OF EDUCATION

Date of Decision: 3/28/06

Date of Mailing: 3/28/06

* This decision may be appealed to the State Board of Education pursuant to *N.J.S.A.* 18A:6-27 *et seq.* and *N.J.A.C.* 6A:4-1.1 *et seq.*

120-06

#120-06

OAL DKT. NO. EDU 8150-05
AGENCY DKT. NO. 203-8/05

L.B., on behalf of minor child, R.M.C., :

PETITIONER, :

V. : COMMISSIONER OF EDUCATION

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

RESPONDENT. :

The record of this matter – returned to the Commissioner by the Office of Administrative Law (OAL) on March 28, 2006 as a withdrawal pursuant to *N.J.A.C.* 1:1-19.2 – has been reviewed.

Upon such review, the Commissioner notes that this matter was deemed withdrawn by the OAL based upon the respondent's letter of March 10, 2006, stating that – as a result of petitioner's guardianship of R.M.C. – respondent had decided to withdraw its motion to dismiss the petition, and would not seek back tuition. Respondent also advised that it would forward to the OAL a stipulation of dismissal.

The record, however, contains neither a stipulation of dismissal, nor any communication from the petitioner evidencing her intent to withdraw her appeal.

Accordingly, this matter is remanded to the OAL for amplification of the record so as to enable the Commissioner to approve a withdrawal, or for such further proceedings as are otherwise necessary to conclude the matter.

IT IS SO ORDERED.* Lucille E. Davy

ACTING COMMISSIONER OF EDUCATION

Date of Decision: 4-5-06
Date of Mailing: 4-5-06

* This decision may be appealed to the State Board of Education pursuant to *N.J.S.A.* 18A:6-27 *et seq.* and *N.J.A.C.* 6A:4-1.1 *et seq.*

121-06

OAL DKT. NO. EDU 4111-04
AGENCY DKT. NO. 72-2/04

ATLANTIC CITY EDUCATION ASSOCIATION, ON BEHALF OF ITSELF AND THE MEMBERS NAMED HEREIN, JORGE COSME AND WILLIAM SMALLWOOD,	:	
PETITIONER,	:	
V.	:	COMMISSIONER OF EDUCATION
BOARD OF EDUCATION OF THE CITY OF ATLANTIC CITY, ATLANTIC COUNTY,	:	DECISION
RESPONDENT.	:	

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

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

IT IS SO ORDERED.

Lucille E Davy

ACTING COMMISSIONER OF EDUCATION

Date of Decision: 4/05/06

Date of Mailing: 4/05/06

State of New Jersey
OFFICE OF ADMINISTRATIVE LAW

INITIAL DECISION
SETTLEMENT
OAL DKT. NO. EDU 4111-04
AGENCY DKT. NO. 72-2/04

ATLANTIC CITY EDUCATION ASSOCIATION, ON BEHALF OF ITSELF AND THE MEMBERS NAMED HEREIN, JORGE COSME AND WILLIAM SMALLWOOD,
Petitioner,
v.
BOARD OF EDUCATION OF THE CITY OF ATLANTIC CITY,
Respondent.

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

Kimberly A. Baldwin, Esq., for respondent (Capizola, Fineman & Lapham, P.C., attorneys)

Record Closed: February 21, 2006 Decided: February 24, 2006

BEFORE **BRUCE M. GORMAN,** ALJ:

This matter was transmitted to the Office of Administrative Law on May 18, 2004, for determination as a contested case, pursuant to N.J.S.A. 52:14B-1 to -15 and N.J.S.A. 52:14F-1 to -13.

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

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

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

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

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

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

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

February 24, 2006
DATE

BRUCE M. GORMAN, ALJ

Receipt Acknowledged:

3-2-06
DATE

DEPARTMENT OF EDUCATION

MAR 3 2006

DATE

DIRECTOR AND
CHIEF ADMINISTRATIVE LAW JUDGE

OFFICE OF ADMINISTRATIVE LAW

/sd

RECEIVED
2006 FEB 21 A 10:44
STATE OF NEW JERSEY
OFFICE OF AG

RELEASE AND AGREEMENT

IT IS HEREBY AGREED by and between **JORGE COSME** ("Cosme") and the **ATLANTIC CITY BOARD OF EDUCATION** ("Board"), for the good and sufficient consideration set forth below, as follows:

1. The Board, as used herein, shall at all times mean the Atlantic City Board of Education, its subsidiaries, affiliates, predecessors, successors and assigns of any and all of them, their present and former directors, officials, officers, representatives, associates, partners, servants, employees, agents, attorneys, designees, successors, heirs, executors and administrators whether in their individual or official capacities, and all other persons, firms, corporations, associations, partnerships or any other entity connected therewith.

2. Cosme, as used herein shall mean Jorge Cosme, his heirs, representatives, executors, administrators, assigns, successors-in-interest and predecessors-in-interest.

3. Within thirty (30) days of the Board's receipt of this Agreement and Release, executed by Cosme or his representative before a Notary Public, the Board shall pay to Cosme the sum of SEVEN THOUSAND ONE HUNDRED TWENTY DOLLARS AND NO CENTS ($7,120.00). Cosme understands and agrees that any adjustments to his withholding or any estimated tax payments are his responsibility.

4. In exchange for the receipt of the monies set forth in paragraph 3 above, Cosme releases and waives any and all claims that were asserted, or could have been asserted, by him for lost wages, income and other benefits (excluding loss of sick time),

breach of express or implied contract, interference in any contract, economic opportunity or prospective economic advantage, compensatory damages for pain, suffering, emotional distress, stress, humiliation, embarrassment, damage to reputation and mental anguish, punitive damages, interest, attorneys fees, and costs of suit arising out of his employment with the Board up to the date of this agreement as such employment relates to the matter known as Atlantic City Education Association, et als. v. Board of Education of Atlantic City, Docket No. EDUOA 04111-04S, Agency Ref. No. 72-2/04, for, but not limited to, violation of his civil rights, privileges and immunities secured by the Civil Rights Act of 1871, 1964 and 1991, 42 U.S.C. §§1981, 1983, 1985, 1986 and 1988, the New Jersey Tort Claims Act, N.J.S.A. 59:1-1 et. seq., the Fifth and Fourteenth Amendments to the United States Constitution, the New Jersey Law Against Discrimination, N.J.S.A. 10:5-1 et. seq., the Tenure Protection Act, N.J.S.A. 18A:17-4 and any and all other federal, state and local constitutional, statutory, regulatory or administrative laws, ordinances or common law duties. Cosme agrees that he will not seek any additional compensation or benefits from the Board, except for loss of sick time, in connection with the claims asserted in the aforementioned legal action.

5. The execution of this Release and Agreement is intended by the parties as a resolution of any and all possible claims and rights, actual or implicit, known or unknown as of this date, which Cosme may have against the Board, up to the time of execution of this Release and Agreement, arising from or in any way relating to the matter known as Atlantic City Education Association, et als. v. Board of Education of Atlantic City, Docket No. EDUOA 04211-04S, Agency Ref. No. 72-2/04, including, but not limited to, attorney fees pursuant to 42 U.S.C. §1983 and/or 42 U.S.C. §1988

and/or N.J.S.A. 10:5-1 et seq. Neither the execution of this Release and Agreement, nor anything contained herein, shall be construed as an admission by the Board or Cosme of any liability or unlawful conduct whatsoever relative to that matter.

6. Cosme and the Board shall bear all costs and expenses arising from the actions of their own counsel in connection with this Release and Agreement. However, if it is necessary for either party to commence any legal action against the other to enforce the terms of this Release and Agreement, then the Board or Cosme, if it/he is the prevailing party, shall be entitled to recover its/his reasonable attorneys' fees, costs and disbursements incurred in prosecuting the action.

7. This Release and Agreement contains the entire agreement between Cosme and the Board with regard to the matter known as Atlantic City Education Association, et als. v. Board of Education of Atlantic City, Docket No. EDUOA 04111-04S, Agency Ref. No. 72-2/04, and shall be binding upon and inure to the benefit of their officials, officers, directors, attorneys, representatives, employees, associates, partners, agents, servants, executors, administrators, personal representatives, heirs successors and assigns of each, and all other persons, firms, corporations, associations or partnerships or any other entity or persons connected therewith, except as set forth herein or as may be agreed to in writing between the parties. It may not be modified, altered, changed or terminated except upon the express written consent of Cosme and the Board, which consent must be signed by Cosme and the Board or their duly authorized agents. It is contingent upon and subject to approval and ratification by the Board.

8. Cosme represents and warrants that no other person or entity has or has had any interest in the claims, demands, obligations or causes of action asserted on his behalf in the matter known as Atlantic City Education Association, et als. v. Board of Education of Atlantic City, Docket No. EDUOA 04111-04S, Agency Ref. No. 72-2/04, and that Cosme has not sold, assigned, transferred, conveyed or otherwise disposed of any of the claims, demands, obligations or causes of action asserted on his behalf in the aforementioned matter.

9. This Release and Agreement shall be construed and interpreted in accordance with the laws of the State of New Jersey.

10. If any term, provision or condition of this Release and Agreement is held invalid or unenforceable by a court of competent jurisdiction, such holding shall be without effect upon the validity or enforceability of any other provision, term or condition of this Release and Agreement.

11. A waiver by Cosme and the Board of a breach of any provision hereof shall not operate or be construed as a waiver of that breach by the other, or as a waiver of any subsequent breach by the other.

12. In executing this Release and Agreement, Cosme has relied upon the legal advice of his attorney, who is the attorney of his own choice, as to the terms of this Release and Agreement, which have been completely read and explained by his attorneys and those terms are fully understood and voluntarily accepted.

13. Cosme and the Board agree to cooperate fully and execute any and all supplementary documents and to take all additional actions which may be necessary or

appropriate to fully effectuate the basic terms and the intention of this Release and Agreement.

14. This Release and Agreement shall become effective immediately following execution by Cosme and the Board and approval by all applicable Board officials, except as noted herein.

15. All notices, demands and requests which are required and desired to be given shall be in writing and shall be sent regular mail and pre-paid, registered or certified mail, return receipt requested, addressed as follows:

For **JORGE COSME**:

Kathleen Naprstek Cerisano, Esq.
ZAZZALI, FAGELLA, NOWAK, KLEINBAUM & FRIEDMAN, P.C.
150 West State Street
Trenton, New Jersey 08608

For the **ATLANTIC CITY BOARD OF EDUCATION**:

Kimberly A. Baldwin, Esq.
CAPIZOLA, FEINMAN & LAPHAM
100 North Main Road
Vineland, New Jersey 08360

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

Roseann D. Hofker

Jorge Cosme

Jorge Cosme

ATLANTIC CITY BOARD OF EDUCATION

Lisa Mooney

Lisa Mooney, ~~Board Secretary~~ Business Administrator

By: Cornell Davis

Cornell Davis, Board President

ROSEANN D. HOFKER
NOTARY PUBLIC OF NEW JERSEY
Commission Expires 5/15/2000

19234.doc

STATE OF NEW JERSEY

:ss.

COUNTY OF ATLANTIC

I, Roseann D. Hofker, a Notary Public of the State of New Jersey, do hereby certify that on February 10, 2006 Jorge Cosme personally came before me and acknowledged under oath, to my satisfaction, that this person (or if more than one person, each person):

(a) is named in and personally signed this document; and

(b) signed, sealed and delivered this document as his free and voluntary act.

Roseann D. Hofker

(Print name and title below signature)

ROSEANN D. HOFKER
NOTARY PUBLIC OF NEW JERSEY
Commission Expires 5/15/2008

Post-it® Fax Note 7671	Date 2/15/06	# of pages ▶ 6
To Diana	From Lisa Mooney	
Dept. Capitola	Co. ACBOE	
Phone #	Phone # 343-7200 x.5038	
Fax # 856-692-7802	Fax #	

RECEIVED
2006 FEB 21 A 10:44
STATE OF NEW JERSEY
OFFICE OF ATTORNEY GENERAL

AGREEMENT

IT IS HEREBY AGREED by and between **WILLIAM SMALLWOOD** ("Smallwood") and the **ATLANTIC CITY BOARD OF EDUCATION** ("Board"), for the good and sufficient consideration set forth below, as follows:

1. The Board, as used herein, shall at all times mean the Atlantic City Board of Education, its subsidiaries, affiliates, predecessors, successors and assigns of any and all of them, their present and former directors, officials, officers, representatives, associates, partners, servants, employees, agents, attorneys, designees, successors, heirs, executors and administrators whether in their individual or official capacities, and all other persons, firms, corporations, associations, partnerships or any other entity connected therewith.

2. Smallwood, as used herein shall mean William Smallwood, his heirs, representatives, executors, administrators, assigns, successors-in-interest and predecessors-in-interest.

3. Within thirty (30) days of the Board's receipt of this Agreement and Release, executed by Smallwood or his representative before a Notary Public, the Board shall pay to Smallwood the sum of TWELVE THOUSAND FIVE HUNDRED FIFTEEN DOLLARS AND NINETY-SIX CENTS ($12,515.96). Smallwood understands and agrees that any adjustments to his withholding or any estimated tax payments are his responsibility.

4. In exchange for the receipt of the monies set forth in paragraph 3 above, Smallwood releases and waives any and all claims that were asserted, or could have

been asserted, by him for lost wages, income and other benefits (excluding loss of sick time), breach of express or implied contract, interference in any contract, economic opportunity or prospective economic advantage, compensatory damages for pain, suffering, emotional distress, stress, humiliation, embarrassment, damage to reputation and mental anguish, punitive damages, interest, attorneys fees, and costs of suit arising out of his employment with the Board up to the date of this agreement as such employment relates to the matter known as Atlantic City Education Association, et als. v. Board of Education of Atlantic City, Docket No. EDUOA 04111-04S, Agency Ref. No. 72-2/04, for, but not limited to, violation of his civil rights, privileges and immunities secured by the Civil Rights Act of 1871, 1964 and 1991, 42 U.S.C. §§1981, 1983, 1985, 1986 and 1988, the New Jersey Tort Claims Act, N.J.S.A. 59:1-1 et. seq., the Fifth and Fourteenth Amendments to the United States Constitution, the New Jersey Law Against Discrimination, N.J.S.A. 10:5-1 et. seq., the Tenure Protection Act, N.J.S.A. 18A:17-4 and any and all other federal, state and local constitutional, statutory, regulatory or administrative laws, ordinances or common law duties. Smallwood agrees that he will not seek any additional compensation or benefits from the Board, except for loss of sick time, in connection with the claims asserted in the aforementioned legal action.

5. The execution of this Release and Agreement is intended by the parties as a resolution of any and all possible claims and rights, actual or implicit, known or unknown as of this date, which Smallwood may have against the Board, up to the time of execution of this Release and Agreement, arising from or in any way relating to the matter known as Atlantic City Education Association, et als. v. Board of Education of Atlantic City, Docket No. EDUOA 04211-04S, Agency Ref. No. 72-2/04, including, but

not limited to, attorney fees pursuant to 42 U.S.C. §1983 and/or 42 U.S.C. §1988 and/or N.J.S.A. 10:5-1 et seq. Neither the execution of this Release and Agreement, nor anything contained herein, shall be construed as an admission by the Board or Smallwood of any liability or unlawful conduct whatsoever relative to that matter.

6. Smallwood and the Board shall bear all costs and expenses arising from the actions of their own counsel in connection with this Release and Agreement. However, if it is necessary for either party to commence any legal action against the other to enforce the terms of this Release and Agreement, then the Board or Smallwood, if it/he is the prevailing party, shall be entitled to recover its/his reasonable attorneys' fees, costs and disbursements incurred in prosecuting the action.

7. This Release and Agreement contains the entire agreement between Smallwood and the Board with regard to the matter known as Atlantic City Education Association, et als. v. Board of Education of Atlantic City, Docket No. EDUOA 04111-04S, Agency Ref. No. 72-2/04, and shall be binding upon and inure to the benefit of their officials, officers, directors, attorneys, representatives, employees, associates, partners, agents, servants, executors, administrators, personal representatives, heirs successors and assigns of each, and all other persons, firms, corporations, associations or partnerships or any other entity or persons connected therewith, except as set forth herein or as may be agreed to in writing between the parties. It may not be modified, altered, changed or terminated except upon the express written consent of Smallwood and the Board, which consent must be signed by Smallwood and the Board or their duly authorized agents. It is contingent upon and subject to approval and ratification by the Board.

8. Smallwood represents and warrants that no other person or entity has or has had any interest in the claims, demands, obligations or causes of action asserted on his behalf in the matter known as Atlantic City Education Association, et als. v. Board of Education of Atlantic City, Docket No. EDUOA 04111-04S, Agency Ref. No. 72-2/04, and that Smallwood has not sold, assigned, transferred, conveyed or otherwise disposed of any of the claims, demands, obligations or causes of action asserted on his behalf in the aforementioned matter.

9. This Release and Agreement shall be construed and interpreted in accordance with the laws of the State of New Jersey.

10. If any term, provision or condition of this Release and Agreement is held invalid or unenforceable by a court of competent jurisdiction, such holding shall be without effect upon the validity or enforceability of any other provision, term or condition of this Release and Agreement.

11. A waiver by Smallwood and the Board of a breach of any provision hereof shall not operate or be construed as a waiver of that breach by the other, or as a waiver of any subsequent breach by the other.

12. In executing this Release and Agreement, Smallwood has relied upon the legal advice of his attorney, who is the attorney of his own choice, as to the terms of this Release and Agreement, which have been completely read and explained by his attorneys and those terms are fully understood and voluntarily accepted.

13. Smallwood and the Board agree to cooperate fully and execute any and all supplementary documents and to take all additional actions which may be necessary

or appropriate to fully effectuate the basic terms and the intention of this Release and Agreement.

14. This Release and Agreement shall become effective immediately following execution by Smallwood and the Board and approval by all applicable Board officials, except as noted herein.

15. All notices, demands and requests which are required and desired to be given shall be in writing and shall be sent regular mail and pre-paid, registered or certified mail, return receipt requested, addressed as follows:

For **WILLIAM SMALLWOOD**:

Kathleen Naprstek Cerisano, Esq.
ZAZZALI, FAGELLA, NOWAK, KLEINBAUM & FRIEDMAN, P.C.
150 West State Street
Trenton, New Jersey 08608

For the **ATLANTIC CITY BOARD OF EDUCATION**:

Kimberly A. Baldwin, Esq.
CAPIZOLA, FEINMAN & LAPHAM
100 North Main Road
Vineland, New Jersey 08360

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

Roseann P. Hafker

William Smallwood
William Smallwood

ATLANTIC CITY BOARD OF EDUCATION

Lisa Mooney
Lisa Mooney, ~~Board Secretary~~ Business Administrator

By: Cornell Davis
Cornell Davis, Board President

STATE OF NEW JERSEY

:ss.

COUNTY OF ATLANTIC

I, Roseann D. Hofker, a Notary Public of the State of New Jersey, do hereby certify that on February 10, 2006 William Smallwood personally came before me and acknowledged under oath, to my satisfaction, that this person (or if more than one person, each person):

(a) is named in and personally signed this document; and

(b) signed, sealed and delivered this document as his free and voluntary act.

Roseann D. Hofker
(Print name and title below signature)

ROSEANN D. HOFKER
NOTARY PUBLIC OF NEW JERSEY
Commission Expires 5/15/2008

122-06

OAL DKT. NO. EDU 11900-05
(EDU 7115-05 ON REMAND)
AGENCY DKT. NO. 145-6/05

CONTROL BUILDING SERVICES, INCORPORATED,	
PETITIONER,	
V.	COMMISSIONER OF EDUCATION
STATE-OPERATED SCHOOL DISTRICT OF THE CITY OF PATERSON AND PRITCHARD INDUSTRIES, INCORPORATED,	DECISION
RESPONDENT.	

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

Upon full review, the Commissioner concurs with the Administrative Law Judge that because petitioner declined to proceed with the prosecution of this matter it is appropriately dismissed.

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

IT IS SO ORDERED.*

Lucille Davy

ACTING COMMISSIONER OF EDUCATION

Date of Decision: 4/05/06

Date of Mailing: 4/05/06

* This decision may be appealed to the State Board of Education pursuant to *N.J.S.A.* 18A:6-27 *et seq.* and *N.J.A.C.* 6A:4-1.1 *et seq.*

State of New Jersey
OFFICE OF ADMINISTRATIVE LAW

INITIAL DECISION

OAL DKT. NO. EDU 11900-05

AGENCY DKT. NO. 145-6/05

(**REMAND** OAL DKT. NO. EDU 7115-05)

CONTROL BUILDING
SERVICES, INCORPORATED,

Petitioner,

v.

STATE-OPERATED SCHOOL DISTRICT
OF THE CITY OF PATERSON AND
PRITCHARD INDUSTRICES, INCORPORATED,

Respondents.

Joseph B. Fiorenzo, Esq., for petitioner Control Building Services, Incorporated (Sokol, Behot & Fiorenzo, attorneys)

Sydney A. Sayovitz, Esq., appearing for respondent State-Operated School District of the City of Paterson (Schenck Price Smith & King, attorneys)

Patrick T. Collins, Esq., appearing for respondent Pritchard Industries, Incorporated, (Franzblau Dratch, attorneys)

Record Closed: February 21, 2006 Decided: March 3, 2006

BEFORE **DANIEL B. MCKEOWN, ALJ (t/a):**

On August 22, 2005, the Commissioner of Education (Commissioner) issued an Order by which an initial decision is sought of a recommended order that was issued on

June 28, 2005 by the undersigned. That recommended Order denied the application for emergency relief of Control Building Services, Inc. (Control Services) by which Pritchard Industries, Incorporated would have been prohibited from commencing certain work under a contract it, Control Services, asserted it should have been awarded because it submitted the low bid. In his decision remanding the matter, the Commissioner noted that in the recommendation denying the application for emergency relief, the conclusion was reached:

> Should petitioner [Control Services] wish to press claims made against the State-Operated School District of the City of Paterson and Pritchard for conduct that was to have occurred in 2003, counsel must contact the Clerk of the Office of Administrative Law within 14 days from the date of this decision and a hearing date will be arranged. Otherwise, the matter shall be considered moot and will be dismissed (Order of June 28, 2004, at 5).

The Commissioner adopted the recommended order on July 20, 2005 as his decision on the motion. There is no evidence in the record petitioner notified the Clerk of the Office of Administrative Law that it wished to press any claims after the issuance of the recommended order; indeed, there is no correspondence from petitioner after the recommended Order was issued. Nevertheless, when a recommended initial decision was issued on July 20, 2005, the wording of this recommendation is, as the Commissioner notes in his order of remand, '*identical*' (Emphasis by Commissioner) to the Order that disposed of the emergent relief request. The Commissioner held that the recommended initial decision does not indicate "the ALJ's conclusion with respect to whether this matter should be dismissed as moot . . . "and, therefore, the decision does not constitute an initial decision. Thus, the matter was remanded for issuance of an initial decision.

A telephone inquiry was made as to the status of the matter on February 21, 2006. After reviewing the file, the matter is ready for disposition by way of an initial decision.

It is error that a second recommended order disposing of the emergent relief matter issued instead of an initial decision recommending the dismissal of the matter as moot after the expiration of time for petitioner to further press claims. The second written recommended order should have noted the absence of correspondence that additional proceedings were requested by petitioner to further his claim, and that the matter be dismissed as moot for failure of petitioner to press the claim any further.[i]

In the absence of evidence, petitioner Control Building Services, Incorporated elected to press its claims after its application for emergent relief was denied, it is recommended in this initial decision that the matter be dismissed as moot.

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

This recommended decision may be adopted, modified or rejected by the **COMMISSIONER OF THE DEPARTMENT OF EDUCATION,** who by law is authorized to make a 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.

[i] In reviewing the Order of Remand, it is noted that the Commissioner wrote he adopted my recommended Order on June 20, 2005. However, my recommended Order was not issued until June 28, 2005. From the context of the entire decision, it is obvious the Commissioner intended to write July 20, 2005, not June 20.

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.

March 3, 2006
DATE

Daniel B. McKeown
DANIEL B. MCKEOWN, ALJ (t/a)

E-mail Receipt of Initial Decision Confirmed by the Department of Education on:

March 3, 2006
DATE

Mailed to Parties:

MAR 06 2006
DATE

DIRECTOR AND CHIEF ADMINISTRATIVE LAW JUDGE
OFFICE OF ADMINISTRATIVE LAW

jb

124-06

OAL DKT. NO EDU 1318-06
AGENCY DKT. NO. 336-11/05

IN THE MATTER OF THE TENURE	:	
HEARING OF VIVIAN ENGLISH,	:	
STATE-OPERATED SCHOOL DISTRICT	:	COMMISSIONER OF EDUCATION
OF THE CITY OF PATERSON,	:	DECISION
PASSAIC COUNTY.	:	
	:	

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

Upon review, the Commissioner approves the settlement terms since they comport with the *Cardonick* standards for review of settlements in tenure matters and adopts the settlement as the final decision in this matter. *See In re Cardonick*, 1990 *S.L.D.* 842, 846, decided by the Commissioner of Education April 7, 1982, *aff'd* State Board April 6, 1983; and *N.J.A.C.* 6A:3-5.6(a). The matter is hereby dismissed, subject to compliance with the terms of the settlement.

IT IS SO ORDERED.

Lucille Davy

ACTING COMMISSIONER OF EDUCATION

Date of Decision: 4/06/06

Date of Mailing: 4/07/06

State of New Jersey
OFFICE OF ADMINISTRATIVE LAW

INITIAL DECISION

SETTLEMENT

OAL DKT. NO. EDU 1318-06

AGENCY DKT. NO. 336-11/05

IN THE MATTER OF THE TENURE HEARING OF VIVIAN ENGLISH, STATE-OPERATED SCHOOL DISTRICT OF THE CITY OF PATERSON, PASSAIC COUNTY,

---

Sidney A. Sayovitz, Esq., for petitioner
(Schenck, Price, Smith & King, attorneys)

Vivian English, *pro se*

Record Closed: March 7, 2006 Decided: March 7, 2006

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

This matter involves tenure charges of unbecoming conduct or other just cause certified by the State-Operated School District of the City of Paterson ("District") against Vivian English under the Tenure Employees' Hearing Law, N.J.S.A. 18A:6-10 to -18.1.

Based upon my review of the record and the testimony at the hearing, I **FIND** that the proposed settlement is consistent with the public interest for the following reasons:

1. Vivian English has been employed as a confidential secretary in the Passaic Public School System for approximately eight years.

2. The allegations pertain to a single event in February 2005 in which English allegedly revealed confidential information to an attorney who was handling her workers' compensation claim against the district.

3. If respondent were successful in defending against the tenure charges, she would be entitled to return to her job in the district. For various reasons, however, respondent has decided that she would prefer to find employment elsewhere.

4. Under the terms of settlement, respondent will receive credit for her unused vacation days to which she is entitled under governing District policy. She will not receive any other payments from the District.

5. From both parties' point of view, this settlement is preferable to risking the uncertainties of litigation.

6. Before entering this agreement, English fully understood her rights and had adequate opportunity to ask questions to opposing counsel and the judge.

7. Since respondent does not hold any certifications issued by the State Board of Examiners, it is unnecessary to refer this case to the State Board for further action.

8. The settlement is fully dispositive of all issues in controversy.

I **CONCLUDE** that the terms of settlement are in the public interests.

It is **ORDERED** that the parties comply with the settlement terms and that the proceedings are hereby concluded.

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

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

March 7, 2006
DATE

Ken R. Springer
KEN R. SPRINGER, ALJ

Receipt Acknowledged:

3-10-06
DATE

M. Kathleen Dunscom/CR
DEPARTMENT OF EDUCATION

Mailed to Parties:

MAR 14 2006
DATE

DIRECTOR AND CHIEF ADMINISTRATIVE LAW JUDGE
OFFICE OF ADMINISTRATIVE LAW

al

OAL DKT. NO. EDU 1318-06
AGENCY DKT. NO. 336-11/05

IN THE MATTER OF THE TENURE HEARING OF VIVIAN ENGLISH, STATE-OPERATED SCHOOL DISTRICT OF THE CITY OF PATERSON, PASSAIC COUNTY

STIPULATION OF SETTLEMENT

Petitioner State-Operated School District of Paterson ("District") and respondent Vivian English ("respondent") agreed to settle this matter as follows:

1. Respondent will withdraw her request for a tenure hearing and resign her employment with the District effective December 1, 2005, and the District agrees to dismissal of the tenure charges pending before the Commissioner of Education ("Commissioner").

2. The District shall pay respondent for her accumulated 33.5 vacation days. Respondent will not receive any other back pay, counsel fees, costs or any other monetary relief or any other relief whatsoever as a result of this settlement.

3. Respondent's personnel file contained at the District will reflect that respondent resigned in good standing effective as of December 1, 2005.

4. This matter (OAL Dkt. No. EDU 1318-06 - Agency Dkt. No. 336-11/05) shall be dismissed with prejudice.

5. This stipulation of settlement shall not constitute a precedent in any other matter involving another employee.

6. By entering into this matter, neither the District nor the respondent admits any liability with regard to this matter.

7. Respondent waives all claims, suits or actions, whether known, unknown, vested or contingent, civil, criminal or administrative, in law or in equity against the District, its employees, agents or assigns, including but no 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, facts and disputes giving rise to this action up to the date of this agreement, including but not limited to all claims under Title VII of the Civil Rights Act of 1964, the Civil Rights Act of 1991, the Americans with Disabilities Act, the Family and Medical Leave Act, the Equal Pay Act, the Age Discrimination in Employment Act, the Older Workers Benefit Protection Act, the Developmentally Disabled Rights Act, the Alcoholism Treatment and Rehabilitation Act, the Handicapped Blind or Deaf Persons Civil Rights Law, the Occupational Safety and Health Act, the Rights to the Family Leave Act, the New Jersey Law Against Discrimination, the conscientious Employee Protection Act, the New Jersey Tort Claims Act, the Civil Service Act, Title 11A, the common law and any contract express or implied.

8. This agreement will only become effective when the Superintendent of the State-Operated School District of Paterson and the Commissioner approve it.

9. Any disapproval by the Superintendent or Commissioner shall not interfere with the rights of either party to pursue this matter further.

10. The parties waive their right to file either exceptions or cross-exceptions herein.

11. The parties hereby stipulate that this agreement shall fully dispose of all issues in controversy between them with regard to this matter.

The parties have agreed to the settlement agreement and freely and voluntarily agree to its provisions.

Dated: 3/1/06 By: _____

Sidney A. Sayowitz, Esq. for the District

(Schenck, Price, Smith & King, attorneys)

Dated: 3/1/06 By: Vivian English

Vivian English, respondent

PATERSON PUBLIC SCHOOLS

33-35 Church Street
Paterson, New Jersey 07505
Office: 973-321-0980
Fax: 973-321-0470
Email: mglascoe@paterson.k12.nj.us

Michael E. Glascoe, Ed.D.
State District Superintendent

March 7, 2006

VIA FACSIMILE (973) 648-6124 & FIRST CLASS MAIL

Honorable Ken R. Springer, A.L.J.
Office of Administrative Law
33 Washington Street
Newark, New Jersey 07102

Re: In the Matter of the Tenure Hearing of Vivian English, State Operated School District of the City of Paterson, Passaic County
OAL DKT. NO.: EDU 1318-06
AGENCY DKET. NO. 336-11/05

Dear Judge Springer:

I have reviewed and approved the Stipulation of Settlement in connection with the above referenced matter and request that same be forwarded to the Commissioner for approval.

Thank you for your courtesies.

Sincerely,

Michael E. Glascoe

Michael E. Glascoe, Ed.D.

c: Sidney Sayovitz, Esq. (via First Class Mail)

125-06

Commissioner of Education
Decision

OAL DKT. NO. EDU 5979-04
AGENCY DKT. NO. 80-2/04

WINDSOR LEARNING CENTER, INC.,
PETITIONER,
V.
NEW JERSEY STATE DEPARTMENT OF EDUCATION, OFFICE OF COMPLIANCE,
RESPONDENT.

OAL DKT. NO. EDU 5982-04
AGENCY DKT. NO. 77-2/04

WINDSOR PREP., INC.,
PETITIONER,
V.
NEW JERSEY STATE DEPARTMENT OF EDUCATION, OFFICE OF COMPLIANCE,
RESPONDENT.

OAL DKT. NO. EDU 5980-04
AGENCY DKT. NO. 75-2/04

SHEPARD ACADEMY, INC.,
PETITIONER,
V.
NEW JERSEY STATE DEPARTMENT OF EDUCATION, OFFICE OF COMPLIANCE,
RESPONDENT.

OAL DKT. NO. EDU 5983-04
AGENCY DKT. NO. 76-2/04

WINDSOR ACADEMY, INC.,
PETITIONER,
V.
NEW JERSEY STATE DEPARTMENT OF EDUCATION, OFFICE OF COMPLIANCE,
RESPONDENT.

OAL DKT. NO. EDU 5981-04
AGENCY DKT. NO. 78-2/04

SHEPARD HIGH SCHOOL, INC.,
PETITIONER,
V.
NEW JERSEY STATE DEPARTMENT OF EDUCATION, OFFICE OF COMPLIANCE,
RESPONDENT.

OAL DKT. NO. EDU 5984-04
AGENCY DKT. NO. 79-2/04

WINDSOR SCHOOL, INC.,
PETITIONER,
V.
NEW JERSEY STATE DEPARTMENT OF EDUCATION, OFFICE OF COMPLIANCE,
RESPONDENT.

SYNOPSIS

The six petitioners in these consolidated appeals challenged the disallowance of legal fees incurred in connection with the defense against criminal charges – leading to the convictions for theft by deception of two former directors and the corporate entities – in their final approved tuition rates for the 2001-2002 and 2002-2003 fiscal years. Petitioners challenged the disallowance as arbitrary, capricious and unreasonable; argued that the fees incurred in the defense of the six schools should be recognized as a legitimate operating expense even if the disallowance of the legal fees incurred in the defense of the individual directors is upheld; and requested that the Commissioner exercise her powers to extend the time for repayment of any disallowed expenses beyond the thirty day period set forth in the regulations.

The ALJ found, *inter alia,* that the Department's disallowance represents an appropriate exercise of agency expertise in the field of school financing and does not detract from the established principle that schools may include professional fees related to *bona fide* educational purposes in their tuition rates; the equities do not predominate in favor of extending the 30-day period for petitioners to make restitution of tuition overcharges, but, rather, clearly lie in favor of the public getting its money back as soon as possible. The ALJ granted summary decision to the Department, and denied the relief requested by petitioners.

Upon a thorough and independent review, the Commissioner adopts the Initial Decision of the OAL as the final decision in this matter, emphasizing that – even assuming, *arguendo*, she had the authority to extend the 30-day timeline prescribed by regulation for the repayment of these monies – public policy and the equities in this matter militate against such an action.

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.

April 6, 2006

125-06

OAL DKT. NO. EDU 5979-04
AGENCY DKT. NO. 80-2/04

WINDSOR LEARNING CENTER, INC.,
PETITIONER,
V.
NEW JERSEY STATE DEPARTMENT OF EDUCATION, OFFICE OF COMPLIANCE,
RESPONDENT.

OAL DKT. NO. EDU 5980-04
AGENCY DKT. NO. 75-2/04

SHEPARD ACADEMY, INC.,
PETITIONER,
V.
NEW JERSEY STATE DEPARTMENT OF EDUCATION, OFFICE OF COMPLIANCE,
RESPONDENT.

COMMISSIONER OF EDUCATION
DECISION

OAL DKT. NO. EDU 5981-04
AGENCY DKT. NO. 78-2/04

SHEPARD HIGH SCHOOL, INC.,
PETITIONER,
V.
NEW JERSEY STATE DEPARTMENT OF EDUCATION, OFFICE OF COMPLIANCE,
RESPONDENT.

OAL DKT. NO. EDU 5982-04
AGENCY DKT. NO. 77-2/04

WINDSOR PREP., INC.,
PETITIONER,
V.
NEW JERSEY STATE DEPARTMENT OF EDUCATION, OFFICE OF COMPLIANCE,
RESPONDENT.

OAL DKT. NO. EDU 5983-04
AGENCY DKT. NO. 76-2/04

WINDSOR ACADEMY, INC., :
PETITIONER,
V. :
NEW JERSEY STATE DEPARTMENT OF
EDUCATION, OFFICE OF COMPLIANCE, :
RESPONDENT.
:

OAL DKT. NO. EDU 5984-04
AGENCY DKT. NO. 79-2/04

WINDSOR SCHOOL, INC., :
PETITIONER,
V. :
NEW JERSEY STATE DEPARTMENT OF
EDUCATION, OFFICE OF COMPLIANCE, :
RESPONDENT.
:

The record of this matter and the Initial Decision of the Office of Administrative Law (OAL) have been reviewed. Petitioners' exceptions and the Department's reply thereto were filed in accordance with the requirements of *N.J.A.C.* 1:1-18.4.

Petitioners' exceptions essentially recast and reiterate their arguments advanced before the Administrative Law Judge (ALJ) below, *i.e.,* the Department's determination to disallow legal fees incurred by the schools was arbitrary, capricious and unreasonable because it contained no explanation or justification; such disallowance represents ad-hoc rule making on the part of the Department which is prohibited by *Metromedia, Inc. v. Director, Div. of Taxation*, 97 *N.J.* 313 (1984); and – should the petitioners be required to repay these monies – principles of equity demand that the regulatory provision requiring that such repayment be made within 30-days after resolution of an appeal be waived. In that the Commissioner finds that each of

petitioners' exception advancements was fully and fairly considered and addressed in the Initial Decision, these will not be revisited here.

Upon a thorough and independent review, the Commissioner is in accord with the ALJ's grant of summary decision to the Department, as she concurs with his determination that the Department appropriately disallowed legal fees incurred in connection with the defense against criminal charges – leading to the convictions for theft by deception of two former directors and the corporate entities – from petitioners' approved tuition rates for the 2001-02 and 2002-03 fiscal years. The Commissioner further agrees that even assuming, *arguendo*, she had the authority to extend the 30-day timeline prescribed by regulation for the repayment of these monies, public policy and the equities in this matter militate against such an action.

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

IT IS SO ORDERED.*

Lucille E Davy

ACTING COMMISSIONER OF EDUCATION

Date of Decision: 4/06/06

Date of Mailing: 4/07/06

* This decision may be appealed to the State Board of Education pursuant to *N.J.S.A.* 18A:6-27 *et seq.* and *N.J.A.C.* 6A:4-1.1 *et seq.*

State of New Jersey
OFFICE OF ADMINISTRATIVE LAW

INITIAL DECISION

OAL DKT. NO. EDU 5979-04
AGENCY DKT. NO. 80-2/04

WINDSOR LEARNING CENTER, INC.
Petitioner,
v.
NEW JERSEY STATE DEPARTMENT OF EDUCATION, OFFICE OF COMPLIANCE,
Respondent.

OAL DKT. NO. EDU 5980-04
AGENCY DKT. NO. 75-2/04

SHEPARD ACADEMY, INC.,
Petitioner,
v.
NEW JERSEY STATE DEPARTMENT OF EDUCATION, OFFICE OF COMPLIANCE,
Respondent.

OAL DKT. NO. EDU 5981-04
AGENCY DKT. NO. 78-2/04

SHEPARD HIGH SCHOOL, INC.,
Petitioner,
v.
NEW JERSEY STATE DEPARTMENT OF EDUCATION, OFFICE OF COMPLIANCE,
Respondent.

OAL DKT. NO. EDU 5982-04
AGENCY DKT. NO. 77-2/04

WINDSOR PREP., INC.,
Petitioner,
v.
NEW JERSEY STATE DEPARTMENT OF EDUCATION, OFFICE OF COMPLIANCE,
Respondent.

OAL DKT. NO. EDU 5983-04
AGENDY DKT. NO. 76-2/04

WINDSOR ACACEMY, INC.,
Petitioner,
v.
NEW JERSEY STATE DEPARTMENT OF EDUCATION, OFFICE OF COMPLIANCE,
Respondent.

OAL DKT. NO. EDU 5984-04
AGENCY DKT. NO. 79-2/04

WINDSOR SCHOOL, INC.
Petitioner,
v.
NEW JERSEY STATE DEPARTMENT OF EDUCATION, OFFICE OF COMPLIANCE,
Respondent.

Vito A. Gagliardi, Jr., Esq., for petitioner
(Porzio, Bromberg & Newman, attorneys)

Allison Colsey Eck, Deputy Attorney General, for respondent
(Peter C. Harvey, Attorney General of New Jersey, attorney)

Record Closed: April 27, 2005 Decided: February 28, 2006

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

Statement of the Case

These six consolidated appeals involve separate challenges brought by six private schools for the disabled (collectively, "Windsor Schools") to the disallowance of certain legal fees in their final approved tuition rates for the 2001-02 and 2002-03 fiscal years. The six Windsor Schools had interlocking directorships. Pursuant to N.J.S.A. 18A:46-14-21, private schools for the disabled receiving students from public school districts may not charge a tuition rate that exceeds the actual cost per student as determined under rules prescribed by the Commissioner of Education ("Commissioner") and approved by the State Board of Education.[1]

Auditors from the New Jersey Department of Education ("Department") excluded various expenses, totaling $263,580 for 2001-02 and $188,937 for 2002-03, incurred in connection with the defense against criminal charges leading to the convictions for theft by deception of two former directors and the schools. In their written findings, the auditors determined that the costs were unreasonable within the meaning of N.J.A.C. 6A:23-4.2(a)(1), which limits allowable expenses to those that are "ordinary and necessary and not in excess of the cost which would be incurred by an ordinary prudent person in administration of public funds." The auditors also regarded the expenses as failing to satisfy the regulatory requirement that any allowable cost must be "consistent with the individualized education program (IEP) of a disabled student."[2] Id. In addition, the auditors treated the expenses as non-allowable under the express exclusion of

[1] All six schools are approved by the State of New Jersey as private schools for the disabled.
http://www.state.nj.us/cgi-bin/education/specialed/instate1.pl?string=schoolcode&maxhits=1000

[2] During the time covered by the audit (2001-02 and 2002-03), the matter was governed by the regulations then in effect. On August 16, 2004, the Department amended the regulations, making largely technical changes. 36 N.J.R. 1312(a) (March 15, 2004); 36 N.J.R. 3895(a) (Aug. 16, 2004). The relevant portion of revised regulations) currently requires that allowable costs be "consistent with the students' individualized education programs (IEP)."

costs "found to be patently unreasonable by the Commissioner or his or her representative(s) or the independent auditor/accountant." N.J.A.C. 6:23-4.5(a)(63).[3]

Windsor Schools challenge the Department's disallowance of the legal fees on three grounds. First, they argue the determination should be overturned as arbitrary, capricious and unreasonable. Second, even if disallowance of the legal fees incurred in defense of the individual directors is upheld, they argue that the fees incurred in defense of the six schools should be recognized as a legitimate operating expense. Lastly, they request that the Commissioner exercise his equitable powers to extend the time for repayment of any disallowed expenses beyond the thirty-day period set forth in the regulations.[4]

Procedural History

By letters dated May 28 and June 13, 2003, the Department's Office of Compliance Investigation notified the six Windsor Schools that it had completed its fiscal monitoring of petitioners' budgets for FY 2002 (July 1, 2001 to June 30, 2002) and had disallowed legal fees incurred as a result of criminal charges brought against the individual members of the management team.[5] Shortly thereafter, on July 28, 2003, the Office of Compliance amended its earlier findings to disallow legal fees incurred as a result of criminal charges brought against the schools' corporate entities.

Petitioners sought timely review by the Chief of Staff Gloria Hancock. On November 18, 2003, Chief of Staff Hancock denied each of these appeals. Three months later, on February 20, 2004, the Windsor Schools filed separate appeals to the Commissioner of Education ("Commissioner"). Subsequently, on June 24, 2004, the

[3] This provision was recodified in the 2004 revision and identical language is now at N.J.A.C. 6:23-4.5(a)(65).
[4] N.J.A.C. 6A:23-4.2(l).
[5] The fiscal monitoring report indicated that these amounts must be excluded from the FY 2003 budget as well.

Commissioner transmitted all six appeals to the Office of Administrative Law ("OAL") for hearing.

Since all six appeals involve common issues of fact, the parties agreed to submit the matter of disposition on cross-motions for summary decision. On April 19, 2005, the parties submitted a joint stipulation of facts and legal briefs in support of their respective positions. They filed reply briefs on or before April 22, 2005. The OAL held oral argument on April 27, 2005, on which date the record closed.

Findings of Fact

All of the material facts are stipulated by the parties or admitted in the pleadings. I **FIND** the following facts:

Windsor Learning Center, Inc. is a corporation that owns and operates a private school for the disabled located in Pompton Lakes, New Jersey. Shepard Academy, Inc. is a corporation that owns and operates a private school for the disabled located in Morristown, New Jersey. Shepard High School, Inc. is a corporation that owns and operates a private school for the disabled located in Morristown, New Jersey. Windsor Prep, Inc. is a corporation that owns and operates a private school for the disabled located in Paterson, New Jersey. Windsor Academy, Inc. is a corporation that owns and operates a private school for the disabled located in Paterson, New Jersey. Windsor School, Inc. is a corporation that owns and operates a private school for the disabled located in Pompton Lakes, New Jersey.[6]

Prior to July 1, 2001, Dr. Daniel Greco and Philip Scardilli were officers and trustees of the various Windsor Schools. On or about January 25, 2003, Greco and Scardilli were indicted by a Morris County Grand Jury on fifteen counts of criminal activity arising out of their management of the Windsor Schools. Ultimately, on March

[6] In its initial brief, petitioners' counsel represented that Windsor Learning Center, Inc. and Shepard Academy, Inc. are for-profit entities and the four other schools are not-for-profit educational institutions.

17, 2003, Greco and Scardilli each pled guilty to one count of the second degree crime of theft by deception and the remaining counts were dismissed. Sentenced on August 18, 2003, they each received imprisonment for a term of six years, were required to divest themselves of their interest or positions in all Windsor Schools, forfeited their professional licenses and certificates in the education field and agreed to pay restitution in excess of $3.6 million. Similar criminal indictments containing a lesser number of counts were filed against the six corporate entities. They too each pled guilty to a single count of theft by deception on March 17, 2003 and, as part of the sentence, consented to entry of an order holding them jointly and severally liable for restitution of $3.6 million.

The Department has accepted petitioners' breakdown of legal fees derived from invoices submitted by the criminal attorney rather than attempting to perform its own allocation of legal fees between individual and corporate expenses. Windsor Schools quantified the amount of legal fees incurred for criminal defense work during 2001-02 as $202,510 for the two individuals and $44,070 for the six corporate entities.[7] Corresponding legal fees incurred during 2002-03 totaled $105,972 for the two individuals and $53,083 for the corporate entities, plus an unallocated amount of $17,332 relating to Shepard Academy, Inc.[8]

As a result of their criminal convictions, Greco and Scardilli divested themselves of all interest in the Windsor Schools and the six schools are presently under new ownership and management.

---

[7] There is, however, a $6,000 shortfall between the $263,580 amount disallowed by the state auditors and the $257,580 total legal expenses in petitioners' calculations. The source of this discrepancy appears to be an error in reporting the individual and corporate legal fees attributable to Windsor School, Inc. ($102,785 instead of $108,785). Since both individual and corporate legal fees are disallowable, the error does not effect the outcome of this case. The higher number used by the state auditors is the correct figure for total legal fees.

[8] Here too, there is a difference of $12,550 between the $188,937 disallowed by the auditors and the $176,387 reflected in petitioners' allocation of legal expenses. Again, the source of the discrepancy seems to be an underreporting by petitioners of the total legal expenses for Windsor School, Inc. ($35,000 instead of $47,550).

Legal Analysis and Conclusions

Based on the foregoing facts and the applicable law, I **CONCLUDE** that the Department properly disallowed these expenses from the Windsor Schools' approved tuition rates for FY 2002 and 2003.

New Jersey law authorizes public school districts to send handicapped students to approved private schools as the means of satisfying the districts' duty to provide suitable facilities and programs of education for children with educational disabilities. N.J.S.A. 18A:46-14(g). Council of Private Schools for Children with Special Needs, Inc. v. Saul Cooperman, 205 N.J. Super. 544 (App. Div. 1985), certif.. den. 103 *N.J.* 490 (1985). The Legislature has expressed concern for the quality of education for handicapped pupils as well as its overall cost to the public. Council of Private Schools, at 545. Toward that end, the Legislature has conferred statutory authority on the Commissioner, with the consent of the State Board of Education, to approve special facilities and educational programs for education of handicapped students, N.J.S.A. 18A:46-15(a), and to require private schools to provide such educational, financial and statistical reports as may be necessary to carry out the purposes of Chapter 46. N.J.S.A. 18A:46-19. Tuition rates that approved private schools may charge to sending public school districts are strictly regulated. Pursuant to N.J.S.A. 18A:46-21, tuition rates charged by approved private schools cannot "exceed the actual cost per pupil as determined under the rules prescribed by the [C]ommissioner and approved by the State Board of Education." N.J.S.A. 18A:46-21.

To carry out its responsibility to ensure that public funds are properly spent for legitimate educational purposes, the Department has adopted regulations prescribing the accounting and bookkeeping systems utilized by approved private schools for the disabled. N.J.A.C. 6:24-2.2 prescribes that the final tuition rate to be charged to public school districts must be "an amount less than or equal to the certified actual cost per student." Subsection (a)(1)(ii) of this regulation requires that allowable costs shall be "consistent with the students' individualized education programs (IEP)." Furthermore, Subsection (a)(1)(iv) requires that such costs must be "reasonable, that is, ordinary and

necessary and not in excess of the cost which would be *incurred by an ordinarily prudent person in the administration of public funds.*" (Emphasis added.) N.J.A.C. 6:23-4.2(a)(1)(iv).

While the Department has enumerated numerous examples of specific costs that are non-allowable, that list is not intended to be exhaustive and does not preclude the Department from acting to prevent waste or fraud. N.J.A.C. 6A:23-4.5 A catch-all provision set forth in Subsection (a)(65) of the rule on non-allowable costs broadly encompasses all "[c]osts found to be *patently unreasonable* by the Commissioner or his or her representative(s) or the independent auditor/accountant." (Emphasis added.)

Legal fees incurred in the unsuccessful defense of individuals and corporate entities engaged in the misuse of public funds do not qualify as an expense "incurred by an ordinarily prudent person in the administration of public funds." That Windsor Schools' directors were allowed to plead to only one of the charges (in exchange for acceptance of stiff prison sentences) does not alter the basic character of the expenditure. Certainly it was not an abuse of discretion for the state auditors and the Department's internal review staff to conclude that such use of public money is of no significant benefit to the handicapped students attending the private schools. Rather, the Department's finding represents an appropriate exercise of agency expertise in the complex field of school financing.

Petitioners' contention that the Department engaged in *ad hoc* rule-making in derogation of Metromedia, Inc. v. Director, Div. of Taxation, 97 N.J. 313 (1984) is without merit. As previously noted, the Department already has enacted general regulations prohibiting allowance of costs which are not consistent with students' IEPs or are determined to be patently unreasonable. Therefore, the Department was not announcing a new rule, but simply interpreting its existing regulations as applicable to the particular facts. In the context of public administration, adjudication is regulation. In re Appeal of Certain Sections of the Uniform Administrative Procedure Rules, 90 N.J. 85, 93 (1982). An agency can use the adjudicative process to set certain policies, to give specific content to general regulations and to handle specialized problems that

arise. Thus, the agency's decisional authority is directly and integrally related to its regulatory function. Id. "Administrative agencies cannot be expected to cover the course of administrative regulation on one leg. They need both their rule-making and adjudicatory powers to perform their duties properly." 90 N.J. at 94.

Windsor Schools exaggerates when it contends that the Department's rulings "transcend the rights of petitioners and have broad ramifications for private educational institutions which take on public school students." Hopefully, not too many private schools or their administrators will be convicted of theft of public money earmarked for education of handicapped children. Nothing in the Department's determination detracts from the well-established principle that schools may include professional fees related to *bona fide* educational purposes in their tuition rates. Cf. Hankin v. Hamilton Twp. Bd. of Educ., 47 N.J. Super. 70 (App. Div. 1957), certif. den. 25 N.J. 489 (1957) (affirming award of architects' reasonable compensation for preparation of plans in connection with construction of school additions and new high school); Board of Educ. v. Finne, 88 N.J. Super. 91 (Law Div. 1965) (granting summary judgment in favor of architectural firm for services rendered).

Similarly, the Commissioner recognized that legal costs and fees concerning school matters are ordinarily included in the tuition rate calculation in sending-receiving relationships, but nonetheless required each side to bear its own legal expenses in litigation between the two districts. Upholding the distinction drawn by the Commissioner, the Appellate Division found it to be "a legally sustainable exercise of authority over his area of expertise". Board of Educ. of Lincoln Park v. Board of Educ. of Boonton, OAL Dkt. No. 5944-02 (April 2, 2003), clarified (Comm'r May 15, 2003), aff'd (State Bd. Nov. 7, 2003), aff'd No. A-2155-03T3, slip op. at 8, (N.J. App. Div. May 25, 2005).

It would be incongruous to require public school districts to pay legal fees incurred by dishonest directors of private schools, whereas a public school district would not be required to reimburse the legal fees of its own employees who have been convicted of criminal offenses. Public school districts must reimburse their employees

for the cost of defending themselves against criminal prosecution related to their employment only if "such proceeding be dismissed or result in a final disposition in favor of such person." N.J.S.A. 18A:16-6.1. Bower v. Board of Educ. of East Orange, 149 N.J. 416 (1997). Having pled guilty to at least one of the criminal charges against them, Greco and Scardilli did not achieve a favorable outcome within the meaning of the statute. Surely there is no compelling reason to treat private school employees more generously than public school employees under comparable circumstances, especially where the crime of which the private school officials have been convicted involves the fraudulent taking of public money.

Where, as here, a private school is itself convicted of participating in a criminal scheme, the cost of its legal defense falls within the same category of expenses that are not "consistent with the student's individualized education program" and "patently unreasonable." Indeed, the facts of this case are much less sympathetic than those in Lincoln Park, supra, where the legal fees disallowed by the Commissioner were spent in furtherance of civil litigation between sending and receiving districts. In contrast, the legal fees which the Windsor Schools want to include in their tuition rates derive from their losing battle to defend against criminal charges of defrauding the very districts on which petitioners seek to impose such costs. Other state agencies in New Jersey have rejected analogous efforts by a commercial enterprise to pass along unreasonable litigation expenses as an ordinary cost of doing business. Illustratively, in Renaissance Rehabilitation and Nursing Ctr. v. Dep't of Health & Senior Servs., OAL Dkt. HLT 1090-02, 2004, N.J. AGEN LEXIS 322 (May 18, 2004), the Commissioner of Health refused to include the amount of a jury award, including punitive damages, in setting Medicaid rates because such legal expenses "were not reasonable costs of providing routine care services." (slip op. at 1).

Lastly, Windsor Schools invokes the equitable powers of the Commissioner to waive strict application of the regulatory requirement that a private school for the disabled must pay or credit the sending public school districts for tuition overpayment "not more than 30 days after an appeal on a certified amount is finally resolved." N.J.A.C. 6A:23-4.2(l). Pleading economic hardship and an alleged threat to the

schools' financial viability, Windsor Schools emphasizes that the current owners were not involved in any criminal wrongdoing. Not having reserved the right to waive application of the deadline, it is debatable how much authority the Commissioner actually possess to waive regulations that inure to the benefit of particular sending school districts. Compare, e.g., N.J.A.C. 6A:3-1.16, wherein the Commissioner expressly reserved the right to waive procedural rules. In re Petition for Authorization to Conduct a Referendum on the Withdrawal of N. Haledon Sch. Dist., 181 N.J. 161 (2004), on which petitioners rely, arose in the context of the Commissioner's constitutional mandate to enforce the State's policy against racial discrimination and does not necessarily confer a broader power on the Commissioner to disregard duly-adopted regulations.

Assuming, however, that an agency head possesses inherent authority to waive application of agency regulations to prevent manifest injustice, such power should be exercised sparingly. Even at the agency level, waiver would require a case-by-case determination of whether the facts of a particular situation merit waiver and, thus, might hamper efficient rule application. See Dougherty v. Dep't of Human Servs., 91 N.J. 449 (1982). Considerations of fairness and uniformity weigh against making exceptions to general rules on a piecemeal basis. Here the equities do not predominate in favor of extending the 30-day period for the Windsor Schools to make restitution of tuition overcharges. Basically, petitioners are seeking an interest-free loan at the expense of the public school districts that have paid tuition in excess of the final approved rate. As between the innocent schools districts and the successors-in-interest to private schools whose directors committed criminal acts, the equities clearly lie in favor of the public getting its money back as soon as possible.

Order

It is **ORDERED** that summary decision is hereby granted upholding the Department's determination and denying the relief requested by the Windsor Schools.

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

This recommended decision may be adopted, modified or rejected by the **COMMISSIONER OF THE DEPARTMENT OF EDUCATION,** who by law is authorized to make a 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.

February 28, 2006
DATE

Ken R. Springer
KEN R. SPRINGER, ALJ

Receipt Acknowledged:

3/3/06
DATE

DEPARTMENT OF EDUCATION

Mailed to Parties:

DIRECTOR AND
CHIEF ADMINISTRATIVE LAW JUDGE

MAR 08 2006
DATE

OFFICE OF ADMINISTRATIVE LAW

al

#127-06

BOARD OF EDUCATION OF THE CITY OF ELIZABETH, UNION COUNTY,	:	
PETITIONER,	:	COMMISSIONER OF EDUCATION
V.	:	DECISION
NEW JERSEY STATE DEPARTMENT OF EDUCATION,	:	
RESPONDENT.	:	

SYNOPSIS

The petitioning Board, an Abbott District, filed a petition challenging the Department's denial of funding for a community attendance liaison in its preschool budget for the 2006-2007 fiscal year; the Board asserts that this position performs "significant duties and responsibilities critical to the success of its preschool program" which cannot be performed by individuals in other positions. The Department maintains, *inter alia,* that it already funds other district employees who perform outreach duties, and emphasizes that attendance in a preschool program is not compulsory, nor do its guidelines recognize an attendance officer as a recommended position for the early childhood program.

The ALJ found that: Elizabeth's request in the amount of $50,786 would fund a position that is essentially that of a truancy officer for a program where attendance is voluntary; Elizabeth has funding for sufficient outreach and support staff to operate a high quality preschool program, and has the ability to restructure the duties of existing staff to address poor attendance at the preschool level if that is deemed a priority; in terms of demonstrated need, Elizabeth has not shown any unique local conditions that might justify funding this extra position. The ALJ denied the relief requested by the petitioning Board.

Upon a full and independent review of this matter, the Commissioner agreed with the ALJ's conclusion that the Department properly denied the District's special requests for a community attendance liaison as the District has not satisfied its burden of demonstrating the need for such a position or its effectiveness in the provision of its Abbott preschool program. Accordingly, the Initial Decision is adopted as the final decision in this matter, and the petition is 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.

April 7, 2006

OAL DKT. NO. EDU 1908-06
AGENCY DKT. NO. 73-2/06

BOARD OF EDUCATION OF THE CITY OF ELIZABETH, UNION COUNTY	:	
PETITIONER,	:	
V.	:	COMMISSIONER OF EDUCATION
NEW JERSEY STATE DEPARTMENT OF EDUCATION,	:	DECISION
RESPONDENT.	:	
	:	

The record of this matter and the Initial Decision of the Office of Administrative Law (OAL) have been reviewed. The parties filed no exceptions to the Initial Decision within the necessarily abbreviated exception period for Early Childhood Program appeal matters specified in the Initial Decision.

Upon a full and independent review, the Commissioner agrees with the ALJ's conclusion that the Department properly denied the District's special request for a community attendance liaison as the District has not satisfied its burden of demonstrating the need for such a position or its effectiveness in the provision of its Abbott preschool program.

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

IT IS SO ORDERED.[1]

Lucille E Davy
ACTING COMMISSIONER OF EDUCATION

Date of Decision: 4/07/06
Date of Mailing: 4/07/06

[1] Pursuant to P.L. 2005, c. 132, "Abbott" determinations are final agency actions appealable directly to the Appellate Division of the New Jersey Superior Court. In accordance with the June 24, 2003 Order of the Supreme Court, such appeals must be filed within six days of the Commissioner's decision. *N.J.A.C.* 6A:10A-9.7(a)5.

State of New Jersey
OFFICE OF ADMINISTRATIVE LAW

INITIAL DECISION

OAL DKT. NO. EDU 1908-06

AGENCY DKT. NO. 73-2/06

BOARD OF EDUCATION OF
ELIZABETH, UNION COUNTY,

Petitioner,

v.

NEW JERSEY DEPARTMENT
OF EDUCATION,

Respondent.

Richard E. Shapiro, Esq., for petitioner

Carolyn Grace Labin, DAG, for respondent
(Zulima V. Farber, Attorney General of New Jersey, attorney)

Record Closed: March 20, 2006 Decided: March 27, 2006

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

Statement of the Case

This is an appeal by the Elizabeth Board of Education ("Elizabeth" or "Board") from the denial of its special request for state funding of a "community attendance

liaison" in its preschool budget for the 2006-2007 fiscal year ("FY '07").[1] Pursuant to the mandate of the New Jersey Supreme Court, Abbott school districts must provide high quality preschool programs to their three- and four-year old children and the Commissioner of Education ("Commissioner") must "ensure" that such programs are adequately funded and "assist" local districts in implementing them.[2] Instructions issued by the Department of Education ("Department") for completing the FY '07 budget forms provide that districts must use a special request form for items "that either (1) do not fit within or (2) exceed the amounts in any of the line-item categories contained in their respective budget guidelines." Elizabeth filed eighteen special request forms, all but three of which were approved by the Department. Originally, the Board challenged all three denials. Prior to the hearing, the parties satisfactorily resolved two of the issues, so that the only remaining dispute involves funding for the community attendance liaison.

Elizabeth contends that the community attendance liaison performs "significant duties and responsibilities critical to the success of its preschool program" and which cannot be performed by individuals in other positions. The Department maintains that it already funds other district employees, such as the community parent involvement specialist ("CPIS") and a team of social workers, who are available for outreach duties, including home visits. Moreover, the Department points out that attendance in a preschool program is not compulsory and that its guidelines do not recognize an attendance officer as a recommended position for a well-run preschool program. Further, the Department objects that Elizabeth has failed to furnish sufficient supporting documentation to establish the need and effectiveness of its special request.

---

[1] Elizabeth is one of 31 special needs districts designated by New Jersey Supreme Court decision or by statute as an "Abbott district." N.J.S.A. 18A:7F-3. Abbott v. Burke, 119 N.J. 287, 394 (1990) ("Abbott II").

[2] Abbott v. Burke, 153 N.J. 480, 505-508 (1998) ("Abbott V") and Abbott v. Burke, 163 N.J. 95, 120 (2000) ("Abbott VI")

Procedural History

On or about November 13, 2005, Elizabeth filed its one-year programmatic budget for its Abbott Preschool Program during FY '07. By letter dated January 13, 2006, the Department approved a total budget of $39.4 million, but denied three special requests including the amount of $50,787 to fund the position of community attendance liaison. One month later, on February 14, 2006, Elizabeth filed a petition of appeal to the Commissioner.

Subsequently, on February 16, 2006, the Commissioner transmitted the matter to the Office of Administrative Law ("OAL") for hearing as a contested case. On or before March 8, 2006, the parties exchanged position papers setting forth more specific facts with respect to the issues in dispute. The OAL held hearings on March 10, 13 and 15, 2006. Witnesses and exhibits are listed in the appendix. Upon receipt of post-hearing briefs from the parties, the record closed on March 20, 2006.

Findings of Fact

General Background Facts

In 2006-07, Elizabeth has an approved projected enrollment of 2,997 three- and four-year olds or 78.5% of the estimated universe of eligible students.[3] Currently, Elizabeth operates 130 or more preschool classrooms, located in 16 elementary school buildings and three stand-alone early childhood centers scattered throughout the city. Additionally, Elizabeth contracts with eight private providers to furnish preschool services to 555 children.

[3] New Jersey regulations establish the goal of enrolling 90% of the universe of eligible three- and four-year olds. N.J.A.C. 6A:10A-2.2(a)(21)(iii). David Joye, co-director of the Department's Office of Early Childhood Education, candidly acknowledged that only 7 or 8 of the 31 Abbott districts have met the 90% benchmark.

New Jersey has adopted a recommended staffing model to assist districts in delivering services and maintaining communication with families. Under that model, preschool supportive staff consists of one "community and parent involvement specialist", one "social worker" for every 250-300 children in a district-operated classroom and one "family worker" for every 45 children in a community-provider setting.

Special Request for Community Attendance Liaison

Elizabeth seeks funding in the amount of $50,786 for a "community attendance liaison." Despite the fancy title, the position is essentially that of a truancy officer, whose primary duties consist of visiting the homes of preschool students who have been absent for more than three consecutive days and educating their parents or guardians on the importance of early childhood education and consistent attendance.

Forms designed by the Department for use by an Abbott district in making a special request specify in bold-faced print that:

> **Only those special requests accompanied by detailed descriptions and justifications, including documented evidence of need and/or effectiveness from studies, evaluations, needs assessments, etc. will be considered by the Department.** [4]

Nonetheless, Elizabeth submitted a short one-page request, without any supporting documentation. In that document, Elizabeth made the blanket assertion that the community attendance liaison averages 50 to 60 home visits per week. Nothing was offered to demonstrate the need for such function or its effectiveness. Couched in conclusory language, Elizabeth urged that the community attendance liaison "performs

[4] In a letter dated November 29, 2005, Dr. Eric Rodney, the Department representative responsible for review of Elizabeth's budget requests, reminded the District that "[s]pecial requests should be accompanied by documented evidence, need and effectiveness from studies" and that "failure to do so may prevent the department from approving these services or materials."

specific responsibilities that cannot be completed by the Community Parent Involvement Specialist."

Since participation in the preschool program is voluntary, Department staff were perplexed by the statement in Elizabeth's submission that "a 5 day legal notice is issued to the parent or guardian to send the pupil to school."[5] During her testimony at the hearing, Olga Hugelmeyer, Elizabeth's director of early childhood education, conceded that this statement was erroneous and that issuance of a 5-day notice was inapplicable at the preschool level.

Elaborating on the need for an extra position, Hugelmeyer testified that only the community attendance liaison can work after regular school hours and on weekends and that none of the other outreach workers employed by Elizabeth are allowed by contract to do so. Thus, the CPIS is considered to be a "teaching" position and her contract only requires her to work from 8:30 a.m. to 4:30 p.m. Hugelmeyer added that the CPIS "does not go into the field and visit parents' homes." Similarly, the preschool social workers funded by the Department work from 8:15 a.m. to 3:05 p.m., and it is not part of their contract to meet with parents after hours.

Although Elizabeth has employed a community attendance liaison since September 1999, her duties were previously divided between preschool and Kindergarten and her compensation has always been paid out of local funds. This is the first year that Elizabeth has asked the state to assume this cost. Contrary to Hugelmeyer's understanding, the community attendance liaison is under no greater obligation than other district employees to work beyond normal school hours. Olga Fajardo, the person occupying that position since its inception, testified that her regular work hours are 8:00 a.m. to 4:30 p.m., and she conducts home visits during that period. When she is unsuccessful in contacting a parent or guardian, she often makes visits after school or on weekends when working parents are more likely to be at home. She does so out of her own sense of dedication and genuine enthusiasm for the preschool

[5] Typically, the 5-day notice is required for children between ages 6 and 16, where school attendance is compulsory. N.J.S.A. 18A:38-29.

program. It does not appear that she receives any additional compensation or overtime payment for working beyond her regular hours.

Fajardo, who has a high school diploma, summarized the process by which she gets assigned cases.[6] Initially the classroom teacher, office secretary or building vice principal attempts to make telephone contact with the parent of a preschool child who has been absent for three days. Sometimes the family has moved without notifying the school or the telephone number has been disconnected. If the parent cannot be reached, the case is referred to Fajardo to make a home visit. Additionally, Fajardo may be assigned to visit the home if a child is excessively late to class. She visits the home and, if no one is there, leaves a card under the door asking the parent to contact her. Often she has to return to the home two or three times before she is able to track down the missing parent.

Once she makes contact with a parent, Fajardo explains the benefits of the preschool program and encourages improved attendance. If the parent claims that the child is sick, Fajardo asks for a doctor's note. Fajardo keeps a written daily log, in which she records the date of referral, the child's name and identification number, the school attended, the number of days absent or tardy, the date of the home visit or other contact, and the outcome. She reports her findings to the building administrator and later checks with the school to make sure that child's attendance has improved.

As noted, the Department routinely funds several other preschool positions involved with community outreach. Every Abbott district must hire a "community and parent involvement specialist" or CPIS. State regulations prescribe that the CPIS' responsibilities shall, at a minimum, include: staffing the Early Childhood Advisory Council; being responsible for the community needs assessment; organizing and

[6] Elizabeth's written job description, produced for the first time at the hearing, requires that the community attendance liaison possess a high school diploma and a valid driver's license.

coordinating systematic parent involvement plans and activities; and coordinating work with other agencies.[7]

Guidelines promulgated by the Department's Office of Early Childhood Education envision that the CPIS will support efforts to extend services provided by classroom teachers and maintain communications with families. Abbott Preschool Program Implementation Guidelines ("Guidelines"), 49 to 50 (Updated July 2005). Recruitment efforts "must be in earnest and assigned to individuals who know the community and understand the necessity of public relations." Guidelines, at 14. Preschool staff must develop a partnership with parents, understanding their perspectives, enhancing their knowledge of child development, and involving them in the program. Guidelines, at 48. Recommended ways to increase family participation in the preschool program include "hold[ing] meetings at different times of the day to accommodate working schedules." Guidelines, at 49. Communication between home and parent should be "regular and two-way." Guidelines, at 54.

Tina Anapolsky has served as CPIS in Elizabeth since 2001. She is qualified as a teacher, but not as a school social worker.[8] Her duties, for the most part, consist of chairing the Early Childhood Advisory Council, coordinating with local agencies and attending meetings of various community groups.[9] Anapolsky also has an opportunity to talk with parents during registration and by attending parent workshops held throughout the school year. None of the workshops (which are taught by the social workers or family worker, not by her) are held at night or on weekends. Acknowledging that she does not get to speak to every parent, Anapolsky characterized her contact with families as "informal and anecdotal." She regards her "primary location" to be her office, and rarely leaves the building, except to attend meetings or visit community

---

[7] N.J.A.C. 6A:10A-22(a)(17).

[8] While no particular certification is required, the instruction sheet for filling out the FY '07 programmatic budget indicates that "[t]he specialist will ideally possess a Masters of Social Work (MSW) and have experience designing parent involvement programs."

[9] Elizabeth's Early Childhood Advisory Council is made up of various "stakeholders" in the community, such as Trinitas Hospital, Elizabethport Presbyterian, the Department of Human Services, the Department of Education and the directors of private community providers of preschool services.

providers. Somewhat defensively, she insists that nothing in her contract requires her to work beyond 4:30 p.m. or visit parents in their homes.

In addition, the Department has supplied funding for eight social workers for the preschool program in the Elizabeth public schools. Among the tasks enumerated by regulation, the social worker is responsible for "coordinating with the [CPIS] to reach out to families, determine individual family needs and provide advocacy services, and obtain available community services."[10] Social workers are also responsible for collaborating with classroom teachers and other school professionals, providing follow-up and assessment of child needs, helping parents learn about child development, nutrition and a safe environment, and designing and providing parent workshops.

Elizabeth presented the testimony of Karen Pierre as illustrative of the types of duties performed by the preschool social workers. Pierre, who holds a masters degree in social work, is assigned to provide services at two public schools and two community providers with a combined total of 25 classrooms.[11] Stationed at Prince Street School, she receives referrals when students exhibit behavior problems in class. Presently, she has a caseload of 34 students. By the end of last year, she had a caseload of 43 students. After receiving a referral, she meets with the teacher, observes the child in class and devises a behavior support program. She develops strategies for teachers and parents to address behavior problems and engages in role-playing activities. She also serves as a resource on what behaviors are developmentally appropriate and assists the parents in gaining access to outside agencies for help. Moreover, she presents parent workshops on different topics, such as nutrition, daily classroom routine and how to help children learn at home. During initial orientation, Pierre spends about twenty minutes discussing the importance of attendance and distributing student handbooks containing information about the District's attendance policy.

---

[10] N.J.A.C. 6A:10A-2.2(a)(12).

[11] It is unclear why Fajardo assumed the task of serving as attendance officer for the community providers, since each community provider has its own family worker whose responsibilities include "help[ing] families stay involved with the program." N.J.A.C. 6A:10A-2.2(a)(13).

Pierre works during regular school hours and never leaves the premises to visit parents at home. Recognizing, however, that behavioral problems in preschool are "family issues," Pierre routinely invites parents to meet with her in school. Pierre considers her responsibilities to be a full-time job, and does not usually get involved in attendance issues unless she has an existing relationship with a particular child.

On the question of need for the position, Elizabeth alleged that a preschool attendance officer is needed to comply with the mandates of the federal No Child Left Behind Act ("NCLB") in order to avoid having any of its schools stigmatized as being "in need of improvement."[12] Natalie Kosoncoky, Elizabeth director of accountability, explained that each school in the district must achieve a proficiency standard on 41 different indicators to achieve Adequate Yearly Progress ("AYP"). New Jersey has selected an attendance rate of 90% of enrollment as one of those indicators.[13] Even though preschool is purely voluntary, preschool attendance is counted in determining whether a particular school building has met its benchmark. Individual schools that fail to achieve AYP are subject to an escalating set of sanctions over a five-year period, starting with an early warning in the first year and culminating in implementation of a restructuring plan in the fifth year. Department witnesses agree that statewide attendance rates in preschool have historically been lower than in elementary grades, so that inclusion of preschool data has a tendency to drag down the attendance score of those schools with preschool classes.[14] Significantly, however, Kosoncoky conceded that no school in Elizabeth has ever failed to make AYP because of a low attendance rate.

Another concern expressed by Elizabeth is the possibility of a reduction in the amount of its state Preschool Expansion Aid ("PSEA") if attendance in preschool were to drop. Calculation of PSEA is based not on attendance, but on actual enrollment at

---

[12] 20 U.S.C.A. §6301 to 6578

[13] Notwithstanding that attendance is termed a "secondary" measure," a school will not achieve AYP if it is deficient in this single category.

[14] Department officials acknowledged that this methodology may not be a federal requirement and promised to confer with Title I staff about omitting preschool attendance as a future measure for NCLB purposes.

the time of the yearly census on October 15th. Auditors from the Department's Office of School Financing visit school districts during the spring to examine their business records, including sampling classroom attendance to verify the enrollment count.[15] Substantial discrepancies between the attendance and reported enrollment could conceivably lead to an adjustment in PSEA, either upward or downward as the case may be. When and if a reduction is proposed, the affected school district would have an opportunity to request a hearing.

Elizabeth waited until the last rebuttal witness on the last day of hearing to produce any data purporting to demonstrate the effectiveness of the requested position. Earlier, on March 3, 2006, Elizabeth had submitted a compilation of the number of home visits made by the community attendance liaison between December 2005 and February 2006, but this uninformative summary failed to disclose whether or not attendance had subsequently improved as a result of these efforts. Finally, at the hearing on March 15, 2006, Elizabeth introduced into evidence Fajardo's daily logs memorializing each contact with the parent cross-matched against district attendance records for the each child. Unfortunately, however, the District made no effort to quantify this raw data in any statistically meaningful way.

Although Hugelmeyer claimed that 80% of Fajardo's home visits resulted in a successful outcome, she never explained the basis for her overly optimistic conclusion. Of the 29 students for whom attendance records were provided, 8 were absent for three or more days in February following Fajardo's visit.[16] Children kept home due to illness might well have returned once they felt better, regardless of whether or not Fajardo contacted their parents. Many of the visits were made during the last few days of the month and were meaningless in terms of measuring improvement in attendance. In

[15] Elizabeth appears to be holding itself to an unnecessarily strict standard. Olga Hugelmeyer testified that district policy is to disenroll preschoolers who have unexcused absences of more than ten days. David Joye of the Office of Early Childhood Education stated that Department auditors look for unexcused absences of more than 15 days.

[16] No. 191912-14 days; No. 292377-3 days; No. 200733-3 days; No. 192783-9 days; No. 200275-3 days; No. 200214-3 days; No. 200233-3days; No. 201236-3 days.

sum, Elizabeth's proofs were insufficient to definitively show the effectiveness of the position.

I **FIND** that Elizabeth has funding for sufficient outreach and support staff to operate a high quality preschool program. The Department's staffing model provides a CPIS and four social workers responsible for increasing community utilization of preschool services and maintaining communications with parents. If the Elizabeth school administration determines that poor attendance at the preschool level is a high priority, it has the ability to restructure the duties of existing staff to address the problem. Certainly the District could put more emphasis during initial enrollment on acquainting parents with the advantages of preschool for their children and the importance of attendance. Elizabeth cannot contract for its staff to work only during the day and then be heard to complain that it has nobody available to meet with the parents at night. (Indeed, the record establishes that the District's outreach staff are no more contractually prohibited than the community attendance officer from working outside regular school hours.)

It is equally important for the CPIS to make herself available to meet with working parents at times and places convenient to her clientele as it is for her to observe workshops given by others or attend community meetings outside the school. Similarly, the social worker's responsibilities include reaching out to families and assistance in serving the child's individual needs, without drawing artificial distinctions between behavior problems in class and general attendance problems. Since preschool is not compulsory, the choice of whether or not to send the child ultimately belongs to the parent. However, the social worker should accommodate the parent's schedule if the family requires counseling or additional information in order to make an informed choice.

In terms of demonstrated need, Elizabeth has not shown any unique local conditions that might justify funding this extra position. Nothing on the record suggests that Elizabeth's preschool attendance is lower than the statewide experience. Exaggerated fears that this factor might cause one of its schools to fall below the NCLB

standards are allayed by the fact that none of Elizabeth's schools has ever failed to make AYP due to low attendance. PSEA is calculated on the basis of enrollment rather than attendance and, again, there is nothing to suggest that Elizabeth has ever been threatened with a loss of PSEA because of attendance. Verification of attendance by state auditors is done to ensure the accuracy of the enrollment figures. Surely, Elizabeth should not be entitled to continue to receive aid for phantom students.

Conclusions of Law

Based on the foregoing facts and the applicable law, I **CONCLUDE** that the Department properly denied Elizabeth's special request for a community attendance liaison.

In Abbott v. Burke, 153 N.J. 480, 508 (1998) ("Abbott V"), the New Jersey Supreme Court emphasized the importance of early childhood education and directed the Commissioner to "ensure" that preschool programs for three- and four-year-old children are adequately funded. Thereafter, in Abbott v. Burke, 163 N.J. 95, (2000) ("Abbott VI"), the New Jersey Supreme Court reaffirmed its commitment to quality preschool programming and reiterated its direction to the Commissioner to "ensure" adequate resources and funding for that purpose. Two years later, in Abbott v. Burke, 170 N.J. 536, 559 (2002) ("Abbott VIII"), the Supreme Court revisited the topic and commented that funding decisions should be "based not on arbitrary, predetermined per-student amounts, but rather, on a record containing funding allocations developed after a thorough assessment of actual needs." Recently, in Board of Education of Millville v. New Jersey Dep't of Educ., 183 N.J. 264 (2005), Supreme Court clarified that to "ensure" adequate funding is not the same as to "provide" state funding and that the Commissioner may require Abbott districts to reallocate money from district budget accounts to make up preschool funding shortfalls.

Elizabeth objects to the Department's alleged failure to articulate fully the reasons for denial of its special request. Citing the regulation requiring the Department to provide "specific reasons for denying the program or expenditure," N.J.A.C. 6A:10A-

97(a)(1), Elizabeth points out that the only reason given in the January 13, 2006 letter for not funding the community attendance liaison is the Department approval of "a community parent involvement specialist for the district." Nevertheless, Elizabeth undoubtedly understood that the Department evaluated its special request in the context of whatever existing staff could be mobilized to deal with attendance matters. Before the hearing began, the parties exchanged more specific statements of fact. In that document, the Department clarified that the denial was due to Elizabeth's failure to document the need for the new position and because other funded positions could perform the same duties. At the hearing itself, Elizabeth offered affirmative proofs on the functions of its social workers, vice principals, and school secretaries as well as the CPIS. Consequently, Elizabeth was not unfairly surprised by any claimed deficiencies in the Department's denial letter and was fully prepared to litigate all reasons for denial of its request.

Abbott decisions have repeatedly referred to the "particularized needs" of the children in the Abbott districts as the driving force in developing appropriate programs. Abbott V, at 511. See also, Abbott v. Burke, 149 N.J. 145, 198 (1997) ("Abbott IV"); Abbott v. Burke, 136 N.J. 444, 451-52 (1994) ("Abbott III"); Abbott v. Burke, 119 N.J. 287, 295 (1990) ("Abbott II"). Agency practice comports with this approach by requiring Abbott districts to demonstrate the need and effectiveness of any special requests.

Existing case law mandates that Abbott districts make suitable efforts to encourage widespread participation in the preschool program. Realistically, the Supreme Court recognized that "even if every parent is informed about the availability of preschool, not all parents will chose to enroll their children." Abbott VIII, at 551. Some parents may not wish to '"put their child[ren] in the 'world' too soon," while others may prefer a more family-oriented child care environment or the flexibility of alternative child care options. Abbott VIII, at 551, quoting from *Evaluation of Early Childhood Programming in the 30 Abbott School Districts: Phase 1 Report* (Feb. 2001). Concerned about under-enrollment of eligible children, the Court ordered increased outreach and recruitment efforts so that "children will not be denied the benefits of a quality preschool program simply because their parents do not know it exists." Abbott

VIII, at 552. Hence, the remedy fashioned by the Court is focused on assuring that parents are fully aware of the opportunity for their children, rather than requiring all parents to take advantage of what is offered. Elizabeth now seeks to extend that remedy beyond the court mandate and reach parents who clearly know of the option because they have enrolled their children in a preschool program.

Whatever the merits of a school district choosing to spend its own money on improving preschool attendance, Elizabeth has not demonstrated the need and effectiveness of creating such a position in fulfillment of the Abbott preschool program. Unlike the upper grades, attendance is voluntary in preschool so that a truancy officer is nonessential. Claims that the position is necessitated by NCLB or distribution of PSEA are theoretical and overblown. Elizabeth has never been at genuine risk of failing to meet NCLB standards or losing state aid because of low preschool attendance rates. More importantly, the Department already funds sufficient preschool support staff to satisfy Elizabeth's outreach and recruitment obligations. Should the need arise, Elizabeth can redeploy its funded CPIS and social workers to include attendance in their community relations efforts. Furthermore, Elizabeth has not introduced sufficient data establishing the effectiveness of the community attendance liaison. Statistics gathered during the one-month period of February 2006 are subject to varying interpretation and do not substantiate the claim that attendance improved significantly as a result of Fajardo's home visits.

Unable to meet its burden of proof, Elizabeth tried unsuccessfully to shift the burden of producing substantiating documentation from itself onto the Department. Throughout the hearing, Elizabeth complained that the Department never told it what documents were required so that its special request could be approved. Elizabeth's complaint is based on a misreading of the New Jersey Supreme Court's admonition that the parties should work cooperatively together through the administrative process and that Department staff should "assist the districts in curing any deficiencies that have caused the Department to reject any plan." Abbott VIII, at 544. As the record shows, Dr. Rodney met with Elizabeth officials on February 28, 2006, corresponded with Elizabeth on numerous occasions and continued diligently working with Elizabeth

to resolve all remaining disputes up to and including the first day of hearing. But it does not follow that the Department has any obligation to tell Elizabeth how to justify a position that the Department regards as wasteful and unnecessary. Ultimately, Elizabeth has superior knowledge of relevant information in its possession and bears the burden of proving that its special request should be granted. N.J.A.C. 6A:10A-9.6(c). See Schaffer v. Weast, 126 S. Ct. 1300, 528, 163 L. Ed.2d 387, *2005 U.S. LEXIS 8554* (2005) ("The burdens of pleading and proof with regard to most facts have and should be assigned to the plaintiff who generally seeks to change the present state of affairs and who therefore naturally should be expected to bear the risk of failure of proof or persuasion.").

Order

It is **ORDERED** that the relief requested by the Elizabeth Board of Education 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 twenty-five days this recommended decision shall become a final decision in accordance with N.J.S.A. 52:14B-10 and N.J.A.C. 6A:10A-9.7(a)(4)..

Notwithstanding the provisions of any rule to the contrary, exceptions to Initial Decisions of the Office of Administrative Law in Abbott District Early Childhood Program appeal matters shall be filed within three (3) days of the date of mailing of the Initial Decision, and reply exceptions shall be filed within two (2) days of receipt of exceptions. File written exceptions with the **COMMISSIONER OF THE DEPARTMENT OF EDUCATION, 100 Riverview Plaza, 4th Floor, PO Box 500, Trenton, New Jersey 08625-0500,** marked "Attention: Exceptions." A copy of any exceptions must be sent to the judge and to the other parties.

March 27, 2006
DATE

Ken R. Springer
KEN R. SPRINGER, ALJ

E-mail Receipt of Initial Decision Confirmed by the Department of Education on:

_____
DATE

E-mailed Initial Decision to the parties on:

March 28, 2006
DATE

al

APPENDIX

List of Witnesses

Petitioner's Witnesses:

1. Olga Hugelmeyer, director of early childhood education, Elizabeth public school district

2. Olga Fajardo, community attendance liaison, Elizabeth public school district

3. Tina Anapolsky, community parent involvement specialist, Elizabeth public school district

4. Karen Pierre, preschool social worker, Elizabeth public school district

Respondent's Witnesses:

5. Dr. Eric Rodney, education program development specialist, New Jersey Department of Education

6. David Joye, acting co-director of the Office of Early Childhood Education, New Jersey Department of Education

Petitioner's Rebuttal Witnesses:

7. Natalie Kosonoky, director of accountability, Elizabeth public school district

8. Olga Hugelmeyer, director of early childhood education, Elizabeth public school district

List of Exhibits

No.	Description
J-1	Copy of letter to Pablo Munoz from Gordon MacInnes, dated January 13, 3006
J-2	Copy of district's special request form for community attendance liaison, dated August 19, 2005
P-1	Copy of job description for community attendance liaison approved by the Elizabeth Board of Education on August 18, 2005
P-2	Copy of response to NJDOE discussion on February 28, 2006 concerning denial of three of the District's Special Requests, submitted on March 3, 2006
P-3	Copy of district one-year budget instructions and guidance for the school year 2006-2007
P-4	Copy of excerpts from the Consolidated State Application Accountability Workbook for No Child Left Behind in New Jersey published by the United States Department of Education, dated August 25, 2005
P-4 (a)	Copy of complete Consolidated State Application Accountability Workbook for No Child Left Behind in New Jersey published by the United States Department of Education, dated August 25, 2005
P-5	Copy of an e-mail to Eric Rodney from Olga Hugelmeyer, dated March 7, 2006

P-6 Copy of excerpt from Abbott Preschool Program Implementation Guidelines published by the New Jersey Department of Education, updated July 2005

P-6 (a) Copy of complete Abbott Preschool Program Implementation Guidelines published by the New Jersey Department of Education, dated July 2005

P-7 Copy of e-mail to Eric Rodney from Olga Hugelmeyer, dated March 9, 2006

P-8 Copy of fax confirmation receipt, dated March 3, 2006

P-9 Copy of letter to Olga Hugelmeyer from Eric Rodney, dated March 18, 2005

P-10 Copy of letter to Eric Rodney from Olga Hugelmeyer, dated November 29, 2005

P-11 Copy of letter to Eric Rodney from Olga Hugelmeyer, dated December 5, 2002

P-12 Copy of letter to Eric Rodney from Olga Hugelmeyer, dated December 16, 2005

P-13 Copy of letter to Olga Hugelmeyer from Eric Rodney, dated January 3, 2006

P-14 Copy of various e-mail requests regarding transportation costs, dated January 5, 10, 11 and 12, 2006

P-15 Copy of letter to Eric Rodney from Olga Hugelmeyer, dated January 12, 2006

P-16 Copy of "How Adequate Yearly Progress (AYP) Is Calculated" from the Department's website, dated March 14, 2006

P-17 Copy of "Guide to the No Child Left Behind (NCLB) Report" from the Department website, dated March 14, 2006

P-18 Copy of "Understanding Accountability in New Jersey for 2005 State Assessments," published by the New Jersey Department of Education, undated

P-19 Redacted copy of spread sheet showing community attendance liaison log and corresponding attendance data for February 2006

R-1 Copy of letter to Olga Hugelmeyer from Eric Rodney, dated November 29, 2005

R-2 Copy of district special request form for secretaries for School Nos. 50, 51 and 52, dated August 19, 2005

R-3 Copy of district special request form for assistant principals, dated August 19, 2005

132-06

ELLEN MUENCH,

PETITIONER,

V.

NEW JERSEY DEPARTMENT OF EDUCATION, STATE BOARD OF EXAMINERS,

RESPONDENT.

COMMISSIONER OF EDUCATION

DECISION

SYNOPSIS

Petitioner, a candidate for teacher certification, challenged the State Board of Examiners' (Board of Examiners) decision to deny her petition for the issuance of a standard certificate, or in the alternative, a third provisional certificate allowing her to participate in a provisional program in the Rahway school District. The Board of Examiners determined that her appeal, filed five months after she received the second of two "insufficient" certification ratings – assigned by two different school districts at the end of each of two consecutive years of teaching under provisional certification – was untimely under *N.J.A.C.* 6A:9-17.18 (a)(1). Petitioner asserted that her second insufficiency rating and her failure to timely file her appeal were attributable to the effects of domestic abuse and, in any event, she was never given personal notice of the requirements for appealing a certification rating under *N.J.A.C.* 6A:9-17.18. She maintained that her circumstances constituted "good cause" under *N.J.A.C.* 6A:9-17.18(c) for the waiver of any time requirements.

The ALJ found that: the Department has published regulations that clearly define the consequences of a second "insufficient" rating for individuals teaching under a provisional license; the time limit for filing an appeal is clearly identified in the regulations; petitioner had constructive notice of the regulations and adequate opportunity to establish the existence of a "good cause" reason for her failure to file in a timely fashion; and petitioner's due process rights to proper notice were not violated. Further, the ALJ found that petitioner failed to present evidence in regard to her claim that domestic abuse was the causative factor in both her failure to achieve a "satisfactory" teaching recommendation and her failure to file within the time required by *N.J.A.C.* 6A:9-17.18(a)(1). Accordingly, the ALJ dismissed the petition for failure to file within the 60-day time limit.

The Commissioner agreed with the ALJ that: petitioner did not show good cause to waive the 60-day limitations period under *N.J.A.C.* 6A:9-17.18(a)(1); and petitioner's due process rights were not violated. The Commissioner determined, however, to remand the case to the Board of Examiners to address the issue of petitioner's invocation of *N.J.A.C.* 6A:9-17.18(d), which grants candidates who receive a "disapproved" or two recommendations of "insufficient," and who have not challenged the performance assessment/certification recommendation pursuant to *N.J.A.C.* 6A:9-17.18(a), the right to petition the Board of Examiners for approval of an additional opportunity to seek provisional employment.

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.

OAL DKT. NO. EDU 2754-05
AGENCY DKT. NO. 61-2/05

ELLEN MUENCH,	:	
PETITIONER,	:	
V.	:	COMMISSIONER OF EDUCATION
NEW JERSEY DEPARTMENT OF EDUCATION, STATE BOARD OF EXAMINERS,	:	DECISION
RESPONDENT.	:	

Petitioner challenges the January 25, 2005, decision of the State Board of Examiners (Board of Examiners) to deny her petition for the issuance of a standard certificate or, in the alternative, a third provisional certificate allowing her to participate in a provisional program in the Rahway school district. The Commissioner has reviewed the record, the Initial Decision, and petitioner's post-hearing reply brief dated March 6, 2006, which was not considered in the Office of Administrative Law (OAL). The Commissioner did not review petitioner's *pro se* letter dated March 17, 2006, because throughout the proceedings she has been represented by counsel, and there has been no notice that she has discharged her attorney and is now representing herself.[1] Respondent did not file exceptions.

The facts that follow are not disputed by the parties. In October 2002, petitioner received a provisional teaching certificate with an endorsement in elementary education. She was hired by the New Brunswick School District for the 2002-2003 school year,[2] at the end of which she received a rating of "insufficient."

[1] Under *N.J.A.C.* 1:1-5.1, petitioner may be represented by counsel, or represent herself, but not both.

[2] The copy of petitioner's contract with the New Brunswick Board of Education does not specify what petitioner's teaching assignment would be.

Petitioner completed the course requirements for Teacher of English as a Second Language in August 2003, and was hired by the Perth Amboy District for the 2003-2004 school year as an early childhood ESL teacher. Copies of three of her ratings for the school year at Perth Amboy are in the record. An October 2003 evaluation contained a 'needs improvement' grade for one assessment category. A November 2003 evaluation contained 'needs improvement' grades for two assessment categories, and a February 2004 evaluation contained 'needs improvement' grades for four assessment categories and grades of 'unsatisfactory' for four other assessment categories. The Perth Amboy district ultimately gave petitioner a rating of "insufficient" at the end of the school year.

In September 2004, petitioner began a third year of work as an ESL teacher in grades 6-8 in the Rahway school district. On her first evaluation, dated September 29, 2004, there were eight assessment categories; petitioner received a 'needs improvement' grade for one of them. Subsequent to that evaluation, the Rahway district learned that petitioner had received "insufficient" ratings for the prior two school years which, pursuant to *N.J.A.C.* 6A:9-8.7(b)(2) and (c), meant that petitioner could not enroll in the provisional teacher program for a third year without petitioning the Board of Examiners. Consequently, the Rahway district removed petitioner from the position.

Petitioner appealed to the Board of Examiners on November 24, 2004. She contended that her second insufficiency rating was attributable to the effects of domestic abuse that she was experiencing up until February 20, 2004, and was not representative of her skills. Relying on *N.J.A.C.* 6A:9-17.18, she asked that the Board of Examiners issue her a standard certificate or allow her a third provisional teaching year – and an opportunity to prove her skills – in the Rahway district.

In her appeal to the Board of Examiners, petitioner invoked both *N.J.A.C.* 6A:9-17.18(a) and *N.J.A.C.* 6A:9-17.18(d). *N.J.A.C.* 6A:9-17.18(a) allows a teaching candidate to challenge a "disapproved" recommendation or the second of two "insufficient" recommendations. Such a challenge must be filed within 6o days of receipt of the adverse

recommendation, *N.J.A.C.* 6A:9-17.18(a)(1), but the period may be relaxed for good cause. *N.J.A.C.* 6A:9-17.18(c). On the other hand, *N.J.A.C.* 6A:9-17.18(d) allows a candidate who has received an adverse certification recommendation, and who has not challenged it pursuant to *N.J.A.C.* 6A:9-17.18(a), to "petition the Board of Examiners for approval of an additional opportunity to seek provisional employment. The candidate shall be responsible for demonstrating by clear and convincing evidence to the Board of Examiners why he or she would be likely to succeed if granted the requested opportunity."

The decision of the Board of Examiners was issued on January 25, 2005. It did not reach the merits of petitioner's appeal for standard or provisional certification because the Board of Examiners determined that the appeal was untimely under *N.J.A.C.* 6A:9-17.18(a)(1), and that petitioner had not shown good cause for relaxing the 60-day limitations period, as permitted by *N.J.A.C.* 6A:9-17.18(c). The Board of Examiners reasoned that the "insufficient recommendation' had been issued no later than the last day of the 2003-2004 school year, and that petitioner had consequently not filed her appeal until five months after her second rating of 'insufficient,' i.e., three months after the regulatory deadline. During the five months, petitioner had evidently conducted a job search which produced the Rahway position. The Board of Examiners concluded that since the after-effects of the domestic violence, which apparently ended with the issuance of a final restraining order in March 2004, did not stop petitioner from conducting a job search, there was inadequate reason to believe that the after-effects constituted an impediment to petitioner filing a timely appeal of her second 'insufficient' recommendation.

The Board of Examiners did not address petitioner's invocation of *N.J.A.C.* 6A:9-17.18(d). It directed that "the second 'insufficient' rating stands, and Ms. Muench may not participate in the Provisional Teacher Program in the future."

The OAL hearing took place on January 20, 2006. After considering the evidence and a post hearing brief submitted by respondent, the administrative law judge (ALJ) took the same

position that had been taken by the Board of Examiners. He characterized petitioner's appeal as a challenge to the second "insufficient" recommendation, and agreed with the Board of Examiners that before the merits of petitioner's adverse recommendations could be addressed, petitioner was required to prevail on the specific issue of justification of her untimely appeal. No hearing transcripts were provided to the Commissioner, but the ALJ stated in the Initial Decision that petitioner failed to present evidence "regarding the alleged mental, emotional or physical results of the alleged domestic violence and the supposed relationship to Ms. Muench's failure to file within the necessary time frame." (Initial Decision at 3)

Instead, petitioner focused on alleged constitutional issues. Petitioner asserted that since a second recommendation of 'insufficient' has the effect of closing out petitioner's teaching career, the State has a constitutional obligation to provide meaningful notice and opportunity to be heard. There is language in the Initial Decision that suggests that petitioner may have presented witnesses who testified that education students are not, in the course of their training about the provisional certificate program, given personal notice of the appeal requirements for 'insufficient recommendations.' *(Ibid.)*

The ALJ found, however, that the published regulation setting forth the 60-day requirement for appeals satisfied any requirement for meaningful public notice. *(Ibid.)* Any teacher could readily determine when a negative appraisal would need to be appealed and how. In the ALJ's view, petitioner was charged with knowledge of the law, "including duly published regulations contained in the New Jersey Administrative Code." (Initial Decision at 5) "[N]o other form of notice was constitutionally required." *(Ibid.)*

Because he found that adequate notice about the 60-day rule existed, and because he found that petitioner had presented no evidence at the hearing concerning her claims that the after-effects of the domestic violence impeded her ability to pursue a timely appeal, the ALJ concluded that petitioner had failed to make a timely appeal and had failed to show good cause why

the 60-day rule should be waived in her case. (*Ibid.*) He ordered dismissal of her appeal without addressing the issue of her invocation of *N.J.A.C.* 6A:9-17.18(d).

In petitioner's January 20, 2006 trial brief she articulated her position that the circumstances of her case warranted a relaxation of the 60-day limitations period in *N.J.A.C.* 6A:9-17.18(a)(1). In her view, the "good cause" showing that is required – under *N.J.A.C.* 6A:9-17.18(c), as a prerequisite to relaxing the 60-day appeals period – need not be limited to a showing of good cause for tardiness in filing an appeal. Citing no authority, she contended that the Commissioner may look at her situation as a whole to determine good cause for waiving the 60-day rule.[3] (Petitioner's trial brief at 7)

Petitioner also argued – as she had in her appeal to the Board of Examiners and her petition to the Commissioner – that she qualified under *N.J.A.C.* 6A:9-17.18(d) for an additional opportunity to seek provisional employment, and that *N.J.A.C.* 6A:9-17.18(d) is not encumbered by the time limitation in *N.J.A.C.* 6A:9-17.18(c). (Petitioner's trial brief at 7)

The balance of petitioner's brief was devoted to a discussion of due process rights. Petitioner claimed that, under the circumstances of this case, denying her a teaching career would be a constitutional violation. (Petitioner's trial brief at 8) Petitioner characterized the third opportunity for a provisional teaching job that she seeks as a right, and contended that it may not be – but was – withheld from her without proper notice and an opportunity to be heard. (*Ibid.*)

Petitioner's March 6, 2006, "reply brief," appears to constitute a response to the arguments set forth in a post hearing brief submitted by the State on February 17, 2006. It echoes the

---

[3] One of petitioner's allegations in her January 20, 2006, brief was that although she was hired as an elementary teacher, she was illegally forced to teach ESL before she was so qualified. Since, pursuant to *N.J.A.C.* 6A:9-17.18(a), only the second "insufficient" rating shall be the subject of an appeal concerning standard certification recommendations, this allegation is not germane to the disposition of this controversy. Moreover, the Commissioner has been provided with no evidence to support the contention, and petitioner apparently never challenged the alleged illegal assignment during or directly after her tenure in the New Brunswick School District.

constitutional arguments in her January 20, 2006 brief, and her contention that her circumstances constituted good cause to waive the 60-day limitations period in *N.J.A.C.* 6A:9-17.18(a)(1).[4]

The Commissioner agrees with the ALJ that petitioner did not show good cause to waive the 60-day limitations period under *N.J.A.C.* 6A:9-17.18(a). Further, for the reasons set forth in the Initial Decision, the Commissioner agrees that petitioner's due process rights were not violated.[5] However, the Commissioner has determined to remand the case to the Board of Examiners to address the issue of petitioner's invocation of *N.J.A.C.* 6A:9-17.18(d).

That regulation states, in pertinent part:

> Candidates who receive a recommendation of "disapproved" or two recommendations of "insufficient," and who have not challenged the certification recommendation pursuant to (a) above may petition the Board of Examiners for approval of an additional opportunity to seek provisional employment. The candidate shall be responsible for demonstrating by clear and convincing evidence to the Board of Examiners why he or she would be likely to succeed if granted the requested opportunity. . . .

Petitioner asked, in the alternative, for another chance for a provisional teaching assignment, pursuant to *N.J.A.C.* 6A:9-17.18(d). She alleged facts that were meant to show that her poor performance was not based upon incompetence, but rather was caused by an anomalous situation. She further offered facts for the purpose of meeting the requirement of *N.J.A.C.* 6A:9-17.18(d) that she demonstrate that she would likely succeed if given another chance as a provisional teacher.

Unlike *N.J.A.C.* 6A:9-17.18(a), *N.J.A.C.* 6A:9-17.18(d) does not contain a limitations period. Petitioner invoked it in her appeal to the Board of Examiners and before the OAL, but

---

[4] The Commissioner notes that petitioner's reference (on page 2 of her brief) to the legislature's provision of *N.J.A.C.* 6A:9-17.18(c) is an error, since regulations are promulgated by State agencies. The Commissioner also finds that petitioner's references to the rules of New Jersey Superior Court are inapposite to the present controversy.

[5] Further, in the Commissioner's view, petitioner's claim that she has a "right," "property interest," "liberty interest" or "entitlement" to a teaching certificate is bootstrapping. A teaching certificate was never granted to petitioner, due to her failure to satisfy the prerequisites. It is axiomatic that one must first possess a property or liberty interest before one may seek protection against its confiscation.

neither the Board nor the ALJ addressed the issue of its applicability to petitioner's situation. Accordingly, the Commissioner remands this matter to the Board of Examiners for the application of *N.J.A.C.* 6A:9-17.18(d) or, if the Board determines that *N.J.A.C.* 6A:9-17.18(d) may not be applied, for the articulation of the reasons therefor.

IT IS SO ORDERED.[6]

Lucille E Davy

ACTING COMMISSIONER OF EDUCATION

Date of Decision: 4/12/06

Date of Mailing: 4/12/06

[6] This decision may be appealed to the State Board of Education pursuant to *N.J.S.A.* 18A:6-27 *et seq.* and *N.J.A.C.* 6A:4-1.1 *et seq.*

State of New Jersey
OFFICE OF ADMINISTRATIVE LAW

INITIAL DECISION
OAL DKT. NO. EDU 02754-05S
AGENCY DKT. NO. 61-2/05

ELLEN MUENCH,
Petitioner,
v.
NEW JERSEY STATE DEPARTMENT OF EDUCATION, STATE BOARD OF EXAMINERS,
Respondent.

Sean F. Byrnes, Esq., for petitioner

Marta N. Kozlowska, Deputy Attorney General, for respondent (Zulima V. Farber, Attorney General of New Jersey, attorney)

Record Closed: February 22, 2006 Decided: February 28, 2006

BEFORE **JEFF S. MASIN,** ALJ:

Ellen Muench is a candidate for a teacher certificate. She has a Master's Degree in Education and has taught under provisional certification during the 2003-04 and 2004-05 school years. The first year she was employed by the New Brunswick Board of Education. She received an "insufficient" recommendation from that district and the following year she worked for the Perth Amboy Board of Education. She again received an "insufficient" rating. Pursuant to N.J.A.C. 6A:9-8.7, a candidate who receives two "insufficient" or one "disapproved" recommendations may not receive a standard teaching certificate, but the candidate may be permitted to petition the Board of Examiners for approval to seek provisional employment in districts other than those in which the candidate received unfavorable recommendations. N.J.A.C. 6A:9-17.18. Alternatively, a candidate receiving a second "insufficient" recommendation may seek to challenge that recommendation before the Board of Examiners. On November 24,

2004, an attorney representing Ms. Muench filed a letter with the State Board of Examiners ("Board"), appealing the second "insufficient" rating to the Board, pursuant to N.J.A.C. 6A:9-17.18.[1] On January 25, 2005, the Board issued a letter, in which it reported that at its January 20, 2005, meeting it had determined that Ms. Muench had filed her appeal on November 24, 2004, and, as it believed that she had received her final evaluation and certification recommendation no later than the last day of the school year, June 30, 2004, the filing was made well out-of-time, since the regulation authorizing such appeals provides that the appeal "shall" be filed with the Board of Examiner's Secretary "within 60 days of receipt of the final evaluation and certification recommendation." N.J.A.C. 6A:9-17.18 (a)1. Those same regulations provide that, "[f]or good cause shown, the Board of Examiners may relax the 60-day requirement in (a) above." N.J.A.C. 6A:9-17.18 (c). However, the Board also determined in that same meeting that Ms. Muench had not demonstrated "good cause" for waiving the filing deadline. In view of these determinations, the Board did not consider the merits of Ms. Muench's appeal and dismissed it as untimely.[2] On February 25, 2005, she filed a Petition with the Commissioner of Education, seeking to appeal the Board of Examiners ruling.[3] The Board filed a motion with the Commissioner, pursuant to N.J.A.C. 6A:3-1.10, seeking to dismiss the appeal as untimely. Ms. Muench responded and the Board replied. The Commissioner transferred the contested case to the Office of Administrative Law, with a direction to decide the timeliness issue as a threshold question. On October 6, 2005, I issued an Interlocutory Order, concluding, in part, that a hearing was necessary to determine the facts relevant to Ms. Muench's claims that mental, emotional or physical sequlae of domestic violence had impacted upon her sufficiently as to provide "good cause" for her failure to file a timely petition. I also determined that the "good cause" spoken of in the regulation related to a showing of "good cause" for the late filing and not to any generalized "good cause" basis asserting why the Board should hear the case on its merits even if there was no showing of a legitimate and sufficient reason why the petition was filed late.

---

[1] The regulations provide that in the case of a candidate receiving two "insufficient" recommendations, only the second "insufficient" recommendation "shall" be the subject of the appeal. N.J.A.C. 6A:9-17.18(a).

[2] Had the matter proceeded to the merits, the parties would have been Ms. Muench and the Perth Amboy Board of Education. The sole remedies that the Board of Examiners may provide are the issuance of a standard certificate or an opportunity to seek further employment as a provisional teaching staff member. N.J.A.C. 6A:9-17.18. If the candidate does not seek to challenge the "insufficient" recommendation, the candidate may petition the Board of Examiners for approval of an additional opportunity to seek provisional employment. N.J.A.C. 6A:9:17.18 (d).

[3] While styled as a "Petition," and not a "Verified Petition," this document does include a sworn averment by Ms. Muench that the "facts contained therein are true to the best of my knowledge and belief."

In his trial brief, counsel for Ms. Muench, pointing to the devastating impact that a second "insufficient" recommendation causes to his client, raises constitutional arguments relating to questions of notice of the impact of such a recommendation. More specifically, he claims that in a situation where, as here, the effect of the second notice is to "close the door on her teaching career," the State has a constitutional obligation to provide "meaningful" notice and an opportunity to be heard, and failure to do so amounts to a violation of due process. At the hearing, counsel presented witnesses dealing with the notice issue and with aspects of the training that education students such as Ms. Muench receive regarding issues relating to the provisional certificate program. Nothing was presented regarding the alleged mental, emotional or physical results of the alleged domestic violence and the supposed relationship to Ms. Muench's failure to file within the necessary time frame. Following the hearing held on January 11, 2006, the deputy attorney general filed a brief in reply to counsel's trial brief and the record closed on February 22, 2006.

The sixty-day filing requirement is set forth at N.J.A.C. 6A:9-17.18 (c). The regulation clearly states the significance of the receipt of a second "insufficient" recommendation and the right to appeal that recommendation. It clearly states that such an appeal must be filed with 60 days of the final evaluation. Thus, the existence of public notice of the requirement is not at issue. Ms. Muench's arguments relate instead to the need, if any, for some more direct, personal form of notice being necessary to meet the constitutional standard. The DOE responds that no special form of notice of the consequences of a second insufficiency is constitutionally required and that Ms. Muench is charged with knowledge of the published regulation. It relies on case law which supports that the principle that "ignorance of the law is no excuse.," Escalante v. Twp. Of Cinnaminson, 283 N.J. Super. 244, 250 (App. Div. 1995), Lutz v. Semcer, 126 N.J. Super. 288, 297 (Law Div. 1974)

In support of her position, Ms. Muench relies upon cases that speak of the need for the state to provide notice and an opportunity to be heard before depriving a citizen of property or personal liberty. Mullane v. Central Hanover B. & T. Co., 339 U.S. 306, 313, 70 S.Ct. 652, 94 L.Ed. 865,873 (1950); Rivera v. Board of Review, 127 N.J. 578,

583 (1992), Garzon v. Board of Review, 370 N.J. Super. 1 (2004). While that general principle is well known, the cases cited do not apply to the facts and the legal landscape of this case. Mullane deals with a question involving the provision of a statutorily required notice to present beneficiaries of trusts who were known by name and address. The United States Supreme Court held that these beneficiaries were entitled to receive individual notice rather than to have to rely upon a newspaper notice of a proceeding brought by the trustee of a common trust fund to settle the accounts of the trust. Rivera involved questions concerning the nature of notice required to apprise a migrant worker of a determination by the Division of Employment Security that he had been found to have been ineligible for benefits he had already received. The notice was sent to his off-season home during the farming season and, as a result, he had not filed an appeal prior to the filing deadline. The Court found the notice inadequate. In Garzon, another unemployment case, the Appellate Division found a notice problem arising

> because we find that a form letter, forwarded to Garzon when it was determined that her appeal was late, did not adequately advise her that the Board of Review would relax its time limitations if "good cause" for doing so were demonstrated, and the "Timeliness Certification" accompanying that letter did not pose questions clearly designed to elicit the facts necessary to establish good cause. If the need to obtain information sufficient to determine whether good cause has been demonstrated is to be met through the use of a certification, then that certification and the instructions accompanying it should be revised.
>
> [Garzon, supra, 370 N.J. Super. at 3]

The Court noted that the Division had chosen the use of the form letter and the "Timeliness Certification" as the means to meet the notice deficiencies identified by the Supreme Court in Rivera, supra. It was to the inadequacies of these documents that the Garzon court addressed itself.

None of these cases addresses a situation such as that posed by the present matter. Here, the DOE has published regulations that clearly define the consequences of a second "insufficient" recommendation and the process for appealing such a negative appraisal. It has also clearly identified the time limit for filing an appeal and has made provision to consider "good cause" claims for late filing. Individual teachers

who are part of the program can therefore readily determine how and when an appeal must be filed. The cases relied upon by the appellant do not mandate any requirement for individualized notice of either the appeal process or the filing deadline. In these cases either the means of notice required to advise one of pending litigation of which one would not likely have any knowledge (Mullane), or of a determination by a state agency of which one might also have no knowledge (Rivera), or of certain provisions and requirements of which the State determined to give specific notice but did so in an inadequate and insufficient manner, were at issue. Here, unlike those who may not be aware of legal proceedings that might affect them, Ms. Muench certainly knew she had received both "insufficient" recommendations. The regulations made it clear that with two "insufficient" recommendations her ability to continue to seek further employment as a provisional teacher was severely impacted, just the same as if she had received a recommendation of "disapproved." N.J.A.C. 6A:9-8.7(C). Ms. Muench was *the* person who had to determine whether she wanted to appeal from the second of these, or petition for another opportunity, and the published regulations were available to provide her with the rules governing any such appeal. She was charged with knowledge of the law, including duly published regulations contained in the New Jersey Administrative Code. She had constructive notice of the regulations. She has had adequate opportunity to establish the existence of a "good cause" reason for her failure to file in a timely fashion. Indeed, at this hearing she appears to have abandoned the grounds for "good cause" that she originally asserted. She cannot now claim that the State has failed to provide adequate notice to her; no other form of notice was constitutionally required. As such, and as she failed to provide "good cause" for failing to meet the 60-day appeal deadline, her appeal is **DISMISSED**.

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

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

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

Within thirteen (13) days from the date on which this recommended decision was mailed to the parties, any party may file written exceptions with the **COMMISSIONER OF THE DEPARTMENT OF EDUCATION, 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 28, 2006
DATE

JEFF S. MASIN, ALJ

E-mail Receipt of Initial Decision Confirmed by the Department of Education on:

February 28, 2006
DATE

Mailed to Parties:

DIRECTOR AND
CHIEF ADMINISTRATIVE LAW JUDGE

MAR 3 2006
DATE

OFFICE OF ADMINISTRATIVE LAW

mjm

EXHIBIT LIST:

FOR THE PETITIONER:

P-1 Memorandum Re: Licensure from Brenda G. Silver to Traditional Route Provisional Teacher

FOR THE RESPONDENT:

R-1 Provisional Teacher Program (PTP) Registration Application start date 9/1/02

R-2 Provisional Teacher Program, Summative Evaluation dated 4/30/03

R-3 Provisional Teacher Program, Summative Evaluation dated 4/22/04

R-4 Provisional Teacher Program (PTP) Registration Application, start date 9/1/03

133-6

T.S., ON BEHALF OF MINOR CHILDREN, M.S. AND M.C.,	:	
PETITIONERS,	:	COMMISSIONER OF EDUCATION
V.	:	DECISION
BOARD OF EDUCATION OF THE TOWNSHIP OF GLOUCESTER, CAMDEN COUNTY,	:	
RESPONDENTS.	:	

SYNOPSIS

Petitioner filed a *pro se* residency appeal, challenging the respondent Board's determination that she is not a *bona fide* resident nor is she domiciled within its school district, and therefore her two children are not eligible for a free public education in Gloucester Township schools. Petitioner stated in her appeal, dated December 2005, that she was not at that time living in the district.

The ALJ found that: petitioner was unable to provide any documentation sufficient to support her claim that she is a resident domiciled in the district; petitioner, by her own admission, is seeking housing in the school district, but has not been able to acquire such housing since September 2005 when her two children were enrolled in respondent's schools; petitioner's children are not eligible for a free public education in Gloucester Township schools. The ALJ dismissed the appeal and ordered petitioner to pay respondent tuition in the amount of $4,599.34 per child for the period between September 6, 2005 and February 23, 2006, plus any additional days of attendance beyond February 23, 2006 at the rate of $43.39 per day per child.

The Commissioner concurs with the ALJ that petitioner has not demonstrated that her children are entitled to a free education in the respondent's school district, and adopts the Initial Decision as the final decision in this matter. The Commissioner directs petitioner to remit tuition to the Board of Education as stated in the Initial Decision; the Board is authorized to disenroll M.S. and M.C. unless it determines to permit their further attendance on a discretionary basis.

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.

OAL DKT. NO. EDU 10225-05
AGENCY DKT. NO. 353-12/05

T.S., ON BEHALF OF MINOR CHILDREN, M.S. AND M.C.,	:	
PETITIONERS,	:	COMMISSIONER OF EDUCATION
V.	:	DECISION
BOARD OF EDUCATION OF THE TOWNSHIP OF GLOUCESTER, CAMDEN COUNTY,	:	
RESPONDENTS.	:	

The record of this matter and the Initial Decision of the Office of Administrative Law (OAL) have been reviewed. No exceptions were filed by the parties.[1]

Upon review, the Commissioner concurs that petitioner has not demonstrated that her children are entitled to a free education in the respondent's school district pursuant to *N.J.S.A.* 18A:38-1.

Accordingly, the Initial Decision of the OAL is adopted as the final decision in this matter. The Board is authorized to disenroll M.S. and M.C. unless it determines to permit their further attendance on a discretionary basis, and petitioner is directed to remit tuition to the Board of Education in the amount of $4,599.34 per child

[1] Petitioner submitted a letter indicating that the district had acted to disenroll her children upon receipt of the Initial Decision, and asking that the Commissioner allow them to finish the year in the district on a tuition basis, notwithstanding the district's refusal at that point to do so. The former issue was resolved upon the district administration's recognition that the OAL order was not effective unless and until adopted by the Commissioner, while the latter is a matter of local board discretion which the Commissioner may not disturb in the absence of a showing that the district's action was arbitrary or unlawful – a conclusion which the present factual record does not support.

for the period from September 6, 2005 through February 23, 2006, and $43.39 per day per child for each day of attendance thereafter.

IT IS SO ORDERED.[2]

ACTING COMMISSIONER OF EDUCATION

Date of Decision: 4/13/06

Date of Mailing: 4/14/06

[2] This decision may be appealed to the State Board of Education pursuant to *N.J.S.A.* 18A:6-27 *et seq.* and *N.J.A.C.* 6A:4-1.1 *et seq.*

State of New Jersey
OFFICE OF ADMINISTRATIVE LAW

INITIAL DECISION
OAL DKT. NO. EDU 10225-05
AGENCY DKT. NO. 353-12/05

T.S., ON BEHALF OF MINOR CHILDREN,
M.S. and M.C.,
Petitioners,
v.
BOARD OF EDUCATION OF THE TOWNSHIP OF GLOUCESTER, CAMDEN COUNTY,
Respondent.

T.S., on behalf of M.S. and M.S., petitioners, pro se

John D. Wade, for respondent (Wade, Long, Wood & Kennedy, attorneys)

Record Closed: March 3, 2006 Decided: March 6, 2006

BEFORE **LILLARD E. LAW**, ALJ, t/a:

STATEMENT OF THE CASE AND PROCEDURAL HISTORY

Petitioner appeals from a determination by the Gloucester Township Board of Education (Board) that petitioner is not a bone fide resident nor is she domiciled within in its school district and, therefore, her two children are not eligible to attend its schools for a free public education. N.J.S.A. 18A:38-1(a).

The matter was transmitted from the Commissioner of Education (Commissioner) to the Office of Administrative Law (OAL) for determination as a contested case, pursuant to N.J.S.A. 52:14A-1 to 15 and N.J.S.A. 52:14F-1 to 13. The hearing was held on February 23, 2006, at the Office of Administrative Law, Mercerville, New Jersey. Counsel for respondent was requested to submit a calculation of tuition alleged to be due, pursuant to Board of Education of the Township of Cranford v. A. McG. And L.M. McG., 95 N.J.A.R. 2d (EDU) 74, aff'd 96 N.J.A.R. 2d (EDU) 140, rev'd and remanded, App. Div., February 10, 1998, A-4742-95T3, slip. op. at pp. 8-10. The hearing record closed upon receipt of the submission on March 3, 2006.

FACTUAL DISCUSSION

Having carefully reviewed and considered the testimony adduced at the hearing and having given fair weight thereto, **I FIND** the following **FACTS** in this matter:

A pre-hearing telephone conference was conducted with the parties and this tribunal on February 15, 2006, at which, among other things, petitioner agreed to provide the Board's attorney with requested discovery material; i.e., utility statements, lease agreements, driver license, and/or other indicia to demonstrate petitioner's residence/domicile within the Board's school district. Petitioner failed to provide any of the requested discovery to the Board's attorney. Nor did petitioner offer any evidence at the hearing to support her assertion she is a resident within the Board's school district.

The hearing record demonstrates that petitioner enrolled her two sons in the Board's Chews Elementary School in or about September 2005. Based upon an investigation by the Board's central and attendance office, the Board determined that the minor children were not residents of the school district and the children were illegally attending the Board's schools, pursuant to N.J.S.A. 18A:38-1. On November 1, 2005, the Board's Superintendent of Schools sent petitioner a letter, by way of certified mail, to advise petitioner of the Board's review of the domicile/residency of petitioner's

two children. On or about November 21, 2005, the Board, in executive session, took action to exclude the minor children from its school effective November 22, 2005.

On November 30, 2005, the Superintendent sent petitioner a letter in which, among other things, he advised petitioner of the investigation of the children's residence/domicile and the Board's action to exclude the children from its schools. The Superintendent also advised petitioner of her right to appeal the Board's decision before the Commissioner, and that the children would be permitted to attend the Board's school pending the outcome of her appeal. He further asserted that, in the event no appeal is set forth before the Commissioner, the children would be removed from the Board's school the 21st day after the receipt of the Board's notice and petitioner would be responsible for tuition in the amount of $43.39 per student per day for each day the children attended the Board's school.

Petitioner perfected her Pro Se Residency Appeal before the Commissioner on December 2, 2005 (R-2).

Petitioner testified she provided the school district with a copy of her New Jersey driver license, in support of her assertion she was a resident of the Board's school district. Petitioner's driver license shows her address as: 590 Lower Landing Road, Townhouse 228, Blackwood, New Jersey 08012. Blackwood is within the Board's jurisdiction.

Petitioner then testified that she does not reside at Townhouse 228 but, rather, she resides at Townhouse 255, with her godmother. Petitioner asserted she could not produce a rental lease with her name as a leaseholder because the lease is in the name of her godmother. Nor could petitioner produce any utility bills or other documentation to demonstrate she was, in fact, a resident of Townhouse 255. Petitioner admitted she did not pay any rent to her godmother.

Subsequent to petitioner having providing the Principal of the Chews Elementary School with a copy of her New Jersey driver license, petitioner was in receipt of a letter

from the Superintendent of Schools which asserted that the school officials had proof that petitioner lived at 9 E. Hodges Avenue, Lawnside, New Jersey. Lawnside is not within the Board's school district.

Petitioner's submission of the Pro Se Residency Appeal to the Commissioner, dated December 2, 2005, contains a series of statements to which petitioner was required to respond. Item Number 5, on the Appeal asks the following:

> Give a brief explanation of why attendance is being denied, including date of district's decision. Please attach, if possible, a copy of district's written determination. (Additional sheets may be used.)

Petitioner answered Item Number 5 as follows:

> I am not living in the district. I am waiting for housing authority to place me in my home. (R-2)

On December 5, 2005, petitioner addressed a letter to the Board's Superintendent of Schools where she stated, in part, as follows:

> My children and I are residing at 590 Lower Landing Road TH 255, we are staying with my godmother Mary Williams. We are awaiting housing authorities to place us in an home and this should be happening in January of 2006. If you could allow my children to remain in the school until January 31, 2006, I will have an address for you with all the information or have my children transfer from the Chews Elementary School district. (Attached to the transmission from the Commissioner to the OAL)

Petitioner testified that she had not acquired housing through the housing authority as of that date of the herein hearing held on February 23, 2006.

Petitioner testified that her sister lives at the address, which appears on a coupon to enroll her son, M.C., in the at-home book club selection. The coupon shows petitioner's name and the address of 9 Hodge Avenue, Lawnside, New Jersey (R-1). In addition, petitioner's name and address is shown on a cancelled check issued to the

Chews Elementary School as "9 E Hodge Lane, Lawnside, NJ 08045" (R-3). A copy of a page from a telephone directory also demonstrates that petitioner's address to be 9 E Hodge Avenue, Lawnside (R-4).

Petitioner executed applications for school free and reduced price meals for her two sons for the year 2005, dated September 7, 2004 (R-5). Thereon, petitioner listed her address as Blackwood, New Jersey. However, the telephone number she provided on the applications was same as her address at Lawnside, New Jersey (R-4). On the application for free and reduced price meals for the 2006 fiscal year, petitioner listed the Blackwood address and a telephone number which is different from the telephone number petitioner listed on the 2005 application (R-6).

Petitioner admitted on the herein hearing record she did not have any documentation to demonstrate she resided within the Board's school district.

LEGAL ANALYSIS

Pursuant to N.J.S.A. 18A:38-1, free public education shall be provided to any person over five and under twenty years of age who is domiciled within the school district. In general, domicile is the place of a person's abode where he or she has the present intent of remaining and to which he or she has present intent to return, Mercadante v. City of Patterson, 111 N.J. Super. 35, 39 (Ch. Div. 1970), aff'd, 58 N.J. 112 (1971). The courts have recognized that a person may have multiple residences, but only one domicile, State v. Benny, 20 N.J. 238, 251 (1955); In re Jaffe, 74 N.J. 86, 90-91 (1977), Lea v. Lea, 18 N.J. 1 (1955). The residence may coincide with domicile, however, it alone does not determine domicile. State v. Benny, supra. Domicile is that place which the person regards as his or her true permanent home. In re Jaffe, supra.

The court stated In the Matter of Unanue, 255 N.J. Super. 362 (Law Div. 1991) that it is:

> . . .clear. . .that a choice of domicile by a person, irrespective of his motive, will be honored by the court, provided there are sufficient objective indicia, by way of proofs, supporting the actual existence of that domicile. Id. at 376.

The Unanue court continued to observe that persuasive evidence of actual domicile may include:

> . . .recitals as to domicile in a will, trust, tax return or other formal document, as well as statements to others as to domicile, are evidential of the actual domicile. But they are not all conclusive. They are of value evidentiary to the extent that they are not intended to deceive and other proofs support such domicile. Id. at 377.

CONCLUSIONS

The record in this matter clearly demonstrates that petitioner is not domiciled within the Board's school district. By her own admission, petitioner is seeking housing in the school district, however, she has not been able to acquire such housing since on or about September 2005, when her two sons were enrolled in the Board's schools.

Petitioner was unable to provide any documentation, by way of utility bills, rental receipts, lease agreement or other indicia which would be sufficient to support her claim she is a bone fide resident domiciled in the Board's school district.

I **CONCLUDE**, therefore, that petitioner has not shown, nor provided any credible evidence, that she is domiciled within the jurisdiction of the Board of Education of the Township of Gloucester. I **FURTHER CONCLUDE** that petitioner's two children are not eligible for a free public education within the Board's school district under N.J.S.A. 18A:38-1.

CALCULATION OF TUITION DUE

The calculation of tuition due as a consequence of petitioner's two children's attendance in the Board's schools is pursuant to the decision found in Board of Education of the Township of Cranford v. A. McG. and L. McG., 95 N.J.A.R. 2d (EDU) 74, aff'd 96 N.J.A.R. 2d (EDU) 140, rev'd and remanded, App. Div., Feb.10, 1998 A-

4742-95T3, slip op. at pp. 8-10. The Board forwarded its calculation to this tribunal on March 3, 2006, which constitutes the close of the herein hearing record.

By way of the Board attorney's Certification, it asserts that the Superintendent of Schools calculated the daily tuition rate for each of petitioner's children to be $43.39 per day of school attendance. Between the period, beginning September 6, 2005 through February 23, 2006 (the date of the herein hearing), it is calculated there is a possible 106 school days for each child. Consequently, the tuition due and owing between September 6, 2005 and February 23, 2006, to be $4,599.34 per child. Additional days of attendance beyond February 23, 2006, accrue at the rate of $43.39 per child.

ORDER

Accordingly, it is hereby **ORDERED** that petitioner's Pro Se Residency Appeal is **DISMISSED.** It is **FURTHER ORDERED** that petitioner arrange with the Board's representatives to make the necessary tuition payments and that her children are to be removed from the Board's school immediately.

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

This recommended decision may be adopted, modified or rejected by the **COMMISSIONER OF THE DEPARTMENT OF EDUCATION,** who by law is authorized to make a 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.

March 6, 2006
DATE

Lillard E. Law
LILLARD E. LAW, ALJ t/a

E-mail Receipt of Initial Decision Confirmed by the Department of Education on:

3-6-06
DATE

Mailed to Parties:

MAR 8 2006
DATE

DIRECTOR AND CHIEF ADMINISTRATIVE LAW JUDGE
OFFICE OF ADMINISTRATIVE LAW

mph

WITNESSES

For Petitioners:

T.S.

For Respondent:

None

DOCUMENTS IN EVIDENCE

For Petitioner:

None

For Respondent:

R-1 Coupon for at-home club selection

R-2 Pro SE Residency Appeal

R-3 Check ABCO Federal Credit Union

R-4 Page from telephone directory

R-5 Application for Free and Reduced Price Meals or Free Milk – 2005 (2 pages)

R-6 Fiscal Year 2006 – Household Application for Free and Reduced Breakfast, Lunch & Milk (2 pages)

#134-06

134-06

OAL DKT. NO. EDU 21-06
(EDU 2753-05 ON REMAND)
AGENCY DKT. NO. 31-2/05

L.M. , ON BEHALF OF MINOR CHILD, N.H.,

PETITIONER, :

V. : COMMISSIONER OF EDUCATION

BOARD OF EDUCATION OF THE PRINCETON REGIONAL SCHOOL DISTRICT, MERCER COUNTY, : DECISION

RESPONDENT. :

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

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

IT IS SO ORDERED.

Lucille E Davy

ACTING COMMISSIONER OF EDUCATION

Date of Decision: 4/13/06
Date of Mailing: 4/14/06

State of New Jersey
OFFICE OF ADMINISTRATIVE LAW

INITIAL DECISION

SETTLEMENT

OAL DKT. NO. EDU 21-06
(ON REMAND EDU 2753-05)
AGENCY DKT. NO. 31-2/05

L.M. O/B/O N.H.,

Petitioner,

v.

BOARD OF EDUCATION OF THE PRINCETON REGIONAL SCHOOL DISTRICT, MERCER COUNTY,

Respondent.

L.M., parent, pro se

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

Record Closed: March 8, 2006 Decided: March 8, 2006

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

This matter was remanded to the Office of Administrative Law (OAL) by order of the Commissioner of the Department of Education based upon the necessary revision of the settlement. This included either the signature of Board's attorney on Settlement Agreement or a resolution attached thereto. The remanded matter was received by the OAL on January 5, 2006.

On January 12, 2006, a letter was sent to the parties requesting that they enter into a settlement that complied with the terms of the remand. The parties were given until February 15, 2006, to file requested settlement document. However, the parties failed to do so. On February 27, 2006, this matter was set down for hearing on March 9, 2006. Prior to that hearing date, the parties filed a fully executed settlement, with the resolution attached.

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

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

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

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

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

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

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

MARCH 8, 2006

DATE

DOUGLAS H. HURD, ALJ

Receipt Acknowledged:

March 13, 2006

DATE

DEPARTMENT OF EDUCATION

Mailed to Parties:

DIRECTOR AND CHIEF ADMINISTRATIVE LAW JUDGE

MAR 14 2006

DATE

OFFICE OF ADMINISTRATIVE LAW

/lam

SETTLEMENT AGREEMENT

WHEREAS, a residency dispute has arisen between Louis Maldonado and Lynn Hartley, parents of Nicholas Hartley ("N.H.") and the Princeton Regional School District ("the District") concerning N.H.'s entitlement to a free education in the District; and

WHEREAS, Mr. Maldonado filed a "Pro Se Residency Appeal" dated February 3, 2005, appealing the District's decision to disenroll N.H.; and

WHEREAS, Mr. Maldonado obtained an Order signed by the Honorable Audrey Blackburn, J.S.C., on January 21, 2005, transferring residential custody of N.H. to him at 300 Elm Road Princeton, New Jersey 08540; and

WHEREAS, all parties are desirous of settling the issues raised in the "Pro Se Residency Appeal";

NOW, THEREFORE, the parties agree to the following terms of settlement:

1. The District hereby withdraws its opposition to the "Pro Se Residency Appeal," now pending before the Honorable Douglas H. Hurd, A.L.J., for an initial decision.

2. The District agrees to forego any claims for reimbursement from Mr. Maldonado and/or Ms. Hartley for N.H.'s educational expenses from September 1, 2004, until the present.

3. The District agrees that N.H. shall continue to be entitled to a free education unless the above custody order is modified or Mr. Maldonado's domicile is changed to another school district.

4. Mr. Maldonado and Ms. Hartley hereby release and discharge the District from any and all claims which they may have acquired, prior to the date of this agreement.

5. By entering into this agreement, the District does not concede that N.H. was entitled to a free education prior to January 21, 2005; this agreement is made for settlement purposes only.

6. The parties agree that the terms and conditions of this agreement shall remain confidential and that the terms and conditions may not be disclosed to a third party except to enforce this agreement. The parties further agree that this paragraph shall not be interpreted in a manner inconsistent with the requirements of the New Jersey Open Public Records Act, N.J.S.A. 47:1A-1, et seq.

Date: 03/02/2006

Louis Maldonado

Date: 3/3/06

Lynn Hartley

Date: February 4, 2006

Anne Burns, President
Board of Education of the
Princeton Regional School District

141-06

NANCY SIMONS,	:	
PETITIONER,	:	
V.	:	COMMISSIONER OF EDUCATION
BOARD OF EDUCATION OF THE TOWNSHIP OF HAMILTON, MERCER COUNTY,	:	DECISION
RESPONDENT.	:	

SYNOPSIS

Petitioner – a non-tenured guidance counselor – challenged the determination of the respondent to rescind her contract for the 2003-2004 school year, arguing that her employment was secure based on her acceptance of a contract in April 2003. Respondent Board asserted that petitioner's employment was duly terminated in accordance with the sixty-day termination at will clause in her contract.

The ALJ found, *inter alia*, that: the facts are essentially undisputed; contracts of non-tenured teachers which contain provisions for termination at will by either party upon a specified number of days notice may be terminated without the need to demonstrate good cause; petitioner has not offered proof that the decision to terminate her was arbitrary, capricious or unreasonable. Accordingly, the ALJ concluded that: petitioner's termination was valid; petitioner is entitled to sixty days pay for the period from September 1, 2003 to October 30, 2003, minus nine weeks of unemployment compensation, together with interest calculated from September 1, 2003.

Upon a thorough and independent review of the record, the Commissioner concurs with the ALJ that respondent Board properly exercised its contractual right to terminate petitioner's employment subject to a sixty-day notice period, which ran its course prior to the date upon which petitioner would have attained tenure. However, the Commissioner determined that since the notice period began on July 24, 2003 and ended on September 22, 2003, the petitioner is not entitled to salary for 38 of the 60 days, because she was apparently on a ten-month contract. Thus, the petitioner is only entitled to salary for the period from September 1 through 22, 2003, minus unemployment benefits. The Commissioner adopted the Initial Decision of the OAL with the above modification; noted that it was unnecessary to reach to the merits of petitioner's performance; and dismissed the rest of petitioner's claims.

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.

April 24, 2006

OAL DKT. NO. EDU 8067-03
AGENCY DKT. NO. 312-8/03

NANCY SIMONS,	:	
PETITIONER,	:	
V.	:	COMMISSIONER OF EDUCATION
BOARD OF EDUCATION OF THE TOWNSHIP OF HAMILTON, MERCER COUNTY,	:	DECISION
RESPONDENT.	:	

The Initial Decision and record for this matter have been reviewed. No exceptions were filed.

For the reasons expressed in the Initial Decision, the Commissioner finds that respondent properly exercised its right, under its contract with petitioner, to terminate her employment subject to notice of sixty days. The resulting termination date brought petitioner's employment with respondent's district to a close short of the statutory period that would have been necessary for petitioner to earn tenure. The Commissioner accordingly adopts the Initial Decision as modified hereinafter.

If the entire sixty-day notice period had occurred during the school year while teachers were receiving paychecks, petitioner would have been entitled to sixty days of wages, in accordance with the compensation terms of her contract with respondent minus – as mitigation – any unemployment benefits that she received during that time. However, in the within matter, the sixty-day period ran from July 24, 2003 through September 22, 2003. Petitioner is consequently entitled to salary only for September 1 through 22, 2003, minus the unemployment benefits she received for that period of time.[1]

The reasoning in *Bitzer v. Board of Education of the Town of Boonton, Morris County,* 1976 *S.L.D.* 370 (1976), upon which the ALJ herein relied to come to a different conclusion, was rejected

[1] A copy of this decision will be forwarded to the Department of Labor so as to facilitate prompt reimbursement by respondent of the offset unemployment benefits.

by the Appellate Division in *Patricia Fallon v. Board of Education of the Township of Mount Laurel,* 1977 *S.L.D.* 1287 (App. Div.), *certif. den.* 74 *N.J.* 275 (1977). The court in *Fallon* disagreed with and reversed the State Board's decision which had held that a notice of termination given after a new contract was deemed to have been granted pursuant to *N.J.S.A.* 18A:27-10 and 11 could not begin to run until the commencement date of the new school year. Consequently, in a later case entitled *New Jersey Education Association v. Essex County Educational Services Commission,* 1984 *S.L.D.* 439, *aff'd.* State Board of Education, 1985 *S.L.D.* 1976, *aff'd.* App. Div. A-3154-84 (April 30, 1986), the Commissioner relied on *Fallon, supra,* in holding that the sixty-day notice period began, in that case, to run on July 1, 1980 – the date on which the employees in that case received their notice – as opposed to the date of the first day of their employment responsibilities in September.

The Commissioner also notes that it is unnecessary to address the merits of petitioner's performance and, accordingly, she declines to do so.

Regarding the issue of interest, the Commissioner finds that because petitioner has not satisfied the requirements of *N.J.A.C.* 6A:3-1.17(a)(1) and *N.J.A.C.* 6A:3-1.17(c)(1), she is not entitled to prejudgment interest. The rest of petitioner's claims are dismissed.

IT IS SO ORDERED.[2]

Lucille E Davy

ACTING COMMISSIONER OF EDUCATION

Date of Decision: 4/24/06

Date of Mailing: 4/24/06

[2] This decision may be appealed to the State Board of Education pursuant to *N.J.S.A.* 18A:6-27 *et seq.* and *N.J.A.C.* 6A:4-1.1 *et seq.*

State of New Jersey
OFFICE OF ADMINISTRATIVE LAW

INITIAL DECISION
OAL DKT. NO. EDU 8067-03
AGENCY DKT. NO. 312-8/03

NANCY SIMONS,
Petitioner,
v.
BOARD OF EDUCATION OF THE TOWNSHIP OF HAMILTON, MERCER COUNTY,
Respondent.

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

Dennis M. DeSantis, Esq., for respondent (Destribats, Campbell, DeSantis & Magee, attorneys)

Record Closed: October 25, 2004 Decided: March 7, 2006

BEFORE **RICHARD F. WELLS**, ALJ:

STATEMENT OF THE CASE

Petitioner, Nancy Simons, a school guidance counselor, asserts that the respondent, Board of Education of the Township of Hamilton, Mercer County, improperly rescinded her contract and thereby adversely impacted her tenure acquisition rights. In response, respondent maintains that it acted within its discretion to

terminate non-tenured employees and that petitioner's contract contained a sixty-day termination at will clause.

PROCEDURAL HISTORY

On August 22, 2003, petitioner filed her Verified Petition. Respondent filed its answer on September 29, 2003. Thereafter, the within matter was transmitted by the New Jersey Department of Education, Bureau of Controversies and Disputes, to the Office of Administrative Law ("OAL"), where, on October 21, 2003, it was filed as a contested case. The matter was originally scheduled to be heard on July 26, 2004, but was adjourned upon the joint request of counsel. Thereafter, the matter was rescheduled on September 20, 2004, and heard in the OAL offices in Trenton. Subsequently, the parties were afforded the opportunity to submit post-hearing memoranda and upon receipt of same, the record was closed on October 25, 2004. Thereafter, Orders of Extension were obtained to permit the filing of the Initial Decision beyond the statutory time period, pursuant to N.J.S.A. 52:14B-10(c)1.

ISSUES PRESENTED

Whether a non-tenured guidance counselor is terminable at will and, if so, does the provision for a sixty-day notice before termination apply?

FINDINGS OF FACT

1. Petitioner, Nancy Simons, was a non-tenured teacher employed as a Guidance Counselor by the respondent.

2. Petitioner's employment began with respondent on November 6, 2000.

3. Petitioner was offered and accepted re-appointment for the 2001-2002, and 2002-2003, school terms.

4. In April of 2003, petitioner was offered and signed an employment contract for the 2003-2004, school term.

5. On July 24, 2003, the Hamilton Township Board of Education "voted to rescind" petitioner's appointment for the 2003-2004, school term.

6. Petitioner was "highly regarded" by her supervisor during the 2000-2001, 2001-2002, and 2002-2003, school years. Petitioner's evaluations during that time reflected that view.

7. A new school principal started in the 2002-2003, school year.

8. There were some personality conflicts between petitioner and the new principal that included some disrespectful language on the part of petitioner.

9. Petitioner's June 20, 2003, Annual Performance Report, prepared by the new principal, was neutral in tone but noted that:

> It is an observation of this administrator that communications and interaction between and among staff and parents could use improvement....[the petitioner] could benefit from constructive criticism if she was more willing to discuss the particulars of a given situation in a collegial manner. It is suggested that...[the petitioner] take more initiative to begin projects that are counselor related and follow through to completion...[the petitioner] was absent for two consecutive weeks at a very busy time of year which impeded upon the continuity of services.

10. The June 20, 2003, Performance Report does not indicate whether the petitioner was recommended for Retention (that portion of the evaluation form was left blank).

11. There was some discussion with petitioner that she and a guidance counselor from another school would switch positions for the upcoming school year.

12. Petitioner received a letter dated July 24, 2003, stating that the respondent Board of Education "voted to rescind" petitioner's appointment for the 2003-2004, school term at a meeting held on July 23, 2004.

13. Petitioner received no notice or warning of the July 23, 2004, meeting and vote.

14. Petitioner requested via letter dated July 28, 2003, the reasons in writing for the respondent's actions.

15. The respondent, via letter dated August 28, 2003, informed petitioner of the reasons for "not being reappointed":

> The decision was based on the recommendations of the building administrator who found that your performance was deficient in regards to your communications and interactions between and among parents and that the positive and clear communication strategies that facilitate this process were often missing. Additionally, you were unwilling to discuss particulars of a given situation in a collegial manner after the receipt of constructive criticism. You did not take the initiative to begin counselor-related projects and follow them through to completion. Additionally, you absence for two consecutive weeks at a very crucial time of year impeded the continuity of services such as assistance with field day, test administration, and group sessions.

16. Had petitioner's contract for the 2003-2004 school term not been rescinded, she would have become eligible for tenure during that term.

17. Petitioner received unemployment insurance benefits of $482 per week as a result of her application for benefits of August 10, 2003.

18. Petitioner was unemployed from August 2003 through December 2003.

19. Petitioner's written contract contained a termination clause with a sixty-day notice provision.

20. Respondent's written policy on "Employee Contracts" contained a sixty-day notice provision for unilateral terminations.

CONCLUSIONS OF LAW

N.J.S.A. 18A: 27-10 requires that non-tenured teachers be notified by May 15th if they will not be reemployed for the upcoming academic year;

> On or before May 15 in each year, each non-tenured teaching staff member continuously employed by a board of education since the preceding September 30 shall receive either:
> a. A written offer of a contract for employment from the board of education for the next succeeding year providing at least the same terms and conditions of employment but with such increases in salary as may be required by law or policies of the board of education, or a written notice from the chief school administrator that such employment will not be offered.
>
> [N.J.S.A. 18A: 27-10.]

The burden is then on the teacher to accept the employment offer in accordance with N.J.S.A. 18A: 27-12; "If the teaching staff member desires to accept such employment he shall notify the board of education of such acceptance, in writing, on or before June 1 in which event such employment shall continue as provided herein." The primary purpose of the statutory scheme is to provide teachers with timely notice that they will not be employed by a board of education for the upcoming school year so that they may seek employment elsewhere. Armstrong v. East Brunswick Twp. Board of Education, 1975 S.L.D. 112, 115-116, modified, St. Bd., 1975 S.L.D. 117, aff'd, App. Div., 1976 S.L.D. 1104.

The case before this tribunal is different than the situation where a non-tenured teacher is not offered a renewed contract for employment. In that situation, the teacher is entitled to two separate and distinct procedural safeguards. The first, known as a

Rice hearing, occurs when a board of education intends to discuss at a meeting of the board, the non-renewal of specific employees for performance or other reasons. Skidmore v. Board of Education of the Twp. of Washington, Mercer County, EDU 6588-03, Initial Decision, (October 20, 2004), rejected, Comm'r. (December 1, 2004) <http://lawlibrary.rutgers.edu/oal/search.html>. Rice, requires that the employee receive notice of the meeting so that they may be present. Rice v. Union Co. Regional High School Board of Education, 155 N.J. Super. 64 (App. Div. 1977). The second procedural safeguard is a Donaldson hearing, which must be requested by the non-renewed teacher. Skidmore, supra. Under Donaldson, a non-tenured teacher may request and receive a written statement of the reasons for her non-renewal. Ibid.

The operative facts of the case before this tribunal are essentially undisputed. The petitioner was offered employment for the 2003-2004 school year on April 22, 2003, prior to the statutory May 15th date. The petitioner accepted the offer of employment the following day, April 23, 2003. The petitioner argues that her employment was secure for the 2003-2004 school term since a contract had been offered and accepted. Petitioner, therefore, asserts that the respondent could not terminate her employment absent some cause for termination. Consequently, the question before this tribunal is whether the subsequent termination of the petitioner is valid and, what remedies, if any, petitioner is entitled to.

A school board has "virtually unlimited discretion in hiring or reviewing the contracts of non-tenured teachers." Dore v. Board of Education of the Township of Bedminster, Somerset County, 185 N.J. Super. 447, 453 (App. Div. 1982). This power to terminate non-tenured teachers is so broad that "absent constitutional constraints or legislation affecting the tenure rights of teachers, local boards of education have almost a complete right to terminate the services of a teacher who has no tenure and is regarded as undesirable by the local board. Id. at 456. Furthermore, employment contracts of non-tenured public school teachers which contain provisions for termination by either party upon a specified number of days notice may be terminated in accordance with the terms of the contract without the need to demonstrate good cause. Mozier v. Board of Education of Cherry Hill Twp., Camden County, 450 F. Supp. 742,

748 (D.N.J. 1977). The board's decision will be vacated only when it is arbitrary, capricious and unreasonable. Kopera v. West Orange Board of Education, 60 N.J. Super. 288, 294 (App. Div. 1960).

Here, the petitioner was offered and accepted a contract for the new school term. Thus, the provisions of that contract apply. Respondent offered evidence that all of the contracts of its employees contain a provision that provides that the contract may be terminated upon sixty-days notice from either party. Indeed, the petitioner signed such a contract in October 2000, when she was initially hired. Thus, absent proof by the petitioner that the decision to terminate her was arbitrary, capricious or unreasonable, I **FIND** petitioner is only entitled to sixty days notice of her termination.[1]

Accordingly, because the petitioner has not offered evidence that her termination was arbitrary, capricious or unreasonable, I **CONCLUDE** her termination is valid. Indeed, the respondent offered testimony that the petitioner was insubordinate to her supervisor, the school principal.[2] Petitioner's annual evaluation was neutral at best, reflecting the school principal's observation of the petitioner's work product. Respondent offered testimony by the school principal that the petitioner had problems communicating with at least three other parents. Further, the school principal testified that the petitioner had attendance problems. Given the broad discretion that school boards have regarding termination of non-tenured staff members, any of these factors preclude a finding that the school board's decision was arbitrary and capricious.

Because petitioner's termination was valid, petitioner is only entitled to the terms of the contract – namely, the sixty-day notice provision. Bitzer v. Board of Education of the Town of Boon, Morris County, 76 S.L.D. 370 (1976) held that a notice provision clause requires that the terminated employee receive salary for the specified number of days beginning September 1 on the next school year, minus mitigation of any other salary earned. As a result, I **FIND** petitioner is entitled to sixty days pay from

[1] The petitioner did request a written statement regarding the reasons for her termination. As set forth in the above Findings of Fact, I am satisfied respondent provided petitioner with the letter dated August 28, 2003. (R-6).

September 1, 2003, to October 30, 2003.[3] Therefore, I **CONCLUDE** the petitioner is entitled to sixty days pay minus nine weeks of unemployment compensation (as mitigation, i.e., $482 x 9), together with interest at the legal rate, calculated from September 1, 2003. See R. 4:42-11.

In conclusion, because school boards have virtually unlimited discretion to terminate non-tenured employees, I **FIND** that the termination of the petitioner was not arbitrary, capricious or unreasonable. Although there is no need for the respondent to show good cause when terminating employees, the testimony offered by the school principal is sufficient to show that the school board's action had a rational basis. Since the terms of the employment contract govern, the sixty-day notice provision applies from September 1, 2003. Accordingly, I **FIND** petitioner entitled to sixty days pay, minus any unemployment compensation as mitigation, plus interest on the net amount owed.

DISPOSITION

For the reasons set forth hereinabove, I **FIND** that petitioner is not entitled to reinstatement. Rather, I **FIND** that respondent appropriately terminated petitioner in accordance with the applicable contract terms. Accordingly, I **FIND** petitioner is entitled to sixty days pay at the appropriate rate for the school year of 2003-2004, minus any unemployment compensation petitioner received, plus interest on the net amount owed by respondent to petitioner at the legal rate under the applicable court rule cited above.

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

---

[2] In September of 2002, the school principal testified that she received a formal complaint letter from a parent regarding the petitioner. The school principal testified convincingly that during the resolution and heated discussion of the complaint with the parent and the principal, the petitioner used inappropriate expletives.

[3] Petitioner argued that she would have been entitled to tenure either in November 2003 or January 2004, depending on the date used for petitioner's "start" date (petitioner commenced employment with respondent on November 6, 2000, as a long term substitute and was appointed to a permanent position on January 29, 2001). Since the sixty-day notice period does not overlap with either date, I **FIND** the question of tenure accrual need not be further addressed.

This recommended decision may be adopted, modified or rejected by the **COMMISSIONER OF THE DEPARTMENT OF EDUCATION,** who by law is authorized to make a 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.

3-7-06

DATE

RICHARD F. WELLS, ALJ

E-mail Receipt of Initial Decision Confirmed by the Department of Education on:

3-7-06

DATE

Mailed to Parties:

MAR 10 2006

DIRECTOR AND CHIEF ADMINISTRATIVE LAW JUDGE

DATE

OFFICE OF ADMINISTRATIVE LAW

jh

WITNESSES

For petitioner:

Nancy Simons

For respondent:

Joseph November
Stephanie Crea

EXHIBITS

For petitioner:

P-1 Letter signed by petitioner on April 25, 2003
P-2 Letter from respondent, dated July 24, 2003
P-3 Handwritten letter from petitioner, dated July 28, 2003
P-4 Marlboro Township pay stub for pay period ending June 30, 2004
P-5 Hamilton Township Schools observation report, dated March 18, 2003 (signed by petitioner May 19, 2003)

For respondent:

R-1 Unemployment insurance benefit notice to claimant of benefit determination
R-2 Annual Performance Report, dated June 20, 2003
R-3 Contract, dated October 26, 2000
R-4 Contract, dated December 21, 2000
R-5 Policy re: Employee Contracts
R-6 Letter from respondent, dated August 28, 2003

OAL DKT. NO. EDU 3681-06
AGENCY DKT. NO. 74-2/06

CATHOLIC FAMILY AND COMMUNITY SERVICES, ET AL.,	:	
PETITIONERS,	:	
V.	:	COMMISSIONER OF EDUCATION
STATE-OPERATED SCHOOL DISTRICT OF THE CITY OF PATERSON, PASSAIC COUNTY AND NEW JERSEY STATE DEPARTMENT OF EDUCATION,	:	DECISION ON MOTION
RESPONDENTS.	:	

The record of this emergent matter – which included an audiotape of the hearing conducted at the Office of Administrative Law (OAL) on April 4, 2006, along with the recommended order of the Administrative Law Judge (ALJ) – have been reviewed.

Upon her independent and careful review of the record, the Commissioner determines to adopt the ALJ's recommended order granting emergent relief in this matter as she concurs, for the reasons articulated in his decision, that petitioners have satisfied the requisite standards for the granting of such relief pursuant to *Crowe v. DeGioia*, 90 *N.J.* 126 (1982).

Accordingly, the within application for emergent relief is hereby granted. This matter is being returned to the OAL for such further proceedings as may be necessary to bring it to conclusion.[1]

[1] It is noted that on Page 7 of the ALJ's Order he mistakenly reports that the only matter referred to the OAL by the agency was the instant emergent application. The transmittal additionally included a Petition of Appeal and the transmittal form specifically described the Nature of the Case thusly: "Petitioner, early childhood education provider, challenges internal audit findings for 2003-04 and 2004-05 and seeks to enjoin respondents from implementing repayment or reduction schedule pending underlying determination claiming that absent such

IT IS SO ORDERED.*

Lucille E Davy

ACTING COMMISSIONER OF EDUCATION

Date of Decision: 4/18/06

Date of Mailing: 4/18/06

restraints the schools will be compelled to shut down operations." With the grant of this interim order, the propriety of the referenced audit findings is now before the OAL.

[2]This decision may be appealed to the State Board of Education pursuant to *N.J.S.A.* 18A:6-27 *et seq.* and *N.J.A.C.* 6A:4-1.1 *et seq.*

State of New Jersey
OFFICE OF ADMINISTRATIVE LAW

EMERGENCY ORDER

OAL DKT. NO. EDU 03681-06

AGENCY DKT. NO. 74-2/06

CATHOLIC FAMILY AND COMMUNITY SERVICES ET. AL.,

Petitioner,

v.

STATE-OPERATED SCHOOL DISTRICT OF CITY OF PATERSON, PASSAIC COUNTY AND NEW JERSEY STATE DEPARTMENT OF EDUCATION,

Respondent.

Vito A. Gagliardi, Jr., Esq., for petitioner (Porzio, Bromberg & Newman, P.C., attorneys)

Roy J. Evans, Esq., for respondent District (Schenck, Price, Smith & King, LLP, attorneys)

Allison Colsey Eck, Deputy Attorney General, appearing for respondent Department (Zulima V. Farber, Attorney General of New Jersey, attorney)

Record Closed: April 4, 2006 Decided: April 4, 2006

BEFORE **JESSE H. STRAUSS**, ALJ:

PROCEDURAL BACKGROUND

In this matter petitioner requested an emergency hearing to enjoin respondents from reducing monthly monies allegedly due it pursuant to a contract between petitioner and respondent State-Operated School District of City of Paterson, Passaic County (the "District). On March 29, 2006, the Department of Education Bureau of Controversies and Disputes referred the matter to the Office of Administrative Law (OAL) for an emergency hearing. On April 4, 2006 the undersigned heard the emergency aspect of the case. At oral argument that day, counsel for petitioner represented that that part of the dispute solely with regard to the application for emergency relief involving the Department of Education had been resolved but requested that the application for emergency relief against the District proceed.

EMERGENCY HEARING RESULTS

Catholic Family and Community Services (CFCS) is a not-for-profit corporation which operates and administers a wide variety of social service programs within the boundaries of the Diocese of Paterson including the operation of Friendship Corner Schools, which are early childhood education programs that provide educational services to 360 children enrolled in the Paterson Public Schools (the "District") pursuant to Abbott v. Burke, 153 N.J. 480 (1998) Abbott v. Burke, 163 N.J. 95 (2000).

As an Abbott District obligated to provide an early education program, the District has entered into a series of successive contracts with the Friendship Corner Schools of CFCS to provide those services for the fiscal years 2003-04, 2004-05 and 2005-06.

In the fall of 2005 the District's Internal Audit Unit completed an audit of Friendship Corner Schools for July 1, 2003-June 30, 2004 initially concluding that $226,992.83 was owed upon finding that they did not follow the approved Abbott budget for certain personnel costs. CFCS had previously returned $41,472 from a total amount of $268,464.83 leaving a balance of $226,992.83 which the District recouped by deducting from purchase orders owed to CFCS under the current contract for December 2005,

January 2006 and February 2006. CFCS subsequently asked, and the District agreed, that $88,985.49 of the recouped amount regarding administrative costs incurred during the 2003-04 school year be reinstated. According to CFCS, that money has not yet been returned but accepts the District's representation that it will be returned.

In November 2005, the District informed CFCS, without providing an audit report or any other specifications, that, upon review of the Friendship Corner Schools' financial reports for the 2004-05 school year, it found that CFCS owed the District additional monies which, when adjusted, totaled $303,392. The District initially announced a "repayment/reduction schedule from monies owed to CFCS under the 2005-06 contract from February to May 2006. The repayment schedule was then revised so that the recoupment of the 2004-2005 money would extend from March 2006 through December 2006.

The 2003-04 and 2004-05 contracts between CFCS and the District provided for a mechanism to recoup any unexpended or misspent funds occurring under those contracts. They provided as follows:

> The Provider agrees to submit to the District a quarterly expenditure report of actual, approvable, reasonable and customary expenditures ... and understands that the District will recoup any unexpended or misspent funds during and at the end of the school year based on the quarterly expenditure reports, enrollment records and monthly payments made by the District.
>
> ...Based on its review of the quarterly expenditure report, the District shall make prorated adjustments to subsequent monthly payments through the end of the contract.

Significantly, the 2005-06 contract expanded on the adjustment procedure as follows:

> Based on its review of the quarterly expenditure reports, the District shall make prorated adjustments to subsequent monthly payments. When necessary, based on quarterly expenditure reports, the District may recoup funds after the contract period has ended.

Whereas the earlier contracts provided for recoupment from future payments only in subsequent monthly payments during the life of the contract, the current contract provides for recoupment during the rest of the contract period as well as after the contract period has ended.

The problem appears to lie in the attempt of the District to recoup monies, allegedly misspent in 2003-04 and 2004-05, not through the mechanism in place during the life of those contracts, but rather through an expanded mechanism first put into place in the current contract.

CFCS has filed for emergency relief before the Commissioner of Education claiming that the District's recoupment action is in violation of state law and its contract with CFCS and that it should be restrained from collecting allegedly misspent monies under the 2003-04 and 2004-05 contracts through reductions in monies due to CFCS under its 2005-06 contract.

Previously, CFCS filed an Order to Show Cause with Temporary Restraints in the Superior Court of New Jersey, where, on February 27, 2006, the Honorable Joseph J. Riva issued Temporary Restraints ordering that the District shall not implement a repayment or reduction schedule as to the 2004-2005 fiscal year regarding purchase orders owed to CFCS in the 2005-06 fiscal year pending disposition of the instant dispute. He further ordered that the District shall not implement a repayment or reduction schedule regarding future services rendered by plaintiffs pending disposition of the instant dispute. He further ordered that the District be required to provide immediately for the return of $88, 858 to

CFCS which it admits is due and owing pending appeal in its letter of January 31, 2006. He further ordered that the Department of Education be dismissed without prejudice. He finally ordered that the temporary restraints which are granted to maintain the status quo until the Commissioner of Education has an opportunity to review and decide the application for restraints submitted by CFCS on February 22, 2006 and which shall expire upon the issuance of a final determination by the Commissioner on the application for temporary restraints, are not intended to supersede the Commissioner's jurisdiction and determination regarding the ultimate issues raised.

For a request for interim relief or stay, N.J.A.C. 6A:3-1.6 requires as follows:

(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 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.

I have heard the arguments of all parties and read their submissions.

I **FIND** that CFCS will suffer irreparable harm if the requested relief is not granted. The District does not contest through any certifications of its own the certified claim that Friendship Corner Schools are financially destitute with no surplus or reserves for contingencies, and are being subsidized by CFCS, and that CFCS does not have the funds to continue this subsidy. It appears that the implementation of the repayment/reduction plan will force CFCS to close the Friendship Corner Schools

notwithstanding an acknowledgment that the parent organization of Catholic Charities may in the future be able satisfy past obligations. Although matters involving money damages often do not justify a finding of irreparable harm, because if a party ultimately prevails it can recover the monies taken, here the recovery of the money at a later time may be a futile exercise if the enterprise has collapsed in the interim for lack of sufficient operating funds. The unrebutted certification of CFCS discloses that it has become delinquent in paying health benefits premiums for lack of cash flow and is at risk of losing this coverage. It has also implemented a hiring freeze and has delayed supply purchases. Of equal concern is that, if the schools shut down because of insufficient operating funds, the 360 District students will be deprived of the educational services mandated by the Abbott decisions.

I additionally **FIND** that the reasonable likelihood of success on the merits falls in favor of CFCS on the basis of simple contract law and contract interpretation. This application is not about whether CFCS indeed owes monies under two expired contracts. At issue is whether the current contract permits the mechanism of recoupment from promised monies under the current contract, not for misspent funds under the current contract, but for allegedly misspent funds under prior contracts. It does not appear to do so, although, unlike its predecessors, it allows the District to recoup funds misspent in 2005-06 after this contract period. The prior contracts do not provide for a recoupment from future payments under future contracts after the prior contract has expired. The District aptly points out that providers of Abbott preschool programs agree to spend the funds approved in the annual budget only as specified. If there is a breach of that commitment, the District is free to engage in traditional contractual remedies under those contracts. My finding on likelihood of success is limited to the method of recoupment and not the right of recoupment

Although N.J.A.C. 6A:23-4.2(l) applies to tuition payments to private schools for the disabled and not private preschools, it does suggest the notion of collecting misspent money only after due process is provided. I am troubled that the process leading to the assessment for 2004-05 appeared to me less thorough and less interactive than the

process leading to the assessment for 2003-04. The due process concern is not dispelled by a claim that CFCS should have been policing itself and returning money all along.

It is correct that N.J.A.C. 6A:10A-2.3 requires the District to monitor the expenditures of each contracted child care center provider at least quarterly and shall recoup any unexpended funds at the end of the school year. That provision is consistent with the contracts in effect in 2003-04 and 2004-05. It does not give any greater authority to the District to collect those monies by recoupment from a different contract.

I additionally **FIND** that the legal right underlying the claim of CFCS is settled under traditional principles of contract law that one cannot breach a contract by failing to make contractually obligated payments (in this case agreed upon monthly purchase orders under the 2005-06 contract) where that contract contains no language to allow a party to recoup monies from prior fiscal years under prior contracts.

Finally, I **FIND** that the balance of the equities weigh in favor of CFCS in view of the unrebutted financial picture of CFCS. If a financially crippled organization must cease to provide services, unless the District has an immediate alternate method to provide a preschool program to 360 children, the children will be deprived of mandated services and the District itself will be in breach of its Abbott obligations. On the other hand, the District will always be able to pursue traditional collection remedies if, indeed, CFCS breached its obligations under prior contracts.

I **CONCLUDE** that CFCS has met the requirements of N.J.A.C. 6A:3-1.6 and is entitled to certain emergency relief.

It appears that the only matter referred to the OAL by the Department of Education relates to the application for emergency relief. It further appears, from the presentations of the parties, that the issues of whether monies are actually owed to the District under the 2003-04 and 2004-05 contracts and, if so, in what amounts are currently the subject of internal appeal processes. Accordingly, OAL will not retain jurisdiction over any other

aspects of this matter, subject to any direction to the contrary by the Department of Education.

ORDER

I hereby **ORDER** that the District shall not implement a repayment or reduction schedule as to the 2004-05 fiscal year by reducing agreed upon monthly purchase orders to CFCS under the 2005-06 fiscal year contract pending disposition of the pending dispute and that CFCS is not required to repay the District any monies from the 2004-2005 fiscal year pending disposition of the instant Appeal.

This order on application for emergency relief may be adopted, modified or rejected by the Department of Education, which by law is authorized to make a final decision in this matter. The final decision shall be issued without undue delay, but no later than forty-five (45) days following the entry of this order. If the Department of Education does not adopt, modify or reject this order within forty-five (45) days, this recommended order shall become a final decision on the issue of emergent relief in accordance with N.J.S.A. 52:14B-10.

April 4, 2006
DATE

JESSE H. STRAUSS, ALJ

142-06

IN THE MATTER OF THE TENURE HEARING OF DARLENE ~~DONAHUE~~, SCHOOL DISTRICT OF PEMBERTON :

AND :

DARLENE DONAHUE, :

PETITIONER, :

V. :

BOARD OF EDUCATION OF THE TOWNSHIP OF PEMBERTON, BURLINGTON COUNTY, :

RESPONDENT. :

COMMISSIONER OF EDUCATION

DECISION

SYNOPSIS

In the first of these two consolidated matters, the petitioning Board brought tenure charges of conduct unbecoming against respondent – a tenured librarian/media specialist – for use of the District's Newcomb Middle School circulation desk computer to access and view pornographic materials on the internet during school hours, and to send e-mail messages containing inappropriate, obscene, lewd or vulgar language to another district employee. In the second matter, Ms. Donahue appealed the District's determination to withhold her 2003-2004 salary increments for the same reasons set forth in the first matter. Ms. Donahue contends that her intent when accessing improper internet material was to protect children from exposure to inappropriate websites by identifying flaws in the District's content filtering software.

The ALJ identified the issue in this case to be whether respondent viewed inappropriate or pornographic websites for personal gratification or in order to expose flaws in the District's filtering software and – if the latter – whether she had the right to engage in such conduct; therefore, the case hinged largely on respondent's credibility. The ALJ found, *inter alia,* that: respondent's testimony lacked credibility; respondent engaged in conduct unbecoming a public school teacher by using the District's computers to access and view internet pornography during school hours; and respondent's unbecoming conduct was sufficiently flagrant to justify her dismissal. The ALJ concluded that petitioning Board met its burden of proving the tenure charges against respondent, and that her dismissal is warranted.

The Commissioner concurs with the ALJ that the District has proven its charges against respondent by a preponderance of the credible evidence. Accordingly, the Initial Decision is adopted as the final decision in this matter. Respondent is dismissed from her tenured position as of the date of this decision, and the matter is referred to the State Board of Examiners for action against respondent's certificate as that body deems appropriate.

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.

April 24, 2006

OAL DKT. NOS. EDU 4379-03 and EDU 6586-03
AGENCY DKT NOS. 177-6/03 and 285-8/03
(CONSOLIDATED)

IN THE MATTER OF THE TENURE HEARING OF DARLENE DONAHUE, SCHOOL DISTRICT OF PEMBERTON	:	
AND	:	COMMISSIONER OF EDUCATION
DARLENE DONAHUE,	:	DECISION
PETITIONER,	:	
V.	:	
BOARD OF EDUCATION OF THE TOWNSHIP OF PEMBERTON, BURLINGTON COUNTY,[1]	:	
RESPONDENT.	:	

The record and Initial Decision issued by the Office of Administrative Law (OAL) have been reviewed. Exceptions on behalf of Ms. Donahue and the Board's reply thereto, filed in accordance with the requirements of *N.J.A.C.* 1:1-18.4, were fully considered by the Commissioner in reaching her determination herein.

Respondent's exceptions charge that the Administrative Law Judge's (ALJ) decision failed to recognize and resolve the crux of respondent's defense in this case, *i.e.*, her *motive* in accessing or attempting to access inappropriate, sexually explicit or pornographic internet cites. Respondent makes extensive citation to her hearing testimony and that of her

[1] It is noted that with respect to the increment withholding portion of this consolidated case: on the first day of hearing the Administrative Law Judge determined, without objection of the parties, that – because the charges underlying both the tenure case and the increment withholding were identical – resolution of the tenure matter, either way, would necessarily render the increment withholding moot. (Transcript December 1, 2004, pp. 4-7) Additionally, the parties' subsequent submissions made no reference to the increment withholding.

expert which, she avers, conclusively establishes that her motive was concern for the protection and safety of her students not satisfaction of her own personal prurient interests. In finding to the contrary, respondent maintains the ALJ failed to give fair consideration to all of the evidence in support of her position and, rather, focused only on that which supported her removal from her position. (Respondent's Exceptions dated March 21, 2006)

Upon a careful and independent review of the record, which included transcripts of the hearing conducted at the OAL[2], the Commissioner – finding respondent's exceptions wholly without merit – concurs with the findings and conclusions of the Administrative Law Judge (ALJ) that the District has proven its charges against respondent by a preponderance of the credible evidence and that termination from her employment is warranted.

In so determining, the Commissioner recognizes – as did the ALJ – that the central issue in this case:

> is not whether Ms. Donahue attempted to access inappropriate or pornographic websites using the Newcomb Middle School circulation desk computer. Rather, the issue is whether she did so for personal gratification or in order to expose flaws in the District's internet content filter software and, if the latter, whether she had the right to engage in such conduct. Therefore, much of this case hinges on Ms. Donahue's credibility.
> (Initial Decision at 26)

For the reasons meticulously detailed on pages 26-29 of his decision, the ALJ concluded that Ms. Donahue's "testimony raises so many more questions than it provides answers that it simply does not 'hang together'." (quote at 26) In this regard, the Commissioner is mindful that the ALJ's credibility determinations are entitled to deference. "The reason for this rule is that the administrative law judge, as a finder of fact, has the greatest opportunity to observe the demeanor of the involved witnesses and, consequently, is better qualified to judge their

[2] Hearing dates were December 1 and 2, 2004, May 16 and 19, 2005 and September 27, 2005.

credibility." *In the Matter of Tenure Hearing of Tyler*, 236 *N.J. Super.* 478, 485 (App. Div.) *certif. denied*, 121 *N.J.* 615 (1989); *In the Matter of the Tenure Hearing of Frank Roberts*, 96 *N.J.A.R.* 2d (EDU) 549, 550. Indeed, with the 2001 amendment to the Administrative Procedure Act (*P.L.* 2001, *c.* 5, §4), 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)) The Commissioner's considered review of the entire record before her provides no basis whatsoever for alteration of the ALJ's determinations.

Accordingly, the Initial Decision of the OAL is adopted as the final decision in this matter for the reasons clearly stated therein. It is hereby directed that Darlene Donahue be dismissed from her tenured position in the School District of Pemberton Township as of the date of this decision. This matter shall be transmitted to the State Board of Examiners for action, as that body deems appropriate, against respondent's certificates.

IT IS SO ORDERED.[3]

Lucille E. Davy
ACTING COMMISSIONER OF EDUCATION

Date of Decision: 4/24/06

Date of Mailing: 4/24/06

[3] This decision may be appealed to the State Board of Education pursuant to *N.J.S.A.* 18A:6-27 *et seq.* and *N.J.A.C.* 6A:4-1.1 *et seq.*

State of New Jersey
OFFICE OF ADMINISTRATIVE LAW

INITIAL DECISION
OAL DKT. NOs. EDU 4379-03 and
EDU 6586-03
AGENCY DKT. NOs. 177-6/03 and
285-8/03

PEMBERTON TOWNSHIP SCHOOL DISTRICT BOARD OF EDUCATION,
Petitioner,
v.
DARLENE DONAHUE,
Respondent.

LaTonya N. Bland, Esq., appearing for Petitioner (Capehart & Scatchard, P.A., attorneys)

Steven R. Cohen, Esq., and **Carol H. Alling, Esq.**, appearing for Respondent (Selikoff & Cohen, attorneys)

Record Closed: January 23, 2006 Decided: March 10, 2006

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

The first of these two consolidated matters, OAL Docket No. EDU 4379-03, involves tenure charges brought by petitioner, the Pemberton Township School District Board of Education, against respondent, Darlene Donahue, for conduct unbecoming a public school teacher. The Board has alleged that Ms. Donahue used the district's

computers to access and view pornographic materials on the internet during school hours and send several e-mail messages containing inappropriate, obscene, lewd, or vulgar language to another district employee. The second matter, OAL Docket No. EDU 6586-03, concerns Ms. Donahue's appeal from the District's determination to withhold her 2003-04 salary and adjustment increments for the same reasons as set forth in the in the first matter.

On May 29, 2003, the Board adopted a resolution finding that probable cause existed to credit the evidence supporting the tenure charges, that the charges were sufficient to warrant Ms. Donahue's dismissal from her tenured position, and that her 2003-04 salary should be withheld. The tenure charges were served under cover letter dated June 2, 2003, and she in turn filed her answer on June 11, 2003. Ms. Donahue subsequently filed the aforementioned Petition of Appeal on June 19, 2003 demanding, inter alia, restoration of her salary adjustment and increment for the 2003-04 school year as well as reimbursement of a sum of money equal to her loss of salary.

The matters were heard as scheduled on December 1 and 2, 2004; May 16 and 19, 2005; and September 27, 2005 at the Office of Administrative Law, 9 Quakerbridge Plaza, Mercerville, New Jersey. The parties requested the opportunity to submit post-hearing briefs and the record was closed upon receipt of the final brief on January 23, 2006.

Ms. Donahue is a 1975 graduate of Trenton State College and currently holds certificates in early childhood learning, elementary school education, and library science. She was employed by the Pemberton Township School District in August 1989 as the librarian at the Fort Dix Elementary School and was transferred one year later to serve in the same capacity at the Newcomb Middle School. She remained at Newcomb as a librarian/media specialist for approximately thirteen years, until the tenure charges which gave rise to the present proceedings were filed.

As the librarian, Ms. Donahue was initially responsible for selecting, cataloguing, and screening books and videos to ensure they were age and grade appropriate;

teaching students research skills; and generally assisting students and teachers with various research projects. She also became responsible for teaching students internet research skills when the District connected to the internet in 1998.

At that time the District adopted Policy No. 2361 entitled "ACCEPTABLE USE OF COMPUTER INTERNET/COMPUTERS AND RESOURCES." Among other things, Section L.8. of the policy expressly prohibits students and teachers from accessing obscene or pornographic materials as follows:

> a. Users will not use the District system to access material that is profane or obscene (pornography) that advocates illegal acts, or that advocates violence or discrimination towards other people (hate literature). For students, a special exception may be made for hate literature if the purpose of such access is to conduct research and access is approved by both the teacher and the parent. District employees may access the above material only in the context of legitimate research.
> b. If a user inadvertently accesses such information, they should immediately disclose the inadvertent access in a manner specified by their school. This will protect users against an allegation that they have intentionally violated the Acceptable Use Policy.
>
> [Policy No. 2361 §L.8., Exhibit P-10]

Additionally, Section L.4. restricts employees' use of the District's e-mail in the following ways:

> a. Restrictions against Inappropriate Language apply to public messages, private messages, and material posted on Web pages.
> b. Users will not use obscene, profane, lewd, vulgar, rude, inflammatory, threatening, or disrespectful language.
>
> [Policy No. 2361 §L.4., Exhibit P-10]

Daniel Bevilacqua, the District's Director of Personnel, described Policy No. 2361 as

> a comprehensive document that outlines an agreement providing a privilege to employees for the use of Internet access and E-mail, and calls it out as a privilege, in that it details the do's and don'ts, if you will, and the appropriate protocols and procedures to be followed in the event of a determination of inappropriateness.
>
> [T1 55:5-12[1]]

Mr. Bevilacqua testified that the "protocols and procedures" require teachers who have inadvertently accessed inappropriate websites to immediately notify the Director of Public Information, Kathy Bernacki, "and indicate that this might be a site that needs to be added" to the internet filter. Neither the policy nor the procedures authorize teachers such as Ms. Donahue to monitor or test the effectiveness of the District's internet filtering system on their own.

In accordance with established procedures, on Friday, October 11, 2002, Linda Guidone, a high school English teacher, provided Ms. Bernacki with a printout of an inappropriate website that she had inadvertently accessed using the District's proxy server. Later that afternoon, Ms. Bernacki called the District's Network Engineer, Lori McMillan, and asked her to add that website to the internet filter's list of blocked sites.

Testifying on behalf of the District, Ms. McMillan stated that she logged on to the District's server from home that evening and added the inappropriate website to the filter. She then stopped and restarted the server to update the filter and perform a test to ensure that it was operating properly. She tested the filter by scanning the user activity logs for inappropriate websites that should have been blocked and noticed that there had been a substantial amount of inappropriate activity coming from one particular IP address, that of the Newcomb Middle School Circulation Desk computer.

Ms. McMillan became quite upset when she saw the number and names of these inappropriate sites and knew she had to inform Ms. Bernacki about her discovery. Since she made this discovery on a Friday evening and the schools were closed for

[1] T1 refers to the transcript of the hearing conducted on December 1, 2004.

Columbus Day on Monday, October 14, she was unable to brief Ms. Bernacki until Tuesday, October 15, at 7:00 a.m. At that time she accompanied Ms. Bernacki to the Newcomb School, where they booted up the circulation desk computer.

When they looked at the computer's internet history files, Ms. Bernacki and Ms. McMillan noticed that many sites of a "questionable nature" had been visited. Much the same was true of the "Favorites" folder in Internet Explorer, in which they noticed that a number of "very questionable things" had been saved or bookmarked for future access. At that point they unplugged the computer, notified the school office that they were removing it, and brought it with them to Ms. McMillan's office in Computer Services, which is located in Pemberton High School.

Upon returning to her office, Ms. McMillan opened the Surf Watch filtering program and Super Scout reporting software installed on the proxy server. Using the *Super Scout* software, Ms. McMillan ran off a custom "User Activity Detail" report[2] for the circulation desk computer for a seven day period including October 9, 10 and 11, 2002 (Exhibit P-1). When asked if she had gone back any further in time, Ms. McMillan testified that she could not because the logs "rotated" or wrote over the data they amassed every seven days.

After reviewing this report Ms. McMillan accessed approximately fifty-two of the questionable websites and concluded that the circulation desk computer had been used to access inappropriate and pornographic websites including such words and phrases as "sexy blondes," "hardcore," "porno," "pussy," "sex positions," "bound brunettes," "freakish cocks," and other graphic or descriptive terms. She then prepared a second report entitled "User Activity," Exhibit P-2, which listed these websites in alphabetical order, indicated whether access had been allowed or blocked, and provided the date and time that access had been attempted.

Next, Ms. McMillan re-opened the computer's internet history file, which is automatically generated and records each website a user visits in chronological order.

[2] More specifically, Ms. McMillan testified that she exported the Super Scout data into a Microsoft Excel spreadsheet and then printed it out.

After reviewing its contents, she printed out six pages of screenshots[3] displaying an alphabetical list of the websites that had been visited up to the date the computer had been removed from the Newcomb Middle School library.[4] In addition to academic sites such as americanfolklore.net and ghosts.sbs.edu, as well as commercial sites such as spencergifts.com, oldnavy.com, and astrology.yahoo.com,[5] the history folder, Exhibit P-3, included the following inappropriate websites:

- 100-percent-adult-sex-positions.com
- 101sexualhealth.com
- 3x-sexy-blondes-hardcore-porno-sex-pictures-pussy-pics.com
- a49d7e39eea946d6d85bf856f7.playgal.com
- blonde-babes-hot-blondes.com
- blondesinbikinis.com
- bound-brunettes.com
- brunette-babes.girlfriend.nu
- celebrate intimacy.com
- datingfun.com
- explanation-about-sexual-intercourse-positions.com
- free-hot-gay-nude-hairy-chested-mean-bears-sex-porn-pics.com
- free-hot-nude-beautiful-teen-brunette-pussy-girls-pics.com
- free-hot-nude-blonde-bikini-women-babes-pussy-girls-pics.com
- hot-free-nude-beautiful-teen-brunette-pussy-girls-pics.com
- hot-free-nude-blonde-bikini-women-babes-pussy-girls-pics.com
- hot-nude-brunette-gallery.com
- hotredirect.com
- mysexsecrets.com

---

[3] Ms. McMillan stated that she clicked on the Print Screen button, copied and pasted the image into Microsoft Word, and then printed it out.

[4] Ms. McMillan explained that much like the User Activity logs, these files are automatically cleared every twenty days, although a user may go into Internet Explorer and clear the files manually.

[5] Policy No. 2361 §A3 also provides that "Users may not use the District system for commercial purposes, defined as offering or providing goods or services or purchasing goods or services for personal use." Although she ordered a natal chart from AstroStore, a site listed in the Yahoo! Astrology directory, Exhibit P-13, there is nothing in the record indicating that Ms. Donahue paid for the chart or otherwise purchased any goods or services from websites such as these using the circulation desk computer.

- orgasmic-tendencies.net
- sexpositions.privat.ms
- sex-positions.surfhere.net
- xratedpornos.com

A comparison of the inappropriate sites listed in the "User Activity Detail" report and those displayed in the history file disclosed that many of them "matched up."

Ms. McMillan then reopened the "Favorites" folder in Internet Explorer and printed a screenshot that included the objectionable websites the user had intentionally added to or saved in the folder for faster access at another time. As was the case with the history file, in addition to academic sites such as South Jersey Ghost Research and Unsolved Mysteries, and commercial directories such as Yahoo! Business and Economy Shopping and Services, the Favorites folder, Exhibit P-4, included the following inappropriate websites and directories:

- Yahoo! Society and Culture – Sexuality
- Yahoo! Society and Culture – Sexuality Activities
- Men's Health Men's Guide to Fitness, Health, Sex...
- Sex Positions 101 – Because Missionary Style is Bor...
- Blonde Babes, Hot Blondes, Naked Blondes, Nud...
- Blondes in Bikinis.com
- Free Hot Nude Blonde Bikini Women Babes Pussy...

For the most part, these sites correlated to others displayed in the previous exhibits.

Ms. McMillan also opened the "Cookies"[6] folder generated from the computer's internal "C" or Hard Drive and printed a screenshot of the contents.[7] The folder, Exhibit P-5, indicated that the user, "ddonahue," had visited, among others, sites with names such as "freakishcocks," "petitebeaver," and "sluttoons." Ms. McMillan stated that these

[6] A cookie is a message given by a Web server to a Web browser. The browser stores that message in a text file and sends it back to the server each time the browser requests a page from the server.

sites not only correlated to others displayed in the previous exhibits in name, but were also "within a few moments" of the access times for the sites listed in those exhibits.

Finally, Ms. McMillan checked the e-mail on the computer's hard drive and found three "questionable" messages that Ms. Donahue had sent to Edward Komosinski, a physical education teacher employed by the District. The three e-mails, listed in chronological order, contained the following messages:

- Monday, June 17, 2002, 2:54 p.m. – ""I'll meet you for some ball!!!!!!! Hm." (Exhibit P-6).

- Tuesday, June 18, 2002, 7:39 a.m. – "I hope you like the card I sent you. Little nasty, so you might want to turn the screen and turn down volume if you have sound on your comp. I also sent a nasty message too. Your messages aren't getting to my home comp. Maybe K isn't getting his either. It was great seeing you yesterday!!!! I have a note and a big blanket for you. I'll meet you at the ballfield for a little 'ball playing'!!!??? Have a great day!!! Miss you.... XXXXXXXXXXXXXXXXXXOOOOOOOOOOOO" (Exhibit P-7).

- Tuesday, June 18, 2002, 10:24 a.m. – "Hi!!!!! I'm sooooo glad the messages are getting through. Sounds great for this afternoon. I love the Ahhhhhhhh badge!!!! You got my motor running!!! Vrooom Vrooom Can't wait to help them with the Ahhhhhhhh badge. Miss you!!!! I can't wait to show you how much. XXXXXXXXXXXXXOOOOOOOOOOOO" (Exhibit P-8).

Upon completing her examination of the circulation desk computer, Ms. McMillan made an identical copy of the hard drive and placed it in the school's safe "just in case anything happened." As it happens, something did happen and the internet history, which had been programmed to recycle every twenty days, was wiped clean when the computer was subsequently booted up for Ms. Donahue's expert. At that time Ms. McMillan made a copy of the "ghost" drive for the expert's use.

Also testifying on behalf of the District was Ms. Bernacki, who stated that the District had purchased the Surf Watch internet filter on the recommendations of the venders it had been working with to build and implement its wide area network. In 1998, Surf Watch was "an industry leader ... one of the 2 or 3 big names in Internet filtering at

---

[7] See footnote 3, supra.

that point." T4 33:23-25.[8] In or about 2002, Surf Watch was bought out by Cyber Patrol, which itself was "voted the editor's choice by Network Magazine for the most effective Internet filter." T4 34:19-25.

Cyber Patrol met the District's needs in that it not only updated the filter on a nightly basis, but also provided occasional new product releases. Unfortunately, Cyber Patrol's upgrades proved to be "more buggy" than those provided by Surf Watch before the buy-out. Among other things, the upgrades occasionally caused the proxy server to crash, although these problems diminished once the District switched to N2H2 in January 2003. In any event, Ms. Bernacki testified that "over the course of the last 5 or 6 years," she had typically received "about 1 call a month, 1 to 2 calls a month" from teachers reporting inadvertent access to an inappropriate website, regardless of the filter system in place. T4 63:12-14.

To the best of her recollection, none of those calls had been from Ms. Donahue. Nor could she recall having ever received any calls or voice mail from Ms. Donahue complaining about the effectiveness of the internet filter, much less advising her that she was conducting an investigation to prove that the internet filter was deficient. Had Ms. Donahue left her voice mail, she would have recorded the date, time, and subject of the call in a black, hard-bound log book she kept to ensure she addressed problems as they arose. And a review of the log book had failed to disclose any entries concerning calls Ms. Donahue had made complaining about the accessibility of inappropriate websites. In fact, the log book had contained but one entry from Ms. Donahue and it had concerned a broken fax machine.

Recalling the events of October 15, 2002, Ms. Bernacki corroborated Ms. McMillan's testimony and confirmed that she had assisted Ms. McMillan in the preparation of the User Activity reports. She'd also had Ms. McMillan place the raw data into a separate file so that she could create a report disclosing whether access to a particular website had been blocked or permitted and, if permitted, the length of time the user had spent viewing the site. The result was a report entitled "Circulation Station

[8] T4 refers to Volume 1 of the transcript of the hearing conducted on December 2, 2002.

User Activity Extract from Super Scout Sorted by Date and Time," Exhibit P-9, which gave rise to a Stipulation read into the record as follows:

> P-9, Exhibit E to the tenure charges. We are stipulating that with the exception of the 4 sites mentioned,[9] all of these sites contain or contained ... in 10/02 sexually explicit material, and that is all we are stipulating with the exception that yellow highlighting means the site was "allowed," [and] gray shading is that the site was "blocked." The stipulation does not suggest, imply, or illustrate anything other than that, and that's it.
>
> [T4 25:6-21]

According to Ms. Bernacki, the report disclosed that Ms. Donahue had typically spent a very short amount of time, "a minute or less," at each inappropriate website, although there had been exceptions. For example, the report disclosed that Ms. Donahue had accessed auroralovenest.hypermart.net on October 10, 2002 at 7:47:44 a.m., and did not access the next website, www.sn.gr, until 7:57:30 a.m., approximately ten minutes later. Similarly, she had accessed www.sexpositions.privat.ms on October 11, 2002 at 12:28:33 p.m., and did not access www.allhosting-x.com until 12:39:55 p.m., approximately eleven minutes later. Other exceptions included the following websites:

- www.celebrateintimacy.com – accessed October 11, 2002 at 11:56:25 a.m.; the next site, www.stangl-taller.at, accessed at 12:00:21 p.m. Total elapsed time: approximately four minutes.
- a49d7e39ee9b7393a946d6d85bf856f7.playgal – accessed October 11, 2002 at 12:21:26 p.m.; next site, www.excalamation-about-sexual-intercourse-positions.com, accessed at 12:27:17. Total elapsed time: approximately six minutes.
- 3X-sexy-blonde-hardcore-porno – accessed October 11, 2002 at 1:00:42 p.m.; attempted access to nudeblondewomen.com at 1:02:33 p.m. Total elapsed time: approximately three minutes.

[9] Greenfield.fortunecity.com; pquinn.com; menshealth.com; and positive.org.

- free-hot-nude-beautiful-teen-brunette-pussy-girls-pics.com – accessed October 11, 2002 at 1:10:58 p.m.; attempted access to sexhunt.com at 1:13:39 p.m. Total elapsed time: approximately three minutes.
- www.hot-free-nude-blonde-woman-bikini-babes-pussy-girls-pics.com – accessed October 11, 2002 at 1:13:56 p.m.; attempted access to www.yahooligans.com, at 1:44:43 p.m. Total elapsed time: approximately thirty-one minutes.

All told, Ms. Donahue accessed or attempted to access approximately 160 inappropriate websites with sexually explicit material over the three day period of October 9 – 11, 2002.

Ms. Benacki also compared the entries in Exhibit P-9 to the Newcomb School Sign-In Sheets for October 7 – 11, 2002, Exhibit P-14, to see if Ms. Donahue had in fact been on the premises when the internet activity in question had taken place. The comparison disclosed that the circulation desk computer had been used on October 8, 2002, to access six different websites before Ms. Donahue signed in at 7:20 a.m.[10] Further comparison disclosed that the computer had also been used on October 11 to access or attempt to access forty-six different websites, nineteen of which were blocked by the internet filter, before Ms. Donahue once again signed in at 7:20 a.m.[11] The last of these sites, c6edca036cc5197adc4a4bc8cf8553fa.sex-toy-slut.com, was accessed at 7:19:29 a.m., and was followed in quick succession by five more sites, three of which were blocked, between 7:20:04 and 7:20:49 a.m.

Given these discrepancies, Ms. Bernacki spoke with the school's Principal, Mr. Ruben, who advised her that Ms. Donahue entered the school from the rear of the building and "often came in through the library and stopped in the library before she signed in." T4 87:8-10.

Ms. Bernacki also compared Ms. Donahue's teaching schedule to the User Activity reports to determine whether Ms. Donahue had accessed or attempted to

[10] www.shamrock.org; www.weirdworld.com; www.13thchild.com; www.jerseydevilforumcom; www.theoeastwind.com; and www.theshadowlands.net.
[11] The Sign-In Sheets disclosed that Ms. Donahue routinely signed in at 7:20 a.m.

access any of the inappropriate websites when students were present in the library. This comparison resulted in a spreadsheet entitled "Trend Analysis for Internet Access from Circulation Desk PC," Exhibit P-15. However, the spreadsheet did not list any of the websites, be they appropriate or inappropriate, by name. Nor did it provide the actual times access was attempted. Consequently, the parties stipulated that respondent's Exhibits R-5, R-6, and R-7, dealing with October 9, 10 and 11, 2002, respectively, should be accepted as accurately indicating the websites Ms. Donahue had accessed or attempted to access during certain periods on any given school day.

The spreadsheet for Wednesday, October 9, 2002, Exhibit R-5, disclosed that Ms. Donahue had attempted to access eleven inappropriate or pornographic websites, one successfully, during her prep period between 11:40 a.m. and 12:20 p.m. She had also attempted to access two additional such sites, one successfully, during a class period from 12:30 to 1:10 p.m. The two sites, sex-positions.surfhere.net and images.v3.com, were not consecutive, but rather had been preceded, separated, and followed by apparently appropriate sites such as www.njghostresearch.org, www.allworldhosting.org, and www.yahooligans.com.

The spreadsheet for Thursday, October 10, Exhibit R-6, disclosed a significantly greater amount of questionable activity. Prior to her first class at 8:00 a.m., Ms. Donahue attempted to access, but was blocked from viewing, two inappropriate sites. However, the search for inappropriate sites increased between 8:00 and 8:40 a.m., during her first class of the day. During that period she attempted to access twelve inappropriate sites, seven of them successfully. Among these twelve websites were five bearing domain extensions such as "fr" (France) and "uk" (United Kingdom). As was the case on October 9, these sites were accessed before, during and after other apparently acceptable sites.

During her next class, between 8:43 and 9:23 a.m., she attempted to access only two inappropriate sites, one successfully. And again, these sites were not consecutive

but rather interspersed among several other websites.[12] After attempting and successfully accessing only one site during her lunch period, Ms. Donahue engaged in the bulk of her surfing after school, between 2:20 and 2:31 p.m. At that time she attempted to access nine inappropriate websites, six successfully.[13]

Finally, the spreadsheet for Thursday, October 11, Exhibit R-7, disclosed that Ms. Donahue had engaged in a significant amount of searching for inappropriate sites during her prep and break periods, between 11:40 a.m. and 12:20 p.m.; the following class period between 12:30 and 1:10 p.m.; and the class period after that between 1:13 and 1:53 p.m.

During her prep and break periods she attempted to access 15 inappropriate sites, 11.5[14] of them successfully, and, as before, not all of them consecutively. However, it was during the 12:30 to 1:10 class that she attempted to access 69 inappropriate sites, 11[15] of them successfully

Ms. Bernacki reiterated that Policy No. 2361 and the reporting protocol had been adopted to prevent intentional, if not repetitive, use of the District's internet connection to access inappropriate and pornographic websites. And although section L.8. permitted access to inappropriate sites "in the context of legitimate research," the reference to "legitimate research" meant "[r]esearch associated to school projects, with classroom projects, to instruction of children, to, perhaps, professional development to improve an employee's skills so far as word processing, say, or Excel, or Database –

---

[12] Four years later, it cannot be ascertained whether sites such as voyanciel.free.fr, content4web.net2one.fr, pro.weborama.fr, killabees31.free.fr, www.weborama.fr and members.lycos.fr, all bearing domain extensions for France, or www.chezlola.net were appropriate or inappropriate.

[13] Curiously, sites such as www.girlsgonewild.com, www.wildpartygirls.org, and exits.freepornpics.com were blocked, but other more explicit sites such as www.sluttoons.com, www.petitebeaver.com, and www.freakishcocks.com were allowed.

[14] Access to one of these websites – www.celebrateintimacy.com – was marked as "A/B" or Allowed/Blocked. Since there is no explanation for this designation in the record, the site has been credited as having been half-blocked and half-accessed.

[15] Access to two of these websites – abcbearsactofgod.com and www.hot-free-nude-beautiful-teen-brunette-pussy-girls-pics.com – was marked as "A/B." Again, since there is no explanation for this designation in the record, each of them has been credited as having been half-blocked and half-accessed.

instructional research." T5 24:10-17.[16] It did not mean the type of investigation in which Ms. Donahue had been engaged.

Ms. Bernacki also testified that all of this had been covered in 1998 when she trained the District's employees in the use of the internet. In fact, each employee had been given a copy of the "Acceptable Use" policy and been required to sign an "Employee Account Agreement" acknowledging receipt and review of the "Acceptable Use" policy prior to being given access to the internet. This included Ms. Donahue, who signed her "Employee Account Agreement," Exhibit P-11, on November 4, 1998.

Adam Sheridan, employed as a technology coordinator at the Newcomb School, testified that he could recall only one occasion when a teacher had complained about an inappropriate e-mail she'd received, but that the teacher had not been Ms. Donahue. In fact, to the best of his recollection, Ms. Donahue had never complained to him about pornographic e-mail or her ability to access inappropriate websites, although she had complained about pop-up ads for things like dating services and Viagra appearing on the students' computers in the library in or about February 2002. He responded to that complaint by installing pop-up prevention software on those computers.

The District's expert, Anthony DeFeciani, Vice President of Open Systems Technologies ("OST") in charge of Engineering and Emergent Technologies, testified that OST had worked with the District for a number of years helping it implement its network infrastructure, which included network switching and router hardware, as well as e-mail servers, web servers and content filtering servers. In or about March 2004, the company was retained to conduct a technical analysis to determine if the Newcomb Middle School circulation desk computer had been used to access sexually explicit materials during the course of a school day.

In conducting this analysis, he and Jason Hovak, an OST Senior Systems Engineer, evaluated all of the information contained in the following Internet Explorer files on the computer's hard drive:

[16] T5 refers to Volume 2 of the transcript of the hearing conducted on December 2, 2002.

- Log File – A transaction file created by the Internet Explorer web browser indicating the websites a user has visited or attempted to visit. In this case, log files were created not only on the computer's hard drive, but on the content filtering server as well.
- History File – A file created by Internet Explorer providing a daily log of the dates and times specific websites were accessed. The server-based Cyber Patrol software similarly recorded the sites visited and the source IP address of the particular computer visiting those sites.
- Temporary Files – Files that are downloaded and "cached" or recorded in a temporary directory on the hard drive to improve overall access time to websites a user has previously accessed and wishes to access again.
- Favorites Files – "Bookmarks" for sites frequently visited by a user. Websites' names are manually placed in a folder so that a user wishing to access them can simply click on their names rather than having to recall or type in the entire URL, e.g., www.whatever.com.

OST's written report dated March 31, 2004, Exhibit P-16, included a matrix comparing the circulation desk's recovered history file to the District's internet content filtering server's log file. Preliminarily, Mr. DeFeciani pointed out that the raw history file from the computer reported time in Greenwich Mean Time (GMT) and had to be converted to Eastern Standard Time (EST), which during the months of Daylight Savings Time required a four hour adjustment. Upon completing that conversion, he concluded that the matrix clearly showed a correlation between the two files and included material that was related to files in the computer's Favorites folder as well.

Based upon the information contained in the matrix, Mr. DeFeciani also concluded that the circulation desk computer had been used to access sexually explicit material during school hours. He based this conclusion on his analysis of the log files on both the computer's hard drive and the content filtering server, which disclosed that the circulation desk computer had been used for "sexually explicit accesses" during a

six hour period on October 11, 2002 alone. He further concluded that much of this material had been accessed following active Yahoo! key word searches, including:

- http://search.yahoo.com/bin/search?p=falatio
- http://search.yahoo.com/search?p=fallatio
- http://search.yahoo.com/bin/search?p=fallatio
- http://search.yahoo.com/bin/search?p=positions

In addition to the sexually explicit material recorded in the computer's history and the filter server's logs, similar material could be found in the computer's Favorites folder. Three of these websites – "Yahoo! Business and Economy Shopping and Services Sex Adult Galleries for Women," "Yahoo! Business and Economy Shopping and Services Sex Adult Galleries," and "Yahoo! Society and Culture Sexuality" – were added to Favorites on October 9, 2002. And the following six additional sites were added on October 11, 2002:

- Blonde Babes, Hot Blondes, Naked Blondes, Nude Blondes And Hot Babes
- Blondes in Bikinis.com
- Free Hot Nude Blonde Bikini Women Babes Pussy Girls Pics
- Men's Health Men's Guide to Fitness, Health, Sex and Life
- Sex Positions 101 Because Missionary Style is Boring
- Yahoo! Society and Culture Sexuality Activities and Practices Sex Positions

Closer examination of the recovered history file and filter server logs also disclosed that the user had gone beyond the initial "welcoming" page of a sexually explicit website by clicking on multiple pages within the same site. For example, the matrix revealed that the following web pages in askmen.com had been accessed over an eight minute span:

- http://www.askmen.com/love/love_tip/50_love_tip.html
- http://www.askmen.com/love/love_tip/28_love_tip.html
- http://www.askmen.com/love/love_tip_60/76_love_tip.html

- http://www.askmen.com/love/love_tip_60/64_love_tip.html
- http://www.askmen.com/love/love_tip_60/73_love_tip.html
- http://www.askmen.com/love/love_tip_60/75_love_tip.html
- http://www.askmen.com/love/love_tip/59_love_tip.html
- http://www.askmen.com/love/love_tip/47_love_tip.html

According to Mr. DeFeciani, this information conclusively established that the user had continuously accessed the site during this eight minute span.

Also testifying on behalf of the District as an expert witness was the aforementioned Jason Hovak, an OST Senior Systems Engineer. He concurred with Mr. DeFeciani that many of the sites listed in the matrix could not have been accessed inadvertently because they were obtained using a key word search with multiple variations on a word's spelling.[17] Similarly, there were the web pages related to "www.askmen.com" that had been accessed over an eight minute span, which led him to believe that the user had been clicking from one link to another.

Mr. Hovak further explained that "anywhere in the report that a site is listed by its fully qualified domain name is an access to that site," and sites using that name thereafter represent web pages from the same website. He gave as an example http://srd.yahoo.com/S=2766679:WS3/R=17/K=fallatio/*http://search.yahoo.com/search ?p=fallatio&hq=site:www.everevolving.com., which was accessed by a key word search using a variant spelling of the word "fellatio." The six sites that followed all represented accesses to the domain "www.everevolving.com," suggesting that the user had clicked on links within that domain. He added that some of these sites were related to sites recovered from the Favorites folder on the computer's hard drive.

Other examples included the sites http://www.bound-brunettes.com and http://srd.yahoo.com/drst/95484389/*http://www.boundbrunettes.com, found within four sites of one another, and the sites in between, http://brunette-babes.girlfriend.nu. and http:///srd.yahoo.com/drst/95484460/*http://brunette-babes.girlfriend.nu. The sites that

[17] E.g., "falatio" and "fallatio" (sic).

followed, http://srd.yahoo.com/drst/95484512/*http://www.brunetteheaven.com and http://srd.yahoo.com/drst/95484411/*http://www.foxybrunettes.com, also included the word "brunette" in their titles and may therefore have been related to the same initial key word search.

As Mr. DeFeciani and Mr. Hovak concluded in their written report,

> It is apparent that some websites were accessed beyond the first page. This report sites one example of multiple pages accessed over several minutes which clearly refutes the claim that time spent accessing inappropriate sexually explicit sites was typically not longer then (sic) eight seconds. While the user's intent cannot be determined from the data, it is clear that sexually explicit material was actively pursued and in some cases examined beyond a cursory glance.
>
> [OST Report, pg. 5]

Ms. Donahue's expert, Kevin Gilper, Chief Technology Officer of World Wide Web Communications, testified that he too had had an opportunity to examine the Newcomb School circulation desk computer and had copied the temporary internet files, history files, user's profile,[18] Favorites files, and computer registry to an external hard drive. He also took a series of screenshots of the contents of the Favorites folder and copied them onto the external hard drive as well.

Mr. Gilper's initial focus was on the history, or index.dat, file because it was a "near perfect record of what the browser's activity were (sic). Every, every page that the browser opens is recorded in the history file." T7 20:5-9.[19] He used the term "near perfect" because in addition to recording a user's actions, such as typing in the URL of a website, the history also recorded "pop ups" and "redirects."[20] Using a variety of

[18] Mr. Gilper defined the user's profile as "a folder on the machine that has user specific settings." T7 14:10-12.
[19] T7 refers to the transcript of the hearing conducted on May 19, 2005.
[20] A "redirect" occurs when the user conducts a search and the internet browser makes a request for a specific site, but the web server to which it connects substitutes another URL and directs the browser to go to the second location.

programs,[21] he printed out a report of the internet activity for October 11, 2002, including the names and URLs of the websites, along with the dates and times they were accessed. Exhibit R-8.

Mr. Gilper testified that as he reviewed this report he was impressed by the "sheer quantity of records," which suggested that the user had been "performing a survey a websites." T7 27:14-16. However, what he found even more significant was the broad range of topics searched and the fact that the user appeared to spend more time performing these searches in Yahoo! than actually spending time in the websites themselves. Very little time – in most cases approximately ten seconds – elapsed between website accesses, and the data indicated that the user had accessed the sites in the order that they had been listed.

In his expert report, Exhibit R-13, Mr. Gilper also indicated that a review of the temporary internet files as well as the history failed to produce any evidence that the user had accessed web pages beyond the portals of the websites. When the entries were viewed in chronological order it was readily apparent that only the first screens of the sites had been accessed because only one request had been made to each adult site and there had been no subsequent requests. This was different from the user's behavior in accessing non-adult sites, where she accessed pages beyond the initial screens. In his opinion, this was consistent with an attempt to prove that the filtering program was not working. And while he acknowledged OST's adverse conclusion, he attributed it to that company's reliance on the logs from the Super Scout reporting program, which contained entries not present in the temporary internet or history files, and entry times inconsistent with those given in these files.

Mr. Gilper added that the Favorites folder supported that position as well. As he noted, the first adult website in that folder had been added on October 9, 2002 at 12:20 p.m.[22] Moreover, it had been the 140th file overall. Four Yahoo! site directories and four adult sites accessed from those same directories followed. However, a comparison with

[21] Mr. Gilper imported the data in the index.dat file into Microsoft Excel, and then imported that information, albeit in a different format, into Microsoft Access, with which he prepared a report.

the history files failed to disclose any attempted access of pages beyond the first pages of those adult sites, which in his opinion "indicate[d] that she was not interested in viewing the material contained within each site." Gilper Report, pg. 7.

Testifying in her own behalf, Ms. Donahue stated that Newcomb Middle School students were prohibited from using the school's computers for internet access until they received internet instruction from her, and instruction for the 2002-03 school year was scheduled to begin on Tuesday, October 15, 2002, immediately following the Columbus Day holiday. However, a male student named "L."[23] had accessed a triple-X pornographic website the previous spring and she herself had begun to receive persistent pop-up ads of "scantily clad girls" and "pornographic e-mail" on the circulation desk computer. She therefore had serious concerns about the effectiveness of the District's internet content filtering software and the prospect of starting internet instruction that fall.

On October 9, 2002, with internet instruction scheduled to begin the following week, Ms. Donahue took her concerns to the school principal, Mr. Fred Ruben. As she recalled, she told him that "things were coming up on the computers – I was afraid for their safety, the students' safety, and I didn't want an incident like the previous year with 'L.' I was concerned for the students. I did not think the filters were working ... something was not right." T8 45:13-19.[24] Nevertheless, Mr. Ruben told her to start the internet instruction as scheduled and stop worrying.

Later that same day she noticed a group of students in one of her classes giggling and holding their thumbs up, and couldn't help but think that "it wasn't a good sign." She walked up to their table and, when she asked them what they were up to, they giggled and asked her if she had seen "Thumbzilla." She told them she had no idea what they were talking about and that they must have meant Godzilla. However, that only caused them to giggle some more. After class, she "had a really bad feeling –

[22] Although the report directed the reader's attention to "Attachment A," the only attachment to the report was a glossary of terms.
[23] Ms. Donahue could not recall his last name.
[24] T8 refers to Volume 1 of the transcript of the hearing conducted on September 27, 2005.

and ... thought, what if – what if these kids know something on the computer – I don't know." T8 47:25 to 48:4.

At this point she began to think that the filters were "seriously damaged" because things just weren't right. She therefore logged on to the internet and typed in a search for "Thumbzilla." She clicked on one of the search results and noticed two green almond-sized Godzilla-type figures and the words, "Enter if you dare." She then clicked on the image of a door and entered the site, where she saw fifty lines of type in a very small font covering "every type of situation – sexual – any type of sexual topic you could think of was on there." T8 48:17-24. With growing concern she clicked on something else and "there were, like, 6 pictures would appear. 'Uh – and they were totally, totally node (sic) sexual acts. I was shocked. My first action was I turned the screen off and I was just like, oh my God." T8 49:6-8.

After her experience with Thumbzilla, Ms. Donahue decided to see if any other inappropriate sites were getting through the filter. She began by typing in a key word search for "sex" because "there is no need of that being anywhere in an elementary system." T8 50:4-5. To her surprise, "it not only screened sites, there were search engines leading to other – the clicking and clicking, and I found so many things going through it, it just – it just shocked me." Id. at 6-9.

However, Ms. Donahue steadfastly denied that she had conducted any of these searches when students were present in the library. Although her teaching schedule, Exhibit R-11, may have indicated that classes were supposed to be present during the periods she was testing the filter, she explained that some of the teachers occasionally brought their students into the library just long enough to take out new books. Others just called in and cancelled their time in the library because the students were working on something in the classroom. There were also times when assemblies were scheduled over periods during which classes would have otherwise been present.

Ms. Donahue also testified that because of the sheer number of sites, she began to record the topics on loose-leaf paper that she stapled together. She also called Ms.

Bernacki on Thursday and Friday morning before her first class, left these topics on her voice mail, and "pleaded to please just leave a message – that you've gotten this – that you're working on this, 'cause I'm starting Internet next week. Please...." Id. at 15-22. When she did not hear back from Ms. Bernacki, she began to bookmark some sites in preparation for a meeting she hoped to schedule with Superintendent Cowell, Mr. Ruben and Ms. Bernacki the following week.

Although she'd intended to visit Ms. Bernacki's office on Friday afternoon, Ms. Donahue had to cancel her plans because her aunt was critically ill in the hospital. Unfortunately, her aunt passed away that afternoon and the funeral was held on Tuesday, October 15. Therefore, she did not return to the Newcomb School until Wednesday, October 16, when she was summoned to the Principal's office following her last scheduled class that morning.

Ms. Donahue stated that Mr. Ruben met her outside his office and simply told her that she needed to get her union representative. Shortly thereafter she entered Mr. Ruben's office with the building representative, Ms. Lisa Mainor, and was met by Mr. Bevilacqua, who asked her to leave the building. When she requested an explanation, Mr. Bevilacqua handed her a sealed envelope in which she found the following memo:

> Please be advised that effective today, Wednesday, October 16, 2002, you are suspended with pay pending action by the Board of Education on Tuesday, October 29, 2002, regarding violations of Board Policy #2361.
>
> You will be further advised of your rights by separate memo.
>
> [Bevilacqua Memo, Exhibit R-12]

According to Ms. Donahue, once she completed reading the memo Mr. Ruben walked her to the library and told her she needed to gather her belongings and leave. He then requested her keys and reiterated that she "need[ed] to leave." Moreover, the only items she was allowed to take with her were her coat and pocketbook, "and that was it." She had to leave behind all of her personal effects including her "textbooks from

college, I'll never get back, mementos from children, pictures, all of my hundred hours materials – everything. The list that – everything of the topics. I mean, everything was there." T8 62:19 to 63:2.

Ms. Donahue stated that she was surprised because she did not know that there was a policy pertaining to the acceptable use of the District's computers and internet connection. Although she acknowledged having signed the Employee Account Agreement, she claimed she had done so in haste and thought it pertained to the use of e-mail. She also acknowledged that a copy of the District's policies could be found in the library, but that she had not gone back and researched them after signing the agreement.

Looking back, Ms. Donahue confessed that she had not exercised her best judgment and wished she had not panicked. Asked what she would have done differently, she replied, "maybe called a meeting, and had everyone see what I saw, have it dealt with." Id. at 68:1-3. She concluded her testimony with the following statement:

> [M]y job is being a teacher – is my life. I love my children, my students – the only purpose was to protect them, and I did panic, and I am sorry, and it was misinterpreted, but it was only to protect them – to see if things were blocked, but for years I had told them that those filters weren't, but obviously they didn't, so – but it's -- my life.
>
> [Id. at 68:5-12]

Tenure is intended to protect teachers from dismissal for "unfounded, flimsy or political reasons." Spiewak v. Rutherford Bd. of Educ., 90 N.J. 63, 73 (1982) (quoting Zimmerman v. Newark Bd. of Educ., 38 N.J. 65, 71 (1962)). Accordingly, a tenured teacher may be dismissed for "inefficiency, incapacity, unbecoming conduct, or other just cause," but only after a hearing in compliance with the Tenure Employees Hearing Law, N.J.S.A. 18A:6-10 to -30.1.

> The closest analogous case law is public lewdness. Compare Town of West Orange Bd. of Educ. v. Lieb, 1985 S.L.D. 933 (teacher's conviction for public lewdness constituted conduct unbecoming); Bd. of Educ. Township of Old Bridge v. Pappa, 1988 S.L.D. 542 (teacher's flagrantly lewd act at a rest area along the Garden State Parkway constituted conduct unbecoming). Grundfest's conduct was not the criminal equivalent of public lewdnesss, N.J.S.A. 2C:14-4(a) (a flagrantly offensive act which is likely to be observed by nonconsenting persons), but it was the functional equivalent. By misusing a school computer during school hours to access and view pornography on the internet, he committed a flagrantly lewd act which he should have known might be observed by a student. ...
>
> [Board of Education of the Borough of Madison v. Robert I. Grundfest, Initial Decision, supra at 40-41]

In a case analogous to the present matter, Egg Harbor Township Board of Education v. Gregory Gomes, Initial Decision (November 1, 2002), aff'd, Commisioner, <http://lawlibrary.rutgers.edu/oal/>, a social studies teacher was charged with unbecoming conduct for having used the district's computers to access and view pornographic materials on the internet while on school property and during school hours. In his decision, the Hon. W. Todd Miller, A.L.J., found that Gomes's actions and conduct had been sufficiently flagrant to justify his dismissal. He based his decision on the fact that

> This was not a single incident of misconduct involving a serious lack of sound judgment. In the Matter of the Tenure Hearing of Earmond DeMarco, [1980 S.L.D. 204, aff'd St. Bd., 1980 S.L.D. 227]. Gomes demonstrated a serious lack of self-restraint and judgment on repeated occasions. He repeatedly viewed internet pornographic materials, over several months, while on school property, in unoccupied classrooms and in the school library. ... Notably, some of the sites accessed involve teenage pornographic material. ... These computers were public property and are used by other teachers as well as available for use by students. Numerous pornographic internet sites were knowingly or inadvertently saved on the computers. Students could have viewed these materials, either by actually observing Gomes while on the internet or through access from the sites stored and saved on the three computers. Gomes was aware that

In order to dismiss a tenured teacher, the underlying charges must be filed with the local Board of Education. N.J.S.A. 18A:6-11. The teacher is given an opportunity to submit a written statement in defense of the charges. Ibid. After the Board has considered the charges, it must determine by majority vote whether there is probable cause to believe the charges are true. If so, the Board must decide whether the charges warrant dismissal or a reduction in salary. Ibid. Should the Board determine that the charges do in fact warrant either of these penalties, it must certify and forward the charges to the Commissioner of Education for a hearing. Ibid.

If the Commissioner determines the charges are sufficient to warrant dismissal or a reduction in salary, he or she will forward the case to the Office of Administrative Law for disposition, N.J.S.A. 18A:6-16, where the burden shall be on the Board to prove the charges by a preponderance of the credible evidence. In re Polk License Revocation, 90 N.J. 550, 560 (1982). Ultimately, it will be the State Board of Education that makes the final decision. In re Hearing of Tyler, 236 N.J. Super. 478, 485 (App. Div. 1989), certif. denied, 121 N.J. 615 (1990).

Unbecoming conduct or the lack of fitness to discharge the duties of a teacher are grounds for dismissal. N.J.S.A. 18A:6-10; In re Tenure Hearing of Grossman, 127 N.J. Super. 13, 29 (App. Div. 1974) (citing Laba v. Newark Board of Education, 23 N.J. 364 (1957)). Unfitness to remain a teacher may be demonstrated by a single incident if sufficiently flagrant. In re Fulcomer, 93 N.J. Super. 404, 421 (App. Div. 1967); Pietrunti v. Bd. of Educ. of Brick Tp., 128 N.J. Super. 149 (App. Div. 1974), certif. denied, 65 N.J. 573 (1974).

Viewing pornographic material on the internet has been compared to public lewdness and, therefore, considered to be conduct unbecoming. In Board of Education of the Borough of Madison v. Robert I. Grundfest, Initial Decision (March 29, 2000), rev'd on other grounds, St. Bd., <http://lawlibrary.rutgers.edu/oal/>, a teacher was charged with using a school computer to access and view pornography on the internet. As the Hon. Jeffrey A. Gerson, ALJ, stated:

> his conduct was improper and unprofessional. He knew that it violated the district's policy for computer use.
>
> [Egg Harbor Township Board of Education v. Gregory Gomes, Initial Decision, supra at 12]

The issue in this particular case is not whether Ms. Donahue attempted to access inappropriate or pornographic websites using the Newcomb Middle School circulation desk computer. Rather, the issue is whether she did so for personal gratification or in order to expose flaws in the District's internet content filter software and, if the latter, whether she had the right to engage in such conduct. Therefore, much of this case hinges on Ms. Donahue's credibility.

Credibility is the value that the fact finder gives to the testimony of a witness. It contemplates 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 (9th Cir. 1963). Credible testimony must proceed from the mouth of the credible witness and must be such as common experience, knowledge and common observation can accept as probable under the circumstances. State v. Taylor, 38 N.J. Super. 6, 24 (App. Div. 1955); Gilson v. Gilson, 116 N.J. Eq. 556, 560 (E. & A. 1934). And in this case, Ms. Donahue's testimony raises so many more questions than it provides answers that it simply does not "hang together."

Ms. Donahue testified that she was "so shocked at what I saw. ... I was just so upset. I just couldn't believe it." T8 39:21 to 40:15. Yet, despite the shock she experienced viewing these sites, she engaged in an extensive search for a significant number of them. As she explained it, she was so shocked by the "Thumbzilla" website on October 9, 2002, that she "panicked" and started trying to access pornographic websites to make sure the District's internet content filtering software was preventing them from being viewed by her students. Yet, neither she nor any of the students could have viewed "Thumbzilla" from any of the District's computers that or any other day because it had been blocked by the software.

She also testified that she kept a list of the sites she was able to access, first on sheets of loose-leaf paper and then in her Favorites folder. However, she never made Ms. Bernacki aware of the written list and certainly did not mention it to Mr. Bevilacqua, even after he'd served her with the notice of suspension and asked her to leave the building. Nor did she volunteer that she had saved some of the same and similar sites in her Favorites folder. Given the nature of these proceedings, it is hard to imagine that the District would not have used the written list of inappropriate websites to support the tenure charges had it existed. Therefore, her assertion that she kept a list in order to show the District what she had been able to access appears to be nothing more than a pretext.

Ms. Donahue was also heard to say that she had called and left messages on Ms. Bernacki's voicemail on Thursday morning, October 10, and Friday morning, October 11. However, Ms. Bernacki steadfastly denied this claim and I found her to be a much more credible witness than Ms. Donahue. Among other things, Ms. Bernacki impressed me as someone who takes her responsibility for the safety of the District's internet access very seriously. In fact, the immediacy with which she responded to Ms. McMillan's verbal report on Tuesday, October 15, 2002, at 7:00 in the morning, speaks volumes about the way she carries out her duties. Had Ms. Donahue actually called her on Thursday or Friday morning, I've no doubt Ms. Bernacki would have confirmed receipt of the voice mail and dispatched Ms. McMillan to take care of the problem that day, much as she did when she received the call from Ms. Guidone about an inappropriate website that Friday morning. Consequently, I do not believe Ms. Donahue had any contact with Ms. Bernacki or Ms. McMillan during the days in question.

Ms. Donahue's contention that she left these voice mail messages also begs the question of why she would have continued to search for and access such a significant number of inappropriate sites after she made the calls. By her own admission, she was shocked by the "disgusting pornographic" websites and e-mails that appeared on her screen. It is therefore difficult to understand why she would have continued to seek them out when providing Ms. Bernacki with the names or URLs of just a few would have

been more than sufficient to place the District on notice that there was a problem with the filtering software.

Additionally, careful examination of the user activity reports discloses that hers were not panic-driven searches pursuing any number of search words or topics. Rather, she was quite methodical and appeared to stay with a topic such as blondes, fellatio, and sexual positions before moving on to another. What is more, there were times she clicked on sites listed in a search result and then proceeded to click on individual web pages within those sites. www.askmen.com, in which Ms. Donahue clicked on no fewer than eight different "love tips" during one session, is but one example.

Nor was Ms. Donahue reticent about accessing or attempting to access sites with obviously pornographic names such as 3x-sexy-blondes-hardcore-porno-sex-pictures-pussy-pics.com, free-hot-nude-beautiful-teen-brunette-pussy-girls-pics.com, orgasmic-tendencies.net, or xratedpornos.com., to name just a few. An alternative explanation for the fact that some of the inappropriate sites were visited for only a matter of seconds could be that they simply did not contain content in which she was interested. Be that as it may, still other sites remained on her computer for minutes at a time, including hot-free-nude-blonde-woman-bikini-babes-pussy-girls-pics.com, which she accessed during a sustained period of internet activity and apparently did not leave for approximately thirty-one minutes. As Messrs DeFeciani and Hovak concluded, "it is clear that sexually explicit material was actively pursued and in some cases examined beyond a cursory glance."

Also casting a long shadow on her testimony are the three pieces of e-mail Ms. Donahue sent to Edward Komosinski in June 2002, approximately four months before her questionable conduct was discovered. More than giving light to an apparently very physical relationship, the messages suggest that Ms. Donahue was no stranger to sexually explicit material. Were it otherwise, she would not have sent a self-described "nasty" card in the first place, much less cautioned Mr. Komosinski to turn the screen and turn down the sound. Nor would she have made reference to a second, separate "nasty" message she had sent him. Besides being in violation of the District's e-mail

policy in their own right, the e-mail messages also suggest that Ms. Donahue's activities might not have been limited to a discreet three or four day period.

Finally, the fact that there were no reported incidents of students actually being exposed to pornographic or otherwise inappropriate material on the circulation desk computer is of no moment. What is material is the fact that Ms. Donahue embarked on these searches during school hours, in the school library, using the circulation desk computer. She knew, or certainly should have known, that her conduct was not only improper and unprofessional, but in violation of the District's policy for computer use as well.

Ms. Donahue is a public school teacher who is entrusted with the care and custody of children and must exercise a degree of self-restraint and controlled behavior unlike most other types of employment. In re Tenure Hearing of Lucarelli, 97 N.J.A.R.2d (EDU) 537, 541, quoting In the Matter of the Tenure Hearing of Sammons, 1972 S.L.D. 302, 321. As a public role model, she is held to a higher standard of behavior than other employees and individuals in society. In the Matter of the Tenure Hearing of Sammons, supra. Sadly. she did not meet this standard and violated the public trust and confidence needed for her to continue in her capacity as a teacher of middle school-aged children.

Based upon the foregoing, I find that Darlene Donahue engaged in conduct unbecoming a public school teacher by using the District's computers to knowingly and intentionally access and view internet pornography during school hours. And I further find that her unbecoming conduct was sufficiently flagrant to justify her dismissal. I therefore conclude that the Pemberton Township School District Board of Education has met its burden of proving the tenure charges preferred against Darlene Donahue by a preponderance of the credible evidence and determine that her dismissal is warranted.[25] It is so **ORDERED**.

[25] Having concluded that the tenure charges should be sustained, I need not reach the issue of whether the District properly withheld Ms. Donahue's salary increment, although it would certainly have been decided in the affirmative.

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

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

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

March 10, 2006
DATE

ISRAEL D. DUBIN, ALJ

E-mail Receipt of Initial Decision Confirmed by the Department of Education on:

3-10-06 Jom
DATE

Mailed to Parties:

DIRECTOR AND CHIEF ADMINISTRATIVE LAW JUDGE

MAR 14 2006
DATE

OFFICE OF ADMINISTRATIVE LAW

IDD/mamf

APPENDIX

WITNESSES

For Petitioner:

Kathy Bernacki
Daniel Bevilacqua
Anthony DeFeciani
Jason Hovak
Lori McMillan
Adam Sheridan

For Respondent:

Darlene Donahue
Kevin Gilper

EXHIBITS

For Petitioner:

P-1 User Activity Detail Report
P-2 User Activity Report
P-3 History – Screenshot
P-4 Favorites – Screenshot
P-5 Cookies – Screenshot
P-6 Donahue e-mail dated June 17, 2002, 2:54 p.m.
P-7 Donahue e-mail dated June 18, 2002, 7:39 a.m.
P-8 Donahue e-mail dated June 18, 2002, 10:24 a.m.
P-9 Circulation Station User Activity Extract
P-10 Policy #2361
P-11 Employee Account Agreement dated November 4, 1998
P-12 Bernacki Statement
P-13 Natal Chart Order Form
P-14 Newcomb School Sign-In Sheets – October 7-11, 2002
P-15 Trend Analysis for Internet Access from Circulation Desk PC
P-16 OST Expert Report

For Respondent:

R-1 Bernacki e-mail dated October 16, 2002 w/ attachment
R-2 Detailed Reports - Types
R-3 Cookies - Screenshot
R-4 User Activity Report
R-5 User Activity Report by Class Period – October 9, 2002
R-6 User Activity Report by Class Period – October 10, 2002
R-7 User Activity Report by Class Period – October 11, 2002
R-8 Website Access Report (74 pages)

R-9 (a) Interrogatory 21 – Question and Answer

(b) Interrogatory 45 – Question and Answer

(c) Interrogatory 47 – Question and Answer

(d) Interrogatory 50 – Question and Answer

(e) Interrogatory 52 – Question and Answer

(f) Interrogatory 68 – Question and Answer

R-10 Library Diagram

R-11 Donahue Class Schedule

R-12 Suspension Memo dated October 16, 2002

R-13 World Wide Web Communications Expert Report

144-06

OAL DKT. NO. EDU 1165-06
AGENCY DKT. NO. 344-11/05

T.B., on behalf of minor child, T.S.H.,	:	
PETITIONER,	:	COMMISSIONER OF EDUCATION
V.	:	DECISION
BOARD OF EDUCATION OF THE CITY OF SUMMIT, UNION COUNTY,	:	
RESPONDENT.	:	

The record of this matter and the advisement of petitioner's failure to appear, transmitted to the Commissioner by the Office of Administrative Law (OAL) pursuant to *N.J.A.C.* 1:1-14.4 – along with a copy of the notification sent to the parties by OAL on March 24, 2006 and providing petitioner thirteen days to submit an explanation for such nonappearance – have been reviewed. There being no explanation filed by petitioner, the petition of appeal is hereby dismissed with prejudice due to petitioner's failure to appear at hearing or provide an explanation for such nonappearance.[1]

IT IS SO ORDERED.[2]

Susan Bryant
COMMISSIONER OF EDUCATION

Date of Decision: 4/25/06
Date of Mailing: 4/25/06

[1] It is noted that the respondent Board of Education did not counterclaim for tuition.

[2] This decision may be appealed to the State Board of Education pursuant to *N.J.S.A.* 18A:6-27 *et seq.* and *N.J.A.C.* 6A:4-1.1 *et seq.*

State of New Jersey

DEPARTMENT OF EDUCATION
PO BOX 500
TRENTON, NJ 08625-0500

JON S. CORZINE
Governor

LUCILLE E. DAVY
Acting Commissioner

April 25, 2006

Kimberly M. Clark, Pro Se
649 Parkview Avenue
North Plainfield, NJ 07063

Anthony P. Sciarrillo, Esq.
Lindabury, McCormick & Estabrook
53 Cardinal Drive
P.O. Box 2369
Westfield, NJ 07091-2369

Dear Parties:

K.M.C., on behalf of minor children, K.J.C. AND K.M.C. V. BOARD OF EDUCATION OF THE BOROUGH OF NORTH PLAINFIELD, SOMERSET COUNTY, EDU DKT. NO. EDU 00109-06, AGENCY DKT. NO. 377-12/05

We are enclosing a copy of the decision of the Commissioner of Education dated April 25, 2006 in the above-captioned matter. Appeals of Commissioner decisions, other than State Department of Education employee contractual determinations and matters involving the New Jersey State Interscholastic Athletic Association, may be filed with the State Board of Education pursuant to *N.J.A.C. 6A:4-1.1* et seq.

Please note that this office is no longer providing an additional copy of the initial decision to the parties in this case.

Additionally, please note that, pursuant to *N.J.A.C.* 6A:4-1.4(a), the Commissioner's decision is mailed to the parties three days prior to the date it is deemed officially filed. This provides counsel and *pro se* litigants with the decision before it is made public by the Department. Parties and counsel are requested to refrain from making Commissioner decisions public prior to the filing date. Your cooperation is appreciated.

Very truly yours,

M. Kathleen Duncan

M. Kathleen Duncan, Director
Bureau of Controversies and Disputes

MKD/kk:o/dec ltr/KMCandKJC
Enclosure
c: Clair Applegate, OAL Library
Jones Addo, State Library

OAL DKT. NO. EDU 109-06
AGENCY DKT. NO. 377-12/05

K.M.C., on behalf of minor children, K.J.C. and K.M.C. PETITIONER, V. BOARD OF EDUCATION OF THE BOROUGH OF NORTH PLAINFIELD, SOMERSET COUNTY, RESPONDENT.	:	COMMISSIONER OF EDUCATION DECISION

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

Upon review, the Commissioner approves the settlement terms and adopts the settlement as the final decision in this matter. The Commissioner is, however, compelled to comment on Term (6) of this agreement. Although the parties may agree between themselves to keep the specific terms of a settlement agreement confidential, they cannot seek to bind the Commissioner or any other individual to such confidentiality. Furthermore, in the absence of a motion to seal the record for good cause shown, Commissioner's decisions are a matter of public record. The matter is hereby dismissed, subject to compliance with the terms of the settlement.

IT IS SO ORDERED.

Isaac Bryant
ACTING COMMISSIONER OF EDUCATION

Date of Decision: 4/25/06

Date of Mailing: 4/25/06

State of New Jersey
OFFICE OF ADMINISTRATIVE LAW

INITIAL DECISION
SETTLEMENT
OAL DKT. NO. EDU 109-06
AGENCY DKT. NO. 377-12/05

K.M.C. o/b/o minor children, K.J.C. and K.M.C.,
Petitioners,
v.
BOARD OF EDUCATION OF THE BOROUGH OF NORTH PLAINFIELD, SOMERSET COUNTY,
Respondent.

K.C., on behalf of **K.J.C.** and **K.M.C.**, for petitioners, pro se
Anthony P. Sciarrillo, Esq., for respondent (Lindabury, McCormick & Estabrook, attorneys)

Record Closed: March 7, 2006 Decided: March 10, 2006

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

Petitioner, K.M.C., challenges the expulsion of her two children, K.J.C. and K.M.C., and requested emergent relief with regard thereto. This matter was transmitted to the Office of Administrative Law on January 13, 2006, for determination as a contested case, pursuant to N.J.S.A. 52:14B-1 to -15 and N.J.S.A. 52:14F-1 to -13. The matter was scheduled for an emergent relief hearing, which was to be held on January 20, 2006. On January 19, 2006, prior to the scheduled emergent relief hearing, petitioner withdrew her emergent relief request. The matter was then scheduled for a hearing to be held on February 22, 2006.

Prior to the scheduled hearing, the parties agreed to a settlement and have prepared a Stipulation of Settlement indicating the terms thereof, which is attached and fully incorporated herein.

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

1. The parties have voluntarily agreed to the settlement as evidenced by the parent's signature and the execution thereof by the president and secretary of the Board of Education and the submission of a certified and sealed copy of the minutes of the Board of Education approving the Stipulation of Settlement as required by N.J.A.C. 6A:3-1.13(d).

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

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

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

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

March 10, 2006
DATE

JOSEPH F. MARTONE, ALJ

Receipt Acknowledged:

3-15-06
DATE

DEPARTMENT OF EDUCATION

Mailed to Parties:

MAR 15 2006
DATE

OFFICE OF ADMINISTRATIVE LAW

mph

LINDABURY, MCCORMICK & ESTABROOK
53 Cardinal Drive
P.O. Box 2369
Westfield, N.J. 07091
(908) 233-6800
Attorneys for Respondent
North Plainfield Board of Education

2006 MAR -7 A 10:41

K.C. *o/b/o* K.J.C. and K.M.C.,	: BEFORE THE COMMISSIONER OF EDUCATION OF NEW JERSEY
Petitioner,	: AGENCY DKT. NO. 377-12-05
-vs-	:
NORTH PLAINFIELD BOARD OF EDUCATION, SOMERSET COUNTY,	: **STIPULATION OF SETTLEMENT**
Respondent.	:

WHEREAS K.J.C. and K.M.C. were suspended from school for actions associated with an incident in the high school cafeteria on October 7, 2005; and

WHEREAS K.J.C. and K.M.C. were suspended from school on October 7, 2005; and

WHEREAS an expulsion hearing was held on November 14, 2005, whereby the Board of Education expelled K.J.C. and K.M.C. from the North Plainfield High School; and

WHEREAS K.J.C. and K.M.C. were placed in the Somerset Academy, an alternative program, at Respondent's expense; and

WHEREAS on December 19, 2005, Petitioner filed an appeal of the Board of Education's determinations to expel K.J.C. and K.M.C. and place them at Somerset Academy.

WHEREAS this Stipulation of Settlement resolves the matter currently before the Honorable Joseph F. Martone, ALJ.

The parties, having resolved this matter, hereby agree as follows:

(1) The parties agree that K.J.C. and K.M.C. will remain at Somerset Academy for the remainder of the 2005-2006 school year.

(2) Provided K.J.C. has no disciplinary infractions, continues to have no disciplinary infractions and maintains passing grades for the remainder of the school year at Somerset Academy, K.J.C. will be permitted to return to the North Plainfield High School in September of 2006.

(3) Provided K.M.C. has no disciplinary infractions, continues to have no disciplinary infractions and maintains passing grades for the remainder of the school year at Somerset Academy, K.M.C. will be permitted to return to the North Plainfield High School in September of 2006.

(4) Should either student be disciplined or suspended at anytime during the 2005-2006 school year at Somerset Academy, she shall not be permitted to return to the North Plainfield High School in September of 2006.

(5) Upon K.M.C. and K.J.C.'s return to the North Plainfield High School, K.M.C. and K.J.C. will be expected to maintain passing grades and to abide by all of the school's rules, regulations and policies. Nothing herein, shall preclude the North Plainfield Board of Education and / or administration to discipline, suspend or expel K.M.C. and K.J.C, in accordance with the law, in the event of future infractions of the school's rules, regulations and policies.

(6) This Agreement shall remain confidential and neither party shall disclose the terms of this Agreement to third parties.

(7) This Agreement shall be governed by the laws of the State of New Jersey.

(8) In consideration of the terms of this Agreement, the parties agree to waive all rights to seek reimbursement of any costs, including attorneys' fees and the like.

(9) In consideration of the terms of this Agreement, the parties shall release each other from any and all claims, rights and liabilities, including but not limited to any and all claims for compensatory education, money damages, civil liability, or any other equitable or legal relief through the date of this Agreement.

(10) This Agreement contains the entire Agreement and understanding between the parties and constitutes a full and final agreement on any and all issues relating to this matter.

(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 have the opportunity to consult with legal counsel or representatives of their choice and that they reviewed the Agreement in detail with their counsel or representatives of choice and they fully understand its requirements and limitations.

(13) This Agreement is subject to ratification by the North Plainfield Board of Education.

ON BEHALF OF K.M.C. and K.J.C.

Kimberly M. Clark Dated: February 24, 2006

Kimberly Clark, *Parent*

ON BEHALF OF THE NORTH PLAINFIELD BOARD OF EDUCATION

By L. L. Boyd-Nelson Dated: February 24, 2006
BOARD PRESIDENT

By _____ Dated: February 28, 2006
BOARD SECRETARY

BOND REFUNDING

B. Ms. O'Connor moved, seconded by Mrs. Szaroleta and unanimously approved by roll call vote to enter into an agreement with McManimom & Scotland as Bond Counsel for refunding of outstanding bonds, as per attached Resolution 10-B.

Thomas Allen - Aye
David Branan - Aye
Edwin Estevez, Jr. - Aye
Kathleen Mullen - Aye
Mary Elizabeth O'Connor - Aye
Nancy Szaroleta - Aye
Linda Bond-Nelson - Aye

C. Ms. O'Connor moved, seconded by Mrs. Szaroleta and unanimously approved by roll call vote that to enter into an authorizing agreement to Capital Financial Advisors for financial advisory services, as per attached Resolution 10-

Thomas Allen - Aye
David Branan - Aye
Edwin Estevez, Jr. - Aye
Kathleen Mullen - Aye
Mary Elizabeth O'Connor - Aye
Nancy Szaroleta - Aye
Linda Bond-Nelson - Aye

1ST READING BOND ORD.

D. Ms. O'Connor moved, seconded by Mrs. Szaroleta and unanimously approved by roll call vote to adopt the first reading of the refunding bond ordinance, as per attached Resolution 10-D.

P[illegible]IC HE[illegible]ING 3/15/06

And in accordance with the requirements of a refunding bond ordinance, the North Plainfield Board of Education will hold a public hearing on March 15, 2006 to consider the ordinance for a second reading and final adoption. There will be an opportunity for public discussion at this meeting.

Thomas Allen - Aye
David Branan - Aye
Edwin Estevez, Jr. - Aye
Kathleen Mullen - Aye
Mary Elizabeth O'Connor - Aye
Nancy Szaroleta - Aye
Linda Bond-Nelson - Aye

STUDENT SETTLE-MENT

Ms. O'Connor moved, seconded by Mrs. Szaroleta and unanimously approved that be it resolved, that the North Plainfield Board of Education hereby approve the stipulation of settlement with respect to students EX1 05-06 and EX2 05-06.

Correspondence

Letters were received as follows from:

CORRESP. NJDOE to Suplee, Clooney & Company re: Audit
NPEA re Retirement Dinner – 5/16/06 at Berkeley Plaza

Financial Report

FINANCE REPORT

Mrs. Szaroleta moved, seconded by Mr. Branan and unanimously approved by roll call vote that the Board of Education approve the list of bills and payrolls dated January 31, 2006 in the amount of $4,148,416.61.

THIS IS A TRUE AND CERTIFIED COPY OF THE MINUTES OF THE NORTH PLAINFIELD BOARD OF EDUCATION OF FEBRUARY 15, 2006.

DONALD STERNBERG, BD. SECY/SBA

145-06

#145-06

IN THE MATTER OF THE TENURE HEARING OF ADAM MUJICA, STATE-OPERATED SCHOOL DISTRICT OF THE CITY OF PATERSON, PASSAIC COUNTY.	:	COMMISIONER OF EDUCATION DECISION

SYNOPSIS

In April 2001, petitioning school district certified tenure charges against a tenured teacher for unbecoming conduct related to incidents of inappropriate behavior with a student in 1984-85 and another student in 1994-95. These tenure charges followed separate tenure charges brought against respondent by petitioner in October 2000. The instant matter remained inactive pending the outcome of the first set of charges.

The ALJ concluded that: the final disposition of the prior tenure charges is an intervening event that renders the instant matter moot; there are no legal rights, duties, obligations, privileges, benefits or other legal relationships between the parties still in issue; and the instant matter is no longer a contested case. The ALJ ordered the tenure charges against respondent dismissed as moot.

Upon review, the Commissioner concurs with the ALJ for the reasons set forth in the Initial Decision, that the tenure charges against respondent at issue in this matter have been mooted by his removal as a tenured employee based upon a prior set of charges. The Initial Decision is adopted as the final decision in this matter.

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.

April 25, 2006

OAL DKT. NO. EDU 5184-01
AGENCY DKT. NO. 129-5/01

IN THE MATTER OF THE TENURE HEARING OF ADAM MUJICA, STATE-OPERATED SCHOOL DISTRICT OF THE CITY OF PATERSON, PASSAIC COUNTY.	:	COMMISIONER OF EDUCATION DECISION

The record of this matter and the Initial Decision of the Office of Administrative Law have been reviewed. No exceptions were filed by the parties.

Upon review, the Commissioner concurs with the Administrative Law Judge, for the reasons thoroughly set forth in the Initial Decision, that the tenure charges against respondent at issue in this matter have been mooted by his removal as a tenured employee based upon a prior set of charges.[1]

Accordingly, for the reasons expressed therein, the Initial Decision of the OAL dismissing the above-captioned tenure charges as moot is adopted as the final decision in this matter.

IT IS SO ORDERED.[2]

Isaac Bryant

ACTING COMMISSIONER OF EDUCATION

Date of Decision: 4/25/06

Date of Mailing: 4/25/06

[1] The administrative decision effectuating such removal was affirmed by the Appellate Division of the Superior Court on October 24, 2005, and no further appeal is pending. (Initial Decision at 3)

[2] This decision may be appealed to the State Board of Education pursuant to *N.J.S.A.* 18A:6-27 *et seq.* and *N.J.A.C.* 6A:4-1.1 *et seq.*

State of New Jersey
OFFICE OF ADMINISTRATIVE LAW

INITIAL DECISION
OAL DKT. NO. EDU 5184-01
AGENCY REF. NO. 129-5/01

IN THE MATTER OF THE TENURE HEARING OF ADAM MUJICA, STATE OPERATED SCHOOL DISTRICT OF PATERSON, PASSAIC COUNTY

Joanne Butler, Esq., for petitioner (Schenck, Price, Smith & King, LLP, attorneys)

Adam Mujica, respondent, *pro se*

Record Closed: January 30, 2006 Decided: March 15, 2006

BEFORE **ROBERT J. GIORDANO**, ALJ:

STATEMENT OF THE CASE AND PROCEDURAL HIUSTORY

The instant matter involves tenure charges brought against respondent, Adam Mujica, a tenured teacher employed by the petitioner, State-Operated School District of Paterson on April 12, 2001. These tenure charges, alleging conduct unbecoming a teacher followed separate tenure charges brought against respondent by petitioner on or about October 24, 2000. That first set of certified charges, under OAL Dkt. No. EDU

10130-00, consisting of nine charges of conduct unbecoming a teacher and insubordination, was heard before Administrative Law Judge Margaret M. Hayden and was concluded on April 17, 2001. Judge Hayden sustained the eight counts of conduct unbecoming, and dismissed the one count alleging insubordination. Judge Hayden ordered the removal of the respondent as a tenured employee of the District in an Initial Decision entered on July 20, 2001.

The instant certified charges were filed with the Commissioner of Education on May 14, 2001. Respondent was permitted to file an answer to the tenure charges by June 4, 2001. On June 4, 2001, respondent filed a motion for summary decision to dismiss the tenure charges, with the Commissioner. The matter was transmitted to the Office of Administrative Law for decision on the motion, prior to the commencement of a plenary hearing. A telephone conference was conducted by the undersigned on June 14, 2001. A briefing schedule was entered. Thereafter, respondent supplemented the motion to dismiss by letter memorandum dated June 18, 2001. Petitioner's brief in opposition to the motion was filed on June 25, 2001. Respondent filed a reply brief on July 3, 2001.

By Order entered July 13, 2001, the undersigned dismissed counts one and two of the certified tenure charges filed against the respondent. The remaining count three, conduct unbecoming, alleged that the respondent engaged in a course of inappropriate conduct toward an instructional assistant at East Side High School.

Thereafter, the matter was set down for hearing for September 24, 2001. A telephone conference was held in the matter on August 8, 2001 to discuss the status of the first set of tenure charges, and the scheduling of the within matter. Counsel advised the undersigned that the removal of the respondent on the first tenure charges was on appeal to the State Board of Education. At that time, counsel for the respondent addressed the issue of placing the instant matter on the inactive list, pending the final disposition of the first set of charges. The respondent agreed to waive any right to salary he might have pursuant to the provisions of N.J.S.A. 18A:6-14, during the period

of inactivity. The matter remained inactive during the long procedural history of the first set of tenure charges, as set forth hereinafter.

The Initial Decision of Judge Hayden, dated July 20, 2001, regarding that first set of charges was affirmed by the Commissioner of Education. Thereafter, the State Board of Education sustained seven charges of conduct unbecoming a teacher, which consisted of sexually inappropriate remarks and gestures made by the respondent to his students. The matter was appealed to the Superior Court of the State of New Jersey, Appellate Division, which affirmed the decision of the State Board of Education. The Appellate Division remanded the matter, however, for a reconsideration of the penalty.

For a second time, the Commissioner found conduct unbecoming sufficient to warrant removal. The State Board once again affirmed the Final Decision of the Commissioner, and the matter was once again appealed to the Appellate Division on March 19, 2004. The Appellate Division affirmed the removal of the respondent in a decision entered on October 24, 2005.

At the conclusion of the appeal process involving the first set of tenure charges, the instant matter was placed on the calendar for hearing scheduled on December 16, 2005. Counsel for the petitioner had been replaced by the Law Firm of Schenck, Price, Smith & King, Joanne Butler, Esq. appearing. John Norton, Esq., respondent's counsel for the entirety of the prior proceeding, was no longer representing respondent in the instant matter. The respondent is now representing his own interests, *pro se*. Prior to the hearing, the undersigned conducted a telephone conference on December 14, 2005, to discuss the status of the matter and any issues that might have arisen. Counsel for the petitioner addressed the issue of dismissal of the tenure charges, in light of the fact that the respondent's removal from his tenured position on the prior tenure charges had been affirmed by the Appellate Division. It was the position of the petitioner that the instant matter was therefore moot. The respondent concurred that the removal from his tenured position had been upheld, and that there were no further appeals on his behalf.

The undersigned directed Ms. Butler to file a motion requesting the matter be dismissed. A motion to dismiss and letter brief in support of the motion was received by the undersigned on December 27, 2005. Pursuant to N.J.A.C. 1:1-12.2, the return date of the motion was set at January 30, 2006. No opposition to the motion received by that date, the record in the matter was closed on January 30, 2006.

ISSUE PRESENTED

Whether good cause exists sufficient to warrant the dismissal of the instant tenure charges as moot.

FACTUAL DISCUSSION

The pertinent facts are undisputed. This matter involves tenure charges of conduct unbecoming, insubordination and other just cause certified by the State District Superintendent of the State Operated School District of the City of Newark against the respondent under the provisions of the Tenure Employees Hearing Law, N.J.S.A. 18A:6-10, et seq. The respondent herein had been removed from his tenured position with the petitioner as a result of prior tenure charges. The instant matter was placed on the inactive list pending the appeal of the removal of the respondent on the prior tenure charges. The respondent waived any claims for back pay during the pendency of that appeal. The Appellate Division upheld the removal in that case, by decision entered October 24, 2005.

LEGAL DISCUSSION

The determination of controversies and disputes arising under the local school laws is within the exclusive jurisdiction of the Commissioner of the Department of Education. N.J.S.A. 18A:6-9. A tenured school teacher cannot be dismissed or have his or her compensation reduced except for inefficiency, incapacity, unbecoming conduct, "or other just cause," and then only after a hearing when written charges of the cause or

causes of the complaint, signed by the person or persons making the same, have been preferred against the teacher. N.J.S.A. 18A:6-10. The pertinent statutory provisions addressing the filing of tenure charges with the local school district, certification of the charges to the Commissioner, filing of responses by the teacher, a determination of the sufficiency of the charges by the Commissioner, and deadlines applicable to the hearings in such cases are set forth at N.J.S.A. 18A:6-11, et seq.

Regulations promulgated by the Department of Education address the "withdrawal, settlement or *mooting* of tenure charges." N.J.A.C. 6A:3-5.6(a) [Emphasis added]. Paragraph (a) provides that "once tenure charges are certified to the Commissioner, such charges may be withdrawn or settled only with the Commissioner's approval." It then discusses the requirements that must be satisfied in order to secure that approval. Cardonick, supra., ("it is proper, therefore, for the Commissioner to review and evaluate, and to approve and disapprove, tenure settlements."). In construing regulatory provisions, the plain language must first be considered. Merin v. Maglaki, 126 N.J. 430 (1992). Pertinent provisions must also be read in pari materia. Alling Street Urban Renewal Co. v. City of Newark, 204 N.J. Super. 185 (App. Div. 1985), cert. den. 103 N.J. 472 (1986). The regulation specifically requires that tenure charges may be withdrawn or settled only with the Commissioner's approval, and then only upon consideration of certain factors, N.J.A.C. 6A: 3-5.6(a). However, this does not specifically address the issue of whether the matter is subject to dismissal as moot.

It has been held that court-fashioned doctrines for the handling of litigation do have some genuine utility and relevance in administrative proceedings. City of Hackensack v. Winner, 82 N.J. 1, 29 (1980). One such court-fashioned doctrine is the doctrine of mootness. Mootness may be found to apply in cases in which no effective relief can be granted. Handabaka v. Division of Consumer Affairs, 167 N.J.Super. 12 (App. Div. 1979) (case ruled as moot where applicant sued for a civil service appointment but no longer desired the appointment).

An issue is "moot" when a determination is sought on a matter which, when rendered, cannot have any practical effect on the existing controversy and where the

conflict between the parties has become merely hypothetical. In re Conroy, 190 N.J. Super. 453, 458 (App. Div. 1983); Barshatsky v. Freehold Regional High School District Board of Education, 95 N.J.A.R. 2d (EDU) 73. The courts and the Commissioner of the Department of Education ordinarily will refuse to review questions which become academic prior to the issuance of a decision out of reluctance to render a legal decision in the abstract and a desire to conserve judicial or administrative resources. In re Conroy, supra. at 459; Carolyn Henry v. Board of Ed. of the City Wildwood, 1975 S.L.D. 1, 3. On the other hand, as was made clear in Conroy, the courts will decide a moot case that presents issues of great public importance or is based on a controversy capable of repetition, yet evading review because of the short duration of any single plaintiff's interest.

In an administrative proceeding, an issue is not moot if it remains contested. Under the Uniform Administrative Procedure Rules, an issue remains contested if a specific party's legal right is at issue and that party invokes their right to a hearing. Bloom v. Department of Transportation, TRP 6600-03, Initial Decision (August 3, 2004) <http://library.rutgers.edu/oal/search.html>. However, actions by a party can render a case moot.

Mootness applies to the issues involved [in a controversy] and as a general rule require that legal opinions, via adjudication, not be given concerning issues which are no longer in existence because of changes in facts and circumstances [that] surround a case. A particular cause of action may be mooted by intervening events, which include actual changes in the law, administrative actions, and settlement between the parties. It is well settled law in New Jersey, that issues that have become moot prior to adjudication are no longer actionable. Coviello v. Bd. Of Educ. of the Borough of Fair Lawn, 94 N.J.A.R. 2d (EDU) 486.

In order that a case avoids dismissal pursuant to the mootness doctrine, it must meet the qualifications of a contested case. Bloom v. Department of Transportation, supra. A contested case is defined as a proceeding that determines the legal rights,

duties, obligations, privileges, benefits or other legal relationships of specific parties. N.J.S.A. 52:14B-9.

CONCLUSIONS OF LAW

The resolution of the instant matter is not reached by way of settlement or withdrawal. Nor is it in consideration of the unilateral resignation from employment by the respondent. Instead, the petitioner requests that the matter be dismissed as moot as a result of the Appellate Division decision affirming the removal of the respondent on prior tenure charges.

I **CONCLUDE** that the final disposition of the prior tenure charges is an intervening event that renders the instant matter moot. There are no legal rights, duties, obligations, privileges, benefits or other legal relationships between the parties still in issue. I **CONCLUDE** as such that the instant matter is no longer a contested case.

ORDER

Accordingly, it is **ORDERED** that the tenure charges certified by petitioner State Operated School District of the City of Newark against respondent Adam Mujica be and are hereby **DISMISSED** as moot.

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

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

Within thirteen (13) days from the date on which this recommended decision was mailed to the parties, any party may file written exceptions with the **COMMISSIONER OF THE DEPARTMENT OF EDUCATION, 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.

3/15/06
DATE

ROBERT J. GIORDANO, ALJ

E-mail Receipt of Initial Decision Confirmed by the Department of Education on:

3/15/06
DATE

Mailed to Parties:

DIRECTOR AND
CHIEF ADMINISTRATIVE LAW JUDGE

MAR 16 2006
DATE

OFFICE OF ADMINISTRATIVE LAW

lr

#146-06

OAL DKT. NO. EDU 11164-04
AGENCY DKT. NO. 247-7/04

DEBORAH LASSITER,	:	
PETITIONER,	:	
V.	:	COMMISSIONER OF EDUCATION
BOARD OF EDUCATION OF THE TOWNSHIP OF IRVINGTON, ESSEX COUNTY,	:	DECISION
RESPONDENT.	:	

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

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

IT IS SO ORDERED.

ACTING COMMISSIONER OF EDUCATION

Date of Decision: 4/25/06
Date of Mailing: 4/25/06

State of New Jersey
OFFICE OF ADMINISTRATIVE LAW

INITIAL DECISION

SETTLEMENT

OAL DKT. NO. EDU 11164-04

AGENCY DKT. NO. 247-7/04

DEBORAH LASSITER,

Petitioner,

v.

BOARD OF EDUCATION OF THE TOWNSHIP OF IRVINGTON, ESSEX COUNTY,

Respondent.

Gregory T. Syrek, Esq., for petitioner (Buccceri and Pincus, attorneys)

Lester E. Taylor, Esq., for respondent (Hunt, Hamlin & Ridley, attorneys)

Record Closed: March 17, 2006 Decided: March 17, 2006

BEFORE **MARGARET M. MONACO,** ALJ:

On June 20, 2004, the petitioner, Deborah Lassiter, filed a Verified Petition with the Commissioner of Education alleging that the respondent, the Board of Education of the Township of Irvington (the Board), violated her tenure and/or seniority rights when it failed to reemploy petitioner for the 2004-2005 school year. On August 23, 2004, the Board filed an Answer to Petition. The Department of Education transmitted the matter to the Office of

Administrative Law where, on October 21, 2004, it was filed 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 undersigned held a telephone prehearing conference on December 23, 2004 and issued a Prehearing Order on December 27, 2004. At the parties' joint request, the hearing scheduled for July 6 and July 14, 2005 was adjourned and the parties thereafter filed cross-motions for summary decision. Oral argument with regard to the parties' respective motions was conducted on December 14, 2005. Subsequently, the parties engaged in discussions toward an amicable resolution of the matter. Under letter dated March 16, 2006, counsel for petitioner submitted the attached Stipulation of Settlement setting forth the terms of agreement between the parties and the attached resolution of the Board approving the terms of the settlement.

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

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

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

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

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

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

March 17, 2006
DATE

MARGARET M. MONACO, ALJ

Receipt Acknowledged:

3-22-06
DATE

DEPARTMENT OF EDUCATION

Mailed to Parties:

MAR 24 2006
DATE

DIRECTOR AND
CHIEF ADMINISTRATIVE LAW JUDGE

OFFICE OF ADMINISTRATIVE LAW

db

RECEIVED
STATE OF NEW JERSEY
2006 MAR 17 A 10:45

BUCCERI & PINCUS, ESQS.
1200 Route 46
Clifton, NJ 07013-2440
(973) 773-5665
Counsel for Petitioner

DEBORAH LASSITER,	:	BEFORE THE COMMISSIONER OF EDUCATION/OFFICE OF
Petitioner,	:	ADMINISTRATIVE LAW
v.	:	AGENCY REF. NO. 247-7/04 OAL DKT. NO. EDU 11164-04N
BOARD OF EDUCATION OF THE TOWNSHIP OF IRVINGTON,	:	
Respondent.	:	**STIPULATION OF SETTLEMENT**

This Stipulation of Settlement is made by and between Deborah Lassiter (hereinafter "Ms. Lassiter") and the Irvington Board of Education (hereinafter "the Board"). In consideration of the mutual promises and undertakings contained in this Agreement, and for good and valuable consideration, the receipt of which is hereby acknowledged, the undersigned state:

WHEREAS, Ms. Lassiter has been employed as a teaching staff member by the Board; and,

WHEREAS, Ms. Lassiter has filed the above-captioned matter with the Commissioner of Education alleging that the Board violated her tenure and/or seniority rights when it failed to reemploy her for the 2004-05 school year; and,

WHEREAS, the Board has denied violating Ms. Lassiter's rights; and,

WHEREAS, in lieu of further pursuing this action, the parties desire to enter into an agreement stipulating the terms of Ms. Lassiter's separation from her employment status with the Board and resolving this litigation.

IT IS on this _____ day of February, 2006, agreed as follows:

1. Ms. Lassiter agrees that, in return for compliance with this Agreement and in consideration for the sums specified herein, she waives and relinquishes any and all tenure, seniority and employment recall rights she may have with the Board. This waiver shall take effect upon the approval of this Agreement by the Commissioner of Education.

2. The Board agrees that it will pay the following sum to Ms. Lassiter, representing the salary she would have earned if employed by the Board for the period of time from September 1, 2004 through December 31, 2005, less the amount she received for unemployment compensation benefits:

$ 76,701.00	2004-2005 salary
30,680.40	9/1/05-12/31/05 salary
$107,381.40	
- 12,740.00	Unemployment
$ 94,641.40	

The Board will pay to Ms. Lassiter the gross sum of $94,641.40 as follows:

a) $20,000.00 shall be paid immediately upon receipt of the approval of the terms of this Agreement by the Commissioner of Education.

b) $74,641.40 shall be paid to Ms. Lassiter on or about July 1, 2006.

3. The sums paid by the Board to Ms. Lassiter shall be net of normal deductions.

4. The Board agrees that, based on the deduction of unemployment benefits from the amount to be paid to Ms. Lassiter, it shall bear the responsibility for repaying or reimbursing the Division of Unemployment Compensation, or other appropriate agency, for any benefits paid to Ms. Lassiter during the period of time from July 1, 2004 through December 31, 2005.

5. Ms. Lassiter agrees to dismiss the within action against the Board with prejudice.

6. This Agreement shall not in any way be construed as an admission by either party of any liability, or of any wrongful acts whatsoever against the other party or any other person.

7. Nothing in this Agreement shall be construed as conferring any benefit upon any person, group or association not a direct signatory hereto. Further, this Agreement shall not be deemed to establish any "past practice" or other precedent

requiring the Board to, or restricting it from, providing any benefit to any person, group or association other than Ms. Lassiter.

8. The parties acknowledge that each has been represented by legal counsel of her or its own choosing, that they sign this Agreement as their own voluntary act and deed, and that they fully understand the duties and obligations enumerated herein.

9. The individuals signing this agreement on behalf of the Board acknowledge that they have been duly authorized to do so and bind the Board by their action.

10. This Agreement shall be subject to and construed under the laws of the State of New Jersey.

11. All terms of this Agreement are deemed material. This document may not be altered, amended, modified or revoked except by an instrument executed in writing by the parties.

12. Ms. Lassiter acknowledges that she has been advised that she has the right to consult with an attorney or a representative of her own choosing prior to signing this Agreement, and has done so, and that she signs this Agreement as her own voluntary act and deed, and that she fully understands the duties and obligations enumerated herein.

13. Both parties acknowledge that this Agreement is subject to the approval of the Office of Administrative Law and the Commissioner of Education. If such approval is not given, this Agreement and all of the stipulations, releases and acknowledgements, whether contained herein or attached hereto,

shall be rendered null and void and the parties shall be returned to the status quo existing prior to this Agreement.

14. By entering this agreement, each party releases and discharges the other with respect to all claims or rights that either party may have against the other. This includes all claims, including those of which either party is not aware and those not mentioned herein. The releases by each party apply to all claims resulting from anything which has happened up to now.

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

WITNESS:

Gregory T. Syrek, Esq.

Deborah Lassiter

Dated: 3/2/06

WITNESS:

Irvington Board of Education

Lester E. Taylor, Esq.

By: _____
Board President

Dated: 3-13-06

Dated:

REGULAR BOARD MEETING
FINANCE
February 15, 2006

RECEIVED
STATE OF NEW JERSEY
DEPARTMENT OF EDUCATION
2006 MAR 17 A 10:45

WALK-ON

SETTLEMENT OF DEBRA LASSITER VS THE IRVINGTON BOARD OF EDUCATION

WHEREAS, the petitioner files a petition of appeal alleging that the Irvington Board of Education violated NJSA18A28-C by non-renewing her teaching contract for the 2004 – 2005 academic year, and

WHEREAS, through their respective counsel and or representative, have reviewed the matter and arrived at an amicable settlement of the issue in dispute without admitting liability, or fault.

NOW THEREFORE be it resolved by the Irvington Board of Education, by the township of Irvington, that it authorized the terms and conditions of the settlement to be entered by, and between, the parties on or about February 16, 2006, in the total amount of $107,381.40, payable to the petitioner minus $12,740, for which petitioner received an unemployment compensation resulting in a net settlement amount of $94,641.40, and

BE IT FURTHER RESOLVED, by the Board of Education of the township of Irvington that it authorizes the superintendent to pay $20,000.00 of the aforementioned settlement amount to the petitioner immediately after approval of said agreement by the commissioner of education, and that the balance of $74,641.40 shall be thereafter paid on, or about July 1, 2006, and

BE IT FURTHER RESOLVED, that the board president, and or the superintendent, and, or her designee shall be shall be authorized to take all necessary action to implement and comply with the terms of the aforementioned settlement agreement.

ACTION:
Motion by: Norma Carty, Second by: Ahmed Screven
Roll Call: Unanimously Approved on a roll call vote

As certified by:

Michael G. Steele
Business Administrator/Interim Board Secretary

MGS/vp

147-06

#147-06

IN THE MATTER OF THE APPLICATION OF THE BOARDS OF EDUCATION OF THE TOWN OF BOONTON AND THE BOROUGH OF LINCOLN PARK, MORRIS COUNTY, FOR AN ORDER AUTHORIZING SEVERANCE OF SENDING–RECEIVING RELATIONSHIP.	:	COMMISSIONER OF EDUCATION DECISION

SYNOPSIS

In this uncontested case, the boards of education of the Town Boonton and the Borough of Lincoln Park seek to sever their sending-receiving relationship of over 50 years, asserting that severance is in the best interest of their respective communities. The school district of Lincoln Park sends its high school students (grades 9-12) to Boonton High School, currently making up the majority of the high school's student body.

The ALJ found, *inter alia,* that: while Lincoln Park has the majority of pupils in the high school, it has only one member on the Boonton Board of Education, resulting in a lack of representation that has fostered distrust and a history of protracted litigation between the two boards; pursuant to *N.J.S.A.* 18A:38-13, the Commissioner may not weigh the overall positive and negative impacts of a proposed severance on the affected school districts, and any substantial negative impact on either district will result in a denial of severance; the instant proposed severance would not result in a substantial negative impact on the racial composition of the districts; severance would have a substantial negative impact on the educational quality at Boonton High School, though the quality of education at Lincoln Park would not be adversely affected. The ALJ concluded that the petition for severance must be denied, and commented that she is without jurisdiction to address the inequity of Lincoln Park's limited representation on the Boonton Board of Education.

The Commissioner determines to accept the recommendation of the ALJ that the application for severance not be granted, based upon the well-supported finding that Boonton would suffer a substantial negative educational impact if it were to lose the high school students from Lincoln Park. The Commissioner declines to reach the remainder of the ALJ's report, which summarizes testimony regarding financial impact without making findings or a recommendation, and makes conclusions regarding racial impact with which the Commissioner is reluctant to concur on the present record. Additionally, the Commissioner emphasizes that perceived inequities in the statutorily-prescribed composition of local district boards of education are a matter of State policy to be addressed by the Legislature.

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.

April 25, 2006

OAL DKT. NO. EDU 5623-04
AGENCY DKT. NO. 251-8/02

IN THE MATTER OF THE APPLICATION OF THE BOARDS OF EDUCATION OF THE TOWN OF BOONTON AND THE BOROUGH OF LINCOLN PARK, MORRIS COUNTY, FOR AN ORDER AUTHORIZING SEVERANCE OF SENDING–RECEIVING RELATIONSHIP.	:	COMMISSIONER OF EDUCATION DECISION

The record of this uncontested matter and the Report and Recommendation of the Office of Administrative Law (OAL) issued pursuant to N.J.A.C. 1:1-21.5 have been reviewed.[1] Comments were filed by the Lincoln Park Board of Education (Lincoln Park), to which the Boonton Board of Education duly replied.

In its comments, Lincoln Park urges that if the Report's findings are read correctly, the Administrative Law Judge (ALJ) actually concluded that Lincoln Park (as opposed to Boonton) met all of the statutory conditions for severance; therefore, the recommendation to deny severance should be rejected. According to Lincoln Park, the ALJ found no negative racial impact on either district, accepted testimony to the effect that Lincoln Park would save money by having its own high school, and determined that severance would have educational benefits for Lincoln Park; the fact that Boonton failed to demonstrate an ability to operate without Lincoln Park students "should not be a factor" in the decision to grant severance, the district contends, "since it is not a factor in

[1] The Report and Recommendation of the OAL in this uncontested matter is misidentified as an Initial Decision, and, pursuant to the rules for contested cases, the parties' subsequent submissions – here construed as "Comments" – were filed as exceptions.

the statutory criteria for Lincoln Park, a separate legal entity." Moreover, Lincoln Park argues, if it can succeed with a small high school— as the ALJ found it could— it then follows that Boonton should be able to do the same; a degree of financial hardship and loss of elective courses of study should not lead to a conclusion of negative educational impact at a time when every district in the state is facing similar difficulties. (Lincoln Park Comments at 1-2, quotation at 2)

Lincoln Park further urges the Commissioner, if severance is not granted, to address the "inequity, unfairness and discrimination" that result from Lincoln Park having only one member on the Boonton Board of Education when its high school population constitutes the majority of Boonton High's student body. The Board cites with approval the ALJ's comments at page 23 of the Report, and implores the Commissioner to remedy the representation situation so that "Lincoln Park can have a real voice and impact at the high school level even if it is forced by the final decision in this matter to remain a party in the sending-receiving relationship." (Lincoln Park Comments at 3)

In reply, the Boonton Board of Education submits that the ALJ's reference to the statutory representation scheme for sending-receiving districts has no bearing on the statutory criteria for severance—which is the question before the Commissioner—and reiterates that, in any event, the referenced scheme has already been challenged and upheld in federal court.[2] (Boonton Reply at 1)

Upon review and consideration, the Commissioner determines to accept the recommendation of the ALJ that the parties' application for severance not be granted,

[2] See ALJ's Report at 9.

and does so expressly based upon the finding—well supported in the record—that Boonton would suffer a substantial negative educational impact if it were to lose the high school students from Lincoln Park. As the ALJ properly found, the Commissioner may not collectively weigh the overall positive and negative impacts of the criteria for grant of severance and conclude thereby that a positive impact in one category outweighs a negative impact in another; nor may the Commissioner consider the impact on one district without regard to the impact on the other, as Lincoln Park appears to suggest in its comments. (*Englewood, supra* at 462; Report at 12-14) In this latter regard, it is not enough for Lincoln Park to contend that— notwithstanding the evidence on record to the contrary—Boonton "should" be able to remain viable because small schools can be successful, and because districts are required in other circumstances to make programmatic reductions as a result of fiscal constraints.

Having so found, the Commissioner declines to reach the remainder of the ALJ's Report[3], which summarizes testimony with regard to financial impact without making findings or a recommendation, and makes conclusions with regard to racial impact with which the Commissioner is reluctant to concur on the present record – particularly without benefit of meaningful adversarial perspective.

Accordingly, the Commissioner concurs with the recommended conclusion of the OAL that the parties' application for severance of their sending-receiving relationship must be denied for failure to meet the criteria of *N.J.S.A.* 18A:38-13. To the extent that the ALJ criticizes the general statutory scheme for

[3] The ALJ's Report notes, at page 9, footnote 5, that an appeal of the referenced decision regarding inclusion of legal fees and costs in tuition assessments "is presently pending in the Superior Court, Appellate Division." This appeal was decided on May 25, 2005, A-2155-03T3, and affirmed the November 5, 2003 decision of the State Board of Education.

representation of sending districts on receiving boards of education and suggests that the Commissioner remedy its "gross inequity" (Report at 23), the application of *N.J.S.A.* 18A:38-8.1 *et seq.* is neither before the Commissioner in the present matter nor appropriately addressed in the context of a request for severance pursuant to *N.J.S.A.* 18A:38-13; moreover, perceived inequities in the composition of local district boards of education are first and foremost a matter of State policy to be addressed by the Legislature.[4]

IT IS SO ORDERED.[5]

Isaac Bryant

ACTING COMMISSIONER OF EDUCATION

Date of Decision: 4/25/06

Date of Mailing: 4/25/06

[4] See, for example, *N.J.S.A.* 18A:38-8.4 (*P.L.* 1999, c. 414) and the sponsor and committee statements thereto.

[5] This decision may be appealed to the State Board of Education pursuant to *N.J.S.A.* 18A:6-27 *et seq.* and *N.J.A.C.* 6A:4-1.1 *et seq.*

State of New Jersey
OFFICE OF ADMINISTRATIVE LAW

INITIAL DECISION

OAL DKT. NO. EDU 5623-04

AGENCY DKT. NO. 251-8/102

I/M/O THE APPLICATION OF THE BOE OF THE TOWN OF BOONTON AND THE BOROUGH OF LINCOLN PARK, MORRIS COUNTY, FOR AN ORDER ON SEVERANCE OF A SENDING-RECEIVING RELATIONSHIP

Dennis A. Collins, Esq., for petitioner Board of Education of the Town of Boonton (Collins and Vella, attorneys)

Nathanya G. Simon, Esq., for respondent Board of Education of the Borough of Lincoln Park (Schwartz, Simon, Edelstein, Celso and Kessler, attorneys)

Record Closed: November 11, 2005 Decided: December 23, 2005

BEFORE **IRENE JONES**, ALJ:

STATEMENT OF THE CASE AND PROCEDURAL HISTORY

Pursuant to the provisions of *N.J.S.A.* 18A:38-11, the boards of education of the Town of Boonton ("Boonton") and the Borough of Lincoln Park ("Lincoln Park") have

engaged in a sending-receiving relationship for over fifty years. The District of Lincoln Park sends its high school students (grades 9-12) to Boonton High School.

N.J.S.A. 18A:38-13 provides that any school district that seeks to change a sending-receiving relationship may do so only upon approval by the Commissioner of Education. On August 9, 2002, the petitioner, the Town of Boonton, filed a petition with the Commissioner of Education ("Commissioner") seeking to sever its sending-receiving relationship with Lincoln Park.

The respondent, Lincoln Park, opposed the severance and moved to dismiss the petition. Thereafter, the Commissioner transmitted the matter to the Office of Administrative Law for hearing as a contested case. The matter was assigned to Administrative Law Judge Stephen Weiss. Subsequent to the transmittal, Lincoln Park changed its position and joined the request for severance. The parties assert that severance is in the best interest of their respective communities. Accordingly, with the consent of Judge Weiss, Lincoln Park withdrew its motion to dismiss the petition and entered into settlement negotiations before Judge Weiss.

On November 12, 2003, Judge Weiss issued an initial decision that approved the settlement agreement that provided for the severance of the sending-receiving relationship. On December 26, 2003, the Commissioner rejected the settlement agreement on the basis that additional information was required before the relationship could be terminated, in accordance with *N.J.S.A.* 18A:13-38. The Commissioner then ordered interested persons to submit written comments on the severance issue. Further, the Commissioner ordered that a public hearing be held on whether the severance meets the requirements of *N.J.S.A.* 18A:13-38. On June 4, 2004, the Commissioner transmitted the matter to the Office of Administrative Law as an uncontested case and it was reassigned to the undersigned.

After a prehearing conference, a public hearing was held on August 16, 2004, at Boonton High School in Boonton, New Jersey. Several hundred people attended the public hearing; some forty-four citizens voiced their opinions on the proposed

severance, and some sixty citizens wrote letters voicing either objections to or support for the proposed severance.

On August 17, 2004, a plenary hearing was held. Boonton presented the expert testimony of Harry Galinsky, Ed.D., a renowned expert on regionalization, de-regionalization and sending/receiving relationships. Galinsky prepared and presented a report entitled "A Feasibility Study to Determine the Impact of Terminating the Sending-Receiving Relationship Between the Boonton and Lincoln Park School Districts." Lincoln Park presented the testimony of Dr. Joyce Valenza, superintendent of the Lincoln Park public schools, and James T. Tevis, the district's business administrator and board secretary. The parties submitted posthearing briefs and the record closed on November 3, 2004, upon receipt of the transcript of the public hearing.

In February 2005, while writing the initial decision, the record was reopened upon notice to the undersigned that the Academy for Visual and Performing Arts ("Performing Arts Academy" or "Academy"), a tenant within Boonton High School, had vacated its space and moved to the Denville Campus of the Morris County School of Technology. The parties advised that the vacancy could have a significant influence on the statutory criteria by which the severance would be decided. Specifically, the Academy had fifty-nine students at Boonton High and contributed some $750,000 annually to the high school's budget; the move would impact the financial aspects of the proposed severance. Further, since there would be fewer students than originally projected, the loss of the Academy could impact the educational quality of Boonton High School. As a result of the Academy's move on June 23, 2005, Dr. Galinsky supplemented his feasibility study to include the impact, if any, on the recommendations contained in his 2002 study. The supplement was filed on October 14, 2005. On October 14, 2005, Dr. Galinsky presented oral testimony on the supplement and the parties submitted supplemental briefs on November 11, 2005, at which time the record closed.

THE PUBLIC HEARING

At the public hearing, local residents from both communities were invited to express their views on the severance. While hundreds of people appeared, some forty-four people spoke. Their opinions, pro and cons, were about 50/50. Additionally, many letters were received, the majority of which opposed severance, and two-thirds of the letters received from the Boonton residents opposed severance. The majority of letters received from the Lincoln Park residents also opposed severance. However, there were many letters submitted in support of the severance.

Significantly, the majority of the letters noted that the severance was being driven by an inability of the two boards to get along. Some concluded that egos were in the way of working together. Another letter noted that the current allocation that allows only one voting member from Lincoln Park Township to sit on the Boonton Board of Education is inequitable and it is the allocation that is the true source of the problem.

The mayors of Boonton and Lincoln Park oppose the severance, concluding that it would adversely affect both high schools. Notably, Boonton's mayor is a middle school principal and his children have attended the Boonton public school system. He questions the impact on the teaching staff, school state rankings, SAR scores, athletics, and extra-curricular school programs, as well as the tax impact.

The mayor of Lincoln Park questions the suitability of Lanes Field, the proposed site of the new high school, concluding that it is inappropriate because it floods. Further, it is inappropriate because it will displace the two recreation fields at Lanes Field where the Borough has expended some $500,000 in improvements. He also questions the impact of having two small schools and the substantial negative impact to the curriculum that will be offered by two smaller schools.

Finally, a few students wrote letters about the severance. The majority of them opposed severance. Many questioned the viability of splitting Boonton High and questioned why the boards could not work together.

FINDINGS OF FACT

Background and Characteristics of the Two Communities

The Town of Boonton is a small suburban community located in the northeastern section of Morris County, New Jersey. It has a total land area of 2.45 square miles. It is bounded on the north and northwest by Boonton Township and on the west by the Borough of Mountain Lakes. The 1990 Census put Boonton's population at 8,343. The 2000 U.S. Census reported 8,496 residents, an increase of 153, or less than 2% growth over the ten-year period.

Boonton's school district is a pre-K through 12 system operating in three school buildings, housing 1,296 students. Grades 9-12 include approximately 327 pupils from the Borough of Lincoln Park who attend Boonton High School.[1] Boonton Middle School educates 151 students in grades 7-8 within the high school.

The high school is located on a 19.09-acre site and it was constructed in 1927. The first addition to the school was built in 1936 and the second addition was constructed in 1962. The high school functions as an educational facility for 611 students enrolled in grades 9-12. Prior to February 2005, it was also the site for the Morris County Performing Arts Academy.

Previously, the parties' sending-receiving relationship included the school districts of Parsippany, Montville and Boonton Township. As those municipalities' population grew, the districts of Parsippany and Montville left the joint system to establish their own school districts. Boonton Township entered into a new sending-receiving relationship with Mountain Lakes High School. *See Bd. of Educ. of Township of Boonton v. Bd. of Educ. of Town of Boonton*, 92 *N.J.A.R.*2d (EDU) 235. The parties' current sending/receiving agreement, executed in April 1999, is for seven years, ending in June 2006.

[1] The number of students fluctuates each year.

The net impact of the withdrawals has been that the majority, 53%, of the Boonton High School students are now from Lincoln Park. While Lincoln Park has the majority of students in the high school, it has only one member on the Boonton Board of Education ("BOE"). The BOE governs the day-to-day operations of the school. Lincoln Park asserts that this effectively leaves it without any real voice in the day-to-day or year-to-year operational decisions that affect the high school. Thus, over the last fifty years, significant issues have arisen and Lincoln Park's positions were either defeated or rebuffed. The lack of input into the day-to-day decisions has resulted in a history of protracted litigation that has cost the two districts vast sums of money. The litigation has resulted in Boonton having to refund Lincoln Park hundreds of thousands of dollars.

Reasons for Termination of the Sending/Receiving Relationship

A principal reason for the severance lies in the long, protracted and expensive litigation between the two boards. In order to appreciate the enormity of dissatisfaction, a cursory review of some of the litigation is set forth below. The litigation is costly, the underlying issues are significant and serious. These issues involve Lincoln Park's "representation" and voting on the Boonton BOE, core democratic principles in a democracy. Further, there are differences in goals and objectives in educating the students, and issues surrounding Lincoln Park's participation in the selection of administrators for the high school. As a result of the litigation, Boonton and Lincoln Park no longer trust each other. This distrust causes funds to be allocated for annual audits and ongoing and anticipated litigation. This, of course, diverts resources that could otherwise be used for direct education. Indeed, Dr. Joyce Valenza, superintendent for the Lincoln Park School District, testified that the district budgets $15,000 annually for litigation expenses. Additionally, Lincoln Park annually audits the accounts to insure that it is not overcharged for tuition.

This petition is not the first time that the two boards have sought severance. In 1994 Lincoln Park filed a petition with the Commissioner seeking to enjoin Boonton from incorporating its seventh- and eighth-grade students into its high school facility.

While the matter was pending, the parties entered into a settlement agreement, wherein it was agreed that Boonton would establish several staff positions to service the seventh- and eighth-graders only. The parties also agreed to a two-year moratorium, whereby Boonton agreed not to oppose, for a two-year period, any petition filed by Lincoln Park seeking to withdraw from the sending/receiving relationship. *See Bd. of Educ. of the Borough of Lincoln Park v. Bd. of Educ. of the Town of Boonton*, 95 *N.J.A.R.*2d (EDU) 493.

On review of the settlement, the Commissioner found that the parties did not have the power to bind future boards, and therefore could not enter into such an agreement. The State Board of Education modified the Commissioner's findings to allow the parties to remove the unenforceable clauses.[2]

In July 1995 Lincoln Park filed a petition seeking an interpretation of the sending/receiving agreement and certain school laws.[3] Lincoln Park sought an interpretation of *N.J.S.A.* 18A:38-8.1, which provided for a representative on the receiving board of education where a sending district's students comprise at least 10% of the student body. Lincoln Park's students constituted 56% of the student body, thus entitling it to a representative on the Board. Lincoln Park also contended that it and its appointee (to the Boonton BOE) had the right "to receive and discuss among themselves all information, matters, business and concerns relating to high school programs brought before the Boonton BOE prior to action taken by the Boonton BOE." Further, Lincoln Park sought to allow its appointee to have full rights and privileges as a member of the Board, subject to statutory voting restrictions. Moreover, it sought permission to allow its appointee to communicate with the Lincoln Park Board of Education and its superintendents on matters pending before the Boonton BOE. *See Bd. of Educ. of the Borough of Lincoln Park v. Bd. of Educ. of the Town of Boonton*, 97 *N.J.A.R.*2d (EDU) 592. Lincoln Park also sought to remove the newly appointed principal of Boonton High School. It alleged that the Boonton board and its superintendent had acted arbitrarily, capriciously, illegally and in bad faith in the

[2] Specifically, Boonton agreed not to contest any request to sever the relationship irrespective of the statutory criteria set forth in *N.J.S.A.* 18A:38-13.
[3] The petition involved two issues which were consolidated by the presiding judge.

selection search process for the new principal. Further, it sought to have a new search selection process put in place.

The administrative law judge (ALJ) found and concluded that pursuant to the sending/receiving agreement, the Lincoln Park appointee was entitled to documents, information and communications that were distributed to other Board members. Further, the ALJ found that the appointee could freely communicate with its superintendent on matters regarding Board meetings. However, it was concluded that the appointee was bound to maintain confidentiality of matters discussed in closed sessions, thus prohibiting disclosure of any information that was received during closed session. Further, the ALJ denied Lincoln Park's request to have copies of documents and other communications prior to the information being made public and prior to public dissemination and consideration by the Boonton BOE.

The ALJ did find that the Boonton superintendent and the Boonton BOE acted in bad faith when they unilaterally eliminated Lincoln Park's participation in the selection of a principal. Thus, the position of principal was vacated and reopened.

As a consequence of the finding of bad faith in the selection of a principal for Boonton High School, the certifications of Boonton's superintendent, Joy Northrop Divincenzi, were suspended by the State Board of Examiners for five years. *See Bd. of Educ. of the Borough of Lincoln Park v. Bd. of Educ. of the Town of Boonton*, 97 *N.J.A.R.*2d (EDU) 592.

In *English v. Board of Education of the Town of Boonton*, 135 *F. Supp.* 2d 588 (D.NJ. 2001), a member of the Lincoln Park BOE filed suit challenging the provisions of *N.J.S.A.* 18A:38-8. The statute provided for no more than one representative from the sending district to participate on a receiving district's board of education. Initially, Lincoln Park prevailed, as the court held that the statute was unconstitutional as applied to the Lincoln/Boonton sending/receiving relationship. However, on appeal to the United States District Court, an interim remedy was fashioned by the district judge that gave Lincoln Park three members on Boonton's BOE pending a new statute by the

State Legislature. Boonton appealed to the Third Circuit, United States Court of Appeals. The court held that the New Jersey send-receive scheme, as enacted and applied to Lincoln Park, did not violate the principle of "one person, one vote."[4] *See English v. Bd. of Educ. of the Town of Boonton*, 161 *F. Supp. 2d* 344 (D.NJ. 2001).

In *Borough of Lincoln Park Board of Education v. Board of Education of the Town of Boonton*, EDU 5944-02, Initial Decision (April 2, 2003), *adopted*, Comm'r (May 15, 2003), *aff'd*, St. Bd. (November 5, 2003) <http://lawlibrary.rutgers.edu/oal/search.html>, Lincoln Park successfully challenged Boonton's inclusion of legal fees and costs in its tuition assessments. There, Boonton sought to recover litigation costs incurred in cases filed by the Lincoln Park Board of Education. The ALJ concluded that Boonton could not include the cost of legal fees in the tuition for Lincoln Park students.[5]

In *Borough of Lincoln Park Board of Education v. Board of Education of the Town of Boonton*, No. MRS C-217-00 (Ch. Div.), Lincoln Park charged Boonton with breach of contract and failure to appropriately credit certain monies in the tuition rate per the 1999 Sending/Receiving Agreement between the parties. Judgment was entered in favor of Boonton. The court found that Lincoln Park breached the contract by failing to commence the audit process in a timely fashion. The court concluded that Lincoln Park had full knowledge of the audit process and its right to audit, and knowingly permitted the applicable deadlines to expire without legal justification.

In the instant matter, witness Valenza testified about the ongoing litigation and day-to-day problems between the Boonton and Lincoln Park school districts. She noted that Lincoln Park now spends $15,000 each year auditing the tuition assessment. The boards have attempted to correct the representation issue by the creating a high school committee. However, since the committee is only advisory, not statutorily mandated, it

[4] The court declined to review the statute under strict scrutiny, and concluded that the application of *N.J.S.A.* 18A:38-8.2 to Lincoln Park was not irrational. The court reversed the order of the district court, granting summary judgment to Lincoln Park, and remanded the matter with directions that the court grant cross-motions for summary judgment in favor of defendants. *See English v. Bd. of Educ. of the Town of Boonton*, 301 *F.*3d 69 (3d Cir. 2002), *cert. denied*, 537 *U.S.* 1148, 123 *S. Ct.* 852, 154 *L. Ed.* 2d 851 (2003).

[5] Further, it was held that neither the administrative tribunal nor the Commissioner could enter an award of attorney's fees or legal costs. An appeal is presently pending in the Superior Court, Appellate Division.

carries no weight. Disputes have arisen and have not been satisfactorily resolved. Further, Boonton asserts that it is under no legal obligation to the committee and will not consent to continue the committee's existence when the new contract is negotiated. Moreover, Boonton will no longer use the committee to engage in articulation discussions between seventh- and eighth-grade teachers. These discussions are used to coordinate the curriculum between the Lincoln Park Middle School and Boonton High School. Boonton has indicated that it will agree to nothing additional except the "bare bones" sending-receiving contract provided by the State. Only the science curriculum is currently being coordinated.

Valenza further testified that the two boards have significant differences and approaches to the use of technology, special education and the music program. For example, Lincoln Park is focused on placing computers in every class, whereas Boonton endorses the use of computer labs. Lincoln Park endorses mainstreaming and inclusion of classified students in regular classrooms, which is not being done at Boonton High School.

TESTIMONY

Boonton retained Harry A. Galinsky, Ed.D., in March 2001 to conduct a feasibility study to determine the impact of terminating its sending/receiving relationships. Additionally, Galinsky was to determine whether the severance could meet the statutory criteria in *N.J.S.A.* 18A:13-56. Dr. Galinsky's credentials and expertise are impressive. He has over forty-five years of experience in public education; he was a long-term teacher, a high school guidance counselor, an elementary and high school administrator, and an assistant to the superintendent. P-1. Furthermore, he was an assistant superintendent for secondary education, deputy superintendent and superintendent in the Paramus and Morris school districts. Galinsky established a successful dropout prevention program and early childhood program to identify at-risk students. He also developed a multifaceted approach to educating a growing number of non-English-speaking students.

Presently, Galinsky is a consultant to various school districts and the Department of Education. He has participated in approximately forty superintendent searches for various school districts. He was a facilitator to twenty communities in eastern Bergen County, including Englewood, Englewood Cliffs and Tenafly. There, he assisted in developing a cooperative plan to encourage voluntary attendance at a regionalized high school and a regional magnet school in Englewood, New Jersey. Additionally, he has been presented as an expert in five or six regionalization or sending/receiving cases. Galinsky has been recognized as an expert witness in the severance of the Dover Township/Mine Hill sending/receiving agreement. Based on his experience and educational background, Dr. Galinsky was recognized herein as an expert in the field of public administration and education.[6]

Dr. Galinsky conducted an in-depth review of the two districts and submitted his report to Boonton in March 2002. In the initial hearings, Galinsky testified that the data contained in his 2001 feasibility report remained sound and relevant. He concludes that severance is appropriate. His findings on the impact on racial composition, the impact on financial conditions and the impact on educational quality are discussed below.

Dr. Joyce Valenza, superintendent of schools for Lincoln Park, also testified in support of the proposed severance. Dr. Valenza has thirty years of educational experience. Prior to her current position, she was assistant superintendent of the Fair Lawn School District. Additionally, she was district supervisor of the Randolph Township School District. Valenza holds certifications as a chief school administrator, principal, supervisor and teacher.[7] Valenza testified about the community benefits from the community having its own high school. Further, she noted that the current students at Boonton High School would be phased into the new high school over four years.

James T. Tevis, business administrator and board secretary for Lincoln Park, provided additional support for the severance. As the business administrator, Tevis is

[6] Galinsky received his bachelor of arts degree from Rutgers University, a master's degree from New York University and a doctoral degree from Rutgers University.

[7] Her educational background includes a bachelor of arts in business education and teaching from Montclair State University, a master's degree in administration and supervision, and a doctorate in educational leadership from Nova Southeastern University.

the chief financial officer for the district. As board secretary, he prepares legal notices for board meetings and activities. He also prepares the minutes of the board meetings.

Tevis supported the superintendent's testimony that there exists a negative and contentious relationship between the districts. Specifically, Lincoln Park believed that Boonton was overcharging it for tuition, thus, a lawsuit was filed. Lincoln Park prevailed. *See Borough of Lincoln Park Bd. of Educ. v. Bd. of Educ. of the Town of Boonton, supra*, EDU 5944-02, Initial Decision (April 2, 2003) <http://lawlibrary.rutgers.edu/oal/search.html>. Since that time, Lincoln Park has conducted annual audits on the tuition rates. If a new contract is negotiated past 2005-2006, the tuition rate will once again be challenged, resulting in continuing litigation.

Tevis calculates that the cost of a new high school will be some $30.8 million. He anticipates that the district will receive over $7.5 million in State aid, thus leaving a balance of $23.327 million to be funded through local taxes. His findings on the impact to local taxes are discussed below.

ANALYSIS

Pursuant to *N.J.S.A.* 18A:38-11, "[t]he board of education of every school district which lacks high school facilities within the district . . . shall designate a high school or high schools" outside of the district for the education of its students. Thus, two or more schools may enter into a sending-receiving relationship, whereby a contract is formed between the involved districts for the provision of educational services in exchange for a fixed tuition payment. See *N.J.S.A.* 18A:38-8.

Severance of a sending-receiving relationship between school districts requires the approval of the commissioner. *Bd. of Educ. of Englewood Cliffs v. Bd. of Educ. of Englewood*, 257 *N.J. Super.* 413 (App. Div. 1992), *aff'd*, 132 *N.J.* 327, *cert. denied*, 510 *U.S.* 991, 114 *S. Ct.* 547, 126 *L. Ed.* 2d 449 (1993). Approval is based on the criteria

set forth in *N.J.S.A.* 18A:38-13, which includes an analysis of whether severance will create a "substantial negative impact." Specifically, the statute provides:

> No such designation of a high school . . . shall be changed or withdrawn . . . except upon application made to and approved by the commissioner. Prior to submitting an application the district seeking to sever the relationship shall prepare and submit a feasibility study, considering the educational and financial implications for the sending and receiving districts, the impact on the quality of education received by pupils in each of the districts, and the effect on the racial composition of the pupil population of each of the districts. *The commissioner shall make equitable determinations based upon consideration of all the circumstances, including the educational and financial implications for the affected districts, the impact on the quality of education received by pupils, and the effect on the racial composition of the pupil population of the districts. The commissioner shall grant the requested change in designation . . . if no substantial negative impact will result therefrom.*
>
> [*N.J.S.A.* 18A:38-13 (emphasis added).]

The determination of whether there will be a substantial negative impact on the educational quality, financial implications, or racial composition of the affected school districts involves weighing and balancing the stated categories. *Englewood, supra*, 257 *N.J. Super.* at 461-62. The commissioner may not, however, weigh the overall positive and negative impacts of these categories as a group. *Id.* at 462. Specifically, *Englewood* holds:

> The act lays out a series of factors to be considered by the Commissioner as part of a feasibility study including: the educational (offerings) and financial (budgetary) implications for *both* districts, the impact on the quality of education in *both* districts, and the effect on the racial composition of the pupil population in *both* districts. The Commissioner's responsibility is to reach an "equitable" determination – one that is fair to both districts – keeping in mind his responsibility as the ultimate educational authority in the State. To be sure, the Commissioner may engage in weighing and balancing within each of the stated categories.

> For example, he may assess whether financial losses outweigh financial gains in a proposed move or whether racial balance is improved in one district more than it is negatively affected in the other. However, he is not free to weigh the overall positive and negative impacts of severance or to determine that a substantial negative impact he has found in any category is "outweighed" by a positive impact in another. The reason for this is that the legislatively prescribed considerations do not exist in a vacuum but are inextricably bound up with the question of what kind of an education is to be provided. A substantial negative impact in one category necessarily implicates an overall educational quality issue. The focus of the Commissioner's inquiry is whether a substantial negative impact exists *at all*; if it does, severance is to be denied.
>
> [*Ibid.* (citation omitted).]

Thus, a finding of any substantial negative impact will result in a denial of severance. Only if there is no substantial negative impact on the factors set out in *N.J.S.A.* 18A:38-13 will severance be granted.

Impact on Racial Composition

N.J.S.A. 18A:38-13 requires that the Commissioner consider the impact on the racial composition of the pupil population of both districts. Notably, the Commissioner has concluded that the issue of racial balance is one of utmost importance to the State. *Bd. of Educ. of Englewood Cliffs v. Bd. of Educ. of Englewood, supra*, 257 *N.J. Super.* 413, *aff'd*, 132 *N.J.* 327, *cert. denied*, 510 *U.S.* 991, 114 *S. Ct.* 547, 126 *L. Ed.* 449; *Bd. of Educ. of Merchantville v. Bd. of Educ. of Pennsauken*, St. Bd. (January 7, 1998) <http://www.nj.gov/njded/legal>; *Bd. of Educ. of Winfield v. Bd. of Educ. of Rahway*, EDU 7138-98, Comm'r (March 2, 2000) <http://lawlibrary.rutgers.edu/oal/search.html>. In those matters, the impact on the racial composition was carefully examined. In *Englewood Cliffs*, the severance was rejected because of a substantial negative impact on the racial composition and education quality of the high school. There, the Board of Education of Englewood Cliffs sought to sever its sending/receiving relationship with the District of Englewood and enter into a new sending/receiving relationship with the Tenafly Board of Education. The impacted high school, Dwight Morrow High School

(DMHS), had 799 students, 21 of whom were from Englewood Cliffs. At that time 11.8% of DMHS students were white, 66.2% were black, 17.8% Hispanic and 3.9% Asian. The 21 Englewood Cliffs students consisted of 15 whites, 4 Asians and 2 Hispanics. If severance were granted, the DMHS would have become 10.2% white, 68% black, 18% Hispanic and 3.5% Asian, resulting in a 1.60% loss of white students at the DMHS. While the proportional loss, a 1.6% decrease of white students, was *de minimis*, severance was denied because the impact of losing 21 white students was deemed substantial since the high school had so few white and Asian students. *Bd. of Educ. of Englewood Cliffs v. Bd. of Educ. of Englewood, supra*, 257 *N.J. Super.* at 440, 441.

Conversely, in *Board of Education of Winfield v. Board of Education of Rahway, supra*, EDU 7138-98, Comm'r (March 2, 2000) <http://lawlibrary.rutgers.edu/oal/search.html>, it was concluded that termination of a sending-receiving relationship would not have a negative racial impact. There, the severance resulted in a 1.9% decrease in the proportion of white students attending Rahway, and a percentage decrease of the overall white student population of 7.9%. The Commissioner found that these statistical changes did not leave Rahway racially imbalanced. The Commissioner further found that a statistical change in the racial composition of the current receiver is itself not dispositive of whether a significant negative impact will result from severance of the relationship. Instead, "it is imperative that the significance of the statistical change in a particular case be evaluated under 'all of the circumstances.'" *Bd. of Educ. of Winfield v. Bd. of Educ. of Rahway, supra*, EDU 7138-98, Comm'r (March 2, 2000) <http://lawlibrary.rutgers.edu/oal/search.html> (citation omitted).

Most recently, the New Jersey Supreme Court, in *In the Matter of the Petition for Authorization to Conduct a Referendum on the Withdrawal of North Haledon School District from the Passaic County Manchester Regional High School District*, 181 *N.J.* 161 (2004), denied the severance petition of the Borough of North Haledon, which sought to withdraw from the Passaic County Manchester Regional High School District. The regional district consisted of North Haledon, Haledon and Prospect Park. North

Haledon sought to withdraw from the district, as its share of the operating costs were dramatically and disproportionally higher than Haledon's or Prospect Park's because it had a higher property tax base than the other two districts. The voters in Haledon and Prospect Park would not agree to an equalized valuation basis based on per-pupil costs, notwithstanding the glaring inequity.[8] In addition to a higher property tax base, North Haledon students were predominantly white. It was estimated that if North Haledon were to leave the district, the white population would decline from 51% to 38%.

The Supreme Court denied the withdrawal of the North Haledon students in order to prevent racial imbalance in the school and prevent any action that would exacerbate racial imbalance. The Court further held that "[n]ot every action that reduces the percentage of white students [in a school district] necessarily implicates the State's policy against segregation in the public schools." However, in this case withdrawal would accelerate a demographic trend. Recognizing the gross inequity to North Haledon from the current valuation, the Court did order the Commissioner of Education and the municipalities to develop an equitable cost apportionment scheme among the three communities. *In re the Petition for Authorization to Conduct a Referendum on the Withdrawal of North Haledon Sch. Dist. from Passaic County Manchester Reg'l High Sch. Dist., supra*, 181 *N.J.* at 183.

In the instant case, the 2000 U.S. Census reports the Town of Boonton's population at 8,496, of which 83% is white and about 15% is minorities.[9] The same census reports that Lincoln Park's population of 10,930 is 90% white and 9% minorities.[10] Accordingly, both communities are predominantly white.

Using the projected enrollment figures for 2006-07, Boonton High School, *including* Lincoln Park students, will be around 77% white and 23% minorities. In comparison, the projected enrollment for Boonton High School *without* Lincoln Park students will be about 64% white and 36% minorities. As a result, if Lincoln Park

[8] North Haledon's cost per student was $23,000, while the cost per student for Haledon and Prospect Park was $6,000 and $7,000, respectively.

[9] The 2000 U.S. Census provides that Boonton's total population is 84.9% "white alone or in combination," 83% are "white alone," 1.9% are "white in combination," and 15.1% are "not white alone or in combination."

students are permitted to withdraw from Boonton High School, then Boonton will have a 13% reduction in white students and a 13% increase in minorities.

If Lincoln Park has its own high school, then the projected enrollment for 2006-07 will be around 86% white and 14% minorities. This will result in an increase of 9% in the number of white students enrolled compared to a combined enrollment at Boonton High. While there would be a statistical change in the racial composition of Boonton, (the receiving school), this statistical change by itself is not dispositive of whether a significant negative impact will result from the severance.

One factor to be considered is whether the severance will leave a negative perception, as was the case in *Englewood.* There, it was concluded that the loss of 21 white students from the sending district would result in an implicit message that the receiving school was not good enough for white and Asian students, but acceptable for blacks and Hispanics. *Bd. of Educ. of Englewood Cliffs v. Bd. of Educ. of Englewood, supra*, 257 *N.J. Super.* at 440-41. Here, there is no issue, alleged or implied, of "white flight." The projected enrollment for Boonton High School in 2006-07, including Lincoln Park students, will be about 77% white and 23% minorities. Severance will result in the white population decreasing to 64% and the minority population increasing to 36%. As a result, Boonton High School is not "racially imbalanced." Also, the Town of Boonton and the Borough of Lincoln Park are predominantly white, with relatively stable minority populations. Therefore, Boonton High School, excepting the Asian population, is not projected to have a large increase in its minority student enrollment in the foreseeable future. Consequently, I **FIND** that the proposed severance under this criteria will not result in a substantial negative impact.

Impact on Financial Conditions

It is important to emphasize that it has been held that *N.J.S.A.* 18A:38-13 "was never intended to create a revenue source for receiving districts or protect them from tax increases." *See Bd. of Educ. of Ho-Ho-Kus v. Bd. of Educ. of Midland Park*, 96

[10] The 2000 U.S. Census provides that Lincoln Park's total population is 91.4% "white alone or in combination,"

*N.J.A.R.*2d (EDU) 964, 972 (quoting *Bd. of Educ. of the Township of Boonton v. Bd. of Educ. of the Town of Boonton*, 92 *N.J.A.R.*2d (EDU) 235, 244). Accordingly, an increase in taxes does not automatically translate into a substantial negative impact.

In the initial feasibility study, Dr. Galinsky estimated that Boonton High School's anticipated revenue from tuition from Lincoln Park would be $3,163,129 for the 2002 school year.[11] Without the Lincoln Park students, Boonton would be able to reduce its budget by the expected decrease in expenses from the reduction in students. Galinsky projected that the difference between lost tuition and Boonton's operating costs would be $447,280. This "deficit," he opines, would not result in a significant tax increase to the residents of Boonton. Dr. Galinsky's conclusions relied on growth in the number of students at the Academy of Visual and Performing Arts. He projected that the Academy's enrollment would increase to 120 students over the next four years versus the current enrollment of 43. Based on that projected enrollment, he concluded that tuition would increase from $211,259 to $589,560. This increased revenue would be used to cover the deficit left by the termination of the sending-receiving relationship. Based on that assumption, Galinsky concluded that there was no substantial negative impact on the financial condition for Boonton High School since any tax increase on Boonton residents would be minimal. Further, he concluded that Boonton could offset tax increases by decreasing the school budget as a result of reduced costs from less students, and by increasing the enrollment of the students at the Academy.

Galinsky's June 2005 supplemental study acknowledged that the loss of the Academy for Visual and Performing Arts would result in the loss of $481,339 in tuition receipts. Further, the projected increase in students that Galinsky relied on in his initial study no longer holds. Thus, Boonton is looking at an initial decrease in tuition revenues of more than $3.6 million.[12] Galinsky concludes, however, that Boonton can partially offset this loss by cuts in its staff and budget reductions resulting from reduced

---

90.1% are "white alone," 1.4% are "white in combination," and 8.6% are "not white alone or in combination."

[11] The breakdown of this amount includes: (1) tuition of $9,324 per student x 323 Lincoln Park students; (2) $31,788 paid for six self-contained special education students; and (3) $119,689 for resource center enrollments.

[12] The actual number is 3,678,976, which includes $3,197,638 of tuition from Lincoln Park and $481,338 from the Academy.

enrollment. Further, he notes that Boonton will achieve savings of $144,857 from a special education agreement with the Chancellor Academy.

However, even with reductions, cuts in staff and savings, Boonton still needs $1,144,731 to make up lost tuition in the 2004-05 school year and $1,279,476 for the 2005-06 school year. This shortfall must come from increased property taxes. He calculates that school taxes will increase $.10 per $100 of assessed valuation in 2004 and $.21 per $100 of assessed valuation in 2005. For a homeowner with an average assessment of $175,000, the increase would be $175 in 2004 and $368 in 2005.

Galinsky asserts that the financial impact to Lincoln Park is the cost of constructing a new high school. Business administrator James Tevis testified on the financial impact to Lincoln Park if severance were granted. Tevis was a member of the ad hoc committee that was formed to determine the feasibility of Lincoln Park building its own high school. The committee looked at several sites and determined that a site, Lanes Field, that the district already owns would be appropriate. In his initial testimony Tevis projected that the building expenses would result in an average tax increase of $191.95 for each $100,000 of assessed value. He calculated the operating cost for the new high school to be $57.46 for each $100,000 of assessed value, for a total of approximately $250 per $100,000 of assessed value. Since the average assessed value of Lincoln Park homes is $170,000, he projected a $400 tax increase. R-15. He concludes that this increase is not a substantial negative impact in light of the many benefits the community and students would receive from having their own high school.

Tevis acknowledges that his projections are contingent on three factors: the amount of State aid that the district receives; construction costs per square foot; and the bond interest rate.

At the August 17, 2005, hearing, Tevis updated his testimony. His projected tax increase is now $180 higher, for an increased assessment of $329.36 per $100,000 of assessed value. Tevis asserts that only $40 is attributable to the new high school.

However, he notes that Lincoln Park's tuition is now higher because of the loss of the Academy. Thus, Tevis projects that Lincoln Park will achieve greater savings in tuition costs if the severance is granted.

Impact on Educational Quality

Currently, Boonton High School provides its approximately 600 students with a comprehensive academic program. During the 2001-2002 school year, the school offered 135 general courses and 14 special education courses. The curriculum also includes an applied technology lab and 10 advanced placement courses and honors courses for all academic areas."[13]

Initially, Galinsky conceded that severance would reduce the number of course "sections" offered by the school. However, he found that Boonton would still be able to offer all of the programs offered in its current curriculum. Thus, he concludes that the education quality would not suffer a substantial negative impact because the school would be able to maintain its scope of courses and quality of education.

Additionally, severance would result in a smaller school system for both districts. Indeed, Boonton would lose over half of its student population. Galinsky believes that this loss does not translate into a substantial negative impact to the remaining students because the school would still offer the same courses as prior to severance.

In *Board of Education of Bloomingdale v. Board of Education of Butler*, 94 *N.J.A.R.*2d (EDU) 553, *aff'd*, 95 *N.J.A.R.*2d (EDU) 151, *aff'd*, 96 *N.J.A.R.*2d (EDU) 843, the State Board of Education recognized that it would be possible for a school losing half its student population to restructure its program so as to continue to educate its students "in some way." Even so, the State Board, quoting the ALJ, recognized that the educational impact would be "negative and substantial because of drastic impact on scope and quality of curricular offerings necessitated by reduction of student population

[13] In its brief, Boonton stated that there are 10 AP classes; however, it subsequently stated that the number of AP courses is 27.

virtually in half." Such a drastic reduction in the student population necessitates a reduction in teachers as well, which also could affect the quality of education.

Galinsky testified to the "school of thought" that favors the creation of smaller schools. Smaller schools will: (1) allow teachers to know their students better; (2) provide an environment that is more conducive to learning; (3) better protect individual students from "falling between the cracks"; (4) allow better performance from teachers working together; and (5) allow better school management. Accordingly, he does not believe that Boonton High School will be negatively impacted by the reduction of students.

Galinsky concedes that the withdrawal of the Lincoln Park and Performing Arts Academy students poses challenges to Boonton as to curriculum offerings; however, he does not believe that it will have a profound adverse effect. A supplemental report concludes that most of the courses currently offered will continue to be offered. Those courses that will be eliminated will have some of the concepts taught in courses that continue to be available. He acknowledges that some classes, however, are being eliminated outright, including Music Appreciation, AP Physics, AP History 1 and 2, AP French, and AP Spanish. The elimination of the AP courses may hinder the college plans of a few students, but these students could still opt to study independently and take the AP examination so as to qualify for the college credit associated with the AP test.

The loss of over half its student population would result in an enrollment of about 308 students at Boonton High. Consequently, some sports teams and extracurricular activities will also have to be eliminated, including golf, tennis, swimming, marching band, the annual musical theater production, and the school's literary magazine. To counter the loss of these activities, Galinsky asserts that the students in a smaller Boonton High School may benefit from a more intimate environment and more individualized attention.

In *Board of Education of Bloomingdale v. Board of Education of Butler, supra*, 94 *N.J.A.R.*2d (EDU) 553, it was found that where a receiving school would lose almost half of its students if the sending-receiving relationship were severed, the educational impact on the receiving school was negative and substantial because of the drastic impact on the scope and quality of curricular offerings necessitated by the reduction of the student population. The ALJ found that the transmogrification of the receiving school from a comprehensive high school to a small district high school was a negative educational step. Here, the facts are on point with *Bloomingdale* because Boonton would lose more than half of its student population, requiring it to overhaul current curriculum, which would include losing several advanced placement courses, as well as certain school activities and sports, such as the marching band, tennis and swimming. It is not realistic that students who desire AP classes can study independently. It does not seem likely that students could properly learn these subjects on an advanced level, as required by the AP test.

The changes to the school's curriculum and the loss of so many school activities are drastic changes that would result in undue hardship for those students who attend Boonton High School. While smaller schools may have benefits, there is a real difference when a large, comprehensive high school is converted into a smaller high school in two years. Accordingly, I **FIND** that the transforming of Boonton High School from a large, comprehensive high school into a small district school will have a substantial negative impact on its educational quality.

Conversely, Lincoln Park, after a phase-in period, will be able to offer a comprehensive academic program for its high-school-level students, including advanced placement courses and all subjects required for entrance into college. Therefore, I **FIND** that the quality of education at Lincoln Park will not be affected by the withdrawal of the Performing Arts Academy students from Boonton High School. Indeed, severance would have specific benefits for Lincoln Park. The district proposes to move away from the traditional approach to schooling, pursuing articulation agreements with universities, colleges and vocational schools so as to provide its students with "a rich and diverse" curriculum. Further, Superintendent Valenza

visualizes computers in every classroom, as opposed to the current computer labs at Boonton. Most importantly, the district would be free to provide the education vision of its own administrators and to decide its own course. Presently, it has no real voice in structuring the educational path of its high school students, notwithstanding that it constitutes the majority.

CONCLUSION

Based on the foregoing, I **CONCLUDE** that under the statutory criteria, the petition for severance must be **DENIED** because there would be a substantial negative impact on the quality of education for the Boonton School District. However, this recommendation is made with a great deal of reluctance since there are many real benefits, especially to Lincoln Park, from the severance. It is blatantly inequitable that Lincoln Park does not have a real vote on matters that it pays for, that affect the day-to-day operations of the high school, and on the education of its children. This is not what one expects in a democratic society. Unfortunately, I am without jurisdiction to address this gross inequity – that is for the Commissioner and the State Legislature to remedy. However, it is in the best interest of the school districts to do so, to avoid expensive and time-consuming litigation.

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

This recommended decision may be adopted, modified or rejected by the **COMMISSIONER OF THE DEPARTMENT OF EDUCATION,** who by law is authorized to make a 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.

December 23, 2005

DATE

IRENE JONES, ALJ

E-mail Receipt of Initial Decision Confirmed by the Department of Education on:

12/23/05

DATE

Mailed to Parties:

DIRECTOR AND
CHIEF ADMINISTRATIVE LAW JUDGE

JAN 3 2006

DATE

OFFICE OF ADMINISTRATIVE LAW

sej

APPENDIX

EXHIBIT LIST

For the ALJ:

C-1 Letters from the public

Joint:

J-1 Affidavit of Publication, Morris County Daily
J-2 Affidavit of Publication, Citizen of Morris County
J-3 *Star Ledger*
J-4 1990 Census
J-5 2000 Census
J-6A 1998/1999 Enrollment by School – Boonton
J-6B 1998/1999 Enrollment by School – Lincoln Park
J-7A 1999/2000 Enrollment by School – Boonton
J-7B 1999/2000 Enrollment by School – Lincoln Park
J-8A 2000/2001 Enrollment by School – Boonton
J-8B 2000/2001 Enrollment by School – Lincoln Park
J-9A 2001/2002 Enrollment by School – Boonton
J-9B 2001/2002 Enrollment by School – Lincoln Park
J-10A 2002/2003 Enrollment by School – Boonton
J-10B 2002/2003 Enrollment by School – Lincoln Park
J-11A 2003/2004 Enrollment by School – Boonton
J-11B 2003/2004 Enrollment by School – Lincoln Park

For the Petitioner:

P-1 Résumé of Harry A. Galinsky, Ed.D.
P-2 Affidavit of Harry A. Galinsky, Ed.D., dated August 9, 2004
P-3 Enrollment projections for 2004/2005 school year prepared by Dr. Galinsky

For the Respondent:

R-1 Petition for Severance filed by Board of Education of the Town of Boonton v. Lincoln Park Board of Education, dated August 8, 2002

R-2 Joint Stipulation of Facts by the parties received by the State of New Jersey, October 20, 2003

R-3 Consent Order regarding the severance of the parties' sending-receiving relationship, dated October 13, 2003

R-4 Notice of Public Hearing, the July 27, 2004, Lincoln Park Board of Education Meeting, published by Boonton in the *Daily Record* and by Lincoln Park in the *Star Ledger*, August 2, 2004

R-5 Feasibility Study to Determine the Impact of Terminating the Sending-Receiving Relationship between the Boonton and Lincoln Park School Districts, by Dr. Harry A. Galinsky, dated March 15, 2002

R-6 2002 Statewide Ranking of Public High Schools, New Jersey

R-7 New Small Learning Communities, Findings from Recent Literature, by Kathleen Cotton, December 2001

R-8 Diversity in the Lincoln Park Schools, authored by Dr. Joyce J. Valenza, February 13, 2004

R-9 Lincoln Park Board of Education Newsletter, Winter 2004 [sic] "Board Separates Fact from Fiction"

R-10 Certification of James Tevis, Announcement Regarding Severance, dated January 13, 2004

R-11 Enrollment Projection Study, by Ross Haber Associates, dated April 8, 2003

R-12 Cost Analysis – Lincoln Park Board of Education Referendum, dated January 9, 2004

R-13 Letter addressed to Dr. William Librera, Commissioner of Education, dated March 17, 2004, from Mr. James Tevis, School Business Administrator

R-14 Letter addressed to Mr. James Tevis, dated May 4, 2004, from Mr. Bernard E. Piaia, Jr., Director, Office of School Facilities, State of New Jersey

R-15 Resident letter dated January 27, 2004, advising public of financial impact of severance from Boonton

R-16 Traffic Impact Report addressed to Joseph Maiella, P.E., P.P., Borough of Lincoln Park, dated August 4, 2003, authored by John A. Desch, P.E.

R-17 Affidavit of Joyce Valenza, Ed.D., with addendum

R-18 Affidavit of James Tevis with addendum

R-19 Latest Revision to Department of Education High School Component

Witnesses for Town of Boonton

Dr. Harry A. Galinsky

Witnesses for the Borough of Lincoln Park

Dr. Joyce J. Valenza

James Tevis, Business Administrator and Board Secretary

150-06

LENAPE REGIONAL HIGH SCHOOL DISTRICT BOARD OF EDUCATION, BURLINGTON COUNTY,	:	COMMISSIONER OF EDUCATION
PETITIONER,	:	DECISION
V.	:	
NEW JERSEY STATE DEPARTMENT OF EDUCATION, OFFICE OF SPECIAL EDUCATION PROGRAMS,	:	
RESPONDENT.	:	

SYNOPSIS

Petitioning Board of Education appealed the Department's finding of noncompliance as the result of a complaint investigation conducted by the Office of Special Education Programs pursuant to *N.J.A.C.* 6A:14-9.2. The investigation was conducted subsequent to a request from a parent, A.M., who enumerated areas of concern with regard to her son's IEP for the 2001-2002 school year, particularly related to the provision of appropriate technology to improve P.M.'s academic and environmental organizational skills. The parties agreed that the matter was appropriately heard as a contested case before the Commissioner.

The ALJ granted respondent's motion for summary decision and affirmed the Department's finding of noncompliance and corrective action, concluding that the school district was obligated to provide appropriate assistive technology – at public expense and without charge – in order to meet its federally mandated obligation to provide a "free and appropriate public education" under the Individuals with Disabilities Education Act. The ALJ did not address the question of Commissioner jurisdiction, concluding that the parties' prior agreement – together with transmittal of the matter to the Office of Administrative Law (OAL) by the agency – had resolved the issue. A motion to intervene or participate filed by the parent (A.M.) who initiated the complaint on behalf of her son – raising Commissioner jurisdiction among other issues – was denied by the ALJ, and the Commissioner declined to review the ALJ's ruling on an interlocutory basis.

The Commissioner, upon review of the entire record, expressed serious reservations about her jurisdiction to decide the merits of the matter, and remanded it to the OAL for argument, analysis and recommended conclusions of law on the threshold question of Commissioner jurisdiction. Additionally, solely for purposes of argument on jurisdiction, the Commissioner granted participant status to A.M.

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.

April 25, 2006

OAL DKT. NO. EDU 735-03
AGENCY DKT. NO. 27-1/03

LENAPE REGIONAL HIGH SCHOOL DISTRICT BOARD OF EDUCATION, BURLINGTON COUNTY,	:	COMMISSIONER OF EDUCATION
PETITIONER,	:	DECISION
V.	:	
NEW JERSEY STATE DEPARTMENT OF EDUCATION, OFFICE OF SPECIAL EDUCATION PROGRAMS,	:	
RESPONDENT.	:	

The record of this matter and the Initial Decision and prior Order of the Office of Administrative Law (OAL) on A.M.'s Motion to Intervene or Participate have been reviewed,[1] as have exceptions filed by the Board of Education (Board) and the reply thereto by the Department of Education (Department). These submissions pertain to the merits of the matter, and are not summarized herein for the reasons set forth below.

Upon review, the Commissioner finds – as in a recent appeal of a complaint investigation involving the same parties, *Board of Education of the Lenape Regional High School District v. New Jersey State Department of Education*, decided by the Commissioner on March 21, 2006 (*Lenape I*) – that he has serious reservations regarding any attempt on his part to rule on the merits of this matter. As in *Lenape I*, the

[1] Pursuant to *N.J.A.C.* 1:1-14.10(j)2, this order is reviewable at the end of the contested case, where – as here – the Commissioner declined to review it on an interlocutory basis. It is noted that the Initial Decision (at 2) erroneously states that the Commissioner *adopted* the referenced order, when – in fact – she merely declined to review it interlocutorily. A.M. sought leave from the State Board of Education to appeal the Commissioner's denial of her request for interlocutory review; in a decision dated March 1, 2006, the State Board denied the motion.

issues herein fundamentally arise out of the IDEA and its interpretation, notwithstanding that they also implicate Department actions and State Board regulations adopted in furtherance of the federal law.

Similarly, as in *Lenape I*, the ALJ again concluded that the question of Commissioner jurisdiction did not need to be addressed at the OAL in light of the fact that: 1) the case was transmitted by the agency; and 2) the parties agreed that such jurisdiction was not an issue in dispute. However, as the Commissioner held in *Lenape I*, party agreement cannot confer jurisdiction where none exists, and the act of transmittal does not in itself foreclose further inquiry where the need for it becomes apparent, as it has here.

Although the existing record in this matter contains – as it did in *Lenape I* – substantial argument on the question of Commissioner jurisdiction in the context of briefing on A.M.'s motion to intervene or participate, the Commissioner is no less loathe in this instance to decide so critical an issue without benefit of full adversarial argument and an initial analysis with recommended conclusions of the law by the OAL.

Therefore, prior to any possible consideration of the merits of this matter, the Commissioner has determined, as in *Lenape I*, to: 1) grant A.M.'s motion to participate, but *solely* on the question of Commissioner jurisdiction; and 2) remand this matter to the OAL so that the argument, analysis and recommendations necessary for the Commissioner to decide the threshold jurisdictional issue on the most informed basis possible may be developed with A.M.'s participation. Once again, A.M.'s participation will add constructively to the case, since she alone is presenting an adversarial perspective on the question of jurisdiction, and it will not delay or confuse the matter

because the Commissioner would – even without her involvement – seek further exploration of the jurisdictional question before issuing a final ruling in this matter; moreover, as a parent of disabled child(ren), A.M. has a significant interest in the outcome of a matter implicating the process by which such parents may seek to resolve complaints against school districts. *N.J.A.C.* 1:1-16.6(a)-(b). In light of these considerations, the Commissioner deems it appropriate for A.M. to have the opportunity to argue orally, file statement(s) or brief(s), and file exceptions to the Initial Decision on Remand. *N.J.A.C.* 1:1-16.6(c). *Lenape I, supra.*

Accordingly, the Order of the ALJ denying A.M.'s request to intervene or participate in this matter is rejected to the extent that it does not allow A.M. to participate on the question of Commissioner jurisdiction, and the matter is hereby remanded to the OAL for the limited purpose of argument, analysis and recommended conclusions of law on the question of jurisdiction as set forth above.

IT IS SO ORDERED.*

ACTING COMMISSIONER OF EDUCATION

Date of Decision: 4/25/06

Date of Mailing: 4/25/06

* This decision may be appealed to the State Board of Education pursuant to *N.J.S.A.* 18A:6-27 *et seq.* and *N.J.A.C.* 6A:4-1.1 *et seq.*

State of New Jersey
OFFICE OF ADMINISTRATIVE LAW

INITIAL DECISION
OAL DKT. EDU 735-03
AGENCY REF NO 27-1/03

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

Petitioner,

v.

NEW JERSEY STATE DEPARTMENT OF EDUCATION, OFFICE OF SPECIAL EDUCATION (OSEP),

Respondent.

Susan S. Hodges, Esq., for petitioner, (Archer & Greiner, attorneys)

Carolyn Grace Labin, Deputy Attorney General, for respondent (Zulima V. Farber, Attorney General of New Jersey, attorney)

Record Closed: March 6, 2006 Decided: March 13, 2006

BEFORE **ANA C. VISCOMI,** ALJ:

STATEMENT OF THE CASE AND PROCEDURAL HISTORY

Petitioner appeals from an OSEP compliance investigation finding that petitioner Lenape failed to provide a free appropriate public education (FAPE)

pursuant to N.J.A.C. 6A:14-1.1 et seq., to Lenape student, P.M., on account of Lenape's district requirement that P.M.'s parents sign a Bailment Agreement prior to the release of school property for out-of-school use. The matter was transmitted to the Office of Administrative Law (OAL) on March 6, 2003, for a hearing as a contested case pursuant to N.J.S.A. 52:14F-1 to -13 and N.J.S.A. 52:14 B-1 to -15. P.M.'s parent, A.M., subsequently moved before the undersigned to intervene and/or participate in the within matter. That motion was denied. On December 23, 2005, the Commissioner adopted the undersigned's Order denying AM's motion. On February 1, 2006, the State Board of Education denied A.M.'s motion for leave to appeal the Commissioner's decision.

The parties do not contest jurisdiction of the within matter and have submitted same on cross-motions for summary decision pursuant to N.J.A.C. 1:1-12.5. Final responsive pleadings in that regard were received on March 6, 2006, and the record closed.

FACTUAL DISCUSSION

The facts in this matter should not be in dispute and shall constitute **FINDINGS OF FACT.**

P.M. was an 18-year-old Lenape student eligible to receive special education and related services. On July 14, 2001, P.M.'s IEP team met in order to develop his IEP for the 2001-2002 school year. Pursuant to a settlement reached in federal District Court, P.M. was placed in an out-of-district school, the Pine Ridge School in Williston, Vermont. His IEP contained two entries relevant to the issue in dispute. With regard to the section titled "Individualized Educational Program Conference Report,"[1] the following is indicated:

[1] See Affidavit of Michael Comman, Ph.D., exhibit B, at page 33.

> (P) received an assistive technology evaluation on April 24, 2001 to determine the most appropriate technology to improve his academic and environmental organizational skills including note-taking and writing skills. Suggestions included a reading and writing support program, a numeric processor, money software, an interactive algebra computer game, an interactive geometry computer game, a digital recorder with indexing, and a hand held graphic organizer. (P) is in agreement that the language arts computer program and the graphics organizer would be helpful. The District is in agreement with these two recommendations (Handspring PDA and Text Help Read and Write). In order for assistive technology to be successfully implemented, there must be uniformity across (P)'s educational curriculum and his home. The District accepts this report and is in agreement with the two recommendations that (P) is interested in exploring (Handspring PDA $249 and Text Help Read and Write software $249).

The second discussion appears under the heading of "Special Factors; Assistive Technology."[2] It provides:

> Received evaluation 4/24/01. Does not need assistive technology devices and/or services; would benefit from use of Handspring PDA to improve organizational skills at home and in school and Text Help Read and Write software.

At the meeting, Lenape advised A.M. that it would provide P.M. the Handspring PDA but that "like all other Lenape students,"[3] P.M. would be responsible for the care and maintenance of the equipment and his parents would be required to sign a Bailment Agreement before the equipment could be released to P.M. Lenape purchased the Handspring PDA equipment for P.M. The Bailment Agreement provided essentially that the parent of the recipient would agree to be held liable for loss, damage or failure to return the equipment. A.M. refused to sign the Bailment Agreement; the Handspring PDA equipment was thus not provided to P.M.

---

[2] Id., at page 35.
[3] See Affidavit of Michael A. Comman, Ph.D., at page 2, number 4.

On June 18, 2002, July 17, 2002 and August 13, 2002, A.M., on behalf of P.M., requested OSEP conduct a compliance investigation into 24 separate, enumerated areas of concern with regard to P.M.'s IEP for the 2001-2002 school year. With regard to the matter at issue, OSEP conducted an investigation, which included several phone interviews with the complainant, a review of documentation provided by the district and interviews with district personnel during a site visit on September 4, 2002. The factual findings from the investigation are essentially those indicated herein. Along with the conclusions, all were contained in the Complaint Investigation Report. (R-1)[4] The conclusions reached provided, in relevant part:

> (b)ecause the IEP team determined that in order for PM to receive a free, appropriate public education the software and the Handspring PDA was listed in the IEP as an IEP requirement, the district was required to provide it. A district board of education cannot condition a free and appropriate public education on the parent's ability to be willing to pay for an assistive technology device should repairs be necessary.
>
> Therefore, because the district failed to provide assistive technology required by the IEP of a student with disabilities, the district is determined to be noncompliant.

The corrective action required the district reimburse the complainant the cost of the Handspring PDA, as AM had purchased one after the district refused to provide one until the bailment agreement was signed. The district was further directed to provide P.M. Text Help Read and Write software. [5]

LEGAL ANALYSIS

In support of its motion for summary decision, respondent asserts its finding of non-compliance was consistent with state and federal law and must be upheld as reasonable. Since the IEP team determined the Handspring PDA to

[4] See attachment to February 21, 2006, letter brief submitted by respondent.
[5] R-1, at page 21.

be necessary and included it on P.M.'s IEP, the district is obligated to provide it without the requirement that a parent sign a bailment agreement as the Individual with Disabilities Education Act (IDEA) guarantees a "free appropriate public education" (FAPE) and that has been interpreted as special education and related services that have been provided at public expense under public supervision and direction, without charge, and meeting the standards of the state education agency and conforming to the student's IEP. 20 U.S.C. §1401(9)(A)-(D); N.J.A.C. 6A:14-1.1(d)(1).

Petitioner asserts in opposition to this motion and in support of its cross-motion for summary decision that first, the IEP provided that P.M. did "not need" assistive technology but "would benefit from use of Handspring PDA;" second, it complied with the IEP by purchasing the equipment; and third, it complied with Lenape's policy which requires any student accepting equipment to sign a Bailment Agreement. To have done otherwise, petitioner asserts, would mean the district treated P.M. in a discriminatory fashion because of his eligibility for special education and related services. With regard to the OSEP compliance investigation, petitioner asserts the importance of Lenape's policy regarding the Bailment Agreement and the fact that it refused to treat P.M. in a disparate manner with regard to the Bailment Agreement was not adequately considered by OSEP in finding non-compliance. Further, petitioner asserts summary decision should be granted in its favor because it complied with the IEP by purchasing the equipment for P.M. The IEP does not exempt P.M. from complying with the district's requirement regarding the Bailment Agreement.

The resolution of this matter does not center upon the purported disparate treatment of P.M., if as a student eligible for special education, he, unlike other typically developing students, was not required to sign a Bailment Agreement prior to the release of equipment. I **FIND** that the district was "in agreement" with the April 24, 2001, assistive technology evaluation recommendations for the Handspring PDA and the Text Help Read and Write. Further, the district

recognized that "in order for assistive technology to be successfully implemented, there must be uniformity across (P)'s educational curriculum and his home. The District accepts this report... ." In order to meet its federally mandated obligation to provide FAPE, special education and related services are to be provided at public expense without charge and in conformity with an IEP that meets the requirement of IDEA. 20 U.S.C. § 1401 (8), 34 C.F.R. 300.13 (a)(d). Thus, once the IEP team accepted the assistive technology as recommended by the evaluation, it was obligated to provide it to P.M. without any requirement of a Bailment Agreement which might entail a future cost on his part. N.J.A.C. 6A:14-3.7.

DECISION AND ORDER

Based on the foregoing, Respondent's motion for summary decision pursuant to N.J.A.C. 1:1-12.5 is hereby **GRANTED.** Respondent's finding of non-compliance and corrective action is hereby **AFFIRMED.** Petitioner's cross motion for summary decision is hereby **DENIED** and its appeal is **DISMISSED.**

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

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

Within thirteen (13) days from the date on which this recommended decision was mailed to the parties, any party may file written exceptions with the **COMMISSIONER OF THE DEPARTMENT OF EDUCATION, 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 13, 2006

DATE

Ana C. Viscomi

ANA C. VISCOMI, ALJ

E-mail Receipt of Initial Decision Confirmed by the Department of Education on:

3-13-06

DATE

Mailed to Parties:

MAR 17 2006

DATE

Laura Anderson

DIRECTOR AND CHIEF ADMINISTRATIVE LAW JUDGE

OFFICE OF ADMINISTRATIVE LAW

/lam

151-06

OAL DKT. NO. EDU 1129-05
AGENCY DKT. NO. 417-11/04

JERSEY CITY GOLDEN DOOR CHARTER SCHOOL, HUDSON COUNTY,	:	
PETITIONER,	:	
V.	:	COMMISSIONER OF EDUCATION
NEW JERSEY STATE DEPARTMENT OF EDUCATION, OFFICE OF COMPLIANCE INVESTIGATION,	:	DECISION
RESPONDENT.	:	

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

IT IS SO ORDERED.

ACTING COMMISSIONER OF EDUCATION

Date of Decision: 4/25/06
Date of Mailing: 4/26/06

State of New Jersey
OFFICE OF ADMINISTRATIVE LAW

INITIAL DECISION

SETTLEMENT

OAL Dkt. No. EDU 01129-05N

Agency Ref. No. 417-11/04

JERSEY CITY GOLDEN DOOR CHARTER SCHOOL, HUDSON COUNTY

Petitioner,

v.

NEW JERSEY STATE DEPARTMENT OF EDUCATION, OFFICE OF COMPLIANCE INVESTIGATION,

Respondent.

Joseph Wenzel, Esq., for petitioner (*Lum, Danzis, Drasco & Positanl*)

Allison Colsey, DAG. for respondent (*NJ Department of Law & Public Safety*)

Record Closed: March 16, 2006 Decided: March 20, 2006

BEFORE **CARIDAD F. RIGO**, ALJ:

On January 11, 2005, this matter was transmitted to the Office of Administrative Law (OAL) for hearing on emergent relief as a contested case pursuant to N.J.S.A. 52:14B-1 to -15 and N.J.S.A. 52:14F1 to -13. A hearing was scheduled on January 12, 2006 & February 7, 2006 at the OAL in Newark, New Jersey, during which there were extensive settlement discussions. On February 6, 2006 a call was received from Joseph Wenzel, Esq. advising the parties were working on a Finalized Settlement and does not feel there is a need for the February 7, 2006 hearing.

On March 1, 2006, the parties entered into a tentative settlement agreement and the terms of that agreement were placed on the record. The parties prepared and submitted the attached settlement indicating the terms of agreement which are incorporated herein by reference.

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

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

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

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

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

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

March 20, 2006
DATE

CARIDAD F. RIGO, ALJ

Receipt Acknowledged:

3-22-06
DATE

DEPARTMENT OF EDUCATION

Mailed to Parties:

MAR 24 2006
DATE

DIRECTOR AND CHIEF ADMINISTRATIVE LAW JUDGE

OFFICE OF ADMINISTRATIVE LAW

ljb

ZULIMA V. FARBER
Attorney General of New Jersey
Attorney for Petitioner, New Jersey
Department of Education,
Office of Compliance Investigation
Richard J. Hughes Justice Complex
P.O. Box 112
Trenton, New Jersey 08625

By: Allison Colsey Eck
Deputy Attorney General
(609) 292-5214

RECEIVED
STATE OF NEW JERSEY
OFFICE OF ADMINISTRATIVE LAW
2006 MAR 16 A 8:05

JERSEY CITY GOLDEN DOOR CHARTER SCHOOL, Petitioner, v. DEPARTMENT OF EDUCATION, OFFICE OF COMPLIANCE INVESTIGATION, Respondent.	OFFICE OF ADMINISTRATIVE LAW OAL Dkt. No. EDU OT 01129-05N STIPULATION OF SETTLEMENT

WHEREAS, petitioner, Jersey City Golden Door Charter School ("Golden Door"), and respondent, New Jersey Department of Education, Office of Compliance Investigation ("Department"), have mutually agreed to settle the above-captioned matter, with Joseph M. Wenzel, Esq., appearing on behalf of Golden Door, and with Zulima V. Farber, Attorney General of New Jersey, (Allison Colsey Eck, Deputy Attorney General appearing) on behalf of the Department; and

WHEREAS, this matter arose from Golden Door's appeal of the Department's November 21, 2003, Report of Examination which

identified bid violations in connection with the acquisition of services from Foundations, Inc., the purchase of assorted computer hardware from Dell Computers and the purchase of services of a technology consultant from School.Net without advertising to obtain competitive bidding; and

WHEREAS, on November 23, 2004, after exhausting the Office of Compliance's appeal process, Golden Door filed a petition of appeal challenging the Department's September 1, 2004 final determination regarding the Report of Examination with the Commissioner of Education and the matter was subsequently transferred to the Office of Administrative Law as a contested case; and

WHEREAS, the parties to this matter have entered into discussions to amicably resolve this matter in the public interest; 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. Golden Door shall refund the sum of $82,193.00 of State Aid, comprising $54,391.00 in General Fund State Aid and $27,802.00 in Special Revenue State Aid, to the Department.

2. In lieu of remitting the payment directly to the Department, Golden Door agrees that the Department shall withhold the sum of $20,548.25 from Golden Door's quarterly State Aid

payments for April 2006, July 2006, October 2006 and January 2007, with the quarterly payment being equitably apportioned between the General Fund State Aid and Special Revenue State Aid.

3. Upon execution of this stipulation of settlement, Golden Door will withdraw its appeal of the Department's September 1, 2004 final determination regarding the bid violations identified in the Department's Report of Examination dated November 21, 2003.

4. Golden Door does not concede that the allegations in the petition in this matter were not justified, nor does the Department admit or concede the truth of the allegations contained in the petition filed in this matter and both parties have entered into this agreement for the purposes of settlement only.

5. The parties agree that this stipulation of settlement fully resolves all issues between them arising from the Department's Report of Examination dated November 21, 2003, and the Final Appeal Determination issued September 1, 2004, that are the subject of this appeal.

Date 3/1/06

Joseph M. Wenzel, Esq.
Attorney for Petitioner,
Jersey City Golden Door Charter School

ZULIMA V. FARBER
ATTORNEY GENERAL OF NEW JERSEY
Attorney for New Jersey
Department of Education

Date: 3/14/06

By: Allison Colsey Eck
Allison Colsey Eck
Deputy Attorney General

156-06

OAL DKT. NO. EDU 1910-04
AGENCY DKT. NO. 451-11/03

ESTATE OF KENNETH MOSS,	:	
PETITIONER,	:	
V.	:	COMMISSIONER OF EDUCATION
BOARD OF EDUCATION OF THE CITY OF EAST ORANGE, ESSEX COUNTY,	:	DECISION
RESPONDENT.	:	

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

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

IT IS SO ORDERED.

Lucille E Davy
ACTING COMMISSIONER OF EDUCATION

Date of Decision: 4/27/06

Date of Mailing: 4/27/06

State of New Jersey
OFFICE OF ADMINISTRATIVE LAW

INITIAL DECISION
SETTLEMENT
OAL DKT. NO. EDU 1910-04
AGENCY DKT. NO. 451-11/03

ESTATE OF KENNETH MOSS ,
Petitioner,
v.
BOARD OF EDUCATION OF THE CITY OF EAST ORANGE, ESSEX COUTNY,
Respondent.

Timothy R. Smith, Esq., for petitioner
(Law Office of Timothy R. Smith, attorney)

Marc H. Zitomer, Esq., for respondent
(Schwartz, Simon, Edelstein, Celso & Kessler, LLP, attorneys)

Record Closed: March 10, 2006 Decided: March 14, 2006

BEFORE **STEPHEN G. WEISS** ALJ:

STATEMENT OF THE CASE

This matter was transmitted to the Office of Administrative Law by the Department of Education as a contested case in March 2004. The petition of appeal

sought reimbursement of legal fees incurred in defense of criminal charge against Moss who by then was deceased. Some delays were caused by the need to correct the filing to indicate the petitioner (the estate) was properly represented by either an administrator or an executor. Thereafter, as a result of discussions between newly engaged board counsel and the attorney for the estate the terms of a settlement were reached. A Stipulation of Settlement and Release has now been submitted to me for review which is attached hereto and made a part hereof. Also attached is a copy of the minutes of the Board of Education of the City of East Orange meeting of February 14, 2006 wherein the Board approved the settlement.

I have reviewed the terms of the Settlement Agreement and I **FIND** as follows:

(1) The parties voluntarily have agreed to the settlement as evidenced by the signatures which appear thereon, together with the Board Resolution;

(2) The Settlement Agreement fully disposes of all issues in controversy and is consistent with law.

Therefore, it is **ORDERED** that the parties comply with the settlement terms and that the proceedings in this matter be concluded.

I hereby **FILE** my initial decision with the **DEPARTMENT OF EDUCATION** for consideration.

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

March 14, 2006
DATE

STEPHEN G. WEISS, ALJ

Receipt Acknowledged:

March 17, 2006
DATE

DEPARTMENT OF EDUCATION

Mailed to Parties:

MAR 22 2006
DATE

DIRECTOR AND CHIEF ADMINISTRATIVE LAW JUDGE
OFFICE OF ADMINISTRATIVE LAW

nd

SCHWARTZ SIMON EDELSTEIN CELSO & KESSLER, LLC
Ten James Street
Florham Park, New Jersey 07932
(973) 301-0001; Fax (973) 301-0203
Attorneys for Respondent,
East Orange Board of Education

OFFICE OF ADMINISTRATIVE LAW
33 WASHINGTON STREET
NEWARK, NJ 07102
MAR 10 2006

ESTATE OF KENNETH MOSS Petitioner, -vs.- EAST ORANGE BOARD OF EDUCATION, ESSEX COUNTY Respondent.	BEFORE THE COMMISSIONER OF EDUCATION OFFICE OF ADMINISTRATIVE LAW OAL DOCKET NO. EDUOR-01910-2004N Agency Reference No. 451-11/03 **STIPULATION OF SETTLEMENT AND RELEASE**

This Stipulation of Settlement and Release is made by and between the East Orange Board of Education (the "Board") with administrative offices located at 715 Park Avenue, East Orange, New Jersey, 07017 and the Estate of Kenneth Moss, whose address is 755 Summer Avenue, Newark, New Jersey 07104 (the "Petitioner"). In consideration of the mutual promises and undertakings contained in this Stipulation of Settlement and Release and for good and valuable consideration, the receipt of which is hereby acknowledged, the undersigned parties state:

WHEREAS, on January 3, 2002, Petitioner was employed by the Board as a teaching staff member; and

WHEREAS, Petitioner was charged with a criminal action for certain acts alleged to have occurred on January 3, 2002, while Petitioner was in the employ of the Board; and

WHEREAS, on June 25, 2003, the criminal complaint against Petitioner was dismissed; and

WHEREAS, the Petitioner filed a Petition of Appeal with the Commissioner of Education on or about November 18, 2003, pursuant to N.J.S.A. 18A:16-6.1, seeking reimbursement from the Board for Petitioner's attorneys' fees and costs associated with the legal defense of the criminal action with which Petitioner had been charged; and

WHEREAS, on January 28, 2004, the Board filed its answer to the Petition of Appeal with Affirmative Defenses; and

WHEREAS, the parties have determined that it is in their respective best interests to enter into this Stipulation of Settlement and Release to avoid the need for further litigation;

NOW, THEREFORE, in consideration of the mutual promises and covenants, the parties agree as follows:

1. The Board will pay to the Petitioner the sum of Seven Thousand Dollars ($7,000.00) in full and complete satisfaction of the amount Petitioner is claiming to be due and owing to him from the Board for Petitioner's attorneys' fees and costs.
2. This settlement amount will be paid directly to the trust account of Petitioner's legal counsel, Timothy Smith, Esq. of Timothy R. Smith & Associates, LLC, 76 South Orange Avenue, Suite 211, South Orange, New Jersey, 07079, following the approval of this Stipulation of Settlement and Release by the Commissioner of Education.
3. Petitioner, in consideration of this Agreement, hereby releases the Board, individually and collectively, and its agents, servants and employees from any and all claims, causes of action, suits, actions at law and in equity, administrative proceedings, and judicial and quasi-judicial proceedings of any kind whatsoever, which have been brought, or could be brought, arising under or relating in any way to the subject

matter set forth in the Petition of Appeal now and forever, except to enforce the terms of this Stipulation of Settlement and Release.

4. Petitioner acknowledges that he has reviewed this Stipulation of Settlement and Release with his own independent legal counsel and that he enters into it without duress, and of his own free will and volition. He further acknowledges that he fully understands the terms of this Stipulation of Settlement and Release and the duties and obligations enumerated herein.
5. Petitioner, in consideration of this Stipulation of Settlement and Release and in full, final and complete settlement of this matter hereby withdraws, with prejudice, the above-docketed Petition of Appeal.
6. Nothing contained in this Stipulation of Settlement and Release should be construed as an admission of wrongdoing by either party and neither party shall be considered a prevailing party for any reason.
7. This Stipulation of Settlement and Release is conditioned upon approval of the Board.
8. The Board's President is authorized to execute this Stipulation of Settlement and Release on behalf of the Board.
9. This Stipulation of Settlement and Release contains the entire agreement between the parties, and no other representations, whether verbal or in writing shall be binding upon them.
10. All terms of this Stipulation of Settlement and Release are deemed material. This instrument may not be altered, amended, modified or revoked except by a new instrument executed in writing by the parties.
11. This Stipulation of Settlement and Release is an agreement which is to be construed

in accordance with the laws of the State of New Jersey.

IN WITNESS WHEREOF, the parties, or their duly authorized representatives, do set forth their hands and seal as of the date(s) set forth below.

FOR THE EAST ORANGE BOARD OF EDUCATION:

By: Patricia Hall
Patricia Hall, Board President

Date: 3/9/06

By: Jamel Adi
, Witness

PETITIONER:

Patricia J. Moss
Estate of Kenneth Moss

Date: February 8, 2006

Sworn and subscribed before me this
8 day of February 2006

Mary Hazel Jones
Notary Public Expires Nov. 2, 2008

EXTRACT FROM THE MINUTES OF A MEETING OF THE BOARD OF EDUCATION OF THE CITY OF EAST ORANGE, NEW JERSEY AS RECORDED IN THE OFFICIAL MINUTE BOOK

The Board of Education of the City of East Orange in the County of Essex, New Jersey convened a Regular Meeting on Tuesday, February 14, 2006 at 6:20 p.m.

The following members of the Board were present:

Mr. Reginald Davis, Mr. Vernon Pullins, Jr., Mrs. Marsha B. Wilkerson, Mr. Arthur L. Wright, and Mrs. Patricia Hall

The following resolution was offered by Mr. Vernon Pullins, Jr., duly seconded by Mrs. Marsha B. Wilkerson and adopted by the Board of Education:

Resolution

RESOLVED, that the Board hereby approves the Settlement Agreements/Release in the following employee indemnification matters which are currently before the Commissioner of Education in the amounts set forth as follows:

1. Bayard v. East Orange Board of Education, OAL Docket No. EDUOR 03306-2005N, $5,000.00;

2. Moss v. East Orange Board of Education, OAL Docket No. EDUOR 01910-2004N, $7,000.00;

3. Toe v. East Orange Board of Education, OAL Docket No. EDUOR 01119-2005N, $5,000.00;

4. Perinio v. East Orange Board of Education, OAL Docket No. EDUOR 07384-2005N, $6,500.00;

BE IT FURTHER RESOLVED, that the Board President is hereby authorized to execute the Settlement Agreements/Releases in the above matters on behalf of the Board and copies thereof shall be included in the permanent minutes of this meeting.

ROLL CALL: AYES: 5
ABSENT: 2

STATE OF NEW JERSEY}
} ss
COUNTY OF ESSEX}

I, Jamie L. Adams, Interim Board Secretary of the Board of Education, of the East Orange Board of Education, in the County of Essex, State of New Jersey, hereby certify that the foregoing extract from the minutes of the meeting of the Board of said district, fully called and held on Tuesday, February 14, 2006 has been compared by me with the original minutes as officially recorded in my office in the minute book of said East Orange Board of Education, original minutes so far as the same related 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 9th day of March 2006.

Jamie L. Adams, Interim Board Secretary

157-06

OAL DKT. NO. EDU 3306-05
AGENCY DKT. NO. 19-1/05

BERNARD BAYARD,	:	
PETITIONER,	:	
V.	:	COMMISSIONER OF EDUCATION
BOARD OF EDUCATION OF THE CITY OF EAST ORANGE, ESSEX COUNTY,	:	DECISION
RESPONDENT.	:	

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

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

IT IS SO ORDERED.

Lucille Edney

ACTING COMMISSIONER OF EDUCATION

Date of Decision: 4/27/06

Date of Mailing: 4/27/06

State of New Jersey
OFFICE OF ADMINISTRATIVE LAW

INITIAL DECISION

SETTLEMENT

OAL DKT. NO. EDU 3306-05

AGENCY DKT. NO. 19-1/05

BERNARD BAYARD ,

Petitioner,

v.

BOARD OF EDUCATION OF THE CITY OF EAST ORANGE, ESSEX COUTNY,

Respondent.

Timothy R. Smith, Esq., for petitioner

(Law Office of Timothy R. Smith, attorney)

Marc H. Zitomer, Esq., for respondent

(Schwartz, Simon, Edelstein, Celso & Kessler, LLP, attorneys)

Record Closed: March 10, 2006 Decided: March 14, 2006

BEFORE **STEPHEN G. WEISS** ALJ:

STATEMENT OF THE CASE

This matter was transmitted to the Office of Administrative Law by the Department of Education as a contested case in March 2005. The petition of appeal

alleged that the respondent had refused to indemnify petitioner for legal fees pursuant to N.J.S.A. 18A:16-6.1. Thereafter, discussions were conducted with counsel concerning the dispute and the terms and conditions of a tentative settlement were reached. A Stipulation of Settlement and Release has now been submitted to me for review which is attached hereto and made a part hereof. That document sets forth the agreement made between the parties concerning an amicable resolution of the matter. Also attached is an extract of the minutes of the Board of Education of East Orange meeting of February 14, 2006 at which time the instant settlement was approved.

I have reviewed the terms of the Settlement Agreement and I **FIND** as follows:

(1) The parties voluntarily have agreed to the settlement as evidenced by the signatures which appear thereon, together with the Board Resolution;

(2) The Settlement Agreement fully disposes of all issues in controversy and is consistent with law.

Therefore, it is **ORDERED** that the parties comply with the settlement terms and that the proceedings in this matter be concluded.

I hereby **FILE** my initial decision with the **DEPARTMENT OF EDUCATION** for consideration.

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

MARCH 17, 2006
DATE

STEPHEN G. WEISS, ALJ

Receipt Acknowledged:

March 17, 2006
DATE

DEPARTMENT OF EDUCATION

Mailed to Parties:

DIRECTOR AND CHIEF ADMINISTRATIVE LAW JUDGE

MAR 22 2006
DATE

OFFICE OF ADMINISTRATIVE LAW

nd

OFFICE OF ADMINISTRATIVE LAW
33 WASHINGTON STREET
NEWARK, NJ 07102
MAR 10 2006

SCHWARTZ SIMON EDELSTEIN CELSO & KESSLER, LLC
Ten James Street
Florham Park, New Jersey 07932
(973) 301-0001; Fax (973) 301-0203
Attorneys for Respondent,
East Orange Board of Education

BERNARD BAYARD Petitioner, -vs.- EAST ORANGE BOARD OF EDUCATION, ESSEX COUNTY Respondent.	BEFORE THE COMMISSIONER OF EDUCATION OFFICE OF ADMINISTRATIVE LAW OAL DOCKET NO. EDUOR-03306-2005N Agency Reference No. 19-1/05 **STIPULATION OF SETTLEMENT AND RELEASE**

This Stipulation of Settlement and Release is made by and between the East Orange Board of Education (the "Board") with administrative offices located at 715 Park Avenue, East Orange, New Jersey, 07017 and Bernard Bayard, whose address is 34 4th Street, Woodridge, New Jersey 07075 (the "Petitioner"). In consideration of the mutual promises and undertakings contained in this Stipulation of Settlement and Release and for good and valuable consideration, the receipt of which is hereby acknowledged, the undersigned parties state:

WHEREAS, on April 11, 2003, Petitioner was employed by the Board as a teaching staff member; and

WHEREAS, Petitioner was charged with a criminal action for certain acts alleged to have occurred on April 11, 2003, while Petitioner was in the employ of the Board; and

WHEREAS, on April 30, 2004, the criminal complaint against Petitioner was dismissed; and

WHEREAS, the Petitioner filed a Petition of Appeal with the Commissioner of Education on or about January 19, 2005, pursuant to N.J.S.A. 18A:16-6.1, seeking reimbursement from the Board for Petitioner's attorneys' fees and costs associated with the legal defense of the criminal action with which Petitioner had been charged; and

WHEREAS, on March 1, 2005, the Board filed its answer to the Petition of Appeal with Affirmative Defenses; and

WHEREAS, the parties have determined that it is in their respective best interests to enter into this Stipulation of Settlement and Release to avoid the need for further litigation;

NOW, THEREFORE, in consideration of the mutual promises and covenants, the parties agree as follows:

1. The Board will pay to the Petitioner the sum of Five Thousand Dollars ($5,000.00) in full and complete satisfaction of the amount Petitioner is claiming to be due and owing to him from the Board for Petitioner's attorneys' fees and costs.
2. This settlement amount will be paid directly to the trust account of Petitioner's legal counsel, Timothy Smith, Esq. of Timothy R. Smith & Associates, LLC, 76 South Orange Avenue, Suite 211, South Orange, New Jersey, 07079, following the approval of this Stipulation of Settlement and Release by the Commissioner of Education.
3. Petitioner, in consideration of this Agreement, hereby releases the Board, individually and collectively, and its agents, servants and employees from any and all claims, causes of action, suits, actions at law and in equity, administrative proceedings, and judicial and quasi-judicial proceedings of any kind whatsoever, which have been brought, or could be brought, arising under or relating in any way to the subject

matter set forth in the Petition of Appeal now and forever, except to enforce the terms of this Stipulation of Settlement and Release.

4. Petitioner acknowledges that he has reviewed this Stipulation of Settlement and Release with his own independent legal counsel and that he enters into it without duress, and of his own free will and volition. He further acknowledges that he fully understands the terms of this Stipulation of Settlement and Release and the duties and obligations enumerated herein.
5. Petitioner, in consideration of this Stipulation of Settlement and Release and in full, final and complete settlement of this matter hereby withdraws, with prejudice, the above-docketed Petition of Appeal.
6. Nothing contained in this Stipulation of Settlement and Release should be construed as an admission of wrongdoing by either party and neither party shall be considered a prevailing party for any reason.
7. This Stipulation of Settlement and Release is conditioned upon approval of the Board.
8. The Board's President is authorized to execute this Stipulation of Settlement and Release on behalf of the Board.
9. This Stipulation of Settlement and Release contains the entire agreement between the parties, and no other representations, whether verbal or in writing shall be binding upon them.
10. All terms of this Stipulation of Settlement and Release are deemed material. This instrument may not be altered, amended, modified or revoked except by a new instrument executed in writing by the parties.
11. This Stipulation of Settlement and Release is an agreement which is to be construed

in accordance with the laws of the State of New Jersey.

IN WITNESS WHEREOF, the parties, or their duly authorized representatives, do set forth their hands and seal as of the date(s) set forth below.

FOR THE EAST ORANGE BOARD OF EDUCATION:

By: _____
Patricia Hall, Board President

Date: 3/9/06

By: _____
, Witness

PETITIONER:

_____
Bernard Bayard

Date: 1-31-06

Sworn and subscribed before me this
31st day of January, 2006

_____
Notary Public
Zinovia H. Hatzipetros
A Notary Public of New Jersey
My Commission Expires APRIL 13, 2009

EXTRACT FROM THE MINUTES OF A MEETING OF THE BOARD OF EDUCATION OF THE CITY OF EAST ORANGE, NEW JERSEY AS RECORDED IN THE OFFICIAL MINUTE BOOK

The Board of Education of the City of East Orange in the County of Essex, New Jersey convened a Regular Meeting on Tuesday, February 14, 2006 at 6:20 p.m.

The following members of the Board were present:

Mr. Reginald Davis, Mr. Vernon Pullins, Jr., Mrs. Marsha B. Wilkerson, Mr. Arthur L. Wright, and Mrs. Patricia Hall

The following resolution was offered by Mr. Vernon Pullins, Jr., duly seconded by Mrs. Marsha B. Wilkerson and adopted by the Board of Education:

Resolution

RESOLVED, that the Board hereby approves the Settlement Agreements/Release in the following employee indemnification matters which are currently before the Commissioner of Education in the amounts set forth as follows:

1. Bayard v. East Orange Board of Education, OAL Docket No. EDUOR 03306-2005N, $5,000.00;

2. Moss v. East Orange Board of Education, OAL Docket No. EDUOR 01910-2004N, $7,000.00;

3. Toe v. East Orange Board of Education, OAL Docket No. EDUOR 01119-2005N, $5,000.00;

4. Perinio v. East Orange Board of Education, OAL Docket No. EDUOR 07384-2005N, $6,500.00;

BE IT FURTHER RESOLVED, that the Board President is hereby authorized to execute the Settlement Agreements/Releases in the above matters on behalf of the Board and copies thereof shall be included in the permanent minutes of this meeting.

ROLL CALL: AYES: 5
ABSENT: 2

STATE OF NEW JERSEY}
} ss
COUNTY OF ESSEX}

I, Jamie L. Adams, Interim Board Secretary of the Board of Education, of the East Orange Board of Education, in the County of Essex, State of New Jersey, hereby certify that the foregoing extract from the minutes of the meeting of the Board of said district, fully called and held on Tuesday, February 14, 2006 has been compared by me with the original minutes as officially recorded in my office in the minute book of said East Orange Board of Education, original minutes so far as the same related 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 9th day of March 2006.

Jamie L. Adams, Interim Board Secretary

158-06

OAL DKT. NO. EDU 1119-05
AGENCY DKT. NO. 393-11/04

KLA TOE,	:	
PETITIONER,	:	
V.	:	COMMISSIONER OF EDUCATION
BOARD OF EDUCATION OF THE CITY OF EAST ORANGE, ESSEX COUNTY,	:	DECISION
RESPONDENT.	:	

The record of this matter, the proposed settlement agreement and the Initial Decision issued by the Office of Administrative Law (OAL) pursuant to *N.J.A.C.* 1:1-19.1, have been reviewed.

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

IT IS SO ORDERED.

Lucille E Davy

ACTING COMMISSIONER OF EDUCATION

Date of Decision: 4/27/06

Date of Mailing: 4/27/06

State of New Jersey
OFFICE OF ADMINISTRATIVE LAW

INITIAL DECISION
SETTLEMENT
OAL DKT. NO. EDU 01119-05
AGENCY DKT. NO. 393-11/04

KLA TOE,

Petitioner,

v.

EAST ORANGE BOARD OF EDUCATION,

ESSEX COUNTY,

Respondent.

Timothy R. Smith, Esq., for petitioner
(LaRocca, Feeley & Smith, Rosellini)

Marc H. Zitomer, Esq., for respondent
(Schwartz, Simon, Edelstein, Celso & Kessler, LLP)

Record Closed: March 10, 2006 Decided: March 10, 2006

BEFORE **SANDRA ANN ROBINSON,** ALJ:

This matter was transmitted to the Office of Administrative Law on January 10, 2005, for determination as a contested case.

Prior to hearing, the parties agreed to an amicable resolution of the matter and submitted a Stipulation of Settlement and 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 the signatures of their representatives.

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

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

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

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

March 10, 2006
DATE

Sandra Ann Robinson
SANDRA ANN ROBINSON, ALJ

Receipt Acknowledged:

3-15-06
DATE

M. Kathleen Duncan/QR
DEPARTMENT OF EDUCATION

MAR 17 2006
DATE

Mailed to Parties:
DIRECTOR AND CHIEF ADMINISTRATIVE LAW JUDGE
OFFICE OF ADMINISTRATIVE LAW

cml

OFFICE OF ADMINISTRATIVE LAW
33 WASHINGTON STREET
NEWARK NJ 07102

MAR 10 2006

SCHWARTZ SIMON EDELSTEIN CELSO & KESSLER, LLC
Ten James Street
Florham Park, New Jersey 07932
(973) 301-0001; Fax (973) 301-0203
Attorneys for Respondent,
East Orange Board of Education

KLA TOE Petitioner, -vs.- EAST ORANGE BOARD OF EDUCATION, ESSEX COUNTY Respondent.	BEFORE THE COMMISSIONER OF EDUCATION OFFICE OF ADMINISTRATIVE LAW OAL DOCKET NO. EDUOA-01119-2005N Agency Reference No. 393-11/04 **STIPULATION OF SETTLEMENT AND RELEASE**

This Stipulation of Settlement and Release is made by and between the East Orange Board of Education (the "Board") with administrative offices located at 715 Park Avenue, East Orange, New Jersey, 07017 and Kla Toe, whose address is 2124 Denk Court, Union, New Jersey 07083 (the "Petitioner"). In consideration of the mutual promises and undertakings contained in this Stipulation of Settlement and Release and for good and valuable consideration, the receipt of which is hereby acknowledged, the undersigned parties state:

WHEREAS, on March 15, 2004, Petitioner was employed by the Board as a custodian; and

WHEREAS, Petitioner was charged with a criminal action for certain acts alleged to have occurred on March 15, 2004, while Petitioner was in the employ of the Board; and

WHEREAS, on July 28, 2004, the criminal complaint against Petitioner was dismissed; and

WHEREAS, the Petitioner filed a Petition of Appeal with the Commissioner of Education on or about October 27, 2004, pursuant to N.J.S.A. 18A:16-6.1, seeking reimbursement from the Board for Petitioner's attorneys' fees and costs associated with the legal defense of the criminal action with which Petitioner had been charged; and

WHEREAS, on December 16, 2004, the Board filed its answer to the Petition of Appeal with Affirmative Defenses; and

WHEREAS, the parties have determined that it is in their respective best interests to enter into this Stipulation of Settlement and Release to avoid the need for further litigation;

NOW, THEREFORE, in consideration of the mutual promises and covenants, the parties agree as follows:

1. The Board will pay to the Petitioner the sum of Five Thousand Dollars ($5,000.00) in full and complete satisfaction of the amount Petitioner is claiming to be due and owing to him from the Board for Petitioner's attorneys' fees and costs.
2. This settlement amount will be paid directly to the trust account of Petitioner's legal counsel, Timothy Smith, Esq. of Timothy R. Smith & Associates, LLC, 76 South Orange Avenue, Suite 211, South Orange, New Jersey, 07079, following the approval of this Stipulation of Settlement and Release by the Commissioner of Education.
3. Petitioner, in consideration of this Agreement, hereby releases the Board, individually and collectively, and its agents, servants and employees from any and all claims, causes of action, suits, actions at law and in equity, administrative proceedings, and judicial and quasi-judicial proceedings of any kind whatsoever, which have been brought, or could be brought, arising under or relating in any way to the subject

matter set forth in the Petition of Appeal now and forever, except to enforce the terms of this Stipulation of Settlement and Release.

4. Petitioner acknowledges that he has reviewed this Stipulation of Settlement and Release with his own independent legal counsel and that he enters into it without duress, and of his own free will and volition. He further acknowledges that he fully understands the terms of this Stipulation of Settlement and Release and the duties and obligations enumerated herein.
5. Petitioner, in consideration of this Stipulation of Settlement and Release and in full, final and complete settlement of this matter hereby withdraws, with prejudice, the above-docketed Petition of Appeal.
6. Nothing contained in this Stipulation of Settlement and Release should be construed as an admission of wrongdoing by either party and neither party shall be considered a prevailing party for any reason.
7. This Stipulation of Settlement and Release is conditioned upon approval of the Board.
8. The Board's President is authorized to execute this Stipulation of Settlement and Release on behalf of the Board.
9. This Stipulation of Settlement and Release contains the entire agreement between the parties, and no other representations, whether verbal or in writing shall be binding upon them.
10. All terms of this Stipulation of Settlement and Release are deemed material. This instrument may not be altered, amended, modified or revoked except by a new instrument executed in writing by the parties.
11. This Stipulation of Settlement and Release is an agreement which is to be construed

in accordance with the laws of the State of New Jersey.

IN WITNESS WHEREOF, the parties, or their duly authorized representatives, do set forth their hands and seal as of the date(s) set forth below.

FOR THE EAST ORANGE BOARD OF EDUCATION:

By: Patricia D. Hall
Patricia Hall, Board President

Date: 3/9/06

By: Jamie Adler
, Witness

PETITIONER:

Kla A. Toe
Kla Toe

Date: Feb 8, 2006

Sworn and subscribed before me this
8th day of February, 2006

Candice J. Luchejko
Notary Public

CANDICE J. LUCHEJKO
A Notary Public of New Jersey
My Commission Expires August 10, 2008

EXTRACT FROM THE MINUTES OF A MEETING OF THE BOARD OF EDUCATION OF THE CITY OF EAST ORANGE, NEW JERSEY AS RECORDED IN THE OFFICIAL MINUTE BOOK

The Board of Education of the City of East Orange in the County of Essex, New Jersey convened a Regular Meeting on Tuesday, February 14, 2006 at 6:20 p.m.

The following members of the Board were present:

Mr. Reginald Davis, Mr. Vernon Pullins, Jr., Mrs. Marsha B. Wilkerson, Mr. Arthur L. Wright, and Mrs. Patricia Hall

The following resolution was offered by Mr. Vernon Pullins, Jr., duly seconded by Mrs. Marsha B. Wilkerson and adopted by the Board of Education:

Resolution

RESOLVED, that the Board hereby approves the Settlement Agreements/Release in the following employee indemnification matters which are currently before the Commissioner of Education in the amounts set forth as follows:

1. Bayard v. East Orange Board of Education, OAL Docket No. EDUOR 03306-2005N, $5,000.00;

2. Moss v. East Orange Board of Education, OAL Docket No. EDUOR 01910-2004N, $7,000.00;

3. Toe v. East Orange Board of Education, OAL Docket No. EDUOR 01119-2005N, $5,000.00;

4. Perinio v. East Orange Board of Education, OAL Docket No. EDUOR 07384-2005N, $6,500.00;

BE IT FURTHER RESOLVED, that the Board President is hereby authorized to execute the Settlement Agreements/Releases in the above matters on behalf of the Board and copies thereof shall be included in the permanent minutes of this meeting.

ROLL CALL: AYES: 5
ABSENT: 2

STATE OF NEW JERSEY}
} ss
COUNTY OF ESSEX}

I, Jamie L. Adams, Interim Board Secretary of the Board of Education, of the East Orange Board of Education, in the County of Essex, State of New Jersey, hereby certify that the foregoing extract from the minutes of the meeting of the Board of said district, fully called and held on Tuesday, February 14, 2006 has been compared by me with the original minutes as officially recorded in my office in the minute book of said East Orange Board of Education, original minutes so far as the same related 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 9th day of March 2006.

Jamie L. Adams, Interim Board Secretary

State of New Jersey

DEPARTMENT OF EDUCATION
PO BOX 500
TRENTON, NJ 08625-0500

RICHARD J. CODEY
Acting Governor

WILLIAM L. LIBRERA
Commissioner

February 15, 2005

TO: Chief School Administrator
Charter School Lead Person

FROM: Isaac R. Bryant, Assistant Commissioner
Division of Student Services

SUBJECT: Immigrant Student Count - 2005

Title III requires that states reserve a portion of their Title III funds for school districts that have experienced a significant increase in the percentage or number of immigrant children and youth who have enrolled in the public and nonpublic elementary schools and secondary schools in the geographic areas under their jurisdiction. The purpose of the funds is to pay for activities that provide enhanced instructional opportunities for immigrant children and youth to help them attain English proficiency, to help them meet the same challenging academic standards as all children, and to help them with their transition to American society.

This memorandum is to inform you that the immigrant student enrollment count is now available online. **Please be aware that there has been a change in the way the immigrant student data will be collected; the data will be collected via the Internet and back-up information must also be provided by mail. You must complete both the online data collection as well as the supporting documentation in order to be considered for funding.**

In order to be eligible for a possible grant allocation, districts must meet the following criteria:

- The district's combined public and nonpublic school immigrant student enrollment in February 2005 must represent at least a 2% increase as compared to the average immigrant enrollment of the two preceding years: February 2003 and 2004.

- Districts must have a total public and nonpublic school enrollment of 20 or more immigrant students in February 2005.

- Districts must be eligible for Title III funds. In order to be eligible, districts must have received a $10,000 or greater Title III allocation or be part of a consortium that receives an allocation of at least this amount.

The federal regulations define immigrant students as those who:

- are aged three to 21;
- were **not** born in any state, Puerto Rico, or the U.S. Virgin Islands (St. Thomas, St. Croix and St. John); and
- have not been attending one or more schools in any one or more states for more than three full academic years.

If you would like to be considered for funding for FY 2006, please submit your district's immigrant student enrollment data to the New Jersey Department of Education at http://homeroom.state.nj.us (ISGE) where all current web-based DOE data collection systems reside. On the immigrant count data collection homepage (ISGE), you will find the following to assist you in completing the immigrant student enrollment information:

- Welcome to New Users;
- User Manual;
- Immigration Count Form;
- Frequently Asked Questions;
- Data Entry Instructions; and
- System Requirements.

The immigrant student count must be submitted via the Internet to the Department of Education by **March 18, 2005. In addition to the immigrant student enrollment submitted online, you must complete back-up forms and mail them to the New Jersey Department of Education**. The immigrant student data collection forms and instructions can also be accessed on the department's website at http://homeroom.state.nj.us and click on ISGE. The forms must be received no later than **March 31, 2005.**

The information requested on the forms is as follows:

- the number of eligible immigrant students (Pre K-12) enrolled in the school district;
- the number of eligible immigrant students enrolled in nonprofit, nonpublic schools within the district; and
- the countries of origin of the immigrant students.

You need to submit this information only if you intend to be considered for funding. In order to be eligible for funding, districts must have a 2% or greater increase in the percentage of immigrant children and youth enrolled in the public and nonpublic schools in the district as compared to the average of the February 2003 and February 2004 student immigrant enrollment count submitted to the department. **The deadline for receipt of the online data is March 18, 2005 and the supporting documentation is March 31, 2005.**

Please mail, fax, or e-mail the completed back-up forms to the Department of Education by March 31, 2005. Forms must be submitted to:

New Jersey Department of Education
Division of Student Services
Office of Specialized Populations
PO Box 500
Trenton, NJ 08625-0500
Fax: (609) 292-1211
e-mail: isge@doe.state.nj.us

If you have any questions, please call Lori Ramella at (609) 292-8777 or e-mail the Office of Specialized Populations at isge@doe.state.nj.us.

IRB/LR/ G/LORI/Immigrant Count Feb.05/February 2005 cover letter

c: Members, State Board of Education
Commissioner William L. Librera
Dwight Pfennig
J. Michael Rush
Senior Staff
Rochelle Hendricks
Erika Leak
County Superintendents
Garden State Coalition of Schools
Members, NJ LEE Group
James F. Curry
Raquel Sinai
Lori Ramella

159-06

OAL DKT. NO. EDU 7384-05
AGENCY DKT. NO. 103-5/05

DEBORAH PERINIO :

PETITIONER, :

V. : COMMISSIONER OF EDUCATION

BOARD OF EDUCATION OF THE CITY OF EAST ORANGE, ESSEX COUNTY, : DECISION

RESPONDENT. :

The record of this matter, the proposed settlement agreement and the Initial Decision issued by the Office of Administrative Law (OAL) pursuant to *N.J.A.C.* 1:1-19.1, have been reviewed.

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

IT IS SO ORDERED.

Lucille E Davy
ACTING COMMISSIONER OF EDUCATION

Date of Decision: 4/27/06

Date of Mailing: 4/27/06

State of New Jersey
OFFICE OF ADMINISTRATIVE LAW

INITIAL DECISION

SETTLEMENT

OAL DKT. NO. EDU 7384-05

AGENCY DKT. NO.: 103-5/05

DEBORAH PERINIO,

Petitioners,

v.

BOARD OF EDUCATION OF THE CITY OF EAST ORANGE, ESSEX COUNTY,

Respondent.

Gail Oxfeld Kanef, Esq.., for petitioner
(Oxfeld, Cohen, P.C. attorneys)

Marc H. Zitomer, Esq., for respondent
(Schwartz, Simon, Edelstein, Celso & Kessler, LLP, attorneys)

Record Closed: March 13, 2006 Decided: March 14, 2006

BEFORE **JEFFREY A. GERSON**, ALJ:

On June 28, 2005 this matter was transmitted to the Office of Administrative Law (OAL) for hearing as a contested case pursuant to *N.J.S.A.* 52:14B-1 to -15 and *N.J.S.A.* 52:14F1 to -13. The matter was scheduled for hearing on January 11 and 12, 2006 but adjourned because the parties had reached a settlement subject to Board approval. The

approval. The Stipulation of Settlement indicating the terms of settlement was approved by the Board and forwarded to the undersigned on March 13, 2006. A copy of the Settlement is attached hereto.

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

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

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

I **CONCLUDE** that the agreement meets the safeguard requirements of *N.J.A.C.* 1:1-19.1 and, accordingly, I approve the settlement and **ORDER** that the parties comply with the settlement terms and that these proceedings be **CONCLUDED**.

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

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

MARCH 13 06
DATE

JEFFREY A. GERSON, ALJ

Receipt Acknowledged:

March 17, 2006
DATE

DEPARTMENT OF EDUCATION

Mailed to Parties:

MAR 22 2006
DATE

DIRECTOR AND
CHIEF ADMINISTRATIVE LAW JUDGE

OFFICE OF ADMINISTRATIVE LAW

sej

SSEC&K
ATTORNEYS-AT-LAW

RECEIVED
STATE OF NEW JERSEY
OFFICE OF
2006 MAR 13 A 11: 15

SCHWARTZ SIMON EDELSTEIN CELSO & KESSLER LLP

TEN JAMES STREET • FLORHAM PARK • NEW JERSEY 07932 TEL: 973.301.0001 FAX: 973.301.0203

Lawrence S. Schwartz PA
Nathanya G. Simon[3]
Donald A. Kessler PA
Allan P. Dzwilewski
Andrew B. Brown
Michael H. Cohen
Denis G. Murphy

Stephen J. Edelstein
Nicholas Celso, III
Burton Zitomer[3]
Paul H. Green
Marc H. Zitomer[3]
Stefani C Schwartz[1]
Matthew I. Kane[3]

counsel
Jacob Green
Alan J. Schnirman
Gregory G. Johnson[4]
Lisa C. Wood[3]
John G. Geppert, Jr.
Philip B. Whitcomb[3,1]
Charles E. Falk[8]

Brad M. Kaplan[3]
Joan M. Damora
Hope R. Blackburn
David J. Ruitenberg
Judith D. O'Donnell
Ronald J. Ricci

Please Reply to Florham Park Office.

WWW.SSECK.COM

WRITER'S E-MAIL ADDRESS: mzitomer@sseck.com

Christopher R. Welgos
Peter J. Vazquez, Jr.[3]
Michael C. Kovacs
Nuris E. Portuondo[9,3]
Rachel A. Davis[3]
Jean S. Lidon
David M Farkouh[3]
Jaime M. Davids[3]
Damon A. Vespi
Andrea J. Godwin

Heidi M.G. Hanley
Jacquelyn A. Pelosi[4]
Susan W. D'Angelo[4]
Robin S. Ballard[4]
Jason J. Waldstein
David L. Blank[3]
James W. MacFarlane[4,7]
Gregory T. Dennison[3]
Kurt J. Trinter
Natalie S. Shafer[3]

of counsel
Klingeman Law LLC
Glenn C. Guritzky[3]
Kathleen W. Hofstetter
Scott A. Elk[2]
Miguel A. Maza[5]

1-Also member of FL Bar
2-Member of FL Bar only
3-Also member of NY Bar
4-Also member of PA Bar
5-Also member of PR Bar
6-Also member of IL Bar
7-Also member of AL Bar
8-Also member of VA Bar
9-Also member of D.C. Bar

March 9, 2006

Via Lawyers Service
Honorable Jeffrey Gerson, A.L.J.
Office of Administrative Law
33 Washington Street
Newark, New Jersey 07102

Re: Deborah Perinio v. East Orange Board of Education
OAL Docket No: EDUOR 07384-2005N

Dear Judge Gerson:

Enclosed please find a fully executed copy of a Stipulation of Settlement and Release in the above referenced matter. Also enclosed is a Board Resolution approving the Agreement and authorizing the Board President to execute same on behalf of the Board of Education.

Thank you for your consideration.

Respectfully submitted,

Marc H. Zitomer

MHZ:JP
Encl.
c: Gail Oxfeld Kanef, Esq. (via Lawyers Service)

EXTRACT FROM THE MINUTES OF A MEETING OF THE BOARD OF EDUCATION OF THE CITY OF EAST ORANGE, NEW JERSEY AS RECORDED IN THE OFFICIAL MINUTE BOOK

RECEIVED
STATE OF NEW JERSEY
2006 MAR 13 A 11: 15

The Board of Education of the City of East Orange in the County of Essex, New Jersey convened a Regular Meeting on Tuesday, February 14, 2006 at 6:20 p.m.

The following members of the Board were present:

Mr. Reginald Davis, Mr. Vernon Pullins, Jr., Mrs. Marsha B. Wilkerson, Mr. Arthur L. Wright, and Mrs. Patricia Hall

The following resolution was offered by Mr. Vernon Pullins, Jr., duly seconded by Mrs. Marsha B. Wilkerson and adopted by the Board of Education:

Resolution

RESOLVED, that the Board hereby approves the Settlement Agreements/Release in the following employee indemnification matters which are currently before the Commissioner of Education in the amounts set forth as follows:

1. Bayard v. East Orange Board of Education, OAL Docket No. EDUOR 03306-2005N, $5,000.00;

2. Moss v. East Orange Board of Education, OAL Docket No. EDUOR 01910-2004N, $7,000.00;

3. Toe v. East Orange Board of Education, OAL Docket No. EDUOR 01119-2005N, $5,000.00;

4. Perinio v. East Orange Board of Education, OAL Docket No. EDUOR 07384-2005N, $6,500.00;

BE IT FURTHER RESOLVED, that the Board President is hereby authorized to execute the Settlement Agreements/Releases in the above matters on behalf of the Board and copies thereof shall be included in the permanent minutes of this meeting.

ROLL CALL: AYES: 5
ABSENT: 2

STATE OF NEW JERSEY}
} ss
COUNTY OF ESSEX}

I, Jamie L. Adams, Interim Board Secretary of the Board of Education, of the East Orange Board of Education, in the County of Essex, State of New Jersey, hereby certify that the foregoing extract from the minutes of the meeting of the Board of said district, fully called and held on Tuesday, February 14, 2006 has been compared by me with the original minutes as officially recorded in my office in the minute book of said East Orange Board of Education, original minutes so far as the same related 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 9th day of March 2006.

Jamie L. Adams, Interim Board Secretary

SCHWARTZ SIMON EDELSTEIN CELSO & KESSLER, LLC
Ten James Street
Florham Park, New Jersey 07932
(973) 301-0001; Fax (973) 301-0203
Attorneys for Respondent,
East Orange Board of Education

RECEIVED
STATE OF NEW JERSEY
OFFICE OF ADMINISTRATIVE LAW
2006 MAR 13 A 11: 15

DEBORAH PERINIO Petitioner, -vs.- EAST ORANGE BOARD OF EDUCATION, ESSEX COUNTY Respondent.	BEFORE THE COMMISSIONER OF EDUCATION OFFICE OF ADMINISTRATIVE LAW OAL DOCKET NO. EDUOR-07384-2005N Agency Reference No. 103-5/05 **STIPULATION OF SETTLEMENT AND RELEASE**

This Stipulation of Settlement and Release is made by and between the East Orange Board of Education (the "Board") with administrative offices located at 715 Park Avenue, East Orange, New Jersey, 07017 and Deborah Perinio, whose address is 175 Sanford Street, East Orange, New Jersey 07018 (the "Petitioner"). In consideration of the mutual promises and undertakings contained in this Stipulation of Settlement and Release and for good and valuable consideration, the receipt of which is hereby acknowledged, the undersigned parties state:

WHEREAS, on February 27, 2004, Petitioner was employed by the Board as a teaching staff member; and

WHEREAS, Petitioner was charged with a criminal action for certain acts alleged to have occurred on February 27, 2004, while Petitioner was in the employ of the Board; and

WHEREAS, on October 26, 2004, after a trial, Petitioner was found not guilty and the criminal complaint against Petitioner was dismissed; and

WHEREAS, the Petitioner filed a Petition of Appeal with the Commissioner of Education on or about April 29, 2005, pursuant to N.J.S.A. 18A:16-6.1, seeking reimbursement from the Board for Petitioner's attorneys' fees and costs associated with the legal defense of the criminal action with which Petitioner had been charged; and

WHEREAS, on June 6, 2005, the Board filed its answer to the Petition of Appeal with Affirmative Defenses; and

WHEREAS, the parties have determined that it is in their respective best interests to enter into this Stipulation of Settlement and Release to avoid the need for further litigation;

NOW, THEREFORE, in consideration of the mutual promises and covenants, the parties agree as follows:

1. The Board will pay to the Petitioner the sum of Six Thousand Five Hundred Dollars ($6,500.00) in full and complete satisfaction of the amount Petitioner is claiming to be due and owing to her in reimbursement from the Board for Petitioner's attorneys' fees and costs.
2. This settlement amount will be paid directly to the trust account of Petitioner's legal counsel, Gail Oxfeld Kanef, Esq., of Oxfeld Cohen, P.C., 60 Park Place, 6th Floor, Newark, New Jersey 07102-4003, following the approval of this Stipulation of Settlement and Release by the Commissioner of Education.
3. Petitioner, in consideration of this Agreement, hereby releases the Board, individually and collectively, and its agents, servants and employees from any and all claims, causes of action, suits, actions at law and in equity, administrative proceedings, and judicial and quasi-judicial proceedings of any kind whatsoever, which have been brought, or could be brought, arising under or relating in any way to the subject

matter set forth in the Petition of Appeal now and forever, except to enforce the terms of this Stipulation of Settlement and Release.

4. Petitioner acknowledges that she has reviewed this Stipulation of Settlement and Release with her own independent legal counsel and that she enters into it without duress, and of her own free will and volition. She further acknowledges that she fully understands the terms of this Stipulation of Settlement and Release and the duties and obligations enumerated herein.

5. Petitioner, in consideration of this Stipulation of Settlement and Release and in full, final and complete settlement of this matter hereby withdraws, with prejudice, the above-docketed Petition of Appeal.

6. Nothing contained in this Stipulation of Settlement and Release should be construed as an admission of wrongdoing by either party and neither party shall be considered a prevailing party for any reason.

7. This Stipulation of Settlement and Release is conditioned upon approval of the Board.

8. The Board's President is authorized to execute this Stipulation of Settlement and Release on behalf of the Board.

9. This Stipulation of Settlement and Release contains the entire agreement between the parties, and no other representations, whether verbal or in writing shall be binding upon them.

10. All terms of this Stipulation of Settlement and Release are deemed material. This instrument may not be altered, amended, modified or revoked except by a new instrument executed in writing by the parties.

11. This Stipulation of Settlement and Release is an agreement which is to be construed

in accordance with the laws of the State of New Jersey.

IN WITNESS WHEREOF, the parties, or their duly authorized representatives, do set forth their hands and seal as of the date(s) set forth below.

FOR THE EAST ORANGE BOARD OF EDUCATION:

By: Patricia M. Hall
Patricia Hall, Board President

By: Jamie Aden
, Witness

Date: 3/9/06

PETITIONER:

Deborah Perinio

Date: 2/10/06

Gail Offeld Hall
Offeld Corcoran

Sworn and subscribed before me this
10 day of FEB., 2006

Notary Public
EDWARD PERANIO
ATTORNEY AT LAW
STATE of NEW JERSEY

#160-06

160-06

OAL DKT. NO. EDU 0879-06S
AGENCY DKT. NO. 96-3/06

BETTY THOMAS, ET AL.,	:	
PETITIONERS,	:	
V.	:	COMMISSIONER OF EDUCATION
BOARD OF EDUCATION OF THE CITY OF CAMDEN, CAMDEN COUNTY,	:	DECISION
RESPONDENT.	:	

The record of this matter, the proposed settlement agreement and the Initial Decision issued by the Office of Administrative Law (OAL) pursuant to *N.J.A.C.* 1:1-19.1(a) and (b), have been reviewed.

Upon such review, the Commissioner approves the settlement terms and adopts the Initial Decision as the final decision in this case. 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: 4/27/06

Date of Mailing: 4/27/06

State of New Jersey
OFFICE OF ADMINISTRATIVE LAW

INITIAL DECISION

SETTLEMENT

OAL DKT. NO. EDU 0879-06S

AGENCY DKT. NO. 96-3/06

BETTY THOMAS, ET AL.,

Petitioners,

v.

THE BOARD OF EDUCATION
OF THE CITY OF CAMDEN,
CAMDEN COUNTY,

Respondent.

Betty Thomas, petitioner, pro se

Barbara Waite, petitioner, pro se

Kevin Barfield, petitioner, pro se

Loretta Gooden, petitioner, pro se

Harvey C. Johnson, Esq., appeared for respondent (WolfBlock, P.C., attorneys)

Record Closed: March 9, 2006 Decided: March 9, 2006

BEFORE **ISRAEL D. DUBIN**, ALJ

Petitioners, officers of the Camden City District Parent Advisory Council (DPAC) filed a petition for emergency relief alleging that the City of Camden Board of Education has improperly interfered with the DPAC membership's nomination, election, and installation of officers. Among other things, petitioners have requested an order directing the Board to permit the election of the then-unopposed slate of officers approved on October 31, 2005.

This matter was transmitted to the Office of Administrative Law on March 8, 2006, for a hearing on the requested emergent relief. The hearing was scheduled for March 9, 2006, at which time the parties entered into the following settlement of the dispute that was placed on the taped record:

1. The election and installation of the slate of officers approved by the DPAC membership on October 31, 2005, shall be held on March 16, 2006.
2. The parties understand and agree that this shall be a special election and that the officers shall serve a one-year-term instead of the two-year-terms provided for in the DPAC's bylaws.
3. The DPAC shall convene meetings of its executive committee and general membership as soon as is practicable to review and, it is anticipated, revise its bylaws with regard to the minimum qualifications of candidates for office.

Having had an opportunity to *voir dire* the parties on the record, I am satisfied and therefore find that they have voluntarily agreed to this settlement, which is the entire settlement, and that no separate understandings or verbal or written agreements have been made. And I further find that the settlement is reasonable, fully disposes of all issues in controversy, and is consistent with the law. Accordingly, I **ORDER** that the parties comply with the Settlement Agreement and that these proceedings be concluded.

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

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

March 14, 2006
DATE

ISRAEL D. DUBIN, ALJ

Receipt Acknowledged:

3-16-06
DATE

DEPARTMENT OF EDUCATION

Mailed to Parties:

MAR 17 2006
DATE

DIRECTOR AND CHIEF ADMINISTRATIVE LAW JUDGE
OFFICE OF ADMINISTRATIVE LAW

IDD/mamf

161-06M

OAL DKT. NO. EDU 2010-05
AGENCY DKT. NO. 33-2/05

R.O. on behalf of minor child, R.O., II, :

PETITIONER, :

V. COMMISSIONER OF EDUCATION

BOARD OF EDUCATION OF THE WEST WINDSOR-PLAINSBORO SCHOOL DISTRICT, MERCER COUNTY, : DECISION

:

RESPONDENT.

:

Petitioner's motion for reconsideration and respondent's reply have been fully reviewed.

The Commissioner finds that petitioner has failed to meet the requirements of *N.J.A.C.* 6A:3-1.15(b)(2), and accordingly denies petitioner's motion.

IT IS SO ORDERED.

Rochelle E Hendricks

ACTING COMMISSIONER OF EDUCATION

Date of Decision: 4/27/06

Date of Mailing: 4/27/06

#162-06

IN THE MATTER OF THE TENURE :

HEARING OF SONIA VELEZ, : COMMISSIONER OF EDUCATION

SCHOOL DISTRICT OF HUDSON : DECISION

COUNTY SCHOOLS OF TECHNOLOGY. :

SYNOPSIS

The Board filed tenure charges against respondent – a tenured secretarial staff member – for incapacity, chronic and excessive absenteeism, and other just cause. Respondent admits that she has been absent from her secretarial duties since April 15, 1999, and asserts that her absence is the result of work-related illness. Respondent further asserts that tenure charges should be held in abeyance pending the final outcome of her Workers' Compensation actions against the Board. The parties requested a disposition of the matter via Summary Decision.

The ALJ found that: the issue of incapacity is conceded by the respondent, and that respondent is incapacitated from performing the duties of her secretarial position; there are no genuine issues of material fact in this matter that would preclude a grant of Summary Decision, and the Board is entitled to prevail as a matter of law. Furthermore, the ALJ concluded that: there is no conflict with tenure charges being resolved while worker's compensation claims are still pending; the Board has established that the tenure charges are well supported by evidence; the respondent should be permanently removed from her tenured secretarial position with the Board.

Upon careful and independent review, the Commissioner agrees with the ALJ's determination that the tenure charges against respondent have been sustained and, therefore, summary decision – calling for respondent's dismissal from her tenured secretarial position due to excessive and chronic absenteeism, incapacity and other just cause – is appropriately granted to the Board. In so deciding, the Commissioner emphasizes, *inter alia,* that – regardless of whether or not respondent is ultimately determined to have sustained an injury or illness arising out of her employment – the status of her workers compensation claims are irrelevant to the determination of the tenure charge of incapacity. Accordingly, the Commissioner directs that Sonia Velez be dismissed from her tenured secretarial employment with the Hudson County Schools of Technology as of the date of 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.

April 27, 2006

OAL DKT. NO. EDU 3255-05
AGENCY DKT NO. 54-2/05

IN THE MATTER OF THE TENURE	:	
HEARING OF SONIA VELEZ,	:	COMMISSIONER OF EDUCATION
SCHOOL DISTRICT OF HUDSON	:	DECISION
COUNTY SCHOOLS OF TECHNOLOGY.	:	

The record of this matter and the Initial Decision issued by the Office of Administrative Law (OAL) have been reviewed. Respondent's exceptions and the District's reply thereto, filed in accordance with the requirements of *N.J.A.C.* 1:1-18.4, were fully considered by the Commissioner in reaching a determination herein.

Respondent's exceptions essentially recast and reiterate her sole argument advanced below, again contending that it was inappropriate for these charges to go forward until a determination is issued by Workers' Compensation as to whether a work-related injury or illness was the cause of her extensive absences. Citing to *Neptune Twp. Education Association v. Board of Education of the Township of Neptune,* 1989 *S.L.D.* 2086 and *Smith v. Board of Education of the City of Trenton*, 1989 *S.L.D.* 1506, respondent maintains that when absence related tenure charges are filed against an employee, a board may not merely rely on the sheer number of absences but, additionally, must take into consideration the *reason* for such absences. Should Workers' Compensation ultimately decide that respondent became unable to perform her duties due to a work-related injury, respondent professes that this would significantly impact the examination of the propriety of the Board's charges and any possible sanction. (Respondent's Exceptions at 1-2)

In reply, the Board urges that respondent's exception must be rejected. Contrary to her intimation, it professes, the Initial Decision obviously reflects that the Board did not rely on the sheer number of absences in bringing its charges against respondent. As presented by the ALJ (Initial Decision 12-14), the totality of factors surrounding these absences were thoroughly considered, not the least of which were the considerably long period of time involved and the accommodations provided respondent by the Board – including the deferring of action against her – to facilitate her return to work. (Board's Reply Exceptions at 3) The Board further proposes that the ALJ's rejection of respondent's contention that the instant tenure charges must be placed in abeyance until her Worker's Compensation matters have been determined is entirely consistent with the facts in this case and the settled law on this issue. Whatever the outcome is in that forum, it is without question that the underlying facts here – warranting respondent's removal from her position – remain unaltered and unaffected. By respondent's own admission, she has been absent from her position for almost 7 years and has no plans to return to work. As accurately observed by the ALJ in her decision, the Board submits, "[t]he charges are supported by evidence; [t]here are reasons for the alleged chronic and excessive absences, incapacity or other just causes that are good reasons, but [these] will not negate the facts of the case which show without dispute that Respondent is incapacitated and can not perform her duties." (Initial Decision at 17) (Board's Reply Exceptions at 4)

Upon careful and independent review, the Commissioner agrees with the ALJ's determination that the tenure charges against respondent have been sustained and, therefore, summary decision – calling for respondent's dismissal from her tenured secretarial position due to excessive and chronic absenteeism, incapacity and other just cause – is appropriately granted to the Board.

In so determining, the Commissioner initially notes – as was correctly observed by respondent in her exceptions – that when pursuing absence related tenure charges against one of its employees, a Board may not rely solely on the sheer number of absences to justify the termination of the employee but, rather must demonstrate that:

> [t]here was consideration of (1) the particular circumstances of the absences and not merely the number of absences, (2) the impact that the absences had on the continuity of instruction during the period of time the absences occurred, not merely after the fact, and (3) that there be some warning given to the employee that his or her supervisors were dissatisfied with the pattern of absences. *In the Matter of the Tenure Hearing of Michele Hernandez, School District of the City of Elizabeth, Union County*, decided by the Commissioner October 15, 2001, citing *In the Matter of the Tenure Hearing of Lena White*, 92 *N.J.A.R.* 2d (EDU) 157, 161.

Review of the ALJ's analysis of these factors, based on the stipulated facts in this matter and applicable case law (Initial Decision 13-14), persuades the Commissioner that the Board has satisfied its burden in this regard.

Next, it is undisputed that respondent has been continuously absent from her secretarial position since May 7, 1999; during this period, she was – and continues to be – incapable of performing her work duties, and cannot now, almost seven years later, forecast when – or whether – she may ever be able to return to her position. Notwithstanding that respondent concedes that she is, in fact, incapacitated from performing her job, she – nonetheless – mistakenly harbors a belief that the tenure charges to this effect are "premature," as her workman's compensation actions claiming that such incapacity is a result of a work-connected illness or injury have not yet been resolved. It is by now axiomatic that action can be taken against a tenured individual for excessive absenteeism even if such were the result of a work-related illness or injury. *In the Matter of the Tenure Hearing of Thomas Jabour, School District of the Delaware Valley Regional High School District, Hunterdon County*, decided by the

Commissioner January 8, 1999; *In the Matter of the Tenure Hearing of Phyllis Stanley, Board of Education of Freehold Regional High School District, Monmouth County*, 1995 *N.J.A.R.* 2d (EDU) 495; *In the Matter of the Tenure Hearing of Grace Folger, School District of the City of Orange, Essex County*, decided by the Commissioner May 15, 2000. Moreover, that respondent's lengthy absence may be related to her claims of work-related illness or injury is of no consequence whatsoever in this matter. As found in *Stanley, supra.*:

> [w]hether or not [respondent] is ultimately determined to have sustained an injury [or illness] arising out of her employment with the petitioner, ***is irrelevant to the determination of the certified tenure charge of incapacity. "Incapacity" as identified in *N.J.S.A.* 18A:6-10 relates to the inability to perform a position, irrespective of the cause of the inability to work. (at 498)

The Commissioner concludes that although a favorable decision from the Division of Worker's Compensation would entitle respondent to the full measure of remedies available under that body of law, it will in no way affect respondent's status as an individual who is incapable of performing the duties of her employment.

Accordingly, the Initial Decision of the OAL, as expounded upon above, is adopted as the final decision in this matter. The Commissioner hereby directs that Sonia Velez be dismissed from her tenured secretarial employment with the Hudson County Schools of Technology as of the date of this decision.

IT IS SO ORDERED.[1]

ACTING COMMISSIONER OF EDUCATION

Date of Decision: 4/27/06

Date of Mailing: 4/27/06

[1] This decision may be appealed to the State Board of Education pursuant to *N.J.S.A.* 18A:6-27 *et seq.* and *N.J.A.C.* 6A:4-1.1 *et seq.*

State of New Jersey
OFFICE OF ADMINISTRATIVE LAW

SUMMARY DECISION
OAL DKT. NO. EDU 03255-05
AGENCY DKT. NO. 54-2/05

HUDSON COUNTY SCHOOLS OF TECHNOLOGY BOARD OF EDUCATION,

Petitioner,

v.

SONIA VELEZ,

Respondent

Nicholas Celso, III, Esq., representing Petitioner
(Schwartz, Simon, Edelstein, Celso and Kessler, LLP)

Gregory T. Syrek, Esq, representing Respondent
(Bucceri and Pincus, Counselors At Law)

Record Closed: February 28, 2006 Decided: March 17, 2006

BEFORE **SANDRA ANN ROBINSON**, ALJ:

STATEMENT OF THE CASE

This matter involves tenure charges filed against Sonia Velez (Respondent), a tenured secretary employed by the Hudson County Schools of Technology Board of Education, (Petitioner/Board). On January 18, 2005 Frank J. Gargiulo, Superintendent of Schools filed sworn tenure charges with the Board. On February 17, 2005 the Board certified the charges to the Commissioner of Education, pursuant to N.J.S.A. 18A:6-10 et. seq. On February 22, 2005 the sworn tenure charges were filed by the Board with the Commissioner of Education, pursuant to N.J.A.C. 6A:3-5.1 et. seq. Petitioner's tenure charges against Respondent are for excessive and chronic absenteeism,

incapacity and other just causes. Respondent does not dispute her attendance record, but contends that her inability to work stems from an illness connected to environmental exposures at her assigned worksite which was designated by the Board.

PROCEDURAL HISTORY

This matter was transferred from the Department of Education Bureau of Controversies and Disputes to the Office of Administrative Law on March 18, 2005 as a contested case pursuant to *N.J.S.A.* 52:14F-1 to F-13. An In-Person Pre-Hearing conference was scheduled for April 7 and 22, 2005 and the initial de novo hearing dates were set for June 10, 27, July 6 and August 24 2005. Counsel for the parties, mutually requested a postponement of the hearing dates due to a need for additional discovery time; the request was granted. Thereafter, the parties requested a disposition of the matter via Summary Decision. Oral arguments scheduled for February 9 and 10, 2006 were waived and the parties request for disposition of the matter via Summary Decision was granted with the provision that briefs and documents in support of the Motions for Summary Decision be exchanged between the parties and received by the undersigned by the close of business on February 28, 2006. All briefs and supporting documents were timely received and the record closed on February 28, 2006.

ISSUES

The issues to be resolved in this matter regarding the Hudson County Schools of Technology Board of Education's four (4) charges against a tenured secretary for alleged excessive absenteeism, chronic absenteeism and incapacity and/or other just cause resulting in a determination that termination of employment is warranted, are:

(1) Whether the charges are supported by evidence;

(2) Whether there are reasons for the alleged chronic and excessive absences, incapacity or other just causes, which could be considered good cause(s) or reasons for excused absences;

(3) Whether, based on the findings in (1) and (2) above, should Respondent permanently be removed from her tenured secretarial position with the Board?

THE CHARGES

Tenure Charge 1: Certified by the Board on February 17, 2005 - alleges that Respondent had been absent from her position as a secretary since May 7, 1999;

Tenure Charge 2: Certified by the Board on February 17, 2005 - alleges that Respondent requested and was granted a leave of absence until January 19, 2000, but that she failed to return to her position after the sick leave had expired.

Tenure Charge 3: Certified by the Board on February 17, 2005 - alleges that the Respondent has been and continues to be chronically absent from her position.

Tenure Charge 4: Certified by the Board on February 17, 2005 - alleges that the Respondent is incapacitated from performing her duties as a secretary and that she will continue to be incapacitated in the future.

SUMMARY OF UNDISPUTED FACTS

The parties have stipulated to the following facts:

1. The Board of Education of the Hudson County Schools of Technology (hereinafter "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:54-11 et seq., which is entrusted with maintaining and conducting the Vocational Schools of Hudson County.

2. On or about March 13, 1991, Sonia Velez, ("Respondent") commenced employment with the Board as a secretary.

3. Respondent attained tenure in her position as secretary and presently remains employed by the Board in that capacity.

4. Respondent has been absent from her secretarial duties since May 7, 1999.

5. Respondent has exhausted all of her accumulated sick leave days.

6. By letter dated December 1, 1999, Respondent requested an extension of sick days.

7. The Board granted a thirty (30) day extension of sick leave, effective November 29, 1999.

8. On January 19, 2000, Respondent exhausted the sick leave extension authorized by the Board.

9. Attendance records indicate that during the 1998-1999 school-years the Respondent was absent 53 days.

10. Attendance records indicate that during the 1999-2000 school-years the Respondent was absent 221.5 days which constitutes the total number of work days for that school year.

11. During the 2000-2001 school-years the Respondent was absent 221.5 days, which constitutes the total number of work days for that school year.

12. During the 2001-2002 school-years the Respondent was absent 221.5 days, which constitutes the total number of work days for that school year.

13. During the 2002-2003 school-years the Respondent was absent 221.5 days, which constitutes the total number of work days for that school year.

14. During the 2003-2004 school-years the Respondent was absent 221.5 days, which constitutes the total number of work days for that school year.

15. During the 2004-2005 school-years the Respondent was absent 221.5 days, which constitutes the total number of work days for that school year.

16. The Respondent has not reported to her position during the current 2005-2006 school year and remains absent to the present.

17. By letter dated August 16, 2000, Petitioner requested notification of the Respondent's intentions to return to work.

18. By letter dated August 28, 2000, Respondent's physician advised the Board of his diagnosis and the Respondent's ability to return to work for the Board.

19. By letter dated February 4, 2004, the Board wrote to the Respondent regarding her intention to return to work.

20. Respondent's physician evaluated her on February 12, 2004 and stated that Respondent could not return to any r regular work environment/job duties until further notice.

21. On January 18, 2005, Mr. Frank J. Gargiulo, Superintendent of Schools, filed sworn tenure charges of excessive absenteeism, incapacity and/or other just cause against Respondent, together with a sworn statement of evidence in support of the charges, with Richard M. Myrlak, Board Secretary.

22. On January 18, 2005, copies of the sworn tenure charges and sworn statement of evidence were transmitted to Respondent by certified mail, return receipt requested, and by regular mail, along with a letter notifying Respondent of her right to submit a written statement of position and written statement of evidence under oath with respect to the documents enclosed within fifteen (15) days from receipt of the letter.

23. On February 17, 2005, after considering the sworn tenure charges and sworn statement of evidence against Respondent, together with the submission filed on her behalf, the Board determined to certify the charges to the Commissioner of Education for a hearing, pursuant to N.J.S.A. 18A:6-10 et seq.

24. Thereafter, on or about February 22, 2005, the sworn tenure charges, together with a certificate of determination and certificate of service, were filed by the Board with the Commissioner of Education, and Respondent was simultaneously served with the sworn

tenure charges, sworn statement of evidence, certificate of determination and certificate of service, pursuant to N.J.A.C. 6A:3-5.1 et seq.

25. On or about March 8, 2005, an Answer was filed on behalf of Respondent.

26. The matter was thereafter transmitted to the Office of Administrative Law as a contested case, assigned to the undersigned and scheduled for de novo hearing dates.

27. The Respondent is physically incapable of performing her duties as a secretary as of this date (February 16, 2006).

28. The Respondent has been physically incapable of performing her duties as a secretary while she has been absent from her position.

29. The Respondent will be physically incapable of performing her duties as a secretary for the balance of the 2005-2006 school years.

30. The Respondent does not know when she will be physically able to perform her duties as a secretary.

31. Respondent does not know if she will be physically able of performing her duties as a secretary in the future.

32. In or about December 1999, Respondent was offered a position in an alternate District facility.

33. Respondent declined the Petitioner's offer of a secretarial position in an alternate District facility.

34. Respondent has continued to receive medical insurance benefits paid by the District during her absence.

MOTION FOR SUMMARY DECISION

DISCUSSION AND ANALYSIS

When considering a Motion for Summary Decision, this tribunal must determine whether the pleadings, the answers to interrogatories, admissions and affidavits demonstrate that no genuine issue of material fact exists. Motions for Summary Decision are the administrative counterpart to Summary Judgment and should be granted if the pleadings, discovery and certifications "show 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. It is well-established that where no disputed issues of material fact exist, an administrative agency need not hold an evidential hearing in a contested case. Frank v. Ivv Club, 120 N.J. 73, 98, citing Cunningham v. Dept. of Civil Service, 69 N.J. 13, 24-25 (1975). Moreover, disputes as to the conclusions to be drawn from the facts, as opposed to the facts themselves, will not defeat a motion for summary judgment. Contini v. Bd. of Ed. of Newark, 96 N.J.A.R.2d (EDU) 196, 215, Contini v. Board of Education 286 N.J. Super. 106, 121(App. Div. 1995). Citing Lima and Sons. Inc. v. Borough of Ramsey, 269 N.J.Super. 469,478 (App. Div. 1994). In Brill v. Guardian Life Insurance Company of America, 142 NJ. 520, 541 (1995) the New Jersey Supreme Court encouraged trial courts to grant summary judgment whenever the proper circumstances present themselves. When the evidence is so one-sided that one party must prevail, courts should not hesitate to grant summary judgment. Brill, at 540.

In the instant matter, Respondent does not offer disputed facts or documentation showing contradictory findings of the issues raised in the Petition. In fact, Respondent herein stipulates to the accuracy of the hiring, tenure and attendance history submitted by Petitioner.

An adverse party's mere reliance on arguments in a brief and the bare allegations of the complaint, without more is insufficient to create a genuine issue of fact. LaRusso, 97 N.J.A.R. 2d (EDU) at 506 (citations omitted); Camuso v. City of Newark, *OAL Docket No. CSV* 3667-98, 1999 WI 1189096 (OAL October 26, 1999) (Initial Decision). Baran v. Clouse Trucking, Inc., 225 N.J. Super. 230, 234 (App. Div.) certif. denied, 113 N.J. 353 (1988). Moreover, an adverse party's "misguided subjective belief", without more are also insufficient to create a fact issue. In the Matter of Bergen Pines County Hospital Layoff, *OAL Docket Nos. CSV* 11139-98 et. al., 2000 WI 17384830 (OAL November 8, 2000) (Initial Decision) (citation omitted).

Relevant to the inquiry regarding a motion for summary decision is whether the competent evidential materials which have been presented, when viewed in the light of the most favorable to the non-moving party, are sufficient to permit a rational fact finder to resolve the alleged disputed issues in favor of the non-moving party. Brill at 540. In, Board of Education of Woodbury v New Jersev State Department of Education, OAL Docket No. EDU 8072-03 (March 15, 2004), citing Bowles v City of Camden, 993 F. Supp 255, 261 (DNJ 1998), the court noted that: If the non-moving party's evidence is merely colorable, or is not significantly probative, summary judgment should not be denied.

Respondent has not submitted competent evidence that would create a genuine issue of material fact, which could only be determined by an evidentiary hearing. In response to Petitioner's Motion for Summary Decision, Respondent submits a letter memorandum dated February 17, 2006 which does not dispute the attendance records or the fact that documents have been submitted which suggest that Respondent may be physically unable to perform her duties due to an illness caused by environmental exposures at Petitioner's worksite. Respondent's contentions regarding the actual cause(s) for her alleged physical inability to perform her duties were not substantiated by laboratory

findings or her physicians' letter. The physician's letter indicates that Respondent's illness is "most likely due to environmental exposures".

No reliable evidence was submitted to give credence to Respondent's contention that the suspected environment, the school district location, is actually the cause of an illness, and/or a work-related illness for Respondent. Therefore, without verification of statements made by Respondent's physician, it is reasonable to believe that the statements made in Respondents reply to the Motion for Summary Decision were unsubstantiated and speculative. In order for the non-movant to prevail, a responding affidavit must be offered setting forth specific facts, which indicate that there is a genuine issue of a material fact that can only be determined in an evidentiary proceeding. 37 New Jersey Practice, Administrative Law and Practices, § 194 at 202 (Lefelt) (1988). The instant case is void of such an affidavit. The United States Supreme Court in Celotex Corp. v. Catrett, 477 U.S. 317 (1986l) explained that "one of the principal purposes of the summary judgment rule is to isolate and dispose of factually unsupported claims or defenses, and we think it should be interpreted in a way that allows it to accomplish this purpose." Celotex at 323-324.

LEGAL DISCUSSION AND CONCLUSIONS

CHRONIC AND EXCESSIVE ABSENTEEISM

N.J.S.A. 18A:17-2 -

> Tenure of secretaries, assistant secretaries, school business administrators, business managers and secretarial and clerical employees
>
> 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.

N.J.S.A. 18A:6-10 – DISMISSAL

Dismissal and reduction in compensation of persons under tenure in public school system

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, 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.

Tenure laws are designed to protect employees from unwarranted political interference and from arbitrary and capricious treatment, however they are not an infinite protection. In Kasony v. Lawrence Township Board of Ed., *OAL Docket No.* EDU 2680-99 (On Remand) *EDU 10490-98), (June* 8, 1999), affirmed Commissioner Decision, July 22, 1999, indicating that excessive absenteeism may be grounds for tenure dismissal. In Tenure Hearing of Edith Trautwein, OAL Docket. No. EDU 9692-82 (1983), the Board certified five charges against a tenured teacher including a charge of excessive absenteeism and the court found there was a right to impose discipline because of the pattern of excessive absences constituted unbecoming conduct. The Commissioner determined that excessive absenteeism can constitute a tenure charge. Also, in Hernandez v. City of Elizabeth School District, OAL Docket. No. EDU 3126-01 (2001) the court found that excessive absenteeism constitutes valid grounds for dismissal of a tenured secretary. Excessive absenteeism must be determined by each school district and must be shown as reasonable. Trautwein, supra

However, "excessive or chronic absenteeism of a tenured employee, even if related to legitimate medical or health problems, has been held to constitute "incapacity", "unbecoming conduct" and/or "just cause" within the meaning of N.J.S.A. 18A:6-10, so as to warrant dismissal from employment. In order to terminate a tenured employee for excessive absenteeism, the Board must demonstrate that:

> there was consideration of (1) the particular circumstances of the absences and not merely the number of absences, (2) the impact that the absences had on the continuity of instruction during the period of time the absences occurred, not merely after the fact, and (3) that there be some warning given to the employee that his or her supervisors were dissatisfied with the pattern of absences. Hernandez citing Tenure Hearing of Lena White. 92 NJ.A.R. 2d (EDU) 157. 161.

PARTICULAR CIRCUMSTANCES OF THE ABSENCES – the parties have stipulated to the germane facts of this case and are in agreement that Respondent has been absent from work for six years, which amounts to chronic and excessive. Respondent and her doctor provided correspondence, as stipulated in the Joint Stipulation of Facts, which indicates that Respondent will not be returning to work. A tenured employee may be dismissed when the underlining reasons for the absenteeism indicate there is a likelihood that the conduct will continue in the future. State-Operated School District of Jersey City v. Pellecchio, 92 N.J.A.R. 2d (EDU) 267, affd, N.J.A.R. 2d (EDU) 30 (Pellecchio); Passaic Ed. of Educ. v. Vianid (EDU) 76 (Viani).

Petitioner was aware of Respondent's health issues and thus the reason for extending her leave of absence. Respondent failed to return to her position in January 2000 when the leave expired. Thereafter she reported her inability to work in the assigned building and Petitioner offered her a position elsewhere in the district. Respondent did not accept the offer.

IMPACT OF ABSENCES ON SCHOOL DISTRICT OPERATIONS - In Stanley v. FreeholdRegional School District 95 N.J.A.R.*2d* (EDU) 495 (1995), the court agreed with the school board's contention that the secretarial support staff is important to the effective operation of a school district and found a significant negative effect of an absence of such a support staff member for a period exceeding two years. Respondent's chronic and excessive absences are significantly longer - six (6) years. Petitioner identified the negative effect on the

operation of the district and in particular, at the high school where Respondent was assigned – including the need for the Board to plan for its clerical and secretarial needs around Respondent's absences; leaving a tenured secretarial spot open for six (6) years in the event Respondent were to return to her position; making arrangements for an accommodation to place Respondent in a different school within the district, which she refused; and by re-extending leave time in good faith for six years, while initially believing Respondent would return.

NOTIFICATION OF UNACCEPTABLE ABSENCES – in the Joint Stipulation of Facts the parties agree that on a number of occasions the Superintendent periodically contacted Respondent to learn whether she would be returning to her position. During each contact Respondent said she was unable to return to her position and did not know when she would be able to return. Petitioner makes payment of Respondent's medical benefits as Respondent's absences continue. As of the time of completion of this Summary Decision, Respondent continued to be absent from her position because she remains incapacitated.

INCAPACITATION –

> NJ.S.A. 18A:6-10 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, 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.

Chronic and excessive absenteeism may constitute incapacity and unbecoming conduct, as well as just cause warranting suspension or dismissal, even in instances where the absences were caused by legitimate medical reasons and where leaves of absence and sick days were approved. Trenton Board Of Education V. Williamson, 1986 *S.L.D. 1462;* Stanley v.

Freehold Regional School District 95 N.J.A.R.*2d (EDU)* 495 (1995). Stanley is similar to Respondent's instant case, since Ms. Stanley a tenured clerk with the Freehold Regional School District filed an incident report alleging a work related injury which she described as "severe depression". A doctor's note indicated that Ms. Stanley's condition was triggered when she was in contact with work. As a result, Ms. Stanley was absent from her position, and exhausted all of her sick, vacation and holiday time. Thereafter she requested and was granted an unpaid medical leave of absence under the FLMA. An additional leave of absence was requested and denied. When Ms. Stanley's leave of absence expired, she failed to return to her position and provided no indication to the Board that she planned to return to her position. She notified the board that she would not attend a scheduled meeting (because of her health) to discuss her intentions. Tenure charges of abandonment and incapacity were certified by the Board. The court found that the Board had not met the abandonment charge, but had met its burden with respect to the charge of incapacity, and she was dismissed on that basis. In Stanley incapacity is related to the inability to perform a duty despite the cause of the inability.

In Kasony, supra, certified tenure charges for excessive absenteeism and incapacity were brought against a custodian who was injured in the course of his employment and had been absent from his position for three years. The Board argued that the Respondent's incapacity was established as a matter of law because of his excessive and chronic absences and therefore dismissal should be on those grounds unless evidence was available to prove he could return to work. The court relied on Stanley in reaching a decision.

In Delaware Valley Regional High School District Board of Education v. Jabour, OAL Docket No.EDU 08524-98S,(1998), *the* board sought to remove a tenured industrial arts teachers because of incapacitation and no indication that his condition would improve. The Court found that the matter was ripe for Summary Decision

because the material issue regarding the ability to perform the job was resolved. In the instant matter Respondent stipulates that she is incapacitated from performing her secretarial duties which are required in her position.

RIPENESS OF TENURE CHARGES WHILE WORKER'S COMPENSATION CLAIM REMAINS OPEN –

A total of five Worker's Compensation claims have been filed by Respondent between July 23, 1999 and June 27, 2000 and all remain pending. The cause of Respondent's illness and the resolution of the Worker's Compensation matters have no relevancy in determining the appropriate penalty due to a finding of incapacity. In Stanley, supra the Commissioner of Education agreed. A Summary Decision in this matter will not an impact on the disposition of claims in the Worker's Compensation court.

FINDINGS AND CONCLUSION

Based on the undisputed facts, the Joint Stipulation of Facts, briefs and additional letter memoranda offered in support or in opposition of Summary Decision, I **FIND** that the issue of incapacity is conceded, and there are no material facts in dispute. I further **FIND** that Respondent is incapacitated from performing the duties of her secretarial position.

Having considered the competent evidential materials presented in the light mist favorable to the non-moving party, I **CONCLUDE** that no genuine issue of material fact exists to preclude the grant of a Summary Decision in this case and that the moving party is entitled to prevail as a matter of law. I also **CONCLUDE** that there is no conflict with tenure charges being resolved while worker's compensation claims are still pending since one case has no bearing on the other. I further **CONCLUDE** that Petitioner has established by a preponderance of the credible evidence that the Hudson County Schools of Technology Board of Education's four (4) charges against the tenured secretary

herein for alleged excessive absenteeism, chronic absenteeism and incapacity and/or other just cause should result in a determination that termination of employment is warranted, because:

The charges are supported by evidence;

There are reasons for the alleged chronic and excessive absences, incapacity or other just causes, which are good causes and reasons, but will not negate the facts of the case which show without dispute that

Respondent is incapacitated and cannot perform her duties;

Based on the findings in (1) and (2) above, the Respondent should permanently be removed from her tenured Secretarial position with the Board, on the grounds of excessive absenteeism, incapacity and/or other just cause.

****

ORDER

Based on the foregoing I hereby **ORDER** that Petitioner's 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 (45) days and unless such time limit is otherwise extended, this recommended decision shall become a final decision in accordance with *N.J.S.A.* 52:14B-10.

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

March 17, 2006 — Sandra Ann Robinson

DATE — **SANDRA ANN ROBINSON**, ALJ

E-mail Receipt of Initial Decision Confirmed by the Department of Education on:

3/17/06

DATE

Mailed to Parties:

DIRECTOR AND CHIEF ADMINISTRATIVE LAW JUDGE

MAR 20 2006

DATE — OFFICE OF ADMINISTRATIVE LAW

DOCUMENT SUBMISSIONS

Sworn Tenure Charges of Excessive Absenteeism, Incapacity and/or Other Just Cause

Certificate of Determination

Petitioner's Brief and Exhibits In Support of Board's Motion For Summary Judgment

Respondent's Letter Brief In Opposition to Petitioner's Motion For Summary Decision

Petitioner's Response to Respondent's Letter Memorandum dated February 17, 2006.

163-06

OAL DKT. NO. EDU 5653-05
AGENCY DKT. NO. 95-4/05

MYLES HOLMES,	:	
PETITIONER,	:	
V.	:	COMMISSIONER OF EDUCATION
BOARD OF EDUCATION OF THE CITY OF PASSAIC, PASSAIC COUNTY,	:	DECISION
RESPONDENT.	:	

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

Upon review, the Commissioner cannot accept the settlement agreement as neither the decision nor the record of this matter contains a copy of a fully executed agreement; the settlement provided has not been signed by any representative of the Board but, rather, the copies before the Commissioner have only been signed by petitioner and his counsel.*

Accordingly, the Commissioner hereby remands this matter to the OAL for revision of the Settlement Agreement consistent with the concerns set forth above. Absent a fully executed agreement, the matter shall proceed to hearing.

IT IS SO ORDERED.

Lucille E Davy

ACTING COMMISSIONER OF EDUCATION

Date of Decision: 4/27/06

Date of Mailing: 4/27/06

* If it is the Board's intent that this agreement be executed by the Board President as is indicated on the document, the record must include a copy of the Board's resolution approving the settlement and designating this individual to sign the agreement on its behalf. In the alternative, the agreement may be executed by the Board attorney, who is the Board's duly authorized representative in litigation.

State of New Jersey
OFFICE OF ADMINISTRATIVE LAW

INITIAL DECISION

SETTLEMENT

OAL Dkt. No. EDU 05653-05

Agency Ref. No. 95-4/05

MYLES HOLMES

Petitioner,

v.

BOARD OF EDUCATION OF THE CITY OF PASSAIC, PASSAIC COUNTY,

Respondent.

Marvin L. Comick, Esq., for petitioner (Love & Randall)

Brad M. Weintraub, Esq. for respondent (Weiner Lesniak, LLP)

Record Closed: March 15, 2006 Decided: March 15, 2006

BEFORE **CARIDAD F. RIGO**, ALJ:

On May 26, 2005, this matter was transmitted to the Office of Administrative Law (OAL) for hearing on emergent relief as a contested case pursuant to N.J.S.A. 52:14B-1 to -15 and N.J.S.A. 52:14F1 to -13. A hearing was scheduled on November 9, 2005 at the OAL in Newark, New Jersey, during which there were extensive settlement discussions.

On February 14, 2006 a letter was received from Mr. Weintraub advising that the Board of Education authorized a settlement with petitioner and were in the process of preparing a Settlement Agreement. On March 1, 2006, the parties entered into a tentative settlement agreement and the terms of that agreement were placed on the

record. The parties prepared and submitted the attached settlement indicating the terms of agreement which are incorporated herein by reference.

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

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

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

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

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

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

Mar. 15, 2006
DATE

CARIDAD F. RIGO, ALJ

Receipt Acknowledged:

March 17, 2006
DATE

DEPARTMENT OF EDUCATION

Mailed to Parties:

MAR 22 2006
DATE

DIRECTOR AND
CHIEF ADMINISTRATIVE LAW JUDGE
OFFICE OF ADMINISTRATIVE LAW

ljb

SETTLEMENT AGREEMENT AND RELEASE

This Settlement Agreement and Release ("Agreement") is made and entered into between the Board of Education of the City of Passaic, Passaic County (the "Board") and Myles Holmes ("Holmes"). This Agreement is made pursuant to the following terms and conditions.

RECITALS

WHEREAS, pursuant to a series of contracts, Holmes was employed by the Board as a janitorial employee since on or about December 12, 1994;

WHEREAS, on or about April 5, 2005, Holmes was notified by the Board that his employment was being terminated for cause;

WHEREAS, on or about April 19, 2005, Holmes filed a Petition with the Commissioner of Education, asserting that his termination by the Board violated his claimed tenure rights as a janitorial employee;

WHEREAS, the Board subsequently filed an Answer with Affirmative Defenses, denying that Holmes had obtained tenured employment status with the Board and that his rights had otherwise been violated;

WHEREAS, the matter was transferred to the Office of Administrative Law as a contested case and was docketed as EDUOR-05653-2005N;

WHEREAS, the parties have elected to settle all outstanding matters and allegations in dispute in lieu of a hearing so as to avoid expending further resources and to eliminate the uncertainties of litigation; and

WHEREAS, the Board and Holmes deem it to be in their best interests to set forth in a formal written agreement their respective rights, duties and obligations regarding Holmes's separation from employment with the Board; and

WHEREAS, the Board and Holmes are now mutually desirous of settling the matters and allegations in dispute; and

WHEREAS, all parties have been afforded the opportunity to consider the terms of this Agreement with advice of counsel and/or a representative of their choice;

NOW, THEREFORE, in consideration of the promises and the mutual covenants herein contained, and for other good and valuable considerations, the parties hereby agree as follows:

1. The "Board", as used herein, shall at all times mean the Board of Education of the City of Passaic, Passaic County, its affiliates, predecessors, successors and assigns of any and all of them, their present and former directors, officials, officers, representatives, associates, partners, servants, employees, agents, attorneys, and successors, whether in their individual or official capacities, and all other persons, firms, corporations, associations, partnerships or any other entity connected therewith.
2. "Holmes", as used herein, shall mean Myles Holmes, his heirs, representatives, privies, executors, administrators, assigns, successors-in-interest and predecessors-in-interest.
3. Holmes agrees that within fifteen (15) days of the execution of this Agreement, Holms will submit to the Board a letter of resignation effective February 1, 2006, Upon its receipt of the letter, the Board will be deemed as accepted Holmes's resignation effective February 1, 2006.
4. Within thirty (30) business days of the complete execution of this Settlement Agreement and General Release, the Board agrees to pay Holmes the gross sum of $38,248.95, less all applicable taxes, representing his back pay for the period of April 5, 2005 through January 31, 2006, plus all accrued sick and/or vacation time to which he may be entitled to as a result of his previous employment with the Board.
5. In consideration of the payment outlined in Paragraph 4 hereof, Holmes agrees to never seek reemployment or assert any tenure status with the Board at any time in the future in any capacity. Although the Board does not admit nor acknowledge that Holmes is a tenured employee of the Board, and in fact, contests his claimed status as a tenured employed, Holmes understands and agrees that by entering into this Settlement Agreement and General Release, he forever waives any claims, rights and privileges to tenured employment status he may have or may have had with the Board.
6. This Agreement is not and shall not in any way be construed as an admission by the Board of any acts of wrongdoing whatsoever, or that the Board, or any of its officers, members, agents, employees or representatives violated any federal or

state constitutional prohibitions or any federal, state or local law, statute, ordinance, regulation or public policy of the State of New Jersey. Instead, the parties have entered into this Agreement for the sole purpose of resolving all claims, both asserted and unasserted, in order to avoid the burden, expense, delay and uncertainties of litigation.

7. Holmes releases, acquits, gives up and forever discharges any and all claims and rights which he may have against the Board up to the time of the execution of this Settlement Agreement and General Release. This releases all claims, including those asserted in the matter of Holmes v. City of Passaic Board of Education, Passaic County, docketed before the Office of Administrative Law as EDUOR-05653-2005N, as well as any other claims of which Holmes is aware or unaware and those not mentioned in this Settlement Agreement and General Release. This Settlement Agreement and General Release applies to all claims resulting from any incident which may have occurred from the date of the alleged incident until now. Holmes specifically releases any and all claims for compensatory damages, pain, suffering, emotional distress, stress, humiliation, embarrassment, mental anguish, medical expenses, punitive damages, interests, attorneys fees, costs of suit, loss of sick time, loss of vacation time, loss of benefits, consequential damage, reputation damage, breach of express or implied contract, interference in any contract, economic opportunity or prospective economic advantage which arose out of or could arise, including but not limited to, violation of his 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, Title 18A of the New Jersey Statutes, the New Jersey Law Against Discrimination, New Jersey Conscientious Employee Protection Act, the federal Americans with Disabilities 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. Holmes hereby waives any and all relief not explicitly provided for herein.

8. Holmes and the Board expressly understand and agree that said payment includes any and all amounts that may be claimed by Holmes or on his behalf, or by his attorneys, heirs, successors or assigns, against the Board. Holmes and the Board agree and acknowledge that this Settlement Agreement and General Release is also contingent on and subject to approval and ratification by the Board of Education of the City of Passaic.

9. This settlement is intended as and for damages for any and all possible injuries and Holmes hereby waives any and all claims for lost wages, income or future earnings.

10. In any action commenced against Holmes to enforce the provisions of this Agreement, the Board, if it is the prevailing party, shall be entitled to recover its reasonable attorneys' fees, costs and disbursements incurred in prosecuting the action.

11. Holmes specifically acknowledges that the payment referred to in Paragraph 4 hereof constitutes any and all additional consideration not otherwise owed to him for this Settlement Agreement and General Release.

12. The parties and their attorney(s) agree and promise that they will not disclose, either directly or indirectly, in any manner whatsoever, any information regarding either: (a) the substance or existence of his charges and/or actions against the Board; or, (b) the existence, terms or contents of this Settlement Agreement and General Release, to any person or organization, including, but not limited to, any governmental agency, members of the press and media, present and former officers, employees and agents of the Board and other members of the public. This paragraph shall not preclude the parties or their attorney(s) from disclosing the existence or terms of this Settlement Agreement and General Release to governmental authorities that require such information. The parties may only state, without elaboration, as follows: "The situation has been resolved to the mutual satisfaction of Holmes and the Board." In the event that the Board is approached for a reference, the only information to be provided will be Holmes's date of hire, date of resignation and salary.

13. Holmes agrees that he shall not seek any further amount of money from the Board other than the amount set forth in Paragraph 4 hereof.

14. This Settlement Agreement and General Release contains the full agreement of Holmes and the Board and may not be modified, altered, changed or terminated except upon the express prior written consent of Holmes and the Board, which consent must be signed by Holmes and the Board, or their duly authorized agents.

15. The waiver by Holmes and/or the Board of a breach of any provision hereof shall not operate or be construed as a waiver of that breach by the other, or as a waiver of any subsequent breach by the other.

16. If any term, provision or condition of this Settlement Agreement and General Release is held invalid or unenforceable by a court of competent jurisdiction, such holding shall be without effect upon the validity or enforceability of any other provision, term or condition of this Settlement Agreement and General Release.

17. This Settlement Agreement and General Release shall be construed and interpreted in accordance with the laws of the State of New Jersey.

18. This Settlement Agreement and General Release may be executed in counterparts, with each of which shall be deemed to be an original copy, but all of which together shall be deemed one and the same instrument.

19. This Settlement Agreement and General Release shall become effective immediately following execution by Holmes and the Board, but shall be contingent upon approval by the Office of Administrative Law. In the event that approval is not given for this Agreement, Holmes shall immediately refund all monies provided to him hereunder to the Board.

20. Holmes and the Board shall each bear all of their own costs, expenses and attorneys feels arising from the prosecution or defense of this matter and in connection with this Settlement Agreement and General Release.

21. This Settlement Agreement and General Release contains the entire Agreement between Holmes and the Board with regard to the matters set forth in it, and shall be binding upon and inure to the benefit of their officials, officers, directors, attorneys, representatives, employees, associates, partners, agents, servants,

executors, administrators, personal representatives, heirs, successors and assigns of each, and all other persons, firms, corporations, associations or partnerships or any other entity or persons connected therewith, except as set forth herein or as may be agreed to in writing between the parties.

22. In entering into this Settlement Agreement and General Release, Holmes has relied upon the legal advice of his attorney, who is the attorney of his own choice, as to the terms of this Settlement Agreement and General Release which have been completely read and explained to him by his attorney and those terms are fully understood and voluntarily accepted.

23. This Settlement Agreement and General Release shall become effective immediately following execution by all of the following parties.

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

MYLES HOLMES

By: _____
Marvin L. Comick, Esq.

Dated: 3-1-06

By: Myles Holmes
MYLES HOLMES

Dated: 3/01/06

STATE OF NEW JERSEY)
)
COUNTY OF)

On 3-1, 2006, before me personally came MYLES HOLMES to me known and known to me to be the individual described in, and who executed, the foregoing Settlement Agreement and general Release, and duly acknowledged me that he executed the same.

Sworn to before me on
this 1 day of March, 2006.

_____
Notary Public
MARVIN L. COMICK
Attorney at Law
State of New Jersey

By: _____
Brad M. Weintraub, Esq.

Dated: _____

BOARD OF EDUCATION OF THE CITY OF PASSAIC

By: _____
Richard Diaz, Board President

Dated: _____

F:\WP-DATA\INS\MATTERS\85748 Settlement Agreement.doc

167-06

BOARD OF EDUCATION OF THE WEST WINDSOR-PLAINSBORO REGIONAL SCHOOL DISTRICT, MERCER COUNTY,	:	
PETITIONER,	:	COMMISSIONER OF EDUCATION
V.	:	DECISION
NEW JERSEY STATE DEPARTMENT OF EDUCATION, OFFICE OF SPECIAL EDUCATION PROGRAMS,	:	
RESPONDENT.	:	

SYNOPSIS

Petitioning Board of Education appealed the Department's determination that the district failed to follow the appropriate procedures for obtaining parental consent pursuant to *N.J.A.C.* 6A:14-2.3(b), and provided speech and language therapy services without effective consent and without going to due process for A.R. Petitioner asserts that parental consent for special education services was obtained when the mother A.R. signed the initial Individual Education Program (IEP) shortly after the child entered the district's schools, and that this initial consent remains effective until revoked by written notification. The Department moved for Summary Decision.

The ALJ found, *inter alia,* that: the district's continued implementation of the IEP for A.R. did not require parental consent; that continued implementation of the IEP could not be negated by the parents' revocation of consent since parental consent for such implementation is not required by either the IDEA or the implementing New Jersey regulations. Accordingly, the ALJ concluded that the determination of the respondent in its complaint investigation report is incorrect and should be reversed and dismissed.

The Commissioner, upon review of the entire record, expressed serious reservations about her jurisdiction to decide the merits of the matter, and remanded it to the OAL for argument, analysis and recommended conclusions of law on the threshold question of Commissioner jurisdiction.

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.

Mailed 5/02/06

OAL DKT. NO. EDU 8012-05
AGENCY DKT. NO. 212-8/05

BOARD OF EDUCATION OF THE WEST WINDSOR-PLAINSBORO REGIONAL SCHOOL DISTRICT, MERCER COUNTY,	:	
PETITIONER,	:	COMMISSIONER OF EDUCATION
V.	:	DECISION
NEW JERSEY STATE DEPARTMENT OF EDUCATION, OFFICE OF SPECIAL EDUCATION PROGRAMS,	:	
RESPONDENT.	:	

The record of this matter and the Initial Decision of the Office of Administrative Law (OAL) have been reviewed, as have exceptions filed by the Department of Education (Department) and the reply thereto by the Board of Education (Board). These submissions pertain to the merits of the matter, and are not summarized herein for the reasons set forth below.

Upon review, the Commissioner finds – as in two recent appeals of complaint investigations, *Board of Education of the Lenape Regional High School District v. New Jersey State Department of Education*, decided by the Commissioner on March 21, 2006, and *Board of Education of the Lenape Regional High School District v. New Jersey State Department of Education*, decided by the Commissioner on April 25, 2006 – that she has serious reservations regarding any attempt on her part to rule on the merits of this matter. As in the *Lenape* matters, the issues herein fundamentally arise out of the IDEA and its interpretation, notwithstanding that they also

implicate Department actions and State Board regulations adopted in furtherance of the federal law.

Although it was reasonable for the ALJ to have assumed that the question of Commissioner jurisdiction did not need to be addressed at the OAL – since the case was transmitted by the agency and the parties did not dispute jurisdiction,[1] – as the Commissioner held in the *Lenape* matters, party agreement cannot confer jurisdiction where none exists, and the act of transmittal does not in itself foreclose further inquiry where the need for it becomes apparent. Here as in *Lenape*, the Commissioner is loathe to decide so critical an issue without benefit of an initial analysis with recommended conclusions of the law by the OAL.

Therefore, prior to any consideration of the merits of this matter, the Commissioner has determined to remand it to the OAL for the limited purpose of analysis and recommended conclusions of law on the question of jurisdiction.

Accordingly, the Commissioner does not reach the findings and conclusions of the Initial Decision, and this matter is hereby remanded to the OAL for limited proceedings on the question of jurisdiction as set forth above.

IT IS SO ORDERED. [2]

Lucille E Davy

ACTING COMMISSIONER OF EDUCATION

Date of Decision: 5/02/06

Date of Mailing: 5/02/06

[1] Unlike the *Lenape* matters, this matter did not include a motion to intervene by the parents who initiated the compliant investigation at issue.

[2] This decision may be appealed to the State Board of Education pursuant to *N.J.S.A.* 18A:6-27 *et seq.* and *N.J.A.C.* 6A:4-1.1 *et seq.*

State of New Jersey
OFFICE OF ADMINISTRATIVE LAW

INITIAL DECISION
OAL DKT. NO. EDU 8012-05
AGENCY DKT. NO. 212-8/05

WEST WINDSOR-PLAINSBORO REGIONAL SCHOOL DISTRICT,
Petitioner,
v.
NEW JERSEY DEPARTMENT OF EDUCATION, OFFICE OF SPECIAL EDUCATION PROGRAMS,
Respondent.

John E. Collins, Esq., for petitioner (Parker McCay, attorneys)

Patricia M. O'Neill, Deputy Attorney General, for respondent: (Zulima V. Farber, Attorney General of New Jersey, attorney)

Record closed: February 6, 2006 Decided: March 23, 2006

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

STATEMENT OF THE CASE AND PROCEDURAL HISTORY

On July 8, 2005, the Office of Special Education Programs (OSEP) of the New Jersey Department of Education issued Complaint Investigation Report C2005-2634. In that Report, it determined that the West Windsor-Plainsboro Regional School District failed to follow appropriate procedures for obtaining parental consent, pursuant to

N.J.A.C. 6A:14-2.3(b), where it provided special services from February 22, 2005 until April 25, 2005, and thus corrective action was required. (Ibid.) On August 26, 2005, the West Windsor-Plainsboro school district filed a petition with the Commissioner of the Department of Education, challenging OSEP's finding, and OSEP filed an Answer on or about September 19, 2005. The matter was transmitted to the Office of Administrative Law (OAL) on September 30, 2005, for hearing as a contested case.

On November 22, 2005 a telephone conference was conducted between all parties whereupon it was agreed that each party would submit a cross-motion for summary decision, and a briefing schedule was established. The parties further agreed to rely upon those documents referenced in OSEP's Complaint Investigation Report C2005-2634 in support of the Motion for Summary Decision. Pursuant to said briefing schedule, the parties filed their respective submissions, and the record was closed on February 6, 2006.

FACTUAL DISCUSSION

None of the facts in this matter are disputed by the parties. Therefore, the following discussion shall constitute my **FINDINGS OF FACT** in this matter.

A.R. is a child born to bi-lingual parents who speak both Tamil and English at home. A.R. was originally evaluated in the North Brunswick School District where she resided at the time with her parents and a sibling. A.R.'s parents had requested a child study team (CST) evaluation because of their concerns with A.R.'S speech and language development and behavioral problems. Following this evaluation, the school district's Individual Education Program (IEP) team met on September 12, 2003, and concluded that A.R. was eligible for special education and related services, based on an eligibility category of preschool disabled. (R-2, Exhibit A.) A.R. then began receiving speech-language services pursuant to a September 12, 2003 IEP and Behavioral Intervention Plan (BIP). Included in the September 12, 2003 IEP was a "Procedural Safeguards Statement" wherein it stated "[A]s a parent of a student who is or may be determined eligible for special education services, you have the rights . . . under the

New Jersey Administrative Code for Special Education." Furthermore, it stated,

"A description of these rights, which are called procedural safeguards, is contained in the document, Parental Rights in Special Education (PRISE)." (R-2, Exhibit A.)

A.R.'s mother, R.R. signed the IEP, thereby providing parental consent for the IEP to be implemented by the school district. Pursuant to the parental consent notice, R.R. acknowledged that she had read the proposed IEP and that she understood that her consent was voluntary and could be revoked at any time. (R-2, Exhibit A.)

At the end of the 2004 school year, because A.R. was about to enter kindergarten, she was referred for another evaluation. (R-2, Exhibit B.) On May 18, 2004, the North Brunswick IEP team again met regarding A.R.'s neurodevelopmental evaluation and speech language evaluation, wherein A.R. was diagnosed with Attention Deficit Hyperactivity Disorder (ADHD) and speech delay. Pursuant to the evaluations, the IEP team concluded that A.R. was eligible for special education and related services, based on an eligibility category of other health impaired. Ibid.

On September 4, 2004, A.R. transferred to the West Windsor-Plainsboro Regional School District, and that school district implemented the May 18, 2004 IEP of the North Brunswick School District. A new entrant IEP was developed on September 10, 2004, which incorporated the provisions of the May 18, 2004 IEP. On September 10, 2004, R.R. signed the procedural safeguards statement of the IEP, thereby consenting to the implementation of the IEP by the West Windsor-Plainsboro School District. (R-2, Exhibit B.) This IEP provided that in addition to A.R.'s placement in the regular education kindergarten classroom, she would receive small group speech/language therapy as a related service, twice per week for 30 minutes per session. Subsequently, on September 14, 2004, goals and objectives for speech and language therapy, which were not part of the initial IEP, were developed and attached to the IEP.

On November 11, 2004, the West Windsor-Plainsboro School District referred A.R. to Cross Country Clinical and Educational Services for a bilingual speech-language evaluation with the consent of A.R.'S parents. (R-2, Exhibits C and D.) Based on the results of the evaluation, continued speech and language therapy were recommended. (R-2, Exhibit E.) An IEP dated December 17, 2004, was then completed based on the results of this reevaluation. (R-2, Exhibit F.) A.R.'s parents attended the December 17, 2004, meeting and did not dispute the IEP. However, A.R.'s parents did not sign the IEP as they had previously.

A.R. stopped attending the after-class speech-language therapy sessions on December 21, 2004. On January 8, 2005, A.R.'s father, J.R., sent an e-mail to Dr. Michael C. Welborn, Principal of Wicoff Elementary School, advising that "[A.R.] will not be attending Speech classes hereafter." (R-2, Exhibit G.)

Shortly thereafter, A.R.'s parents met with Dr. Welborn and Dr. Deborah R. Batchelor, West Windsor-Plainsboro's Supervisor of Special Services, and A.R.'s parents advised Dr. Batchelor that they did not want A.R. to receive special services and did not want her to remain classified as a special education student.

On January 19, 2005, Dr. Batchelor sent a letter to A.R.'s parents, wherein she summarized their meeting and further advised the parents that A.R. should continue to receive both speech and language services (R-2, Exhibit H). Dr. Batchelor specifically stated in that letter:

> Based on this reevaluation . . . from Cross Country as well as our district speech and language therapist, it is the district's recommendation that [A.R.] continues to be a child who would benefit from special education services, with an eligibility classification of Multiply Disabled. While we think that a placement at the Maurice Hawk School in a program for students who are Communication Impaired would be appropriate, we will amend the Individual Education Plan that was written on December 8, 2004 to have her placement remain at the Wicoff School to receive speech and language services and the assistance of an instructional

> assistant for part of the school day while she is in kindergarten, which was the placement and program that was developed with your wife on September 10, 2004.

Included with this written correspondence was a copy of the PRISE which described the parental rights with regard to A.R.'s special services.

On February 3, 2005, Dr. Batchelor acknowledged in a letter to the parents (R-2, Exhibit I) that the parents had sent two e-mails dated January 22, 2005. There is no indication in the documents supplied in this matter what was stated in the two e-mails from the parents. In her letter Dr. Batchelor reminded the parents that A.R. came to the school district as a classified student and that the district thinks that A.R. continues to need special education services and it could not declassify her unless it agreed that she has no disability. She pointed out that the district actually recommended a more intensive type of program but the district compromised with the parents and agreed to have her remain at the Wicoff School, just receiving speech services and the assistance of an instructional assistant.

In February 2005, a progress report from the speech and language specialist was issued, which indicated that A.R. had not been attending speech lessons since December 21, 2004. (R-2, Exhibit J.)

The school district then resumed providing speech-language therapy, but in the regular education classroom, on February 22, 2005, and continued to provide this service through April 25, 2005. As a result of the school district's continuation of speech and language therapy, A.R's parent sent a letter to the school district dated April 23, 2005 (R-2, Exhibit K), stating,

> I would like to bring to your kind attention that [A.R.] is <u>not at all</u> attending the Speech & IEP education. As you aware, I have cancelled this program for her as of Jan. 05.

On April 26, 2005, mediation was conducted through OSEP, at which time A.R.'s parents agreed that A.R. would receive speech and language therapy within the

classroom setting only. (R-2, Exhibit L.) The IEP team reconvened on May 18, 2005, to incorporate the terms of the mediation agreement into the IEP. (R-2, Exhibit M.) On May 23, 2005, A.R.'s parent advised the school district, by written correspondence, that he disagreed with the IEP and thus directed the school district that he was effectively withdrawing consent for special education services. (R-2, Exhibit N.) Shortly thereafter, on June 2, 2005, A.R.'s parent was advised, by written correspondence from the school district's attorney that the school district had an obligation to provide services as long as A.R. needs such services. (R-2, Exhibit 0.)

Shortly after mediation, on April 29, 2005, a request for complaint investigation was filed with OSEP on behalf of A.R. by her parents. Specifically, the complaint alleged a violation of the rights of the parents by the West Windsor-Plainsboro School District for the time period from January, 2005 until April 25, 2005. (R-2, Exhibit P.)

LEGAL DISCUSSION AND ANALYSIS

Petitioner herein challenges the July 8, 2005, OSEP issued Complaint Investigation Report C2005-2634, wherein it was determined that the petitioner failed to follow appropriate procedure for obtaining parental consent, pursuant to N.J.A.C. 6A:14-2.3(b), where it provided special services from February 22, 2005 until April 25, 2005, and thus corrective action was required. (Ibid.) Specifically, OSEP directed the District to revise its procedures for acknowledging and implementing revocation of consent in accordance with N.J.A.C. 6A:14-2.3. Furthermore, OSEP ordered that the District's revised procedures must ensure that services provided for the IEP will discontinue once consent has been revoked, unless the District proceeds to a due process hearing. Ibid.

Pursuant a briefing schedule ordered in this matter, the Department has moved for Summary Decision and relies upon those documents referenced in OSEP's Complaint Investigation Report C2005-2634 in support of its Motion.

Respondent's arguments

Respondent takes the position that OSEP appropriately determined that the District failed to follow appropriate procedures for obtaining consent pursuant to N.J.A.C. 6A:14-2.3(b). Specifically, pursuant to N.J.A.C. 6A:14-2.3, initial consent given by the parent for special education services remains effective until revoked by written notification. N.J.A.C. 6A:14-2.3. Furthermore, a school district must obtain parental consent prior to initial evaluations, any assessment for reevaluation, implementation for the initial IEP, and release of student records. N.J.A.C. 6A:14-2.3(a). If a parent refuses to provide consent and the district and the parent have not agreed to other action, the district shall request a due process hearing to obtain consent. N.J.A.C. 6A:14-2.3(b). Respondent points out that, moreover, pursuant to PRISE, which outlines the procedural safeguards for a parent of a child with special needs, consent means that the "parent understands that he or she willing gives permission and permission may withdrawn at any time." PRISE, §C1(c) (R-2, Exhibit Q).

Respondent takes the position that in the present matter, A.R.'s father provided the District with a written correspondence, dated January 8, 2005, the effect of which was to advise the District that parental consent for special services was revoked. (R-2, Exhibit G.) In addition, A.R.'s parents met with the District principal and special services supervisor on January 14, 2005, whereupon A.R.'s father advised once again that he did not want A.R. to receive special services. (R-2, Exhibit H.)

Respondent asserts that the District was aware that A.R.'s parent revoked consent for the District to provide special services, and that in two letters dated January 19, 2005 and February 3, 2005, the District acknowledged A.R.'s parents' request to cease special services. It contends that despite this, it ignored this request and continued to provide special services. (R-2, Exhibits H & I.)

Respondent points out that if the District argues that the January 8, 2005 e-mail does not constitute effective revocation of consent, nowhere in either the statutory or

regulatory scheme, nor in the PRISE, is notification in the form of an e-mail precluded. In fact, N.J.A.C. 6A:14.2.3(e) and PRISE set forth written notification requirements for the school district only, not the parent.

Thus, respondent contends that in light of the fact that parental consent was validly revoked, the District had an obligation to request a due process hearing to obtain parental consent, relying on N.J.A.C. 6A:14-2.3(b). However, the District failed to do so and, instead, after failed attempts to convince A.R.'s parents to continue special services, the District continued to provide speech-language services to A.R. from February 22, 2005 until April 25, 2005. Thus, respondent's position is that the District failed to follow appropriate procedure as set forth in N.J.A.C. 6A:14-2.3 and OSEP properly determined that corrective action was necessary.

Petitioner's arguments

Petitioner points out that in its Complaint Investigation Report, OSEP cites the provisions of N.J.A.C. 6A:14-2.3(a) and (b) as support for its decision. Petitioner argues, however, that a close reading of those provisions reveals that they are not relevant to the facts at hand.

N.J.A.C. 6A:14-2.3(a) provides that a school district shall obtain parental consent in the following four specific situations:

1. Prior to conducting any assessment as part of an initial evaluation;
2. Prior to implementation of the initial IEP resulting from (a) 1 above;
3. Prior to conducting any assessment as part of a reevaluation, except that such consent is not required if the district board of education can demonstrate that it had taken reasonable measures, consistent with (i) 7 below, to obtain such consent and the parent failed to respond; and
4. Prior to the release of student records according to N.J.A.C. 6:3-6.

N.J.A.C. 6A:14-2.3(b) goes on to state that if parental consent is not received in any of these four situations, the school district must request a due process hearing "to obtain consent" from an administrative law judge.

Petitioner contends that none of the four scenarios outlined in N.J.A.C. 6A:14-2.3(a) existed in the present case during the 2004-05 school year. A.R.'s initial evaluation was done with parental consent prior to the 2003-04 school year when she resided in North Brunswick. Her initial IEP was implemented in North Brunswick, once again with the consent of her parents. After the family's relocation to West Windsor-Plainsboro, re-evaluations were conducted by Cross County Clinical and Educational Services, also pursuant to parental consent. The fourth situation of N.J.A.C. 6A:14-2.3(a), the release of student records, is not in issue herein.

Petitioner argues that since the four factual predicates of N.J.A.C. 6A:14-2.3(a) did not exist in this matter, the provision of N.J.A.C. 6A:14-2.3(b) mandating that the school district must file for a due process hearing were not applicable. In this case, the parents attempted to withdraw their consent for special education services long after their child had been evaluated and a program was in place for her. Unlike N.J.A.C. 6A:14-2.3(b), the Administrative Code does not contain a provision placing the burden on the school district to request a due process hearing in order to continue services. To the contrary, N.J.A.C. 6A:14-2.3(f)(3)(ii) imposes the burden upon parents to file for due process when they seek to discontinue services for which they have already given consent.

N.J.A.C. 6A:14-2.3(d) mandates written notice from the school district to the parents whenever the district proposes to change the educational placement of a student or declines to change such placement. In this case, A.R.'s parent's request to terminate special education services constituted a request to change her educational placement, which the District declined. The District's Supervisor of Special Services, Dr. Deborah R. Batchelor, then sent two letters dated January 19, 2005, and February 3, 2005, explaining the District's reasons for declining the parents' request, thereby satisfying the written notice requirements of N.J.A.C. 6A:14-2.3(e). Pursuant to N.J.A.C.

6A:14-2.3(f)(5), no further action was required by the District; N.J.A.C. 6A: 14-2.3(f)(5) does not require a school district to initiate a due process hearing in order to continue services after a parental request for a change in a student's classification or educational placement. This burden falls on the parents.

An analogous situation arises when the school district, rather than the parents, seeks to change the educational placement of a student. Once again, appropriate written notice must be given to the parents under N.JA.C. 6A:I4-2.3(e) and (f). However, N.J.A.C. 6A:14-2.3(f)(3) then permits the district to implement its proposed action after 15 days' notice unless the parents, not the district, have filed for mediation or due process.

Based on the foregoing, petitioner argues that OSEP's "Complaint Investigation Report" was based on a misreading of the relevant regulations. Those regulations were promulgated to implement in New Jersey the mandates of the federal Individuals with Disabilities Education Act (IDEA). It is instructive that the current IDEA (including 2004 amendments) requires prior informed parental consent only for initial evaluations and for initial placements for the receipt of special education and related services. 20 U.S.C.S. § 1414(a)(I)(D). The IDEA does not address the issue of parental consent for the continuation of special education services, and it does not impose a responsibility upon school districts to initiate due process proceedings in the event of attempted parental revocation of consent.

Petitioner also refers to the federal regulations implementing the IDEA, which provide that "informed parent consent must be obtained before- (i) conducting an initial evaluation or reevaluation; and (ii) initial provision of special education and related services to a child with a disability." 34 C.F.R. § 300.505 (a)(I). The federal regulation also provides that a state may require parental consent for additional services and activities as long as "the State establishes and implements effective procedures to ensure that a parent's refusal to consent does not result in a failure to provide the child with FAPE." 34 CFR § 300.505(d). As noted above, New Jersey has not adopted a regulation requiring ongoing consent for IEP services which have already been

consented to and which have been implemented. Such a regulation would interfere with the student's paramount right to receive a free appropriate public education ("FAPE"). In fact, OSEP's reading in this case of the existing New Jersey regulations would have a similar effect by denying, at least temporarily, necessary services to the affected student.

Analysis

Summary decision may be granted where the papers and discovery which have been filed, together with any affidavits, show that there is no genuine issue as to any material fact challenged and the moving party is entitled to prevail as a matter of law. N.J.A.C. 1:1-12.5(b). The standards governing the grant or denial of summary judgment are set forth by the New Jersey Supreme Court in Brill v. Guardian Life Ins. Co. of America, 142 N.J. 520 (1995). Brill requires a fact finder to consider whether the 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 dispute in favor of the non-moving party. Id. at 523.

In the administrative forum, N.J.A.C. 1:1-12.5 provides the standard for summary decision. The New Jersey Supreme Court sustained the validity of N.J.A.C. 1:1-12.5 "noting that it is related to and, indeed essential to the proper conduct of administrative hearings in a contested matter." Contini v. Board of Educ. of Newark, 286 N.J. Super. 106, 116 (App. Div. 1995) (citations omitted)

In this matter, there are no material facts in dispute. Rather, the crux of the dispute between the parties is the legal issue whether the District was required to followed the appropriate procedure for obtaining parental consent pursuant to N.J.A.C. 6A:14-2.3 when it failed to honor the parents' revocation of consent in January 2005 and continued to implement A.R.'s then existing IEP?

In their respective submissions, only attorney for respondent referred to the definition of the term "consent" found at N.J.A.C. 6A:14-1.3, and neither discussed its

applicability to this matter. This definition provides:

> "Consent" means agreement in writing that is required by this chapter. Consent shall be obtained from the parent having legal responsibility for educational decision making. The district board of education shall ensure that the parent:
>
> 1. Has been fully informed of all information relevant to the activity for which consent is being sought, in his or her native language or other mode of communication;
>
> 2. Understands and agrees in writing to the implementation of the activity for which consent is sought, and the consent describes that activity and lists the records (if any) that will be released and to whom;
>
> 3. Understands that the granting of consent is voluntary and may be revoked at any time; and
>
> 4. If the parent revokes consent, that revocation is not retroactive (that is, it does not negate an action that has occurred after the consent was given and before the consent was revoked).

I have been unable to locate any similar definition of the term "consent" in the IDEA. In addition, I have been unable to locate any prior court decisions or administrative decisions determining the legal effect of the parental revocation of consent.

While under the foregoing definition, it is clear that parental consent may be revoked at any time, it is also clear that the revocation does not negate an action that has occurred before the consent was revoked. It logically follows from this that the revocation of consent does not negate any action that has occurred for which consent is not required.

In the present matter, it is undisputed that on January 8, 2005, A.R.'s parent sent an e-mail to the District's school principal that A.R. will not be attending speech classes thereafter. It should be remembered that the speech classes up until that time were taking place after the regular education program. It is also undisputed that shortly

thereafter, the parents met with the District's school principal and supervisor of special services and advised them that they did not want A.R. to receive special education services or even to remain classified as a special education student.

In her letter of February 3, 2005, in response to the parents, Dr. Batchelor stated that the District compromised with the parents and agreed to have A.R. remain at the Wyckoff School receiving speech services and the assistance of an instructional assistant rather than implement a different program at another school within the District.

Thus, the District recognized the right of the parent to refuse to have their child attend speech therapy sessions which had been occurring at a time after the regular education program hours. However, the District believed that it had the responsibility to implement the IEP which required it to provide speech therapy, and it was doing so during regular school hours in the regular education classroom.

From the foregoing, I **FIND** that on January 8, 2005, A.R.'s father, J.R., by implication, revoked his consent for A.R.'s attendance at speech therapy by indicating that A.R. would not be attending after school speech therapy sessions from that date forward. I **FIND** that shortly thereafter, when the parents met with the School Principal and the Supervisor of Special Services, they revoked their consent for A.R. to receive special services and did not want her to remain classified as a special education student. I **FIND** that by letter dated January 19, 2005, the District notified the parents that A.R. would remain at the Wyckoff School to receive speech and language services and the assistance of an instructional assistant for part of the day while she was in kindergarten pursuant to the IEP of December 8, 2004.

I **FIND** that the parental revocation of consent could not be effective to negate the previously conducted assessments of A.R. which were part of an initial evaluation, could not negate the implementation of the initial IEP for A.R. which resulted from the initial evaluation, and could not negate the conducting of any prior assessment as part of a reevaluation of A.R. Each of these events were accomplished facts for which consent had been previously given pursuant to N.J.A.C. 6A:14-2.3(a). I **FIND** that the

District's continued implementation of the IEP for A.R., which was in effect as of the dates of the parents' revocation of consent in January 2005, did not require parental consent. Ibid. Therefore, I **FIND** that such continued implementation of the IEP could not be negated by the parents' revocation of consent since parental consent for such implementation is not required by either the IDEA or by the implementing New Jersey Regulations. Accordingly, I **CONCLUDE** that the determination of respondent OSEP in its Complaint Investigation Report C2005-2634 is **INCORRECT** and should be **REVERSED** and **DISMISSED.**

It should be noted that neither party addressed the standard to be applied in deciding this matter, e.g., whether petitioner must show that OSEP's determination was arbitrary and unreasonable. Since I have determined that OSEP is incorrect as a matter of law, I believe that the arbitrary and unreasonable standard has been met.

DECISION AND ORDER

For the reasons stated above, it is hereby **ORDERED** that the determination of respondent OSEP in its Complaint Investigation Report C2005-2634, wherein it determined that the West Windsor-Plainsboro Regional School District failed to follow appropriate procedures for obtaining parental consent, pursuant to N.J.A.C. 6A:14-2.3(b), and thus corrective action was required, is hereby **REVERSED** and **DISMISSED.**

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

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

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

Within thirteen (13) days from the date on which this recommended decision was mailed to the parties, any party may file written exceptions with the **COMMISSIONER OF THE DEPARTMENT OF EDUCATION, 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 23, 2006
DATE

JOSEPH F. MARTONE, ALJ

E-mail Receipt of Initial Decision Confirmed by the Department of Education on:

3-23-06
DATE

Mailed to Parties:

MAR 27 2006
DATE

OFFICE OF ADMINISTRATIVE LAW

mph

LIST OF EXHIBITS:

For petitioner:

P-1 Petitioner's Brief, filed January 20, 2006

P-2 Petitioner's Reply Letter Brief, filed February 1, 2006

For respondent:

R-1 Notice of Motion for Summary Decision, filed January 23, 2006

R-2 Letter Brief in Support of Motion with the following attached exhibits:

- A. IEP, dated September 12, 2003
- B. IEP, dated September 10, 2004
- C. Notice of Meeting, dated October 7, 2004
- D. Re-Evaluation Plan, dated October 6, 2004
- E. Cross-County Evaluations
- F. IEP, dated December 17, 2004
- G. Parent e-mail, dated January 8, 2005
- H. Dr. Batchelor letter to parents, dated February 3, 2005
- I. Dr. Batchelor letter to parents, dated February 3, 2005
- J. Speech-Language Progress Report for February 2005
- K. Parent letter to Dr. Batchelor, dated April 23, 2005
- L. Settlement Agreement, dated April 26, 2005
- M. IEP, dated May 18, 2005
- N. Parent letter to Child Study Team, dated May 23, 2005
- O. Attorney for petitioner letter to parents, dated June 2, 2005
- Q. Copy of PRISE Booklet

R-3 Reply Letter Brief, filed February 6, 2006

168-06

OAL DKT. NO. EDU 2376-05
AGENCY DKT. NO. 20-1/05

WILLIAM J. KRZAN, III,	:	
PETITIONER,	:	
V.	:	COMMISSIONER OF EDUCATION
BOARD OF EDUCATION OF THE LENAPE REGIONAL HIGH SCHOOL DISTRICT, BURLINGTON COUNTY,	:	DECISION
RESPONDENT.	:	

The record of this matter, the proposed Settlement Agreement and General Release, and the Initial Decision issued by the Office of Administrative Law have been reviewed.

Upon such review, the Commissioner approves the parties' proposed settlement and adopts the Initial Decision as the final decision in this matter, which is hereby dismissed, subject to compliance with the terms of the settlement.

IT IS SO ORDERED.

Lucille E Davy

ACTING COMMISSIONER OF EDUCATION

Date of Decision: 5/03/06

Date of Mailing: 5/03/06

State of New Jersey
OFFICE OF ADMINISTRATIVE LAW

INITIAL DECISION
SETTLEMENT
OAL DKT. NO. EDU 2376-05
AGENCY DKT. NO. 20-1/05

WILLIAM J. KRZAN, III,
Petitioner,
v.
BOARD OF EDUCATION OF THE LENAPE REGIONAL HIGH SCHOOL DISTRICT, BURLINGTON COUNTY, ET AL.
Respondent.

David A. Krenkel, Esq., for petitioner
Susan S. Hodges, Esq., for respondent (Archer & Greiner, P.C., attorneys)

Record Closed: March 24, 2006 Decided: March 30, 2006

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

William J. Krzan, III, appeals from the decision of the Lenape Regional High School District terminating his employment as Personnel Director. He filed his Petition of Appeal on April 18, 2005 and the matter was transmitted to the Office of Administrative Law for hearing as a contested case on April 12, 2005. N.J.S.A. 52:14B-1 to –15 and N.J.S.A. 52:14F-1 to –13.

An in person prehearing conference was convened on January 18, 2006. At that time the parties engaged in meaningful settlement negotiations and agreed upon the following settlement, the terms of which are set forth in the attached Settlement Agreement submitted on March 24, 2006. 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 and their representatives' signatures on the attached Settlement Agreement; and
2. The settlement fully disposes of all issues in controversy and is consistent with the law.

Accordingly, I **ORDER** that the parties comply with the terms of the Settlement Agreement and that these proceedings be and are hereby concluded.

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

March 30, 2006

DATE

ISRAEL D. DUBIN, ALJ

Receipt Acknowledged:

April 3, 2006

DATE

DEPARTMENT OF EDUCATION

Mailed to Parties:

APR 5 2006

DIRECTOR AND CHIEF ADMINISTRATIVE LAW JUDGE

DATE

OFFICE OF ADMINISTRATIVE LAW

IDD/mamf

DOCUMENTS IN EVIDENCE

Jointly submitted

J-1 Stipulation of Settlement

RECEIVED
2006 MAR 24 A 11:53
STATE OF NEW JERSEY
OFFICE OF ADMIN LAW

SETTLEMENT AGREEMENT AND GENERAL RELEASE

The Lenape Regional High School District Board of Education ("Board"), 93 Willow Grove Road, Shamong, New Jersey 08088 and **William Krzan ("Krzan")**, 25 Fawn Court, Mount Holly, New Jersey 08060, his heirs, executors, administrators, successors, and assigns, hereinafter referred to as "the parties," agree that:

1. **Last Day of Employment**. Krzan's last day of employment with the Board was October 31, 2004.

2. **Consideration**. In consideration for signing this Settlement Agreement and General Release ("**Agreement**") and compliance with the promises made herein, the Board shall furnish Krzan with the following payments and benefits:

a. A total payment of $40,000.00. Said payment will be made within ten (10) days of the Board meeting at which this Agreement is ratified. Lenape will issue an IRS Form 1099 as appropriate. Said payment will be made as follows: one check payable to "William Krzan" in the amount of $32,190.01, one check to "David Krenkel, Esquire" in the amount of $7,809.99;

b. If requested, the attached form will be completed as attached as Exhibit A to this Agreement, and provided to the New Jersey Division of Pensions;

c. The above subparagraphs describe valuable consideration to which Krzan would not otherwise be entitled.

Regardless of any withholding or tax forms issued by Lenape, Krzan shall be required to ensure that all taxes are properly paid. In the event of a tax assessment by any federal, state or local taxing authority, as a result of not making deductions or withholding from the sum to be paid thereunder to Krzan as part of this Agreement, Krzan shall be responsible for his own share of that assessment and any interest, penalties, or other charges. Krzan agrees to indemnify and hold Lenape harmless for the amount equal to Krzan's portion of the tax assessment, as well as for any and all interest or penalties that may be required to pay to any taxing authority for or upon any payments which should have been paid by Krzan.

3. **No Consideration Absent Execution of this Agreement**. Krzan understands and agrees that the monies and benefits specified in paragraph "2" above would not be provided to him except for his execution of this Agreement and the fulfillment of the promises contained herein.

4. **Acknowledgments.** Krzan acknowledges that he has read all of the terms of this Agreement and has had an opportunity to discuss it with individuals of his own choice, who are not associated with the Board. He has been advised by the Board to consult with an attorney of his own choosing and has done so.

5. **General Release of Claims.** Krzan knowingly and voluntarily releases and forever discharges the Board, its successors and assigns and the current and former employees, officers, directors, board members, administrators, representatives and agents thereof,

including but not limited to the insurers of the Board (all of these parties are collectively referred to throughout the remainder of this Agreement as the "Board"), of and from any and all claims, known and unknown, including any claims for attorney's fees Krzan has or may have against the Board as of the date of execution of this Agreement, including, but not limited to, any alleged violation of:

- Title VII of the Civil Rights Act of 1964, as amended;
- The Civil Rights Act of 1991;
- Sections 1981 through 1988 of Title 42 of the United States Code, as amended;
- The Employee Retirement Income Security Act of 1974, as amended;
- The Immigration Reform and Control Act, as amended;
- The Americans with Disabilities Act of 1990, as amended;
- The Age Discrimination in Employment Act of 1967, as amended;
- The federal Age Discrimination in Employment Act;
- The federal Older Worker's Benefit Protection Act;
- The federal Equal Pay Act;
- The federal Employee Retirement Income Security Act;
- The federal Americans with Disabilities Act;
- The Workers Adjustment and Retraining Notification Act, as amended;
- The Occupational Safety and Health Act, as amended;
- The New Jersey Law Against Discrimination;
- The New Jersey Family Leave Act;
- The federal Family and Medical Leave Act;
- The New Jersey State Wage and Hour Law;
- The New Jersey Conscientious Employee Protection Act;
- The New Jersey Equal Pay Law;
- The New Jersey and/or federal Constitution;
- Any other federal, state or local civil or human rights law or any other local, state or federal law, regulation or ordinance;
- Any public policy, contract, tort, or common law claims other any other theories now or hereafter recognized; or
- Any allegation for costs, fees, or other expenses including attorneys' fees incurred in any matter.

6. **Agreement of Withdrawal of Charge.** Upon receipt of the Settlement Payment described in detail in Paragraph 2 of this Agreement, Krzan shall take the necessary steps to withdraw and/or dismiss with prejudice the Petition filed with the Office of Administrative Law.

7. **Affirmations**. Krzan affirms that he has not filed, caused to be filed, or presently is a party to any claim, complaint, or action against the Board in any forum or form, other than the Petition described above, which Krzan hereby agrees to withdraw and/or dismiss with prejuidice. Krzan further affirms that he has been paid and/or has received all leave (paid or unpaid), compensation, wages, bonuses, commissions, and/or benefits to which he may be entitled and that no other leave (paid or unpaid), compensation, wages, bonuses, commissions

and/or benefits are due to him, except as provided in this Agreement. Krzan furthermore affirms that he has no known workplace injuries or occupational diseases.

8. **Confidentiality**. Krzan agrees not to disclose any information regarding the existence or substance of this Agreement, except to his spouse, tax advisor, and an attorney with whom Krzan chooses to consult regarding his consideration of this Agreement. Nothing herein is intended to or shall preclude Krzan from filing a complaint and/or charge with any appropriate federal, state, or local government agency and/or cooperating with said agency in its investigation. Krzan, however, shall not be entitled to receive any relief, recovery, or monies in connection with any complaint or charge brought against the Board, without regard as to who brought any said complaint or charge.

9. **Non-Disparagement.** Krzan further agrees that he will not make any statement or representation, oral or written, that could adversely affect the reputation, image, goodwill, or commercial interest of the Board. The Board's officers, directors, board members and attorneys will likewise not make any statement or representation, oral or written, that could adversely affect the reputation, image or good will of Krzan.

10. **Disclosures.** Krzan agrees that, should he hereafter be subjected to a Court order or other compulsory process to compel the disclosure of any of the terms and conditions of this Agreement, he may abide by any lawful Court order or subpoena; however, before turning over any of the terms and conditions of this Agreement, he shall first promptly notify the legal counsel for the Board of such order or process and consent to the intervention of the Board in such matter to seek to prevent such disclosure. Such notification required from Krzan in this paragraph shall be directed to the following:

Susan S. Hodges, Esquire
Archer & Greiner, P.C.
One Centennial Square
Haddonfield, New Jersey 08033
Telephone: (856) 795-2121
Facsimile: (856) 795-0574

11. **Letter of Reference.** Lenape shall furnish Krzan a letter of reference regarding his employment in the form of correspondence attached hereto as Exhibit B. Any inquires shall be directed to the Director of Personnel.

12. **Reemployment; Re-Entry.** Krzan agrees that his employment with the Board has terminated and that he will not seek reinstatement or reemployment with the Board or enter in or upon or linger about the premises of the Board, except to the extent that any portion of said premises are open to members of the general public, and Krzan's presence is consistent with the purposes for which the premises are open to the public. Krzan further agrees that this Agreement is good and sufficient cause for the Board to reject any application for employment, reinstatement or reemployment submitted by Krzan. Additionally, Krzan agrees that this Agreement is sufficient and legal cause for the Board to terminate him should he be inadvertently hired by the Board or any of its related entities.

13. **Ratification.** This Agreement is subject to ratification by the Board at the next regularly scheduled meeting following receipt of the signature pages signed by Krzan. The Superintendent shall recommend ratification to the Board.

14. **Opportunity to Consider.** Krzan has been given the opportunity to take a period of at least twenty-one (21) days within which to consider this Agreement. Krzan acknowledges that if he chooses to sign this Agreement before that date, he does so knowingly and voluntarily.

15. **Right to Cancel.** Krzan also understands that he has the right to change his mind and cancel this Agreement, but only as it pertains to the waiver of any federal age discrimination claim he may have, within seven (7) days following the date on which he signed it. The portion of this Agreement that pertains to Krzan's waiver of any federal age discrimination claim he may have will not be effective until the end of this period.

16. **Governing Law and Interpretation.** This Agreement shall be governed and conformed in accordance with the laws of the state of New Jersey without regard to its conflict of laws provision. In the event that Krzan breaches any provision of this Agreement, Krzan affirms that the Board may institute an action to specifically enforce any term or terms of this Agreement. Should any provision of this Agreement be declared illegal or unenforceable by any court of competent jurisdiction and cannot be modified to be enforceable, excluding the general release language, such provision shall immediately become null and void, leaving the remainder of this Agreement in full force and effect.

17. **Construction of Agreement and Section Headings.** Each of the parties and their attorney have reviewed, revised, and negotiated or had the opportunity to negotiate the terms, conditions, and language of this Agreement. The rule of construction that ambiguities are to be resolved against the drafting party shall not be applied in interpreting this Agreement. Section and paragraph titles in this Agreement are used for convenience only and are not intended to and shall not in any way enlarge, define, limit, or extend the rights or obligations of the parties or affect the interpretation of this Agreement.

18. **Nonadmission of Wrongdoing**. The parties agree that neither this Agreement nor the furnishing of the consideration for the release contained herein shall be deemed or construed at anytime for any purpose as an admission by either party of any liability or unlawful conduct of any kind.

19. **Competency to Execute.** Krzan is not affected or impaired by illness, use of alcohol, drugs or other substances or otherwise impaired. Krzan is competent to execute this Agreement and to waive any and all claims he has or may have against the Board. Krzan is not a party to any bankruptcy or other lien, creditor-debtor or other proceeding which would impair his right to settle this case and to waive all claims he may have against the Board.

20. **Amendment**. This Agreement may not be modified, altered or changed except upon express written consent of both parties wherein specific reference is made to this Agreement and General Release.

20. **Amendment**. This Agreement may not be modified, altered or changed except upon express written consent of both parties wherein specific reference is made to this Agreement and General Release.

21. **Entire Agreement**. This Agreement sets forth the entire agreement between the parties hereto, and fully supersedes any prior agreements or understandings between the parties. Krzan acknowledges that he has not relied on any representations, promises, or agreements of any kind made to him in connection with his decision to accept this Agreement, except for those set forth in this Agreement.

HAVING ELECTED TO EXECUTE THIS SETTLEMENT AGREEMENT AND GENERAL RELEASE, TO FULFILL THE PROMISES AND TO RECEIVE THE SUMS AND BENEFITS IN PARAGRAPH "2" ABOVE, KRZAN FREELY AND KNOWINGLY, AND AFTER DUE CONSIDERATION, ENTERS INTO THIS SETTLEMENT AGREEMENT AND GENERAL RELEASE INTENDING TO WAIVE, SETTLE AND RELEASE ALL CLAIMS HE HAS OR MIGHT HAVE AGAINST THE BOARD. KRZAN ACKNOWLEDGES THAT THE PARTIES HAVE COMPLIED WITH THE REQUIREMENTS OF THE OLDER WORKERS BENEFIT PROTECTION ACT OF 1990.

IN WITNESS HEREOF, the parties hereto knowingly and voluntarily executed this Settlement Agreement and General Release as of the date set forth below:

William J. Krzan

William J. Krzan

Witness: David Krenkel

Date: 3-3-06

Lenape Regional High School District Board of Education

By: John W Hodges

Witness:

Date: 3/10/06

ARCHER & GREINER, P.C.
Attorneys for Lenape Regional High School District Board of Education

By:

Susan S. Hodges, Esquire

Date: 3/14/06

David A. Krenkel, Esquire
Attorney for William J. Krzan

Date: 3-3-06

169-06

THE FORUM SCHOOL,	:	
PETITIONER,	:	
V.	:	COMMISSIONER OF EDUCATION
NEW JERSEY STATE DEPARTMENT OF EDUCATION, OFFICE OF COMPLIANCE INVESTIGATION,	:	DECISION
RESPONDENT.	:	

SYNOPSIS

Petitioning private school for the disabled appealed the Department's determination to disallow the cost of a student trip to a Broadway play – $2,625 – in its final approved tuition rate for the 2002-2003 fiscal year. Petitioner argued that the event was a field trip designed to implement the State's core curriculum content standards in the visual and performing arts, and to increase student appreciation of music and theater.

The ALJ concluded that the cost of tickets to a Broadway show is unnecessarily expensive and above the cost that would be incurred by an ordinarily prudent person in the administration of public funds, and granted summary decision in favor of the Department. In so determining, the ALJ pointed out, *inter alia,* that there are less costly alternatives to achieve the desired educational benefit.

The Commissioner agrees that summary decision is appropriately granted to the Department as she concurs that the $2,635 cost should be disallowed from the petitioner's final approved tuition rate for the 2003-2003 fiscal year. Accordingly, the Initial Decision is adopted as the final decision in this matter.

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.

May 4, 2006

OAL DKT. NO. EDU 3879-05
AGENCY DKT. NO. 57-2/05

THE FORUM SCHOOL,	:	
PETITIONER,	:	
V.	:	COMMISSIONER OF EDUCATION
NEW JERSEY STATE DEPARTMENT OF EDUCATION, OFFICE OF COMPLIANCE INVESTIGATION,	:	DECISION
RESPONDENT.	:	

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

Upon a full and independent review, the Commissioner agrees that summary decision is appropriately granted to the Department as she concurs with the Administrative Law Judge's determination that the $2,635 cost of a student field trip to a Broadway show should be disallowed from petitioner's final approved tuition rate for the 2002-03 fiscal year.

Accordingly, the Initial Decision of the OAL is adopted, for the reasons well stated therein, as the final decision in this matter.

IT IS SO ORDERED.*

Lucille E Davy

ACTING COMMISSIONER OF EDUCATION

Date of Decision: 5/04/06

Date of Mailing: 5/04/06

* This decision may be appealed to the State Board of Education pursuant to *N.J.S.A.* 18A:6-27 *et seq.* and *N.J.A.C.* 6A:4-1.1 *et seq.*

State of New Jersey
OFFICE OF ADMINISTRATIVE LAW

INITIAL DECISION
OAL DKT. NO. EDU 3879-05
AGENCY DKT. NO. 57-2/05

THE FORUM SCHOOL,
Petitioner,
v.
NEW JERSEY DEPARTMENT OF EDUCATION, OFFICE OF COMPLIANCE INVESTIGATION,
Respondent.

Andrew C. White, Esq., for petitioner
(Drinker Biddle & Reath LLP, attorneys)

Melanie M. Brooks, Deputy Attorney General, for respondent
(Zulima V. Farber, Attorney General of New Jersey, attorney)

Record Closed: November 7, 2005 Decided: March 31, 2006

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

Statement of the Case

This is an appeal brought by the Forum School ("Forum School"), an approved private school for the disabled, from the disallowance of the cost of a student trip to a Broadway play in its final approved tuition rate for the 2002-03 fiscal year ("FY 2003").

Pursuant to N.J.S.A. 18A:46-14-21, private schools for the disabled receiving students from public school districts may not charge a tuition rate that exceeds the actual cost per student as determined under rules prescribed by the Commissioner of Education ("Commissioner") and approved by the State Board of Education.

Auditors from the New Jersey Department of Education ("Department") excluded the amount of $2,635 incurred for a field trip involving 34 students and staff to attend a Broadway production of the musical play Man of La Mancha. In their written findings, the auditors originally disallowed the cost on the ground that it constitutes "an ordinary living expense for a student that is normally assumed by the parents of a student" and, therefore, is excluded under N.J.A.C. 6A:23-4.5(a)(30).[1] During the course of the appeal process, the Department advanced two additional justifications for denial of this expense: first, that the cost has not been shown to be "consistent with the individualized education programs (IEP) of a disabled student," as required by N.J.A.C. 6A:23-4.2(a)(1);[2] and, second, that the cost is unreasonable within the meaning of N.J.A.C. 6A:23-4.2(a)(1), which limits allowable expenses to those that are "ordinary and necessary and not in excess of the cost which would be incurred by an ordinarily prudent person in the administration of public funds."[3]

Forum School describes the event as a "field trip" designed to implement the state's core curriculum standards in the visual and performing arts and to increase student appreciation of music and theater. Since the activity allegedly advances legitimate instructional goals and objectives, Forum School maintains that it should be includable in the approved tuition rate. Responding to the Department's claim that the activity is an ordinary living expense, Forum School urges that the regulatory requirement of N.J.A.C. 6A:23-4.5(a)(30) must yield to the governing statute, N.J.S.A. 18A:36-21, which prohibits districts from requiring parents of children in special education classes to pay for authorized school field trips. Further, Forum School

---

[1] Effective August 16, 2004, this regulatory section was amended and recodified. 36 N.J.R. 1313(a), 36 N.J.R. 3895(a). Identical language is still found at N.J.A.C. 6A:23-4.5(a)(30) (2004).

[2] This section is recodified in the current regulations as N.J.A.C. 6A:23-4.2(a)(ii) (2004).

[3] This section is recodified as N.J.A.C. 6:23-4.2(a)(iv) (2004).

contends that the regulations fail to provide meaningful guidance as to which field trips are allowed and which are disallowed in setting tuition rates, and that the Department has always approved such costs in the past.

Procedural History

By letter, dated July 13, 2004, the Department notified Forum School that it had completed a fiscal monitoring of petitioner's budget for FY 2003 and had approved all but $73,585 of its $3.5 million request.[4] On or about July 28, 2004, Forum School filed an appeal with the Department's Office of Compliance Investigation setting forth in detail the reasons for its disagreement with the disallowance of the $2,635 cost of a field trip to a Broadway show. Thereafter, on August 13, 2004, the Office of Compliance Investigation reviewed Forum School's submissions and upheld its earlier determination. On or about September 28, 2004, Forum School filed a second-tier appeal to the Department's Chief of Staff. One month later, on October 28, 2004, the Chief of Staff issued a letter of denial. Consequently, on February 22, 2005, Forum School filed an appeal to the Commissioner of Education ("Commissioner"). The Department filed an answer on March 11, 2005.

Subsequently, on April 20, 2005, the Commissioner transmitted the matter to the Office of Administrative Law ("OAL") for hearing as a contested case. Prior to hearing, the parties agreed that the facts are undisputed and that the case could be decided as a matter of law. On October 7, 2005, the parties filed a joint stipulation of facts and exhibits. Shortly thereafter, on October 24, 2005, the parties filed cross-motions for summary decision and supporting briefs. Forum School also filed an affidavit setting forth additional uncontested facts. Both parties filed reply briefs on October 31, 2005. The OAL heard oral argument by telephone conference on November 7, 2005.

[4] The auditors also recommended that Forum School exclude similar items for the following fiscal year should the same type of costs be incurred.

Findings of Fact

All of the material facts are derived from the joint stipulation of facts and the affidavit filed by Forum School. I **FIND** the following facts to be undisputed:

The Forum School is a non-profit private school for developmentally disabled children located in Waldwick, New Jersey. Forum School has been approved by the Department to provide special education programs to public school children.[5] On March 19, 2003, thirty-four students and staff of Forum School attended a showing of Man of La Mancha, a Broadway play, at the Martin Beck Theatre in New York City at the cost of $77.50 a ticket.[6] Dr. Steven Krapes, the Forum School director, charged the cost of the theater tickets on his personal credit card and then obtained reimbursement from the school.

Forum School arranged the trip to the Broadway show as part of its music program and to satisfy the core curriculum standards promulgated by the Department. Core Curriculum Content Standard 1.1 for the Visual and Performing Arts prescribed that "all students will acquire knowledge and skills that increase **aesthetic** awareness in dance, music, theater, and visual arts." Standard 1.4 provided that "all students will demonstrate knowledge of the process of **critique**." (Bold face in originals.)[7] In preparation for viewing the play, students at Forum School participated in various learning activities, including: (a) a study of the story itself; a study of the lyrics of the play and the meanings associated with the songs; (b) a review of the Play-Bills to familiarize themselves with the story and actors; and (c) development of a series of

---

[5] The Department's website lists Forum School as a non-profit private school approved for classified children with autism, behavioral disabilities and preschool disabilities. "The program utilizes a developmentally stimulating curriculum, with a structured behavioral management approach." http://www.nj.gov/njded/specialed/instate/

[6] The total of $2,635 equates to 34 theater tickets at $77.50 each and does not appear to include any costs of transportation, parking or refreshments.

[7] The Department revised and readopted the Core Curriculum Content Standards for the Visual and Performing Arts in April 2004. Reprints of the current version of the Core Curriculum Content Standards are available at the Department's website. http://www.state.nj.us/njded/cccs/

questions to ask the actors in a question and answer period following the play. In the days after the play, the students (a) wrote about their theatre experience, the plot lines, and character development in language arts class and (b) in music class, critiqued the appropriateness of specific songs from the play in supporting character and plot development.

Previously, students from Forum School have attended Broadway plays, including: (a) Oklahoma (April 2002); (b) The Music Man (April 2001); (c) Phantom of the Opera (March 2000); (d) Stomp (March 1999); (e) 1776 (January 1998); (f) Bring in Da Noise, Bring in Da Funk (May 1997); (g) Cats (April 1996) and (h) Fantasticks (May 1995). None of the costs associated with attending these performances were disallowed by the Department.

Conclusions of Law

Based on the foregoing facts and the applicable law, I **CONCLUDE** that the cost of tickets to a Broadway show is unnecessarily expensive and above the cost that would be incurred by an ordinarily prudent person in the administration of public funds.

This appeal is a sequel to the recent case entitled Bergen Center for Child Dev., Inc. v. New Jersey Dep't of Educ., OAL Dkt. No. EDU 1807-05 (Aug. 31, 2005), aff'd (Comm'r Oct. 14, 2005) 2005 N.J. AGEN LEXIS 492, wherein the Commissioner had occasion to review the law concerning allowance of the cost of field trips in setting tuition rates for private schools for the disabled. Applying the same three regulations involved here, the Commissioner found the cost of a field trip geared toward developing the social and life skills of disabled children to be an allowable cost. That same analysis will be followed here to determine whether the cost of theater tickets to a Broadway show satisfies the same regulatory requirements.

First, N.J.A.C. 6A:23-4.5(a)(30) prohibits a private school from passing along to the sending public school districts "an ordinary living expense for a student that is normally assumed by the parent of a student attending public day school." Undeniably, the theater trip organized by Forum School meets the literal definition of a "field trip" as

"a journey by a group of pupils, away from the school premises, under the supervision of a teacher." N.J.S.A. 18A:36-22. Educators recognize that field trips "are a regular part of a District's program and are designed to help familiarize the students with their community and foster their independence." Clifton Bd. of Educ. v. D.C., OAL Dkt. No. EDS 19771-97, 1998 N.J AGEN. LEXIS 345 (May 1998). Teachers may be assigned to supervise educational trips which are properly part of the curriculum. Parrish v. Moss, 200 Misc. 375, 106 N.Y.S.2d 577 (Sup. Ct. 1951), aff'd without opinion, 270 App. Div. 608, 107 N.Y.S.2d 580 (App. Div. 1951).

N.J.S.A. 18A:36-21 authorizes public boards of education to impose all or part of the costs of a field trip on the pupils' parents or legal guardians.[8] If parents usually pay such costs, as they do for food, clothing and shelter, then an argument could be made that such expense is an ordinary living expense for a student that is normally assumed by the parent.[9] Unfortunately, the record does not disclose the general practice of public school districts with regard to theater productions. During oral argument, counsel could not say whether or not public school districts routinely require parents to bear the cost of their own child's tickets on school-sponsored trips to Broadway shows.

Assuming that most public schools do charge parents for such field trips, however, the statute contains an express exception for "pupils in special education classes and pupils with financial hardship." Even if a handicapped child were enrolled in the public school, therefore, the cost of this field trip would not be assumed by his or

[8] The Deputy points out that enactment of this statute was a legislative response to the agency decision in Willett v. Board of Educ. of Colts Neck, 1966 S.L.D. 202 ((Dec. 2, 1966), in which the Commissioner declared that a school board policy requiring parents to pay for all field trips violated a child's right to a free public education. While historically accurate, such legislative history is not particularly helpful in resolving the immediate question. Indeed, the fact that the Legislature saw fit to exempt parents of disabled children from paying for school field trips cuts against the Department's argument.

[9] Dr. Krapes' reference, in one of his letters, to the Child Nutrition Program merely clouds the issue, since the federally subsidized school lunch program was enacted to safeguard the health and well-being of all the nation's schoolchildren by insuring that they are provided with at least one low-cost nourishing meal per day, and to encourage domestic consumption of the nation's agricultural commodities. 42 U.S.C.A. § 1771. See also, 14 A.L.R. Fed. 634 (2006).

her parent. Students enrolled in Forum School are in special education and, therefore, their parents are exempt from having to pay for field trips. Parents of disabled children should not be financially worse off simply because their child is so handicapped that his or her needs cannot be met in a public school setting. Of course, that does not necessarily mean that Forum School may demand reimbursement of unreasonable expenses from the sending public school districts.

Second, consideration must be given to whether the cost is "consistent with the students' individualized education program" as mandated by N.J.A.C. 6A:23-4.2(a)(1) Proofs establish that the theater visit was connected to classroom exercises dealing with aesthetic awareness and critique of the theatrical arts and served to fulfill the objectives of the Department's core curriculum standards. The Department rejected the cost because the activities "should have been laid out in an individualized education plan (IEP)." However, the regulation only requires that an allowable cost be "consistent" with the individualized education plan, not that the IEP make specific reference to such cost.

An individualized education program is defined as a written plan developed jointly by the parents and school staff "which sets forth present levels of performance, measurable annual goals and short-term objectives or benchmarks and describes an integrated sequential program of individually designed instructional activities and related services necessary to achieve the stated goals and objectives." N.J.A.C. 6A:14-1.3. While an IEP must include sufficiently definite milestones so that a child's progress can be adequately measured, Lascari v. Ramapo Indian Hills Reg. High Sch. Dist., 116 N.J. 30, 48-49 (1989), it need not be as detailed as a teacher's daily lesson plan. Given the fact that the theater trip is an integrated learning experience incorporated as part of Forum School's music curriculum, it satisfies the condition that the cost must be "consistent" with the child's IEP.

Third, the question arises whether the cost is "ordinary and necessary and not in excess of the cost which would be incurred by an ordinarily prudent person in the administration of public funds" as provided by N.J.A.C. 6A:23-4.2(a)(1) (1996).

Although this particular regulation is mentioned in the Bergen Center decision, the Commissioner never fully addressed the issue because the Department had conceded that the costs in that case were reasonable. Here, however, the Department challenges the reasonableness of the expense.

Commentary in Bergen Center contemplated a situation much like the present one:

> This particular requirement is more subjective than the others, due to the difficulty of articulating a bright line test for separating reasonable from unreasonable expenses. Few would seriously argue that a sending public district must pay for a trip to Madrid by the Spanish class or front row seats at a top Broadway show for a theater class, although certainly such costs could be justified as serving a legitimate educational purpose.
> Bergen Center (slip op. at 7).

In its reply brief, Forum School "does not dispute that certain expenditures may rise to the level of unreasonableness on their face, such as 'a trip to Madrid by the Spanish class.' " Petitioner's counsel also acknowledged at oral argument the legitimacy of the concern that the statute not be read as "a blank check." Thus, the question is not whether there should be an upper limit on costs, but rather where to draw the line.

Forum School suggests that its students are entitled to nothing less than the very best educational experience. Counsel maintains that part of Forum School's responsibility "is to expose the students to the most inspiring and skillful productions, so that exposure to those performances will feed a student's creativity and dreams[.]" Contrary to this ambitious mission statement, the legal standard under the Individuals with Disabilities Education Act, 20 U.S.C.A. §§ 1400 to 1487, is not to maximize the potential of handicapped children, but rather "to confer some educational benefit." Lascari, at 47. Federal appellate courts have further refined that standard to clarify that such educational benefit must be "meaningful," "achieve significant learning," and confer "more than merely trivial benefit." T.R. v. Kingwood Tp. Bd. of Educ., 205 F.3d

572 (3rd Cir. 2000); Ridgewood Bd. of Educ. v. N.E., 172 F.3rd 238 (3rd Cir. 1999); Polk v. Central Susquehanna Intermediate Unit 16, 853 F.2d 171, 183-184 (3rd Cir. 1988), cert. den. sub. nom. Central Columbia Sch. Dist. v. Polk, 488 U.S. 1030 (1989). In establishing State oversight of private schools, the New Jersey Legislature expressed concern for the quality of education for handicapped pupils as well as its overall cost to the public. Council of Private Schools for Children With Special Needs, Inc. v. Cooperman, 205 N.J. Super. 544 (App. Div. 1985). Accordingly, the Department acted properly within the legal framework to inquire whether there exist less costly alternatives to achieve the desired educational benefit.

Who better to determine whether the cost is reasonable than the Commissioner, with her expertise in the field of education and extensive knowledge of the financial operations of public school districts in New Jersey? Common sense should have alerted Forum School's administration that, in this era of fiscal restraint and recurring budget crisis, the luxury of sending school children to Broadway plays at public expense is a questionable use of scare resources. It was blatant enough to be noted as an obvious example of extravagant spending in Bergen Center. One can sympathize with Forum School's sincere desire to make their students' first theater experience as enjoyable and entertaining as possible. Nonetheless, the core curriculum concepts of aesthetic awareness and critique could have been imparted just as well, if not better, in more modest surroundings, such as going to a nearby professional theater or watching a Hollywood movie in the classroom.[10]

Forum's School's desire for greater certainty is understandable, but it is impractical to expect the Department to devise an exhaustive list of the universe of all possible financial abuses. Leaving anything out would be an invitation to fill the vacuum. Placing a dollar ceiling on field trip costs, as Forum School has also proposed, would be an unsatisfactory alternative, because private schools that otherwise spend less than the top amount might be encouraged to increase their

[10] New Jersey boasts a variety of excellent quality theaters, including the New Jersey Performing Arts Center in Newark, the Paper Mill Playhouse in Millburn, the Shakespeare Theater at Drew University in Madison, McCarter Theater in Princeton, the Crossroads Theater in New Brunswick and Harms Hall in Englewood.

expenditures up to the limit. In any event, the legal authority to write regulations is entrusted to the Commissioner and the State Board of Education, N.J.S.A. 18A:46-21, and those public officials have chosen to express the limit in terms of overall reasonableness.

Finally, the happenstance that the Department did not disallow costs associated with Forum School's prior field trips to Broadway shows over the last nine years does not preclude it from disallowing unreasonable costs in FY '07. Estoppel connotes a change in position by a person to his detriment in reliance upon the word or conduct of another. Rossum v. Jones, 97 N.J. Super. 382, 392 (App. Div. 1967). Equitable estoppel is rarely applied against public entities, particularly when estoppel would interfere with essential governmental functions. Nonetheless, equitable considerations are relevant to assessing governmental conduct, Skulski v. Nolan, 68 N.J. 179, 198 (1975), and may be invoked to prevent manifest injustice. Vogt v. Borough of Belmar, 14 N.J. 195, 205 (1954). See also, O'Malley v. N.J. Dep't of Energy, 109 N.J. 309, 316 (1989).

Present circumstances weigh heavily against estopping the Department from recovering monies rightfully owed to the sending public school districts. Nothing on the record indicates that the Commissioner or other Department official affirmatively represented to Forum School that it was appropriate to use public money to purchase Broadway theater tickets. It is unclear whether the Department was even aware that Forum School had been engaging in this practice. State regulations provide that the Department will conduct a fiscal monitoring of an approved private school for the disabled "at least every six years." N.J.A.C. 6A:23-4.13. The record does not reveal how many times in the last nine years the Department's auditors actually examined Forum School's financial books or when was the last time that a fiscal monitoring occurred. Certainly there is no evidence that the Department auditors had previously uncovered the expenditures for Broadway tickets or given any assurances that such payments were allowable costs. In sum, Forum School did not reasonably rely on past promises by the Department that it would not seek recovery of unreasonable costs in future fiscal years.

Order

It is **ORDERED** that summary decision is granted in favor of the Department dismissing the appeal of Forum School.

And it is **ORDERED** that Forum School's motion for summary decision in denied.

This recommended decision may be adopted, modified or rejected by the **COMMISSIONER OF THE DEPARTMENT OF EDUCATION,** who by law is authorized to make a 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.

March 31, 2006
DATE

KEN R. SPRINGER, ALJ

Receipt Acknowledged:

E-mail Receipt of Initial Decision Confirmed by the Department of Education on:

April 3, 2006
DATE

Mailed to Parties:

DIRECTOR AND CHIEF ADMINISTRATIVE LAW JUDGE

APR 4 2006
DATE

OFFICE OF ADMINISTRATIVE LAW

al

171-06

OAL DKT. NO. EDU 44-06
AGENCY DKT. NO. 341-11/05

J.E.V.-H., on behalf of minor child, E.J.V.-H.,	:	
PETITIONER,	:	
V.	:	COMMISSIONER OF EDUCATION
BOARD OF EDUCATION OF THE MAINLAND REGIONAL HIGH SCHOOL DISTRICT, ATLANTIC COUNTY,	:	DECISION
RESPONDENT.	:	
	:	

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

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

IT IS SO ORDERED.

Lucille Edy

ACTING COMMISSIONER OF EDUCATION

Date of Decision: 5/04/06

Date of Mailing: 5/04/06

State of New Jersey
OFFICE OF ADMINISTRATIVE LAW

INITIAL DECISION
SETTLEMENT
OAL DKT. NO. EDU 44-06
AGENCY DKT. NO. 341-11/05

J.E. V.-H. ON BEHALF OF MINOR CHILD, E.J. V.-H.,
Petitioner,
v.
BOARD OF EDUCATION OF THE MAINLAND REGIONAL HIGH SCHOOL DISTRICT, ATLANTIC COUNTY,
Respondent.

Barbara J. Lieberman, Esq., for petitioner

Louis J. Greco, Esq., for respondent

Record Closed: April 4, 2006 Decided: April 5, 2006

BEFORE **EDGAR R. HOLMES,** ALJ, T/A:

This matter was transmitted to the Office of Administrative Law on November 16, 2004, for determination as a contested case, pursuant to N.J.S.A. 52:14B-1 to -15 and N.J.S.A. 52:14F-1 to -13.

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

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

1. The parties have voluntarily agreed to the settlement as evidenced by their signatures or their representatives' signatures and as placed on the record on March 20, 2006.

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

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

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

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

April 5, 2006
DATE

EDGAR R. HOLMES, ALJ, T/A

Receipt Acknowledged:

4-10-06
DATE

DEPARTMENT OF EDUCATION

Mailed to Parties:

APR 10 2006
DATE

DIRECTOR AND CHIEF ADMINISTRATIVE LAW JUDGE

OFFICE OF ADMINISTRATIVE LAW

/sd

Louis J. Greco
642 Bay Avenue
Somers Point, NJ 08244
(609) 601-0500
Attorney for Respondent

RECEIVED

2006 APR -4 P 1:59

STATE OF NEW JERSEY
OFFICE OF ADMIN LAW

J.V.H. o/b/o E.V.H.	:	BEFORE THE OFFICE OF ADMINISTRATIVE LAW
, Petitioner	:	OAL Docket #: EDU 44-06 Agency #: 341-11/05
vs.	:	
MAINLAND REGIONAL HIGH SCHOOL DISTRICT BOARD OF EDUCATION	:	Stipulation of Settlement and Dismissal
, Respondent	:	

The parties to the within matter having amicably resolved their differences do hereby agree as follows:

1. Mainland Regional High School District Board of Education shall withdraw its notice of non-eligibility and shall admit E.V.H. to Mainland Regional High School.

2. J.V.H. shall pay to Mainland Regional High School tuition in the amount of $4,000 within 7 days.

3. J.V.H. and Mainland Regional High School District Board of Education hereby mutually release each other from any and all liabilities in regard to enrollment of E.V.H. in Mainland Regional High School and the Notice of Ineligibility issued by Mainland Regional Board of Education.

4. The dismissal of this action shall be with prejudice as to tuition claims for past dates but without prejudice as to future acts by either party and shall be subject to the receipt of tuition in the amount of $4,000.00.

Dated: March 22, 2006

Jan E. Van Holt

Jan Van Holt

Dr. Russell Dever, Superintendent
Mainland Regional High School
District Board of Education

Barbara Lieberman, Esquire
Attorney for Jan Van Holt

Louis J. Greco, Esquire
Attorney for Mainland Regional High
School District Board of Education

170-06

OAL DKT. NO. EDU 13143-05
AGENCY DKT. NO. 236-9/05

R.K., on behalf of minor children, N.K., A.K. and M.K.,	:	
PETITIONER,	:	
V.	:	COMMISSIONER OF EDUCATION
BOARD OF EDUCATION OF THE BOROUGH OF RIDGEFIELD, BERGEN COUNTY,	:	DECISION
RESPONDENT.	:	

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

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

IT IS SO ORDERED.

Lucille Eday

ACTING COMMISSIONER OF EDUCATION

Date of Decision: 5/04/06

Date of Mailing: 5/04/06

State of New Jersey
OFFICE OF ADMINISTRATIVE LAW

INITIAL DECISION

SETTLEMENT

OAL DKT. NO. EDU 13143-05
AGENCY DKT. NOS. 236-9/05

R.K. O/B/O MINOR CHILDREN, N.K., A.K. AND M.K.,

Petitioners,

v.

BOARD OF EDUCATION OF THE BOROUGH OF RIDGEFIELD, BERGEN COUNTY,

Respondent.

Arthur E. Balsamo, Esq., for petitioners

Stanley Turitz, Esq., for respondent (Ferrara, Turitz, Harraka & Goldberg, attorneys)

Record Closed: March 30, 2006 Decided: March 30, 2006

BEFORE **EDITH KLINGER,** ALJ:

This matter was transmitted to the Office of Administrative Law on December 19, 2002, for determination as a contested case pursuant to N.J.S.A. 52:14B-1 to -15 and N.J.S.A. 52:14F-1 to -13.

The parties have agreed to settle this matter and have prepared the attached Settlement Agreement indicating the terms of settlement, which was received by the undersigned on March 30, 2006

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

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

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

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

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

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

March 30, 2006
DATE

EDITH KLINGER, ALJ

Receipt Acknowledged:

April 5, 2006
DATE

DEPARTMENT OF EDUCATION

Mailed to Parties:

APR 07 2006
DATE

DIRECTOR AND CHIEF ADMINISTRATIVE LAW JUDGE
OFFICE OF ADMINISTRATIVE LAW

pb

SETTLEMENT AGREEMENT

This Settlement Agreement (hereinafter referred to as the "Agreement") between Plaintiff Kirkor Keisoglu and Rita Keisoglu individually and as parents and natural guardians of N.K., A.K. and M.K. and Defendant **RIDGEFIELD BOARD OF EDUCATION** (hereinafter "Board of Education").

WHEREAS, the Board of Education refused to allow the minor child of Kirkor Keisoglu and Rita Keisoglu to continue its education in the Ridgefield School District because the Board of Education believed that the minor child was not domiciled in Ridgefield;

RECEIVED
STATE OF NEW JERSEY
2006 MAR 31 A 9:00

WHEREAS, Kirkor Keisoglu and Rita Keisoglu commenced an action against the Board of Education with the Commissioner of Education captioned Kirkor Keisoglu and Rita Keisoglu individual and as parents and natural guardians of N.K., A.K. and M.K. v. the Public School District of the Borough of Ridgefield, Bergen County, Agency Docket No. EDU/131-43-05 (hereinafter referred to as "the Action"), disputing the Board of Education's determination that the minor children were not domiciled in Ridgefield;

WHEREAS, Kirkor Keisoglu and Rita Keisoglu and the Board of Education desire to resolve all outstanding issues with respect to the Action.

NOW, THEREFORE, in consideration of the terms and conditions set forth herein, the Kirkor Keisoglu and Rita Keisoglu and the Board of Education agree as follows:

1. The Kirkor Keisoglu and Rita Keisoglu will make one year tuition payments for two minor children N.K. and A.K. totaling $10,060.00 payable on signing this Agreement. Said payment shall be to Ferrara, Turitz, Harraka & Goldberg Trust Account.

2. The payment shall be held in escrow by the Board of Education attorney until this Agreement is approved by the Commissioner of Education.

3. Kirkor Keisoglu and Rita Keisoglu do not make any admissions regarding their domicile during the time period at issue in the Action.

4. The parties have read the above Settlement Agreement and have conferred with counsel regarding its contents and hereby agree to abide by its terms and conditions.

5. This Agreement is subject to approval by the judge of The Office of Administrative Law and the Commissioner of Education.

Ridgefield Board of Education

By: _____
R. Paul Vizzuso, Board Secretary

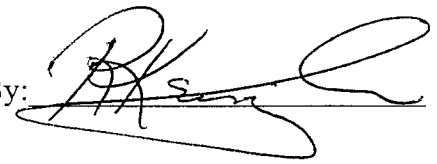
DATED: 3/28/06

Kirkor Keisoglu on behalf of the minor Children, N.K., A.K. and M.K

By: _____

DATED: 3-23-06

Rita Keisoglu on behalf of the
minor Children N.K., A.K. and M.K.

By: 

DATED: 3-23-06

G:\MAIN\SCHOOL\SB-7690\Settlement Agreement.wpd

174-06

OAL DKT. NO. EDU 2397-06
(EDU 8150-05 ON REMAND)
AGENCY DKT. NO. 203-8/05

L.B., on behalf of minor child, R.M.C.,	:	
PETITIONER,	:	
V.	:	COMMISSIONER OF EDUCATION
BOARD OF EDUCATION OF LENAPE REGIONAL SCHOOL DISTRICT, BURLINGTON COUNTY,	:	DECISION
RESPONDENT.	:	

The record and notice of dismissal transmitted to the Commissioner by the Office of Administrative Law have been reviewed. It is noted that this matter was characterized as a Settlement, pursuant to *N.J.A.C.* 1:1-19.1, on the cover page of the Initial Decision. The Commissioner determines that, inasmuch as the parties have submitted a clear intent to dismiss this contested case and given that no settlement terms were brought to the record, this matter is appropriately categorized as a withdrawal under *N.J.A.C.* 1:1-19.2.

The Commissioner hereby approves the withdrawal and dismisses this matter.

IT IS SO ORDERED.*

Lucille Eday
ACTING COMMISSIONER OF EDUCATION

Date of Decision: 5/08/06

Date of Mailing: 5/08/06

* This decision may be appealed to the State Board of Education pursuant to *N.J.S.A.* 18A:6-27 *et seq.* and *N.J.A.C.* 6A:4-1.1 *et seq.*

State of New Jersey
OFFICE OF ADMINISTRATIVE LAW

INITIAL DECISION

SETTLEMENT

OAL DKT. NO. EDU 2397-06

ON REMAND OAL DKT. NO. EDU 8150-05

AGENCY DKT. NO. 228-8/05

L.B., ON BEHALF OF MINOR CHILD, R.M.C.,

Petitioners,

v.

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

Respondent.

L.B., on behalf of R.M.C., petitioner, pro se

Susan S. Hodges, Esq., for respondent (Archer & Greiner, attorneys)

Record Closed: April 12, 2006 Decided: April 13, 2006

BEFORE **PATRICIA M. KERINS**, ALJ:

This matter was transmitted to the Office of Administrative Law on April 5, 2006, 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 March 28, 2006, the record in this matter was returned to the Commissioner of Education based on a withdrawal by the parties. It was remanded by the Acting Commissioner of Education on April 5, 2006, on the grounds that the Stipulation of Dismissal between the parties was not provided to the Commissioner.

The Stipulation of Dismissal executed by the parties is attached and fully incorporated herein.

I have reviewed the record and I **FIND** that the parties have voluntarily agreed to the Stipulation of Dismissal as evidenced by their signatures or their representatives' signatures.

I **CONCLUDE** that this Stipulation of Dismissal concludes these proceedings, and therefore **ORDER** a dismissal of this matter.

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

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

April 13, 2006
DATE

Patricia M. Kerins
PATRICIA M. KERINS, ALJ

Receipt Acknowledged:

4-18-06
DATE

Karen Lemesky
DEPARTMENT OF EDUCATION

Mailed to Parties:

APR 19 2006
DATE

OFFICE OF ADMINISTRATIVE LAW

PMK/bdt

ARCHER & GREINER
A Professional Corporation
One Centennial Square
Haddonfield, NJ 08033
(856) 795-2121
Attorneys for Respondent, Lenape Regional High School District Board of Education

BY: SUSAN S. HODGES, ESQUIRE

RECEIVED
2006 MAR 24 A 10:27
STATE OF NEW JERSEY
OFFICE OF ADMIN LAW

L.B., on behalf of minor child, R.M.C., Petitioner, v. BOARD OF EDUCATION OF THE LENAPE REGIONAL HIGH SCHOOL DISTRICT, Respondent.	STATE OF NEW JERSEY OFFICE OF ADMINISTRATIVE LAW Docket No. 203-8/05 **STIPULATION OF DISMISSAL**

The matter in difference in the above entitled action having been amicably adjusted by and between the parties, it is hereby stipulated and agreed that the same be and it is hereby dismissed without costs against either party.

Minister Lonneice Badley
LONNEICE BADLEY, *Pro Se*

DATED: 3/17/06

ARCHER & GREINER, P.C.
Attorneys for Respondent

BY: _____
SUSAN S. HODGES

DATED: 3/20/06

#177-06S

177-06

RECORD SEALED

BOARD OF EDUCATION OF THE TOWNSHIP OF DELAWARE, HUNTERDON COUNTY,

PETITIONER,

V.

NEW JERSEY DEPARTMENT OF EDUCATION,

RESPONDENT.

COMMISSIONER OF EDUCATION

DECISION

SYNOPSIS

Petitioning Board of Education appealed the Department's determination that it was legally responsible to pay the educational costs for pupil S.W., a minor now being educated at KidsPeace, a private school where he was placed by the Division of Youth and Family Services (DYFS) during the 2004-2005 school year. S.W., Sr., the custodial parent, had been evicted from a residence in the Delaware Township school district a month prior to the child's placement at KidsPeace, and subsequently moved back to his parent's home in Flemington. Petitioner contends therefore that S.W., Sr. was not homeless at the time that S.W. was placed at KidsPeace, and that the provisions of *N.J.S.A.* 18A:7B-12(c) do not apply.

The ALJ concurred with the petitioner, finding, *inter alia*, that: "homeless" is not a proper description of S.W., Sr.'s situation; S.W., Sr.'s residency at his parents home cannot necessarily be construed as temporary, and his intent to leave cannot be the determining factor in identifying him as homeless; S.W., Sr. was never in any real sense "homeless"; and statutory liability for funding the educational costs rests with the district in which the parent resides, therefore petitioner is not responsible for these expenses. In so determining, the ALJ relied upon two prior cases in which the Commissioner decided that students and their parents were not homeless. The ALJ ordered the record of this matter sealed.

The Commissioner found, *inter alia,* that: the court order placing S.W. in KidsPeace was issued while S.W., Sr., resided in Delaware Township; at the time of the Department's determination, an assessment of the permanence of S.W., Sr.'s residence with his parents would have been premature; the cases upon which the ALJ relied are not apposite to the present case; petitioner did not meet its burden to show that the Department's assignment of educational costs was arbitrary, capricious or unreasonable; there is no evidence that S.W., Sr. had a legal right to remain in his parents' home, and it was reasonable for the Department not to assume that this would be his permanent home. Accordingly, the Commissioner rejects the ALJ's determination regarding S.W.'s educational costs for the 2004-2005 school year; orders petitioner to pay same; remands the case to the OAL for a determination concerning whether petitioner remained the responsible district for S.W.'s educational costs after June 2005; and adopts the ALJ's order to seal the record, but not the 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.

May 10, 2006

OAL DKT. NO. EDU 08011-05S
AGENCY DKT. NO. 222-8/05

BOARD OF EDUCATION OF THE TOWNSHIP OF DELAWARE, HUNTERDON COUNTY,	:	
PETITIONER,	:	COMMISSIONER OF EDUCATION
V.	:	DECISION
NEW JERSEY DEPARTMENT OF EDUCATION,	:	RECORD SEALED
RESPONDENT.	:	

The record, Initial Decision and parties' exceptions and reply exceptions in this matter have been reviewed.[1] The Commissioner notes that the issue to be determined, whether the Delaware Township school district is liable for the educational costs of a classified student's residential school placement, is fact sensitive. Consequently, the absence of a transcript of the hearing in the Office of Administrative Law (OAL), and the limited number of specific findings of fact in the Initial Decision has restricted the Commissioner's ability to evaluate certain factual contentions as to which the parties disagree. Nonetheless, the Commissioner believes that there is sufficient evidence in the record to render a modified decision.

The controversy centers on the minor child, S.W. The parties agree that in April 2003, custody of S.W. was awarded to S.W., Sr., who resided at the time in his parents' home in Flemington. Six months later, in November 2003, S.W., Sr. moved with his children to Delaware Township. S.W. attended school in Delaware Township from November 2003 until January 21, 2005, at which time the New Jersey Division of Youth and Family Services (DYFS)

[1] Petitioner's "sur-reply letter brief" dated March 6, 2006 was not considered, as there is no provision for such consideration in *N.J.A.C.* 1:1-18.4.

removed him from his father's residence in Delaware Township, pursuant to an agreement signed by his father, and placed him temporarily in a Catholic Charities Diagnostic Center in Bridgewater, New Jersey. (Respondent's Exhibit at 4-5)

It appears that by court order dated February 24, 2005, the Hunterdon Division of Youth and Family Services was authorized to place S.W. in a private residential facility, i.e., KidsPeace, in Orefield, Pennsylvania. (Respondent's Exhibit at 3-4) Subsequently, S.W., Sr. was evicted from his residence in Delaware Township. According to case worker contact sheets that were included in a file produced by DYFS to the OAL, S.W., Sr. went to stay with his parents in Flemington at some point between March 15 and April 8, 2005.[2] On April 7, 2005, S.W. was delivered to KidsPeace. *(Ibid.)*

A DYFS case worker contact sheet dated April 22, 2005 memorialized an April 12, 2005 conversation between a case worker and S.W., Sr. wherein S.W., Sr. indicated that he did not plan to be at his parents' residence for a long time. He apparently so testified at the OAL hearing, and the ALJ found that testimony to be credible. (Initial Decision at 3) Another conversation between S.W., Sr. and a DYFS case worker on May 20, 2005 – memorialized on a May 23, 2005 DYFS contact sheet – indicated that S.W., Sr. was still trying to find a way to leave his parents' residence.

In the meanwhile, on April 21, 2005, Karen Gagne – the State Responsible Student Coordinator for the Office of Education in the Department of Human Services – sent Raymond Hofelder, of the Department of Education's Office of School Funding, a form containing information offered to enable him to determine the district of residence for S.W., for the purpose of assigning responsibility for the costs of S.W.'s educational expenses in the

[2] The Commissioner cannot ascertain whether the materials in this DYFS file were marked as exhibits at the OAL hearing, but a letter dated December 5, 2005, from the ALJ to the parties gave them notice, pursuant to *N.J.A.C.* 1:1-15.2, that the ALJ deemed them relevant to the case.

KidsPeace facility. (Respondent's Exhibit at 1-7) The form described S.W., Sr. as "transient," (Respondent's exhibit at 3) and stated that S.W., Sr. "became transient" from his Delaware Township address on County Road "approx. the end of March 2005." (Respondent's Exhibit at 5) After reviewing the information from the Department of Human Services, Hofelder assigned financial responsibility for S.W.'s placement to Delaware Township because it was the "[d]istrict where father last resided before becoming homeless" and he was "[h]omeless at time of placement." (Respondent's Exhibit at 7) Accordingly, by letter dated May 5, 2005, Yut'se Thomas, Director of the Office of School Funding, notified petitioner that it was responsible for S.W.'s educational costs for the 2004-2005 school year. (Respondent's Exhibit at 8)

Petitioner challenged the determination by letter dated May 23, 2005 from petitioner's attorney. Before responding, Hofelder requested verification from DYFS of the information it had provided concerning S.W., Sr. Gagne forwarded him a copy of an internal communication, dated June 20, 2005, from Nicole Palumbo, the DYFS employee who had placed S.W. Palumbo conveyed both her personal knowledge about the facts relating to S.W.'s placement, and the information she received from S.W.'s current caseworker.

Palumbo explained that at the time she was assigned to S.W.'s case, she learned of S.W., Sr.'s eviction and change of location from his incarcerated girlfriend. When Palumbo contacted S.W., Sr., he indicated that he was temporarily staying with his parents to allow him to save money to acquire a "nicer place" for when his children returned to him. (Respondent's Exhibit at 10) On June 25, 2005, Palumbo spoke with a subsequent case worker who had been assigned to S.W., and had just visited S.W., Sr. This case worker told Palumbo that S.W., Sr. still maintained that he was with his parents temporarily to save money. *(Ibid.)*

On August 11, 2005 – after receipt of the update from Palumbo, via Gagne – Yut'se Thomas (now an Assistant to the Commissioner of Education) sent another letter to petitioner upholding respondent's original decision that S.W., Sr. was homeless; that the Delaware Township School District was the last district in which S.W., Sr. resided before becoming homeless; and that, consequently, petitioner is responsible for the costs of S.W.'s education for the 2004-2005 school year. (Respondent's Exhibit at 11-12) The facts articulated as the bases for this determination were: that S.W., Sr. was evicted from his residence in Delaware Township due to the inability to pay rent; that he moved in with his parents out of necessity; that he expressly told the DYFS caseworker that his stay with his parents was temporary, i.e., until such time as he could afford his own place; and that Delaware Township was consequently S.W., Sr.'s last district of residence before he became homeless. (Respondent's Exhibit at 12)

Petitioner filed its appeal with the Commissioner of Education (Commissioner) on August 31, 2005, the case was transmitted to the OAL on September 27, 2005, and a hearing was conducted on December 19, 2005.

In his Initial Decision, the ALJ made reference to *N.J.S.A.* 18A:7B-12, which requires a "district of residence" determination to serve as the basis for assignment of a student's educational costs. As the ALJ pointed out, *N.J.S.A.* 18A:7B-12b directs that the district of residence for a child who has been placed by a State agency in a private residential facility "shall be the present district of residence of the parent or guardian with whom the child lived prior to his most recent . . . placement by [the] State agency." (Initial Decision at 1-2) The Commissioner notes that, similarly, *N.J.A.C.* 6A:23-5.2(a)(2) states:

> The "present district of residence" of a child placed by a State agency in a . . . private school or out-of-state facility also referred

> to in the first paragraph of *N.J.S.A.* 18A:7B-12b means the New Jersey district of residence of the child's parent(s) or guardian(s) as of the date of the child's initial placement by the State agency.

In his Initial Decision the ALJ also made references to *N.J.S.A.* 18A:7B-12c, which informs that: "[t]he 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." Further, *N.J.S.A.* 18A:7B-12c characterizes a 'homeless' person as "an individual who temporarily lacks a fixed, regular and adequate residence." (*Id.* at 2) The Commissioner notes, in addition, that *N.J.A.C.* 6A:17-2.3 characterizes a child as homeless when he or she resides in – among other alternatives – "the residence of relatives or friends with whom the homeless child is temporarily residing out of necessity because the family lacks a regular or permanent residence of its own." *N.J.A.C.* 6A:17-2.3(a)(3).

The ALJ correctly explained that it is the Department of Education (Department) that determines the district of residence for a student placed by a State agency in a residential facility. *N.J.A.C.* 6A:23-5.2(b). That determination is made using information provided by the placing agency, in this case DYFS. (*Id.* at 2-3)

The information that DYFS provided to the Department is in the record for this case. It establishes that S.W. had lived with his father and attended school in petitioner's district for over a year prior to his removal from the home by DYFS on January 21, 2005. When DYFS obtained a court order – on February 24, 2005 – to send S.W. to KidsPeace, his father still lived in petitioner's district. On April 7, 2005 – when S.W. was physically transferred to KidsPeace – S.W., Sr. may have left petitioner's district, but the DYFS record is not precise. Neither party has established the date between March 15 and April 8 on which S.W., Sr. moved into his

parents' house. The Initial Decision contains no specific finding of fact on this point, and the Commissioner was not provided with a transcript from which she could seek relevant testimony.

In light of the foregoing, the specifics of which were not directly addressed by either the ALJ or the Department in the context of the statutory language in *N.J.S.A.* 18A:7B-12b, the Commissioner must consider the possibility that the petitioner is the correct assignee for S.W.'s educational costs under the terms of that statutory provision. Since S.W., Sr. was living in Delaware Township on the date DYFS obtained a court order approving S.W.'s placement at KidsPeace, and may or may not have finished moving to his parents' house on April 7, 2005, when S.W. arrived at KidsPeace, the Commissioner cannot categorically rule out – based on the record before her – that at the time of S.W.'s placement at KidsPeace, the "present district of residence of the parent or guardian with whom the child lived prior to his most recent . . . placement by a State agency" was petitioner's district. Further, the Commissioner notes that when a determination about the parent or guardian's district of residence cannot be made, the district in which the child resided prior to his or her state placement is designated to pay for the child's educational expenses. *N.J.S.A.* 18A:7B-12b. That district was Delaware Township.

The analysis used by the Department to assign responsibility for S.W.'s educational costs, however, appeared to turn on the issue of homelessness. It was *N.J.S.A.* 18A:7B-12c (see also *N.J.A.C.* 6A:23-5.2(g)) upon which the Department relied in making its determinations about S.W.'s educational costs. Thus, the ALJ analyzed same in evaluating petitioner's claims. The Initial Decision recites (but makes no specific finding of fact) that S.W., Sr. had been living with his parents in the Flemington-Raritan School District at the time the Department made its cost assignment determination. (Initial Decision at 2) Despite

the fact that S.W., Sr. consistently maintained that his stay with his parents was temporary, the ALJ rejected the Department's determination that S.W., Sr. was homeless at the time of his son's placement to KidsPeace. More specifically, while recognizing that the Department's determination was entitled to deference (Initial Decision at 3), the ALJ ultimately concluded that S.W., Sr. was never homeless, and that responsibility for S.W.'s educational costs should have been conferred on the Flemington-Raritan School District "from the time of [his] eviction and relocation to his parents' home." (Initial Decision at 7)

At the same time, the ALJ noted that "it may be felt by the Commissioner or the State Board that it is more appropriate that some period of time pass between the date when Mr. W. was evicted and moved in with his parents until that point in time when the stay with his parents became 'sufficiently fixed, regular and adequate so as to preclude a finding of homelessness.'" If so, the ALJ's recommendation was that petitioner pay S.W.'s educational costs only through the end of the 2004-2005 school year and the summer of 2005, if applicable. *(Ibid.)*

In disagreeing with the Department that S.W., Sr. was homeless at the time it assigned responsibility for S.W.'s educational costs, the ALJ discussed the provision in *N.J.S.A.* 18A:7B-12c which states: "[f]or the purpose of this amendatory and supplementary act, 'homeless' shall mean an individual who temporarily lacks a fixed, regular and adequate residence." The ALJ observed that there was "no contention that [S.W., Sr.'s] parents' home was not a permanent structure or that it was not physically adequate to serve as a dwelling in which the parents and their son could reside." (Initial Decision at 3) He perceived the operative question to be how much weight to give S.W., Sr.'s perception that his parents' house was not his fixed and regular residence, but rather a temporary abode.

S.W., Sr. apparently testified at the OAL hearing – and the ALJ found credible his testimony – that he had believed his stay at his parent's house was temporary. *(Ibid.)* However, the ALJ did not believe that S.W.'s intent to stay only temporarily necessarily meant that his sojourn with his parents would be brief. The ALJ observed that it is not unusual for adult children to return to live with their parents after college, failed marriages, financial setbacks, or during periods of indecision about the paths to follow in their lives. In his view, while the children may regard their return to their parents' homes as temporary, "at some point the intent to leave might begin to seem more the dream than the attainable goal. For these reasons, mere intent cannot be the determining factor in identifying someone as homeless." (Initial Decision at 4)

In connection with these issues, the ALJ discussed two prior cases in which the Commissioner of Education decided that students and their parents were not homeless: *L.C. on behalf of B.C. v. Board of Education of the Township of Branchburg*, 96 *N.J.A.R.* 2d (EDU) 1003, and *Board of Education of the Township of Maurice River, Cumberland County, v. Board of Education of the City of Wildwood, Cape May County*, 93 *N.J.A.R.* 2d (EDU) 895.

In *L.C.*, a parent and child who had lived for years in Branchburg, were evicted and went to stay with a relative in Somerville. *L.C., supra,* 96 *N.J.A.R.* 2d at 1003. The parent viewed the move as temporary, but paid half of the rent and received mail at the apartment, even though her name was not on the lease. (*Id.* at 1003-1004) Almost five months after the parent and child moved to Somerville, the Branchburg Board of Education – having belatedly learned of same – voted that the parent and child were no longer domiciled in Branchburg, and that the child was consequently not entitled to a free education therein. (*Id.* at 1004)

The parent countered that she and her child were homeless, pursuant to *N.J.A.C* 6A:17-2.3(a)(3), which states that a child may be considered homeless if he or she temporarily resides with relatives or friends out of necessity because the family lacks a regular or permanent address of its own. She argued that, pursuant to *N.J.S.A.* 18A:31-1(f) and *N.J.S.A.* 18A:7B-12(c), the Branchburg school district was responsible for her child's education because it was their district of residence when they became "homeless." (*Id.* at 1005)

The ALJ and Commissioner in *L.C.* determined that petitioner and her child were not domiciled in Branchburg, and were not homeless. While petitioner's transfer to her brother's apartment may have been initially characterizable as temporary, the particular facts of petitioner's living arrangements, both at the time of respondent's determination and at the time of the OAL hearing, supported the conclusion that her residence in her brother's apartment had become sufficiently fixed, regular and adequate to preclude a finding of homelessness. More specifically, the Commissioner found that "petitioner's brother's home [had], in the months since September 1995, effectively become petitioner's regular and fixed residence." (*Id.* at 1005-1006)

In *Maurice River*, a child, A.P., who had lived in the Wildwood school district moved with his mother to his grandmother's home in Maurice River in May 1991. The reason for the move was a "marital dispute." *Maurice River,* 93 *N.J.A.R.* 2d (EDU) at 896. From the beginning of the 1991-1992 school year until October 18, 1991, A.P. still attended school (a pre-first program) in Wildwood, because his mother was hoping for a reconciliation and a return to A.P.'s father's home in Wildwood. *(Ibid.)*

Because the reconciliation did not occur, A.P.'s mother enrolled him in the Maurice River school district on October 22, 1991. On the registration form, she placed a check

mark next to the following reason for A.P.'s enrollment in the Maurice River district: "We are out of necessity living with relatives or friends." *(Ibid.)* Two weeks later – after A.P.'s grandmother wrote a letter to the county welfare agency stating that A.P.'s family could no longer live with her – A.P. moved with his mother to an apartment in Maurice River, where they received a rent subsidy for a year. The family continued to live in the Maurice River apartment through the time of the hearing in the OAL, and after the rent subsidy expired. *(Id.* at 896-897*)*

It was the Maurice River Board of Education (petitioner), not A.P.'s mother, that contended that A.P. was homeless and accordingly demanded tuition payment from respondent Wildwood Board of Education. It based its determination of homelessness on 1) the above mentioned October 22, 1991 enrollment form that indicated that A.P. was living by necessity with a relative, and 2) information from county welfare agency employees that A.P.'s family – which was given a rent subsidy for the first year it lived in its Maurice River apartment – was homeless. *(Ibid.)*

The *Maurice River* ALJ and the Commissioner found that A.P. was not a homeless child during the 1991-1992 school year. (*Id.* at 897) They rejected the notion that receipt of a housing subsidy signifies that the recipient is homeless; such subsidies are, in fact, provided to prevent homelessness. *(Ibid.)* They also rejected the idea that all persons living with relatives, even out of necessity, are homeless. *(Ibid.)* And they further pointed out that A.P.'s father still had a home in Wildwood. *(Ibid.)* The Commissioner adds that it is unclear, from the published facts in *Maurice River*, whether A.P.'s mother left the marital home by necessity, which could make a difference when applying the statutory and regulatory definitions of homelessness to the facts of the case.

The ALJ in the instant case considered *L.C.* and *Maurice River* to be precedent because in both those cases it was determined that parents (and their children) who stayed with relatives out of necessity were nonetheless not homeless for purposes of determining which school district was responsible for tuition. The ALJ concluded that S.W., Sr.'s situation was comparable to L.C.'s and B.P.'s (A.P.'s mother), and that his intention to stay with his parents only until he could save money for a place of his own was, like L.C.'s intention, not enough of a basis to characterize him as homeless. (Initial Decision at 3) As mentioned above, at the time of the OAL hearing, S.W., Sr. was still residing with his parents.

The Commissioner does not agree that *L.C.* and *Maurice River* are apposite to the present case. There appears to be no dispute that at the time of the Department's initial determination concerning S.W.'s educational costs, S.W., Sr. had very recently been evicted for non-payment of rent, and had unequivocally told his DYFS caseworker that he was temporarily staying with his parents to save money for a new residence. There is nothing to the contrary in the record before the Commissioner. Thus this case deviates from *L.C.* and *Maurice River* in that – at the time of the Department's determination – insufficient time had passed for the Department to assess whether S.W., Sr. would truly reside with his parents for a short stay, or make his stay more permanent. After-the-fact observation that at the time of the OAL hearing in December 2005, S.W., Sr. was still, after nine months, residing in his parents' home – suggesting some degree of permanence – did not render invalid the Department's May 5, 2005 decision about the 2004-2005 school year.

In addition, the present case is factually dissimilar from *Maurice River* in other ways. At the time of the Maurice River Board of Education's petition for tuition reimbursement, A.P.'s family had not only lived in Maurice River for five months, but A.P.'s mother had given

up her hope of returning to her husband in Wildwood and, by November 1 of the school year in question, the family had transitioned to its own apartment in Maurice River. Those circumstances were not conducive to a classification of homelessness, and bear little precedential value for the case now before the Commissioner.

Nor does the fact pattern in *L.C.* bear much similarity to the present case. The record before the Commissioner does not indicate whether, at the time of the Department's determination, S.W., Sr. had been regularly paying money toward his parents' household expenses, as the mother did in *L.C.*, or whether S.W., Sr. had taken any other actions in the few weeks he had been with his parents that would suggest his presence at his parents' residence might be more than short-lived. In the absence of same, the Department's conclusion that S.W., Sr. was homeless could not be characterized as unreasonable.

Further, *N.J.A.C.* 6A:17-2.4(c) and *N.J.A.C.* 6A:23-5.2(g) direct that the district of residence described in *N.J.S.A.* 18A:7B-12 shall continue to be the district of residence "for as long as the parent(s) or guardian(s) remain homeless." When S.W., Sr. was evicted, there were no more than three months left to the 2004-2005 school year. By the time an intelligent assessment of the permanence or transience of S.W., Sr.'s stay at his parents' home – and the ancillary determination about homelessness – could have been made, the school year would have been all but finished, and S.W.'s educational costs for the last three months would have been assignable to petitioner under those regulations.

A school district challenging the Department's determination about residency bears the burden of proving that the Department's determination was arbitrary, capricious or without reason. *State-Operated School District of the City of Newark v. New Jersey Dept. of Education, Division of Finances,* EDU 1370-98, Final Decision (March 22, 1999). The

Department's decision is entitled to a presumption of correctness. *Board of Education of the Borough of South River v. N.J. Department of Education,* EDU10117-98 (November 1, 2000). The Commissioner does not agree with the Initial Decision that petitioner met its burden to show that respondent's assignment of S.W.'s educational costs for the 2004-2005 school year was arbitrary, capricious or unreasonable.

The Commissioner also carefully reviewed both parties' exceptions. At the outset, the Commissioner notes that petitioner was correct in pointing out that the ALJ did not make specific factual findings in support of his determinations. However, the Commissioner can neither rely on petitioner's nor respondent's characterizations of the testimony at the OAL hearing because neither party provided a transcript of same.

The Commissioner does not agree with respondent that *J.S. on behalf of D.S. v. Parsippany-Troy Hills Township Board of Education, and J.S. on behalf of J.S. v. Parsippany-Troy Hills Township Board of Education,* OAL DKT. NO. EDS 1676-01, OAL DKT. NO. EDS 1677-01, CONSOLIDATED AGENCY DKT. NO. 01-4866, AGENCY DKT. NO. 01-4867 (March 19, 2001) present a fact pattern apposite to this case. In *J.S.,* petitioner and his family were living in the Parsippany-Troy Hills school district, where the children had been attending school, when they were evicted from their apartment in August 2000. (*J.S.* at 3) Some friends in Vernon Township allowed the family to stay with them, *gratis*, while J.S. searched for permanent housing. (*Ibid.*) At the beginning of September J.S. enrolled his children in the Vernon Township schools, using a note from Mr. K., the friend with whom the family was staying. (*Ibid.*) The note verified that J.S. and his family were residing with Mr. K. *(Ibid.)*

About two weeks later, however, Mr. K. asked J.S. and his family to leave. (*Ibid.*) After some nights in a hotel and one night in a car, J.S. and his family moved in with his

father in West Paterson, where they remained at least through the time of the OAL hearing, [which was in February of 2001]. *(Id.* at 4*)* The ALJ was asked to decide, *inter alia*, which district, between Parsippany-Troy Hills and Vernon Township, was responsible for the children's education. For some reason, neither party raised the issue of whether West Paterson should be the responsible district. (*Id.* at 9, n.4)

Petitioner demanded that his children be allowed to attend school in Vernon, arguing that Vernon was the last place the family resided before becoming homeless. (*Id.* at 5) The ALJ disagreed, finding that the facts made it obvious that J.S.'s friends in Vernon understood their hosting of J.S.'s family to be temporary. (*Id.* at 7) Thus, J.S.'s family did not have a fixed, regular and adequate residence in Vernon. *(Ibid.)* The district responsible for the children's education was, consequently, Parsippany-Troy Hills.

At the time of Vernon Township's notice to J.S. that they did not believe his children were entitled to a free education in Vernon Township, J.S.. and his family had already left Vernon Township, having only resided there for about a month. It was already clear that the Vernon residency was temporary. By way of contrast, the Department's determination in the instant case was made at a time when the nature of S.W., Sr.'s residency with his parents was not clear. In sum, *J.S.* neither supports nor hurts respondent's position.

Finally, a point raised in *Board of Education of the Township of Delran, Burlington County v. Board of Education of the City of Clifton, Passaic County*, OAL DKT. NO. EDU 04113-96S, AGENCY DKT. NO. 87-3/96 (December 23, 2004), bears some discussion in connection with the issues in the present case. In *Delran*, K.G. and her three children lived in Clifton for at least two years prior to November 1995, when they were evicted for failure to pay rent. (*Delran* at 2) From November 20, 1995 until January 18, 1996, K.G. and

her children stayed in an apartment in Delran with a J.M., and her children attended school in Delran for the two months. (*Ibid.*) K.G.'s name was not on the lease for the Delran apartment, and she had no approval from the apartment complex management to reside there. *(Ibid.)* On or about January 18, 1996, K.G. and the children relocated to Hackensack. *(Ibid.)*

Delran demanded tuition from Clifton for K.G.'s three children for the two months they attended school in Delran, asserting that under the regulation that preceded *N.J.A.C.* 6A:17-2.3(a)(3), K.G.'s children were homeless after they were evicted from their home in Clifton, and also during their stay – out of necessity – at J.M.'s apartment in Delran. (*Id.* at 1-2) Consequently, Delran maintained that responsibility for the children's education lay with Clifton. The ALJ agreed, and further observed that "[i]t can hardly be argued that residence in a home in which one has no legal right to remain is 'regular' or 'fixed.'" (*Id.* at 6) Thus, K.G.'s family's status while it was in Delran was "homeless." The ALJ explained that for purposes of tuition assignment, the concern was whether the district where the family stayed in an unauthorized arrangement should bear the costs for educating the children, rather than the district which was responsible for them before they became adrift. (*Ibid.*)

In his reference to "legal rights," the ALJ may have been alluding to petitioner's allegation that K.G. and her children did not have permission from the management of J.M.'s apartment complex to reside in J.M.'s apartment. However, this principle also applies to the fact that an individual who is not named on a dwelling's lease or deed does not have a legal right to reside in that dwelling, unless circumstances exist that bestow upon the individual an equitable right.

Notwithstanding the fact that it was his parents that S.W., Sr. went to after his eviction, there is no evidence showing that he had a <u>legal</u> right to remain in his parents' home,

either by the presence of his name on a lease or deed, or by an implied contract created by monetary or other types of contributions by him to the household or dwelling. Thus, when he went to his parents after the eviction, it was reasonable for the Department to refrain from jumping to the conclusion that his parents' home would be his permanent residence.

In summary, the Commissioner rejects the determination in the Initial Decision that respondent erred in assigning S.W.'s educational costs for the 2004-2005 year to petitioner, and orders petitioner to pay same. Further, the Commissioner declines to make any determinations about S.W.'s educational costs for the summer of 2005 or the 2005-2006 school year, as the record is insufficient to support same, and remands the case to the OAL for a determination concerning whether petitioner remained the responsible district for S.W.'s educational costs after June 2005. A copy of this decision will be simultaneously forwarded to the Flemington-Raritan Regional School District so that their Board may determine whether to intervene in this matter upon remand. Finally, the Commissioner adopts the ALJ's order for the sealing of the record (but not the decision).

IT IS SO ORDERED.[3]

Lucille E Davy

ACTING COMMISSIONER OF EDUCATION

Date of Decision: 5/10/06

Date of Mailing: 5/10/06

[3] This decision may be appealed to the State Board of education pursuant to *N.J.S.A.* 18A:6-27 *et seq.* and *N.J.A.C.* 6A:4-1.1 *et seq.*

185-06

185-05

REVISED DECISION

OAL DKT. NO. EDU 5653-05
AGENCY DKT. NO. 95-4/05

MYLES HOLMES,	:	
PETITIONER,	:	
V.	:	COMMISSIONER OF EDUCATION
BOARD OF EDUCATION OF THE CITY OF PASSAIC, PASSAIC COUNTY,	:	DECISION
RESPONDENT.	:	

On April 27, 2006, the Commissioner issued a decision in this matter which rejected the parties proposed settlement due to deficiencies in execution of the Settlement Agreement and she, therefore, remanded the case to the Office of Administrative Law (OAL) for revision of this document or – absent such revision – hearing on the matter's merits.

Subsequent to the issuance of this decision but prior to its remand to the OAL, counsel for the Board submitted a fully executed Settlement Agreement and Release, along with a copy of the Board's resolution approving the settlement, thereby fully curing the deficiencies cited by the Commissioner. Upon full review, the Commissioner approves the supplemented settlement and adopts the settlement as the final decision in this matter. This case is hereby dismissed, subject to the parties' compliance with the terms of the settlement.

IT IS SO ORDERED.*

Lucille E Davy
ACTING COMMISSIONER OF EDUCATION

Date of Decision: 5/18/06
Date of Mailing: 5/18/06

* This decision may be appealed to the State Board of Education pursuant to *N.J.S.A.* 18A:6-27 *et seq.* and *N.J.A.C.* 6A:4-1.1 *et seq.*

SETTLEMENT AGREEMENT AND RELEASE

RECEIVED BY
CONTROVERSIES
& DISPUTES
2005 MAY 11 AM 10: 29

This Settlement Agreement and Release ("Agreement") is made and entered into between the Board of Education of the City of Passaic, Passaic County (the "Board") and Myles Holmes ("Holmes"). This Agreement is made pursuant to the following terms and conditions.

RECITALS

WHEREAS, pursuant to a series of contracts, Holmes was employed by the Board as a janitorial employee since on or about December 12, 1994;

WHEREAS, on or about April 5, 2005, Holmes was notified by the Board that his employment was being terminated for cause;

WHEREAS, on or about April 19, 2005, Holmes filed a Petition with the Commissioner of Education, asserting that his termination by the Board violated his claimed tenure rights as a janitorial employee;

WHEREAS, the Board subsequently filed an Answer with Affirmative Defenses, denying that Holmes had obtained tenured employment status with the Board and that his rights had otherwise been violated;

WHEREAS, the matter was transferred to the Office of Administrative Law as a contested case and was docketed as EDUOR-05653-2005N;

WHEREAS, the parties have elected to settle all outstanding matters and allegations in dispute in lieu of a hearing so as to avoid expending further resources and to eliminate the uncertainties of litigation; and

WHEREAS, the Board and Holmes deem it to be in their best interests to set forth in a formal written agreement their respective rights, duties and obligations regarding Holmes's separation from employment with the Board; and

WHEREAS, the Board and Holmes are now mutually desirous of settling the matters and allegations in dispute; and

WHEREAS, all parties have been afforded the opportunity to consider the terms of this Agreement with advice of counsel and/or a representative of their choice;

NOW, THEREFORE, in consideration of the promises and the mutual covenants herein contained, and for other good and valuable considerations, the parties hereby agree as follows:

1. The "Board", as used herein, shall at all times mean the Board of Education of the City of Passaic, Passaic County, its affiliates, predecessors, successors and assigns of any and all of them, their present and former directors, officials, officers, representatives, associates, partners, servants, employees, agents, attorneys, and successors, whether in their individual or official capacities, and all other persons, firms, corporations, associations, partnerships or any other entity connected therewith.
2. "Holmes", as used herein, shall mean Myles Holmes, his heirs, representatives, privies, executors, administrators, assigns, successors-in-interest and predecessors-in-interest.
3. Holmes agrees that within fifteen (15) days of the execution of this Agreement, Holms will submit to the Board a letter of resignation effective February 1, 2006, Upon its receipt of the letter, the Board will be deemed as accepted Holmes's resignation effective February 1, 2006.
4. Within thirty (30) business days of the complete execution of this Settlement Agreement and General Release, the Board agrees to pay Holmes the gross sum of $38,248.95, less all applicable taxes, representing his back pay for the period of April 5, 2005 through January 31, 2006, plus all accrued sick and/or vacation time to which he may be entitled to as a result of his previous employment with the Board.
5. In consideration of the payment outlined in Paragraph 4 hereof, Holmes agrees to never seek reemployment or assert any tenure status with the Board at any time in the future in any capacity. Although the Board does not admit nor acknowledge that Holmes is a tenured employee of the Board, and in fact, contests his claimed status as a tenured employed, Holmes understands and agrees that by entering into this Settlement Agreement and General Release, he forever waives any claims, rights and privileges to tenured employment status he may have or may have had with the Board.
6. This Agreement is not and shall not in any way be construed as an admission by the Board of any acts of wrongdoing whatsoever, or that the Board, or any of its officers, members, agents, employees or representatives violated any federal or

state constitutional prohibitions or any federal, state or local law, statute, ordinance, regulation or public policy of the State of New Jersey. Instead, the parties have entered into this Agreement for the sole purpose of resolving all claims, both asserted and unasserted, in order to avoid the burden, expense, delay and uncertainties of litigation.

7. Holmes releases, acquits, gives up and forever discharges any and all claims and rights which he may have against the Board up to the time of the execution of this Settlement Agreement and General Release. This releases all claims, including those asserted in the matter of Holmes v. City of Passaic Board of Education, Passaic County, docketed before the Office of Administrative Law as EDUOR-05653-2005N, as well as any other claims of which Holmes is aware or unaware and those not mentioned in this Settlement Agreement and General Release. This Settlement Agreement and General Release applies to all claims resulting from any incident which may have occurred from the date of the alleged incident until now. Holmes specifically releases any and all claims for compensatory damages, pain, suffering, emotional distress, stress, humiliation, embarrassment, mental anguish, medical expenses, punitive damages, interests, attorneys fees, costs of suit, loss of sick time, loss of vacation time, loss of benefits, consequential damage, reputation damage, breach of express or implied contract, interference in any contract, economic opportunity or prospective economic advantage which arose out of or could arise, including but not limited to, violation of his 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, Title 18A of the New Jersey Statutes, the New Jersey Law Against Discrimination, New Jersey Conscientious Employee Protection Act, the federal Americans with Disabilities 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. Holmes hereby waives any and all relief not explicitly provided for herein.

8. Holmes and the Board expressly understand and agree that said payment includes any and all amounts that may be claimed by Holmes or on his behalf, or by his attorneys, heirs, successors or assigns, against the Board. Holmes and the Board agree and acknowledge that this Settlement Agreement and General Release is also contingent on and subject to approval and ratification by the Board of Education of the City of Passaic.

9. This settlement is intended as and for damages for any and all possible injuries and Holmes hereby waives any and all claims for lost wages, income or future earnings.

10. In any action commenced against Holmes to enforce the provisions of this Agreement, the Board, if it is the prevailing party, shall be entitled to recover its reasonable attorneys' fees, costs and disbursements incurred in prosecuting the action.

11. Holmes specifically acknowledges that the payment referred to in Paragraph 4 hereof constitutes any and all additional consideration not otherwise owed to him for this Settlement Agreement and General Release.

12. The parties and their attorney(s) agree and promise that they will not disclose, either directly or indirectly, in any manner whatsoever, any information regarding either: (a) the substance or existence of his charges and/or actions against the Board; or, (b) the existence, terms or contents of this Settlement Agreement and General Release, to any person or organization, including, but not limited to, any governmental agency, members of the press and media, present and former officers, employees and agents of the Board and other members of the public. This paragraph shall not preclude the parties or their attorney(s) from disclosing the existence or terms of this Settlement Agreement and General Release to governmental authorities that require such information. The parties may only state, without elaboration, as follows: "The situation has been resolved to the mutual satisfaction of Holmes and the Board." In the event that the Board is approached for a reference, the only information to be provided will be Holmes's date of hire, date of resignation and salary.

13. Holmes agrees that he shall not seek any further amount of money from the Board other than the amount set forth in Paragraph 4 hereof.

14. This Settlement Agreement and General Release contains the full agreement of Holmes and the Board and may not be modified, altered, changed or terminated except upon the express prior written consent of Holmes and the Board, which consent must be signed by Holmes and the Board, or their duly authorized agents.

15. The waiver by Holmes and/or the Board of a breach of any provision hereof shall not operate or be construed as a waiver of that breach by the other, or as a waiver of any subsequent breach by the other.

16. If any term, provision or condition of this Settlement Agreement and General Release is held invalid or unenforceable by a court of competent jurisdiction, such holding shall be without effect upon the validity or enforceability of any other provision, term or condition of this Settlement Agreement and General Release.

17. This Settlement Agreement and General Release shall be construed and interpreted in accordance with the laws of the State of New Jersey.

18. This Settlement Agreement and General Release may be executed in counterparts, with each of which shall be deemed to be an original copy, but all of which together shall be deemed one and the same instrument.

19. This Settlement Agreement and General Release shall become effective immediately following execution by Holmes and the Board, but shall be contingent upon approval by the Office of Administrative Law. In the event that approval is not given for this Agreement, Holmes shall immediately refund all monies provided to him hereunder to the Board.

20. Holmes and the Board shall each bear all of their own costs, expenses and attorneys feels arising from the prosecution or defense of this matter and in connection with this Settlement Agreement and General Release.

21. This Settlement Agreement and General Release contains the entire Agreement between Holmes and the Board with regard to the matters set forth in it, and shall be binding upon and inure to the benefit of their officials, officers, directors, attorneys, representatives, employees, associates, partners, agents, servants,

executors, administrators, personal representatives, heirs, successors and assigns of each, and all other persons, firms, corporations, associations or partnerships or any other entity or persons connected therewith, except as set forth herein or as may be agreed to in writing between the parties.

22. In entering into this Settlement Agreement and General Release, Holmes has relied upon the legal advice of his attorney, who is the attorney of his own choice, as to the terms of this Settlement Agreement and General Release which have been completely read and explained to him by his attorney and those terms are fully understood and voluntarily accepted.

23. This Settlement Agreement and General Release shall become effective immediately following execution by all of the following parties.

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

MYLES HOLMES

By: _____
Marvin L. Comick, Esq.

Dated: 3-1-06

By: Myles Holmes
MYLES HOLMES

Dated: 3/01/06

STATE OF NEW JERSEY)
)
COUNTY OF)

On 3-1, 2006, before me personally came MYLES HOLMES to me known and known to me to be the individual described in, and who executed, the foregoing Settlement Agreement and general Release, and duly acknowledged me that he executed the same.

Sworn to before me on
this 1 day of March, 2006.

_____
Notary Public
MARVIN L. COMICK
Attorney at Law
State of New Jersey

By: _____
Brad M. Weintraub, Esq.
Dated: 5/10/06

BOARD OF EDUCATION OF THE CITY OF PASSAIC

By: _____
Richard Diaz, Board President
Dated: _____

F:\WP-DATA\INS\MATTERS\85748 Settlement Agreement.doc

Approval of Payment for Babysitting for Parents who Attend After-School Workshops

Dr. Robert H. Holster, Superintendent of Schools, approves payment to the following staff member for babysitting for parents who attend the Parent Workshops after-school for two (2) hours a month from November 2005 through June 2006, for a total of 16 hours at the EAP contractual rate of $17.00 per hour.

Staff Member	*Position*
Annette Dean	Paraprofessional

Payment provided from Account No. 20-211-100-106-62-0051.

41. **Resolution Authorizing Settlement of Litigation**

WHEREAS, the PASSAIC BOARD OF EDUCATION is involved in a lawsuit challenging the termination of an employee, Myles Holmes, OAL Docket No. EDU 95-4/05; and

WHEREAS, it is in the best interests of the Passaic School District to settle this matter amicably;

NOW THEREFORE BE IT RESOLVED that the Passaic Board of Education hereby authorizes the Board Attorney to enter into an agreement settling and resolving this matter between the parties to this litigation, OAL Docket NO. EDU 95-4/05 in accordance with the approved settlement agreement between the parties; and

BE IT FURTHER RESOLVED that the Board Attorney and the Superintendent of Schools or his designee are authorized to take whatever action is necessary to effectuate the purposes of this resolution.

42. **Resolution Authorizing the Superintendent of Schools to Request Authorization from the Passaic County Superintendent to Permit the Emergent Hiring of New Employees**

WHEREAS, the New Jersey criminal history background check laws, N.J.S.A. 18A:6-4.13, et seq., N.J.S.A. 18A:6-7.1, et seq. and N.J.S.A. 18A:39-17, et seq. were revised, effective June 30, 1998; and

WHEREAS, the amendments to these laws prohibit the employment of individuals until the New Jersey State Department of Education, Criminal History Review Unit, notifies them and the Board of Education that they are authorized to work in a school district; and

WHEREAS, the amendments to these laws permit a school district to seek authorization from the County Superintendent to hire individuals on an emergent basis; and

WHEREAS, in order to provide continuity of instruction in the Passaic Public Schools, it will be necessary to fill vacant positions on an emergent basis so that schools can commence in an orderly fashion;

NOW THEREFORE BE IT RESOLVED that the Passaic Board of Education hereby authorizes the Superintendent of Schools of the Passaic Public School District to request authorization from the Passaic County Superintendent to permit the emergent hiring of the following individuals contingent upon the Passaic County Superintendent's approval:

187-06

OAL DKT. NO. EDU 2152-06
AGENCY DKT. NO. 84-2/06

M.R.Q. and A.R., on behalf of minor child, J.M.R.,	:	
PETITIONERS,	:	
V.	:	COMMISSIONER OF EDUCATION
BOARD OF EDUCATION OF THE TOWNSHIP OF HAMILTON, MERCER COUNTY,	:	DECISION
RESPONDENT.	:	

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

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

IT IS SO ORDERED.

Rochelle Hendricks
ACTING COMMISSIONER OF EDUCATION

Date of Decision: 5/23/06

Date of Mailing: 5/23/06

State of New Jersey
OFFICE OF ADMINISTRATIVE LAW

INITIAL DECISION

SETTLEMENT

OAL DKT. NO. EDU 2152-06

AGENCY DKT. NO. 84-2/06

M.R.O. AND A.R., ON BEHALF OF MINOR CHILD, J.M.R.,

Petitioner,

v.

BOARD OF EDUCATION OF THE TOWNSHIP OF HAMILTON, MERCER COUNTY,

Respondent.

M.R.O. and A.R., petitioners, pro se

Dennis M. DeSantis, Esq., for respondent (Destribats, Campbell, DeSantis, Magee & Staub, attorneys)

Record Closed: May 3, 2006 Decided: May 5, 2006

BEFORE **JOHN SCHUSTER III**, ALJ:

This matter was transmitted to the Office of Administrative Law on March 28, 2006, for determination as contested cases, pursuant to N.J.S.A. 52:14B-1 to -15 and N.J.S.A. 52:14F-1 to -13.

The parties appeared for a hearing on May 3, 2006. They conferred and agreed to a settlement and prepared a Settlement Agreement (J-1) memorializing the terms thereof, which is attached and fully incorporated herein.

After being placed under oath, the petitioners stated he fully understood and agreed to be bound by the terms of the settlement.

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

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

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

I **CONCLUDE** that this settlement agreement meets the requirements 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 **NEW JERSEY DEPARTMENT OF EDUCATION** for consideration.

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

May 5, 2006
DATE

JOHN SCHUSTER III ALJ

Receipt Acknowledged:

5-9-06
DATE

DEPARTMENT OF EDUCATION

Mailed to Parties:

MAY 11 2006
DATE

OFFICE OF ADMINISTRATIVE LAW

mh

EXHIBITS

Joint exhibit:

J-1 Settlement Agreement

J-1 Exhibit
5/3/06

M.R.O. and A.R.
O/b/o J.M.R.
Petitioners
V.

AGENCY DOCKET NO.:
84/2/06

HAMILTON TOWNSHIP
BOARD OF EDUCATION
Respondent

OAC DOCKET # EDU 2152-06

STIPULATION OF SETTLEMENT

1. J.M.R. shall be permitted to complete his Kindergarten class at Kisthardt School for 2005-2006.

2. The Petitioner shall not re-enroll J.M.R. in the Hamilton Township School District again unless ~~the~~ J.M.R. is domiciled in the Hamilton Township School District at an address other than at 2307 S. BLOAD STREET, HAMILTON, NJ.

3. Should the Petitioners enroll their Son J.M.R. illegally again in the Hamilton Township School District, the Petitioners shall then owe the Respondent $8,985.00 representing the per-pupil cost for their Son for the 2005-2006 school year. together with the cost for the additional school year.

Petitioners

Maria R. Olmeda
MARIA R. OLMEDA

Alberto Rodriguez
ALBERTO RODRIGUEZ

Respondent

Dennis M. Kleinsmith
Dennis M. Kleinsmith, attorney for Respondent

188-06

OAL DKT. NO. EDU 453-06
AGENCY DKT. NO. 29-1/06

W.B., on behalf of minor child, W.D.B.,	:	
PETITIONER,	:	
V.	:	COMMISSIONER OF EDUCATION
BOARD OF EDUCATION OF THE MAINLAND REGIONAL HIGH SCHOOL DISTRICT, ATLANTIC COUNTY,	:	DECISION
RESPONDENT.	:	
	:	

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

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

IT IS SO ORDERED.

Lucille Wag
ACTING COMMISSIONER OF EDUCATION

Date of Decision: 5/23/06

Date of Mailing: 5/23/06

State of New Jersey
OFFICE OF ADMINISTRATIVE LAW

INITIAL DECISION
SETTLEMENT
OAL DKT. NO. EDU 453-06
AGENCY DKT. NO. 29-1/06

W.B. O/B/O MINOR CHILD, W.D.G.,
Petitioner,
v.
BOARD OF EDUCATION OF THE MAINLAND REGIONAL SCHOOL, ATLANTIC COUNTY,
Respondent.

Elizabeth T. Logan, Esq., for petitioner (Law Offices of Charles A. Matison, Esq., P.C., attorneys)

Louis J. Greco, Esq., for respondent

Record Closed: May 4, 2006 Decided: May 8, 2006

BEFORE **EDGAR R. HOLMES,** ALJ, T/A

This matter was transmitted to the Office of Administrative Law on February 9, 2006, for determination as a contested case, pursuant to N.J.S.A. 52:14B-1 to -15 and N.J.S.A. 52:14F-1 to -13.

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

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

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

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

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

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

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

5/8/06
DATE

EDGAR R. HOLMES, ALJ, T/A

Receipt Acknowledged:

5-12-06
DATE

DEPARTMENT OF EDUCATION

Mailed to Parties:

MAY 15 2006
DATE

OFFICE OF ADMINISTRATIVE LAW

/sd

RECEIVED
2006 MAY -4 A 9:49
STATE OF NEW JERSEY
OFFICE OF ADMIN LAW

Louis J. Greco
642 Bay Avenue
Somers Point, NJ 08244
(609) 601-0500
Attorney for Respondent

Walter Brahmann, guardian and natural Parent of W.D.B.	:	BEFORE THE OFFICE OF ADMINISTRATIVE LAW
, Petitioner	:	OAL Docket #: EDU 453-06 Agency #: 29-1/06
vs.	:	
MAINLAND REGIONAL HIGH SCHOOL DISTRICT BOARD OF EDUCATION	:	Stipulation of Settlement and Dismissal
, Respondent	:	

The parties to the within matter having amicably resolved their differences do hereby agree as follows:

1. Mainland Regional High School District Board of Education shall withdraw its notice of non-eligibility and shall admit W.D.B. to Mainland Regional High School.

2. Walter J. Brahmann shall pay to Mainland Regional High School tuition in the amount of $4,000 within 14 days.

3. Walter J. Brahmann and Mainland Regional High School District Board of Education hereby mutually release each other from any and all liabilities in regard to enrollment of W.D.B. in Mainland Regional High School and the Notice of Ineligibility issued by Mainland Regional Board of Education.

4. The dismissal of this action shall be with prejudice as to tuition claims for past dates but without prejudice as to future acts by either party and shall be subject to the receipt of tuition in the amount of $4,000.00.

Dated: April 7, 2006

Walter J. Brahmann

Elizabeth T. Logan, Esquire
Attorney for Walter Brahmann

Louis J. Greco, Esquire
Attorney for Mainland Regional High School
District Board of Education

190-06

OAL DKT. NO. EDU
AGENCY DKT. NO. 170-5/06

SHAY STEELE, JOHN DOLLARD, AND THERESA KELLY,	:	
PETITIONERS,	:	
V.	:	COMMISSIONER OF EDUCATION
	:	DECISION ON MOTION
BOARD OF EDUCATION OF THE CITY OF ATLANTIC CITY, ATLANTIC 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 Deputy Commissioner, to whom this matter has been delegated pursuant to *N.J.S.A.* 18A:4-33, determines to adopt the recommended Order of the Administrative Law Judge (ALJ) for the reasons well expressed in her Order.

Accordingly, the recommended Order of the ALJ is adopted. The Board is hereby directed, as contemplated by the ALJ, to convene on May 26, 2006 to conduct its annual reorganization meeting, and shall at that time seat the three newly elected members – Shay Steele, Pamela Jones and Scott Evans – in conformance with Board policy and procedures. This matter shall proceed at the OAL for those proceedings necessary to bring it to conclusion.

IT IS SO ORDERED.*

Isaac Bryant
DEPUTY COMMISSIONER OF EDUCATION

Date of Decision: 5/23/06

Date of Mailing: 5/23/06

* This decision may be appealed to the State Board of Education pursuant to *N.J.S.A.* 18A:6-27 *et seq.* and *N.J.A.C.* 6A:4-1.1 *et seq.*

State of New Jersey
OFFICE OF ADMINISTRATIVE LAW

ORDER ON EMERGENT RELIEF

OAL DKT. NO. EDU 2874-06

AGENCY DKT. NO. 170-5/06

SHAY STEELE, JOHN DOLLARD,
AND THERESA KELLY,
Petitioners,

v.

BOARD OF EDUCATION OF THE
CITY OF ATLANTIC CITY,
ATLANTIC COUNTY,
Respondent.

Joan H. Langer, Esq., for Petitioners (Wilson, Elser, Moskowitz, Edelman & Dicker, attorneys)

Christopher A. Brown, Esq., for Respondent Atlantic City Board of Education (Brown and Bergman, attorneys)

Daniel J. Gallagher, Esq., for Intervenor Scott Evans (Miller and Gallagher, attorneys)

BEFORE **PATRICIA M. KERINS**, ALJ:

STATEMENT OF THE CASE

This matter arises out of the disputed elections results from the April 18, 2006 vote for three seats on the Atlantic City Board of Education (ACBOE), and the Board's attempts to reorganize itself as required by statute while challenges to those results are ongoing.

Petitioners are members of the Atlantic City Board of Education (ACBOE) who have filed a petition with the Commissioner of Education (Commissioner) seeking emergent relief. They request that the Board reorganization meeting held on May 9, 2006 be voided on the grounds that it violated the Open Public Meeting Act (OPMA), and that a quorum of its members was not present. They further allege that Board policies and procedures were violated in the manner in which the meeting was conducted, and that actions taken at the meeting were in violation of statutory provisions governing the award of contracts by school boards and conflicts of interest among school board members. Petitioners also request that the annual reorganization meeting of the ACBOE be postponed until the outcome of the election contests for the three new members is determined, and that the new members of the Board not assume office until the contests are decided.

PROCEDURAL HISTORY

On May 3, 2006, one of the newly elected members of the ACBOE, Scott Evans filed an action in the Superior Court of New Jersey, Atlantic County. Evans requested the Court order ACBOE members to attend an emergency reorganization meeting on May 5, 2006. On May 4, 2006, the Honorable Valerie H. Armstrong, A.J.S.C., entered an order dismissing his complaint (A-4(B)). The Court took the position that the issues relating to the Board and its reorganization were matters under the jurisdiction of the Commission of Education (A-4(F)). On May 9, 2006, the Petitioners filed a request for emergent relief with the Commissioner and asked that the reorganization meeting of the ACBOE scheduled for May 9, 2006, and the concomitant swearing in of its new officers be enjoined pending the outcome of the contested election results. On that same date, four of the already sitting ACBOE members, and two of the new members went forward with a reorganization meeting.

On May 12, petitioners filed an Amended Petition with the Commissioner, requesting that the reorganization meeting of May 9, 2006 be voided, and that the annual reorganization meeting, and the swearing in of new officers be enjoined until the

election challenges were decided. [1] On May 15, 2006, counsel for the respondent ACBOE and counsel for one of the newly elected members Scott Evans[2] filed responses to the Petition with the Commissioner. On May 16, 2006, the matter was transmitted to the Office of Administrative Law (OAL) for hearing as a contested case pursuant to N.J.S.A. 52:14F-1 to –13 and N.J.S.A. 52:14B-1 to -15.

On May 18, 2006, a hearing was held on the request for emergent relief at the offices of the OAL in Atlantic City, New Jersey. The Court on its own motion, pursuant to N.J.A.C. 1:1-16, granted intervenor status to Evans. After unsuccessful attempts to settle the matter, counsel for petitioners, the respondent ACBOE, and intervenor Scott Evans argued the matter, relying on the briefs and certifications submitted. All sides were given an opportunity to present witnesses at the hearing, or to reconvene on May 19, 20006 in Atlantic City to present testimony or other evidence. The parties chose to submit briefs and certifications to supplement the record. The record remained open until the morning of May 22, 2006.

FACTUAL DISCUSSION

Most of the salient facts in this matter are not in dispute. The ACBOE is currently an eleven member body. Due to population changes, a review is underway by state authorities as to whether one of the sending districts is entitled to another seat on the board. If so, the Board will become a twelve member body. Three of the eleven seats were at issue in the April 18, 2006 school election. At the close of the polls the winning candidates were Shay Steele (1,213 votes), George Crouch (1,056 votes) and John Devlin (885 votes).

[1] Petitioners also filed a Verified Complaint requesting the same relief with the Superior Court of New Jersey on May 15, 2006. By letter of May 17, 2006, Judge Armstrong again declined jurisdiction in favor of the Commissioner of Education. (A-4(F).

[2] Daniel Gallagher, counsel for Scott Evans was voted in as counsel for the ACBOE at the disputed May 9, 2006 meeting. Petitioners have raised an issue on the validity of his appointment under school board contracting and conflicts of interest statutes. Mr. Gallagher has entered an appearance in this matter solely on behalf of Scott Evans. The issues surrounding his appointment as counsel for the ACBOE are not addressed in this decision on petitioners' request for emergent relief.

On April 21 and 24, 2006, Steele, Crouch and Devlin requested the Superior Court to impound approximately 1,500 absentee and messenger ballots, citing voting irregularities. When the over 900 messenger ballots and the several hundred absentee ballots were counted, the vote total changed the winners to Scott Evans (1,610 votes), Pam Jones (1,590 votes) and Joel Nunez (1,472 votes). Shortly thereafter in early May, Judge Armstrong ordered a recount.

Before the recount could be completed, counsel for Scott Evans filed an action in Superior Court to require the ACBOE to reorganize itself at an emergency meeting on May 5, 2006, and in the absence of a quorum, that the newly elected candidates be allowed to participate in order to create a quorum. Judge Armstrong denied that request. Prior to the election, the ACBOE had scheduled and advertised May 2, 2006, as the date for its reorganization meeting. According to papers filed by Intervenor Evans (I-1), the meeting was cancelled by school officials due to the pendency of the recount. On that date, four of the Board members and three newly elected candidates appeared for the reorganization meeting. No meeting was held, but counsel for Evans asserts that he administered the oath of office to Scott Evans and Pamela Jones on that date. (I-1, page 2 and Exhibits C and D).

On May 8, 2006, the recount was conducted and the results were certified by the Atlantic County Clerk on May 9, 2006. The three certified winners were Scott Evans, Pamela Jones and Shay Steele. Officials of the ACBOE had rescheduled and advertised the reorganization meeting for May 9, 2006. Prior to that meeting however, the Petitioners advised ACBOE officials and counsel that they were moving before the Commissioner to enjoin the reorganization meeting pending the outcome of the election contests. Aware of the request to enjoin the meeting, and uncertain as to whether a quorum would exist for the meeting, the Superintendent of Schools, Fredrick P. Nickels (Nickels) contacted the eight sitting members of the Board and was informed that only four of the members would be present at the meeting. He then contacted outgoing Board President Cornell Davis, who advised him to cancel the meeting. He then notified the Board members and administrative staff that the meeting was cancelled, and provided notice of that cancellation to the media. (R-1 (2)).

Four of the sitting members of the Board, Stephen Bonanni, John Dollard, Theresa Kelly, and Rashun Stewart, and newly elected member Shay Steele provided Certifications that they were informed of the meeting's cancellation and therefore did not attend (A-4). Each also certified that they subsequently learned that a reorganization meeting was held on May 9, 2006, by four other sitting Board members, and two of the newly elected members, Evans and Jones. The record shows that while steps were taken by the School Superintendent to cancel the meeting and notify the public, four of the sitting Board members Rochelle Salway, Dolores Callaway, Stephanie Davies-Khan and Sophia LaPorte disagreed with that decision. Together with newly elected members Evans and Jones, they held a reorganization meeting on May 9, 2006. Since an oath of office had been administered by Daniel Gallagher, Esq., to Evans and Jones on May 2, 2006 (I-1, page 2, Exhibits C and D), the four sitting members who chose to attend the meeting and the two newly elected members took the position that a quorum existed. They convened the reorganization meeting and conducted business, including the hiring of counsel.

Intervenor Evans presented a series of Certifications from residents and staff who attended the disputed May 9, 2006 meeting (I-3). Each asserts that they did not receive notice of the cancellation and that they witnessed the two new members being sworn in and Board business being conducted. The meeting was conducted without the usual board administrative staff being present, including the Board Secretary who serves to take the official minutes of the meeting. At the hearing in this matter, neither the minutes of the disputed meeting, nor the transcript of the meeting were placed in the record.

Subsequent to the disputed meeting of May 9, 2006, Petitioners filed their Amended Petition with the Commissioner to void the actions taken at the May 9, 2006 meeting on the grounds that it violated the OPMA and that the meeting was conducted without a valid quorum being present. They also requested that the reorganization meeting not be held until the election contests have been decided, and that the Board continue to sit with its already sitting eight members. At the hearing in this matter, the

parties informed the court that election contests to the certified results of the vote had been filed in the Superior Court.

LEGAL DISCUSSION

The issues in this matter concern the attempts by members of the ACBOE to reorganize and conduct business while an election recount and election contests are ongoing. The first issue to be addressed is whether, pending the outcome of the election contests, the three newly elected board members should be allowed to assume their seats or whether the Board should continue with the already sitting eight members. The record shows that there are three duly certified winners of the April 18, 2006 election. Although the initial certification by the County Clerk and Board of Elections was overturned due to the court ordered recount of votes, the recount was completed on or about May 9, 2006 and the results were certified. There does not appear to be any statutory provision or relevant case law which bars the certified winners of the election from taking office. Nor is there any current order of a court of competent jurisdiction which prevents the winners from taking office pending the outcome of the election challenges currently pending in Superior Court. I therefore **FIND** that the certified winners of the April 18, 2006, school board election for Atlantic City may take office and petitioners' request to enjoin the seating of the newly elected members is **DENIED**.

The question then becomes when and in what manner, the certified winners of the election assume office. School districts in New Jersey are required by statute to reorganize themselves after the yearly school elections held in April. N.J.S.A. 18A:10-3 provides that each board "shall organize annually at a regular meeting held not later than at 8 p.m. at which time new members shall take office..." Depending on the type of school district, that meeting will occur either on May 16 or on a day during the first or second week following the school election. If the meeting cannot take place on the applicable date "by reason of lack of a quorum or for any other reason", the reorganization shall be held within three days thereafter. N.J.S.A. 18A:10-3. While the statute is silent on what should occur when, for whatever reason the reorganization

meeting does not take place, the statute's clear imperative is that a reorganization of boards and the seating of new members take place by May 19.

Both the statute and the ACBOE policy 0163 (A-2(C) assume that the new members will "take office" at the reorganization meeting. Petitioners therefore object to the disputed reorganization meeting held on May 9, 2006, on the grounds that the meeting was invalid due to the lack of a quorum. Since only four of the Board's sitting members were present, they argue that the two newly elected members could not be counted toward the required six member quorum. The usual reorganization meeting procedure is for a quorum of the Board to convene and administer the oath of office to the newly elected members. At the May 9 meeting, two of the newly elected members who had been administered the oath of office by an attorney of the State of New Jersey on May 2, 2006, were counted toward the quorum.

The newly elected members could not count toward the quorum until they had assumed office. Intervenor Evans argues that since he and Jones had been administered the oath of office by someone authorized to administer the oath under the election laws, N.J.S.A. 41:2-17, they had assumed their office when they were administered the oath. At that point, they argue, they were entitled to participate in the reorganization meeting. Reviewing the record in this matter, I find that it is unclear when the oaths of office were actually administered to Evans and Jones. The only official evidence submitted of the oath of office being administered to Evans and Jones related to the oath administered to them on May 2, 2006 by counsel. The form attesting to the oath being administered to Jones lists the date for the oath as the May 2, 2006, meeting, but it was attested to on May 9, 2006 by counsel. On May 2, 2006, the election results were being recounted and the certification of votes was in question. Since the recount and vote certification issue was before Superior Court and the results were not finalized until May 9, 2006, an oath of office administered on May 2, 2006, was not only outside the procedures set by board policy and outside the statutory assumption that it would occur at the reorganization meeting, it was invalid due to the uncertainty of the vote certification process.

While there is some evidence in the Certifications of those in attendance (I-3) at the disputed May 9 meeting that a second oath was administered at that time, neither the official evidence of that oath, nor the transcript or minutes of that meeting have been entered into the record. Since I find that the oath administered to Evans and Jones on May 2, 2006, was not valid, and since official evidence of the oath being administered on May 9, 2006 is not in the record, I cannot make a finding as to whether a quorum actually existed at the May 9, 2006 reorganization meeting. I note however, that even if the oath was administered at the May 9 meeting, a legal issue exists as to whether the newly elected members could count toward the quorum necessary for the meeting.

Petitioners also challenge the validity of the May 9, 2006 meeting on the grounds that it was held in violation of the OPMA. As a public body, the meetings of a school board are to be conducted in public and are subject to the mandates of the OPMA. N.J.S.A. 10:4-6 et seq., N.J.S.A. 18:10-6. The purpose of the OPMA is to provide access to public meetings and to prevent secrecy in the conduct of public affairs. In order to provide fair and open access to the public, the OPMA requires adherence to notice provisions for public meetings and "any action taken by a public body at a meeting which does not conform with the provisions of this act shall be voidable". N.J.S.A. 10:5-15. Strict adherence to the letter of the Act is required in determining whether a violation of the Act has occurred. Polillo v. Deane, 74 N.J. 562, 578 (1977). While the statute provides that the remedy for a violation of the OPMA shall be a proceeding in lieu of prerogative writ in Superior Court, authority exists allowing an administrative agency in its exercise of primary jurisdiction over a controversy, to determine issues arising under the OPMA. Sukin V. Northfield Bd. Of Ed., 171 N.J. Super. 184, 187 (A.D. 1979).

In the case at hand, the record shows that the initial reorganization meeting scheduled for May 2, 2006, was cancelled due to the uncertainly over the election results and the pending recount. The meeting was then rescheduled for May 9, 2006 and appropriate notice was given to the public. Actions were then taken by the Superintendent of Schools in consultation with sitting board members to cancel the

meeting. Members of the Board were notified, and notice of the cancellation was provided to the public. Members of the administrative staff, including the Board Secretary who usually administers oaths and takes the minutes of the meeting, were advised not to attend. Upon receiving notice of the cancellation, four members of the Board and two of the newly elected members chose to conduct the cancelled meeting without notifying the other board members that they were proceeding with the meeting. In doing so they violated the provisions of the OPMA. While the meeting had been validly noticed to the public, the actions taken by the Superintendent and his staff to cancel the meeting were taken in good faith on the assumption that a quorum would not be present and in recognition of the petition to enjoin the meeting filed with the Commissioner. I find that those actions effectively negated the notice required of the meeting required under the OPMA. Given the actions taken to cancel the meeting and notify the press and public, the decision by a portion of the Board to convene the cancelled meeting without further notice to the public or their colleagues on the Board was in contravention of both the letter and the spirit of the OPMA.

Remedies for violations of the act include voiding of actions taken at the meeting. N.J.S.A. 10:4-15. Such action may be warranted when notice to the public has been less than adequate and when members of a public body have also failed to notify their fellow members of actions to be taken. Roman v. Township of South Hackensack, 302 N.J. Super. 568, 575 (A.D., 1997). The violation of the Act in this matter is not of a *de minimus* nature. It concerned notice to the public and fellow board members of the Board's reorganization and its seating of newly elected board members during a series of actions contesting their election. It also involved the convening of the Board in a manner not in conformance with its usual policies and procedures, and without the presence of its usual administrative staff.

Balancing the statutory mandate for the school board to reorganize annually after the April elections with the requirements of the OPMA, I FIND that the Petitioners have met the standards for emergent relief in their request that the disputed May 9, 2006 meeting of the ACBOE be voided based upon nonconformance with the OPMA. In order to comply with N.J.S.A. 18-10-3, all members of the Board must convene on

May 26, 2006 to conduct the annual reorganization meeting, and they shall seat the three newly elected members Shay Steele, Pamela Jones and Scott Evans in conformance with Board policy and procedures.

I make no findings or decisions on the allegations of noncompliance with other statutory mandates that are contained in Counts Four and Five of Petitioners' Verified Complaint at this time. Such findings are not necessary to the emergent relief granted in this opinion and are outside the scope of the emergent hearing held in this matter. I retain such jurisdiction as may be appropriate over those Counts and those issues will be scheduled for hearing pursuant to N.J.A.C. 1:1-1 et seq.

ORDER

Based on the foregoing, I **ORDER** that all members of the Atlantic City Board of Education meet on May 26, 2006, to conduct the reorganization meeting required by N.J.S.A. 18A:10-3, and to seat its three newly elected members in conformance with the statue and Board policy. I further **ORDER** that Fredrick Nickels, the Superintendent of Schools provide notice to the public of such meeting in conformance with the requirements of the OPMA.

This order on application for emergency relief may be adopted, modified or rejected by the **Commissioner of the Department of Education** who by law is authorized to make a final decision in this matter. The final decision shall be issued without undue delay, but no later than forty-five (45) days following the entry of this order. If the Commissioner does not adopt, modify or reject this order within forty-five (45) days, this recommended order shall become a final decision on the issue of emergent relief in accordance with N.J.S.A. 52:14B-10.

May 23, 2006
DATE

Patricia M. Kerins
PATRICIA M. KERINS, ALJ

/lam

LIST OF EXHIBITS

For Petitioners:

A-1 Letter from Joan H. Langer to Commissioner of Education, dated May 9, 2006

A-2 Letter from Joan H. Langer to Commissioner of Education, dated May 12, 2006

A-3 Fax from Joan H. Langer to Hon. Kerins, dated May 17, 2006 with letter attached dated May 17, 2006

A-4 Fax from Joan H. Langer to Hon. Kerins, dated May 19, 2006 with letter attached dated May 19, 2006

For Respondent:

R-1 Letter from Christopher A. Brown to Commissioner of Education, dated May 15, 2006

R-2 Memo from Christopher A. Brown to Hon. Kerins dated May 19,2006

For the Intervenor:

I-1 Fax from M. Kathleen Duncan, Director, to Sandy Hlatky dated May 16, 2006 with attached letter from Daniel J. Gallagher to Kathleen Duncan, dated May 15, 2006

I-2 Fax from Daniel J. Gallagher to Joan Langer dated May 19, 2006, with attached letter from Daniel J. Gallagher to Hon. Kerins, dated May 19, 2006

I-3 Fax from Daniel J. Gallagher to Hon. Kerins dated May 19, 2006, with attached Certification

#191-06

CARTERET EDUCATION ASSOCIATION,	:	
PETITIONER,	:	
V.	:	COMMISSIONER OF EDUCATION
BOARD OF EDUCATION OF THE BOROUGH OF CARTERET, MIDDLESEX COUNTY AND NILKANTH PATEL,	:	DECISION
RESPONDENTS.	:	
	:	

SYNOPSIS

Petitioning education association challenged preferential treatment allegedly accorded the school business administrator/board secretary (SBA) with respect to payment for accumulated sick leave, in violation of statute and district policy. Respondent board denied the allegations; asserted that petitioner failed to comply with the 90-day rule of limitation set forth at *N.J.A.C.* 6A:3-1.3(i); and filed motion for summary judgment.

The ALJ found: the November 2003 public Board meeting, attended by the president of the Carteret Education Association (CEA), to be the triggering event for the 90-day notice period; petitioner did not exercise reasonable diligence in the filing of the petition; the assertion of the CEA president that he had no reason to learn the existence of an "individual" contract for the SBA until November 2004 is not supported in the record. The ALJ granted respondent's motion for summary decision and dismissed the petitioner's appeal.

The Commissioner disagrees with the ALJ's conclusion that the appeal is appropriately dismissed as time barred, noting that when a petitioner's cause of action is dismissed on procedural grounds pursuant to *N.J.A.C.* 6A:3-1.3, it is essential to ensure that the requirements of so doing have been fully satisfied in light of the provision's underlying purpose. The Commissioner finds that: with respect to its approval of Mr. Patel's contract at the November 2003 meeting, petitioner had every reason to rely on respondent's compliance with statutory requirements; petitioner first became aware of questionable aspects in connection with the SBA contract in November 2004, and was not provided with a copy of said contract until January 2005; "adequate notice" arose upon receipt of that document by the CEA; therefore, the instant petition – filed in March 2005 – was timely. Accordingly, the Initial Decision is rejected, and the matter is remanded to the OAL for hearing on its merits.

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.

OAL DKT. NO. EDU 2998-05
AGENCY DKT. NO. 81-3/05

CARTERET EDUCATION ASSOCIATION,	:	
PETITIONER,	:	
V.	:	COMMISSIONER OF EDUCATION
BOARD OF EDUCATION OF THE BOROUGH OF CARTERET, MIDDLESEX COUNTY AND NILKANTH PATEL,	:	DECISION
RESPONDENTS.	:	
	:	

The record of this matter and the Initial Decision of the Office of Administrative Law (OAL) have been reviewed. Petitioner's exceptions and the Board's reply thereto, filed in accordance with *N.J.A.C.* 1:1-18.4, were fully considered by the Commissioner in reaching her determination herein.[1]

Petitioner's exceptions charge that the Administrative Law Judge's (ALJ) determination that the November 12, 2003 Board meeting was the triggering event for the filing of a petition in this matter is erroneous. Petitioner points out that the governing provision with respect to timeliness of a petition, *N.J.A.C.* 6A:3-1.3(i), in applicable part provides:

> The petitioner shall file a petition no later than the 90th day from the date of receipt of the notice of a final order, ruling or other action by the district board of education, individual party, or agency, which is the subject of the requested contested case hearing.***

[1] The Board did not file reply exceptions.

While conceding that Carteret Education Association (CET) President, Robert Cowan, was in attendance at the November 12, 2003 meeting and, therefore, was aware of the Board's appointment of Mr. Patel to the position of Business Administrator/Board Secretary, both the resolution which was adopted in this regard and the meeting minutes subsequently issued clearly and unambiguously discussed only: 1) that a contract was being entered with Mr. Patel; 2) the salary to be paid; and 3) the effective date of the contract. As such, it argues, neither Mr. Cohen nor petitioner had any reason to believe – nor did the Board's action provide any reason to suggest – that Mr. Patel's contract accorded him accumulated sick leave benefits over and above those granted to all other District employees. (Petitioner's Exceptions dated May 8, 2006)

Moreover, petitioner argues, *N.J.S.A.* 18A:30-3.2 sets forth the requirements which must be fulfilled in order to grant an individual credit for unused sick leave earned in another district:

> Whenever a board of education employs any person who has an unused accumulation of sick leave days from another school district in New Jersey, the employing board may grant, not later than the end of the first year of employment, part or full credit therefore. The amount of such credit shall be fixed by resolution of the board uniformly applicable to all employees and subject to the provisions of this chapter. *Id.* at 8

Here it is undisputed that the Board did not take the requisite public action at its November 12, 2003 meeting and, therefore, petitioner proposes, absent public notice of the Board's action, there is no way petitioner could have or should have known that Mr. Patel's contract granted him benefits of this nature. (*Ibid.*) Petitioner professes that it first became aware that Mr. Patel's contract might be other than standard in nature in November 2004, at which time it requested a copy of this contract – which was not provided until late January 2005. Petitioner advances that it was at this point in time that it learned that Mr. Patel had accumulated

sick leave benefits "that had never been publicly disclosed or separately voted upon in public," (*Id.* at 2) and it filed the instant Petition of Appeal within the requisite 90 days of this discovery. Petitioner, therefore, urges that the decision of the ALJ dismissing this matter as untimely be rejected.

The Board's reply exceptions support the correctness of the Initial Decision and urge its adoption by the Commissioner.

Upon careful and independent review of the record, the Commissioner determines to reject the Initial Decision, as she does not – under the circumstances presented in this matter – agree with the ALJ's conclusion that this case is appropriately dismissed as time-barred pursuant to *N.J.A.C.* 6A:3-1.3. In so determining, the Commissioner was particularly mindful that when imposing the severe penalty of dismissing a petitioner's cause of action on procedural grounds pursuant to this provision, it is essential to ensure that the requirements of so doing – in light of this provision's underlying purpose – have been fully satisfied.

With this in mind, the Commissioner turns to consideration of the applicability of *N.J.A.C.* 6A:3-1.3(i) to the facts in this matter. This provision specifies:

> [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, which is the subject of the requested contested case hearing. ***

Guidance as to what constitutes notice sufficient to trigger the running of this regulatory provision was provided by the Supreme Court in *Kaprow v. Board of Education of Berkeley Tp.*, 131 *N.J.* 572 (1993) wherein it examined the underlying purpose of both the limitations period and the concept of "adequate notice". Essentially, the *Kaprow* Court found the limitations period begins to run when a party has adequate notice of a final order, ruling or action by a board of

education, adequate notice being defined as one which 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." *Kaprow* at 587. Moreover, it found that notice is "adequate" where it furthers the purpose of the 90-day limitations period,

> [t]hat is, the notice requirement should effectuate concerns for individual justice by not triggering the limitations period until the [affected persons] have been alerted to the existence of facts that may equate in law with [their] cause of action***At the same time, [the notice] should further considerations of repose by establishing an objective event to trigger the limitations period in order "to enable the proper and efficient administration of the affairs of government." *Id.*

The Commissioner observes that the instant record – with respect to the salient issue under consideration here – establishes that, at its public meeting of November 12, 2003, the Board voted to approve the employment contract of Nilkanth Patel, School Business Administrator/Board Secretary. Such action clearly set forth this individual's salary and the effective date of the contract. It is uncontroverted that no further details with respect to this contract were presented at this meeting nor in the subsequently issued meeting minutes. It is similarly uncontroverted that at no time during this meeting did the Board fix by resolution, in accordance with *N.J.S.A.* 18A:30-3.2, the credit to be accorded Mr. Patel for unused accumulated sick leave days earned in his prior employment. Under these circumstances, it cannot reasonably be concluded that, on November 12, 2003, petitioner had notice of the existence of any facts which – under the concept of the exercise of "reasonable diligence" – would impose on it a duty to further investigate by inquiring as to the specific terms and conditions of Mr. Patel's contract, or compel it to secure a copy of this document. Rather, given the absence of any indication to the contrary, petitioner had every reason to rely on the Board's compliance with statutory requirements surrounding all aspects of Mr. Patel's employment contract. Petitioner asserts that

it first became aware of potentially questionable aspects in connection with the Patel contract in November 2004 and immediately requested a copy, which it contends – and the Board does not refute – was ultimately provided in late January 2005. The Commissioner finds that the record of this matter amply supports that the "adequate notice" contemplated by *Kaprow, supra.* – serving to trigger the running of the 90-day filing timeline of *N.J.A.C.* 6A:3-1.3(i) – arose at the point in time when, upon receipt of this document, petitioner discovered that Mr. Patel had been granted accumulated sick leave benefits from prior employment absent public disclosure and the requisite public action. Consequently, she concludes that the instant Petition of Appeal, filed on March 24, 2005, was timely. The Commissioner, however, is compelled to clarify that this decision deals solely with the procedural issue of timeliness. It does not consider the substantive issues contained in the petition or any remedies which may be available to petitioner, if applicable.

Accordingly, the Initial Decision dismissing the instant Petition of Appeal as untimely is rejected. This matter is hereby remanded to the OAL for hearing on its merits.

IT IS SO ORDERED.[2]

Lucille E Davy

ACTING COMMISSIONER OF EDUCATION

Date of Decision: 5/25/06

Date of Mailing: 5/25/06

[2] This decision may be appealed to the State Board of Education pursuant to *N.J.S.A.* 18A:6-27 *et seq.* and *N.J.A.C.* 6A:4-1.1 *et seq.*

State of New Jersey
OFFICE OF ADMINISTRATIVE LAW

INITIAL DECISION
GRANTING RESPONDENTS'
SUMMARY DECISION
PURSUANT TO N.J.A.C. 1:1-12.5
AND N.J.A.C. 6A: 3-1.3(i)
OAL DKT. NO. EDU 2998-05
AGENCY DKT. NO. 81-3/05

CARTERET EDUCATION
ASSOCIATION (CEA),
Petitioner
v.
BOARD OF EDUCATION OF THE
BOROUGH OF CARTERET, MIDDLESEX
COUNTY AND NILKANTH PATEL,
Respondents.

Stephen Klausner, Esq., for petitioner

Mary H. Smith, Esq., for respondents, (Wilentz, Goldman & Spitzer, attorneys)

Record Closed: April 3, 2006 Decided: April 19, 2006

BEFORE **ANA C. VISCOMI**, ALJ:

STATEMENT OF THE CASE AND PROCEDURAL HISTORY

On March 24, 2005, the Carteret Education Association (CEA) filed a petition challenging the alleged preferential treatment accorded School Business Administrator/Board Secretary Nilkanth Patel with respected to payment for accumulated sick leave from his previous public school employment and alleging violation of N.J.S.A. 18A:30-3.2 and district policy. Respondents filed an answer asserting general denial of the allegations and an affirmative defense that the CEA failed to comply with the 90-day rule of limitation set forth at N.J.A.C. 6A: 3-1.3(i). The matter was transmitted to the Office of Administrative Law (OAL) on May 18, 2005, for a hearing as a contested case pursuant to N.J.S.A. 52:14F-1 to -13 and N.J.S.A. 52:14B-1 to -15. It was assigned to the undersigned Administrative Law Judge on June 13, 2005, and as a result of a pre-hearing conference, the parties have submitted the within matter initially, by motion, to resolve the issue of the timeliness of petitioner's application. The pleadings were submitted between March 9, 2006, and April 3, 2006, and the record closed.

FACTUAL DISCUSSION

The following facts are not in dispute and shall constitute **FINDINGS OF FACT.**

At a public board of education meeting on November 12, 2003, the Board approved the 2003-2004 contract of respondent Nilkanth Patel as School Business Administrator/Board Secretary (SBA/BS).[1] CEA President Robert Cowan was in attendance at that meeting. Immediately prior to the Board acting to approve the 2003-2004 contract, Cowan spoke about the subject of after school programs appointments.

[1] See exhibit B to respondents' motion.

Petitioner has no evidence to rebut the fact that the Board approved, by a roll call majority vote of the members of the Board, the employment contract between the Board and Patel, effective July 1, 2003, through June 30, 2004, at a public board meeting on November 12, 2003.[2] In addition to providing for a salary of $122,500.00, the contract also provided, with regard to accumulated sick leave:

> ...the SBA/BS shall be permitted to carry over the balance of one-hundred twenty-eight (128) days from his prior employment . ...

Petitioner had knowledge as of November 12, 2003, that Patel was employed as the SBA/BS.[3] The document containing the Board minutes of the November 12, 2003, meeting is a public document.[4] Prior to November 12, 2003, petitioner has made requests of the Board for copies of public documents.[5] The 2003-2004 contract is a government record pursuant to the Open Public Records Act, N.J.S.A. 47:1A-1.1 et seq.

On March 24, 2005, petitioner filed the within matter challenging the contract approved at the public meeting of November 12, 2003.

Respondent Patel is in his third year of employment with the Board.

LEGAL ANALYSIS

Respondents assert their motion for summary decision should be granted as there is no dispute that petitioner CEA failed to timely file the petition within the 90 day period required by N.J.A.C. 6A:3-1.3(i). Relying on Kaprow v Bd. of Educ. of Berkeley Twp, respondents assert that the rationale behind the strict

---

[2] See Requests for Admissions and Responses, exhibits C and D to respondents' motion.
[3] Id.
[4] Id.
[5] Id.

application of the 90 day rule is that it "provides finality in education matters."[6] Further relying on Kaprow, respondents assert that the "objective event"[7] triggering the limitation period occurred on November 12, 2003, when the Board voted to approve Patel's contract at its public meeting. The petitioner's argument that it was not aware of the contents of the contract until it reviewed it in February 2005, cannot be deemed the "objective event" triggering the 90 day period, since the exercise of reasonable diligence on the part of the CEA would have caused it to request a copy of the contract after the November 12, 2003, meeting that its president, Robert Cowen, attended. Furthermore, respondents assert petitioner has not demonstrated exceptional circumstances by way of compelling reason, substantial constitutional issues or issues of significant public interest beyond the parties. It is in these limited circumstances, respondents assert, the Commissioner has relaxed the 90 day limitations period.[8]

In opposition, and not supported by any affidavit pursuant to N.J.A.C. 1:1-12.5 and R. 4:46-5, petitioner contends that the existence of an individual contract between the respondents was not known to the CEA until November 2004 and that a request for same at the time was not complied with until late January 2005. By letter of February 4, 2005, CEA President Cowan requested a copy of the Board resolution wherein it gave Patel credit for 128 accumulated sick days and a copy of the certification filed with the Board regarding those sick days pursuant to N.J.S.A. 18A:30-3.3.[9] By memorandum of February 11, 2005, Carteret Superintendent of Schools Kevin Ahearn advised that there was "no existing board resolutions" that had been passed.[10] By memorandum of February 14, 2005, Ahearn forwarded Cowen a copy of the February 10, 2005,

---

[6] 131 N.J. 572, 583 (1993)
[7] Id., at 587.
[8] Respondents cite the Commissioner's decisions in Bd of Educ. of the Gloucester County Inst. of Tech., Commissioner of Education, December 16, 1999 (Dkt. No. 444-9/98), Atkin v. Bd. of Educ. of City of Elizabeth, Commissioner of Education, February 22, 1999, (Dkt. No. 39-99L) aff'd App. Div. December 15, 2000 (Dkt. No. A-128-99), Elmwood Park Bd. of Educ. v. Farrell, 95 N.J.A.R. 2d (EDU) 375 and DeMaio v New Providence Bd. of Educ., 99 N.J.A.R. 2d (EDU) 449.
[9] See exhibit B attached to petitioner's opposition to summary decision motion dated March 10, 2006.
[10] See exhibit C to petitioner's opposition dated March 10, 2006.

"Certification of Unused Accumulated Sick Leave Days" completed by Englewood Public Schools Assistant Director of Human Services, Danielle Jarvis-Shubrick, indicating, in part:

> upon leaving the employment of the Englewood Public School on December 31, 1998, Nilkath Patel had 195.5 unused accumulated sick leave days.[11]

As a result, petitioner contends that the Board entered into a "customized" individual contract, rather than a standard contract pursuant to N.J.S.A. 18A:27-3 and that this contract was therefore *void ab initio* as the Board lacked the statutory authority to enter into such a contract because customized contracts are only permitted pursuant to N.J.S.A. 18A:17-24.2, which is inapplicable herein. Petitioner asserts that the Board minutes were prepared by Patel and therefore, "intentionally vague." As a result, it contends that upon discovering the individual contract, it filed the petition within 90 days of discovery. Additionally, petitioner asserts respondent BOE failed to comply with N.J.S.A. 18A:30-3.2 which requires that a resolution be passed specifically relating to Patel's sick leave and therefore a timeliness issue as to this petition does not exist.

In reply, respondents assert that the Board had the authority, pursuant to N.J.S.A. 18A:27-6 to include all necessary terms and conditions of employment in the 2003-2004 contract, and as such, the contract is fully compliant and not void. Additionally, respondents assert the discovery rule is inapplicable in this matter as it is premised on reasonable diligence which the petitioner has failed to demonstrate the exercise thereof. In this instance, reasonable diligence would have required the petitioner to have inquired as to the terms and conditions of the contract and filed a petition within 90 days of November 12, 2003.

In sur-reply, petitioner contends that the recent release of the State Commission of Investigation (SCI) report titled "Questionable and Hidden

[11] See exhibits D and E to petitioner's opposition dated March 10, 2006.

Compensation for Public School Administrators"[12] highlights the very concerns it has articulated.

The Commissioner has general jurisdiction to hear and determine controversies and disputes arising under the school laws. N.J.S.A. 18A:6-9. N.J.A.C. 6A:3-1.3(i) requires that a petition of appeal be filed within 90 days of notice of a ruling affecting a petitioner. Formal notice of the school board's action is not necessary to raise a claim. Indeed, the Commissioner has held that a letter from the local board secretary which provided clear and unambiguous notice of the local board's final action triggered the 90-day limitation. Kaprow v. Board of Educ. of Berkeley Twp., 255 N.J. Super 76 (App. Div. 1992), cert. granted, 130 N.J. 16, aff'd, 131 N.J. 572 (1993). The 90-day rule is to be strictly applied, Gordon v. Passaic Twp. Bd. of Ed., 1985 S.L.D.1929, aff'd, No. A.-3294-84 (App. Div. May 27, 1986), cert. den., 105 N.J. 534 (1986). The Commissioner has the authority, however, pursuant to N.J.A.C. 6A:3-1.16, to relax that time period "in any case where a strict adherence thereto may be deemed inappropriate or unnecessary or may result in injustice." But such authority is rarely invoked. See Kaprow v. Board of Educ. of Berkely Twp., supra. Moreover, relaxation of the regulation is generally unsuccessful unless there are compelling reasons justifying relaxation or where circumstances are such that strict adherence would be inappropriate, unnecessary or where injustice would occur. Gordon, supra, at 1931. In this matter, I **FIND** that the November 12, 2003, public Board meeting attended by CEA president Robert Cowan to be the triggering event for the 90 day period. Petitioner does not dispute knowledge that the SBA/BS contract is a public document subject to disclosure pursuant to the Open Public Records Act (OPRA) and petitioner does not dispute having previously requested copies of public documents. But such prior knowledge is not required nor is petitioner's familiarity with OPRA request process dispositive of this matter. That knowledge is deemed imputed to the petitioner, in this circumstance, due to Mr. Cowan's presence at that meeting. That provided adequate notice sufficient to commence

[12] The full report is available at www.state.nj.us/sci

the 90 day period. Reasonable diligence on the part of the petitioner could have been exercised promptly and the within petition filed in a timely manner. Mr. Cowan's assertion, not supported by affidavit, that he had no reason to learn the existence of Patel's "individual" contract until November 2004 is not supported by the record in this matter.

Petitioner's assertion that the SBA/BS contract is *void ab initio* is erroneous. N.J.S.A. 18A:17-24.6 specifically permits the board to determine the "the initial terms and conditions of the employment contract between the boards and ... (the) school business administrator ...(which) terms shall be maintained for the life of the contract. Petitioner's reliance upon N.J.S.A. 18A: 17-24.2 is misplaced as that statute concerns boards sharing a superintendent or SBA and that is inapplicable in this matter.

Petitioner cites to the recent publication of the State Commission of Investigation report and presumably, although not specifically articulated, seeks relaxation of the 90 day time period due to a significant public interest[13] rationale. Certainly, public interest on the issue highlighted by the SCI report is heightened at this juncture. Had reasonable diligence been exercised by the petitioner, the timely filing of this petition would have caused this matter to proceed forward on the merits. It should be noted; however, that N.J.S.A. 18A:30-3.2 permits a board of education employing any person who has an unused accumulation of sick days from another New Jersey school district to "grant, not later than the end of the first year of employment, part or full credit ... (and) the amount of any such credit shall be fixed by resolution of the board... ." N.J.S.A. 18A:30-3.4 requires the accumulation of sick leave days from another district be credited upon receipt of the certificate of the prior employer. Further, N.J.S.A. 18A:30-3.3 provides that:

> Upon termination of employment of any employee from any school district, the board shall issue, at the request of the

[13] It is presumed this is an alternative argument to 90 day time period not commencing to run until February 2005.

> employee, a certificate stating such employee's unused accumulation of sick leave days as of the date of such termination. Such certificate shall be filed with the new employer within one year of the date of such new employment.

Here, no resolution was passed pursuant to N.J.S.A. 18A:30-3.2. Interestingly, the certification from Jarvis-Shubrick is not provided prior to the Board meeting of November 12, 2003, but rather on February 10, 2005, after the February 4, 2005, inquiry by Cowan. But it must also be emphasized though that respondent Patel is now in the third year of his employment with this Board. As the Supreme Court noted in Kaprow:[14]

> because local school boards operate on a cash basis, claims must be filed promptly so that the local board can anticipate any back pay requirements. ....(The 90 day limitations period) represents a fair and reasonably necessary requirement for the proper and efficient resolution of disputes under the school laws.

It is for that reason that respondent's motion for summary decision pursuant to N.J.A.C. 1:1-12.5 for failure to timely file the petition in accordance with N.J.A.C. 6A:3-1.3 must be granted.

DECISION AND ORDER

Respondents' motion for summary decision is hereby **GRANTED** and petitioner's appeal is hereby **DISMISSED.**

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

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

[14] Kaprow, supra, at 582.

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.

April 19, 2006

DATE

ANA C. VISCOMI, ALJ

E-mail Receipt of Initial Decision Confirmed by the Department of Education on:

DATE

APR 26 2006

Mailed to Parties:

DIRECTOR AND

DATE

OFFICE OF ADMINISTRATIVE LAW

/lam

194-06

OAL DKT. NO. EDU 6599-05
AGENCY DKT. NO. 206-8/05

L.A., on behalf of minor children. T.J.A. and P.M.A.,	:	
PETITIONER,	:	
V.	:	COMMISSIONER OF EDUCATION
BOARD OF EDUCATION OF THE CITY OF PORT REPUBLIC, ATLANTIC COUNTY,	:	DECISION
RESPONDENT.	:	

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

Upon a full review, the Commissioner determines to adopt the Administrative Law Judge's recommended decision for the reasons articulated therein.

Accordingly, the Initial Decision of the OAL is adopted as the final decision in this matter and the instant Petition of Appeal is hereby dismissed.

IT IS SO ORDERED.*

Lucille E Davy

ACTING COMMISSIONER OF EDUCATION

Date of Decision: 5/30/06

Date of Mailing: 5/30/06

* This decision may be appealed to the State Board of Education pursuant to *N.J.S.A.* 18A:6-27 *et seq.* and *N.J.A.C.* 6A:4-1.1 *et seq.*

State of New Jersey
OFFICE OF ADMINISTRATIVE LAW

INITIAL DECISION
OAL DKT. NO. EDU 6599-05
AGENCY DKT. NO. 206/8/05

L.A. ON BEHALF OF MINOR CHILDREN, T.J.A. AND P.M.A.,
Petitioner,
v.
BOARD OF EDUCATION OF THE CITY OF PORT REPUBLIC, ATLANTIC COUNTY,
Respondent,

Duane T. Phillips, Esq., for petitioner

Clement F. Lisitski, Esq., for respondent

Record Closed: November 2, 2005 Decided: November 10, 2005

BEFORE **BRUCE M. GORMAN,** ALJ:

The New Jersey Department of Education (DOE) Bureau of Controversies received a request for emergent relief on August 25, 2005, wherein petitioner contended the Board of Education's refusal to promote her two children to the next grade for the 2005-2006 school year on the basis of their having too many absences was arbitrary and capricious. The matter was transmitted to the Office of Administrative Law (OAL) on September 1, 2005, and was docketed as EDU 6599-05. *N.J.S.A.* 18A:38-1. The Director of the OAL assigned the undersigned to hear this matter pursuant to *N.J.S.A.* 52:14F-5o.

The matter was scheduled for oral argument on September 2, 2005, at the OAL office in Atlantic City. An Order on Emergent Relief was entered by the undersigned ALJ on September

6, 2005, and the matter was set down for plenary hearing for November 2, 2005, at the OAL office in Atlantic City, New Jersey.

The parties appeared for hearing on November 2, 2005, in the matter docketed at EDU 6599-05. At that time, the parties reached a settlement of both this case (EDU 6599-05), and of another matter filed by petitioner against respondent docketed as GRC-6816-05. The settlement set forth below is intended to resolve both matters, but, as it is one document, this Initial Decision is intended to address all issues contained in both matters. I note that the settlement of the matter docketed at EDU 6599-05 leaves open one issue for my adjudication, and my resolution of that issue is set forth 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 the testimony placed on the record on November 2, 2005, a copy of which is attached hereto.

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

Pursuant to the terms of the settlement between the parties and as set forth herein, there remains one open item. The current academic transcript of T.A. at respondent's school contains the following typed language:

> Your child has been retained due to excessive absences per *N.J.S.A.* 18A:38.25-30, 18A:29, and BOE Attendance Policy 5117.7.

Additionally, the transcript contains the following hand-written notation:

> "see attached attendance report."

Appended to the transcript is a second page purporting to be a delineation of T.A.'s attendance at respondent's school.

P.A.'s transcript likewise contains the above-cited typed and handwritten language, and an attached "attendance report." Petitioner argues that this language is inaccurate, and that it is prejudicial to the children. According to petitioner, anyone reading the transcript would believe that the children had been retained in the prior grade, when in fact they had not been. Further, petitioner avers that the appended "attendance report" is not a normal practice, but one that has been adopted solely for T.A. and P.A. to highlight respondent's struggles with petitioner.

Respondent argues that the typed notation is part of the history of the student's tenure at the school and must be preserved. Regarding the handwritten note and the accompanying attendance schedule, while admitting that the attendance report is not normal practice, the school superintendent, Rosemary Fiore, testified that the school's computer system would not reflect at the bottom of the transcript the absences prior to February. Therefore, it was necessary to append the schedule of absences.

I **FIND** respondent's position to be without merit on each issue. First, the typed text on the transcript sets forth inaccurate information. Neither child was "retained" due to excessive absences. Respondent attempted to retain the children, but that retention was enjoined by my Order in this matter of September 6, 2005, and the settlement agreement herein permanently rescinds respondent's efforts to retain the children. Because of my Order of September 6, neither child spent even one day in his prior grade. Therefore, the typed statement is factually inaccurate and I **ORDER** that it be deleted from each child's transcript.

I **FIND** the respondent's argument regarding the handwritten note and the accompanying schedule to be equally specious. I **FIND** incredible and unbelievable Ms. Fiore's contention that the school's computer could not be programmed to reflect the children's attendance records prior to February. I **ORDER** the school to effectuate the reflection of each child's proper attendance record in the appropriate place at the bottom of the transcript by whatever means necessary. If it shall somehow prove impossible to correct the existing transcript, then respondent shall produce a new transcript in accordance with this **ORDER.** I further **ORDER** that the handwritten notation and the attendance report be deleted from each child's transcript.

Finally, petitioner has questioned the content of the attendance report. The attendance report reflects that the students were enrolled at respondent's school on October 27, 2004. I **ORDER** that the transcript reflect only absences occurring on or after that date. No absences that occurred in other school districts shall be reflected on the transcript. Similarly, the attendance report reflects that the students "did not attend school from January 4 through January 7 due to residency..." Based upon that statement, I **FIND** that those absences were the result of the on-going residency dispute between petitioner and respondent. Therefore, the failure of the students to attend school was not an "absence," but rather the result of their being barred from attending. Accordingly, I **ORDER** that the dates January 4 through 7 not be reflected as absences on the children's transcripts.

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

This recommended decision may be adopted, modified or rejected by the **COMMISSIONER OF THE DEPARTMENT OF EDUCATION,** who by law is authorized to make a 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.

11/10/05
DATE

BRUCE M. GORMAN, ALJ

Receipt Acknowledged:

4-13-06
DATE

DEPARTMENT OF EDUCATION

Mailed to Parties:

APR 13 2006
DATE

DIRECTOR AND CHIEF ADMINISTRATIVE LAW JUDGE
OFFICE OF ADMINISTRATIVE LAW

/sd

Agreement of Settlement of Promotion (Track Placement) and OPRA Matters

Louise Andreaci
v.
Port Republic BOE

OAL Docket # EDU-6599-05
OAL Docket # GRC-6818-05

On the issue of retaining the students (EDU-6599-05), the parties have stipulated that they should be advanced to next grade but that the Court is asked to resolve the issue of what text or notes appear on the transcripts and report cards.

On the issue of which records should be provided (GRC-6819-05), the parties have agreed that the records marked with a "Y" on Exhibit A as specified and clarified with notes on Exhibit B shall be provided to petitioners attorney by December 2, 2005 and that petitioners

attorney may make an appointment to review Board minutes for the last 4 years.

11/2/05 Duane T. Phillips
Duane T. Phillips
Attorney for Petitioner

11-2-05 [illegible]
Clement J. Lisitski
Attorney for Rossyanket School Board

ED 06-599-05 stipulation unresolved issue is markings on transcript
GAC-6816-05 -oral argument

N School Nurses Background and Education

Y All letters written to school: superintendent, Board, staff, teachers, coaches, etc. about Andreaci family for past 4 years

Y Documents allowing students who are non-residents to attend the school in '04-'05 and '05-'06

N Any complaints filed against the school nurse

Y Documents on non-resident students for '04-'05 and '05-'06 ~~about~~ concerning staying past the 60 day period
-including student was given an extra ~~year~~ year b/c his family owned land but no house

Minutes mentioning this?

Y Copies of all rules pertaining to non-residents

Y Copies of all rules about phone calls to school

Y Copies of all rules about visitors to school

N Copies of all Board minutes for 10 years

Exhibit A

198-06

#198-06

SEARCH DAY PROGRAM, INC., :

PETITIONER, :

V. : COMMISSIONER OF EDUCATION

NEW JERSEY DEPARTMENT OF EDUCATION, : DECISION

RESPONDENT :

SYNOPSIS

Petitioning private school for the disabled appealed the Department's determination to disallow $342,593 in salaries and benefits to nine teachers for the 2002-2003 school year because of their alleged failure to obtain emergency certification. Petitioner argued that this disallowance would require the return of the above amount to its sending districts, creating financial hardship for the non-profit school.

The ALJ found, *inter alia*, that: respondent has clear responsibility -- implicit in the laws and regulations requiring teachers to physically possess an emergency teaching certificate before commencing employment -- to act promptly on applications for emergency certification; respondent has for many years allowed teachers to commence work in September without emergency certificates in hand as long as applications for the certificates have been submitted and approved by the County Superintendent; in practice, emergency certificates have been issued by the Department as late as April or May of the school year, and then backdated to the date that the County Superintendent recommended approval to the Department; the credible evidence establishes that petitioner submitted paperwork for the nine teachers in question in a timely manner, and that it is likely that the applications in question were lost or misplaced; and that the situation could have been resolved by the County Superintendent's office in 2003. The ALJ concluded that respondent is equitably estopped from designating the salaries & benefits in question as non-allowable costs, and ordered: the Monmouth County Superintendent to review the replacement applications for the teachers in question, and to confirm that said teachers would have been entitled to receive emergency teaching certificates for 2002-2003; the Office of Licensing and Certifications to issue the appropriate emergency certificates backdated to September 2002; and the Division of Finance to reconsider its disallowance of the related salaries and benefits.

The Commissioner adopts the ALJ's conclusions that both the weight of evidence and the doctrine of estoppel support a decision in favor of petitioner, and orders that after determining which teachers were or were not entitled to receive emergency certificates for 2002-2003, the Division of Finance shall either rescind or recalculate the disallowance of $342,593 in salary and benefits costs in the calculation of tuition which petitioner may charge to its sending districts.

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.

June 2, 2006

OAL. DKT. NO. EDU 8569-04
AGENCY DKT. NO. 292-8/04

SEARCH DAY PROGRAM, INC.,	:	
PETITIONER,	:	
V.	:	COMMISSIONER OF EDUCATION
NEW JERSEY DEPARTMENT OF EDUCATION,	:	DECISION
RESPONDENT.	:	

Petitioner appeals a determination by the Division of Finance of the New Jersey Department of Education (the Department) that for the 2002-2003 school year, salaries and benefit costs totaling $342,593.00, for nine of petitioner's teachers, must be disallowed under N.J.A.C. 6:20-4.4(a)(4) and (11) (effective at the time but now superseded), due to the teachers' alleged failure to obtain emergency certification. Such a disallowance would have the effect of requiring petitioner to return that amount to its sending districts. Since petitioner is a non-profit entity which rarely achieves surpluses, and the amount cannot be paid with tuition from subsequent years, petitioner would have to engage in extensive fund raising. After reviewing the Initial Decision, the record[1], and the parties' exceptions, the Commissioner finds as follows.

It is undisputed that petitioner, a private, non-profit school for the disabled, located in Ocean Township, Monmouth County, and specializing in the education of autistic students, has been approved by the Department to receive placements from public school districts. It is also undisputed that in order to be fully staffed, petitioner has frequently hired teaching candidates who have not acquired standard teaching certificates. Thus, for several

[1] Transcripts of hearings held on August 25 and 26, 2005, and October 28, 2005 were provided.

years, petitioner has been forwarding to the Monmouth County Office of the Department of Education (Monmouth County Office) applications for emergency certificates for the positions of "teacher of the handicapped" and "speech language specialist." Normally, these application packages are processed by the County Office and, if approved, are forwarded to the Department's Office of Licensing and Credentials (State Licensing Office), in Trenton, for issuance of the certificates. The County Superintendent's approval is the basis for issuing certificates. The State Licensing Office sends the certificates to the teacher/applicants. (1T146[2])

It was the responsibility of petitioner's office manager, Christina Johnson, to process the applications for emergency certification. (1T9) She testified that her general practice up through the 2002-2003 school year was to ask the staff for transcripts, money orders and applications in June and collect them in July. *(Ibid.)* She would give the application materials to Executive Director Katherine Solana for review and signature, and send the paperwork via regular mail to the County Office after she received it back from Solana. (1T9; 1T24) She did not keep copies of what she forwarded to the County Office. (1T20-21)

Johnson testified that in 2002 she did not deviate from the procedures described above when she handled the applications for emergency certificates for the previously mentioned nine teachers. (1T24) However, in June of 2003, as she initiated the process of preparing emergency certification applications for the next school year, she realized that the certifications for the prior year had never arrived. (1T10) She testified that her failure to realize earlier that there was something amiss was attributable to the fact that the emergency certificates had, in her experience, always arrived well into the second half of the school year, i.e., March, April or

[2] 1T = Transcript of August 25, 2005 hearing; 2T = Transcript of August 26, 2005 hearing; 3T = Transcript of October 28, 2005 hearing.

May, and had always been backdated to the prior September. (1T11; 1T164) Respondent does not dispute this.

Johnson advised Solana of the problem (1T15), and contacted county certification officer Donna Pesci. (1T16) Pesci could not find any record of the applications and asked Johnson for copies. Johnson had some money order receipts provided by the applicant teachers (1T33; 1T59; P-13; P-14), a transcript copy for one of the teachers (P-15), and possibly a copy of the envelope, but could provide nothing else because she generally did not keep copies of what she forwarded to the County Office. (1T20-21) She sent what she had to Pesci. (1T21) Pesci's supervisor, June Hankel, contacted Johnson and said she would look into the problem. (1T23)

In August 2003, at the suggestion of Pesci and/or Hankel, Search Day resubmitted applications to the County Office for all nine teachers for the 2002-2003 year. (P-4) Hankel sent the paperwork to the State Licensing Office on September 15, 2003, and checked with Peggy Smith of that office on October 8 and 24, 2003. (P-5; P-6) Solana also wrote to the State Licensing Office on September 8, 2003, explaining the situation, and asking both for retroactive emergency certificates for the 2002-2003 school year, and renewals for the 2003-2004 school year. (P-8)

Joan Brady, Director of the State Licensing Office, responded to Solana's September 8, 2003 letter on October 28, 2003. She stated that there was no basis upon which to grant petitioner's request for retroactive emergency certificates for 2002-2003 and renewals for 2003-2004 [presumably because the State Licensing Office possessed no approvals from the County Superintendent], and further directed petitioner to submit new applications for the 2003-2004 school year. (P-8) On November 10, 2003, Hankel sent Smith an email reminding the State Licensing Office that petitioner had already resubmitted applications to the County

Office and that those applications had been forwarded to the State Licensing Office on September 15. (P-9) Hankel followed the e-mail up on November 18, 2003, November 25, 2003, and December 1, 2003, at which point the 2003-2004 emergency certificates were apparently issued, backdated to September 2003. (*Ibid.*) The list of teachers whose salaries had been disallowed for 2002-2003 and the list of teachers who were approved for teaching in 2003-2004 were identical.

In the meanwhile, during the late summer and autumn of 2003, petitioner met with the county superintendent (P-15), and wrote to the Commissioner of Education and other employees of the Department of Education (P-17; P-18; P-19) about the dispute concerning the emergency certification applications, and the serious impact that the disallowance of $349,593 would have on petitioner's $3 million annual budget.

The factual controversy in this case is whether petitioner submitted to the County Office the nine emergency certification applications for the 2002-2003 school year. There are copies in the file of statements from all nine of the involved teachers describing when and how they submitted their emergency applications (P-11) and, as stated above, petitioner's office manager described at the OAL hearing how she processed and forwarded the applications.

Both Pesci and Hankel denied ever receiving emergency certification paperwork from petitioner for the 2002-2003 school year. Neither witness believed that the applications could have been lost or misplaced in their office. Hankel, however, testified that before arriving in the County Education Office, all mail went to and was processed by the Monmouth County mailroom, located in a different building. (3T25-26)

In addition, both Pesci and Hankel testified that their office moved in August 2002. (1T149; 3T20) August is, according to their testimony, the busiest time for

receiving certification application materials from the fifty-two districts and private schools in Monmouth County. (1T158-159) Further, Hankel stated that the move was executed "in different times" (3T24) and that she was on vacation during the days in which the files for emergency certification applications were transported to the new office. (3T20-21)

The ALJ found in favor of petitioner on two grounds. The first ground was the weight of the evidence. The ALJ found Johnson's testimony to be credible and consistent with other evidence in the record, such as the statements, receipts and a transcript copy from the nine teachers whose salaries were disallowed, showing that they had submitted their application materials by September of 2002. Johnson's explanation for her tardy realization that there was a problem with the 2002-2003 certifications was also consistent with other evidence in the record that the State was typically late in issuing emergency certificates. Thus, the expectation that the certificates were on their way precluded timely concern and action while there was still time to correct the situation.

In addition, respondent's position that it is unlikely that the county lost or misplaced petitioner's emergency certificate applications is not entirely harmonious with certain undisputed facts. First, the County Office moved during the critical period in which emergency certificate applications were submitted by over 52 districts. Second, Hankel was not actually present on the days that the office contents were moved. Third, the emergency certification filing cabinets were sealed for a few days, and Hankel was not able to explain what was done with applications that might have come in during those days and could not be filed.

The ALJ also referred to Hankel's testimony that all county mail was first routed to a mailroom at a location separate from the Superintendent's office. Neither Hankel nor Pesci

knew how the mail was processed in the county mailroom, or how it was subsequently distributed to the various county offices.

The second ground upon which the ALJ based his decision was equitable. The regulations in 2002 mandated that services requiring a certificate could be rendered only by the holder of the required certificate . . . . *N.J.A.C.* 6:11-3.1(a). However, emergency certificate applications could not be submitted to the county until after August 1. *N.J.A.C.* 6-11-4.3(b). The Department's witness, Smith, testified that it was virtually impossible for the county and state to process every emergency certificate application between August 1 and the beginning of the school year. Consequently – as conceded by both the county and State witnesses – each year teachers in many districts taught without "holding" their emergency certificates. The certificates typically did not arrive from the State until half of the school year – or more – was over.

Technically, therefore, the State violated its own regulations each school year, by designating as allowable costs the salaries of many teachers who did not actually have their certificates in hand. Further, through this pattern of practice, the State caused districts to rely on the validity of their emergency teacher's credentials until it was too late to resubmit applications. The districts came to expect backdated certificates to arrive in March, April, or even May.

The ALJ also took into consideration the fact that respondent did not allege that any of the teachers who had not received the emergency certification for the 2002-2003 school year would have been ineligible to receive same, had their applications been timely processed. In fact, they all were approved for certificates for the 2003-2004 school year, and apparently several had received certificates for the 2001-2002 school year.

Upon consideration of the foregoing, the ALJ concluded that respondent is equitably estopped from designating the 2002-2003 salaries and fringe benefits of petitioner's nine emergency teachers as non-allowable costs.

In its exceptions, respondent challenges both of the ALJ's grounds for his Initial Decision in favor of petitioner. In challenging the ALJ's determination about the weight of the evidence, respondent asserts that Johnson testified that she submitted applications in batches as they were supplied to her by teachers (1T54:23-1T56:3) and that she did so in August and September as they came in. (1T55:20-25) Because it would be unlikely that multiple batches of only one out of fifty-two schools' emergency certificate applications would get lost, respondent contends that the weight of the evidence goes against petitioner's contention that the County Office lost the applications. Respondent also pointed to Hankel's and Pesci's testimony about how meticulous their office practices were.

The Commissioner sees no reason to disturb the ALJ's finding concerning the weight of the evidence. First, the Commissioner must defer to the ALJ's determination that Johnson's testimony about mailing the emergency certification applications was credible and more likely than respondent's position concerning the infallibility of the county office procedures. *D.L. v. Board of Educ. of Princeton Regional School Dist.*, 366 *N.J. Super.* 269, 273 (App. Div. 2004); *Clowes v. Terminex Int'l.*, 109 *N.J.* 575 (1988).

Second, the hearing transcript reveals that the testimony of Johnson to which respondent refers was given in response to questions, some theoretical, about Johnson's general procedures prior to 2002-2003. (1T54:13 to 1T55:13) In point of fact, Johnson testified that "[i]f [she] had three applications, [she] would send three applications in one envelope."

(1T55:14-15) And she also testified that she did not specifically recall whether the 2002 applications went in separately or together. (1T55:16-19)

A review of the statements from the nine teachers and the money order receipts mentioned above reveals that at least seven or eight of the applications could have been sent in one envelope in September or October.[3] If that were the case, the timing would have been after the move of the County Superintendent's Office, but the possibility of misplacement by the county mailroom or the County office would have remained.

Respondent's challenge to the ALJ's application of equitable estoppel is also without merit. Relying on *Jesse Barr v. City of Newark Police Department,* 97 *N.J.A.R.* 2d 582, (1997), *aff'd.*, Merit System Board (decided April 15, 1997), and other cases, respondent maintains that to establish a claim of equitable estoppel against a government entity, a party must prove that the public entity knowingly and intentionally misrepresented or engaged in conduct that is calculated to mislead another, and that the misled party relied upon the government entity, changing its position to its detriment. The intentional misrepresentation requirement is needed to balance the detriment to the public interest that could result from estoppel against the government. *O'Malley v. Department of Energy*, 109 *N.J.* 300, 317 (1987). Estoppel against the government is only justified where its absence would cause manifest injustice. *W.V. Pangborne & Co., Inc. v. New Jersey Dep't. of Transportation*, 116 *N.J.* 543, 554 (1989). Respondent reasons that the doctrine of equitable estoppel is inapplicable to this case because there was no showing of intentional misrepresentation by the Department.

However, in *State Dep't. of Environmental Protection v. Ventron Corp.*, 94 *N.J.* 473 (1983), a case cited in the authority upon which respondent relies, the New Jersey Supreme Court explained that "intentional misrepresentation by the government may be found if

[3] Christine Peterson wrote that her application was submitted in January 2003.

a public official knew or should have known of material facts but acted as if he did not have knowledge, thus causing a misrepresentation. *Ventron, supra,* 94 *N.J.* at 499. The evidence in this case reveals that both the Department and the County knowingly 1) allowed "emergency" teachers to work in the county's schools for the better part of the year without their certificates and 2) routinely sent backdated certificates to the teachers after most of the school year had passed. These practices by the Department left little time for the correction of errors, since the schools relied upon receiving backdated certificates in March, April or May, and thus had no reason to suspect problems until the end of the school year.

Further, there is nothing in this record to suggest that detriment to the public interest would result from a decision in favor of petitioner. There is no contention that the nine teachers did not do the jobs for which they were hired and paid, and there is no contention that they were not eligible for emergency certificates. To the contrary, a decision in favor of respondent would impose a debt on the petitioner of ten percent of its budget, which would cripple its ability, as a non-profit entity that rarely enjoys surpluses, to continue its important service to the community. [4]

In summary, the Commissioner adopts the ALJ's conclusions that both the weight of the evidence and the doctrine of estoppel support a decision in favor of petitioner. Accordingly, the Monmouth County Superintendent of Schools shall review the replacement applications for 2002-2003 emergency certificates submitted on behalf of the nine teachers at issue and confirm whether they would have been entitled to emergency certification for the 2002-2003 school year. As to those teachers who were so entitled, the Office of Licensing and Certification shall issue emergency certificates backdated to September 2002. Finally – after the

[4] The first argument in respondent's third exception appears to be missing some text and is not comprehensible. The second argument is unconvincing. The Commissioner is not persuaded that the payment of $342,593 in installments will significantly ease the impact of the debt on petitioner's budget.

county superintendent determines which, if any, of the teachers were not entitled to receive emergency certificates for 2002-2003 – the Division of Finance, Office of Fiscal Policy and Planning shall either rescind or recalculate its disallowance of $342,593 in salary and fringe benefit costs in the calculation of tuition which petitioner may charge to its sending districts.

IT IS SO ORDERED. [5]

Rochelle Hendricks

ACTING COMMISSIONER OF EDUCATION

Date of Decision: 6/02/06

Date of Mailing: 6/02/06

[5] This decision may be appealed to the State Board of Education pursuant to *N.J.SA.*. 18A:6-27 *et seq.* and *N.J.A.C.* 6A:4-1.1 *et seq.*

State of New Jersey
OFFICE OF ADMINISTRATIVE LAW

INITIAL DECISION
OAL DKT. NO. EDU 8569-04
AGENCY DKT. NO. 292-8/04

SEARCH DAY PROGRAM, INC.,
Petitioner,
v.
NEW JERSEY DEPARTMENT OF EDUCATION,
Respondent.

For petitioner: **David B. Rubin, Esq.**

For respondent: **Marta N. Kozlowska**, Deputy Attorney General (Zulima V. Farber, Attorney General of New Jersey, attorney)

Record closed: December 8, 2005 Decided: March 9, 2006

BEFORE **JOSEPH F. MA RTONE**, ALJ:

STATEMENT OF THE CASE AND PROCEDURAL HISTORY

Petitioner in this matter, Search Day Program, Inc., is a private, non-profit school for the disabled located in Monmouth County which specializes in the needs of autistic children between the ages of three to twenty-one. Petitioner appeals respondent's disallowance of the allocation of $342,593 in salaries to various teachers for the 2002-2003 school year as a result of its review of petitioner's financial audit. Respondent determined that these teachers did not possess the appropriate certifications for the

school year. This matter was transmitted to the Office of Administrative Law on October 14, 2004, for hearing as a contested case. The matter was heard on August 25, August 26 and October 28, 2005, and after receiving the submissions of the parties, the record was closed on December 8, 2005. By an Order of Extension filed in this matter, the time for filing the initial decision was extended until March 9, 2006.

FACTUAL DISCUSSION

It is undisputed that petitioner, Search Day Program, Inc., is a private non-profit special education school located in Ocean Township, Monmouth County. It is a school for children with autism, and has been approved by the Department of Education to receive placements from public school districts. Petitioner serves approximately sixty students ages three through twenty-one, and has a staff of approximately sixty-five employees. Its annual budget is approximately $3 million.

On August 23, 2004, petitioner, filed a petition of appeal with the Commissioner of Education, challenging a determination by the Division of Finance that $342,593 in salary and benefits for nine teachers during the 2002-2003 school year were "non-allowable" costs, because they were not appropriately certified. See, N.J.A.C. 6:20-4.4(a)(4),(11) (superseded).

Christina Johnson, the Office Manager at Search Day Program, testified that her duties included making certain that emergency teaching certificates were properly applied for and received. She would obtain documentation from the teachers and deliver them to the Department of Education's county office. In June of each year she would tell the staff members to obtain their official transcripts and in July of each year she would collect them together with the applications and fees for each teacher for the coming school year and send them by mail to the Department's Monmouth County Superintendent's office.

In Ms. Johnson's three years as office manager and two prior years as receptionist/office clerk at Search, it was not unusual for the teachers not to have their

emergency certificates in hand. For the most part, the teachers received their certificates between March and May of the following year, and they would bring them into the school. There were never any discussions with the Department of Education about this and no concerns were ever raised.

In the summer of 2002, the same summer Ms. Johnson sent in the documents in question, the Monmouth County Superintendent's Office moved to a different building on State Highway No. 9 in Freehold, New Jersey. Ms. Johnson stated that after she mailed the paperwork for the emergency certificates to the Monmouth County Superintendent's Office, she just assumed that the emergency certificates would be received by the following spring. She had no conscious knowledge that the certificates had not been received until she started to ask employees for their paperwork for the next school year in June 2003. She then advised Ms. Katherine M. Solana, the Executive Director of Search Day Program, that the emergency certificates had not arrived. She then called the Monmouth County Superintendent's Office and spoke to Donna Pesci, and Ms. Pesci told her to fax over copies of whatever she had. She had not kept copies of all of the documents and could only fax over two or three money orders and copies of applications. Both Ms. Pesci and June Hankel, who worked in the same office, said they would look into it.

Ms. Johnson explained that once the applications and supporting transcripts were reviewed by the county office and approved and signed by the County Superintendent, they would be sent to the Department of Education in Trenton, and the Department would mail the certificates to the individual teachers. Ms. Johnson further indicated that there was no suggestion that any of the teachers would not have been approved for emergency teaching certificates.

Eventually, Ms. Johnson was advised by Ms. Hankel that neither the county office nor the Department of Education in Trenton had any record of receiving the applications and therefore nothing could be done. She was also told by Ms. Hankel that the 2003-2004 renewal applications must be changed from renewal applications to initial applications. As a result, all employees with emergency certificates resubmitted

initial applications for the 2003-2004 school year.

Ms. Johnson testified that the 2003-2004 applications were hand-delivered to the County Superintendent's office, and the certificates were issued to the teachers in early December

2003, backdated to September 2003. The Department has not taken the position that the teachers were uncertified from September 2003 through December 2003. As for the emergency certificates for 2004-2005, the first one was received in mid-March 2005 backdated to September 2004. No one in the Department of Education ever said that it was necessary to have an emergency certificate in hand in order for that teacher's salary to be an allowable cost.

On cross-examination, Ms. Johnson indicated she was aware of the importance of the applications. The previous office manager also sent these applications to the County Superintendent's office by mail.

Katherine M. Solana, the Executive Director of Search Day Program, testified that Search was established 34 years ago and specializes in providing special education services to children with autism. She has been connected with Search for 28 years. There are approximately 60 students and 65 employees. She has been Executive Director since 1998, and served as an Administrator for the five years prior thereto, and for more than twelve years she was a classroom teacher. She was first involved with the certification process in 1998.

Ms. Solana agreed with Ms. Johnson's testimony concerning the extensive delay in the issuance of emergency teaching certificates by the Department of Education. It was common practice for the Department to backdate the certificates to the beginning of the school year. She explained that the procedure is for the employee to submit the application, transcript and fee and for Search Day Program to mail the completed application by regular mail to the County Superintendent's office. Search Day Program had never been docked or disallowed prior to the 2002-2003 school year. However, she admitted she had no hands-on role in this process.

Ms. Solana testified that she first learned from Ms. Johnson that there was a problem in June 2003, but that Ms. Johnson was trying to work it out with the County Superintendent's office. Search resubmitted the paperwork, but there was still a problem so she requested a meeting with Mr. Michael Maddaluna, the County Superintendent. She attended a meeting with Karen Fruman, Supervisor of Special Education, June Hankel and Mr. Maddaluna. Mr. Maddaluna asked why Search had not called to inquire as to the status of the emergency certificates during the school year. Ms. Solana brought up the fact that there is a significant delay in the Department's issuance of these certificates and Mr. Maddaluna replied that it was her responsibility to keep on this. Mr. Maddaluna indicated he would look into this with the Department. Sometime after the meeting, Ms. Hankel called her and advised her that Mr. Maddaluna would be leaving the Superintendent's position and that she was back in charge of handling the matter.

Ms. Solana began telephoning the Department of Education in Trenton herself to cut through the red tape and get the problem resolved. After several unfruitful calls, she wrote to Brady on September 8, 2003, explaining in detail what had occurred. (P-4) Brady responded by letter of October 28, 2003 (P-B), denying Solana's request for relief. Solana followed up the next day with a letter to Commissioner of Education William Librera himself (P-17), requesting a meeting to discuss the matter, and sent yet another letter to Brady on November 12, 2003 (P-18)

Search's independent audit for the 2002-2003 school year had been filed with the Department. Since the allowability of the affected teachers' compensation had not yet been resolved, the auditors had no choice but to show the $342,593 costs of the nine teachers' salary and fringe benefits as non-allowable.

Teacher	Salary	Employee Benefits	Pension Contributions
D. Moroni	$32,124	7,236	
P. Jones	29,194	10,515	
C. Peterson	17,522	3,370	

M.	Golden	17,862	10,444	536
C.	Tedeschi	34,516	14,978	1,397
S.	Yolinsky	26,584	6,738	
L.	Evans	33,741	14,923	1,352
B.	Daly	39,344	7,856	1,185
K.	Gregory	23,497	6,486	1,193

Ms. Solana wrote another letter to the Department on January 9, 2004, once again pleading her case (P-19). Finally, in June 2004, Search's attorney, Paul Anzano, Esq., wrote once more to Commissioner Librera, forwarding another copy of Ms. Solana's prior letter and again requesting a meeting. (P-25)

On June 21, 2004, Mr. Verner of the Division of Finance sent a memo to Mr. Rosenberg (P-26), suggesting how he should respond to Mr. Anzano's letter. The contents of that memo are as follows:

> The 2002-2003 Search Day Program audited financial statements reflect $343,000 of non-allowable costs due to uncertified staff. Their attorney Paul Anzano is requesting a meeting to discuss this issue.
>
> • Over the years, school has annually received emergency certifications from the county office for various employees and these employees were approved for 2003-2004.
>
> • In June 2003, the school's executive director, Katherine Solana contacted the county office checking the status of the emergency certifications for 2002-2003.
>
> • The county office is claiming that they never received any applications for emergency certifications or standard certifications for 2002-2003 while Ms. Solana claims that applications were made on a timely basis.
>
> • When asked why she waited until June 2003 to check the 2002-2003 status, Ms. Solana claims that it wasn't unusual that applications for emergency certification to the county office made in September weren't returned until March or April.
>
> • I spoke to Joan Brady who indicated the county office has no documentation that timely application was made.

> • Ms. Solana or the employees have no documentation to support their claim that applications were made on a timely basis.
>
> • See attached September 8, 2003 letter from Katherine Solana to Joan Brady and Joan Brady's letter dated October 28, 2003 indicating there is no basis for backdating the 2002-2003 certificates.
>
> Based on the above information, I see no need for a meeting since you have no authority to intercede in this issue. I feel their only avenue is filing a petition of appeal with the Commissioner pursuant to the provisions of N.J.A.C. 6A:3-I.1 et seq.

Mr. Rosenberg, apparently on Mr. Verner's advice, replied to Paul Anzano, Esq., by letter of June 28, 2004, that "I understand the importance of this issue, but I feel that a meeting would not be beneficial since I have no authority to intercede in this issue." (P-27). Mr. Rosenberg reminded Mr. Anzano of Search's right to file a petition of appeal with the Commissioner, and this present proceeding was instituted two months later.

Ms. Solana testified that the annual budget of Search Day Program is approximately $3 million. Funds are paid to it from the sending districts. There is an occasional surplus in funds but Search generally operates at deficits. Search does not have the funds to repay the disallowed tuition. The amount could not be paid from tuition for subsequent years and could only be paid through fundraising. She also explained that if these teachers could be considered to have been hired as substitute teachers, Search would have to pay back $89,428, and if they were considered to be teacher's aides, Search would have to pay back $137,322. All of the teachers in question were approved for the following year and many were approved for the prior year.

On cross-examination, Ms. Solana testified that the decision that the $342,593 were not allowable costs resulted from the auditor's submission of an independent audit. The audit is due by November 30 of each year and the auditor reported these as nonallowable expenses. Mr. Verner of the Department takes the position that Search's

own audit shows these as nonallowable expenses, therefore he is powerless. She also testified that Search resubmitted new original applications for these emergency certificates. She stated that there is no procedure to follow up on these submissions.

The 2001-2002 emergency teacher certificates were issued beginning in December 2001 through the spring of 2002. The application forms come in triplicate and Search did not retain the green copy of the form in 2002-2003. The 2004-2005 emergency teacher certificates came in at the end of April and during May 2005, and were effective in September 2004. She indicated that there is no question the applications were submitted on time.

Donna Pesci testified that she has been the Certification Officer at the Monmouth County Office of the Department of Education since 1998. She and June Hankel are the only two that work in the Certifications office. Ms. Hankel has been there 17 years and is in charge. In that position, she opens all incoming mail, puts together all files of applicants and processes renewals. Each emergency certificate renewal is filed alphabetically by individual names and the money order for the fee is attached. The money order and the white copy of each application is sent to the Department and the Department then sends the emergency certificate to the applicant.

Ms. Pesci testified that she does not remember the specifics as to the 2002-2003 school year. There was no paperwork in the office to show that the renewal from Search Day Program were submitted. When Ms. Johnson called they looked through the file cabinet for the names she provided and no applications could be found. The County Superintendent's Office moved in the summer of 2002, and the filing cabinets were taped closed and locked when they moved. She indicated that policy is that as long as the paperwork was filed with the County Superintendent everything was "OK" with the Department, and that an applicant for an emergency teaching certificate was not to worry about it. There is always some kind of delay and Trenton is always backlogged.

On cross-examination, Ms. Pesci stated that seven of the nine teachers from

Search Day Program were renewal applications. Over 50 schools and organizations send in these applications. It is typical to receive them by regular mail, and they are mailed to both a post office box and to the street address of the County Superintendent's Office. When the Office moved in August 2002, it took them a day or two to accomplish the move.

Margaret L. Smith testified that she is employed by the Department of Education at the Office of Licensure and Credentials. She has held the position of Coordinator of Licensing Programs for six years and is a resource person for county offices. She testified that she is familiar with the emergency teaching certificates regulations, which changed in 2004. The application requires the school district to show that it advertised and found no suitable certified teacher, and the County Superintendent makes the determination whether the school district has taken all necessary and appropriate steps to find a certified teacher. If an emergency teaching certificate is issued, it can be renewed from year to year provided the applicant is making progress toward a permanent teaching certificate. The State office has no authority to deny a certificate if the County Superintendent has approved it.

Ms. Smith became aware of the Search Day Program matter in September 2003. The Department searched through all renewal requests and the renewal applications from Search were never located. She acknowledged that there is a delay in issuing emergency certificates but indicated that the bulk of the certificates are issued by November of each year. The certificates are issued based on the date they are approved by the County Superintendent. Thus, if the County Superintendent approves the application on September 1, the State office back dates the certificate to that date.

On cross-examination, Ms. Smith acknowledged that the regulations require the teacher to have an emergency certificate in hand in order to teach, but that it would be impossible to follow the regulations literally. This requirement was not applied mechanically and the State accepts the County Superintendent's approval as the approval date. The County Superintendent's approval is not a recommendation but is binding and is the basis for issuing the emergency certificate. When the school district

has filed properly it is not penalized for the State's delay in issuing the certificate. However, those school districts that have not followed the proper procedure should be penalized.

James Verner testified that he is the section supervisor in the Division of Finance, Office of Fiscal Policy and Planning, a position he has held for approximately eighteen years. He is familiar with petitioner's allegations. He explained that each school must have a private auditor perform an annual audit pursuant to N.J.A.C. 6A:4-1 to 4.16. His office is responsible for certifying the actual cost per pupil. It is up to the independent auditor to determine non-allowable costs pursuant to the regulations. In the present matter, the independent auditor for Search Day Program listed approximately $342,000.00 in teachers' salaries as a non-allowable cost. He explained that the Department does not go back and determine if nonallowable costs are nonallowable. He talked to Ms. Solana about this and told her to appeal the decision. He also indicated that he would be able to work out a payment schedule with Search.

Mr. Verner acknowledged that teachers must hold a certificate and that the certificate must have an issue date to be effective. He acknowledged that Assistant Commissioner Michael Azzara issued a memo (P-32) approximately ten years before with a practical solution to the problem of delay in issuance of emergency teaching certificates. The memo provides that the date the individual may begin employment is the date the County Superintendent signs the form indicating approval to issue or renew the emergency certificate. There is no sanction for this practice in the regulations, and its purpose was to deal with the reality of the situation.

Mr. Verner has Search's Audit, but has no recollection when it was received. If Search submitted renewal applications and the county office did not receive them, it is up to the Office of Licensing and Certifications to intercede. The auditors are required to disallow salaries paid to noncertified teachers.

June Hankel testified that she has been employed by the Department of Education, Monmouth County Superintendent of Schools, for 18 years, and is in charge

of teacher certifications in the Certification Department. She reviews all certifications and paperwork, compiles applications to work for Trenton and addresses all questions from applicants as far as requirements for certifications. Her Department handles applications from school districts for substitute teachers, emergency teacher certificates, renewals and conditional licenses. She and Donna Pesci handle all of the paperwork for the county office.

Ms. Hankel testified that when a school district has requested an emergency teaching certificate, it is good for one year and expires on June 30 of that year. It must be proven to the county office that the school district has advertised fruitlessly. The application is given to the superintendent to sign. A form is sent out to all school districts in June with a memo regarding emergency certificates (R-1), and applications are accepted by their office from July 31 through August of each year. Once an application is received, the emergency teaching certificates files are maintained individually and the file is pulled for each individual and they check to make sure the application is filled out properly with the appropriate fee. It is a three-part application. The bottom part is completed by the county and is signed by the superintendent. The pink copy is put in the applicant's file, the green company is for the school district and the original white copy is sent to the Department's Office of Licensure and Credentials in Trenton. Trenton issues and sends out the renewal license.

Ms. Hankel does not recall if her office sent out renewal certificates to teachers in 2002-2003. She does recall that Ms. Johnson called to her attention that no renewals were received. She and Donna Pesci searched through every drawer and file in the county office and found no documentation that the renewal applications were ever received by their office. They also went through the folder of green application files and found nothing. They advised Ms. Johnson of this fact. Ms. Solana then met with the County Superintendent, but, because no renewal forms were found and no record of application fees were found, Joan Brady said that the Department would not backdate emergency certificates. As a result, the applicants had to apply for new emergency certificates.

Ms. Hankel acknowledged that her office moved during the week of August 12, 2002. She was on vacation during the move. She would not permit files to be taken out of the cabinets and the files had been locked and taped shut and had to be moved with the files remaining in them. The office is very cautious because it deals with people's livelihoods, and they tried to do everything they could to secure their files. It was when she returned from vacation to the new office that the filing cabinets were unsealed and all the mail was scrutinized. To her knowledge the move only took a couple of days. She is very "anal" and either she or Donna Pesci opens the mail, no one else. Money orders are immediately stapled to the applications. In her eighteen years working there they have never lost a file. The mail first goes to the Monmouth county mail room, which is located somewhere in Freehold, then delivered to her office by county workers who may have had other stops en route. When she was asked whether Search's mailings may have been misplaced in the County mailroom before they ever got to her office, Ms. Hankel replied, "I can't answer that."

Ms. Hankel indicated that she has taken paperwork home in recent years, but did not do so in 2002. The meeting with Ms. Solana was pleasant and there were no challenges to anyone's credibility.

LEGAL DISCUSSION AND ANALYSIS

Petitioner herein challenges the determination by the Division of Finance that $342,593 in salary and benefits for nine teachers during the 2002-2003 school year were "non-allowable" costs, because they were not appropriately certified. See, N.J.A.C. 6:20-4.4(a)(4),(11) (superseded). At the time in question, the administrative regulations at issue in this case were codified in Title 6 of the Administrative Code. They have since been recodified in Title 6A, but the original provisions will be referred to herein as they were in effect at the time

Private special education schools are required to employ professional staff who hold the state-issued certification appropriate to their scope of responsibility. At the time in question here, when the events underlying this case occurred, N.J.A.C. 6:11-4.3

provided that when a school could demonstrate that suitable professional staff were unavailable, the Department could issue an emergency certificate to candidates not yet eligible for standard certification:

> (a) An emergency certificate is a substandard one-year certificate issued only in the field of educational services, teacher of the handicapped, teacher of the blind and partially sighted, and teacher of the deaf and hard of hearing.
>
> (b) An emergency certificate is issued only on application of a public school district, submitted after August 1, in which the district board of education declares its inability due to unforeseen shortages or other extenuating circumstances to locate a suitable certified teacher.

A private school receiving pupils from a local public school district may not charge tuition that exceeds the actual cost per pupil as determined under rules prescribed by the commissioner and approved by the State Board of Education. N.J.S.A.18A:46-21. Pursuant to this statutory grant of rule-making power, the State Board of Education has promulgated regulations governing the maximum tuition rates that may be charged by private special education schools. N.J.A.C. 6:20-4.1 to 4.4 (superseded). At the time in question here, private schools for the disabled were permitted to charge tuition in "an amount less than or equal to the certified actual cost(s) per pupil," N.J.A.C. 6:20-4.1(a) (superseded), calculated in accordance with a schedule of allowable and non-allowable costs in the regulations, as reflected in an annual audit report filed with the Department by November. N.J.A.C. 6:20-4.8(a) (superseded).

N.J.A.C. 6:11-3.1(a) provided that services requiring a certificate under the State Board's regulations be rendered only "by the holder of the required certificate or under his or her direct and continuous personal supervision." Under N.J.A.C. 6:20-4.4(a),

> "[a] cost which is not allowable in the calculation of the certified annual cost per pupil includes the following:
>
> * * *

> (4) The salary of a professional staff member who is not certified but is functioning in a position requiring certification in accordance with N.J.A.C. 6:11[,]
>
> * * *
>
> [and]
>
> (11) The cost of fringe benefits which are based on non-allowable salary. . .

At Search Day Program, the standard practice for many years was for the office manager to instruct staff members requiring original or renewal emergency certificates to submit their official transcripts, money orders and application forms to her office over the summer before the school year to which the certificate would apply. The office manager would then send these applications and supporting documents to the County Superintendent's Office by regular mail, usually during August or, depending on the date of hire, September. It is undisputed in this case that while emergency certificates were supposed to be in hand when the employee commenced work in September, they typically were not issued by the Department of Education until the late winter or spring of the following year, backdated to the previous September. For as long as anyone could remember, by the time Search's employees received their certificates from the Department of Education and turned them in to the school, most of the school year had already elapsed.

Christina Johnson testified that she sent the nine teachers' paperwork to the County Superintendent's Office in a timely manner consistent with how Ms. Pesci testified most districts and private schools send them. This was the same procedure she had followed since the time she assumed the position two years earlier, and was no different than her predecessor had followed for many years without incident. It is noted that at no time did Ms. Johnson testify that she submitted this paperwork in multiple packages over a period of two months. It was not disputed at the hearing that all nine of the teachers fully satisfied the eligibility criteria for an emergency certificate, and would have been issued one if timely application were made. Ms. Johnson was

adamant that she had sent in the paperwork, and secured written statements from the affected employees attesting to their timely submission of the required paperwork to her in 2002 (P-11 through P-14).

Ms. Solana testified from her own experience as a teacher at Search, going back over twenty years, that certifications that were applied for over the summer would not be received from the State until many months later, and were always backdated to the previous September.

Petitioner argues that the overwhelming weight of the credible evidence establishes that Ms. Johnson sent the nine teachers' paperwork to the County Superintendent's Office in a timely manner. Ms. Johnson's testimony was not directly disputed by respondent. In addition, I had the opportunity to assess Ms. Johnson's testimony and demeanor, and found her to be credible. The respondent's response to this testimony was simply that it did not receive these materials. However, petitioner argues that even if they did not, the evidence suggests any number of reasons why this may have been so. The County Office moved to a new building in August 2002, the same critical month that certification applications from over fifty school districts and private schools, including Search day Program, were being received by her office. Ms. Pesci and Ms. Hankel both suggested that the likelihood of Search's paperwork being misplaced as a result of the move was slight, because all of their file cabinets were locked and taped shut in preparation for the move, and not reopened until they arrived in the new office space. However, as argued by petitioner, if the documents were misplaced somewhere in the office, they most likely would not have been filed in the cabinets to begin with.

Ms. Hankel had no personal knowledge of what paperwork came and went in the office during the period of the move as she was away on vacation. Nor could she satisfactorily explain what happened with the mail arriving at the office daily while she was away, after the file cabinets had been secured in anticipation of the impending move. Ms. Hankel also testified that mail addressed to the County Office at that time was first routed to a central mail drop serving all Monmouth County agencies, then

delivered to her office by county workers who may or may not have had other stops en route. When she was asked whether Search's mailings may have been misplaced in the County mailroom before they ever got to her office, Ms. Hankel replied that she could not answer that. Ms. Pesci and Ms. Hankel both indicated that the likelihood of Search's paperwork being misplaced as a result of the move was slight, because all of their file cabinets were locked and taped shut in preparation for the move, and not reopened until they arrived in the new office space. However, if the documents were misplaced somewhere in the office, they would not have been filed in the cabinets to begin with.

Petitioner argues that even if it is assumed, but not conceded, that Ms. Pesci and Ms. Hankel never received the documents, the appropriate sequence must be analyzed in the context of a regulatory scheme that the Department itself has routinely ignored. From the outset of this dispute until the hearings commenced, the Department steadfastly maintained that a teacher's salary and fringe benefits were non-allowable for any period of service during which the teacher was not the holder of a certificate required by the regulations. In discovery, Jim Verner of the Division of Finance, took the position that in order to work in a position that requires school certification the individual must possess the proper school certification required for the position. If a staff member was working in a position that required a school certification but was not properly certificated for all or a portion of the school year, all salary and fringe benefits during the period of non-certification would be considered non-allowable costs.

However, at the hearing, every witness who testified for the Department admitted that teachers are routinely permitted to commence their teaching duties before they become the "holder" of the required certificate. Ms. Pesci agreed that certifications are not issued by the Department until well after the midpoint of the school year, backdated to September. It was her understanding that as long as the paperwork is delivered to the County Office on time, and signed off on by the County Superintendent before the school year begins, the employee would be held harmless regardless of the date when the physical certificate is issued.

Margaret Smith, who was on staff with the Department's Office of Licensure and Credentials at the time of the underlying events herein, testified that, according to the regulations, a teacher is required to have the emergency certificate physically in his or her possession before commencing work. She testified, however, that because it was virtually impossible for the County Offices and the Department to process emergency certificates between August 1st and the start of school in September, the Department has for many years allowed employees to start work without a certificate in hand, as long as the paperwork was submitted to the County Office, and the County Superintendent had recommended approval by the Department. Once the Department issued the physical certificate later in the school year, it would be backdated to the date that the County Superintendent recommended approval.

It was acknowledged that teachers must hold a certificate to teach, but that Assistant Commissioner Azzara issued a memo (P-32) approximately ten years before to address the problem of delay in issuance of emergency teaching certificates. The memo provided that the date the individual may begin employment is the date the County Superintendent signs the approval to issue or renew the emergency certificate. Emergency teaching certificates are then backdated to that date even though there is no sanction for this practice in the regulations.

In my opinion, the position and arguments of petitioner herein are in the nature of a claim of equitable estoppel. Equitable estoppel is generally defined as

> [T]he effect of the voluntary conduct of a party whereby he is absolutely precluded, both at law and in equity, from asserting rights which might perhaps have otherwise existed, either of property, of contract, or of remedy, as against another person, who has in good faith relied upon such conduct, and has been led thereby to change his position for the worse, and who on his part acquires some corresponding right, either of property, of contract, or of remedy.
>
> [Highway Trailer Co. v. Donna Motor Lines, Inc., 46 N.J. 442, 449 (1966), cert. den. sub nom., Mount Vernon Fire Ins. Co. v. Highway Trailer Co., 385 U.S. 834 (1966).]

The doctrine is intended to prevent a party's disavowal of prior conduct if such repudiation would frustrate the demands of justice and good conscience. Carlsen v. Masters, Mates & Pilots Pension Plan Trust, 80 N.J. 334, 339 (1979). Equitable estoppel arises from one's "conduct," which necessarily encompasses spoken or written words, positive acts, and silence or a negative omission to act. State v. United States Steel Corp., 22 N.J. 341, 358 (1956). An estoppel may also arise by silence or omission where one is under a duty to speak or act. Summer Cottagers' Ass'n of Cape May v. City of Cape May, 19 N.J. 493, 503-04 (1955).

Estoppel is properly invoked where "conduct, either express or implied, . . . reasonably misleads another to his prejudice so that a repudiation of such conduct would be unjust in the eyes of the law." Dambro v. Union Cnty. Park Comm'n, 130 N.J. Super. 450, 457 (Law Div. 1974). Equitable estoppel is not based upon "subjective intent but rather on the objective impression created by the actor's conduct." Ibid. Inasmuch as the basis for equitable estoppel is the preclusion against speaking contrary to one's own act or deed, West Jersey Title v. Industrial Trust Co., 27 N.J. 144, 153 (1958); Anske v. Boro. Of Palisades Park, 139 N.J. Super., 342, 348 (App.Div. 1976), it is not essential to application of the doctrine that the act was fraudulent or intentionally misleading.

In order to establish such a claim, the claiming party must show that the alleged conduct was done, or representation was made, intentionally or under such circumstances that it was both natural and probable that it would induce action. Further, the conduct must be relied on, and the relying party must act so as to change his or her position to his or her detriment. Fidelity Union Trust Co. v. Essex Cty. Mortgage Co., 130 N.J.Eq. 351, 353 (E. & A.1941); see W.V. Pangborne & Co. v. New Jersey Dep't of Transp., 116 N.J. 543, 553 (1989).

Several cases hold that the courts should apply the doctrine of equitable estoppel only in very "compelling circumstances." Bonaventure Intern. v. Spring Lake, 350 N.J. Super. 420, 436 (App. Div. 2002). Although, equitable estoppel is rarely

invoked against public entities, O'Malley v. Department of Energy, 109 N.J. 309, 316 (1987), it may be invoked against a governmental agency "where interests of justice, morality and common fairness clearly dictate that course." Gruber v. Raritan, 39 N.J. 1, 13 (1962), and to prevent manifest injustice, Anske, supra, 139 N.J.Super. at 348, unless the application would prejudice essential governmental functions, Vogt v. Borough of Belmar, 14 N.J. 195, 205 (1954).

Equitable considerations are relevant in assessing governmental conduct and impose a duty on the court to invoke estoppel when the occasion arises. Skulski v. Nolan, 68 N.J. 179, 198 (1975). In Skulski, the Court concluded that it was appropriate for the Court to weigh equitable considerations, particularly the "reliance factor" in determining the applicability of estoppel. Id. at 198-99.

In this matter, I **FIND** that respondent had a clear duty and responsibility to act promptly on applications for emergencies teaching certifications. I **FIND** that such duty is implicit in the laws and regulations requiring a teacher to physically possess an emergency teaching certificate before commencing employment. I also **FIND** that it was virtually impossible for the County Superintendent's office and for respondent to process emergency teaching certificates in compliance with the foregoing requirements. I **FIND** that respondent had, for many years, allowed employees to commence work as teachers in September of the school year without an emergency certificate in hand as long as the application was submitted to the County Superintendent's office and the County Superintendent had recommended approval by the Department. I **FIND** that the Department would eventually commence issuing emergency teaching certificates by December of the school year, but that some would not be issued until April or May of the school year. I **FIND** that at the time the Department actually issued these emergency teaching certificates, they would be backdated to the date that the County Superintendent recommended approval.

I **FIND** that that the overwhelming weight of the credible evidence establishes that Ms. Johnson sent the nine teachers' paperwork to the County Superintendent's Office in a timely manner. I make this finding based on the fact that Ms. Johnson's

testimony was not directly disputed by respondent. In addition, as I previously stated, I had the opportunity to assess Ms. Johnson's testimony and demeanor, and found her to be credible. I **FIND** that the circumstances in this matter are such that it is more likely that the applications in question for emergency teaching certificates for the staff of Search Day Program had been lost or misplaced.

I **FIND** that if the Department of Education had issued emergency teaching certificates on an immediate basis as required by law, a school district or school such as petitioner herein would become immediately aware of the fact that applications for such emergency teaching certificates had been lost or misplaced. I **FIND** that the petitioner in this matter was not made aware that the applications it submitted were lost or misplaced until June 2003 because of the Department's regular, recurrent, and unavoidable delay in issuing such certificates. I **FIND** that by relying on the regular and recurrent delay in issuing such emergency teaching certificates by the Department to its detriment, petitioner herein would be cause to suffer a severe injustice with catastrophic consequences.

The testimony of petitioner's Executive Director is that petitioner is a nonprofit organization and does not have sufficient funds to pay back the $342,000 claimed by respondent. Her testimony was to the effect that this approved school for autistic children would be required to close. I **FIND** that the interests of justice, morality and common fairness clearly dictate some other result in this matter. I **FIND** that this entire situation would have been easily resolved in 2003 by the County Superintendent's office reviewing the replacement applications of the teachers in question, confirming that these teachers would have been entitled to receive emergency teaching certificates, and having the Department issue such certificates backdated to September 2002.

The State Department of Education, through its State Board and Commissioner, has broad powers and responsibilities to supervise public education in the State and effectuate constitutional and legislative policies concerning it. Piscataway Township Bd. of Education v. Burke, 158 N.J. Super. 436, 441 (App. Div. 1978). The Commissioner

of Education has fundamental and indispensable jurisdiction over all disputes and controversies arising under the school laws and the Supreme Court "has repeatedly reaffirmed the great breadth of the Commissioner's power." Hinfey v. Matawan Regional Bd. of Ed., 77 N.J. 514, 525 (1978). Certainly those broad powers extend to remedying a situation such as this where a provider of essential educational services is facing extinction. I **FIND** that by now requiring the Monmouth County Superintendent of Schools to review the replacement applications of the teachers in question, confirming that these teachers would have been entitled to receive emergency teaching certificates for the 2002-2003 school year, and by requiring the Office of Licensing and Certifications to issue such emergency teaching certificates backdated to September 2002, this matter may be remedied. For the reasons stated above, I **CONCLUDE** that this is the fair and appropriate action to take in this matter in order to avoid severe injustice with catastrophic consequences for petitioner.

DECISION AND ORDER

As stated in the foregoing discussion, and for the reasons stated therein, I hereby **ORDER** that the Monmouth County Superintendent of Schools shall review the replacement applications of those teachers employed by Search Day Program who applied for emergency teaching certificates for the 2002-2003 school year, and shall confirm that said teachers would have been entitled to receive emergency teaching certificates for the 2002-2003 school year. As to those teachers who were so entitled, I further **ORDER** that the Office of Licensing and Certifications shall issue emergency teaching certificates backdated to September 2002. Finally, I **ORDER** that the Division of Finance, Office of Fiscal Policy and Planning, shall reconsider its disallowance of the allocation of $342,593 in salaries to various teachers for the 2002-2003 school year as a result of its review of petitioner's financial audit.

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

This recommended decision may be adopted, modified or rejected by the **COMMISSIONER OF THE DEPARTMENT OF EDUCATION,** who by law is authorized to make a 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.

March 9, 2006
DATE

JOSEPH F. MARTONE, ALJ

E-mail Receipt of Initial Decision Confirmed by the Department of Education on:

3-10-06
DATE

Mailed to Parties:

MAR 14 2006

DIRECTOR AND CHIEF ADMINISTRATIVE LAW JUDGE

DATE

OFFICE OF ADMINISTRATIVE LAW

mph

LIST OF WITNESSES:

For Petitioner:

Christina Johnson
Katherine M. Solana

For Respondent:

Donna Pesci
June Hankel
Margaret Smith
James Verner

LIST OF EXHIBITS:

For Petitioner:

P-1 Interrogatory #25 and Answer
P-2 August 18, 2003 e-mail from J. Hankel to P. Smith; August 29, 2003 e-mail from P. Smith to J. Hankel
P-4 September 8, 2003, letter from K. Solana to J. Brady
P-5 October 8, 2003, e-mails to/from P. Smith/J. Hankel
P-6 October 24, 2003, e-mail from J. Hankel to P. Smith
P-7 October 24, 2003, e-mail from P. Smith to J. Hankel
P-9 November 10, 2003, e-mail from J. Hankel to P. Smith
P-10 November 10, 2003, e-mail from P. Smith to J. Hankel
P-12 August 18, 2003, statement of K. Gregory
P-13 September 3, 2002, money order stub
P-14 September 12, 2002, money order receipt
P-15 August 18, 2003, Certification meeting notes
P-16 Memo from C. Hollander

P-17 October 29, 2003, fax/letter from K. Solana to W. Librera

P-18 November 12, 2003, letter from K. Solana to J. Brady

P-19 January 9, 2004, letter from K. Solana "To Whom It May Concern"

P-25 June 2004, letter from P. Anzano to W. Librera

P-26 June 21, 2004, memo from J .Verner to R. Rosenberg/K. Attwood

P-27 June 28, 2004, letter from R. Rosenberg to P. Anzano

P-28 Statement of Non-Allowable Costs 2002-2003

P-32 Assistant Commissioner Azzara Memo of July 20, 1994

For respondent:

R-1 Blank Renewal Application Form BTEAC – 5a

R-2 Monmouth County Superintendent's Memo to Chief School Administrators, dated May 27, 2005

199-06

OAL DKT. NO. EDU 5210-06
AGENCY DKT. NO. 150-4/06

D.E., on behalf of minor children, E.E. and J.E.,	:	
PETITIONER,	:	
V.	:	COMMISSIONER OF EDUCATION
BOARD OF EDUCATION OF THE BOROUGH OF PARAMUS, BERGEN COUNTY,	:	DECISION
RESPONDENT.	:	
	:	

The record, parties' settlement agreement as to the home instruction schedule for minor children E.E. and J.E., and Initial Decision issued by the Office of Administrative Law, pursuant to *N.J.A.C.* 1:1-19.1, have been reviewed.

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

IT IS SO ORDERED.

ACTING COMMISSIONER OF EDUCATION

Date of Decision: 6/02/06

Date of Mailing: 6/02/06

State of New Jersey
OFFICE OF ADMINISTRATIVE LAW

INITIAL DECISION

SETTLEMENT

OAL DKT. NO. EDU 5210-06

AGENCY DKT. NO. 150-4/06

D.E., ON BEHALF OF MINOR CHILDREN,

E.E. AND J.E.,

Petitioner,

v.

BOARD OF EDUCATION OF THE BOROUGH

OF PARAMUS, BERGEN COUNTY,

Respondent.

Joseph S. DiMaria, Esq., for Petitioner
(DiMaria & DiMaria, attorneys)

Cherie L. Adams, Esq., for Respondent
(Sills, Cummis, Radin, Tischman, Epstein & Gross, attorneys)

Record Closed and Decided: May 3, 2006

BEFORE **BARRY N. FRANK**, ALJ:

This matter was transmitted to the Office of Administrative Law (OAL) from the Department of Education on April 24, 2006, 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. Petitioner appeals the decision of respondent to suspend her two sons, E.E. and J.E., for the balance of the 2005-06 school year.

An oral argument was scheduled for May 3, 2006 at the OAL, 33 Washington Street, Newark, New Jersey. At the hearing, settlement discussions were held and a settlement was reached.

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

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

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

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

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

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

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

May 3, 2006
DATE

BARRY N. FRANK, ALJ

Receipt Acknowledged:

5-5-06
DATE

DEPARTMENT OF EDUCATION

Mailed to Parties:

MAY 9 2006
DATE

DIRECTOR AND CHIEF ADMINISTRATIVE LAW JUDGE
OFFICE OF ADMINISTRATIVE LAW

jb

Schedule: Elijah Emmanuel

Ten hours home instruction per week in the following content areas

Mathematics	2.5 hours
Language Arts	2.5 hours
Science	2.5 hours
Social Studies	2.5 hours

Petitioners do not seek instruction in Spanish and Elijah will begin high school in Spanish I.

If the scheduled hours are canceled by the instructor for any reason during the week, the instructor will provide make up instruction for the missed time. Parents will notify Dr. Giordanella in the event time is missed and not made up.

Parents [signature] & Paramus Bd of Ed.

Student Elijah Emmanuel

~~Students~~ _____ By Dr. Kathleen Giordanella

Joseph DMaria Esq [signature] Cherie Adams, Esq. [signature]

Dated: May 3, 2006

Schedule: Jand Emmenuel

Ten hours of home instruction per week in the following content areas:

English	1½ hours
French	1½ hours
Biology	1½ hours
SAT Prep	1½ hours
History	1½ hours
Algebra	1½ hours
Photography	1 hours

Gym - Independent Study

If the scheduled hours are canceled by the instructor for any reason during the week, the instructor will provide make up instruction for the missed time. Parents will notify Dr. Giordanella in the event time is missed and not made up.

Parents _____

_____

Paramus Bd. of Ed.
Kathleen Giordanella Ed.D.
By Dr. Kathleen Giordanella

Student Jand Emmenuel

Joseph D. Maria, Esq. _____ Cherie Adams, Esq. Cherie L. Adams

Dated: May 3, 2006

200-06

OAL DKT. NO. EDU 5603-06
AGENCY DKT. NO. 168-5/06

PRITCHARD INDUSTRIES, INC.,	:	
PETITIONER,	:	
V.	:	COMMISSIONER OF EDUCATION
BOARD OF EDUCATION OF RIDGEWOOD VILLAGE, BERGEN COUNTY, AND GCA SERVICES GROUP, INC.,	:	DECISION ON MOTION
RESPONDENTS.	:	

The record of this emergent matter, which included an audiotape of the hearing conducted at the Office of Administrative Law (OAL), and the Order of the Administrative Law Judge (ALJ) have been reviewed.

Upon such review, the Commissioner determines to adopt the ALJ's recommended Order denying emergent relief, as she concurs with his audiotape determination that – in order for petitioner to institute a challenge in this matter – such challenge should have been brought prior to its participation in the bidding process.

Accordingly, the Order of the OAL denying emergent relief is adopted. This matter is being returned to the OAL for those proceedings which may be necessary to bring it to conclusion.

IT IS SO ORDERED.*

Lucille Davy
ACTING COMMISSIONER OF EDUCATION

Date of Decision: 6/02/06
Date of Mailing: 6/02/06

* This decision may be appealed to the State Board of Education pursuant to *N.J.S.A.* 18A:6-27 *et seq.* and *N.J.A.C.* 6A:4-1.1 *et seq.*

RECEIVED BY
CONTROVERSIES
& DISPUTES
2006 MAY 25 AM 8:43

State of New Jersey
OFFICE OF ADMINISTRATIVE LAW

ORDER

OAL DKT. NO. EDU 5603-06

AGENCY DKT. NO. 168-5/06

PRITCHARD INDUSTRIES, INC.,

Petitioner,

v.

THE RIDGEWOOD VILLAGE BOARD OF EDUCATION, BERGEN COUNTY, AND GCA SERVICES GROUP, INC.,

Respondent.

BEFORE **JEFFREY A. GERSON**, ALJ:

THIS MATTER having been brought before the Court by way of Application for Emergent Relief by Petitioner, Pritchard Industries, Inc., through its attorneys, Franzblau & Dratch, Patrick T. Collins, Esq., appearing, on notice to Sills Cummis, Epstein & Gross, attorneys for the Village of Ridgewood Board of Education, Philip E. Stern, Esq., appearing, and on notice to Cozen O'Connor, attorneys for GCA Services Group, Inc., William D. Hogan, Esq., appearing, and the Court having considered the arguments and papers by counsel in this matter, and good cause having been shown:

IT IS on this 24th day of May, 2006,

ORDERED as follows:

Petitioner's application for emergent relief is hereby denied because petitioner has failed to demonstrate the standards set forth in N.J.A.C. 6A:3-1.6(b) and for the reasons expressed on the record by the undersigned which are hereby incorporated by reference.

This order may be reviewed by the **COMMISSION OF THE DEPARTMENT OF EDUCATION** upon interlocutory review pursuant to *N.J.A.C.* 11-14.10.

May 24, 2006

Date

JEFFREY A. GERSON, ALJ

sej

cc: William Speziale, Deputy Clerk

202-06

OAL DKT. NO. EDU 4078-06
AGENCY DKT. NO. 169-5/06

M.R.M., ON BEHALF OF MINOR CHILD, E.M.,	:	
PETITIONER,	:	COMMISSIONER OF EDUCATION
V.	:	DECISION ON MOTION
BOARD OF EDUCATION OF THE CITY OF BRIDGETON, CUMBERLAND COUNTY,	:	
RESPONDENT.	:	

The record of this emergent matter and the Order of the Office of Administrative Law (OAL) have been reviewed.

Upon review, the Commissioner concurs with the Administrative Law Judge (ALJ) that petitioner has met the established standard for granting of interim relief. *Crowe v. DeGioia*, 90 *N.J.* 126 (1982); N.J.A.C. 6A:3-1.6

With respect to irreparable harm and balancing of interests, the Commissioner so holds for the reasons expressed by the ALJ. However, with respect to likelihood of success on the merits, the Commissioner holds as she does based on the probability that E.M. will be found entitled to attend the Salem County Vocational-Technical School in accordance with established decisional law, not – as suggested by the ALJ – for reasons of constitutional entitlement to a thorough and efficient education or the lack of comparability between the resident district and vocational school drama programs. *Board of Education of the Ramapo-Indian Hills Regional School District, Bergen County v. Board of Education of the Bergen County Vocational Technical School*

District, Bergen County, State Board of Education Decision, February 6, 2002; *Board of Education of Scotch Plains-Fanwood, Union County v. Union County Board of Chosen Freeholders, Board of Education of the Union County Vocational-Technical School District and the New Jersey State Department of Education*, State Board of Education Decision, February 6, 2002; and *K.B. on behalf of minor child, H.B. v. Board of Education of the Rancocas Valley Regional High School District, Burlington County, Gloucester County Institute of Technology and Lenape Regional High School District Board of Education,* Superior Court, Appellate Division, Dkt. No. A-6814-02T4, November 12, 2004, cert. denied 182 *N.J.* 431 (2005).

Accordingly, for the reasons expressed therein as clarified above, the Order of the OAL is adopted as the final disposition of petitioner's application for emergent relief. The Commissioner hereby directs the respondent Board of Education to issue forthwith a letter to the Salem County Career and Technical School accepting responsibility for E.M.'s tuition and transportation for the 2006-07 school year pending the outcome of this matter, which is set for hearing on the merits on June 15, 2006 in accordance with the ruling of the ALJ.

IT IS SO ORDERED.*

Lucille Wong

ACTING COMMISSIONER OF EDUCATION

Date of Decision: 6/27/06

Date of Mailing: 6/5/06

* This decision may be appealed to the State Board of Education pursuant to *N.J.S.A.* 18A:6-27 *et seq.* and *N.J.A.C.* 6A:4-1.1 *et seq.*

State of New Jersey
OFFICE OF ADMINISTRATIVE LAW

ORDER-EMERGENT RELIEF

OAL DKT. NO. EDU 4078-06

AGENCY DKT. NO. 169-5/06

M.R.M., ON BEHALF OF MINOR CHILD, E.M.,

Petitioner,

v.

BOARD OF EDUCATION OF THE CITY OF BRIDGETON, CUMBERLAND COUNTY,

Respondent.

M.R.M., petitioner, pro se

No one appearing for respondent

BEFORE **BRUCE M. GORMAN,** ALJ:

STATEMENT OF THE CASE AND PROCEDURAL HISTORY

On May 4, 2006, petitioner filed a letter pro se with the Commissioner of Education seeking emergent relief on behalf of her daughter, E.M. Petitioner sought to compel respondent to pay tuition and transportation costs for her daughter's attendance at an out-of-county vocational school.

The Division of Controversies and Disputes transferred the case to the Office of Administrative Law on May 24, 2006, and the matter was set down to be heard on an emergent basis on May 26, 2006.

At oral argument on May 26, 2006, petitioner appeared. The Clerk's Office notified Paul Kienzle, Esq., respondent's solicitor, of the hearing date. The Clerk's Office confirmed that Mr. Kienzle received the notice. Notwithstanding this sequence of events, neither Mr. Kienzle nor anyone else from respondent appeared. Mr. Kienzle, however, did fax to the Court a letter after working hours on May 25, 2006, indicating that he had "commitments on May 26, 2006 and will not be present." Mr. Kienzle did not notify the Court by telephone of his fax, nor did he call to request an adjournment. His fax was not discovered until Tuesday, May 30, 2006 following the Memorial Day holiday. His letter offers no detail as to why he could not appear, but unilaterally states he would not appear. Accordingly, the hearing proceeded ex parte. Given that Mr. Kienzle did not request an adjournment, there was no cause to forestall the emergent application.

By separate letter received by fax on May 30, 2006, Mr. Kienzle requested that I recuse myself from this matter. By the time that letter was received, I had already heard the case.

The basis of the request was as follows. The Bridgeton Superintendent is Victor Gilson. Mr. Gilson formerly served as superintendent of the Dennis Township School system. Shortly after his departure in 1994, I was appointed solicitor for that Board. Mr. Gilson filed suit against the Dennis Township Board either immediately before or immediately after my appointment. However, I did not represent the Board in that matter; the Board was represented by the former solicitor, Louis Greco, Esq.

In his letter, Mr. Kienzle states that Mr. Gilson "indicates that you were advising the Dennis Township Board of Education on matters adverse to him and he believes that there is a conflict of interest with respect to your serving as a Judge with respect to any matters involving the Board of Education of the City of Bridgeton."

This argument is misplaced for two reasons. First, Mr. Gilson is not a litigant in this matter; he is only an agent of respondent. The Board of Education is the party hereto, and bears ultimate responsibility for the actions or omissions of its agents.

But more importantly, Mr. Gilson is in error. I did not represent the Dennis Board in its suit with Mr. Gilson, a matter that occurred some twelve years ago. Accordingly, there is no cause for my recusal. Since counsel has not formally moved for my recusal, no order is appropriate on this issue.

FACTUAL AND LEGAL DISCUSSION

Petitioner spoke on behalf of her daughter E.M. E.M. is a resident of the Bridgeton school district. She will graduate from the 8th grade at Immaculate Conception Regional School in June.

E.M. has been involved in the performing arts since 5th grade. Her involvement includes not only school activities, but also activity with a community theater, the Cumberland County Players. Her goal is to seek a career in the performing arts.

Toward that end, petitioner sought out high school programs that would allow E.M. to pursue her career. She found two in the area: Gloucester County Institute of Technology (GCIT) and Salem County Career and Technical High School (Salem).

E.M. applied for admission to the two schools. Each required an audition. E.M. passed the auditions and was admitted to each school. In the case of GCIT, the school had twenty-five openings for 125 applicants. Salem had fifteen openings, and continues to audition.

E.M.'s admission to each school was conditioned upon respondent confirming that it would assume the obligation to pay tuition and provide transportation for E.M. Petitioner testified that she notified respondent in December that she would need such confirmation.

For some months, respondent failed to respond to petitioner's requests for such a letter of confirmation. Finally, on April 3, the superintendent advised petitioner that respondent would not agree to pay tuition or transportation. The superintendent stated that respondent offered a drama program comparable to that offered at GCIT and Salem (P-3).

Petitioner appealed the superintendent's determination to the Board of Education. On April 24, the Board affirmed the superintendent's action and denied tuition and transportation (P-4). Petitioner then filed this appeal.

Petitioner presented the curriculum for the Bridgeton High School Visual & Performing Arts Department (P-5), the Course of Study for GCIT (P-6), and the Salem County Vocational Technical Program Description (P-7). She argued that the Bridgeton program offered nothing to E.M. during 9th grade, and was primarily based around participation in choir.

Petitioner stated that E.M. preferred the Salem program. The primary reason for the choice was proximity. The Salem school is fifteen minutes from petitioner's home; GCIT is forty-five minutes away.

Petitioner requested emergency relief in the form of an Order compelling respondent to provide Salem with a letter confirming that it would assume responsibility for E.M.'s tuition and transportation costs. She stated that Salem was holding a slot open for E.M., but the school was continuing to audition. The letter of responsibility from respondent is a condition of admission. If such letter is not immediately forthcoming, Salem may fill the slot with a student who can provide such a letter.

The requirements for granting emergent relief are well settled. Petitioner carries the burden in seeking emergent relief. The standard is set forth in Crowe v. DeGioia, 90 N.J. 126 (1982), necessary for the awarding of this relief. See also, Princeton Ins. Co. v. 349 Associates, L.L.C., 147 N.J. 337, 340(1997). Crowe requires a showing of **each** of the four specific criteria:

1. The relief must not be granted except when necessary to prevent irreparable harm, or harm for which there is no adequate legal remedy;

2. Relief should not be granted when the legal right underlying the applicant's claim is unsettled;

3. The applicant for relief must make a preliminary showing of a reasonable probability of ultimate success on the merits; and

4. The relative hardship to the parties in granting or denying relief must be considered. Id. at 132-34.

I am satisfied that E.M. may suffer irreparable harm if relief is not granted. If Salem and GCIT fill the slots currently reserved for her, E.M. will be foreclosed from entering the program, and will lose the opportunity to further her education in her chosen field. Therefore, I **FIND** that petitioner has met her burden to show irreparable harm.

Although petitioner offered no law on the issue, I **FIND** that the law on this issue is not unsettled. Under the New Jersey State Constitution, E.M. is entitled to a thorough and efficient education. Depriving her of an appropriate program would violate her rights under the State Constitution.

I also **FIND** that petitioner has shown a reasonable probability of success on the merits. Petitioner testified without contradiction that respondent's program was inferior to that offered by Salem and GCIT. A cursory review of the respective curricula (P-5 through P-7) reveals that respondent's curriculum is less detailed and appears to offer EM fewer options, particularly in the 9th grade. I do not find that respondent's curriculum fails to meet the minimum standards necessary for such a program. A finding on that issue must abide a plenary hearing. But the disparity between the programs apparent from the face of the curricula is sufficient to establish a reasonable probability of success by petitioner.

Finally, no hardship will be imposed upon respondent by requiring it to forward the confirming letter to Salem. Forwarding the letter will have the limited effect of

holding open E.M.'s place in Salem's 2006-2007 9th grade class. No permanent liability for tuition or transportation will be imposed upon respondent without a full hearing.

At the same time, substantial hardship will result to E.M. if Salem should determine to fill her slot in next year's 9th grade class with another student. Issuing the confirming letter will alleviate that potential hardship.

For all the reasons set forth above, I **ORDER** respondent to issue a letter to Salem stating that it will assume financial responsibility for E.M.'s tuition and transportation costs for the 2006-2007 school year.

ORDER

I **ORDER** that respondent issue to the Salem County Career and Technical School a letter accepting responsibility to provide tuition and transportation for E.M. for the 2006-2007 school year.

I **ORDER** that this matter be set down for plenary hearing on **June 15, 2006**, at 9:00 a.m. at the Office of Administrative Law, 1601 Atlantic Avenue, Atlantic City, New Jersey.

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 (45) days following the entry of this order. If the **COMMISSIONER OF THE DEPARTMENT OF EDUCATION** does not adopt, modify or reject this order within forty-five (45) days, this recommended order shall become a final decision on the issue of emergent relief in accordance with N.J.S.A. 52:14B-10.

Bruce M. Gorman

May 30, 2006
DATE

BRUCE M. GORMAN, ALJ

/sd

APPENDIX

Documents In Evidence

For Petitioner:

P-1 Letter from Salem County Vocational Technical Schools to petitioner, April 20, 2006

P-2 Letter from Gloucester County Vocational Technical School District to petitioner, March 17, 2006

P-3 Letter from Bridgeton Public Schools to Petitioner, April 3, 2006

P-4 Letter from Bridgeton Public Schools to Petitioner, April 24, 2006

P-5 Bridgeton High School Curriculum Description, Drama Program

P-6 Gloucester County Vocational Technical School District Course Study – Drama

P-7 Salem County Vocational Technical Program Description

For Respondent:

None

Witnesses

For Petitioner:

M.R.M., petitioner, pro se

For Respondent:

None

205-06

CEREBRAL PALSY LEAGUE, INC.,	:	
PETITIONER,	:	
V.	:	COMMISSIONER OF EDUCATION
NEW JERSEY DEPARTMENT OF EDUCATION,	:	DECISION
RESPONDENT.	:	

SYNOPSIS

Petitioner appeals the Department's determination to disallow certain expenses in the computation of final tuition rates for the 2002-2003 school year for two private schools for the disabled operated by petitioner, one located in Union and the other in Cranford. The Cranford school appeals from the denial of an increase in its final tuition rate of more than 10% over its tentative rate, and both the Cranford and the Union schools appeal from the Department's refusal to recognize "employee merit awards" as an allowable expense, arguing that they do not constitute merit pay increases within the scope of *N.J.A.C.* 6A:23-4.4(a)(15).

The ALJ found, *inter alia*, that: as early as October 2003, petitioner's executive director and trustees knew that the final tuition request for Cranford School would be more than 10% above its tentative rate; petitioner failed to exercise due diligence in complying with the 45-day notice requirement; there is no support for petitioner's contention that a new school is exempt from the 45-day notice requirement; petitioner's two schools expended nearly $70,700 in employee merit awards for FY '03, which money would otherwise have been refunded to the sending public school districts; petitioner failed to timely file a copy of its merit award plan with the Department, thereby allowing no opportunity to review and approve the payout; and respondent Department uncovered serious deficiencies in the design of the merit award plan after a copy was ultimately obtained. The ALJ concluded that the Department properly disallowed Cranford School's tuition increase in excess of the 10% limit, and both schools' employee merit awards, and determined that petitioner's request for relief should be denied.

Upon thorough and independent review of the record, the Commissioner adopted the Initial Decision of the OAL 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.

June 6, 2006

OAL DKT. NO. EDU 9024-04
AGENCY DKT. NO. 117-3/04

CEREBRAL PALSY LEAGUE, INC.,	:	
PETITIONER,	:	
V.	:	COMMISSIONER OF EDUCATION
NEW JERSEY DEPARTMENT OF EDUCATION,	:	DECISION
RESPONDENT.	:	

The record of this matter and the Initial Decision of the Office of Administrative Law (OAL) have been reviewed. Petitioner's exceptions and the Department's reply thereto, submitted in accordance with *N.J.A.C.* 1:1-18.4, were fully considered by the Commissioner in reaching her decision herein.

Petitioner's exceptions essentially recast and reiterate its arguments advanced below. As it is determined that these were fully addressed and considered by the Administrative Law Judge (ALJ) in his decision, they will not be revisited here.

Upon a thorough and independent review of the record, which included transcripts of the hearing below,[1] the Commissioner is in agreement with the ALJ – for the reasons clearly detailed in the Initial Decision - that the Department properly disallowed Cranford School's tuition increase in excess of the 10% limit, and the employee merit awards for both Cranford and Union Schools, from the computation of petitioner's approved tuition rates for the 2002-03 fiscal year.

[1] Hearing was conducted on May 24, May 25, and July 29, 2005.

Accordingly, the Initial Decision of the OAL is adopted as the final decision in this matter and the instant Petition of Appeal is hereby dismissed.

IT IS SO ORDERED.[2]

Lucille E Davy

ACTING COMMISSIONER OF EDUCATION

Date of Decision: 6/06/06

Date of Mailing: 6/07/06

[2] This decision may be appealed to the State Board of Education pursuant to *N.J.S.A.* 18A:6-27 *et seq.* and *N.J.A.C* 6A:4-1.1 *et seq.*

State of New Jersey
OFFICE OF ADMINISTRATIVE LAW

INITIAL DECISION

OAL DKT. NO. EDU 9024-04
AGENCY DKT. NO. 177-3/04

CEREBRAL PALSY LEAGUE, INC.,
Petitioner,
v.
NEW JERSEY DEPARTMENT OF EDUCATION,
Respondent.

Resa T. Drasin, Esq., for petitioner
(Woehling & Freeman, attorneys)

Marta Kozlowska, Deputy Attorney General, for respondent
(Zulima V. Farber, Attorney General of New Jersey, attorney)

Record Closed: October 17, 2006 Decided: April 28, 2006

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

Statement of the Case

These are consolidated appeals by two private schools from the disallowance of certain expenses in the computation of their final tuition rate for the 2002-2003 fiscal year ("FY '03"). Petitioner Cerebral Palsy League ("CPL") operates two separate approved private schools for children with disabilities, the Jardine Academy I located in Union, New Jersey ("Union School") and the Jardine Academy II located in Cranford, New Jersey ("Cranford School"). Pursuant to statute, the New Jersey Department of Education ("Department") has the responsibility of regulating tuition rates that an

approved private school for the disabled can charge to a sending public school district.[1] Regulations promulgated by the Department provide that the Commissioner of Education ("Commissioner") shall approve a tentative tuition rate for the upcoming school year no later than January 1 of the preceding school year.[2] After the close of the pertinent school year, the Commissioner approves the final tuition rate for that year, which must be "equal to or less than the certified actual cost per student."[3]

Basically, the pleadings raise two issues, one unique to Cranford School and the other applicable to both schools. Cranford School appeals from the denial of an increase in its final tuition rate of more than 10% over its tentative rate for the FY '03 school year. Throughout FY '03, the governing regulation provided that, if a private school proposes to charge a final tuition rate in excess of 10% of the tentative rate, then it must notify each sending district and the appropriate Department official "within 45 days after the private school becomes aware of such increase." N.J.A.C. 6A:23-4.2(a)(2).[4] Otherwise, the private school is limited to a maximum tuition increase of 10%. Thus, the regulation does not absolutely bar a private school from raising tuition by more than 10% if justified by its certified actual costs, but imposes conditions on the circumstances under which it may do so.

Initially, Cranford School argues that, as a "new school" in only its second full year of operation, it is exempt from the 45-day notice requirement. In response, the Department interprets its regulation as applying equally to all approved private schools for the disabled, regardless of whether they are new or old. Alternatively, in the event that the 45-day notice provision is deemed applicable, Cranford School contends either

[1] N.J.S.A. 18A:46-21.
[2] N.J.A.C. 6A:23-4.2(i)
[3] N.J.A.C. 6A:23-4.1.
[4] Effective August 16, 2004, the subchapter governing tuition for private schools for the disabled, N.J.A.C. 6A:23-4, was amended and recodified. 36 N.J.R. 1313(a)(March 16, 2004); 36 N.J.R. 3895(a)(Aug. 16, 2004). Unless otherwise specified, citations in this decision will refer to the previous set of regulations in existence during FY '03.

that it complied with the 45-day notice requirement or that strict compliance should be waived due to honest confusion and lack of harm to the sending districts. The Department counters that Cranford School failed to serve the required notice within 45 days of the date it became aware of the undercharges and that the regulations are clear and unambiguous.

Both schools appeal from the Department's refusal to recognize so-called "employee merit awards" as an allowable expense because the underlying plans had not been filed with the Commissioner as mandated by N.J.A.C. 6A:23-4.4(a)(15). They urge that their "merit awards" do not constitute a "merit pay increase" within the scope of the regulation and also that the regulation itself imposes no set time limit for submitting such plans to the Commissioner. Further, the schools maintain that the only reason recognized by the regulation for excluding a merit award is "if the sole purpose of the award(s) is to avoid returning unexpended tuition funds to the public schools." Nonetheless, the Department maintains that the regulation uses the terms "merit pay increases" and "merit awards" interchangeably and was designed to require pre-approval by the Commissioner before such plan can be implemented.

Generally, the Department points out that merit pay awards are non-allowable unless consistent with plans on file with the Commissioner, N.J.A.C. 6A:23-4.5(a)(33). Even if the plans had been timely filed, the Department contends that the Commissioner would not have approved them anyway because the plan did not specify a dollar amount or how many times an individual would be evaluated.

For the reasons that follow, the Department's determination on both issues is correct and will be upheld.

Procedural History

By letter dated March 2, 2004, the Department notified CPL that it had reviewed the audited financial statements for FY '03 and had determined that Cranford School's tuition increase above 10% of the tentative tuition rate was non-allowable. Soon thereafter, on April 20, 2004 and April 26, 2004, respectively, the Department notified CPL that Union's and Cranford's costs for employee merit awards were non-allowable. On March 29, 2004, CPL filed a petition to the Commissioner on behalf of Cranford School seeking a tuition increase of 14.3%. On June 24, 2004, CPL filed two separate petitions on behalf of Union and Cranford Schools challenging the exclusion of the merit awards. The Department filed its answers to these appeals on July 28, 2004.

Subsequently, on August 18, 2004, the Commissioner transmitted all three appeals to the Office of Administrative Law ("OAL"), where they were consolidated for hearing together as a contested case. The OAL held hearings on May 24, May 25 and July 29, 2006. Witnesses and exhibits are listed in the appendix. Both parties filed post-hearing briefs on October 3, 2005 and reply briefs on October 17, 2005.

Findings of Fact

General Background Facts

All of the general background facts are undisputed. Cerebral Palsy League, a not-for-profit corporation, was established fifty-five years ago when few services were available for children afflicted with cerebral palsy.[5] Presently, CPL operates two private schools for the disabled in New Jersey. Union School has been in operation since the 1970's in Union, New Jersey. Cranford School recently opened its doors in January 2001, midway through the 2000-2001 academic year, at a separate facility in Cranford, New Jersey. Both offer special education and related services to students with special

[5] The League has tax exempt status under 29 U.S.C.A. §501(c)(3).

needs, including those with multiple handicaps, severe cognitive deficits, physical challenges or complex medical needs. Each school is approved by the State of New Jersey and accredited by Middle States Association of Colleges and Schools.[6] Union School serves younger children ages 3 to 10 years old, while Cranford School serves older children and young adults from 10 to 21 years old.

Notwithstanding that the two schools had different locations and different student bodies for the latter part of the 2000-2001 fiscal year ("FY '01"), the Department decided to continue treating them as a combined entity for that year in order to spare Cranford School the extra time and expense of revising its accounting records and preparing separate audited financial statements.[7] Thus, for financial auditing purposes, Cranford School's first year of operation was 2001-2002 ("FY '02") and its second year of operation was 2002-2003 ("FY '03.)[8] Further evidence that the Department regarded FY '03 as Cranford's second year of operation comes from its letter granting the new school until the end of the 2003 school year to attain a minimum daily average enrollment of 16 students. Since state regulations require that new private schools for the disabled must achieve a minimum average daily enrollment of 16 students by the end of the second school year to retain their approved status, this deadline confirms that the Department treated FY '03 as Cranford's second year of operation.[9]

10% Cap on Tuition Increases

Debra Wolfel, executive director of CPL, testified that the organization's former director of finance had difficulty handling the added responsibilities of managing

---

[6] Directory of In-State Approved Private Schools for the Disabled (2006). http://www.state.nj.us/njded/specialed/instate/instate.pdf

[7] N.J.A.C. 6A:23-4.2(a) provided that "a currently approved private school for the disabled which is expanding a program to *another location* or opening a new program is considered a new private school which shall be approved by the Commissioner prior to opening." (Emphasis added). Applying this regulation literally, the Department could, if it had wanted, treated Cranford as a "new school" for the second half of FY '01.

[8] Under the pertinent regulation, a private school for the disabled is considered to be a new school "in the first two years of operation." N.J.A.C. 6A:23-4.1.

[9] N.J.A.C. 6A:23-4.3(c).

finances for two separate schools. While the finance director gave periodic reports at the regular meetings of CPL's Board of Trustees ("Board"), he failed to that disclose there would be a projected gap between tentative and final tuition rates for FY '03. Instead, the Board was led to believe at its meeting on June 24, 2003, near the close of the fourth quarter, that "our cash flow was better this year than last year and we should not experience the 'crunch' we felt last year." When the outside auditing firm of Curchin & Co. completed its independent audit for FY '03, however, the Board learned for the first time that there was a shortfall of approximately $300,000 between tuition revenues and expenses. Curchin & Co. found that the accrual method of accounting had not been applied consistently and, as a result, that Cranford School had substantially understated its accrued expenses for FY '03.

Most of the factual disagreement concerns when CPL realized that Cranford School's final tuition request would exceed 10% of its tentative tuition rate. Significantly, Executive Director Wolfel admits that the independent auditors presented their audit report at the monthly meeting of the Board on October 28, 2003 and informed her and the trustees of the significant additional expenses. Page 50 of the audit report recites that the per-diem cost per Cranford student at the tentative rate was only $278.20, whereas the certified actual cost per Cranford student was $318.09 (representing an increase of 14.3% over the tentative rate.) None of the auditors, however, expressed this excess in percentage terms, either in the audit report or during their presentation at the Board meeting. Because she did not do the math herself, Director Wolfel now says that she failed to appreciate that the actual cost per student was more than 10% over the tentative tuition rate "until much later." Consequently, she claims that the forty-five day period for notifying the sending districts should run from that uncertain date rather than from the Board meeting on October 28, 2003.

It is undisputed that Cranford School did not notify the sending districts and the Department of the 14.3% tuition undercharge until January 7, 2004, which is 71 days after October 28, 2003. Nonetheless, CPL's counsel urges that the mailing was "certainly" within forty-five days of whatever date Director Wolfel finally learned that the costs would exceed 10% of the tentative rate. Since Director Wolfel cannot pinpoint the

date with any precision, it is unclear how that time-frame can be ascertained so certainly, especially since Director Wolfel testified that she did not concentrate on percentage amounts until after the Department had rejected the tuition increase of more than 10%.

Another factual dispute involves whether CPL was justified in mistakenly assuming that it had thirty days after receipt of its final tuition notice from the State to notify the sending districts. During the prior fiscal year (FY '02), Cranford School's undercharges were less than 10%, so that the question of putting sending district on notice of a larger tuition increase did not arise. Following standard practice, James Verner, section supervisor in the Department's Division of Finance, wrote to Director Wolfel on February 28, 2003, advising that the Department had approved Cranford School's final tuition rate and recommending that the school notify each sending district of any final audit adjustments "no later than 30 days after receipt of this letter." On its face, this letter refers to final audit adjustments of whatever amount, overcharges as well as undercharges, and has nothing to do with a school's continuing obligation to notify sending districts of anticipated tuition increases of more than 10% within forty-five days of whenever such increases become known. However, Director Wolfel ostensibly interpreted the letter to mean that the school need not send notices to sending districts until after Department approval of its final tuition rate and that the same procedure would apply to the subsequent fiscal year (FY '03) as well.

Making CPL's position even less tenable, the Department annually distributed a copy of its mandated tuition contract with approved private schools for the handicapped, which plainly sets forth the forty-five day notice requirement. Paragraph 7 of the contract clearly states that:

> In accordance with N.J.A.C. 6A:23-4.2(a)2, the APPROVED PRIVATE SCHOOL shall notify each SENDING DISTRICT and the Assistant Commissioner of Finance, Division of Finance that such increase will be charged and the reason for the increase within 45 days after the APPROVED PRIVATE SCHOOL becomes aware of such increase. If the APPROVED PRIVATE SCHOOL fails to comply, the school may only charge a 10 percent increase.

Moreover, a cover memo accompanying the contract for FY '02 alerted CPL to changes to the regulations made as the result of a new code adopted by the State Board of Education on April 4, 2001. One of the highlighted changes was the forty-five day notice requirement applicable to private schools proposing to charge a final tuition rate in excess of 10% of the tentative rate. Cranford School makes a big deal of the fact that the cover memo sent together with the contract for FY '03 does not highlight this provision, although the contract itself contains identical language. Of course, the reason is that the change had already been made in the prior year and, as Director Wolfel recognized, the same procedure would apply to the subsequent fiscal year as well, unless otherwise noted.

I FIND that, as early as October 28, 2003, Director Wolfel and CPL's trustees knew or should have known that the final tuition request for Cranford School would exceed its tentative rate by more than 10%. On October 28, 2003, the independent auditing firm advised the Board that the accrued expenses were substantially in excess of the tentative tuition rate and that a large adjustment would be necessary. In particular, the auditors provided sufficient information from which it was readily ascertainable that the increase would be greater than 10%. Director Wolfel's claim of ignorance does not excuse Cranford School and its board of trustees from having to comply with the forty-five day notice requirement. Managers of approved private schools must exercise due diligence and cannot shield their institution from the consequences of inattentiveness by professing lack of knowledge well within their cognizance.

Nothing in the Department's letters to CPL lends support to Cranford School's contention that a new school is exempt from the forty-five day notice requirement. To the contrary, the mandated tuition contract mailed to all schools prior to the commencement of the fiscal year incorporates the regulatory language prescribing a forty-five day notice whenever a school becomes aware that its proposed final tuition rate will exceed its tentative rate by 10%. No confusion can realistically be said to exist between such regulatory requirement and the Department's recommendation that

private schools apprise sending districts of their approved final tuition rates within thirty days after the Department's review of their audited financial statements.

Employee Merit Awards

CPL adopted an "employee merit award" plan on July 1, 2001, which remained in effect throughout FY'03.[10] Its purpose was to recognize an employee's outstanding work performance and tie monetary reward to an employee's end-of-year performance. Under the plan, "all employees will be evaluated by their director, prior to the close of each fiscal year (June 30)." In order to be eligible for a merit award, an employee must have been employed by CPL for the full fiscal year and have "received at least 2 scores of 'exceptional' or 'outstanding' performance" and not "any scoring less than 'satisfactory' or 'standard.'" Each year the amount of the award was to be set by the Personnel Committee of the Board and adopted by the Board prior to the last meeting of the fiscal year. Merit awards are "payable as a lump-sum amount." Payment was to be made, as far as practicable, before the end of the fiscal year in which the award was earned. Union School awarded a total of $39,540 to 33 staff members out of 63 employees. Cranford School awarded a total of $31,155 to 28 staff members out of 51 employees.

CPL witnesses testified that the merit award does not become part of the employee's base salary in that year and is not carried over into the subsequent year's contracted salary. Since merit awards were granted to outstanding employees of those CPL programs showing a deficit, Director Wolfel denied that the plan was devised to deplete unspent funds so that the money would not have to be refunded to the school districts at the end of the year.

[10] Because the incentive did not seem to be working as expected, the League discontinued employee merit awards in FY' 04.

Section Supervisor Jim Verner stated that the Department disallowed the merit pay awards because CPL had failed to file a copy of the plan with the Department for review. According to Verner, the regulatory intent was for the private school to file the plan at the beginning of the school year so that the Department would have an opportunity to approve it before any award was made. Neither school submitted a copy of the merit award plan until long after the end of FY '03, so that the Department never had the opportunity to review the plan before it took effect.[11] As soon as Verner obtained a copy of the plan, in or around March 2004, he raised serious concerns about potential violations of Department regulations pertaining to merit salary increases. He faulted the plan for failing to fix any definite dollar amount and for lack of adequate standards in how an individual's performance would be evaluated.[12] Of course, the adequacy of the plan is academic at this point, since FY '03 had already passed by the time that the Department saw the plan.

I FIND that the two schools expended nearly $70,700 in employee merit awards for FY '03, which money would otherwise have been refunded to the sending public school districts. CPL failed to file a copy of its merit award plan with the Department until after expiration of FY '03, thereby depriving the Department of any opportunity to review and approve the payout. Ultimately, when the Department obtained a copy of the plan, it uncovered serious deficiencies in the specification of the maximum amount of the awards and in the procedures for selecting the recipients.

Conclusions of Law

Based on the foregoing facts and the applicable law, **I CONCLUDE** that the Department properly disallowed Cranford School's tuition increase in excess of the 10% limit and both schools' employee merit awards.

---

[11] If the plans had been filed earlier, the Department could have identified any deficiencies and afforded the League the opportunity to cure them during the year in which they were operative.

[12] Verner noted that an employee needed two exceptional or outstanding performance ratings in order to qualify for an award, but that the plan did not specify how many times per year each individual would be evaluated.

New Jersey law authorizes public school districts to send handicapped students to approved private schools as the means of satisfying the districts' duty to provide suitable facilities and programs of education for children with educational disabilities. N.J.S.A. 18A:46-14(g). Council of Private Schools for Children with Special Needs, Inc. v. Saul Cooperman, 205 N.J. Super. 544 (App. Div. 1985), certif. den. 103 *N.J.* 490 (1985). The Legislature has expressed concern for the quality of education for handicapped pupils as well as its overall cost to the public. Council of Private Schools, at 545. Toward that end, the Legislature has conferred statutory authority on the Commissioner, with the consent of the State Board of Education, to approve special facilities and educational programs for education of handicapped students, N.J.S.A. 18A:46-15(a), and to require private schools to provide such educational, financial and statistical reports as may be necessary to carry out the purposes of Chapter 46. N.J.S.A. 18A:46-19. Tuition rates that approved private schools may charge to sending public school districts are strictly regulated. Pursuant to N.J.S.A. 18A:46-21, tuition rates charged by approved private schools cannot "exceed the actual cost per pupil as determined under the rules prescribed by the [C]ommissioner and approved by the State Board of Education." N.J.S.A. 18A:46-21.

To carry out its responsibility to ensure that public funds are properly spent for legitimate educational purposes, the Department has adopted regulations prescribing the accounting and bookkeeping systems utilized by approved private schools for the disabled. N.J.A.C. 6A:23-4.1 to 4.16.

N.J.A.C. 6A:23-4.2(a)(2), as it was worded in FY '03, provided that:

> If the private school for the disabled proposes to charge a final tuition rate in excess of 10 percent of the tentative tuition rate charged, the private school shall notify each sending district board of education and the Assistant Commissioner, Division of Finance that such an increase will be charged and the reason for the increase within 45 days after the private school becomes aware of such increase.[13]

There is no inherent ambiguity in this language that conceivably might give rise to the misunderstanding that new schools are exempt from the forty-five day notice requirement. As a fundamental rule of construction, it is not a court's function to rewrite a plainly-written enactment. Courts turn to extrinsic evidence only where there is an ambiguity in the language that leads to more than one plausible interpretation. DiProspero v. Penn, 183 N.J. 477, 492-92 (2005). Petitioner's reference to N.J.A.C. 6A:23-4.3(g) is inapposite, since that provision deals with final adjustments at year's end and does not supersede the forty-five day rule. If the Department had intended the forty-five days to start running only after the final rate had been fixed, then adoption of N.J.A.C. 6:23-4.2(a)(2) would have been superfluous. Youth Consultation Service, Inc v. Rosenberg, OAL Dkt. No. EDU 7893-03, 2004 N.J. AGEN LEXIS 528 (Sept. 2, 2004), aff'd (Comm'r Oct. 14, 2004). http://lawlibrary.rutgers.edu/oal/final/edu7893-03.pdf

Similarly, CPL's claim that it did not become "aware" of the 14.3% increase until a "much later" date is spurious. In Youth Consultation Service, management possessed sufficient information to realize that the costs of its school exceeded the 10% limit when the directors received the completed independent audit and learned of the certified cost per student. Here too, CPL became "aware" that the increase could

[13] In order to clarify its regulatory intent, the Department adopted a "technical" amendment, which took effect on August 4, 2004. As currently worded, N.J.A.C. 23:2.4(a)(2) provides the notice must be given "on or before the following dates: December 15, for the first quarter, March 15th for the second quarter, June 15th for the third quarter and September 15th for the fourth quarter, or the next business day when applicable." 36 N.J.R. 1313(a) (March 13, 2004); 36 N.J.R. 3895(a) (Aug. 16, 2004).

be expected to exceed the 10% limit at its board meeting on October 28, 2003, when the independent auditors made their report to the trustees. Board members must exercise due diligence in monitoring the finances of regulated private schools.

Next, CPL's request that the Commissioner "relax" strict application of the regulation is without merit. Assuming that an agency head possesses authority to waive application of agency regulations to prevent manifest injustice, such power should be exercised sparingly. Even at the agency level, waiver would require a case-by-case determination of whether the particular circumstances merit waiver and, thus might hamper efficient rule application. See Dougherty v. Dep't of Human Servs., 91 N.J. 449 (1982). Considerations of fairness and uniformity weigh against creating exceptions to general rules on a piecemeal basis. Windsor Learning Center, Inc. v. New Jersey State Dep't of Educ., OAL Dkt. No. EDU 5979-04, 2006 N.J. AGEN LEXIS 244 (Feb. 28, 2006), aff'd (Comm'r April 6, 2006).

Notification of increases over 10% during the year was designed to "encourage better budgeting and tracking of expenditures at the private schools and provide public schools more timely notice of anticipated tuition adjustments." 33 N.J.R. at 1417. Youth Consultation Services, supra. While the League speculates that a short delay in serving the required notice would not have any serious impact on fiscal operations of the sending districts, it makes this argument without consulting the affected districts and without any basis in the record. Moreover, excusing the League's carelessness in monitoring its own financial affairs would undermine the equally important objective of promoting better budgeting and tracking of expenditures at private schools seeking public funding.

In light of the disposition of the first issue, the second issue is moot, since the cost of the merit awards is already included in the disallowed charges that exceed 10% of the tentative rate. Nevertheless, the merit awards will also be addressed for the purpose of a complete record.

N.J.A.C. 6A:23-4.5(a)(33) provides that the costs of a merit pay award is non-allowable if the award is inconsistent with the plans on file with the Commissioner.[14] In turn, N.J.A.C. 6A:23-4.4(a)(15) sets forth the conditions under which an approved private school may incur "merit pay increases." Among other criteria, the board must formally adopt a "merit pay plan," and that plan must be filed with the Commissioner, "who may exclude from tuition any merit award(s) if the sole purpose of the award(s) is to avoid returning unexpended tuition funds to public schools." Plans adopted by private schools must include certain mandatory provisions, namely: (i) eligibility for all employees; (ii) the basis by which the pay is earned; (iii) the amount of awards by plan(s); (iv) the maximum number of awards to be given by plan(s) for each year; and (v) the date of board approval and the date of initiation of the plans. The Department treated this regulation as applicable to CPL's "merit pay awards" and disallowed the expense because the plan had never been filed with the Commissioner.

Initially, CPL argues that the N.J.A.C 6A:23-4.4(a)(15) only covers "merit pay increases," as distinct from the "merit pay awards" granted by the two schools. However, the regulation itself does not draw such fine distinctions and uses the phrases "merit pay increases" and "merit awards" as if they are interchangeable. Use of the term "merit pay increase" implies an upward adjustment of compensation based on an employee's actual performance, as opposed to other considerations like seniority or educational attainment. If the semantic hairsplitting advocated by CPL is condoned, an approved private school would easily be able to circumvent the regulation by inventing a new name for a non-allowable expense.

Alternatively, CPL contends that the merit pay award can be disallowed only in the event that its "sole purpose" is to avoid returning unexpended funds to public schools. Although the language of the regulation is susceptible of such interpretation, that argument would carry more weight if CPL had submitted the plan to the

[14] CPL contends that a "merit award" (which is payable in a lump sum and does not carry over to the employee's base salary in subsequent years) differs from what is commonly understood by the term "salary." Regardless of whether or not the payment is considered "salary," a merit award must still satisfy the criteria of N.J.A.C. 6A:23-4.4(a)(15) in order to be allowable.

Commissioner for review. Testifying on behalf of the agency, Supervisor Verner interpreted N.J.A.C. 6A:23-4.4(a)(15) as bestowing greater authority on the Department to ensure that the merit pay plan fully conforms to the regulatory requirements. Since CPL failed to file the merit plan for review, however, the Department denied the cost for that reason alone and never reached the broader issue.

Emphasizing that the regulation has no deadline, CPL maintains that it complied with its literal language by filing the merit pay plan in March 2004, some eight months after the close of FY '03. Read together with the prohibition in N.J.A.C. 6A:23-4.5(k) against allowance of most salary increases after the start of the fiscal year, it would make little sense to review the plan for adequacy after the payout had already accrued. Courts should avoid constructions of language that would render any word inoperative, superfluous, redundant, or meaningless. Township of Pennsauken v. Schad, 160 N.J. 156, 174 (1999).[15]

In short, CPL cannot recover the disputed costs due to its failure to comply with the regulatory notice requirements and its failure to file a copy of its merit award plan with the Commissioner.

Order

It is **ORDERED** that CPL's request for relief is denied.

[15] Amendments effective on August 16, 2004 added a sentence that, "The plan(s) shall be submitted for approval to the Commissioner prior to implementation." N.J.A.C. 6A:23-4.4(a)(15).(2004). CPL's argument is not strengthened by this new language, since the revisions were adopted "to clarify and enhance existing financial and business service rules," rather than to alter or change them. 36 N.J.R. 1313(a) (March 15, 2004).

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

This recommended decision may be adopted, modified or rejected by the **COMMISSIONER OF THE DEPARTMENT OF EDUCATION,** who by law is authorized to make a 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.

April 28, 2006
DATE

KEN R. SPRINGER, ALJ

E-mail Receipt of Initial Decision Confirmed by the Department of Education on:

April 28, 2006
DATE

Mailed to Parties:

DIRECTOR AND CHIEF ADMINISTRATIVE LAW JUDGE

MAY 1 2006
DATE

OFFICE OF ADMINISTRATIVE LAW

al

APPENDIX

List of Witnesses

1. Debra Wolfel, executive director, Cerebral Palsy League, Inc.

2. Charles Zalewski, director of finance, Cerebral Palsy League, Inc.

3. James Verner, section supervisor, Division of Finance, Department of Education

List of Exhibits

No.	Description
J-C	Copy of letter to Richard Rosenberg from John Gillespie, dated January 7, 2004
J-D	Copy of letter to John Gillespie from Richard Rosenberg, dated January 30, 2004
J-E	Copy of letter to Debra Wolfel from Jim Verner, dated March 2, 2004
J-G	Copy of letter to Debra Wolfel from Jim Verner, dated April 20, 2004
J-H	Copy of letter to Debra Wolfel from Jim Verner, dated April 26, 2004
J-I	Copy of letter to Debra Wolfel from Jim Verner, dated August 27, 2004
J-N	Copy of petitioner's answers to interrogatories and requests for documents, certified on March 23, 2005

J-O Copy of memorandum to chief school administrators, et al. from Thomas H. McMahon, dated June 12, 2001

J-P Copy of memorandum to chief school administrators, et al. from Richard Rosenberg, dated April 26, 2002

J-Q Copy of affidavit filed on behalf of the Cranford school, dated May 3, 2003

J-R Copy of affidavit filed on behalf of the Union school, dated May 30, 2003

J-S Copy of letter to Debra Wolfel from Jim Verner, dated February 28, 2003

P-1 Copy of Jardine Academy brochure, undated

P-2 Copy of letter to Debra Wolfel from Richard Rosenberg, dated February 13, 2002

P-3 Copy of excerpt of minutes from the board of directors meeting of the Cerebral Palsy League held on June 24, 2003

P-4 Copy of excerpt from the minutes of the board of directors meeting of the Cerebral Palsy League held on October 28, 2003

P-5 Copy of letter to Debra Wolfel from Jim Verner, dated April 20, 2004

P-6 Copy of letter to Richard Rosenberg from Charles Zalewski, dated March 1, 2004

P-7 Id. Copy of booklet entitled Financial Accounting for New Jersey Private Schools for the Disabled-The Audit Program, 2002-2003 school year published by the New Jersey Department of Education, issued June 2003

P-8 Copy of policies and procedures regarding employee merit award, effective July 1, 2001

R-1 Copy of original financial report on special purpose financial statements of the Cerebral Palsy League, Inc., dated June 30, 2003

R-2 (a) Copy of letter to the Department of Education from Debra Wolfel, dated March 29, 2004

(b) Copy of semi-final financial report on special purpose financial statements of the Cerebral Palsy League, Inc., dated June 30, 2003

R-3 (a) Copy of letter to the Department of Education from Charles Zalewski, dated June 8, 2004

(b) Copy of final revised financial report on special purpose financial statements of the Cerebral Palsy League, Inc., dated June 30, 2003

206-06

OAL DKT. NO. EDU 2010-05
AGENCY DKT. NO. 33-2/05

R.O. on behalf of minor child, R.O., II,	:	
PETITIONER,	:	
V.	:	COMMISSIONER OF EDUCATION
BOARD OF EDUCATION OF THE WEST WINDSOR-PLAINSBORO SCHOOL DISTRICT, MERCER COUNTY,	:	DECISION ON MOTION
RESPONDENT.	:	

Petitioner's motion for clarification of the Commissioner's decision denying petitioner's motion for reconsideration of the Commissioner's March 17, 2006 Final Decision dismissing petitioner's claims has been reviewed. No opposition to the motion having been received, the Commissioner finds as follows:

The decision denying petitioner's motion for reconsideration was necessitated by petitioner's failure to satisfy the criteria, set forth in *N.J.A.C.* 6A:3-1.15(b)(2), that parties must meet to show that reconsideration is justified. More specifically,

1) Petitioner made no showing that the Commissioner made a mistake;[1]

2) Petitioner presented no newly discovered evidence that could not have been previously discovered by due diligence;

[1] Under the terms of this regulation, mere disagreement with the outcome of a decision, or with the analysis upon which it is based, shall not constitute "mistake."

3) Petitioner alleged no newly ascertained misrepresentations or other misconduct by respondent or its representatives that could not have been previously ascertained and alleged; and

4) Petitioner cited no reversals of prior judgments upon which the Commissioner relied in making her decision in this matter.

For the foregoing reasons, petitioner's motion for reconsideration was, and still is, denied.

IT IS SO ORDERED.

Lucille E Davy

ACTING COMMISSIONER OF EDUCATION

Date of Decision: 6/07/06

Date of Mailing: 6/07/06

207-06

PASQUALE SPITALETTA,	:	
PETITIONER,	:	
V.	:	COMMISSIONER OF EDUCATION
BOARD OF EDUCATION OF THE CALDWELL-WEST CALDWELL SCHOOL DISTRICT, ESSEX COUNTY,	:	DECISION
RESPONDENT.	:	

SYNOPSIS

Petitioner, a tenured social worker employed by the Board, contends that the Board violated *N.J.S.A.* 18A:66-1 *et seq* when it failed to deduct and forward pension contributions to the Teachers' Pension and Annuity Fund (TPAF) during the 1986-87 and 1987-88 school years. Petitioner seeks reimbursement from the Board in the amount of $6,932.68, the difference between the amount petitioner was required to pay when he purchased service credits at the 1999 rate and the amount that should have been withheld from his pay for the period in question.

On cross-motions for summary decision and based on the outcome of a prior proceeding before the TPAF Board of Trustees, the ALJ found, *inter alia*, that: petitioner's appeal was timely filed; petitioner was wrongfully denied his status as an eligible member of the TPAF for two years; petitioner was granted the right to purchase service credits, but did so at an increased cost due to the Board's error; and petitioner's recovery of funds he was required to pay in excess of what his pension withholdings would have been in 1986-87 and 1987-88 would provide appropriate restitution to petitioner. The ALJ granted the petitioner's motion for summary judgment and ordered the Board to reimburse petitioner in the amount of $6,932.68.

The Commissioner rejected the Initial Decision. The Commissioner found that petitioner's claim based on the Board's failure to treat him as an employee for pension purposes arises under pension law, so that its remedy lies within the jurisdiction of the TPAF Board of Trustees rather than the Commissioner of Education. The Commissioner further found that petitioner's claim of violation of a 1988 arbitration Consent Award lies within the jurisdiction of the Public Employment Relations Commission and was, additionally, filed well out of time. Finally, even assuming timely filing, the Commissioner found no proof that the Board was in any way responsible for petitioner's claimed eleven-year delay in learning about the 1988 Consent Award, so that there was no basis in equity to order the Board to compensate petitioner for the cost increase that resulted. The Commissioner 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.

OAL DKT. NO. EDU 1091-05
AGENCY DKT. NO. 377-10/04

PASQUALE SPITALETTA,	:	
PETITIONER,	:	
V.	:	COMMISSIONER OF EDUCATION
BOARD OF EDUCATION OF THE CALDWELL-WEST CALDWELL SCHOOL DISTRICT, ESSEX COUNTY,	:	DECISION
RESPONDENT.	:	

The record of this matter and the Initial Decision of the Office of Administrative Law (OAL) have been reviewed, as have the parties' submissions on exception filed in accordance with N.J.A.C. 1:1-18.4.

The respondent Board of Education (Board) objects to the Administrative Law Judge's (ALJ) finding that petitioner was not aware of the Consent Award settling his 1986 grievance until 1999, contending that the ALJ unilaterally accepted petitioner's representation without taking any account of a Board certification to the contrary. (Board's Exceptions at 3-4) The Board also objects to the ALJ's finding that the petition was timely filed, contending that any claim petitioner had against the Board was settled by the 1988 Consent Award, and that if said Award – which by its own terms constituted a "full resolution" of the dispute – were not deemed enforceable, petitioner should have brought further action in a more timely fashion. (*Id.* at 5-7, 11) Most significantly, the Board objects to the ALJ's "bootstrapping" of a prior matter involving petitioner and the Board of Trustees of the Teachers' Pension and Annuity Fund (TPAF) – but not the Board – onto the instant matter,

and to her concluding from her decision in the earlier matter that the Board was somehow to blame for petitioner's delay in filing his application for purchase of TPAF credit and therefore liable for his increased costs. According to the Board, not only did the ALJ apply the wrong standard by construing inferences in favor of petitioner rather than respondent in granting summary decision, she even erroneously indicated that her Initial Decision was to be filed with the Board of Trustees of TPAF rather than the Commissioner of Education. (*Id.* at 5-12)[1]

In reply, petitioner counters that the ALJ appropriately decided the matter summarily in his favor based upon documents presented and the prior TPAF decision, since a court or agency "can take account of fact-finding made in complimentary proceedings," citing *Winschel v. City of Jersey City*, 96 *N.J.* 651, 666 (1984). (Petitioner's Exceptions at 1-2) Petitioner also reiterates that his appeal was filed within 90 days of the ruling upon which it was based, i.e., the TPAF ruling that he was an employee during the period in question for purposes of accruing pensionable service time. (*Id.* at 2) Finally, petitioner contends that the Board's violation of the 1988 Consent Award when petitioner attempted to purchase service credit in 1999 precludes it from relying on this agreement now as a basis to deny recovery to petitioner. (*Id.* at 3)

Upon careful and independent review, the Commissioner has determined to reject the Initial Decision in this matter.

The undisputed facts are as follows: Petitioner has been a social worker in the Board's district since 1981. In the spring of 1986, by which time he had acquired tenure, he

[1] The Board additionally objects to a number of statements in the ALJ's procedural recitations, contending that these either inaccurately or insufficiently relate what actually transpired, particularly with respect to the Board's ability to fully argue its case. (Board's Exceptions at 2, 4-5, 9, 10)

was notified by the Board that his position would be terminated at the end of the 1986 school year as the result of a reduction in force; the Board subsequently hired him as a per diem Consultant-Case Manager/Social Worker for the 1986-87 and 1987-88 school years,[2] during which time the Board did not withhold pension contributions from his payment because it did not consider him a salaried employee. In October 1986, the Caldwell-West Caldwell Education Association filed a grievance alleging that the Board's hiring of a consultant to fill the position of Case Manager/Social Worker violated the recognition clause of the collective bargaining agreement; a second grievance was filed in January 1987, alleging that petitioner was part of the Association's bargaining unit and subject to deduction of agency fees. The grievances were heard by an arbitrator, and were ultimately settled in 1988 via a Consent Award stating as follows:

1. Mr. P. Spitaletta's functions shall henceforth be done by bargaining unit personnel.
2. The Association will be paid the Agency Fee monies for 1987-88 amounting to $141.10.
3. The Board will credit Mr. Spitaletta's sick leave bank for time worked in school year 1987-88 in the amount of five (5) days.
4. If the Grievant decides to seek pension credit, the Board shall provide assistance to facilitate the back credit purchase.
5. The above is in full resolution of AR-87-272. Future similar issues will be decided on a case by case basis.
6. Arbitrator Robert E. Light retains jurisdiction over interpretation and compliance of the above.

   (Exhibit A, No. J-10, Certification of Mark A. Wenczel, Esq., Attachment to Board's Brief in Opposition to Petitioner's Motion for Summary Judgment and in Support of the Board's Motion for Summary Judgment)

[2] For 1986-87, petitioner received a stipend of $200 per day for two days service per week with a maximum of 75 days per year; for 1987-88, the stipend remained the same, but the maximum number of days was reduced to 64. (Exhibit A, Nos. J-3 and J-6, Certification of Mark A. Wenczel, Esq., Attachment to Board's Brief in Opposition to Petitioner's Motion for Summary Judgment and in Support of the Board's Motion for Summary Judgment)

Petitioner returned to full-time employment with the district in the fall of 1988. In June 1999,[3] petitioner sought to purchase pension credit for the 1986-87 and 1987-88 school years; in September 2000, his request was denied by the Division of Pensions because the service in question was characterized by the Board as that of an independent contractor rather than an employee. The Division of Pensions did not notify petitioner of his right to appeal its decision, and in the fall of 2002, petitioner sought recourse through the Board of Trustees of TPAF.[4] On August 6, 2004, following a hearing at the OAL conducted by the same ALJ as heard the matter now before the Commissioner, the TPAF Board held that, for pension purposes, petitioner was an employee rather than an independent contractor during the 1986-87 and 1987-88 school years and that the Division of Pensions had improperly denied his request to purchase pension credit for this period. Petitioner then purchased the credit at the rate applicable in 1999 when he first applied for purchase; his cost was $8,522.68, reflecting a difference of $6,932.68 from what his cost would have been ($1,590) had contributions been withheld from his pay during the period in question. On October 27, 2004, petitioner filed the present action to recover this difference from the Board.

Reviewing these facts in light of applicable law, the Commissioner can find no basis on which to grant petitioner the relief he seeks. To the extent that petitioner is claiming that the Board should have treated him as an employee for pension purposes during 1986-87

---

[3] The parties dispute the point at which petitioner became aware of the 1988 Consent Award, with petitioner contending that he only discovered it upon assuming the presidency of the Caldwell-West Caldwell Education Association in 1999 and the Board contending that he knew or should have known about it in 1988 as evidenced by his conceded knowledge of the underlying arbitration proceeding and the plain language of the Consent Award itself, which specifically references petitioner's purchase of pension credit.

[4] Petitioner also appears to have filed a grievance around this time with the respondent Board of Education, as evidenced by the Board's response – denying the grievance for untimely filing – dated December 16, 2002. (Exhibit A, Certification of Daniel Gerardi, Ph.D., Attachment to Board's Brief in Opposition to Petitioner's Motion for Summary Judgment and in Support of the Board's Motion for Summary Judgment)

and 1987-88, but did not:[5] that claim is more properly raised before the TPAF Board, where the relief due petitioner appears to be addressed by a statute (*N.J.S.A.* 18A:66-6.1) providing a specific remedy for instances where an employee should have been enrolled in the pension system and making contributions to it, but was not. Application of that statute, however – and the awarding of relief under it – lies within the jurisdiction of the TPAF Board, not the Commissioner of Education.[6] [7]

To the extent that petitioner is claiming that the Board violated the above-quoted 1988 Consent Award, jurisdiction over that order – by its own terms – lies with the Public Employment Relations Commission. Even if it did not, however, petitioner clearly had knowledge of the Board's characterization of his service for pension purposes at the latest upon his receipt of the September 8, 2000 letter from the Division of Pensions explaining the basis for denial of his purchase request, so that his October 27, 2004 petition in this matter was filed well beyond the 90 days permitted by rule. (Exhibit J, Certification of Mary J. Hamer, Attachment to Petitioner's Brief in Reply to the Board's Opposition to

---

[5] Petitioner himself characterizes his claim against the Board – accurately, based upon the Petition of Appeal and briefs filed at the OAL – as a recovery of the increased costs he experienced "due to [the Board's] failure to deduct pension contributions from his salary and forward them to the Division of Pensions as it should have done in the 1986-87 and 1987-88 school years." (Petitioner's Brief in Support of Motion for Summary Decision at 2-3) Petitioner further describes the central issue in this matter as "whether or not the Board should have taken pension contributions from the petitioner's salary and forwarded them to the Division of Pensions during the 1986-87 and 1987-88 school years," and argues that "[if] the petitioner was an employee rather than an independent contractor during the period in question as the decision of the [TPAF Board] holds, then respondent should have withheld pension contributions from his salary and forwarded them to the Division of Pensions.***The [TPAF Board] is the appropriate agency to decide whether or not petitioner was an employee for pension purposes rather than the Commissioner of Education. The Commissioner can and should hold that respondent acted inappropriately by not withholding petitioner's pension contributions during the years in question but should not reconsider the decision made by the [TPAF Board]." (*Id.* at 6-8)

[6] The Commissioner is uncertain as to why relief under this statute was neither requested nor addressed in petitioner's proceeding before the TPAF Board.

[7] It was for this reason that the question of Commissioner jurisdiction was identified as a threshold issue upon transmittal of the contested case to the OAL; the record does not indicate why the ALJ elected not to address the matter.

Petitioner's Motion for Summary Decision) Contrary to petitioner's assertion, he did not need to wait for the TPAF Board to determine that he was, in fact, an employee for pension purposes in order to make a claim that the Board was violating the Consent Award's provision requiring it, "if the Grievant decides to seek pension credit," to "provide assistance to facilitate the back credit purchase." (Consent Award, Term No. 4) Nor does the Commissioner find any circumstance in the record that would warrant relaxation of the 90-day rule pursuant to *N.J.A.C.* 6A:3-1.16, particularly when weighed against the rule's salutary purpose of discouraging dilatoriness and providing a measure of repose in the conduct of school affairs.

Finally, even assuming, *arguendo*, that the petition was timely filed and petitioner truly did not or could not have become aware of the 1988 Consent Award until 1999, to the extent that the additional cost of his credit purchase was occasioned by that delay, there is not a shred of evidence on record – nor, for that matter, does petitioner expressly claim – that the Board was in any way responsible for such lack of awareness. The Commissioner cannot, therefore, find any basis on which to hold the Board accountable for petitioner's loss and order it to make restitution as a matter of equity.

Accordingly, for the reasons set forth herein, the Initial Decision of the OAL is rejected in its entirety, and the Petition of Appeal is dismissed.

IT IS SO ORDERED.[8]

ACTING COMMISSIONER OF EDUCATION

Date of Decision: 6/08/06

Date of Mailing: 6/09/06

[8] This decision may be appealed to the State Board of Education pursuant to *N.J.S.A.* 18A:6-27 *et seq.* and *N.J.A.C.* 6A:4-1.1 *et seq.*

State of New Jersey
OFFICE OF ADMINISTRATIVE LAW

SUMMARY DECISION
OAL DKT. NO. EDU 01091-05
AGENCY DKT. NO. 377-10/04

PASQUALE SPITALETTA,

Petitioner,

V.

BOARD OF EDUCATION OF THE
CALDWELL-WEST CALDWELL
SCHOOL DISTRICT, ESSEX COUNTY, NEW JERSEY

Respondent.

Mary J. Hammer, Esq., for Petitioner
(Bucceri and Pincus Law Firm)

Mark A. Wenczel, Esq., for Respondent
(Gaccione, Pomaco & Malanga)

Record Closed: September 19, 2005 **Decided:** January 26, 2006

BEFORE **SANDRA ANN ROBINSON,** ALJ:

STATEMENT OF THE CASE

Pasquale Spitaletta, Petitioner, claims that the Caldwell, West Caldwell Board of Education, Respondent, violated *N.J.S.A.* 18a:66-1, *et seq.* when Respondent's personnel failed to deduct and forward pension contributions from his pay checks to the Teachers' Pension and Annuity Fund for the school years 1986-1987 and 1987-1988. Respondent had initially argued that Petitioner was not entitled to pension credit for the

two periods, since he was then an Independent Contractor. The undersigned heard and decided the case involving the issue of independent contractor vs. employee on June 17, 2004, and concluded from the law and factual testimony that Petitioner was an employee in 1986-1988. Thereafter, Petitioner purchased the service credits for $8,522.68, at the rate based on his age and salary on the date of his initial request to purchase (June 1999). Had Respondent withheld contributions between 1986 and 1988 Petitioner's pension contribution would have been $1,590.00. Petitioner now seeks reimbursement from Respondent of $6,932.68, which is the increased cost for the recent purchase ($8,522.68 – 1,590.00). Respondent contends that Petitioner's claim is time-barred, under both the common law laches doctrine and *N.J.A.C.* 6A:3-1.3(i), which requires Petitioner to bring this action within 90 days of receipt of notice of a final agency action or order on the matter.

PROCEDURAL HISTORY

The New Jersey Department of Education Bureau of Controversies & Disputes received a Petitioner's request to appeal on October 26, 2004. The matter was transmitted by the Department of Education to the Office of Administrative Law (OAL) on January 6, 2005, for hearing and determination as a contested case pursuant to *N.J.S.A.* 52:14B-1 to B-15 and *N.J.S.A.* 52:14F-1 to F-13. On January 27, 2005 the case was listed with the undersigned. Conferences were held in 2005 on June 2, July 12 and August 12. Petitioner submitted a "Motion for Summary Decision" on June 16, 2005; thereafter on July 6, 2005 Respondent submitted "Respondent's Brief In Opposition To Petitioner's Motion For Summary Judgment and In Support of Respondent's Motion For Summary Judgment" and thereafter on July 11, 2005 Petitioner submitted "Petitioner's Brief In Reply To Respondent's Opposition". All Briefs were supported with Certifications from the parties counsel. A Telephone Settlement Conference was held on July 12, 2005 which was unsuccessful. The parties requested oral arguments oral arguments to fully address all issues to be decided via Summary Decision. The scheduled July 14 and 15, 2005

de novo hearing dates were postponed to prepare for oral arguments on the Summary Decision Motions.

On July 28, 2005, Petitioner's counsel faxed a letter to OAL and Respondent, to advise of an error in the method used by Petitioner to calculate the damages being sought. Petitioner offered to file a formal motion to amend the prior motions. On July 29, 2005, the undersigned held a telephone conference with counsel for the purpose of resolving the issue of the revision to the damages claim. On August 8, 2005 counsel for the school board suggested that oral arguments proceed and that the issue be included in the arguments. Oral arguments were scheduled for August 25, 2005 however counsel for the school board requested a brief adjournment because of a conflict with a trial in Superior Court in Bergen County on the same date. On September 14, 2005 oral arguments were completed and the hearing record was closed. Due to a voluminous caseload, inclusive of a numerous EDS matters, the undersigned requested and was granted two extensions until February 2, 2006 to complete a Summary Decision in this matter.

CASE BACKGROUND

Petitioner is a tenured social worker employed by Respondent Board of Education since 1981. In the spring of 1986 Respondent notified Petitioner that his position would terminate effective June 30, 1986, as part of a reduction in force. Then for the commencement of the 1986 school year Respondent hired Petitioner as a Consultant-Case Manager/Social worker which continued through the 1987-88 school year. Respondent did not withhold pension contributions from Petitioner's salary to forward to the Division of Pensions.

In May 1999, after Petitioner became President of the Caldwell-West Caldwell Education Association he discovered the Consent Award which settled the Association's grievance against Respondent regarding the creation of the Consultant-Case Manger/Social Worker position. The next month, in June 1999, Petitioner sought to

purchase pension credits for the 1986-87 and 1987-88 school years. The Division of Pensions refused Petitioner's request, advising him that his service during the years in question was ineligible for purchase because he was a consultant. Petitioner argued his status as a consultant vs. employee and lack of notice from the Division of Pensions of his right to appeal the decision of ineligibility.

In the fall of 2002, Petitioner again tried to purchase pension credits for the 1986-87 and 1987-88 school years. The Division of Pensions denied Petitioner's request again, based on Respondent's representation that Petitioner was an independent contractor during the period and not an employee. Petitioner appealed that denial and an OAL Initial Decision was issued and adopted by the Board of Trustees of the Teachers' Pension and Annuity Fund, which held that Petitioner was an employee during the 1986-88 school years and should be allowed to purchase pension credits for those years.

ISSUES

The two issues in this case are as follows:

(1) Is Petitioner time-barred from bringing this action?

(2) If Petitioner is not time-barred, is Petitioner entitled to reimbursement from Respondent for all or part of the difference between the cost of Petitioner's pension credits when purchased in 2004 versus what the cost would have been in 1986-1987 and 1987-1988, had Respondent properly withheld pension contributions from Petitioner's pay?

MOTION FOR SUMMARY DECISION

DISCUSSION AND LEGAL ANALYSIS

Under *N.J.A.C.* 6A:3-1.12(a), the Commissioner of Education shall apply the standard set forth in the Uniform Administrative Procedure Rules in deciding Motions for

Summary Decision. In accord with *N.J.A.C.* 1: 1-12.5(b) of the Uniform Administrative Procedure Rules, a Motion for Summary Decision shall be rendered:

> [I]f 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.

In *Brill v. Guardian Life Insurance Company of America,* 142 *NJ* 520 at 541 (1995), the New Jersey Supreme Court determined that "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..." Pursuant to *N.J.A.C.* 1:1-12.5(b) and *Contini v. Board of Education of Newark,* 286 *N.J. Super.* 106, 121-122 (App. Div. 1995) (citing *Brill v. Guardian Life Ins. Co.,* 142 *NJ* 520 (1995), summary decision may be granted in an administrative proceeding if there is no genuine issue of material fact in dispute and the moving party is entitled to prevail as a matter of law. Also, "disputes as to the conclusions to be drawn from the facts, as opposed to the facts themselves, will not defeat a Motion for Summary Judgment. *Contini v. Board of Education of Newark*, 96 *N.J.A.R.* 2d (EDU) 196, 215, citing *Lima & Sons, Inc. v. Borough of Ramsey,* 269 *N.J. Super.* 469, 478 (App. Div. 1994); *In the Matter of the Tenure Hearing of Andrew Phillips, School District of the Borough of Roselle*, Union County, Commissioner's Decision No. 129-97, decided March 20, 1997; and *In the Matter of the Tenure Hearing of Neal A. Ercolano, Board of Education of Branchburg Township*, Somerset County, Commissioner's Decision No. 140-00, decided May 1, 2000. When there is submission of cross-motions for Summary Decision, it may reasonably be inferred that the parties agree that Summary Decision is appropriate in the matter. The Attorneys in the instant case filed and exchanged Motion Briefs and Certifications which fully explored on paper, the issues which had to be addressed in a Summary Decision; and, Counsel also supported their Summary Decision briefs via Oral Arguments. When considering a Motion for Summary Decision, this tribunal must determine whether the pleadings, the admissions and affidavits demonstrate that no genuine issue of material fact exists. In this matter an Initial Decision has been rendered and adopted and Petitioner seeks a

determination on an issue which arose because of the outcome or finding in the Initial Decision. Here, the pleadings, discovery and certifications show there is no genuine issue as to any material fact being challenged and a Summary Decision is ripe in for this matter.

In the instant matter, Petitioner claims that the Caldwell, West Caldwell Board of Education, Respondent, violated *N.J.S.A.* 18a:66-1, *et seq.* when Respondent's personnel failed to deduct and forward pension contributions from his pay checks to the Teachers' Pension and Annuity Fund for the school years 1986-1987 and 1987-1988. *N.J.S.A.* 18A:66-1, known as the "Teachers' Pension and Annuity Fund Law "sets forth the following definition teacher at 18A:66-2 p.:

> "Teacher" means any regular teacher, special teacher, helping teacher, teacher clerk, principal, vice-principal, supervisor, supervising principal, director, superintendent, city superintendent, assistant city superintendent, county superintendent, State Commissioner or Assistant Commissioner of Education, members of the State Department of Education who are certificated, unclassified professional staff and other members of the teaching or professional staff of any class, public school, high school, normal school, model school, training school, vocational school, truant reformatory school, or parental school, and of any and all classes or schools within the State conducted under the order and superintendence, and wholly or partly at the expense of the State Board of Education, of a duly elected or appointed board of education, board of school directors, or board of trustees of the State or of any school district or normal school district thereof, and any persons under contract or engagement to perform one or more of these functions. It shall also mean any person who serves, while on an approved leave of absence from regular duties as a teacher, as an officer of a local, county or State labor organization which represents, or is affiliated with an organization which represents, teachers as defined in this subsection. No person shall be deemed a teacher within the meaning of this article who is a substitute teacher. In all cases of doubt the board of trustees shall determine whether any person is a teacher as defined in this article.

In regard to membership eligibility, N.J.S.A. 18A:66-2.1. Teachers; membership in Teachers' Pension and Annuity Fund, indicates the following:

> Any individual in the categories specified in section 1 p. of this act, who was a member of the Teachers' Pension and Annuity Fund on December 11, 1975, shall be considered to be in continuous membership in that system.

The Initial Decision concluded that Petitioner was an employee at all times in question and had continuous membership in the Teachers' Pension and Annuity Fund. The Decision was upheld and Petitioner has purchased service credits for 1986 through 1988.

Petitioner questions through this appeal whether he is entitled to a reimbursement for the additional money he had to pay, because of the delay in purchase, after his initial request to purchase, when Respondent deemed he was an independent contractor. Respondent's response to Petitioner's request for reimbursement is that Petitioner's claim is time-barred, under both the common law laches doctrine and *N.J.A.C.* 6A:3-1.3(i), which requires Petitioner to bring this action within 90 days of receipt of notice of a final agency action or order on the matter. Petitioner says this action was brought within ninety (90) days of a final agency action or order in the initial case dated August 6, 2004 and pursuant to *N.J.A.C.* 6A:3-1.3(i), which sets forth:

> The petitioner shall file a petition no later than the 90th day from the date of receipt of the notice of a final order, ruling or other action by the district board of education, individual party, or agency, which is the subject of the requested contested case hearing. 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.

Petitioner is not time-barred, if it is determined that Teachers' Pension and Annuity Fund final decision in the previous *Spitaletta* case, dated August 6, 2004, constitutes the final order referred to in the above rule. The interpretation of the word "subject", in *N.J.A.C.* 6A:3-1.3(i), refers back to the preceding phrase "agency". There is no law or specific interpretation of "agency" or whether "agency" only refers to the Department of Education, or encompasses sub-agencies of the Department of Education. However, in deciding this matter *N.J.A.C.* 6A:3-1.16 which supports the "Relaxing of Rules", must be taken into consideration:

> 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.

Respondent's argument that Petitioner is time-barred because he knew or should have known of the 1988 Consent Award between the school board and his teachers' association comes without evidence that the results of the action in 1988, brought by the Teachers' Association was actually or specifically made known to Petitioner; nor is there information on whether the Association disseminated the results of the Consent Award to their membership. However, regardless of whether the content of the Consent Award was disclosed to Petitioner, the facts of the case continue to illustrate that it was Respondent's negligence, lack of knowledge or failure to act in making contributions to the Teachers' Pension and Annuity Fund, which caused Petitioner to delay his application from 1988 until 1999. There is no evidence that Petitioner had constructive knowledge of the Consent Award, dating back from 1988, and therefore "laches" should not apply. Further, Respondent contention that a "time-barred" claim exists under both common law laches doctrine and *N.J.A.C.* 6A:3-1.3(i) should be dismissed because of the timely filing after the Teacher's Pension and Annuity Fund final decision in the previous *Spitaletta* case, dated August 6, 2004.

In regard to reimbursement for the increase in purchase price between 1988 and 1999 the underlying issue is one of "restitution" and the reasoning that such reimbursement must serve "to make the injured party whole". This approach is used in cases where a school district acted wrongly, such as a violation of tenure or seniority rights, or a wrongful suspension. The instant case is similar to a wrong action case, in that Petitioner was reclassified due to reduction in the work force, but continued to perform all job responsibilities under the previous job classification and Respondent wrongly stopped his pension deductions for a two year period. Of import in arriving at a decision in this matter is the relevancy of *N.J.S.A.* 18A:66-63. "Correction of Errors by Trustees":

> If any change or error in records results in a member or beneficiary receiving from the retirement system more or less than he would have been entitled to

> receive had the records been correct, then on discovery of the error, the board of trustees shall correct it and, so far as practicable, adjust the payments in such a manner that the actuarial equivalent of the benefit to which he was correctly entitled shall be paid.

It remains a fact that Petitioner should have been deemed an employee of Respondent in 1986-1987 and 1987-1988, and thus had the right to purchase pension credits for those years. It is noted again, that the Consent Award, included Respondent's agreement to help purchase pension credits for Petitioner. In *Newark Board of Education v. Ruth Levitt and Esther E. Sasloe*, 197 *N.J. Super* 239 (1984), the BOE was found to have wrongfully classified two teachers as substitutes, for years, and thus denied them all salary, tenure, and pension benefits. A summary of *Newark Board of Education v. Ruth Levitt and Esther E. Sasloe,* follows:

> Petitioners argued that their assignment by the board as long-term substitute teachers from 1945 through 1961 improperly prevented them from acquiring tenure protection and also denied them proper placement on the teacher's salary guide, longevity increments, leaves of absence and other fringe benefits which should have accrued to them as regular teaching staff members. They sought compensation for the wages, fringe benefits and credits that they would have received had they been properly assigned. The Commissioner issued his decision on October 5, 1977. He adopted the findings of the hearing examiner, found that petitioners were regular full-time teachers during the years in question and ordered the board to compensate them for the back pay and benefits due to them.

In *Newark Board of Education v. Ruth Levitt and Esther E. Sasloe* the Superior Court, Appellate Division (Decided Nov. 29, 1984), held that the Decision by the State Board of Education affirming the amount found by the Commissioner of Education to have been owing to teachers who had been improperly assigned by the city school board as long-term substitute teachers was supported by sufficient credible evidence and the award of damages due to their improper assignment was justified. In the instant case Petitioner seeks only the reimbursement of the difference in the cost to purchase now, as opposed to what he should have paid in 1988 when he initially made a request to purchase. A determination of the cause in this appeal also yields a rationale that Petitioner should be made whole and that restitution is achieved in the reimbursement to Petitioner of the amount of the increased payment to purchase the service credits.

FINDINGS

All of the facts necessary for the disposition of Petitioner's Motion for Summary Decision and Respondent's Motion for Summary Judgment are uncontested. The issues presented in this appeal pertain to a legal analysis on laches, time-barred and right to receive full or partial reimbursement of the increased cost to purchase service credits. All concerns regarding a miscalculation of the actual increased cost for the purchase of service credits were resolved and accepted by Respondent after oral arguments, a review of supporting documents and prior to the preparation of a Summary Decision.

Based upon and after my review of the Briefs, listening to oral arguments and drawing all reasonable inferences in favor of Petitioner, **I FIND,** the following:

Petitioner brought this action within 90 days of receipt of notice of a final agency action or order on the matter, and within ninety (90) days of a final agency action or order in the initial case dated August 6, 2004 and pursuant to *N.J.A.C.* 6A:3-1.3(i);

Petitioner was wrongfully denied his status as an eligible member of the Teachers' Pension and Annuity Fund, for two years, due to no fault of Petitioner;

Petitioner's contribution to pension benefit funds were not submitted to the Teachers' Pension and Annuity Fund by Respondent on behalf of Petitioner, due to no fault of Petitioner;

Petitioner was granted the right to purchase service credits from 19986-1988, but did so at an increased cost, due to the error of Respondent;

Petitioner has experienced a financial loss because of the error and has not been made whole;

Petitioner's recoupment of the additional funds, in excess of 1988 amount needed to purchase service credits, would provide Restitution to Petitioner and make him whole.

ORDER

For all the foregoing reasons, it is **ORDERED** that Petitioner's Motion for Summary Decision Be and Is Hereby **GRANTED,** and that Respondent promptly reimburse Petitioner for the difference of $6,932.68, which is the increased cost for the purchase of services credits from 1988 to the date of the request to purchase in June 1999.

It is further **ORDERED** that Respondent's Motion for Summary Judgment Be and Is Hereby **DENIED**.

I hereby FILE my initial decision with the **BOARD OF TRUSTEES OF THE TEACHERS' PENSION AND ANNUITY FUND** for consideration.

This recommended decision may be adopted, modified or rejected by the **BOARD OF TRUSTEES OF THE TEACHERS' PENSION AND ANNUITY FUND** which by law is authorized to make a final decision in this matter. If the **Board of Trustees of the Teachers' Pension and Annuity Fund** 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 **DIRECTOR, DIVISION OF PENSIONS, One State Street Square, 50 West State Street, PO Box 295, Trenton, New Jersey 08625-0295,** marked "Attention: Exceptions." A copy of any exceptions must be sent to the judge and to the other parties.

January 26, 2006
DATE

Sandra Ann Robinson
SANDRA ANN ROBINSON, ALJ

E-mail Receipt of Initial Decision Confirmed by the Department of Education on:

_____
DATE

Mailed to Parties:
Laura Sanders
DIRECTOR AND
CHIEF ADMINISTRATIVE LAW JUDGE

JAN 27 2006
DATE

OFFICE OF ADMINISTRATIVE LAW

cml

APPENDIX

Petitioner's Brief and Certification In Support of Motion for Summary Decision

Respondent's Brief and Certification In Support of Motion for Summary Judgment

Petitioner's Brief In Reply To Respondent's Opposition

208-06

#208-06

IN THE MATTER OF THE TENURE	:	
HEARING OF DONNA CARTRETTE,	:	COMMISSIONER OF EDUCATION
SCHOOL DISTRICT OF THE CITY	:	DECISION
OF UNION, HUDSON COUNTY.	:	

SYNOPSIS

The Board certified tenure charges of excessive absenteeism and insubordination against Donna Cartrette, a tenured custodian in the Union School District. Respondent was directed via both certified and regular mail to file an Answer to the tenure charges against her, but failed to do so. Because no reply was received in response to the Board's charges, each count of the charges against respondent is deemed to be admitted. *N.J.A.C.* 6A:5-3(c).

The Commissioner reviewed the tenure charges certified against the respondent, and the evidence in support of those charges. Deeming such charges to be admitted, and noting that respondent has twice failed to respond to the allegations against her, the Commissioner finds that respondent's actions constitute excessive absenteeism and insubordination amply warranting dismissal from her tenured custodial position. Summary judgment is granted to the District, and Donna Cartrette is dismissed from her tenured custodial position as of the filing date of 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.

June 12, 2006

AGENCY DKT. NO. 163-5/06

IN THE MATTER OF THE TENURE	:	
HEARING OF DONNA CARTRETTE,	:	COMMISSIONER OF EDUCATION
SCHOOL DISTRICT OF THE CITY	:	DECISION
OF UNION, HUDSON COUNTY.	:	

For the Board, Mitzy Galis-Menendez, Esq. (Chasan, Leyner & Lamparello)

This matter was opened before the Commissioner of Education on May 5, 2006 through certification of tenure charges of excessive absenteeism and insubordination by the Board of Education of the City of Union (Board) against Donna Cartrette (respondent), a tenured custodian. Respondent did not reply to the charges when they were initially filed with the Board, and subsequently, the board determined to certify the charges. On May 2, 2006, the Board served respondent, via regular mail and certified mail, return receipt requested, with the Board's resolution, Certificate of Determination, and transmittal letter to the Commissioner, referencing the previously filed and served charges.

Upon receipt of the certified charges on May 5, 2006, the Commissioner directed respondent, via both certified and regular mail, to file an Answer to such charges. This communication clearly provided notice to respondent – as did the Board's above-referenced May 2, 2006 communication – 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 by the charged employee.

Neither the regular nor the certified notices from the Commissioner were returned as undeliverable, but no reply was received from respondent.

The Commissioner's review of the certified tenure charges, and the statement of evidence in support of them, indicates that: (1) respondent's absences in the eight years of her employment have been consistently significant and have worsened over the years; (2) such absences have negatively impacted on the district's ability to operate and maintain its buildings; (3) respondent was granted a medical leave expiring on December 27, 2005, and has neither returned to work nor provided notice of her intent to return; and (4) respondent has consistently failed to acknowledge receipt of Board documents regarding her attendance and failed to attend a related meeting with district administrators as directed.

Deeming such charges to be admitted, and noting that respondent has twice failed to respond to the allegations against her, the Commissioner finds that respondent's actions constitute excessive absenteeism and insubordination amply warranting dismissal from her tenured custodial position.

Accordingly, summary decision is hereby granted to the Board, and respondent Donna Cartrette is dismissed from her tenured custodial position in the Board's employ as of the filing date of this decision.

IT IS SO ORDERED.*

Lucille E Davy

ACTING COMMISSIONER OF EDUCATION

Date of Decision: 6/12/06

Date of Mailing: 6/12/06

* This decision may be appealed to the State Board of Education pursuant to *N.J.S.A.* 18A:6-27 *et seq.* and *N.J.A.C.* 6A:4-1.1 *et seq.*

209-06

#209-06E

OAL DKT. NO. EDU 4143-06 and EDU 4144-06
AGENCY DKT. NO. 192-5/06 and 191-5/06
(CONSOLIDATED)

D.E., JR., PETITIONER, V.	:	
BOARD OF EDUCATION OF THE BOROUGH OF BOUND BROOK, SOMERSET COUNTY, RESPONDENT.	:	
and	:	COMMISSIONER OF EDUCATION
C.B. ON BEHALF OF MINOR CHILDREN, R.M.B. AND R.B., PETITIONERS, V.	:	DECISION ON MOTION
BOARD OF EDUCATION OF THE BOROUGH OF BOUND BROOK, SOMERSET 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 determines to adopt the ALJ's recommended Order denying emergent relief as she concurs with his determination that petitioners have failed to satisfy the requirements necessary for the granting of such extraordinary relief as set forth in *Crowe v. DeGioia*, 90 *N.J.* 126 (1982), most notably: that they will suffer irreparable harm absent the grant of the requested relief; that the legal right

underlying their claim is settled; or that a balancing of the equities and interests of the parties inures to their favor.[1]

Accordingly, the instant application for emergent relief is hereby denied. This matter is being returned to the OAL for those proceedings which may be necessary to bring it to conclusion.

IT IS SO ORDERED.[2]

Lucille E Davy

ACTING COMMISSIONER OF EDUCATION

Date of Decision: 6/12/06

Date of Mailing: 6/12/06

[1] In so holding, the Commissioner notes that *N.J.A.C.* 6A:14-2.7(m)1 appears to have been cited in the Initial Decision (at 5 and 8) in error, since nothing in the record reviewed suggests applicability of that rule herein.

[2] This decision may be appealed to the State Board of Education pursuant to *N.J.S.A.* 18A:6-27 *et seq.* and *N.J.A.C* 6A:4-1.1 *et seq.*

State of New Jersey
OFFICE OF ADMINISTRATIVE LAW

ORDER ON
EMERGENT RELIEF

D.E., JR.,
Petitioner,
v.
BOARD OF EDUCATION OF THE BOROUGH OF BOUND BROOK, SOMERSET COUNTY,
Respondent,

OAL DKT. NO. EDU 4143-06
AGENCY DKT. NO. 192-5/06

and

C.B. ON BEHALF OF MINOR CHILDREN, R.M.B. AND R.B.,
Petitioners,
v.
BOARD OF EDUCATION OF THE BOROUGH OF BOUND BROOK, SOMERSET COUNTY,
Respondent.

OAL DKT. NO. EDU 4144-06
AGENCY DKT. NO. 191-5/06
(CONSOLIDATED)

David R. Giles, Esq., for petitioner, D.E., Jr.

Stephen M. Latimer, Esq., for petitioners, C.B. on behalf of R.M.B and R.B. (Loughlin and Latimer, attorneys)

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

BEFORE **DONALD J. STEIN**, ALJ:

STATEMENT OF THE CASE AND PROCEDURAL HISTORY

On May 25, 2005, petitioner, C.B. on behalf of her children, R.M.B. and R.B., filed an application for emergent relief with the New Jersey Department of Education, Bureau of Controversies and Disputes. The application requested that R.M.B. and R.B. be immediately returned to school and their record expunged. The application also requested several additional items to be discussed below.

On May 25, 2005, petitioner, D.E. filed a similar application for emergent relief with the New Jersey Department of Education, Bureau of Controversies and Disputes. The application also requested that D.E. be immediately returned to school and his record expunged, as well as the additional items to be discussed below.

These matters were transmitted to the Office of Administrative Law (OAL) for a hearing on the requested emergent relief on May 31, 2006. The case heard in the OAL, Trenton (Hamilton Township) on June 6, 2006, at 9:00 a.m., and the record closed on that date. Before the start of the hearing, the two cases were consolidated.

STATEMENT OF FACTS

Some of the facts are undisputed. D.E. and R.M.B. are juniors at Bound Brook High School (High School). R.B. is a sophomore at the same school. On March 17, 2006, an altercation occurred among several Hispanic and African American students at the High School, and one or two white students. The Board suspended D.E., R.B., and R.M.B (the three students), pending an expulsion/suspension hearing scheduled for April 18, 2006. The expulsion hearing was adjourned at the request of Mr. Giles, attorney for D.E., who was seeking additional discovery; and C.B, who was seeking an attorney. The attorneys for the petitioners have requested this emergent application be heard before the Board expulsion hearing. Home instruction has been provided to the students on an eight hour per week basis.

The facts of the altercation are in issue. One statement indicated that the alleged victim and a group of four other Hispanic male students passed R.M.B., R.B., and D.E., and a group of six other students, four black and two white. The victim's friend indicated some members of the other group including R.B. started talking trash to the alleged victim. Then everyone started hitting him. One of the boys knocked the alleged victim to the ground and everyone started kicking him. R.B.'s statement said that he was in the bathroom at 12:30 and when he got outside the fight was done and he only saw a group of people. R.M.B.'s statement was that he and a friend were walking home together and were in front of a group of students. They saw they were going to be a fight so they kept walking. D.E. stated that he and four other boys left the school building together and stopped by a nearby bridge where they hang-out. The alleged victim came down the street with a group of fifteen other Hispanic individuals. The alleged victim and an African American student started a fight. Another Hispanic jumped in, and then one of the white students jumped in. The Hispanic student who jumped in was on top of one of D.E.'s friends. D.E. tried to pull him out of the fight. At that point, D.E. saw a large crowd forming and left. He denied that anyone was trash talking to him.

The Board asserts that R.B., R.M.B., and D.E. were with a group of students (Group A). Another group of students including O.N. and A.N. (Group B), were walking by Group A, when O.N. was struck in the back of his head by J.W. (a member of Group A). Other members of Group A including R.B., R.M.B., and D.E., then punched, picked and stomped by O.N.'s head. When a second member of Group B, A.N., attempted to protect O.N., he was assaulted by members of Group A. The police were called to the scene.

Respondents allege that School Resource Officer (SRO) Sascha Higazi reported to the scene, attended to alleged victims who were Hispanic, and took statements from Hispanic students but not from African American students. The principal was advised by the Bound Brook Police that the incident was gang related and retaliatory and counter-retaliatory actions were anticipated to take place in the Community and the High School on March 20, 2006. On March 20, 2006, before school started, the

parents were contacted and asked not to send the children to school for a few days for fear there would be retaliation.

Respondents allege the following procedural deficiencies occurred during the disciplinary process:

1. The short-term suspension without notice or discipline violated the students' right to procedural due process.
2. The Board violated procedural due process by failing to offer a hearing within 21 days, and withheld records and information needed to respond to the charges.
3. The Board's failure to comply with the Department of Education's Student Conduct regulations violated the students' right to procedural due process.
4. The school officials were not authorized to extend the suspensions beyond the second regularly held meeting of the Board without formal action by the Board.
5. The students' rights were violated under N.J.A.C. 6A:16-7.5 by recommending expulsion without ever being suspended or placed in an alternative setting.
6. The students' constitutional right to an education were violated when they were suspended and not provided minimal education services pursuant to N.J.A.C. 6A:16-7.2(a) 5 and 7.3(a) 8.
7. The Board violated the students' right to confidentiality and privacy when it disclosed the pupil records to the Bound Brook Police Department.

The Board denies these allegations and argues:

1. The students received notice and an opportunity to be heard prior to the ten day suspension.
2. The students were provided with a Board hearing within thirty days, but the hearing was postponed by the petitioner and attorney for the petitioner.
3. The students were provided with the necessary records for the hearing.

4. His suspension was not extended beyond the second regularly scheduled meeting of the Board. The delay was due to the petitioner and attorney's request for a postponement of the hearing.

DISCUSSION OF THE LAW

The standards which must be met by the moving party in an application for emergent relief in a matter concerning a special needs child are embodied in N.J.A.C. 6A:14-2.7(m)1, N.J.A.C. 1:6A-12.1, and Crowe v. DeGoia, 90 N.J. 126, 132-34 (1982). Emergency relief may only be granted if the judge determines that:

1. The petitioner will suffer irreparable harm if the 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 petitioner must satisfy all four prongs of the Crowe test.

Since the school year ends in June 26, 2006, petitioners have not established that the students will suffer irreparable harm. As argued by the respondent, the students are being provided ongoing alternative education, will have the opportunity to take final exams, and receive credit for the 2005-2006 school year. The petitioners have contributed to any potential harm by adjourning the April 18, 2006 hearing and then not rescheduling it pending the adjudication of this matter.

When attempting to satisfy the second and third prongs of the four-part Crowe test, petitioner has a difficult burden. If the law is well settled, it is settled in favor of the Board of Education. Local boards of education are charged with the responsibility of protecting the health, safety, and welfare of their students and ensuring the orderly conduct of the academic process. The actions they take in adopting and enforcing the

policies necessary to carry out these responsibilities have a presumption of validity and, in order to prevail, a petitioner must show that the Board acted arbitrarily and outside the scope of its discretionary authority. Thomas v Bd of Ed of Morris Tp., 89 N.J. Super. 327, 332 (App. Div. 1965); Kopera v West Orange Bd of Ed., 60 N.J. Super. 288, 294 (App. Div. 1960).

This case involves the enforcement by the school district of clear educational policies. The action of a board of education which lies within the area of its discretionary powers may not be upset unless patently arbitrary, without rational basis, or induced by improper motives. Kopera v. West Orange Bd. of Ed., supra, 60 N.J. Super. at 294. The Board's disciplinary policy authorizes it to suspend or expel a student for conduct such as an assault. Petitioners have not shown that such action was arbitrary and capricious.

In a public school setting, for good cause, including an assault upon another student, a student may be suspended and/or expelled from school, subject to due process requirements, including notice of the charge on which the demand for suspension or expulsion is based; a statement of the factual allegation on which a charge is based; discovery of the name of any person with knowledge of any relevant fact and discovery of any relevant document; and a hearing, during which the student may confront any witness against her. N.J.S.A. 18A:37-1 to -5 to -5; Tibbs v. Bd. of Ed. of Tp. of Franklin, 59 N.J. 506 (1971). Further, where a school administrator has a reasonable basis for a belief that a student presents a danger to herself or to others or to school property, he may temporarily suspend the student, pending and conditioned upon notice and a hearing before the board of education. N.J.S.A. 18A:37-5.

Since the facts are in issue as to what occurred on March 17, 2006, and the petitioners have not established that the actions of the Board were arbitrary and capricious, the petitioners have not established that they are likely to prevail on the merits of the underlying claim.

Petitioners also attempt to argue that they have not been provided discovery for the Board hearing. It is not disputed that the Board has given them the statements of all witnesses. Petitioners are seeking statements of students who will not be called to testify, citing Tibbs. Petitioner's reliance on Tibbs is misplaced.

Tibbs involved the expulsion of five students for allegedly assaulting two other students. In a per curiam decision, the Appellate Division reversed the expulsions for failing to produce the accusing witnesses for testimony and cross-examination." Tibbs, 114 N.J. Super., at 288. The Supreme Court issued a per curiam decision in the case, affirming the Appellate Division's decision for the reasons expressed in the concurring opinion of Judge Kolovsky. 59 N.J. 506, 507 (1971).

Neither the language of the decisions in Tibbs, nor Judge Kolovsky's concurrence, hold that a student is entitled to a summary of witness testimony in advance of a full Board hearing. Rather, as explicated in Judge Kolovsky's concurrence, Tibbs centered on the due process requirement that "a respondent charged with misconduct in a hearing before a governmental agency be given the opportunity to confront and cross-examine adverse witnesses where the decision of the governmental agency will turn on questions of fact." 114 N.J. Super. at 301. While recognizing that the Commissioner had previously held that accused students were entitled to be given at least the names of the witnesses against them and copies of their statements and affidavits, Judge Kolovsky's concurrence articulated the due process requirement that such witnesses appear in person so that, in the absence of an appearance, the witnesses' statements could not be considered or relied on by the board. Id. at 300. In this case, the Board has clearly provided the statements of testifying witnesses, which is more than required by Tibbs. No authority has been produced by petitioners that they are entitled to the statements of witnesses who will not be called to testify.

The petitioners have not proven that the legal right underlying their claim is settled. The due process arguments asserted are not ripe for decision at this time. The initial suspension and the suspension or expulsion hearing are intertwined and cannot be analyzed separately. Petitioner's own action in delaying the expulsion hearing has created the issues now being argued. The Board could decide to reinstate the

students, which would render this application moot, or suspend or expel the students in an arbitrary manner. Until a decision is rendered by the Board, it cannot be determined if the actions were arbitrary and capricious, as well as violative of procedural due process.

Petitioners must also show that when the equities and interests of the parties are balanced, the petitioners will suffer greater harm than the respondent will suffer if the requested relief is not granted. The petitioners may suffer some harm being away from school, but they are still receiving alternate instruction. However, the Board runs the risk of greater harm, especially if the immediate return of the students would escalate violence and retaliation within the school. Therefore, I further **FIND** that the petitioners have not proven that they would suffer greater harm than respondents.

Since this application only addressed the initial suspension, and the Board has not yet made a final determination, there are no further issues to be addressed.

DECISION AND ORDER

Since N.J.A.C. 6A:14-2.7(m)1 and N.J.A.C. 1:6A-12.1 are written in the conjunctive and all three petitioners have failed to satisfy the four requirements, I **CONCLUDE** that the petitioners have failed to establish grounds for the granting of emergency relief. Accordingly, it is **ORDERED** that the petitions of R.B., R.M.B., and D.E., for emergent relief is **DENIED** without prejudice.

It is further **ORDERED** that the Board hearing concerning expulsion or suspension take place as soon as possible.

It is further **ORDERED** that the remaining claims made by the petitioners are dismissed. There are no other issues remaining once the emergent relief matter is resolved.

This order on application for emergency relief may be adopted, modified or rejected by the **COMMISSIONER OF THE DEPARTMENT OF EDUCATION**, who by law is authorized to make a final decision in this matter. The final decision shall be issued without undue delay, but no later than forty-five (45) days following the entry of this order. If the **COMMISSIONER OF THE DEPARTMENT OF EDUCATION** does not adopt, modify or reject this order within forty-five (45) days, this recommended order shall become a final decision on the issue of emergent relief in accordance with N.J.S.A. 52:14B-10.

June 7, 2006
DATE

DONALD J. STEIN, ALJ

bdt

LIST OF EXHIBITS

For petitioner:

P-1 Brief for petitioner D.E.

P-2 Brief for petitioners R.M.B. and R.B.

For respondent:

R-1 Response brief

R-2 Response brief

210-06

#210-06SEC

IN THE MATTER OF COLLEEN GARTLAND :

AND CARMINE PICARDO, :

WEST ESSEX BOARD OF EDUCATION, :

ESSEX COUNTY. :

:

COMMISSIONER OF EDUCATION

DECISION

SYNOPSIS

The School Ethics Commission (Commission) determined that West Essex Board of Education members Colleen Gartland and Carmine Picardo violated *N.J.S.A.* 18A:12-24.1(c) and (d) of the Code of Ethics for School Board Members when they met with officers of the West Essex Teachers' Association, without the knowledge of the Board or the Superintendent, to discuss concerns that the Association brought to their attention. After considering the nature of the charge, the Commission recommended that the Commissioner of Education impose a penalty of censure upon Mr. Picardo, and a penalty of suspension from the Board for a period of one month for Ms. Gartland.

Upon a thorough review of the record, the Commissioner, whose decision was restricted solely to a review of the Commission's recommended penalty pursuant to *N.J.S.A.* 18A:12-29(c) and *N.J.A.C.* 6A:3-9.1, concurred with the Commission's recommendation. The Commissioner thus ordered that Carmine Picardo be censured and Colleen Gartland be suspended from the Board for a period of one month as school officials 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.

June 12, 2006

AGENCY DKT. NO. 95-3/06

IN THE MATTER OF COLLEEN GARTLAND	:	
AND CARMINE PICARDO,	:	COMMISSIONER OF EDUCATION
WEST ESSEX BOARD OF EDUCATION,	:	DECISION
ESSEX COUNTY.	:	
	:	

The record of this matter and the amended decision[1] of the School Ethics Commission ("Commission"), comes before the Commissioner to impose a sanction upon Colleen Gartland and Carmine Picardo, members of the West Essex Board of Education, based upon findings of fact and conclusions of law by the Commission that they violated *N.J.S.A.* 18A:12-24.1(c) and (d) of the Code of Ethics for School Board Members in the School Ethics Act when they met with officers of the West Essex Teachers' Association, without the knowledge of the Board or the Superintendent, to discuss concerns that the Association brought to their attention. The Commission recommends that Mr. Picardo be censured and Ms. Gartland be suspended from the Board for a period of one month for these violations.

Upon issuance of the amended decision of the Commission, the parties were provided 13 days from the mailing of such decision to file written comments on their respective recommended penalties for the Commissioner's consideration. Mr. Picardo did not file any comments. Ms. Gartland's comments were untimely and, thus, cannot be considered herein.[2]

---

[1] It is noted that the Commission's original decision in this matter, authorized at its February 28, 2006 meeting, was transmitted to the Commissioner and the parties on March 3, 2006. Subsequent to this decision's issuance and prior to the Commissioner's review and issuance of her decision with respect to the imposition of penalty, the Commission received additional information which it was felt might conceivably serve to impact and/or alter its determination and, therefore, it requested return of the file for that body's review and consideration. The decision before the Commissioner here is the Commission's amended decision in this matter, authorized at its March 28, 2006 meeting, which was transmitted to the Commissioner and the parties on May 4, 2006.

[2] The amended decision was mailed to the parties on May 4, 2006. Ms. Gartland's comments, although dated May 16, 2006, were mailed on May 20, 2006 and filed on May 23, 2006, well outside the allotted timeline for their receipt.

Initially, it must be emphasized that, pursuant to *N.J.S.A.* 18A:12-29(c) and *N.J.A.C.* 6A:3-9.1, the determination of the Commission as to violation of the School Ethics Act is **not reviewable by the Commissioner** herein. Only the Commission may determine whether a violation of the School Ethics Act occurred. The Commissioner's jurisdiction is limited to reviewing the sanction to be imposed following a finding of a violation by the Commission. Therefore, this decision is restricted solely to a review of the Commission's recommended penalty.

Upon a thorough review of the record, the Commissioner determines to accept the Commission's recommendation, for the reasons expressed in its decision, that censure of Mr. Picardo and a one month suspension from the Board for Ms. Gartland are the appropriate penalties in this matter. In so determining, the Commissioner is persuaded that, in recommending these penalties for the parties' violations, the Commission fully considered the nature of the offenses and weighed the effects of aggravating and mitigating circumstances. Consequently, the Commissioner finds no cause to disturb the Commission's recommended penalties in this matter.

Accordingly, IT IS hereby ORDERED that Carmine Picardo be censured and Colleen Gartland be suspended from the Board for a period of one month, as school officials found to have violated the School Ethics Act.

IT IS SO ORDERED.[3]

Lucille E Davy

ACTING COMMISSIONER OF EDUCATION

Date of Decision: 6/12/06

Date of Mailing: 6/13/06

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

#211-06

OAL DKT. NO. EDU 6701-03
AGENCY DKT. NO. 332-8/03

MICHELE BOTTI & LAURA MELVENEY,	:	
PETITIONERS,	:	
V.	:	COMMISSIONER OF EDUCATION
BOARD OF EDUCATION OF THE BOROUGH OF EATONTOWN, MONMOUTH COUNTY,	:	DECISION
RESPONDENT.	:	

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

Upon review, the Commissioner approves the settlement terms of both the Botti and Melveney agreements, and adopts these settlements as the final decision in this matter. The Commissioner is, however, compelled to comment on Term 4 in the Botti Agreement and Term 15 in the Melveney Agreement. Although the parties may agree between themselves to keep the specific terms of a settlement agreement confidential, they cannot seek to bind the Commissioner or any other individual to such confidentiality. Furthermore, in the absence of a motion to seal the record for good cause shown, Commissioner decisions are a matter of public record. This said, the matter is hereby dismissed, subject to compliance with the terms of the settlement.

IT IS SO ORDERED.

Lucille E Davy
ACTING COMMISSIONER OF EDUCATION

Date of Decision: 6/12/06

Date of Mailing: 6/13/06

State of New Jersey
OFFICE OF ADMINISTRATIVE LAW

INITIAL DECISION

SETTLEMENT

OAL DKT. NO. EDU 6701-03

AGENCY DKT. NO. 332-8/03

MICHELE BOTTI &

LAURA MELVENEY,

Petitioners,

v.

BOARD OF EDUCATION OF

BOROUGH OF EATONTOWN,

MONMOUTH COUNTY,

Respondent.

Kathleen Naprstek Cerisano, Esq., for petitioners (Zazzali, Fagella, Nowak, Kleinbaum & Friedman, attorneys)

Linda Ganz Ott, Esq., for respondent (Appruzzese, McDermott, Mastro & Murphy, attorneys)

Carol Alling, Esq., for intervenors (Selikoff & Cohen, attorneys)

Record Closed: May 9, 2006 Decided: May 11, 2006

BEFORE **DONALD J. STEIN**, ALJ:

This matter was transmitted to the Office of Administrative Law on September 29, 2003, for determination as a contested case, pursuant to N.J.S.A. 52:14B-1 to -15 and N.J.S.A. 52:14F-1 to -13.

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

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

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

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

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

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

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

May 11, 2006
DATE

Donald J. Stein
DONALD J. STEIN, ALJ

Receipt Acknowledged:

5-15-06
DATE

M. Kathleen Duncan/ch
DEPARTMENT OF EDUCATION

Mailed to Parties:

MAY 16 2006
DATE

Janice Andrews
OFFICE OF ADMINISTRATIVE LAW

bdt

Received
May 9, 2006

ZAZZALI, FAGELLA, NOWAK
KLEINBAUM & FRIEDMAN, P.C.
150 West State Street
Trenton, New Jersey 08608
(609) 392-8172
Attorneys for Petitioners

MICHELE BOTTI and LAURA MELVENEY, Petitioners, v. BOARD OF EDUCATION OF EATONTOWN, MONMOUTH COUNTY, Respondent.	:	BEFORE THE COMMISSIONER OF EDUCATION OF THE STATE OF NEW JERSEY OAL Dkt No. EDU 6701-2003S Agency Ref. No. 332-8/03 **STIPULATION OF SETTLEMENT**

The above-captioned matter having been brought before the Commissioner of Education upon a Petition of Appeal filed by petitioner Michele Botti and Laura Melveney, and the dispute between Michele Botti and the Eatontown Board of Education having since been settled, petitioner LAURA MELVENEY ("Melveney"), now known as LAURA REVOLINSKY, and the EATONTOWN BOARD OF EDUCATION ("Board") in consideration of the mutual promises contained in this Stipulation, hereby agree to resolve the dispute between them, now pending before this court, subject to the terms and conditions set forth below:

1. For purposes of this agreement, respondent Board of Education of Eatontown, Monmouth County, shall hereinafter be referred to as the Board and petitioner Laura Melveney shall hereinafter be referred to as Melveney.

2. Solely for purposes of settlement, the parties agree that Melveney should have been retained as a full-time elementary school teacher for the 2003-04 school year and thereafter. The Board thus agrees to reinstate Melveney to the position of full-time elementary school teacher, as of the 2003-04 school year.

3. Although Melveney would be entitled to a back pay award of $82,970.00 for the 2003-04 and 2004-05 school years, she also had a duty to mitigate her damages. Taking such duty into consideration, the parties have agreed that the Board shall therefore pay to Melveney the gross amount of **$18,730.00**, subject to standard and ordinary deductions, which represents the annual salary of $40,165.00 she would have earned during the 2003-04 school year (Step BS-5) and the annual salary of $42,805.00 she would have earned during the 2004-05 school year (Step BS-6), less mitigation (monies obtained from other sources) during this time period in the amount of $64,240.00.

4. This award of back pay shall be made to Melveney within thirty (30) days following the execution of this agreement.

5. During the 2003-04 and 2004-05 school years, Melveney would have received Board paid health insurance coverage. The Board shall therefore reimburse Melveney for her expenses for securing health insurance coverage for the period from November 1, 2003 through June 30, 2005, and for additional sums that Petitioner paid for dental insurance coverage during this period of time. This sum totals **$3,327.26**, and consists of the sum of $1,672.06 which she paid in insurance premiums for COBRA coverage for the period November 1, 2003 through June 30, 2004, the sum of $212.00 which she paid for dental insurance coverage for the period November 1, 2003 through

June 30, 2004, and the sum of $1,443.20 which she paid in contributions (10%) toward insurance premiums during the period September 1, 2004 through June 30, 2005. No tax deductions shall be taken.

6. This reimbursement for medical/dental coverage shall be made to Melveney within thirty (30) days following the execution of this agreement.

7. The Board has not provided any tax advice to Melveney regarding whether any compensation agreed to in this agreement will be taxable either to the federal government or the State of New Jersey. The Board has also not provided any advice to Melveney regarding pension credit and/or pension contributions for any back pay monies paid to her in connection with this settlement agreement.

8. The parties agree that Melveney shall pay the employee's share of any pension contributions to the Teachers' Pension & Annuity Fund for the period of September 1, 2003 through June 30, 2004 based upon her gross annual salary for the 2003-04 school year of $40,165.00 before any reduction for mitigation of damages, that the Board shall not be liable for the employee's share thereof, that Melveney shall not be liable for the employer's share thereof, that the State will contribute the employer's share of pension contributions if it agrees to do so, and that if the State does not contribute the employer's share of pension contributions, the Board shall contribute the employer's share of such contributions. Pension contributions were made to the Teachers' Pension and Annuity Fund for the period September 1, 2004 through June 30, 2005, pursuant to Melveney's full-time employment with the Ocean Township Board of Education during that period of time.

9. The Board shall re-employ Melveney for the 2006-07 school year as a full-time tenured teaching staff member, in an assignment consistent with her instructional certification as an elementary school teacher (K-8). Her salary and benefits for the 2006-07 school year shall be consistent with that provided to a teaching staff member on Step BS-7 of the salary guide for the 2006-07 school year as set forth in the applicable collective bargaining agreement.

10. As of June 30, 2003, Melveney had accumulated 44.5 sick days. Any sick days to which Melveney is entitled for the 2006-07 school year shall be added to the 44.5 sick days which she had previously accumulated.

11. Melveney shall receive full seniority credit in the elementary category for the 2003-04 and 2004-05 school years, as if she had been employed on a full-time basis by the Board during those two (2) school years. Thus, as of the start of the 2006-07 school year, Melveney shall have 5 years 5 months of seniority in the elementary category.

12. Melveney shall withdraw the Petition of Appeal presently pending before the Office of Administrative Law and Commissioner of Education, with prejudice, when her counsel receives notice and documentation that the Board has approved the terms and conditions of this settlement.

13. This Settlement Agreement resolves any and all claims by Melveney arising from the Board's termination of her employment, which took effect June 30, 2003, and regarding Melveney's allegation that the Board acted unlawfully in terminating her employment and/or in failing to retain petitioner in a full-time position.

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

15. The terms of this Agreement are confidential, and they are not to be discussed by the parties hereto, except with their respective attorneys, financial advisors and the Board's employees on a need to know basis or as otherwise required by law.

16. The parties agree that they have been represented by counsel and enter into this Agreement voluntarily. Neither party admits any wrongdoing whatsoever by executing this document.

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

18. This Agreement shall be governed by the laws of the State of New Jersey.

19. Upon approval by the Board and full execution of the Agreement, the Board, agrees to submit this Agreement and a copy of the Board's resolution to the Honorable Donald J. Stein, ALJ within seven (7) days of the signing of this Agreement.

Laura A. Revolinsky
Laura (Melveney) Revolinsky

Dated: April 7, 2006

ZAZZALI, FAGELLA, NOWAK,
KLEINBAUM & FRIEDMAN, P.C.
Attorneys for Petitioner Laura Melveney

By: _____ Dated: 4/11/06
Kathleen Naprstek Cerisano, Esq.

EATONTOWN BOARD OF EDUCATION

By: _____ Dated: 4/24/06

APRUZZESE, McDERMOTT, MASTRO & MURPHY
Attorneys for Respondent
Eatontown Board of Education

By: _____ Dated: 5/4/06
Linda Ganz Ott, Esq.

EATONTOWN BOARD OF EDUCATION

ADMINISTRATIVE OFFICES
215 BROAD STREET
EATONTOWN, NEW JERSEY 07724-1618
TEL. (732) 935-3302
FAX (732) 542-1700

RECEIVED
2006 MAY -9 A 11: 15
STATE OF NEW JERSEY
OFFICE OF ADMIN LAW

Norma M. Tursi
Business Administrator/Board Secretary

Eatontown Board of Education
Meeting of April 24, 2006

It was moved by Mr. Naimoli and seconded by Mrs. Lastella to approve the following resolution: Roll call vote was all in favor, motion carried unanimously.

BE IT RESOLVED, by the Board of Education of the Borough of Eatontown, that the Board President and Board Secretary are hereby authorized to execute the attached stipulation of settlement in the matter of Michelle Botti and Laura Melveney under OAL Docket No: EDU 6701-2003S and Agency Reference No: 332-8/03; and

BE IT FURTHER RESOLVED, that the Administration is hereby authorized to take whatever steps necessary to effectuate the terms of the stipulation of settlement.

I hereby certify that the above resolution was passed by a recorded role call vote of the Board of Education of the Borough of Eatontown at its regularly scheduled meeting of April 24, 2006.

Norma M Tursi

Norma Tursi
Board Secretary

SETTLEMENT AGREEMENT

The EATONTOWN BOARD OF EDUCATION ("Board") and MICHELE BOTTI ("Botti") in consideration of mutual promises contained in this Settlement Agreement ("Agreement"), agree as follows:

1. The Board shall pay to Botti the total sum of $8,500.00 within thirty (30) days of the execution of this Agreement. This consists of $4,000.00 for reimbursement for COBRA benefits which she procured subsequent to the termination of her employment by the Board and $4,500.00 for back pay and accumulated sick leave.

2. Botti agrees that her name will not be retained on any Board preferred eligibility list for those teachers subjected to a reduction in force and that she shall not apply for any current or future available positions with the Board now or at any time in the future.

3. Botti hereby releases and forever waives any and all claims she has or might have against the Board, its officers, employees, agents, successors and assigns arising out of any aspect of her employment with the Board up to the date this Agreement is signed and shall sign a General Release and Waiver at the same time she signs this Agreement. The General Release and Waiver shall be an integral part of this Agreement.

4. The terms of this Agreement are confidential, and they are not to be discussed by the parties hereto, except with their respective attorneys, financial advisors and the Board's employees on a need to know basis or as otherwise required by law.

5. The parties agree that they have been represented by counsel and enter into this Agreement voluntarily. Neither party admits any wrongdoing whatsoever by executing this document.

RECEIVED
2023 AUG 30 A 10:30

6. The Board has not provided any tax advice to Botti regarding whether any compensation agreed to in this Agreement will be taxable either to the federal government or the State of New Jersey.

7. This Settlement and the General Release and Waiver constitute the entire agreement with respect to the subject matter referred to herein and shall not be amended, modified or amplified except in writing signed by both parties. No oral statement of any person shall in any manner or degree modify the terms and provisions of this Agreement.

8. This Agreement shall be governed by the laws of the State of New Jersey.

9. Upon approval by the Board and full execution of the Agreement, the Board, agrees to submit this Agreement and a copy of the Board's resolution to the Honorable Donald J. Stein, ALJ within seven (7) days of the signing of this Agreement.

EATONTOWN BOARD OF EDUCATION

By: _____, President

Dated: 1/9/06

Michele Botti

Dated: 12/16/05

WITNESSES

_____

Dated: 1/9/06

_____

Dated: 12/16/05

/145383/Eatintown/Botti

EATONTOWN BOARD OF EDUCATION

ADMINISTRATIVE OFFICES
215 BROAD STREET
EATONTOWN, NEW JERSEY 07724-1618
TEL. (732) 935-3302
FAX (732) 542-1700

2006 JAN 23 A 10:30

OFFICE OF ADMIN. LAW

Norma M. Tursi
Business Administrator/Board Secretary

EATONTOWN BOARD OF EDUCATION

BOARD OF EDUCATION MEETING OF January 9, 2006

It was moved by Mr. Schiels and seconded by Mr. Naimoli to approve the following resolution: Roll call vote was all in favor, motion carried unanimously.

BE IT RESOLVED that the Board Attorney is hereby authorized to execute a stipulation of settlement in the matter of Botti vs Eatontown Board of Education (docket #EDU6701-03) in the amount of $8,500.00, less any mandatory deductions,;

BE IT FURTHER RESOLVED that the funds will be distributed upon the full release from the petitioner.

BE IT FURTHER RESOLVED that the Board President is authorized to sign the settlement agreement.

I hereby certify to be a true and correct copy of the board minutes of the January 9, 2006 Eatontown Board of Education meeting.

Norma M Tursi

Norma M. Tursi, Business Administrator/Board Secretary

GENERAL RELEASE AND WAIVER

2006 JAN 23 A 10:30

I, MICHELE BOTTI, having agreed to a Settlement Agreement in the matter of Michele Botti and Laura Melveney v. Eatontown Board of Education, OAL Dkt. No. EDU 06701-2003S, hereby provide the following General Release and Waiver ("Release"). The terms of the Release are as follows:

1. I acknowledge and agree that specific consideration for this Release is provided by the provisions of the attached Settlement Agreement dated December _____, 2005, which is hereby integrated into this Release.

2. In consideration for the receipt of compensation for reimbursed medical, back pay and accumulated sick leave as set forth in the Settlement Agreement, I specifically release all claims which I had or may have against the Eatontown Board of Education ("Board") relating to or arising out of any aspect of my employment with the Board, up to the date of execution of the Settlement Agreement, including, but not limited to, all claims under Title 18A of the New Jersey Statutes, The Age Discrimination in Employment Act, 20 U.S.C. § 621, et seq., and specifically § 626, Title VII of the Civil Rights Act, The Civil Rights Act of 1991 and the laws amended thereby, The American with Disabilities Act, The Family and Medical Leave Act of 1993, The New Jersey Law Against Discrimination; The New Jersey Conscientious Employee Protection Act, New Jersey Family Leave Act, any contract of employment, express or implied, any provision of the Constitutions of the United States or the State of New Jersey, and any other

This page reviewed by:

Michele Botti

Dated: 12/16/05

law, common or statutory, of the United States, the State of New Jersey or any other state, but excluding any workers' compensation claim I have or may have arising out of my employment with the Board. This Release shall apply to all known, unknown claims, liens, injuries and damages up to and including the day of the date of the Settlement Agreement.

3. I specifically waive all rights to discovery of matters that occurred during my employment with the Board through to the date of execution of this General Release and Waiver, unless related to a party's breach of contract claim.

4. I hereby execute this Release without being under any duress. I agree that I am not being coerced to sign this Release, and that the decision to provide this Release is being made of my own free will and with advice of legal counsel.

5. I acknowledge and agree that the Board may initiate a legal action to enforce the provisions, or any one of them, of this Release.

This page reviewed by:

Michelle Gatt

Dated: 12/16/05

ACKNOWLEDGEMENT

I HAVE CAREFULLY READ AND FULLY UNDERSTAND THE TERMS AND CONDITIONS OF THIS RELEASE. BY MY SIGNATURE BELOW, I DEMONSTRATE MY ACKNOWLEDGEMENT OF AND AGREEMENT TO EACH AND EVERY TERM OF THIS RELEASE. I ACKNOWLEDGE THAT I WAS ACCORDED AN OPPORTUNITY TO TAKE 21 DAYS TO CONSIDER WHETHER TO EXECUTE THIS RELEASE, BUT I HAVE SPECIFICALLY AND KNOWINGLY WAIVED THIS OPPORTUNITY. I ACKNOWLEDGE THAT I HAD THE OPPORTUNITY TO REVIEW THIS RELEASE WITH LEGAL COUNSEL AND/OR ANYONE ELSE OF MY CHOOSING AND TO DISCUSS WITH EACH SUCH PERSON THE TERMS AND CONDITIONS OF THIS RELEASE AND MY RIGHTS UPON EXECUTION. NO REPRESENTATIONS CONCERNING THE TERMS OR EFFECT OF THIS RELEASE AND NO PROMISES, INDUCEMENTS, AGREEMENTS OR UNDERSTANDINGS OF ANY KIND WERE MADE TO ME OR WITH ME BY THE DISTRICT OR ITS ATTORNEYS TO CAUSE ME TO AGREE TO THE TERMS OF THIS RELEASE OTHER THAN AS SET FORTH IN THE DOCUMENT. I HAVE VOLUNTARILY SIGNED THIS RELEASE AS MY OWN FREE ACT WITH FULL KNOWLEDGE OF ITS TERMS AND CONDITIONS, WHICH ARE FINAL AND BINDING UPON ME. I UNDERSTAND THAT, FOR A PERIOD OF 7 DAYS FOLLOWING MY EXECUTION OF THIS RELEASE, I MAY REVOKE THIS RELEASE, AND THAT THIS RELEASE WILL NOT BE EFFECTIVE OR ENFORCEABLE UNTIL THE REVOCATION PERIOD HAS EXPIRED.

Michelle Botti
Signature

Michelle Botti
Name (please print)

Dated: 12/14/05

STATE OF NEW JERSEY :
: **SS:**
COUNTY OF Monmouth :

I CERTIFY that on December 16, 2005, MICHELE BOTTI personally came before me and acknowledged under oath, to my satisfaction that she is named in and personally signed this document.

Andrea Capozzoli
A Notary Public of the State of New Jersey

ANDREA CAPOZZOLI
NOTARY PUBLIC OF NEW JERSEY
My Commission Expires December 1, 2009

/145382/Eatontown/Botti

212-06

OAL DKT. NO. EDU 1314-06
AGENCY DKT NO. 328-11/05

IN THE MATTER OF THE TENURE	:	
HEARING OF ANTONIA MANAHAN,	:	
NORTHERN HIGHLANDS REGIONAL	:	COMMISSIONER OF EDUCATION
HIGH SCHOOL DISTRICT,	:	DECISION
BERGEN COUNTY.	:	

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

Upon review, the Commissioner approves the settlement terms since they comport with the *Cardonick* standards for review of settlements in tenure matters and adopts the settlement as the final decision in this matter. *See In re Cardonick*, 1990 *S.L.D.* 842, 846, decided by the Commissioner of Education April 7, 1982, *aff'd* State Board April 6, 1983; and *N.J.A.C.* 6A:3-5.6(a). The Commissioner is, however, compelled to comment on Term 17 of the parties' agreement. Although the parties may agree between themselves to keep the specific terms of a settlement agreement confidential, they cannot seek to bind the Commissioner or any other individual to such confidentiality. Furthermore, in the absence of a motion to seal the record for good cause shown, Commissioner decisions are a matter of public record. This said, the matter is hereby dismissed, subject to compliance with the terms of the settlement.

IT IS SO ORDERED.

Lucille Eday

ACTING COMMISSIONER OF EDUCATION

Date of Decision: 6/12/06
Date of Mailing: 6/13/06

State of New Jersey
OFFICE OF ADMINISTRATIVE LAW

INITIAL DECISION

SETTLEMENT

OAL DKT. NO. EDU 1314-06
AGENCY DKT. NO. 328-11/05

IN THE MATTER OF THE TENURE HEARING OF ANTONIA MANAHAN, NORTHERN HIGHLANDS REGIONAL HIGH SCHOOL DISTRICT, BERGEN COUNTY

James L. Plosia, Esq., for petitioner (Apruzzese, McDermott, Mastro & Murphy, attorneys)

Gregory T. Syrek, Esq., for respondent (Bucceri and Pincus, attorneys)

Record Closed: May 11, 2006 Decided: May 12, 2006

BEFORE **EDITH KLINGER,** ALJ:

This matter was transmitted to the Office of Administrative Law on January 12, 2006, 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 settle this matter and have prepared the attached Stipulation of Settlement indicating the terms of settlement, which was received by the undersigned on May 11, 2006.

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

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

RECEIVED
2006 MAY 11 P 2:16
STATE OF NEW JERSEY
OFFICE OF ADMIN LAW

SETTLEMENT AGREEMENT AND GENERAL RELEASE

This Agreement is made by and between Antonia Manahan (hereinafter referred to as "Ms. Manahan") who resides at 69 Heights Road, Allendale, New Jersey 07401, and the Northern Highlands Regional High School Board of Education (hereinafter referred to as "the Board"), with its offices at 298 Hillside Avenue, Allendale, New Jersey 07401. In consideration of the mutual promises and undertakings contained in this Agreement, the receipt of which is hereby acknowledged, the undersigned state:

WHEREAS, Ms. Manahan is a tenured secretary, first employed by the Board in 2002; and

WHEREAS, the Board has brought tenure charges against Ms. Manahan seeking to terminate her tenured employment; and

WHEREAS, Ms. Manahan has denied the allegations contained in the tenure charges brought against her; and

WHEREAS, the tenure charges are now pending before the Office of Administrative Law, bearing Docket No. EDU 01314-2006N; and

WHEREAS, in lieu of proceeding with the tenure charges, the parties desire to enter into an agreement stipulating the terms of Ms. Manahan's separation from her employment with the Board; and,

WHEREAS, Ms. Manahan has indicated her desire to resign from her employment with the Board effective the date of the approval of this agreement by the Commissioner of Education,

IT IS on this 1st day of May, 2006, agreed that:

1. Ms. Manahan agrees to resign from her secretarial position with the Board effective with the date on which the Commissioner of Education approves the terms of this Agreement. The resignation will be in the form attached hereto.

2. The Board agrees to withdraw its tenure charges against Ms. Manahan with prejudice. This withdrawal is premised upon Ms. Manahan's resignation

(b) to avoid a lengthy, expensive hearing on the charges and any possible appeals. The parties note that this matter is presently scheduled for four (4) days of hearing, which may or may not be sufficient.

8. Ms. Manahan acknowledges that she has been advised that she has the right to consult with an attorney or a representative of her own choosing prior to signing this Agreement, and has done so, and that she signs this Agreement as her own voluntary act and deed, and that she fully understands the duties and obligations enumerated herein.

9. The undersigned representatives of the Board acknowledge that they are authorized to sign the Agreement on the Board's behalf pursuant to a resolution of the Board dated May 1, 2006. A copy of the Board's resolution approving this Agreement shall be provided to the Office of Administrative Law and Commissioner of Education.

10. All terms of this Agreement are deemed material. This document may not be altered, amended, modified or revoked except by an instrument executed in writing by the parties.

11. Both parties acknowledge that their agreement to dismiss the tenure charges is subject to the approval of the Office of Administrative Law and the Commissioner of Education. If such approval is not given, this Agreement and all of the stipulations, releases and acknowledgments, as well as Ms. Manahan's resignation, whether contained herein or attached hereto, shall be rendered null and void and the parties shall be returned to the status quo existing prior to this Agreement.

12. Nothing in this Agreement shall be construed as conferring any benefit upon any person, group or association not a direct signatory hereto. Further, this Agreement shall not be deemed to establish any "past practice" or precedent requiring the Board to, or restricting it from, providing any benefit to any person, group or association other than Ms. Manahan.

13. The parties agree that their respective covenants and entry into this Agreement do not constitute any admissions of wrongdoing or guilt on the part of either party.

ANTONIA MANAHAN
69 Heights Road
Allendale, NJ 07401

April 17, 2006

Dr. Robert McGuire, Superintendent
Northern Highlands Regional High School District
298 Hillside Avenue
Allendale, NJ 07401

Dear Dr. McGuire:

I hereby resign from my employment as a secretary employed by the Northern Highlands Regional High School Board of Education effective the date of the approval of the attached Agreement by the Commissioner of Education. This resignation is expressly conditioned upon the Board's compliance with the Agreement dated as of April 17, 2006, between the Board and myself and shall be null and void if the terms of that Agreement are not met. This resignation is otherwise irrevocable regardless of any subsequent change in my circumstances. My resignation is based on family concerns.

Respectfully submitted,

Antonia Manahan

/ls

EXHIBIT A

Rights Act of 1964, as amended; the Americans with Disabilities Act; the Age Discrimination in Employment Act of 1967, as amended; the Civil Rights Act of 1966, 42 *U.S.C.* §1981; the Older Worker Benefit Protection Act; the Worker Adjustment and Retraining Notification Act; the Family and Medical Leave Act of 1993; the New Jersey Law Against Discrimination; the New Jersey Conscientious Employee Protection Act; the New Jersey Constitution; and any other federal or state statute covering the employment relationship, under the common law or in equity or arising under any agreement, understanding or promise, written or oral, formal or informal, between Ms. Manahan and the Board;

(iii) Any and all claims for back pay, reinstatement, vacation pay, liquidated, compensatory and punitive damages, and attorneys' fees, disbursements and costs, which Ms. Manahan or her legal representatives, heirs, executors, administrators, successors, and assigns ever had, now have, or hereafter can, shall, or may have against the Releasees by reason of any matter, cause, or thing whatsoever from the beginning of the world to the day of the date of Ms. Manahan's execution of the Agreement.

2. Ms. Manahan represents and warrants that she has never commenced or filed, and she covenants and agrees never to commence or file or aid or in any way, prosecute or cause to be commenced, or prosecuted, against the Releasees any action, charge, complaint or other proceeding, whether administrative, judicial, legislative or otherwise, including, but not limited to, any action or proceeding contesting the validity of this Release or attempting to negate, modify or reform it, or for attorneys' fees, disbursements or costs, based upon or seeking relief on account of actions or failures to act by the Releasees which may have occurred or failed to occur before the date of Ms. Manahan's execution of the Agreement; provided, however, that this Release shall not apply to any of the rights created by the annexed agreement nor bar Ms. Manahan from bringing any action to enforce the terms of the annexed Agreement. It is further provided that nothing in this Release or the annexed Agreement shall be construed as waiving or releasing any right to indemnity which

State of New Jersey)
) **ss.**
County of Passaic)

On this 17 day of April, 2006, before me personally came ANTONIA MANAHAN, known to me to be the individual described in and who executed the foregoing Release, and she duly acknowledged to me that she voluntarily and knowingly executed the said Release, after having read and understood said document.

Gregory T. Syrek
An Attorney at Law of the
State of New Jersey

GENERAL RELEASE

This GENERAL RELEASE is given as of the 9th day of May, 2006, from the NORTHERN HIGHLANDS REGIONAL HIGH SCHOOL DISTRICT BOARD OF EDUCATION, whose mailing address is 298 Hillside Avenue, Allendale, New Jersey 07401 (hereinafter referred to as "the Board") to ANTONIA MANAHAN, residing at 69 Heights Road, Allendale, New Jersey 07401 (hereinafter referred to as "Ms. Manahan").

1. In consideration of the promises contained in the annexed Agreement ("The Agreement"), the Board hereby UNCONDITIONALLY RELEASES AND FOREVER DISCHARGES Ms. Manahan, her trustees, officers, agents, attorneys, employees, successors, heirs, executors and assigns (all of whom are hereinafter collectively referred to as the "Releasees") from all claims, liabilities, demands and causes of action, whether known or unknown, fixed or contingent, that the Board may have or claim to have against Ms. Manahan for any reason as of the date of execution of the Agreement, including, but not limited to:

(i) Any and all claims asserted or which could have been asserted;

(ii) Any and all claims, charges or complaints asserted, or which could have been asserted, concerning any aspect of Ms. Manahan's employment with the Board, any agreement concerning such employment or her separation from such employment. Tenure charges previously filed against Ms. Manahan will be dismissed pursuant to the terms of the Agreement between the parties.

(iii) Any and all claims for restitution of any sort, liquidated, compensatory and punitive damages, and attorneys' fees, disbursements and costs, which the Board or its legal representatives, heirs, executors, administrators, successors, and assigns ever had, now have, or hereafter can, shall or may have against the Releasees by reason of any matter, cause, or thing whatsoever from the beginning of the world to the date of the date of the parties' execution of the Agreement.

2. The Board represents and warrants it has never commenced or filed, and it covenants and agrees never to commence or file or aid or in any way, prosecute or cause to be commenced, or prosecuted, against the Releasees any action, charge, complaint or other

EXHIBIT C

State of New Jersey)
) ss.
County of)

On this 9th day of May, 2006, before me personally came, Gary S. Lane, who is the Board Secretary/Business Administrator of the Northern Highlands Regional High School District Board of Education and stated under oath to my satisfaction that:

(a) this person was the subscribing witness to the signing of the attached instrument;

(b) this instrument was signed by ~~Margo Winning,~~ Barbara Garand who is the President of the Northern Highlands Regional High School District Board of Education, the entity named in this instrument, and was fully authorized to and did execute this instrument on its behalf;

(c) the subscribing witness signed this proof under oath to attest to the truth of these facts.

Patricia A. Hogan

PATRICIA A. HOGAN
Notary Public of New Jersey
My Commission Expires 10/01/2009

213-06

OAL DKT. NO. EDU 4785-05
AGENCY DKT. NO. 143-6/05

NAN PENNY JUROS,	:	
PETITIONER,	:	
V.	:	COMMISSIONER OF EDUCATION
BOARD OF EDUCATION OF THE TOWNSHIP OF EGG HARBOR, ATLANTIC COUNTY,	:	DECISION
RESPONDENT.	:	
	:	

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

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

IT IS SO ORDERED.

Lucille E. Davy
ACTING COMMISSIONER OF EDUCATION

Date of Decision: 6/12/06

Date of Mailing: 6/13/06

* Term 8 of the parties' agreement specifies that a copy of the Board resolution ratifying this agreement is attached as Exhibit A. It is noted that such resolution was neither attached to the agreement nor contained in the record of this matter. However, given that this agreement was signed by the Board attorney, that body's duly authorized representative in litigation, the Commissioner accepts this individual's signature as attestation that the agreement was indeed approved by the Board.

State of New Jersey
OFFICE OF ADMINISTRATIVE LAW

INITIAL DECISION
SETTLEMENT
OAL DKT. NO. EDU 4785-05
AGENCY DKT. NO. 143-6/05

NAN PENNY JUROS,
Petitioner,
v.
BOARD OF EDUCATION OF THE TOWNSHIP OF EGG HARBOR, ATLANTIC COUNTY,
Respondent.

Barbara E. Riefberg, Esq., for petitioner (Baron & Riefberg, attorneys)

William S. Donio, Esq., for respondent (Cooper Levenson, attorneys)

Record Closed: May 8, 2006 Decided: May 15, 2006

BEFORE **W. TODD MILLER,** ALJ

This matter was transmitted to the Office of Administrative Law on July 11, 2005, for determination as a contested case, pursuant to N.J.S.A. 52:14B-1 to -15 and N.J.S.A. 52:14F-1 to -13.

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

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

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

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

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

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

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

5-15-06
DATE

W. Todd Miller
W. TODD MILLER, ALJ

Receipt Acknowledged:

5-17-06
DATE

Karen Kennedy
DEPARTMENT OF EDUCATION

MAY 18 2006
DATE

Laura Sanders
DIRECTOR AND CHIEF ADMINISTRATIVE LAW JUDGE
Mailed to Parties:

DATE
/sd

OFFICE OF ADMINISTRATIVE LAW

William S. Donio, Esquire
Cooper Levenson April
Niedelman & Wagenheim, PA
1125 Atlantic Avenue - 3rd Floor
Atlantic City, NJ 08401
(609) 344-3161
File No.: 50696-257
Attorneys for Respondent

RECEIVED
2006 MAY -8 A 11:51
STATE OF NEW JERSEY
OFFICE OF ADMIN LAW

NAN PENNY JUROS **Petitioner,** **v.** **EGG HARBOR TOWNSHIP BOARD OF EDUCATION** **Respondent.**	**BEFORE THE COMMISSIONER OF EDUCATION OF THE STATE OF NEW JERSEY** **Agency Ref. No.: 143/6/05** OAL DKT NO. **Civil Action** **SETTLEMENT AGREEMENT**

This Settlement Agreement is made as of the ____ day of _____, 2006 by and among Nan Penny Juros, (hereinafter "Petitioner"); and the Egg Harbor Township Board of Education, Atlantic County (hereinafter "the Board") (collectively "the parties").

WHEREAS, the Board is a body corporate and politic of the State of New Jersey having statutory responsibilities for the management and administration of the Egg Harbor Township School District in Atlantic County, New Jersey; and

WHEREAS, Petitioner was employed by the Board as an Aide from on or about January 1, 2002; and

WHEREAS, Petitioner filed a Petition of Appeal against the Board with the Commissioner of Education, entitled *Nan Penny Juros v. Egg Harbor Township Board of Education*, Docket Number 143/6/05 which asserted, among other items, claims against the

Board in conjunction with a request for salary for the period of time Petitioner was out of work between March 9, 2005 and June 30, 2005; and

WHEREAS, the parties wish to settle all controversies among and between them, including Petitioner's claims in the Petition of Appeal set forth above, and any and all related claims which related or unrelated, known or unknown, could have been asserted by Petitioner against the Board; and

WHEREAS, the parties acknowledge that the merits of the controversy are in dispute and that neither the Board nor Petitioner admits any liability to any other, but all have reasons to desire a resolution of the matter; and

NOW THEREFORE, in consideration of the agreements, covenants and conditions contained herein, the adequacy and sufficiency of which is expressly acknowledged by the parties hereto, the parties agree as follows:

1. **DISMISSAL OF ACTION.**

(a) The Board will return to Petitioner's available bank of sick leave time three (3) sick leave days.

(b) The Board will remove a letter of reprimand dated March 7, 2005, and issued to Petitioner by the Middle School Principal, from Petitioner's permanent employment file.

2. Petitioner dismisses with prejudice all claims contained in the Petition against the Board.

3. **RELEASE.** In consideration for the consideration provided for in this agreement, Petitioner, personally and for her estate and/or heirs, waives, releases and gives up any and all claims, demands, obligations, damages, liabilities, causes of action and rights, in law or in equity, known and unknown, that she may have against the Board and any and all of its officers,

directors, agents, representatives and employees (present and former) and their respective successors and assigns, heirs, executors and legal or personal representatives, based upon any act, event or omission occurring before the execution of this Agreement including, but not limited to, any events related to, arising from or in connection with Petitioner's employment with the Board. Petitioner specifically waives, releases and gives up any and all claims arising from or relating to her employment and/or association with the Board based upon any act, event or omission occurring before the execution of this Agreement including, but not limited to, any claim that was asserted or could have been asserted under any federal or state statutes, regulations, or common law or Board policies or regulations. Petitioner specifically waives, releases and gives up any and all claims including, but not limited to, any potential claim relating to the alleged violation of *N.J.S.A.* 18A:30-2.1 as claimed in Petitioner's Petition.

4. **NO CLAIMS PERMITTED/COVENANT NOT TO SUE.** Petitioner waives her right to file any charge or complaint in her own behalf, to participate as a complainant, a plaintiff or a charging party in any charge or complaint, or to collect damages as a result of any charge or complaint which may be made by any other person or organization on her behalf, with respect to anything which has happened up to the execution of this Agreement, before any federal, state or local court or administrative agency against the Board except as such waiver is prohibited by law.

5. **ATTORNEY'S FEES.** Each party agrees that each party will bear its own costs and attorney's fees which have been incurred in connection with the within matter and in conjunction with the negotiation and preparation of this Agreement.

6. **NO ADMISSION OF LIABILITY.** It is expressly understood that neither the execution of this Agreement, nor any other action taken by the Board in conjunction with

Petitioner's claims or this settlement, constitute admission by the Board of any violation of any law, duty or obligation. It is also understood that the acceptance of this settlement does not constitute any representation by Petitioner as to the merits of her claims or the lack thereof.

7. **ENTIRE AGREEMENT.** This Agreement contains the sole and entire Agreement between the parties hereto. Each party represents and acknowledges that prior to executing this Agreement, they consulted with or had an opportunity to consult with counsel, has had ample time to do so and that no party relied upon any representation or statement not set forth in this Agreement made by any other party hereto, or their counsel or representatives, with regard to the subject matter of this Agreement. No other promises or agreements shall be binding unless in writing, signed by the parties hereto, and expressly stated to represent an amendment to this Agreement.

8. **BOARD RESOLUTION.** Attached hereto as Exhibit A is a true copy of a Resolution of the Board, adopted in compliance with the laws of the State of New Jersey, including the Open Public Meetings Act, duly ratifying this agreement and authorizing the Board's signatory to sign this Agreement on its behalf.

IN WITNESS WHEREOF, the parties have set their hands and seals as of the day and year first written.

COOPER LEVENSON APRIL NIEDELMAN & WAGENHEIM, PA

By: _____
William S. Donio, Esq.
Attorney for Respondent

Dated: 5/2/06

BARON & RIEFBERG

By: _____
Barbara E. Riefberg, Esq.
Attorney for Petitioner

Dated 4/12/2006

CPAC; 650577.1

TARGET 6-19-06 DUE 7-3-06

State of New Jersey
OFFICE OF ADMINISTRATIVE LAW
1601 Atlantic Avenue, Sixth Floor
Atlantic City, New Jersey 08401
(609) 441-3763
FAX: 609-441-3824

W. TODD MILLER
ADMINISTRATIVE LAW JUDGE

September 27, 2005

Barbara E. Riefberg, Esquire
Baron & Riefberg
Building F, Suite 600
1307 White Horse Road
Voorhees, NJ 08043

William S. Donio, Esquire
Cooper Levenson
1125 Atlantic Avenue
Atlantic City, NJ 08401

RE: NAN PENNY JUROS V. EGG HARBOR TOWNSHIP BOARD OF EDUCATION
OAL Dkt. No. EDU 4785-05
AGENCY Dkt. No. 143-6/05

Dear Counsel:

Enclosed please find the Prehearing Order regarding the above captioned matter. The plenary hearing will be held on **April 20, 2006, at 9:00 a.m.** at the Atlantic City Office of Administrative Law, 1601 Atlantic Boulevard, 6th Floor, Atlantic City, New Jersey **before W. Todd Miller, ALJ.**

Very truly yours,
W. Todd Miller /sjd
W. Todd Miller
Administrative Law Judge

sjd
Enclosure

cc: Sandra Hlatky, Deputy Clerk, OAL

State of New Jersey
OFFICE OF ADMINISTRATIVE LAW

PREHEARING ORDER
OAL DKT. NO. EDU 4785-05
AGENCY DKT. NO. 143-6/05

NAN PENNY JUROS,
Petitioner,
v.
BOARD OF EDUCATION OF THE TOWNSHIP OF EGG HARBOR, ATLANTIC COUNTY,
Respondent.

After notice, a prehearing conference was held in the above-entitled matter on September 26, 2005, and the following procedures were settled:

1. **NATURE OF PROCEEDINGS AND ISSUES TO BE RESOLVED:**

A. Nature of Proceedings: Petitioner asserts the respondent failed to pay her salary without loss of sick time for injury sustained in the course of her employment pursuant to *N.J.S.A.* 18A:30-2.1. Petitioner claims she suffered fear and anxiety regarding autistic student who was physical and violent. She could not return to work as an aide for that class. The district would not allow petitioner to resume work as an aide until it conducted a medical/psychiatric examination of petitioner. Consequently, petitioner was not paid for the period March 9, 2005, to June 30, 2005. Petitioner also has a pending workers' compensation claim.

B. Issues to be Resolved: Is petitioner entitled to compensation pursuant to the provisions of *N.J.S.A.* 18A:30-2.1 for the period she out of work pending a district ordered medical examination? If so, what amount compensation is petitioner entitled?

2. **PARTIES AND THEIR DESIGNATED ATTORNEYS OR REPRESENTATIVES:**

A. Petitioner: Nan Penny Juros

By: Barbara E. Riefberg, Esquire
Baron & Riefberg
Building F, Suite 600
1307 White Horse Road
Voorhees, NJ 08043
(856) 627-6000

B. Respondent: Board of Education of the Township of Egg Harbor, Atlantic County

By: William S. Donio, Esquire
Cooper Levenson
1125 Atlantic Avenue
Atlantic City, NJ 08401
(609) 344-3161

No change in designated trial counsel shall be made without leave of the administrative law judge if such change will interfere with the date for hearing. If no specific counsel is set forth in this Order, any partner or associate may be expected to proceed with trial on the agreed date.

3. **SPECIAL LEGAL REQUIREMENTS AS TO NOTICE OF HEARING:**

No change in designated trial counsel shall be permitted without leave of the administrative law judge (ALJ) if such change will interfere with the scheduled hearing date or dates.

4. **SCHEDULE OF HEARING DATES, TIME AND PLACE:**

A plenary hearing shall be held on **April 20 2006, at 9:00 A.M.,** at the **Office of Administrative Law, 1601 Atlantic Avenue, Sixth Floor, Atlantic City, New Jersey**.

No adjournments will be granted except in strict accordance with the requirements of *N.J.A.C.* 1:1-9.6.

5. **STIPULATIONS:**

Upon completion of discovery, the parties or their counsel shall confer and shall attempt to agree on those facts which are not disputed. They shall then submit to the ALJ a Joint Stipulation of Facts ten (10) days prior to the first scheduled hearing date.

6. **SETTLEMENT:**

The parties or their counsel are urged to confer and attempt to settle this matter. In the event a settlement is reached, the parties shall be required to immediately notify the ALJ, and shall submit a settlement agreement pursuant to *N.J.A.C.* 1:1-19.1, or a written withdrawal pursuant to *N.J.A.C.* 1:1-19.2, within ten (10) days thereof, unless extended by the ALJ.

7. **AMENDMENTS TO PLEADING:**

None.

8. **DISCOVERY AND DATE FOR COMPLETION**:

The time limits for discovery shall be in strict accordance with *N.J.A.C.* 1:1-10.4. Unless otherwise provided by written order of the ALJ, all discovery shall be completed as follows:

A. The parties may seek discovery in this matter as permitted by *N.J.A.C.* 1:1-10.4.

B. The parties shall exchange lists of the names and addresses of all persons who may be called to testify as witnesses at the hearing. Except for good cause shown, the undersigned will not permit any witnesses to testify whose name does not appear on these lists. This restriction will not apply to rebuttal witnesses whose testimony cannot be reasonably anticipated.

C. The parties shall exchange copies of all documents, which may be relied upon at the hearing.

D. Pursuant to *N.J.A.C.*, 1:1-10.4, **all discovery shall be completed no later than thirty (30) days before the first hearing date.**

E. The time limits for discovery will be strictly imposed unless it is found to be impracticable.

9. **ORDER OF PROOFS:**

The burden of proof in this matter falls on petitioner, who must carry it by a preponderance of the credible evidence.

10. **EXHIBITS MARKED FOR IDENTIFICATION:**

All exhibits which the parties intend to use in this matter shall be premarked, and a list of the premarked exhibits shall be provided to the ALJ at the commencement of the hearing. Petitioner's exhibits shall be marked P-1, *et seq.*; respondent's exhibits as R-1, *et seq.*; joint exhibits as J-1, *et seq.*

11. **EXHIBITS MARKED IN EVIDENCE:**

None at this time. No exhibit will be marked for identification or introduced into evidence at the hearing unless an original and one (1) copy are provided to the undersigned and a copy for each other party. This requirement will be strictly enforced unless impracticable.

12. **ESTIMATED NUMBER OF FACT AND EXPERT WITNESSES**:

No limitation. As to any expert witness, the offering party shall provide the other parties in the matter with a resume, a written summary of testimony, and reasonable access to all reports, data, investigations, studies, tests, and the like upon which the expert testimony will be based.

13. **MOTIONS:**

Any dispositive motion must be filed at least 45 days before the hearing date.

14. **OTHER SPECIAL MATTERS:**

None at this time.

This order may be reviewed by the **COMMISSIONER OF THE DEPARTMENT OF EDUCATION** either upon interlocutory review pursuant to *N.J.A.C.* 1:1-14.10 or at the end of the contested case, pursuant to *N.J.A.C.* 1:1-18.6.

9-27-05
DATE

W. TODD MILLER, ALJ

sd

214-06

OAL DKT. NO. EDU 3682-06
AGENCY DKT. NO. 117-3/06

JANICE PAMPLONA AND
TODDLERTOWN CHILD CARE CENTER,

PETITIONER,

V.

BOARD OF EDUCATION OF THE
TOWNSHIP OF IRVINGTON,
ESSEX COUNTY,

RESPONDENT.

COMMISSIONER OF EDUCATION

DECISION

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

Upon such review, the Commissioner observes that an unidentified individual signed the Settlement Agreement on behalf of the Board. In that neither the file nor the settlement agreement contains a copy of the Board's resolution approving the settlement[1] and further designating this individual to sign the agreement on its behalf, nor – in the alternative – is the agreement signed by the Board attorney, who is the Board's duly authorized representative in litigation, the Commissioner cannot approve the within settlement agreement.

Accordingly, the Commissioner hereby remands this matter to the OAL for revision of the Settlement Agreement consistent with the concerns set forth above. If the parties are unwilling or unable to reach accord on a modified agreement for submission to the Commissioner, the matter shall proceed to hearing.

IT IS SO ORDERED.[2]

Lucille E. Davy

ACTING COMMISSIONER OF EDUCATION

Date of Decision: 6/12/06

Date of Mailing: 6/13/06

[1] It is noted that the agreement, on its face, is specifically contingent on such approval.

[2] This decision may be appealed to the State Board of Education pursuant to *N.J.S.A.* 18A:6-27 *et seq.* and *N.J.A.C.* 6A:4-1.1 *et seq.*

State of New Jersey
OFFICE OF ADMINISTRATIVE LAW

INITIAL DECISION

SETTLEMENT

OAL DKT. NO. EDU 03682-06

AGENCY REF.NO.117-3/06

JANICE PAMPLONA AND TODDLERTOWN CHILD CARE CENTER,

Petitioner,

v.

BOARD OF EDUCATION OF THE TOWNSHIP OF IRVINGTON, ESSEX COUNTY,

Respondent.

Kecia M. Clarke, Esq., for petitioner

Raymond L. Hamlin, Esq., for respondent (Hunt, Hamlin & Ridley, attorneys)

Record Closed: April 28, 2006 Decided: May 2, 2006

BEFORE **CAROL I. COHEN**, ALJ:

The matter was transmitted to the Office of Administrative Law (OAL) on March 29, 2006 for determination as a contested case. A hearing was scheduled for April 6, 2006.

On the date of the hearing the parties were able to resolve the matter. On April 28, 2006, the parties submitted the attached Settlement Agreement indicating the terms of the agreement. Having reviewed the record and the settlement terms, I **FIND**:

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

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

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

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

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

5/2/06
DATE

Carol I. Cohen
CAROL I. COHEN, ALJ

Receipt Acknowledged:

5-5-06
DATE

M. Kathleen Duncan/CH
DEPARTMENT OF EDUCATION

MAY 9 2006
DATE

Mailed to Parties: Irene Kimmel
DIRECTOR AND CHIEF ADMINISTRATIVE LAW JUDGE

OFFICE OF ADMINISTRATIVE LAW

RECEIVED
2006 APR 28 A 8:22
STATE OF NEW JERSEY
OFFICE OF ADMIN LAW

Janice Pamplona and Toddler Town v. Irvington Board of Education
Agency Reference Number: 117-3/06

SETTLEMENT AGREEMENT

WHEREAS, this matter having been brought by way of an Emergent Application for Relief as a result of issues which arose concerning the licensing status of the petitioner; and

WHEREAS, the parties acknowledge that Petitioner Janice Pamplona, currently employed in the capacity of Lead Teacher for Petitioner Toddler Town, possesses a Standard Certificate for Eligibility K-5; and

WHEREAS, Janice Pamplona possesses a Bachelor's Degree in accordance with N.J.A.C. 6A:9-11.1 and is a newly hired teacher pursuant to the language set forth in 6A:9-11.1 (a)(2); and

WHEREAS, Janice Pamplona has applied for a Pre-School through Grade Three Certification; and

WHEREAS, the language contained in N.J.A.C. 6A:9-11.1, et seq. and Section II of paragraph 3 (a) and 3 (c)(iii) of the Revised-2005 Abbott Preschool Educational Program Contract between the Irvington Board of Education and Toddler Town Child Center, which permits the employment of a teacher who possesses the above referenced qualifications provided said employee completes said requirements within one (1) year;

NOW THEREFORE BE IT RESOLVED that Janice Pamplona, Toddler Town Child Center and the Irvington Board of Education agree to settle the above referenced dispute provided Janice Pamplona, receives a certificate of eligibility from the Department of Education for Pre-School through Grade Three, enrolls in a Department of Education Provisional teacher program and completes the appropriate early childhood education courses and obtain a teacher of preschool through grade three endorsement within one calendar year from the date of her application of March 5, 2006, that her employment at Toddler Town shall remain in effect.

In addition, the Board of Education will not withhold any funding related to Ms. Pamplona's employment during this period unless it is demonstrated that Ms. Pamplona is no longer employed at Toddler Town, is removed from any accredited Department of Education course, withdraws from said course, or fails to obtain the requisite endorsement within the one year time period.

All parties have had the benefit of counsel with respect to this matter and the Court having reviewed the moving papers of petitioner Janice Pamplona, Toddler Town Child Care Center and the opposition from the Irvington Board of Education, acknowledges that the within agreement is fair, equitable and in accordance with current law, the New Jersey Administrative Code and the Revised-2005 Abbott Preschool Educational Program Contract between the Irvington Board of Education and Toddler Town Child Center.

It is agreed that the within agreement is subject to Board of Education approval. The failure to approve the within agreement shall not result in the Board of Education's right to withhold payment to Toddler Town for purposes of the within cause of action but would rather return this matter to the Office of Administrative Law for a full adversarial determination.

Toddler Town Child Center
Alvin Spearman, Sr.

Irvington Board of Education

Janice Pamplona

Date: April 6, 2006

Honorable Carol I. Cohen, A.L.J.

BOARD OF EDUCATION OF THE SOMERSET HILLS REGIONAL SCHOOL DISTRICT, SOMERSET COUNTY,	:	
PETITIONER,	:	COMMISSIONER OF EDUCATION
V.	:	DECISION
BOARD OF EDUCATION OF THE TOWNSHIP OF BEDMINSTER, SOMERSET COUNTY,	:	
RESPONDENT.	:	

SYNOPSIS

The Somerset Hills and Bedminster boards of education, parties to a sending-receiving relationship, jointly requested a Declaratory Ruling wherein the Commissioner would construe the provisions of *N.J.S.A.* 18A:38-8.2a(2) and determine whether the sending Bedminster Board may appoint an alternate representative to the receiving Somerset Hills Board to function in the absence of the regular representative, and whether such alternate may sit on a committee of the Somerset Hills Board.

The Commissioner held that the controlling statute provides for one, and only one, member of a sending district board to sit as a qualified voting member of the receiving board. Therefore, the law does not permit a sending district board of education to appoint an "alternate" representative to the receiving board of education to function in the absence of the duly designated representative or to sit on a committee of the receiving board. The Commissioner recognized that the existing statutory scheme may be perceived as unsatisfactory by some sending boards, but noted that changes to the governance structure of school districts are a matter of State policy appropriately addressed by the Legislature after full and fair public debate.

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.

June 15, 2006

AGENCY DKT. NO. 76-2/06

BOARD OF EDUCATION OF THE SOMERSET HILLS REGIONAL SCHOOL DISTRICT, SOMERSET COUNTY,	:	
PETITIONER,	:	COMMISSIONER OF EDUCATION
V.	:	DECISION
BOARD OF EDUCATION OF THE TOWNSHIP OF BEDMINSTER, SOMERSET COUNTY,	:	
RESPONDENT.	:	

This matter came before the Commissioner of Education on February 10, 2006 by way of a Petition for Declaratory Ruling jointly submitted by two parties to a sending-receiving relationship. In their submission, the petitioning receiving district Board of Education (Somerset Hills) and the respondent sending district Board of Education (Bedminster) requested that the Commissioner construe the provisions of *N.J.S.A.* 18A:38-8.2a(2) and determine whether the Bedminster Board may appoint an "alternate" representative to the Somerset Board to function in the absence of the "regular" representative, and whether such "alternate" may sit on a committee of the Somerset Board.

The request was accepted pursuant to the Commissioner's discretion under *N.J.A.C.* 6A:3-2.1 *et seq.*, and the parties were afforded an opportunity to submit briefs in support of their respective positions. Primary briefs were duly filed, and the record closed on March 20, 2006 upon expiration of the time for submission of reply briefs.[1]

[1] Neither party elected to file a reply brief.

The essential facts of this matter are not in dispute. The Somerset Hills Board of Education operates a limited purpose regional school district serving its constituent districts and also receiving secondary students from the Bedminster school district through a sending-receiving relationship established pursuant to *N.J.S.A.* 18A:38-8 *et seq*. Because Bedminster's students comprise at least ten percent (10%) of the total pupil enrollment in the affected grades, the Bedminster Board is entitled to one representative on the Somerset Hills Board pursuant to *N.J.S.A.* 18A:38-8.2(a)2. When annually selecting this representative from among its members, the Bedminster Board has developed a practice of appointing both a "regular" representative and an "alternate," the latter to attend meetings of the Somerset Hills Board when the regularly appointed member is unable to do so, and to sit in his or her stead on a Somerset Hills Board committee where the "alternate" has particular expertise. Although Somerset Hills has apparently agreed to this arrangement in the past, the Board now questions its legality.

In support of its position, the Somerset Hills Board contends that the use of a "substitute" or "alternate" when the regularly appointed sending district representative is unable to attend a meeting of the receiving board is contrary to the plain language of *N.J.S.A.* 18A:38-8.2 *et seq*. Those statutes, according to the Board, provide for: 1) sending district representation on the receiving district board of education in accordance with a formula based on pupil enrollment; 2) annual designation of the sending district board member who will represent the district on the receiving board; and 3) the designated board member to be subject to the rules and procedures of the receiving board. Nowhere, Somerset Hills opines, is it suggested that a sending board is entitled to

alternate its representation between different members, in effect creating a "shared seat" on the receiving board. The Board observes that the sending district's representative is a member of the receiving board of education, taking an oath of office that vests him or her with all the authority and discretion of board membership; it would, therefore, be impossible to have a shared seat, since only one sworn member of the Somerset Hills Board may be from Bedminster. It is likewise impossible, Somerset Hills contends, to have Bedminster's "alternate" sit on a committee of the Somerset Hills Board, a situation tantamount to having two Bedminster representatives in a position to act as Somerset Hills Board members, contrary to statute. (Somerset Hills' Brief at 1-3)

The Bedminster Board, on the other hand, urges the Commissioner to permit its present practice to continue "to further the intent and plain meaning of the statute and the logical application of the facts." (Bedminster's Brief at 3) The Board first observes that operative statute neither provides a definition of "representative" nor uses terms such as "person" or "individual," and that neither case law nor legislative history provides guidance on the issue in dispute herein. (*Id.* at 3-4) Analyzing the statute in terms of its "plain language" and "common sense," the Board argues that: 1) there is nothing in the statute prohibiting the use of an "alternate;" 2) had the Legislature wanted to limit the sending district's representation to one specific person or require a rotation of substitutes, it would have expressly said so; and 3) a sending district has the right to representation on the receiving board, so that a flat denial of any substitute for the regularly appointed member would disenfranchise the sending community altogether when the regular designee cannot attend, while haphazard designation of substitutes would destroy the sending district's continuity of

representation—a particularly important point where, as here, the chosen "alternate" would provide expertise to a receiving board committee. (*Id.* at 5, 7)

Bedminster next contends that its position does not violate statute by placing two representatives on the Somerset Hills Board, since at any given meeting there will be only one Bedminster member attending and voting, which is exactly what the law contemplates; it further argues that the use of the indefinite "an" and "any" in *N.J.S.A.* 18A:38-8.1 supports its position. (*Id.* at 6-7) Finally, Bedminster opines that the equities lie in its favor, since denying representation to a sending district when its regular designee cannot attend meetings—or preventing the board from sending an alternate with expertise to sit as a member of a receiving board committee—results in great injustice, considering that the sending district must still send tuition payments to the receiving district even though it has not had a voice in the receiving board's decision-making; whereas there is no harm to the receiving district if its board meetings are attended by an "alternate" in lieu of the sending district's regular representative. (*Id.* at 7)

Upon careful review and consideration, the Commissioner concludes that the "alternate" arrangement used by Bedminster is not permissible under controlling law.

N.J.S.A. 18A:38-8.1 provides in pertinent part:

> 18A:38-8.1. 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.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: *** [a. – d. omitted]***

N.J.S.A. 18A:38-8.2 provides:

18A:38-8.2. A school district which is sending pupils to another school district pursuant to N.J.S.18A:38-8 shall have representation on the board of education of the receiving school district as follows:

a. (1) If the pupils of the sending district comprise less than 10 percent of the total enrollment of the pupils in the grades of the receiving district in which the pupils of the sending district will be enrolled, the sending district shall have no representation on the receiving district board of education.

(2) If the pupils of the sending district comprise at least 10 percent of the total enrollment of the pupils in the grades of the receiving district in which the pupils of the sending district will be enrolled, the sending district shall have one representative on the receiving district board of education.

b. If the total number of pupils of two or more sending districts, which do not qualify for representation under subsection a. of this section, comprise at least 15 percent of the total enrollment of the pupils in the grades of the receiving district in which the pupils of the sending districts will be enrolled, they shall have collectively two representatives on the receiving district board of education. The annual designation of the representatives, in the event more than two districts collectively qualify under this subsection, shall be rotated among the boards of education of the sending districts according to a schedule determined by the joint agreement of the boards.

c. Notwithstanding the provisions of subsections a. and b. of this section, the number of representatives designated by the sending districts to be additional members shall not exceed three additional members on a receiving board with originally nine or more members, two additional members on a receiving board with originally seven or eight members, and one additional member on a receiving board with originally less than seven members. In the event that this restriction results in an unequal representation of sending districts, the annual designation of the representative or representatives shall be rotated among the boards of education of the sending districts according to a schedule determined by the joint agreement of the boards.

d. A representative of a sending district 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. The calculation of percentages required under this section shall be based on the number of pupils reported as of the last school day prior to October 16 of each prebudget year.

The intent of these statutes is clearly and unequivocally that any sending district board of education qualifying for representation on a receiving board of education pursuant to sections 18A:38-8.2a. and 8.2b shall be entitled to designate, annually for a term of one year beginning with the organizational meeting of the receiving board, one of its members to represent the sending district's interests as a member of the receiving board.

Where the larger statutory framework is so clear in its intent, the absence of express references to "persons" or "individuals" and the lack of an express prohibition against "alternates" carry no weight in arguing for the permissibility of the practice used by Bedminster. Neither is the use of indefinite articles of any import; such usage plainly reflects the law's applicability to situations where there may be more than one sending district with representation on any given receiving board ("*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 *a* sending district;" "*A* representative***shall be designated***," but *cf.* "*The* representative shall be subject***," *emphasis supplied*). Taken in context, what the legislative language clearly intends is that each qualifying sending district is entitled to designate from among its own number one member, and one member only, as its representative to the board which receives its students.[2]

Moreover, the corollary of the statutory directive that a sending district representative shall be a voting member of the receiving board(s) of education is that an

[2] Nothing herein is intended to preclude the appointment of a new representative for the remainder of an unexpired term should the representative appointed pursuant to section 18A:38-8.2d subsequently cease to be a member of the sending district board of education or become unable to fulfill the duties of the representative.

"alternate" cannot be thus sworn without creating a situation where the receiving board will then have two duly authorized additional board members from a single sending district, notwithstanding that only one of the two members may be present and acting at any given time. This situation cannot be allowed to occur: Not only does the law make no express provision for it; it is also clearly contrary to the plain language of sections 18A:38-8.2a. through 8.2c., which collectively act to limit the extent of sending district membership on a receiving board.

Finally, the statute itself belies Bedminster's arguments based on the "injustice" of paying tuition to a receiving board when sending district representation is not guaranteed at each and every meeting of the receiving board. Although not applicable to the situation herein, the rotation provisions of sections 18A:38-8.2b. and 8.2c. clearly demonstrate that the Legislature contemplated circumstances where a sending district would be paying tuition to its receiving district while having reduced—or even no—representation on the receiving board of education, in some cases for a year or more. Moreover, there are other means available to a sending board to mitigate the impact of its representative's individual absences, such as electronic or telephonic participation when the representative is unable to be physically present at a receiving district board meeting, or having another member of the sending board attend the receiving district board meeting as a member of the public.

Consequently, the Commissioner determines and declares that *N.J.S.A.* 18A:38-8.2a(2) does not permit the Bedminster Board of Education, or any other sending district board of education, to appoint an "alternate" representative to its receiving board of education to function in the absence of the "regular" representative or

sit on a committee of the receiving board. To the extent that the existing statutory scheme for representation of sending districts on receiving boards of education is perceived as resulting in injustice to sending districts, this is a matter of State policy appropriately addressed by the Legislature after full and fair public debate.

IT IS SO ORDERED.[3]

Lucille E Davy
ACTING COMMISSIONER OF EDUCATION

Date of Decision: 6/15/06
Date of Mailing: 6/16/06

[3] This decision may be appealed to the State Board of Education pursuant to *N.J.S.A.* 18A:6-27 *et seq.* and *N.J.A.C.* 6A:4-1.1 *et seq.*

219-06

OAL DKT. NO. EDU 6720-05
AGENCY DKT. NO. 198-8/05

BEDMINSTER EDUCATION ASSOCIATION,	:	
PETITIONER,	:	COMMISSIONER OF EDUCATION
V.	:	DECISION
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 exceptions from the petitioning Education Association (Association) and the reply of the respondent Board of Education (Board), both filed in accordance with the provisions of *N.J.A.C.* 1:1-18.4.

In its exceptions, the Association concurs with the Administrative Law Judge's (ALJ) finding that a "substantial likelihood of some harm" to the Association's current or prospective membership is all that is needed to confer standing upon the Association in this matter; it contends, however, that the ALJ erred in his subsequent analysis by confusing standing with likelihood of success on the merits. (Petitioner's Exceptions at 4) The Association argues that it did, in fact, adequately plead that some harm would come to its membership as a result of the Board's promulgation of professional development procedures which do not conform to the provisions of applicable rule, specifically: "a limitation or constraint against the role of the individual teaching staff members in developing professional improvement plans which are

supposed to be individualized to each particular teaching staff member to correct individual deficiencies or address individual areas of professional growth," thus impeding individual staff members from "setting their own individual goals, seeking their supervisor's input with regard to those goals and assisting (*sic*) their own proficiency levels." (*Id.* At 5-6) At this early point in the litigation, according to the Association, it need not have proven that its claim would ultimately be successful on the merits; to the contrary, even if the Board's motion to dismiss *were* based upon failure to state a claim or cause of action – which it was not – the Association's allegations were sufficient to suggest a cause of action. Thus, the Association urges, the ALJ should have accorded it every reasonable inference and permitted it to engage in discovery and present proofs, including testimony from adversely affected teachers. (*Id.* At 5-6)

In reply, the Board reiterates that "a cognizable grievance by one or more affected employees remains a necessary condition precedent" to any dispute of this type, and that the Association has nowhere alleged that "the formulation of professional development plans based on a set of consistent standards determined by the [Board], in its discretion, has prevented any individuals from asserting their statutory rights and/or entitlements under the regulation at issue." (Board's Reply at 3-4) The Board contends that the ALJ was entirely correct in sparing the parties the time and expense of litigating a non-justiciable claim, and in recognizing that the Association must first plead facts sufficient to initiate and maintain an action before the court in order to have the opportunity later to prove them. (*Id.* at 5-6) Urging the Commissioner to disregard the "inapposite" case law referenced by petitioner in its discussion of dismissal for failure to state a claim, the Board contends that a party cannot attain standing "vicariously through

unnamed potential witnesses" or based upon facts beyond those alleged in the complaint; thus, the ALJ properly held the Association to lack standing because its petition "failed to allege any actual harm to any individual teachers, nor any potential harm to it as an entity" as a result of the Board's action. (*Id.* at 6-8) Finally, the Board objects to the Association's "eleventh-hour" use of exceptions as a means of introducing factual assertions not pled in the underlying petition, "to-wit, that staff were directed to complete the contested forms on their own over summer break, and that 'numerous teaching staff members expressed concern about the validity' of the contested plans." (*Id.* at 8-9)

Upon review, the Commissioner concurs with the ALJ that, based upon the standard articulated in *Ridgewood, supra* (Initial Decision at 5-6), the Association is not entitled to pursue this matter as pled. Contrary to the Association's assertions on exception, the ALJ did not dismiss its appeal because the petition failed to state a cause of action, but rather because its facts and allegations did not support a finding – essential to a threshold determination of justiciability – that, if true, such facts and allegations constituted actual or imminent (rather than speculative) harm to the Association or its membership. The Commissioner further notes that the Petition fails to establish the "interest" required to maintain a contested case pursuant to *N.J.A.C.* 6A:3-1.2, since bare assertions of violation of rule and generalized contentions that the disputed forms act solely by their existence to inhibit the mutual development of individual professional improvement plans, are simply not enough to establish that the Association or any of its members will be "substantially, specifically and directly affected by the outcome" of a determination by the Commissioner.

Accordingly, for the reasons expressed therein as clarified above, the Initial Decision of the OAL is adopted as the final decision in this matter and the Petition of Appeal is dismissed. The Commissioner stresses, however, that such dismissal is without prejudice to the Association's right to timely pursue allegations that actual harm has accrued, or is accruing, to itself or its member(s) as a result of the Board's use of the form disputed herein.

IT IS SO ORDERED.*

Lucille E Davy

ACTING COMMISSIONER OF EDUCATION

Date of Decision: 6/16/06

Date of Mailing: 6/16/06

* This decision may be appealed to the State Board of Education pursuant to *N.J.S.A.* 18A:6-27 *et seq.* and *N.J.A.C.* 6A:4-1.1 *et seq.*

State of New Jersey
OFFICE OF ADMINISTRATIVE LAW

INITIAL DECISION

DISMISSAL FOR LACK OF STANDING

OAL DKT. NO. EDU 6720-05

AGENCY DKT. NO. 198-8/05

BEDMINSTER EDUCATION ASSOCIATION,

Petitioner,

v.

BOARD OF EDUCATION OF THE TOWNSHIP OF BEDMINSTER, SOMERSET COUNTY,

Respondent.

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

Nicholas Celso, III, Esq., for respondent (Schwartz, Simon, Edelstein, Celso & Kessler, attorneys)

Record closed: February 6, 2006 Decided: March 23, 2006

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

STATEMENT OF THE CASE AND PROCEDURAL HISTORY

Petitioner, Bedminster Education Association, is the majority representative of all certified, non-supervisory, teaching staff members employed by respondent. It has filed

a petition of appeal with the Commissioner of Education alleging that the respondent's issuance to teaching staff members of a form to be utilized in the development of their individual professional improvement plan or professional development plan for the 2005-2006 school year violates the provisions of N.J.A.C. 6:3-4.3(f)3 and N.J.A.C. 6:3-4.3(h)3. The Bureau of Controversies and Disputes transmitted this matter to the Office of Administrative Law with the notation on the transmittal that respondent raises the threshold issues of standing and ripeness.

FACTUAL DISCUSSION

Respondent does not dispute that petitioner is the majority representative of all certified teaching staff members employed by respondent, excluding certain supervisory personnel. Additionally, it is undisputed that respondent Board of Education of Bedminster Township is responsible for the administration and operation of the Bedminster Township public schools.

Petitioner challenges the issuance by respondent to teaching staff members of a certain form to be utilized in the development of their individual professional improvement plan or professional development plan for the 2005-2006 school year. Petitioner asserts that by issuing this form and requiring its use, respondent is violating the provisions of N.J.A.C. 6:3-4.3(f)3 and N.J.A.C. 6:3-4.3(h)3, contending that it is usurping the right of teaching staff members to participate in the formulation of such plans. This is based on its contention that the respondent's actions have unduly circumscribed the role of the teaching staff member in the process of development of their individual professional improvement plan or professional development plan for the 2005-2006 school year. Respondent filed an answer in which it asserts, inter alia, that it distributed a draft version of such a form for teacher's personal use as a worksheet, that the matter is not ripe for adjucation and that petitioner lacks standing with regard to this matter.

LEGAL DISCUSSION AND ANALYSIS

N.J.S.A. 34:13-5.3 permits public employees to join an employee organization and have the right to be represented in collective negotiations by such an organization. This section further states that a majority representative of public employees shall be entitled to negotiate agreements covering all employees, to negotiate proposed new rules or modifications of existing rules governing working conditions, and to negotiate with respect to grievances, disciplinary disputes and other terms and conditions of employment. It also provides that public employers shall negotiate written policies setting forth grievance and disciplinary review procedures and such procedures shall be included in any agreement between the public employer and the representative organization; however, such procedures may not replace or be inconsistent with any alternate statutory appeal procedure.

The foregoing statutory provision clearly authorizes an employee organization to engage in collective negotiations on behalf of employees with a public employer. However, the issue in this matter is whether an employee organization such as petitioner herein has standing to challenge the actions of a public employer as violative of regulatory provisions governing the public employer.

In support of its argument favoring standing, petitioner relies on Education Assoc. of Passaic v. Passaic Bd of Educ., OAL Dkt No. EDU 1081-98 and EDU 1517-98 (1999) aff'd Comm'r (4/26/99) and Kinnelon Educ. Assoc. v. Bd of Educ of Kinnelon, OAL Dkt. No. EDU 9575-99 (2001) aff'd Comm'r (5/18/01). These are two administrative decisions in which education associations filed petitions of appeal similar to those in the present matter, alleging board of education practices and policies violative of state regulations regarding the development of professional improvement plans. However, in reviewing these two decisions, it is clear that in neither case did any party raise the issue of the standing of the respective associations, nor did the ALJ or Commissioner deal with this issue since it was not raised. There is no indication whether this was because no one thought to raise the issue of standing or because the

parties believe that the issue was settled in favor of the associations' standing.

There are two additional cases which appear to support the position of petitioner. In Wyckoff Educ. Ass'n. v. Wyckoff Bd of Educ, et al, 1981 S.L.D. 1128, the association challenged the school district's use of clerical aides to perform certain duties which may only be performed by certificated school nurses. The issue of standing was specifically addressed, and it was ruled that these issues go to the employment of and delegation of duties to individuals in the district, and that these are clearly matters within the scope of the association's status as a representative of employees. Since the matter intimately affects the employment of certain of its members, the association was ruled to have standing.

The decision in Wyckoff relied on the ruling of the Court in Winston v. Bd of Educ. of So. Plainfield, 125 N.J. Super.131. (App. Div. 1973), the second case which appears to support petitioner's position. In Winston, the association initiated a grievance on behalf of a non-tenured teacher whose employment contract was not renewed and who alleged that she was penalized for exercising first amendment rights. The teacher's initial complaint was in the form of a grievance filed by the association dealing with an adverse evaluation report. Her employment was discontinued by the non-renewal of her employment contract before the grievance procedure could be completed. Thus, it became a controversy or dispute cognizable by the Commissioner of Education. The Court noted that the association had the authority to initiate the grievance through the applicable administrative levels and observed that it would be anomalous to deny the association the standing to pursue the matter to conclusion, stating:

> The final disposition of such claims might have an impact which transcends the personal interest of the individual claimant and have repercussions affecting other employees. No sound reason has been advanced why, at the critical and final stages of the administrative machinery before the Commissioner of Education and ultimately the State Board, the very real interest of the Association should be negated and the Association shorn of its status to participate as a

> party and to represent the interests of the aggrieved employee.
>
> The concern of an exclusive representative of public employees with respect to matters touching their employment is tangible and genuine; it is an interest sufficient to enable such an entity to participate as a party in proceedings before the Commissioner and State Board of Education.
> [Id. at 142.]

Another case that appears at first glance to support petitioner's position is Red Bank Reg. Educ. Ass'n. v. Red Bank Reg. H.S. Bd. of Educ., 78 N.J. 122 (1978). However, I agree with respondent that the holding therein is limited to the issue whether a majority representative may pursue in its own name and upon its own impetus grievances that it is otherwise authorized to present on behalf of an employee under the Employer-Employee Relations Act. Thus, the Association was seeking to vindicate its own rights in that case.

In Ridgewood Educ. Ass'n. v. Ridgewood Bd. of Educ., 284 N.J. Super. 427 (App. Div. 1995), the Court ruled that the association had standing to challenge a school district policy that limited the employment of supplemental teachers to two years. Respondent points out that the association was acting as co-petitioner with individuals who were taxpayers and teachers in the district. Id. at 431. However, the Court specifically found that the association had a cognizable interest in protecting the employment status of existing or prospective members who would automatically be denied an opportunity to acquire tenure under the contested policy. Id. at 432. The Court stated:

> It was incorrect to view the REA as lacking standing on the ground that no current employee of the Board and none of REA's present members were affected by the implementation of the policy. Only "[a] substantial likelihood of some harm visited upon the plaintiff in the event of an unfavorable decision is needed for the purposes of standing." New Jersey State Chamber of Commerce v. New Jersey Election Law Enforcement Comm'n, 82 N.J. 57, 67,

> 411 A.2d 168 (1980). Where a plaintiff association "would have an obvious, albeit indirect, interest in the effect upon others of statutory and administrative regulations," Id. at 68, 411 A.2d 168, requirements for standing are met. The REA's relationship to the Board policy under attack "is not that of [a] total stranger[] or casual interloper[]." Ibid. That association's interest in protecting the employment status of prospective members who, when appointed as part-time supplemental teachers, would, under the adopted policy, be denied an opportunity to acquire tenure, is an adequate basis for according it representational standing in a suit challenging the validity of the policy.
> [Ibid.]

Notwithstanding the above holdings in Winston and Ridgewood, respondent contends that in each case in which an association was found to have standing, it either had an individual right it was seeking to vindicate (Red Bank), or it was representing the claims of individual teachers (Wyckoff, Winston and Ridgewood). It points out that in Wyckoff, the ALJ and Commissioner found representational status because the case involved the employment of and delegation of duties to individuals in the district and intimately affected the employment of certain of its members. Wyckoff Educ. Ass'n., supra., 1981 S.L.D. at 1132. It argues that in Ridgewood, the association was a co-petitioner with taxpayers and teachers in the district who were thus "interested persons. supra, at 431.

I disagree with respondent's position, particularly in light of the language in Ridgewood. As indicated in the above-quoted language from the Ridgewood case, supra, 284 N.J. Super. at 432, a substantial likelihood of some harm visited upon the employment status of even prospective members of plaintiff's association in the event of an unfavorable decision is all that is needed for the purposes of standing. Therefore, I **FIND** that petitioner herein would have standing in this matter as long as it has shown a substantial likelihood of harm to its members arising from the complained of conduct by respondent.

It is with respect to the requirement of a showing of harm that petitioner's

standing fails. As pointed out by attorney for respondent, I **FIND** that the development and application of teacher evaluation criteria is a non-negotiable managerial prerogative that is removed by law from the scope of the association's organizational interest. N.J.A.C. 6A:32-4.4(c)2; Bethlehem Tp. Bd of Educ v. Bethlehem Tp. Ed. Ass'n., 91 N.J. 38, 47 (1982) (" there can be no negotiation on the subject of criteria for evaluating teaching staff"). In addition, I **FIND** that the petitioner has not alleged that the formulation of professional development plans based on a set of consistent standards determined by the board of education, in its discretion, has prevented any individuals from assessing their own proficiency levels, setting their own individual goals and seeking their supervisor's input as to these issues. I **FIND** that the petitioner has failed to point out how the actions of respondent have interfered with the requirement set forth in N.J.A.C. 6A:32-4.4 (formerly N.J.A.C. 6:3-4.3(h)3) that professional improvement plans be developed by the supervisor and the teaching staff member only.

I agree with respondent's contention that petitioner has failed to allege any harm that may arise as to the association and has failed to identify any individual that has been adversely affected by the complained of action by the respondent and I so **FIND**. Therefore, I **FIND** that petitioner lacks standing in this matter on the limited basis that it has not shown a substantial likelihood of some harm arising from the complained of conduct by respondent, and I **CONCLUDE** that the petition should be **DISMISSED** on this basis.

DECISION AND ORDER

Based on my finding that petitioner lacks standing in this matter on the limited basis that it has not shown a substantial likelihood of some harm arising from the complained of conduct by respondent, I hereby **ORDER** that the petition is hereby **DISMISSED** for lack of standing.

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

This recommended decision may be adopted, modified or rejected by the **COMMISSIONER OF THE DEPARTMENT OF EDUCATION,** who by law is authorized to make a 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.

March 23, 2006
DATE

Joseph F. Martone
JOSEPH F. MARTONE, ALJ

E-mail Receipt of Initial Decision Confirmed by the Department of Education on:

3/23/06
DATE

Mailed to Parties:
DIRECTOR AND CHIEF ADMINISTRATIVE LAW JUDGE

MAR 24 2006
DATE

OFFICE OF ADMINISTRATIVE LAW

mph

LIST OF WITNESSES:

For Petitioner:

None

For Respondent:

None

LIST OF EXHIBITS:

For Petitioner:

P-1 Petitioner letter memorandum filed December 23, 2005

For Respondent:

R-1 Notice of Motion for Dismissal of Petition for Lack of Standing filed November 22, 2005

R-2 Brief in Support of Motion to Dismiss Appeal

R-3 Respondent's Reply Brief filed December 30, 2005

220-06 SEC

220-06

IN THE MATTER OF JAMES CHIEGO, :

UNION TOWNSHIP BOARD OF EDUCATION, :

HUNTERDON COUNTY. :

:

COMMISSIONER OF EDUCATION

DECISION

SYNOPSIS

The School Ethics Commission (Commission) determined that Union Township Board of Education member James Chiego violated *N.J.S.A.* 18A:12-24.1(e) of the Code of Ethics for School Board Members by taking private action that may compromise the Board with respect to a Certification he filed in another matter pending before the Commission. After considering the nature of the charge, the Commission recommended that the Commissioner of Education impose a penalty of censure upon Mr. Chiego.

Upon a thorough review of the record, the Commissioner, whose decision was restricted solely to a review of the Commission's recommended penalty pursuant to *N.J.S.A.* 18A:12-29(c) and *N.J.A.C.* 6A:3-9.1, concurred with the Commission's recommendation. The Commissioner thus ordered that James Chiego 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.

June 16, 2006

AGENCY DKT. NO. 165-5/06

IN THE MATTER OF JAMES CHIEGO, UNION TOWNSHIP BOARD OF EDUCATION, HUNTERDON COUNTY.	COMMISSIONER OF EDUCATION DECISION

The record of this matter and the decision of the School Ethics Commission ("Commission"), including the recommended penalty of censure, have been reviewed.

This matter comes before the Commissioner to impose a sanction upon Respondent James Chiego, member of the Union Township Board of Education, based upon findings of fact and conclusions of law by the Commission that he violated *N.J.S.A.* 18A:12-24.1(e) of the Code of Ethics for School Board Members by taking private action that may compromise the Board with respect to a Certification he filed in another matter pending before the Commission.

Upon issuance of the decision of the Commission, respondent was provided 13 days from the mailing of such decision to file written comments on the recommended penalty for the Commissioner's consideration. Comments of counsel on behalf of Mr. Chiego urge that a penalty of censure is too onerous in this matter. He submits that, notwithstanding that Mr. Chiego signed a Certification which was submitted to the School Ethics Commission, it was not considered by that body because it was filed out of time. Moreover, he had no role in the dissemination of this document to the members of the Union Township Planning Board. Counsel further argues that punishing Mr. Chiego for expressing his personal opinion effectively

operates to chill his First Amendment rights, which he did not surrender by virtue of becoming a Board member. Finally, counsel proposes that even though Mr. Chiego's Certification caused controversy the evening it was disseminated to Planning Board members, there is no evidence that the relationship between the Board and the Planning Board has been compromised. As such, counsel asserts that Mr. Chiego should receive no penalty whatsoever or, in the alternative, the least onerous penalty possible, reprimand.

Initially, it must be emphasized that pursuant to *N.J.S.A.* 18A:12-29(c) and *N.J.A.C.* 6A:3-9.1, the determination of the Commission as to violation of the School Ethics Act is **not reviewable by the Commissioner** herein. Only the Commission may determine whether a violation of the School Ethics Act occurred. The Commissioner's jurisdiction is limited to reviewing the sanction to be imposed following a finding of a violation by the Commission. Therefore, this decision is restricted solely to a review of the Commission's recommended penalty.

Upon a thorough review of the record and full consideration of the comments submitted on behalf of Mr. Chiego, the Commissioner first notes that having found a violation of the School Ethics Act, the Commission was statorily obligated to recommend a sanction for this infraction (See *N.J.S.A.* 18A:12-29c). As evidenced in its decision, the Commission recommended the more stringent penalty of censure because "although Mr. Chiego asserts that he did not read the entire certification when he signed it, he intended it to be submitted to the Commission for consideration. As a board member, he is responsible for ensuring the accuracy of his entire certification and he must be publicly held accountable for the consequences." (Commission Decision at 5) The Commissioner finds no cause to disturb the Commission's recommended penalty in this matter.

Accordingly, IT IS hereby ORDERED that James Chiegto be censured as a school official found to have violated the School Ethics Act.

IT IS SO ORDERED.*

ACTING COMMISSIONER OF EDUCATION

Date of Decision: 6/16/06

Date of Mailing: 6/16/06

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

RECEIVED BY
CONTROVERSIE
& DISPUTES
2006 MAY -9 AM 9:

IN THE MATTER OF	:	**BEFORE THE SCHOOL ETHICS COMMISSION**
JAMES CHIEGO	:	**Docket No. C51-05**
UNION TOWNSHIP	:	
BOARD OF EDUCATION	:	
HUNTERDON COUNTY	:	**DECISION**

PROCEDURAL HISTORY

This matter arises from a complaint filed on November 18, 2005 by Amy Bailey and Frank Goldberg alleging that James Chiego, a member of the Union Township Board of Education (Board), violated the School Ethics Act (Act), N.J.S.A. 18A:12-21 et seq. Specifically, complainants allege that Mr. Chiego violated N.J.S.A. 18A:12-24.1(a), (c), (e), (f) and (g) when he perjured himself on a certification that was filed on behalf of the Board in another matter that was pending before the Commission.

Mr. Chiego filed a timely response, through his attorney, Philip E. Stern, Esq. Therein he admitted signing a certification dated September 26, 2005; however, he maintained that he did not read paragraph 14 of the certification. In his answer, Mr. Chiego indicated that he stood by the truth of paragraphs one through 13, but paragraph 14 represented his attorney's summary of the previous paragraphs.

The Commission invited the parties to attend its March 28, 2006 meeting to present witnesses and testimony, but did not require that they be present. The Commission advised the parties that it would consider whether the Code of Ethics for School Board Members was violated. Mr. Chiego did not attend the meeting. The complainants attended the meeting and Mr. Goldberg and his witness Michael Beck presented testimony. At its March 28, 2006 public meeting, the Commission voted to find that Mr. Chiego violated N.J.S.A. 18A:12-24.1(g) of the Code of Ethics for School Board Members. The Commission also voted to dismiss the remaining allegations. Since the complaint involved an allegation of perjury, the Commission also voted to refer the charge of perjury to the Attorney General's Office.

After the March 28, 2006 meeting, the Commission granted both parties the opportunity to provide input into its determination regarding the imposition of a sanction on Mr. Chiego. Through his attorney, Mr. Chiego argued that there should be no sanction because he did not violate the Code of Ethics for School Board Members. The complainants argued that the Commission should remove Mr. Chiego. At its April 25, 2006 public meeting, the Commission vacated its decision of March 28, 2006 finding that Mr. Chiego violated N.J.S.A. 18A:12-24.1(g) of the Code of Ethics for School Board Members in order to consider the submissions of both parties since the submission on behalf of Mr. Chiego focused on the violation as well as the sanction. During the April

25, 2006 executive session the Commission discussed the submissions of both parties. At the public portion of the April 25, 2006 meeting, the Commission voted to find that Mr. Chiego violated N.J.S.A. 18A:12-24.1(e) of the Code of Ethics for School Board Members and to recommend that the Acting Commissioner of Education impose a penalty of censure. The Commission also decided not to forward the matter to the Attorney General's Office.

FACTS

The Commission was able to discern the following facts based on the pleadings, documents submitted and testimony.

Mr. Chiego is and was at all times relevant to this complaint a member of the Board. On September 26, 2005, Mr. Chiego signed a certification, which was submitted to the Commission in the matter of Patricia Lee, et al. v. Barri Beck, C01-05, (September 27, 2005). However, the Commission did not accept the certification of Mr. Chiego, which was submitted in the afternoon of September 26, 2005, because it was submitted out-of-time and the day before the September 27, 2005 Commission meeting on C01-05. In correspondence dated November 1, 2005, the attorney for the complainants in C01-05 indicated, in part, "that we did not receive any information from Mr. Chiego that the certification he signed was inaccurate until the above matter [C01-05] was dismissed." The certification contained information regarding Mr. Chiego's interpretation of what occurred at the September 22, 2005 Union Township Planning Board (Planning Board) meeting. Mr. Chiego stands by the truth of paragraphs one through 13, which represent an accurate, verbatim account of his observations of the September 22, 2005 meeting of the Union Township Planning Board. Mr. Chiego claims that paragraph 14 of the certification represents his attorney's summary of the previous paragraphs. Mr. Chiego said that he did not read paragraph 14.

The Board was on the agenda for the October 4, 2005 Planning Board meeting to discuss some facility issues. Prior to the appearance of the Board, Mr. Chiego's certification was discussed. One of its members said that Mr. Chiego "...disdains and insults every member of the Planning Board." One Planning Board member told the Board that School Board President Patricia Lee had not seen the certification until he had shown it to Ms. Lee that night. Another Planning Board member asked the Board President if she could explain the situation. The Board President said that, "the affidavit was filed individually by Mr. Chiego." She also indicated that she hoped that Mr. Chiego's action would not impact the Board's relationship with the Planning Board. A Planning Board member said that, "Mr. Chiego's action does not help the relationship." Another Planning Board member found it troubling. The Planning Board referred the matter to the Board Counsel for a response.

ANALYSIS

The Commission initially notes that, pursuant to N.J.S.A. 18A:12-29, the complainant bears the burden of factually proving any violations of the Code of Ethics for School Board Members.

The complainants allege that Mr. Chiego violated N.J.S.A. 18A:12-24.1(a), (c), (e), (f) and (g) when he perjured himself on a certification that was filed on behalf of the Board with the Commission in another matter that was pending before the Commission.

N.J.S.A. 18A:12-24.1(a) provides:

> I will uphold and enforce all laws, rules and regulations of the State Board of Education and court orders pertaining to the schools. Desired changes shall be brought about only through legal and ethical procedures.

In order for the Commission to find a violation of N.J.S.A. 18A:12-24.1(a), the complainants would have to provide the Commission with a determination from the courts or the Commissioner of Education that Mr. Chiego violated a law, rule or regulation of the State Board of Education, or a court order pertaining to the schools. Absent such a determination, the Commission cannot find a failure to enforce all laws, rules and regulations of the State Board of Education and court orders pertaining to the schools. The Commission also notes that there is no evidence to show that Mr. Chiego attempted to make any change. Therefore, the Commission finds that Mr. Chiego did not violate N.J.S.A. 18A:12-24.1(a).

N.J.S.A. 18A:12-24.1(c) provides:

> I will confine my board action to policy making, planning, and appraisal, and I will help to frame policies and plans only after the board has consulted those who will be affected by them.

In order for the Commission to find a violation of N.J.S.A. 18A:12-24.1(c), the Commission must first determine if Mr. Chiego's action in filing the certification with the Commission was board action. The evidence before the Commission supports a determination that Mr. Chiego's action was not Board action. The Board president told the Planning Board that Mr. Chiego filed the certification individually. The evidence also shows that the Board President was not even aware that Mr. Chiego had filed the certification with the Commission until the night of the Planning Board meeting on October 4, 2005. Mr. Chiego's filing of the certification was not done in furtherance of his Board duties. The complainants have not presented any evidence to show that Mr. Chiego's action was board action. Therefore, the Commission finds that Mr. Chiego did not violate N.J.S.A. 18A:12-24.1(c).

N.J.S.A. 18A:12-24.1(e) provides:

> I will recognize that authority rests with the board of education and will make no personal promises nor take any private action that may compromise the board.

The Commission initially determined at its March 28, 2006 meeting, that Mr. Chiego did not violate N.J.S.A. 18A:12-24.1(e). However, upon further review of the evidence and the submissions of both parties, at its April 25, 2006 meeting, the Commission voted to find that Mr. Chiego violated N.J.S.A. 18A:12-24.1(e) based on the reasoning below.

To find a violation of N.J.S.A. 18A:12-24.1(e), the Commission must first determine whether Mr. Chiego's action in signing the certification was private action. The Commission determined above that, based on the evidence, Mr. Chiego's action was not board action. The same evidence that led to the Commission's finding that the action was not board action also leads to a conclusion that the action was private action. The Board president, who was unaware that Mr. Chiego had filed the certification, told the Planning Board that Mr. Chiego filed the certification individually. Based on the evidence, the Commission finds that Mr. Chiego's action in filing the certification with the Commission was private action.

The Commission must next determine if Mr. Chiego took private action that may compromise the Board. Mr. Chiego's certification contained information regarding his interpretation about what occurred at the September 22, 2005 Planning Board meeting. The Board was on the agenda for the October 4, 2005 Planning Board meeting to discuss facility issues. The evidence shows that the Planning Board was so concerned with the certification that Mr. Chiego filed, that at the October 4, 2005 meeting, prior to the Board's appearance before the Planning Board, Planning Board members asked the Board president to provide an explanation of the situation. At that Planning Board meeting, there was also a discussion between the Board president and the Planning Board regarding the impact of Mr. Chiego's action on the relationship of the Board with the Planning Board. One Planning Board member said that "Mr. Chiego's action does not help the relationship." The Planning Board ultimately referred the matter to their attorney. Based on the evidence, the Commission finds that when Mr. Chiego filed the certification with the Commission, he took private action that may compromise the Board. Therefore, the Commission finds that Mr. Chiego violated N.J.S.A. 18A:12-24.1(e).

N.J.S.A. 18A:12-24.1(f) provides:

> I will refuse to surrender my independent judgment to special interest or partisan political groups or to use the schools for personal gain or for the gain of friends.

There is no evidence to show the involvement of any special interest or partisan political groups. Mr. Chiego submitted the certification in support of the complainants in C01-05 who are not special interest or partisan political groups. Furthermore, there is no evidence to show that Mr. Chiego used the schools for his gain of the gain of his friends. His submission of the certification was unrelated to the use of the schools. Therefore, the Commission finds that Mr. Chiego did not violate N.J.S.A. 18A:12-24.1(f).

N.J.S.A. 18A:12-24.1(g) provides:

> I will hold confidential all matters pertaining to the schools which, if disclosed, would needlessly injure individuals or the schools. In all other matters, I will provide accurate information and, in concert with my fellow board members, interpret to the staff the aspirations of the community for its school.

Mr. Chiego stands by the truth of paragraphs one through 13 in the certification, since they set forth his observations, but argues that paragraph 14 represented his attorney's summary of the previous paragraphs. Mr. Chiego also certified that he did not read paragraph 14. This evidence creates an inference that paragraph 14 is inaccurate. For this reason the Commission initially found, at its March 28, 2006 meeting, that Mr. Chiego violated N.J.S.A. 18A:12-24.1(g). However, upon further review of the evidence and the submissions of both parties, at its April 25, 2006 meeting, the Commission concluded that the certification contained information that was Mr. Chiego's interpretation of what occurred at the September 22, 2005 Planning Board meeting. It represented Mr. Chiego's opinion, which the Commission cannot find either accurate or inaccurate. Therefore, the Commission finds that Mr. Chiego did not violate N.J.S.A. 18A:12-24.1(g).

Based on further review of the evidence, which indicated that paragraph 14 was an opinion rather than a misstatement of fact, the Commission decided not to forward the matter to the Attorney General's office.

DECISION

For the reasons discussed above, the Commission finds that James Chiego violated N.J.S.A. 18A:12-24.1(e) of the Act. The Commission recommends that the Acting Commissioner of Education impose a penalty of censure because, although Mr. Chiego asserts that he did not read the entire certification when he signed it, he intended it to be submitted to the Commission for consideration. As a board member, he is responsible for ensuring the accuracy of his entire certification and he must be publicly held accountable for the consequences.

This decision has been adopted by a formal resolution of the School Ethics Commission. This matter shall now be transmitted to the Commissioner of Education for action on the Commission's recommendation **for sanction only**, pursuant to N.J.S.A. 18A:12-29. Within 13 days from the date on which the Commission's decision was

mailed to the parties, Mr. Chiego may file written comments on the recommended sanction with the Commissioner of Education, c/o Bureau of Controversies and Disputes, P.O. Box 500, Trenton, NJ 08625, marked "Attention: Comments on Ethics Commission Sanction." A copy of any comments filed must be sent to the School Ethics Commission and all other parties.

Paul C. Garbarini

Paul C. Garbarini
Chairperson

Resolution Adopting Decision – C51-05

Whereas, the School Ethics Commission has considered the pleadings filed by the parties and the documents submitted in support thereof; and

Whereas, at its meeting of March 28, 2006, the Commission found that James Chiego violated N.J.S.A. 18A:12-24.1(g) of the Act; and

Whereas, at its meeting of April 25, 2006 the Commission vacated the March 28, 2006 decision and found that Mr. Chiego violated N.J.S.A. 18A:12-24.1(e) and recommended that the Commissioner of Education impose a sanction of censure; and

Whereas, at its meeting of April 25, 2006, the Commission reviewed a draft decision prepared by its staff and agrees with the decision;

Now Therefore Be It Resolved that the Commission hereby adopts the proposed decision referenced as its decision in this matter and directs its staff to notify all parties to this action of the Commission's decision herein.

Paul C. Garbarini, Chairperson

I hereby certify that the Resolution
was duly adopted by the School
Ethics Commission at its public meeting
on April 25, 2006.

Lisa James-Beavers
Executive Director

PCG/LJB/MET/ethics/decisions/C51-05

222-06

222-06E

OAL DKT. NO. EDU 4318-06
AGENCY DKT. NO. 216-6/06

T.S., S.D., AND J.M.,	:	
PETITIONERS,	:	COMMISSIONER OF EDUCATION
V.	:	DECISION ON MOTION
BOARD OF EDUCATION OF THE BOROUGH OF MANVILLE, SOMERSET COUNTY,	:	
RESPONDENT.	:	

The record of this emergent matter, including the audiotape of proceedings before the Administrative Law Judge (ALJ), and the Order issued by the Office of Administrative Law (OAL) have been reviewed by the Deputy Commissioner, to whom this matter has been delegated for hearing pursuant to N.J.S.A. 18A:4-33.

Upon such review, the Deputy Commissioner concurs with the ALJ that petitioners have not met the standard for grant of interim relief. In particular, the Deputy Commissioner finds that petitioners have shown virtually no likelihood of success on the merits of their underlying claim that the respondent Board of Education abused its lawful discretionary authority by the manner in which it interpreted and applied its established disciplinary policies under the circumstances presented herein. *Crowe v. DeGioia*, 90 *N.J.* 126 (1982); N.J.A.C. 6A:3-1.6.

Accordingly, the Order of the OAL denying emergent relief is adopted for the reasons expressed therein, and this matter is hereby returned to the OAL for such further proceedings as the parties and the ALJ deem necessary to bring it to conclusion.

IT IS SO ORDERED.*

Isaac Bryant
DEPUTY COMMISSIONER OF EDUCATION

Date of Decision: June 16, 2006
Date of Mailing: June 16, 2006 (via fax)

* This decision may be appealed to the State Board of Education pursuant to *N.J.S.A.* 18A:6-27 *et seq.* and *N.J.A.C.* 6A:4-1.1 *et seq.*

State of New Jersey
OFFICE OF ADMINISTRATIVE LAW

ORDER

OAL DKT. NO. EDU 4318-06

AGENCY DKT. NO. 216-6/06

T.S., S.D., AND J.M.,

Petitioners,

v.

BOARD OF EDUCATION OF THE BOROUGH OF MANVILLE, SOMERSET COUNTY,

Respondent.

David W. Trombadore, Esq., for petitioners (Trombadore & Wilson, attorneys)

David Rubin, Esq., for respondent

Record Closed: June 15, 2006 Decided: June 15, 2006

BEFORE **RICHARD F. WELLS**, ALJ:

In this matter, petitioners allege that the discipline imposed upon their children is contrary to respondent's own rules regarding discipline. Petitioners ask that the Commissioner vacate, rescind, or reduce the suspensions and allow the students to take final exams and participate in graduation exercises. The matter was forwarded by the New Jersey State Department of Education to the Office of Administrative Law ("OAL") on June 14, 2006, where it was filed as a contested case. The case was heard as an emergent matter on June 15, 2006.

The case involving the three petitioners revolves around an incident that occurred on Wednesday, June 7, 2006, wherein these high school seniors were apprehended by the Manville police in the act of spray painting high school property, including the gymnasium wall and parking lot. It was alleged that some of the wording included obscene language. The petitioners were arrested and taken to the police station where they were charged with criminal mischief. Essentially, the three students admitted in one form or the other to either actually spray painting on the gymnasium wall or being involved in that enterprise. Although not set forth in the Verified Emergency Petition, the three students testified that the fourth member of their group was the one who actually spray painted the obscene wording and not the three students involved in the instant Emergency Petition. All three students denied that they were responsible for the use of the "F-word," but one of the students did admit to spray painting the word "bitch" on the wall.

The school administration imposed a ten-day suspension for the students, which runs through the end of this week, i.e., June 16, 2006. The school district maintained that its policies and procedures were that students on suspension were denied the opportunity to participate in extra-curricular activities and other school-related events, including graduation exercises scheduled for this Friday, June 16, 2006. The respondent school district argued that since final examinations were scheduled for the period while the suspension has been enforced, the students missed their final examinations and so have not fulfilled all of their academic requirements necessary to receive their diplomas. The school district took the position that once the suspension is served by the three students, they would be permitted to take their final examinations during the week of June 19, 2006 and once all of their academic requirements were fulfilled, they would receive their diplomas. Of course, the three students would be unable to attend their graduation ceremonies on Friday, June 16, 2006.

Petitioners argued that the penalty imposed was unduly harsh and not consistent with the school disciplinary code. It was petitioners' reading of the school disciplinary code that such an offense should merit little more than a one-day in-school suspension. Petitioners argued that the school district's Code of Conduct provided that a ten-day

out-of-school suspension could only be imposed in connection with a second fifth level offense. Petitioners adamantly maintained that the school district was unreasonable, arbitrary, and capricious by characterizing the conduct complained as a fifth level offense. The respondent school district countered that the administration has the discretion under its conduct and discipline policy to suspend a student from school for disorderly or illegal conduct. Relying on page 10 of the conduct and discipline document, respondent states that the "length of suspension will be determined by school authorities and will reflect the offense committed." Respondent maintained that the sanction of a ten-day out-of-school suspension was warranted and was an appropriate exercise of its discretion. Respondent school district refused to alter its position with regard to the length of the suspension notwithstanding the fact that the penalty would result in the three students being denied participation in their graduation ceremony.

I have listened intently to the testimony and reviewed the documents submitted. I am exceedingly sympathetic to the fact that the petitioners will be denied the memory and experience of seeing their children graduate. But the undeniable fact is that such a repercussion is the direct result of the students' behavior. I was not persuaded by the three students' explanation that spray painting their graduation year or otherwise marking their parking space in the parking lot was a tradition that was done on a yearly basis with the express or tacit approval of the school administration. However, it is my conclusion that even if the three students felt that tradition demanded that they mark their parking space in some fashion, none of the students suggested that spray painting on the gym wall was similarly condoned or overlooked. Setting aside the lack of genuine contriteness on the part of the three students, I do find it to be a great shame that these seniors cannot receive their diploma with their classmates. The result is harsh, but this ALJ cannot substitute his judgment for that of the school district's administration. Of course, it cannot be ignored that this dispute has as its origin the conduct of these three senior high school students.

It is the conclusion that this ALJ that petitioners have failed to bear their burden of demonstrating a likelihood of success on the merits and imminent irreparable harm in the absence of undue prejudice to the non-moving party or the public interest.

Petitioners have shown no special circumstances that would permit an exception to the Commissioner's earlier holding that the inability to participate in graduation ceremonies for disciplinary reasons does not constitute irreparable harm. B.S. o/b/o Daughter D.C. v. Bd. of Educ. of Parsippany-Troy Hills, 96 N.J.A.R.2d (EDU) 697. I am not satisfied that the case of Lee v. Weisman, 505 U.S. 577 (1992) establishes a "statutory right" to attend high school graduation notwithstanding the disciplinary suspensions. Additionally, respondents do make a valid argument that granting emergent relief would prejudice the school district and the public interest in general by undermining a disciplinary sanction and concomitantly send a message to the student body that one can engage in criminal, destructive, and insulting vandalism on one week and then the following week demand that the school "publicly honor them" during graduation. Respondent school district convincingly points to the language contained in the Parsippany-Troy Hills case cited above, where it was noted that a local school district has "a significant interest in ensuring that its disciplinarian's policies are implemented in such a way that violators understand there will be consequences for their misconduct."

Additionally, the petitioners do not dispute the underlying charge that they engaged in vandalism by the spray painting on school property, including the gym wall. The issue before this tribunal was the extent of the penalty imposed. Under those circumstances, the law is clear that this tribunal cannot substitute its own judgment for what the appropriate punishment should be, or even how the school district's discipline policy should be interpreted. The bottom-line to this controversy is that petitioners did not meet their burden of proving that the school district's decision was arbitrary, capricious, or unreasonable. Accordingly, this tribunal is constrained to deny petitioners' Emergency Petition.

This order on application for emergency relief may be adopted, modified or rejected by the **COMMISSIONER OF THE DEPARTMENT OF EDUCATION**, who by law is authorized to make a final decision in this matter. The final decision shall be issued without undue delay, but no later than forty-five (45) days following the entry of this order. If the **COMMISSIONER OF THE DEPARTMENT OF EDUCATION** does not adopt, modify or reject this order within forty-five (45) days, this recommended order shall become a final decision on the issue of emergent relief in accordance with N.J.S.A. 52:14B-10.

6-15-06
DATE

RICHARD F. WELLS, ALJ

jh

WITNESSES

For petitioners:

A.S.

B.D.

D.M.

For respondent:

None

EXHIBITS

For petitioners:

None

For respondent:

R-1 through R-24	Photographs
R-25	Student Handbook
R-26	Student Conduct Report, dated June 8, 2006

223-06

OAL DKT. NO. EDU 12576-05
AGENCY DKT. NO. 287-10/05

IN THE MATTER OF THE TENURE HEARING OF MARILYN CUYKENDALL, SCHOOL DISTRICT OF THE TOWNSHIP OF BOONTON, MORRIS COUNTY.

COMMISSIONER OF EDUCATION

DECISION

After reviewing the Initial Decision approving a proposed settlement of this matter, and the documents that were submitted with same, the Commissioner is constrained to remand this matter to the Office of Administrative Law (OAL).

On October 20, 2005, the petitioning School District of Boonton filed with the Commissioner of Education (the Commissioner) certified tenure charges of unbecoming conduct and insubordination against Marilyn Cuykendall, who had served petitioner as Board Secretary/Business Administrator. The specific allegations submitted to support the charges included the following:

> Alteration of attendance records pertaining to vacation leave;
>
> Failure to properly communicate with and report to the district superintendent;
>
> Failure to respond to inquiries from district superintendent;
>
> Violation of Board policies and directives concerning purchasing;
>
> Disregard of directives issued by the district superintendent concerning such matters as the rate of pay for summer school employees and the issuance of personnel contracts.

Six days of hearings were conducted in the OAL on January 31, and February 2, 3, 7, 8 and 15, 2006. According to correspondence in the file, during the proceedings on

February 16, the parties placed settlement terms onto the record. No transcripts of the hearing or settlement terms are in the record transmitted to the Commissioner.

A settlement agreement (Agreement) dated March 10, 2006, executed by both parties, is attached to the Initial Decision. Under the terms of the Agreement, the petitioner agreed to withdraw the tenure charges (Para. 1 of Agreement), dissolve respondent's suspension and restore all back pay and benefits. (Para. 2 of Agreement) The parties agreed that for the balance of the 2005-2006 school year, *i.e.*, through June 30, 2006, respondent would be on administrative leave (Para. 4 of Agreement), and petitioner would pay respondent full salary and benefits. (Para. 3 of Agreement)

Respondent agreed to resign effective June 30, 2006, with the option to retire on that date or thereafter (Para. 5 of Agreement), and petitioner agreed to pay respondent $176,264.82, by way of three installment payments of $58,754.94, as "consideration for the cancellation of future rights and benefits otherwise due to Ms. Cuykendall as a statutorily tenured employee of the Board." (Para. 6 of Agreement)

The Administrative Law Judge (ALJ) found that the Agreement and petitioner's meeting minutes and resolution were consistent with the law, fully disposed of all the issues in controversy, and were voluntarily entered into by the parties. (Initial Decision at 1-2) The ALJ more specifically found that:

> A totally satisfactory explication of the circumstances justifying the settlement of this matter is contained in the sixth "whereas" paragraph on page one of the Agreement settling this matter;
>
> . . . . and,
>
> This Agreement is in the public interest on account of all those matters referred to in the sixth and seventh "whereas" paragraphs on page one of the Agreement.

He thus concluded that the settlement meets the requirements of *N.J.A.C.* 6A:3-5.6, and approved it.

The Agreement's sixth and seventh "whereas" paragraphs, upon which the ALJ relies, read as follows:

> WHEREAS, the risk of litigation and the uncertainty of the outcome, the threat of further and additional litigation arising out of the Charges, Grievances or otherwise, and a due consideration of the costs and expenses of litigation induced the Board to engage in extensive negotiations with Ms. Cuykendall with a view toward resolution of all outstanding issues between the parties, including, without limitation, all matters embraced within the Charges and the Grievances; and
>
> WHEREAS, the parties did reach an agreement resolving, settling and adjudicating all matters in dispute between them, and now wish to record their agreement and secure the approval thereof by the Commissioner of Education, pursuant to *N.J.A.C.* 6A:3-5.6, and, believing the same constitutes a fair and reasonable settlement of the matter and to be in the public interest, as well as in the interest of the parties hereto, upon the ground that it eliminates the risks, inconvenience, cost and expense of litigation, and enables a complete resolution of all disputes and grievances, including matters not embraced within the current proceedings, ...

Decades ago, the Commissioner of Education expressed his reservations about "settlements reached in tenure matters which are opened upon proper certification of charges as prescribed by statute and under statutory formula, but which are concluded by lump sum payments to respondent parties." *In the Matter of the Tenure Hearing of Frank Cardonick, School District of the Borough of Brooklawn, Camden County*, 1982 *School Law Decisions* 842, 845 (April 7, 1982). He made it clear that he would "carefully examine the factual circumstances surrounding each settlement so proposed, both as to the nature of the charges involved in such matter as well as to the exact terms of the settlement," in order to preserve the integrity of the Tenure Employees Hearing Act, *N.J.S.A.* 18A:6-10 *et seq.*, and insure that

determinations in tenure matters serve not only the interests of the parties but also the broader public interests. *Ibid.*

Similarly, the Commissioner has cautioned that once a Board takes up the burden of tenure charges it cannot lay it back down again without setting 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 Kenneth Smith, School District of Orange, Essex County*, decided by the Commissioner on March 22, 1982, decision on remand June 16, 1983, *aff'd. with modification* by the State Board of Education, November 2, 1983, *aff'd.* Superior Court, January 30, 1986.

As guidance in evaluating the circumstances pertaining to proposed settlements in tenure matters, the State Board of Education articulated standards. The proposed settlement must: 1) Be accompanied by documentation as to the nature of the charges; 2) Include an explanation of the circumstances justifying the settlement or withdrawal; 3) Evidence the consent of both the charged and the charging parties; 4) Indicate that the charged party entered into the agreement with a full understanding of his or her rights; 5) Demonstrate that the agreement is in the public interest; and 6) Where the charged party is a teaching staff member, indicate that he or she has been advised of the Commissioner's duty to refer tenure determinations resulting in loss of position to the State Board of Examiners for possible loss of certificate. *N.J.A.C.* 6A:3-5.6; *In re Cardonick*, 1990 S.L.D. 842, 846. Thus, in order to meet her obligation to the schools and children of this State, and the public, the Commissioner must be assured that any settlement is consistent with appropriate standards for setting aside tenure matters as expressed in *Cardonick, supra. See, also, In the matter of the Tenure Hearing of Gary Willis, North Hunterdon*-Voorhees

Regional High School District, Hunterdon County, OAL Dkt. No. EDU 91-05, Agency Dkt. No. 438-12/04, decided July 8, 2005.

Both of the paragraphs upon which the ALJ relies as justification for a settlement of this matter state simply that the parties wish to avoid the risks and expenses of litigation, a general sentiment, applicable to most controversies. Such statements neither explain why certified tenure charges should be dropped in this particular case nor why it is in the public's best interest, after the matter has been litigated through six or seven days of hearings, to pay this respondent over $176,000, in addition to full salary for the 2005-2006 school year. The Initial Decision does not include specific enough findings to justify the settlement terms, and the absence from the record of transcripts of the proceedings precludes the Commissioner from, for example, making her own findings that the evidence elicited at the hearing could not sustain the charges, or that back pay, front pay and an extra $176,000 are collectively less than a realistic assessment of the costs of continuing the litigation.

Accordingly, the matter is remanded to the OAL for proper evaluation of the proposed settlement under the *Cardonick* standards, or further proceedings.

IT IS SO ORDERED.[1]

Lucille Davy

ACTING COMMISSIONER OF EDUCATION

Date of Decision: 6/19/06

Date of Mailing: 6/19/06

[1] This decision may be appealed to the State Board of Education pursuant to *N.J.S.A.* 18A: 6-27 *et seq.* and *N.J.A.C.* 6A: 4-1.1 *et seq.*

State of New Jersey
OFFICE OF ADMINISTRATIVE LAW

INITIAL DECISION

SETTLEMENT

OAL DKT. NO. EDU 12576-05

AGENCY DKT. NO. 287-10/05

IN THE MATTER OF THE TENURE HEARING OF MARILYN CUYKENDALL, SCHOOL DISTRICT OF THE TOWNSHIP OF BOONTON, MORRIS COUNTY.

Paul N. Barger, Esq., appeared for petitioner (Barger & Bolger, attorneys)

Jeffrey D. Ullman, Esq., appeared for respondent (Ullman, Furhman & Platt, attorneys)

Record Closed: March 15, 2006 Decided: March 27, 2006

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

In this matter, the petitioner filed tenure charges against the respondent for alleged unbecoming conduct and alleged insubordination.

During the pendency of this case at the Office of Administrative Law (OAL), the parties settled their differences according to the provisions contained in the attached Agreement, meeting minutes and Board Resolution.

Having reviewed the contents of the attached Agreement, meeting minutes and Board Resolution, I **FIND**: (a) that they are consistent with the law, (b) that they fully

dispose of all issues in controversy, and (c) that they were voluntarily entered into by the parties.

Moreover, from my review of the entire record, I **FIND** that:

a) The nature of the charges was fully portrayed in the statement of charges and the written answer to same transmitted by the Department of Education to the OAL on or about November 28, 2005;

b) A totally satisfactory explication of the circumstances justifying the settlement of this matter is contained in the sixth "whereas" paragraph on page one of the Agreement settling this matter:

c) Both the charged and charging parties have consented to the settlement, as evidenced by the Agreement, meeting minutes, Board Resolution and file correspondence from the parties' attorneys;

d) Respondent entered into the Agreement with a full understanding of her rights, as substantiated by the Agreement she signed, her attorney's correspondence in this matter dated March 10, 2006 and what the undersigned set forth on the record on or about February 15, 2006; and,

e) This agreement is in the public interest on account of all those matters referred to in the sixth and seventh "whereas" paragraphs on page one of the Agreement.

Accordingly, on the basis of the foregoing, I **CONCLUDE** that this Settlement meets the requirements of N.J.A.C. 6A:3-5.6 and I hereby **APPROVE** same. In conjunction there with, I **ORDER** that the parties comply with the contents of the three settling documents. Finally, I **ORDER** that these proceedings **BE** (and are hereby) **TERMINATED**.

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

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

3/27/06
DATE

Thomas E. Clancy
THOMAS E. CLANCY, ALAJ

Receipt Acknowledged:

3/29/06
DATE

DEPARTMENT OF EDUCATION

Mailed to Parties:

MAR 30 2006
DATE

DIRECTOR AND CHIEF ADMINISTRATIVE LAW JUDGE
OFFICE OF ADMINISTRATIVE LAW

da

ORIGINAL

AGREEMENT

AGREEMENT, made this 10th day of MARCH, 2006, by and between the Boonton Township Board of Education, 11 Valley Road, Boonton Township, New Jersey 07005 ("the Board") and Marilyn Cuykendall, 63 Taft Lane, Morristown, New Jersey 07960 ("Ms. Cuykendall"):

WHEREAS, Ms. Cuykendall is and has been employed continuously by the Board as the Business Administrator of the Boonton Township School District and Board Secretary of the Board since 1998, and has achieved tenured status in her position; and

WHEREAS, certain disputes and grievances arose between the parties, including grievances against the Board which Ms. Cuykendall submitted for the Board's consideration on or about September 20, 2005 ("the Grievances"); and,

WHEREAS, on or about October 18, 2005, the Board certified to the Commissioner of Education certain charges against Ms. Cuykendall alleging conduct unbecoming a School Business Administrator and acts of insubordination ("the Charges"), on account of which the Board suspended Ms. Cuykendall from employment, without pay, effective October 18, 2005, and for which the Board sought to terminate Ms. Cuykendall's tenure and employment; and

WHEREAS, Ms. Cuykendall timely served and filed with the Commissioner of Education her Answer to the Charges denying the allegations thereof, and the Commissioner of Educaton thereafter referred the matter for hearing to the Office of Administrative Law; and

WHEREAS, a hearing on the Charges commenced on January 31, 2006, before Hon. Jesse H. Strauss, A.L.J., and continued thereafter on February 2, 3, 7, 8 and 15, 2006; and

WHEREAS, the risk of litigation and the uncertainty of the outcome, the threat of further and additional litigation arising out of the Charges, Grievances or otherwise, and a due consideration of the costs and expenses of litigation induced the Board to engage in extensive negotiations with Ms. Cuykendall with a view toward resolution of all outstanding issues between the parties, including, without limitation, all matters embraced within the Charges and the Grievances; and

WHEREAS, the parties did reach an agreement resolving, settling and adjusting all matters in dispute between them, and now wish to record their agreement and secure the approval thereof by the Commissioner of Education, pursuant to *N.J.A.C.* 6A:3-5.6, and, believing the same constitutes a fair and reasonable settlement of the matter and to be in the public interest, as well as in the interest of the parties hereto, upon the ground that it eliminates the risks, inconvenience, cost and expense of litigation, and enables a complete resolution of all disputes and grievances, including matters not embraced within the current proceedings,

NOW, THEREFORE, for and in consideration of the sum of $1.00, and other good and valuable consideration, including the mutual promises exchanged below, the receipt and

sufficiency of which each party hereby acknowledges to the other, the parties agree as follows:

1. The Charges shall be, and the same hereby are, withdrawn and dismissed, with prejudice, effective February 15, 2006.

2. Ms. Cuykendall's suspension from her position as Business Administrator of the Boonton Township School District and Board Secretary of the Boonton Township Board of Education shall be and the same hereby is dissolved effective February 15, 2006, and all back pay, benefits and emoluments of office (hereinafter "Back Pay"), accrued from the date of her suspension through February 15, 2006, shall be restored to her forthwith, as fully and completely as if the suspension had never been imposed, in a single lump sum payment.

3. Ms. Cuykendall shall receive the balance of her full salary for the 2005–2006 School Year, accruing on and after February 16, 2006 through June 30, 2006, as provided by her existing contract with the Board, in such regular installments as the Board, by custom and practice, shall make for all other administrative employees of the Boonton Township School District (hereinafter "Front Pay"), and Ms. Cuykendall shall further be entitled to all benefits and emoluments of her office and position, including, but not limited to, medical and health insurance benefits, from February 16 through June 30, 2006, or, in the case of medical, health and other benefits, through such later date as the applicable insurance plan or the governing law in such cases provides.

4. From February 16, 2006 through June 30, 2006, Ms. Cuykendall shall be on administrative leave from the duties and responsibilities of her office and position as Business Administrator of the Boonton Township School District and Board Secretary of the Boonton Township Board of Education, *provided, however,* that such administrative leave shall not in any way reduce or diminish her entitlement to Back Pay, Front Pay or the benefits and emoluments of her office as provided elsewhere herein.

5. Effective June 30, 2006, Ms. Cuykendall shall resign her position, and, to that end, she shall, simultaneously with the execution of the within agreement, tender her written resignation, effective June 30, 2006, which such resignation shall be held in escrow by the attorneys for the Board pending approval of the within agreement by the Commissioner of Education. Nothing contained herein shall prejudice Ms. Cuykendall's right, at her sole election and discretion, to retire on June 30, 2006, or thereafter, upon the giving of timely notice to that effect.

6. The Board shall also pay to the order of Ms. Cuykendall the further and additional sum of One Hundred Seventy Six Thousand Two Hundred Sixty Four and 82/100 ($176,264.82) Dollars in three equal installments of Fifty Eight Thousand Seven Hundred Fifty Four and 94/100 Dollars ($58,754.94) each, without deduction or setoff of any kind or description, on January 2, 2007, July 1, 2007, and July 1, 2008, respectively ("the Installment Sums"), or in such other installment amounts and at such times and places as the parties may hereafter agree in writing. To the extent permitted by law, the Installment Sums shall not be deemed compensation for past services rendered, within the meaning of the Federal Insurance

Contributions Act, or other similar federal and state laws, but shall instead be deemed consideration for the cancellation of future rights and benefits otherwise due to Ms. Cuykendall as a statutorily tenured employee of the Board.

7. The foregoing is intended to fully and completely settle, adjust and resolve all outstanding grievances and disputes between the parties. Accordingly, the Board, for itself and for all successor Boards of Education of the Boonton Township School District, releases, acquits and forever discharges Ms. Cuykendall, her heirs and assigns, as their interest may appear, and Ms. Cuykendall, her heirs and assigns, as their interests may appear, hereby releases, acquits and forever discharges the Board, and all successor Boards of Education of the Boonton Township School District, from any and all claims, grievances, demands, actions and causes of action, at law or in equity, and however the same may be described, arising out of or in any way connected with Ms. Cuykendall's service as the Business Administrator of the Boonton Township School District and Board Secretary of the Boonton Township Board of Education, from the beginning of time to the date hereof, excepting only such claims, grievances, demands, actions or causes of action, if any, arising out of any breach or claimed breach of the within Settlement Agreement.

8. The within Settlement Agreement reflects the complete and integrated agreement of the parties with respect to the subject matter hereof, and each party hereby waives and renounces to the other any claim of reliance upon any statement, representation or warranty not contained herein.

9. Each party has been represented by counsel of choice throughout this matter, including the negotiation and execution of the within Settlement Agreement, and each party represents and warrants to the other that the party has had a full, fair and reasonable opportunity to consult with counsel with respect to this matter and the settlement thereof; that each party has read and is familiar with the terms, provisions and conditions hereof; that the same represents each party's understanding of the agreement between them, settling and disposing of the Charges, the Grievances and all other extant disputes and grievances; that each party is satisfied with the terms, provisions and conditions of the settlement; that acceptance of the same is in the self interest of each party; and that such acceptance is the free and voluntary act and deed of such party, and not the product of coercion or duress of any kind.

10. It is the express intention of the parties that the within Settlement Agreement be deemed compliant with *N.J.A.C.* 6A:3-5.6, and that the same be approved by the Commissioner of Education pursuant thereto, given the matters expressed in the preamble to the Agreement.

IN WITNESS WHEREOF, the parties hereto have executed this Agreement, effective as at the date first above written.

Boonton Township Board of Education

By: Mary Lio
Mary Lio, President

Marilyn Cuykendall

BOONTON TOWNSHIP BOARD OF EDUCATION
REGULAR SESSION MINUTES
Tuesday, March 7, 2006, 7:00 PM, Library/Media Center

CALL TO ORDER

Time: 7:05 PM

STATEMENT OF NOTICE

"This is a regular session of the Boonton Township Board of Education held for the purpose of transacting appropriate Board business. In compliance with Chapter 231, Laws of 1975, the notice of this meeting was advertised in the Morris County Daily Record. Copies of the agenda of this meeting were appropriately posted and made available to the public."

ROLL CALL

Present: Valerie Harrs, Kenneth Finnegan, Mary Lio, Robin Kalfus, Debra Price, Joanne King, Walter Picot

Absent: Maria Naeem, Marta Pascarella

Also Present: Superintendent/Principal, Dr. Roseann Humphrey

PLEDGE OF ALLEGIANCE

BOARD BUSINESS

MOTION to approve: Minutes of the February 28, 2006 regular session.

Moved by Mrs. Lio, seconded by Mrs. Kalfus and duly approved by 7-0 vote with Mrs. Naeem and Mrs. Pascarella absent.

> MOTION to approve: Separation of service agreement between Boonton Township Board of Education and Ms. Marilyn Cuykendall pending her resignation as of June 30, 2006 (*tabled 2/28/06*).

Moved by Mrs. Lio, seconded by Mrs. Kalfus and duly approved by 7-0 roll call vote as follows:

AYE: Harrs, Finnegan, Lio, Kalfus, Price, King, Picot
ABSENT: Naeem, Pascarella

ADMINISTRATIVE REPORTS

CORRESPONDENCE

RESOLUTION

BE IT RESOLVED by the Boonton Township Board of Education that the Agreement between Marilyn Cuykendall and the Boonton Township Board of Education, on file in the office of the Board Secretary/Business Administrator, is hereby approved, in its entirety, by the Board, contingent upon Ms. Cuykendall's resignation from the District, effective June 30, 2006.

Dated: March 7, 2006

David Blake
Interim Board Secretary/Business Administrator

224-06

#224-06

TATIANA CHARAPOVA,	:	
PETITIONER,	:	
V.	:	COMMISSIONER OF EDUCATION
BOARD OF EDUCATION OF THE TOWNSHIP OF EDISON, MIDDLESEX COUNTY,	:	DECISION
RESPONDENT.	:	

SYNOPSIS

Petitioner, a non-tenured ESL teacher formerly employed by the Board, challenged the determination of the respondent to not renew her contract for the 2005-2006 school year. She asserted that the contract was not renewed due to discriminatory reasons.

The ALJ found, *inter alia*, that: the Board's nonrenewal letter dated April 19, 2005 was the cause of action in this matter, but the petition was not filed until August 4, 2005, 17 days after the 90-day period for filing had expired; there being no basis for relaxing the time requirement set forth in *N.J.A.C.* 6A3-1.3(d), the petition was, therefore, untimely filed. The ALJ concluded that the respondent's motion for summary dismissal of the petition should be granted.

The Commissioner rejected the Initial Decision, finding that notwithstanding petitioner's receipt of the "blanket" nonrenewal letter sent to all nontenured staff, the earliest she could have made the allegations she did was sometime in May, when she became aware that similarly situated colleagues were being recalled to employment, while she was not; therefore, the petition was filed within applicable regulatory limitations. The Commissioner remanded the matter to the OAL for proceedings on the merits of petitioner's claim, noting that the instant decision neither expressed nor implied any opinion on the merits of such claim.

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.

June 20, 2006

OAL DKT. NO. EDU 6722-05
AGENCY DKT. NO. 194-8/05

TATIANA CHARAPOVA,	:	
PETITIONER,	:	
V.	:	COMMISSIONER OF EDUCATION
BOARD OF EDUCATION OF THE TOWNSHIP OF EDISON, MIDDLESEX COUNTY,	:	DECISION
RESPONDENT.	:	

The record of this matter and the Initial Decision of the Office of Administrative Law (OAL) have been reviewed. Timely exceptions were filed by petitioner pursuant to *N.J.A.C.* 1:1-18.4; however, the Commissioner has not considered certain of the documents appended thereto, since these constitute evidence not presented at hearing in contravention of *N.J.A.C.* 1:1-18.4(c). The respondent Board of Education (Board) did not file a reply.

In her exceptions, petitioner objects to the Administrative Law Judge's (ALJ) assumption, expressed at pages 6-7 of the Initial Decision, that petitioner would have been advised by her education association representative of the deadline for filing a petition of appeal. Petitioner contends that, in fact, no such advice was given, and that, moreover, she was denied legal counsel. Therefore, according to petitioner, the Commissioner should set aside the Initial Decision and consider her claim on the merits in the interest of fundamental fairness. (Petitioner's Exceptions at 1-3)

Upon careful and independent review of the record, the Commissioner rejects the Initial Decision of the OAL, not for the reasons suggested by petitioner, but for the reasons set forth below.

While the Commissioner endorses much of the ALJ's discussion of the 90-day rule and its general application, the Commissioner cannot concur that petitioner's cause of action in this matter arose with her receipt of the Board's letter of April 19, 2005 advising her that she would not be offered a contract for the 2005-06 school year. That letter reads in its entirety as follows:

> The total number of positions which will be needed for the operation of the Edison Township Public Schools for the 2005-06 school year cannot be determined at this time due to various factors, such as uncertainties with respect to the number of staff members who may be returning from various leaves of absence, enrollment trends, and financial constraints. Thus, you are hereby notified, in accordance with N.J.S.A. 18A:27-10, that you will not be offered a contract for employment by the Edison Township Board of Education for the 2005-06 school year.
>
> Please feel free to contact my office if you have any questions on this subject. (Board's Brief in Support of Motion for Summary Decision, Exhibit A; Petitioner's Response to Board's Motion, Exhibit 4)

At the Board's April 18, 2005 meeting, the Board had adopted a resolution nonrenewing the contracts, for the reasons reiterated in the above-referenced letter, of no fewer than 177 nontenured staff members – approximately 95 of them certificated teachers, including petitioner and another ESL teacher. (Petitioner's Response to Board's Motion, Exhibit 2, pages 2-6) Within this context, the April 19 letter received by petitioner is clearly a "blanket" notice of the type routinely sent by boards of education during the annual budget process when reductions in staffing are anticipated, but their exact nature and extent is at that point uncertain; indeed, petitioner claims to have been told exactly this when she received the letter via hand delivery along with other

nontenured colleagues assigned to the same school and inquired about it. (Petitioner's Response to Board's Motion at 1; *Id.*, Exhibit 2, page 1; Board's Brief, Exhibit B)[1]

Although precise dates are difficult to determine,[2] it is apparent from petitioner's papers that sometime during May she became aware of teaching positions – including ESL positions – being filled in the district, and that many teachers on the April 18 reduction in force (RIF) list were apparently being recalled; she was additionally under the impression that there had been no significant reduction in the number of ESL students. (Cover Letter to Petitioner's Response to Board's Motion at 1-2) Following discussions with her colleagues, petitioner began to believe that the Board might have acted in bad faith by using the April 18 RIF as a subterfuge to mask its true, discriminatory intent: to terminate her employment because of her age and national origin. (*Id.* At 2) On May 23, 2005, the Board approved the assignment of 85 teaching staff members "returning from reduction in force," thus recalling a significant majority of the teachers on the April 18 nonrenewal list, including the other ESL teacher but not petitioner. (Petitioner's Response to Board's Motion, Exhibit 2, pages 7-9)

---

[1] This construction is further supported by the June 2, 2005 letter to the district superintendent from the education association president, wherein a new nonrenewal letter is requested on petitioner's behalf so that it will be clear as she seeks employment for the upcoming school year that the reason she was not offered a position with respondent's district was a "true" reduction in force, i.e., there was, in fact, no position for her once the uncertainties referenced in the April 19 letter were resolved. (Petitioner's Response to Board's Motion, Exhibit 9) Petitioner erroneously characterizes this letter as the association's notice to the district that petitioner's "reduction in force was not the case and the true reasons [for her nonrenewal] should be provided" (Petitioner's Response to Board's Motion at 2); the record does not include a response from the district, and petitioner contends none was given. (Cover Letter to Petitioner's Response to Board's Motion at 2)

[2] Petitioner's papers reflect confusion about the exact dates of events in May, stating, for example that the association president's meeting with the superintendent took place in "early May" and that his subsequent letter was dated "May 23" or, at another point, "May 25" (Cover Letter to Petitioner's Response to Board's Motion at 2, Petitioner's Response to Board's Motion at 2). The letter in question is dated June 2 and shows the meeting to have taken place on May 25 (see Note 1 above).

Under these circumstances – even in a climate where petitioner had been experiencing difficulty with the new principal of her assigned school prior to April 2005 – the Commissioner cannot find, given the nature of petitioner's claim, that adequate notice for purposes of appeal was provided by her receipt of the Board's "blanket" nonrenewal notice on April 19. *Kaprow, supra*. Rather, the Commissioner finds that petitioner could not have made the allegations that she did prior to having at least some awareness that once the Board's budget and personnel uncertainties were settled, similarly situated colleagues were being recalled while she was not. *Eisenberg, supra.* Indeed, the ALJ implicitly recognizes this in the Initial Decision, wherein he states:

> Finally, much like the petitioner in *Eisenberg v. Fort Lee Bd. of Educ.,* Ms. Charapova has also asserted that it was not until well after the Board's final action on April 19, 2005, that she became aware of new information alerting her to the existence of an additional allegation. More specifically, she has alleged that with the passage of the new budget in May 2005, the Board "reinstated many if not all of the RIF'd personnel." *Charapova Response, supra.* She believes that the only possible explanation for her not being rehired was that the Board must have discriminated against her. However, she did not submit any documentation supporting this allegation and, even if she had, unlike the situation in *Eisenberg*, the fact remains that she became aware of this information not one day but rather nearly two months before the 90-day period had run its course. With approximately 60 days remaining, she had more than ample time to file her petition. Accordingly, the April 19, 2005, decision must be considered the Board's final decision amenable to review, making Ms. Charapova's petition untimely. (Initial Decision at 7)

Where the Commissioner differs from the ALJ is in holding that: regardless of the facial merits of petitioner's claim or how quickly she moved to file once she had the requisite awareness, petitioner is entitled to appeal to the Commissioner within 90 days from the point at which she became, or reasonably should have become, aware of a possible cause of action against the district. In the present instance, the

earliest that petitioner could have made the allegations that she did is sometime in early-to-mid-May; indeed, under the circumstances, her claim might arguably not have ripened until the Board acted on May 23 to offer reemployment to the great majority of nontenured teachers, including an ESL teacher other than petitioner, affected by the April 18 RIF. Even using the earlier date, however, petitioner's August 5 petition[3] was filed within the required regulatory time frame, and, moreover, even if the 90-day rule were found to have been formally triggered when petitioner received her official notice of nonrenewal, the Commissioner would also find that, under the circumstances, relaxation of the rule would be warranted. *Eisenberg, supra*, at 8

In so holding, the Commissioner stresses that boards of education have every right to effectuate good faith reductions in force and to nonrenew the employment contracts of nontenured teachers for any reason that is not statutorily or constitutionally proscribed; indeed, throughout the present proceeding, the Board has maintained that this is precisely what it did with respect to petitioner. (Answer to Petition of Appeal at 1, 4-5; Board's Brief in Support of Motion for Summary Decision at 1) The Commissioner, therefore, emphasizes that the decision herein is limited solely to the timeliness of the petition, and that no opinion of any kind is expressed or implied as to the merits of petitioner's claims. The Commissioner additionally notes that, in further proceedings before the OAL, nothing herein is intended to preclude the Board from pursuing its defenses or to foreclose summary dismissal of the petition on grounds other than untimely filing.

[3] The Initial Decision is corrected to note that, although dated August 4, 2005, the petition was actually filed on August 5. (*Cf.*, Initial Decision at 1, 2 and 6)

Accordingly, the Initial Decision of the OAL dismissing the Petition of Appeal on grounds of untimely filing is rejected for the reasons expressed herein, and this matter is hereby remanded to the OAL for proceedings, consistent with the parameters set forth above, on the merits of petitioner's claim.[4]

IT IS SO ORDERED.[5]

ACTING COMMISSIONER OF EDUCATION

Date of Decision: 6/20/06

Date of Mailing: 6/20/06

[4] Petitioner's papers suggest that related claims are pending before the U.S. Equal Employment Opportunity Commission and the New Jersey Division on Civil Rights. (Cover Letter to Petitioner's Response to Board's Motion at 1, undated letters to ALJ filed December 19, 2005 and January 23, 2006) If a related matter has been or will be transmitted to the OAL by the Division on Civil Rights, the present matter may be appropriately considered for consolidation and a determination of predominant interest pursuant to *N.J.A.C.* 1:1-17.1 *et seq.*

[5] This decision may be appealed to the State Board of Education pursuant to *N.J.S.A.* 18A:6-27 *et seq.* and *N.J.A.C.* 6A:4-1.1 *et seq.*

State of New Jersey
OFFICE OF ADMINISTRATIVE LAW

INITIAL DECISION
SUMMARY DECISION
OAL DKT. NO. EDU 6722-05S
AGENCY REF. NO. 194-8/05

TATIANA CHARAPOVA,

Petitioner,

v.

BOARD OF EDUCATION OF THE TOWNSHIP OF EDISON, MIDDLESEX COUNTY,

Respondent.

Tatiana Charapova, petitioner, pro se

Rita F. Barone, **Esq.**, appearing for respondent (Purcell, Ries, Shannon, Mulcahy & O'Neill, Esqs., attorneys)

Record Closed: February 21, 2006 Decided: April 3, 2006

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

On August 3, 2005, Tatiana Charapova, a non-tenured ESL teacher, filed a Verified Petition with the Commissioner of Education alleging that her contract "ha[d] not been renewed due to reasons other than unsatisfactory job performance." On September 1, 2005, the Edison Township Board of Education filed its Answer stating

that Ms. Charapova's contract had, in fact, not been renewed because of a Reduction in Force in the school district. The Board also asserted as an affirmative defense that Ms. Charapova's action was barred for failure to file her Petition within applicable time limitations.

On September 12, 2005, the matter was transmitted to the Office of Administrative Law by the Commissioner of Education, who requested that an Administrative Law Judge be assigned to conduct a hearing on the merits. The Director of the OAL in turn assigned the case to this ALJ. N.J.S.A. 52:14B-2(b) and N.J.S.A. 52:14F-15(o).

A pre-hearing conference was scheduled for December 19, 2005 but adjourned at Ms. Charapova's request. The pre-hearing conference was rescheduled for and held on January 23, 2006, at which time the Board's counsel, Ms. Barone, advised the court that she would be filing a Motion for Summary Decision seeking dismissal of the case. The Board subsequently moved for summary decision on January 25, 2006, alleging that Ms. Charapova had failed to file her Petition within the 90-day period set forth in N.J.A.C. 6A:3-1.3(d). Ms. Charapova filed her responding papers on February 21, 2006 and the record was closed on that date.

It is undisputed that by letter dated April 11, 2005, the Board advised Ms. Charapova that a meeting would be held on April 14, 2005 to discuss "matters which may affect your employment." Notice of Board Meeting, Board's Exhibit C. Ms. Charapova did not attend this meeting. By letter dated April 19, 2005, the Board notified her that she would not be offered a contract for the 2005-2006 school year "due to various factors, such as uncertainties with respect to the number of staff members who may be returning from various leaves of absence, enrollment trends, and financial constraints." Nonrenewal Letter, Board's Exhibit A. It is from this letter that Ms. Charapova filed her Petition of Appeal on August 4, 2006.[1] She has alleged that the contract was not renewed due to discriminatory reasons.

Summary decision is the administrative counterpart to summary judgment in the judicial arena. 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." In order to defeat a summary decision motion, the adverse party must respond by affidavits setting forth "specific facts showing that there is a genuine issue which can only be determined in an evidentiary hearing." Use of the summary procedure is aimed at "the swift uncovering of the merits and either their effective disposition or their advancement toward prompt resolution by trial." Judson v. Peoples Bank & Trust Co. of Wesfield, 17 N.J. 67, 74 (1954).

The New Jersey Supreme Court has encouraged trial-level courts "not to refrain from granting summary judgment when the proper circumstances present themselves." Brill v. Guardian Life Ins. Co. of America, 142 N.J. 520, 541 (1995). While cautioning that a judge should not weigh the truth of the evidence or resolve factual disputes at this early stage of the proceedings, the Court clarified that "when the evidence 'is so one-sided that one party must prevail as a matter of law,' [citation omitted], the trial court should not hesitate to grant summary judgment." Brill at 540.

Here, a careful reading of the record discloses that the material facts giving rise to this matter are not in dispute. Therefore, pursuant to N.J.A.C. 1:12.5(b) and Brill v. Guardian Life Insurance Co. of America, 142 N.J. 520, 523 (1995), this matter is ripe for Summary Decision.

The threshold issue in this matter is whether Ms. Charapova's petition alleging that the Board improperly decided not to renew her contract was timely filed. In this regard, the New Jersey Administrative Code provides that a petitioner may challenge the action of a board of education by filing a petition conforming to the requirements of N.J.A.C. 6A:3-1.3. In addition to serving the petition upon the respondent, the petition must be filed

[1] The Petition of Appeal was not perfected until on or about August 18, 2005, when Ms. Charapova

> 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.
>
> [N.J.A.C. 6A:3-1.3(i)]

Although this provision does not address the types of notice that may be considered "adequate notice" under the rule, the New Jersey Supreme Court has held that "adequate notice must be sufficient to inform an individual of some fact that he or she has a right to know and that the communicating party has a duty to communicate." Kaprow v. Berkeley Township Bd. of Educ., 131 N.J. 572, 597 (1993). The 90-day limitation period for commencing an action begins to run when the "plaintiff learns, or reasonably should learn, the existence of that state of facts which may equate in law with a cause of action." Id. at 587, citing Burd v. New Jersey Tel. Co., 76 N.J. 284, 291 (1978). Therefore, the 90-day period begins when a petitioner learns of facts that would enable him to file a timely claim. Kaprow v. Berkeley Township Bd. of Educ., supra, 131 N.J. at 588-89.

In Kaprow, the New Jersey Supreme Court held that an unofficial and informal note sent from the board secretary to the petitioner stating that two positions had been created and filled was sufficient to trigger the start of the 90-day period against the petitioner's assertion of tenure rights. Id. at 587. The Court explained that the time limitation provides "a measure of repose, an essential element in the proper and efficient administration of school law." Id. at 582. In essence, "the limitation period gives school districts the security of knowing that administrative decisions regarding the operation of the school cannot be challenged after 90 days." Ibid.

What is more, the 90-day requirement has been strictly followed and applied almost without exception. For example, a petition filed only two days after the 90-day period has been dismissed as untimely. See Dreher v. Jerxey City Bd. of Educ., 1987 S.L.D. 2439, rev'd, App. Div. A-6120-82 (February 28, 1958) (reversed for further fact-

---

provided the Commissioner with proof of service on the Board.

finding to determine if Dreher was a ten- or twelve-month employee, which did not affect the 90-day limitation holding). In fact, regardless of whether the board complies with statutory, administrative or regulatory requirements, the petitioner is required to file the petition no later than 90 days after the receipt of notice of the final decision. Portee v. Newark Board of Educ., 94 N.J.A.R. 2d (EDU) 381, 383.

The State Board of Education has since clarified the importance of the petitioner either receiving notice of the final decision or "knowing of facts that enabled [the petitioner] to file a timely claim." Eisenberg v. Fort Lee Bd. of Educ., St. Bd. of Educ. (November 5, 2003) <http://www.nj.gov/njded/legal>. In Eisenberg, the petitioner received "final" notice on April 3, 2001, that the board decided not to renew his employment contract. Eisenberg requested a statement of the reasons for his non-renewal, which he received on May 1, 2001. Eisenberg then requested a meeting with the board to discuss his non-renewal on May 10, 2001, and a public meeting was held on July 2, 2001. The following day, Eisenberg received a letter concerning the board's "final determination regarding your employment status," which indicated that the board had upheld its decision not to renew his contract. Eisenberg filed his petition of appeal with the Commissioner on September 29, 2001.

The board contended that the final action in that case took place on April 3, 2001, and that the 90-day limitation therefore started to run at that point, compelling dismissal of the petition as untimely filed. The Administrative Law Judge disagreed and determined that the 90-day limitation period began on July 3, 2001, when Eisenberg received the "final determination regarding [his] employment status." On appeal, the Commissioner reversed the ALJ's decision, agreeing with the board that the "Superintendent's letter of April 3, 2001, had alerted Eisenberg to the existence of facts that might equate in law with a cause of action." Eisenberg then appealed to the State Board of Education, which reversed the Commissioner's decision and held that in this particular set of circumstances, the final notice took place on July 3, 2001.

The State Board distinguished the matter, noting that Eisenberg did not learn of pertinent information until just prior to the meeting on July 2, 2001. This new information

alerted him to the existence of an allegation not known to him until late June and, therefore, "the petitioner could not have made the same allegations prior to his becoming aware of such information." Accordingly, the July 3, 2001, decision had to be the final decision amenable to review, making Eisenberg's petition timely.

In the present case, Ms. Charapova received and personally signed for the Board's letter of non-renewal on April 19, 2005. Therefore, the 90-day period within which to file her petition of appeal began to run on that date. She did not file her petition until August 4, 2005, 17 days after that period had expired. Consequently, Ms. Charapova's petition was untimely filed.

On the facts presented, there is simply no basis for a relaxing of the time requirement set forth in N.J.A.C. 6A:3-1.3(d). To be sure, pursuant to N.J.A.C. 6A:3-1.16, the Commissioner has broad discretion to relax the rules, as follows:

> The rules in this chapter shall be considered general rules of practice to govern, expedite and effectuate the procedure before, and the actions of the Commissioner in connection with, the determination of controversies and disputes under the school laws. Where such rules do not reflect a specific statutory requirement or an underlying rule of the OAL, they may be relaxed or dispensed with by the Commissioner, in the Commissioner's discretion, in any case where a strict adherence thereto may be deemed inappropriate or unnecessary or may result in injustice.

However, Ms. Charapova acknowledged in her responding papers that she had been in regular communication with the Teachers Association President and Vice President, and ultimately the Middlesex County Teachers Association representative, throughout this period of time. In fact, she stated that it had been the Middlesex County representative who, in mid May, had "outlined the regulations regarding the continuation and termination of employment for non tenured teachers...." Charapova Response, February 14, 2006. Given the fact that this conversation took place approximately one month after Ms. Charapova received notice that her contract would not be renewed, it would not be unreasonable to assume that the county representative also advised her that she had to file a petition of appeal by no later than July 19, 2005.

Moreover, at her behest the Teachers Association President scheduled a meeting with the Superintendent of Schools, which was convened "in early May of 2005." Although she understood that the meeting had been "productive," the "Superintendent failed to respond to the Association President's letter of May 23, 2005 requesting the true reasons for non-renewal of my contract." Ibid. Assuming for argument's sake that this is true, it is yet additional proof that she had the benefit of the Teachers Association's assistance throughout this period of time. That being the case, it is hard to believe she was not advised to protect her rights by filing her petition before the July 19 deadline.

Finally, much like the petitioner in Eisenberg v. Fort Lee Bd. of Educ., Ms. Charapova has also asserted that it was not until well after the Board's final action on April 19, 2005, that she became aware of new information alerting her to the existence of an additional allegation. More specifically, she has alleged that with the passage of the new budget in May 2005, the Board "reinstated many if not all of the RIF'd personnel." Charapova Response, supra. She believes that the only possible explanation for her not being rehired was that the Board must have discriminated against her. However, she did not submit any documentation supporting this allegation and, even if she had, unlike the situation in Eisenberg, the fact remains that she became aware of this information not one day but rather nearly two months before the 90-day period had run its course. With approximately 60 days remaining, she had more than ample time to file her petition. Accordingly, the April 19, 2005, decision must be considered the Board's final decision amenable to review, making Ms. Charapova's petition untimely.

Based upon the foregoing, I find that Tatiana Charapove failed to file her Petition of Appeal within the 90-day period prescribed by *N.J.A.C.* 6A:3-1.3(d) and therefore conclude that the Board's Motion for Summary Decision seeking dismissal of the petition should be **GRANTED**. It is so **ORDERED**.

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

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

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

April 3, 2006
DATE

ISRAEL D. DUBIN, ALJ

E-mail Receipt of Initial Decision Confirmed by the Department of Education on:

April 4, 2006
DATE

Mailed to Parties:

APR 6 2006

DIRECTOR AND
CHIEF ADMINISTRATIVE LAW JUDGE

DATE

OFFICE OF ADMINISTRATIVE LAW

IDD/mamf

230-06

230-06

OAL DKT. NOS. EDU 6143-05 and EDU 6428-05 (CONSOLIDATED)
AGENCY DKT. NOS. 186-8/05 and 148-6/05

EXECUTIVE COMMITTEE OF THE VINELAND SCHOOL DISTRICT'S PARENT ADVISORY COMMITTEE ON BILINGUAL EDUCATION AND M.N., ON BEHALF OF MINOR CHILD, S.R.,	:	
PETITIONERS,	:	
V.	:	
BOARD OF EDUCATION OF THE CITY OF VINELAND, CUMBERLAND COUNTY,	:	
RESPONDENT,	:	COMMISSIONER OF EDUCATION
AND	:	DECISION
EXECUTIVE COMMITTEE OF THE VINELAND SCHOOL DISTRICT'S PARENT ADVISORY COMMITTEE ON BILINGUAL EDUCATION,	:	
PETITIONER,	:	
V.	:	
BOARD OF EDUCATION OF THE CITY OF VINELAND, CUMBERLAND COUNTY, AND NEW JERSEY STATE DEPARTMENT OF EDUCATION, OFFICE OF SPECIALIZED POPULATIONS,	:	
RESPONDENTS.	:	

The record of this matter and the Initial Decision of the Office of Administrative Law (OAL) have been reviewed. Petitioners and the respondent Department of Education (Department) each filed primary exceptions; petitioners

additionally filed a reply to the Department's exceptions. The respondent Board of Education (Board) submitted neither exceptions nor replies.

In its exceptions, the Department objects to the Administrative Law Judge's (ALJ) conclusion that its 2004-05 and 2005-06 waivers of the requirement for full-time bilingual programs in the third and fourth grades at the Board's Mennies School are null and void because the Department lacked legal authority to review and grant such waivers on a school-by-school, grade-by-grade basis. The Department urges the Commissioner to reject the Initial Decision and instead accept the Department's interpretation and application of its own statutes and regulations, which – when reasonable, as here – are entitled to great weight under well-established decisional precedent. (Department's Exceptions at 1-2) Stressing that its actions – consistent with the intent of both the Legislature and the State Board of Education – are guided by the need for local district flexibility in meeting requirements for bilingual education, the Department contends that the ALJ erred in holding the plain language of such law to dictate that waivers may be requested and granted on a district-wide basis only and may not be requested or granted at all if a district has sufficient limited English proficient (LEP) students in any one language to establish two or more bilingual classes in consecutive grades in any one school. (*Id.* at 2-9)[1] The Department additionally urges that, viewed in light of its interpretation of applicable law, its particular decision to grant a waiver in this instance was reasonable and should also be upheld. (*Id.* at 9-10)

[1] Throughout its discussion, the Department presents situations where it believes that the ALJ's interpretation – particularly when applied to languages less widespread than Spanish – would lead to manifestly unreasonable results, such as where districts having one well-defined cluster of eligible students in two consecutive grades would be forced to offer full-scale K-12 programs even though only a handful of eligible students are enrolled at other levels.

In reply, petitioners restate their arguments – substantially adopted by the ALJ – to the effect that the plain language of the law neither permits the interpretation espoused by the Department as to granting waivers by individual school or grade(s) nor encompasses the Department's practice of using the waiver process to provide flexibility in programming for reasons of educational policy without determining that a full-time program is impractical for one or more of the reasons prescribed in statute and rule. Petitioners reiterate that, regardless of what the Department may wish, the law provides that: 1) waivers may be granted solely on a district-wide basis and solely where it is impractical to provide a full-time program meeting statutory and regulatory requirements due to the age range, grade span or geographic location of eligible pupils; and 2) no waiver may be granted under any circumstances where eligible students in two consecutive grades in any one school are sufficient to establish two or more self-contained or subject area classes. (Petitioners' Reply at 1-10)

In their primary exceptions, while endorsing the ALJ's interpretation of operative law, petitioners object to his dismissal of their remaining claims as moot, arguing that their allegations remain live and their requests for relief remain unaddressed with respect to the Mennies Pilot Program not meeting statutory and regulatory requirements for full-time bilingual education, violation of No Child Left Behind Act requirements for provision of information to parents, and violation of State requirements for maximum practicable parent involvement and maintenance of a parent advisory committee on bilingual education. (Petitioners' Exceptions at 3-5) Petitioners also object to the ALJ's failure to list the two witnesses and four documents admitted into

evidence at the December 14, 2005 hearing, before testimony was halted by the ALJ's decision to bifurcate proceedings.[2] (Id. at 1-2, 4)

Upon careful review and consideration, the Commissioner rejects the Initial Decision, as to both its conclusions of law and its determination that petitioners' remaining claims in this matter are moot.

The framework for provision of bilingual education adopted by the New Jersey State Legislature requires that, in any school year where at the beginning of the year there are 20 or more LEP students in the district in any one language classification, a program in that language must be established for all eligible students in the district. *N.J.S.A.* 18A:35-18a. The requirements for such programs are clear and specific:

> "Programs in bilingual education" means a full-time program of instruction (1) in all those courses or subjects which a child is required by law, rule or regulation to receive given in the native language of the children of limited English-speaking ability enrolled in the program and also in English (2) in the aural comprehension, speaking, reading, and writing of the native language of the children of limited English-speaking ability enrolled in the program and in the aural comprehension, speaking, reading and writing of English, and (3) in the history and culture of the country, territory or geographic area which is the native land of the parents of children of limited English-speaking ability enrolled in the program and in the history and culture of the United States.
>
> *N.J.S.A.* 18A:35-16

The only exception permitted by the statute is where a board of education is able to demonstrate, through application to the Commissioner for waiver of this requirement, that provision of a program of the type specified above is "impractical" due to the age range, grade span or geographic location of eligible pupils; in such case, the board may provide a "special alternative instructional program" for as long as the conditions exist that justified the waiver. *N.J.S.A.* 18A:35-18b.

---

[2] See Initial Decision at 3.

In considering the statutory scheme, the ALJ adopted petitioners' position that where a waiver is requested, its application must necessarily be district-wide. The Commissioner does not concur with this conclusion. While operative law clearly and unequivocally fixes responsibility for the provision of a program of bilingual education – including any request for waiver – on the board of education, district-level responsibility and district-wide programmatic integrity neither equate to nor compel district-wide uniformity with respect to the requirements of *N.J.S.A.* 18A:35-16 regardless of need or circumstance. Such a construction would be contrary to both sound educational policy and the intent of the Legislature and State Board of Education in adopting laws expressly intended to provide flexibility to districts. *See* 30 *N.J.R.* 1249, 1250; P.L. 1995, c. 59, including legislative history (Appendix A to Petitioners' Post-Trial Brief). Moreover, contrary to the assertions of petitioners, nothing in statute or rule prohibits a district from requesting – or the Department from granting upon demonstration that a program meeting the requirements of *N.J.S.A.* 18A:35-16 is impractical district-wide – a waiver that "targets" specific schools or grades so as to result in a full-time program in some situations and an alternative program in others, or one that proposes an alternative program where a full-time program had previously been established.

Similarly, in considering the State Board rules promulgated to implement the statute, the Commissioner cannot concur that *N.J.A.C.* 6A:15-1.5(a)4 acts to preclude any possibility whatsoever of any waiver anywhere in the district, where two bilingual classes can be established in any two consecutive grades in any one district school. Even granting that the language of the rule itself might – viewed in isolation – be subject to more than one interpretation, its context and the accompanying summary of provisions

approved by the State Board at the time of proposal (30 *N.J.R.* 1250) make it clear that the rule is not intended to restrict beyond the latitude permitted by statute a board's ability to apply for waiver, but rather to define the threshold below which a finding of impracticality consistent with statutory criteria is inherently precluded. Thus, a district may not even *request* a waiver of the requirement for a full-time bilingual program pursuant to *N.J.A.C.* 6A:15-1.5(a) where the concentration of students to be impacted by the waiver reaches the level specified in 6A:15-1.5(a)4, since under these circumstances, the district *cannot* meet the requisite criteria of impracticality by reason of age range, grade span or geographic location.

Thus, the Commissioner fully concurs with the Department's interpretation and application of the operative statutes and rules with respect to the issues discussed above, so that the inquiry must now turn to its granting of the particular waiver in dispute.

As previously set forth, New Jersey's statutory scheme on its face allows for waiver of the requirement for a program meeting the criteria of *N.J.S.A.* 18A:35-16 *only* in those instances where the board of education can demonstrate to the Commissioner that the age range, grade span or geographic location of eligible pupils makes it impractical to provide the required program. It is equally clear that "eligible pupils" in this context refers to the student population district-wide, that is, to the "20 or more pupils" who have triggered the requirement for a full-time program. Consequently, the Commissioner concurs with petitioners that no waiver may be granted by the Department without regard to the overall age range, grade span or geographic location of the eligible population of a district, and that a small number of eligible students within

any one school cannot alone qualify a district for waiver without consideration of other factors, including whether the students in question could, for example, reasonably be assigned to a different school. While a greater degree of flexibility might well be desirable from educational or administrative standpoints as argued by the Department, the fact remains that the controlling statute *mandates* a full-time program unless the district's eligible students *cannot* reasonably be configured so as to make such a program practicable. Similarly, the Commissioner is compelled to concur with petitioners that the law as written does not allow for waiver based on a district's desire to implement alternative educational approaches, no matter how well motivated or potentially promising.

The record in this matter clearly establishes that the Department's decision to grant waivers in 2004-05 and 2005-06 for the Mennies School Pilot Program did not take into account the overall configuration of the district's LEP population; it further establishes that the Board's desire to implement the program was rooted in educational philosophy rather than the impracticality of providing the traditional full-time program to eligible third- and fourth-graders in the Mennies School, who, it appears, could at the very least have been readily accommodated within the full-time program at the district's Johnstone School. Simply stated, the Commissioner cannot find on the present record that the Board demonstrated – or that the Department required the Board to demonstrate, as required by law – that "due to the age range, grade span or geographic location of the eligible pupils it would be impractical to provide a full-time bilingual education program" to the Mennies students. *N.J.S.A.* 18A:35-18b. Consequently, the Department's action in granting a waiver under these circumstances cannot be upheld.

In determining the relief to be awarded as a result of this finding, however, the Commissioner is mindful that, despite the Board's application for waiver in order to implement the Mennies Pilot Program, the record supports petitioners' contention – which the Board did not dispute through reply exceptions – that the Board considers the Mennies program a full-time program which complies with statutory requirements for bilingual education; the Commissioner is further mindful that parents of Mennies students are being given the option of enrolling their children in the full-time bilingual program at Johnstone, and that all requests for such accommodation have thus far been honored.[3] Under these circumstances, notwithstanding the holding on the waiver issue herein, the Commissioner is loath to order discontinuance of the Mennies program or consider granting remedial relief to students enrolled during the years in question on the basis of the record and argument thus far developed. Additionally, the Commissioner notes that petitioners' pleadings did, in fact, raise allegations of violation susceptible to repetition but left unresolved by the Initial Decision and proceedings thus far conducted at the OAL.

Accordingly, the Commissioner rejects the Initial Decision of the OAL and holds, for the reasons expressed above rather than those set forth by the ALJ, that the Department erred in granting a waiver to the Vineland Board of Education for the Mennies Pilot Program; the Commissioner further rejects the ALJ's conclusion that petitioners' remaining claims are mooted by such holding. The Commissioner directs the Department to reform its practices with respect to review of bilingual education program waiver requests to the extent necessary to implement the holdings of this decision, and

[3] In this regard, the Commissioner notes that parents of students eligible for bilingual education have the option of declining enrollment in bilingual education programs or of removing them once enrolled. *N.J.S.A.* 18A:35-22, 18A:35-22.1.

the instant matter is hereby remanded to the OAL for determination of 1) the compliance of the Mennies Pilot Program with statutory and regulatory requirements for full-time bilingual education and the relief to be granted upon any finding of noncompliance, and 2) petitioners' allegations of violation of State requirements for parent involvement and maintenance of a parent advisory committee on bilingual education.[4] [5] Should the Board so wish, it may continue to implement the Mennies Pilot Program during the pendency of these proceedings, provided that the parent or guardian of each student enrolled in the program is provided with full information about the program and given the option of enrolling the student in an established full-time bilingual program elsewhere in the district.

IT IS SO ORDERED.[6]

Lucille E Davy

ACTING COMMISSIONER OF EDUCATION

Date of Decision: 6/26/06

Date of Mailing: 6/26/06

[4] Petitioners' allegations based on the No Child Left Behind Act (NCLBA) are not justiciable by the Commissioner of Education. See *D.N. and J.J., on behalf of minor child, J.J. v. Board of Education of the City of Elizabeth, Union County,* Commissoner of Education Decision, February 11, 2004 (citing the 2003 U.S. District Court decision in *Association of Community Organizations for Reform Now et al. v. New York City Department of Education et al.,* holding that NCLBA does not provide for a private right of action); see also *Fresh Start Academy v. Toledo Board of Education*, 363 *F. Supp. 2d.* 910 (N.D. Ohio 2005).

[5] The Commissioner notes that, as claimed by petitioners, Keith Figgs and Annette Rudd appeared as witnesses for petitioners at the hearing on December 14, 2005, and that P-13, P-14, P-34 and P-44 were admitted into evidence on that date. (See pages 3-4 above.) It is anticipated that this will be duly reflected in the Initial Decision on Remand resulting from the Commissioner's directive herein.

[6] This decision may be appealed to the State Board of Education pursuant to *N.J.S.A.* 18A:6-27 *et seq.* and *N.J.A.C.* 6A:4-1.1 *et seq.*

State of New Jersey

OFFICE OF ADMINISTRATIVE LAW

INITIAL DECISION

EXECUTIVE COMMITTEE OF THE VINELAND SCHOOL DISTRICT'S PARENT ADVISORY COMMITTEE ON BILINGUAL EDUCATION, Petitioners, v. **BOARD OF EDUCATION OF THE CITY OF VINELAND,** Respondent.	OAL DKT. NO. EDU 6143-05 AGENCY DKT. NO. 186-8/05
AND	
EXECUTIVE COMMITTEE OF THE VINELAND SCHOOL DISTRICT'S PARENT ADVISORY COMMITTEE ON BILINGUAL EDUCATION, Petitioners, v. **BOARD OF EDUCATION OF THE CITY OF VINELAND, CUMBERLAND COUNTY, NEW JERSEY STATE DEPARTMENT OF EDUCATION, CUMBERLAND COUNTY OFFICE AND NEW JERSEY STATE DEPARTMENT OF EDUCATION, OFFICE OF SPECIALIZED POPULATIONS,** Respondents.	OAL DKT. NO. EDU 6428-05 AGENCY DKT. NO. 148-6/05 (CONSOLIDATED)

Lazlo Beh, Esq. for petitioner (South Jersey Legal Services, Inc., attorneys)

Paul Kalac, Esq., for respondent, Board of Education of the City of Vineland (Parker, McCay & Criscuolo, attorneys)

Carolyn G. Labin, Deputy Attorney General, for respondent, Department of Education (Peter C. Harvey, Attorney General of New Jersey, attorney)

Record Closed: February 6, 2006 Decided: February 10, 2006

BEFORE **BRUCE M. GORMAN**, ALJ:

STATEMENT OF THE CASE AND PROCEDURAL HISTORY

Petitioner contends that the Vineland Board of Education's (Vineland) Mennies Pilot Program does not meet the requirements of a full-time program of bilingual education and seeks reinstatement of a compliant program. The petitioner requested a fair hearing and the matter docketed at OAL Docket No. EDU 6143-05 was transmitted to the OAL on August 3, 2005, to be heard as a contested case pursuant to N.J.S.A. 52:14B-1 to 15 and 14F-1 to 13. Oral argument was scheduled on August 11, 2005, but was adjourned as respondent's counsel was on vacation. The matter was rescheduled for oral argument on August 23, 2005. The record remained open.

Petitioner appealed the action of respondent Department of Education (Department) granting a waiver to respondent Vineland Board of Education (Vineland) permitting Vineland not to provide a full time bilingual program to 3rd and 4th grade students at the Mennies School, a school contained within Vineland's system. The petitioner requested a fair hearing and the matter docketed at OAL Docket No. EDU 6428-05 was transmitted to the OAL on August 22, 2005, to be heard as a contested case pursuant to N.J.S.A. 52:14B-1 to 15 and 14F-1 to 13. By Order dated September 27, 2005, this ALJ consolidated both matters and denied respondent, New Jersey Department of Education's motion for summary decision. The matters were scheduled for a hearing on December 14, 2005, and December 22, 2005, in the Office of Administrative (OAL), at 1601 Atlantic Avenue, Sixth Floor, Atlantic City, New Jersey. Several issues were identified for adjudication. The hearing proceeded on that date

and the record remained open. On my own motion I then bifurcated the proceeding. The hearing continued on December 22, 2005. At issue on that date was only the question of whether the Department properly granted the waiver to Vineland. All other issues were reserved for subsequent adjudication.

FACTUAL DISCUSSION

The Mennies School is an elementary school contained within the Vineland School system. The Executive Committee of the Vineland District's Parent Advisory Committee on Bilingual Education (Committee) and M.N. on behalf of S.R., a child enrolled at the Mennies School, brought this action to appeal the decision of the Department to issue a waivers permitting the Vineland not to provide a full time bilingual program in grades 3 and 4 at the Mennies School for limited English proficient (LEP) students during the 2004-2005 and 2005-2006 school years.

The parties entered into a Stipulation agreeing to the truth of certain facts. The stipulated facts are as follows:

> (1) In both school years 2004/2005 and 2005/2006, the Vineland school district had or has 20 or more Spanish-speaking limited English proficient (LEP) students in its schools.
>
> (2) Specifically, in the 2004/2005 school year there were approximately 344 such students, and in the 2005/2006 school year there are approximately 373 such students.
>
> (3) During the 2004/2005 school year, the Vineland school district had approximately 59 Spanish-speaking LEP students enrolled in kindergarten classes, approximately 56 Spanish-speaking LEP students enrolled in its 1st grade classes, and approximately Spanish-speaking 36 LEP students enrolled in its 2nd grade classes.
>
> (4) During the 2004/2005 school year the Vineland school district had three bilingual kindergarten classrooms for its Spanish-speaking LEP students, three bilingual 1st

grade classrooms for its Spanish-speaking LEP students, and two bilingual 2nd grade classrooms for its Spanish-speaking LEP students.

(5) During the 2005/2006 school year, the Vineland school district has approximately 45 Spanish-speaking LEP students enrolled in kindergarten classes, approximately 45 Spanish-speaking LEP students enrolled in its 1st grade classes, and approximately 57 Spanish-speaking LEP students enrolled in its 2nd grade classes.

(6) During the 2005/2006 school year the Vineland school district has three bilingual kindergarten classrooms for its Spanish-speaking LEP students, three bilingual 1st grade classrooms for its Spanish-speaking LEP students, and two bilingual 2nd grade classrooms for its Spanish-speaking LEP students.

(7) In both school years 2004/2005 and 2005/2006, the Vineland school district had or has a full-time program of bilingual education in place for its Spanish-speaking LEP students in grades kindergarten through twelve, with the exception of the 3rd and 4th grade students at the district's Mennies School.

(8) In both school years 2004/2005 and 2005/2006, the Vineland school district submitted waiver requests to the Department of Education's Office of Specialized Populations seeking a waiver from the requirement to provide a full-time program of bilingual education to the Spanish-speaking LEP students in the 3rd and 4th grades of the district's Mennies School.

(9) The 2004/2005 waiver was submitted on February 4, 2005.

(10) The 2005/2006 waiver was submitted on August 23, 2005.

(11) At the time of its waiver request for the 2004/2005 school year, the Mennies School represented that it had 10 Spanish-speaking LEP students in its 3rd grade and 10 Spanish-speaking LEP students in its 4th grade.

(12) During the 2004/2005 school year, the district's Johnstone School had a full-time bilingual program for Spanish-speaking LEP students.

(13) The Department of Education's Office of Specialized Populations approved the Vineland school district's 2004/2005 waiver request on February 16, 2005, and the Department of Education's Cumberland County approved the waiver on February 24, 2005.

(14) The Department of Education's Office of Specialized Populations approved the Vineland school district's 2004/2005 waiver request without reviewing (a) the district's data or the district-wide enrollment of Spanish-speaking LEP students, or (b) student achievement data.

(15) At the time that the Department of Education's Office of Specialized Populations approved the Vineland school district's 2004/2005 waiver request, the Office of Specialized Populations had in its possession the following documents:

(a) The Vineland school district's LEP census count for the 2004/2005 school year (P14, admitted into evidence at 12/14/05 hearing);

(b) The Vineland school district's Three-Year Bilingual Plan for 2002-2005 [stipulated into evidence as J3].

(16) At the time of its waiver request for the 2005/2006 school year, the Mennies School represented that it had 9 Spanish-speaking LEP students in its 3rd grade and 6 Spanish-speaking LEP students in its 4th grade.

(17) During the current 2005/2006 school year, the Johnstone School has a full tie bilingual program for Spanish-speaking LEP students.

(18) As part of its 2005/2006 waiver request, the Vineland school district told the Department of Education's Office of Specialized Populations that it had allowed the parents of the Spanish-speaking LEP students who were enrolled in the Mennies School's 3rd and 4th grades the option of enrolling their children in the Johnstone School's 3rd and 4th grade bilingual classrooms.

(19) As part of its 2005/2006 waiver request, the Vineland school district also told the Department of Education's Office of Specialized Populations that the district had decided that all beginning Spanish-speaking LEP

students in the 3rd and 4th grades would be assigned to the Johnstone School's bilingual program.

(20) The Department of Education's Office of Specialized Populations approved the Vineland school district's 2005/2006 waiver request on October 17, 2005.

(21) The Department of Education's Office of Specialized Populations approved the Vineland school district's 2005/2006 waiver request without reviewing (a) the district's data on the district-wide enrollment of Spanish-speaking LEP students, or (b) student achievement data.

(22) At the time that the Department of Education's Office of Specialized Populations approved the Vineland school district's 2005/2006 waiver request, the Office of Specialized Populations had in its possession the following documents:

(a) The Vineland school district's Three Year Bilingual Plan for 2005-2008 [previously marked for identification as P5; stipulated into evidence as J4];

(b) An August 18, 2005 fax from Millie Ramos to Lori Ramella [previously marked P8 for identification; stipulated into evidence as j5];

(c) A September 28, 2005 fax from Annette Rudd to Raquel Sinai [previously marked P10 for identification; stipulated into evidence as J7].

Raquel Sinai was called to testify. Ms. Sinai is Coordinator or Bilingual and English as a Second Language (ESL) Education for the Division of Student Services at the Department. She participated in the process leading to the approval of the waiver and is one of the people who approved the waiver.

Ms. Sinai testified that the Department relied upon N.J.A.C. 6A:15-1.5(a) in approving the waiver. She agreed that Vineland must provide a bilingual program district-wide, but asserted that the Mennies School was entitled to a waiver for grades 3 and 4 because of the low number of LEP students in those grades. She stated that the

basis of the regulation is to provide flexibility to the school district, and that waiver decisions were "not an exact science".

Ms. Sinai agreed that N.J.A.C. 6A:15-1.5 is the regulation designed to enforce the provisions of N.J.S.A. 18A:35-18b. That statute authorizes the issuing of waivers from the requirement to establish a program of bilingual education mandated in N.J.S.A. 18A:35-18a. Ms. Sinai could identify no other regulation addressing the waiver issue.

Ms. Sinai testified that the Department issues waivers on a school by school and grade by grade basis. As authority for this approach, she cited N.J.A.C. 6A:15-1.5(a)4. She construed that paragraph as requiring that when the number of LEP students in two consecutive grades in any one school in the district rises to the level where the district can establish two or more self-contained or subject area classes, the district must establish a full-time bilingual program in that school.

Ms. Sinai testified there are the Department guidelines for establishing a bilingual program, but no formal regulatory scheme. She cited the various definitions contained in N.J.A.C. 6A:15-1.2 as forming the framework for the guidelines developed by the Department.

Ms. Sinai acknowledged that because of its substantial LEP population (see stipulation, supra) Vineland has an approved, district-wide Bilingual Education Program for Spanish-speaking LEP students.

LEGAL ANALYSIS

This case turns on the meaning of the language of N.J.S.A. 18A:35-18, and the regulations supporting the statute, specifically, N.J.A.C. 6A:15-1.5. N.J.S.A. 18A:35-18 states:

> a. When, at the beginning of any school year, *there are within the schools of the district* 20 or more pupils of

limited English-speaking ability in any one language classification, the board of education shall establish, for each such classification, a program in bilingual education for all the pupils therein; provided, however, that a board of education may establish a program in bilingual education for any language classification with less than 20 children therein.

b. The Commissioner of Education may waive the requirement that a board of education establish a full time bilingual education program when the board is able to demonstrate that due to the age range, grade span or geographic location of the eligible pupils it would be impractical to provide a full time bilingual education program. The waiver shall permit the *district* to implement a special alternative instructional program for as long as the conditions exist that justified the waiver. (Emphasis added)

N.J.A.C. 6A:15-1.5 states in pertinent part:

(a) A *district* may request a waiver from N.J.A.C. 6A:15-1.4(d) to establish an instructional program alternative on an annual basis with the approval of the Department of Education when there are 20 or more students eligible for the bilingual education program in grades kindergarten through 12, and the *district* is able to demonstrate that due to the age range, grade span and/or geographic location of eligible students, it would be impractical to provide a full-time bilingual program.

* * *

4. A district board of education may not request a waiver when the number of LEP students increases in one language group to the point where the district can establish two or more self-contained or subject area classes in two consecutive grades within any one school in the district, the local board of education shall establish a full-time bilingual education program *for that language group*. (Emphasis added)

In this case, the Department has granted a waiver to Vineland from the requirement that it establish a full-time bilingual education program for grades 3 and 4 in the Mennies School. Petitioner challenges the granting of that waiver. For the reasons set forth below, I **FIND** and **CONCLUDE** that the waiver should not have been granted because the Department has no authority to issue such a limited waiver.

How a statute is to be construed has been the subject of much judicial consideration. In Royal Food Distributors, Inc. v. Director of the Division of Taxation, 15 N.J. Tax 60 (1995), the Court wrote:

> In determining the meaning of a statute, it is first necessary to consider the statutory language, for "[w]hen a statute is clear on its face, a court need not look beyond the statutory terms to determine the legislative intent." State v. Churchdale Leasing, Inc., 115 N.J. 83, 101, 557 A.2d 277 (1989); see GE Solid State v. Director, Div. of Taxation, 132 N.J. 298, 307, 625 A.2d 468 (1993); Department of Law & Public Safety v. Bigham, 119 N.J. 646, 650, 575 A.2d 868 (1990); State v. Butler, 89 N.J. 220, 226, 445 A.2d 399 (1982); In re Jamesburg High School Closing, 83 N.J. 540, 547, 416 A.2d 896 (1980); Franklin Tp. v. Environmental Protection Dept., 7 N.J.Tax 224, 229 (Tax 1984), aff'd per curiam, 7 N.J.Tax 657 (App.Div.1985). A court's function is to "enforce the legislative will as expressed by the clear language of the statute, not to presume the Legislature intended something other than what is expressed by its plain language." In re Howell Tp., Monmouth County, 254 N.J. Super. 411, 419 (App.Div.1991), certif. den., 127 N.J. 548, 606 A.2d 362 (1991). Further, " '[c]onstruing' or 'interpreting' a clear and unambiguous statute is simply not permissible." MacMillan v. Director, Div. of Taxation, 180 N.J. Super. 175, 177, 434 A.2d 620 (App.Div.1981), aff'd o.b. per curiam, 89 N.J. 216, 445 A.2d 397 (1982).

Similarly, in State v. Malik, 365 N.J. Super. 267 (App. Div. 2003), the Appellate Division stated:

> We start, as we must, with the words of the statute because if the language is plain and its meaning clear, the inquiry ends there, our sole function being "to enforce [the statute] according to its terms." Sheeran v. Nationwide

> Mutual Ins. Co., Inc., 80 N.J. 548, 556, 404 A.2d 625, 629 (1979) (quoting Caminetti v. United States, 242 U.S. 470, 485, 37 S. Ct. 192, 194, 61 L. Ed. 442, 452 (1917)).

The Appellate Division in Malik went on to consider the canon of statutory construction known as ejusdem generis. The Court stated:

> Granted, that canon instructs that " 'when general words follow specific words in a statutory enumeration, the general words are construed to embrace only the objects similar in nature to those objects enumerated by the preceding specific words.' " Stryker v. Dir., Div. of Tax'n, 168 N.J. 138, 155-56, 773 A.2d 674, 684 (2001) (quoting State v. Hoffman, 149 N.J. 564, 584, 695 A.2d 236, 246 (1997)). However, the canon applies only where the Legislature's " 'expression is of doubtful meaning,' " and it is to be avoided " 'where the legislative design is expressed in plain and unambiguous terms' " Id. at 156, 773 A.2d at 684 (quoting Edwards v. Mayor of Moonachie, 3 N.J. 17, 23, 68 A.2d 744, 747 (1949)), as is the case here. Furthermore, the canon may not be used " 'to defeat the legislative purpose revealed by the provision in its entirety, giving to all the terms their normal sense and significance....' " Id. at 159, 773 A.2d at 687 (quoting Edwards, supra, 3 N.J. at 23, 68 A.2d at 747).

In this case, the language of both the statute and the regulation are clear and unambiguous. N.J.S.A. 18A:35-18b affords the Department the power waive the requirement that a *board of education* establish a full time bilingual education program. It goes on to state that the waiver "shall permit the *district* to implement a special alternative instructional program..."

In other words, the statute deals with a district-wide waiver exempting Vineland from establishing a district-wide bilingual program. Nothing in the statute empowers the Department to pick and choose among the various schools in the district. Either the district as a whole receives the waiver, or the district must establish a district-wide bilingual program.

That construction is buttressed by the language of N.J.A.C. 6A:15-1.5(a). That regulation states that a "*district* may request a waiver". It does not say that a *school* may request a waiver. Nor does it say that a district may request a waiver for a *specific school.* The regulation provides for the *district* to request the waiver. If the district is applying for the waiver, then the waiver necessarily must affect the entire district.

The Department pounces upon the words "within any one school" contained in N.J.A.C. 6A:15-1.5(a)4 as justification for issuing waivers on a school by school and grade by grade basis. The Department's reading of the regulation is flawed. N.J.A.C. 6A:15-1.5(a)4 sets a minimum standard for the establishment of a full-time bilingual program. The regulation states that a district may not request a waiver:

> ...when the number of LEP students increases in one language group to the point where the district can establish two or more self-contained or subject area classes in two consecutive grades within any one school in the district...

When that circumstance occurs in any school within the district, the regulation requires:

> ...the local board of education shall establish a full-time bilingual education program for that *language group.* (Emphasis added)

The regulation does not say that the Board shall establish a full time bilingual education program for those classes. Nor does it state that it shall establish a program for a specific school. If the LEP population of any two consecutive grades in any one school in the district allow for the establishment of two or more self-contained or subject area classes, then the district must establish a program for *that language group.* The words *that language group* mean all students within the district who are in that group.

This construction may appear draconian at first glance, but it is not so. To the contrary, the clear language of the statute and accompanying regulation simplify the process. If any language group in a district meets the minimum standards, then the

district must have a program. That program must meet the minimum standards established by the Department. But the composition of the program will be driven by the needs of the students in the language group. And the school district will have the latitude to engage in district-wide planning for the language group as a whole, rather than establishing a series of programs in specific grades in specific schools.

The latter scenario is the logical result of the Department's present waiver policy. At present, Vineland has a program for LEP children in grades 3 and 4 in the Johnstone School, but has a waiver for the same children in the Mennies School. Instead of one overall program for the entire district, the district has been balkanized, with some grades and some schools covered by a program while others are exempt. Such is not the intent of the legislative scheme.

Vineland already has a bilingual education program for Spanish-speaking LEP students as mandated by NJS 18A:35-18. The LEP students in grades 3 and 4 at the Mennies School are subject to the provisions of that program. Whether the program meets the needs of the 3rd and 4th grade LEP students at the Mennies School is not an issue I decide here, but that issue must be adjudicated within the confines of the district-wide program presently in place in Vineland, pursuant to whatever standards the Department has established for such programs. Grades 3 and 4 at the Mennies School cannot be exempted from the district-wide program through the waiver process.

The waiver issued by the Department is void because the Department has no authority to issue a waiver to a specific school or a specific grade in a specific school. A waiver under NJS 18A:35-18 can only be issued to a school district as a whole. Accordingly, the action of respondent Department of Education must be **REVERSED.**

My decision herein renders the remaining issues moot. According, the balance of the petition must be. **DISMISSED.**

ORDER

I **ORDER** that respondent Department of Education's action granting to respondent Vineland Board of Education a waiver of the requirement to a program of bilingual education for Grades 3 and 4 at the Mennies School be **REVERSED** as **VOID.**

I **ORDER** that the remaining issues of the petition be **DISMISSED** as moot.

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

This recommended decision may be adopted, modified or rejected by the **COMMISSIONER OF THE DEPARTMENT OF EDUCATION,** who by law is authorized to make a 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.

February 10, 2006
DATE

BRUCE M. GORMAN, ALJ

E-mail Receipt of Initial Decision Confirmed by the Department of Education on:

2-10-06
DATE

Mailed to Parties:

DIRECTOR AND
CHIEF ADMINISTRATIVE LAW JUDGE

FEB 16 2006
DATE

OFFICE OF ADMINISTRATIVE LAW

/sd

WITNESSES AND DOCUMENTS IN EVIDENCE

WITNESSES

For Petitioner:

Raquel Sinai

For Respondent:

None

EXHIBITS

For Petitioner:

None

For Respondent:

None

Joint:

J-1 Vineland School District's 2004/2005 waiver request [previously marked P1 for identification]

J-2 Approval of the Vineland School District's 2004/2005 waiver request by the Department of Education's Office of Specialized Populations and Cumberland County Office

J-3 Vineland School District's Three Year Bilingual Plan for 2002-2005 [previously marked P49 for identification]

J-4 Vineland School District's Three Year Bilingual Plan for 2005-2008 [previously marked P5 for identification]

J-5 August 18, 2005 fax from Millie Ramos to Lori Ramella [previously marked P8 for identification]

J-6 Vineland School District's 2005/2006 LEP census for native Spanish-speaking students [previously marked P45 for identification]

J-7 September 28, 2005 fax from Annette Rudd to Raquel Sinai [previously marked P10 for identification]

J-8 Checklist of Lori Ramella regarding the Vineland School District's Three Year Bilingual Plan for 2005-2008 [previously marked P12 for identification]

J-9 Bilingual Discussion Paper/Vision Statement from Department of Education regarding 1998 amendments to New Jersey's Bilingual Education regulations

#232-06

232-06

Agency Dkt. No. 182-5/06

JACK HAHN,	:	
PETITIONER,	:	
V.	:	COMMISSIONER OF EDUCATION
BOARD OF EDUCATION OF THE TOWNSHIP OF WALL, MONMOUTH COUNTY,	:	DECISION
RESPONDENT.	:	
	:	

The Commissioner, having determined that there is no currently adjudicable issue before her in the present case, hereby dismisses the petition without prejudice.

IT IS SO ORDERED.[1]

ACTING COMMISSIONER OF EDUCATION

Date of Decision: 6/28/06

Date of Mailing: 6/28/06

[1] This decision may be appealed to the State Board of Education pursuant to *N.J.S.A.* 18A:6-27 *et seq.* and *N.J.A.C.* 6A:4-1.1 *et seq.*

233-06

#233-06

OAL DKT. NO. EDU 900-06
AGENCY DKT. NO. 68-2/06

K.G. on behalf of minor child A.H.,	:	
PETITIONER,	:	
V.	:	COMMISSIONER OF EDUCATION
BOARD OF EDUCATION OF THE TOWNSHIP OF HAMILTON, MERCER COUNTY,	:	DECISION
RESPONDENT.	:	

The Initial Decision and record have been reviewed, and the Commissioner adopts the Initial Decision for the reasons stated therein. Accordingly, the Commissioner orders that A.H. is ineligible to attend school in respondent's district, and petitioner is liable for tuition in the amounts set forth in the Initial Decision.

Petitioner's exceptions were received on June 12, 2006, twenty-one days after the mailing of the Initial Decision and eight days past the allowable time for exceptions as set forth in *N.J.A.C.* 1:1-18.4(a). Consequently, they were not considered.

IT IS SO ORDERED.[1]

Lucille Davy
ACTING COMMISSIONER OF EDUCATION

Date of Decision: 6/28/06

Date of Mailing: 6/28/06

[1] This decision may be appealed to the State Board of Education pursuant to *N.J.S.A.* 18A:6-27 *et seq.* and *N.J.S.A.* 6A:4-1.1 *et seq.*

State of New Jersey
OFFICE OF ADMINISTRATIVE LAW

INITIAL DECISION
OAL DKT. NO. EDU 900-06
AGENCY DKT. NO. 68-2/06

K.G., ON BEHALF OF MINOR CHILD,
A.H.,
Petitioner,
v.
BOARD OF EDUCATION OF THE
TOWNSHIP OF HAMILTON,
MERCER COUNTY,
Respondent.

K.G., petitioner, pro se

Dennis M. DeSantis, Esq., for the respondent (Destribats, Campbell, DeSantis, Magee and Staub, attorneys)

Record Closed: May 9, 2006 Decided: May 18, 2006

BEFORE **JOSEPH PAONE**, ALJ:

STATEMENT OF THE CASE AND PROCEDURAL HISTORY

Petitioner K.G. appeals the determination of respondent Board of Education of the Township of Hamilton (Board) that A.H., petitioner's daughter, is ineligible to attend

the Hamilton Township schools because she is not domiciled in Hamilton. The Board is seeking reimbursement from petitioner representing tuition for the number of days of ineligible attendance.

By letter of February 3, 2006, the Board notified petitioner of its determination. On February 10, 2006, the Commissioner received petitioner's appeal. On March 10, 2006, the New Jersey Department of Education, Bureau of Controversies and Disputes, transmitted the contested case to the Office of Administrative Law. N.J.S.A. 52:14B-1 to -15; N.J.S.A. 52:14F-1 to -13. The hearing was held on May 9, 2006, and the record closed.

FINDINGS OF FACT

On September 1, 2005, petitioner enrolled her child, A.H., in kindergarten at the McGalliard School, which is in the Board's district. Petitioner listed her and A.H.'s address as: "Bradford Ave, Bldg. 11, Apt. 13, Hamilton NJ 08610." She listed A.H.'s father's address as: "249 Morris Ave, Trenton, NJ 08611." R-1.

Albert Offredo has been an investigator for the Board's Central Registration Office for the past twelve years. Prior to that, he was a Hamilton Township police officer for twenty-five years, and worked as a detective for eleven of those years, conducting many surveillances.

On January 3, 2006, Offredo was informed by a private citizen that petitioner and A.H. were living at 249 Morris Avenue in Trenton. As a result, he conducted seven separate surveillances. On January 4, 2006, Offredo arrived at petitioner's reported Bradford Avenue address in Hamilton at 8:00 a.m. and remained there until 9:00 a.m. He observed that no one left the residence during that time. At 9:10 a.m. he confirmed in a telephone call with an individual at the McGalliard School that A.H. was in attendance. Offredo inferred that A.H. arrived at the school from a location other than her Hamilton address.

On January 5, 2006, Offredo arrived at 249 Morris Avenue in Trenton at 7:45 a.m. At 8:37 a.m. he observed a white female arrive in a four-door Chrysler. Petitioner admitted that this woman was her sister. A woman and child exited the residence, entered the vehicle and the vehicle then drove off. The vehicle was followed, arrived at the school at 8:51 a.m., and entered the school driveway in order to allow the child to exit the vehicle and enter the school. Offredo confirmed with a school administrator that the child was A.H. A school secretary confirmed that A.H. was brought to school by her mother. Offredo also identified petitioner at the hearing as the woman he observed accompanying A.H.

On January 9, 2006, Offredo arrived at 249 Morris Avenue at 8:00 a.m. Offredo observed petitioner's sister arrive in the same Chrysler at 8:33 a.m. Petitioner and K.G. exited the residence and entered the vehicle, which again was followed to the school, arriving at 8:45 a.m. Similarly, on January 11, 13, 19 and 24, 2006, Offredo observed petitioner's sister arrive at 249 Morris Avenue at approximately the same time in the same car and petitioner and A.H. exit the residence and enter the vehicle. On each occasion he observed their vehicle travel to the school, arriving at approximately the same time before the commencement of each school day.

Petitioner did not dispute any of Offredo's testimony. She testified, however, that A.H. resided with her and they maintained a dual residence. Petitioner had been living with A.H.'s father, V.H., for sixteen years at 249 Morris Avenue, which is a single-family home owned by V.H.'s mother. Petitioner is not married to V.H. Due to difficulties in their relationship, she moved into her deceased father's one-bedroom apartment, located at Bradford Avenue in Hamilton, in August 2005 and remained there until mid-December 2005, when she moved back to 249 Morris Avenue to care for V.H.'s mother, who was suffering from an illness. Petitioner had received training in the personal care of elderly people. Petitioner remained at the Morris Avenue residence until mid-February 2006, when she returned to the Hamilton residence and stayed until April 17, 2006. Since then she has resided at her mother's home in Vincentown, Burlington County. There she cares for her mother's diabetic cat and watches the home while her mother is away in Arizona.

Petitioner admitted that A.H. has clothes and toys at both the Hamilton and Trenton residences. She also admitted that her thirty-five-year-old sister has resided at the Hamilton apartment with her two sons since December 2005 and continues to do so. When not living at the Hamilton apartment, petitioner's sister lives with their mother at their mother's second home in Roebling. When her mother is away, however, her mother does not trust petitioner's sister to remain in the Roebling home.

Petitioner submitted a PSE&G statement for the Hamilton apartment in her name for March 2006 showing a balance due and notice of "shut off." P-3. Petitioner claims that the balance has since been paid. Petitioner does not pay any bills herself and does not have a checking account. She gives money to her sister, who then pays the bills. On cross-examination she provided her driver's license, which was issued on February 16, 2006, and shows her residence as 249 Morris Avenue, Trenton. She claimed that the Motor Vehicle Commission would not issue a license with the Hamilton address because she did not have a lease or sufficient proof that she resided there.

Petitioner claims to have a month-to-month tenancy at the Hamilton apartment, but the landlord purportedly refuses to give her a lease until her deceased father's estate is settled. Since his death on June 17, 2005, the estate has paid the rent for the apartment for petitioner's benefit and a credit is supposed to be deducted from her portion of the estate when it is settled. To further explain the absence of a written lease, petitioner provided a letter from S.G., the administrator for the estate. P-1. The letter states that petitioner is subletting the Hamilton apartment and explains that the lease must remain under petitioner's deceased father name until the estate is "finalized."

Petitioner supports her daughter and herself with food stamps and occasionally by caring for elderly people. She is presently using her mother's car. A.H.'s father has sometimes bought clothes for A.H. or given petitioner money for A.H.'s care, but not often because he is frequently unemployed. In her concluding remarks, petitioner admitted that she did not realize that she had to live in her Hamilton apartment in order for her daughter to attend school in the district.

I **FIND** Offredo's uncontradicted testimony as fact. On the seven occasions when Offredo conducted his surveillance, petitioner and A.H. were not residing at the Hamilton residence. On the other hand, I **FIND** petitioner's testimony inconsistent and unpersuasive.

CONCLUSIONS OF LAW

"Public schools shall be free to . . . [a]ny person who is domiciled within the school district" and is over five and under twenty years of age. N.J.S.A. 18A:38-1(a) (emphasis added). The Board has determined that petitioner is not domiciled in the district. Accordingly, petitioner has "the burden of proof by a preponderance of the evidence that [A.H.] is eligible for a free education under the criteria listed," i.e., that she is "domiciled" in Hamilton. N.J.S.A. 18A:38-1(b)(2). While petitioner claims that she and her daughter reside in both Hamilton and Trenton, the issue is whether A.H. is, in fact, domiciled in Hamilton.

"Every person has a domicile at all times, and no person has more than one domicile at any one time." In re Estate of Gilmore, 101 N.J. Super. 77, 87 (App. Div.), certif. denied, 52 N.J. 175 (1968). The terms "residence" and "domicile" "are not convertible. A person may acquire several residences but only one domicile." Di Fiore v. Erie-Lackawanna R.R. Co., 67 N.J. Super. 267, 270 (Law Div. 1961).

> A person has the right to choose his own domicil, and his motive in doing so is immaterial. . . . A very short period of residence in a given place may be sufficient to show domicil, but mere residence, regardless of its length, is not sufficient. It has been said that concurrence, even for a moment, of physical presence at a dwelling place with the intention of making it a permanent abode, effects a change of domicil. And once established, the domicil continues until a new one is found to have been acquired through an application of the same tests.
>
> [Lyon v. Glaser, 60 N.J. 259, 264 (1972).]

N.J.A.C. 6A:22-3.1(a)(1) provides a further explication:

> A student is domiciled in the school district when he or she is living with a parent or legal guardian 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.

An evaluation of all the facts and circumstances of this case fails to convince this tribunal by a preponderance of the credible and competent evidence that petitioner established a domicile in Hamilton. The evidence proffered in support of the contention that petitioner established domicile in Hamilton is her uncorroborated testimony that she intended to reside there and had resided there from August to December 2005 and February to April 2006. She has also proffered a utility bill in her name. On the other hand, the evidence is quite compelling that her residence in Trenton continues to be her domicile. She has lived there for sixteen years with her daughter's father and did not move into the Hamilton apartment until shortly before A.H. commenced school. Her driver's license, which was reissued in February, contains the Trenton address. Petitioner keeps clothes and toys for A.H. at the Trenton home. On the seven separate occasions that Offredo conducted a surveillance, petitioner accompanied A.H. to school directly from her Trenton residence. Petitioner's sister also resides with her two sons in the one-bedroom Hamilton apartment, albeit, when petitioner is purportedly not present. Petitioner does not have a written lease and the rent is paid not by her, but by her deceased father's estate.

To explain the absence of a written lease, petitioner relies on the letter from S.G., the administrator of the estate (P-1). There was no testimony explaining who he is; however, he has petitioner's surname. The document is hearsay. Hearsay evidence should 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." N.J.A.C. 1:1-15.5(a). I have serious reservations about the document. No rational explanation was provided by petitioner as to why the lease had to remain in her deceased father's name. The letter is also

inconsistent with petitioner's testimony that she was renting the apartment on a month-to-month basis directly from the landlord. The letter also appears to have been specifically prepared for this litigation, undermining S.G.'s motivation. Without S.G.'s actual testimony, there is no way to test the reliability of the statements contained in his letter. Accordingly, I have given no weight to this document.

Petitioner has failed to provide any evidence, other than her self-serving testimony, that she intends to make the Hamilton address her "permanent home." Her actions have been inconsistent with the notion that she "intends to return to [her Hamilton residence] when absent and [that she] has no present intent of moving from it." N.J.A.C. 6A:22-3.1(a)(1). She has since April 17, 2006, resided in Vincentown and has not clearly stated when she intends to return to Hamilton. Petitioner testified that she is staying at her mother's Vincentown home to house-sit while her mother is away. The clear inference is that petitioner is watching the home until her mother returns. Yet, petitioner testified that her sister is living at the Hamilton apartment because her mother does not trust her sister to stay alone in the Roebling home while she is away. Petitioner's testimony begs the question: where will her mother reside when she returns – Vincentown or Roebling? Her explanation for her absence from the apartment and her sister's presence is not only illogical, but specious.

The Trenton residence apparently is maintained by V.H. and his mother, who owns the home. There is no evidence, however, how petitioner pays for the upkeep of the Hamilton apartment or whether she even has the resources or income to do so.

Not one witness was presented to corroborate petitioner's presence at the Hamilton address. Moreover, other than her name listed on the PSE&G statement for March 2006, petitioner has not provided any documents that would corroborate her permanent residence in Hamilton Township, e.g., mail, receipts, bills, bank account statements, tax returns, etc. Frankly, petitioner's name on one utility bill is simply not persuasive, especially since petitioner's sister directly pays the bill.

Petitioner's spontaneous and unsolicited remark that she did not realize that she had to live in the Hamilton apartment is quite revealing. While petitioner may have

resided at the Hamilton apartment at some time, I **FIND** that she did so only sporadically. I further **FIND** that she has failed to establish that she intended to make that apartment her permanent residence and has merely utilized the address in order that A.H. may attend a school in the district. I, thus, **CONCLUDE** that petitioner has failed to meet her burden of proof that she is domiciled in Hamilton, and, therefore, the Board is not compelled to provide A.H. with a free education.

The Board is entitled to recover tuition from a parent of a child found ineligible to attend a school in its district. N.J.S.A. 18A:38-1(b)(2). "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 . . . ." Ibid. Offredo testified that the total annual per pupil cost for the 2005-2006 school year is $8,989. The per diem rate is $49.94. There have been 153 days of ineligible attendance. Accordingly, the total due the Board as of May 9, the date of the hearing, is $7,640.82.

ORDER

I hereby **ORDER** that the Board's decision to remove A.H. from the school is **AFFIRMED**. I further **ORDER** that the Board's application for tuition reimbursement is hereby **GRANTED** in the amount of $7,640.82, plus $49.94 per day for each day A.H. attends the school after May 9, 2006.

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

This recommended decision may be adopted, modified or rejected by the **COMMISSIONER OF THE DEPARTMENT OF EDUCATION,** who by law is authorized to make a 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, 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.

5-18-06

DATE

JOSEPH PAONE, ALJ

E-mail Receipt of Initial Decision Confirmed by the Department of Education on:

5-18-06

DATE

Mailed to Parties:

MAY 22 2006

DATE

OFFICE OF ADMINISTRATIVE LAW

jh

APPENDIX

Witnesses

For Petitioner:

K.G.

For Respondent:

Albert Offredo

Exhibits

For Petitioner:

P-1 Letter from administrator of estate, dated April 27, 2006

P-2 Administration, Short Certificate

P-3 PSE&G March 2006 Statement

For Respondent:

R-1 Hamilton Township School Pupil Enrollment Form

R-2 Notice of ineligibility from Hamilton Township School District, dated February 3, 2006, sent to 249 Morris Avenue, Trenton

R-3 Notice of ineligibility from Hamilton Township School District dated February 3, 2006, sent to 11 Bradford Avenue, Hamilton

R-4 Notice of assessment for tuition dated May 3, 2006, from Central Registration, Hamilton Township School District

234-06

OAL DKT. NO. EDU 7495-03
AGENCY DKT. NO. 221-6/03

P.G., on behalf of minor child M.G.,	:	
PETITIONER,	:	
V.	:	COMMISSIONER OF EDUCATION
BOARD OF EDUCATION OF THE BOROUGH OF WOODCLIFF LAKE, BERGEN COUNTY,	:	DECISION
RESPONDENT.	:	

The Commissioner has reviewed the record of this case, the Initial Decision, and the parties' exceptions.[1]

It is undisputed that, pursuant to the "Uniform State Memorandum of Agreement between Education and Law Enforcement Officials" (the Agreement), which is approved by the New Jersey Department of Law and Public Safety (Department of Law and Public Safety) and the New Jersey Department of Education (the Department), respondent's community had a police officer who worked with the schools on matters pertaining to juveniles. That police officer was Detective James Uhl of the Woodcliff Lake police department. Detective Uhl's mission was to enhance school security, deter drug use, sales and other forms of criminal behavior in the schools, interact with the students in positive and constructive ways, enhance the working relationship between education and law enforcement officials, and facilitate the handling of delinquency complaints. To that end, he requested that the other officers in the Woodcliff Lake

[1] Since respondent was granted an extension to March 23, 2006 to file its exceptions, and since petitioner's "amended exceptions" were filed within five days of that date, petitioner's amended exceptions were deemed reply exceptions and considered by the Commissioner.

police department inform him of any incidents brought to their attention that involved Woodcliff Lake juveniles. 2T10.[2]

Such an incident was brought to his attention on Saturday, April 12, 2003, when Sergeant John Burns of the Woodcliff Lake police called him at home. 2T10 Sergeant Burns related that M.G. had been arrested by the Hillsdale police when a traffic stop of a car in which M.G. was a passenger led to the discovery of six small bags of marijuana in M.G.'s backpack. 2T10-13. Facts relating to the incident are set forth in petitioner's hearing exhibits P-15, P-16 and P-17. In Detective Uhl's experience, the possession of marijuana in multiple small bags signified an intent to distribute same. 2T12; 2T16; 2T34.

On Monday morning, April 14, 2003, Detective Uhl went to Woodcliff Lake Middle School, in which M.G. was a student, and spoke to the principal, Lauren Barbelet. 2T15. He conveyed the information referenced above about M.G.'s arrest following a traffic stop. He reported that M.G. had exited the car after the stop, and had been found later, some distance from the scene of the traffic stop, 2T30-31, with his backpack which contained six bags of marijuana. 2T15-16. Marijuana was also found in the possession of other occupants of the car. *Ibid.* Detective Uhl also shared with Barbelet his opinion that multiple small bags of marijuana indicated an intent to distribute. 1T169; 2T16.[3]

A search of M.G.'s school locker conducted by Barbelet and Detective Uhl revealed nothing but a sweatshirt. 2T17.[4] Barbelet attempted to bring M.G. to her office to discuss the matter but M.G. was not in school that day. 1T172. Bartelet's attempts to reach

---

[2] 1T = transcript of hearing dated June 28, 2005; 2T – transcript of hearing dated June 29, 2005.

[3] Detective Uhl testified that although M.G.'s parents could have contacted him for information or discussion, they did not. Uhl was aware that Detective Farrell of the Hillsdale Police Department had communicated with C.G. prior to the release of M.G. to her custody. 2T37.

[4] Barbelet testified that the fact that there was absolutely nothing but a sweatshirt, i.e., no books, etc., concerned her. 1T236.

M.G.'s mother, C.G., at home were unsuccessful, so she left a message with her home number. 1T172-73. When C.G. telephoned Bartelet at home in the evening, Bartelet related what she had been told by Detective Uhl, and explained to C.G. that M.G. would be suspended for two days (April 15 and 16), would have to pass a drug screening before reentering school, and would lose his privilege to attend the eighth grade class trip. 1T175-79. C.G. was aware of the charges against M.G., 1T252, and told Bartelet that M.G. regretted what he had done. 1T176. She offered no facts or circumstances that would mitigate the behavior. 1T252. M.G.'s April 17, 2003 drug screen was negative, so he was able to return to school after his two-day suspension (and the school holiday). 1T176-78.

Bartelet determined that an immediate suspension was warranted both for M.G.'s sake and the sake of the other students in the school: "If there [was] something going on, I think for his own good it needed to be addressed as soon as possible, and if there was anything, because it was packaged in individual bags according to what I was told by the police officer, that . . . can endanger the students in my building which range from 11 to 14 [years old]." 1T206. See also 1T252-53. Bartelet also determined that M.G. would lose his privilege to participate in the class trip because the trip was the next event/privilege on the calendar. 1T248-49. As bases for her position, Bartelet relied upon provisions in respondent's policy 5530 and regulation 5530, hearing exhibits R-2 and R-3. 1T209; 1T219, 1T249-51. Those provisions state, in pertinent part:

> Woodcliff Lake Board of Education Substance Abuse Policy 5530 (page 2).
>
> The Board prohibits the use, possession, and/or distribution of a substance on school premises, at any event away from the school premises that is sponsored by this Board, and on any transportation vehicle provided by this Board.
>
> A pupil who uses, possesses, or distributes a substance, on or off school premises, will be subject to discipline. Discipline will be

graded to the severity of the offense, the nature of the problem and the pupil's needs. Discipline may include suspension or expulsion.

AND

Woodcliff Lake Board of Education Substance Abuse Regulation 5530, Section B(1)(a).

Any violation of Board rules prohibiting the use, possession and/or distribution of a substance is a serious offense, and the pupil who violates a substance abuse rule will be disciplined accordingly. Repeated violations are more severe offenses and warrant stricter disciplinary measures. Pupils who violate the substance abuse rules will be disciplined as follows:

a. First offense: Police Intervention, 2 day suspension, parent conference, loss of school privileges. [5]

Respondent's Superintendent, Edward Michaelson, had studied the district's policies and regulations with Barbelet, 2T53, and had concurred with her determinations. 2T55. Petitioner and C.G. met with Michaelson on May 20, 2003 to discuss the matter, 2T70-71, but he implemented no change to the discipline imposed by Bartelet. 2T72. It was further Michaelson's view, as a result of many years' experience handling student discipline related to substance abuse, that many students who used drugs were aware of ways to manipulate the drug screening procedures to produce false negatives. 2T69-70. Thus, when asked whether M.G.'s negative drug screening should have mitigated the discipline M.G. received for his possession of six bags of marijuana, Michaelson testified that he "would not take the results of the drug screening to be an absolute that a child was not smoking marijuana or involved in drugs of any kind." 2T71.

[5] Related to the policy and regulation were provisions of the code of conduct in the handbook that was distributed to all students at the beginning of each year, signed by the students and their parents, and discussed during assemblies and lunch periods. The provisions explained, among other things, that school-related functions such as trips were not rights, but rather were privileges that could be revoked for just cause. They further explained that a suspension would result in the loss of a student privilege, and that the use of "banned substances" such as drugs would result in suspensions. R-5 Bartelet testified that when a student was suspended, he or she lost the next privilege on the school calendar. 1T248-49.

Barbelet planned a three-day program for M.G.'s benefit, that was designed to cover the subject matter of the class trip. She gave petitioner an outline of same. R-6. Certified teachers who could assist M.G. with the work were expected to be in school during the three days of the class trip. 1T180. In addition, at petitioner's request, Barbelet had a team meeting with M.G.'s teachers to put together a packet of M.G.'s missing assignments. 1T 181-82.[6] The packet was ready for pick-up by M.G.'s parent on Tuesday afternoon, May 27, 2003. 1T182. Upon the request of M.G.'s parents, however, M.G. did not attend school on the three days of the class trip. 1T116. C.G. picked up the work assignments that had been prepared for M.G. on the afternoon of the third day of the trip. 1T114.

It is undisputed that no record of M.G.'s arrest or discipline was forwarded to the high school that M.G. would subsequently attend. Under cover of a letter dated June 19, 2003, Barbelet provided petitioner with a copy of the educational file sent to the high school, which contained only M.G.'s report cards and standardized test labels. R-11 and R-12.

On June 24, 2003, petitioner filed an appeal with the Commissioner of Education, naming the Woodcliff Lake Board of Education, Michaelson and Bartelet as respondents. In February 2004, after answering the petition and after the adjournment of the scheduled hearing, respondents filed a motion for summary decision. On March 21, 2005, the Administrative Law Judge (ALJ) entered an order dismissing the claims against Michaelson and Bartelet, which dismissals were not appealed.

The summary judgment motion was denied, and a hearing took place on June 28 and June 29, 2005. As the ALJ noted, during the hearing petitioner submitted a "Request for Relief, Revised June 27, 2005," in which he demanded an order declaring that:

---

[6] Teacher comments on M.G.'s report card, P-12, indicated that in all his classes except possibly social studies, he was not demonstrating sufficient effort and/or was failing to submit homework assignments.

> M.G.'s suspension for the period April 15-16, 2003, was unjust and unlawful;
>
> Respondents unjustly denied M.G. a rightful opportunity to participate in the regular school program during the period of May 28-30, 2003;
>
> Respondents ignored M.G.'s right to due process; and
>
> Respondent violated *N.J.S.A.* 18A:40A-10, which requires, among other things, that school districts establish and disseminate to students and parents at the beginning of each school year, substance abuse policies which address prevention strategies, identification techniques, and referral and intervention activities.

Petitioner's Exhibit P-1.

At the outset of the Initial Decision, the ALJ addressed respondent's contention that petitioner's claims should be dismissed as moot, since M.G. transitioned to the high school, and since no record of his arrest or suspension exists in his educational file either at the middle school or at the high school. She agreed that

> Petitioner's claim relating to M.G.'s inability to participate in the eighth grade class trip is moot. In short, M.G. has already missed the event, which occurred before the petition was filed, and there is no indication that this event remains in M.G.'s educational records. As such, there is simply no relief that can be granted. . . .
>
> Further, the undersigned does not view a student's loss of the opportunity to participate in a class trip, which the school's Handbook makes clear is a privilege and not a right, as presenting an issue of great importance compelling resolution despite its mootness.
>
> Initial Decision at 11.

Next, the ALJ noted that in his post hearing submissions, petitioner did not address the issue concerning respondent's alleged violation of *N.J.S.A.* 18A:40A-10 (presumably for failure to distribute to parents changes that were made in the district's substance abuse policy). In any event, in her view: "In as much as M.G. is no longer a student at the school, this claim is also moot." Initial Decision at 12.

The ALJ regarded as related, petitioner's claims of improper suspension and failure to provide due process. She rejected petitioner's contention that due process was denied, Initial Decision at 12-14, and acknowledged that the issue of the suspension was "technically moot," Initial Decision at 12, but determined that it "stands on somewhat different footing." *Ibid.* She explained:

> Although the record reveals that information regarding this suspension, including the underlying basis for the suspension and actions taken by respondent, do not appear in any educational record maintained by the Middle School or sent to the high school, this does not equate to a rescission of the suspension. Apart from this, the propriety of the suspension, which was based on the reported conduct away from school grounds, raises an important issue that is capable of repetition warranting disposition even though it may be technically moot.
>
> *Ibid.*

Having determined that petitioner's claim about M.G.'s suspension warranted a decision on the merits, the ALJ considered "whether respondent's determination to suspend the student based on the alleged conduct reported by the police [was] within the scope of its authority or [was] otherwise arbitrary, capricious or unreasonable." Initial Decision at 14. In so doing, the ALJ reviewed the relevant statutes, regulations and policies of the respondent district.

First, the ALJ discussed *N.J.S.A.* 18A:37-2, which sets forth conduct that constitutes good cause for suspension or expulsion. Initial Decision at 15. One of the identified conducts is "[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) (emphasis added by ALJ). *Ibid.* The legislative history explained that the foregoing provision was enacted to help control the problem of youth/alcohol abuse, especially in schools. Senate Education Committee Statement, Assembly No. 689 – L.1981, c. 59.

Second, the ALJ noted that *N.J.S.A.* 18A:40A-11 requires boards of education to 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 or at school functions, or who show significant symptoms of the use of those substances on school property or at school functions." Emphasis added by ALJ; *Ibid.* She further noted that this statutory mandate is implemented via regulation *N.J.A.C.* 6A:16-4.1, which requires each district board of education to

> adopt and implement policies and procedures for the assessment, intervention, referral for evaluation, referral for treatment, and discipline of students whose use of alcohol or other drugs has affected their school performance, or for students who consume or who are suspected of being under the influence of the following substances in school or at school functions.[7]
>
> Emphasis added by ALJ; *Ibid.*

Third, the ALJ referred to respondent's substance abuse policy and regulation, emphasizing again that their language refers to substance abuse on school grounds, at school sponsored events, or in school transportation vehicles. Initial Decision at 16. She consequently reasoned that the policy did not extend to M.G.'s conduct, which was not on school property or connected with a school function. Initial Decision at 17.

Respondent argued that the second paragraph of the section concerning discipline in respondent's substance abuse policy requires discipline of all pupils who use, possess or distribute substances "on or off school premises," R-2, p.2, but the ALJ concluded that this language must be read *in pari materia* with the preceding paragraph, which appears to limit respondent's prohibition of the use, possession and/or distribution of a substance to school premises, to off-premises events sponsored by the school district, and to vehicles provided by

[7] The enumerated substances included alcohol, controlled dangerous substances as identified in *N.J.S.A.* 24:21-2, chemicals that release fumes that cause certain effects on the brain or nervous system, improperly used over-the-counter and prescription medications, and anabolic steroids.

respondent. Initial Decision at 17. She pointed out that such an interpretation comported with the language quoted above from *N.J.S.A.* 18A:40A-11 and *N.J.A.C.* 6A:16-4.1. *Ibid.*

In addition, the ALJ considered certain school law cases. In *R.R. v. Shore Regional High School Bd. of Educ.*, 109 *N.J. Super.* 337 (Ch. Div. 1970), a student was accused of stabbing a neighbor after school and, when the school authorities learned of the charges, was suspended with no formal or informal hearing prior or subsequent to his removal from school. *R.R., supra*, 109 *N.J. Super.* at 339. The ALJ in the within case acknowledged that the *R.R.* court held that the school district was authorized to discipline a student for conduct occurring off school grounds that posed a risk to the physical or emotional safety and well-being of students, faculty and property. *Id.* at 344.[8] Initial Decision at 17-18.

On the other hand, the ALJ in the instant case noted that in *F.B. and M.B. on behalf of J.B. and L.B. v. Moorestown Tp. Bd. of Educ.*, EDU 2655-99 (November 16, 1999), an Initial Decision adopted by the Commissioner of Education on February 15, 2000, the ALJ cautioned that the mere fact that a student's conduct off of school grounds is unlawful or inappropriate does not confer upon a board of education the legal authority to discipline because of it. *F.B. and M.B., supra*, at 15-16. Initial Decision at 18. In *F.B.*, students admitted to drinking beer, off of school premises, before attending a school sponsored dance. School employees supervising the dance had not observed any symptoms of intoxication, but the district none-the-less imposed suspensions on the students for violation of the substance abuse policy. The ALJ in that case ultimately concluded that the respondent's Board policy was too vague to constitute the legal authority required to impose sanctions upon the students for their conduct -

[8] In that particular case, however, the court found that the student had not been provided with even the most basic procedural due process. *Id.* at 350. The court consequently allowed the student to return to school, subject to a medical examination. *Ibid.*

which occurred one to one half hours prior to the dance, at a substantial distance from school property, and which did not affect their behavior or appearance at the dance. *F.B.* at 21.

From the foregoing statutory and decisional law the ALJ in this case concluded that the key to a determination about the appropriateness of discipline for off-school premises conduct was the nature of the nexus between the conduct and school-related activities. Initial Decision at 18. In so concluding, the ALJ specifically referred to *N.J.S.A.* 18A:37-2(c), which states that "[c]onduct of such a character as to constitute a continuing danger to the physical well-being of other pupils" constitutes good cause for suspension or expulsion. *Ibid.* The ALJ also referred to respondent's Suspension Policy, R-1, which provides that pupils may be suspended if it is "necessary to protect the physical or emotional safety and well being of the pupil or other students." Initial Decision at 19.

It was the ALJ's ultimate conclusion that M.G.'s "arrest for alleged possession of a controlled dangerous substance" did not, alone, bear a sufficient nexus to school related activities to warrant a suspension. *Ibid.* She distinguished *M.P. for A.P. v. Paramus Bd. of Educ.*, EDS 9304-99 (October 14, 1999), a case in which the discipline of a student after his arrest, during a car stop, for possession of marijuana (outside of school premises) was upheld. The ALJ concluded that the Paramus School district's evidence had been stronger, *i.e.*, Paramus had presented a police officer witness who had observed and recognized the substance found in A.P.'s possession as marijuana and had been present when A.P. had admitted that he had "weed" for himself and his friends, *M.P. for A.P., supra*, at 6. Initial Decision at 19. Because M.G. had not been charged with distribution, because, in the ALJ's opinion, no competent evidence had been presented to support an intent by M.G. to distribute, and because witness Detective Uhl had

not been directly involved in the incident leading to M.G.'s arrest, the ALJ concluded that *M.P. for A.P.* could not be used as precedent for the present case. Initial Decision at 20.

In sum, the ALJ concluded 1) that M.G.'s conduct did not fall under the purview of respondent's policy and code of conduct; 2) that there was insufficient competent evidence to support a finding that M.G.'s suspension was necessary to protect his, other students,' or teachers' physical or emotional safety and well-being or school property; 3) that there was insufficient competent evidence to support a finding that M.G.'s conduct materially interfered with the maintenance of good order in the school; 4) that respondent was without authority to impose discipline against M.G. based upon the information received regarding his arrest; and 5) that, consequently, the manner in which respondent enforced its policy was arbitrary, capricious and unreasonable, requiring a reversal and expungement of the disciplinary action taken. Initial Decision at 20-21. The Commissioner disagrees.

The Commissioner finds that it was not arbitrary and capricious for respondent to conclude that M.G.'s conduct fell under the purview of respondent's policy and code of conduct. Respondent's Policy 5610 regarding suspensions, third paragraph, states:

> No pupil otherwise eligible for attendance at the schools of this district shall be excluded from school unless that pupil has materially and substantially interfered with the maintenance of good order in the schools or unless it is necessary to protect the physical or emotional safety and well-being of the pupil or other students. [Emphasis added.]

On April 14, 2003, Detective Uhl informed Bartelet that M.G. had been arrested after the discovery of six bags of marijuana in his backpack, and that, in his experience, such packaging indicated an intent to distribute. Bartelet did not have an opportunity to speak to M.G. when she received the information from Detective Uhl because he was absent from school. When C.G. responded to Bartelet's attempts to reach her, C.G. did not deny any of the

allegations, but rather relayed M.G.'s regrets about his actions. It was not arbitrary or capricious for Bartelet to regard M.G.'s conduct, which suggested an intent to distribute marijuana to others, as a potential threat to the physical or emotional safety and well-being of M.G. or his fellow students in her school, and to impose discipline.[9] *See, e.g., Kopera v. West Orange Bd. of Educ.,* 60 *N.J. Super.* 288, 296 (App. Div. 1960) (the purpose of administrative review of a board of education's action is not to substitute the reviewer's judgment for the judgment of the board, but rather to determine whether the board had a reasonable basis for its determination about what action to take).

Both *R.R.* and *M.P. for A.P., supra,* hold that students may be disciplined for actions taken outside of the school environment, and *M.P. for A.P.,* in particular, holds that a student exhibiting conduct that implies intent to distribute a controlled dangerous substance, whether or not the behavior is discovered on school grounds, can pose a danger to the physical and emotional safety and well-being of himself and other pupils. The Commissioner does not agree that *M.P. for A.P.* can be materially distinguished from the present case. In *M.P. for A.P.*, the fact that the police officer who witnessed A.P.'s confession testified at the hearing buttressed the Paramus Board of Education's case. However, at the time the Paramus school authorities expelled A.P., no charges had been filed. The ALJ in that case recognized that Paramus had had the authority to make a disciplinary determination about A.P. - simply on the basis of information provided by the police about A.P.'s possession of marijuana for himself and his friends - without awaiting the outcome of charges and proceedings in another jurisdiction, *i.e.,* Superior Court. *M.P. for A.P., supra,* at 3.

[9] The Commissioner does not agree with petitioner that the police's confiscation of the marijuana found in M.G.'s possession neutralized the potential danger to M.G. and other students. Once behavior was disclosed that evidenced an intent to distribute, the possibility that M.G. possessed other contraband or had access to other contraband could not be discounted.

Nor did the petitioner in this case present any evidence at the hearing that rebutted Detective Uhl's report that M.G. possessed six bags of marijuana. The fact that Uhl's account of the marijuana found with M.G. was hearsay does not automatically render the evidence incompetent. *N.J.A.C.* 1:1-15.5(a) and (b). Petitioner, himself, offered into evidence three exhibits (P-15, P-16 and P-17), *i.e.*, reports by Woodcliff Lake officers Uhl and Burns, and by an eye witness to the car stop, that described M.G.'s apprehension and possession of marijuana and the circumstances leading up to same. While the reports were all hearsay, they nonetheless corroborated each other and were from three separate individuals, one of whom was a witness, Jeffrey Alboum, to the car stop and police activity. Alboum's statement did not directly refer to M.G., but it corroborated facts in Burns' and Uhl's reports of the information they had received from the Hillsdale police.

Petitioner also failed to present any expert testimony to rebut Detective Uhl's expert opinion about the significance of the packaging of M.G.'s marijuana into several bags. Nor did the ALJ find any facts or make any conclusions as to why Uhl's expert testimony should not have been accepted as evidence that M.G. intended to distribute his marijuana.

In sum, respondent presented allegations and direct testimony, such as the testimony of Barbelet that C.G. had conveyed M.G.'s remorse for the conduct that led to the discipline at issue in this case, that on April 12, 2003, M.G. possessed several bags of marijuana. Respondent also presented unrebutted expert testimony that the packaging of the marijuana indicated intent to distribute. Respondent cited statutes, regulations and policies that bestow upon school boards the authority to protect their students from physical or emotional harm, and cited the legal holding of *M.P. for A.P.*, i.e., that juvenile conduct away from school, such as

drug possession, can constitute the basis for discipline designed to protect the safety and well-being of the juvenile's fellow students at school.

Petitioner cannot prevail, in this administrative proceeding, by simply leaving respondent to its proofs. Since respondent has presented evidence to support the discipline which petitioner challenges, petitioner must present facts supporting his challenge, that are sufficient to constitute a preponderance of the credible evidence.[10] *E.A., Sr. and D.A., on behalf of minor child, E.A., Jr., v. State-operated School District of the City of Jersey City, Marie Morrissey, and Richard DiPatri*, OAL DKT. NO. EDU 3499-98, AGENCY DKT. NO. 50-3/98, decided December 23, 1999, at p.16 (the burden of proof in matters of student discipline is on petitioners, by a preponderance of the credible evidence).

Also related to the parties' respective duties to provide evidence is a Letter Order in the file, dated February 10, 2004, indicating that respondent requested police records about M.G.'s conduct on April 12, 2003, and was denied same. Thus, respondent was denied competent evidence that it could have used to support its position that M.G.'s conduct warranted concern about himself and the other students.

The authority the ALJ relied upon for the denial was *R.* 5:19-2(b), which states:

> Social, medical, psychological, legal and other records of the Court, Probation Division and law enforcement agencies pertaining to juveniles charged as delinquents shall be strictly safeguarded from public inspection and shall be made available only pursuant to *N.J.S.* 2A:4A-60 to 62. Any application for such records shall be made by motion to the court.

The ALJ interpreted *R.* 5:19-2(b) to require that applications to the court accompany <u>all</u> requests for information about juveniles. Letter Order dated February 10, 2004. However, the

[10] Petitioner's contention that the absence of a criminal charge of possession with intent to distribute bars respondent from disciplining M.G. for intent to distribute is meritless. The elements of the various criminal statutes are based on different criteria and standards, and drafted to address different objectives than the policies and regulations promulgated by school administrators.

Commissioner notes that Comment to *R.* 5:19-2(b) states that the rule provides "that unless the statute [*N.J.S.A.* 2A:4A-60] clearly applies, all applications for and resistance to disclosure must be made by motion." Emphasis added. Thus, conversely, if *N.J.S.A.* 2A:4A-60 does clearly apply to the circumstances of the case, no application to the court is needed.

The Commissioner finds that *N.J.S.A.* 2A:4A-60(c)(3) and (e) clearly do apply to the facts of this case. *N.J.S.A.* 2A:4A-60, 60.1, 61 and 62 address the conditions under which information about juveniles may be disclosed and to whom. *N.J.S.A.* 2A:4A-60(c)(3) states that:

> At the time of charge, adjudication or disposition, information as to the identity of a juvenile charged with an offense, the offense charged, the adjudication and disposition shall, upon request, be disclosed to: . . . [o]n a confidential basis, the principal of the school where the juvenile is enrolled for use by the principal and such members of the staff and faculty of the school as the principal deems appropriate for maintaining order, safety or discipline in the school or to [sic] planning programs relevant to the juvenile's educational and social development, provided that no record of such information shall be maintained except as authorized by regulation of the Department of Education . . . . [Emphasis added.]

And *N.J.S.A.* 2A:4A-60(e) provides that:

> Nothing in this section prohibits a law enforcement or prosecuting agency from providing the principal of a school with information identifying one or more juveniles who are under investigation or have been taken into custody for commission of any act that would constitute an offense if committed by an adult when the law enforcement or prosecuting agency determines that the information may be useful to the principal in maintaining order, safety or discipline in the school or in planning programs relevant to the juvenile's educational and social development. Information provided to the principal pursuant to this subsection shall be treated as confidential but may be made available to such members of the staff and faculty of the school as the principal deems appropriate for maintaining order, safety or discipline in the school or for planning programs relevant to the juvenile's educational and social development. No information provided pursuant to this section shall be maintained. [Emphasis added.]

As stated above, the Commissioner finds that respondent presented enough evidence to support the proposition that Bartelet's concerns, on April 14, 2003, about protecting students and maintaining order were reasonable, and therefore satisfied *N.J.S.A.* 2A:4A-60's requirements for obtaining information about juveniles. Thus, respondent should have received the information about the offense charged, the adjudication, and the disposition, without an application to the court. That information could have, for instance, confirmed or denied whether M.G. was found with six bags of marijuana. In a case such as the present case, it is important to avoid the creation of catch-22's by requiring parties to prove their cases in order to get access to the information that they need to prove their cases.

The Commissioner also finds that sufficient competent evidence and authority exist to support the two-day suspension imposed by respondent. The suspension period can provide for drug screening, meetings with parents, and other activities designed to ascertain whether the student has been engaging in prohibited conduct and assess the likelihood that the student will continue conduct potentially detrimental to other students. Furthermore, in dispensing student discipline it is legitimate to factor in a message to other students, *M.T. on behalf of G.T. v. Ewing Township Board of Education*, OAL DKT. NO. EDS 10042-03, AGENCY DKT. NO. 2004 8471, decided May 6, 2004, at p.5.

As to the application of *N.J.S.A.* 18A:37-2(c), the Commissioner finds that it applies to M.G.'s conduct, for the same reasons as have been articulated above. *N.J.S.A.*18A:37-2 sets forth categories of conduct that warrant suspension. Category c. is "conduct of such character as to constitute a continuing danger to the physical well-being of other pupils." Considering the warning in respondent's Policy 5530 concerning Substance Abuse, which states that the Board "will take necessary and appropriate steps to protect the

school community from harm and from exposure to harmful substances," it is clear that under respondent's Policy 5530, distribution of such substances as marijuana is considered conduct that poses a "continuing danger to the physical well-being of other pupils." It should also be noted that by the statute's own language, conduct constituting good cause for suspension or expulsion includes, but is not limited to the conduct described in sections a through j of *N.J.S.A.* 18A:37-2

In sum, for the reasons set forth above, the Commissioner dismisses petitioner's claims relating to the two-day suspension imposed upon M.G. in April 2003,[11] The Commissioner dismisses the balance of petitioner's claims for the reasons set forth in the Initial Decision. The Commissioner also adopts the ALJ's order that exhibits P-15, P-16 and P-17 be sealed.

IT IS SO ORDERED.[12]

ACTING COMMISSIONER OF EDUCATION

Date of Decision: 6/28/06

Date of Mailing: 6/29/06

[11] The Commissioner notes the mootness of the demand for expungement of the disciplinary action imposed by respondent since, as the ALJ found, there is no reference to the two-day suspension or the revocation of the class trip in M.G.'s educational record. It is not necessary to analyze whether the discipline imposed by respondent was of public importance, likely to reoccur, but capable of evading review, because the Commissioner upholds respondent's actions.

[12] This decision may be appealed to the State Board of Education pursuant to *N.J.S.A.* 18A:6-27 *et seq.* and *N.J.A.C.* 6A:4-1.1 *et seq.*

State of New Jersey
OFFICE OF ADMINISTRATIVE LAW

INITIAL DECISION

OAL DKT. NO. EDU 7495-03
AGENCY DKT. NO. 221-6/03

P.G. ON BEHALF OF MINOR CHILD, M.G.,

Petitioner,

v.

BOARD OF EDUCATION OF THE BOROUGH OF WOODCLIFF LAKE,

Respondent.

P.G., petitioner, pro se

Scott W. Carbone, Esq., for respondent (Fogarty and Hara, attorneys)

Record Closed: September 30, 2005 Decided: February 14, 2006

BEFORE **MARGARET M. MONACO,** ALJ:

STATEMENT OF THE CASE

Petitioner appeals the determination of the respondent, the Board of Education of the Borough of Woodcliff Lake (the Board), suspending his son for two days and precluding his participation in the end of the year class trip. The Board contends that petitioner's claims are moot and, alternatively, that its actions complied with applicable law and Board policy.

PROCEDURAL HISTORY

On June 24, 2003, petitioner filed a Petition with the Commissioner of Education, which named the Board, along with the Board's Superintendent of Schools (Dr. Edward Michaelson) and the Principal of Woodcliff Middle School (Lauren Barbelet) as respondents. On July 28, 2003, respondents filed an Answer and Separate Defenses to the Petition and, thereafter, filed an Amended Answer and Separate Defenses. Petitioner submitted a response on or about August 6, 2003. The Department of Education transmitted the matter to the Office of Administrative Law (OAL) where, on August 11, 2003, it was filed for hearing as a contested case. Following the adjournment of the hearing scheduled for February 9 and February 10, 2004 at respondents' request, respondents filed a motion for summary decision. Petitioner opposed the motion and submitted a cross-motion for summary decision in his favor. On March 21, 2005, the undersigned entered an Order dismissing the claims against respondents Dr. Edward Michaelson and Lauren Barbelet and otherwise denying the parties' respective motions. A hearing was held on June 28 and June 29, 2005, during which petitioner submitted a revised request for relief. Specifically, petitioner seeks an order declaring that M.G.'s suspension for the period of April 15 and April 16, 2003 was unjust and unlawful, declaring that the Board unjustly denied M.G. a rightful opportunity to participate in the regular school program during the period of the May 28 to May 30, 2003 (i.e. the class trip), declaring that the Board ignored M.G's right to due process and declaring that the Board violated N.J.S.A. 18A:40A-10. Following the conclusion of testimony, the record was kept open for the receipt of post-hearing submissions. The parties submitted briefs and reply briefs in support of their positions, after which the record was closed.[1]

[1] Under letter dated January 6, 2006, the Board submitted to the undersigned a copy of the decision issued in K.K. o/b/o P.K. v. Saddle Brook Twp Bd. of Educ., EDU 10925-04, Initial Decision, (October 31, 2005), adopted, Comm'r. (December 7, 2005). Petitioner objected to the timeliness of this submission via letter dated January 7, 2006. Inasmuch as the Board's letter forwarded a decision which is otherwise available to the undersigned and did not advance any additional legal arguments, the undersigned rejects petitioner's objection to this submission.

ISSUES PRESENTED

The initial issue presented is whether petitioner's claims should be dismissed as moot. Should dismissal not be deemed warranted, the issue then presented is whether respondent's actions complied with applicable law and Board policy and/or are arbitrary, capricious or unreasonable.

FINDINGS OF FACT

A majority of the relevant facts are not in dispute. The petitioner, who is M.G's father (Mr. G.), along with M.G.'s mother (Mrs. G.) testified at the hearing. Testifying on behalf of the Board were Superintendent Edward Michaelson, Principal Lauren Barbelet and Detective James Uhl. Based upon a review of the testimony and the documentary evidence presented, and having had the opportunity to observe the demeanor and assess the credibility of the witnesses who testified, I **FIND** the following relevant **FACTS:**

In September 2002, Lauren Barbelet served as the Principal of Woodcliff Middle School. At the beginning of the school year in September 2002, the Woodcliff Middle School Handbook (the Handbook) was distributed to the student body at the Middle School including M.G., who was then in the eighth grade. The Handbook includes a section entitled "Woodcliff Middle School Code of Conduct" (Code of Conduct). The Handbook and the Code of Conduct must be signed by both the student and the student's parent(s). On the first day of school, Principal Babelet provides a power point presentation to the students at an assembly, which addresses important sections of the Handbook and the Code of Conduct. She also speaks to the students during lunch periods regarding aspects of the Handbook and the Code of Conduct.

The Code of Conduct includes provisions addressing student privileges, prohibited activities and consequences for violations. It states in pertinent part:

STATEMENT OF STUDENT PRIVILEGES

It is important for students to understand that the following are considered privileges, not rights, and may be revoked for just cause:

- Participation in assembly programs, dances, parties, specialized school activities and other school-related functions including Team Canteen and the Ski Program
- Participation in field trips and/or extracurricular activities
- Access to the Internet and computer network
- Possession of a locker
- Participation in Promotion Ceremony and other End-of-the-Year Events

* * *

Behaviors that result in suspension from school:

- Jeopardizing the safety of others
- Fighting
- Use or possession of weapons, explosives or dangerous/inappropriate objects
- Use of banned substances such as tobacco, alcohol or drugs
- Gambling
- Damage to school and/or personal property.

* * *

Important Notice

A school suspension will result in the loss of a student privilege.

* * *

[O]ne suspension will result in the loss of one major privilege. This may include, but not be limited to one or more of the following school activities or functions:

- **Class trip ....**
- **Dinner dance ....**
- **Class Activity such as team competition, field day, etc...**
- **Graduation**

***All other trips or activities as deemed appropriate by the principal or superintendent. (R-5)**

Detective Uhl, with the Woodcliff Lake Police Department, functions as the youth or juvenile officer for the Middle School. In this capacity, Detective Uhl is apprised by other police officers in his Department of incidents involving juveniles from the town. On Saturday, April 12, 2003, Detective Uhl received a telephone call from a Sergeant with the Woodcliff Lake Police Department who advised that the Hillsdale Police Department had arrested M.G. in Woodcliff Lake and that M.G. was found by the arresting officer to have six small bags of marijuana in his backpack. The Sergeant further relayed his understanding of events that transpired prior to the arrest, which the Sergeant did not witness. Detective Uhl contacted a Detective with the Hillsdale Police Department on Monday, April 14, 2003. The Detective informed Detective Uhl that the marijuana was found in M.G.'s backpack and the department would be making a determination of the charge. The Detective also indicated that M.G. felt as if he would only be charged with possession, and not with intent to distribute, because the quantity of the substance was less than the required amount.[2]

In the morning of April 14, 2003, Detective Uhl visited Principal Barbelet at the Middle School. Detective Uhl apprised Principal Barbelet of the information he had received from the other officers. Detective Uhl informed Principal Barbelet that on Saturday, April 12, 2003, M.G. had been arrested for possession of marijuana, a controlled dangerous substance. Detective Uhl further advised Principal Barbelet that, prior to his arrest, M.G. had been a passenger in a vehicle; after the Hillsdale Police

[2] Certain police records were introduced at the hearing. (P-15 to P-17). The undersigned **ORDERS** that these records be and hereby are sealed. See N.J.S.A. 2A:4A-60.

stopped the vehicle the occupants, including M.G., ran from the vehicle; and M.G. was arrested by the Hillsdale police a short time later in Woodcliff Lake. Detective Uhl described to Principal Barbelet the information he had received regarding the marijuana found in M.G.'s possession being packaged in several small bags and stated that, in his experience, marijuana packaged in this fashion was usually intended for sale. Detective Uhl further relayed the Hillsdale Detective's advice regarding M.G.'s comment.

Based on this information, Principal Barbelet requested her secretary to send M.G. to her office. Principal Barbelet was advised that M.G. was absent from school that day. Principal Barbelet then attempted, without success, to telephone M.G.'s home. Principal Barbelet, accompanied by Detective Uhl, undertook a search of M.G.'s locker, the propriety of which petitioner does not challenge. The search was conducted at a time when the students were in class and lasted approximately 10 to 15 seconds. Only a sweatshirt was found in the locker.

After Detective Uhl left the school, Principal Barbelet unsuccessfully attempted to contact M.G.'s mother and left a message along with her home telephone number. Principal Barbelet also contacted Superintendent Edward Michaelson regarding the situation. Based upon their review of the Board's policies, a determination was made that M.G. would be suspended for two days and would lose the next scheduled student privilege, which was the eighth grade class trip to New England. Principal Barbelet explained that the choice to revoke M.G.'s participation in the class trip was not random. It was chosen because it was the next scheduled student privilege listed in the Code of Conduct. The determination to suspend M.G. for two days was based upon Board Policy 5530 and Regulation R5530, both of which are entitled "Substance Abuse." (R-2 and R-3).

Later that evening, Mrs. G contacted Principal Barbelet at home. During this conversation, Principal Barbelet advised Mrs. G. of the information that she had received from the Woodcliff Lake Police Department regarding M.G.'s arrest. Principal Barbelet further informed Mrs. G. that, under the circumstances and pursuant to Board policy, M.G. would be suspended for the next two days (April 15 and 16, 2003), would

lose his end of the year privileges and must submit to a drug screen as a condition of readmission to the school. At the hearing, Principal Barbelet stated that M.G.'s suspension was based on the information reported by the police regarding M.G.'s arrest.

The evidence reveals that there was some initial confusion on the part of Principal Barbelet regarding the type of drug screen required. On April 17, 2003, Principal Barbelet informed Mrs. G. that a urinalysis was required and the school's physician would perform the screen at the school's expense. Later that day, M.G. underwent a drug screen, which was negative for any illegal substances. Principal Barbelet was informed of the results on April 18, 2003 and M.G. was re-admitted to school the next scheduled school day. At the hearing, petitioner stated that he did not contest the school's requirement that M.G. undergo this drug screen. The record further discloses that neither Principal Barbelet nor any other school staff member ever observed or had any direct knowledge of M.G. using, being under the influence of, or in possession of any illegal substances.

On May 5, 2003, Mr. G. visited Principal Barbelet and requested copies of the Board's policies relating to the discipline imposed. Principal Barbelet credibly testified, and I **FIND**, that she explained to Mr. G. that the Board policies were in the process of being revised and edited, Principal Barbelet did not want to give Mr. G. an old version and Mr. G. could obtain the materials at the Board's office, which was located on the same campus. Principal Barbelet offered to accompany Mr. G. to the Board's office but Mr. G. declined the offer. Under letter dated May 7, 2003, Principal Barbelet forwarded to Mr. G. a copy of Board Policy 5530 and Regulation R5530. (P-7) Mr. G. did not dispute that he received this Policy and Regulation from Principal Barbelet and Superintendent Michaelson. However, Mr. G. stated that, prior to the filing of the within Petition, he was not provided with a copy of the Board's "Suspension" Policy (Policy No. 5610), which was not disputed by respondent's evidence.

By letter dated May 8, 2003, Mr. G. advised Superintendent Michaelson of his dissatisfaction with the handling of the matter and his opinion that M.G.'s discipline

violated due process and was unjust. (R-8) In the letter, Mr. G. requested an appointment with the Superintendent to discuss the matter and requested "the detail of the specific quality education plan" the district intended to provide during the three days M.G. would be in school instead of attending the class trip.

Superintendent Michaelson scheduled a meeting for May 20, 2003. In a letter dated May 12, 2003, Mr. G. requested that certain information be furnished prior to the meeting. (P-9). Superintendent Michaelson responded to this correspondence by letter dated May 14, 2003 (R-10) and met with Mr. and Mrs. G. on May 20, 2003. Following the meeting, no change was made to M.G.'s discipline.

Principal Barbelet planned an independent program for M.G. for the three days covering the class trip and provided Mr. G with an outline of the program. (R-6) The program was intended to replicate the experience of the eight grade trip. Certified teachers would also be at the school to assist M.G. during the days of the trip. After receiving the outline of the work, Mr. G. requested that M.G. be permitted to work on missing school assignments which had been identified in progress reports. Principal Barbelet held a team meeting with all of M.G.'s teachers and put together a packet of M.G.'s missing assignments. Ultimately, M.G's parents decided that M.G. would not attend school on the days of the class trip (May 28, 29 and 30, 2003). Principal Barbelet had the packet of M.G.'s assignments ready for pickup as of the afternoon of May 27, 2003. However, when Mrs. G. went to the school to pick up the assignments in the morning of May 28, 2003, the staff in the office could not locate the materials. Mrs. G. later picked up M.G.'s assignments in the afternoon on May 30, 2003.

The parties do not dispute that only M.G.'s report cards and standardized test labels were forwarded to the high school that M.G. would be attending the following school year. Principal Barbelet provided Mr. G. with a copy of the educational file that was being forwarded to the high school under letter dated June 19, 2003 (R-11 and R-12). The materials forwarded do not contain any reference to M.G.'s arrest or the subsequent action taken by the school.

LEGAL DISCUSSION AND ANALYSIS

The initial issue to be determined is whether petitioner's claims should be dismissed as moot. The Board contends that petitioner's challenge to M.G.'s suspension and the revocation of his end of the year privilege (i.e. the class trip) should be dismissed as moot in light of the fact that M.G. has graduated from the Middle School, attends high school and no record of any of the events exist on his educational record maintained by the Middle School or the records forwarded to the high school.

It is well settled that "questions that have become moot or academic prior to judicial scrutiny generally have been held to be an improper subject for judicial review." Anderson v. Sills, 143 N.J. Super. 432, 437 (Ch. Div. 1976). See Oxfeld v. New Jersey State Bd. of Education, 68 N.J. 301 (1975) (proceeding challenging the constitutionality of a school regulation governing student distribution of pamphlets on school grounds was moot where petitioners were no longer students at the school). An action is moot when it no longer presents a justiciable controversy because the issues involved have become academic, or when a decision is sought on a matter which, when rendered, will have no practical effect on the existing controversy. Victoria v. Woodbridge Twp. Bd. of Educ., 1982 S.L.D. 1, 5. "[F]or reasons of judicial economy and restraint, courts will not decide cases in which the issue is hypothetical, a judgment cannot grant effective relief, or the parties do not have concrete adversity of interest." Anderson, supra, 143 N.J. Super. at 437. When there has been a change in circumstances that raises doubts concerning the immediacy of the controversy, courts will ordinarily dismiss the case as moot, regardless of the stage to which the litigation has progressed. Ibid.

Equally well established is that the Commissioner does not decide moot issues. Farmer v. Camden Bd. of Educ., EDU 6789-01 and EDU 6790-01, Initial Decision, (November 17, 2003), adopted, Comm'r (December 23, 2003) <http://lawlibrary.rutgers.edu/oal/search.html>; Pinkham v. Borough of South River Bd. of Educ., 1974 S.L.D. 1103, 1110, modified in part and aff'd, 1975 S.L.D. 1119. See J.B. and P.B. o/b/o B.B. v. Asbury Park Bd. of Educ., 1988 S.L.D. 2303. The Commissioner has embraced "the policy of the courts to refrain from advisory opinion[s],

from deciding moot cases, or generally functioning in the abstract, and 'to decide only concrete contested issues conclusively affecting adversary parties in interest.'" Pinkham, supra, 1975 S.L.D. at 1110-11 (quoting Moss Estate, Inc. v. Metal & Thermit Corp., 73 N.J. Super. 56, 67 (Ch. Div. 1962)) (citation omitted).

Notwithstanding, courts will occasionally rule on matters which are technically moot when they present issues of substantial importance and are capable of repetition yet evading review because of the short duration of any single petitioner's interest. See In re Geraghty, 68 N.J. 209, 212-13 (1975); Advance Elec. Co. v. Montgomery Twp. Bd. of Educ., 351 N.J. Super. 160, 166-68 (App. Div. 2002), certif. den., 174 N.J. 364 (2002); In re Conroy, 190 N.J. Super. 453, 458-59 (App. Div. 1983), rev'd on other grounds, 98 N.J. 321, 342 (1985).

Judged against these standards, the undersigned agrees with the Board's position that petitioner's claim relating to M.G.'s inability to participate in the eighth grade class trip is moot. In short, M.G. has already missed the event, which occurred before the Petition was filed, and there is no indication that this event remains in M.G.'s educational records. As such, there is simply no relief that can be granted. See R.C. o/b/o M.C. v. Pemberton Twp. Bd. of Educ., EDS 4212-02, Order Denying Emergent Relief (June 17, 2002) <http://lawlibrary.rutgers.edu/oal/search.html> (portion of petition regarding student's participation in a field day was moot since the field day had already been held); R.F. v. Park Ridge Bd. of Educ., 93 N.J.A.R. 2d (EDU) 79, 81, adopted, 93 N.J.A.R. 2d (EDU) 81, aff'd., 93 N.J.A.R. 2d (EDU) 416, aff'd., A-5058-92 (App. Div. November 22, 1993), certif. den., 135 N.J. 469 (1994) (petition challenging the board's decision barring petitioners from participating in graduation events was moot where the students had graduated and no record of the incident remained in their records). Further, the undersigned does not view a student's loss of the opportunity to participate in a class trip, which the school's Handbook makes clear is a privilege and not a right, as presenting an issue of great importance compelling resolution despite its mootness.

To the extent that petitioner's revised request for relief alleges that the Board violated N.J.S.A. 18A:40A-10, petitioner's post-hearing submission does not address

this claim. Based on the testimony, it appears that this claim is predicated on the Board's alleged failure to distribute its Substance Abuse Policy. Inasmuch as M.G. is no longer a student at the school, this claim is also moot.

M.G.'s suspension, however, stands on somewhat different footing. Although the record reveals that information regarding this suspension, including the underlying basis for the suspension and actions taken by respondent, do not appear in any educational record maintained by the Middle School or sent to the high school, this does not equate to a rescission of the suspension. Apart from this, the propriety of the suspension, which was based on the reported conduct away from school grounds, raises an important issue that is capable of repetition warranting disposition even though it may be technically moot.

Turning to petitioner's claims, the record does not support that respondent failed to afford M.G. with the required due process prior to imposing the suspension. The United States Supreme Court has recognized that a student has a legitimate property interest in a public education which is protected by the Constitution's due process clause and, as a result, a student may not be denied that interest without minimum due process procedures. Goss v. Lopez, 419 U.S. 565, 574, 95 S. Ct. 729, 736, 42 L. Ed. 2d. 725, 734-35 (1975). In cases involving a short term suspension (i.e. a suspension for less than ten days) minimum due process requirements dictate that (1) the student be given oral or written notice of the charges against him; (2) if the student denies the charges, the student is entitled to an explanation of the evidence that forms the basis for the charges; and (3) the student is to be given the opportunity to present his side of the story. Id. at 581, 95 S. Ct. at 740, 42 L. Ed. 2d. at 739. The student need not be given notice of the charges in advance of the hearing. Id. at 582, 95 S. Ct. at 740, 42 L. Ed. 2d. at 739. Rather, the Court in Goss observed that "[i]n the great majority of cases the disciplinarian may informally discuss the alleged misconduct with the student minutes after it has occurred" and, "in being given an opportunity to explain his version of the facts at this discussion, the student [must] first be told of what he is accused of doing and what the basis of the accusation is." Ibid. The student is not entitled to a formal trial-type proceeding. Id. at 583, 95 S. Ct. at 740, 42 L. Ed. 2d. at 740.

Similar provisions are incorporated in the Board's "Suspension" Policy (Policy No. 5610). That Policy defines a "short term suspension" as "a suspension of not more than five school days" and provides that a "pupil may be suspended by the building principal following an informal hearing." The student is entitled to "notice of the charges and an opportunity to be heard before the person or body with the authority to reinstate the pupil." The informal hearing shall be afforded "as soon as possible after the suspension, and within one school day thereafter, except that, when extraordinary circumstances involving the health and safety of the pupils or others in the school require immediate exclusion, the hearing may be delayed to such a time as the circumstances permit."

The sequence of events in this matter was not seriously challenged. After learning of M.G.'s arrest, Principal Barbelet attempted to discuss the matter with M.G. but M.G. was not in school. Principal Barbelet's attempts to reach M.G.'s home also proved unsuccessful. Principal Barbelet eventually spoke with M.G.'s mother that night and advised her of the allegation she received from the police regarding M.G.'s arrest. According to Principal Barbelet, while Mrs. G. stated that M.G. regretted the incident, Mrs. G. did not offer any statement that mitigated or excused his conduct and Principal Barbelet then informed Mrs. G. that, pursuant to Board policy, M.G. would be suspended for two days. Although Mrs. G. described that she expressed to Principal Barbelet her exception to the suspension because she saw no connection between the incident and the school, Mrs. G. acknowledged that they spoke for a while, Mrs. G. was able to talk freely to Principal Barbelet, Mrs. G. did not deny M.G.'s arrest and Mrs. G. had the opportunity to say what she wanted to say. The record further reveals that M.G.'s parents were also provided the opportunity to later meet with the Superintendent regarding the discipline imposed.

Based upon a totality of the circumstances, I **CONCLUDE** that respondent did not violate M.G.'s procedural due process rights. Given that M.G. was not in school and could not be reached at home, Principal Barbelet took the most appropriate course under the circumstances by contacting Mrs. G. Mrs. G. was apprised of the conduct that formed the basis for the proposed suspension and was given the opportunity to

deny the conduct or present M.G.'s side of the story to mitigate the allegations that had been made. Accordingly, the prongs of the Goss test were satisfied.

In assessing the propriety of the challenged suspension, it is recognized that local boards of education have been charged by the Legislature with the orderly conduct of public schools and are vested with broad discretion in matters involving pupil discipline. K.O.H. o/b/o R.H. v. Edison Twp. Bd. of Educ., 95 N.J.A.R. 2d (EDU) 275, 276, adopted, 95 N.J.A.R. 2d (EDU) 278, aff'd, 96 N.J.A.R. 2d (EDU) 445. When a local board has acted within its authority, its actions carry a presumption of validity and will not generally be disturbed absent an affirmative showing that its judgment was arbitrary, capricious or unreasonable. Thomas v. Morris Twp. Bd. of Educ., 89 N.J. Super. 327, 332 (App. Div. 1965), aff'd., 46 N.J. 581 (1966); Quinlan v. North Bergen Bd. of Educ., 73 N.J. Super. 40, 46-7 (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). Accordingly, the critical issue presented is whether respondent's determination to suspend the student based on the alleged conduct reported by the police is within the scope of its authority or is otherwise arbitrary, capricious or unreasonable. Resolution of this issue necessitates a review of the applicable statutes and the Board's policies.

The right to an education is not without restrictions. Pupils must comply with "rules established in pursuance of law for the government of such schools...and submit to the authority of the teachers and others in authority over them." N.J.S.A. 18A:37-1. Pupils who fail to comply may be subject to suspension or expulsion. N.J.S.A. 18A:37-2. A school principal may suspend a pupil from school for "good cause" and is responsible for reporting the suspension to the district's superintendent of schools. N.J.S.A. 18A:37-4.

N.J.S.A. 18A:37-2 specifically enumerates conduct which shall constitute "good cause" for suspension or expulsion of a student. In 1981, the New Jersey Legislature amended the statute to add to the list the following conduct:

> 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.
>
> [N.J.S.A. 18A:37-2j] (emphasis added)

The Senate Education Committee Statement which accompanied the bill explained:

* * *

> The purpose of this bill...is to help control the problem of youth/alcohol abuse, especially in the schools. This bill would make possession, consumption or being under the influence of alcohol in school one of the specifically listed causes for suspension or expulsion. This bill would reaffirm the social policy of the State, and the concerted effort that is being made to eliminate youth/alcohol problems.

Pursuant to N.J.S.A. 18A:40A-11, boards of education are required to "adopt and implement, in accordance with rules and regulations promulgated by the State board, policies and procedures for the evaluation, referral for treatment and discipline of pupils involved in incidents of possession or abuse of substances as defined in ... [N.J.S.A. 18A:40A-9] on school property or at school functions, or who show significant symptoms of the use of those substances on school property or at school functions." (emphasis added). The State Board of Education has implemented this requirement through the adoption of N.J.A.C. 6A:16-4.1. In accordance with that regulation, each district board of education must "adopt and implement policies and procedures for the assessment, intervention, referral for evaluation, referral for treatment, and discipline of students whose use of alcohol or other drugs has affected their school performance, or for students who consume or who are suspected of being under the influence of" any controlled dangerous substance, as identified in N.J.S.A. 24:21-2, "in school or at school functions...."(emphasis added).

The Policy respondent adopted in compliance with these requirements provides, in pertinent part, as follows:

> The Board prohibits the use, possession, and/or distribution of a substance[3] on school premises, at any event away from the school premises that is sponsored by this Board, and on any transportation vehicle provided by this Board.
>
> A pupil who uses, possesses, or distributes a substance, on or off school premises, will be subject to discipline. Discipline will be graded to the severity of the offense, the nature of the problem and the pupil's needs. Discipline may include suspension or expulsion.... (R-2 at p.2)

To implement this Policy, respondent adopted Regulation R5530, which states:

> Any violation of Board rules prohibiting the use, possession and/or distribution of a substance is a serious offense, and the pupil who violates a substance abuse rule will be disciplined accordingly.... Pupils who violate the substance abuse rules will be disciplined as follows:
>
> a. First offense: Police Intervention, 2 day suspension, parent conference, loss of school privileges....(R-3 at p.2)

At the hearing, the school officials articulated the position that M.G.'s conduct on April 12, 2003 as reported by the police falls within the prohibition of the above articulated Policy and, therefore, resulted in the two day suspension and the loss of the school privilege in accordance with the quoted Regulation. Principal Barbelet further testified that, based on the information conveyed by the police, she believed the student's suspension was necessary for the protection of the safety and well being of the student and the other students at the school.

In his post-hearing submission, petitioner advances several arguments in support of why the imposed suspension was improper. Petitioner contends that the specified conduct does not fall within the parameters of the Policy since M.G. did not use, possess or distribute a controlled dangerous substance on school premises, at any event away from the school premises that is sponsored by the Board or on any

[3] A "substance" is defined as including controlled dangerous substances as defined in N.J.S.A. 24:21-2.

transportation vehicle provided by the Board. Among other assertions, petitioner argues that the Policy and its Regulation are not clearly written and challenges respondent's claimed authority to discipline students for alleged substance possession that does not involve the school.[4]

The specific conduct which is under scrutiny consisted of the student's arrest for alleged possession of marijuana. This alleged conduct occurred on a weekend and did not involve school property or a school function.

Succiently stated, the wording of the Board's Substance Abuse Policy does not clearly extend to the conduct under review. A reasonable interpretation of the Policy dictates that the second paragraph of the Policy, which addresses discipline for the use, possession or distribution of a controlled dangerous substance, must be read in pari materia with the first paragraph, which prohibits such conduct on school premises, at any Board sponsored event away from the school premises and on any transportation vehicle provided by the Board. This interpretation comports with the requirements of N.J.S.A. 18A:40A-11 and N.J.A.C. 6A:16-4.1, which are specifically referenced in the Policy. As quoted above, the language of that statute and regulation authorizes a board of education to discipline students involved in the possession or use of controlled dangerous substances actually occurring on school property or at school functions. Neither of these circumstances took place in the within matter.

The decisional law has recognized that there is certain conduct away from school grounds for which a board of education may impose a consequence. In R.R. v. Shore Reg. High School Bd. of Educ., 109 N.J. Super. 337, 343-44 (Ch. Div. 1970), Judge Lane explained the circumstances under which a local board is authorized to discipline students for conduct occurring off school grounds:

> There can be no doubt that the establishment of an educational program requires rules and regulations necessary for the maintenance of an orderly instructional program and the creation of an educational environment

[4] While petitioner advances a host of other claims, the undersigned finds no merit to these claims, some of which are irrelevant to the issues presented and go beyond the scope of the requested relief.

> conducive to learning. Such rules and regulations are equally necessary for the protection of public school students, faculty and property. The power of public school officials to expel or suspend a student is a necessary corollary for the enforcement of such rules and the maintenance of a safe and orderly educational environment conducive to learning. But public school officials cannot exercise this power where the activity which is the subject of the proposed suspension or expulsion does not materially and substantially interfere with the requirements of appropriate discipline in the operation of the school....
>
> In New Jersey public school officials have the authority to suspend or expel students for events happening out of school hours. Palmyra Board of Education v. Hansen, 56 N.J. Super. 567, 571 (Law Div. 1959); N.J.S.A. 18A:37-2. This court is unable to find a New Jersey decision holding that school officials have the right to expel or suspend a pupil for conduct away from school grounds, but the better view is that school authorities have such a right where such is reasonably necessary for the student's physical or emotional safety and well-being, or for reasons relating to the safety and well-being of other students, teachers or public school property. (emphasis added)

The mere fact that a student's off school grounds conduct is unlawful or inappropriate does not confer upon a board of education the legal authority to discipline because of it. F.B. and M.B. o/b/o J.B. and L.B. v. Moorestown Twp. Bd. of Educ., EDU 2655-99, Initial Decision, (November 16, 1999), adopted, Comm'r. (February 15, 2000). Plainly, the possession of marijuana cannot be condoned. However, the legal issue is not whether the conduct was appropriate but whether respondent had the authority to discipline the student under the circumstances presented. Ibid.

The statutory provisions and decisional law support the need for a sufficient connection or nexus between the student's off school grounds conduct and school-related activities. See N.J.S.A. 18A:37-2c (conduct which shall constitute good cause for suspension or expulsion includes "[c]onduct of such a character as to constitute a continuing danger to the physical well-being of other pupils"); N.J.S.A. 18A:25-2 ("A teacher or other person in authority over such pupil shall hold every pupil accountable for disorderly conduct in school and during recess and on the playgrounds of the school and on the way to and from school"); R.F., supra (students who consumed alcoholic beverages on the way to the prom were barred from participating in the year-end ceremonies). Contrast F.B. and M.B. o/b/o J.B. and L.B., supra (board was without

legal authority to impose discipline upon students for drinking in a vacant lot one to one and a half hours prior to a dance and which did not affect their behavior or appearance at the dance). Indeed, respondent's "Suspension" Policy (Policy 5610) expressly directs that "[n]o pupil otherwise eligible for attendance at the schools of this district shall be excluded from school unless that pupil has materially and substantially interfered with the maintenance of good order in the schools or unless it is necessary to protect the physical or emotional safety and well being of the pupil or other students." (R-1). The necessary connection between the student's conduct and school-related activities is further reinforced by recent amendments to the education regulations, which became effective on September 6, 2005.[5]

Simply put, the record in this case does not establish the necessary connection between the student's alleged conduct and school-related activities. The undersigned is not persuaded that a student's arrest for alleged possession of a controlled dangerous substance alone warrants his suspension from school.

The decision in M.P. for A.P. v. Paramus Bd. of Educ., EDS 9304-99 (October 14, 1999) cited in the Board's brief does not support a contrary result. That case involved disciplinary action imposed predicated on an allegation that the student was arrested for possession with the intent to distribute a controlled dangerous substance. At the hearing before the Administrative Law Judge, the respondent presented the testimony of a police officer who was part of a surveillance of the student and who was present when the student admitted that he had "weed" which was for him and his friends. The officer further testified that he recognized the vegetation and smell as that

---

[5] N.J.A.C. 6A:16-7.6, entitled "Conduct away from school grounds," states in pertinent part:

(a) School authorities have the right to impose a consequence on a student for conduct away from school grounds, including on a school bus or at a school-sponsored function that is consistent with the district board of education's code of student conduct, pursuant to N.J.A.C. 6A:16-7.1.

1. This authority shall be exercised only when it is reasonably necessary for the student's physical or emotional safety and well-being or for reasons relating to the safety and well-being of other students, staff or school grounds, pursuant to N.J.S.A. 18A:25-2 and 18A:37-2.

2. This authority shall be exercised only when the conduct which is the subject of the proposed consequence materially and substantially interferes with the requirements of appropriate discipline in the operation of the school....

of marijuana. Based upon this evidence, the Administrative Law Judge concluded that the respondent had proven, by a preponderance of the evidence, each element of the charge, i.e. the student's arrest, possession and the intent to distribute. The Administrative Law Judge further held that the possession of a controlled dangerous substance with the intent to distribute constitutes a continuing danger to the well-being of other students and constitutes good cause for suspension or expulsion pursuant to N.J.S.A. 18A:37-2(c). In contrast, as far as the record reveals, the instant matter did not involve an arrest for a distribution charge and no competent evidence was presented to support an intent to distribute on the part of the student. Additionally, the officer who testified at the hearing was not directly involved in the incident and his account as to what allegedly occurred was based on the statements of other officers, which is plainly hearsay.[6]

Based upon the foregoing, I **CONCLUDE** that the student's conduct under review does not clearly fall within the specific provisions of respondent's articulated Policy and the school's Code of Conduct.[7] I **CONCLUDE** that insufficient competent evidence exists to support of a finding that the two day suspension was necessary for the student's physical or emotional safety and well-being or for reasons relating to the safety and well-being of other students, teachers or public school property. See R.R., supra., 109 N.J. Super. at 343, Board Policy 5610. I **CONCLUDE** that insufficient competent evidence exists to support a finding that the student's reported conduct materially and substantially interfered with the requirements of appropriate discipline in the operation of the school or the maintenance of good order in the school. See R.R., supra., 109 N.J. Super. at 343; Board Policy 5610. I **CONCLUDE** that insufficient competent evidence exists to support a finding that the student's reported conduct was of such a character as to constitute a continuing danger to the physical well-being of other pupils pursuant to N.J.S.A. 18A:37-2c. Indeed, had this been the case, no explanation is offered as to how a two day suspension would address this alleged

---

[6] Similarly, the recent decision in K.K. o/b/o P.K. v. Saddle Brook Twp. Bd. of Educ., EDU 10925-04, Initial Decision (October 31, 2005), adopted, Comm'r (December 7, 2005) provides no solace to respondent since the petitioner in that case had withdrawn her complaint regarding her son's suspension.

[7] Although the Board's post-hearing submission quotes provisions of a policy, identified as Policy No. 5600, that policy was not offered at the hearing.

danger. I **CONCLUDE** that respondent was without authority to impose discipline against the student based upon the information received regarding his arrest. Accordingly, I **CONCLUDE** that the manner in which respondent enforced its policy was arbitrary, capricious and unreasonable so as to require a reversal and expungement of the disciplinary action taken.[8]

ORDER

It is hereby **ORDERED** that the determination of respondent suspending M.G. for two days be and is hereby **REVERSED** and respondent is directed to take action to ensure that all references to this disciplinary action is removed from his school records.

It is further **ORDERED** that petitioner's remaining claims be and hereby are **DISMISSED**.

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

[8] It is recommended that respondent revise its Substance Abuse Policy to clarify the proper sphere of respondent's disciplinary authority.

This recommended decision may be adopted, modified or rejected by the **COMMISSIONER OF THE DEPARTMENT OF EDUCATION,** who by law is authorized to make a 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.

February 14, 2006
DATE

Margaret M Monaco
MARGARET M. MONACO, ALJ

E-mail Receipt of Initial Decision Confirmed by the Department of Education on:

February 15, 2006
DATE

Mailed to Parties:

Laura Anderson
DIRECTOR AND CHIEF ADMINISTRATIVE LAW JUDGE

FEB 17 2006
DATE

OFFICE OF ADMINISTRATIVE LAW

db/sej

APPENDIX

List of Witnesses

For Petitioner

Mr. G.

Mrs. G.

For Respondent

Lauren Barbelet

James Uhl

Edward Michaelson

List of Exhibits in Evidence

For Petitioner

P-1 Request for Relief

P-2 Certification of Lauren Barbelet (5 pp)

P-3 Woodcliff Lake Board of Education Policy 5530, Substance Abuse (8 pp)

P-4 Woodcliff Lake School District Regulation R 5530, Substance Abuse (13 pp)

P-5 Letter from Scott W. Carbone, Esq. to Mr. G. dated January 16, 2004 (6 pp)

P-6 Letter from Mr. G. to Dr. Edward Michaelson, Superintendent, dated May 12, 2003

P-7 Letter from Dr. Edward Michaelson, Superintendent of Schools, to Mr. G. dated May 14, 2003

P-8 Laboratory Invoice for Services on April 17, 2003

P-9 Excerpts of Woodcliff Middle School Code of Conduct (4 pp)

P10 Respondents' Answer and Separate Defenses to Petitioner's Petition before the Commissioner of Education dated July 25, 2003 and Proof of Service (11 pp)

P-11 Curriculum Health, Grade 8, Safety/Substance Abuse (7 pp)

P-12 Pupil Progress Report

P-13 No exhibit admitted

P-14 Woodcliff Lake Board of Education Policy 5610, Suspension (2 pp)

P-15 Supplemental Report, dated April 12, 2003 and letter dated January 24, 2004 (2 pp)

P-16 Offense Report dated April 12, 2003

P-17 Report dated April 12, 2003

For Respondent

R-1 Woodcliff Lake Board of Education Policy 5610, Suspension (3 pp)

R-2 Woodcliff Lake Board of Education Policy 5530, Substance Abuse (8 pp)

R-3 Woodcliff Lake School District Regulation R 5530, Substance Abuse (13 pp)

R-4 Woodcliff Lake Board of Education Policy 8330, Pupil Records (6 pp)

R-5 Woodcliff Middle School Handbook, including Woodcliff Middle School Code of Conduct and letters dated September 2002 (19 pp)

R-6 Outline-Students Not Attending New England Field Trip

R-7 Letter from Lauren Barbelet, Principal, to Mr. G. dated May 7, 2003 with enclosures (41 pp)

R-8 Letter from Mr. G. to Dr. Edward Michaelson, Superintendent, dated May 8, 2003 (2 pp)

R-9 Letter from Mr. G. to Dr. Edward Michaelson, Superintendent, dated May 12, 2003

R-10 Letter from Dr. Edward Michaelson, Superintendent of Schools, to Mr. G. dated May 14, 2003

R-11 Letter from Lauren Barbelet, Principal, to Mr. G. dated June 19, 2003

R-12 Education file (11 pp)

R-13 Letter from Scott W. Carbone, Esq. to Mr. G. dated January 7, 2004 (4 pp)

R-14 Letter from Mr. G. to Scott W. Carbone, Esq. dated January 24, 2004 (5 pp)

R-15 Letter from Mr. G. to Scott W. Carbone, Esq. dated December 27, 2003 (9 pp)

R-16 Letter from Scott W. Carbone, Esq. to Mr. G. dated January 16, 2004 (6 pp)

R-17 Letter from Mr. G. to Scott W. Carbone, Esq. dated January 23, 2004

R-18 Letter from Scott W. Carbone, Esq. to Mr. G. dated January 27, 2004 (2 pp)

R-19 Excerpt of Property Settlement Agreement (3 pp)

R-20 Certification of Mrs. G. dated May 15, 2005 (2 pp)

R-21 Uniform State Memorandum Agreement between Education and Law Enforcement Officials (13 pp)

235-06

OAL DKT. NO. EDU 8827-05
AGENCY DKT. NO. 274-10/05

R.O., on behalf of minor child, R.O., II,	:	
PETITIONER,	:	
V.	:	COMMISSIONER OF EDUCATION
BOARD OF EDUCATION OF THE WEST WINDDSOR-PLAINSBORO SCHOOL DISTRICT, MERCER COUNTY,	:	DECISION
RESPONDENT.	:	

The record, Initial Decision and exceptions thereto have been reviewed.

This decision is the disposition of a second petition brought by the same party, appealing the same action by respondent. Petitioner challenges respondent's action in imposing a ten-day suspension on petitioner's minor child, R.O. II, for possession of a knife on school premises. The first petition was filed on February 7, 2005 and assigned Agency Docket Number 33-2/05, and OAL Docket Number EDU 2010-05. Petitioner claimed, in that petition, that a hearing should have preceded his child's suspension, the suspension was inappropriate, and any reference to the suspension should be removed from his child's record. Petitioner also asked for the names and identities of students who might have had knowledge of the facts related to R.O. II's possession of the knife.

Several months after the case was transmitted to the OAL, the ALJ denied an application by petitioner for leave to amend his petition, and the Acting Commissioner of

Education denied petitioner's motion for interlocutory review of the ALJ's determination. Petitioner then filed the petition in the present matter – on October 11, 2005.

The second petition, assigned Agency Docket Number 274-10/05, and OAL Docket Number EDU 8827-05, contained three counts. In the first count petitioner alleged violations of R.O. II's due process rights, reciting once again that no hearing was held by school authorities before or after the ten-day suspension, no incident report was prepared contemporaneous with the suspension, and the identities of student witnesses were not provided to petitioner. Petitioner also claimed that Assistant Principal Donna Gibbs-Nini informed a prosecutor's investigator that R.O. II "possessed the knife for the purpose to use it against the person or property of another."[1] Petitioner's second count alleged violations of the New Jersey Law Against Discrimination (NJLAD), and his third count alleged that R.O. II's civil rights had been violated. The latter claim rested on the absence of a hearing at the time of the suspension, non-disclosure of names of possible student witnesses, alleged provision of false information by Gibbs-Nini to the prosecutor's office and the OAL, and alleged concealment of information related to a possible student witness, U.D.

Petitioner's demands for relief were listed at the end of the three counts but did not specify which count was relied upon for each demand. Petitioner demanded 1) the names and identities of "student witness," 2) a formal hearing with evidence and argument, 3) removal from R.O. II's record of any reference to the suspension, and "any and all remedies" under the LAD and other applicable State and federal civil rights laws.

[1] The Commissioner sees no support in the record for this contention. The quoted language appears to be the wording of a charge entered on the bottom of a complaint signed by the prosecutor's investigator who interviewed Gibbs-Nini after the police were made aware of the incident concerning R.O. II and the knife. See Attachment 8 to petitioner's March 27, 2006 "sur-reply" to respondent's motion for summary judgment.

On November 4, 2005, the Acting Commissioner of Education dismissed the second count for lack of jurisdiction. Respondent then moved, on December 9, 2005, to dismiss the remaining counts, alleging that the second petition was untimely filed, and asserting that disposition of the second petition was subject to *res judicata* since, on February 3, 2005, in a Superior Court proceeding flowing from the same incident, R.O. II had been adjudicated delinquent for possessing a dangerous knife while on the grounds of an educational institution without written authorization from the governing officer of the institution, in violation of *N.J.S.A.* 2C:39-5(e)(2).

On March 17, 2006, the Acting Commissioner of Education adopted the OAL's Initial Decision in EDU 2010-05, granting summary judgment to respondent and dismissing R.O.'s first petition. On April 3, 2006, the ALJ issued an Initial Decision in the present matter granting respondent's motion to dismiss R.O.'s second petition, EDU 8827-05.

In analyzing the relief demanded by petitioner, the ALJ found that petitioner was "essentially making a claim under *N.J.A.C.* 6:3-6.7 [now *N.J.A.C.* 6A:32-7.7], that provides for the ability to 'expunge inaccurate, irrelevant or otherwise improper information' from the pupil's records." Initial Decision at 3-4. He further found that the claim was fully and finally adjudicated in the disposition of petitioner's first petition, wherein it was determined that the preclusive effect of the above-mentioned Superior Court judgment of delinquency barred further litigation of the matter, and provided a legitimate basis for both R.O. II's suspension and the reference to the suspension in R.O. II's school record. Initial Decision at 4.

In addition to the foregoing holding, the ALJ discussed, in dictum, some evidential issues and issues related to discovery. *Ibid.* He stated that the discovery requests in the second petition were identical to those adjudicated in the first petition, except for petitioner's

January 14, 2006 motion to compel answers to interrogatories concerning petitioner's civil rights claim. *Ibid.* He thus concluded that, even if petitioner's second petition were not untimely, and even if petitioner's claims had not already been adjudicated, the discovery requests duplicative of those in the first petition could not be relitigated, and the January 14, 2006 motion for answers to interrogatories should also not be granted, as it pertained to a claim that had been dismissed. *Ibid.*

The ALJ also discussed a certification by R.O. II that was submitted to the OAL on March 27, 2006, as a reply to respondent's reply brief for respondent's motion for summary disposition. In the certification, R.O. II stated that when he encountered Assistant Principal Gibbs-Nini on March 3, 2004, he was not in a class, but rather in a school hallway, on his way to turn in the knife he had found on the bus that morning. The ALJ noted that after two years of copious filings in three litigations, this certification was the first evidentiary document challenging respondent's evidence concerning the facts of the incident at the heart of both the two petitions before the Commissioner of Education and the charge against R.O. II in Superior Court. Initial Decision at 5. He concluded that it was "simply too late for petitioner to now argue that his son was innocently on his way to the principal's office to turn in the weapon, as opposed to being pulled out of class by a member of the school administration and then compelled to turn over the knife." *Ibid.*

Finally, with respect to petitioner's claims in the first and third counts of the second petition, the ALJ found them to be time-barred.

As to respondent's motion for sanctions against petitioner for abuse of discovery, the ALJ found that petitioner filed both duplicative pleadings and duplicative discovery requests, some of which had already been the subject of stipulations. Initial Decision at 6. Although the

ALJ was "not completely persuaded" that petitioner's discovery practices were intentionally harassing, he cautioned that "petitioner's discovery juggernaut certainly appeared poised to go over the precipice into overzealous, burdensome and harassing conduct." *Ibid.* However, the ALJ ultimately found that there was "no unreasonable failure to comply with an order of this tribunal sufficient to order sanctions under *N.J.A.C.* 1:1-14.14(a)(4)." *Ibid.* And he was "unable to conclude that petitioner has engaged in any misconduct which obstructed or tended to obstruct the conduct of the instant contested case under *N.J.A.C.* 1:1-14.14(b)." *Ibid.*

The Commissioner adopts the ALJ's determinations for the reasons expressed in the Initial Decision. Petitioner's second petition is time-barred, and the counts that were not dismissed on November 4, 2005, raise issues that have been adjudicated in prior proceedings. Further, the undisputed facts conceded by petitioner and his son, *i.e.* that R.O.II found a knife on the bus on his way to school and, despite the presence of numerous teachers and other staff persons to whom R.O. II could have relinquished the knife, still had it in his possession hours later, when the assistant principal sought him out, establish sufficient grounds for the suspension that was imposed upon R.O. II. There was no indication in any submission over the past two years that student witnesses, if any, would contradict those crucial facts. Even assuming *arguendo* that R.O. II's certification that he was on his way to return the knife when the assistant principal found him was true, the Commissioner still could not find that respondent's imposition of a ten-day suspension for R.O. II's possession of the knife in school was arbitrary or capricious. Moreover, as found in the adjudication of the first petition, R.O. II was given the process due him under the applicable authority.

Finally, the Commissioner adopts the ALJ's determination that, although petitioner has not been careful to propound reasonable discovery requests, the facts do not

support bad faith or intentional harassment, and there was no failure to comply with an order of [the OAL] severe enough to order sanctions under *N.J.A.C.* 1:1-14.14(a) or (b). The Commissioner, however, concurs with the ALJ's caution to petitioner that his discovery practices came very close to constituting "overzealous, burdensome and harassing conduct." *Ibid.*

In summary, the Initial Decision is adopted as supplemented herein, and the petition is dismissed.

IT IS SO ORDERED.[2]

Lucille E Davy

ACTING COMMISSIONER OF EDUCATION

Date of Decision: 6/28/06

Date of Mailing: 7/10/06

[2] This decision may be appealed to the State Board of Education, pursuant to *N.J.S.A.* 18A:6-27 *et seq.* and *N.J.A.C.* 6A:4-1.1 *et seq.*

State of New Jersey
OFFICE OF ADMINISTRATIVE LAW

INITIAL DECISION
SUMMARY DECISION
OAL DKT. NO. EDU 8827-05
AGENCY DKT. NO. 274-10/05

R.O., ON BEHALF OF MINOR CHILD, R.O., II,
Petitioner,
v.
BOARD OF EDUCATION OF WEST WINDSOR-PLAINSBORO SCHOOL DISTRICT, MERCER COUNTY,
Respondent.

R.O., petitioner, pro se

Eric L. Harrison, Esq., for respondent (Methfessel & Werbel, attorneys)

Record Closed: April 3, 2006 Decided: April 3, 2006

BEFORE **RICHARD F. WELLS**, ALJ:

STATEMENT OF THE CASE

Petitioner challenges a ten-day suspension imposed upon his minor son due to his possession of a weapon on school property. Petitioner seeks a due-process hearing

and a reversal or expungement of this suspension. Petitioner argues that the suspension was based upon false information and that no hearing was afforded him before the suspension was imposed. Additionally, petitioner argues that the respondent school district withheld the identity of witnesses and other information necessary for a full and complete defense of the allegations lodged against his son. Additionally, petitioner asserts that representatives of respondent school district were guilty of intentional prevarication to his detriment. Additionally, petitioner asserts that the suspension imposed was a function of respondent's discriminatory practices and a denial of his son's civil rights.

Respondent has moved for summary decision under N.J.A.C. 1:1-12.5. Respondent argues that the gravamen of this matter has already been fully and finally adjudicated in the Superior Court of New Jersey, as well as in the Office of Administrative Law ("OAL") under docket number EDU 2010-05. Respondent moves for summary dismissal and asserts that the instant matter brought by petitioner is time-barred under N.J.A.C. 6A:3-1.3. Respondent asserts that the within matter is barred under the doctrine of res judicata. Additionally, respondent maintains that petitioner's discovery requests have previously been addressed in the earlier filed action in the OAL, and petitioner's entitlement to the information has been fully and finally determined. Respondent further alleges that petitioner's multiple and voluminous discovery requests are duplicative and/or seek information not likely to lead to admissible evidence and, as such, are burdensome and oppressive. As a result, respondent seeks sanctions for petitioner's alleged discovery abuses.

PROCEDURAL HISTORY

This tribunal issued its Initial Decision-Summary Decision on November 7, 2005, under OAL Dkt. No. EDU 2010-05. The Initial Decision held that respondent's motion for summary judgment was granted and petitioner's action to expunge inaccurate, irrelevant, or otherwise improper information from his records was dismissed. On October 11, 2005, petitioner filed the instant Petition under docket number OAL EDU 8827-05 that consisted of three separate counts. On November 4, 2005, the Acting Commissioner of the Department of Education dismissed the second count of the

Petition on the grounds that it sought relief under the Law Against Discrimination and, as such, that particular claim for relief fell within the jurisdiction purview of the Division on Civil Rights, rather than the Commissioner of Education. On November 22, 2005, the remaining two counts of the Petition were transmitted to the OAL, where the matter was filed as a contested case. Earlier, on or about October 31, 2005, respondent filed its Answer to the Petition. On December 9, 2005, respondent filed the instant motion for summary dismissal pursuant to N.J.A.C. 1:1-12.5. By letter dated December 19, 2005, this tribunal advised counsel for both parties that it would await the Commissioner's decision on petitioner's exceptions filed to the grant of summary decision under OAL Dkt. No. EDU 2010-05 before deciding respondent's motion for summary decision in the instant matter, i.e., OAL Dkt. No. EDU 8827-05.

On March 17, 2006, the Acting Commissioner of Education adopted this tribunal's Initial Decision-Summary Decision under OAL Dkt. No. EDU 2010-05, and ordered that respondent's motion for summary judgment was granted and the dismissal of the Petition filed under OAL Dkt. No. EDU 2010-05. By letter dated March 25, 2006, petitioner advised of his intention to withdraw his pending appeal to the State Board of Education.

For purposes of the instant motion for summary decision, as well as the attendant discovery disputes, this tribunal considered the papers filed by respondent dated December 8, 2005, January 19, 2006, March 22, 2006, and March 23, 2006. Concomitantly, this tribunal considered the papers filed by petitioner dated January 14, [2006], January 25, 2006, March 20, 2006, March 22, 2006, and March 25, 2006.

FINDINGS OF FACT AND CONCLUSION OF LAW

In the matter currently before this tribunal, the gravamen of the Petition filed by petitioner is a challenge to the ten-day suspension that petitioner's son received for possession of a knife on school premises. Petitioner seeks the removal of the suspension from his son's school records. As such, petitioner is essentially making a claim under N.J.A.C. 6:3-6.7 that provides for the ability to "expunge inaccurate,

irrelevant or otherwise improper information" from the pupil's records.[1] I **FIND** that these issues have been previously fully and finally adjudicated. R.O., On Behalf of Minor Child, R.O., II v. Bd. of Educ. of the West Windsor-Plainsboro Sch. Dist., Mercer County, EDU 2010-05, Initial Decision (Nov. 7, 2005), adopted, Comm'r (March 17, 2006) <http://lawlibrary.rutgers.edu/oal/search.html>. I **FIND** that the issue of the preclusive effect of the Superior Court judgment was fully litigated in the initial OAL action brought under docket number EDU 2010-05. Accordingly, I **FIND** that petitioner is precluded from relitigating this matter. Electro-Miniatures Corp. v. Wendon Co., 889 F.2d 41, 44-46 (3d Cir. 1989); Department of Law & Pub. Safety, Div. of Gaming Enforcement v. Gonzalez, 273 N.J. Super. 239, 242 (App. Div. 1994).[2]

Although the above finding is dispositive, this tribunal finds it worthwhile to address the ancillary discovery issues. With regard to petitioner's request for the names and identities of student witnesses and/or informants, as well as whether the identity of any such individuals is protected under the Family & Educational Records Privacy Act of 1974 ("FERPA"), I **FIND** that these issues have similarly been fully adjudicated in the initial OAL action. At that time, this tribunal issued lengthy discovery orders under OAL Dkt. No. EDU 2010-05 dated June 13, 2005, and August 29, 2005 that addressed and disposed of those issues. I **FIND** that petitioner is precluded from relitigating those discovery issues in the instant case before this tribunal. The OAL Orders of June 13, 2005, and August 29, 2005, under OAL Dkt. No. EDU 2010-05, are hereby incorporated by reference and made a part hereof (C-1 and C-2 attached hereto). Parenthetically, I note that petitioner's motion to compel answers to interrogatories, dated January 14, [2006], concerned petitioner's "civil rights violation claim." However, as set forth in the above Procedural History, on November 4, 2005, the Acting Commissioner of the Department of Education dismissed petitioner's count that sought relief under the Law Against Discrimination on the grounds that such an action more properly should be filed with the Division on Civil Rights.

---

[1] N.J.A.C. 6:3-6.7 was repealed effective September 6, 2005, and recodified under N.J.A.C. 6A:32-7.7. See, 37 N.J.R. 1982(a).

[2] The Initial Decision, dated November 7, 2005, under docket number EDU 2010-05, as well as the Decision of the Acting Commissioner of Education, dated March 17, 2006, under docket number EDU 2010-05 are hereby incorporated by reference and made a part hereof (C-3 and C-4 attached hereto).

This tribunal notes that in its Initial Decision under EDU 2010-05, decided November 7, 2005, there was the observation that it did not appear petitioner was mounting a challenge to the duration of the suspension given the absence of appropriate affidavits or other suitable information on the subject (Initial Decision, EDU 2010-05, p. 6, fn. 4). A review of the Petition filed under OAL Dkt. No. EDU 8827-05 similarly does not serve to put respondent on notice that the duration of the suspension is somehow being challenged. Rather, as noted hereinabove, petitioner again seeks the removal of the suspension from petitioner's son's school record. As set forth above, the propriety of petitioner's claim in that regard has been disposed of and will not be relitigated. Indeed, given the lengthy history of this matter and notwithstanding all of the voluminous filings made, this tribunal notes that it was not until March 27, 2006, that a certification of petitioner's son was offered to this tribunal that challenged any of the operative facts heretofore relied upon respondent. At this juncture of this matter, I **FIND** that it is simply too late for petitioner to now argue that his son was innocently on his way to the principal's office to turn in the weapon, as opposed to being pulled out of class by a member of the school administration and then compelled to turn over the knife.[3]

A review of the First Count and the Third Count of the Petition filed in the instant matter does not reveal that petitioner is raising disparate treatment or selective discriminatory enforcement in his efforts to expunge the alleged inaccurate, irrelevant, or otherwise improper information in his son's school record. Accordingly, I do not find that such an assertion has been either pled or established sufficient to preclude the grant of summary decision. This topic was similarly addressed in the Initial Decision, dated November 7, 2005, under OAL Dkt. No. EDU 2010-05. Of course, this decision is not intended to be dispositive of any claims petitioner may have under the New Jersey

[3] The certification signed by petitioner's son, dated March 22, 2006, was tendered to this tribunal as an apparent reply to respondent's Reply Brief that noted that petitioner's opposition to the motion for summary decision contained hearsay only and was devoid of sufficient, competent, and credible evidence. The Uniform Administrative Procedure Rules do not provide for the opportunity to reply to reply briefs. (See, N.J.A.C. 1:1-12.2(d).) Putting technicalities aside, it is this tribunal's conclusion that the student certification, dated March 22, 2006, is insufficient at this point to create a genuine issue of material fact sufficient to prevent the grant of summary decision. As discussed above, the matter has already been decided. This tribunal will not engage in speculation as to what may have occurred in the Superior Court Juvenile proceeding, had petitioner elected to put his son on the witness stand and testify that he simply found the knife and was on his way to turn it in, but before he got to the principal's office, he was interdicted by school staff.

Law Against Discrimination or other applicable federal and state civil rights laws. The record is clear that that particular aspect of petitioner's dispute as raised in the dismissed Second Count of the Petition have been reserved as properly under the purview of the Division on Civil Rights.[4]

Lastly, with regard to respondent's motion for sanctions due to petitioner's alleged discovery abuse, I do find that petitioner has served a multitude of discovery requests in the instant action, as well as the earlier filed action in the OAL, much of which is duplicative. Additionally, and as set forth above, I am satisfied that the relief requested in the instant matter under OAL Dkt. No. EDU 8827-05 is duplicative of the relief sought in the matter under OAL Dkt. No. EDU 2010-05. However, I am not completely persuaded that the mountain of discovery launched on respondent, although often duplicative and even in some circumstances subject to earlier stipulations, was ill-intentioned and purposely harassing, as opposed to the zealous representation of a client. I might add, however, that it is my conclusion that petitioner's discovery juggernaut certainly appeared poised to go over the precipice into overzealous, burdensome, and harassing conduct. Although I did advise counsel by letter dated September 18, 2005, that I would review the discovery efforts to determine if the information sought is consistent with the spirit and purpose of the discovery rules under the Administrative Procedure Act, it is my conclusion that there is no unreasonable failure to comply with an order of this tribunal sufficient to order sanctions under N.J.A.C. 1:1-14.14(a)4. Additionally, I am unable to conclude that petitioner has engaged in any misconduct which obstructed or tended to obstruct the conduct of the instant contested case under N.J.A.C. 1:1-14.14(b). Accordingly, respondent's motion for sanctions in the form of recoupment of attorneys' fees is **DENIED**.

[4] Consistent with the above, this tribunal makes no finding as to whether any action plaintiff may file or may have filed with the Division on Civil Rights is time-barred. However, inasmuch as the underlying incident and suspension from school took place on March 3, 2004, N.J.S.A. 6A:3-1.3(i) should render Count One and Count Three time-barred and therefore provide separate grounds for dismissal of the instant Petition. See, e.g., Markulin and Neptune Township Educ. Ass'n v. Bd. of Educ. Bd. of Township of Neptune, 92 N.J.A.R.2d (EDU) 406.

CONCLUSION

For the reasons set forth hereinabove, I am satisfied from the papers and supporting documentation submitted, that there is no genuine issue as to any material fact challenged and that the moving party, Board of Education of the West Windsor-Plainsboro School District, Mercer County, is entitled to prevail as a matter of law. Accordingly, respondent's motion for summary decision is **GRANTED**, and the instant Petition is hereby **DISMISSED**. Respondent's motion for sanctions in the form of attorneys' fees 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 (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.

4-3-06

DATE

RICHARD F. WELLS, ALJ

E-mail Receipt of Initial Decision Confirmed by the Department of Education on:

4-3-06

DATE

Mailed to Parties:

APR 5 2006

DIRECTOR AND CHIEF ADMINISTRATIVE LAW JUDGE

DATE

OFFICE OF ADMINISTRATIVE LAW

jh

State of New Jersey
OFFICE OF ADMINISTRATIVE LAW

ORDER

OAL DKT. NO. EDU 2010-05

AGENCY DKT. NO. 33-2/05

R.O., ON BEHALF OF MINOR CHILD,

R.O., III,

Petitioner,

v.

BOARD OF EDUCATION OF THE WEST WINDSOR-PLAINSBORO SCHOOL DISTRICT, MERCER COUNTY,

Respondent.

Rotimi A. Owoh, petitioner, pro se

Eric L. Harrison, Esq., for respondent (Methfessel & Werbel, attorneys)

BEFORE **RICHARD F. WELLS**, ALJ:

Petitioner brings the instant discovery motion.

The questions presented are:

(1) Whether respondent School Board's answers to the petitioner's interrogatories are sufficient?

(2) Whether there has been a juvenile adjudication of this matter?

(3) What is the legal basis for the respondent's privilege claim that it does not have to identify the student witnesses/complainants?

EXHIBIT C-1
PENGAD-Bayonne, N. J.

FACTS

On March 3, 2004, R.O. was suspended for ten days from Community Middle School. Community Middle School is a part of the West Windsor Plainsboro School District. R.O. was suspended by the Assistant Superintendent of School, without a hearing, based on a review of the record. R.O. was suspended for possessing a knife on school property. An informant told Assistant Principal Donna Gibbs-Nini that R.O. was in possession of a knife. Ms. Nini escorted R.O. to the main office where, upon questioning, R.O. took the knife out of his pocket and placed it on the table. R.O. claimed that he had found the knife on the school bus in the morning and was going to turn it in to school authorities. He supplied the name of a witness, who later corroborated his explanation. Ms. Nini learned that R.O. was encouraged by students to turn the knife over. Ms. Nini turned the knife over to Detective Guy Amour of the Plainsboro Police Department. This resulted in juvenile proceedings in Superior Court, Family Part, County of Middlesex, for possession of a weapon for unlawful purposes. On December 10, 2004, Judge Dennis Nieves of Middlesex Superior Court denied petitioner's motion that the state disclose to the defense the identity of the informant.

Petitioner is seeking to have the record of the suspension expunged from R.O.'s school record. Petitioner argues that the suspension, without a hearing, was in violation of R.O.'s due process rights. Petitioner seeks an interim order, directing respondent to respond to interrogatories concerning the names of any witnesses against R.O., and the names of various other students involved with the incident.

DISCUSSION

I. Existence of a Juvenile Adjudication

Respondent has submitted the decision by the Middlesex County Superior Court denying petitioner's motion to compel the State to disclose the identity of student witnesses involved in this case. Respondent argues that res judicata applies to the dispute over the interrogatories. Similar to the concept of res judicata is the doctrine of collateral estoppel. Because the terms res judicata and collateral estoppel have been used interchangeably, leading to possible confusion

between the terms, courts have replaced the term "collateral estoppel" with "issue preclusion" and "res judicata" with "claim preclusion." Pittman v. LaFontaine, 756 F. Supp. 834, 841 (D. N.J. 1991). Claim preclusion and issue preclusion are applicable to administrative actions. See, City of Hackensack v. Winner, 82 N.J. 1, 31 (1980) ("...there are important goals to be achieved from the prudent and selective application in an administrative proceedings of such doctrines as res judicata, collateral estoppel and the single controversy rule"); Taylor by Taylor v. Englehard Industries, 230 N.J. Super. 245, 253 (App. Div. 1989) ("The principals of res judicata and collateral estoppel are applicable to administrative hearings.")

A. Claim Preclusion

Claim preclusion prevents the same parties from re-litigating the same cause of action that was the subject matter of a judgment between the parties. Electro-Miniatures Corp v. Wendon Co., Inc., 889 F.2d 41, 44 (3d Cir. 1989)(citations omitted). In this case, the judgment in the Superior Court was not between petitioner and the respondent. Instead, the judgment was between the petitioner and the State of New Jersey. Thus, claim preclusion does not apply here.

B. Issue Preclusion

Issue preclusion can be asserted in an administrative proceeding to preclude re-litigating an issue that had been litigated in court. 37 New Jersey Practice, Administrative Law and Practice Second Edition, § 6.27, at 345 (Steven L. Lefelt) (rev. 2d ed. 2000). Issue preclusion "bars re-litigation of any issue which was actually decided in a prior action, generally between the same parties involving a different claim or cause of action." State v. Gonzalez, 75 N.J. 181, 186 (1977). For issue preclusion to apply, the following requirements must be met:

(1) The identical issue was decided in a prior adjudication;
(2) There was a final judgment on the merits;
(3) The party against whom the bar is asserted was a party or in privity with a party to the prior adjudication; and
(4) The party against whom the bar is asserted had a full and fair opportunity to litigate the issue in question.

[Board of Trustees of Trucking Employees of North Jersey Welfare Fund, Inc v. Centra, 983 F.2d 495, 505 (3d Cir. 1992).]

In Superior Court, Judge Nieves denied petitioner's motion to compel the State to disclose the identity of the student informant. The issue is identical because, in the present case, the petitioner is seeking an Order to compel the respondent to disclose the identities of the student informant and other student witnesses. Issue preclusion is appropriate against R.O., who was a party to the adjudication in Superior Court and is a party to the present action. R.O. had a full and fair opportunity to make his motion in Superior Court and the issue was decided there.

"The doctrine of issue preclusion does not require a decision on the ultimate issue, only a final determination on a specific issue to preclude re-litigation of the particular issue." Ibid. The Centra court cited the following example:

> P is discharged from his employment in a state agency on the ground of gross insubordination. P brings an action under appropriate state procedure contesting the propriety of the discharge, but expressly reserves any possible federal claim, a reservation in which the state court acquiesces. Judgment is against P on a finding that he was guilty of gross insubordination. The rule of claim preclusion does not prevent P from maintaining any action in federal court, but the issue of insubordination may not be relitigated, assuming the state court proceeding afforded a fair opportunity to litigate the issue.
>
> [Id. at 505 (quoting Restatement (Second) of Judgments, Section 86, cmt. F, illus 7 (1982)).]

The case in Superior Court was an adjudication on a weapons possession charge. It is not known what the final decision on the ultimate issue was. However, as seen from the above example, issue preclusion should apply here because the Superior Court judge did make a final decision on the motion of petitioner to compel disclosure of the student informant's name.

II. Legal Basis for Respondent's Privilege Claim[1]

Respondent claims that it cannot respond to petitioner's request for the names of any student witnesses based on 20 U.S.C.A. 1232g, known as the Family & Educational Records Privacy Act of 1974 ("FERPA"). Specifically, respondent claims that disclosure is prohibited by 20 U.S.C.A. 1232g(b)(1) and 20 U.S.C.A. 1232g(b)(2), which provide:

> No funds shall be made available under any applicable program to any educational agency or institution which has a policy or practice of permitting the release of education records (or personally identifiable information contained therein other than directory information, as defined in paragraph (5) of subsection (a) of this section) of students without the written consent of their parents to any individual, agency, or organization ...
>
> [20 U.S.C.A. 1232g(b)(1)]
>
> No funds shall be made available under any applicable program to any educational agency or institution which has a policy or practice of releasing, or providing access to, any personally identifiable information in education records other than directory information ...
>
> [20 U.S.C.A. 1232g(b)(2)]

20 U.S.C.A. 1232g(a)(4)(A) defines "education records" as records, files, documents and other materials that "contain information directly related to a student" and that are maintained by the educational agency. The term "directory information" is defined by 20 U.S.C.A. 1232g(a)(5)(A) to include a student's name, address and telephone number. Under 34 C.F.R. 99.3, the term "personally identifiable information" includes but is not limited to the student's name.

[1] Since issue preclusion applies (see discussion in Part I), Part II, regarding the student informant's name becomes moot. However, Respondent claims a FERPA privilege for the identities of other students.

The sub-issue to be resolved is whether a student's name is "personally identifiable information" such that it cannot be disclosed without parental consent or whether it is "directory information" such that it may be disclosed.

A. Is a student's name personally identifiable information or directory information?

1. Relevant Case Law

FERPA does not directly prohibit disclosure of educational records. Bauer v. Kincaid, 759 F. Supp. 575, 589 (W.D Mo. 1991). Instead, FERPA is a law that provides for the withholding of federal funds otherwise available to an educational institution for the disclosure of educational records. Ibid. The function of FERPA is to protect educationally related information. Ibid.

The following two cases discuss whether the names of student witnesses are protected under FERPA. While these cases are from different jurisdictions and are not binding on this tribunal, they are useful in evaluating how other courts have handled this issue, especially since there is no New Jersey case directly on this point.

In Staub v. East Greenbush School District #1, 128 Misc.2d 935, 491 N.Y.S.2d 87 (Sup. Ct. 1985), plaintiff's child was injured during gym class. Plaintiff sought a class list with the names and address of all students taking gym class at the time plaintiff's child was injured. Defendant claimed that these records are privileged. The court held that the names and addresses of the students at the scene of the injury were directory information and not privileged under FERPA.

Board of Education of Colonial School District v. Colonial Education Association, 1996 WL 104231 (Del. Ch., No. 14383, (February 28, 1996)),[2] aff'd 685 A.2d 361 (Del. 1996), discusses the disclosure of the names of the student witnesses under FERPA, in which a teacher was suspended by the Board of Education of Colonial School District ("District") for alleged

misconduct toward female students. The Colonial Education Association ("Association") sought the names of the student complainants and witnesses. The District argued that the names of the student witnesses were protected as educational records under FERPA. The court stated that in order to constitute educational records under FERPA, the information must have some tie to the educational process, such as records relating to individual student academic performance, financial aid or scholastic probation, which are kept in individual student files. Id. at *6[3] (quoting Bauer, supra, 759 F. Supp. at 590-91). "The names of the victim and witnesses to an alleged incident of sexual harassment by a teacher does not relate closely enough with the educational process to warrant the statutory protection of "educational records" in FERPA." Id. at *6.

2. Application

Petitioner seeks the name of the informant who told Ms. Nini that R.O. had a knife as well as the names of various other students in connection with this incident. However, respondent argues that 20 U.S.C.A. 1232g(b)(1) and 20 U.S.C.A. 1232g(b)(2), prevent disclosure of personally identifiable information, which includes a student's name, from educational records. As stated in Staub and Board of Education of Colonial School District, supra, the student witnesses' names are not educational records as defined by FERPA, nor do they have any tie to educationally related information such as academic performance, financial aid or scholastic probation and, thus, are not intended to be protected under FERPA.

Instead, such information, as in Staub and Board of Education of Colonial School District, is deemed to be directory information because it is a student's name and is not in an educational record. Disclosure of directory information does not subject the school to penalty under FERPA. However, in the case before this tribunal, disclosure of the name of the student informant is prevented by issue preclusion (see Part I).

[2] Lower Court decision is unreported.
[3] Westlaw pages are designated by an asterisk.

III. Sufficiency of Respondent's responses to Petitioner's Interrogatories

Discovery is designed to give parties access to facts that tend to support or undermine their position or the position of their adversary. N.J.A.C. 1:1-13.2(c). In granting a discovery motion, the judge must consider "the specific need for the information, the extent to which the information is within the control of the party and matters of expense, privilege, trade secret, and oppressiveness." N.J.A.C. 1:1-10.1(c). Discovery can be requested by written interrogatories. N.J.A.C. 1:1-10.2(a)(1). "Parties can obtain discovery regarding any matter, *not privileged*, which is *relevant* to the subject matter involved in the pending action..." R. 4:10-2(a) (emphasis added).[4]

Petitioner seeks responses to Interrogatories 3, 6, 7, 8, 12-16, 18-21, and 42-46. Each interrogatory will be considered based on the issue preclusion discussion in Part I, respondent's claimed FERPA privilege (discussed in Part II), and a relevance analysis.

A. Substance of Each Interrogatory

Interrogatory #3 asks for the name(s) of "any student other than the accused" who told any school official that the knife was found on a school bus.

Interrogatory #6 asks for "the names of all students who saw the accused student in the holding area in March 3, 2004."

Interrogatory # 7 asks for the name(s) of the student(s) that told R.O. to turn in the knife.

Interrogatory #8 asks for "the names of the students mentioned in the memorandum prepared by Donna Gibbs-Nini dated June 16, 2004, who allegedly told the accused student to turn in the knife at 7:30 A.M. on March 3, 2004.

[4] In the absence of a rule a judge may proceed in accordance with the New Jersey Court Rules. N.J.A.C. 1:1-1.3(a).

Interrogatory #12 asks if the school kept a log recording the daily arrival and departure time for each school bus and the name of any person responsible for keeping such log.

Interrogatories #13, 14, 15, & 16 ask for the names of any student or staff that saw R.O. with a knife in any classroom, bathroom, cafeteria, gym, library or lab on March 3, 2004.

Interrogatory #18 asks for the name of the informant mentioned in Assistant Principal Nini's June 16, 2004, memorandum.

Interrogatory #19 asks for the name of the student, mentioned in Ms. Nini's June 16, 2004, memo, that told R.O. to turn in the knife at 10:30 A.M. on March 3, 2004.

Interrogatory #20 asks for the name of the student according to the above-mentioned memo that told Ms. Nini that R.O. shrugged his shoulders when told to turn in the knife.

Interrogatory #21 asks for the names of the students mentioned in the June 16, 2004, memo that were talking about the knife.

Interrogatories #42, 43 and 44 ask whether there was a student who threatened another student with a knife, the race of that student's mother, and whether the same student punched someone on a school bus.

Interrogatories #45 and 46 ask whether the school called the police based on the above situations.

B. Application of Issue Preclusion

Interrogatory #3 - Based on the issue preclusion discussion in Part I, it is appropriate to follow the decision of the Superior Court to deny disclosure of the identity of the student informant.

Interrogatory #6 - The issue that was decided in Superior Court was disclosure of the identity of the student informant. An "informant" is defined as one who gives information. The American Heritage Dictionary of The English Language 927 (3d ed. 1996). This interrogatory asks about students who saw R.O., not those that gave information. Issue preclusion hinges on what was "actually litigated and determined" and not what might have been litigated. Gareel v. Weinstein, 161 N.J. Super. 1, 13 (App. Div. 1978). Based on the Superior Court's decision, disclosure of the identity of the informant was actually litigated and determined. It is not known whether the disclosure of the identity of any other student was actually litigated and determined. Thus, unless respondent can show that the identity of other students was actually litigated and determined by the Superior Court, issue preclusion will not apply here.

Interrogatory # 7 - The Superior Court order refers to the student informant that told Assistant Principal Nini that R.O. had a knife, not to students who spoke to R.O. Therefore, issue preclusion does not apply to this interrogatory, unless respondent can show that the identity of other students was actually litigated and determined by the Superior Court.

Interrogatory #8 - The analysis for this is the same as for Interrogatory #7.

Interrogatory #12 – This is referring to a different issue, so issue preclusion does not apply. Respondent responded that the school did have a log but it was discarded at the end of each day.

Interrogatories #13, 14, 15, & 16 - Disclosure of the names of the staff are not precluded by the Superior Court order. The Superior Court order refers to the student informant that told Assistant Principal Nini that R.O. had a knife, not the names of students who saw R.O. with a knife in the listed school areas. Therefore, issue preclusion does not apply to this interrogatory, unless respondent can show that the identity of other students was actually litigated and determined by the Superior Court.

Interrogatory #18 - Issue preclusion will apply based on the analysis for interrogatory #3.

Interrogatory #19 - The memo does not mention any such student.

Interrogatory #20 - The name of the student is already given in the memo.

Interrogatory #21 - The Superior Court order refers to the student informant that told Assistant Principal Nini that R.O. had a knife, not to students that were talking about the knife among themselves. Therefore, issue preclusion does not apply to this interrogatory, unless respondent can show that the identity of other students was actually litigated and determined by the Superior Court.

Interrogatories #42, 43 and 44 - Disclosure of this information was not decided in Superior Court, therefore, issue preclusion does not apply.

Interrogatories #45 and 46 - Disclosure of this information was not decided in Superior Court, therefore, issue preclusion does not apply.

C. Application of Privilege (FERPA)

Respondent's response was to claim privilege based on FERPA. As discussed in Part II, FERPA protects education records and personal identifiable information from those records. The names of student witnesses are not educational records, do not have any tie to educational information, such as academic performance, financial aid or scholastic probation and, thus, are not intended to be protected under FERPA. Respondent cannot use FERPA to refuse to disclose information in Interrogatories 6, 7, 8, 13-16, 19-21, and 42-46. However, issue preclusion applies to prevent disclosure under interrogatory #3 and #18. Interrogatory #12 does not have a FERPA issue.

D. Relevance Analysis

R. 4:10-2(a) will allow petitioner to "obtain discovery regarding any matter, not privileged, which is relevant to the subject matter involved in the pending action..."

There is no FERPA privilege for Interrogatories 6,7,8,12-16,19-21 and 42-46. The "privilege" referred to in R. 4:10-2(a) is those privileges set forth in N.J.R.E. 501-517. Respondent did not expressly claim any of the exceptions listed there. See Pressler, Current N.J. Court Rules, comment 3.1 on R. 4:10-2(a) (2005).

Pressler, Current N.J. Court Rules, comment 2 on R. 4:10-2 (2005), states that "relevance for purposes of this rule has been defined as congruent with relevancy under N.J.R.E. 401, namely, a tendency in reason to prove or disprove any fact of consequence to the determination of the action." In other words, with respect to discovery, the test of relevancy is whether the subject matter sought to be discovered is useful. Gureghian v. Hackensack Hospital, 109 N.J. Super. 143 (Law Div. 1970)(citing Myers v. St. Francis Hospital, 91 N.J. Super. 377 (App. Div. 1966). "Relevance is basically a case by case proposition." Myers v. St. Francis Hospital, 91 N.J. Super. 377, 386 (App. Div. 1966).

The ultimate redress petitioner seeks in this case is to expunge the suspension from R.O.'s student records. N.J.A.C 6:3-6.7 allows a parent to seek to "expunge inaccurate, irrelevant or otherwise improper information from the pupil record." The petitioner must show that the suspension was inaccurate or improper.

Respondent objects to Interrogatory #43 on relevancy grounds. The interrogatory seeks the race of a student's mother. In petitioner's brief dated May 5, 2005, he argues, on page 4, that Interrogatories 42-46 explore the "possibility that respondent may be engaged in selective and discriminatory enforcement of the so-called zero-tolerance [weapons] policy." In the letter of Assistant Superintendent Jon Cosse, dated January 14, 2005, Dr. Cosse writes that the suspension received by R.O. is consistent with the discipline received by other students for possession of a weapon on school grounds. I am not persuaded that an answer to Interrogatory #43 would be useful in determining if the suspension is improper because it is not consistently applied as claimed by Dr. Cosse. Leave is granted to petitioner to make an additional showing of relevancy should petitioner determine he wishes to pursue this line of inquiry.

CONCLUSION

Petitioner seeks to have the record of R.O.'s ten-day suspension for possession of a weapon on school grounds expunged from his record. In the interim, petitioner requests an order, compelling respondent to answer several interrogatories. A juvenile adjudication in Middlesex County Superior Court denying petitioner's motion for disclosure of the identity of the student informant prevents this tribunal from compelling answers to Interrogatories 3 and 18 based on issue preclusion. For Interrogatories 6, 7, 8, 13-16, 19-21, and 42-46, respondent claims privilege based on the Family & Educational Records Privacy Act (FERPA). FERPA is intended to protect educationally related information. The names of student witnesses are not educational records nor are they related to educational information. Instead, they are "directory information," which the school is not penalized for disclosing. Petitioner can obtain discovery regarding any non-privileged, relevant subject matter. I **FIND** the information sought in Interrogatory #43 is not relevant. The respondent's responses to Interrogatories 42, 44-46 are not sufficient. The information sought may be useful in determining if the suspension is improper based on an inconsistently applied school suspension policy. Since the information is relevant and not privileged, respondent should be compelled to answer.

ORDER

1. Petitioner's motion to compel answers to Interrogatories 3, 18, and 43 is **DENIED**.

2. Respondent is to supply full and complete answers to Interrogatories 6-8, 12-16, 21, 42, 44-46 within 30 days from the date of this Order.

This Order may be reviewed by the **COMMISSIONER OF THE DEPARTMENT OF EDUCATION** either upon interlocutory review pursuant to *N.J.A.C.* 1:1-14.10 or at the end of the contested case, pursuant to *N.J.A.C.* 1:1-18.6.

6-13-05
DATE

RICHARD F. WELLS, ALJ

jh

State of New Jersey
OFFICE OF ADMINISTRATIVE LAW

ORDER

OAL DKT. NO. EDU 2010-05

AGENCY DKT. NO. 33-2/05

R.O., ON BEHALF OF MINOR CHILD,

R.O., III,

Petitioner,

v.

BOARD OF EDUCATION OF THE WEST WINDSOR-PLAINSBORO SCHOOL DISTRICT, MERCER COUNTY,

Respondent.

R.O., petitioner, pro se

Eric L. Harrison, Esq., for respondent (Methfessel & Werbel, attorneys)

BEFORE **RICHARD F. WELLS**, ALJ:

The issue before this tribunal is a follow-up to an earlier discovery motion and Order. Petitioner now seeks an order compelling respondent to answer Interrogatory #21. For the reasons set forth below, I **FIND** the motion to compel should not be granted because respondent has answered the interrogatory by stating the information sought is not available to respondent. Additionally, the information sought does not seem relevant to the underlying dispute.

EXHIBIT C-2
PENGAD-Bayonne, N. J.

FACTS

In a July 20, 2005, letter, petitioner requested an order to "compel Respondent to comply with [this ALJ's] Order by furnishing Petitioner" with a response to Interrogatory #21. Interrogatory #21 asked respondent to "[s]tate the names of the students who, according to paragraph 1 of memorandum dated June 16, 2004, were talking about the knife in the morning of March 3, 2004."[1] Petitioner seeks to have this tribunal "compel Respondent" to answer the Interrogatory because respondent's attorney wrote to petitioner, on July 19, 2005, that he would not "...instruct [his] clients to interview either the confidential informant or Uday to satisfy [Petitioner's] discovery demands."[2]

Petitioner then sent a letter dated July 21, 2005 to this tribunal, in which he provided further reasons to compel respondent to answer Interrogatory #21. Petitioner argues that Ms. Gibbs-Nini's responses to Interrogatories 32, 33, 37, 38, 39, and 40 are inconsistent with her responses during the civil adjudication of this matter. Also, her responses to Interrogatories 42, 44, 45 are inconsistent with a certified statement provided by another parent. Petitioner appears to be making an equity argument that because respondent and Ms. Gibbs-Nini have not acted in good faith, petitioner needs to know the names of the students requested in Interrogatory 21 to protect the due process rights of R.O.

Respondent's July 21, 2005, letter opposes "...Mr. Owoh's request for an order compelling [them] to interview the confidential informant." Respondent argues that they "do not believe there exists a legal basis to compel the school district to interview a confidential informant to obtain additional information at the request of the Petitioner." Respondent further argues that since the student suspension was based on R.O.'s admission that he possessed a knife, that "any further inquiry of students who may have seen the knife or heard R.O. talking about it would be irrelevant. Respondent also points out that, since the Superior Court found that R.O. knowingly possessed a weapon on school property and adjudicated him delinquent, issue preclusion bars re-litigation of R.O.'s possession of a weapon on school property.

[1] Paragraph 1 of the June 16, 2004 memorandum states: "During the morning of March 03, 2004, a student confidentially informed me that [R.O.] was in possession of a knife. When I asked how he came by this information, he replied that he had seen it and that *other students* were talking about it." See Attachment of petitioner's July 20, 2005, Letter (emphasis added).

Petitioner's July 22, 2005, letter responds to respondent's July 21, 2005, letter. Petitioner asserts that respondent's arguments have already been addressed by this ALJ's Order of June 13, 2005. Petitioner repeats his previous allegations of bad faith addressed to respondent.

Petitioner's July 27, 2005, letter provides a copy of a July 21, 2005, Order by the Superior Court of New Jersey, Appellate Division. The Superior Court Order grants the motion by the appellant (petitioner) to stay appellate proceedings. The Superior Court Order states, in full, "The motion is granted, and the matter is remanded to the Family Part for purposes of pursuing appellant's motion and motion for new trial based on the alleged inconsistencies revealed by the interrogatories. The appeal is dismissed, without prejudice to a new appeal without additional filing fees, following the remand proceedings." Petitioner characterized the Superior Court Order as remanding "the case for a new trial."

Respondent then wrote a letter dated July 28, 2005, opposing petitioner's characterization of the Superior Court Order. Respondent states, "...contrary to Mr. Owoh's description of the order, the Appellate Division has not remanded the case for a new trial." Rather, it has remanded the case to the Superior Court to consider Mr. Owoh's motion for a new trial based on 'alleged inconsistencies' in the district's responses to interrogatories in this matter." Respondent also suggests, for reasons of judicial economy, that the scheduled hearing dates in this case be "carried until the Superior Court has ruled on Mr. Owoh's motion for a new trial in the juvenile matter."

Petitioner's July 29, 2005, letter opposes respondent's suggestion to delay the scheduled hearings. Petitioner argues that R.O.'s due process rights have been violated since March 3, 2004, and that any further delay should not be accepted.

DISCUSSION

Parties can obtain discovery regarding any matter that is relevant and not privileged, "including...the identity and location of persons having knowledge of any discoverable matter." R. 4:10-2. The purpose of discovery is to facilitate the disposition of cases. N.J.A.C. 1:1-10.1(a).

[2] See Attachment 4 to petitioner's July 20, 2005, Letter.

Discovery increases the efficiency of a hearing and increases the likelihood of settlement or withdrawal by giving parties access to facts that tend to support or undermine their arguments or that of their adversary. Ibid.

N.J.A.C. 1:1-14.9 requires resolutions that do not "completely conclude the case" to be made by an order. This ALJ's June 13, 2005, Order expressly states that "Respondent is to supply full and complete answers to Interrogatories...21... within 30 days from the date of this Order." Respondent's answer to Interrogatory #21 is that: "I [Ms. Donna Gibbs-Nini] do not know the names of the students who were reported by Uday to have been talking about the knife in school." Petitioner wrote to respondent suggesting that respondent interview its confidential informant for the information. Respondent has refused, claiming that they "do not believe there exists a legal basis to compel the school district to interview a confidential informant to obtain additional information at the request of the Petitioner."

Interrogatories are to be answered by the party they are served upon. R. 4:17-4.[3] "The party shall furnish all information available to the party and the party's agents, employees and attorneys." R. 4:17-4. The issue is whether the names of the students Petitioner requests are "available to the party."

Fed. R. Civ. Pro. 33(a) is very similar to R. 4:17-4. It provides that "...any party may serve upon any other party written interrogatories... to be answered by the party served... who shall furnish such information as is available to the party."

Under the Federal Rule, a corporation must provide information that is available from the corporation itself or from sources under its control. See Brunswick Corp. v. Suzuki Motor Co., 96 F.R.D. 684, 686 (E.D. Wis., 1983), Trane Co. v. Klutznick, 87 F.R.D. 473, 476 (W.D. Wis. 1980). This rule is based on the theories that a corporation's knowledge is a combination of the knowledge of each individual employee and that a party cannot claim ignorance as a reason for not answering interrogatories, if the information is within his control. Trane Co., supra, 87 F.R.D. at 476. For example, a subsidiary is sufficiently within a parent corporation's control to

[3] "In 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)

make information from the subsidiary available in an interrogatory to the parent. Brunswick Corp., supra, 96 F.R.D. at 686. In Trane Co, supra, the plaintiffs served interrogatories on the President of the United States seeking information from the files of the State and Treasury Departments. The court held that the President had control over the information and therefore the information is available to him. Id. at 477. The court found that the President's statutory and constitutional authority gives him as much or more control over the executive departments than a corporation has over its subsidiaries. See Trane Co, supra, 87 F.R.D. at 477.

In this case, Ms. Nini answers that she has no personal knowledge of the names of the students sought in the interrogatory. The question then becomes: is the confidential informant sufficiently within Ms. Nini's control to require the information (*i.e.*, the names of the students) from the informant? The difference between the parent/subsidiary (or the president/agency situation) as compared to the instant situation is that, in the former case, the information that is considered "available to the party" comes from an officer or employee of the party. In this case, the student informant is not an employee of the school. The situation would be closer to the parent/subsidiary model if the person with the information were another teacher or school employee. However, the instant situation involves the knowledge of a school student who has earlier been considered a confidential informant. Research has revealed no obligation on the part of the school administration to interrogate a student to satisfy third party inquiries for information. Accordingly, I **FIND** the names of the students sought by Interrogatory #21 should not be considered "available to the party" under these circumstances.

In addition to the above, I question the relevancy of the information sought in Interrogatory #21. Simply put, what assistance to a fair determination of this dispute can the identity of the other students (who were talking about the knife) provide under the apparent circumstance where R.O. already admitted he possessed the knife by turning it in to the school administrator? Therefore, in addition to the above, I **FIND** the information sought would be merely cumulative and would be unlikely to lead to admissible evidence.

CONCLUSION

Federal Rule of Civil Procedure 33(a) is similar to New Jersey Court Rule 4:14-4 in that both require a party to "furnish all information available to the party." Under the Federal Rule, information is available to a party if it is within the party's control. For example, a subsidiary is sufficiently within a parent corporation's control and a federal agency is sufficiently within the President's control, to make information from those sources available to the parent corporation and the President, respectively. Unlike a subsidiary or federal agency, the information from the student informant is not available to the respondent because it is not within the control of the respondent. The information is not within the control of the respondent because the student informant, unlike a subsidiary or federal agency, is not an officer or employee of the party. Also, the information sought by Interrogatory 21 is not relevant to petitioner's case because possession of the knife is based on the admission of R.O. Petitioner's motion is **DENIED.**[4]

This Order may be reviewed by the **COMMISSIONER OF THE DEPARTMENT OF EDUCATION** either upon interlocutory review pursuant to *N.J.A.C.* 1:1-14.10 or at the end of the contested case, pursuant to *N.J.A.C.* 1:1-18.6.

8-29-05
DATE

RICHARD F. WELLS, ALJ

jh

[4] Should respondent seek a stay of the instant proceeding before this tribunal pending the outcome in the Superior Court case, respondent must prepare and file a motion in that regard. Accordingly, this Order does not rule on the topic of a stay or issue preclusion.

State of New Jersey
OFFICE OF ADMINISTRATIVE LAW

INITIAL DECISION
SUMMARY DECISION
OAL DKT. NO. EDU 2010-05
AGENCY DKT. NO. 33-2/05

R.O., ON BEHALF OF MINOR CHILD,
R.O., II,
Petitioner,
v.
BOARD OF EDUCATION OF THE WEST WINDSOR-PLAINSBORO SCHOOL DISTRICT, MERCER COUNTY,
Respondent.

R.O., petitioner, *pro se*

Eric L. Harrison, Esq., for respondent (Methfessel & Werbel, attorneys)

Record Closed: November 7, 2005 Decided: November 7, 2005

BEFORE **RICHARD F. WELLS**, ALJ:

STATEMENT OF THE CASE

Petitioner challenges a ten-day suspension imposed upon him due to his possession of a weapon on school property. Petitioner seeks a due-process hearing and a reversal or expungement of the suspension. Petitioner argues that the suspension was based upon a false premise and that no hearing was afforded him before the suspension was imposed. Additionally, petitioner argues that the respondent school district withheld the identity of witnesses and other

EXHIBIT C-3

information necessary for a full and complete defense of the allegations lodged against him. Still further, petitioner asserts that representatives of respondent school district were guilty of intentional prevarication to his detriment. Concomitantly, petitioner asserts that the suspension imposed was a function of the respondent's discriminatory practices, evidencing selective enforcement.

Respondent had moved for summary decision under *N.J.A.C.* 1:1-12.5. Respondent argues that the gravamen of this matter has already been fully and finally adjudicated in the Superior Court of New Jersey. Therefore, respondent asserts that the doctrine of issue preclusion bars the relitigation of the possession of weapons charge. Additionally, respondent observes that petitioner has filed no appropriate response under the Uniform Administrative Procedure Rules and so the grant of summary decision is mandated.

PROCEDURAL HISTORY

The instant matter was transmitted by the New Jersey State Department of Education to the Office of Administrative Law ("OAL") where, on March 10, 2005, it was docketed as a contested case. Thereupon, this tribunal issued Orders dated June 13, 2005, August 29, 2005, September 22, 2005, September 23, 2005, September 30, 2005, October 17, 2005 and October 19, 2005.

Respondent filed its motion for summary decision on October 19, 2005 and petitioner responded in writing that same date. Thereafter, respondent filed supplemental papers in support of its motion for summary decision on November 1, 2005 and November 3, 2005. Petitioner supplemented his response by letters dated October 30, 2005, November 1, 2005, November 3, 2005, and November 6, 2005.

FINDINGS OF FACT

I **FIND** that there is no dispute over the following facts:

1. On March 3, 2004, petitioner was a seventh grade student at Community Middle School in the West Windsor Plainsboro School District.

2. Petitioner was suspended from school on March 3, 2004.

3. No formal hearing was held prior to or immediately after March 3, 2004.

4. No written explanation was given to petitioner's parents on March 3, 2004 for the suspension.

5. No incident report was given to petitioner's parents prior to the suspension or immediately after the suspension.

6. Petitioner's parent specifically requested a copy of the incident report prepared by the school.

7. Petitioner was suspended for a period of ten days for possessing a weapon on school grounds.

8. On May 10, 2004, a Juvenile Delinquency Complaint was lodged against petitioner wherein it was alleged that on March 3, 2004, petitioner possessed a weapon, namely, a knife, with the purpose to use it unlawfully against the person or property of another, in violation of *N.J.S.A.* 2C:39-4(d), 3rd degree and purposely and knowingly possessing a weapon (knife) while on the property of a school in violation of *N.J.S.A.* 2C:39-5(e)(2) – 4th degree. Said Juvenile Delinquency Complaint was filed in the Superior Court of New Jersey, Chancery Division Family Part, County of Middlesex.

9. On February 3, 2005, petitioner was adjudicated delinquent by a New Jersey Superior Court judge for knowing possession of a weapon on school grounds in violation of *N.J.S.A.* 2C:39-5(e)(2).

10. On February 3, 2005, the Superior Court found that petitioner had knowingly possessed a "dangerous knife" with a four-inch blade.

11. On February 3, 2005, the Superior Court found that petitioner claimed that he found the knife on the school bus, arrived at school on the bus at approximately 7:00 a.m. and did not turn over the knife to Assistant Principal Donna Gibbs-Nini until after he was called to her office at approximately 11:20 a.m.

CONCLUSIONS OF LAW

In the matter before this tribunal, petitioner seeks to challenge the ten-day suspension that he received for possession of a knife on school premises. Petitioner avers that the suspension should be removed from his school records. Essentially, petitioner is making this claim under *N.J.A.C.* 6:3-6.7 that provides for the ability to "expunge inaccurate, irrelevant or otherwise improper information" from the pupil's records.[1] However, the validity of the charge that petitioner possessed a dangerous weapon on school property has already been adjudicated in the New Jersey Superior Court and petitioner has been found guilty beyond a reasonable doubt. Accordingly, I **FIND** that this issue has already been adjudicated and the doctrine of issue preclusion prevents any re-litigation. Parenthetically, this tribunal is without authority to disturb, set aside, interfere with or otherwise overrule the Superior Court's finding on this score.[2]

As noted in the above Findings of Fact, petitioner's possession of a knife on school property was the subject of a prior judicial proceeding, namely, a delinquency proceeding in the Superior Court of New Jersey, Chancery Division, Family Part. Following a hearing, the Superior Court Judge determined that petitioner did knowingly possess a weapon on school grounds and adjudicated him delinquent. Thereafter, the Superior Court Judge sentenced petitioner to a probationary term.

I am satisfied that the juvenile hearing in Superior Court resulted in a final judgment on the merits, which depended entirely on the finding of fact that petitioner wrongly possessed a

[1] *N.J.A.C.* 6:3-6.7 was repealed effective September 6, 2005 and recodified under *N.J.A.C.* 6A:32-7.7. *See* 37 *N.J.R.* 1982(a).

[2] By letter dated November 6, 2005, petitioner raises a new issue for the first time in this dispute. Petitioner argues that the school district is improperly disclosing and relying on his school and juvenile records. I am not persuaded by this argument. I **FIND** petitioner has continuously referred to the Superior Court action during the pendency of this matter before this tribunal. Additionally, I **FIND** the information was properly released pursuant to *N.J.S.A.* 2A:4A-60d(1).

weapon on school property. That matter was litigated in the Superior Court resulting in a final judgment and it would be inappropriate to re-litigate in this forum.

The doctrine of issue preclusion prohibits the re-litigation of any factual or legal issue that was actually determined in an earlier proceeding. *See, e.g., New Jersey Dep't of Law & Pub. Safety v. Gonzalez*, 273 *N.J. Super.* 239, 242 (App. Div. 1994). To invoke the doctrine of issue preclusion, the issues presented within the two proceedings must be identical, and the earlier proceedings must have afforded a full and fair opportunity to the party against whom the doctrine of issue preclusion is invoked to litigate the contested issue. *See also Morton Int'l, Inv. v. Gen. Accident Ins. Co. of Am.*, 266 *N.J. Super.* 300, 321 (App. Div. 1991), *aff'd*, 134 *N.J.* 1 (1993); *Watkins v. Resorts Int'l Hotel & Casino, Inc.*, 124 *N.J.* 398, 412 (1991). The doctrine of issue preclusion is recognized in administrative proceedings. *City of Hackensack v. Winner*, 82 *N.J.* 1, 31-33 (1980). *See also* 37 *New Jersey Practice, Administrative Law and Practice*, § 6.27 at 345 (Steven L. Lefelt, Anthony Miragliotta and Patricia Prunty) (rev. 2d ed. 2000). Further, in appropriate circumstances, a judgment in regard to which an appeal is pending should be given preclusion effect. *Restatement (Second) of Judgments* § 13 comment g (1980); *O'Hara v. Bd. of Educ. of Vocational Sch. in Camden County*, 590 *F. Supp.* 696, 702 (D.C. N.J. 1984), *aff'd*, 760 *F.*2d 259 (3d Cir. 1985). For issue preclusion to apply, the following requirements must be met:

> (1) The identical issue was decided in a prior judication;
>
> (2) There was a final judgment on the merits;
>
> (3) The party against whom the bar is asserted was a party or in privity with a party to the prior adjudication; and
>
> (4) The party against whom the bar is asserted had a full and fair opportunity to litigate the issue in question.
>
> [*Board of Trustees of Trucking Employees of North Jersey Welfare Fund, Inc. v. Centra*, 983 *F.*2d 495, 505 (3d Cir. 1992).]

In the matter before this tribunal, I am satisfied that the above-listed elements are satisfied and that issue preclusion applies. There has already been a full hearing where petitioner had a full and fair opportunity to litigate the issue in question and a final judgment on the merits was rendered wherein petitioner was found to have wrongfully possessed a weapon on school

property. Accordingly, and in reliance on the Superior Court ruling, I **FIND** that petitioner's school record cannot be determined to be "inaccurate, irrelevant or otherwise improper."

As concerns petitioner's ancillary claims of selective enforcement and/or discrimination, I am constrained to conclude that the record before this tribunal fails to so much as establish even a *prima facie* case on either discrimination, selective enforcement, discriminatory enforcement, discriminatory pattern of enforcement or an improper denial of due process.[3] Although this tribunal's file is thick with submittals from petitioner's counsel, what is required to defeat respondent's motion for summary decision has not been proffered. The Uniform Administrative Procedure Rules is clear that when a motion for summary decision is made and supported, an adverse party, in order to prevail, must by responding affidavit, set forth specific facts showing that there is a genuine issue which can only be determined in an evidentiary proceeding. *N.J.A.C.* 1:1-12.5(b) goes on to state: "If the adverse party does not so respond, a summary decision, if appropriate, shall be entered." (Emphasis supplied.)[4]

In the matter before this tribunal, the motion for summary decision was adequately supported by the Transcript of Trial of February 3, 2005, as well as the Certification of Donna Gibbs-Nini, dated September 8, 2005. Petitioner's response has been limited to claims or allegations, all in the absence of adequate support in the record.

CONCLUSION

For the reasons set forth hereinabove, I am satisfied from the papers and supporting documentation submitted, that there is no genuine issue as to any material fact challenged and that the moving party, Board of Education of the West Windsor-Plainsboro School District, Mercer County, is entitled to prevail as a matter of law. Accordingly, respondent's motion for

[3] In his recent November 6, 2005 submittal, petitioner argues he was deprived a hearing and cites *N.J.A.C.* 6A:16-5.5(e) and *N.J.A.C.* 6A:16-5.6(c). The regulations for the Student Development Program were supplemented September 6, 2005 and the correct citations should be *N.J.A.C.* 6A:16-5.5(g) and *N.J.A.C.* 6A:16-5.6(g). In any event, the more relevant regulation section is *N.J.A.C.* 6A:16-7.2(a)2i and the record in this case establishes no impropriety on the part of respondent in this regard. *See also N.J.A.C.* 6A:32-7.7(b). It is noteworthy that *N.J.A.C.* 6A:32-7.7 provides for a ten-day appeal period to either the district board of education or the Commissioner of Education. Petitioner states the final decision of the school district was January 14, 2005, yet the date of petitioner's appeal is February 4, 2005.

[4] Although invited to do so by this tribunal's letter of October 26, 2005, petitioner has offered no affidavits or other suitable information on the subject of whether the duration of the suspension was appropriate for challenge during an evidentiary hearing.

summary decision is **GRANTED** and petitioner's action to expunge inaccurate, irrelevant or otherwise improper information from his records is hereby **DISMISSED.**

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

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

Within thirteen (13) days from the date on which this recommended decision was mailed to the parties, any party may file written exceptions with the **COMMISSIONER OF THE DEPARTMENT OF EDUCATION, 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.

11-7-05

DATE

RICHARD F. WELLS, ALJ

E-mail Receipt of Initial Decision Confirmed by the Department of Education on:

11-7-05

DATE

Mailed to Parties:

DATE

OFFICE OF ADMINISTRATIVE LAW

jh

OAL DKT. NO. EDU 2010-05
AGENCY DKT. NO. 33-2/05

R.O. on behalf of minor child, R.O., II,	:	
PETITIONER,	:	
V.	:	COMMISSIONER OF EDUCATION
BOARD OF EDUCATION OF THE WEST WINDSOR-PLAINSBORO SCHOOL DISTRICT, MERCER COUNTY,	:	DECISION
RESPONDENT.	:	Wells

The record in this matter, the Initial Decision of the Office of Administrative Law (OAL), petitioner's exceptions and respondent's reply exceptions have been thoroughly and independently reviewed.[1] After considering the facts and applicable law, the Commissioner adopts the administrative law judge's (ALJ) decision to grant respondent summary judgment, dismissing the petition.

This case was initiated on February 9, 2005, by petitioner's appeal to the Commissioner from respondent's denial of petitioner's request to remove from his minor son's (R.O.) school record any mention of a ten-day suspension that had been imposed on March 3, 2004, as a result of R.O.'s possession of a knife on school premises. Petitioner also requested a "hearing to challenge the school suspension," and the "names and identities" of students who could possibly provide facts about the conduct that precipitated the suspension. (Petition at 2) General reference to such students had been made in a June 16, 2004, memorandum by Donna Gibbs-Nini, one of two assistant principals in R.O.'s school. The matter was transmitted to the OAL on March 8, 2005.

[1] Replies to reply exceptions are not contemplated by *N.J.A.C.* 1:1-18.4. Consequently, petitioner's reply to respondent's reply exceptions was not considered.

EXHIBIT C-4
PENGAD-Bayonne, N. J.

On September 23, 2005, petitioner moved before the Commissioner for interlocutory review of an order by the ALJ denying petitioner leave to supplement the original petition. On October 6, 2005, the Commissioner issued an order granting interlocutory review, adopting the ALJ's order denying supplementation of the original petition, and stating that the appropriate course of action would be for petitioner to raise his new claims in a separate petition of appeal. Accordingly, petitioner filed a second petition – Agency Dkt. No. 274-10/05, OAL Dkt. No. EDU 8827-05 – on October 9, 2005, alleging violation of R.O.'s due process rights (First Count), racial discrimination (Second Count) and violation of R.O.'s civil rights (Third Count). The Commissioner dismissed the Second Count for lack of jurisdiction on November 4, 2005, and the matter was transmitted to the OAL on November 9, 2005.

Petitioner once again moved before the Commissioner for interlocutory review on October 20, 2005. On this occasion, petitioner challenged the ALJ's October 19, 2005 order denying reconsideration of his September 30, 2005 order denying petitioner's motion to compel respondent to answer a new set of interrogatories. The Commissioner declined interlocutory review on October 28, 2005.

On October 19, 2005, respondent resubmitted a motion for summary judgment that had originally been filed, and denied, in the previous month. The gravamen of respondent's motion was that the question of whether R.O. had possessed a knife on school premises on March 3, 2004 had already been decided in the affirmative in a proceeding in family court on February 3, 2005. On that occasion, R.O. had been adjudicated delinquent for possessing a dangerous knife while on the grounds of an educational institution without written authorization from the governing officer of the institution, in violation of *N.J.S.A.* 2C:39-5(e)(2), a fourth degree crime. Respondent argued that the doctrine of issue preclusion – as articulated, for example, in *State v. Gonzalez*, 75 *N.J.* 181, 186 (1977) – bars petitioner from litigating the issue again. Further, since R.O. had been found guilty of

possessing a knife on the grounds of an educational institution, there was no basis under *N.J.A.C.* 6A:32-7.7(a)(1) for expungement of the suspension from his record.

Petitioner's responses to the summary judgment motion contained a number of arguments. First, petitioner maintained that certain alleged erroneous rulings by the family court judge, and the appealability of the delinquency determination, barred summary judgment. Second, petitioner asserted that it was improper for respondent to use and disclose, in the present proceeding, transcripts and orders from R.O.'s juvenile delinquency trial. While not expressly stated in his papers, petitioner presumably intended that the ALJ deny summary judgment because respondent's grounds for same were offered to the ALJ via these documents from the family court action.

Third, petitioner appeared to contend that summary judgment could not be granted because R.O. was improperly denied a hearing before the respondent board. For the proposition that R.O. was entitled to such a hearing, petitioner relied upon *N.J.A.C.* 6A:16-5.5, *N.J.A.C.* 6A:16-5.6 and *N.J.A.C.* 6A:16-5.7, which provide that students who commit certain offenses must receive certain due process rights, including hearings before the board of education.

The ALJ found that the following facts in this matter are undisputed. On March 3, 2004, R.O. was a seventh grade student at Community Middle School in the West Windsor-Plainsboro school district. On that date, he was suspended for ten days for possessing a weapon on school grounds. No written explanation was given to R.O.'s parents on March 3, 2004 or immediately thereafter, and no formal hearing was held by respondent before or after imposition of the suspension. R.O.'s parents requested a copy of an incident report prepared by a school employee. (Initial Decision at 2-3)

The ALJ also found that certain facts relating to R.O.'s family court proceeding are also undisputed. They are as follows. On May 10, 2004, a juvenile delinquency complaint was filed against petitioner in New Jersey Superior Court, Chancery Division Family Part, Middlesex County, containing – among other charges – allegations that on March 3, 2004, R.O. purposefully and

knowingly possessed a dangerous knife while on the property of an educational institution in violation of *N.J.S.A.* 2C:39-5(e)(2) – 4th degree. On February 3, 2005, the Superior Court judge found that R.O. had claimed that on March 3, 2004, he had found a knife on the school bus, that the bus had arrived at the school at approximately 7:00 a.m., and that R.O. had not given the knife to Assistant Principal Donna Gibbs-Nini until after he was summoned, at approximately 11:20 a.m. The judge then found the above-articulated allegations in the juvenile delinquency complaint to be true, and adjudicated R.O. delinquent. (Initial Decision at 3-4)

Since it was undisputed that a court had already adjudicated R.O. guilty of possessing a dangerous knife on the grounds of an educational institution, the ALJ agreed with respondent that – under the doctrine of issue preclusion – the Department of Education cannot relitigate the matter, and the petition must be dismissed as a matter of law. He reasoned further that there is no basis to expunge information about R.O.'s ten-day suspension from his school record. Under *N.J.A.C.* 6A:32-7.7(a)(1), information in a student's school record must be inaccurate, irrelevant or otherwise improper for it to warrant expungement. The ALJ found that the record of R.O.'s suspension meets none of those criteria. (Initial Decision at 4-6)

The ALJ also rejected petitioner's claim that R.O. was entitled to a hearing before the board of education. He agreed with respondent that *N.J.A.C.* 6A:16-5.5, *N.J.A.C.* 6A:16-5.6 and *N.J.A.C.* 6A:16-5.7 – regulations that pertain, respectively, to student possession of firearms, assaults with weapons, and assaults on board of education members and employees – are irrelevant to the level of process due to R.O. The foregoing regulations address offenses that carry serious penalties, including expulsion and suspensions up to a year or more. The penalty imposed on R.O. was what the Department of Education's regulations consider short-term, and is subject to the requirements of *N.J.A.C.* 6A:16-7.2. The ALJ determined that R.O. had received the informal hearing required by *N.J.A.C.* 6A:16-7.2 (a)(2). (Initial Decision at 6)

As for petitioner's contention that respondent improperly used documents from R.O.'s delinquency proceeding, the ALJ noted that petitioner himself had continually referred to the family court proceeding during the pendency of this matter in the OAL, and that the information was properly released pursuant to *N.J.S.A.* 2A:4A-60 (d)(1). (Initial Decision at 4)

Finally, the ALJ revisited the summary decision standards set forth in *N.J.A.C.* 1:1-12.5 (b). He found that respondent's brief and certifications had met its burden to show that there were no disputes of material fact, and that respondent was entitled to prevail as a matter of law. Petitioner, on the other hand, had failed to respond with any opposing certifications showing that there were, in fact, genuine issues of material fact that required determination at an evidentiary hearing. (Initial Decision at 6)

The Commissioner finds no merit in petitioner's twenty-one exceptions, most of which are duplicative of his arguments in opposition to respondent's application for summary judgment. In his exceptions 10, 11 and 12, petitioner maintains that the ALJ omitted certain findings of fact. And in exception 16, petitioner claims that the ALJ erroneously denied him access to students who might have had relevant information. Based upon these allegations, petitioner argues in his first exception that outstanding disputes of fact render summary judgment inappropriate. However, the undisputed facts in this case are sufficient to support the suspension that was imposed upon R.O. He had a four-inch knife in his possession in school for over four hours and produced it from his pocket when asked about it. Nothing in the record suggests that he was prevented from turning over the knife during the four hours. Any remaining facts, including the "newly discovered facts" referenced in petitioner's exception 13, are not material, and consequently do not serve as a bar to summary judgment. Even though the allegations of the pleadings may raise issues of fact, if the other papers show that, in fact, there is no real material issue, then summary judgment can be granted. *Judson v. People's Bank & Trust Co. of Westfield*, 17 *N.J.* 67, 75 (1954). *See, also, Brill v.*

Guardian Life Ins. Co., 142 *N.J.* 520, 530 (1995) (disputed issues that are of an insubstantial nature cannot overcome a motion for summary judgment).

Further, petitioner provided no evidential support for his allegations, such as a certification from R.O. about any fact which he deemed relevant to his position, but which was not adduced at the delinquency trial. Bare conclusions in the pleadings, without factual support in tendered affidavits, will not defeat a meritorious application for summary judgment. *United States Pipe & Foundry Co. v. American Arbitration Ass'n,* 67 *N.J. Super.* 384, 399-400 (App. Div. 1961).

Petitioner's exceptions 2, 3 and 4, in which he contends that respondent improperly utilized R.O.'s juvenile records, are also meritless. As the ALJ observed, petitioner himself submitted the juvenile records to the court. The juvenile delinquency complaint against R.O. was annexed to the petition, and it appears – from a letter by petitioner, dated September 15, 2005 – that petitioner sent the ALJ a copy of the transcript of the juvenile delinquency proceeding. If a party offers or allows evidence with full knowledge of the risks, he will be regarded as waiving, irrevocably, his right to have his evidence excluded. *Administrator of Monfort v. Rowland*, 38 *N.J. Eq.* 181 (N.J. Ch. 1884); *Berryman v. Graham*, 21 *N.J. Eq.* 370 (E.E.A. 1869); *Boone v. Ridgway Exrs.*, 29 *N.J. Eq.* 543 (N.J. Ch. 1878).

Moreover, *N.J.S.A.* 2A:4A-60 does not bar the availability of R.O.'s juvenile records in this proceeding. The Commissioner agrees with the ALJ that *N.J.S.A.* 2A:4A-60(d) allows public disclosure of information about R.O.'s delinquency proceeding. Further, the Commissioner finds that information about the delinquency proceeding was properly disclosed to respondent under *N.J.S.A.* 2A:4A-60(c) (2). Respondent was the equivalent of "the agency which filed the complaint." Respondent reported the offense to the police, and served – through Assistant Principal Gibbs-Nini – as the complaining witness. In addition, the Commissioner agrees with respondent that *N.J.S.A.*2A:4A-60 (A) (6) pertains. Respondent is an agency that has an interest in the case and

made, through counsel, a request to the court to obtain the records of R.O.'s family court proceeding, which request was granted.

The Commissioner similarly finds no merit in petitioner's argument, in his exception 5, that respondent's absence as a party in the delinquency proceeding bars the application of the doctrine of issue preclusion. R.O. was found to have knowingly possessed a dangerous knife on school premises in a prior proceeding. R.O. is seeking, in the present proceeding, to dispute his liability for the same offense. It is R.O., the party against whom the doctrine of issue preclusion is asserted, that must have been a party (or in privity with a party) in the prior proceeding. *Board of Trustees of Trucking Employees of North Jersey Welfare Fund, Inc. v. Centra*, 983 *F.*2d 495, 505 (3d Cir. 1992); *State v. Gonzalez*, 75 *N.J.* 181, 186 (1977). Respondent's lack of participation in that proceeding is irrelevant.

The Commissioner also finds that petitioner's fourteenth exception is irrelevant to the instant controversy. In that exception, petitioner invokes standards for criminal trials, which standards do not govern these administrative proceedings.

Respecting petitioner's exceptions 6, 7, 8, 9 and 15, in which petitioner disputes the ALJ's conclusions about the due process required for ten-day suspensions, and about the applicability – or lack thereof – of *N.J.A.C.* 6A:16-7.2 and 7.3, and *N.J.A.C.* 6A:16-5.5 through 5.7 to this issue, the Commissioner adopts the ALJ's determinations, for the reasons set forth in the Initial Decision and supplemented herein.

Petitioner's exception 17 is moot because respondent does not request dismissal of the petition on the basis of timeliness, and petitioner's exception 18 is rendered moot by the recent decision of the State Board of Education regarding petitioner's appeal of the denial of his request for an order compelling answers to twenty-seven interrogatories.

Finally, petitioner's exceptions 19, 20, and 21 pertain to the subject matter of a separate petition filed with the Commissioner on October 9, 2005, and will not be addressed herein.

In summary, for the reasons articulated in the Initial Decision of the OAL, and supplemented herein, respondent's motion for summary judgment is granted, and the petition is dismissed.

IT IS SO ORDERED*

Lucille E. Davy

ACTING COMMISSIONER OF EDUCATION

Date of Decision: 3/17/06

Date of Mailing: 3/17/06

* The Commissioner's decision may be appealed to the State Board of Education pursuant to *N.J.S.A.* 18A:6-27 *et seq.* and *N.J.A.C.* 6A:4-1.1 *et seq.*

236-06

#236-06

OAL DKT. NO. EDU 8830-05
AGENCY DKT. NO. 316-11/05

IN THE MATTER OF THE TENURE	:	
HEARING OF DEAN HOWARTH,	:	COMMISSIONER OF EDUCATION
SCHOOL DISTRICT OF THE TOWNSHIP	:	DECISION
OF MAPLE SHADE, BURLINGTON COUNTY.	:	

The record of this matter, the parties' proposed Stipulation of Settlement and Settlement Agreement together with the resolution of the Board approving the settlement and authorizing the Board President to execute the 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 concurs with the ALJ that the settlement terms are 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 approved, and this matter is hereby dismissed subject to compliance with the terms of the settlement. Pursuant to *N.J.A.C.* 6A:9-17.6(a)1, a copy of this decision shall be transmitted to the State Board of Examiners for action against respondent's certificate as the Board may deem appropriate.

IT IS SO ORDERED.

Lucille E Day

ACTING COMMISSIONER OF EDUCATION

Date of Decision: 7/10/06

Date of Mailing: 7/10/06

* The record indicates that the appended undated resolution of the Maple Shade Board of Education was adopted on June 12, 2006, and that the unidentified individual attesting to the agreement is the Board Secretary, authorized to administer oaths pursuant to *N.J.S.A.* 18A:17-11.

State of New Jersey
OFFICE OF ADMINISTRATIVE LAW

INITIAL DECISION
SETTLEMENT
OAL DKT. NO. EDU 08830-05S
AGENCY DKT. NO. 316-11/0

IN THE MATTER OF THE TENURE CHARGES AGAINST DEAN HOWARTH, MAPLE SHADE BOARD OF EDUCATION, BURLINGTON COUNTY.

Richard A. Friedman, Esq., for respondent Dean Howarth (Zazzali Fagella, Nowak, Kleinbaum and Friedman, attorneys)

Joan Kane Josephson, Esq., and Frank Cavallo, Esq., for petitioner Maple Shade Board of Education, Burlington County (Parker McCay, attorneys)

Record Closed: June 15, 2006 Decided: June 15, 2006

BEFORE **JEFF S. MASIN**, ALJ:

This matter having come before the Office of Administrative Law; and this administrative law judge having conducted partial hearings; and the parties having reached a stipulation of settlement and settlement agreement attached hereto; and the administrative law judge having reviewed that stipulation; and being thoroughly familiar with the evidence offered in the hearing and having discussed the matter at length with counsel; and having determined that the settlement reached between the parties which includes the resignation of Mr. Howarth, as well as his having already suffered the loss of adjustment and longevity increments and suspension without pay for 120 days, that the settlement is in the best interests of the parties and that it does not violate any of the

concerns regarding the public interest that the Commissioner considers under the Cardonick principle, and that it has been entered into with awareness of the possibility of proceedings occurring before the Board of Examiners; therefore, I am satisfied that the settlement should be approved.

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

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

2. The settlement fully disposes of all issues in controversy between these parties.

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** my initial decision with the **COMMISSIONER OF THE DEPARTMENT OF EDUCATION** for consideration.

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

June 15, 2006
DATE

JEFF S. MASIN, ALJ
Receipt Acknowledged:

6-19-06
DATE

DEPARTMENT OF EDUCATION

Mailed to Parties:

JUN 20 2006
DATE

DIRECTOR AND
CHIEF ADMINISTRATIVE LAW JUDGE

OFFICE OF ADMINISTRATIVE LAW

mjm
Attachment

ZAZZALI, FAGELLA, NOWAK
KLEINBAUM & FRIEDMAN
150 West State Street
Trenton, New Jersey 08608
(609) 392-8172
Attorneys for Respondent
Dean Howarth

2006 JUN 15 P 2:18

IN THE MATTER OF THE TENURE CHARGES AGAINST DEAN HOWARTH, TOWNSHIP OF MAPLE SHADE BOARD OF EDUCATION	BEFORE THE OFFICE OF ADMINISTRATIVE LAW AGENCY DOCKET NO.: 316-11/05 OAL DOCKET NO.:EDUTH 08830-05S **STIPULATION OF SETTLEMENT AND SETTLEMENT AGREEMENT**

The parties to this matter, the petitioner Maple Shade Township Board of Education and respondent Dean Howarth, having reached an agreement to resolve the within matter, hereby request that the Administrative Law Judge and the Commissioner of Education approve the following terms and conditions as their settlement agreement.

1. The parties agree that their agreement to this agreement and its validity is contingent upon the approval of the Commissioner of Education of all of the terms of this agreement, and that if any of the terms of this agreement are rejected by the Commissioner of Education, this agreement shall be deemed null and void, and that in such event, neither parties' position in relation to the tenure charges shall be prejudiced, that neither party shall waive any legal rights, and that the matter shall be returned to the Office of Administrative Law for the continuation of the hearing in relation to the tenure charges, provided that nothing in this paragraph or in this agreement shall, in such event, preclude the parties from agreeing to a new, revised or modified

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

settlement agreement, provided that such agreement is subject to the approval of the Commissioner of Education.

2. Prior to approving this settlement agreement, the Administrative Law Judge reviewed all of the evidence in this case, including all materials referenced below.

3. The parties agree that based upon and subject to the Commissioner of Education's approval of all of the terms of this agreement, the petitioner shall withdraw the tenure charges.

4. Rationale for Settlement

A. On or about November 7, 2005, petitioner filed tenure charges and supplemental tenure charges with the Commissioner of Education against the respondent.

B. The charges alleged that respondent violated petitioner's Internet and Acceptable Use school policy, and engaged in a private business during school hours in violation of school policy, and in doing so, engaged in unbecoming conduct.

C. In the course of discovery and presentation of proofs before the Administrative Law Judge, the parties reviewed the relevant evidence, which demonstrated to their satisfaction that in relation to the charge that respondent conducted a private business during school hours, that respondent stored documents pertaining to the private business on his school computer, but took no other action in relation to his private business during school hours.

D. In the course of discovery and presentation of proofs before the Administrative Law Judge, the parties reviewed the relevant evidence, which demonstrated to their satisfaction that in relation to the charge that respondent violated the school's Internet and Acceptable Use Policy, that respondent never attempted to peruse, view, download or transmit images, pictures, or information from pornographic websites on his school computer at any time.

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

E. In the course of discovery and presentation of proofs before the Administrative Law Judge, the parties reviewed the relevant evidence, which demonstrated to their satisfaction that in relation to the charge that respondent violated the school's Internet and Acceptable Use Policy, that respondent sent and/or received emails of a personal nature during school hours.

F. In the course of discovery and presentation of proofs before the Administrative Law Judge, the parties reviewed the relevant evidence, which demonstrated to their satisfaction that in relation to the charge that respondent violated the school's Internet and Acceptable Use Policy, that the violations of the school policy committed by respondent included receiving, storing and/or sending inappropriate emails. Attached to some of those emails were pictures of naked women, and in one instance, the performance of a sexual act. Attached to other of the emails were jokes of a sexual nature and/or materials which might be deemed inappropriate for storage on a school computer.

G. Both parties acknowledge that this settlement agreement is based upon their analysis and understanding of the evidence which was exchanged in discovery and was proffered at the hearing, that these conclusions appear to be probable, but cannot be stated with certainty, and that in the event that this settlement agreement is not approved and the matter continues on for a hearing, neither this agreement nor anything in this agreement shall be admissible in evidence, and that neither party will be deemed to have admitted or conceded any of the contents of or the statements in paragraph 4 (C), (D), (E), or (F) of this agreement, or in any other paragraph in this agreement.

H. Petitioner is aware of the public interest in the proper pursuit and handling of tenure charges to assure that unqualified persons do not teach in the public schools in New Jersey. However, upon review of all the circumstances, the uncertainty of the result which might

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

be obtained, respondent's tenured service in the district, in all other respects satisfactory teaching record, the fact that respondent's employment, adjustment, and longevity increments were withheld for the 2005-2006 school year, that respondent was suspended without pay for one hundred and twenty (120) days, and the lack of any evidence that students received, reviewed or were exposed to any of the materials referenced to in the tenure charges or in this settlement agreement, and that respondent's actions did not harm or threaten to harm any students at any time, petitioner believes and respondent concurs that it is in the best interests of all parties and the public to resolve this matter by this settlement agreement.

5. The parties agree that the acts or omissions engaged in by respondent as referred to in paragraph 4 may be deemed to constitute conduct unbecoming and were sufficient to warrant the filing of the tenure charges, but that the appropriate penalty in these circumstances is the withholding of respondent's employment, adjustment, and longevity increments, suspension without pay for the aforementioned one hundred and twenty (120) days, and respondent's resignation from the school district. Respondent will resign upon the Commissioner of Education's approval of this settlement agreement, but with said resignation being retroactive to June 30, 2006. The parties agree that the resignation shall be null, void, and of no effect unless the Commissioner of Education approves this settlement agreement. The parties further agree that the facts do not warrant suspension or revocation of respondent's certificate, but are aware that the Commissioner may refer the matter to the State Board of Examiners which may initiate proceedings to revoke or suspend respondent's certificate.

6. By settling this matter, the parties acknowledge that petitioner will pay respondent's salary to him through June 30, 2006, and that any benefits, including, but not limited to, health insurance benefits, will be provided by petitioner to respondent through August

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

1, 2006. The parties agree that the provision of health insurance benefits for this time period pertain to this agreement only, and shall not be precedential with respect to any other of petitioner's employees, or to respondent's majority representative, the Maple Shade Township Education Association.

7. Petitioner will provide a letter of reference to respondent subject to the conditions in this paragraph within ten (10) days of the approval of this settlement agreement by the Commissioner of Education. In addition, if any prospective employers contact petitioner, or any of petitioner's officers, agents, employees, representatives or members about respondent, the only information provided about respondent shall be the date(s) of respondent's employment with petitioner, his teaching position(s) with petitioner, and the information contained in his teaching observations and evaluations with the school district; provided that nothing herein shall limit any legal right which may exist to access to this settlement agreement.

8. By settling this matter, respondent acknowledges that he is waiving his right to a completion of a hearing before the Office of Administrative Law and Commissioner of Education, in which he could seek an adjudication on the merits of the tenure charges, and on the penalty, if any, if the charges are sustained. Respondent further acknowledges that he understands and agrees to the terms of this agreement and that he is satisfied with the legal representation that he received in this matter.

9. The parties agree that in the event that the Commissioner of Education does not accept any paragraph of this settlement agreement, this settlement agreement shall be deemed null and void, and the matter shall be returned to the Office of Administrative Law for a continuation of a hearing without prejudice to either parties' position and without waiver of any of either parties' legal rights.

10. The petitioner board of education has approved the terms of this settlement agreement as acknowledged by the attached resolution.

Charles E. Kern, President of the Maple Shade Township Board of Education

STATE OF NEW JERSEY :
: SS
COUNTY OF Burlington :

I certify that on June 12th, 2006, Charles E. Kern, President of the Maple Shade Township Board of Education, personally came before me and acknowledged under oath, to my satisfaction, that he is the person named in and personally signed this document, and signed, sealed and delivered this document as his act and deed.

Cheryl L. Smith, Superintendent of Schools
Maple Shade Township School District

STATE OF NEW JERSEY :
: SS
COUNTY OF Burlington :

I certify that on June 12th, 2006, Cheryl L. Smith, Superintendent of Maple Shade Township School District, personally came before me and acknowledged under oath, to my satisfaction, that he is the person named in and personally signed this document, and signed, sealed and delivered this document as his act and deed.

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

Dean Howarth

Dean Howarth, Respondent

STATE OF NEW JERSEY :
: SS
COUNTY OF Mercer :

I certify that on June 13, 2006, Dean Howarth, Respondent in the within matter, personally came before me and acknowledged under oath, to my satisfaction, that he is the person named in and personally signed this document, and signed, sealed and delivered this document as his act and deed.

Carrie Jo R. Herbert

CARRIE JO R. HERBERT
NOTARY PUBLIC OF NEW JERSEY
Commission Expires 12/5/2008

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

RESOLUTION OF THE TOWNSHIP OF MAPLE SHADE BOARD OF EDUCATION APPROVING THE SETTLEMENT AGREEMENT BETWEEN THE BOARD OF EDUCATION AND DEAN HOWARTH

WHEREAS, Tenure Charges and Supplemental Tenure Charges were filed on behalf of the Township of Maple Shade Board of Education ("Board") in the Office of Administrative of Law against Dean Howarth ("Howarth"); and

WHEREAS, the Board and Howarth, through their respective counsel engaged in extensive settlement discussions following three (3) days of hearing in this matter; and,

WHEREAS, as a result of those settlement discussions the parties have expressed a desire to settle the tenure charges; and

WHEREAS, the Board believes it to be the best interest of the Maple Shade School District to settle all claims in accordance with the terms of this Agreement.

NOW, THEREFORE, BE IT RESOLED BY THE TOWNSHIP OF MAPLE SHADE BOARD OF EDUCATION AS FOLLOWS:

1. The Settlement Agreement between Township of Maple Shade Board of Education and Dean Howarth is hereby approved.

2. The Board of Education President is hereby authorized to execute the Settlement Agreement.

237-06

OAL DKT. NO. EDU 1320-06
AGENCY DKT. NO. 302-10/05

B.L.E., on behalf of minor child, I.L.W.,	:	
PETITIONER,	:	
V.	:	COMMISSIONER OF EDUCATION
BOARD OF EDUCATION OF THE TOWNSHIP OF WEST ORANGE, ESSEX COUNTY,	:	DECISION
RESPONDENT.	:	

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

Upon such review, the Commissioner observes that the President of the Board of Education of the Township of West Orange signed the Stipulation of Settlement on behalf of the Board. In that neither the file nor the settlement agreement contains a copy of the Board's resolution approving the settlement and designating this individual to sign the agreement on its behalf, nor, in the alternative, is the agreement signed by the Board attorney, who is the Board's duly authorized representative in litigation, the Commissioner cannot approve the within settlement agreement.

Accordingly, the Commissioner hereby remands this matter to the OAL for revision of the Stipulation of Settlement consistent with the concerns set forth above. If the parties are unwilling or unable to reach accord on a modified agreement for submission to the Commissioner, the matter shall proceed to hearing.

IT IS SO ORDERED.*

Lucille E Davy

ACTING COMMISSIONER OF EDUCATION

Date of Decision: 7/10/06
Date of Mailing: 7/10/06

* This decision may be appealed to the State Board of Education pursuant to *N.J.S.A.* 18A:6-27 *et seq.* and *N.J.A.C.* 6A:4-1.1 *et seq.*

State of New Jersey
OFFICE OF ADMINISTRATIVE LAW

INITIAL DECISION

SETTLEMENT

OAL Dkt. No. EDU 01320-06N

Agency Ref. No. 302-10/05

B.L.E. ON BEHALF OF MINOR CHILD, I.L.W.

Petitioner,

v.

BOARD OF EDUCATION OF THE TOWNSHIP OF WEST ORANGE ESSEX COUNTY

Respondent.

Brenda L. Ellis., *pro se*

Stephen J. Christiano, Esq., for respondent

Record Closed: May 8, 2006 Decided: May 24, 2006

BEFORE **CARIDAD F. RIGO**, ALJ:

On January 12, 2006, this matter was transmitted to the Office of Administrative Law by way of an application for due process filed by petitioners B.L.E. on behalf of I.L.W., challenging the Board of Education's residency determination.

A hearing was scheduled on May 8, 2006 at the OAL, 33 Washington Street, Newark, New Jersey, during which time the parties reached a settlement.

On May 23, 2006, the parties prepared and submitted the attached settlement indicating the terms of agreement which are incorporated herein by reference.

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

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

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

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

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

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

May 24 2006
DATE

CARIDAD F. RIGO, ALJ

Receipt Acknowledged:

5-26-06
DATE

DEPARTMENT OF EDUCATION

Mailed to Parties:

MAY 31 2006
DATE

DIRECTOR AND CHIEF ADMINISTRATIVE LAW JUDGE
OFFICE OF ADMINISTRATIVE LAW

ljb

RECEIVED
2006 MAY 24 P 1:15

Stephen J. Christiano, Esq.
Attorney for Respondent
49 Mt. Pleasant Avenue
West Orange, NJ 07052
(973) 736-1636

BEFORE THE COMMISSIONER
OF EDUCATION OF NEW JERSEY
OAL DOCKET NO. EDU 1320-2006
AGENCY REF. NO. 302-10/05

B.L.E., ON BEHALF OF MINOR CHILD, I.L.W.,
Petitioner,

v.

BOARD OF EDUCATION OF THE TOWNSHIP OF WEST ORANGE, ESSEX COUNTY,
Respondent.

STIPULATION OF SETTLEMENT

The parties having amicably adjusted the differences between them, it is hereby stipulated as follows:

(1) Petitioner withdraws her petition of appeal.

(2) Respondent withdraws its counterclaim for tuition charges.

(3) Petitioner shall pay respondent the sum of $300 in full settlement of all tuition charges. Payment shall be made within 15 days of the approval of this settlement by the Commissioner of Education.

(4) If petitioner does not make payment within 15 days of the Commissioner's approval of the settlement, respondent shall be entitled to the entire amount of tuition for the period of I.L.W.'s school attendance in West Orange.

(5) The settlement is subject to approval by the Commissioner of Education. If the Commissioner rejects this settlement, any tuition payment previously made by petitioner shall be refunded by respondent.

(6) This stipulation of settlement constitutes the entire agreement of and understanding between the parties.

Dated:

Brenda L. Elllis, Petitioner

Rachel Woodson, Parent

Attest:

Secretary

Board of Education of
The Township of West Orange

By: _____
President

241-06

OAL DKT. NO. EDU 9909-00
AGENCY DKT. NO. 372-9/00

LORRAINE MOORE,	:	
PETITIONER,	:	COMMISSIONER OF EDUCATION
V.	:	DECISION
STATE-OPERATED SCHOOL DISTRICT 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, as have exceptions filed by the State-Operated School District (District) pursuant to *N.J.A.C.* 1:1-18.4. Petitioner did not reply to the District's exceptions.

On exception, the District contends that the Administrative Law Judge (ALJ) correctly recited the legal standard for adjudication of increment withholding matters, but then improperly applied it by placing the burden of proof on the District rather than on petitioner and by substituting her own judgment for that of petitioner's evaluators. (District's Exceptions at 2-3). The District further contends that the ALJ held the District's proofs to heightened standards, improperly gave the benefit of equipoise in evidence to the party (petitioner) bearing the burden of proof, and judged the qualifications of District evaluators by her own standards without regard to State certification rules. (*Id.* at 3-5) Finally, the District proffers that the ALJ ignored many of her own factual findings, overlooking demonstrated deficiencies in petitioner's

performance that fully warranted the withholding of her increment. (*Id.* at 5-13) The District concludes:

> When the proper standard of review is properly applied to the significant undisputed facts in this case, it readily appears that the petitioner has not proven that there was anything unreasonable or arbitrary in the District's decision to withhold her salary increment for less than satisfactory performance. On the contrary, the evidence in the record provides more than adequate support for the District's conclusion that the petitioner's poor teaching performance did not merit the reward of a salary increment. (*Id.* at 13)

Upon careful and independent review, the Commissioner determines to reject the Initial Decision, substantially for the reasons stated by the District in its exceptions. The Commissioner is compelled to concur with the District that, despite the ALJ's recitation of the correct standard for reviewing the withholding of increments, Initial Decision at 30,[1] the standard was not appropriately applied to the facts at hand. Instead, the Commissioner finds, based on the record before her, that the District's decision to withhold petitioner's increment did not exceed the valid exercise of its discretionary authority and that petitioner has not met her burden of establishing otherwise.

It is by now settled law that actions concerning increment withholding may not be upset unless they can be demonstrated to be patently arbitrary, capricious, unlawful or induced by improper motive, and, further, that the burden of proof that an action was so deficient rests with the person challenging the decision. *Kopera v. West Orange Bd. of Educ.*, 60 *N.J. Super.* 288, 294, 297 (App. Div. 1960) As held by the State Board of Education in *Helen Yorke v. Board of Education of the Township of Piscataway, Middlesex County*:

[1] Although the ALJ inadvertently states that the burden of proving unreasonableness is on "the BOE member," it is clear from the context and subsequent discussion that she is referring to the petitioner.

> It is well established that the only question open for review when a board withholds an increment is whether the board had a reasonable basis for its factual conclusion. *Kopera v. West Orange Bd. of Ed.*, 60 *N.J. Super.* 288, 295-96 (App. Div. 1960). The [adjudicating entity] therefore may not substitute its judgment for either the board or those who made the evaluation, but may only determine: (1) whether the underlying facts were as those who made the evaluation claimed and, (2) whether it was reasonable for them to conclude as they did based upon those facts, bearing in mind that they were experts, admittedly without bias or prejudice, and closely familiar with the *mise-en-scene*. *Id.* At 296-97. (1990 *S.L.D.* 1818, 1819; appeal A-6083-89T5 dismissed by Appellate Division on January 7, 1991 due to appellant's failure to prosecute)

In the present instance, ALJ held that "the underlying facts pertinent to the evaluations were [not] as referenced in the evaluations," and that, "even in light of the deference to be given to the evaluators," petitioner had proven by a preponderance of the credible evidence that the District's action was arbitrary and unreasonable, thus meeting her burden under *Kopera, supra*. (Initial Decision at 32-33) However, the analysis on which this conclusion rests, set forth in full at 31-32, reveals that in reaching her conclusion, the ALJ effectively shifted the burden of proof from petitioner to the District. For example, the ALJ: 1) faulted District evaluators for failing to support their statements regarding Core Curriculum Content Standards and State mandates with documents at hearing, while making no comparable demand on petitioner; 2) required the District to present affirmative evidence that it had given individual teachers specific instruction as to what was expected of them by way of lesson plans, while ignoring undisputed evidence that general instructions and models were available to all teachers in the district; 3) sought proof from the District that, prior to the evaluations in question, petitioner had been specifically instructed to change her lesson plan format and had further been offered suggestions for improvement, ignoring the fact that the areas of need identified in petitioner's January 2000 evaluation remained uncorrected at the time of her

subsequent evaluation in May; 4) expected the District to explicate precisely how and by whom the final decision to withhold petitioner's increment was made, notwithstanding the signatures of the Principal and Vice Principal – both of whom had evaluated petitioner – on the summative evaluation document recommending withholding (R-3) and the recognition that any withholding must ultimately be directed by the State District Superintendent, as it was in this instance (R-4); and 5) favored petitioner in matters where her testimony was deemed as credible as that of District's witnesses, rather than giving the benefit of equipoise to the District, as the burden of proof properly demanded. In short, the ALJ's analysis required the District to justify its action, rather than requiring petitioner to prove its arbitrariness.

Similarly, the ALJ made numerous substitutions of her own judgment for that of District evaluators and the State Superintendent. For example, she opined that, contrary to the opinion of evaluators, petitioner's lesson plans *were* sufficiently detailed, and that they comported with District requirements because the District offered no evidence of a specific written mandate for use of particular techniques on a daily or other time-specific basis. She further opined that because petitioner's ratings overall were generally satisfactory or "needing some improvement," withholding of increment was not warranted on balance, preferring petitioner's mechanistic approach to the District's individualized weighing of factors and contexts.[2] She called into question the judgment of District evaluators – all of them experienced and properly certified – by implying that they were not well-informed or sufficiently qualified, noting that District witnesses

[2] Petitioner's central argument on appeal is that she "received only one Unsatisfactory out of twelve possible scoring areas" – a reference to the fact that each of petitioner's three evaluations was scored in four overall areas – and that the District offered no evidence that "Needs Improvement" was considered less than satisfactory for purposes of withholding teacher increments. (Petitioner's Post-Hearing Brief at 8-10)

"exhibited a lack of information in certain respects, including familiarity with some of the materials considered, including the format of group presentations" (at 31), and that Vice Principal Pekarsky "did not evidence experience teaching any English courses nor substantial information regarding the English curriculum" (at 31). She suggested that the recommendation to withhold petitioner's increment was suspect because Pekarsky's role in the decision-making process was unclear and he was unaware of Principal Dabney's positive evaluation of October 27, 1999 when he prepared his own negative assessment, overlooking the fact that Dabney concurred with Pekarsky's summative year-end evaluation despite his own earlier opinion.

Lastly, the ALJ discounted substantial evidence on record supporting the District's decision to withhold petitioner's increment. Nothing in the documents presented by petitioner is sufficient to overcome the judgment of seasoned, certified evaluators that petitioner's lesson plans were not sufficiently individualized for each day, that they were virtually identical for long periods of time, and that their teaching objectives were too broadly stated; it is not dispositive in this regard that the District does not expressly "prohibit" cookie-cutter lesson plans (at 28) or that it uses a plan book format that, in the opinion of petitioner and the ALJ, offers too small a space for the District's stated requirements (at 30). Likewise, the record is clear that petitioner on the date of her third evaluation attempted to begin a lesson recognized by students as already taught, and was out of class for a significant period of time for an activity that was not reflected in her lesson plan while the balance of the class was left unattended. The record also shows that on two observations petitioner delayed instruction at the beginning of class, and that on the third she assigned lengthy individual projects while engaged at her

desk, then had students deliver oral reports without questions or feedback. Neither was anything presented that would counter the observation that petitioner made little or no attempt to have her students practice with rubrics so as to familiarize them with and prepare them for the types of activities included in State tests.

Under the circumstances, the District cannot be faulted for reasoning that:

> [Petitioner] was an experienced teacher, yet she did not prepare adequate and specific lesson plans to indicate what she planned to teach and what the students would be able to learn. She made no effort to improve her lesson planning after receiving Ms. Ruane's evaluation in January 2000 but continued to cut and paste identical lesson plans in her book. She wasted time getting her class started when Ms. Ruane observed her class and was not even present at the start of the class observed by Mr. Pekarsky on May 2, 2000. When she was in the classroom, she did not ask her students questions which would challenge them toward critical thinking, did not conduct activities which would motivate them, did not engage the students in her class --- and did not even teach at all during the class observed by Mr. Pekarsky, but sat at her desk while students worked on projects for over 40 minutes and then let the students make oral presentations, giving them no feedback and asking them no questions.***The petitioner in this case did not merit a salary increment because her lesson planning and instructional techniques were well below the quality which the District had every right to expect from its teaching staff.*** (District's Exceptions at 11-12)

As the District rightly observes, a teacher's performance need not be egregiously deficient in order for an increment to be withheld:

> The purpose of a salary increment, as stated in *Barnards Twp. Bd. of Educ. v. Barnards Twp. Ed. Assn,* 79 *N.J.* 311, 321 (1979), is "to reward only those who have contributed to the educational process thereby encouraging high standards of performance." Salary increments are a "reward for meritorious service" and a means for a school district "to ensure a high-quality teaching staff for its students," *Probst v. Haddonfield Bd. of Educ.,* 127 *N.J.* 518, 527 (1992). An increment can be withheld for performance which simply "did not meet the expectations or standards of excellence required by the Board ....," *Gnatt v. Manalapan-Englishtown Reg'l School Dist.,* 92 N.J.A.R.2d (EDU) 589, 594. (District's Exceptions at 12)

Here, while petitioner may well be a long-standing and generally capable educator who was clearly doing many things right in the judgment of all three of her evaluators – as evidenced by their positive ratings and comments in reference to those aspects of her teaching *not* judged as unsatisfactory or needing improvement – serious deficiencies in performance were nonetheless apparent during the year in question. Thus, while the District's action may be viewed as harsh and reasonable minds might differ as to its appropriateness, in light of underlying facts which the record shows to have been as evaluators claimed, the Commissioner cannot find that the District abused its discretion in concluding that petitioner's 1999-2000 performance overall was not sufficiently meritorious to warrant award of an increment for the subsequent school year.

Accordingly, the Initial Decision of the OAL, recommending that the District's decision be reversed and that petitioner be awarded a salary increment for the 2000-2001 school year, is rejected for the reasons set forth herein. The District's action is upheld and the Petition of Appeal is dismissed.

IT IS SO ORDERED.[3]

Lucille E Davy

ACTING COMMISSIONER OF EDUCATION

Date of Decision: 7/12/06

Date of Mailing: 7/12/06

[3] This decision may be appealed to the State Board of Education pursuant to *N.J.S.A.* 18A:6-27 *et seq.* and *N.J.A.C.* 6A:4-1.1 *et seq.*

State of New Jersey
OFFICE OF ADMINISTRATIVE LAW

INITIAL DECISION

OAL DKT. NO. EDU 9909-00
AGENCY DKT. NO. 372-9/00

LORRAINE MOORE,

Petitioner,

v.

STATE-OPERATED SCHOOL DISTRICT OF THE CITY OF JERSEY CITY,

Respondent.

Philip Feintuch, Esq., for petitioner (Feintuch, Porwich & Feintuch, attorneys)

Charlotte Kitler, General Counsel, for respondent

Record Closed: April 4, 2005 Decided: November 17, 2005

BEFORE **DIANA C. SUKOVICH,** ALJ:

PROCEDURAL HISTORY

On September 14, 2000, Lorraine Moore (petitioner or Moore) filed a petition with the State Department of Education (DOE), alleging that the State-Operated School District of the City of Jersey City (respondent or District) improperly withheld a salary increment to which she was entitled. Respondent filed an answer on September 28, 2008, and the DOE transmitted the matter to the Office of Administrative Law on November 27, 2000 for determination as a contested case pursuant to *N.J.S.A.* 52:14F-1 to -13.

Telephone conferences were conducted on January 11 and July 11, 2001 and September 25, 2003. Efforts by the parties to resolve the matter were not successful. A hearing was conducted, but not concluded, on December 3, 2003. Petitioner requested that if an additional hearing day could not be scheduled imminently, a hearing be scheduled subsequent to June 22, 2004, the last day of the 2003/04 school year (SY). A hearing scheduled on June 23, 2004 was adjourned at petitioner's request, because the last day of the SY had been changed to that date, and a hearing scheduled on October 18, 2004 was adjourned at respondent's request, because of the unavailability of witnesses and an emergent matter pertinent to counsel. A hearing was conducted on October 28, 2004. Subsequent to the receipt of transcripts by the parties, a request by petitioner for an extension of the deadlines for the filing of briefs was granted. Respondent and Moore filed briefs and at this judge's request, the District filed transcript references pertinent to its brief. Subsequent to additional communications with the parties, the record was closed on April 4, 2005.

NATURE OF THE CASE

Petitioner, a tenured teacher with the District, contests action by respondent denying her a salary increment for the 2000/01 SY. Respondent did so based on its assessment of Moore's performance during the 1999/00 SY. As is discussed in more detail hereinafter, the burden of proof is upon petitioner. The issue, broadly, is whether Moore proved her case, by a preponderance of the credible evidence.

FINDINGS OF FACT

UNDISPUTED FACTS

It is clear that many of the pertinent facts are not materially in dispute. Based upon a review of the entire record, I **FIND** the following to be facts.

Petitioner has been employed by the District for at least 30 years, at least 29 as an English Teacher at Snyder High School (Snyder), her current assignment. Prior to the 2000/01 SY, she was never denied an increment.

Pursuant to District guidelines, a "SWAT, which "stands for" 'Student Will Be Able To', must address, in a teacher's lesson plan, the "learning" that will occur. A teacher is also required to write an associated "BY", the activities by which one can "verify" that the "learning" occurred. (Tr., 10/28/04, pp. 12-13.) A SWAT is an objective, for students, indicating what a teacher will be addressing on any given day. The articulation of a SWAT enables a teacher to determine, at the end of the day, if the objectives were met. A "BY" includes techniques to help meet the objectives. A teacher is also required to list pertinent objectives on a board in a classroom and to include such in his/her lesson plan book. A review of a lesson plan book should allow an individual to determine if there was continuity in lessons, over time.

Additionally, "New Jersey Core Content Curriculum Standards" must be followed and implemented. Respondent's teachers "have always been instructed" to incorporate such in their written plans. (*Id.* at 19.) District personnel are "always mindful" of the State High School Proficiency Assessment (HSPA). The pertinent tests assess students by "rubrics", State "guides". For example, there is a rubric "for writing", "from zero to six", and, also, an "open ended rubric from one to three." *Id.* at 26.)

During the 1999/00 SY, Moore was observed/evaluated by three administrators, Bruce Dabney (Dabney), Ellen Ruane (Ruane), and Henry Pekarsky (Pekarsky). At the time, Dabney was the Principal of Snyder. Ruane, who has been employed by the District since 1974, is currently Snyder's Principal. She previously was a Teacher, an Assistant Principal, and a Language Arts Supervisor. She held the latter position in the 1999/00 SY and was responsible for monitoring implementation of the English curriculum and evaluating English Teachers in two of respondent's high schools, including Snyder. Pekarsky has been employed by the District for at least 33 years and currently is a High School Vice Principal. He previously was a Business Teacher and was a Vice Principal at Snyder during the 1999/00 SY. He never was an English Teacher.

Dabney observed respondent on October 27, 1999. He completed a Formative Observation Form (Observation Form), pertinent to his observation, which document was signed by both petitioner and Dabney on October 28, 1999. The content of that document is as stated in Exhibit P-1. The Observation Form addressed four "Domains," Planning and Preparation, Students and Learning, Instruction, and The Classroom Environment, Domains 1, 2, 3, and 4, respectively. Dabney rated petitioner as Satisfactory, "S", in all four Domains and in each subsection pertinent to the Domains. (Ex. P-1, p. 1.) The subsections relevant to Domain 1 were "Demonstrates Knowledge of Content and Pedagogy" (1a), Selects Instructional Objectives" (1b), "Plans Effective Instructional Activities" (1c), "Demonstrates Knowledge of Instructional Materials & Resources" (1d), and "Designs Coherent and Continuous Instruction" (1e); pertinent to Domain 2, "Demonstrates Knowledge of Students (Characteristics, Approaches to Learning, Skills and Knowledge, and Cultural Heritage)" (2a), "Assesses Student Learning using a Variety of Evaluation Techniques" (2b), "Links Appropriate Assessment to Instructional Objectives" (2c), "Uses Assessment Results for Instructional Planning" (2d), and "Maintains Accurate Records on Student Progress and Performance" (2e); pertinent to Domain 3, "Communicates the Lesson Cleary and Accurately" (3a), "Employs Effective Questioning and Discussion Techniques" (3b), "Engages Students in Learning" (3c), "Provides Feedback to Students" (3d), and "Demonstrates Flexibility and Responsiveness" (3e); and, pertinent to Domain 4, "Creates an Environment of Respect and Rapport with pupils and staff" (4a), "Establishes a Culture for Learning" (4b), "Implements and Maintains Classroom Procedures" (4c), "Monitors Student Behavior" (4d), and "Utilizes Designated Space Effectively" (4e) (*Id.* at 1-3) In addition to S, ratings of "Needs Improvement", "N.I.", "Unsatisfactory", "U", and "Not Applicable", "N/A", could be assigned. (*Id.* at 1.)

Dabney's written "Suggestions" regarding Domain 1 were that petitioner continue to use the various exercises, to encourage students to pace themselves when delivering oral presentations, and to continue to emphasize the "SRA/HFPT process." (*Ibid.*) His suggestion pertinent to Domain 2 was that Moore continue to link oral presentations to the referenced "process." The suggestions relevant to Domain 3 were that she continue to allow students to select the topics for their oral presentations, because such makes students "responsible" for the content, and to continue to stress the importance of correct grammar. (*Id.* at 2.) Finally, Dabney's suggestions relative to

Domain 4 were that Moore continue to encourage students to show appreciation of their colleagues' work and that she have students "hold" their questions until after a speech was delivered. (*Id.* at 3.)

Ruane observed Moore on January 19, 2000. The observation was not precipitated by a specific matter, but was conducted as part of Ruane's responsibilities.

Prior to the observation, Ruane met with petitioner to review what would be evaluated. Contractually, it is required that conferences be conducted prior and subsequent to an observation. The teacher is required to sign a pre-observation conference form, and the pertinent evaluation is to be conducted within 20 days thereafter. A Pre Observation Conference Form (Conference Form) was signed by Ruane and Moore on January 13, 2000. That document referenced Domains 1 through 4 and the pertinent subcomponents. It noted that the evaluator and evalutee identified and discussed the specific instructional areas which would be addressed during the observation/evaluation, *i.e.*, "plan book, marking book, journals, Showcase/working portfolios", and that Ruane would conduct a formal observation/evaluation within 20 schools days. The Conference Form also referenced a 'Framework for Teaching,' included in the District "planning binder," which defined what teachers "should know and be able to do", and which formed the basis of respondent's observation/evaluation process. The document also noted that all Domains would be assessed, with emphasis on the items noted. (Exh. R-2, p. 6.) During the conference, Ruane advised Moore that she would conduct an observation within 20 days and referenced the matters that she would be evaluating, writing such in Moore's presence. Ruane had previously been a supervisor of Moore.

Snyder is on a "block schedule". (Tr.,12/3/03, p.11.) On the day in question, Ruane observed Moore during "Block 4," the last block of the day, from 1:40 p.m. until 3:05 p.m. (Tr.,10/28/04, p. 9.) Ruane also reviewed Moore's lesson plans.

Upon entering the classroom, Ruane observed that the students were engaged in activities, reflecting written objectives, SWATs, which had been prepared by petitioner, pertinent to journal writing. Journal writing and sharing occur daily.

Ruane subsequently completed an Observation Form, the content of which is as stated in Exhibit R-2. Copies of pages from petitioner's lesson plan book for the week of January 17, 2000 were attached to the Observation Form. As noted in the plans, Monday of that week was a holiday. The content of that document is as stated in pages four and five of Exhibit R-2.

Pertinent to Domain 1, Ruane rated petitioner N.I. She rated Moore N.I.; regarding Domains 1b, c, and d; and S, regarding Domains1a and 3. Ruane noted that the lesson plans for the observed lesson, and for the entire week for English I, were identical, with the exception of listed chapters, pertinent to reading material being addressed in the classroom, a book, "Great Expectations." She also noted that the course of study for English I "stipulates" that the novel be read "along with unit 4" and that Moore had no written plans for unit 4 for the observed reference. Ruane also addressed the written objectives, SWATs, which included that students were to write on the selected journal topic, pertinent to 'To Do' instructions on the board, that at least five students would share their writings with the class, to review chapter I by taking a quiz, and to make a notebook and take notes on the sequence of events. Homework included student generated vocabulary words, definitions, and sentencing. The activities noted were journal writing and sharing, an oral review of Chapter I, making notebooks, working in groups to read the assigned chapter for the purpose of summarizing it, and looking for vocabulary sequence of events and characters. Ruane noted that Moore used the "overhead" in her classroom. (Exh. R-2, p. 1.)

Ruane's suggestions for Domain I were that petitioner be selective in the standards addressed in a lesson, referencing the progress indicators to help determine exactly what the students were expected to practice on any given day; to continue to plan for, and implement, journal writing and sharing, limited to 10 to 15 minutes, noting that students did not have to come to a podium; and that students be given time to read the work independently, as it was difficult to assign groups reading followed by an assignment, because students read at different rates. (*Ibid.*)

Ruane rated Moore as N.I. pertinent to Domain 2b and as S regarding Domains 2a, c, d, and e. She summarized that Moore maintained a record book documenting

student attendance and progress/success pertinent to journals, grammar checks, group presentations, essays, etc.; that student working and showcase portfolios were maintained for each student; that District guidelines regarding "The Magnificent Seven" needed to be followed; that a review of folders evidenced that Moore attempted to give students numerous opportunities to demonstrate mastery; and that there was limited documentation of the use of the "open-ended response" and "speaking" rubrics to assess student efforts. Ruane's suggestions were that Moore provide opportunities for formal speaking; that students be assessed on their abilities to construct a response and communicate such clearly, utilizing the "New Jersey Speaking Rubric;" formulate and assess open-ended questions for students to answer, as freshmen would be required to do so on the HSPA, in the Spring of 2002; provide opportunities for self/peer critique of work using the rubrics; and follow respondent's guidelines for showcase portfolios "(Magnificent Seven)". (*Id.* at 2)

Ruane rated Moore N.I. regarding Domains 3b, c, and d and S pertinent to Domains 3a and e. She summarized that Moore communicated lesson objectives clearly and accurately and that her directions were clear and direct. However, Ruane also wrote on the Observation Form that improvement was needed regarding asking effective questions. She noted that those asked tested literal comprehension and that too much time was devoted to journal writing and sharing, noting that the entire activity should last no more than 15 minutes and that journal sharing did not commence until 1:55 p.m., 15 minutes into the lesson. As reflected in the Observation Form, Ruane had recommended to Moore, during a previous conference, that students read their entries at their desks and that she eliminate applause after each speaker; during the observation, a student read at the podium, and the class applauded. Ruane noted that the group assignment should have been given to the students after the reading had been finished, *i.e.,* the arrangement of the task did not allow all students to be engaged in the discussion/assignment, and the topics were too broad. Ruane suggested that Moore vary the type of questions, including both "literal and inferential comprehension" ones; and create "higher order thinking situations," *i.e.,* comprehension questions exploring "higher order" questions of interpretation and evaluation, rather than "simple recall", as such would result in increased interest and motivation. In that respect, Ruane referenced a November 1998 "CONNECT FIVE News letter."(*Id.* at 3.)

Pertinent to Domain 4, Ruane rated petitioner S in all respects. She summarized that Moore maintained an environment of respect and rapport with the students; that teacher/student interactions were friendly and demonstrated general caring and respect; that Moore addressed her students as 'ladies and gentlemen' and had created a "culture for learning", conveying "genuine enthusiasm" for the subject, encouraging the students to do the same; and that petitioner "consistently circulated" around the room to keep students focused. Moore implemented and maintained classroom procedures, and students were expected to enter the class and take their journals from a file cabinet located in the back of the room. It was "evident" that expectations for student behavior had been discussed, and the class' behavior was "appropriate." Additionally, the designated space was utilized "effectively," and students moved from desks in rows to desks rearranged in groups for cooperative learning assignments. (*Ibid.*) Ruane's suggestions were that petitioner consider an alternative system for distribution of journals, as some time was "wasted" by having students take their materials from the file cabinet; that attention be given to starting instructional sessions on time and continuing with planned activities until the end of the period; and that petitioner continue to display students' work on a timely basis. (*Ibid.*)

Ruane met with petitioner on February 8, 2000, conducting a post-evaluation conference. She gave petitioner a copy of the Observation Form which she had completed, and both signed it. The Observation Forms completed by Ruane and Dabney contained statements to the effect that the signature of an Evalutee did not indicate approval, nor disapproval, of the evaluation and that additional performance data could be entered into the record by the evalutee within ten working days after he/she signed the Forms. Ruane conducted no other evaluations of Moore during the 1999-00 SY.

Pekarsky conducted a pre-observation conference with petitioner, apparently by telephone, and subsequently observed one of her classes on May 2, 2000, from 1:40 to 2:50 p.m. He had not previously observed her. Pekarsky's practice, when evaluating a teacher for the first time, is to provide information which addresses the matters that will be considered during the evaluation and to prepare a SWAT. Pekarsky's practice, in general, when assessing a teacher, is to include suggestions pertinent to SWATs.

Moore was not in her classroom when Pekarsky arrived. He assumed that she would be present "within a minute or two". When she was not, he asked the students where she was, and was told that she was "in 205," a computer laboratory. Pekarsky asked one of the students to go and tell respondent that he was in the classroom to perform an evaluation. Moore subsequently returned, with the students that had been in the computer laboratory. Respondent "was ready to start teaching something", and some of the students, "a lot", "shouted out": 'We already did that.' Moore then "came up with the lesson that she was able to cover and she had the students working on a –a project and then they had to give a oral presentation." During her absence, the other students had been "left unattended". (Tr.,12/3/03, pp.15-16.) Respondent's lesson plans did not reference that any students would be in another classroom

Pekarsky completed an Observation Form, dated May 4, 2000, the content of which is stated in Exhibit R-1. He rated Moore as U, pertinent to Domain 1; S, pertinent to Domains 2 and 4; and N.I., pertinent to Domain 3. He rated petitioner S pertinent to Domains 1a and d and U pertinent to Domains1b, c, and e. He summarized that Moore demonstrated proficiency in meeting the core curriculum standards. However, her SWATs were identical for the past two weeks and "basically" the same for three preparations; the lesson plan book reflected that "Odysseus" had been addressed from April 10, 2000, and would be until May 3, 2000; that petitioner did not have a lesson for May 4, 2000, as "required" by "contract"; and that when petitioner assigned a lesson to the students, "they all shouted out loud that we already completed that assignment." Pekarsky also noted that the previous evaluation, that prepared by Ruane, had "cited" Moore pertinent to her SWATs and To Do's. However, Moore continued to use the same format and "not allow any creativity or alternatives". He also noted that Moore had first told the students that they would work on their projects for 25 minutes, but that such "took 45 minutes." He additionally indicated that upon his arrival at the classroom, at least 60 percent of the students were in another room, room 205, that the other students were left unsupervised, and that petitioner's lesson plans did not indicate that students had assignments to complete in Room 205. Finally, he stated that the lesson plan book was "cut and pasted." Pekarsky's suggestions were that petitioner should follow recommendations in her previous evaluation and that she "must" utilize more

than one teaching technique to address different conditions, materials, and student maturities. (Exh. R-1, p. 1.)

Pekarsky rated Moore as S regarding Domain 2 and all subcomponents thereof. He summarized that Moore assessed students through group projects and oral presentations, she maintained folders, journals and portfolios for each student, her lesson plan and "role" books were current, and she used a "stamp with a smile and it states good work." In the latter respect, he stated that such was "insufficient", as students "must know what good work means and show any corrections that are needed." (*Ibid.*) He made no suggestions pertinent to Domain 2.

Pertinent to Domain 3, Pekarsky rated petitioner N.I. He rated her S regarding Domains 3a and c and N.I. regarding Domains 3b, d, and e. He summarized that petitioner had her students work in small groups; that they had to prepare a report regarding their reading material, *Odysseus*; that each student had a "job" to perform; that the students then gave oral presentations; that petitioner did not provide feedback nor ask "open ended or high order thinking questions"; that "too much time" was spent on preparing the reports, resulting in Moore having to "cut two groups short in order to complete the assignment"; and that she utilized "limited instructional procedures" and seemed "reluctant to vary techniques or innovate." (*Id.*at 2.) The pertinent Observation Form contains no suggestions regarding Domain 3.

Pekarsky rated Moore as S regarding Domain 4 and all subcomponents thereof. The summary was that Moore had good rapport with students, the students responded "very well" to her, petitioner had "excellent control", and the classroom was decorated with students' work. (*Ibid.*) He had no written suggestions.

Pekarsky subsequently sent petitioner a letter regarding a post-evaluation conference pertinent to his observation/evaluation, to be conducted in his office. His intent was to discuss it with Moore. Although she went to Pekarsky's office on the day in question, May 4, 2000, petitioner did not sign the document. Dabney was present at the time. Pekarsky gave petitioner a copy of the document, and he signed it. The

pertinent Observation Form states that Moore "refused" to sign the evaluation and that Dabney was present. (Exh. R-1., p. 2.)

A Personal Improvement Plan (PIP), a "SUMMATIVE EVALUATION INSTRUCTIONAL ANNUAL WRITTEN PERFORMANCE REPORT", was subsequently completed pertinent to Moore. (Exh. R-3, p. 1.) A meeting regarding it was scheduled in Dabney's office on June 22, 2000. Moore went to the office on the day in question. Pekarsky was present; Dabney, apparently, was not.

Pekarsky completed the first page of the PIP, which reflected ratings of U regarding Domain 1 ; S, regarding Domains 2, 4, and 5; and N.I., regarding Domain 3. The stated "Strengths" of petitioner were good rapport with students, monitoring student behaviors, and demonstrating knowledge of subject materials. Areas needing improvement were attendance; utilization of a variety of teaching strategies, with a notation that in order to comply with the HSPA test, students had to be prepared to formulate and assess "open-ended questions"; attention to starting instructional sessions on time and continuing with planned activities until the end of the period; utilizing District policy in preparing lesson plans; and utilizing different lessons regarding each subject. The stated suggestions were utilization of "real-world problems" to motivate and apply theory; utilization of computers to develop "conceptual understanding"; "Real world applications and modeling"; utilization of a "flexible set" of strategies to solve problems; changing the teacher's "role" from dispensing information to "facilitating"; the "role" of students should "sift" {sic} in preparation for entrance into the work force or "higher education"; and utilization of a variety of instructional methods "to cultivate students." (*Ibid.*)

Pekarsky signed both pages of the PIP on June 22, 2000, and the document indicates that Dabney also did so. Petitioner did not sign either page. Neither Pekarsky nor Moore wrote comments. Each page of the PIP contained a statement that the "Evaluatee's" signature indicated neither approval or disapproval and that additional performance data could be entered into the record by the Evaluatee within ten working days of signing the document. (Exh. R-3, pp. 1-3.)

Consistent with District practices, the second page of the PIP was prepared by Dabney. That portion reflects "STRENGTHS TO BUILD ON" of "Excellent" attendance, knowledge of subject matter, and organization and planning techniques. The stated "NEEDS" were to access pupils and evaluate their progress, continue to utilize effective instructional techniques, and to stress the importance of good attendance. The "IMPROVEMENT ACTION" was to develop and implement a strategy to improve pupil attendance, to develop and implement a strategy to improve passing rates, and to develop questioning strategies to encourage greater pupil participation. (*Id.* at 2.) A section for comments by the Evaluatee was not completed. A portion, apparently completed by Dabney, indicated, via a checkmark, that petitioner did not demonstrate progress in meeting the prior year's PIP and that she was recommended for re-employment, but that she was not recommended for an increment.

To Pekarsky's belief, only a Principal can recommend that an increment be withheld or increased. A Vice Principal "just does the initial work." Pekarsky had input, to Dabney, in the current matter, "because" of his evaluation. (Tr.,12/3/03, p. 33.)

By letter dated July 1, 2000, Michael A. Donahue, respondent's Executive Assistant/Human Resources, advised Moore that the State District Superintendent (Superintendent) had "directed" that her salary increment be withheld for the 2000-01 SY because of "LESS THAN SATISFACTORY PERFORMANCE" and that the types of increments being withheld were "EMPLOYMENT" and "ADJUSTMENT" Increments. (Exh. R-4.) As reflected in that document, petitioner's salary, in each of the 1999-00 and 2000-01 SYs, was $73,950.

DISPUTED FACTS

As discussed in more detail hereinafter, petitioner has the burden of proving, by a preponderance of the credible evidence, unreasonableness, pertinent to the acts and related conclusions relied upon by respondent and its ultimate decision to withhold an increment. The reasonableness of the pertinent evaluations and other matters relied upon by the District and respondent's determination to withhold an increment were vigorously contested by the parties.

Dabney was not presented as a witness. Ruane referenced, during her testimony on direct examination, lesson plans prepared by petitioner pertinent to Domain 1. Moore initially addressed the lesson plan for Tuesday during the week of January 17, 2000, noting, for example, that if a SWAT was for students to be able to comprehend a short story, the associated BY would be reading and answering five questions.

Ruane testified that petitioner's lesson plans were inappropriate for several reasons. They all related to '*Great Expectations*', which was not to be taught "independently", but at the same time as "Unit Four of the Course Guide." The lesson plans were not pertinent to "Unit Four of the Prentice Hall Literature Series" (Unit 4). However, the pertinent lesson plans, which were attached to the Observation Form completed by Ruane, do not explicitly reference "*Great Expectations*", although such is addressed in the summary written by Ruane pertinent to Domain 1. Any documents regarding the curriculum for English I and/or Unit 4 were not moved into evidence, and their content is not clear from the record. However, the plans are, to a substantial extent, the same for each day of the week in question. (Tr.,10/28/04, p. 16.)

Ruane also testified, referencing Wednesday in the pertinent lesson plans, that they were inappropriate in other respects. She noted, for example, that a reference in a SWAT to "write on a selected journal topic" is not an appropriate one, but should have been phrased differently, such as 'students will be able to respond to a prompt by writing for . . . ten minutes. So, the SWAT is the learning", and the 'BY' is the student activity. Similarly, sharing writings is not an appropriate SWAT, not an objective, but is a BY. A statement that students will be able to review a chapter does not indicate the learning that will occur. For example, learning can be by summarizing a chapter, making inferences. As testified to by Ruane, SWATs are "usually followed by a verb"; and the BY, by the children's "actions." There was no indication that Unit 4 was being utilized during the lesson, and no distinctions apparent from any of the lesson plans between SWATs and BYs. (*Id.* at 17-18.)

Ruane also testified that she rated petitioner as N.I. regarding Domain I because of considerations regarding the New Jersey Core Curriculum Standards for Literacy,

which have to be incorporated by teachers. Those standards are reading, writing, speaking, viewing and listening, and there are "progress indicators" under each area. Although Moore included all five components in her lesson plans, for example, for Wednesday, there were no progress indicators regarding which were specifically addressed. The plans were "too broad". Teachers are to be "very specific" in stating progress indicators, which are to "delineate exactly what you are teaching". All five core content standards do not have to be listed for a particular lesson. When asked a question by this Judge regarding Unit 4, Ruane noted that she did not have the course guide with her, that "it would be continuing with the reading selections in the Prentice Hall literature book." Referencing her suggestions pertinent to Domain I, Ruane testified that "we encourage" journal writing to be done within 10 to 15 minutes, and Moore did not commence the process until 15 minutes into the lesson and too much time was spent on that assignment. Ruane noted that English Teachers "know" that "it should be in the beginning and that it should take no more than five to ten minutes, the entire process – or ten to 15 minutes." There are many other areas a teacher must cover. (*Id.* at 19-25.)

Ruane testified that she rated Moore N.I. regarding student learning, Domain 2, because petitioner did not have her "portfolio" for the students. The documents in the student folders indicated "a variety" of work, but not usage of rubrics. In that respect, Ruane noted the importance of preparing students for the HSPA. She noted that by February, there should have been a variety of "pieces" from which it would be evident that rubrics were utilized. Instead, there was "limited documentation" of such. For example, students' essays should be critiqued via the usage of State rubrics, which is the procedure followed when students take the HSPA test. An assignment involving answering questions should utilize the rubrics, including an opportunity for peer critiquing, which was not evident to Ruane; There was no "ample documentation" of such in the folders.

Those matters, as well as the importance of open-ended questions, were reflected in Ruane's Observation Form, generally, and her suggestions, specifically. Ruane defined an open-ended question as a "comprehensive one." For example, upon reading an article, a student would have to answer a question. Ruane testified that

Moore used open-ended questions during her teaching, but that there was "limited documentation" in the student folders. She again noted that by February, there should have been documentation of such, "many". (*Id.* at 26-29.)

Regarding Domain 3, Ruane noted, for example, the subcomponent referencing employing effective questioning and discussion techniques, both literal and inferential questions, in relation to *Great Expectations*. Moore's questions were limited to "literal" ones, such as "What happens next"? Inferential questions, in contrast, do not call for "simple recall" answers, but require analysis and synthesis of content. Additionally, the activities did not include all the students. For example, petitioner asked oral questions, resulting in involvement only by the students who responded, in contrast to written questions. Also, only five questions were asked regarding Chapter 1. Ruane again noted that less time should have been spent on journal writing. The group assignment assumed that everyone had finished the required reading, which, Ruane noted, should never be an assumption, and the topics were too broad. (*Id.* at 30-32.)

On cross-examination, Ruane testified that the lesson plans were deficient in both form and content. She reiterated that *Great Expectations* was not addressed in conjunction with Unit 4, although she had no pertinent course guide with her. She also responded in the negative to a question regarding whether a course guide requires that every lesson be "done together," stating that any novel addressed in freshman year should not be considered "autonomously". Moore's lesson plans for the week in question made no reference to Unit 4. However, the course guide does not "stipulate" any rationing of time between the novel itself and the Literature series. Ruane's testimony was not responsive pertinent to a question regarding whether a particular novel might be addressed one week and not the next. (*Id.* at 35-36.)

Ruane was asked a series of questions, on cross-examination, regarding SWATs, plan books, inferential questions, and distinctions between the latter and "objective" questions. Her responses were not particularly clear. She stated that she, personally, was not familiar with *Great Expectations*, at least to the extent of the questions. Notwithstanding, the pertinent lesson plans set forth "everything" that petitioner was going to do in the class, and petitioner adhered to them. (*Id.* at 40-46.)

The topic of rubrics was also addressed on cross-examination. Ruane's testimony regarding whether letter grades, as opposed to numerical ones, rubrics, which are utilized on the State tests, are also used in the District regarding report cards and tests was not clear, although, apparently, report cards are issued with letter grades. Regarding English tests in the District, Ruane testified that teachers "should" use rubrics. Other than on practice tests pertinent to State mandates, teachers are "encouraged" to utilize rubrics, although not on "every single test", so that students are accustomed to such a practice when taking State and "mock" tests. Although the District does not have a policy that regular tests not related to State proficiency tests must utilize rubrics, teachers "in all the content areas are encouraged" to use them "as a source of assessment," although not all the time. Ruane also testified that it is "Absolutely" important that the State rubrics be utilized, even if a student's response to questions were correct, because such is State "policy." It is "imperative" that students and teachers be familiar with the method of assessment utilized on the State tests, rubrics. A discussion then ensued, in the form of responses to questions on cross-examination, regarding whether or not such familiarity with rubrics would make a difference regarding whether a student's response to a question on a State test was deemed accurate, Ruane noting that the questions used to assess reading comprehension are "inferential," "open-ended," and are addressed in State "rule books" distributed to teachers. (*Id.* at 45-53.)

Ruane also testified, on cross-examination, that all subcomponents of Domain 1 address the manner in which lesson plans are written, as well as the content, again noting that those of petitioner did not reference the Prentice Hall series and lacked objectives. She again referenced the time spent on certain tasks, including journals, the type of questions asked and the manner in which students were asked to answer, and an assumption that all students had read the selections addressed. (*Id.* at 54.)

Ruane additionally also testified that except for Unit 4, the status of which could not be ascertained, Moore was "at the proper place" in the "curriculum guide," as evidenced in the observation. Ruane could not recollect how many students were in the classroom, but testified that they were "very well behaved" and "responsive," the

room was "amply decorated" with students' work, and the classroom environment "was conducive to learning." Although she could not recollect the observation, she recollected some aspects, and her memory was refreshed by reviewing the Observation Form she completed. Moore had no "difficulty" with the class. However, "critical questions," incorporating "analysis and synthesis of the content," were not "evident" in the questions regarding *Great Expectations,* and there was "limited engagement" of students in learning because of the activities utilized by petitioner. However, Ruane did not address whether a teacher would be expected to administer written questions, or tests, in every class on a daily basis. She was initially not responsive to certain questions, although she subsequently testified that a teacher must ask a variety of questions, regardless of the abilities of the students, although she acknowledged that there are "different levels of challenge." When asked regarding her assessment pertinent to Domain 3c, Ruane also testified that she did not conclude that Moore did not "engage" her students in learning, but that petitioner did not maximize "the opportunity" to engage as many students as possible, as evidenced, for example, by the fact that she only asked five questions, again contrasting oral and written questions. She also recollected that "In addition to the other activities that she had for the students to get into a group to answer questions," petitioner "went around," observing the students, but all of the students "were not engaged the way they should be." The testimony, in that respect, was somewhat ambiguous and did not address the question of whether, for example, such was significant in relation to the amount of time spent by Ruane in the classroom. In that respect, she testified that, in general, students in group activities may not all be involved and a "knowledgeable teacher" would ensure that opportunities are provided for all students to be involved as much as possible. However, such did not address her observation, specifically. (*Id.* at 30-60.)

Pekarsky testified, on direct examination, that his ratings pertinent to Domain 1 were based on his conclusion that the instructional goals and objectives in the lesson plans were not "very clear." They were essentially the same, "cut and paste," for each day of an approximate two-week period. To Pekarsky, "everything revolves around" a teacher's plans. There was no way to assess petitioner's objectives. Similarly, petitioner's plans lacked "effective instructional activities," and based upon his observation, there was "no coherent or continuous instruction." For example, petitioner

did not address specifics regarding *Odysseus*, which she addressed, per her plans, from April 10, 2000 until May 3, 2000. Also pertinent to Domain 1, petitioner's students worked on their projects for 41 minutes, while the pertinent lesson plans stated that they would do so for 26 minutes. It is important for a teacher to have "guidelines" regarding a "timeline" pertinent to students. Upon entering the classroom, petitioner told the students that they would work on a particular project for 25 minutes. Because more time was expended, some of the oral presentations were eliminated or shortened. The students worked on their projects, which were not reflected in the lesson plans, independently, or in groups of two to three individuals. The fact that the lesson plans did not reference that students would be working independently or in groups, resulted in Pekarsky having difficulties with her written objectives. Moore was "not teaching" while they did so. Pekarsky also noted petitioner's prior evaluation, that of Ruane, in that respect. Consistent with his practices, he did not review the prior evaluation until he had completed his own observation/evaluation, to ensure that he was "open-minded" and gave "the teacher the benefit of the doubt". (Tr. 12/3/03, pp. 17-24.)

Pekarsky rated petitioner N.I. regarding Domain 1 "only because" she made no comments, feedback, after an oral report was presented, which also would have encouraged attention by other students. He rated petitioner N.I. regarding Domain 3 because she did not provide feedback nor ask "open ended," "high order thinking," questions, which are encouraged by the District because of the HSPA test. In fact, Moore asked no questions when the students finished their presentations. (*Id.* at 22-27.)

On cross-examination, Pekarsky testified, pertinent to Domain 1,that he did not object to a lesson plan being "cut and pasted," as long as it included various items, including what was being covered on a given day. However, petitioner's plans were "the same cut and paste for each day" a "photocopy of – of the same material being covered." Although the Observation Form completed by Pekarsky referenced that the lesson plan book was "cut and pasted," it also noted that the SWATs were identical for two weeks and essentially the same for three preparations. He reiterated that more than half the class was in another room when he entered the classroom and that such was not reflected in petitioner's lesson plans. In Pekarsky's view, such was also

relevant to planning, because time was "wasted" bringing students to and from the computer laboratory. However, he did not "take exception" to the fact that projects consumed 41 minutes, instead of 25, but merely "stated the facts." Pekarsky did not ask petitioner why students were in the computer laboratory. Relevant to Domain 3a, he believed that petitioner communicated the lessons 'clearly and accurately.' However, regarding Domain 1b, she asked no questions, nor made any statements or comments, regarding the student presentations, resulting in students, generally, merely sitting in the classroom. He noted that classes should be "student centered, not teacher centered." All students could not present their projects because there was insufficient time for such. Pekarsky could not recollect how long the various presentations lasted. At one point, Pekarsky testified that "it was a group presentation," and when asked questions in that regard, he stated that the students gave presentations as a "group," of either three or four individuals." . . . because each group is different – probably had a different number of students." He further clarified that more than one student simultaneously appeared in front of the class, but could not recollect if each student in a group spoke. He additionally indicated that more than one group appeared before the class simultaneously, but could not recollect how many individuals in each group made a presentation to the class, but apparently assumed that such varied among the groups. Pekarsky also could not recollect how many groups spoke during his observation. However, he testified that petitioner did not preface their presentations with any comments. Pekarsky also testified that he did not have a standard format regarding observations he performed, and, therefore, would not have noted the topics discussed by any students. ". . . it was not important at that time." He also testified that he "used" to have a form, with a "check it off," attempting to be as "objective as possible," but did not explicitly testify that he did so pertinent to the observation in question, nor was any such form offered into evidence or referenced. His Observation Form, in pertinent part, referenced that 41 minutes were spent by students, apparently preparing the reports, and such constituted "too much time." He could not ascertain, based upon petitioner's lesson plans, if that aspect of the task had commenced on a prior day, and was to continue after the day in question. His recollection was that pursuant to contract, lesson plans are to be prepared three days in advance. The lesson in question would have therefore been continued for at least two more days. (*Id.* at 52- 61.).

Pekarsky also testified, on cross-examination, that it would not be "unusual" for a teacher to not "actively be teaching" when a class was working on its own. In his experience, teachers "usually" "walk around" the classroom, assisting students, although such "doesn't have to happen." His recollection was that petitioner stayed at her desk, "working on something," although he was "not positive." (*Id.* at 61-62.)

Pekarsky additionally testified that he was not previously aware of Dabney's evaluation and that he did not see it until the day of his own testimony in the current matter (December 3, 2003). He was not even aware of Dabney's evaluation when he spoke with the latter concerning his own recommendations. Although Pekarsky should have received it pursuant to the District's practices, Dabney never provided it for him. Although he would have considered it, if he had had access to it, Pekarsky had "no idea" regarding whether it would have affected his recommendation. He recognized Moore's and Dabney's signatures on the document, and in his opinion, it would be one maintained by respondent "in the normal course of school records." If he had previously reviewed it, he "probably" would have questioned Dabney regarding it, including, apparently, regarding Dabney's recommendation that an increment be withheld, in light of the fact that Dabney rated petitioner with an S in all areas. (*Id.* at 40-42.)[1]

Pekarsky's rating of petitioner pertinent to Domain 1a was based upon his view that she "definitely knows her content and material." She is a "good teacher in that area," having knowledge of what she is "supposed to teach." However, he could not recollect if Moore was teaching an English I or English II class during his observation. Pekarsky never taught an English class. He also could not recollect the number of students in the class, although he believed there were "probably" approximately 24. His practice is to note such when performing an evaluation, and reference it in notes he prepares, which he did not have at the hearing, and which probably no longer exist. (*Id.* at 40-44.)

[1] The pertinent transcript, on its face, contains a typographical error. Based upon the context, it is apparent that Pekarsky testified that he "would have" questioned Dabney, not that he "wouldn't question" the latter, as reflected in the transcript. (Tr., 12/3/03, p. 42.) Petitioner's post-hearing letter memoranda references Pekarsky's testimony as indicated in the above findings of fact, a matter not disputed by respondent.

Pekarsky was asked questions on cross-examination regarding Domain 1b, and was requested to provide examples of instructional goals and objectives. He stated that such would constitute a statement, indicating what a teacher planned on teaching on a particular day, as well as an assessment section regarding such. He noted that petitioner "gave a few different strategies" for achieving her goals. An example of a goal would be 'This is what I plan on accomplishing'; and of an assessment, 'This is how I am going to assess'. A more specific example provided by Pekarsky was that the students would "learn about Romeo and Juliet", and an assessment would be "discussing certain criterias", etc. (*Id.* at 44-45).

To Pekarsky, planning effective instructional activities refers to how a teacher intends to accomplish his/her goals. Domain 1d, in his view, is similar to Domain Ia. He again testified, in that respect, that petitioner "does demonstrate the knowledge." When asked if Domains 1a and d reference similar matters, Pekarsky testified that they have "a lot of similarity", and in response to a similar question regarding Domains 1b and e, that 1b "is one day. E is a period of time." (*Id.* at 4.)

Pekarsky also testified, on cross-examination, regarding his statement in the pertinent Observation Form relevant to the time allotted for *Odysseus.* The period of time allotted by Moore was not "unusual." "That was not the problem." He could not recommend the amount of time suggested in the curriculum guide, although he was certain it was "a reasonable amount of time." (*Id.* at 46-47.)

Pekarsky was also asked questions regarding his comments pertinent to the fact that Moore's SWATs were identical. He testified that all teachers teach "at least two different subjects", and petitioner's plan had "basically the same SWAT in there for the two different subjects, but for three periods." When then asked if petitioner "was teaching two different subjects to the same class", Pekarsky responded: "No, two different subjects." He noted that his practice is to review a lesson plan for a particular day and also, apparently, "the whole lesson plan book." Teachers currently are required to submit lesson plan books for review and approval. However, Pekarsky could not recollect if such was required at the time in question. He had no recollection of reviewing petitioner's lesson plan book prior to his observation, although he did not

believe he had done so. While in the classroom on the day of the observation, he reviewed petitioner's entire book. (*Id.* at 46- 49.)

His response to a question regarding his conclusions pertinent to students working in groups for periods of time during the observation were not entirely clear. He referenced that situation, as well as the fact that students were in a computer laboratory, and the latter was not referenced in the lesson plans. When again asked how many students were in the regular classroom when he arrived, Pekarsky testified that "I would probably say about twelve, ten to twelve." (*Id.* at 49-52.)

Pertinent to Domain 3a, Pekarsky testified that the materials covered by Moore during the observation were "very clear" and "accurate." His assessment pertinent to Domain 3b related to the fact that no questions were asked regarding the student presentations. (*Id.* at 54.)

Moore was "really upset" regarding the evaluation. In his experience, she is "a really nice person." Dabney was "mad" when petitioner refused to sign the Observation Form. To Pekarsky's knowledge, petitioner had obtained a copy of it prior to the date of the post-evaluation conference. The content of the Form was not discussed, because Moore did not want to do so. Petitioner left his office. (*Id.* at 63-65.)

Pekarsky also testified regarding the PIP on cross-examination. In response to questions regarding his comment on that document that petitioner should use 'real world problems to motivate and apply theory', he testified that such "works out very effectively with our students." For example, efforts to teach about a play by presenting such in a way relevant to current events assists students in comprehending the lesson plan. Based on his observation, petitioner did not do so. However, he did not have knowledge of whether such techniques were utilized by Moore throughout the entire school year. A teacher would not be expected to "do everything" expected in every lesson. (*Id.* at 66-68.)

Pekarsky also testified, on cross-examination, in that respect, and regarding his comment on the PIP that petitioner should utilize computers to develop conceptual

understanding, .that his suggestions were to "Just help petitioner" and "had nothing to do with – withholding an increment. " His responses to questions regarding whether a decision or recommendation to withhold petitioner's increment would have been affected if he had not felt a need to make suggestions were not entirely responsive. When asked if he recommended that petitioner not receive an increment, Pekarsky testified that there "was a discussion on it" and that he agreed "with the principal's decision." When asked if he made a specific recommendation, that the increment be withheld, Pekarsky testified that he did not "tell" Dabney to withhold the increment, but that "we did it jointly." When then asked if it was his "position" that she not receive an increment, Pekarsky responded: "It's not mine. It's the principal's. Only the principal could make that determination." Pekarsky stated that the "input" that he gave to Dabney was "what I saw". Dabney, then, would have to consider "all the other information that he has on a teacher". He was then asked if he "in any fashion" made any suggestions to Dabney regarding an increment. His answers were not completely responsive. Pekarsky further testified that Dabney would "ask three questions", "like he asked other people and I gave him what I saw in the classroom – and from what he – what I saw, he made a recommendation that the increment should be withheld". That recommendation was made to the "Board of Education". In response to further questions regarding whether he made any recommendation to Dabney, Pekarsky's responses were again not responsive. When asked what his recommendation was, he responded: "I – I just went by what I saw". It was subsequently clarified that any recommendation would have been to the Superintendent. Pekarsky ultimately testified that he told Dabney 'from what I observed, I feel that her increment should be withheld,' when "he brought it up..." His recommendation was based upon the items noted in the PIP section he completed, his observation, and a review of petitioner's lesson plan book. He concluded that "this is what's been occurring over a period of time". Essentially, however, Pekarsky's recommendation was based mainly upon his evaluation. (*Id.* at 69-78).

Pekarsky also testified that although it is the District's practice to conduct a conference regarding a PIP, he could not recollect if there was one pertinent to petitioner. He clarified that he did not discuss it with Moore,that Dabney, as the Principal, was the "lead person" in that respect, and he did not know if Dabney

discussed it with petitioner. However, he then testified: "I sat there and Mr. Dabney did the talking." *(Id.* at 79.)

Petitioner testified, on direct examination, with a focus on Domain 1, that the class was working on *Odysseus* on the day of Pekarsky's evaluation. The students were divided into groups, 'literature circles', with certain tasks to complete. In her view, that "engages" all students. She walked throughout the classroom, providing assistance, answering questions, etc., as the students prepared their presentations. Different groups were working on different chapters of *Odysseus*, so that more "ground could be covered." The time allotted for *Odysseus* was not inappropriate; the students "were not honor students, they were just regular, kind of low comprehension type students". The book consisted of 20 chapters. She noted that Pekarsky's evaluation did not reference the fact that school was closed for "Easter week" during the time period in question. The class was "at that point in the guide" where it "should have been". There were questions from the students, and answers from her, as well as discussions, during the "period of time" of the evaluation. She provided "feedback" to the students. (Tr.,10/28/04, p. 73.)

Moore also testified regarding the reasons why she did not sign the Observation Form completed by Pekarsky. Upon completing the Form, Pekarsky "called" her into a room in proximity to his office. Dabney "was nowhere around." From a distance, Moore saw what appeared to be a 'U' and asked him if he had given her 'an unsatisfactory'. Pekarsky responded that he had rated her with only one 'U' but had given her "a good report for the rest of it." He refused to give her the evaluation when she requested that he do so, and then she stated that she was "going to go straight to the union". Pekarsky responded that he would not give it to her unless she immediately signed it. Moore then told him that she had at least ten days to review the document and write a response. She reiterated that she was "going straight to the union", and he would not give her the Form. Moore additionally testified that she never received a copy of the Observation Form until the end of June, 2000 "just about when we were about to go on vacation", when she was requested by Dabney to go to his office, and she told him that she had "reported" Pekarsky "to the union." Dabney gave her a copy of the Observation Form. (*Id.* at 73-74.)

Moore also testified that she never saw the PIP prior to the end of the pertinent school year, because she had not signed, nor seen, the evaluation, and that Pekarsky "just made this up." She received a copy as a result of a conversation with someone in the union, who, to her knowledge, called "the school" and the "Board of Education". She finally received a copy of the PIP in approximately July 2000, and she had no input regarding the document. (*Id.* at 74-77.)

Moore also testified about Ruane's evaluation. Petitioner was teaching "*Great Expectations*" at the time, a novel consisting of 58 chapters. She had previously taught Unit 4, prior to teaching "this particular novel." The "course of study" "doesn't exactly say that should be on it – it gives you a list of what you're supposed to cover in a certain time period, for the marking period." The curriculum for English I required that by the end of the marking period, the students should have "covered a novel and a couple of units." Not only did the curriculum guide not suggest that a teacher teach Unit 4 together with "Great Expectations", simultaneously, but such would be "impossible"; it would cause confusion among students whose comprehension was "already low". (*Id.* at 79-80).

Prior to Pekarsky's evaluation, no one had ever taken exception to Moore's lesson plans, including her SWATs. Additionally, when the core content curriculum standards were introduced, teachers were not specifically told that such should be itemized in a certain way, numerically. Moore testified that the standards are not "even written as – as covering what goes on in the classroom" and that at the time in question, everyone in the English Department wrote SWATs as she did. Teachers were provided a "model" regarding lesson plans, and at a meeting, Ruane told teachers that they should include "a couple of SWATs" in their lesson plans, but did not instruct that the core content curriculum standards should be itemized, but that the teachers should include "whichever ones we did." Moore also testified that pertinent to core curriculum standards, the lesson plans referenced in Ruane's evaluation included activities pertinent to reading, writing, speaking, and viewing. Petitioner had prepared her lesson plans, including pertinent to SWATS, in the same format since approximately the 1995-96 school year. (*Id.* at 80- 83.)

Moore also testified, pertinent to Domain 3, as evaluated by Ruane, that her understanding, based upon courses, was that "inferential" reasoning was part of "interpretive reading", making inferences. She had given the students questions that required inferences, as well as critical thinking skills. For example, questions regarding sequences, which were discussed in class, also tested comprehension. All the students were engaged. Moore had prepared a "transparency" listing the sequence of events. Characters in the assignments were also discussed in class, including character development. The students were required to read the novel and draw conclusions. Moore testified that there were approximately 15 students in the class, and that the class was a "less than average" one. She attempted to "teach to the brightest and review for the slower ones by doing certain activities and certain tasks." (*Id.* at 84-86).

Snyder has approximately 1500 students, and approximately 160 to 170 teachers, a "rather large school". In Moore's view, it is a "difficult inner city "school. The lesson plans reviewed by Ruane were the same as those utilized at the time of Dabney's observation. He took no exception to the plans. Moore noted that there was "so much to input into the plans, in a small space". Moore was "surprised" by Ruane's evaluation. It was "not true" that she met with Pekarsky, with Dabney, regarding the PIP. She never completed the second page of the PIP. (*Id.* at 84-89.)

On cross-examination, Moore acknowledged that Snyder is not a "difficult school," but a "typical" one, that her students were not "difficult," but were "well-behaved", and that she had no "problems with any discipline" with her students. (*Id.* at 89.)

Moore also agreed with Ruane's suggestion that petitioner vary the type of questions asked students, to include both literal and inferential ones. She testified, on cross-examination, that she did so. She also stated that she asked "higher order thinking" questions, consistent with the level of students, who were ninth-graders, just out of eighth grade, and she attempted "all the time" to "challenge them", noting that at some point, a supervisor "took pictures and gave presentations" regarding the accomplishments of petitioner's students. Additionally, one of the students in the class observed by Ruane subsequently was a Valedictorian or Salutatorian at Snyder. It is

her practice to "change" her approaches in a class, if need be. Based, at least to some extent, upon the entire evaluation, Moore reduced the journal writing in her class from 15 to 10 minutes, evidently in response to Ruane's evaluation, specifically. She noted that the students were required to take a written examination for the HSPA for 60 minutes. Petitioner also reduced the amount of "sharing" to a smaller number of students, so that such would not exceed five minutes. Petitioner eliminated the activity of students speaking at a podium, as Ruane did not believe such was necessary, although Moore previously did so because one of the rubrics pertained to public speaking. Moore also subsequently made certain that the students, and she, did not deviate from the content of her lesson plans, for a particular day, referencing the "To Do," which she would put on the board in her classroom, "seat work" expected of the students upon their initial entry into the class, until they commenced working on their journals. Moore disagreed with Ruane's assessment of petitioner's SWATs. Petitioner testified on cross-examination, that she believed hers were written properly, as everybody else wrote them the same way. She attempted to change her approach, in response to Ruane's observation, but the latter "never explained how". She acknowledged that a SWAT for Wednesday in the pertinent lesson plan book for the week of January 17, 2000 was that the students would write on the selected journal topic, the same as a SWAT in the plan for May 22, a Tuesday, but noted that the students were required to write in their journals daily. She also stated that the teachers had been instructed by a supervisor that students are required to write in journals daily. It was her opinion that such would facilitate students passing the State High School Proficiency Examination. (*Id.* at 97-109.)

Moore also addressed the fact that some of her students were in a computer laboratory on the day of Pekarsky's evaluation. The students commenced in the regular classroom and proceeded to work on projects in the computer room. They were going to "spend a little while there" and return to the classroom. Moore acknowledged that such was not referenced in her lesson plan for the day in question, although it "was in previous lesson plans". When she returned to the classroom, all students were then present. (*Id.* at 91.)

A substantial portion of the testimony of the witnesses on behalf of respondent lacked specific information regarding the documents referenced, and was inconsistent, unresponsive, and ambiguous. Material considerations were also not addressed. Petitioner's testimony was somewhat more specific, although more abbreviated. It is apparent that there is some agreement among the parties, as evidenced by the testimony offered. Based upon a review of the entire record, I **FIND** the following to be additional facts.

The pertinent lesson plans prepared by petitioner were, to a substantial extent, duplicative and essentially the same. They reflected, in pertinent parts, State curriculum standards. Respondent does not *per se* prohibit lesson plans from being essentially the same for specific periods of time. The student folders contained documents pertinent to a variety of lessons, and Moore asked "open-ended" questions during Ruane's observation. Petitioner asked the class oral questions, including questions pertinent to the assigned reading materials. Petitioner also conducted group activities on the day of Ruane's observation.

The District does not clearly require English teachers to utilize publisher materials simultaneous with assignments pertinent to the particular readings in question on a daily basis. Petitioner's lesson plans, relevant to the materials addressed in her class during Ruane's observation, set forth everything that petitioner planned to address in class, and she adhered to the lesson plans in that respect.

The District issues report cards with letter grades, not rubrics. Although respondent encourages English Teachers to utilize rubrics on regular English tests, such is not required pertinent to every test administered. English Teachers are to utilize rubrics, at least to some extent, pertinent to practice tests *vis-à-vis* State mandates.

Moore was current in relation to respondent's curriculum guides as of the time of the observations in question. In general, petitioner's students were well behaved, and did not present substantial disciplinary issues. They were also responsive to her teaching efforts, and petitioner's classroom was conducive to learning. At least to some

extent, Moore "engaged" her students in learning, during Ruane's observation. Additionally, petitioner assisted students, as needed, as they worked on various tasks.

It is not unusual for District teachers to provide assistance to students, as needed, as they work in groups or individually, nor for a teacher to not "actively" be teaching at such times. Respondent does not require that teachers always walk throughout a classroom, providing assistance as students work, on a daily basis.

Pekarsky was not aware of Dabney's evaluation of petitioner, and he did not review it, at the time he prepared his own observation and discussed the question of granting an increment to petitioner with Dabney. However, Pekarsky recommended to Dabney that the increment be withheld.

To Pekarsky, petitioner performed in a manner reflecting knowledge of the content of materials which she presented to her class during his observation. The time allotted to, and actually spent, by petitioner on certain tasks during his observation were not material to his evaluation of her and was not unusual, generally. Pekarsky also concluded that petitioner presented materials to her class in an appropriate manner during his observation. The suggestions Pekarsky formulated pertinent to the relevant PIP did not influence his determination to recommend to Dabney that an increment be withheld for petitioner.

Moore incorporated Unit 4 in her classes prior to the date of Ruane's evaluation. Prior to the pertinent evaluations, no District personnel had, to Moore's knowledge, taken exception to her lesson plans, including the SWATs which she formulated. Moore had prepared her lesson plans, and SWATs, in the same format since approximately the 1995-96 school year. Moore attempted to comply with her understanding of the critiques reflected in the pertinent evaluations.

DISCUSSION

The Commissioner of the DOE (Commissioner) has general jurisdiction to determine and hear controversies and disputes arising under the local school laws. *N.J.S.A.* 18A:6-9. A board of education (BOE) has the power to increase the initial

salary or any increment, or the number of increments, for any member or classification of members. *Id.*at § 29-13. A BOE may withhold, for inefficiency or "other good cause," the "employment" or "adjustment" increment, or both, of any member, in any year. It is the BOE's "duty" to give written notice of such action, within ten days, together with the reasons therefore, to the member, who may appeal the action to the Commissioner. It is not mandatory for the BOE to pay a denied increment in any future year as an adjustment increment. *Id.* at §14.

The burden of proving "unreasonableness" in an appeal is upon the BOE member. The Commissioner should consider whether the underlying facts were as claimed by those making the evaluation and whether the conclusion made, upon those facts, was "unreasonable", ". . . bearing in mind that they were experts, admittedly without bias or prejudice, and closely familiar with the *mise en scene* . . ." *Kopera v. West Orange Bd. of Education*, 60 *N.J. Super* 288, 296-297 (App. Div. 1960) (*Kopera*).

An annual increment is a reward for meritorious service in a school district. Evaluation of such service is a "management prerogative essential to the discharge of the duties of a Board of Education", and a determination in that respect, after evaluation, achieves the dual objectives of providing teachers "economic security and of encouraging quality in performance." *North Plainfield Education Association on Behalf of Arlene Koumgian, v. Board of Education of the Borough of North Plainfield*, 96 *N.J.* 587, 593 (1984) (citations omitted). The decision to withhold an increment is dependent upon an evaluation of the "quality of the services" rendered by a teacher. The purpose of *N.J.S.A.* 18A:29-14 is to "reward only" those teachers who have contributed to the educational process by encouraging "high standards of performance." A local school board must make a judgment regarding the "quality of the educational system." It is reasonable to expect that an adversely affected teacher will attempt to eliminate the causes or bases of 'inefficiency.' *Board of Education of the Township of Bernards v. Bernards Township Education Association*, 79 *N.J.* 311, 321 (1979) (*Bernards*).

The Commissioner's authority to review a withholding of a teacher's increment is one method by which he/she may carry out his statutory responsibilities which, as our

Supreme Court has recognized, includes establishing uniform standards of pupil proficiency and insuring the existence of a qualified, competent, and efficient teaching staff. *Bernards, supra* at 322. "Increment withholding is widely used to promote and maintain high standards of professionalism for public-school teachers", by focusing on a teacher's "shortcomings". The "lasting economic effect" of such a decision is an incentive for "improving unsatisfactory performance." *Pamela Probst v. Board of Education of the Borough of Haddonfield*, 127 *N.J.* 518, 526 (1992).

A determination must be made regarding whether the facts upon which a BOE determined to withhold an increment constituted 'inefficiency or other good cause.' *Bernards, supra* at 324. A BOE may consider a teacher's "performance history" relative to a decision regarding the withholding of an increment. Notwithstanding, formal evaluations may constitute a sufficient basis for upholding a BOE's decision to deny an increment. *Roslyn Brickman Gnatt v. Board of Education of the Manalapan-Englishtown Regional School District*, 92 *N.J.A.R.* 2d (EDU) 589 (*Gnatt*).

In *Gnatt, supra*, which is relied upon, in part, by petitioner, the Commissioner adopted an Initial Decision upholding a decision to withhold an increment. As Moore argues, the facts of that case are substantially different from those of the current matter. Gnatt's supervisors and other personnel in the district had expressed concerns regarding her performance, generally focusing upon disciplinary issues, and had taken actions in that respect over a period of time, both in providing assistance to Gnatt, as well as ultimately issuing tenure charges against her.

In my judgment, the pertinent lesson plans were detailed and, on their fact, evidenced compliance with District requirements, as referenced in the record. Petitioner's characterization of the lesson plan book format as requiring substantial information in a relatively small space was accurate. The testimony of respondent's witnesses regarding requirements pursuant to the District's practices and guidelines, in that respect, was not specific, did not evidence any requirements that were mandatory on a daily basis, nor in any time period, and were not supported with documentary evidence. Similarly, the testimony regarding distinctions among SWATs and BYs and literal and interpretative questions was also lacking, and petitioner's testimony in that

respect was as credible as that of Pekarsky and Ruane. As referenced, documentary evidence pertinent to any core curriculum requirements and State mandates were also not proffered. The overall ratings, pertinent to all three evaluations, were generally satisfactory or needing some improvement, and do not support a conclusion that an increment should have been withheld, especially in light of the absence of detailed pertinent evidence. It is also somewhat surprising that supervisors, responsible for evaluating teachers, would not have information regarding the identity of the individual ultimately responsible for increment determinations. It cannot be determined from the record whether Dabney was the ultimate decision maker, or the Superintendent. Nor were the considerations of the ultimate decision-maker, and the weight given to various factors, evident. I also give some weight to the fact that there is no evidence that petitioner was instructed to change the format of her lesson plans, including SWATs and BYs, prior to the evaluations in question. Nor did respondent offer evidence regarding specific instructions, even in the absence of written guidelines, to its teachers in that respect. The fact that respondent's witnesses exhibited a lack of information in certain respects, including familiarity with some of the materials considered, including the format of group presentations, etc. is also telling. Additionally, as referenced by petitioner, Pekarsky, although a supervisor with responsibilities for evaluating teachers, apparently in various areas, did not evidence experience teaching any English courses nor substantial information regarding the English curriculum. The role of Pekarsky's recommendation is not clear, but the fact that he did not have any awareness of Dabney's evaluation when he discussed the matter with Dabney raises questions regarding respondent's decision to withhold an increment. There is also no evidence that any one offered Moore suggestions, in material respects, prior to the second evaluation. The importance of Pekarsky's evaluation is highlighted by the fact that he was the only evaluator to rate petitioner U, one U, among the three evaluations. Similar considerations are relevant to the PIP. However, I give no weight to Moore's testimony regarding the nature of Snyder and the students. As respondent argued, it was her responsibility, as a teacher, to follow District requirements, regardless of differing abilities among her students.

The considerations set forth in *Koper, supra*, in my judgment, were not sufficiently addressed by respondent. It cannot be concluded that the underlying facts

pertinent to the evaluations were as referenced in the evaluations. Even in light of the deference to be given to the evaluators, in this context, I am persuaded that petitioner proved, by a preponderance of the credible evidence, that respondent's action was unreasonable and arbitrary.

CONCLUSION

It is hereby **CONCLUDED** that petitioner proved, by a preponderance of the credible evidence, that respondent's determination to withhold her salary increment for the 2000/2001 school year was arbitrary and unreasonable.

ORDERS

It is hereby **ORDERED** that respondent's salary increment for the 2000/2001 school year be and is hereby reinstated and that petitioner receive any related emoluments.

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

This recommended decision may be adopted, modified or rejected by the **COMMISSIONER OF THE DEPARTMENT OF EDUCATION,** who by law is authorized to make a 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 17 2005
DATE

Diana C. Sukovich
DIANA C. SUKOVICH, ALJ

E-mail Receipt of Initial Decision Confirmed by the Department of Education on:

11/18/05
DATE

Mailed to Parties:

NOV 21 2005
DATE

Laura Sanders
DIRECTOR AND
CHIEF ADMINISTRATIVE LAW JUDGE
OFFICE OF ADMINISTRATIVE LAW

al/lrs/mvh

APPENDIX

Witnesses

For Petitioner:

Lorraine Moore

For Respondent:

Henry Pekarsky

Ellen Ruane

Exhibits in Evidence

Exh. P-1	Observation Form regarding October 27, 1999
Exh. R-1	Observation Form regarding May 2, 2000
Exh. R-2	Observation Form regarding January 19, 2000
Exh. R-3	PIP
Exh. R-4	Letter dated July 1, 2000

242-06

242-06

OAL DKT. NO. EDU 10927-04
AGENCY DKT. NO. 405-11/04

WINTHROP McGRIFF,	:	
PETITIONER,	:	
V.	:	COMMISSIONER OF EDUCATION
BOARD OF EDUCATION OF THE TOWNSHIP OF MONTCLAIR, ESSEX COUNTY,	:	DECISION
RESPONDENT.	:	

The record of this matter and the Initial Decision of the Office of Administrative Law (OAL) have been reviewed. Petitioner's exceptions and the Board's reply thereto, filed in accordance with *N.J.A.C.* 1:1-18.4, were fully considered by the Commissioner in reaching her determination herein.

Petitioner's exceptions, in relevant part, essentially recast and reiterate his arguments advanced below. As it is determined that such arguments were comprehensively considered and addressed in the Initial Decision, they will not be revisited herein.

Upon a full and independent review of the record, which included transcripts of the two days of hearing,[1] the Commissioner, giving due deference to the Administrative Law Judge's (ALJ) credibility determinations,[2] concurs with the ALJ's findings of fact and

[1] Hearing was conducted on September 12 and 13, 2005. The record reflects that a hearing tape defect on September 12, 2005 prevented approximately 15 pages of Mr. McGriff's direct examination from being transcribed. The parties endeavored to reconstruct this testimony from their hearing notes and have submitted Exhibit J-2 as a reasonable reconstruction of the missing testimony.

[2] 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

conclusion that petitioner has failed to sustain his burden of establishing that the Board violated his tenure, seniority and/or preferred eligibility rights by its appointment of a non-tenured individual to the position of Assistant Principal for Athletics and Student Activities.

Upon review, the Commissioner is initially compelled to concur with the ALJ's denial of the Board's Motion to Dismiss this matter on the grounds that petitioner's claim was untimely pursuant to *N.J.A.C.* 6A:3-1.3. The Commissioner finds, as did the ALJ that the instant record, particularly conflicting testimony, precludes a definitive determination as to the specific point in time when petitioner received "adequate notice," within the intendment of *Kaprow v. Board of Education of Berkeley Tp.*, 131 *N.J.* 572 (1993), of his potential cause of action, thereby triggering the running of this regulatory provision. As such, the Commissioner concurs with the ALJ that the motion must be denied and the matter is required to proceed to adjudication on its merits.

In her consideration of the merits of this matter, wherein petitioner claims tenure, seniority and/or preferred eligibility entitlement to an Assistant Principal for Athletics and Student Activities position for which a non-tenured individual has been employed, the Commissioner first is in accord with the ALJ's judgment that any claim of petitioner to entitlement to the position at issue by virtue of his service as a Department Chair is outside the scope of his Petition of Appeal. Notwithstanding this, the Commissioner further agrees that any such claim is without merit. As correctly pointed out in the Board's reply exceptions:

> [i]n September 2004, McGriff was transferred from one Department Chair position to another Department Chair position. It is undisputed that in that transfer he suffered no loss of employment, nor loss of salary. McGriff believes that his dutues as Department Chairperson were allegedly similar to the duties of

---

unreasonable or are not supported by sufficient, competent and credible evidence in the record." (*N.J.S.A.* 52:14B-10(c))

> the Assistant Principal for Athletics and Student Activities. The fallacy of this alleged similarity aside, this analysis clearly falls under the purview of *Carpenito*. See, 322 *N.J. Super.* at 530. As pointed out by the Appellate Division, "[s]eniority is a by-product of tenure and comes into play only if tenure rights are reduced by way of dismissal or reduction in tangible employment benefits." *Id.* at 531. In this matter, any rights Petitioner alleges to have to the position of Assistant Principal for Athletics and Student Activities must flow from his former position as Athletic Director, rather than his position as a Department Chair, since he remains employed by the Board as a Department Chair.
> (Board's Reply Exceptions at 3)

The Commissioner, however, finds it necessary to clarify any misunderstanding which may exist in the Board's articulation above and the Initial Decision discussion, at pages 40-41 with respect to use of the word "position" when examining a Board's authority to lawfully assign and transfer tenured employees within the scope of their certification, resulting in no loss of tangible employment benefits, without implicating their tenure and seniority rights. A Board possesses the authority to transfer tenured individuals to another *assignment* within their position, but such employees may not be transferred involuntarily from one *position* to another.

Turning next to petitioner's allegation that the position of Assistant Principal for Athletics and Student Activities was an unrecognized title requiring, pursuant to *N.J.A.C.* 6A:9-5.5, submission to the County Superintendent to ascertain the appropriate required certification, the Commissioner is in full agreement with the ALJ that:

> [s]uffice it to say, irrespective of the specific area for which an assistant principal is assigned, the title is unquestionably recognized. *See N.J.S.A.* 18A:28-5. *See also N.J.A.C.* 6A:32-5.1(l)12. The job description and the evidence, as hereinbefore detailed, do not support petitioner's apparent claim that the position is not, in fact, one of an assistant principal. The record reveals that when the Board created the new job description of the position a vacant assistant principal position existed at the high school. Additionally, the duties attending the position, as set forth in the job description and the testimony, fail to support petitioner's stance that they lack the character necessary to require a principal

> endorsement. Indeed, responsibilities such as the direction of the activities of school-level supervisors and school-wide responsibility in the principal's absence fall squarely within the parameters of *N.J.A.C.* 6A:9-12.3(b). Whether every performance responsibility of the position would necessitate an endorsement of principle (sic) is not the pertinent inquiry. Equally unavailing is petitioner's reliance on the various newspaper articles to support his claim to the position. Plainly, those articles have no evidentiary weight in the determination of the nature of the position under review. And, Ms. Belace's service as a consultant, which involved a panoply of responsibilities in preparation for the incoming assistant principal, does not support petitioner's "sham transfer of duties" allegation.
> (Initial Decision at 42)

Similarly rejected is petitioner's argument that he was qualified to serve as Assistant Principal for Athletics and Student Activities by virtue of his service under his Supervisor's endorsement under his Administrative Certificate. The Commissioner is in accord with the ALJ's proffered analysis in this regard wherein she stated:

> ***that the position of "assistant principal" is a separately tenurable position cannot be seriously debated. *See N.J.S.A.* 18A:28-5; *Nelson, supra; Skowronski, supra; DeCarlo, supra; Miller, supra.* Equally settled is that an educator must serve the statutory required period of time in that position in order to achieve tenure rights to an assistant principal assignment. And, the regulations make clear that a principal endorsement is a *sine qua non* to serve as an assistant principal. *N.J.A.C.* 6A:9-12.3(b).
>
> In this matter, petitioner attained tenure in the District as a result of his employment as athletic director and department chair. Petitioner was qualified for that service by virtue of his supervisor endorsement. *N.J.A.C.* 6A:9-12.3(c). Petitioner never served in the position of assistant principal for the District or in any other position that required a principal endorsement. Beyond this, petitioner did not possess a principal endorsement at the time the Board posted and filled the challenged position and, thus, petitioner was not qualified to hold an assistant principal assignment. Pursuant to the express terms of *N.J.S.A.* 18A:28-5, petitioner cannot transfer the tenure he acquired as a supervisor under his supervisor endorsement to the separately tenurable position of assistant principal in which he accrued no work experience and which requires a different endorsement. ***

(Initial Decision at 41)

Next, dismissed as meritless is petitioner's proffer that the duties of the assistant principal position at issue are "substantially similar" to those he performed in his athletic director assignment, thereby entitling him to this position. As noted by the Supreme Court in *Dennery v. Passaic County Reg. High School District Bd. of Educ.*, 131 *N.J.* 626 (1993):

> A 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. (at 640)

With this guidance in mind, the Commissioner's full review persuades her of the correctness of the ALJ's conclusion in this regard:

> I further CONCLUDE that the position of Assistant Principal for Athletics and Student Activities is significantly different from petitioner's former athletic director assignment. A canvas of the job description coupled with the testimony demonstrates an insufficient identity of duties between the positions and that they are, in fact, qualitatively different positions with substantially distinguishable duties to serve different educational functions. That the assistant principal performs duties previously within the purview of an athletic director does not lead to the conclusion that the positions are the same. Although some of the duties performed by petitioner as athletic director are now performed by the assistant principal, a mere overlap of duties does not give petitioner a right to the new position. Simply put, the assistant principal undertakes numerous responsibilities not required of an athletic director and the duties of the position go well beyond the realm of athletics. A critical distinction between the two posts is the performance of major functions that are entrusted to assistant principals at the high school, such as the imposition of discipline, building-wide responsibility in the principal's absence and the direction and evaluation of supervisors. The assistant principal position also includes various functions that had been performed by other administrators relative to student activities, fire drills, busing and oversight of departments. As previously set forth in the FINDINGS OF FACT, as athletic director petitioner did not perform these duties as well as other performance responsibilities

> assigned to the Assistant Principal for Athletics and Student Activities. In short, the duties of the new position are markedly broader in nature and scope than the athletic functions performed by petitioner and deal with matters distinctly different than the work performed by petitioner in his former title.
> (Initial Decision at 42-43)

Finally, petitioner's suggestion that the Board's reorganization and/or creation of the challenged position in June 2004 was undertaken in a deliberate, bad faith attempt to exclude him from assuming the position and to circumvent his rights is rejected out of hand. As found by the ALJ, not only is such a claim time-barred pursuant to the 90-day rule but, most importantly, the record is wholly devoid of any credible evidence in support of such a contention.

Accordingly, the Initial Decision is adopted as the final decision in this matter and the instant Petition of Appeal is hereby dismissed.

IT IS SO ORDERED.[3]

Lucille Davy
ACTING COMMISSIONER OF EDUCATION

Date of Decision: 7/13/06

Date of Mailing: 7/13/06

[3] This decision may be appealed to the State Board of Education pursuant to *N.J.S.A.* 18A:6-27 *et seq.* and *N.J.A.C.* 6A:4-1.1 *et seq.*

State of New Jersey
OFFICE OF ADMINISTRATIVE LAW

INITIAL DECISION

OAL DKT. NO. EDU 10927-04

AGENCY DKT. NO. 405-11/04

WINTHROP MCGRIFF,

Petitioner,

v.

BOARD OF EDUCATION OF THE TOWNSHIP OF MONTCLAIR, ESSEX COUNTY,

Respondent.

Sheldon H. Pincus, Esq., for petitioner (Bucceri and Pincus, attorneys)

Jennifer Mazawey, Esq., for respondent (Genova, Burns & Vernoia, attorneys)

Record Closed: January 10, 2006 Decided: May 4, 2006

BEFORE **MARGARET M. MONACO,** ALJ:

STATEMENT OF THE CASE

Petitioner, Winthrop McGriff, claims that the respondent, the Board of Education of the Township of Montclair (the Board), violated his tenure, seniority and/or preferred eligibility rights by failing to appoint him to the position of Assistant Principal for Athletics and Student Activities. The Board controverts petitioner's entitlement to the position and maintains that petitioner's claim is time barred pursuant to the 90-day limitation codified in N.J.A.C. 6A:3-1.3.

PROCEDURAL HISTORY

On November 11, 2004, petitioner filed a Verified Petition with the Commissioner of Education asserting that in or around June 2004 the Board created a position entitled Assistant Principal for Athletics and Student Activities, petitioner applied for the position in or around September 2004 and in or around November 1, 2004 the Board resolved to hire an individual, without tenure, for the position. The Verified Petition alleges that the position of Assistant Principal for Athletics and Student Activities is an unrecognized position for which the Board failed to comply with the requirements of N.J.A.C. 6A:9-5.5; the duties of the position are substantially identical to petitioner's former position of athletic director; and the creation of the position, together with the requirement that the holder of the position possess certification as a principal, was undertaken by the Board in an attempt to exclude petitioner from assuming the duties of the position and to circumvent his tenure rights as athletic director. Petitioner avers that the Board's actions violated his tenure, seniority and/or recall rights pursuant to N.J.S.A. 18A:28-5, N.J.S.A.18A:28-10 and N.J.S.A. 18A:28-12. On or about November 29, 2004, the Board filed a Motion to Dismiss in Lieu of an Answer.

The Department of Education transmitted the matter to the Office of Administrative Law where, on December 16, 2004, it was filed for hearing as a contested case. On February 23, 2005, the undersigned conducted a telephone conference with counsel and, thereafter, entered an Order denying the Board's Motion to Dismiss on February 28, 2005. The Board then filed an Answer to the Verified Petition. The hearing was held on September 12 and 13, 2005. Following the conclusion of testimony, the record remained opened for the receipt of transcripts and post-hearing briefs.[1] The parties submitted briefs and reply briefs in support of their respective positions. The record was closed upon receipt of the last submission.

[1] In a letter dated October 21, 2005, counsel for petitioner advised that a portion of the testimony could not be transcribed. Subsequently, the parties agreed upon a summary of this testimony, which is memorialized in a letter dated November 4, 2005 and marked as a joint exhibit. (J-2).

ISSUES PRESENTED

The threshold issue concerns the timeliness of petitioner's Verified Petition pursuant to N.J.A.C. 6A:3-1.3. Should petitioner's claims be determined to have been timely filed, the issue then presented is whether the Board violated petitioner's tenure, seniority and/or preferred eligibility rights by its appointment of a non-tenured individual to the position of Assistant Principal for Athletics and Student Activities.

STIPULATED FACTS

At the commencement of the hearing, the parties submitted a Stipulation of Facts memorializing the parties' agreement as to various facts and the admission of certain documents into evidence.[2] The undersigned adopts, as **FINDINGS OF FACT** in this matter, the following stipulated facts:

1. Petitioner is a tenured teaching staff member employed by the Board since 1989.

2. At all times material to this cause of action, petitioner has held the following certificates issued to him by the New Jersey State Board of Examiners/Office of Teachers credentials:

   (a) An Administrative Certificate with an endorsement of Supervisor (issued 7/89).

   (b) An Instructional Certificate with an endorsement of Teacher of Health and Physical Education (issued 6/73).

   (c) An Instructional Certificate with an endorsement of Teacher of Driver Education (issued 7/85).[3] (P-1 to P-3).

---

[2] The parties stipulated to the authenticity and admission into evidence of Exhibits P-1 to P-74 and R-1 to R-16.

[3] Although the parties stipulated that this certificate was issued 7/85, the certificate introduced as P-3 depicts a date of 1/75.

3. In May 2005, petitioner was issued an Administrative Certificate with Certificate of Eligibility to serve as a Principal by the State Board of Examiners of the State of New Jersey. (P-4).

4. Petitioner commenced employment as the Athletic Director (10-month position) on September 1, 1989. (P-6).

5. Petitioner's position as Athletic Director expanded to an 11-month position (paid on a 12-month basis) effective July 1, 1990. (P-7).

6. In the school year 1991-1992, the then Superintendent of Schools informed petitioner that his services as Athletic Director included oversight of the Middle School (grades 6-8) after-school sport programs in addition to his duties at the High School. Petitioner was deemed responsible for the grades 6-12 athletic programs. (P-8).

7. For the school year 1993-1994, petitioner's duties were expanded to require him to serve in the dual capacity of Athletic Director/Acting Department Chair for Physical Education. (P-9 and P-10).

8. Petitioner continued to be employed in that capacity until December 1, 1996 when the duties of the Department Chair for Physical Education were split off from his duties. The job description for Athletic Director was then revised to make the position a 12-month position. (P-13).

9. During the period of November–December 1997, the Board resolved to abolish the position of Athletic Director effective February 16, 1998. The Board further resolved to create two new positions, entitled Department Chair for Male Physical Education and Athletics and the position of Department Chair for Female Physical Education and Athletics, essentially splitting the Athletic Director position into two positions – one for male physical education and athletics, and one for female physical education and athletics. In this configuration, petitioner was appointed to serve as

the Department Chair for Male Physical Education and Athletics and served in that position until June, 2004. The Department Chair for Male Physical Education and Athletics position was a ten month position with four additional weeks in the summer at the employee's per diem rate of pay. (P-14, P-17 to P-19).

10. On June 7, 2004, the Board resolved to abolish the position of Department Chair for Male Physical Education and Athletics and the position of Department Chair for Female Physical Education and Athletics effective September 1, 2004. The Board then resolved to create the position of Assistant Principal for Athletics and Student Activities, and notified petitioner that effective September 1, 2004, petitioner would be assigned to serve in a position entitled the Department Chair for Physical Education. He has served in that position to the present date. The individual who had been serving as the Department Chair for Female Physical Education and Athletics was assigned to serve in a position entitled the Department Chair for Health and Related Activities, effective September 1, 2004. (P-20 to P-22).

11. In or about September 2004, petitioner applied for employment in the position of Assistant Principal for Athletics and Student Activities.

12. The Board claims that petitioner was ineligible to serve in the position of Assistant Principal for Athletics and Student Activities because he did not then possess an Administrative Certificate with an Endorsement of Principal which was made a requirement of the position by the Board.

13. On or about November 1, 2004, the Board resolved to hire an individual, without tenure, to be employed effective on or about January 1, 2005, in the position entitled Assistant Principal for Athletics and Student Activities. That individual was John Porcelli, an individual who had previously not been employed in any capacity in the Montclair School District (the District).

14. By virtue of his employment service under his Administrative Certificate with an endorsement of Supervisor, petitioner gained tenure pursuant to N.J.S.A.18A:28-5 and N.J.S.A. 18A:28-6 in the capacities of Athletic Director and Department Chairperson for Male Physical Education and Athletics.

15. When petitioner was first appointed to serve as Athletic Director in September, 1989, the job description for said position was that document which is identified as Exhibit P-12.

16. At the time the Board resolved to abolish the position of Athletic Director in February 1998, the job description for said position was that document which is identified as Exhibit P-13.

17. When petitioner served in the position of Department Chairperson for Male Physical Education and Athletics, the job description for said position was that document which is identified as Exhibit P-19.

18. The job description for the position Assistant Principal for Athletics and Student Activities is that document which is identified as Exhibit P-22.

19. At the time of his hiring, John Porcelli was the holder of a New Jersey Principal Certificate. (R-1).

20. During the requisite period within which this Petition is based, the Board did not seek a determination from the County Superintendent of Schools regarding the certification required for someone to perform the duties of the position Assistant Principal for Athletics and Student Activities.

FINDINGS OF FACT

At the hearing, petitioner testified on his own behalf and presented Louise Bellace, who was employed by the Board from September 2004 to January 2005. Testifying on behalf of the Board were Frank Alvarez, the District's Superintendent of

Schools; James Patterson, the District's Personnel Administrator; Melvin Katz, the Principal of Montclair High School; and John Porcelli, the Assistant Principal for Athletics and Student Activities.

Many of the facts surrounding this matter are not significantly disputed. Based upon a review of the testimony and the documentary evidence presented, and having had the opportunity to observe the demeanor of the witnesses and assess their credibility, I **FIND** the following **FACTS**:

Petitioner's relevant service with the Board can be summarized as follows. Petitioner commenced employment with the Board in 1989. From September 1989 until February 1998, petitioner served as athletic director for the District. In or around November/December 1997, the Board resolved to abolish the athletic director position effective February 16, 1998. Thereafter, and through the present date, petitioner has served in the capacity of a department chairperson. From February 1998 through August 2004, petitioner was a department chair for male physical education and athletics. Since September 2004, petitioner has served as a department chair for physical education. Prior to May 2005, petitioner held an administrative certificate with an endorsement of supervisor. In May 2005, petitioner was issued a certificate of eligibility to serve as a principal. Throughout his employment with the Board, petitioner has never served as an assistant principal or held any other position that required a principal endorsement.

The Board's witnesses presented credible testimony, which the undersigned accepts as **FACT**, regarding an assistant principal's involvement in athletics prior to June 2004. James Patterson (Patterson), who has served as the personnel administrator for approximately sixteen years, credibly testified that, beginning in or around 2001, Bruce Dabney (Dabney), an assistant principal for the ninth grade building, was involved in athletics at the high school and was asked to oversee the department. Patterson explained that it is a common practice for an assistant principal to oversee another department and various departments have been assigned to assistant principals as part of their regular duties. The assistant principal's role with regard to overseeing athletics included the responsibility to resolve any conflicts that

arose between parents and decisions made in athletics, and matters that could not be resolved between the two department chairpersons. In the Fall of 2003, Peter Renwick (Renwick) was appointed to an assistant principal position. A fifth assistant principal position had been added for the 2003-2004 school year and, during that school year, the five assistant principals employed at the high school were Bruce Dabney, Peter Renwick, Ed Lebida, Ken Watts and Bill Gibney. From the Fall of 2003 to January 2004, Dabney's responsibilities with regard to overseeing the athletic department began to be transitioned over to Renwick. During the 2003-2004 school year, Renwick had authority over athletics, along with clubs and student activities.

Although petitioner denied that Assistant Principal Dabney and Assistant Principal Renwick served as an assistant principal in charge of athletics and described their role as a "liaison" to the superintendent, the undersigned affords little weight to this testimony. In addition to the testimony offered by Patterson, the District's Superintendent of Schools, Frank Alvarez (Alvarez), credibly testified that he reviewed the structure of the athletic department after he commenced employment in November 2003, it was "clear" that Renwick was the assistant principal for athletics, it "was clearly a supervisory position" and, pursuant to the structure set up at that time, petitioner and the department chair for female athletics reported directly to Renwick. Beyond this, petitioner acknowledged that, when he served as department chair in charge of male physical education and athletics, he met with Dabney regarding athletics, Dabney had responsibilities over the athletic department, Dabney was petitioner's supervisor and Renwick assumed Dabney's role during 2003-2004 school year.

At the time Alvarez commenced service as the Superintendent of Schools in November 2003, the District had been working on three goals; student achievement, a perception of the public schools and financial stability. As the new Superintendent, Alvarez considered these goals and undertook a review of all of the District's programs. It "struck" Alvarez as "odd" that four individuals were overseeing matters relating to athletics at the high school given the size of the school. Alvarez believed that there was "a need to streamline the program" and a need "to look at some ways to be more cost effective" in terms of the delivery of services. At this point in time, the four individuals involved in matters relating to athletics at the high school were Peter Renwick, an

assistant principal in charge of athletics; petitioner, a department chairperson for male physical education and athletics; Frank Bonzckowski, a department chairperson for female physical education and athletics; and a non-tenured employee who appears to have served as a department chairperson for physical education and health. Alvarez recommended that the athletic department be reorganized. He discussed these recommendations with Personnel Administrator Patterson and the then high school principal. Alvarez presented the reorganization plan to the Board in June 2004. The Board voted and approved the reorganization as proposed by Alvarez.

Petitioner received a "Sunshine Law Notification" advising that on June 7, 2004 the Board would be discussing a personnel matter which related to his employment. The notice informed petitioner that the Superintendent was recommending a reorganization of responsibilities in the area of athletics at the high school; as part of this reorganization the Superintendent was recommending that the positions of department chairperson for male athletics and department chairperson for female athletics would be eliminated; and, under the new configuration of department chairperson responsibilities, petitioner would be assigned to the duties in the position of department chairperson for physical education effective September 1, 2004. (P-20). Petitioner did not attend the Board's meeting on June 7, 2004. Via memorandum dated June 8, 2004, Personnel Administrator Patterson informed petitioner that the Board had approved the reorganization of duties in the athletic department at the high school; petitioner's current position was abolished; petitioner would be assigned an equivalent position as department chair for physical education; and petitioner's salary for 2004-2005 would be the same as it would have been under his former position. (P-21).

The reorganization approved by the Board reduced the number of employees involved in athletics at the high school and affected individuals beyond petitioner. The components of the reorganization included the elimination of the two department chair positions for male and female physical education and athletics. Petitioner and the other department chair, who were employed under a supervisor endorsement, were reassigned to equivalent positions under the same bargaining unit (i.e. the Supervisors Association). Petitioner was assigned to the position of department chairperson for physical education and Ms. Bonczkowski was assigned as department chairperson for

health. Petitioner suffered no loss in salary as a result of this reassignment. The reorganization also included the elimination of the position held by the non-tenured individual who lost his job.

The Board created a new job description for the position of Assistant Principal for Athletics and Student Activities, which depicts that it was "established" on June 21, 2004. (P-22). After the reorganization, the duties of the positions of department chairperson for male and female athletics were reassigned to the Assistant Principal for Athletics and Student Activities. The Board posted for the position of Assistant Principal for Athletics and Student Activities. At the time the Board posted for the position, one of the five assistant principal positions at the high school was vacant.

In or around June 6, 2004, petitioner learned from colleagues of a classified advertisement in the newspaper regarding the assistant principal position. Petitioner applied for the position, which according to the stipulated facts occurred in or about September 2004. Petitioner had reviewed the job description for the position at the time he submitted his application.

During the summer of 2004 and until September 1, 2004, petitioner continued his duties as department chairperson for male physical education and athletics. As a result of the reorganization, this position was eliminated effective September 1, 2004 and petitioner was then assigned as department chair for physical education.

In September 2004, petitioner was interviewed by a committee composed of staff, administrators and community representatives for the Assistant Principal for Athletics and Student Activities position. During the interview, Montclair High School Principal Melvin Katz (Katz) inquired whether petitioner held a principal certificate. At the time petitioner applied for and was interviewed for the position, petitioner did not possess an endorsement of principal on his administrative certificate. While the course work for obtaining this endorsement had been completed, petitioner had not yet taken the praxis examination. Petitioner's resume sets forth a delineation of his educational degrees, professional experience, coaching experience, awards, commendations, community service and professional memberships. (P-5). In addition, petitioner was

inducted in the Newark Hall of Fame in 2004 and was issued a certificate of eligibility to serve as principle in May 2005.

Ultimately, petitioner was not selected for the position of Assistant Principal for Athletics and Student Activities. Petitioner presented undisputed testimony that the Board did not formally advise petitioner in writing regarding this determination but, rather, Principal Katz verbally informed petitioner, in passing, that he was not selected for the job.[4] On or about November 1, 2004, the Board resolved to hire John Porcelli (Porcelli) for the position to be employed effective on or about January 1, 2005. After the Board hired Porcelli, there continued to be five assistant principals at the high school.

Prior to Porcelli commencing employment, and from September 1, 2004 until January 2005, Louise Bellace (Bellace) was employed as a consultant for the Board. During this period, Bellace did not work every day, she had no set hours and Bellace was paid on a per diem rate based on the number of hours worked, which hours decreased over the months of her employment. Bellace previously held various interim and/or consulting positions with the Board since her retirement in 1998. Before her retirement, Bellace was employed with the District for twenty-four years as a physical education teacher, a department chair of physical education, an assistant principal in the high school and an assistant principal for the middle school, respectively. She was then employed for four years as a principal at a middle school in West Orange.

Bellace presented credible testimony, which the undersigned accepts as **FACT**, regarding her responsibilities during this time frame. Bellace's role was to coordinate several services, which had been with various assistant principals, under the auspices of the Assistant Principal for Athletics and Student Activities position. Bellace assisted in bringing back the student activities portion of the job from another assistant principal. All of the clubs at the high school were put under the umbrella of the Assistant Principal for Athletics and Student Activities. Assistant Principal Renwick previously had

---

[4] Although petitioner denied being informed of the reason underlying the Board's determination, the Verified Petition states that "[a]n agent of the respondent told petitioner that he was not qualified for the position in that he does not possess an Administrative Certificate with an Endorsement of Principal."

responsibility for student activities and Bellace worked closely with him to coordinate this portion of her responsibilities. The busing portion for athletics and student activities would also be the responsibility of the Assistant Principal for Athletics and Student Activities, which prior to September 1, 2004 had been the responsibility of an assistant principal. The Assistant Principal for Athletics and Student Activities would be responsible for the use of facilities at the high school, which prior to September 1, 2004 had been the responsibility of another assistant principal. Bellace's duties also included bringing back together the male and female aspects of athletics.

Additionally, Bellace's duties as consultant included changing the office into an administrative office with partitioning and furniture upgrades. Bellace ordered new furniture and changed the office into an assistant principal's office where discipline could be melted out in privacy. She assisted in hiring a secretary for the new assistant principal. She assisted in automating the athletic and student activities programs. Bellace had responsibility insofar as the assignment of officials for sporting events when needed and if the officials were not already assigned. However, when Bellace started in September 2004 approximately ninety percent of the referees had been hired for the Fall and part of the winter season. The coaches were also in place for the Fall of 2004 and were the individuals recommended by petitioner (P-43) when the responsibility for recommending coaches was still within his purview. During the period that Bellace worked as a consultant for the Board, correspondence was sent under Bellace's name regarding canceling officials' assignments (P-53, P-54); requesting information from coaches concerning tournaments/clinics (P-56); and advising the staff of a fencing coach opportunity. (P-57). On these documents, Bellace utilized the title "Interim Athletic Director." Bellace explained that she used this title "[i]n dealing with the athletic portion" of the job "because we did not want to confuse the issue" in connection with dealings with schools, coaches and others. No one directed Bellace to use or not to use the title. Principal Katz did not object to it. Bellace was also involved in contracting with other school districts for athletic events (P-58, P-59), contracting with individuals to officiate sport events (P-60, P-61)[5], requesting monies to pay sporting event officials (P-

[5] The parties agreed that the contracts introduced at the hearing were representative of the contracts Bellace entered into and petitioner had 26 additional contracts regarding sporting events and 53 additional contracts with officials.

51, P-52), and communications with the County concerning use of its athletic field. Bellace did not undertake activities regarding the budget until after Porcelli started. Bellace explained that this budget would be different because the budgets previously prepared by petitioner and the former department chair for female athletics would be merged and budgets were also needed for student activities and busing, which previously had been done by other administrative areas. During this period, Bellace did not undertake staff evaluations. Bellace was not involved in the discipline of students and was not given authority by the principal to suspend students.

While the evidence reveals that Bellace, as consultant, performed some duties relating to athletics, Principal Katz presented credible testimony, which the undersigned accepts as **FACT**, that from September 2004 until when Porcelli started his position, most of the functions of the Assistant Principal for Athletics and Student Activities position were left for Katz to do. Principal Katz dealt with many of the day-to-day activities that arose in terms of decisions regarding the athletic program. Functions that Katz undertook during this time period included the replacement of the lacrosse coach and addressing an issue regarding another coach. He also undertook observations for members of the English department due to the absence of a department chairperson, a responsibility that he later assigned to Porcelli.

After the Board approved the hiring of Porcelli, a newspaper article referred to him as an athletic director. (P-63). Superintendent Alvarez contacted the editor of the newspaper and requested a correction, which was printed on November 18, 2004 and states that the District hired Porcelli "to be an assistant principal" of the high school "not an athletic director." (R-15). At the hearing, petitioner presented various newspaper articles which refer to Porcelli as athletic director (P-63 to P-74, P-78 to P-80) and the Board submitted other articles referring to him as an assistant principal. (R-15, R-16).

All assistant principals belong to the Montclair Principals Association. All supervisors who are based in the high school belong to the Montclair Supervisors Association. These Associations have separate contracts. The job descriptions for petitioner's former athletic director and department chair positions depict that the terms of employment include "salary and benefits as negotiated by the MSA." (P-13, P-19). In

contrast, the "salary and benefits" for the position of Assistant Principal for Athletics and Student Activities are "per the MPA agreement." (P-22).

THE TESTIMONY

Apart from the testimony that forms the foundation of the aforesaid **FINDINGS OF FACT**, a summary of other testimony by the various witnesses follows.

Winthrop McGriff Petitioner testified that he undertook a comparison of the performance responsibilities, qualifications, etc., concerning the job description for the position of Assistant Principal for Athletics and Student Activities, as compared to the job descriptions for his former athletic director and department chair positions. (P-75, P-76). Petitioner concluded that the job descriptions were "substantially identical" and petitioner did not need a principal's certificate to assume the duties and responsibilities relevant to the assistant principal position. Due to conflicting testimony presented, it cannot be ascertained exactly when petitioner undertook this analysis and reached the conclusions stated.

At the hearing, petitioner reviewed each of the performance responsibilities set forth in the job description for the Assistant Principal for Athletics and Student Activities (P-22) and the Board's Answers to Interrogatories addressing duties Porcelli has performed under each performance responsibility. (P-77). Petitioner presented detailed testimony, which is incorporated by reference, addressing the various performance responsibilities and how these related to his responsibilities as athletic director and as department chair for male physical education and athletics. Petitioner further identified various documents to support his testimony. Petitioner testified that he performed each of the listed responsibilities relating to the position of Assistant Principal for Athletics and Student Activities when he served as athletic director and also performed the duties as to male athletics in his capacity as department chair.

On cross examination, petitioner admitted that he did not possess a principal endorsement in November 2004 and was not then eligible to hold the position of assistant principal. Petitioner acknowledged that his role as athletic director with regard

to overseeing advisors and clubs/groups in the high school was limited to the intramural program. Petitioner did not have responsibility for overseeing the student government, the key club, the debate club, student government elections, the student council or other student activities within the high school. Petitioner acknowledged that the evaluations performed when he served as athletic director did not evaluate petitioner concerning curriculum writing, his role in emergency management and his evaluation of certified staff relating to their teaching duties. Petitioner acknowledged that he was not in charge of enforcement of the District's student disciplinary policy as athletic director. Rather, petitioner enforced discipline as athletic director by recommending a student's suspension. Petitioner did not have the responsibility of suspending a student and admitted that, as a supervisor, he did not have the authority to suspend a student. Petitioner did not ever suspend a student without referring the student to either the assistant principal or the principal. Petitioner acknowledged that, as athletic director, he was not responsible for the evaluation of certified staff in their teaching discipline. As athletic director, petitioner did not evaluate other supervisors or department chairs at the high school. Petitioner evaluated coaches, who are certified teaching staff members, only as to their coaching functions. Petitioner had a role in disciplining coaches and other athletic staff as athletic director. He was not involved in the discipline or evaluation of teaching staff members relative to their teaching duties as athletic director. Petitioner also was not responsible for the development, revision and evaluation of secondary curriculum as athletic director and no role in curriculum writing. His responsibility as athletic director with regard to maintaining active and positive relationships with supervisors, students, staff, parents and the community related only to athletic activities. Petitioner did not attend the principal's meetings with the assistant principals. With regard to petitioner's responsibility during fire and emergency preparedness drills, petitioner testified that the principal and Dr. Watts advised petitioner, as a supervisor, where to be posted to assist during fire drills. Petitioner understood that Dr. Watts, who was an assistant principal, was responsible for the coordination of fire drills and emergency management.

Superintendent Frank Alvarez Alvarez testified that the reorganization of the athletic department effectuated a savings of approximately $100,000 per year. He explained that the components of the reorganization included maintaining the position of assistant

principal in charge of athletics as the person who would oversee all of athletics. Alvarez testified that he did not view this position as a newly created position. Rather, Alvarez described that it "was a position that existed when [he] came to the District," it was a "position that was in place for some time" and "it was just part of this reorganization." Alvarez agreed that the duties of the assistant principal position were expanded as a result of the reorganization and a change was made to the job description. Alvarez stated that the assistant principal has responsibilities for supervising staff, disciplining students and overseeing all student activities.

Personal Administrator James Patterson Patterson testified that the Board posted for the position of assistant principal, which is a recognized title, and the Board posted for that position because it was the vacancy that existed as a result of Assistant Principal Dabney's reassignment. Patterson indicated that the intention of this position was that the individual would do "many of the things that were formerly done by a different position, plus all the things that can be done under an assistant principal's position." He described that Dabney's position was not as broad as the new position or as focused. A job description was created for the position of Assistant Principal for Athletics and Student Activities, which Patterson opined was not required to be submitted to the County Superintendent of Schools. At the time of the reorganization, Patterson considered whether petitioner had preferred eligibility rights to the assistant principal position. Patterson testified that petitioner is a tenured athletic director in the District, he worked under a supervisor certificate and petitioner's tenure entitlement would not extend to a position that required a principal certificate. Patterson explained the differences between the athletic director position and the assistant principal position. Patterson stated that there can be many things that teachers and administrators do and what must be examined is the scope. Assistant principals have authority over the entire building with the exception of the building principal. An assistant principal can discipline and suspend staff. An assistant principal can supervise and discipline any staff member below their point of the organization. An assistant principal in the District is responsible for evaluating certified staff. They direct the activities of department chairs and conduct their evaluations. All assistant principals at the high school suspend students. Patterson noted that the principal and the assistant principals are the only individuals in the building with the authority to suspend students. He testified that, while teachers,

secretaries and others may recommend that a student be suspended, "the only person that can do the suspension is someone with the license to suspend," which is a "critical piece of authority."

Principal Melvin Katz Katz has served as the principal of Montclair High School since July 1, 2004. When Katz began his tenure as principal, Katz was informed that the Board would be advertising for an assistant principal for athletics and student activities. At that time, there were five assistant principal positions at the high school, four of which were filled. Katz understood that the Board was seeking to hire an assistant principal for that fifth vacant position. Katz testified that assistant principals in the building have two distinct roles; an administrative role and a supervisory role. Their supervision is to oversee the department chairpersons to ensure that the chairpersons are doing what they need to do in terms of evaluations, assessments and ordering of supplies. All of the assistant principals are responsible for overseeing various departments within the school. For the 2005-2006 school year, Porcelli is responsible for supervising the chairs of both the English and Social Studies departments and overseeing those departments. Katz described that an assistant principal's administrative role is to create a climate in the building that is "safe and secure for all of the students, the staff and the teachers." Assistant principals administer the disciplinary code and ensure that Board policy is carried out. They serve as the principal's representatives and have his authority. Assistant principals are responsible for suspending students. The assistant principals, including Porcelli, had several suspensions during the 2004-2005 school year. In addition, every assistant principal must be ready to assume the role of principal in Katz' absence. Assistant principals also handle large group auditorium meetings, handle issues that involve student activities and oversee some of the guidance services.

John Porcelli As of the hearing, John Porcelli (Porcelli) had served as the Assistant Principal for Athletics and Student Activities at the high school for approximately nine months. Prior to commencing employment with the Board, Porcelli was employed by the Morris School District for sixteen years. For the last eight years in that district, Porcelli served as the director of physical education and athletics, which was a district-wide position. Previously, he worked as a teacher on special assignment and as a social studies teacher.

Porcelli described his responsibilities as assistant principal in charge of athletics and student activities at the high school. He testified that the job "is very varied" and the Board's Answers to Interrogatories setting forth the scope of his responsibilities include much of what Porcelli does but not everything. Porcelli is in charge of the athletic program. He is in charge of a "very large student activity program which includes extracurricular and clubs." The high school has a "very large varied club program" consisting of over sixty clubs. Porcelli is in charge of the student elections. Fundraising activities must go through his office. Porcelli is involved in activities and clubs relating to out of school trips. He is involved in planning the annual activities fair. Porcelli was involved in the student awards ceremony. All of the assistant principals had a piece of the award ceremony. Porcelli also was involved in the graduation practice and ceremony. He worked on these activities with the principal and the other assistant principals.

In addition, Porcelli has responsibility with regard to the evaluation of certified staff. Porcelli is responsible for overseeing the English and Social Studies departments. Porcelli undertook observations and evaluations of certain certified staff in the English, Health and Physical Education departments during the 2004-2005 school year. He also evaluates the nurses. Currently, Porcelli is involved in the selection of two new security positions.

Porcelli is responsible for the use of facilities at the high school. This responsibility includes the booking of all rooms in the high school and any other facility, such as the school's athletic fields. Porcelli also has responsibility as it relates to emergency management and fire drills. All of the assistant principals are responsible for an area of the building during a fire drill. Porcelli's area of responsibility for fire drills is the athletic wing of the building. Porcelli attends assistant principal meetings, which Katz holds with the five assistant principals on an approximate weekly basis. During these meetings a variety of issues are discussed such as building atmosphere, curriculum issues, staff and events. He also has attended administrative council meetings, which the Superintendent holds on a monthly basis with all district-wide administrators and principals.

Porcelli and a committee composed of coaches and community members have met over the last six months to create a uniform athletic code of conduct for the high school, which was then pending before the Board for approval. If the code of conduct is approved, Porcelli would be the chief administrator of the code and responsible for implementing the code should a violation occur, including the potential suspension of athletes and non-athlete student spectators. Currently, Porcelli is involved in student discipline. He has suspended students during his nine months as assistant principal. Porcelli is further responsible for the discipline of students for matters relating to their participation in other student activities. On approximately four to five occasions over the last nine months, Porcelli has served as the assistant principal in charge of the ninth grade building in Assistant Principal Renwick's absence.

ADDITIONAL FINDINGS OF FACTS

Based upon a review of the totality of the evidence, and having had the opportunity to assess the credibility of the witnesses who testified, I **FIND** the following additional **FACTS**:

1. An assistant principal at the high school has authority over the entire building, with the exception of the building principal. An assistant principal has responsibilities regarding student discipline. Assistant principals at the high school administer the disciplinary code and suspend students. They supervise and can discipline staff. An assistant principal directs the activities of department chairs and conducts their evaluations. All assistant principals must be prepared to oversee the entire high school building in the absence of Principal Katz and the ninth grade building in the absence of Assistant Principal Renwick, who is the administrator of that building.

2. In addition to the reassignment of the athletic duties previously undertaken by the positions of department chair for male and female physical education and athletics, the responsibilities of the position Assistant Principal for Athletics and Student Activities include responsibilities for which all assistant principals in the building are responsible (e.g. discipline), along with responsibilities that previously had been within the purview of other assistant principals.

3. The Assistant Principal for Athletics and Student Activities position includes responsibilities outside of the realm of athletics. These responsibilities include, among others, responsibility for all facilities use in the high school; overseeing all school clubs and activities in the building, both athletic and non-athletic in nature; arranging for all transportation for these clubs and activities, as well as athletics; supervising and evaluating designated certified and non-certified staff; assisting in the development, revision and evaluation of all secondary curriculum; and supervising activities such as fire drills and emergency preparedness/safety compliance programs.

4. The undersigned accepts as **FACT** Porcelli's testimony detailing his responsibilities as Assistant Principal for Athletics and Student Activities. Porcelli's duties include, among others, responsibility for the athletic program, the student activities program, student elections and fundraising activities. Porcelli is responsible for overseeing the English and Social Studies departments. He evaluates certified staff as well as the nurses. Porcelli is responsible for the use of all facilities at the high school. He has been involved in student discipline, including the suspension of students. He was responsible for and instrumental in creating a uniform athletic code of conduct. If approved, Porcelli will be the administrator of that code and responsible for implementing discipline for violations. He is also responsible for the discipline of students for incidents relating to their participation in other student activities. Porcelli has served as the administrator in charge of the ninth grade building in Assistant Principal Renwick's absence. Similar to other assistant principals at the high school, Porcelli is responsible for an area of the building during fire drills, he attends weekly assistant principal meetings with the principal and he was involved in the student awards and graduation ceremonies.

5. As athletic director, petitioner did not have responsibility to oversee or supervise student activities or clubs in the District except for the intramural program. Contrast P-22.

6. As athletic director, petitioner did not have responsibility to evaluate teaching staff members relative to their teaching duties. Petitioner had input in the evaluation of the equipment managers, the secretary and the buildings and grounds individual who

set up the fields. Petitioner's role in the evaluation, hiring or discipline of teaching staff members was limited to their capacity as coaches. Petitioner did not evaluate other supervisors or department chairs at the high school. Contrast P-22, No. 21.

7. As athletic director, petitioner's role with regard to the enforcement of discipline was limited to recommending a student's suspension. Petitioner did not ever suspend a student without referring the student to the principal. Contrast P-22, No. 12.

8. As athletic director, petitioner was not responsible for assisting with the development, revision and evaluation of all secondary curriculum and had no role in curriculum writing. Contrast P-22, No. 10.

9. As athletic director, petitioner was not responsible for assisting with the school budget and school finances. Rather, petitioner had responsibility only with regard to the budget of the athletic program. Contrast P-22, No. 4.

10. As athletic director, petitioner was not responsible for enforcing all board policies and administrative directives. His responsibility was limited to the rules and regulations which govern the conduct of athletic activities. Contrast P-22, No. 7.

11. As athletic director, petitioner was not responsible for assisting in planning and supervising required activities such as fire drills and emergency preparedness/safety compliance programs. Contrast P-22, No. 14.

12. As athletic director, petitioner's role with regard to the recruiting, screening, hiring, training, assigning, evaluation and removal of staff assigned to the school was limited to coaches, along with input with regard to the evaluation of the equipment managers, a secretary and the buildings and grounds person. Contrast P-22, No. 23.

13. As athletic director, petitioner's role with regard to the mentoring and orientation of staff was limited to coaches. Contrast P-22, No. 25.

14. As athletic director, petitioner was not responsible for other performance responsibilities listed in the job description for the Assistant Principal for Athletics and Student Activities including, among others, the responsibility to attend meetings, special events and school sponsored activities outside the realm of athletics (No. 13); to conduct meetings of staff, students and parents necessary for the proper running of the school making all groups aware of charges in policy or procedure when necessary (No. 24); to discuss and address individual student problems including the discipline, suspension, exclusion or removal from students participating in all school programs (No. 29); to assist with the continuous improvement of the overall instructional program within the school apart from his involvement in supervisors meetings (No. 22); and to establish and maintain relationships with local community groups and individuals to develop, foster and solicit understanding and support for overall school objectives and programs, to interpret board policies and administrative directives, and discuss and resolve individual student/staff/parent problems (No. 18).

15. Pursuant to the job descriptions introduced at the hearing, the "primary function" or "job goal" of the position of athletic director is "[o]rganization of the athletic program and in general charge of all athletic related matters." (P-12, P-13). In contrast, the "job goal" of the position of Assistant Principal for Athletics and Student Activities is "[t]o use leadership, supervisory, and administrative skills in such a way that will assist the principal in coordinating all aspects of the school within the framework of Board policy in order to maximize the educational development of each student with a particular emphasis on extracurricular athletics and student activities." (P-22).

LEGAL DISCUSSION

The initial issue to be determined is whether petitioner's Verified Petition is time barred pursuant to N.J.A.C. 6A:3-1.3. The regulation dictates in salient 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, which is the subject of the requested contested case.
>
> [N.J.A.C. 6A:3-1.3(i)]

The New Jersey Supreme Court reaffirmed the validity of the 90-day limitations period (then codified as N.J.A.C. 6:24-1.2(c)) in the seminal case of Kaprow v. Berkeley Twp. Bd. of Educ., 131 N.J. 572 (1993). The Supreme Court concluded that the rule "falls within the scope of statutory authority granted to the Commissioner and the State Board" and "represents a fair and reasonably-necessary requirement for the proper and efficient resolution of disputes under the school laws." Id. at 582. In explaining the underlying purpose of the rule, the Court said:

> The limitations period provides a measure of repose, an essential element in the proper and efficient administration of the school laws. It stabilizes the relationship between the teachers and the administration. Because education disputes frequently involve conflicting claims to one teaching position, the remedy is to award the prevailing party the position with back pay. The limitation period gives school districts the security of knowing that administrative decisions regarding the operation of the school cannot be challenged after ninety days. Moreover, because local school boards operate on a cash basis, claims must be filed promptly so that the local board can anticipate any back-pay requirements....
>
> [Id. at 582]

In Kaprow, a tenured assistant superintendent filed a petition for reinstatement after his employment was terminated as a result of a reduction in force (RIF). The Court rejected the petitioner's assertion that his RIF right was an "absolute statutory entitlement" and, therefore, exempt from the 90-day limitations period. Id. at 583. Rather, the Court observed that the petitioner's "RIF rights stem from his termination for reasons related to fiscal efficiency in the administration of the school system and from his status as a tenured assistant superintendent". Id. at 585. The Court went on to explain that the petitioner's "RIF right to a preference in reemployment is predicated on his status as a tenured assistant superintendent" and, if the petitioner "had not acquired tenure pursuant to N.J.S.A. 18A:28-5, he would have no right to seniority nor to a place on the preferred eligibility list." Id. at 585-86. The Court held that rights resulting from a

RIF do not constitute a statutory entitlement "[b]ecause RIF rights are inextricably tied to employment in a school system and to tenure rights" and, thus, "a 'functional relationship exists between [the petitioner's] RIF right to preference in reemployment and his service in the school district." Id. at 586.

Similarly, the petition in this case asserts a violation of petitioner's tenure, seniority and/or preferred eligibility rights stemming from his prior service as athletic director. Accordingly, I **CONCLUDE** that petitioner's claim is subject to the 90-day limitations period set forth in N.J.A.C. 6A:3-1.3(i).

In judging the timeliness of petitioner's petition, the regulation instructs that the 90-day period is triggered from the date on which the affected individual received "notice" of the "final order, ruling or other action," which is the subject of the contested case. Although the regulation does not specify what constitutes adequate notice, the Supreme Court explained that "[a]dequate notice must be sufficient to inform an individual of some fact that he or she has a right to know and that the communicating party has a duty to communicate." Kaprow, supra, 131 N.J. at 587. In this regard, the Court stated that "the notice requirement should effectuate concerns for individual justice by not triggering the limitations period until the tenured teachers have been alerted to the existence of facts that may equate in law with a post- RIF cause of action" and, "[a]t the same time, it should further considerations of repose by establishing an objective event to trigger the limitations period in order 'to enable the proper and efficient administration of the affairs of government.'" Ibid. (citation omitted). In Kaprow, the Court concluded that the final order, ruling or other action by the local board occurred when the board appointed non-tenured individuals to positions to which the petitioner claimed tenure rights, and the 90-day period commenced on the date that the board secretary informed the petitioner that the board had created and filled the two positions. Id. at 588. See Nissman v. Long Beach Island Twp. Bd. of Educ., 272 N.J. Super. 373, 381 (App. Div. 1994), certif. den., 137 N.J. 315 (1994) (holding that the 90-day period began to run on the date the local board took formal action resolving not to offer the petitioner a new contract or tenure, rather than the date on which the petitioner's contract ended and she claimed a substantive right accrued).

In its post-hearing submission, the Board asserts that petitioner's claim is time-barred since the 90-day period began to run in June 2004 when the Board created the position of Assistant Principal for Athletics and Student Activities and when petitioner admits that he was aware of the new position. The Board avers that, during this same time period, petitioner concedes that he reviewed the job description for the assistant principal position and concluded that it was the same as his former athletic director position. The Board argues that petitioner "knew or should have known that he had a potential claim to the position" in June 2004, petitioner "had sufficient information in June 2004 to know that a new position had been created and to know the performance responsibilities of the position" and, "[i]f petitioner truly believed that the new position was one in the same as his previous athletic director position, then his application for the position was unnecessary and his claim accrued once the position was posted."

Petitioner contends that his tenure and preferred eligibility rights were triggered, not on the creation of the position in June 2004, but upon actual notice that petitioner would not be hired for the position. Petitioner maintains that the Board's action on November 1, 2004 resolving to hire Porcelli to assume the position is the measuring point for judging the timeliness issue and his petition, which was filed ten days later, is timely. Petitioner cites Dudzinski v. Franklin Borough Bd. of Educ., 97 N.J.A.R. 2d (EDU) 531 and Lynch v. West Morris Regional High School Bd. of Educ., 1990 S.L.D. 453 in support of his position.

In Lynch, the local board notified the petitioner, a tenured teacher, on March 22, 1989, that her employment as a compensatory education/reading teacher would be terminated due to a reduction in force. The petitioner, who held an English endorsement, applied for available English teaching positions and was interviewed for the positions. By letter dated June 22, 1989, the petitioner was informed that her application had been rejected and the board then employed three non-tenured teachers to fill the positions. On September 7, 1989, the petitioner filed a petition claiming entitlement to a teacher of English position. In concluding that the petition was timely filed, the Commissioner rejected the board's argument that the 90-day period began to run on the date of the petitioner's termination as the petitioner was aware on that date of

vacancies in English positions in the district. Id. at 461. Rather, the Commissioner held:

> With respect to the question of timeliness, the Commissioner notes that the plain language of [the] regulation speaks to notice of the final action which is the cause of dispute, so that, strictly speaking, petitioner's 90-day filing period should be tolled from the date upon which she became aware that a nontenured teacher was hired to fill a position for which she was qualified. The record before me does not permit this determination to be made, establishing only that the Board hired a nontenured English teacher on June 19, 1989; that petitioner was notified on or about June 22, 1989 of her rejection for this position; and that the June 22 notice did not in itself serve to indicate that a person with less entitlement than she was hired. However, because petitioner's appeal was timely filed reckoning even from the earliest possible date on which her initial cause of action could be found to have arisen (June 19), I find no necessity for further proceedings or determinations on my part regarding this matter.
>
> [Id. at 463]

Turning to the within matter, the undersigned concurs with petitioner's stance that the Board's action in June 2004 is not the triggering event for purposes of evaluating whether the Board's failure to assign petitioner to, and employment of a non-tenured individual for, the position to which petitioner claims an entitlement violated his tenure, seniority and/or preferred eligibility rights. In addition, the record does not permit a determination to be made concerning when petitioner undertook a comparison of the various job descriptions or when petitioner reviewed the job description for the position, except that this later event occurred before his application in or about September 2004. The regulation further makes clear that the clock begins to run upon "notice" of the final action which is the subject of the contested case. Here, petitioner's claim is predicated, at least in part, upon petitioner's assertion that the Board violated his tenure, seniority and/or preferred eligibility rights by appointing a non-tenured individual to the assistant principal position. In this regard, the record is bereft of evidence that the Board provided written notice to petitioner vis-à-vis his non-selection for the posted position. While it also does not disclose the exact date on which the principal orally informed petitioner that he was not chosen for the job, it is reasonable to conclude that this communication

transpired after petitioner's interview in September 2004. Inasmuch as petitioner filed his petition within ninety days of this communication, it is not necessary to determine whether the principal's advice or the Board's later action on November 1, 2004 commenced the 90-day limitations period.

I **CONCLUDE** that the record does not support the Board's argument that petitioner failed to timely file his petition to the extent that petitioner alleges that the Board's failure to assign him to the position and its employment of a non-tenured individual violated his tenure, seniority and/or preferred eligibility rights. However, I further **CONCLUDE** that to the extent petitioner's petition can be construed as an attempt to challenge the Board's action in June 2004 reorganizing the athletic department, such claim is time barred pursuant to N.J.A.C. 6A:3-1.3(i).

Prior to addressing the parties' positions, a review of the applicable law governing tenure, seniority and preferred eligibility rights is instructive.

The tenure laws, N.J.S.A. 18A: 28-1 to -18, define the conditions under which teaching staff members are entitled to the security of tenure.[6] Tenure has been described as a "statutory right imposed upon a teacher's contractual employment status." Zimmerman v. Newark Bd. of Educ., 38 N.J. 65, 72 (1962), cert. den., 371 U.S. 956, 83 S. Ct. 508, 9 L. Ed. 2d. 502 (1963). The statutory provisions supersede contractual terms. Spiewak v. Rutherford Bd. of Educ., 90 N.J. 63, 72 (1982). The objective of the tenure statutes is to protect competent and qualified teaching staff members, after a probationary period, from removal for "unfounded, flimsy, or political reasons." Zimmerman, supra., 38 N.J. at 71. They are "designed to aid in the establishment of a competent and efficient school system by affording to principals and teachers a measure of security in the ranks they hold after years of service." Viemeister v. Prospect Park Bd. of Educ., 5 N.J. Super. 215, 218 (App. Div. 1949).

---

[6] A "teaching staff member" is defined as "a member of the professional staff of any district...holding office, position or employment of such a character that the qualifications, for such office, position or employment require him to hold a valid and effective standard, provisional or emergency certificate, appropriate to his office, position or employment, issued by the State Board of Examiners...." N.J.S.A. 18A:1-1.

To acquire the security of tenure, the precise conditions articulated in the statute must be met. Picogna v. Cherry Hill Bd. of Educ., 143 N.J. 391, 400 (1996); Kletzkin v. Spotswood Bd. of Educ., 136 N.J. 275, 278 (1993); Spiewak, supra., 90 N.J. at 72; Zimmerman, supra, 38 N.J. at 72; Ahrensfield v. State Bd. of Educ., 126 N.J.L. 543, 544 (E & A 1941). Tenure "arises only by passage of the time fixed by the statute...." Canfield v. Pine Hills Bd. of Educ., 51 N.J. 400 (1968), rev'd. on dissent, 97 N.J. Super. 483, 490 (App. Div. 1967). The employee shoulders the burden of proving an entitlement to tenure protection, which ordinarily must be clearly proven. Id. at 493.

All teaching staff members employed in the public schools must generally be "the holder of a valid certificate to teach, administer, direct or supervise the teaching, instruction, or educational guidance of...pupils in such public schools...." N.J.S.A. 18A:26-2. See N.J.A.C. 6A:9-5.1(a). In order to achieve tenured status, a teaching staff member must possess an appropriate certificate. "No teaching staff member shall acquire tenure in any position in the public schools...who is not the holder of an appropriate certificate for such position, issued by the State Board of Examiners, in full force and effect...." N.J.S.A. 18A:28-4.

Beyond appropriate certification, to attain tenure a teaching staff member must serve a probationary period in a given position under a designated certificate. In other words, a teaching staff member acquires tenure by (1) working in a position for which a teaching certificate is required; (2) holding the appropriate certificate; and (3) serving the requisite period of time. Spiewak, supra, 90 N.J. at 74. N.J.S.A. 18A:28-5, prescribing the required probationary period, provides in pertinent part:

> The services of all teaching staff members employed in the positions of teacher, principal..., assistant principal, vice-principal, assistant superintendent, and all school nurses..., school athletic trainer and such other employees as are in positions which require them to hold appropriate certificates issued by the board of examiners ... 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...after employment in such district or by such board for:
>
> (a) Three consecutive calendar years...; or

> (b) Three consecutive academic years, together with employment at the beginning of the next succeeding academic year; or
>
> (c) The equivalent of more than three academic years within a period of any four consecutive academic years.
>
> For purposes of this chapter, tenure in any of the administrative or supervisory positions enumerated herein shall accrue only by employment in that administrative or supervisory position. Tenure so accrued shall not extend to any other administrative or supervisory position....

The State Board has implemented the certification requirement by authorizing the issuance of three categories of educational certificates: Instructional, Administrative and Educational Services. N.J.A.C. 6A:9-5.2(a). In addition, the State Board has designated endorsements under each type of certificate, which identify the specific area in which a certificate holder is authorized to serve. Employment in a specific assignment requires that the educator hold the appropriate endorsement. Nelson v. Old Bridge Bd. of Educ., 148 N.J. 358, 363 (1997). Four different endorsements may be issued under an administrative certificate; school administrator, principal, supervisor and school business administrator. N.J.A.C. 6A:9-12.3. Pertinent to the within matter, the regulation directs:

> (b) The principal endorsement is required for any position that involves service as an administrative officer of a school or other comparable unit within a school or district. Such positions shall include assistant superintendent for curriculum and instruction, principal, assistant principal, vice-principal and director. Holders of this endorsement are authorized to provide educational leadership by directing the formulation of goals, plans, policies, budgets and personnel actions of the school or other comparable unit, and recommending them to the chief district administrator, and by directing their implementation in the school or other comparable unit. Holders of this endorsement also are authorized to direct and supervise all school operations and programs, to evaluate school staff, including teaching staff members and to direct the activities of school-level supervisors.
>
> (c) The supervisor endorsement is required for both supervisors of instruction and athletic directors who do not hold a standard principal's endorsement. The supervisor shall be defined as any school officer who is charged with authority and responsibility for the continuing direction and guidance of the work of instructional personnel....
>
> [N.J.A.C. 6A:9-12.3(b) and (c)]

See also N.J.S.A. 18A:26-2.1 (requiring a "supervisory certificate" to be eligible for appointment as the director of athletics in any public secondary school).

N.J.A.C. 6A:9-5.5(a) provides that "[e]ach district board of education shall assign position titles to teaching staff members that are recognized in these rules." Should a district board of education determine that the use of an unrecognized position title is desirable, prior to appointing a candidate the district board must submit to the county superintendent a written request for permission to use the proposed title, which shall include a detailed job description. N.J.A.C. 6A:9-5.5(b)1. The county superintendent will then exercise his/her discretion regarding approval of the request and determine the appropriate certification and title for the position. N.J.A.C. 6A:9-5.5(b)2.

The statutory provisions afford boards of education wide latitude in the organization of its staff to meet the district's needs. A board may effectuate a RIF for reasons of economy, because of a change in the administrative or supervisory organization or for other good cause. N.J.S.A. 18A:28-9. The courts have consistently recognized that a RIF "whether of tenured or nontenured teachers, if done for reasons of economy, is entirely within the authority of the board." Maywood Bd. of Educ. v. Maywood Educ. Assoc., 168 N.J. Super. 45, 55 (App. Div. 1979), certif. denied, 81 N.J. 292 (1979). See Jamison v. Morris School Dist. Bd. of Educ., 198 N.J. Super. 411, 414-15 (App. Div. 1985); Klinger v. Cranbury Twp. Bd. of Educ., 190 N.J. Super. 354, 357 (App. Div. 1982), certif. denied, 93 N.J. 277 (1983). Further recognized is that "[t]he determination to reduce the teaching force by abolishing positions need not eliminate the services that may be related to those positions." Impey v. Shrewsbury Bd. of Educ., 273 N.J. Super. 429 (App. Div. 1994), aff'd, 142 N.J. 388, 399 (1995). See Klinger, supra, 190 N.J. Super. at 357.

Seniority refers to an employee's bumping rights upon a RIF. Howley v. Ewing Bd. of Educ., 1982 S.L.D. 1328, 1339, aff'd., 1983 S.L.D. 1554. It is a concept that applies to certain rights of tenured personnel and only has meaning when a RIF is necessary. Id. at 1340. Dismissals resulting from a RIF must be made on the basis of seniority according to standards established by the Commissioner and approved by the State Board. N.J.S.A. 18A:28-10. See N.J.A.C. 6A:32:5.1. "[S]eniority provides a mechanism for ranking all tenured teaching staff members so that reductions among the tenured force can be

effected in an equitable fashion and in accord with sound educational policies." Capodilupo v. West Orange Bd. of Educ., 218 N.J. Super. 510, 514 (App. Div. 1987), certif. den., 109 N.J. 514 (1987). The concept of seniority becomes relevant only after tenure has been achieved. A tenured member dismissed as a result of a RIF must be maintained on a preferred eligible list in the order of seniority for reemployment whenever a vacancy occurs in a position for which such person is qualified and must be reemployed if and when such vacancy occurs. N.J.S.A. 18A:28-12. As explained in Carpenito v. Rumson Bd. of Educ., 322 N.J. Super. 522, 531 (App. Div. 1999), "[w]hen a school board deems it necessary to eliminate a position, 'seniority' is a right afforded to tenured employees entitling the employee to either continue in an existing job opening based upon their longevity of employment or to be placed upon an eligible list for reemployment when a new position becomes available." As a "by-product of tenure", seniority "comes into play only if tenure rights are reduced by way of dismissal or reduction in tangible employment benefits." Ibid. "[T]he triggering event for preference based on seniority is either a dismissal or transfer coupled with a loss of a tangible employment benefit." Id. at 533. "Seniority rights are not triggered when a school board merely transfers or assigns its tenured teaching staff members to other positions within the teacher's appropriate certification." Id. at 534.

A board of education's authority to transfer teaching staff members is limited only to the extent provided by the tenure laws. Howley, supra., 1982 S.L.D. at 1339. The courts have embraced the principle that "[a] board of education must be permitted to maintain control over the administration of its schools where its conduct is in compliance with the tenor and spirit of the Tenure laws" and "[a]n employee should not be permitted to remain in a desired position to subvert a school board's managerial authority to lawfully assign and transfer its staff within the scope of their certification, absent disciplinary reasons or bad faith." Carpenito, supra., 322 N.J. Super. at 534. The petitioner bears the "ultimate burden when contesting action by a board of education of demonstrating both that his/her seniority rights were violated and that he/she suffered harm so as to entitle him/her to redress as a result of that violation." Elson v. Hudson County Area Vocational-Technical Schools Bd. of Educ., 96 N.J.A.R. 2d (EDU) 229, 233.

Under the statutory scheme, "tenure is achieved in a specific 'position' and the scope of the tenured position is initially limited by the 'certificate' the teaching staff member

must hold to satisfy the prerequisite of qualifications for his or her employment." Ellicott v. Frankford Twp. Bd. of Educ., 251 N.J. Super. 342, 348 (App. Div. 1991). See Howley, supra., 1982 S.L.D. at 1337. The "position" in which a teaching staff member achieves tenure is either one of the specifically designated positions in N.J.S.A. 18A:28-5 or other employment for which an appropriate certificate is required. Ellicott, supra, 251 N.J. Super. at 347; Duva v. State-Operated School District of the City of Jersey City, EDU 9801-98, State Bd. of Educ. (March 6, 2002) <http://lawlibrary.rutgers.edu/oal/search.html.>. The specific positions listed in N.J.S.A.18A:28-5 are separately tenurable positions. The State Board and the Commissioner have consistently recognized the distinction in the tenure laws between positions separately tenurable and those not listed in N.J.S.A. 18A:28-5. Nelson, supra., 148 N.J. at 365. It is firmly established that service in the enumerated positions is required before tenure can be achieved in them. Id. at 372-73. See N.J.S.A. 18A:28-5.

The decisional law has addressed the scope of tenure protection afforded to teaching staff members. It is recognized that because a "teacher" is one of the positions enumerated in N.J.S.A. 18A:28-5, tenure achieved under an instructional certificate is as a "teacher" and the scope of tenure protection is extended to all of the endorsements on that certificate (which do not include any other position listed in the statute) regardless of whether the individual had served under those endorsements. Duva, supra. See Bednar v. Westwood Bd. of Educ., 221 N.J. Super. 239 (App. Div. 1987), certif. den. 110 N.J. 512 (1998) (tenured teacher who worked as an elementary art teacher may avoid a RIF by claiming secondary school assignment of non-tenured art teacher); Capodilupo, supra. (tenured teacher with elementary and secondary physical education endorsements had tenure in all positions for which he was qualified under his instructional certificate). The same principles apply in determining the tenure protection afforded to teaching staff members who acquire tenure under an educational services certificate, with the exception of school nurse. Duva, supra. More particularly, the scope of tenure protection afforded to a teaching staff member who acquires tenure under an educational services certificate extends to all endorsements possessed by the staff member on that certificate with the exception of school nurse since that position is specifically enumerated in the statute and is separately tenurable. Ibid. See Ellicott, supra.

Similarly, the scope of tenure protection afforded to teaching staff members who attain tenure under an administrative certificate turns on whether the position under review is specifically listed in N.J.S.A. 18A:28-5. Except for those explicitly enumerated positions, tenure protection is extended to all assignments under an administrative certificate for which the employee held an appropriate endorsement. See Duva, supra. (holding that "since neither 'director' nor 'supervisor' are among those positions enumerated in N.J.S.A. 18:28-5, the scope of petitioner's tenure protection under his Administrative Certificate extended to all assignments for which he was qualified by virtue of possessing a supervisor's endorsement"); Sahagian v. North Bergen Bd. of Educ., 1989 S.L.D. 2878, 2883-84 (holding that "because petitioner was tenured as a supervisor, having served under that endorsement with his administrator's certificate, he is entitled, by virtue of his tenured status as a supervisor, to any other supervisory position in the district over a non-tenured individual").

It is beyond debate that the positions of "principal" and "assistant principal" are specifically enumerated in N.J.S.A. 18A:28-5 and, thus, are separately tenurable. See Nelson, supra., 148 N.J. at 366-67; Skowronski v. Jackson Twp. Bd. of Educ., 95 N.J.A.R. 2d (EDU) 451, 453. Tenure in one of the enumerated administrative or supervisory positions only accrues "by employment in that administrative or supervisory position" and "shall not extend to any other administrative or supervisory position...." N.J.S.A. 18A:28-5. As to these positions, tenure achieved under one endorsement to an administrative certificate may not be transferred to another endorsement under that certificate. N.J.S.A.18A:28-5; Nelson, supra., 148 N.J. at 366-68. Accordingly, where a newly-created position is separately tenurable, a petitioner will not be found to possess a right to the position in the absence of fulfilling the service requirement.

In Nelson, the petitioner held an administrative certificate with separate supervisor and principal endorsements. Nelson, supra., 148 N.J. at 361. He was appointed to the position of department chairperson at the district's high school and qualified for that position, in which he achieved tenure, by virtue of his supervisor endorsement. Ibid. The petitioner never served in the capacity of administrator, principal or vice principal under his principal endorsement. Ibid. Subsequently, the board eliminated the petitioner's chairperson position as part of a RIF and he was

reassigned to the position of teacher. Ibid. The board later filled an elementary principal position with a non-tenured individual and the petitioner filed a petition maintaining that the tenure he had achieved under his supervisor endorsement as chairperson extended to that principal's position. Ibid. The Supreme Court rejected Nelson's claim. The Court held that service in the separately listed positions is required before tenure can be achieved, the two positions were not "significantly similar" even through both endorsements fell under the administrative certificate and permitting an educator to transfer tenure rights to a separately tenurable position would "promote unsound education policy." Id. at 365-73.

The courts have permitted an individual to claim eligibility to a new position based on tenure in another position only when the two positions are "substantially identical." The New Jersey Supreme Court has recognized that, "[w]hen the duties of the position in which a teaching-staff member has acquired tenure are substantially identical to those of the position that the person seeks, a local school board may not sidestep an educator's tenure rights by simply renaming the position or tacking on additional meaningless requirements" and "must extend the teaching-staff member's tenure rights to the newly-created position." Dennery v. Passaic County Reg. High School District Bd. of Educ., 131 N.J. 626, 639 (1993). See Viemeister, supra., 5 N.J. Super. at 218 (providing for the reinstatement of a tenured principal on the basis that his position had not in fact been abolished when the board created the position of "teaching" principal); Vogel v. Ridgefield Bd. of Educ., State Bd. of Educ. (June 5 , 1985), slip op. at 6-8 (holding that the board did not abolish in substance the position of elementary school principal but merely reassigned the duties of that position to a substantially similar position and the board's failure to reinstate petitioner, a tenured principal, to that position violated his tenure and seniority rights). See also Luppino v. Bayonne Bd. of Educ., 1980 S.L.D. 1028, 1036-37 (concluding that the duties of administrator of home instruction and principal of home instruction "were substantially the same," "[a]ny difference in the duties was insubstantial," petitioner's title change did not involve the "meaningful" addition of extra duties and, thus, petitioner acquired tenured status in the position of principal). The Supreme Court in Dennery further explained:

> A mere overlap in duties, however, 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. Santasiero v. Parsippany-Troy Hills Bd. of Educ., 1984 S.L.D. 854, 879; see also Sandri v. Board of Educ., 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. Board of Educ., 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").
>
> [Dennery, supra., 131 N.J. at 640]

See Gonsalves v. South Orange-Maplewood Bd. of Educ., 1985 S.L.D. 249, 261 (rejecting the petitioner's claim that the board violated his seniority and tenure rights when it abolished his vice principal position and failed to appoint him to a newly-created curriculum supervisor position and holding that the positions were "different positions with different duties to serve different educational functions", "no substantial similarity" in the duties of the positions existed and "the inclusion of some of the duties of a petitioner's abolished position within those of a new position does not give petitioner a right to the new position").

The Commissioner and the State Board have addressed situations analogous to the within matter in which a teaching staff member asserts tenure and seniority rights to a newly-created assistant or vice principal position predicated on a claim that the duties of the new position are substantially the same as the employee's duties as a supervisor. Such claims have been consistently rejected even when the petitioner held a principal endorsement.

In Miller v. New Providence Bd. of Educ., 1987 S.L.D. 23, the petitioner, who served as a Supervisor of Physical Education and Health/Athletic Director, claimed that the board violated his tenure and seniority rights by failing to assign him to a newly-created position of Supervisor of Physical Education/Vice Principal after his position was eliminated. The petitioner alleged that he was entitled to the new position because he was a tenured Supervisor of Physical Education, Health and Athletics; the new position

was petitioner's old position combined with some additional duties; and the petitioner was fully certified for the new position. Id. at 36. In denying the petitioner's claim, the Commissioner stated that, "[w]hile it is undisputed that petitioner had a tenure and seniority claim to his former position of Supervisor of Physical Education and Health/Athletic Director, it is clear that the Board's action...in abolishing that position and thereafter combining petitioner's duties under a newly created position of Supervisor of Physical Education and Athletics/Vice Principal...was consistent with the provisions of N.J.S.A. 18A:28-9...." Id. at 43. The Commissioner found that, although the duties of the two positions did "overlap," the combined new position encompassed "significantly greater duties" than the petitioner performed in his former title. Ibid. The Commissioner further concluded that the petitioner had no claim to the new position "inasmuch as he had never previously performed any of the major duties of vice principal in his former title, nor had he previously acquired tenure in the position of vice principal." Ibid.

In De Carlo v. South Plainfield Bd. of Educ., 1988 S.L.D. 1796, the petitioner held the position of a general supervisor and possessed, among others, certification as a secondary school principal. As part of an administrative reorganization, the board abolished five general supervisor positions at the high school. At the same meeting, the board added four new assistant principal positions and approved job descriptions for the new positions, designating them as Assistant Principal A (a 12-month) position and Assistant Principal B (a 10-month position). The petitioner was assigned to a guidance counselor position and his name was placed on a preferred eligibility list for the position of general supervisor should that position be reinstated. Among other claims, the petitioner asserted a claim to the assistant principal position arguing that his former position was in effect no different than the vice principal position. In rejecting the petitioner's claim, the Commissioner held that "because supervisors and assistant or vice principals are separately tenurable positions pursuant to statute, N.J.S.A.18A:28-5, petitioner acquired tenure as a supervisor, not as a vice principal, notwithstanding the fact that he may have also held a principal's endorsement" and, "[t]herefore, petitioner had no claim to the position of vice principal." Id. at 1809-10. The Commissioner also found that, although a review of the job description for the position reflected an "overlap"

in duties, there were "significantly distinguishing duties" between the two positions to counter against any argument suggesting bad faith on the part of the board. Id. at 1810.

In Skowronski, supra, 95 N.J.A.R.2d (EDU) at 453, the State Board concurred with the Commissioner's determination that the petitioner had no entitlement to newly-created assistant principal positions after his supervisor position was abolished. In so ruling, the State Board held that since petitioner "had not achieved tenure in the position of 'assistant principal', petitioner's tenure rights achieved as the result of his employment as a supervisor did not encompass those new positions." Rather, the State Board observed that, "[n]otwithstanding the fact that the principal and supervisor endorsements are both issued under the administrative certificate, the tenure laws expressly designate 'assistant principal' as a separately tenurable position" and, thus, "[h]aving achieved no tenure rights in such 'position', petitioner had no entitlement by virtue of tenure to any assignments within that tenured position." Ibid. The State Board further agreed with the Commissioner's determination that the "duties and responsibilities of the newly-created position differ substantially from those of petitioner's former position." Ibid.

It is against this backdrop that the parties' positions are considered.

ANALYSIS AND CONCLUSIONS OF LAW

Petitioner contends that the Board's "act of excluding him from assuming the duties of the position" of Assistant Principal for Athletics and Student Activities "violated his tenure, seniority and/or preferred eligibility rights established pursuant to N.J.S.A. 18A:28-5, N.J.S.A. 18A:28-10 and N.J.S.A. 18A:28-12." Petitioner maintains that his tenure in the position of athletic director rendered him eligible for the Assistant Principal for Athletics and Student Activities position as the "essential duties" of the positions are "substantially identical." Petitioner avers that the job title for the controverted position "is unrecognized because it is not that of 'Assistant Principal,' but rather the 'Assistant Principal for Athletics and Student Activities'" and "the Board's unilateral imposition of the requirement for the holder of the position to possess an Administrative Certificate with an Endorsement of Principal...without first seeking a determination from the County

Superintendent of Schools as to certificate requirements violated N.J.A.C. 6A:9-5.5." It is urged that "[t]he Board's designation of so-called 'additional' duties did not require the holder of the position to hold a Principal endorsement to the exclusion of one holding a Supervisor endorsement" or, alternatively, that petitioner's Supervisor endorsement "afforded him the authority to perform the duties of the overlapping duties and such other duties that were tacked on by the Board." Petitioner asserts that if the disputed position "did not require the holder to possess a Principal endorsement because, in fact, a Supervisor endorsement sufficed to permit the holder thereof to perform the duties," then petitioner must prevail "because his tenure as a Supervisor afforded him a right to the position." Petitioner cites Duva, supra. and Sahagian, supra. for the proposition that, if an individual obtains tenure by service under a supervisor endorsement, their tenure extends to any other position within that endorsement. Petitioner further seeks a determination by this forum that an administrative certificate with an endorsement of principal is not required to undertake responsibilities such as supervising student activities/clubs, evaluating teaching staff members, participating in fire drill activities, booking rooms/facilities and the development, revision and/or evaluation of secondary curriculum. In addition, petitioner claims that the Board's "action was undertaken in a deliberate, bad faith attempt to exclude [petitioner] from assuming the position" and the "sham transfer of duties" is further supported by the service of Ms. Bellace as the "Interim Athletic Director until Mr. Porcelli commenced employment" and the newspaper articles identifying Mr. Porcelli as the athletic director.

The Board controverts petitioner's entitlement to the position of Assistant Principal for Athletics and Students Activities. The Board maintains that "the position of assistant principal is a 'separately tenurable position' to which petitioner has no tenure rights" by virtue of the tenure he achieved under his supervisor endorsement as athletic director and department chair for male athletics. The Board contends that the "regulatory scheme affirms that regardless of the specific area for which the Assistant Principal is assigned, the title is unquestionably recognized" and, thus, "it was not necessary for the Board to submit the title to the County Superintendent prior to appointing an individual to the position." The Board asserts that N.J.A.C. 6A:9-12.3(b) requires that individuals in this position must hold a principal endorsement and petitioner's failure to possess this endorsement at the time the job was posted or filled

"casts a fatal blow to his claim." The Board further argues that "petitioner's tenure in the position of athletic director does not render him eligible for the position of Assistant Principal as the positions are dissimilar" as established by a review of the job descriptions and the testimony at the hearing. The Board observes that, apart from the significant differences between the positions, "it is important to note that prior to the creation of the new position, the title of Assistant Principal existed at the high school," "there also existed a vacancy in that position" and "the duties of the former Department Chair for Athletics have been assigned to the existing Assistant Principal position; the Board did not create a position with duties of an Athletic Director and then assign that position an Assistant Principle title." Lastly, the Board maintains that petitioner has no entitlement to the assistant principal position stemming from his service as a department chairperson and petitioner's testimony addressing his duties in that position is irrelevant to the determination regarding petitioner's alleged right to the position. In this regard, the Board notes that "petitioner's reassignment from department chair for male athletics and physical education to department chair for physical education in September 2004 did not constitute a reduction in force for which he has tenure and/or seniority rights." Rather, petitioner was "moved from one department chairperson position to another" and "suffered no reduction in salary or other tangible employment benefits."

Succinctly stated, the undersigned concurs with the Board's position. Initially it is observed that any claim that petitioner is entitled to the disputed position emanating from his service as department chair is beyond the scope of the Verified Petition. Apart from this, any such claim is devoid of merit. Clearly, the Board possesses the authority to maintain control over the administration of its schools, including the managerial authority to lawfully assign and transfer its staff within the scope of their certification. See Carpenito, supra., 322 N.J. Super. at 534. As a consequence of the administrative reorganization in June 2004, the Board did not dismiss or reduce petitioner's compensation in contravention of the tenure protections afforded by N.J.S.A. 18A:28-5 and petitioner suffered no loss of any tangible employment benefit resulting from his reassignment. A mere transfer or reassignment to another position within the teaching staff member's certification without a loss of tangible employment benefits does not implicate the tenure and seniority requirements. Similarly, the evidence vis-à-vis

petitioner's duties in his former department chair assignment is not pertinent to the evaluation of petitioner's asserted claim to the assistant principal position stemming from his prior service as athletic director. Indeed, given that the position was one of a department chair, it had certain responsibilities beyond the purview of an athletic director (e.g. evaluation of staff).

Turning to petitioner's remaining assertions, that the position of "assistant principal" is a separately tenurable position cannot be seriously debated. See N.J.S.A. 18A:28-5; Nelson, supra.; Skowronski, supra.; De Carlo, supra.; Miller, supra. Equally settled is that an educator must serve the statutory required period of time in that position in order to achieve tenure rights to an assistant principal assignment. And, the regulations make clear that a principal endorsement is a sine qua non to serve as an assistant principal. N.J.A.C. 6A:9-12.3(b).

In this matter, petitioner attained tenure in the District as a result of his employment as athletic director and department chair. Petitioner was qualified for that service by virtue of his supervisor endorsement. N.J.A.C. 6A:9-12.3(c). Petitioner never served in the position of assistant principal for the District or in any other position that required a principal endorsement. Beyond this, petitioner did not possess a principal endorsement at the time the Board posted and filled the challenged position and, thus, petitioner was not qualified to hold an assistant principal assignment. Pursuant to the express terms of N.J.S.A. 18A:28-5, petitioner cannot transfer the tenure he acquired as a supervisor under his supervisor endorsement to the separately tenurable position of assistant principal in which he accrued no work experience and which requires a different endorsement. Accordingly, I **CONCLUDE** that petitioner has no entitlement to the position of Assistant Principal for Athletics and Student Activities based upon his tenure, seniority and/or preferred eligibility rights.

The undersigned finds no merit in petitioner's contention that the position in issue is unrecognized and the Board was required to submit the job description to the County Superintendent prior to appointing Mr. Porcelli to the position. Suffice it to say, irrespective of the specific area for which an assistant principal is assigned, the title is unquestionably recognized. See N.J.S.A. 18A:28-5. See also N.J.A.C. 6A:32-5.1(l)12.

The job description and the evidence, as hereinbefore detailed, do not support petitioner's apparent claim that the position is not, in fact, one of an assistant principal. The record reveals that when the Board created the new job description for the position a vacant assistant principal position existed at the high school. Additionally, the duties attending the position, as set forth in the job description and the testimony, fail to support petitioner's stance that they lack the character necessary to require a principal endorsement. Indeed, responsibilities such as the direction of the activities of school-level supervisors and school-wide responsibility in the principal's absence fall squarely within the parameters of N.J.A.C. 6A:9-12.3(b). Whether every performance responsibility of the position would necessitate an endorsement of principle is not the pertinent inquiry. Equally unavailing is petitioner's reliance on the various newspaper articles to support his claim to the position. Plainly, those articles have no evidentiary weight in the determination of the nature of the position under review. And, Ms. Bellace's service as a consultant, which involved a panoply of responsibilities in preparation for the incoming assistant principal, does not support petitioner's "sham transfer of duties" allegation.

Beyond the certification requirement, I further **CONCLUDE** that the position of Assistant Principal for Athletics and Student Activities is significantly different from petitioner's former athletic director assignment. A canvas of the job description coupled with the testimony demonstrates an insufficient identity of duties between the positions and that they are, in fact, qualitatively different positions with substantially distinguishable duties to serve different educational functions. That the assistant principal performs duties previously within the purview of an athletic director does not lead to the conclusion that the positions are the same. Although some of the duties performed by petitioner as athletic director are now performed by the assistant principal, a mere overlap of duties does not give petitioner a right to the new position. Simply put, the assistant principal undertakes numerous responsibilities not required of an athletic director and the duties of the position go well beyond the realm of athletics. A critical distinction between the two posts is the performance of major functions that are entrusted to assistant principals at the high school, such as the imposition of discipline, building-wide responsibility in the principal's absence and the direction and evaluation of supervisors. The assistant principal position also includes various functions that had

been performed by other administrators relative to student activities, fire drills, busing and oversight of departments. As previously set forth in the **FINDINGS OF FACT,** as athletic director petitioner did not perform these duties as well as other performance responsibilities assigned to the Assistant Principal for Athletics and Student Activities. In short, the duties of the new position are markedly broader in nature and scope than the athletic functions performed by petitioner and deal with matters distinctly different than the work performed by petitioner in his former title.

Finally, to the extent that petitioner attempts to impunge the reorganization of the athletic department or the creation of the challenged position in June 2004, such claims would be time-barred pursuant to the 90-day rule. Additionally, the record is devoid of evidence to support any argument that the Board commenced its reorganization or created the new job description in order to circumvent petitioner's tenure, seniority or preferred eligibility rights. No credible evidence supports any improper motive or bad faith on the part of the Board. Indeed, the evidence suggests that the administrative reorganization resulted in a cost savings to the District. While the undersigned makes no specific finding as to whether a cost savings actually occurred, it cannot be said that the reorganization of positions, and the shifting of duties previously undertaken by other assistant principals and the department chairs to the new position, was arbitrary, capricious or predicated on motives other than legitimate educational purposes.

In sum, I **CONCLUDE** that petitioner did not attain tenure in the position of assistant principal and his tenure achieved as a supervisor in the assignments of athletic director and department chair does not encompass the new position. I further **CONCLUDE** that the position of Assistant Principal for Athletics and Student Activities differs materially from petitioner's former athletic director post both in terms of job duties and endorsement requirements. I further **CONCLUDE** that because petitioner never served as an assistant principal, petitioner did not perform any of the major duties of assistant principal as an athletic director and that position had substantially different duties, the Board was not obligated under the tenure laws or the seniority rules to assign petitioner to the new position. Based upon the foregoing, I **CONCLUDE** that petitioner has failed to establish, by a preponderance of the credible evidence, that he had a right to be assigned to the position of Assistant Principal for Athletics and Student

Activities and the Board's employment of a non-tenured individual for that position violated petitioner's tenure, seniority and/or preferred eligibility rights.

ORDER

I **ORDER** that petitioner's Verified Petition be and hereby is **DISMISSED WITH PREJUDICE**.

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

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

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

May 4, 2006
DATE

Margaret M Monaco
MARGARET M. MONACO, ALJ

E-mail Receipt of Initial Decision Confirmed by the Department of Education on:

DATE

Mailed to parties:

MAY 8 2006
DATE

DIRECTOR AND CHIEF ADMINISTRATIVE LAW JUDGE
OFFICE OF ADMINISTRATIVE LAW

db

APPENDIX

List of Witnesses

For Petitioner:

Louise Bellace

Winthrop McGriff

For Respondent:

Frank Alvarez

James Patterson

Melvin Katz

John Porcelli

List of Exhibits In Evidence

Joint Exhibits:

J-1 Stipulation of Facts (12 pp)

J-2 Letter from Sheldon Pincus, Esq. dated November 4, 2005 (4 pp)

For Petitioner:

P-1 State Board of Examiners Certificate, Supervisor, issued July 1989

P-2 State Board of Examiners Certificate, Teacher of Health and Physical Education, issued June 1973

P-3 State Board of Education Certificate, Teacher of Driver Education, issued January 1975

P-4 State Board of Examiners, Certificate of Eligibility, Principal, issued May 2005

P-5 Resume (4 pp)

P-6 Personnel Change Notice dated June 19, 1989

P-7 Personnel Change Notice dated May 29, 1990

P-8 Memorandum from Superintendent of Schools, Mary Lee Fitzgerald, to Windy McGriff dated February 25, 1991 (2 pp)

P-9 Personnel Change Notice dated September 20, 1993

P-10 Memorandum from Elaine Davis, High School Principal, to Dr. William Librera, Superintendent, dated August 16, 1993

P-11 Personnel Change Notice dated September 26, 1994

P-12 Job Description for Athletic Director, May 1989

P-13 Job Description for Athletic Director, November 1996 (2 pp)

P-14 Personnel Change Notice dated December 7, 1998

P-15 Minutes of Board Meeting on November 3, 1997 (19 pp)

P-16 Minutes of Board Meeting on November 19, 1997 (16 pp)

P-17 Minutes of Board Meeting on December 15, 1997 (24 pp)

P-18 Memorandum from James Patterson to Elaine Davis, Corwin Drake and Windy McGriff dated December 9, 1997 and Draft Job Descriptions (5 pp)

P-19 Job Description for Department Chairperson for Male Physical Education and Athletics, January 1998 (3 pp)

P-20 Memorandum from James Patterson to Windy McGriff dated June 2, 2004

P-21 Memorandum from James Patterson to Windy McGriff dated June 8, 2004

P-22 Job Description for Assistant Principal for Athletics and Student Activities, June 21 2004 (2 pp)

P-23 Excerpt regarding Regulations (2 pp)

P-24 Athletic Director Evaluation dated January 29, 1990 (3 pp)

P-25 Athletic Director Evaluation dated March 13, 1991 (3 pp)

P-26 Athletic Director Evaluation dated March 7, 1990 (3 pp)

P-27 Athletic Director Evaluation dated January 7, 1991 (3 pp)

P-28 Athletic Director Evaluation dated February 27, 1992 (2 pp)

P-29 Department Chair Evaluation dated June 1995 (2 pp)

P-30 Athletic Director Evaluation dated November 27, 1991 (3 pp)

P-31 Memorandum from Elaine Davis, Principal, to Winthrop McGriff dated August 27, 2001

P-32 Memorandum from Windy McGriff dated September 6, 2001

P-33 Excerpt of Budget Report for 2001/2002 (2 pp)

P-34 Male Athletics account status

P-35 Permit Application for Athletic Fields

P-36 NNJIL Basketball Officials Contract

P-37 Letter from George Middleton, Secretary, NNJIL, to Whom it May Concern dated June 27, 2005

P-38 Permit Application for Athletic Fields, Permit Rates and Schedule (3 pp)

P-39 Memorandum from Windy McGriff dated June 30, 2004 (2 pp)

P-40 Excerpt of Budget Report for 2001-2002 (2 pp)

P-41 Memorandum from Windy McGriff to All Head Male Coaches of Fall, Winter and Spring Seasons dated January 12, 2004 (2 pp)

P-42 2004-05 Budget Book for Soccer (21 pp)

P-43 Message from Windy McGriff dated June 23, 2004

P-44 NNJIL Boys Basketball Officials Directory (3 pp)

P-45 NNJIL 2004-2005 Schedule by Date (3 pp)

P-46 NNJIL 2004-2005 Master Boys Basketball Officials Game Schedule (3 pp)

P-47 Memorandum from Melvin Katz, Principal, to Whom it May Concern dated June 15, 2005

P-48 Memorandum from Ed Church to Windy McGriff dated April 21, 2004

P-49 Schedules for Boys Sports 2004-2005 (16 pp)

P-50 Memorandum from Windy McGriff to Dr. Mel Katz dated September 27, 2004

P-51 Check Request Form dated November 29, 2004

P-52 Check Request Form dated December 1, 2004

P-53 Letter from Louise Bellace dated December 2, 2004

P-54 Letter from Louise Bellace dated December 2, 2004

P-55 Memorandum from Dr. James Patterson to Windy McGriff dated June 2, 2004

P-56 Memorandum from Louise Bellace to All Coaches dated November 22, 2004

P-57 Memorandum from Louise Bellace to All Staff dated September 29, 2004

P-58 Contract for Sporting Events dated November 3, 2004

P-59 Contract for Sporting Event dated November 3, 2004

P-60 Contract for Officiating Sporting Events dated November 3, 2004

P-61 Contract for Officiating Sporting Events dated November 3, 2004

P-62 Newspaper Article

P-63 Newspaper Article (3 pp)

P-64 Newspaper Article

P-65 Newspaper Article (2 pp)

P-66 Photograph

P-67 Newspaper Article

P-68 Newspaper Article (2 pp)

P-69 Newspaper Article (2 pp)

P-70 Newspaper Article

P-71 Newspaper Article (4 pp)

P-72 Newspaper Article (4 pp)

P-73 Newspaper Article (3 pp)

P-74 Newspaper Article (3 pp)

P-75 Comparison of Job Descriptions for Assistant Principal for Athletics and Student Activities and Athletic Director (15 pp)

P-76 Comparison of Athletic Director Job Descriptions v. Department Chairperson for Male Physical Education and Athletics (9 pp)

P-77 Interrogatories and Answers to Interrogatories (26 pp)

P-78 Newspaper Article (2 pp)

P-79 Newspaper Article (4 pp)

P-80 Newspaper Article (3 pp)

For Respondent:

R-1 State Board of Examiners, Certificate of Eligibility, Principal, issued September 2004

R-2 Classroom Observation Form dated May 4, 2005 (2 pp)

R-3 Classroom Observation Form dated March 30, 2005 (2 pp)

R-4 Classroom Observation Form dated April 5, 2005 (2 pp)

R-5 Classroom Observation Form dated May 3, 2005 (2 pp)

R-6 Teacher Annual Performance Report for 2004-05 (3 pp)

R-7 Classroom Observation Form dated June 14, 2005 (2 pp)

R-8 Teacher Annual Performance Report dated June 20, 2005 (3 pp)

R-9 Classroom Observation Form dated May 2, 2005 (2 pp)

R-10 Teacher Annual Performance Report dated June 15, 2005 (3 pp)

R-11 Classroom Observation Form dated April 28, 2005 (2 pp)

R-12 Teacher Annual Performance Report dated June 15, 2005 (3 pp)

R-13 Evaluation dated June 27, 2005 (4 pp)

R-14 Newspaper Article (4 pp)

R-15 Newspaper Correction

R-16 Newspaper Article (3 pp)

248-06

#248-06

OAL DKT. NO. EDU 11784-03
AGENCY DKT. NO. 374-10/03

EAST ORANGE COMMUNITY CHARTER SCHOOL, INC.,	:	
PETITIONER,	:	COMMISSIONER OF EDUCATION
V.	:	DECISION
NEW JERSEY STATE DEPARTMENT OF EDUCATION,	:	
RESPONDENT.	:	

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

Upon review, the Commissioner concurs with the Administrative Law Judge that, under the particular facts of this matter, the Department of Education should not have disallowed the disputed Title I expenditures and directed their repayment by petitioner.

Accordingly, for the reasons expressed therein, the Initial Decision of the OAL, reversing the Department's determination of disallowance and directive for repayment, is adopted as the final decision in this matter.

IT IS SO ORDERED.*

Isaac Bryant
ACTING COMMISSIONER OF EDUCATION

Date of Decision: 7/17/06
Date of Mailing: 7/17/06

* This decision may be appealed to the State Board of Education pursuant to *N.J.S.A.* 18A:6-27 *et seq.* and *N.J.A.C.* 6A:4-1.1 *et seq.*

State of New Jersey
OFFICE OF ADMINISTRATIVE LAW

INITIAL DECISION
OAL DKT. NO. EDU 11784-03
AGENCY DKT. NO. 374-10/03

EAST ORANGE COMMUNITY CHARTER SCHOOL, INC.,
Petitioner,
v.
NEW JERSEY DEPARTMENT OF EDUCATION,
Respondent.

Robert Taylor, Esq., for petitioner

Patricia M. O'Neill, Deputy Attorney General, for respondent
(Zulima V. Farber, Attorney General of New Jersey, attorney)

Record Closed: February 3, 2005 Decided: June 1, 2006

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

Statement of the Case

This is an appeal by a charter school from the audit of its Title I "flow through" funds for fiscal year 2001-02 available under the Improving America's Schools Act of 1994/No Child Left Behind Act of 2002 Title I Program ("Title I"). Specifically, East

Orange Community Charter School, Inc. ("East Orange") appeals from a decision of the New Jersey Department of Education ("Department") requiring it to repay $34,543 in Title I funds.[1] The Department disallowed this amount on the ground that the East Orange had "encumbered" the funds for their cost prior to the commencement date of the Title I fiscal year, which the Department says violated 34 C.F.R. 76.700 to -711, commonly known as "EDGAR."[2] In part, the problem arose because the charter school and the Title I program have different fiscal calendars. East Orange has a fiscal year of July 1st through June 30th, whereas the Title I program has a fiscal year of September 1st through August 31st.

East Orange does not deny that the services and supplies were ordered prior to September 1, 2001, but contends that the orders were made on the basis of surplus funds remaining in its general educational budget as of June 2001. Although East Orange authorized these expenditures before commencement of the Title I fiscal year, it did so in anticipation of obtaining reimbursement out of Title I funds once such money became available. Charter school administrators maintain that the purchase orders had to be issued in advance so that the East Orange could be ready to deliver Title I services when school reopened in September. In essence, East Orange temporarily borrowed money from itself to cover purchase orders necessary to implement the Title I program in September, which amount could then be repaid out of Title I funds as soon as the new fiscal year began.

Significantly, the Department does not allege any misuse of public funds or that the expenditures did not go toward operation of the Title I program during September 1, 2001 to August 31, 2002. Instead, the thrust of the Department's argument is that federal regulations prohibit East Orange from committing to the purchase of goods and services until the Title I fiscal year has already begun.

Ultimately, the case turns on the proper interpretation of the federal regulations and, more particularly, what event is sufficient "to obligate" Title I funds. In the

[1] Amounts have been rounded off to the nearest dollar.
[2] Education Department General Administrative Regulations.

Department's view, the issuance of a purchase order itself "encumbers" those funds and, as a result, constitutes a binding obligation on the purchaser. East Orange argues that a purchase order does not become an enforceable debt until it has been "accepted" by the seller, usually by shipment of the goods.

For the reasons that follow, East Orange utilized its general surplus to ensure timely procurement of various goods and services and did not obligate Title I funds prior to September 1, 2002.

Procedural History

By letter dated May 16, 2003, the Department's Office of Compliance Investigation ("Office of Compliance") notified petitioner that it had completed an examination of East Orange's Title I operations for the period September 1, 2001 through August 31, 2002 and had disallowed a total of $46,867.64 for, among other reasons, encumbering funds to the Title I program prior to the start of the grant date. On or about June 6, 2003, East Orange filed an appeal to the Director ("Director") of the Office of Compliance. Thereafter, on June 13, 2006, the Director reviewed East Orange's submissions and upheld the earlier determination. On or about June 24, 2003, East Orange filed a second-tier appeal to the Department's Chief of Staff. Two weeks later, on July 7, 2003, the Chief of Staff entered a decision granting relief to the extent of $12,325, but denying the amount of $34,543 because "encumbering funds prior to their availability is a violation of EDGAR 76.708 for which there [are] no exceptions." Accordingly, on October 7, 2003, East Orange filed the present appeal to the Commissioner of Education ("Commissioner"). The Department filed its answer on November 18, 2003.

Subsequently, on December 26, 2003, the Commissioner transmitted the matter to the Office of Administrative Law ("OAL") for hearing as a contested case. The OAL held a hearing on October 25, 2004. Witnesses and exhibits are listed in the appendix. Upon receipt of post-hearing submissions from the parties, the record closed on February 5, 2005.

Findings of Fact

General Background Facts

Most of the general background facts are undisputed. East Orange Community Charter School, Inc., comprised of four buildings located in the host district of East Orange, is a public school organized pursuant to the Charter School Program Act of 1995, N.J.S.A. 18A:36A-1 to -18. Chartered by the State since September 1998, the school is managed by a board of trustees deemed to be public agents authorized by the State Board of Education to supervise and control the school.[3] During the 2001-2002 academic year, East Orange had an enrollment of approximately 300 students. Offering classes from Kindergarten through Grade 4, the school emphasizes an intensive reading program. While the typical academic year for public school districts in New Jersey is 180 days, East Orange has a longer academic year of 187 days. Teachers report to work on the third Monday in August. Revenues to operate the school are derived from two principal sources: state and local taxes through the host district board of education; and Title I grants distributed by the state.

On July 16, 2001, East Orange submitted its Fiscal Year 2002 grant application "in substantially approvable form." Four months later, on November 27, 2001, the Department notified East Orange that it had approved its application and recommended Title I funding of $214,158, subject to the availability of funds, for the grant year starting on September 1, 2001 and ending August 31, 2002. Included in this notice was an advisory note that East Orange should not begin to obligate these funds until the program start date (September 1, 2001) or the date that the application was received by the State in substantially approvable form (July 16, 2001), *whichever is later.* Hence, East Orange was on notice that the Title I funds could not be "obligated" until September 1, 2001, the later of the two dates.

[3] See N.J. Dept. of Educ. website. http://www.nj.gov/njded/chartsch/app/docs/faq.doc

There is a considerable time lag between the award of the grant and the date when the recipient actually receives the money. It was not until March 2002, or seven months into the ten-month academic year, that the Department wired the Title I funds directly into East Orange's general operating account.[4]

Selection of September 1st as the Title I start date is not mandated by federal law, but is purely a matter of state policy.[5] Anthony Hearn, the Department's audit manager in charge of overseeing the audits of school districts, acknowledged that Congress allows states to set a grant year starting anywhere between July 1st and September 30th. Although the Department's Office of Grants Management could have designated the Title I fiscal year to coincide with the school district's fiscal year, it chose a different date largely for its own administrative convenience. According to Mr. Hearn, September 1 was designated because the "we don't get final awards [fixing] the amount that the State is going to get [to distribute to the school districts] until May." Mr. Hearn explained, "We can't start a grant and tell people to start something on July 1st when we don't have a final amount[.]"

When Title I Funds Become "Obligated"

As a recipient of Title I funds, East Orange must furnish certain services required by the terms of its grant. Linda Muchell, executive director of the school, testified that it normally takes six to eight weeks from the order date to the delivery of supplies and services. In her capacity as chief executive officer of the charter school, Ms. Muchell authorized the issuance of purchase orders for certain items in July and August so that East Orange would be ready for the children when school opened in September 2001. East Orange's comptroller, Terry Pierce, confirmed that materials and services totaling $34,543 had to be ordered "at least six weeks or so before the school term in order for those . . . materials and services to be available for the schoolchildren when they arrived in September." Ms. Pierce utilized the "undesignated balance" or surplus in the

[4] Title I funds must "balance out" to zero at the end of the grant year. East Orange received $214,158 in grant money and spent $214,158.

[5] State regulations do not establish the beginning and end of the grant year. Instead, the Department's Office of Grants Management determines the grant year "by policy."

general operating account to defray these expenses, with the understanding that the general account would be reimbursed from the Title I funds upon their receipt in March 2002. As of June 30, 2001 (the end of the 2001-2002 school fiscal year), the general account had a surplus of $120,432, more than enough to cover the $34,543 until the Title I funds became available.

East Orange's temporary advance against other accounts until it can legally draw against Title I funds is consistent with its past practice, which the Department never previously questioned. For example, teachers start collecting salary as soon as the school year begins. Yet Title I funds are not wired into East Orange's account until many months later. During the interim, the East Orange has no choice but to pay its teaching staff out of the general account and reimburse that account once the Title I money arrives. Otherwise, the school could not pay its teachers and would be unable to deliver the required Title I services.

Walter Freye, a certified public accountant with extensive experience in school finance, performed an independent audit of East Orange's 2001-2002 budget. Mr. Freye described several ways in which public school districts "reconcile" the differences between immediate needs and delayed funding. Some schools wait to order supplies until after September 1, in which case the supplies do not arrive until six or more weeks later. Such schools lack necessary materials to begin the program on time and the parents often complain. Large schools acquire supplies in bulk over the summer and, when particular items are requisitioned in September, charge the cost to the Title I account. Unfortunately, East Orange is too small to engage in this practice. The Department's audit manager, Anthony Hearn, suggested that most districts save unspent Title I funds from the preceding year and use that reserve to buy supplies for the upcoming school year. East Orange could not adopt this approach, however, because it already spent last year's entire Title I grant during the fiscal year in which it had been received. On cross-examination, Mr. Hearn conceded that it would violate the

terms of the application to use Title I funds for a fiscal year other than the one for which those funds were appropriated.[6]

Since the Department recognized East Orange's cash flow dilemma, it appears that East Orange's primary mistake was assigning the wrong code number from the uniform system of accounting. Under the uniform chart of accounts, expenditures from Title I funds should be coded "20," whereas expenditures from surplus should be coded "11." Aware that expenses would have to be charged against surplus, East Orange nonetheless utilized Title I account codes to facilitate tracking of these expenditures in order to identify amounts to be reimbursed from Title I funds upon their receipt. Terry Pierce, East Orange's comptroller, characterized this procedure as "an internal accounting adjustment" to ensure that expenditures for Title I items would eventually be charged to the proper funding source. When the Department conducted its audit, however, it disallowed all items charged to the 20 account prior to September 1st as having been "encumbered" before the start date of the Title I program.[7]

Expert opinion differs on what it means "to obligate" funds for purposes of Title I grant money. Until a purchase order is issued, a district keeps its revenue in a pool of undifferentiated dollars, usually deposited in a checking account. Testifying for the Department, Mr. Hearn claimed that a fund becomes "encumbered" when the district issues a purchase order charging an expense to a particular code number. Mr. Hearn's view is that the district becomes obligated to pay the vendor as soon as the purchase order is issued. Distinguishing between "encumbering" and "obligating" funds, Mr. Freye agrees that the East Orange's accounting system "encumbers" particular dollars "upon the cutting of a purchase order." However, Mr. Freye considers "obligating" funds to be a legal question as to whether or not a legally binding contract arose. In his experience, a commitment or debt does not occur until the vendor has done something

---

[6] Mr. Hearn clarified that it is permissible to carry over up to 15% of Title I funds from one year to the next and, with the permission of the State, a district can carry over more than 15% once every three years. See 34 C.F.R. §§76.709, -710.

[7] Even if East Orange had used the correct code number, the final result of the audit would not have been different. The Deputy Attorney General takes the position that Title I grant money cannot be used to recoup expenses previously charged to the undesignated fund balance.

to indicate its acceptance of the order, such as by shipping the goods. Before acceptance by the vendor, the purchaser can generally cancel the order without incurring liability. None of the purchase orders issued in July and August 2001 set forth a specific delivery date.

I FIND that East Orange had to pre-order certain services and supplies in July and August 2001 in order to carry out its statutory responsibility to provide Title I services to its students. Typically there exists a lead time of six to eight weeks from the date that services and supplies are ordered until the date of delivery. If East Orange had waited until September 1, 2001 before issuing purchase orders, it would not have been adequately prepared to commence the Title I program when school opened in September.

Designation of the September 1, 2001 start date for the Title I fiscal year is not a requirement of federal law, but rather a date chosen by New Jersey educational authorities for administrative convenience. Title I money for the grant fiscal year was not actually received by the charter school until March 2002. Meanwhile, East Orange appropriately utilized available funds from other sources, including surplus carried over from the preceding school year, to pay bills until the grant money could be used. In doing so, East Orange acted under the reasonable expectation that any advance from its general account would be reimbursed once Title I funds were received. All of the Title I grant money appropriated for the 2001-2002 grant year was used exclusively for operation of the Title I program during that same grant year.

In order to keep track of expenses attributable to the Title I program, East Orange miscoded the costs as coming from Title I funds when the funds were actually derived from surplus. Nevertheless, East Orange did not obligate any Title I funds within the meaning of federal law until after September 1, 2001. Issuance of the purchase order alone did not obligate any funds. It was not until the vendor accepted the order by shipping the goods or delivering the services that East Orange entered into a legally enforceable contract.

Conclusions of Law

Based on the foregoing facts and the applicable law, **I CONCLUDE** that East Orange did not obligate Title I funds before September 1, 2001.

Charter schools are public schools that "have more autonomy than other public schools in staffing, curriculum and spending choices." In re Grant of Charter Sch. Application of Englewood on the Palisades Charter Sch., 164 N.J. 316, 320 (2000). Federal regulations govern Title I grant monies awarded to States for distribution among various local educational authorities, such as East Orange, which apply for subgrants. 34 C.F.R. §76.708(a) provides that:

> . . . the State may not authorize an applicant for a subgrant to obligate funds until the later of the following two dates:
>
> (1) The date that the State may begin to obligate funds under Sec. 76.703;[8] or
>
> 2) The date that the applicant submits its application to the Sate in substantially approvable form.

The operative term in this provision is "obligate." It is unnecessary to speculate about the precise meaning of this term, since the regulations themselves contain their own definition. 34 C.F.R. 76.707(a) specifies that an obligation for the acquisition of real or personal property is made "on the date on which the State or subgrantee makes a binding written commitment to acquire the property." Similarly, 34 C.F.R. 76.707(b) specifies that an obligation for personal services is made "when the services are performed."

If the drafters of the federal regulations had intended to limit encumbering funds as distinguished from obligating funds, they could easily have said so. "Encumbrances" has a distinct and separate meaning under generally accepted accounting principles. In

[8] In New Jersey, the start date for the 2001-2002 Title I program was September 1, 2001.

the GAAP Technical Systems Manual for New Jersey School Districts promulgated by the Department, the term "encumbrances" is defined as

> Commitments related to unperformed (executory) contracts for goods or services. Used in budgeting, encumbrances are not GAAP expenditures or liabilities, but represent an estimated amount of expenditures ultimately to result if unperformed contracts in process are completed.

Simply stated, an "encumbrance" is an amount set aside to cover future contingencies that may arise under contracts as yet unfulfilled. While issuance of a purchase order creates an "encumbrance" in the accounting sense, it does not give rise to an "obligation" in the legal sense of a binding contract. Traditional elements of an enforceable contractual obligation include offer, acceptance and consideration. Creek Ranch, Inc. v. N.J. Turnpike Auth., 75 N.J. 421 (1978). A mere offer unsupported by consideration may be revoked by the offeror so long as he does so before the offeree accepts it. American Handkerchief Corp. v. Frannat Realty Co., 17 N.J. 12, 17 (1954). East Orange's issuance of a purchase order constitutes an offer to make a purchase, but the transaction does not ripen into a legal "obligation" until the vendor has accepted the offer by shipping the goods or otherwise signifying its acceptance of East Orange's proposal. See Uniform Commercial Code, N.J.S.A. 12A:2-206. As 34 C.F.R. §76.707 clearly provides, the "obligation" does not come into being until the subgrantee enters into a binding legal commitment or the supplier has delivered the services.

Order

It is **ORDERED** that the Department's finding that East Orange must reimburse Title I funds in the amount of $34,543 is hereby 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 (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.

June 1, 2006
DATE

Ken R. Springer
KEN R. SPRINGER, ALJ

E-mail Receipt of Initial Decision Confirmed by the Department of Education on:

DATE

Mailed to Parties:

JUN 2 2006
DATE

DIRECTOR AND CHIEF ADMINISTRATIVE LAW JUDGE
OFFICE OF ADMINISTRATIVE LAW

nd

APPENDIX

List of Witnesses

1. Linda H. Muchell, executive director, East Orange Community Charter School, Inc.

2. Terry Pierce, comptroller, East Orange Community Charter School, Inc.

3. Walter K. Frye, C.P.A., W. Freye & Associates, P.C.

4. Lester Ohler, state auditor, Office of Compliance Investigation, Department of Education

5. Anthony Hearn, manager, Office of Compliance Investigation, Department of Education

List of Exhibits

No.	Description
J-1	Copy of East Orange Community Charter School expenditure account comment scan, dated July 9, 2004
J-2	Copy of purchase orders and checks for the period July 20, 2001 to October 25, 2001
J-3	Copy of East Orange Community Charter School comprehensive annual financial report for the fiscal year ended June 20, 2002
J-4	Copy of letter to Harden Simmons from Anthony Hearn, dated May 16, 2003

J-5 Copy of Department of Education corrective action plan, dated June 4 and 5, 2003

J-6 Copy of letter to Ray Montgomery from Linda Muchell, dated June 4, 2003

J-7 Copy of letter to Harden Simmons from Ray Montgomery, dated June 13, 2003

J-8 Copy of letter to Harden Simmons from Gloria Hancock, dated July 7, 2003, with attached fiscal year 2002 notification of grant award

J-9 Copy of East Orange Community Charter School general fund balance sheet, dated June 30, 2001 and 2002

249-06

#249-06R

OAL DKT. NO. EDU 6326-05 (EDU 2157-04 ON REMAND)
AGENCY DKT. NO. 470-12/03

ANTHONY MUSCO,	:	
PETITIONER,	:	COMMISSIONER OF EDUCATION
V.	:	DECISION ON REMAND
BOARD OF EDUCATION OF THE BOROUGH OF CARTERET, MIDDLESEX COUNTY,	:	
RESPONDENT.	:	

The record of this matter and the Initial Decision of the Office of Administrative Law (OAL) have been reviewed, as have petitioner's exceptions to the Initial Decision and the Board of Education's (Board) reply.

In his exceptions, petitioner contends the Administrative Law Judge (ALJ) lacked authority to enforce the parties' settlement agreement. According to petitioner, the ALJ erred in relying on *Sirotnak, supra*, while ignoring the State Board of Education's November 2, 2005 decision in *Klumb v. Manalapan-Englishtown Regional School District*, wherein it was "implicitly held that the Department of Education did not have subject matter jurisdiction to enforce settlement (*sic*) of its own decisions and orders." Therefore, petitioner asserts, the Initial Decision should be "reversed" and the matter should be dismissed "with the statement that either or both parties can seek

endorsement/relief (*sic*) before the Superior Court, Middlesex County, pursuant to Court rule 4:67-6." (Petitioner's Exceptions at 2)[1]

In reply, the Board contends that *Klumb* is procedurally and factually distinguishable, and that the ALJ ruled correctly based upon applicable decisional law. (Board's Reply at 1)

Upon careful and independent review, the Commissioner adopts the decision of the ALJ, approves the settlement agreement on remand, and holds it to be binding upon the parties.

As a preliminary matter, the Commissioner fully concurs with petitioner that the Commissioner of Education does not generally have jurisdiction over enforcement of agency orders, which must in most instances be sought in Superior Court; see *N.J.A.C.* 6A:3-3.1(b). The present dispute, however, does not turn on enforcement of an agency order (as in *Klumb*), but rather on a determination as to whether an agreement reached at the OAL in resolution of a contested case remains binding on the parties when one party to the agreement has had a change of heart prior to final approval by the Commissioner. Determinations of this type clearly fall within the Commissioner's jurisdictional purview; see, for example, *In the Matter of the Tenure Hearing of Daniel Woodside, School District of the City of Elizabeth, Union County*, Commissioner Decision of April 19, 1993 and State Board of Education Decision of October 8, 1993, and *In the Matter of the Tenure Hearing of Kathleen Connors-Ryan, Freehold Regional School District, Monmouth County and Kathleen Connors-Ryan v. Board of Education of*

[1] Petitioner also points out that the Initial Decision erroneously lists the county in this matter as Ocean rather than Middlesex, and clarifies that, contrary to the ALJ's statement of the issue in the Initial Deicsion at 1, the actual claim in his Petition of Appeal was that he had "recall rights to the Board's recreation of the position of Supervisor of Special and Related Services."

the Freehold Regional School District, Monmouth County, Commissioner Decision of May 26, 1993. Consequently, the Initial Decision is correct in this regard and petitioner's objection is without merit.

The Commissioner also concurs with the ALJ that petitioner may not now repudiate the agreement into which he previously entered. That settlement – signed by petitioner and the Superintendent of the Board's schools, found to have been entered voluntarily, and proffered as a full disposition of all issues in controversy in a manner consistent with law – stated in its entirety:

> *Musco v. Carteret Board of Education*, OAL Dkt. No. EDU 2157-04: In consideration of the petitioner, Anthony Musco relinquishing his tenure/seniority rights to the position of Supervisor of Special and Related Services, the respondent, Board of Education agrees to pay the petitioner the amount of $34,000 in the form of retroactive salary, representing the period of December 1, 2003 through June 30, 2005. This agreement resolves all issues that have been or could have been brought by the petitioner in this action.

The Commissioner rejected this agreement, in a decision dated August 11, 2005, for two specific reasons: 1) absence in the record of any indication of Board approval as required by *N.J.A.C.* 6A:3-1.13(d); and 2) reference in the language of the agreement to relinquishment of tenure/seniority rights, which incorrectly suggested that petitioner was waiving his statutory rights rather than simply deciding against invoking them in this particular instance.

While the first deficiency was potentially substantive, the expanded record on remand proved it to be, in actuality, *de minimis*: Although the ALJ closed the record and issued an Initial Decision recommending approval of the parties' settlement on July 6, 2005 – erroneously based solely upon the Superintendent's signature of that same date – the agreement was, in fact, approved by the Board on July 13, 2005 and the

stipulated $34,000 payment was made to petitioner two days later. (Certification of Nilkanth Patel at 1, with exhibits) The second deficiency, on the other hand, was technical from the outset, rejecting not the substance of the settlement but its expression in a manner inconsistent with law; indeed, the Department's instructions on transmitting the matter to OAL on remand expressly characterized it as a settlement needing to be "reworded and properly authorized." [2] As a matter of fact, had the record of this matter as initially forwarded to the Commissioner for review been held open at the OAL long enough to include the requisite indication of Board approval, the Commissioner would not have remanded the matter, but would simply have approved the settlement agreement with the proviso that petitioner's stated "relinquishing" was to be construed as a withdrawal of his present claim rather than as a waiver of his statutory tenure rights. Under these circumstances, with Board approval now evident, there is no reason why the Commissioner cannot – or should not – adopt the original agreement subject to the clarification noted above.

Nor is this result altered by the new dispute that has now arisen from the parties' second agreement – apparently entered into at the same time as the agreement at issue in this matter, but expressly kept separate from it and referenced in the record for the first time during OAL proceedings on remand.[3] While both parties now seem to regard this second agreement as an integral part of the settlement of petitioner's claim

[2] The parties and ALJ appear to have erroneously assumed that the Commissioner wanted the settlement term relating to tenure/seniority "taken out of the agreement" altogether (See, e.g., Board's Motion to Enforce Settlement at 3, Initial Decision at 3), as opposed to simply having it reworded for consistency with law.

[3] No explanation was provided, by either the parties or the ALJ, as to why the second agreement was not submitted to the ALJ and Commissioner or otherwise referenced in the record of the earlier proceeding, nor as to why the full terms of settlement were not incorporated into a single agreement if the parties deemed all such terms to be material.

(see their respective certifications proffered at the OAL on remand),[4] the fact remains that they themselves affirmatively represented the agreement quoted above as a full resolution of the contested case now before the Commissioner, and, to any extent that the two agreements were linked in the minds of the parties, they acted at their peril in not presenting the entire agreement to the ALJ and Commissioner for review pursuant to *N.J.A.C.* 1:1-19.1. Regardless of the content of any "sidebar" agreement, the terms of the proffered settlement in this matter are clear: Petitioner agreed to abandon the claim set forth in his petition in exchange for a payment of $34,000, which he undisputedly received. Thus, as found by the ALJ, *the only agreement at issue in this matter* was entered into voluntarily by both parties, included all the essential terms of settlement, and was signed by petitioner and approved and effectuated by the Board; therefore, it must be deemed binding.

Petitioner's stance – refusing to re-sign a technically conformed agreement because the Board has, in his view, not properly fulfilled promises made to him solely in connection with a separate, unrelated agreement – cannot be sustained; to do so would be tantamount to permitting a litigant to seize upon technical deficiencies in one proceeding as an opportunity for leverage in another. Simply stated, petitioner cannot repudiate the instant agreement, which resolves the entire controverted matter and makes no reference to contingency upon any other agreement or circumstance, based on a dispute that is not before the Commissioner.

Accordingly, the Initial Decision of the OAL on remand is adopted for the reasons expressed therein and above. The previously proffered settlement agreement,

[4] Indeed, petitioner's entire submission is based on his objection to the Board's implementation of the second agreement.

construed with respect to tenure/seniority rights as set forth herein, is approved and adopted as the final decision in this matter, which is hereby dismissed in light of the Board's demonstrated compliance with the terms of settlement.

IT IS SO ORDERED.[5]

Isaac Bryant
ACTING COMMISSIONER OF EDUCATION

Date of Decision: 7/17/06
Date of Mailing: 7/18/06

[5] This decision may be appealed to the State Board of Education pursuant to *N.J.S.A.* 18A:6-27 *et seq.* and *N.J.A.C.* 6A:4-1.1 *et seq.*

State of New Jersey
OFFICE OF ADMINISTRATIVE LAW

INITIAL DECISION
OAL DKT. NO. EDU 6326-05
(ON REMAND EDU 2157-04)
AGENCY DKT. NO. 470-12/03

ATHONY MUSCO,

Petitioner,

v.

BOARD OF EDUCATION OF THE BOROUGH OF CARTERET, OCEAN COUNTY,

Respondent.

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

Rita F. Barone, Esq., for respondent (Purcell, Ries, Shannon, Mulchay & O'Neill, attorneys)

Record Closed: May 19, 2006 Decided: May 22, 2006

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

On December 19, 2003, Petitioner filed a petition of appeal claiming that his tenure and seniority rights were violated when the Board of Education of Carteret appointed him to the newly created position of Supervisor of Special and Related Services. The matter was scheduled for a hearing on July 6, 2005. On the date of the hearing, the parties entered into a settlement agreement which states:

> In consideration of the petitioner, Anthony Musco relinquishing his tenure/seniority rights to the position of Supervisor of Special and Related Services, the respondent,

> Board of Education agrees to pay the petitioner the amount of $34,000 in the form of retroactive salary, representing the period of December 1, 2003 through June 30, 2005. This agreement resolves all issues that have been or could have been brought by the petitioner in this action.

The agreement was signed by Petitioner and the Superintendent. At the same time the above agreement was executed, the Petitioner also issued a letter of resignation effective October 31, 2005. The letter of resignation was a separate agreement between the parties that was beyond the scope of jurisdiction of the petition of appeal. The settlement agreement and resignation were submitted to the Board and approved on July 13, 2005.

The settlement agreement was approved and incorporated into an Initial Decision that was transmitted to the Commissioner of Education. On August 11, 2005, the Commission of Education remanded the decision for two reasons: (1) the settlement agreement was not signed by the Board attorney, nor, in the alternative, was there a resolution approving the settlement and designating the Superintendent to sign the agreement; and (2) the Petitioner may not waive the statutory right of tenure.

The parties attempted to revise the settlement agreement to address the seniority rights issue, but Petitioner claimed he was entitled to additional payments and thus refused to sign an amended settlement agreement. The Board then moved to enforce the settlement agreement as written absent the term relinquishing seniority since the Petitioner had resigned from the District. The parties submitted briefs to address the issue of enforcing the settlement.

The Board certified that it paid Petitioner the $34,000 agreed to under the settlement agreement. Petitioner does not dispute that the $34,000 was paid to him. Petitioner's claim is that the resignation agreement was not complied with by the Board because it did not pay him for a month in the summer. Petitioner asserts that the Board owes him an additional $10,044.60, less deductions. The Board claims that it made all payments under the terms of the resignation.

The Board relies upon the case of Board of Education of the Township of Clinton v. John Sirotnak, 92 N.J.A.R. 2d (Edu.) 628 (Final Decision October 15, 1992). In that

case, the Board sought to enforce a settlement which the petitioner disputed. The Initial and Final Decisions held that a settlement agreement is binding on the parties and that basic contract law applies. I agree with the Board that the Sirotnak case is similar to the matter before me. In the instant matter, the settlement agreement is binding on both parties because it was entered into freely and the essential terms are clearly set forth in the document. The Board is correct when it states in its brief that the "fact that the Department of Education requires the term with regard to the relinquishment of the seniority rights be taken out of the agreement is of no moment because the Petitioner has resigned his position with the Board." In addition, the Petitioner is not contending that the additional payment is due under the settlement agreement; rather, he is contending that the additional payment is due under the terms of the resignation. The resignation terms, however, are not before me and are not part of the petition of appeal.

CONCLUSION AND ORDER

Based on the foregoing, I hereby conclude that the terms of the settlement agreement entered into on July 6, 2005, between the parties are binding. The term relinquishing seniority rights is not an issue since the Petitioner has resigned. Accordingly, I hereby **ORDER** that the July 6, 2005, agreement should be enforced as written, absent the term relinquishing seniority rights.

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

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

May 22, 2006

DATE

DOUGLAS H. HURD, ALJ

E-mail Receipt of Initial Decision Confirmed by the Department of Education on:

5-22-06

DATE

Mailed to Parties:

MAY 26 2006

DATE

OFFICE OF ADMINISTRATIVE LAW

mh

251-06

OAL DKT. NO. EDU 5651-05
AGENCY DKT. NO. 109-5/05

K.J.S., on behalf of minor child, H.C.S.,	:	
PETITIONER,	:	
V.	:	COMMISSIONER OF EDUCATION
BOARD OF EDUCATION OF THE BOROUGH OF FORT LEE, BERGEN COUNTY,	:	DECISION
RESPONDENT.	:	

The record of this matter and advisement of failure to appear transmitted to the Commissioner by the Office of Administrative Law (OAL) pursuant to *N.J.A.C.* 1:1-14.4, along with a copy of the notification sent to the parties by OAL on June 27, 2006, providing petitioner thirteen days to submit an explanation for such nonappearance, have been reviewed. There being no explanation filed, this matter is no longer deemed to be a contested matter before the Commissioner and is hereby dismissed with prejudice.*

IT IS SO ORDERED.

Isaac Bryant
ACTING COMMISSIONER OF EDUCATION

Date of Decision: 7/19/06

Date of Mailing: 7/19/06

* This decision, as the Commissioner's final determination in the instant matter, may be appealed to the State Board of Education pursuant to *N.J.S.A.* 18A:6-27 *et seq.* and *N.J.A.C.* 6:4 -1.1 *et seq.*

250-06

#250-06

OAL DKT. NO. EDU 4078-06
AGENCY DKT. NO. 169-5/06

M.R.M., ON BEHALF OF MINOR CHILD, E.M.,	:	
PETITIONER,	:	COMMISSIONER OF EDUCATION
V.	:	DECISION
BOARD OF EDUCATION OF THE CITY OF BRIDGETON, CUMBERLAND COUNTY,	:	
RESPONDENT.	:	

The record of this matter, the Consent Order Accepting Responsibility to Provide Tuition and Transportation for E.M. for the 2006-2007 School Year, and the Initial Decision issued by the Office of Administrative Law have been reviewed.

Upon such review, the Commissioner approves the parties' proposed settlement and adopts the Initial Decision as the final decision in this matter, which is hereby dismissed, subject to compliance with the terms of the settlement.

IT IS SO ORDERED.

ACTING COMMISSIONER OF EDUCATION

Date of Decision: 7/18/06
Date of Mailing: 7/18/06

State of New Jersey
OFFICE OF ADMINISTRATIVE LAW

INITIAL DECISION
SETTLEMENT
OAL DKT. NO. EDU 4078-06
AGENCY DKT. NO. 169-5/06

M.R.M. ON BEHALF OF MINOR CHILD, E.M.,
Petitioner,
v.
BOARD OF EDUCATION OF THE CITY OF BRIDGETON, CUMBERLAND COUNTY,
Respondent.

Samuel J. Serata, Esq., for petitioner

Paul Kienzle, Esq., for respondent

Record Closed: June 30, 2006 Decided: June 30, 2006

BEFORE **W. TODD MILLER,** ALJ

This matter was transmitted to the Office of Administrative Law on May 24, 2006, for determination as a contested case, pursuant to N.J.S.A. 52:14B-1 to -15 and N.J.S.A. 52:14F-1 to -13.

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

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

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

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

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

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

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

6-30-06
DATE

W. TODD MILLER, ALJ

Receipt Acknowledged:

7-11-06
DATE

DEPARTMENT OF EDUCATION

Mailed to Parties:

JUL 12 2006

DIRECTOR AND CHIEF ADMINISTRATIVE LAW JUDGE

DATE

OFFICE OF ADMINISTRATIVE LAW

/sd

RECEIVED
2006 JUN 30 A 11:38

SAMUEL J. SERATA
20 Franklin Street
Bridgeton, New Jersey 08302
(856)451-6444
Attorney for Petitioner, M.R.M., Behalf of Minor Child, E.M.

	BEFORE THE COMMISSIONER OF EDUCATION, STATE OF NEW JERSEY
	OAL Docket No. EDU 4078-06 Agency Docket No. 169-5/06
M.R.M., ON BEHALF OF MINOR CHILD, E.M., Petitioner, vs. BOARD OF EDUCATION OF THE CITY OF BRIDGETON, CUMBERLAND COUNTY, Respondent.	Civil Action CONSENT ORDER ACCEPTING RESPONSIBILITY TO PROVIDE TUITION AND TRANSPORTATION FOR E.M. FOR THE 2006-2007 SCHOOL YEAR

This matter being scheduled for trial on June 29, 2006, and the Petitioner being represented by Samuel J. Serata, Esq., and the Respondent being represented by A. Paul Kienzle, Jr., of Casarow, Kienzle & Raczenbek; it being represented to the Court that the parties have resolved the issues involved and have agreed to dispose of these issues; and the parties, through their attorneys have consented to this Order, and it appearing that good cause exists:

It is, on this ___ day of June, 2006, ORDERED that the respondent issue to the Salem County Career and Technical School an unconditional letter accepting responsibility to provide tuition and transportation for E.M. for the 2006-2007 school year.

W. Todd Miller, A.L.J.

We hereby consent to the Form and Entry of the above Order:

M.R.M., ON BEHALF OF MINOR CHILD, E.M., Petitioner

By: _____
Samuel J. Serata
Attorney

BOARD OF EDUCATION OF THE CITY OF BRIDGETON, Respondent

By: _____
A. Paul Kienzle, Jr.
Solicitor

252-06

OAL DKT. NO. EDU 1639-05
AGENCY DKT. NO. 448-12/04

NORBERT POWELL, o/b/o ROMEO'S EXOTIC JUICE, INC.,	:	
PETITIONER,	:	
V.	:	COMMISSIONER OF EDUCATION
STATE-OPERATED SCHOOL DISTRICT OF THE CITY OF NEWARK, ESSEX COUNTY,	:	DECISION
RESPONDENT.	:	

The record of this matter and the Initial Decision of the Office of Administrative Law (OAL) have been reviewed. Petitioner's exceptions, dated July 7, 2006 and filed July 11, 2006 - in response to an Initial Decision which was mailed to the parties on June 16, 2006 - were untimely pursuant to *N.J.A.C.* 1:1-18.4 and, thus, these and the District's reply thereto are not considered herein.

Upon an independent and comprehensive review of the record, the Commissioner, giving due deference to the Administrative Law Judge's (ALJ) credibility determinations,[1] agrees with her conclusion that petitioner has failed to sustain his burden of establishing that the District acted in an arbitrary or capricious manner when it cancelled petitioner's contract with the school district. The Commissioner further concurs with the ALJ that even assuming, *arguendo*,

[1] 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).

that petitioner's allegation that the District's bid specifications were violative of *N.J.S.A.* 18A:18A-15 was properly before the Commissioner,[2] *N.J.S.A.* 18A:18A-15 clearly specifies:

> Any *prospective* bidder who wishes to challenge a bid specification shall file such challenges in writing with the purchasing agent no less than three business days prior to the opening of the bids. *Challenges filed after that time shall be considered void and having no impact on the board of education or the award of a contract.* (emphasis supplied)

Therefore, any challenge of petitioner to the specifications is untimely and must be dismissed as a matter of law.

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

IT IS SO ORDERED.[3]

ACTING COMMISSIONER OF EDUCATION

Date of Decision: 7/19/06

Date of Mailing: 7/19/06

[2] Such a challenge to the bid specifications was neither pled in the Petition of Appeal nor was it listed in the ALJ's Prehearing Order as an issue for resolution. Rather, this claim was raised for the first time in a submission made by petitioner shortly before the hearing.

[3] This decision may be appealed to the State Board of Education pursuant to *N.J.S.A.* 18A:6-27 *et seq.* and *N.J.A.C.* 6A:4-1.1 *et seq.*

State of New Jersey
OFFICE OF ADMINISTRATIVE LAW

INITIAL DECISION

OAL DKT. NO. EDU 1639-05

AGENCY DKT. NO. 448-12/04

NORBERT POWELL, o/b/o ROMEO'S

EXOTIC JUICE, INC.,

Petitioner,

v.

STATE-OPERATED SCHOOL DISTRICT

OF THE CITY OF NEWARK, ESSEX COUNTY,

Respondent.

Marvin L. Comick, Esq., appearing for Petitioner
(Love & Randall, attorneys)

Adam S. Herman, Esq., appearing for Respondent
(Perry L. Lattiboudere, General Counsel)

Record Closed: May 1, 2006 Decided: June 15, 2006

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

STATEMENT OF THE CASE

Petitioner, on behalf of Romeo's Exotic Juice, Inc. (Petitioner), filed a petition alleging Respondent, State-Operated School District of the City of Newark (Respondent), arbitrarily, capriciously, and unreasonably cancelled a contract for the supply of East Side Entrees Shake 'N Sip shelf stable milk. Respondent asserts

Petitioner failed to supply the product and, therefore, Respondent had sufficient reason to terminate the subject contract.

FINDINGS OF FACT

Based on the evidence presented at the hearing as well as on the opportunity to observe the witnesses and assess their credibility, I make the following findings of fact, which are essentially undisputed, in this matter.

1) Respondent is a public school district which administers a summer lunch program and a "Grab and Go" breakfast program for its students.

2) Respondent desired to incorporate shelf stable milk products into the summer lunch and Grab and Go breakfast programs for the 2004-05 and 2005-06 school years. The programs were in place to encourage children to eat well.

3) In selecting the product it desired to serve the students, Respondent performed a nutritional analysis and conducted taste testing and character recognition with the students and determined the students liked the taste of the East Side Entrees Shake 'N Sip milk products and were attracted to the East Side Entrees Shake 'N Sip packaging, which contains the image of a children's cartoon character, SpongeBob Squarepants, which is extremely popular currently.

4) Increased consumption of milk by the students through the programs is an important goal of Respondent.

5) Respondent prepared an RFQ for East Side Entrees Shake 'N Sip milk products.

6) The RFQ specifications clearly identify East Side Entrees as the manufacturer of the products it was seeking and also clearly identifies the respective East Side Entrees' product codes:

Code #64005 is "Shake 'N Sip" brand low fat chocolate milk with SpongeBob Squarepants on the packaging;

Code #64010 is "Shake 'N Sip" brand low fat strawberry milk with SpongeBob Squarepants on the packaging;

Code #64015 is "Shake 'N Sip" brand low fat vanilla milk with SpongeBob Squarepants on the packaging;

Code #64025 is "Shake 'N Sip" brand low fat milk with SpongeBob Squarepants on the packaging;

Code #64105 is "Shake 'N Sip" brand low fat chocolate milk shake with SpongeBob Squarepants on the packaging;

Code # 64110 is "Shake 'N Sip" brand low fat strawberry milk shake with SpongeBob Squarepants on the packaging, and

Code #64115 is "Shake 'N Sip" brand low fat vanilla milk shake with SpongeBob Squarepants on the packaging.

7) Petitioner submitted a response to the RFQ.

8) Petitioner represented in its response that it would supply Shake 'N Sip brand low fat chocolate milk, low fat strawberry milk, low fat vanilla milk, low fat milk, low fat chocolate milk shake, low fat strawberry milk shake, and low fat vanilla milk shake.

9) Petitioner was awarded a two-year contract #6521 to provide East Side Entrees Shake 'N Sip shelf stable milk products to the district.

10) Petitioner never returned a fully executed contract to Respondent; however, Petitioner did attempt to perform under the contract.

11) Petitioner did deliver shelf stable milk by a different manufacturer which also contained different cartoon characters on the packaging.

12) Respondent did not agree to accept the alternative product since it was not covered by the contract and had not been approved through Respondent's taste testing and character recognition testing with students.

13) Respondent advised Petitioner that it had failed to provide the East Side Entrees Shake 'N Sip products and the offered alternative was not acceptable. Petitioner was given three days to cure the default.

14) Petitioner did not cure the default despite being provided with notice an opportunity to cure.

15) Respondent terminated the contract effective October 8, 2004, due to Petitioner's non-compliance. The contract was awarded to another vendor.

ANALYSIS AND CONCLUSIONS

Although, pursuant to the prehearing order entered in this matter, the only issue to be determined in this case is whether Respondent's termination of the contract in question was arbitrary, capricious or unreasonable under the circumstances of this case. Petitioner subsequently presented the argument that the specifications were drawn in violation of the statute pertaining to the development of specifications in public school contracts. I granted Petitioner leave to address the issue in his post hearing submission.

Based on the plain language of the statute in question, I **CONCLUDE** Petitioner's reliance on it was misplaced. The statute clearly provides specifications for the provision of goods or services under the Public Schools Contracts Law shall be drafted in a manner to encourage free, open and competitive bidding and, further, no specification under this law may require the furnishing of any "brand name" but may require "brand name or equivalent," with certain exceptions.[1] Moreover, the statute also clearly provides any specification which is knowingly limited to one bidder shall be null and void. N.J.S.A. 18A:18A-15.

[1] There is an exception for proprietary goods or services which may have been applicable here, since the brand in question utilized a specific cartoon character for which there may have been the necessity of obtain a license. The resolution of whether this is so or not is not relevant to this case because of the failure of Petitioner to raise the challenge to specifications as discussed fully above.

Petitioner asserts the specifications required the provision of a specific brand of shelf stabilized milk, East Side Entrees' "Shake 'N Sip." There is no question that the record before me does reflect that "Shake 'N Sip" was the only brand which the district would accept. Respondent, on the other hand, contends these goods are not subject to the statutory requirements because they were the subject of an RFQ.[2] Assuming arguendo, the goods were subject to the statutory requirements relating to specifications, since, once again, the determination of this issue is not relevant to the outcome of this case, Petitioner's argument must fail simply because the statute specifically provides a challenge to the specifications must be in writing, filed with the purchasing agent no less than three business days prior to the opening of the bids. Challenges filed after that time are considered void and of no consequence to the board of education or the award of a contract. Id.

Since the challenge to the specifications was not contemplated even at the time this petition was filed, clearly there is no merit to Petitioner's argument. In fact, Petitioner, in his post hearing submission, conceded he fully intended to provide the district with East Side Entrees produced shelf stable milk; however, he was unable to because of the "district sanctioned monopoly" of the vendor from whom he sought to purchase the product. Notably, the only evidence of such a monopoly came into the record by way of the hearsay testimony of Petitioner; the record is not clear as to whether the "vendor" who enjoys the purported monopoly is the producer or distributor of the product in question.

Having determined the reliance of Petitioner on the statutory requirements relating to specifications was misplaced, I turn now to the issue of whether the district's termination of the contract in question was arbitrary, capricious or unreasonable under the circumstances of this case.

There is no question the items sought in the RFQ were specified in the documents. Petitioner himself admitted he recognized the district was seeking one

[2] Request For Quotation.

specific brand. The reason for the district's preference was clearly articulated. In developing a menu for its two programs, the "Grab and Go" breakfast and the summer lunch program it had conducted taste testing and character recognition with the students and had performed nutritional analysis. The district determined the students liked the taste of the selected product and were attracted to the packaging which contains the image of a children's cartoon character currently extremely popular, SpongeBob Squarepants.

Petitioner testified the nutritional analyses of the alternative product he was offering and the preferred product were substantially the same. Moreover, the alternative product also had a cartoon character, from Looney Tunes, on its packaging.

Respondent's witnesses testified as to the taste testing and character recognition, noting that "children eat with their eyes" and based on the experience Doris Epps, the Deputy Director of Food and Nutrition Services and Joyce Lee, who has been with the District for over 33 years, I accord the testimony of these witnesses substantial weight with regard to the needs of the district and the way in which children in this district make dietary choices. Epps testified there is a correlation between taste and consumption as well as a correlation between the character and consumption.

Respondent chose a brand of shelf-stabilized milk which, in the opinion of its nutritionists, would entice the children to drink milk and this choice was based on the results of its taste testing and character recognition study. I **FIND**, therefore, the determination to require the provision of this specific brand of milk to have been reasonable under the circumstances. I further **FIND**, even if the specifications herein were to be determined to be contrary to statutory requirements for specifications as set forth above, Petitioner is without remedy because he failed to file his challenge timely.[3]

Accordingly, I **CONCLUDE** this petition is without merit; I further **CONCLUDE** it should be **DISMISSED WITH PREJUDICE**. It is so **ORDERED**.

[3] I note, once again, I have declined to determine if the specifications in this case are subject to the provisions of N.J.S.A 18A:18A-15.

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

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

Within thirteen (13) days from the date on which this recommended decision was mailed to the parties, any party may file written exceptions with the **COMMISSIONER OF THE DEPARTMENT OF EDUCATION, 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 15, 2006
DATE

Maria M La Fiandra
MARIA MANCINI LA FIANDRA, ALJ

E-mail Receipt of Initial Decision Confirmed by the Department of Education on:

June 15, 2006
DATE

Mailed to Parties:

JUN 16 2006
DATE

DIRECTOR AND CHIEF ADMINISTRATIVE LAW JUDGE
OFFICE OF ADMINISTRATIVE LAW

jb

APPENDIX

Witnesses:

Norbert Powell

Doris Epps

Joyce Lee

Exhibits:

P-1 Specification for Shelf Stable Milk Product

P-2 Contract

P-3 Letter - Susan Balbosa to Powell, June 24, 2004

P-4 Milk Container (red box)

P-5 Milk Container (lavender box)

P-6 Letter - Doris Epps to Powell, September 15, 2004

P-7 Letter - Powell to Epps, September 16, 2004

P-8 Letter - Joyce Lee to Powell, September 16, 2004

P-9 Letter - Lee to Powell, September 21, 2004

P-10 Letter - Lee to Powell, September 27, 2004

P-11 Letter - Powell to Balbosa, July 13, 2004

P-12 Invoices

P-13 Request for Admissions, August 15, 2005

R-1 Letter - Epps to Powell, September 14, 2004

R-2 Contract

256-06

#256-06

OAL DKT. NO. EDU 3361-04
AGENCY DKT. NO. 23-1/04

YOUTH CONSULTATION SERVICE, INC.	:	
PETITIONER,	:	COMMISSIONER OF EDUCATION
V.	:	DECISION
NEW JERSEY STATE DEPARTMENT OF EDUCATION, OFFICE OF COMPLIANCE INVESTIGATION,	:	
RESPONDENT.	:	

The record of this matter and the Initial Decision of the Office of Administrative Law (OAL) have been reviewed, as have the parties' arguments on exception.[1]

In its submission, petitioner Youth Consultation Service, Inc. (YCS) seeks partial rejection of the Initial Decision, reiterating its prior argument that the regulations at issue do not apply to YCS's President/CEO (Mr. Mingoia).[2] YCS contends once again that the Department of Education (Department) had no basis in law upon which to demand that Mr. Mingoia's salary be limited or that its allocation among constituent entities begin with the maximum salary for a director at any one school, and it urges adoption of the ALJ's finding that the Department's disallowance was improperly based upon a "time allocation" regulation not in effect during the period at issue. YCS also renews its claim that the Department's methodology violated its own regulation because the "maximum salary calculated" pursuant to *N.J.A.C.* 6A:23-4.2(p) would be less than the President's (Mr. Mingoia's) corresponding salary in the prior year. (YCS's Cross-Exceptions at 1-13)

[1] The Department of Education submitted primary exceptions and a reply to YCS's cross-exceptions; YCS submitted cross-exceptions incorporating replies to the Department's exceptions.

[2] These are sufficiently summarized by the ALJ at 9-11 and are not repeated here.

The Department, on the other hand, endorses the ALJ's conclusion regarding the applicability of excess salary rules to Mr. Mingoia, but urges rejection of her conclusion that the Department engaged in unauthorized rulemaking in its actual calculation of Mr. Mingoia's allocated allowable salary for tuition rate purposes. The Department argues that the formula rejected by the ALJ as a retroactive application of later rules was not, in fact, relied upon by the Department in making the calculation at issue; rather, the basis for the Department's calculation rested on *N.J.A.C.* 6A:23-4.2(f)2i in conjunction with *N.J.A.C.* 6A:23-4.5(a)8, both as they existed in 2001-02. (Department's Exceptions at 1-5; Reply Exceptions at 1-7)

Upon review and consideration, the Commissioner adopts in part, and rejects in part, the Initial Decision.

Initially, the Commissioner fully concurs with the ALJ, for the reasons expressed in the Initial Decision, that regulations establishing a maximum allowable salary for purposes of the tuition rate chargeable to public school districts apply to the President/CEO of YCS, which the Department properly analogized to a Chief School Administrator/Executive Director/Director in setting the allowable salary for the position pursuant to *N.J.A.C.* 6A:23-4.2(p). As did the ALJ, the Commissioner notes that the Department's action places no limit on the actual salary YCS pays to Mr. Mingoia for his various duties, only on the portion of it that can be charged to public school districts for his services to YCS's private schools for the disabled; neither does it dictate or limit the manner in which YCS may charge Mr. Mingoia's salary to programs not regulated by the Department.

Having concurred with the ALJ that agency rules disallowing excess salary are applicable to Mr. Mingoia, however, the Commissioner cannot similarly agree that the Department's actual calculation of Mr. Mingoia's salary for purposes of YCS-Sawtelle Learning Center South's (YCS South) public school district tuition rate was improper, nor that it constituted a retroactive application of rule. To the contrary, what the record demonstrates is

that the Department arrived at its calculation through a reasonable application of then-existing rules – including the very rules found applicable by the ALJ – in no way relying on *N.J.A.C.* 6A:23-4.5(a)8 as it was subsequently amended or engaging in impermissible *ad hoc* rulemaking.

The audit documents underlying this matter show that the Department limited the chargeable amount of Mr. Mingoia's overall salary in accordance with *N.J.A.C.* 6A:23-4.5(a)8, recognizing that, to the extent Mingoia's services were attributable to YCS's private schools for the disabled, his position was analogous to that of a Chief School Administrator/Executive Director/Director and the maximum allowable salary established pursuant to *N.J.A.C.* 6A:23-4.2(p) must be applied in determining YCS's public school tuition rate. The properly limited salary amount was then allocated to YCS's allowable indirect cost center pursuant to *N.J.A.C.* 6A:23-4.2(f)2i, and, because Mr. Mingoia's chargeable services were not devoted exclusively to one school, the portion attributable to YCS South was prorated as required by *N.J.A.C.* 6A:23-4.5(a)8; such proration was accomplished by applying to YCS's total allowable general and administrative costs the allocation percentage (3.17%) derived from the ratio of YCS South's direct costs to YCS's total direct costs, consistent with *N.J.A.C.* 6A:23-4.2(f)3i. See Exhibits A and C, included with the Hearing Brief and Exhibits on Behalf of Petitioner and also as unnumbered attachments to the parties' Joint Stipulation of Facts. The Commissioner finds no evidence here of impermissible rulemaking, error or arbitrariness; indeed, the Department's calculation reflects sound educational and fiscal policy as well as consistency with then-applicable rule. [3]

[3] Although YCS states that the Department cannot disavow its reliance on the "time allocation" method after having admitted its use through briefs and testimony (YCS's Cross-Exceptions at 10-11), this "admission" is questionable for a number of reasons: First, the term does not appear until the Chief of Staff's letter of October 21, 2003 (Exhibit E), and then in a generic usage not linked to any specific formula, let alone to the highly prescribed method of *N.J.A.C.* 6A:23-4.5(a)8 as amended. Second, the context of any purported "confirmation" at hearing cannot be examined in the absence of transcripts, which were not provided to the

Finally, YCS's contention that the Department's action violates *N.J.A.C.* 6A:23-4.2(p) – because the maximum allowable salary applied to Mr. Mingoia is less than his corresponding salary in the prior year – reflects a misunderstanding of the cited rule. The "no reduction" provision referenced by YCS refers on its face to the benchmark maximum salaries calculated by the Commissioner for purposes of measuring excessiveness, not to the comparative effect of the benchmark's application in any given situation. The Commissioner finds no evidence on record, nor, indeed, does YCS appear to be claiming, that the Department's maximum allowable salary calculation for the job title and year in question was less than the corresponding salary calculation in the prior year.

Accordingly, to the extent that it upholds the Department's action, the Initial Decision of the OAL is adopted for the reasons expressed therein; to the extent that it does not, the decision is rejected for the reasons set forth above and the Petition of Appeal is dismissed in its entirety.

IT IS SO ORDERED.[4]

ACTING COMMISSIONER OF EDUCATION

Date of Decision: 7/26/06

Date of Mailing: 7/26/06

Commissioner. *In re Morrison*, 216 *N.J. Super.* 143 (App. Div. 1987). Finally and most compellingly, YCS's claim of *ad hoc* or retroactive application of a new "time allocation" methodology is belied by the actual audit report at issue (Exhibit A), which evidences no use of such method and whose disallowance calculations are readily attributable to existing rules.

[4] This decision may be appealed to the State Board of Education pursuant to *N.J.S.A.* 18A:6-27 *et seq.* and *N.J.A.C.* 6A:4-1.1 *et seq.*

State of New Jersey
OFFICE OF ADMINISTRATIVE LAW

INITIAL DECISION

OAL DKT. NO. EDU 3361-04

AGENCY DKT. NO. 23-1/04

YOUTH CONSULTATION SERVICE, INC.,

Petitioner,

v.

NEW JERSEY DEPARTMENT OF EDUCATION, OFFICE OF COMPLIANCE INVESTIGATION,

Respondent.

Daniel R. Esposito, Esq., appearing for Petitioner
(Kalison, McBride, Jackson & Murphy, PA, attorneys)

Melanie M. Brookes, Deputy Attorney General, appearing for Respondent
(Zulima V. Farber, Attorney General of New Jersey, attorney)

Record Closed: January 10, 2006 Decided: February 23, 2005

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

STATEMENT OF THE CASE

Petitioner, Youth Consultation Service, Inc. (YCS), is appealing the determination of the Department of Education (DOE), Office of Compliance Investigation (OCI) audit of business services and tuition charges for the 2001-02 school year for Sawtelle-South

Learning Center-Collingswood (Sawtelle-South) resulting in the disallowance of certain costs, including an amount in excess of the maximum salary for the director of Sawtelle-South.

PROCEDURAL HISTORY AND STIPULATED FACTS

The parties filed a joint stipulation of facts on November 2, 2005. Those facts, which include the procedural history, are set forth in full as follows:

1) YCS is a multi-purpose social service organization that provides educational and therapeutic programs at multiple site locations. Sawtelle-South, a program of YCS, is a private school for the disabled approved by the DOE and located in New Jersey.

2) On July 28, 2003, YCS received notification that the DOE completed an audit of the business services and tuition charges for the 2001-02 school year for Sawtelle-South, resulting in non-allowable costs totaling $21,990 attributable to an overpayment to an uncertified teacher (Finding #1) and an excess maximum salary for the President of YCS, Richard Mingoia (Mingoia or President) (Finding #2).[1] (See Appendix, Exhibit A).

3) On September 11, 2003, YCS submitted an appeal to Finding #2, stating that such salary was allocated in conformance with the existing regulations and generally accepted accounting principles. (See Appendix, Exhibit B).

4) On September 26, 2003, Ray Montgomery, Director of OCI, responded to the September 11, 2003 letter, denying YCS's appeal stating "the governing sections [N.J.A.C. 6A:23-4.2(f); N.J.A.C. 6A:23-4.2(p) and 4.5(8)][2] deal directly with [the] issue." (See Appendix, Exhibit C).

---

[1] There were a number of issues raised by the audit. The first issue was attributed an overpayment to an uncertified teacher and is not an issue in this hearing. The issues to be resolved herein are whether the title President/CEO of Sawtelle-South is one to which a maximum allowable salary, established by regulation, applies and whether the method used to calculate that salary during the 2001-02 school year was correct.

[2] Although OCI refers to the applicable regulatory section as such, the correct section is N.J.A.C. 6A:23-4.5(a)(8). We will refer to this section as the latter although the quoted language of OCI leaves out the "(a)" designation.

5) On October 9, 2003, YCS submitted a notice of appeal of the decision of Montgomery, contained in the September 26, 2003 letter relating to Finding #2, the limitation of the salary of Mingoia. The notice of appeal questioned Finding #2, stating that "[I]ndirect general and administrative costs allocated to the private school in (sic) was not in accordance with N.J.A.C. 6A:23-4.2(f) because indirect costs included salaries that exceeded the associated maximum salary determined in N.J.A.C. 6A:23-4.2(p) . . . ." In addition, the appeal contested the OCI's interpretation and application of N.J.A.C. 6A:23-4.5(a)(8), which addresses part-time/split-time positions. In this appeal, petitioner maintained that the applicable regulatory sections were complied with and there is no basis in the DOE regulations or any other applicable laws to limit the overall salary of the President of YCS or require the formulary allocation in the manner interpreted by OCI. (See Appendix, Exhibit D, Letter of October 9, 2003).

6) On October 21, 2003, by letter from Gloria Hancock, DOE Chief of Staff, the DOE denied the October 9, 2003 appeal, reiterating Montgomery's position that "all of the items appealed in [YCS's] letter are specifically governed by the DOE Finance and Business Services [regulations], N.J.A.C. 6A:23." Hancock stated in the denial:

> N.J.A.C. 6A:23-4.5(8) also discusses part-time / split-time funded position and your company's situation as defined in N.J.A.C. 6A:23-4.2(f). The governing sections deal with the issue and is rationally explained that whatever the salary, we would not allow you to charge each of your private schools and [sic] amount equal to the amounts allowed in that given county, but would have you allocate it at the maximum level first and then split the salary based on a time allocation to each school since the maximum salary is that of a 100% funded position and not that of a partially funded position. Therefore your appeal is denied.

That decision also states "YCS may further appeal this decision within 90 days to the Commissioner of Education in accordance with the provisions of N.J.A.C. 6A:3-1.3." YCS is petitioning to appeal and reverse the October 21, 2003 denial accordance with N.J.A.C. 6A:3-1.3.

7) Hancock states in the denial that "[T]he finding dealt with the issue of the salary of the President being in excess of the maximum allowable under N.J.A.C. 6A:23-4.2(p) being reduced before the allocation to programs governed by the Department of Education." Hancock sited to the following regulations: N.J.A.C. 6A:23-4.2(f) & N.J.A.C. 6A:23-4.2(p) and 6A:23-4.5(a)(8).

N.J.A.C. 6A:23-4.2(f) states that:

> Any entity that operates other programs in addition to a private school for the disabled program(s) at one or more locations shall charge their costs as follows:
>
> (1) Direct costs for each program as determined pursuant to (c) above;
> (2) Indirect cost centers established as follows:
>
> i. A cost center, which shall include indirect costs that are allowable costs in accordance with N.J.A.C. 6A:23-4; and
> ii. A cost center, which shall include indirect non-allowable costs that are not chargeable as allowable costs in accordance with N.J.A.C. 6A:23-4.

N.J.A.C. 6A:23-4.2(p) promulgates a list of maximum salaries for certain job titles in the private school for the disabled:

That section states:

> A list of maximum salaries by administrative job titles and county according to the job titles contained in N.J.A.C. 6:11 and 6A:23-4.1 which pertains to private schools for the disabled shall be calculated and published by the Commissioner. Maximum salaries shall be based on the highest contracted salary by administrative job title for the entire State in a district board of education and educational services commissions with comparable average daily enrollments for any prior year indexed by the average increase in salary between the two preceding school years for each job title. Such salaries shall be based on a 12 month contract period from July 1 through June 20, and the maximum salary

> of the private school staff member shall be prorated for staff employed for less than 12 months. Each district board of education, special services district board of education and educational services commission with an ADE equal to or less than the highest private school ADE will be considered comparable. Under no circumstances shall the maximum salary calculated, be less than the corresponding salary in the prior year for the same job title. [N.J.A.C. 6A:23-4.2(p)].

N.J.A.C. 6A:23-4.5(a)(8) states that:

> A salary in excess of the associated maximum salary determined in N.J.A.C. 6A:23-4.2(o), (p), and (q) for a staff member or consultant whose position requires certification, license or a bachelor's degree including director, assistant director, executive director, and business manager. Part-time or split-time positions shall be prorated including salaries in entities defined in N.J.A.C. 6A:23-4.2(e) and (f).

8) During the period of July 1, 2001 through June 30, 2002, Mingoia was the President/CEO of YCS which had under his purview many programs which are not related to Sawtelle-South and not regulated by the DOE. Mingoia's salary for his services to the entire agency was $226,000 per year.

9) The portion of Mingoia's salary allocated to Sawtelle-South was an indirect cost attributed to general and administrative costs.

10) The portion of Mingoia's salary allocated to Sawtelle-South was in accordance with the percentage of Sawtelle-South's overall percentage of the YCS general administrative costs.

11) N.J.A.C. 6A:23-4.5(8) cited by the denial deems that salaries in excess of a maximum salary shall be deemed "non-allowable." This section states that "Part-time or split time positions shall be prorated including salaries in entities defined in (e) & (f)." N.J.A.C. 6A:23-4.2(f) states that indirect costs shall establish "costs centers" which include "allowable costs" and which include indirect "non-allowable costs."

12) N.J.A.C. 6A:23-4.2(p) states that "[U]nder no circumstances shall the maximum salary calculated be less than the corresponding salary in the prior year for the same job title."

In January 2005, the parties filed cross applications for summary decision. On March 29, 2005, I issued an Order denying both applications, finding there were issues of material fact regarding the duties or obligations of Petitioner's CEO/President as compared to those of a chief administrator of a local public school district.

The matter proceeded to hearing, which took place on November 3, 2005, and the record closed on January 10, 2006, after Petitioner filed certain additional documentation.

LEGAL ANALYSIS AND CONCLUSIONS

Petitioner presents two issues to be resolved in this case. Succinctly summarized, first, Petitioner asserts Respondent DOE has no authority under the regulations, specifically N.J.A.C. 6A:23, to limit the overall salary of the President of an agency with administrative duties involving programs not regulated by DOE and the regulations establishing maximum salaries promulgated pursuant to N.J.A.C. 6A:23-4.2 do not apply to the salary of the President/CEO of YCS; second, in applying the current formula to his salary in the 2001-2002 school year, Respondent engaged in impermissible rule making.

The regulations pertinent during the audit period provide:

> (a) A cost that is not allowable in the calculation of the certified actual cost per student means the following:
>
> > A salary in excess of the associated maximum allowable salary determined in N.J.A.C. 6A:23-4.2(o), (p), and (q), for a staff member or consultant whose position require certification, license or bachelor degree including director,

> assistant director, executive director, and business manager. Part-time or split-time positions shall be prorated including salaries in entities defined in N.J.A.C. 6A:23-4.2(e) and (f). 33 N.J.R. 1437.

The regulations also provide indirect costs are those which are incurred for common or joint purpose and are not readily assignable to a program and/or a revenue source. A private school for the disabled may establish a cost center which will include the charging of indirect costs allowable in accordance with the provision with the regulation governing the tuition rate procedures which a private school for the disabled located in New Jersey shall employ to determine the final tuition rate charged back to the district of residents of disabled pupils. N.J.A.C. 6A:23-4.2.

In this case, the Petitioner asserts that the portion of Mingoia's salary, which was attributed to Sawtelle-South for the audit year was appropriately charged according to generally accepted accounting principals (GAAP). Respondent, on the other hand, asserts that a portion of Mingoia's salary must be excluded from the calculations before the indirect cost of the salary is allocated to Sawtelle-South. For the reasons which follow, I **FIND** the regulations establishing the maximum salaries for certain positions in private schools for the disabled are applicable to the position of President/CEO of YCS; I further **FIND,** however, Respondent Department improperly determined to exclude a portion of the President/CEO's salary as non-allowable because the formula employed had not been codified into a regulation at the time period covered by the audit.

The regulations which outline the procedure for charging tuition by private schools for the disabled to the public school districts in which the disabled child resides are found at N.J.A.C. 6A:23-4.1 et seq. These rules provide guidelines for determining each school's certified actual costs[3] per student and require that the tuition rate charged to the public school district not exceed this amount.

[3] "Certified actual cost per student" is defined as the actual allowable cost for the entire school year plus the maximum surcharge/public school placement restricted working capital fund divided by the average daily enrollment for the school year.

Under these regulations, all private schools for the disabled must determine which costs incurred by the private schools for the disabled must be excluded in a school's determination of its per pupil costs. One of these is, specifically, "[a] salary in excess of the associated maximum allowable salary determined by regulation for a staff member or consultant whose positions require certification, license or a bachelor's degree including a director, assistant director, executive director and business manager." The current regulation, adopted in 2004, well after the audit period at issue here, also provides that the school for the disabled shall prorate salaries for such part-time or split-time positions and it provides a formula for calculating part-time and split-time salaries. N.J.A.C. 6A:23-4.5(a)(8).[4]

The second regulation applicable to the issue herein specifies the procedures by which a private school for the disabled must calculate their tuition rates. Two subsections of this regulation apply to this case in conjunction with the above regulation. First, as the parent organization operating Sawtelle-South along with other programs not related to educating the disabled, the regulations require YCS to separate indirect costs, incurred for a common or joint purpose and not readily assignable to a program or revenue source, into two cost centers, one for costs allowable in the calculation of the school's tuition rate and one for costs not allowed to be included in the tuition rate. N.J.A.C. 6A:23-4.2(f) 2. Second, under regulations currently in place, private schools for the disabled must use as a guide, a list of maximum allowable salaries by administrative job title and county, according to the job titles contained in N.J.A.C. 6:11 and 6A:23-4.1, which pertain to private schools for the disabled, published by the Commissioner. N.J.A.C. 6A:4.2(p) further provides the maximum allowable salary of a staff member holding a part-time or split time position shall be prorated including the salary of staff employed in entities defined in (e) and (f) above. (Emphasis supplied.)

It is undisputed that the title at issue here, that of President/CEO is not among those to be found in the above-cited regulations and I do so **FIND.**

[4] Although Respondent apparently relies on and cites to the current regulations adopted in 2004, the regulations in effect during the period of the audit, adopted in May 2001, reflect substantially the same provision, except the formula for calculating the maximum salary was not set forth in the 2001 version of the regulation.

Pursuant to those regulations, specifically N.J.A.C. 6A:23-4.1, a maximum salary for the position of a chief school administrator/ executive director/ director of a private school for the disabled has been established. It is the maximum salary for this position in the county of Camden that Respondent applied to the President/CEO of YCS, the parent organization of Sawtelle-South. Since that position is one with over arching responsibilities to the many facilities and programs under the auspices of YCS, Respondent asserts according to the regulations, the salary of the CEO must be prorated among the various operations of YCS on a cost to cost basis, since there is no comparable title to that of President/CEO on the list published by the Commissioner.

Petitioner asserts first, because of the nature of the position of President/CEO of YCS, a multi-purpose social service organization providing educational and therapeutic programs statewide, the regulations are not applicable, since there is no comparable position cited in the regulations. Second, Petitioner asserts Respondent retroactively applied a regulation not in effect during the period of the audit. The 2001 version of the regulations, N.J.A.C. 6A:23-4.5(a)8, merely required split time or part time positions to be prorated, including the salaries defined in N.J.A.C. 6A:23-4.2(e)and (f), while the 2004 version of the regulations included the formula by which the part time and split time maximum allowable salary is to be calculated. See N.J.A.C. 6A:23-4.5(a)8.i, et seq.

I turn first to the issue of whether the regulations governing the establishment of maximum allowable salaries is applicable to the position of President/CEO of YCS. In a similar case, the ALJ noted although the public schools do not use the title of CEO, the breadth and scope of the regulations at issue permit an interpretation to include the title as the functional equivalent to that of district superintendent. Both are charged with accomplishing the task of administering programs in different locations, carried out under the day to day auspices of other people. Other administrators occupying such positions as executive director, whose responsibilities are analogous to that of a school principal, are responsible for day-to-day operations in each of the Carrier locations,

while the CEO, who is responsible for the overall administration of all programs maintained by the parent organization, is analogous to the position of district superintendent. Carrier Foundation-East Mountain Sch. v. New Jersey Dep't of Educ., OAL Dkt. No. EDU 508-00, (Feb. 21, 2001), adopted Comm'r (April 12, 2001), aff'd State Bd. of Ed. (Oct. 3, 2001).[5]

Petitioner argues the Carrier case is not binding on this forum a number of reasons. Petitioner first asserts Carrier is inapposite to the case at bar, because the regulation in effect at the time Carrier was decided was markedly different from that which was adopted in May, 2001 and second, because the Administrative Law Judge drew the analogy between a CEO who was responsible for ten schools in a single county and a district superintendent, asserting the duties of the CEO in Carrier were not as complex or geographically extensive as those of Mr. Mingoia.

While Carrier may not be binding on this forum in these specific circumstances, i.e., the difference in the responsibilities of the CEO in each of the two instances, it is certainly persuasive. Moreover, it is well established that agency interpretations of their own regulations are entitled to great deference. In Carrier, the Commissioner concurred with the determination of the ALJ, noting that the salaries of chief administrative officers of private schools for the disabled are limited in the public interest. A limitation on the salary of the CEO of YCS is no less in the public interest than the limitation placed on the salary of the CEO of Carrier.

Moreover, Petitioner's reliance on the argument that the duties of the President/CEO of YCS are more complex because his responsibilities are carried out on a statewide rather than district or county wide basis is misplaced because Petitioner has adopted a narrow view of the analogy drawn by the ALJ in Carrier and has failed to consider the limitations contained in the regulations in the context of a large city district superintendent, such as Paterson, Trenton, Camden, Newark or Jersey City. The

[5] The regulations in effect when Carrier was decided were amended in 2001 and again in 2004. The language of the regulations, however, with respect to this issue of establishing a list of positions to which a maximum would apply was substantially the same.

Jersey City. The district superintendents in these districts have responsibilities which are more complex, and possibly more numerous, than those of the district superintendent in a small municipality where there may be one high school and several middle and elementary schools. Moreover, the geographical complexity is minimized by the great advances in modern technology of which we are all aware.

Petitioner's assertion that Respondent is impermissibly limiting the salary YCS can pay its President/CEO is also without merit. I see nothing in the regulations which limits the salary an institution such as YCS can pay its chief executive officer; the limitation is on what portion of that salary can be calculated as an allowable cost to be included in the tuition to be charged to the public school district of a disabled child's residence. Moreover, DOE's express purpose in amending these regulations is to encourage private schools for the disabled to spend more on instructional needs impacting direct education and to spend less on administrative costs. See 33 N.J.R. 1416 (May. 2001) noting the limitation on director's salaries of over $185,000 as a specific example of the indirect costs the Department was seeking to limit. The focus of the regulations passed in May 2001 was to encourage more public funds to be spent on direct instruction where the expenditure can most benefit disable pupils. To include salaries for titles such as the CEO/President of YCS would certainly advance the underlying purpose of these regulation and further protect the public interest. Conversely, to determine to exclude these salaries would seriously undercut the underlying purpose of these regulations.

Based on the foregoing, I **CONCLUDE** the regulations in question, specifically those found at N.J.A.C. 6A:23-4.2(o), (p), and (q) as well as N.J.A.C. 6A:23-4.5(a)(s) apply to the President/CEO of YCS.

Turning next to the issue of whether the formula applied to determine the portion of Mr. Mingoia's salary was to be charged to the tuition to be assessed against the public schools sending disabled students to Sawtelle-South was proper, the presumption against retroactive application of a regulation is well established.

Administrative regulations are ordinarily construed to be prospective in operation. Bowen v. Georgetown University Hospital, 488 U.S. 204, 109 S.Ct. 468, 102 L.Ed.2d 493 (1988) and the New Jersey Supreme Court has indicated one hallmark of an administrative regulation is it has prospective effect. Metromedia, Inc. v. Director, Division of Taxation, 97 N.J. 313, 329 (1984). Although there are three circumstances in which retroactive application of a regulation may be appropriate, none are applicable to this case.

The imposition of a specific, new methodology for allocation of a maximum allowable salary has far reaching ramifications for those similarly situated to Mr. Mingoia, who fulfill a variety of functions and are not easily classified into the responsibilities set forth in N.J.A.C. 6A:23-4.2(p). Thus, the new methodology cannot be employed on an ad hoc basis. Petitioner and all similarly situated institutions must be afforded fair notice of such a substantive change in the regulations.

Accordingly, I **CONCLUDE** the regulatory provision setting forth the specific formula for calculating maximum allowable salaries which was adopted in 2004 and which, therefore, was not in effect during the audit period at issue here cannot be used for the determination of the issue to be resolved herein. Instead the regulations as adopted in May, 2001, should have been applied. Those regulations, as noted above, merely require the salaries of part time or split time positions to be prorated. 33 N.J.R. 1437 (supra). Since those regulations do not contain any guidance or explanation of how the calculations should be allocated, I **CONCLUDE** the methodology employed by YCS, following generally accepted accounting principles (GAAP) and prorating Mr. Mingoia's salary on a cost-to-cost basis was appropriate for that audit report.

ORDER

Accordingly, I hereby **ORDER** the determination of Respondent with respect to the actual calculation of the salary be and hereby is **REVERSED**; I further **ORDER** the remainder of this petition be and hereby is **DISMISSED WITH PREJUDICED**.

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

This recommended decision may be adopted, modified or rejected by the **COMMISSIONER OF THE DEPARTMENT OF EDUCATION,** who by law is authorized to make a 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.

February 23, 2006
DATE

Maria M La Fiandra
MARIA MANCINI LA FIANDRA, ALJ

E-mail Receipt of Initial Decision Confirmed by the Department of Education on:

February 23, 2006
DATE

Mailed to Parties:

Laura Anders
DIRECTOR AND CHIEF ADMINISTRATIVE LAW JUDGE

FEB 24 2006
DATE

OFFICE OF ADMINISTRATIVE LAW

jb

APPENDIX

Witnesses:

Richard Mingoia

Anthony Hearn

Exhibits:

R-1	Financial Statements of YCS, June 30, 2002
R-2	Audit Work papers - From July 1, 2001 to June 30, 2002
R-3	Private Schools for the Disabled Maximum Salaries 2001-02
R-4	Letter w/attachment - Hearn to Mingoia, re July 28, 2003
R-5	Letter w/attachment - Norma S. Sylvestri to Ray Montgomery, September 11, 2003
R-6	Letter w/attachment - Montgomery to Mingoia, September 26, 2003
R-7	Letter - Esposito to Gloria Hancock (4 pgs), October 9, 2003
R-8	Letter - Hancock to Mingoia, October 21, 2003
J-1	YCS Pamphlet
J-2	Joint Stipulation of Facts w/Appendix

257-06

257-06F1A

OAL DKT. NO. EDU 6721-05
AGENCY DKT. NO. 202-8/05

T.P., on behalf of minor child, T.A.E.,	:	
PETITIONER,	:	COMMISSIONER OF EDUCATION
V.	:	DECISION
BOARD OF EDUCATION OF THE TOWNSHIP OF EDGEWATER PARK, BURLINGTON COUNTY,	:	
RESPONDENT.	:	

The Commissioner has reviewed the record of this matter and the advisement of petitioner's failure to appear, transmitted to the Commissioner by the Office of Administrative Law (OAL) pursuant to *N.J.A.C.* 1:1-14.4, together with a copy of the notification sent to the parties by OAL on July 11, 2006 and providing petitioner thirteen days to submit an explanation for such nonappearance. There being no explanation filed by petitioner, the petition of appeal is hereby dismissed with prejudice due to petitioner's failure to appear at hearing or provide an explanation for such nonappearance.

IT IS SO ORDERED.*

Lucille Davy
ACTING COMMISSIONER OF EDUCATION

Date of Decision: 7/27/06

Date of Mailing: 7/27/06

* This decision may be appealed to the State Board of Education pursuant to *N.J.S.A.* 18A:6-27 *et seq.* and *N.J.A.C.* 6A:4-1.1 *et seq.*

253-06

OAL DKT. NO. EDU 7611-04
AGENCY DKT. NO. 158-5/04

MOLLYANN RUBIN,	:	
PETITIONER,	:	
V.	:	COMMISSIONER OF EDUCATION
STATE-OPERATED SCHOOL DISTRICT OF THE CITY OF PATERSON, PASSAIC COUNTY,	:	DECISION
RESPONDENT.	:	
	:	

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

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

IT IS SO ORDERED.

Isaac Byrd
ACTING COMMISSIONER OF EDUCATION

Date of Decision: 7/19/06

Date of Mailing: 7/19/06

State of New Jersey
OFFICE OF ADMINISTRATIVE LAW

INITIAL DECISION

SETTLEMENT

OAL DKT. NO. EDU 7611-04

AGENCY DKT. NO. 152-5/04

MOLLYANN RUBIN,

Petitioner,

v.

STATE OPERATED SCHOOL DISTRICT OF THE CITY OF PATERSON,

Respondent.

Gail Oxfeld Kanef, Esq., for petitioner
(Oxfeld Cohen, P.C., attorneys)

Joanne L. Butler, Esq., Esq., for respondent
(Schenck, Price, Smith & King, LLP, attorneys)

Record Closed: June 20, 2006 Decided: June 23, 2006

BEFORE **DIANA C. SUKOVICH,** ALJ:

On May 3, 2004, petitioner, a tenured teaching staff member of respondent, filed a petition with the State Department of Education (DOE) to contest a Professional Improvement Plan regarding petiitoner prepared by personnel of respondent, in 2003. The DOE transmitted the matter to the Office of Administrative Law on August 4, 2004 for determination as a contested case pursuant to N.J.S.A. 52:14F-1 to -13.

The matter was assigned to this judge, on September 7, 2004.Throughout the proceedings, telephone and settlement conferences were conducted. Hearings scheduled on May 24 and 25, 2005 were adjourned, at petitioner's request, because of a pending settlement. The parties ultimately reached a resolution of the matter and an executed Settlement Agreement and Release of Claims (Settlement Agreement) was filed on June 14, 2006. That document contained incorrect docket numbers, apprarent inadvertent typographical errors. Petitioner filed a Certification, executed by the parties' counsel, referencing the pertinent numbers, on June 20, 2006, on which date the record was closed. Hearings scheduled on August 2 and 3, 2006 were therefore adjourned. Attached herewith are copies of the Settlement Agreement and the Certification.

Having reviewed the terms of the Settlement Agreement and the Certification, I **FIND** that the parties voluntarily have agreed to the terms and conditions of the settlement, as evidenced by the signatures contained thereon, and that the settlement fully disposes of all issues in controversy and is consistent with the law.

Therefore, I **ORDER** that the parties comply with the terms of the settlement and that these proceedings be and are hereby **CONCLUDED**.

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

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

June 23, 2006
DATE

Diana C. Sukovich
DIANA C. SUKOVICH, ALJ

Receipt Acknowledged:

7-10-06
DATE

M. Kathleen Duncan
DEPARTMENT OF EDUCATION

Mailed to Parties:

JUL 12 2006
DATE

DIRECTOR AND CHIEF ADMINISTRATIVE LAW JUDGE
OFFICE OF ADMINISTRATIVE LAW

lr

SCHENCK, PRICE, SMITH & KING, LLP
10 Washington Street
P.O. Box 905
Morristown, New Jersey 07963-0905
(973) 539-1000
Attorneys for Respondent
State Operated School District of Paterson

RECEIVED
2006 JUN 14 P 2:52
STATE OF NEW JERSEY
OFFICE OF ADMIN LAW

MOLLYANN RUBIN,	:	STATE OF NEW JERSEY
	:	OFFICE OF ADMINISTRATIVE LAW
Petitioner,	:	
	:	OAL DKT. NO. EDU 9351-03
v.	:	
	:	
STATE-OPERATED SCHOOL DISTRICT OF PATERSON	:	**SETTLEMENT AGREEMENT AND RELEASE OF CLAIMS**
	:	
Respondent.	:	
	:	

WHEREAS, the Parties, Mollyann Rubin ("Rubin") and the State Operated School District of Paterson ("Paterson"), desiring to resolve all matters of dispute between them as specified below, without further expenditure of time, money and resources do hereby enter into this Settlement Agreement and Release of Claims ("Agreement") knowingly and voluntarily,

. WHEREAS, Rubin has completed the Foundation for Educational Improvement courses during the Summer, 2005, paying 50% of the cost of the program., which has resulted in an action by Paterson to restore the increment withheld for the 2003-2004 academic year.

WHEREAS, Rubin has pending a petition against Paterson before the Office of Administrative Law as Molly Ann Rubin v. State Operated School District of Paterson, Docket No. EDU 9351-03, related to the preparation of a professional improvement plan and the consequent increment withholding for failure to abide by its terms.

NOW THEREFORE, in consideration of the mutual covenants and agreements hereinafter set forth, both Parties being separately advised by counsel and intending to be legally bound, hereby covenant and agree as follows:

1. All the foregoing is incorporated herein as part of this Agreement.

2. As used herein, "Paterson" means the State-Operated School District of Paterson and all of its predecessors, past and present subsidiaries, divisions, departments, successors, assigns, directors, officers, agents, employees and representatives.

3. In consideration of the mutual acts, covenants and promises herein, it is agreed as follows:

a Paterson will restore Rubin's increment for the 2004-2005 school year retroactive to September, 2004, with all appropriate deductions and pension contributions made on her behalf.

b. Rubin shall voluntarily dismiss, with prejudice, the within Petition bearing Docket No. EDU 9351-03.

4. In exchange for the promises made by Paterson in this Agreement, and except for the affirmative action complaint which is currently pending and any subsequent litigation related to the claims set forth in that affirmative action complaint and the back pay to which Rubin is entitled by virtue of this agreement, Rubin, her heirs, legal representatives, and assigns, hereby releases and forever discharges Paterson and its employees, officers, agents, agencies and assigns from any and all claims, demands, obligations, actions, causes of action, damages, attorney's fees, costs, expenses, and compensation of any kind whatsoever, both legal and equitable and including but not limited to any and all claims for compensatory damages, punitive damages, back pay, front pay and the interest thereon and any claims under N.J.S.A. 18A:29-11, which Rubin now has or may hereafter acquire against Paterson specifically set forth in, or arising out of, the current Petition bearing Docket No. EDU 9351-03, including but not limited to any civil rights or discrimination claims or any expressed or implied contract between Paterson and Rubin, whether oral or written, or any collective negotiations agreement, or any other Federal, State, County, or local statutes, ordinances, resolutions and regulations, or any employment manual or handbook or personnel policies, except for those claims which arise out of the affirmative action complaint now pending. Nothing in this settlement agreement shall be deemed to release any claims related to Rubin's pending affirmative action complaint.

5. In consideration of the undertakings and agreements of Paterson set forth in this Agreement, Rubin agrees to acquit and release fully from any and all claims of whatsoever nature and sort, inclusive of costs and attorney's fees, that Rubin has or may have against Paterson and its officers, employees and agents which are set forth in or arising out of the current Petition bearing Docket No. EDU 9351-03, which claims are described, and limited, in Paragraph 4 above.

6. It is agreed and understood that nothing in this Agreement constitutes an admission of guilt or wrongdoing by either party, either in an individual or employment capacity or that they have violated any statute, rule, regulation or legal obligation.

7. Rubin declares that she has read and reviewed this Agreement with her representative and fully understands the terms of such Agreement and that she voluntarily accepts it for purposes of making a full and final compromise of all claims which are set forth in or arising out of the current Petition bearing Docket No. EDU 9351-03, which claims are described, and limited, in Paragraph 4 above.

8. The Parties to this Agreement agree and pledge to cooperate and communicate in good faith to implement and abide by its terms.

IN WITNESS WHEREOF, Rubin and Paterson intending to be legally bound, have set their hands and seals to this Agreement as of the day and year written below.

Mollyann Rubin

Date: 5/24/06

Dr. Michael Glascoe, Superintendent
State-Operated School District of Paterson

Date: 6/8/06

SCHENCK, PRICE, SMITH & KING, LLP
10 Washington Street
P.O. Box 905
Morristown, New Jersey 07963-0905
(973) 539-1000
Attorneys for Respondent
State Operated School District of Paterson

MOLLYANN RUBIN,	:	STATE OF NEW JERSEY OFFICE OF ADMINISTRATIVE LAW
Petitioner,	:	
	:	OAL DKT. NO. EDU 7611-04 Agency Ref. No. 158-5/04
v.	:	
	:	
STATE-OPERATED SCHOOL DISTRICT OF PATERSON	:	**COUNSEL CERTIFICATION AS TO DOCKET NUMBER**
Respondent.	:	

The undersigned, as Counsel for the parties in the within contested case, certify as follows:

1. The Docket Number referenced in the Settlement Agreement and Release of Claims signed by the parties (EDU 9351-03) was incorrect.
2. The correct OAL Docket Number for this action, which was the subject of the Settlement Agreement and Release of Claims signed by the parties, is **EDU 7611-04**, and the correct Agency Reference Number is **158-5/04**.

Gail Oxfeld Kanef, Esq.,
Counsel for Mollyann Rubin

Date: 6-19-06

Joanne L. Butler, Esq.
Counsel for the State-Operated School District of Paterson
Date: 6/20/06

00832517

258-06

AGENCY DKT. NO. 240-7/06

BRIGHT LIGHTS & STARS ACADEMY,	:	
PETITIONER,	:	
V.	:	COMMISSIONER OF EDUCATION
BOARD OF EDUCATION OF THE CITY OF NEW BRUNSWICK, MIDDLESEX COUNTY,	:	DECISION
RESPONDENT.	:	

The submissions by the above-captioned parties and the letter dated July 25, 2006, from petitioner's counsel withdrawing the petition in the above referenced case have been reviewed. The Commissioner hereby approves the withdrawal of the controversy and the matter is accordingly closed.

IT IS SO ORDERED.

Lucille E Davy

ACTING COMMISSIONER OF EDUCATION

Date of Decision: 7/31/06

Date of Mailing: 7/31/06

260-06

OAL DKT. NO. EDU 8887-04
AGENCY DKT. NO. 319-9/04

MAURICE S. KAPROW,	:	
PETITIONER,	:	
V.	:	COMMISSIONER OF EDUCATION
BOARD OF EDUCATION OF BERKELEY TOWNSHIP, OCEAN COUNTY, DEBRA EVANS AND MARIE KECK,	:	DECISION
RESPONDENTS.	:	
	:	

The record of this matter and the Initial Decision of the Office of Administrative Law (OAL) have been reviewed. The Board's exceptions and petitioner's reply thereto, filed in accordance with *N.J.A.C.* 1:1-18.4, were fully considered by the Commissioner in reaching her determination herein.

On exception, the Board essentially renews its arguments advanced below. First, it charges that the positions of Assistant Superintendent and District Director of Elementary Education (DDEE) (formerly District Supervisor of Education) are not substantially similar. Although conceding that some aspects of the jobs may be analogous, it maintains that a reasoned comparison of the duties of the two positions demonstrates that the tasks of the now-abolished Assistant Superintendent position were "qualitatively more expansive, autonomous and of a higher level than the responsibilities of the DDEE." (Board's Exceptions at 1-3) Next, the Board again maintains that, inasmuch as there is no substantial identity of duties between the two positions, because petitioner has never served as a DDEE he cannot transfer tenure achieved in his separately tenurable position of Assistant Superintendent to lay claim to the DDEE job. (Board's Exceptions at 4)

In reply, petitioner points to Exhibit P-3, a side-by-side comparison of the job descriptions of his prior Assistant Superintendent employment posts with those of the DDEE position, which, he proposes, demonstrates a "task by task virtual identity between the two positions." In addition

to this identity of duties, petitioner points to other corresponding characteristics between the positions which are of the type, he avers, the Commissioner in *Santarsiero v. Parsippany-Troy Hills Board of Education,*[1] 1984 *S.L.D.* 854, found persuasive in determining whether or not the two positions at issue in that case were substantially similar. These, he submits, include:

> 1. There was only one Assistant Superintendent in the District and likewise, there is only one District Director in the District now;
>
> 2. Both positions were "directly responsible to the Superintendent of Schools"***;
>
> 3. Both were twelve (12) month, as opposed to ten (10) month positions;
>
> 4. Both had virtually identical "Minimum Requirements for Employment". In fact, as to this item, Ms. Lippincott agreed on cross examination that the minimum requirements of the two (2) positions were identical, testifying that although there appeared to be additional requirements for Assistant Superintendent, in fact, the District Director had to have those same qualifications in order to qualify for the position;
>
> 5) Both positions had "district-wide" responsibilities, as opposed to being a "building-based" position, such as Principal.
>
> (Petitioner's Reply Exceptions at 2-3)

Petitioner submits that, pursuant to the New Jersey Supreme Court's decision in *Dennery, supra,* it is abundantly clear that former teaching staff members terminated in a RIF are entitled, pursuant to their tenure and seniority rights, to be re-employed by their former Board not only in the *position title* of their prior position but also in any position which is *substantially identical* to their former job function. (*Id.* at 5) Here, petitioner charges, the Board attempted to circumvent his tenure rights by resurrecting the position of Assistant Superintendent but camouflaging it under what the Board would have us believe is an "inferior" title, District Director. He cites to *Viemeister v. Board of Education*, 5 *N.J. Super.* 215 (App. Div. 1949) and *Vogel v. Board of Educ.,* decided by State Board of Education June 5, 1985, as decisions where the Appellate Division and the State Board, respectively, have considered and reached

[1] Cited with approval by the New Jersey Supreme Court in *Dennery v. Bd. of Educ.*, 131 *N.J.* 626 (1993).

behind this particular type of façade, finding the job duties of the old and new titles to be substantially identical. (*Id.* at 6)

Petitioner, therefore, urges the Commissioner to adopt the decision of the ALJ as it is supported by the evidence and fully consistent with applicable law.

Upon a full and independent review of the record, which it is noted did not include transcripts of the hearing conducted below, the Commissioner concurs with the ALJ that summary decision is appropriately granted to petitioner.

The record in this matter reflects that effective June 30, 1981, petitioner's employment as Assistant Superintendent was terminated as a result of a reduction in force (RIF). His future employment rights in the District as a tenured Assistant Superintendent were protected by *N.J.S.A.* 18A:28-12 which specifies that any teaching staff member dismissed as a result of a RIF:

> shall be and remain upon a preferred eligible list in the order of seniority for reemployment whenever a vacancy occurs in a position for which such person shall be qualified and he shall be reemployed by the body causing dismissal, if and when such vacancy occurs***"

As the only Assistant Superintendent in the District at the time of the RIF, petitioner was entitled, as a matter of law, to any assistant superintendency within the scope of his certificate established by the District in the future. Additionally, it is by now well-established that a riffed individual's tenure rights may not be circumvented or defeated by a Board's assigning of different job titles to positions essentially subsuming the identical duties performed by such tenured employee under a different job title but, rather, a Board must extend the teaching staff member's tenure rights to such newly created position. (See *Dennery v. Bd. of Educ.*, 131 *N.J.* 626 (1993); *Viemeister* and *Vogel, supra*).

With this background in mind, the Commissioner turns to the seminal issue in this matter - whether when the Board created the job entitled Supervisor of Elementary Education (subsequently retitled Director of Elementary Education [DDEE]) it created a position whose job functions were substantially identical to the duties and responsibilities of petitioner's former riffed Assistant

Superintendent position.[2] Pursuant to *Dennery, supra*, if it is determined that the essential duties of the two positions are "substantially similar," petitioner's tenure rights as Assistant Superintendent subsume the duties of DDEE and he was, therefore, entitled to the position over those individuals appointed by the Board.[3] The Commissioner's considered review of the nature and scope of the essential duties of the jobs at issue, looking to substance rather than form, persuades her, for the reasons comprehensively detailed on Pages 12-15 of the Initial Decision, that the two employment posts are functionally equivalent. As such, the Board was required to notify petitioner of his tenure entitlement to the DDEE position and must immediately place him in this job.

Notwithstanding this result, the Commissioner declines to grant petitioner's request for attorney fees and pre-or post-judgment interest in this matter. With respect to attorney fees, it is by now well established that, due to the lack of express statutory authority for so doing, the Commissioner does not have plenary authority to award counsel fees in determining controversies and disputes presented under Education Law. See *Balsley v. North Hunterdon Bd. of Educ.*, 117 *N.J.* 434, 442-443 (1990). As to pre-judgment interest, the Commissioner finds that the ALJ was correct in declining to order such interest based on petitioner's failure to satisfy the requirements of *N.J.A.C.*6A: 3-1.17(a). Finally, any request for post-judgment interest is premature, as the 60-day timeline relative to the granting of this interest does not even begin to toll until the Commissioner renders her decision in the instant matter. (*N.J.A.C.* 6A:3-1.17(c)2).

Accordingly, the Initial Decision is adopted as the final decision in this matter for the reasons well articulated therein. The Board of Education of Berkeley Township is directed to

---

[2] To the extent the Board's arguments may be interpreted as a claim that the positions of Supervisor and/or Director are separately tenurable, such a contention is erroneous. In that neither of these positions is specifically eneumerated in *N.J.S.A.* 18A:28-5, they are not separately tenurable. (See *Nicholas Duva v. State-Operated School District of the City of Jersey City*, decided by the State Board of Education March 6, 2002.)

[3] The record reflects that Respondent Marie Keck was promoted from Principal to the District Supervisor of Elementary Education on July 1, 2002; Respondent Debora Evans was appointed to this position on July 1, 2004. On or about August 18, 2004, the title of the position was changed to District Director of Elementary Education, although the duties and responsibilities remained the same.

immediately appoint petitioner to the position of District Director of Elementary Education and compensate him with back pay, less mitigation, and emoluments due him consistent with this decision.

IT IS SO ORDERED.[4]

ACTING COMMISSIONER OF EDUCATION

Date of Decision: 8/02/06

Date of Mailing: 8/02/06

[4] This decision may be appealed to the State Board of Education pursuant to *N.J.S.A.* 18A:6-27 *et seq.* and *N.J.A.C.* 6A:4-1.1 *et seq.*

State of New Jersey
OFFICE OF ADMINISTRATIVE LAW

INITIAL SUMMARY

DECISION

OAL DKT. NO. EDU 8887-04

AGENCY DKT. NO. 319-9/04

MAURICE S. KAPROW,

Petitioner,

v.

BOARD OF EDUCATION OF BERKELEY TWP., DEBRA EVANS AND MARIE KECK,

Respondents.

Duane O. Davidson, Esq., for petitioner (Lomurro, Davidson, Eastman & Muñoz, P.A., attorneys)

Mary Jane Lidaka, Esq., for respondents (Berry, Sahradnik, Kotzas, Riordan & Benson, attorneys)

Record Closed: March 29, 2006 Decided: May 30, 2006

BEFORE **JAMES W. FAISON, III,** ALJ:

STATEMENT OF THE CASE

Petitioner, Maurice S. Kaprow, is currently on active duty as a Commissioned Officer (Commander) in the United States Navy. He has been assigned to the Chaplin Corp. since January 1990. From 1976 through 1981, petitioner was employed by respondent, Berkeley Township Board of Education (hereafter "Berkeley BOE" or "respondent") where, on October 5, 1979, he acquired tenure in the position of Assistant

Superintendent. Effective June 30, 1981, Berkeley BOE terminated petitioner's employment as a Reduction In Force (RIF). Under the circumstances of petitioner's dismissal from employment, Berkeley BOE was obligated to inform petitioner regarding re-employment prospects to positions for which he is qualified. Petitioner alleges that Berkeley BOE failed to notify and failed to timely notify him of positions in which he could be employed. He further contends that he should immediately be appointed to the position of District Supervisor (or Director) of Elementary Education because the duties of that position are substantially the same as petitioner's duties as Assistant Superintendent. Respondents Marie Keck and Debra Evans were hired as District Supervisor of Elementary Education in July 2002 and July 2004, respectively.

Berkeley BOE refutes petitioner's entitlement to the position of District Supervisor of Elementary Education. It contends that the duties and responsibilities of that position are dissimilar to those incumbent upon petitioner when he served as Assistant Superintendent. Berkeley BOE contends that the position of District Supervisor of Elementary Education is a distinctly different position and, therefore, was not obligated to notify petitioner of its existence, opening or hiring to fill.

PROCEDURAL HISTORY

Petitioner served a Verified Petition (Exhibit C-1) dated September 8, 2004, upon the New Jersey State Department of Education, Bureau of Controversies and Disputes seeking relief and remedy of the complained of conduct of Berkeley BOE. With the petition, Proof of Service was filed verifying service upon all respondents. Answer to Petition (Exhibit C-2) dated October 6, 2004, was filed on behalf of all respondents. Determining the matter to be a contested case, Bureau of Controversies and Disputes transmitted the case to the Office of Administrative Law (OAL) where it was filed October 29, 2004, pursuant to N.J.S.A. 52:14F-1 to -13.

A settlement conference was conducted by telephone March 29, 2005. Parties could not reach resolution, but agreed to present the case by way of mutual motions for Summary Decision. In compliance with instruction, they filed joint Stipulations of Facts (Exhibit P-2) and Issues in Contention (Exhibit P-4). Pursuant to a telephone pre-

hearing conference conducted June 7, 2005, a Scheduling Order was entered June 21, 2005 (Exhibit C-3), regarding the filing of motions and reply briefs. The parties were also permitted to reserve the right to present testimony, exhibits and oral arguments in support of their respective positions and to refute their adversary's motion. Those presentations were made November 4, 2005, and the record was permitted to remain open to permit time for filing closing briefs. The briefs were timely received and the record initially closed December 9, 2005.

Review of the briefs found them to be replete with information and citations regarding the issues of tenure and similarity/nonsimilarity of the positions in question. However, they were less instructive on the issue of required notice notwithstanding tenure. The record was reopened (Exhibit C-4) to permit the parties to supplement their closing briefs, which they did. After dealing with a housekeeping issue of accounting for an exhibit, the record again closed.

Witnesses and exhibits are listed in the appendix.

Petitioner has previously filed several petitions against Berkeley BOE related to the reduction in force and elimination of his post as Assistant Superintendent. The first petition, filed August 1, 1988, was denied eventually due to the ninety day rule, but several admonishments were leveled at respondent. The Commissioner found that respondent erred in its duties under N.J.S.A. 18A:28-12, by not notifying petitioner about the position of Assistant Superintendent of Administrative Services, available in 1986. The Appellate Division referred to Berkeley BOE's actions as stonewalling in response to its failure to reply to petitioner's letters of correspondence sent in 1988 and failure to create a preferred eligibility list. In fact, the Appellate Division ordered respondent to inform petitioner of any Assistant Superintendent vacancy, or other similar position. Kaprow, supra, 255 N.J. Super. at 92. The Supreme Court noted its disapproval of respondent's conduct and underscored the Commissioner's instruction to be more conscientious in fulfilling its obligations in regards to seniority rights. Kaprow, supra, 131 N.J. at 591-592.

On December 2, 1999, petitioner filed a second petition seeking vindication of his seniority rights after learning that several positions, for which he qualified, had been filled by others with less seniority. This contest was resolved by way of settlement and a Consent Order entered by the ALJ. Kaprow v. Board of Education, EDU 00117-00, Initial Decision Settlement, (February 6, 2001), adopted, Comm'r. (March 26, 2001). The Order, dated February 1, 2001, again admonished respondent for failing to fulfill its statutory duty under N.J.S.A. 18A:28-12 and further directed respondent to maintain seniority and eligibility lists of employees affected by a RIF.

SUMMARY DECISION

The Uniform Administrative Procedure Rules provide that summary decision is available in the administrative process when:

> the papers and discovery which have been filed, together with the affidavits, if any, show that there is no genuine issue as to any material fact challenged and that the moving party is entitled to prevail as a matter of law. When a motion for summary decision is made and supported, an adverse party in order to prevail must by responding affidavit set forth specific facts showing that there is a genuine issue which can only be determined in an evidentiary proceeding. If the adverse party does not so respond, a summary decision, if appropriate, shall be entered.
>
> [N.J.A.C. 1:1-12.5(b).]

Summary decision is substantially similar to the summary judgment rule provided by the New Jersey Rules of Court, R. 4:46-2. Contini v. Bd. of Ed. of Newark, 286 N.J. Super. 106, 121 (App. Div. 1995), certif.. denied, 145 N.J. 372 (1996)

Moreover, the New Jersey Supreme Court has declared that in deciding a motion for summary judgment a 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., 142 N.J. 520, 540 (1995). Conversely, if the moving party demonstrates by "competent evidential material" that no genuine, material issue of fact remains, then summary judgment is appropriate. The critical inquiry may thus be framed as asking "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." Id. at 536 (quoting Anderson v. Liberty Lobby, Inc., 477 U.S. 242, 106 S. Ct. 2505, 91 L. Ed. 2d 202 (1986)). Thus, the role of the judge is to resolve whether there is a genuine issue for trial and not to "weigh evidence and determine the truth of the matter." Id. at 540. The import of the summary judgment rule is to eliminate cases in which a trial would serve no useful purpose, i.e. a rational jury could reach only one conclusion, without unjustly depriving a party of a trial. Ibid. When a party moves for summary decision in the context of an administrative proceeding, the analysis whether a genuine issue of material fact exists must be based upon the principles set forth above and not in consideration of the standard of review afforded the agency.

FACTUAL DISCUSSION

Petitioner Maurice Kaprow was employed by respondent Berkeley BOE as an Assistant Superintendent in Charge of Curriculum beginning October 5, 1976. Kaprow acquired tenure as an Assistant Superintendent on October 5, 1979. After spending seven months as Acting Superintendent, Chief Administrator for the Berkeley Township School District, petitioner's job title was changed back, effective February 5, 1980, to Assistant Superintendent. The Berkeley BOE then terminated petitioner's employment effective June 30, 1981, as part of a reduction in force (RIF). At the time, Kaprow was the only tenured Assistant Superintendent in the District and, therefore, the only one who acquired seniority rights. Kaprow holds the following certificates and endorsements issued by the New Jersey State Board of Examiners:

A.) Instructional Certificate:
  1.) Teacher of Hebrew – 1972
  2.) Elementary School Teacher –1979

B.) Administrative Certificate
  1.) Principal Endorsement – 1972
  2.) Supervisor Endorsement – 1972
  3.) School Administrator – 1973

The administrative positions in the district, prior to August 18, 2004, are ranked from highest, as follows:

A.) Superintendent of Schools

B.) District Director/Supervisor of Elementary Education

C.) Principal

By letter dated September 22, 1981, the Berkeley BOE informed Kaprow that he had seniority rights to the position of Assistant Superintendent or its equivalent. Respondent assured Kaprow that it would notify him, via his last known address, of any job applicable these rights. However, respondent failed to notify petitioner of his seniority rights to certain positions, despite assurances and a statutory responsibility to do so. The Berkeley BOE provided no notice to Kaprow of any eligible positions until he requested such information in February of 1988. Consequently, petitioner filed a Verified Petition against the Board on August 1, 1988, asserting a claim to the position of Assistant Superintendent of Administrative Services and/or District Supervisor. Kaprow's claim was eventually dismissed as untimely, pursuant to N.J.A.C. 6:24-1.2I.

On May 2, 1997, after another prolonged period of no communications, petitioner requested from respondent details of each position filled requiring an Administrative Certificate, since January 4, 1996. Petitioner requested the same information again on September 28, 1999, after the Berkeley BOE failed to notify him of any available positions or maintain a seniority list. On December 2, 1999, Kaprow filed a Verified Petition against Berkeley BOE. The action was eventually resolved by way of a settlement. As part of the settlement, respondent sent petitioner a "Seniority List" along with job notifications on four occasions before again ceasing communications. On June 14, 2004, Kaprow requested information on all new hires since January 1, 2000, requiring an Administrative Certificate. The District Superintendent eventually responded with the requested information by letter dated July 6, 2004. Specifically, the Board informed Kaprow about the hiring of Debora Evans as Principal on July 1, 2001, Marie Keck as District Supervisor of Elementary Education on July 1, 2002, and Debora Evans as District Supervisor of Elementary Education on July 13, 2004. The salary for Keck was $90,830.00 and for Evans as District Supervisor, $93,600.00. The Board has been unable to produce information such as, memoranda, letters, notes, resolutions or minutes from any meeting referencing these positions or appointments thereto.

LEGAL DISCUSSION

Educational personnel are tenured in New Jersey under the Tenure Act, N.J.S.A. 18A:28-1 to -18. The Tenure Act should be applied liberally to further its purpose of shielding teaching staff who qualify for its protection. Spiewak v. Rutherford Bd. of Ed., 90 N.J. 63, 74 (1982). To qualify for tenure under the Act, an individual must satisfy the following requirements:

> The services of all teaching staff members employed in the positions of teacher, principal, other than administrative principal, assistant principal, vice-principal, assistant superintendent, ... and such other employees as are in positions which require them to hold appropriate certificates issued by the board of examiners, serving in any school district or under any board of education ... 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 ... after employment in such district or by such board for:
>
> (a) Three consecutive calendar years, or any shorter period which may be fixed by the employing board for such purpose; or
>
> (b) Three consecutive academic years, together with employment at the beginning of the next succeeding academic year; or
>
> (c) The equivalent of more than three academic years within a period of any four consecutive academic years.
>
> For purposes of this chapter, tenure in any of the administrative or supervisory positions enumerated herein shall accrue only by employment in that administrative or supervisory position. Tenure so accrued shall not extend to any other administrative or supervisory position and nothing herein shall limit or restrict tenure rights which were or may be acquired pursuant to N.J.S.A. 18A:28-6 in a position in which the individual actually served.
>
> [N.J.S.A. 18A:28-5.]

The New Jersey State Board of Education (State Board) has established a certificate system requiring any person employed as a teaching staff member by a

district board of education [to] hold a valid and appropriate certificate N.J.A.C. 6A:9-5.1. The Board has provided for three distinct types of certificates – Instructional, Educational Services, and Administrative. N.J.A.C. 6A:9-2.1; N.J.A.C. 6A:9-5.2. An educator may hold more than one of these certificate types.

In addition to the different types of certificates, the State Board has also provided for special endorsements, which are affixed to a specific certificate. These endorsements, e.g. Art, Health Education, English, etc., "coincide with the educational subjects or positions that share common attributes and thus are grouped under a particular certificate." Dennery v. Bd. of Educ., 131 N.J. 626, 633 (1993). Accordingly, a person is qualified to teach in a particular area based upon the endorsement(s) enumerated on the Instructional Certificate.

Once a person becomes tenured under an Instructional Certificate for a specific endorsement, that person has tenure for all endorsements under that certificate. Grosso v. Board of Education, decided by the State Board of Education, March 7, 1990, appeal dismissed, No. A-4359-89 and A-4360-89 (App. Div. 1990).

However, tenure protection is not available across certificates. Dennery v. Bd. of Educ., 131 N.J. 626, 638 (1993). In Dennery, petitioner's position of guidance counselor was eliminated as part of a reduction in force (RIF) and replaced by a new position termed "class supervisor," which required an Administrative Certificate. Dennery, already holding an Instructor's Certificate, obtained an Administrative Certificate and applied for one of the new positions. The Court found that a comparison of the endorsements under each certificate revealed substantial differences between the two certificates. Id. at 637. Endorsements represent common or related skills required for satisfactory performance of educational duties under that certificate, while certificates "represent distinct and separate areas spanning the entire field of public education." Ibid. Under the regulations, the Court held that "tenure accrues to a teaching staff member under a certificate only if he or she has also served in a position under that same certification for a requisite period of time." Id. at 638.

A school district may not avoid an individual's tenure rights by creating a new position that, while it may have a different name or include additional requirements, is substantially similar to the prior position. Dennery, supra, 131 N.J. at 639. Characteristics that will not warrant a finding of substantially similar include, but are not necessarily limited to: 1.) A mere overlap of duties; 2.) A similar position but with additional meaningful duties; and 3.) A similar position but with different responsibilities. Id. at 640; see also Sandri v. Bd. of Educ., 1986 S.L.D. 1501 (ruling that duties of abolished position of supervisor of guidance/shop were similar but of lesser nature and scope then newly-created position of director of special needs and student services.)

In Viemeister v. Board of Education, 5 N.J. Super. 215 (App. Div 1949), a tenured principal was reinstated as principal despite the board of education's attempt to create the new position of "teaching principal." The court held that Viemeister's previous position was not abolished in fact and, further, explained that in analyzing whether two positions are substantially similar, courts will look to substance over form. Id. at 218.

The area of tenure law is further complicated in regards to Administrative Certificates. The law treats Administrative Certificates differently. At the outset, the endorsements available for an Administrative Certificate include school administrator, principal, supervisor and school business administrator. N.J.A.C. 6A:9-12.3. Each endorsement contemplates different responsibilities. Furthermore, N.J.S.A. 18A:28-5 contains a list of certain positions such as "teachers, principals other than administrative principals, assistant principals, vice principals, assistant superintendents and all school nurses..." that are separately tenurable. That is,

> tenure in any of the administrative or supervisory positions enumerated herein shall accrue only by employment in that administrative or supervisory position. Tenure so accrued shall not extend to any other administrative or supervisory position....
>
> [N.J.S.A. 18A:28-5.]

This statutory language is based upon Nelson v. Board of Education, 148 N.J. 358 (1997).[i] In Nelson, the petitioner, who was employed as a Department Chairperson pursuant to his Supervisor endorsement, also held a Principal endorsement on his Administrative Certificate. Eventually, he lost his Chairperson appointment due to a RIF. Later, a principal position in the district was filled and Nelson filed a claim that he had tenure rights pursuant to his Principal endorsement, which he had never utilized. The Court ruled that Nelson did not obtain tenure rights to the principal position since his tenure rights under the Administrative Certificate only applied to positions in which he had experience, i.e. the Chairperson position that required the Supervisor endorsement. Id. at 366. Moreover, the Court went over the concept of "separately tenurable" noting that "principal" was specifically enumerated in N.J.S.A. 18A:28-5, and therefore, tenure could only be obtained by actual work experience as a principal. Id. at 365-366.

While Nelson affirms that the positions in N.J.S.A. 18A:28-5 are separately tenurable, a case decided by the State Board of Education has concluded that positions not specifically enumerated in N.J.S.A. 18A:28-5 are not separately tenurable. See Duva v. State-Operated School District of the City of Jersey City, 2002 AGEN LEXIS 1373. Duva had served as Director of Research, Planning and Evaluation, a position that required an Administrative Certificate with either a principal or supervisor endorsement. The position was eventually abolished, and the district gave him a school psychologist assignment under his Educational Services Certificate. Thereafter, Duva claimed tenure rights to a supervisory position. The State Board described both Duva's prior position as director and the position for which he claimed tenure rights as unspecified, since neither was specifically enumerated in N.J.S.A. 18A:28-5. The State Board ultimately found that an Administrative Certificate with an endorsement as a school administrator was necessary for both jobs, rather than a principal or supervisor endorsement. Since neither job was classified, the State Board concluded that tenure protection extended to "all assignments under his Administrative Certificate for which he held the appropriate endorsement, except for those positions specifically enumerated in

[i] The language was amended by the Legislature in response to the Appellate Division's ruling in Nelson v. Board of Education, A-6441-94 (App. Div. April 29, 1996), which relied on Dennery for the proposition that tenure under one endorsement transferred to all other endorsements on that certificate. See L. 1996, c. 2153, §1-3.

N.J.S.A. 18A:28-5." Duva, supra, at 27. Thus, Duva, who also had a supervisor endorsement, qualified for any non-specified position requiring a supervisor endorsement. This line of cases therefore suggests that an Administrative Certificate is similar to an Instructional Certificate when no separately tenurable position is involved. Furthermore, tenure acquired in a separately tenurable position can transfer to another position only if it is exactly the same or substantially similar and not a separately tenurable position.

In sum, there are three types of Certificates available to an educator – Instructional, Educational Services and Administrative. The endorsements available under each certificate identify a specific subject area in which a certificate holder is authorized to serve. Tenure rights attach depending upon the type of certificate and the position he or she holds. For Administrative Certificates, positions enumerated under N.J.S.A. 18A:28-5 are separately tenurable, and tenure rights to these positions are only afforded based upon service in that area. On the other hand, if tenure is accrued in a position that is unclassified, then tenure rights extend to all unspecified positions under that endorsement. Alternatively, and relevant to the matter herein, tenure rights may extend to a separately tenurable position if it is substantially similar to a prior post to which the educator had tenure.

ANALYSIS

Petitioner's primary argument is that District Supervisor (or Director) Elementary Education (DDEE) and Assistant Superintendent are substantially similar so that tenure and, therefore, seniority rights apply. Essentially, the job descriptions, while not identical, generally describe the same types of responsibilities. Using the criteria analyzed in Santasiero, supra, petitioner avers that the comparison between DDEE and Assistant Supervisor illustrates identical responsibilities and duties. In light of the alleged similarities, Kaprow asserts that he is entitled to damages, including reinstatement and pre- and postjudgment interest.

The respondent Berkeley BOE's first argument contesting Kaprow's tenure rights is that both positions are separately tenurable and therefore he has no rights to DDEE.

Respondent next claims that the positions are not substantially similar since the responsibilities and duties of DDEE are much more limited than Assistant Superintendent. That is, Berkeley BOE argues that DDEE is more supervisory in nature, e.g. observing staff, supervising basic skills and enrichment and technology programs, organization of committees, etc. The Berkeley BOE also contends that a separate endorsement of supervisor is required. Furthermore, the respondent points to the language of N.J.S.A. 18A:28-5 prohibiting tenure rights accrued in a separately tenurable position to apply to "any other administrative or supervisory position." Since Kaprow has no tenure rights to DDEE, the Berkeley BOE argues that seniority rights do not apply either. Consequently, respondent alleges it had no obligation to notify petitioner of any DDEE opening.

It is undisputed that petitioner's former position of Assistant Superintendent is a separately tenurable position under his Administrative Certificate. Thus, the issue in this case is whether the position of DDEE is substantially similar to Assistant Superintendent thereby giving Kaprow tenure rights to that position. If the positions are substantially similar, then the Berkeley BOE breached a duty owed to Kaprow by failing to notify him of his tenure rights to the position.

In order to reach a proper conclusion, a comparison must be made between the employment posts held by petitioner and the current position in dispute: Assistant Superintendent in charge of Curriculum, Assistant Superintendent and DDEE. Specific duties and responsibilities for the District Director of Elementary Education include:

1.) Organize curriculum committees for the review and selection of textbooks and curriculum improvement.
2.) Observe teaching staff in the district.
3.) Be responsible for district compliance of equal educational opportunities.
4.) Organize in-service workshops for student achievement.
5.) Recommend and/or develop staff development program. Organize district committees for areas of focus in education as directed by the Superintendent.
6.) Prepare news releases to inform community of educational happenings in the district.
7.) Order testing materials and function as the district testing coordinator.

8.) Assist, organize, and report to the Superintendent of Schools the progress and results of district goals.
9.) Maintain formal and informal channels of communication between Berkeley and Central Regional School District.
10.) Supervise the Basic Skills Program in the schools.
11.) Supervise the District's Enrichment and Technology Programs.
12.) Assist the building principals in supervising and evaluating instructional and non-instructional personnel.
13.) Perform administrative duties as directed by the Superintendent of Schools.
14.) Serve as building principal in his/her absence.

The minimum requirements to obtain this position included a Standard New Jersey Teacher's Certification, Certification as a Supervisor and Principal; Five years of successful elementary teaching experience; and a minimum of three years administrative or supervisory experience. Furthermore, the "Duty Status" for this position required the educator to: 1.) Serve as a District Administrator and supervise the Basic Skills Program in the schools, and 2.) Be directly responsible to the Superintendent of Schools.

In comparison, the job function for Assistant Superintendent (the most recent position held by petitioner) included assisting the Superintendent in carrying out the duties and responsibilities related to all areas of the elementary school district's programs. Additionally, the position required the individual to develop the curriculum and be responsible for administrative responsibilities related to federal programs and various grant programs. There were twenty-four separate "Specific Duties and Responsibilities" enumerated for this position. In relevant part, these duties included:

1.) Serve as the Superintendent's Assistant in charge of curriculum supervision, curriculum improvement and curriculum education.
2.) Report directly to the Superintendent for all supervision of, improvement of, and evaluation of curriculum and academic programs.
3.) Make administrative and supervisory decisions, subsequent to the Superintendent's review and approval for all work responsibilities assigned by the Superintendent.
4.) Keep the Superintendent and the Building Principals fully informed as to the conditions, needs and daily operations of the school district according to the responsibilities assigned by the Superintendent.

5.) To assist with the supervision and evaluation of policies, rules and regulations formulated by the Board of Education and the Superintendent of Schools.
6.) Assist the Superintendent of Schools by evaluating principal and teacher efficiency for appointment, promotion, demotion, transfer or dismissal purposes.
7.) Assist in preparation of public news releases which are to be submitted directly to the Superintendent of Schools which will inform the community of achievements of the academic programs.
8.) Assume full responsibility for making certain the same curriculum and the same educational programs are being developed simultaneously in all schools.
9.) To assist administrators and instructional staff members in the development of progress reports which are adequate and suitable for reporting pupil progress.
10.) To assist, in obtaining speakers, demonstrations and audio-visual materials.
11.) To assist the Superintendent of Schools with the supervision of all school employees and their school activities and work responsibilities.
12.) Attend various workshops, conferences and conventions in an effort to improve personal professional skills and to bring back any new innovative ideas for use in the school district.
13.) To serve in capacity of the Superintendent of Schools during the Superintendent's absence and to fulfill all of the Superintendent's duties during the Superintendent's absence.
14.) To serve and be responsible for other various duties related to the curriculum, academic programs and management of the school district as outlined by the Superintendent of Schools.

The minimum requirements to hold this position were: 1.) A standard New Jersey Teacher's Certificate and five years of successful elementary teaching experience; 2.) A Master's Degree from an approved institution; 3.) A standard Principal's Certificate and a minimum of three years of administrative or supervisory experience; 4.) Successful completion of a college curriculum approved by the New Jersey State Department of Education (NJDOE) as the basis for issuing an endorsement or a program of college studies including twelve semester hours of graduate study in administration, supervision and curriculum development; 5.) Authorization from the NJDOE for the appropriate certificate for an Assistant Superintendent which is considered "in good standing"; and 6.) Any additional requirements made by NJDOE which are necessary for the issuance of a certificate for an Assistant Superintendent.[ii] The "Duty Status" dictated that the position would be

[ii] See footnote 15.

directly responsible to and receive assignments and workload from the Superintendent of Schools.

When examined side-by-side, it is readily apparent that both jobs involved district wide responsibilities. Both positions were intricately involved in development of curriculum in the district, including formation of committees, selection of textbooks, and coordination of testing; observing and/or evaluating staff across the district; improving and overseeing educational programs throughout the district; overseeing compliance with equal opportunity policy; performing administrative duties as delegated by the Superintendent; directly reporting to Superintendent; and required an Administrative Certificate with supervisor and principal endorsements. Furthermore, DDEE had other similarities with Kaprow's first administrative position as Assistant Superintendent in Charge of Curriculum (ASCC). Both included many of the above similarities, plus ASCC also was in charge of initiating a newsletter to inform the community of academic programs and achievements. Finally, no matter how the position is named, it appears that it was on a higher line of authority than principal but directly below the Superintendent.[iii]

Having examined the specifics of the jobs and reviewed the parties' arguments, the analysis indicates that the positions of DDEE and Assistant Superintendent are substantially similar. If anything, DDEE is a more restricted position requiring less responsibility, yet still requires the additional endorsement of a supervisor. This fact cuts against respondent's reliance on cases in which no substantial similarity was found. In such circumstances, it is most often because the new position required greater responsibility and oversight than the former position. In Viemeister, the Appellate Division held that the prior position had not been abolished in fact and that, in substance, the former position continued. These facts are similar to the present case, except that many years appear to have passed in between the "abolition" of the former position and "creation" of the other.

[iii] Respondent has submitted a flowchart showing DDEE as a lateral move from principal but also used the term "promotion" when describing a former principal's assumption of the position.

CONCLUSION

DDEE and Assistant Superintendent both have the same line of authority, perform district-wide functions, and have the same job requirements. Comparing substance over form, the two positions are substantially similar, and although Assistant Superintendent was a separately tenurable position, tenure rights should be applicable in this case.

A final note must be made concerning damages. Petitioner seeks both pre- and postjudgment interest, relying on Springer v. Board of Education of Mount Holly, EDU 8421-97, Initial Decision, (May 8, 1998), adopted, Comm'r. (June 25, 1998) <http://lawlibrary.rutgers.edu/oal/search.html>. The ALJ stated:

> When a teaching staff member asserts her tenure and seniority rights to be assigned or reinstated to a position and if the teaching member is successful, she would be awarded back pay and emoluments commencing from the date that she should have been given the position.
>
> [Id. at 7.]

"Emolument" has been embraced by the New Jersey Supreme Court as:

> [t]he profit arising from office or employment; that which is received as a compensation for services, or which is annexed to the possession of office as salary, fees, and perquisites; advantage; gain, public or private.
>
> [Casamasino v. City of Jersey City, 158 N.J. 333, 350 (1999) (citing Black's Law Dictionary 616 (4th ed. 1968)).]

Administrative decisions have consistently held that reinstatement to a prior position entitles the successful party to back pay. See Luppino v. Board of Education, 1980 S.L.D. 1028; Arnold v. Board of Education, 96 N.J.A.R.2d (EDU) 1015.

Furthermore, an award of interest, both pre- and/or postjudgment, is within the power of the Commissioner of Education in response to a successful claim for a monetary award. N.J.A.C. 6A:3-1.17. In order to obtain prejudgment interest, the party must "specify in the petition's request for relief and shall propose, before the Commissioner or the ALJ, whoever is hearing the case, an interest calculation...." Ibid.

Moreover, the "Commissioner shall award prejudgment interest when he or she has concluded that the denial of the monetary claim was an action taken in bad faith and/or has been determined to have been taken in deliberate violation of statute or rule." Ibid. Petitioner cites respondent's continual failure to keep him abreast of positions in which he may have been eligible as evidence of bad faith.

Lastly, petitioner requests attorney's fees be awarded due to the extraordinary circumstances. However, petitioner points to no legal authority authorizing such an award. Therefore, attorney's fees do not appear to be appropriate in the instant matter.

ORDER

It is **ORDERED** that respondent's Motion for Summary Decision is **DENIED.** It is further **ORDERED** that petitioners Motion for Summary Decision is **GRANTED**. It is further **ORDERED** that petitioner shall be immediately appointed as District Director of Elementary Education of the Berkeley Township School District. It is further **ORDERED** that petitioner is awarded back pay, seniority rights, tenure rights and all other rights and benefits to which he is entitled consistent with this initial decision. It is further **ORDERED** that petitioners request for counsel fees 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 (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.

5-30-06
DATE

JAMES W. FAISON, III, ALJ

E-mail Receipt of Initial Decision Confirmed by the Department of Education on:

5/30/06
DATE

JUN 1 2006
DATE

Mailed to Parties:

DIRECTOR AND CHIEF ADMINISTRATIVE LAW JUDGE
OFFICE OF ADMINISTRATIVE LAW

mh

APPENDIX

EXHIBITS IN EVIDENCE

For Petitioner:

P-1 Certification of Petitioner
P-2 Stipulation of Facts (with attachments)
P-3 Comparison of Job Descriptions
P-4 Issues in Contention
P-5 Berkeley Township School District: Chart of Line and Staff Relationship
P-6 Approximate Salary Difference: July 2002 – October 2005
P-7 Contract

For Respondent:

R-1 Berkeley Township Board of Education: Flow chart (revised 8/18/04)

Court:

C-1 Verified petition
C-2 Answer to petition
C-3 Scheduling order
C-4 Letter to attorneys, 1/25/06

WITNESSES

For Petitioner:

Maurice Kaprow

For Respondent:

Arleen Lippincott

262-06

OAL DKT. NO. EDU 8279-00
AGENCY DKT. NO. 287-8/00

BOARD OF EDUCATION OF THE GLOUCESTER COUNTY INSTITUTE OF TECHNOLOGY, GLOUCESTER COUNTY,	:	
PETITIONER,	:	COMMISSIONER OF EDUCATION
V.	:	DECISION
BOARD OF EDUCATION OF THE BOROUGH OF MOUNT EPHRAIM, CAMDEN COUNTY,	:	
RESPONDENT.	:	

The record of this matter, the parties' proposed Settlement Agreement, and the Initial Decision issued by the Office of Administrative Law have been reviewed.

Upon such review, the Commissioner approves the parties' settlement and adopts the Initial Decision as the final decision in this matter, which is hereby dismissed, subject to compliance with the terms of the settlement.

IT IS SO ORDERED.

Lucille Davy

ACTING COMMISSIONER OF EDUCATION

Date of Decision: 8/03/06

Date of Mailing: 8/03/06

State of New Jersey
OFFICE OF ADMINISTRATIVE LAW

INITIAL DECISION
SETTLEMENT
OAL DKT. NO. EDU 8279-00
AGENCY DKT. NO.287-8/00

BOARD OF EDUCATION OF THE GLOUCESTER VOCATIONAL TECHNICAL SCHOOL DISTRICT, GLOUCESTER COUNTY,
Petitioner,
v.
BOARD OF EDUCATION OF THE BOROUGH OF MOUNT EPHRAIM, CAMDEN COUNTY,
Respondent.

Louis Cappelli, Jr., Esq., for petitioner
Frank P. Cavallo, Esq., for respondent (Parker McCay, attorneys)

Record Closed: June 23, 2006 Decided: July 19, 2006

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

Petitioner Board of Education of the Gloucester County Vocational Technical School District filed a petition asserting that respondent Mount Ephraim Borough Board of Education has wrongfully refused to pay tuition for respondent's students who attend petotioner's school. This matter was transmitted to the Office of Administrative Law on October 26, 2000, for determination as a contested case, pursuant to N.J.S.A. 52:14B-1 to -15 and N.J.S.A. 52:14F-1 to -13. Because of the pendency of a companion case before the Superior Court, Appellate Division, entitled K.B. v.

Rancocas Valley Reg. H.S. Dist., Dkt. No. A-6814-02-T5, decided on November 12, 2004, certification denied by the Supreme Court on January 28, 2005, the proceedings in this matter were held in abeyance at the request of the parties.

Numerous status conferences were held between July 2001 and December 2004, and an in-person settlement conference was held on June 10, 2005. When no settlement was finalized, the matter was scheduled for hearing on November 2, 2005. On that date the hearing was adjourned based on a likely settlement, and rescheduled for November 28, 2005. On this latter date, the parties agreed to a settlement, subject to execution of a written settlement agreement.

The parties subsequently prepared a Settlement Agreement indicating the settlement terms. However, when no settlement agreement complying with the formal requirements of N.J.A.C. 6A:3-1.13(d) for effectuating a settlement were forthcoming from petitioner, Orders were entered on May 4 and June 8, 2006. As a result of receiving an original signed and sealed resolution of the Board of Education of the Gloucester County Vocational Technical School District on June 23, 2006, authorizing the settlement, the written Settlement Agreement indicating the terms thereof now conforms to the requirements N.J.A.C. 6A:3-1.13(d). The written 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.

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

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

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

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

July 19, 2006

DATE

Joseph F. Martone

JOSEPH F. MARTONE, ALJ

Receipt Acknowledged:

7-21-06

DATE

M. Kathleen Dunson/cg

DEPARTMENT OF EDUCATION

Mailed to Parties:

JUL 24 2006

DATE

Laura Sanders

DIRECTOR AND CHIEF ADMINISTRATIVE LAW JUDGE

OFFICE OF ADMINISTRATIVE LAW

mph

SETTLEMENT AGREEMENT

WHEREAS, the Gloucester County Institute of Technology (hereinafter "G.C.I.T) operates a Performing Arts Academy with enrollment open to both in-county and out-of-county residents;

WHEREAS, pupil(s) from the Borough of Mount Ephraim School District, County of Camden, (hereinafter "Mt. Ephraim") applied to and were accepted at GCIT's Performing Arts Academy commencing with the 1997-1998 school year and continuing through the 2004-2005 school year; and,

WHEREAS, GCIT has filed a Petition of Appeal with the Commissioner of education, State of New Jersey, seeking the payment of and out-of county fee for each pupil residing within the geographical boundaries of Mt. Ephraim and attending GCIT, together with the costs of transportation for those pupils and interest on the unpaid tuition; and,

WHEREAS, Mt. Ephraim has, in good faith, denied GCIT's claims; and,

WHEREAS, All possible legal proceedings have been undertaken and exhausted on behalf of Mt. Ephraim with respect to the issues presented in defense of GCIT's claims; and,

WHEREAS, GCIT and Mt. Ephraim have undertaken, through their respective counsel settlement negotiations as it is in both school districts' financial interest to reach an amicable resolution of this matter without further legal proceedings or delay.

IT IS HEREBY AGREED by and between and to settle and terminate any and all disputes between them by executing this Settlement Agreement ("Agreement") as follows:

1. Mt. Ephraim shall pay, within sixty (60) days of execution of this Agreement, the sum of $35,000.00 representing payment in full for all disputes between the parties and that were made a part of the Petition of Appeal.
2. Both GCIT and Mt. Ephraim do hereby remise, release and forever discharge each other, their respective Boards of Education and their officers, members, employees, agents, respective successors and assigns, heirs, executors and administrators, of and from any all manner of action and causes of action, suits, debts, claims and demands whatsoever in law or in equity, which they ever had, now and up through and including June 30, 2005.
3. Both Boards of Education will take the appropriate action at its next regularly scheduled meeting to approve and accept the terms of the within settlement.
4. By entering into this Agreement, neither party is making any admission with respect to any of the issues raised by the respective parties.
5. Each party is to bear their own cost and attorneys fees.
6. Both GCIT and Mt. Ephraim agree and acknowledge that the Agreement and the parties described herein and the settlement and termination of any claims that the parties have against each other, as set forth herein, is not and shall not be construed to be an admission of any violation of any federal, state or local statute or regulation or of any duty owed by and between the parties.
7. By signing this Agreement, the parties certify that they have had the opportunity to discuss the Agreement with counsel. They are fully satisfied with the services of their counsel with respect to both this agreement and all other aspects of this case and

they enter into this Agreement knowingly, willingly and without any coercion or improper inducement.

8. In the event that any portion of this Agreement is determined to be illegal, the parties agree in advance, to reform the Agreement so that each party receives the full benefit of the bargain.
9. By signing this Agreement, each signator represents that he or she is a party or has been duly authorized by a party to sign that party's behalf.
10. The parties agree that this Agreement may be signed and counterparts and that facsimiles of signatures will have the same force and effect as original signatures.

Intending to be legally bound hereby, GCIT and Mt. Ephraim execute the foregoing Agreement this ____ day of _____, 2005.

Witness:

BOARD OF EDUCATION OF
GLOUCESTER COUNTY
INSTITUTE OF TECHNOLOGY

BOARD SECRETARY

BOARD PRESIDENT

Witness:

BOARD OF EDUCATION OF THE
BOROUGH OF MOUNT EPHRAIM
SCHOOL DISTRICT

BOARD SECRETARY

BOARD PRESIDENT

MOUNT EPHRAIM PUBLIC SCHOOLS

125 South Black Horse Pike
MOUNT EPHRAIM, NJ 08059

RICHARD J. SERFLING
Chief School Administrator
(856) 931-1634
FAX (856) 931-0202

MICHAEL A. PROFICO
Supervisor of Special Services
(856) 931-1785
FAX (856) 931-0202

MARY LOU HIRSHMILLER
Supervisor of Curriculum & Instruction
(856) 931-7807

MELISSA E. RAYWOOD
Business Administrator/Board Secretary
(856) 931-4134
FAX (856) 931-6630

Mt. Ephraim Board of Education
Regular Meeting
R.W. Kershaw School
Monday, November 14, 2005
7:30PM

FINANCE

A motion was made by James Pacetti and seconded by Tina DeVita-Meeser to approve Items 1- 12 as follows:

(11) Gloucester County Institute of Technology Settlement Agreement
It is recommended that the attached settlement agreement be approved as recommended by counsel. [Attachment]

Motion Carried – All Ayes

I, Melissa Raywood, Business Administrator/Board Secretary of the Board of Education of the Borough of Mt. Ephraim in the County of Camden, New Jersey, HEREBY CERTIFY that the foregoing extract from the minutes of a meeting of the Board of Education duly called and held on November 14, 2005 *has been compared by me with the original minutes as officially recorded in my office in the Minute Book of the Board of Education and is a true, complete and correct copy thereof and of the whole of the original minutes so far as they relate to the subject matters referred to in the extract.*

IN WITNESS WHEREOF, I have hereunto set my hand and affixed the corporate seal of the Board of Education this 22nd day of November, 2005

Melissa Raywood

Melissa Raywood, Board Secretary

[SEAL]

GLOUCESTER COUNTY VOCATIONAL TECHNICAL SCHOOL DISTRICT
RESOLUTION # 35

ACCEPTANCE OF THE SETTLEMENT OFFER FROM MOUNT EPHRAIM SCHOOL DISTRICT FOR PAYMENT OF NONRESIDENT FEES

WHEREAS, the Gloucester County Vocational Technical School District ("District") has been engaged in litigation with the Mount Ephraim School District ("Mount Ephraim") concerning nonpayment of nonresident fees owed to the District by Mount Ephraim; and

WHEREAS, the District and Mount Ephraim have undertaken, through their respective counsel, settlement negotiations as it is in both districts' financial interest to reach an amicable resolution of this matter; and

WHEREAS, Mount Ephraim's Board of Education made a settlement offer to the District of $35,000.00, representing payment in full for all disputes between them that are associated with this matter; and

WHEREAS, the District's Board Solicitor recommended acceptance of Mount Ephraim's settlement offer; and

WHEREAS, at its regular meeting on March 15, 2006, the District's Board agreed that acceptance of the settlement offer from Mount Ephraim is in the best interest of the District.

NOW, THEREFORE, BE IT RESOLVED, on this 26th day of May, 2006 as follows:

that the Gloucester County Vocational Technical School District Board of Education hereby authorizes the acceptance of the settlement offer of $35,000.00 from Mount Ephraim Regional Board of Education as is memorialized in the settlement agreement attached hereto.

Anthony W. Wilcox
President

5/25/06
Date

Daniel T. Greene
School Business Administrator/Board Secretary

5/26/06
Date

261-06

OAL DKT. NO. EDU 279-00
AGENCY DKT. NO. 373-12/99

BOARD OF EDUCATION OF THE GLOUCESTER COUNTY INSTITUTE OF TECHNOLOGY, GLOUCESTER COUNTY,	:	
PETITIONER,	:	COMMISSIONER OF EDUCATION
V.	:	DECISION
BOARD OF EDUCATION OF THE NORTHERN BURLINGTON COUNTY REGIONAL SCHOOL DISTRICT, BURLINGTON COUNTY,	:	
RESPONDENT.	:	

The record of this matter, the parties' proposed Settlement Agreement, and the Initial Decision issued by the Office of Administrative Law have been reviewed.

Upon such review, the Commissioner approves the parties' settlement and adopts the Initial Decision as the final decision in this matter, which is hereby dismissed, subject to compliance with the terms of the settlement.

IT IS SO ORDERED.

Lucille E Davy
ACTING COMMISSIONER OF EDUCATION

Date of Decision: 8/03/06
Date of Mailing: 8/03/06

State of New Jersey
OFFICE OF ADMINISTRATIVE LAW

INITIAL DECISION
SETTLEMENT
OAL DKT. NO. EDU 279-00
AGENCY DKT. NO. 373-12/99

BOARD OF EDUCATION OF THE GLOUCESTER COUNTY INSTITUTE OF TECHNOLOGY,
Petitioner,
v.
BOARD OF EDUCATION OF THE NORTHERN BURLINGTON COUNTY REGIONAL SCHOOL DISTRICT, BURLINGTON COUNTY,
Respondent.

Louis Cappelli, Jr., Esq., for petitioner
Frank P. Cavallo, Esq., for respondent (Parker McCay, attorneys)

Record Closed: June 23, 2006 Decided: July 19, 2006

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

In this matter, the petitioner, the Board of Education of the Gloucester County Institute of Technology, alleges that respondent Board of Education of the Northern Burlington Regional School District violated its statutory obligation to pay tuition for students attending its county vocational program. Respondent raised the claim that the petition was filed untimely. The matter was transmitted to the Office of Administrative Law on January 21, 2000, for determination as a contested case, pursuant to N.J.S.A. 52:14B-1 to -15 and N.J.S.A. 52:14F-1 to -13. The matter was originally assigned to

Hon Kathryn Clark, ALJ. Upon Judge Clark's retirement the matter was reassigned to me on March 3, 2004.

Because of the pendency of a companion case before the Superior Court, Appellate Division, entitled K.B. v. Rancocas Valley Reg. H.S. Dist., Dkt. No. A-6814-02-T5, decided on November 12, 2004, certification denied by the Supreme Court on January 28, 2005, the proceedings in this matter were held in abeyance at the request of the parties.

Status conferences were held on August 2, 2004, and December 8, 2004, and an in-person settlement conference was held on June 10, 2005. When no settlement was finalized, the matter was scheduled for hearing on November 2, 2005. On that date the hearing was adjourned based on a likely settlement, and rescheduled for November 28, 2005. On this latter date, the parties agreed to a settlement, subject to execution of a written settlement agreement.

The parties subsequently prepared a Settlement Agreement indicating the settlement terms. However, when no settlement agreement complying with the formal requirements of N.J.A.C. 6A:3-1.13(d) for effectuating a settlement were forthcoming from petitioner, Orders were entered on May 4 and June 8, 2006. As a result of receiving an original signed and sealed resolution of the Board of Education of the Gloucester County Vocational Technical School District on June 23, 2006, authorizing the settlement, the written Settlement Agreement indicating the terms thereof now conforms to the requirements N.J.A.C. 6A:3-1.13(d). The written 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.

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

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

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

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

July 19, 2006

DATE

JOSEPH F. MARTONE, ALJ

Receipt Acknowledged:

7-21-06

DATE

DEPARTMENT OF EDUCATION

Mailed to Parties:

JUL 24 2006

DATE

OFFICE OF ADMINISTRATIVE LAW

mph

SETTLEMENT AGREEMENT

2005 NOV 22 P 12:44
STATE OF NEW JERSEY
OFFICE OF ADMIN LAW

WHEREAS, the Gloucester County Institute of Technology (hereinafter "G.C.I.T) operates a Performing Arts Academy with enrollment open to both in-county and out-of-county residents;

WHEREAS, pupil(s) from the Northern Burlington County School District, County of Burlington, (hereinafter "Northern") applied to and were accepted at GCIT's Performing Arts Academy commencing with the 1997-1998 school year and continuing through the 2004-2005 school year; and,

WHEREAS, GCIT has filed a Petition of Appeal with the Commissioner of education, State of New Jersey, seeking the payment of and out-of county fee for each pupil residing within the geographical boundaries of Northern and attending GCIT, together with the costs of transportation for those pupils and interest on the unpaid tuition; and,

WHEREAS, Northern has, in good faith, denied GCIT's claims; and,

WHEREAS, All possible legal proceedings have been undertaken and exhausted on behalf of Northern with respect to the issues presented in defense of GCIT's claims; and,

WHEREAS, GCIT and Northern have undertaken, through their respective counsel settlement negotiations as it is in both school districts' financial interest to reach an amicable resolution of this matter without further legal proceedings or delay.

IT IS HEREBY AGREED by and between and to settle and terminate any and all disputes between them by executing this Settlement Agreement ("Agreement") as follows:

1. Northern shall pay, within sixty (60) days of execution of this Agreement, the sum of $36,000.00 representing payment in full for all disputes between the parties and that were made a part of the Petition of Appeal.
2. Both GCIT and Northern do hereby remise, release and forever discharge each other, their respective Boards of education and their officers, members, employees, agents, respective successors and assigns, heirs, executors and administrators, of and from any all manner of action and causes of action, suits, debts, claims and demands whatsoever in law or in equity, which they ever had, now and up through and including June 30, 2005.
3. Board will take the appropriate action at its next regularly scheduled meeting to approve and accept the terms of the within settlement.
4. By entering into this Agreement, neither party is making any admission with respect to any of the issues raised by the respective parties.
5. Each party is to bear their own cost and attorneys fees.
6. Both GCIT and Northern agree and acknowledge that the Agreement and the parties described herein and the settlement and termination of any claims that the parties have against each other, as set forth herein, is not and shall not be construed to be an admission of any violation of any federal, state or local statute or regulation or of any duty owed by and between the parties.
7. By signing this Agreement, the parties certify that they have had the opportunity to discuss the Agreement with counsel. They are fully satisfied with the services of their counsel with respect to both this agreement and all other aspects of this case and

they enter into this Agreement knowingly, willingly and without any coercion or improper inducement.

8. In the event that any portion of this Agreement is determined to be illegal, the parties agree in advance, to reform the Agreement so that each party receives the full benefit of the bargain.
9. By signing this Agreement, each signator represents that he or she is a party or has been duly authorized by a party to sign that party's behalf.
10. The parties agree that this Agreement may be signed and counterparts and that facsimiles of signatures will have the same force and effect as original signatures.

Intending to be legally bound hereby, GCIT and Northern execute the foregoing Agreement this 21ST day of NOVEMBER, 2005.

Witness:

BOARD OF EDUCATION OF
GLOUCESTER COUNTY
INSTITUTE OF TECHNOLOGY

BOARD SECRETARY

BOARD PRESIDENT

BOARD OF EDUCATION OF THE
NORTHERN BURLINGTON COUNTY
REGIONAL SCHOOL DISTRICT

Witness:

BOARD OF EDUCATION OF THE GCIT
~~NORTHERN BURLINGTON COUNTY~~
~~REGIONAL SCHOOL DISTRICT~~

BOARD SECRETARY

BOARD PRESIDENT

NORTHERN BURLINGTON COUNTY
REGIONAL SCHOOL DISTRICT
Columbus, New Jersey 08022

BOARD OF EDUCATION REGULAR MEETING MINUTES
November 21, 2005

2006 JAN 31 A 11:04

RESOLVED that the Northern Burlington County Regional Board of Education hereby authorizes the settlement offer to the Gloucester County Institute of Technology as is memorialized in the Settlement Agreement listed as **EXHIBIT #06-069**, as per the Board Solicitor's recommendation.

Motion: Mr. Strasser **Second:** Mr.Dorsey **Roll Call:** Unanimous

CERTIFICATION:

I hereby certify that the foregoing is a true copy of a Resolution passed by the Northern Burlington County Regional Board of Education on November 21, 2005.

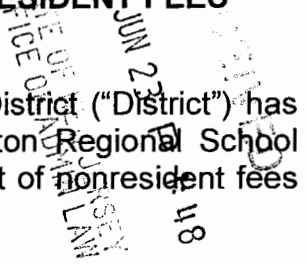
Richard J. Kaz, Jr.
Board Secretary

Date: November 22, 2005

Attachment A-4

GLOUCESTER COUNTY VOCATIONAL TECHNICAL SCHOOL DISTRICT
RESOLUTION # 34

ACCEPTANCE OF THE SETTLEMENT OFFER FROM NORTHERN BURLINGTON REGIONAL SCHOOL DISTRICT FOR PAYMENT OF NONRESIDENT FEES



WHEREAS, the Gloucester County Vocational Technical School District ("District") has been engaged in litigation with the Northern Burlington Regional School District ("Northern Burlington") concerning nonpayment of nonresident fees owed to the District by Northern Burlington; and

WHEREAS, the District and Northern Burlington have undertaken, through their respective counsel, settlement negotiations as it is in both districts' financial interest to reach an amicable resolution of this matter; and

WHEREAS, Northern Burlington's Board of Education made a settlement offer to the District of $36,000.00, representing payment in full for all disputes between them that are associated with this matter; and

WHEREAS, the District's Board Solicitor recommended acceptance of Northern Burlington's settlement offer; and

WHEREAS, at its regular meeting on March 15, 2006, the District's Board agreed that acceptance of the settlement offer from Northern Burlington is in the best interest of the District.

NOW, THEREFORE, BE IT RESOLVED, on this 26th day of May, 2006 as follows:

that the Gloucester County Vocational Technical School District Board of Education hereby authorizes the acceptance of the settlement offer of $36,000.00 from Northern Burlington Regional Board of Education as is memorialized in the settlement agreement attached hereto.

Anthony W. Wilcox
President
5/25/06
Date

Daniel T. Greene
School Business Administrator/Board Secretary
5/26/06
Date

264-06

OAL DKT. NO. EDU 10118-05
AGENCY DKT. NO. 266-8/02

MR. AND MRS. T.F.S., on behalf of minor child, J.R.S.,	:	
PETITIONERS,	:	
V.	:	COMMISSIONER OF EDUCATION
BOARD OF EDUCATION OF SOUTH BRUNSWICK TOWNSHIP, MIDDLESEX COUNTY, DR. SAMUEL STEWART, SUPERINTENDENT OF SCHOOLS AND DEBRA JOHNSON, MAYOR,	:	DECISION
RESPONDENTS.	:	
	:	

The record of this matter and the Initial Decision of the Office of Administrative Law (OAL) have been reviewed. Exceptions of both parties, filed in accordance with *N.J.A.C* 1:1-18.4, were fully considered by the Commissioner in reaching her determination herein.[1]

Petitioners' extensive exceptions criticize numerous aspects of the ALJ's factual presentation alternatively charging, *inter alia*, that such presentation misrepresents the proceedings and testimony at the OAL;[2] is deliberately ambiguous; attempts to mislead the Commissioner; and attempts to disparage the petitioners. They further charge that the ALJ

[1] The Board's exceptions seek solely to clarify that J.R.S. attends Crossroads North Middle School rather than Crossroads South which her older sister, C.M.S., attended. It maintains that, although the walking route to the two schools is the same, Crossroads North is closer to the family's home.

[2] In this regard, a description of testimony of certain individuals which, petitioners aver, was adduced at hearing is presented along with the implications and/or conclusions which they maintain should be deduced from such testimony.

engaged in outrageous judicial behavior and exhibited a prejudicial attitude towards them, and they urge the Commissioner to reject his decision.

Upon a full and independent review of the record[3], the Commissioner, finding petitioners' exceptions without merit, agrees with the ALJ, for the reasons comprehensively presented in his Initial Decision, that petitioners have failed to sustain their burden of establishing, by a preponderance of the credible evidence, that the Board's determination to discontinue its practice of providing bus transportation for students in the housing developments at issue here who resided less than a mile from their respective schools - requiring these students to walk to school via a route designed to insure their safe passage - was arbitrary, capricious or unreasonable or an abuse of its discretion.

Accordingly, the Initial Decision of the OAL is adopted as the final decision in this matter and the instant Petition of Appeal is hereby dismissed.

IT IS SO ORDERED.[4]

Lucille E Davy

ACTING COMMISSIONER OF EDUCATION

Date of Decision: 8/04/06

Date of Mailing: 8/04/06

[3] It is noted that the record did not contain transcripts of the hearing conducted at the OAL.

[4] This decision may be appealed to the State Board of Education pursuant to *N.J.S.A.* 18A:6-27 *et seq.* and *N.J.A.C.* 6A:4-1.1 *et seq.*

State of New Jersey
OFFICE OF ADMINISTRATIVE LAW

INITIAL DECISION
OAL DKT. NO. EDU 10118-05
(ON REMAND EDU 6674-02)
AGENCY DKT. NO. 266-8/02

MR. and MRS. T.F.S. o/b/o J.R.S.,
Petitioner,
v.
BOARD OF EDUCATION OF SOUTH BRUNSWICK TWP., MIDDLESEX COUNTY, DR. SAMUEL STEWART, SUPERINTENDENT OF SCHOOLS AND DEBRA JOHNSON, MAYOR,
Respondent.

T.F.S., petitioner, pro se

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

Record Closed: April 18, 2006 Decided: June 29, 2006

BEFORE **ISRAEL D. DUBIN**, ALJ

Petitioners challenge the South Brunswick Township Board of Education's decision to deny their daughter, J.R.S., transportation services to and from Crossroads Middle School South. Among other things, they allege that the Board failed to follow

recommendations set forth in The Relative Risks of School Travel, Special Report 269 of the Transportation Research Board of the National Academies, and designated a walk route between their home in the Regents Square residential development and the Middle School that is "obviously and significantly unsafe." They therefore demand that the Board's decision not to provide bussing be reversed as arbitrary, capricious, and unreasonable.

Petitioners filed their initial complaint on behalf of their oldest daughter, C.M.S., who was then about to attend Crossroads Middle School South, on August 28, 2002, and the matter was transmitted to the Office of Administrative Law for hearing as a contested case under OAL Docket No. 6674-02 on October 9, 2002. A lengthy period of discovery, followed by a series of motions, briefs, orders, and one interlocutory appeal ensued and continued through July 2004, when Administrative Law Judge Steven C. Reback retired and the matter was reassigned to this ALJ for handling. The matter was subsequently heard on October 13, 2004; December 14 & 15, 2004; and February 9, 2005, and the record was closed upon receipt of petitioners' final post-hearing submission on September 2, 2005.

A thorough review of the record conducted prior to writing the Initial Decision disclosed that petitioners had filed their action shortly before C.M.S. began attending Crossroads South as a sixth grade student in September 2002. Since the Middle School was then, and remains, comprised of grades six, seven, and eight, logic dictated that C.M.S. had presumably graduated from Crossroads South in June 2005 and begun attending South Brunswick High School at approximately the same time the record had been closed.

During a conference call conducted on September 12, 2005, petitioner T.F.S. confirmed that C.M.S. was in fact attending and receiving transportation services to and from South Brunswick High School.[1] Four days later, on September 16, 2005, I received from respondent's counsel the certification of Jeffrey R. Scott, Assistant

Superintendent for Business, in which he stated that "C.M.S., the subject of this proceeding, is now a ninth grade student at South Brunswick High School; she receives daily transportation services based on the distance between her home and the High School."

Based upon the fact that C.M.S. was no longer attending Crossroads South, I found that the issue of whether she was entitled to transportation services to and from that school was academic and any decision I rendered would have had no practical effect on the then-existing controversy. I therefore concluded that given the change in circumstances, the issue was no longer appropriate for judicial review and dismissed the complaint as moot.

By order dated November 2, 2005, the Commissioner of Education rejected the Initial Decision on the basis that since petitioners had a second daughter, J.R.S., who in September had begun attending the same school previously attended by C.M.S., the underlying facts giving rise to the controversy remained and the graduation of C.M.S. had not rendered it moot. The Commissioner therefore remanded the case to the O.A.L., directed that petitioners be permitted to submit an amended petition substituting J.R.S. for C.M.S., and ordered that the matter "proceed for a determination on petitioners' underlying claim." Commissioner's Decision. The amended petition was subsequently filed on February 14, 2006 and an in-person prehearing conference was held.[2] The record closed on April 18, 2006 upon receipt of the parties' respective measurements of the distance between petitioners' home and the Crossroads Middle School.

By way of background, in the 1990's the Crossroads North and Crossroads South Middle Schools were known as the Upper Elementary School (grades 5 and 6) and the Crossroads Middle School (grades 7 and 8), respectively. In September 2002,

[1] T.F.S. also indicated that he was no longer demanding the "stipend" or reimbursement for any of the days he or his wife drove C.M.S. to or home from the middle school.

[2] Petitioners' amended complaint raised anew many issues that had previously been decided by Judge Reback and me. During the in-person conference I advised him that I would not revisit these issues and would, instead, decide the matter on their underlying claim as directed by the Commissioner.

the School District opened a new elementary school and changed the student population of all its elementary schools to kindergarten through grade 5. Simultaneously, the Upper Elementary School became Crossroads Middle School North, and the Crossroads Middle School became Crossroads Middle School South. Both middle schools, which are adjacent to each other and separated by athletic fields, have been comprised of grades 6, 7 and 8 since that time.

In 1995, representatives of the Board of Education and South Brunswick Township Committee met to explore ways in which to reduce the school district's expenses and, therefore, the tax burden on the township's residents. One of the suggestions involved eliminating some of the district's costly bus routes by building new sidewalks to create safe walking routes for those students residing less than one mile from their schools.[3] One of these bus routes serviced students such as C.M.S. and J.R.S., who resided in the Georges Road – Kingston Lane area in the vicinity of what were then known as the Upper Elementary School and Crossroads Middle School. Although there were sidewalks on Georges Road at that time, they were not continuous and did not cover the entire distance a student might be required to walk.

During the Executive Session of the Board's meeting on January 11, 1999, the aforementioned Jeffrey Scott advised the members that the installation of sidewalks along Georges Road had been completed. The Board then agreed that although it would continue to transport the affected students for the balance of the school year, the students would become walkers in September 1999.

The subsequent announcement that students in the affected neighborhoods would be walking to school the following year resulted in a number of parents attending a Board meeting to voice their concerns.[4] At that time, the Board invited the parents, their consultant, Robert T. Straub, and representatives of the Police Department to attend the September 24, 1999 meeting of its Transportation Committee. The meeting was held as scheduled and the following concerns were expressed:

[3] Petitioner's home is approximately one mile from the middle school.

1. Accident statistics along the entire walking route[.][5]
2. Communications with parents need improvement. Many parents did not know that once sidewalks were complete that their children would be walkers.
3. Sidewalks incomplete along Kingston Lane[.]
4. There has been an increase and a change in traffic patterns as a result of Summerfield, Pierre's[,] the completion (sic) of 522, and Deans Pond Crossing.
5. Students are too young to be walking along George's Road with its 45 mph speed limit.
6. Speed limit of 45 mph[.]
7. When 522 is open, traffic volume along George's Road will increase making a bad situation worse.
8. Right turn on red is allowed from George's Rd to Kingston Lane and vice versa.
9. Left turn should not be allowed when light has "walk" indicator on[.]
10. Affected residents were not given opportunity to pay for subscription bussing.
11. Curb cutouts need realignment
12. No right hand turn should be allowed from rt 522 to George's Rd.
13. No through truck traffic should be allowed on George's Road.
14. There are no stop lines and crosswalks from the developments onto George's Road.
15. Students are standing at the bottom (sic) of the curb cutouts required by the A.D.A.
16. There are not enough crossing guards. Guards should be added to Jason/George's, Woodland/George's, Stanley George's, Stanley/Kingston or install traffic signals.
17. Path for walkers to enter and exit UES.
18. Left out of neighborhoods onto George's Rd requires quick acceleration because of 45 mph speed limit.
19. Crossing Guard has concerns about safety[.]
20. Enforce 25 mph speed limit when school is in session.

[Committee Meeting Report, Transportation Committee Meeting of September 24, 1999 (Exhibit R-6)]

[4] The record does not include the date of that particular Board meeting.
[5] This statement presumably referred to a request for such statistics.

By letter dated October 22, 1999, the Board conveyed the parents' concerns to the Township Administrator, Matthew Watkins. The concerns were explained in priority order as follows:

1. **Speed limit of 45 mph** – Although there is a posted 25 mph speed limit in front of the UES, parents felt that the speed limit should be 25 mph along the stretch of George's Road from UES to the new section of Route 522. (The police department's traffic division has made a request to the County to reduce the speed limit.)
2. **Right turn on red is allowed from George's Rd to Kingston Lane and vice versa** – Even with a crossing guard, drivers continue to make a right on red while students are being crossed. (The police department's traffic division has made a request that there be no right turns on red allowed at this intersection.)
3. **There are no stop lines and crosswalks from the developments onto George's Road** – Parents report that since there are no stop lines and defined crosswalks, cars do not come to a complete stop when exiting a development to accelerate onto George's Road. This makes for a dangerous situation for children walking to school.
4. **Sidewalks incomplete along Kingston Lane** – Students who walk along Kingston Lane do not have a continuous sidewalk from George's Road to Major Road.
5. **Crossing Guard has concerns about safety** – The crossing guard assigned to the intersection of George's Road and Kingston Lane has affirmed concerns 1 through 4.
6. **Enforce 25 mph speed limit when school is in session.**
7. **Curb cutouts need realignment** – B. Straub, a traffic consultant working with the parents, indicated that the curb cutouts for handicapped access needed realignment.

[Scott Letter to Township Administrator, October 22, 1999 (Exhibit P-12)]

Given the nature of these concerns and the estimated amount of time it would take to address them, the Board decided to continue providing transportation for students residing in the affected neighborhoods through the 2001-2002 school year. At

some point the issue was revisited[6] and, on April 17, 2002, John Longo, the Director of the School District's Buildings, Grounds and Transportation Department asked the South Brunswick Police Department to "review the path students must walk to get to school from (the Woodland Meadows, East Garden Way and Regents Square[7] developments) and provide input as to whether this is reasonable." Longo Letter to Sgt. Kushwara, April 17, 2002 (Exhibit P-8).

Sgt. Michael Kushwarra responded by requesting information concerning the number of students the Board anticipated would be walking to school. In a memorandum dated April 26, 2002 (Exhibit P-6), Sandra Kowalsky, the District's Transportation Coordinator, advised him that a total of 62 students would be walking to school from those three developments combined.[8]

By letter dated June 12, 2002, Sgt. Kushwarra advised Mr. Longo that the Police Department had no objections to the proposed walk route for the affected students. As he explained:

> Our review concluded that Georges Road in this area provides for safe passage of pedestrians with continuous sidewalks on both sides of the roadway. A signalized intersection exists and a School Crossing Guard is assigned at Kingston Lane and Georges Road. Motor vehicle accidents data in the affected area is minimal since 1/01/02, with no reported injuries attributed to them. Pedestrian counts conducted by this office do not reflect a significant impact as a result of additional walkers. As such, this office has no opposition to the proposal at this time.
>
> [Kushwarra Letter to Longo, June 12, 2002 (Exhibit P-7)]

[6] The record does not disclose when the issue was visited or the length of time over which it was discussed.
[7] As stated earlier, C.M.S. and T.R.S. reside in the Regents Square development.
[8] The distribution of students was detailed as follows: Woodland Estates – 32; Regents Square – 18; and East Garden Way – 12.

On July 18, 2002, Joanne Kerekes and James Warfel, the principals of the Crossroads Middle Schools, jointly sent the parents and guardians of the affected students the following letter:

> We are writing to inform you that the Board of Education along with the South Brunswick Schools Transportation Committee ... and the South Brunswick Township Police Department have (sic) made some changes in the transportation routes for next year.
>
> Students who live in Regents Square, Woodland Meadows, East Garden Way and Stanley Avenue will now be walkers to Crossroads School. They will no longer be bussed to school.
>
> It has been determined that students have a safe walkway to the middle school. There are sidewalks for the students to use, and there is a light and crossing guard to guide them with road crossing.
>
> [Principals' Letter to Parents/Guardians, July 18, 2002 (Exhibit R-8)]

Four days later, on July 22, 2002, petitioner, whose daughter C.M.S. was about to attend Crossroads Middle School South as a sixth-grader in September, sent an e-mail to Board of Education member and Transportation Committee Chairperson Dr. Matthew Speesler objecting to the cessation of bussing. For the most part, the e-mail consisted of petitioner criticizing the measures taken by South Brunswick Township, the South Brunswick Police Department, and the Board of Education to address the concerns raised by parents at the September 24, 1999 meeting of the Board's Transportation Committee. He also made a number of suggestions/demands including morning and afternoon police patrols to ensure speed limit compliance and placement of crossing guards at each of the affected developments along Georges Road. Among other reasons given as justification for these measures, petitioner stated that

> Invariably, Regents Square Students and East Garden Students will become 'buddies, friends' and want to walk home together FORCING A STUDENT CROSS-OVER ON

> BUSY 4 lane Georges Road right at the cross over from 4 lane (sic) to 2 lane (sic) at 45 MPH (a fundamentally unsafe condition for even an adult not to mention 10 to 13 year old pre-teens!!!!!!
>
> [E-mail to Matthew Speesler, July 22, 2002 (Exhibit P-1, Pink Tab 15)]

Superintendent of Schools Samuel B. Stewart responded and advised petitioners that the safety concerns raised in 1999 had been reviewed and addressed by Mr. Scott, who'd reported that the following actions had been taken:

1. The Board of Education had asked the Police Department to petition Middlesex County for a reduction of the speed limit on Georges Road. Although the County ultimately denied the request, the Police Department and Board deemed the road safe for walkers because of the continuous sidewalks with sufficient setback.
2. The Township had acted to prohibit right turns on red from Georges Road to Kingston Lane (and vice versa) between the hours of 7:00 and 9:00 in the morning, and 2:00 and 4:00 in the afternoon on school days, when student walkers would be present in the area.
3. All stop lines and crosswalks on roads leading from the developments onto Georges Road had been painted.
4. A fifty foot section of sidewalk in front of one house on Kingston Lane remained incomplete, but was not part of the prescribed walk route to be used by the affected students. The crossing guards' concerns, such as training and right turns on red, had been fully addressed.
5. The Police Department had assured the Board of Education that the 25 mile per hour speed limit on Georges Road in the Crossroads Middle School North school zone would be strictly enforced. Moreover, the School District and Township had jointly installed traffic apparatuses which visually displayed motorists' speeds as they traveled through the area to remind them to adhere to the posted speed limit.
6. All curb cutouts had been determined to be safe.

On July 31, 2002, the Board's Transportation Committee met once again, with Sergeant Kushwarra and Patrolman Ken Drost in attendance. During that meeting the one remaining concern that had not been addressed – the 50 foot section of sidewalk

on Kingston Avenue that had not yet been completed – was discussed. After consultation with the Police Department's representatives, the Committee concluded that

> [t]here are however other safe walkways so students can avoid this section. The SBPD traffic division is aware of this and we will address this issue again with the town, as well as alternative sidewalks that could be installed on Kingston Lane. It (is) deemed, however, not to be a problem with safe passage.
>
> [Minutes, Transportation Committee Meeting, July 31, 2002 (Exhibit P-11)]

Following that meeting, the Board altered the prescribed walk route to Crossroads South in order to avoid the missing fifty-foot section of sidewalk on Kingston Lane.[9] The revised walk route was described in a memo signed by both Dr. Speesler and Dr. Stewart and sent to parents and guardians along with a detailed map on August 28, 2002. As described, Crossroads South students residing in the Regents Square and Woodland Meadows developments would be required to use the continuous sidewalks on the north side of Georges Road until they reached Kingston Lane. There, a traffic guard trained by the Police Department, with the assistance of a signalized traffic control device, would accompany them across Georges Road.

Once across Georges Road, the students would continue on the south side until they reached the parking lot entrance of Crossroads North. At that point they would use a sidewalk along the left side of the entrance that would lead them to a walkway along the south edge of the parking lot, a walkway clearly marked with painted diagonal yellow lines and bordered by a grass lawn. School personnel would be stationed as monitors along the sidewalk and "cross-hatched" path until students reached the paved path that crosses the athletic fields to Crossroads South. Additionally, traffic at the entrance to and in the parking lot of Crossroads North was not anticipated to be heavy

[9] Students from the affected neighborhoods attending Crossroads Middle School North enjoyed uninterrupted sidewalks adjacent to Georges Road, with sufficient setbacks from the roadway and shoulders to ensure the safety of the walkers.

in the morning because personnel were required to report to school thirty minutes earlier than students. See Exhibit R-1(b)(i).

Following the announcement of the walk route, the principals of the two middle schools sent flyers to parents and guardians describing safety procedures to be followed by walkers and suggesting that they discuss these procedures with their children. As of the date of the hearing, there had been no incidents involving injuries to students on the prescribed walk routes to the Crossroads Middle Schools.

Testifying on his own behalf, T.F.S. claimed that the Board's decision to discontinue bussing for students residing in the Regents Square development was arbitrary, capricious, and unreasonable. Among other things, he relied on the fact that the Board had completely ignored the recommendations made in *The Relative Risks of School Travel*, Special Report 269 of the Transportation Research Board of the National Academies. This publication identified five categories of risk factors[10] and made a series of recommendations designed to minimize the risks. While allowing that *The Relative Risks of School Travel* was a public report and neither regulatory nor binding in any way on school districts across the country, petitioner asserted that the Board at the very least had "exercised bad judgment in not following each and every recommendation."

Petitioner further averred that the Board's decision not to offer subscription bussing to the parents of the affected students was arbitrary and capricious as well. He was certain that if the Board charged them $15 to $20 dollars per month, they would all willingly participate. While acknowledging that he had not spoken to the parents of the other 18 students in the Regents Square development, he insisted that the Board "should have honored the parents' requests!"

Also of grave concern to petitioner was the fact that many of the homeowners with houses along the walk route failed to shovel their walks following snow storms. As

a result, students avoided these obstacles by walking on the shoulders of the roads that had been plowed. This placed them in danger of being struck by cars and made the walk route extremely unsafe. In fact, the route was so inherently unsafe that regardless of the season and conditions, neither C.M.S. nor, presumably, J.R.S. had ever been permitted to walk to school.[11]

While much of Jeffrey Scott's testimony followed and supported the chronology set forth above, he also augmented certain points and addressed some of petitioners' ancillary concerns. He explained that the Board's rationale for the discontinuance of the Regents Square bus route was primarily financial. The district has an annual transportation budget of approximately $3,000,000 that continues to increase with expanding enrollment. Generally speaking, each bus route costs the Board between $17,000 and $20,000 per year. By eliminating just 10 bus routes, the Board would be able to save between $170,000 and $200,000 per year, and between $1.7 and $2 million over ten years. And while there were costs associated with the construction of sidewalks, they were fixed, one-time costs. Therefore, the township and its taxpayers would save money in the long run.

Mr. Scott added that he and members of the Board routinely examined bus and walk routes "all over town" following snow storms in order to determine whether a delayed opening or closing was necessary. In this regard, the Board worked closely with the Police Department and Department of Public Works to enforce township ordinances and ensure safe passage. When homeowners along designated walk routes failed to shovel the snow from the sidewalks in a reasonable amount of time, the Board would have the DPW take care of it and bill the homeowners for the expense. However, as a general rule, snow was not a factor in determining the safety of a walk route and, while there may have occasionally been mounds of snow at street corners that students

[10] The identified risk factors were (a) human, (b) vehicular, (c)operational, (d) infrastructure/environmental, and (e) societal.

[11] Ironically, C.M.S. was frequently transported by bus to and from Crossroads South numerous times during her three years at the school. This was due to the Board's policy of providing "early busses" and "late busses" to all students involved in before- and after-school extracurricular activities, regardless of where they lived.

had to overcome, "the Board expects parents to clothe students in appropriate attire for walking in snow."

Mr. Scott further testified that the Board had considered each of the twenty initial parental concerns and the condensed list of seven prior to taking final action. However, after consultation with the Township Counsel, Police Department, and Shropshire Associates, a traffic engineering and transportation planning firm, it concluded that it had addressed the most important concerns and adopted a safe walk route. In a perfect world all students would be bussed. But given ever-tightening budgets and reductions in State per-student aid, Boards of Education had to make cuts wherever possible, and discontinuing the bussing of students who resided less than a mile from their respective schools was seen as one of the best ways to do it.

Also testifying on behalf of the Board was Sgt. Michael Kushwarra of the South Brunswick Police Department. As the head of the traffic bureau for the past eighteen years, he is very familiar with the roads. And, as the parent of a ten-year-old and six-year-old, he is sensitive to issues of safety in school zones.

As was the case with Mr. Scott, much of the sergeant's testimony followed and supported the chronology set forth above. He did, however, address certain specific issues in more detail. For example, although petitioners demanded that crossing guards be placed at the intersections of Jason and Georges, Woodland and Georges, Stanley and Georges, and Stanley and Kingston roads, the amount of automobile and foot traffic, even at peak hours, simply didn't warrant it. Additionally, Woodland had an island in the middle of the road that was large enough to offer students refuge from approaching vehicles in the event that became necessary.

Sgt. Kushwarra also stated his belief that the parents had a role to play in ensuring safe passage to and from school and other places. For example, he was well aware of the fact that students used other intersections at all times of the day and on weekends to go to friends' homes, stores, and the like, but it is not the Police

Department's job to tell kids what side of the street they should walk on or what intersections they should use. Rather, these are things that parents should be discussing with their children. All the Police Department could do was provide the Board with some of the information it needed to make an informed decision, enforce local ordinances, and provide such other support as the Board might require. Even now the Police Department was continuing to work with the Board to make the walk routes in these and other areas safer.

Sgt. Kushwarra concluded his testimony by stressing that many of the parents' concerns, such as banning truck traffic or reducing the speed limit on Georges Road, were actually quality of life issues more so than pedestrian safety issues. No significant risk factors were present when the walk route was chosen and they did not exist at present. And while the Police Department was working to make the roads safer for pedestrian traffic, that did not mean they were unsafe now.

Also testifying for the Board was David Shropshire, a traffic engineer and planner with extensive experience designing and analyzing pedestrian walking routes in places such as Atlantic City and Camden. He stated that his firm, Shropshire Associates, LLC, had been retained by the South Brunswick Board of Education to conduct a pedestrian safety evaluation of the walk route in issue. This evaluation included an analysis of sidewalks, crosswalks, signage, traffic signals, vehicle speed and sight distance in the area encompassing the Regents Square Development and Georges Road with its intersections along the prescribed route. Upon completion of his field reconnaissance he issued a report reaching the following conclusions:

Sidewalks. In accordance with the *NJDOT Pedestrian Compatible - Planning and Design Guidelines*, *AASHTO-Geometric Design of Highways and Streets*, and *ITE Design and Safety of Pedestrian Facilities*, the minimum allowable width for sidewalks in school areas is five feet with a four foot width acceptable in residential areas. These publications also call for a minimum setback distance of two feet between the sidewalks and the back of the curbs.

The results of his study disclosed that all of the sidewalks adhered to the minimum five foot width requirement, with the exception of a 420 foot section of Georges Road located between Jason Street and Stanley Avenue, and the short distance between Regal Drive and Crossroads North. However, these sections had more than adequate shoulder and setback widths. Therefore, these particular sections did not pose a risk and were acceptable.

Crosswalks. In accordance with the *NJDOT Pedestrian Compatible - Planning and Design Guidelines*, crosswalks should be placed at all signalized intersections, at all locations where a school crossing guard is stationed, at all intersections within ¼ mile of a school, and where professional judgment warrants. The publication also states that a crosswalk should be between six and ten feet wide.

The firm's study disclosed that all of the intersections along the prescribed walk route have crosswalks and the widths of these crosswalks range from six to seven feet. The only crosswalks that traverse Georges Road are the two located at Kingston Lane, where a crossing guard is positioned. Additionally, there is a nineteen-foot refuge island where Georges Road intersects Woodland Way. This island is of an acceptable design to afford pedestrians safe refuge.

Mr. Shropshire added that visual observation of the intersections along Georges Road disclosed that none of the stop-controlled intersections warranted the presence of a crossing guard. The *ITE Design and Safety of Pedestrian Facilities* publication recommends a crossing guard for any stop-controlled intersection with a volume of 500 or more vehicles per hour during the AM or PM school hours. However, he did not observe that much traffic at the times he conducted his reconnaissance.

Signage. Mr. Shropshire's study disclosed that the signage at the signalized intersection of Georges Road and Kingston Lane had been designed in accordance with the *Manual on Uniform Traffic Control Devices*. Additionally, No Turn on Red

(during school hours) signs had been added to assist the crossing guard in protecting children from turning vehicles. Finally, 25 MPH speed limit signs (when children are present) and radar signs that flash approaching vehicles' speeds had been installed on both the northbound and southbound Georges Road approaches in the vicinity of the school.

Traffic Signals. After observing the intersection of Stanley Avenue and Georges Road and consulting the *Manual on Uniform Traffic Control Devices*, Mr. Shropshire did not believe that a traffic signal was warranted. As he explained, the *NJDOT Design Manual* requires a minimum of 1181 feet between signalized intersections, and the distance between the signalized intersection at County Route 522 and Stanley Avenue did not meet that standard.

Vehicle Speed. Both the *NJDOT Pedestrian Compatible – Planning and Design Guidelines* and *AASHTO-Geometric Design of Highways and Streets* agree that 45 MPH is an acceptable speed for vehicular traffic given that the appropriate facilities are provided for the pedestrians. These facilities include suitable roadway crossings and properly spaced sidewalks and shoulders. Georges Road possesses all of the facilities and therefore should be acknowledged as an acceptable walking path.

However, Mr. Shropshire specifically recommended that a School Advance Sign and a School Crossing Sign be installed at the intersection on the northbound side of Georges Road to warn drivers of crossing children and the approaching school zone. He also recommended that tree branches near the southbound 25 MPH (when children are present) sign be trimmed to ensure its visibility.

Mr. Shropshire concluded his testimony by stating that the walking route for Regents Square students attending Crossroads North met all generally accepted design standards along Georges Road. However, he reiterated that certain minimal improvements needed to be made to ensure safe travel for these students. These included the installation of School advance signs and School Crossing signs at the

Georges Road/Kingston Lane intersection, and maintaining the grounds in the vicinity of the existing signage to ensure visibility. With the implementation of these recommendations as well as a program to inform parents and children of the proper walking route will help to ensure safe walking conditions for these students.

N.J.S.A. 18A:39-1 provides that a school district must provide secondary school students who reside more that 2 ½ miles from their public school with transportation to and from that school. However, "[a]part from required transportation for remote or handicapped students, the decision whether to transport students rests entirely within the discretion of the local school board." Buonocore v. Hillsdale Borough Board of Education, 92 N.J.A.R.2d (EDU) 655, 657 (citations omitted). What is more, the Commissioner will not second guess the exercise of this discretion unless it is arbitrary, capricious or unreasonable. See, e.g. Lemma v. Branchburg Bd. of Educ., OAL Docket No. EDU 8953-97, Initial Decision (July 22, 1998), adopted, Commissioner (August 28, 1998) <http//lawlibrary.rutgers.edu/oal/search.html> (upholding local school district's refusal to change bus stop); Mandaglio v. Mendham Twp. Bd. of Educ., 1990 S.L.D. 1380, 1384 Commissioner (1990) (upholding uniformly applied school policy prohibiting school busses from turning around on dead-end streets); J.O'D. v. Peapack-Gladstone Bd. of Educ., 1989 S.L.D. 1303, 1313, Commissioner (March 15, 1989) (upholding appropriateness of local school district's designation of bus stop and rejecting proposed alternate route as "patently dangerous").

Of course, responsibility for the removal of traffic safety hazards belongs to the municipal governing authorities rather than to the school boards. Schrenk v. Ridgewood Bd. of Educ., 1961 S.L.D. 185, 187, Commissioner (April 15, 1961). A local school district has no obligation to enforce traffic laws or to provide sidewalks, traffic lights, crossing guards, police patrols, and the like to meet the requirements of safe travel for school children. Nichols v. Wayne Twp. Bd. of Educ., 93 N.J.A.R.2d (EDU) 701, Commissioner (Sept. 3, 1993), adopted, 94 N.J.A.R.2d 277, State Bd. (Feb. 2, 1994), aff'd, 95 N.J.A.R.2d (EDU) 157, No. A-3526-93T5 (App. Div. 1995), certif. den., 142 N.J. 449 (1995). Recognizing its responsibility, South Brunswick Township has, among

other things, acted to prohibit right turns on red from Georges Road to Kingston Lane (and vice versa) at specified times, painted stop lines and crosswalks on roads leading from the developments onto Georges Road, agreed to enforce the 25 mile per hour speed limit on Georges Road in the Crossroads North school zone, and installed traffic apparatuses which visually display motorists' speeds as they travel through the school area.

It does not follow, however, that the Board has no duty to provide its walking students with a safe walk route. Certainly, the manner in which the Board designs a walk route and student safety are factors to be considered in assessing whether the Board acted in an arbitrary, capricious, or unreasonable way. Wayne Twp. Bd. of Educ. v. Kraft, 139 N.J. 597, 604 (1995). Whether a walk route is safe depends on the surrounding facts. Id. at 602. Compare, Board of Educ. v. Bailey, 1984 S.L.D. 1165, State Bd. (1984) (finding it unsafe for children to walk on an isolated path through a county park) with Mangieri v. Board of Educ., 1991 S.L.D. 69, State Bd. (1991) (finding it safe for children to use a walkway across railroad tracks).

Here, the Board literally spent years studying and deliberating the merits of requiring students in the affected developments to become walkers. Through its Transportation Committee, the Board listened to the parents' concerns and, in consultation with the South Brunswick Police Department, considered and attempted to address each and every one of them. Ultimately, the final decision to end the practice of providing students in the affected developments with transportation was not made until the Board's budget meeting in the spring of 2002, but only after the Board was satisfied that the concerns first raised by the parents in 1999 had been thoroughly addressed and that the Police Department had approved of the walk route.

Based upon the foregoing, I find that petitioners have failed to meet their burden of establishing by a preponderance of the competent and credible evidence that the Board's actions were arbitrary, capricious or unreasonable, or that it in any way abused its discretion in discontinuing its practice of providing transportation for students in the

affected developments and causing them to walk along a route designed to ensure safe passage. I therefore conclude that the amended petition should be **DISMISSED**. It is so **ORDERED**.

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

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

June 29, 2006

DATE

ISRAEL D. DUBIN, ALJ

E-mail Receipt of Initial Decision Confirmed by the Department of Education on:

6-30-06

DATE

Mailed to Parties:

JUL 12 2006

DATE

OFFICE OF ADMINISTRATIVE LAW

IDD/mamf

APPENDIX

WITNESSES

For Petitioner:

T.F.S., petitioner

For Respondent:

Sgt. Michael Kushwarra

Jeffrey Scott

David Shropshire

EXHIBITS

For Petitioners:

P-1 *The Relative Risks of School Travel*

P-2 Videotape of August 12, 2002 Board of Education Meeting

P-3 Stranger Alert Notification dated June 17, 2002

P-4 Memo from Kowalsky to Scott dated June 24, 2002

P-5 Letter from Stewart to Parents dated September 9, 1998

P-6 Memo from Kowalsky to Kushwarra dated April 26, 2002

P-7 Letter from Kushwarra to Longo dated June 12, 2002

P-8 Letter from Longo to Kushwarra dated April 17, 2002

P-9 Letter from Longo to Olsen dated August 2, 2002

P-10 Not admitted into evidence

P-11 Transportation Committee Meeting Minutes – July 31, 2002

P-12 Letter from Scott to Watkins dated October 22, 1999

P-13 (a) Knef Intervenor Application dated November 27, 2002

(b) Knef Letter of Withdrawal dated December 12, 2002

P-14 E-Mail from Kerekes to Ransi dated August 1, 2002

P-15 Letter from Ransi to Kerekes dated July 25, 2002

P-16 Packet of Police Accident Reports

P-17 Diagram of Crossroads Schools campus

For Respondent:

R-1 (a)Letter from Stewart and Speesler to Parents dated August 28, 2002

(b)(1) "Option 1" map

(b)(2) "Option 2" map

R-2 Curriculum Vitae of David Shropshire

R-3 Shropshire Report dated September 10, 2004

R-4 Photograph of island (attached to R-3)

R-5 Executive Session Minutes, Meeting of January 11, 1999

R-6 Transportation Committee Meeting Report - September 27, 1999

R-7 Letter from Scott to Watkins dated October 22, 1999

R-8 Letter from Kerekes and Warfel to Parents/Guardians dated July 18, 2002

265-06

OAL DKT. NO. EDU 9292-05
AGENCY DKT. NO. 130-5/05

MITCHELL VITIELLO,	:	
PETITIONER,	:	
V.	:	COMMISSIONER OF EDUCATION
BOARD OF EDUCATION OF THE CITY OF ORANGE, ESSEX COUNTY,	:	DECISION
RESPONDENT.	:	

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

Upon such review, the Commissioner observes that the agreement authorizes the Board's President to sign on behalf of the Board, although such agreement was actually signed by the Board's Business Administrator. In that neither the file nor the settlement agreement contains a copy of the Board's resolution approving the settlement and designating anyone to sign the agreement on its behalf, nor, in the alternative, is the agreement signed by the Board attorney, who is the Board's duly authorized representative in litigation, the Commissioner cannot approve the within settlement agreement.

Accordingly, the Commissioner hereby remands this matter to the OAL for supplementation of the record and/or revision of the Settlement Agreement consistent with the concerns set forth above. If the parties are unwilling or unable to reach accord on a modified agreement for submission to the Commissioner, the matter shall proceed to hearing.

IT IS SO ORDERED.*

Lucille Davy
ACTING COMMISSIONER OF EDUCATION

Date of Decision: 8/04/06
Date of Mailing: 8/04/06

* This decision may be appealed to the State Board of Education pursuant to *N.J.S.A.* 18A:6-27 *et seq.* and *N.J.A.C.* 6A:4-1.1 *et seq.*

State of New Jersey
OFFICE OF ADMINISTRATIVE LAW

INITIAL DECISION

SETTLEMENT

OAL DKT. NO. EDU 09292-05
AGENCY DKT. NO. 130-5/05

MITCHELL VITIELLO,

Petitioner,

v.

BOARD OF EDUCATION OF THE CITY OF ORANGE, ESSEX COUNTY,

Respondent.

Timothy R. Smith, Esq., for petitioner (LaRocca, Feeley, Smith & Rosellini, attorneys)

Marvin L. Comick, Esq., for respondent (Love and Randall, attorneys)

Record Closed: July 10, 2006 Decided: July 11, 2006

BEFORE **EDITH KLINGER,** ALJ:

This matter was transmitted to the Office of Administrative Law on August 8, 2005, 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 settle this matter and have prepared the attached Settlement Agreement indicating the terms of settlement, which was received by the undersigned on July 10, 2006

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

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

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

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

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

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

July 11, 2006
DATE

EDITH KLINGER, ALJ

Receipt Acknowledged:

7-19-06
DATE

DEPARTMENT OF EDUCATION

Mailed to Parties:

JUL 20 2006
DATE

DIRECTOR AND CHIEF ADMINISTRATIVE LAW JUDGE
OFFICE OF ADMINISTRATIVE LAW

pb

Jennifer Borja, Esq.
Timothy R. Smith & Associates, L.L.C.
76 South Orange Avenue, Suite 211
South Orange, NJ 07079
Attorney for Petitioner, Mitchell Viteillo

RECEIVED
2006 JUL 11 A 8:40
STATE OF NEW JERSEY
OFFICE OF ADMIN. LAW

MITCHELL VITIELLO Petitioner,	BEFORE THE COMMISSIONER OF EDUCATION OF NEW JERSEY OFFICE OF ADMINISTRATIVE LAW OAL DOCKET NO.: EDUOR-09292-2005N
ORANGE BOARD OF EDUCATION, Respondent.	Agency Reference No.: 130-5/05 **STIPULATION OF SETTLEMENT AND RELEASE**

This Stipulation of Settlement and Release is made by and between the Orange Board of Education (the "Board") with administrative offices located at 451 Lincoln Avenue, Orange, New Jersey. 07050 and Mitchell Vitiello (the "Petitioner"), whose address is 5 Roland Road, Peaquannock, New Jersey 07440. In consideration of mutual promises and undertakings contained in this Stipulation of Settlement and Release and for good and valuable consideration the receipt of which is hereby acknowledge, the undersigned parties state:

WHEREAS, on March 8, 2004, Petitioner was employed by the Board as a teaching staff member; and

WHEREAS, Petitioner was charged with a criminal action for certain acts alleged to have occurred on March 8, 2004, while Petitioner was in the employ of the Board; and

WHEREAS, on February 25, 2005, the criminal complaint against Petitioner was dismissed pursuant to a not-guilty verdict after trial; and

WHEREAS, Petitioner filed a Petition of Reimbursement with the Commissioner of Education on or about May 18, 2005, pursuant to N.J.S.A. 18A:16-6.1, seeking reimbursement

from the Board for Petitioner's attorneys' fees and costs associated with the legal defense of the criminal action with which Petitioner had been charged; and

WHEREAS, on July 25, 2005, the board filed its answer to the Petition of Reimbursement with Affirmative Defenses; and

WHEREAS, the parties have determined that it is in their respective best interests to enter into this Stipulation of Settlement and Release to avoid the need for further litigation;

NOW, THEREFORE, in consideration of the mutual promises and covenants, the parties agree as follows:

1. The Board will pay to the Petitioner the sum of Twelve Thousand Dollars ($12, 000.00) in full and complete satisfaction of the amount Petitioner is claiming to be due and owing to him from the Board for Petitioner's attorneys' fees and costs.
2. This settlement amount will be paid directly to the trust account of Petitioner's legal counsel, Timothy R. Smith Esq. of Timothy R. Smith & Associates L.L.C., 76 South Orange Avenue, Suite 211, South Orange, New Jersey, 07079, following the approval of this Stipulation of Settlement and Release by the commissioner of Education.
3. Petitioner, in consideration of this Agreement, herby release the Board, individually and collectively, and its agents, servants and employees from any and all claims, causes of action, suits, actions at law and in equity, administrative proceedings, and judicial and quasi-judicial proceedings of any kind whatsoever, which have been brought, or could be brought, arising under or relating in any way to the subject matter set forth in the Petition of Appeal now and forever, except to enforce the terms of this Stipulation of Settlement and Release.

4. Petitioner acknowledges that he has reviewed this Stipulation of Settlement and Release with his own independent legal counsel and that he enters into it without duress, and of his own free will and volition. He further acknowledges that he fully understands the terms of this Stipulation of Settlement and Release and the duties and obligations enumerated herein.

5. Petitioner, in consideration of this Stipulation of Settlement and Release and in full, final and complete settlement of this matter hereby withdraws, with prejudice, the above-docketed Petition of Reimbursement.

6. Nothing contained in this Stipulation of Settlement and Release should be construed as an admission of wrongdoing by either party, and neither party shall be considered a prevailing party for any reason.

7. This Stipulation of Settlement and Release is conditioned upon approval of the board.

8. The Board's President is authorized to execute this Stipulation of Settlement and Release on behalf of the Board.

9. This Stipulation of Settlement and Release contains the entire agreement between the parties, and no other representations, whether verbal or in writing shall be binding upon them.

10. All terms of this Stipulation of Settlement and Release are deemed material. This instrument may not be altered, amended, modified or revoked except by a new instrument executed in writing by the parties.

11. This Stipulation of Settlement and Release is an agreement which is to be construed in accordance with the laws of the State of New Jersey.

IN WITNESS WHEREOF, the parties, or their duly authorized representatives, do set forth their hands and seal as of the dates(s) set forth below.

FOR THE ORANGE BOARD OF EDUCATION:

By: _____ By: _____

ADEKUNLE JAMES, BUSINESS ADMINISTRATOR , Witness

Date: 4-11-06

PETITIONER:

_____ 4-25-06

Mitchell Vitiello

Date: 4-21-06

Sworn and subscribed to before me this
25 day of April, 2006

_____

Notary Public

ZINOVIA HATZIPETROS
A Notary Public of New Jersey
My Commission Expires APRIL 13, 2009

272-06

OAL DKT. NO. EDU 2681-06
AGENCY DKT. NO. 137-4/06

C.M.R. on behalf of minor child D.R., :

PETITIONER, :

V. : COMMISSIONER OF EDUCATION

BOARD OF EDUCATION OF THE BOROUGH OF BUENA, ATLANTIC COUNTY, :

RESPONDENT. :

The record in this matter, the proposed settlement agreement, a resolution by respondent authorizing the settlement, and the Initial Decision issued by the Office of Administrative Law (OAL) pursuant to N.J.A.C. 1:1-19.1, have been reviewed.

Upon such review, the Commissioner approves the settlement terms and adopts the settlement as the final decision in this case. The Commissioner notes, however, that although respondent's resolution authorized its president to execute the settlement, respondent's secretary actually signed on behalf of respondent. Because the resolution itself and the cover letter from respondent's counsel represents that respondent wishes to enter into the settlement, the Commissioner concludes that this discrepancy is immaterial to the settlement's validity.

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: 8/11/06

Date of Mailing: 8/11/06

State of New Jersey
OFFICE OF ADMINISTRATIVE LAW

INITIAL DECISION
SETTLEMENT
OAL DKT. NO. EDU 2681-06
AGENCY DKT. NO. 137-4/06

C.M.R. ON BEHALF OF MINOR CHILD, D.R.,
Petitioner,
v.
BOARD OF EDUCATION OF THE BOROUGH OF BUENA, ATLANTIC COUNTY,
Respondent.

C.M.R., petitioner, pro se

Emily A. Buonadonna, Esq., for respondent (Capizola, Fineman & Lapham, P.C., attorneys)

Record Closed: June 26, 2006 Decided: June 27, 2006

BEFORE **BRUCE M. GORMAN,** ALJ:

This matter was transmitted to the Office of Administrative Law on May 2, 2006, for determination as a contested case, pursuant to N.J.S.A. 52:14B-1 to -15 and N.J.S.A. 52:14F-1 to -13.

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

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

1. The parties have voluntarily agreed to the settlement as evidenced by their signatures or their representatives' signatures and as placed on the record on June 1, 2006.

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

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

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

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

June 27, 2006
DATE

BRUCE M. GORMAN, ALJ

Receipt Acknowledged:

7-10-06
DATE

DEPARTMENT OF EDUCATION

JUL 11 2006

Mailed to Parties:

DIRECTOR AND
CHIEF ADMINISTRATIVE LAW JUDGE

DATE

OFFICE OF ADMINISTRATIVE LAW

/sd

C.M.R. o/b/o D.R. v. Buena Regional School District Board of Education

Dkt. No. 137-4/06

Settlement Agreement

1. The parties to this action agree that D.R. was improperly enrolled in the Buena Regional School District (the "District") from 9/6/2005 to 3/23/2006.

2. C.M.R. agrees to pay to the District $5,327.06 as tuition reimbursement for the time D.R. was improperly enrolled in the District from 9/6/2005 to 3/23/2006.

3. Payment by C.M.R. of $5,327.06 will be made as follows:
   (w) ~~$500 by January 15, 2006~~
   ~~$ 500 by January 15, 2006~~
   (w) $175 by the 15th of each month

thereafter, beginning August 15, 2006, until the amount is paid in full.

Payment shall be made by check or money order paid to the order of "The Buena Regional School District" and shall be sent to

Thomas J. Kearney Business Administrator
Board Secretary

P.O. Box 309
Buena, NJ 08310

there will be a ten (10) day grace period after which time if payment has not been made, the District can demand payment be made in full.

4. C.M.R. shall provide a copy of a Lease Agreement or a copy of her cancelled rent checks for the property she leases at 444 S. Brewster Road, Buena Borough, NJ by the 15th of each month beginning August 15, 2006. The Lease Agreement or cancelled checks shall be sent to Thomas J. Kearney at the above address. This paragraph must be complied with until the tuition reimbursement is paid in full.

5. If C.M.R. moves from 444 S. Brewster Road, she shall notify the District and provide proof of eligibility that satisfies her burden of demonstrating D.R.'s eligibility to enroll in the District. If it is determined D.R. is ineligible for continued attendance in the District, the Superintendent may apply to the Board for D.R.'s removal.

6. C.M.R. shall provide a copy of her husband's (John Fiocchi) pay stub or check from his place of employment which verifies his wages.

7. This Settlement Agreement settles the matter of C.M.R. o/b/o D.R. v. Buena Regional School District as well as any Crossclaims made by the District, Dkt. No. 137-4/06.

8. By entering into this Settlement Agreement, the District does not waive its right to claim that D.R. has been improperly enrolled in the District since 3/23/2006 or that he is improperly enrolled in the District at some time in the future.

9. This Settlement Agreement is not Final and is subject to approval by the Buena Regional School Dist Bd of Educ. on June 13, 2006.

Christine M. Rhodes

Christine M. Rhodes,
Petitioner

Thomas J. Kearney,
B.A. / Bd. Sec.

RESOLUTION

WHEREAS, Petitioner C.M.R. on behalf of D.R., filed a *Pro Se* Residency Appeal, Agency Docket No. 137-4/06, against the Buena Regional School District Board of Education on April 10, 2006; and

WHEREAS, the Buena Regional School District Board of Education filed an Answer, Affirmative Defenses and a Counterclaim on April 26, 2006; and

WHEREAS, a plenary hearing in this case was scheduled to be held on June 1, 2006 before the Hon. Bruce M. Gorman, A.L.J. in the Office of Administrative Law, Atlantic City, New Jersey; and

WHEREAS, the parties negotiated and entered into a Settlement Agreement on June 1, 2006; and

WHEREAS, the Board has reviewed the terms of the Settlement Agreement and discussed those terms with its Solicitor to the Board's satisfaction; and

WHEREAS, the Board has determined that the best interest of the District would be served by resolving this matter in accordance with the terms of the attached Settlement Agreement.

BE IT RESOLVED that the Board of Education of the Buena Regional School District hereby authorizes the President of the Board to enter the Settlement Agreement by and between the Board and C.M.R. on behalf of D.R., which Agreement will resolve the matter of *C.M.R. on behalf of D.R. v. Buena Regional School District Board of Education*, Agency Docket No. 137-4/06 currently pending before the Commissioner of Education.

ADOPTED on June 13, 2006.

RECEIVED
2006 JUN 26 A 10:02
OFFICE OF THE SECRETARY
STATE OF NEW JERSEY

CERTIFICATION

I, **THOMAS J. KEARNEY**, Secretary of the Board of Education of the Buena Regional School District, a Public Body of the State of New Jersey, hereby certify that the foregoing is a true copy of a Resolution as it appears in the records of the Board of Education of the Buena Regional School District and as was duly and legally adopted at a meeting of the Board held on June 13, 2006 pursuant to and in accordance with the laws of the State of New Jersey by a recorded vote of a majority of those members present which did constitute a quorum of the Board; that it has not been modified, amended or rescinded and is in full force and effect as of the date hereof.

Thomas J. Kearney, Board Secretary

Dated: June 21, 2006

274-06

OAL DKT. NO. EDU 11291-05
AGENCY DKT. NO. 215-8/05

S.V. on behlf of minor children, T.S. and S.M.,

PETITIONER,

V.

BOARD OF EDUCATION OF THE VILLAGE OF RIDGEFIELD PARK, BERGEN COUNTY,

RESPONDENT.

COMMISSIONER OF EDUCATION

DECISION

The record of this matter, the proposed settlement agreement, and the Initial Decision issued by the Office of Administrative Law (OAL) pursuant to *N.J.A.C.* 1:1-19.1, have been reviewed.

Upon such review, the Commissioner approves the settlement terms and adopts the settlement as the final decision in this case. In so holding, however, the Commissioner observes that the settlement agreement provides for effectuation of its terms upon execution of the agreement by the parties. The ALJ and parties herein, as well as all parties to contested cases, are cautioned that they act at their peril in effectuating settlement terms that have not yet been approved by the Commissioner.

The matter is hereby dismissed, subject to compliance with the terms of the settlement.

IT IS SO ORDERED.

Lucille Edley

ACTING COMMISSIONER OF EDUCATION

Date of Decision: 8/14/06

Date of Mailing: 8/14/06

State of New Jersey
OFFICE OF ADMINISTRATIVE LAW

INITIAL DECISION

SETTLEMENT

OAL DKT. NO. EDU 11291-05

AGENCY REF.NO.215-8/05

S.V., ON BEHALF OF MINOR CHILD, T.S. AND S.M.,

Petitioner,

v.

BOARD OF EDUCATION OF THE VILLAGE OF RIDGEFIELD PARK, BERGEN COUNTY,

Respondent.

Jennifer L. Nasta, Esq., for petitioner (Lowenstein & Sandler, attorneys)

Jeffrey R. Merlino, Esq., for respondent (Lindabury, McCormick & Estabrook, P.A., Attorneys)

Record Closed: July 14, 2006 Decided: July 17, 2006

BEFORE **CAROL I. COHEN**, ALJ:

The matter was transmitted to the Office of Administrative Law (OAL) on September 20, 2005 for determination as a contested case. A hearing was scheduled for March 26, 2006, which was adjourned by the petitioner to obtain new counsel. The hearing was rescheduled for May 26, 2006 and it was adjourned by the petitioner's attorney due to the unavailability of the subpoenaed witness. Again, it was rescheduled for June 2, 2006.

Prior to the hearing, the parties were able to settle the matter. On July 14, 2006 the parties submitted the attached Stipulation of Settlement and a Stipulation of Dismissal with

Prejudice indicating the terms of the agreement. Having reviewed the record and the settlement terms, I **FIND**:

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

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

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

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

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

7/17/06
DATE

Carol I. Cohen
CAROL I. COHEN, ALJ

Receipt Acknowledged:

7-19-06
DATE

Karen Kennedy
DEPARTMENT OF EDUCATION

JUL 20 2006
DATE

Mailed to parties:

DIRECTOR AND CHIEF ADMINISTRATIVE LAW JUDGE
OFFICE OF ADMINISTRATIVE LAW

id

LOWENSTEIN SANDLER PC
Attorneys At Law
65 Livingston Avenue
Roseland, New Jersey 07068
973.597.2500
Attorneys for S.V. on behalf of Minor Child, T.S. and S.M.

RECEIVED
2006 JUL 14 P 1:01
STATE OF NEW JERSEY
OFFICE OF ADMIN LAW

SUPERIOR COURT OF NEW JERSEY
OFFICE OF ADMINISTRATIVE LAW
OAL DOCKET NO.: EDUOS 11291-2005N
AGENCY REF. NO.: 215-8/05

HONORABLE CAROL I. COHEN

S.V. ON BEHALF OF MINOR CHILD, T.S. AND S.M., Petitioner, vs. VILLAGE OF RIDGEFIELD PARK BOARD OF EDUCATION, Respondent.	**STIPULATION OF SETTLEMENT**

This Stipulation of Settlement (the "Stipulation") is entered by and between Sonia Vaisenberg ("Vaisenberg") and the Village of Ridgefield Park Board of Education ("Ridgefield Park") (collectively, the "Parties" and individually, a "Party").

WHEREAS, on or about August 2, 2005, Ridgefield Park notified Vaisenberg that T.S. and S.M. were ineligible to receive a free education in Ridgefield Park ("Notice of Ineligibility");

WHEREAS, on or about August 23, 2005, Vaisenberg filed a *Pro Se* Residency Appeal (the "Residency Appeal") with the State of New Jersey Commissioner of Education (the "Commissioner");

WHEREAS, on our about September 7, 2005, Ridgefield Park filed an Answer to the Residency Appeal and a Counterclaim seeking tuition for the attendance by T.S. and S.M. in the Ridgefield Park public school (the "Counterclaim"); and

WHEREAS, the Parties have settled the Residency Appeal and Counterclaim under the terms and conditions set forth in this Stipulation.

NOW THEREFORE, in consideration of the following terms and conditions, and other good and valuable consideration, the sufficiency of which is hereby acknowledged, the Parties agree as follows:

1. The Effective Date of this Stipulation is the date upon which it is fully executed by the Parties.

2. Upon the occurrence of the Effective Date, Vaisenberg will dismiss with prejudice the Residency Appeal against Ridgefield Park, and Ridgefield Park will dismiss with prejudice the Counterclaim against Vaisenberg by filing the Stipulation of Dismissal with Prejudice attached hereto as Exhibit A.

3. In consideration of this Stipulation, the Parties waive any and all claims, rights and liabilities asserted in or arising from the Residency Appeal and the Counterclaim, including any and all claims for tuition, education, special education, related services, transportation, therapy, compensatory education, money damages, civil liability, and any other equitable or legal relief which may have accrued up to and including the Effective Date.

4. Nothing in this Stipulation shall constitute any admission or acknowledgment of liability by the Parties.

5. No provision of this Stipulation may be amended except by a written instrument executed by the Parties.

6. Each person signing this Stipulation hereby represents and warrants that he or she has been duly authorized and has the requisite authority to enter into this Stipulation on behalf of the Party on whose behalf they so sign.

7. In executing this Stipulation, the Parties have not relied upon any representation or statement, other than as specifically stated in this Stipulation.

8. The Parties have relied entirely upon their own judgment, beliefs and interest and, where applicable, the advice of their own counsel (for whose expense each shall be solely responsible) and they each have had a reasonable period of time to consider this Stipulation.

9. This Stipulation was the product of negotiations between the Parties and any rule of construction requiring that ambiguities are to be resolved against the drafting party shall not apply in the interpretation of this Stipulation.

10. This Stipulation shall be binding only upon, and only inure to the benefit of, the Parties and their respective successors and assigns.

11. This Stipulation shall be governed and construed in accordance with the laws of the State of New Jersey.

12. If, during the term of this Stipulation, a specific clause of the Stipulation is determined to be illegal or in violation of Federal or State law, the remainder of this Stipulation shall not be affected and shall remain in full force and effect.

13. This Stipulation sets for the entire agreement between the Parties and fully supersedes any and all prior agreements and understandings, written or oral, between the Parties pertaining to the subject matter hereof.

14. The Parties shall execute and deliver all such further instruments and take all such further actions as may be reasonably necessary or appropriate to carry out this Stipulation.

15. This Stipulation may be executed in one or more counterparts, including by facsimile, each of which shall be deemed an original, but all of which together constitute one and the same instrument.

SONIA VAISENBERG

By: _____
Sonia Vaisenberg

Dated: July 12, 2006

VILLAGE OF RIDGEFIELD PARK BOARD OF EDUCATION

By: _____
Anthony P. Sciarrillo, Esq.
Board Attorney

Dated: July 12, 2006

LOWENSTEIN SANDLER PC
Attorneys At Law
65 Livingston Avenue
Roseland, New Jersey 07068
973.597.2500
Attorneys for S.V. on behalf of Minor Child, T.S. and S.M.

RECEIVED
2006 JUL 14 P 1:01
STATE OF NEW JERSEY
OFFICE OF ADMIN LAW

SUPERIOR COURT OF NEW JERSEY
OFFICE OF ADMINISTRATIVE LAW
OAL DOCKET NO.: EDU OS 11291-2005N
AGENCY REF. NO.: 215-8/05

HONORABLE CAROL I. COHEN

S.V. ON BEHALF OF MINOR CHILD, T.S. AND S.M.,
Petitioner,

vs.

VILLAGE OF RIDGEFIELD PARK BOARD OF EDUCATION,
Respondent.

STIPULATION OF DISMISSAL WITH PREJUDICE

IT IS HEREBY STIPULATED AND AGREED by and between the parties to the above-captioned action, through their undersigned counsel, that this action be and hereby is dismissed with prejudice and without costs in favor of either party.

By: _____
Jennifer L. Nasta, Esq.
Lowenstein Sandler, PC
65 Livingston Avenue
Roseland, NJ 07068
Attorneys for Petitioner

Dated: July 12, 2006

By: _____
Jeffrey R. Merlino, Esq.
Lindabury, McCormick & Estabrook, PC
53 Cardinal Drive
P.O. Box 2369
Westfield, NJ 07091
Attorneys for Respondent

Dated: July 12, 2006

273-06

OAL DKT. NO. EDU 10284-05
AGENCY DKT. NO. 337-11/05

MONMOUTH-OCEAN EDUCATIONAL SERVICES COMMISSION,

PETITIONER,

V.

NEW JERSEY STATE DEPARTMENT OF EDUCATION, DIVISION OF FINANCE,

RESPONDENT.

COMMISSIONER OF EDUCATION

DECISION

The record in this matter and the Initial Decision have been reviewed.[1] The Commissioner adopts the determination of the Office of Administrative Law (OAL) that the petition must be dismissed. The undisputed material facts in this case are set forth in the Initial Decision, and will not be repeated. However, the Commissioner adds the following information to lend context to the Administrative Law Judge (ALJ)'s findings and conclusions, with which the Commissioner concurs.

Petitioner is an Educational Services Commission, *i.e.*, "an agency established . . . in one or more counties for the purpose of carrying on programs of educational research and development and providing to public school districts such educational and administrative services as may be authorized pursuant to rules of the State Board of Education." *N.J.S.A.* 18A:6-51(a). Such a Commission is created under the following conditions. First, five or more boards of education, and the Commissioner

[1] The Initial Decision was mailed to the parties on July 28, 2006. Pursuant to *N.J.A.C.* 1:1-18.4(a), exceptions were due on July 11, 2006. Petitioner's exceptions were received by the Commissioner on July 13, 2006 and were consequently untimely.

of Education (Commissioner), must study and investigate, and conclude that the creation of a Commission is advisable. *N.J.S.A.* 18A:6-52(a). The boards may then petition the State Board of Education (State Board) for permission to establish a Commission. *Ibid.* Annexed to the petition must be a report identifying the kinds of educational and administrative services and programs that the boards of education expect the Commission to provide, estimated costs of the provision of those services and programs, and a method of financing the expenditures, "including a detailed budget which projects anticipated costs and identifies anticipated sources of revenue until such can be financed under its first regularly adopted budget . . . ." *Ibid.*

If the State Board approves the establishment of a Commission, a "Representative Assembly" is formed, comprised of one representative of each of the boards of education [districts] which petitioned to create the Commission. *N.J.S.A.* 18A:6-53 The Representative Assembly elects a board of fifteen or more directors, including at least one director from each district. *N.J.A.C.* 18A:6-54; *N.J.A.C.* 18A:6-55 This board of directors performs functions similar to a corporate board, in that it has the authority to contract, pay debts, purchase or lease real or personal property and hire a compensated Secretary to execute board decisions and perform various reporting and recording duties. *N.J.S.A.* 18A:6-57; *N.J.S.A.* 18A:6-59; *N.J.S.A.* 18A:6-61. The Commission board can also hire a superintendent or chief administrator to run the Commission. *N.J.S.A.* 18A:6-60

The Commission board is responsible for annually submitting to the Representative Assembly the financial information which the assembly needs to present a budget to the county superintendent of schools. *N.J.S.A.* 18A:6-62 That information

must include the estimated cost of providing each service or program, the fees to be charged for same, and the method by which the commission expenses shall be funded. *Ibid.* Commissions may also apply for grants from individuals, agencies and governments for programs approved by the State Board. *N.J.S.A.* 18A:6-67

Commissions may contract with school districts, public agencies and private agencies to provide services, to both public and non-public schools. *N.J.S.A.* 18A:6-63 In the present case, petitioner contracted with two school districts to provide nursing services to a non-public school, Our Lady of Perpetual Help (OLPH), located within their district boundaries, in connection with Chapter 226 of the Laws of 1991, which mandates that public school districts arrange such services with State money that is distributed to the districts for that purpose.[2] When public schools make such contracts with Commissions to provide nursing services, the nurses are considered "employees of a third-party contractor." *N.J.A.C.* 6A:16-2.4(b)

Petitioner entered into the two identical contracts (the Contracts) with the Henry Hudson Regional School District and the Highlands School District in 1991.[3] Respondent is not a party to either of the Contracts.[4] Under the contract terms, the respective boards of education agreed "to pay the Commission the full amount of State Aid received in support of Chapter 226" on a fixed schedule. The record indicates that for the 2004-2005 school year, that amount was $9578.00. Significantly, the Contracts provide that "[n]o other funding is due the Commission in order to operate this program."

---

[2] Any unused Chapter 226 funds must be returned to the State on an annual basis, *N.J.S.A.* 18A:40-31(b), but once the allocated funds are spent, no public school district is obligated to make expenditures in excess of the amount of Chapter 226 aid it received. *N.J.S.A.* 18A:40-31(c).

[3] Since OLPH is apparently located within the boundaries of both the Henry Hudson Regional School District and the Highlands Borough School District, both contribute Chapter 266 funds for the nursing services.

[4] Copies of the contracts are in the record, marked C-1 and C-2, respectively.

The Contracts also provide that "[t]he Commission shall contact the designated non-public schools within the district and determine the services to be provided within the parameters of the law and the limitation of funding." In connection therewith, the contract requires that the Commission issue an annual addendum to the contract "outlining the individual services provided to each non-public school located within the district."

Included in the record in multiple locations, including Exhibit P-3A, are copies of the contract addendum relating to OLPH, for the 2004-2005 school year. The addendum, signed by a representative of OLPH and by a representative of petitioner, recited that petitioner was permitted to use $574.68 of the above referenced $9578.00 of Chapter 226 funds for administrative expenses, and would provide 10.75 hours of nursing services per week for 33 weeks. The base cost of the nurse per hour was set at $20.50, for a total base cost of $7272.38. This amount was multiplied by 1.12 to cover fringe benefits (social security, pension and unemployment insurance), amounting to $8145.25, and again by 1.1 to cover nursing supervision, amounting to $8959.78. $43.75 remained in the 2004-2005 OLPH Contract for supplies and physicals.

As related in the Initial Decision, petitioner did not provide OLPH with the full 354.75 hours of nursing services that had been identified in the contract addendum. The nurse that it assigned to OLPH, like all Commission employees, was entitled to sick leave pursuant to *N.J.S.A.* 18A:6-66, and took 9.5 days during the 2004-2005 school year. The Commission maintained that it had the right to unilaterally reduce the amount of OLPH nursing service hours memorialized in the addendum, in accordance

with the amount of money it had to pay as sick leave benefits to the nurse that had been assigned to OLPH.

In a letter dated June 20, 2005 to John Lally of the New Jersey Department of Education (respondent), who is responsible for the oversight of services provided to non-public schools, Timothy Nogueira, petitioner's superintendent, articulated petitioner's rationale for providing OLPH with less than the promised amount of nursing services. Exhibit R-3E Nogueira contended that since the nurse in question worked only at OLPH, her wages and benefits could only be paid with non-public nursing program funds. Paying her for her sick leave, argued Nogueira, reduced the pool of Chapter 226 funds available for services to OLPH, resulting in the provision to OLPH of less than the contracted for amount of hours of nursing services.

Nogueira stated that other non-public schools to which petitioner provides services "have elected to set aside part of their funding allocation in the eventuality that the nurse[s] assigned to the[ir] school[s] [are] absent for any reason . . . ." *Ibid.* The administrator at OLPH elected not to do so. *Ibid.* Nogueira further declared his intention to write to the schools to which petitioner had been providing nursing services, advising them that they could "set aside money within their non-public nursing service agreement to cover these contingencies," and that if they did not, they would be responsible for securing a substitute nurse. *Ibid.*

In response to Nogueira's letter and a similar letter from petitioner's counsel, Yut'se Thomas, Assistant to the Commissioner for Finance, and Susan B. Martz, Director of the Office of Program Support Services, Department of Education, wrote to

petitioner's counsel on October 13, 2005. Exhibit R-3G They advised that petitioner is a service provider like any other:

> The salaries and benefits of the employees of any given service provider is [sic] outside the contractual obligations of the public school district. The service provider, when utilized by the district, is a contracted entity providing a purchased professional service, and nothing more. As such, it is inappropriate for non-public schools to be asked to set aside funds to pay for the salaries and benefits of employees of the service provider . . . .

Thomas and Martz emphasized that no one at the Department would advise petitioner to dishonor its contractual obligations with its employees, but that petitioner's nurses' salaries and benefits are the responsibility of neither the public school districts nor the non-public schools that receive the services. Corroborative of that position is guidance which respondent issued in October 1994, which states that when agencies use employees to provide services, the employees' benefits "should already be calculated in their hourly rate." Exhibit P-3J and Exhibit R-3H

The petition in this matter demands "entry of a judgment: (a) requiring the [sic] public agency, such as the MOESC, to comply with *N.J.S.A.* 18A:30-1, *et seq.* in the provision of Chapter 226 services, and (b) requiring that the Chapter 226 services are to be solely paid for [sic] funding designated for Chapter 226." The Commissioner sees no reason to enter such an order, since a) by the terms of *N.J.S.A.* 18A:6-66, petitioner must comply with *N.J.S.A.* 18A:30-2 *et seq.*, and b) respondent has issued no directive requiring petitioner to use non-Chapter 226 funding to pay for Chapter 226 services.

The Commissioner concurs with the ALJ that the ultimate issue to be decided in this controversy is whether the petitioner has proven that the respondent was arbitrary, capricious or unreasonable in interpreting the relevant statutes and regulations

to preclude petitioner from passing on its employee costs to OLPH. *Matturi v. Bd. of Trs. of the Judicial Ret. Sys.*, 173 *N.J.* 368, 381 (2002) ("we defer to '[t]he agency's interpretation . . . provided it is not plainly unreasonable," citing *In re Pub. Serv. Elec. & Gas Co.'s Rate Unbundling, Stranded Costs & Restructuring Filings,* 167 *N.J.* 377, 384 (2001), quoting *Merin v. Maglaki*, 126 *N.J.* 430, 437, (1992)). The Commissioner also agrees with the ALJ's conclusion that petitioner did not meet that burden.

Respondent's 1994 guidance, referenced above, and its subsequent advisements have neither barred petitioner from paying its employees sick leave benefits nor required that petitioner use non-Chapter 226 funds to do so. Rather, respondent has counseled that third party providers such as petitioner may factor expected sick leave benefits into the fees charged to the school districts for the services to the non-public schools. It is true that the amount of hours of nursing services provided to non-public schools could decrease as a result. However, petitioner has pointed to nothing in *N.J.S.A.* 18A:40-23 *et seq.*, the legislation that established public school districts' responsibility to provide nursing services to non-public schools, that would prohibit such a result. To the contrary, the legislative history and statutory provisions infer such a possibility, *inter alia*, by imposing caps on the funding of the nursing services for non-public schools, and by specifying that "[i]n any year, no district shall be required to make expenditures for the purpose of this act in excess of the amount of State aid received for these purposes. *N.J.S.A.* 18A:40-31(c)

The statutory and regulatory provisions discussed above reveal that petitioner is an entity that, having been created by a group of public school districts, received the authority and responsibility to annually formulate and adopt budgets which

include the estimated costs of providing each of its services and/or programs. Petitioner is required to annually establish the fees to be charged for its services and notify each district in its representative assembly of those fees. The Commissioner reiterates that also among petitioner's powers is the authority to enter into contracts to "receive and administer funds and grants from any individual or agency, including but not limited to, agencies of the federal government . . . , provided that the funds or grants are for programs and services for which the commission has received approval from the State board . . . ." *N.J.S.A.* 18A:6-67

In light of petitioner's above described obligations to scrutinize its finances each year, it is not unreasonable to expect that petitioner would have recognized that its employees' sick leave benefits were a cost of doing business that needed to be addressed. There are no strictures in the legislation creating Commissions, or in the Chapter 226 legislation, against factoring the cost of sick leave benefits into the cost of providing a nurse to a non-public school to provide health care services. Thus, factoring such costs into its service fees to the school districts would have been and is an acceptable way of handling them.

Demanding that a non-public school be responsible for a sick leave escrow or a substitute nurse, on the other hand, has no statutory support. There are no provisions in the Chapter 226 legislation requiring non-public schools to contribute in any way to the costs of the nursing services mandated therein. Indeed, under the statutory scheme the State distributes the Chapter 226 funds to public school districts which, in turn, either use them to provide nursing services with school district employees or pay them to other service providers - such as petitioner. The non-public students are essentially third-party

beneficiaries; they receive the services, but neither they nor their schools receive the money.

Nor can petitioner look to the school districts for separate funding of employee benefits. Under *N.J.S.A.* 18A:40-31 and the terms of the contract between petitioner and the two school districts identified above, the districts were not obligated to provide petitioner with any funds over and above the allotment of Chapter 226 money that they received from the State. To the extent that there was a shortfall in petitioner's provision of hours of nursing service to OLPH, it was attributable to petitioner's own planning and management of resources.

In sum, as found by the ALJ, respondent's position with regard to the application of relevant statutory and regulatory authority to the facts of this case was not arbitrary, capricious, unreasonable or unlawful.[5] The petition is dismissed.

IT IS SO ORDERED.[6]

Lucille E. Davy
ACTING COMMISSIONER OF EDUCATION

Date of Decision: 8/11/06

Date of Mailing: 8/11/06

[5] The Commissioner disagrees with the ALJ's suggestion that rulemaking would be appropriate, given the clarity of the existing statutory scheme.

[6] This decision may be appealed to the State Board of Education pursuant to *N.J.S.A.* 18A:6-27 *et seq.* and *N.J.A.C.* 6A:4-1.1 *et seq.*

State of New Jersey
OFFICE OF ADMINISTRATIVE LAW

INITIAL DECISION
OAL DKT. NO. EDU 10284-05
AGENCY DKT. NO. 337-11/05

MONMOUTH-OCEAN EDUCATIONAL SERVICES COMMISSION,
Petitioner,
v.
NEW JERSEY STATE DEPARTMENT OF EDUCATION, DIVISION OF FINANCE,
Respondent.

Peter Sokol, Esq., for petitioner (McComber & McComber, attorneys)

Eun S. Bae, Deputy Attorney General, for respondent (Zulima V. Farber, Attorney General of New Jersey, attorney)

Record closed: May 17, 2006 Decided: June 26, 2006

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

STATEMENT OF THE CASE AND PROCEDURAL HISTORY

Petitioner, Monmouth-Ocean Educational Services Commission, challenges determinations that were made by respondent, New Jersey Department of Education (DOE), regarding the permitted use of State funds appropriated pursuant to N.J.S.A.

18A:40-23 to -31, commonly referred to as Chapter 226.[1] Respondent determined that Chapter 226 funds may only be used for the provision of nursing services, and that while a contracted service provider may include the fringe-benefit expenses of its employees in negotiating the rate that it charges its client school districts, such benefits are not distinct expenses for which Chapter 226 funds may be separately allocated.

On November 28, 2005, petitioner challenged respondent's October 13, 2005, letter by an appeal to the Commissioner of Education. Respondent filed its Answer on December 19, 2005, and the matter was transmitted to the Office of Administrative Law (OAL) on December 23, 2005. During a prehearing telephone conference on February 8, 2006, the parties agreed to address the matter by way of cross-motions for summary decision. After receiving the submissions of the parties addressing the matter, I closed the record on April 18, 2006. However, on May 4, 2006, I reopened the record, conducted a telephone conference with the attorneys and requested additional documents. I then reclosed the record on May 17, 2006, after receiving the requested documents.

FACTUAL DISCUSSION

The parties agree that there are no genuine issues as to any material facts, and the outstanding issues involve purely legal questions. The primary legal issue is whether respondent's determination that Chapter 226 funds may not be allocated to separately fund the fringe benefits of nurses employed by a contracted service provider is arbitrary, capricious and unreasonable.

I have carefully considered the certifications and briefs submitted by the parties and I have concluded that the underlying essential facts in this matter are not disputed. John M. Lally, who is employed by the State of New Jersey, Department of Education, Division of Student Services in the Office of Program Support Services, provided a certification (R-3) in support of respondent's motion for summary decision (R-1). Mr. Lally is responsible for the oversight of services provided to nonpublic schools, including

[1] Adopted as Laws of 1991, Chapter 226.

the monitoring of nursing services provided to nonpublic schools pursuant to Chapter 226. Michelle Dumford, the director of Special Services for the Monmouth-Ocean Educational Services Commission (MOESC), provided a certification (P-3) in support of the MOESC's motion for summary decision (P-1). One of Ms. Dumford's responsibilities is to administer Chapter 226 services provided by the MOESC. Based on these two certifications, I have determined and I **FIND** that the following are the undisputed facts in this matter.

Chapter 226 authorizes nursing services for nonpublic school students, and requires that the public school district in which the nonpublic school is located provide nursing services to nonpublic school students. If a nonpublic school wishes to participate in the nursing services program, it submits a Non-public School Enrollment Report in October of each year, which determines the number of students for which State funds will be allocated. In July of each year, the Department allocates State funds to the public school district for the provision of nursing services, in an amount equal to the number of nonpublic school students within the district identified by the district on or before November 5 of each year, multiplied by the State support limit. At the end of each school year, the public school district is responsible for filing the annual nonpublic nursing project completion report with the Department of Education, and any unexpended funds must be returned to the Department. Unexpended funds that are not so returned by the public school district are recovered through a reduction to the public school district's general State aid payment.

N.J.S.A. 18A:40-28 provides that the board of education of a school district responsible for providing such nursing services may contract with any public or private agency approved by the Commissioner for the provision of such services. Petitioner is an educational services commission (ESC) established pursuant to N.J.S.A. 18A:6-51 to -70. In accordance with the laws governing the formation of ESCs, petitioner is statutorily authorized to contract with client school districts to provide various educational services, and is vested with the ancillary power to "determine the fee to be charged for providing each service and program." N.J.S.A. 18A:6-63. The MOESC has been providing Chapter 226 services to nonpublic schools on behalf of public schools

since the advent of Chapter 226.

During the 2004-2005 school year, the Henry Hudson Regional (HHR) and Highlands school districts, as the responsible public school districts, received Chapter 226 funds of $2,450.00 and $7,128.00, respectively, for nursing services at the Our Lady of Perpetual Help (OLPH) School. Thus, the total sum of $9,578.00 was available for the providing of Chapter 226 nursing services at OLPH during the 2004-2005 school year (P-3, Exhibit A). Pursuant to agreements entered into by the HHR and Highlands school districts and the petitioner (C-1; C-2), petitioner agreed to provide the required nursing services to OLPH in return for the payment to petitioner of the full amount of Chapter 226 State aid.

An annual conference occurred with the nonpublic school administrator as required by N.J.A.C. 6A:16-2.4(d). At that meeting, the allocation of funds from the State for the nonpublic school was reviewed along with the cost of the nurse available to provide those services. Generally, the cost of the nurse is based on the nurse's cost per hour. The nurses employed by the MOESC vary in cost, depending upon each employee's experience and length of employment. The funds allocated by the State are divided by the nurse's hourly rate to determine the number of hours that a nurse is available to the nonpublic school during the thirty-six-week school year. This computation is shared with the nonpublic school.

There are times when the nonpublic school requests supplies which, pursuant to the statute, may be purchased from the allocated monies. Such supplies are then paid for from available funds and the number of hours worked by the nurse at the nonpublic school is adjusted based on the balance of available funds. As part of the conference, the nonpublic school administrator agrees to the number of hours and weeks per year that the nurse is to be in attendance at the nonpublic school. Most of the allocations in the State permit only part-time nurses.

Ms. Dumford provided the format that was utilized as the outline for determining the scope of Chapter 226 nursing services for each nonpublic school (P-3, Exhibit A).

This document applies to OLPH, the MOESC nurse and the school year applicable to the issue that gave rise to the MOESC petition herein. The format identifies each nonpublic school and the amount of funding allocated to the Chapter 226 nursing service to be provided to that nonpublic school, less a 6 percent administrative fee permitted to be charged by regulation that goes to pay for the administrator's services and the services of the MOESC office in administering the program. That administration service includes determining the expenditure of the funding allocation for each nonpublic school; the hiring and, at times, firing of nurses; the scheduling of nurses; the administering of any benefits the nurses may receive, including sick leave; the evaluation of the nurses' performance; the coordination of supply purchases; and payroll services. This document identifies the nurses, the nurses' hourly rates of pay, a determination of hours assigned per week and the number of weeks.

Based on these calculations, the HHR and Highlands public school districts in turn contracted with the MOESC for nursing services, and entered into a Non-Public Nursing Services Agreement. According to the Agreement, approximately $574.68 was set aside from the total aid for administrative costs, leaving a balance of $9,003.32 for nursing services (P-3, Exhibit B). According to the Agreement, the MOESC was required to provide a total of 354.75 hours of service, at the hourly rate of $20.50 per hour. The total nursing cost was itemized in the Agreement as follows: $7,278.38 for wages, $866.68 for Social Security, pension and unemployment insurance, and $814.51 for direct program expense related to supervision. Respondent DOE does not participate in negotiating Non-Public Nursing Services Agreements.

The dispute in this matter has arisen because the nurse assigned to OLPH for the 2004-2005 school year gave notice that she was utilizing her then-banked sick leave of 9.5 days towards a personal health leave. Because of the sick-leave statute and as the MOESC has done before, the nurse on leave was paid for those 9.5 days. By Ms. Dumford's computations, the 9.5 days equaled 48.75 hours at OLPH. The principal at OLPH computed a different hour total, claiming that there were 59 hours lost to OLPH because of the use of 10 sick days and 1 personal day. This payment for sick leave consumed part of the State-allocated funds for Chapter 226 services to be delivered to

OLPH.

According to the Agreement (P-3, Exhibit A), the nurse was assigned 10.75 hours per week, which the OLPH principal agreed to schedule as either 5.25 hours per day or 5.50 hours per day for two days per week. Based on the funding balance, Ms. Dumford employed a replacement nurse, recommended by the principal of OLPH, for 25.25 hours at $20.25 per hour.

On May 16, 2005, the principal of OLPH sent memoranda to the school business administrators of the HHR and Highlands school districts complaining that approximately 59 hours (or, by Ms. Dumford's computations, 48.75 hours) of Chapter 226 nursing services were not provided (P-3, Exhibit B; R-3, Exhibit C). On that same date, Melissa Malloy, a representative of OLPH, contacted respondent and advised that her school was not receiving the hours of service required by the Agreement. Mr. Lally received a copy of these memoranda and contacted the two involved public school districts by letters dated May 31, 2005 (P-3, Exhibit C; R-3, Exhibit D), and requested that the districts take steps to ensure that the nonpublic school received the services to which it was entitled, based on the Chapter 226 funds.

An MOESC representative then contacted the Department on behalf of the Highlands and HHR public school districts (P-3, Exhibits F and G; R-3, Exhibits E and F). The superintendent of the MOESC wrote a letter to Mr. Lally dated June 20, 2005 (R-3, Exhibit F) explaining the circumstances and asking for a solution, as well as suggesting a solution. The superintendent of the MOESC asserted that the employee assigned to OLPH had been absent during the 2004-2005 year because of personal health issues. The superintendent stated that the MOESC employees were entitled by statute to paid sick leave, and that because OLPH had not set aside any funds to cover such paid absences there were not enough Chapter 226 monies remaining to fund the hours required by the Agreement. The MOESC also represented that in all of its future Non-Public Nursing Services Agreements, it would either require the recipient school to set aside a portion of its funds to pay for the fringe benefits of MOESC employees, or require the school to secure a substitute nurse in the absence of the MOESC employee.

Petitioner's attorney was also asked to seek direction from the DOE on how to proceed given the statutory requirements and the DOE instructions, and wrote letters dated August 17, 2005 (P-3, Exhibit G), and September 30, 2005 (P-3, Exhibit H), which led to the respondent's correspondence of October 13, 2005 (P-3, Exhibit I; R-3, Exhibit G). It is the interpretation and effect of this letter that is the crux of the dispute between the parties.

This letter was written in response to petitioner's position that it could not provide OLPH a substitute nurse. Petitioner asserted that because OLPH had not set aside any of its allocated Chapter 226 funds for such a contingency, there were insufficient funds to cover both the paid sick-leave benefits of its employee and a substitute nurse. Petitioner further advised that in all of its future nursing agreements, it intended to either require the nonpublic school to set aside a portion of its Chapter 226 funds to pay for the fringe benefits of its nurses, or, alternatively, require the nonpublic school to secure a substitute nurse in the event that petitioner's employee is unable to work.

By its letter dated October 13, 2005 (P-3, Exhibit I; R-3, Exhibit G), the Department informed the MOESC that Chapter 226 funds are only to be used for the provision of nursing services and that the fringe benefits of its employees are not distinct Chapter 226 expenses, therefore a nonpublic school cannot be required to set aside a portion of its funds to pay for those leave benefits. Mr. Lally stated that this advice is consistent with prior guidance that the Department has issued in relation to the use of Chapter 226 funds (P-3, Exhibit J; R-3, Exhibit H).

Because petitioner contends that by this letter of October 13, 2005, the respondent is engaging in rulemaking, and because of the critical importance of this letter to this dispute, I am quoting the major portion of the letter that sets forth the position of respondent:

> It is the department's position that pursuant to N.J.S.A. 18A:40-23, that the funding provided to public school districts for nursing services to children enrolled in nonpublic schools must be used for that purpose only. Funding is provided on a per pupil basis, and public school districts are expected to return unused funds to the Department of Education. Further, it is our understanding that public school districts undertake to provide nonpublic schools with a specific number of hours of nursing services, based on the number of eligible students and the state allowable per pupil amounts. As such, it is our view that the salaries and benefits of the employees of any given service provider is outside of the contractual obligations of the public school district. The service provider, when utilized by the district, is a contracted entity providing a purchased professional service, and nothing more. As such it is inappropriate for nonpublic schools to be asked to set aside funds to pay for the salaries and benefits of employees of the service provider. The employees in question are not employed by the public school district, nor are they employed by the nonpublic school. The public school districts are allowed to use up to 6% of the funds provided to cover costs incurred as a result of administering the program. No other fee or set aside are allowable costs.
>
> It is with this in mind that the June 28, 2005 letter was sent to public school districts reminding them that any funds, other than the 6% allowed for administrative costs, should be spent on providing actual nursing services or should be returned to the Department of Education. Neither Mr. Lally nor anyone at the Department of Education would advise Monmouth-Ocean Educational Services Commission to dishonor its contractual obligations with its employees. However, the Monmouth-Ocean ESC nurses' salaries and benefits are not the responsibility of the public school district or nonpublic school.
>
> [P-3, Exhibit I; R-3, Exhibit G.]

Both parties acknowledge that in 1994 the Department issued guidance explaining that a school district could use Chapter 226 funds to pay for the fringe benefits of Chapter 226 employees. However, respondent contends that a contracted service provider, such as the MOESC, should include the cost of such benefits in the rate that it charges for the service. The MOESC received a memorandum from the

DOE on or about October 21, 1994 (P-3, Exhibit J) which, in part, instructed through a series of questions and answers that fringe benefits should be calculated into the hourly rate. The MOESC has been essentially following the same prescription since the advent of Chapter 226 because sick leave is a statutory entitlement and payment for those sick-leave days has to come from the allocated funding for the Chapter 226 program. If it did not come from the Chapter 226 funding, then that funding would have to come from monies devoted to other programs, either from the public schools themselves or from other programs that the MOESC is running. In other words, other public monies would be utilized to subsidize the Chapter 226 services.

To the best of Mr. Lally's knowledge, no other educational services commissions have expressed having the problems experienced by the MOESC in planning for the paid-leave rights of its employees in the context of Chapter 226. Since being in her position, Ms. Dumford has never had the DOE question or overrule the MOESC practice of paying its nurses during their sick leave from the Chapter 226 allocation, until the issue arose with OLPH.

LEGAL DISCUSSION AND ANALYSIS

A. Statutory and Regulatory Framework

N.J.S.A. 18A:40-23 sets forth the Legislature's declaration of its intent in adopting the provisions of N.J.S.A. 18A:40-23 to -31, referred to as Chapter 226:

> The Legislature hereby finds and determines that the welfare of the State requires that all school-age children be assured equal access to appropriate health care services. In order to achieve this objective, it is the intent of the Legislature to require that the State and local communities provide basic nursing services for children in both public and nonpublic schools.

N.J.S.A. 18A:40-25(a) requires each board of education of a district in which a nonpublic school is located to provide nursing services for pupils who are enrolled full-

time in the nonpublic school. The mandated services include assistance with medical examinations, including dental screening; conducting screening of hearing examinations; the maintenance of student health records, and notification of local or county health officials of any student who has not been properly immunized; and conducting examinations of pupils between the ages of ten and eighteen for the condition known as scoliosis. N.J.S.A. 18A:40-25(b) requires each such board to adopt written policies and procedures extending the emergency care provided to public school pupils to those pupils who are enrolled full-time in the nonpublic school who are injured or become ill at school or during participation on a school team or squad.

N.J.S.A. 18A:40-28 provides that a board of education may contract with any public or private agency approved by the commissioner for the provision of such nursing services. N.J.S.A. 18A:40-31(a) provides a formula by which the commissioner shall determine the support limit. N.J.S.A. 18A:40-31(b) provides, in part:

> The commissioner shall provide State aid to each school district in an amount equal to the number of nonpublic school pupils within the district identified by the district on or before November 5 multiplied by the State support limit. In the event that the expenditure incurred by any district is less than the amount of State aid received, the district shall refund the unexpended State aid after the completion of the school year, but not later than December 1 of the following school year.

N.J.S.A. 18A:40-31(c) states, in part:

> In any year, no district shall be required to make expenditures for the purposes of this act in excess of the amount of State aid received for these purposes.

State aid for Chapter 226 services is calculated on a per-pupil basis. N.J.S.A. 18A:40-31; N.J.A.C. 6A:16-2.4(g). Each district is obligated to provide to the commissioner annually both the estimated cost of providing the mandatory nursing services, and the number of nonpublic school students within the district entitled to receive those services. N.J.S.A. 18A:40-31. State aid is thereafter distributed among

the districts in proportion to the number of students to be serviced, capped by a statutorily defined support limit. Ibid. The "support limit" is defined as the maximum amount that may be appropriated in a given year, and is tied to the consumer price index. See N.J.S.A. 18A:40-24 and -31(a).

Chapter 226 provides that a local school district may satisfy its nonpublic nursing service obligation by providing the nursing services directly, by joining with other boards of education to provide the services, or by contracting with any public or private agency approved by the commissioner for the provision of nursing services. N.J.S.A. 18A:40-28. If the district provides nursing services directly, then the nurse is considered an employee of the school district. N.J.A.C. 6A:16-2.4(b). If the school district contracts with a public or private agency, the regulations define the nurse as either an "employee of a third-party contractor, or an independent contractor." N.J.A.C. 6A:16-2.4(b).

Irrespective of the method of delivery, the services provided are expressly limited by the amount of aid received, and no district is required to make additional expenditures above the amount of aid received for the provision of the nursing services. N.J.S.A. 18A:40-31(c).

The regulation permits a recipient district to use a portion of its Chapter 226 aid to cover administrative costs in an amount that is limited to either the actual costs or 6 percent of the funds allocated to the nonpublic school, whichever is less. N.J.A.C. 6A:16-2.4(a)(2).

Position of Petitioner

Petitioner objects to that portion of respondent's letter of October 13, 2005, that asserts that the sick-leave entitlements of any nurses employed by petitioner to provide Chapter 226 nursing services are "outside of the contractual obligations of the public school district," and that "it is inappropriate for non-public schools to be asked to set aside funds to pay for the salaries and benefits of employees of the service provider." It further objects to respondent's conclusion that petitioner's "nurses' salaries and benefits

are not the responsibility of the public school district or the non-public school."

Petitioner contends that by taking the foregoing positions in the letter of October 13, 2005, and in earlier correspondence, respondent is establishing the proposition or "rule" that the Department of Education only allocates funds for the provision of nursing services.

Petitioner contends that by the provisions of Chapter 226, the Department of Education's only responsibility is to establish the "support limit" or budget for the providing of nursing services for each nonpublic school, and does not establish the minimum hours of nursing services to be provided or the nurse's per-hour cost. Petitioner asserts, however, that the respondent is taking the position that the cost of a Chapter 226 nurse may not include statutory sick-leave benefits because that would lower the number of hours of nursing services. Petitioner contends that by taking this "new" position, respondent is engaging in promulgating regulations without following the requirements to do so.

Petitioner further contends that by taking the position that public employee benefits such as sick leave are not reimbursable under Chapter 226, the respondent is requiring public school districts to contract only with private entities or public agencies that are not subject to statutory sick-leave benefits, and that this improperly mandates privatization. Petitioner argues that respondent is not permitted to take this position in the absence of the adoption of regulatory provisions pursuant to law.

Position of Respondent

Attorney for respondent contends that respondent's construction of Chapter 226 is entitled to substantial deference as the agency responsible for enforcing, interpreting and implementing its provisions, and that its determination may not be disturbed unless it is plainly arbitrary, capricious or unreasonable, citing Matturi v. Board of Trustees of the Judicial Retirement System, 173 N.J. 368, 381 (2002). Respondent concedes that the provisions of Chapter 226 do not address whether an ESC may charge the fringe

benefits of its employees as a separate Chapter 226 expense. However, it asserts that its position that it may not is based on a permissible interpretation of the statute. Matturi, supra, 173 N.J. at 381-82. The respondent contends that the reasonable inference to be drawn from the statutory history of the enactment of Chapter 226 is that the Legislature intended to provide the fullest extent of benefits with available and limited funds, and that petitioner's funding scheme would undermine this intent by benefiting its private employees at the expense of the nonpublic school students. It contends that if petitioner's interpretation is implemented, the pool of resources available to fund nursing services would be severely diminished, and this is inconsistent with the intent of Chapter 226.

Respondent takes the position that the current regulation found at N.J.A.C. 6A:16-2.4(a)(2) permits recipient districts to carve out a portion of its Chapter 226 aid for administrative costs in an amount that is limited to either the actual costs or 6 percent of the funds allocated to the nonpublic school, whichever is less. The regulations provide for no other set-asides. Respondent argues that petitioner's status as an educational services commission is of no import and that Chapter 226 does not distinguish between it and other third-party contractors, referring to the provisions of N.J.A.C. 6A:16-2.4(b).

Finally, respondent argues that the guidance provided by the Department simply means that Chapter 226 funds may be used to pay for the fringe benefits of an agency employee, but only to the extent that those expenses are included in the rate assessed by the agency. It contends that the petitioner is statutorily authorized to include such expenses in calculating the fee it charges its client school districts, referring to N.J.S.A. 18A:6-63(a). Under its agreement with the responsible public school districts, petitioner was obligated to provide 354.75 hours of nursing services, and its lack of funds was the direct result of its failure to calculate the appropriate fee to be assessed for its services.

Discussion and Analysis

The first issue is whether the funding provided to public school districts for nursing services to children enrolled in nonpublic schools pursuant to N.J.S.A. 18A:40-23 must be used only for the provision of nursing services.

Chapter 226 funding to public school districts for nursing services for children enrolled in nonpublic schools is provided on a per-pupil basis. N.J.S.A. 18A:40-31(b) requires each board of education to forward annually to the commissioner an estimate of the next school year's cost of providing the services required pursuant to the act and the number of pupils attending nonpublic schools, excluding those who have refused nursing services. I **CONCLUDE** that this language clearly limits the funding under Chapter 226 to those costs necessary to provide only those nursing services specified in N.J.S.A. 18A:40-25 and -26.

This being the case, I agree with the respondent's position that an ESC such as petitioner may not charge the payment of sick-leave benefits of one of its employees as a separate Chapter 226 expense. N.J.S.A. 18A:40-31(b) limits Chapter 226 expenditures to those necessary to provide services specified in N.J.S.A. 18A:40-25 and -26. Therefore, I **CONCLUDE** that by respondent stating its interpretation that Chapter 226 expenditures may only be allocated for the provision of nursing services, it is not establishing a "rule" that the Department only allocates funds for the provision of such services.

The difficulty encountered by petitioner that gave rise to this matter is that petitioner did not build into its hourly rate for nursing services an amount sufficient to cover the use of sick leave by the nurse it assigned to OLPH. The Department has made it clear that Chapter 226 funds may be used to pay for the fringe benefits of an ESC employee, but only to the extent that those expenses are included in the rate assessed by the ESC for providing actual nursing services. The respondent even goes so far as to point out that the petitioner is statutorily authorized to include such expenses in calculating the fee it charges its client school districts based on N.J.S.A.

18A:6-63(a). In this particular case, petitioner could have factored into the hourly rate of pay for the assigned nurse an amount to cover the nurse's use of sick leave based on the nurse's available accumulated leave.

While I am not an accountant and I have no special expertise in budgetary issues, it would seem to me that if the assigned nurse has "banked" or available sick leave, the petitioner would be able to factor into its calculations an amount sufficient to pay the nurse if sick leave is used. Thus, petitioner should have agreed to provide 306.00 hours of nursing services to OLPH. The 306 hours represents 354.75 hours as calculated by the parties, less the 48.75 hours of banked sick leave available to the assigned nurse. I realize that if this method is used to deal with this issue, the students attending nonpublic schools will be shortchanged in the amount of nursing services they receive, depending on the sick-leave balance of the assigned nurse. I, therefore, agree with petitioner that it would be in the best interest of all parties for the Department to address this issue by the adoption of appropriate regulations. However, I am not in a position to order or direct the Department to do so.

The next issue is whether it is appropriate for the petitioner to request that either the responsible public school districts or the involved nonpublic schools set aside funds to pay for the salaries and benefits of employees of the service provider. Public school districts are required to provide nonpublic schools with a specific number of hours of nursing services, based on the number of eligible students and the State allowable per-pupil amounts. The students attending the nonpublic schools are the beneficiaries of the law, and the only involvement of the nonpublic schools is to permit their students to receive nursing services. The nonpublic schools are not parties to any agreement with the responsible public school district or between the responsible public school district and an outside service provider. Petitioner has pointed to no statutory, regulatory or decisional authority obligating the nonpublic school to pay for the salaries and benefits of employees of either the responsible public school or the service provider.

With regard to the responsible public school districts, the service provider, when utilized by the responsible public school district, is a contracted entity providing a

purchased professional service. As such, it is inappropriate for the petitioner to request that the responsible public school district set aside funds to pay for the salaries and benefits of employees of the service provider. The employees in question are not employed by the public school district, nor are they employed by the nonpublic school. Other than the 6 percent of Chapter 266 funds permitted to be set aside to cover costs incurred as a result of administering the program, no fees or set-asides are allowed. In addition, no responsible public school district is required to make additional expenditures above the amount of aid received for the provision of the nursing services. N.J.S.A. 18A:40-31(c). Therefore, I **CONCLUDE** that the salaries and benefits of the employees of any given Chapter 266 service provider are outside of both the legal responsibilities and contractual obligations of the responsible public school district.

Based on the foregoing, I further **CONCLUDE** that I agree with the respondent that the Monmouth-Ocean ESC nurses' salaries and benefits are not the responsibility of either the public school district or the nonpublic school, whether by statute, regulation or contract.

I disagree with petitioner that respondent is engaged in promulgating regulations by taking the position in its letter of October 13, 2005, that the sick-leave entitlements of any nurses employed by petitioner to provide Chapter 226 nursing services are "outside of the contractual obligations of the public school district," and that "it is inappropriate for nonpublic schools to be asked to set aside funds to pay for the salaries and benefits of employees of the service provider." I **CONCLUDE** that respondent's response was simply taking a legal position that is consistent with the contract between the parties and with the applicable statute.

I agree with respondent that under petitioner's agreement with the two responsible public school districts, petitioner was obligated to provide 354.75 hours of nursing services to OLPH during the school year, and I so **CONCLUDE**. Its lack of sufficient funds to pay sick leave to the assigned nurse resulted from its failure to calculate the appropriate fee to be assessed for its services.

DECISION AND ORDER

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

This recommended decision may be adopted, modified or rejected by the **COMMISSIONER OF THE DEPARTMENT OF EDUCATION,** who by law is authorized to make a 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, P.O. Box 500, Trenton, New Jersey 08625-0500,** marked "Attention: Exceptions." A copy of any exceptions must be sent to the judge and to the other parties.

June 26, 2006
DATE

JOSEPH F. MARTONE, ALJ

E-mail Receipt of Initial Decision Confirmed by the Department of Education on:

6-26-06
DATE

JUN 28 2006

Mailed to Parties:

DATE

OFFICE OF ADMINISTRATIVE LAW

ADMINISTRATIVE LAW JUDGE

mph

LIST OF WITNESSES:

For Petitioner:

None

For Respondent:

None

LIST OF EXHIBITS:

ALJ Exhibits:

C-1 Non-Public Nursing Services Agreement with Henry Hudson Regional School District

C-2 Non-Public Nursing Services Agreement with Highlands School District

For Petitioner:

P-1 Petitioner's Notice of Motion for Summary Decision

P-2 Petitioner's Brief in Support of Motion for Summary Decision

P-3 Certification of Michelle Dumford with the following attachments:

Exhibit A. 2004-2005 Non-Public Nursing Services Agreement Format

Exhibit B. OLPH memos, dated May 16, 2005

Exhibit C. John Lally letters, dated May 31, 2005

Exhibit D. John Lally letters, dated June 16, 2005

Exhibit E. John Lally letter, dated June 28, 2005

Exhibit F. MOESC letter, dated June 20, 2005

Exhibit G. Attorney for MOESC letter, dated August 17, 2005, with attachments

Exhibit H. Attorney for MOESC letter, dated September 30, 2005, with attachments

Exhibit I. Respondent's letter, dated October 13, 2005

Exhibit J. October 6, 1994, Guidance concerning Chapter 226

P-4 Reply Letter Brief dated April 13, 2006

For Respondent:

R-1 Respondent's Notice of Motion for Summary Decision

R-2 Respondent's Brief in Support of Motion for Summary Decision

R-3 Certification of John M. Lally with the following attachments:

Exhibit A. 2004-05 Chapter 226 Entitlement

Exhibit B. Henry Hudson Regional and Highlands School District joint letter, dated June 8, 2005

Exhibit C. OLPH memos, dated May 16, 2005

Exhibit D. John Lally letters, dated May 31, 2005

Exhibit E. MOESC letter, dated June 20, 2005

Exhibit F. Attorney for MOESC letter, dated August 17, 2005

Exhibit G. Respondent's letter, dated October 13, 2005

Exhibit H. Excerpt from October 6, 1994, Guidance regarding Chapter 226

R-4 Reply Letter Brief dated April 13, 2006

Hatrak, Marianne

From: System Administrator
To: EDU2; EDU3
Sent: Monday, June 26, 2006 4:55 PM
Subject: Delivered: Initial Decision; OAI Dkt. No. EDU 10284-05; Agency Dkt. No. 337-11/05, Monmouth-Ocean Educational Serv. Commission v. NJDOE

Your message

To: EDU
Subject: Initial Decision; OAI Dkt. No. EDU 10284-05; Agency Dkt. No. 337-11/05, Monmouth-Ocean Educational Serv. Commission v. NJDOE
Sent: 6/26/2006 4:55 PM

was delivered to the following recipient(s):

EDU2 on 6/26/2006 4:52 PM
EDU3 on 6/26/2006 4:52 PM

276-06

#276-06W

OAL DKT. NO. EDU. 1448-06
AGENCY DKT. NO. 354-12/05

RIDGEFIELD TEACHING ASSISTANTS ASSOCIATION,	:	
PETITIONER,	:	
V.	:	COMMISSIONER OF EDUCATION
BOARD OF EDUCATION OF THE BOROUGH OF RIDGEFIELD, BERGEN COUNTY,	:	DECISION
RESPONDENT.	:	
	:	

The record and Stipulation of Dismissal With Prejudice transmitted to the Commissioner by the Office of Administrative Law have been reviewed. Appropriately categorized as a withdrawal pursuant to *N.J.A.C.* 1:1-19.2, such withdrawal is approved by the Commissioner and this matter is hereby dismissed with prejudice.

IT IS SO ORDERED.*

Lucille E Davy
ACTING COMMISSIONER OF EDUCATION

Date of Decision: 8/18/06

Date of Mailing: 8/18/06

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

State of New Jersey
OFFICE OF ADMINISTRATIVE LAW

INITIAL DECISION

DISMISSAL

OAL DKT. NO. EDU 1448-06

AGENCY DKT. NO. 354-12/05

RIDGEFIELD TEACHING ASSISTANTS ASSOCIATION,

Petitioner,

v.

BOARD OF EDUCATION OF THE BOROUGH OF RIDGEFIELD, BERGEN COUNTY,

Respondent.

Sanford R. Oxfeld, Esq., appearing for Petitioner
(Oxfeld Cohen, LLC, attorneys)

Stanley Turitz, Esq., appearing for Respondent
(Ferrara, Turitz, Harraka & Goldberg, attorneys)

Record Closed: July 17, 2006 Decided: July 21, 2006

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

Petitioner asserts Respondent violated N.J.S.A. 18A:30-2 by not allowing sick leave to teaching assistants.

This matter was transmitted to the Office of Administrative Law (OAL) from the Department of Education on January 23, 2006 for hearing as a contested case, pursuant to N.J.S.A. 52:14B-1 to -15 and N.J.S.A. 52:14F-1 to -13.

A hearing was scheduled for November 29, 2006 at the OAL, 33 Washington Street, Newark, New Jersey. The parties have amicably settled this matter and, further, have stipulated the matter should be dismissed with prejudice. That stipulation is annexed hereto as Exhibit A and made a part hereof.

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

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

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

Accordingly, I hereby **ORDER** this matter be and hereby is **DISMISSED WITH PREJUDICE** and without costs against either party.

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

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

July 21, 2006
DATE

Maria Mancini La Fiandra
MARIA MANCINI LA FIANDRA, ALJ

Receipt Acknowledged:

7-26-06
DATE

Catherine Condelli
DEPARTMENT OF EDUCATION

Mailed to Parties:

JUL 28 2006
DATE

Laura Sanders
DIRECTOR AND CHIEF ADMINISTRATIVE LAW JUDGE
OFFICE OF ADMINISTRATIVE LAW

jb

Oxfeld Cohen, PC
60 Park Place, 6th Floor
Newark, NJ 07102-5504
973-642-0161
Attorneys for Petitioner

RECEIVED

2006 JUL 17 P 2:36

STATE OF NEW JERSEY
OFFICE OF ADMIN LAW

RIDGEFIELD TEACHING ASSISTANTS ASSOCIATION,

Petitioner,

vs.

BOARD OF EDUCATION OF THE BOROUGH OF RIDGEFIELD, County of Bergen

Respondent.

OFFICE OF ADMINISTRATIVE LAW

DOCKET NO: EDU 1448-06

STIPULATION OF DISMISSAL WITH PREJUDICE

As the parties have resolved the above matter amicably, it is hereby stipulated and agreed that this matter pending before the Honorable Maria LaFiandra, A.L.J., is dismissed with prejudice, but without costs against either party.

Dated: July 11, 2006

Oxfeld Cohen, PC

By: Sanford R Oxfeld, Esq.
Attorneys for Petitioner

Ferrara, Turitz, Harraka & Goldberg

By: Stanley Turitz, Esq.
Attorneys for Respondent

279-06

#279-06

OAL DKT. NO. EDU 4554-06
AGENCY DKT. NO. 230-6/06

IN THE MATTER OF THE TEACHING	:	COMMISSIONER OF EDUCATION
CERTIFICATE OF WHEATONIA B. JONES.	:	DECISION ON MOTION

The record of this emergent matter, including the audiotape of proceedings at the Office of Administrative Law (OAL), and the Order Granting Emergent Relief issued by the Administrative Law Judge (ALJ), have been reviewed.

Upon such review, the Commissioner concurs with the ALJ that petitioner has satisfied each of the criteria of *Crowe, supra*, so as to be entitled to preserve her qualification to teach at her current job while her appeal is pending on the merits. In so holding, the Commissioner fully recognizes that the remedy ordered by the ALJ in this matter is an extraordinary one, and the Commissioner grants it here with the greatest reluctance. However, the Commissioner must agree that the recommended relief is warranted under the unique facts of this matter, where: 1) a candidate with several years of service under an emergency certificate, who has now met all requirements for standard certification, has been caught at an intersection of rules and events[1] that have collectively worked to deny her the opportunity for a fair hearing

[1] In this regard, the Commissioner notes that: 1) DYFS rules in effect at the time of the report at issue herein provided no reconsideration or appeal process for findings of "unsubstantiated with concerns," as they did for findings of "substantiated," so that petitioner had no opportunity to challenge or clarify such findings before that agency; indeed, the category of "unsubstantiated with concerns" no longer even exists. See *N.J.A.C.* 10:129-5.3; 37 *N.J.R.* 2132(a) and 5004(b); 2) Although the DYFS report was issued and copied to the Department's Office of Licensure and Certification in May 2003, it did not reach the Board of Examiners until the fall of 2005; 3) Because petitioner's current emergency certificate will expire at the end of August, the Show Cause Order issued in November 2005 (and promptly answered by petitioner) was withdrawn on July 20 without a hearing ever being held, even as the Order's existence caused petitioner's application for a standard certificate to be put "on hold" and there was no possibility of renewal or extension for her emergency certificate due to rule changes providing that such certificates may no longer be issued to anyone other than candidates for educational services certification and that extensions for teachers of the handicapped will be valid only until August 31, 2006. See *N.J.A.C.* 6A:9-6.3(a) and *N.J.A.C.* 6A:9-11.3(p); and, finally, 4) the Board of Examiners takes the position, as expressed during proceedings before the ALJ herein, that no hearing is required prior to its decision to deny issuance of a certificate, as such hearing is provided upon appeal to the Commissioner.

before forfeiting – based on possible questions of fitness arising from a report of a single incident – the ability to continue her career as public school teacher, together with employment time accrued in a district where she would appear to be acquiring tenure upon receipt of her standard certificate; and 2) the mode of relief the Commissioner would have preferred – renewal or extension of petitioner's emergency certificate as Teacher of the Handicapped so as to allow her to maintain the *status quo* while her appeal regarding standard certification is pending – is now foreclosed by *N.J.A.C.* 6A:9-6.3(a) and *N.J.A.C.* 6A:9-11.3(p).

In one respect, however, the Commissioner cannot concur with the relief ordered by the ALJ, i.e., the issuance of a standard certificate "pending the outcome of this case." (Initial Decision at 7) Pursuant to *N.J.A.C.* 6A:9-6.1, a standard certificate is a "permanent certificate" which cannot be vacated or otherwise invalidated except as established by rule – that is, through revocation, suspension, relinquishment or voluntary surrender. *N.J.A.C.* 6A:9-17.5 through 17.12.[2] Thus, should petitioner fail in the scheduled hearing on the merits of her appeal of the Board of Examiners' denial of her application, there would be no clear mechanism by which the certification granted pursuant to this order could be quickly and easily rescinded; moreover, petitioner would (it appears) additionally have acquired tenure in the district where she has been employed since 2002, arguably requiring the district to bring tenure charges in order to terminate her employment. On the other hand, should petitioner prevail, the Board will have been deprived of its opportunity, after petitioner has had the requisite fair hearing, to make its own judgment as to her fitness to teach – thereby impinging upon the Board's statutory right and responsibility to determine in the first instance who is, and is not, fit to teach in the New Jersey public schools.

[2] The Commissioner notes in particular that relinquishment and voluntary surrender may be evoked only under highly prescribed circumstances, none of which would apply to the instant matter.

The Commissioner, therefore, directs the Board of Examiners to issue petitioner's standard certificate forthwith, *without prejudice*, however, to the Board's concomitant ability to issue – should it so choose – an immediate Order to Show Cause why such certificate should not be suspended or revoked, which petitioner is then directed to answer as soon as possible[3] so that the OAL hearing dates of December 20, 21, 26 and 27, 2006 – originally scheduled for hearing on the Order to Show Cause with regard to petitioner's emergency certificate (See Exhibit P-2) and later reassigned to a hearing on the merits of petitioner's appeal herein[4] – may be reserved for hearing on any Order issued by the Board as a result of this decision, so as to bring the question of petitioner's certification status to the prompt closure that will best serve petitioner, the district where she is employed, and the interests of the Board of Examiners.

Accordingly, as modified herein, the recommended Order of the ALJ is adopted for the reasons expressed therein and above. This matter shall continue at the OAL for such proceedings as are necessary to bring it to closure, subject to reservation of hearing dates as previously indicated.[5]

IT IS SO ORDERED.[6]

Lucille Davy

ACTING COMMISSIONER OF EDUCATION

Date of Decision: 8/18/06

Date of Mailing: 8/18/06

[3] The Commissioner notes that the previously issued Order and Answer should enable both the Board and petitioner to move quickly in this regard.

[4] The Commissioner assumes that the ALJ's omission of the December 26 date in the Order herein was an oversight; however, if that date had previously been cancelled or altered at the OAL, the Commissioner does not intend for the instant directive to override such action.

[5] Should the Board of Examiners elect not to issue an Order to Show Cause against petitioner's standard certificate, the parties are requested to notify the OAL as soon as possible so that the hearing dates herein reserved may be cleared for other matters.

[6] This decision may be appealed to the State Board of Education pursuant to *N.J.S.A.* 18A:6-27 *et seq.* and *N.J.A.C.* 6A:4-1.1 *et seq.*

State of New Jersey
OFFICE OF ADMINISTRATIVE LAW

ORDER GRANTING
EMERGENT RELIEF
OAL DKT. NO. EDU 4554-06
AGENCY DKT. NO. 230-6/06

IN THE MATTER OF
THE TEACHING CERTIFICATE
OF WHEATONIA B. JONES.

Michael C. Damm, Esq., for petitioner (Selikoff and Cohen, attorneys)

Patricia O'Neill, Deputy Attorney General, for respondent (Zulima V. Farber, Attorney General of New Jersey, attorney)

BEFORE **DONALD J. STEIN,** ALJ:

STATEMENT OF THE CASE AND PROCEDURAL HISTORY

On November 10, 2005, the State Board of Examiners (SBE) issued an Order to Show Cause to revoke and/or suspend the emergency teaching certificate of Wheatonia Jones (petitioner) based upon an incident with a student. DYFS investigated the situation and did not substantiate abuse, but raised some questions as to the appropriateness of petitioner's behavior. On January 11, 2006, the matter was transmitted to the Office of Administrative Law (OAL). (EDE 79-06)

On May 9, 2006, petitioner filed an application for emergent relief with the New Jersey Department of Education, Bureau of Controversies and Disputes (respondent). The application requested that a temporary emergency certificate for a teacher of the handicapped be issued to the petitioner. On May 11, 2006, this matter was transmitted to the Office of Administrative Law (OAL) for a hearing on the requested emergent relief. The case was heard in the OAL, Trenton (Hamilton Township) on May 19, 2006, at 9:00 a.m., and the two cases were consolidated. At the conclusion of oral argument, the parties requested the record be kept open to allow the petitioner to file additional pleadings.

On July 20, 2006, the respondent withdrew the Order to Show Cause (EDE 79-06) R-1. Petitioner then agreed to withdraw the emergent application (EDU 2842-06).

On June 22, 2006, Wheatonia Jones (Petitioner) filed an application for emergent relief with the New Jersey Department of Education, Bureau of Controversies and Disputes. The application requested that the New Jersey Department of Education (respondent) issue her a certification for Teacher of the Handicapped, pending completion of respondent's review of her certification. At issue is a March 2003 incident involving the petitioner and a student. On June 29, 2006, the matter was transmitted to the Office of Administrative Law (OAL) for a hearing on the requested emergent relief. The case was heard in the OAL, Trenton (Hamilton Township) on July 26, 2006, at 9:00 a.m. Since petitioner introduced a new document at the hearing without notice to the respondent, the record remained open for two days for the submission of rebuttal evidence. Respondent submitted a response on August 1, 2006, and the record closed on that date.

STATEMENT OF FACTS

For the purposes of this hearing, most of the essential facts are not in dispute. Petitioner has been continuously employed by the Camden City Board of Education as a teacher of the handicapped since 2002. She has been issued emergency certificates since August 2002, and is currently teaching under a renewed emergency certificate which will expire in August 2006.

On March 28, 2003, an incident occurred between the petitioner and a student. An investigation and final report by the Department of Human Services, Institutional Abuse Unit, determined that there was no abuse on her part, but concerns were raised over her actions. In November 2005, an Order to Show Cause was filed seeking the revocation of her emergency certificate.

Petitioner has been teaching since March 28, 2003, without incident. Since that time her emergency certificate was renewed three times. In March 2006, the Petitioner completed all the necessary paperwork and documentation for a standard Teacher of the Handicapped Certificate. On April 17, 2006, petitioner was notified, through her attorney, that it was the policy of the Department of Education to place on hold any certificate applications of candidates who are currently under Board review.

However, since there are no actions pending before the Board, the respondent acknowledged that the denial was based upon N.J.A.C. 6A:9-17.2, which states that the Board may refuse to issue a certification to a candidate who meets all the requirements for certification if the candidate is not suitable for employment as a teaching staff member in the public schools on the basis of demonstrated inefficiency, incapacity, conduct unbecoming a teacher, or other just cause, pursuant to N.J.A.C. 6A:9-17.5.

Respondent argues that the DYFS investigation, which did not find abuse, but stated there were concerns with Petitioner's action, is the basis for their action. No other evidence was introduced by the respondent.

Petitioner, in her certification, stated that on March 28, 2003, an out-of-control student attacked her during the course of her duties. She further stated that her actions do not constitute the basis for the revocation or suspension of her license (P-2). The student involved in the matter admitted to, and pled guilty to aggravated assault upon a teacher with respect to this incident (P-3).

Petitioner argues that she will suffer irreparable harm if not granted her certificate, because she will no longer be able to teach, and thus lose her job. Her emergency certificate expires in August 2006, and she will not be able to teach, pending the outcome of this case (P-2). Petitioner further argues that her due process rights have been violated since she has not been found to have done anything wrong, and is prevented from returning to work as a teacher until the matter is resolved. Generally, petitioner asserts she has a property interest in the certificate that requires a hearing prior to any suspension/revocation.

CONCLUSIONS OF LAW

The standards which must be met by the moving party in an application for emergent relief are embodied in N.J.A.C. 6A:14-2.7(m)1, N.J.A.C. 1:6A-12.1, and Crowe v. DeGoia, 90 N.J. 126, 132-34 (1982). Emergency relief may only be granted if the judge determines that:

1. The petitioner will suffer irreparable harm if the 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 petitioner must satisfy all four prongs of the Crowe test.

Having carefully considered the parties' respective arguments, I am convinced that the petitioner will suffer irreparable harm if she is not immediately issued a teaching certificate pending the resolution of this matter. She will be unable to be employed as a teacher and lose her job. Petitioner also satisfies the fourth prong, and will suffer greater harm than respondent if the relief is not granted. The harm suffered by the petitioner is stated above. Since the petitioner has not been involved in any incident since March 2003, and the Board has seen fit to issue her three emergency certificates since this incident, the likelihood of any harm being sustained by the respondent is minimal.

The respondent argues that there would be a danger to the school children if she is permitted to obtain her license pending the hearing. When asked if such a danger existed, how she could be granted three emergency certificates after the incident, respondent explained that the Board did not receive the DYFS records until after the last certificate was issued. However, on May 29, 2003, the DFYS letter was sent to the school superintendent, copied to the Board. Therefore, the Board had notice of this incident and still issued three emergency certificates to the petitioner. No Board minutes were provided to ascertain any discussions that took place when granting the three emergency certificates.

Therefore I **FIND** and **CONCLUDE** that the petitioner will suffer greater harm than the respondent if the relief is not granted.

Petitioner must also establish her likelihood of success on the merits. The Petitioner has denied any action that would give rise to the suspension or revocation, and has introduced evidence that the student involved admitted and pled guilty to committing aggravated assault upon her. Respondent has introduced no evidence to the contrary. They intend to rely upon the DYFS report that found no substantiated abuse, but raised concerns with the petitioner's action. In other words, the respondent is basing its case upon a conclusion from the DYFS investigator stating that although physical abuse was not substantiated, "There was some concerns related to the teacher, Ms. Wheatonia Jones actions" (C-1). No facts have been presented to identify these concerns at the hearing. These conclusions are not evidentiary, and as such, there has been no evidence to contradict the petitioner's proofs. Based upon the evidence presented, I **FIND** it likely that the petitioners would have prevailed on the merits.

Respondent argues that there is no legal right for the petitioner to the relief. Pursuant to N.J.S.A. 6A:9-17.2., and N.J.S.A. 6A:9-17.5, the 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, or other just cause. Although respondent has the discretion to take such action, no valid basis has been set forth to do so. As stated above, the Board is seeking to take this action based upon a conclusory statement from a DYFS investigator without a factual basis. Petitioner has completed all the necessary paperwork and documentation for a standard Teacher of the Handicapped Certificate. She has taught under three emergency certificates, and if qualified has the right to obtain the standard certificate. I **FIND** no rational basis for the Board to withhold the issuance of a standard teaching certificate of the handicapped to the petitioner, pending the outcome of this case.

Accordingly, the petitioner has met all prongs of the emergent relief standard, and is entitled to emergency relief.

DECISION AND ORDER

For these reasons, I **CONCLUDE** that petitioner has established sufficient grounds for the granting of emergency relief. Accordingly, it is **ORDERED** that the Petition for Emergent Relief is **GRANTED,** and it is further **ORDERED** that a standard teaching certificate of the handicapped be issued to the petitioner, pending the outcome of this case. It is further **ORDERED** that this will be heard on December 20, 21, and 27, 2006, 9:00 a.m., at the Office of Administrative Law (Hamilton).

This order on application for emergency relief may be adopted, modified or rejected by **COMMISSIONER OF THE DEPARTMENT OF EDUCATION**, who by law is authorized to make a final decision in this matter. The final decision shall be issued without undue delay, but no later than forty-five (45) days following the entry of this order. If the Commissioner of the Department of Education does not adopt, modify or reject this order within forty-five (45) days, this recommended order shall become a final decision on the issue of emergent relief in accordance with N.J.S.A. 52:14B-10.

August 3, 2006
DATE

DONALD J. STEIN, ALJ

bdt

Witnesses

For Petitioner:

None

For Respondent:

None

Exhibits

For Petitioner:

P-1 DYFS letter to Camden City Board of Education, dated May 29, 2003

P-2 Brief and exhibits from petitioner

P-3 Charge Result Inquiry

For Respondent:

R-1 Letter of withdrawal

278-06 W

278-06

OAL DKT. NO. EDU. 5603-06
AGENCY DKT. NO. 168-5/06

PRITCHARD INDUSTRIES, INC.,	:	
PETITIONER,	:	
V.	:	COMMISSIONER OF EDUCATION
BOARD OF EDUCATION OF THE VILLAGE OF RIDGEWOOD, BERGEN COUNTY AND GCA SERVICES GROUP, INC.,	:	DECISION
RESPONDENTS.	:	
	:	

The record and Stipulation of Dismissal transmitted to the Commissioner by the Office of Administrative Law have been reviewed. Appropriately categorized as a withdrawal pursuant to *N.J.A.C.* 1:1-19.2, such withdrawal is approved by the Commissioner and this matter is hereby dismissed with prejudice.

IT IS SO ORDERED.*

Lucille Davy
ACTING COMMISSIONER OF EDUCATION

Date of Decision: 8/18/06

Date of Mailing: 8/18/06

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

State of New Jersey
OFFICE OF ADMINISTRATIVE LAW

INITIAL DECISION

DISMISSAL

OAL DKT. NO. EDU 5603-06

AGENCY DKT. NO.: 168-5/06

PRITCHARD INDUSTRIES, INC.,

Petitioners,

v.

RIDGEWOOD BOARD OF EDUCATION AND GCA SERVICES GROUP, INC.,

Respondent.

Patrick T. Collins, Esq.., for petitioner
(Franzblau & Dratch, attorneys)

Nicole G. Conforti, Esq., for Ridgewood Board of Education, respondent
(Sills, Cummis, Epstein & Gross, P.C., attorneys)

John Kessler, Esq., for GCA Services Group, Inc. respondent

Record Closed: June 29, 2006 Decided: July 11, 2006

BEFORE **JEFFREY A. GERSON**, ALJ:

On May 11, 2006, this matter was transmitted to the Office of Administrative Law (OAL) for hearing as a contested case pursuant to *N.J.S.A.* 52:14B-1 to -15 and *N.J.S.A.* 52:14F1 to -13. The matter was initially heard on May 19, 2006 by the undersigned on

petitioner's application for a temporary restraint. Petitioner's application for relief was denied by Order dated May 24, 2006. The matter was subsequently scheduled for hearing for September 13, 2006 but the date was adjourned because the parties notified the undersigned that a Stipulation of Dismissal was being signed by the parties. A copy of the Stipulation of Dismissal was received by the undersigned on June 29, 2006 and is attached hereto.

I have reviewed the record and Stipulation of Dismissal and **FIND**:

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

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

I **CONCLUDE** that the dismissal meets the safeguard requirements of N.J.A.C. 1:1-19.1 and that these proceedings be **CONCLUDED**.

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

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

7/11/06
DATE

JEFFREY A. GERSON, ALJ

Receipt Acknowledged:

7-26-06
DATE

Catherine Condelori
DEPARTMENT OF EDUCATION

Mailed to Parties:

Laura Sanders
DIRECTOR AND
CHIEF ADMINISTRATIVE LAW JUDGE

JUL 28 2006
DATE

OFFICE OF ADMINISTRATIVE LAW

sej

WILLIAM D. HOGAN, ESQUIRE
COZEN O'CONNOR
Liberty View, Suite 300
457 Haddonfield Road
Cherry Hill, New Jersey 08002
(856) 910-5000
Attorneys for Respondent,
GCA Services Group, Inc.

OFFICE OF ADMIN LAW
FILED

2006 JUN 29 P 4:43

PRITCHARD INDUSTRIES, INC.,	:	BEFORE THE COMMISSIONER OF EDUCATION OF NEW JERSEY
Petitioner,	:	
v.	:	
RIDGEWOOD BOARD OF EDUCATION and GCA SERVICES GROUP, INC.,	:	Agency Docket No. 168-5/06 OAL Docket No. EDU-5603-06
	:	**STIPULATION OF DISMISSAL**
Respondents.	:	

It is hereby stipulated by and between the parties hereto that this matter may be dismissed without prejudice and without costs.

DATED: June 15, 2006

FRANZBLAU DRATCH
Attorneys for Plaintiff

By: _____
Patrick T. Collins, Esq.

DATED: June 23, 2006

SILLS, CUMMIS, EPSTEIN & GROSS
Attorneys for Respondent Ridgewood Village Board of Education

By: _____
Philip E. Stern, Esq.

DATED: June 19, 2006

COZEN O'CONNOR
Attorneys for Respondent GCA Services Group, Inc.

By: _____
William D. Hogan, Esq.

WDH/pas
Enclosures
cc: Phillip Stern, Esquire (w/encl.)
Patrick Collins, Esquire (w/encl.)

277-06

#277-06

OAL DKT. NO. EDU 8154-05
AGENCY DKT. NO. 187-8/05

TOBA S. KNOBEL	:	
PETITIONER,	:	
V.	:	COMMISSIONER OF EDUCATION
BOARD OF EDUCATION OF THE MERCER COUNTY SPECIAL SERVICES SCHOOL DISTRICT, MERCER COUNTY,	:	DECISION
RESPONDENT.	:	
	:	

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

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

IT IS SO ORDERED.

Lucille E Davy
ACTING COMMISSIONER OF EDUCATION

Date of Decision: 8/18/06

Date of Mailing: 8/18/06

State of New Jersey
OFFICE OF ADMINISTRATIVE LAW

INITIAL DECISION

SETTLEMENT

OAL DKT. NO. EDU 8154-05

AGENCY DKT. NO. 187-8/05

TOBA S. KNOBEL,

Petitioner,

v.

BOARD OF EDUCATION OF THE MERCER COUNTY SPECIAL SERVICES SCHOOL DISTRICT, MERCER COUNTY,

Respondent.

Robert M. Schwartz, Esq., for petitioner

Michael J. Herbert, Esq., for respondent (Herbert, VanNess, Cayci & Goodell, attorneys)

Record Closed: July 26, 2006 Decided: July 26, 2006

BEFORE **PATRICIA M. KERINS**, ALJ:

This matter was transmitted to the Office of Administrative Law on October 13, 2005, for determination as a contested case, pursuant to N.J.S.A. 52:14B-1 to -15 and N.J.S.A. 52:14F-1 to -13.

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

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

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

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

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

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

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

July 26, 2006
DATE

Patricia M. Kerins
PATRICIA M. KERINS, ALJ

Receipt Acknowledged:

8-1-06
DATE

Karen Kennedy
DEPARTMENT OF EDUCATION

Mailed to Parties:

AUG 2 2006
DATE

OFFICE OF ADMINISTRATIVE LAW

bdt

FURTHER RESOLVED, the Board of Education acknowledges the following contract status:

ORIGINAL CONTRACT AMOUNT	$25,303,940
NET CHANGE BY APPROVED CHANGE ORDERS	191,650
NEW CONTRACT AMOUNT	25,495,590
PAID ON PREVIOUS CERTUIFICATES FOR PAYMENT	25,491,408
CURRENT PAYMENT	4,182
BALANCE TO FINISH INCLUDING RETAINAGE	$0.00

RECEIVED
2006 JUL 26 A 10:30
STATE OF NEW JERSEY
OFFICE OF ADMIN LAW

J. Settlement of Legal Action – (Attachment 5-4 distributed to Board Members Only)

RESOLVED, the Board of Education approves the negotiated settlement of the matter of Toba S. Knobel v. Mercer County Special Services District memorialized in the attached Stipulation of Settlement. (Attachment #6)

K. Approval of Transportation Contract(s) Addenda

RESOLVED, the Board of Education approves addenda to each of the following 2004-2005 transportation contracts:
(Attachment #3)

Mr. Klavon abstained on this resolution

L. Approval of Transportation Contract Transfer Agreement

RESOLVED, the Board of Education approves the Contract Transfer Agreement entered into by Stires Bus Company and First Student, Inc. First Student, Inc. has purchased Stires Bus Company and will transport students according the same terms and specifications as those in effect for Multi Contracts:

Multi ST16 - Rt. SE13		Multi S99A - Rt. JC45
Rt. SNG2		Rt. RD76
		Rt. RD78
Multi S99B - Rt. SPCD		Rt. RD79
		Rt. RD80
Multi SR97 - Rt. EDN2		Rt. RD85
		Rt. RDA7
Multi TA10 - Rt TA10		
Multi STA5 - Rt. LHA2		Multi ST1V - Rt. EDN6
Rt. RSES		
Rt. ME01		

Mr. Klavon abstained on this resolution

M. Approval of Board of Education Policy (Second Reading) (Attachment #7)

WHEREAS, the Board of Education has introduced and approved on first reading the policy(ies) listed below, and

WHEREAS, the Board of Education has complied with its Policy 9311 and provided an opportunity for interested parties to review the proposed policy(ies) and contribute opinions and information for the Board's consideration, now, therefore, be it

RESOLVED, the Board of Education adopts the following policy(ies) on second reading, and be it

FURTHER RESOLVED, the Board of Education directs the Superintendent to distribute the policy(ies) to all registered policy book holders and any other interested parties.

HERBERT, VAN NESS, CAYCI & GOODELL
A Professional Corporation
22 Chambers Street
Princeton, New Jersey 08542
(609) 924-2495
Attorneys for Respondent
Mercer County Special Services School District

RECEIVED

2006 JUL 26 A 10:30

STATE OF NEW JERSEY
OFFICE OF ADMIN LAW

TOBA S. KNOBEL, **Petitioner,** **V.** **MERCER COUNTY SPECIAL SERVICES SCHOOL DISTRICT,** **Respondent.**	**STATE OF NEW JERSEY** **COMMISSIONER OF EDUCATION** **AGENCY DOCKET NO. 187-8/05** **STIPULATION OF SETTLEMENT**

WHEREAS, the petitioner Toba S. Knobel (hereinafter referred to the "petitioner") filed an appeal with the Commissioner of Education alleging entitlement as a Principal for the Summer Program at the Mercer County Youth Detention Center; and

WHEREAS, the respondent, Mercer County Special Services School District (hereinafter referred to as the "District"), has denied that the petitioner was entitled to be appointed as a principal for the Summer Program at the Youth Detention Center; and

WHEREAS, the parties have now agreed to amicably resolve their differences as follows:

1. The District will pay to the petitioner the amount of Fifteen Thousand Dollars ($15,000.00) for a waiver of any and all claims including those contained within the Petition now filed before the Commissioner of Education.

2. In making such a voluntary payment, the District does not admit to any violation of state statute or regulations or any rights of the petitioner.

3. The petitioner will agree to dismiss the pending Petition before the Commissioner of Education with prejudice.

4. The petitioner will further release any claims to tenure, the right to recall as a staff member at the District or any other rights that may be asserted based upon her past employment with the District. She will also waive and release any claims she may have against any official, administrator or employee of the District.

5. This Agreement contains the entire understanding between the parties and shall supersede any agreements that have been reached by the parties in the past, either through their agents or otherwise, including oral or written agreements.

6. The petitioner will promptly execute a Release of any and all claims and her attorney will file a Stipulation of Dismissal with the Bureau of Controversies and Disputes dismissing this litigation.

By: _____ 5/25/06
Robert M. Schwartz
Attorney for Petitioner, Toba Knobel
Dated

By: Toba Knobel 5/22/06
Toba Knobel, Petitioner
Dated

By: Rosemarie Bonomo 6/13/2006
Rosemarie Bonomo, President
Mercer County Special Services School District
Board of Education
Dated

By: _____ 6/13/2006
Steve Gillingham, Board Secretary
Mercer County Special Services School District
Board of Education
Dated

298-06

GEORGE GROSS,	:	
PETITIONER,	:	
V.	:	COMMISSIONER OF EDUCATION
BOARD OF EDUCATION OF THE TOWNSHIP OF MOUNT HOLLY, BURLINGTON COUNTY,	:	DECISION
RESPONDENT.	:	

SYNOPSIS

Petitioner, a former tenured teacher who had been employed by the Board for 37 years, sought an order directing the respondent to approve the rescission of his resignation and restore him to the teaching position he held during the 2003-04 school year. Petitioner contends that he was enticed to retire based on promises made by Board employees regarding the terms and availability of future long term substitute positions, and because these promises were not kept, the Board must allow the rescission of his resignation and return him to his previous employment status. Respondent contends that the central issue in this matter is whether or not petitioner, following his retirement from the district, was promised payment for speculative employment with the Board at the substitute rate of pay or at Step 1 on the teacher salary guide.

The ALJ found, *inter alia*, that: a tendered resignation or retirement is legally binding upon acceptance by a board of education and cannot thereafter be unilaterally rescinded or modified by the staff member; no cause exists in the instant matter to support application of the doctrine of equitable estoppel; and boards of education cannot be bound by the oral representations of business administrators, superintendents, or board attorneys. Accordingly, the ALJ concluded that the Board's refusal to permit rescission of petitioner's resignation was appropriate and well within its discretionary authority, and that the petition should be dismissed.

The Commissioner concurs with the ALJ's conclusions, emphasizing that the petitioner has failed to establish that the Board's refusal to approve his attempted rescission of his retirement was arbitrary, capricious, unreasonable or violative of his tenure rights, and that this matter lacks compelling extraordinary circumstances which could serve to provide equitable justification for the rescission of petitioner's retirement. Accordingly, the Initial Decision of the OAL is adopted as the final decision in this matter, and the instant Petition of Appeal is 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.

September 1, 2006

OAL DKT. NO. EDU 8567-04
AGENCY DKT. NO. 305-9/04

GEORGE GROSS,	:	
PETITIONER,	:	
V.	:	COMMISSIONER OF EDUCATION
BOARD OF EDUCATION OF THE TOWNSHIP OF MOUNT HOLLY, BURLINGTON COUNTY,	:	DECISION
RESPONDENT.	:	

The record of this matter and the Initial Decision of the Office of Administrative Law (OAL) have been reviewed. Petitioner's exceptions and the Board's reply thereto, filed in accordance with *N.J.A.C.* 1:1-18.4, were fully considered by the Commissioner in reaching her determination herein.

On exception petitioner essentially recasts and reiterates his arguments advanced below with respect to the applicability of the doctrines of estoppel and/or mutual mistake to this case. (Petitioner's Exceptions, Pages 11-22) He additionally charges that the Administrative Law Judge (ALJ) either failed to resolve or incorrectly resolved numerous factual issues, which petitioner deems critical to this case, with regard to the "promises" made to him at various points in time by Board Secretary/Business Administrator Margiotta and Principal Dileo. In so doing, he maintains, the ALJ ignored the "consistent and clear testimony with vivid recollection as to statements made [by these individuals]" offered by petitioner and his witness, Frederick Gerry and instead credited the unreliable and incredible testimony of Margiotta and Dileo. Petitioner

presents detailed discussion of each of these factual issues and the resolution which, he avers, must be adduced from the true record. (Petitioner's Exceptions at pages 3-11, quote at 4) The exceptions conclude by urging the Commissioner to reject the Initial Decision and to issue an Order:

> (a) finding and declaring that Respondent's refusal to allow Petitioner to rescind his offer to resign and retire is null, void, and of no effect;
>
> (b) deeming Petitioner's resignation to be rescinded;
>
> (c) directing Respondent to take all actions necessary and proper to restore Petitioner to the position of employment he held during the 2003-04 school year, together with all benefits, emoluments, and advantages including tenure and seniority, to which he would have been entitled had Respondent allowed him to rescind his resignation and retirement as he had requested; and
>
> (d) granting Petitioner any and all other relief and remedies which are appropriate and to which he is lawfully entitled.
> (Petitioner's Exceptions, Page 23)

The Board's reply exceptions advocate the correctness of the ALJ's decision and urge its adoption by the Commissioner.

Upon a careful and independent review of the record – which included transcripts of one of the two days of hearing[1] – the Commissioner, finding petitioner's exceptions wholly without merit, is in accord with the ALJ's conclusion that petitioner has failed to establish that the Board's refusal to approve his attempted rescission of his retirement was arbitrary, capricious, unreasonable or violative of his tenure rights.[2]

---

[1] The Initial Decision recites that hearing in this matter was conducted on November 1 and 2, 2005. Transcripts for only November 1, 2005 were included in the record. However, the record evidences that the November 2, 2005 proceedings may have been conducted, on limited issues, by telephone.

[2] With respect to petitioner's challenge to the ALJ's credibility determinations in this matter, 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

It is uncontroverted that, by letter dated February 2, 2004, petitioner notified the Board that he was taking advantage of the Board of Education's Enhanced Sick Leave Sell Back Plan and would be retiring at the end of the 2003-04 school year. The Board adopted a resolution accepting petitioner's retirement notice at a Special Meeting on February 5, 2004. The seminal issue in this matter is whether the school laws provide petitioner with the entitlement to rescind his resignation/retirement under the specific circumstances of this case. Initially, in this regard, it is by now a long-accepted precept in school law that a submitted resignation/retirement is legally binding upon acceptance by a board and cannot subsequently be unilaterally modified or rescinded by either the teaching staff member or the Board. *See F. Rupert Belles v. Wayne Township Board of Education*, 1938 *S.L.D.* 556; *Kozak v. Waterford Township Board Education*, 1976 *S.L.D.* 633; *Cutro v. Hazlet Township Board of Education*, 94 *N.J.A.R.* 2d (EDU) 402, *affirmed with modification* by the State Board of Education, 97 *N.J.A.R.* 2d (EDU) 557; *Bloomfield Education Association v. Board of Education of the Township of Bloomfield*, decided by the Commissioner December 29, 2003. Despite this well-recognized maxim, New Jersey courts have felt compelled, on rare occasion in a few unique education law cases, to provide relief to petitioners - in the face of situations involving extraordinary equitable considerations - by relaxing the strict mandate of this rule in order to prevent what they perceived as abject injustice. *See Hall v. Jefferson Board of Education*, 125 *N.J.* 299 (1991) and *Evaul v. Board of Education of the City of Camden*, 35 *N.J.* 244 (1961) (details of which are discussed by the ALJ on Page 10 of the Initial Decision). The instant petitioner professes that similarly compelling extraordinary equitable circumstances, entitling him to rescission of his retirement, are present in this matter.

---

supported by sufficient, competent and credible evidence in the record." *N.J.S.A.* 52:14B-10(c). The record before the Commissioner provides no cause for modification or rejection in this regard.

Petitioner claims entitlement to rescission on two alternative theories, *i.e.*, 1) equitable estoppel and 2) mutual mistake of the parties. As to estoppel – this theory of recovery requires that an individual prove: 1) that there was a clear and definite promise; 2) that the promise was made with the expectation that the promisee would rely on it; 3) that the petitioner *reasonably* relied on the promise; and 4) that the promise resulted in a detriment in reliance thereon. *Peck v. Imedia, Inc.*, 293 *N.J. Super.* 151, 165 (App. Div. 1966) (emphasis supplied) Even assuming, *arguendo*, that certain representations or promises may have been made to petitioner by Ms. Margiotta, the Board's Secretary/Business Administrator and/or Mr. Dileo, Principal of the Holbein School, the Commissioner rejects out-of-hand petitioner's claim of estoppel as she, initially, finds no merit in his contention that he properly and reasonably relied on these District administrators as having the authority to grant him the deal he sought, thereby rendering the representations and/or promises of these individuals as binding on the Board. It is long-settled in education law that the representations of individual board members or administrators are insufficient to bind a board to a particular course of action. *See e.g.*, *Harold A. Vandenbren v. Board of Education of the School District of Wanaque*, 1967 *S.L.D.* 4, *aff'd* State Board of Education; 1967 *S.L.D.* 6; *Alice W. Cardman and Millburn Education Association v. Board of Education of the Township of Millburn,* 1977 *S.L.D.* 746; *Cheryl Dorrington v. North Bergen Board of Education*, 1982 *S.L.D.* 247; *Kevin Griffin v. Board of Education of the City of Paterson*, 93 *N.J.A.R.* 2d (EDU) 882. Rather, here, as in *Dorrington, supra*:

> ***An examination of the [full] record reveals that the Board committed itself not at all to petitioner, but that petitioner mistakenly relied on the opinions and assurances of [Board administrators] in concluding that a commitment had been made. Such reliance was misplaced, since opinions and assurances cannot stand in the stead of deliberate Board action.***

Dorrington at 256, *quoting Anna Brennan v. Board of Education of the City of Pleasantville*, 1977 *S.L.D.* 1059.

The Commissioner further concludes that it is inconceivable that petitioner, as a professional educator with 37 years experience in the District's employ, would be unaware of this hierarchical nature of public education. Additionally, the Commissioner concurs with the ALJ, for the reasons clearly detailed in the Initial Decision at pages 12-13, that, - particularly in light of the speculative rather than guaranteed nature of any possible future employment opportunities in the District - there is nothing upon which petitioner could have or should have relied to his detriment. It is, therefore, evident that the Board is not estopped from asserting that no agreement existed between it and petitioner which might serve to require it to allow rescission of his proffered retirement.

Similarly rejected is petitioner's argument that rescission of his retirement is justified on the grounds of mutual mistake by the parties. The Commissioner is in full agreement with the ALJ's analysis and conclusion that Teachers Pension Annuity Fund Fact Sheet #28 has no applicability or bearing under the circumstances of this matter and, therefore, "there was no mutual misunderstanding of the 'law' warranting rescission of [petitioner's] retirement." (Initial Decision Pages 15-16, quote at 16)

In light of the above, the Commissioner finds and concludes that this matter lacks the compelling extraordinary circumstances such as those present in *Hall* and *Evaul* which could serve to provide equitable justification for the rescission of petitioner's retirement.

Accordingly, the Initial Decision of the OAL, as explicated above, is adopted as the final decision in this matter and the instant Petition of Appeal is hereby dismissed.

IT IS SO ORDERED.[3]

Lucille E Davy

ACTING COMMISSIONER OF EDUCATION

Date of Decision: 9/01/06

Date of Mailing: 9/01/06

[3] This decision may be appealed to the State Board of Education pursuant to *N.J.S.A.* 18A:6-27 *et seq.* and *N.J.A.C.* 6A:4-1.1 *et seq.*

State of New Jersey

OFFICE OF ADMINISTRATIVE LAW

INITIAL DECISION

OAL DKT. NO. EDU 8567-04

AGENCY DKT. NO. 305-9/04

GEORGE GROSS,

Petitioner,

v.

BOARD OF EDUCATION OF THE TOWNSHIP OF MT. HOLLY, BURLINGTON COUNTY,

Respondent.

Keith Waldman, Esq., appearing for Petitioner (Selikoff & Cohen, P.A., attorneys)

Frank Cavallo, Jr., Esq., appearing for Respondent (Parker McCay, P.A., attorneys)

Record Closed: July 14, 2006 Decided: July 26, 2006

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

Petitioner, George Gross, seeks an order directing the Mount Holly Board of Education to approve the rescission of his resignation and restore him to the teaching position he held during the 2003-04 school year. Gross filed his petition with the

Commissioner of Education on September 3, 2004, the Board filed its answer on October 4, and the matter was transmitted to the Office of Administrative Law for determination as a contested case on October 14. N.J.S.A. 52:14F-1 to –13. The matter was heard as scheduled on November 1 and 2, 2005, and the record was closed upon receipt of recently submitted supplemental correspondence on July 14, 2006.

George Gross holds K-8 certification and prior to his resignation on February 2, 2004, had been a teacher in the Mount Holly School District for thirty-seven years. Although he had been eligible to retire in 1999 at age 54, he'd decided to wait until January 5, 2007, when he turned 62 and would be eligible to receive Social Security in addition to his full pension.

During the 2003-04 school year, the Board offered an enhanced sick leave buy-back program to all employees meeting certain criteria. The program called for retiring teachers to receive a $10,000 payment over and above any payment they would otherwise receive for their accumulated sick leave. In order to participate, retiring employees had to submit their letters of resignation/retirement by February 2, 2004.

Although he had already decided not to participate in the program, in or about the last week of January 2004, Gross attended a meeting with the Board's Business Administrator, Theresa Margiotta, and the Principal of the Holbein School, John Dileo. According to Gross, Ms. Margiotta promised him that if he took advantage of the program and retired, he would be given the right of first refusal on any long-term leave assignments, including the anticipated maternity leave of Melissa Krawiecz between September 2004 and January 2005. In addition to the right of first refusal on long-term leaves, Gross would also be given the opportunity to accept any coaching, officiating, or before- and after-school extracurricular activity positions that might arise.

Testifying in his own behalf, Gross stated that in addition to these rights of first refusal, Ms. Margiotta promised him that his compensation as a long-term substitute would be the same as that of a first year teacher; i.e., the first step of the salary guide. This was an important factor in his deciding to retire because he knew how much additional income he would need if he retired on full pension before he was eligible to

receive Social Security benefits. As he recalled telling her, "Theresa, I'm not interested in sub-pay. I mean, I've been here for 37 years, why would I want to work for sub-pay? I'll never work for sub-pay no matter what." T39:21-23.[1] He also recalled Ms. Margiotta addressing his objection as follows:

> No, George, you're not gonna work for sub pay. I represent the Board and we're gonna give you first year teacher's salary. You'll not only get your first year teacher's salary on this, but you're gonna get the $10,000.00 buyout and you're gonna get your regular - - you know, I'm getting this pay, I'm getting my retirement, I'm getting a $10,000.00 buyout. ... You'll be making more money. And on top of that, anything else comes along, we're gonna give it to you. ... You help us and we'll help you. We'll take care of this for you.
>
> [T39:24 to 40:9]

Upon hearing this, Gross asked her whether there was anything that could possibly go wrong, to which she replied: "No, I've researched this. There's nothing possible that can go wrong with this, George. This is a good thing for both of us." T40:14-16. And Mr. Dileo told him much the same thing:

> Now, I'm not trying to scam ya'. This thing is good for both of us, all right... My credibility, because there's a lot of teachers gonna be retiring here, you're like the tip of the iceberg here, so, there's gonna be a lot of teachers after you retiring, so if I don't keep my word to you, then I'm not gonna have any credibility at all with the rest of them.
>
> [T42:2-9]

However, Ms. Margiotta would not put the offer in writing because no one else knew Ms. Krawiecz was pregnant and her maternity leave position had not yet been posted. Consequently, he declined to submit his letter of resignation until he could return with someone to serve as a witness. Still, he left the meeting elated and testified that "this is the first time I walked out of here with a little joy in my heart." T40:19-20.

[1] T denotes the transcript of the hearing conducted on November 1, 2005.

Testifying on behalf of the Board, Ms. Margiotta provided a different account of the January meeting. She stated that John Dileo had called her into the meeting to answer Gross's questions about the enhanced sick leave program and the opportunities that would be available to him if he were to retire. At that time, she and Dileo advised him that they were expecting a number of teachers to go out on maternity and other types of long-term leaves in the coming year and that he would be given the opportunity to fill those positions, take on any extracurricular before- and after-school activities, and accept any coaching or refereeing positions that might open up.

Ms. Margiotta also recalled discussing the Board's rates of pay for short- and long-term substitutes. She advised Gross that the standard compensation for substitute teachers was $75 per day. However, the rate of compensation for long-term substitutes, defined as those filling a position for between 20 and 100 days, was $95. It was only if an individual substituted for over 100 days that the compensation would be equal to that of a first year teacher.

She further testified that Gross made it quite clear that he no interest in subbing in different classrooms on different days, and instead wanted something more consistent, where he could "take ownership of the classroom," prepare lesson plans, complete report cards, and conduct conferences. Having been advised earlier in the year that his teaching position at the Holbein School was going to be abolished and that he would be assigned to teach a fourth grade class at the Falwell School the following September, Gross also told her that he wanted to remain in the Holbein School. It was at that time that she mentioned Ms. Krawiecz's impending pregnancy leave.

Ms. Margiotta admitted telling Gross that she would not put any of the matters they had discussed in writing. This was not so much because Ms. Krawiecz's pregnancy leave had not yet been posted, but rather because she simply could not make any guarantees. For example, although she and Mr. Dileo had no problem giving him a right of first refusal for any long-term substitute positions that might open up in the Holbein School, they had no way of knowing how many, if any, positions would actually materialize. Nor did they have any way of knowing how long those leaves would

last. Given these uncertainties, she made certain Gross understood that if he took the buy-out, he would be submitting an "irrevocable letter of separation."

Also testifying on behalf of the Board was Mr. Dileo, who stated that to the best of his recollection, Gross came to his office in late January 2005 and asked a number of questions about the buy-out because "he had gone to pensions," knew the amount he would receive in pension benefits, and wanted to know what might be available at the Holbein School in the way of maternity leaves or Family Medical Leave Act openings if he wanted to come back in a full-time substitute's capacity. Dileo advised him that he'd "love to have him back" at Holbein and, as it happened, Melissa Krawiecz was pregnant and expected to go out on maternity leave in September. However, he couldn't "guarantee anything ... because suppose she has a miscarriage or something." T116:8-9.

Dileo also recalled Gross asking him questions about the compensation he would receive as a full-time substitute because he wanted "to be paid at the rate I went out with." T118:13-14. At that point Dileo called in Ms. Margiotta who outlined the different rates of pay substitute teachers received. While acknowledging that there had been a long-term substitute who'd been paid at the first step of the salary guide, she explained that the individual had been hired to fill two consecutive medical leaves that, together, were going to exceed 100 days. In fact, that individual had been contractually employed as a substitute "on a whole year basis."

On February 2, 2004, Gross returned to Dileo's office with his good friend, Frederick Gerry, whom he'd asked to serve as his witness. According to Mr. Gerry,

> Basically, the discussion was on the deal that George would be getting, which as I state in my letter [Exhibit P-1], was that he would be receiving first year teacher's salary and that the maternity leave would be sometime from September to January, sometime in January. And George seemed happy with that and he was offered extracurricular, if that was available. He was offered any officiating that might come about, because he had done some officiating for us before in basketball and softball. And he was told that there could

> be a possibility of other maternity leaves, or leaves that people would have that he could take. And that was basically the discussion.
>
> [T16:10-22]

When asked to elaborate on the issue of compensation, Gerry stated, "He (Gross) was told that he would be offered the position of Melissa Kravietz (sic), who was going on maternity leave for whatever and that he would get that position at first year teacher's salary." T21:7-10.

Gerry also testified that one statement in particular

> stuck in my head and that was just before we left the meeting. George said to him, he said, "Is there anything that can go wrong with this deal?" and John Dileo said, "No," and "George if something does go wrong with this deal, then my credibility will suffer, and I can't have that happen."
>
> [T20:12-18]

By letter dated February 2, 2004, Gross notified the Board that he was "taking advantage of the Board of Education's Enhanced Sick Leave Sell Back Plan and retiring." Retirement Letter, Exhibit R-1. The Board, in turn, accepted his retirement at a Special Meeting on February 5, 2004. Some time later, Gross filed his application for "Early-55+ Retirement," which was approved by the Division of Pensions and Benefits on May 6, 2004.

Toward the end of the school year, Mr. Dileo apparently raised an issue about the enrollment of long-term substitutes in the TPAF because on June 3, 2004, Ms. Margiotta sent the following e-mail to Dileo and Gross regarding "TPAF Employment After Retirement:"

> We have researched your concerns regarding employment after retirement in the TPAF Pension System. Fact Sheet #28 (which will be sent interoffice mail) specifically excludes re-enrollment in the TPAF system if the following criteria is (sic) applicable:

- employed as a per diem substitute
- employed as a permanent or long-term substitute
- employed replaced an employee on leave of absence

Also, since you will not be employed longer [than] 100 days, no enrollment is necessary.

Therefor (sic), feel free to apply for any of the maternity leaves of absence substitute positions. Any position over 20 days but less than 100 days get (sic) paid at the increase (sic) rate of $95 per diem.

I hope this clarifies the issue. If you have any questions, please feel free to contact me.
Thanks.

[Margiotta TPAF e-mail, Exhibit R-4]

By letter dated June 7, 2004, Gross protested the Board's sudden reliance on TPAF Fact Sheet #28 to change the terms of his compensation as a substitute teacher. As he indicated, his only reason for choosing to retire "at the 11th hour" was the assurance he'd received from Ms. Margiotta and Mr. Dileo that he would be hired back at a first-year teacher's salary. Had he not been completely confident that they would keep their word, he would not have retired.

Margiotta and Dileo jointly replied in a memorandum dated June 10, 2004. Since the letter contains much more detailed information than the combined testimony of the four witnesses, it is repeated verbatim as follows:

> We are in receipt of your letter of June 7, 2004 regarding the open positions for the 2004-2005 school year due to leave of absences (sic) that will be taking place. I would like to re-iterate as per my previous e-mails, the discussions were based on the possibility of there being a leave of absence over 99 days. When Mr. Dileo and I met with you to discuss possible employment options after retirement, we stated that you would be given first choice of any openings at Holbein School as you requested, and that if any positions exceeded the 99 day time period, first step on the contract would be the salary. Currently, none of the leave of absences (sic) for next year extends (sic) past the 99-day limit. The longest scheduled leave of absence is only 93 days, which does not meet the 100-day limit we use as a

guide for hiring on step 1. The alternate possibility that was discussed was that you could substitute at the increase (sic) sub rate of $95.00 per day (possible new rate of $100.00 per day) for any leave of absences (sic) less than 100 days. The Board of Education is aware of the difficulty in hiring certified personnel to fill these vacancies and I'm sure they would be willing to discuss adjusting the rate for next year.

In regard to the contract given to another employee, this contract was necessary as he filled two consecutive positions, which required him to work the entire school year. In this case, it was mandatory to hire him as a contracted employee since the total employment was for the full school year. This was an agenda item recommended by the superintendent and approved by the Board of Education.

As I stated, based on your retirement allowance, the combined total earning that you will make including the long-term/vacancy substitute pay, retirement incentive payment and your estimated annual retirement would be as follows:

Retirement Incentive	10,000.00
Long Term Sub Pay	9,300.00
Annual Retrmt (Est)	42,000.00
Total Annual Pay	**61,300.00**

We believe this to be an equitable offer since all of these factors together very nearly match your current annual salary for a full 10-month contract while only requiring you to work for five months. As I stated before, we had no prior knowledge of how long these maternity vacancies would be requested for as each individual reviews and requests their own time period.

In addition, Mr. Dileo has recommended to you that you could also apply for any district stipend positions if there are any available (such as breakfast supervisor, sporting events, etc) in addition to regular substituting sporadically during the second half of the year.

Please be assured that we value your experience as a teacher and we hope you will consider applying for these vacancies. I hope this clarifies the current situation and that we can reach a resolution acceptable to both parties.

[June 10, 2004 Memorandum, Exhibit R-7]

Contemporaneously, Gross sent a letter to the Board's Personnel Committee requesting a meeting concerning his retirement and re-hiring to relieve teachers on leaves of absence. The request was granted the next day and the meeting was held on June 14, 2004.

Ms. Margiotta attended the meeting and, according to Gross, advised him that the Board could not follow through with the agreement because "the law changed and that there was nothing that she could do about it and that they couldn't go through with the deal because that it just couldn't be done."[2] T55:7-10. Upon hearing that, Gross said "Okay, no harm, no foul, just un-retire me. I'll go back and start teaching again and it was a nice try..." Id. at 11-12. However, Personnel Committee member Ron Bozarth said, "George, once you retire you can't un-retire." Id. at 14. Still, it was agreed that the matter would be presented to the entire Board for its consideration on June 16, 2004. At that meeting, the Board decided not to grant Gross's request to rescind his retirement.

It is well settled that a tendered resignation or retirement is legally binding upon acceptance by a board of education and cannot thereafter be unilaterally rescinded or modified by the staff member. Cutro v. Board of Educ. of the Twp. of Hazlet, Monmouth County, 97 N.J.A.R. 2d (EDU) 557; Hall v. Board of Educ., 125 N.J. 299 (1991); Evaul v. Board of Education of the City of Camden, 35 N.J. 244 (1961). Since acceptance effectively terminates employment, attempted modification, rescission, or withdrawal by the employee will be unsuccessful unless equitable considerations require that the board take the requested action. Cutro v. Board of Educ. of the Twp. of Hazlet, Monmouth County, supra.

Equitable estoppel is "'rarely invoked against a governmental entity.'" Wood v. Borough of Wildwood Crest, 319 N.J. Super. 650, 656 (App. Div. 1999) (quoting Vogt v. Borough of Belmar, 14 N.J. 195, 205 1954). Still, equitable considerations "are relevant in assessing governmental conduct" and impose a duty on the court to invoke estoppel when the occasion arises." Ibid. (citing Skulski v. Nolan, 68 N.J. 179, 198 (1975)).

For example, in Hall v. Board of Educ., supra, 125 N.J. 299, a staff member submitted a request to change her intended retirement date, only to have the request denied by the board. The Supreme Court held that the board's denial was inappropriate under the particular circumstances of the case. Emphasizing the narrow scope of its decision, the majority predicated its holding on an "ambiguous contractual provision" in the collective bargaining agreement and "a consistent, longstanding practice by the district board of permitting modification of an intended retirement date." Id. at 306.

In Evaul v. Board of Education of the City of Camden, supra, 35 N.J. 244, a tenured teacher with twenty-five years of service in the district tendered her resignation as a result of "an extraordinary concatenation of events," including an "unanticipated and tempestuous confrontation" with the Principal, Superintendent, and Board President. Id. at 249. Given these facts, the Supreme Court concluded that "the submission of her resignation was an impetuous act prompted by her understandably distraught condition" and that "in the unusual circumstances of this case, it [was] unduly harsh for appellant to lose rights acquired during the many years she served as a teacher in the Camden school system." Id. at 249-50. Accordingly, the Court ordered that she be reinstated.

In Skulski v. Nolan, supra, 68 N.J. 179, the receiver of the Hudson County Employees' Pension Commission terminated approximately 250 disability pensions for various reasons and a number of the pensioners appealed. Preliminarily, the Supreme Court held that "it [was] appropriate for [the Court] to weigh equitable considerations, particularly the reliance factor," in determining whether the receiver's termination of these previously granted pension benefits was appropriate. Id. at 199. Following an analysis of these considerations, the Court reversed the Appellate Division's decision upholding the receiver's termination of Skolski's pension benefits. As the Court concluded, Skolski had "relied upon the pension award in declining to secure subsequent full-time employment either within or without the county, thereby foreclosing the opportunity to secure alternate pension benefits." Ibid. Additionally, at the time of the receiver's action, Skulski had been receiving these benefits for approximately ten

[2] The record does not include a citation to "the law" or explain the impact it would have on the parties'

years. Consequently, application of the doctrine of equitable estoppel was deemed appropriate.[3]

Here, too, Gross has argued that any number of equitable circumstances entitle him to rescind his retirement as a matter of law. Among other things, he has argued that Ms. Margiotta, as a representative of, and speaking for, the board, promised him the right of first refusal on any long-term leave positions that might arise and that his compensation would be the same as that of a first year teacher. Had it not been for these promises, he asserts, he would not have participated in the enhanced sick leave buy-back program and retired when he did.

As a general rule, public bodies such as boards of education cannot be bound by the oral representations of even high ranking officials such as the business administrator, superintendent of schools, or school board attorney. For example, in Board of Education of Willingboro, County of Burlington v. Bonnie Lott, OAL Docket No. EDU 2384-92S, the Hon. Jeff Masin, ALJ, held that a school board attorney did not have actual authority to bind the Board, but could only negotiate within certain parameters and then go back to the Board for final approval. Similarly, in Community Projects for Students, Inc. v. Wilder, 60 N.C. App. 182, 298 S.E.2d 434 (Ct. App. 1982), the North Carolina Court of Appeals expressly held that the doctrine of apparent authority is inapplicable to boards of education.

In Community Projects, a seller of fund-raising activities and materials sought to enforce a contract for goods and services signed by Wilder, a teacher and choral director in the senior high school, and ratified by the high school principal. The trial court issued a directed verdict in favor of the board of education and the Court of Appeals affirmed. The appellate court began its analysis by citing G.S. 115-52 (now recodified as G.S. 115C-522(a)), which provides that local school boards alone have the duty or authority to enter into or authorize purchases of supplies and equipment for

---

understanding. However, taken in context, it is believed Ms. Margiotta was referring to Fact Sheet # 28.

[3] The Appellate Division's judgments upholding the termination of five other pensioners' benefits were affirmed.

their respective local school systems. More importantly, at least insofar as the present matter is concerned, the panel held:

> Neither can plaintiff prevail on the theory of Wilder's apparent authority to obligate defendant Board of Education. Those who deal with public officials are deemed to have notice of the nature and extent of the authority of such officials to bind their principal.
>
> [60 N.C. App. at 183, 298 S.E.2d. at 435 (citation omitted)]

This is particularly true in the present matter, where Gross had been employed as a teacher by the Mount Holly Board of Education for thirty-seven years, occasionally served as a basketball and softball official for which he received a stipend, and had known Ms. Margiotta and her father, who happened to be her predecessor,[4] for at least thirty years, or since "she was a little girl." Consequently, he must or should have known that Ms. Margiotta could not speak for, much less bind, the Board.

Even so, the fact remains and I find that Gross failed to establish that he relied on Ms. Margiotta's assurances to his detriment. Rather, careful review of the record discloses that, if anything, he received the benefit of his bargain with the school district, beginning with the $10,000.00 payment he received in accordance with the enhanced sick leave buy-back program. This payment certainly inured to his benefit because he had exhausted his allotment of sick days as of February 2, 2004 deadline for participation in the program.

Additionally, and perhaps most importantly, it must be remembered that what Gross bargained for was not a guaranteed number of long-term leaves, but rather the right of first refusal on any maternity or other long-term leaves that *might* arise. In other words, the quid pro quo was not a specific guaranteed long-term leave at a certain guaranteed rate of pay, but rather the *possibility* of employment at the Holbein School as a long-term substitute. Not only that, he was under no obligation to accept, and could have turned down, any leaves that might have been offered. As he testified,

[4] Gross testified that he was the videographer at Mr. Margiotta's retirement party.

> ... the other part of the coin was that, by taking those maternity leaves, I would not only be able to work just a part of the year, but I would be able to continue working till I was 65, because I would have had some time off in the Spring to play golf. I would have some extra free time and stuff and that would be a real - - that would be a real benefit to me. Because I could go beyond 62.
>
> [T64:5-12]

The flaw in Gross's analysis is that it presupposes that the long-term leaves at the Holbein School would commence in the autumn of each school year. In the event such an opening came up later in the year – one that would have kept him in the classroom through the Spring – he could, and possibly would, have turned it down to play golf. T64:13-21. Moreover, it might have come to pass that the leaves of absence requested in a given year would be of only relatively short durations. Consequently, other than the promise of being the first substitute offered a long-term leave, in the event one materialized, there was nothing else upon which he could rely, much less to his detriment. In fact, it was because of all these uncertainties that Ms. Margiotta made certain Gross understood that if he took the buy-out, he would be submitting an "irrevocable letter of separation." Nonetheless, Gross took the buy-out.

And, since there were no guarantees of employment as a long-term substitute, Gross had no basis for his belief that he would earn an amount of money that would adequately supplement his pension benefits until he was eligible for social security. And that is regardless of the rate of pay. So, once again, there was nothing upon which he could or should have relied. Not only that, it rendered the rate at which he would have been paid irrelevant.

Nevertheless, I am convinced that the various rates of pay for substitute teachers were fully discussed during, and understood by Gross following, his meeting with Ms. Margiotta and Mr. Dileo on February 4. I believed Ms. Margiotta, whom I found to be a serious, straightforward, and credible witness, when she testified that she told Gross the standard compensation for substitute teachers was $75 per day and the rate of compensation for long-term substitutes, defined as those filling a position for between

20 and 100 days, was $95. It was only if an individual substituted for over 100 days that the compensation would be equal to that of a first year teacher. Therefore, any assurances she may have given Gross about being paid at the rate of a first year teacher must have been based on the assumption that he would accept a long-term leave in excess of 100 days. This is particularly true given their discussion of the long-term substitute who'd been paid at the first step of the salary guide because he'd been contractually hired to fill two consecutive medical leaves that together were going to exceed 100 days.

In fact, Gross's own testimony suggests that he was aware of and understood Ms. Margiotta's description of the rates of pay for long-term substitute teachers. Although he denied there had been any discussion of a 100-day threshold for the receipt of step one pay, he testified that

> Actually, Theresa said to me, and it was like a ball park base, she said, "you'd probably be making around $250 a day and there was a new contract coming out that, you know, **it was gonna be at least, if that came out, it would someways be around in that area, ... a hundred dollars a day.**
>
> [T42:24 – 43:5 (emphasis added)]

This was consistent with Ms. Margiotta's testimony that that they had discussed the possibility of his substituting at the long-term substitute's rate of $95.00 per day, which was likely to be increased to $100.00 per day, for any leaves of absence that were less than 100 days. June 10, 2004 Memorandum, Exhibit R-7.

Furthermore, it was Gross's own witness, Mr. Gerry, who stated that it was not Ms. Margiotta, but rather "Mr. Dileo [who] stated that the salary would be the same salary that a first year teacher would receive." Gerry Letter to Mr. Marinelli, Exhibit P-1. And if it was, in fact, Dileo who promised him he would be paid at the rate of a first year teacher, Gross must or certainly should have known that a school principal cannot bind the Board. This is particularly when the business administrator has already quoted a much different rate of compensation.

Finally, the parties have argued about the relevancy of a purported "change in the law" that prohibited the board from "go[ing] through with the deal because it just couldn't be done." More specifically, they have argued over whether the provisions of TPAF Fact Sheet #28 require retired employees who accept a position of more than 99 days to reenroll in the pension fund and forego their retirement benefits. Gross asserts that such is the case and that this mutual misunderstanding of the law warrants rescission of his retirement and restoration to his teaching position. The Board disagrees, arguing that the provisions of Fact Sheet #28 "have no bearing whatsoever on the outcome of this case" and that the sole issue is whether Ms. Margiotta or Mr. Dileo agreed to pay Gross a substitute rate that equaled a first year teacher's salary. I agree with the Board that Fact Sheet #28 has no bearing on this case, albeit on slightly different grounds.

Fact Sheet #28, entitled "Employment After Retirement," Exhibit J-13, concerns the possible impact a return to public employment in New Jersey can have on a retiree's pension benefits. As a general rule, any individual who accepts regular or part-time employment in a position covered by the TPAF must reenroll in the pension fund. More particularly, enrollment will be required if the individual is "appointed to a teaching or professional staff position requiring certification and the position is covered by Social Security; and [the] annual salary is $500 or more." Ibid.

However, "seasonal or substitute teachers employed on a temporary basis" are not eligible for TPAF membership. More specifically, the Fact Sheet contains the following proscription:

> **TPAF Enrollment Not Permitted**
>
> You cannot reenroll in the TPAF if you are employed:
> - As a per diem substitute;
> - As a permanent or long-term substitute;
> - As a replacement for a regular employee on approved leave of absence (provided the regular employment is not on terminal leave).
>
> [Ibid.]

Conspicuous by its absence is any mention of a 100-day threshold for reenrollment in the TPAF. Even if Gross accepted a long-term leave position expected to last more than 99 days, and even if the compensation was equal to that of a first year teacher, he would still be considered a "permanent or long-term substitute" prohibited from reenrolling in the TPAF. In other words, there would be nothing prohibiting the board from "go[ing] through with the deal because it just couldn't be done." Consequently, there was no mutual misunderstanding of the "law" warranting rescission of Gross's retirement.

Based upon the foregoing, I find that the Mount Holly Board of Education's refusal to permit rescission of George Gross's resignation, which was purportedly submitted in reliance on certain promised incentives, was appropriate and well within its discretionary authority. I therefore **CONCLUDE** that Gross's Petition of Appeal should be **DISMISSED**. It is so **ORDERED**.

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

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

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

July 26, 2006

DATE

ISRAEL D. DUBIN, ALJ

E-mail Receipt of Initial Decision Confirmed by the Department of Education on:

July 26, 2006

DATE

AUG 1 2006

Mailed to Parties:

DIRECTOR AND
CHIEF ADMINISTRATIVE LAW JUDGE

DATE

OFFICE OF ADMINISTRATIVE LAW

IDD/mamf

APPENDIX

WITNESSES

For Petitioner:

George Gross
Frederick Gerry

For Respondent:

Theresa Margiotta
John Dileo

EXHIBITS

Joint Exhibits:

J-1 Letter of Resignation
J-2 Minutes of Special Meeting – February 5, 2004
J-3 Letter from Division of Pensions and Benefits to Gross
J-4 E-Mail from Margiotta to Dileo re TPAF Employment after Retirement
J-5 Letter from Gross to Margiotta and Dileo
J-6 Letter from Gross to Personnel Committee
J-7 Letter from Margiotta and Dileo to Gross
J-8 Memo from Margiotta to Gross
J-9 Letter from Margiotta to Gross
J-10 Earnings Printout
J-11 Petition of Appeal
J-12 Answer with Separate Defenses
J-13 Fact Sheet #28 – Employment After Retirement – TPAF
J-14 Collective Bargaining Agreement – July 1, 2001 through June 30, 2004

For Petitioner:

P-1 Letter from Gerry to Dr. Marinelli

For Respondent:

R-1 Letter of Retirement
R-2 Minutes of Special Meeting – February 5, 2004
R-3 Letter from Division of Pensions and Benefits to Gross
R-4 E-Mail from Margiotta to Dileo re TPAF Employment after Retirement
R-5 Earnings Printout
R-6 Letter from Gross to Margiotta, Dileo and Marinelli
R-7 Memo to Gross from Margiotta and Dileo
R-8 Letter from Margiotta to Gross
R-9 Letter from Dileo to Gross
R-10 Minutes of Regular Monthly Meeting – August 20, 2003; June 16, 2004; and June 22, 2005

294-06

OAL DKT. NO. EDU 2398-06
AGENCY DKT. NO. 70-2/06

J.K.E-W., on behalf of minor children, J.E., D.F. and K.F.,	:	
PETITIONER,	:	
V.	:	COMMISSIONER OF EDUCATION
BOARD OF EDUCATION OF THE CITY OF NEW BRUNSWICK, MIDDLESEX COUNTY,	:	DECISION
RESPONDENT.	:	

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

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

IT IS SO ORDERED.

ACTING COMMISSIONER OF EDUCATION

Date of Decision: 8/25/06

Date of Mailing: 8/25/06

State of New Jersey
OFFICE OF ADMINISTRATIVE LAW

INITIAL DECISION
SETTLEMENT
OAL DKT. EDU 2398-06
AGENCY REF NO 70-2/06

J.K.E-W., O/B/O J.E., D.F. AND K.F.,
Petitioners,
v.
BOARD OF EDUCATION OF THE CITY OF NEW BRUNSWICK, MIDDLESEX COUNTY,
Respondent.

J.K.E-W., petitioner, pro se

George F. Hendricks, Esq., for respondent (Hendricks & Hendricks, attorneys)

Record Closed: August 4, 2006 Decided: August 8, 2006

BEFORE **ANA C. VISCOMI,** ALJ:

STATEMENT OF THE CASE AND PROCEDURAL HISTORY

This matter was transmitted to the Office of Administrative Law on April 12, 2006, for determination as a contested case, pursuant to N.J.S.A. 52:14B-1 to -15 and N.J.S.A. 52:14F-1 to -13. It was then scheduled for hearing on June

23, 2006. As a result of a pre-hearing conference with the undersigned, the parties agreed to a settlement subject to Board approval.

The parties have agreed to a settlement. The Board passed a resolution approving the settlement (R-1). R.E., daughter of petitioner J.E-W, submitted an executed authorization allowing her mother to act on her behalf regarding her children (JE, DF and KF) (P2). In addition, petitioner J.K.E-W has submitted a request the matter be withdrawn based upon the Resolution passed by the Board (P-1).

I have reviewed the record and the terms of settlement, as incorporated in the Resolution, as well as the letters received by J.E-W. (P-1) and R.E. (P-2) and I **FIND**:

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

2. The Board of Education has passed a resolution approving the settlement.

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

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

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

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

August 8, 2006
DATE

ANA C. VISCOMI, ALJ

Receipt Acknowledged:

8-14-06
DATE

DEPARTMENT OF EDUCATION

Mailed to Parties:

AUG 15 2006
DATE

DIRECTOR AND
CHIEF ADMINISTRATIVE LAW
OFFICE OF ADMINISTRATIVE LAW

/mh

August 2, 2006

PETITIONER/ATTORNEY
Jerodean Kirby Evans-Williams, Pro Se
14 CogswellPlace
New Brunswick, NJ 08901

RESPONDENT/ATTORNEY
Board Secretary
New Brunswick Board of Education
268 Baldwin Street, 3rd Floor
P.O. Box 2683
New Brunswick, NJ 08903-2683

Petitioner, Jerodean Kirby Evans-Williams, residing at 14 Cogswell Place New Brunswick NJ 08901, hereby requests the Commissioner of Education to Withdrawl my application on behalf (J.E., D.F, K.F), the school law (N.J.S.A. 18A:6-9), by reason of the agreed resolution enter into by myself and new Brunswick Board of Education.

RECEIVED
2006 AUG -4 A 10:51
STATE OF NEW JERSEY
OFFICE OF ADMIN LAW

Signature of petitioner or representative

P-1

RECEIVED
2006 AUG -4 A 10:51
STATE OF NEW JERSEY
OFFICE OF ADMIN LAW

August 3, 2006

To Whom it may concern:

I Rhonda Evans mother of Ja'Nora Evans, Darnel Felton, and Krystal Felton give Jerodean Kirby Evans-Williams the authority to act on my behalf regarding their education. Thank you

Rhonda Evans

RESOLUTION

RECEIVED
2006 JUL 17 A 11
STATE OF NEW JERSEY
OFFICE OF ADMIN L

Regarding Challenge of Residency Determination of Jerodean K. Evans-Williams O/B/O minor children J.E., D.F., and K.F.

WHEREAS, the matter of the residency determination of Jerodean K. Evans-Williams O/B/O minor children J.E., D.F., and K.F. before the Board, and the Board attorney recommending the settlement to the Board regarding the above captioned matter;

NOW, THEREFORE, BE IT RESOLVED that the New Brunswick Board of Education accepts the settlement proposal by the Grandmother Jerodean K. Evans-Williams as follows:

- J.E., the oldest granddaughter, who is a Senior in New Brunswick School system and has been a student in this system since Kindergarten, be permitted to complete her Senior year at New Brunswick High School;

- D.F. and C.F., Ms. Evans-Williams' other two grandchildren, who live with her daughter, the children's mother, in a district other then New Brunswick, will be enrolled in the school system in which the daughter resides.

NOW, THEREFORE, BE IT RESOLVED that the Board hereby approves the above settlement and resolution of the Residency Appeal under Docket No.: EDUOS-2398-2006S.

VP

DALE CALDWELL
Board President

RICHARD JANNARONE
Business Administrator/Board Secretary

ADOPTED: 6-29-06

R-1

243 06

#293-06

OAL DKT. NO. EDU 5104-06
(EDU 9272-01 ON REMAND)
AGENCY DKT. NO. 349-9/01

Q.D., on behalf of minor child, H.D.,	:	
PETITIONER,	:	
V.	:	COMMISSIONER OF EDUCATION
BOARD OF EDUCATION OF THE MORRIS HILLS REGIONAL SCHOOL DISTRICT, MORRIS COUNTY,	:	DECISION ON REMAND
RESPONDENT.	:	

The record of this matter, returned to the Commissioner as a withdrawal pursuant to *N.J.A.C.* 1:1-19.2, has been reviewed. Upon such review, it is noted that by decision dated March 29, 2006, the Commissioner, remanded the matter to the Office of Administrative Law (OAL) because neither the record nor the parties' previously proposed Stipulation of Settlement and Mutual Dismissal included any indication of approval by the Board of Education; the Commissioner, therefore, could not approve the agreement pursuant to *N.J.A.C.* 1:1-19.1.[1] Consequently, upon conclusion of OAL proceedings on remand, the matter should have been submitted to the Commissioner for review as an Initial Decision recommending approval of settlement, not as a withdrawal.

[1] Specifically, the Business Administrator/Board Secretary had signed the Settlement Agreement on behalf of the Board, and neither the file nor the settlement agreement included a copy of the Board's resolution approving the settlement and designating the Business Administrator/Board Secretary to sign the agreement on its behalf; nor, in the alternative, was the agreement signed by the Board attorney as the Board's duly authorized representative in litigation.

Notwithstanding the error in process, however, the record developed on remand demonstrates that the Board did, in fact, approve the agreement in question at its meeting of August 4, 2005. Accordingly, the Commissioner now approves the settlement terms and adopts the parties' agreement as the final decision in this matter, which is hereby dismissed, subject to compliance with the terms of the settlement.

IT IS SO ORDERED.

Lucille E Davy

ACTING COMMISSIONER OF EDUCATION

Date of Decision: 8/24/06

Date of Mailing: 8/24/06

292-06

#292-06R

J.D. and T.W., on behalf of minor child, U.W.,	:	
PETITIONER,	:	
V.	:	COMMISSIONER OF EDUCATION
BOARD OF EDUCATION OF THE CITY OF ORANGE, ESSEX COUNTY,	:	DECISION
RESPONDENT.	:	

SYNOPSIS

Petitioners filed a *pro se* residency appeal, challenging the respondent Board's determination that their child, U.W., was not eligible to attend Orange Public Schools based upon residency. Respondent district filed an answer in which it requested that the Commissioner assess tuition cost against petitioners for the period that the student received services while ineligible. Subsequently, petitioners withdrew their appeal, stating that the child had moved out of the district, and the matter was transmitted by the Office of Administrative Law (OAL) to the Commissioner for consideration of the withdrawal of the petition. The Commissioner remanded the matter to the OAL for supplementation of the record and an appropriate recommended order regarding the payment of tuition.

The ALJ found that: the petitioners failed to attend the scheduled hearing and offered no explanation for their failure to appear; U.W. continued to attend Orange Public Schools for 31 school days after the parents moved to East Orange; and, therefore, tuition in the amount of $1,345.57 for the 31 days of ineligible attendance is owed to the respondent district.

The Commissioner concurs with the ALJ that the Board is appropriately awarded tuition from the petitioners; adopts the Initial Decision for the reasons stated therein; and directs the petitioners to remit $1,3445.57 to the respondent 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.

August 22, 2006

OAL DKT. NO. EDU 1036-06
(EDU 11308-04 ON REMAND)
AGENCY DKT. NO. 283-8/04

J.D. and T.W., on behalf of minor child, U.W.,	:	
PETITIONER,	:	
V.	:	COMMISSIONER OF EDUCATION
BOARD OF EDUCATION OF THE CITY OF ORANGE, ESSEX COUNTY,	:	DECISION
RESPONDENT.	:	

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

Upon a full review, the Commissioner concurs with the Administrative Law Judge that the Board is appropriately awarded tuition from the petitioners, in the amount of $1,345.57, for 31 days of their child, U.W.'s, ineligible attendance in its schools.

Accordingly, the Initial Decision of the OAL is adopted for the reasons stated therein and the instant Petition of Appeal is hereby dismissed. Petitioners are directed to remit to the Board of Education of the City of Orange the tuition due and owing pursuant to this decision.

IT IS SO ORDERED.*

Lucille E Davy
ACTING COMMISSIONER OF EDUCATION

Date of Decision: 8/22/06
Date of Mailing: 8/22/06

* This decision may be appealed to the State Board of Education pursuant to *N.J.S.A.* 18A:6-27 *et seq.* and *N.J.A.C.* 6A:4-1.1 *et seq.*

State of New Jersey
OFFICE OF ADMINISTRATIVE LAW

INITIAL DECISION

OAL DKT. NO. EDU 01036-06

AGENCY DKT. NO. 283-8/05

OAL DKT. NO. EDU 11308-04(**ON REMAND)**

AGENCY DKT. NO. 373-10/04 (**ON REMAND**)

J.D. AND T.W., ON BEHALF OF MINOR CHILD, V.W.,

Petitioners,

v.

BOARD OF EDUCATION OF THE CITY OF ORANGE, ESSEX COUNTY,

Respondents.

J.D. and T.W., pro se

Marvin Comick, Esq., for respondents (Love and Randall, attorneys)

Record Closed: July 27, 2006 Decided: August 1, 2006

BEFORE **CAROL I. COHEN,** ALJ:

PROCEDURAL HISTORY AND STATEMENT OF THE CASE

The petitioners J.D. and T.W. appealed from the denial by the Board of Education of the city of Orange, Essex County (respondent/BOE) of their application to allow their child (V.W.) to be educated in the Orange School System. Orange denied

the petitioner's attendance at its school, based on the fact that they alleged that the parents had moved out of district. The petitioners filed their appeal on August 5, 2004. The respondent filed its answer on September 8, 2004. In its answer, the respondent requested tuition reimbursement for the period during which V.W. was ineligible to attend the Orange schools. The matter was filed with the Office of Administrative Law (OAL) on October 26, 2004. The case was scheduled for a hearing on April 13, 2005. The petitioner T.W. telephoned the clerk's office and stated that he wished to withdraw his petition, because the child had moved out of district. The file was returned to the Commissioner of Education with a notification of withdrawal. The Acting Commissioner reviewed the file and determined that the request for tuition reimbursement had not been resolved. Therefore, the matter was remanded to the OAL on September 29, 2005 for supplementation of the record regarding tuition reimbursement. The matter was scheduled for a hearing on July 17, 2006. The petitioner failed to appear. The court took testimony of Howard A. Johnson, accountant for the Orange Board of Education regarding the yearly tuition for a child in grades 1-5. On July 27, 2006, the Board attorney supplemented the record with the certification of the Barbara L. Clark, Director of the Department of Special Service, Orange BOE

ISSUES

1. Whether the respondent is entitled to tuition reimbursement.

FINDINGS OF FACT

Based on the testimony presented and the documentary evidence submitted, and having had an opportunity to observe the witness and to assess her credibility, I make the following **FINDINGS OF FACT:**

1. J.D. and T.W. failed to attend the scheduled hearing or to call the court to ask for an adjournment or to explain the reason for their failure to appear.

2. The tuition rate for a student attending K-5 in the Orange School system is $7,813 for the 2003-2004 school year.

3. On December 10, 2003, V.W. and his parents moved from their apartment in Orange to E. Orange.

4. V.W. continued to attend Lincoln Avenue School in Orange until February 1, 2004. That period is 31 school days.

5. Based on a 180 day school year the per diem tuition rate is $43.41

6. Therefore, the amount of tuition due for 31 days is $1,345.57

LEGAL DISCUSSION

Public education must be provided free to persons over six and up to twenty years of age, who are domiciled within the School District - N.J.S.A. 18A:38-1(a).

N.J.S.A. 18A:38 b(2) allows the district to apply for removal of the child from the District, if they do not meet the statutory requirement and to ask for the reimbursement of tuition costs during the period of ineligibility. The District presented evidence that the child moved out of the district on or about December 10, 2003. However, V.W. continued to attend Lincoln Avenue School in Orange until on or about February 1, 2004.

CONCLUSION

I **CONCLUDE** that the District has met its burden under N.J.S.A. 18A:38 b(2) and shown that the child remained in the Orange School, when she was living out of district for approximately 31, days and is entitled to tuition reimbursement.

ORDER

I **ORDER** that the District's application for tuition reimbursement in the amount of $1,345.57 is hereby **GRANTED**.

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

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

Within thirteen (13) days from the date on which this recommended decision was mailed to the parties, any party may file written exceptions with the **COMMISSIONER OF THE DEPARTMENT OF EDUCATION, 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.

8/1/06 — Carol I. Cohen

DATE — **CAROL I. COHEN**, ALJ

E-mail Receipt of Initial Decision Confirmed by the Department of Education on:

8/1/06

DATE

Mailed to Parties:

Laura Sanders

AUG 2 2006 — DIRECTOR AND CHIEF ADMINISTRATIVE LAW JUDGE

DATE — OFFICE OF ADMINISTRATIVE LAW

id

APPENDIX

Exhibits

For Petitioner

None

For Respondent

R-1 Tuition Costs

R-2 Affidavit of Barbara Clark

280-06

OAL DKT. NO. EDU 6449-04
AGENCY DKT. NO. 186-5/04

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

The record, Amendment #1 to the parties' previously negotiated sending-receiving agreement, and Initial Decision issued by the Office of Administrative Law (OAL), pursuant to *N.J.A.C.* 1:1-19.1, have been reviewed.

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

IT IS SO ORDERED.

Lucille Eday
ACTING COMMISSIONER OF EDUCATION

Date of Decision: 8/18/06
Date of Mailing: 8/18/06

* It is noted that the file of this matter contains confirmation that the Amendment has been duly approved by each of the respective boards.

State of New Jersey
OFFICE OF ADMINISTRATIVE LAW

INITIAL DECISION

SETTLEMENT

OAL DKT. NO. EDU 6449-04

AGENCY DKT. NO. 186-5/04

BOARD OF EDUCATION OF THE TOWNSHIP OF BERLIN, CAMDEN COUNTY,

Petitioner,

v.

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

Respondent.

Robert DeSanto, Esq., for petitioner (Gruccio, Pepper, Giovinazzi, DeSanto and Farnoly, attorneys)

Ronald W. Sahli, Esq., for respondent (Sahli and Padovani, attorneys)

Record Closed: July 26, 2006 Decided: July 27, 2006

BEFORE **JAMES W. FAISON, III,** ALJ:

This matter was transmitted to the Office of Administrative Law on August 13, 2004, 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 document indicating the terms thereof, which is attached and fully incorporated herein.

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

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

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

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

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

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

July 27, 2006
DATE

JAMES W. FAISON, III, ALJ

Receipt Acknowledged:

8-1-06
DATE

DEPARTMENT OF EDUCATION

Mailed to Parties:

AUG 2 2006
DATE

OFFICE OF ADMINISTRATIVE LAW

cmo

RECEIVED
2006 JUL 26 P 1:16
STATE OF NEW JERSEY
OFFICE OF ADMIN LAW

AMENDMENT #1 TO AGREEMENT

THIS AMENDMENT ("Amendment") is made by and between the BOARD OF EDUCATION OF THE BOROUGH OF PINE HILL and the BOARD OF EDUCATION OF THE TOWNSHIP OF BERLIN to that certain Agreement ("Agreement") between them dated December 21, 1999.

W I T N E S S E T H:

WHEREAS, the Board of Education of the Township of Berlin ("Berlin") and the Board of Education of the Borough of Pine Hill ("Pine Hill") entered into the Agreement setting forth the terms and conditions of their sending district - receiving district relationship; and

WHEREAS, the parties desire to more appropriately plan their budgets and cash flow as affected by the reimbursement of tuition adjustment that may occur as a result of past and present self and/or state audits of students, beginning with the 2001-2002 fiscal year; and

WHEREAS, the parties have negotiated procedures for the implementation of tuition reimbursement and desire to modify their existing agreement accordingly; and

WHEREAS, to resolve the petition of Berlin presently pending before the Commissioner on some of the issues related to the subject matter hereof;

NOW THEREFORE, in consideration of the above premises and the mutual promises and covenants herein contained, the parties hereto agree as follows:

1. The Agreement is hereby amended and supplemented as follows:

A. The following provision shall be added to the end of the first paragraph of Paragraph 4 (Tuition) of the Agreement:

The estimated cost per pupil shall include Pine Hills's best estimate of the costs for special education for the next school year.

B. The following provision shall be added to the end of Paragraph 4 (Tuition) of the Agreement:

Pine Hill and Berlin agree that, if at any time during the term of this Agreement, as a result of an agreement of the parties and/or as a result of a state audit for any one school year, a party to this Agreement is required to reimburse or pay an adjustment of tuition in an amount of $100,000.00 or less, then such adjusted sum shall be paid in 10 equal installments in the next fiscal year following the audited adjustment being made and published to both parties. In the event that any adjusted sum exceeds $100,000.00, then said party shall pay the excess over the next three (3) fiscal years in equal installments. In the event, however, that the adjusted figure is not received by the party required to pay or reimburse the adjustment in sufficient time for that party to place same in its budget for the next fiscal year, then the first annual installment shall not be required to be made until the second fiscal year after receipt of notice of the adjustment; provided further in such case that the adjusted

balance shall be made in two (2) equal annual installments. All payments to be made under this Paragraph shall be made by January 10 of the applicable fiscal year until the total adjusted amount has been paid in full.

C. The following provision shall be added to the end of Paragraph 6 (Determination of Number of Berlin Pupils to which Tuition Rate Shall Apply) of the Agreement:

In the event that a Berlin student attending Pine Hill moves his or her residency outside of Berlin but applies to Pine Hill to be permitted to continue to attend Pine Hill without payment of tuition, then Pine Hill shall refer the decision as to whether such student shall be permitted to attend Pine Hill on that basis to Berlin for determination. The determination by Berlin shall be final and binding on Pine Hill. However, if Berlin's determination is that the student should not attend Pine Hill without payment of tuition, Pine Hill shall still be entitled to accept such student if either the student pays the full tuition then charged to Berlin or the student's attendance at Pine Hill is not charged to Berlin.

2. This Amendment shall apply to any tuition adjustments which may occur as a result of agreements made by the parties and/or as a result of state audits of the 2002-2003 fiscal year as well as of any fiscal year thereafter during the term of the Agreement and for the applicable years following the term of the Agreement.

3. Except to the extent amended hereby, the Agreement is hereby ratified and confirmed and remains in full force and effect.

4. The parties understand that this Amendment is governed by the laws of the State of New Jersey and the Rules and Regulations of the New Jersey Department of Education and the State Board of Education. If any provision of this Amendment is deemed unenforceable, illegal or inconsistent with the then current statutes, rules or regulations, such statutes, rules or regulations, shall govern. However, to the extent that enforceable provisions of this Amendment exist and are not inconsistent with such statutes, rules or regulations, they shall remain binding upon the parties.

Dated: July 24, 2006

ATTEST:

Board Secretary

PINE HILL BOARD OF EDUCATION
OF THE BOROUGH OF PINE HILL

By: _____
President

Dated: _____, 2006

ATTEST:

Beth Ann Coleman, Board Secretary

BOARD OF EDUCATION OF THE
TOWNSHIP OF BERLIN

By: _____
Mary Williams, President

300-06

OAL DKT. NO. EDU 7036-06
AGENCY DKT. NO. 178-5/06

IN THE MATTER OF THE TENURE	:	
HEARING OF STEVEN KRAMER,	:	COMMISSIONER OF EDUCATION
SCHOOL DISTRICT OF THE TOWNSHIP	:	DECISION
OF MONTVILLE, MORRIS COUNTY.	:	

The record of this matter, the parties' proposed Stipulation of Settlement and Release together with the resolution of the Board approving the settlement and authorizing the Board President to execute the 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 concurs with the ALJ that the settlement terms are 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 approved, and this matter is hereby dismissed subject to compliance with the terms of the settlement. Pursuant to *N.J.A.C.* 6A:9-17.6 (a) 1, a copy of this decision shall be transmitted to the State Board of Examiners for action against respondent's certificate as the Board may deem appropriate.

IT IS SO ORDERED.

Lucille E Davy

ACTING COMMISSIONER OF EDUCATION

Date of Decision: 9/07/06
Date of Mailing: 9/07/06

State of New Jersey
OFFICE OF ADMINISTRATIVE LAW

INITIAL DECISION

SETTLEMENT

OAL DKT. NO. EDU 7036-06
AGENCY DKT. NO. 178-5/06

IN THE MATTER OF THE TENURE HEARING OF STEVEN KRAMER, BOARD OF EDUCATION OF THE TOWNSHIP OF MONTVILLE, MORRIS COUNTY

Steven J. Edelstein, Esq., for petitioner (Schwartz, Simon, Edelstein, Celso & Kessler, attorneys)

Robert M. Schwartz, Esq., for respondent

Record Closed: August 17, 2006 Decided: August 18, 2006

BEFORE **MARGARET M. MONACO,** ALJ:

This matter involves tenure charges of unbecoming conduct and/or other just cause certified by the Board of Education of the Township of Montville (the "Board") against respondent Steven Kramer under the provisions of the Tenure Employees Hearing Law, N.J.S.A. 18A:6-10, et seq. The respondent served as a tenured principal at Montville High School. At its meeting on May 16, 2006, the Board, by a majority vote of its full membership, found probable cause to certify the Sworn Tenure Charges against the

respondent and that the Sworn Tenure Charges were sufficient, if credited, to warrant the respondent's dismissal and/or reduction of his salary. Under letter dated May 17, 2006, the Board filed the Sworn Tenure Charges and a Certificate of Determination with the Commissioner of the Department of Education (Department), together with proof of service upon the respondent and respondent's attorney. The Department acknowledged receipt of the certified tenure charges on May 18, 2006. The respondent filed an Answer and Affirmative Defenses, which the Department received on May 30, 2006. By letter dated June 1, 2006, the Department notified counsel for the parties of its referral of the matter to the Office of Administrative Law where, on June 9, 2006, it was filed for hearing pursuant to N.J.S.A. 18A:6-16. The matter was assigned to the undersigned on June 19, 2006 and a prehearing conference was held on June 26, 2006. Subsequently, a prehearing order was entered establishing discovery deadlines and scheduling the hearing for September 22, 25, 26, 27, 28, October 5 and 17, 2006.

Prior to the hearing, and under correspondence dated August 16, 2006, counsel for the Board submitted a Stipulation of Settlement and Release ("Stipulation of Settlement"), along with a certified copy of an extract from the minutes of the Board's meeting on August 8, 2006, during which the Board adopted a resolution approving the settlement agreement. The aforesaid Stipulation of Settlement and resolution of the Board are attached hereto and incorporated by reference in this Initial Decision.

In accordance with N.J.A.C. 6A:3-5.6(a),

> Once tenure charges are certified to the Commissioner, such charges may be withdrawn or settled only with the Commissioner's approval. Any proposed withdrawal or settlement, whether submitted to the Commissioner or to the ALJ, shall address the following standards established by the State Board of Education in the matter entitled In re Cardonick, State Board decision of April 6, 1983 (1990 School Law Decisions (S.L.D.) 842, 846):
>
> 1. Accompaniment by documentation as to the nature of the charges;
>
> 2. Explication of the circumstances justifying settlement or withdrawal;

3. Consent of both the charged and charging parties;

4. Indication that the charged party entered into the agreement with a full understanding of his or her rights;

5. A showing that the agreement is in the public interest; and

6. Where the charged party is a teaching staff member, a showing that the teaching staff member has been 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.

Based upon a review of the record, including the terms of the attached Stipulation of Settlement, I **FIND:**

1. The Sworn Tenure Charges against the respondent, along with the Sworn Statement of Evidence in support of the charges, are attached to the Stipulation of Settlement.

2. The Stipulation of Settlement reflects that the respondent has tendered his irrevocable resignation from all employment with the Board effective as of the close of business on July 31, 2006.

3. The Stipulation of Settlement memorializes the Board's agreement that, upon approval of the Stipulation of Settlement by the Commissioner, the subject tenure charges shall be moot and shall be withdrawn by the Board.

4. The proposed settlement will serve the public interest because, as a result of the respondent having tenured his irrevocable letter of resignation from his employment with the Board, the Board will not have to incur a

lengthy tenure dismissal hearing. In addition, as reflected in the Stipulation of Settlement, since some of the Board's witnesses are students, the settlement will obviate the need for the Board to expose these students to a potentially confrontational legal proceeding.

5. The Stipulation of Settlement memorializes the respondent's acknowledgement that he entered into the agreement with a full understanding of his rights; the respondent was fully informed of the implications of the agreement by his counsel; and the respondent entered into the agreement without duress and of his own free will and volition.

6. The Stipulation of Settlement memorializes that respondent has been apprised of the Commissioner's duty to refer tenure matters, pursuant to N.J.A.C. 6A:3-5.6(a)(6), to the State Board of Examiners for a possible suspension or revocation of his certificate.

7. On August 8, 2006, the Board adopted a resolution approving the settlement agreement.

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

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

I **CONCLUDE** that the Stipulation of Settlement meets the requirements of N.J.A.C. 6A:3-5.6 and that the settlement should be approved.

Accordingly, it is **ORDERED** that, subject to the Commissioner's approval, the Stipulation of Settlement and Release be and hereby is approved and these proceedings are hereby concluded.

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

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

August 18, 2006
DATE

Margaret M. Monaco
MARGARET M. MONACO, ALJ

Receipt Acknowledged:

8-23-06
DATE

M. Kathleen Dunn Cox/dh
DEPARTMENT OF EDUCATION

Mailed to Parties:
Laura Anders
DIRECTOR AND CHIEF ADMINISTRATIVE LAW JUDGE

AUG 25 2006
DATE

OFFICE OF ADMINISTRATIVE LAW

db

EXTRACT FROM THE MINUTES OF THE MEETING OF THE BOARD OF EDUCATION OF THE TOWNSHIP OF MONTVILLE, MORRIS COUNTY, NEW JERSEY AS RECORDED IN THE OFFICIAL MINUTE BOOK:

The board of education of the Township of Montville in the County of Morris, New Jersey, convened in special session on August 8, 2006 at 7:00 p.m. in the board conference room of the Board's administrative offices, Montville, NJ.

The following members of the Board of Education were present:
Jon Alin, President

Steven Cohen, Frank Cooney, Karen Cortellino, Karl Feaster, Charles Grau, and Michael Palma.

The following members of the board of education were absent:
Timothy Lindert and John Petrozzino.

The following resolution was offered by Member Grau and seconded by Member Cooney and adopted by the board of education by the following roll call vote:

RESOLVED: That the Board hereby approves the Settlement Agreement and Release ("Settlement") in the matter captioned I/M/O Tenure Hearing of Dr. Steven Kramer, Board of Education of the Township of Montville, Morris County, bearing Agency Docket Number 178-5/06 and OAL Docket Number EDUTH 07036-2006N, in accordance with the terms and conditions set forth therein; and

Be it further resolved, that a copy of the Settlement shall be included in the permanent minutes of this meeting; and

Be it further resolved, that the Board President is hereby authorized to execute the Settlement on behalf of the Board.

ROLL CALL AYES: 7 NOES: 0

STATE OF NEW JERSEY
COUNTY OF MORRIS

I, Raymond G. Karaty, Secretary of the Board of Education of the Township of Montville 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 August 8, 2006 has been compared by me with the original minutes as officially recorded in my office in the minute book of said Montville 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 14th day of August 2006.

(Board Seal)

Raymond G. Karaty
Assistant Board Secretary

SCHWARTZ SIMON EDELSTEIN
CELSO & KESSLER LLP
Ten James Street
Florham Park, New Jersey 07932
(973) 301-0001
Attorneys for Montville Township
Board of Education

RECEIVED

2006 AUG 17 A 11:07

STATE OF NEW JERSEY
OFFICE OF ADMIN LAW

IN THE MATTER OF THE TENURE HEARING OF STEVEN KRAMER, BOARD OF EDUCATION OF THE TOWNSHIP OF MONTVILLE, MORRIS COUNTY.

BEFORE THE COMMISSIONER OF EDUCATION OF NEW JERSEY
AGENCY DOCKET NO: 178-5/06
OAL DOCKET NO. EDUTH 07036-2006N

ADMINISTRATIVE ACTION

STIPULATION OF SETTLEMENT AND RELEASE

WHEREAS, the Board of Education of the Township of Montville ("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 Montville School District; and

WHEREAS, Dr. Steven Kramer ("Respondent") commenced employment with the Board as principal of Montville High School; and

WHEREAS, on April 17, 2006, Catherine Mozak, Interim Superintendent of Schools, filed sworn tenure charges of unbecoming conduct and/or other just cause against Respondent, together with a sworn statement of evidence in support of the charges, with Ray Karaty, Acting Board Secretary (See, Exhibits A & B, respectively); and

WHEREAS, on May 16, 2006, after considering the sworn tenure charges and sworn statement of evidence against Respondent, together with the submission filed on his behalf, the Board determined to certify the charges to the Commissioner of Education for a hearing, pursuant to N.J.S.A. 18A:6-10 *et seq.*; and

WHEREAS, on or about May 17, 2006, the sworn tenure charges, together with a certificate of determination and certificate of service, were filed by the Board with the Commissioner of Education, and Respondent was simultaneously served with the sworn tenure charges, sworn statement of evidence, certificate of determination and certificate of service, pursuant to N.J.A.C. 6A:3-5.1 *et seq.*; and

WHEREAS, on or about May 30, 2006, an Answer and Affirmative Defenses was filed on behalf of Respondent; and

WHEREAS, on or about June 1, 2006, the Department of Education transmitted the matter to the Office of Administrative Law as a contested case, where it was assigned to Administrative Law Judge Margaret Monaco; and

WHEREAS, the parties, wishing to resolve the within matter amicably without the need for litigation, while achieving the goals of both parties, hereby stipulate to settle same, subject to the terms and conditions set forth herein, upon approval by the Court and the Commissioner of Education;

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

1. **Tenure Charges to be Moot**

The Board agrees that upon approval of the within settlement agreement and release by the Commissioner that the subject tenure charges shall be moot and shall be withdrawn by the Board. However, both parties agree that in the event that this agreement is not approved by the Commissioner of Education that they fully reserve their rights to proceed with this litigation and/or any other cause of action that they might have against one another and that their obligations under this agreement shall be null and void.

2. **Resignation**

Respondent has tendered his irrevocable resignation from all employment with the Board, effective as of the close of business on July 31, 2006.

3. **Payment**

The Board will pay to the Respondent his regular salary, pursuant to contract, through July 31, 2006, retroactive to May 16, 2006. Respondent waives any right to be paid following July 31, 2006. Respondent also waives his right to all other compensation from the Board of any kind, including but not necessarily limited to payment for unused sick, vacation and personal days.

4. **Health Benefits**

The Board agrees to pay the premium for Respondent's health benefits at their current level, through September 30, 2006, after which Respondent shall have the same COBRA rights as any other former employee.

5. Release

In exchange for the above consideration, Respondent, and his heirs and assigns hereby irrevocably and unconditionally waive, release and forever discharge any claims or rights, 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, 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 for emotional distress or pain and suffering, any claims involving tax liability stemming from this settlement, and any 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 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 Retaining Notification Act, the New Jersey Law Against Discrimination, the New Jersey Family Leave Act, the New Jersey Conscientious Employee Protection Act, the New Jersey Workers' Compensation Law, the New Jersey Wage and Hour Law, the Employer-Employee Relations Act, any collective negotiations agreement, any common law claim and any other claims 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 Consolidated Omnibus Budget Reconciliation Act (commonly referred to as "COBRA"), provided that Respondent is not entitled to have the District pay any amounts for his or his dependents' health insurance coverage under COBRA.

6. Referral to State Board of Examiners

The Board, its officers and agents will agree not to initiate any further proceedings against Respondent in any forum whatsoever, but will comply with N.J.A.C. 6A:9-17.4 and any lawful subpoenas or directives it may receive.

Respondent also has been apprised of the Commissioner's duty to refer tenure matters, pursuant to N.J.A.C. 6A:3-5.6(a)(6), to the State Board of Examiners for possible suspension or revocation of his certificate.

7. **Non-Disparagement**

a.) Respondent agrees not to disparage the Board, its past and present Board members, officers, administrators, agents, employees, attorneys, and their successors, heirs and assigns nor to make or solicit any comments, statements, or the like to the media or to others that may be considered to be derogatory or detrimental in nature.

b.) The Board agrees not to disparage Respondent nor to make or solicit any comments, statements, or the like to the media or to others that may be considered to be derogatory or detrimental in nature.

8. **Surrender of Board Property**

Respondent shall forthwith surrender all school keys and property in his possession to the below named legal counsel who, in turn shall forward same to the Board's counsel.

9. **Public Interest**

The proposed settlement of this tenure dispute will serve the public interest because, as a result of Respondent having tendered his irrevocable letter of resignation from his employment with the Board, the Board will not have to incur a lengthy tenure dismissal trial. Moreover, since some of the Board's witnesses are students, this settlement will obviate the need for the Board to expose these students to a potentially confrontational legal proceeding.

10. **Board Approval**

The Board President is authorized to execute this Agreement on behalf of the Board of Education.

11. **Assent to Terms**

Respondent hereby acknowledges that he entered into this agreement with a full understanding of his rights and that he was fully informed of the implications of this agreement by his counsel. Respondent also enters into without duress of his own free will and volition.

Respondent acknowledges that he was given the opportunity to fully consider this Agreement for a period of up to twenty-one (21) days and seven (7) days from the execution of this document to revoke this Agreement by delivering written notification to Stephen J. Edelstein, Esq., 10 James Street, Florham Park, New Jersey 07932. It is understood that if this Agreement is revoked, it will not be effective or enforceable and Respondent will not be entitled to the entire consideration described herein.

12. **Entire Agreement**

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.

13. **Severablility**

In the event that a court or agency of competent jurisdiction shall deem any part of this Agreement to be contrary to law, then the remaining portions of the Agreement shall remain in full force and effect.

14. **Governing Law**

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:

Date: 8/8/06

DR. STEVEN KRAMER

WITNESS:

Date: 8/8/06

/s/

FOR THE MONTVILLE BOARD OF EDUCATION:

Date: 8/15/06

JON ALIN, BOARD PRESIDENT

ATTEST:

Date: 8/15/06

~~DOMINIC BUTLER~~, RAY KARATY

Asst. Board Secretary/Business Administrator

307-06

307-06

V.W. on behalf of minor child E.B., :

PETITIONER, :

V. : COMMISSIONER OF EDUCATION

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

RESPONDENT. :

SYNOPSIS

Petitioner, E.B.'s mother, seeks an order granting E.B. a new hearing on disciplinary charges or reinstatement to his original elementary school placement, arguing that E.B. was unfairly disciplined in retaliation for petitioner's activities as a former PTO officer at her son's elementary school. Respondent Board contends that E.B.'s transfer to an alternate educational placement was appropriate given his defiant and disruptive behavior, and poor academic performance.

The ALJ concluded, *inter alia,* that the transfer of E.B. to a different academic program was not deprivation of a property or liberty interest and consequently did not require a due process analysis and, in any event, the petitioner failed to show that E.B. was denied due process in the district disciplinary hearing. The ALJ also concluded that there was ample evidence to sustain charges of open defiance of teacher authority and continued disruptive behavior throughout the school year, that E.B.'s academic performance was failing, and that the transfer of E.B. to the Renaissance Program curriculum was appropriate and not punitive in nature. The ALJ ordered that the petition be dismissed.

The Commissioner, relying upon the credibility findings of the ALJ, determined that the respondent's decision to transfer E.B. to the Renaissance program was not arbitrary, capricious or unreasonable, but rather warranted by E.B.'s disruptive behavior and poor academic performance. The Commissioner also determined that E.B. received the process that was due him, adopted the Initial Decision of the OAL as the final decision in this matter, and dismissed the instant 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.

September 7, 2006

OAL DKT. NO. EDU 5509-06
AGENCY DKT. NO. 166-5/06

V.W. on behalf of minor child E.B.,	:	
PETITIONER,	:	
V.	:	COMMISSIONER OF EDUCATION
STATE-OPERATED SCHOOL DISTRICT OF THE CITY OF NEWARK, ESSEX COUNTY,	:	DECISION
RESPONDENT.	:	

The record and Initial Decision in this matter have been reviewed. No exceptions have been filed. For the reasons that follow, the Commissioner adopts the Initial Decision of the Office of Administrative Law (OAL).

The Administrative Law Judge (ALJ) who heard this matter made detailed findings of fact and credibility determinations. Neither party challenged any of the findings by way of exceptions, nor were transcripts of the hearing provided to the Commissioner. Additionally, the Commissioner finds nothing in the hearing exhibits that contradicts the ALJ's findings. Accordingly, the Commissioner relies upon the credibility findings of the ALJ, and adopts the factual findings in the Initial Decision. *See, e.g., In the Matter of Raymond Morrison*, 216 *N.J. Super.*143, 159 (App. Div. 1987).

The instant controversy arose when, after a disciplinary hearing, petitioner's son was transferred from the school he had been attending – E. Alma Flagg Elementary School (Flagg) – to a curriculum called the "Renaissance Program" at the Gladys Hillman Jones School (Jones). Petitioner asks that the Commissioner either 1) order that her son be returned to Flagg

and a "conference" be provided to assess her son and identify appropriate services, or 2) order that her son be given a second, *de novo* disciplinary hearing.

More specifically, as set forth in the Initial Decision, a hearing was held by the designee of the Superintendent of respondent's district on April 13, 2006, to find facts concerning the behavior of petitioner's son, E.B., and to make determinations about discipline, if any, and E.B.'s educational needs.[1] The hearing was precipitated by an incident on March 7, 2006, in which E.B. had grabbed and pushed the heads of two other students while in computer class.[2] As the evidence at the hearing showed, however, the March 7 incident had been preceded by several episodes of defiant and disruptive behavior over the course of the school year, and by tests and reports that indicated that E.B.'s academic performance was poor.

Petitioner and E.B. attended the district hearing, but they chose not to testify. A family friend cross-examined respondent's witnesses. While the hearing officer had denied petitioner's request for a two-week adjournment of the hearing so that her attorney could formulate a defense, he did accept a submission from petitioner's counsel on the day of the hearing and, according to respondent in its brief in opposition to petitioner's motion for emergent relief, he did leave the record open for further submissions from petitioner's counsel. None, however, were filed.

The hearing officer's Report and Recommendation, which was adopted by the District Superintendent, sustained three charges: 1) lewd and inappropriate conduct/gender

---

[1] The ALJ found that notice of the hearing had been hand delivered to petitioner on April 6, 2006.

[2] The ALJ found that the Vice-Principal of Flagg had left petitioner a voicemail message one day after the March 7, 2006, incident describing what had been reported to him and asking her to meet with him to discuss it, and that petitioner had not responded.

harassment/violation of the District's harassment, intimidation and bullying policy; 2) open defiance of teacher authority; and 3) continued disruptive behavior. His determination was that E.B. should be transferred from Flagg to the Renaissance Program at Jones. The Renaissance Program would offer E.B. a fresh start in a new academic environment, with different teachers and with students who would be unaware of E.B.'s history. He would be in smaller classes, allowing him to receive more personal attention. The program would provide tutoring and counseling. The transfer was ordered effective May 1, 2006.

At the OAL hearing, respondent presented multiple witnesses who offered testimony about E.B.'s episodes of disrespectful, defiant and disruptive behavior. That behavior, as well as E.B.'s poor academic performance, was also memorialized in exhibits that were entered into evidence at the OAL hearing. Respondent also presented Dr. Vincent Mays, Respondent's Director of Alternative Education, whose testimony verified that the Renaissance Program, which had been designed by and was monitored by the New Jersey Department of Education, does provide classes of only five to eight students, who receive much individualized attention and monitoring. E.B. chose not to testify, leaving most of the evidence submitted by respondent unrebutted.

In sum, the facts found by the ALJ supported his conclusion that petitioner failed to show that respondent's decision to transfer E.B. to the Renaissance program was arbitrary, capricious or unreasonable. To the contrary, the facts supported that E.B.'s behavior and academic performance warranted the transfer. And for the reasons set forth in the ALJ's legal analysis, the Commissioner agrees that the foregoing standard is the correct one for this controversy.

The Commissioner further agrees with the ALJ, based on the legal authority cited in the Initial Decision, that transfer to a different educational program, as opposed to expulsion, did not deprive E.B. of property or liberty interests, and that consequently no constitutional issues were implicated by respondent's actions. The notice provided by respondent for the District's hearing, and the hearing itself – which was attended by petitioner and E.B., and in which live testimony and documentary evidence were presented – were adequate. Moreover, petitioner's son received a second, *de novo* hearing in the OAL.

Because none of the witnesses regarded E.B.'s behavior on March 7, 2006, as having sexual connotations, the ALJ determined that the district hearing officer's finding on the charge of "lewd and inappropriate conduct/gender harassment/violation of the District's harassment, intimidation and bullying policy" was not sustainable. The Commissioner agrees. However, the remaining district charges stand,[3] and the transfer of E.B. to the Renaissance Program is, as the ALJ concluded, "a measured response to E.B.'s overall behavior as well as academic deficiencies." (Initial Decision at 14)

Respondent's action is upheld and the petition in this matter is dismissed.

IT IS SO ORDERED.[4]

Lucille Davy

ACTING COMMISSIONER OF EDUCATION

Date of Decision: 9/07/06

Date of Mailing: 9/07/06

[3] For the reasons articulated by the ALJ, the Commissioner concurs that the facts do not support petitioner's claim that discipline accorded E.B. was retaliation for his mother's activities as a PTO officer.

[4] This decision may be appealed to the State Board of Education pursuant to *N.J.S.A.* 18A:6-27 *et seq.* and *N.J.A.C.* 6A:4-1.1 *et seq.*

State of New Jersey
OFFICE OF ADMINISTRATIVE LAW

INITIAL DECISION

OAL DKT. NO. EDU 05509-06

AGENCY DKT. NO. 166-5/06

V.W., ON BEHALF OF MINOR CHILD,

E.B.,

Petitioner,

v.

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

Respondent.

Denise T. Lanchantin, Esq., for petitioner

Arsen Zartarian, Esq., for respondent (Perry L. Lattiboudere, General Counsel, Office of the General Counsel, attorneys)

Record Closed: June 16, 2006 Decided: July 25, 2006

BEFORE **JESSE H. STRAUSS**, ALJ:

STATEMENT OF THE CASE

Petitioner V.W. o/b/o E.B., a minor child has petitioned the Commissioner of Education (Commissioner), pursuant to N.J.A.C. 6A:3-1.1 et. seq., for an order granting E.B. a new hearing on disciplinary charges and reinstatement to E. Alma Flagg Elementary School (Flagg). The issues are whether the State-Operated School District of the City of Newark (District/respondent) afforded petitioner due process in the

disciplinary hearing process, whether the charges against E.B. are sustainable, and whether the District acted arbitrarily and unreasonably in transferring E.B. from Flagg to the District's Renaissance Program in a different school.

PROCEDURAL HISTORY

On May 2, 2006 petitioner filed a petition of appeal with the Commissioner seeking emergency relief from the transfer of E.B. On May 10, 2006 the Director of the Bureau of Controversies and Disputes of the New Jersey Department of Education transmitted the matter to the Office of Administrative Law (OAL) pursuant to N.J.S.A. 52:14B-1 to –15 and N.J.S.A. 52:14F-1 to –13, where it was filed for determination as a contested case.

The undersigned granted an adjournment of the May 16, 2006 hearing on the application for emergency relief at the request of petitioner so that she could obtain counsel. On May 30, 2006 I granted petitioner's motion to file an amended petition, heard and denied the application for emergency relief, ordered that E.B. immediately report to the Renaissance Program, and scheduled the matter for a plenary hearing on June 14, 2006. The hearing commenced on that date and continued to June 16, 2006 at which time the record closed after the presentation of oral summations.

FACTUAL DISCUSSION

Based upon a review of the testimonial and documentary evidence presented, and having had the opportunity to observe the demeanor and assess the credibility of the witnesses who testified, I **FIND** the following **FACTS:**

E.B. is an unclassified twelve year old regular education student in the seventh grade who had spent all of his regular education at Flagg.

By letter dated April 06, 2006, the District notified petitioner that a disciplinary hearing regarding her son was scheduled for April 13, 2006 involving the following

charges: lewd and inappropriate conduct/ gender harassment/violation of the District's harassment, intimidation and bullying policy; open defiance of teacher authority; continued disruptive behavior; physical assault upon other pupils. This notice indicated that the factual basis for the charges consisted of the following: On or about March 07, 2006, E.B. engaged in the following activity: E.B. grabbed two female students' heads and pushed them towards his groin area; E.B. touched a female student inappropriately on her leg; E.B. disregarded a teacher's repeated direction to remain seated in the computer lab, and instead continued to leave his seat, eventually leaving the computer area, entering the library, where he stomped his feet and clapped his hands.

Essex-Newark Legal Services, then acting on petitioner's behalf, requested an adjournment to prepare a defense. However, the District declined due to the District's calendar, the upcoming spring break and the nature of the charges. The hearing proceeded as scheduled on April 13, 2006 before Hearing Officer Terrence Cunningham, Special Assistant in the District's SLT IV. Although E.B. and his mother V.W. were present at this proceeding, they chose not to testify. However, they were represented by a family friend who cross-examined witnesses. Hearing Officer Cunningham heard testimony from student D.H., student E.M., Flagg teacher Sheila Montague and Flagg Vice Principal John Silveira. Following the hearing Cunningham issued a Report and Recommendation of Hearing Officer dated April 25, 2006 wherein he sustained the charges of lewd and inappropriate conduct/gender harassment/violation of the District's harassment, intimidation and bullying policy; open defiance of teacher authority, and continued disruptive behavior. He dismissed the charge of physical assault upon other pupils.

Hearing Officer Cunningham submitted the following recommendation to the State District Superintendent:

1. [E.B.] needs a fresh new academic environment. This will give him a new start with different teachers and students who are unaware of [E.B.]'s history at Dr. Flagg.

2. [E.B.] needs an academic environment that will offer a smaller classroom setting. This will allow the teachers an ample opportunity to give [E.B.] the personal attention he needs to be successful in class.

3. [E.B.] needs tutoring services. Because [E.B.] has not had consistent success academically, I highly recommend one-on-one tutoring for him.

4. [E.B.] needs counseling services. Counseling is one of the most crucial components for a child in [E.B.]'s situation to begin the transition into a positive academic program. Also, counseling will help the emotional healing process that he must go through to become a productive student. Counseling will also afford [E.B.] a venue to discuss issues that may affect his life academically and socially.

To satisfy [E.B.]'s specific needs, I recommend the Renaissance Program. The Renaissance Program offers the following services that will address [E.B.]'s recommended program:

1. Fresh new academic environment.
2. The smaller classroom setting with no more than 10 students in a classroom.
3. Tutoring services and individualized attention.
4. Counseling services as deemed appropriate by school personnel.

By resolution dated April 26, 2006, the State District Superintendent adopted in the entirety the Hearing Officer's Report and Recommendation and determined that "effective May 1, 2006, [E.B.] shall no longer be eligible to attend Dr. Alma Flagg School and shall be placed in the Renaissance Program at Gladys Hillman Jones School."

Students D.H. and E.M. and teacher Montague testified before the undersigned with regard to the events of March 7, 2006 in addition to the written statements they had submitted on March 7. E.B. declined to testify and, as a result, the testimony of the

three other witnesses of March 7 is uncontested. Any inconsistencies in their credible testimony were too minor to create any basis to question the accuracy of the following findings. D.H., E.M. and E.B. were all in the computer lab at Flagg that day with other students, all of whom were being supervised by Montague. The class had been assigned to work on the Vantage Program, which is designed to improve writing skills. Although D.H. and E.M. were working with this program, E.B. had accessed a rap music website despite instructions from Montague not to do so. These three students were sitting together at a computer table where they engaged in some joking. E.B. had asked the two young ladies to marry him. In response, E.M. wrote some fake divorce papers. Around this time, E.M. jokingly showed the other two some gooey substance which she had in a container which looked like mucous. When E.B. saw it, he pretended to sneeze and then left his seat without permission to get a tissue from the teacher's desk. Montague instructed him to return to his seat as she had previously several times during the class when he had left his computer to walk around. He had earlier even left the computer room and had entered the library where he commenced clapping his hands and stomping his feet. In this instance, as he approached his computer, he grabbed the side of the heads of the seated D.H. and E.M. from behind and pushed their heads down without the permission of either young lady. D.H. was angered by this action of E.B. and rose from her seat and was about to hit him when Montague intervened, instructed them to stop this activity and indicated that she intended to report the incident to the principal. D.H. indicated that E.B.'s action caused her head to bang into that of E.M., although E.M. recalled that the two heads only came close together and did not touch. Because E.B. was behind the two students when he pushed their heads down, neither of them saw what part of his body came near their heads, and E.M. actually thought D.H. had done it until D.H. advised her that E.B. had pushed her head. However, Montague had a clear view of E.B.'s actions and observed that he had pushed both of their heads toward his groin area.

Montague felt that E.B.'s conduct was egregious because one of the young ladies was particularly sensitive to inappropriate physical contact, and D.H. appeared to be very upset over having had her head pushed. Consequently, she immediately wrote up a description of the incident, which she submitted to the principal. However,

although she deemed this conduct to be inappropriate horseplay in a classroom setting, she did not consider it to be sexual in nature or an act of sexual harassment simply because he pushed their heads toward his groin area. In fact, each young lady only learned that their heads had been pushed in the proximity of E.B.'s groin area when Montague so told them later in the day. Although both of them were bothered by E.B.'s unwelcome conduct, neither considered his actions or intent to have sexual connotations. D.H. considered it to be a continuation of the joking about the gooey stuff and that E.B. was simply "mushing" her. Following this incident, E.B. resumed his seat and finished the class. Montague did not believe that the incident was of such nature as to require her immediately to contact security or to remove E.B. from the class.

Montague described E.B.'s behavior as generally bad long before March 7. As early as September 2005, she recorded several incidences of concern. One day he entered her classroom and began singing as classroom instruction began and ignored two requests to stop. The following day he failed to complete the previous night's homework, but belligerently refused to attend the lunchtime detention that had been established for all students with a homework delinquency. His defiant behavior continued that day as he exited her classroom without permission. A subsequent meeting of the vice-principals, Montague, E.B. and his mother V.W. failed to result in a solution to E.B.'s behavior as V.W. rejected suggestions to prevent future misbehavior and indicated that E.B. did not have to obey Montague. E.B. again failed to submit his homework the next day, which Montague overlooked. She refused his demand to use the bathroom because she knew from his homeroom teacher that he had used it during the previous period. He proceeded to threaten Montague by saying, "ooh, wait 'til I tell my mother." Again, E.B. left class without permission. On October 6, 2005 Montague sent a form home to V.W. advising that E.B. was consistently not completing homework assignments. Although she then indicated that his behavior on that day was satisfactory, she noted that his attention in class, following of directions, interest in learning, participation in class, respect for rules and regulations and social adjustment needed improvement. She also advised that his assumption of responsibility, completion of assignments, study habits, test performance and use of school time was unsatisfactory. On November 3 Montague issued a warning notice with regard to E.B.'s

social studies and literature classes that his homework was incomplete, he lacked serious effort and had poor test scores. On November 18, she prepared a "Request for Assistance" form indicating that E.B. had had a problem staying on task and a very low writing ability since the beginning of the academic year in literature, social studies, math and science. She also advised that he constantly taunts various students in the classroom every day often smacking them in the back of the head. Efforts to create interventions for E.B. were unsuccessful because of resistance from his mother.

According to Montague, even after November, E.B. continued to refuse to remain in his seat during class time, and requested to use the bathroom two to three times per period and would often walk out on his own. The extra attention she constantly had to pay to E.B. detracted from her regular instructional duties. She was of the opinion that E.B. would function much better in a small group classroom as opposed to the classes of 30 students which she instructs. She did not consider E.B. to be a bad or violent child but rather a mischievous youngster prone to little-boy antics.

E.B.'s other teachers also recorded concerns about his conduct. On October 13 science teacher Palmer issued a warning notice regarding lack of attention, lack of serious effort, poor test scores, and incomplete class assignments. This was followed by an October 27 notification to E.B.'s mother that, although he was returning his homework assignments, his responses were incorrect; his tests also reflect the same erroneous and off topic responses, and his behavior is extremely disruptive and disrespectful. Math teacher Williams issued a warning notice on October 26 identifying problem areas of incomplete homework, lack of attention, lack of serious effort, poor test scores, and incomplete class assignments. He subsequently issued a parental notice on November 30 advising of a detention for December 1 due to rude and disrespectful behavior and his inability and lack of concern to ameliorate this trend. He issued another report on January 6, 2006 indicating that E.B. was doing unsatisfactory work and was insubordinate by telling a teacher to shut up.

Vice Principal John A. Silveira set forth various efforts to address E.B.'s behavior. He assigned E.B. 30 minutes of detention for November 14 due to disruptive behavior in

the classes of Palmer and Montague including the use of inappropriate behavior and failure to stay on task. V.W. refused to allow E.B. to serve the detention. Consequently, Silveira suspended E.B. for one day for disorderly conduct and failure to attend detention. Silveira articulated the events which led to Williams' issuance of a detention on November 30. Williams had witnessed an altercation in the hallway between E.B. and a younger female student which E.B. denied. When Williams told E.B. that he had witnessed the altercation, E.B. made some disrespectful remarks and, without permission, walked away and into the bathroom. After Williams informed Silveira of the incident, Silveira approached E.B. as he entered the cafeteria and gave the following report: "When I attempted to talk to him he turned away from me and said, 'I can't lineup?' I said, 'No, but I want to talk to you a minute.' He then said, 'I don't want to talk to you.' I then said, 'Then you'll have to go to the main office and wait there.' He said, 'Man, you better get out of here.' I asked him if I had heard correctly when he said, 'I better get out of here.' He did not answer and attempted to walk out of the cafeteria away from me and bumping me in the process. I told him to wait as there were students coming in through the door. I said, 'Make sure you don't hit me this time when you leave.' He replied, 'You hit me' and left on his way to the main office." He was subsequently disrespectful to Principal Wilson. Silveira issued a notice of a four day suspension, which was reduced to two days.

Silveira issued another notice of detention for E.B. for December 20 for defiant and disrespectful behavior after he would not remain in his office after being referred there with another student. E.B. walked out without answering when questioned about his behavior. As with the November detention, Silveira converted this one to a one day suspension after V.W. refused to allow E.B. to serve the detention.

At 8:15 a.m. on January 13, 2006, Silveira attempted to curtail two pre-school hours basketball games in the gym. Although one group stopped, the other, which included E.B. did not. Silveira requested the basketball from E.B. From a distance of three feet, E.B. threw the ball with both hands and with great force at Silveira striking him on the lower right leg. When Silveira bounced the ball back to E.B. and asked him to give it to him properly, he instead threw it to another student and walked away.

When Silveira directed him to accompany him to the office, E.B. responded by saying, "You better get out of my face" and, "Man, you better get out of here." He was then accompanied to the office by a security guard.

When Silveira learned of the March 7, 2006 incident from Montague that afternoon, he interviewed D.H. and E.M. and had them write down their personal accounts. He consulted with Principal Wilson, and they agreed that, because E.B.'s prior suspensions during the school year had reached the limit as designated by the District, they would refer the matter to the SLT IV office as well as the legal department for guidance as to how to proceed. The charges ultimately filed against E.B. were generated by the SLT IV office and not by personnel at Flagg. Silveira telephoned V.W. at home on March 8. As there was no answer, he left a message on her answering machine advising her what had been reported on the previous day and requesting her to come to the school to discuss the incident. V.W. did not contact the school. V.W. testified that she never received such a telephone message and that the first time she learned of the incident was when she received the written April 6 notice of the April 13 hearing. However, I am persuaded that Silveira did, indeed, attempt to contact V.W. by telephone as evidenced by his recordation of that act in his written report of March 8, 2006. It is unlikely that his testimony regarding the call was fabricated in order to make it appear that he complied with the notification requirements of the Newark Public Schools Discipline Plan and Policy when he had recorded this effort prior to any claim that he had violated the notification portion of the Policy. He never interviewed E.B. about the events of March 7 because his mother had made it clear on previous occasions that no administrator in the building was to confront E.B.

E.B.'s academics were problematic. In 2004-05 his final grades were C in reading, C in writing, D in mathematics, D in social studies and D in science. In the first marking period of 2005-06, his grades were D in reading and writing and F in mathematics, social studies and science. He received an F in every academic subject in the second marking period. His ratings on the Standards Proficiency Assessment in the spring of 2004 was partially proficient (124) in language arts proficiency and partially proficient (113) in mathematics. His ratings in the spring of 2005 was partially proficient

(123) in language arts literacy and partially proficient (104) in mathematics. Silveira had spoken to V.W. about the importance of seventh grade for E.B. for high school entry. Because of E.B.'s poor academic showing, Silveira had recommended pullouts into a small classroom setting because, without interventions, he was convinced that E.B. would fail. However, V.W. refused to participate in the discussion.

E.B.'s mother V.W. has been a Newark resident for 33 years and she herself attended Flagg from sixth to eighth grade. E.B. had been a student at Flagg since kindergarten, during which period V.W. had volunteered as a teacher's assistant, lunchroom aide and, from 2001 to 2004 had been president of Flagg's PTSO. She described her relationship with Principal Wilson as a good one when he began in the 2004-05 year. They shared concerns about safety and the health environment at Flagg. However, in February 2005, in front of teachers and parents, Wilson publicly voiced his objection to V.W. running for another term as PTSO president. In the summer of 2005 she filed a complaint in the United States District Court and amended it on October 31, 2005 alleging that Wilson opposed her reelection because her advocacy regularly brought attention to problems at the school, denied her access to the school and caused disciplinary actions to be brought against E.B. in retaliation for her actions. E.B. was never suspended or disciplined before Wilson became principal. A motion to dismiss this federal complaint is pending. She contends that the District's decision to transfer E.B. to the Renaissance Program is not for good cause but rather in retaliation for her lawsuit against Wilson and other members of the District's administration.

Dr. Vincent Mays has been the Director of Alternative Education for the District for eight years. Its programs have been designed and monitored by the New Jersey Department of Education and are for children who do not fit into the regular schools because of behavioral, social or academic issues. The programs are presented in a small learning environment with only five to eight students in each class who receive much more individualized attention than is possible in the regular classroom. The coordinators attempt to collaborate with the parents to establish a plan of action which is monitored on a daily basis. Dr. Mays runs programs at 13 sites including a middle school Renaissance Program for each SLT. As a result of the proceeding below, the

District transferred E.B. to the Renaissance Program at the Gladys Hillman Jones School (Hillman). Dr. Mays acknowledged that a number of students at the Hillman Renaissance Program attend because of behavioral problems. However, none currently come out of the juvenile justice system or were involved in violent crimes. For the GEPA standardized test for eighth graders in the Hillman Renaissance Program, 14.3 percent were proficient in language arts, 9.3 percent were proficient in math and 13.5 percent were proficient in science.

LEGAL ANALYSIS

The Commissioner generally has jurisdiction to hear and determine controversies and disputes arising under the school laws. N.J.S.A. 18A:6-9. However, the exercise of discretionary powers by a local board of education, or in this case by a State District Superintendent, may not be upset unless patently arbitrary, or without reasonable basis, or induced by improper motives. Kopera v. West Orange Bd. of Ed., 60 N.J.Super. 288 (App. Div. 1960). Since there is a presumption of validity, the burden of proving unreasonableness lies with the party challenging the action. Id. at 297. Also see, K.O.H. o/b/o R.H. v. Bd. of Ed. of the Township of Edison, 95 N.J.A.R.2d. (EDU) 275 (1995). Accordingly, the Commissioner's scope of review is limited to determining whether the underlying facts were as those which the finder of fact at the district level found and whether it was unreasonable for the board or superintendent to conclude based on those facts as it did as to the appropriate action. The decision below carries a presumption of validity

I **CONCLUDE** that petitioner has failed to meet her burden of proof that she and E.B. were denied due process in the proceeding of April 13, 2006 in that she received adequate notice of the hearing as well as the underlying issue of events occurring on March 7, 2006. Both petitioner and E.B. were present and given an opportunity to confront the witnesses against E.B. and to present a defense. They chose not to do so. There was no suspension of E.B. from school before (or after) he was afforded an opportunity to tell his side of the story, and the Hearing Officer heard live testimony from witnesses. See R.W. o/b/o R.W. v. Bd. of Ed. Of Hunterdon Central Regional High

School, 93 N.J.A.R. 2d (EDU) 113 (1992). No property interest of constitutional proportions is implicated when, as here, the school has not expelled the student, but has instead transferred him to another curriculum. A transfer to a different school for disciplinary reasons is not a form of punishment and does not support a claim of a constitutional deprivation of property or liberty interests. Nevares v. San Marcos Consolidated Independent School District, 1997 U.S. App. LEXIS 14955; Zamora v. Pomeroy, 639 F.2d 662 (CA 10, 1981). In any event, this issue is moot in that the undersigned heard all of the testimony anew and made independent findings set forth above after petitioner had adequate notice, an opportunity to present witnesses and other evidence, and representation by counsel.

As to the specific charges made against E.B. and heard on April 13, 2006[1], the facts do not support a conclusion that E.B.'s conduct on March 7 constituted a violation of the District's policy on harassment, intimidation and bullying. The District's Discipline Plan and Policy [J-1] at page 53 defines "Harassment, Intimidation or Bullying" as "any gesture or written, verbal or physical act ... that (a) is motivated by any actual or perceived characteristic such as ... gender ... and (b) a reasonable person should know, under the circumstances, that the act(s) will: (1) have the effect of harming a student ...; (2) place a student in reasonable fear of harm to his/her person ...; or (3) have the effect of insulting or demeaning any student ... in such a way as to cause disruption in, or substantial interference with the orderly operation of the school." E.B.'s physical contact with the young ladies on March 7 was unwelcome, disruptive, immature and wholly inappropriate. However, the fact that the heads of the two young ladies were pushed down by E.B. and ended up in the vicinity of his groin is not per se reflective of a motivation of E.B. to engage in an act with sexual connotations. Neither Montague nor the young ladies considered his action to be sexually motivated or demeaning. In fact, neither female student was even aware of where their heads were pushed in relation to E.B.'s body until Montague informed them later in the day. The conduct undoubtedly caused a disruption in the orderly operation of the school.

[1] Hearing Officer Cunningham dismissed the charge of "Physical Assault upon other pupil" upon a determination that E.B.'s conduct was not intended to "cause bodily injury" or put the female students "in fear of imminent serious bodily injury."

However, the District's policy is written in the conjunctive, and the element of motivation has not been satisfied.

I **CONCLUDE** that there is ample evidence however to sustain the charges of open defiance of teacher authority and continued disruptive behavior and that petitioner has failed to sustain her burden of proof that the District's findings as to these allegations were without reasonable basis. The totality of E.B.'s conduct on March 7, including but not limited to his interaction with the two females, constituted disruptive behavior and open defiance of teacher authority in that he ignored the assignment that day, left his work area without permission numerous times and engaged in negative behavior that bore no relationship to the intended purpose of his presence in class that day. What is particularly disturbing is that E.B.'s conduct that day was not aberrational but rather consistent with a multitude of negative documented behaviors he had exhibited throughout the school year.

Petitioner challenges the bona fides of the claims of misconduct by E.B. throughout the school year by suggesting that they were in retaliation for her confrontations with Flagg's principal regarding her activism over conditions in the school and her insistence that she be allowed to continue as PTO president. I disagree. The panoply of complaints about E.B. did not come from a single source. In addition to the two classmates who certainly exhibited no prejudice against E.B. in their testimony, the common threads of complaints about E.B.'s academic performance, attitude and behavior came from the vice principal and three different teachers. It is simply implausible that any of them, no less all of them, would fabricate claims against E.B. because of her dispute with the principal.

Petitioner finally argues that E.B.'s transfer from Flagg to the Renaissance Program is not pedagogically appropriate and is based by the Hearing Officer on an incomplete investigation. She contends that, assuming the alleged facts are true, they do not justify the transfer or the recommended services. I **CONCLUDE** that the State District Superintendent's transfer of E.B. to the Renaissance Program and the imposition of other supports were neither arbitrary nor unreasonable. This action

certainly lacks the punitive nature of a suspension or expulsion. See, Nevares v. San Marcos Consolidated Independent School District, supra. Instead, it is a measured response to E.B.'s overall behavior as well as academic deficiencies. Dr. Mays convincingly demonstrated that the Renaissance Program is accredited and geared to provide individual attention to E.B. in a pedagogically positive and comprehensive small group setting. There was no evidence, as petitioner suggests, that the Renaissance Program, despite low standardized test scores, lacks appropriate academic content and is merely a repository for antisocial students. The Hearing Officer's recommendation, and the State District Superintendent's affirmation, of a transfer to an alternate program outside of Flagg was reasonable in that it considered the totality of E.B.'s record rather than the single incident of March 7. This is so even if the proven misconduct of March 7 did not rise to the level of a violation of the District's Harassment, Intimidation or Bullying Policy.

ORDER

It is hereby **ORDERED** that the petition be dismissed in its entirety consistent with the above Initial Decision.

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

This recommended decision may be adopted, modified or rejected by the **COMMISSIONER OF THE DEPARTMENT OF EDUCATION,** who by law is authorized to make a 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.

July 25, 2006
DATE

Jesse H. Strauss
JESSE H. STRAUSS, ALJ

E-mail Receipt of Initial Decision Confirmed by the Department of Education on:

7/25/06
DATE

Mailed to Parties:
Laura Sanders
DIRECTOR AND
CHIEF ADMINISTRATIVE LAW JUDGE

JUL 26 2006
DATE

OFFICE OF ADMINISTRATIVE LAW

id

APPENDIX

Witnesses

For Petitioner:

V.W.

For Respondent:

D.H.

E.M.

Sheila Montague

John Silveira

Vincent Mays

Joint Exhibits

J-1 Newark Public Schools Discipline Plan and Policy
J-2 Zartarian to V.W., April 6, 2006
J-3 Zartarian to V.W., April 27, 2006 –Hearing Officer Report

Exhibits

For Petitioner:

P-1 Montague to Wilson, March 7, 2006
P-2 Staff Development Memo
P-3 Silveira to Wilson, March 15, 200[6]
P-4 U.S. District Court Complaint, October 31, 2005
P-5 Education Progress Report for E.B.
P-6 Parent/Student Incident Report, November 16, 2005
P-7 Parent/Student Incident Report, November 4, 2005
P-8 Parent/Student Incident Report, November 2, 2005

For Respondent:

R-1 Montague Memo, September 19, 2005
R-2 Parent Notification Form, October 6, 2005
R-3 Warning Notice, November 3, 2005
R-4 Request for Assistance Form, November 18, 2005
R-5 Detention Notice for November 14, 2005
R-6 School Suspension Notification, November 16, 2005
R-7 Silveira to Wilson, November 30, 2005
R-8 School Suspension Notification, November 30, 2005
R-9 School Suspension Notification, November 30, 2005
R-10 School Suspension Notification, December 15, 2004
R-11 Detention Notice, December 19, 2005
R-12 School Suspension Notification, December 21, 2005
R-13 Incident Report Form, 1/13/06
R-14 Incident Report Form, 3/8/06
R-15 Warning Notice, October 13, 2005
R-16 Warning Notice, October 26, 2005
R-17 Parent Notification Form, October 27, 2005
R-18 Parent Notification Form, November 30, 2005
R-19 Parent Notification Form, January 6, 2006
R-20 Progress Report, 2004-2005
R-21 Progress Report 2005-2006
R-22 Test Data for E.B.

308-06

ERIKA HOGAN,	:	
PETITIONER,	:	
V.	:	COMMISSIONER OF EDUCATION
BOARD OF EDUCATION OF POINT PLEASANT BOROUGH, OCEAN COUNTY,	:	DECISION
RESPONDENT.	:	

SYNOPSIS

Petitioner, a tenured English and foreign languages teacher formerly employed by the Board, contends that the respondent Board's decision to withhold her salary increment for the 2002-2003 school year was arbitrary, capricious and unreasonable; additionally, she challenges respondent's failure to pay her full salary and benefits for the 2002-2003 school year without loss of sick leave, pursuant to *N.J.S.A.* 18A:30-2.1, for psychiatric disability she contends arose out of and in the course of her employment. The Board contends that its action to withhold the increment was appropriate pursuant to *N.J.S.A.* 18A:29-14, as it had documented deficiencies in petitioner's performance over a number of years. Further, respondent asserts petitioner is not entitled to the benefit of *N.J.S.A.* 18A:30-2.1 because her psychiatric disability arose from merited criticism and would not be compensable under the Workers' Compensation statutes.

The ALJ found, *inter alia*, that: petitioner's subjective perception of the stresses of her work environment was the causal trigger for her psychiatric injury; petitioner did not establish the existence of a hostile work environment, but credible evidence established that she was under pressure from actual stresses in her work environment resulting from criticisms and demands for improvement in the classroom, which resulted in the withholding of her increment; petitioner's psychiatric disability is not compensable under the Worker's Compensation Act and she is not entitled to full salary and benefits without loss of sick leave for the entire 2002-2003 school year. The ALJ affirmed the determinations of the Board, and dismissed the petition.

Upon a thorough and independent review of the record, the Commissioner concurs with the determinations of the ALJ, and adopts the Initial Decision as the final decision in this matter.

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.

September 8, 2006

OAL DKT. NO. EDU 6083-02 and EDU 736-03
AGENCY DKT. NO. 238-7/02 and 25-1/03
(CONSOLIDATED)

ERIKA HOGAN,	:	
PETITIONER,	:	
V.	:	COMMISSIONER OF EDUCATION
BOARD OF EDUCATION OF POINT PLEASANT BOROUGH, OCEAN COUNTY,	:	DECISION
RESPONDENT.	:	

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

Upon such review, the Commissioner agrees with the Administrative Law Judge (ALJ), for the reasons comprehensively detailed in his decision, that petitioner has failed to sustain her burden of establishing that the Board's withholding of her increment for the 2002-03 school year was arbitrary, capricious or unreasonable. The Commissioner further concurs with the ALJ, again for the reasons well stated in his decision, that petitioner's psychiatric disability is not compensable under the Workers' Compensation Act and, therefore, she is not entitled to full salary and benefits without loss of sick leave for the 2002-03 school year under *N.J.S.A.* 18A:30-2.1.

Accordingly, the recommended decision of the OAL is adopted and the instant consolidated Petitions of Appeal are hereby dismissed.

IT IS SO ORDERED.*

Lucille Edley

ACTING COMMISSIONER OF EDUCATION

Date of Decision: 9/08/06
Date of Mailing: 9/08/06

* This decision may be appealed to the State Board of Education pursuant to *N.J.S.A.* 18A:6-27 *et seq.* and *N.J.A.C.* 6A:4-1.1 *et seq.*

State of New Jersey

OFFICE OF ADMINISTRATIVE LAW

INITIAL DECISION

OAL DKT. NOS. EDU 6083-02
AND EDU 736-03
(CONSOLIDATED)
AGENCY DKT. NOS. 238-7/02
AND 25-1/03

ERIKA HOGAN,

Petitioner,

v.

BOARD OF EDUCATION OF
POINT PLEASANT BOROUGH,
OCEAN COUNTY,

Respondent.

James T. Hundley, Esq., for petitioner (Hundley and Parry, attorneys)

Daniel S. Popovitch, Esq., for respondent (Popovitch & Popovitch, attorneys)

Record Closed: March 20, 2006 Decided: August 4, 2006

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

STATEMENT OF THE CASE AND PROCEDURAL HISTORY

Petitioner Ericka Hogan challenges as arbitrary, capricious and unreasonable respondent Board's decision to withhold her salary increment for the 2002-2003 school year. The Board asserts that it acted appropriately pursuant to N.J.S.A. 18A:29-14, on the ground that petitioner failed to implement good instructional management practices

in her classes despite observations for a number of years bringing the deficiencies to her attention. Petitioner also challenges the Board's failure to pay her full salary and benefits for the entire 2002-2003 school year without loss of sick leave, pursuant to N.J.S.A. 18A:30-2.1, for psychiatric disability she contends arose out of and in the course of her employment. The Board asserts that petitioner is not entitled to the benefit of N.J.S.A. 18A:30-2.1 because her psychiatric disability arose from merited criticism and would not be compensable under the Workers' Compensation statutes.

Petitioner filed her Petition of Appeal on the increment withholding with the Commissioner of Education on July 29, 2002, and the Board filed its answer on August 9, 2002. The matter was transmitted to the Office of Administrative Law for determination as a contested case on August 21, 2002, and a telephone prehearing conference was held on November 19, 2002. At that time counsel advised that petitioner was on medical leave and intended to file a second petition, seeking the salary and leave benefits of N.J.S.A. 18A:30-2.1. She had been notified on or about October 21, 2002, that her request for sick leave benefits under that statute was denied by the Board. Under the 90 day timeliness rule, N.J.A.C. 6A:3-1.3(d), a petition challenging this denial had to be filed by January 21, 2003 (January 19, the 90th day after notice of the Board's action, was a Sunday and January 20 was a holiday.) The second Petition of Appeal was timely filed with the Commissioner on January 21, 2003, and the matter was transmitted to the Office of Administrative Law on March 6, 2003.

The two matters were consolidated for hearing. Following periods of inactivity pending disposition of a related workers' compensation proceeding, the hearing was held on October 21 and December 22, 2005. The record remained open following the hearing to permit the parties to submit post-hearing briefs. The last of these was received on February 1, 2006, and the record closed on that date. The time for filing this Initial Decision was extended by Orders of Extension.

DISCUSSION

Petitioner Erika Hogan began her employment with respondent Board of Education in September 1984. At all relevant times she was a full-time, tenured teacher with certifications for teaching foreign language and English. Her base salary for the 2001-2002 school year, at Step 14A with a master degree, was $53,080. On May 4, 2002, the Board notified petitioner that it had voted on April 29, 2002, to withhold her increment of $2,150 for the next school year, so her salary continued to be $53,080 for the 2002-2003 school year.

For physical and emotional reasons, petitioner was absent from her teaching position for the entire 2002-2003 school year. From September 1, 2002, to December 9, 2002, petitioner was on sick leave and she received her full salary and benefits in the gross amount of $17,555 during that period. From December 10, 2002, until March 31, 2002, petitioner was placed on unpaid family leave, but the Board paid the cost of petitioner's medical benefits during that period. From April 1, 2003, until June 30, 2003, petitioner was paid no salary or benefits by respondent.

Petitioner retired on an ordinary disability pension, effective June 1, 2003. On January 19, 2005, an Order Approving Settlement with Dismissal was entered on petitioner's related workers' compensation claim. The lump sum settlement between the parties was accepted by the Judge of Compensation as fair and just, pursuant to N.J.S.A. 34:15-20, with the reason noted as, "Difficulty in proof of causal relationship."

The foregoing is undisputed and stipulated by the parties and is thus **FOUND AS FACT**.

Petitioner Hogan mainly taught English during her first year at Point Pleasant Borough High School. The following school year, she taught only German classes, and this assignment continued into the early 1990s. In April 1992, the School Board notified petitioner that a full-time German teacher position was being eliminated pursuant to a reduction in force, but she was eligible to claim a newly created position of part-time

secondary teacher of German (Exhibit P-22). Petitioner was the only full-time German teacher at the time, and she thought the district's action was part of a concerted effort to get rid of her. With the help of legal representation provided by her union, petitioner was able to continue with a full-time contract for the 1992-1993 school year, teaching both English and German.

It was petitioner's testimony that she was observed once per year until the 1992-1993 school year, when the number of observations increased. In 1996, there were ten observations of her classroom teaching (Exhibits P-23, R-2, R-3, R-4, and R-6). No one told her why there were so many, and petitioner felt this too was done because the administrators were trying to get rid of her. Petitioner recalled that there was a return to one observation per year between 1997 and 2000.

According to petitioner, additional classroom observations took place during the 2000-2001 school year, particularly during the second half. She could not remember if the observers conversed with her about the reasons for additional observations. Petitioner did recall that she taught one German section and for the rest of her classes she taught English. Three were English inclusion classes; there were special education students in these classes, and also a special education teacher. Petitioner testified that she felt the special education teacher was not doing her job properly, including not allowing petitioner to reprimand the special education students. Petitioner also taught an American Literature class that did not have inclusion students, and she had no problems with that class. She acknowledged that the district had the right to assign her to teach inclusion classes, and she maintained that her problem was with the special education teacher and not the inclusion students.

Petitioner began seeing Marianne Perzel, Licensed Clinical Social Worker, for individual therapy in April 2001 (Exhibit J-1). Petitioner went to the therapist because she was under a lot of stress at school and did not know how to deal with it. She explained that the biggest problem was the lack of administrative support. Students told her that the administration wanted to get rid of her and this made her feel bad. When she was reprimanded by Vice Principal Linda Rocco in front of students,

petitioner felt even worse. According to petitioner, when she put students out of class for behavior, they would come back from the office saying they were told to come back and harass her some more.

Petitioner recalled being in the high school office on September 11, 2001, and feeling that she was being harassed by Ms. Rocco. During their interaction, Vice Principal Leo Baranowski came into the office and announced that "the second tower was hit." Petitioner did not know what he was talking about, and she then learned from him of the attack on the World Trade Center in New York City. She said to Ms. Rocco, "You didn't know about this, did you?" and Ms. Rocco said that she did. Petitioner could not understand how the administrator could harass her on a day like that, and she continued to be upset after that date.

Petitioner also recalled another incident that she thought occurred during her last year of teaching. Near the end of a class period, she was allowing her students to express themselves with artwork. When two of several problematic students dropped crayons on the floor and then stomped on them, petitioner called the office and asked for Mr. Baranowski to come to the class. In a letter to petitioner (Exhibit R-10), Vice Principal Baranowski described the situation:

> On March 20, 2002 at the end of third period, office personnel suggested I go to room 103. Upon arriving at the door, you were outside the room and alerted me to the fact that there had been an accident.
>
> Outside the door were two blue crayon tracks leading into the classroom. Opening the door to room 103, I noticed that there were numerous crayon tracks of various colors throughout the room. You started to explain how the incident occurred; according to you, a student dropped the box of crayons on the floor and by mistake made marks on the floor. This explanation can be used for the marks around the student desk, but could not possibly explain how the entire classroom was covered in crayon marks. In your written account you indicated that [L.] and [J.] were walking all over the crayons, were told to stay in their seats, and refused. This type of classroom behavior cannot be tolerated.

> If students are actively engaged in vandalizing a classroom, the teacher must immediately stop them or solicit help in stopping them. For the next three periods, members of our maintenance crew attempted to clean the room. Because of the cleanup we had to find rooms for the students in room 103 so we could continue cleaning the class.
>
> What was initially an accident turned into an act of vandalism due to inaction on your part. In the future you must act immediately when gross acts of vandalism take place in your classroom.

Petitioner acknowledged having some problems in the classroom as early as 1996, but she felt the manner of observation at that time was unfair; the observers stayed for only about fifteen minutes but wrote their observations as if they had stayed for the entire class period. Petitioner did not remember if she had classroom management issues during the 2000-2001 school year, but she acknowledged she did have such issues in the 2001-2002 school year. Her last day of school in June 2002 was her last day of teaching, and she did not report to work for the 2002-2003 school year. She described herself as really sick and a total mess, and her doctor told her she could not go back to work (Exhibit J-1). Petitioner confirmed that she subsequently retired on an ordinary disability pension.

Edward Leibfried has been an employee of respondent Board for 35 years, starting as a business education teacher. He has served as a guidance counselor, assistant principal and principal, supervisor of staff development, and presently as assistant superintendent of schools.

Mr. Leibfried was assistant principal for curriculum at Point Pleasant Borough High School in 1984, and he observed petitioner then as part of his duties. In his report of an observation of petitioner's German I class on December 3, 1984 (Exhibit R-14), Mr. Leibfried rated petitioner's classroom management as marginal. He noted that several students spoke out of turn without raising their hands, and he recommended that petitioner clearly define appropriate classroom management procedures to the students, such as quietly taking their seats at the beginning of class and raising their hands before answering. He found that petitioner's plan book was in satisfactory order.

Mr. Leibfried testified that he was assistant superintendent in charge of curriculum in February 2002 when he was directed by Superintendent Robert Ciliento to observe petitioner in the classroom. He observed petitioner's Western Literature class on February 6, 2002, and prepared an observation report (Exhibit P-17). According to Mr. Leibfried, it was not a good lesson; there were both instructional and classroom management deficiencies. In particular, petitioner did not follow the district's lesson design format and she did not have a classroom management plan in place. In the observation report, for the portion identified as "Needs Improvement," Mr. Leibfried wrote:

> I have grave concerns regarding Mrs. Hogan's classroom management. It is non-existent. Students called out of turn throughout the lesson. One student asked, "How come you can't act like a teacher everyday." Another student got out of his seat to tell me how out of control things are. I also observed this first hand. Still another student yelled, "Control the class, Hogan" and another, "Sustained, I find you in contempt."
>
> I also have grave concerns regarding Mrs. Hogan's instructional management. It is unsatisfactory. There were no clear objectives stated and any attempts to follow through with assignments were interrupted by misbehaviors.
>
> Mrs. Hogan was still talking about vocabulary and going to the library halfway through the class period. I observed what I considered to be an abuse of principles of learning, such as check for understanding, active participation and closure. The Western Literature class is comprised of seniors. I sincerely believe that they feel they are being shortchanged and deserve better. To succeed next year, whether it be at the community college level, in the work force or whatever their future endeavors may be, they know that they will need to possess basic writing skills. After observing unsatisfactory classroom management and instructional management skills in the classroom, I do not feel that Mrs. Hogan is capable of providing these skills.

Mr. Leibfried recommended that petitioner immediately develop a classroom management plan and implement a sound instructional management plan. He provided

her with copies of a classroom management plan and the lesson design format implemented in the district and emphasized in its Teacher Induction Program. Mr. Leibfried also recommended that petitioner submit a copy of a completed lesson design format each week to her immediate supervisor, High School Principal Dr. John Staryak.

Mr. Leibfried noted that petitioner prepared a written rebuttal (Exhibit P-17) in which she argued that she was doing some of the instructional techniques he had mentioned. She did not acknowledge any deficiencies and she tried to rebut all recommendations. Mr. Leibfried testified that he was surprised by his observation. Considering petitioner's 18 years of experience gained since he observed her in 1984, he expected her to have professional growth and perfection of classroom management techniques, but that is not what he observed. Mr. Leibfried discussed with Superintendent Ciliento that petitioner was having difficulty. He testified sincerely that they did not discuss forcing petitioner out of the district; their goal was helping her improve.

Linda Rocco is principal of respondent district's Nellie Bennett Elementary School. She was hired in November 1999 as vice principal of the high school, and she became supervisor of languages in September 2000. She had previously been a classroom teacher for 16 years and had held administrative positions in two other districts.

Among Ms. Rocco's duties as an administrator and language supervisor at the high school was classroom observation of petitioner. On March 12, 2001, she observed petitioner's Western Literature class, and she noted her concerns in an observation report (Exhibit P-8). There were many areas that needed improvement, particularly in lesson design and class management:

> As we discussed on our conference, this lesson did not have an introductory activity. You told me that the lesson objective was to review A Streetcar Named Desire. This is not an objective. An objective must include a behavior, a skill or concept and an evaluation component. Class activities were not organized so that the students could see the relationship of

> the parts to each other. The questions reviewed on the worksheet had no relationship to the video shown. This is an example of the lack of organization in this lesson. There was no closure to provide for summary of learning.
>
> Class management is an area of concern. Five students arrived late to class. Only one student was confronted. During our conference I asked you what your rules are regarding students moving around during the lesson. You told me that the students are not allowed to leave their seats. Nine students got up during class time and engaged in activities unrelated to the lesson. This was not addressed. As stated in the GENERAL OBSERVATIONS section, there were times that the students were not attentive to you. As a result, class participation was limited. The fact that the equipment was not properly set up contributed to class management problems.

Ms. Rocco provided these recommendations:

> Class management must improve for learning to take place. Please review the attached information from "Effective Schooling Practices: A Research Synthesis," which deals with this issue. Schedule an appointment with me within one week in order that we may review the material. When developing lesson objectives, be specific about the skill being taught or reviewed as well as the evaluation tool designed to measure the accomplishment of the objective. Lesson activities must relate to the objective and be presented in a logical sequence with a smooth transition from one activity to another. Actively involve the students in an introductory activity that focuses their attention on the objective(s) of the lesson. Provide a closure activity to assess student learning.

Petitioner provided a written rebuttal to the observation (Exhibit P-8). She disputed Ms. Rocco's observations about the lesson, claiming that she did do introductory work and that there was closure. Much of the rebuttal was devoted to petitioner's criticisms of the special education teacher assigned to the class. Petitioner's rebuttal was also critical of the observation report itself, noting that when Ms. Rocco commented that many students talked, she did not identify a specific number of students, or identify them by name, or indicate whether they were special education students. In response to Ms. Rocco's comment that students were leaving

their seats, petitioner wrote, "perhaps you can tell me who they were and at what point this occurred. I would be happy to address it at that time."

Ms. Rocco observed petitioner again on April 26 and November 12, 2001 (Exhibits P-10 and P-14). Again, for both observations Ms. Rocco found that petitioner's lesson planning and teaching quality needed improvement. When she conferred with petitioner about these observations, petitioner's reaction was the same as before. She again was very unwilling to respond to the recommendations and did not feel that any of them were warranted. Ms. Rocco saw no improvement from one observation to the next, and petitioner attempted to rebut every suggestion offered.

Ms. Rocco was a sincere and candid witness. She testified that there was no concerted effort by the district to get rid of the German language program, and as world language supervisor, she wanted the German program to flourish. She assumed that Principal Staryak also observed petitioner, but she was not specifically aware that he had done so on October 20, 2000, and February 27, 2001. Ms. Rocco's testimony that she never harassed or humiliated petitioner, or reprimanded her in front of students was emphatic and believable in every respect. Ms. Rocco denied ever telling students that they could harass petitioner and she never heard any other administrator say such a thing. No administrator ever told Ms. Rocco that there was an effort to force petitioner out of the district, and Ms. Rocco's understood that the administrators were there to help teachers become excellent.

Dr. John Staryak became principal of the Point Pleasant Borough High School during the 1999-2000 school year. At that time, there were about 50 or 60 German language students. Dr. Staryak attributed the elimination of the German program after the 2001-2002 school year to low enrollment. He opined that a reason for low enrollment in the program was the lack of stimulating teaching by petitioner, which had prompted complaints.

Dr. Staryak acknowledged that he and others observed petitioner's classroom teaching during the 2000-2001 school year. He is familiar with all of the observation

reports and from them he developed concerns about petitioner's teaching performance, classroom management, and organization. Dr. Staryak is also aware that petitioner wrote rebuttals to almost all of the reports, expressing her disagreements and her view that the criticisms were not warranted, and listing the problems she felt she faced. He concluded petitioner was not receptive to improvement. Dr. Staryak denied petitioner's claim that the worst students were put in her Western Literature class; it is an elective for seniors and placement in classes was done by the scheduling computer. As to petitioner's claim that nothing was done when she reported students to the office for discipline, Dr. Staryak testified that petitioner's student discipline problems were handled the same as any other teacher's. He emphasized that no teacher or administrator at the high school would ever tell a student to go ahead and harass petitioner.

Dr. Staryak noted that while the overwhelming majority of tenured teachers had one classroom observation per year, concern about whether quality education was happening in the classroom was reason to have additional observations. In petitioner's case, observations beyond the usual one were prompted by Dr. Staryak's receipt of about five parent complaints and numerous student complaints regarding the quality of education in her classroom. Parents complained that petitioner lost students' work and grades, that the classroom was in disarray, and that teaching was not happening. These complaints were also brought to Superintendent Ciliento's attention. Dr. Staryak acknowledged that petitioner's annual performance report for the 2000-2001 school year (Exhibit P-11) does not mention parent or pupil complaints.

Dr. Staryak testified that there were six classroom observations of petitioner during the 2001-2002 school year because of continuing concerns and complaints from parents and students, of a nature similar to the previous year. There had been five observations of petitioner by the time Dr. Staryak wrote the 2001-2002 annual performance report in March 2002 (Exhibit P-20). Dr. Staryak emphasized that effective lesson design and implementation is part of classroom management. He concluded that withholding petitioner's increment was warranted because her students were not receiving a thorough and efficient education and no evidence of improvement

had been seen despite sending petitioner to workshops to improve her teaching. Unfortunately, there was plenty of evidence of lack of improvement, including dead time in lessons and lack of control in the classroom. Dr. Staryak recommended to Superintendent Ciliento that petitioner's increment be withheld for the upcoming 2002-2003 school year. The superintendent agreed with the recommendation and presented the matter to the Board (Exhibit R-12).

According to Dr. Staryak, he continued to receive complaints about petitioner's performance after he wrote her annual performance report and recommended her increment be withheld. He did another classroom observation of petitioner's Western Literature class on May 29, 2002 (Exhibit P-18). Dr. Staryak found that petitioner's classroom management remained unsatisfactory. He noted that when she attempted to ask the class questions, students called out random comments and one-word answers instead of participating in a meaningful, orderly discussion. It was Dr. Staryak's opinion that the classroom environment was not conducive to learning. Dr. Staryak has over 29 years of experience in education, including ten years teaching and fifteen years in guidance. He was a sincere and plainspoken witness, and his testimony was credible.

Robert Ciliento has been superintendent of schools for respondent district since November 1998 and he is familiar with the district's procedures for conducting classroom observations of teachers. He concurred that it was usual during the 1998-1999 school year that the high school teachers had one observation, unless they taught in more than one subject area. The principal or supervisor conducting annual reviews considered the observation information as a major component in assessing the performance and overall functioning of each teacher. Every teacher had a performance improvement plan that normally was developed jointly by the teacher and the supervisor.

Mr. Ciliento is familiar with the observation and annual performance reports involving petitioner. He acknowledged that the only concern raised in a March 1999 report of an observation of petitioner teaching a combined German III/IV class was that she was too hasty dismissing pupil questions (Exhibit P-1). The annual performance

review for the 1998-1999 school year (Exhibit P-2) indicates that petitioner managed her classes adequately. Mr. Ciliento found that assessment interesting, as he would have expected excellent class management since petitioner had only six students in her upper level German class. There was nothing mentioned in the annual performance review for 1999-2000 (Exhibit P-3) that Mr. Ciliento felt required administrative or supervisory attention, although he noted that the report mentioned problems in petitioner's inclusion classes.

Petitioner was observed in her classroom four times during the 2000-2001 school year; once in her English II class, and three times in Western Literature. She was not observed in her German III/IV class. Principal Dr. John Staryak observed the English II class on October 20, 2000, and reported that the lesson needed formal closure (Exhibit P-4). Dr. Staryak observed a Western Literature class on February 27, 2001, and reported the issues requiring supervisory attention: classroom management, lack of considerations for special education students, too much time spent on a quiz, inattentive students, and lack of lesson closure (Exhibit P-5). Mr. Ciliento noted that Dr. Staryak listed his specific recommendations for petitioner, including directing her to attend a professional development session in "Effective Practices."

Petitioner was observed in an inclusion Western Literature class by Vice Principal Linda Rocco on March 12, 2001 (Exhibit P-8). Mr. Ciliento felt that this observation indicated that a supervisory response was warranted. Specifically, Ms. Rocco reported that there was no introductory phase to the lesson, there was no lesson objective, the lesson was unorganized, and there was no closure to the lesson. In addition, only one of five late students was confronted by petitioner, the students were not attentive, and equipment for the lesson was not properly set up. The report advised petitioner that class management must improve for learning to take place, and it was recommended that she be specific about the skill being taught, with an activity related to the lesson objective.

Ms. Rocco again observed petitioner in a Western Literature class on April 26, 2001 (Exhibit P-10). Mr. Ciliento felt that this observation also revealed items

warranting administrative attention: classroom management, lack of materials, too much time spent on a test, and an unclear rationale for giving extra credit. Ms. Rocco provided petitioner with useful literature on improving classroom techniques. The annual performance review for 2000-2001 (Exhibit P-11) restated the items in petitioner's performance warranting supervisory intervention: a lesson lacked closure, the students were not engaged and were inattentive, and there was a clear lack of direction. Petitioner's classroom management and control were unsatisfactory. It was Mr. Ciliento's opinion that it had been normal and warranted to do several observations of petitioner during the school year because of the severe deficiencies in her lessons that needed to be improved.

Mr. Ciliento testified that there were other tenured teachers in addition to petitioner who needed to improve, so the district started intensive supervision beginning in the 2001-2002 school year. This applied to both elementary and high school teachers, and its purpose was not to harass a teacher but rather to improve instruction. Programs were offered to high school teachers on the various aspects of good instructional practices and on behavior management.

Petitioner was observed in a Western Literature class by Dr. Staryak on October 17, 2001 (Exhibit P-12). In his report, he noted among the items in the category "Needs Improvement" that students arriving late must be challenged and appropriate action taken, if necessary. He reported that classroom management continued to be a problem, and that there was still too much time passing with students not engaged. Dr. Staryak recommended that petitioner plan to attend several specified training sessions. He clarified this in a letter to petitioner dated November 2, 2001 (Exhibit P-13), after receiving her response to his report:

> Under "Recommendations" in your observation of 10/17/01 I wrote, "Please plan to attend training sessions on 'Checking for Understanding' Part I on Thursday, January 17, 2002 and Part II on Thursday, April 11. Also plan to attend the session on 'Effective Practice' on Tuesday, March 5." In your response you indicated, "I do not find anything in the evaluation that there are classroom management issues that could be addressed by anything suggested by the titles of the courses

> offered. I would therefore request that the requirement to attend these seminars be changed from required to a suggestion."
>
> Under the "Recommendations section I wrote, "It is important to pause a video at various points to check for understanding." Your attendance at training on "Checking for Understanding" could be helpful to you. Effective practice is a key component of lesson design. It is very helpful in imprinting learning on students' long term memory. During the class period students should be engaged in appropriate practicing of skills presented. When students are engaged discipline problems are minimized and learning opportunities are maximized. The session on "Classroom Management and Parent Communication" was presented on September 13, well before this observation was written. As per your Professional Improvement Plan, you would have been welcome to attend this session. You are welcome to attend another session on this topic. It would be preferable if it were at a time in which school is not in session, but I will approve a professional day if that is the most viable option.
>
> My primary concern is that students in Western Literature are receiving a thorough and efficient education. When there is time in the classroom in which students are not engaged in the lesson, discipline problems often result, impacting instruction. The best was to avoid this is an interesting and well planed lesson. Good classroom management, effective practice, and checking for understanding are keys to good teaching.
>
> If I felt that it simply would be a good idea for you to attend a training session I would have recommended it either verbally or in writing. My concerns about your teaching and ability to keep students engaged are significant. "Please plan to attend" should be taken as a directive.

Vice Principal Linda Rocco observed petitioner teaching her German I class on November 12, 2001 (Exhibit P-14). Although petitioner disagreed, Ms. Rocco reported that the lesson given was not in the lesson plan. Further, the lesson lacked stimulation and the closure was weak. In her report, Ms. Rocco advised petitioner to enforce attendance, plan lessons to include a wide range of activities, and maintain the students' attention. It was recommended that petitioner attend workshops.

Vice Principal Leo Baranowski observed petitioner teaching a Western Literature class on December 13, 2001 (Exhibit P-15). Mr. Ciliento noted that under the heading

"Needs Improvement," Mr. Baranowski reported that the class lacked focus and that petitioner needed to state the lesson objective to the class and then teach to it, providing information, asking questions, and using designed activities. Checking for understanding would allow her to decide whether to reteach or move on. He recommended that petitioner design lessons without downtime and that she not make idle threats regarding detentions, noting that classroom adjustments are made all the time, but they need to be controlled by the teacher and not the students.

The fourth observation of petitioner during the 2001-2002 school year was done by Vice Principal Stephen Genco on January 8, 2002 (Exhibit P-16). Mr. Ciliento thought it obvious that this observation of petitioner's Western Literature class came less than a month after Mr. Baranowski's observation because petitioner's problems continued. Mr. Genco reported observing that eight students were late to class and petitioner did not question them as to their whereabouts. He also observed a number of students talking during a quiz, disrupting other students. Students talked excessively while petitioner attempted to discuss the theme of a reading assignment. Mr. Genco identified the following improvement needs:

> Classroom management: classroom management begins with clear student behavioral expectations. From the moment your students enter the classroom, they must be held accountable for their actions. Students who are following teacher directives should be positively reinforced as well as providing consequences for students who continually disrupt the learning environment. You must address student lateness and command respect from you students at all times. As per our post observation conference, this observer would have stopped the lesson and addressed the class on what it means to be rude as well as what it means to have respect for others. Additionally, "dead time" with regard to instruction increases the likelihood of disruptive behavior. Despite the many ways the theme "Faith" could have been explored, the lesson was not designed to elicit higher order thinking skills from the learners. Instead, one-word responses were elicited from the learners.

Petitioner was observed for a fifth time during the 2001-2002 school year when Assistant Superintendent Edward Leibfried went to her Western Literature class on February 6, 2002 (Exhibit P-17). Mr. Ciliento testified credibly that this was done at his

direction and solely because he knew from his discussions with the high school administrators and his review of petitioner's previous observations that she was having major problems with classroom management and lesson design. Mr. Ciliento recalled that the assistant superintendent's February 2002 observation report stated that petitioner's classroom management was non-existent and her instructional management was unsatisfactory, and he did not feel petitioner was capable of providing these skills (Exhibit P-17).

Petitioner's annual written performance report for 2001-2002 (Exhibit P-20) was done by Dr. Staryak in March 2002. It references and was largely based upon the five observations that had been done to that point that year. Dr. Staryak's report notes that petitioner's annual performance report for the previous year cited concerns about petitioner's classroom management and lack of lesson organization, and that the evaluation was unsatisfactory. Dr. Staryak further summarized that petitioner's observations for 2001-2002 revealed continual failure to improve instructional skills, despite many attempts through conferencing, classroom observation, and written recommendations. This was deemed unacceptable. Dr. Staryak concluded the annual performance report by stating:

> Ms. Hogan is responsible for acknowledging the deficiencies in her instruction, making a concerted effort to improve, and achieving the improvement. This has not transpired, and, as a result, Ms. Hogan's performance during the 2001-2002 school year is again deemed unsatisfactory.

Mr. Ciliento confirmed that the recommendation to the School Board that it withhold petitioner's increment for 2002-2003 originated with Dr. Staryak. Mr. Ciliento agreed with Dr. Staryak, and the 2001-2002 annual written performance report played a major role in his concurrence. It was his opinion that petitioner's classroom management problems arose from ineffective teaching. She did not maintain order because she did not keep the students interested, and she could have corrected this by using the lesson design approach to present material: settle the class, do a lesson oriented anticipatory set up to get the students' attention, introduce the lesson and

teach it, help students with a lesson activity, and wrap up the lesson by telling the students what they learned.

Mr. Ciliento noted that after the Board voted to withhold petitioner's increment, it offered petitioner a contract for the 2002-2003 school year with the salary reflecting the withheld increment (Exhibit P-21). According to Mr. Ciliento, there were only seven students who were going to take German in 2002-2003, and petitioner would be the only German teacher. When it was learned that petitioner was not going to return to teach at the beginning of the year, with sick leave of uncertain duration, the class was disbanded and German was not offered. Mr. Ciliento emphasized that it could not be further from the truth to suggest that there was a conscious effort to get rid of the German program; he would have preferred to keep it but there were not enough students for more than one German class and a German teacher for just one class could not be found. Mr. Ciliento's testimony was straightforward and sincere and entirely worthy of belief.

N.J.S.A 18A:29-14 provides that a board of education may withhold a teacher's salary increment for inefficiency or other good cause. It is well-established that a board's imposition of an increment withholding may not be upset unless the action is demonstrated to be patently arbitrary, capricious, unlawful or induced by improper motive. See, Kopera v. West Orange Bd. of Ed., 60 N.J. Super. 288 (App. Div. 1960). The burden of proving that such action was so deficient lies with the petitioner. Id. at 297. If the petitioner fails to meet this burden, the Commissioner's judgment may not be substituted for that of the board in exercising its lawful discretionary authority.

Petitioner contends that the numerous classroom observations she endured were not remedial in nature and were not intended to improve her classroom management skills. Asserting that the observation reports contain little in the way of professional assistance, petitioner argues that the number and frequency of the observations reveal that their purpose was to establish grounds to withhold her increment and lay the groundwork for the termination of her employment.

Respondent Board contends that petitioner had ongoing problems managing her classroom and was not fulfilling her obligation to provide her students with an opportunity to learn in an appropriate setting. It is the Board's position that petitioner resisted the administration's efforts to help her improve, the additional observations were appropriate and necessary, and the observations revealed good cause for withholding petitioner's increment.

The evaluation narrative for petitioner's 2000-2001 annual written performance report advised her that the central issues of classroom management and control were unsatisfactory areas. It was strongly recommended that petitioner make a concerted effort to improve those aspects of her instruction, and she was advised that her instruction would be monitored closely the following year. Unfortunately, it was necessary for High School Principal Dr. John Staryak to state in petitioner's 2001-2002 annual written performance report that there had been no evidence of improvement in classroom management or individualizing of instruction, despite many attempts by administrators to obtain petitioner's improvement through observation, conferencing, and written recommendations. Thus, petitioner's performance for the 2001-2002 school year was also deemed unsatisfactory.

I **FIND** from the credible evidence in the record that there was no plan or attempt to force petitioner from her teaching position and that the school administrators did not subject petitioner to a hostile work environment. The observation and annual performance reports admitted into evidence and the credible testimony of administrators who performed observations demonstrate that petitioner had persistent classroom management and lesson organization problems. The administrators had ample opportunity to observe lessons, activities, and entire class periods, and they consistently brought to petitioner's attention the real deficiencies in her classroom management and lesson organization that they observed. Petitioner was responsible for improving her performance, and she was given numerous recommendations on how to do so. Instead, she resisted constructive criticism and sought to deflect responsibility for the identified problems; she was not able to achieve satisfactory performance. I so **FIND**.

The Board of Education withheld petitioner's increment for the 2002-2003 school year based upon her failure to implement good instructional management practices in her classes, despite observations in the 2001-2002 and previous school years bringing these deficiencies to her attention. Given the underlying facts in this matter, it is clear that the Board had a reasonable basis for its action, and I so **CONCLUDE**. I further **CONCLUDE** that petitioner has not met her burden of establishing that the Board's action was patently arbitrary, capricious, unlawful or induced by improper motive.

The parties stipulated to the admission into evidence of several medical and therapist reports as Exhibit J-1. They are: a report by L.C.S.W. Marianne Perzel, dated November 17, 2002; a psychiatric report by Morris Reby, M.D., dated February 14, 2003; a psychiatric report by Robert Dengrove, M.D., dated April 25, 2003; and a psychiatric report by David Scasta, M.D., dated February 24, 2004.

Ms. Marianne Perzel, L.C.S.W., began seeing petitioner for individual therapy on April 4, 2001. Treatment stopped in May 2001, but resumed in February 2002. Ms. Perzel noted in her report that petitioner presented with stress and anxiety over how she perceived she was being treated by administrative personnel within her school district. Petitioner told her therapist that each day she felt like she was going into unfriendly, enemy territory. Petitioner developed symptoms consistent with depression, including difficulty sleeping, difficulty focusing on most tasks, loss of interest, hopelessness, and generalized unhappiness. Her self-esteem was damaged and her self-confidence in her ability to teach was deteriorating.

Ms. Perzel reported that when petitioner re-entered therapy in February 2002, it was clear that her depression and anxiety had become more severe. She experienced migraine headaches almost daily and spend some part of each day crying and feeling out of control. It was clear to the therapist that petitioner was suffering psychologically from her decision to continue working in an environment she viewed as hostile and unsupportive. After petitioner was notified by the school district that her yearly increment was being withheld for the next school year, it was apparent to Ms. Perzel

that petitioner would be physically and emotionally unable to return to work in September 2002.

Ms. Perzel noted that petitioner did not have a history of psychiatric disturbance and had never previously had therapy or mental health treatment of any kind. Petitioner was referred to a psychiatrist to assess her suitability for medication, and she was put on an antidepressant. Ms. Perzel thought that a diagnosis of depression, stress and post-traumatic stress was apt, and attributed petitioner's condition to a hostile work environment.

Morris Reby, M.D., conducted a psychiatric examination of petitioner on February 10, 2003. Petitioner told him that she believed the district was trying to get the older teachers out and had started giving her the worst students in the last two years. She also mentioned that special education children were included in her regular education classes and the special education teacher was undermining her in the classroom. Petitioner complained that the vice principal did not deal with disciplinary issues she brought to his attention.

Dr. Reby found petitioner to be a generally passive individual who could at times be assertive. He felt she had experienced trauma, with anxiety and depression, based upon her symptoms of flashbacks, difficulty concentrating and sleeping, withdrawing from society and not enjoying life, and feelings of guilt, inferiority, and insecurity. It should be noted that Dr. Reby was also of the impression that petitioner's passive dependent personality made her hypersensitive to criticism and the aggressive classroom environment.

Dr. Robert Dengrove saw petitioner on a regular basis after first evaluating her on September 6, 2002. In his report of April 25, 2003, Dr. Dengrove identified the various medical reports and records he reviewed and discussed the history he obtained from petitioner. After describing the mental state examination, Dr. Dengrove summarized his findings:

Mrs. Erika Hogan is a 57 year old teacher for the twelfth grade in English and German at Point Pleasant High School who developed injury during the course of her 18 year employment, especially during the last two years of this employment by the Point Pleasant Board of Education. During the course of her last two years of teaching, she felt under increased pressure as a result of her exposure to a hostile work environment which she believed issued from her school administrators' actions. This pressure arose as a result of harassment over her request for books and the demand for her to do double the work, over the preferential treatment of the inclusion class teacher's aide, over the lack of support given her in the classroom, over the increasingly critical evaluations of her performance as a teacher, over the leaking of personal information to feed rumor and innuendo to question her competency as a teacher; all of which has been described above. The increased pressure and stress led Mrs. Hogan to enter into counseling from March to June of 2001, and again from February or March of 2002 to the present with Ms. Perzel on a weekly basis; and to seek psychiatric treatment, initially with Dr. O'Neil from 6/17/02 through the end of August 2002, and, subsequently with Dr. Dengrove from 9/6/02 to the present. In order to treat those conditions which resulted from this stress, she is currently taking the antidepressant, Paxil, and the minor tranquilizer, Xanax. As a result of this medical condition, she was unable to resume teaching this past September, and remains unable to do so at the present time and for the foreseeable future because of this continuing mental condition.

At the time of my evaluation, Mrs. Hogan both experiences and exhibits the diagnostic criteria for a Major Depressive Disorder, single episode, in partial remission but still of moderate severity (DSMIV-296.25; as noted above, she scored a 20 on a Beck Depression Inventory which is suggestive of a clinical depression of moderate severity); Post Traumatic Stress Disorder (DSMIV-309.81) following exposure to traumatic events involving a threat to physical integrity of self which is persistently re-experienced and coupled with persistent avoidance of stimuli associated with the trauma, numbing of general responsiveness, and persistent symptoms of increased arousal; Panic Disorder with agoraphobia (DSMIV-300.21); and a stress-related physiological response exacerbating a Headache Disorder. These conditions developed as a result of, in all reasonable medical probability, the trauma sustained as a result of her occupational exposure to a hostile work environment during the course of her last two years as a teacher for the Point Pleasant Board of Education. These diagnoses are indicated by the subjective complaints listed

> above and by the objective signs noted in the Mental State Examination and other examinations.
>
> It is my opinion that Mrs. Hogan remains unable to resume her teaching duties at the present time and for the foreseeable future due to those medical conditions described above.

Respondent's expert, Dr. David Scasta, evaluated petitioner psychiatrically on February 24, 2004. He noted in his report that Dr. Dengrove had called him about a week earlier to inform him that petitioner was quite distressed about having to undergo the evaluation and to advocate a gentle approach. Petitioner was very tearful when she came to the evaluation and she complained of unremitting panic attacks, expressing the fear that she would have another if she began to discuss her experience with the School Board. She refused to talk directly about the history of her symptoms, and attributed all of her emotional problems to her treatment at school.

When asked to describe her then current symptoms, petitioner told Dr. Scasta that she cannot go near a school or classroom without having a severe panic attack. She had panic attacks at home and away from home, and she complained of violent headaches so severe she must go into a darkened room. She also often found herself crying. Petitioner expressed that she had been made to look stupid by being given idiot lesson plans to complete. She stated that students were told to harass her in the classroom. When asked why students would be told to do this, petitioner stated that the administration wanted to get rid of the German program and there was a preferred teacher the administration wanted to keep. Petitioner felt the administration's efforts were intentional and malicious.

For his evaluation, Dr. Scasta reviewed 223 pages of records, including the therapist and psychiatrists' reports described above. These records also included the petitioner's classroom observation reports and her responses from 1984 until she last worked in 2002, and Dr. Scasta reported on their contents in some detail. Significantly, Dr. Scasta wrote that he carefully surveyed the records for any indication of an event that would meet the criteria for a Post Traumatic Stress Disorder and found none. To the point, he observed that an unfavorable review from an employer and a subsequent

failure to renew a teaching contract would not even remotely approach the level of trauma severity that would be sufficient to precipitate a Post Traumatic Stress Disorder. Dr. Scasta noted that he had become accustomed to social workers, in particular, diagnosing any event which severely upsets an individual as Post Traumatic Stress Disorder, when the diagnosis actually applies to horrific traumas generally entailing the risk of death, such as earthquakes, gunshot wounds, and other such events.

Dr. Scasta acknowledged that his diagnosis argument was largely academic. Petitioner had exhibited declining performance as a teacher and she had increasing difficulty controlling her classes. When she had difficulty she was evaluated more frequently by a number of different administrators and they all raised the same issues concerning classroom control. It was not clear to Dr. Scasta from a psychiatric standpoint whether petitioner was perhaps developing a Major Depressive Disorder at the time that was impairing her ability to be motivated to stay focused on discipline in the classroom. He opined that it was more likely that petitioner had difficulty adapting to new educational systemic structures and, after years of teaching, found it difficult to have the energy to continue to fight the students to maintain control of the classroom. As petitioner came under increasing criticism from her employer, she developed an Adjustment Disorder with Depressed and Anxious Mood which quickly escalated into a full Major Depressive Disorder and a very severe Panic Disorder.

It was Dr. Scasta's expert opinion that petitioner's current symptoms appeared to be directly due to her difficulties that she had as a teacher. He found no evidence of any other major stressors in petitioner's life that would have contributed to her symptoms. With petitioner apparently having no prior history of Major Depression, it appeared to Dr. Scasta that her depression was work related. Although he disagreed with the specific diagnoses of Dr. Dengrove and Ms. Perzel, Dr. Scasta noted that petitioner seemed to benefit from seeing these professionals, and he recommended that petitioner continue in psychiatric treatment.

N.J.S.A 18A:30-2.1, "Payment of sick leave for service connected disability," provides in part:

> a. Whenever any employee, entitled to sick leave under this chapter, is absent from his post of duty as a result of a personal injury caused by an accident arising out of and in the course of his employment, his employer shall pay to such employee the full salary or wages for the period of such absence for up to one calendar year without having such absence charged to the annual sick leave or the accumulated sick leave provided in N.J.S. 18A:30-2 and 18A:30-3. Salary or wage payments provided in this section shall be made for absence during the waiting period and during the period the employee received or was eligible to receive a temporary disability benefit under chapter 15 of Title 34, Labor and Workmen's Compensation, of the Revised Statutes. Any amount of salary or wages paid or payable to the employee pursuant to this section shall be reduced by the amount of any workmen's compensation award made for temporary disability.

Petitioner contends that she has a psychiatric disability that arose out of and in the course of her employment. She asserts that such a disability is recognized as compensable under the Workers' Compensation Act. Thus, petitioner seeks her full salary and benefits for the entire 2002-2003 school year without loss of sick leave, arguing that her situation falls within the remedial scope and contemplation of N.J.S.A. 18A:30-2.1.

Respondent Board agrees that petitioner suffers from a major depressive disorder and that she is totally disabled from the performance of her teaching duties. While recognizing that a solely psychiatric injury could be compensable under the Workers' Compensation Act, respondent questions whether petitioner's claim is cognizable under the Educational Sick Leave statute when there has been no accompanying physical trauma. Respondent further asserts that even if petitioner's claim is cognizable under N.J.S.A. 18A:30-2.1, it still must be determined whether petitioner's injury would be compensable under the Workers' Compensation Act. It is respondent's position that an employee's psychiatric disability triggered by legitimate criticism cannot be accepted as a basis for compensation.

In Magaw v. Middletown Board of Education, 323 N.J. Super. 1 (App. Div. 1999), the court considered the Board's appeal from a Workers' Compensation judge's decision that a physical education teacher's tonsil cancer was caused by secondhand smoke at work and was therefore a compensable occupational disease, pursuant to N.J.S.A. 34:15-30 and 34:15-31. The Board also appealed the compensation judge's decision that it would have to reimburse the employee for his sick leave used during his disability, pursuant to N.J.S.A. 18A:30-2.1. The court affirmed the compensability decision, but reversed and vacated the sick time directive on the ground that the judge of compensation had exceeded his jurisdiction when he directed the Board to reinstate sick leave.

Regarding compensability under the Workers' Compensation Act, the Magaw court observed that N.J.S.A. 34:15-31 defines and limits compensable occupational diseases which arise out of an in the course of employment to those "which are due in a material degree to causes and conditions which are or were characteristic of or peculiar to a particular . . . place of employment." Thus, a petitioner must "link his or her disease to causes arising out of the workplace which are peculiar to petitioner's place of employment." Magaw, supra, at 13. Noting that "Magaw's exposure at his place of employment to a chain smoker compared with his efforts to minimize all other exposure, rendered smoke exposure at his place of employment peculiar or characteristic," the court found that the compensation judge's determination that Magaw established a nexus between his disease and place of employment was based on sufficient evidence present in the record, including objective medical evidence. Id. at 13-15.

As to the compensation judge's sick time directive, the court in Magaw noted that it was not clear what statutory authority the compensation judge believed he was applying. Analyzing the Workers' Compensation Act and the School Laws, the court recognized that while the Commissioner of Education will defer to a judge of compensation's temporary disability determination, it is the Commissioner who usually decides whether and how the sick leave section, N.J.S.A. 18A:30-2.1, applies. Id. at 17. "Accordingly, given what appears to be a relatively comprehensive statutory

delegation to the Commissioner of Education, N.J.S.A. 18A:30-1 to -8, and an absence of any express authority in the Worker's Compensation Act's temporary disability provision, N.J.S.A. 34:15-12(a), we believe that the Legislature intended that the Commissioner, rather than a judge of compensation, decide whether Magaw's sick leave should be reinstated. Id. at 17-18.

N.J.S.A. 18A:30-2.1 is meant to complement workers' compensation benefits for a strictly limited time period, ensuring that school employees receive full salary during temporary disability for up to one year. Significantly, the court observed in Magaw that the question of whether N.J.S.A. 18A:30-2.1 applies only to "accidents" or whether it also applies to compensable occupational diseases appears not to have been decided. Id. at 17. However, some guidance on this question may be found in Theodore v. Dover Board of Education, 183 N.J. Super. 407 (App. Div. 1982), where the court addressed the meaning of the phrase, "accident arising out of or in the course of his employment," as set forth in N.J.S.A 18A:30-2.1, in the context of a school district custodian who reinjured his back attempting to replace a light bulb. The court was persuaded that the phrase as used in the school law was intended to have precisely the same meaning as it does in the context of the Workers' Compensation Act:

> This is made clear by the Statement accompanying the 1967 amendment of N.J.S.A 18A:30-2.1, which notes that its purpose is "to provide leave of absence with pay in cases of injuries or illness arising from employment and subject to the Workman's Compensation Act." The pertinent provision of the Workers' Compensation Act, N.J.S.A. 34:15-7, provides for benefits to an employee for injuries or death sustained "by accident arising out of and in the course of employment," the same formulation as is used in N.J.S.A 18A:30-2.1. In the workers' compensation context, except in the so-called heart cases, the term "accident" has traditionally been construed to include all work-related episodes and events resulting in injury, and indeed all unexpected injuries, whether or not unusual strain or exertion was involved and whether or not there was a direct impact. [Citations omitted.] Thus, there can be no question that a compensable accident was involved in the workers' compensation sense when plaintiff reinjured his back attempting to replace a light bulb. Since it was a compensable accident in the workers' compensation sense, we are satisfied

> that it was also an accident within the remedial scope and contemplation of N.J.S.A 18A:30-2.1.
> Theodore, supra, at 415.

If one accepts that the purpose of N.J.S.A 18A:30-2.1 is to provide leave of absence with pay in cases of injuries or illness arising from employment and subject to the Workman's Compensation Act, then it follows from a broad reading of Theodore that compensable occupational diseases should be within the remedial scope and contemplation of N.J.S.A. 18A:30-2.1.. In any event, New Jersey courts have recognized for many years that psychiatric disability apart from physical disability may be an independent compensable workers' compensation claim. Saunderlin v. E.I. DuPont Co. 102 N.J. 402, 406-407 (1986). So, accepting that N.J.S.A. 18A:30-2.1 does apply to a purely psychiatric claim, the question to be resolved in the present matter is whether petitioner's psychiatric disability actually would be compensable under the Workers' Compensation Act. As noted above, an Order Approving Settlement with Dismissal was entered on petitioner's related Workers' Compensation claim, so there is no compensation judge's disability determination that may garner deference.

Emotional injuries caused by gradual job-related mental stress can be compensable under the appropriate circumstances. In order for such an injury to be compensable, a claimant must prove the existence of objective evidence of job stress that when viewed realistically establishes working conditions sufficiently stressful to contribute to the development of a mental disorder. Although objective evidence is required, an employee's subjective reaction is not to be disregarded. Goyden v. State Judiciary, 256 N.J. Super. 438, 442 (App. Div. 1991), aff'd. o.b., 128 N.J. 54, (1992), citing Williams v. Western Electric Company, 178 N.J. Super. 571 (App. Div. 1981).

In Goyden, the court considered the employer's appeal from a decision by a judge of compensation which held that Goyden was totally disabled because of a chronic and severe depression attributable to his work as supervisor of court records. The employer argued that the determination that petitioner's employment was objectively stressful and precipitated his mental illness was unsupported. The court noted that under Williams, supra, for a worker's mental condition to be compensable,

the working conditions must be stressful, viewed objectively, and the believable evidence must support a finding that the worker reacted to them as stressful. In addition, for a present-day claimant to succeed, the objectively stressful working conditions must be "peculiar" to the particular work place, and there must be objective evidence supporting a medical opinion of the resulting psychiatric disability, in addition to the "bare statement of the patient." Goyden, supra, at 445-6.

Based upon extensive analysis of the record and review of the compensation judge's fact finding, the court in Goyden reversed the determination that the employee was disabled because of a chronic and severe depression caused by his work. The court found the psychiatric testimony upon which the compensation judge relied, as well as the judge's findings concerning it, materially at odds with the record. Goyden, supra, at 450. From its careful study of the record, the court was persuaded that the underlying condition from which Goyden suffered, and which created his stress on the job, was his compulsive personality. This condition stemmed from his childhood and tied his self-esteem to his job. Goyden's retirement decision, combined with his personality, triggered his depression, and would have done so regardless of "peculiar" workplace conditions. Absent evidence of "peculiar" conditions that would be stressful to those without such a predisposition, compensability would be precluded. Id. at 458-9.

Particularly germane to the issue in the present matter is the discussion in the court's Goyden opinion concerning the import of a management evaluation. While the evaluation noted Goyden's sound knowledge of duties, thorough and timely completion of assignments, and other positive attributes, it also suggested his interpersonal skills with employees needed improvement and it asserted that he at times failed to recognize authority. Goyden characterized the evaluation as "vindictive" and he identified it as triggering his depression. Id. at 448-50. Credible testimony in the record supported the assertions that Goyden had trouble with authority and that subordinates had difficulty communicating with him. Id. at 450. The court explained the significant legal principle applicable to these facts:

> That Goyden had bypassed Fortson, and that there were complaints from subordinates is not disputed in the record. The State argues that an employee's disability claim cannot be triggered by legitimate criticism in an evaluation. We agree. Compensability based on stress from merited criticism is not favored. See State Accident Ins. Fund Corp. v. Anderson, 94 Or. App. 11, 13-14, 764 P.2d 924, 925 (1988) (merited discipline of policeman objectively stressful "with hesitancy" accepted as basis for compensation). This ruling of the Oregon Supreme Court was based on prior interpretation of statute. [Footnote omitted].
>
> There is no similar statutory interpretation problem as to the New Jersey statute. Merited criticism cannot fairly be considered to be a "cause . . . and condition . . . characteristic of or peculiar to a particular trade, occupation, process or place of employment." N.J.S.A. 34:15-31. Merited criticism is common to all occupations and places of employment.
> [Goyden, supra, at 450-1].

Returning to the present matter, it is undisputed that petitioner's illness includes a major depressive disorder and a severe panic disorder. As a consequence of her psychiatric illness she is totally disabled from the performance of her teaching duties. The written therapist and psychiatrists' opinions presented by the parties are substantially in accord that petitioner did not have a history of psychiatric disturbance prior to 2000. Based upon these reports, which identify no other source of major stressors in petitioner's life, I **FIND** that petitioner's subjective perception of the stresses in her work environment was the causal trigger for her psychiatric injury.

It was petitioner's subjective perception that she was under increased pressure in the classroom from exposure to a hostile work environment created by the school administrators' actions. The reality of this perception was not corroborated by objective proofs; as noted above, petitioner did not establish the existence of a hostile work environment. However, it is also clear that petitioner was under pressure from actual stresses in her work environment that have been established by credible evidence. These included the well-founded, consistent criticisms of her classroom management and lesson organization set forth in the observation and annual reports, the lack of

improvement and consequent need for more frequent classroom observations, and the decision ultimately to withhold her increment. I so **FIND**.

I **FIND** that when petitioner's actual job stresses arising from appropriate evaluations of her performance are viewed realistically, they do establish working conditions sufficiently stressful to contribute to the development of a mental disorder. As discussed in Goyden, supra, at 442, emotional injuries caused by gradual job-related mental stress can be compensable under the appropriate circumstances. However, I **CONCLUDE** that the significant limitation on compensability discussed in Goyden, supra, at 450-1, applies here. Petitioner's entitlement to workers' compensation disability cannot be triggered by legitimate criticism in an evaluation. This is so because merited criticism is common to all occupations and places of employment and cannot fairly be considered to be a cause and condition characteristic of or peculiar to a particular occupation or place of employment, as required by N.J.S.A. 34:15-31.

In Cairns v. City of East Orange, 267 N.J. Super. 395 (App. Div. 1993), the court considered the question of compensability under the Workers' Compensation Act for psychiatric disability resulting from receipt of a notice of layoff. The Supervising Judge of Compensation found that receipt of the layoff notice was the "causal triggering mechanism for [petitioner]'s medical problem and disability." Id. at 399. Nevertheless, he dismissed the claim petition on the merits, concluding that layoff notices are inherent to employment and the claimant's psychiatric injuries could not be regarded as "work related" or "arising out of employment." The court affirmed the dismissal, relying in part on the earlier Goyden opinion, and held that receipt of a layoff notice is neither peculiar to the employment, nor essentially related to the work or nature of the work. Id. at 401. Rather, layoff decisions and notices related to terminations are common to all employment. The court further explained the underlying policy considerations for its interpretation of "arising out of employment:"

> We recognize that drastic personnel action may in certain circumstances result in adverse mental and even physical consequences. Unfortunately, it is not uncommon for

> businesses, even large enterprises, to cut back their workforce or to close their doors and displace an entire workforce. The resulting disability to a severed employee in some cases may be immediate, while in other instances it may occur slowly and progressively depending on personal factors such as inability of the layed-off worker to obtain work. It would be unusual for there not to be some emotional response by an employee to drastic personnel action.
>
> Nonetheless, in the absence of evidence of a clear legislative intent to require payment of workers' compensation benefits for disability caused by varying personalized responses of employees to bona fide personnel decisions that alter an employee's work status, we are constrained to conclude that the burden of providing compensation to such employees may not be imposed upon an employer. Even where instances of such harm may be predictable, the stress or trauma caused by such personnel decisions is an ordinary part of life and is not so peculiar to the specific employment as to be deemed to arise out of the employment.
> [Cairns, supra, at 401].

To the extent petitioner's psychiatric disability resulted from her receipt of notice of her increment being withheld, the foregoing policy considerations underlying the court's interpretation of "arising out of employment" apply. The increment withholding was a bona fide personnel decision altering petitioner's work status. Thus, petitioner's psychiatric injury caused by her personalized response to the bona fide personnel decision cannot be regarded as arising out of employment. For this reason and the reasons above regarding merited criticism, petitioner's psychiatric disability is not compensable under the Workers' Compensation Act. As a consequence, petitioner is not entitled under N.J.S.A. 18A:30-2.1 to full salary and benefits without loss of sick leave for the entire 2002-2003 school year. I so **CONCLUDE**.

Based upon the foregoing, the Board's determination to withhold petitioner's increment for the 2002-2003 school year, pursuant to N.J.S.A 18A:29-14, is **AFFIRMED** and petitioner's requested relief is **DENIED**. Further, the Board's determination to deny petitioner's request for her full salary and benefits for the entire 2002-2003 school year without loss of sick leave, pursuant to N.J.S.A. 18A:30-2.1, is **AFFIRMED** and the requested relief is **DENIED**.

Therefore, the Petitions of Appeal are **DISMISSED**. I so **ORDER**.

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

This recommended decision may be adopted, modified or rejected by the **COMMISSIONER OF THE DEPARTMENT OF EDUCATION,** who by law is authorized to make a 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.

August 4, 2006

DATE

Joseph F Fidler

JOSEPH F. FIDLER, ALJ

E-mail Receipt of Initial Decision Confirmed by the Department of Education on:

8-7-06

DATE

Mailed to Parties:

AUG 9 2006

DATE

DIRECTOR AND
CHIEF ADMINISTRATIVE LAW JUDGE

OFFICE OF ADMINISTRATIVE LAW

/lam

EXHIBITS

Joint Exhibits:

J-1 Medical and Therapeutic Reports and Workers' Compensation Order Approving Settlement

For Petitioner:

P-1 March 30, 1999, Observation Report of Mr. Ierley
P-2 June 14, 1999, Annual Performance Report
P-3 June 22, 2000, Annual Performance Report
P-4 October 20, 2000, Observation Report of Dr. Staryak
P-5 February 27, 2001, Observation Report of Dr. Staryak
P-6 March 1, 2001, Letter from Dr. Staryak to petitioner
P-7 March 8, 2001, Memo to petitioner from Dr. Staryak
P-8 March 12, 2001, Observation Report by Vice Principal Rocco
P-9 March 13, 2001, Letter to Dr. Staryak from petitioner
P-10 April 26, 2001, Observation Report by Ms. Rocco
P-11 2000-01 Annual Performance Report, dated April 9, 2001
P-12 October 17, 2001, Observation Report by Dr. Staryak
P-13 November 2, 2001, Memo from Dr. Staryak to petitioner
P-14 November 12, 2001, Observation Report by Vice Principal Rocco
P-15 December 13, 2001, Observation Report by Vice Principal Baranowski
P-16 January 8, 2002, Observation Report by Vice Principal Genco
P-17 February 6, 2002, Observation Report by Assist. Superintendent Leibfried
P-18 May 29, 2002, Observation Report by Dr. Staryak
P-19 June 10, 2002, Response of petitioner to Observation Report
P-20 2001-02 Annual Performance Report, dated March 11, 2002
P-21 Salary Notification
P-22 April 15, 1992, Notice to petitioner from Board

P-23 Observation Reports: March 18, 1996, by Principal Blake; March 18, 1996, by Mr. Swanson; March 19, 1996, by Mr. Swanson; March 20, 1996, by Principal Blake; March 20, 1996, by Vice Principal Swanson; May 9, 1996, by Mr. Brennan

P-24 April 15, 2002, letter from petitioner to Ms. Rocco

For Respondent:

R-1 June 16, 1995, Observation Report by Mr. Ierley

R-2 March 29, 1996, Observation Report by Mr. Ierley

R-3 June 18, 1996, Annual Performance Report for 1995-1996

R-4 May 8, 1996, Observation Report by Mr. Blake

R-5 June 11, 1997, Annual Professional Report for 1996-1997

R-6 June 4, 1996, Observation Report by Mr. Swanson

R-7 February 19, 1997, Observation Report by Mr. Ierley

R-8 April 28, 1998, Observation Report by Mr. Ierley

R-9 June 15, 1998, Annual Performance Report for 1997-1998

R-10 Documents and photos regarding incident of March 20, 2002, with petitioner's letter of April 15, 2002

R-11 Observation Report dated October 24, 1994, by R. Dennis Swanson

R-12 Rice notice April 23, 2002, regarding proposed increment-withholding

R-13 Professional Improvement Plan dated June 1995

R-14 Observation Report dated December 3, 1984, by Mr. Leibfried

WITNESSES

For Petitioner:

Robert Ciliento
Dr. John Staryak
Erika Hogan

For Respondent:

Edward Leibfried
Linda Rocco
Dr. John Staryak

316-06

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

SYNOPSIS

Petitioner alleged that the respondent Board failed to adequately protect her from harassment by other students following a sexual assault perpetrated by another Plainfield High student that occurred off school premises, and sought relief that included, *inter alia*: an increase in the number of hours of home instruction provided to petitioner; placement in another school district in Union County beginning in September 2006; changing petitioner's absences following the incident from "unexcused" to "excused"; removal of her attacker from the school for the remainder of the 2005-2006 academic year; and implementation by the district of instructional education for students and staff on the issues of sexual harassment. Respondent filed motion for summary decision.

The ALJ found, *inter alia,* that: petitioner's request for placement in another district is moot because petitioner will no longer be living in New Jersey as of September 2006; there is no legal basis that might justify ordering the District to implement an educational program on sexual harassment; removal of the attacker to an alternate placement is not presently necessary as T.W. will not be attending the same school next year; and the Board must revise its attendance records to reflect that T.W. was not considered to be "absent" during the time she was receiving home instruction during the 2005-2006 school year. The ALJ granted respondent's motion for summary decision and dismissed the petition, but ordered that the Board must revise its attendance records to conform to *N.J.A.C.* 6A:32-8.1.

The Commissioner concurred with the ALJ for the reasons clearly stated in his decision, adopted the Initial Decision of the OAL, 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.

September 12, 2006

OAL DKT. NO. EDU 5442-06
AGENCY DKT. NO. 159-5/06

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

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

Upon review, the Commissioner concurs with the Administrative Law Judge that the Board must revise its attendance records to reflect that T.W. was not considered absent during the period she was receiving home instruction and that – in all other respects – summary decision dismissing this matter as moot is appropriately granted to the Board.

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

IT IS SO ORDERED.*

Lucille E Davy

ACTING COMMISSIONER OF EDUCATION

Date of Decision: 9/12/06
Date of Mailing: 9/13/06

* This decision may be appealed to the State Board of Education pursuant to *N.J.S.A.* 18A:6-27 *et seq.* and *N.J.A.C.* 6A:4-1.1 *et seq.*

State of New Jersey
OFFICE OF ADMINISTRATIVE LAW

INITIAL DECISION

OAL DKT. NO. EDU 5442-06

AGENCY DKT. NO. 159-5/06

C.V., ON BEHALF OF HER MINOR CHILD T.W.,

Petitioner,

v.

BOARD OF EDUCATION OF THE CITY OF PLAINFIELD,

Respondent.

Luretha M. Stribling, Esq., for petitioner

Margaret Miller, Esq., for respondent
(Weiner Lesniak, attorneys)

Record Closed: August 8, 2006 Decided: August 15, 2006

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

Statement of the Case

This is an appeal by a female high school student who was sexually assaulted off school premises by a male student. Both the victim and the attacker attend the same high school. Essentially, petitioner T.W. alleges that the Plainfield School District

("Plainfield" or "District") treated her with "deliberate indifference" and failed adequately to protect her from harassment by other students in school. She filed a complaint with the Commissioner of Education ("Commissioner") seeking the following items of relief: (1) that the hours of home instruction which she is currently receiving be increased pending the outcome of the hearing; (2) that she be placed in another school district in Union County, at the expense of Plainfield, when she returns to school in September 2006; (3) that her absences from school since the middle of October 2005 be changed from "unexcused " to "excused;" (4) that her attacker be immediately removed from school for the remainder of the academic year and barred from participation in any sports; (5) that the school district implement instructional education for both students and staff that addresses the issues of sexual harassment.

Presently, the matter comes before the OAL on respondent's motion for summary decision dismissing all of petitioner's claims. During oral argument, petitioner's counsel represented that her client is in the process of moving out of state and will not be attending the District in the upcoming school year. Consequently, views were solicitated from both counsel as to how much of the original relief sought by petitioner has become moot and what issues remain to be tried at an administrative hearing.

Procedural History

On May 1, 2006, C.V. filed a petition on behalf of her daughter T.W., together with an application for emergent relief, with the Commissioner. Respondent Plainfield Board of Education ("Board") filed its written response on May 9, 2006. Subsequently, the Commissioner forwarded the matter to the OAL on May 3, 2006 for hearing as a contested case.

The OAL scheduled oral argument for May 9, 2006 on petitioner's application for emergent relief. Prior to oral argument, the parties entered into a settlement of the emergent relief issue. Under its terms, the Board agreed to provide home instruction of at least two hours per day for the remainder of the 2005-2006 school year; to continue

providing Club Z tutoring services of at least two hours per day, four days per week, for the remainder of the 2005-2006 academic year; to refer T.W. immediately to District child study team for evaluation of her eligibility for special education and related services; and to process petitioner's application for counseling and other services available from the Family Support Service Center[1]. The OAL scheduled the hearing on the underlying merits of this controversy for August 8 and 16, 2006.

Meanwhile, on July 25, 2006, the Board filed its notice for summary decision, supported by the certification of Frank Ingargiola, principal of Plainfield High School. Petitioner filed her opposing papers on August 4, 2006. Instead of commencing the hearing, on August 8, 2006 the OAL held oral argument on the threshold question of whether all issues could be resolved by summary decision. One day later, on August 9, 2006, petitioner's counsel belatedly filed an opposing certification of C.V. Despite the lateness of its submission, the C.V.'s certification has been fully considered deciding this motion.

Findings of Fact

All of the facts necessary for disposition of Board's motion are uncontested. **I FIND** the following facts:

T.W. was a ninth-grade student in the District. At the time of the filing of the petition, T.W. had not been classified by the Plainfield child study team as eligible to receive special education or related services. Most significantly, petitioner's attorney

[1] Notwithstanding the urgency of the situation, the District child study team did not contact the parent to commence the evaluation until July 21, 2006. N.J.A.C. 6A:14-3.4(c) requires a school district to determine eligibility and implement any individual educational program "within 90 calendar days" after parental consent for initial evaluation has been received. Since the parties entered into the settlement agreement on May 9, 2006, the District child study team should have issued its determination of T.W.'s eligibility for special education on or before August 7, 2006. Any request for relief based on the Board's failure to comply with the rules governing special education, however, must be bought as a separate appeal to the Office of Special Education Programs ("OSEP") and may not properly be regarded as part of the present appeal See N.J.A.C. 6A:14-2.7(a)

represented at oral argument that C.V. will soon be moving out of the state and that her daughter T.W. will no longer be enrolled in the District when school reopens in September.

On or about October 21, 2005, C.V. contacted the high school principal, Frank Ingargiola, to advise that her daughter, T.W., had been sexually assaulted by another student, identified as John Doe.[2] C.V. further indicated that she had reported this incident to the Plainfield Police Department."

Ingargiola has no knowledge of exactly when or where the sexual assault is said to have occurred. However, C.V. did advise him that the assault did not occur on school premises, during school hours or while the students where on their way to or from school. C.V.'s certification corroborates that the assault happened "off school premises during October 2005."

Additionally, C.V. complained to Ingargiola on October 21, 2005 that two other students had approached T.W. in the school cafeteria, asking her: "How did you like being molested?" Upon learning of this incident, Ingargiola immediately arranged for these two students to be suspended from school. Again, C.V.'s certification verifies that at least one of the students who made such remark to T.W. was been suspended.

Aside from the foregoing complaints, C.V.'s petition makes no other specific allegations of harassment. In her certification, however, C.V. refers to various times during October and November 2005 when students from Plainfield High School purportedly "called T.W. via cell phones during school hours from Plainfield High School and made fun of her and taunted her regarding the sexual assault." These instances occurred while T.W. was at home. T.W. stopped taking phone calls in December 2005 because of the continual harassment.

[2] John Doe is T.W.'s step-brother. Petitioner's counsel acknowledged that John Doe is the son of C.V.'s husband and is related to T.W. by marriage, but not by blood.

Although T.W. stopped going to school on October 14, 2005, she was not "officially" removed from school until on or about October 28, 2005. At or about that time, C.V. requested that T.W. be provided with home instruction. As per C.V's request, T.W. began receiving home instruction on or about November 8, 2005. Originally, the school provided her with only five hours of home instruction per week.[3] As a result of the settlement agreement reached on May 9, 2006, the frequency of home instruction has been doubled to 10 hours per week. School attendance records reflect that T.W. was a "non-member" during the time she was receiving home instruction and not actually attending classes at school.

C.V. notified Ingargiola that "on April 21, 2006, John Doe was found guilty of first degree sexual assault." However, the District has not received any confirmation of this conviction from John Doe, the Plainfield Police Department or the Superior Court of New Jersey, Family Part. Likewise, the District has not received any notice that any restraining or no-contact orders had been entered against John Doe or that John Doe would be incarcerated or detained as a result of his conviction. When C.V. advised him that John Doe had been found guilty of sexual assault, Ingargiola requested that the district be provided with proof of the adjudication or, at a minimum, some documentation demonstrating that the juvenile matter was heard by the Family Part on April 21, 2006.[4] To date, no such documentation has been provided to the District, nor has the Board received any information from any other source showing that John Doe was in fact found guilty of any criminal misconduct. C.V. sets forth in her certification that John Doe is due for sentencing sometime in August 2006.[5]

---

[3] A non-learning disabled student receiving home instruction due to temporary illness or injury shall be provided with no fewer than five hours of instruction per week. N.J.A.C. 6A:14-4.9(a)(5).

[4] Attached to her opposing papers, petitioner included a copy of a summons ordering T.W. to appear as a witness in a juvenile proceeding to be held at Union County Courthouse in Elizabeth on June 23, 2006.

[5] Court records of juvenile proceedings are kept confidential and safeguarded from public inspection. N.J.S.A. 2A:4A-60 to-62. Once the juvenile charges have been adjudicated, however, the outcome shall, on request, be disclosed to the victim or a member of the victim's immediate family and, on a confidential basis, to the principal of the school where the juvenile is enrolled for use in maintaining, order, safety or discipline in the school or for planning programs relevant to the juvenile's education, moral and social development. N.J.S.A. 2A:4A-60

Conclusions of Law

Based on the foregoing facts and the applicable law, **I CONCLUDE** that the petition should be dismissed, largely on the ground of mootness.

Summary decision is the administrative counterpart to summary judgment in the judicial arena. *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 or certifications, 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. Use of the summary procedure is aimed at the swift uncovering of the merits and either their effective disposition or their advancement toward prompt resolution by trial. Judson v. Peoples Bank & Trust Co. of Wesfield, 17 N.J. 67, 74 (1954). While cautioning that a judge should not weigh the truth of the evidence or resolve factual disputes at this early stage of the proceedings, the Court clarified that 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. Brill v. Guardian Life Ins. Co. of America, 142 N.J. 520, 540 (1995).

An issue becomes "moot" when the decision sought in a matter, when rendered, can have no practical effect on the controversy. .Greenfield v. N.J. Dep't of Corrections, 382 N.J. Super. 254, 257 (App. Div. 2006). Moot or academic appeals are generally dismissed. Caput Mortuum, L.L.C. v. S. & S. Crown Servs. Ltd, 366 N.J. Super. 323, 330 (App. Div. 2004). Thus, a court will not decide a case if the issues are hypothetical, a judgment cannot grant effective relief, or there is no concrete adversity of interest between the parties.

In a case reminiscent of our own, a student who had graduated from high school sought to continue litigation involving the constitutionality of a school regulation governing distribution of pamphlets on school grounds. Oxfeld v. New Jersey State Bd. of Educ., 68 N.J. 301 (1975). Dismissing the appeal for mootness, the New Jersey Supreme Court commented:

> Neither the petitioner-appellant nor any of the other original named petitioners is any longer a student at Columbia High School. They are not now nor have they for some time been subject to the regulation's force. Further, we do not view this case as presenting any issue of great public importance compelling definitive resolution despite mootness. Oxfeld, 68 N.J. at 303.

With respect to T.W.'s request to be placed in another Union County school in September, such relief is no longer necessary. T.W. is moving out of state and will be attending school in different community for the 2006-2007 academic years. Indeed, petitioner's counsel conceded at oral argument that the placement issue is now moot because petitioner will no longer be living in New Jersey.

Furthermore, petitioner has not established a prima facie case that the Plainfield School District tolerated a hostile learning environment or failed to take effective action when a single incident of harassment was brought to its attention. To the contrary, the record demonstrates that the school administration acted swiftly to punish the two students who verbally confronted her in the cafeteria. Accordingly, there is no legal basis that might justify ordering the District to implement an educational program on sexual harassment. In any event, since T.W. is leaving the school district, she can no longer pursue a remedy on behalf of teachers and students who remain. See Oxfeld, supra, where the graduated students were prevented from challenging the validity of school rules that no longer applied to them

Similarly, there is no present need to transfer the attacker to an alternate placement in order to separate him from his victim, now that T.W. will not be attending the same school next year. Fundamental due process requires that John Doe be afforded notice and an opportunity to be heard before taking the drastic step of involuntarily transferring him to an alternative placement or prohibiting him for participation in school-sponsored sports activities. Mathews v. Eldridge, 424 U.S. 319 (1977); Mullane v. Cent. Hanover Bank & Trust Co., 229 U.S. 306 (1950). Having failed to join John Doe as a named party, petitioner cannot obtain any relief against him. See

N.J.A.C. 6A:3-1.2, defining "indispensable party" as a person "without whose inclusion a matter cannot proceed or adequate judgment cannot be entered."

Insofar as petitioner requested an increase in the hours of home instruction from five to ten hours per week, that relief has already been granted as a result of the settlement of the emergent relief issue.

While petitioner alleges that she was marked "absent" from school for the time that she was on home instruction, the Board's official attendance records carried her as a "non-member." During oral argument, Board counsel gave assurances that this designation merely indicates that T.W. was not present in the classroom and that her absence would not be counted against her for attendance or grading purposes. N.J.A.C. 6A:32-8.1, however, mandates that, "No absences will be recorded for a student while on home instruction," providing that such student receives a minimum of five hours per week of home instruction. To avoid any confusion, the Board must revise its attendance records to reflect that T.W. was not considered to be "absent" during the time that she was receiving home instruction.

Lastly, T.W. seeks money damages to compensate her for the emotional distress and embarrassment that she suffered as a result of the harassment to which she was subjected in the school cafeteria. Significantly, the petition filed with the Commissioner made no mention of such relief and the idea seems to have been added later as an afterthought. Therefore, the money-damage issue is well beyond the scope of the pleadings and should be dismissed on that ground alone. Even if the issue were properly raised, the Commissioner does not clearly possess the jurisdiction to grant such a remedy.

At this advanced date in the development of administrative law, there is no constitutional objection to legislative authorization to an administrative agency to award money damages as incidental relief in connection with a subject delegable to it. Basically the question is whether the Legislature intended to confer such power on the agency head. Jackson v. Concord Co., 54 N.J. 113, 126 (1969). Petitioner's counsel is

unable to cite any statute authorizing the Commissioner to award money damages under the circumstances of this case. N.J.S.A. 18A:6-9 confers upon the Commissioner broad power to hear and decide "all controversies and disputes arising under the school laws." Notwithstanding such expansive language, petitioner has not referred to any New Jersey case in which the Commissioner's power was interpreted to extend to an award of money damages to a private party, other than in the limited context of special education, increment withholding or teacher's lost earnings. See, generally, Spivak v. Clark, 97 N.J.A.R.2d (EDU) 270, 1996 N.J. AGEN LEXIS 1190.

Unlike the generalized grant of authority to the Commissioner, the statute conferring power on the Director of the Division on Civil Rights is more specific with respect to money damages. Recently, the Appellate Division construed express language in the LAD, which authorizes a complainant before Division on Civil Rights to recover damages to compensate for emotional distress "to the same extent as is available in common law torts," N.J.S.A. 10:5-17, as permitting an award of $50,000 against a school district that had failed to prevent repeated harassment of a student on account of his perceived sexual orientation. L.W. v. Toms River Reg. Sch. Bd. of Educ., 381 N.J. Super. 465 (App. Div. 2005), certif. granted 186 N.J. 605 (2006). Although the Commissioner and the Division on Civil Rights have concurrent jurisdiction in discrimination cases concerning education, the remedies available in each forum are not necessarily identical. For example, in Balsey v. North Hunterdon Reg. Sch. Dist. Bd. of Educ., 117 N.J. 434 (1990), the New Jersey Supreme Court held that the school laws did not give the Commissioner the right to award counsel fees in a successful education-discrimination proceeding and that the proper forum for such claim was the Division on Civil Rights. It is unclear whether or not higher courts would recognize the Commissioner's legal authority to award money damages.

Given the unsettled nature of the law in this area, it would be improper for the Commissioner to go out of her way to grant relief that T.W. never asked for in the first place. Rather, the preferred course of action is for the Commissioner to defer to the

specialized jurisdiction of the Division on Civil Rights to award money damages in discrimination cases.[6]

Order

It is **ORDERED** that the Board must revise its attendance records to conform to N.J.A.C. 6A:32-8.1.

And further **ORDERED** that summary decision is granted in favor of the Board dismissing the petition in all other respects.

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

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

[6] Parenthetically, it should be noted that T.W. may be out of time to initiate a money damage claim before either administrative agency. Appeals to the Commissioner must be filed "no later than the 90th day from the date of receipt of the notice of a final order, ruling or other action by the district board of education, individual party or agency, which is the subject of the requested contested case hearing." N.J.A.C. 6A:3-1.3(i). Complaints to the Division on Civil Rights must be filed "within 180 days after the alleged act of discrimination." N.J.S.A. 10:5-18.

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.

August 15, 2006
DATE

KEN R. SPRINGER, ALJ

E-mail Receipt of Initial Decision Confirmed by the Department of Education on:

August 15, 2006
DATE

Mailed to Parties:

AUG 16 2006
DATE

DIRECTOR AND
CHIEF ADMINISTRATIVE LAW JUDGE
OFFICE OF ADMINISTRATIVE LAW

nd

318-06

#318-06R

OAL DKT. NO. EDU 3334-06
(EDU 1266-04 ON REMAND)
AGENCY DKT. NO. 11-1/04

M.L. DeM., on behalf of minor child, A.P.,	:	
PETITIONER,	:	
V.	:	COMMISSIONER OF EDUCATION
BOARD OF EDUCATION OF THE TOWNSHIP OF GLEN RIDGE BOROUGH, ESSEX COUNTY,	:	DECISION
RESPONDENT.	:	
	:	

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

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

IT IS SO ORDERED.

Trudie E Davy
ACTING COMMISSIONER OF EDUCATION

Date of Decision: 9/13/06

Date of Mailing: 9/14/06

State of New Jersey
OFFICE OF ADMINISTRATIVE LAW

INITIAL DECISION

SETTLEMENT

OAL DKT. NO.: EDU 3334-06

AGENCY DKT. NO. 11-1/04

M.L. DeM., o/b/o A.P.,

Petitioner,

v.

BOARD OF EDUCATION OF THE TOWNSHIP OF GLEN RIDGE BOROUGH, ESSEX COUNTY,

Respondent.

Alexander Charn, Esq., for petitioner

Anthony P. Sciarillo, Esq., for respondent
(Lindabury, McCormick & Estabrook, attorneys)

Record Closed: July 25, 2006 Decided: August 16, 2006

BEFORE **MUMTAZ BARI-BROWN**, ALJ:

STATEMENT OF THE CASE

On March 14, 2006, the Department of Education, Bureau of Controversies and Disputes transmitted this matter to the Office of Administrative Law for determination as a contested cas pursuant to N.J.S.A. 52:14B-1 to –13 and N.J.S.A. 52:14F-1 to –15.

The parties have agreed to a stipulation of settlement, which is attached and fully incorporated. I have reviewed the record and the settlement terms and I **CONCLUDE:**

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

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

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

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

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

August 16, 2006
DATE

MUMTAZ BARI-BROWN, ALJ

Receipt Acknowledged:

8-23-06
DATE

DEPARTMENT OF EDUCATION

Mailed to Parties:

AUG 25 2006
DATE

DIRECTOR AND CHIEF ADMINISTRATIVE LAW JUDGE
OFFICE OF ADMINISTRATIVE LAW

nd

LINDABURY, McCORMICK & ESTABROOK
A Professional Corporation
53 Cardinal Drive
P.O. Box 2369
Westfield, New Jersey 07091
(908) 233-6800
Attorneys for the Glen Ridge Board of Education

RECEIVED
STATE OF N.J.
OFFICE OF ADMIN. LAW
2006 JUL 25 A 10:46

M.L.D. o/b/o A.P.,	OFFICE OF ADMINISTRATIVE LAW
Petitioner,	AGENCY REF. NO. : 11-1/04
vs.	
GLEN RIDGE BOARD OF EDUCATION, ESSEX COUNTY,	**STIPULATION OF SETTLEMENT**
Respondent.	

This Stipulation of Settlement (the "Stipulation") is entered by and between Mary Lou DeMedici ("DeMedici") and the Glen Ridge Board of Education ("Board") (collectively, the "Parties" and individually, a "Party").

WHEREAS, on or about October 27, 2003, the Board notified DeMedici that A.P. was ineligible to receive a free education in Glen Ridge ("Notice of Ineligibility");

WHEREAS, on or about January 14, 2004, DeMedici filed a Residency Appeal (the "Residency Appeal") with the State of New Jersey Commissioner of Education (the "Commissioner");

WHEREAS, on our about February 11, 2004, the Board filed an Answer to the Residency Appeal and a Counterclaim seeking tuition for the attendance by A.P. in the Glen Ridge Public Schools (the "Counterclaim"); and

WHEREAS, the Parties have settled the Residency Appeal and Counterclaim under the terms and conditions set forth in this Stipulation.

NOW THEREFORE, in consideration of the following terms and conditions, and other good and valuable consideration, the sufficiency of which is hereby acknowledged, the Parties agree as follows:

1. The Effective Date of this Stipulation is the date upon which it is fully executed by the Parties.

2. Upon the occurrence of the Effective Date, DeMedici will dismiss with prejudice the Residency Appeal against the Board, and the Board will dismiss with prejudice the Counterclaim against DeMedici .

3. In consideration of this Stipulation, DeMedici shall pay to the Board the sum of $2,000.00, which has already been paid to the Board and the Board has accepted, and the Parties waive any and all further claims, rights and liabilities asserted in or arising from the Residency Appeal and the Counterclaim, including any and all claims for tuition, education, special education, related services, transportation, therapy, compensatory education, money damages, civil liability, and any other equitable or legal relief which may have accrued up to and including the Effective Date.

4. Nothing in this Stipulation shall constitute any admission or acknowledgment of liability by the Parties.

5. No provision of this Stipulation may be amended except by a written instrument executed by the Parties.

6. Each person signing this Stipulation hereby represents and warrants that he or she has been duly authorized and has the requisite authority to enter into this Stipulation on behalf of the Party on whose behalf they so sign.

7. In executing this Stipulation, the Parties have not relied upon any representation or statement, other than as specifically stated in this Stipulation.

8. The Parties have relied entirely upon their own judgment, beliefs and interest and, where applicable, the advice of their own counsel (for whose expense each shall be solely responsible) and they each have had a reasonable period of time to consider this Stipulation.

9. This Stipulation was the product of negotiations between the Parties and any rule of construction requiring that ambiguities are to be resolved against the drafting party shall not apply in the interpretation of this Stipulation.

10. This Stipulation shall be binding only upon, and only inure to the benefit of, the Parties and their respective successors and assigns.

11. This Stipulation shall be governed and construed in accordance with the laws of the State of New Jersey.

12. If, during the term of this Stipulation, a specific clause of the Stipulation is determined to be illegal or in violation of Federal or State law, the remainder of this Stipulation shall not be affected and shall remain in full force and effect.

13. This Stipulation sets for the entire agreement between the Parties and fully supersedes any and all prior agreements and understandings, written or oral, between the Parties pertaining to the subject matter hereof.

14. The Parties shall execute and deliver all such further instruments and take all such further actions as may be reasonably necessary or appropriate to carry out this Stipulation.

15. This Stipulation may be executed in one or more counterparts, including by facsimile, each of which shall be deemed an original, but all of which together constitute one and the same instrument.

MARY LOU DEMEDICI

By: Mary Lou DeMedici
Mary Lou DeMedici

Dated: July 24, 2006

GLEN RIDGE BOARD OF EDUCATION

By: _____

Dated: July 11, 2006

Glen Ridge Public Schools

BOARD OF EDUCATION

RECEIVED OCT 2 4 2005

B-4 Approve Settlement Agreement

Moved: **Mr. McGovern** Seconded: **Ms. Cusumano**

BE IT RESOLVED, upon the recommendation of the Superintendent, that the Glen Ridge Board of Education approves the Settlement Agreement with Mary Lou DeMedici o/b/o AP for tuition during the period of his out-of-district domicile in the amount of $2,000 payable in two (2) installments: November 1, 2005 and January 1, 2006. The Board agrees to dismiss the claim for tuition against Mrs. DeMedici pending before the Office of Administrative Law.

Agnew	Cusumano	Eisen	McGovern	O'Connor	Raskin	Salvatelli	Ward	Ginsburg
Aye	Aye	Aye	Aye	Aye	Aye	Aye	Aye	Aye

CERTIFICATION

I, Peter Caprio, Business Administrator/Board Secretary to the Board of Education of the Borough of Glen Ridge (the "Board") in the County of Essex, New Jersey, DO HEREBY CERTIFY that the foregoing is a true and exact copy of the resolution duly adopted by the Board at a regular meeting held on October 10, 2005 which meeting was duly called and held in accordance with the Open Public Meetings Act and at which meeting a quorum was present and acting throughout, and aforesaid resolution has not been amended, modified or repealed and remains in full force and effect on and as of the date hereof.

IN WITNESS WHEREOF, I have hereunto set my hand and affixed the official seal of the Board this 11th day of October, 2005.

(SEAL)

Peter Caprio
Business Administrator/Secretary
Board of Education of the
Borough of Glen Ridge

319-06

IN THE MATTER OF THE SUSPENSION :

OF THE TEACHING CERTIFICATE OF :

THOMAS FESOLOWICH, TERA NOVA :

GROUP T/A CHANCELLOR :

ACADEMY II, MORRIS COUNTY. :

:

COMMISSIONER OF EDUCATION

DECISION

SYNOPSIS

Petitioner sought to suspend the instructional certificate of respondent pursuant to *N.J.S.A.* 18A:26-10 for not providing adequate notice of resignation from his position as a physical education teacher at Chancellor Academy II, a private school for the disabled. Respondent contends that petitioner: did not offer him a contract renewal at the time other staff members were renewed; was critical of his work performance in a meeting on May 18 which respondent had requested in order to clarify his work status for the following academic year; and terminated him two days after this hostile meeting by signaling that he should hand over his keys.

The ALJ found, *inter alia*, that: the primary issue in this case is whether the respondent was terminated or left voluntarily; the testimony of the witness for the petitioner was less than straightforward and decisive, and therefore lacking in credibility; the witness for the respondent was credible; and the petitioner failed to sustain the burden of proof in this matter. Accordingly, the ALJ concluded that the petition should be dismissed with prejudice.

Upon a thorough and independent review, the Commissioner concurs with the determination of the ALJ that this matter is appropriately dismissed. In so doing, she emphasizes that the language of the controlling statute is clear and explicit, and requires that both of the requisite conditions for a cause of action to arise under its terms must be met, ie.: a teaching staff member has ceased to perform his duties before the expiration of the term of his employment, **and** the board has not consented to the teaching staff's action. The Commissioner agrees that petitioner has failed to sustain its burden of establishing that respondent is guilty of unprofessional conduct so as to justify the Commissioner's suspension of his teaching certificate for a period not exceeding one year. Accordingly, the Initial Decision of the OAL is adopted, and the petition is 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.

September 14, 2006

OAL DKT. NO. EDU 11608-05
AGENCY DKT NO. 205-8/05

IN THE MATTER OF THE SUSPENSION :
OF THE TEACHING CERTIFICATE OF :
THOMAS FESOLOWICH, TERA NOVA :
GROUP T/A CHANCELLOR :
ACADEMY II, MORRIS COUNTY. :
:

COMMISSIONER OF EDUCATION

DECISION

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

Upon an independent and careful review of the record in this matter, the Commissioner concurs with the determination of the Administrative Law Judge (ALJ) that this matter is appropriately dismissed. In so determining, the Commissioner finds that the language of the controlling statute in this matter, *N.J.S.A.* 18A:26-10, is clear and explicit as to the requisite conditions for a cause of action to arise under its terms, namely, 1) a teaching staff member ceases to perform his duties before the expiration of the term of his employment, **and** 2) the board does not consent to the teaching staff member's action. According due deference to the ALJ credibility determinations,[1] the Commissioner agrees that petitioner has failed to sustain its burden of establishing that Mr. Fesolowich is guilty of unprofessional conduct pursuant to this

[1] 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). The record before the Commissioner provides no cause for modification or rejection in this regard.

provision so as to justify the Commissioner's suspension of his teaching certificate for a period not exceeding one-year.

Accordingly, the recommended Initial Decision is adopted for the reasons clearly stated therein and the instant matter is hereby dismissed.

IT IS SO ORDERED.[2]

Lucille E Davy

ACTING COMMISSIONER OF EDUCATION

Date of Decision: 9/14/06

Date of Mailing: 9/14/06

[2] This decision may be appealed to the State Board of Education pursuant to *N.J.S.A.* 18A:6-27 *et seq.* and *N.J.A.C.* 6A:4-1.1 *et seq.*

State of New Jersey
OFFICE OF ADMINISTRATIVE LAW

INITIAL DECISION
OAL DKT. NO. EDU 11608-05
AGENCY DKT. NO. 205-8/05

IN THE MATTER OF THE SUSPENSION OF THE TEACHING CERTIFICATE OF THOMAS FESOLOWICH, TERA NOVA GROUP T/A CHANCELLOR ACADEMY II, MORRIS COUNTY

Fiona M. Kolvek, Esq., appearing for Petitioner Tera Nova Group t/a Chancellor Academy II (Eveland Law Offices, attorneys)

Stephen N. Dratch, Esq., appearing for Respondent Thomas Fesolowich (Franzblau, Dratch, PC, attorneys)

Record Closed: June 27, 2006 Decided: August 21, 2006

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

STATEMENT OF THE CASE AND PROCEDURAL HISTORY

Petitioner requests that Respondent's teaching certificate be suspended for lack of proper notice of resignation.

The matter was initiated, originally, by letter from Petitioner to the Commissioner dated July 3, 2005. That letter was referred to the Director of the Bureau of Controversies and Disputes who provided information on the procedure to be followed in seeking suspension of a certificate under N.J.S.A. 18A:26-10 as amended by PL 2005, c. 74. As a result of that information, an Order to Show Cause was issued by the Commissioner on July 7, 2005, with instruction that it was to be served by Petitioner on Respondent in order to initiate these proceedings.

Respondent answered by letter dated August 1, 2005. The file was transmitted to the Office of Administrative Law (OAL) on October 7, 2005, 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 21, 2005, I issued a prehearing order. Petitioner filed an application to disqualify counsel of Respondent. That application was denied on March 29, 2006. An order granting Petitioner's request for interlocutory review was entered by the Director of OAL on April 19, 2006, and my order denying the application to disqualify Respondent's attorney was affirmed by the Director on May 3, 2006. Just before the hearing date, Respondent filed an application to dismiss on the grounds that the case should have been prosecuted by a Deputy Attorney General (DAG) since this matter involves the suspension or revocation of a certification. That application to dismiss was decided at the time of hearing and it was denied. The case proceeded to hearing on June 13, 2006, and the record closed on June 27, 2006.

FINDINGS OF FACT

Based on the evidence presented at the hearing as well as on the opportunity to observe the witnesses and assess their credibility, I make the following findings of fact, which are essentially undisputed, in this matter.

1. Petitioner herein is Terranova Group t/a Chapel Hill Academy (Terranova or Petitioner), an approved private school for the disabled.

2. Chance Corporation t/a Chancellor Academy (Chance) is a related corporation. Chance and Terranova are schools originally owned by the Sheridans. Chance opened in 1983 and in or about 1993 Mr. Sheridan, with the help of Thomas Celli, opened a second school Chancellor t/a Chancellor Academy II. The schools were separate entities and separate corporate bodies; however, the Sheridans were owners of both.

3. In 1998, Celli and Diane Somers executed a purchase agreement to become the owners of Terranova. The purchase was ultimately finalized on March 15, 2005.

4. Respondent Thomas Fesolowich holds a teaching certificate issued by New Jersey Department of Education and was employed by Petitioner Terranova from May 2000 to May 2005.[1] Respondent was never disciplined by Petitioner during the term of his employment and prior to May 2005.

5. A meeting occurred on May 18, 2005, between Respondent, Thomas Celli and Diane Somers.

6. A second meeting was planned for May 19, 2005; however, that was canceled by Celli.

7. A meeting took place on May 20, 2005 between Celli and Respondent, Fesolowich.

8. On May 23, 2005, Respondent began work for Chance Corporation.

ANALYSIS AND CONCLUSIONS

The statute under which this case is brought 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. N.J.S.A. 18A:26-10.

In this case, there is no question that Fesolowich ceased to perform his duties before the expiration of the term of his employment; the term of the employment agreement dated May 6, 2004 was from September 1, 2004 to June 30, 2005. Fesolowich did not return to Chancellor Academy II after Friday, May 20, 2004; his last day of teaching, based on the testimony of both Fesolowich and Celli was May 19, 2004.

The issue in this case, however, is whether Fesolowich was terminated or left voluntarily.

The witness for Petitioner was Thomas Celli, the co-director and one of the owners of Terranova. Celli testified that at the end of each school year a new contract for employees for the next year is extended. At that time, there is a meeting between the staff member and the administration to talk about the contract, the responsibilities, the performance of the last year and the expectations for the coming year.

Normally, the contracts are given out between May 5 and 10 at the end of the school day. During the year in question, Fesolowich was coaching for his child and, consequently, did not remain on the premises after the school day so that the administration was unable to get the contract to him before May 18. On May 18, during the meeting between Fesolowich and the administration, according to Celli, Fesolowich

[1] Respondent was also employed by the Terranova between September 1994 to June 1996.

became very aggressive; he was not given copy of the contract for the coming year because he was so aggressive and seemed to be having a bad day. As a result, the meeting of May 18 was rescheduled to the following day, May 19. However, Celli was running late, other office issues had popped up, and he, Celli; postponed the meeting to May 20. According to Celli's testimony, on May 20 when he arrived on the school premises, his co-director, Diane Somers, said, "Tom just quit."

Celli specifically testified that he never told Fesolowich that he was fired. Fesolowich, at their encounter, gave Celli an envelope which had a purported resignation letter in it. According to Celli, Respondent left and Celli felt he was not returning, although there is a joint exhibit which says that Respondent is giving two weeks notice. On the other hand, with respect to the issue of whether he was terminated or left of his own free will, Fesolowich testified that during May 2005 there had been some discussion about the contract for the following year. He had asked Somers for a meeting on May 18 to discuss the issue and the meeting was set. During that meeting, which took place after school, he, Somers and Celli discussed his performance for the preceding year in which they indicated that the website, for which he was responsible had remained incomplete, as well as several other deficiencies in his performance. Fesolowich testified that he did not see any contract on the table at the May 18 nor was a contract or raise mentioned. He testified that Celli terminated the meeting because he, Celli, did not like Fesolowich's attitude.

Fesolowich further testified that on the morning of May 20, he followed his usual routine which was to travel from Farmingdale, New York, a trip of approximately one and a half hours and arrived at school sometime between 7:15 and 7:30 a.m. He had no intention of meeting with Celli except in the afternoon after school. When he arrived, he found his assistant, Mr. Byrne, leaving the school property and learned that Mr. Byrne had been asked for his keys. Fesolowich interpreted that to mean that Byrne had been fired. He further testified that at this point his own expectations were either that he would be fired or his salary would be decreased. At some point after seeing Mr. Byrne and talking to him, Fesolowich met Celli who apparently beckoned to Fesolowich who interpreted the gesture, in context with what he had been told by Mr. Byrne, to

mean that Celli was asking for his keys and he was being terminated. He further testified, however, that he had already determined to leave his position after the meeting on May 18. In fact, he had composed a letter the evening before and indicated he intended to leave and was given his two weeks notice pursuant to the contract.

Petitioner relies on Fesolowich's employment with Chancellor Academy I, under the auspices of the Sheridans, the former owners of Terranova t/a Chancellor Academy II, commencing on May 23 as evidence of Respondent's intention to leave his position precipitously.

The testimony of Richard Sheridan on this issue is dispositive. Sheridan testified he hired Respondent on May 23, 2005 as a result of Respondent having been terminated from his position with Petitioner. He further testified that they came to terms on the evening of May 22 and that there was no understanding of Fesolowich working for Sheridan at any time before that. I **FIND**, based on the straight forward manner in which he testified, Richard Sheridan to have been a credible witness.[2]

Although there are witnesses who testified on behalf of Respondent with respect to the issue of his record prior to the incident and his employment at Chancellor Academy I after this incident, the issue of how Fesolowich left the position he had with Chancellor Academy II turns primarily on the testimony of the two men, Fesolowich and Celli, making the issue to be resolved one of credibility.

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 re Estate of Perrone, 5 N.J. 514 (1950), commenting that testimony must proceed from the mouth of a credible witness as well as be credible in itself in order to be believed. The testimony must be such as common experience and observation provide as probable in the circumstances.

[2] The issue of credibility is discussed more fully bellow.

In assessing credibility, inferences may be drawn concerning the witness's expression, tone of voice and demeanor, and the witness's interest in the outcome or his motive or bias should be considered. It has been noted that one factor to consider to determine which parties' version of an incident has the "reasonable probability of truth" is that "[t]he interest, motive, bias and prejudices of a witness may effect 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. 1952), cert. denied 10 N.J. 316 (1952). A trier fact may reject testimony because it is lacking in credibility or because it is inconsistent with other testimony or common experience.

In this case, I **FIND** the testimony of Celli to be lacking in credibility for the following reasons. First, Celli testified in terms of details he "believed" were so or, on at least one occasion "I'm not exactly sure, but . . . ."In short, his testimony was less than straightforward and decisive, and I do so **FIND**. In addition, although Celli testified Fesolowich's departure caused disruption, his testimony was non-specific and lacking in details which would have affected credibility.

Celli also testified that Diane Somers told him (Celli) Fesolowich quit. This statement is hearsay, which is admissible in this forum, subject to the residuum rule, which requires some legally competent evidence to support each ultimate finding of fact to provide assurancy of reliability. N.J.A.C. 1:1-15.5(b). In this case, the ultimate fact to be decided is whether Respondent quit; there is, however, nothing more than this hearsay testimony and a statement by Celli that he never told Respondent he was fired.

Celli testified that he was left with the impression upon Fesolowich leaving on May 20, that Fesolowich would not be returning, yet he did nothing to ameliorate the situation nor did he deny that he motioned for and accepted Fesolowich's keys, ultimately the reason on which Fesolowich based his assumption that he had been terminated. Celli also did not present any documentation of Fisolowich's purported actions at the hearing.

Moreover, failure of Petitioner to produce Diane Somers as a witness permits me to draw an adverse inference. Her testimony on the issue of whether Fesolowich quit is essential to determination I must make. I must, therefore, draw the inference that her testimony would not have supported that of Celli.

Based on all of this, I **FIND** petitioner has not sustained the burden of proof, although I am cognizant weaknesses of Respondent's testimony as well.

Fesolowich testified that he expected to be terminated and it seemed to me this expectation could have been the basis for him believing Celli asked for his keys and was terminating him, which may very well have been a misinterpretation on Fesolowich's part. In addition, the undated letter he purportedly wrote to his colleagues on the evening of May 18 speaks about clarifying his reasons for looking but never specifically details the date and manner of his departure. On the other hand, this dated resignation letter clearly states he is giving 2 weeks notice. Based on this record, I **FIND** the parties in equipoise.

In a case such as this one, Petitioner bears the burden of proving the matter at hand; I have already found Petitioner had not sustained the burden. Accordingly I **CONCLUDE** this matter should be dismissed with prejudice.

ORDER

I hereby **ORDER** this matter be and hereby is dismissed with prejudice.

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

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

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

Within thirteen (13) days from the date on which this recommended decision was mailed to the parties, any party may file written exceptions with the **COMMISSIONER OF THE DEPARTMENT OF EDUCATION, 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 21, 2006
DATE

Maria M La Fiandra
MARIA MANCINI LA FIANDRA, ALJ

E-mail Receipt of Initial Decision Confirmed by the Department of Education on:

8-21-06
DATE

Mailed to Parties:
Laura Anders
DIRECTOR AND
CHIEF ADMINISTRATIVE LAW JUDGE

AUG 22 2006
DATE

OFFICE OF ADMINISTRATIVE LAW

jb/da

APPENDIX

Witnesses

Thomas Celli
Richard Sheridan
Ernest Byrne
Thomas Fesolowich

Exhibits

J-1 Respondent's Proposed Stipulation of Facts
The parties agreed to Stipulated Facts 1 through 6.
In addition, they agreed that the documents set forth in J-1 as Stipulations 11-26 were joint exhibits.

P-1 Employment Agreement May 6, 2004
Term: September 1, 2004 to June 30, 2005

P-2 Employment Contract
(Unsigned) September 1, 2005 – June 30, 2006

P-4 Letter – undated from Tom Fesolowich

State of New Jersey

DEPARTMENT OF EDUCATION
PO BOX 500
TRENTON, NJ 08625-0500

JON S. CORZINE
Governor

LUCILLE E. DAVY
Acting Commissioner

September 15, 2006

Gilberto M. Garcia, Esq.
Garcia & Kricko
560 Sylvan Ave., 2nd Floor
Englewood Cliffs, NJ 07632

Kathleen Asher, DAG
NJ Department of Law & Public Safety
Division of Law
Richard J. Hughes Complex
P.O. Box 112
Trenton, NJ 08625-0112

Thomas R. Kobin, Esq.
Chasan, Leyner & Lamparello
300 Harmon Meadow Boulevard
Secaucus, NJ 07094

Dear Parties:

EDUARDO NUNEZ V. NEW JERSEY STATE DEPARTMENT OF EDUCATION, AGENCY DKT. NO. 57-2/02, OAL DKT. NO. EDU 3689-02

We are enclosing a copy of the decision of the Commissioner of Education dated September 14, 2006, in the above-captioned matter. Appeals of Commissioner decisions, other than State Department of Education employee contractual determinations and matters involving the New Jersey State Interscholastic Athletic Association, may be filed with the State Board of Education pursuant to *N.J.A.C. 6A:4-1.1* et seq.

Please note that this office is no longer providing an additional copy of the initial decision to the parties in this case.

Additionally, please note that, pursuant to *N.J.A.C.* 6A:4-1.4(a), the Commissioner's decision is mailed to the parties three days prior to the date it is deemed officially filed. This provides counsel and *pro se* litigants with the decision before it is made public by the Department. Parties and counsel are requested to refrain from making Commissioner decisions public prior to the filing date. Your cooperation is appreciated.

Very truly yours,

M. Kathleen Duncan, Director
Bureau of Controversies and Disputes

MKD/mbo:o/dec ltr/enunez
Enclosure
c: Jones Addo, State Library
Clair Applegate

#323-06

OAL DKT. NO. EDU 7858-05
(EDU 3689-02 ON REMAND)
AGENCY DKT. NO. 57-2/02

EDUARDO NUNEZ,	:	
PETITIONER,	:	
V.	:	COMMISSIONER OF EDUCATION
STATE DEPARTMENT OF EDUCATION,	:	DECISION ON MOTION
RESPONDENT.	:	

A motion by the Union City Board of Education to intervene in the above referenced case was filed with the Commissioner on August 18, 2006. On that date the parties were advised that they would have ten days from receipt of the motion papers to submit any objections they might have to the motion. To date, no objections have been received.

Pursuant to *N.J.A.C.* 6A:3-1.8(b), the motion to intervene must be reviewed in accordance with the standards set forth in the applicable rules of the Office of Administrative Law (OAL), *i.e.*, *N.J.A.C.* 1:1-16.1 to 16.6. The Commissioner finds that those standards have been met.

The movant could be substantially affected by the outcome of the case, and consequently satisfies the standards set forth in *N.J.A.C.* 1:1-16.1 and 16.2. Further, no significant confusion or delay is implicated by the intervention of the movant. *N.J.A.C.* 1:1-16.3. The hearing in this matter has been held and, at this stage of the proceedings, the movant's participation shall be limited to written legal argument by way of a brief and/or exceptions to the Initial Decision.

The motion to intervene is granted with the conditions set forth above.

IT IS SO ORDERED.*

Lucille Edney

ACTING COMMISSIONER OF EDUCATION

Date of Decision: 9/14/06

Date of Mailing: 9/15/06

* This decision may be appealed to the State Board of Education pursuant to *N.J.S.A.* 18A:6-27 *et seq.* and *N.J.A.C.* 6A:4-1.1 *et seq.*

322-06

#322-06

OAL DKT. NO. EDU 8764-05
AGENCY DKT. NO. 261-9/05

HENRY SOLARES,	:	
PETITIONER,	:	
V.	:	COMMISSIONER OF EDUCATION
BOARD OF EDUCATION OF THE CITY OF NEW BRUNSWICK, MIDDLESEX COUNTY,	:	DECISION
RESPONDENT.	:	
	:	

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

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

IT IS SO ORDERED.

Lucille E Davy

ACTING COMMISSIONER OF EDUCATION

Date of Decision: 9/14/06

Date of Mailing: 9/15/06

State of New Jersey
OFFICE OF ADMINISTRATIVE LAW

INITIAL DECISION

SETTLEMENT

OAL DKT. EDU 8764-05

AGENCY DKT. NO. 261-10/05

HENRY SOLARES,

Petitioners,

v.

BOARD OF EDUCATION OF THE CITY OF NEW BRUNSWICK, MIDDLESEX COUNTY,

Respondent.

Benjamin A. Spivack, Esq., for petitioner (Oxfeld Cohen, attorneys)

George F. Hendricks, Esq., for respondent (Hendricks & Hendricks, attorneys)

Record Closed: August 25, 2006 Decided: August 29, 2006

BEFORE **ANA C. VISCOMI,** ALJ:

STATEMENT OF THE CASE AND PROCEDURAL HISTORY

This matter was transmitted to the Office of Administrative Law on November 21, 2005, for determination as a contested case, pursuant to N.J.S.A. 52:14B-1 to -15 and N.J.S.A. 52:14F-1 to -13. It was thereafter assigned to the undersigned

ALJ on December 6, 2005. After a series of status conferences conducted between January 9, 2006 through April 26, 2006, the parties advised the within matter as settled.

On or about July 17, 2006, the undersigned received an executed settlement agreement (J-1). After inquiring regarding whether the respondent Board of Education passed a resolution approving the settlement, counsel submitted correspondence dated August 25, 2006, advising the Board had not passed a resolution approving the settlement, but approved the finance report payment to petitioner and the payment had been made. (R-1)

I have reviewed the record and the terms of settlement (J-1) and respondent's correspondence regarding Board action (R-1), and I **FIND**:

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

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

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

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

This recommended decision may be adopted, modified or rejected by the **COMMISSIONER OF THE DEPARTMENT OF EDUCATION,** who by law is authorized to make a final decision in this matter. If the Commissioner of the

Department of Education does not adopt, modify or reject this decision within forty-five (45) days and unless such time limit is otherwise extended, this recommended decision shall become a final decision in accordance with N.J.S.A. 52:14B-10.

August 29, 2006
DATE

ANA C. VISCOMI, ALJ

Receipt Acknowledged:

8-31-06
DATE

DEPARTMENT OF EDUCATION

Mailed to Parties:

SEP 07 2006
DATE

DIRECTOR AND
CHIEF ADMINISTRATIVE LAW JUDGE

OFFICE OF ADMINISTRATIVE LAW

/mh

HENRY SOLARES, **Appellant,** **v.** **CITY OF NEW BRUNSWICK BOARD OF EDUCATION** **Respondent.**	RECEIVED 2006 JUL 17 A 11:48 **OAL DOCKET NO. EDUOA 08764-2005S** STATE OF NEW JERSEY OFFICE OF ADMIN LAW **SETTLEMENT AGREEMENT**

THE UNDERSIGNED PARTIES TO THE CAPTIONED MATTER AGREE AS FOLLOWS:

1. The City of New Brunswick Board of Education (Board) will pay Mr. Henry Solares the gross amount of $4064.00 minus applicable deductions.

2. Mr. Solares will withdraw his appeal of the above-captioned matter.

3. The monies paid by the Board to Mr. Solares fully disposes of the above-captioned matter.

4. Mr. Solares hereby releases and discharges the Board from any and all claims that he has or may have against the Board, its directors, officers, employees, agent agents, successors and assigns.

John Peters VP

Respondent City of New Brunswick Board of Education
Date: 6-27-06

Appellant Henry Solares
Date:

George Hendricks
Attorney for Respondent
Date: 6-29 06

Benjamin A. Spivack
Attorney for Appellant
Date:

5-1

HENRY SOLARES, Appellant, v. CITY OF NEW BRUNSWICK BOARD OF EDUCATION Respondent.	)	OAL DOCKET NO. EDUOA 08764-2005S SETTLEMENT AGREEMENT

THE UNDERSIGNED PARTIES TO THE CAPTIONED MATTER AGREE AS FOLLOWS:

1. The City of New Brunswick Board of Education (Board) will pay Mr. Henry Solares the gross amount of $4064.00 minus applicable deductions.

2. Mr. Solares will withdraw his appeal of the above-captioned matter.

3. The monies paid by the Board to Mr. Solares fully disposes of the above-captioned matter.

4. Mr. Solares hereby releases and discharges the Board from any and all claims that he has or may have against the Board, its directors, officers, employees, agent agents, successors and assigns.

Respondent City of New Brunswick Board of Education
Date:

Appellant Henry Solares
Date:

George Hendricks
Attorney for Respondent
Date:

Benjamin A. Spivack
Attorney for Appellant
Date: 6/26/06

325-06

#325-06

M.L.P. on behalf of minor child C.L.P.,	:	
PETITIONER,	:	
V.	:	COMMISSIONER OF EDUCATION
BOARD OF EDUCATION OF THE TOWNSHIP OF BLOOMFIELD, ESSEX COUNTY,	:	DECISION
RESPONDENT.	:	

SYNOPSIS

Petitioner filed a *Pro Se* Residency Appeal challenging the Board's residency determination that her child, C.L.P. is not eligible for a free education in the Bloomfield Public Schools. The Board contends that C.L.P. resides with her grandmother in East Orange.

The ALJ found that the petitioner M.L.P. did not appear for the hearing and did not provide any explanation for the nonappearance; therefore petitioner failed to carry the burden of proof that C.L.P. met the requirements to receive a free education within the respondent school district. The ALJ concluded that the petition should be dismissed, and the petitioner assessed tuition for the period of C.L.P.'s ineligible attendance in district schools.

Upon careful and independent review of the record, the Commissioner rejects the Initial Decision of the OAL for the following reasons: respondent does not challenge the fact that petitioner is domiciled in its district; it is well settled that the domicile of a minor child is determined by the domicile of the parent; and – by virtue of M.L.P.'s undisputed domicile in Bloomfield – her child had a right to a free public education in respondent's district. Accordingly, no tuition is due for C.L.P.'s attendance in Bloomfield schools during the 2005-2006 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.

September 19, 2006

OAL DKT. NO. EDU 1420-06
AGENCY DKT. NO. 395-12/05

M.L.P. on behalf of minor child C.L.P.,	:	
PETITIONER,	:	
V.	:	COMMISSIONER OF EDUCATION
BOARD OF EDUCATION OF THE TOWNSHIP OF BLOOMFIELD, ESSEX COUNTY,	:	DECISION
RESPONDENT.	:	

Petitioner, M.L.P., a resident of Bloomfield, initiated this matter when respondent, Bloomfield Board of Education, acted to disenroll her daughter, C.L.P., from its school district. The record and Initial Decision of the Office of Administrative Law (OAL) have been reviewed. No exceptions were received.

The procedural history as described in the Initial Decision is adopted by the Commissioner.[1] In addition, the Commissioner accepts as undisputed the facts set forth in the Initial Decision, which facts were primarily provided by way of respondent's June 30, 2006 certification, and were unopposed by virtue of petitioner's failure to appear at the hearing and failure to respond to respondent's certification.

After careful consideration, the Commissioner rejects the Initial Decision and Order for the following reasons. Respondent does not challenge the fact that petitioner was

[1] The Commissioner notes, however, certain discrepancies in the record. First, while the official OAL hearing notice did set June 21, 2006 as the hearing date for this controversy, correspondence and certification dated June 30, 2006 from the respondent identified June 15, 2006 – presumably incorrectly – as the date that the hearing took place. In addition, in a July 13, 2006, letter from the OAL to the petitioner – in which petitioner was invited to make objections to respondent's tuition proofs – the Administrative Law Judge (ALJ) stated that a hearing notice had been sent to the parties on March 15, 2006. In actuality, the official OAL notice appears to have been disseminated on March 20, 2006.

domiciled in its district; it contends that C.L.P. stayed with her grandmother in East Orange during the school week, and therefore failed to meet the domicile requirement that would entitle her to a free public education in Bloomfield. However, it is well settled that a minor child does not establish his or her own domicile. Rather, the domicile of the child is determined by the domicile of the parent. Although it appears that C.L.P. spent a great deal of time at her grandmother's residence, she nonetheless had a right to a free public education in respondent's district by virtue of the fact that her mother, the petitioner, was domiciled in that district. *See, e.g. J.M. on behalf of minor child S.C. v. Board of Education of the Township of West Orange, Essex County,* OAL Dkt. No. EDU1061-00, Agency Dkt. No. 347-11/99, decided May 24, 2001.

Notwithstanding petitioner's failure to appear at the hearing, the facts that respondent offered established petitioner's domicile in Bloomfield, and there was nothing in the record to cast doubt on petitioner's legal custody of C.L.P. Therefore, C.L.P. must be deemed to have been domiciled in Bloomfield during the 2005-2006 school year and entitled to a free public education there. Accordingly, no tuition is due respondent.

IT IS SO ORDERED.[2]

ACTING COMMISSIONER OF EDUCATION

Date of Decision: 9/19/06

Date of Mailing: 9/20/06

[2] This decision may be appealed to the State Board of Education, pursuant to *N.J.S.A.* 18A:6-27 *et seq.* and *N.J.A.C.* 6A: 4-1.1 *et seq.*

State of New Jersey
OFFICE OF ADMINISTRATIVE LAW

INITIAL DECISION
OAL DKT. NO. EDU 01420-06
AGENCY DKT. NO. 395-12/05

M.L.P, ON BEHALF OF MINOR CHILD C.L.P.,
Petitioner,
v.
BOARD OF EDUCATION OF THE TOWNSHIP OF BLOOMFIELD, ESSEX COUNTY,
Respondent.

M.L.P., petitioner, pro se

Mark A. Wenczel, Esq., for respondent (Gaccione, Pomaco & Malanga, attorneys)

Record Closed: August 4, 2006 Decided: August 10, 2006

BEFORE **LESLIE Z. CELENTANO**, ALJ:

STATEMENT OF THE CASE AND PROCEDURAL HISTORY

Petitioner filed a pro se residency appeal form with the Commissioner of Education on December 29, 2005, challenging a residency determination by the Board of Education of the Township of Bloomfield (respondent) with regard to the minor child,

C.L.P. On January 12, 2006, respondent filed an answer and counterclaim which included a request for tuition reimbursement for the alleged period of ineligible attendance and the immediate disenrollment of C.L.P.

The matter was transmitted to the Office of Administrative Law (OAL) on January 19, 2006, 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 scheduled for June 21, 2006, and notices were mailed to petitioner and to the attorney for the Board. Petitioner did not appear on the hearing date. No message was received in regard to the nonappearance. On June 30, 2006, respondent submitted proofs with regard to its request for tuition reimbursement and disenrollment of C.L.P. On July 13, 2006, correspondence was sent to petitioner advising her that the respondent's proofs had been admitted into evidence and offering her the opportunity to file any objections by July 28, 2006. No submissions were received from respondent and after giving respondent several additional business days to submit any papers, the record was closed on August 4, 2006.

The issues in this matter are whether C.L.P. 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 C.L.P. should be granted.

FACTUAL DISCUSSION

Based upon the papers submitted as of the hearing date and the supplemental submission by respondent, I **FIND** the following **FACTS** which are essentially undisputed:

The Board undertook an investigation of this matter including an observation of the residence of C.L.P.'s grandmother E.W., who resides at 231 N. 19th Street, East Orange, New Jersey. The investigation was conducted over a period of time beginning on September 30, 2005 and continuing over several days in October and November

2005. C.L.P. was seen leaving the residence at 231 N. 19th Street, East Orange, New Jersey in the morning, with her grandmother E.W., and being driven to the Watsessing School in Bloomfield, New Jersey. C.L.P. was also observed being picked up at the Watsessing School by her grandmother and transported to 231 N. 19th Street, East Orange. On no occasion was C.L.P. ever observed being dropped off at any time in the morning by M.L.P. at E.W.'s home.

By letter dated November 18, 2005, the district notified petitioner that a Board meeting had been scheduled to vote upon the disenrollment of C.L.P. from the district schools as she was determined to not be domiciled within the district. The meeting was scheduled for December 20, 2005 at 8:00 p.m. and M.L.P. was in attendance. At that meeting M.L.P. advised the Board that she drops C.L.P. off at her grandmother E.W.'s home at 5:30 a.m. each day, at 231 N. 19th Street, East Orange, and that was why C.L.P. had never been observed leaving the Bloomfield residence to go to school.

The investigation continued with observations of E.W.'s residence over several additional days in January, February, May and June 2006. C.L.P. was again observed leaving the residence at 231 N. 19th Street, East Orange, New Jersey in the morning, and being driven to the Watsessing School by E.W. On no occasion was C.L.P. dropped off in the morning by M.L.P.

On each day of observation the investigator arrived at the East Orange address between 4:15 and 4:30 a.m. and remained until C.L.P. and E.W. left for school at approximately 8:30 each morning. His continued observations were consistent with C.L.P. residing with her grandmother in East Orange, rather than with her mother in Bloomfield, since at least September 30, 2005 when the investigation commenced.

A copy of a Lease and Deposit Agreement provided to the district by M.L.P. indicates that M.L.P. resides at 42 Dodd Street, Bloomfield, New Jersey. The Board investigator spoke with M.L.P.'s landlord who advised that M.L.P. was residing in the one bedroom apartment at that location with another adult.

C.L.P. was enrolled as a first grade student during the 2005-2006 school year and the tuition cost for a first grade student in the Township of Bloomfield during the 2005-2006 school year was $8,824.

DISCUSSION AND CONCLUSION

Attendance at public schools shall be free to any person who meets the requirements set forth in N.J.S.A. 18A:38-1. A child who is domiciled within the school district and satisfies other requirements may attend the public schools free of charge. N.J.S.A. 18A:38-1(a). If the board of education denies admission to the child, the resident may contest that determination before the Commissioner of Education. In the proceeding before the Commissioner of Education, the parent has the burden of proof by a preponderance of the evidence to establish that the child meets the requirements for eligibility. If the evidence does not support the claim, the parent shall be assessed tuition for the student prorated to the time of the student's ineligible attendance within the district. Ibid. In the within matter, M.L.P. did not appear for the hearing and did not provide any explanation for the nonappearance. Accordingly, M.L.P. failed to carry the burden of proof that C.L.P. met the requirements to receive a free education within the District's public schools. I therefore **CONCLUDE** that the petition in this matter should be dismissed and C.L.P. disenrolled from the district immediately.

Furthermore, in view of the dismissal of the petition and the determination that C.L.P. was ineligible for attendance at respondent's public schools during the period of time in question, M.L.P. must accordingly be assessed tuition for that time period, which in this instance is the 2005-2006 school year. Based upon these findings, I **CONCLUDE** that M.L.P. should be assessed tuition in the amount of $8,824. for the period of C.L.P.'s ineligible attendance.

ORDER

Based upon the foregoing, it is **ORDERED** that:

1. The petition in this matter be and hereby is **DISMISSED**.

2. Respondent's counterclaim for assessment of tuition is **GRANTED** in the amount of $8,824.00.

3. Respondent's request that C.L.P. be disenrolled from the district immediately is **GRANTED.**

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

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

Within thirteen (13) days from the date on which this recommended decision was mailed to the parties, any party may file written exceptions with the **COMMISSIONER OF THE DEPARTMENT OF EDUCATION, 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 10, 2006
DATE

LESLIE Z. CELENTANO, ALJ

E-mail Receipt of Initial Decision Confirmed by the Department of Education on:

8-10-06
DATE

Mailed to Parties:

DIRECTOR AND
CHIEF ADMINISTRATIVE LAW JUDGE

AUG 11 2006
DATE

OFFICE OF ADMINISTRATIVE LAW

da

324-06

#324-06

UNION COUNTY EDUCATIONAL SERVICES COMMISSION,

PETITIONER,

V.

BOARD OF EDUCATION OF THE TOWNSHIP OF WESTFIELD, UNION COUNTY,

RESPONDENT.

COMMISSIONER OF EDUCATION

DECISION

SYNOPSIS

Petitioning Educational Services Commission (ESC) sought an emergency order directing the Westfield Board of Education to renew the ESC's lease on Westfield's Lincoln Street School building for the 2006-07 school year. The lease had been annually renewed since 1982, but Westfield gave notice in June 2006 that it would not be renewed for 2006-07 because the Board wished to utilize the building for educational purposes and the ESC had failed to appropriately manage the conduct of its students. (The latter assertion arose from an incident in May where four ESC students were involved in alleged criminal behavior, causing fear and alarm among nearby residents.) The ESC claimed that it could not find an alternative facility by the ordered quit date of October 1, 2006, and that it would therefore be unable to provide necessary educational programs – including a state-mandated Abbott alternative education program – to its contracting districts unless Westfield were compelled to renew the lease.

The ALJ granted emergent relief, finding that the ESC and intervening Abbott district of Elizabeth had demonstrated irreparable harm to the students and districts depending upon the affected ESC programs for the 2006-07 school year; a likelihood of success on the merits of a plenary appeal based upon the facts of the matter; and the greater interest when balanced against the interests of Westfield, which did not need the building for the 2006-07 school year, and the concerned residents granted participant status at the OAL. The ALJ also found that the Commissioner had jurisdiction over the dispute, contrary to Westfield and participants' contention that it was a landlord-tenant matter properly heard in Superior Court.

The Deputy Commissioner, to whom the matter was delegated pursuant to N.J.S.A. 18A:4-33, adopted the ALJ's decision with modification. Holding that the Commissioner did have jurisdiction over the matter, the Deputy Commissioner ordered Westfield to renew the disputed lease for the 2006-07 school year. However, the Deputy Commissioner also directed the County Superintendent of Schools to monitor and facilitate the ESC's efforts to find a new location for 2007-08, and the ESC to adopt and enforce policies to ensure adequate supervision of its students during the remaining term of the 2006-07 lease.

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.

OAL DKT. NO. EDU 7522-06
AGENCY DKT. NO. 236-7/06

UNION COUNTY EDUCATIONAL SERVICES COMMISSION, PETITIONER, V. BOARD OF EDUCATION OF THE TOWNSHIP OF WESTFIELD, UNION COUNTY, RESPONDENT, AND BOARD OF EDUCATION OF THE CITY OF ELIZABETH, UNION COUNTY, INTERVENOR.	:	COMMISSIONER OF EDUCATION DECISION

The record of this matter and the Initial Decision of the Office of Administrative Law (OAL) have been reviewed, as have the respective exceptions thereto filed by the respondent Board of Education (Westfield or Board) and participants Lisa Wolf (also known as Lisa Stern) and Susan Hopper (participants), and the reply of the petitioning Educational Services Commission (ESC). No submissions on exception were made by the intervening Elizabeth Board of Education (Elizabeth).

Westfield initially excepts to the Administrative Law Judge's (ALJ) holding that the Commissioner has jurisdiction over this matter, contending that the statute and case law cited by the ALJ are inapposite and that the matter should be decided in Superior Court as the straightforward landlord-tenant dispute it is. (Westfield's Exceptions at 1-5) The Board

then urges that, having erroneously assumed jurisdiction, the ALJ further lacked the requisite factual record to reach the conclusions she did with respect to the ESC's likelihood of success on the merits and balancing of the interests of the parties, since the limited proofs presented fell far below the level necessary to sustain the extraordinary remedy granted – particularly where the possibility of maintaining the *status quo* for anything less than the full academic year was not even considered and the ESC made no showing that it had engaged or was now engaging in sufficient attempts to locate an alternative facility. (*Id.* at 5-9) The Board additionally argues that the ALJ erred in not conditioning grant of emergent relief on reporting/monitoring of ESC efforts to relocate the programs at issue so as to permit expedient vacating of the Lincoln Street School premises, in failing to give appropriate weight to the serious public safety issues raised by participants, and in failing to recognize that the Board's decision not to renew the ESC's lease and its plan to use the Lincoln Street School for a district-wide kindergarten program are lawful discretionary determinations entitled to a presumption of correctness not overcome in this proceeding. (*Id.* at 10-12) Thus, Westfield avers, the Initial Decision must be "reversed in its entirety and vacated" and the ESC's petition dismissed with prejudice. (*Id.* at 13)

Participants first except to the ALJ's decision on grounds that it was based on 1) an incomplete record, as a result of the ALJ's failure to have the telephone conference call of July 27, 2006[1] recorded – as required by OAL rule – and to consider a number of participants' papers as exhibits[2], as she did for comparable documents from the ESC and Westfield; and 2) mischaracterization of participants' central claim, through treatment of the May 3, 2006 incident as an isolated event rather than the culmination of "years of a course of

[1] See Initial Decision at 2.

[2] See Initial Decision at 11-12.

criminal and antisocial conduct" at the ESC programs located at the Lincoln Street School. (Participants' Exceptions at 1-4) They also except, on grounds similar to Westfield's, to the ALJ's holding on Commissioner jurisdiction – which, they add, will have a detrimental effect on the willingness of boards of education statewide to lease real property to other school districts based on a fear that educational considerations may trump the normal rules of landlord-tenant relationships in any dispute. (*Id.* at 4-7) Like the Board, participants also contend that the Initial Decision lacks factual support for the remedy ordered and relies on inapposite legal authority (*Id.* at 7-11), and that the ALJ erred in not placing specific conditions on the ESC's continued occupancy of the Lincoln Street School, as the Commissioner is authorized to do by virtue of the very case law relied upon by the ALJ. (*Id.* at 11-13) In this regard, participants reiterate their request for: 1) stationing of an on-duty police officer "in and about the school premises from the time students begin to arrive at the school until such time as all students have left the school"; 2) submission, to the court and counsel, of a report by the ESC on the 30th day of each month detailing its efforts to locate alternative sites, including dates, locations sought, persons contacted, results of efforts, and reasons for any lack of success; and 3) a directive that the ESC comply with the transportation policy it claims to have adopted in ¶8 of the Petition of Appeal and Exhibit E. (*Id.* at 13-14)

In reply, the ESC counters that the ALJ was entirely correct in holding the Commissioner to have jurisdiction over this matter, noting that – notwithstanding that the circumstances they address are not precisely those presented here – the statute and case law relied upon in the Initial Decision clearly *do* illustrate the general proposition for which they are cited, namely that the Commissioner of Education has jurisdiction over disputes involving school district leases as well as the authority to order districts to enter into a lease agreement.

More importantly, the ESC posits, the Commissioner is lodged with "encompassing responsibility over public education and broad authority to supervise all public schools" (*N.J.S.A.* 18A:4-23 and *Hinfey v. Matawan Regional Board of Educ.*, 77 *N.J.* 514, 525 (1978)) and is charged with ensuring that New Jersey public school districts fulfill their obligation to provide to all students a thorough and efficient system of education (*N.J.S.A.* 18A:7F-2a(6)). (ESC's Reply at 2-4)

As to the purported lack of factual basis on which to conclude that the relief ordered by the ALJ was warranted, the ESC argues that Westfield knows full well the stringent and lengthy approval process faced by boards of education seeking to acquire property for school use, as well as the impossibility of Elizabeth's being able to replicate or make other arrangements for the program now provided by the ESC in such a short time frame; it further argues that the ESC counsel's representations to the ALJ during the July 27, 2006 teleconference – as memorialized by letter dated the following day and listed as an exhibit[3] – make it abundantly clear that the ESC has been diligent in its efforts to relocate since learning that Westfield would not renew its lease, and that Westfield's Answer admitted ¶13 of the ESC's Petition of Appeal, which states:

> [The ESC] began a search for a suitable facility even before [being] officially notified about the nonrenewal of the Lease. One facility had just leased its space and another facility was much too small for [the ESC's] needs. Aside from the disruption of the education program, on such short notice, [the ESC] cannot, under the best of circumstances, locate a new facility, negotiate a lease and prepare and/or renovate a building by October 1, 2006. [The ESC] has a commitment to provide a thorough and efficient education for the Hillcrest students and cannot accomplish this without a facility.

The ESC additionally discounts any claim that it should have been looking for an alternative facility since 2001, since there was no reason at any time prior to June 2006 to believe that its

[3] See Initial Decision at 11.

long-standing lease agreement would not be renewed absent a year's advance notice. (ESC's Reply at 4-8)

With respect to its adversaries' complaints about the absence of monitoring or reporting of the ESC's efforts to relocate as a condition of its remaining at the Lincoln Street School, the ESC states that it would not object to such monitoring; in fact, it opines, the "direct and immediate involvement of the Commissioner would assist in the orderly processing" of its efforts and that "the Commissioner's intimate knowledge of [the process of obtaining an educationally suitable facility] might require an extension of the use of Westfield facilities greater than the year ordered by [the ALJ]," so as to "assure that all sides exercise their responsibilities and the children most effected (*sic*) by such a relocation are protected." (ESC's Reply at 8)

Finally, the ESC argues that the ALJ correctly ignored participants' position, which has "no basis in fact, no basis in educational policy and certainly no basis in protecting the constitutionally guaranteed rights to education of all students," but rather consists of "emotional assertions" resulting from "one incident which has prompted this amazing outcry of the neighbors who do not want Elizabeth students in their neighborhood." The ESC opines that participants' "false and misleading allegations/conclusions only impede the [ESC's] ability to find alternative locations" and that their "specific exceptions require no response" and should be ignored by the Commissioner, who cannot allow educational programs to be jeopardized based on "an emotional, unfounded and ignorant perspective." (ESC's Reply at 8-9)

Upon careful review and consideration of the OAL record[4] and arguments on exception, the Deputy Commissioner, to whom this matter has been delegated pursuant to *N.J.S.A.* 18A:4-33, adopts the Initial Decision of the ALJ with modification as set forth below.

Initially, the Deputy Commissioner concurs with the ALJ that this matter is appropriately heard before the Commissioner of Education. As the ALJ, the ESC and Elizabeth correctly recognize, more is at stake here than a dispute between a landlord seeking to enforce the literal terms of a lease and a tenant raising equitable arguments against so doing. Rather, the ESC – an entity created by the Legislature for the express purpose of providing needed services to local district boards of education in accordance with its authorizing statute (*N.J.S.A.* 18A:6-51 *et seq.*) – is contending that Westfield's action has rendered it unable to provide planned, budgeted and approved educational services for which districts have duly contracted with it pursuant to *N.J.S.A.* 18A:6-63 for the 2006-07 school year, including in the case of Elizabeth an alternative education program mandated by *N.J.A.C.* 16A:16-9.1(b) as part of the constitutionally guaranteed thorough and efficient system of free public education (*Abbott v. Burke*, 153 *N.J.* 480, 526 (1998)). Moreover, the ESC's claim is fundamentally rooted in the virtual impossibility under applicable school law of quickly obtaining an appropriate alternate facility or of Elizabeth's being able to make alternate arrangements at this point in the school-year planning and budgeting cycle. See, for example, *N.J.S.A.* 18A:7F-1 *et seq.*, *N.J.S.A.* 18A:7G-1 *et seq.*, *N.J.S.A.* 18A:20-1 *et seq.*, *N.J.S.A.* 18A:22-1 *et seq.*, *N.J.S.A.* 18A:27-10 *et seq.*; *N.J.A.C.* 6A:16-9.2, *N.J.A.C.* 6A:23A-1.1 *et seq.*, *N.J.A.C.* 6A:26-1.1 *et seq.*, *N.J.A.C.* 6A:27-9.1 *et seq.*, *N.J.A.C.* 6A:32 *passim.*

[4] It is noted that the record included an audiotape of the July 20, 2006 proceeding before the ALJ.

Thus, there can be no doubt that this matter falls within the expertise and jurisdictional purview of the Commissioner of Education.

The Deputy Commissioner further concurs, substantially for the reasons expressed by the ALJ, that the ESC has met the requisite standard for grant of emergent relief, *Crowe v. DeGioia, supra*, *N.J.A.C.* 6A:3-1.6, and that the appropriate order is to direct renewal of the parties' lease, as sought in the ESC's application, for the entire 2006-07 school year. In so holding, the Deputy Commissioner recognizes – as did the ALJ by forwarding her ruling to the agency as an initial decision rather than a decision on motion – that granting such relief effectively ends the instant dispute without benefit of a plenary hearing. However, the Deputy Commissioner also recognizes – as likely did the ALJ subsequent to her conduct of the initial proceeding on July 20, 2006 – that by the time a hearing were held and rulings made by the ALJ and Commissioner, the 2006-07 school year would be well under way and an order disrupting the Hillcrest program mid-year would not issue even in the extremely unlikely event that the ESC did not prevail on the merits of its claim.

The Deputy Commissioner further recognizes that, even within the limited context of an emergent relief proceeding, certifications from the present and former ESC superintendents would have been preferable to counsel's representations of their statements via letter (letter of July 28, 2006) in conjunction with an unrecorded telephonic conference – shortcomings which gave Westfield and participants a basis to claim infirmity in the record.[5] However, the Deputy Commissioner finds that the truly material claims in this matter – that the ESC reasonably anticipated use of the Lincoln Street School for 2006-07 based upon a

[5] The Deputy Commissioner here clarifies that the documents "missing" from the Exhibit list of the Initial Decision (see page 3 above) were, in fact, considered by him as attachments to the brief and certifications participants were permitted to file pursuant to N.J.A.C. 1:1-16.6(c).

long-standing agreement with Westfield, which the ESC had no cause to believe prior to June 2006 would not be renewed as it had many times before, and that the standards and processes for facility approval and budget/program development with which the ESC and Elizabeth are bound by law to comply effectively preclude any realistic prospect of making alternate arrangements for Hillcrest Academy students for the 2006-07 school year – are both compelling and essentially indisputable. Under the circumstances, it would be placing form over substance – as well as an abrogation of the Commissioner's statutory responsibility for public education – to hold that the ESC's claim must fail because the ESC did not present sufficient factual evidence to prove its inability to obtain a different facility within the time frame demanded by Westfield.[6] Moreover, the Deputy Commissioner declines to grant relief for a shorter term than the entire 2006-07 school year, not only because the factual record and applicable processes of school law provide no basis to establish the date certain or point(s) of contingency necessary to do so, but also because the Deputy Commissioner will not issue a directive that would result in mid-year disruption of an established educational program serving a particularly vulnerable student population.

In deciding thus, the Deputy Commissioner is not unmindful of the concerns raised by Westfield and participants, particularly in view of the ESC's suggestion (Reply Exceptions at 8) that it may be contemplating a demand for renewal of the disputed lease beyond the 2006-07 school year. The Deputy Commissioner initially stresses that no such order will issue on the present record, since the ESC will have had – for 2007-08 – the one-year termination notice it relied upon herein in claiming that Westfield did not honor its prior agreement as expected, and Westfield may well have actual (as opposed to anticipated)

[6] It is noted that the record includes a certification from the Acting Superintendent of Elizabeth as to that district's inability to educate the Hillcrest students itself or make other arrangements on such short notice.

need for the Lincoln Street School during 2007-08; thus, while the Deputy Commissioner cannot prospectively foreclose the ESC from later seeking additional relief, any such application must be a new dispute to be pled and decided based upon the facts as they then exist, not upon an expectation as a result of this proceeding that the ESC may lease the Lincoln Street School indefinitely notwithstanding Westfield's desire to terminate if the ESC can show that it tried to arrange for another facility and failed.

Moreover, in order to minimize the possibility of this year's situation repeating itself and provide all parties with timely and certain knowledge of their post-2006-07 status, the Deputy Commissioner additionally directs that the Union County Superintendent of Schools shall: 1) monitor the ESC's efforts to locate a new facility for 2007-08 so as to ensure that such efforts are being undertaken with due promptness and diligence, and 2) provide such assistance as is necessary, including but not limited to guiding the ESC's navigation of Department approval processes, so as to facilitate transition of the ESC programs to a new location and avoid needless delays. The Deputy Commissioner further cautions the ESC – and all boards and agencies providing public educational services – that a party acts at its peril in negotiating a lease based on "a handshake and gentlemen's agreement" rather than clear, written contractual terms, or in agreeing to termination or nonrenewal clauses that do not allow for sufficient notice to relocate affected program(s).

Similarly, the Deputy Commissioner – finding the concerns of participants to be neither unfounded nor irrelevant – directs the ESC to adopt and enforce such measures as are necessary to ensure that its students at the Lincoln Street School do not pose a danger to the property and safety of nearby residents during the remaining term of the 2006-07 lease, such measures to include adequate supervision of students during the school day and when in

the immediate vicinity before and after school, and enforcement of policies (such as the aforementioned transportation policy) designed to prevent recurrence of events such as transpired on May 3, 2006.

Accordingly, the Initial Decision of the OAL is adopted with modification as the final decision in this matter for the reasons expressed therein and above.[7] [8] The ESC and Westfield Board of Education are directed to renew the ESC's lease of the Lincoln Street School for the 2006-07 school year; and the ESC is directed to forthwith undertake duly diligent efforts to relocate affected programs for the 2007-08 school year – such efforts to be monitored and assisted by the Union County Superintendent of Schools – and to adopt and enforce policies to ensure adequate supervision of its students during the remaining term of the 2006-07 lease.

IT IS SO ORDERED.[9]

DEPUTY COMMISSIONER OF EDUCATION

Date of Decision: **9/18/06**

Date of Mailing: **9/19/06**

[7] In the interest of clarity, the Deputy Commissioner notes that the ALJ's reference to "No Child Left Behind" (Initial Decision at 8) is purely rhetorical and that this federal law is in no way relied upon or implicated by the instant ruling.

[8] Such adoption also includes concomitant adoption of the ALJ's rulings on the intervention of Elizabeth and the participation of Lisa Stern and Susan Hopper.

[9] This decision may be appealed to the State Board of Education pursuant to *N.J.S.A.* 18A:6-27 *et seq.* and *N.J.A.C.* 6A:4-1.1 *et seq.*

State of New Jersey
OFFICE OF ADMINISTRATIVE LAW

INITIAL DECISION

OAL DKT. NO. EDU 7522-06

AGENCY DKT. NO. 236-7/06

UNION COUNTY EDUCATIONAL SERVICES COMMISSION,

Petitioner.

v.

BOARD OF EDUCATION OF THE TOWN OF WESTFIELD BOARD OF EDUCATION,

Respondent,.

Dennis A. Collins, Esq., for petitioner (Collins, Wella & Casello, L.L.C., for petitioner)

Richard J. Kaplow, Esq. for respondent on behalf of (Westfield Board of Education)

Kirk C. Nelson, Jr. Esq., Intervenor

Nelson Wolf, Esq., Participant

Record Closed: July 27, 2006 Decided: August 2, 2006

BEFORE: **CARIDAD F. RIGO, ALJ**

STATEMENT OF THE CASE AND PROCEDURAL HISTORY

On July 10, 2006, petitioner, Union County Educational Services Commission (hereinafter UCESC) filed a Petition for Emergent Relief before the Commissioner of Education to compel the respondent, Westfield Board of Education (hereinafter WBOE)

to lease its former Lincoln Street School building to the UCESC for its use as Hillcrest Academy South Campus from July 1, 2006 through June 30, 2007, with no more than a 4% (four per cent) increase in rent.

On July 13, 2006, the Department of Education transmitted the matter to the Office of Administrative Law (OAL) as a contested case. On July 20, 2006, an emergent hearing was held at which time the Elizabeth Board of Education (EBOE), Lisa Stern and Susan Hopper made applications to intervene. The petitioner and the respondent presented oral arguments.

On July 21, 2006, orders were entered allowing the EBOE as an intervenor pursuant to N.J.A.C. 1:1—6.3 *et seq.* Lisa Stern and Susan Hopper were permitted as participants pursuant to N.J.A.C. 1:1-16.6; they are residents of the Town of Westfield.

On July 27, 2006, additional oral arguments were heard via a telephone conference call with all of the parties participating.

FACTUAL BACKGROUND

The essential facts are not in dispute. The facts as can be discerned from the pleadings, exhibits, arguments of counsel, certifications are the following:

The UCESC leased a school building from the WBOE since 1982, via a series of written leases. The last written lease ran from July 1, 1998 through June 30, 2001; every year since the expiration of that written lease the renewal was informal. The renewals would come after a verbal approval from the WBOE, along with a writing outlining the rent increase, and said renewals would run from July 1 to June 30 of the following year.

The City of Elizabeth receives services from the UCESC for the operation of its state approved program for its alternative education program; this alternative school accommodates approximately eighty-eight (88) Elizabeth students who require a highly

structured and personalized environment in order for them to benefit from a secondary academic program. This school is now called the Hillcrest Academy South Campus. The UCESC also operates from this building, called the Lincoln Street School, the Interim Alternative Educational Program (IAEP). The IAEP school accommodates students who have been removed from their home district's school for disciplinary reasons and/or are pending results of a child study team evaluation. The IAEP presently has six students, two who are from Westfield.

On May 3, 2006, four (4) Hillcrest students misbehaved requiring Westfield police intervention; it is alleged that the students stole a bicycle(s) and a car from the neighborhood. The students were arrested after a foot chase through the residential area of Westfield. Residents of Westfield object to the WBOE renewing its agreement with the UCESC, claiming that the incident of May 3, 2006, frightened residents and that it has impacted on the general safety and security of the Westfield community.

On June 16, 2006, the Superintendent of WBOE by letter to the Superintendent of the UCESC advised that it would not recommend to the WBOE that it extend the lease for the 2006-2007 academic school year. The UCESC received a letter dated June 23, 2006, stating that the UCESC must quit and vacate the premises/school building housing the Hillcrest Academy on or before October 1, 2006. The WBOE stated it will not renew UCESC lease for the following reasons: the tenancy expires on June 30, 2006, the WBOE wants to utilize the building for its own educational purposes and that the UCESC failed to appropriately manage the conduct of its students.

ISSUES

1. Does the State Commissioner of Education have jurisdiction over this matter?
2. Will the petitioner suffer irreparable harm if the requested relief is not granted?
3. Is the UCESC likely to succeed on the merits?
4. Who will suffer greater harm, the WBOE or the UCESC and/or EBOE?

LEGAL DISCUSSION AND ANALYSIS

The first issue to be determined is whether or not this matter comes under the broad scope of "school laws." The Commissioner of Education has been authorized by N.J.S.A. 18A:6-9 to determine "all controversies and disputes arising under the school laws." The UCESC is an "agency established...for the purpose of carrying on programs of educational research, development and to provide to public school districts educational and administrative services and programs as may be authorized pursuant to rules of the State Board of Education." N.J.S.A. 18A:6-51.

The educational services provided at the Hillcrest Academy include an alternative high school, which is contractually provided to the City of Elizabeth, so that Elizabeth complies with the mandated requirement of an alternative high school. N.J.A.C. 6A:16-9.1., Elizabeth is an Abbott district. In addition to the Hillcrest Academy, UCESC also provides an Interim Alternative Education Program (IAEP) at the same location. The IAEP is a disciplinary program for special education students.

The WBOE challenges the UCESC's request for emergent relief on jurisdictional grounds, and takes the position that the Commissioner of Education should not intervene in the parties' privately negotiated commercial tenancy agreement. The WBOE also presents that this request for emergent relief fails to allege the existence of a justifiable controversy arising under the school laws of this state. **I DISAGREE**.

Traditionally, the Commissioner is excluded from determining contract matters, and to that purpose, the WBOE relies upon Picogna v.Board of Education of Cherry Hill, 249 N.J. Super. 332 (App. Div. 1991). The Picogna case can be distinguished from the current matter. In Picogna, the Appellate Division held that the Commissioner of Education did not have jurisdiction to determine a teacher's wrongful discharge claim because it did not arise under the school laws. The Chancery Court found that petitioner's employment was wrongfully terminated under the contract and under the Conscientious Employees Protection Act (CEP Act). The Court ruled that petitioner's

employment claims were asserted under a collective bargaining agreement clearly under employment contract law, and not under school law.

I FIND that this lease arrangement is not a simple commercial landlord/tenant matter, unfettered by any other requirement. The N.J. legislature has specifically, and with some detail, imposed regulations directly related to school boards and school districts when it comes to leasing and contracting for and to school lands or property. In fact, N.J.S.A. 18A:20-4.2 is replete with mandates and conditions under which school lands and property may be leased. This statute invests the Commissioner of Education with the authority to approve lease terms extending beyond five years. However, in this instance, the Commissioner's approval was never necessary because the terms of the original written lease was for less than five years, the last written lease expiring in 2001, and thereafter continuing year to year on a "gentlemen's agreement and a hand shake." Although the Commissioner's specific approval was not necessary, due to the limited lease terms, the Commissioner has broad authority over the educational activities conducted by these school districts. This authority includes where, how and when such educational activities take place. Clearly, the purpose of the Hillcrest Academy is to provide state mandated schooling for certain students. The fact that that schooling is mandated and supervised by the state clearly puts it in the realm of school law.

The UCESC relies upon In the Matter of the Deficient and Overcrowded High School Facilities in the South Amboy School District, 1977 S.L.D. 488, to illustrate that when a district has inadequate facilities and is unable to adequately and appropriately deliver schooling to its students, the Commissioner can assert its authority and direct a neighboring school district to alleviate the burden of the burdened school district. In the South Amboy case, supra., the Commissioner asserted his authority and directed Spotswood, a neighboring school district, to lease to South Amboy an unused school building in order to alleviate the burden on the South Amboy students and faculty.

Here, the situation is similar. Elizabeth, an Abbot district, see Abbot v. Burke, 119 N.J. 287 (1990), is unable to provide the facility or the services for approximately 88 students. Elizabeth is unable to carry out its statutory educational mandates and looked to the UCESC to assist it. While Elizabeth is not a party to the alleged lease/tenancy agreement, it is a direct beneficiary having contracted for essential services to be provided for these students from the UCESC. Also, there are other school districts within the county that participate in the IAEP services provided at the subject location, including the Westfield school district: **I FIND** that there are other students besides Elizabeth students that are or will be affected by the non-renewal.

Simply put, the educational interests at stake clearly dictate that this matter falls under the broad umbrella of those matters characterized as "school laws" and jurisdiction resides in the Commissioner of Education. The best interests of the students and the general community at large is best served if UCESC stays at the Lincoln School location for the 2006-2007 academic year.

The second question is: Will the UCESC as well as the EBOE suffer irreparable harm. I **FIND** that the petitioner(s) will suffer irreparable harm. It is well settled that a harm is "irreparable" when there can be no adequate remedy after-the-fact in law or equity; monetary damages cannot adequately redress the intangibles of the lost opportunity or in this case the lost education.

Approximately 88 students from Elizabeth will not be educated in an appropriate facility at least for the 2006-2007 academic year and/or their education will be disrupted on October 1, 2006. They will not receive a thorough and efficient education because the school facility or building will not be available to them. The WBOE does not dispute that Elizabeth does not have the space, trained staff or the specialized curriculum. Elizabeth will not be able to comply with the requirement that it have an alternative high school program. It is unreasonable and unthinkable that a school district such as Elizabeth would be able to find a location, obtain the necessary state and community approvals and replicate the Hillcrest Academy academic programs within 90 days or

less. Even if the petitioner were to locate similarly adequate space and equip the space with all of the essentials, such a move would be too disruptive to the students, their parents and their school districts within the short span of time involved. I **FIND** that approximately eighty-eight students will be irreparably harmed by not receiving a very necessary and required education.

An element of irreparable harm is personal inconvenience. One does not only have to consider the student's education but also their parents and/or guardians and the many others that are responsible for their general education and welfare. The WBOE presents that to the extent that the educational program of any Hillcrest Academy student would be unavailable said student would be entitled to be placed on temporary home instruction pending an appropriate alternative placement. See WBOE letter dated July 28, 2006. **I FIND** that if that were to occur it will inflict severe personal and financial inconvenience to the parents, their respective school districts and all of the ancillary support staff.

The third question: Is the UCESC likely to succeed on the merits. **I FIND** that UCESC is likely to succeed on the merits whether it is disputed in Superior Court as a landlord/tenant matter or before an Administrative tribunal.

The UCESC and WBOE had a mutually beneficial relationship for many years. Westfield had vacant school space that UCESC found suitable in every way in order for it to conduct state and federal mandated educational programs for which it was responsible. The UCESC and the WBOE entered into a lease of the Lincoln School building, and said agreement extended for over twenty years. After the expiration of the 1998-2001 lease a pattern of practice developed regarding the renewals. The WBOE and the UCESC, without changing any of the material terms of the lease, except an unwritten, previously agreed upon rent increase, renewed the UCESC lease from the 2001-2002 academic year every year through to the 2005-2006 academic year; this informal extension was the norm. However, after the May 3, 2006 incident, this previous informal conduct abruptly ended when UCESC received a formal Notice to Quit

providing a three month period in which UCESC was required to procure suitable space for its academic programs. It is well settled that when a tenancy for a stated term of a year or more is converted to a holdover month to month tenancy by reason of an expiration of a written lease without execution of a renewal lease, the holdover tenancy is ordinarily subject to all of the terms and conditions of the written lease other than its durational term. Center Avenue Realty Inc. v. Joel Smith, 264 N.J. Super. 344, 348 (App.Div. 1993).

In the case of State v. Shack, 58 N.J. 297 (1971), Chief Justice Weintraub wrote:

> A man's right in his real property of course is not absolute. It was a maxim of the common law that one should so use his property as not to injure the rights of others. *Broom, Legal Maxims* (10th ed. Kersley 1939), *p.* 238; 39 *Words and Phrases*, "Sic Utere Tuo ut Alienum Non Laedas," *p.* 335. Although hardly a precise solvent of actual controversies, the maxim does express the inevitable proposition that rights are relative and there must be an accommodation when they meet. This process involves not only the accommodation between the right of the owner and the interests of the general public in his use of his property, but involves also an accommodation between the right of the owner and the right of individuals who are parties with him in consensual transactions relating to the use of the property...See *Reste Realty Corp. v. Cooper*, 53 *N.J.* 444, 451-453 (1969); *Marini v. Ireland*, 56 *N.J.* 130, 141-143 (1970).
>
> [Ibid at 305]

Therefore, for the reasons outlined herein, I **FIND** that UCESC would likely succeed.

I **FIND** that the fourth question is automatically resolved taking into consideration all of the above and further balancing the equities. I therefore **FIND** that UCESC and/or EBOE would suffer the greater harm. I **FIND** that there is an overriding public policy that must be preserved that is in keeping with the mandate of "**NO CHILD LEFT BEHIND**".

ORDER

It is, therefore, **ORDERED**, that Petitioner's Motion for Emergent Relief is granted 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 (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.

August 2, 2006
DATE

Caridad F. Rigo, ALJ

E-mail Receipt of Initial Decision Confirmed by the Department of Education on:

8/2/06
DATE

Mailed to Parties:

DIRECTOR AND
CHIEF ADMINISTRATIVE LAW JUDGE

AUG 7 2006
DATE

OFFICE OF ADMINISTRATIVE LAW

ljb

List of Exhibits

For Petitioner

P-A Lease Agreement

P-B 1. 2/17/05 Memo from Behot (UCESC) to Berman (WBOE) re: rental increase.

2. 12/07/01 Memo from Behot to Berman re: rental increase.

3. 5/17/05 Letter from Hartnett(UCESC)to Foley (WBOE) re: Hillcrest Academy.

4. 12/8/98 Letter from Behot to Berman transmitting executed contract.

P-C Letter from Kennedy (Elizabeth) to Behot transmitting contract for Hillcrest Academy.

P-D 6/26/6 Letter from Union County Superintendent of Schools to Hartnett.

P-E 5/19/06 letter from Hartnett to parents of Hillcrest students.

P-F 6/16/06 letter from Foley to Hartnett re: declining recommendation for lease extension.

P-G 6/20/06 Letter from counsel for UCESC to WBOE

P-H 6/23/06 Notice to Quit and Demand for Possession of Leased Premises.

7/28/06 Letter from Counsel confirming representations at telephone conference.

For Respondent

R-A Certification of William J. Foley, Ed.D.

R-B Excerpts of Police Blotter

7/28/06 Letter from Counsel confirming representations at telephone conference.

For Intervenor Elizabeth Board of Education

Certification of Pablo Munoz, Acting Superintendent

For Participant Residents of Westfield

Certification of Lisa Wolf

Certification of Susan Hopper

326-06

AGENCY DKT. NO. 261-8/06

IN THE MATTER OF THE TENURE	:	
HEARING OF JAMES DULACK,	:	COMMISSIONER OF EDUCATION
SCHOOL DISTRICT OF UNION	:	DECISION ON MOTION
CITY, HUDSON COUNTY.	:	

For Movant/Respondent, Oxfeld Cohen

For Petitioner, Chasan Leyner & Lamparello

This matter was opened before the Commissioner of Education on July 31, 2006, through the certification of tenure charges against respondent, a tenured custodian. Petitioner alleged excessive absenteeism and insubordination. Respondent's answer was filed on August 28, 2006, past the fifteen-day period allowed by *N.J.A.C.* 6A:3-5.3 for responses to tenure charges, and on September 1, 2006, default was entered against the respondent.

On September 11, 2006, respondent brought the instant motion to vacate the default. For the reasons set forth in the movant/respondent's motion, and in the absence of opposition from petitioner, the motion is granted. The default entered against the movant/respondent on September 1, 2006, is vacated and respondent's answer, filed on August 28, 2006, is accepted.

IT IS SO ORDERED.

Lucille Davy

ACTING COMMISSIONER OF EDUCATION

Date of Decision: 9/20/06

Date of Mailing: 9/20/06

#310-06

OAL DKT. NO. EDU 8619-05
AGENCY DKT NO. 276-10/05

IN THE MATTER OF THE TENURE	:	
HEARING OF KAREN CURCHIN,	:	COMMISSIONER OF EDUCATION
ATLANTIC COUNTY SPECIAL	:	DECISION
SERVICES SCHOOL DISTRICT,	:	
ATLANTIC COUNTY.	:	

The record and Initial Decision issued by the Office of Administrative Law (OAL) have been reviewed. The District requested and was granted an extension of time within which to file exceptions. These exceptions, and respondent's reply thereto, were timely submitted.

Upon a full review of the record in this matter, which included transcripts of the hearing conducted below[1], the Commissioner is compelled to reject the Initial Decision and remand this matter to the OAL. In the course of review, it was revealed that: there is an outstanding Division of Youth and Family Services (DYFS) case currently at the OAL (Dkt. No. HSV 916-06) with respect to the actions which formed the foundation of the Board's tenure charges here, and that Ms. Curchin is currently on that Division's Central Registry. The Commissioner, therefore, concludes that the instant matter must be consolidated with the DYFS case in order that it can proceed in accordance with predominant interest regulations, *N.J.A.C.* 1:1-17.1.

Accordingly, the recommended Initial Decision is rejected and this matter is remanded to the OAL.

IT IS SO ORDERED.[2]

Lucille Edday
ACTING COMMISSIONER OF EDUCATION

Date of Decision: 9/12/06
Date of Mailing: 9/12/06

[1] Hearing dates were February 7, February 22, February 27, and May 15, 2006.

[2] This decision may be appealed to the State Board of Education pursuant to *N.J.S.A.* 18A:6-27 *et seq.* and *N.J.A.C.* 6A:4-1.1 *et seq.*

State of New Jersey
OFFICE OF ADMINISTRATIVE LAW

INITIAL DECISION
OAL DKT. NO. EDU 8619-05
AGENCY DKT. NO. 276-10/05

IN THE MATTER OF THE TENURE HEARING OF KAREN CURCHIN, ATLANTIC COUNTY SPECIAL SERVICES SCHOOL DISTRICT, ATLANTIC COUNTY

Robert A. Muccilli, Esq., for petitioner Atlantic County Special Services School District (Capehart & Scatchard, attorneys)

Ned Rogovoy, Esq., for respondent Karen Curchin

Record Closed: June 23, 2006 Decided: July 3, 2006

BEFORE **W. TODD MILLER,** ALJ:

STATEMENT OF THE CASE

This matter involves tenure charges brought by the Atlantic County Special Services School District (District or petitioner) against Karen Curchin (Curchin or respondent) for two instances of conduct unbecoming a school teacher. Petitioner alleges that respondent, on or about November 16, 2004, was hitting the head of a

student, L.P.M., a severely and multiply disabled special education student. Petitioner further alleges that respondent repeatedly hit student L.P.M. at the same time that the student was being repeatedly hit in the head by a classroom aide with his shoe (P-20). The District seeks Curchin's dismissal. Curchin asserts that no such incidents of abuse occurred.

PROCEDURAL HISTORY

On October 11, 2005, certified tenure charges were filed by the District with the Commissioner of Education. On November 7, 2005, the matter was received in the Office of Administrative Law (OAL) for determination as a contested case pursuant to N.J.S.A. 52:14B-1 to -15, N.J.S.A. 52:14F-1 to -13, and N.J.S.A. 18A:6-16. A prehearing telephone conference was held on November 29, 2005. The matter was scheduled for hearing on February 7, 22 and 27, March 17, and May 15, 2006, at the Office of Administrative Law in Atlantic City, New Jersey. Posthearing briefs and closing arguments were received on June 23, 2006 and the record was closed on that date.

SUMMARY OF THE RELEVANT TESTIMONY

District's Case

Petitioner offered the testimony of Edra Pantazes. Ms. Pantazes was employed as a teacher's aide by the Atlantic County Special Services School District in September 2004. Her prior experience includes working at the Discovery Learning Center for one year as a teacher's aide. She attended Seton Hall University for one year, William Paterson University for two years, and is presently a student at Stockton State College. However, she has taken a leave from Stockton State College due to illness. Her current grade level is between junior and senior year. She possesses a New Jersey substitute teacher certification. She has earned approximately 100 college credits towards a teaching degree.

Pantazes was assigned to Craig Costigan's class in September 2004. His class included self-contained children. Costigan's classroom was immediately adjacent to L.P.M.'s classroom. The two rooms were connected by a smaller room, which the teachers referred to as the time-out room. Pantazes became loosely familiar with L.P.M.'s classroom by virtue of the common room. She ventured into L.P.M.'s room for a few minutes on two or three occasions.

On November 16, 2004, the date of the incident, Pantazes reported to Costigan's classroom. Pantazes was a floater as of November 16, 2004, and Curchin's classroom was short an aide, so Pantazes was reassigned to Curchin's classroom. She entered Curchin's classroom through the hallway door at approximately 9:30 a.m. Her first observations were of the students eating breakfast. They were having yogurt and milk. The students were seated around a large rectangular table in the middle of the room. Curchin was seated at one end of the table with L.P.M. seated to her right (P-27). The remaining students were seated around the table, primarily on the side facing the blackboard and swings (left side of P-27).

L.P.M. was known as a violent, self-mutilating student. On occasion he was required to wear a leather helmet. He inflicted wounds on himself, including scratches on his face. He frequently threw his shoes or boots at other students. On November 16, 2004, L.P.M. took off his shoe and threw it at a fellow student. The shoe struck the milk and caused it to spill on the floor. Pantazes prepared a drawing of the incident (P-28). The milk hit another student, T.N. (P-28). Immediately to T.N.'s right was teacher's aide Barbara Adkins.

Pantazes described Curchin's initial reaction to the shoe-throwing incident. Curchin swatted L.P.M. on the back left side of his head and told him not to throw his shoes. Edra Pantazes described the velocity of the swat on a scale of one to ten, with one being the lowest and ten being the highest, as a three. It was openhanded. Curchin drew her hand back only a few inches and, as described by Pantazes, lightly swatted L.P.M. on the head. She also used a stern voice directing him not to throw his shoes. Pantazes did not describe it as yelling, but more as redirectional.

Barbara Adkins began to clean up the spilled milk immediately. Student T.N. stood up, but then moved back into his chair. Shortly thereafter, L.P.M. threw a second shoe and hit T.N. on the arm. The shoe landed on the floor. Pantazes observed Barbara Adkins pick up the shoe, walk over to L.P.M. and hit him with the shoe on the right side of the head around his ear. She did this two or three times while standing on his right side. Pantazes said Adkins brought her arm up in the air with her forearm pointed up in the air, shoe in hand, and her elbow parallel to the ground, and then struck downward. Pantazes was asked to describe the velocity of Adkins' movement, with one being the lowest and ten being the highest. Pantazes placed the velocity between five and six when the sole of the shoe hit L.P.M.'s head.

Curchin was sitting to L.P.M.'s left while Adkins was hitting him with the shoe. Pantazes stated that Curchin also commenced hitting L.P.M. on the head while seated at his left. Pantazes stated that Curchin used an open hand while hitting L.P.M. on the head. Curchin's arm was in what could be described as a pushup position, around chest high, and she pushed outward with an open hand. Pantazes could not hear any noise from Curchin's hand hitting L.P.M. on the head. Pantazes stated that Curchin hit L.P.M. more than once. She did not recall if Curchin was making any verbal comments while hitting L.P.M. She described the facial expressions of Adkins and Curchin as tight, angry, clenched and red.

Pantazes described the shoes L.P.M. was wearing that day as of a boot type with a hard sole. Eventually the shoes were put back on L.P.M.'s feet. They were wrapped with ace bandages to prevent him from taking them off and throwing them again.

Pantazes was asked to recall the presence of other aides or faculty in the classroom. She stated that Barbara Adkins' sister, Caroline Nocella, was not in the room during this incident. She also stated that Emma Pennello, a teacher's aide, was standing in the kitchen area helping to serve breakfast.

Pantazes reported the incident two days later, on November 18, 2004. She reported it two days later because she was shocked and did not know what to do. She discussed the matter with Mr. Costigan and a friend. She decided to report the incident after these discussions.

Pantazes was subject to cross-examination. She was questioned regarding her familiarity with Barbara Morvay, the superintendent of the Atlantic County Special Services School District. She indicated that her family had been friends with the Morvay family for a long time. She was then asked whether she was aware that Morvay was the superintendent. Pantazes denied any knowledge that Morvay held this title prior to her employment with the District.

Pantazes was asked to discuss her assignments from September through November 2004. She stated that she was initially assigned to Costigan's class as a one-on-one aide. The student she was working with was disenrolled sometime in September or October. She then became a floater. Assignments were ordinarily handed out each morning when she arrived. Consequently, she would arrive in her assigned classroom after the class had begun. She was asked whether she was normally assigned to Ann Finley's class. She could not recall. Pantazes was asked to provide details as to other assignments during the period in question. Again, she did not recall. Edra Pantazes acknowledged that she was only in Curchin's classroom for one day, the date of the incident.

Pantazes was asked to name the other students in Curchin's class, but she did not recall the names of the other students. She also could not recall how many students were in the classroom on the date of the incident.

On cross-examination Pantazes agreed that Curchin's class was already in session when she entered the classroom. Class begins around 9:00 a.m. and Pantazes arrived around 9:30 a.m. Breakfast was already served. The children were sitting around the table. Emma Pennello was in the kitchen area of the room assisting in the preparation and service of food. Pantazes could not recall which aides in the

classroom were one-on-one aides. Pantazes was asked if there were any children sitting on the east side of the table, the side farthest from the blackboard and swings, but she could not recall (P-28). She approximated that the class had 5 students.

Pantazes was questioned about her assignment at 9:30 a.m. when she entered Curchin's classroom. She recalled that she was told to help with breakfast, but could not recall who told her to do so. She was asked whether she recalled what type of yogurt the children were being served. She did not recall. Pantazes was questioned about the specific disabilities of each child in the classroom. Again, she could not recall. However, she did state that L.P.M. was self-abusive, non-verbal and occasionally wore a helmet. She could not recall how she knew that L.P.M. was non-verbal. But, she knew that L.P.M. was self-abusing from prior contact with Curchin's class through the time-out room.

Edra Pantazes was asked to describe how long the incident lasted. She stated that the "entire scene only lasted a few seconds."

Pantazes was questioned about her discussions of the incident with others after it occurred. The first person she spoke with was Enrique Augusto. She talked to Augusto on November 17, 2004. Pantazes did not recall where she spoke to Augusto. She felt comfortable enough to confide in him. Pantazes was questioned about her assignment on November 17, 2004. She did not recall whose class she was assigned to on that date. She also did not recall what time of day she spoke to Augusto.

Pantazes was questioned about her November 18, 2004, statement. She initially went to principal Pat Dannenberg's office. She did not recall whether it was in the morning or afternoon. She stated that she discussed the entire incident with Dannenberg and then was instructed to prepare a written statement (P-12). She wrote the statement once and submitted it. She was not coached by Dannenberg, nor did she prepare several drafts. However, she had discussed the matter with two people prior to meeting with Dannenberg. They were Augusto and teacher Craig Costigan.

Pantazes did not recall specifically on what date she spoke to Costigan. She told both of them that she thought she "witnessed abuse, but was not sure."

Pantazes was questioned about her discussion with Curchin later after the incident. She recalled the two of them taking a walk outside. They talked about L.P.M.'s conduct, including the fact that he regularly throws shoes. Pantazes questioned the school policy regarding the handling of this type of this behavior. However, she did not say anything to Curchin about the incident. She was scared, in denial, and avoided confrontation.

Pantazes was questioned whether she observed any injuries to L.P.M. as a result of the incident. She stated that he is self-abusive. He has marks all over him from self-abuse. Consequently, she was unable to discern whether there were any injuries as a result of the November 16, 2004, incident.

Pantazes was questioned whether she thought Curchin could have prevented the shoe-throwing incidents. Pantazes stated, "No, it happened too quickly. [L.P.M.] just suddenly threw the shoes."

Pantazes was asked about which hand Adkins had the shoe in while she was hitting L.P.M., but she said she could not recall. She was offered her transcribed statement of February 8, 2005, to refresh her recollection (P-14 at 14). Therein, Pantazes was asked, "Do you remember which hand or arm that she used to pick up the shoe?" Pantazes responded: "Her right." Pantazes testified at the hearing that, irrespective of the transcript, she presently could not recall which hand Adkins had the shoe in when she was hitting L.P.M. Pantazes was asked whether Adkins admonished L.P.M. after the first incident. She could not recall.

Pantazes was questioned regarding Curchin's involvement during the shoe-throwing incidents. Pantazes confirmed that Curchin lightly swatted L.P.M. on the head after the first incident, and actually was pushing L.P.M. in the head after the second

incident. In other words, Curchin was not actually hitting L.P.M., but was more pushing outward toward L.P.M. with an open hand.

Edra Pantazes was asked to describe the velocity of the shoes when they were thrown. On a scale of one to ten, with ten being the highest velocity, she described the velocity as a ten. Students could have been seriously hurt. The velocity was very high and the potential for injury was great.

During Pantazes' direct and cross-examination, she was very emotional. She cried on and off, talked in a low voice, and rarely made direct eye contact. She was asked repeatedly whether she needed a break. I observed that Pantazes could hardly stand and walk across the room. She was trembling.

Petitioner offered the testimony of Alfonso Renna, investigator for the Department of Human Services, Institutional Abuse Investigation Unit (IAIU), South. His unit was contacted on or about November 18, 2004, and he was assigned to investigate the matter. His investigation involved interviews with Karen Curchin; Barbara Adkins; Edra Pantazes; Emma Pennello; Caroline Nocella, and others.

Renna interviewed Curchin at the offices of her attorney on January 6, 2005. Curchin described L.P.M. as an aggressive student. He suffers from severe disabilities and is self-mutilating. She denied hitting L.P.M.

Renna interviewed Emma Pennello on November 23, 2004, and on January 18, 2005. Pennello recalled that L.P.M. threw shoes very frequently. However, she did not recall if a shoe-throwing incident occurred on November 16, 2004. She specifically denied that L.P.M. was struck or hit by anyone. She stated that there were four staff members in the room at the time the alleged incident occurred. When asked whether Caroline Nocella was in the room, Pennello told Renna that she was not sure.

Renna interviewed Edra Pantazes on November 23, 2004, and on January 18, 2005. She denied any conflicts with staff members. She did indicate, however, that

she does not like to work with difficult students. Notably, Pantazes stated to Renna that Curchin flicked L.P.M. in the back of the head after the first shoe-throwing incident. She described "flicking" as using the pointer finger and thumb to hit someone, as a child would do to irritate a friend. Renna then discussed the second shoe-throwing incident with Pantazes. She confirmed that both Adkins and Curchin struck L.P.M. in the head after this incident, apparently to get his attention.

Renna also interviewed Caroline Nocella. Nocella stated that she believed she was in Curchin's classroom on November 16, 2004. She stated that she was in the room for approximately one-half hour. She said she was going on a field trip and went to her sister's room to await departure for the field trip.

After concluding his interviews, Renna substantiated a finding of abuse based upon the actions of Adkins and Curchin and the risk to the student.

Renna was questioned on cross-examination about the process involved in substantiating abuse. He stated that the investigations are reviewed jointly by his supervisor and him.

Renna was questioned about his interview of Pennello. His investigative notes state, with regard to the incident involving Adkins and Curchin on November 16, 2004:

> On the date of the alleged incident, 11/16/04, there were 4 staff in the room, normally there were 3 staff and 8 children but on that day they had an extra aide assigned to their room who was a floater.
>
> Again stated she never witnessed Ms. Curchin or Ms. A. hitting [L.] in any way on that day or any other day.

Renna interpreted this documented statement from Pennello to mean that she did not observe the incident, but it could have occurred. He did not take Pennello's statement as a statement of fact denying that the incident had occurred.

Renna was asked to recall Pantazes' statement to him with regard to Curchin flicking L.P.M.'s ear. Again Renna recounted for the record a motion wherein the index finger and thumb are placed together and the index finger is pushed off from the thumb in what would be a flicking motion. It was not described as a swat, but rather a finger motion to the ear.

Renna was asked to summarize the basis of his decision that abuse should be substantiated. He said that he based his conclusion almost entirely on the testimony of Edra Pantazes. He concluded that there was no ill will or motive by Pantazes. He entirely discounted the statements of the other witnesses, including Curchin, Adkins, Pennello and Nocella. Renna could not explain with particularity why he discounted the statements of the other witnesses. He did not make any credibility judgments. He simply stated that he just accepted what Edra Pantazes told him.

I observed Mr. Renna to be an honest and candid investigator. However, his investigation was cursory or sketchy. Material portions of his testimony were not documented in his report. He candidly admitted that many of the statements he made before this administrative law judge (ALJ) should have been more specifically documented in his report. He did not seriously probe interviewees in terms of recollection, vantage point, trustworthiness of statements, follow-up questions and similar techniques used by investigators. By comparison, the Prosecutor's Office conducted a thorough investigation using the tools mentioned above.

Petitioner offered the testimony of Kevin Walsh, investigator, Atlantic County Prosecutor's Office. Walsh was assigned to the Crimes Against Children Unit on or about November 16, 2004. He is currently assigned to a different unit. The children's unit handles investigations of physical and sexual assaults upon children. The sources of information ordinarily are the Division of Youth and Family Services (DYFS), municipal police departments, etc. Walsh was subpoenaed to testify in the present matter. His initial contact with this matter came from investigator Alfonso Renna through a referral to the Atlantic County Prosecutor's Office.

Walsh interviewed Karen Curchin, Edra Pantazes, Emma Pennello, and Caroline Nocella. The interview of Karen Curchin was done with counsel present. Walsh described the interview process. Initially he would engage in a pre-interview with the witness or the accused. This enabled them to refresh their recollection prior to giving a taped statement. At the conclusion of the pre-interview, a formal investigative statement was obtained. The statements were taped and made under oath.

Walsh identified and authenticated the investigative narratives and transcripts accumulated by the Prosecutor's Office (P-7 to P-11; P-15 to P-19). Walsh was asked to give his opinion about the events that occurred on November 16, 2004, including credibility of witness statements. Walsh stated that he believed that Pantazes' statements were credible. He also concluded that the statements of other witnesses, including Curchin, Pennello and Nocella, were credible, but had some questionable inconsistencies. Since the present matter is a de novo proceeding, the credibility determinations of an investigator are not relevant or binding upon this ALJ.

Walsh highlighted some significant statements contained in his investigation records. Particularly, when Curchin was interviewed she had no specific recollection of the incident occurring on November 16, 2004. Walsh also documented that Curchin had no negative comments regarding or bias toward Pantazes.

Walsh was subject to cross-examination. He was questioned whether he had the IAIU investigative report in his possession at the time he was conducting his investigation. Walsh indicated that he did not have the IAIU investigative report while conducting his interviews. Walsh was questioned about certain inconsistencies between the IAIU report and his report. For instance, Pantazes told the IAIU investigator that the first contact between Curchin and L.P.M. was a flick of the finger, and not a swat to the head. Walsh was not aware of these inconsistent statements by Pantazes.

Walsh discussed the procedure for determining whether the Prosecutor's Office submits a case for indictment. The file is reviewed by the assistant chief county

prosecutor, James McClain. In this case, McClain determined, after reviewing the entire case, that there was insufficient evidence to file criminal charges or to justify a continuing criminal investigation. This was confirmed in a closing memo to the file from McClain dated July 1, 2005. After the case was closed, the investigative reports, transcripts, and other materials were submitted to the attention of superintendent Barbara Morvay at the Atlantic County Special Services School District. This was accomplished after Morvay contacted the Prosecutor's Office to find out the status of the case and was advised that it had been closed. McClain advised Morvay to make the request for the investigative materials.

Walsh was questioned whether Emma Pennello witnessed either Curchin or Adkins hitting L.P.M. Walsh was directed to the February 8, 2005, statement of Emma Pennello, pages 2-24 (P-15). In her statement, Pennello confirmed that neither Adkins or Curchin smacked or hit L.P.M. in any way. She indicated that she could not see everything that was going on among Curchin, L.P.M. and Adkins. Pennello also observed that while Adkins was scolding L.P.M. she was waiving his shoe, which was in her left hand, around his face and head, but she was not hitting him, or at least Pennello did not hear any contact. They were blocking her view. However, she did not see them hit L.P.M., nor did she hear any sounds that were consistent with L.P.M. being hit. Pennello did observe Adkins scolding L.P.M. and, as she was scolding him, L.P.M. was hitting the left side of his face (P-15 at 22-24).

Petitioner offered the testimony of Carmella Price, transportation supervisor. As transportation supervisor, it is Price's duty to set up bus routes, arrange field trips, and handle all matters connected with transportation for the Atlantic County Special Services School District. Price was asked to review Caroline Nocella's time sheet for the week of November 15 through November 19 (P-13). Price identified the time sheet and stated she was familiar with it. This time sheet contains Nocella's signature, as well as Price's. She stated that there was no field trip scheduled for November 16, 2004. There was a field trip scheduled for November 15, 2004, which was canceled, and a trip to Best Buy on November 18, 2004.

Petitioner offered the testimony of Pat Dannenberg, currently the principal at the Atlantic County Special Services School District. She has been in the teaching profession for twenty-six years, and has been a principal for sixteen of those twenty-six years. She holds a bachelor of arts degree in French and a master's degree in psychology. She also possesses several New Jersey certifications, including certificates in principal/supervisor, supervisor, school psychologist, pupil personal services, French and psychology.

Dannenberg stated that she is familiar with L.P.M. He was approximately fifteen years old in November 2004. His disabilities include Down's syndrome and mental retardation — low end, at approximately a two-year level — and his I.Q. is between 35 and 36. He also has auditory, visual and behavioral impairments and is non-verbal.

Dannenberg discussed L.P.M.'s behavioral issues. He is seriously self-abusive and non-compliant. He hurts others, kicks them and throws things. He cannot communicate. Consequently, if he was subject to abuse, he would not be able to advocate for himself. His behavioral intervention plan includes techniques such as distraction, redirection and incentives. Dannenberg stated that L.P.M.'s behavioral plan does not include any techniques such as hitting or slapping. The District also uses a Rifton chair. The Rifton chair assists in posture and positioning while in the classroom. The Rifton chair has a belt similar to an automobile seatbelt which can be used to restrain L.P.M. and hold him while seated in the chair. The chair is approximately two feet off the ground. Consequently, when L.P.M. is in the Rifton chair, he is seated very low. This makes it difficult for him to participate in educational activities at the normal height of a desk or table.

Dannenberg was asked whether she was familiar with Curchin, Adkins and Pantazes. She indicated that Curchin was a master teacher, and Adkins and Pantazes were aides. Adkins had been an aide for Curchin for approximately two and one-half years. Pantazes was an aide who started in September 2004. Pantazes was initially assigned to Ann Finley's class as a one-on-one aide. The student she was assigned to did not attend the Atlantic County Special Services School as of September 2004.

Consequently, Pantazes was reassigned to Costigan's class as a one-on-one aide. The student she was working with in Costigan's class left shortly after the school year began. Pantazes then became a floater.

Dannenberg was questioned about her response to the November 16, 2004, incident. She met with Pantazes in her office on November 18, 2004. She and Pantazes discussed the incident and she then asked Pantazes to immediately write a statement detailing the incident. Dannenberg also spoke to Superintendent Morvay on November 18, 2004.

Dannenberg met with Curchin on November 18, 2004. Curchin came to Dannenberg's office with Craig Wigley, a union representative. The union representative advised Curchin not to say anything.

Dannenberg was asked whether Curchin had reported any incidents of abuse from November 16. Dannenberg stated that Curchin failed to report any incidents. Failure to report abuse is a violation of school policy (P-21, Exhibits A and D).

Dannenberg was asked whether there were any prior concerns involving Curchin. Dannenberg stated, without specifying a specific date, that she received an anonymous note that Curchin was tying a student to a chair. The student in question was L.P.M. Dannenberg confronted Curchin on the matter. Curchin indicated that L.P.M. was being restrained in the seat with a belt. In order for a mechanical device to be implemented, it must be approved by the Child Study Team (CST). Curchin said that she was using a belt for legitimate educational reasons. L.P.M.'s Rifton chair was too low to the ground for him to meaningfully participate in classroom activities. Therefore, Curchin elevated L.P.M. to a chair of normal height. However, she was concerned that he would injure himself or not sit upright in the chair. She improvised and used what is similar to a weightlifter's belt to help L.P.M. with his posture while sitting in a higher chair. This secured him in a reasonable and safe manner. This technique was brought before the CST. The CST, which included L.P.M.'s parents,

approved the restraining technique utilized by Curchin. No disciplinary charges were filed against Curchin.

Dannenberg was asked how Adkins was assigned as an aide to Curchin's classroom. Dannenberg recalled that Adkins was known as a take-charge, aggressive aide. She could be negative at times and very assertive. When she was assigned to Curchin, Dannenberg advised Curchin to keep an eye on Adkins. She wanted Curchin to make sure that Adkins behaved in a dignified manner with the students and toned down her assertive behavior.

Dannenberg was subject to cross-examination. She was asked whether Adkins received satisfactory performance appraisals while under Curchin's stewardship. "Satisfactory" is the highest score available on the performance appraisal forms. Again, Adkins was an aide for Curchin for approximately two and one-half years prior to November 2004, according to Dannenberg. Adkins received satisfactory performance appraisals during the relevant time period. Dannenberg was asked whether Curchin had complied with Dannenberg's instructions that Adkins' student treatment be modified and corrected, i.e., that she be more dignified and less domineering. Dannenberg acknowledged that Adkins' satisfactory performance appraisals confirmed that Curchin was properly remediating Adkins' bad habits. Dannenberg did observe that Adkins was subject to a disciplinary event for using bleach after having been instructed not to do so. Another teacher or aide was experiencing allergic reactions and all staff members were instructed to discontinue the use of bleach.

Dannenberg was asked to review Karen Curchin's performance appraisals for the years 2000 through 2004 (R-1 through R-6). All of the appraisals, except for an appraisal dated May 17, 2004, were prepared by Dannenberg. Curchin received satisfactory appraisals for each year. The appraisal process is a culmination of the entire year's observations. Dannenberg stated that she does scheduled observations of the teachers, of which the teachers are notified. Dannenberg does continue to make observations of the teachers throughout the year. This includes undisclosed observations or just mental notes made during the course of a day. There are times

when Dannenberg will actually peer into classrooms and just observe for a few minutes. In Curchin's case, Dannenberg had exclusively positive comments, such as:

> [C]reates an emotionally/physically safe environment for her students.
>
> [R-1.]

> She and her aides have done a nice job of creating a pleasant, safe environment for the students. She really has helped get these students off campus and into the community which has been very positive for them. Ms. Curchin lobbied for playground equipment for them. They get quite a lot of exercise and several have gained strength and stamina and have far exceeded their P.T. goals. It is clear that the students feel comfortable and valued in their class. [She] doggedly determines with DYFS when the students need help. Interested in getting students off campus and into the world. The students love it and the non-handicapped population are beginning to respond positively when they interact with our students in public because our students are repeat customers.
>
> [R-2.]

> She teaches a class of our most severely disabled adolescents. Ms. Curchin is very flexible. She easily accepts new students to assist districts with emerging situations, also takes difficult students from other campuses or classes in the district. Ms. Curchin is becoming quite proficient in using technology to develop measurement tasks for student portfolios. Her willingness to take on the task of becoming computer literate has been a pleasure to witness and a great example for other staff members. Ms. Curchin also works hard to connect her students with agencies which will improve the quality of their lives. She is very persistent about getting them services.
>
> [R-3.]

> The atmosphere which she and her aides create in the classroom is warm and inclusive. Ms. Curchin is a strong advocate for her students. She works effectively with our staff and without outside agencies to get them what they

> need. She has done an outstanding job dealing with their physical needs (e.g., consistent walking program) and of exposing them to the community, where they have learned to function in a socially acceptable manner, given the nature of their deficits.
>
> [R-4.]
>
> Ms. Curchin and her aides have created a very positive classroom environment for the students. Each student is treated with care and dignity. This type of caring atmosphere is critical to fostering a safe and comfortable classroom for these students to grow and develop at their ability levels.
>
> [R-5.]
>
> Ms. Curchin's classroom is well organized and a friendly place. The students feel comfortable there. Instead of food re-enforcers, which are very motivating for this age level, Ms. Curchin has gliders and rocking chairs in her classroom. Students do work hard to get an opportunity to use the glider. On the date of this observation, her students worked hard on their vocational tasks. The teacher was aware of their levels and matched tasks to their abilities. The tone of the class was friendly and encouraging.
>
> [R-6.]

Dannenberg was questioned whether she met with IAIU investigator Renna. Dannenberg recalled being interviewed by the investigator. She was asked by respondent's counsel to review the investigator's statement. Dannenberg advised the investigator that she was "surprised to hear about the allegation regarding Ms. Curchin as Ms. Curchin always seemed to be concerned about children at the school" (P-1 at 5). Dannenberg was asked if she was ever suspicious or ever heard of any allegations of abuse arising in Curchin's class. Dannenberg stated that she never suspected any abuse being committed by Curchin or her aides prior to this incident.

Dannenberg was asked to describe Curchin's demeanor. Dannenberg stated that Curchin has always been friendly and inclusive.

Petitioner offered the testimony of Barbara Morvay, superintendent of the Atlantic County Special Services School District. Morvay has been superintendent of the District since 2002. She possesses a bachelor of arts degree in teacher of the handicapped and speech therapy. Her certifications include superintendent, assistant superintendent, business administrator and school administrator.

Morvay stated that she was familiar with the November 16, 2004, incident. She was initially advised of the incident by Principal Dannenberg. Morvay learned that Edra Pantazes had observed the incident. She advised Dannenberg to get a written statement from Pantazes, which is standard operating procedure. Morvay then contacted the institutional abuse hotline. She was thereafter contacted by Mr. Renna of the Institutional Abuse office. The agency conducted its investigation. An initial status report was issued on or about February 9, 2005. The initial report concluded that abuse would likely be substantiated (P-3). The preliminary report stated that there was a serious concern regarding the actions of both Adkins and Curchin (P-3). Their method of intervention was determined to be inappropriate by the IAIU. Notably, the District did not conduct its own investigation. It relied exclusively upon the investigations of the IAIU and the Atlantic County Prosecutor's Office.

Morvay discussed the tenure charge process. The District waited for all of the outside agencies to conclude their investigations. The District relied primarily upon the conclusions contained in the IAIU report in assessing whether or not to assert tenure charges. Tenure charges were not pursued until after the Atlantic County Prosecutor's Office determined whether to issue an indictment. Morvay was advised in July 2005 that Curchin and Adkins would not be charged criminally. Therefore, Morvay requested a copy of all of the investigative reports from the Atlantic County Prosecutor's Office. The IAIU's and prosecutor's investigations were reviewed by Morvay, the school board and its attorney. After reviewing all of the pertinent investigative reports, it was determined that tenure charges would be filed against Adkins and Curchin. The tenure charges were prepared on or about August 24, 2005 (P-20). A Statement of Evidence in Support of Tenure Charges was also submitted on that date (P-21).

Morvay was asked to authenticate the school policy on abuse. The school has a policy regarding student health, welfare, and physical management (P-21, Exhibit A). It states that any staff member who observes abuse must report it to the administration within twenty-four hours of the incident. Strict adherence to this policy is required. Morvay stated that neither Curchin nor Adkins reported an abuse incident from November 16, 2004. The abuse was reported by aide Edra Pantazes. Notably, Pantazes did not report the abuse until November 18, which was forty-eight hours after the incident. Morvay stated that the twenty-four-hour reporting requirement was waived in this case because Pantazes was uncertain and afraid.

Morvay was subject to cross-examination. She was asked why tenure charges were brought in lieu of a suspension or a withholding of a salary increment. Morvay stated that tenure charges were based upon the strength of the IAIU report. The IAIU investigator substantiated abuse. The District did not conduct its own investigation. Additionally, Morvay never interviewed Pantazes in connection with the incident.

Morvay stated that she can assert additional disciplinary charges against teaching staff members or aides if circumstances warrant. Morvay specifically stated that cases of this nature have no statute of limitations. Morvay was asked whether the defense witnesses had been notified that there is a potential for additional charges, and she said that she has not advised the witnesses that other charges could issue, if circumstances warrant.

Morvay was asked about her familiarity with Edra Pantazes and her family. Morvay stated that she is not friends with Pantazes or her family. They are merely acquaintances. She only knows the family from the community. She emphatically stated that they are not friends and have not been friends. Morvay recalled that Pantazes' mother was a preschool teacher for one of her children. However, that relationship did not blossom into a long-term friendship.

Morvay was asked how long she has known Curchin. She stated that she did not recall.

Curchin's Case

Respondent offered the testimony of Emma Pennello, who was a classroom aide for Curchin for approximately five years. She has been involved in the education system for a total of fifteen years. She possesses a GED degree and no New Jersey certifications. Her training consists of in-service programs offered by Atlantic County Special Services School District.

Pennello was directed to R-8, a drawing of Curchin's classroom. Pennello verified that the drawing actually depicted Curchin's classroom layout for the 2004 school year.

Pennello was questioned about the November 16, 2004, incident. She indicated that she had no specific recollection of the incident. She acknowledged that she was interviewed by investigators from the IAIU and the Atlantic County Prosecutor's Office, and that she had given investigators Walsh and Renna specific details of what had occurred in Curchin's classroom on November 16, 2004 (P-1 at 5; P-15). Pennello reaffirmed as she testified before this ALJ that she had no present knowledge of the incident on November 16, 2004. She explained why she felt compelled to give specifics to the respective investigators. When she was being interviewed, she was without benefit of counsel. The interviews occurred without notice or adequate time to plan, review or contemplate the events of November 16, 2004. Pennello had a general recollection of a typical day and then adapted those general recollections specifically to November 16. In hindsight, she was wrong for stating that her general recollection was specific to November 16, 2004. While the class does have a general routine that it follows on a daily basis, it was inappropriate for her to suggest that the daily routine was similar to or accurately depicted events that occurred on November 16, 2004.

Pennello was subject to cross-examination. She confirmed that she is not happy that Curchin and Adkins are subject to suspension for alleged abuse. She has known both of these individuals for several years and she respects them.

Pennello was asked if Caroline Nocella was in the room on November 16, 2004. She could not recall if Nocella was in the room or if she had a field trip that day.

Pennello was also asked whether she had contact with Curchin or Adkins subsequent to November 16, 2004. She indicated that she had casual contact with them. She may have discussed some details about the case in an effort to refresh her recollection. She also met them at personal affairs, such as funerals or other events.

Respondent offered Susan Frambes as a witness. Ms. Frambes is a school social worker. She has a bachelor of arts degree from the University of Pennsylvania in sociology and a master's degree from Bryn Mawr College in social services. She also has thirty credits towards her doctorate. She is in her sixteenth year as a social worker at the Atlantic County Special Services School District.

During the 2003-2004 school year, which is the school year prior to November 16, 2004, Frambes worked in Curchin's classroom. Three days each week she would assist the teachers during their lunch hour. In effect, she provided relief to the teachers so they could eat lunch. She performed this task consistently throughout the entire school year. She had the opportunity to observe Curchin and Adkins, as well as L.P.M., for at least three hours each week. She did not see L.P.M. throw shoes. However, she did observe L.P.M.'s other behavioral difficulties and knew he was a very difficult student to handle.

Frambes stated with confidence that she never saw Curchin or Adkins do anything inappropriate. She stated that they are outstanding teachers. They rarely took breaks, even while Frambes was there to fill in for them during lunch. Both Curchin and Adkins ate lunch with the students, even though they could have taken a break. Both Curchin and Adkins taught her many good techniques on how to handle

students with severe disabilities. She never saw these teachers yell at, hurt or do anything improper or unprofessional with the students.

Frambes was subject to cross-examination. She conceded that she was not in the classroom on the date of the incident in question.

Respondent offered the testimony of Barbara Adkins. Adkins was employed by the Atlantic County Special Services School District from 1989 through November 2004. Prior to working with the District, she worked at the Parents and Friends Association (PAFA) in Vineland. The PAFA is an institution that provides services to adults with severe disabilities. She possesses a high school diploma and attended a two-week training course regarding special needs for adults with disabilities while employed at the PAFA.

Adkins' first position with the District was as a bus driver. Thereafter, she became a substitute aide, while also serving as bus driver. In 1991 or 1992 she became a full-time one-on-one aide.

Adkins summarized her work history with Curchin. She worked in Curchin's classroom for approximately two to two and one-half years. During the 2003 school year, Adkins was a one-on-one aide for student S. For the 2003-2004 and 2004-2005 school years, she was a one-on-one aide in Curchin's classroom and became familiar with L.P.M., but was not his aide. She was asked to review the diagram of Curchin's classroom (R-8) and she confirmed that it was accurate.

Adkins described the classroom layout, and the circumstances and events leading up to the incident of November 16, 2004. Around 9:30 a.m. all of the students were aligned around the table (see R-8). There were three students seated on the blackboard side of the table, L.P.M. was seated at the head of the table (or top of R-8), and student A. was seated at the bottom of the table. Students A. and B. were seated on the side of the table opposite the blackboard. Some time around 9:30 a.m. Curchin took students A. and B. to the kitchen area outside the classroom to get snacks and

food for the classroom. This was a common routine for the class. Typically, Curchin would obtain the food and have one or two students assist her. While Curchin was outside the classroom, L.P.M. threw a shoe at one of the students, T., who was sitting on the blackboard side of the table just to Adkins' left side. The shoe slid across the table and landed on the floor. Adkins picked the shoe up and tossed it towards Curchin's desk, away from L.P.M. L.P.M. regularly throws his shoes, as well as engages in other inappropriate behavior. Within seconds, L.P.M. took off his other shoe and threw it and hit T. The shoes were thrown with significant velocity. The second shoe bounced off T. and back onto the table. Adkins took the shoe and walked around to L.P.M. She approached L.P.M., who was sitting at the head of the table, and began scolding him while holding the shoe in her left hand. She was waiving the shoe within approximately six to ten inches of L.P.M.'s face. Adkins recalled that when L.P.M. gets scolded, it sometimes stimulates him and he becomes self-mutilating.

L.P.M. began scratching his face while he was being scolded. Adkins attempted to stop him from scratching his face. When this occurs, L.P.M. clenches his hand and digs his fingernails into his face, grabbing on to something to prevent his arm from being restrained by the aide. Adkins then has to grab L.P.M.'s arm and pull his fingernails out of his face to release his hand so it can be restrained. This prevents L.P.M. from inflicting significant injury to his face. Once L.P.M.'s hand was removed from his face on November 16, 2004, Adkins sat down with L.P.M. to remain in close proximity in case L.P.M. acted up again. Curchin and the two other students had not yet returned with the food for the students. It generally took Curchin about ten to fifteen minutes to gather the food and return. The entire incident with L.P.M. occurred within a two- or three-minute time span while Curchin was gone.

Adkins was asked where Pantazes was during this incident. She said that Pantazes was sitting next to H., who was in a rocking chair away from the table. Adkins was also asked if her sister, Caroline Nocella, was in the room. Adkins indicated that Nocella came into the room for a short period after Curchin had left the room (9:30–9:45 a.m.). She was in the room for both shoe-throwing incidents. However, Adkins

was unsure whether Nocella had observed the shoes being thrown. Nocella was seated at the table near where Curchin usually sits.

Curchin returned to the room sometime after 9:45 a.m. Nocella had left the room prior to Curchin returning. The students who had assisted Curchin sat back in their chairs at the table on the side opposite the blackboard. The food was passed out and the students had their morning snack. Adkins assisted L.P.M. with his food. He generally requires assistance eating. Pantazes moved over to help student M. with his food at the table.

Adkins was subject to cross-examination. She was asked to break down the specific times when Curchin left and returned to the room. Adkins approximated that Curchin left the room at 9:45 a.m.; that the first shoe and second shoe were thrown between 9:47 a.m. and 9:48 a.m.; that she moved and sat next to L.P.M. at approximately 9:49 a.m.; and that Curchin returned to the room at approximately 10:00 a.m. Adkins estimated that her sister, Caroline Nocella, was in the room between 9:47 and 9:55 a.m.

Adkins was then asked to review the times provided by Curchin to investigator Walsh (P-11). The times testified to by Adkins were approximately fifteen to thirty minutes different than the times given by Curchin to Walsh. Adkins stated that the times she gave were approximations. During the day she does not look at the clock and does not reflect on the specific time of day. There are no bells for classroom changes and no set schedules that the teachers must follow. Each day has its own variables and unique events that cause deviations in the routine schedule, such as toileting students, diaper changes, students arriving late, and things of that nature. Adkins believed that her time estimates were probably more accurate than those offered by Curchin to Walsh.

Adkins was asked why she refused to give a statement to the investigators from the IAIU and the Prosecutor's Office. She took the advice of her attorney not to provide a statement. Her attorney was present at this hearing.

Adkins was asked whether she had a close personal friendship with Curchin. Adkins stated that she worked with Curchin for approximately two to two and one-half years. They were not close personal friends. They attended one union affair together and had lunch one time outside of work. They expressed condolences to each other during the last year over family losses. Their relationship outside of work is unremarkable.

Adkins was asked whether shaking a shoe at a student was appropriate behavioral intervention. Adkins stated that she yelled at L.P.M. in a firm voice to prevent further injury to other students while she was shaking the shoe approximately six to ten inches away from his face. She is not familiar with his IEP because aides do not have access to IEPs. She also indicated that she has scolded L.P.M. on other dates and also shaken his shoe at him while she was scolding him.

Adkins was questioned about her performance appraisals from 2000 to 2005 (P-34; P-35). She acknowledged that she had some negative comments in her appraisals in the year 2000. Adkins stated that her 2004 performance appraisal was performed by Principal Dannenberg. Her review was entirely satisfactory and had high, glowing remarks.

Respondent offered the testimony of Craig Costigan. Costigan is employed as a teacher by the Atlantic County Special Services School District. His classroom is adjacent to that of Curchin. Costigan acknowledged that Edra Pantazes was a one-on-one student aide in his classroom until the student she was working with left the District. Thereafter, Pantazes became a floater.

Costigan was asked whether he discussed the November 16, 2004, incident with Pantazes. Costigan recalled that he talked to Pantazes on November 16 or 17. Pantazes felt that she could confide in Costigan. They talked privately in a bathroom across from his room. Pantazes told Costigan that Adkins threw a shoe at L.P.M. on November 16, 2004. Pantazes also told Costigan that Curchin slapped L.P.M. on the

head. Pantazes wanted to know whether she should report this as abuse. Costigan explained the options to Pantazes, which included reporting the incident if she believed it was abuse or not reporting it if she believed it was not abuse.

Costigan was subject to cross-examination. He confirmed that he is a New Jersey Education Association (NJEA) member. He also admitted that he was contacted by attorneys for the NJEA, including respondent's attorney and Adkins' attorney.

Costigan was asked to recall more details of his November 16 or 17 conversation with Pantazes. The conversation lasted about ten minutes. Pantazes was seeking his advice. Costigan related his experience with observing abuse at the District. Costigan's wife is also a teacher in the District and also witnessed abuse. Both he and his wife have had to report staff members for abuse in other incidents.

Costigan discussed how he recalled his conversation with Pantazes. He initially met with counsel for Curchin and Adkins. He did not recall during that meeting some specifics of the conversation that he and Pantazes had on November 16 or 17, 2004. He reflected on his meeting with Pantazes after meeting with counsel. He thought about it overnight and more details came to mind. He contacted the attorneys the following day and stated that he was reasonably sure that Pantazes told him that Adkins threw a shoe at L.P.M.

Costigan was questioned by this ALJ regarding what techniques he uses for behavioral intervention. Costigan indicated that when students misbehave, he does use a loud, firm voice to back the student down. Some students have auditory issues, so you have to yell loudly to get their attention. It is common to yell at students. However, he would not waive an instrument, including a shoe, at a student's face to intimidate the student.

Respondent, Karen Curchin, testified. She has been teaching for thirty-one years. Her New Jersey certifications include teacher of deaf and hard of hearing,

teacher of the handicapped, and teacher of elementary education. On November 16, 2004, Curchin was working under her teacher of the handicapped certification.

Curchin stated that L.P.M. had been a student in her class for approximately four or five years. Barbara Adkins was an aide in her class for approximately the same time period. Curchin stated that Edra Pantazes was never an aide in her classroom before the date of the incident in question.

Curchin was specifically asked about her recollection of the events of November 16, 2004. She was asked whether she recalled Adkins waving a shoe in the face of L.P.M. Curchin stated that she had no recall of that event on November 16, 2004. She was asked whether she had any recall of her hand striking L.P.M. She stated that she had no recall of her hand striking L.P.M. Curchin stated that she never strikes anyone as a form of behavioral intervention.

Curchin was questioned about Edra Pantazes' involvement with her class on the date of the incident. Curchin recounted her initial observations of Pantazes. She stated that she sat in the corner of the classroom and it appeared as though she did not want to be in the classroom. She looked uncomfortable. Pantazes had to be prompted to perform the relevant tasks for the students. For example, when the children were walking outside on November 16, Pantazes had to be prompted to maneuver the slower children. Curchin stated that she did not recall any specific conversations with Pantazes during their walk.

Curchin testified that she first learned of the allegation of abuse on November 18, 2004. It was late in the day and she was called to Principal Dannenberg's office. She was advised that she was being suspended because of an allegation of abuse. She has been suspended since November 18, 2004.

Curchin was subject to cross-examination. Curchin was again asked how long she worked with Barbara Adkins. She said that she worked with Adkins for four or five

years. She was then asked how long she worked with Emma Pennello. Curchin stated that she worked with Pennello for approximately eight years.

Curchin was questioned about her social interaction with her class aides. She stated that she rarely socialized with her aides outside of work. After November 15, 2004, she met with her aides possibly three times. These meetings were usually group meetings or related to some event or celebration. For example, Curchin met with her aides after a death in someone's family. A group of eight people went to lunch. On another occasion, she met Barbara Adkins for lunch at the Mill Street Pub, Mays Landing, New Jersey. She was asked whether they had any specific conversations about this case. Curchin stated that they may have discussed the case briefly, but they generally tried to avoid the case and talk more about family and other pleasantries.

Curchin was asked to review IAIU investigator Renna's report (P-39 at 8). Curchin was directed to specific portions of her statement to Renna. Renna's notation states that an aide named Edra may have been the one to refer the case to the District for investigation. Curchin stated that Renna's notes are incorrect and that she did not mention Edra, but rather mentioned Enrique. Curchin was then referred to the investigation report of Kevin Walsh, Atlantic County Prosecutor's Office (P-11 at 5). She reviewed her statement to Walsh, wherein it is recorded that Curchin states that she didn't "have anything negative to say about Edra." Curchin agreed with the statement recorded by Walsh.

Curchin was questioned about her familiarity with L.P.M.'s IEP. She agreed that the behavioral intervention sections of the IEP did not authorize or permit shoe shaking as an appropriate intervention technique.

Curchin was asked whether she had observed either of her aides, Adkins or Pennello, shake a shoe at L.P.M. on other dates. She answered, "Yes." At this point, Curchin elaborated on why the aides were permitted to demonstratively use the shoe in the presence of L.P.M. as a form of intervention. Curchin stated that ordinarily when L.P.M. threw his shoes, they would just take his shoes, set them aside, and let him walk

around the classroom in his socks. However, L.P.M. was throwing his shoes on the bus ride to and from school. Curchin perceived this as dangerous and determined that simply taking away his shoes was inappropriate. The better approach would be to teach him to not throw his shoes. Accordingly, they modified their strategy. If L.P.M. threw his shoes, they would attempt to redirect him or train him not to throw his shoes. L.P.M. is non-verbal and hearing impaired. He has been observed wearing hearing aids. Therefore, simply using voice commands was insufficient. It was necessary to use the shoes in an instructive way to redirect him. As a result, the aides would show the shoe to him visually and either scold him or encourage him not to throw his shoes. The aide would be talking to L.P.M. with his shoe in her hand, shaking it up and down and pointing to it, saying, "Do not throw the shoes." It was anticipated that this new approach might initially agitate L.P.M. However, for L.P.M.'s own safety and the safety of others, this approach was necessary. To simply allow him to throw the shoes and then take the shoes and put them aside was insufficient, given that he was throwing the shoes outside the classroom and placing the bus driver at risk.

According to Curchin, L.P.M. had injured several aides. For example, when an aide would try to put L.P.M.'s shoe back on, he would take his other shoe and hit the aide in the head. An aide was seriously injured when she was hit in the eye. Curchin had also been hurt.

Curchin believed it was simply unfair to ignore this problem. As the master teacher, she decided that more active intervention was necessary, which included utilizing the shoe demonstratively in the presence of the student in order to attempt to gain some control over this problem.

Based on this new strategy, Curchin prepared behavioral charts for monitoring L.P.M. One specific category on the charts was shoe throwing (P-29; P-37; P-42 through P-44). On each of these charts there are notations indicating the number of times L.P.M. threw shoes, threw food, injured himself or hit others. Most of the entries are in the self-injurious behavior column. L.P.M. was noted to be self-mutilating,

whether agitated or not. The next highest number of entries is in the shoe-throwing column.

Curchin was asked whether waiving a shoe at L.P.M. precipitated self-mutilating behavior. Curchin agreed that intervening and disciplining L.P.M. generally increased his self-mutilating behavior. However, she disagreed that discipline was the only cause of that behavior. L.P.M. would engage in self-mutilating behavior spontaneously. When he threw shoes he was agitated, and any corrective measures, whether vocal or demonstrative, could cause him to engage in self-mutilating conduct. Nevertheless, Curchin believed that her strategy was appropriate, given that the shoe-throwing incidents were occurring more frequently and occurring outside the classroom. She acknowledged that her intervention strategies were not formally documented in the IEP.

Curchin was asked by this ALJ if she specifically recalled the events of November 16, 2004. She stated that while the events on this date may seem extraordinary to an outsider, L.P.M. routinely engaged in self-mutilating behavior, shoe throwing, and other outbursts. These were common, daily events. Consequently, the events of November 16, 2004, did not strike her as extraordinary or unusual.

She explained that her routine was to get two or three students to help her with breakfast. Breakfast was usually somewhere between 9:20 a.m. and 9:40 a.m. She would take two or three students down several hallways to the cafeteria. All of the other classes were having breakfast at the same time. Therefore, there were many students and teachers in the cafeteria collecting the food and utensils for breakfast. Depending on the crowd in the cafeteria and the disabilities of the children who were assisting, the process could take as long as fifteen minutes before Curchin and her students returned to the classroom. Curchin stated with a reasonable degree of certainty that she left the classroom on November 16, 2004, with at least two students to get the breakfast. If a shoe-throwing incident occurred while she was absent from the classroom, it would not be an abnormal or extraordinary event that would be immediately reported to her. It would be considered a routine incident that would just be entered in the behavioral log. The behavioral log would be completed by either Curchin or a classroom aide. She

stated that paperwork is the last item of importance. The students' needs and control over the classroom come first. Paperwork is usually completed at a convenient break in activities.

LEGAL ANALYSIS AND DISCUSSION

Tenure is intended to protect teachers from dismissal for unfounded, flimsy or political reasons. Spiewak v. Rutherford Bd. of Educ., 90 N.J. 63, 73 (1982) (quoting Zimmerman v. Newark Bd. of Educ., 38 N.J. 65, 71 (1962)). Accordingly, a tenured teacher may be dismissed for inefficiency, incapacity, unbecoming conduct, or other just cause only after a hearing in compliance with the Tenure Employees Hearing Law, N.J.S.A. 18A:6-10 to -30.1. In order to dismiss a tenured teacher, the underlying charges must be filed with the local board of education. The teacher is given an opportunity to submit a written statement in defense. After the board considers the charges, it must determine by majority vote whether there is probable cause to believe the charges are true. If the charges are credited, the board must decide whether the charges warrant dismissal or a reduction in salary. If the board determines that the charges warrant either of those penalties, it must certify and forward the charges to the commissioner of the Department of Education for a hearing. N.J.S.A. 18A:6-11.

If the commissioner determines that the charges are sufficient to warrant dismissal or reduction in salary, he or she will forward the case to the Office of Administrative Law for disposition. N.J.S.A. 18A:6-16. The State Board of Education makes the final decision. In re Hearing of Tyler, 236 N.J. Super. 478, 485 (App. Div. 1989), certif. denied, 121 N.J. 615 (1990). The burden is on the board to prove the charges by a preponderance of the credible evidence. In re Polk License Revocation, 90 N.J. 550, 560 (1982).

Unbecoming conduct or the lack of fitness to discharge the duties of a teaching position are grounds for dismissal of a tenured teacher. N.J.S.A. 18A:6-10; In re Tenure Hearing of Grossman, 127 N.J. Super. 13, 29 (App. Div. 1974) (citing Laba v. Newark Bd. of Educ., 23 N.J. 364 (1957)). "[U]nfitness to remain a teacher may be demonstrated by a single incident if sufficiently flagrant." In re Tenure Hearing of

Fulcomer, 93 N.J. Super. 404, 421 (App. Div. 1967) (citation omitted); Pietrunti v. Bd. of Educ. of Brick Township, 128 N.J. Super. 149 (App. Div.), certif. denied, 65 N.J. 573 (1974) (inflammatory orientation speech by tenured teacher attacking school administration warranted her dismissal).

Generally, a single incident of misconduct involving a serious lack of sound judgment or loss of control has been deemed insufficient to justify dismissal. For instance, it has been held that using profanity and threatening to kill a student only warranted the withholding of a teacher's salary increment, rather than dismissal of the teacher. In re Tenure Hearing of DeMarco, 1980 S.L.D. 204, aff'd, St. Bd., 1980 S.L.D. 227. On the other end of the spectrum, engaging in single act of sexual misconduct with a student has been held to be a sufficiently flagrant act to support dismissal. In re Tenure Hearing of Simpson, 1978 S.L.D. 368, aff'd, St. Bd., 1978 S.L.D. 377.

Respondent is a public school teacher who regularly interacts with severely disabled school-age children, and therefore is in a position of public trust. Teachers are entrusted with the care and custody of children, and so their duties require a degree of self-restraint and controlled behavior unlike most other types of employment. As entrusted public role models, teachers are held to a higher standard of behavior than other employees and individuals. In re Tenure Hearing of Lucarelli, 97 N.J.A.R.2d (EDU) 537, 541 (quoting In re Tenure Hearing of Sammons, 1972 S.L.D. 302, 321). These high standards are particularly applicable for teachers of the severely disabled. Many students are so disabled that they cannot defend or advocate for themselves.

The outcome of this case depends largely upon observations made by staff members of an incident that lasted less than a "few seconds." (P-12). The District's primary witness was Edra Pantazes. Pantazes was a newly hired aide. She was unfamiliar with Curchin, Adkins and the students in the classroom. She had only been in Curchin's classroom on one day for approximately fifteen minutes. While Pantazes appeared honest and truthful, her recollection and statements have a variety of material inconsistencies. For example, Pantazes told IAIU investigator Renna that Curchin flicked L.P.M. on the ear using her index finger and thumb after the first shoe-throwing incident. She subsequently told investigator Walsh that Curchin hit L.P.M. with an open

hand in a swinging motion on the back of the head after the first shoe incident. She advised teacher Craig Costigan that Adkins threw a shoe at L.P.M. She subsequently told the investigators that Adkins was hitting L.P.M. with a shoe. Pantazes was asked which hand Adkins had the shoe in while she was hitting L.P.M. Pantazes stated she could not recall. She was offered her transcribed statement of February 8, 2005, to refresh her recollection (P-14 at 14). She was asked by Walsh: "Do you remember which hand or arm that she used to pick up the shoe?" Pantazes responded: "Her right." Notably, Pantazes testified at the hearing that, after reviewing the transcript, she could not presently recall which hand Adkins held the shoe in to hit L.P.M. Pantazes testified that her family is close personal friends with the Morvay family. When Morvay testified, she stated that the Pantazes and Morvay families are not close personal friends, but merely acquaintances. Most importantly, the schematics that Pantazes drew depicting Curchin's classroom just prior to and during the incident (P-27; P-28) show no students at the table on the side opposite the blackboards and swings. Pantazes was specifically asked whether there were students on the right side (or the side opposite the blackboard) of the table. She either responded "no" or said she could not recall. This is of particular significance and corroborates the version of events offered by Adkins. If the students were not at the table, they must have been out of the room with Curchin. This places Curchin outside of the room when the incident occurred, as discussed below.

Adkins stated that Curchin left the classroom around 9:45 a.m. with the students who had been seated on the side of the table opposite the blackboard. These students went with Curchin to the kitchen to obtain the food for snack time between 9:15 and 10:00 a.m. This is standard procedure for the class. This explains why there were no students on the right side of the table when the incident occurred, as observed by Pantazes. The students were not in the room because they were with Curchin (see P-27; P-28). As indicated earlier, Pantazes appeared extraordinarily nervous and even scared during her testimony. She spoke in a low voice. Initially, she stated that she was not sure if she witnessed abuse. When asked about pertinent details of the events of November 16, 2004, she repeatedly stated that she did not recall. This does not suggest that Pantazes was untruthful. However, it does call into question her

recollection of events, her ability to recall, and her opinion and interpretation of the circumstances. She was unfamiliar with the class routine and the students' disabilities; therefore, her interpretation of events may have been somewhat skewed. L.P.M. was self-mutilating. Aggressive intervention was necessary to prevent him from injuring himself or others. Intervention in the form of pulling his hand away from his face or scolding him may look like abuse. These actions could be misconstrued by someone unfamiliar with the class. Most importantly, however, Pantazes specifically recalled that the students who were with Curchin in the kitchen were outside of the classroom during the incident. This places Curchin outside of the classroom.

The testimony of Barbara Adkins and Karen Curchin was more trustworthy and reliable than that of Pantazes. Adkins was firm, confident, and appeared sure and calm while testifying. She did not prevaricate or equivocate. She candidly admitted that she had problems with L.P.M. on November 16, 2004. She acknowledged that she scolded him and waved a shoe within six to ten inches of his face. She candidly admitted that she routinely uses that technique as behavioral intervention. She did not back away from this. Adkins' testimony was more consistent than that of Pantazes. She was more familiar than Pantazes with the students' disabilities and classroom routine. She remains exposed to an abuse charges by both DYFS and the District. Nevertheless, she was candid about her conduct on November 16, 2004.

More importantly, Adkins confirmed that Curchin was not in the room when both shoe-throwing incidents occurred. While Adkins' time frames differ somewhat from the time frames estimated by Curchin, I find this immaterial to the staff member's ability to recall events. As explained by Adkins, she is not focused on the clock and does not record events minute by minute. While the class has a routine that it tries to follow, this routine is regularly interrupted by events such as altercations, toileting, feeding, or other events of the day. The class does not follow the clock to the minute. Moreover, the fact that Adkins and Curchin had different opinions as to time reflects that they did not rehearse or coordinate their testimony. As mentioned earlier, Adkins confirmed that Curchin left the room with two students from the right side of the table. This is specifically corroborated by Pantazes and Curchin. Pantazes drew a schematic of the

room and did not identify any students on the right side of the table. Pantazes estimated that there were five students in the room. Adkins, a full time aide, placed seven students at the table before Curchin took two of the students to the kitchen outside the classroom. Hence, five students remained in the room when Curchin left. Statements by Adkins and Pantazes confirm that five students remained in the room while Curchin was gone. Pantazes' initial statement dated November 18, 2004 states that the "all of the children were sitting at the table "waiting to eat" when she entered the room. (P-12). This statement suggests that the food had not arrived when she entered the room at 9:30 a.m. It confirms that Curchin was still getting some food from the main kitchen. Also, witnesses testified that the in classroom kitchen had some food or snacks. This explains why some children may have had milk or yogurt before Curchin returned from the main kitchen. Finally, Curchin did not recall any shoe throwing incident on November 16, 2004, because she was not in the room. Her statements to the IAIU investigator and prosecutor's office are consistent in this regard. Consequently, Adkins' testimony, together with Pantazes' testimony and November 18, 2004, statement, confirmed that Curchin was more likely in the kitchen with the students, that is, outside the classroom, than in the classroom with L.P.M. during the shoe-throwing incidents. I so **FIND**.

I am also satisfied that Curchin is a well-respected teacher. Based upon the testimony of Frambes, Adkins and Dannenberg, together with Curchin's performance appraisals, there is no indication that Curchin was predisposed or, as argued by the district, "premeditated" to commit abuse. Evid R. 404(c); Evid R. 803(c)21. Dannenberg specifically assigned Adkins to Curchin in 2004 because of Curchin's capabilities. Curchin was charged with improving some of Adkins' areas of performance. In 2004 Adkins received an outstanding appraisal. The inference is that Curchin did an adequate job, according to the appraisal prepared by Dannenberg, in redirecting Adkins' efforts.

Dannenberg appraised Curchin from 2000 to 2004. Dannenberg found Curchin to be kind, caring, dedicated, innovative, and persistently seeking better for her students. She received satisfactory performance appraisals, which is the highest score

possible. Curchin appeared to perform above and beyond the requirements of the job. Dannenberg stated that her performance appraisals reflect not only scheduled classroom observations, but also her periodic observations of the teacher's performance throughout the entire year. This included observations that may not have been known of by or disclosed to the teacher. The only incident of concern in Curchin's sixteen-year history with the District involved an innovative restraining technique ultimately determined to be useful and appropriate by the parents of the child and the Child Study Team. Interestingly, the child in question was L.P.M.

Pantazes was unfamiliar with the teachers and students in the classroom on November 16, 2004. It is conceivable that during the excitement of this emotional event Pantazes confused certain staff members. Adkins stated that during the shoe-throwing incidents, Curchin was not in the room. In her November 18, 2004 written statement, Pantazes states "the teacher swatted" [L]. She does not state Curchin swatted the student. (P-12). This suggests some uncertainty as to initial identity. Adkins said that she picked up the shoes after each incident. Pantazes stated that Adkins picked up the shoe after the first shoe incident but not after the second shoe incident. Adkins' sister, Caroline Nocella, came into the room and sat in a chair next to L.P.M. Nocella was sitting next to L.P.M. during a shoe-throwing incident, according to Adkins. Since Pantazes, the accusing aide, was admittedly unfamiliar with the teachers, aides and students, it is plausible that she may have confused Curchin with Nocella.

Notably, Pantazes did not specifically identify Curchin during the hearing as the teacher who engaged in abuse. She discussed Curchin through her testimony, but did not specifically identify her by pointing her out to this judge. While identifying the accused in court is not required in an administrative proceeding, her failure to make this identification lends itself to the notion that a classroom aide totally unfamiliar with the class such as she could have misidentified or confused staff members. This is especially true since Adkins' testimony was convincing that Curchin was getting breakfast with two other students in another room when the incident occurred. And, Pantazes failed to place the very same students at the conference table or in the room. The conclusion to be drawn from all the testimony is that Curchin and the students

helping Curchin were not in the room during the incident. Consequently, it is more believable and credible that Curchin was not in the classroom during the incident. I so **FIND**.

Finally, no injuries were observed. I am mindful that L.P.M is self-abusive but, the violent actions described by Pantazes would have left some fresh marks, bruises, scratches or other evidence of inappropriate contact. There was no evidence offered of any injury or marks consistent with what Pantazes described. Pantazes observed what Adkins believed to be appropriate behavioral intervention for L.P.M. Pantazes was extraordinarily distraught and emotional during her testimony before this ALJ. L.P.M.'s self-abusive behavior and the related intervention clearly disturbed her. It may have looked like a violent exchange, particularly to someone as sensitive and emotional as Pantazes. In Pantazes' own words she was "most likely [in] shock" after the incident. (P-12). The fulltime aides and teachers are more accustomed to the disorders and behaviors of these challenged children and therefore more likely to recount what occurred accurately. The shock of L.P.M. abusing himself clearly disturbed Pantazes. Her emotional state and unfamiliarity placed some doubt on her recollection or interpretation of events.

The district argues that Curchin's witnesses were incredible due to a variety of subtle inconsistencies and that its sole witness was credible because she was consistent and unbiased. Credibility and material inconsistencies were analyzed and resolved in favor of Curchin for the reasons discussed supra., There were inconsistencies with all the testimony, as expected. Times, dates and recall generally vary. But the burden rests with the district and the inconsistencies in Pantazes' testimony was a deciding factor. She was a very new, inexperienced, unfamiliar with the children and teachers in the classroom, distraught and very emotional, inconsistent as to the description of the abuse (flick v. hitting), and most notably left the children out of the schematic who were with Curchin in the kitchen. Again, credibility does not mean someone lied. It means someone's version of events is more reliable based upon many factors. 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).

Surprisingly, the district argues that Curchin acted in a "premeditated, cruel and vicious manner." (District's brief at page 33). These adjectives would be more fitting for a heinous crime than for debatable intervention involving a disabled child. Curchin was not charged with crime even though the matter was referred to the Atlantic County Prosecutor's office. They declined to prosecute. Having heard all the testimony, there was nothing that would lead this Judge to reach a finding of premeditated or intent to be cruel or vicious. There was absolutely no evidence that Curchin or other staff members were premeditated to act in such a way. There was no plan, motive or intent to assault L.P.M. L.P.M. was a difficult and self-abusive child. He was capable of inflicting significant injury upon himself, classmates and teachers. He recently threw his heavy shoes at a bus driver. Staff intervention was needed when L.P.M. became violent or self-abusive. He would dig his fingers into his face. His fingers would have to be pried off his face with force. Behavioral intervention may even look abusive or appear violent. But, staff members must protect L.P.M. from himself as well as protect the other students and staff members. Under these circumstances, it would be hard to call such conduct "premeditated, cruel and vicious." Teaching children with severe disabilities such as L.P.M. is no easy task. And, against these facts, circumstances and working conditions, I **FIND** and **CONCLUDE** that Curchin did not act with premeditation.

CONCLUSION AND ORDER

Based on the testimony, exhibits and posthearing briefs, I **CONCLUDE** that respondent Karen Curchin did not commit abuse of a student or fail to prevent any aides from inflicting abuse. Curchin did not witness any abuse and, therefore, had no obligation to report anything. Petitioner, Atlantic County Special Services School District, failed to meet its burden of proof. I therefore **ORDER** the tenure action **DISMISSED**. I further **ORDER** that Curchin be reinstated with back pay, pension or service credit and all other emoluments.

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

This recommended decision may be adopted, modified or rejected by the **COMMISSIONER OF THE DEPARTMENT OF EDUCATION,** who by law is authorized to make a 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, 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.

7-3-06 — W J Miller

DATE — **W. TODD MILLER**, ALJ

E-mail Receipt of Initial Decision Confirmed by the Department of Education on:

7-3-06

DATE

Mailed to Parties:

JUL 12 2006

DATE — OFFICE OF ADMINISTRATIVE LAW

/sd

EXHIBITS

For petitioner:

P-1 Institutional Abuse and Neglect Report

P-1a Record Part of Abuse Report

P-1b Record Part of Abuse Report

P-1c Record Part of Abuse Report

P-2 Letter from Morvay to Renna, December 9, 2004

P-3 Interim Status Letter from Renna/Carroll to Morvay (February 9, 2005)

P-4 DYFS Response Report

P-5 Institutional Abuse Investigation Unit Findings Letter from Nixon to Morvay (July 14, 2005)

P-6 Institutional Abuse Investigation Unit Findings Letter from Nixon to Curchin (July 14, 2005)

P-7 Crimes Against Children Investigation Report, Atlantic County Prosecutor's Office

P-8 Crimes Against Children Investigation Report, Atlantic County Prosecutor's Office, Report of Interview with Edra Beth Pantazes (February 8, 2005)

P-9 Crimes Against Children Investigation Report, Atlantic County Prosecutor's Office, Report of Interview with Emma J. Pennello (February 8, 2005)

P-10 Crimes Against Children Investigation Report, Atlantic County Prosecutor's Office, Report of Interview with Caroline L. Nocella (March 1, 2005)

P-11 Crimes Against Children Investigation Report, Atlantic County Prosecutor's Office, Report of Interview with Karen A. Curchin (March 8, 2005)

P-12 Handwritten Statement of Edra Pantazes (November 18, 2004)

P-13 Timesheet signed by Caroline Nocella (November 19, 2004) and Field Trip Form for Best Buy (November 18, 2004)

P-14 Transcript of Walsh's Interview of Edra Beth Pantazes

P-15 Transcript of Walsh's Interview of Emma Pennello

P-16 Transcript of Walsh's Interview of Caroline L. Nocella

P-17 Tape of Walsh's Interview of Edra Beth Pantazes

P-18 Tape of Walsh's Interview of Emma Pennello

P-19 Tape of Walsh's Interview of Caroline L. Nocella

P-20 Tenure Charges

P-21 Statement of Evidence in Support of Tenure Charges (with exhibits)

P-22 Resolution certifying Tenure Charges

P-23 Curchin's Response to Tenure Charges

P-24 Petitioner's Interrogatories, Document Requests and Requests for Admissions to Curchin

P-25 Curchin's Responses to Petitioner's Interrogatories, Document Request and Request for Admissions

P-26 Follow up letter from Morvay to Curchin (November 19, 2004)

P-27 Drawing by Edra Pantazes of Curchin's room before incident

P-28 Drawing by Edra Pantazes of Curchin's room during incident

P-29 Behavioral Tracking Log, November 19, 2004

P-30 Time Sequence for November 16, 2004, drawn by Barbara Adkins at the hearing

P-31 Drawing of first shoe throwing incident of November 16, 2004, drawn by Barbara Adkins at the hearing

P-32 Drawing of second shoe throwing incident of November 16, 2004, drawn by Barbara Adkins at the hearing

P-33 Letter from Michael Damm, Esq. (counsel for Barbara Adkins) summarizing her position, December 29, 2004

P-34 Performance Appraisal for Barbara Adkins by Pat Dannenberg, February 21, 1997

P-35 Performance Appraisal for Barbara Adkins by Pat Dannenberg, February 13, 2001

P-36 Memo from Pat Dannenberg to Barbara Adkins, July 14, 2000

P-37 Behavioral Tracking Log, November 16, 2004

P-38 Lesson Plan, November 15, 2004

P-39 Department of Human Resources Institutional Abuse and Investigative Report by Alfonso Renna (unredacted)

P-40 Omitted

P-41 Curchin's handwriting of the word "took" (lower case) as written on the easel on large paper

P-42 Behavioral tracking chart, November 15, 2004

P-43 Behavioral tracking chart, November 17, 2004

P-44 Behavioral tracking chart, November 18, 2004

For respondent:

R-1 Performance Appraisal, Karen Curchin, January 19, 2000

R-2 Performance Appraisal, Karen Curchin, March 16, 2001

R-3 Performance Appraisal, Karen Curchin, February 8, 2002

R-4 Performance Appraisal, Karen Curchin, November 14, 2002

R-5 Performance Appraisal, Karen Curchin, May 17, 2004

R-6 Performance Appraisal, Karen Curchin, October 27, 2005

R-7 Employee Profile of Karen Curchin, July 27, 2005

R-8 Schematic of Karen Curchin's classroom on November 16, 2004, drawn by Curchin

WITNESSES

For petitioner:

Edra Beth Pantazes

Alfonso Renna

Kevin Walsh

Carmella Price

Pat Dannenberg

Barbara Morvay

For respondent:

Karen Curchin
Emma Pennello
Susan Frambes
Barbara Adkins
Craig Costigan

327-06

#327-06

C.M.,	:	
PETITIONER,	:	
V.	:	
BOARD OF EDUCATION OF THE FREEHOLD REGIONAL HIGH SCHOOL DISTRICT, MONMOUTH COUNTY,	:	
RESPONDENT,	:	COMMISSIONER OF EDUCATION
AND		DECISION
BOARD OF EDUCATION OF THE FREEHOLD REGIONAL HIGH SCHOOL DISTRICT, MONMOUTH COUNTY,	:	
PETITIONER,	:	
V.	:	
B.M. AND C.M.	:	
RESPONDENTS.	:	

SYNOPSIS

Petitioner, an 18-year-old high school senior, filed a *Pro Se* Residency Appeal challenging the Board's residency determination that he was not eligible for a free education in the Freehold Regional High School District. The Board subsequently filed a separate petition against C.M. and his mother, B.M., seeking tuition reimbursement for the full 2005-2006 school year. C.M. asserted that he was domiciled with friends within the Board's district while completing his senior year at Howell High School.

The ALJ found that: B.M. admitted she and her son moved out-of-district in the summer of 2005; C.M. was using a Spring Lake address for voter registration and motor vehicle records during the winter and spring of 2006; C.M. and B.M. are responsible for the full tuition for the 2005-2006 school year as they were not domiciled in district; and C.M.'s financial responsibility for tuition accrued from his 18th birthday on December 18, 2005. The ALJ ordered C.M. and B.M. to reimburse the Board in the amount of $8,868.

Upon careful and independent review of the record, the Commissioner concurs with the findings and conclusions set forth by the ALJ. The Initial Decision of the OAL is adopted as the final decision in this matter, and C.M. and B.M. are directed to reimburse the Board in the amount of $8,868.

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.

September 21, 2006

OAL DKT. NO. EDU 2564-06 and EDU 4396-06 (CONSOLIDATED)
AGENCY DKT. NOS. 126-3/06 and 208-6/06

C.M.,	:	
PETITIONER,	:	
V.	:	
BOARD OF EDUCATION OF THE FREEHOLD REGIONAL HIGH SCHOOL DISTRICT, MONMOUTH COUNTY,	:	
RESPONDENT,	:	COMMISSIONER OF EDUCATION
AND		DECISION
BOARD OF EDUCATION OF THE FREEHOLD REGIONAL HIGH SCHOOL DISTRICT, MONMOUTH COUNTY,	:	
PETITIONER,	:	
V.	:	
B.M. AND C.M.	:	
RESPONDENTS.	:	

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

Upon such review, the Commissioner fully concurs with the findings and conclusions clearly set forth by the Administrative Law Judge, with respect to both the due process and fair notice provided to B.M. and C.M. throughout this proceeding and C.M.'s lack of entitlement to a free public education in the Board's schools during the 2005-06 school year.

Accordingly, the Initial Decision of the OAL is adopted for the reasons expressed therein, and C.M. and B.M. are directed to reimburse the Freehold Regional Board of Education $8,868 in payment of tuition for the period of C.M.'s ineligible attendance.

IT IS SO ORDERED.*

Lucille E. Davy

ACTING COMMISSIONER OF EDUCATION

Date of Decision: 9/21/06

Date of Mailing: 9/22/06

* This decision may be appealed to the State Board of Education pursuant to *N.J.S.A.* 18A:6-27 *et seq.* and *N.J.A.C.* 6A:4-1.1 *et seq.*

State of New Jersey
OFFICE OF ADMINISTRATIVE LAW

INITIAL DECISION
CONSOLIDATED
OAL DKT. NO. EDU 2564-06
AGENCY DKT. NO. 126-3/06

C. M.,

Petitioner,

v.

BOARD OF EDUCATION OF THE FREEHOLD REGIONAL HIGH SCHOOL DISTRICT, MONMOUTH COUNTY,

Respondent

and

BOARD OF EDUCATION OF THE FREEHOLD REGIONAL HIGH SCHOOL DISTRICT, MONMOUTH COUNTY,

OAL DKT. NO. EDU 4396-06
AGENCY REF. NO. 208-6/06

Petitioner,

v.

B. M. and C. M.,

Respondents.

C. M., petitioner/respondent, pro se

B. M., respondent, pro se

Marc H. Zitomer, Esq., for respondent/petitioner Freehold Regional H.S. District BOE, (Schwartz, Simon, Edelstein, Celso & Kessler)

Record Closed: July 11, 2006 Decided: August 11, 2006

BEFORE: **ANA C. VISCOMI**, ALJ

STATEMENT OF THE CASE AND PROCEDURAL HISTORY

Petitioner C.M., was an 18-year-old high school senior when he challenged respondent Board of Education's (hereinafter "BOE") residency determination. He requested a hearing and the matter was transmitted to the Office of Administrative Law (OAL) on April 25, 2006, for a hearing as a contested case pursuant to N.J.S.A. 52:14F-1 to -13 and N.J.S.A. 52:14B-1 to -15. Petitioner was entitled to an expedited hearing pursuant to N.J.S.A. 18A:38-1. After a pre-hearing telephone conference with the parties on May 16, 2006, the matter was scheduled for hearing on June 5, 2006. That hearing was adjourned at the request of BOE counsel during a conference call on May 31, 2006, in which C.M. participated, wherein counsel advised the BOE would be filing a separate petition against CM, individually, and his mother B.M., individually, seeking tuition reimbursement for the full 2005-2006 school year that C.M. attended school in-district.[1] During the course of the telephone conference, the parties were advised that the hearing date was adjourned to June 23, 2006. Thereafter, the BOE filed a verified petition of appeal before the Department of Education (hereinafter "DOE") on June 6, 2006, and requested consolidation with the matter then presently before the OAL. Notably, on June 7, 2006, the BOE's counsel filed supplemental proof of service upon respondent B.M., with the DOE. The matter was then transmitted to the OAL on June 20, 2006, for consolidation with the previously transmitted petition filed by C.M.[2] By handwritten ex-parte letter to the undersigned dated June 10, 2006, and

[1] C.M. was 17 years old when he commenced his senior year at the Howell High School, one of the high schools in the Freehold H.S. regional district. He turned 18 years old on December 18, 2005.

[2] The matters were consolidated by Order of June 23, 2006.

forwarded on June 12, 2006, by certified mail, return receipt requested, B.M. advised she was responding to the verified petition and indicated neither she nor her son was represented by prior counsel, Stewart Martinez, Esq.[3] The letter also discussed her purported financial difficulties in paying tuition, that she moved out of district in order to secure affordable housing, that her son, C.M. wanted to finish high school with his friends at Howell High Schools and that he had moved in with family friends in-district in order to accomplish same. Upon receipt of this correspondence on June 19, 2006, my secretary, Mrs. Lysa Martino, contacted B.M. to advise she must forward a copy of her letter to her adversary.

Although, as previously indicated, C.M. was verbally advised by the undersigned of the June 23, 2006, hearing date during the course of a conference call with BOE counsel, OAL official notices advising him of the hearing date were mailed to the Farmingdale address he purportedly "resided" at in-district while attending Howell High School.[4] Additionally, it should be noted that B.M. was advised of the June 23 hearing date by letter of June 8, 2006, from M. Kathleen Duncan, Director of the Bureau of Controversies and Disputes, forwarded to B.M. at her Spring Lake address and at the law office where she was employed.

Neither B.M. nor C.M. appeared on the date of the hearing and as of the date of this Initial Decision have never attempted to advise of any reason for their respective failure to appear. As procedural due process was afforded B.M. and C.M., respectively, the hearing proceeded forward on the merits. While the burden of proof rests with C.M. and B.M. in this matter pursuant to N.J.S.A. 18A-38-1(b)(1), BOE sought to present proofs on the merits.

The BOE seeks tuition reimbursement pursuant to N.J.S.A. 18A:38-1.

[3] B.M. was and may still be employed at the same law firm as Mr. Martinez.
[4] It should also be noted that the hearing date was selected so as not to conflict with C.M.'s final exams and graduation.

FACTUAL DISCUSSION

Patricia Emmerman, Assistant Superintendent of Student Services for the BOE, testified. There are 12,000 students in the high school district which is made of six schools,[5] including Howell. The annual tuition rate is $8,868.00. (RP-21) On June 20, 2006, C.M. graduated from Howell High School. He had attended his entire senior year at this high school.

By letter dated July 27, 2005, (RP-1), BM advised Howell H.S. principal Zina Duerbig that she and her son, C.M. recently moved to a different address in Farmingdale (still within the H.S. district). She requested that although this would ordinarily require her son to attend Colts Neck H.S., that he be permitted to attend Howell H.S. as he has attended three years of high school there. Dr. Emmerman approved the request in a letter dated August 1, 2005. (RP-2) B.M. then submitted an executed authorization permitting her son to drive a car to school. (RP-3) A copy mailed back to B.M. at her old address was returned indicating a forwarding address in Spring Lake, Emmerman testified. (RP-4) By letter December 1, 2005, Dr. Emmerman advised B.M. that it had been discovered she and her son had moved out-of-district, to Spring Lake, the prior summer. (RP-5) She also indicated that on November 4, 2005, B.M. was given notice that she would have to pay tuition in the amount of $886.80 monthly for C.M. to continue attending Howell H.S. or she would have to register him in the high school where they resided. (RP-5)

By letter of December 6, 2005, Board counsel notified B.M. of a December 12, 2005, hearing to remove C.M. from the district as B.M. had failed to pay any tuition. (RP-7) B.M.'s prior counsel then presented the certification of B.M. to the

[5] The schools are: Marlboro, Howell, Freehold Borough, Howell, Freehold Township, Colts Neck and Manalapan.

Board requesting a tuition waiver. (RP-8) That certification, dated January 4, 2006, also provided,

> 8. Over the summer of 2005, C(M) and I moved from my friend's residence located at 14 Ruset Lane, Farmingdale, New Jersey 07727 (within the Freehold Regional High School District, (hereafter "FRHSD"), to an apartment located at 2028 New Bedford Road, Apt. 208, Spring Lake, New Jersey 07762.
>
> 9. Unfortunately, this apartment is located outside of the FRHSD boundaries but after much searching, I was unable to locate lower cost housing within the District boundaries.

The Board did not grant the tuition waiver. B.M. then stated that her son would dis-enroll from the district's high school. The next day, Emmerman testified, C.M. presented an undated notarized statement from a Kathryn White, indicating that he had started residing in her home in Farmingdale two weeks prior so that it would be easier for him to attend school.[6] (RP-9) Emmerman then ordered the residency officer, Richard Healy, to conduct periodic surveillance and she personally advised C.M. that this would happen. Healy submitted various memoranda regarding his efforts. (RP-11 to RP-15) Based on Healy's conclusion that C.M. was not domiciled in Farmingdale, but rather, Spring Lake, the BOE scheduled another hearing for March 13, 2006. (RP-17) Neither B.M. nor C.M. appeared at the scheduled time; however, the hearing ensued and C.M. arrived approximately one hour later after it concluded with the BOE having passed a resolution finding that neither B.M. nor C.M. resided within the district. Emmerman advised him of the results of the hearing. By letter dated March 15, 2006, BOE counsel advised both mother and son of his ineligibility to attend Freehold Regional High School District. (RP-18) The notice also indicated how an appeal of its decision could be filed. It was also forwarded to B.M.'s prior, then current counsel, Stewart Martinez, Esq. (RP-18)

---

[6] During the course of the pre-hearing conference, C.M. represented that he resided with the White family. M.W., Mrs. White's son, was C.M.'s friend and classmate, and C.M. indicated he would testify on his behalf at the June 23, 2006, hearing.

At the hearing, counsel for the BOE also presented a redacted copy of C.M.'s voter registration card indicating that he registered to vote on February 5, 2005, and listed his Spring Lake address (RP-18) as well as a copy of his certified driver's abstract dated June 14, 2006, indicating the same Spring Lake address. (RP-19) Based on a request from the undersigned ALJ, counsel submitted the certification of John Bradshaw, Commissioner of Registration and Superintendent of Elections for Monmouth County[7] indicating that absent Court Order, the Superintendent of Elections may not provide unredacted signatures on voter registration cards; however, the copy of C.M.'s card provided was taken from the actual application C.M. completed in order to register to vote and this contained his signature. (RP-22)

LEGAL ANALYSIS

Public schools are free to persons over the age of five and under the age of 20 who are domiciled within the school district. N.J.S.A. 18A:38-1. The only witness in this matter, Patricia Emmerman, was a credible witness. It is undisputed that for the entire 2005-2006 school year, C.M. was not domiciled within the Freehold Regional High School District. I **FIND** that B.M. admitted that she and her son moved out-of-district in the summer of 2005 in her certification submitted to the BOE in support of the tuition waiver request. I also **FIND** that C.M. registered to vote on February 5, 2006, using the Spring Lake address which is the same address he utilized when he filed an address change with the Motor Vehicle Commission as evidenced by the certified abstract of June 14, 2006. Spring Lake is not located within the Freehold Regional H.S. district.

[7] Spring Lake is located in Monmouth County.

N.J.S.A. 18A:38-1(b)(2) provides, in pertinent part,

> ...(i)f in the judgment of the commissioner the evidence does not support the claim of the parent or guardian (that the parent and/or emancipated student is domiciled within the school district), the commissioner shall assess the parent ... tuition for the student prorated to the time of the student's ineligible attendance in the schools of the district.

I further **FIND** that C.M. and B.M. are responsible for the full tuition for the 2005-2006 school years; $8,868.00 as they were not domiciled within the school district. As C.M. did not turn 18 years old until December 18, 2005, his financial responsibility accrued thereafter.

DECISION AND ORDER

Based on the foregoing, petitioner/respondent C.M. and respondent B.M. are hereby ordered to reimburse the BOE $8,868.00, representing tuition for the full 2005-2006 school year.

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

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

August 11, 2006
DATE

ANA C. VISCOMI, ALJ

E-mail Receipt of Initial Decision Confirmed by the Department of Education on:

8-14-06
DATE

AUG 18 2006
DATE

Mailed to Parties:

OFFICE OF ADMINISTRATIVE LAW

mh

APPENDIX

WITNESSES

For the Petitioner/Respondent C.M. and the Respondent B.M.:

None

For the Respondent/Petitioner BOE

Patricia Emmerman

EXHIBITS

For the Petitioner/Respondent C.M. and the Respondent B.M.:

None

For the Respondent/Petitioner BOE

RP-1 Letter from B. M. to Zina Duerbig, Principal dated July 27, 2005

RP-2 Letter to B. M. from Patricia Emmerman Ed.D. dated August 1, 2005 (1 pg.)

RP-3 Howell High School Senior Driving/Parking Contract for C. M. issued on September 7, 2005 (1 pg.)

RP-4 Envelope to M. Returned to Sender by US Postal Service on October 30, 2005 showing forwarding address in Spring Lake, NJ (1 pg.)

RP-5 Letter to Mrs. M. from Patricia Emmeman Ed.D. dated December 1, 2005 (1 pg.)

RP-6 Memorandum from Dr. Joan Nesenkar Saylor dated March 22, 2005 regarding per pupil costs for 2005-2006 school year (1 pg.)

RP-7 Letter to Mrs. M. from Nathanya G. Simon, Esq. dated December 6, 2005 (1 pg.)

RP-8 Certification of B. M. dated January 4, 2006 (29 pgs.)

RP-9 Letter from Kathryn M. White, undated, with attached utility bill (2 pgs.)

RP-10 Letter from Patricia Emmerman Ed.D. to Ms. Catherine White dated February 8, 2006 (1 pg.)

RP-11 Report of Richard Healy, attendance officer, dated February 17, 2006 (1 pg.)

RP-12 Report of Richard Healy, attendance officer, dated February 22, 2006 (1 pg.)

RP-13 Report of Richard Healy, attendance officer, dated March 3, 2006 (1 pg.)

RP-14 Report of Richard Healy, attendance officer, dated March 8, 2006 (1 pg.)

RP-15 Report of Richard Healy, attendance officer, dated March 10, 2006 (1 pg.)

RP-16 4 digital photographs (1 pg.)

RP-17 Letter from Marc H. Zitomer, Esq. to Stewart M. Martinez, Esq., dated March 7, 2006 (2 pgs.)

RP-18 Letter from Nathanya G. Simon, Esq. to B. M. and C. M., dated March 15, 2006 (5 pgs.)

RP-19 C. M.'s voter registration as of May 31, 2006 (1 pg.)

RP-20 Certified Drivers Abstract for C. M., dated June 14, 2006 (2 pgs.)

RP-21 Policy 5111: Eligibility of Resident/Nonresident Pupils

RP-22 Certification of John Bradshaw (with attachments)

332-06

332-06R

OAL DKT. NO. EDU 13138-05
AGENCY DKT. NO. 254-9/05

LYDIA BECKER,	:	
PETITIONER,	:	COMMISSIONER OF EDUCATION
V.	:	DECISION
EYLSIAN CHARTER SCHOOL, HUDSON COUNTY,	:	
RESPONDENT.	:	

The record of this matter, the settlement agreement proposed by the parties, and the Initial Decision of the Office of Administrative Law (OAL) issued pursuant to *N.J.A.C.* 1:1-19.1, have been reviewed.

Upon such review, the Commissioner cannot concur with the OAL's recommendation that the proposed settlement be approved.

Initially, the Commissioner notes that this matter is a school law dispute brought to her pursuant to *N.J.S.A.* 18A:6-9, wherein petitioner claims that her employment with the respondent charter school has been terminated in violation of her tenure rights.[1] The Commissioner has grave concerns about the appropriateness of accepting, as resolution of a dispute of this type, a $50,000 payment to petitioner as "reimbursement of [her] physical manifestations of her emotional distress damages, physical injury, and/or attorneys' fees and costs" (Settlement Agreement at ¶ 3) – none of which claims are cognizable before the Commissioner. Additionally, the Commissioner cannot reach the parties' proposed handling, for tax purposes, of monies to be paid under

[1] The Commissioner recognizes that petitioner is pursuing related claims in other forums; however, the instant agreement is proposed solely in resolution of petitioner's tenure claim before the Commissioner.

the agreement (*Id.* at ¶ 3, 6), since she possesses neither the agency expertise nor the jurisdiction to determine whether the parties' proposed actions are consistent with applicable State and federal tax law.

Moreover, the agreement contains provisions: 1) assigning its enforcement to the Office of Administrative Law, in violation of the clear prescription of *N.J.A.C.* 6A:3-3.1(b) that judgments of the Commissioner shall be enforced through action in the Superior Court consistent with New Jersey Court Rules (*Id.* at ¶ 9); 2) addressing confidentiality of the agreement and inquiry by prospective employers in a manner that does not appear to recognize the requirements of New Jersey's Open Public Records Act, *N.J.S.A.* 47:1A-1 *et seq.*, or contemplate that – pursuant to *N.J.A.C.* 1:1-14.1(a) – records of all hearings shall be open for public inspection unless the record is sealed for good cause shown (*Id.* at ¶ 1, 5); 3) calling for payment of monies prior to approval of the settlement by the Commissioner (*Id.* at ¶ 3); 4) allocating a very substantial proportion of the legal fees and costs claimed to have been thus far incurred by petitioner to her pending proceedings arising from the Law Against Discrimination and/or Family and Medical Leave Act, notwithstanding their actual relationship to such proceedings (*Id.* at ¶ 4); and 5) calling for a material term of the agreement – notwithstanding that such term may be disapproved for unrelated reasons – to be contingent upon attorney certifications that are not part of the record (*Ibid.*).

Accordingly, while not foreclosing the possibility of settlement, the Commissioner rejects the proposed agreement and remands this matter to the OAL for revision of the settlement agreement consistent with the concerns set forth above, or for

further proceedings if the parties are unable or unwilling reach accord on a revised agreement.

IT IS SO ORDERED.[2]

ACTING COMMISSIONER OF EDUCATION

Date of Decision: 9/25/06

Date of Mailing: 9/26/06

[2] This decision may be appealed to the State Board of Education pursuant to *N.J.S.A.* 18A:6-27 *et seq.* and *N.J.A.C.* 6A:4-1.1 *et seq.*

State of New Jersey
OFFICE OF ADMINISTRATIVE LAW

INITIAL DECISION

SETTLEMENT

OAL DKT. NO. EDU 13138-05

AGENCY DKT. NO. 254-9/05

LYDIA BECKER,

Petitioner,

v.

ELYSIAN CHARTER SCHOOL,

HUDSON COUNTY,

Respondent.

Ty Hyderally, Esq., for Petitioner

Rita F. Barone, Esq., for Respondent
(Purcell, Ries, Shannon, Mulcahy & O'Neill, attorneys)

Record Closed: August 3, 2006 Decided: August 4, 2006

BEFORE **BARRY N. FRANK**, ALJ:

This matter was transmitted to the Office of Administrative Law (OAL) from the Department of Education on December 29, 2005, 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 assigned to the undersigned on February 15, 2006.

A hearing was scheduled for May 1, 2006 at the OAL, 33 Washington Street, Newark, New Jersey; however, the hearing was adjourned and subsequent hearing dates were scheduled. At the hearing on June 26, 2006, settlement discussions were

held and a settlement was reached. The parties prepared a tentative Settlement Agreement indicating the terms thereof pending the Board's Resolution.

I have reviewed the record, Settlement Agreement and the Board's Resolution, which are attached and fully incorporated herein, and **FIND**:

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

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

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

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

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

August 4, 2006
DATE

Barry N. Frank
BARRY N. FRANK, ALJ

Receipt Acknowledged:

8-9-06
DATE

M. Kathleen Duncan/eh
DEPARTMENT OF EDUCATION

Mailed to parties:

AUG 11 2006
DATE

DIRECTOR AND CHIEF ADMINISTRATIVE LAW JUDGE
OFFICE OF ADMINISTRATIVE LAW

jb

Lydia Becker
v.
Elysian Charter School

EDHOR 13138-2005-1

The parties hereby agree to the following terms as a resolution of the tenure claims made by Petitioner, Lydia Becker. This resolution and agreement in no way affects or limits Becker's rights to pursue the claims brought in state court to include but not be limited to LAD, FMLA, theft, defamation, wrongful possession, etc. This agreement resolves solely Petitioner's allegations that her tenure rights were violated.

The parties agree to the following terms as a resolution of this matter:

(1) From this date forward following the parties' signatures to this agreement, the terms of this agreement and the discussion leading up to the settlement amount are subject to a confidentiality agreement. Should either party breach the confidentiality agreement, ~~there~~ they shall pay the non-breaching party $50,000 as appropriate and fair ~~damages~~ liquidated damages. It shall not be a breach for ~~Becker~~ the parties to discuss the terms of this agreement or the amount of this settlement with their respective counsel, tax advisors, and/or immediate family members.

② The parties shall agree to a mutual non-disparagement clause which shall not in any way affect or limit their rights to litigate or defend the action currently pending in ~~civil~~ state court. The breaching party shall pay the non-breaching party $10,000 for violating this clause.

③ ECS shall pay Lydia Becker $50,000 within 35 days of June 26, 2006. Payment shall be 1099'd as non-wage income. Payment shall be construed as reimbursement of Becker's physical manifestations of her emotional distress damages, physical injury, and/or attorneys' fees and costs. Payment shall not be considered an offset for any monies Becker may later recover in the state action currently pending. Accordingly, should Becker later recover monies, whether it be by settlement or litigation or some other method, ECS shall not argue, either directly or indirectly,

that the monies to recovered shall be offset by the monies paid herein.
Payment shall be made by check and sent to Law Offices of Ty Hyderally, PC. Payment shall be made to "Law Offices of Ty Hyderally, PC as counsel for Lydia Becker."

(4) The parties acknowledge that Becker currently has approximately $41,000 in legal fees and costs. The parties expressly agree, as a condition of this agreement, that $31,000 of this amount can be allocated as legal fees and costs incurred in litigating the LAD and/or FMLA claim. ~~Ety~~ ΣCS can contest the reasonableness of the amount of fees and costs. However, ΣCS waives it rights to contest whether ~~or~~ or not the $31,000 in fees and costs are related to pursuing the LAD and/or FMLA claim and stipulates that the

monies are related to pursuing the FMLA and/or LAD claim.

(4)(5) ECS agrees in keeping with the mutual non-disparagement language that if it receives a job inquiry for Becker from a potential employer, it will confine its response to confirming the dates of her employment* job title. ECS shall state that it is their policy to not give out any additional information, and no negative inference shall be drawn from the limitations imposed by school policy.

This paragraph is subject to Beckers' attorneys (including her prior attorneys) certifying that Becker has incurred at least $1,000 in legal fees and costs as of June 26, 2006.

(5)(6) Becker shall execute a properly drafted tax indemnification clause with regard to ECS' payment of monies in this agreement and the characterization ~~thereof~~ thereof.

(6)(7) Should either party be found to breach this agreement, the non-breaching party shall receive reasonable attorneys' fees and costs associated with proving the breach of the agreement.

A material breach shall not include late payment under section 3.

(8) (5) This agreement reflects the fact that Becker shall withdraw with prejudice presently pending before the OAL at her tenure claim. Therefore, ~~Becker shall make~~ no further claim shall be made by Becker, to a job entitlement based on ~~tenure arguments~~ an argument that Becker had tenure or based the tenure statute. ~~Becker acknowledges that during the course of her employment with ECS she held a non-tenured position.~~ DKT No.

(9) (8) The OAL shall be empowered to enforce the terms of this agreement.

(10) (9) This agreement shall be subject to Loard resolution.

The parties voluntarily enter into this agreement after having ample opportunity to consult with attorneys of their choosing.

Lydia Becker
Lydia Becker
Petitioner
Date: 6/26/06

Elysian Charter Schools
Respondent.
By: Steven Feinstein
Its: Board Chair

RESOLUTION NO 1

ELYSIAN CHARTER SCHOOL BOARD OF TRUSTEES' RESOLUTION MEMORALIZING SETTLEMENT AGREEMENT IN THE MATTER OF LYDIA BECKER V. ELYSIAN CHARTER SCHOOL, DOCKET NO. EDU OR 13138-2005 INSTITUTED BEFORE THE DEPARTMENT OF EDUCATION.

WHEREAS Lydia Becker instituted a Petition of Appeal before the New Jersey Department of Education as to her claimed tenure rights against Elysian Charter School after being terminated from employment from Elysian effective June 30, 2005;

WHERAS at a settlement conference before the Office of Administrative Law on June 26,2006 the parties agreed to settle the matter before the department of Education;

NOW,THEREFORE BE IT RESOLVED, by the Elysian Charter School Board of Trustees on this 24th day of July, 2006 that:

1. The terms and conditions of the handwritten settlement agreement dated June 26,2006 are hereby authorized; and

2.Elysian Charter School shall issue a settlement check to Lydia Becker in the agreed upon amount set forth in the approved agreement .

Elysian Charter School Board
Of Trustees

Steven Feinstein-Chairperson

I hereby certify that this Resolution was adopted by the Elysian Charter School Board of Trustees at a Public Hearing held on July 24, 2006 by a vote of 6 for and 0 against..

Robert Sinnott, Board Secretary

328-06

AGENCY DKT. NO. 265-8/06

DENISE TUCKER,

PETITIONER,

V.

BOARD OF EDUCATION OF THE CITY OF CAMDEN, CAMDEN COUNTY,

RESPONDENT.

COMMISSIONER OF EDUCATION

DECISION

This matter was opened on August 7, 2006 via petition of appeal, wherein petitioner demanded reinstatement of her increment and her appointment to the position of vice-principal. She further demanded that her file be purged of any reference to respondent's actions in withholding her increment and rescinding her appointment to the position of vice principal.

In respondent's answer, dated September 18, 2006, it was alleged that petitioner had resigned from her position in respondent's school district as of August 31, 2006. On September 19, 2006 the Commissioner received from petitioner's counsel a letter confirming the resignation and requesting leave to withdraw the petition.

Insofar as the relief requested in the petition is rendered moot by petitioner's resignation, and the respondent has filed no counterclaim, the Commissioner approves the withdrawal of the petition.

IT IS SO ORDERED.

Lucille E. Davy

ACTING COMMISSIONER OF EDUCATION

Date of Decision: 9/22/06

Date of Mailing: 9/22/06

333-06

#333-06

BOARD OF EDUCATION OF THE CITY OF CLIFTON, PASSAIC COUNTY,	:	
PETITIONER,	:	COMMISSIONER OF EDUCATION
V.	:	DECISION
R.N.,	:	
RESPONDENT.	:	

SYNOPSIS

Petitioning Board filed a complaint seeking reimbursement from respondent, R.N., of the costs of tuition pertinent to the attendance of respondent's minor cousin, D.C., in 2003 on the basis that D.C. was not entitled to a free public education in Clifton schools.

The parties stipulated that R.N. did not have custody or legal guardianship of D.C. while the latter attended Clifton High School. The ALJ found neither D.C.'s mother nor D.C. were domiciled in Clifton, and that no evidence – apart from broad statements by R.N. and D.B., D.C.'s mother – was presented to support the conclusion that R.N. assumed responsibility for D.C.'s personal obligations during the Spring of 2003. Further, no affidavit was offered by D.C.'s mother to demonstrate economic or family hardship under *N.J.S.A.* 18A:38-1(b). The ALJ concluded that D.C. was not entitled to a free public education in Clifton Schools, and petitioner is entitled to tuition reimbursement from respondent in the amount of $1,474.55.

The Commissioner concurs with the ALJ's determinations in this matter. Accordingly, the petition is granted and – pursuant to *N.J.S.A.* 18A:38-1(b)(1) – respondent is liable for tuition in the amount of $1,474.55.

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.

September 28, 2006

OAL DKT. NO. EDU 3239-05
AGENCY DKT. NO. 435-12/04

BOARD OF EDUCATION OF THE CITY OF CLIFTON, PASSAIC COUNTY,	:	
PETITIONER,	:	COMMISSIONER OF EDUCATION
V.	:	DECISION
R.N.,	:	
RESPONDENT.	:	

In this matter, the petitioner seeks reimbursement of tuition for thirty-five days of school attendance by respondent's cousin in May and June of 2003. The record and Initial Decision have been reviewed. No transcript of the proceedings has been provided to the Commissioner, and no exceptions have been filed.

The record reveals that respondent R.N., a resident of Clifton, agreed to take in his teenaged cousin, D.C., in the Spring of 2003. On April 30 and May 1, 2003, respondent and D.C.'s mother, D.B., filled out multiple documents required by petitioner for the enrollment of D.C. in petitioner's high school. In one of the documents, respondent stated that D.C.'s parent or guardian resided at his address. (J-1) The filled-in information in another of the documents (J-2) could also have been interpreted to indicate that D.C.'s mother's address was respondent's home at 120 M. Avenue in Clifton.[1] Two documents contained notations that respondent and/or D.B. had not submitted the required verifications of residence but would subsequently do so. (J-2; J-3)

[1] According to the Administrative Law Judge (ALJ) D.B. testified at the hearing on the one hand that she lived in Clifton during May and June of 2003 (ID4) but on the other hand that she had never been domiciled or lived in Clifton (ID3).

Respondent also signed documents that contained warnings that he could be assessed tuition if information he was providing was false. (J-1; J-4)

The Initial Decision (ID) recites that during May and June 2003, D.C. attended high school in petitioner's district. On or about June 10, 2003, petitioner filled out further District forms (J-4)[2] seeking D.C.'s enrollment in the District for the 2003-2004 year. However, the required affidavit by D.C.'s actual parent or legal guardian demonstrating economic or family hardship was not included in J-4. In fact, J-4 identified D.C.'s uncle in North Carolina as his legal guardian. [3] Respondent's request to enroll D.C. in the District for the 2003-2004 school year was denied and D.C. did not return after the 2002-2003 school year.

To support its claim for tuition reimbursement, petitioner submitted to the OAL an affidavit by its business administrator establishing the per diem tuition rate for petitioner's high school students and the number of days that D.C. attended the high school.

Based upon the foregoing, the Commissioner agrees with the ALJ's conclusion that D.C. was not entitled to a free public education in Clifton during the months of May and June 2003. Since R.N. was neither a parent nor a legal guardian of D.C. during the relevant time period, D.C. was not domiciled in Clifton and was consequently not eligible to attend school there under *N.J.S.A.* 18A:38-1(a). Nor did D.B. submit the affidavit of hardship that would have had to have been offered to petitioner to show why D.C. needed to live with R.N. and to prove that D.C. was eligible, under *N.J.S.A.*18A:38-1(b), for a free public education in Clifton.

---

[2] J-4 also contained a warning that respondent could be assessed tuition if the information he was providing was false.

[3] It was apparently stipulated at the hearing (ID-2) that respondent had not had custody of D.C. while D.C. attended petitioner's high school. An employee of petitioner, however, testified that respondent told her that he was seeking custody of D.C. (ID5) Generally, testimony by D.B. and R.N. indicated that D.B. had been having problems getting D.C. to go to school, and that R.N. had helped her with D.C. over an extended period of time. (ID6-7).

The Commissioner is further persuaded that the ALJ is correct in finding that the proofs established that the tuition owed for D.C.'s education in petitioner's district during May and June of 2003 is $1,474.55.

Accordingly, the petition is granted and, pursuant to *N.J.S.A.* 18A:38-1(b)(1), respondent is liable for tuition in the amount of $1,474.55.

IT IS SO ORDERED.[4]

ACTING COMMISSIONER OF EDUCATION

Date of Decision: 9/28/06

Date of Mailing: 9/29/06

[4] This decision may be appealed to the State Board of Education pursuant to *N.J.S.A.* 18A:6-27 *et seq.* and *N.J.A.C.* 6A:4-1.1 *et seq.*

State of New Jersey
OFFICE OF ADMINISTRATIVE LAW

INITIAL DECISION
OAL DKT. NO. EDU 3239-05
AGENCY DKT. NO. 435-12/04

CITY OF CLIFTON BOARD OF EDUCATION,

Petitioner,

v.

R.N.,

Respondent.

Anthony V. D'Elia, Esq., for petitioner (Chasan Leyner & Lamparello, attorneys)

R.N., respondent, pro se

Record Closed: July 17, 2006 Decided: August 15, 2006

BEFORE **DIANA C. SUKOVICH,** ALJ:

PROCEDURAL HISTORY

On December 13, 2004, the City of Clifton (Clifton) Board of Education (BOE or petitioner) filed a complaint with the State Department of Education (DOE) seeking reimbursement from R.N. (respondent) of the costs of tuition pertinent to the attendance of D.C., a minor, in the BOE's school district (District) during 2003, on the basis that D.C. was not entitled to a free public education in the District's schools. R.N. filed an answer on January 3, 2005. The DOE transmitted the matter to the Office of Administrative Law on March 17, 2005 for determination as a contested case pursuant to N.J.S.A. 52:14F-1 to -13.

The case was assigned to this judge, on March 28, 2005. During the proceedings, the parties attempted to resolve the matter. Although such was considered by petitioner, those efforts did not come to fruition. Subsequent to a hearing, various communications ensued regarding procedural matters and exhibits. A telephone conference was conducted on July 17, 2006.

NATURE OF THE CASE

Although the matter was commenced by a petition filed with the DOE by the BOE, as discussed in more detail hereinafter, the burden of proof, by a preponderance of the credible evidence, is upon R.N. to demonstrate that D.C. was entitled to a free education in the District at the time in question. If he were not, the burden is upon the BOE, also by a preponderance of the credible evidence, to establish the tuition for which respondent is liable.

STIPULATIONS

The parties stipulated to the following facts:

1. From May 1, 2003 until the end of the pertinent school year, D.C., a relative of respondent, attended the Clifton High School (High School).

2. R.N. is not a parent of D.C. Respondent never had custody or legal guardianship of D.C. while the latter attended the High School.

3. Subsequent to the end of the school year in question, D.C. did not return to petitioner's schools.

4. The issues in this case pertain only to the attendance of D.C. at the High School during 2003.

FINDINGS OF FACT

It is clear that the relevant facts are not materially in dispute. Based upon a review of the entire record, I **FIND** the following to be additional facts.

D.B. is D.C.'s mother. R.N. is D.B.'s nephew.

A "RESIDENCE VERIFICATION OF PARENT/GUARDIAN FOR ENTERING PUPILS" (Verification), a District form, was signed by R.N. and D.B., pertinent to D.C. That document, dated April 30, 2003, referenced that D.C. was in the ninth grade at the High School; his address, as well as that of his "PARENT/GUARDIAN", was at a specific address in Clifton; the "PARENT/GUARDIAN" did not own the property in question; R.N. was D.C.'s cousin; D.B. was D.C.'s mother and was the "applicant"; and R.N. was a "Clifton resident", not the "applicant". (Exh. J-1, p. 1.) In D.B.'s view, D.B. was never "domiciled" in Clifton. D.B. did not "live" at the referenced Clifton address at the time. (D.B.'s testimony.) D.C., in her view, did. Karen K. Dickey (Dickey), who has been employed by the BOE for at least ten years, "took" and processed the Verification, which is an "enrollment application". (Dickey's testimony.) Dickey did not know R.N. or D.B, and she did not meet D.B.

Pertinent to the application, a "**RESIDENCY QUESTIONNAIRE**" (Questionnaire), a BOE document utilized when there is no "proof" that a parent of a child resides in Clifton, was also completed pertinent to D.C. (Exh. J-1, p. 3. Dickey's testimony.) The Questionnaire reflected the address referenced on the Verification and that D.C. was in the ninth grade at the High School. Pertinent to various questions on the form, it was also stated that D.C. was residing with R.N., his cousin, and D.B., his mother, in a single-family home. No responses were provided pertinent to documentary verification; the Questionnaire stated that at least three documents, pertinent to residency "verification" or "children not with their natural parents", were required. V.C. was stated to be D.C.'s father, and his address was noted as being "Unknown". D.B. was referenced as residing at a particular address in Toms River, New Jersey (Toms River); however, it was also indicated in the Questionnaire that she lived in "T.R.", New Jersey. D.B.'s occupation was stated as "CE", and she was employed at "AT &T". (Exh. J-1, p. 3.) D.C.'s "Residency", at the address referenced for respondent, was characterized as "Temporary", with notations that D.C. would "sleep" at that residence seven days per

week and that the "arrangement" would be for two months. D.B. completed the Questionnaire and signed the document, as the "parent or guardian". (Id. at 4.) The information specific to the application, and to R.N., D.B., and D.C., was included on the Questionnaire and Verification by individuals other than Dickey. In fact, D.B. completed that portion of the form pertinent to D.C. sleeping at the Clifton address for two months. In her view, she and D.B. "lived", at the time, at the Clifton address referenced thereon. (D.B.'s testimony.) At the time, the BOE did "accept" placement of D.C. with the District. (Dickey's testimony.)

A "Student Application for Enrollment" form" (Enrollment Application), another BOE form, was also completed regarding D.C., on its face, in part, by petitioner's employees. That document referenced, in part, that D.C.'s address was in Clifton, the prior referenced one; that he had been born in Brick Town, New Jersey, Ocean County; and that he resided with his mother. R.N. and another individual, F.S., were listed as "emergency" names for contact; and D.B. was noted to be employed at AT & T. D.C.'s prior "home address" was referenced as at the prior one in Toms River. The Enrollment Application also referenced that D.C. has a sister, K.C., who, at the time, was at college. A verification document, a Birth Certificate, was referenced; however, it was noted that "2 additional proofs will follow". (Exh. J-2, pp. 5-6.) On the face of the document, D.B. signed it, on or about April 30, 2003, and Dickey signed it on May 1, 2003.

The Enrollment Application was "completed" on April 30, 2003, not May 1, 2003. However, Dickey did "not take it" until May 1; i.e., she "processed" the document on May 1, 2003, at petitioner's offices. Dickey did not complete the portions of the Enrollment Application pertinent to information relevant to D.C., D.B., and any other individuals referenced. Based upon the document, it was Dickey's understanding that there was "no other parent" of D.C., other than D.B. (Dickey's testimony.)

The Enrollment Application had already been completed when "someone", "who represented" herself as D.C.'s "mom", brought the documents to the BOE's offices. It was, and is, respondent's practice not to "accept" such a form from a "parent" if he/she does not have a "legal guardian form." Dickey subsequently spoke with R.N., as it had

"come to light" that D.C. was "living with him" and that D.C.'s mother was "not living there." To Dickey's understanding, D.B. was residing in Toms River, and D.C. was living in Clifton, with R.N. Respondent told Dickey that because of "difficulties" regarding D.C. living with his mother, respondent had "taken" D.C. to "live with him" in Clifton. Although R.N. "claimed" that he was "seeking custody" of D.C., "no paperwork", in that respect, was provided to the BOE. (Ibid.)

As a result of the situation, R.N. was asked to complete a "PROVISIONAL ENROLLMENT" form (Provisional Enrollment), which he did. That document, dated May 1, 2003, was addressed to D.B., at the relevant Clifton address. As stated therein, D.C. was admitted to the District's schools on a "*Provisional Enrollment*" basis, with the "understanding" that certain specified "deficiencies" would be corrected, within 21 days, or an appeal would be filed with the Commissioner of the DOE (Commissioner). The referenced "deficiencies" were to be addressed by the submission of "additional proofs of residence to include" a "bank statement, lease, or utility" "etc.". As also referenced in the Provisional Enrollment, a failure to do so, or to file an appeal, would result in "removal" by the BOE, without a hearing, and if it were later determined that D.C. was "ineligible" to attend the District's schools, the parent or guardian "may be liable for pro rated tuition." (Exh. J-3.) The Provisional Enrollment was signed, on its face, on behalf of the BOE, by J. Barry Mascari (Mascari).

An "APPLICATION BY CLIFTON RESIDENT" form (Resident Application), part of an "APPLICATION FOR ADMISSION" (Admission Application), was completed, pertinent to D.C.'s attendance at the High School. (Exh. J-4, pp.1-2.). The Resident Application, on its face, was signed by R.N. on June 10, 2003. It stated, in pertinent part, that D.C. had resided with S.B. and D.B., "for the past three" years, in Toms River, and with R.N., Sr., in Fayetteville, North Carolina. Pertinent to the student's "PARENTS AND FAMILY", "Uncle" was indicated. D.B.'s address was referenced as being in Toms River, and F.B., D.C.'s brother, was referenced as attending school in Toms River. (Exh. J-4, p. 2.) The Resident Application also stated that D.C. had commenced residing at R.N.'s residence, in Clifton, on May 1, 2003. Pertinent parts of the Resident Application, addressing the "Amount of monthly support, if any received for student", indicated no such income. It was also indicated that D.C. would be "claimed as a

dependent on the applicant's income tax returns", apparently, those of R.N., and that D.C. was residing with R.N., rather than his "custodial parents or court appointed guardian"; because "school problems escalated into family problems". (Id. at 2.) R.N. completed, at a minimum, that part of the Resident Application pertinent to where D.C. resided during the prior three years. To R.N.'s knowledge, D.C. "lived" in Toms River during that period. (R.N.'s testimony.)

An "AFFIDAVIT OF APPLICANT (CLIFTON RESIDENT)" (Affidavit), submitted with the Admission Application, was, on its face, also completed by R.N., dated June 10, 2003. (Exh. J-4, p. 4.) Respondent referenced, pertinent to preprinted statements on the Affidavit, that:

> The child will reside with me and be gratuitously supported me for the entire year and not just for that part of the year that school is in session.
>
> I am or will be paying for the child's food, shelter, and clothing as of the date the child lives with me. (Ibid.)

Pertinent BOE documents reflect that the Admission Application was reviewed by BOE personnel on June 10, 2003 and that it was denied on June 20, 2003, because "No sworn statement submitted from parent/guardian" and "The sworn statement does not establish that the parent/guardian is not capable of supporting or providing care due to family or economic hardship". (Id. at 1.)

D.B., at the time in question, had "problems" with D.C. pertinent to school. Although she would "drop" him "off" at school, he would "not stay in" school. Such problems had developed at the end of his freshman year in a high school, not in Clifton. Initially, D.B. had hoped that D.C. would stay with R.N. only during the summer, if he did "well". "Problems", however, subsequently developed. R.N. assisted D.B. with D.C., generally, which assistance included providing food. At the time, it was anticipated that R.N. would "try to get custody" of D.C. However, there were no "discussions" regarding "custody" until the "end" of the period in question. R.N. was "newly married", and R.N.'s spouse, apparently, opposed any efforts by R.N. to gain custody of D.C. As of June, 2003, D.B. had "legal custody" of D.C. (D.B.'s testimony.)

It was R.N.'s practice to "usually" take D.C. to school. Respondent "supervises" a "bible school", and D.C. was "always with him." In the past, R.N. had helped D.B., pertinent to D.C., and she had provided him with assistance, as needed. At the time in question, R.N. provided "help" to D.B. because she was experiencing "problems at home." In respondent's view, D.C. "lived" with him. R.N. intended to "take" his cousin and to "help" D.B. with him. Over the years, R.N. became involved with D.C., to help D.B. While R.N. was "growing up", "many" cousins and his aunt lived with him and his "family", whenever there were "family problems". (R.N.'s testimony.)

Subsequent to June 3, 2006, R.N. "learned" that there were "issues" regarding D.C.'s attendance in the District's schools. He was contacted by a "truant officer", and, to R.N.'s knowledge, there was an "investigation" regarding whether D.C. "lived" with R.N. On June 2, 2003, an "investigator" "came by" to speak with R.N. regarding the matter, at R.N.'s residence. R.N. was asked questions regarding where D.C. and D.B. "lived". R.N. "showed" the "investigator" a "room" and "clothes", in that respect. R. N. was subsequently contacted, by telephone, by "someone", not with the BOE, and was "told" that R.N. could not obtain "custody" because R.N.'s father had "custody" of D.C. D.C. had previously "lived" with respondent's father, in North Carolina. Prior to attending the High School, D.C. had resided in North Carolina for approximately one year. Although not entirely clear, R.N.'s father "still" had custody of D.C. when the latter resided in Toms River. (R.N.'s testimony.)

R.N. subsequently spoke with Mascari, to respondent's knowledge, a "supervisor" with the BOE, regarding the matter. (Ibid.) As a result of that conversation, R.N. completed at least a portion of the Admission Application, "PART III. AFFIDAVIT OF NON-RESIDENT PARENT(S WHOSE CHILD RESIDES WITH AND IS SUPPORTED BY A RESIDENT OF CLIFTON" (Part III). (Exh. J-4, p.5.)[1] Also as a result of that conversation, R.N. called D.B. regarding the matter.

D.C. was "enrolled" in the BOE's school system "between" May 1, 2003 and September 3, 2003. The annual "per pupil cost" for D.C. for that period of time, at the

High School, was $7,584.00. The "per diem cost" for D.C., for that period of time, was $1,474.55, reflecting 35 days at $42.13 per day. (Exh. P-1.)

At some point, R.N. filed a complaint, against D.B. and V.C., in the Chancery Division-Family Part, Ocean County, Superior Court of New Jersey (Complaint) for custody of D.C. Apparently, V.C. did not appear, D.B. consented to a "CHANGE" in custody, and an order was issued, granting custody to R.N., "WITHOUT PREJUDICE" to V.C. (Exh. J-5, p. 2.)

DISCUSSION

The Commissioner generally has jurisdiction to hear and determine controversies and disputes arising under the school laws. N.J.S.A. 18A:6-9.

Public schools are required to provide a free education to individuals between the ages of five and twenty years in certain circumstances, including to individuals who are domiciled within the school district. N.J.S.A. 18A:38-1(a).

Local school districts must also provide a free education to any person who is kept in the home of another person domiciled within the district and supported by such other person gratis as if he/she were such other person's own child, upon the filing by that person with the pertinent Board of Education (Board) of a sworn statement. Such statement shall, if so required by the Board, state that he/she is domiciled within the district and is supporting the child gratis and will assume all personal obligations for the child relative to school requirements. The sworn statement must also state that he/she intends to keep and support the child gratuitously for a longer time than merely through the school term. A copy of certain documents regarding residency shall also be filed. The parent/guardian shall file with the Board a sworn statement that he/she is incapable of supporting or providing care for the child because of a family or economic hardship and that the child is not residing with the resident of the district solely to receive a free public education therein. The statement shall be accompanied by documentation supporting the validity of the sworn statements. Id. at § (b)(1).

[1] The PART III moved into evidence was a blank form.

If, in the Board's judgment, the evidence does not support the validity of a resident's claim, the Board may deny admission to the child. The resident may contest such a decision to the Commissioner and shall be entitled to a hearing on the validity of the claim. The resident shall have the burden of proof, by a preponderance of the evidence, to demonstrate that the child is eligible for a free education. No child shall be denied admission during the pendency of such proceedings. If the child is then currently enrolled in the district, he/she shall not be removed during the 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 resident's claim, the Commissioner shall assess tuition for the student, prorated to the time of the student's ineligible attendance in the district. Ibid.

I am persuaded that respondent did not demonstrate, by a preponderance of the credible evidence, that D.C. was entitled to a free public education in the District. To the contrary, the BOE proved that he was not.

No evidence, other than broad statements by R.N. and D.B., was presented supporting a conclusion that R.N., during the time in question, assumed responsibility for D.C.'s "personal obligations", neither generally, nor relative to the latter's education, or that R.N. intended to do so for a period longer than the applicable school term. To the contrary, the evidence was that respondent, and D.B., intended that the living arrangement was to be short-term, while D.B. was experiencing "problems", which were not detailed, with her son, and that R.N., as well as other relatives, had provided assistance in the past. Evidence also was not offered that D.B., at the time, was not able to care for D.C., or that a "hardship" existed in that respect. The Complaint, and related Order, on their face, are not dated, were not addressed in detail, and, as referenced hereinabove, the parties stipulated that R.N. did not have custody or legal guardianship of D.C. while the latter attended the High School. I therefore give them little weight.

The BOE's calculation of the monies owed to it for reimbursement relative to D.C.'s enrollment in the High School is consistent with the applicable statutory provisions. In the absence of evidence regarding payment schedules, I am persuaded that 90 days is a reasonable deadline for the payment of the amount in question.

CONCLUSIONS

I **CONCLUDE** that D.C. was not entitled to a free public education in the District and that petitioner is entitled to reimbursement from respondent in the amount of $1,474.55 for the cost of providing a public education to D.C. at the High School, from May 1, 2003 until September 3, 2003, and that the monies in question should be paid to petitioner within 90 days of the effective date of this decision, unless an alternative payment schedule is agreed to by the parties.

ORDERS

It is hereby **ORDERED** that respondent reimburse petitioner $1,474.55 for D.C.'s enrollment at the High School, from May 1, 2003 until September 3, 2003, and that respondent reimburse petitioner the amount in question within 90 days of the effective date of this decision, unless an alternative payment schedule is agreed to 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 (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.

August 15, 2006
DATE

Diana C. Sukovich
DIANA C. SUKOVICH, ALJ

E-mail Receipt of Initial Decision Confirmed by the Department of Education on:

DATE

Mailed to Parties:

DIRECTOR AND
CHIEF ADMINISTRATIVE LAW JUDGE

AUG 16 2006
DATE

OFFICE OF ADMINISTRATIVE LAW

lr

APPENDIX

Witnesses

For Petitioner:

Karen. K. Dickey

For Respondent:

R.N.

D.B.

Exhibits In Evidence

J-1 Residence Verification of Parent/Guardian for Entering Pupils and Residency Questionairre

J-2 Student Application for Enrollment

J-3 Provisional Enrollment

J-4 Application for Admission

J-5 Complaint

P-1 Affidavit of Karen R. Perkins

337-06

OAL DKT. NOS. EDU 9918-05 and EDU 12936-05
AGENCY DKT. NOS. 136-5/05 and 293-10/05
(CONSOLIDATED)

BOARD OF EDUCATION OF THE BOROUGH OF RIDGEFIELD, BERGEN COUNTY,	:	
PETITIONER,	:	
V.	:	COMMISSIONER OF EDUCATION
BOARD OF EDUCATION OF THE BOROUGH OF RIDGEFIELD PARK, BERGEN COUNTY, AND NEW JERSEY DEPARTMENT OF EDUCATION, DIVISION OF FINANCE,	:	DECISION
RESPONDENTS.	:	

The record in this matter, the proposed settlement agreement, resolutions by petitioner and respondent Board of Education of Ridgefield Park authorizing the settlement, correspondence from petitioner's counsel withdrawing petitioner's claims against respondent New Jersey Department of Education, and the Initial Decision issued by the Office of Administrative Law (OAL) pursuant to N.J.A.C. 1:1-19.1, have been reviewed. Upon such review, the Commissioner approves the settlement terms and adopts the settlement as the final decision in this case, with one clarification.

As counsel for both petitioner and the remaining respondent, Board of Education of Ridgefield Park, acknowledged in correspondence dated August 9, 2006 and August 10, 2006, respectively, the settlement agreement will be annexed to the Final Decision in this matter and will, consequently, be part of a public document. Consequently, Paragraphs 10 and 11 of the

settlement agreement are operative only insofar as they do not contradict the provisions of the Open Public Records Act, *N.J.S.A.* 47:1A-1 *et seq.*

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: 9/29/06

Date of Mailing: 9/29/06

State of New Jersey
OFFICE OF ADMINISTRATIVE LAW

INITIAL DECISION

SETTLEMENT

OAL DKT. NO. EDU 09918-05
AGENCY DKT. NO. 136-5/05

OAL DKT. NO. EDU 12936-05
AGENCY DKT. NO. 293-10/05

(CONSOLIDATED)

BOARD OF EDUCATION OF THE BOROUGH OF RIDGEFIELD,

Petitioner,

v.

BOARD OF EDUCATION OF THE BOROUGH OF RIDGEFIELD PARK AND DEPARTMENT OF EDUCATION, DIVISION OF FINANCE,

Respondents.

Stanley Turitz, Esq., for petitioner (Ferrara, Turitz, Harraka & Goldberg, attorneys)

Eun S. Bae, Deputy Attorney General, for respondent Department of Education, Division of Finance (Zulima V. Farber, Attorney General of New Jersey, attorney)

Anthony P. Sciarillo, Esq., for respondent Board of Education of the Borough of Ridgefield Park (Lindabury, McCormick & Estabrook, attorneys)

Record Closed: August 16, 2006 Decided: August 16, 2006

BEFORE **MARGARET M. MONACO,** ALJ:

On or about May 31, 2005, the petitioner, the Board of Education of the Borough of Ridgefield (Ridgefield), filed a Petition with the Commissioner of Education from a determination of respondent Department of Education, Division of Finance (the

Department) that Ridgefield was the district of residence for two of Ms. B.'s children (B.L. and J.L.). An Amended Petition was filed on or about July 20, 2005. The Board of Education of the Borough of Ridgefield Park (Ridgefield Park) filed an Answer and Counterclaim on or about June 23, 2005 and an Amended Answer, Counterclaim and Crossclaim on or about August 8, 2005. The Department filed an Answer on or about August 9, 2005 and an Answer to Crossclaim on or about August 10, 2005. The Department of Education transmitted the matter to the Office of Administrative Law (OAL) where, on September 6, 2005, it was filed under OAL Docket No. EDU 09918-05 for determination as a contested case.

On or about October 25, 2005, Ridgefield filed a separate Petition challenging the Department's determination that it was the district of residence for another child of Ms. B. (R.C.), a minor in a state facility. On or about November 16, 2005, the Department filed an Answer to the Petition and the matter was transmitted to the OAL where, on December 20, 2005, it was filed under OAL Docket No. EDU 12936-05 for determination as a contested case. Subsequently, an Amended Petition was filed naming Ridgefield Park as an additional respondent.

On March 1, 2006, the undersigned entered an Order of Consolidation. The consolidated matter was scheduled for hearing on June 7, 13 and 14, 2006. The hearing was adjourned, at the parties' joint request, to provide additional time toward finalizing an amicable resolution. Counsel for Ridgefield submitted under letter dated July 19, 2006, the attached Settlement Agreement between Ridgefield and Ridgefield Park, along with the attached resolution adopted by Ridgefield approving the Settlement Agreement. Subsequently, counsel for Ridgefield advised the undersigned, via letter dated August 9, 2006, that it withdrew the Petition of Appeal as to claims against the Department of Education. On August 16, 2006, counsel for Ridgefield Park submitted the attached resolution of the Board approving the settlement agreement.

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

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

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

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

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

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

August 16, 2006
DATE

Margaret M Monaco
MARGARET M. MONACO, ALJ

Receipt Acknowledged:

8-18-06
DATE

DEPARTMENT OF EDUCATION

Mailed to Parties:

AUG 23 2006
DATE

Laura Anders
DIRECTOR AND
CHIEF ADMINISTRATIVE LAW JUDGE
OFFICE OF ADMINISTRATIVE LAW

db

RIDGEFIELD PARK PUBLIC SCHOOLS
Ridgefield Park, N.J.

R:#117 - 6/28/06
SETTLEMENT
AGREEMENT

Motion by Trustee Kraljic
Seconded by Trustee Cathcart
RESOLVE that the Board of Education approve the Stipulation of Settlement between the Ridgefield Board of Education and the Ridgefield Park Board of Education under Agency Ref. No.: 136-5/05 – Agency Ref. No.: 293-10/05.

Vote: Ayes: Trustees: Artuso, Cathcart, DeLuca, Haines, Kraljic, Miller, Rapp and President Butler
Absent: Trustees: DeSantis and Thiemann

RECEIVED
2006 AUG 16 P 2:10
STATE OF NEW JERSEY
OFFICE OF ADMIN LAW

CERTIFICATION
This is to certify that the above is a true and accurate copy of the original resolution passed by the Board of Education at the Public Meeting held on June 28, 2006.

Ronald R. Guider
Board Secretary

JUN. 1 9 RECD

Ridgefield Public School District

RECEIVED
2006 JUL 21 P 3:23
STATE OF NEW JERSEY
OFFICE OF ADMIN LAW

R. Paul Vizzuso
Business Administrator/
Board Secretary

555 Chestnut Street
Ridgefield, New Jersey 07657
201-945-4455 ext. 262
Fax 201-945-7830
rpviz@ridgefieldschools.com

The Ridgefield Board of Education met at 7:00 p.m. on Thursday, June 8, 2006 in the High School Cafeteria, Ridgefield, New Jersey.

The following Board Trustees were present:

Mr. DeSimone
Mr. Calabrese
Mrs. Fugnitti
Mr. Grippa
Mrs. Larkin
Mr. Ponticorvo
Mr. D'Amico

At said meeting the following Resolution was adopted:

It is hereby moved by Mrs. Fugnitti and seconded by Mr. Grippa that the Board of Education adopted the following Resolution:

Ridgefield Board of Education Homelessness Litigation

WHEREAS, the Board of Education has been involved in litigation with the Ridgefield Park Board of Education and the Division of Finance of the Commissioner of Education's Office challenging the homelessness determination for students R.C., B.L., and J.L. for the school year 2004 – 2005; and

WHEREAS, the Board of Education has determined that its in its best financial interest to resolve the matter without any future litigation; and

WHEREAS, the parties have agreed that the Ridgefield Board of Education and the Ridgefield Park Board of Education will, in essence, split the cost 50/50 for the education of R.C., B.L., and J.L. for the school year or portion thereto for 2004 – 2005;

THEREFORE, based upon the recommendation of the Superintendent of Schools, the Business Administrator, and the Board Attorney, the Board of Education hereby approves the attached Settlement Agreement in the matter

pending before the Commissioner of Education as Docket No. 136-5/05 and Docket No. 293-10/05 in accordance with the attached Settlement Agreement.

BE IT FURTHER RESOLVED that the Board President is hereby authorized to execute said Agreement, subject to the ultimate approval of the Commissioner of Education.

Upon Roll Call Motion carried unanimously: 7 Yes 0 No 0 Abstain

I, R. Paul Vizzuso, School Business Administrator/Board Secretary of the Borough of Ridgefield, in the County of Bergen, State of New Jersey, hereby certify that the above extract from the minutes of the June 8, 2006 Work Session/Business Meeting of the Ridgefield Board of Education to be a true and accurate copy of the official minutes of the meeting.

R. Paul Vizzuso
School Business Administrator/Board Secretary

6/15/06
Date

Final

LINDABURY, McCORMICK & ESTABROOK
A Professional Corporation
53 Cardinal Drive
P.O. Box 2369
Westfield, New Jersey 07091
Telephone: (908) 233-6800
Attorneys for Respondent
Ridgefield Park Board of Education
Anthony P. Sciarrillo, Esq.

ATTORNEY GENERAL OF NEW JERSEY
Richard J. Hughes Justice Complex
25 Market Street, P.O. Box 112
Trenton, New Jersey 08625-0112
Telephone: (609) 984-8464
Attorneys for Department of Education
Eun S. Bae, Esq., DAG

BOARD OF EDUCATION OF THE BOROUGH OF RIDGFIELD, BERGEN COUNTY Petitioner, -vs- BOARD OF EDUCATION OF THE BOROUGH OF RIDGEFIELD PARK, BERGEN COUNTY AND ASSISTANT COMMISSIONER, DIVISION OF FINANCE, NJ DEPARTMENT OF EDUCATION Respondents.	**BEFORE THE NEW JERSEY COMMISSIONER OF EDUCATION** AGENCY DOCKET NO. 136-5/05
BOARD OF EDUCATION OF THE BOROUGH OF RIDGFIELD, BERGEN COUNTY Petitioner, -vs- STATE OF NEW JERSEY - DEPARTMENT OF EDUCATION, DIVISION OF FINANCE AND BOARD OF EDUCATION, BOROUGH OF RIDGEFIELD PARK, Respondents.	**BEFORE THE NEW JERSEY COMMISSIONER OF EDUCATION** AGENCY DOCKET NO. 293-10/05 **SETTLEMENT AGREEMENT AND RELEASE**

Petitioner, the Board of Education of the Borough of Ridgefield (hereinafter "Petitioner"), and Respondents, the Board of Education of the Borough of Ridgefield Park (hereinafter "Ridgefield Park") and Department of Education (collectively hereinafter "Respondents") in the above entitled actions having agreed to amicably resolve their differences, it is hereby stipulated and agreed that this matter shall be settled upon the following terms:

1. Petitioner and Ridgefield Park agree to share the cost for R.C.'s placement in a State facility from October 7, 2004 through June 30, 2005. The total cost for R.C.'s placement in a State facility from October 7, 2004 through June 30, 2005 is $21,976.00. Within 60 days of the approval of this Settlement Agreement by the Commissioner of Education, Petitioner shall pay the sum of $21,976.00 to Respondent, Department of Education.

2. Within 60 days of the approval of this Settlement Agreement by the Commissioner of Education, Respondent, Ridgefield Park shall reimburse Petitioner the sum of $10,988.00.

3. Within 60 days of the approval of this Settlement Agreement by the Commissioner of Education, Petitioner agrees to pay to Ridgefield Park the sum of $4,616.00 for the cost of tuition for B.L. attending Ridgefield Park Schools during the 2004-2005 school year.

4. Petitioner and Ridgefield Park agree that neither party shall pay the other party for tuition costs regarding J.L.

5. It is understood and agreed that the consideration described in Paragraphs 1-4 above shall be in full satisfaction and settlement and waiver of all of the claims contained in the Petitions and Amended Petitions filed in these actions and any other claims or demands which Petitioner now has or may have against all Respondents; and in recognition of and consideration

for Petitioner's promise to dismiss with prejudice all of the claims contained in the within Petitions and Amended Petitions filed before the Commissioner of Education of the State of New Jersey and in the Office of Administrative Law, and a Release of all claims.

6. The parties have reached this Agreement to avoid the expense, inconvenience and potential acrimony of continued legal action, and in the interest of the public good.

7. Petitioner releases and gives up any and all claims, including claims for attorney's fees, and rights and liabilities which Petitioner may have against the Respondents, whether raised or not raised, arising out of and/or related or unrelated to the claim in controversy, as more particularly described below:

> Petitioner does hereby fully and forever surrender, release and discharge Respondents from any and all suits, claims, controversies, rights, promises, debts, liabilities, demands, obligations, costs, expenses, actions, claims for attorney's fees, and causes of actions of every nature, character, and description, in law or in equity, whether presently known or unknown, vested or contingent, suspected or unsuspected, related directly or indirectly to the aforementioned claim, or even if unrelated to this claim, as to the law or facts or both, which Petitioner may at any time own or hold against Respondents, arising prior and up to the date of this Settlement Agreement and Release, including the date hereof.

8. Respondents release and give up any and all claims, including claims for attorney's fees, and rights and liabilities which Respondents may have against the Petitioner, whether raised or not raised, arising out of and/or related or unrelated to the claim in controversy, as more particularly described below:

> Respondents do hereby fully and forever surrender, release and discharge Petitioner from any and all suits, claims, controversies, rights, promises, debts, liabilities, demands, obligations, costs, expenses, actions, claims for attorney's fees and causes of actions of every nature, character, and description, in law or in equity, whether presently known or unknown, vested or contingent, suspected or unsuspected, related directly or indirectly to the aforementioned claim, or even if unrelated to this claim, as to the law or facts or both, which Petitioner may at any

time own or hold against Respondents, arising prior and up to the date of this Settlement Agreement and Release, including the date hereof.

9. The parties agree that this Agreement shall function as a Stipulation of Dismissal and fully resolves the disputes as to all claims and causes of action by and between all parties as filed with the Commissioner of Education and Office of Administrative Law in these actions.

10. As a condition of this Agreement, Petitioner and its attorneys hereby agree not to reveal the terms and conditions of this Agreement nor the amount or range of amount of said compromise payment and settlement made on behalf of Ridgefield Park to anyone at any time, except insofar as any such disclosure is required by law.

11. The parties agree that any breach of any obligation under this Agreement including, but not limited to, its confidentiality provisions, will constitute a breach of this Agreement. In the event of a breach of this Agreement by one of the parties hereto, the breaching party shall pay a penalty to the non-breaching party to be established in the discretion of the Court for a willful violation of any term of this Agreement. In the event that either the Petitioner and/or the Respondents are required to commence an action in law or equity to enforce its rights under this Agreement and it prevails, the party against whom the action is brought shall be required to pay the prevailing party reasonable attorneys' fees and costs in addition to any damages which may be recoverable.

12. It is understood that neither the execution of this Agreement nor any other action taken by the Respondents or the Petitioners in connection with this settlement constitutes an admission by the Respondents or the Petitioners of any violation of any law, duty or obligation, or that any decision or action with respect to the determination of homelessness and/or district of residence was unwarranted, unjustified, or otherwise unlawful. The Respondents and Petitioners

specifically disclaim any liability to each other or any other person. The parties have entered into this Agreement solely to compromise disputed claims. No findings of any kind have been made or issued by the Court on the merits of the claims in this action and neither party purports to be the prevailing party in this action.

13. All parties to this Agreement and their counsel participated in the negotiation and drafting of this Agreement as equals. No particular party shall be deemed to be the drafter or provider of this Agreement, and the parties agree that the Agreement shall not be construed against any particular party.

14. Petitioner and Respondent acknowledge that it has consulted with its attorneys regarding this Agreement; that the terms of this Agreement have been explained to it by its attorneys; and that it has represented to its attorneys that it has read this Agreement and fully understands them and agrees to be bound by them. Petitioner and Respondent has also acknowledged that it has been given a reasonable period of time within which to consider this settlement and the terms of this Agreement prior to executing them.

15. This Agreement sets forth the entire agreement between Petitioner and the Respondents. This Agreement supersedes all prior agreements or understandings, if any, between the parties regarding the subject matter of this Agreement. This Agreement may not be altered, amended or modified except by a writing, signed and duly authorized by all parties.

16. This Agreement shall be governed by the laws of the State of New Jersey.

17. Nothing contained herein shall be intended to bar either party from initiating such action as may be necessary to enforce the terms of this Agreement.

18. If, during the term of this Agreement, a specific clause of the Agreement is determined to be illegal or in violation of 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.

19. This Agreement is subject to ratification by the Board of Education of the Borough of Ridgefield and the Board of Education of the Borough of Ridgefield Park.

The foregoing terms and provisions are hereby agreed to and accepted:

Attest: Stanley Fuchs

By: Joseph D'Amico
President of the Borough of Ridgefield Board of Education
Dated: 6/8/06

Attest:

By: Barbara Merritt Butler
President of the Borough of Ridgefield Park Board of Education
Dated: 6-28-2006

334-06

#334-06

FRED ENGEL AND PHILIP MARAVIGLIA,	:	
PETITIONERS,	:	COMMISSIONER OF EDUCATION
V.	:	DECISION
STATE-OPERATED SCHOOL DISTRICT OF THE CITY OF NEWARK, ESSEX COUNTY,	:	
RESPONDENT.	:	

SYNOPSIS

Petitioning teaching staff members alleged that the respondent Newark School District unlawfully refused to promote them based on their prior histories, and, further, had unlawfully demoted petitioner Maraviglia in violation of his tenure rights.

The ALJ found that the District acted within its lawful discretionary authority in considering Maraviglia's entire employment background – which included a conviction for illegal activity related to the 1992 Newark school election, and sanctioning by the Commissioner and State Board of Examiners for the same conduct – in determining not to appoint him to the positions he sought. (Petitioner Engel withdrew his claim early in the proceedings.) The ALJ further found that the District did not violate Maraviglia's tenure rights by "demoting" him, since he had not been officially appointed to the position from which he claimed to have been unlawfully removed. The ALJ, therefore, recommended dismissal of the petition.

The Commissioner adopted the Initial Decision of the ALJ 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.

September 28, 2006

OAL DKT. NO. EDU 1594-02
AGENCY DKT. NO. 485-11/01

FRED ENGEL AND PHILIP MARAVIGLIA,	:	
PETITIONERS,	:	COMMISSIONER OF EDUCATION
V.	:	DECISION
STATE-OPERATED SCHOOL DISTRICT OF THE CITY OF NEWARK, ESSEX COUNTY,	:	
RESPONDENT.	:	

The record of this matter and the Initial Decision of the Office of Administrative Law (OAL) have been reviewed, as have petitioner Maraviglia's exceptions and the reply of the Newark School District (District).[1]

In his exceptions, petitioner reiterates his prior arguments before the Administrative Law Judge (ALJ), stressing that the ALJ failed to address his contention – based on *In the Matter of the Tenure Hearing of Fulcomer*, 93 *N.J. Super.* 404 (App. Div. 1967) – that only the Commissioner can determine the appropriate penalty for unbecoming conduct by a teaching staff member, and local district officials may not usurp this authority by increasing the penalty imposed. According to petitioner, where – as here – the judgment of a local official is wrongly substituted for that of the Commissioner and the best qualified candidate is consequently kept from a district position, not only is the affected employee unfairly and unlawfully harmed, the district's provision of a thorough and efficient system of public education is also compromised. (Petitioner's Exceptions at 1-8) In reply, the District relies on its post-hearing

[1] The prior withdrawal of petitioner Engel's claim is noted and approved by the Commissioner.

submission and stresses that "at no time did the Commissioner of Education seek to limit the District's discretion with regard to [petitioner's] future employment requests." (District's Reply at 1-4, quotation at 4)

Upon review, the Commissioner fully concurs with the analysis and conclusions of the ALJ. Contrary to petitioner's assertions on exception, the ALJ – while not mentioning the case by name – did address the contention for which *Fulcomer* is proffered, by recognizing in her discussion and conclusions that the District was entitled to exercise its lawful discretion in the selection of candidates – including petitioner – for appointment to District positions, and that such exercise constitutes neither a substitution of the District's judgment for that of the Commissioner nor the imposition of a penalty beyond that prescribed by the Commissioner in petitioner's prior tenure proceeding.

Accordingly, for the reasons expressed therein, the Initial Decision of the OAL is adopted as the final decision in this matter, and the Petition of Appeal is dismissed.

IT IS SO ORDERED.[2]

ACTING COMMISSIONER OF EDUCATION

Date of Decision: 9/28/06

Date of Mailing: 9/29/06

[2] This decision may be appealed to the State Board of Education pursuant to *N.J.S.A.* 18A:6-27 *et seq.* and *N.J.A.C.* 6A:4-1.1 *et seq.*

State of New Jersey
OFFICE OF ADMINISTRATIVE LAW

INITIAL DECISION
OAL DKT. NO. EDU 1594-02
AGENCY DKT. NO. 485-11/01

FRED ENGEL AND PHILIP MARAVIGLIA,
Petitioners,
v.
STATE OPERATED SCHOOL DISTRICT OF THE CITY OF NEWARK, ESSEX COUNTY,
Respondent.

Sanford Oxfeld, Esq., for petitioners (Oxford Cohen, attorneys)

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

Record Closed: July 31, 2006 Decided: August 15, 2006

BEFORE **EDITH KLINGER**, ALJ:

PROCEDURAL HISTORY

On November 28, 2001, petitioners, Fred Engel and Philip Maraviglia, filed a Petition of Appeal with the Commissioner of Education (Commissioner) alleging that respondent, the State Operated School District of the City Of Newark (District), unlawfully refused to promote Engel and Maraviglia and unlawfully demoted Maraviglia

in violation of his tenure rights pursuant to N.J.S.A. 18A:28-5. On January 14, 2002, the District filed its answer and affirmative defenses. On February 5, 2002, the Commissioner transmitted the matter to the Office of Administrative Law (OAL) as a contested case pursuant to N.J.S.A. 52:14B-1 to -15 and N.J.S.A. 52:14F-1 to -13.

The hearing in this matter was significantly delayed due to an announced settlement between the parties. After some time had elapsed, it became apparent that no real agreement had been reached and the appeal was set down for hearing.

The evidentiary hearing was held on May 5, 2005 at which time the undersigned was notified that the matter had been resolved by the parties with respect to petitioner, Engel and his appeal was effectively withdrawn. As a result, the following initial decision relates solely to the remaining dispute involving petitioner, Maraviglia.

A briefing schedule was established but the parties once more indicated that the matter was settled and the record was held open. The record closed on August 7, 2006 when the final submission was received from the parties.

BACKGROUND INFORMATION

The following background information is reported below in detail since it is part of the public record and constitutes one basis for the District's subsequent denial of Maraviglia's applications for certain positions.

Maraviglia was indicted by a grand jury for illegally voting in the 1992 Newark School Board election and soliciting others to commit the same offense. On June 25, 1996, he entered a guilty plea to violation of N.J.S.A. 2C:-2-6, complicity, a fourth degree offense. On September 5, 1996, a Judgment of Conviction was entered by the court, sentencing him to two years of probation, a $500 fine and 120 hours of community service.

On November 21, 1996, the District filed tenure charges against Maraviglia. The charges allege unbecoming conduct for violation of N.J.S.A. 18A:14-65, disturbing

school board elections, and for conviction of N.J.S.A. 2C:2-6. N.J.S.A. 18A:14-65 was repealed in 1995.

The District was granted summary decision on April 22, 1998 by the Commissioner of Education on the grounds that Maraviglia "engaged in a course of conduct intended to interfere with the conducting of a school election and, subsequently, admitted that he did so knowingly and willingly." IMO the Tenure Hearing of Philip Maraviglia, State-Operated School District of the City of Newark, Essex County, Agency Dkt. No. 556-11/96, p.13. The Commissioner imposed a seven-month unpaid suspension upon petitioner.

In his decision, the Commissioner stated:

> [T]he Commissioner is mindful of the District's legitimate concern over a situation where tenured teaching staff, who as role models for their pupils and holders of the public trust must be held to the highest standards of good conduct, are known to have been convicted of behavior that is both illegal and, at least facially, connected to their school employment ...."

The Commissioner suspended Maraviglia for seven months without pay for unbecoming conduct and imposed the forfeiture of his employment and adjustment increments for the 1998-1999 and 1999-2000 school years. He stated in a footnote, on the final page of his decision, that, "This penalty is the most severe penalty the Commissioner has ever imposed short of dismissal."

This was followed by an Order by the State Board of Examiners, suspending Maraviglia's license to teach for a period of one year, from June 18, 1998 until June 18, 1999. The Commissioner's statement of policy is echoed in the decision of the State Board of Examiners which wrote:

> It is the conclusion of the State Board of Examiners that the offense to which Mr. Maraviglia herein pled guilty discredits his professional stature. The Board further finds that such offense, tampering with the outcome of a school election, affects his credibility as a role model to his pupils. It is well established that teachers are holders

of the public trust and are held to the highest standards of good conduct.

REVIEW OF EVIDENCE

As a preliminary matter, there is no dispute that petitioner had all necessary certifications for the positions discussed below. It is further undisputed that Maraviglia had an unblemished record prior to his actions resulting in the tenure charges and the suspension which is the subject of the above order. There is also no dispute that he has had no disciplinary issues following his reinstatements at the end of his suspension.

Maraviglia testified that, in September 1999, after his suspension ended, he returned to his former position as a guidance counselor in the technical high school.

He later applied for the job of guidance counselor at the District's science high school with the recommendation of that high school's principal, Christine Taylor. She was told that he would not get the position. She rejected the other applicants and the position remained open for the year. In June 2000, he applied again for the position.

In August 2000, he was told by Taylor that she was recommending his promotion to chief counselor at the science high school again. Two days later, he was called to an interview and learned that he would not get the position after all. He thought that the top of the range salary difference between the chief guidance counselor position and the one he held was almost $20,000 a year.

Dr. John P. Duggan, Director of School Administration Student Information (SASI) in the District, testified that he recommended Maraviglia for the position of Supervisor of Student Information Services. In 2001, Maraviglia applied for the position and was led to believe that it was his. He was instructed to report to the District on August 1, 2001 and was sent for training.

When Maraviglia completed the training and returned to his office, he found a note telling him to report to the human services office for a meeting. The meeting was

scheduled for 1:30 p.m. that afternoon and Maraviglia attended with his union representative. At this meeting, he was told that, after checking his records, the District determined that it would not offer him the position.

Duggan said that Maraviglia actually worked in this position for a period of about a month. Then Duggan was called down to the District's Office of Human Resources and told, without explanation, that Maraviglia could no longer hold the job, although Duggan believed him to be the most qualified candidate. Duggan testified that the Assistant Superintendent of the District said Maraviglia would not get the job because of past conduct. No further explanation was provided. Maraviglia returned to his prior tenured position. This is the action that he now characterizes as a "demotion."

According to Maraviglia, the difference in top of the range salary between the guidance counselor position at the technical high school and the SASI supervisor's position was about $22,000 a year.

Maraviglia was subsequently promoted by the District to be the School-to-Careers Supervisor and became tenured on March 10, 2005 after serving two years in the position.

Maraviglia admitted that at no time did he receive a communication from the State District Superintendent of Schools offering him either the chief counselor position or the SASI position.

The Decision of the Commissioner of April 22, 1998 was silent with respect to Maraviglia's ability to seek promotion on reinstatement and he admitted that there is nothing in that Decision, or elsewhere, that required the District to promote him.

THE POSITIONS OF THE PARTIES

Petitioner claims that the District's refusals to promote him and his "demotion" from the SASI position were penalties, additional to those imposed by the Commissioner and the Board of Examiners, and were not based upon his qualifications

or his conduct at the time the actions were taken. He argues that the District's conduct usurped the statutory powers of the Commissioner of Education and the Board of Examiners to determine the appropriate penalties.

Petitioner points out that, prior to his 1996 conviction, he had a "superlative record" in the District and, when he returned after his suspension, he had only Satisfactory and Superior ratings.

Maraviglia's position does not take into account that he returned to the District in approximately September 1999 after the suspension of his certificates ended in June 1999 and began to apply for promotions less than one year later. In fact, during the initial period of petitioner's applications, until June 2000, the Commissioner's prior disciplinary order was still in effect since he had also ordered the forfeiture of Maraviglia's employment and adjustment increments for the 1998-1999 and 1999-2000 school years.

It must also be considered that petitioner became tenured in his present position as of March 10, 2005 after two years of service. This means that he was promoted on or about March 10, 2003, less than three years after the real end of the disciplinary period imposed by the Commissioner.

The District argues that a local board of education, or a State District Superintendent acting as the local board, has the discretion to consider a candidate's whole record, including his prior negative employment record, when contemplating a promotion. Whether the hiring decisions are made by the State District Superintendent or by the local board, it does not change the factors to be considered in arriving at those decisions:

> (b) Each district board of education shall determine the types of background experiences and personal qualities, if any, that the school district requires or prefers successful candidates for specific positions to possess in addition to appropriate State certification. Such local requirements shall be based upon a careful review of the position in question, and the requirements shall be based upon a careful review of the position in question, and the requirements

> shall emphasize the nature of experience and the quality of individual achievement desired, rather than only the amount of experience.
>
> [N.J.A.C. 6A-4.1(b).]

The board, or State District Superintendent, may exercise its "right and responsibility" to require job candidates to present information, including "records of past experience," to document competency relevant to the specific position. N.J.A.C. 6A-32.4.1(c).

Petitioner can not strip the State District Superintendent and/or the Board of their statutory and regulatory right and responsibility to determine the qualifications of a candidate for employment. For this reason, Duggan's evaluation of Maraviglia's qualifications can not replace the authority of the District to "determine the types of background experiences and personal qualities, if any, that the school district requires or prefers successful candidates for specific positions to possess in addition to appropriate State certification." N.J.A.C. 6A-4.1(b).

I **CONCLUDE** that, if no violation of school law is involved, the determination of these qualifications is not within the authority of the Commissioner.

I **CONCLUDE** that the actions of the State District Superintendent, acting as the Board, were within her statutory and regulatory authority to assess the qualifications of candidates for employment in the District and did not constitute the imposition of penalties beyond those imposed by the Commissioner and the Board of Examiners.

Parenthetically, it would seem that Maraviglia's past history could be considered if he applied for a position in a different school district. The decisions of the Commissioner and the Board of Examiners are matters of public record available to any potential employer. Petitioner's argument here begs the question of whether he should be placed at an advantage by applying in the district where he committed the offense because it would be the only district that could not take his past history into account.

It appears that the District did not consider Maraviglia for promotion, at least until after the end of the 1999-2000 school year when he completed the sanctions imposed upon him by the Commissioner. It then took time to evaluate his performance over a period of a few years before promoting him in early 2003. I **CONCLUDE** that this period of observation and evaluation was not arbitrary or capricious with respect to an employee who, not all that long before, was subject to "the most severe penalty the Commissioner has ever imposed short of dismissal." The forum can not substitute its inexpert opinion for the statutory discretion of the State District Superintendent acting as the Board.

Maraviglia also argues that he was demoted without cause from his position as Supervisor of Student Information Services in violation of his tenure rights, but the record shows no evidence that he was ever appointed to this position by official action of the Board, or by the State District Superintendent acting as the Board, as required by N.J.S.A. 18A:27-1.

Even though he might have mistakenly been informed by Duggan and others that he was the holder of this position, the misinformation could not bind the Board.

The errors of District employees do not create an estoppel in favor of Maraviglia. The case law is clear that representations of an individual Board member or administrator are insufficient to bind the Board, or the State District Superintendent in this case, to a particular course of action. Robert Busler v. East Orange BOE, EDU 3916-00, Comm'r. (August 30, 2001), affirmed, St. Bd., (February 6, 2002) http://lawlibrary.rutgers.edu/oal/search.html; Dorrington v. North Bergen BOE, 1982 S.L.D. 247 (Campbell 1982), aff'd, 1982 S.L.D. 256. This can only be accomplished by official Board action.

Absent formal action or ratification by the Board, or State District Superintendent, Maraviglia could not reasonably rely upon representations by other District employees. I **CONCLUDE** that these representations were insufficient to confer the promotion upon Maraviglia and, therefore, he never officially served as Supervisor of Student

Information Services and could not be demoted from a position he never held. I, therefore, **CONCLUDE** that no violation of his tenure rights occurred that would entitle him to relief in this regard.

ORDER

Accordingly, it is **ORDERED** the petition of Philip Maraviglia is hereby **DISMISSED WITH PREJUDICE** since there is no relief to which he is entitled. It is further **ORDERED** that the appeal of Fred Engel is **DISMISSED** since the matter was resolved by the parties and withdrawn and no issues remain outstanding.

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

This recommended decision may be adopted, modified or rejected by the **COMMISSIONER OF THE DEPARTMENT OF EDUCATION,** who by law is authorized to make a 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.

August 15, 2006
DATE

Edith Klinger
EDITH KLINGER, ALJ

E-mail Receipt of Initial Decision Confirmed by the Department of Education on:

8/15/06
DATE

Mailed to Parties:
Laura Anders
DIRECTOR AND
CHIEF ADMINISTRATIVE LAW JUDGE

AUG 16 2006
DATE

OFFICE OF ADMINISTRATIVE LAW

pb

APPENDIX

Witnesses

For Petitioner:

Fred Engel
Philip Maraviglia
John P. Duggan

Exhibits

By Official Notice:

Exhibit B	Indictment
Exhibit C	Judgment of Conviction
Exhibit D	State Board of Examiners, Order to Show Cause, 1/21/97 State Board of Examiners, Order of Suspension, 7/23/98 Commissioner of Education, Decision, 4/22/98

335-06

OAL DKT. NO. EDU 3687-03
AGENCY DKT. NO. 98-3/03

THEODORE GIBSON,	:	
PETITIONER,	:	
V.	:	COMMISSIONER OF EDUCATION
BOARD OF EDUCATION OF THE TOWNSHIP OF RANDOLPH, MORRIS COUNTY,	:	DECISION
RESPONDENT.	:	

The record in this matter, the proposed settlement agreement, a resolution by respondent authorizing the settlement, and the Initial Decision issued by the Office of Administrative Law (OAL) pursuant to N.J.A.C. 1:1-19.1, have been reviewed.

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

IT IS SO ORDERED.

ACTING COMMISSIONER OF EDUCATION

Date of Decision: 9/29/06

Date of Mailing: 9/29/06

State of New Jersey
OFFICE OF ADMINISTRATIVE LAW

INITIAL DECISION

SETTLEMENT

OAL DKT. NO. EDU 03687-03

AGENCY DKT. NO. 98-3/03

THEODORE GIBSON,

Petitioner,

v.

BOARD OF EDUCATION OF THE TOWNSHIP OF RANDOLPH, MORRIS COUNTY,

Respondent.

Nancy Oxfeld, Esq., for petitioner (Oxfeld Cohen, LLC, attorneys)

Malachi J. Kenney, Esq., for respondent (Kenney, Gross, Kovats & Parton, attorneys)

Record Closed: August 9, 2006 Decided: August 14, 2006

BEFORE **MARGARET M. MONACO,** ALJ:

On March 21, 2003, the petitioner, Theodore Gibson, filed a Petition with the Commissioner of Education alleging that the action of the respondent, the Board of Education of the Township of Randolph (the Board), charging petitioner with sick days for a work related injury violated N.J.S.A. 18A:30-2.1. On April 4, 2003, the Board filed an

OXFELD COHEN, P.C.
60 Park Place, Sixth Floor
Newark, NJ 07102
Attorneys for Petitioner

RECEIVED

2006 MAY 12 A 10:48

STATE OF NEW JERSEY
OFFICE OF ADMIN LAW

Theodore Gibson,	:	BEFORE THE COMMISSIONER OF EDUCATION OF THE STATE OF NEW JERSEY
Petitioner,	:	
vs.	:	OAL DOCKET NO.: EDUOA 03687-2003N AGENCY REF. NO. 98-3/03
Board of Education of the Township of Randolph,	:	SETTLEMENT AGREEMENT
Respondent,		

THIS AGREEMENT is made on this 2nd day of May, 2006, by and between Theodore Gibson residing at 148 Prospect Street, Dover, New Jersey 07081, and the Board of Education of the Township of Randolph, 2 Emery Avenue, Randolph, New Jersey 07869.

WHEREAS, the Board of Education is a body corporate and politic legally charged with the effective management and operation of the Randolph School District; and

WHEREAS, Theodore Gibson is a custodian employed by the Board of Education of the Township of Randolph; and

WHEREAS, on or about September 17, 2002, Theodore Gibson suffered a work related injury; and

WHEREAS, as a result of that injury, Theodore Gibson was absent from work on several days and charged with sick days.

NOW, THEREFORE, in consideration of the mutual promises and covenants set forth herein, the parties agree to the following:

1. Upon the execution of this Agreement, Theodore Gibson shall agree to withdraw with prejudice his petition against the Board in exchange for receipt of the sick days he was charged with while he was out due to the work related injury;

2. Theodore Gibson will be entitled to seven and one-half (7.5) sick days, which represents the following days he was

absent, due to the work related injury, and charged with a sick day:
(full days)
9/20/02, 9/23/02, 9/24/02, 9/25/02, 9/26/02, 9/27/02, 9/30/02.
(half days)
9/19/02;

3. This Agreement does not constitute an admission of liability by either party, nor does it constitute an admission of violation of any statute, regulation, rule, policy or legal duty. This Agreement shall not be cited as precedent, nor shall it be used in any future legal proceedings (except for the enforcement of its own terms), by either party or their representatives;

4. Each party to this Agreement hereby acknowledges that they have had ample opportunity to review this Agreement and the terms embodied herein, and to consult with competent legal counsel, prior to executing this Agreement; more specifically, the Board has discussed this Agreement with Board counsel, and Theodore Gibson has reviewed this matter and this Agreement with his private counsel;

5. This Agreement constitutes the parties' entire understanding and agreement on the subjects encompassed herein;

6. This Agreement shall be governed by, and shall be subject to, the laws of the State of New Jersey.

OXFELD COHEN, P.C.
Attorneys for Petitioner

By: _____
NANCY P. OXFELD, ESQ.

Dated: 5/2/06

KENNEY, GROSS, KOVATS, et. al
Attorneys for Respondent

By: _____
MALACHI KENNEY, ESQ.

Dated: 5/4/06

BOARD OF EDUCATION
OF THE TOWNSHIP OF RANDOLPH
MORRIS COUNTY, NEW JERSEY
as recorded in the official minute book

The Board of Education of the Township of Randolph in the County of Morris, New Jersey, convened in public session on **June 20, 2006** in the Randolph High School Library, Millbrook Avenue, Randolph, New Jersey.

Christine Carey - President
Ethan Blynn - Vice President

The following members of the Board of Education were present: Ethan Blynn, Kathleen Fettweis, Claire Keller, Barbara Levinson, Gregory Mark, Barbara Wedinger, and Douglas Weisberger.

Board member Maria Martoranna was absent.

Christine Carey made a motion seconded by Ethan Blynn and carried unanimously by roll call vote to approve the following:

APPROVAL OF SETTLEMENT AGREEMENT

RESOLVED, the Randolph Township Board of Education credit T.G. with 7.5 sick days for which the employee was charged during the Fall of 2002 as summarized in **Finance Exhibit # 9** attached hereto and made a part of the minutes.

ROLL CALL VOTE: **AYES: 8**
NO: 0
ABSENT: 1

STATE OF NEW JERSEY)

COUNTY OF MORRIS) ss

I, **Linda N. Gordon,** Assistant **Business Administrator**, of the Board of Education, of the Township of Randolph, in the County of Morris, State of New Jersey, hereby certify that the foregoing extract from the minutes of the meeting of **June 20, 2006** has been compared by me with the original minutes as officially recorded in my office in the minute book of said Randolph Township Board of Education and is a true, complete copy thereof and of the whole of said original minutes so far as the same relates 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 day of **August 3, 2006.**

Linda N Gordon

SEAL

ASSISTANT BUSINESS ADMINISTRATOR

8. APPROVAL OF SETTLEMENT AGREEMENT

RESOLVED, the Randolph Township Board of Education credit T.G. with 7.5 sick days for which the employee was charged during the Fall of 2002 as summarized in **Finance Exhibit # 9** attached hereto and made a part of the minutes.

337-06

OAL DKT. NO. EDU 772-06
AGENCY DKT. NO. 391-12/05

S.L.A. and D.O.A., on behalf of minor child, D.A.A.,	:	
PETITIONERS,	:	
V.	:	COMMISSIONER OF EDUCATION
BOARD OF EDUCATION OF THE TOWNSHIP OF WINSLOW, CAMDEN COUNTY,	:	DECISION
RESPONDENT.	:	

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

Upon a full and independent review, the Commissioner concurs, for the reasons detailed in the Initial Decision, that this matter is appropriately dismissed as moot.

Accordingly, the recommended decision of the OAL is adopted and the instant Petition of Appeal is hereby dismissed.

IT IS SO ORDERED.*

Lucille Davy

ACTING COMMISSIONER OF EDUCATION

Date of Decision: 9/29/06

Date of Mailing: 9/29/06

* This decision may be appealed to the State Board of Education pursuant to *N.J.S.A.* 18A:6-27 *et seq.* and *N.J.A.C.* 6A:4-1.1 *et seq.*

State of New Jersey
OFFICE OF ADMINISTRATIVE LAW

INITIAL DECISION
OAL DKT. NO. EDU 772-06
AGENCY DKT. NO. 391-12/05

S.L.A. and D.O.A. o/b/o D.A.A.,
Petitioners,
v.
BOARD OF EDUCATION OF THE TOWNSHIP OF WINSLOW, CAMDEN COUNTY,
Respondent.

NO APPEARANCE BY OR ON BEHALF OF PETITIONER

John S. Kennedy, Esq., for respondent (Wade, Long, Wood & Kennedy, L.L.C., attorneys)

Record Closed: August 15, 2006 Decided: August 31, 2006

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

Petitioners allege that the Board of Education of the Township of Winslow has "failed to provide a safe environment for the education of [their] minor child and, therefore, is liable to [them] to provide a safe environment based on promissory estoppel." They filed their complaint on December 28, 2005, and the matter was transmitted to the Office of Administrative Law for hearing as a contested case on March 1. The matter was initially scheduled to be heard on August 17, 2006, but was

moved up to August 15, 2006, due to a conflict with this Administrative Law Judge's pre-existing vacation plans.

On August 11, 2006, S.L.A. called my chambers complaining that the hearing had been moved up to August 15, 2006, without her consent. She also said that she couldn't make it on the new date[1] and consequently would not appear. At that point, my secretary advised her that if she wanted an adjournment she should call her adversary, request his consent, and submit a formal request in writing.

S.L.A. replied that she had already done that, had no intention of calling him again, would not be faxing or mailing a request for an adjournment, and would not appear on August 15. A short time later, my secretary called her back and left a message on her voice mail indicating that the matter would be dismissed for want of prosecution if she did not appear. S.L.A. did not return the call or otherwise communicate with my secretary.

Immediately preceding the hearing, counsel for the Board provided the court with a copy of a "WINSLOW TOWNSHIP HIGH SCHOOL *WITHDRAWAL/TRANSFER FORM*" dated August 8, 2006. The form, which was signed by S.L.A., indicated that D.A.A. was withdrawing from the Winslow Township High School and transferring to Hammonton High School that same date. Consequently, counsel for the Board requested that the matter be dismissed as moot.

Ordinarily, an issue is moot when a decision that is being sought in a particular matter will, when rendered, have no practical effect on the existing controversy. In re Conroy, 109 N.J. Super. 453, 458 (App. Div. 1983). In such cases, the issues that have become moot or academic prior to judicial scrutiny" are generally considered to be ... improper subject[s] for judicial review." Anderson v. Sills, 143 N.J. Super. 432, 437 (Ch. Div. 1976). 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 stage to which the litigation has progressed. Ibid.

[1] S.L.A. did not provide any information concerning her inability to appear.

In this particular case, S.L.A. has withdrawn D.A.A. from the Winslow Township High School and enrolled him in the Hammonton High School. Consequently, petitioners' complaint that the Board has "failed to provide a safe environment for the education of [their] minor child and, therefore, is liable to [them] to provide a safe environment" for the 2006-07 school year is no longer a justiciable issue.

Based upon the foregoing, I **CONCLUDE** that any decision I might render will have no practical effect on the existing controversy and the matter should be **DISMISSED** as **MOOT**. It is so **ORDERED**.

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

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

Within thirteen (13) days from the date on which this recommended decision was mailed to the parties, any party may file written exceptions with the **COMMISSIONER OF THE DEPARTMENT OF EDUCATION, 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 31, 2006

DATE

ISRAEL D. DUBIN, ALJ

E-mail Receipt of Initial Decision Confirmed by the Department of Education on:

August 31, 2006

DATE

Mailed to Parties: DIRECTOR AND CHIEF ADMINISTRATIVE LAW JUDGE

SEP 07 2006

DATE

OFFICE OF ADMINISTRATIVE LAW

IDD/mh/mamf

EXHIBITS

For petitioners:

None

For respondent:

R-1 Withdrawal/Transfer Form

347-06

STATE OPERATED SCHOOL DISTRICT OF PATERSON, PASSAIC COUNTY,

PETITIONER,

V.

C. R.,

RESPONDENT.

COMMISSIONER OF EDUCATION

DECISION

SYNOPSIS

Petitioning school district requested that the Commissioner compel respondent, a secretary employed by the district, to undergo a psychiatric examination and reimburse petitioner for the cost of a scheduled examination that respondent failed to attend. Respondent received notice pursuant to *N.J.A.C.* 6A:3-1.5, but failed to answer the petition.

After a careful review of the verified petition and attached exhibits, the Commissioner concludes that the allegations of paranoid behavior contained therein – which respondent has chosen not to deny – are sufficient to justify petitioner's directive to respondent to undergo psychiatric examination. However, the Commissioner declines at this time to order respondent to pay $200 for the missed appointment with the doctor chosen by petitioner as no documentation has been submitted to show that the fee from the psychiatrist has been billed and paid by the district. The Commissioner granted summary decision to petitioner, and directed C.R. to undergo a psychiatric evaluation by a physician or institution of petitioner's choice within thirty days of the date of 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.

September 29, 2006

AGENCY DKT. NO. 277-8/06

STATE OPERATED SCHOOL DISTRICT OF PATERSON, PASSAIC COUNTY,	:	
PETITIONER,	:	
V.	:	COMMISSIONER OF EDUCATION
C. R.,	:	DECISION
RESPONDENT.	:	

For Petitioner, Schenck, Price, Smith & King

C. R., *Pro Se*

This matter was opened before the Commissioner of Education on August 10, 2006 by way of a verified petition against respondent, a secretary employed by petitioner. Petitioner requests that the Commissioner compel respondent to undergo a psychiatric examination and reimburse petitioner for a scheduled examination that respondent failed to attend.

By notice dated August 10, 2006, the Bureau of Controversies and Disputes (the Bureau) directed respondent, via regular mail, to file an answer to the petition. On September 7, 2006, the Bureau directed respondent for a second time, via both certified and regular mail, to file an answer to the petition. The certified notice was returned as unclaimed, but neither of the notices sent by regular mail has been returned.

The first communication from the Bureau clearly provided respondent with notice that, pursuant to *N.J.A.C.* 6A:3-1.5, an individual against whom a petition is filed shall have

20 days from receipt of the petition to file an answer. The second notice advised that if respondent did not file an answer within ten days of her receipt of same, each count of the petition would be deemed to have been admitted and the Commissioner may decide the matter on a summary basis. The Bureau has received neither an answer to the petition from the respondent nor from any attorney purporting to represent respondent. Consequently, each count shall be deemed admitted, pursuant to *N.J.A.C.* 6A:3-1.5(e).

The allegations in the verified petition and the supporting exhibits indicate that since November of 2005 respondent has been expressing concerns about monitoring by petitioner of her personal computer and telephone lines, and about perceived interference with her work by members of petitioner's information technology department (IT). Respondent also expressed worries to coworkers about alleged internal politics in the district and about her fear that IT personnel were sabotaging the data she was assigned to process. Two employees of a vendor that was implementing an information system for petitioner reported that respondent, who was also working on the project, was inundating them with calls expressing alarm and paranoia.

Respondent's distress escalated. In mid-November respondent told a co-worker that she had been to the police because the school district had broken "into the codes", was sending things to her home computer, and was driving her crazy. In December 2005, respondent was taken from work to the hospital with chest pains. At that time she expressed to a co-worker the belief that the district would not rest until "it killed her".

By way of a letter dated January 4, 2006, the district superintendent requested – pursuant to *N.J.S.A.* 18A:16-2 and district policy – that respondent undergo a psychiatric examination, to be paid for by petitioner. A hearing was requested by respondent and held on

February 1, 2006. She attended with a family member, having declined union representation. At the hearing she stated, among other things, that "someone was watching her through her computer screen" and that "she could not determine when she was working in a real or a fake program".

Respondent advised at the hearing that she had made an appointment with a psychiatrist. On February 14, 2006, petitioner received a report from the psychiatrist diagnosing respondent as suffering from a delusional disorder, persecutory type. The doctor considered the condition treatable with anti-psychotic medication and intensive psychotherapy. However, when petitioner's director of human resources, Mr. Rojas, met with respondent to discuss the report and recommendations, respondent stated that she would not use medication or therapy.

On March 10, 2006, respondent stated that she would see another psychiatrist. Rojas advised respondent, by letter dated February 13, 2006, that the district would pay for her examination only if it approved her choice of physician. He asked respondent to sign and return a consent form within four days, and counseled her that if she did not, he would schedule an examination and notify her of the date, time and place. If she did not attend the examination, the district would take disciplinary action, and petition the Commissioner for an order both compelling the examination and reimbursing petitioner for any missed appointments.

Respondent did not return the consent form. In accordance with *N.J.S.A.* 18A:16-3, Rojas scheduled an appointment for psychiatric evaluation of respondent on July 13, 2006, and notified respondent, but respondent did not attend the appointment. A fee of $200 was charged petitioner for the missed appointment.

The Commissioner concludes that the allegations, which respondent has chosen not to deny, may be deemed admitted, and are sufficient to justify petitioner's directive to

respondent to undergo a psychiatric examination. At this time, however, the Commissioner will not order respondent to pay $200 for the missed appointment with the doctor chosen by petitioner. Petitioner did not, among the many exhibits attached to the petition, include an invoice or other documentation showing that the "no show fee" from the psychiatrist had been billed and paid by the district.

IT IS ORDERED this 29th day of September, 2006, that summary decision shall be granted to petitioner with the above referenced modification. C. R. is directed to undergo a psychiatric evaluation by a physician or institution of petitioner's choice within thirty days of the date of this Decision.[1]

Lucille E Davy

ACTING COMMISSIONER OF EDUCATION

Date of Decision: 9/29/06

Date of Mailing: 10/05/06

[1] This decision may be appealed to the State Board of Education pursuant to *N.J.S.A.* 18A:6-27 *et seq.* and *N.J.A.C.* 6A:4-1.1 *et seq.*

#349-06

OAL DKT. NO. EDU 4914-06
AGENCY DKT. NO. 214-6/06

T.J.A., on behalf of minor child, M.J.,	:	
PETITIONER,	:	
V.	:	COMMISSIONER OF EDUCATION
BOARD OF EDUCATION OF THE TOWNSHIP OF EWING, MERCER COUNTY,	:	DECISION
RESPONDENT.	:	

On October 5, 2006, this matter was returned to the Commissioner by the Office of Administrative Law (OAL) pursuant to *N.J.A.C.* 1:1-19.2(b) in light of petitioner's withdrawal of the Petition of Appeal.

Upon review of the record, the Commissioner notes that – notwithstanding petitioner's letter to the OAL indicating that the petition was being withdrawn because M.J. has moved out of state and is no longer enrolled in the respondent's schools – the Board's answer in this residency matter contains an unresolved counterclaim for tuition for the period of M.J.'s alleged ineligible attendance. Accordingly, the Commissioner remands this matter to the OAL for such proceedings as are necessary to address the Board's counterclaim.

IT IS SO ORDERED.*

Lucille E Davy
ACTING COMMISSIONER OF EDUCATION

Date of Decision: 10/12/06
Date of Mailing: 10/12/06

* This decision may be appealed to the State Board of Education pursuant to *N.J.S.A.* 18A:6-27 *et seq.* and *N.J.A.C.* 6A:4-1.1 *et seq.*

350-06

RICHARD VINCENTI,	:	
PETITIONER,	:	
V.	:	COMMISSIONER OF EDUCATION
STATE-OPERATED SCHOOL DISTRICT OF THE CITY OF PATERSON, PASSAIC COUNTY,	:	DECISION
RESPONDENT.	:	

SYNOPSIS

Petitioner, a teacher employed by the Board, contends that the Board violated *N.J.S.A.* 18A:30-2.1 when it charged his sick days for a work related injury during the 2001-2002 school year. Petitioner previously filed a petition in May 2002 seeking restoration of sick leave for the same period of time; petitioner subsequently entered into a settlement agreement with respondent, pursuant to which respondent reinstated 11 sick days. The agreement was approved by the Commissioner in a final decision issued in April 2003. Respondent district asserts that this matter should be dismissed, as petitioner is seeking restoration of additional sick leave contrary to the doctrine of *res judicata*; additionally, the instant petition was not timely filed pursuant to *N.J.A.C.* 6A:3-1.3(i).

The ALJ found that: the settlement agreement approved by the Commissioner in 2003 was a final determination; the petitioner voluntarily and with aid of counsel entered into an agreement which restored certain days to his accumulated sick leave bank; the instant petition is therefore barred by the doctrine of *res judicata*, and is additionally time barred by the 90-day rule. The ALJ determined that the instant petition should be dismissed with prejudice.

The Commissioner concurs with the ALJ's determination that this matter is appropriately dismissed as untimely, which renders unnecessary any consideration on the merits of whether the instant claim is barred by the doctrine of *res judicata*. The Commissioner, however, points out that petitioner's criticism on exception of the ALJ's findings and conclusions – which were made based on the record before her – is unwarranted, as any culpability here lies solely with the petitioner. Accordingly, the Initial Decision of the OAL is adopted, and the instant petition is 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.

October 12, 2006

OAL DKT. NO. EDU 13059-05
AGENCY DKT. NO. 320-11/05

RICHARD VINCENTI,	:	
PETITIONER,	:	
V.	:	COMMISSIONER OF EDUCATION
STATE-OPERATED SCHOOL DISTRICT OF THE CITY OF PATERSON, PASSAIC COUNTY,	:	DECISION
RESPONDENT.	:	

The record of this matter and the Initial Decision of the Office of Administrative Law (OAL) have been reviewed. Petitioner filed timely exceptions; however, subsequent review indicated that he had neglected to serve copies of these exceptions upon his adversary and the Administrative Law Judge (ALJ) as required by *N.J.A.C.* 1:1-18.4. Upon faxed notification of this deficiency from the Bureau of Controversies and Disputes on September 13, 2006, petitioner, by return facsimile, certified that the requisite service would immediately be accomplished. The District's reply exceptions were filed three business days from its receipt of petitioner's exceptions, well within the timeframe dictated by *N.J.A.C.* 1:1-18.4 for such replies. These submissions were fully considered by the Commissioner in reaching her determination herein.

On exception, petitioner charges that the Initial Decision is replete with errors and/or determinations which are without factual basis, resulting in an almost irreparable situation in this matter. (Petitioner's Exceptions at 1) Initially, he asserts, the ALJ's determination that the instant petition must be dismissed as *res judicata* is clearly in error. Although conceding that he, indeed, filed a Petition of Appeal in March 2002 which sought restoration of sick days in the 2001-02 school year, petitioner maintains it is readily apparent that the March 2002 petition (attached as Appendix B) had nothing whatsoever to do with the instant case. Rather, he advances:

> ***the issue presented in [the March 2002] matter was, after Mr. Vincenti rested his leg and received appropriate medical treatment, he was released to return to work as of February 14, 2002. This is set forth in a memo dated February 1, 2002 (paragraph 3 of the Petition of Appeal; Appendix B.)
>
> However, rather than allowing Mr. Vincenti to return to work, the District sent Mr. Vincenti a letter indicating that before he could return to work he had to see a psychiatrist (see paragraph 4 of the Petition of Appeal).
>
> Pursuant to the school law, a request was then made of the District, as Mr. Vincenti's original injury was not of a psychological origin, but, rather, involved his left leg, why was Mr. Vincenti asked to see a psychiatrist and where did Mr. Vincenti's behavior deviated (sic) from the norm (see paragraph 5 of the Petition of Appeal).
>
> The District chose to ignore the request for a statement of reasons and never indicated why it believed Mr. Vincenti's behavior deviated from the norm (see paragraph 6 of the Petition of Appeal).
>
> Accordingly, the sick days that were sought in the first Petition of Appeal referenced by the Administrative Law Judge had nothing to do with an injury to Mr. Vincenti's ankle and/or leg. Rather, the issue was limited solely to receiving back-pay and restoration of sick days for the period of time that the District refused to allow Mr. Vincenti to return to work after he was medically cleared to return to work, when the District did not comply with the school laws and indicate why it was requesting that Mr. Vincenti see a psychiatrist. The period of time involved was February 14, 2002, the date that the District was advised that Mr. Vincenti would be able to return to work, in connection with his leg injury, through March 5, 2002, the date that Mr. Vincenti was finally allowed to return to work.
>
> Accordingly, the Settlement Agreement (attached as Appendix C) specifically referenced that case, i.e., the case in which Mr. Vincenti was not allowed to return to work, and gave him eleven sick days, a compromise figure, for the period of time from February 14 through and including March 5, 2002. (*Id.* at 1-2)

In contrast, petitioner argues, the instant petition is the first time he requested restoration of sick days, pursuant to *N.J.S.A.* 18A:30-2.1, for the period of time he was unable to work due to his work-related injury. Petitioner charges that the ALJ probably never looked at the Petition of Appeal in the first matter and, therefore, was oblivious to the fundamental differences between these two matters. Consequently, "[b]ecause the [ALJ] ignored this basic fact, the rest of

her legal conclusions are specious at best and totally without any legal foundation." (Petitioner's Exceptions at 3) Therefore, he argues, *res judicata* is totally inapplicable in this matter. Notwithstanding, he argues, even if the two petitions *had been on the same issue*, the language in paragraph 3 of the Settlement Agreement in the first case – specifically: "[t]his settlement shall not impact Vincenti's claim for additional sick days to which he claims entitlement pursuant to the school laws in a manner to be determined by the Workers Compensation Courts" – served to preserve his right to bring the second additional action. (*Id.* at 4) (emphasis added)

As to the issue of timeliness of the petition, petitioner advances that "[i]t is also significant that the [ALJ], while citing *N.J.A.C.* 6A:3-1.3(i), never actually looked at the statute (sic)" which he avers, in sub paragraph 1, reads:

> [a]ny petitioner claiming benefits under *N.J.S.A.* 18A:30-2.1 shall file petition within 90 days of the date of the determination at the Division of Worker's Compensation that either finds the employee to have sustained a compensable injury or settles the compensation case without a determination of work-related causation.***

He professes this is precisely what happened in the instant matter – this petition "was filed within 90-days of the date that the Worker's Compensation Division determined that [his] injury to his foot was compensable." (*Id.* at 4)

In reply, the District charges that petitioner's arguments advanced in his Exceptions are disingenuous and contrary to those arguments he made before the ALJ below in response to the District's Motion to Dismiss. (District's Reply Exceptions at 2) With respect to the *res judicata* issue, the District points out that petitioner's Brief in Opposition to the Respondent's Motion to Dismiss makes no mention whatsoever that his prior petition (March 2002) was "separate and distinct" from the instant petition. Rather, it professes, "the argument posed in the opposition brief rests solely on the interpretation and the alleged intention behind the various settlement agreements, noting the 'perverse and inequitable result' should the District be permitted to renege on the language of the settlement agreement related to the pursuit of additional sick days. (See June 29, 2006

Opposition Brief, pages 2 and 3)." (District's Reply Exceptions at 2) Now, it proposes, petitioner, in blatant violation of *N.J.A.C.* 1:1-18.4(c), is attempting to supplement the record - subsequent to the issuance of the ALJ's decision in this matter - by submitting with his Exceptions, as [Appendix B], a copy of the March 2002 petition: a document which heretofore had never been presented to or shared with either the District or the ALJ during the course of these proceedings. (*Id.* at 2-3)

Turning to the timeliness of the petition, pursuant to *N.J.A.C.* 6A:3-1.3(i), the District urges:

> any possible means of calculating the days during which Petitioner had to file the within Petition mandates a conclusion that the Petition had to be filed in late July-early August 2005. As Petitioner noted in paragraph 5 of the Petition, the workers comp case "concluded via settlement agreement" on May 2, 2005. If the date of that decision constitutes the beginning of the running of the limitations period, then the Petition had to be filed within ninety days, by July 31, 2005. As the 31st was a Sunday, the limitations period expired on August 1, 2005. If an allowance is made for mailing the decision, then presumably three days must be added to the May 2 date, beginning the limitations period on May 5, 2005. Thus, the limitations period ended on August 3, 2005. The Petition in this case was not filed until on or about November 9, 2005, more than 180 days after the workers comp case was settled and incorporated into a decision. (District's Reply Exceptions at 2)

Interestingly, the District observes, in his June 29, 2006 Opposition Brief, petitioner admits that his petition was filed "in excess of the 90 days" mandated by regulation and, rather, argues that the rule should be relaxed because of the important public policy issues involved. Now, in his exceptions, petitioner maintains that his instant petition "was filed within 90 days of the date that the Worker's Compensation Division determined that [his] injury to his foot was compensable." The District queries "[h]ow does May 2, 2005 to November 9, 2005 equal 90 days? And how can counsel go from admitting fault to making a bold but false representation that the Petition was timely filed?" (*Id.* at 3)

The District, therefore, urges that the Commissioner adopt the decision of the ALJ.

Upon a full and independent review of the record, and after due consideration of the parties' exception arguments, the Commissioner concurs with the ALJ's determination that this matter is appropriately dismissed as untimely. Whether it is accepted that the 90-day timeline of *N.J.A.C.* 6A:3-1.3(i) expired "90 days after petitioner's sick days were originally charged against his accumulated sick leave, presumably during the early part of 2002," as found by the ALJ (Initial Decision at 4) **or**, as argued by petitioner, "90 days of the date of the determination at the Division of Worker's Compensation that either finds the employee to have sustained a compensable injury or settles the compensation case without a determination of work related causation"[1] (ie: May 2, 2005), it is without question that the instant Petition of Appeal, filed on November 10, 2005, was untimely. It is further determined that the record presents no compelling circumstance whatsoever which would warrant relaxation of the regulatory time line. Finally, the Commissioner observes that it cannot reasonably be argued that provisions in settlement agreements which purport to preserve petitioner's possible claim for additional sick days to which he might contend entitlement – either in this forum or the Division of Worker's Compensation – could serve to waive the administrative filing requirements for such claim.

Although the above dismissal of this matter on the procedural issue of timeliness renders consideration on the merits of whether the instant claim is barred by the doctrine of *res judicata* unnecessary, the Commissioner is, nonetheless, compelled to point out the abject incongruity of petitioner's exception arguments criticizing the ALJ's adjudication of this issue as a consequence of her total failure to recognize the separate and distinct subject matter of his petition

---

[1] It is noted, however, that petitioner's cited version of *N.J.A.C.* 6A:3-1.3(i) became effective *July 3, 2006*. Prior to this time, this regulatory provision specified:

> [a]ny petitioner claiming benefits under *N.J.S.A.* 18A:30-2.1 must file a petition within 90 days of receipt of the notice of the district board's action, or of the action of the district board's agent, which has the effect of denying such benefits, notwithstanding that the Commissioner may hold the petition in abeyance pending determination by the Division of Workers' Compensation as to whether the underlying injury is work-related.

filed on May 2, 2002, and that of this matter, filed on November 10, 2005. First of all, it is observed that the instant Petition of Appeal specifically addresses the prior matter, stating:

> On February 4, 2003, Petitioner Vincenti, represented by the undersigned, entered into an agreement with the Paterson State-Operated School district to settle EDUOR 05137-02N, *which was a dispute concerning the allocation of Petitioner's accumulated sick leave during the 2002 school year. The dispute was over absences commencing on or about December 10, 2001, and continuing into the 2002 school year. These absences were caused by an injury to Petitioner's left ankle that occurred in the workplace on or about December 5, 2001.* By the terms of the settlement (a copy of which is attached hereto) the District agreed to reinstate eleven sick days to Vincenti's accumulated leave. (Petition of Appeal, #2. at page 2) (emphasis supplied)

Moreover, at no time during the course of the adjudication of this matter did petitioner raise the issue of subject matter distinction or submit documentation in this regard, but rather – in violation of *N.J.A.C.* 1:1-18.4(c) – first aired this charge and appended a copy of the first petition in his exceptions to the Initial Decision. As such, derisive criticism of the ALJ's findings and conclusion on this issue made based on the record before her is unwarranted, as any culpability here lies solely with the petitioner.

Accordingly, the Initial Decision of the OAL is adopted, as modified above, and the instant Petition of Appeal is hereby dismissed.

IT IS SO ORDERED.[2]

Lucille E. Davy

ACTING COMMISSIONER OF EDUCATION

Date of Decision: 10/12/06

Date of Mailing: 10/12/06

[2] This decision may be appealed to the State Board of Education pursuant to *N.J.S.A.* 18A:6-27 *et seq.* and *N.J.A.C* 6A:4-1.1 *et seq.*

State of New Jersey
OFFICE OF ADMINISTRATIVE LAW

INITIAL DECISION
MOTION TO DISMISS
OAL DKT. NO. EDU 13059-05
AGENCY DKT. NO. 320-11/05

RICHARD VINCENTI,
Petitioner,
v.
STATE OPERATED SCHOOL DISTRICT OF PATERSON, PASSAIC COUNTY,
Respondent.

Sanford R. Oxfeld, Esq., appearing for Petitioner
(Oxfeld Cohen, PC, attorneys)

Joanne Butler, Esq., appearing for Respondent
(Schenck, Price, Smith & King, attorneys)

Record Closed: July 20, 2006 Decided: August 28, 2005

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

STATEMENT OF THE CASE AND PROCEDURAL HISTORY

Petitioner alleges that the Board's action to charge his sick days for work related injuries/illness violates N.J.S.A. 18A:30-2.1.

On December 23, 2005, the Department of Education transmitted the matter to the Office of Administrative Law (OAL) for determination as a contested case pursuant to N.J.S.A. 52:14B-1 to –15 and N.J.S.A. 52:14F-1 to –13.

Respondent, State Operated School District of Paterson, seeks an order dismissing this matter because Petitioner is seeking restoration of additional sick leave contrary to the doctrine of res judicata and for violation of the 90-day rule set forth at N.J.A.C. 6A:3-1.3(i).

Petitioner is a teacher of comprehensive science and biological science employed by the Paterson School District since 1989 as a high school science teacher. Commencing on or about December 10, 2001 and continuing into the 2002 school year, Petitioner suffered an injury which was subsequently determined to have occurred in the work place on or about December 5, 2001.

Petitioner filed a petition on or about May 2, 2002, seeking restoration of sick leave days during the 2001-02 school year. On February 4, 2003, Petitioner entered into an agreement with Respondent to settle the matter bearing OAL Dkt. No. EDU 05137-02. Pursuant to that agreement, Respondent reinstated 11 days between and including February 14 and March 5, 2002. The agreement was approved by the Commissioner who issued a final decision dated April 11, 2003. On May 2, 2005, a Workers' Compensation matter was concluded via a settlement agreement at which time the determination was made that Petitioner's injury to his foot was work related.

This matter was subsequently filed on November 10, 2005. In it, Petitioner requests restoration of all sick days charged to his sick leave. He further requests salary increments withheld on account of the injury be restored as well as restoration of appropriate back pay and other emoluments of employment.

The agreement between these two parties provided in ¶3:

> This settlement shall not impact Vincente's [sic] claim for additional sick days to which he claims entitlement pursuant to the school laws in a manner to be determined by the Workers' Compensation courts.

Petitioner proceeded to pursue his Workers' Compensation claim which was also resolved by way of an agreement. That agreement, embodied in an order approving settlement, also provides "Petitioner free to pursue administrative resolution of 'sick day' issue." Accordingly, Petitioner has filed this petition seeking restoration of additional days to his sick leave bank pursuant to N.J.S.A. 18A:30-2.11(a), which provides for sick leave with pay for absences incurred by an accident arising out of and in the course of employment.

On the other hand, Respondent asserts the instant action is barred by the doctrine of res judicata; in addition, according to Respondent, the petition was not timely filed.

For the reasons which follow, the application to dismiss is granted. The claim filed in May 2002 bearing OAL Dkt. No. EDU 05137-02 is clearly a claim for restoration of sick leave benefits which had been deducted from Petitioner's accumulated sick leave during the 2001-02 school year. Petitioner reached a settlement agreement wherein Respondent agreed to reinstate 11 days of sick time and that settlement agreement was approved by the ALJ and by Final Decision of the Commissioner on April 11, 2003. Clearly, this was a final determination with regard to the issue of sick days which had been charged against Petitioner's accumulated sick leave for the 2001-02 school year, except for preserving Petitioner's right to pursue a Workers' Compensation claim. When the Workers' Compensation matter was concluded via a settlement, the order included a provision to the effect that Petitioner was free to pursue administrative remedies for sick pay.

With respect to Respondent's assertion that the instant claim is barred by the doctrine of res judicata, I concur. Petitioner had his one bite at the apple when he filed the earlier action at the OAL and decided to sign a settlement agreement which was approved by the Commissioner in a final decision. The matter reached a final

determination in which Respondent became obligated to restore certain sick days to Petitioner's accumulated leave bank. The provision in the agreement that it shall not impact a claim for additional sick days to which Petitioner might claim entitlement pursuant to the school laws in a manner to be determined by the Workers' Compensation courts is language which indicated that Respondent recognized that Workers' Compensation court has jurisdiction over the determination of whether the injury claimed was suffered in the course of employment and that there might be judicial relief in addition to the settlement into which the parties had entered pursuant to the Workers' Compensation laws.

While it is the usual practice in this forum to accept a petition such as the one Petitioner filed on May 2, 2002, for determination with respect to seeking the restoration of sick leave for work related incident, in the normal course of practice, these petitions are placed on an inactive list until the related Workers' Compensation claim is adjudicated. That did not happen in this case. Instead, Petitioner voluntarily and with aid of counsel, entered into an agreement which restored certain days to his accumulated sick leave bank. Upon doing so and upon the Commissioner issuing a final decision, the requirements of the doctrine of res judicata were met. Those requirements include the existence of a final judgment by a court of competent jurisdiction, identity of the issues, parties and cause of action. All of these criteria are met in the instant action. Accordingly, I **FIND** and **CONCLUDE** that this petition is barred by the doctrine of res judicata.

Notwithstanding my determination with respect to res judicata, I also note the Respondent raised the issue of whether this action is time barred. I further **CONCLUDE** that the action is time barred by the 90-day rule N.J.A.C. 6A:3-1.3(i). The action would have been time barred 90 days after petitioner's sick days were originally charged against his accumulated sick leave, presumably during the early part of 2002. By filing the petition before the Commissioner of Education on or about May 2, 2002 seeking restoration of sick leave days, Petitioner acknowledges that Respondent had taken the adverse action of charging his sick leave account with the days on which he was absent

due to what, at the time, he perceived as a work related injury. The agreement resolving the claim filed on May 2, 2002 brought that matter to a conclusion.

I note Respondent's contention that the Workers' Compensation court addressed all issues and left Petitioner free to pursue administrative issue of the sick leave issue. While the language was contained within the order of the Workers' Compensation court, that court did not, nor was it required, to consider the procedural requirements of the education laws and regulations relating to the filing of an appeal in this forum of an adverse determination.

Clearly, the adverse determination had taken place sometime in early 2002 and the first claim was filed timely. That claim was brought to a conclusion by the means of a settlement agreement. There has been no other adverse determination by Respondent which would reinstate Petitioner's right to pursue a claim pursuant to the school laws after the issuance of the Workers' Compensation decision of May 2005. Accordingly, I further **CONCLUDE** that this claim is also barred by the failure to comply with the 90-day rule as set forth under N.J.A.C. 6A:3-1.3(i).

ORDER

I hereby **ORDER** this petition be and hereby is **DISMISSED WITH PREJUDICE.**

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

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

Within thirteen (13) days from the date on which this recommended decision was mailed to the parties, any party may file written exceptions with the **COMMISSIONER OF THE DEPARTMENT OF EDUCATION, 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, 2006
DATE

Maria M. La Fiandra
MARIA MANCINI LA FIANDRA, ALJ

E-mail Receipt of Initial Decision Confirmed by the Department of Education on:

August 28, 2006
DATE

Mailed to Parties:

Laura Sanders
DIRECTOR AND
CHIEF ADMINISTRATIVE LAW JUDGE

AUG 29 2006
DATE

OFFICE OF ADMINISTRATIVE LAW

jb

354-06

OAL DKT. NO. EDU 9210-06
(EDU 12576-05 ON REMAND)
AGENCY DKT. NO. 287-10/05

IN THE MATTER OF THE TENURE HEARING	:	
OF MARILYN CUYKENDALL,	:	COMMISSIONER OF EDUCATION
SCHOOL DISTRICT OF THE TOWNSHIP	:	DECISION
OF BOONTON, MORRIS COUNTY.	:	
	:	

The record of this matter, the parties' proposed 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 concurs with the Administrative Law Judge that the settlement terms are 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 approved, and this matter is hereby dismissed subject to compliance with the terms of the settlement. Pursuant to *N.J.A.C.* 6A:9-17.6(a)1, a copy of this decision shall be transmitted to the State Board of Examiners for action against respondent's certificate as that body may deem appropriate.

IT IS SO ORDERED.

Lucille Edag

ACTING COMMISSIONER OF EDUCATION

Date of Decision: 10/16/06

Date of Mailing: 10/16/06

State of New Jersey
OFFICE OF ADMINISTRATIVE LAW

INITIAL DECISION

SETTLEMENT

OAL DKT. NO. EDU 09210-06

EDU 12576-05 **(ON REMAND)**

AGENCY DKT. NO. 287-10/05

IN THE MATTER OF THE TENURE HEARING OF MARILYN CUYKENDALL, SCHOOL DISTRICT OF THE TOWNSHIP OF BOONTON, MORRIS COUNTY.

Paul N. Barger, Esq., appeared for petitioner (Barger & Bolger, attorneys)

Jeffrey D. Ullman, Esq., appeared for respondent (Ullman, Furhman & Platt, attorneys)

Record Closed: September 18, 2006 Decided: September 18, 2006

BEFORE **JESSE H. STRAUSS**, ALAJ:

REMAND REQUIREMENTS

In this matter, the School District of Boonton Township (District) filed tenure charges against the respondent for alleged unbecoming conduct and alleged insubordination.

On March 27, 2006 Administrative Law Assignment Judge Thomas E. Clancy

approved a settlement entered into by the parties. However, on June 19, 2006, the Acting Commissioner of Education remanded this case to the Office of Administrative Law (OAL) for evaluation of the proposed settlement under the Cardonick standards or [for] further proceedings.

More specifically, the Commissioner's remand directed the following:

(1) that transcripts be provided for the six days of hearings completed before Administrative Law Judge Jesse H. Strauss during January and February, 2006;

(2) that an explanation be supplied as to why certified tenure charges should be dropped in this particular case;

(3) that an explanation be supplied as to why it is in the public's best interest after six days of hearings to settle this case on the terms agreed to by the parties;[1] and,

(4) that "specific enough" findings be provided to justify the settlement terms.

RESPONSES AND DISCUSSION

(1)

Relative to the above, the attorney for the School District has ordered the necessary transcripts and shall make them available to the Commissioner as soon as they are available.

(2)

With regard to the withdrawal and dismissal of the tenure charges, I, Administrative Law Judge Jesse H. Strauss, **DO HEREBY CERTIFY** the following:

> **I heard testimony for six days which mostly involved the examination and extensive cross examination of the District's primary witness, its Superintendent/Principal, at the only school in the District. She presented evidence with regard to each of the charges alleged against the respondent. In addition, the District introduced many exhibits in support of**

[1] These explanations are required to augment those two paragraphs relied upon by ALAJ Clancy, which express the general sentiment that the "parties wish to avoid the risks and expenses of litigation." (See Commissioner's remand)

the allegations, and the respondent introduced many of her own exhibits in the course of cross-examination (which diminished the seriousness of many of the allegations). At the conclusion of the Superintendent/Principal's testimony, as well as that of two additional witnesses, I conferenced the matter with counsel for both parties and expressed a concern to them that, even if I totally credited the testimony of the three witnesses, the proofs suggested that, at best, respondent's misconduct would not warrant so severe a penalty as removal from her tenured position.

Furthermore, it was abundantly clear at the conclusion of the Superintendent/Principal's testimony, that the personality conflict between her and the respondent was so severe, unmistakable and intractable that a resumption of their working relationship would deleteriously impact the administrative, business and teaching responsibilities of this "one school building" district, where everyone works in close proximity and the duties of the Superintendent and the Business Manager are inextricably intertwined. Given this context, both parties readily acknowledged that a future working relationship between the two administrators would be fraught with difficulties inimical to the discharge of the District's obligations to its taxpayers, parents, students and vendors and would create a toxic environment.

Jesse H. Strauss

Administrative Law Judge

Dated: September 18, 2006

Moreover, in the event the tenure charges are not allowed to be withdrawn and dismissed, the respondent shall then continue prosecution of a grievance she filed against the District before the tenure charges were filed against her. Certainly, this would exacerbate the antagonistic and volatile workplace atmosphere foisted upon both parties by the disapproval of the settlement already agreed upon.

Following the presentation of the evidence referred to above, the undersigned's expressions of his observations concerning the "then" state of evidence and subsequent settlement discussions before Administrative Law Judge Thomas E. Clancy, at a conference with the undersigned held on September 6, 2006, the

parties' attorneys averred that their settlement of the matter reflected a determination by the Board that any continuation and completion of the litigation was unlikely to result in a finding of unbecoming conduct and/or insubordination of such an extent to warrant the respondent's dismissal and loss of tenure. Given this backdrop, the parties expressed a genuine concern that a consequence of any penalty short of dismissal would be the resumption of an untenable working relationship wherein the Board of Education would lack confidence in the respondent's performance of her duties. As to the favorable consideration of this factor in the Cardonick standard of review, see, In the Matter of the Tenure Hearing of Joseph Mazzarella, School District of Ridgefield Borough, Bergen County, OAL DKT. NO. EDU 11954-2004, approved by Commissioner, AGENCY DK. NO. 392-11/04 (April 13, 2005).

(3)

Concerning why it is in the public's best interest to settle this case on the terms agreed to by the parties, the settlement:

(a) Allows a global disposition of a broad range of legal issues, including an aforementioned grievance as well as a viable action under the Conscientious Employee Protection Act (CEPA), N.J.S.A. 34:19-1 et seq. which was about to be filed. By approving the settlement, the Boonton taxpayers are not exposed to the potentially exponential costs of litigation attendant to the continued prosecution of this matter as well as the defense of at least two other civil lawsuits. See, the State Board of Education Decision in The Matter of the Tenure Hearing of Zena Mitchell, State Operated School District of the City of Newark, Essex County, http://lawlibrary.rutgers.edu/oaldecisions/pdfs/edu3765-98.pdf. (March 7, 2001).

(b) Renders unnecessary the creation of a bitter and hostile work environment in the one building where everyone in the District works and where loathing, animosity, resentment and acrimony would otherwise abound—especially in circumstances where the respondent would continue to prosecute her grievance and would file a CEPA action against the School District.

(c) Eliminates a tinderbox situation in the workplace wherein its attendant volatility, instability and foment would likely imperil the education of its children while the District's administrators and teachers are distracted by personnel matters in the one building where everyone works.

(d) Actually saves the School District and its taxpayers a substantial amount of money, according to the compelling argument of its attorney. In summary, the undersigned provides the following: shortly after the commencement of the hearing, the respondent's 120-day suspension without pay had expired. The Respondent would have been entitled to reimbursement for additional loss of pay in the absence of a removal of tenure. In view of the passage of time through an anticipated ten additional days of hearing, production of a transcript, the filing of briefs and the preparation of an initial decision, the Board would have been responsible for the respondent's salary for the remainder of the 2005-06 school year regardless of the outcome of the proceeding. The agreement to make certain payments to the respondent in installments through July 1, 2008, by the District's calculations, would save it money in that it retained a replacement to perform the duties of Business Administrator/Board Secretary at a substantially lower salary and without certain perquisites the respondent would have enjoyed upon her return. (See attached June 28, 2006 letter of the District's counsel which provides specific calculations as to the savings effected for the District and also a "Cost Analysis of the Settlement Agreement").

(e) Is fair to both sides. The District realizes the opportunity to replace the respondent with an individual who would require a lower salary and less costly benefits at a savings to taxpayers than if the respondent were reinstated. Since the parties acknowledge that the respondent's removal probably would not have occurred at the conclusion of this litigation, both the respondent and personnel of the District would avoid working in an antagonistic environment by entering into the settlement. If the instant matter proceeded through approximately ten more days of hearing as contemplated and post-hearing submissions and the CEPA claim and the grievance were litigated, the cost to both parties would be great. At a recent conference, both attorneys agreed that the total joint cost of the various litigations could easily approach $250,000.

(4)

Finally, referring to the provision of "specific enough" findings to justify the settlement terms, the undersigned is of the opinion that all of the information furnished in subsections (2) and (3) above CONSTITUTES justification for the approval of the Settlement Agreement presently being scrutinized. Beyond the above certification by the undersigned, the rendering of any additional specific findings of fact related to the underlying charges would be inappropriate since the hearing has not been concluded and the parties currently seek only an approval of their Settlement Agreement rather than the issuance of a post-hearing Initial Decision.

DISPOSITION

On the basis of the foregoing, I **CONCLUDE** that the Settlement Agreement under review satisfies the Cardonick standards. I therefore **URGE** the Commissioner to **APPROVE** same in the conscientious exercise of her discretion in such matters.

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

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

September 18, 2006
DATE

Jesse H. Strauss
JESSE H. STRAUSS, ALJ

Receipt Acknowledged:

9-20-06
DATE

M. Kathleen Dunscombe/CK
DEPARTMENT OF EDUCATION

Mailed to Parties:

Laura Sanders
DIRECTOR AND
CHIEF ADMINISTRATIVE LAW JUDGE

SEP 21 2006
DATE

OFFICE OF ADMINISTRATIVE LAW

id

Barger & Bolger
Attorneys at Law

248 Main Street
Chatham, NJ 07928
Phone: (973) 635-0660
Fax: (973) 635-6009

Paul N. Barger*
Beth Ann Bolger**

Writer's E-Mail Address:
paul@bargerlaw.net

* Admitted NJ, DC and IL
**Admitted NJ and NY

RECEIVED
STATE OF N.J.
OFFICE OF ADMIN. LAW
2006 JUN 30 P 2:25

June 28, 2006

VIA FACSIMILE AND REGULAR MAIL
Honorable Thomas E. Clancy, A.L.J.
Office of Administrative Law
33 Washington Street
Newark, NJ 07102

Re: In the Matter of the Tenure Hearing of Marilyn Cuykendall, School District of the Township of Boonton, OAL Dkt. No. (EDU) 12576-05

Dear Judge Clancy:

As Your Honor is aware, this firm represents the Boonton Township Board of Education (the "Board") in the above-referenced matter. In light of the Commissioner of Education's decision to remand this case back to the Office of Administrative Law in a decision dated June 19, 2006, please accept this letter as clarification of the Board's rationale for withdrawing the tenure charges against Marilyn Cuykendall and reaching an amicable resolution.

The Boonton Township Board of Education certified tenure charges against Ms. Cuykendall, its Business Administrator/Board Secretary, based upon a series of incidents that made it impossible for the Board to continue Ms. Cuykendall's employment. Those incidents are outlined in great detail in the Board's Statement of Charges.

It goes without saying that a Business Administrator/Board Secretary is in a position of trust. The members of the Boonton Township Board of Education believed, and continue to believe, that they could no longer trust Ms. Cuykendall and that Ms. Cuykendall put her own agenda ahead of the Board's interests.

The Boonton Township Board of Education operates a one-building school district. The Rockaway Valley School is a K-8 school with approximately 510 students.

Administrators at the Rockaway Valley School work very closely with each other and are in constant contact. The Superintendent, Dr. Roseann Humphrey, and other members of the Administration believed that they could no longer work with Ms. Cuykendall. All involved believed that allowing Ms. Cuykendall to continue in her position would ultimately cost the taxpayers money and, more importantly, would be detrimental to the student body.

The Board understood the difficulty in sustaining tenure charges, but determined that it was left without another option. Settlement efforts failed after Ms. Cuykendall made what the Board perceived to be an extraordinarily misguided proposal. The Board, therefore, had the unpleasant options of either keeping Ms. Cuykendall employed or certifying tenure charges. The Board chose the latter and we are comfortable that this was the correct and perhaps only course of action.

The Board's lone goal was to remove Ms. Cuykendall from her position as the Business Administrator/Board Secretary. At the time the case was filed, the Board believed strongly that the charges could be sustained. Although the Board is still firmly of the position that Ms. Cuykendall's actions were reprehensible and should result in the loss of tenure, it became clear, after six days of hearing, that it would be unlikely that the Board would be able to sustain the charges.

In assessing the case, with the assistance of counsel, the Board was of the opinion that Ms. Cuykendall would receive some type of reprimand from the Administrative Law Judge, perhaps resulting in the forfeiture of a portion of her salary. The Board recognized, however, that Ms. Cuykendall would likely not lose her tenure rights.[1]

With that realization, the parties sat down and began to discuss settlement options. The parties were in complete agreement that, under no circumstances, could Ms. Cuykendall return to her position as Business Administrator/Board Secretary. A local school board cannot function properly when it has no confidence or trust in its secretary. Further, it would be unfair to both Ms. Cuykendall and to District personnel to put Ms. Cuykendall back into a high profile position at the Rockaway Valley School. There was tremendous animosity and distrust before the charges were filed and it would have been a disastrous situation for Ms. Cuykendall to return after six days of hearing.

There are only four administrators in the District --- Superintendent/Principal, Business Administrator, Supervisor of Student Services and Supervisor of Special Services. The Superintendent/Principal, Supervisor of Student Services and Supervisor of Special Services all testified with respect to the substantial difficulty they had working with Ms. Cuykendall. The strong feelings articulated by the District witnesses evidenced an impossible work environment to which none of the Administrators, including Ms. Cuykendall, could possibly have endured.

---

[1] It is rather important to note, as the Business Administrator/Board Secretary, Ms. Cuykendall was the keeper of the records for the Board. As such, the Board found it difficult during the hearing to prove that Ms. Cuykendall had altered records, as alleged, and had taken unilateral actions without Board approval.

The agreement reached by the parties serves a tremendous benefit to all involved, including the taxpayers of Boonton Township and the students that attend the Rockaway Valley School.

Pursuant to N.J.S.A. § 18A:6-14, upon certification of charges against Ms. Cuykendall, the Board suspended Ms. Cuykendall for 120 calendar days without pay. The 120-day period expired after the initial days of hearing. If the Board was not able to sustain the tenure charges, Ms. Cuykendall would have been entitled to reimbursement for the amount that she lost. Since the Board did not feel that it would be able to sustain the charges, the Board likely would have been responsible for Ms. Cuykendall's backpay.

When the 120-day period expired, the Board continued Ms. Cuykendall's suspension, but, as required by law, reinstated her pay. It is, therefore, very easy for the Board to justify paying Ms. Cuykendall her salary for the remainder of the 2005-06 year as part of the agreement since the 120-day statutory period expired while the case was still pending. We believe that there would have been at least six more days of hearing and then the parties would have submitted briefs and responses to Judge Strauss. The 2005-06 school year would have neared its conclusion before Judge Strauss had an opportunity to render an initial decision. In other words, regardless of the ultimate outcome of the case, the Board was going to be responsible for Ms. Cuykendall's salary for at least the rest of the school year.

That, of course, leads to the $58,754.94/year for three years. Ms. Cuykendall's salary for the 2005-06 school year $105,336. Assuming a standard raise, her salary for the 2006-07 school year would have been approximately $110,000. Her salary for 2007-08 would have been $115,000 and her salary for 2008-09 would have been $120,000. Ms. Cuykendall also received $5,000/year to attend a class at Kean College.

For 2006-07, the Board has secured the services of an experienced Business Administrator/Board Secretary for approximately $70,000/year. When you factor Ms. Cuykendall's settlement with the new Business Administrator/Board Secretary's salary, the total cost to the Board for the 2006-07 school year will be $128,754.94. Had the Board not certified charges against Ms. Cuykendall and kept her in its employee, the cost to the Board would have been approximately $115,000. When we considered the legal costs that most certainly would have continued into the 2006-07 school year and would likely have exceeded $14,000, it made no financial sense to continue this matter. Further, the Board firmly believes that Ms. Cuykendall did not have the Board's best interests in mind and likely cost the taxpayers additional money through certain actions.

Ms. Cuykendall would have cost the Board approximately $120,000 for 2007-08 and approximately $125,000 in 2008-09. So, assuming the Board could have secured the services of a replacement at $70,000/year, Ms. Cuykendall's dismissal will likely result in cost savings for Boonton Township taxpayers for the 2007-08 and 2008-09 school years.[2]

---

[2] Please see attached analysis of settlement amounts.

In addition, a major aspect of this case was the vacation days to which Ms. Cuykendall felt she had earned and was entitled. As detailed in the Statement of Charges, the Board felt that Ms. Cuykendall had acted in a fraudulent manner in accruing her vacation days and should not be permitted to receive compensation for those days. The value of those days to Ms. Cuykendall --- even with the most conservative of estimates --- was at least $20,000. The analysis of any agreement must factor in that savings to the Board.

Another factor in all of this was Ms. Cuykendall's very real threat to file an action pursuant to the Conscientious Employee Protection Act. The Board, following the sound logic detailed by the State Board of Education In the matter of the tenure hearing of Zena Mitchell, State-Operated School District of the City of Newark, 2001 N.J. AGEN LEXIS 982 (State Bd. of Educ. Mar. 7, 2001), decided that a global settlement would save everyone a great deal of time and money. Further, a decision that the Board could not sustain tenure charges against Ms. Cuykendall would have limited the Board's ability to defend itself against any future claims brought by Ms. Cuykendall.

The bottom line is that Ms. Cuykendall could not return to the Rockaway Valley School. It would be unfair to District personnel, Ms. Cuykendall and, most importantly, to the students, to have such a toxic situation in the building. Had this matter continued and had the Board not been able to sustain the charges --- a likely outcome --- Ms. Cuykendall, at some point, would have returned to her job. Everyone is in agreement that this would have been the worst possible result for the Board, Ms. Cuykendall and for the Boonton Township students.

It is the Board's belief that this is truly a case where, had the parties completed the hearing, no one would have ended up winning. The Board would have spent a great deal of money on legal fees, but would not have been able to attain its goal of taking Ms. Cuykendall's tenure.

The Board further believes that the Court would have ruled that Ms. Cuykendall's behavior must result in some sort of salary forfeiture. As such, Ms. Cuykendall would have incurred legal fees, lost salary and would still have to return to a job where she was clearly not wanted.

That outcome was unacceptable to all involved and, as a result, the parties negotiated a settlement fair to both sides.

Again, the parties could not have settled this matter before the Board certified charges against Ms. Cuykendall as Ms. Cuykendall was simply asking for too much money. It is important that the Court and the Commissioner be made aware of this as it fully explains why the Board waited until the sixth day of hearing to reach an agreement. The fact is that the parties were too far apart to even enter into negotiations until after the hearing commenced.

This agreement is in the public's best interests and fully justifies the Board's decision to withdraw the tenure charges filed against Ms. Cuykendall.

The Board reviewed a draft of this letter at a meeting held on June 27, 2006 and agreed with the contents contained herein. If necessary, we can provide Your Honor with a statement from the current Board Secretary and/or the Board President certifying that to be the case.

Thank you.

Respectfully submitted,

Paul N. Barger

Enclosure

cc: Jeffrey D. Ullman, Esq. (via facsimile and regular mail)

Cost Analysis of Settlement Agreement

	A	B
2006-07 SY		
Compensation	$128,754.94	$110,000.00
Tuition		$5,000.00
Vacation Days		$20,000.00
Legal Fees		$15,000.00
2007-08 SY		
Compensation	$128,754.94	$115,000.00
Tuition		$5,000.00
Legal Fees		$10,000.00
2008-09 SY		
Compensation	$128,754.94	$120,000.00
Tuition		$5,000.00
TOTAL	**$386,264.82**	**$405,000.00**

A. This column details the amount the Board would have to pay the new Business Administrator/Board Secretary and to purchase Ms Cuykendall's tenure for the 2006-07, 2007-08 and 2008-09 school years under the Agreement. The parties reached a global settlement eliminating additional legal fees. The Board has additional cost savings as it has not had to pay the new Business Administrator/Board Secretary certain benefits that it provided to Ms. Cuykendall.

B. This column details the costs to the Board to continue litigation. The analysis includes conservative estimates of both potential legal fees and the amount Ms. Cuykendall argues she is owed for unused vacation and sick days.

AGREEMENT

AGREEMENT, made this 10th day of MARCH, 2006, by and between the Boonton Township Board of Education. 11 Valley Road, Boonton Township, New Jersey 07005 ("the Board") and Marilyn Cuykendall, 63 Taft Lane, Morristown, New Jersey 07960 ("Ms. Cuykendall"):

ORIGINAL

WHEREAS, Ms. Cuykendall is and has been employed continuously by the Board as the Business Administrator of the Boonton Township School District and Board Secretary of the Board since 1998, and has achieved tenured status in her position; and

WHEREAS, certain disputes and grievances arose between the parties, including grievances against the Board which Ms. Cuykendall submitted for the Board's consideration on or about September 20, 2005 ("the Grievances"); and,

WHEREAS, on or about October 18, 2005, the Board certified to the Commissioner of Education certain charges against Ms. Cuykendall alleging conduct unbecoming a School Business Administrator and acts of insubordination ("the Charges"), on account of which the Board suspended Ms. Cuykendall from employment, without pay, effective October 18, 2005, and for which the Board sought to terminate Ms. Cuykendall's tenure and employment; and

WHEREAS, Ms. Cuykendall timely served and filed with the Commissioner of Education her Answer to the Charges denying the allegations thereof, and the Commissioner of Educaton thereafter referred the matter for hearing to the Office of Administrative Law; and

WHEREAS, a hearing on the Charges commenced on January 31, 2006, before Hon. Jesse H. Strauss, A.L.J., and continued thereafter on February 2, 3, 7, 8 and 15, 2006; and

WHEREAS, the risk of litigation and the uncertainty of the outcome, the threat of further and additional litigation arising out of the Charges, Grievances or otherwise, and a due consideration of the costs and expenses of litigation induced the Board to engage in extensive negotiations with Ms. Cuykendall with a view toward resolution of all outstanding issues between the parties, including, without limitation, all matters embraced within the Charges and the Grievances; and

WHEREAS, the parties did reach an agreement resolving, settling and adjusting all matters in dispute between them, and now wish to record their agreement and secure the approval thereof by the Commissioner of Education, pursuant to *N.J.A.C.* 6A:3-5.6, and, believing the same constitutes a fair and reasonable settlement of the matter and to be in the public interest, as well as in the interest of the parties hereto, upon the ground that it eliminates the risks, inconvenience, cost and expense of litigation, and enables a complete resolution of all disputes and grievances, including matters not embraced within the current proceedings,

NOW, THEREFORE, for and in consideration of the sum of $1.00, and other good and valuable consideration, including the mutual promises exchanged below, the receipt and

sufficiency of which each party hereby acknowledges to the other, the parties agree as follows:

1. The Charges shall be, and the same hereby are, withdrawn and dismissed, with prejudice, effective February 15, 2006.

2. Ms. Cuykendall's suspension from her position as Business Administrator of the Boonton Township School District and Board Secretary of the Boonton Township Board of Education shall be and the same hereby is dissolved effective February 15, 2006, and all back pay, benefits and emoluments of office (hereinafter "Back Pay"), accrued from the date of her suspension through February 15, 2006, shall be restored to her forthwith, as fully and completely as if the suspension had never been imposed, in a single lump sum payment.

3. Ms. Cuykendall shall receive the balance of her full salary for the 2005–2006 School Year, accruing on and after February 16, 2006 through June 30, 2006, as provided by her existing contract with the Board, in such regular installments as the Board, by custom and practice, shall make for all other administrative employees of the Boonton Township School District (hereinafter "Front Pay"), and Ms. Cuykendall shall further be entitled to all benefits and emoluments of her office and position, including, but not limited to, medical and health insurance benefits, from February 16 through June 30, 2006, or, in the case of medical, health and other benefits, through such later date as the applicable insurance plan or the governing law in such cases provides.

4. From February 16, 2006 through June 30, 2006, Ms. Cuykendall shall be on administrative leave from the duties and responsibilities of her office and position as Business Administrator of the Boonton Township School District and Board Secretary of the Boonton Township Board of Education, *provided, however,* that such administrative leave shall not in any way reduce or diminish her entitlement to Back Pay, Front Pay or the benefits and emoluments of her office as provided elsewhere herein.

5. Effective June 30, 2006, Ms. Cuykendall shall resign her position, and, to that end, she shall, simultaneously with the execution of the within agreement, tender her written resignation, effective June 30, 2006, which such resignation shall be held in escrow by the attorneys for the Board pending approval of the within agreement by the Commissioner of Education. Nothing contained herein shall prejudice Ms. Cuykendall's right, at her sole election and discretion, to retire on June 30, 2006, or thereafter, upon the giving of timely notice to that effect.

6. The Board shall also pay to the order of Ms. Cuykendall the further and additional sum of One Hundred Seventy Six Thousand Two Hundred Sixty Four and 82/100 ($176,264.82) Dollars in three equal installments of Fifty Eight Thousand Seven Hundred Fifty Four and 94/100 Dollars ($58,754.94) each, without deduction or setoff of any kind or description, on January 2, 2007, July 1, 2007, and July 1, 2008, respectively ("the Installment Sums"), or in such other installment amounts and at such times and places as the parties may hereafter agree in writing. To the extent permitted by law, the Installment Sums shall not be deemed compensation for past services rendered, within the meaning of the Federal Insurance

Contributions Act, or other similar federal and state laws, but shall instead be deemed consideration for the cancellation of future rights and benefits otherwise due to Ms. Cuykendall as a statutorily-tenured employee of the Board.

7. The foregoing is intended to fully and completely settle, adjust and resolve all outstanding grievances and disputes between the parties. Accordingly, the Board, for itself and for all successor Boards of Education of the Boonton Township School District, releases, acquits and forever discharges Ms. Cuykendall, her heirs and assigns, as their interest may appear, and Ms. Cuykendall, her heirs and assigns, as their interests may appear, hereby releases, acquits and forever discharges the Board, and all successor Boards of Education of the Boonton Township School District, from any and all claims, grievances, demands, actions and causes of action, at law or in equity, and however the same may be described, arising out of or in any way connected with Ms. Cuykendall's service as the Business Administrator of the Boonton Township School District and Board Secretary of the Boonton Township Board of Education, from the beginning of time to the date hereof, excepting only such claims, grievances, demands, actions or causes of action, if any, arising out of any breach or claimed breach of the within Settlement Agreement.

8. The within Settlement Agreement reflects the complete and integrated agreement of the parties with respect to the subject matter hereof, and each party hereby waives and renounces to the other any claim of reliance upon any statement, representation or warranty not contained herein.

9. Each party has been represented by counsel of choice throughout this matter, including the negotiation and execution of the within Settlement Agreement, and each party represents and warrants to the other that the party has had a full, fair and reasonable opportunity to consult with counsel with respect to this matter and the settlement thereof; that each party has read and is familiar with the terms, provisions and conditions hereof; that the same represents each party's understanding of the agreement between them, settling and disposing of the Charges, the Grievances and all other extant disputes and grievances; that each party is satisfied with the terms, provisions and conditions of the settlement; that acceptance of the same is in the self interest of each party; and that such acceptance is the free and voluntary act and deed of such party, and not the product of coercion or duress of any kind.

10. It is the express intention of the parties that the within Settlement Agreement be deemed compliant with *N.J.A.C.* 6A:3-5.6, and that the same be approved by the Commissioner of Education pursuant thereto, given the matters expressed in the preamble to the Agreement.

IN WITNESS WHEREOF, the parties hereto have executed this Agreement, effective as at the date first above written.

Boonton Township Board of Education

By: _____
Mary L. G, President

_____
Marilyn Cuykendall

BOONTON TOWNSHIP BOARD OF EDUCATION
REGULAR SESSION MINUTES
Tuesday, March 7, 2006, 7:00 PM, Library/Media Center

CALL TO ORDER

Time: 7:05 PM

STATEMENT OF NOTICE

"This is a regular session of the Boonton Township Board of Education held for the purpose of transacting appropriate Board business. In compliance with Chapter 231, Laws of 1975, the notice of this meeting was advertised in the Morris County Daily Record. Copies of the agenda of this meeting were appropriately posted and made available to the public."

ROLL CALL

Present: Valerie Harrs, Kenneth Finnegan, Mary Lio, Robin Kalfus, Debra Price, Joanne King, Walter Picot

Absent: Maria Naeem, Marta Pascarella

Also Present: Superintendent/Principal, Dr. Roseann Humphrey

PLEDGE OF ALLEGIANCE

BOARD BUSINESS

MOTION to approve: Minutes of the February 28, 2006 regular session.

Moved by Mrs. Lio, seconded by Mrs. Kalfus and duly approved by 7-0 vote with Mrs. Naeem and Mrs. Pascarella absent.

> MOTION to approve: Separation of service agreement between Boonton Township Board of Education and Ms. Marilyn Cuykendall pending her resignation as of June 30, 2006 (*tabled 2/28/06*).

Moved by Mrs. Lio, seconded by Mrs. Kalfus and duly approved by 7-0 roll call vote as follows:

AYE: Harrs, Finnegan, Lio, Kalfus, Price, King, Picot
ABSENT: Naeem, Pascarella

ADMINISTRATIVE REPORTS

CORRESPONDENCE

RESOLUTION

BE IT RESOLVED by the Boonton Township Board of Education that the Agreement between Marilyn Cuykendall and the Boonton Township Board of Education, on file in the office of the Board Secretary/Business Administrator, is hereby approved, in its entirety, by the Board, contingent upon Ms. Cuykendall's resignation from the District, effective June 30, 2006.

Dated: March 7, 2006

David Blake
Interim Board Secretary/Business Administrator

351-06

#351-06

T.B., on behalf of minor child, L.B.,	:	
PETITIONER,	:	
V.	:	COMMISSIONER OF EDUCATION
BOARD OF EDUCATION OF THE TOWNSHIP OF WEST ORANGE, ESSEX COUNTY,	:	DECISION
RESPONDENT.	:	

SYNOPSIS

T.B. – aunt of L.B., a fifteen year old student currently enrolled in respondent's schools and living with petitioner – contends that L.B. is entitled to continue her education in West Orange as a result of family and economic hardship pursuant to *N.J.S.A.* 18A:38-1(b)(1). L.B. has been attending West Orange schools since second grade, and lived – together with her mother, D.B., and two younger brothers – with her aunt, a homeowner in the district. In September 2005, D.B. and her sons moved to a two bedroom apartment in Keansburg; L.B. remained living with her aunt. Respondent district contends that L.B. does not meet the requirements of the above statute.

The ALJ found, *inter alia,* that: the only issue in dispute is whether L.B.'s mother, D.B., is incapable of supporting or caring for her due to family or economic hardship; D.B. has financial restraints, but inadequate detail was offered to establish hardship pursuant to *N.J.S.A.* 18A:38-1(b)(1); petitioners did not attempt to defraud the district in this matter, and should be differentiated from those who intentionally seek to establish a false or fraudulent residence; and it is fundamentally unfair to burden this family with the obligation to pay tuition. The ALJ determined that L.B. cannot attend school in West Orange unless there is a change in circumstances that meets the restrictions of the residency statute, and that no tuition is due.

The Commissioner adopts in part, and rejects in part the recommended decision of the ALJ. The Commissioner concurs that petitioner has failed to sustain her burden of establishing family and economic hardship, and that L.B., therefore, is ineligible to attend West Orange schools free of charge. However, the Commissioner cannot concur that equitable considerations dictate forgiveness of all tuition; rather, equitable considerations compel that the Board's tuition recovery should commence on December 7, 2005 – the date on which petitioner filed her Petition of Appeal. Accordingly, the Commissioner ordered that L.B. is not entitled to a free education in respondent's schools, and directed the petitioner to remit tuition to the Board at the rate of $73.81 per day for the period from December 7, 2005 through the end of the 2005-06 school year, plus such additional per diem rate applicable from the beginning of the 2006-07 school year through the filing date of 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.

October 12, 2006

OAL DKT. NO. EDU 3276-06
AGENCY DKT. NO. 359-12/05

T.B., on behalf of minor child, L.B.,	:	
PETITIONER,	:	
V.	:	COMMISSIONER OF EDUCATION
BOARD OF EDUCATION OF THE TOWNSHIP OF WEST ORANGE, ESSEX COUNTY,	:	DECISION
RESPONDENT.	:	

The record of this matter and the Initial Decision of the Office of Administrative Law (OAL) have been reviewed. The Board filed timely exceptions. Petitioner's exception submission, however, was filed outside the timelines specified by *N.J.A.C.* 1:1-18.4 for the filing of either primary or reply exceptions and, therefore, was not considered by the Commissioner in reaching her determination herein.[1]

The Board excepts to the Administrative Law Judge's (ALJ) denial of its counterclaim for tuition on the basis of what it categorizes as "some vague notion of fundamental fairness." (Board's Exceptions at 1) Such a determination, it avers, is directly contrary to the governing statute, *N.J.S.A.* 18A:38-1 b(2) which in pertinent part specifies:

> [i]f in the judgment of the commissioner the evidence does not support the claim of the parent or guardian, the commissioner shall assess the parent or guardian tuition for the student***.
> (emphasis added) (*Ibid.*)

[1] It is additionally noted that petitioner's exceptions attempted to introduce new evidence which, pursuant to *N.J.A.C.* 1:1-18.4(c), could not be considered by the Commissioner even if this submission had been timely filed.

It is clear, the Board argues, that this provision's use of the mandatory "shall" as opposed to the permissive "may" proscribes the exercise of discretion on the part of the Commissioner. Where, as here, petitioner fails to sustain the burden of proof, the Board asserts that payment of tuition is compulsory. It, therefore, claims tuition due and owing of $8,931.81 for the period of L.B.'s ineligible attendance in the District's schools. (Board's Exceptions at 2)

Upon careful and independent review of the record in this matter, which did not include transcripts of the hearing conducted at the OAL, the Commissioner adopts in part, and rejects in part, the recommended decision of the ALJ. Initially, the Commissioner concurs with the ALJ, for the reasons detailed in his decision, that petitioner has failed to sustain her burden of establishing, pursuant to *N.J.S.A.* 18A:38-1(b)(1), that L.B.'s mother, D.B. is incapable of supporting or providing care for the child due to a demonstrated family or economic hardship and, L.B., therefore, is ineligible to attend the West Orange schools free of charge. (Initial Decision, Pages 3-6)

With respect to assessment of tuition, however, although the Board is mistaken in arguing that the statutory language requiring assessment of tuition is mandatory in nature, so that the Commissioner has no discretion in this regard – a contention previously rejected by the State Board and the courts, as set forth in *M.R.N. and K.H., on behalf of minor children, D.J.N. and J.M.N., v. Board of Education of the Flemington-Raritan Regional School District, Hunterdon County*, decided by the Commissioner February 24, 2003, Slip Opinion at 13-14, as well as the plain language of *N.J.A.C.* 6A:22-6.3(b) – the Commissioner cannot concur with the ALJ, based on the record before her, that equitable considerations dictate forgiveness of all tuition that would otherwise be due. Nonetheless, the Commissioner observes that although the literal interpretation of petitioner's tuition obligation here would suggest that she is obligated for such

tuition effective with D.B.'s move to Keansburg in September 2005, it would be inequitable on this record to assess her with tuition for this entire period. As found by the ALJ:

> L.B. legally attended the West Orange School System since second grade, a period of approximately 8 to 9 years. West Orange was struggling with out-of-district students attempting to attend their various elementary schools, junior highs and high schools. To combat the influx of illegal students, the Board required all students to document their status. Neither D.B. nor T.B. on behalf of L.B. delineated their situation inaccurately. They provided the documentation requested, submitted affidavits when needed and were undoubtedly under the impression that continued attendance of L.B. at the West Orange School was legally acceptable. They did not move into the district seeking a free education, they simply continued with the education that L.B. had received for the prior eight years. (Initial Decision at Pages 5-6)

Petitioner here had no knowledge of any problem or that anything had altered L.B.'s entitlement to attend school in West Orange until the Board ultimately notified her to this effect, presumably sometime in late November 2005. At this point in time, when confronted with evidence of ineligibility, rather than promptly withdraw L.B. from the district, petitioner chose to avail herself of the benefit of *N.J.S.A.* 18A:38-1 to secure L.B.'s continued attendance in the Board's schools and cannot now disavow the statute's concomitant obligation for payment of tuition. Therefore, the Commissioner is persuaded that equitable considerations compel that the Board's tuition recovery should commence on December 7, 2005, the date on which petitioner filed her Petition of Appeal.

Accordingly, the recommended decision of the OAL is adopted with respect to its determination that L.B. is not entitled to a free public education in the District's schools, but rejected with respect to its determination that no tuition may be assessed for any of the period of L.B.'s ineligible attendance. Petitioner is hereby directed to remit tuition to the Board at the rate of $73.81 per day for the period from December 7, 2005 through the end of the 2005-06 school

year, plus such additional per diem rate applicable from the beginning of the 2006-07 school year through the filing date of this decision.[2]

IT IS SO ORDERED.[3]

Lucille Davy

ACTING COMMISSIONER OF EDUCATION

Date of Decision: 10/12/06

Date of Mailing: 10/13/06

[2] Pursuant to *N.J.A.C.* 6A:4-1.4(a), Commissioner's decisions are deemed filed three days after the date of mailing to the parties.

[3] This decision may be appealed to the State Board of Education pursuant to *N.J.S.A.* 18A:6-27 *et seq.* and *N.J.A.C.* 6A:4-1.1 *et seq.*

State of New Jersey
OFFICE OF ADMINISTRATIVE LAW

INITIAL DECISION
OAL DKT. NO. EDU 3276-06
AGENCY DKT. NO. 359-12/05

T. B. o/b/o MINOR CHILD, L. B.,
Petitioner,
v.
TOWNSHIP OF WEST ORANGE BOARD OF EDUCATION, ESSEX COUNTY,
Respondent.

T. **B.,** petitioner, pro se

Stephen J. Christiano, Esq, for respondent

Record Closed: June 21, 2006 Decided: August 30, 2006

BEFORE **JEFFREY A. GERSON,** ALJ:

STATEMENT OF THE CASE

L.B., a fifteen year old student currently enrolled in the West Orange Public School District and living with her aunt T.B., contends that she is entitled to continue her schooling under the auspices of the West Orange School District as a result of hardship pursuant to N.J.S.A. 18A:38-1(b)(1). The West Orange Board of Education contends that L.B. does not meet the requirements of the statute.

UNDISPUTED FACTS

L.B. along with her mother, D.B. and two younger brothers have been attending the West Orange Public School System since L.B. was in second grade. L.B., D.B. and her two younger brothers lived with their aunt T.B. a homeowner in the West Orange School District.

In September 2005, D.B. and her two sons moved to Keansburg, New Jersey where they are presently residing in a two bedroom apartment. D.B. and her sister, T.B., appeared on behalf of L.B. arguing that she should be allowed to continue her schooling in West Orange because it would be a hardship for her to reside in Keansburg with her mother and two brothers. Financial difficulties and overcrowding at the newly rented apartment were the problems.

D.B.'s testimony with respect to the hardship was rather straightforward but short on necessary details. D.B. contends that she moved from her sister's home intending at the time to take all three of her children with her. Searches for apartments found the cost more than anticipated precluded her from renting an apartment that would comfortably accommodate her family of four.

D.B. rented the apartment in Keansburg and at the time was told by her landlord that the apartment could be occupied by no more than her and her two sons. It was allegedly contended by the landlord that a Keansburg ordinance restricted the rental of the apartment to three occupants. Since D.B. could not afford a larger apartment, she and her sister decided to have L.B. remain in West Orange and complete her schooling there.

THE LAW

The general rule concerning attendance at school free of charge is that public schools are free for anyone over five and under 20 years of age who is domiciled within the district. N.J.S.A. 18A:38-1(a). Domicile has been defined as the place where a

person has his true, fixed, permanent home, and principle establishment, and to which whenever he is absent he has the intention of returning. State v. Benny, 20 N.J. 238, 250 (1955). For purposes of (Subsection A), the domicile of an unemancipated child is the domicile of the 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). Thus, a child would routinely attend school in the district where his or her parents live. The statute did provide for an exception to that rule:

> 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 was 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, as sworn statement that he is domiciled within the district and is supporting the child gratis and will assume all personal obligations of the child relative to school requirements and that he attends 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 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 statement, information from or about which shall be supplied only to the Board and only to the extent that it directly pertains to the support or nonsupport of the child. If in the judgment of the Board of Education the evidence does not support the validity of the claim by the resident, the Board may deny admission to the school.

In short, the evidence must show that (1) T.B. is domiciled within the district; (2) T.B. is supporting L.B. gratis; (3) L.B.'s parents are not capable of supporting or caring for her due to family or economic hardship and; (4) L.B. is not residing with T.B. solely for the purpose of receiving a free public education in the District.

Only Number 3 is in dispute in this matter. The petitioner has the burden of demonstrating a family or economic hardship. P.P.M. o/b/o minor child, S.S. v. Board of Education of the South Orange Maplewood School District, Essex County, OAL Dkt. No. EDU 1839-03 Initial Decision (June 23, 2003) adopted by Commissioner July 31, 2003.

The questionable element here is whether L.B.'s mother has established a family or economic hardship that had rendered her not capable or supporting or caring for her daughter. The State Board has stated that "to satisfy that standard, the family or economic hardship must be real and demonstrable, evidencing a current incapability on the part of the parent to support . . . or provide care as a result of that hardship." J.B. o/b/o her grandchild, R.H. v. Board of Ed. of the Twp. of Ocean, Monmouth County EDU 8770-95, State Bd. decision (September 3, 1997).

Petitioner must provide evidence indicating that there is a family or economic hardship. In this matter, L.B.'s mother claims that a Keansburg Ordinance restricts an apartment with the square footage of the one she is presently a tenant in to three occupants. She further asserts that this apartment was found after a significant search and that any apartment of a larger size would be unaffordable.

The statute requires that "documentation to support the validity of the sworn statements" accompany the affidavit. N.J.S.A. 18A:38-1(b)(1). The difficulty here is that D.B. has provided her apartment lease which was marked into evidence but it does not support her claim. According to the lease at paragraph 5, two people can occupy each bedroom. It is a two bedroom apartment. D.B. has not produced the Ordinance that would limit occupancy of her apartment to three people and in fact has a lease which at paragraph 27A requires her to comply with all municipal ordinances which make it unlikely that the lease would provide for the occupancy of four people if only three could legally reside there.

D.B. unquestionably has financial restraints but little detail was offered to define those restraints. According to D.B., the apartment which she rented in Keansburg was

the maximum she could afford. She testified to having no source of income but nonetheless voluntarily moved into the Keansburg apartment not indicating how she had or would in the future be able to afford the rent. Although I am convinced that D.B. has very limited resources, I am not convinced that D.B. is "incapable of supporting or providing care for the child due to that hardship". I highlight this because the District has asserted a counterclaim for tuition. N.J.S.A 18A:38-1 does provide for the computation of tuition and payment thereafter to the Board if the matter has not been appealed to the Commissioner. Appeals to the Commissioner must necessarily involve hardship and other aspects of tuition collection that should be independently assessed.

As stated by the Court in the case of Protection v. Stavola 103 N.J. 425

> When specific parties are particularly affected by a proposed rule, fair play in administrative due process dictates that an agency must conscientiously concern itself with and make reasonable efforts to accommodate the rights and interests of the affected individual and generally account for the individualized effect of its proposed action". Bally Manufacturing Corporation v. New Jersey Casino Control Commission 85 N.J. 25, 345 (1981).
>
> "There are no simple answers as to what constitutes fundamental fairness" and each case must be considered and evaluated on its merits". In Re Kallen 92 N.J. 14, 27 (1983).

Examining the facts as produced herein, fairness would dictate that no tuition would be due. L. B. legally attended the West Orange School System since second grade, a period of approximately 8 to 9 years. West Orange was struggling with out-of-district students attempting to attend their various elementary schools, junior highs and high schools. To combat the influx of illegal students, the Board required all students to document their status. Neither D.B. nor T.B. on behalf of L. B. delineated their situation inaccurately. They provided the documentation requested, submitted affidavits when needed and were undoubtedly under the impression that continued attendance of L.B. at the West Orange School was legally acceptable. They did not move into the district seeking a free education, they simply continued with the education that L.B. had

received for the prior eight years. The Board of Education of the Township of West Orange seeks tuition in the amount of $8,931.81 representing a $73.81 per diem x 121 school days. It would be fundamentally unfair to burden this family, boarding on poverty, with the obligation to pay for tuition to attend a school district they thought they were entitled to attend. They must be differentiated from those who intentionally seek to establish a false or fraudulent residence to take advantage of the citizens of West Orange. This was not the case here and should not result in a harsh financial burden for L.B.'s family.

ORDER

It is **ORDERED** that L.B. cannot attend school in West Orange unless there is a change in circumstances that meets the restrictions of the residency statute. It is further **ORDERED** that no tuition is due.

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

This recommended decision may be adopted, modified or rejected by the **COMMISSIONER OF THE DEPARTMENT OF EDUCATION,** who by law is authorized to make a 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.

Aug. 30, 2006
DATE

JEFFREY A. GERSON, ALJ

E-mail Receipt of Initial Decision Confirmed by the Department of Education on:

8/30/06
DATE

Mailed to Parties:
Laura Anders
DIRECTOR AND
CHIEF ADMINISTRATIVE LAW JUDGE

AUG 31 2006
DATE

OFFICE OF ADMINISTRATIVE LAW

sej

APPENDIX

Witnesses:

For Petitioner

T.B.

D.B.

For Respondent

Josefa Lopez

Exhibits:

P-1 Re-Registration Statement for the The Public Schools of West Orange dated 9/8/05

R-1 Computer Printout for L.B. from the West Orange Public Schools

R-2 2005-2006 Tuition Costs for West Orange Public Schools

J-1 Affidavit of Parent dated December 1, 2005

J-2 Affidavit for Non-resident Pupil Enrollment dated December 1, 2005

J-3 Apartment Lease dated September 2, 2005 for D.B.

355-06

OAL DKT. NOS. EDU 2781-06 (EDU 8853-01 ON REMAND), EDU 2779-06 (EDU 735-03 ON REMAND), EDU 496-06, EDU 2780-06 (EDU 8012-05 ON REMAND) AND EDU 2595-05

AGENCY DKT. NOS. 373-9/01, 27-1/03, 30-1/06, 212-8/05 AND 69-3/05

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

PETITIONER,

V.

NEW JERSEY STATE DEPARTMENT OF EDUCATION, OFFICE OF SPECIAL EDUCATION PROGRAMS,

RESPONDENT,

AND

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

PETITIONER,

V.

NEW JERSEY STATE DEPARTMENT OF EDUCATION, OFFICE OF SPECIAL EDUCATION PROGRAMS,

RESPONDENT,

AND

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

PETITIONER,

V.

COMMISSIONER OF EDUCATION

DECISION

NEW JERSEY STATE DEPARTMENT OF EDUCATION, OFFICE OF SPECIAL EDUCATION PROGRAMS, :

RESPONDENT, :

AND

BOARD OF EDUCATION OF THE WEST WINDSOR-PLAINSBORO REGIONAL SCHOOL DISTRICT, MERCER COUNTY, :

PETITIONER, :

V. :

NEW JERSEY STATE DEPARTMENT OF EDUCATION, OFFICE OF SPECIAL EDUCATION PROGRAMS, :

RESPONDENT. :

AND

R.K., ON BEHALF OF MINOR CHILD, S.K.-B., AND R.K. ON HER OWN BEHALF, :

PETITIONER, :

V. :

NEW JERSEY STATE DEPARTMENT OF EDUCATION, OFFICE OF SPECIAL EDUCATION PROGRAMS, :

RESPONDENT. :

The records of these matters as they pertain to the common issue of Commissioner of Education jurisdiction over the subject of the appeals, and the "global" Initial Decision on this issue rendered by the Office of Administrative Law (OAL), have been reviewed. Exceptions to the Initial Decision were filed by the respondent Department of Education (Department), the petitioning boards of education (Lenape and West Windsor, respectively), petitioner R.K., and participant A.M.[1] The Department and West Windsor replied to A.M.'s exceptions, and A.M. replied to the exceptions of the Department, Lenape and R.K.

On exception, the Department, Lenape and West Windsor all urge rejection of the Initial Decision, contending that the Commissioner does, indeed, have jurisdiction over the subject of the appeals. The Department reiterates its concern that, absent a contested case hearing before the Commissioner, there is opportunity for neither resolution of factual disputes nor application of agency expertise – both essential for subsequent appellate proceedings – in the event of an appeal from the results of a complaint investigation. (Department's Exceptions at 1-2) Lenape reiterates its argument that findings of noncompliance based on complaint investigations are analogous to those based on monitoring notwithstanding that they arise under different sections of rule, so that both should be appealable to the Commissioner pursuant to *N.J.A.C.* 6A:14-9.1(h); it again urges that this position is consistent both with case law on the right to seek judicial review of administrative actions[2] and with the intent of the State Board of Education as evidenced by

[1] Although listed as an Intervenor in the caption of the Initial Decision and at various points in the record of the "global" issue, A.M. is, in fact, a *participant* in two of the Lenape matters (EDU 2781-06 on remand, *Lenape I*; and EDU 2779-06 on remand, *Lenape II*) as ordered by the Commissioner in decisions dated March 21, 2006 and April 25, 2006, respectively. See Initial Decision at 4-5.

[2] *Hirth v. City of Hoboken*, 337 *N.J.Super.* 149, 160 (App. Div. 2001).

its originally proposed amendments to *N.J.A.C.* 6A:14-9.2,[3] deleted on final proposal only in deference to this pending matter. (Lenape's Exceptions at 1-4) West Windsor makes arguments similar to those of the Department and Lenape, additionally stressing that a holding of "no jurisdiction" in these matters would deprive the Commissioner of the "statutory and inherent administrative authority" to review the decisions of subordinate employees and Departmental units in a supervisory capacity; and that the necessary review may occur, as here, through a contested case proceeding, or alternatively, through uncontested case proceedings, either in such a way as to permit legal argument (and stay of corrective action directives) on broad-based issues while still granting specific relief to the individual complainant within 60 days as required by federal law. (West Windsor's Exceptions at 1-7, quotation at 3)

R.K., while concurring with the Administrative Law Judge (ALJ) that the Commissioner lacks jurisdiction to hear appeals of complaint investigations conducted by the Office of Special Education Programs (OSEP), excepts to the ALJ's dismissal of the pending individual cases and to the analogizing of her complaint to the others underlying the "global" determination.[4] In the first instance, R.K. objects to the amount of time it took for the Department to "act and appropriately examine the [jurisdictional] issue," even as it permitted contested cases to proceed at OAL to the point of being substantially or fully litigated; to dismiss these cases now, and leave the parties thereto without remedy, R.K. argues, would be patently unfair. In the second, R.K. contends that there is a significant difference between appealing the results of a duly conducted complaint investigation and seeking to compel OSEP to undertake an investigation and report its results in the first place,

[3] See Initial Decision at 11, note vi.

[4] See Initial Decision at 17.

where OSEP has "arbitrarily [denied] a legitimate request [submitted pursuant to rule] at its convenience and with no basis in fact or law"; according to R.K., there "must be recourse for parents when OSEP fails or refuses to do its job".[5] (R.K.'s Exceptions at 1-6, quotations at 4 and 5)

A.M., on the other hand, excepts to the Initial Decision only to the extent that it does not take the additional step of holding that school districts have no right to appeal the outcome of OSEP complaint investigations at all, in contrast to parents who may do so through a due process proceeding consistent with the protective requirements of the Individuals with Disabilities Education Improvement Act (IDEA). A.M. also reiterates her argument in the alternative that, should school districts be allowed to appeal OSEP complaint investigation reports, such appeals must be governed by rules otherwise pertaining to special education matters, so that the ALJ would have the final decision and any appeal would be taken directly to State or federal trial court. (A.M.'s Exceptions at 1-5) The Department replies to this latter contention by: 1) stating that the case law relied upon by A.M. is inapposite, since it pertains to due process hearings which differ from complaint investigations in that they reflect disputes between parent(s) and a board with no involvement of the Department; and 2) objecting to any structure which effectively forces parents to file appeals in court, where the Department's actions will come under scrutiny without prior opportunity for agency review through the administrative hearing process. (Department's Reply at 1-3) The same objection is raised by West Windsor, along with the observation that A.M.'s "no appeal" position ignores the federal memorandum[6] indicating

[5] R.K. also states that, based on her own experience and the results of the underlying cases thus far litigated at the OAL, better "quality control" should be established within the Department with respect to OSEP's complaint investigation practices. (R.K.'s exceptions at 5-6)

[6] See Initial Decision at 12.

that states may make their own decisions regarding whether to allow reconsideration of complaint reports, since the IDEA neither prohibits nor requires such reconsideration. (West Windsor's Reply at 1-3)

In her reply submission, A.M. counters that the Department's position is not tenable due to the federal requirement for resolution in 60 days, which effectively precludes administrative hearing, and that the decisional law arising from due process cases *is* applicable because it stands for the general proposition that judicial review of IDEA cases "proceeds [not] only upon the record compiled before the agency," but through "creation of a broader record" in trial court – a proposition that applies equally to due process and complaint investigation proceedings. (A.M.'s Reply at 2) She further contends that Lenape ignores the clear distinctions in purpose and history between the Department's monitoring and investigative processes as set forth in the Initial Decision at 10-12, noting that the section of rule governing complaint investigations establishes no appeal process – as the monitoring section clearly does – and that the Department cannot, without violating the Administrative Procedure Act, adopt a complaint investigation appeal procedure without codifying it in regulation; she counters Lenape's argument on the right to judicial review by reiterating her position that a "subordinate branch" of a "single State agency" does not have standing to challenge decisions of the superior agency, citing *Essex County Welfare Board v. Department of Institutions and Agencies et al.*, 75 *N.J.* 232 (1978). (*Id.* at 2-4) Finally, A.M. agrees that R.K. should not be penalized for the agency's error, and suggests that an appropriate resolution might be to transfer R.K.'s appeal to the OSEP to be heard as a due process matter deemed filed as of the date of R.K.'s petition to the Commissioner. (*Id.* at 4)

Upon careful review and consideration, the Commissioner concurs with the ALJ that the Commissioner of Education lacks jurisdiction over appeals of OSEP complaint investigations.

Initially, the Commissioner finds – for the reasons discussed by the ALJ in the Initial Decision at 11-13 – that the complaint investigation process established in *N.J.A.C.* 6A:14-9.2, when read in conjunction with the IDEA provisions it implements, clearly contemplates that the OSEP Director's (or designee's) decision on any complaint is the final decision of the agency. This conclusion is not only consonant with the IDEA's intent that the complaint investigation process serve as an alternative to the lengthier, more complex due process proceeding (Initial Decision at 14-15); it is also buttressed by the absence in *N.J.A.C.* 6A:14-9.2 of a provision comparable to that of *N.J.A.C.* 6A:14-9.1(h), where the right of appeal to the Commissioner (and thence, by implication, to the State Board) is expressly specified, and by the court having identified the OSEP Director's decision as the final agency decision in its consideration of the facial validity of the rule in question. *Baer v. Klagholz*, 339 *N.J. Super.* 168, 214-17 (2001).

The Commissioner additionally concurs with the ALJ's differentiation of the monitoring process set forth at *N.J.A.C.* 6A:14-9.1 – the results of which are appealable to the Commissioner – from that of the complaint investigation process prescribed at *N.J.A.C.* 6A:14-9.2 (Initial Decision at 10-12), and is unpersuaded by the argument that the appeal provision of the former must extend by implication to the latter as a matter of legal construction or educational policy. The two sections reflect distinct processes and purposes, as found by the ALJ, and, in the case of the process set forth at *N.J.A.C.* 6A:14-9.2, the State Board of Education has clearly chosen to place responsibility for agency expertise and staff

oversight with the Director of OSEP rather than with the Commissioner or State Board. As the ALJ aptly observed, the Board could have done otherwise had it wished, and the choice it made is entirely consistent with the longstanding general absence of the Commissioner and State Board from adjudication of special education disputes despite the fact that these arise under State statutes and regulations and are "inarguably 'controversies and disputes arising under the school laws' " (*Id.* at 9-10, 16; quotation at 10); indeed, this very absence militates against finding the Commissioner and State Board to have indispensable expertise for purposes of reviewing matters inextricably linked to disputes arising under the IDEA. See *Lenape I, Lenape II* and *West Windsor-Plainsboro, supra.* Moreover, while the Commissioner is not unmindful of the benefits of an OAL factual record for purposes of appeal, the Commissioner concurs with the ALJ that the absence of such a record is an inevitable consequence of the IDEA's mandate for a less complex alternative to due process proceedings, and that any appeal from a decision reached through such alternative would be likely judged by standards that recognize both the limited underlying process and the reasons for it. (Initial Decision at 15-16)[7]

With respect to the question of appeal, A.M. has urged that the Commissioner should find district boards of education to be precluded from appealing agency complaint investigation decisions in *any* forum, or if permitted, then only through the same mechanism as is used for due process hearings. In this regard, the Commissioner recognizes – as likely did the ALJ in not reaching definitive conclusions on this point – that the Commissioner of

[7] It is here worth noting that there are other circumstances within the Department where final agency decisions are not based on records developed through OAL proceedings, yet may be heard by the court on appeal; this would be true of any State Board decision reviewing a determination of the Commissioner not made in his or her adjudicative capacity, such as granting or revoking a school charter (*N.J.A.C.* 6A:11-2.5) or restoring municipal reductions to a school budget defeated by voters (*N.J.A.C.* 6A:23-8.10(f)). Additionally, the uncontested case hearing process is not a viable option in this context, since – even assuming, *arguendo*, that it is otherwise appropriate – acceptance of agency head requests for such hearings is at the sole discretion of the Director of the OAL (*N.J.S.A.* 52:14F-5(o); *N.J.A.C.* 1:1-21.1).

Education has no authority to limit the courts with respect to determination of their own jurisdiction. However, the Commissioner does believe it prudent to express her opinion for the record, in anticipation of further consideration of this question by the State Board of Education and the courts.

Accordingly, the Commissioner here opines that while federal law no longer provides for review of final agency complaint investigation decisions by the Secretary of the U.S. Department of Education (Initial Decision at 9), the current law's silence on this point cannot be read to prohibit such appeals as may be available at the State level, nor to extend IDEA requirements expressly linked to due process appeals (20 U.S.C. §1415(i)2(C)) to appeals of complaint investigations so as to remove the latter from the normal State agency decision appeal structure. Initially, the Commissioner views the right to judicial review of final agency decisions as axiomatic provided the requesting party has standing; in this regard, the Commissioner specifically rejects A.M.'s contention – based on *Essex County Welfare Board, supra* – that local district boards of education lack such standing with respect to agency complaint investigation findings. Rather, the Commissioner opines that, while local boards may be subordinate branches of the State agency (SEA) for purposes of administering the IDEA – as county welfare boards are (or were at the time of the *Essex* decision) for administering the federal Aid to Families with Dependent Children (AFDC) law – the two are not otherwise analogous; unlike county welfare boards (*N.J.S.A.* 44:1-10 et seq.), local boards of education are governing bodies of autonomous political subdivisions of the State, with independent authority to tax in support of educational expenditures including those associated with programs and services under the IDEA – thus giving them the same right to judicial review of adverse State agency decisions on behalf of constituents

and taxpayers as was accorded by the *Essex* Court to county governing bodies in the case of AFDC appeals. The Commissioner further notes that IDEA complaint investigation provisions – unlike those for due process proceedings – impose no specific requirement for *de novo* hearing or application of a preponderance of evidence standard on appeal so as to compel proceedings in a trial court; thus, the Commissioner concurs with the ALJ's suggestion that the proper venue for appeal of OSEP complaint investigation decisions would appear to be the Appellate Division of Superior Court. (*Id.* at 13-14) [8] [9]

However, as recognized by the ALJ, "appeal" and "reconsideration" are not synonymous, and the IDEA has been interpreted to leave to each State the decision as to whether – and through what process – *reconsideration* of complaint investigation decisions should be allowed. (Initial Decision at 13-15) Subsequent to issuance of the Initial Decision in this matter, the State Board effectively answered this question for New Jersey by adoption of a rule expressly providing for reconsideration by the OSEP Director of a final complaint investigation decision when "a party believes that [it] includes an error that is material to the determination in the decision" and informs the OSEP and the other party of the asserted error in writing, within 15 days of the date of the report; the steps to be taken to consider the claim of error will be determined by the OSEP. *N.J.A.C.* 6A:14-9.2(c)1;

[8] In so opining, the Commissioner is not unmindful of the potential for different elements of a single complaint investigation to be on appeal in different forums: in the Law Division for elements pursued through due process, and in the Appellate Division for elements either not eligible for due process or not pursued by a complainant through that mechanism; however, as with the absence of an OAL record discussed above, such anomaly is a direct consequence of the IDEA's requirement for provision of a simpler alternative to due process hearings without foreclosing full rights to such hearings for parents who wish them. Additionally, since the Appellate Division has adjudicative expertise in special education matters by virtue of hearing appeals from Law Division decisions, the consequences are less problematic than having the Commissioner hear complaint investigation appeals notwithstanding the Commissioner's prohibition from hearing due process matters involving the same types of issues.

[9] Similarly, to the extent the ability to choose between trial and appellate courts creates an opportunity for "forum shopping" by parents, that consequence, too, flows directly from the IDEA.

38 *N.J.R.* 3530(b), 3567. Thus, there can be no doubt as to the State Board's intent to absent the Commissioner and State Board from the reconsideration process, no less than from the underlying decision on which it is based.

Notwithstanding the Commissioner's concurrence with the ALJ that the Commissioner of Education lacks jurisdiction over the pending individual matters underlying the "global" issue addressed herein, the Commissioner also concurs with R.K. that no petitioner in these matters should be left without remedy as a result of proceeding before the Commissioner in good faith. While dismissal of the pending appeals without further agency action was the only option available to the ALJ in the absence of a regulatory provision for reconsideration, such a provision now exists and should be made available to the petitioners notwithstanding any "reconsideration" that may have been given by the OSEP in response to a petitioner's prior informal request(s). The Commissioner, therefore, finds that the appropriate disposition of these matters is dismissal of the contested cases as recommended by the ALJ, but without prejudice to the petitioners' ability to request reconsideration by the OSEP Director within 15 days of the filing date of the Commissioner's decision, and – in the case of R.K., where the petitioner is a parent rather than a school district and consequently has additional rights under the IDEA[10] – further without prejudice to her concomitant right to pursue eligible issues through a due process hearing deemed requested as of the filing date (March 10, 2005) of her petition to the Commissioner. Additionally, the record of a petitioner's OAL proceeding up to this point

[10] The Commissioner concurs with the ALJ that, for purposes of reconsideration or appeal, there is no reason to treat R.K.'s contentions of OSEP error any differently from those of school districts contesting OSEP's finding(s) of noncompliance. See Initial Decision at 17.

will be made available for OSEP review as part of any reconsideration or due process proceeding thus requested.

Accordingly, the Initial Decision of the OAL is adopted for the reasons expressed therein, as amplified above. The respective appeals filed by the Lenape Board of Education, West Windsor-Plainsboro Board of Education, and R.K. are hereby dismissed as contested cases before the Commissioner of Education, without prejudice to each petitioner's ability to request – within 15 days of the filing date of this decision – reconsideration by the OSEP Director pursuant to *N.J.A.C.* 6A:14-9.2(c)1; in R.K.'s case, such dismissal is further without prejudice to her ability to request a due process hearing on any eligible issues, with such request deemed filed on March 10, 2005. Additionally, so that A.M. may hereafter have all the rights and obligations of a party as to the "global" issue addressed by the within decision (*N.J.A.C.* 1:1-16.1(b)), the Commissioner hereby elevates her status from participant to intervenor for this limited purpose.

IT IS SO ORDERED.[11] [12]

Lucille E Davy

ACTING COMMISSIONER OF EDUCATION

Date of Decision: 10/16/06

Date of Mailing: 10/16/06

[11] Upon filing of the within decision, the Commissioner will request that the matter entitled *Board of Education of Millburn Township v. New Jersey State Department of Education, Office of Special Education Programs* – presently pending at the OAL as Dkt. No. EDU 07130-06 (Agency Dkt. No. 185-5/06) – be returned to the agency pursuant to *N.J.A.C.* 1:1-3.3, with notice to the petitioning board as to its right to request reconsideration in the same manner as the petitioners herein.

[12] This decision may be appealed to the State Board of Education pursuant to *N.J.S.A.* 18A:6-27 *et seq.* and *N.J.A.C.* 6A:4-1.1 *et seq.*

State of New Jersey
OFFICE OF ADMINISTRATIVE LAW

INITIAL DECISION
OAL DKT. NO. EDU 496-06
AGENCY DKT. No. 30-1/06

LENAPE REGIONAL HIGH SCHOOL DISTRICT BOARD OF EDUCATION,

Petitioner,

v.

STATE OF NEW JERSEY, DEPARTMENT OF EDUCATION, OFFICE OF SPECIAL EDUCATION PROGRAMS,

Respondent

and

OAL DKT.NO. EDU 2779-06 (on remand EDU 735-03)
AGENCY DKT. NO. 27-1/03

LENAPE REGIONAL HIGH SCHOOL DISTRICT BOARD OF EDUCATION,

Petitioner,

v.

STATE OF NEW JERSEY, DEPARTMENT OF EDUCATION, OFFICE OF SPECIAL EDUCATION

PROGRAMS,

Respondent

and

OAL DKT. NO. EDU 2781-06 (on remand EDU 8853-01)
AGENCY DKT. NO. 373-9/01

LENAPE REGIONAL HIGH SCHOOL DISTRICT BOARD OF EDUCATION,

Petitioner,

and

A.M. o/b/o P.M., a minor,

Intervener,

v.

STATE OF NEW JERSEY, DEPARTMENT OF EDUCATION, OFFICE OF SPECIAL EDUCATION PROGRAMS.

Respondent

and

OAL DKT. NO. EDU 2780-06 (on remand EDU 8012-05)
AGENCY DKT. NO. 212-8/05

WEST WINDSOR-PLAINSBORO REGIONAL SCHOOL DISTRICT,

Petitioner,

v.

STATE OF NEW JERSEY,
DEPARTMENT OF EDUCATION,
OFFICE OF SPECIAL EDUCATION
PROGRAMS,
Respondent

and

OAL DKT. NO. EDU 2595-05
AGENCY DKT. NO. 69-3/05

R.K. o/b/o S.K.-B., a minor, and
R.K., on her own behalf,
Petitioner,
v.
STATE OF NEW JERSEY,
DEPARTMENT OF EDUCATION,
OFFICE OF SPECIAL EDUCATION
PROGRAMS,
Respondent.

ARTHUR F. RISDEN, Esq., for petitioner Lenape Regional, (Archer & Greiner, attorneys)

JOHN E. COLLINS, Esq., for petitioner West Windsor-Plainsboro Regional (Parker McCay, attorneys)

ELIZABETH ATHOS, Esq., for intervener A.M. (Education Law Center, attorneys)

R.K., petitioner, appearing pro se

PATRICIA M. O'NEILL, Deputy Attorney General, for respondent (Zulima V. Farber, Attorney General of New Jersey, attorney)

Record Closed: June 13, 2006 Decided: June 27, 2006

BEFORE: **JEFF S. MASIN,** ALJ:

This initial decision considers whether the Commissioner of Education ("Commissioner") has jurisdiction to consider "appeals" from determinations reached by the Office of Special Education Programs ("OSEP") under the "Complaint Investigation" provisions set forth at N.J.A.C. 6A:14-9.2. As detailed in a footnote below, various disputes concerning decisions rendered by OSEP have been proceeding within the administrative forum and have reached different stages. In three cases, administrative law judges ("aljs") have previously rendered initial decisions. In two others, contested cases are pending initial consideration at the Office of Administrative Law ("OAL"). In four of these matters, school districts seek to challenge the determination of OSEP that the district failed to comply with procedures required by the Individuals with Disabilities Education Improvement Act ("IDEA 2004"), 20 U.S. §1400 et seq. and state regulations, N.J.A.C. 6A:14-1 et seq., adopted to implement that statute and its state counterpart.[i] In one of these cases, a parent has been granted intervention. In one other matter, the parent of a classified student seeks to challenge actions of OSEP itself regarding how that Office allegedly acted, or failed to act, in regard to a complaint filed by the parent against a school district. Although each of these cases was initially referred to the OAL by the Commissioner as a contested case pursuant to N.J.S.A. 52:14B-1 to – 21 and N.J.S.A. 52:14F-1 to -13, as is explained in a decision rendered by the Commissioner in each of the cases which have already produced initial decisions, the Commissioner,

[i] In EDU 00496-06, Lenape Regional High School District appeals a determination that it failed to abide by the procedures of N.J.A.C. 6A:14 for proposing an appropriate educational program for a classified child, D.W. In EDU 2781-06 (formerly 8853-01), an ALJ issued an initial decision vacating a finding by OSEP that the Lenape District had been in "noncompliance" in failing to develop an Individualized Education Plan ("IEP") for P.M., a classified student. In EDU 2779-06 (formerly EDU 735-03), an ALJ granted OSEP's motion for summary decision dismissing Lenape's appeal of a OSEP determination that the district, once having accepted assistive technology recommendations involving classified student P.M., was obligated to provide technology without any requirement of a Bailment Agreement. In EDU 2780-06 (formerly EDU 8012-05), the ALJ vacated OSEP's determination that the West Windsor-Plainsboro Regional School District failed to follow proper procedure in obtaining parental consent regarding aspects of the special education process. In EDU 2595-05, the parent of a classified child contends that OSEP violated N.J.A.C. 6A:14-9.2(a), when it failed to properly review, investigate and take action on a signed, written complaint filed against the Somerset Hills School District, contending that its investigation was flawed and that it willfully and arbitrarily denied an investigation of portions of her complaints against the School Board.

perhaps prompted by the position advocated by the intervener, has recently questioned whether she has jurisdiction to decide the merits of these matters and has remanded the cases to OAL for a determination of the threshold question of the Commissioner's jurisdiction.[ii] The Director and Chief Judge of the OAL determined that a global resolution of this issue was appropriate and, while the cases have not themselves been consolidated, each of the cases was transferred to this judge for the limited purpose of deciding the jurisdictional issue.[iii] The attorneys and the pro se litigant have been given the opportunity to supplement the prior submissions made by some of them in regard to the jurisdictional issue (which was not then decided). Briefs have been received and the record closed as of June 13, 2006.

PRELIMINARY CONCLUSION

For the reasons explained below, I **CONCLUDE** that the Commissioner has no jurisdiction to consider an "appeal" of the OSEP final report issued by that Office in a complaint investigation. While "reconsiderations" of complaint investigation final reports are an option neither endorsed nor prohibited by Federal law, the use of this "inherent" power must be carefully considered, quite possibly by regulations that address the process within the unique context and concerns of special education.

DISCUSSION

The IDEA, as amended in 2004, (the "Individuals With Disabilities Improvement Act",), establishes a framework of rights and procedures which States seeking a share of federal monies for the provision of special education services to educationally

[ii] In EDU 2779-06 and EDU 2781-06, the Commissioner has granted the request of A.M., parent of P.M., to intervene in Lenape's appeal of the OSEP determinations. A.M. challenges the jurisdiction of the Commissioner to hear these appeals. The subject of jurisdiction is foundational to any forum's ability to decide a dispute, "[j]urisdiction over the subject matter cannot be waived or conferred by consent or lack of objection thereto[,]" Roxbury Twp. Board. of Educ. v. West Milford Board of Educ., 283 N.J. Super. 505 (App. Div. 1995), certif. denied, 143 N.J. 325 (1996), citing McKeeby v. Arthur, 7 N.J. 174 (1951)..

[iii] An additional case, Board of Education of Millburn Township v. New Jersey State Department of Education, Office of Special Education Programs, OAL DKT. NO. 07130-06, Agency DKT. No. 185-5/06, has recently been transmitted, but in order to avoid any further delay in the determination of this global issue, it has not been included in this initial decision and the views of Millburn's attorney have not been solicited on the issue of jurisdiction. It is assumed that the assistant attorney general assigned to that case would advocate the same position taken here by the deputy attorney general representing the DOE, OSEP in the cases included in this initial decision.

handicapped children must follow. The law requires that each state have a single State Education Agency ("SEA"), defined as "the State board of education or other agency or officer primarily responsible for the State supervision of public elementary and secondary schools." 20 U.S.C. 1401(7). In New Jersey, the State Board of Education is the SEA and the Department of Education is subject to the authority and control of the State Board. East Brunswick Board of Education v. New Jersey State Board of Education, EHLR 554:122 (D.N.J. Civil Action no. 81-3600, July 1982). However, in practice, the local education agencies ("LEA"), that is, the local school districts, actually provide the day-to-day services required by IDEIA, including the identification and classification of educationally handicapped students and the provision to these students of a free appropriate public education ("FAPE"). N.J.A.C. 6A:14-9.1(a) directs the Department of Education to "monitor all programs and services required by this chapter for compliance with New Jersey statutes, the New Jersey Administrative Code, the approved education plan and Federal requirements under the . . . (IDEA)." In addition to its monitoring function, where an organization or individual requests a "complaint investigation" "regarding the provision of special education and related services covered under this chapter," N.J.A.C. 6A:14-9.2 (a)(b) provides that the "State Director of the Office of Special Education or designee shall be responsible for reviewing, investigating and taking any action on any signed written complaint . . .".[iv] Further,

[iv] (a) The State Director of the Office of Special Education Programs or designee(s) shall be responsible for reviewing, investigating and taking action on any signed written complaint of substance regarding the provision of special education and related services covered under this chapter.

(b) An organization or individual may request a complaint investigation by submitting a written signed request to the State Director of the Office of Special Education Programs. The complaint shall include:

1. A statement that a public or private education agency has violated the requirements of State and/or Federal statute and/or regulation for the provision of special education and related services;

2. The facts on which the statement is based; and

3. The time period when the alleged violation occurred.

i. The complainant shall allege a violation that occurred not more than one year prior to the date that the complaint is received unless:

(1) A longer period is reasonable because the violation is continuing; or

(2) The complainant is requesting compensatory services for a violation that occurred not more than three years prior to the date the complaint is received.

(c) The Office of Special Education Programs in conjunction with the county office of education shall complete an investigation within 60 calendar days after receipt of the written signed complaint.

where a parent or guardian, or in some instances where a school board, invoke the due process hearing provisions of IDEA, such matters, while filed initially with OSEP, are transferred for an impartial hearing to the OAL, where aljs are assigned to conduct the hearings. 34 C.F.R. 300.507 and 300.520-300.528. In the due process context, the decisions of aljs are final administrative decisions, with appeals from such decisions cognizable in either the Law Division of Superior Court or in the United States District Court. 20 U.S.C. 1415(f)(3)(A)(i)(I) and 20 U.S.C. 1415(g)(2). Unlike the situation in the vast majority of matters arising in the field of administrative agency adjudication in New Jersey, no review or appeal of alj due process decisions can be taken to the Commissioner or the State Board of Education, the agency head for the agency which

---

1. The investigation may include, but not be limited to:

i. Review of policies and procedures;

ii. Review of student record(s);

iii. Observation of programs; and

iv. Interview(s).

2. The complainant shall be given the opportunity to provide additional information, either orally or in writing about the allegations in the complaint;

3. The State Director of the Office of Special Education Programs may extend the timeline for completion of the investigation only if exceptional circumstances exist with respect to a particular complaint.

(d) If a written complaint is also the subject of a due process hearing or contains multiple issues of which one or more are part of that hearing, the Office of Special Education Programs shall set aside any part of the complaint that is being addressed in the due process hearing until the conclusion of the hearing. Any issue in the complaint that is not part of the due process hearing shall be resolved according to (c) above.

1. If an issue is raised in a complaint that has been previously decided in a due process hearing involving the same parties, the hearing decision is binding and the Office of Special Education Programs shall inform the complainant to that effect.

(e) A report of findings, conclusions and, when warranted, the required corrective actions shall be sent to all parties.

(f) If the education agency is found to be in noncompliance, a corrective action plan shall be developed and submitted to the Department of Education through the county office of education.

(g) The corrective action plan shall include, but not be limited to:

1. Objectives and strategies for correcting each noncompliance item cited, including resources needed to obtain the objectives; and

2. The dates by which the noncompliance will be corrected.

(h) The county office of education shall review the corrective action plan and notify the State Director of the Office of Special Education Programs and the education agency if it is acceptable.

(i) The county office of education shall review the implementation of the corrective action and notify the State Director of the Office of Special Education programs when the implementation is completed.

(j) When a corrective action plan is not submitted, found unacceptable or implemented, the county office of education shall notify the agency of the actions the Department of Education intends to take.

[*N.J.A.C.* 6A:14-9.2.]

transmits the case to the OAL. East Brunswick Board of Educ. v. New Jersey State Board of Educ., supra, (no employee of the SEA is permitted to render a final agency decision in due process hearings; citing 20 U.S.C. § 1415(b)(2), now 20 U.S.C. 1415(f)(3)(A)(i)(I)).

The complaint investigation function described in the State regulation reflects requirements of federal law. In connection with these complaint investigations, 34 C.F.R. 300.661 provides required "minimum State complaint procedures." [v] These establish a limited time frame of 60 days within which the SEA must generally carry out its independent investigation, provide an opportunity to the complainant to submit additional information, review all relevant information and make an independent determination as to whether the public agency is violating a requirement of Part B of IDEA and issue a final written decision to the complainant addressing each allegation in the complaint. The written decision must incorporate findings of fact and conclusions and reasons for the SEA's final decision. The regulation also provides for time extensions and for procedures for effective implementation of the SEA's final decision, including "(i) technical assistance activities; (ii) negotiations; and (iii) corrective actions to achieve compliance." Recognizing that some issues can be raised in both complaint investigations and due process proceedings, the regulation addresses the interplay between these two procedures. Where a request for due process is filed concerning the same issues as are under consideration in the complaint investigation, the State must set aside any part of the complaint being addressed in the due process hearing until the conclusion of that hearing. Any matter addressed in the complaint that is not a part of the due process hearing must be resolved by the SEA within the time frame and procedures established in paragraphs (a) and (b) of 34 C.F.R. 300.661. If a matter raised in a complaint has already been determined in a due process hearing, the hearing decision is binding. 34 C.F.R. 300.661(c)(2)(i)(ii). Finally, "[A] complaint

---

[v] "Part B's State complaint procedures are critical to each State's exercise of its general supervision responsibilities because they provide parents with an important means of ensuring that the educational needs of their children are met and provide the State educational agency (SEA) with a powerful tool to identify and correct noncompliance with the IDEA and its implementing regulations." Memorandum from Kenneth R. Warlick, Director, Federal Office of Special Education Programs to Chief State School Officers, Subject: Complaint Resolution Procedures Under part B of the Individuals with Disabilities Education Act (Part B), dated July 17, 2000.

alleging a public agency's failure to implement a due process decision must be resolved by the SEA." 34 C.F.R. 300.661(c)(3).

Under a previous version of the federal regulations, 34 C.F.R. 300.661(4)(d) provided that each SEA's complaint procedures "shall include," "[T]he right of the complainant or the public agency to request the Secretary to review the SEA's final decision." However, as the regulation now stands, after amendment by 64 Fed. Reg. 12465, Mar. 12, 1999, revised Part 300, effective May 11, 1999, any reference to these review rights has been eliminated. As the regulation now reads, it neither requires nor prohibits any reviews of the SEA final decision; it is silent on the subject. As a result, there is now a question of what, if any, review or appeal may be available to either the complainant or the public agency under federal and State law from the required SEA complaint investigation "report of findings, conclusions and, when warranted . . . required corrective action," N.J.A.C. 6A:14-9.2(e). That said, it must be noted that the review formerly permitted to the federal Secretary of Education involved a review of the final decision of the State Education Agency. In the present matters, the question deals with the possibility of an "appeal" of the decision of OSEP, a sub-unit of the Department of Education, to the Commissioner, who is the agency head of that principal department of State government and the person normally authorized to issue final agency decisions for that agency. While it is clear that the change in the Federal regulations has eliminated any review of the SEA decision by the Secretary of the federal Department of Education, that change does not speak to the question of what, if any, "appeal" or "review" may be permitted within the State's own governmental structure.

In support of the Commissioner's jurisdiction to hear such appeals, the Attorney General, on behalf of DOE, and counsel for the Lenape and West Windsor-Plainsboro, Boards, note that the Commissioner has extremely broad jurisdiction over controversies arising under the school laws. N.J.S.A. 18A:6-9 ("to hear and determine . . .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."). Yet, as the East Brunswick case determined, the provisions of IDEA are such that even

though there are state statutes and regulations pertaining to the provision of special education and special education disputes are inarguably "controversies and disputes arising under the school laws," nevertheless the Commissioner and the State Board do not have jurisdiction to determine disputes arising under these laws where they involve due process complaints filed pursuant to IDEA and the counterpart state provisions. As East Brunswick holds, Congress determined to dictate limits upon internal State procedures for the processing of this category of education disputes. The Congressional limitation reaches not only the subordinate employees of the DOE, but even the "chief employee" herself, the Commissioner. Muth v. Central Bucks School Dist. 839 F.2d 112, 123-124 (3rd Cir. 1988), rev'd on other grounds, Dellmuth v. Muth, 491 U.S. 223, 109 S.Ct. 2397, 105 L.Ed. 2d 181 (1989). It is for this reason that the Commissioner long ago designated the OAL and its judges to serve as the independent, impartial hearing forum for due process disputes. In light of this history, it cannot be so cavalierly assumed that the broad grant of jurisdiction found in N.J.S.A. 18A:6-9 necessarily means that the Commissioner automatically has jurisdiction to consider appeals of complaint investigations that arise in the context of special education. Rather than a mechanical resort to that provision for the answer to the question, the issue must be decided in the context of the special concerns that Congress clearly had regarding the area of special education. While aspects of that concern appear to have motivated the requirement that in due process no employee of the SEA have the authority to rule on the dispute, it is not clear that those same concerns have led to a similar ban in the complaint investigation area.

An examination of the State regulations governing the complaint investigation process reveals that N.J.A.C. 6A:14-9.2 places the responsibility to review, investigate and take action on signed written complaints upon the Director of OSEP or the Director's designee and not directly upon the DOE or the Commissioner or the State Board. This arrangement contrasts with that established under N.J.A.C. 6A:14-9.1, the "monitoring and corrective action" function, which specifically directs that the DOE itself "monitor all programs and services required by this [special education] chapter." All of the requirements of federal law governing the complaint investigation process, including

the time limits, extensions, opportunity to submit additional materials, requirement for a report of findings, conclusions and, where warranted, required corrective actions, the issuance of that report, the review of corrective action plans developed in response to the report of findings and conclusions resulting from a complaint investigation, the verification of the implementation of corrective action plans, all are placed within the requirements imposed by N.J.A.C. 6A:14-9.2, and all are imposed upon the Director of OSEP. None of these provisions are included in N.J.A.C. 6A:14-9.1. Under the federal regulations, the detailed requirements mandated in N.J.A.C. 6A:14-9.2 are imposed upon the SEA. Thus, as the federal regulations require the SEA's **final** decision within 60 days and the State regulation imposes this 60-day requirement upon the Director of OSEP or the Director's designee as the time frame in which the Director must issue the decision, it must be then that the State regulatory construct treats the OSEP report as the SEA's final report, essentially issued on behalf of the State Board as the SEA. This is a critical point in the analysis of the question. Nothing in the regulations suggests that the OSEP report is subject to filing with, review and/or approval by, or appeal to the Commissioner or State Board within the 60-day time limit, and unlike N.J.S.A. 6A:14-9.1(h), the monitoring function, which carries no time limit for its process and contains a specific right of appeal to the Commissioner, "according to N.J.A.C. 6A:3," of the denial of approval of a corrective action plan, imposition of sanctions or determination of noncompliance, N.J.A.C. 6A:14-9.2, with the complaint investigation process set forth therein and governed by the federally imposed time limit, contains no such language regarding any appeal to or review by the Commissioner. It only includes the statement concerning the fact that the section in no way is to be construed as limiting a parent or adult students' right to seek a due process hearing with regard to issues raised in the request for complaint investigation.[vi] Thus, despite the argument put forth by Lenape

[vi] A Notice of Pre-Proposal regarding N.J.A.C. 6A:14-9.2, issued in the New Jersey Register at 37 N.J.R. 4663 (December 19, 2005), contained a provision amending that provision so as to specifically permit either party to a complaint investigation to appeal the decision contained in the final report issued by OSEP. The appeal would be filed "pursuant to N.J.A.C. 6A:3." However, as pointed out by counsel for Lenape, the actual Rule Proposal published on June 5, 2006, 38 N.J.R. 2288, omits this appeal provision. Counsel represents that the DOE informed him that it chose to remove this provision due to the pendency of this global decision. Further, the pro se petitioner represents that John Worthington, a representative of OSEP, advised her that in pre-proposing the amendment, the Department did not intend to take any legal position on the jurisdictional question. Be that as it may, the Attorney General, as the legal representative of DOE and OSEP, has advocated their legal position on the jurisdictional issue in these matters. Since the published Rule Proposal does not include the amendment, I take no instruction or any inference from this history. Further, I express no opinion as to the validity of such an amendment in the context of the current federal and state regulations.

that the Commissioner's jurisdiction to consider an appeal of the OSEP determination exists from the language of N.J.A.C. 6A:14-9.1(h), there appears to be a conscious distinction between the two sections and no basis for considering the appeal right from a monitoring report as also incorporating a right to an appeal from a complaint investigation report. And given the time limits that govern the complaint investigation process, it may be that this factor influenced the decision to place the responsibility for carrying out this function on OSEP and to forgo any stated involvement of the Commissioner or the State Board in the federally-mandated process.

If the OSEP report is indeed the "final" SEA report, then any "review" by the Commissioner of that report must be either an "appeal" of the SEA final decision or a "reconsideration" of that final decision. If so, then insight into the question of whether such "reviews" are permitted may be gathered from a Memorandum issued on July 17, 2000 by the United States Department of Education, Office of Special Education and Rehabilitative Services. Addressed to "Chief State School Officers" from Kenneth R. Warlick, Director, Office of Special Education Programs, the subject of the memo is "Complaint Resolution Procedures under Part B of the Individuals with Disabilities Education Act (Part B)." Its stated purpose is to provide guidance on the State complaint procedures set forth at 34 C.F.R. §§ 300.660-300.662 of the final Part B regulations, published in the Federal Register on March 12, 1999. In a question and answer section of the Memorandum, Director Warlick addresses the question of whether a State complaint decision can be appealed. He answers,

> The regulations are silent as to whether a state complaint decision may be appealed. Part B neither prohibits nor requires the establishment of procedures to permit either party to request reconsideration of a State complaint decision.

Noting the requirement for a final SEA decision within 60 days, unless an extension is granted by the SEA due to exceptional circumstances, Mr. Warlick comments that in the absence of such an extension,

> "[I]f that decision requires corrective action(s) the implementation of such corrective actions cannot be delayed pending any procedures for reconsideration of the decision. A State may choose to establish procedures for reconsideration of complaint decisions that would result in a decision on the reconsideration within 60 days of the date on which the complaint was originally filed. Alternatively, a State may establish procedures for the reconsideration when the reconsideration process would not be completed until later than 60 days after the original filing of the complaint, but only if implementation of any corrective actions required in the SEA's final decision is not delayed pending the reconsideration process.

Mr. Warlick's comments are interesting, especially as the head of the federal office charged with responsibility for special education matters. He starts out to answer whether "appeals" are permitted and quickly turns to a discussion of whether "reconsiderations" are permissible. While the federal DOE clearly understands the regulations to put a premium on avoiding delay in the implementation of any corrective actions required by a SEA's final decision, it acknowledges that the States are free to implement a process for the "reconsideration" of a final SEA decision, so long as the procedures chosen assure that no delay in implementation occurs while such reconsideration proceeds. However, there is clearly a distinction in the law between an "appeal" and a "reconsideration."[vii] While the jurisdiction over appeals from final agency decisions or actions under New Jersey law lies strictly in the Appellate Division of Superior Court, R.2:2-3(a)2, (other than in due process cases), administrative agencies possess inherent power to reopen and reconsider adjudications. 37 New Jersey Practice §6.31, pp. 354-356 (LeFelt). Thus, if the OSEP decision is the SEA final decision, the federal law does not pose a bar to New Jersey allowing a

[vii] The term "appeal" has different meanings in administrative law. For instance, a civil servant who is disciplined can "appeal" the determination of the appointing authority to the Merit System Board. These "appeals" in actuality involve a de novo hearing, and the determination below is not entitled to any weight. Yet, if no request is made to the Merit System Board for such an "appeal," the decision below stands. Similarly, there are other matters in which the agency head of principal state agencies are asked to hear "appeals," generally of decisions made by lower tier officials within the agency who, in essence, issue interim determinations that may become "final" if not challenged within a time frame provided by statute or regulation. But there is no instance where any final decision of a State agency is subject to "appeal" within the Executive Branch. An "appeal" of a final decision is a matter for the Judiciary. R. 2:2-3(a)2.

"reconsideration" of that final decision. However, if the OSEP decision constitutes the final decision of the SEA, that is, the State Board/DOE, then any "appeal" of such decision would lie only with the Appellate Division, and certainly not with the Commissioner. Thus, DOE's invocation of the discretion implied under federal regulation to permit "reconsiderations" as a legal basis for providing parties "with a review process for complaint investigation decisions" only goes so far. If the "review" is an "appeal," such a "review" by the Commissioner, or for that matter, by the State Board, would violate the rules of appellate review. If the "review" is a "reconsideration," then what is the nature of the process to be utilized in such reconsideration? While the DOE suggests that the Commissioner can utilize the "existing appeal procedures" under N.J.A.C. 6A:3 to provide the "review," one may question whether the full process of contested case resolution is appropriate for "reconsiderations." Indeed, the Ninth Circuit Court of Appeals noted in Lucht v. Molalla River School District, 225 F.3d 1023, 1028 (9th Cir. 2000), a "Comment to CRP Regs.," published at 64 Fed. Reg. 12646 (1999), that the complaint resolution procedure was an alternative existing to "provide parents and school districts with mechanisms that allow them to resolve differences without resort to more costly and litigious resolution through due process." This comment is supported by the federal OSEP itself, in its July 17, 2000 Memorandum, where Director Warlick comments in the Introduction that, "The State complaint procedures, which are under the direct control of the SEA, have the potential for providing a less costly and more efficient mechanism for resolving disputes than the impartial due process hearing system." See also Beth V. v. Carroll, 87 F.3d 80, 87 (3rd Cir. 1996). Thus, if reconsiderations are to be permitted, many questions need to be answered. For instance, is reconsideration always available? Is it a matter of "right?" May the Commissioner decline to reconsider?[viii] Is the purpose of reconsideration the same as the purpose of appeal, and what standards govern the outcome of a reconsideration? Is reconsideration completely de novo or only de novo on the record made before OSEP? Are "reconsiderations" contested or uncontested cases? Is the contested case process appropriate for reconsiderations if invocation of that process will engender the "costly and litigious" process that both the Third and the Ninth Circuit

[viii] Clearly not if the refusal is arbitrary. Lefelt, supra.

and Federal OSEP envision was to be avoided by complaint investigations? Is discovery available for a reconsideration? Indeed and quite importantly, who reconsiders, the Commissioner, who did not make the decision under review in the first place, or the OSEP Director, who did? Generally, one would expect reconsideration to be by the official who actually made the decision to be reconsidered. The need for careful forethought and possible rule-making seems clear and merely converting these pending cases to reconsiderations may not be appropriate.

Despite the intervener's contention, Judge Debevoise's ruling in East Brunswick barring DOE employees from deciding due process cases is limited to that category of special education controversies and there is nothing in his decision or in the federal regulations which imposes such a ban on their participation in complaint investigation determinations. While one may legitimately question why resolution of complaint investigations that themselves can involve issues that are cognizable in due process, can nevertheless be determined by DOE employees, the federal regulations do not include any stated prohibition to that effect. Perhaps this is because the independent due process hearing is an available alternative for parents or boards who deem it a preferable forum in which to air their controversy. Further, even after the issuance of a complaint investigation report, where a dispute still exists due process is still a procedure available for a party desiring to continue to pursue many of the rights asserted under IDEA.

DOE properly points out that if the Commissioner does not have jurisdiction over "appeals," there may be issues of fact existing regarding OSEP's determinations, and the appellate forum is not an appropriate place for resolving these issues. That may well be so, but under the present arrangement chosen by the State to resolve complaint investigations within the allowable time limits, the fact that the OSEP determination is made without a full evidentiary hearing in which a record can be made and such factual disputes resolved is a by-product of the existing procedures. And again, if the intent of the complaint investigation is to be less costly and litigious than due process, is that purpose served by the use of fact-finding hearings, especially when the due process

procedures exist as an alternative for parents and school boards to pursue many, although not all, of the issues that may arise in complaint investigations? Perhaps the very nature of the complaint investigation, "less expensive and litigious," is purposely designed to be essentially a "paper review," with perhaps some supplementation by oral presentation (not necessarily in a hearing structure). The standards on appeal, and indeed for reconsideration, for such a process might be influenced by the rationale for the limited process contemplated, especially given the alternative available, in many instances, of a full due process proceeding.

It would be theoretically possible for the Commissioner and even the State Board to be directly involved in the determination of complaint investigations before the issuance of the final report.[ix] However, this would require their involvement to occur within the 60-day time limit (in the absence of exceptional circumstances). The OSEP report could be issued not as the final decision of the SEA, but as an interim step that requires submission to and approval by the Commissioner and perhaps the State Board. Admittedly, given the short time frame such a process would be difficult to operate and any hearings that might be needed to consider resolution of factual disputes within that time frame would be doubly difficult to conduct in time. I am not recommending that any particular procedures be adopted, only noting that the present format is not the only one permitted by the law. Of course, given the rules governing due process proceedings, the idea that the Commissioner and the State Board might not be involved in deciding matters relating to special education is certainly neither a new or a shocking concept. Here again, the requirements of Federal law involve twists in the normal process by which disputes are handled administratively under our State's Administrative Procedure Act.

[ix] As should be quite clear, there is no fundamental problem with the Commissioner having jurisdiction over the original complaint investigation. Besides the fact that OSEP is a division of the very DOE headed by the Commissioner, the regulations could place the burden of issuing the final report on the Commissioner within the 60-day time limit. However, as currently drawn, that burden falls upon OSEP.

While each of the other cases under consideration here involves an issue of a school district seeking to overturn an OSEP determination that the school was noncompliant with its legal responsibilities under special education law, in R.K., acting on behalf of her child, S.K-B. and herself, v. DOE, OSEP, EDU 2595-05, the parent originally requested a complaint investigation of a school district's conduct and OSEP issued a report that in part found noncompliance by the district. However, the parent contends that OSEP has continually failed to investigate two remaining unresolved issues regarding her child's legal right to compensatory education hours for a period in 2001 and also denied her request to investigate issues involving the provision of FAPE in 2003-2004. The pre-hearing order issued by Judge Dubin states that she seeks an order against OSEP to compel it to conduct an investigation regarding the district's provision of compensatory home instruction and the procedures it utilized to provide S.K.-B. with a FAPE. Clearly, to the extent that OSEP issued a report on its investigation of the school district's conduct, Ms. K. is unsatisfied with the outcome as reported therein, either to the extent that OSEP found compliance where she disputes compliance occurred or where it made no finding on issues on which she sought findings. Her attempt to have the Commissioner review what OSEP found to be in compliance contrary to her position is no different from the attempt by the districts in the companion matters to have the Commissioner review what they believe were improper findings against them by OSEP. To the extent the petitioner seeks to compel an investigation that she claims never occurred, the attempt sounds like a Judicial Branch petition in lieu of prerogative writ seeking what was formerly a writ of mandamus to force a public official to perform required duties of the office. But splitting up her dissatisfactions about the report seems to me to make little sense. To the extent that the report represents OSEP's response to the investigation it was asked to undertake, any request to the Commissioner to review it for its alleged faults is either an appeal or a request for reconsideration. Thus, the same considerations set forth earlier in this opinion apply.

For the reasons expressed, I **CONCLUDE** that the Commissioner of Education has no jurisdiction to consider an appeal from the final decision of the Office of Special

Education Programs issued in response to a complaint investigation conducted under N.J.A.C. 6A:14-9.2. Therefore, the appeals presently pending at the OAL must be **DISMISSED**.

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

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

Within thirteen (13) days from the date on which this recommended decision was mailed to the parties, any party may file written exceptions with the **COMMISSIONER OF THE DEPARTMENT OF EDUCATION, 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 29, 2006
DATE

JEFF S. MASIN, ALJ

ns

E-mail Receipt of Initial Decision Confirmed by the Department of Education on:

6/27/06
DATE

Mailed to Parties:
DIRECTOR AND CHIEF ADMINISTRATIVE LAW JUDGE

JUN 29 2006
DATE

OFFICE OF ADMINISTRATIVE LAW

356-06

OAL DKT. NO. EDU 01166-06
AGENCY DKT. NO. 367-12/05

J.C., ~~on~~ behalf of minor children, J.D. and K.R.,	:	
PETITIONER,	:	COMMISSIONER OF EDUCATION
V.	:	DECISION
BOARD OF EDUCATION OF THE BOROUGH OF ALPINE, BERGEN COUNTY,	:	
RESPONDENT.	:	

The record of this matter, the parties' proposed Settlement Agreement, and the Initial Decision issued by the Office of Administrative Law (OAL) recommending approval of the settlement pursuant to *N.J.A.C.* 1:1-19.1, have been reviewed.

Upon review, the Commissioner cannot agree with approval of the parties' settlement at this juncture. The Agreement has been signed by the Board President and Board Secretary/Business Administrator, not by the Board attorney, who is the Board's duly authorized representative in litigation; neither is it supported, in the alternative, by a copy of the Board resolution approving the settlement and designating the President and/or Secretary to sign the Agreement on behalf of the Board. Under these circumstances, the proposed Agreement is not in accord with *N.J.A.C.* 6A:3-1.13(d), and the Commissioner cannot accept it as the final decision in this matter.

Additionally, the Commissioner observes that the settlement's central term (Term 1A-B) appears to have been effectuated prior to both OAL and final agency approval, consistent with the agreement on its face but contrary to *N.J.A.C.* 1:1-19.1.

Indeed, the settlement appears to have been effectuated even prior to *Board* approval – having been executed by petitioners on June 21, 2006 and by Board officials on an unidentified date thereafter, and calling for payment by June 30, 2006 – whereas Board counsel represented to the ALJ by letter dated August 7, 2006 that the Board was "scheduled to sign the [agreement] at its next regularly scheduled Board meeting on August 17, 2006." While not rejecting the settlement on this basis – assuming it was, in fact, approved by the Board – the Commissioner is compelled to caution the parties herein – and all parties to controverted matters – that litigants act at their peril in proposing and acting upon settlement terms requiring effectuation prior to receipt of necessary approvals.

Accordingly, the Commissioner hereby remands this matter to the OAL for such further proceedings as are necessary to bring the Settlement Agreement into compliance with *N.J.A.C.* 6A:3-1.13(d).

IT IS SO ORDERED.*

Lucille E. Davy

ACTING COMMISSIONER OF EDUCATION

Date of Decision: 10/17/06

Date of Mailing: 10/17/06

* This decision may be appealed to the State Board of Education pursuant to *N.J.S.A.* 18A:6-27 *et seq.* and *N.J.A.C.* 6A:4-1.1 *et seq.*

State of New Jersey
OFFICE OF ADMINISTRATIVE LAW

INITIAL DECISION
SETTLEMENT
OAL DKT. NO. EDU 01166-06
AGENCY DKT. NO. 267-12/05

J.C. O/B/O MINOR CHILDREN J.D. AND K.R.,

Petitioners,
v.

ALPINE BOARD OF EDUCATION,
Respondent.

Ronald Schartz, Esq. for petitioners

Vittorio S. LaPira, Esq., for respondent
(Fogarty & Hara, attorneys)

Record Closed: September 13, 2006 Decided: September 18, 2006

BEFORE **SANDRA ANN ROBINSON,** ALJ:

This matter was transmitted to the Office of Administrative Law on January 10, 2006, for determination as a contested case.

Prior to hearing, the parties agreed to an amicable resolution of the matter and submitted the attached Settlement Agreement. Having reviewed the record and the settlement terms, I **FIND:**

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

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

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

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

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

September 18, 2006
DATE

Sandra Ann Robinson
SANDRA ANN ROBINSON, ALJ

Receipt Acknowledged:

9-22-06
DATE

DEPARTMENT OF EDUCATION

Mailed to Parties:

SEP 26 2006
DATE

DIRECTOR AND CHIEF ADMINISTRATIVE LAW JUDGE
OFFICE OF ADMINISTRATIVE LAW

cml

OFFICE OF ADMINISTRATIVE LAW
33 WASHINGTON STREET
NEWARK, NJ 07102
SEP 18 2006

FOGARTY & HARA, ESQS.
16-00 Route 208 South
Fair Lawn, NJ 07410
(201) 791-3340
Attorneys for Respondent,
Alpine Board of Education
Our File No. 112

J.C. o/b/o minor children J.D. and K.R., Petitioners, v. ALPINE BOARD OF EDUCATION, Respondent.	BEFORE THE COMMISSIONER OF EDUCATION OF THE STATE OF NEW JERSEY AGENCY REF. NO. 267-12/05 OAL DOCKET NO. EDUOS-01166-2006N **SETTLEMENT AGREEMENT**

THIS AGREEMENT is made between: (1) the Alpine Board of Education (hereinafter referred to as the "Board") with offices located at 500 Hillside Ave, Alpine, New Jersey; (2) J.C. (hereinafter referred to as "Petitioner") whose address is currently 379 Anderson Avenue, Alpine, New Jersey; and (3) A.D. and S.R. (hereinafter referred to as the "Parents"), whose address is currently 379 Anderson Avenue, Alpine, New Jersey.

WHEREAS, J.D. and K.R. are pupils who were residing with J.C., and are now residing with their parents S.R. and A.D., in the Alpine School District (hereinafter referred to as the "District"); and

WHEREAS, the J.C. sought to enroll J.D. and K.R. as pupils in the District for a tuition-free public education based upon his claim that J.D. and K.R. were "affidavit students" within the meaning of N.J.S.A. 18A:38-1; and

WHEREAS, the Board denied the enrollment of J.D. and K.R., finding that they did not meet the standards to qualify as "affidavit students" within the meaning of N.J.S.A. 18A:38-1; and

WHEREAS, Petitioner filed a verified petition of appeal seeking a declaration that J.D. and K.R. were eligible for tuition-free attendance in the District; and

WHEREAS, the Board enrolled J.D. and K.R. in the District and provided them with a tuition-free public education; and

WHEREAS, the Board counterclaimed against Petitioner for the costs of tuition for the period of J.D. and K.R.'s ineligible attendance in the District; and

WHEREAS, the Parents/Guardians and the Board would like to reach an amicable resolution on all issues to avoid the time and expense associated with the litigation of this matter.

NOW, THEREFORE, the Parents and Board herein agree to the following terms, covenants and promises:

1. SETTLEMENT TERMS AND EXECUTION OF DOCUMENTS.

   A. Petitioner and the Parents agree to pay the Board three thousand five hundred dollars ($3,500.00) as a compromise of this disputed claim. Said payment shall be made no later than June 30, 2006.

   B. The parties agree that if the Petitioner and/or the Parents fail to make such payment by June 30, 2006, the Board shall have the right to initiate litigation to recover the outstanding amount against the Petitioner and/or the Parents jointly and severally, and shall be entitled to recover reasonable attorneys' fees and costs of suit incurred in the prosecution of such litigation.

   C. Upon the signatures of all parties and approval by the Board, this Agreement shall be submitted to the Office of Administrative law to be incorporated into a final order, approved by an Administrative Law Judge, and shall be governed by the laws of the State of New Jersey. The

parties agree to refrain from filing any proceeding regarding the issues that are the subject of the instant verified petition of appeal. However, both parties expressly reserve the right to bring a claim to enforce their rights under the terms and conditions of this Agreement.

2. NO RELIANCE. The parties hereto represent and acknowledge that, in executing this Settlement Agreement, they have not relied upon any representation or statement, written or oral, made by any of the parties' agents, attorneys or representatives with regard to the subject matter, basis or effect of this Settlement Agreement or otherwise.

3. PARTIAL INVALIDITY. Should any part, term or provision of this Settlement Agreement be declared or determined by a Court of competent jurisdiction, applying New Jersey law, to be illegal, invalid or unenforceable, the legality, validity or enforceability, of the remaining parts, terms or provisions shall not be affected thereby.

4. REPRESENTATION BY COUNSEL. Each party is represented by competent counsel of its choosing and that they have signed this Settlement Agreement as their own voluntary act and deed, and that they fully understand the duties and obligations enumerated herein.

5. NO ADMISSION. This Settlement Agreement and compliance with this Settlement Agreement shall not be construed as an admission by any party of any liability whatsoever with respect to any matter.

6. GOVERNING LAW. This Settlement Agreement and all provisions hereof shall be governed by and construed under the law of the state of New Jersey without reference to conflicts of law principles.

7. MODIFICATION. No amendment, modification or attempt to supersede or cancel any of the terms, covenants or conditions hereof shall be effective unless such amendment, modification or direction to supersede or cancel such term or covenant is in writing and executed by all of the parties hereto or, in the case of a waiver, by or on behalf of the party waiving compliance. The failure of any party at any time or times to require performance of any provision hereof shall in no way affect the right at a later time to enforce the same. No waiver by either party of the breach of any term or covenant contained in this Settlement Agreement, in any one or more instances, shall be deemed to be, or construed as, a further or continuing waiver of any such breach or a waiver of any breach of any other term or covenant.

8. SUCCESSORS. All of the terms, agreements, covenants and conditions of this Settlement Agreement shall be binding upon, and inure to the benefit of and be enforceable by, the parties hereto and their respective successors, heirs and other legal representatives.

9. ENTIRE AGREEMENT. This Settlement Agreement and the documents referred to herein set forth the entire agreement and the understanding of the parties in respect of the transactions contemplated hereby and thereby and supersede all prior agreements, arrangements and understandings relating to the subject matter hereof. No representation, promise, inducement or statement of intention has been made by the parties which is not embodied in this Settlement Agreement or in the documents referred to herein, and none of the parties shall be bound by or liable for any alleged representation, promise, inducement or statement of intention not so set forth.

10. COUNTERPARTS. This Settlement Agreement may be signed in counterparts, which, when taken together, shall constitute but a single document when executed by all parties. This Settlement Agreement shall not be effective until such time as it has been duly authorized and executed by all parties.

11. FURTHER ASSURANCES. The parties shall execute any document(s) required in the future to manifest the intent and purpose of this Settlement Agreement.

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

WITNESS:

ALPINE BOARD OF EDUCATION

By: _____
Mrs. Joyce Sonpal
Board President

Dated: 6/21/06

_____
Ms. Donna Alonso
Board Secretary/
School Business Administrator

Dated: 6/21/06

WITNESS:

By: _____
Mr. John Chou

Dated: 6/21/06

Dated: 6/21/06

WITNESS:

By: _____
Mr. Anthony Ding

Dated: 6/21/06

Dated: 6/21/06

WITNESS:

By: _____
Ms. Seishu Ran

Dated:

Dated:

** TOTAL PAGE.06 **

10. COUNTERPARTS. This Settlement Agreement may be signed in counterparts, which, when taken together, shall constitute but a single document when executed by all parties. This Settlement Agreement shall not be effective until such time as it has been duly authorized and executed by all parties.

11. FURTHER ASSURANCES. The parties shall execute any document(s) required in the future to manifest the intent and purpose of this Settlement Agreement.

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

WITNESS:

Ms. Donna Alonso
Board Secretary/
School Business Administrator

Dated: 6/21/06

ALPINE BOARD OF EDUCATION

By: Elizabeth Herrics
~~Mrs. Joyce Soupel~~ Elizabeth Herrics
Board President

Dated: 6/21/06

WITNESS:

By:
Mr. John Chou

Dated: 6/21/06

Dated: 6/21/06

WITNESS:

By:
Mr. Anthony Ding

Dated: 6/21/06

Dated: 6/21/06

WITNESS:

By:
Ms. Seishu Ran

Dated:

Dated:

** TOTAL PAGE.06 **

** TOTAL PAGE.09 **

355-05

355-06

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

PETITIONER,

V.

NEW JERSEY STATE DEPARTMENT OF EDUCATION, OFFICE OF SPECIAL EDUCATION PROGRAMS,

RESPONDENT,

AND

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

PETITIONER,

V.

NEW JERSEY STATE DEPARTMENT OF EDUCATION, OFFICE OF SPECIAL EDUCATION PROGRAMS,

RESPONDENT,

AND

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

PETITIONER,

V.

NEW JERSEY STATE DEPARTMENT OF EDUCATION, OFFICE OF SPECIAL EDUCATION PROGRAMS,

RESPONDENT,

AND

COMMISSIONER OF EDUCATION

DECISION

BOARD OF EDUCATION OF THE WEST WINDSOR-PLAINSBORO REGIONAL SCHOOL DISTRICT, MERCER COUNTY,

PETITIONER,

V.

NEW JERSEY STATE DEPARTMENT OF EDUCATION, OFFICE OF SPECIAL EDUCATION PROGRAMS,

RESPONDENT.

AND

R.K., ON BEHALF OF MINOR CHILD, S.K.-B., AND R.K. ON HER OWN BEHALF,

PETITIONER,

V.

NEW JERSEY STATE DEPARTMENT OF EDUCATION, OFFICE OF SPECIAL EDUCATION PROGRAMS,

RESPONDENT.

SYNOPSIS

In prior decisions, the Commissioner had remanded appeals of Office of Special Education Programs (OSEP) complaint investigation decisions to the Office of Administrative Law (OAL), requesting consideration – as a threshold matter – of whether the Commissioner of Education had jurisdiction over such appeals. In addition to the remanded appeals, additional appeals of this type were then pending at the OAL.

Although the pending cases were not consolidated, for purposes of addressing their common jurisdictional question, the OAL issued a "global" Initial Decision. The ALJ concluded that the Commissioner did not have jurisdiction over OSEP complaint investigation appeals, finding that OSEP decisions in these matters were final agency decisions and that the pending petitions must therefore be dismissed.

The Commissioner adopted the recommended decision of the ALJ with amplification. The Commissioner held that the OSEP decisions were final agency decisions and opined that, as such, they were appealable to the Appellate Division of the Superior Court. The Commissioner added that dismissal of the pending appeals was without prejudice to the petitioners' ability to request reconsideration by the OSEP Director within 15 days of the filing date of the Commissioner's decision, consistent with newly adopted regulations. In the case of R.K. – who as a parent has additional rights under the IDEA – dismissal was further without prejudice to her ability to seek a due process hearing, with any request deemed filed as of the filing date of her petition to the Commissioner.

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.

357-06

#357-06

IN THE MATTER OF THE TENURE	:	
HEARING OF DONNA MOSLEY,	:	COMMISSIONER OF EDUCATION
SCHOOL DISTRICT OF THE	:	DECISION
CITY OF TRENTON, MERCER COUNTY.	:	

SYNOPSIS

The Board certified tenure charges against Donna Mosley, a tenured senior secretary in the Trenton School District, alleging conduct unbecoming an employee in violation of a prior "Last Chance" Settlement Agreement approved by the Commissioner in January 2006. Respondent was directed via both certified and regular mail to file an Answer to the tenure charges against her, but failed to do so. Because no reply was received in response to the Board's charges, each count of the charges against respondent is deemed to be admitted. *N.J.A.C.* 6A:5-3(c).

The Commissioner reviewed the tenure charges certified against the respondent, and the statement of evidence in support of those charges. Deeming such charges to be admitted, and noting that respondent has chosen not to deny allegations against her, the Commissioner finds that the Board has demonstrated that respondent is guilty of unbecoming conduct, warranting dismissal from her tenured position. Summary judgment is granted to the District, and Donna Mosley is dismissed from her tenured secretarial position as of the date of 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.

October 17, 2006

AGENCY DKT NO. 295-8/06

IN THE MATTER OF THE TENURE	:	
HEARING OF DONNA MOSLEY,	:	COMMISSIONER OF EDUCATION
SCHOOL DISTRICT OF THE	:	DECISION
CITY OF TRENTON, MERCER COUNTY.	:	

For the Board, Thomas W. Sumners, Jr., Esq. (Law Offices Sumners George)

Donna Mosley, *Pro Se*

This matter was opened before the Commissioner of Education on August 31, 2006, through the certification of tenure charges against Donna Mosley, a senior secretary with the Board of Education of the City of Trenton, alleging conduct unbecoming an employee in violation of a prior "Last Chance" Settlement Agreement approved by the Commissioner of Education.

By notice dated August 31, 2006, the Commissioner directed respondent, via both certified and regular mail, the certified copy having been returned as unclaimed, to file an Answer to the tenure charges against her. The communication from the Bureau of Controversies and Disputes, sent regular mail and presumed received, clearly provided respondent notice that, pursuant to *N.J.A.C.* 6A:3-5.3 and 6A:3-5.4, an individual against whom tenure charges are certified *shall have 15 days from the date such charges are filed with the Commissioner* to file a written response to the charges, and that failure to answer within the prescribed period, where no extension has been applied for and granted, will result in the charges being deemed admitted by the charged employee. Because no reply has been received from respondent, or any attorney on her behalf, in

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

The Commissioner has reviewed the tenure charges certified against respondent by the Board and the statement of evidence in support of those charges, specifically:

> 1. During the 2005-2006 school year, Petitioner and Respondent entered into a settlement agreement ("Agreement") regarding the action captioned **"In the Matter of the Tenure Hearing of Donna Mosley, School District of the City of Trenton, Mercer County,"** OAL Docket No. EDU 6093-04; Agency Docket No. 228-6/04, which was approved by the Commissioner of Education on January 11, 2006.
>
> 2. The Tenure Charges filed by the Board in the aforementioned matter were withdrawn by the Board pursuant to the Agreement between Petitioner and Respondent.
>
> 3. The Agreement provided that Respondent agree to comply with a Health Improvement Program ("HIP"). The Respondent also agreed that to retain her position she must be able to perform her duties, "including but not limited to maintaining sobriety and having a satisfactory record of attendance." The Board agreed to reinstate Respondent upon the condition that she successfully comply with a [HIP].
>
> 4. Pursuant to the Agreement, Respondent agreed that she will acquiesce to random blood testing upon evidence or suspicion of any return to substance abuse, and acknowledged that her employment will be terminated if the result is positive or if she failed to take a test.
>
> 5. Following her return to work on November 7, 2005, Respondent violated the Agreement by not maintaining her sobriety and failing to have a satisfactory record of attendance.
>
> 6. Since Respondent's return to work, she has missed a total of 105 days, in direct violation of maintaining satisfactory attendance as per the Agreement.
>
> 7. Respondent was tardy for work fourteen (14) times from November 7, 2005 through January 13, 2006 in direct violation of her maintaining satisfactory attendance as per the Agreement.

8. On January 20, 2006, Respondent failed to notify the school and or the attendance office of her absence. This is considered not only a violation of the Trenton Board of Education Policy 4251, but also a direct violation of the Commissioner of Education approved Settlement Agreement's "satisfactory record of attendance" provision.

9. Respondent has not returned to work since February 15, 2006, in direct violation of maintaining satisfactory attendance as per the Agreement.

10. On June 8, 2006, (Carolyn Gibson, Assistant Superintendent Human Resources, Trenton Board of Education) held a meeting with Respondent and her union representative, ***, discussing Respondent's job abandonment and to schedule a test for possible substance abuse. Respondent then indicated that the test was not necessary and further admitted, with her union representative present, that she was using drugs again, in direct violation of the Commissioner of Education approved Settlement Agreement's "maintaining sobriety" provision. (Statement of Tenure Charges certified to the Commissioner August 31, 2006, Carolyn Gibson, Assistant Superintendent Human Resources, Trenton Board of Education)

Deeming the within charges to be admitted, and noting that respondent has chosen not to deny the allegations against her, the Commissioner finds that the Board has demonstrated that respondent is guilty of unbecoming conduct, warranting dismissal from her tenured position.

IT IS ORDERED THIS _____day of October 2006 that summary decision shall be granted to the district, and Donna Mosley shall be dismissed from her tenured position as a senior secretary in the Board's employ as of the date of this order.*

Lucille E Davy
ACTING COMMISSIONER OF EDUCATION

Date of Decision: 10/17/06
Date of Mailing: 10/17/06

*This decision may be appealed to the State Board of Education pursuant to *N.J.S.A.* 6-27 *et seq.* and *N.J.A.C.* 6A:4-1.1 *et seq.*

358-06

#358-06SEC

AGENCY DKT. NO. 355-9/06

IN THE MATTER OF JOHN CHILDRESS,	:	
BOARD OF EDUCATION OF THE	:	COMMISSIONER OF EDUCATION
TOWNSHIP OF EAST GREENWICH,	:	DECISION
GLOUCESTER COUNTY.	:	
	:	

The record of this matter and the September 27, 2006 decision of the School Ethics Commission, forwarded to the Commissioner pursuant to *N.J.S.A.* 18A:12-29 solely for review of the Commission's recommended penalty, have been reviewed. No comments were filed by the respondent, notwithstanding notice from the Commission that such comments could be filed within thirteen (13) days of the mailing date of the Commission's decision.

Upon review, the Commissioner concurs with the penalty recommended by the Commission and additionally admonishes the respondent for failing to attend the required training, in that such disregard of the law has resulted in a waste of administrative and adjudicative time at both State and local levels.

Accordingly, the above-named respondent is hereby suspended as a school official found to have violated the School Ethics Act, such suspension to remain in effect until respondent completes the required New Jersey School Boards Association training for new board members on October 24, 2006; provided, however, that if such training is not completed, the above-named respondent shall be summarily removed from office.

IT IS SO ORDERED.*

Lucille Davy

ACTING COMMISSIONER OF EDUCATION

Date of Decision: 10/17/06

Date of Mailing: 10/17/06

* This decision, as the Commissioner's final determination regarding penalty in the instant matter, may be appealed to the State Board of Education pursuant to *N.J.S.A.* 18A:6-27 *et seq.* and *N.J.A.C.* 6A:4-1.1 *et seq.* Pursuant to *N.J.A.C.* 6A:4-1.4(a), Commissioner decisions are deemed filed three days after the date of mailing to the parties.

RECEIVED BY
CONTROVERSIES
& DISPUTES
2006 SEP 29 PM 2:32

SCHOOL ETHICS COMMISSION	:	**BEFORE THE SCHOOL ETHICS COMMISSION**
v.	:	
	:	**DOCKET NO. T05-06**
JOHN CHILDRESS	:	
East Greenwich Board of Education	:	**DECISION FOR FAILURE**
Gloucester County	:	**TO ATTEND TRAINING**
	:	

WHEREAS, the School Ethics Act, N.J.S.A. 18A:12-21 et. seq. was enacted by the New Jersey State Legislature to ensure and preserve public confidence in school board members and school administrators and to provide specific ethical standards to guide their conduct; and

WHEREAS, N.J.S.A. 18A:12-33 requires each newly elected or appointed board member to complete, during the first year of the member's first term, a training program offered by the New Jersey School Boards Association (NJSBA) regarding the skills and knowledge necessary to serve as a school board member or charter school trustee; and

WHEREAS, John Childress was newly elected or appointed in May 2005 to a local school board or charter school board and therefore, had until May 2006, to complete the training requirement; and

WHEREAS, the NJSBA mails correspondence to all new board members who have failed to register for or attend an orientation and did mail such correspondence to this board member on October 5, 2005, January 17, 2006 and February 6, 2006; and

WHEREAS, the NJSBA conducted eight training sessions between April 2005 and March 2006 at varying locations and continuously published the dates and times of the sessions in its publication, *School Board Notes*; and

WHEREAS, the last training session to fulfill the requirement was held on July 14-16, 2006; and

WHEREAS, the Commission issued an Order on August 4, 2006, directing John Childress to Show Cause why he had not attended training up until that time; and

WHEREAS, Mr. Childress did not respond to the Order; and

WHEREAS, the Commission notified Mr. Childress that the Commission would discuss this matter at its September 26, 2006 meeting; and

WHEREAS, Mr. Childress has failed to attend the required training program for the one year allowed; and

WHEREAS, the Commission finds that his failure to attend board member training from April 2005 to March 2006 constitutes a clear violation of N.J.S.A. 18A:12-33; and

WHEREAS, the Commission finds that the appropriate penalty for the violation is suspension from the board until he attends the NJSBA's October 24, 2006 training session and removal if he fails to attend the October 24, 2006 session;

NOW THEREFORE BE IT RESOLVED that the School Ethics Commission finds that John Childress violated the N.J.S.A. 18A:12-33 of the School Ethics Act and recommends that the Commissioner of Education impose a penalty of suspension from the board until he attends the October 24, 2006 training session and removal if he fails to attend the October 24, 2006 training session.

Paul C. Garbarini/MET
Paul C. Garbarini, Chairman
School Ethics Commission

Dated: September 27, 2006

I certify that the within Resolution
was duly adopted by the School Ethics
Commission at its Public Meeting
on September 26, 2006.

Lisa James-Beavers/MET
Lisa James-Beavers
Executive Director

This matter shall be transmitted to the Commissioner of Education for action on the Commission's recommendation for sanction pursuant to N.J.S.A. 18A:12-29. Within thirteen (13) days from the date on which the Commission's decision was mailed to the parties, any party may file written comments on the recommended sanction with the Commissioner of Education, c/o Bureau of Controversies and Disputes, 100 Riverview Plaza, CN 500, Trenton, NJ 08625, marked "Attention: Comments on Ethics Commission Sanction." A copy of any comments filed must be sent to the School Ethics Commission and all other parties.

PCG/LJB/MET/training/decisions

7004 0750 0002 6439 3651

U.S. Postal Service™
CERTIFIED MAIL™ RECEIPT
(Domestic Mail Only; No Insurance Coverage Provided)

For delivery information visit our website at www.usps.com®

OFFICIAL USE

Postage	$
Certified Fee	
Return Reciept Fee (Endorsement Required)	
Restricted Delivery Fee (Endorsement Required)	
Total Postage & Fees	$

TAS

Postmark Here

Sent To John Childress

Street, Apt. No.; or PO Box No.

City, State, ZIP+4

PS Form 3800, June 2002 See Reverse for Instructions

361-06SEC

361-06

AGENCY DKT. NO. 354-9/06

IN THE MATTER OF ILEANA CABALLERO,	:	
BOARD OF EDUCATION OF THE	:	COMMISSIONER OF EDUCATION
TOWN OF GUTTENBERG,	:	DECISION
HUDSON COUNTY.	:	

The record of this matter and the decision of the School Ethics Commission, forwarded to the Commissioner pursuant to N.J.S.A. 18A:12-29 solely for review of the Commission's recommended penalty, have been reviewed. No comments were filed by the respondent.

Upon review, in light of respondent's resignation from the Board, the Commissioner concurs with the penalty of censure recommended by the Commission and additionally admonishes the respondent for failing to attend the required training, in that such disregard of the law has resulted in a waste of administrative and adjudicative time at both State and local levels.

Accordingly, the above-named respondent is hereby censured as a school official found to have violated the School Ethics Act.

IT IS SO ORDERED. *

Lucille E Davy
ACTING COMMISSIONER OF EDUCATION

Date of Decision: 10/18/06
Date of Mailing: 10/18/06

* This decision, as the Commissioner's final determination regarding penalty in the instant matter, may be appealed to the State Board of Education pursuant to *N.J.S.A.* 18A:6-27 *et seq.* and *N.J.A.C.* 6A:4-1.1 *et seq.* Pursuant to *N.J.A.C.* 6A:4-1.4(a), Commissioner decisions are deemed filed three days after the date of mailing to the parties.

RECEIVED BY
CONTROVERSIES
& DISPUTES

2006 SEP 29 PM 2:33

State of New Jersey

DEPARTMENT OF EDUCATION
PO Box 500
TRENTON, NJ 08625-0500

RICHARD J. CODEY
Acting Governor

LUCILLE E. DAVY
Acting Commissioner

September 28, 2006

Ms. Ileana Caballero
6900 Broadway, Apt. 10C
Guttenberg, NJ 07093

Subject: Order to Show Cause for Failure to Attend Training
School Ethics Commission Docket No. T06-06

Dear Ms. Caballero:

On August 4, 2006, the School Ethics Commission advised you that it had issued an Order for you to show cause why you failed to comply with the requirement that you attend new board member training within the first year of your first term on the board, as set forth in N.J.S.A. 18A:12-33 of the School Ethics Act.

Please be advised that at its meeting on September 26, 2006, the School Ethics Commission reviewed all of the evidence before it including a certification from Mark Bonjavanni, Senior Consultant, Inservice for the New Jersey School Boards Association. Based on the evidence, the Commission found that you did not attend the June 2-4, 2006 training session. The Commission voted to recommend to the Commissioner of Education that you be censured since you have resigned from the board. The Commission further advises you that if the Guttenberg Board of Education (Board) paid for your attendance at the June 2-4, 2006, training session, then you should reimburse the Board since you failed to attend the training.

Sincerely,

Lisa James-Beavers/MET

Lisa James-Beavers, Executive Director
School Ethics Commission

LJB/MET/training/correspondence/06 Caballero3
c: Kathy Duncan
County Superintendent
Walter Meyer
Karen Huebsch

RECEIVED BY
CONTROVERSIES
& DISPUTES
2006 SEP 29 PM 2:33

SCHOOL ETHICS COMMISSION	:	**BEFORE THE SCHOOL ETHICS COMMISSION**
v.	:	
	:	**DOCKET NO. T06-06**
ILEANA CABALLERO	:	
Guttenberg Board of Education	:	**DECISION FOR FAILURE**
Hudson County	:	**TO ATTEND TRAINING**
	:	

WHEREAS, the School Ethics Act, N.J.S.A. 18A:12-21 et. seq. was enacted by the New Jersey State Legislature to ensure and preserve public confidence in school board members and school administrators and to provide specific ethical standards to guide their conduct; and

WHEREAS, N.J.S.A. 18A:12-33 requires each newly elected or appointed board member to complete, during the first year of the member's first term, a training program offered by the New Jersey School Boards Association (NJSBA) regarding the skills and knowledge necessary to serve as a school board member or charter school trustee; and

WHEREAS, Ileana Caballero was newly elected or appointed in May 2005 to a local school board or charter school board and therefore, had until May 2006, to complete the training requirement; and

WHEREAS, the NJSBA mails correspondence to all new board members who have failed to register for or attend an orientation and did mail such correspondence to this board member on October 5, 2005, January 17, 2006 and February 6, 2006; and

WHEREAS, the NJSBA conducted eight training sessions between April 2005 and March 2006 at varying locations and continuously published the dates and times of the sessions in its publication, *School Board Notes*; and

WHEREAS, the last training session to fulfill the requirement was held on July 14-16, 2006; and

WHEREAS, the Commission issued an Order on August 4, 2006, directing Ileama Caballero to Show Cause why she had not attended training up until that time; and

WHEREAS, Ms. Caballero filed a response to the Order wherein she certified that she did attend the June 2-4, 2006 training session; and

WHEREAS, Mark Bonjavanni, Senior Consultant, Inservice for NJSBA certified that Ms. Caballero was assigned to small group #8 and on the first night of the training session, the group leader told Mr. Bonjavanni that Ms. Caballero's book and name tent were in his small group room, but that she never appeared; and

WHEREAS, Mr. Bonjavanni further certified that on Saturday morning, June 3, 2006, the group leader reported to him that Ms. Caballero's binder was gone and she did not appear for the session; and

WHEREAS, Mr. Bonjavanni further certified that he then called Ms. Caballero's room and left a message on the room answering machine asking Ms. Caballero to contact him after the large group session; and

WHEREAS, Mr. Bonjavanni further certified that Ms. Caballero did not contact him; and

WHEREAS, the attendance roster for the June 2-4, 2006 training session shows that Ms. Caballero did not attend any of the small group sessions; and

WHEREAS, the Commission notified Ms. Caballero that the Commission would discuss this matter at its September 26, 2006 meeting and requested her to attend; and

WHEREAS, Ms. Caballero submitted her resignation as a member of the Guttenberg Board of Education effective September 19, 2006; and

WHEREAS, the Commission finds that Ms. Caballero has failed to attend the required training program for the one year allowed; and

WHEREAS, the Commission finds that her failure to attend board member training from April 2005 to March 2006 constitutes a clear violation of N.J.S.A. 18A:12-33; and

WHEREAS, the Commission finds that the appropriate penalty for the violation is censure since Ms. Caballero is no longer a member of the Guttenberg Board of Education;

NOW THEREFORE BE IT RESOLVED that the School Ethics Commission finds that Ileana Caballero violated the N.J.S.A. 18A:12-33 of the School Ethics Act and recommends that the Commissioner of Education impose a penalty of censure.

Paul C. Garbarini /MET
Paul C. Garbarini, Chairman
School Ethics Commission

Dated: September 27, 2006

I certify that the within Resolution
was duly adopted by the School Ethics
Commission at its Public Meeting
on September 26, 2006.

Lisa James-Beavers /MET
Lisa James-Beavers
Executive Director

This matter shall be transmitted to the Commissioner of Education for action on the Commission's recommendation for sanction pursuant to N.J.S.A. 18A:12-29. Within thirteen (13) days from the date on which the Commission's decision was mailed to the parties, any party may file written comments on the recommended sanction with the Commissioner of Education, c/o Bureau of Controversies and Disputes, 100 Riverview Plaza, CN 500, Trenton, NJ 08625, marked "Attention: Comments on Ethics Commission Sanction." A copy of any comments filed must be sent to the School Ethics Commission and all other parties.

PCG/LJB/MET/training/decisions

7004 0750 0002 6439 3637

U.S. Postal Service™
CERTIFIED MAIL™ RECEIPT
(Domestic Mail Only; No Insurance Coverage Provided)

For delivery information visit our website at www.usps.com®

OFFICIAL USE

Postage	$
Certified Fee	
Return Reciept Fee (Endorsement Required)	
Restricted Delivery Fee (Endorsement Required)	
Total Postage & Fees	$

TDC

Postmark Here

Sent To: Ileana Caballero
Street, Apt. No.; or PO Box No.: 6900 Broadway Apt 10C
City, State, ZIP+4: Guttenberg NJ 07093

PS Form 3800, June 2002 — See Reverse for Instructions

362-06

IN THE MATTER OF THE TENURE	:	
HEARING OF ADELPHIA POSTON,	:	COMMISSIONER OF EDUCATION
SCHOOL DISTRICT OF THE CITY OF	:	DECISION
ORANGE TOWNSHIP, ESSEX COUNTY.	:	

SYNOPSIS

Petitioning school district certified multiple tenure charges of conduct unbecoming and insubordination against respondent – a tenured middle school science teacher – for actions which included, *inter alia*: a physical altercation with another teaching staff member; use of expletives in the classroom and during interactions with other staff at the school; and a physical altercation with a student. A number of tenure charges originally certified were subsequently withdrawn by petitioner for lack of evidence.

The ALJ identified three issues in this matter: 1) whether charges of conduct unbecoming are supported by the evidence; 2) whether there are mitigating circumstances for such conduct; and 3) whether the penalty of permanent removal from a tenured teaching position is warranted. The ALJ found that: the Board failed to sustain most of the charges; mitigating circumstances existed that must be taken into consideration in determining the appropriate penalty; and that all that could ultimately be held against respondent was one incident of poor judgment which did not warrant dismissal from tenured employment. The ALJ imposed a 30-day suspension for respondent's poor judgment "when using expletive words in her classroom on one specific occasion."

The Commissioner adopted the Initial Decision with modification. Because the ALJ's credibility assessments and resultant fact-finding were sufficiently supported by the record, the Commissioner concurred that very few of the Board's charge specifications were actually proven and those that were did not warrant her dismissal from tenured employment. However, the Commissioner also found a 30-day suspension insufficient to impress upon respondent and others that obscene and derogatory outbursts – regardless of how grievously provoked – cannot be tolerated in the school setting, and the ALJ's recommended penalty was increased to forfeiture of the 120 days of salary already withheld from respondent pursuant to *N.J.S.A.* 18A:6-14. Additionally, in light of the numerous indications on record that respondent is experiencing difficulties in resolving conflicts and dealing with disruptive students, the Commissioner directed that respondent be provided with appropriate training and assistance.

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.

October 18, 2006

362-06

OAL DKT. NO. EDU 3876-05
AGENCY DKT. NO. 78-3/05

IN THE MATTER OF THE TENURE	:	
HEARING OF ADELPHIA POSTON,	:	COMMISSIONER OF EDUCATION
SCHOOL DISTRICT OF THE CITY OF	:	DECISION
ORANGE TOWNSHIP, ESSEX COUNTY.	:	

The record of this matter and the Initial Decision of the Office of Administrative Law (OAL) have been reviewed, as have exceptions filed by the Board of Education (Board) and Respondent's reply thereto.[1]

In its exceptions, the Board contends that although the Administrative Law Judge (ALJ) correctly recited the legal principles controlling tenure matters, she misapplied them to the facts herein, reaching an erroneous conclusion as to the appropriate penalty to be imposed upon respondent. According to the Board, respondent's admissions *alone* warrant more than a thirty-day unpaid suspension, and when added to the testimony of Board witnesses, they clearly warrant her dismissal from tenured employment. The Board argues that respondent engaged in highly offensive and unprofessional behavior toward staff and students, and that allowing such conduct to pass with nothing more than a thirty-day suspension "sends a terrible message to stakeholders in the Orange School System [who should not] be forced to put up with this behavior, [as well as to other teachers who] may think it is worth thirty days to physically attack a colleague and/or curse out a student in front of their class." The Board opines that respondent "obviously has reached the point in her life and career, where she has become combative,"

[1] Shortly after issuance of the Initial Decision, a Substitution of Attorney was filed with the ALJ, wherein Alfred F. Maurice, Esq. was substituted for Louis P. Bucceri, Esq. as counsel for respondent. However, respondent subsequently elected to proceed *pro se* and submitted reply exceptions on that basis.

having "articulated and acted out an 'I'm not going to take it anymore' attitude***[which] should not be tolerated in the public school setting." (Board's Exceptions at 1-2)[2]

In reply, respondent argues that the Board's exceptions read as though charges were proven at hearing, which they were not. Reviewing her own response to each of the charges and noting the Board's various withdrawals and lack of proofs, respondent states that she has "no history of a hostile and aggressive attitude and demeanor the entire time [she] was at the Middle School," and she urges the Commissioner to adopt the ALJ's decision, with which she "wholeheartedly and gratefully" agrees. (Respondent's Reply, Part I at 1-7, quotation at 2; and Part II at 1-2, quotation at 5[3])

Upon careful and independent review of the record of proceedings at the OAL, and of the parties' arguments on exception, the Commissioner adopts the Initial Decision of the ALJ with modification as set forth below.

Initially, although the ALJ did not make pertinent findings and recommendations as required by *N.J.A.C.* 6A:3-5.6(a) and (c), the Commissioner here approves the Board's withdrawal of Charges 2b and 2h (use of expletives with students) and Charge 4b (use of racial slurs in class), since – although the charges are unquestionably serious – the Board discovered following certification that it either lacked evidence to pursue them or that the charge had been based on error. The Commissioner likewise approves the withdrawal as *de minimis* of Charge 2d (impeding the school nurse's ability to quickly access her emergency cards and pen at a time of urgent need), since it is evident from the record (I.D. Exhibit P-4/D and respondent's Answer

[2] The Board also references its prior argument that respondent's testimony was simply not plausible, attaching a copy of its post-hearing brief.

[3] Because of confusion resulting from the various changes in respondent's representation (see Note 1 above), respondent's reply exceptions were submitted in two parts. See October 6, 2006 letter to respondent from the Director of the Bureau of Controversies and Disputes.

at ¶7) that the most that might have been established for this charge is that respondent should not have gotten in the nurse's way when it was evident that she was busy and dealing with a crisis.

The Commissioner is more reluctant to approve withdrawal as *de minimis* of Charge 2e (not permitting a student in respiratory distress to leave class in a timely manner to see the nurse for asthma medication).[4] However, in view of the principal's representation that when notified of this incident he immediately advised respondent as to proper procedure (Transcript of Hearing, April 12, 2006, at 32), and the fact that the Board alleged neither a past pattern nor any recurrence of incidents of this type, the Commissioner finds it unlikely that this charge – if proven true despite respondent's denial (Answer at ¶8) – would have materially affected the outcome of this matter. Thus, because no purpose would be served by directing litigation of the charge at this point in proceedings, the Commissioner approves its withdrawal. *In re Cardonick,* State Board decision of April 6, 1983 (1990 *School Law Decisions* [*S.L.D.*] 842, 846)

With respect to the remaining charges, the Commissioner first observes – as recognized by the Board – that the ALJ has generally cited and applied appropriate principles of law in deciding this matter.[5] The Commissioner further observes – again, as recognized by the Board (Post-Hearing Submission at 7) – that the outcome of the matter with respect to the proving of charges turns largely on witness credibility.

This being so – and the ALJ having had the opportunity to assess the credibility of the various witnesses who appeared before her, and having made findings of fact based upon their testimony – the standard governing the Commissioner's review is clear and unequivocal:

---

[4] The Initial Decision (at 4) erroneously places the alleged act in 2004; the correct year is 2003 (Exhibit P-4e).

[5] The remarks on criminality included within the ALJ's discussion of unbecoming conduct – as well as her reference to pre-trial intervention – do not pertain to the instant matter and are clearly the result of "cutting and pasting" an otherwise applicable paragraph from a prior OAL decision, *In the Matter of the Tenure Hearing of Thomas Wachendorf, New Jersey State Department of Corrections, Mountainview Correctional Facility*, OAL Dkt. No. EDU 6860-04, decided May 3, 2005, pages 5-6 (Commissioner's Decision July 14, 2005).

> The agency head 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. In rejecting or modifying any findings of fact, the agency head shall state with particularity the reasons for rejecting the findings and shall make new or modified findings supported by sufficient, competent, and credible evidence in the record. (*N.J.S.A.* 52:14B-10(c))[6]

On reviewing the record with this standard in mind,[7] the Commissioner cannot conclude that the ALJ's credibility assessments and resultant fact-finding were without the requisite level of support; thus, the Commissioner must substantially adopt the Initial Decision with respect to the truth of the Board's charges. As a consequence, the Commissioner must also concur with the ALJ that – notwithstanding the Board's characterization of respondent's conduct as "profane, volatile and assaultive" (Post-Hearing Brief at 7) and its belief that it should not be "forced to gamble" on her continued good behavior by keeping her employed as a teacher (*Id.* at 10-11) – very few of the Board's specific allegations were actually proven in this proceeding, and those that were did not generally rise to a level sufficient to support a tenure charge.

To briefly summarize: Charge One, where respondent was alleged to have choked and cursed a colleague during a heated altercation on the day prior to the beginning of school, was essentially reduced to a finding that respondent might have handled the confrontation between herself and Dr. Jones – which she was found to have neither initiated nor pursued as charged, and for which both she and Dr. Jones were chastised by the principal without assignment of blame – in a more professional manner by seeking immediate administrative

---

[6] Decisional law, too, has long held that an agency head must generally defer to credibility determinations made by the ALJ who had the opportunity to hear the testimony and observe the demeanor of the witnesses. *In the Matter of the Tenure Hearing of Tyler,* 236 *N.J. Super.* 478, 485 (App. Div.), *certif. denied,* 121 *N.J.* 615 (1989); *S.D. v. Div. Med. Assistance and Health Services,* 349 *N.J. Super.* 480, 485 (App. Div. 2002); *D.L. and Z.Y. on behalf of minor children T.L. and K.L. v. Board of Education of Princeton Regional School District,* 366 *N.J. Super.* 269, 273 (App. Div. 2004), citing *State v. Locurto,* 157 *N.J.* 463, 470 (1999). See also *State v. Salimone,* 19 *N.J. Super.* 600, 608 (App. Div. 1952), certif. denied 10 *N.J.* 316 (1952).

[7] Full transcripts of hearing were provided.

in the subsequent physical tussle was found to have been solely in self-defense – with the "choking" of Dr. Jones being, in fact, her attempt to push him away as he pinned her against a cabinet – and her utterance of profanity a culminating outburst of rage and frustration brought on by Jones' goading and persistence.

Charge Two, which originally included eight separate specifications of alleged insubordination and inappropriate behavior during the 2003-04 school year, was eviscerated by the Board's withdrawal – as noted above – of four specifications involving cursing, use of expletives, and interference with the functioning of the school nurse, and by the ALJ's finding that two additional charges involving use of expletives and screaming at a colleague lacked any semblance of evidence and were, additionally, outside the time frame of the charge as stated. All that remained as proven were respondent's departure from a difficult parent conference before the parent was satisfied and without being explicitly excused by the assistant principal in attendance (Charge 2f), and respondent's having independently scheduled a parent meeting involving a sensitive situation (the T.A. incident, Charge Five) after being specifically advised by the principal not to do so (Charge 2g). Even these actions were found to have been mitigated by circumstances, in the first instance because the parent was abusive and the assistant principal was doing nothing to intervene, and in the second because respondent had tried repeatedly without success to arrange the meeting through proper channels. Further, with respect to Charge 2f, respondent's year-end evaluation not only made no reference to the incident, but actually found respondent's performance for that year fully satisfactory in all areas, including accommodation of parents, professional demeanor, fulfillment of assigned duties, and dealings with students and staff.[8]

[8] Additionally, the incident in question, which occurred on February 6, 2003, fell outside the time frame of the charge (the 2003-04 school year).

Charge Three, where respondent was alleged to have used a racial epithet to describe a colleague in front of students, was dismissed in its entirety due to the complete lack of testimony or competent evidence to corroborate the second-hand account of the Board's sole witness, whom the ALJ additionally deemed less credible than respondent.

Charge Four, respondent's alleged poor judgment and inappropriate conduct in the classroom, was reduced to one incident by the Board's withdrawal – for lack of evidence – of the specification (Charge 4b) alleging inappropriate racial and sexual remarks during a career education class. The remaining incident – respondent's alleged encouragement of a student to make a drawing illustrating his desired career of "porno star" and allowing other students to see it (Charge 4a) – was found to be lacking any supporting testimony or evidence whatsoever, while the corollary allegation regarding incorrect reporting of the incident in question (Charge 4a1) was found to be without basis because respondent did, in fact, follow appropriate procedure.

Charge Five, where respondent was alleged to have punched a student (T.A.) in the stomach after calling his mother a "bitch ass dyke" (Charge 5a), was reduced to a finding that respondent – following relentless needling by the persistently disruptive T.A., who was taunting her repeatedly with the epithet "dyke," reached the bursting point and hurled the same epithet back at him with reference to his mother – whereupon T.A. exploded and punched respondent; respondent never touched the student, as he subsequently admitted in a municipal court proceeding. With respect to the Board's corollary allegation that respondent "spoke in a very loud voice and displayed erratic and uncontrollable behavior" and admitted calling T.A.'s mother a "bitch ass" as well as a "dyke" at a meeting with the administration called to discuss this incident (Charge 5a1), the ALJ, in disposing of the charge, presents the testimony of the Board's sole witness, Assistant Superintendent Frazier, in a manner suggesting that she was taking such testimony as fact. (Initial Decision at 38) However, with respect to respondent's deportment at

the meeting, the ALJ makes no actual findings of fact (*Id.* at 32), and the transcript of hearing reveals that Frazier testified to nothing more than that the "pitch" and "intonation" of respondent's voice indicated that she was becoming "vexed," "agitated" and "annoyed" as the meeting progressed – nowhere even suggesting that her behavior was erratic or uncontrollable as charged by the Board. (Transcript of Hearing, April 11, 2006, at 9-11, 14). Similarly, while the aforementioned recitation of Frazier's testimony in this context (at 38) might suggest that the ALJ was giving credence to Frazier's representation that respondent admitted using the term "bitch ass," she expressly found elsewhere that respondent neither used the term nor admitted using it. (Initial Decision at 31, 32 and 37)

Thus, upon completion of fact-finding as to the truth of the Board's charges, the ALJ concluded that the only "mountable charges" against respondent were those portions of Charge Five involving the use of inappropriate language with student T.A. (Initial Decision at 41) While recognizing that use of profane and derogatory language with a student is inappropriate for a teacher under any circumstances, even where the student in question has been "able to stress respondent to a point of using poor judgment, and incite her to retaliate with unbecoming language" (*Id.* at 44-45), the ALJ concluded that – in light of respondent's seven-year record of successful teaching with satisfactory and outstanding evaluations, the absence of any discipline prior to that associated with the instant charges, and no reported repetition of conduct of the type associated with the T.A. incident – the only penalty warranted is respondent's suspension for a period of 30 days for her "use of 'poor judgment' when using expletive words in her classroom on one specific occasion." (*Id.* at 47)

The Commissioner fully concurs with the ALJ that, notwithstanding the scope and seriousness of the Board's original charges, the conduct actually proven in this proceeding does not warrant the extreme penalty of respondent's dismissal from tenured employment.

However, the Commissioner cannot concur with the ALJ that the appropriate penalty for such conduct is a 30-day suspension.

Initially, the Commissioner finds that the recommended suspension[9] is not a sufficient penalty – even in light of mitigating circumstances – to recognize and impress upon respondent the seriousness of the conduct in which she was found to have engaged, nor the extent of her own responsibility for it. The ALJ was correct in implicitly rejecting the Board's comparisons to "similar" tenure matters in which the respondents were dismissed,[10] the respondents in those matters having been found guilty of far more extreme and pervasive misconduct than the respondent herein; however, respondent's analogy to matters where charges were dismissed,[11] or where the charged party was found to have documented mental and physical incapacity at the time of the conduct in question,[12] is equally inapplicable.

What is required instead is a penalty sufficiently heavy to make it clear that obscene and derogatory outbursts of the type displayed by respondent in her confrontation with a colleague, and – most egregiously – in her classroom interaction with a student, are a very serious matter and simply cannot be tolerated in the school setting no matter how grievously a teaching staff member may be provoked (*In the Matter of the Tenure Hearing of Juanita Zielinski, School District of the Town of Guttenberg, Hudson County*, 1977 *S.L.D.* 786, 793), yet

---

[9] Presumably referring to 30 days of the 120-day period of unpaid suspension served by respondent pursuant to *N.J.S.A.* 18A:6-14.

[10] *In the Matter of the Tenure Hearing of Philip Sheridan, School District of the City of Orange Township, Essex County*, 92 *N.J.A.R.2d* (EDU) 393, and *In the Matter of the Tenure Hearing of Kenneth Van Gilson, Flemington-Raritan Regional School District, Hunterdon County,* 93 *N.J.A.R.2d* (EDU) 378.

[11] *In the Matter of the Tenure Hearing of Peter J. Romanoli, School District of the Township of Willingboro, Burlington County*, 1975 *S.L.D.* 352, *In the Matter of the Tenure Hearing of Thomas L. Harty, School District of the Borough of Wallington, Bergen County,* 1960-61 *S.L.D.* 199, and *In the Matter of the Tenure Hearing of H. Evelyn Cohn, School District of the City of Trenton, Mercer County*, 1983 *S.L.D.* 633.

[12] The Commissioner is not persuaded on this record that the Board filed tenure charges in "retaliation" for respondent's exercise of her right to request reasons for the Board's directive that she undergo a psychiatric exam pursuant to *N.J.S.A.*18A:16-2l, as respondent claims. The Commissioner finds it more likely that the Board, having concerns about respondent, made a strategic decision that the most expedient way in which to proceed was to let respondent's conduct speak for itself rather than attempting to probe her underlying mental state.

at the same time acknowledging that the charges proven against respondent were far fewer than those in matters where the respondent was not dismissed, but suffered a very substantial monetary penalty such as a salary reduction of six months or more and/or withholding of one or more increments in addition to increments already withheld.[13] The Commissioner, therefore, determines that the appropriate monetary penalty for respondent, under all of the circumstances, is forfeiture of the 120 days of salary already withheld from her pursuant to *N.J.S.A.* 18A:6-14.

Additionally, the Commissioner notes that while the record may not have supported the bulk of the Board's tenure charges, it is replete with indications that respondent – however successful she may have been in the past – has become increasingly stressed and is now experiencing difficulty in her interactions with colleagues and superiors, and in dealing with disruptive students and trying situations.[14] The Commissioner, therefore, finds it appropriate to further direct, "as a component of the penalty imposed against the respondent, that the Board arrange for and the respondent attend a program designed to provide training" in anger management, conflict resolution and handling difficult and disruptive students. *In the Matter of the Tenure Hearing of Barbara Emri, School District of the Township of Evesham, Burlington County*, decided by the State Board, December 3, 2003, slip opinion at 6-8 (quotation at 8) Such training may be in conjunction with referral of respondent to the district's Employee

---

[13] See, for example, *In the Matter of the Tenure Hearing of Barbara Emri, School District of the Township of Evesham, Burlington County*, decided by the Commissioner October 21, 2002, affirmed by the State Board December 3, 2003, citing *In the Matter of the Tenure Hearing of Charles Motley, State-operated School District of the City of Newark, Essex County*, decided by the Commissioner August 4, 1999; *In the Matter of the Tenure Hearing of Henry Allegretti, School District of the City of Trenton*, decided by the Commissioner March 22, 2000; and *In the Matter of the Tenure Hearing of George Mamunes, Pascack Valley Regional School District,* decided by the Commissioner June 26, 2000.

[14] For example, although respondent may not have been the aggressor in the conflict with Dr. Jones, she nonetheless let herself be drawn into a confrontation with him and reacted with language totally inappropriate to the school setting even in the absence of students. Later, although respondent may not have called Dr. Jones by derogatory names as charged, she apparently did speak inappropriately to students about her difficulties with him; her denial of Charge Three (Answer ¶12) is expressly limited to her alleged use of racial epithets. Additionally, in several instances where administrators did not respond to concerns or situations as she thought they should, respondent reacted with a less than optimal degree of professionalism, and, throughout her testimony and written communications, she repeatedly expressed frustration at having to tolerate "disrespect" from staff and students.

the Tenure Hearing of Barbara Emri, School District of the Township of Evesham, Burlington County, decided by the State Board, December 3, 2003, slip opinion at 6-8 (quotation at 8) Such training may be in conjunction with referral of respondent to the district's Employee Assistance Program, which the Board directed in August 2004 but never actually effectuated given its subsequent actions (Initial Decision at 32-33, Exhibits R-36 through R-46), and through inclusion of appropriate strategies in respondent's Individual Professional Development Plan.[15]

Accordingly, the Initial Decision of the OAL, as modified herein, is adopted as the final decision in this matter.[16] Respondent shall not be dismissed from tenured employment but shall forfeit the 120 days' salary already withheld from her, and arrangements shall promptly be made for training and assistance as set forth above.

IT IS SO ORDERED.[17]

Lucille E Davy
COMMISSIONER OF EDUCATION

Date of Decision: 10/18/06
Date of Mailing: 10/19/06

[15] Nothing herein is intended to foreclose the Board from subsequently directing that respondent be examined pursuant to *N.J.S.A.* 18A:16-2 if, in its judgment, respondent shows evidence of deviation from normal health, *provided*, however, that such directive must be effectuated in accordance with *N.J.A.C.* 6A:32-6.3(e) or such other rule as may be applicable at that time.

[16] The Commissioner notes, for purposes of clarity, that, although the ALJ has correctly summarized respondent's testimony with respect to her worker's compensation claim (Initial Decision at 20), the referenced exhibit (R-35, notice of suspension pending investigation) does not pertain to this testimony; similarly, although respondent testified, as recited, that her increment was withheld, the referenced exhibit (R-46, letter of counsel regarding tenure charges) does not so state, nor does any other document on record. (See Transcript of Hearing, April 12, 2006, at 173, 233.)

[17] This decision may be appealed to the State Board of Education pursuant to *N.J.S.A.* 18A:6-27 *et seq.* and *N.J.A.C.* 6A:4-1.1 *et seq.*

State of New Jersey
OFFICE OF ADMINISTRATIVE LAW

INITIAL DECISION
OAL DOCKET NO. EDU 03876-05
AGENCY DKT. NO. 78-3/05

IN THE MATTER OF THE TENURE HEARING OF ADELPHIA POSTON, SCHOOL DISTRICT OF THE CITY OF ORANGE TOWNSHIP, ESSEX COUNTY

Marvin L. Comick, Esq., Love and Randall Attorneys At Law, representing Petitioner

Louis F. Bucceri, Esq., Bucceri and Pincus Counselors At Law, representing Respondent

Record Closed: June 6, 2006 **Decided**: July 19, 2006

BEFORE **SANDRA ANN ROBINSON**, ALJ:

STATEMENT OF THE CASE

The Township of Orange Board of Education (Petitioner/Board), certified tenure charges against Adelphia Poston (Respondent), with the Commissioner of Education (Commissioner), alleging that Respondent had engaged in Conduct Unbecoming a Teaching Staff Member. The Board reviewed Respondent's documents in opposition to the charges filed; and thereafter on March 21, 2005 a Certificate of Determination was mailed to Respondent.

PROCEDURAL HISTORY

Respondent requested an appeal of the Board's determination and on April 20, 2005, the Commissioner transmitted the matter to the Office of Administrative Law (OAL) as a contested case pursuant to N.J.S.A. 52:14B-1 to B-15 and N.J.S.A. 52:14F-1 to F-13. In accordance with N.J.S.A. 52:14B-10.1 a pre-hearing conference was scheduled for July 6, 2005; and thereafter conferences and de novo hearing dates were scheduled for September 29, 2005, October 11, 2005, November 2, 2005, January 23, 2006 and April 11, 2006. Testimony was completed on April 11, 2006 and the parties ordered transcripts to assist in the preparation of post hearing documents, to be received at OAL on or before June 6, 2006. The documents were received and the record closed on June 6, 2006.

ISSUES

(1) Whether the charges of conduct unbecoming a teacher are supported by the evidence presented?

(2) If the charges of unbecoming conduct can be sustained, are there reasons (mitigating circumstances) for such conduct, which could be considered good cause(s) or reasons for having engaged in the conduct?

(3) Based on the findings in (1) and (2) above, is the penalty of permanent removal from a tenured teaching position, warranted?

CHARGES AND SPECIFICATIONS

CHARGE ONE – CONDUCT UNBECOMING:

POSTON ENGAGED IN A PHYSICAL ALTERCATION WITH ANOTHER TEACHING STAFF MEMBER

SPECIFICATION:

On or about September 3, 2003, Poston engaged in a physical altercation with another teaching staff member. As Dr. Gerald Jones, a science teacher, attempted to go into the closet of Room 222 to retrieve books that Poston contended were hers, she jumped in front of him and grabbed him by the neck in an attempt to choke him. At one point during the physical altercation, Poston yelled "get the fuck out of here." This incident was witnessed by another teaching staff member, Dr. P. Howell, who is also a science teacher. His classroom is across from Poston's. See Exhibits A, B, and C **[see Appendix Attachments P-1/A, P-2/B, and P-3/C]**.

CHARGE TWO – CONDUCT UNBECOMING, INSUBORDINATION:

ON SEVERAL OCCASIONS DURING THE 2003-2004 SCHOOL YEAR, POSTON USED EXPLETIVES AND DISPLAYED UNPROFESSIONAL AND INAPPROPRIATE CONDUCT DIRECTED AT STAFF MEMBERS, STUDENTS AND PARENTS.

SPECIFICATIONS:

a. On one occasion Dr. P. Howell, a science teacher walked into Poston's classroom to ask her something and she demanded that he leave. In her demand, she used the word "fuck" and other expletives.
b. On one occasion Poston cursed at student K.T. and told him to "get the fuck out of her class."
c. On another occasion Dr. P. Howell went into the teacher's room to use the copy machine. He did not realize that Poston was copying something already. As he approached the machine, Poston began screaming at him at the top of her lungs admonishing him for "trying to read her personal information." This was characteristic of her demeanor towards him and other staff members.
d. On or about October 30, 2003, Poston was in the nurse's office checking a student's emergency cards for a telephone number. While she was checking the cards, a student whom the nurse had recently called 911 for was having a severe asthma attack. The nurse had to call her mother right away, and Poston hindered

the nurse's ability to have immediate access to the cards. In addition, Poston had used her pen without permission, so that the nurse could not immediately put the phone number in her log. See Exhibit D **[see Appendix Attachment P-4/D]**.

e. On or about November 12, 2004, Poston did not allow a student in distress with shortness of breath out of class to go to the nurse to take medicine in a timely manner. See Exhibit E **[see Appendix Attachment P-5/E]**.

f. On or about February 6, 2003, Poston displayed unprofessional behavior at a parent/teacher conference. She abruptly left the parent conference without being excused and before the problems had been resolved. See Exhibit F **[see Appendix Attachment P-6/F]**.

g. On or about March 1, 2004 Poston committed an act of Insubordination when she was told by the Principal not to reschedule a meeting with a parent. Despite the directive, she rescheduled the meeting for the following day and then she called out absent. See Exhibit G **[see Appendix Attachment P-7/G]**.

h. During the 2003-2004 school year the Principal received numerous complaints by students who had been dismissed from Poston's class and cursed at. See Exhibit H **[see Appendix Attachment P-8/H]**.

CHARGE THREE – CONDUCT UNBECOMING:

POSTON USED THE WORD "NIGGER" TO DESCRIBE A TEACHING STAFF MEMBER IN FRONT OF STUDENTS

SPECIFICATION:

Some time after the September 3, 2003 incident, Poston was teaching a Career Education class. During the class a student asked Poston why she had been absent from school. The student stated that she heard that Poston and Jones had gotten into a fight. Poston replied me and that "nigger" did not get into a fight, "I got run over by a black bull. Poston also stated to the students in the room that she does not teach Science anymore because she just didn't want to be by that "nigger." Three students in particular, A.L., J.C. and K.T. got upset by the language that Poston used toward Dr. Jones, but they didn't tell anyone at that

time because they did not want to get involved.

A week or so later J.C. had a project due for Dr. Jones' class and worked on it in Poston's class. Poston asked her what teacher she was doing the project for. Once 1.C. replied Dr. Jones, Poston stated, "that we don't do nigger's work in my class." J.C. put it away and later in the lunchroom she and A.L. told Dr. Jones about the incidents. They then submitted a written statement to Jones. See Exhibits I and J **[see Appendix Attachments P-9/I and P-10/J]**.

CHARGE FOUR – CONDUCT UNBECOMING:

ON SEVERAL OCCASIONS DURING THE 2003-2004 SCHOOL YEAR, POSTON EXERCISED POOR JUDGMENT AND DISPLAYED UNPROFESSIONAL AND INAPPROPRIATE CONDUCT IN THE CLASSROOM

SPECIFICATIONS:

a. On or about January 29, 2004, Poston encouraged student J.S. to draw his career choice. The student stated that he wanted to be a "porno star." The student asked Ms. Poston more than once if she was sure she wanted him to draw it because of what "porno stars" do. She told him to draw it despite the student's apprehension. She also assured the student that what is done in her class stays in her class on a previous occasion. The student also asked whether he would get in trouble and she replied that he would not. The student drew the picture and not only did she share the drawing with the building Principal, other students also viewed the picture while it was in Poston's possession. See Exhibit K **[see Appendix Attachment P-11/K]**.

i. With regard to the above mentioned incident, Poston did not follow the proper protocol with the chain of command. Poston forwarded the incident report to the Assistant Superintendent for Curriculum and Instruction as opposed to the building Principal as instructed. See Exhibit L **[see Appendix Attachment P-12/L]**.

b. On one occasion Poston told a story in her Career Education class about

how when she was younger and she went for a job, whites would not accept her. She used the words "white ass cracker" in front of the class. She also indicated that later during that day a white person cut her off and she called him a "motherfucker" and stuck her middle finger up at the person and demonstrated this to the class. There were several students in the class who witnessed this incident.

CHARGE FIVE – CONDUCT UNBECOMING:

POSTON ENGAGED IN A PHYSICAL ALTERCATION WITH A STUDENT

SPECIFICATIONS:

a. In February of 2004, Poston engaged in a physical altercation with eighth grade student, T.A. The student was attempting to finish an assignment and place his name and date on the paper. However, Poston demanded the paper, and as he attempted to complete the task, she snatched the paper from his hand. He mumbled "dyke" under his breath. Poston yelled at him to repeat what he said in front of the class. He said "dyke." Poston went on to say that "your mama's a bitch ass dyke." T.A. got offended and asked her what she said. He stood up and said say it to my face. As the student approached Poston, she punched him in the stomach. He grabbed her, she tripped backward and both of them fell onto the desk of student S.A.

i. On March 3, 2004, a meeting was held at the Orange Board of Education Administrative Office with the Assistant Superintendent Constance L. Frazier and the Assistant to the Superintendent for Human Resources and Operations, Belinda Scott Smiley to discuss the above mentioned incident. During the meeting Poston spoke in a very loud voice and displayed erratic and uncontrollable behavior. When it was explained to her that she has to be professional in all situations, no matter how frustrated she may become, she responded by stating that "she wasn't going to take anything from these kids," and "how much more can I tolerate?" She also admitted that she made the statement "your bitch ass mother is a dike" to the student.

SUMMARY OF TESTIMONY

PETITIONER'S WITNESSES

ANTOINE GAYLES (Principal Gayles) has been in the field of education for eight years and has been the Principal of Avon Avenue School in Newark for the past ten months commencing September 2005. He was the Principal of Orange Middle School for two years and the Principal of Orange Alternative High School for three years. Principal Gayles received his BA degree from Swathmore College, his Masters Degree from Brandeis University and his Ph.D. in Education from Seton Hall University. Principal Gayles' relationship to Respondent is that of a supervisor to employee; he has no social encounters with Respondent. Principal Gayles fully supports the tenure charges he drafted against Respondent; however, he has no personal animosity towards Respondent.

TEACHER TO TEACHER PHYSICAL INCIDENT – September 3, 2003 Principal Gayles was having lunch in the cafeteria when science teacher Howell rushed in and indicated that: "two teachers Respondent and Jones were going at each other". Principal Gayles went to the classroom to investigate, but upon arrival Gayles only saw Dr. Jones a science class teacher. Dr. Jones told the Principal that he got into a fight with Respondent over some books that he thought were being discarded. Jones explained that he believed the books were assigned to his previous year's students and he collected them; but when Respondent disagreed, the two of them ended up in the classroom and Respondent obstructed him from taking the books. He had reached around Respondent to get the book(s) and Respondent's hand went to his throat. Jones submitted a written statement regarding the incident **(Exhibit P-3/C).** After listening to Dr. Jones, Principal Gayles looked for Respondent to speak with her about the incident and found her returning to the classroom. Principal Gayles said that Respondent initially refused to go with him to his office to explain her side of the story. She insisted on returning to her classroom, but Principal Gayles informed her that Jones was still in the room. Respondent then dropped the books she had been carrying onto

the floor **(Exhibit P-1/A).** Respondent said she was coming from the teacher's lounge with a collection of unclaimed books and Jones saw the books and disputed the ownership. After Respondent took the books into her room, Jones pinned her against the cabinet as he tried to obtain possession of the books. Principal Gayles also spoke with Teacher Howell about the incident.

Principal Gayles prepared a memorandum to Respondent setting forth his expectations for professional conduct and underscoring the seriousness of the allegations **(Exhibit P-2/B).** He also prepared an account of the incident for Administrative Assistant Belinda Scott-Smiley **(Exhibit P-1/A).**

MALE STUDENT INCIDENT – An incident involving Respondent and student T.A. took place on February 27, 2004. T.A. said he was hit by Respondent. Respondent said T.A. hit her because she took away his test paper when the time was up. Respondent said that T.A. mumbled that she was "dyke". Respondent said she responded to T.A. and said, "your mother's a dyke ass bitch." Principal Gayles felt that Respondent's behavior was inappropriate and should have conformed to higher standards. Professionalism doesn't include a teacher cursing, swearing, using foul language, or hitting students. After he interviewed three or four students in the classroom, he did not form a conclusion. Other students reported that Respondent yells at them and uses profanity in class. T.A. was scheduled to testify, but did not appear for Court.

MISCELLANEOUS CONDUCT UNBECOMING ISSUES –

Principal Gayles explained a memorandum from Laura W. Sacks, RN, the school nurse, dated October 30, 2003 regarding an incident where Respondent was in the nurse's office looking at student emergency cards. The Principal said he spoke with Respondent immediately about the necessity of permitting students with asthma, to be allowed to visit the nurse as soon as they needed to. He did not issue a determination regarding Respondent's behavior for this incident **(Exhibit P-5/E).** On cross-examination Principal Gayles admitted Respondent had not released an asthmatic

student from her class; he had confused Respondent with another incident (**Exhibit P-4/D**).

The Principal explained another memorandum dated March 2, 2004 that concluded with his request for a suspension of Respondent. Respondent had abandoned her post and left students unattended in a classroom. Respondent was to have gone to the Central Office but she did not, and when the Principal telephoned her at her home, he found her there and she had no explanation **(Exhibit P-7/G).**

Principal Gayles was asked about an incident January 24, 2004, in Respondent's career education class when one of the class assignments was to draw a picture of their (the students') future aspirations. Respondent sent one student's questionable picture directly to the Assistant Superintendent and broke the chain of command for reporting incidents. The chain of command requires that a report first be given to the Assistant Administrator and to the Principal. In this instance Principal Gayles was unaware of the entire incident until the Assistant Superintendent advised him **(Exhibits P-11/K, P-12/L, R-27, R-28, R-20).**

On cross-examination Principal Gayles disclosed that out of the fifty or more teachers at Orange Middle School, he spends significantly more time with Respondent's issues, incidents and infractions with both staff and students **(Exhibits P-8/H, P-10/J).** There were occasions when Respondent would become volatile when he tried to engage in conversation with her. He confirmed that upon Respondent's return from her leave in mid-October 2003, she was transferred to a position as a career training instructor **(Exhibit R-16).**

CONSTANCE L. FRAZIER (Frazier) is the Assistant Superintendent for Curriculum and Instructional Services in the Orange Public Schools. She was hired in November 1995, holds Bachelor and Master degrees in Art Education; and is currently a candidate in a doctoral program at Columbia University. From the period in 2003 when Superintendent Dr. Sally left the school system Frazier became the Interim Superintendent. Upon the confirmation of the new Superintendent Nathan Parker in

2004, Frazier returned to her former position of Assistant Superintendent for Curriculum and Instructional Services.

TEACHER TO TEACHER PHYSICAL INCIDENT – In regard to the September 3, 2003 physical incident between Respondent and Dr. Jones, Frazier recalled that something happened and it involved someone taking a book from someone else's hands. Frazier was not present during the incident, but was informed of the details of the incident after the occurrence. She read the incident reports by the respective teachers. Frazier said she has known Dr. Jones since the commencement of Jones' employment with the Orange Public Schools approximately five years ago. She made no inquiry of Jones regarding the altercation with Respondent.

MALE STUDENT INCIDENT - On March 3, 2004, Frazier held a meeting in her office with Respondent and Mrs. Belinda Scott-Smiley of Human Resources for the purpose of reviewing an incident that Respondent had with a male student on February 27, 2004, and to discuss disciplining Respondent. Frazier recalled that the incident involved Respondent calling to the student "your mother is a bitch ass" or something of that magnitude. According to Respondent, the student had prompted the exchange by first calling Respondent a "dyke". Frazier said that during this meeting Respondent was vexed, agitated and had a raised pitched voice. Frazier quoted Respondent's words during the meeting; "I am not going to put up with this". Frazier said she was surprised and disappointed by Respondent's actions because of her belief that teachers had to maintain a certain demeanor even if children frustrated them. Frazier said Respondent never denied that she told the student that his mother was a "bitch ass." On cross-examination, Frazier clarified that the March 3rd 2004 meeting was a number of days after the date of the incident with the male student; and after Respondent had already spoken to the Principal Gayles, Mary Careen and herself (Frazier), in another conference.

MISCELLANEOUS CONDUCT UNBECOMING ISSUES –

Frazier said she was not involved in the decision to change Respondent's position from science teacher to careers teacher. She said Principal Gayles made that recommendation, which then went to Mrs. Scott Smiley of Human Resources, and then to the Board of Education for a vote on the matter. Frazier did not know the reasoning for the position change, or why Dr. Jones was not similarly affected.

In regard to an incident report dated January 29, 2004, pertaining to the student who mapped out his career goals with an inappropriate picture, Frazier said she did not see it. She explained that previously there had been two Assistant Superintendents, one Superintendent of Operation and Human Resources (Michael Cohen), and one Superintendent of Curriculum and Instruction (Constance Frazier). When Michael Cohen retired prior to January 29, 2004 there was no replacement and therefore the incident report which would have normally gone to the Superintendent of Operation and Human Resources was not directed anywhere **(Exhibits R-18, R-19, P-11/K).**

Frazier said she was aware that from October 2003 to February 2004, Respondent had raised concerns with Principal Gayles about being reclassified from a Science teacher to a Careers teacher. Respondent was also concerned about the lack of books, sufficient space and being shunted from room to room.

GERALD JONES (Dr. Jones/Jones) was a science teacher and podiatrist at Orange Middle School in September of 2003. He was about 230 lbs and 6' 2" in height at that time. Jones' classroom was room 220, which shared an interior door to classroom 221, which was originally Respondent's classroom. Across the corridor from rooms 220 and 221 were rooms 223 and 222. Science teacher Howell used Classroom 222 which is directly across from classroom 221. On September 2, 2003 an administrative decision was issued to have Respondent and Howell switch rooms. Classrooms 220 and 221 were the largest classrooms; and classrooms 222 and 223 were the smallest.

TEACHER TO TEACHER PHYSICAL INCIDENT – September 3, 2003 was a prep day for teachers prior to students starting classes; no students were on the premises. Dr. Jones testified that he saw some unattended science books in the hallway near his classroom and surmised that the books were placed there for disposal by custodians. He inspected the books closer and discovered some books had markings used by his class. He said that because Jones' classroom and Respondent's classroom shared an interior door, he elected to enter from Respondent's open classroom while carrying the books to avoid the difficulty of unlocking his own classroom's door from the hallway while carrying the books.

Dr. Jones said Respondent saw him with the books and took them from him. He explained the markings in the books to Respondent, but Respondent said that she taken the books from the teachers' lounge, so her students would be using them now. Respondent stood in front of the file cabinet to put the books away. Jones was adamant in his testimony that he did not touch Respondent at all and that neither party used profanity at this point.

Dr. Jones said he then reached over Respondent to take a book, but she slapped his hand away. He made a second attempt to take a book from the cabinet, but Respondent then placed her right hand on his throat in an attempt to choke him. Jones questioned Respondent's sanity, and she released him; she then walked to the door and called him a "black motherfucker" and "nigger". Jones said he made no further attempts to stop Respondent when she collected the remainder of the books, but he did repeatedly tell her how he couldn't believe she tried to choke him over some books.

When Respondent went walked to the hallway, she stopped and turned to Jones approximately three times and continued to call him a "fucking nigger." Jones never responded to the profanity. Teacher Howell entered the hallway from his classroom and other teachers came out in the hallway due to the noise. Respondent then said, "I'm not going to let you man-handle me". Jones responded by saying, "You are lying".

Principal Gayles arrived and stopped the arguing and spoke to Respondent and Jones individually.

Thereafter, Dr. Jones testified that science teacher Howell came up to him to express disbelief that Respondent tried to choke him. Dr. Howell said he had been in his old classroom 222 and saw the entire incident through the window of the classroom door. On cross-examination, Jones explained in further detail how the classrooms were aligned with each other, separated by the hallway. Most doors have automatic closers, and he recalls the doors in both Rooms 221 and 222 were closed. On each door is a window, approximately 3' x 20" in size.

MISCELLANEOUS CONDUCT UNBECOMING ISSUES –

Dr. Jones acknowledged that even though Respondent had been teaching science for a collectively longer period of time than either he or Howell, she had been assigned to the smallest room for the 2004 school year. Jones confirmed that he and Teacher Howell have been friends for a long time, but only speak about school related matters; they do not socialize together.

Jones reviewed Respondent's Compensation Claims and Medical Reports, and had no recollection or idea as to how Respondent could have been diagnosed with a strain and contusion, because a contusion cannot be faked.

Dr. Jones said he had experienced encounters with Respondent and that he had been "fed up" with her attitude and manner of addressing him – "she spoke at you"; however, for the most part, he had let Respondent's past encounters slide.

PATRICK C. HOWELL (Dr. Howell/Howell) is a podiatrist and science teacher at Orange Middle School. He started working there on May 20, 2000, and knows both Respondent and Gerald Jones because they are colleagues in the Science Department. Dr. Howell said he has no personal relationships with either of them; although both he and Jones are from Jamaica and had met before he entered the school district.

TEACHER TO TEACHER PHYSICAL INCIDENT – On September 3, 2003, Dr. Howell observed an altercation between Respondent and Jones in the school. He heard both parties shouting, but only heard Respondent use obscenities. Dr. Howell could not recall whether the door to Respondent's classroom was closed or slightly ajar, but he was able to observe the actions incident to the argument through the classroom door window. Dr. Howell saw Respondent's hand on Jones' neck and he saw Jones' right hand in the air; Jones had his back towards Dr. Howell. Because of a previous confrontation with Respondent, Dr. Howell did not personally intervene, but instead rushed to get Principal Gayles from the cafeteria which is located on the same floor. Dr. Howell and the Principal walked to Respondent's room together, but Dr. Howell did not enter the room on the advice of the Principal.

MISCELLANEOUS CONDUCT UNBECOMING ISSUES –

Dr. Howell's previous incident with Respondent occurred when he walked into the teachers' room to make photocopies. Respondent was already using the photocopier when Dr. Howell entered the room. He had looked at what was on the copy machine saw it was Respondent's and turned to leave. Respondent accused him of looking at her personal materials and he heard her say "fuck" at him under her breath. He discussed the incident with another teacher, Mrs. Stuart, and Mrs. Stuart shared with Dr. Howell that she too had a similar event between Respondent and herself.

Dr. Howell recalled another incident when he asked Respondent for an extra school desk, but she told him to "get the fuck out." Dr. Howell informed the Principal about his concerns with Respondent and the Principal advised Dr. Howell to, "stay away from Respondent". On cross-examination, Dr. Howell explained that the desk incident took place in the spring of the previous school year (2002-2003). Respondent did not explain to Dr. Howell why he could not have the desk.

Dr. Howell said that despite those encounters, he holds no grudge or negative feelings toward Respondent, but he wishes she were more professional in her

relationship. He said their previous cordial relationship went cold after the classroom switch.

DORIS MOSES (Moses) was an Administrator and the Assistant Principal in Essex County for thirty three (33) years until her retirement in August 2004. Moses worked in the Newark, East Orange and Orange School Districts; her assignment with the Orange Middle School commenced in November 1999 and continued until she retired.

MISCELLANEOUS CONDUCT UNBECOMING ISSUES –

Moses explained a February 6, 2003 memo she wrote expressing her shock and disappointment with Respondent's behavior at a conference with a student and the student's mother. Moses was concerned that Respondent was not respectful to the parent, had caused for emotions to run high and for voices to be raised at the meeting; then Respondent departed the meeting before it ended. On cross-examination, Moses elaborated on the incident, saying the student had not completed all of her assignments and received an "F". The parent wanted to find out what was necessary for her child to pass the remainder of the course and had accused Respondent of not treating her child fairly. Moses acknowledged that the February meeting was not her first encounter with the parent, but she nonetheless expected teachers to remain professional **(Exhibit P-6/F).**

Moses also testified that she received telephone calls from parents and other teachers, alleging that Respondent wouldn't allow their child to go to the bathroom. Moses spoke to Respondent and believed they had resolved the concerns in this area. Moses noted that most teachers who teach in the same subject area tend to group together or stick together, but Respondent was never really friendly with the other science teachers.

Moses discussed an "Observation Report" prepared on Respondent dated May 13, 2003 and signed by then Principal Richard Giessuebel, wherein it was reported that

Respondent had no problems with: 1) maintenance of grades, and; 2) meeting all professional responsibilities **(Exhibit R-52).**

RESPONDENT'S WITNESSES

TAMMY BALDWIN (Baldwin) is a Physical Education & Health Teacher, as well as the Union Representative at Orange Middle School. Her duties as the Union Representative include ensuring that teachers' rights are not violated; and, if requested by a teacher, to be present at meetings with administration. She has been a Union Representative for approximately nine years, and has been employed by the Orange Board of Education for fifteen years.

TEACHER TO TEACHER PHYSICAL INCIDENT – September 3, 2003 Baldwin was present in the cafeteria on September 3rd and followed Principal Gayles back to the science wing to learn what was going on. There was no visible scuffle between Respondent and Jones when Baldwin arrived at the science wing. Principal Gayles told Respondent and Jones to just relax. Baldwin said she shortly left the area. Later that day, Respondent requested Baldwin's presence as Union Representative at a meeting in Principal Gayles' office. At the meeting, the Principal requested Respondent to avoid contact with Jones.

Baldwin testified that she believed Gayles favored Jones' version of the story, because every time Respondent attempted to explain her side of the story, Gayles would interrupt and say, "that's not what Dr. Jones said, that's not the way it happened." Baldwin said her only understanding of the incident is from what Respondent explained. Baldwin said that after the meeting she was aware that Respondent had been removed from the science department and placed in another position. The September 3, 2003 memorandum was the only memo Baldwin saw regarding this incident; she never knew other memo's regarding the incident existed **(Exhibit P-2/B).** On cross-examination, Baldwin reiterated the version of the incident as she heard it from Respondent:

> "Respondent found some books down in the teachers' lounge and was coming back upstairs with her lunch and the books. She set them down to unlock her classroom and to set down her lunch, but came out to find Dr. Jones had claimed them as his. Then Jones followed her into the classroom and tried to take the books; she put the books into a cabinet and that's when Jones pinned her against the cabinet to get the books".

Baldwin explained how it is usual for teachers to take whatever books are left in the teachers' lounge and use them in their classrooms.

S.J. is now 16 years old and attends Orange High School. In February 2004, Respondent was S.J.'s career teacher in the Orange Middle School.

MALE STUDENT INCIDENT – S.J. testified primarily about an incident which occurred on February 27, 2004 in her careers class. A classmate named T.A. made some remark towards Respondent and Respondent repeated it back at him, but directed it at his mother. T.A. then got up and said to Respondent, "Don't talk about my mother." T.A. then pushed Respondent and the two got into a physical scuffle. S.J. said she did not see Respondent punch T.A. S.J. did recall Respondent having to reprimand T.A. on other occasions. Principal Gayle interviewed students, but S.J. did not come for an interview.

On cross-examination, S.J. said she has never heard Respondent use profanity in class before the incident with T.A. She could no longer remember the exact profanity words Respondent used to T.A. on that day. S.J. also disclosed that she had an excellent attendance record for the trimester in Respondent's class

RESPONDENT'S TESTIMONY

ADELPHIA POSTON (Respondent) is a 65 year old, 5' 9", 145 lb. woman who was originally hired by the Orange Board of Education as a science teacher for grades K-8, in September 1999. She is certified as an elementary school teacher who worked in the East Orange School District for one year before coming to Orange; she also taught school in Texas. In September of 2003, she was given a new assignment as a careers teacher, after an altercation with another science teacher, Dr. Jones.

TEACHER TO TEACHER PHYSICAL INCIDENT – On Wednesday September 3, 2003, Respondent said that only teachers were at Orange Middle School for a preparation day before student's commenced classes. Respondent was in the teachers' room with another colleague Mr. Demarso and they spotted a stack of books by the door. On September 2nd the day before, Respondent was given a room transfer and she was already in the process of moving material from Room 221 to 222, so she took seven of the heavy books upstairs to her classroom. Respondent said she temporarily placed the books in the hallway and went into Room 222. She spoke briefly with Dr. Jones in the hallway and went into her former Room 221 to retrieve a chart. When she returned to the hallway and saw Jones with the books in his hand and she asked him in a kidding sort of way, "Where are you going with those?" Dr. Jones said he was unaware that Respondent had placed the books there and believed they were in the hallway to be thrown out. He gave her the books but followed her into the classroom saying that some of the books were his. Respondent said she told him the books where hers and then told him not to come into her room. Respondent walked to the back of her room towards the metal cabinet, and Dr. Jones followed her while both still argued about the ownership of the books. Dr. Jones wanted to look through the books, but Respondent said she refused to allow him to do so. Dr. Jones said, "Give them to me," but Respondent again refused. Respondent then said: "Dr. Jones, these books have been down in the teachers' room all summer . . . Why are you halting me with the books now?" "I am tired of doing all the work and you guys getting the credit." On cross-

examination Respondent acknowledged that when she took the science books from the teachers' lounge, she did not initially inspect them to see who they belonged to and she acknowledged not giving Dr. Jones an opportunity to inspect them.

Respondent said that while she was putting the books into the cabinet, Dr. Jones slammed her body against the cabinet and pinned her against it. Respondent was unable to get him off her and she felt Jones manipulating her hand up to his neck. Respondent said that Teacher Howell then entered the room and asked what was going on, to which Dr. Jones answered that Respondent was trying to choke him. Dr. Jones then went into the hallway with Howell and told the people that had gathered that Respondent had tried to choke him. Respondent denied the allegation and said, "No, I didn't, you're just trying to deflect the situation, you attacked me."

Respondent said she then left the area and went back downstairs to get seven more books to bring upstairs. On her way back, she met Principal Gayles in the hallway of the science wing, and he wanted to hear her version of the incident. Respondent told Gayles that she wanted to put the books down, but Gayles told her not to enter the room. Respondent said she dropped the books on the floor because she was unable to hold them any longer. The Principal told her to go downstairs to his office. Respondent heard Gayles get on the telephone and asked for Tammy Baldwin the Union Representative.

Respondent said she was unable to say much when the Principal Gayles questioned her version of events; he kept insisting that Dr. Jones' version was different from hers. Respondent said that Gayles believed the science books were already in the hallway before Respondent brought them from the teachers' lounge. On that particular point, Respondent said, "I can prove it," because she knew the other teacher in the lounge, Mr. Demarso, could support her story that they found the books down there. Books were of concern to Respondent because she had to scrounge for books.

Respondent said she complied with Principal Gayles request to demonstrate how Dr. Jones attacked her. She stressed that she did not try to strangle Dr. Jones. Respondent prepared a hand-written statement for Principal Gayles. She said that due to her emotional state she asked a colleague to type it up for her and the colleague changed some of words and submitted it to Gayles; Respondent subsequently submitted another revision (**Exhibit R-1**).

On September 4, 2003, Respondent sought medical attention from the worker's compensation doctor (**Exhibit R-5**). She had spasms and problems with her arms, left shoulder, right hip, back and neck. Copies of the compensation claim medical report were sent to Principal Gayles and the Board of Education (**Exhibits R-6, R-7**). Respondent also went to see Dr. Ruby Sampson, her primary care physician and was referred through Worker's Compensation to an Orthopedist Dr. Rosa. Dr. Rosa reported that Respondent be required to take one month off from work due to her suffering and need for recovery from a cervical and lumbar strain, and hip contusions (**Exhibits R-8, R-10**). After Respondent's filing of a worker's compensation action in court, the district acknowledged and paid for the injuries via a settlement. Assistant Superintendent Dr. Parker had originally approved Respondent's leave of absence through October 2003 **(Exhibit R-14).** Then Worker's Compensation sent a letter explaining that her injury was not work related, so the claim was denied and Respondent was asked to contact her own insurance company; thereafter she was docked (**Exhibit R-35**).

Respondent and Jones both told Gayles on the day of the September 2003 incident that they weren't hurt (**Exhibit P-1/A**). Respondent said she did feel sore and believed the adrenaline from the fight masked her soreness. Respondent is unable to stand or bend too long and her upper body feels heavy when she writes on the blackboard for a lengthy time; she is considered to have a permanent disability and continues to see a doctor.

Respondent returned to work on September 24, 2003 (**Exhibit R-11**). On September 26, 2003 she was notified that the Board had voted to transfer her to a

careers program position, effective October 22, 2003 (**Exhibit R-12**). Respondent said she had never taught a careers course before, but the previous careers teacher had a stroke and had to leave which created a vacancy after the 2003 school year. A former language arts teacher, Mr. Matthews, took over Respondent's science class after her transfer to careers. Respondent said she needed more materials because only a third of the class had the required textbooks and workbooks. Also, she was required to travel to various classrooms daily, which was a total change from her science teaching when she had a permanent room assignment. Respondent said she was unhappy with Dr. Jones after their altercation, but says she was not affected by working in an adjacent classroom to him. She had taught science for a few years and was more upset at the transfer to careers than working near Jones. However, in later testimony Respondent said that on one occasion, she was temporarily in Room 221 when Jones and Howell walked into the classroom. She said she felt "at risk" and then later admitted that the administrative decision to separate her from Jones may have been wise, but was unfair.

Respondent filed a criminal complaint against Dr. Jones in Orange Municipal court (**Exhibits R-3** and **R-4**). Dr. Jones filed a criminal complaint against Respondent in Orange Municipal Court. Both parties withdrew the charges against each other after mediation.

Respondent asked Principal Gayles for an explanation regarding the position change, but no meeting ever developed (**Exhibits R-13, R-15**). Respondent viewed the constant moving around as disturbing to the children and a negative impact on the ability to concentrate. From time to time Respondent said her classes where shifted out of the computer room when another teacher's class needed to use the room.

MALE STUDENT INCIDENT - In regard to the student T.A. incident on February 27, 2004, Respondent contends that T.A. was disrespectful and inconsiderate during the class quarterly examinations (**Exhibit R-25**). T.A. did not take the test, but caused a disruption by continuing to call Respondent "dyke" whenever she talked to him. When the examination time had ended, T.A. had not yet written his own name on the paper,

so Respondent took it from him and wrote his name on the paper. T.A. then told Respondent, "You spelled my name wrong, dyke." Respondent responded, "Your mother's a dyke." T.A. got up and then punched her in the shoulder. When Respondent threatened to call security, T.A. shoved her to the floor and eventually security escorted him out.

Respondent admits it was inappropriate for her to call the student's mother a "dyke," but denies calling her a "bitch-ass dyke". Respondent said the student had "filled her up" and she felt disrespected. In justifying the lapse of judgment, Respondent explains that T.A. had been rude and bothersome since the day they met. From the beginning of the trimester in November, she had warned him, talked to him, and tried to conference with his parents to get him to do his school work and behave in class (**Exhibits R-27**, **R-28**, **R-29**). Respondent prepared an incident report and took it to Principal Gayles, notifying him she wished to file a police report. At the end of the school day, Respondent said she went back to the office and learned that the Principal had already met with T.A.'s mother without her. The Principal said he was unable to find Respondent in time for the meeting. Gayles and Respondent agreed to reschedule a meeting for the next Monday.

Due to injuries suffered from the scuffle with T.A., Respondent was at the hospital on Saturday, and had to return to the hospital on Monday, March 1st. Respondent informed the school of her impending absence through TSS (The Substitute Service) at around 6 AM Monday morning. Respondent learned later that T.A.'s mother had come in for the meeting. Principal Gayles preferred to schedule another meeting instead of having Respondent call the mother directly. Respondent contacted Constance Frazier Assistant Superintendent for Curriculum and Instructional Services, for intervention, but when Frazier didn't return her call immediately, Respondent filed the charges at the police department at 5AM on March 23, 2004 (**Exhibit R-26**). T.A. filed a counter-complaint. The two parties met in Municipal Court on September 8, 2004. T.A. admitted that Respondent did not touch him and he

admitted touching Respondent, but said he did not hurt her. All charges were dismissed without prejudice (**Exhibits R-30, R-31**).

MISCELLANEOUS CONDUCT UNBECOMING ISSUES –

Respondent denies that she ever swore at Teacher Howell and has no recollection of any incident where she told him to "get the fuck out" of her class after he had asked to borrow a desk. Nor did Respondent recall an incident where Teacher Howell entered into the copy room while she was already using a machine and she accused him of "looking at her stuff".

In regard to Respondent walking out of a parent teacher conference in February 2003 - Respondent concedes that at a prior conference, she had initially relented and was willing to change the student's grade from a "D" to "C", if the student worked to "earn that C." After the first marking period ended, Respondent did not feel the student had fulfilled her end of the promise and when the parent asked at the next conference for additional consideration of the grade being changed to "C", Respondent adamantly refused. The parent was irate because Respondent wouldn't change the grade, while Respondent insisted she had given the student assignments and they were not completed. The parent began to scream and yell and Ms. Moses declined to intervene, so Respondent left the room. Moses did not say anything to Respondent, and a later teacher evaluation form likewise did not mention the incident (**Exhibit R-52**).

Concerning any claim that Respondent allegedly cursed at students or told them to go see to the Principal, Respondent contends that it is the students themselves who threatened to walk out of her class and go to Principal Gayles for the purpose of getting her fired. Respondent asked Principal Gayles to set up an appointment with her representative to discuss this problem, but nothing ever happened (**Exhibits R-20, R-23**). Respondent also disclosed that she had written a memorandum to Gayles about her intolerable working conditions, specifically the problems with students cursing her and leaving her class without permission (**Exhibit R-21**).

In regard to the career assignment, Respondent denies encouraging a student to draw a pornographic picture to illustrate his career choice. When Respondent received the picture from J.S., she took it to the counselors' office after class (**Exhibits P-11/K R-22**). Dr. Young, the Administrative Assistant was unavailable, so Respondent then took the inappropriate picture to Principal Gayles, but Gayles only smirked at the picture after looking at it, and commented, "That's J.S." Respondent spoke with some teachers in the teachers' lounge, who suggested that she speak to members of the child study team. On the next day, a counselor from the child study team requested that J.S. be transferred out of Respondent's class. Respondent argued against the transfer and later wrote an incident report and gave copies to Principal Gayles' secretary and the Board of Education (**Exhibits R-18, R-19**). J.S. never received any disciplinary action.

On March 3, 2004 Respondent and Frazier had a meeting and Frazier gave Respondent a memorandum dated March 2, 2004 authored by Principal Gayles which indicated that Respondent had acted unprofessionally by abandoning her position on March 2nd and was being suspended. Respondent was advised that her suspension was also due to the inordinate amount of time the administration had to spend with Respondent, and the ongoing DYFS and police investigations involving her. The letter of suspension was dated March 5, 2004 and was served on Respondent, March 9, 2004 after the school Board voted to suspend her with pay (**Exhibits R-33, R-35**). Respondent was told to submit to a psychiatric examination, without the name of the examining doctor or the reason for the exam (**Exhibit R-32**). No other mention of a doctor or appointment was mentioned by school officials until June 2004, when Belinda Scott Smiley referred Respondent to an employee assistance program (**Exhibit R-36**). In June 2004, no contact information was given to Respondent, so she asked her Union Representative for help **(Exhibit R-39).** Respondent obtained the assistance of legal counsel who communicated with school officials. A decision was made by the school board to rescind the request for respondent to take a psychiatric examination **(Exhibits R-38, R-40 thru R-45).** Thereafter, Respondent's salary increment was withheld **(Exhibit R-46).**

In regard to the abandonment of position by Respondent on March 2, 2004, Principal Gayles admitted on cross-examination that Respondent did call out sick according to The Substitute Service (TSS) list which was faxed at 7:01AM the morning of March 2nd. Gayle explained that when a teacher is absent from school and wishes to be excused, it is proper procedure for the teacher to inform "Substitute Services"; and Respondent was in compliance. Gayles said it was "Substitute Services" error if no substitute appeared to handle Respondent's classes. He further admitted that it is not the fault of the teacher who calls in if the substitute service doesn't automatically assign a substitute. Principal Gayles also held blame on Respondent since she did show up that day and became irate and left for the Central Office. Respondent had come to school to participate in a pre-scheduled Tuesday morning parent meeting along with Assistant Principal Young.

STIPULATED FACTS

THE PARTIES HAVE STIPULATED TO THE FOLLOWING FACTS:

(1). The tenure charges in this matter were filed initially as a memorandum to the Board Secretary from the Board Counsel dated January 24, 2004. This date was a typographical error. The correct date was January 24, 2005.

(2). Charge 4(B) of the tenure charges in this matter has been withdrawn by the Orange Board of Education due to a lack of evidence.

FINDINGS OF FACTS

Based on the credible testimony and the supporting documentation accepted into evidence, I Find as Fact the following:

1) In February 2003, Respondent left a meeting with a parent, student and Vice Principal Doris Moses prior to conclusion. The parent was harassing Respondent in an effort to have her child's grade changed; the Vice Principal did not direct or

require Respondent to remain at the meeting and thereafter found no need to reprimand or discipline Respondent and made no comment of the incident on any Teacher Observation Reports and Teacher Evaluation Reports;

2) Respondent maintained satisfactory and outstanding Teacher Observation Reports and Teacher Evaluation Reports for the three (3) school years preceding the 2003-04 school year;

3) On September 2, 2003 at the commencement of the school year for teachers, Respondent was summarily told that she was being moved out of her classroom which she had taught in since 1999. Respondent was not pleased with the change since she had renovated and repaired the room to make it useful space. Her new room would be the smallest science classroom.

4) On September 3, 2003, only the teachers were present in the school building preparing for the students school opening day. On that day Respondent discovered science textbooks which had been left in the teachers' Lounge. Since there was a shortage of textbooks, teachers try to find any books which were not turned in the year before, for their classes. She took some books back to her class and planned to return to the Teachers' Lounge to retrieve more. Since the door to her newly assigned classroom was closed, she put the books on a desk in the hallway, then opened the door to the room and went inside to put down her lunch. When she came back out of the room to take the books off the desk she saw another science teacher, Dr. Jones, leaving Room 221. They spoke about a periodic element chart that belonged to Respondent but was still on the wall in her old classroom; Respondent collected the chart from her old classroom. When she exited the room Dr. Jones was looking at the science books which had been placed on the desk in the hallway by Respondent. She asked what Dr. Jones was doing with the books. He said he thought they were being thrown away. Respondent explained that she had carried them from the Teachers' Lounge. Dr. Jones gave her the book he was holding and she took the remainder from the desk into her new room. Dr. Jones

followed Respondent into the room and demanded that Respondent give him the books.

5) Dr. Jones claimed the books were his because he saw markings in some which are used in his classes. Respondent put the books in a metal cabinet in the back of the room against the wall opposite the doorway. Dr. Jones continued efforts to obtain the books. Respondent told Dr. Jones that she had carried them to her room to look through and was not giving them to him. Respondent asked Dr. Jones to leave her room. Dr. Jones told Respondent that he was taking the books;

6) In an effort to reach for the books Dr. Jones moved forward closer to the cabinet and pinned Respondent against the cabinet with the left side of his body as he tried to reach over Respondent's shoulders/arm to get the books off the cabinet shelf behind her. Respondent demanded that Dr. Jones get off of her and used her right hand to try to push him away;

7) Dr. Howell observed Dr. Jones' hand/arm up in the air (during his effort to reach for the books) and Dr. Howell saw Respondents hand near Dr. Jones' shoulder/neck as she tried to push him away from her;

8) Respondent went back to the teachers' Lounge to retrieve additional books and then came back to her room. Principal Gayles was waiting at Respondent's room to speak with her about the incident.

9) Respondent wanted to go inside her classroom to speak with the Principal. The Principal explained that Dr. Jones was still in the room.

10) A meeting was held in the Principal's office with Respondent, her Union Representative, Tammy Baldwin and Mr. Gayles. The weight of the testimony reveals that during Respondent's attempt to tell her side of the story, Principal

Gayles' continued to interpose his comments about Dr. Jones' version of the incident.

11) Respondent experienced minor soreness on the afternoon of September 3, 2003, and the pain grew worse over time. On the morning of September 4, 2003, she went to the school nurse and was told to see a doctor at 'Care Station,' one of the district's workers' compensation medical providers. She saw the doctors on September 4, 2003, September 8, 2003 and September 9, 2003. The diagnosis was cervical and lumbar strains and hip contusions. Respondent also went to her personal physician, Ruby T. Sampson on September 10, 2003 who authorized her absence through September 12, 2003;

12) At this time of the September 3, 2003 incident, Respondent was 62 years old, five feet nine inches tall, with a weight of 145 pounds. Dr. Jones was 43 years old, weighed 230 pounds and was six feet, two inches tall;

13) Respondent was authorized by the District Workers Compensation Administrator to see their designated orthopedic doctors at the Center for Orthopedics. She saw Dr. Richard Rosa on September 19, 2003 who authorized her absence for an additional month due to cervical, lumbar and hip sprains, as well as multiple contusions. Dr. Rosa authorized Respondent's return to work in October 2003. She returned on October 24, 2003.

14) Respondent's medical bills were paid because they were due to job related injuries pursuant to a Workers Compensation Court Settlement Agreement;

15) Respondent and Dr. Jones filed municipal court complaints that were withdrawn later after mediation;

16) Principal Gayles testified that he issued memoranda of reprimand to both Respondent and Mr. Jones, despite the fact that Respondent acted in self defense. Principal Gayles claimed that he did not decide who was right or wrong as to the incident. Respondent submitted a rebuttal to reprimand issued by Principal Gayles.

17) When Respondent returned to work in October 2003, she was reassigned to teach Careers instead of Science. She had never taught Careers, and was not given adequate texts/curriculum or supplies. Respondent no longer had a permanent classroom, but had to move around to use many different rooms. She was frequently assigned to use a room only to find that it was occupied. Respondent has reason to know and believe that the constant moving of her students from place to place and the delays in starting class seriously undermined the discipline of her students and conveyed a sense that Respondent was disrespected by the administration. This led to increased disrespectful behavior among some of her students.

18) Dr. Jones was not reassigned, nor did he provide a response to the reprimand from Dr. Gayles;

19) Respondent repeatedly requested to meet with Principal Gayles to discuss her situations inclusive of the teaching assignment change and her room change. Principal Gayles and his Administration never met with Respondent.

20) On January 29, 2004, Respondent had her Careers classes to draw a picture of their career goal. One student drew a pornographic picture. Respondent took the picture to show it to a Vice Principal and School Counselor, but they were unavailable. Respondent took the drawing to Principal Gayles who dismissed it as not significant, but typical for the particular student. Respondent gave a copy of the picture to the Child Study Team and prepared an incident report and a disciplinary report.

21) Respondent sought guidance in handling this matter and assistance for the student. There is no testimony or evidence to suggest that Respondent encouraged the student to draw a pornographic picture;

22) Respondent use of curse word or expletives Patrick Howell, K.T. or any other student except T.A. was not proven through the testimony or evidence presented;

23) Respondent did not interfere with the school nurse or cause for the medical endangerment of a student, as testified to by the Principal and acknowledged by Petitioner's counsel with a withdrawal of the charge;

24) Respondent did not dismiss numerous students from her classes or curse at them as testified to by the Principal and acknowledged by Petitioner's counsel with a withdrawal of the charge due to lack of evidence;

25) Respondent did not refer to Dr. Jones as a 'nigger' to her students as acknowledged by Petitioner's counsel with a withdrawal of the charge due to lack of evidence;

26) On February 27, 2004 Respondent's student T.A. refused to take final trimester test. At the end of the test period he had not placed is name on the blank test paper. Respondent took the test from other students and from T.A. and placed T.A. name on the top of his test sheet. T.A. stood up, looked over her shoulder and said "You spelled my name wrong, dyke." T.A. was disruptive throughout the test time and repeatedly called Respondent "dyke" as she continued to encourage him to take the test;

27) T.A. continued to repeat the slur to Respondent, who then lashed out at T.A. and said, "Your mother's a dyke." T.A. then began to physically attack Respondent by blocking her path as she tried to walk away from him, then by punching her in the shoulder when she begged him not to touch her, and finally by pushing her into a desk. At no time did Respondent punch or strike T.A. Respondent was able to call security who removed T.A. from the classroom. During the judicial mediation and settlement of this incident T.A. disclosed that he had punched Respondent and that Respondent never touched him;

28) Respondent reported the incident to Principal Gayles and expected a meeting with the parent that day. Principal Gayles met the parent without including Respondent.

29) Respondent's efforts to meet with T.A.'s parent before filing a police report were fruitless;

30) Principal Gayles' finding that Respondent was Insubordinate because of her efforts to meet with the parent before filing charges and because she did not adhere to his directive to not schedule an appointment because he would call the parent, when Respondent return to work – was insubordination with a reasonable cause attached. Respondent had tried to meet with Principal Gayles and he continued to shy away from any meeting with Respondent; at some point Respondent had to protect herself and make a decision to file a complaint without input from the Principal and without a conversation with the parent; Respondent had also tried to obtain the assistance of the Assistant Superintendent Frazier (on March 2, 2004); and she said she would have Principal Gayles call Respondent, but he never called.

31) Respondent agonized over the decision to file a police report, and was bereft of the support and input of her supervisors because of their unavailability. The police report was filed early morning of March 3, 2004.

32) T.A. filed a counter-complaint accusing Respondent of punching him.

33) During the Juvenile Court hearing on Respondent's charge against T.A., the student admitted that Respondent did not punch him. Respondent agreed to drop her charge if T.A. dropped his charges.

34) On March 3, 2004 Respondent attended a meeting with Assistant Superintendent Frazier and Belinda Scott Smiley, Administrative Assistant to the Superintendent, for the purpose of discussing the disciplinary measures to be taken because of the T.A. incident. Respondent confirmed that she called T.A.'s mother a "dyke" but denied that she added "bitch ass". Respondent was advised by Frazier and Scott Smiley that since there were ongoing Division of Youth and Family Services (DYFS), police and school district investigations, she was being suspended with pay.

35) Respondent was never contacted by DYFS nor did she receive a report from DYFS;

36) On March 5, 2004 Respondent received a letter from the Superintendent of Schools, that he would recommend that she undergo a psychiatric examination; no referral information was attached. No communication was received from the district regarding the psychiatric examination through June 2004. Respondent phoned the district in June 2004 to learn what was happening and was told that information on the district's Employee Assistance Program (EAP) would be mailed to her. She received a written notice indicating that she was going to be contacted about the EAP program in September 2004. Respondent never received information on who to contact to participate in the EAP. Respondent contacted her Union Representative to pursue the issue.

37) On October 21, 2004 more than seven (7) months later, Respondent received a letter to undergo a psychiatric examination. Respondent submitted a letter requesting an opportunity to seek legal advice;

38) By letter of November 8, 2004, the District alleged that "certain incidents" between Respondent and unspecified staff and students were the reason for the examination request. This letter was written in response to a verbal request for reasons.

39) By letter of November 12, 2004, Respondent's attorney made a written request for reasons as well. By letter of November 19, 2004 counsel for Respondent requested a more detailed set of reasons. The district's lawyer responded on November 30, 2004, sending a second copy of the November 8, 2004 letter.

40) By letter of December 16, 2004, Respondent's counsel clarified what was needed as to reasons for the examination request. The Orange School District withdrew the examination request and filed tenure charges which were served on February 4, 2005.

FINDINGS WITH RESPECT TO THE CHARGES

Based on the Joint Stipulation of Facts, the Findings of Fact, Briefs and Letters of Memoranda and the Credible Sworn Testimony, I **FIND** as follows:

1. CHARGE ONE CONDUCT UNBECOMING that:

a. Respondent did engage in a physical altercation with Dr. Gerald Jones another teaching staff member on September 3, 2003;

b. Respondent did try to push Dr. Jones away, in self defense, as she was pinned against the cabinet during Dr. Jones' attempt to retrieve the book(s) from the shelf behind Respondent;

c. Dr. Jones did make contact with Respondent's body as he reach over her to grab the book(s) from the shelf behind her;

d. Respondent did have her hand on Dr. Jones' neck in defense of her body;

e. Respondent did yell "get the fuck out of here" at some point or points during the altercation;

f. Dr. Howell, another teaching staff member, did see Respondent and Dr. Jones very closely together and saw Dr. Jones' hand/arm up in the air and Respondent with her hand around/near Dr. Jones' neck.

2. CHARGE TWO CONDUCT UNBECOMING that Respondent was insubordinate during the 2003-2004 school year, used expletives and displayed unprofessional and inappropriate conduct directed at staff members, students and parents.

a) The alleged incident regarding Respondent using the "fuck" word and other expletives to Dr. Howell was during the 2002-2003 school year, dates which are not in issue in this case. However, even if the alleged incident were to be considered in determining past practices, there was no inference made by Principal Gayles to substantiate Dr. Howell's testimony over Respondent's, nor was an incident report submitted on this specific alleged occurrence. Respondent contends that at no time did she use expletives to Dr. Howell.

b) The alleged incident between student K.T. and Respondent has been withdrawn from this case by Petitioner due to the lack of evidence;

c) The alleged incident at the photocopy machine was between Dr. Howell and Respondent. Dr. Howell testified that he inadvertently looked at Respondent's papers on the copy machine and she became inflamed and unprofessional because she though he was trying to read her personal materials. This alleged incident also took place

during the 2002-2003 school-year which is not in issue in this case. Also, there was no substantiating testimony or incident report on this occurrence which could be considered for a review of past practices;

d) The alleged incident regarding the checking of emergency cards in the nurse's office by Respondent and the protocol requested by the nurse for Respondent to follow, has been withdrawn from this case by Petitioner counsel having considered the claim de minimus;

e) The alleged incident regarding Respondent not allowing a student with asthma to go to the nurses office was negated by Principal Gayles, and withdrawn by Petitioner's counsel, because he mistakenly believed Respondent had placed one of her students in medical jeopardy, but he was thinking of a different situation;

f) On February 6, 2003 Respondent left a parent conference without being excused and before the problem was resolved. However, during testimony Respondent provided credible reasons why she deemed it best to leave the room. Respondent said that "at a prior conference, she had initially relented and was willing to change the student's grade from a "D" to "C", if the student worked to "earn that C." After the first marking period ended, Respondent did not feel the student had fulfilled her end of the promise, so when the parent asked at another conference for additional consideration on changing the grade to "C", Respondent adamantly refused. The parent was irate because Respondent wouldn't change the grade, while Respondent insisted she had given the student assignments and they were not completed. The parent began to scream and yell and Doris Moses, Assistant Principal declined to intervene, so Respondent left the room. Moses did not say anything to Respondent, and a later teacher evaluation form likewise did not mention the incident. The documentation of the satisfactory evaluation was accepted into evidence and Respondent's testimony was not refuted.

g) The March 1, 2004 incident of scheduling a meeting after the Principal gave an instruction not to do so was insubordination, but with a reason which should be

considered as a mitigating justification. The instruction of the Principal was documented in the exhibits entered on the record.

h) The alleged incidents via complaints received by the Principal from or on behalf of students who had been dismissed from class or who had been cursed at were dismissed by Petitioner's counsel due to a failure to produce evidence of same.

3. CHARGE THREE CONDUCT UNBECOMING that Respondent used the word "Nigger" to describe a teaching staff member in front of students - There was no substantiating testimony or supporting evidence for any of Dr. Jones' testimony. Witnesses requested to testify did not find their way to Court on any of the five de novo hearing dates. Exhibit P-9/I was reviewed and the fact that neither Belinda Scott-Smiley nor Nathan Parker provided testified to confirm their receipt of the document, the date of receipt and the content of their discussions with Dr. Jones on the issues presented was taken into account. Based on Dr. Jones' testimony alone, his letter could be perceived as self-serving. Likewise, Exhibit P-10/J was reviewed and the fact that no opportunity was afforded to Petitioner to confront the author of the document and/or the persons whose names were written by the author on the bottom of the letter, was also taken into consideration.

4. CHARGE FOUR CONDUCT UNBECOMING

a) That Respondent exercised poor judgment when encouraging a student to draw his career choice, even when he was skeptical about doing it and asked if he would get into trouble. It is difficult to believe that Respondent could in advance have known what the student would draw. There is no indication that her effort to encourage the student to draw was anything more than a teacher's desire to have all students participate in the training plan. The student did not appear to testify. There was no evidence produced to confirm that Respondent knowingly showed the drawing to other students.

i. That Respondent's action in not following set protocol by initially discussing the drawing with the Assistant Superintendent for Curriculum and Instruction instead of first

bringing it to the attention of the Principal was a breach of the chain of command and an act of insubordination.

b) The information shared in this section was not brought out during testimony on this case, and Petitioner's counsel has withdrawn charge 4b.

5. CHARGE FIVE CONDUCT UNBECOMING - that Respondent engaged in a physical altercation with a student in February 2004

a) Respondent confirms an altercation with T.A., a student, on February 27, 2004. Respondent said T.A. was disrespectful and inconsiderate during the class quarterly examinations and would not take the test. He caused disruptions in the class by continuing to call Respondent "dyke" whenever she spoke to him. When the exam ended, Respondent noticed that T.A. had not done any work on the paper and had not written his name on it. Respondent took the exam paper from T.A. and wrote his name on the paper; the untouched exam was accepted into evidence and a hand written comment with T.A.'s name written on the top appears on the document. T.A. informed Respondent that she had spelled his name wrong and called her a 'dyke" again. Respondent responded, "Your mother's a dyke." T.A. got up and punched Respondent in the shoulder, and when Respondent threatened to call security, T.A. shoved her. He was escorted from the classroom by security. Respondent admitted calling the student's mother a "dyke," but denies calling her a "bitch-ass dyke".

Respondent filed the charges at the police department at 5AM on March 3, 2004. T.A. filed a counter-complaint. Respondent and T.A. met in Municipal Court on September 8, 2004. T.A. admitted that Respondent did not touch him; and he admitted touching Respondent, but he said he did not hurt her. All charges were dismissed without prejudice as shown on the documents accepted into evidence.

Respondent said T.A. had "filled her up" and she felt disrespected. She said T.A. had been rude and bothersome since the day they met and from the beginning of the trimester in November, she had warned him, talked to him, and tried to conference with

his parents to get him to do his school work and behave in class. Respondent prepared an incident report and took it to Principal Gayles to notify him that she wanted to file a police report. At the end of the school day on February 27, 2004 Respondent went back to the Principle's office and learned that the Principal had already met with T.A.'s mother, because he was unable to find Respondent in time for the meeting.

i. On March 3, 2004, a meeting was held at the Orange Board of Education Administrative Office with the Assistant Superintendent Constance L. Frazier and the Assistant to the Superintendent for Human Resources and Operations, Belinda Scott Smiley to discuss the above February 27, 2004 incident. Frazier testified that during the meeting Respondent spoke in a very loud voice and displayed erratic and uncontrollable behavior. When it was explained to her that she has to be professional in all situations, no matter how frustrated she may become, she responded by stating that "I am not going to put up with this or take anything from these kids". Respondent admitted that she made the statement "your mother is a bitch ass".

LEGAL DISCUSSION AND ANALYSIS

UNBECOMING CONDUCT:

Respondent has been charged with several counts of "unbecoming conduct", pursuant to N.J.S.A. 18A: 6-10. The term unbecoming conduct is an elastic one broadly defined to include any conduct "which has a tendency to destroy public respect for [government] employees and competence in the operation of [public] services." Karins v. City of Atlantic City, 152 N.J. 532, 554 (1998). Behavior rising to the level of unbecoming conduct "need not be predicated upon the violation of any particular rule or regulation, but may be based merely upon the violation of 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." Hartmann v. Police Department of Ridgewood, 258 N.J. Super. 22, 40 (App. Div. 1992). In the context of a teacher tenure case, "...the touchstone is fitness to discharge the duties and functions of one's office or position." In

The Tenure Hearing of Grossman, 127 N.J. Super. 13, 29 (App. Div. 1974) certif. denied, 65 N.J. 292 (1974).

The weight of the testimony reveals that the conduct between Dr. Jones and Respondent was primarily at the instigation of Dr. Jones, who followed Respondent into her classroom and inside the room assaulted her by voluntarily drawing his body close to hers and reaching over her as she stood with her back pinned to the cabinet. The facts of this case are void of any concern illustrated by Dr. Jones for his conduct. Respondent a 65 year old female weighing 145 lbs., against a young man weighing 230 lbs at 6' 2" in height, should never be a contest. Dr. Jones, a science teacher and podiatrist, was expected to also be a gentleman and to leave the situation alone or to report his difficulties to the Principal or appropriate personnel. Instead, Dr. Jones freely walked into and stayed in Respondent's room, even after she asked him to leave.

The unbecoming conduct in this matter is that of Dr. Jones; and Dr. Jones' actions were the direct cause of the unbecoming conduct charges against Respondent. Respondent would have never been involved in the incident had Dr. Jones not insisted that he should have the books that Respondent had discovered and carried from the teacher's Lounge.

BURDEN OF PROOF:

Petitioner bears the burden of proof and consequently to prevail in the instant case, the truth of the charges must be established by a preponderance of the "credible evidence." Close v. Kordulak Bros., 44 N.J. 589, 598-599 (1965); Atkinson v. Parsekian, 37 N.J. 143, 149 (1962); see also, In The Matter of The Tenure Hearing of Grossman, 127 N.J. Super 13, 23 (App. Div. 1974), certif. denied, 65 N.J. 292 (1974), In Re Tenure Hearing of Philips, 117 N.J. 567, 575 (1990). Preponderance is defined as the "greater weight of the credible evidence in the case," as testified to at trial by witnesses. State v. Lewis, 67 N.J. 47 (1975). In establishing the credibility of witnesses, the New Jersey Supreme Court has pronounced that credibility "must not only proceed from the mouth of a credible witness, but it must be credible in itself, as

well." Spagnuolo v. Bonnett, 16 N.J. 546, 554-555 (1955). It is the obligation and responsibility of the Judge to weigh the credibility of the witnesses in order to make factual findings. Credibility is the value that a fact finder gives to the testimony of a witness. The word contemplates an overall assessment of a witness's story in light of its rationality, internal consistency, and manner in which it "hangs together" with other evidence. Carbo v. United States, 314 F. 2d 718 (9th Cir. 1963), cert. denied, sub nom. Palermo v. United States, 377 U.S. 953 (1964). The term has been defined as testimony which must proceed from the mouth of the credible witness and must be such as our common experience, knowledge, and common observation can accept as probable under the circumstances. State v. Taylor, 38 N.J. Super. 6, 24 (App. Div. 1955); See also, Gilson v. Gilson, 116 N.J. Eq. 556, 560 (E. & A. 1934). A fact finder is expected to base decisions of credibility on his or her own common sense, which is also referred to as intuition or experience. Barnes v. United States, 412 U.S. 837 (1973).

TENURE:

Tenure of teaching staff members is bestowed by statute, N.J.S.A. 18A:28-5, and acquired by satisfactory performance by teachers who have a position in which a teaching certificate is required, if they hold the appropriate certificate and if they been employed for the requisite time, generally, three consecutive calendar years. Because it is a form of job security teachers must be diligent in retaining their tenured status, and School Boards must be scrupulous in meeting their evidentiary burden in order to bring tenure charges against a tenured teacher. N.J.S.A 18A:6-10 provides that: "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, incapacity, unbecoming conduct, or other just cause..." Tenure essentially is to protect teachers from removal for "unfounded, flimsy, or political reasons." Zimmerman v. Board of Education, 38 N.J. 65, 71 (N.J. 1962).

Due to their custody and care of children, teachers are necessarily required to exercise a degree of self-restraint and controlled behavior unlike most other types of employment. In re Tenure Hearing of Lucarelli, 97 N.J.A.R.2d (EDU) 537, 541. As a

public role model, this essentially correlates to a higher standard of behavior. In re Tenure Hearing of Sammons, 1972 S.L.D. 302; see also In re Tenure Hearing of Wachendorf, OAL Dkt. No. EDU 6860-04, Initial Decision (May 3, 2005), aff'd, Comm'r (July 14, 2005).

STANDARD OF PROOF:

The determination of whether to remove a teacher from a tenured position requires consideration of the nature of the act, the totality of the circumstances, and the impact on the teacher's career. In re Fulcomer, 93 N.J. Super 404, 421 (App. Div. 1967). Usually, a series of events demonstrating a pattern of behavior is an indication of "unbecoming conduct." However, if the incident is sufficiently flagrant, one incident will suffice. Redcay v. State Board of Education, 130 N.J.L.369 (Sup. Ct. 1943), aff'd o.b. 131 N.J.L. 326 (E & A., 1944). Dismissal is usually reserved for cases in which there has been a continuing pattern of misconduct accompanied by prior warnings. Fulcomer at 421.

It is noted that in the instant case a number of the charges have been withdrawn by Petitioner's counsel due to lack of evidence, no supporting documentation, no witness testimony and a decision after filing that a charge is de minimus; several charges were drafted by mistake against Respondent because the situations were confused with another teacher; and at least the content of one charge was never presented at the hearing.

In the instant case, the weight of the testimony shows that the only mountable charges against Respondent is for poor judgment in using certain word in the classroom in the T.A. incident. The other charges were dismissed or a credible explanation was provided for the conduct.

RESIDUUM RULE – HEARSAY:

It is well established in administrative hearings hearsay evidence is admissible. Weston v. State, 60 N.J. 36 (1972). However, hearsay evidence is accorded whatever weight the administrative law judge deems appropriate. The nature, character and scope of the evidence, the circumstances of its creation and production, and, in general, its reliability must all be considered. N.J.A.C. 1:1-15.5(a). It is also well established that 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 N.J.A.C. 1:1-15.5(b). The New Jersey Supreme Court has pronounced:

> "[T]he rule is that 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, Ibid at 50-51.

PRIOR DISCIPLINARY HISTORY

Respondent is a certified as an elementary school teacher who is 65 year old, 5' 9", 145 lbs. and female. She was originally hired by the Orange Board of Education as a science teacher for grades K-8, in September 1999. Respondent worked in the East Orange School District for one year before coming to Orange; and she also taught school in Texas. Over the years from 1999, leading up to the 2003-2004 school year, Respondent has been well evaluated with reports of outstanding and satisfaction in Teacher Observation report and Teacher Evaluations.

In the instant case, Respondent was suspended for the first time due to a series of alleged incidents which could not all be proven. The weight of the testimony reveals that at most Respondent defied her Principal buy attempting to contact a parent to

speak about the betterment of a student. The record reveals that Respondent made a number of attempts to involve the Principal in her decision making, and hence the need to quickly speak to the parent. The incident with T.A. was reduced to an act of poor judgment after hours of agitation and name calling; and in the end T.A. told the truth in Municipal Court, that he did punch Respondent and that Respondent never touched him.

PROGRESSIVE DISCIPLINE

An employee's past disciplinary record may be reviewed to determine the appropriate penalty for the current specific offense. West New York v. Bock, 38 N.J. 500 (1962). The concept of "progressive discipline," the imposition of penalties of increasing severity, is an appropriate consideration in determining the reasonableness of the penalty. Id. at 523-24. In addition to considering an employee's prior disciplinary history when imposing a disciplinary penalty, other appropriate factors to consider include the nature of the misconduct, the nature of the employee's job, and the impact of the misconduct on the public interest. Id.

MITIGATING CIRCUMSTANCES:

The following mitigating circumstances on the charges, must be taken into consideration when determining if there is just cause for the penalty imposed:

1). As to Charge One the altercation between Dr. Jones and Respondent on September 2, 2003 – Dr. Jones commenced the incident and voluntarily chose to come into Respondents class room to harass and assault her. The weight, size, age and sex difference between the parties would justify Respondent trying to protect herself;

2). As to Charge Two the various alleged incidents of misconduct during the 2003-2004 school year were not proven and most were withdrawn by Petitioner's counsel. However, as to paragraph f of the Charge Two – leaving a parent conference, there was no testimony regarding what constituted the unbecoming conduct on Respondent's part. Respondent was being harassed by a parent for refusing to change a child's grade after

the child made a promise to do her homework and did not do it. Instead of arguing with the parent or remaining in the room while the parent became extremely irate, Respondent maintained her dignity and left the room. The Assistant Principal remained in the room and never saw a cause to reprimand respondent on how she conducted herself. In fact, the Assistant Principal confirmed the parents agitation during testimony and confirmed the situation with the student not doing the work. There was no conduct unbecoming against Respondent. The conduct unbecoming was against the parent.

3). As to Charge Three – there was absolutely no testimony or proof to substantiate this charge.

4). As to Charge Four – the drawing by a student in Respondent's Career Class. Respondent followed protocol and sought advice and guidance from superior personnel member. When Respondent took the drawing to the Principal he did not find it disturbing and said: "that is J.S. ... that is typical of JS". There was no evidence presented to show that Respondent encouraged J.S. to draw such a picture. Charge Four was withdrawn by Petitioner's counsel.

5). As to Charge Five, the February 2004 incident with name calling pertaining to a student's mother. The incident resolved itself in Municipal Court when the student told the truth about having hit his teacher and the teacher never touching him. The fact that the teacher did inappropriately verbally respond to the repetitious badgering by the student in class was a moment of poor judgment and the only Charge with merit in this case. However, even this charge has mitigating circumstances attached. All of the testimony on this incident indicates that T.A. was a trouble-maker and continuously disrupted the class. Respondent tried everything she could to get him to do his class work, but he was unapproachable. T.A. just wanted to be in school and play around. The constant annoyance got to Respondent and she let him have a little of his own medicine, but in the wrong place. It has been established that a teacher is held to a higher standard, but in instances such as described in the testimony on this case, a teacher is also a human being and equipped with human feelings. In this case T.A. was

able to stress Respondent to a point of using poor judgment, and incite her to retaliate with unbecoming language which was inappropriate of the standards expected of teachers.

Except for the T.A. incident cited above Respondent Disciplinary History record is clean. And, her teaching performance record is outstanding.

DISMISSAL:

Although "[u]nfitness for a position under the school system is best evidenced by a series of incidents," Redcay v. State Board of Education, 130 N.J.L. 369, 371 (Sup. Ct. 1943), aff'd, 131 N.J.L. 326 (E. & A. 1944), a single flagrant event can likewise merit dismissal. In re Tenure Hearing of Fulcomer, 93 N.J. Super. 404, 421 (App. Div. 1967); In re Tenure Hearing of Samiljan, OAL Dkt. No. EDU 5020-87, Final Decision (April 18, 1987). N.J.S.A. 18A:6-10 – Dismissal and reduction in compensation of persons under tenure in public school system,

> 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) 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.

CONCLUSION

Teachers hold a position demanding public trust and are one of the most dominant and influential forces in the lives of children; teachers are held to a higher standard of conduct. In Re Tenure Hearing of McIntyre, 96 N.J.A.R. 2d (EDU) 718, 725. The responsibility of a teacher is not mitigated by when or where the improper behavior occurs nor the backgrounds of his/her students. Whether teaching in a suburban school district, inner-city school, or a State Youth Correctional Facility, the

teacher must set the standard of appropriate conduct. Respect for lawful authority becomes a greater responsibility for the teacher of a student body who have already demonstrated a great lack of respect for the rule of law.

If, as stated by the Commissioner in In Re McIntyre, Ibid., "educators of this state serve as role models, they are required to set a good example for the children entrusted to them".

Conduct unbecoming a public employee has been defined to include "any conduct with adversely affects the moral or efficiency of a public entity, conduct which has a tendency to destroy respect for public employee and their appointing authorities, or conduct which destroys confidence in public service." Washington v. John J. Montgomery Medical Home, 96 N.J.A.R. 2d. (CSV) 100, 102. To demonstrate unbecoming conduct the public authority does not have to prove the criminality of the actions, nor need the actions give rise to a criminal or disorderly persons charge. One may argue that every conviction of a crime or disorderly persons violations is de facto unbecoming conduct; however, an acquittal – or in this matter completion of a pre-trial intervention (PTI) program – does automatically eliminate a disciplinary charge of conduct unbecoming a public employee.

Respondent has been an exemplary teacher. Prior to the change in school administrations (the advent of a new Principal at Orange Middle School) Respondent taught her science classes without incident and achieved satisfaction in her student's progress and outstanding evaluation in regard to her teacher performance. At no time had Respondent experienced the politics of scrambling for acceptance – she taught her classes and stayed out of everyone's way. Her students did their homework or there were consequences, she worked for the betterment and success of her students. The decision to relocate Respondent to another room is an administrative decision. The way the relocation was done is a human decision which should be questioned (regarding the real purpose for the move) in this matter. One incident of "poor judgment was proven in this case. One proven incident of poor judgment during the course of more than nine

years in the teaching profession is a marvel. Respondent's use of curse words in the class was a result of the constant agitation by a student and the teacher's frustration that she was unable to encourage him to do his lessons and take the test. There are no reported repeats of this conduct after the date of the incident.

The party bearing the burden of proof in an administrative hearing must prove the case by a preponderance of the evidence. This tribunal, therefore, must decide in favor of the party or whose side the weight of the evidence preponderates, and according to the reasonable probability of truth. One factor that must be considered in a determination as to which party's version of an incident has the reasonable probability of the truth is that the interest, motive, bias or prejudice of a witness may affect his credibility and justify the trier whose province it is to pass upon the credibility of an interested witness in disbelieving his testimony. 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.

In this matter, the testimony of all the witnesses was taken into thorough consideration and I found the testimony of Respondent, Antoine Gayles, Tammy Baldwin, S.J. and Constance Frazier to be strongly credible. Further, I found a significant portion of the testimony provided by Dr. Jones, and Patrick Howell to be incredible.

ORDER

Based on the law, the weight of the credible testimony, the documentary evidence, prior disciplinary history, the doctrines of progressive discipline and mitigation, it is **ORDERED** that, Adelphia Poston, Respondent not be dismissed from her tenure position as a school teacher with the School District of the Orange Township; And, it is further **ORDERED** that a penalty of a thirty (30) day suspension be imposed for her use of "poor judgment" when using expletive words in her classroom on one specific occasion.

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

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

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

July 19, 2006
DATE

Sandra Ann Robinson
SANDRA ANN ROBINSON, ALJ

E-mail Receipt of Initial Decision Confirmed by the Department of Education on:

7/19/06
DATE

Mailed to Parties:
Laura Sanders
DIRECTOR AND
CHIEF ADMINISTRATIVE LAW JUDGE

JUL 20 2006
DATE

OFFICE OF ADMINISTRATIVE LAW

cml

APPENDIX

PETITIONER'S WITNESSES

Constance Frazier	Assistant Superintendent for Curriculum and Instructional Services
Antoine Gayles	Principal at Orange Middle School
Patrick Howell	Science Teacher at Orange Middle School
Gerald Jones	Science Teacher at Orange Middle School
Doris Moses	Assistant Principal at Orange Middle School

RESPONDENT'S WITNESSES

Adelphia Poston	Respondent; Science Teacher at Orange Middle School
Tammy Baldwin	Union Representative at Orange Middle School
S.J.	Student at Orange Middle School

PETITIONER'S EXHIBITS

P-1/A	Memorandum to Belinda Scott Smiley from Dr. Antoine Gayles, dated September 5, 2003
P-2/B	Memorandum to Adelphia Poston from Dr. Antoine Gayles, dated September 3, 2003
P-3/C	Statement of Dr. Gerald Jones, dated September 3, 2003
P-4/D	Memorandum to Dr. Antoine Gayles from School Nurse, Laura W. Sacks, RN., dated October 30, 2003; [ID Only]
P-5/E	Memorandum to Dr. Antoine Gayles from School Nurse, Laura W. Sacks, RN., dated November 12, 2003
P-6/F	Memorandum to Adelphia Poston from Doris Moses, Assistant Principal, dated February 6, 2003
P-7/G	Memorandum to Adelphia Poston from Dr. Antoine Gayles, dated March 2, 2004
P-8/H	Memorandum to Adelphia Poston from Dr. Antoine Gayles, dated

	January 30, 2004
P-9/I	Memorandum to Belinda Scott Smiley from Dr. Gerald Jones, dated February 6, 2004
P-10/J	Statement from Student I.C., undated
P-11/K	Picture by Student J.S., undated
P-12/L	Memorandum to Adelphia Poston from Dr. Antoine Gayles, dated February 6, 2004

RESPONDENT'S EXHIBITS

R-1	Memo Poston to Frazier, undated
R-2	Classroom diagram
R-3	Municipal Court Complaint Interview Form (State (Poston) v. Jones, dated September 4, 2003
R-4	Orange Police Report, dated September 4, 2003
R-5	Compensation claim form, dated September 4, 2003
R-6	Compensation claim form, dated September 8, 2003
R-7	Compensation claim form, dated September 9, 2003
R-8	Medical Note, dated September 10, 2003
R-9	Memo Poston to Gayles, dated September 12, 2003
R-10	Center for Orthopedics Note, dated September 19, 2003
R-11	Center for Orthopedics Note, dated October 22, 2003
R-12	Letter Parker to Poston, dated October 22, 2003
R-13	Letter Poston to Gayles, dated October 27, 2003
R-14	Letter Parker to Poston, dated November 20, 2003
R-15	Memo Poston to Gayles, dated November 21, 2003
R-16	Memo Poston to Gayles, dated December 5, 2003
R-17	Memo Poston to Gayles, dated January 12, 2004
R-18	Orange School Incident Report, dated January 29, 2004
R-19	Orange School Discipline Report, dated January 29, 2004
R-20	Memo Poston to Gayles, dated February 2, 2004
R-21	Memo Poston to Gayles, dated February 6, 2004
R-22	Memo Poston to Gayles, dated February 10, 2004

R-23 Memo Poston to Gayles, dated February 11, 2004
R-24 Memo Poston to Gayles, dated February 18, 2004
R-25 Careers Test Form, dated February 27, 2004
R-26 Orange Police Incident Report, dated March 3, 2004
R-27 Orange School Discipline Report, dated January 12, 2004
R-28 Orange School Discipline Report, dated January 12, 2004
R-29 Orange School Incident Report, dated February 5, 2004
R-30 Juvenile Charges Disposition, dated September 8, 2004
R-31 Orange Township Disposition, dated September 20, 2005
R-32 Letter Parker to Poston, dated September 5, 2004
R-33 Letter Parker to Poston, dated March 5, 2004
R-34 Memo Poston to Gayles, dated March 10, 2004
R-35 Letter Parker to Poston, dated March 15, 2004
R-36 Letter Smiley to Poston, dated August 19, 2004
R-37 Letter Wiggins to Smiley, dated September 7, 2004
R-38 Letter Smiley to Poston, dated October 21, 2004
R-39 Memo Poston to Smiley, dated November 8, 2004
R-40 Letter Parker to Poston, dated November 8, 2004
R-41 Letter Bucceri to Smiley, dated November 12, 2004
R-42 Letter Bucceri to Parker, dated November 19, 2004
R-43 Letter Cole to Bucceri, dated November 30, 2004
R-44 Letter Bucceri to Cole, dated December 16, 2004
R-45 Letter Cole to Bucceri, dated December 23, 2004
R-46 Letter Bucceri to James, dated February 17, 2005
R-47 Observation of October 5, 2000
R-48 Observation of December 14, 2000
R-49 Evaluation of March 13, 2001
R-50 Observation of March 2, 2001
R-51 Observation of February 12, 2002
R-52 Evaluation of May 13, 2003

363-06

#363-06 R

EDUARDO NUNEZ,	:	
PETITIONER,	:	
V.	:	COMMISSIONER OF EDUCATION
NEW JERSEY STATE DEPARTMENT OF EDUCATION,	:	DECISION ON REMAND
RESPONDENT,	:	
and	:	
BOARD OF EDUCATION OF THE CITY OF UNION, HUDSON COUNTY, INTERVENOR.	:	

SYNOPSIS

In a prior proceeding, petitioner – a former school maintenance man who had been found disqualified by the Department as the result of a criminal history record check and whose employment was subsequently terminated by the local district board of education – sought an order qualifying him for school employment and reinstating him to his prior position. Petitioner contended that the Department should have conducted his check under the standard in effect at the time he submitted his application to the Board (February 1998), not the standard in effect at the time a check was actually conducted upon discovery that no record could be found of the prior check (September 2001); petitioner also claimed he was rehabilitated. The Commissioner held that the Department acted properly – since it had never received the 1998 application, nor was it aware of petitioner or contacted with respect to him at any time prior to 2001 – but that petitioner should be allowed, on equitable grounds, to demonstrate rehabilitation under the standard of the 1998 law. The Commissioner remanded the matter for further proceedings because petitioner had not at that point had a full and fair opportunity for such demonstration; the Commissioner additionally directed that, if petitioner continued to seek reinstatement to his former position and back pay, the Commissioner directed that the employing Board of Education be named as a respondent if petitioner wished to pursue this claim on remand.

On remand, the ALJ found that petitioner had demonstrated rehabilitation and should be granted an opportunity to pursue his claim for reinstatement and back pay against the Board.

The Commissioner rejected the Initial Decision, holding that – because petitioner offered neither witnesses nor documents to corroborate his own testimony and provided little information beyond that already on record in the prior proceeding – he had failed to demonstrate rehabilitation by clear and convincing evidence as required by statute and applicable decisional law. The Commissioner also rejected the ALJ's order regarding petitioner's claims for reinstatement and back pay, finding that a disqualified employee could not pursue such claims and that petitioner had failed to name the Board – which was granted Intervenor status by the Commissioner subsequent to issuance of the ALJ's decision – as a party to 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.

October 20, 2006

OAL DKT. NO. EDU 7858-05
(EDU 3689-02 ON REMAND)
AGENCY DKT. NO. 57-2/02

EDUARDO NUNEZ, PETITIONER, V. NEW JERSEY STATE DEPARTMENT OF EDUCATION, RESPONDENT, and BOARD OF EDUCATION OF THE CITY OF UNION, HUDSON COUNTY, INTERVENOR.	:	COMMISSIONER OF EDUCATION DECISION ON REMAND

The record of this matter and the Initial Decision on Remand issued by the Office of Administrative Law (OAL) have been reviewed. Although neither party filed exceptions, arguments in opposition to the Initial Decision as it pertained to petitioner's claim for reinstatement and back pay were made by the Union City Board of Education (Board) in support of the Board's motion to intervene, filed on August 18, 2006 and granted by the Commissioner on September 14, 2006.

Upon careful review, the Commissioner rejects the Initial Decision of the Administrative Law Judge (ALJ) for the reasons that follow.

At the outset, the Commissioner rejects the greater portion of the ALJ's "Summary of Facts and Testimony" (Initial Decision at 3-7) and "Analysis of Petitioner's Compliance Under *N.J.S.A.* 18A:6-7.1" (*Id.* at 7-12), since these sections – apart from an

interjected quotation of statute at 7-9 – are reproduced verbatim from the ALJ's Initial Decision of January 5, 2005, which has already been rejected by the Commissioner in its entirety due to pervasive errors in fact-finding and conclusions of law. (Commissioner's Decision, May 26, 2005) Moreover, the discussions in these sections substantially pertain to issues fully litigated between the named parties and decided by the Commissioner in the prior proceeding. As such, they have no bearing on the proceeding on remand – the sole purpose of which was to afford petitioner an equitable opportunity to demonstrate rehabilitation *nunc pro tunc* under the law as it existed in February 1998, and possibly to pursue his claim for reemployment and back pay provided he named the Board as a respondent. (*Id.* at 18-19) The Commissioner does, however, consider the summary of petitioner's testimony on his personal and job history (Initial Decision at 4-5) and the case law (*Wolffbrandt, supra* and *Skwarek, supra*) cited by the ALJ at 11-12, neither of these having been reached in the prior decision because they pertained to petitioner's actual claim of rehabilitation and not to his equitable entitlement to pursue it. (See Note 14, Commissioner's Decision of May 26, 2005 at 16.)[1]

[1] The Commissioner's decision of May 26, 2005 established that the Department of Education never received the criminal history record check application purportedly sent by the Union City Board on petitioner's behalf in February 1998, nor was it aware of petitioner or contacted with respect to him at any time prior to 2001; thus, the Department acted properly in applying *N.J.S.A.* 18A:6-7.1 as it existed at that time when a fingerprint check was finally conducted on petitioner, advising him of his right to appeal to the Commissioner for a different result based on equitable considerations. It further determined that petitioner was not to blame for the delay between his initial application to the Board in February 1998 and the actual check in 2001, so that the interests of justice favored according him the opportunity to demonstrate rehabilitation on a *nunc pro tunc* basis. However, because the ALJ erroneously believed that the determination on petitioner's rehabilitation would be made by the Union City Board of Education, she did not continue with proceedings for this purpose; consequently, although petitioner's testimony and argument touched on his claimed rehabilitation at certain points in passing, the Commissioner remanded the matter for a full and fair rehabilitation hearing, additionally directing the filing of an amended petition naming the Union City Board of Education as a respondent if petitioner intended to pursue his claim for reinstatement and back pay, assuming he were found qualified for school employment.

The Commissioner further rejects the portion of the Initial Decision actually addressing the threshold question on remand (at 12-15), wherein the ALJ concludes that petitioner has demonstrated rehabilitation on the present record so as to be found qualified for school employment.

The Commissioner so holds substantially because the ALJ based her findings solely on petitioner's own testimony and the assertions of his legal counsel. Indeed, apart from basic information regarding petitioner's age, offense, sentence and absence of further arrests – all available from undisputed official documents already on record in the prior proceeding as part of petitioner's criminal history record check – there is not one scintilla of corroborating testimony or evidence for any of the various claims and statements made by or on behalf of petitioner. [2] While the Commissioner has no reason to question the ALJ's acceptance of petitioner as a credible witness, the fact remains that where, as here, the statutory standard for prevailing on appeal is *by clear and convincing evidence*, something more than the bare assertions of even the most forthright and believable petitioner is required to make supportable findings of fact. This is particularly so when: 1) the subject of the appeal, and the claims made in conjunction with it, readily lend themselves to production of corroborating evidence or testimony – as demonstrated in numerous prior matters of this type, *infra*; and 2) when the consequence of accepting a petitioner's word without substantiating proof – the potential exposure of school children to an unfit employee – is so serious and contrary to clear legislative intent. In this latter

[2] Petitioner testified both at the prior proceeding and on remand, the latter during the April 24, 2006 "oral argument" (referenced at page 2 of the Initial Decision) for which no transcript has been provided. (The transcript of the prior proceeding is included in the record; see Note 4 below.) The statements of petitioner's counsel on remand cannot be ascertained conclusively in the absence of a transcript; however, there appears to be no other possible source for certain statements recited by the ALJ as fact, but neither attributed to petitioner (the sole witness on remand) nor ascertainable from any document on record, including the transcript of the prior proceeding.

regard, the Commissioner is additionally concerned that, although the ALJ correctly listed each of the factors set forth in *N.J.S.A.* 18A:6-7.1 as it existed prior to amendment in June 1998, her discussion and analysis reflect no meaningful recognition of the heavy responsibility placed upon the Commissioner by the Legislature, nor do they sufficiently consider how this responsibility has been exercised in prior decisional law.

Initially, with respect to the nature and responsibility of petitioner's position, the ALJ concluded that, as a maintenance worker, petitioner worked in various school buildings, but had no contact with children. (Initial Decision at 12) However, there is nothing in the record to substantiate this conclusion, and, indeed, the then-supervisor of Union City's maintenance workers testified in the prior proceeding that petitioner was "removed from contact with children" when the district learned in 2001 that there was a problem with his criminal history record check. (T16)[3] Additionally, the Commissioner has long held that "although a custodial position is not generally one where the incumbent has direct involvement with students in that he is responsible for their care, supervision or instruction, the Commissioner has been consistently mindful that such a position nevertheless affords an individual significant and otherwise unsupervised access to children, a consideration which must not be minimized when examining rehabilitation pursuant to *N.J.S.A.* 18A:6-7.1." *In the Matter of the Disqualification from School Employment of Gregory Campbell,* 96 *N.J.A.R. 2d* (EDU) 431, affirmed State Board of Education 740; *In the Matter of the Disqualification from School Employment of J.F.C.*, decided by the Commissioner November 7, 1997. (Contrast a position such as teacher's aide, which is "under the direct supervision of a classroom teacher." *In the Matter of the*

[3] Exhibits are referenced by their respective "Petitioner" (P-) or "Respondent" (R-) designations, while the transcript of hearing on June 17, 2004 is indicated by "T" followed by the applicable page number(s).

Disqualification from School Employment of J.C., decided by the State Board of Education July 2, 1997.) See also, *Larry Hall v. New Jersey State Department of Education*, 91 *N.J.A.R. 2d* (EDU) 46, 47; *In the Matter of the Disqualification from School Employment of J.F.C., supra*; *In the Matter of the Disqualification from School Employment of D.L.*, decided by the Commissioner March 20, 1998. ("Protection of the public is particularly vital in the school environment, where a custodian has ready access to impressionable young children who are not under the watchful eye of their parents.")

With respect to the nature and seriousness of petitioner's offense, the ALJ states that petitioner was convicted of possession and sale of drugs and that he was sentenced to imprisonment for a term of 4 ½ years to life, but qualifies the statement by adding that he was released after successfully serving the minimum term and is now remorseful for having committed what he acknowledges as a very serious offense. (Initial Decision at 13) While the ALJ may be correct in her findings as to petitioner's remorse and good behavior while incarcerated, these have no bearing on an assessment of the seriousness of the offense itself. In this regard, the Commissioner has previously viewed as paramount "the Commissioner's responsibility to ensure that students are provided with environments which are free of the influence of alcohol and other drugs," *In the Matter of the Disqualification from School Employment of D.L., supra,* and has stressed that "New Jersey has an expressed public policy of ridding the schools of the scourge of illegal drug use." *Larry Hall v. New Jersey State Department of Education, supra*; *In the Matter of the Disqualification from School Employment of J.F.C., supra.*

As to the date of petitioner's offense, his age at the time of its commission, and the circumstances and social conditions that contributed to it, the Commissioner notes

that by 1998 significant time had elapsed since petitioner's March 1984 conviction, and that at the time of the record check conducted in 2001 (Exhibits R-2, R-5), no other convictions appeared on petitioner's record;[4] the Commissioner further notes petitioner's explanations regarding the difficulties of his upbringing and the opportunity selling drugs afforded him to live the "high life" at age 28 while supporting a wife and a two-year-old son. (Initial Decision at 13) However, in finding rehabilitation where significant time had passed since the offense, the Commissioner has previously distinguished between *possession* and *distribution* of drugs, *In the Matter of the Disqualification from School Employment of H.F.J.*, decided by the Commissioner May 19, 1998, and, in assessing levels of responsibility, has held that offenders in their mid-late twenties are "presumably old enough to understand the consequences" of their action. *In the Matter of the Disqualification from School Employment of M.D.S.*, decided by the Commissioner March 13, 1998 Thus, while the time since his conviction works in petitioner's favor, as does the fact that social conditions and personal circumstances contributed to his decision to sell drugs, the Commissioner must balance against these the fact that petitioner's offense reflected a conscious decision – made at an age of maturity – to violate the law for monetary gain, without regard for the effect of his actions on either his own family or the victims of the "enterprise" in which he was engaging.

Finally and most significantly, with respect to evidence of rehabilitation, the Commissioner cannot agree that petitioner has met his burden on the record presented. (Initial Decision at 13-15) While it is unquestionably true that the Commissioner has in the past found candidates rehabilitated from isolated drug offenses for reasons similar to

[4] Finding No. 6 in the Initial Decision at 13 erroneously gives the date of petitioner's release from prison as 1998, rather than 1988 as consistently testified by petitioner, unchallenged by the Department, and recited elsewhere in the present and prior decisions.

those proffered by petitioner, in all such cases, this finding was based on an array of supporting evidence including letters of corroboration and character attestation from supervisors, co-workers, teachers, clergy, long-time acquaintances (including in one case a police officer, two attorneys and a former teacher) or persons with whom the candidate shared a relationship of particular trust (including in one case the mother of three children entrusted to the candidate for daily child care); certificates of completion of drug, alcohol or self-help programs; copies of diplomas, transcripts or other indicators of educational attainment; and evidence of involvement in community and volunteer programs. *In the Matter of the Disqualification from School Employment of J.C., supra*; *In the Matter of the Disqualification from School Employment of C.W.R., Jr.*, decided by the State Board of Education June 4, 1997; *In the Matter of the Disqualification from School Employment of T.R.B.*, decided by the State Board of Education June 4, 1997; *In the Matter of the Disqualification from School Employment of B.D.W.*, decided by the Commissioner July 10, 1997. In a case similar to petitioner's – in circumstances where a candidate disqualified for drug offenses was found to have made a decision to turn his life around, behaved as a "model" prisoner, and remained drug-free and law-abiding for ten years after his conviction – the candidate was found qualified based on no less than 26 exhibits offered in support of his own testimony. *In the Matter of the Disqualification from School Employment of J.H.*, decided by the Commissioner July 10, 1997. In the two cases cited by the ALJ, the respective petitioners offered compelling evidence over and above their own claims, including – in the case of *Wolffbrandt, supra* – detailed statements from the sentencing judge, the petitioner's parole officer and officials of the school district where he proposed to be employed; in the case of *Skwarek, supra,* "several witnesses and letters

attesting to her rehabilitation and present good character," including compelling statements from friends, counselors, and supervisors (at 2).

In contrast, with respect to petitioner's conduct subsequent to his release from prison, there is not a single document on record supporting the claim that petitioner was neither fired from nor involved in misconduct at any of the nine jobs he held between 1988 and 1998, when he applied to work at the Union City school district. There is not a single letter or affidavit attesting to his good character and conduct, in the workplace or otherwise, nor is there any documentation of his education, or evidence of the "strong community and family life" attributed to him by the ALJ. (Initial Decision at 15) In sum, apart from his documented (until 2001) lack of further involvement with the law, there is not a shred of corroborating testimony or evidence to support the conclusion that petitioner has led an "exemplary" life at all times since his release from prison. (*Ibid.*)

Thus, while petitioner has presented himself as rehabilitated, when examining the record actually developed at hearing in light of the duty imposed on the Commissioner and prior decisional law, the Commissioner is compelled to find – contrary to the conclusion of the ALJ – that petitioner has failed to demonstrate rehabilitation by clear and convincing evidence in accordance with the standard of *N.J.S.A.* 18A:6-7.1. While this result may seem harsh given petitioner's testimony and the ALJ's judgment of his credibility, it cannot be overlooked that the Commissioner remanded this matter to the OAL for the express purpose of providing petitioner with a full and fair opportunity to make a demonstration of rehabilitation sufficient to meet the standard of statute, rather than judging his claim on the sparse record developed up to that point; however, as events have transpired, apart from some additional details regarding petitioner's employment and pre-

conviction family history – all of them based solely on petitioner's own testimony – the record on remand offers the Commissioner virtually nothing beyond the record already reviewed in the prior proceeding.

Finally, because petitioner has not been found qualified for school employment, it follows that he can make no claim against the Union City Board of Education for reinstatement of employment and/or back pay. However, the Commissioner also notes petitioner's failure to name the Board as a respondent in this matter, as he was expressly directed to do in the event he intended to pursue such claim on remand. (Commissioner's Decision of May 26, 2005 at 19) Consequently, the Commissioner also rejects the ALJ's order that "petitioner be granted an opportunity to take appropriate steps to pursue further claims related to this matter." (Initial Decision at 15)[5]

Accordingly, the Initial Decision of the OAL is rejected for the reasons set forth herein and the Petition of Appeal is dismissed.

IT IS SO ORDERED.[6]

COMMISSIONER OF EDUCATION

Date of Decision: 10/20/06

Date of Mailing: 10/20/06

[5] Having so held, the Commissioner finds it unnecessary to reach the Board's arguments in opposition to this order.

[6] This decision may be appealed to the State Board of Education pursuant to *N.J.S.A.* 18A:6-27 *et seq.* and *N.J.A.C.* 6A:4-1.1 *et seq.*

State of New Jersey
OFFICE OF ADMINISTRATIVE LAW

INITIAL DECISION
OAL DKT. NO. EDU 03689-02
AGENCY DKT. NO. 57-2/02

REMAND
OAL DKT. NO. EDU 07858-05

EDUARDO NUNEZ,

Petitioner,

v.

DEPARTMENT OF EDUCATION,

Respondent.

Gilberto M. Garcia, Esq. representing Petitioner

Kathleen Asher, Deputy Attorney General (**Zulima V. Farber**, Attorney General State of New Jersey, representing Respondent)

Record Closed: April 26, 2006 **Decided:** June 9, 2006

BEFORE **SANDRA ANN ROBINSON**, ALJ:

STATEMENT OF THE CASE

Eduardo Nunez, (Petitioner/Nunez) contends that his removal as a maintenance worker by the State of New Jersey Department of Education (Respondent) on December 7, 2001, was a result of a second criminal history review which was unlawful, since he had undergone an initial criminal history review in 1998 and was hired and

worked for the Union City School District from March 1, 1998 until his dismissal on December 13, 2001. On or about November 29, 2001, a second criminal history review of Petitioner was conducted because no criminal review records were found in his personnel file. The second check revealed the existence of a criminal history, for first degree criminal sale of a controlled dangerous substance in New York State, pursuant to N.J.S.A.18A: 6-7.1, for which Petitioner served a four and one-half year jail term during 1984 through 1988. Petitioner argues that he met all the requirements of the application process and was hired prior to the June 30, 1998 effectuation of a deletion in the New Jersey Statutes, allowing rehabilitation to be demonstrated.

PROCEDURAL HISTORY

On April 29, 2002, the Department of Education Bureau of Controversies and Disputes transmitted this matter to the Office of Administrative Law (OAL) where it was filed as a contested case pursuant to N.J.S.A. 52:14B-2(b). A July 2002 settlement conference was scheduled by the ALJ initially assigned to the case, but an adjournment was granted pending the substitution of the Deputy Attorney General handling the case. On July 25, 2002 another Deputy Attorney General was assigned and the matter was scheduled for an in-person settlement conference on November 2, 2002. The November 2nd conference was rescheduled due to a case scheduling conflict by Petitioner's counsel. On February 4, 2003 this matter was reassigned to another ALJ and then reassigned on February 10, 2003 to the undersigned. Another settlement conference date was set for April 25, 2003 and Petitioner's counsel did not appear due to his inability to obtain an air-flight back to New Jersey; the case disposition was treated as a Failure to Appear. On May 1, 2003, Petitioner's counsel requested a reinstatement of the matter because of the circumstances for his non-appearance. The case was reinstated and an in-person pre-hearing was completed on August 29, 2003; a Pre-hearing Order was signed on September 5, 2003. De novo hearing dates were scheduled for December 4 - 5, 2003 and June 17-18, 2004. At the close of testimony on June 18, 2004, the exhibits appearing in the Appendix were entered into evidence; and a Briefing Schedule Order was signed which included time for the acquisition of

tapes and transcripts. Post-hearing briefs were due to the undersigned by September 24, 2004. An extension of time for submission was granted to the parties. On October 28, 2004, the undersigned received a reply to Petitioner's initial post hearing submission from the Attorney General's office. A telephonic conference was scheduled for November 9, 2004 for the purpose of determining a deadline for reply responses, should Petitioner choose to respond to the Attorney General's second submission. Petitioner advised the undersigned by letter that no reply would be forthcoming and the hearing record closed on November 10, 2004. Thereafter, on May 26, 2005, the Commissioner of Education issued a decision requiring further proceedings on this matter. The case was remanded back to the Office of Administrative Law on July 18, 2005 for the purpose of a hearing on whether Petitioner meets the standard for rehabilitation as set forth in N.J.S.A. 18A:6-7.1, and prior to amendment effectuated on June 30, 1998.

The undersigned received the remand on July 27, 2005 and scheduled a de novo hearing on the limited issue(s), for September 21, 2005. The parties requested an adjournment of the September 2005 date and the matter was rescheduled for April 24, 2006. Oral argument was completed on April 24th and the record closed on April 26, 2006 upon review of the taped proceedings.

ISSUE ON REMAND

Does petitioner meet the standard for rehabilitation set forth in N.J.S.A. 18A:6-7.1 as it existed prior to an amendment of that statute which became effective June 30, 1998?

SUMMARY OF FACTS AND TESTIMONY

On March 28, 1984, Petitioner Nunez was convicted of a second-degree sale of a controlled dangerous substance in New York State. On March 1, 1998, the Petitioner was hired as a maintenance worker by the Union City Board of Education. At that time

of hire, Petitioner was fingerprinted, submitted completed application forms, which included the necessary information for a criminal background investigation. **(Exhibits P-1, P-2).** Respondent's witness, Carl Johnson, Secretary to the Union City Board of Education and Supervisor of non-instructional staff acknowledged during testimony that Petitioner had submitted all documents requested of him at the time of hire. Mr. Johnson testified that he gave Petitioner's application to his office personnel for forwarding to the Criminal History Review Unit in Trenton (via regular mail), but he did not receive the results of a criminal background check. Carl Johnson had no idea that Petitioner had a criminal record when he recommended him to the Board for hiring. The Board of Education approved the hiring and awaited a sign-off by the Department of Education, which reviews of the package submitted. **(Exhibits P-3, P-4, P-5).** Carl Johnson explained that if the criminal background check is clear the applicant becomes a permanent hire, and the Board of Education would not receive a formal letter of approval (only the new hire would get a formal letter). Petitioner said on February 27, 1998 he received a letter of approval for provisional hire to commence work in March 1998. Mr. Carl Johnson said that in 1998 the Board of Education only received disqualification letters. When questioned about why there was no disclosure by Petitioner of his criminal background, he responded that he answered the question asked of him on the application:

> Have you been convicted of a crime within the last seven (7) years?
> He answered: NO (because he was convicted on March 28, 1984; the amendment to the New Jersey Administrative Code became effective June 30, 1998; and he was completing the application in February 1998).
> **See Exhibit P-5.**

Petitioner advanced his request of the OAL Court to arrive at a finding which would recommend an opportunity to allow his presentation of arguments and evidence regarding Rehabilitation, by way of: summarizing his work experiences after release from jail explaining that he worked for two plumbing companies (2 years); for Kraft Foods (3 years); Goya Foods (1 year); that he moved to Florida from 1994 to 1998 and

purchased a home while working for Parmalatt, Liberia Foods and A.C. Refrigerator Company. When he vacationed in New Jersey in 1998, he stayed and searched for employment because his family had always found life to be better in New Jersey. He has purchased a home in Wayne, New Jersey for his wife of twenty-three years and their two sons, ages 13 and 23. From 1998 through the date of this hearing Petitioner professed to be an outstanding citizen with no convictions or arrests. He earned $36,000.00 per year without overtime, from the Union City Board of Education; medical and dental benefits were included in his employment package. He was assigned to all schools in the district to assist with carpentry, painting and plumbing. His wife works for Hilton Corporation. His parents, father 86 years old and mother 80 years old live in Union City. He has two brothers and one sister. Petitioner said he was unaware of the rehabilitation waivers until his disqualification was explained to him in 2001. His belief was that his provisional hire was completed after six months on the job, and his permanent position commenced when he received a letter from the Board of Education at the end of the six-month period. **(Exhibit P-3).** He said he had no reason to believe there was any concern about his employment since he had provided truthful response to all the questions asked of him on the application and had completed the fingerprinting requirement for the criminal background check. Petitioner has been terminated without pay, pending the appeal of this matter.

Petitioner discloses information which would be used as evidence of rehabilitation in a plenary hearing before the Board of Education. It is noted that should Petitioner be able to present a rehabilitation argument that he must discuss the circumstances under which the offense occurred; explain whether the offense was an isolated or repeated incident; explain the asocial conditions which may have contributed to the offense; provide evidence of rehabilitation, including good conduct in prison or in the community, counseling or psychiatric treatment received, acquisition of additional academic or vocation schooling, successful participation in correctional work-release, or the recommendation of persons who have had the individual under their supervision (while incarcerated and after).

On November 29, 2001, approximately 45-months after Petitioner began working, the Criminal History Review Unit within the Department of Education conducted a criminal history background check on him because documentation regarding his 1998 submission was not found in his personnel file. **(Exhibits R-1, R-2).** It was during this investigation that the Petitioner's 1984 criminal conviction was revealed. **(Exhibits R-4, R-5).**

Carl Carabelli, Manager New Jersey Department of Education Criminal History Review Unit (Unit) has been with the Unit for sixteen years and prior to becoming Manager he worked for and retired from the New Jersey State Police Criminal Investigations Section. Mr. Carabelli said that prior to the change of law in 1998 an applicant for employment with the Department of Education could be hired for a six-month provisional period, because the response from the FBI on the criminal background checks usually took six months. The procedures for applicant processing and the system for criminal investigation checks have been revised. Currently, the Office of Compliance monitors school employee records (as of July 1, 2002 there was a fully automated system); there was no monitoring in 1998, all procedures were done manually, so there were times when files were not reconciled because of the volume of work to complete. Also, Mr. Carabelli noted that criminal background application documents received by the State prior to 1998 were kept for one year and after 1998 they were kept three years. In 1998, according to Mr. Carabelli, it was the school district's responsibility pursuant to State Statute to "make sure a criminal background check occurred, and the school district had to assume responsibility for compliance". Mr. Carabelli's search of computer data records indicated that Petitioner was not in the database prior to 2001. Carabelli said that had he received Petitioner's application package prior to June 30, 1998 that a disqualification letter would have been mailed to Petitioner allowing a thirty-day response to appeal the decision and include proof of rehabilitation.

On December 12, 2001, Petitioner's employment with the New Jersey Department of Education was terminated due to his felony conviction in New York State

and the fact that the New Jersey Statues changed in 1998 and disqualification (employment in public education sector) was automatic, for any felon. **(Exhibit R-3).** No argument was offered to refute the criminal conviction or application pursuant to the current version of N.J.S.A. 18A:6-7.1 (d):

> "for 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 statues of the United *States* or any other state for a substantially equivalent crime."

Petitioner argues that because of the unique circumstance of the case, he should be allowed to demonstrate rehabilitation pursuant to the prior, no longer effective, version of the statute. **(Exhibit R-6).**

ON REMAND

ANALYSIS OF PETITIONER'S COMPLIANCE UNDER N.J.S.A. 18A;6-7.1

N.J.S.A. 18A:6-7.1 PRIOR TO AMENDMENT EFFECTIVE JUNE 30, 1998:

In 1997, N.J. Stat. § 18A:6-7.1- Criminal record check, set forth the following:

> 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 or contract for the 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 except individuals serving as school bus drivers 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. An individual employed by a board of education

or a school bus contractor holding a contract with a board of education, in the capacity of a school bus driver, shall be required to meet the criminal history record requirements pursuant to section 6 of P.L.1989, c.104 (C.18A:39-19.1). This section shall not apply to any individual who provides services on a voluntary basis. An individual other than a school bus driver shall be disqualified from employment or service under this act if the individual's criminal history record check reveals a record of conviction of any of the following crimes and offenses:

a. In New Jersey, any crime or disorderly person's offense:

(1) bearing upon or involving sexual offense or child molestation as set forth in N.J.S. 2C:14-1 et seq.; or

(2) Endangering the welfare of children or incompetents, as set forth in N.J.S. 2C:24-4 and N.J.S. 2C:24-7; or

b. A crime or offense involving the manufacture, transportation, sale, possession, or habitual use of a "controlled dangerous substance" as defined in the "New Jersey Controlled Dangerous Substances Act," P.L.1970, c.226 (C.24:21-1 et seq.); or

c. (1) A crime or offense involving the use of force or the threat of force to or upon a person or property including: armed robbery, aggravated assault, kidnapping, arson, manslaughter and murder; or

(2) A simple assault involving the use of force which results in bodily injury; or

d. In any other state or jurisdiction, a conviction involving conduct which, if committed in New Jersey, would constitute any of the crimes or disorderly person's offenses described in this section of this act.

e. Notwithstanding the provisions of this section, an individual shall not be disqualified from employment or service under this act on the basis of any conviction disclosed by a criminal record check performed pursuant to this act if the individual has affirmatively demonstrated to the Commissioner of Education clear and convincing evidence of his or her rehabilitation. In determining whether an individual has affirmatively demonstrated rehabilitation, the following factors shall be considered:

(1) The nature and responsibility of the position which the convicted individual would hold;

(2) The nature and seriousness of the offense;

(3) The circumstances under which the offense occurred;

(4) The date of the offense;

(5) The age of the individual when the offense was committed;

> (6) Whether the offense was an isolated or repeated incident;
>
> (7) Any social conditions which may have contributed to the offense;
>
> (8) Any evidence of rehabilitation, including good conduct in prison or in the community, counseling or psychiatric treatment received, acquisition of additional academic or vocational schooling, successful participation in correctional work-release programs, or the recommendation of persons who have had the individual under their supervision.

School employees and applicants are subject to a check of their criminal record. N.J.S.A. 18A:6-7.1. This statute enumerates a list of crimes that permanently disqualify an applicant or employee from employment in a facility, center, school, or school system under the supervision of the Department of Education and the Board of Education. N.J.S.A. 18A:6-7.1(a)-(c). Among the enumerated offenses is the sale of a "controlled dangerous substance," the substantive offense which the Petitioner was convicted of on March 28, 1984. N.J.S.A. 18A:6-7.1(b).

Prior to its June 1998 amendment, N.J.S.A. 18A: 6-7.1 permitted an employee to potentially mitigate a disqualifying criminal offense conviction by affirmatively demonstrating his or her rehabilitation by clear and convincing evidence. See: L. 1986, c. 116, § 1. As amended, the current version of N.J.S.A. 18A:6-7.1, does not allow evidence of rehabilitation to be presented to mitigate past offenses, but instead provides that any individual convicted of a disqualifying offense "shall be permanently disqualified from employment or service." In repealing the provision that had allowed the individual the opportunity to show rehabilitation, the Legislature limited the individual to the opportunity to challenge only the accuracy of the disqualifying criminal history record. N.J.S.A. 18A:6-7.1(e).

The June 30, 1998 amendments to the statute expressly provided that it "shall take effect immediately." Moreover, it provided that the new law "shall first apply to criminal record checks *conducted* on or after the effective date of [the act.]" N.J.S.A.

18A:6-7.1(g) (emphasis added). The statute does not speak to when the investigation should or must be conducted, only the law to be followed when it is done.

The key issue in this matter is which version of the statute should be applied to Petitioner's disqualification. Petitioner contends his employment was conditioned upon the successful completion of a background check and therefore the investigation should have occurred under the authority of the prior version of the statute. However, the statute's plain-language does not provide that the applicable law must be that of the date of hire, but instead provides that the date of the background check should control.

In addition, N.J.S.A. 18A:6-7.2, which governs the authority of the Commissioner of Education in regard to the criminal history investigations of workers in educational institutions, makes no reference to when the background check must be done. It only authorizes the Commissioner of Education to conduct such checks. Whereas, the plain-language of the statute makes no clear reference to when the criminal investigation must be conducted, the statute does state however, that an individual who has been convicted of any of the enumerated offenses, "shall be permanently disqualified from employment or service . . ." making no reference to prospective application only. N.J.S.A. 18A:6-7.1. Generally, courts favor interpretations of statutes that afford prospective application only. Nobrega v. Edison Glen Associates, 167 N.J. 520, 536 (2001).

In Garvin v. N.J. State Bd. of Examiners, EDU 7455-00, Initial Decision, (March 27, 2002), adopted, Commissioner of Education (May 20, 2002), the Petitioner was found ineligible for a teaching certificate under the current version of the statute due to prior convictions which are enumerated as disqualifications from employment under N.J.S.A. 18A:6-7.1. In Garvin, the Petitioner had submitted to a background investigation after he had been granted a position and was teaching pursuant to a conditional teaching certificate. His background check found felony convictions similar to those of Petitioner Nunez, and he was accordingly found to be disqualified from the position of substitute teacher. Garvin contended that he should

be allowed to present evidence of rehabilitation under the old statute due to his holding of conditional licenses during the transition from the old to the current version of the statute. In denying Garvin the opportunity to proffer mitigating evidence of rehabilitation, the Administrative Law Judge held that the conditional permit and the full permit were not equivalent, and his prior position as an emergency-substitute did not provide reasoning to grandfather the prior law to the current standard. Similar facts are currently at bar, except that Petitioner Nunez had been working for the school district for two and one-half years and had fulfilled all requirements of the application process: and had received a letter indicating permanent employment. Petitioner Nunez's situation does warrant the application of the prior version of the statute, since the plain language of the statute provides the applicable date to be the date of the criminal history record check. N.J.S.A. 18A:6-7.1(g). In this instance there is no indication as to whether or not the 1998 background check completed; however what is for certain is that all of the facts and the testimony reveal that Petitioner fully completed his responsibilities and turned all documents for the background check over to Respondent. Respondent acknowledges receipt of all documents and confirms that the documents were turned over for a criminal background check. Under these circumstances, Petitioner should be allowed his due process rights and the Board of Education should entertain a plenary hearing. Unlike Garvin who submitted an application for a standard teaching certificate two months after the June 30, 1998 effective date of the act, Petitioner Nunez had been submitted documents prior to the effective date, and if fact in February 1998 prior to the application of the new law. Absent any indication that Petitioner was the cause for no criminal history record in his personnel file, the opportunity to demonstrate affirmatively his rehabilitation by clear and convincing evidence should be granted.

In Wolffbrandt v. New Jersey State Department of Education 92 NJAR .2d (EDU) 457 (1991), there was a finding that a paroled school custodian worker, who had been arrested for distribution of a controlled dangerous substance, possession of marijuana and armed robbery, demonstrated rehabilitation where he had completed drug treatment, counseling and had actively pursued academic and vocational

training and was supported by good recommendations from persons who knew him in various environments. In State Department of Education v. Skwarek, 92 NJAR .2d (EDU) 1 (1991), there was a finding of rehabilitation for a teacher convicted of possession of marijuana, use of cocaine, possession of hypodermic needle and drug paraphernalia, were there was proof of success in a twelve step program, completion of counseling, subsequent training, community service and received strong recommendation from persons who supervised her.

In this matter, Petitioner Nunez was convicted of "possession" of a controlled dangerous substance, which is a disqualifying offense under both versions of the statute; but the first version allowed for a demonstration of rehabilitation. Petitioner's application for employment and submission of documents and fingerprints for the criminal background check occurred during the first version of the statute and his right to due process should be permitted at advance, as per the terms of pre 1998 statute. The denial of a demonstration of rehabilitation would be improper, according to the circumstances of this case.

ON REMAND

FINDINGS IN REGARD TO PETITIONER MEETING THE STANDARD FOR REHABILITATION WHICH WAS IN EFFECT PRIOR TO JUNE 30, 1998

Towards the affirmative demonstration to the Commissioner of Education of clear and convincing evidence of rehabilitation, the Petitioner herein has argued and testified for consideration of the following circumstances and factors:

(1) The nature and responsibility of the position which the convicted individual would hold – Petitioner is a "Maintenance Man" and was employed as a maintenance worker for the Union City school system. He worked in various school buildings and had no contact with children

(2) The nature and seriousness of the offense – Petitioner testified that on May 28, 1984, he was convicted for distribution of a controlled dangerous substance with the intent to sell. He pleaded guilty to possession of the drugs and the sale of the drugs. He was sentenced to imprisonment for 4-1/2 years to life. However, he completed the end of the minimum term of 52 months successfully and was released. Petitioner said that he was remorseful for committing a very serious offense against his family, against the law and against himself.

(3) The circumstances under which the offense occurred – Petitioner stated that he had an opportunity to make money and therefore he took a chance at selling drugs/narcotics. He explained that this was a one time isolated incident and that he had never been in trouble before and he has never been in trouble since.

(4) The date of the offense – Petitioner was convicted in New York State of first degree criminal sale of a controlled dangerous substance on March 28, 1984.

(5) The age of the individual when the offense was committed – Petitioner was 28 years old at the time of the offense.

(6) Whether the offense was an isolated or repeated incident – The offense was an isolated incident and since the time of his release in July 1998, Petitioner has had no further trouble with the law.

(7) Any social conditions which may have contributed to the offense – Petitioner, his mother and three siblings came to the United States from Cuba in 1966. He grew up without a father. His father had been jailed for opposing Castro and remained in jail for 20 years. Petitioner testified that he was rebellious growing up without a father. He didn't finish high school because too much liberty and freedom was given to him by his mother since she could not watch over him at all times due to her employment schedule as a social worker. His intent was to live a good life in America. However, at 28 years old with a wife and a two year old boy, he strayed from his goals in an isolated incident while trying to live the "high life."

(8) Any evidence of rehabilitation, including good conduct in prison or in the community, counseling or psychiatric treatment received, acquisition of additional academic or vocational schooling, successful

participation in correctional work-release programs, or the recommendation of persons who have had the individual under their supervision – Petitioner's rehabilitation efforts have been numerous. Petitioner's employment and history of work advances after release from prison, is identified on the following chart:

NAME/ADDRESS OF COMPANY	REASON FOR LEAVING	DATES OF EMPLOY / STATUS UPON LEAVING	JOB TITLE
Vermund Corporation: 546 38th Street, Union, NJ	Increase in wages	1988-1989 / good standing	Plumbers Helper
Paolermo Supply: 28th & Kennedy Blvd Union, NJ	Increase to $10 per hour	1989-1990 / good standing	Counter Sales Person
Kraft Food Service: 91st Street North Bergen, NJ	Increase to $12.50 - $17.00 per hour	1990-1992 / good standing	Select Order Package
Goya Foods: Secaucus, NJ	Increase to $17.00 plus Commissions	1992 - 1993	Salesman
AC Refrigeration: Florida	Company filed Bankruptcy after Tax Investigation	July 1994 - 1995	Warehouse Supervisor
Iberia Foods: Miami, Florida	Reason Unknown	1995- 1996	Salesman
Parmalat Milk: Holendale Beach, Florida	Laid off, due to direct deliveries of the product	1995- 1996	Chauffer
Delta Airlines: (Part Time) Fort Lauderdale, Florida	Searching for full time job	1997 for several months	Baggage Loader, Direct Planes to Gate
Fountainbleu Hotel: Miami Beach, Florida	Moved to New Jersey for a position with Union City Board of Education	1998 – two months part time	Bus Boy
Union City Board of Education: Union City, NJ	Termination by the BOE based on Petitioner's alleged disqualification from school employment	Employed by Union City BOE from February 1998 - December 13, 2001	Maintenance Department Worker

After release from prison, Petitioner worked in New Jersey from 1988 through 1993. He and his family then moved to Florida in an effort to find a better position paying more money. At all times since Petitioner's release from prison his conduct has been exemplary. He has never been fired from employment nor has he ever been involved with misconduct during his employment. He purchased homes in New Jersey and in Florida and has timely maintained his mortgage and tax payments. No counseling or psychiatric treatment was recommended for Petitioner after his release or during his parole. He successfully completed his probation term. While incarcerated, Petitioner received an Associate's Degree in Human Behavior, and completed several law courses. Today, Petitioner maintains a strong community and family life with his wife and 25 year old son and 15 year old daughter.

CONCLUSION

Based on all of the foregoing, I **CONCLUDE** that the Petitioner has met the "clear and convincing standard" outline for demonstrating rehabilitation prior to June 30, 1998 and as set forth in N.J.S.A. 18A:6-7.1.

ORDER

Having found that Petitioner qualifies for having met the standard for rehabilitation, I **ORDER** that Petitioner be **GRANTED** an opportunity to take appropriate steps to pursue further claims related to this matter.

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

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

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

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

Sandra Ann Robinson

June 9, 2006

DATE

SANDRA ANN ROBINSON, ALJ

E-mail Receipt of Initial Decision Confirmed by the Department of Education on:

6/9/06

DATE

Mailed to Parties:

DIRECTOR AND CHIEF ADMINISTRATIVE LAW JUDGE

JUN 12 2006

DATE

OFFICE OF ADMINISTRATIVE LAW

cml

APPENDIX

Witnesses For Petitioner:

Eduardo Nunez, Petitioner

Witnesses For Respondent:

None on remand

EXHIBITS

Petitioners:

P-1 Applicant Authorization and Certification February 26, 1998

P-2 Petitioner's Affidavit February 26, 1998

P-3 Letter of Hire Union City Board of Education February 27, 1998

P-4 Union City Board of Education Personnel Master File Year 1997/98

P-5 New Jersey Department of Education Affidavit February 26, 1998

Respondents:

R-1 Applicant Authorization and Certification for 2001

R-2 Finger Print Search Letter from the New Jersey Department of Education December 7, 2001

R-3 Termination Letter from Union City Board of Education December 12, 2001

R-4 New Jersey Department of Education Disqualifying Letter to Union City Superintendent December 7, 2001

R-5 FBI Criminal History Information sheet

R-6 New Jersey Department of Education Letter of Explanation Change in State Statute

APPENDIX

Witnesses For Petitioner:

Eduardo Nunez, Petitioner

Witnesses For Respondent:

None on Remand

EXHIBITS

Petitioners:

P-1 Applicant Authorization and Certification February 26, 1998

P-2 Petitioner's Affidavit February 26, 1998

P-3 Letter of Hire Union City Board of Education February 27, 1998

P-4 Union City Board of Education Personnel Master File Year 1997/98

P-5 New Jersey Department of Education Affidavit February 26, 1998

Respondents:

R-1 Applicant Authorization and Certification for 2001

R-2 Finger Print Search Letter from the New Jersey Department of Education December 7, 2001

R-3 Termination Letter from Union City Board of Education December 12, 2001

R-4 New Jersey Department of Education Disqualifying Letter to Union City Superintendent December 7, 2001

R-5 FBI Criminal History Information sheet

R-6 New Jersey Department of Education Letter of Explanation Change in State Statute

370-06

#370-06

IN THE MATTER OF THE TENURE :

HEARING OF ARDEENA LONG, : COMMISSIONER OF EDUCATION

STATE-OPERATED SCHOOL DISTRICT : DECISION

OF THE CITY OF PATERSON, :

PASSAIC COUNTY. :

SYNOPSIS

Petitioning school district certified fifteen tenure charges of conduct unbecoming and insubordination against respondent – a tenured language arts teacher – for actions which included, *inter alia*: theft of District property; conducting personal business during instructional time; improper entry into a supervisor's personal portfoloio and taking of personal material; possession of stolen items; and dishonesty.

The ALJ found insufficient proofs to sustain several of the tenure charges, but determined that nine of the charges were sustained, in whole or in part, by testimony and evidence presented at hearing. The sustained charges involved acts of theft and dishonesty intended to cover up respondent's unprofessional conduct, including, *inter alia:* entering a supervisor's personal file cabinet and removing items; making personal copies and trying to pass them off as part of a lesson plan; conducting private business at the classroom computer during instructional time; improperly entering her supervisor's personal portfolio, taking personal material, and possession of the stolen items; and theft of the staff sign-out book. The ALJ concluded that the sustained charges do not rise to the level sufficient to revoke respondent's tenure and determined that the appropriate penalty is a six-month suspension and loss of pay, as well as withholding of increments for two years beyond the period of her suspension.

The Commissioner adopted in part, and rejected in part, the Initial Decision of the OAL. The Commissioner concurred with the ALJ regarding the sustainable charges, but categorically disagreed with the ALJ's penalty recommendation, determining that the charges sustained necessitate respondent's removal from her tenured position. In so deciding, the Commissioner concluded that the multiple charges of unbecoming conduct and dishonesty amply demonstrate respondent's unfitness to discharge the duties of her teaching position.

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.

October 26, 2006

OAL DKT. NO. EDU 1998-06
AGENCY DKT NO. 33-1/06

IN THE MATTER OF THE TENURE	:	
HEARING OF ARDEENA LONG,	:	COMMISSIONER OF EDUCATION
STATE-OPERATED SCHOOL DISTRICT	:	DECISION
OF THE CITY OF PATERSON,	:	
PASSAIC COUNTY.	:	

The record of this matter and Initial Decision of the Office of Administrative Law (OAL) have been reviewed. Exceptions of the District and those of respondent, dated and filed October 5, 2006 and October 6, 2006, respectively, were untimely pursuant to *N.J.S.A.* 1:1-18.4.[1] As such, these and both parties' reply exceptions were not considered herein.

Upon careful and independent review of the record of this matter, which includes transcripts of the 5 days of hearing at the OAL,[2] the Commissioner adopts in part, and rejects in part, the recommended decision of the Administrative Law Judge (ALJ). Initially, the Commissioner concurs with the ALJ, for the reasons detailed in her Initial Decision, that the District has established – by a preponderance of the credible evidence – charges 4, 6, part of 7[3], 8, 9 10, 11 and 12. She further agrees, again for the reasons set forth in the decision, that charges

[1] *N.J.S.A.* 1-1-18.4(a) specifies: "Within 13 days from the date the judge's initial decision was mailed to the parties, any party may file written exceptions with the agency head.***" OAL papers indicate that the instant Initial Decision was mailed to the parties on September 18, 2006. This mailing date was subsequently confirmed via telephone communication with both counsel for the District and that of respondent. It is further noted that neither party requested an extension of time within which to file exceptions.

[2] Hearing was held on March 27, 29, 30, 31 and April 11, 2006.

[3] Sustained is that portion of the charge "dealing with Ms. Long exercising a significant lack of judgment and concern for the proper education of her students by using the copy machine to make personal copies of a form and then attempting to cover the infraction by integrating the form into the lesson." (Initial Decision at 31)

1, 2, 3, 5, 13 and 14 have not been sustained. In so determining, the Commissioner has given full consideration to all evidentiary proofs comprising the record, and recognizes that the ALJ's assessment of the credibility of the witnesses is of particular importance. In this regard, the Commissioner is mindful that the ALJ's credibility determinations are entitled to deference. "The reason for this rule is that the administrative law judge, as a finder of fact, has the greatest opportunity to observe the demeanor of the involved witnesses and, consequently, is better qualified to judge their credibility." *In the Matter of Tenure Hearing of Tyler*, 236 *N.J. Super.* 478, 485 (App. Div. 1989), *certif. denied*, 121 *N.J.* 615 (1989). Indeed, with the 2001 amendment to the Administrative Procedure Act (*P.L.* 2001, *c.*5, §4), the Commissioner's standard of review in this regard is clear and unequivocal – she "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)) A reasoned review of the record, with this governing standard in mind, provides no basis for concluding that the ALJ's credibility assessments and resultant fact finding were without the requisite level of support.

Turning to the appropriate penalty in this matter, although clearly recognizing in her decision the gravity of the established charges against respondent, the ALJ inexplicably concludes that these charges do not rise to the level so as to warrant the loss of her tenured position. The Commissioner is compelled to categorically disagree and, therefore, rejects the recommended penalty of the ALJ and, rather, determines that the nature of the charges sustained here necessitates respondent's removal from her tenured position.[4]

[4] It is noted that the ALJ's reference on page 35 of her decision to limitations on suspensions and fines for civil service employees set forth in *N.J.A.C.* 4A:2-2.4 is wholly inapplicable in this matter. Rather, dismissal or reduction

Although the term "unbecoming conduct" may, at times, appear to be a somewhat amorphous concept, as put forward by the ALJ, prior education law cases have provided definitional clarification to assist in recognizing the applicability of this term to specific behavior:

> "[u]nbecoming conduct" is an elastic term broadly defined to include any conduct "which has a tendency to destroy public respect for [government] employees and competence in the operation of [public] services." *Karins v. City of Atlantic City*, 152 *N.J.* 532, 554 (1998) Behavior rising to the level of unbecoming conduct "need not be predicated upon a violation of any particular rule or regulation, *but may be based merely upon a violation of the implicit standard of good behavior which devolves upon one who stands in the public eye as a upholder of what is morally and legally correct.* Despite the apparent vagueness of this standard, "it fairly and adequately conveys its meaning to all concerned." *Laba v. Newark Bd. of Educ.*, 23 *N.J.* 364, 384 (1957). In the context of a school tenure case, "*the touchstone is fitness to discharge the duties and functions of one's office or position.*" *In re Tenure Hearing of Grossman*, 127 *N.J. Super.* 13, 29 (App. Div. 1974, *certif. denied*, 65 *N.J.* 292 (1974)
> (Initial Decision at p. 25, quoting *In the Matter of the Tenure Hearing of Motley, State-Operated School District of Newark, Essex County*, decided by the Commissioner August 4, 1999, *aff'd.* State Board of Education December 1, 1999) (emphasis supplied)

The District has proven multiple charges of unbecoming conduct against respondent which, the Commissioner concludes, amply demonstrate respondent's unfitness to discharge the duties of her position. Initially, charges 6, 9, 10 and 11 of the District's proven charges establish that respondent, on more than one occasion, engaged in an act of theft. It is by now well-recognized in school law that even one act of theft, irrespective of the value of the item taken, is sufficiently flagrant – in and of itself – to require a school district employee's removal from his or her tenured position. *In the Matter of the Tenure Hearing of DePasquale*, 92

---

of salary for teaching staff members for inefficiency, incapacity, conduct unbecoming a teacher, or other just cause is governed by subarticle B of article 2 of chapter 6 of *N.J.S.A.* 18A, not rules and regulations of civil service.

N.J.A.R. 2d (EDU) 537, *aff'd.* by the Appellate Division, Dkt. No. A-4236-92 (1994); *In the Matter of the Tenure Hearing of Alan P. Tighe*, decided by the Commissioner May 3, 1999. Such is the case because "there was an unlawful taking, however brief. This cannot be condoned. A board of education has the right to presume the basic honesty of its employees. A dishonest act by a public employee violates the public trust." (*DePasquale, supra* at 540) Respondent's difficulty with the concept of honesty – demonstrated by her engaging in theft – is further manifasted by her continued prevarication with respect to the charges against her. As pointed out by the ALJ:

> [w]hen confronted with the charge that she had entered Mr. Moody's file cabinet, Ms. Long denied doing so, despite overwhelming evidence that she had entered the cabinet. Again, when she was confronted by Mr. Moody at the copy machine, she denied making personal copies and then concocted a lesson plan to cover her dishonesty. She also denied writing a personal memo to Mr. Moody, even when Ms. Gina saw the memo on the computer screen. Ms. Long's rendition of what occurred during the observation with Ms. Gina involved a number of fabrications, including her denying that the pre-observation form discovered by Ms. Gina was the same one that she had filled out a short time before and her denying that she had the materials to teach English IV, even though Ms. Gina found the materials in Ms. Long's closet. I also found her testimony that Mr. Robina initiated the telephone call rather than her responding to his telephone message to be disingenuous and an attempt by her to reconcile her story, that she could not speak with the administration because of the October letter from the superintendent, with what actually occurred. (Initial Decision at 34-35)

Moreover, respondent's flagrant dishonesty cannot be ascribed to impulsive indiscretions or momentary lapses in judgment. Her vociferous denial of obviously demonstrated facts was exhibited not only at the time of the occurrence of the events at issue here but persisted up to and including the hearing in this matter, conducted some 1-1/2 years later. The Commissioner is left

with the obvious conclusion that respondent is either incapable of recognizing truth or she recognizes it but has absolutely no hesitation to lie repeatedly in order to avoid the consequences of her actions. In either event, such behavior is directly contrary and inimical to the expectations placed on teaching staff members, most particularly an educator in an alternative school which serves an already troubled student population.

Although duly considering all of the factors which ordinarily could serve to militate against respondent's dismissal – specifically, that the events giving rise to the charges against respondent occurred over a short period of time, *i.e.*, September 8, 2004 through October 6, 2004; that prior to this time respondent had positive evaluations and a discipline-free work record for over 20 years; and that respondent's transgressions were committed in an environment marked by an escalating acrimonious relationship with the school principal, Mr. Moody, who also on this record can be found to have conducted himself at times in a less than exemplary fashion – the Commissioner determines that these factors are greatly outweighed by the seriousness of her conduct in this matter. It is axiomatic "that teachers carry a heavy responsibility by their actions and comments in setting examples for the pupils with whom they have contact." *In the Matter of the Tenure Hearing of Blasko, School District of the Township of Cherry Hill*, 1980 *S.L.D.* 987, 1003. There are some actions which are "so foreign to the expectations of the deeds and actions of a professionally certificated classroom teacher as to raise manifest doubts as to the continued performance of that person in the profession." (*Ibid.*) The Commissioner concludes that such is the case here.

Accordingly, the Initial Decision of the OAL, with respect to the sustained charges of unbecoming conduct, is adopted for the reasons well expressed therein but rejected as to penalty, as set forth above. Respondent is hereby dismissed from her teaching position in the

State-Operated School District of Paterson as of the date of this decision. This matter shall be transmitted to the State Board of Examiners for action, as that body deems appropriate, against respondent's certificate in accordance with *N.J.A.C.* 6A:9-17.6(a)1.

IT IS SO ORDERED.[5]

COMMISSIONER OF EDUCATION

Date of Decision: 10/26/06

Date of Mailing: 10/26/06

[5] This decision may be appealed to the State Board of Education pursuant to *N.J.S.A.* 18A:6-27 *et seq.* and *N.J.A.C.* 6A:4-1.1 *et seq.*

State of New Jersey
OFFICE OF ADMINISTRATIVE LAW

INITIAL DECISION
OAL DKT. NO. EDU 01998-06
AGENCY DKT. NO. 33-1/06

STATE-OPERATED SCHOOL DISTRICT OF PATERSON,
Petitioner,
v.
ARDEENA LONG,
Respondent.

Joanne L. Butler, Esq., for petitioner (Schenck, Price, Smith and King, attorneys)

Nancy I. Oxfeld, Esq., for respondent (Oxfeld Cohen, attorneys)

Record Closed: August 8, 2006 Decided: September 15, 2006

BEFORE **CAROL I. COHEN**, ALJ:

STATEMENT OF THE CASE AND PROCEDURAL HISTORY

On January 19, 2006, petitioner State-Operated School District of Paterson (Paterson or District) filed a Statement of Charges under the Tenured Employees Hearing Act alleging fifteen counts against respondent Ardeena Long. The statement alleged insubordination; leaving her class unattended; conduct unbecoming; dishonesty;

insubordination; theft of District property; conducting personal business during instructional time; improper entry into supervisor's personal portfolio; improper taking of supervisor's personal material; possession of stolen items; dishonesty during the investigation; and unwillingness to cooperate in the investigation. The respondent filed her answer on January 25, 2006. On that date the Department of Education advised the parties that it had reviewed the tenure charges and deemed them sufficient, if true, to warrant dismissal or reduction in salary. The matter was forward to the Office of Administrative Law (OAL) on February 22, 2006. The case was scheduled for a hearing on March 27, 30 and 31, 2006. It was continued to April 11, 2006. Summation briefs were scheduled to be submitted on June 7, 2006. However, the first tape of the hearing was lost and the parties had to reconstruct the testimony. The final version of the reconstructed testimony was forwarded to the OAL by Ms. Butler on July 21 and accepted by Ms. Oxfeld on July 24, 2006. Summation briefs were submitted by the petitioner on August 4, 2006, and by the respondent on August 7, 2006.

ISSUES

1. Whether the respondent was guilty of all or any of the charges lodged against her.

2. Whether revocation of tenure was justified under the circumstances.

FINDINGS OF FACT

1. Great Falls Academy (GFA) is a special alternative high school operated by the State-Operated School District of Paterson. Students are referred by the courts, other agencies, or as a result of suspension from the regular Paterson high school. The purpose of the school is to provide an academic program for troubled youth.

2. The students remain at GFA for only one year. The children may arrive at the school at any time during the school year.

3. GFA is physically housed on the second floor of a building owned by the Paterson Housing Authority. The Authority's garage is located on the first floor of the facility.

4. Due to the population of the school, 100 percent supervision of the student body is required at all times. There is a 1:4 staff-to-student ratio in the school. In addition, there are two security guards and a police officer on the premises with 100 students.

5. During the time period at issue, students reported at around 8:20 a.m. to their homerooms, after which they went to the cafeteria for breakfast and reported back to the homeroom, except on Wednesdays. On Wednesdays the staff had a staff meeting beginning at 8:15 a.m.; students did not report to school until 9:30 a.m. and classes started at 10:00 a.m.

6. After homeroom, students at GFA had two blocks of ninety minutes. A block is slightly longer than two regular periods at the Paterson high schools, which are normally forty minutes. After the second block students had lunch.

7. During one block per week each student had a computer concepts class. At that time the teacher who would normally be teaching them had his/her conference period.

8. Ardeena Long began her employment as an English teacher with the Paterson School District during the 1980-1981 school year. During the 1985-1986 school year, when she was assigned to East Side High School, she was suspended from her teaching position for five days. At the end of the school year, the vice principal recommended that Ms. Long be transferred out of East Side High School (P-75 through P-82). There were no other disciplinary proceedings in her personnel file until the incidents that formed the basis of these charges.

9. In her end-of-year evaluation for the 2002-2003 school year, Ms. Long received all ratings of "outstanding" and "satisfactory." The supervisor of GFA, Zatiti

Moody, did note in the comment section: "Ms. Long has much of the control over her classroom. Ms. Long can benefit from relinquishing some of that control and allowing her students to become more active learners. Ms. Long can definitely benefit from adopting a more student-centered approach."

10. For the 2003-2004 school year, Mr. Moody gave Ms. Long ratings of "outstanding" and "satisfactory" (P-7).

11. In June 2002 Ms. Long received the 2001-2002 Governor's Teacher Recognition Award (R-38).

12. When Ms. Long first joined the staff at GFA, Zatiti Moody was a school social worker.

13. Mr. Moody subsequently became the acting supervisor of GFA.

14. Ms. Long was not happy with Mr. Moody's appointment as supervisor. She believed that she was better qualified academically for the position.

THE FACTS AS TO CHARGE 1
CONDUCT UNBECOMING A PROFESSIONAL
(Insubordination)

On or about September 8, 2004, respondent, Ardeena Long, a language arts teacher at Great Falls Academy, engaged in inappropriate conduct when she refused to teach an English IV class assigned to her. Respondent's conduct exhibited insubordination, a significant lack of judgment and disrespect of her supervisor, Zatiti Moody, director of Great Falls Academy.

15. Prior to September 2004 Ms. Long taught English I and II (ninth and tenth grades) at GFA. The population served by GFA had begun to change from students who came through the court system and were generally at the ninth- or tenth-grade levels in English, to students who had been expelled from their schools and were coming in at the eleventh- and twelfth-grade levels.

16. Mr. Moody requested that Ms. Long teach more than one grade level in her class at one time and differentiate instruction for the students. While Ms. Long was hesitant to do this, she did make an effort to teach in this manner prior to September 2004.

17. In September 2004 Ms. Long was asked to teach English IV along with English I and II. Although some teachers at GFA taught more than two preparations, Article 7:2-5.2 of the union contract between the Paterson Education Association (PEA) and the school district stated:

> High school employees shall not be required to teach more than one (1) subject area nor more than a total of two (2) teaching preparations, except where emergencies are proven to exist.

Subsection 7:2-5.5, "Exceptions," provided:

> Any employee may voluntarily accept a teaching preparation in excess of the maximums stated in Section 7:2 of this Article.

18. On Wednesday, September 8, 2004, Ms. Long was written up by Mr. Moody with reference to her

> adamant refusal to assume responsibility over the instruction of English IV. Furthermore, I was extremely surprised to learn that you only teach English I and II. I must also inform you that your statement of "I am not going to teach English IV" borders on insubordination.
>
> [P-8.]

Copies of this memorandum were sent to Eileen Shafer, director of human resources, Jeanette Lyde, district high school coordinator, and Alexandra Gina, supervisor of language arts.

19. While Ms. Long could have taught additional preparations, she was not obligated to do so.

20. Mr. Moody spoke with the head of the English program and determined that English I and II were not prerequisites to English III and IV. As a result, Ms. Long wound up teaching English II to four students and English IV to one student and only having two preparations.

21. Once Ms. Long received her schedule on paper, she taught all classes to which she was assigned.

THE FACTS AS TO CHARGE 2
CONDUCT UNBECOMING A PROFESSIONAL
(Leaving Class Unattended)

On or about September 13, 2004, respondent, Ardeena Long, engaged in inappropriate conduct when she purposefully and knowingly left her classroom full of students, during instructional time, to make photocopies. Respondent's conduct exhibited a significant lack of judgment, was contrary to her duties as a teacher and posed a risk to the safety and well-being of her students.

22. On Thursday, September 9, 2004, and Friday, September 10, 2004, Mr. Moody and Ms. Long wrote a number of memoranda to each other. On September 9 Mr. Moody wrote to Ms. Long concerning her coming back from lunch one minute late (P-9); Ms. Long responded to Mr. Moody's memorandum about allegedly refusing to teach English IV (P-10); and Mr. Moody wrote to Ms. Long stating that he could not respond to that memorandum because there was no signature (P-11). Ms. Long replied to Mr. Moody's September 10 memo on the same day (P-12).

23. On September 10, 2004, Ms. Long responded to Mr. Moody's memo about coming back late from lunch (P-13) and Mr. Moody sent Ms. Long a new schedule (P-14).

24. The memo writing continued when Mr. Moody and Ms. Long returned to work on Monday, September 13, 2004. Mr. Moody wrote to Ms. Long regarding a

clarification of her schedule (P-14); Ms. Long wrote to Mr. Moody regarding allegations of violations, because of her assignment to teach English IV (P-15); Mr. Moody wrote to Ms. Long responding to her September 10, 2004, memo (P-16); Mr. Moody wrote to Ms. Long regarding an allegation of leaving a classroom unattended (P-17); and Mr. Moody wrote to Jeanette Lyde stating that he and Ms. Long could not work in the same building (P-18).

25. It was clear from the tenor of the communications that the working relationship between Mr. Moody and Ms. Long had deteriorated to a very low level.

26. At approximately 8:45 a.m. students were supposed to be in their homeroom classes; during homeroom, attendance was taken, announcements were made and students were prepared for the morning activities. At some point during the homeroom period, some of the students went to the cafeteria to get their breakfast and then reported back to the homeroom.

27. At approximately 8:50 a.m. on September 13, 2004, Mr. Moody opened his office door and saw Ms. Long outside in the hall making copies at the copy machine (P-17).

28. According to the attendance roster, there were students assigned to Ms. Long's classroom at that time of the day. Ms. Long advised Mr. Moody that there were no students in her room at the time. Mr. Moody advised her that even if there were no students in the classroom, she was to remain in the room in case students arrived late. He also advised her that she was to be prepared for class by making copies the day before (P-17A).

29. Mr. Moody did not go into Ms. Long's classroom to check if there were students in the room at the time that Ms. Long was in the hall making copies.

THE FACTS AS TO CHARGE 3
CONDUCT UNBECOMING A PROFESSIONAL
(Improper Taking of Supervisor's Confidential Material)

On or about September 21, 2004, respondent, Ardeena Long, engaged in inappropriate conduct when she purposefully and knowingly entered the personal file cabinet of her supervisor, Zatiti Moody, and removed correspondence from her personnel folder, including written reprimands. Respondent's conduct exhibited a significant lack of judgment, violation of District policy regarding access to personnel records, disregard for the privacy of her supervisor, and has caused the District to lose trust and confidence in her.

30. On September 21, 2004, Mr. Moody was out sick. Mr. Kushner acted as the substitute administrator. Ms. Long came into the office and asked to look through her personnel file. Ms. Long asked Mr. Kushner if she could copy one letter. She also asked him to help her locate her evaluation. Neither she nor Mr. Kushner could locate the evaluation, but another staff member told her that the school secretary could give her a copy of her evaluation.

31. A number of Ms. Long's colleagues saw her remove papers from a file cabinet in Mr. Moody's office and copy papers at the copy machine.

32. Levette Glanton, a science teacher at GFA, was sitting with some colleagues facing the entrance to Mr. Moody's office. Ms. Glanton could see into Mr. Moody's office and observed Ms. Long bending over a file cabinet and removing a file from the cabinet. Ms. Glanton also saw Ms. Long leave Mr. Moody's office and walk toward the copy machine. She heard the copy machine running and Ms. Long saying: "It's my information, I got my file . . . I photocopied my information." Ms. Long also said, "Mr. Moody, Ms. Gina, and Mrs. Lyde have all her (my) paperwork and her (my) grievances anyway. So she (I) was just getting what was hers (mine)."

33. Patricia Carr, a guidance counselor at GFA, was also present in the lobby on September 21, 2004, when Ms. Long removed correspondence from her personnel folder in Mr. Moody's office. When Ms. Carr noticed Ms. Long in Mr. Moody's office, she yelled to her, "I hope that's not my file." She observed Ms. Long walk from the file

cabinet to the copy machine. When Ms. Long left Mr. Moody's office, she walked by Ms. Carr with a lot of papers in her hands. Ms. Carr asked, "Did you get everything you needed?" Ms. Carr said that Ms. Long held up some papers and said that they were her (my) papers, that they had her (my) signature on them, that Mr. Moody and Ms. Lyde had a copy of them, and that she (I) didn't find her (my) evaluation. Ms. Long also said, "Yeah, go ahead and tell Mr. Moody, it's my paperwork."

34. Ola Alade, a special education teacher at GFA, also observed Ms. Long in Mr. Moody's office at that time. Mr. Alade was standing at the copy machine when he saw Ms. Long and Mr. Kushner standing in Mr. Moody's office looking at a folder. He also observed Ms. Long exit Mr. Moody's office with papers in her hands, make photocopies, and return to Mr. Moody's office.

35. Brian Veal, a school community coordinator at GFA, was in the lobby area near Mr. Moody's office on September 21, 2004. He saw Ms. Long standing in front of a file cabinet in Mr. Moody's office. He observed Ms. Long exit Mr. Moody's office with papers in her hand and overheard the conversation between Ms. Carr and Ms. Long. Specifically, he heard Ms. Long state that she was holding "all her (my) stuff" and that "it has her (my) signature on it, and everyone else has a copy." Barrett Rosser, school social worker, also saw Ms. Long in Mr. Moody's office on September 21, 2004. He observed Ms. Long exit the office, stop in the area of the copy machine, and return to Mr. Moody's office.

36. On September 21, 2004, Mr. Moody received a telephone call from a security guard who notified him that Ms. Long was in his office in his personal file cabinet.

THE FACTS AS TO CHARGE 4
CONDUCT UNBECOMING A PROFESSIONAL
(Dishonesty During Investigation)

On or about September 22, 2004, Zatiti Moody observed that written reprimands from Ms. Long's personnel folder were missing. After learning from numerous individuals that they witnessed Ms. Long in his office and in his file cabinet the previous day, he questioned Ms.

Long in the presence of her PEA representative and she denied that she entered the file cabinet and took correspondence from her personnel folder. Respondent's conduct exhibited a significant lack of judgment, was dishonest, unprofessional, and in total disregard for the truth and privacy of others. Respondent's conduct has caused the District to lose trust and confidence in her ability to uphold the standards of professionalism required of teaching staff members in the District.

37. On September 22, 2004, Mr. Moody called Ms. Long into a meeting in his office. Present at that meeting were Mr. Moody, Ms. Long, Dr. Persaud, the building affirmative action officer, and Mr. Lyde, the PEA representative. Mr. Moody asked Ms. Long if she had been in his file cabinet the day before. Ms. Long denied having entered Mr. Moody's file cabinet and stated that there was nothing in the file cabinet she wanted. It is clear from the observations of a number of witnesses, including teachers, counselors and security staff, that Ms. Long did enter the file cabinet in Mr. Moody's office on September 21, 2004.

THE FACTS AS TO CHARGE 5
CONDUCT UNBECOMING A PROFESSIONAL
(Insubordination)

On or about September 22, 2004, during the investigation of the events set forth above, Ms. Long refused to cooperate and walked out of her supervisor's office before the investigation was completed. Before leaving the office, Mr. Moody directed Ms. Long to have a seat in the lobby and wait for him. Ms. Long ignored her supervisor's directive and, instead, used the phone in the main office to call James Joyner, another PEA representative. Mr. Moody also directed Ms. Long to prepare a statement regarding the incident that occurred on September 21, 2004, and Ms. Long refused. Respondent's conduct exhibited a significant lack of judgment, insubordination, and an unwillingness to cooperate in an investigation. Respondent's conduct is reprehensible and unacceptable by the District.

38. Mr. Moody called Ms. Long, Mr. Lyde and Dr. Persaud out of a staff meeting into his office. He informed Ms. Long that the meeting was to discuss what went on in his office the day before regarding her entering the file cabinet in his office. He told Ms. Long that Mr. Lyde was there as the PEA representative.

39. Mr. Moody asked Ms. Long if she had entered his file cabinet, and she denied it emphatically. She said that there was nothing in the file cabinet she could want, and that she did not touch his file cabinet.

40. Ms. Long objected to Mr. Lyde representing her at the meeting, because she claimed that there was a conflict of interest.

41. Ms. Long left the meeting very agitated and went into the staff meeting being held next door. She asked Ms. Milton to act as her representative. However, Ms. Long refused to continue with the meeting with Mr. Moody, because she asserted that it was being conducted in violation of the union contract.

42. Since it was clear that Ms. Long would not participate in the meeting, Mr. Moody asked Ms. Long to exit his office and sit in the lounge/lobby area.

43. Ms. Milton proceeded to the office and called Jim Joyner, an officer with the PEA, on the school's main telephone. After she spoke to Mr. Joyner, Ms. Milton put Ms. Long on the telephone. Ms. Long proceeded to discuss what went on at the meeting with Mr. Joyner. When Mr. Moody came into the office, she handed the telephone to him to speak with Mr. Joyner.

44. Mr. Moody asked Ms. Long to prepare a written statement of what occurred in his office on September 22, 2004.

45. Ms. Long did not prepare the statement. She claimed that she was not feeling well and needed medical attention.

46. Mr. Moody went to the school nurse and asked him to see Ms. Long. The nurse said that he would see her after he finished with a student with whom he was working.

47. Christopher Welyczko, the school nurse, took Ms. Long's blood pressure twice. While he felt that it was elevated, he did not believe that it presented an

emergency situation because of Ms. Long's history of high blood pressure and her state of agitation.

48. He recommended that Ms. Long rest and calm down. When her blood pressure remained high after the second reading, he recommended that she go home for the day.

49. Mr. Moody agreed with the recommendation and told the nurse to arrange for Ms. Long's transportation home, if it was necessary.

50. Ms. Long refused any further assistance. In addition, she did not request that the nurse perform a blood sugar test. The nurse would not have been able to perform such a test, because he did not have the proper equipment to do so.

THE FACTS AS TO CHARGE 6
CONDUCT UNBECOMING A PROFESSIONAL
(Insubordination and Theft of District Property)

On or about September 22, 2004, Ms. Long asked to see the nurse following Mr. Moody's attempt to investigate the incident that occurred the previous day. After seeing the nurse, Ms. Long determined that she could not return to work that day and would prefer to go home. Mr. Moody asked that she sign the staff sign-out book prior to leaving. Instead, Ms. Long lingered in the security area. When Mr. Moody returned to that area ten minutes later, Ms. Long was gone and so was the staff sign-out book. The book has been missing ever since. Respondent's conduct exhibited a significant lack of judgment, insubordination, and a total disregard for District property and procedures.

51. After Ms. Long was seen by the nurse and declined the nurse's offer of both transportation and further medical treatment, Mr. Moody released Ms. Long and directed that she sign out of the building.

52. The sign-out book in question is a book that is used when staff members come in or leave during the course of the day. This book is separate and apart from the book that teachers sign when they arrive at school and when they leave school at the

end of the day. The sign-out book contains information about any and all teachers who sign in or out during the school day.

53. Mr. Moody stood behind Ms. Long as she signed the sign-out book. After Ms. Long signed the book, Mr. Moody returned to his office to work, and then came back out to the area ten minutes later and noticed that the sign-out book was missing. The secretary in the area advised Mr. Moody that no other person had been in the area.

THE FACTS AS TO CHARGE 7
CONDUCT UNBECOMING A PROFESSIONAL
(Leaving Class Unattended)

On or about September 28, 2004, respondent engaged in inappropriate conduct when she purposefully and knowingly left her homeroom class unattended to make personal photocopies. Ms. Long was previously admonished for leaving her class unattended earlier in September. Ms. Long's conduct exhibited insubordination, a significant lack of judgment, a total disregard of her supervisor's directives, was contrary to her duties as a teacher and posed a risk to the safety and well-being of her students.

54. At or about 8:10 a.m., Mr. Moody saw Ms. Long at the copy machine making copies. At this time of the morning, students had not yet assembled for homeroom.

55. Ms. Long was making copies of a homestead rebate application. At first she made one copy. However, when she was approached by Mr. Moody, she made additional copies and claimed that she was using the form as part of a lesson on filling out applications.

56. The school has other, more appropriate application forms to use in order to improve a student's skill in completing applications, such as college and job applications.

57. Homestead rebates are not applicable to this group of students, since most of their parents do not own homes. In addition, it is a difficult application to complete for people unfamiliar with the form.

58. When Mr. Moody observed the lesson in which Ms. Long attempted to infuse the application, it was clear that the form was unrelated to the class topic and unfamiliar to the students.

59. When Mr. Moody questioned the students, they all said that they did not know what they were filling out and that they had never seen the form before. No student claimed that the form had been discussed earlier in class or that the class had seen it before at all.

60. Ms. Long was clearly using school time to make copies of a personal nature. Only when caught did she claim that she was using the document she had been copying as part of a class assignment.

THE FACTS AS TO CHARGE 8
CONDUCT UNBECOMING A PROFESSIONAL
(Conducting Personal Business During Instructional Time)

On or about October 5, 2004, respondent's immediate supervisor, Alexandra Gina, conducted informal and formal observations of Ms. Long's classes at Great Falls Academy. When Ms. Gina arrived in respondent's classroom during instructional time, she noticed Ms. Long on the computer drafting a memo of a personal nature to Zatiti Moody. Respondent's conduct exhibited a significant lack of judgment and was contrary to her duties as a teacher.

61. In 2004-2005, Alexandra Gina was responsible for supervising the language arts programs in thirteen high schools in the District, including GFA. Part of her responsibilities included observing and evaluating staff.

62. On October 5, 2004, Ms. Gina planned to observe and evaluate Ms. Long. Ms. Gina arrived at Ms. Long's class during Block 1, after the class had started. When she approached the classroom, the students were watching a movie, with the volume

very loud, and Ms. Long was at her desk working at her computer. Since Ms. Long did not hear Ms. Gina knock, Ms. Gina entered the room and stood behind Ms. Long for several minutes calling her name and trying to get her attention.

63. While she was waiting for Ms. Long to notice her, Ms. Gina saw the name "Mr. Moody" on the document that Ms. Long was working on, which appeared to be a memo. Ms. Gina also observed a copy of the collective bargaining agreement between the District and the PEA next to (and to the left of) the computer at which Ms. Long was working. Ms. Gina determined that the material on the computer screen was clearly not instructional.

64. Ms. Long was neither watching the movie nor watching her class when Ms. Gina entered the room and saw the memorandum to Mr. Moody on the computer screen. Ms. Long immediately turned off the computer when she realized Ms. Gina was present.

65. When Ms. Gina asked Ms. Long to turn the computer back on, Ms. Gina noted that the document that Ms. Long had been working on was a memo to Mr. Moody about a personal, contractual issue.

66. In her testimony, Ms. Long denied that the incident occurred as Ms. Gina described. She claimed that she noticed Ms. Gina enter the room and walked toward Ms. Gina to greet her. She claimed that she was not seated at her computer.

Since Charges 9, 10, 11 and 12 arise out of the same incident, the Findings of Fact will be set forth together for these charges.

9. (Improper Entry into Supervisor's Personal Portfolio)

Following her informal observation on October 5, 2004, Ms. Gina placed her observation notes and a pre-observation form that respondent had completed in her leather portfolio. Shortly thereafter, while she was still in Ms. Long's classroom, Ms. Gina

noticed that the pre-observation form and the notes of her observation were missing from her portfolio. Ms. Long exhibited conduct unbecoming a professional when she purposefully, knowingly, and without authorization, opened her supervisor's personal portfolio during an observation of respondent's classes at Great Falls Academy with the intent to take, without authorization, a pre-observation form and evaluation notes. Respondent's conduct exhibited a significant lack in judgment, was dishonest, unprofessional, and in total disregard for the privacy of others. Respondent's conduct has caused the District to lose trust and confidence in her ability to uphold the standards of professionalism required of teaching staff members in the District.

10. (Improper Taking of Supervisor's Personal Material)

On or about October 5, 2004, during the observation, Ms. Gina noticed that Ms. Long was holding papers that resembled the pre-observation form and Ms. Gina's handwritten notes. During the observation, respondent engaged in conduct unbecoming a professional when she purposefully, knowingly and without authorization opened her supervisor's confidential portfolio and took a pre-observation form and observation notes relative to the observation of her class at Great Falls Academy. Respondent's conduct exhibited theft, a significant lack of judgment and professionalism, total disregard for the privacy of others, and has caused the District to lose trust and confidence in her.

11. (Possession of Stolen Items)

On or about October 5, 2004, Ms. Long kept in her possession the items that she took from Ms. Gina's leather portfolio. At no time did Ms. Long return either the pre-observation form or her supervisor's observation notes. Respondent's conduct exhibited a significant lack of judgment and professionalism and has caused the District to lose trust and confidence in her.

12. (Dishonesty During the Investigation)

Following the observation on October 5, 2004, Ms. Gina confronted respondent, who denied having taken the documents and stated that they were old forms. Ms. Gina asked that respondent relinquish the papers that she was holding and she did. The papers were in fact the pre-observation form and observation notes from Ms. Gina's portfolio. Respondent's conduct exhibited a significant lack in judgment, was dishonest, unprofessional, and in total disregard for

the truth and privacy of others. Respondent's conduct has caused the District to lose trust and confidence in her ability to uphold the standards of professionalism required of teaching staff members in the District.

67. Ms. Gina made notes on a legal pad of what she had observed when she entered Ms. Long's classroom, including that Ms. Long was working on a memo on the computer. She also jotted down information from the pre-observation conference, blackboard notes, and questions she might ask Ms. Long.

68. Ms. Gina had asked Ms. Long to fill out a pre-observation form to reflect what would be covered in the lesson to begin in Block 2 (P-61). The form was completed during the beginning of Block 1, at approximately 9:15 a.m., about fifteen to twenty minutes into Block 1. Ms. Gina placed the pre-observation form on top of her legal pad, which she had in a portfolio, closed the portfolio, and placed it on the table. The table was one of a number in the rear of the room (P-83).

69. During Block 1, and before the beginning of Block 2, when the formal observation would begin, Ms. Gina began looking through the various boxes of materials and the cabinets in Ms. Long's classroom. She found materials that should have been organized; materials that had never been opened; and multiple sets of the same materials. Ms. Gina began removing the materials from the boxes and cabinets and tried to organize them, utilizing the tables. Among the materials she found were books used to teach English IV, which Ms. Long claimed that she had never received.

70. While Ms. Gina was organizing the materials, Ms. Long moved back and forth between the cabinets and her desk area, moving right to left and left to right.

71. As the rear tables began to fill up, Ms. Gina moved her portfolio from one of the tables to the middle shelf of a bookcase. She placed books on top of the portfolio. The bookcase was located behind the rear tables, approximately halfway between the cabinets and Ms. Long's desk.

72. While filling the tables with the materials from the cabinet, Ms. Gina faced either the interior of the cabinet or the front of the room. Ms. Gina's back was to the area in which the bookcase holding her portfolio was located.

73. Ms. Gina and Ms. Long were the only two people in the rear area of the classroom.

74. Ms. Gina would have seen any person in the vicinity of the bookcase; she saw Ms. Long in that vicinity, but did not see any students there.

75. Approximately ten minutes before the beginning of Block 2, when the formal observation would begin, Ms. Gina retrieved her portfolio from the bookcase. Upon inspection, she saw that the pre-observation form was not in the portfolio, the first page of her legal pad was not in the portfolio, and the upper corner of the torn first page remained affixed to the pad.

76. The legal pad that contained Ms. Gina's written observations, blackboard notes and questions was a brand new pad, which Ms. Gina had removed from its shrink wrap that morning; it had not been used prior to Ms. Gina writing her notes during Block 1; and nothing else had been torn from the pad.

77. Ms. Gina asked Ms. Long to fill out a second pre-observation form since Ms. Gina could not find the first one. The second pre-observation form was completed at approximately 10:30 a.m., as reflected by Ms. Gina's annotation. Ms. Gina also identified the second pre-observation form as "second copy" (P-62).

78. The "second copy" was different from the original pre-observation form completed by Ms. Long, providing more detail than the "sparse" form originally completed (P-61).

79. Neither form reflected a well-planned lesson, although the second (P-62) was clearly better than the first (P-61).

80. Ms. Long had asked a student from Block 1 to stay during Block 2 to organize the materials out on the tables. This student did not start working until after Ms. Gina found that the items were missing from her portfolio.

81. Ms. Gina decided to move to Ms. Long's desk for her observation during Block 2. Ms. Gina asked Ms. Long if she could sit at her desk and Ms. Long assented.

82. Ms. Long then began frantically clearing her desk.

83. While Ms. Gina was watching Ms. Long clear papers from her desk, she noticed two sheets of paper which were folded together, in half, with the inner one sticking out enough to show that it was the missing pre-observation form (P-61).

84. Ms. Gina asked Ms. Long if it was the missing pre-observation form.

85. In response, Ms. Long looked at the papers and stated: "Oh, no, no; that's another form that was — that was long ago. That's something from Mr. Moody."

86. Ms. Gina persisted and asked Ms. Long to hand over the paper.

87. Ms. Long handed over the paper, and it was, in fact, the pre-observation form that had been prepared during Block 1 and placed in Ms. Gina's portfolio (P-61).

88. Ms. Gina observed the class during Block 2. She found many deficiencies, and advised Ms. Long that she would return in a day or two, after she had written up her report. She said that the two of them would meet to discuss the observation. Ms. Long became agitated and pleaded to have the conference take place immediately.

89. At the end of the conference, Ms. Gina afforded Ms. Long an opportunity to discuss the missing papers by asking if there was anything else Ms. Long wanted to tell her. Ms. Long became erratic, frantically offering Ms. Gina the opportunity to search everywhere, including boxes, cabinets, and her purse, to find the missing papers.

THE FACTS AS TO CHARGE 13
CONDUCT UNBECOMING A PROFESSIONAL
(Unwillingness to Cooperate in the Investigation)

Following the October 5, 2004, incidents, an investigation ensued by the District's security services. On or about January 4, 2005, Frank Robina, supervisor of security services, contacted respondent to afford her an interview and an opportunity to explain what transpired on October 5. Respondent was unwilling to cooperate in the investigation, requested a copy of the interview questions prior to the interview, and stated that she would call back after she reached her PEA representative. Ms. Long never returned Mr. Robina's call. Respondent's conduct exhibited a significant lack of judgment and professionalism and an unwillingness to cooperate in an investigation.

90. On October 6, 2004, Ms. Long was summoned to the main office at GFA at 10:00 a.m. Eileen Shafer, who was then director of human resources, was on the telephone and directed her to immediately report to the personnel office. A meeting was held in the personnel office among Ms. Long, Mr. Krause, director of labor relations, Ms. Shafer and Mr. Smith, director of security for the school district. Mr. Smith handed Ms. Long a letter written by the superintendent of schools, which stated that she was immediately placed on suspension. The letter went on to state:

> Please be advised that you are prohibited to have any communication with Paterson Public School District employees and students or enter any Board of Education Facilities in the Paterson Public School District unless approved by the Superintendent in writing.
>
> [P-65.]

91. Frank Robina, a retired, twenty-seven-year veteran of the Paterson Police Department, conducted an investigation on behalf of the District into the events of October 5, 2004. He interviewed Ms. Gina and attempted to interview Ms. Long.

92. When he first called Ms. Long, Mr. Robina spoke with someone who he believed to be Ms. Long's sister, Tangy. He left a message for Ms. Long to call him.

93. Ms. Long did return Mr. Robina's call later that day.

94. Ms. Long claimed that she did not return Mr. Robina's call, but that Mr. Robina called her again at 2:55 p.m. on January 4, 2005.

95. District records confirm Mr. Robina's testimony that Ms. Long called him back.

96. During his conversation with Ms. Long, Mr. Robina explained that he was conducting two investigations that involved Ms. Long and that he wanted to give her an opportunity to tell her side of the story.

97. When Ms. Long asked if she could be considered a target of the investigation, Mr. Robina responded that she could.

98. Ms. Long then stated that she wanted to confer with her PEA representative, and requested that Mr. Robina supply her with the list of questions he would ask her at the interview. Mr. Robina advised her that she could certainly confer with her union representative, but he would not provide her with a list of questions in advance.

99. Mr. Robina requested that she call back to advise him whether she would speak with him. Ms. Long never called Mr. Robina back.

100. Mr. Robina was clear in his representations to Ms. Long that he was the supervisor of security; that he was conducting an investigation of incidents occurring on September 21 and October 5, 2004; that he wanted to give her an opportunity to tell her side of the story; that she was the subject of an investigation; and that she could contact the PEA.

THE FACTS AS TO CHARGE 14
CONDUCT UNBECOMING A PROFESSIONAL
(Insubordination)

On or about September 13 and September 15, 2004, respondent filed grievances relative her employment relationship with her supervisor, Zatiti Moody. On or about September 17, 2004, in response to respondent's grievances, Jeanette Lyde, district high school coordinator, requested Ms. Long's attendance at a meeting on September 21, 2004. Respondent refused to attend the meeting and, on or about September 20, 2004, respondent notified Ms. Lyde that she would not attend the meeting. By letter dated March 8, 2005, Ms. Lyde again attempted to meet with Ms. Long regarding her allegations against Mr. Moody. Ms. Long failed to respond to Ms. Lyde's letter. Respondent also refused to respond to Ms. Lyde's subsequent attempts to schedule a meeting to discuss the matter. Respondent's conduct exhibited insubordination, a significant lack of judgment and professionalism and an unwillingness to cooperate with her supervisors.

101. On September 13, 2004, and September 15, 2004, Ms. Long filed grievances against Mr. Moody on the official PEA grievance form(P-19; P-22).

102. The contract between the PEA and the Paterson School District contains a grievance procedure (R-40 at 3-10). The agreement contains three steps for the processing of a grievance: Level I, involving the principal or immediate supervisor (R-40 at 4, paragraph 3:3-2); Level II, involving the State district superintendent or designee (R-4 at 4-6, paragraph 3:3-3); and Level III, arbitration (R-40 at 6-10, paragraph 3:3-4).

103. No employee has an obligation to pursue a grievance that she has filed, or to participate in the grievance steps. Ms. Lyde admitted that an individual does not have to pursue a grievance, and that the school district has no control over whether a grievance is filed or whether an individual participates. Ms. Shafer testified that an individual has an absolute right not to participate in her own grievance.

104. On September 17, 2004, Ms. Lyde sent a memorandum to Mr. Moody "Re: Grievance" (P-23). That memorandum "requested" that Mr. Moody attend a meeting with Ms. Lyde and Ms. Long on September 23, 2004. A copy of the

memorandum was sent to Ms. Long. That same day Ms. Lyde sent another memorandum to Mr. Moody "Re: Grievance," with a copy to Ms. Long, changing the suggested time and date of the meeting (P-24). On September 20, 2004, Ms. Long sent a memorandum to Ms. Lyde "Re: Grievance Memorandum," declining to meet with Ms. Lyde at that time.

105. On September 22, 2004, District labor relations officer Michael Krause sent a letter to Ms. Long stating that she was not prevented from attending a meeting involving any level of grievance, and in fact she must attend any such meeting if requested.

106. On March 8, 2005, Ms. Lyde wrote to Ms. Long directing that Ms. Long communicate with her office to set up a meeting about "several allegations you made against Zatiti Moody" (P-69). Ms. Lyde testified that the allegations referred to in that letter were Ms. Long's grievances. Ms. Long never responded.

107. On April 20, 2005, Ms. Lyde again wrote to Ms. Long, indicating that a lack of response to the letter would result in disciplinary actions.

108. During a meeting with PEA and New Jersey Education Association representatives on May 10, 2005, involving grievance procedures, Eileen Shafer, director of human resources, and Mike Krause, labor relations officer, reminded the union people that Ms. Long could and should speak with her supervisors or any District administrators, if requested, regarding the suspension investigation. They stated that the suspension letter from the superintendent of schools did not prevent any such communications.

109. This communication was not put down in writing.

CHARGE 15
(Conduct Unbecoming a Professional)

Even if each of the foregoing charges individually does not constitute unbecoming conduct, all of the foregoing charges

considered as a whole constitute conduct unbecoming a professional.

ANALYSIS OF THE LAW

The tenure of educational personnel is authorized by the Education Tenure Act, N.J.S.A. 18A:28-1 to -18. Tenure is a status in a particular position created by statute, not the agreement of the parties, therefore, it is a "'statutory right imposed upon a teacher's contractual employment' . . . [that] may not be forfeited or waived." Spiewak v. Rutherford Bd. of Educ., 90 N.J. 63, 77 (1982) (quoting Zimmerman v. Newark Bd. of Educ., 38 N.J. 65, 72 (1962), cert. denied, 371 U.S. 956, 83 S. Ct. 508, 9 L. Ed. 2d 502 (1963); citing Red Bank Educ. Ass'n v. Red Bank Bd. of Educ., 78 N.J. 122, 141 (1978)). Tenure was designed to protect employees "from dismissal 'for unfounded, flimsy or political reasons.'" Wright v. Bd. of Educ. of East Orange, 99 N.J. 112, 118 (1985) (citing Zimmerman, supra, 38 N.J. at 71). Lack of fitness is usually demonstrated by a series of incidents, but it also may be found when there is a single incident that is sufficiently flagrant. Redcay v. State Bd. of Educ., 130 N.J.L. 369, 371 (Sup. Ct. 1943), aff'd, 131 N.J.L. 326, 327 (E. & A. 1944). While tenure was designed to protect employees, teachers are responsible to act in a professional manner and to serve the welfare of the students in their care. In the final agency decision in In re Tenure Hearing of Sammons, School District of Black Horse Pike Regional, Camden County, 1972 S.L.D. 302, 321, the Commissioner stated:

> [T]eachers of this State . . . are professional employees to whom the people have entrusted the care and custody of tens of thousands of school children with the hope that this trust will result in the maximum educational growth and development of each individual child. This heavy duty requires a degree of self-restraint and controlled behavior rarely requisite to other types of employment. As one of the most dominant and influential forces in the lives of the children, who are compelled to attend the public schools, the teacher is an enormous force for improving the public weal.

As the administrative law judge (ALJ) stated in the case of In the Matter of the Tenure Hearing of Johnston, 95 N.J.A.R.2d (EDU) 439, 443:

> Teaching is a calling requiring "an unusually high degree of self-restraint and controlled behavior." . . . Adolescents are especially vulnerable to the influences of their teachers, who serve as role models and help to shape how youngsters actually view themselves. . . . Being a teacher requires an intense dedication to civility and respect for people as human beings.
>
> [Citations omitted.]

Among the charges lodged against the respondent was "conduct unbecoming." This conduct was defined by the ALJ in In the Matter of the Tenure Hearing of Motley, State-Operated School District of Newark, Essex County, EDU 7421-97, Initial Decision (May 5, 1999), aff'd as modified, Comm'r (August 4, 1999), aff'd, State Bd. of Educ. (December 1, 1999) <http://lawlibrary.rutgers.edu/oal/search.html>:

> "Unbecoming conduct" is an elastic term broadly defined to include any conduct "which has a tendency to destroy public respect for [government] employees and competence in the operation of [public] services." Karins v. City of Atlantic City, 152 N.J. 532, 554 (1998). Behavior rising to the level of unbecoming conduct "need not be predicated upon a violation of any particular rule or regulation, but may be based merely upon a violation of the implicit standard of good behavior which devolves upon one who stands in the public eye as an upholder of what is morally and legally correct. Despite the apparent vagueness of this standard, "it fairly and adequately conveys its meaning to all concerned." Laba v. Newark Bd. of Educ., 23 N.J. 364, 384 (1957). In the context of a school tenure case, "the touchstone is fitness to discharge the duties and functions of one's office or position." In re Tenure Hearing of Grossman, 127 N.J. Super. 13, 29 (App. Div. 1974), certif. denied, 65 N.J. 292 (1974).

Ms. Long is also charged with insubordination, which has been defined as the willful and intentional disregard of the lawful and reasonable directives of an employee's duly authorized supervisor. In re Tenure Hearing of Motley, supra, EDU 7421-97, Initial

Decision (May 5, 1999), aff'd as modified, Comm'r (August 4, 1999), aff'd, State Bd. of Educ. (December 1, 1999) <http://lawlibrary.rutgers.edu/oal/search.html>.

It is the obligation of the District to prove the tenure charges by a preponderance of the credible evidence. The Commissioner, in In the Matter of the Tenure Hearing of Grundfest, School District of Madison, Morris County, EDU 5326-98, Comm'r (June 20, 2000), rev'g Initial Decision (March 29, 2000), aff'd, St. Bd. (November 1, 2000) <http://lawlibrary.rutgers.edu/oal/search.html>, outlined what a board of education had to prove in order to meet its burden in a tenure charge:

> Sustaining tenure charges for unbecoming conduct, however, is a very serious matter. The ramifications for respondent would be not only the loss of his tenured employment, but also the automatic referral of the matter to the State Board of Examiners for possible revocation of his teaching certificate, and the possible loss of his pension benefits. Since the penalty for respondent would be severe, it is the Board's responsibility and its burden to prove by a preponderance of credible evidence [the tenure charges against respondent].

It is clear that the relationship between Ms. Long and Mr. Moody deteriorated rapidly in September 2004. It can be gleaned from the testimony that, prior to the 2004-2005 school year, the parties maintained a strained, but working, relationship. However, this bubbled over immediately at the start of the 2004-2005 school year. It was apparent from the testimony that the two main characters in this case, Ms. Long and Mr. Moody, had entirely different philosophies and orientations. Ms. Long was from the "old school," rigid in her approach and set on "going by the book." Mr. Moody was more experimental and did not necessarily know all the rules and regulations that govern school administration. Neither party behaved admirably in dealing with the other; the situation soon deteriorated into a storm of memos filled with recriminations. It is in this context that the charges against Ms. Long must be judged.

As to Charge 1, relating to the teaching of English IV, the District has not sustained its burden. It is clear that Ms. Long was not flexible in accommodating to the needs of the students. She could have, within the small class, tailored the curriculum to

accommodate to the needs of the one English IV student. However, the union contract did not obligate her to do so. Mr. Moody, because he was not familiar with the union contract, took Ms. Long's position as insubordination. The situation deteriorated from there. Ms. Long had the right to voice her objection to being asked to take on another preparation not required under the contract. In addition, when she was instructed, in writing, to teach an English IV course, she did so. Therefore, she cannot be found guilty of insubordination under Charge 1.

Charge 2 involves allegations that Ms. Long left her homeroom class unattended to make copies. Ms. Long claims that there were no students in the classroom at the time and they could have been at breakfast. The District maintains that students were assigned to homeroom at that time and were in attendance, according to attendance records, on that date. The problem is that Mr. Moody admittedly did not look in the classroom to see if anyone was actually in the classroom. While theoretically the District could argue that Ms. Long should remain in the classroom at all times during her assigned time, there does not appear to be any corroborating evidence that Ms. Long had left students unattended. Therefore, the District has not sustained Charge 2.

Charge 3 alleges that Ms. Long engaged in inappropriate conduct when she purposefully and knowingly entered into Mr. Moody's personal file cabinet and removed items. It is clear from the testimony and statements of witnesses that Ms. Long did enter into Mr. Moody's file cabinet. Mr. Kushner claimed that he gave her permission to look in her personnel file to find her evaluation and to copy one letter. A number of witnesses testified that Ms. Long made multiple copies and had a number of papers in her hand. While Ms. Long asserted that the documents she copied were her own (not from Mr. Moody's files), and staff members who saw her photocopying did not know whether the documents she copied were those she took from Mr. Moody's office or other documents that belonged to her, the testimony from witnesses belies her assertion. Ms. Long told Ms. Glanton, "It's my information, I got my file . . . I photocopied my information. Mr. Moody, Ms. Gina, and Mrs. Lyde have all her (my) paperwork and her (my) grievances anyway. So she (I) was just getting what was hers (mine)." It is unlikely that Ms. Long would have made this statement over a single letter that Mr. Kushner gave her permission to copy.

While I am assured that Ms. Long went into the file cabinet and copied documents from her file, I am not convinced that she permanently removed those documents from the file. In the first place, if she were going to permanently remove the documents, she probably would not bother to copy them. It seems more likely that she did not have copies of all the documents relating to her interaction with Mr. Moody and she made copies of the ones she did not have. In addition, Ms. Long, having been in the system for many years, would have known that the correspondence between her and Mr. Moody had been copied to various administrators. Removing a document from Mr. Moody's file would not have erased the document's existence. Mr. Moody claimed that he had made a separate file of correspondence relating to the current problems between Ms. Long and him. However, he testified that he had not taken an inventory of the contents of his duplicate file until the eve of the trial. All he could state originally was that the file was thinner than he recalled it being, prior to Ms. Long's entering the file cabinet. This proof is not sufficient to sustain the charge that Ms. Long permanently removed items from her personnel file.

Charge 4 involves dishonesty during the investigation, i.e., that Ms. Long, during the meeting with Mr. Moody, denied entering into the file cabinet and taking correspondence from her personnel folder. While, as I stated before, the proofs are not sufficient to sustain the charge of Ms. Long's permanently removing items from her file, I **FIND** that the proofs are more than sufficient to sustain the charge that Ms. Long was dishonest when she denied, in front of Mr. Moody, Mr. Lyde and Dr. Persaud, entering into the file cabinet. The testimony was consistent by all three gentlemen that she denied entering the file cabinet. The testimony and evidence was consistent from all observers that she did, in fact, enter the file cabinet. Ms. Long's argument that if the charge of theft is not sustained then the charge of dishonesty cannot be upheld is not persuasive. I **FIND** that Ms. Long denied entering the file cabinet when she in fact did enter the file cabinet. Therefore the charge of dishonesty is sustained.

Charge 5 involves Ms. Long's refusal to take part in the meeting convened by Mr. Moody to investigate her actions on September 21, 2004. It is clear that Ms. Long refused to take part in the meeting after she was confronted by Mr. Moody and denied

going into the files. However, Ms. Long had a right to have a PEA representative of her choosing present at the meeting. Mr. Moody's calling Mr. Lyde as a PEA representative was not sufficient in light of Ms. Long's objection. Ms. Shafer, the director of human resources, confirmed Ms. Long's right to have another representative present. As for the allegation that Ms. Long did not wait for Mr. Moody in the lobby and instead used the main telephone to call Mr. Joyner, a union official, the only testimony regarding this incident came from Ms. Milton and Ms. Long. Ms. Milton testified that she placed the call to Mr. Joyner, and Mr. Joyner asked to speak to Ms. Long. Since Mr. Moody was not present when the call was placed, he cannot verify who made the call and why Ms. Long was in the main office. The nurse and Ms. Long both testified that she was visibly upset and her blood pressure was raised. While they may differ on other details, it is clear that whatever the cause, Ms. Long was not in a condition at the time to write a statement. The situation had spun out of control by that point. Under the circumstances, I **FIND** that Ms. Long was not in a condition to write a report and, therefore, she could not be charged with insubordination for failing to write the report.

Charge 6 also deals with the details of the incident that occurred on September 22, 2004. It involved the theft of the sign-out book that Ms. Long was supposed to sign before leaving school on that date. Mr. Moody testified that he directed Ms. Long to sign out and leave the building. Mr. Moody stood behind Ms. Long as she signed the book. Mr. Moody then returned to his office. When he came back, the book was missing. The secretary told Mr. Moody that no one other than Ms. Long had been in the area. Ms. Milton testified that she did not remember the sign-out book being gone and she recalled using it in September and October 2004. However, she was not asked when in September and October she used the book and if she knew if it was the same sign-out book as is the subject of this charge. Ms. Milton was admittedly a very close friend of Ms. Long. In addition, some of her testimony regarding the election of the PEA representative was not particularly believable. Therefore, I cannot give credence to her testimony about the sign-out book. Since only ten minutes elapsed between the time that Ms. Long signed out and the time the book was noted missing by Mr. Moody, and Mr. Moody testified that the secretary said that no one else was in the area at the time, I **FIND** that Ms. Long was responsible for the removal of the sign-out book. Therefore Charge 6 is sustained.

Charge 7 involves Ms. Long leaving her classroom unattended to make personal photocopies on September 28, 2004. This charge involves two issues. The first issue is whether she left the classroom unattended and the second is whether she was making personal copies. As to the issue of leaving the classroom unattended, there is conflicting testimony regarding the time that this incident occurred. Ms. Long claimed that it occurred at around 8:10 a.m., when there were no students in the building; Mr. Moody claimed that it was after 8:30 a.m., when the students were in homeroom. The only person who did not have a stake in the outcome of the hearing, and who was not a personal friend of either Mr. Moody or Ms. Long, was Mr. Wood.[1] He testified that he encountered Ms. Long at the copy machine at about 8:10 a.m., before the students entered the school. She was having trouble with the machine and he helped her. He also testified that he heard Mr. Moody arguing with Ms. Long about making personal copies on the copy machine. In assessing credibility the witness's interest in the outcome, motive or bias should be considered. In State v. Spruill, 16 N.J. 73, 78 (1954), the Court discussed the interest of a party in the outcome of a trial as a factor in evaluating the evidence:

> The interest of a party or a witness in the event of the cause is a factor to be considered in assessing his credibility. At common law a witness was rendered incompetent to testify by reason of interest in the outcome of the action; and, while the incompetency has been removed, the bias that such interest would occasion is still to be reckoned with in determining the probative force of the testimony. Every fact or circumstance tending to show the jury the witness' relation to the case or the parties is admissible to the end of determining the weight to be given to his evidence. Trinity County Lumber Co. v. Denham, 88 Tex. 203, 30 S.W. 856 (Sup. Ct. 1895); Wigmore on Evidence (3d ed.), sections 526, 966.

I **FIND** Mr. Wood's testimony to be credible and therefore **FIND** that Ms. Long did not leave her class unattended. However, as to issue of Ms. Long making personal photocopies, I **FIND** that the District has sustained its burden on this portion of the charge. Ms. Long's testimony, that she was using the homestead rebate form to teach

[1] Mr. Wood was working, at the time of the hearing, as a long-term substitute teacher for Ms. Long's classes.

the students how to fill out applications, does not ring true. As Mr. Moody pointed out, this was a difficult form and one that the students were not likely to use any time soon. Nor were their parents likely homeowners. In addition, as Mr. Moody testified, the rebate application did not fit into the lesson plan. The students seemed to be at a loss as to why they were practicing filling out those applications. I found Mr. Moody's testimony more plausible, that he caught Ms. Long copying a personal homestead rebate application and tried to cover the infraction by making copies for the class and blending the form into the lesson plan. Therefore, I **FIND** that the District has sustained that portion of the charge dealing with Ms. Long exercising a significant lack of judgment and concern for the proper education of her students by using the copy machine to make personal copies of a form and then attempting to cover the infraction by integrating the form into the lesson.

Charge 8 deals with the incident that occurred when Ms. Gina entered Ms. Long's classroom to conduct an observation and walked over to her desk. The charge was that Ms. Gina observed Ms. Long conducting private business at the computer during instruction time. Namely, she was composing a memo to Mr. Moody, with the collective bargaining agreement situated next to the computer, while students were viewing a film. Ms. Long denied the incident entirely and claimed that when Ms. Gina came into the room, she went to the door and greeted her. Ms. Gina's description of what occurred when she entered the classroom was quite detailed. Assessment of a witness's expression, tone of voice and demeanor can be useful in determining credibility. In considering these factors, along with the rendition of the facts testified to by Ms. Gina and Ms. Long, I **FIND** Ms. Gina's rendition of what occurred to be more credible. Therefore, I **CONCLUDE** that the District has sustained its burden of proving that on October 5, 2004, Ms. Long was conducting private business on her computer during instructional time.

Charges 9, 10, 11 and 12 all deal with what occurred while Ms. Gina was in Ms. Long's classroom on October 5, 2004. Ms. Long is charged with entry into Ms. Gina's personal portfolio, taking her supervisor's personal material and possession of stolen items, i.e., the pre-observation form and personal notes of Ms. Gina. She is also charged with dishonesty, in that she denied taking the pre-observation form and notes

and, when confronted, tried to avoid turning the form over by stating that it was an old form. There were only two people present when the incident that forms the basis of the charges took place. The testimony of Ms. Long and Ms. Gina was completely contradictory. Therefore, in order to determine the validity of the charge, I must decide who is the more credible witness. Ms. Gina went into great detail in explaining what occurred on October 5, 2004, including her making notes on a fresh pad, the placement of the notes and pre-observation form in her portfolio, the location of the portfolio on the bookcase, the location of the students while she was working in the closet and bookshelves, the interaction between Ms. Long and herself at Ms. Long's desk, the "discovery" of the pre-observation form, and the confrontation with Ms. Long. Ms. Long's explanation that Ms. Gina presumed her guilt and did not give her a chance to exonerate herself not only does not ring true, but does not explain how the pre-observation form got on Ms. Long's desk and why she at first denied that the paper was the missing pre-observation form. Ms. Long's indignation during her testimony at Ms. Gina's asking her to clean up her classroom while a film about race relations, in which black people had to clean the homes of Caucasians, was being shown to the class seemed like a smokescreen for what was really going on, namely, that Ms. Long's supervisor, Ms. Gina, had discovered that Ms. Long's closet and bookcases were in total disarray and all of the teaching material that she claimed she did not have to teach English IV was buried in her closet. Based on a review of the testimony and exhibits, I **FIND** Ms. Gina's rendition of what occurred on October 5, 2004, to be credible, and that of Ms. Long to be incredible. Therefore, I **FIND** that the District has sustained its burden as to Charges 9 through 12 alleging improper entry into her supervisor's personal portfolio, improper taking of personal material, possession of stolen items, and dishonesty.

Charge 13 deals with conduct unbecoming based on Ms. Long's failure to cooperate with the investigation by Frank Robina. The crux of Ms. Long's defense is that, according to the letter handed to her by Mr. Smith, director of security for the school district, she was prohibited from having any communication with Paterson School District employees unless approved by the superintendent in writing. She also claimed that she was told that she could be arrested if she disobeyed. As a result, Ms. Long refused to speak with Mr. Robina when he sought to interview her in January 2005

as part of his investigation of the charges against her. Ms. Long claimed that Mr. Robina called her, she did not call him. During the conversation she discovered that she was the target of the investigation. In addition, she was told that she could not get the questions Mr. Robina intended to ask her in advance. Ms. Long claimed that she told Mr. Robina that she would have to consult with the union. She never called back, because she believed that this would violate the directive that she had been given in the letter from the superintendent. The District presented telephone records showing that Ms. Long called Mr. Robina. This would have been in response to the message that Mr. Robina had left with Ms. Long's sister to call him. The District pointed out that this action would debunk Ms. Long's assertion that she could not speak to Mr. Robina because of the letter. I have found that Ms. Long did in fact call Mr. Robina. I also do not put credence in Ms. Long's statement that she was told that she would be arrested if she disobeyed the letter. The letter did not make this assertion, and Ms. Shafer denied that Ms. Long was told that she would be arrested. However, that does not dispose of the issue. The question is whether Ms. Long was duty bound to participate in the interview. There was no testimony that she was told that she would be disciplined for failure to take part in the interview. In addition, Mr. Robina testified that he left his name, identified who he was, left his telephone number and requested that she give him a call. Once she found out what Mr. Robina was seeking, Ms. Long could have believed that she was not free to speak with him further because of the letter from the District. The proofs of the District are not strong enough to sustain the charge of insubordination for failure to cooperate with Mr. Robina's investigation.

Charge 14 alleges that Ms. Long was insubordinate because she refused to meet with Ms. Lyde concerning certain grievances she had filed against Mr. Moody. Ms. Lyde testified to a number of attempts that she had made to speak with Ms. Long about the matter over a period of more than six months. Ms. Shafer testified that she had told the union representatives that Ms. Long could and should talk with her supervisors or administrators regarding the outstanding grievances. The October letter from the superintendent did not prevent Ms. Long from speaking with the administration. There was testimony as to whether this information was ever conveyed to Ms. Long. There was nothing in writing memorializing the meeting with the union representatives and no proof that the union representatives conveyed Ms. Shafer's statement to Ms. Long.

However, that is really beside the point. As the respondent pointed out, both Ms. Lyde and Ms. Shafer acknowledged that an individual had a right to refuse to participate in the grievance process. Since an individual has that right, it follows that she cannot be considered insubordinate for exercising that right. While Ms. Long's behavior could be considered exasperating, under the circumstances it could not be labeled as insubordinate.

CONCLUSION

Based on my analysis of the testimony and evidence presented, I have sustained Charge 4, Charge 6, part of Charge 7, Charge 8, Charge 9, Charge 10, Charge 11, Charge 12 and part of Charge 13. Two of these charges involve allegations of theft, i.e., taking the sign-out book and Ms. Gina's notes and pre-observation report. Obviously, the value of all of these items is negligible. However, as the ALJ stated in In the Matter of the Tenure Hearing of DePasquale, 92 N.J.A.R.2d (EDU) 537, aff'd, No. A-4236-92 (App. Div. March 31, 1994), a case involving the dismissal of a tenured custodian charged with the theft of a chair from a faculty lounge:

> The value of the chair involved in the incident is likely very slight. A more important consideration, however, is that there was an unlawful taking, however brief. This cannot be condoned. A board of education has the right to presume the basic honesty of its employees. A dishonest act by a public employee violates the public trust.

This problem with honesty is borne out by the other charges that were sustained against respondent. When confronted with the charge that she had entered Mr. Moody's file cabinet, Ms. Long denied doing so, despite overwhelming evidence that she had entered the cabinet. Again, when she was confronted by Mr. Moody at the copy machine, she denied making personal copies and then concocted a lesson plan to cover her dishonesty. She also denied writing a personal memo to Mr. Moody, even when Ms. Gina saw the memo on the computer screen. Ms. Long's rendition of what occurred during the observation with Ms. Gina involved a number of fabrications, including her denying that the pre-observation form discovered by Ms. Gina was the same one that she had filled out a short time before and her denying that she had the

materials to teach English IV, even though Ms. Gina found the materials in Ms. Long's closet. I also found her testimony that Mr. Robina initiated the telephone call rather than her responding to his telephone message to be disingenuous and an attempt by her to reconcile her story, that she could not speak with the administration because of the October letter from the superintendent, with what actually occurred.

From the testimony it appears that Ms. Long has a problem dealing with people who have authority, with whom she might disagree. While, based on the particular charges, I did not find insubordination, it is clear that Ms. Long believes that she does not have to cooperate with or follow the instructions of her supervisors. While Ms. Long only had prior disciplinary infractions in 1985, they demonstrated a similar problem with dealing with authority and fabrication of grievances against others to cover her own actions.

Based on the nature of the charges sustained in this matter, I **CONCLUDE** that they do not rise to the level sufficient to revoke Ms. Long's tenure. In addition, I must consider the fact that prior to this incident, at least on paper, Ms. Long was receiving positive evaluations. According to N.J.A.C. 4A:2-2.4, if tenure is not revoked, the ALJ is limited to a maximum of a six-month suspension and fines. Along with the suspension, the ALJ can also order the loss of salary. In addition, N.J.S.A. 18A:29-14 allows for withholding of salary increments.

Honesty is a quality that is very important for a teacher to impart to her students. In addition, teachers have a special obligation to act as an example to the students that they teach. This is especially important in the type of school setting in which Ms. Long worked. As the Commissioner pointed out in In the Matter of the Tenure Hearing of Tordo, School District of Jackson, Ocean County, 1974 S.L.D. 97, 98-99:

> Teachers are public employees who hold positions demanding public trust, and in such positions they teach, inform, and mold habits and attitudes, and influence the opinions of their pupils. Pupils learn, therefore, not only what they are taught by the teacher, but what they see, hear, experience, and learn about the teacher. When a teacher deliberately and willfully . . . violates the public trust placed in

him, he must expect dismissal or other severe penalty as set by the Commissioner.

The respondent's dishonesty is an important factor that must be considered in determining the proper penalty. In addition, her inability to deal with authority has an effect on the quality of the education not only of her students but the entire school. Based on these factors I **CONCLUDE** that a six-month suspension and loss of pay is a proper penalty. In addition, Ms. Long should not receive a salary increment during the two years that she was not teaching, i.e., October 2004 through September 2006. In addition, based on the theft and dishonesty charges, I **CONCLUDE** that a withholding of her salary increment for two additional years is warranted.[2]

I understand that I do not have the authority to order counseling services or a change of placement. However, I would advise that Ms. Long be transferred to another school. It is very clear that she and Mr. Moody are unable to work together and there is a real question as to whether Ms. Long is suited to teach the student population at GFA. In addition, I believe that Ms. Long would benefit from counseling in dealing with authority and channeling her emotions into more constructive avenues.

ORDER

It is hereby **ORDERED** that the respondent be suspended from her teaching position for six months without pay.

Further, it is **ORDERED** that she not be entitled to a salary increment for school years 2004-2005, 2005-2006, 2006-2007 and 2007-2008.

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

[2] There was no testimony at the hearing regarding whether Ms. Long is eligible for salary increments. This conclusion is based on the supposition that she would be eligible.

This recommended decision may be adopted, modified or rejected by the **COMMISSIONER OF THE DEPARTMENT OF EDUCATION,** who by law is authorized to make a 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, 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.

9/15/06
DATE

Carol I. Cohen
CAROL I. COHEN, ALJ

E-mail Receipt of Initial Decision Confirmed by the Department of Education on:

9/15/06
DATE

Mailed to Parties:
Laura Sanders
DIRECTOR AND
CHIEF ADMINISTRATIVE LAW JUDGE

SEP 18 2006
DATE

OFFICE OF ADMINISTRATIVE LAW

APPENDIX

WITNESSES

For Petitioner:

Zatiti Moody
Ray Lyde, Jr.
Alexandra Gina
Detective Thomas Conyers
Dr. Harold Persaud
Jeannette S. Lyde
Frank Robina
Ola Alade
Patricia E. Carr
Brian Veal
Barrett Rosser
Levette Glanton
Eileen Shafer
Christopher Welyczko

For Respondent:

Ardeena Long
Katie Williams-Milton
Gregory R. Woods

EXHIBITS

For Petitioner:

P-1 to P-82 See attached list

For Respondent:

R-1 to R-40 See attached list

IN THE MATTER OF THE TENURE CHARGES AGAINST ARDEENA LONG, STATE OPERATED SCHOOL DISTRICT OF PATERSON, PASSAIC COUNTY

EXHIBIT LIST

Statement of Charges Under the Tenured Employees Hearing Act P1

Sworn Statement of Evidence in Support of Tenure Charges P2

Correspondence from Ardeena Long to Dr. Stepherson, Assistant Superintendent of HR dated April 14, 2000 ..... P3

Correspondence from E. Jean Stepherson, Ph.D. to Ardeena Long dated April 19, 2000 ..... P4

Paterson Public Schools Tenure Classroom Teacher Evaluation Report dated June 6, 2003 ..... P5

Correspondence from Eileen Shafer to Ardeena Long dated November 5, 2003 ..... P6

Paterson Public Schools Tenured Classroom Teacher Evaluation dated March 23, 2004 ..... P7

Memo from Zatiti Moody, Supervisor of Great Falls Academy to Ardeena Long dated September 8, 2004 with attachment P8

Memo from Mr. Moody to Ardeena Long dated September 9, 2004 with attachment regarding Length of lunch period P9

Memo from Ardeena Long to Mr. Moody dated September 9, 2004 with attachment regarding Teaching assignment P10

Memo from Mr. Moody to Ardeena Long dated September 9, 2004 regarding unsigned memo P11

Memo from Ardeena Long to Mr. Moody dated September 10, 2004 regarding unsigned memo P12

Memo from Ardeena Long to Mr. Moody dated
September 10, 2004 regarding length of lunch period P13

Memo from Mr. Moody to Ardeena Long dated
September 10, 2004 regarding clarification of 1st
Semester English IV schedule P14

Memo from Ardeena Long to Mr. Moody dated
September 13, 2004 regarding English IV
Instructional Time P15

Memo from Mr. Moody to Ardeena Long dated
September 13, 2004 regarding response to
the letter and memo dated September 10, 2004 ..... P16

Memo from Mr. Moody to Ardeena Long dated
September 13, 2004 regarding leaving classroom
Unattended P17

District Enrollment Tally and NJ Attendance
Register dated September 2004 ..... P17A

Memo from Mr. Moody to Jeanette S. Lyde,
District H.S. Coordinator dated September 13, 2004
regarding request for emergency personnel action P18

Paterson Education Association Grievance Form
dated September 13, 2004 with attachments P19

Memo from Ardeena Long to Mr. Moody dated
September 14, 2004 regarding memo-leaving
classroom unattended P20

Memo from Ardeena Long to Mr. Moody dated
September 14, 2004 regarding response to the
letter and memo that Mr. Moody received on
September 10, 2004 ..... P21

Paterson Education Association Grievance Form
dated September 15, 2004 with attached Statement
of Grievance from Ardeena Long dated September 15, 2004 .... P22

Memo from Ms. Lyde to Mr. Moody dated
September 17, 2004 regarding Grievance P23

Memo from Ms. Lyde to Mr. Moody dated September 17, 2004 regarding change in the grievance meeting P24

Notice signed by Ardeena Long regarding receipt of a memo from Mrs. Lyde on September 17, 2004 ..... P25

Memo from Ardeena Long to Mrs. Lyde dated September 20, 2004 regarding Grievance Memo P26

Handwritten note from Elaine McGee dated September 21, 2004 ..... P27

Handwritten note from Levette V. Glanton to Mr. Moody regarding "Observation on September 21, 2004" P28

Memo from Mr. Moody to Ardeena Long dated September 22, 2004 regarding directive to submit written statement 9/22/04 ..... P29

Handwritten note from Ardeena Long regarding receipt of form P30

Handwritten List of missing documents from Ardeena Long's folder P31

Handwritten note from Mr. Kushner to Mr. Moody dated September 22, 2004 regarding "Personnel Folder of Ms. Long" P32

Handwritten note from Ray Lyde, Jr. regarding Observation on September 21, 2004 ..... P33

Typed note from Miss Carr to Mr. Moody dated September 22, 2004 regarding "Observation on September 21, 2004" P34

Typed note from Carmen Acevedo, Security Guard, regarding Observation on September 21, 2004 ..... P35

Typed note from Mr. Ola Aalde dated September 22, 2004 .... P36

Typed note from Mr. Veal to Mr. Moody dated September 22, 2004 regarding "Observation on September 21, 2004" P37

Complaint filed on September 22, 2004 ..... P38

Paterson Policy Department Offense Report
dated September 22, 2004 (Theft) P39

Paterson Policy Department Offense Report
dated September 22, 2004 (assault) P40

Violence, Vandalism, and Substance Abuse
Incident Report Form 2004-2005 (Theft charges) dated
September 22, 2004 ..... P41

Violence, Vandalism, and Substance Abuse
Incident Report Form 2004-2005 (Simple Assault charges)
dated September 22, 2004 ..... P42

Handwritten note dated September 22, 2004 ..... P43

Memo from Mr. Moody to Dr. Clancy dated
September 22, 2004 regarding Hostile Work Environment P44

Handwritten note from Ray Lyde, Jr. dated September 22,
2004 regarding "Observation on September 21, 2004" P45

Mr. Lyde's handwritten report regarding meeting
dated September 22, 2004 ..... P46

Handwritten note from Ray Lyde, Jr. regarding
"Observation on September 21, 2004" P47

Correspondence from James L. Joyner, 2nd V.P.
to Michael Krause, Office of Labor Relations,
dated September 23, 2004 ..... P48

Paterson Police Department Offense Report dated
September 24, 2004 ..... P49

Employees Database from the Human Resource
Department dated September 27, 2004 ..... P50

Correspondence from Mr. Joyner to Mr. Krause
with attachments dated September 27, 2004 ..... P51

Correspondence from Mr. Krause to Ardeena Long
dated September 22, 2004 ..... P51A

Memo from Mr. Moody to Ardeena Long dated September 28, 2004 regarding insubordination P52

Memo from Mr. Moody to Jeanette Lyde dated September 28, 2004 regarding Relief from Daily Unsafe and Hostile P53

Paterson Education Association Grievance Form dated September 28, 2004 with attachments P54

Memo from Ardeena Long to Mr. Moody dated September 29, 2004 regarding insubordination letter dated September 28, 2004 ..... P55

Memo from Mr. Moody to Ardeena Long dated September 29, 2004 with attachment regarding Insubordination (refusal to sign Insubordination dated September 28, 2004) P56

Memo from Ardeena Long to Dr. Clancy dated September 30, 2004 with attachment regarding response to Mr. Moody's Insubordination Letter dated September 28, 2004 ..... P57

Memo from Jeanette Lyde to Mr. Krause dated September 30, 2004 regarding Grievance with attachment P58

Memo from Mr. Moody to Mr. Krause dated October 1, 2004 regarding response to Grievance Memo dated September 28, 2004 ..... P59

Memo from Ardeena Long to Dr. Clancy dated October 4, 2004 regarding escalation of harassment by Mr. Moody P60

Original Teacher Pre-Conference Observation Form and Questions dated October 5, 2004 ..... P61

2nd copy of Teacher Pre-Conference Observation Form and Questions dated October 5, 2004 ..... P62

Memo from Ardeena Long to Alexandra Gina, Supervisor of Language Arts dated October 6, 2004 regarding Observation of October 5, 2004 ..... P63

Personnel Transaction Request & Personnel Action Form dated October 6, 2004 ..... P64

Correspondence to Ardeena Long from Dr. Clancy dated October 6, 2004 regarding Administrative Leave P65

Tenure Classroom Teacher Observation Report dated October 12, 2004 with attached Narrative P66

Memo from Mr. Moody to Ms. Gina dated October 19, 2004 regarding Formal Evaluation for Ardeena Long P67

Memo from Mr. Smith to Dr. Clancy dated January 12, 2005 regarding investigation with attached memo from Frank Robina to James Smith, Director of Security services dated January 8, 2005 regarding Investigation P68

Correspondence to Ardeena Long from Ms. Lyde dated March 8, 2005 ..... P69

Correspondence to Ardeena Long from Ms. Lyde dated April 20, 2005 ..... P70

Memo from Mr. Krause to Ms. Lyde dated May 11, 2005 regarding Ardeena Long P71

Personnel Transaction Request & Personnel Action Form dated February 7, 2006 ..... P72

Correspondence to Ardeena Long from Dr. Glascoe dated February 7, 2006 regarding suspension P73

Correspondence from Joe Clark, Principal of Eastside High School to Ardeena Long dated January 5, 1984 ..... P74

Correspondence from Joe Clark, Principal to Ardeena Long dated October 25, 1985 ..... P75

Correspondence from Joe Clark, Principal to Ardeena Long dated October 28, 1985 ..... P76

Correspondence from Joe Clark, Principal to Dr. Frank Napier, Jr., Superintendent dated October 29, 1985 ..... P77

Correspondence from William H. Butler, V.P.
to Ardeena Long dated November 1, 1985 ..... P78

Correspondence from William H. Butler, V.P. to
Dr. Frank Napier, Jr., Superintendent dated
November 1, 1985 ..... P79

Correspondence from William H. Butler, V.P. to
Mr. Miggliaccio dated January 13, 1986 ..... P80

Correspondence from William H. Butler, V.P. to
Joe Clark, Principal dated March 27, 1986 ..... P81

Correspondence from William H. Butler, V.P. to
Robert Rosenberg, Board Counsel dated April 18, 1986 ..... P82

Sketch by Alexandra Gina P83

Telephone Log.....P-84

IN THE MATTER OF THE TENURE CHARGES AGAINST ARDEENA LONG, STATE OPERATED SCHOOL DISTRICT OF PATERSON, PASSAIC COUNTY.
Agency Ref. No. 33-1/06
OAL Dkt. No. EDU 01998-06

RESPONDENT'S EXHIBIT LIST

Diagram of Great Falls Academy prepared by Zatiti Moody R1

Diagram of Zatiti Moody's office prepared by Ardeena Long R2

Diagram of Ardeena Long's classroom prepared by Ardeena Long R3

Nurses note prepared by Chris Welyczko, RN concerning Ardeena Long dated 9/22/04 . . . . . .R4

Classroom teacher observation of Ardeena Long prepared by Alfred Weiss dated November 10, 1980 . . . . . .R5

Classroom teacher observation of Ardeena Long prepared by Alfred Weiss dated February 7, 1981 . . . . . R6

Classroom teacher evaluation of Ardeena Long prepared by Alfred Weiss dated April 12, 1981 . . . . . R7

Classroom teacher evaluation of Ardeena Long prepared by Robert Orbach dated 11/24/81 . . . . . .R8

Classroom teacher evaluation of Ardeena Long prepared by Robert Orbach dated February 26, 1982 . . . . . R9

Classroom teacher observation of Ardeena Long prepared by Robert Orbach dated April 10, 1982 . . . . . R10

Classroom teacher observation of Ardeena Long prepared by Alfred Weiss dated October 15, 1982 . . . . . .R11

Classroom teacher observation of Ardeena Long prepared by Alfred Weiss dated January 7, 1983 . . . . . R12

Classroom teacher observation of Ardeena Long prepared by Alfred Weiss dated March 8, 1983 . . . . . R13

Memorandum to Ardeena Long from Joe Clark, Principal
RE: Job Performance, dated May 4, 1983 . . . . . R14

Letter from Joe Clark, Principal to Vera P. Thompson,
Assistant Superintendent of Schools,
RE: Ardeena Long Tenure dated May 5, 1983 . . . . . .R15

Memorandum from Joe Clark, Principal to
Ardeena Long dated May 16, 1983
RE: Job Performance report R16

Memorandum from Joe Clark, Principal to
Ardeena Long dated May 27, 1983
RE: Job Performance R17

Letter from Charles J. Riley, Secretary/Bus. Admin.
to Ardeena Long dated April 18, 1983
RE: permanent appointment R18

Performance report of Ardeena Long
prepared by Alfred Weiss for the
1983-1984 school year R19

Letter from Frank Napier Jr. Ed.D.,
Superintendent of Schools to Ardeena Long
dated July 22, 1985, RE: transfer R20

Performance report of Ardeena Long for
the school year 1985-1986 dated May 15, 1986 . . . . . R21

Performance report of Ardeena Long for
the school year 1986-1987 dated 5/20/87 . . . . . .R22

Letter from Frank Napier Jr., Superintendent
of Schools to Ardeena Long dated
September 21, 1987, RE: transfer R23

Performance report of Ardeena Long
prepared by Gumble and Joe Clark for the
school year 1987-88 dated May 1988 . . . . . R24

Performance report of Ardeena Long
prepared by Jeanette Lyde and Joe Clark
for the school year 1988-89 dated March 1989 . . . . . R25

Performance report for Ardeena Long

prepared by Charles Lighty and Alfred Weiss
for the school year 1989-90 dated 19 March 1990 . . . . . .R26

Letter from Frank Napier Jr., Ed.D.,
Superintendent of Schools to Ardeena Long
dated August 13, 1990, RE: transfer R27

Performance report of Ardeena Long prepared by
Charles Lighty and Alfred Weiss for the
1990-91 school year dated 3/27/91 . . . . . .R28

Performance report of Ardeena Long prepared by
Sister Mary Theresa Orbegozo for the 1991-92
dated 4/6/92 . . . . . R29

Letter from Deborah Bohannon, Personnel Asst.
to Ardeena Long, RE: Position Transfer
dated February 5, 1993 . . . . . R30

Memorandum from Dr. John A. Nolan, Director
of Personnel to Dr. Judith Samson, Principal
RE: Transfer of Ardeena Long, dated February 11, 1993 . . . .R31

Performance report of Ardeena Long prepared by
E. Cartollo for the 1992-93 school year
dated 3/15/93. . . . . R32

Performance report of Ardeena Long prepared by
E. Cartollo for the 1993-94 school year
dated 3/15/94. . . . . R33

Performance report of Ardeena Long prepared by
E. Cartollo for the 1994-95 school year
dated 4/1/95 . . . . . R34

Performance report of Ardeena Long prepared by
Joseph Rieder for the 1995-96 school year
dated 4/22/96. . . . . R35

Performance report of Ardeena Long prepared by
Joseph Rieder for the 1998-99 school year
dated 4/5/99 . . . . . R36

Classroom teacher evaluation for Ardeena Long
prepared by Michael S. Leonessa dated 4/24/01 . . . . . .R37

Letter from Edward Duroy, Ed.D., State District

Superintendent to Ardeena Long
RE: receiving the 2001-02 Governor's Teacher
Recognition Award R38

Sign in sheet for Ardeena Long's classes for
the period running from 9/7/04 through 10/5/04 . . . . . R39

Contract agreement between the Paterson School District
And the Paterson Education Association, 2000-2001,
2001-2004 . . . . . .R40

3 79-06

AGENCY DKT. NO. 261-8/06

IN THE MATTER OF THE TENURE	:	
HEARING OF JAMES DULACK,	:	COMMISSIONER OF EDUCATION
SCHOOL DISTRICT OF UNION	:	DECISION ON MOTION
CITY, HUDSON COUNTY.	:	

This matter was opened before the Commissioner of Education on July 31, 2006, through the certification of tenure charges against respondent, a tenured custodian. Petitioner alleged excessive absenteeism and insubordination. Respondent's answer was filed on August 28, 2006, past the fifteen-day period allowed by *N.J.A.C.* 6A:3-5.3 for responses to tenure charges, and default was accordingly entered against the respondent. On September 20, 2006, however, the default was vacated, with the consent of petitioner, and respondent's answer was accepted.

On October 17, 2006, the parties submitted a proposed settlement, whereby the respondent agreed to apply for disability retirement and release any and all claims against petitioner, and petitioner agreed to withdraw the tenure charges and release any and all claims against respondent. The Commissioner has reviewed same, along with the board of education's resolution authorizing and approving the settlement. Upon such review, the Commissioner finds that the settlement terms meet the requirements of *N.J.A.C.* 6A:3-5.6; accordingly, the settlement agreement is adopted as the final decision in this case.

IT IS SO ORDERED.

Lucille Davy

COMMISSIONER OF EDUCATION

Date of Decision: 11/02/06

Date of Mailing: 11/02/06

RECEIVED BY
CONTROVERSIES
& DISPUTES
2006 OCT 17 PM 2:30

SETTLEMENT AGREEMENT AND MUTUAL RELEASE

This Settlement Agreement and Mutual Release is made on this 9 day of September, 2006, by and between James Dulack ("Dulack"), residing at 1610 Kennedy Blvd., Union City, New Jersey 07087 and the Union City Board of Education ("Board"), with offices located at 3912 Bergen Turnpike, Union City, New Jersey 07087.

1. **Background and Purposes of Agreement.**

1.1 Dulack is a tenured custodian employed by the Board.

1.2 Gerald Caputo, Assistant Superintendent of the Union City School District, has filed tenure charges (Charges") against Dulack alleging excessive absences and insubordination.

1.3 The Board considered these charges in closed session at the July 26, 2006 Regular Meeting and voted by a recorded roll call majority vote to certify the charges to the Commissioner of Education.

1.4 Both the Board and Dulack have determined that it is in their mutual best interest to enter into this Agreement and thereby amicably resolve all issues in the tenure charges, including any potential claims.

1.5 The justifications for settlement of this matter include:

1.5.1 Mr. Dulack has submitted his application for a disability retirement.

1.5.2 The settlement of these Charges are in the public interest to avoid costly, protracted litigation, the outcome of which is uncertain.

2. **Settlement.**

The Charges are settled in their entirety subject to the execution of this Agreement and the mutual Releases set forth herein. The Board shall withdraw the Charges without prejudice, subject to the Commissioner of Education's approval.

3. **Complete Release.**

3.1 Dulack releases and gives up any and all claims and rights that he has or may have against the Board, or any of its officials, officers, representatives or employees, including, but not limited to, any claim of liability, damages or attorneys' fees. This release includes all claims, including those of which Dulack is not aware and those not mentioned in this Release. This Release applies to all claims resulting from anything that has happened up to now.

3.2 In addition to releasing any and all claims and rights pursuant to Paragraph 3.1 above, Dulack also specifically releases the following claims:

3.2.1 Any and all claims which were brought or could have been brought or arising:

i) under the New Jersey Law Against Discrimination, N.J.S.A. 10:5-1, et seq. ("LAD"), which, among other things, prohibits discrimination in employment on the basis of an individual's race, creed, color, religion, sex, national origin, ancestry, age, marital status, affectional or sexual orientation, familial status, handicap, atypical hereditary cellular or blood trait or liability for service in the Armed Forces of the United States;

ii) under the Conscientious Employee Protection Act, N.J.S.A. 34:19-1, et seq., which, among other things, prohibits retaliatory action against an employee under certain specified conditions;

iii) under the New Jersey Employer-Employee Relations Act, N.J.S.A. 34:13A-1, et seq.;

iv) under Title VII of the Civil Rights Act of 1964, as amended, 42 U.S.C. § 2000e, et seq., or the Civil Rights Act of 1991, as amended, which, among other things, prohibits discrimination in employment on account of a person's race, color, religion, sex or national origin;

v) under the Age Discrimination in Employment Act of 1967, as amended, 29 U.S.C. § 621, et seq., ("ADEA"), which, among other things, prohibits discrimination in employment on account of a person's age;

vi) under the Americans with Disabilities Act of 1990, as amended, 42 U.S.C. § 12101, et seq., ("ADA"), which, among other things, prohibits discrimination in employment on account of a person's disability or handicap;

vii) under the Family and Medical Leave Act of 1993, as amended, 29 U.S.C. § 2601, et seq., ("FMLA"), which among other things, entitles certain employees to take reasonable leave for medical reasons for the birth or adoption of a child, and for the care of a child, spouse or parent who has a serious health condition;

viii) under the Rehabilitation Act of 1973, as amended, 29 U.S.C. § 701, et seq., which among other things, prohibits discrimination in employment by federal contractors against individuals with disabilities;

ix) under the Employee Retirement Income Security Act of 1974, as amended, 29 U.S.C. §1001, et seq., ("ERISA"), which, among other things, regulates pension and welfare plans and prohibits interference with individual rights protected under that statute;

x) under the Older Workers Benefit Protection Act, 29 U.S.C. § 621, et seq., ("OWBPA"), which, among other things, amends provisions of ADEA and prohibits discrimination in employment and employment benefits on account of a person's age; and

xi) under any federal or state statute, rule or regulation or common law.

3.3 The Board releases and gives up any and all claims and rights that it may have against Dulack, including, but not limited to, any claim of liability, damages or attorneys' fees arising out of the Charges. This release includes all claims, including those of which the Board is not aware and those not mentioned in this Release. This Release applies to all claims resulting from anything that has happened up to now.

4. **Who is Bound.**

Dulack is bound by this Release. Anyone who succeeds Dulack's rights and responsibilities, such as heirs or the executors of Dulack's respective individual estates, are also bound. This Release is made for the benefit of the Board and all who succeed to its rights and responsibilities.

5. **Fair Representation.**

Dulack represents and warrants that Benjamin A. Spivack, Esq. has represented him fully, fairly, and without bias in connection with the Charges.

6. **Consultation with an Attorney.**

Dulack has consulted with his attorney with respect to this Agreement, and reviewed with his attorney all the terms and conditions of this Agreement before signing this Agreement.

7. **Complete Agreement.**

This Agreement contains the entire agreement between the Board and Dulack with respect to the subject matter, and supersedes all prior agreements or understandings dealing with the same subject matter. There is no agreement on the part of the Board or Dulack to do anything other than as is expressly stated in this Agreement.

8. **Choice of Law.**

This Agreement shall in all respects be interpreted, enforced and governed by the laws of the State of New Jersey.

9. **Modification.**

No modification or amendment of this Agreement will be enforceable unless it is in writing and signed by the party to be charged.

10. **Approval by Commissioner of Education and OAL.**

The enforceability of this Agreement, except as set forth in the remainder of this paragraph, is conditioned upon approval by the Administrative Law Judge assigned to

the matter, and, if required by law, including N.J.A.C. 6A:3-5.6, the Commissioner of Education.

11. **Attestation of Dulack.**

Dulack represents and warrants that he fully understands each and every provision of this Agreement, and that he fully understands all of the terms and conditions contained in each provision of this Agreement. Dulack represents and warrants that he fully understands each and every provision of this Agreement voluntarily, of his own free will, without any pressure or coercion from any person or entity whatsoever.

12. **Negotiated Agreement; No Construction Against Any Party.**

This Agreement was not drafted by any of the parties, but rather is the result of negotiations among the parties with the benefit of their attorneys. Each party to this Agreement read this Agreement and has freely and voluntarily executed it. No ambiguity that may arise in this Agreement shall be resolved by construing the Agreement against either of the parties as drafter of same.

13. **Formal Approval.**

The Board shall not be bound by this Agreement until it has been formally approved by Resolution of the Board, and duly executed by all parties.

14. **Execution in Counterparts.** This Agreement may be signed in separate counterparts, each of which shall be deemed a duplicate original, but all of which together shall constitute one and the same instrument.

IN WITNESS WHEREOF, the parties hereto have caused this Agreement to be duly executed.

WITNESS: JAMES DULACK

_____ BY: _____

Dated:_____

WITNESS: UNION CITY BOARD OF EDUCATION

_____ _____

ANTHONY DRAGONA LEONARD CALVO
ACTING BOARD SECRETARY BOARD PRESIDENT

Dated: 10/10/06

F:\files\Miscellaneous LIT\Boards of Ed\UCBE #6001\Dulack, James\revisedSettlement Agmt.doc

RECEIVED
CONTROVERSIES
& DISPUTES
2006 OCT 17 PM 2:31

WITNESS:

JAMES DULACK

BY:

Dated: 10/10/06

WITNESS:

UNION CITY BOARD OF EDUCATION

ANTHONY DRAGONA
ACTING BOARD SECRETARY

LEONARD CALVO
BOARD PRESIDENT

Dated:

F:\files\Miscellaneous LIT\Boards of Ed\UCBE #6001\Dulack, James\revisedSettlement Agmt.doc

RECEIVED BY
CONTROVERSIES
& DISPUTES
2006 OCT 17 PM 2:31

RESOLUTION PRESENTED AT A PUBLIC
MEETING OF THE UNION CITY BOARD OF
EDUCATION HELD ON AUGUST 31, 2006

RESOLUTION AUTHORIZING AND APPROVING THE SETTLEMENT OF TENURE CHARGES IN ACCORDANCE WITH THE TERMS OF A SETTLEMENT AGREEMENT, DATED AUGUST 31, 2006

WHEREAS, on July 26, 2006, the Union City Board of Education ("Board") certified tenure charges against a certain non-instructional employee; and

WHEREAS, upon the recommendation of the Superintendent and Assistant Superintendent of Personnel, the Board has determined that it is in the best interests of the Board to the settle the tenure charges, and avoid the high costs of litigation.

NOW, THEREFORE, BE IT RESOLVED by the Board that:

1. The aforesaid recitals are incorporated herein as though fully set forth at length.

2. The settlement agreement, dated August 31, 2006, a copy of which is on file in the Human Resources office is hereby authorized and approved, with such changes as the Superintendent and Assistant Superintendent of Personnel, in their sole discretion, after consultation with Board Counsel, determine to be necessary convenient and desirable to effect the settlement of the tenure charges at issue.

3. The Board President, Acting Board Secretary, Superintendent, Assistant Superintendent of Personnel and any other official or employee of the Board be and they are hereby authorized to execute any and all documents and to take any and all actions necessary to complete and realize the intent and purpose of this Resolution.

4. This Resolution shall be effective immediately.

ADOPTED: August 31, 2006

I hereby certify that the Union City Board of Education duly Adopted the foregoing on August 31, 2006

Anthony N. Dragona
Interim Board Secretary

SEAL

RECEIVED BY
CONTROVERSIES
& DISPUTES
2006 OCT 17 PM 2:31

378-06

OAL DKT. NO. EDU 224-06
AGENCY DKT. NO. 376-12/05

CHRISTIE C. PONTARI,	:	
PETITIONER,	:	
V.	:	COMMISSIONER OF EDUCATION
BOARD OF EDUCATION OF THE CITY OF OCEAN CITY, CAPE MAY COUNTY,	:	DECISION
RESPONDENT.	:	

The record of this matter, the parties' proposed Stipulation of Settlement, 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 parties' settlement and adopts the Initial Decision as the final decision in this matter, which is hereby dismissed, subject to compliance with the terms of the settlement.

IT IS SO ORDERED.

Lucille E Davy
COMMISSIONER OF EDUCATION

Date of Decision: 11/02/06
Date of Mailing: 11/02/06

State of New Jersey
OFFICE OF ADMINISTRATIVE LAW

INITIAL DECISION
SETTLEMENT
OAL DKT. NO. EDU 224-06
AGENCY DKT. NO. 376-12/05

CHRISTIE C. PONTARI,
Petitioner,
v.
BOARD OF EDUCATION OF THE CITY OF OCEAN CITY, CAPE MAY COUNTY,
Respondent.

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

Michael P. Stanton, Esq., for respondent (Taht, Stanton & McCrosson, attorneys)

Record Closed: October 6, 2006 Decided: October 10, 2006

BEFORE **BRUCE M. GORMAN,** ALJ:

This matter was transmitted to the Office of Administrative Law on January 24, 2006, for determination as a contested case, pursuant to N.J.S.A. 52:14B-1 to -15 and N.J.S.A. 52:14F-1 to -13.

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

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

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

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

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

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

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

10/10/06
DATE

BRUCE M. GORMAN, ALJ

Receipt Acknowledged:

Oct 12 2006
DATE

DEPARTMENT OF EDUCATION

Mailed to Parties:

OCT 13 2006
DIRECTOR AND
CHIEF ADMINISTRATIVE LAW JUDGE
DATE

OFFICE OF ADMINISTRATIVE LAW

/sd

RECEIVED
2006 OCT -6 A 11:03
STATE OF NEW JERSEY
OFFICE OF ADMIN. LAW

ZAZZALI, FAGELLA, NOWAK
KLEINBAUM & FRIEDMAN, P.C.
150 West State Street
Trenton, New Jersey 08608
(609) 392-8172
Attorneys for Petitioner

CHRISTIE C. PONTARI, Petitioner, v. OCEAN CITY BOARD OF EDUCATION, CAPE MAY COUNTY, Respondent.	BEFORE THE OFFICE OF ADMINISTRATIVE LAW OAL Dkt. No. EDUOR 00224-2006S Agency Ref. No. 376-12/05 **STIPULATION OF SETTLEMENT**

The above-captioned matter having been brought before the Commissioner of Education upon the Petition of Appeal of Christie C. Pontari, the parties hereby agree to resolve the dispute between them, now pending before this court, subject to the terms and conditions set forth below:

1. For purposes of this agreement, respondent Ocean City Board of Education, Cape May County, shall hereinafter be referred to as the Board and petitioner Christie C. Pontari shall hereinafter be referred to as the Petitioner.

2. Petitioner commenced employment with the Board on November 28, 2001 in the full-time position of Teacher of Spanish at the Ocean City Intermediate School, and served in that position through the end of the 2001-2002 school year, as well as the 2002-03, 2003-04, and 2004-05 school years.

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

3. During her employment by the Board, Petitioner held the proper certificate and endorsement for each of her assignments, and she therefore acquired tenure with the Board in the position of teacher, which extends to all assignments that she is authorized to fill under her instructional certificate and all endorsements to that certificate.

4. During the 2004-05 school year, Petitioner was paid an annual salary of $48,735.00 (BA Step 5).

5. On or about May 4, 2005, Petitioner was informed by the Board that it was not renewing her employment for the 2005-06 school year due to a reduction in force.

6. Effective January 1, 2006, a tenured teacher of Spanish with much greater seniority than Petitioner retired from employment with the Board.

7. The parties agree that Petitioner should have been recalled to serve in the full-time position of Teacher of Spanish, effective January 1, 2006. The Board thus agrees to reinstate Petitioner to the full-time position of Teacher of Spanish for the 2005-06 school year at a salary $31,491.60; this represents an annual salary of $52,486.00 (BA Step 6) prorated for the six (6) months from January 1, 2006 through June 30, 2006.

8. The Board further agrees to assign Petitioner to the full-time position of Teacher of Spanish for the 2006-07 school year at an annual salary of $56,365.00 (BA Step 7).

9. Although Petitioner is entitled to a back pay award of $31,491.60 for the period of time from January 1, 2006 through June 30, 2006, she also had a duty to mitigate her damages. Taking such duty into consideration, the parties have agreed

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

that the Board shall therefore pay to Petitioner the gross amount of $9,891.60, subject to standard and ordinary deductions, which represents the prorated salary of $31,491.00 she would have earned during the last six (6) months of the 2005-06 school year, less the sum of $21,600.00 which she could have received if she had taken a long-term substitute position offered by the Board during this period of time.

10. This award of back pay shall be made to the Petitioner within thirty (30) days following the execution of this agreement.

11. If employed by the Board during the period of time from January 1, 2006 through June 30, 2006, Petitioner would have received Board paid health insurance coverage for herself and her family. The Board shall therefore reimburse Petitioner the sum of $7,304.80 for her expenses for securing COBRA health insurance coverage for the period from January 1, 2006 through August 31, 2006.

12. If employed by the Board during the period of time from January 1, 2006 through June 30, 2006, Petitioner would have received six (6) sick days and two (2) personal days. The Board shall therefore award Petitioner an additional six (6) sick days and two (2) personal days for the 2006-07 school year.

13. The parties agree that Petitioner shall pay the employee's share of any pension contributions to the Teachers' Pension & Annuity Fund for the period from January 1, 2006 through June 30, 2006 based upon the Petitioner's gross annual salary for the 2005-06 school year of $9,891.60 following the reduction for mitigation of damages, that the Board shall not be liable for the employee's share thereof, that Petitioner shall not be liable for the employer's share thereof, that the State will contribute the employer's share of pension contributions if it agrees to do so, and that if

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

the State does not contribute the employer's share of pension contributions, the Board shall contribute the employer's share of such contributions.

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

15. Petitioner shall withdraw the Petition of Appeal presently pending before the Office of Administrative Law and Commissioner of Education, with prejudice, when Petitioner's counsel receives notice and documentation that the Board has approved the terms and conditions of this settlement.

16. This Settlement Agreement resolves any and all claims by Petitioner arising from the Board's termination of her employment, which took effect June 30, 2005, and regarding Petitioner's allegations that the Board acted unlawfully in terminating her employment and in failing to retain petitioner instead of any other employee in a full-time position.

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

Christie C. Pontari

Dated: 9/21/06

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

ZAZZALI, FAGELLA, NOWAK
KLEINBAUM & FRIEDMAN, P.C.
Attorneys for Petitioner

By: _____ Dated: 9/18/06
Kathleen Naprstek Cerisano, Esq.

OCEAN CITY BOARD OF EDUCATION

By: _____ Dated: 9/29/06

TAHT, STANTON & McCROSSON, P.C.
Attorneys for Respondent

By: _____ Dated: 9/29/06
Michael P. Stanton, Esq.

377-06

OAL DKT. NO. EDU 6242-06
AGENCY DKT. NO. 228-6/06

IN THE MATTER OF THE TENURE	:	COMMISSIONER OF EDUCATION
HEARING OF FELIZ RIOS,	:	DECISION
NEW JERSEY STATE JUVENILE	:	
JUSTICE COMMISSION.	:	

The record of this matter, the parties' proposed Stipulation of Settlement, 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 concurs with the ALJ that the settlement should be approved, since its terms are 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 approved, and this matter is hereby dismissed subject to compliance with the terms of the settlement.

IT IS SO ORDERED.

COMMISSIONER OF EDUCATION

Date of Decision: 11/01/06
Date of Mailing: 11/01/06

State of New Jersey
OFFICE OF ADMINISTRATIVE LAW

INITIAL DECISION

SETTLEMENT

OAL DKT. NO. EDU 6242-06

AGENCY DKT. NO. 228-6/06

IN THE MATTER OF THE TENTURE HEARING OF FELIX RIOS, NEW JERSEY STATE DEPARTMENT OF LAW AND PUBLIC SAFETY, DIVISION JUVENILE JUSTICE COMMISSION.

John Franzini, Deputy Attorney General (Stuart Rabner, Attorney General of New Jersey, attorney)

Rosemarie Cipparulo, Esq., for respondent (Weissman & Mintz, attorneys)

Record Closed: September 20, 2006 Decided: October 5, 2006

BEFORE **DENNIS P. BLAKE**, ALJ:

The matter was transmitted to the Office of Administrative Law on August 16, 2006, for determination as a contested case pursuant to N.J.S.A. 52:14B-1 to -15 and N.J.S.A. 52:14F-1 to -13. The matter was not scheduled for hearing based on notice from the parties that the matter had been settled. A Stipulation of Settlement was prepared indicating the terms thereof, which is attached and fully incorporated herein. (J-1)

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

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

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

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

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

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

10-5-06
DATE

DENNIS P. BLAKE, ALJ

Receipt Acknowledged:

10/11/06
DATE

K. Kennedy
DEPARTMENT OF EDUCATION

OCT 12 2006
DATE

Mailed to Parties:
[illegible]
CHIEF ADMINISTRATIVE LAW JUDGE
OFFICE OF ADMINISTRATIVE LAW

DPB/mamf/mh

DOCUMENTS IN EVIDENCE

Jointly submitted:

J-1 Stipulation of Settlement

RECEIVED

2006 SEP 20 P 4:20

STATE OF NEW JERSEY
OFFICE OF ADMIN LAW

ANNE MILGRAM, Acting
Attorney General of New Jersey
R.J. Hughes Justice Complex
25 Market Street
P.O. Box 112
Trenton, New Jersey 08625-0112
Attorney for Petitioner
Juvenile Justice Commission

By: John Franzini
Deputy Attorney General
(609)633-7088

In the Matter of the Tenure Hearing of Felix Rios, Office of Education, Juvenile Justice Commission	:	Agency Dkt. No.: 228-6/06
	:	STIPULATION OF SETTLEMENT

The Juvenile Justice Commission, Office of Education (JJC), with offices located at 1001 Spruce Street, Suite 202, Trenton, New Jersey 08625, represented by ANNE MILGRAM, Acting Attorney General of New Jersey, John Franzini, Deputy Attorney General, appearing; and Felix Rios, a tenured employee of the JJC represented by Weissman & Mintz, LLC, Rosemarie Cipparulo, Esq. appearing; by way of this Stipulation of Agreement say:

WHEREAS, the JJC initiated the filing of tenure charges against Mr. Rios having filed the charges with the Commissioner of Education on or about June 22, 2006; and

WHEREAS, Mr. Rios was charged with Conduct Unbecoming a Public Employee and Other Just Cause; and

WHEREAS, the charges alleged that on March 26, 2006, Felix Rios, a tenured Teacher 1 within the Juvenile Justice Commission assigned to the New Jersey Training School, exhibited offensive and blatantly unprofessional behavior by purposely pulling his pants down, but remaining clothed in his underwear, in the Gatehouse Sallyport area at the New Jersey Training School in full view of the female corrections officer on duty and other staff of the New Jersey Training School when walking through the metal detector; that the behavior was observed by the female officer and other staff, was unjustified and deprived the female officer and other staff present of the dignity and respect to which they were entitled in the workplace; and

WHEREAS, the JJC sought the suspension of Mr. Rios on the above charges for a period of sixty (60) days without pay; and

WHEREAS, Mr. Rios disputed the charges; and

WHEREAS, the parties wish to enter into an amicable resolution of the tenure charges filed against Mr. Rios prior to a hearing; and

WHEREAS, it is in the best interest of the parties and the public to enter into this Stipulation of Settlement;

NOW, THEREFORE, in consideration of the mutual promises contained herein, the parties agree as follows:

1. Mr. Rios admits the charge of Conduct Unbecoming a Public Employee and Other Just Cause as described above.

2. As the penalty, Mr. Rios shall be suspended for thirty-five (35) days without pay to be served at the convenience of the JJC. He shall also attend and satisfactorily complete anger management training selected by the JJC.

3. The JJC shall not schedule any suspension day on a day before a holiday.

4. The JJC shall schedule the suspension days based on the operational needs of the facility at which Mr. Rios is employed.

5. This Agreement shall be part of Mr. Rios's official personnel file and Mr. Rios's admission of the charge and the penalty imposed by way of settlement may be presented and considered in any subsequent disciplinary action against him.

6. This Agreement constitutes a final and complete resolution of the tenure charges in this matter and fully disposes of all issues in controversy between the parties hereto. Mr. Rios agrees not to appeal the tenure action or the terms of this Agreement in any administrative, arbitral or judicial forum.

7. Settlement of this matter is justified and in the public interest because it imposes the desired discipline without the need for a contested tenure hearing. With

regard to the penalty, Mr. Rios has been employed by the Juvenile Justice Commission for over 16 years. He has had some minor disciplinary infractions but has never had major discipline imposed. The reduction in the length of the suspension without pay from proposed to agreed and the requirement for anger management training is equitable in exchange for eliminating the expense and uncertainty connected with a contested tenure hearing.

8. This Agreement shall not constitute a precedent in any other matter involving Mr. Rios or any other employee.

9. Mr. Rios has been 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 (N.J.A.C. 6A:3-5.6(a)6).

10. This Agreement shall only become effective when the Commissioner of Education approves it. Any disapproval by the Commissioner shall not interfere with the rights of either party to pursue this matter further.

This Agreement is made in good faith. The parties have read the Agreement and freely and voluntarily agree to its provisions.

For the Employee:

9/8/06 Dated:
Felix Rios

Dated: 9/11/06
Rosemarie Cipparulo, Esq.
Weissman & Mintz, LLC
Attorneys for Felix Rios

For the Juvenile Justice Commission:

Dated: 9/18/06
Margie Brown
Director of Education, JJC

ANNE MILGRAM
ACTING ATTORNEY GENERAL OF NEW JERSEY

Dated: 9/15/06
By: John Franzini
Deputy Attorney General

380-06

DAVID A. SMITH,	:	
PETITIONER,	:	
V.	:	COMMISSIONER OF EDUCATION
BOARD OF EDUCATION OF THE GREAT MEADOWS REGIONAL SCHOOL DISTRICT, WARREN COUNTY,	:	DECISION
RESPONDENT.	:	

SYNOPSIS

Petitioner – a tenured school administrator formerly employed by the Board – contends that the respondent violated his statutory rights by failing to offer him a position as assistant principal for the 2004-2005 school year, while retaining a non-tenured assistant principal. Petitioner had been employed by the district in the position of assistant principal from August 2000 through August 2002, at which time respondent promoted petitioner to the position of principal in another school. Petitioner held the position of principal from August 2002 through June 2004, at which time his contract was not renewed "due to economy and efficiency". Subsequently, respondent retained a non-tenured assistant principal without offering petitioner the vacant position. Petitioner claims tenure and seniority rights based on the tacking provision of *N.J.S.A.* 18A:28-6.

The ALJ found that undisputed facts establish that petitioner was employed for a sufficient period of time to acquire tenure as an assistant principal under the tacking provision of *N.J.S.A.* 18A:28-6, and that the respondent terminated his employment while retaining a non-tenured individual in the same position. Accordingly, the ALJ concluded that petitioner is entitled to summary decision, and ordered that the respondent pay petitioner for lost salary and benefits retroactive to July 1, 2004, subject to appropriate mitigation.

Upon a full and independent review of the record, the Commissioner concurs with the determination of the ALJ, and adopts the Initial Decision as the final decision in this matter.

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.

November 2, 2006

OAL DKT. NO. EDU 9192-04
AGENCY DKT. NO. 252-7/04

DAVID A. SMITH,	:	
PETITIONER,	:	
V.	:	COMMISSIONER OF EDUCATION
BOARD OF EDUCATION OF THE GREAT MEADOWS REGIONAL SCHOOL DISTRICT, WARREN COUNTY,	:	DECISION
RESPONDENT.	:	
	:	

The record of this matter and the Initial Decision of the Office of Administrative Law (OAL) have been reviewed. The Board sought and was granted an extension of time within which to submit exceptions and, subsequently, filed them in accordance with the modified timelines. Petitioner did not file reply exceptions.

The Board's exceptions essentially recast and reiterate its arguments advanced below, which the Commissioner determines were fully considered and addressed by the Administrative Law Judge (ALJ) in his decision and, therefore, will not be revisited here.

Upon a full and independent review of the record, the Commissioner concurs with the determination of the ALJ – for the reasons clearly presented in his decision – that petitioner achieved tenure as an assistant principal while serving as a principal pursuant to the tacking provision of *N.J.S.A.* 18A:28-6. As such, the Board's failure to offer petitioner an assistant principal position for the 2004-2005 school year, while retaining a non-tenured assistant principal, was violative of his tenure rights.

Accordingly, the recommended decision of the OAL is adopted as the final decision in this matter. It is hereby Ordered that the Board of Education of the Great Meadows Regional School District reinstate petitioner to the position of assistant principal and award him back pay and emoluments less mitigation.

IT IS SO ORDERED.*

COMMISSIONER OF EDUCATION

Date of Decision: 11/02/06

Date of Mailing: 11/02/06

* This decision may be appealed to the State Board of Education pursuant to *N.J.S.A.* 18A:6-27 *et seq.* and *N.J.A.C* 6A:4-1.1 *et seq.*

OAL DKT. NO. EDU 9192-04
AGENCY DKT. NO. 252-7/04

DAVID A. SMITH,	:	
PETITIONER,	:	
V.	:	COMMISSIONER OF EDUCATION
BOARD OF EDUCATION OF THE GREAT MEADOWS REGIONAL SCHOOL DISTRICT, WARREN COUNTY,	:	DECISION
RESPONDENT.	:	
	:	

The record of this matter and the Initial Decision of the Office of Administrative Law (OAL) have been reviewed. The Board sought and was granted an extension of time within which to submit exceptions and, subsequently, filed them in accordance with the modified timelines. Petitioner did not file reply exceptions.

The Board's exceptions essentially recast and reiterate its arguments advanced below, which the Commissioner determines were fully considered and addressed by the Administrative Law Judge (ALJ) in his decision and, therefore, will not be revisited here.

Upon a full and independent review of the record, the Commissioner concurs with the determination of the ALJ – for the reasons clearly presented in his decision – that petitioner achieved tenure as an assistant principal while serving as a principal pursuant to the tacking provision of *N.J.S.A.* 18A:28-6. As such, the Board's failure to offer petitioner an assistant principal position for the 2004-2005 school year, while retaining a non-tenured assistant principal, was violative of his tenure rights.

Accordingly, the recommended decision of the OAL is adopted as the final decision in this matter. It is hereby Ordered that the Board of Education of the Great Meadows Regional School District reinstate petitioner to the position of assistant principal and award him back pay and emoluments less mitigation.

IT IS SO ORDERED.*

COMMISSIONER OF EDUCATION

Date of Decision: 11/02/06

Date of Mailing: 11/02/06

* This decision may be appealed to the State Board of Education pursuant to *N.J.S.A.* 18A:6-27 *et seq.* and *N.J.A.C* 6A:4-1.1 *et seq.*

State of New Jersey
OFFICE OF ADMINISTRATIVE LAW

INITIAL DECISION
OAL DKT. NO. EDU 9192-04
AGENCY DKT. NO. 252-7/04

DAVID A. SMITH,
Petitioner,
v.
BOARD OF EDUCATION
OF THE GREAT MEADOWS
REGIONAL SCHOOL DISTRICT,
Respondent.

Wayne J. Oppito, Esq., for petitioner

Jason P. Gratt, Esq., for respondent
(Courter, Kobert & Cohen, attorneys)

Record Closed: September 15, 2006 Decided: September 20, 2006

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

Statement of the Case

This is an appeal by school administrator whose employment by the Great Meadows Regional School District ("District") was terminated as of June 30, 2004. Petitioner David A. Smith ("Smith") contends that District's Board of Education ("Board") violated his statutory rights by failing to offer him a position as assistant principal for the

2004-2005 school year, while retaining a non-tenured assistant principal. All of the material facts have been stipulated, but the parties disagree on the legal consequences of the undisputed facts.

During the course of his employment in the District for nearly four years, Smith was promoted from assistant principal to elementary school principal.[1] Relying on the "tacking provision" of the tenure law, N.J.S.A. 18A:28-6, Smith maintains that his more recent service in the position of principal must be added to his earlier service as assistant principal in calculating his length of employment as an assistant principal.

Respondent urges that acquisition of tenure requires *actual service* in a particular position for the statutory period required by N.J.S.A. 18A:28-5, in this case three consecutive academic years, together with employment at the beginning of the next succeeding academic year.[2] Since Smith admittedly served less than three academic years as an assistant principal before being transferred to a principalship, the Board denies that he has tenure as an assistant principal.

For the reasons that follow, the Board's analysis fails to pay adequate attention to the tacking provision of N.J.S.A. 18A:28-6, which mandates that "the period of employment in such new position shall be included in determining the tenure and seniority rights in the former position held by such teaching staff member." Combining

[1] Smith does not claim any entitlement to tenure as a principal, recognizing that he has not served sufficient time in that higher position.

[2] The Board refers to N.J.S.A. 18A:28-5(b), which is u applicable to teachers employed annually for ten-month terms. Because administrators are usually twelve-month employees, the more pertinent section appears to be N.J.S.A. 18A:28-5(a), which confers tenure upon employment for "[t]hree consecutive calendar years, or any shorter period which may be fixed by the employing board for such purpose." It makes no difference in this case, however, since Smith would not have achieved tenure under either subsection unless his time as principal is counted.

the time that Smith was employed as assistant principal and as principal, he attained tenure in the position of assistant principal.

Procedural History

On July 20, 2004, Smith filed a verified petition with the Commissioner of Education ("Commissioner"), seeking reinstatement to a position as assistant principal. The Board filed its answer on August 19, 2004. Subsequently, on August 25, 2004, the Commissioner transmitted the matter to the Office of Administrative Law ("OAL") for hearing as a contested case.[3]

Prior to hearing, the parties agreed that an evidentiary hearing was unnecessary and that the matter could be decided on the basis of stipulated facts. They filed a joint stipulation of facts on July 13, 2005. Both sides filed cross-motions for summary decision on or before July 15, 2005 and submitted reply briefs by July 29, 2005. The OAL conducted oral argument on August 9, 2005. Thereafter, on August 17, 2005, Smith supplemented the record with a copy of his standard administrative certificate. On September 15, 2006, petitioner's submitted a letter clarifying Smith's certification status.

Findings of Fact

All of the material facts are stipulated. **I FIND** the following facts:

1. Respondent Board is a public body organized pursuant to the laws of the State of New Jersey and is responsible for the organization and administration of the District.

[3] On February 8, 2005, petitioner's counsel served written notice of the pendency of this matter on Lee S. Nittel, informing him that the outcome of this litigation might directly impact his employment and advising him of the opportunity to apply to the OAL for intervention status.

2. Petitioner Smith was continually employed in the District from on or about August 1, 2000 until June 30, 2004.[4]

3. Petitioner was initially employed on or about August 1, 2000 as an assistant principal assigned to Great Meadows Regional Middle School.

4. Petitioner was continually employed as an assistant principal assigned to Great Meadows Regional Middle School from August 1, 2000 through and including August 28, 2002.

5. On August 28, 2002, respondent transferred or promoted petitioner, with his consent, to the position of principal, assigned to Central Elementary School.

6. Petitioner was continually employed as principal, assigned to the Central Elementary School, from August 29, 2002 through and including June 30, 2005.

7. In a letter, dated May 5, 2004, from Tracey Severns, Superintendent of Schools, petitioner was notified that his employment contract for 2004-2005 would not be renewed "due to economy and efficiency" and that respondent would be discussing petitioner's "position and status" at its meeting on May 10, 2004.

8. In a memorandum, dated June 2, 2004, petitioner was advised by the superintendent of schools that she was "officially notifying" him "that you will be recommended for employment for the 2004-2005 school year" and that respondent may discuss this matter at its meeting on June 14, 2004.

[4] At all relevant times, Smith possessed either a certificate of eligibility, provisional certificate or standard administrative certificate, authorizing him to be employed in the positions of principal or assistant principal.

9. In a letter, dated June 10, 2004, the superintendent of schools notified petitioner that she was not recommending him for reemployment in the position of elementary principal.[5]

10. Petitioner was verbally notified by the Superintendent of Schools that his employment in the school district would cease as of June 30, 2004.

11. Respondent did not offer petitioner a position of assistant principal for the 2004-2005 school year, while retaining a non-tenured assistant principal.

Conclusions of Law

Based on the foregoing facts and the applicable law, **I CONCLUDE** that Smith has tenure in the District as an assistant principal.

The Tenure Act, N.J.S.A. 18A:28-1 to -18, specifically defines the conditions under which teaching staff members are entitled to the security of tenure. Spiewak v. Board of Educ. of Rutherford, 90 N.J. 63, 72 (1982). Zimmerman v. Newark Bd. of Educ., 38 N.J. 65 (1962), cert. den. 371 U.S. 956 (1963). Tenure arises only upon compliance with the precise conditions articulated in the statute. Picogna v. Board of Education of Cherry Hill, 143 N.J. 391, 400 (1996). See also, Howley v. Ewing Bd. of Educ., 6 N.J.A.R. (EDU) 509, 516 (1982).

N.J.S.A. 18A:28-5 grants tenure to enumerated teaching staff members, including principal, assistant principal, vice-principal and assistant superintendent, who meet the statutory requisites. By the express terms of this statue, an employee of a board of education is entitled to tenure if he or she (1) works in a position for which a teaching certificate is required; (2) holds the appropriate certificate; and (3) has served the requisite period of time. Spiewak, at 74. Generally, a teaching staff member is entitled to tenure if he or she is employed in a school district for (a) three consecutive

[5] In this second letter, Dr. Severns explained that her prior letter of June 2, 2004 had been "sent in error."

calendar years, or (b) three consecutive academic years (if the teacher is employed at the beginning of the next academic year), or (c) the equivalent of more than three academic years within any four academic years. Dennery v. Board of Education of the Passaic Cty. Reg. High Sch. Dist., 131 N.J. 626, 633 (1993).

Special tacking provisions apply to non-tenured teaching staff members who are voluntarily transferred or promoted to a new tenure-eligible position before reaching tenure in their former position. Under N.J.S.A. 18A:28-6, when a teaching staff member eligible to obtain tenure is transferred or promoted with his consent to another tenure-eligible position,

> . . . the period of employment in such new position shall be included in determining the tenure and seniority rights in the former position held by such teaching staff member, and in the event the employment in such new position is terminated before tenure is obtained therein, if he then has tenure in the district or under said board of education, such teaching staff member shall be returned to his former position at the salary which he would have received had the transfer or promotion not occurred together with any increase to which he would have been entitled during the period of such transfer or promotion.

Here Smith was employed for two years and-one-month as an assistant principal and for one year and-ten-months as a principal or a total of three years and-eleven-months of continuous employment in the district. Counting the time that Smith served as principal toward his accumulation of tenure as an assistant principal, he satisfies the statutory requirement of having been employed for more than three academic years. Were it not for this salutary device, a board of education could circumvent an employee's statutory tenure rights by the simple expedient of transferring or promoting him to a new position before tenure is ever achieved.

Indeed, such has been the settled law in New Jersey for the last seventeen years. In Sitek v. Board of Educ. of Southern Reg. High Sch. Dist., 1988 S.L.D. 2247 (Oct. 4, 1988), adopted in part and rev'd in part 1988 S.L.D. 22523 (Comm'r Nov. 15, 1988), aff'd 1989 S.L.D. 3079 (St. Bd. March 1, 1989), a local school district promoted a vice principal to the title of principal. Holding that the petitioner had tenure as a vice

principal, the Commissioner accepted his argument "that time served in a new position upon transfer or promotion shall be included in determining the tenure and seniority rights in his former position as vice principal." 1998 S.L.D. at 2254. Recently, the Commissioner reaffirmed the continuing applicability of the tacking provision to cases involving certificated tenured teaching staff members, but declined to extend that doctrine to secretarial and clerical employees governed by a different tenure statute. See, Giardina v. Pequannock Bd. of Educ., OAL Dkt. No. EDU 7677-03 (Feb. 18, 2005), adopted (Comm'r April 4, 2005), aff'd (St. Bd. Sept. 7, 2005), http://lawlibrary.rutgers.edu/oaldecisions/initial/edu07677-03_2.html, aff'd Dkt. No. A-0822-05T5, slip op. at 8 (N.J. App. Div. June 19, 2006).

Nonetheless, the Board urges that Sitek has been implicitly overruled by the opinion of the New Jersey Supreme Court in Nelson v. Board of Education of Old Bridge, 148 N.J. 358 (1997), as codified by subsequent amendments to N.J.S.A. 18A:28-5. Nelson involved a department chairperson of industrial arts who claimed tenure in the position of principal, even though he had never served in that position. His argument was based on the legal theory that tenure achieved under the supervisor endorsement on his administrative certificate was transferable to the principal endorsement on the same certificate. Declaring that positions specifically enumerated in N.J.S.A. 18A:28-5 are separately tenurable, the New Jersey Supreme Court upheld the State Board's refusal to grant tenure to a position in which petitioner had never been employed. In so doing, the Supreme Court's rationale rested exclusively on an interpretation of N.J.S.A. 18A:28-5. Thus, the Court had no occasion to consider the applicability of N.J.S.A. 18A:28-6. Petitioner in Nelson had only been employed as a supervisor and raised no claim to tenure based on transfer or promotion to a second tenurable position. Unlike Nelson, Smith had actual service in both the vice principal and the principal position, and invoked the tacking provision of N.J.S.A. 18A:28-6 to calculate the length of his service as an assistant principal.

Prior to issuance of the Supreme Court decision in Nelson, the New Jersey Legislature amended N.J.S.A. 18A:28-5 to clarify that tenure in any administrative or supervisory positions "shall accrue only by employment in that administrative or

supervisory position." An accompanying Committee Statement to Assembly Bill No. 1131 explained that such clarification is necessary "in order to continue the traditional practice of providing that tenure is acquired in one of the specifically enumerated positions only if the individual has served for the requisite statutorily required period of time in that position." Although the Board professes to garner support for its view in this language, the amendment does not alter the requisite time period prescribed by N.J.S.A. 18A:28-6 for cases in which a tenure-eligible teaching staff member is transferred or promoted. Nothing in the amendment repeals the tacking provision or seeks to change the way in which tenure has historically been calculated in such instances.

Statutes that deal with the same matter or subject should construed together as a "unitary and harmonious whole." Ramapo River Reserve Homeowners Ass'n. v. Borough of Oakland, 186 N.J. 439, 450 (2006). Adopting the Board's construction of the tenure laws would focus entirely on N.J.S.A. 18A:28-5 and completely ignore the equally important content of N.J.S.A. 18A:26-6. As the Board itself acknowledges, courts should avoid a construction that would render "any word in the statute to be inoperative, superfluous or meaningless, or to mean something other than its ordinary meaning." Bergen Commercial Bank v. Sisler, 157 N.J. 188, 204 (1999). If the Board's myopic approach to interpreting the tenure law were followed, the result would be to nullify the legislative expression embodied in N.J.S.A. 18A:26-6.

School law decisions on which the Board relies are readily distinguishable from the facts of this case. Fedor v. Board of Educ. of Elmwood Park, OAL Dkt. No. EDU 7669-01 (Aug. 13, 2003) http://lawlibrary.rutgers.edu/oaldecisions/initial/edu07669-01_1.html, adopted 2003 N.J. AGEN LEXIS 1541 (Comm'r Sept. 26, 2003) dealt with the issue of whether the reduction of a tenured principal's term from a 12-month to a 10-month position is a reduction in force triggering the application of the seniority regulations. It did not address the relevant question of tacking for purposes of acquiring tenure. Similarly, the companion cases of Leonard v. Board of Educ. of Trenton, OAL Dkt No. EDU 2852- 97, 1998 N.J. AGEN LEXIS 121 (Nov. 17. 1997), adopted 1998 N.J. AGEN LEXIS 951 (Comm'r June 22, 1998) and Schweber v. Board of Educ. of

Trenton, OAL Dkt. No. EDU 6460-96, 1998 N.J. AGEN LEXIS 123 (Nov. 17, 1997), adopted 1998 N.J. AGEN LEXIS 1236 (Comm'r June 10, 1998) merely stand for the proposition that assistant principal and vice principal are separately tenurable positions under N.J.S.A. 18A:28-5 and do not shed any light on the acquisition of tenure in the event of a transfer or promotion.

Undisputed facts establish that Smith was employed for a sufficient period of time to acquire tenure as an assistant principal and that the Board terminated his employment while retaining a non-tenured individual in that same position. Accordingly, Smith is entitled to entry of summary decision in his favor.

Order

It is **ORDERED** that the Board restore Smith to the position of assistant principal.

And it is further **ORDERED** that the Board promptly pay to Smith all lost salary and other benefits retroactive to July 1, 2004, subject to appropriate mitigation, if any.

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

This recommended decision may be adopted, modified or rejected by the **COMMISSIONER OF THE DEPARTMENT OF EDUCATION,** who by law is authorized to make a 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.

September 20, 2006
DATE

Ken R. Springer
KEN R. SPRINGER, ALJ

E-mail Receipt of Initial Decision Confirmed by the Department of Education on:

September 20, 2006
DATE

Mailed to Parties:

Laura Sanders
DIRECTOR AND
CHIEF ADMINISTRATIVE LAW JUDGE

SEP 21 2006
DATE

OFFICE OF ADMINISTRATIVE LAW

nd

381-06

#381-06

S.B., ON BEHALF OF MINOR CHILD, R.B.,	:	
PETITIONER,	:	COMMISSIONER OF EDUCATION
V.	:	DECISION
BOARD OF EDUCATION OF THE TOWNSHIP OF EWING, MERCER COUNTY,	:	
RESPONDENT.	:	

SYNOPSIS

Petitioner contested respondent's determination that her nephew, R.B., was not domiciled in respondent's district, claiming that R.B. was in fact residing with her in Ewing Township. Respondent asserts that R.B. is domiciled with his mother in Trenton, and filed a counterclaim seeking reimbursement of tuition. Petitioner failed to appear at hearing scheduled for October 5, 2006; however, the case file includes a copy of a fax sent by petitioner to the OAL on October 6, 2006, advising that petitioner had been unable to attend the hearing because of a death in the family and requesting another court date.

The ALJ found that petitioner did not appear at the hearing, and that – as of October 6, 2006, the date of the Initial Decision – no written excuse had been provided by S.B. for her nonappearance at the scheduled hearing on October 5, 2006. Accordingly, the ALJ dismissed the petition, and ordered petitioner to pay tuition in the amount of $10,015.35 to respondent Board.

The Commissioner notes that the Initial Decision makes no reference to petitioner's October 6, 2006 fax (which was stamped as received on October 10th, the next business day following the transmittal date on the fax), and observes that there is no indication that the ALJ was aware of this document when rendering his decision. The Commissioner therefore remands this matter to the OAL so that the ALJ may take account of petitioner's explanation for her failure to appear – and make the determination required by *N.J.A.C.* 1:1-14.4 – before turning to any recommendation on the merits.

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.

November 2, 2006

OAL DKT. NO. EDU 4412-06
AGENCY DKT. NO. 201-6/06

S.B., ON BEHALF OF MINOR CHILD, R.B.,	:	
PETITIONER,	:	COMMISSIONER OF EDUCATION
V.	:	DECISION
BOARD OF EDUCATION OF THE TOWNSHIP OF EWING, MERCER COUNTY,	:	
RESPONDENT.	:	

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

Upon review, the Commissioner cannot agree with the Administrative Law Judge (ALJ) that petitioner's appeal must be dismissed at this juncture due to her failure to appear at the hearing scheduled for October 5, 2006, and that tuition may be concomitantly assessed based upon the *ex parte* proofs offered by the Board.

OAL rules provide that in the event a party does not appear at a scheduled hearing, the ALJ shall hold the matter for one day to allow for receipt of a written explanation of nonappearance; after according the other party(ies) an opportunity to respond to any explanation filed, the ALJ shall then either reschedule the hearing with such conditions as are deemed appropriate, or refuse to do so because the nonappearing party was found to have intentionally attempted to cause delay. Where the hearing is not rescheduled, an Initial Decision on the merits may be entered based on *ex parte* proofs

from the appearing party, provided that such decision either memorializes the nonappearing party's failure to file an explanation or sets forth the basis for the ALJ's conclusion that the nonappearance was an intentional attempt to cause delay. *N.J.A.C.* 1:1-14.4

In the instant matter, the Initial Decision – issued on October 6, 2006 based upon a record closed the same day as the scheduled hearing (October 5) – states that no written explanation had been received from petitioner "to date" (at 2). However, the record forwarded to the Commissioner includes a fax from petitioner stating, in full, that "per your conversation with [me,] we had a death in our family and requested for another court date because the service was on Thursday [October 5]. Thank you very much for your understanding." The document's transmittal registry shows it to have been faxed on October 6, 2006 at 4:19 p.m., although OAL did not stamp it as received until the morning of the next business day, October 10, 2006 (Monday, October 9 being a State holiday). The Initial Decision makes no mention of this document, nor is there any indication that the ALJ was aware of it when rendering his decision.[1]

Consequently, the Commissioner finds it necessary to remand this matter to the OAL so that the ALJ may take account of petitioner's explanation and make the determination required by *N.J.A.C.* 1:1-14.4 before turning to any recommendation on the merits. The Commissioner stresses that, in so holding, she makes no inference as to what the result of such determination should be; rather, she simply recognizes that this matter cannot be fairly decided in its absence.

[1] It is not possible to tell from the document – a single page without identification of intended recipient(s) – whether petitioner also faxed, or otherwise provided, a copy to the Board. *N.J.A.C.* 1:1-14.4(b)

Accordingly, for the reasons expressed herein, this matter is remanded to the OAL for further proceedings consistent with applicable rule.

IT IS SO ORDERED.[2]

Lucille E Davy

COMMISSIONER OF EDUCATION

Date of Decision: 11/02/06

Date of Mailing: 11/03/06

[2] This decision may be appealed to the State Board of Education pursuant to *N.J.S.A.* 18A:6-27 *et seq.* and *N.J.A.C.* 6A:4-1.1 *et seq.*

State of New Jersey
OFFICE OF ADMINISTRATIVE LAW

INITIAL DECISION

OAL DKT. NO. EDU 4412-06

AGENCY DKT. NO. 201-6/06

S.B. O/B/O R.B.,

Petitioner,

v.

BOARD OF EDUCATION OF THE TOWNSHIP OF EWING, MERCER COUNTY,

Respondent.

No appearance by or on behalf S.B. and R.B., petitioner

Jeffrey F. Belz, Esq., for respondent

Record Closed: October 5, 2006 Decided: October 6, 2006

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

STATEMENT OF THE CASE AND PROCEDURAL HISTORY

For the 2005-2006 school year, R.B. was enrolled as a student in the Ewing School District. By resolution, dated April 24, 2006, the Ewing Board of Education, after a hearing, determined that R.B. is domiciled on a permanent basis with his mother in Trenton.

S.B. is R.B.'s aunt, and she is a resident of Ewing Township. On May 22, 2006, S.B. filed a petition of appeal contesting the Board's conclusion. She claimed that R.B. was in fact residing with her in Ewing Township. On June 1, 2006, the District filed an

Answer to the petition and a Counterclaim against S.B. seeking reimbursement of tuition.

The Department of Education transmitted the case to the Office of Administrative Law, where it was filed on July 20, 2006. A hearing was scheduled for August 18, 2006. The parties appeared at the hearing, but the matter was postponed because S.B. requested an opportunity to hire an attorney. Thereafter, with parties' consent, this matter was rescheduled peremptorily, for October 5, 2006. On October 5, 2006, S.B. did not appear at the hearing. No written adjournment request of the hearing date had been received or granted, and to date, no written excuse has been provided by S.B. for the nonappearance on the date of the hearing.

Since S.B. did not appear at the hearing, her petition is hereby **DISMISSED**. The Board submitted a certification dated October 5, 2006, by David Mikalauskas, attendance and residency officer for the Board. He certified to the amount of tuition owed by S.B. on a rate of $55.64 per day for 180 days. The certification is admitted into the record and provides reliable evidence attesting to the amount of tuition owed by petitioner.

ORDER

Based on the foregoing, I hereby **ORDER** S.B., on behalf of R.B., to pay $10,015.35 to the Ewing Township Board 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 (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.

October 6, 2006
DATE

DOUGLAS H. HURD, ALJ

E-mail Receipt of Initial Decision Confirmed by the Department of Education on:

10/5/06
DATE

Mailed to Parties:

OCT 12 2006
DATE

OFFICE OF ADMINISTRATIVE LAW

mh

383-06

#383-06

OAL DKT. NO. EDU 1163-06
AGENCY DKT. NO. 279-10/05

ANGEL LABOY,	:	
PETITIONER,	:	
V.	:	COMMISSIONER OF EDUCATION
BOARD OF EDUCATION OF THE CITY OF PASSAIC, PASSAIC COUNTY,	:	DECISION
RESPONDENT.	:	

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

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

IT IS SO ORDERED.

Lucille E Davy

COMMISSIONER OF EDUCATION

Date of Decision: 11/03/06

Date of Mailing: 11/06/06

State of New Jersey
OFFICE OF ADMINISTRATIVE LAW

INITIAL DECISION

SETTLEMENT

OAL DKT. NO. EDU 01163-06

AGENCY REF.NO.279-10/05

ANGEL LABOY,

Petitioner,

v.

BOARD OF EDUCATION OF THE CITY OF PASSAIC, PASSAIC COUNTY,

Respondent.

Alfred F. Maurice, Esq., for petitioner (Springstead & Maurice, attorneys)

Avis Bishop-Thompson, Esq., for respondent (DeCotiis, Fitzpatrick, Cole & Wisler, LLP, attorneys)

Record Closed: September 26, 2006 Decided: October 3, 2006

BEFORE **CAROL I. COHEN**, ALJ:

The matter was transmitted to the Office of Administrative Law (OAL) on January 10, 2006 for determination as a contested case. A telephone Prehearing hearing conference was held on March 20, 2006. An In Person Settlement Conference scheduled for May 30, 2006, was converted into a telephone conference, due to a conflict of the petitioner's attorney. The hearing was scheduled for August 22, 23 and 25, 2006.

On August 21, 2006, the parties were able to resolve the matter. On September 19, 2006, the parties submitted the attached Settlement Employment Agreement and General Release and the Stipulation of Dismissal Without Prejudice. On September 26, 2006, the undersigned received the original certified copy of the Resolution Authorizing Settlement of

Litigation. See attached copy. Having reviewed the record and the settlement terms, I **FIND**:

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

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

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

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

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

10/3/06
DATE

Carol I. Cohen
CAROL I. COHEN, ALJ

Receipt Acknowledged:

10/6/06
DATE

M. Kathleen Duncan/mbo
DEPARTMENT OF EDUCATION

Mailed to Parties:

OCT 10 2006
DATE

Laura Sanders
DIRECTOR AND CHIEF ADMINISTRATIVE LAW JUDGE

OFFICE OF ADMINISTRATIVE LAW

SETTLEMENT EMPLOYMENT AGREEMENT AND GENERAL RELEASE

RECEIVED
2006 SEP 19 A 11:16
OFFICE OF ADMIN LAW

THIS AGREEMENT is made between the **PASSAIC BOARD OF EDUCATION, PASSAIC COUNTY**, individually and collectively, its elected representatives, officers, members, servants, employees, successors, agents, insurers or attorneys, all in both their official and individual capacities (hereinafter collectively referred to as "the Board") with administrative offices located at 101 Passaic Avenue, Passaic, New Jersey 07055 and Angel LaBoy, any and all of his executors, administrators, successors, assigns, agents and representatives, residing at 21 Burgess Place, #2, Passaic, New Jersey 07055 (hereinafter referred to as "Mr. La Boy"). This agreement constitutes the complete and final settlement of any and all disputes arising from or relating to Mr. La Boy's employment by the Board and any claims or actions he has brought or could have brought against the Board.

W I T N E S S E T H:

WHEREAS, Mr. La Boy is a tenured music teacher employed with the Board; and

WHEREAS, Mr. La Boy filed an administrative action against the Board in the Office of Administrative Law (the "OAL"), entitled *Angel La Boy v. Passaic Board of Education, Passaic County*, Docket No.: EDUOR 01163-2006N; Agency Ref. No.: 279-10/05 (the "Administrative Action"); and

WHEREAS, the Parties desire to enter into this Agreement to fully and finally resolve and dismiss with prejudice Mr. La Boy's Administrative Action and to fully and finally settle and resolve any and all claims, complaints, charges and actions of any kind whatsoever, whether known or unknown, which Mr. La Boy may have against the Board; and

WHEREAS, Mr. La Boy acknowledges and agrees that the payment provided for herein is provided as consideration for this Agreement to voluntarily dismiss, waive and withdraw the Administrative Action and any and all claims, complaints, charges, administrative actions and civil actions of any kind against the Board;

NOW, THEREFORE, in consideration of the promises and mutual covenants contained in this Agreement, the Parties hereby agree as follows:

1. The Board has appointed Mr. La Boy as assistant principal of the William B. Cruise School #11 for the 2006-2007 school year. The Board will apply the time Mr. La Boy was employed as Acting Principal of School No. 10 for the purposes of seniority. Tenure eligibility for said time shall be determined in accordance with law. However, nothing contained in this Agreement shall be construed to deny or restrict the Board in its exclusive right to administer itself and control the work of its personnel, nor deny or restrict the Board in any of its responsibilities and authority under *N.J.S.A.* 18A or any other national or state law or local ordinance.

any of its responsibilities and authority under *N.J.S.A.* 18A or any other national or state law or local ordinance.

2. To the extent practicable, the Board agrees to use its best efforts to assist Mr. La Boy in attaining pension credits for the position of Acting Assistant Principal with the Teachers Pension and Annuity Fund (the "TPAF") of the New Jersey Pension System for the 2005-2006 academic year. The Board further agrees to prepare any and all necessary documents and/or paperwork in connection with the pension contributions to the TPAF.

3. The Board agrees to pay Mr. La Boy one-half (½) of the difference in pay between positions of Acting Assistant Principal and Music Teacher for the 2005-2006 academic year. Mr. La Boy shall receive three hundred seventy-four dollars ($374.00) and zero cents, subject to normal withholdings and deductions. The Board will report the salary payment to the taxing authorities via an IRS Form 1099. Mr. La Boy's salary as a music teacher for the 2005-2006 academic year is ninety-three thousand one hundred eight dollars and forty cents ($93,118.40) and is comprised of a base salary of eight-four thousand two hundred seventy dollars and zero cents ($84,270.00) and eight thousand eight hundred forty-eight dollars and zero cents ($8,848.00) longevity. Likewise, the salary of the assistant principal is ninety-three thousand eight hundred twelve dollars and zero cents ($93,812.00) which is comprised of a base of eighty four thousand eight hundred ninety dollars and zero cents ($84,890.00) and eight thousand nine hundred ninety-four dollars and zero cents ($8,994.00) longevity. Accordingly, the difference in back pay is six hundred ninety four dollars and zero cents ($694.00).The check will be sent to Mr. La Boy's Counsel after (i) this Agreement is executed and the Stipulation of Dismissal with Prejudice attached to this Agreement as Exhibit A is signed by the Parties and filed with the Office of Administrative Law and (ii) the seven-day revocation period referred to in paragraph 15 has expired.

4. Mr. La Boy expressly acknowledges and agrees that he and his heirs, executors, administrators, successors and assigns, and not the Board, will be responsible for any such taxes, liabilities, payments or costs, interests and penalties. Mr. La Boy agrees to indemnify and hold harmless the Board to the full extent of any such taxes, liabilities, payments, costs, interest or penalties which may be assessed against the Board in connection with any payment made to or on behalf of Mr. La Boy hereunder.

5. Mr. La Boy, for the consideration given by the Board as set forth above, which he acknowledges is adequate and satisfactory to him, hereby commits as follows:

(a) Mr. La Boy irrevocably and unconditionally remises, releases, waives and forever discharges the Board from any and all manner of liabilities, actions, causes of action, contracts, agreements, promises, claims and demands of any kind or nature whatsoever, in law or equity, whether known or unknown, which Mr. La Boy has ever had or now has against the Board including, but not limited to, claims arising out of or relating to or arising from or in connection with his employment with the Board, compensation and/or benefits with the Board and the Administrative Action. Mr. La

Boy further understands and agrees that this Agreement shall act as a complete bar to any claim, demand or action of any kind whatsoever which could be or could have been brought by him and which seeks personal, equitable or monetary relief for him against the Board, including, but not limited to: any claims of wrongful discharge; breach of express or implied contract; fraud; discrimination; retaliation; wages; benefits; other compensation; misrepresentation; defamation; liability in negligence or tort; and claims of any kind which may be brought in any court of law or equity or an administrative agency; claims for arbitration in any forum; the U.S. Constitution, as amended; the Constitution of the State of New Jersey; Title VII of the U.S. Civil Rights Act of 1964, as amended; the U.S. Age Discrimination in Employment Act of 1967; the U.S. Americans with Disabilities Act; the U.S. Age Discrimination in Employment Act; the U.S. Employment Retirement Income Security Act; the U.S. Fair Labor Standards Act; the United States Family and Medical Leave Act; the New Jersey Family Leave Act; the New Jersey Law Against Discrimination; the New Jersey Conscientious Employee Protection Act; the New Jersey Department of Personnel; and any other federal, state or local law, regulation or ordinance relating to employment; related torts; and employment discrimination; employee benefits; collective bargaining agreement; and the termination of employment and any other claim arising from or relating to Mr. La Boy's employment. Mr. La Boy understands that he is not releasing any claims he may have to enforce the provisions of this Agreement. This release covers both claims that Mr. La Boy knows about and those he may not know about, except for claims (i) that may arise after the date Mr. La Boy executes this Agreement; (ii) for a breach of this Agreement; or (iii) with respect to any benefits in which Mr. La Boy has a vested interest under the terms and conditions of any of the Board's employee benefit plans. Mr. La Boy further agrees not to file a lawsuit or administrative claim or demand for arbitration to assert any of the claims he has given up, released or waived.

(b) Mr. La Boy agrees to dismiss with prejudice the Administrative Action. In that regard, Mr. La Boy's Counsel, in accordance with the New Jersey Rules of Administrative Practice, shall, simultaneous with the execution of this Agreement, execute the Stipulation and Order of Dismissal with Prejudice attached to this Agreement as Exhibit A, dismissing the case with prejudice for the reason of the settlement reached by the Parties. It is acknowledged and understood by Mr. La Boy that any and all rights and obligations set forth in this Agreement are conditioned completely and entirely upon the Court's dismissal of the Administrative Action with prejudice.

(c) Mr. La Boy agrees to withdraw fully and finally and to dismiss with prejudice any and all administrative, state or federal court actions, which have been filed by him against the Board which have not already been closed or otherwise terminated. Mr. La Boy will ask each agency or court with which he has filed an action to enter an order, without appearance by either Party, withdrawing and dismissing the action with prejudice. Any such orders shall be attached to and become a part of this Agreement. It is acknowledged and understood by Mr. La Boy that any and all obligations set forth in this Agreement are conditioned completely and entirely upon the withdrawal and dismissal with prejudice of any and all administrative, state and federal court actions except to enforce this settlement agreement.

(d) Mr. La Boy agrees that he will not talk about, discuss or consult with, advise, counsel or otherwise cooperate with or assist any employees or former employees of the Board in the pursuit of any legal or administrative action(s) against the Board, including, but not limited to, any action(s) in connection with any matters relating to his employment or the termination of his employment, unless compelled to do so by court order or lawful subpoena. Mr. La Boy further agrees that he will not participate, directly or indirectly, as a party, witness or otherwise, in any action at law, proceeding in equity or in any administrative proceeding in which the Board or Board personnel are Parties, unless compelled to do so by force of law with respect to the uses raised in the subject litigation.

(e) Mr. La Boy acknowledges and agrees that other than the consideration provided for herein, he is not entitled to and will not receive any additional compensation or benefits of any kind from the Board and that no representations have been made to her regarding any such additional compensation or benefits. Nothing in this Agreement is intended to or should be construed to affect Mr. La Boy's receipt of the benefits in which he is vested or to which she is entitled under the Board's current pension, disability and/or other vested plans or policies.

6. Except to the extent this Agreement is required to be made public by the New Jersey Open Public Meetings Act, Mr. La Boy agrees to maintain the confidentiality of, and refrain from disclosing, making public, or discussing in any way whatsoever, the terms and conditions of this Agreement. Notwithstanding the foregoing, it is understood that as the sole exception to this Confidentiality Provision, Mr. La Boy may discuss or disclose this Agreement (i) with his immediate family; (ii) with his attorney(s) or tax advisor(s); and (iii) in response to inquiries from, any governmental, regulatory or self-regulatory body or agency with jurisdiction over the activities Mr. La Boy or the Board.

7. Mr. La Boy agrees that he shall not issue any communication, written, verbal or otherwise, that disparages, criticizes or otherwise reflects adversely upon the Board or which encourages any adverse action, arising out of the subject matter of the within litigation, provided that Mr. La Boy is permitted to testify truthfully under oath pursuant to a subpoena.

8. This Agreement is not and shall not in any way be deemed to constitute an admission or evidence of any wrongdoing or liability on the part of the Board, nor of any violation of any federal, state or local statute, rule, regulation or principle of common law or equity. Rather, this Agreement constitutes the good faith settlement and release of disputed claims, and it is acknowledged and agreed by the Parties that this Agreement is being entered into by the Parties solely to avoid the burden, expense, delay and uncertainties of further litigation and to fully and finally resolve, settle and dismiss with prejudice, any and all claims of any kind whatsoever, whether known or unknown, which Mr. La Boy has ever had or now has against the Board arising out of or relating to his employment with the Board, his compensation and benefits with the Board or the Administrative Action. The Board expressly denies any wrongdoing of any kind in regard to Mr. La Boy's employment, his compensation and benefits with the Board and the Administrative Action.

9. This Agreement may not be changed orally and no modification, amendment or waiver of any provision contained in this Agreement, or any future representation, promise or condition in connection with the subject matter of this Agreement shall be binding upon any party hereto unless made in writing and signed by such party.

10. This Agreement contains the entire agreement and complete settlement between the Parties and supersedes any and all previous agreements of any kind whatsoever between them, whether written or oral. All prior and contemporaneous discussions and negotiations have been and are merged and integrated into, and are superseded by, this Agreement. This is an integrated document.

11. In the event that any provision of this Agreement or the application thereof should be held to be void, voidable, unlawful or, for any reason, unenforceable, the remaining portion shall remain in full force and effect, and, to that end, the provisions of this Agreement are declared to be severable.

12. This Agreement is made and entered into, and shall be subject to, governed by and interpreted in accordance with the laws of the state of New Jersey and shall be fully enforceable in the courts of that state, without regard to principles of conflict of laws. The Parties agree that any suit, action or other legal proceeding arising out of this Agreement shall be brought in Superior Court for the State of New Jersey, County of Passaic.

13. Mr. La Boy and his Counsel agree that Mr. La Boy is responsible for his own attorneys' fees and costs incurred in connection with the Administrative Action and his claims against the Board and warrant that both Mr. La Boy and his Counsel waives and release any claims against the Board for attorneys' fees and costs, statutory or otherwise, related in any way to the matters covered by this Agreement, and covenant not to sue or otherwise proceed against the Board with respect to any such claims for attorneys' fees and/or costs. By signing this Agreement, Mr. La Boy and his Counsel affirm that they are waiving and releasing any claims they may have against the Board for attorneys' fees.

14. Mr. La Boy agrees that neither this Agreement nor any portion hereof is assignable. Mr. La Boy represents, warrants and covenants that he has not previously assigned or transferred, or purported to assign or transfer, to any individual or entity, any of the rights, claims, demands or causes of action being released herein, and agrees that no such assignment or transfer may occur without a written consent executed by the Board, and any attempt to do so shall be void.

15. Mr. La Boy certifies that he has read the terms of this Agreement, they have been explained to him by an attorney of his choice and that he understands them in full. The execution hereof by Mr. La Boy shall indicate that this Agreement conforms to Mr. La Boy's understandings and is acceptable to him as a final agreement. It is further

understood and agreed that Mr. La Boy has been advised of the opportunity to consult with counsel of his choice and that he has been given a reasonable and sufficient period of time of no less than twenty-one (21) days in which to consider and return this document. It is further agreed and understood that, upon Mr. La Boy's execution and return of this Agreement, he is thereafter permitted to revoke the Agreement at any time during a period of seven (7) days. To be effective, the revocation must be in writing and hand-delivered or telecopied to counsel for the Board within the seven (7) day period.

WHEREFORE, intending to be legally bound, the Parties have agreed to the aforesaid terms and indicate their agreement by signing below.

PLEASE READ CAREFULLY. THIS AGREEMENT IS A LEGAL DOCUMENT AND INCLUDES A RELEASE OF ALL KNOWN AND UNKNOWN CLAIMS, INCLUDING, WITHOUT LIMITATION, ALL CLAIMS ARISING UNDER THE AGE DISCRIMINATION IN EMPLOYMENT ACT, THE AMERICANS WITH DISABILITIES ACT, TITLE VII OF THE ADMINISTRATIVE RIGHTS ACT OF 1964, THE EQUAL PAY ACT, THE EMPLOYEE RETIREMENT INCOME SECURITY ACT, THE FAIR LABOR STANDARDS ACT, THE OCCUPATIONAL SAFETY AND HEALTH ACT, THE NEW JERSEY LAW AGAINST DISCRIMINATION, THE NEW JERSEY CONSCIENTIOUS EMPLOYEE PROTECTION ACT, STATE AND FEDERAL FAMILY LEAVE LAWS, STATE AND FEDERAL WAGE AND HOUR LAWS AND ANY OTHER FEDERAL, STATE, LOCAL OR COMMON LAW CLAIM.

BY SIGNING THIS AGREEMENT MR. LA BOY ACKNOWLEDGES AND AFFIRMS THAT HE IS COMPETENT, THAT HE HAS BEEN AFFORDED A TIME PERIOD OF NO LESS THAN 21 DAYS TO REVIEW AND CONSIDER THIS AGREEMENT AND HAS BEEN ADVISED TO DO SO WITH AN ATTORNEY OF HIS CHOICE, THAT HE HAS READ AND UNDERSTANDS AND ACCEPTS THIS DOCUMENT AS FULLY AND FINALLY WAIVING AND RELEASING ANY AND ALL CLAIMS, DEMANDS, DISPUTES AND ANY DIFFERENCES OF ANY KIND WHATSOEVER WHICH HE MAY HAVE HAD OR NOW HAS AGAINST EMPLOYER ARISING OUT OF OR RELATING TO HIS EMPLOYMENT WITH EMPLOYER, HIS COMPENSATION AND BENEFITS WITH THE BOARD, THE ADMINISTRATIVE ACTION, OR OTHERWISE, THAT NO REPRESENTATIONS, PROMISES, OR INDUCEMENTS HAVE BEEN MADE TO HIM EXCEPT AS SET FORTH IN THIS AGREEMENT, AND THAT HE HAS SIGNED THESE DOCUMENTS FREELY AND VOLUNTARILY, INTENDING TO BE LEGALLY BOUND BY ITS TERMS, AND WITH FULL UNDERSTANDING OF ITS CONSEQUENCES.

AGREED AND ACCEPTED:

Angel La Boy

Date: August 9, 2006

Subscribed and sworn to before me
this 7 day of August 2006

Notary Public

Vincent Capuana, Board President

Date: August __, 2006

Witness:

Henry J. Lee
Business Administrator/Board Secretary

Date: August 31, 2006

DeCOTIIS, FITZPATRICK, COLE & WISLER, LLP
Glenpointe Centre West
500 Frank W. Burr Boulevard
Teaneck, New Jersey 07666
(201) 928-1100
Attorneys for the Respondent
Passaic Board of Education, Passaic County

RECEIVED
2006 SEP 19 A 11: 16
STATE OF NEW JERSEY
OFFICE OF ADMIN LAW

ANGEL LA BOY,

Petitioner(s),

vs.

PASSAIC BOARD OF EDUCATION,
PASSAIC COUNTY,

Respondent(s).

STATE OF NEW JERSEY
OFFICE OF ADMINISTRATIVE LAW

DOCKET NO.: EDUOR 01163-2006N

AGENCY DOCKET NO: 279-10/05

STIPULATION OF DISMISSAL WITH PREJUDICE

THE MATTER in difference in the above entitled administrative action having been amicably adjusted by and between the parties, it is hereby stipulated and agreed that the same be and it is hereby dismissed with prejudice, and without costs or fees to either party.

Attorneys for Petitioner

SPRINGSTEAD & MAURICE

By: _____
Alfred J. Maurice, Esq.

Dated: August ___, 2006

Attorneys for Respondent

DECOTIIS, FITZPATRICK, COLE & WISLER, LLP

By: _____
Avis Bishop-Thompson, Esq.

Dated: ~~August~~ Sept. 18, 2006

So Ordered:

_____
Carol I. Cohen, J.S.C.

602934_1

EXTRACT FROM THE MINUTES OF A MEETING OF THE BOARD OF EDUCATION OF THE CITY OF PASSAIC, PASSAIC COUNTY, N.J., AS RECORDED IN THE OFFICIAL MINUTE BOOK

RESOLUTION AUTHORIZING SETTLEMENT OF LITIGATION

WHEREAS, a lawsuit has been filed against the Passaic Board of Education in the matter of Angel Laboy v. Passaic Board of Education, et al. and

WHEREAS, it is in the best interest of the Passaic Public Schools to resolve this litigation in an amicable manner;

NOW THEREFORE BE IT RESOLVED, that the Passaic Board of Education authorizes the settlement of this matter according to the terms and conditions agreed to by the parties to this litigation and as set forth in the settlement agreement resolving this matter and maintained on file by the Board Secretary; and

BE IT FURTHER RESOLVED, that the Passaic Board of Education authorizes the Superintendent of Schools, the Board Attorney, and the Business Administrator/Board Secretary to take any and all steps necessary to effectuate the purposes of this resolution.

I, Henry J. Lee, Secretary of the Board of Education of the City of Passaic in the County of Passaic, State of New Jersey, hereby certify that the foregoing extract from the minutes of the meeting of the Passaic Board of Education duly called and held on June 26, 2006 has been compared by me in the original minutes as officially recorded in my office in the minutes book of said Passaic Board of Education is a true, complete copy thereof and of the whole of said original minutes so far as the same related to the subject matter referred to in said extract. I witness I have hereunto set my hand and affixed the corporate seal in the Passaic Board of Education this 22nd day of September 2006.

RECEIVED
2006 SEP 26 A 1:14
STATE OF NEW JERSEY
OFFICE OF ADMIN LAW

Henry J. Lee, Board Secretary, Business Administrator

368-06

368-06

IN THE MATTER OF THE TENURE	:	
HEARING OF UMA SWAMINATHAN,	:	COMMISSIONER OF EDUCATION
SCHOOL DISTRICT OF PISCATAWAY,	:	DECISION
MIDDLESEX COUNTY.	:	

SYNOPSIS

In August 2004, petitioning school district certified tenure charges of incapacity and conduct unbecoming against respondent – a tenured middle school social studies teacher – alleging chronic failure to meet professional expectations, and unprofessional and hostile reactions to supervision by district personnel. Respondent denies the charges and contends that she is a victim of racism based upon her Asian Indian heritage. The matter was transmitted to the OAL on September 7, 2004.

Hearings in this matter were delayed multiple times due to counsels' schedules, finally commencing in November 2005. Hearing days were used for settlement negotiations during the summer of 2006, but were unsuccessful. Subsequently, petitioner requested leave from the ALJ to withdraw tenure charges, and submitted certification indicating that the continued financial cost and diversion of resources necessary to sever the employment relationship with respondent could no longer be justified. The OAL subsequently transmitted the case file – marked "WITHDRAWAL" – to the Commissioner for review, without benefit of an Initial Decision in this matter.

The Commissioner found that the proposed withdrawal did not meet the standards required pursuant to *N.J.A.C.* 6A:3-5.6(a) for withdrawal of tenure matters, emphasizing that once tenure charges have been certified, financial considerations alone do not justify abandoning same. The Commissioner further noted that petitioner's certification, submitted with the request for withdrawal, itself suggests that it is not in the public interest to withdraw tenure charges against respondent. Accordingly, this matter is remanded to the OAL for further proceedings or, in the alternative, for a settlement or withdrawal that meets the standards of *N.J.A.C.* 6A:3-5.6(a) and has been evaluated by the ALJ in an Initial Decision. Further, in light of the fact that the petitioner has reported a finding of probable cause from the Division on Civil Rights, the ALJ is directed to consider the possibility of consolidating these two matters.

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.

October 25, 2006

OAL DKT. NO. EDU 8108-04
AGENCY DKT. NO. 289-8/04

IN THE MATTER OF THE TENURE HEARING OF UMA SWAMINATHAN, SCHOOL DISTRICT OF PISCATAWAY, MIDDLESEX COUNTY.

COMMISSIONER OF EDUCATION

DECISION

On August 23, 2004, petitioner filed tenure charges against the respondent, alleging incapacity and conduct unbecoming. More specifically, petitioner stated in pertinent part as follows:

> **Charge No. 1** (Paragraph 20)
>
> Respondent's chronic failure to meet reasonable professional expectations placed upon her does not constitute mere inefficiency, but is tantamount to incompetence and incapacity such that further opportunities for corrective action or improvement would be futile, and harmful to the students of the district.
>
> **Charge No. 2** (Paragraph 22)
>
> Respondent's persistent refusal over six consecutive school years to perform to the expectations reasonably placed upon her, coupled with her unprofessional and often hostile reaction to appropriate supervisory activities by her Building Principal and other supervisory personnel, are tantamount to conduct unbecoming a teaching staff member.
>
> **Conclusion** (Paragraph 24)
>
> As a result of the facts alleged hereinabove, the undersigned has reluctantly concluded that respondent is professionally unfit to continue as a teacher in the District, and that further attempts to assist her in improving performance would be futile.

Respondent's answer denied the allegations in the petition and contained only one affirmative defense, *i.e.*, that the allegations articulated in the petition, if true, constituted

inefficiency, and must be dismissed because petitioner allegedly failed to implement the procedural and corrective actions required by such a charge.

The matter was transmitted to the Office of Administrative Law (OAL) on September 7, 2004. The hearing was initially set to commence in April 2005. It was adjourned multiple times, due to the difficulties of coordinating the calendars of the Administrative Law Judge (ALJ), the parties' counsel, and the respondent. Correspondence in the file identifies November 16, 2005 as the first hearing day. While it is not clear from the record available to the Commissioner whether any additional hearing days were completed in 2005, there is a transcript of proceedings dated February 7, 2006.

The next reference to a hearing date was an OAL notice which directed the parties to appear on March 29, 2006, but the record does not reveal whether proceedings actually took place on that day. Another OAL notice identified three days in June 2006 as hearing dates, but those dates were apparently used for settlement discussions.[1] By letter dated July 6, 2006, petitioner's counsel advised that he had not heard from respondent's counsel concerning a settlement proposal.

On July 27, 2006, petitioner's counsel reported that he had finally heard from respondent that settlement negotiations were failing, and that the parties would like to have a settlement conference before the hearing dates that had been set for the Fall of 2006. Once again, counsel and respondent had difficulty agreeing on a date for the requested settlement conference. Ultimately, settlement negotiations were held on August 31, 2006, but petitioner

[1] Two subsequent OAL notices reserved six days in September and October 2006, and four days in December 2006, respectively.

received word a week later that respondent had rejected petitioner's proposal and had made no counter offer.[2]

On September 25, 2006 the ALJ received a request from petitioner for leave to withdraw the tenure charges, accompanied by a certification by Robert L. Copeland, Superintendent of the Piscataway School District. In the certification, Copeland states, in pertinent part, as follows:

> [A]fter reviewing her record and conferring extensively with her building principal and other supervisors, I was satisfied that she possessed neither the skills nor the professional attitude necessary to be an effective middle school social studies teacher in this District. She had rejected virtually all attempts to assist her in improving her skills, and reacted to any criticism of her performance with unfounded accusations of racism. After having given her every opportunity to rehabilitate her job performance, I was convinced that further attempts would be futile. . . .
>
> [W]e remain convinced that she should not be teaching middle school students in this District . . . . Based on her historical unwillingness to take direction from any supervisor with whom she disagrees, we have serious concerns about the prospects for success at another grade level without a substantial change in attitude on her part.

The case file, marked "WITHDRAWAL," was transmitted from the OAL on September 28, 2006, for the Commissioner's review.

Although the regulations governing the OAL give ALJs the option of entering Initial Decisions memorializing on the record the circumstances of withdrawals, *N.J.A.C.* 1:1-19.2, an Initial Decision was not filed in this case. Because the present case is a tenure matter, however, any proposed withdrawal must address the six standards set forth in *N.J.A.C.* 6A:3-5.6(a). Those standards are:

---

[2] In the meanwhile, respondent's counsel wrote to petitioner's counsel with a copy to the ALJ stating that his client had received a "finding of Probable Cause" from the New Jersey Division on Civil Rights (which finding does not appear to be part of the record transmitted from the OAL), and that respondent planned to seek a Right to Sue Letter from the EEOC and add civil rights causes of action against petitioner to a lawsuit she had filed in federal court.

1. Accompaniment by documentation as to the nature of the charges;
2. Explication of the circumstances justifying settlement or withdrawal;
3. Consent of both the charged and the charging parties;
4. Indication that the charged party entered into the agreement with a full understanding of his or her rights;
5. A showing that the agreement is in the public interest; and
6. Where the charged party is a teaching staff member, a showing that the teaching staff member has been 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.

[Emphasis added.]

The Commissioner finds that the above articulated standards 2 – 5 have not been met.

As to standard 2, petitioner's justification for withdrawal appears to be the length of time that has already transpired since the tenure charges were filed and the financial burden that can be expected to result from further prosecution of the charges. The Commissioner is mindful of the serious financial liability consequent to lengthy tenure proceedings. However, the record indicates that the proceedings in this case were protracted primarily due to counsel's schedules and decisions by the parties to preempt hearing dates for settlement talks, instead of holding such talks in tandem with the OAL proceedings.

More importantly, it is well settled that once tenure charges have been certified, financial considerations alone do not justify abandoning same. *In the Matter of the Tenure Hearing of Kenneth Smith, School District of Orange, Essex County,* decided by the Commissioner on March 22, 1982, decision on remand June 16, 1983, *aff'd with modification* by the State Board of Education, November 2, 1983, *aff'd.* Superior Court, January 30, 1986 (once a Board takes up the burden of tenure charges it cannot lay it back down again without

setting forth on the record a reasonably specific explanation of why it is now in the public interest not to pursue them). [Emphasis added]

This principle correlates with standard 5 above, which requires a showing that a withdrawal of tenure charges is in the public interest. Petitioner contends that it is in the financial best interests of the district to withdraw the tenure charges. (Certification of Robert L. Copeland, Paragraph 3) The district's interest, however, is not synonymous with the public interest. In point of fact, petitioner's request for withdrawal of the tenure charges itself states: "we remain convinced that she should not be teaching middle school students in this District," and "[b]ased on her historical unwillingness to take direction from any supervisor with whom she disagrees, we have serious concerns about the prospects for success at another grade level without a substantial change in attitude on her part." Petitioner's words suggest that it is not in the best interest of the district's children, *i.e.* the public interest, to withdraw the tenure charges against respondent. Consequently, the Commissioner cannot conclude that standard 5 is met.

Finally, as regards standards 3 and 4, there is nothing in the record to indicate that respondent would willingly change teaching assignments, revise her outlook or accept supervision. Accordingly, the Commissioner remands this matter to the OAL for further proceedings to be conducted in an expeditious and timely manner as required by *N.J.S.A.* 52:14B-10.1, or, in the alternative, for a settlement or withdrawal that meets the standards of *N.J.A.C.* 6A:3-5.6(a) and has been evaluated by the ALJ in an Initial Decision. Further, in light of the fact that petitioner has reported a finding of probable cause from the Division on Civil Rights, the ALJ is directed to consider the factors set forth in *N.J.A.C.* 1:1-17.3

and 17.5 for the possible consolidation of this proceeding before the Commissioner with the matter pending before the Division on Civil Rights.

IT IS SO ORDERED.[3]

COMMISSIONER OF EDUCATION

Date of Decision: 10/25/06

Date of Mailing: 10/25/06

[3] This decision may be appealed to the State Board of Education pursuant to *N.J.S.A.* 18A:6-27 *et seq.* and *N.J.A.C.* 6A:4-1.1 *et seq.*

390-06

#390-06

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

SYNOPSIS

Petitioner – a teacher of practical nursing (PN) – contends that at the time of a reduction in force (RIF), she had more seniority than the teacher retained by the District. Respondent asserts that in so contending, petitioner erroneously relies on her service as a PN instructor during the Fall of 1992. Respondent argues that during that time period, petitioner had no contract to teach same, and neither emergency nor provisional certification in the PN category. Consequently, she could not accrue tenure or seniority.

The ALJ found, *inter alia*, that: respondent knowingly moved petitioner from a properly credentialed position as an instructor of NA into one where she was legally not permitted to perform as a teacher in the absence of proper credentials; petitioner's credential deficits were the result of respondent's actions, and therefore the equities require that petitioner's seniority accrue from the time petitioner began to teach in the PN program full-time, i.e. mid-October 1992. The ALJ concluded that petitioner's seniority is superior to that of the teacher retained during the RIF and, accordingly, petitioner should be compensated with any back pay – less mitigation – and emoluments from the time of her improper termination in May 2001 up to January 2003.

Upon careful and independent review of the record, the Commissioner rejected the Initial Decision, finding, *inter alia*, that: respondent did not act inequitably toward petitioner in 1992, but rather changed petitioner's employment status for the benefit of petitioner; petitioner did not acquire seniority for her two months of teaching PN classes in 1992, as she was teaching under a substitute credential and held neither standard certification, nor provisional or emergency certification; petitioner lost additional days of seniority when she took unpaid leave in 1999; and petitioner forfeited her tenure by declining a recall position in November 2002. The Commissioner determined that petitioner did not show that her seniority as a PN teacher was greater than the teacher retained by the district during the RIF, and that, assuming *arguendo* that the Commissioner has authority to venture outside established rules concerning seniority, it is not warranted in this case.

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.

November 9, 2006

OAL DKT. NO. EDU 4588-01
AGENCY DKT. NO. 238-7/01

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

The petitioner contends that, at the time of a legitimate reduction in force (RIF) in respondent's district (the District), she had more seniority as a teacher of practical nursing than the teacher who was retained by the District. Thus, petitioner maintains that she was improperly RIFed in violation of *N.J.S.A.* 18A:28-10. The Office of Administrative Law (OAL) found in petitioner's favor. After independently reviewing the record,[1] and for the reasons that follow, the Commissioner is constrained to reject the Initial Decision (ID) in this matter.

FACTS AND PROCEDURAL HISTORY

It is undisputed that petitioner was hired by respondent in January 1992 to teach adult nursing assistant (NA) students in Perth Amboy for the remainder of the school year, in a federally funded Job Training Partnership program (JTP) administered by respondent. The record shows that in March 1992 petitioner received emergency certification to qualify her for the position

[1] The Initial Decision was mailed to the parties on June 16, 2006. An extension to July 20, 2006, was granted for the filing of exceptions. Exceptions filed on July 13, 2006, and a reply filed on July 27, 2006, were reviewed by the Commissioner. Exceptions filed by petitioner on July 31, 2006, were out of time, pursuant to *N.J.A.C.* 1:1-18.4, and were not considered. Respondent's August 2, 2006, reply to petitioner's reply exceptions was not considered, as there is no provision in the regulation for same.

(P-1).[2] In April 1992 petitioner was reappointed to teach NA students at the Perth Amboy site of the JTP program for the 1992-1993 school year (2T16; P-1), and her emergency certification for that job was renewed for the 1992-1993 school year. (P-1)

During the summer of 1992, petitioner was allowed – on a temporary basis – to teach students in the Practical Nursing (PN) program, substituting for regular PN instructors who did not wish to teach in July and August. (2T15)[3] Petitioner herself conceded – on cross examination during the April 6, 2005 hearing in this matter – that during those summer months, her status was that of a substitute teacher. (2T68)

It is undisputed that in September 1992, petitioner reported to the Perth Amboy site of the JTP program to begin her contract as an instructor to the 43 NA students. (2T16; R-4) However, as the ALJ found, respondent learned in September 1992 that – as a result of new regulations – petitioner lacked sufficient experience in the area of geriatrics to meet the requirements of NA instructor in the JTP program. (2T66; ID4) Instead of terminating her employment,[4] respondent allowed her to serve as a temporary teacher in the PN program with the specific purpose of allowing her to gain experience she needed in geriatrics, which included clinical long-term health care. (2T18-21; 2T71-72).

Thus, the Commissioner agrees with the ALJ's finding that respondent's relocation of petitioner – in October, November and December of 1992 – to its New Brunswick site to teach classes to PN students was intended to be a temporary measure to allow petitioner to gain experience in geriatrics and return to her contractual position of teacher of NA classes, and that petitioner understood that at the time. (ID9-10) Petitioner conceded that she may have, in fact,

---

[2] P designates petitioner's exhibits and R designates respondent's exhibits.
[3] 1T = Transcript of hearing on March 1, 2005; 2T = Transcript of hearing on April 6, 2005.
[4] Exhibit R-3 suggests that respondent's employment contract contained clauses allowing either party to terminate the contract upon 60 days' notice.

gotten such experience in the Fall of 1992 before she was ultimately switched out of the NA program. (2T72)

As regards the petitioner's status during the Fall of 1992, the Commissioner agrees with the ALJ that petitioner was not a "permanent substitute" during those months. (ID10) Further, it is undisputed that there was no vacant position for Teacher of PN at the time, and no appointment of petitioner by the board of education to a PN teaching position. Petitioner had neither a provisional nor an emergency certificate to teach PN; rather, she was teaching under a substitute teacher K-12/nurse credential for that time period (P-2).[5]

Petitioner had applied for that substitute certificate on October 14, 1992 (R-6), which was on or before she began instructing PN students in the second half of October 1992. (P-12; 2T62; 2T97) The certificate was actually issued on October 30, 1992. (P-2) At that time there were no vacant PN teaching positions in respondent's district (2T19-21), and petitioner was consequently ineligible for emergency PN certification. Nor did she have provisional certification as a teacher of PN. She was still employed by respondent under her contract as a NA instructor (2T19), and was teaching PN classes under the previously mentioned substitute credential. (2T20)[6]

In November 1992, one of the permanent PN teachers unexpectedly resigned and petitioner applied for the position by way of a letter dated November 11, 1992. (P-3) Respondent's assistant superintendent recommended petitioner for the position via memorandum dated December 8, 1992 (R-2), and respondent accepted the recommendation. The parties entered into a

---

[5] The Commissioner concludes that petitioner continued teaching PN from December 14, 1992, through May 1993 without provisional or emergency certification, as there is no evidence to the contrary in the record.

[6] Petitioner testified at the hearing (1T34) that both respondent's assistant superintendent and director of health occupations told her that her credentials were adequate for the temporary position of PN instructor. The Commissioner agrees with the ALJ's finding on ID10 that "any assurance that petitioner may have received from respondent's administrative staff to the effect that her credentials or certifications were satisfactory to allow her to teach as an instructor in the LPN program were with reference to petitioner's K-12/nurse substitute certificate, as opposed to petitioner's emergency . . . certificate with an NA teacher endorsement."

contract dated December 10, 1992, which effectuated petitioner's transfer to the position of PN instructor as of December 14, 1992. (R-3; R-5; R-8)[7] It is undisputed that respondent took simultaneous action to appoint another individual, Rosemary Sestito Simmons (Simmons), to a PN teaching position, memorializing the appointment in a contract dated December 10, 1992, with an effective date of December 1, 1992.

Petitioner received her standard certification as NA instructor in March 1993 (P-4), and standard certification as a PN teacher in May 1993. (P-5) It is undisputed that Simmons received her standard PA certification at a later date. Both women continued to teach in the PN program through May 2001, but petitioner took unpaid leave in 1999, amounting to between 38.5 and 43.5 days. *See* Letter Ruling and Order of ALJ Steven C. Reback (Ruling/Order) dated December 30, 2003, pages 3-4.

In April 1996, respondent's assistant superintendent, Dr. Karen McCloud-Hjazeh, distributed data sheets for the purpose of updating the district's seniority list, and asked the staff – via memoranda – for their input and corrections. (P-6) On petitioner's data sheet were the notations that she began her NA teaching assignment on January 2, 1992, and that she began her PN teaching assignment on December 14, 1992. (*Ibid.*) Although petitioner wrote back to McCloud-Hjazeh advising that she had a B.S., not a B.A., in nursing, and that she had a "regular" certificate to teach NA courses, she did not contradict the information on P-6 identifying December 14, 1992 as the date she had begun her PN teaching assignment. (R-1)

As the ALJ found (ID7), petitioner received a notice of reduction in force (RIF) and her position was abolished on May 9, 2001. Rosemary Sestito Simmons was retained. It was

[7] Using the calendar in R-10, the Commissioner notes that petitioner appears to have worked thirty consecutive days as a substitute PN teacher. This is contrary to *N.J.A.C.* 6A:9-6.5(b) (formerly *N.J.A.C.* 6:11-4.5(c)), which sets a period of twenty consecutive days as the maximum that a substitute may teach in the same position. The ALJ made note of this on page 13 of the Initial Decision.

determined that Simmons had more seniority based both upon the fact that her contractual effective date was December 1, 1992 – as opposed to petitioner's contractual effective date of December 14, 1992 (*Ibid.*) – and upon the fact that in 1999 (and March of 2000) petitioner took a total of 43.5 days of unpaid leave. *See* Ruling/Order, pp. 3-4, *supra*.

In her June 2001 petition, petitioner alleged that her tenure and seniority rights had been violated. She further alleged that at the time her employment was terminated, respondent "retained teaching staff members that [were] less senior than she, as a consequence of which petitioner [was] entitled to said position(s)." The relief she demanded was an order:

> A. Directing Respondent to recognize her tenure and seniority rights to a full time position under one or all of his [sic] endorsements, or areas of eligibility effective July 1, 2001;
>
> B. Directing Respondent to reinstate her to a full time position effective July 1, 2001, under one or all of her endorsements, or areas of eligibility together with all back pay, benefits, and all other emoluments denied as a result of its improper failure to assign or employ Petitioner . . . in or to such position;
>
> C. Directing Respondent to assure that Petitioner . . . received properly pension credits for all periods of its improper failure to assign or employ Petitioner . . . to employment under one or all of his [sic] endorsements;
>
> D. Attaching interest, both pre and post decision, to any back pay awarded; and
>
> E. For such other relief as the Commissioner deems just and appropriate.

To mitigate her damages, petitioner accepted other employment. It is undisputed that in November 2002, respondent gave petitioner notice that she was being recalled to her employment in respondent's district. Petitioner was employed at the time as a full-time nursing instructor with the University of Medicine and Dentistry of New Jersey (UMDNJ) under a one-year contract. She chose to stay with UMDNJ and turned down the recall position with respondent.

On February 25, 2003, ALJ Reback conducted a prehearing conference. The parties subsequently filed cross motions for summary judgment, and ALJ Reback issued the above referenced Ruling/Order thereon. In the Ruling, ALJ Reback found that the record created by the summary judgment papers was insufficient to serve as a basis for calculating petitioner's seniority status, thereby precluding summary judgment on that issue. He did, however, determine that by declining the recall position offered by respondent, petitioner had forfeited her tenure (and therefore her seniority). Petitioner has not challenged this determination and, in any event, the Commissioner concurs with it and adopts it for the reasons set forth in the Ruling/Order.

Testimony on the remaining issue of seniority was taken on March 1 and April 6, 2005 before ALJ Richard F. Wells; post hearing memoranda were submitted by July 6, 2005; and the Initial Decision was issued on June 14, 2006.

DISCUSSION

Seniority is a mechanism for ranking all tenured teaching staff members so that reductions in force can be effected in an equitable fashion and in accord with sound educational policies. *Lichtman v. Ridgewood Bd. of Educ.*, 93 *N.J.* 362, 368, n. 4 (1983); *Ellicott v. Frankford Bd. of Educ.*, 251 *N.J. Super.* 342, 349 (App. Div. 1991). Dismissal of tenured staff resulting from a reduction in force "shall be made on the basis of seniority according to standards to be established by the commissioner with the approval of the state board." *N.J.S.A.* 18A:28-10. State regulations prescribe that "seniority . . . shall be determined according to the number of academic or calendar years of employment . . . in the school district in specific categories. . . ." *N.J.A.C.* 6A:32-5.1(b). Essentially, the categories used for determining seniority are whatever the Commissioner has said they should be. *Howley v. Ewing Bd. of Educ.*, 6 *N.J.A.R.* 509, 524 (Comm'r 1982). In order to earn seniority, a staff member must have actual experience in the particular subject area or field.

Ressler v. Saddle Brook Bd. of Educ., OAL Dkt. Nos. EDU 0705-92 & EDU 5018-92 (May 13, 1994), adopted (Comm'r June 27, 1994).

Because from late October to December 14, 1992, petitioner was teaching PN under a substitute credential, she was ineligible to accrue time toward tenure or toward seniority in the PN category. *Jeanne Sasse v. Board of Education of the Borough of Point Pleasant, Ocean County*, 92 N.J.A.R.2d (EDU) 339, n.1. [Emphasis added]

More specifically, accrual of tenure requires time served as a "teaching staff member." *N.J.S.A.* 18A:28-5:

> The services of all teaching staff members employed in the positions of teacher, . . . serving in any school district or under any board of education, excepting those who are not the holders of proper certificates in full force and effect, shall be under tenure during good behavior and efficiency and they shall not be dismissed or reduced in compensation except for inefficiency, incapacity, or conduct unbecoming such a teaching staff member or other just cause and then only in the manner prescribed by subarticle B of article 2 of chapter 6 of this Title, after employment in such district or by such board for:
>
> (a) Three consecutive calendar years, or any shorter period which may be fixed by the employing board for such purpose; or
>
> (b) Three consecutive academic years, together with employment at the beginning of the next succeeding academic year; or
>
> (c) The equivalent of more than three academic years within a period of any four consecutive academic years.
>
> [Emphasis added.]

No teaching staff member shall be appointed, except by a recorded roll call majority vote of the full membership of the board of education appointing him. *N.J.S.A.* 18A:27-1. Until mid- December, petitioner had not been "appointed" as a teacher of PN. Thus, while she was teaching PN classes without an appointment and under the substitute credential, rather than a standard certification,

petitioner was not eligible for tenure credit.[8] And absent tenure, an individual may assert no seniority claim. *Charles Mills v. Board of Education of the Township of Piscataway*, 92 *N.J.A.R.* 2d (EDU) 372.[9]

There is a regulation, *N.J.A.C.* 6A:32-5.1(e), discussed in the Initial Decision at p.11, that allows accrual of seniority in circumstances where the employee has yet to obtain a standard certificate, but this regulation applies only to employees who later achieve standard certification in the same field as the emergency certificate under which they were serving, or acquire a standard certificate after serving under a provisional certificate. *N.J.A.C.* 6A:32-5.1(e) states:

> The holder of an emergency certificate shall not be entitled to seniority rights but, when he or she becomes the holder of a standard certificate, the years of employment under the emergency certificate shall count toward seniority under the standard certificate. Upon acquisition of a standard certificate, any periods of service under a provisional certificate shall also be counted toward seniority.

Since petitioner had no emergency or provisional certification in teaching PN, she was not eligible to tack the two months of teaching in the Fall of 1992 onto her seniority as a PN teacher.[10]

Nor could petitioner's emergency NA certification allow petitioner to tack those two months onto her seniority as a PN teacher. As the ALJ found, teacher of NA and teacher of PN are two separate endorsements. Possession of one does not qualify the holder to teach the subject matter of the other, and seniority is not interchangeable between the two. *Holloway v. Board of*

---

[8] The Commissioner agrees with the ALJ that *Benson v. Board of Education of the Borough of Rockaway*, 92 *N.J.A.R.*2d (EDU) 15, is not apposite to the circumstances of this case. The petitioner in *Benson* had been 'RIFed' from a full-time position to a part-time position, and was on the preferred eligibility list, pursuant to *N.J.S.A.* 18A:28-12, when a vacancy for a full-time position opened. The intervenor teacher, although she had worked longer in the district, had not been RIFed and was not on the preferred eligibility list. The State Board of Education ruled that notwithstanding the intervenor teacher's greater general seniority in the district, the petitioner was entitled to the vacant position by virtue of her place on the preferred eligibility list.

[9] The substitute credential's restrictions are printed on the face of the substitute nurse credential that petitioner received in October 1992. (P-2)

[10] Respondent could not apply for emergency certification in the PN category because there was no PN teaching vacancy at the time. *See, e.g.*, *N.J.A.C.* 6:11-4.3 (now 6A:9-6.3), and P-1. It is not clear from the record whether petitioner qualified for provisional certification to teach PN at the time in question.

Education of the Borough of Saddle River, Bergen County, EDU 7411-98, page 4 of Initial Decision (June 8, 2000), *aff'd* Comm'r (July 27, 2000) (Seniority accrues in specific "categories" of certification that are designated by regulation. It is measured by the years an employee works in specific job categories); *see also*, *N.J.S.A.* 18A:28-10 and 12; *N.J.A.C.* 6A:32-5.1. (ID11)

In sum, had petitioner accepted a position teaching NA classes in December 1992 instead of PN classes, when she later received her standard NA instructional certificate she would have been able to add the period of time that she had taught NA classes under her emergency certification to her seniority as an NA teacher. However, petitioner pursued the position teaching PN, for which she had not previously held emergency or provisional certification. Consequently, *N.J.A.C.* 6A:32-5.1(e) was inapplicable.

Hence, respondent was not in error in concluding that petitioner's two months of teaching PN classes (from mid-October to mid-December 1992) under a substitute credential did not count toward tenure or toward seniority as a PN teacher. The proper certification is a condition of accruing tenure and seniority. *Joanne McAneny v. Board of Education of the School District of the Chathams, Morris County,* 1991 *S.L.D.* 794, 799-801, 810 (1991).

In considering the conclusions in the Initial Decision to the contrary, the Commissioner notes the following:

First, the Commissioner agrees with the ALJ that petitioner was not properly certificated to teach PN until she received her standard certificate in May 1993, five months after the effective date of her contract with respondent to teach PN. However, despite her lack of proper certification, respondent nonetheless credited her with seniority beginning December 14, 1992. Thus, the only 'harm' petitioner can claim is that respondent declined to credit her the thirty days of

seniority between October 22 and December 14, 1992, during which – according to the record – she taught PN classes.

Second, the Commissioner agrees that *N.J.S.A.* 18A:26-2 and *N.J.A.C.* 6A:9-5.2(b) admonish school administrators not to hire uncertified teachers, but disagrees that respondent acted inequitably in 1992 as regards petitioner. When respondent had petitioner apply for county substitute certification in October 1992, it was with the expectation that petitioner would be teaching PN classes temporarily so that she could gain the experience in geriatrics/long-term care that she needed to qualify for the JTP position for which she had been hired. Under those circumstances, a substitute certificate was not inappropriate.[11] Clearly, the alternative was to terminate petitioner's employment.[12]

Third, the Commissioner disagrees that respondent's designation of different effective dates for petitioner's and Simmons' contracts can be characterized as arbitrary and capricious. There is nothing in the record to prove that there were not valid reasons for the two different dates. As the ALJ correctly stated (ID15), petitioner had the burden to offer evidence to support alleged arbitrary and capricious acts. Moreover, even if petitioner's and Simmons' effective dates had been the same, the record shows that petitioner lost more than fourteen days of seniority when she took unpaid leave in 1999.

Fourth, the Commissioner disagrees with the ALJ's view that "the Findings of Fact clearly support petitioner's belief that she was senior to Simmons/Sestito." (ID16) As discussed *supra*, the mere fact that individuals have been employed in a district does not give them seniority. Nor does the fact that petitioner was teaching PN classes "full-time" have any bearing on seniority

---

[11] The Commissioner does note that it appears that the petitioner was allowed to teach for about thirty consecutive days without a contract, under the substitute certification, when twenty days is the amount allowed.

[12] R-3 indicates that respondent's employment contracts contained provisions whereby either party could terminate the contract upon 60-days notice.

status. "Full-time" simply refers to the amount of hours per pay period that an employee works. And the fact that petitioner had acquired tenure earlier than Simmons, in and of itself, does not signify that petitioner's seniority was greater in 2001. If Simmons held emergency certification in PN when she was hired by respondent, her seniority would have exceeded petitioner's in 2001, when the RIF occurred.[13]

Finally, the Commissioner disagrees that the equities dictate that petitioner be credited with seniority for the days that she taught between mid-October and mid-December 1992. While it was the respondent that switched petitioner from teaching NA classes in the JTP program to teaching PN classes, it was clearly for the benefit of petitioner. She was not qualified to teach in the position for which she was hired. Respondent could have terminated her employment (with 60 days notice) and hired someone qualified for the job, but chose, instead, to give her the opportunity to obtain the experience she lacked.

Neither respondent nor petitioner could have applied for emergency certification in PN for petitioner in the Fall of 1992 because a precondition to the granting of emergency certification by the Department of Education (DOE) is an assurance by a district that there is a vacant position for which it cannot find properly certified instructors. The respondent district had PN teachers to fill its positions in the Fall of 1992, and consequently could offer the DOE no such assurance. Thus, the ALJ's suggestion that respondent was remiss in not procuring emergency PN certification for petitioner, is unfounded.

Finally, it is misleading to ascribe to respondent the full responsibility for taking petitioner out of a position in which she was adequately certificated and placing her into a position for which she had no credential, other than a county substitute certificate. If she had, after gaining

[13] The burden of proof to show that Simmons' was not certificated when she took her position with respondent as a PN teacher was on petitioner. Petitioner provided nothing to support such a proposition.

geriatric experience (which she conceded she did acquire in the Autumn of 1992) returned to teaching NA courses – pursuant to her contract for the 1992-1993 year – she would have been adequately certificated. This is what respondent had anticipated. But petitioner admittedly wished to teach PN courses and urged respondent to allow her to fill an unexpected vacancy, notwithstanding that she had no PN certification.[14]

In summary, the petitioner has not shown that her seniority as a PN teacher was greater than Simmons' seniority in 2001, and has not proven that equities compel the Commissioner to venture outside the established rules regarding seniority. Accordingly, the petition is dismissed.

IT IS SO ORDERED.[15]

Lucille E. Davy
COMMISSIONER OF EDUCATION

Date of Decision: 11/09/06

Date of Mailing: 11/09/06

[14] *McGavin v. Board of Education of the City of Hoboken, Hudson County,* EDU 9836-97 (Commissioner's Decision October 26, 1998) is inapposite. In *McGavin* the respondent board of education let McGavin's emergency certification lapse by failing to reapply for it. The Commissioner consequently allowed the period of the lapse to be included in petitioner's seniority calculation. Here, only seniority for the two months of mid-October through mid December is at issue. During that period of time, respondent could not apply for emergency certification for petitioner because it had PN teachers for its PN positions.

[15] This decision may be appealed to the State Board of Education pursuant to *N.J.S.A.*18A:6-27 *et seq.* and *N.J.A.C.*6A:4-1.1 *et seq.*

State of New Jersey
OFFICE OF ADMINISTRATIVE LAW

INITIAL DECISION
OAL DKT. NO. EDU 4588-01
AGENCY DKT. NO. 238-7/01

EILEEN KELLY,
Petitioner,
v.
BOARD OF EDUCATION OF THE MIDDLESEX COUNTY VOCATIONAL TECHNICAL SCHOOL DISTRICT,
Respondent.

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

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

Record Closed: July 6, 2005 Decided: June 13, 2006

BEFORE **RICHARD F. WELLS**, ALJ:

STATEMENT OF THE CASE

Petitioner, Eileen Kelly, asserts that she had more seniority than did a co-worker at the time of the May 2001 reduction in force. Therefore, petitioner maintains that her layoff was improper because a less senior teaching-staff member was retained for a

position petitioner was qualified for, thereby violating petitioner's rights pursuant to N.J.S.A. 18A:28-10 et seq. Respondent, Middlesex County Vocational Technical School, asserts that it calculated seniority correctly and that petitioner did not possess seniority in the job category at issue, namely, Teacher of Practical Nursing.

Essentially, the dispute centers on petitioner's teaching efforts during the fall of 1992 prior to the time petitioner received a contract to be an instructor in the Licensed Practical Nursing ("LPN") program. Petitioner asserts that during the time period in question she taught practical nursing full time and so should be credited for that time period when seniority is calculated. Conversely, respondent claims that prior to the actual award of a contract to petitioner, any teaching of practical nursing was done only in the capacity of substitute teacher for a limited time period and on a temporary basis. Therefore, respondent argues that the time spent by petitioner as a substitute teacher should not properly be included in the seniority calculation.

Concomitantly, the parties disagree on the issue of whether the particular endorsement under petitioner's instructional certificate permitted the pre-contract practical nursing teaching time to be included in the seniority calculation. Respondent maintains that since petitioner was only teaching in the capacity of a substitute, her status as a certified substitute teacher sufficed to permit her to teach given the temporary nature of the job. However, respondent argues that petitioner would have needed a provisional or emergency certificate with a teacher of practical nursing endorsement in order to have her pre-contract time included in the seniority calculation. Petitioner counters that she specifically asked various administrators if her current instructional certificates were satisfactory and that those administrators constantly reassured her that her credentials were "fine." Accordingly, petitioner argues that based upon respondent's representations, respondent is equitably estopped from challenging the sufficiency of petitioner's teaching credentials.

PROCEDURAL HISTORY

The Verified Petition was filed before the Commissioner of Education on June 25, 2001. Respondent's Answer was filed on July 2, 2001. Thereafter, the New Jersey

State Department of Education transmitted the matter to the Office of Administrative Law ("OAL"), where, on July 30, 2001, it was filed as a contested case. On December 30, 2003, ALJ Steven C. Reback issued a Letter Ruling and Order granting partial summary decision; said Letter Ruling and Order is incorporated by reference and made a part hereof as if set forth at length below. The remaining issues were heard on March 1, 2005, and April 6, 2005. Thereafter, the parties were afforded the opportunity to obtain a transcript of the recorded proceedings and submit post-hearing legal memoranda. Upon receipt of the submittals from the parties, the record was closed on July 6, 2005. Thereafter, Orders of Extension were obtained to permit the filing of the Initial Decision beyond the statutory time period, pursuant to N.J.S.A. 52:14B-10(c)(1).

STATEMENT OF THE ISSUE

When did petitioner's LPN seniority begin to accrue?

FINDINGS OF FACT

I **FIND**:

1. The petitioner, Eileen Kelly, was hired by the Middlesex County Vocational and Technical Schools ("Board") on January 2, 1992, as an instructor of nursing assistants ("NA") through the Joint Training Partnership Act ("JTPA"), a federally funded program.

2. Shortly after her initial employment, petitioner obtained an emergency certificate as a Teacher of Production, Personal or Service Occupations: Nursing Assistants.

3. During the summer of 1992, petitioner taught a course as a teacher of licensed practical nursing ("LPN") on a temporary basis, filling in for the regular teaching staff member that was scheduled to return in September 1992.

4. In September 1992 petitioner was recommended for reemployment for the 1992-1993 school year as a teacher in the NA program and, accordingly, renewed her employment contract for that discipline for school year 1992-1993.

5. In September 1992 the Board learned that by reason of a change in the federal regulations governing the JTPA program, instructors needed to possess training and/or experience in geriatrics in order to obtain a permanent certificate as an NA instructor.

6. Although petitioner returned to the Perth Amboy campus in September 1992 to resume teaching as an NA instructor for the 1992-1993 school year, the assistant superintendent of schools, Joseph C. Colombo, arranged for petitioner and one other NA instructor to swap or trade positions with two LPN teachers, so that petitioner and the other NA instructor could gain the required experience in geriatrics. Accordingly, two LPN instructors were transferred to the NA program while petitioner (and another NA instructor) were transferred to the LPN program.

7. In October 1992 petitioner undertook the responsibility of full-time teacher of LPN.

8. The purpose of the transfer of petitioner to the LPN program at that time was to facilitate petitioner's receipt of a permanent certificate as an NA teacher.

9. At the time of the swap or transfer in October 1992, there were no permanent teaching positions available in the LPN program.

10. When petitioner undertook the responsibilities of LPN teacher in October 1992, petitioner did not possess a provisional or emergency certificate with a teacher of LPN endorsement.

11. When petitioner undertook the responsibilities of LPN teacher in October 1992, petitioner had renewed her emergency or provisional certificate with an NA teacher endorsement that had been due to expire in July 1992.

12. As a result of her application on October 14, 1992, petitioner received (on October 30, 1992) a certificate entitling her to act as a substitute teacher in the category of "Kindergarten through Twelve/Nurse."

13. Between approximately mid-October 1992 and December 10, 1992, petitioner performed in the capacity of full-time LPN instructor.

14. With regard to her employment as an LPN instructor beginning in October 1992, petitioner was assured by both the director of health occupations, Betty Moore, and the assistant superintendent, Joseph Colombo, that her credentials were satisfactory for her to serve in the capacity of teacher of LPN.

15. Although petitioner's transfer into the LPN program in October 1992 was intended to be temporary in nature consistent with the "swap" or "trade" of positions discussed hereinabove, a permanent full-time position became available in the LPN program in November 1992.

16. By letter dated November 11, 1992, petitioner expressed her interest in obtaining one of the positions available in the LPN program and noted that she was eager to work as a "contractual employee" in the LPN program. Additionally, in that same letter, petitioner observed that she had been "utilized" as a full-time nursing instructor for the past month in the LPN program and had taken several courses toward LPN certification as well as a master's degree.

17. On December 8, 1992, Joseph C. Colombo, the deputy superintendent of schools, recommended petitioner for the position of instructor in the LPN program (to replace a retiring Lois Bentevenga), effective December 14, 1992.

18. A formal written contract of employment was executed by petitioner and the Board, effective December 14, 1992, for the position of LPN instructor.

19. Petitioner executed her Employment Contract on December 10, 1992, with a delineated effective date of December 14, 1992. Also, on December 10, 1992, Superintendent Zanzalari advised Rosemary Simmons (a/k/a Rosemary Sestito) that she had been approved for employment as an LPN instructor with a retroactive effective date of December 1, 1992. Both of these hires were the result of the action taken during the December 10, 1992, Board meeting.

20. From December 14, 1992 (the effective delineated date of petitioner's contract as an LPN instructor) until the date of her termination, petitioner remained continuously employed in the LPN program.

21. In April 1996, Dr. McCloud-Hjazeh submitted a work history data sheet to the Board's employees for purposes of calculation of seniority. The data sheet submitted to petitioner indicated that petitioner was employed in the capacity of NA instructor from the date of her initial employment in January 1992 through December 14, 1992, at which time she became employed as an instructor in the LPN program.

22. Petitioner received the work history data sheet but never challenged the date her contract commenced as an LPN instructor.

23. By the end of December 1992 petitioner had completed all course requirements for attainment of standard instructional certificates for Teacher of Production, Personal or Service Occupations: Nursing Assistants, as well as Teacher of Practical Nursing. Ultimately she received those standard certificates.

24. Petitioner filled out an Application for Certification as a Teacher of LPN on January 28, 1993.

25. Petitioner received her standard certificate with a Teacher of Production, Personal or Service Occupations: Nursing Assistants, endorsement in March 1993.

26. In May 1993 petitioner received her standard certificate with a Teacher of Practical Nursing (LPN) endorsement.

27. Petitioner received a notice of a reduction in force ("RIF") and her position was abolished on May 9, 2001.

28. For purposes of respondent's seniority determination, petitioner's seniority start date was December 14, 1992, whereas Rosemary Simmons/Sestito's seniority start date was December 1, 1992.

CONCLUSIONS OF LAW

In her Verified Petition, petitioner asserts that she was a tenured employee of the Middlesex County Vocational Technical School District. Specifically, petitioner maintains that since January 1992 she has been a member of the teaching staff in the area of nursing instruction. In May 2001 respondent made a determination for a reduction in the teaching staff and, as a result, abolished petitioner's position and terminated her employment. However, petitioner argues that her employment was terminated under circumstances where respondent retained teaching-staff members with less seniority. Accordingly, petitioner argues that respondent's actions were in violation of petitioner's rights under N.J.S.A. 18A:28-10 et seq. As a consequence thereof, petitioner seeks relief in the form of an Order:

A. Directing respondent to recognize petitioner's tenure and seniority rights to a full-time position under one or all of her endorsements or areas of eligibility, effective July 1, 2001;

B. Directing respondent to reinstate petitioner to a full-time position, effective July 1, 2001, under one or all of her endorsements, or areas of eligibility, together with all back pay, benefits, and all other emoluments denied as a result of respondent's termination of petitioner;

C. Directing respondent to ensure that petitioner receives proper pension credit for all periods of the alleged improper failure to employ or to assign petitioner to employment under one or all of her endorsements;

D. Directing respondent to pay pre-decision and post-decision interest on any back pay award.

At the outset, it is observed that ALJ Reback's December 30, 2003, Letter Ruling and Order found that petitioner forfeited her seniority and tenure by declining to return to employment with respondent when she was recalled for an open position. Judge Reback specifically granted summary decision with respect to the issue of whether petitioner forfeited her seniority by declining to return to work after she was recalled. Judge Reback further found that petitioner was not entitled to reinstatement.

Apparently, Judge Reback felt that notwithstanding his finding of forfeiture of her seniority, the issue of the propriety of the seniority calculation and her resultant layoff survived the December 30, 2003, grant of partial summary decision. It is noted that Judge Reback did observe that if petitioner was "riffed in violation of N.J.A.C. 6:3-5.1," she may still be entitled to damages, such as back pay.

With regard to respondent's seniority determination and the ultimate decision to lay off or terminate petitioner, as opposed to some other employee, the operative issue is when did petitioner's LPN seniority begin to accrue? Based upon the above Findings of Fact, the issue is distilled further to whether the time spent by petitioner teaching an LPN course in October, November, and December 1992 (prior to the effective date of her LPN contract) should be tacked on to the time petitioner was serving as an instructor in the LPN program under contract.

The arguments proffered by both sides were well articulated. Petitioner argues that prior to the effective date of her LPN contract she served as a full-time LPN instructor for approximately two months. Petitioner states that it is only fair and reasonable that the total time she spent teaching the LPN course, even prior to the effective date of her contract, should be included in the overall calculation of seniority. Further, petitioner adamantly maintains that she was advised by authorized representatives of respondent that her credentials or certifications were satisfactory to permit her to legally teach the LPN course during this pre-contract time period.

Additionally, petitioner observes that although she and her coworker Simmons/Sestito were essentially given contracts on the same date, respondent inexplicably made the coworker's effective date earlier than petitioner's. Petitioner argues that she started teaching in the LPN program earlier than the coworker and petitioner ultimately received LPN certification before the coworker, yet respondent made the determination that the coworker had seniority in the LPN program.

Respondent retorts that petitioner was teaching in the LPN program during the October, November, and December 1992 time frame only as a temporary assignment and it was anticipated that she would return to her regular job classification as an NA instructor. Additionally, respondent argues that petitioner could only have the time worked during October, November, and December 1992 tacked on to her seniority calculation if she was either filling a vacancy or had an appropriate emergency or provisional certificate in the area of LPN instructor. Respondent states that the record is clear that during the time period in question, petitioner was not filling a vacancy, nor did she possess an emergency or provisional certificate as an instructor in the LPN program. Respondent asserts that it was only after an LPN position unexpectedly opened up due to the decision to retire by one of the permanent LPN instructors that respondent was in a position to offer petitioner a contract to teach in the LPN program. Parenthetically, respondent notes that several years later, in 1996, petitioner was asked to review her work history data sheet so that respondent could be assured it was crediting her service properly. Respondent relies on the fact that petitioner's work history data sheet indicated that her assignment in the LPN program commenced on the effective date of her LPN contract, namely, December 14, 1992, and that petitioner never took issue with this fact notwithstanding that she was given the opportunity to do so.

As set forth in the above Findings of Fact, it is my conclusion that petitioner's "swap" or "trade" from NA instructor to instructor in the LPN program during the months of October, November, and December 1992 was a temporary assignment, so that petitioner could gain satisfactory experience in the geriatric area and then return to her regular job as an NA instructor. I am persuaded that during this operative time frame (October, November, and December 1992) there was no vacancy in the LPN program

for petitioner to fill. I am further satisfied that during this operative time period, petitioner did not possess an emergency or provisional certificate with an endorsement as a Teacher of Practical Nursing. I am persuaded that petitioner well understood that her "trade" to the LPN program in October 1992 was temporary. By letter dated November 11, 1992, petitioner sought to be considered for a contractual position in the LPN program, and stated that she was merely being "utilized" as an LPN instructor at the time. Further corroboration of petitioner's understanding of the temporary trade to the LPN program is found in the fact that although given the opportunity to do so, petitioner never sought to correct her work history that indicated that her LPN assignment contractually began on December 14, 1992. I am satisfied that it has been proven that petitioner was never a permanent substitute during the period of the swap in 1992. Rather, and to reiterate, I am satisfied that it has been proved, primarily through petitioner's own testimony, that she was temporarily transferred to the LPN program to gain a geriatric experience component for the purpose of qualifying her as an NA instructor in the JTPA federally funded program.

Consistent with the above Findings of Fact, I am satisfied that petitioner did serve as a full-time LPN instructor during October, November, and December 1992. A strict reading of the applicable regulations does not support the conclusion that this time served can be added on to the service time accumulated as a result of the execution of petitioner's LPN contract. As an aside, I **FIND** that any assurance that petitioner may have received from respondent's administrative staff to the effect that her credentials or certifications were satisfactory to allow her to teach as an instructor in the LPN program were with reference to petitioner's K-12/nurse substitute certificate, as opposed to petitioner's emergency or provisional certificate with an NA teacher endorsement. Consistent therewith, I **CONCLUDE** that the discipline of NA is separate and distinct from the discipline of LPN. Therefore, it is my conclusion that it would be unreasonable for anyone to believe that an emergency or provisional certificate with an NA endorsement would be satisfactory to permit a teacher to perform as an instructor in the LPN program. I am unable to find any support in the regulations or case law for the proposition that seniority gained as an NA teacher is interchangeable with or can be tacked on to seniority gained as a teacher of LPN.

Seniority provides a mechanism for ranking all tenured teaching staff members so that an RIF and reemployment can be administered fairly. Holloway v. Saddle River Bd. of Educ., EDU 7411-98, Initial Decision (June 8, 2000), aff'd, Comm'r (July 27, 2000) <http://lawlibrary.rutgers.edu/oal/search.html>. Unlike tenure, seniority accrues in specific "categories" of certification that are designed by regulation. Ibid; see also N.J.S.A. 18A:28-10, -12; N.J.A.C. 6A:32-5.1. Seniority is measured by the years an employee works in specific job categories. Holloway, supra, EDU 7411-98, Initial Decision (June 8, 2000), aff'd, Comm'r (July 27, 2000) <http://lawlibrary.rutgers.edu/oal/search.html>.

The standards for determining seniority are set forth in N.J.A.C. 6A:32-5.1. The issue to be determined here is when did petitioner's seniority accrue in relation to that of her coworker and with specific reference to the job category of LPN. Generally, seniority is determined according to the number of academic or calendar years of employment, or fraction thereof, in the school district in specific categories under circumstances where the employee holds a standard certificate. The regulations also provide for circumstances where the employee has yet to obtain a standard certificate but renders services under an emergency or provisional certificate. N.J.A.C. 6A:32-5.1(e) governs such a situation and provides:

> The holder of an emergency certificate shall not be entitled to seniority rights but, when he or she becomes the holder of a standard certificate, the years of employment under the emergency certificate shall count toward seniority under the standard certificate. Upon acquisition of a standard certificate, any periods of service under a provisional certificate shall also be counted toward seniority.

Accordingly, N.J.A.C. 6A:32-5.1(e) permits employees who have worked under an emergency or provisional certificate to gain credit towards seniority for that time once they obtain a standard certificate. N.J.A.C. 6A:32.5.1(l)(17)(i) states:

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

On the same day, December 10, 1992, petitioner and another teacher, Rosemary Simmons/Sestito, were awarded employment contracts as LPN instructors.[1] When petitioner and Simmons/Sestito began their contractual employment as LPN instructors, neither possessed a standard certificate with a Teacher of Practical Nursing endorsement. As set forth in the above Findings of Fact, petitioner ultimately received her standard certificate with a Teacher of Practical Nursing endorsement in May 1993. Simmons/Sestito did not receive her standard certificate with a Teacher of Practical Nursing endorsement until April 1994. Parenthetically, the above Findings of Fact reveal that petitioner filled out an Application for Certification as a Teacher of Practical Nursing on January 28, 1993. However, the facts of record do not reveal if petitioner and/or Simmons/Sestito ever received an emergency or provisional certificate prior to receipt of the standard certificate with the Teacher of Practical Nursing endorsement. That notwithstanding, to reiterate, petitioner did receive her standard certificate with an endorsement in the area of Teacher of Practical Nursing almost one full year before Simmons/Sestito received hers.

Based on the foregoing, it appears that although respondent offered contracts (on December 10, 1992) to both petitioner and Simmons/Sestito to serve in the capacity of LPN instructor, neither possessed a standard certificate with the appropriate endorsement at that time.

The above Findings of Fact do establish that petitioner was issued a Substitute Teacher's Certificate on October 30, 1992, that enabled her to act as a substitute teacher in the area of "Kindergarten through Twelve/Nurse." However, I am not satisfied that petitioner's Substitute Teacher's Certificate is the type of certificate discussed in the case of Benson v. Board of Education of the Borough of Rockaway, 92 N.J.A.R.2d (EDU) 15, i.e., a permanent substitute certificate. Petitioner was not a full-time replacement substitute, nor was she substituting for or appointed to a vacant position that would entitle her to employment rights associated with that position. See, e.g., Sayreville Educ. Ass'n v. Sayreville Bd. of Educ., 193 N.J. Super. 424 (App. Div.

[1] As will be discussed in more detail below, respondent made petitioner's employment contract effective December 14, 1992, but made Ms. Simmons/Sestito's contract effective beginning December 1, 1992.

1984). Additionally, it is noteworthy from the restrictions plainly included on petitioner's Substitute Teacher's Certificate that neither petitioner nor respondent could invoke the Substitute Teacher's Certificate as a satisfactory underpinning to allow her to teach LPN either prior to or subsequent to the inception of her LPN contract. The Substitute Teacher's Certificate plainly states:

> This certificate will be issued for a three-year period, but the holder may serve for no more than 20 consecutive days in the same position in one school district during the school year. Such certificates, which are issued by the county superintendent of schools, are designed only for emergency purposes when the supply of properly certificated substitutes is inadequate to staff the school. They carry none of the accrued benefits, such as pension and tenure, to which a regularly employed teacher is entitled, and are intended only for persons temporarily performing the duties of a fully certified and regularly employed teacher.
>
> [P-2.]

Additionally, from the plain language of the Substitute Teacher's Certificate, it is my conclusion that the certificate is more an educational services certificate than an instructional certificate. In other words, the Substitute Teacher's Certificate obtained by petitioner on October 30, 1992, seems to have as its purpose the enabling of petitioner to act as a substitute teacher or substitute nurse in the Middlesex County public schools for grade levels K through 12. I can ascertain no legal basis for the Substitute Teacher's Certificate providing a credentialed foundation for the teaching of LPN. In any event, it is my conclusion that the Substitute Teacher's Certificate certainly did not provide the underpinning for teaching LPN students for a time period greater than twenty consecutive days.

It is my conclusion that when petitioner rendered services as an instructor in the LPN program she was not properly certificated. It is my conclusion that petitioner's Substitute Teacher's Certificate was not satisfactory or appropriate to provide a legal foundation to be an instructor in the LPN program. It is clear under N.J.A.C. 6A:32-5.1(l)(17)(i) that petitioner's emergency certificate with an endorsement in the NA

subject area similarly does not provide the appropriate academic foundation to begin accruing seniority as an LPN instructor.

Whether the same situation applies to Rosemary Simmons/Sestito has not been established. The record facts do reveal that it was not until almost one year after petitioner received her standard certificate in LPN that Simmons/Sestito received her standard certificate in the LPN area, in April 1994.[2] Accordingly, it appears that when respondent made its employment decisions with regard to petitioner and Simmons/Sestito on December 10, 1992, respondent knew, or should have known, that petitioner was not properly certificated. Concomitantly, when respondent made its employment decisions on December 10, 1992, petitioner knew, or should have known, that she was not properly certificated as a Teacher of Practical Nursing. While it may well be the case that it is ultimately the teacher's responsibility to obtain the appropriate certifications, the law places certification responsibility on the school district as well. Specifically, N.J.S.A. 18A:26-2 states:

> 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 . . . .

Consistent therewith, N.J.A.C. 6A:9-5.2(b) provides:

> The chief school administrator of the employing district board of education shall require each newly employed or reassigned teaching staff member to exhibit an appropriate certificate before the teaching staff member assumes any responsibility for the performance of regulated duties. It shall be the chief school administrator's responsibility to ensure that the certificate is valid.

[2] The facts of record establish that petitioner applied for her standard certificate as a Teacher of Practical Nursing on January 28, 1993. Her standard certificate as a Teacher of Practical Nursing was issued in May 1993, or approximately five months later. If that approximate five-month time period can be considered as a standard time between application and issuance, then it would appear that Rosemary Simmons/Sestito would not have applied for her standard certificate as a Teacher of Practical Nursing until in or around December 1993, or at least some time well after the date petitioner first applied for her standard certificate in that area. However, this would be pure speculation and the record contains no facts as to when Simmons/Sestito applied for a standard certificate or otherwise obtained an emergency or provisional certificate with an LPN endorsement. Since this topic was never placed at issue, I must assume that Simmons/Sestito possessed some type of satisfactory prefatory certificate as of November 10, 1992.

Based on the foregoing, it appears that respondent was remiss in offering employment to petitioner as a result of the December 10, 1992, Board of Education meeting because she was not the holder of a valid certificate to teach.[3]

Respondent's actions as a result of the Board meeting of December 10, 1992, are confusing given the varying effective dates of the contracts. As discussed above, although respondent's action vis-à-vis both petitioner and Simmons/Sestito took place on the same date, namely, December 10, 1992, respondent made Simmons/Sestito's beginning date retroactive to December 1, 1992, whereas respondent made petitioner's beginning contractual date December 14, 1992. There was no explanation for these different starting or effective dates in the record. However, it is noteworthy that Joseph Colombo, assistant superintendent of the Middlesex County Vocation Schools, testified for the respondent that during the relevant time period it was his understanding that seniority should accrue from the date the Board takes action by voting on the appointment (T2, 45:14 through 45:19; 48:5 through 48:12). Accordingly, consistent with Mr. Colombo's understanding, it would seem that the accrual of the contractual seniority for both petitioner and Simmons/Sestito should be the date of the Board action, which was December 10, 1992. During the hearing, respondent did not offer an explanation for the disparity in start dates, especially under circumstances where petitioner was already teaching in the LPN program full time prior to the date of the Board meeting on December 10, 1992 (see Findings of Fact above). In the absence of an explanation for respondent's apparent straying from Mr. Colombo's understanding of when seniority accrues, it would seem that respondent acted in an arbitrary and capricious manner in assigning Simmons/Sestito a retroactive contractual start date while proceeding differently with petitioner. The problem is, given the fact that the burden of proof is on the petitioner, I am not entirely satisfied that the issue of an arbitrary and capricious decision was sufficiently brought forth during the hearing such that the onus was placed on respondent to explain its actions.

[3] In the absence of facts to the contrary, I must assume that Simmons/Sestito held some type of appropriate provisional or emergency certificate. Otherwise, neither petitioner nor Simmons/Sestito would have been properly credentialed as of November 10, 1992.

In addition to the somewhat perplexing fact that respondent took official action on the same day that made petitioner's contractual start date later than that of her coworker, the Findings of Fact clearly support petitioner's belief that she was senior to Simmons/Sestito. Petitioner was employed by respondent earlier than was Simmons/Sestito (petitioner being first hired by respondent on January 2, 1992). Petitioner was teaching LPN on a full-time basis before Simmons/Sestito began instruction in that area. Petitioner became permanently certified as a Teacher of Practical Nursing one year before Simmons/Sestito did. Petitioner was tenured on January 3, 1995, whereas Simmons/Sestito could not have been tenured until December 1995.

In addition to the above, it is not disputed that respondent precipitated petitioner's move from the area of NA instructor to the LPN program. And, as discussed above, it is my conclusion that respondent knew or should have known that petitioner was not properly certificated when it orchestrated petitioner's move to the LPN program. Accordingly, it is my conclusion that this case properly must be decided as a matter of fundamental fairness.[4]

In the case of McGavin v. Board of Education of the City of Hoboken, Hudson County, EDU 9836-97, Initial Decision (September 3, 1998), reversed, Comm'r (October 26, 1998) <http://lawlibrary.rutgers.edu/oal/search.html>, the Commissioner of Education declined, as a matter of fundamental fairness, to apply the seniority regulations in a manner that penalized the teacher for a lapse in her certification. In the McGavin case, the calculation of seniority for purposes of measuring the propriety of a reduction in force was undertaken. McGavin was "riffed" in favor of another teacher, who she claimed was less senior. The administrative law judge found against McGavin. The Commissioner of Education reversed. McGavin argued that time under a provisional or emergency certification should count towards seniority once the standard certification was obtained. McGavin also argued, under principles of equity, that time served by McGavin in an area in which the Board had failed to apply for or renew the

[4] Had it been the case that neither petitioner nor Simmons/Sestito was properly credentialed as of the date of the Board action on December 10, 1992, fundamental fairness would remain a consideration, but the equities would then be overwhelmingly in favor of petitioner.

appropriate certification, even though the Board was aware of its obligation in this regard, should count toward seniority. Citing Metaxus v. Board of Education of the City of Hoboken, 96 N.J.A.R.2d (EDU) 708, the Commissioner held that N.J.A.C. 6:3.5.1 directs that time served under an emergency certification should count towards seniority once standard certification is obtained.[5] Further, though there seemed to be a "hole" in McGavin's seniority accrued during a period of time when she was eligible for an emergency certification, but the Board failed to obtain it, the Commissioner of Education ruled that the time should count towards seniority. The Commissioner stated:

> In this analysis, the Commissioner is mindful that, due to an unexplained oversight, the Board did not apply for petitioner's provisional certificate for the 1973-74 school year, notwithstanding an apparent awareness of its obligation to do so . . . under these circumstances, the Commissioner does not find petitioner's reliance upon the Board to secure the provisional certificate for her to be unreasonable, and, as a matter of fundamental fairness, he declines to apply the seniority regulations in a manner that penalizes petitioner for the eight-month period of time in the 1973-74 school year in which she did not have the provisional certificate.
>
> [McGavin, supra, EDU 9836-97, Comm'r (October 26, 1998) <http://lawlibrary.rutgers.edu/oal/search.html>.]

In the instant case, petitioner had been appropriately working for respondent as an NA instructor under her emergency certificate with a Teacher of Production, Personal or Service Occupations: Nursing Assistants, endorsement. Then, during the beginning of the 1992 fall semester, respondent asked petitioner to engage in a "swap" or "trade" such that in October 1992 petitioner undertook the full-time duties of an instructor in the LPN program. Petitioner credibly testified that she asked several individuals within the administration whether she was appropriately credentialed to perform in the capacity of instructor in the LPN program. However, even setting aside petitioner's testimony on the subject of the assurances made to her by respondent's representatives, it would seem apparent that respondent was relying on either petitioner's emergency certificate with the NA endorsement or petitioner's Substitute

[5] N.J.A.C. 6:3-5.1 was recodified at N.J.A.C. 6A:32-5.1.

Teacher's Certificate as the credentialing basis sufficient to permit petitioner to render services as an instructor in the LPN program during October, November, and December before she received her contract. As discussed hereinabove, respondent's position was wrong, in that the emergency certificate with the NA endorsement was not sufficient to permit petitioner to teach in the LPN program. Furthermore, as also discussed above, petitioner's Substitute Teacher's Certificate provided an insufficient basis as well, because of the limitations as to the permissible duration of substitute service in the same position in one school district during the school year. Therefore, it is my conclusion that respondent knew or should have known that it was moving one of its employees from a properly credentialed position to a position where she was legally not permitted to perform as a teacher in the absence of proper credentials. Additionally, and as noted above, respondent had to know that it was in violation of N.J.S.A. 18A:26-2 and N.J.A.C. 6A:9-5.2(b) when it proceeded with the "swap" or "trade" that put petitioner in a job category without proper certification.

It is my conclusion that although petitioner did serve in the capacity of LPN instructor on a full-time basis in October, November, and December 1992, she undertook that engagement on a temporary basis with the expectation of returning to the NA program. Therefore, I do not find it unreasonable that in spite of respondent's explicit or tacit assurances of adequate credentialing, petitioner did not proceed on her own to obtain an emergency or a provisional certificate with an LPN endorsement.[6]

As a matter of fundamental fairness, and consistent with McGavin, it is my conclusion that petitioner possessed seniority in the LPN discipline. With reference to ALJ Reback's Letter Ruling and Order of December 30, 2003, and adopting the calculations of seniority as set forth at pages 13-14, it is my conclusion that with petitioner's full-time employment in the LPN program prior to her receipt of a contract, her seniority exceeds that of Ms. Simmons/Sestito. I **FIND** that this is the case even if only the month of November 1992 is added to the time she served as an LPN instructor under contract. It is my conclusion that petitioner's credential deficits were essentially

[6] In the absence of facts to the contrary, I must assume that respondent did not similarly proceed in derogation of N.J.S.A. 18A:26-2 by hiring Simmons/Sestito on December 10, 1992. It must be assumed that Simmons/Sestito held the appropriate and valid certificates to teach.

the result of respondent's actions and so fundamental fairness requires that petitioner's seniority start to accrue from the time petitioner began to teach in the LPN program full time, which I **FIND** was in mid-October 1992.

I am well aware that on April 12, 1996, petitioner was asked to review her work history data sheet and was advised that it was important to check the accuracy of the information contained therein because it would be used to calculate her seniority. On that work history data sheet there were notations under Annual Assignments that could reasonably be interpreted to mean that petitioner did not begin to work in the LPN program until December 14, 1992. The record reveals that petitioner never challenged the accuracy of the notations on the Annual Assignments sheet, yet she did seek to correct the record with regard to other information.

Be that as it may, I am not persuaded that petitioner's failure to take issue with the handwritten entries that appeared on the Annual Assignments sheet as part of her work history should be considered fatal as some sort of waiver or acquiescence to respondent's position that seniority in the LPN program began at the contract's effective date. The fact that petitioner may have neglected to remind respondent that prior to the effective date typed on the contract she had worked an additional two or more months as a full-time LPN instructor should not, as a matter of fundamental fairness, detract from the fact that petitioner did serve in that capacity. Under the circumstances of this case, where respondent essentially orchestrated the situation in which petitioner would teach without appropriate credentials, fundamental fairness should not permit the outcome to redound to petitioner's detriment. Given the failure on the part of respondent to ensure proper credentialing for petitioner, the proven facts are that petitioner began as a full-time instructor in the LPN program in October 1992, whereas Simmons/Sestito did not begin as a full-time LPN instructor until December 10, 1992. As mentioned above, even including petitioner's missed time for unpaid absences exceeding thirty days, a five-day family leave, and denied bereavement leave, I **FIND** that as a matter of fundamental fairness, petitioner's seniority is superior to that of Ms. Simmons/Sestito. Accordingly, I **FIND** it appropriate and warranted that petitioner be compensated with any back pay, less mitigation, and emoluments due as a result of her

improper termination from employment from the date of the termination on May 9, 2001, up to January 2003.

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

This recommended decision may be adopted, modified or rejected by the **COMMISSIONER OF THE DEPARTMENT OF EDUCATION,** who by law is authorized to make a 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, P.O. Box 500, Trenton, New Jersey 08625-0500,** marked "Attention: Exceptions." A copy of any exceptions must be sent to the judge and to the other parties.

6-13-06

DATE

RICHARD F. WELLS, ALJ

E-mail Receipt of Initial Decision Confirmed by the Department of Education on:

6-13-06

DATE

Mailed to Parties:

JUN 16 2006

DIRECTOR AND CHIEF ADMINISTRATIVE LAW JUDGE

DATE

OFFICE OF ADMINISTRATIVE LAW

jh

WITNESSES

For petitioner:

Eileen Kelly
Karen McCloud-Hjazeh
Maureen Minnick

For respondent:

Joseph Colombo

EXHIBITS

For petitioner:

P-1 Renewal of Emergency or Provisional Certificate
P-1a Emergency Certificate, issued March 1992 (Nursing Assistants)
P-2 Substitute Teacher's Certificate
P-3 Letter from Kelly to Zanzalari, dated November 11, 1992
P-4 Standard Certificate (Nursing Assistants), issued March 1993
P-5 Standard Certificate (Teacher of Practical Nursing), issued May 1993
P-6 Memo, dated April 12, 1996, from Dr. Karen McCloud-Hjazeh
P-7 Seniority List as of May 9, 2001
P-8 Letter from Zanzalari, dated January 7, 1993
P-9 Application for Certification
P-10 Rosemary Simmons, work history data sheet
P-11 Letter from Zanzalari to Rosemary Sestito, dated December 10, 1992
P-12 Quiz, dated October 22, 1992
P-13 Grade Achievement Form, dated December 10, 1992
P-14 Grade Achievement Form, dated December 20, 1992
P-15 Grade Achievement Form, dated December 20, 1992

For respondent:

R-1 Letter from Kelly to McCloud-Hjazeh, dated April 17, 1996

R-2 Memo from Colombo to Zanzalari, dated December 8, 1992

R-3 Employment Contract, dated December 10, 1992

R-4 Enrollment form (1992-1993)

R-5 1992-93 Transfers and Reassignments

R-6 County Substitute Certificate Application, dated October 14, 1992

R-7 Personnel Directory 1991-1992

R-8 Personnel Directory 1992-1993

R-9 Personnel Directory 1993-1994

R-10 Calendar for school year 1992-93

393-06
393-06

OAL DKT. NO. EDU 10219-05
AGENCY DKT. NO. 322-11/05

LAUREN COOKE,	:	
PETITIONER,	:	
V.	:	COMMISSIONER OF EDUCATION
BOARD OF EDUCATION OF THE TOWNSHIP OF EGG HARBOR, ATLANTIC COUNTY,	:	DECISION
RESPONDENT.	:	

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

Upon such review, the Commissioner approves the parties' settlement and adopts the Initial Decision as the final decision in this matter, which is hereby dismissed, subject to compliance with the terms of the settlement.

IT IS SO ORDERED.

Lucille E Davy
COMMISSIONER OF EDUCATION

Date of Decision: 11/14/06
Date of Mailing: 11/14/06

State of New Jersey
OFFICE OF ADMINISTRATIVE LAW

INITIAL DECISION
SETTLEMENT
OAL DKT. NO. EDU 10219-05
AGENCY DKT. NO. 322-11/05

LAUREN COOKE,
Petitioner,
v.
BOARD OF EDUCATION OF EGG HARBOR TOWNSHIP, ATLANTIC COUNTY,
Respondent.

Barbara A. Riefberg, Esq., for petitioner (Baron & Riefberg, attorneys)

William S. Donio, Esq., for respondent (Cooper, Levenson, April, Niedelman & Wagenheim, P.A., attorneys)

Record Closed: October 30, 2006 Decided: October 31, 2006

BEFORE **W. TODD MILLER,** ALJ

This matter was transmitted to the Office of Administrative Law on December 20, 2005, for determination as a contested case, pursuant to N.J.S.A. 52:14B-1 to -15 and N.J.S.A. 52:14F-1 to -13.

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

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

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

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

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

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

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

10-31-06
DATE

W. TODD MILLER, ALJ

Receipt Acknowledged:

11-2-06
DATE

DEPARTMENT OF EDUCATION

Mailed to Parties:

NOV 3 2006
DATE

DIRECTOR AND CHIEF ADMINISTRATIVE LAW JUDGE

OFFICE OF ADMINISTRATIVE LAW

/sd

William S. Donio, Esquire
Cooper Levenson April
Niedelman & Wagenheim, PA
1125 Atlantic Avenue - 3rd Floor
Atlantic City, NJ 08401
(609) 344-3161
File No.: 50700-359
Attorneys for Respondent

RECEIVED
2006 OCT 12 A 8:01
STATE OF NEW JERSEY
OFFICE OF ADMIN LAW

Lauren Cooke **Petitioner,** **v.** **EGG HARBOR TOWNSHIP BOARD OF EDUCATION** **Respondent.**	**BEFORE THE COMMISSIONER OF EDUCATION OF THE STATE OF NEW JERSEY** **Agency Ref. No.: EDU 10219-05** **Civil Action** **SETTLEMENT AGREEMENT**

This Settlement Agreement is made as of the 3rd day of October, 2006 by and among Lauren Cooke, (hereinafter "Petitioner"); and the Egg Harbor Township Board of Education, Atlantic County (hereinafter "the Board") (collectively "the parties").

WHEREAS, the Board is a body corporate and politic of the State of New Jersey having statutory responsibilities for the management and administration of the Egg Harbor Township School District in Atlantic County, New Jersey; and

WHEREAS, Petitioner is a tenured teaching staff member employed by the Board; and

WHEREAS, Petitioner filed a Petition of Appeal against the Board with the Commissioner of Education, entitled *Lauren Cooke v. Egg Harbor Township Board of Education*, Docket Number EDU 10219-05, which asserted, among other items, claims against the Board in conjunction with a request for salary for the period of time Petitioner was out of work between September 1, 2005 and November 4, 2005; and

WHEREAS, the parties wish to settle all controversies among and between them, including Petitioner's claims in the Petition of Appeal set forth above, and any and all related claims which related or unrelated, known or unknown, could have been asserted by Petitioner against the Board; and

WHEREAS, the parties acknowledge that the merits of the controversy are in dispute and that neither the Board nor Petitioner admits any liability to any other, but all have reasons to desire a resolution of the matter; and

NOW THEREFORE, in consideration of the agreements, covenants and conditions contained herein, the adequacy and sufficiency of which is expressly acknowledged by the parties hereto, the parties agree as follows:

1. **DISMISSAL OF ACTION.**

(a) The Board will compensate Petitioner for work days missed between the period of October 17, 2005 and November 4, 2005 for a total of fifteen (15) work days.

(b) During the 2006-2007 school year the Board will continue to implement the following accommodations recommended by Dr. Meeteer in his October 4, 2005 report to the Board :

(i) Provision of a full size desk and chair.

(ii) Permission to complete lesson preparation at home.

(c) Continuation of the accommodations referenced in (b) above beyond the 2006-2007 school year will be contingent upon confirmation by the Board's physician that such accommodations are medically necessary.

2. Petitioner dismisses with prejudice all claims contained in the Petition against the Board.

3. **RELEASE.** In consideration for the consideration provided for in this agreement, with the specific exception of the pending Workers' Compensation claim, Petitioner, personally and for her estate and/or heirs, waives, releases and gives up any and all other claims, demands, obligations, damages, liabilities, causes of action and rights, in law or in equity, known and unknown, that she may have against the Board and any and all of its officers, directors, agents, representatives and employees (present and former) and their respective successors and assigns, heirs, executors and legal or personal representatives, based upon any act, event or omission occurring before the execution of this Agreement including, but not limited to, any events related to, arising from or in connection with Petitioner's employment with the Board. Petitioner specifically waives, releases and gives up any and all claims arising from or relating to her employment and/or association with the Board based upon any act, event or omission occurring before the execution of this Agreement including, but not limited to, any claim that was asserted or could have been asserted under any federal or state statutes, regulations, or common law or Board policies or regulations. Petitioner specifically waives, releases and gives up any and all claims including, but not limited to, any potential claim relating to the alleged violation of *N.J.S.A.* 18A:6-10 *et seq.* as claimed in Petitioner's Petition.

4. **NO CLAIMS PERMITTED/COVENANT NOT TO SUE.** Petitioner waives her right to file any charge or complaint in her own behalf, to participate as a complainant, a plaintiff or a charging party in any charge or complaint, or to collect damages as a result of any charge or complaint which may be made by any other person or organization on her behalf, with respect to anything which has happened up to the execution of this Agreement, before any federal, state or local court or administrative agency against the Board except as such waiver is prohibited by law.

5. **ATTORNEY'S FEES.** Each party agrees that each party will bear its own costs and attorney's fees which have been incurred in connection with the within matter and in conjunction with the negotiation and preparation of this Agreement.

6. **NO ADMISSION OF LIABILITY.** It is expressly understood that neither the execution of this Agreement, nor any other action taken by the Board in conjunction with Petitioner's claims or this settlement, constitute admission by the Board of any violation of any law, duty or obligation. It is also understood that the acceptance of this settlement does not constitute any representation by Petitioner as to the merits of her claims or the lack thereof.

7. **ENTIRE AGREEMENT.** This Agreement contains the sole and entire Agreement between the parties hereto. Each party represents and acknowledges that prior to executing this Agreement, they consulted with or had an opportunity to consult with counsel, has had ample time to do so and that no party relied upon any representation or statement not set forth in this Agreement made by any other party hereto, or their counsel or representatives, with regard to the subject matter of this Agreement. No other promises or agreements shall be binding unless in writing, signed by the parties hereto, and expressly stated to represent an amendment to this Agreement.

8. **BOARD RESOLUTION.** Attached hereto as Exhibit A is a true copy of a Resolution of the Board, adopted in compliance with the laws of the State of New Jersey, including the Open Public Meetings Act, duly ratifying this agreement and authorizing the Board's signatory to sign this Agreement on its behalf.

IN WITNESS WHEREOF, the parties have set their hands and seals as of the day and year first written.

COOPER LEVENSON APRIL NIEDELMAN & WAGENHEIM, PA

By:_____
William S. Donio, Esq.
Attorney for Respondent

Dated: 10/2/06

BARON & RIEFBERG

By:_____
Barbara E. Riefberg, Esq.
Attorney for Petitioner

Dated 10/3/2006

CLAC; 33465.1

398-06

PAMELA MILLER,	:	
PETITIONER,	:	
V.	:	COMMISSIONER OF EDUCATION
BOARD OF EDUCATION OF THE TOWNSHIP OF WEST AMWELL, HUNTERDON COUNTY,	:	DECISION
RESPONDENT.	:	

SYNOPSIS

Petitioner – a former half-time art teacher in respondent's district – alleged that the Board improperly terminated her on contractual notice when she had already obtained tenure in her position. She further alleges that the Board failed to comply with the regulatory requirements of the Provisional Teacher Program. Respondent asserted that petitioner had not yet obtained tenure in the district because during the first six months of her employment, she was working as a substitute teacher and held no certification as a teacher of art.

The ALJ found, *inter alia*, that: the facts in this matter are essentially undisputed and summary decision is appropriate; although petitioner raised the issue of the district's alleged failure to provide required observations and evaluations during her first year of teaching, the issue was constructively abandoned since neither petitioner nor the Board briefed or otherwise pursued it; petitioner did not hold an appropriate certificate to teach art during her first six months in the district – when she filled a vacancy under a substitute credential – and, therefore, that time does not count toward tenure. The ALJ concluded that the Board's termination of petitioner's contract was appropriate and should be affirmed.

Upon a thorough and independent review of the record, the Commissioner concurred with the ALJ that respondent Board properly exercised its contractual right to terminate petitioner's employment, rejected the petitioner's exceptions, and adopted the Initial Decision with clarification.

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.

11/16/06

OAL DKT. NO. EDU 4523-05S
AGENCY DKT. NO. 116-5/05

PAMELA MILLER,	:	
PETITIONER,	:	
V.	:	COMMISSIONER OF EDUCATION
BOARD OF EDUCATION OF THE TOWNSHIP OF WEST AMWELL, HUNTERDON COUNTY,	:	DECISION
RESPONDENT.	:	

The record, the Initial Decision of the Office of Administrative Law (OAL), and the exceptions submitted by the parties have been reviewed.[1] The Commissioner adopts the Initial Decision as the Final Decision in this case with the following clarifications.

In her first exception, petitioner maintains that the Administrative Law Judge (ALJ) erred in finding that petitioner constructively waived the claim articulated in Count II of her petition, *i.e.*, that respondent's alleged failure to properly evaluate her warranted an order restoring her, with back pay and benefits, to a position in respondent's district. Petitioner requests a remand on that issue, contending that since respondent did not raise it in its summary judgment motion papers, she had no obligation to raise it in hers. She further asserts, in the alternative, that she actually did raise the issue in her summary judgment papers, *i.e.*, on the last page of her brief, where she alleged that respondent "took steps to prevent Petitioner from acquiring her permanent certification, namely, by failing in its obligations to observe and evaluate Petitioner during her first year of mentoring . . . ."

In considering petitioner's first exception, the Commissioner notes that in his procedural history in the Initial Decision, the ALJ stated that in a telephone conference on October 25, 2005: "the parties agreed that a hearing was unnecessary because the facts were not in

[1] Petitioner's reply to respondent's reply exceptions was not considered, as the regulations make no provision for same.

dispute, and asked that the matter be summarily decided on the briefs." (Initial Decision at 2) [Emphasis added] Having agreed to a summary decision, it was petitioner's burden to provide support for all claims articulated in her petition, regardless of whether the issues were addressed by respondent in its summary judgment papers.

Another difficulty with petitioner's first exception is that it relies on an untimely claim. Setting aside the fact that it is not evident that petitioner's allegations concerning evaluations are undisputed, the Department of Education's regulations allow a ninety-day period for petitioning the Commissioner for redress of such matters. *N.J.A.C.* 6A:3-1.3(i). It is undisputed that petitioner received provisional certification in March 2002. It must be assumed that by the end of that school year, June 2002 – and certainly by the end of the following school year, June 2003 – petitioner would have been aware that she was not being evaluated. Her petition to the Commissioner was, however, not filed until almost two years later. Accordingly, the Commissioner finds that petitioner is out of time to raise the issue.

Further, the question of whether respondent evaluated petitioner is tangential to the issue of whether petitioner achieved tenure in respondent's district, and does not drive the outcome of this case. According to the record, petitioner received provisional certification on or about March 1, 2002. This is when her tenure eligibility began, because tenure eligibility does not commence until a teaching staff member is the holder of a proper certificate in full force and effect. *N.J.S.A.* 18A:28-5. With or without evaluations, petitioner would have had to have worked in respondent's district for three years from March 1, 2002 to have achieved tenure. It is undisputed, however, that her employment was terminated before the three-year benchmark.

In her second exception, petitioner contends that the ALJ improperly failed to consider her argument that her termination from employment was a violation of public policy. In so arguing, petitioner asks the Commissioner to assume that respondent's 'illegal' employment of petitioner as a substitute for six months, failure to properly evaluate her, and dismissal of her within

days of the date that her tenure could have been established was *per se* evidence of respondent's motive to "[avoid] the obligations of tenure toward its Teacher of Art," in violation of "the policies of teacher protection and security clearly established by the legislature." [No citation provided.]

At the outset, it is questionable whether the Commissioner has the jurisdiction to decide such a claim, which is not based specifically on school law. However, even assuming *arguendo* that the Commissioner has such authority, she cannot find – on the record before her – that respondent's termination of petitioner's employment was a violation of public policy.

For the reasons articulated by the ALJ, petitioner was not tenured in respondent's district. It is settled that employment contracts of non-tenured public school teachers which contain provisions for termination by either party upon a specified number of days notice may be terminated in accordance with the terms of the contract without the need to demonstrate good cause. *See, e.g., Mozier v. Board of Education of Cherry Hill Twp., Camden County,* 450 *F. Supp.* 742, 748 (D.N.J. 1977). It shall be optional with the board whether or not the member shall continue to perform his duties during the period between the giving of notice and the date of termination of employment thereunder. *N.J.S.A.* 18A:27-9. And, in general, a board's decision will be vacated only when it is arbitrary, capricious and unreasonable. *See, e.g., Kopera v. West Orange Board of Education*, 60 *N.J. Super.* 288, 294 (App. Div. 1960).

While the record does not contain a copy of petitioner's contract, no one appears to dispute the fact that the contract contained a provision allowing termination upon sixty days notice.[2] It is thus petitioner's burden to prove that respondent's exercise of the provision was arbitrary, capricious or unreasonable.

The Commissioner appreciates that the proximity of respondent's action to terminate petitioner's employment to the date that she might have received tenure must have greatly

[2] The Commissioner notes, in addition, that there is correspondence in the file, dated June 26, 2006, in which respondent avers that petitioner was given 60 days severance pay.

disappointed petitioner. However, the timing of the dismissal – in and of itself – is not sufficient support for a claim that it was arbitrary and capricious. Indeed, in *Canfield v. Board of Ed. of Pine Hill Borough,* 51 *N.J.* 400, 401 (1968) (adopting dissenting opinion in *Canfield v. Bd. of Edu. of Pine Hill,* 97 *N.J. Super.* 483, 490-93 (App. Div. 1967)), the Court upheld a board's decision to terminate a teacher's employment four days before she would have served the amount of time required for tenure status under *N.J.S.A.* 18A:28-5.

The Commissioner is unpersuaded by petitioner's arguments that respondent's employment of her as a substitute teacher for six months in 2001-2002, and respondent's alleged failure to evaluate her, constitute the basis for a determination that respondent was arbitrary, capricious and unreasonable in terminating her employment in February 2005.[3] First, respondent's retention of petitioner for six months in spite of her lack of proper certification cannot be seen as an action that was detrimental to her. The situation could have resulted in termination of petitioner's employment and the possible withholding from respondent of State funds for the *per diem* expenses. *N.J.A.C.* 6A:9-5.2 (at the time, *N.J.A.C.* 6A:11-3.1(e)). In addition, the Commissioner cannot assume, without more, that the six-month period of substitute teaching in 2001-2002 had any connection with the termination of petitioner's employment over four years later.

Second, petitioner has made no showing of a nexus between respondent's alleged failure to monitor petitioner and the termination of petitioner's employment. It is a huge leap from the facts actually established in this case to petitioner's suggestion that respondent terminated her employment to avoid maintaining a tenured teacher of art position. Petitioner did not meet her burden to present a record that filled that gap. The Commissioner cannot find, on this record, that respondent's action was arbitrary, capricious or unreasonable.

[3] The Commissioner has noted that petitioner is out of time to challenge respondent's alleged failure to evaluate her. She is also out of time to appeal her six-month employment as a substitute.

Accordingly, the Commissioner rejects petitioner's exceptions and, as stated above, adopts the Initial Decision as the Final Decision in this matter.

IT IS SO ORDERED.[4]

COMMISSIONER OF EDUCATION

Date of Decision: 11/16/06

Date of Mailing: 11/16/06

[4] This decision may be appealed to the State Board of Education pursuant to *N.J.S.A.* 18A:6-27 *et seq.* and *N.J.A.C.* 6A:4-1.1 *et seq.*

State of New Jersey
OFFICE OF ADMINISTRATIVE LAW

INITIAL DECISION
SUMMARY DECISION
OAL DKT. NO. EDU 4523-05S
AGENCY REF. NO. 116-5/05

PAMELA MILLER,
Petitioner,
v.
BOARD OF EDUCATION OF THE TOWNSHIP OF WEST AMWELL, HUNTERDON COUNTY
Respondent.

Arnold M. Mellk, Esq., appearing for petitioner (Wills, O'Neill & Mellk, attorneys)

Joseph R. Morano, Esq., appearing for respondent (Scarinci & Hollenbeck, LLC, attorneys)

Record Closed: June 27, 2006 Decided: August 16, 2006

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

Petitioner Pamela Miller claims that the West Amwell Township Board of Education (1) improperly terminated her on contractual notice when she had already obtained tenure in her position and (2) failed to comply with the regulatory requirements of the State-approved District Training Program. She filed her Petition of Appeal on May

13, 2005, and the matter was transmitted to the Office of Administrative Law for hearing as a contested case on June 24, 2005. N.J.S.A. 52:14B-1 to –15 and N.J.S.A. 52:14F-1 to –13.

After several adjournments, a telephone prehearing conference was conducted on October 25, 2005. At that time, the parties agreed that a hearing was unnecessary because the facts were not in dispute, and asked that the matter be summarily decided on the briefs. The request was granted and the parties then agreed on a briefing schedule. The record was closed on June 27, 2006, upon receipt of certain additional information that had been requested on June 23, 2006.

The factual context of this controversy is substantially undisputed. On July 25, 2001, the West Amwell Township Board of Education employed Pamela Miller as a substitute art teacher effective September 1. At that time, Ms. Miller possessed only a substitute teacher's certificate and had not yet been certified as a teacher of art by the State Board of Examiners. Therefore, by letter dated October 9, 2001, Superintendent of Schools Tony DeCanzio clarified her status as follows:

> To Whom It May Concern:
>
> Mrs. Pam Miller has been employed by the West Amwell Board of Education for school year 2001-2002 as our Art Teacher for grades K-6. Mrs. Miller will work as a permanent substitute until completion of her teaching certificate requirements at which time she will be given a permanent contract. Mrs. Miller has done an excellent job with our students and we are extremely pleased with her rapport with the students and the quality of work they are doing with her in class. We all are looking forward to her completing the requirements for permanent certification and becoming a member of our faculty.

In or about March 2002, Ms. Miller received her certificate as a teacher of art. Shortly thereafter on March 26, 2002, the Board voted to employ her as a half-time art teacher and place her on Step 1 of the salary guide contained in the Collective Bargaining Agreement between the Board and the West Amwell Teachers' Association.

Approximately nine months later, on December 19, 2002, Ms. Miller completed and submitted a signed enrollment application for membership in the Teachers Pension and Annuity Fund. In Part I of the application, she circled the words "Substitute" and "Temporary" in describing her employment as an art teacher between September 2001 and March 2002. In Part II, Certification of the Employing Agency, the Board certified that Miller had been employed as an art teacher effective March 1, 2002, at an annual base salary of $18,560.

The Board terminated Ms. Miller's employment on February 25, 2005. She, in turn, filed her petition of appeal on May 13, 2005, alleging that she had been improperly terminated because she had been continuously employed for more than three years and was tenured in her position. She further alleged that the Board "failed utterly in its obligations to observe and evaluate [her], having performed no observations and evaluations during [her] first year of mentoring for purposes of certification." However, since neither she nor the Board briefed or otherwise pursued this issue, I find that the issue has been constructively abandoned.

The parties have filed cross-motions for Summary Decision, which is the administrative counterpart to summary judgment in the judicial arena. 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." In order to defeat a motion for summary decision, the adverse party must respond by affidavits setting forth "specific facts showing that there is a genuine issue which can only be determined in an evidentiary hearing."

Use of the summary procedure is aimed at "the swift uncovering of the merits and either their effective disposition or their advancement toward prompt resolution by trial." Judson v. Peoples Bank & Trust Co. of Westfield, 17 N.J. 67, 74 (1954). In fact, the New Jersey Supreme Court has encouraged trial-level courts "not to refrain from granting summary judgment when the proper circumstances present themselves." Brill

v. Guardian Life Ins. Co. of America, 142 N.J. 520, 541 (1995). While cautioning that a judge should not weigh the truth of the evidence or resolve factual disputes at this early stage of the proceedings, the Court clarified that "when the evidence 'is so one-sided that one party must prevail as a matter of law,' [citation omitted], the trial court should not hesitate to grant summary judgment." Id. at 540.

A careful reading of the record discloses that the material facts giving rise to this matter are not in dispute. Therefore, pursuant to N.J.A.C. 1:12.5(b) and Brill v. Guardian Life Insurance Co. of America, supra, 142 N.J. 520 (1995), I find that this matter is ripe for Summary Decision.

Tenure of teaching staff members is authorized by the Education Tenure Act, N.J.S.A. 18A:28-1, et seq. It is a status in a particular position created by statute, not by agreement of the parties, and is therefore a "statutory right imposed upon a teacher's contractual employment ... [that] may not be forfeited or waived." Spiewack v. Rutherford Bd. of Educ., 90 N.J. 63, 77 (1982), citing Zimmerman v. Newark Bd. of Educ., 38 N.J. 65, 72 (1962); Red Bank Educ. Ass'n v. Red Bank Bd. of Educ., 78 N.J. 122, 141 (1978)).

In order to obtain the protections afforded by this status, "the precise conditions articulated in the statute must be met." Brown et als. v. Bd. of Educ. of Warren Township, OAL Docket No. EDU 4732-01 (previously OAL Docket No. 6128-99) <http://lawlibrary.rutgers.edu/oal/search.html>. N.J.S.A. 18A:28-5, the statute governing tenure of teaching staff members, provides in pertinent part:

> The services of all teaching staff members employed in the position[] of teacher ...and such other employees as are in positions which require them to hold appropriate certificates issued by the board of examiners, serving in any school district or any board of education, excepting those who are not the holders of proper certificates in full force and effect ... shall be under tenure during good behavior and efficiency ... after employment in such district or by such board for:

> (a) Three consecutive calendar years, or any shorter period which may be fixed by the employing board for such purpose; or
>
> (b)Three consecutive academic years, together with employment at the beginning of the next succeeding academic year; or
>
> (c) The equivalent of more than three academic years within a period of any four consecutive academic years.

A "teaching staff member" is defined at N.J.S.A. 18A:1-1 as follows:

> "Teaching staff member" means a member of the professional staff of any district or regional board of education, or any board of education of a county vocational school, holding office, position or employment of such character that the qualifications, for such office, position or employment, require him to hold a valid and effective standard, provisional or emergency certificate, appropriate to his office, position or employment, issued by the state board of examiners and includes a school nurse.

N.J.S.A. 18A:26-2 also requires a teaching staff member to hold a valid and appropriate certificate, but goes even further by prohibiting a board of education from employing as a staff member any teacher who does not hold an appropriate certificate. In this regard, the Board of Examiners has placed upon the chief school administrator the duty of requiring each newly employed or reassigned teaching staff member to exhibit an appropriate certificate before the teaching staff member may assume any responsibility for the performance of regulated duties. N.J.A.C. 6A:9-5.2(b). The chief school administrator must also ensure that the certificate is valid. Ibid. In the event a teaching staff member is found not to possess a valid and appropriate certificate, that teaching staff member, and the board of education itself, may suffer the consequences set forth in N.J.A.C. 6A:9-5.2(d) and (e). More specifically, those two paragraphs provide:

> (d) Any contract or engagement of any teaching staff member shall cease and terminate whenever the employing district board of education receives written notice from the county superintendent, or otherwise ascertains, that such

> person is not, or has ceased to be, the holder of an appropriate certificate required for such employment. A teaching staff member's employment shall cease notwithstanding that the term of employment pursuant to contract or engagement has not expired.
>
> (e) If a properly notified district board of education fails to terminate the employment of an uncertified or improperly certified teaching staff member, the Commissioner may issue an order to show cause why that teaching staff member's per diem salary should not be withheld from the district board of education's State financial aid for each day the teaching staff member remains employed. If such district board of education fails to respond or show adequate cause within 20 days from the date of mailing of the order to show cause, the Commissioner may reduce State financial aid to such district board of education by the amount of the uncertified or improperly certified teaching staff member's per diem contract salary. The district board may show adequate cause either by exhibiting an appropriate certificate or by terminating the contract of the uncertified or improperly certified teaching staff member.

Ms. Miller argues that since she served as the Board's permanent art teacher for a period of greater than three years, regardless of the contractual nature of her employment during her first six months, she should be considered as having acquired tenure in September 2004 and be reinstated as the art teacher in the West Amwell School District. She bases her argument on the fact that she was hired with the expectation and understanding that she would be serving not as "a mere substitute," but rather as a "permanent" substitute art teacher, and would, upon receipt of her teaching certificate with an endorsement in art, be considered a teaching staff member. In other words, despite her designation as a substitute she was, in reality, a teaching staff member from the very first day of her employment.

The Appellate Division had occasion to decide this very argument in Sayreville Educ. Ass'n v. Board of Educ., Etc., 193 N.J. Super. 424 (App. Div. 1984), in which the appellants, appropriately certified teachers all, were employed to replace teachers who had retired or resigned for the balance of the 1980-81 school year. As "substitute teachers," they were denied the statutory and contractual benefits available to teaching staff members, not the least of which was tenure. On appeal, they argued that the

Commissioner and State Board of Education had improperly categorized them as long-term substitutes since each of them had been hired to fill a vacancy for the balance of the school year. The Appellate Division agreed.

The Court found that the teachers literally fell within the definition of a teaching staff member contained in N.J.S.A. 18A:1-1 and not that of a "temporary employee" or substitute as those terms are used in N.J.S.A. 18A:16-1.1. This statute provides that

> In each district the board of education may designate some person to act in place of any officer or employee during the absence, disability or disqualification of any such officer or employee subject to the provisions of section 18A:17-13.
>
> The acts of any person so designated shall in all cases be legal and binding as if done and performed by the officer or employee for who such designated person is acting but no person so acting shall acquire tenure in the office or employment in which he acts pursuant to this section when so acting.

In the decision written by the Hon. Sylvia Pressler, J.A.D., the Appellate Division construed the authorization of this provision

> as applying when the services of a substitute teacher are required because of the temporary absence, even if protracted, of a regular teacher whose return to duty is contemplated. We do not construe it as authorizing the use of a substitute to fill a vacant position on a long-term basis. This interpretation, in our view, accords with the plain meaning of the statutory provision. The phrase, "to act in place of any officer or employee during the absence, disability or disqualification of any such officer or employee," clearly implies a temporary arrangement. That is, the "place" which is the intended subject of the statute is the place of another which that other will reclaim when his period of absence is over. The substitute is appointed to act for the other during that period. If that other employee has, however, terminated his employment, then the place which the appointee is filling is not the place of the other but rather a vacant place, and the statute ordinarily does not apply. This interpretation is, moreover, in accord with the

> observation in *Spievak v. Rutherford Bd. of Ed., supra*, 90 *N.J.* at 77, that the exception to the tenure statute which *N.J.S.A.* 18A:16-1.1 constitutes "is limited to employees hire to take the place of an absent teacher." Again, the implication is clear that the place for which the temporary substitute teacher was hired is not vacant but only temporarily unoccupied by its incumbent.
>
> [Id. at 428]

In the present matter, it is undisputed that Ms. Miller was employed with an expectation of permanency and teaching staff membership. The parties had a mutual understanding that she would be filling a vacancy for a full academic year "as a permanent substitute until completion of her teaching certificate requirements at which time she [would] be given a permanent contract." DeCanzio Letter, Supra. Consequently, at first blush, it would appear that her situation was no different from that of the appellants in Sayreville. However, there is one crucial difference. Unlike the appellants in Sayreville, Ms. Miller did not hold an appropriate certificate, much less a specific endorsement in art, during the first six months she filled the vacancy. And it is this fact that distinguishes Sayreville from the present matter.

It is virtually axiomatic that the period of time a teacher serves in a position without benefit of a valid and appropriate teaching certificate and any specific endorsement that may be required by the position cannot be counted toward the accrual of tenure or seniority. The cases in which this principle has been applied to deny tenure are many and include, but are not limited to, Bjerre v. Hampton Bd. of Educ., 92 N.J.A.R.2d (EDU) 884 (certified elementary school library skills teacher's contract held void because she did not hold media specialist endorsement required by State Board); Passaic Bd. of Educ. v. Gonzales, 97 N.J.A.R.2d (EDU) 488 (bilingual teacher who failed to maintain bilingual emergency certification properly terminated notwithstanding her elementary school and Spanish teacher endorsements); Cooker v. Brigantine Bd. of Educ., 91 S.L.D. 1202, aff'd. 91 S.L.D. 1224, aff'd. N.J. Superior Court, App. Div., Docket No. A 2128-91T1 (1992) (teacher lacking valid and appropriate certificate denied tenure rights after ten years in position); Ledwitz v. Manalapan-Englishtown Reg'l Bd. of Educ., 87 S.L.D. 1963, aff'd 88 S.L.D. 1963, aff'd N.J.

Superior Court, App. Div., Docket No. 2861-87T7 (1989) (certified elementary school teacher who misrepresented possession of a teacher of the handicapped endorsement denied tenure after seven years of service as a special education teacher); and Jennings v. Highland Park Bd. of Educ., 89 S.L.D. 1097 (certified teacher of physical education denied tenure despite previous service as health teacher and athletic trainer).

Nor can a late-acquired endorsement retroactively qualify earlier service. See, e.g., McAneny v. Chatham Bd. of Educ., 91 S.L.D. 794 (late-acquired elementary school teacher's certificate did not qualify thirteen years of supplemental service by a teacher holding only home economics endorsement); and Gelsomino v. Belleville Bd. of Educ., 80 S.L.D. 541 (time served in departmental position for evaluation of teachers prior to acquisition of supervisor's endorsement did not count toward tenure).

Based upon the foregoing I find that the first six months of Ms. Miller's employment, during which she held only a substitute teacher's certificate, did not count towards tenure. Consequently, I **CONCLUDE** that the Board's termination of her contract on February 25, 2005, just three days short of the completion of her third consecutive calendar year of service, was appropriate and should be **AFFIRMED**. It is so **ORDERED**.

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

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

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

August 16, 2006

DATE

ISRAEL D. DUBIN, ALJ

E-mail Receipt of Initial Decision Confirmed by the Department of Education on:

August 16, 2006

DATE

AUG 21 2006

DATE

Mailed to Parties:

OFFICE OF ADMINISTRATIVE LAW

IDD/mamf

349-06

OAL DKT. NO. EDU 13117-05
AGENCY DKT. NO. 249-9/05

BOARD OF EDUCATION OF THE BOROUGH OF DUMONT, BERGEN COUNTY,

PETITIONER,

V.

NEW JERSEY DEPARTMENT OF EDUCATION, BOARD OF EDUCATION OF THE TOWNSHIP OF SOUTH HACKENSACK, BERGEN COUNTY, and R.H. and M.H. on behalf of minor children K.H. and K.H.,

RESPONDENTS.

COMMISSIONER OF EDUCATION

DECISION

OAL DKT. NO. EDU 5975-06
AGENCY DKT. NO. 181-5/06

BOARD OF EDUCATION OF THE BOROUGH OF DUMONT, BERGEN COUNTY,

PETITIONER,

V.

NEW JERSEY DEPARTMENT OF EDUCATION, BOARD OF EDUCATION OF THE TOWNSHIP OF SOUTH HACKENSACK, BERGEN COUNTY, and R.H. and M.H. on behalf of minor children K.H. and K.H.,

RESPONDENTS.

These matters were opened via petitions on September 22, 2005 and May 19, 2006, respectively, wherein petitioner demanded: an order declaring that the individual respondents were not homeless within the meaning of the education laws; that petitioner was not responsible for the children's education after the family ceased to live in Dumont; that petitioner should be reimbursed for any educational costs it paid for the children after the family ceased to live in Dumont; and that the South Hackensack Board of Education has been the school district responsible for the children's education since the family moved into a hotel located in South Hackensack. Both petitions allege substantially the same facts. The second petition, which was consolidated with the first, was brought to ensure that any relief the petitioner might receive would cover the entire period between the date on which the family ceased to live in Dumont and the end of the 2005-2006 school year.

On September 12, 2006, the Office of Administrative Law (OAL) received a Stipulation of Dismissal, executed by all of the parties, reciting that the issues in the controversy had been resolved. The Stipulation was accompanied by a resolution by the petitioning board approving same, and stating that "changed circumstances [had] resolved all issues and disputes between the parties."

The OAL issued an Initial Decision approving the Stipulation of Dismissal on October 3, 2006. The Commissioner adopts the Initial Decision for the reasons set forth therein. The matter is accordingly deemed withdrawn from the Commissioner's consideration.

IT IS SO ORDERED.

Lucille Edary

COMMISSIONER OF EDUCATION

Date of Decision: 11/17/06

Date of Mailing: 11/17/06

State of New Jersey
OFFICE OF ADMINISTRATIVE LAW

INITIAL DECISION

DISMISSAL

BOARD OF EDUCATION OF THE BOROUGH OF DUMONT, BERGEN COUNTY,

Petitioners

v.

NEW JERSEY STATE DEPARTMENT OF EDUCATION, BOARD OF EDUCATION OF THE TOWNSHIP OF SOUTH HACKENSACK, BERGEN COUNTY AND R.H. AND S.H. ON BEHALF OF K.H. AND K.H.,

Respondent.

DKT. NO. EDU 13117-05

AGENCY DKT. NO. 229-9/05

and

BOARD OF EDUCATION OF THE BOROUGH OF DUMONT, BERGEN COUNTY,

Petitioners

v.

NEW JERSEY STATE DEPARTMENT OF EDUCATION, BOARD OF EDUCATION OF THE TOWNSHIP OF SOUTH HACKENSACK, BERGEN COUNTY AND R.H. AND M.H. ON BEHALF OF MINOR CHILDREN, K.H. AND K.H., BERGEN COUNTY,

Respondent.

DKT. NO. EDU 05975-06

AGENCY DKT. NO.181-5/06

Linda Ganz Ott, Esq., (Apruzzese, McDermott, Mastro & Murphy, attorneys) for petitioners

Ralph Padovano, Esq., (Beattie Padovano LLC, attorneys) for respondent South Hackensack Board of Education

Melissa T. Dutton, Deputy Attorney General, (Anne Milgram Acting Attorney General of New Jersey, attorney) for respondent New Jersey State Department of Education.

Record Closed: September 26, 2006 Decided: October 3, 2006

BEFORE **CAROL I. COHEN**, ALJ:

These matters were transmitted to the Office of Administrative Law (OAL) on December 28, 2005 (EDU 13117-05) and on June 5, 2006 (EDU 05975-06) for determination as a contested case. An In Person Prehearing was scheduled for February 14, 2006. Subsequently, multiple telephone conferences were held and several hearing dates were adjourned in order to complete the terms of settlement.

The parties were ultimately able to settle the matter, and they submitted the attached fully executed Stipulation of Dismissal with Prejudice on September 12, 2006. On September 26, 2006, the undersigned received the raised seal Resolution from the Board approving the Stipulation of Dismissal. See attached copy. Having reviewed the record and the Dismissal terms, I **FIND**:

1. The parties have voluntarily agreed to the Stipulation of Dismissal as evidenced by the signature of the parties and/or signatures of their representatives.

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

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

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

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

10/3/06
DATE

Carol I. Cohen
CAROL I. COHEN, ALJ

Receipt Acknowledged:

10/6/06
DATE

M. Kathleen Duncan per
DEPARTMENT OF EDUCATION

OCT 10 2006
DATE

Laura Sanders
DIRECTOR AND CHIEF ADMINISTRATIVE LAW JUDGE
Mailed to Parties:
OFFICE OF ADMINISTRATIVE LAW

id

APRUZZESE, McDERMOTT,
MASTRO & MURPHY P.C.
25 Independence Boulevard
P.O. Box 112
Liberty Corner, New Jersey 07938
(908) 580-1776
Attorneys for Dumont Board of Education

RECEIVED
2006 SEP 12 P 2:22
STATE OF NEW JERSEY
OFFICE OF ADMIN LAW

DUMONT BOARD OF EDUCATION, Petitioner, v. NEW JERSEY DEPARTMENT OF EDUCATION, SOUTH HACKENSACK BOARD OF EDUCATION, and R.H. and M.H. o/b/o K.H.1 & K.H.2, Respondents.	STATE OF NEW JERSEY OFFICE OF ADMINISTRATIVE LAW Agency Ref. No. 249-9/05 OAL Dkt No. EDU 13117-05 AND Agency Ref No. 181-5/06 OAL Dkt. No. EDU 05975-06 **STIPULATION OF DISMISSAL**

The issues in the above matters having been resolved, it is hereby stipulated and agreed that these consolidated actions be, and hereby are, dismissed with prejudice, each party to bear its own costs and attorneys' fees.

APRUZZESE, McDERMOTT,
MASTRO & MURPHY, P.C.

By: Linda Ganz Ott
Linda Ganz Ott
Attorneys for Dumont Board of Education

Dated: 8/31/06

Zulima V. Farber
Attorney General of New Jersey

By: Melissa Dutto
Melissa T. Dutton, DAG
Attorney for New Jersey Department of Education

Dated: 9/6/06

LAW OFFICES
APRUZZESE, McDERMOTT,
MASTRO & MURPHY
A PROFESSIONAL CORPORATION
25 INDEPENDENCE BOULEVARD
P.O. BOX 112
LIBERTY CORNER, N.J. 07938
(908) 580-1776

Beattie Padovano, LLC

By: _____
~~Ralph J. Padovano, Esq.~~ Noah B. Pollak, Esq.
Attorneys for South Hackensack Board of Education

Dated: 9/7/06

_____
Robert Hutton

Dated: 9/8/06

_____
Margaret Hutton

Dated: 9-8-06

/S:cap/Dumont/K.H./Stip of Dismissal-8-30-06

LAW OFFICES
APRUZZESE, MCDERMOTT,
MASTRO & MURPHY
A PROFESSIONAL CORPORATION
25 INDEPENDENCE BOULEVARD
P.O. BOX 112
LIBERTY CORNER, N.J. 07938
(908) 580-1776

RESOLUTION

WHEREAS, there is currently pending a consolidated matter before the Office of Administrative Law Dumont Board of Education v. New Jersey Department of Education, South Hackensack Board of Education and RH. and M.H. o/b/o K.H.1 & K.H.2 OAL Dkt. No. EDU 13117-05 and Agency Ref. No. 249-9/05 and OAL Dkt. No.EDU 05975-06; and

WHEREAS, a Stipulation of Dismissal has been negotiated between counsel for all parties and R.H. and M.H. *pro se* based on the changed circumstances which have resolved all issues and disputes between the parties; and

WHEREAS, the Stipulation of Dismissal would avoid a significant expenditure of time and resources on the part of the Board and its officials that would be necessary to the continuation of the pending litigation;

NOW, THEREFORE BE IT RESOLVED that the Board approves the Stipulation of Dismissal signed by the Board's counsel.

Moved: Dr. Richard Healy

Seconded: Mrs. Debra Shanley

Roll Call Vote: Robert DeWald, Guy Finetto, Cheryl McGrady, Debra Shanley, Rafael Tolentino, Richard Healy, Barbara Correa

Dumont Board of Education Meeting,
September 21, 2006

RECEIVED
2006 SEP 26 A 3:49
STATE OF NEW JERSEY
OFFICE OF ADMIN LAW

Approve Legal Resolution

It was moved by Dr. Healy, seconded by Mrs. Shanley, that the Dumont Board of Education approve the attached Stipulation of Dismissal.

I HEREBY CERTIFY THAT THE ABOVE IS A TRUE AND EXACT COPY OF AN EXTRACT FROM THE MINUTES OF A PUBLIC MEETING OF THE DUMONT BOARD OF EDUCATION HELD ON THURSDAY, SEPTEMBER 21, 2006.

KEVIN CARTOTTO, BOARD SECRETARY

RECEIVED
2006 SEP 26 A 3:49
STATE OF NEW JERSEY
OFFICE OF ADMIN LAW